

1 There is a drop in the heart rate here. And then the  
2 heart rate comes back up and appears to have what we  
3 call some variability.

4 Q Was that of medical significance to you?

5 A Yes.

6 Q Why?

7 A At the time I interpreted that as recovery of  
8 the baby after the position change and after the  
9 contraction.

10 Q Doctor, whether you were in the other room or  
11 in Ms. McCrosky's room, was it your belief and  
12 understanding that you knew what was going on with the  
13 patient and the fetal monitoring strip?

14 A Yes.

15 Q Now, you mentioned that just after 7:10,  
16 approximately 7:11, the heart rate comes up. Is that  
17 accurate?

18 A That's accurate.

19 Q And there's in your judgment some variability  
20 there?

21 A That's -- that is how I interpreted that  
22 section, yes.

23 Q Okay. What happened next?

24 A We would have to go farther into the monitor

1 strip, because --

2 MR. DURNEY: Object to the form of the question,  
3 Your Honor. It's vague and ambiguous. What happened  
4 next in terms of what's seen on the strip or what  
5 happened next with regard to her activities?

6 THE WITNESS: And I can only tell you about what's  
7 on the strip, because I don't know exactly when I was  
8 in her room and when I was in the other room and when I  
9 was out at the nurses' station. It's one of those  
10 three places in that period of time.

11 BY MR. KELLY:

12 Q And, again, is it your recollection that you  
13 were aware of the strip and what was going on with the  
14 strip at all times?

15 A Yes.

16 Q So with respect to this particular page --

17 MR. KELLY: And I don't see the page number at the  
18 bottom.

19 MR. BLACKBURN: 64.

20 MR. KELLY: Thank you.

21 BY MR. KELLY:

22 Q Exhibit 5, page 64, there's reference to -- it  
23 says "LR No. 5"; is that accurate?

24 A I would have to assume so.

1 Q And what does that refer to, if you know?

2 A I would assume that is the IV bag, fluid of  
3 lactated Ringer's, that was hung.

4 MR. KELLY: Now, if we could see the next page of  
5 the strip.

6 BY MR. KELLY:

7 Q What timeframe are we looking at here?

8 MR. KELLY: I'm sorry. Could we go back?

9 THE WITNESS: So at this time, with the contraction  
10 she's having variable decelerations with a return to  
11 the fetal heart rate baseline with each contraction  
12 with a recovery in between.

13 BY MR. KELLY:

14 Q Was that of medical significance to you?

15 A Yes, it was.

16 Q Why?

17 A Well, I interpreted it at the time that the  
18 baby was recovering in between the contractions.

19 Q And, Doctor, was it your judgment at that time  
20 that the baby could be delivered vaginally?

21 A I still anticipated a vaginal delivery.

22 Q Would you have expected at this point in time  
23 any of the nurses to tell you that "Doctor, we need to  
24 deliver the baby," or, "We need to get this baby out"?

1 MR. DURNEY: Object to the form of the question as  
2 to time, Your Honor. Vague and ambiguous.

3 THE COURT: I think you said at this time  
4 referencing that point of 7:20 is the way I took it.

5 MR. KELLY: And that was my intention, Your Honor.

6 THE WITNESS: I -- that's what we were all working  
7 towards.

8 BY MR. KELLY:

9 Q What do you mean?

10 A Getting this baby delivered.

11 Q Ultimately is it a physician decision as to  
12 when the baby is going to be delivered?

13 A Yes.

14 Q And how?

15 A How, yes.

16 Q And where?

17 A Yes.

18 Q Now, at some point in time did you feel that a  
19 cesarean section was going to be necessary?

20 A If we didn't deliver quickly with our attempted  
21 vaginal delivery, that was the plan, to proceed with  
22 the cesarean.

23 MR. KELLY: Could we please see the next slide.  
24



1 BY MR. KELLY:

2 Q Now, Doctor, I want to have you assume  
3 hypothetically we've heard testimony that Dr. Tomita's  
4 D&C was completed by about 7:10. I'll ask you to  
5 assume that hypothetically.

6 A Okay.

7 Q And I'll ask you, does that refresh your  
8 recollection as to approximately when Dr. Tomita  
9 finished her procedure?

10 A I don't remember specifically when in this  
11 period of time. I knew she was done.

12 Q Okay. And do you remember her being on the  
13 unit?

14 A Yes, she was on the unit.

15 Q At what point in time -- and we can scroll  
16 through the strip -- at what point in time did you make  
17 the decision that the patient would have to be taken  
18 for a cesarean section?

19 A When we were unable to deliver her vaginally  
20 using the vacuum assist.

21 Q And what happened next?

22 A After we decided to make the move to -- at this  
23 point we decided to call the C-section.

24 Q When you say "we," you mean you?

1       A    I decided to make the decision to call the  
2 C-section. Dr. Tomita was present. I believe Dr. Koch  
3 was there by then. And our operating room, I assume,  
4 was available. I don't specifically remember -- well,  
5 I remember that we didn't have to go downstairs.

6       Q    Okay. Do you remember one way or the other  
7 whether there was any discussion about taking the  
8 patient downstairs because the OB OR was in use by  
9 Dr. Tomita?

10       MR. DURNEY: Objection. Form of the question, Your  
11 Honor; vague and ambiguous as to time.

12       MR. KELLY: At any time.

13       THE COURT: I think he said "anytime," so I'm going  
14 to overrule the objection.

15       THE WITNESS: It was an option if we needed to do a  
16 C-section before the room was available to go  
17 downstairs.

18 BY MR. KELLY:

19       Q    And, again, that would have been your decision  
20 as a physician as to whether or not to go downstairs or  
21 not?

22       A    I would have gone wherever there was an OR  
23 available.

24       Q    Is it your decision as to where to go?

1       A    It's my decision to do the cesarean delivery.  
2   I don't decide which room we go to.

3       Q    Okay.  Now, at 7:00 -- after --  
4   If we could keep scrolling to 7:30.

5       There's a reference there to "vac" and "pop-off."  
6   Do you see that?

7       A    So that wasn't just -- I misinterpreted that.  
8   That prior page, I assumed that was just her pushing,  
9   but I must not have put the vacuum on until this  
10  contraction.  And then she would have been pushing and  
11  then we would have been pushing and working the vacuum  
12  together until it came off.

13      Q    And what's the significance of the pop-off?

14      A    When you're utilizing the vacuum, that  
15  particular model, once it pops off, occasionally you  
16  might reapply it.  In that situation I chose not to.  
17  You know, it was apparent we weren't going to deliver  
18  quickly vaginally.

19      Q    Okay.  So what did you do next?

20      A    We decided that we needed to move to a  
21  C-section, and so we put the bed back together and get  
22  everything sort of unattached and move over to the  
23  operating room.

24      Q    Okay.  And were you assisted by any other

1 physician at that time?

2 A Dr. Tomita was present.

3 Q Okay. Do you recall that there was a period of  
4 time that the OB OR had to be cleaned and prepared so  
5 that you could perform the cesarean section?

6 A Yes.

7 Q Okay. What was your understanding about that?

8 A That it was being done. I'm not sure what  
9 you're asking.

10 Q Well, did you feel in your judgment that you  
11 could wait until the room was prepared and cleaned  
12 before performing that C-section in that room?

13 A I was busy doing all of this.

14 Q What is all of "this"?

15 A Managing the labor and trying to get the  
16 patient delivered. And I assumed the room was getting  
17 cleaned, and if it wasn't, then we would go downstairs.

18 Q Okay. And were you advised at some point in  
19 time -- strike that. Do you remember at some point in  
20 time being advised that there was a room available  
21 downstairs?

22 A I -- I don't remember specifically.

23 Q You don't remember one way or the other?

24 A I don't remember. It was a conversation going

1 on in the background, but I don't remember specifically  
2 if somebody said there's a room downstairs or not. I  
3 know this -- our OB OR got cleaned up in time for when  
4 we wanted to do our C-section.

5 Q I want you to assume hypothetically that Nurse  
6 Parkhurst has testified that there was a discussion  
7 about getting a room ready downstairs and that, in  
8 fact, phone calls were made and physicians becoming  
9 available in the event that was necessary, but  
10 ultimately it was your decision to stay on the floor  
11 for that delivery. Do you recall that one way or the  
12 other?

13 A Well, if the room was ready, there would be no  
14 reason to leave.

15 Q Okay. I want you to assume also  
16 hypothetically -- Jessica Trejo, she's an OB tech.

17 A Um-hum.

18 Q She also testified she got a call about coming  
19 in and the possibility that you may want to deliver the  
20 baby down on the second floor OR. Do you remember  
21 anything about that?

22 A Yeah, if the -- I'm sure there were  
23 conversations going on about that.

24 Q Okay. But ultimately is it your decision as to

1 where -- whether the baby is going to be delivered and  
2 whether the patient is going to be delivered on the  
3 second floor or on the third floor OB unit?

4 A My decision is that the patient needs a  
5 cesarean. I'm not responsible for finding the room.

6 Q Okay. So then when the room -- you make the  
7 decision to do the cesarean section. And it's your  
8 understanding the room is being prepared; correct?

9 A Correct.

10 Q Okay. And what happens next?

11 A We went to the operating room on labor and  
12 delivery. And in the process of moving to the  
13 operating room, more medication was put into the  
14 epidural so that we were able to use that for her  
15 anesthetic.

16 MR. KELLY: Can we see the next slide, please.

17 MR. DUNEY: Your Honor, could I have the  
18 witness -- unless --

19 THE COURT: I was going to ask the witness to sit  
20 back down unless you need to be there for the strip.  
21 Does she need to be there for the strip?

22 MR. KELLY: Well, I want her to see -- yes, please,  
23 the next slide.

24 THE COURT: Just reference the page number.

1 MR. BLACKBURN: That appears to be the end of it.

2 BY MR. KELLY:

3 Q After "pop-off" -- do you see that?

4 A Um-hum.

5 Q Now, the strip stops there; correct?

6 A Correct.

7 Q And what does that tell us?

8 A This would have been when she was -- I'm not  
9 sure if -- taken off of the monitor in the room and  
10 moved to the operating room.

11 Q You can go ahead and take a seat. Thanks,  
12 Doctor.

13 And then would it be accurate to say that the  
14 patient was taken down to the operating room and you  
15 with the assistance of Dr. Tomita performed the  
16 cesarean section?

17 A That's correct.

18 Q Okay. And you were able to deliver Lyam?

19 A Correct.

20 Q And we've heard that his Apgar scores were very  
21 low.

22 A Correct.

23 Q You remember that?

24 A I do.

1 Q Doctor, in this case, based upon everything you  
2 know about it, did the nurses in this case do  
3 everything you would expect them to do under the  
4 circumstances?

5 A Yes.

6 Q Did you ever have any criticisms of the care  
7 and treatment of the nurses for anything they did or  
8 didn't do?

9 A No.

10 Q And, Doctor, it was your decision at some point  
11 in time -- strike that. You were a defendant in this  
12 case at one point; correct?

13 A I was.

14 Q And it was your decision to settle the case?

15 A Yes.

16 Q Doctor, thanks for your time. I have nothing  
17 further.

18 A You're welcome.

19 THE COURT: Mr. Durney, cross.

20 MR. DURNEY: May it please the Court. May we have  
21 exhibits -- the first book that contains Exhibits 1  
22 through 5 placed in front of the witness. May I  
23 approach for that purpose?

24 THE COURT: You may.



## CROSS-EXAMINATION

1  
2 BY MR. DURNEY:

3 Q Dr. Hayes, you testified in response to one of  
4 Mr. Kelly's questions that Tawni was in room 383. Did  
5 I hear that correctly?

6 A Yes.

7 Q And that there was another patient next door in  
8 384?

9 A Correct.

10 Q Would you turn in the book to the tab numbered  
11 6. If you look at the very first page, you'll see in  
12 the lower right-hand corner of that document that has  
13 been admitted a difficult to read Bate number, but the  
14 second page is the Patient Information Carson Tahoe  
15 Regional Healthcare document that is prepared --

16 A Okay.

17 Q Do you see it?

18 A I do.

19 Q All right. And if you'll look under --

20 MR. DURNEY: May I approach, Your Honor?

21 THE COURT: You may.

22 BY MR. DURNEY:

23 Q We have Tawni in 383. And look at the second  
24 page.

1 A I must have a different page.

2 Q No, you're looking at the right page.

3 A Okay.

4 Q Look at that page. This is the record of the  
5 patient in room 384.

6 A Okay.

7 Q Correct?

8 A If that's what it says.

9 Q In fact, if you turn to page 037 -- you'll see  
10 it in the lower right-hand corner of the document -- or  
11 of the exhibit.

12 A Is that the patient DOE number?

13 MR. DURNEY: Let me approach, Your Honor.

14 THE WITNESS: Yeah, I'm not sure if --

15 THE COURT: Yeah, let's clarify.

16 BY MR. DURNEY:

17 Q There's Bate numbers, and they are -- they're  
18 difficult to see, but they're Patient Doe and 000  
19 followed by numbers.

20 A And you wanted 37?

21 Q There you go. If you look at 0037, you'll see  
22 there at 5:50 a nurse's note authored by Kathleen  
23 Hackler. Do you see that?

24 A I do.

1 Q And at 5:50 that note indicates "Dr. Hayes at  
2 bedside."

3 A Okay.

4 Q What I would like you to do, Dr. Hayes, is just  
5 satisfy yourself that our Exhibit 6 is indeed the  
6 medical chart of the patient next door to Tawni that  
7 we've called Jane Doe.

8 A Okay.

9 Q Would you satisfy yourself? Can you tell us  
10 that it is?

11 A I am going to make that assumption.

12 Q I don't want you just to make an assumption.  
13 We'll look at it some more. Let's take a look at the  
14 next page, page 41, of Jane Doe's records.

15 A Okay.

16 Q Have you found that, ma'am?

17 A Yeah.

18 Q And you can see that now Nurse Mary Graber at  
19 7:00 says "Dr. Hayes at bedside." Do you see that?

20 A Right.

21 Q Now, if there's any doubt in your mind, let's  
22 look at Jane Doe's strip. And if you'll go all the way  
23 to the Doe record -- it's called FMS-37. It's at the  
24 bottom of the exhibit. It's the fetal monitor strip on

1 Jane Doe.

2 A Okay.

3 Okay.

4 Q Do you find the fetal monitor strip, Doe 037?

5 A Yes.

6 Q And written on that strip is "Dr. Hayes." Do  
7 you see that?

8 A Right, I see that.

9 Q So now can you say with certainty that this  
10 indeed is this medical record for the patient next door  
11 to Tawni that we've called Jane Doe?

12 A It looks like it.

13 MR. DURNEY: Offer it, Your Honor. I've offered  
14 Exhibit 6, please, Your Honor.

15 THE COURT: Any objection?

16 MR. KELLY: I have no objection. You want the  
17 entire --

18 MR. DURNEY: The entire thing.

19 MR. KELLY: No objection.

20 THE COURT: It will be admitted.

21 (Exhibit 6 was admitted.)

22 BY MR. DURNEY:

23 Q All right. Now, you were -- you were the  
24 physician assigned to Tawni because you were the

1 on-call physician that night and Tawni came into the  
2 hospital through the MOM's program; is that your  
3 understanding?

4 A That's correct.

5 Q And people who are cared for prenatally at the  
6 MOM's Clinic are, in fact, instructed by the clinic to  
7 come to the hospital when they go into labor?

8 A That's correct.

9 Q And, in fact, the patient that we've been  
10 calling Jane Doe, she came into the hospital at 2:27 in  
11 the morning. And if you take a look at Jane Doe page

12 2 --

13 MR. DURNEY: And can you put it up on the screen  
14 now, Mr. Ivey, Exhibit 6, Bate No. page 2. And if we  
15 could blow up --

16 BY MR. DURNEY:

17 Q Would you agree with me that that shows us that  
18 she arrived at 2:27 in the morning on the 25th?

19 A That looks correct.

20 Q And, again, that she was placed in bed --

21 A 384.

22 Q -- OB B384, right next to Tawni?

23 A Correct.

24 Q All right. And so this lady did not have an

1 assigned physician either, did she?

2 A I don't know.

3 Q Well, we can take a look at that too. Take a  
4 look at the next page, page 3, and just review it to  
5 yourself.

6 MR. DURNEY: Can you put page 3 up, Mr. Ivey. And  
7 if we could focus at the top entitled "History of  
8 Present Illness."

9 MR. McBRIDE: Page, counsel?

10 MR. DURNEY: Page 3 of Exhibit 6.

11 BY MR. DURNEY:

12 Q And just read to yourself the History of  
13 Present Illness that you see up there.

14 A Okay. Apparently Dr. Hess did her delivery.

15 Q My question, ma'am, is: Was this an individual  
16 who came into the hospital with an assigned physician?

17 A I'm sorry. No, she was not.

18 Q Pardon me?

19 A She did not have an assigned physician.

20 Q And so in the beginning she was admitted under  
21 the care of Dr. Shannon Hess, one of your partners?

22 A Yes.

23 Q Does that appear to be the case?

24 A It does.

1 Q All right. And then, yet we see, if you'll  
2 take a look at page 11 of Jane Doe's chart, that at  
3 roughly 2:32, some five minutes after she was admitted,  
4 you entered orders on this young woman.

5 A I did.

6 Q All right. And then if we take a look at page  
7 37, Bate page 37, we see there under the note timed at  
8 5:50 authored by Nurse Kathleen Hackler that you were  
9 at Jane Doe's bedside at 5:50.

10 A That's correct.

11 Q And then when we look at page 41 of Jane Doe's  
12 record, we see that you were also at Jane Doe's bedside  
13 at 7:05. Would you agree?

14 A I agree.

15 Q And, of course, we looked at the strip which  
16 seemed to confirm that 7:05 time; agreed?

17 A Um-hum.

18 Q So can we agree that this is the lady that  
19 was the other person in labor?

20 A It appears that way, yes.

21 Q All right. Now, you indicated at some point in  
22 time, and we'll get into that, that because you had two  
23 women in labor, you went out to the nurses' station and  
24 got on the phone and called your partner.

1 A Correct.

2 Q You called Dr. Koch?

3 A Koch.

4 Q Koch. You called Dr. Koch. And Dr. Koch came  
5 in?

6 A That's the way I remember it.

7 Q Yes. And you remember as well that Dr. Koch  
8 came in and delivered Jane Doe?

9 A That's the way I remember it.

10 Q All right. And you based on anything you've  
11 heard since have no reason to disagree that Jane Doe  
12 was delivered by Dr. Koch?

13 A Until you showed me this.

14 Q But in any event, you understood that Dr. Koch  
15 came in and delivered a patient?

16 A That's what I remember.

17 Q All right. So when we look further -- in fact,  
18 that's what you testified at deposition, isn't it?

19 A Yes.

20 Q That Dr. Koch came in. You called her. She  
21 got to the hospital in 12 minutes of your call;  
22 correct?

23 A I said in my deposition it would normally take  
24 her 12 minutes to get there. I don't know when she



1 arrived at the hospital.

2 Q That's true. You did say it would ordinarily  
3 take her 12 minutes. You would agree that you have no  
4 reason to believe that it took her longer than 12  
5 minutes in this case, do you?

6 A I don't.

7 Q All right. Fair.

8 So you called Dr. Koch. She told you she could  
9 come down. It was your expectation based upon past  
10 experience with Dr. Koch, your partner, that she would  
11 be there in 12 minutes; correct?

12 A Correct.

13 Q And you have no reason to believe that she  
14 didn't do just that?

15 A Correct.

16 Q And you understood when she arrived that she  
17 delivered a baby?

18 A That's the way I remember it.

19 Q That's fair enough. That's all we can ask for  
20 is your best recollection.

21 All right. Now, we know that she didn't deliver  
22 Jane Doe, don't we?

23 A Now I do.

24 Q Because when we look at the record, we see that

1 Jane Doe was delivered by Shannon Hess, wasn't she?

2 A Apparently she was.

3 Q Jane Doe delivered -- well, let's look at page  
4 17 of Jane Doe's record. Does that confirm, in fact,  
5 that it was Dr. Hess that delivered Jane Doe?

6 A It does.

7 Q All right. And Jane Doe -- if you'll look at  
8 page 125 --

9 A Yes.

10 Q I'll let Mr. Ivey catch up to you.

11 Well, you can read it to yourself. Would you agree  
12 with me that Jane Doe's baby was delivered at 7:42?

13 A It would appear, yes.

14 Q 7:42?

15 A Correct.

16 Q All right. And by the way, do you recall the  
17 Apgar scores of that baby?

18 MR. KELLY: Objection; irrelevant.

19 THE WITNESS: I don't know the Apgar scores of that  
20 baby unless I read them, but I --

21 THE COURT: There's an objection. There was an  
22 objection.

23 THE WITNESS: Sorry.

24 THE COURT: Mr. Durney, there's an objection. Do

1 you have any argument on the objection?

2 MR. DURNEY: I certainly do, Your Honor. The --  
3 the -- I'll come back to that. Let me talk some more,  
4 and it will become -- it will be very apparent. I'll  
5 withdraw the question.

6 BY MR. DURNEY:

7 Q All right. So now, Mr. Kelly has gone through  
8 this -- well, strike that. So, in other words, we have  
9 Dr. Hess delivering Jane Doe and we have Dr. Koch  
10 coming in at your direction to delivery the baby;  
11 correct?

12 A That's the way I remember it.

13 Q And we have you attending to Tawni, ultimately  
14 delivering her by C-section later that morning;  
15 correct?

16 A Correct.

17 Q And, in fact, before I leave C-section, when  
18 you've got her to the operating room, would you agree  
19 with me that it took you two minutes to deliver this  
20 baby?

21 A I don't know specifically.

22 Q If you'll take a look -- Exhibit 2 is Tawni's  
23 chart.

24 A Okay. What number?

1 Q 46, page 46 of Tawni's chart, again, looking at  
2 the Bate numbers in the lower right-hand corner.

3 A Is this the document number now?

4 Q I'm sorry?

5 A Document number?

6 Q Yes. It's page MOM 046.

7 A Okay.

8 Q And on that page do you see the case times for  
9 Tawni's C-section?

10 A Yes.

11 Q And do you see there that the room was said to  
12 be ready at 7:30?

13 A Okay.

14 Q And that the patient was in the room at 7:41?

15 A Yes.

16 Q And that anesthesia was started at 7:41?

17 A Yes.

18 Q And that the case was started at 7:46?

19 A Correct.

20 Q And that the baby was delivered at 7:48?

21 A Yes.

22 Q Two minutes. Okay. Can we agree that it took  
23 two minutes?

24 A Yes.

1 Q Thank you.

2 All right. Now, Mr. McBride went through -- excuse  
3 me -- Mr. Kelly went through the strip with you, and I  
4 do want to look at the strip as well.

5 MR. DURNEY: Can we have, Mr. Ivey, the strip up,  
6 Exhibit 5.

7 BY MR. DURNEY:

8 Q And let's begin with page number 58. And I  
9 would like to run through the strip with you. Can you  
10 see it from where you sit, Dr. Hayes?

11 A Yes.

12 Q All right. And so we know that each solid  
13 vertical bar --

14 MR. DURNEY: Would you give me the pointer out of  
15 my briefcase, Ms. Brennan? Wait a minute. Here's one  
16 right here. Thanks.

17 BY MR. DURNEY:

18 Q All right. We know that each black vertical  
19 bar that we see on the strip represents a minute.

20 A Correct.

21 Q All right. So we know that at roughly -- from  
22 this document roughly 6:31 we had a clear -- excuse  
23 me -- a spontaneous rupture of membranes?

24 A Correct.

1 Q And the waters or the amniotic fluid was clear?

2 A Correct.

3 Q Indicating this was a baby that was not in  
4 distress?

5 A Correct.

6 Q And then let's go to the next page.

7 MR. DURNEY: Before we leave that page, Mr. Ivey --  
8 I'm sorry. Let's go back.

9 BY MR. DURNEY:

10 Q And so we had a baseline of roughly what, 135  
11 before the membranes ruptured?

12 A About.

13 Q And then as soon as they ruptured it dropped  
14 down to what would you say?

15 A I think that's the 70s, but I'm not positive.

16 Q Normal would be 110 to 160; correct?

17 A Correct.

18 Q Let's go to the next page. And this spans --  
19 this spans the time of roughly 6:34 to 6:42; would that  
20 be about right?

21 A That would be about right.

22 Q From here to here we're seeing a period of time  
23 of 6:34 to 6:42. All right. And so the strip shows us  
24 that a number of interventions were attempted?

1 A Correct.

2 Q One was oxygen was given?

3 A Correct.

4 Q Terbutaline at your order was given?

5 A Correct.

6 Q The patient was repositioned to her right side  
7 which was a positional change that the nurses are  
8 capable of doing within their discretion?

9 A Yes.

10 Q And then you put in an IUPC?

11 A Correct.

12 Q And we talked about that. That was in order to  
13 infuse solution to replace the amniotic fluid that had  
14 come out when the membranes ruptured?

15 A That's correct.

16 Q And apparently another positional change at  
17 about 6:41 to her hands and knees; correct?

18 A Correct.

19 Q And then we see at 6:42 the infusion of the  
20 amniotic fluid?

21 A Correct.

22 MR. DURNEY: And let's go to the next page,  
23 Mr. Ivey, beginning at 6:43.

24 /////

1 BY MR. DURNEY:

2 Q So here we have a strip that's from 6:43 to  
3 6 -- what would you say? One, two, three, four --  
4 about 6:54?

5 A Correct.

6 Q All right. We see more interventions. We see  
7 the nurses rolling her to a side.

8 A Correct.

9 Q It looks like left. Then we see they roll her  
10 back to her right side. And then a minute later they  
11 put her on her left side; correct?

12 A Correct.

13 Q And then they put her in Trendelenburg?

14 A Correct.

15 Q And then the Foley is DC'd. Did you do that?

16 A No, I did not.

17 Q And that was -- the Foley is typically DC'd or  
18 discontinued in anticipation of mom pushing?

19 A Correct.

20 Q All right. So the idea here at 6:54 was that  
21 mom would begin pushing probably?

22 A Probably.

23 Q That's what the Foley DC would suggest to you?

24 A Yeah.



1 Q All right. Fair enough.

2 And then we see more amniotic fluid infused at  
3 roughly 6:54, 6:55; agreed?

4 A Agreed.

5 Q All right. And by the way, you indicated  
6 before -- or at or about the time of the contractions,  
7 6:51, the baseline was still below normal, wasn't it?

8 A It was.

9 Q And you were beginning to lose beat-to-beat  
10 variability, aren't you?

11 A Correct.

12 Q In fact, all the way from the left side of this  
13 particular segment of the strip from 6:46 or so to  
14 Trendelenburg, the baseline is below normal?

15 A That's correct.

16 Q Beat-to-beat variability is absent?

17 A That's correct.

18 Q And beat-to-beat variability really never  
19 becomes pronounced at any point in this segment of the  
20 strip through 6:54, does it?

21 A Not in that segment.

22 Q Let's go to 6 -- the next segment of the strip,  
23 6:54-ish or 6:55-ish to 7:03. Would you agree with my  
24 characterization of the time?

1 A Yes.

2 Q All right. And again we see a couple of  
3 interventions, but let me stop at 6:57. 6:57 is just  
4 about where we see the notation -- can you read it for  
5 us here?

6 A I believe that says "left lateral."

7 Q In other words, they reposition mom again?

8 A Correct.

9 Q Now, this is when you left Tawni, isn't it?

10 A I think so. Yeah.

11 Q You remember indicating in your deposition that  
12 you were at Tawni's side at about 6:57? Do you  
13 remember that?

14 A That's what I said.

15 Q And do you remember me asking you in deposition  
16 what -- where were you between 6:57 -- let's run  
17 forward just a minute before I ask that question.  
18 Let's make clear that at 6:57 you had left Tawni's  
19 side.

20 A Um-hum.

21 MR. DURNEY: All right. Let's run all the way to  
22 page 65 of the strip, Mr. Ivey.

23 BY MR. DURNEY:

24 Q Now, this segment of the strip is roughly

1 reflective of time 7:22 to 7:31; would you agree?

2 A Yes.

3 Q And this indicates -- or does this indicate to  
4 you when you applied the vacuum?

5 A I initially said that, but apparently she was  
6 pushing on this contraction, and the next page is when  
7 "vacuum" was written, so --

8 Q All right. Very well. Let's go ahead and turn  
9 to page -- the next page which would be 66.

10 So does that help you tell us when the vacuum was  
11 applied?

12 A I'm going to have to assume that's accurate. I  
13 don't know. I mean, I know I put the vacuum on and we  
14 tried. And the nurses document it, so I'm assuming  
15 that's correct.

16 Q I understand that. You rely on nurses to do  
17 the documentation?

18 A I do.

19 Q You're busy?

20 A I am.

21 Q You're very busy?

22 A I was.

23 Q And so if we -- if the nurses recorded it  
24 correctly, the vacuum would have been applied at about

1 what time?

2 A I can't tell what time that is.

3 Q Let's go one segment back in the strip. That  
4 would be --

5 A 7:30 --

6 Q To segment 65. All right. So we've got 7:30  
7 to the right side of segment 65. Let's go to 66. And  
8 we have the notation of "vacuum." So can we assume  
9 that the vacuum popped off at -- at what? -- 7 --

10 A -33 or -4.

11 Q 7:33. How long did it take you to apply the  
12 vacuum?

13 A Less than a minute.

14 Q And how long did it take before the vacuum  
15 popped off and you confirmed that this wasn't going to  
16 work, that Lyam wasn't going to be delivered vaginally  
17 by virtue of the vacuum effort?

18 A Less than a minute.

19 Q All right. So can we agree then the vacuum was  
20 applied somewhere after 7:30?

21 A Correct.

22 Q Now, let's go back to a question I was about to  
23 ask; and that is, where were you between 6:57 and the  
24 time the vacuum was applied? Now, at 6:57 you left

1 Tawni's side to go help Jane Doe deliver, didn't you?

2 A That's my recollection.

3 Q And you went into Jane Doe's room because the  
4 nurse told you that Jane Doe was ready to push?

5 A Correct.

6 Q And so you went into Jane Doe's room at roughly  
7 sometime after 6:57? You gowned up; correct?

8 A Correct.

9 Q You gloved up?

10 A Correct.

11 Q And you stayed there with Jane Doe expecting to  
12 catch her baby?

13 A Correct.

14 Q And so you really don't know where you were  
15 other than with Jane Doe other than the time you came  
16 out to call in Dr. Koch for help between 6:57 and the  
17 time you applied the vacuum; isn't that true,

18 Dr. Hayes?

19 A I would have been one of those three places, in  
20 Tawni's, in 384 or at the nurses' station.

21 Q Take a look -- do you have your deposition in  
22 front of you?

23 A I probably do. I don't know.

24 Q No, it would be --

1 MR. DURNEY: Do we have a copy of that page?

2 May I approach, Your Honor?

3 THE COURT: You may. Do we have the original?

4 MR. DURNEY: I don't know who has the original.

5 MR. McBRIDE: Probably her counsel.

6 MR. KELLY: Probably her counsel.

7 MR. DURNEY: Can we use a copy?

8 THE COURT: Well, do we even have a copy?

9 MR. DURNEY: I do.

10 THE COURT: Well, we have your copy, Mr. Durney.

11 MR. KELLY: Your Honor, I have an extra copy.

12 THE COURT: Okay. I'm just concerned about her  
13 having something in front of her, so that's what I'm  
14 concerned about. Why don't we get it, Mark.

15 BY MR. DURNEY:

16 Q And if you could be so kind as to turn to page  
17 47.

18 A Okay.

19 Q Okay. And if you would read to yourself line  
20 17 at page 47 to line 9 on page 48.

21 A How far did you want me to go?

22 Q I'm sorry. Go over to page 48.

23 A Correct.

24 Q Line 9.

1 A Okay.

2 Q Do you remember me asking that question and do  
3 you remember that answer?

4 A Yes.

5 Q "So my question" -- so I asked you: "So my  
6 question is" --

7 MR. KELLY: I'm sorry. Excuse me. Improper use of  
8 deposition. It's not impeachment.

9 MR. DURNEY: That remains to be seen, Your Honor.

10 THE COURT: What? I didn't hear you.

11 MR. DURNEY: I respectfully disagree with  
12 Mr. Kelly.

13 THE COURT: His objection was --

14 MR. KELLY: It's not impeachment. It's improper  
15 use of depo.

16 THE COURT: Well, you can use the deposition for  
17 impeachment purposes. In fact, is she impeaching  
18 herself or -- I don't have a copy is my problem. I  
19 have no ability to look and see with respect to what  
20 the question is or anything, and I would like to look  
21 at it.

22 MR. KELLY: Can we approach?

23 MR. DURNEY: I have one, Your Honor.

24 THE COURT: You may.

1 (A discussion was held off the record  
2 between the Court and counsel.)

3 THE COURT: I'm going to sustain the objection.

4 BY MR. DURNEY:

5 Q So, Dr. Hayes, can we agree that it was a very  
6 busy morning?

7 A Yes.

8 Q And that you were a very, very busy doctor that  
9 morning?

10 A I was.

11 Q Which, of course, is one of the reasons that  
12 you got on the phone and called your colleague,  
13 Dr. Koch, to come in and help?

14 A Correct.

15 Q So between 6:57 when you left Tawni and roughly  
16 7:30 when you applied the vacuum, we know that part of  
17 the time was spent with Jane Doe in whose room you had  
18 gone gowned, gloved up, expecting to catch a baby?

19 A That's correct.

20 Q And part of the time was spent at the nurses'  
21 station on the telephone calling your colleague,  
22 Dr. Koch, to come in and help you?

23 A That's correct.

24 Q And can we -- can I --



1 MR. DURNEY: Let's put the strip up again,  
2 Mr. Ivey, if you would, please. Page 63. Excuse me.  
3 Page 61. And then again 62, page 62.

4 BY MR. DURNEY:

5 Q All right. We're looking at page 62,  
6 Dr. Hayes. And this is the time -- this segment of the  
7 strip captures the time between 6:55 and 7:03. Okay?

8 A Okay.

9 Q This would have been the -- what was being read  
10 out after your departure at 6:57. When you left at --  
11 before I ask that, would you agree that this strip at  
12 6:57 is a Category III fetal monitoring strip?

13 A II to III, yes.

14 Q All right. And you mentioned in response to  
15 Mr. Ivey's (verbatim) questions that you, of course, as  
16 a board certified OB/GYN or OB learned very early in  
17 your training how to read and interpret fetal monitor  
18 strips.

19 A That is correct.

20 Q And is it your understanding as well that by  
21 virtue of the educational programs at Carson Tahoe  
22 Hospital that the nurses that are on labor and delivery  
23 are also trained on how to read and interpret fetal  
24 monitor strips?

1 A That is correct.

2 Q And that nurses are trained to recognize the  
3 difference between a Category I strip, a Category II  
4 strip and a Category III strip?

5 A That's correct.

6 Q A Category III strip is the worst, isn't it?

7 A That's correct.

8 Q All right. And so when you left the patient at  
9 6:57, did any nurse -- to go help Jane Doe, did any  
10 nurse object?

11 A No.

12 Q Did any nurse indicate to you, "Dr. Hayes, this  
13 is a Category III strip. We think that she should --  
14 we should make efforts to prepare her for C-section"?

15 A I don't remember that.

16 Q Did any nurse indicate to you that even though  
17 the OB OR -- and every well-staffed obstetrical unit  
18 has to have an obstetrical operating room; would you  
19 agree?

20 A Well, I can't say that. Some hospitals don't  
21 have that capability.

22 Q All right. I agree. Too broad a question.

23 A Right.

24 Q At least this hospital -- at this hospital you

1 had an OR on the OB floor?

2 A We do.

3 Q That's the third floor?

4 A Correct.

5 Q And then you have eight operating rooms down on  
6 the second floor?

7 A Correct.

8 Q And I think you indicated in response to  
9 Mr. Kelly's questions that it was the nursing or the  
10 hospital that was responsible for securing an OR or  
11 making arrangements for an operating room.

12 A Correct.

13 Q And you knew at roughly 6:57 when you left  
14 Tawni's side that the OB OR was occupied by Dr. Tomita  
15 who was doing an emergency D&C on a patient with a  
16 retained placenta?

17 A I don't know the specific timeline when she  
18 started, when she finished. I know during this period  
19 of time she had been in the OR doing a D&C in my OB OR.

20 Q The OR log will tell us the time?

21 A It would, yes.

22 Q And that would be the most reliable  
23 information, I assume.

24 A Better than me.

1 Q At any event, at some point in time you knew  
2 that the OB OR was occupied?

3 A Correct.

4 Q And so did any nurse come to you when you left  
5 Tawni's side at 6:57 to say, "Doctor, we have an OR  
6 available downstairs. We can wheel her down there  
7 right now so that she'll be available for C-section"?

8 A I don't remember.

9 Q You believe, Doctor, that nurses are entitled  
10 to exercise their independent judgment with regard to  
11 patient care, don't you?

12 A Yes.

13 Q In fact, you respect that, don't you?

14 A I do.

15 Q And, in fact, if they had -- if they had -- if  
16 they had Tawni in her bed wheeling into OR at 6:57, you  
17 wouldn't have stood in their way, would you?

18 MR. KELLY: Objection; lacks foundation; calls for  
19 speculation.

20 THE COURT: I'm going to go ahead and sustain the  
21 objection. Why don't you lay a foundation, Mr. Durney.

22 BY MR. DURNEY:

23 Q At 6:57, given the patient's condition, would  
24 you have objected if a member of the nursing staff came

1 to you and said, "Doctor, we think that it's  
2 appropriate to wheel this patient to the only available  
3 OR down on the second floor"? You wouldn't have stood  
4 in their way, would you?

5 MR. KELLY: Objection; lacks foundation; calls for  
6 speculation four years later.

7 THE COURT: At the time -- I'm going to go ahead  
8 and sustain it. At the time that this took place, if  
9 you frame it as that, Mr. Durney.

10 MR. DURNEY: I'll rephrase it. At that time, is  
11 that the Court's directive? Thank you.

12 BY MR. DURNEY:

13 Q At that time if somebody had come to you and  
14 said, "We want to wheel her down to the downstairs OR,  
15 which is available," would you have objected?

16 MR. KELLY: Objection; lacks foundation; calls for  
17 speculation.

18 Can we approach?

19 THE COURT: You may.

20 (A discussion was held off the record  
21 between the Court and counsel.)

22 THE COURT: I'm going to sustain the objection.

23 BY MR. DURNEY:

24 Q Would you agree, Doctor, that none of the

1 interventions that we talked about, the positional  
2 changes, placing her on hands and knees, placing her in  
3 Trendelenburg position, including the Terbutaline and  
4 the giving of oxygen and the IUPC, amnioinfusion, none  
5 of those interventions brought the baby's heart rate  
6 into a normal range ever?

7 A No, I don't agree with that.

8 Q All right. Would you agree that --

9 MR. DURNEY: If we can go back, Mr. Ivey, to the  
10 segment before 7 a.m.

11 BY MR. DURNEY:

12 Q All right. Would you agree with me that as of  
13 6:52 none of the interventions prior to discontinuing  
14 or removing the Foley had brought the fetal heart rate  
15 back into a normal range?

16 A Prior to that time they had not.

17 Q Now, Tawni walked into this hospital -- by the  
18 way, when she walked in and you assumed responsibility  
19 for her, you reviewed her prenatal record?

20 A I did.

21 Q So you understood the prenatal course that she  
22 had?

23 A Correct.

24 Q And you understood that she had no

1 complications whatsoever in her prenatal period?

2 A Correct.

3 Q And that by all appearances she walked into  
4 this hospital with a healthy full-term baby boy?

5 A Correct.

6 THE COURT: Mr. Durney, at this time we're going to  
7 take our lunch recess.

8 Ladies and gentlemen of the jury, you're admonished  
9 not to converse among yourselves or with anyone else on  
10 any subject connected with this trial; read, watch or  
11 listen to any report of or any commentary on the trial  
12 by any person connected with this trial or by any  
13 medium or information, including, without limitation,  
14 newspaper, television, radio; or form or express any  
15 opinion on any subject connected with the trial until  
16 the case is finally submitted to you. You may not do  
17 research about any issues involved in the case. You  
18 may not blog, tweet or use the internet to obtain or  
19 share any information.

20 If you'll be back about 1:15, 1:20. We'll be in  
21 recess.

22 (The following proceedings were held  
23 outside the presence of the jury.)

24 THE COURT: Let the record reflect we're outside

( 1 the presence of the jury at this time. Counsel, if  
2 you'll be back about 1:15, I'll put the bench  
3 conference on the record at that time.

4 MR. KELLY: Thank you, Your Honor.

5 MR. DURNEY: Thank you.

6 (The lunch recess was taken at 12:00 p.m.)

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1 CARSON CITY, NEVADA; WEDNESDAY, MARCH 16, 2016  
2 1:20 P.M.

3 --oOo--

4 (The following proceedings were held  
5 outside the presence of the jury.)

6 THE COURT: For the record, we're outside the  
7 presence of the jury at this time in relation to Case  
8 No. 13 TRT 00028.

9 Before the break there was a bench conference in  
10 respect to a question that was asked of Dr. Hayes. I  
11 had the court reporter write out the question because I  
12 wanted to have it exactly correct in regards to what it  
13 was.

14 "At 6:57, given the patient's condition, would you  
15 have objected if a member of the nursing staff came to  
16 you and said, 'Doctor, we think that it's appropriate  
17 to wheel this patient to the only available OR down on  
18 the second floor'? You wouldn't have stood in their  
19 way, would you?"

20 There was an objection by Mr. Kelly. My  
21 recollection was the objection was speculation.

22 Is that correct, Mr. Kelly?

23 MR. KELLY: Yes, Your Honor.

24 THE COURT: And also lack of foundation, I believe,

1 as well.

2 Mr. Durney, I'm going to allow some argument on  
3 this if you want to argue. I've viewed it. I took a  
4 look at the Nevada Rules of Evidence in respect to  
5 that, and I think it does call for speculation at that  
6 time. You can go ahead -- I guess the question is --  
7 you're asking her to speculate back four years ago what  
8 she would have or would not have done in respect to  
9 that. And that's my concern in respect to the  
10 question.

11 I asked at the time that we had the bench  
12 conference whether or not there was any expert opinion  
13 or opinions given in respect to this issue as well.  
14 You indicated no, they wouldn't allow you to ask the  
15 question at the time of the deposition.

16 So in respect to that, do you have any argument?  
17 I'm going to allow both of you to argue, because I  
18 think it's kind of an interesting question. I looked  
19 at NRS 50.025, basically lack of personal knowledge at  
20 the time that it took place to some extent. So --

21 MR. DURNEY: Well, Your Honor, with regard to the  
22 argument that it constitutes undisclosed opinion, this  
23 doctor was a party at the time the deposition was  
24 taken. She was represented by Mr. Ed Lemons who would

1 not allow her to express opinions. And I was not  
2 allowed to ask questions soliciting opinions. So there  
3 was no opportunity for me to elicit from her that which  
4 she thought was called for by the standard of care.

5 In terms of speculation, she's free to answer the  
6 question "I don't know." But the thrust of this case  
7 is that these nurses recognized that they were dealing  
8 with a very, very busy doctor.

9 And allow me to step forward, because I feel like I  
10 shouldn't exclude Dr. Hayes from this.

11 They were given a very, very busy doctor who was  
12 overwhelmed by at least two and perhaps three patients,  
13 and she needed help. And it's the plaintiff's  
14 contention that she didn't get help from this nursing  
15 staff. Part of the team, this closely knit team, that  
16 she depended upon -- and I know she'll tell you when we  
17 ask the question, you depended on these doctors --  
18 excuse me -- these nurses to communicate to you with  
19 regard to the status of the patient. And so the thrust  
20 is that there wasn't that communication, that there  
21 wasn't that teamwork, that they didn't implement the  
22 chain of command, and that had they done so, this  
23 doctor wouldn't have objected.

24 So I think it's perfectly acceptable to ask that

1 question. As I said, she can say "I don't know" if she  
2 wants to.

3 THE COURT: Mr. Kelly.

4 MR. KELLY: Thank you, Your Honor.

5 I respectfully disagree. I think we are now four  
6 years into the case. Dr. Hayes has been deposed, she's  
7 settled the case, and now to ask her four years after  
8 the fact "If the nurses would have done this, what  
9 would you have done or would you have done something  
10 differently?" I can't think of any question that calls  
11 for more speculation than that. And I think that's in  
12 direct violation of NRS 50.025.

13 With respect to her deposition and the argument  
14 that counsel raised regarding her deposition, counsel  
15 was free to ask Dr. Hayes what her state of mind was at  
16 the time, for example, "Doctor, did you form an opinion  
17 or impression at the time that the nurses should have  
18 done something, should have brought this to your  
19 attention?" Those questions were never asked.

20 Mr. Durney did ask, you know, "Doctor, in  
21 retrospect would you have expected the nurses to do  
22 this or something else?"

23 And Mr. Lemons, I think appropriately, said that  
24 calls for speculation. So I think counsel had the

1 opportunity to ask what her state of mind was at the  
2 time, but that's a very different question now four  
3 years later saying "If you had been aware of this or if  
4 they would have brought something to your attention,  
5 would you have done something differently?" That in my  
6 judgment is speculation and in violation of NRS 50.025.

7 THE COURT: Mr. Durney.

8 MR. DURNEY: Well, the only comment that I would  
9 make, Your Honor, is that I don't think I should be  
10 required to ask it in a hypothetical nature, just like  
11 Mr. Kelly has asked witnesses hypothetically to assume  
12 the following. I mean, I could do it that way and that  
13 certainly would be permissible and there's no argument  
14 about that, but I do think that that question elicits  
15 nothing more than this doctor's thought about what  
16 should be done in a situation where the doctor is busy.  
17 And there's no question that this doctor was busy.

18 THE COURT: Okay. Thank you.

19 Well, I believe her testimony has been that -- and  
20 I don't want to misphrase it to some extent, but she  
21 indicated in her opinion the nurses did nothing wrong  
22 in respect. And she also indicated she was not  
23 overwhelmed, and from my understanding of her  
24 testimony, that it's not uncommon to have more than one

1 or two patients in respect to this. There is some  
2 question of where she was between 6:57 and 7:30 -- or  
3 7:33 to some extent. Basically her testimony is she  
4 was back and forth, one of three places, the Court  
5 recalls, either with this particular patient, the other  
6 patient or at the nursing station with respect to this  
7 particular matter.

8 I do -- again, I think it calls for her to  
9 speculate in respect to that. There may be another way  
10 to ask the question in respect to that, but in respect  
11 to the actual question that was requested that I look  
12 at, the Court is going to continue to hold I believe  
13 that it does call for speculation going back in respect  
14 to that and asks this witness to speculate. I guess  
15 the follow-up question -- well, I don't want to give  
16 any thoughts.

17 MR. DURNEY: I'll take whatever guidance you'll  
18 give me, Your Honor.

19 THE COURT: Huh?

20 MR. DURNEY: I'll take whatever guidance you'll  
21 give me.

22 THE COURT: No. That's fine. I was just going to  
23 go on to a question that -- that's fine. I don't think  
24 it's fair to either side in respect to that.

1 Given that, counsel, are you ready to proceed?

2 MR. DURNEY: Yes, Your Honor.

3 MR. KELLY: Yes, Your Honor.

4 THE COURT: Go ahead and bring them in.

5 (The following proceedings held  
6 within the presence of the jury.)

7 THE COURT: Will counsel stipulate to the presence  
8 of the jury?

9 MR. DURNEY: Yes, Your Honor.

10 MR. KELLY: Yes, Your Honor.

11 THE COURT: Mr. Durney, your cross still.

12 MR. DURNEY: Thank you very much, Your Honor.

13 BY MR. DURNEY:

14 Q Dr. Hayes, there's no question that that was a  
15 busy morning; agreed?

16 A Agreed.

17 Q Unusually busy; agreed?

18 A It was busy.

19 Q And certainly you didn't have an opportunity to  
20 review Tawni's strip while you were attending to Jane  
21 Doe after you had gowned up, gloved up and gone in to  
22 catch the baby while she was in labor; agreed?

23 A Agreed.

24 Q In fact, when I took your deposition back in --

1 I think it was in December of 2014. At the time I took  
2 your deposition, you indicated that at the time I took  
3 your deposition you had had a better opportunity to  
4 review the strip than you did when you were engaged  
5 that busy morning? Do you remember that testimony?

6 A Can you rephrase that?

7 MR. DURNEY: Can you repeat it back -- read it  
8 back.

9 (The question was read.)

10 THE WITNESS: Yes, that's correct.

11 BY MR. DURNEY:

12 Q And that is true?

13 A Yes.

14 Q All right. And remember at the time I took  
15 your deposition I asked you for your opinion as to when  
16 a C-section should have been done and your answer was  
17 "I don't have a specific time"?

18 A I didn't.

19 Q You've thought of that question over and over  
20 again since that day, haven't you?

21 A True.

22 Q All right. Doctor, Mr. Kelly brought out the  
23 fact that you're board certified in your discipline and  
24 that you've enjoyed a successful career. You've never



( 1 been disciplined by this hospital as a result of the  
2 events that morning, have you?

3 MR. KELLY: Objection. It's irrelevant.

4 THE COURT: I'm going to overrule. She can answer  
5 that.

6 THE WITNESS: Disciplined by Carson Tahoe?

7 BY MR. DURNEY:

8 Q By the hospital. You've never been disciplined  
9 as a result of the events that occurred that morning,  
10 have you?

11 A No.

12 Q In fact, in order to practice within the walls  
13 of this hospital, you must apply for something called  
14 privileges every other year, don't you?

15 A Correct.

16 Q And you have to apply for a membership to the  
17 medical staff every other year; correct?

18 A Correct.

19 Q And your privileges to practice within the  
20 walls of that hospital have never been curtailed at all  
21 as a result of this event, have they?

22 A No, they have not.

( 23 Q In fact, there has never even been a threat of  
24 curtailing your privileges as a result of the events

1 that morning, have there?

2 MR. KELLY: Objection; irrelevant.

3 THE COURT: That one I'm going to sustain.

4 MR. DURNEY: Thank you, Your Honor.

5 BY MR. DURNEY:

6 Q Has the hospital ever sent a letter to your  
7 employer indicating any criticism of you for the events  
8 that occurred --

9 MR. KELLY: Objection.

10 BY MR. DURNEY:

11 Q -- that morning.

12 MR. KELLY: Objection; irrelevant; also may lack  
13 foundation; call for speculation.

14 THE COURT: I'm going to go ahead and overrule the  
15 objection. She can answer to the extent that you know.

16 THE WITNESS: Not that I know of.

17 BY MR. DURNEY:

18 Q And certainly there was nothing the hospital  
19 did, absolutely nothing, to alter your employer's  
20 contract with the hospital as a result of those events;  
21 agreed?

22 A Not that I know of.

23 Q All right. Doctor, before the break I asked  
24 you to confirm that this mother -- it was her first --

1 it was her first baby; correct?

2 A Correct.

3 Q -- to recognize or to acknowledge that this  
4 mother walked into this hospital after a normal  
5 prenatal period with a full-term healthy baby. And you  
6 indicated that that's, in fact, what happened. My  
7 question is: Doctor, this should not have happened,  
8 should it?

9 MR. KELLY: Objection, Your Honor; irrelevant.

10 THE COURT: Well, I'm going to overrule it.

11 BY MR. DURNEY:

12 Q This should not have happened, should it?

13 A What do you mean when you say "this"?

14 Q What I mean by "this" is a baby delivered at  
15 approximately 7:48 on this morning after being a  
16 patient in this hospital overnight with a normal baby  
17 boy being delivered profoundly disabled -- and you  
18 understand him to be profoundly disabled. I won't go  
19 into that. That should not have happened, should it?

20 A I wish it hadn't.

21 Q That wasn't my question. It shouldn't have,  
22 should it?

23 MR. KELLY: Objection; argumentative and  
24 irrelevant.

1 THE COURT: I'm going to sustain it on  
2 argumentative basis. She answered the question.

3 BY MR. DURNEY:

4 Q We all wish it wouldn't have happened, but now  
5 you have come in to say you have no criticism of the  
6 nurses.

7 A That's correct.

8 Q The nurses have said they have no criticism of  
9 you.

10 MR. KELLY: Well --

11 BY MR. DURNEY:

12 Q Did Tawni --

13 A I don't know what the nurses have said about  
14 me.

15 Q I'll make that representation to you.

16 MR. KELLY: Well -- excuse me. Can we approach?

17 THE COURT: You may.

18 (A discussion was held off the record  
19 between the Court and counsel.)

20 BY MR. DURNEY:

21 Q Doctor, you've indicated that you have no  
22 criticism of the nurses that morning.

23 A That's correct.

24 Q And the nurses have indicated that they

1 acknowledge you to be and that you were then a very  
2 competent and capable obstetrician.

3 A I'll accept that.

4 Q So did Tawni do something wrong?

5 MR. KELLY: Objection; argumentative.

6 BY MR. DURNEY:

7 Q Did Tawni do something wrong?

8 MR. KELLY: Objection; argumentative.

9 THE COURT: I'm going to sustain that. That goes  
10 to argument, Mr. Durney.

11 MR. DURNEY: Well, may I address the --

12 THE COURT: You can.

13 MR. DURNEY: Your Honor, something went wrong and  
14 we're searching --

15 MR. KELLY: Excuse me, Your Honor. Can we do this  
16 at sidebar? This is argument.

17 THE COURT: Yeah, I think it is argument, so --

18 (A discussion was held off the record  
19 between the Court and counsel.)

20 BY MR. DURNEY:

21 Q Doctor, did Tawni do everything that she was  
22 asked to do?

23 A Yes, she did.

24 Q All right. The nurses play a significant role

1 in the management of a patient, don't they?

2 A This is true.

3 Q In fact, the nurses are part of a team  
4 comprised of the OB and themselves; agreed?

5 A Agreed.

6 Q And they, as important members of that team,  
7 are people that you rely on; agreed?

8 A Agreed.

9 Q You rely upon them to communicate with you  
10 about the patient's condition; agreed?

11 A Agreed.

12 Q You rely upon them to relate to you changes in  
13 the patient's condition; agreed?

14 A Agreed.

15 Q You rely upon them to be the first and last  
16 line of defense for that patient; agreed?

17 A Yeah. I wouldn't phrase it that way, but I'll  
18 give you that.

19 Q Would you agree -- I don't want to quibble with  
20 you. I really don't. Would you agree that you expect  
21 the nurses to advocate for their patient?

22 A As they do.

23 Q As they do. But that's their job; agreed?

24 A Correct.

1 Q In this particular case have you ever  
2 apologized to Lyam or Tawni?

3 MR. KELLY: Objection; irrelevant.

4 THE COURT: I'm going to overrule it. I guess I'm  
5 going to allow it, Mr. Durney, but don't go too far  
6 with respect to that.

7 MR. DURNEY: I will not go far at all beyond this  
8 question.

9 THE WITNESS: I have not seen Lyam after I  
10 delivered him. And I took care of Tawni while she was  
11 in the hospital. When she came back to see me, I did  
12 apologize that it had happened the way it did.

13 MR. DURNEY: Thank you.

14 THE COURT: Redirect.

15 MR. KELLY: Thank you.

16 REDIRECT EXAMINATION

17 BY MR. KELLY:

18 Q Dr. Hayes, Mr. Durney just asked you some  
19 questions about the team, it's a team of different  
20 people working on the team for the benefit of the  
21 patient. Would it be accurate to say that the  
22 physician is the leader of the team?

23 A Correct.

24 Q It's the physician who makes the medical

1 decisions; correct?

2 A Correct.

3 Q Doctor, I want to ask you some questions about  
4 Mr. Durney's inquiry about where you would be between  
5 7:57 and 7:30, thereabouts. I think you told us  
6 that -- we know you had Ms. McCrosky and there was a  
7 Jane Doe next door; correct?

8 A Correct.

9 Q Do you remember any other patients that you  
10 were caring for that night?

11 A I don't remember.

12 Q Have you seen any records that would suggest  
13 that there were any other patients that you were caring  
14 for that night?

15 A I haven't looked.

16 Q Jane Doe was in the adjacent room. And I would  
17 ask you to look at Exhibit 6, page 42.

18 A I'll need the book.

19 MR. KELLY: Your Honor, may I approach?

20 THE COURT: You may.

21 BY MR. KELLY:

22 Q Doctor, Exhibit 6, page 42, is an OB labor flow  
23 sheet from Jane Doe's record that counsel referred to  
24 earlier. And if you have Ms. McCrosky in one room and



1 Jane Doe in another, I think you said that you would be  
2 either in one of those rooms or at the nurses' station  
3 between 6:57 and roughly 7:30; is that accurate?

4 A Correct.

5 Q And am I correct that you told us in your  
6 deposition that you would never be more than ten feet  
7 away from Ms. McCrosky?

8 MR. DURNY: Your Honor, objection; leading.

9 MR. KELLY: I'll rephrase it.

10 BY MR. KELLY:

11 Q Were you ever more than ten feet away from  
12 Ms. McCrosky that morning?

13 A From her room, no.

14 Q Okay. And did you ever leave the floor that  
15 morning?

16 A No.

17 Q You were always there and available?

18 A Correct.

19 Q All right. Now, Mr. Durney asked you about a  
20 Category III or -- a Category III strip. What's a  
21 Category I strip?

22 A A Category I strip is a normal reassuring  
23 strip.

24 Q Based upon your custom and practice and your

1 education, if you have one patient with a Category III  
2 strip and one patient with a Category I strip, based  
3 upon your custom and practice, where would you spend  
4 most of your time?

5 A With the Category III strip.

6 Q I would like to have you look at Exhibit 6,  
7 page 42.

8 MR. KELLY: Perhaps we could pull that up.

9 MR. McBRIDE: Do you want to show it on the Elmo?

10 MR. DURNEY: Is this the strip of Jane Doe?

11 MR. KELLY: No.

12 BY MR. KELLY:

13 Q Doctor, what we have now in front of the jury  
14 is Exhibit 6, page 42. And this is an OB labor flow  
15 sheet; correct?

16 A Correct.

17 Q And this, I will represent to you, is from Jane  
18 Doe's record that Mr. Durney referred to earlier this  
19 morning. And can you tell us, what was the category  
20 strip for this particular patient?

21 A It's charted as Category I.

22 Q And that would be normal?

23 A Correct.

24 Q And then above this area where it says "Nurse

1 Narrative" -- if you could scroll up -- it references  
2 "pushing, doing well." Do you see that?

3 A I do.

4 MR. KELLY: And if we could have the whole page,  
5 please.

6 BY MR. KELLY:

7 Q Doctor, is there any reference on this document  
8 which is timed at 7:20 that you were in that room at  
9 that time?

10 A No.

11 Q And, Doctor, based upon your custom and  
12 practice, if a woman has a Category I strip, does the  
13 doctor have to be present when they're pushing?

14 A No.

15 Q And based upon your custom and practice, do you  
16 believe that you would have spent much more time in a  
17 patient's room that has a Category III strip than a  
18 Category I strip?

19 A Yes.

20 Q Doctor, I think you told us that you placed a  
21 call to one of your partners to come in and assist with  
22 the delivery of Jane Doe; correct?

23 A Correct.

24 Q And Mr. Durney pointed out earlier that that

1 baby wasn't delivered until 7:42. Do you recall that?

2 A Correct.

3 Q And that call was placed to your partner at  
4 about 7 o'clock?

5 A I think it was about then. It might have been  
6 a little after. If I remember the timeline, I went in  
7 and tried to deliver. And she probably pushed a couple  
8 times before I left to make the phone call, so I don't  
9 know exactly the timeline.

10 Q Okay. Would it have been approximately  
11 7 o'clock or a little thereafter?

12 MR. DURNEY: I would object. It calls for  
13 speculation. Asked and answered.

14 THE COURT: I'm going to go ahead and sustain it.  
15 Rephrase the question.

16 BY MR. KELLY:

17 Q Do you know approximately what time you went  
18 out to make the call?

19 MR. DURNEY: Objection; asked and answered, Your  
20 Honor. She said she doesn't know.

21 THE COURT: Well, I'm going to overrule it to the  
22 extent she knows.

23 Do you know?

24 THE WITNESS: I would think it might have been

1 about 10 minutes, but I don't know for sure.

2 BY MR. KELLY:

3 Q Okay. All right. But it would have been  
4 shortly after the patient was pushing and you went in  
5 the room about 6:57?

6 A Correct.

7 Q Is it your best estimate it would have been  
8 within 10 minutes of 6:57?

9 MR. DURNEY: Your Honor, he's asked the question  
10 multiple times now. He's gotten an answer.

11 THE COURT: I'll sustain your objection.

12 MR. KELLY: Thank you.

13 BY MR. KELLY:

14 Q In any event, we know that a physician, one of  
15 your partners, I believe Dr. Hess, came in and  
16 delivered; correct?

17 A Correct.

18 MR. KELLY: And if we could put up Exhibit D-7,  
19 page 41. This is a copy of the strip of Jane Doe.

20 MR. DURNEY: What page, Mr. Kelly?

21 MR. KELLY: Exhibit D-7, page 41.

22 MR. DURNEY: And this is the same as Plaintiff's  
23 Exhibit 6?

24 MR. KELLY: Correct.

1 If we could scroll that so that we can see the  
2 handwriting.

3 BY MR. KELLY:

4 Q Doctor, on this strip can you tell  
5 approximately based upon what's written on the strip  
6 approximately what time Jane Doe --

7 THE COURT: Well, before we start testifying about  
8 this strip, in respect to that, it's not been offered  
9 into evidence. This is D-7; correct?

10 MR. DURNEY: Your Honor, the reason I said it's the  
11 same as Plaintiff's Exhibit 5 is the -- excuse me --  
12 Exhibit 6 is already in evidence.

13 MR. KELLY: It is, Your Honor. It's the same as  
14 Exhibit 6.

15 THE COURT: Well, then we'll go ahead and allow D-7  
16 to be admitted.

17 MR. KELLY: Thank you. Page 41.

18 (Exhibit D-7 was admitted.)

19 BY MR. KELLY:

20 Q Doctor, based upon this particular exhibit can  
21 you tell us approximately when Jane Doe's baby was  
22 born?

23 A It looks like 7:41 or -2.

24 Q Doctor, you were asked some questions about

1 Dr. Koch. Dr. Koch is one of your partners?

2 A Correct.

3 Q Do you remember if Dr. Koch was in fact on the  
4 floor in addition to Dr. Hess, yourself and Dr. Tomita?

5 A I do not recall.

6 Q You do recall Dr. Tomita being there; correct?

7 A Yes.

8 Q And Dr. Hess we've established came to deliver  
9 the baby?

10 A And I have to say I don't remember Dr. Hess  
11 being there.

12 Q Okay. Fair enough.

13 Other than Jane Doe and her baby and Tawni McCrosky  
14 and her baby, are you aware of any other kids that were  
15 on the unit that morning in labor?

16 A I don't remember.

17 Q If the records do not suggest there were any  
18 other laboring mothers that morning, would you have any  
19 reason to disagree with that?

20 MR. DURNEY: Objection. That calls for  
21 speculation. All records haven't been produced of  
22 patients. We struggled to get Jane Doe. So it's an  
23 unfair question. And she hasn't reviewed the records,  
24 so it calls for speculation.

1 THE COURT: Well, he asked assuming -- I'm going to  
2 sustain it. Rephrase it.

3 MR. KELLY: Sure.

4 BY MR. KELLY:

5 Q I want you to assume hypothetically that the  
6 records do not reflect that any other laboring mothers  
7 delivered that morning. If that's true, would you have  
8 any reason to disagree with that?

9 A No.

10 Q Is there anything you remember about another  
11 patient that you were taking care of that distracted  
12 you or anything like that?

13 A I don't remember another patient.

14 Q All right.

15 MR. DURNEY: Your Honor, in light of that, I would  
16 move that they bring us the records that Mr. Kelly is  
17 asking this witness to assume exist.

18 THE COURT: He asked a hypothetical question. He  
19 asked her to assume that. Mr. Durney, you can question  
20 her on redirect and say, "Are there any other records  
21 to that knowledge?" But at this point in time I'm  
22 going to sustain -- overrule your objection, because he  
23 asked a hypothetical question that he's allowed to ask.

24 MR. DURNEY: All right. If I'm given an



1 opportunity to recross, I would appreciate it.

2 THE COURT: Well, you can ask if she's aware of any  
3 other documents or ask if she has any knowledge of any  
4 other documents in respect to that or anything else  
5 that would help change that.

6 BY MR. KELLY:

7 Q Doctor, you were asked some questions about the  
8 nurses transferring a patient for a cesarean section.  
9 And specifically Mr. Durney was asking you about nurses  
10 disconnecting IV lines, disconnecting fetal heart  
11 monitors, intrauterine pressure catheters to move a  
12 patient for a cesarean section. Do you recall him  
13 asking you about that?

14 A Yes.

15 Q Doctor, you -- let me rephrase. Would you  
16 expect the nurses to disconnect a patient, take off the  
17 IV lines, take out the IUPC, prepare a patient for a  
18 cesarean section without an order from a physician for  
19 the cesarean section?

20 A No.

21 Q Why?

22 A That's not their decision.

23 Q If nurses hypothetically disconnected a  
24 patient, started wheeling them down the hallway to an

1 operating room without an order from a physician for a  
2 cesarean section, would that be inappropriate?

3 A It depends on the situation.

4 Q Would you expect nurses to do that without an  
5 order?

6 A No.

7 Q The decision to perform a cesarean section,  
8 does that have to be made by a physician?

9 A Yes.

10 Q And in this particular case your decision to  
11 perform a cesarean section was made at 7:30; correct?

12 A Correct.

13 Q Doctor, by the way, are you an employee of the  
14 hospital?

15 A No.

16 Q And you're here under subpoena; correct?

17 A Yes.

18 Q Doctor, thanks for your time. I appreciate it.

19 THE COURT: Mr. Durney.

20 MR. DURNEY: Just a few, Your Honor.

21 RECROSS EXAMINATION

22 BY MR. DURNEY:

23 Q So in response to one of Mr. Kelly's questions,  
24 you indicated that -- you said it depends upon the

1 situation. And the question was would a nurse be  
2 authorized to wheel a patient to an operating room. It  
3 depends on the situation. Would the situation that  
4 you're envisioning be a situation where the patient's  
5 well-being is in jeopardy and a doctor is so occupied  
6 with another patient that she can't give attention to  
7 the patient being wheeled? Would that be one of the  
8 situations where you would think it permissible?

9 MR. KELLY: Objection; incomplete hypothetical.

10 THE COURT: Well, I'm going to overrule the  
11 objection. I think you opened the door with it.

12 So go ahead.

13 THE WITNESS: If the doctor were unavailable, that  
14 would be a situation. The doctor was not unavailable.  
15 I was there.

16 BY MR. DURNEY:

17 Q Understood. You were unavailable when you were  
18 in the room with Jane Doe while she was pushing --

19 A Correct.

20 Q -- anticipating catching a baby; correct?

21 A Correct.

22 Q And Mr. Kelly pointed out to us page -- I  
23 believe it was page 42 of Jane Doe's record. I'll just  
24 read it. He brought up page 42 of Jane Doe's record

1 which is Exhibit 6.

2 MR. DURNEY: And let's blow up the segment right  
3 above what you have.

4 BY MR. DURNEY:

5 Q The notice time is 7:20, isn't it?

6 A Correct.

7 Q And at 7:20 Jane Doe was -- the nurse wrote  
8 down, quote -- under "Nurse Narrative," quote,  
9 "Pushing, doing well." Did I read that correctly?

10 A That's what it says.

11 Q Indicating that a baby could be delivered at  
12 any time? "Pushing, doing well." Agreed?

13 A It could be delivered any time.

14 Q All right. And then there was another question  
15 that Mr. Kelly asked you in a hypothetical sense. He  
16 asked you about -- it's kind of a negative situation,  
17 but he said if there are no records to support a third  
18 patient, you wouldn't have any reason to believe that  
19 there is a third patient. I mean, the question begs  
20 the answer.

21 You haven't done any investigation or work into the  
22 question of whether or not there was a third patient  
23 who was delivered by Dr. Koch, your colleague, after  
24 you called her to come in?

1 A I have not.

2 Q You have not. Thank you, ma'am. That's all I  
3 have.

4 MR. KELLY: Nothing further. Thank you.

5 THE COURT: You're done. You can step down.

6 Does the defense want to call their next witness?

7 MR. KELLY: Thank you very much, Your Honor. The  
8 defense would call Shelly Koontz.

9 THE COURT: Ma'am, if you'd come forward. Stop  
10 right there and raise your right hand.

11 (The oath was administered to the witness.)

12 THE WITNESS: I will.

13 THE COURT: Please take the witness stand. Please  
14 state your full name, spell your last name.

15 THE WITNESS: My full name is Shelly Lee Koontz,  
16 K-o-o-n-t-z.

17 THE COURT: Your witness.

18 MR. KELLY: Thank you.

19 SHELLY LEE KOONTZ,

20 having been called as a witness herein,  
21 being first duly sworn, was examined  
and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. KELLY:

24 Q Good afternoon, Shelly.

1 A Hi.

2 Q Nurse Koontz, you are a registered nurse;  
3 correct?

4 A Yes.

5 Q Licensed in Nevada?

6 A Yes.

7 Q Could you please outline for the jury your  
8 educational background.

9 A Yes. I went to nursing school in Long Beach,  
10 California, graduated in 1987. And I'm also an  
11 internationally board-certified lactation consultant.

12 Q When did you come to Carson Tahoe?

13 A It was approximately September of 1981.

14 Q And going back to your prior answer, what is a  
15 certified lactation consultant?

16 A An internationally board-certified lactation  
17 consultant is a speciality dealing with -- we assist  
18 newborns and mothers with feeding issues, babies that  
19 have weight loss, mothers that have issues or are  
20 unable to breastfeed their baby due to cleft palet or  
21 other issues. So it's a speciality. And, you know, we  
22 deal with challenging feeding situations.

23 Q How long have you been so certified?

24 A 1999 was the year I became certified.

1 Q And what do you have to do to obtain that  
2 certification?

3 A Well, just to apply for the -- to sit for the  
4 exam, you have to have 2500 hours of hands-on clinical  
5 experience documented. You have to have completed a  
6 specific number of continuing educational hours  
7 specific to lactation education, which at that time, I  
8 believe, it was a 40-hour minimum. And those were the  
9 two requirements that I needed to fulfill in order to  
10 just sit for the exam.

11 Q And when you came to Carson Tahoe in 1991 as a  
12 registered nurse, what were your duties and  
13 responsibilities at that time?

14 A At that time I was hired as a staff nurse in  
15 labor and delivery, so primarily patient care.

16 Q Okay. And can you tell us, from 1991 all the  
17 way through the present, what have your positions been  
18 at Carson Tahoe?

19 A From 1991 until 1996 I worked as a staff nurse  
20 in labor and delivery. I was promoted to a charge  
21 nurse position sometime in 1996. And I worked in that  
22 role for a few months, two or three months. I was then  
23 promoted to a position -- at that time it was called a  
24 clinical coordinator, similar to like an assistant

1 nursing manager position. And I remained in that role  
2 until 2005. At that point they did some restructuring  
3 in the hospital, and I was promoted to nurse manager.  
4 So from -- and that was until 2014.

5 Q So you were a nurse manager from 2005 to 2014?

6 A That's correct.

7 Q So you were the nurse manager -- a nurse  
8 manager when Ms. McCrosky was at the hospital?

9 A Yes.

10 Q And can you tell us, at that time, 2012, what  
11 were your duties and responsibilities as a nurse  
12 manager?

13 A I had oversight of the day-to-day functions and  
14 responsibilities of the unit -- I hired staff --  
15 performance evaluations, reviewing competencies,  
16 budgetary responsibilities. I still did some hands-on  
17 patient care.

18 Q Approximately how many years were you in a  
19 nursing leadership role at Carson Tahoe?

20 A It would have been a total of 18 years.

21 Q And in 2014, you changed gears?

22 A I did. I had some personal obligations with my  
23 family and requested -- I needed a position that I had  
24 a little more flexibility, and so I went back to the



1 bedside and took a staff nurse position.

2 Q Are you AWHONN certified?

3 A Yes, I am.

4 Q And can you tell us what -- how you spell  
5 AWHONN and what it means?

6 A Well, I'm a member of AWHONN. And AWHONN is  
7 the Association of Women's Health, Obstetric and  
8 Neonatal Nurses. It's an organization that is the  
9 standard of care. They produce a lot of articles and  
10 publications and educational material for staff.

11 Q As part of your duties and responsibilities as  
12 a nurse manager in 2012, were you responsible for  
13 making sure that the nurses in the labor and delivery  
14 unit were competent and qualified?

15 A Yes.

16 Q How did you go about doing that?

17 A Well, there were several ways. First of all,  
18 nurses are, you know, from the time that -- there's a  
19 whole preceptorship program when they're newly hired,  
20 but from an annual standpoint, we would review their  
21 competencies. They were observed, had to do return  
22 demonstration, competency. I would have feedback from  
23 the charge staff, from the physicians. And then the  
24 nurses themselves would sit down and we'd review their

1 competencies. And any identified areas would be  
2 documented and readdressed.

3 Q Going back to 2012 -- and I know you've been  
4 sitting patiently throughout the trial -- are you aware  
5 of any competency problems you had with any of the  
6 nurses associated with Ms. McCrosky's care?

7 A No, there were no competency issues.

8 Q As of 2012 had you formed a professional  
9 opinion or impression as to the competency of the  
10 nurses who cared for Ms. McCrosky?

11 A Yes.

12 Q What was your opinion?

13 A They were very competent and qualified nurses  
14 to provide care to Ms. McCrosky.

15 Q We've heard a lot of questions asked of various  
16 witnesses about the chain of command. I want to spend  
17 a few minutes asking you about your understanding of  
18 the chain of command. And in the labor and delivery  
19 room setting is there a policy at the hospital, a  
20 written policy, with respect to chain of command?

21 A Yes, there is.

22 Q And what's the purpose of that?

23 A The purpose is -- the purpose of having a  
24 policy -- first of all, they're guidelines. And nurses

1 frequently need to reference policies. And it's --  
2 it's so nurses have an understanding and a reference  
3 should they have a question in order to take the right  
4 action, if needed.

5 Q Okay. I would like to show you what has  
6 previously been marked and, I believe, admitted as  
7 Exhibit 31.

8 THE COURT: Is that Plaintiff's 31?

9 MR. KELLY: Yes, Your Honor.

10 BY MR. KELLY:

11 Q We have on the screen Exhibit 31. Is this a  
12 true and correct copy of the hospital's chain of  
13 command policy?

14 A It appears to be. I can't really see it.

15 MR. KELLY: Your Honor, may I approach?

16 THE COURT: You may.

17 BY MR. KELLY:

18 Q Let me show you a copy.

19 A Thank you.

20 Yes, this is the policy.

21 Q And was that policy in force and effect in  
22 2012?

23 A Yes, it was.

24 Q And what did you understand the policy to mean

1 as it pertained to the nurses in the labor and delivery  
2 unit, and specifically the reference to if the nurse  
3 has any reason to question a physician's order?

4 A Well, it's well spelled out in the policy that  
5 if a nurse does have any reason to question a  
6 physician's order that she would follow this policy.

7 Q Okay. Now, let me show you what we have  
8 previously marked as Exhibit D-58.

9 A Okay.

10 Q Do you need a copy?

11 A Probably. I just -- there's some small detail  
12 that I'm having difficulty reading.

13 Q What is Exhibit D-58?

14 A This exhibit is a diagram that breaks down --  
15 it matches this policy that's in writing, but it's  
16 easier, I believe, for the jury to understand and  
17 review if you break it down into this format.

18 Q Did you assist --

19 MR. DURNEY: Your Honor, we have never been  
20 provided with a copy of this. Can --

21 MR. McBRIDE: That is not true.

22 MR. DURNEY: Can I see it?

23 MR. McBRIDE: I have this one.

24 THE COURT: Why don't you just wait one second.

1 MR. KELLY: Sure.

2 MR. DURNEY: Thank you.

3 THE COURT: Go ahead.

4 MR. KELLY: Thank you.

5 BY MR. KELLY:

6 Q Nurse Koontz, is this a diagram that you helped  
7 prepare with the assistance of counsel to help  
8 illustrate the chain of command policy?

9 A Yes, it is.

10 Q And can you tell us --

11 THE COURT: Before we go into it -- I think you've  
12 laid the foundation to some extent. It has to be  
13 admitted before we start testifying in respect to it.

14 MR. KELLY: I apologize. I will move to have  
15 Exhibit 31 admitted, please.

16 THE COURT: Any objection?

17 MR. DURNEY: Well, I certainly would like a little  
18 more foundation. I mean, apparently this was prepared  
19 at counsel's suggestion, so it's an exhibit that is  
20 prepared by counsel, which I've never seen before.

21 THE COURT: I'm going to go ahead and sustain it.  
22 Lay a little better foundation.

23 MR. KELLY: I'll lay a foundation. Thank you. I  
24 do believe, though, it was previously produced. And I

1 misspoke. It's D-58.

2 BY MR. KELLY:

3 Q Ms. Koontz, we talked earlier about the written  
4 policy that you just showed us and described. What is  
5 the purpose of D-58 and how does it relate to the  
6 written policy that you've shown us?

7 A It's just simply a diagram or a breakdown.  
8 It's an easier way to understand this policy when you  
9 look at it in that format.

10 Q And you assisted in its preparation?

11 A Yes.

12 Q And do you feel that it is a fair and accurate  
13 diagram depicting the written policy that we've just  
14 discussed?

15 A I do, yes.

16 MR. KELLY: I move that D-58 be admitted.

17 THE COURT: Any objection?

18 MR. DURNEY: No objection, Your Honor.

19 THE COURT: It will be admitted.

20 MR. KELLY: Thank you.

21 (Exhibit D-58 was admitted.)

22 BY MR. KELLY:

23 Q With respect to Exhibit D-58 --

24 MR. KELLY: Your Honor, may she step down?

1 THE COURT: She may. The pointer is right there.

2 BY MR. KELLY:

3 Q Nurse Koontz, as the nurse manager at that  
4 time, can you describe for us this particular exhibit  
5 and how the chain of command is designed to work.

6 A Yes, I can. So you -- it starts out with the  
7 bedside RN. That's the nurse that's actually providing  
8 hands-on care of the patient. And the bedside RN may  
9 have a question about a physician's order or feel that  
10 she needs assistance from higher up because of a  
11 questionable physician's order.

12 So the bedside RN is going to contact -- her first  
13 contact is going to be -- it's going to be the charge  
14 RN or the team leader, okay. At that time her  
15 responsibility is to, you know, give the patient --  
16 report on the patient, discuss any history, review the  
17 medical issues and discuss, you know, any issues that  
18 she's having at that time.

19 At that point -- you know, the idea is you always  
20 want to try to solve the issue as low on the chain of  
21 command as possible. So if the charge RN feels that  
22 she can, you know, help with this situation, she's  
23 going to actually go right to the physician. She's  
24 going to discuss the issues and the concerns that the

1 bedside RN has and maybe that charge leader or team  
2 leader has at the time as well. At that time hopefully  
3 there's a resolution, okay.

4 If there's not a resolution, the charge nurse feels  
5 that there's still an issue and the problem is not  
6 solved, her next step is she's going to have some  
7 options. She's going to -- she's going to contact the  
8 administrative coordinator which is the house  
9 supervisor. They're in house. They're in the hospital  
10 24 hours, seven days a week.

11 Depending on the situation and the time of day,  
12 that charge nurse or team leader may go to the nurse  
13 manager or she may go to the nursing director. So it's  
14 usually going to be the person that's most easily able  
15 to help her with her issue or who is most available at  
16 the time.

17 Also, based on this policy, it also shows that  
18 there may be a conference, there may be a discussion,  
19 between the nurse manager, administrative coordinator.  
20 You know, there may be a conference that takes place  
21 between these individuals. Not in every case. But  
22 that's how this diagram is designed to show you, how it  
23 can happen that way.

24 At that point, the administrative coordinator,



1 nurse manager or director, whoever is directly involved  
2 with the charge nurse, the team leader, may go to that  
3 physician at that point if that's the appropriate --  
4 the appropriate thing to do.

5 At that point, if they feel that the issue --  
6 they're going to review, discuss a plan of action  
7 again, okay. If the problem is still not addressed  
8 correctly and there's still issues, they're going to go  
9 higher up in the chain of command. And that may be  
10 contact -- that would be according to this contacting  
11 the chief nursing officer.

12 Again, there's going to be a review, a discussion,  
13 and a plan made. The chief nursing officer may elect  
14 to go to the chief of staff if that's appropriate. And  
15 at that point the chief of staff is going to go back to  
16 the patient's physician and hopefully there's a  
17 resolution.

18 Q How do nurses know when to implement the chain  
19 of command?

20 A When they're questioning physicians' orders or  
21 actions.

22 Q Can you give us some examples of your  
23 experience in that regard?

24 A Sure. I dealt with personally a case a couple

1 years ago with a pediatric patient where we had a  
2 concern that the child wasn't being attended to by the  
3 physician, the surgeon. The parents had some concerns  
4 and wanted to speak to the physician. The nurse  
5 contacted the physician. The physician didn't respond  
6 appropriately and said that he would be up.

7 Q What do you mean "be up"?

8 A He wouldn't come up -- he was busy and  
9 preoccupied in another area of the hospital and he  
10 basically would come up when he felt it was appropriate  
11 for him to do so. The nurse -- because the parents  
12 were extremely concerned and the nurse was concerned,  
13 and acting as an advocate, she contacted the charge  
14 nurse.

15 The charge nurse -- and she also contacted the  
16 house supervisor in this case. Both the charge nurse  
17 and the house supervisor went to the patient's bedside,  
18 listened to the family, and at that point contacted the  
19 surgeon. The surgeon gave the nurse, the charge nurse,  
20 and the house supervisor the same response.

21 At that point they came to see me -- I'm located  
22 right in the OB department and pediatric department --  
23 and explained the situation as it had happened. And so  
24 I had elected at that point to contact the director of

1 nursing.

2 The director of nursing came to my office. Again,  
3 a discussion was made -- or we discussed the situation.  
4 From there the director of nursing contacted our chief  
5 of staff -- or actually it was our chief medical  
6 officer at the time. He came to the office. Again, we  
7 had a discussion. At that point he contacted the  
8 surgeon, and the surgeon did, in fact, come to the  
9 patient's bedside.

10 Q In that particular situation how long did it  
11 take to go up the chain of command?

12 A From the time it started until the time that  
13 the chief medical officer contacted the physician, the  
14 whole thing was a two-hour -- it took two hours to have  
15 resolution.

16 Q I want to jump that head and ask you, were you  
17 the nurse manager on the day shift on April 25th, 2012?

18 A Yes, I would have been the manager.

19 Q Okay. And do you recall coming to the hospital  
20 that morning?

21 A Yes.

22 Q Okay. And --

23 A That was the day of Lyam's birth?

24 Q Correct.

1 A Yes.

2 Q And at that point in time, after you came to  
3 the hospital, you learned about Ms. McCrosky, even  
4 after Lyam was born, did you ever form an opinion or  
5 impression as to whether or not your nurses should have  
6 gone up the chain of command?

7 A Yes.

8 Q What was your opinion?

9 A Based on the OB emergency that was occurring  
10 and the fact that they didn't -- they weren't  
11 questioning the physician's orders, we didn't feel it  
12 was appropriate.

13 Q You can go ahead and have a seat. Thank you.

14 Nurse Koontz, with respect to the chain of command,  
15 and as far as you've been at the hospital, both as a  
16 manager and as a labor and delivery nurse, are you  
17 aware of any culture of retaliation if nurses elect to  
18 utilize the chain of command policy?

19 A No.

20 Q Can you describe that for us and explain.

21 A The nurses have a very collaborative working  
22 relationship with our physicians. There's discussion  
23 and communication that occurs every day, all day.  
24 They're positive working relationships. If -- we have

1 had situations where nurses have questioned physicians  
2 and have been concerned, and there's always been a  
3 collaborative discussion. There's never been a fear of  
4 retaliation.

5 Q Does Carson Tahoe perform simulation drills for  
6 the chain of command policy?

7 A No.

8 Q Why not?

9 A Because we're never determined that to be  
10 necessary.

11 Q What is JCAHO?

12 A JCAHO is an acronym for Joint Commission.  
13 They're an organization that accredits healthcare  
14 organizations across the country, inpatient,  
15 outpatient, laboratories. There's a whole -- a lot of  
16 different types of accreditation services that they  
17 offer, but the big one -- they're well-known, very well  
18 respected. And that's just kind of an overview. But  
19 they accredit -- they come and they survey our hospital  
20 about every three years.

21 Q Did they come and survey your hospital in 2011?

22 A Yes, they did.

23 Q And you were a nurse manager at that time?

24 A Yes, I was.

1 Q What was your role or responsibility as it  
2 pertained to the JCAHO investigation and audit?

3 A Well, it's interesting. The Joint Commission,  
4 they actually want to interview the staff, and they --  
5 when they do our surveys in labor and delivery or in  
6 any patient care areas, they -- the hospital will have  
7 the nurse managers help as far as, you know, obtaining  
8 any documents they need, but they really want to be  
9 there, you know, with the nurses.

10 They don't -- nurses that aren't -- you know,  
11 they're on duty, doing their jobs, and they want to  
12 observe. And they do something called patient tracers  
13 which follows a patient all the way through -- multiple  
14 tracers, but all the way through from the time they're  
15 admitted until the time that they're discharged. And a  
16 few of those tracers may be a cesarean section, it may  
17 be a normal vaginal delivery.

18 Q Were you involved with the Joint Commission's  
19 investigation, as it were, in 2011?

20 A Investigation -- can you --

21 Q What do you call it when they come out to the  
22 hospital?

23 A It's an unannounced hospital survey.

24 Q Unannounced hospital survey. And were you

1 involved with that survey back in 2011?

2 A Yes.

3 Q And to your knowledge did the Joint Commission  
4 find any problems or did they have any concerns at all  
5 with the labor and delivery department?

6 A No.

7 Q Did they admonish you or the hospital for not  
8 having simulation drills for chain of command?

9 A No.

10 Q You do have simulation drills for emergencies,  
11 though; correct?

12 A That's correct.

13 Q We heard about the NOELLE doll earlier. Can  
14 you briefly describe that for us?

15 A Yes. We had simulation drills prior to  
16 purchasing the NOELLE dolls as well. We've been doing  
17 them for many years. But the NOELLE doll -- we were  
18 actually -- it was a donation by our auxillary. It's  
19 a -- it's a life-size female mannequin that can give  
20 birth. And we can maneuver in all different positions  
21 and really utilize her as a training tool.

22 We use the NOELLE doll for -- since we've had  
23 her -- I think it's been at least five or six years,  
24 maybe longer -- for simulation drills for shoulder --

( 1 for any -- for obstetrical emergencies. And we've had  
2 drills related to shoulder dystocia, which is where,  
3 you know, the shoulder gets lodged in the birth -- in  
4 the pelvis. We've had simulation drills for  
5 obstetrical hemorrhage, for many different -- you know,  
6 many different types of obstetrical emergencies.

7 Q Including taking a patient downstairs to  
8 another floor for delivery in an emergency?

9 A Yes. Yes. That was part of our training when  
10 we moved into the new hospital is utilizing the second  
11 floor obstetrical, the main OR, in the event that we  
12 needed that, an extra OR suite.

13 Q By the way, in 2012 as nurse manager would you  
14 expect your nurses to voluntarily disconnect a patient  
15 from IVs, from fetal monitoring, from perhaps an IUPC,  
16 and rush the patient down to an operating room without  
17 a physician's order for a cesarean section?

18 A Absolutely not.

19 Q Why?

20 A That is a patient safety issue.

21 Q What do you mean?

22 A To make -- first of all, it's a medical  
23 decision if a patient is going have a cesarean birth.  
( 24 The patient in the room being monitored, blood



1 pressure, fetal monitoring, everything that's involved,  
2 if we were to disconnect that patient and start moving  
3 her without even knowing who the surgeon would be, it's  
4 unsafe, especially a patient that is complete and  
5 getting ready to deliver. It would be -- it would --  
6 we would not do that. That would not be a safe move at  
7 all.

8 Q Let me come back to the chain of command for a  
9 minute. And in the context of you being on the floor  
10 that morning, do you -- can you tell us, approximately  
11 what time did you arrive?

12 A I arrived at the hospital, I believe, that  
13 morning -- like every morning, right around 8 o'clock,  
14 sometimes 7:30, sometimes 8:00, but I remember arriving  
15 to work at about 8 o'clock.

16 Q Okay. And upon your arrival did you come to  
17 learn about Ms. McCrosky?

18 A I learned -- when I arrived to work I learned  
19 that they were working on a baby in the operating room.  
20 And so that was my first -- you know, my first  
21 knowledge of Tawni and Lyam.

22 Q What did you do next?

23 A I -- as they moved -- at that point they were  
24 actually in the process of -- they had resuscitated

1 Lyam and they were moving him to the nursery to  
2 stabilize him. And I went into the nursery and helped  
3 with equipment and also began recording the treatment  
4 that they were providing to baby Lyam.

5 Q Now, at that time who were the physicians  
6 that -- the obstetricians that were on the floor, on  
7 the unit?

8 A Well, Dr. Hayes, Dr. Tomita, those were the two  
9 that I saw. Dr. -- obstetricians? Pediatricians?

10 Q How about any physicians?

11 A Okay. So Dr. Amrhein was there and Dr. Hall  
12 was there. There were other physicians. I can't tell  
13 you specifically. I don't remember seeing them  
14 specifically.

15 Q Either on that day or any subsequent day did  
16 you ever form the opinion -- strike that.

17 On that day and any subsequent day, based upon your  
18 understanding of the events surrounding Lyam's birth,  
19 did your nurses perform as you would expect them to  
20 perform under the circumstances?

21 A Yes, very much so.

22 Q Can you explain that for us?

23 A They -- we're all trained and we understand  
24 the interventions that are needed in the event that the

1 fetal monitor strip -- or the baby is showing signs of  
2 any issues or problems. The nurses performed all of  
3 the interventions. They followed the physician's  
4 orders. They were there at the bedside. They did  
5 everything within their scope of practice to help baby  
6 Lyam.

7 Q Dr. Tomita, her name has come up. And I know  
8 you've been here, but for the record, I want you to  
9 assume that Ms. Lusich testified that Dr. Tomita at one  
10 point in time was at the nurses' station when she,  
11 Ms. Lusich, was talking to Dr. Hayes. What's your  
12 understanding as to what Dr. Tomita's title was at that  
13 time?

14 A Dr. Tomita was our chief of staff. She was our  
15 chief of OB.

16 Q In going back to our exhibit -- I think it was  
17 57 -- of the --

18 MR. KELLY: No, you had it up there, Hunter. The  
19 same one.

20 BY MR. KELLY:

21 Q -- the chain of command. Where would  
22 Dr. Tomita fall on this diagram?

23 A She would be at the top.

24 Q So the person who would be at the top of the

1 chain of command was on the unit?

2 A That's correct.

3 Q I would like to ask you a few questions about  
4 fetal monitoring, and I won't cover ground we've  
5 already covered.

6 MR. KELLY: I would like to mark for identification  
7 Exhibit D-57, page 7.

8 (Exhibit D-57, page 7, was marked.)

9 MR. KELLY: I would like to move Exhibit D-57, page  
10 7, into evidence.

11 THE COURT: Any objection?

12 MR. DURNEY: No, no objection.

13 THE COURT: It will be admitted.

14 (Exhibit D-57, page 7, was admitted.)

15 BY MR. DURNEY:

16 Q Nurse Koontz, could you tell us, what is  
17 Exhibit D-57, page 7, depicting?

18 A That is a bedside fetal monitor, maternal fetal  
19 monitor.

20 Q And where is this located as it relates to the  
21 patient?

22 A It's at the head of the bed.

23 Q And can you tell us generally, how does it work  
24 and where does the strip come out?

1 motion in limine that I kind of expanded on. So that's  
2 why I was kind of surprised a little bit about it too.  
3 So, anyway, I think that's where I am, and I haven't  
4 changed.

5 MR. KELLY: One other issue, Your Honor. With  
6 respect to Nurse Koontz's testimony, she was asked in  
7 her deposition about an article that was put up in the  
8 nurses' station some time after this event. And I want  
9 to move to preclude any reference to that article or  
10 the fact that it was brought up or put on the board as  
11 a subsequent remedial measure. It's not relevant. It  
12 was done after the fact. And to bring it up would be  
13 more prejudicial than probative of any issue in the  
14 case. It's Exhibit 33, Your Honor.

15 THE COURT: Mr. Durney.

16 MR. DURNEY: Your Honor, this is in the form of a  
17 motion in limine. And if subsequent remedial repair  
18 was something -- or measure was something that was of a  
19 concern to the defense, then they should have complied  
20 with the Court's schedule on motions in limine. This  
21 is relevant. It contains information that indeed  
22 reflected the standard of care at the time of the  
23 incident and well before the incident. It reflects the  
24 standards of care that have existed for years. So --

1 MR. KELLY: Even if that's true, it's hearsay.

2 MR. DURNEY: Well, it's not hearsay to ask  
3 Ms. Koontz if this was the article that she posted in  
4 the nurses' lounge and if this was the article upon  
5 which she wrote "This is a good article about  
6 standard" -- excuse me -- "about the chain of command,"  
7 which is an issue in this case. So, number one, they  
8 failed to comply with the Court's schedule on motions  
9 in limine. Number two, it's relevant. Number three,  
10 it reflects the standard of care that existed prior to  
11 this event.

12 THE COURT: I'll take a look at it and review it.  
13 Again, whether she posted something and took this  
14 action -- I think there's some case law, and I'm going  
15 back, that remedial matters, basically you have to be  
16 careful about them because you have to make sure that  
17 they come in under the right circumstances in respect  
18 to that. I'll take a look at it again. And I want to  
19 look at it. I'll read that particular Exhibit 33.

20 I think, Mr. Durney, we still have about maybe half  
21 an hour or more of the film.

22 MR. IVEY: About five minutes at most.

23 MR. McBRIDE: Five, ten minutes.

24 THE COURT: Wow.

1 MR. McBRIDE: And we're -- we're trying, Your  
2 Honor. And so that's the dilemma we're in. We are  
3 aware, I think, that Mr. Durney -- that the grandmother  
4 is going to testify today. I don't know how long she's  
5 going to go or Ms. Brennan intends to go. I don't have  
6 much with her either. So we're kind of in limbo a  
7 little bit with the witnesses.

8 MR. KELLY: That having been said --

9 MS. BRENNAN: She is not here yet. They're having  
10 car trouble.

11 MR. KELLY: -- I think we still are going to be  
12 ahead of schedule.

13 MR. McBRIDE: Yes.

14 THE COURT: Okay. And I understand that.

15 Well, we'll take a look at it and we'll see where  
16 we go. And I reserve ruling on that issue until I have  
17 a chance to look at the article and take a look at --  
18 see that the foundation is laid and everything else in  
19 respect to this matter, and we'll make a decision in  
20 respect to that.

21 MR. KELLY: Would it be helpful to have  
22 Ms. Koontz's deposition testimony where it's  
23 referenced?

24 THE COURT: I would like to look at that too if you

1 have that, if you can pull it out. I was going to look  
2 at Exhibit 33.

3 MR. McBRIDE: Your Honor, I think too another way  
4 to fill some of the time that might be helpful because  
5 of the scheduling issues that we have, of course, would  
6 be to try to hash out the jury instructions as best as  
7 possible too.

8 THE COURT: We can do that later today.

9 MR. McBRIDE: We could do that maybe later today or  
10 if we even have time tomorrow.

11 THE COURT: Okay. We'll take a look at that.

12 MR. DURNEY: In terms of jury instructions, Your  
13 Honor, there are -- we're still working on them. You  
14 know, I apologize, but sometimes things come to you  
15 over the course of trial, and they have to us. And so  
16 there are instructions that we would wish to submit  
17 that we wouldn't -- we might not be prepared to give to  
18 you this afternoon.

19 THE COURT: Well, we'll look at it and see where we  
20 go.

21 MR. McBRIDE: Okay. Thanks, Judge.

22 THE COURT: We'll take just a short break and then  
23 we'll bring the jury in.

24 MR. McBRIDE: Great.



1 Your Honor, did you want to see this depo?

2 (A recess was taken.)

3 THE COURT: Our juror has arrived.

4 We're back on the record outside the presence of  
5 the jury in respect to Case No. 13 TRT 00028.

6 I guess there's one issue you wanted to talk about  
7 with the video; is that correct?

8 MR. KELLY: Yes, Your Honor.

9 THE COURT: Okay. What's that?

10 MR. KELLY: The issue, Your Honor, has to do with a  
11 question to Dr. Capell about collateral source. And  
12 there's a reference that Dr. Capell makes with respect  
13 to Medicaid and what Medicaid would cover, but also  
14 comments that to the extent that Medicaid would not  
15 cover it, the Affordable Care Act would. So we believe  
16 that that's relevant. The Court has already ruled that  
17 collateral sources are admissible. It was the law and  
18 is the law, that is, the ACA, the Affordable Care Act,  
19 and I think this expert's, the plaintiff's expert's,  
20 reference to it is relevant and admissible.

21 THE COURT: Mr. Durney.

22 MR. DURNEY: Dr. Capell they're referring to as  
23 plaintiff's expert did not refer to it. It was  
24 referred to in a question. And Mr. McBride asked

1 Dr. Capell if benefits would be available under the  
2 Affordable Healthcare Act. And I objected to the  
3 question based on foundation, because you've got to be  
4 an expert to know eligibility requirements for the  
5 Affordable Healthcare Act.

6 And, indeed, if there is a verdict in this case in  
7 favor of the plaintiffs, the McCroskys will not be  
8 entitled to benefits under the Affordable Healthcare  
9 Act. And so to insert another layer of confusion I  
10 just think is impermissible.

11 Secondly, that really does call for an expert  
12 opinion that was never disclosed. We didn't raise it.  
13 They raised it in the deposition. And I made an  
14 objection to it.

15 THE COURT: Well, it was interesting. Kevin  
16 Kirkendall in his testimony referenced to the  
17 collateral source rule. It was kind of interesting.  
18 He just -- offhand he made mention of it and that. And  
19 I was waiting for somebody to say something. Nobody  
20 said anything in respect to that. But I'm going to go  
21 ahead and not allow it. Although I think there's some  
22 relevancy, the statute clearly indicates you can put  
23 those bills in in respect to that. And if it was the  
24 defense asking that question, then I don't think that's

1 fair at this particular time. So I'm not going to  
2 allow that.

3 But I am -- in respect to the article, Exhibit 33,  
4 I think -- I've looked at NRS 48.095. It's clear. It  
5 clearly indicates that subsequent remedial measures --  
6 "When, after an event, measures are taken which, if  
7 taken previously, would have made an event less likely  
8 to occur, evidence of the subsequent measure is not  
9 admissible to prove negligence or culpable conduct in  
10 connection with the event."

11 I think clearly by putting this article, at least  
12 that could be made an argument in respect to that. I  
13 think it's hearsay. So I'm not going to allow Exhibit  
14 33.

15 MR. KELLY: Thank you.

16 THE COURT: Here's your deposition back.

17 Given those rulings, counsel ready to proceed?

18 MR. McBRIDE: Yes, Your Honor.

19 THE COURT: Thank you.

20 (The following proceedings were held  
21 within the presence of the jury.)

22 THE COURT: Will counsel stipulate to the presence  
23 of the jury?

24 MR. DURNEY: Yes, Your Honor.

1 MR. KELLY: Yes, Your Honor.

2 THE COURT: Okay. Thank you all for being here,  
3 one of you a little late, but I'm not going to say who  
4 or get into that at all in respect to that. But thank  
5 you again.

6 Additionally, I do want to retell you one thing.  
7 If you see the attorneys in the hall or anything else  
8 or some of the staff and that, sometimes they won't  
9 acknowledge you. They'll just kind of nod or anything  
10 else. They're not trying to be rude with you or  
11 anything else. They've been instructed to stay away  
12 from you as much as possible.

13 So I just want to put that in your mind again,  
14 because sometimes we forget that. You know, you're  
15 walking by and you may want to chitchat or just say  
16 hello and they'll turn the other way or hide. All of  
17 them will. So don't take it personally. It's nothing  
18 to do with you or anything else. It's basically the  
19 Court's instructions to just disregard in that.

20 Also, I want to basically tell you that the  
21 attorneys have worked hard in respect to cutting down  
22 the video significantly, and the Court appreciates that  
23 in regards to that. So we're going to play the balance  
24 of that for you this morning and then we'll get to some

1 other matters. Okay. Ready to proceed?

2 CROSS-EXAMINATION (Continued)

3 BY MR. McBRIDE:

4 Q The -- with regard to -- would you agree,  
5 Doctor, that Lyam's treating physicians would be the  
6 ones most appropriate to judge what treatments would be  
7 required for Lyam in the future?

8 A It depends on the question. If you were to ask  
9 a treating physician "What does he need right now?"  
10 that's one thing. If you were to ask him or her "What  
11 do you think he's going to need for the rest of his  
12 life?" that's really another question. And some  
13 doctors have experience in making those kinds of  
14 estimations; others do not. So it really would depend  
15 on how the question was asked and the experience of the  
16 treating physician.

17 Q Okay. And do you know what experience  
18 Dr. Rodriguez has?

19 A No, I don't.

20 Q Okay. Do you know what experience Dr. Johnson  
21 has?

22 A No, I do not.

23 Q Would you defer in any respect -- you're not an  
24 ophthalmologist; correct?

1 A That's correct.

2 Q You're certainty not a pediatric  
3 ophthalmologist; correct?

4 A That's correct.

5 Q Okay. And would you defer to a pediatric  
6 ophthalmologist with regard to the future care and  
7 needs of Lyam?

8 MR. DURNEY: Objection. Foundation. Calls for  
9 speculation.

10 THE WITNESS: As I said in my deposition and here  
11 today, yes, I would defer to a pediatric  
12 ophthalmologist regarding the specifics of the future  
13 medical needs.

14 BY MR. McBRIDE:

15 Q As well as the gastroenterologist; correct?

16 A I -- I think so. I'm a little closer to what  
17 gastroenterologists do than what ophthalmologists do,  
18 but, yeah, I think so.

19 Q As well as an ENT; correct?

20 A Yes.

21 Q Okay. And any reason to believe that Lyam's  
22 treating physicians are not providing appropriate care?

23 A No.

24 Q You don't have any criticisms of them?

1 THE COURT: That's it?

2 MR. IVEY: That's it.

3 THE COURT: I told you they did a good job.

4 At this time, Mr. Durney, you want to call your  
5 next witness.

6 MS. BRENNAN: We're going to call Kelly McCrosky.

7 THE COURT: Ma'am, would you please come forward.

8 MS. KELLY McCROSKY: All the way?

9 THE COURT: Keep coming. No, stop right there.  
10 And please raise your right hand and be sworn.

11 (The oath was administered to the witness.)

12 THE WITNESS: Yes.

13 THE COURT: Please take the witness stand. And  
14 please state your full name and spell your last name.

15 THE WITNESS: Okay. My name is Kelly McCrosky. My  
16 last name is spelled M-c-C-r-o-s-k-y.

17 KELLY McCROSKY,

18 having been called as a witness herein,  
19 being first duly sworn, was examined  
and testified as follows:

20 DIRECT EXAMINATION

21 BY MS. BRENNAN:

22 Q Hi, Kelly.

23 A Hi.

24 Q Can you please tell the jury your relationship

1 to Tawni and Lyam.

2 A I'm Tawni's mom and Lyam's grandma.

3 Q And we understand that Tawni and Lyam live with  
4 you and your husband, Les. Is that correct?

5 A Yes.

6 Q Has Tawni always lived with you and Les  
7 continuously?

8 A No. There was a part of -- a little bit of  
9 time where she had moved out and was living on her own.  
10 And then when she found out that she was pregnant, she  
11 moved back home right after she found out she was  
12 pregnant so that she could save money for the baby.

13 Q How did you find out that Tawni was pregnant?

14 A She wasn't feeling well and I took her to the  
15 doctor to find out what was going on with her. And the  
16 doctor did a pregnancy test and found out she was  
17 pregnant.

18 Q So it was a surprise?

19 A It was a surprise, but it was also a happy  
20 surprise.

21 Q And how long after she found out did she move  
22 back in with you and Les?

23 A About two weeks.

24 Q And the purpose again was --



1       A    Just so she could save money for the baby and  
2   have enough money. She was working while she was  
3   pregnant and she saved money that she worked for so she  
4   would have it for when he was born.

5       Q    And so were you and Les having her pay rent?

6       A    No.

7       Q    Just helping her out?

8       A    Yes.

9       Q    So she was living with you for quite a while  
10   while she was pregnant?

11      A    Yes, the whole time.

12      Q    Eight months or so?

13      A    Pretty much, yeah.

14      Q    Were you involved in her pregnancy?

15      A    Yes. I went to every doctor's appointment with  
16   her, her ultrasound appointments. I helped her with  
17   the nursery. We did pretty much everything together.

18      Q    What kind of doctor appointments did you go to  
19   with her?

20      A    We went to -- it was called the MOM's Clinic in  
21   Carson City. It was just basically they would have a  
22   nurse go in and do her blood pressure and basically  
23   measure her belly and everything, make sure everything  
24   was going smoothly.

1 Q And you went to all those appointments with  
2 her?

3 A Yes.

4 Q Do you know offhand how many appointments she  
5 went to?

6 A Well, I think it's basically one a month until  
7 the last month, and then I think it's like every two  
8 weeks or every week after that for the last month.

9 Q Did she go to any types of prenatal classes?

10 A Yes.

11 Q Did you attend those classes with her?

12 A Yes, I did.

13 Q What kind of classes?

14 A Birthing classes. Gosh. I want to say  
15 parenting classes, birthing classes. There was a  
16 couple different types of classes that we went to.  
17 Breast feeding class.

18 Q And where were those classes held?

19 A They were held at Carson Tahoe.

20 Q And about how many classes over the period of  
21 her pregnancy would you estimate?

22 A Probably -- I want to say maybe six.

23 Q And you went to all of those with her?

24 A Yes.

1 Q Was it fun to attend those?

2 A Yes.

3 Q And you said that you helped her decorate a  
4 nursery?

5 A Uh-huh.

6 Q What did you guys do?

7 A We painted her room. And then I had bought  
8 some jungle decals and we stuck those on the wall and  
9 everything. And then we bought her bedding and  
10 everything. There was a little jungle theme. So he  
11 had his little room to come home to when he came home.

12 Q And did you ever throw Tawni a baby shower?

13 A Yes.

14 Q And when was that?

15 A Approximately about a month before she had  
16 Lyam.

17 Q Okay. So was it an exciting time for the  
18 family?

19 A Yeah, very exciting. We were thrilled to be  
20 able to be having a grandson. We have a granddaughter,  
21 but we were having a grandson this time.

22 Q So you attended the ultrasound with her and  
23 found out at the same time?

24 A Yes.

1 Q Do you recall the night that Tawni went into  
2 labor?

3 A Yes, I do.

4 Q What do you remember about that night?

5 A She had kind of basically been in labor all day  
6 long. And then later on that evening, it became  
7 apparent that the contractions were getting stronger  
8 and that we needed to leave and take her to the  
9 hospital immediately so that she could give birth to  
10 the baby.

11 Q And you went to Carson Tahoe Hospital?

12 A Yes.

13 Q Was that a spontaneous decision to go to Carson  
14 Tahoe or was it a planned --

15 A Tawni was preregistered at Carson Tahoe.

16 Q What does that mean?

17 A She was -- the -- at the MOM's Clinic they  
18 basically told her that she would deliver at Carson  
19 Tahoe, so we needed to go there and have her  
20 preregistered so that when she went into labor she  
21 didn't have to go through all of that, the registration  
22 and all of that. She would already have all the  
23 paperwork done and she would be able to be admitted  
24 quicker.

1 Q And so when you guys left your home, which is  
2 in --

3 A Spring Valley, Nevada. It's south of  
4 Gardnerville.

5 Q So you left your house in Spring Valley. And  
6 you followed Tawni to Carson Tahoe?

7 A Yes.

8 Q Did you arrive pretty much simultaneously?

9 A Yes, we did. Tawni went with her sister and  
10 then my husband and I followed in our own car.

11 Q And so we've been told that after you arrived  
12 at the hospital that night there was a short time  
13 between the ER and getting up to the labor and delivery  
14 floor.

15 A Yes.

16 Q But once you -- once Tawni was admitted onto  
17 the labor and delivery floor and checked into a room,  
18 were you in the room with her?

19 A Yes.

20 Q You checked in with her?

21 A I checked in with her.

22 Q What time did she get into a hospital bed,  
23 approximately?

24 A Approximately, I want to say maybe midnight.

1 Q Okay.

2 A It was late at night.

3 Q And so when you guys got into the room at  
4 midnight, who was with you?

5 A Tawni -- well, obviously Tawni was with us --  
6 my husband and her sister, Casey, and I.

7 Q And it was midnight. Did you guys stay up  
8 talking or did you get some rest? Did you go to sleep?

9 A We didn't get a whole lot of rest. We stayed  
10 up basically talking. We were talking -- we were  
11 excited about seeing our new grandbaby.

12 Q And, by the way, you knew that you were having  
13 a grandson?

14 A Yes.

15 Q Did you know what his name was going to be?

16 A Yes. Yes. Tawni had a name picked out for him  
17 as soon as we found out that he was a boy.

18 Q Was there any significance to Lyam?

19 A Lyam -- I think Tawni just really liked the  
20 name Lyam. We're Scotch-Irish, so Lyam kind of fit  
21 right in there with that. And then Les is Tawni's  
22 dad's name, so Lyam Les.

23 Q And so from midnight up until sunrise was there  
24 anything eventful going on in the room?

1 A Not really, no, just, you know, basically her  
2 contractions and just waiting.

3 Q Did you ever leave the room during that time?

4 A No.

5 Q And then after sunrise we've been told that at  
6 about 6:30 Tawni's water broke.

7 A Yes. She delivered what was kind of like --  
8 the only way I can describe it is it looked like a  
9 water balloon. I had never seen anything like it. I  
10 had no idea what it was for sure.

11 Q So you were in the room when it happened?

12 A Yes.

13 Q And how did you know that something had  
14 happened?

15 A Tawni said, "Something is going on. Can you  
16 look and see what's happening."

17 Q And did you go and look?

18 A Yes. We pulled back the sheet and looked, and  
19 she had delivered the water balloon, the water sac.

20 Q Were there any nurses or doctors in the room  
21 when this happened?

22 A No.

23 Q So what did you do next?

24 A We called the nurse with the call button and

1 had the nurse come in and look and see what was going  
2 on at that point.

3 Q Did a nurse come in pretty quickly?

4 A Yes, a nurse came in and checked and then left  
5 again.

6 Q Did the doctor come in?

7 A No.

8 Q Okay. When the nurse came in after you pushed  
9 the call button, how long was she in the room?

10 A Not very long. A few minutes.

11 Q Did she say anything?

12 A No.

13 Q Do you know what she did?

14 A No. She just pulled back the covers and  
15 looked. And that's all I remember is that she had  
16 pulled back the covers to look and see what had  
17 happened.

18 Q Where were you standing in the room?

19 A I was sitting off to the side of the bed.

20 Q Okay. And then what do you remember next after  
21 she -- she came in. Someone came in, left the room.  
22 And then how long before somebody else came in?

23 A I'm not sure exactly how long it was before  
24 somebody else came in. Minutes, maybe 15 minutes.



1 It seemed like a long time.

2 Q Okay. Well, we know that her water broke at  
3 6:30 and we know that Tawni went for a C-section at  
4 some point right after 7:30. So there was an hour.

5 A Right.

6 Q Were you in the room that entire hour?

7 A Yes, I was.

8 Q During that hour did you see the doctor at any  
9 point?

10 A I saw the doctor, I think, twice that whole  
11 time.

12 Q For long periods of time?

13 A No. The longest period of time I believe I saw  
14 the doctor was when she came in and tried to use the  
15 vacuum to get Lyam out which was only really a few  
16 minutes.

17 Q Okay. And the vacuum was towards the end  
18 before C-section; correct?

19 A Yes.

20 Q Before that were there nurses in the room?

21 A Off and on, not consistently. They came in.  
22 They tried to reposition Tawni in different positions  
23 for a few minutes, and then nothing. They just left.  
24 There was nobody else in there.

1 Q And so did you -- were you concerned at this  
2 time?

3 A I was concerned, yes.

4 Q Did you -- what were you concerned about?

5 A I knew something was going wrong. I didn't  
6 know what. I just knew something wasn't right.

7 Q Did you ask anybody what was going on?

8 A No.

9 Q Why not?

10 A I felt like she was in capable hands. She  
11 was -- she was at the hospital. She was -- they were  
12 trained to do that. They knew what they were doing. I  
13 didn't.

14 Q So you didn't feel comfortable --

15 A No.

16 Q -- asking the nurses?

17 A No.

18 Q And you didn't know what was going on?

19 A No.

20 Q Did you want to know what was going on?

21 A I wanted to know. I just -- I guess I didn't  
22 really feel like it was my place to ask.

23 Q Okay. And, by the way, at this time, 6:30 to  
24 7:30, was Les in the room?

1 A No. Les had stepped out right probably about  
2 6:25 to get a cup of coffee, and so he wasn't in the  
3 room at that time.

4 Q Had he tried to come back in the room?

5 A Yes, he did. And the -- there was a nurse that  
6 told him he couldn't come back in because she was  
7 trying to -- trying to push, trying to get the baby  
8 out.

9 Q Did you wonder where Les was? Did anyone tell  
10 you at any point your husband is not going to be  
11 allowed back in the room?

12 A No.

13 Q Did you ask?

14 A No.

15 Q Did you wonder where he was?

16 A Yes, I did wonder where he was.

17 Q At any time in this hour timeframe that we're  
18 talking about around 6:30 to 7:30 did you ever hear  
19 anybody in the room talking about a C-section?

20 A No.

21 Q Did anybody that you heard say to Tawni, "We  
22 might need to be going to C-section"?

23 A No.

24 Q Did you overhear nurses talking about it?

1 A No.

2 Q Did you ever hear the doctor talking about it?

3 A No.

4 Q Did anyone say to you, "We might need to take  
5 your daughter to C-section"?

6 A No.

7 Q So at what point did you learn Tawni was going  
8 to go to C-section?

9 A Just before she went into C-section. They had  
10 tried to use the vacuum on Lyam to get him out. The  
11 vacuum did not work. And then they said that they were  
12 going to have to take her to do a C-section on her.

13 Q And so that's minutes beforehand?

14 A Yes.

15 Q And were you able to accompany Tawni into the  
16 operating room for the C-section?

17 A Yes, I was.

18 Q Did you have to put on a gown?

19 A Yes.

20 Q So once you were in the operating room with  
21 Tawni, where were you?

22 A I was sitting up at her head.

23 Q So --

24 A Just above her head.

1 Q -- she's on a bed?

2 A Um-hum.

3 Q And you're standing behind her?

4 A I was actually -- I think I was sitting. I  
5 don't remember if I was standing or sitting, but I was  
6 right at the top of her head.

7 Q Okay. At this point were you worried?

8 A Yes.

9 Q Did you have an understanding of what was going  
10 on and why you were in C-section?

11 A Yes.

12 Q What was your understanding?

13 A I just knew something was not right,  
14 something -- they couldn't get him out and something  
15 wasn't going right. They -- that's all I knew.

16 Q How long had it felt like something hadn't been  
17 going right?

18 A It felt like a lifetime.

19 Q So you're in the OR. They're performing a  
20 C-section. How long did it take as far as you can  
21 recall to get Lyam out?

22 A Seconds. It wasn't very long.

23 Q It was quick?

24 A It was very quick.

1 Q So were you able to see Lyam being delivered?

2 A I did not get to see him delivered because of  
3 where I was positioned at.

4 Q Okay. So what happened when he was born?

5 A As soon as Lyam was born, they took him across  
6 the room and they -- I started hearing counting, doing  
7 CPR. They had taken him and just put him on a table or  
8 something across the room and started doing CPR.

9 Q What was -- what was your impression? You  
10 couldn't see him, but could you hear --

11 A My impression was -- you wait -- the first  
12 thing you wait for when a baby is born is to hear that  
13 cry. You want to hear that baby's cry and to know that  
14 that baby is healthy and everything is okay. And I  
15 didn't hear that. All I heard was counting.

16 Q What did the no cry mean to you?

17 A That Lyam wasn't -- he was gone.

18 Q What was Tawni doing during this time?

19 A Tawni was laying on the bed just listening.  
20 She -- she couldn't really do anything at that point,  
21 so she was just kind of listening.

22 Q Did she know what was going on?

23 MR. McBRIDE: Objection. Calls for speculation.

24 /////

1 BY MS. BRENNAN:

2 Q Did Tawni ask you what was happening?

3 A Yes, she did.

4 Q What did she ask you?

5 A She said, "Mama, what's happening? What's  
6 going on?"

7 Q What did you tell her?

8 A I tried to look at her. I tried to -- I wanted  
9 to reassure her that everything was going to be okay,  
10 but I couldn't. And I just tried to smile at her, but  
11 my face told her everything that she needed to know.

12 Q And did you stay in the operating room?

13 A No. I was told that I needed to leave. I  
14 asked why. They said there was complications and I  
15 needed to leave.

16 Q And so you left. And what happened? What did  
17 you do next?

18 A I had a nurse escort me out of the operating  
19 room. I got out in the hall and I passed out.

20 Q You actually fainted?

21 A Yes.

22 Q And when you came to, where were you?

23 A I was laying on a bed that they had out in the  
24 hall. I think it was there for Tawni when she came out

1 of the operating room. They had laid me on that.

2 Q And so this sounds like an insensitive  
3 question, but when you came to and you were on the bed,  
4 were you under the impression that Lyam was dead?

5 A Yes.

6 Q Was Les there when you came to?

7 A No.

8 Q How long was it until Les came to you?

9 A A few minutes. Somebody had gone and gotten  
10 him and told him that I needed him.

11 Q And so did he come to you?

12 A Yes, he came directly to me.

13 Q And what did you tell Les had happened in the  
14 OR?

15 A I told him that Lyam had passed away.

16 Q What about Casey? Where is Casey during this  
17 time?

18 A Casey was in another waiting room. Her and Les  
19 had both been taken to the same waiting room to wait  
20 for the delivery. And she was -- she was still in  
21 there.

22 Q So did they eventually bring Casey to where you  
23 and Les were?

24 A No. Les actually took me to her.



1 Q Okay. And what did you tell Casey what you had  
2 seen in the OR?

3 A I told her that Lyam had passed away.

4 Q So how long --

5 A He was gone.

6 Q -- under the belief that Lyam had passed away?

7 A I don't know. It seemed like forever. I don't  
8 know for sure how long it was.

9 Q Were there any nurses coming out and updating  
10 you during this time?

11 A No.

12 Q How did you finally learn that Lyam had, in  
13 fact, not passed away?

14 A A nurse came and told us that they were going  
15 to transport Lyam to Renown Hospital in Reno and that  
16 he was in critical condition.

17 Q Did you have an opportunity to meet Lyam before  
18 he was transported to Renown?

19 A For just a second. We were able to go in and  
20 see him just for a second, and then we had to leave.

21 Q Were you able to touch him?

22 A No.

23 Q What did you see when you went in to meet him?

24 A A little boy in critical condition, blue, just

1 a baby that didn't look like he was going survive.

2 Q Were you worried at the time that this might be  
3 your first and last meeting with Lyam?

4 A Yes.

5 Q We know that your husband, Les, told us that he  
6 followed Lyam down to Renown that day.

7 A Yes.

8 Q What did you do?

9 A I stayed at the hospital with Tawni so that she  
10 would have somebody with her. And I knew that Lyam  
11 would have Les with him.

12 Q And what was the mood after Lyam was gone from  
13 the hospital room when you and Tawni were still at  
14 Carson Tahoe?

15 A It was, I guess you would say, somber. It was  
16 not the exciting time that we had imagined it would be.

17 Q And while you and Tawni stayed at Carson Tahoe,  
18 was Les calling and giving updates?

19 A Yes.

20 Q Were the updates encouraging?

21 A No.

22 Q And how long was Tawni at Carson Tahoe before  
23 she was released?

24 A I think it was two days.

1 Q And did you stay with her those two days?

2 A Yes.

3 Q And upon her release where did -- what did you  
4 guys do?

5 A We went straight to Renown.

6 Q You didn't go home?

7 A No. We went straight from Carson Tahoe  
8 straight to Renown.

9 Q When you got to Renown, where was Lyam?

10 A He was in the NICU, the neo -- I think it's  
11 Neonatal Intensive Care Unit.

12 Q Were you able to hold or touch Lyam when he was  
13 in the NICU?

14 A No.

15 Q For how long?

16 A Gosh, I want to -- I think it was about two  
17 weeks before we were able to hold him or really touch  
18 him.

19 Q What were the -- if you can remember, what were  
20 the doctors telling you about Lyam's prognosis during  
21 those two weeks when you couldn't physically touch him?

22 MR. McBRIDE: Objection, Your Honor. Hearsay.

23 THE COURT: I'm going to sustain that.

24 /////

1 BY MS. BRENNAN:

2 Q Did the doctors tell you Lyam's prognosis  
3 during those two weeks that he was in the NICU?

4 A Yes.

5 MR. McBRIDE: Same objection, Your Honor.

6 THE COURT: Sustained.

7 BY MS. BRENNAN:

8 Q Ultimately how long was Lyam at Renown?

9 A Six weeks.

10 Q And did you stay in Reno for those six weeks or  
11 did you commute back to Gardnerville?

12 A I stayed in Reno with Tawni the whole six weeks  
13 that he was there.

14 Q Where did you guys stay?

15 A We lived between the hospital and the Ronald  
16 McDonald House.

17 Q What's the Ronald McDonald House?

18 A It's a house that -- it's right by Renown, so  
19 it was nice to have a place that was right there close  
20 by -- that you pay whatever you can to stay there.  
21 They have people that volunteer to bring in food for  
22 you. They have rooms for you to stay in. And we slept  
23 there and spent the rest of our time at the hospital.

24 Q And that is you? Tawni?

1       A    And Les.  And Casey, when she wasn't working,  
2 she would come up after work.

3       Q    So after six weeks when Lyam was ultimately  
4 released, where did you guys go?

5       A    After the six weeks was up and they finally  
6 released Lyam, we brought him home, took him home to  
7 our house.

8       Q    So is it fair to say that you've lived under  
9 the same roof as Lyam for his entire life?

10      A    Yes.

11      Q    Other than when he's not at home and he's in a  
12 hospital?

13      A    Yes.  But even when he's in the hospital, I am  
14 there with him and I'm there with his mom.

15      Q    So there's the four of you living under one  
16 roof, you, Les, Tawni and Lyam?

17      A    Yes.

18      Q    Do you work?

19      A    No, I don't.

20      Q    Why not?

21      A    I have fibromyalgia, and it causes a lot of  
22 chronic pain in my back and my legs.  It makes it very  
23 difficult to hold down a job.  And some days my body  
24 doesn't want to work with me very well, so --

1 Q Do you have any income?

2 A No, I don't.

3 Q And does Tawni have a job?

4 A No, she doesn't. Her full-time job is taking  
5 care of Lyam.

6 Q So you don't work, Tawni doesn't work. Who  
7 pays the bills at your house?

8 A My husband.

9 Q So Les is the sole breadwinner?

10 A Yes.

11 Q And how old is Les?

12 A He's sixty, almost 61.

13 Q Are you aware of Les having plans to retire any  
14 time soon?

15 A No.

16 Q So you're not working. Are you home most of  
17 the day?

18 A Yes, I am.

19 Q Are Lyam and Tawni home most of the day?

20 A Yes.

21 Q So you spend a lot of time with them?

22 A Yes.

23 Q Do you help take care of Lyam?

24 A I do.

1 Q What types of things do you do to help take  
2 care of him?

3 A I make his bottles. I feed him. I get his  
4 medicines for him. I change him. I dress him. The  
5 only thing I can't do is bathing. It's too hard for me  
6 to try to bathe him, so Tawni has to always do that.

7 Q Why is it too hard?

8 A It's my back, and I can't do it.

9 Q We've heard from various therapists that have  
10 been here in trial that people come out to your house  
11 regularly to give Lyam therapy.

12 A Yes.

13 Q Are you there for that?

14 A Yes, I am. I sit in on all of his therapy  
15 sessions also.

16 Q You participate?

17 A Yes, I do.

18 Q In what way?

19 A In any way that I can. They have taught me  
20 different things that I can do with Lyam while I'm  
21 holding him or talking to him, different things that I  
22 can do with him. They've taught me how to stretch out  
23 his legs a little bit, stretch out his hands. Just  
24 whatever I can do, I do.

1 Q So you do do those things?

2 A Yes.

3 Q Have you noticed improvements with Lyam?

4 A Tremendous improvements, yes. Yes.

5 Q Like what?

6 A From -- when we first brought him home, we  
7 weren't ever really given encouraging news for a long  
8 time. Lyam is the most amazing little boy that you  
9 could ever come across. He is -- he's just so amazing.  
10 He'll say "Uh-huh" and "Unh-unh" and "No." And he  
11 loves to be loved and held and cuddled. And his hands  
12 used to be contracted all the time like this, and now  
13 we've gotten to where we can rub his hands and he'll  
14 relax his hands for us, he'll relax in our arms.

15 He just -- he's just an amazing soul. His eyesight  
16 has gotten better. He can track people now where he  
17 didn't used to be able to track people. He can track  
18 objects that he didn't used to be able to see or track.  
19 He's -- he has come so far compared to what he was when  
20 we first brought him home.

21 Q Do you think he knows grandma?

22 A Oh, definitely he knows his grandma.

23 Q He knows grandpa?

24 A Yes.



1 Q And mom?

2 A Yes.

3 Q And Casey?

4 A Yes. And Casey's boyfriend too.

5 Q So you said you couldn't help Lyam with bathing  
6 because he's too heavy. Can you carry him?

7 A I can. It's difficult. I can't carry him up  
8 the stairs. I can carry him down the stairs. But Lyam  
9 is getting so big that he's going to have me outgrown  
10 before very long, and I'm not going to be able to carry  
11 him for much longer.

12 Q And is that because of your fibromyalgia or --

13 A Yes.

14 Q -- age or --

15 A Probably both.

16 Q Are you worried at all about being able to  
17 continue to help Tawni with Lyam into the future?

18 A Yes.

19 Q In what ways?

20 A Physically my body is going to give out. It  
21 gets -- it deteriorates all the time. I'm not going to  
22 always be able to be able to help out and do the things  
23 that I do with him. I won't be able to carry him  
24 across the room.

1       Financially, I worry every day that -- if something  
2 happens to my husband, I don't know where we're going  
3 to be.

4       Q   What's your favorite activity that you  
5 personally share with Lyam?

6       A   I love to read to him. I've read to him since  
7 he was a newborn in the NICU. I always wanted him to  
8 know that I was there and that somebody was there for  
9 him, and so I would go in and I would take books and I  
10 would sit and read to him the whole time that he was in  
11 the NICU. And we still -- I -- sitting in my lap and  
12 we read books. Right now I have a stack of Easter  
13 books on my stool so that I can read books to him.

14       Q   Does he seem to enjoy it?

15       A   Yes.

16       Q   And we've all heard a lot of testimony about  
17 Lyam's disabilities. What are your hopes for Lyam in  
18 the future with regard to his disabilities?

19       A   My hope is that Lyam is going to surprise  
20 everybody and he's going to grow up and he's going to  
21 be an amazing, amazing young man. Nobody can say how  
22 long he's going to live. That's God's choice. That's  
23 nobody's else choice. That's God's choice. So my  
24 hopes for Lyam is that he is going to surprise

1 everybody and he is going to shock everybody. He is a  
2 miracle. And God has given us a miracle.

3 Q That's all I have. Thank you.

4 THE COURT: Mr. McBride, cross.

5 MR. McBRIDE: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. McBRIDE:

8 Q Good morning, Ms. McCrosky. How are you?

9 A Fine. Thank you.

10 Q Now, Ms. McCrosky, I want to just go back and  
11 go over a couple of things in your testimony that you  
12 just gave with Ms. Brennan. And you testified that you  
13 were in the room when Tawni delivered the bag of water;  
14 correct?

15 A Yes.

16 Q And when the water broke; right?

17 A Yes.

18 Q Okay. And you stated that there was no one in  
19 the room immediately or at that time when that  
20 happened; right?

21 A Yes.

22 Q But also you testified that someone, a nurse,  
23 came into the room within seconds; right?

24 A Yes.

1 Q Okay. But it's your testimony -- I believe you  
2 said that that nurse just pulled aside the covers and  
3 then walked out of the room. Is that true?

4 A No. I said that she did something. I didn't  
5 know what she had done.

6 Q Okay. And isn't it true that Dr. Hayes also  
7 came into the room within seconds of that occurring?

8 A I'm not sure. I don't remember.

9 Q Okay. But it's true that Dr. Hayes was in the  
10 room at the point when Tawni had to do various  
11 maneuvers; right?

12 A For a point she was. She was not in there the  
13 whole time, no.

14 Q Okay. And so it's your testimony that  
15 Dr. Hayes was not in the room continuously after the  
16 water broke up until the vacuum delivery?

17 A Yes.

18 Q Okay.

19 MR. McBRIDE: Hunter, if I could, go to page 32 of  
20 Ms. McCrosky's deposition, lines 22 through 25.

21 Your Honor, I have an extra depo transcript if  
22 you'd like to see it. May I approach?

23 THE COURT: Thank you.

24 /////

1 BY MR. McBRIDE:

2 Q And let me go back. And, Ms. McCrosky, you  
3 recall having your deposition taken last year?

4 A Yes.

5 Q Do you remember me being there asking you  
6 questions?

7 A I was very nervous. Yeah.

8 Q I'm not that memorable, so I wouldn't blame you  
9 if you didn't remember me.

10 A I wouldn't recognize you if I saw you on the  
11 street.

12 Q Your husband didn't recognize me either.  
13 But do you recall me asking or an attorney asking  
14 you questions?

15 A Yes.

16 Q And you understood that the deposition that you  
17 gave -- you were told that it was being given under  
18 oath; correct?

19 A Yes.

20 Q And you understood that carries with it the  
21 same force and effect as the one you just took here  
22 this morning; correct?

23 A Yes.

24 Q Okay. And at line 32, the question was: "Do

1 you remember Dr. Hayes?

2 "Yes.

3 "Was she in the room?

4 "ANSWER: Yes."

5 And then you go on and you say --

6 And this is on page 33.

7 MR. BLACKBURN: Which lines, counsel?

8 MR. McBRIDE: Lines 1 through 11.

9 BY MR. McBRIDE:

10 Q "And was she in the room during the period when  
11 Tawni was being asked to go through the different  
12 positions?

13 "Yes.

14 "And she was also in the room during the vacuum  
15 procedure?

16 "Yes.

17 "From the time she was asked to start getting into  
18 the positions to the end of the vacuum procedure, was  
19 Dr. Hayes in the room continuously?

20 "Yes."

21 Isn't that true that was your testimony, ma'am?

22 A Yes, sir it was. I'm trying to remember --

23 Q It's a yes or no.

24 A Yes.

1 Q Okay. And before that, you also testified that  
2 Dr. Hayes and the nurses were in the room periodically  
3 at regular intervals checking the monitor and checking  
4 on Tawni and the status of the baby; correct?

5 A Yes.

6 Q And you were present in the room when Dr. Hayes  
7 used the vacuum; correct?

8 A Yes.

9 Q And isn't it true you also don't recall any  
10 conversations of discussing Lyam's heart rate or any  
11 issues with any of the nurses or Dr. Hayes?

12 A Yes.

13 Q You did not discuss?

14 A No, I did not.

15 Q And then once -- you observed Dr. Hayes attempt  
16 the vacuum. Is it your testimony that Dr. Hayes  
17 attempted to use the vacuum more than one time?

18 A Yes.

19 Q Okay. And once that didn't work, you agreed  
20 that it was Dr. Hayes's decision at that point to take  
21 the patient to the operating room; correct?

22 A Yes.

23 Q Now, regarding the expenses that you and your  
24 husband have incurred and Tawni has incurred since

1 Lyam's birth, it's true that other than clothes or  
2 diapers that you, your husband and Tawni haven't had to  
3 pay anything related to Lyam's medical care or his  
4 condition; true?

5 A True. Medicare has paid for it, but they  
6 expect to be paid back also.

7 Q Okay.

8 MR. McBRIDE: Move to strike the answer as  
9 nonresponsive.

10 THE COURT: I'll strike the last portion. It was a  
11 yes-or-no answer.

12 BY MR. McBRIDE:

13 Q And Lyam continues to see Dr. Amrhein at Carson  
14 Medical Group; isn't that true?

15 A Yes.

16 Q That's the same group as Dr. Hayes is in;  
17 right?

18 A Yes.

19 Q And although you have not been working for the  
20 past -- actually the past five years prior to your  
21 deposition -- and that would have been since 2010?  
22 That's correct?

23 A Yes.

24 Q Prior to that, though, you had worked a period



1 of time for the school district working with special  
2 needs children; correct?

3 A Yes.

4 Q And that would include working on physical  
5 therapy and reading to them, similar to what you do for  
6 Lyam today?

7 A Yes.

8 Q And it's true, isn't it, ma'am, that other  
9 than, perhaps, the experts retained by Mr. Durney's  
10 office, no one has ever criticized -- no physician has  
11 ever criticized the care and treatment that Lyam  
12 received while he was at Carson Tahoe Medical Group;  
13 isn't that true?

14 A True.

15 Q That's all I have. Thank you.

16 THE COURT: Ms. Brennan, redirect.

17 MS. BRENNAN: I have a question.

18 REDIRECT EXAMINATION

19 BY MS. BRENNAN:

20 Q Have you ever asked any of Lyam's doctors if  
21 they criticized Dr. Hayes?

22 A No.

23 Q And Dr. Amrhein is with the Carson Medical  
24 Group; correct?

1 A Yes.

2 Q The same group as Dr. Hayes?

3 A Yes.

4 Q Do you have any understanding of why Tawni went  
5 to Dr. Amrhein?

6 A She needed a pediatrician before we could take  
7 Lyam home. I think -- I believe she was given a list  
8 of pediatricians that she could contact, and  
9 Dr. Amrhein agreed to take him on.

10 Q And so that's the reason?

11 A Yes.

12 Q It was from a list of providers?

13 A Yes.

14 Q Okay. That's all I have. Thank you.

15 MR. McBRIDE: No questions.

16 THE COURT: Thank you, ma'am. You can step down.

17 Mr. Durney, does plaintiff have any additional  
18 witnesses?

19 MR. DURNEY: Your Honor, at this point the  
20 plaintiff needs to take some issues up with the Court  
21 before resting, but we are very close to resting.

22 THE COURT: We'll go ahead --

23 You want to break then just for a few minutes?

24 MR. DURNEY: May it please the Court, I would.

1 THE COURT: Ladies and gentlemen of the jury, we're  
2 going to take a short recess. During this time you're  
3 admonished not to talk or converse among yourselves or  
4 with anyone else on any subject connected with this  
5 trial; or read, watch, or listen to any report of or  
6 any commentary on the trial by any person connected  
7 with the trial or by any medium or information,  
8 including, without limitation, radio, newspaper,  
9 television; or form or express any opinion on any  
10 subject connected with this trial until the case is  
11 finally submitted to you. You may not do any research  
12 about any issues involved in the case. You may not  
13 blog, tweet or use the internet to obtain or share any  
14 information.

15 We're going to take a short recess.

16 (The following proceedings were held  
17 outside the presence of the jury.)

18 THE COURT: The record reflect we're outside the  
19 presence of the jury.

20 Mr. Durney, I think -- you did indicate you wanted  
21 to make sure you had everything admitted in respect to  
22 that. Have you gone through the sheet?

23 MR. DURNEY: The -- I have looked at the sheet,  
24 Your Honor. And while a number of these exhibits can

1 be -- the foundation for a number of these exhibits can  
2 be laid with witnesses to follow based on Mr. Kelly's  
3 representations to me about who his witnesses will be,  
4 but one of the records would be the Jane Doe records  
5 that have been referred to as Exhibit 6. I would offer  
6 them.

7 THE COURT: You would offer Exhibit 6?

8 MR. DURNEY: Yes, I am.

9 THE COURT: Has there been any foundation for that?

10 MR. DURNEY: There will be, Your Honor. And it's  
11 the records that were produced to us by Mr. Kelly at  
12 the hospital.

13 MR. KELLY: I'm not sure, Your Honor, how this is  
14 going to play out, so perhaps we can just hold on the  
15 to Exhibit 6 until --

16 THE COURT: Well, we can indicate he's offered it,  
17 but at this time there's been no foundation for it.

18 MR. DURNEY: All right, Your Honor. This -- before  
19 we rest, I would like the Court to consider the  
20 testimony of Jenny Glover. Jenny Glover was deposed.  
21 And she is the individual who secured the signature of  
22 Tawni McCrosky on the conditions of admission when she  
23 preregistered.

24 And I've suggested to Mr. Kelly and to Mr. McBride

1 that in order to save time, we could simply publish the  
2 deposition of Ms. Glover. This, of course, is all  
3 outside the presence of the jury in respect to the  
4 Court's order. But we could simply publish the  
5 deposition of Ms. Glover and stipulate that that's what  
6 she would testify to had she been called as a live  
7 witness so that we can save some time.

8 MR. KELLY: Your Honor, I would object to  
9 Ms. Glover's deposition being read or she being called  
10 as a witness. The purpose of reading her deposition  
11 apparently is for the ostensible agency issue that the  
12 Court has already ruled is irrelevant to this case.  
13 There is no issue before this jury about ostensible  
14 agency. There is no other purpose that Ms. Glover's  
15 testimony would be offered.

16 The issue -- and I would ask Mr. Durney to  
17 articulate any other issue other than ostensible agency  
18 which has already been ruled by this Court to be  
19 irrelevant in this case. Therefore, unless Mr. Durney  
20 has an offer of proof as to why Ms. Glover's testimony  
21 would be relevant, I would object to it being read.

22 THE COURT: Mr. Durney.

23 MR. DURNEY: Yes, Your Honor. Well, the Court has  
24 ruled as a matter of law that Dr. Hayes cannot be

1 considered an agent of the hospital. And I understand  
2 the Court's ruling. As I indicated when we began the  
3 case and as we indicated in our trial statement, we  
4 simply want to make outside the presence of the jury an  
5 offer of proof to make certain that all facts  
6 pertaining to the issue of ostensible agency are on the  
7 record, because depending on what occurs here  
8 obviously, this will be an issue on appeal.

9 So we simply want to make as an offer of proof,  
10 without any insult to the Court's ruling and certainly  
11 outside the presence of the jury, additional facts  
12 pertaining to that issue.

13 MR. KELLY: I would respectfully disagree. That's  
14 the purpose for the appeal. If this issue is going to  
15 be appealed, then it's going to be appealed as a matter  
16 of law. And it would be improper, I think, for the  
17 court of appeal to consider testimony that wasn't even  
18 before the jury and is irrelevant with respect to the  
19 issues that we're here to litigate.

20 So I further can't understand why that would be and  
21 should be included in this court's record when that  
22 issue has already been resolved. If it's going to go  
23 up on appeal, it's going to go up on appeal based upon  
24 the Court's ruling and the Court's reasoning for its

1 ruling, which is already in the record. I think it  
2 would be improper to introduce evidence about  
3 ostensible agency at this point in time in light of the  
4 Court's prior ruling and the reasoning for that ruling.

5 MR. DURNEY: It's simply an offer of proof, Your  
6 Honor.

7 THE COURT: Well, I'm not going to allow --

8 Is the deposition in the evidence? Has it been  
9 submitted to the court under any circumstances, the  
10 original?

11 MR. DURNEY: No, but I have it with me right now,  
12 Your Honor, and I would like to lodge it with the  
13 court.

14 THE COURT: What I'm going to do is allow you to  
15 lodge it with the court.

16 MR. DURNEY: Thank you.

17 THE COURT: I'm not going to allow it to be read.  
18 I'm not going to allow it to come in front of the jury.  
19 I'm just going to allow it for purposes of the court's  
20 record, that it be lodged with the court is all I'm  
21 going to do, Mr. Durney. So you can go ahead and  
22 submit it to the clerk. It will be marked as  
23 Plaintiff's Exhibit 74. It's not going to be admitted  
24 for the purpose of this trial. It will be allowed in

1 the court's record for the purpose of essentially  
2 having it submitted at this time --

3 MR. DURNEY: Thank you very much, Your Honor.

4 THE COURT: -- so that at least we have that.

5 (Exhibit 74 was marked.)

6 THE COURT: Also, in respect to the Court's ruling  
7 on the ostensible authority doctrine, again -- I know,  
8 Mr. Durney, you brought it up a couple times in respect  
9 to that -- I've gone back, I've read the Court's prior  
10 determination. Again, I think that based upon Nevada  
11 law and where we stand at this point in time, I think  
12 the Court's ruling was correct. Otherwise, I would  
13 have changed that to any extent.

14 I also believe -- and I'm just putting this on the  
15 record, because I think -- when you stated Dr. Hayes  
16 has settled her obligation in this case, I think that  
17 has a significant bearing on the ostensible authority  
18 doctrine in respect to this matter and as a result of  
19 that. And I think that would have to be considered in  
20 respect to any appeal on that issue.

21 So I'm just making a reference to that, because I  
22 think it has bearing on that in regards to that. I  
23 think as a result of that, it would have some  
24 implication. So the Court is just making that note for



1 the record.

2 MR. KELLY: Thank you, Your Honor.

3 THE COURT: Anything else?

4 MR. DURNEY: Ms. Brennan just reminded me that  
5 there's one other issue -- excuse me -- one other  
6 document that is pertinent to this issue that we would  
7 like to lodge -- mark for identification and lodge with  
8 the court.

9 THE COURT: Again, the Court is going to allow it  
10 to be marked for identification purposes. I'm not  
11 going to allow it to go in front of the jury. Then  
12 we'll at least have it for the Court's record.

13 MR. KELLY: I just would like to know what it is.

14 MR. DURNEY: So would I. She's trying to find it,  
15 Your Honor.

16 MS. BRENNAN: I'm trying to find it.

17 MR. DURNEY: The Court's indulgence. If you want  
18 to just allow us to do it later, I mean, I'm certainly  
19 willing to do that.

20 THE COURT: Well, I guess then the next issue is  
21 absent that, are you going to rest?

22 MR. DURNEY: Yes.

23 THE COURT: Okay. At this time, Mr. Kelly.

24 MR. KELLY: It's my understanding that Dr. Hayes is

1 going to be here at 10:15, so I would request -- it is  
2 now 10:10. I would request a five-minute recess, and I  
3 will see if she is here.

4 THE COURT: Okay. Thank you very much.

5 MR. KELLY: Thank you.

6 (A recess was taken.)

7 (Exhibit 75 was marked.)

8 THE COURT: We're outside the presence of the jury  
9 in respect to Case No. 13 TRT 00028.

10 Counsel, are you ready to proceed?

11 MR. DURNEY: Your Honor, yes. We marked Exhibit 75  
12 for identification. A copy has been provided to  
13 Mr. McBride and Mr. Kelly. And for the record, I  
14 understand the Court's ruling, but I would offer it.

15 MR. KELLY: And for the record, I'm going to  
16 object.

17 THE COURT: The Court understands that. Again, I'm  
18 not going to allow it to come and be an exhibit in  
19 front of the jury for the jury. I'm just going to  
20 allow it to be part of the court record in the event of  
21 any appeal in this matter.

22 Go ahead and bring the jurors in.

23 (The following proceedings were held  
24 within the presence of the jury.)

1 THE COURT: Will counsel stipulate to the presence  
2 of the jury?

3 MR. DURNEY: Yes, Your Honor.

4 MR. KELLY: Yes, Your Honor.

5 THE COURT: Mr. Durney, does the plaintiff rest?

6 MR. DURNEY: The plaintiff rests, Your Honor.

7 THE COURT: Defense wish to call its first witness?

8 MR. KELLY: Thank you very much, Your Honor. The  
9 defense would like to call Dr. Amy Hayes.

10 THE COURT: Ma'am, please come forward. If you'll  
11 stop right there and please raise your right hand and  
12 be sworn.

13 (The oath was administered to the witness.)

14 THE WITNESS: I do.

15 THE COURT: Please take the witness stand. Please  
16 state your full name, spell your last name, please.

17 THE WITNESS: Amy Sue Hayes, H-a-y-e-s.

18 THE COURT: Your witness, counsel.

19 MR. KELLY: Thank you very much, Your Honor.

20 AMY SUE HAYES, M.D.,

21 having been called as a witness herein,  
22 being first duly sworn, was examined  
and testified as follows:

23 /////

24 /////

## DIRECT EXAMINATION

BY MR. KELLY:

Q Good morning, Doctor.

A Good morning.

Q You are a physician licensed to practice medicine in the state of Nevada; correct?

A Correct.

Q And your specialty is that of an obstetrician and gynecologist?

A Correct.

Q Could you please outline for the ladies and gentlemen of the jury your educational background beginning with your undergraduate degree.

A I went to Stanford University, 1979 to 1983. Then I went to University of Rochester School of Medicine and Dentistry in Rochester, New York from 1983 to 1987. Then I went to Phoenix, Arizona to do my residency training for OB/GYN at Good Samaritan Medical Center program there from 1987 to 1991.

Q And, Doctor, what did you do professionally after 1991?

A After I finished my residency I took six months off. I got married. And then I started working for CIGNA healthcare, which was a staff model HMO, for four

1 years. And after that -- did you want to know the next  
2 one?

3 Q Sure.

4 A Then I joined a private practice in Phoenix for  
5 a year and ten months. And that was Maricopa OB/GYN  
6 Associates. And then in 1987 I moved here.

7 Q Doctor, are you board certified?

8 A I am.

9 Q What year were you board certified?

10 A 1993.

11 Q Doctor, as part of your training and  
12 experience, including your residency and your practice  
13 since that time, have you learned how to interpret  
14 fetal monitoring strips?

15 A Yes.

16 Q Can you explain for the jurors your education  
17 and training and experience through internship and  
18 residency through the present with respect to  
19 electronic fetal monitoring and your experience with  
20 that.

21 A Well, during residency we were trained on how  
22 to interpret the strip and what that would indicate.  
23 More recently there have been some updates to that  
24 paradigm for interpreting the strips -- I don't

1 remember exactly when that update occurred. I think --  
2 I would have to speculate if it was 2010, '11, '12,  
3 somewhere in that time zone -- sort of broad  
4 interpretations of, you know, how to interpret the  
5 fetal monitoring strip.

6 Q Was the interpretation of fetal monitoring  
7 strips something that was taught to you by the  
8 attendings during your residency?

9 A Yes.

10 Q And your residency was four years?

11 A Yes.

12 Q And then you told us what you did  
13 professionally after your residency. Did that include  
14 the interpretation of fetal monitoring strips?

15 A As part of my job?

16 Q As part of your practice.

17 A Yes.

18 Q Can you explain -- during that timeframe, from  
19 the time you trained through the present, has  
20 electronic fetal monitoring been a part of obstetrics?

21 A Yes.

22 Q Can you explain that for us?

23 A I'm not sure I understand your question.

24 Q How does fetal monitoring come into play for an

1 obstetrician during labor and delivery?

2 A Oh. Well, the monitor is how we're able to  
3 interpret what's going on with the baby. And so  
4 it's -- it is an opportunity to look at the fetal heart  
5 rate and observe how it is responding to the process of  
6 labor and the mother's condition.

7 Q Would it be accurate to say that since your  
8 training virtually every laboring mother would have  
9 electronic fetal monitoring?

10 A The majority do.

11 Q What year did you come to Carson Tahoe?

12 A 1997.

13 Q And have you been full-time since that time at  
14 Carson Tahoe as a board certified obstetrician?

15 A Yes, I have.

16 Q And so would it be accurate to say that by the  
17 time Ms. McCrosky came into the unit on April 25th,  
18 2012, you had been at Carson Tahoe for some 15 years?

19 A I believe that's correct.

20 Q All right. Let me ask you, with respect to  
21 your group -- are you a member of an obstetrical group?

22 A Yes, I am.

23 Q What's the name of that group?

24 A The group I belong to is Carson Medical Group.

1 Q How many -- and I want to spend our time this  
2 morning talking about the year 2012, and specifically  
3 April of 2012. Okay?

4 A Yeah.

5 Q In April of 2012, can you tell us,  
6 approximately how many obstetricians were there at  
7 Carson Medical Group?

8 A There were six of us then.

9 Q And how did the on-call schedule work between  
10 the six of you?

11 A We would rotate call. During the week, Monday  
12 through Thursday, you took 24 hours of call from 7 a.m.  
13 one morning to 7 a.m. the next day. And then one  
14 person would take call for the weekend which would be  
15 Friday morning to Monday morning, 7:00.

16 Q So if there is hypothetically an emergency or  
17 you're notified about a patient in labor, how is it  
18 that it's determined who is going to respond to that  
19 call?

20 A At that time we had one specific person  
21 designated as the on-call person. And so for their own  
22 patients or any MOM's Clinic patients or any no doc  
23 patients, that person was responsible, essentially any  
24 uncovered patient. At that time we were also still



1 doing our own deliveries when we weren't on call.

2 Q Do you know how it was that you came to treat  
3 Tawni McCrosky in April of 2012?

4 A I was on call that night.

5 Q And have you had a chance to review your  
6 deposition in preparation for your testimony today?

7 A Yes.

8 Q Have you reviewed any records?

9 A No.

10 Q Okay. When you were contacted -- based upon  
11 your review of your deposition, what's your  
12 understanding as to approximately when you were  
13 contacted to come in and care for Ms. McCrosky?

14 A I don't remember exactly the time of night. It  
15 was the middle of the night. So whether that was 12:00  
16 or 1:00-ish, that wasn't in the deposition, and I don't  
17 specifically remember.

18 Q Okay.

19 A But around that time.

20 Q Do you remember approximately when you came in  
21 to evaluate Ms. McCrosky?

22 A The first time the record documented that I was  
23 actually in her room was, I believe, 6 o'clock a.m.

24 MR. KELLY: Your Honor, I would like to show the

1 witness, which has already been admitted and perhaps we  
2 could have it demonstrated to the jury -- I believe  
3 it's Exhibit 2, page 93.

4 May I approach, Your Honor?

5 THE COURT: You may.

6 BY MR. KELLY:

7 Q Dr. Hayes, I will represent to you that your  
8 recollection is actually quite good. Do you see in  
9 front of you the exhibit that references that you were  
10 at the bedside at 6:02 a.m.?

11 A I see that.

12 Q Is that generally consistent with your  
13 recollection?

14 A As best I can recall, yeah.

15 Q And over to the right it references that one of  
16 the nurses who was there was Gia Parkhurst. Do you  
17 know Nurse Parkhurst?

18 A Yes.

19 Q How long have you known Ms. Parkhurst?

20 A As long as she's worked at Carson Tahoe. I  
21 wouldn't be able to say exactly how many years that's  
22 been.

23 Q Would it be accurate to say that as of April of  
24 2012 you had known her for several years?

1 A Correct.

2 Q Had performed several deliveries with her in  
3 attendance?

4 A Correct.

5 Q As of April of 2012 did you believe her to be a  
6 competent and caring nurse?

7 A I did.

8 Q While I'm at it, there are other nurses that we  
9 will talk about that the jury has actually met,  
10 including Veronica Klein. Do you know Ms. Klein?

11 A I do.

12 Q And how long have you known her?

13 A At least -- let me think. She -- it's been at  
14 least ten years. Probably more.

15 Q And do you know Ms. Veronica Klein to be a  
16 competent and caring OB -- excuse me -- labor and  
17 delivery nurse?

18 A I do.

19 Q We've also met Suzie Lusich. Do you know Nurse  
20 Lusich?

21 A I do.

22 Q And how long have you known her?

23 A As long as she's worked on labor and delivery.

24 Q Again, many years?

1 A Many years.

2 Q Again, do you know her to be a competent and  
3 caring and compassionate labor and delivery nurse?

4 A I do.

5 Q Dr. Hayes, while I'm here, it is true, is it  
6 not, that based upon everything you know about this  
7 case and your recollection of the case that you don't  
8 have any criticisms of the nurses who provided care and  
9 treatment to Ms. McCrosky in this case? True?

10 A That's true.

11 Q Doctor, after you came on the floor -- and the  
12 exhibit demonstrates that you performed a sterile  
13 vaginal exam. Do you see that?

14 A I do.

15 Q Okay. And was it your custom and practice when  
16 coming on the floor to care for a patient that you  
17 would perform a vaginal?

18 A If it was indicated.

19 Q Okay. And in this particular case, why was it  
20 indicated?

21 A I needed to evaluate how -- I knew she was  
22 dilated complete according to the nurses, and I wanted  
23 to determine what station the baby's head was at and  
24 how things were progressing.

1 Q And is it medically significant to determine  
2 where the baby's head is at and how the patient is  
3 progressing?

4 A Yes.

5 Q Why?

6 A That's part of your evaluation of whether or  
7 not labor is progressing, is to determine, you know --  
8 the station which is referred to in the exam -- I don't  
9 know if you guys have talked about this, but when  
10 you're doing a vaginal exam to evaluate how the baby is  
11 progressing in labor and whether or not it is coming  
12 down into the pelvis, part of that is determined by the  
13 position of the baby's head in relation to the bony  
14 architecture of the pelvis.

15 Q Okay. And the assessment and analysis of the  
16 station, is that somewhat subjective?

17 A Very subjective.

18 Q Can you explain that for us?

19 A Well, the definition is that the biparietal  
20 diameter, which is about this part of the head,  
21 should -- is in relation to where the ischial spines  
22 come into the pelvis. For many people it's a little  
23 looser than that. It's just kind of a feeling for how  
24 far into the pelvis that can be. And it can vary

1 depending on a contraction pattern and the position of  
2 the patient and whether or not her bladder is full. A  
3 variety of reasons will determine how far down into the  
4 pelvis the head has descended.

5 Q Doctor, would it also have been your custom and  
6 practice when you come on and you see a patient for the  
7 first time to review the fetal monitoring strip to see  
8 how the baby is doing?

9 A Yes.

10 Q And is it the custom and practice for you to  
11 perform numerous vaginal examinations during the course  
12 of a labor and delivery -- excuse me -- a labor if it's  
13 indicated?

14 A If they're indicated.

15 Q And I believe in your deposition you told us  
16 that you would have performed several vaginal  
17 examinations on this patient between, say, 6 o'clock  
18 and about 6:30 when her water broke?

19 A I don't know how many I did between 6:00 and  
20 6:30. I know there were more after 6:30. I can't  
21 speak to how many exams there were between.

22 Q Was there anything prior to -- strike that.  
23 You're aware that there was a spontaneous rupture of  
24 membranes at about 6:30?

1 A Yes.

2 Q And to your recollection, was there anything  
3 untoward or any suggestion that this patient was at an  
4 increased risk for prolapsed cord or cord compression  
5 at any time before 6:30?

6 A Well, the fact that the head had not engaged in  
7 the pelvis -- yes, I knew that the head wasn't well  
8 applied. And so I believe I had discussed with the  
9 patient that I wasn't breaking her bag of water at that  
10 time because the head had not completely filled the  
11 pelvis. And so when the bag of water breaks, there is  
12 a risk that the cord could be washed either down below  
13 the head or next to the head or into a position where  
14 it gets compressed.

15 Q And that's something that you knew during the  
16 timeframe between your exam at approximately 6:02 and  
17 the time that the spontaneous rupture of membranes  
18 occurred at about 6:30?

19 A The best I remember, yes.

20 Q Okay. That's not something you need Nurse  
21 Parkhurst to tell you, is it?

22 A No.

23 Q That's something you know based upon your  
24 background and your experience and your training?

1 A Correct.

2 Q All right. Is it uncommon for -- strike that.  
3 Did you have any other laboring patients that morning?

4 A I did.

5 Q How many?

6 A I don't remember exactly how many. I know  
7 there was at least one other patient who was also close  
8 to delivery at the same time.

9 Q Okay. I'm going to ask you to assume  
10 hypothetically --

11 MR. KELLY: In fact, perhaps we could get the  
12 photograph of the nurses' station with the two rooms.  
13 I want to say it was 57, but I may be incorrect about  
14 that.

15 Thank you.

16 BY MR. KELLY:

17 Q What is in front of you now is Exhibit 57, page  
18 3. Do you recognize this photograph?

19 A I do.

20 Q And can you describe what are we looking at?

21 A This is the view of room 383 and 384 as viewed  
22 from the nurses' station.

23 Q Okay. And I'll represent to you that we've had  
24 some testimony that Ms. McCrosky was in 383 and your



1 other laboring patient was right next door in 384.

2 Does that refresh your recollection at all?

3 A Sounds correct.

4 Q And I'll also represent to you that according  
5 to the records we have no evidence of any other  
6 laboring patient that you were caring for that morning.

7 A I'll believe that.

8 Q All right. After you had performed your  
9 examination at about 6:02, do you remember being  
10 notified that there was a spontaneous rupture of  
11 membranes or something that had occurred in  
12 Ms. McCrosky's room that required your attendance?

13 A I remember that.

14 Q What do you recall?

15 A I remember them saying -- I don't remember  
16 specifically what they said. When I reviewed the  
17 records, it said that her bag of water had prolapsed.

18 Q What does that mean?

19 A Well, sometimes the bag of water can actually  
20 come out of the vagina before it ruptures, so there  
21 would appear to be this balloon-like structure sitting  
22 out on the bed.

23 Q Is that of medical significance to you as an  
24 obstetrician?

1 A Yes.

2 Q Why?

3 A Well, I would need to reevaluate where the  
4 station of the head would be at that point and whether  
5 or not that was intact or had ruptured.

6 Q When you arrived in the patient's room, what  
7 did you observe?

8 A I vaguely -- I can't say specifically whether  
9 the bag of water was still intact or if that was what  
10 the nurses told me. I just -- somewhere in that  
11 timeframe the bag of water had come down and it  
12 ruptured. Whether it happened before I came into the  
13 room or when I was in the room, I can't say for sure.

14 Q What happened next?

15 A The head had come down into the pelvis pretty  
16 well. I don't remember specifically what station it  
17 was, but it was definitely filling the pelvis.

18 Q Was that of medical significance to you?

19 A Yes.

20 Q Why?

21 A That would indicate that she was progressing in  
22 labor and moving towards vaginal delivery.

23 Q Okay. Now, at or about that point in time did  
24 you have occasion to review the fetal monitoring strip?

1 A Yes.

2 Q And is that something that you keep an eye on  
3 throughout the course of events?

4 A Yes.

5 Q How do you do that?

6 A Well, either -- if you're in the room, you can  
7 see the monitor, or if you're out at the nurses'  
8 station, there is a bank of video monitors that have  
9 the strips running.

10 Q Okay. So would it be accurate to say that  
11 virtually at all times you would be able to be aware of  
12 what's going on with the fetal monitoring strip whether  
13 you're in the patient's room or you're at the nurses'  
14 station?

15 A That's correct.

16 Q After the rupture of membranes did you come to  
17 learn that there was a change in the fetal monitoring?

18 A Yes.

19 Q Tell us about that.

20 A Without it right in front me, I can't say  
21 exactly. There was a drop in the fetal heart rate. I  
22 don't remember specifically how low it went, but it  
23 prompted us to try maneuvers to change that situation.

24 Q Okay. Would you like to see the monitoring

1 strip? Would that refresh your recollection?

2 A I can see it. I mean, I vaguely -- I don't  
3 remember minute to minute what happened, but I remember  
4 that there was a drop in the fetal heart rate and we  
5 started to do different procedures and maneuvers to try  
6 to -- it's what you call -- you try to resuscitate the  
7 baby inside by either changing the mom's position,  
8 which I think we did several times, by increasing her  
9 intravenous fluids, by putting on oxygen.

10 I think at one point we put a little monitor in  
11 next to the baby, which is a hollow tube, called an  
12 intrauterine pressure catheter that allows me to  
13 actually infuse fluid back in around the baby to try to  
14 restore the cushion on the umbilical cord.

15 Often you'll assume if the heart rate drops that  
16 the cord is getting pressure on it. You don't always  
17 know. You have to assume. But that was our assumption  
18 at the time.

19 Q We've heard the term "interventions." Have you  
20 been describing for us interventions that are performed  
21 by doctors and nurses in the face of a strip that  
22 demonstrates some fetal distress?

23 A That's correct.

24 Q So the positioning you talked about. You

1 talked about providing oxygen. What's the point of  
2 that?

3 A Just to try to optimize the oxygen that is  
4 getting to the baby through the maternal circulation.

5 Q You described for us the IUPC. And I think  
6 what you're also describing is called amnioinfusion?

7 A That's correct.

8 Q And that's where you as a physician are putting  
9 additional fluid into the sac in an effort to relieve  
10 pressure if there is pressure on the cord?

11 A That's correct.

12 Q And does that require a physician's order?

13 A Yes.

14 Q And a physician at Carson Tahoe would be the  
15 person to perform amnioinfusion?

16 A That's correct.

17 Q I will represent to you also that we have  
18 learned and the records have shown that Terbutaline was  
19 utilized. Does -- first of all, what's Terbutaline and  
20 what's its purpose?

21 A Terbutaline is a medication that causes smooth  
22 muscle relaxation. And in obstetrics we use that to  
23 try and relax the uterus. So in this setting it would  
24 be an attempt to decrease the frequency and intensity

1 of contractions in order to facilitate the other  
2 interventions to try to improve the oxygenation of the  
3 baby.

4 Q And does Terbutaline require a physician's  
5 order?

6 A It does.

7 Q And to your recollection would it be accurate  
8 to say that you were with Ms. McCrosky almost  
9 continuously between, say, 6:30 and 6:50 or  
10 thereabouts?

11 A I believe I was.

12 Q We've heard testimony from the nurses about the  
13 various interventions and the positional changes that  
14 were occurring. Can you describe for us and explain  
15 for us, what's the purpose of positional changes for  
16 the mother?

17 A Well, a couple of things. You try to change  
18 the position of the patient so that if there -- if you  
19 can get that baby to move or the fluid around the baby  
20 to move, it may wash the cord away from the position  
21 that it's currently in where it might be under  
22 pressure. In addition, you're optimizing the  
23 circulation to the uterus by changing the mom's  
24 position, taking her from on her back to her side.

1 Sometimes we put people on their hands and knees to try  
2 to move the baby, move the cord. Some of that will  
3 facilitate the baby descending into the birth canal as  
4 well. And --

5 Does that answer your question?

6 Q I think it does.

7 Let me get -- it might help refresh your  
8 recollection to look at the cord -- the strip rather.

9 MR. KELLY: If we could see, please, Exhibit 5.  
10 Let's start with page 59.

11 BY MR. KELLY:

12 Q And I'll represent to you, Doctor, that the  
13 jurors have seen this many times. But perhaps to help  
14 reference you and refresh your recollection, what we  
15 see -- well, let me strike that.

16 On the strip we see handwriting with respect to  
17 different interventions; would that be accurate?---

18 A Correct.

19 Q And are those notations made contemporaneous  
20 with what's going on with the strip and what's going on  
21 with the mother at that time?

22 A That's the idea.

23 Q Okay. And you mentioned hands and knees,  
24 sometimes you put the patient on hands and knees.

1 There is a reference over here at about 6:41. It says  
2 "H&K." Would that suggest to you, anyway, hands and  
3 knees?

4 A Yes.

5 MR. DURNEY: Your Honor, he's leading the witness.  
6 I'm letting him, but I would prefer it if he didn't.

7 MR. KELLY: I'll rephrase.

8 THE COURT: I'm going to sustain.

9 MR. KELLY: Can we see the next page, please. And  
10 the next page after that.

11 BY MR. KELLY:

12 Q Doctor, you've described for us these  
13 interventions. At some point in time did you form an  
14 opinion and professional impression that these  
15 interventions were actually providing some benefit,  
16 that they were actually working?

17 And we can scroll through this if that's easier.  
18 If we could keep scrolling.

19 Why don't you tell us -- let me stop you and ask.  
20 What are we seeing right here in terms of  
21 interventions?

22 A I think we had already placed the intrauterine  
23 pressure catheter at this point and started the  
24 amnioinfusion and so infused a certain amount of



1 fluid -- I don't remember exactly how much -- in an  
2 attempt to try to restore the cushion around the baby.  
3 And there was -- at the time probably before we get to  
4 the section where she's on her right side, we had seen  
5 the heart rate start to come up, and then it came back  
6 down. So then we tried to move side to side. And  
7 "Trendelenburg" would be a reference of putting the  
8 patient on her head a bit, tipping her head down and  
9 her feet up, in an attempt to try to dislodge or move  
10 the cord.

11 And I don't -- unfortunately, the exams are not  
12 recorded on when I was checking her, but when -- along  
13 this course of treatment I would have been doing  
14 repeated exams. And my recollection, although it is  
15 not dictated or noted, is that the head was continuing  
16 to descend into the pelvis.

17 Q Was that of significance to you?

18 A Well, yes.

19 Q Why?

20 A Then that would imply that I would be able to  
21 facilitate a vaginal delivery soon.

22 Q Okay. And was it your judgment at this point  
23 in time, about 6:50 on the strip, that a vaginal  
24 delivery may very well be possible for Ms. McCrosky?

1 A Yes.

2 Q Why?

3 A Because the fetal head was coming down into the  
4 pelvis well, and I -- at the time in the room looking  
5 at this right then, it appeared that there had been  
6 some recovery of the fetal heart tones. As we were  
7 doing these maneuvers, then we would see the heart rate  
8 come up a little bit.

9 Q There is reference to one of the maneuvers, and  
10 you described it, Trendelenburg. After that particular  
11 intervention or maneuver, were you encouraged with the  
12 heart rate increase?

13 A I was.

14 Q And at that particular point in time what was  
15 your medical judgment with respect to how this patient  
16 was going to deliver?

17 A At that point I still anticipated we were going  
18 to have a vaginal delivery.

19 Q Doctor, the decision as to how a patient is  
20 going to deliver, whether vaginal or by cesarean  
21 section, is that a physician decision?

22 A Yes.

23 Q With respect to where a patient is going to  
24 deliver, whether on the OB floor or if they're taken

1 downstairs to the OR, is that a physician decision as  
2 well?

3 A Yes. It depends on what rooms are available.

4 Q Okay. And with respect to when a delivery is  
5 going to be accomplished, is that also a physician  
6 decision?

7 A Yes.

8 Q Would you expect any of the nurses, whether  
9 Ms. Parkhurst or Ms. Klein, Ms. Hackler, Ms. Lusich,  
10 any of the nurses, would you expect them to make a  
11 decision as to when a baby should be delivered?

12 A No.

13 Q Would you expect any of those nurses to make a  
14 decision as to how a baby is going to be delivered?

15 A No.

16 Q Or where a baby is going to be delivered?

17 A No.

18 Q At this particular point in time, around  
19 6:50 or so, do you recall being distracted in any way?

20 A I -- I did have another patient in labor who I  
21 was also following, but my focus right then was where I  
22 was in the room.

23 Q All right. Is it rare for a physician to have  
24 two laboring patients next door to each other?

1 A Not really.

2 Q If you have a patient in another room who  
3 hypothetically is progressing normally, I mean, is that  
4 something you think would have been so distracting to  
5 you that you wouldn't have been able to pay close  
6 attention to Ms. McCrosky?

7 A No.

8 Q As you sit here today can you think of any  
9 reason, whether you were tired or distracted or you  
10 didn't understand what you were doing, out of your  
11 senses, anything like that that you can recall that  
12 day?

13 A No.

14 Q Would it be accurate to say you were using your  
15 best judgment based upon your background, experience  
16 and training?

17 A I thought I was.

18 Q Doctor, you told us at about 6:50 or so it was  
19 your judgment that you might be able to deliver the  
20 patient vaginally?

21 A I don't remember exactly when. I sort of had  
22 that anticipation all along.

23 Q There is a notation on the exhibit in front of  
24 you. It says "Foley DC." Do you see that?

1 A I do.

2 Q What does that refer to?

3 A That means that the Foley catheter was removed.

4 Q And what's your understanding as to why that  
5 would be done?

6 A I would assume that we did that in anticipation  
7 of her delivering.

8 Q What happened next?

9 A The best I remember, somewhere within the next  
10 few minutes I ended up going into the room next door to  
11 try to deliver that patient, other patient, in 384.

12 Q Okay. And did you deliver that patient?

13 A No, I did not.

14 Q Why is that?

15 A She was not ready.

16 Q So what did you do next?

17 A I went -- I know that in between I was back and  
18 forth into the room to check on Tawni and the baby.  
19 And then I went to the nurses' station to call one of  
20 my partners to come in to standby to do the delivery of  
21 the patient in 384 if I had to do a C-section on Tawni.

22 Q Did you actually make a call to one of your  
23 partners to come in?

24 A I did.

1 Q Okay. And we know from the records that a  
2 Dr. Hess came in and delivered that patient.

3 A No. It was Dr. Koch.

4 Q You think it was Dr. Koch?

5 A Yes.

6 Q Okay. And Dr. Koch is one of your partners?

7 A She is.

8 Q Who is Dr. Tomita?

9 A Dr. Tomita is another partner of mine.

10 Q Now, was Dr. Tomita on the unit for a D&C?

11 A Yes, she was.

12 Q After you made the call for one of your  
13 partners to come in, what happened next?

14 A Then I went back into Tawni's room and we made  
15 preparations to try to deliver her vaginally with the  
16 use of a vacuum, suction vacuum.

17 Q Okay. And can you describe for the ladies and  
18 gentlemen of the jury, what's the purpose of utilizing  
19 a vacuum as opposed to pushing with a spontaneous  
20 delivery?

21 A Well, when you -- it's to try to expedite  
22 delivery of a patient who will also be pushing. She --  
23 and I don't remember if she pushed before we tried the  
24 vacuum. The baby had definitely come well down into

1 the pelvis so that it was close to delivery. And so  
2 you use the vacuum in that situation to try to speed  
3 things up and facilitate the delivery.

4 Q What happened next?

5 A She didn't deliver vaginally.

6 Q Do you recall approximately how many times you  
7 attempted to use the vacuum?

8 A I -- I put it on and I don't know if it was one  
9 or two contractions and it came off. And at that point  
10 we decided to proceed with the cesarean.

11 Q Were you either looking at or aware of the  
12 fetal monitoring strip throughout this timeframe?

13 A I was.

14 Q And I think you told us, but, again, how would  
15 you be aware of it? It's right there in the room?

16 MR. DURNEY: Object to the form, Your Honor. Can  
17 we have a time? It's vague. How could she be aware of  
18 it when?

19 THE COURT: I'll go ahead and sustain the  
20 objection. You might just clarify.

21 MR. KELLY: Sure.

22 BY MR. KELLY:

23 Q At the time you're attempting the vacuum  
24 delivery.

1       A    I was in the room and looking at the monitor  
2 strip at the head of the bed.

3       MR. KELLY:  Can we please see the next page of  
4 Exhibit 5.

5       Thank you.

6 BY MR. KELLY:

7       Q    This next frame of the strip references a  
8 timeframe of about 7 o'clock.

9       MR. KELLY:  And if we could see the next page,  
10 please.

11 BY MR. KELLY:

12       Q    Now we see a period of about 7:10.

13       MR. DURNEY:  Objection, Your Honor.  It  
14 misrepresents the exhibit.  It's a span from 7:04 to  
15 7:12.  I object to the narrative from Mr. Kelly.  A  
16 direct question, please.

17       THE COURT:  Well, I'm going to go ahead --  
18 Mr. Kelly, you can rephrase it, look at this page.  It  
19 does indicate 7:10 on the right-hand side.

20       MR. KELLY:  That's what I was referring to.  I  
21 apologize.

22 BY MR. KELLY:

23       Q    Doctor, could you please describe for us, what  
24 are we looking at here?



1 A Well, the fetal heart rate is initially in the  
2 160s. And then with the contraction, it drops -- I  
3 can't tell -- I think 80s or 90s, but I'm not positive.  
4 And so when it did not come back up --

5 THE COURT: If it would help you, you can get down  
6 with a pointer if you'd like --

7 MR. KELLY: Yeah, Doctor.

8 THE COURT: -- instead of explaining across the  
9 room.

10 THE WITNESS: Okay. I'll just use my finger.

11 So the heart rate had dropped again, and so the  
12 position change of Trendelenburg was used here.

13 BY MR. KELLY:

14 Q Was that at your order and direction?

15 A Yes. I don't know that -- if I was in the room  
16 or if I was in the other room trying to do the delivery  
17 at this point. I couldn't -- I would have to go back  
18 and look specifically at the timeline that was outlined  
19 in the deposition, but Trendelenburg would have been  
20 used to try to cause the heart rate to improve which it  
21 does here a few minutes later come up. And then it  
22 comes back down with this next contraction.

23 Q And now what time are we looking at?

24 A We're looking at the contraction at 7:10.

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5  
6 **IN THE SUPREME COURT OF THE STATE OF NEVADA**  
7

8  
9 TAWNI McCROSKY, individually and  
10 as the natural parent of  
LYAM McCROSKY, a minor child,

11 Appellants,

12 vs.

13 CARSON TAHOE REGIONAL  
14 MEDICAL CENTER, a Nevada  
business entity,

15 Respondent.  
16

Supreme Court Case No.: 70325

FJDC Case No. 13TRT000281B

17  
18 **APPELLANT'S APPENDIX**

19 **VOLUME 11**  
20  
21  
22

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3.	Defendant Carson Tahoe Regional Medical Center's Answer to Plaintiff's Complaint	May 30, 2013	1	AA000030 – AA000038
4.	Defendant Carson Tahoe Regional Medical Center's Answer to Plaintiff's First Amended Complaint	April 30, 2015	1	AA000050 – AA000065
5.	Defendant Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment	August 11, 2015	1	AA000112 – AA000213
6.	Defendant Carson Tahoe Regional Medical Center's Motion in Limine No. 7 to Permit the Introduction of Collateral Source Payments as Evidence at the Time of Trial	October 1, 2015	4	AA000646 – AA000652
7.	Defendant Carson Tahoe Regional medical Center's Motion to Include Co- Defendant Amy Sue Hayes, M.D. On the Verdict Form	August 5, 2015	1	AA000079 – AA000111

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10.	Defendant Carson Tahoe Regional medical Center's Reply in Support of Motion to Include Co-Defendant Amy Sue Hayes, MD on the Verdict Form	August 28, 2015	3	AA000530 – AA000537
11.	Defendant Carson Tahoe Regional Medical Center's Reply in Support of Motion in Limine No. 7 to Permit the Introduction of Collateral Source Payments as Evidence at the Time of Trial	October 29, 2015	5	AA000799 – AA000804
12.	Defendant Hayes' Answer to Amended Complaint	May 21, 2013	1	AA000023- AA000029
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18.	Notice of Entry of Order re: Motion for Summary Judgment	September 23, 2015	4	AA000638 – AA000645
19.	Order Granting Defendant Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment	September 22, 2015	4	AA000624 – AA000627
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21.	Order Granting in Part and Denying in Part Defendant's Motions in Limine	December 14, 2015	5	AA000957 – AA000965
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25.	Plaintiff's Opposition to Defendant CTRMC's Motion to Include Co-Defendant Amy Sue Hayes, MD on the Verdict Form	August 21, 2015	2	AA000214 – AA000263
26.	Plaintiff's Reply to Defendant Carson Tahoe Regional Medical Center's Opposition to Plaintiffs' Omnibus Motion in Limine	November 16, 2015	5	AA000883 – AA000954
27.	Plaintiffs' Omnibus Motion in Limine	October 19, 2015	5	AA000771 – AA000798
28.	Plaintiffs' Opposition to Defendant Carson Tahoe Regional Medical Center's Motion in Limine Nos. 1-15	October 19, 2015	4	AA000653 – AA000770
29.	Request for Submission re: Motion in Limine No. 7	October 29, 2015	5	AA000805 – AA000806
30.	Request for Submission re: Plaintiffs' Omnibus Motion in Limine	December 3, 2015	5	AA000955 – AA000956

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32.	Sur-Reply to Defendant Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment	August 31, 2015	4	AA000538 – AA000544
33.	Transcript from hearing on Carson Tahoe Regional Medical Center's Motion for Partial Summary Judgment	September 1, 2015	4	AA000545 – AA000623
34.	Transcript of Trial Proceedings Day 1	March 8, 2016	5-6	AA000973 – AA001242
35.	Transcript of Trial Proceedings Day 10	March 19, 2016	14	AA002918 – AA003005
36.	Transcript of Trial Proceedings Day 11	March 20, 2016	14-15	AA003006 – AA003120
37.	Transcript of Trial Proceedings Day 2	March 9, 2016	6-7	AA001243 – AA001532
38.	Transcript of Trial Proceedings Day 3	March 10, 2016	8	AA001533 – AA001717
39.	Transcript of Trial Proceedings Day 4	March 11, 2016	8-9	AA001718 – AA001918
40.	Transcript of Trial Proceedings Day 5	March 12, 2016	9-10	AA001919 – AA002054

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24.	Request for Submission re: Motion in Limine No. 7	October 29, 2015	5	AA000805 – AA000806
25.	Defendant Carson Tahoe Regional Medical Center's Opposition to Plaintiff's Omnibus Motion in Limine	November 4, 2015	5	AA000807 – AA000882
26.	Plaintiff's Reply to Defendant Carson Tahoe Regional Medical Center's Opposition to Plaintiffs' Omnibus Motion in Limine	November 16, 2015	5	AA000883 – AA000954
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41.	Special Verdict	March 22, 2016	15	AA003121 – AA003123
42.	Judgment on Jury Verdict	April 6, 2016	15	AA003124 – AA003126
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44.	Fetal Monitor Strips	N/A	15	AA003134 – AA003199

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of Durney & Brennan, Ltd., and that on the  
3 date shown below, pursuant to NRAP 25(d), I caused service of the foregoing  
4 document by electronically filing the same with the Clerk of the Court which  
5 serves the following party automatically: deposited in the United States mail at  
6 Reno, Nevada, a true copy of the foregoing document, addressed to:

7  
8 Robert C. McBride, Esq.  
9 CARROLL, KELLY, TROTTER  
10 FRANZEN, McKENNA & PEABODY  
11 8329 W. Sunset Rd., Ste. 260  
12 Las Vegas, Nevada 89113

13 Additionally, I deposited in the United States mail at Reno, Nevada, a true  
14 copy of the foregoing document, addressed to:

15 John C. Kelly, Esq.  
16 CARROLL, KELLY, TROTTER  
17 FRANZEN & McKENNA  
18 111 W. Ocean Blvd., 14<sup>th</sup> Fl.  
19 Long Beach, California 90801-5636

20 DATED this 19<sup>th</sup> day of DECEMBER, 2016.

21 /s/ Abbey C. Whitfield  
22 ABBEY WHITFIELD  
23  
24  
25  
26  
27  
28



1 A No, I didn't.

2 Q Okay. You could have done that, though; right?

3 A Certainly I could have asked for permission,  
4 yes.

5 Q And that would have been helpful for you to at  
6 least check with those current treating physicians to  
7 find out what they thought that Lyam's current and  
8 future needs would be; correct?

9 A I didn't think it was necessary. I thought all  
10 of the reports that I had reviewed were well written  
11 and weren't fragmentary. And I think I had a very good  
12 idea of each of those doctor's opinions as they  
13 prepared their reports.

14 Q Okay. Well, you never spoke to the  
15 orthopedist, Lyam's orthopedist; correct?

16 A I don't know the name of an orthopedist that  
17 he's seen.

18 Q Okay. And so you couldn't have asked that  
19 orthopedist or that physician then your opinion about  
20 the need for the hip abduction surgery, correct?

21 A I wasn't aware there was an orthopedist on the  
22 case. So, yes, I could not have.

23 Q Right. And, likewise, you didn't attempt to  
24 verify with any physician, whether it was the primary

1 care physician, Dr. Amrhein, or any other physician,  
2 whether or not Lyam would require the Achilles tendon  
3 release; correct?

4 A That's correct, I did not.

5 Q Or you didn't check with anyone to determine  
6 whether or not Lyam would require scoliosis surgery;  
7 correct?

8 A That's correct, I did not.

9 Q In fact, at the time of your evaluation of  
10 Lyam, Lyam did not have any evidence of scoliosis;  
11 true?

12 A In my examination, he did not. Actually in  
13 Dr. Cokely's, which was just about a week before, he  
14 did. So I think it was at least at that point a  
15 variable probably a positional scoliosis.

16 Q Okay. And so you and Dr. Cokely differ in that  
17 evaluation; correct?

18 A We had a couple of other differences. I  
19 thought his head circumference was a half a centimeter  
20 larger than Dr. Cokely did, but that's within the error  
21 of the system. So there were some differences, but I  
22 think they're all explainable. I think we were both  
23 seeing the same youngster in the same way.

24 Q You didn't -- also, you did not make any effort

1 to contact Dr. Rodriguez at all?

2 A I did not.

3 Q Okay. And instead you left that to Carol  
4 Hyland; correct?

5 A In terms of input to the life care plan, yes, I  
6 did.

7 Q Okay. You testified that you thought six  
8 visits to Dr. Rodriguez would be needed in the future.  
9 Do you recall that?

10 A Six a year?

11 Q Six a year.

12 A Yes.

13 Q Okay. And if Dr. Rodriguez were to say that he  
14 only needed to see Lyam two times a year, would you  
15 defer to Dr. Rodriguez?

16 A Absolutely. I think I've said that with each  
17 of these recommendations that are not necessarily my  
18 own specialty.

19 Q In fact, in the case in which you testified,  
20 the Frazier case in which you testified on behalf of  
21 the defense in that case, you testified that twice a  
22 year is the frequency that a pediatric neurologist  
23 would have to see their patients.

24 MR. DURNEY: Object to the form of the question.

1 BY MR. McBRIDE:

2 Q Do you recall that?

3 MR. DURNEY: I object to the form of the question.  
4 It's -- you're comparing apples and oranges, another  
5 patient.

6 BY MR. McBRIDE:

7 Q Well, let's go back to this patient, and just  
8 so we can get it on the record for foundational  
9 purposes on this, that -- let's see. You testified in  
10 this case, in the Frazier case, that --

11 MR. DURNEY: That's, again, 1991?

12 MR. McBRIDE: 1991. Excuse me. Actually '91 or  
13 '93. I can't remember. Anyway, it was '91 or '93.  
14 Yeah, that was a '91 case.

15 BY MR. McBRIDE:

16 Q You said that the consistent diagnosis with  
17 this child was microcephaly and static, meaning  
18 unchanging, encephalopathy or cerebral palsy and then  
19 certain manifestations of the cerebral palsy become  
20 some parts of the diagnosis, including visual  
21 impairment, hearing impairment, quadriplegia,  
22 dysphagia, which means swallowing difficulty, and  
23 respiratory distress from a neurological point of view.  
24 That's consistent with Lyam's diagnosis as well.

1 A No. There's a huge difference.

2 Q Okay. Tell me, what's the huge difference  
3 there?

4 A He has a seizure disorder and he is being  
5 treated by a neurologist for a seizure disorder.

6 Q And I'm glad you brought that up, because in  
7 this case, this child -- and I'll be happy to show you  
8 where the child had a seizure disorder. And in this  
9 case --

10 A Well, you didn't read it, and you were asking  
11 me if they were the same. If you're going to withhold  
12 part of it, I don't know how to respond.

13 Q Well, let me put it like this. That was in  
14 your answer, and I quoted your answer.

15 A Yes.

16 Q And -- and -- but if that's an additional  
17 factor, which you think that Lyam -- we need to throw  
18 in there, I'm happy to show it to you. But it's later  
19 on in here where you refer to the fact that this child  
20 had a seizure disorder and was taking medication for  
21 it.

22 A At the time?

23 Q Yes. For instance, let me read it for you,  
24 Doctor --

1 A Okay.

2 Q -- so we can clarify.

3 A Sure.

4 Q This is your testimony. "We're talking about  
5 the frequency of seeing pediatric neurologists, or  
6 merely, with a youngster who has had a seizure and is  
7 taking a medication, once a year would be sufficient,  
8 but -- you know, once or twice. I'm not quibbling with  
9 that."

10 Okay. So based on that, you would agree with me  
11 that the consistent diagnosis this child had, including  
12 the seizure disorder, with medication, is very, very  
13 similar to Lyam McCrosky; correct?

14 A With the seizure disorder, yes.

15 Q Okay. You also testified, I think -- again,  
16 you testified that as far as seeing a  
17 gastroenterologist -- and, again, keep in mind in this  
18 case on what you testified on behalf of the defense  
19 here in Fresno, that this child who had a  
20 gastrostomy needed to be seen -- see a  
21 gastroenterologist on a periodic basis based on what  
22 particular needs the youngster has at the time.

23 A I very well might have said that.

24 Q Okay. And would you agree with that in this

1 case?

2 A I think in this case I am asked how frequently  
3 that would be. I made an estimation of twice a year.

4 Q The report that you authored, was that  
5 something that you personally prepared or did you leave  
6 that to your assistant -- I forget his name --  
7 Mr. McCulley to do for you?

8 A My assistant, Mr. McCulley, and my  
9 transcriptionist both participate in the preparation of  
10 the report in terms of transcribing. Ordinarily what I  
11 do is when I sit down to do a report, I will dictate  
12 it. I usually don't correct my dictation. I wait  
13 until the transcription has typed it out. We get that  
14 from her as an electronic record. It's printed out by  
15 Mr. McCulley. He hands it to me and I look at it and I  
16 proofread it.

17 If I make corrections, I will, you know, underline  
18 something and put a line to say what the appropriate  
19 word should be. Once in a while I add even a sentence.  
20 Once in a while I move a paragraph from one place to  
21 another. These are all part of proofreading.

22 And then to save time, I hand that to Mr. McCulley  
23 and he types in those corrections. And then I look at  
24 it again to make sure. Sometimes it goes through

1 several of those proofreading steps. And when I'm  
2 satisfied with it, then I sign it, and then it is sent  
3 to whoever it was directed towards. And copies are put  
4 in my records and carbon copies are sent to whoever was  
5 to review carbon copies. So other people participate  
6 in this, but I don't think anyone participates as to  
7 content.

8 Q And during that whole process that you just  
9 described, neither you nor Mr. McCulley or the  
10 transcriptionist provide a copy of that draft report to  
11 Lyam's treating physicians to ask for their input or  
12 whether they agree or disagree with any of those  
13 recommendations; true?

14 A No, I don't believe I've ever done that.

15 Q Okay. Since your deposition you referenced  
16 reviewing some additional records. Do you know what  
17 Lyam's current condition is today?

18 A Yes. I have spoken with his mother just to  
19 update what records -- you know, when my records  
20 stopped. I've also reviewed school records and some  
21 therapy records. I don't believe I've seen any other  
22 medical records.

23 Q The -- are you aware of any hospitalizations  
24 that Lyam has had since January of last year?



1       A    Yes, I'm aware of an April hospitalization, but  
2   I was aware of that at my deposition in July.  And that  
3   was for a seizure disorder.  It was the first seizure  
4   he had had in -- well, since the neonatal period, but  
5   it then set in motion the process that he was going to  
6   have to be on antiseizure medicine.

7       Q    So there was -- do you know if he's still  
8   taking it, the medication?

9       A    Let me look at my note.  I think so.  Yes, his  
10  mother told me that he was taking the same medicine but  
11  had increased it.  It's called Keppra.  I put some  
12  notes on my handwritten notes.  Let's see.  Yes, it was  
13  increased from one milliliter twice a day when I wrote  
14  my report to one and a half milliliters once a day and  
15  one milliliter half a day, in other words, a half a  
16  milliliter increase.

17      Q    Do you know if Lyam has been hospitalized at  
18  all since April of last year?

19      A    His mother said that he was not.

20      Q    Okay.  So that was two hospitalizations for the  
21  entirety of 2015; correct?

22      A    Yes.

23      Q    Okay.  And prior to that, you recall writing in  
24  your report that Lyam had not had a hospitalization for

1 18 months prior to January of 2015? Do you recall  
2 that?

3 A I believe so. I could look back, but that  
4 sounds right to me.

5 Q So in -- in -- so over -- in other words, over  
6 the last three years then, up until today, certainly  
7 this year, you're not aware of any hospitalizations;  
8 correct?

9 A Yeah. I asked his mother have there been any  
10 other, and she just mentioned the April one --

11 Q Okay.

12 A -- of last year.

13 Q Okay. So in nearly three years then there have  
14 only been three hospitalizations of Lyam, correct?

15 A Yes.

16 THE COURT: We're going to go ahead and take --  
17 stop at this time.

18 Ladies and gentlemen, we have another witness  
19 that's here, so we'll pick up on this again at that  
20 point in time, but in order to accommodate this  
21 witness, we're going to take him at this time.

22 Mr. Durney, do you want to go ahead and call that  
23 witness.

24 MR. DURNEY: Yes. Thank you, Your Honor. We would

1 call Kevin Kirkendall.

2 THE COURT: If you all want to stand for a few  
3 minutes, it kind of helps, I'll tell you that.

4 Sir, please come forward. And don't mind us all  
5 standing for you.

6 MR. KIRKENDALL: It's a new one for me.

7 THE COURT: Please stop raise your right hand and  
8 be sworn.

9 (The oath was administered to the witness.)

10 THE WITNESS: Yes.

11 THE COURT: Please sit down. Please state your  
12 full name, spell your last name, please.

13 THE WITNESS: Kevin Bruce Kirkendall. Kirkendall  
14 is spelled K-i-r-k-e-n-d-a-l-l.

15 THE COURT: Your witness, Mr. Durney.

16 MR. DURNEY: May it please the Court.

17 KEVIN BRUCE KIRKENDALL,

18 having been called as a witness herein,  
19 being first duly sworn, was examined  
and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. DURNEY:

22 Q Good afternoon, Mr. Kirkendall.

23 A Good afternoon.

24 Q What is your occupation and profession and what

1 do you bring to this trial?

2 A Well, I'm a certified fraud examiner; I'm a  
3 certified public accountant. Most of the time, because  
4 of the work I do, I'm referred to as a forensic  
5 economist. I am here to simply calculate the economic  
6 damages in this case.

7 Q All right. Let's talk a little bit about your  
8 credentials. How about your educational upbringing?  
9 Describe it for us.

10 A Sure. I have a bachelor's in accounting and I  
11 have a master's in business administration.

12 Q And how long ago did you get your master's?

13 A 1995.

14 Q Are you in business now?

15 A I'm sorry?

16 Q I say, are you in business now?

17 A I am now.

18 Q What do you call yourself?

19 A Kirkendall Consulting Group.

20 Q And what does Kirkendall Consulting Group do?

21 A The majority of my work, the vast majority,  
22 probably 99 percent, relates to matters such as what  
23 we're here for today, the calculation of economic  
24 damages in wage loss cases, personal injury cases. I

1 also do a significant amount of -- excuse me -- a  
2 significant amount of work in commercial damage-type  
3 cases where businesses are arguing and fighting about  
4 damages.

5 Q And how long have you been -- what do we call  
6 it? Litigation-related work?

7 A Yes.

8 Q Fair enough.

9 How long have you been involved in  
10 litigation-related work?

11 A About 20 years.

12 Q Prior to that you mentioned that you by  
13 profession are a CPA, a certified public accountant.

14 A Yes.

15 Q Prior to engaging in litigation-type work, what  
16 did you do with your degrees?

17 A I was in school. I've been doing this since I  
18 got out of school.

19 Q Very well.

20 And do you do it for both defendants in litigation  
21 as well as plaintiffs in litigation?

22 A Yes.

23 Q Is there a percentage as between defendants and  
24 plaintiffs when you're retained, I mean?

1       A    I don't track it very closely, but roughly it  
2 ranges, depending on the year, from 70 percent to  
3 90 percent, 85 percent defense work.

4       Q    Most of the time you're retained by the  
5 defense?

6       A    Yes.

7       Q    From a purely statistical standpoint, it's  
8 rather unusual for somebody like me representing a  
9 plaintiff to hire you?

10       MR. McBRIDE:  Objection.  Calls for speculation.

11       MR. DURNEY:  I'll withdraw the question.

12       THE COURT:  Why don't you rephrase it, Mr. Durney.  
13 I think it was --

14 BY MR. DURNEY:

15       Q    At least most of the time you're hired by the  
16 defendants like Mr. Kelly; fair?

17       A    Most of the time it is by defendants, yes.

18       Q    So now, in this particular case I engaged you  
19 to reduce the life care plan that was prepared by Carol  
20 Hyland down to present value.

21       A    Yes.

22       Q    Agreed?  Let's -- you have to answer audibly --  
23 I'm sorry -- for our record, sir.

24       A    I'm sorry.  I said "Yes."

1 Q Oh, I didn't hear you, which is not unusual. I  
2 apologize.

3 All right. Let's talk about the concepts. What's  
4 present value?

5 A Present value is simply the amount of money  
6 that we need to invest today at certain interest rates  
7 that will grow to the amount it is -- that is needed in  
8 the future at different times in the future. It  
9 involves identifying an appropriate what we call  
10 discount rate or rates or appropriate growth rates.

11 Q So to use an example, if Lyam requires a  
12 surgery in five years that costs \$10, would it be fair  
13 to gave him \$10 today given the fact that he won't have  
14 to spend it for five years?

15 A No. The courts require that we determine how  
16 much needs to be invested today. And I'll change your  
17 scene a little bit. Let's say it's \$100 -- we need  
18 \$100 dollars in 10 years, and we're getting 10 percent  
19 interest, we know that you need to invest roughly \$62  
20 today at 10 percent interest.

21 So if it's a surgery for \$100 in 10 years, if we  
22 invest \$62 today at 10 percent interest, it will grow  
23 to what is needed in 10 years.

24 Q Now, if we decided that the surgery that's

1 required in 10 years costs a hundred bucks today, can't  
2 we expect that the cost of surgery will go up in 10  
3 years as well?

4 A We do expect the surgery to go up. And as I  
5 mentioned, we try to account for that by identifying a  
6 growth rate or estimating the rate at which the cost  
7 will increase over time. And I build the growth rates  
8 into my calculation.

9 Q So that's factored in?

10 A Yes.

11 Q All right. And so what did you -- in order to  
12 express an opinion as to the present value of  
13 Ms. Hyland's life care plan, what materials did you  
14 consider?

15 A Well, certainly I needed her life care plan.  
16 And then there's various sources that I look to to  
17 obtain the data that's needed. I use a discount rate  
18 that's called a U.S. Treasury STRIPS rate. It's simply  
19 a risk-free rate of return. And I go to the Wall  
20 Street Journal and I'm able to get those particular  
21 rates from the Wall Street Journal.

22 The discount rates, I rely upon governmental data  
23 as to what the various components of the life care  
24 plan -- excuse me -- as to how much those have grown in



1 the past, and I use that to estimate the future. So  
2 Ms. Hyland's life care plan, the growth rate and the  
3 discount rates -- obviously there's the various -- the  
4 birthdates and various dates come into the  
5 calculations. And those are generally what I look at.

6 Q And are those the materials that experts like  
7 you customarily rely on in formulating an opinion as to  
8 present value?

9 A Yes, absolutely. A number of experts will use  
10 slightly different discount rates, but almost all of us  
11 use a risk-free discount rate.

12 Q All right.

13 MR. DURNEY: And may I -- may I show the witness  
14 Exhibit 65, Your Honor, and may I approach?

15 THE COURT: You may.

16 BY MR. DURNEY:

17 Q I'm going to turn us to Exhibit 65 marked for  
18 identification. Let's put it down here before it falls  
19 off. Thank you.

20 Tell us what Exhibit 65 for identification is.

21 A This is simply a summary schedule of the value  
22 of the life care plan.

23 Q In other words, something you prepared?

24 A Yes, that's correct.

1 Q Your summary of Ms. Hyland's life care plan?

2 A That's right.

3 Q Applying the methodology that you just  
4 discussed, reducing present value, applying discount  
5 factors, et cetera?

6 A That's correct. Along the top line you'll see  
7 the various components of the life care plan. And  
8 underneath those components you'll see the various  
9 figures that result from the calculations.

10 Q Now, Ms. Hyland's life care plan contains  
11 information obtained from two sources, Dr. Capell and  
12 Dr. Rodriguez, and sometimes the values were different.  
13 Did you find that to be the case?

14 A Yes.

15 Q When you had -- when Dr. Rodriguez thought that  
16 there would be a need for six neurology visits a year,  
17 Dr. Capell felt that there would be a need for four, or  
18 wherever there was a discrepancy, what did you do about  
19 that discrepancy?

20 A I simply took the average. Not being a medical  
21 practitioner, I have no basis for making a  
22 determination one way or the other.

23 Q Ms. Hyland testified that that's acceptable  
24 methodology. Do you agree?

1 A It is. I see it on almost every report where  
2 there's a life care plan.

3 Q Routinely done?

4 A Yes.

5 Q And this --

6 MR. DURNEY: Exhibit 65 I would offer, Your Honor.

7 THE COURT: Any objection?

8 MR. McBRIDE: Well, I'll object, Your Honor, as  
9 hearsay.

10 THE COURT: I'm sorry. I didn't hear you.

11 MR. McBRIDE: Your Honor, object as hearsay.

12 THE COURT: He prepared to report. He's laying the  
13 foundation. So I'm going to overrule the objection.  
14 Go ahead.

15 (Exhibit 65 was admitted.)

16 MR. DURNEY: Let's bring up -- it's 65, Mr. Ivey.  
17 Thank you.

18 BY MR. DURNEY:

19 Q It's going to be hard to see. Perhaps you  
20 could step down and help us go through it.

21 A Sure. That one or this one?

22 Q I think you better come to this one. It's  
23 easier for these people to see. Me too.

24 A Sure. What we have here along the top, these

1 are just the various parts of the life care plan, the  
2 neurologist, endocrinologist. And because there's many  
3 of them, there's actually --

4 You can slide that down.

5 There's actually --

6 Well, you don't need to.

7 There's actually six pages that show the various  
8 components of the life care plan. Those are exhibits  
9 F-1 through F-6.

10 What I first do is identify the original value.  
11 Then in this column, for like the gastroenterologist, I  
12 will apply a growth rate. And each year it grows  
13 approximately 3 percent. I can't see the figure, but  
14 roughly 3 percent is the estimated growth for each  
15 year.

16 And then over here in this column you'll see the  
17 investment rate. And that's the rate we talked about  
18 earlier that's used to identify the amount of money  
19 that needs to be invested today. Using the investment  
20 rate, we'll calculate what's called the discount  
21 factor. And that's just a real simple formula. Then  
22 the discount factor is multiplied by the total of all  
23 of the components of the life care plan to give us the  
24 value of those in that particular year.

1 Did I just do that?

2 MR. IVEY: No.

3 MR. DURNEY: It's magic.

4 THE WITNESS: Yes. So there's the discount  
5 factors. And the discount factor multiplied by the  
6 value for that particular year gives us the total value  
7 for the present value of the components for that  
8 particular year.

9 Then these are all added together down here at the  
10 bottom.

11 And then if you can go to the top left of that one.  
12 All these bottom numbers --

13 MR. IVEY: Top left of --

14 THE WITNESS: Top left of F-1. There we go.

15 All the bottom numbers from the various exhibits  
16 are summarized right here giving us a total right there  
17 of -- I believe that's 9,435,000.

18 BY MR. DURNEY:

19 Q All right. Go ahead and sit back down and  
20 we'll -- our resolution isn't very good -- we'll talk  
21 about these numbers. Let's leave it up.

22 So if I can recount, these numbers for the various  
23 elements of Ms. Hyland's life care plan, they -- you  
24 have -- you have determined by calculating present

1 value a sum of money, which if prudently invested  
2 today, will result in the amount of money needed to pay  
3 for the medical expenses that are required in the  
4 future?

5 A That is correct, yes.

6 Q Reasoning that it's really unfair to give him  
7 all the money today, because if he invested it today,  
8 he would ultimately have more money than is necessary  
9 to pay for the medical expenses, assuming he lives to  
10 the predicted life expectancy?

11 A Yes. It would be a windfall in essence.

12 Q Okay. Now, we talked -- I met with you this  
13 afternoon and we went over this a little bit. There's  
14 some mistakes in here, isn't there?

15 A Yes. Yes.

16 Q I don't know if we call them mistakes, but  
17 there's some things you would like to change?

18 A Well, yes, there's a couple things. I don't  
19 know --

20 MR. McBRIDE: Your Honor, can we approach, please?

21 THE COURT: You may.

22 (A discussion was held off the record  
23 between the Court and counsel.)

24 /////

1 BY MR. DURNEY:

2 Q That was an inartful question.

3 A Well, I never make mistakes, and so --

4 Q As I understand it, there is some modifications  
5 to this that actually reduce the number; is that  
6 correct?

7 A That is correct.

8 Q Let's talk about that. Explain it.

9 A Sure. The -- one of the components of the life  
10 care plan is a handicapped -- or a handicapped-equipped  
11 van. And when I initially made the calculations, it  
12 was not clear to me from the report of Ms. Hyland  
13 whether that was an amount over and above the cost of a  
14 car, which they would have already purchased, or if it  
15 was the total cost.

16 So what I have done -- I've since spoke to Carol,  
17 MS. Hyland, and determined that that was the total  
18 cost, and so I deducted from that roughly the average  
19 cost of a passenger vehicle brand new at \$34,000. And  
20 so because I had included the full price, it overstated  
21 the value by actually about \$135,000. I had mentioned  
22 earlier it was 105-. It's actually 135,000. So the  
23 number that you see here needs to be reduced by that  
24 amount.

1 Q This 9 million and -- I know it's difficult to  
2 read.

3 A Yes.

4 Q So the exhibit itself will tell us that the  
5 jury will have. So we need to deduct 135,000 from it.  
6 Is there any other modification that would inure to the  
7 benefit of the defendant?

8 A Yes. Since -- when I first calculated this, it  
9 was April 8th of 2015. The discount rates have changed  
10 a little bit. As a result of the change in the  
11 discount rates -- the discount rates have actually gone  
12 up a slight amount. And they make about a 2 percent  
13 difference, which comes to in this case approximately  
14 \$225,000. And so this figure, the total figure, needs  
15 to be reduced by that amount as well.

16 Q So we've reduced the total amount by 135- to  
17 account for the fair assumption that Ms. McCrosky ought  
18 to buy her own -- or could have purchased her own car  
19 had Lyam been born able-bodied?

20 A Yes.

21 Q And the report, therefore, only includes the  
22 modifications to a vehicle self purchased?

23 A Yes.

24 Q And the maintenance --



1 A Well, it's the difference between the cost of  
2 the fully equipped van and a passenger vehicle.

3 Q Understood.

4 And then the \$225,000 deduction -- these are two  
5 separate distinct deductions?

6 A Yes.

7 Q The \$225,000 deduction is because over the past  
8 year since you've prepared your report the discount  
9 rates have gone --

10 A They've increased. They've increased a little  
11 bit.

12 Q Interest rates, is that impacted at all?

13 A Well, that's what I mean. The interest rates  
14 are the discount rates. The interest rate or discount  
15 rate -- we use them interchangeably -- they have  
16 increased slightly. If you have a higher interest rate  
17 or a higher discount rate, then you earn more interest  
18 on the funds over time, so you don't need to invest as  
19 much today, which is why the number goes down.

20 Q Understood.

21 All right. And so do you have -- you have a  
22 document directly in front of you. You've got Exhibit  
23 F-1, F-2, F-3, F-4, F-5 and F-6. You've explained F-1.  
24 In brief terms explain each of the five exhibits.

1       A    Sure. And it's very easy. If you understand  
2 Exhibit F-1, you understand Exhibits F-2 through F-6.  
3 They're the exact same format. The only difference is  
4 at the top of each exhibit are the other components of  
5 the life care plan. That's the only difference. It's  
6 the exact same format, exact same type of calculations.

7       Q    All right. Fine.

8       I asked you to do one other thing, too, in addition  
9 to reducing the life care plan of Ms. Hyland to present  
10 value; and that is, to evaluate the loss of earnings  
11 and benefits that Lyam would have reasonably expected  
12 to earn had he been born able-bodied.

13      A    Yes.

14      Q    Did you do that?

15      A    I did.

16      Q    Tell us about your methodology for that.

17      A    Sure. Working with Ms. Hyland, she opined in  
18 discussions with me that she felt it was reasonable  
19 that Lyam could be expected to earn from 9 to \$10 an  
20 hour plus wage growth over time. And so utilizing that  
21 figure and then the same sort of discount rates and  
22 then a wage growth rate, I estimated the present value  
23 of all of his future earnings. In other words, I --  
24 and it's very similar to the life care plan. I

1 estimated the amount of money that needed to be  
2 invested today that will provide the annual earnings  
3 and benefits that he would have received when they're  
4 needed through an estimated retirement age of about 63.

5 Q And you commenced your calculation at what age?  
6 You assumed that he would go to work at what age?

7 A Nineteen I believe it was.

8 Q And so the methodology used, the same as the  
9 methodology used in calculating the present value of  
10 the life care plan?

11 A Virtually. The discounting is exactly the  
12 same. The growth rates are different, of course. We  
13 use a growth rate that is meant to estimate -- that  
14 includes inflation, but it also includes increased  
15 amount of pay as Lyam would have continued to get  
16 better at his job. Generally, as we stick with a job,  
17 we get better at it and we merit additional raises and  
18 more income. And using that growth rate, I've tried to  
19 account for that.

20 Q And you indicated that you started at an  
21 assumed wage of 9 to \$10 an hour?

22 A I used actually \$9.50 an hour.

23 Q And is that based upon studies, government  
24 studies, and others, the wage that one with a high

1 school education can expect to make?

2 A It's based on Ms. Hyland's testimony, but it is  
3 very, very close to what we would find in various  
4 governmental tables. The PINC-04 tables, for example,  
5 show us that the annual earnings are just about the  
6 same.

7 Q So it essentially is dependent upon scientific  
8 statistical analysis, but conceivably if Lyam had not  
9 gone on to get a high school education, he could have  
10 earned less?

11 A Sure.

12 Q Or if Lyam had gone on to get a college  
13 education, you would have expected him to earn more?

14 A Certainly.

15 Q All right. So based on the assumptions that he  
16 got -- that he earns -- that he begins at \$9.50 an  
17 hour, the approximate amount that someone with a  
18 college -- or, excuse me -- high school education  
19 presently has, and assuming that he began work at 19  
20 and worked until the age of 63, what would the -- what  
21 is the present value of the loss of earnings and  
22 benefits?

23 A I don't have the figure. I thought it might be  
24 part of this exhibit. Let me see if I can find it here

1 real quick. That comes to \$1,485,044.

2 Q \$485,000?

3 A \$1,485.044.

4 Q Again, present value?

5 A That's correct, yes.

6 MR. DURNEY: I believe that's all I have, Your  
7 Honor. Thank you very much.

8 THE COURT: Cross.

9 MR. McBRIDE: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. McBRIDE:

12 Q Mr. Kirkendall, would you agree with me that no  
13 matter what methodology is used that the data -- that  
14 your report, your analysis, is only as good as the  
15 information you receive; correct?

16 A Yes, my analysis is only as good as the  
17 information that's included in it.

18 Q In fact, you have to rely on Ms. Hyland and  
19 others in order to come to those opinions and  
20 conclusions; correct?

21 A Yes, that's correct.

22 Q Okay. Now, you were contacted on this case  
23 originally by Mr. Durney in March of 2015. Do you  
24 recall that?

1 A I believe that's accurate.

2 Q Okay. Did you also bring your complete file  
3 with you?

4 A Today? Here?

5 Q Today.

6 A Yes. Well, I -- I brought my file. I don't  
7 know if I have everything in it.

8 Q Did you bring your emails and the rest of that  
9 material that was produced at your deposition?

10 A I can look and see.

11 Q Okay. We'll get to that in a second.

12 Do you recall in this case being referred to  
13 Mr. Durney's office by Ed Howden?

14 A I believe that's right. I recalled that as you  
15 mentioned it.

16 Q Okay. And, in fact, that was in approximately  
17 March of 2015? Do you recall that?

18 A I think that's accurate.

19 Q Okay. After that referral do you remember  
20 sending Mr. Howden a thank you note and telling him  
21 that "I greatly appreciate -- I just wanted to let you  
22 know how much I appreciate the referrals you've been  
23 sending my way. I greatly appreciate each and every  
24 one. I will continue to refer you out as often as I

1 have the opportunity to do so"? Do you remember saying  
2 that?

3 A Yes.

4 Q And Mr. Howden, you understand he's no longer  
5 acting as an expert in this case; correct?

6 A That is my understanding, yes.

7 Q But originally you had relied on information  
8 that Mr. Howden had prepared in the formulation of some  
9 of your reports; correct?

10 A Yes.

11 Q And, in fact, Mr. Howden provided you with  
12 rough drafts of his reports to consider in  
13 evaluating -- in coming to the opinions that you have  
14 here today; correct?

15 A I don't recall if he provided them or if  
16 retaining counsel provided them, but I did receive  
17 them.

18 Q All right. And Mr. Durney also provided you  
19 with Ms. Hyland's report; right?

20 A Yes.

21 Q And you reviewed that?

22 A Yes.

23 Q And you considered all the information -- you  
24 relied on that information and assumed that that was

1 all correct?

2 A Yes.

3 Q True?

4 You were never provided with any of the reports  
5 from defendant's experts -- true? -- the life care  
6 planner, Ms. White, or the economist, Mr. Sims, before  
7 your deposition; isn't that right?

8 A I believe that's correct.

9 Q And when you were provided with Ms. Hyland's  
10 report initially, Ms. Hyland never advised you that she  
11 thought that Tawni McCrosky would be entitled to any  
12 attendant care; true?

13 A I'm sorry. Did you say in her report or --

14 Q At any point in time when she provided the  
15 report to you -- you had an opportunity to speak to her  
16 before you prepared your reports; true?

17 A I did speak to her. I don't know exactly when,  
18 but, yes, I certainly spoke with her.

19 Q And she never mentioned anything about adding  
20 any sort of amount for attendant care for Ms. McCrosky;  
21 true?

22 A Attendant care for Ms. McCrosky meaning  
23 Ms. McCrosky needed care?

24 Q No, attendant care for Lyam that Ms. McCrosky



1 might be entitled to.

2 A Oh, compensation to Ms. McCrosky. I  
3 understand. We did have a discussion concerning that  
4 at one point, yes.

5 Q But not initially?

6 A I don't recall. I don't think so.

7 Q And not at the time you prepared your initial  
8 report; true?

9 A I'll take your word for it. I don't recall. I  
10 don't believe so, but I don't know for sure.

11 Q Now, you did do reports in this matter, and you  
12 did separate reports for Tawni McCrosky as well as for  
13 Lyam McCrosky; right?

14 A Yes.

15 Q And I heard you say that you don't make  
16 mistakes. I know that was facetious. We all make  
17 mistakes; true?

18 A Oh, yes.

19 Q However, in the reports that you had and you  
20 were prepared -- and you had prepared in this case,  
21 there was even some mistakes you realized at the time  
22 of your deposition in this matter; true?

23 A Yes, that's right.

24 Q Okay. And, in fact, some of those calculations

1 that you came up with in your reports, Mr. Durney  
2 during the deposition asked you to recalculate those  
3 figures and come up with a different number. Do you  
4 remember that?

5 A Yes. With regard to Tawni, yes.

6 Q And that number increased, didn't it?

7 A I don't recall. I haven't looked at those  
8 reports in detail for quite sometime.

9 Q The care that Lyam receives -- or at least it's  
10 identified in Ms. Hyland's report -- and I think it was  
11 on the exhibit that you just -- we were just looking  
12 at. The attendant care, do you recall that -- do you  
13 have that in front of you?

14 A Are you speaking of Exhibit F-1?

15 Q Yes, Exhibit F-1.

16 A I have that.

17 Q In that report -- or on that report, you see  
18 the calculations for attendant care that are -- I'm  
19 sorry. F-6.

20 A Yes, I see that.

21 Q The attendant care that's listed there, were  
22 those numbers that you received from Ms. Hyland's  
23 report?

24 A Yes.

1 Q And do you know at what hourly rate she figured  
2 that out?

3 A I don't recall. I could look in her report,  
4 but I don't know the rate.

5 Q All right. And do you recall Ms. Hyland  
6 suggesting that Ms. McCrosky be compensated at a  
7 particular number?

8 A Yes, at one point we did discuss that.

9 Q Okay. Do you recall if it was the same amount  
10 as listed here?

11 A I don't recall the amount, so I don't. I don't  
12 know.

13 Q Okay. And the attendant care that's listed  
14 here, those figures -- again, you did not ask  
15 Ms. Hyland what she based that information on; correct?

16 A That's correct.

17 Q Did you consider over what period of time that  
18 might be required?

19 A Over what period of time the attendant care  
20 would be required?

21 Q Right.

22 A Well, she states in the report, and I  
23 calculated it over that time period.

24 Q Okay. And you also were shown the life

1 expectancy report from Dr. Shavelle; true?

2 A Yes. Can I back up? My last question -- my  
3 response to your last question, she told me -- or gave  
4 the amount, and then using the life expectancy  
5 opinions, I calculated that through a certain date.

6 Q All right. Now, in your preliminary report of  
7 your opinions that you prepared for Ms. McCrosky --  
8 excuse me -- for Lyam in this case, that was April 8th,  
9 2015; right?

10 A Yes.

11 Q And in that report, preliminary report, you  
12 relied on Mr. Howden's vocational report; true?

13 A Yes.

14 Q And there were two of them; right?

15 A I don't recall, but I did rely on his opinions.

16 Q One for Lyam; one for Tawni?

17 A Yes.

18 Q And you were also provided with a life  
19 expectancy report from -- actually you don't identify  
20 it here at this time -- from Dr. Shavelle? At some  
21 point you were provided with his report?

22 A Yes.

23 Q All right. Do you recall in the  
24 April 8th report what life expectancy -- whose opinion

1 you were relying on for the life expectancy that you  
2 arrived at in your first report of April 8, 2015?

3 A I believe it was Dr. Shavelle.

4 Q Okay. You don't have it listed as among the  
5 documents you've reviewed.

6 MR. McBRIDE: Your Honor, may I approach?

7 THE COURT: You may.

8 BY MR. McBRIDE:

9 Q Is this a copy of your report.

10 A Yes.

11 Q Okay. And if you could refer to that. You can  
12 look at my copy. I don't see Dr. Shavelle's report  
13 listed here.

14 A Could you go to the next page?

15 Q Sure.

16 A There's more listed up there.  
17 Right, it's not listed there.

18 Q Now, subsequently --

19 A Could I point something out?

20 Q Sure.

21 A It is listed on Exhibit B of my reports.

22 Q Exhibit B of your report?

23 A Exhibit B of my report, the exhibit attached to  
24 that, it is listed in Footnote 2.

1 Q All right. And so then subsequently you were  
2 asked to prepare another report with regard to Lyam;  
3 true?

4 A Yes.

5 Q And that's the one that you came up with the  
6 day before your deposition on August 13th, 2015; right?

7 A Yes.

8 Q And in that -- in that report -- do you have  
9 that one in front of you?

10 A I can get it, I think. Is it one of the  
11 exhibits here?

12 Q It is actually -- do you have it in your file?

13 A I may. Let me look.

14 Q And if it will save time, I can show --

15 A I have it.

16 Q Okay. You have it. Okay. Now, you prepared a  
17 supplemental report of your opinions on August 13,  
18 2015, the day before your deposition; right?

19 A Yes.

20 Q We've established that. And this was for Lyam.  
21 And in this time you also considered the life care plan  
22 report of Dr. Rodriguez; true?

23 A That's correct.

24 Q And that was something that Mr. Durney told you

1 to consider in preparing this updated report; right?

2 A Yes.

3 Q Okay. And so in that report -- and in the  
4 report -- a minute ago I thought you had said that  
5 Lyam's -- you had calculated Lyam's lost earnings --  
6 earnings and benefits, present value of earnings and  
7 benefits, to be \$1.4 million, approximately.

8 A Yes.

9 Q Do you remember saying that?

10 A Yes.

11 Q Okay.

12 MR. McBRIDE: Your Honor, may I approach again?

13 THE COURT: You may.

14 BY MR. McBRIDE:

15 Q Now, in this version of your report -- and I'll  
16 show it to you -- August 13, 2015, you list the present  
17 value of Lyam's earnings and benefits at 1,044,468;  
18 correct?

19 A Yes.

20 Q Okay. So that's different than what you just  
21 testified to?

22 A It is.

23 Q And that would have been a mistake; right?

24 A Just a minute. I'm looking. Give me just a

1 moment.

2 Q Sure.

3 A The reason it's 1,044,000 is because the life  
4 expectancy utilized in that calculation is to 54 and a  
5 half years as opposed to 63 years in the first  
6 calculation.

7 Q Okay. But you just testified, did you not,  
8 with regard to Mr. Durney's question that the present  
9 value of Lyam's earnings and benefits was \$1.4 million;  
10 true?

11 A That's right. That's with a life expectancy  
12 of -- or, excuse me -- a worklife expectancy to age 63.  
13 Forgive me. I just said life expectancy a moment ago,  
14 and I meant worklife expectancy.

15 Q Okay. And then in addition, the report of  
16 Dr. Rodriguez that was provided to you -- you  
17 understand that Dr. Rodriguez puts a life expectancy of  
18 this child of 20 years; isn't that right?

19 A Yes.

20 Q That would have the effect of increasing your  
21 original projections as to what future economic costs  
22 or amounts of his earnings as well as potential medical  
23 expenses into the future would be; true?

24 A No. No. The life expectancy has nothing to do



1 the lost earnings and benefits. It only deals with the  
2 life care plan itself.

3 Q So it does have the effect of increasing the  
4 life care plan that Ms. Hyland --

5 A Certainly.

6 Q -- that Ms. Hyland had prepared?

7 A Yes, absolutely.

8 Q And, in fact, Mr. Durney had asked you to  
9 consider Dr. Rodriguez's report as well; right?

10 A That's correct.

11 Q You didn't take an average of Dr. Rodriguez's  
12 report and Dr. Shavelle's report, did you?

13 A No.

14 Q The figures that you arrive at, the -- you  
15 never once considered Dr. Cokely's opinion as to what  
16 Lyam's expected life -- what his life expectancy would  
17 be; true?

18 A I did not make calculations based on his  
19 opinions.

20 Q Okay. And it's a Ms. Cokely. It's Dr. Cokely.

21 A I'm sorry. Ms.

22 Q And so if -- if hypothetically you would use  
23 Dr. Cokely's opinion as to the life expectancy for Lyam  
24 of five to seven years, that would significantly reduce

1 the life care plan, the amount that you calculated for  
2 the value of the life care plan; correct?

3 A Oh, yes, certainly.

4 Q By almost a third; true?

5 A By almost a third, yes, depending on whether  
6 it's the five or seven, yes.

7 Q And you were told not to consider any other  
8 life care plans or any other information other than  
9 what Mr. Durney wanted you to see; correct?

10 A No, I was never told that.

11 Q Well, you were provided only what Mr. Durney  
12 provided you; true?

13 A That's correct, but I was never told not to  
14 consider anything else.

15 Q Well, you never asked for anything else, did  
16 you?

17 A No.

18 Q Okay. And you were never given Dr. Cokely's  
19 report or her opinions; right?

20 A No, I don't believe so.

21 Q You only input the numbers that Mr. Durney and  
22 Mr. Durney's experts, Ms. Hyland and Dr. Capell,  
23 provide you with, and then you calculate what those  
24 numbers should be?

1       A    I most certainly relied upon Ms. Hyland and the  
2 medical experts concerning the life expectancies in the  
3 calculations that I performed, yes.

4       Q    All right.  And sometimes those calculations  
5 would be in error, as we've seen; right?

6       A    I make errors once in a while, yes.

7       Q    And did Mr. Durney ask you to make any  
8 additional changes other than the ones he identified  
9 here today, the reductions that you talked about  
10 earlier?

11       A    Not that I recall.

12       Q    Did he ask you to consider making any reduction  
13 based on the testimony of Dr. Shavelle who testified  
14 here this morning as to what he believes Lyam's true  
15 life care plan should be?

16       A    We didn't discuss Dr. Shavelle's testimony, so  
17 no.

18       Q    You also did not consider a scenario where any  
19 of Lyam's future medical expenses would be covered by  
20 Medicaid; true?

21       A    That's correct, I did not.

22       Q    Or possibly any other additional benefits --  
23 true? -- that he might be entitled to?  You didn't  
24 consider any additional benefits?

1 A No. I never do. That's --

2 Q I'm sorry.

3 A Well, it's a collateral source. I never do  
4 consider those things.

5 Q All right. And were you instructed by  
6 Mr. Durney in this case specifically not to consider  
7 that?

8 A We didn't discuss any of those matters, so  
9 there would be no -- could be no such instruction.

10 Q And so in calculating Lyam's lost earnings that  
11 you identified earlier and his earning capacity, you  
12 assumed the worklife opinions of Mr. Howden; correct?

13 A Initially, yes. Yes, in my first report,  
14 that's correct.

15 Q All right. Well, you didn't consider any other  
16 experts' opinions in that respect, did you?

17 A No.

18 Q All right. And you did that without any  
19 question or adjustment to those figures that Mr. Howden  
20 provided you; true?

21 A That's correct. I am not a life expectancy  
22 expert. I do not have opinions in that regard.

23 Q And you're not a vocational rehab expert?

24 A I am not.

1 Q And it's true that you didn't take into  
2 consideration the possibility that Lyam would -- if he  
3 had been without this injury that he would have had  
4 periods of unemployment possibly; true?

5 A Are you asking me did I consider that?

6 Q Did you consider that?

7 A Well, that's a component of the worklife  
8 expectancy figure. If we use the typical or the common  
9 increment-decrement models, those certainly do include  
10 that. And I did do so in my second report.

11 In the first report I relied upon Mr. Howden's  
12 opinion. And to the extent he considered that in his  
13 worklife expectancy, then it's reflected in my report.  
14 To the extent he did not, then it's not reflected in my  
15 report.

16 Q Okay. And the second report you're talking  
17 about, that's the one that still has the error with  
18 regard to Lyam's earnings and benefits that we just  
19 discussed?

20 A Well, it's not an error. I explained that is  
21 the result of a different worklife expectancy. In  
22 fact, it is the worklife expectancy from the  
23 increment-decrement tables that I just mentioned to  
24 you. It's not an error.

1 Q All right. But it's different -- you would  
2 agree it's a different number?

3 A Sure. It's a much shorter worklife expectancy.

4 Q You didn't consider a worklife statistic;  
5 correct?

6 A I'm sorry?

7 Q Did you consider a worklife statistic?

8 A Well, that's what I just was talking about. I  
9 guess I wasn't clear. This second report does indeed  
10 consider a worklife expectancy statistic. It comes  
11 from the increment-decrement tables. Those are the  
12 source for the worklife expectancy statistics.

13 Q The opinions that -- with regard to Lyam's  
14 future medical costs, again, all of those opinions are  
15 based on solely the information that you gleaned from  
16 Ms. Hyland report; true?

17 A I'm sorry, counsel. -- Could you say that again?

18 Q Sure. The future medical needs and the  
19 calculations that you arrived at to obtain the future  
20 medical needs for Lyam, the 9-million-dollar figure  
21 that you arrived at, that would be information that you  
22 obtained from Ms. Hyland in her report; true?

23 A In part that's true. The components of the  
24 life care plan themselves and the amounts for those

1 components and the duration or the timing of those I  
2 obtained from Ms. Hyland. The growth rates and the  
3 discount rates, those I obtained myself.

4 Q That's part of your job?

5 A That's correct.

6 Q All right. And, again, you don't make any  
7 independent effort to verify the information that  
8 Ms. Hyland provides you; right?

9 A No, I do not.

10 Q And you don't contact any of the doctors or do  
11 any sort of investigation yourself?

12 A Way beyond the scope of my expertise as a  
13 forensic economist.

14 Q And if you would consider -- if there's a  
15 difference of opinion in terms of what needs that Lyam  
16 might have in the future, say, if they -- another  
17 expert were to provide you with an opinion that those  
18 were not needed in the future, and that changed your --  
19 changed Ms. Hyland's report, you would agree that your  
20 report would also reflect those changes or need to  
21 reflect those changes?

22 A If I'm asked to include those changes, then it  
23 certainly would reflect those changes.

24 Q The discount rate just for a second. You

1 indicated that that had increased since you prepared  
2 your report; right?

3 A Yes.

4 Q And it's true that we have no real way to  
5 determine if the discount rate will increase in the  
6 future; correct?

7 A That's correct, but we don't need to.

8 Q But it's possible the discount rate may  
9 increase again in the future; correct?

10 A Yeah, but that's entirely irrelevant to my  
11 calculations. I don't use a historical rate. I use a  
12 current rate. I use a rate that is -- actually as of  
13 the date of the calculation is the exact rate that  
14 those funds can be invested in. I'm not looking at the  
15 past and estimating what the future is going to be  
16 based on the past. When I use the treasury STRIPS, I'm  
17 using an actual rate. There is no need to estimate or  
18 guess what it might be in the future, because I already  
19 know. You have the exact rate. That's one of the  
20 benefits of using the treasury STRIPS. You don't have  
21 to estimate from past numbers.

22 Q Well, wouldn't you agree that it's more  
23 appropriate to use a historical rate when it comes to  
24 determining the discount rate to be applied as opposed



1 to what you did in this case?

2 A Oh, absolutely not. No, certainly not.

3 Q Now -- and, again, Doctor --

4 A Thank you.

5 Q Do you have a Ph.D.?

6 A I do not.

7 Q Mr. Howden --

8 A Kirkendall.

9 Q Mr. Kirkendall. Excuse me.

10 Mr. Kirkendall, the opinions that you have  
11 formulated -- again, just for clarification, the  
12 opinions you have formulated, you make no determination  
13 as to whether or not Ms. Hyland's report is accurate or  
14 the information that goes into it is accurate, right?

15 A That's correct.

16 Q That's all the questions I have. Thank you.

17 THE COURT: Mr. Durney, redirect.

18 MR. DURNEY: If it please the Court, I just have a  
19 few questions.

20 REDIRECT EXAMINATION

21 BY MR. DURNEY:

22 Q Mr. Kirkendall, Mr. McBride pointed out the  
23 evolution of opinions in this case and pointed out that  
24 there were some errors. You've expressed the opinion

1 in this courtroom that the loss of wages and benefits  
2 that Lyam McCrosky reasonably could have expected to  
3 earn if born able-bodied and worked from 19 to 64,  
4 reduced to present value, is the sum of \$1,485,044.  
5 Is there any error whatsoever in that opinion?

6 A You're correct, except the worklife expectancy  
7 is to age 63.

8 Q I'm sorry. I missed it by --

9 A If you include the 63, then that's correct,  
10 that's my opinion given those variables.

11 Q And that figure could go up if he worked beyond  
12 63, it could go down if he decided to retire at 53,  
13 et cetera?

14 A That's correct.

15 Q So this is the best you can do with the  
16 statistics and the information published by the  
17 government and others in reaching an opinion today as  
18 to what -- the most likely value of earnings and wages  
19 lost to Lyam?

20 A I believe it's a very reasonable methodology.  
21 I believe the figure is very reasonable.

22 Q Now, Mr. McBride makes an issue of the discount  
23 rate that you employed and suggests that, perhaps, we  
24 should use next year's discount rate or historical

1 rates. What do you think of that?

2 A Well, you get three economists in a room and  
3 they'll have six different opinions on this, but the  
4 method that I use is I identify the rate that somebody  
5 could invest money in today. For example, if Lyam is  
6 to earn \$40,000 by the time -- in his 30th year -- at  
7 age 30 he's to earn \$40,000, well, I can go to the Wall  
8 Street Journal and find out the return that can be  
9 expected on a 10-year treasury STRIP. And that might  
10 be 3 percent. And I know for a certainty that if I  
11 invest in a certain amount today at that interest rate,  
12 I know I will receive that rate of return into the  
13 future.

14 What's at issue here is a lot of economists will  
15 try and look at what the interest rates have been in  
16 the past and they'll take some sort of average and try  
17 and apply those in the future. And they're trying to  
18 estimate based on what's happened. And we know --  
19 we've all heard this -- past performance is no  
20 indication of future performance.

21 While that may be somewhat reasonable, there's a  
22 better method. We can find out exactly how much -- or  
23 exactly the rate of return on the date the funds are  
24 invested. And we know if we spend \$40,000 or \$30,000

1 on treasury STRIPS at 3 percent, we know for sure --  
2 unless the government defaults, we know for sure that  
3 those funds will be paid off when they mature in 10  
4 years. So I think it's much better to use the treasury  
5 STRIPS which are a current investment rate.

6 Q A current discount rate?

7 A Yes.

8 Q And then Mr. McBride pointed out that  
9 Dr. Rodriguez is of the opinion that Lyam will live an  
10 additional 20 years. In your Exhibit F you run the  
11 figures out to 15 additional years; correct?

12 A Yes.

13 Q So if we were to run the figures out an  
14 additional 20 years, as suggested by Dr. Rodriguez,  
15 roughly how would we do it?

16 A Roughly, without sitting down with a calculator  
17 and my computer, I would simply assume an average. So  
18 I would take the 900 and -- actually it's about  
19 9,200,000 after we make the deductions. I divide that  
20 by the 15 years that we have, and we come up with a  
21 figure of about 600,000 a year. And then we take -- if  
22 it goes from 15 years to 20 years, so we've got an  
23 additional five years at 600,000, so it would be an  
24 additional \$3 million or \$600,000 per year.

1       You could do the same -- if you think it's going to  
2 be 16 years, then you could add an additional 600-.

3       Q   All right. Mr. Kirkendall, thank you very  
4 much, sir.

5       A   Sure.

6       THE COURT: Recross.

7       MR. McBRIDE: Just a couple.

8                       RECROSS EXAMINATION

9 BY MR. McBRIDE:

10       Q   Mr. Kirkendall, you said that if you got three  
11 economists in a room they would all have different  
12 opinions; right?

13       A   Oh, yes.

14       Q   And there's different ways to calculate the  
15 numbers and different methodologies? You would agree  
16 with that; right?

17       A   Certainly.

18       Q   And you're a CPA; is that correct?

19       A   I am.

20       Q   You're not an economist; true?

21       A   I am a forensic economist.

22       Q   But you don't have any additional training as  
23 an economist? You don't have a degree in economics;  
24 true?

1       A   Well, it depends on how you define an economist  
2 as to whether I'm an economist. Ph.D.s in economics  
3 often like to exclude their competitors, I guess, who  
4 don't have a degree in economics, but the  
5 methodologies, the data that I use, that I utilize, are  
6 matters that are taught in accounting, finance,  
7 economics. And economics certainly doesn't have the  
8 corner -- there's no corner of the market, so to speak,  
9 on this type of work.

10       Q   But you would agree that there's different  
11 opinions? Different economists, based on the  
12 information that they are provided and the information  
13 that they consider, can come up with different numbers;  
14 true?

15       A   Oh, absolutely.

16       Q   And you hadn't seen any of the numbers of any  
17 of the experts in this case before your deposition;  
18 true?

19       A   That's correct.

20       Q   Okay. And so you aren't able to offer any  
21 criticisms or concerns about any of their calculations  
22 or adjustments that they made in their report, because  
23 you haven't seen those?

24       A   Yes. I know nothing about their reports.

1 Q Okay. Thank you. That's all I have.

2 THE COURT: Counsel, can you approach. I just want  
3 to ask one quick thing.

4 (A discussion was held off the record  
5 between the Court and counsel.)

6 THE COURT: Just for the record, the Court asked  
7 the parties basically to consider maybe asking one  
8 additional question. Mr. Durney agreed to do that.

9 MR. DURNEY: Thank you, Your Honor.

10 FURTHER REDIRECT EXAMINATION

11 BY MR. DURNEY:

12 Q Mr. Kirkendall, you have never given -- been  
13 given any information whatsoever to make an analysis of  
14 liability or whether or not anybody is at fault in this  
15 case, have you?

16 A Oh, no.

17 Q That's not your job?

18 A Absolutely not.

19 Q And nothing you've said has anything to do or  
20 is predicated in any way on the belief that somebody  
21 did anything wrong?

22 A No. I have no opinion in that regard.

23 MR. DURNEY: Is that good enough?

24 THE COURT: That's fine. Thank you.

1 MR. McBRIDE: Your Honor --

2 THE COURT: Well, I'm going to leave it at that,  
3 Mr. McBride. I think Mr. Durney asked exactly what the  
4 Court asked in respect to this matter.

5 You can step down.

6 THE WITNESS: Thank you.

7 THE COURT: Ladies and gentlemen of the jury, at  
8 this time we're going to take our evening recess at  
9 this time rather than start back in on the video for  
10 you in respect to that.

11 So during this, you're admonished not to converse  
12 among yourselves or with anyone else on any subject  
13 connected with this trial; or read, watch, or listen to  
14 any report of or commentary on the trial by any person  
15 connected with the trial or by any medium of  
16 information, including, without limitation, newspapers,  
17 television, and radio. You are further admonished not  
18 to form or express any opinion on any subject connected  
19 with this trial until the case is finally submitted to  
20 you. You may not do research about any issues involved  
21 in the case. You may not blog, tweet, or use the  
22 internet to obtain or share information.

23 You're directed to return to the jury deliberation  
24 room for further proceedings. Tomorrow if you'll be



1 here at quarter to 9:00, 8:45. Thank you.

2 (The following proceedings were held  
3 outside the presence of the jury.)

4 THE COURT: The record reflect we're outside the  
5 presence of the jury at this time. I'll come back. I  
6 want to talk about a couple of -- one, I told you to be  
7 here at 8:30 tomorrow. I think we can do it Thursday  
8 morning rather. The Court has looked at some different  
9 things and that, so I think 8:30 tomorrow is kind of  
10 presupposing some stuff.

11 Also, I don't know -- I would like to know where  
12 you are in your schedule, Mr. Durney, in regards to  
13 that. It appears to me we've got about -- I've looked  
14 through this -- half hour, 45 minutes to an hour, give  
15 or take, maybe --

16 MR. IVEY: We suppressed several pages, so I think  
17 we're probably 25, 30 minutes.

18 THE COURT: Okay. That's good. And you might go  
19 through it and see if there's anything else we can  
20 press down on that. Again, I don't tell people how to  
21 try their case or anything, that's not my prerogative,  
22 but I do think that they've gotten a little bit lost in  
23 this.

24 MR. DURNEY: No question.

1 THE COURT: So my question, Mr. Durney, is the  
2 schedule tomorrow. I don't know where you are.  
3 Obviously I think we have one deposition to read. Is  
4 that correct?

5 MR. DURNEY: It is correct, Your Honor. But we're  
6 going to read that deposition tonight. And in light of  
7 the Court's rulings and in light of what has already  
8 been said from the witness stand, we may choose not to  
9 read it. But we do have one witness who will last no  
10 longer than 15 or 20 minutes. And, of course --

11 THE COURT: So that --

12 MR. DURNEY: -- the balance of Dr. Capell's  
13 deposition. And then we will rest. I would like an  
14 opportunity to review the exhibits to see what had been  
15 admitted before we close.

16 THE COURT: And we'll allow you some time to do  
17 that in respect to that. I guess the reason I ask that  
18 is so the defense can prepare and know where they are  
19 with their witnesses tomorrow.

20 MR. KELLY: Your Honor, I can share with you what  
21 we anticipate. And we shared this with Mr. Durney  
22 yesterday. We anticipate Dr. Hayes will be here  
23 tomorrow afternoon. I anticipate that Nurse Koontz  
24 would be available tomorrow afternoon.

1 Thursday, I believe we have our expert life care  
2 planner and economist. I don't know how long that's  
3 going to take. We also have Nurse Carla Sells who  
4 should be here Thursday morning.

5 Friday we have an expert, nursing expert. And we  
6 have Dr. Cokely who has been referred to today, a  
7 pediatric neurologist, for Friday.

8 And on Monday we have scheduled Dr. Kessler, an  
9 obstetrician. And barring any unforeseen  
10 circumstances, we would expect to rest Monday, perhaps  
11 Monday morning.

12 THE COURT: Remember, Monday is our law and motion  
13 calendar, so we don't go until 1:30. I guess my  
14 question -- are there any other witnesses that could  
15 fill in tomorrow a little bit? I don't know how -- it  
16 seems to me like tomorrow is going to be pretty light  
17 in respect to that. If we're looking at an hour in  
18 respect to that and Dr. Hayes -- I don't know how long  
19 she's going to take in respect to that. So think about  
20 it in respect to that. There's a possibility we have  
21 some time tomorrow to fill in. I've been tough on the  
22 plaintiff; I'll be as equally tough on the defense.

23 MR. KELLY: The witnesses I just mentioned are all  
24 the witnesses we intend to call.

1 THE COURT: Okay. Well, see if you can't maybe  
2 move Dr. Hayes up a little bit or see where we are in  
3 respect to that just so we see where we are.

4 Additionally, I did put on the record -- at the  
5 bench conference -- the Court generally -- very  
6 seldom -- or I do ask questions once in a while. I  
7 felt there was a question I wanted to ask, but I didn't  
8 want to prejudice anybody by the Court asking it. I  
9 felt that it was a question in respect to none of this  
10 testimony really went to liability per se. I thought  
11 it was important to clarify that based on the nature of  
12 what the testimony was in respect to that.

13 I know it would have come out in instructions and  
14 that and everything, but I also felt that what was  
15 going on in respect to the nature of it -- in this  
16 course I felt that I would like to have asked that  
17 question. Mr. Durney agreed that he would ask it,  
18 reluctantly, I would put on the record, to do so. And  
19 Mr. Durney I would note that for you.

20 MR. DURNEY: I appreciate that, Your Honor. It was  
21 reluctantly, but you've stated it correctly.

22 THE COURT: Okay. Thank you.

23 MR. KELLY: Thank you very much, Your Honor.

24 THE COURT: Quarter to 9:00 tomorrow. Thank you.

1 Court will be in recess.

2 (The proceedings were adjourned at 4:45 p.m.)

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1 STATE OF NEVADA     )  
                              ) ss.  
2 COUNTY OF WASHOE    )

3  
4       I, LORI URMSTON, Certified Court Reporter, in and  
5 for the State of Nevada, do hereby certify:

6       That the foregoing proceedings were taken by me  
7 at the time and place therein set forth; that the  
8 proceedings were recorded stenographically by me and  
9 thereafter transcribed via computer under my  
10 supervision; that the foregoing is a full, true and  
11 correct transcription of the proceedings to the best  
12 of my knowledge, skill and ability.

13       I further certify that I am not a relative nor an  
14 employee of any attorney or any of the parties, nor am  
15 I financially or otherwise interested in this action.

16       I declare under penalty of perjury under the laws  
17 of the State of Nevada that the foregoing statements  
18 are true and correct.

19       DATED: At Reno, Nevada, this 9th day of  
20 May, 2016.

21  
22                                   LORI URMSTON, CCR #51

23                                   \_\_\_\_\_  
24                                   LORI URMSTON, CCR #51

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7 FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR CARSON CITY

9 HONORABLE JAMES T. RUSSELL, DISTRICT JUDGE

10 TAWNI McCROSKY, individually  
11 and as the natural parent of,  
12 LYAM McCROSKY, a minor,

13 Plaintiff,

Case No. 13 TRT 00028 1B

14 vs.

Dept. No. I

15 CARSON TAHOE REGIONAL MEDICAL  
16 CENTER, a Nevada business  
17 entity,

18 Defendant.  
19 \_\_\_\_\_/

20 TRANSCRIPT OF PROCEEDINGS

21 TRIAL - DAY 7

22 WEDNESDAY, MARCH 16, 2016

23 CARSON CITY, NEVADA

24 Reported by:

LORI URMSTON, CCR #51

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## I N D E X

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6 - Jane Doe Patient Records,  
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74 - Deposition of Jenny Glover 1414

75 - Unidentified document 1416

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1			
2	D-7 CTRMC - Jane Doe Fetal Monitor		
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4	D-57, page 7 - Photograph of bedside		
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6	D-58 - Diagram illustrating chain		
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1 CARSON CITY, NEVADA; WEDNESDAY, MARCH 16, 2016  
2 8:45 A.M.

3 --oOo--

4 (The following proceedings were held  
5 outside the presence of the jury.)

6 THE COURT: We're back on the record in respect to  
7 Case No. 13 TRT 00028. I just wanted to see if there's  
8 any issues we need to talk about in respect to this  
9 matter before the jury comes in. We're down two.  
10 We're waiting for two jurors anyways.

11 Mr. Durney, any issues?

12 MR. DURNEY: No. Mr. McBride and I have been  
13 chatting about how to shorten up Dr. Capell's  
14 deposition. And I think that there's just a few more  
15 tweaks that have to go into that effort and then we'll  
16 be ready with that, Your Honor.

17 THE COURT: Well, I'm sure -- don't take this  
18 wrong. I'm sure the jurors and the Court appreciates  
19 it. I know it's technical and I know you had to go  
20 through it, but it was tough on them. It was tough  
21 watching their faces.

22 MR. DURNEY: It was tough on all of us. The  
23 problem is it's foundational.

24 THE COURT: And I understand.

1 MR. McBRIDE: And they did hear some of that as  
2 well from Ms. Hyland, too, so I tried to do my best to  
3 take out a lot of the information that I covered with  
4 her too.

5 THE COURT: That's great.

6 MR. KELLY: Your Honor, there are a couple of  
7 issues that we want to bring up before the jury comes  
8 back. First, with respect to the -- this being  
9 condensed, Dr. Capell's testimony, we're also advised  
10 that plaintiff has elected not to read the deposition  
11 of Dr. Johnson. So in terms of scheduling witnesses,  
12 we're doing our best.

13 And what we have, I think, been able to accomplish  
14 is to have Dr. Hayes here earlier. She was originally  
15 going to be coming at 1:30. I think she can be here at  
16 10:15. So we're trying to get our witnesses lined up  
17 in light of this abbreviated plaintiff's case. But  
18 that having been said, we only -- today we only have  
19 Dr. Hayes and Nurse Koontz, so I'm not sure where  
20 that's going to leave us once we're done at the end of  
21 the day, but we wanted to give the Court some notice  
22 about that.

23 Number two, because Dr. Hayes is testifying, I just  
24 want to make sure that there's no question about the

1 amount of her settlement. The Court's already made a  
2 ruling on that, that we can get into the fact that she  
3 settled the case but not for the amount. I just want  
4 to make sure that's clear.

5 THE COURT: That is correct.

6 MR. DURNEY: Now, Your Honor, I -- I'm glad  
7 Mr. Kelly brought this up. I appreciate that the  
8 amount should not be considered and respect the Court's  
9 opinion on that. And you're absolutely right. But the  
10 fact of the settlement comes in; the fact that she was  
11 a defendant comes in. That's clear.

12 And during my opening there was an objection and it  
13 upset you and I was admonished. And I still don't  
14 quite understand that, because -- I think the word  
15 "responsibility" is what troubled everybody.

16 MR. KELLY: It was "obligation."

17 THE COURT: No, it was -- it was -- I have the  
18 exact quote. "Dr. Hayes has settled her obligation in  
19 this case."

20 MR. DURNEY: So that's the word.

21 THE COURT: That was what concerned me, what  
22 exactly did that mean and what exactly -- well, one,  
23 that's kind of an argument to some extent. But I  
24 just -- I'm not sure what that still means, Mr. Durney.

1 I'm still not. So that was the word, "obligation."

2 MR. DURNEY: Well, there's lots of synonyms and  
3 antonyms and lord knows what, but, I mean,  
4 "responsibility" is a word that I think is appropriate.

5 MR. KELLY: I just don't.

6 MR. DURNEY: Well, we just -- Mr. Kelly and I --  
7 well, colleagues disagree on a lot of things, but  
8 that's with respect to this case, but, I mean --

9 THE COURT: Well, again --

10 MR. DURNEY: That's exactly what it is.

11 THE COURT: That was an opening statement. And the  
12 Court's concern on that was exactly what that -- one,  
13 it's argument to some extent, but what exactly that  
14 meant from the standpoint -- a proof standpoint.  
15 Generally in opening statement you argue the facts, the  
16 facts in this case will show. So that was my concern,  
17 Mr. Durney. And that's where it goes.

18 Now, from a testimonial standpoint, we'll have to  
19 see where it goes and what comes out of that in respect  
20 to that, but, again, the motion in limine is pretty  
21 clear. You can talk about the fact that Dr. Hayes  
22 settled; you can talk about the fact that Dr. Hayes was  
23 a defendant in this matter. That was kind of what --  
24 that I ruled, and it was primarily -- it was your

1 Q All right. We'll come back to the gastrostomy  
2 tube a little later on in our discussion, but let's  
3 continue with your description of the young boy's  
4 disabilities.

5 A I say "obvious loosening of an early placed  
6 Nissen" -- that's N-i-s-s-e-n -- "fundoplication."

7 That's probably something I should draw also.

8 Q Hang on. I mean go right ahead, please.

9 A All right.

10 Q Hang on to our board this time. Yeah.

11 A Okay.

12 Q It kind of goes up.

13 A Ordinary the mouth goes down to the stomach.  
14 This is the child's nose. The oral cavity connects to  
15 a structure called the esophagus. And this esophagus  
16 goes into the stomach. The MIC-KEY tube goes directly  
17 into the stomach. But at the time of the surgery,  
18 Dr. Hulka did something else, and that's called  
19 fundoplication. That's just putting three words  
20 together. Well, two words. Fundoplication.

21 The fundus of the stomach is called this part.  
22 This is the fundus and this is the duodenum, the other  
23 end of the stomach. And the middle of it is called the  
24 pylorus.

1        Took a -- a part of -- the diaphragm goes right  
2 across here. And the esophagus penetrates the  
3 diaphragm. The diaphragm is a muscle that breathes.  
4 You can take some of the fibers of the diaphragm --  
5 there's other sources, but that's the classic way to do  
6 it. And I don't recall exactly how Dr. Hulka did it --  
7 and wrap them around here. And what that does is --  
8 plicate means -- it means tie off. It's basically  
9 partially -- it doesn't completely -- tying off the  
10 esophagus. So the esophagus, at least the far end of  
11 it, is much smaller. And as the diaphragm contracts,  
12 it gets even smaller. It tightens up.

13        But the effect of this is it prevents vomiting. He  
14 can't regurgitate, because when he starts to tighten  
15 up, the esophagus basically closes down here. And you  
16 can't force fluid back out. You can't get stomach  
17 content out. And that was because initially he was  
18 vomiting quite a bit, every time he was given food by  
19 mouth, and so Dr. Hulka decided "Let's fix this problem  
20 and this problem at the same time."

21        And she's in the same area, of course, with the  
22 surgical field. And a fundoplication is often done  
23 when a gastrostomy is done.

24        And I say "obvious loosening" because he is



1 throwing up nowadays which means that this is loosened  
2 and probably needs to be redone. The reason why you  
3 don't want a youngster like this to vomit is because an  
4 ordinary three-year-old, if they throw up, you know,  
5 they're greatly distressed about that and certainly  
6 aren't sleeping. It doesn't come out a little bit at a  
7 time. If it comes out a little bit at a time, it can  
8 go into the lungs and cause a pneumonia. And that's  
9 why you do the fundoplication.

10 Q All right. Please continue with our discussion  
11 about disability.

12 A No. 7, locomotion impairment. In other words,  
13 he's not walking. He has some head control which you'd  
14 expect in a youngster who is about three or four months  
15 old. Even two-months-old youngsters have some head  
16 control. But he doesn't -- if you set him up, he'll  
17 just fall right over. He doesn't get himself to the  
18 same position, he doesn't maintain sitting. And you  
19 would expect a youngster to get himself to the sitting  
20 position by about four months -- well, by about five  
21 months. And if you just sat him, he would stay sitting  
22 by about four months.

23 So these are skills which are in the first year  
24 which he is not establishing. And certainly he's not

( 1 doing other steps to walking or crawling, pulling  
2 himself to stand, cruising along furniture and all of  
3 those other steps which ordinarily would occur.

4 The next one is severe developmental disability.  
5 And by that I mean he clearly has cognitive problems.  
6 They are probably going to impair his ability -- have  
7 impaired his ability to speak and to process  
8 information and things like that.

9 One of the early ways to tell even if a person  
10 isn't speaking, even if a child isn't speaking is do  
11 they seem to follow commands. Commands is probably the  
12 wrong word. But if you're putting a child's shirt on  
13 and you say, "Give me your arm," you know, ordinarily  
14 an eight- or nine-month-old will start sticking his arm  
15 out because he knows or she knows you're going to put  
16 on their jacket or whatever.

17 He doesn't follow commands. And you would expect  
18 he would by eight or nine months. And so that probably  
19 is a significant cognitive impairment. And I say  
20 "severe developmental disability secondary to No. 1."

( 21 The next one is spasticity. And I've already  
22 defined that. But I say "severe developmental" -- no.  
23 "Severe -- significant spasticity." And then I  
24 quantify it.

( 1        There's a system called the Ashworth,  
2        A-s-h-w-o-r-t-h, or the Modified Ashworth System, which  
3        is a zero to 4 system of spasticity. Ordinarily a  
4        person who is neurotypical, who doesn't have a  
5        disability like this, has no spasticity, so they would  
6        be zero, Ashworth zero. He is about 2 to 3 which is  
7        fairly significant. Four would be absolutely rigid,  
8        just a tight little knot. And he's not absolutely  
9        rigid, but he's getting there in terms of the  
10       spasticity. And I say -- and, again, it's a  
11       significant spasticity.

12       Modified Ashworth 2 to 3 with resultant mobility  
13       impairment we've already talked about. He's not moving  
14       his arms, he's not moving his legs as he should. Part  
15       of it is because of spasticity, part of it is his  
16       ability to make those particular commands from his  
17       brain to his arms or his legs.

18       And I say "and major joint contractures." The  
19       joint is usually bridged by several muscles. If a  
20       muscle -- and I'm just using my arm here -- causes a  
21       person to have their arm bent all the time -- and he  
22       has some contracture in his elbow. If -- if the  
23       position that he ends up in because of his cerebral  
24       palsy keeps his arm bent all the time, it really -- it

1 doesn't go through the full range of motion, it loses  
2 that motion. And that's what he's beginning to do.

3 And I -- and I have identified muscles -- or  
4 joints -- I'm sorry -- in his hips, his knees, his  
5 ankles, his elbows and his shoulders which are  
6 beginning to lose full mobility.

7 And it looks like No. 10 is just the same as No. 8.  
8 I think I maybe lost my train of thought. It's the  
9 same words even.

10 And then I have added another. When I did the  
11 correction for my deposition, I added the word  
12 "microcephaly." Microcephaly means decreased size of  
13 the head. And he clearly has that, probably because  
14 his brain isn't developing as it should. And we know  
15 that from the magnetic resonance imaging, the MRIs of  
16 his head that have been done. He doesn't have full  
17 normal brain development. As a consequence, his head  
18 is much smaller than it should be for his age.

19 Q I've asked you to project for us this young  
20 boy's medical needs for the balance of his life based  
21 upon the disabilities that you've just described to us.  
22 But before we go there, perhaps you could describe for  
23 us what medical interventions and care the boy has  
24 received up until now.

1       A    I'll do that in general, because he's received  
2 quite a bit, and it would take quite a long time to  
3 explain it all. I do have this in -- I'm looking at my  
4 report -- six pages -- or five pages of the information  
5 which I have reviewed about his medical care up to a  
6 year before I saw him. Then I say on the date of the  
7 evaluation Lyam's mother provided additional  
8 information.

9       Q    Well, I don't want you to -- to spend a lot of  
10 time on this, but at least a thumbnail sketch of the  
11 kind of care that he has received to date.

12       A    Certainly. Well, he was born at Tahoe Carson  
13 Hospital. His date of birth is 4/25/12. His mother  
14 was in active labor.

15       MR. McBRIDE: Objection. Nonresponsive.

16       THE WITNESS: Do you want me to continue?

17 BY MR. DURNEY:

18       Q    Please continue, yes.

19       A    He remained there for a number of hours, both  
20 while his mother was in labor and then after he was  
21 born. He required resuscitation at birth. He required  
22 a cesarean section which was based on what the baby  
23 monitor -- the fetal heart tone monitor indicated that  
24 he was in distress. At the time he was born, as I say,

1 he required resuscitation. A pediatrician was present.

2 That pediatrician arranged for transfer to a place  
3 where a higher level of care was available -- and that  
4 was Renown Medical Center in Reno -- and arranged for  
5 the transport team to come to Carson City -- or to  
6 Carson Tahoe Hospital and then transport him to the  
7 Renown Hospital. He was at the Renown Hospital --

8 Q Let's -- let's -- let's stop just a second  
9 before we go to Renown where I think he remained a  
10 patient for about a month and a half. But before we go  
11 there, at birth there were Apgar scores that were  
12 recorded. First of all, what are Apgar scores?

13 A Well, they're named after an actual person --  
14 you know, the letters don't mean something -- Virginia  
15 Apgar who was a pediatrician and an anesthesiologist  
16 some 40, 50 years ago now. And she devised a system  
17 for assessing a newborn in terms of their  
18 cardiorespiratory and neurologic function and gave a  
19 number of 10 which would have been normal. And  
20 everyone starts at 10.

21 The way you think about this is -- and I've done  
22 Apgars on dozens of children earlier in my career, so  
23 I'm familiar with the system. And to my knowledge, it  
24 hasn't changed.

1 And you take numbers off. For instance, if you can  
2 hear a heart rate, but it's decreased, you take one  
3 off. If you can hear a heart rate, but it's really  
4 decreased, you take two off. If you can't hear a heart  
5 rate at all, you take three off.

6 And the same thing goes with color, the same thing  
7 with breathing, the same thing with tone. Tone is the  
8 tightness of the body.

9 And so these Apgars are listed. And the way she  
10 originally defined this was that you take an Apgar --  
11 or you make an Apgar assessment at one minute of life.  
12 One minute after the baby is born, either by a cesarean  
13 section or by vaginal delivery, you make an estimate of  
14 what their Apgar is. Then you do it again at five  
15 minutes. And that was all Dr. Apgar had.

16 But nowadays for youngsters who have difficulties,  
17 not every baby, most babies just get two Apgars, we do  
18 an Apgar at not just one minute and five minutes but  
19 also 10 minutes, 15, and sometimes even 20 minutes.

20 So her Apgar -- his Apgar was at one minute zero.  
21 In other words, he had no tone, completely blue, didn't  
22 have a heart rate, didn't have respiratory effort.

23 Q And at one minute --

24 A Zero at one minute. One at five minutes for

1 color alone, in other words, he was starting to --  
2 with -- within actual breathing artificially through --  
3 through a mask with oxygen was starting to color up.  
4 In other words, he was less purple. Babies are born  
5 purple, by the way. He was less purple than when he  
6 was born.

7 One at 10 minutes for color alone, three at 15  
8 minutes for color and heart rate. So by 15 minutes  
9 there was a detectable heart rate. Let's see. If he  
10 got three, he would have had a heart rate -- he would  
11 have two off, so he probably had a heart rate below 50.  
12 That's what I'm estimating from those numbers. And the  
13 last one was at 15 minutes. They didn't do a  
14 20-minute.

15 And then also to corroborate what his state is,  
16 they do a blood gas. And his was fairly low. And the  
17 blood pH, that is, the acidity of the blood -- when  
18 you're being asphyxiated, your blood pH goes down. And  
19 his was quite low.

20 Q Indicating what?

21 A Asphyxia, anoxia.

22 Q All right. So you took us -- you -- you took  
23 us to Renown after he was transferred from Carson Tahoe  
24 Hospital. I don't want you to go in great detail, but



1 can you tell us what they -- what they did for Lyam?  
2 You've already talked about Dr. Hulka and the insertion  
3 of the gastrostomy tube and the fundoplication, but  
4 give us an overview of what the medical team was doing  
5 for this baby in the month and a half that he spent at  
6 Renown.

7 A Well, he was 42 days at Renown, all of them in  
8 intensive care, neonatal intensive care. He had --

9 Q Then I misspoke. It should have been about a  
10 month and a third. I don't want to misspoke --  
11 misspeak. Go ahead.

12 A Forty-two is the number I came up with.

13 Q All right.

14 A He was in intensive care. He had three days of  
15 what's called cooling. That's a relatively new  
16 technique available maybe in the last eight or nine  
17 years where youngsters who are asphyxiated, in other  
18 words, who have an oxygen problem or a circulation  
19 problem, or both in his case, are cooled down, not --  
20 not -- not very cold. The body temperature ordinarily  
21 is 98 Fahrenheit, 99 if it's core temperature, inside  
22 temperature. They're cooled to about 80. So they're  
23 cooled by almost 20 degrees. And this seems to  
24 preserve brain function. And so he had that procedure

1 done.

2 He had a surgery done by Dr. Hulka. He had the  
3 antiseizure medicines started. He had a neurologist  
4 seeing him. He had -- primarily -- or he was initially  
5 on a respirator machine that breathed for him. He was  
6 eventually able to breath on his own. There were many,  
7 many other things, but I think those would be the main  
8 things.

9 Q All right. All right. In terms of therapies  
10 that he has been provided -- earlier on in our  
11 discussion you talked about Nevada Early Intervention  
12 Services. Were therapy --

13 THE COURT: Ladies and gentlemen, I gave the sign  
14 to just cut it off here at this point in time with  
15 respect to this matter. We're going to go ahead and  
16 take our lunch recess.

17 During this recess you are admonished not to talk  
18 or converse among yourselves or with anyone else on any  
19 subject connected with this trial; or read, watch or  
20 listen to any report of or commentary on the trial by  
21 any person connected with the trial or by any medium or  
22 information, including, without limitation, newspapers,  
23 television, and radio; or form or express any opinion  
24 on any subject connected with this trial until the case

1 is finally submitted to you. You may not do research  
2 about any issues involved in the case. You may not  
3 blog, tweet or use the internet to obtain or share any  
4 information.

5 If you could be back about 1:15.

6 (The following proceedings were held  
7 outside the presence of the jury.)

8 THE COURT: The record will reflect we're outside  
9 the presence of the jury.

10 Mr. Kelly, do you have something?

11 MR. KELLY: Thank you, Your Honor. I neglected to  
12 identify and mark an exhibit during Dr. Shavelle's  
13 testimony from the butcher paper. I would like to do  
14 that now.

15 THE COURT: Okay. That would be Exhibit No. -- we  
16 can mark it. It will be 73?

17 THE CLERK: D-62.

18 THE COURT: Oh, defendant's. Excuse me. 62?

19 THE CLERK: Yes.

20 MR. DURNEY: Are we going to mark both pieces of  
21 paper?

22 THE COURT: We'll go ahead and mark it then.

23 MR. KELLY: What number?

24 THE CLERK: D-62.

1 THE COURT: D-62.

2 MR. DURNEY: Mr. Kelly, are you going to mark them  
3 both?

4 MR. KELLY: No, I was just marking this one.

5 MR. DURNEY: If we're going to do that, Your Honor,  
6 I want to mark them both.

7 THE COURT: Okay. The next one would be marked as  
8 plaintiff's --

9 MR. KELLY: That's fine. That's okay. That's  
10 fine. We can call it D-62-A and B.

11 THE COURT: 62 and 63.

12 MR. KELLY: Okay.

13 THE COURT: We'll go ahead and mark those.  
14 Any objection to them both being admitted?

15 MR. DURNEY: No, Your Honor.

16 THE COURT: Mr. Kelly?

17 MR. KELLY: No, Your Honor.

18 THE COURT: Thank you. They're marked and admitted  
19 into evidence. Thank you.

20 (Exhibits D-62 and D-63 were marked and admitted.)

21 THE COURT: Anything further?

22 MR. KELLY: No, Your Honor.

23 MR. DURNEY: No, Your Honor.

24 THE COURT: If you'll be back about 10 after,

1 quarter after.

2 MR. DURNEY: Your Honor, I have -- do you want to  
3 start at quarter after?

4 THE COURT: Right. Well, 20 after.

5 MR. DURNEY: Well, okay. As much time as I can  
6 have before 1:30 I would appreciate.

7 THE COURT: Well, we'll see where we are. Sometime  
8 between quarter after and 1:30.

9 MR. McBRIDE: Actually one more thing. Just to  
10 make sure, are we going to continue on with Dr. Capell?

11 MR. DURNEY: Yes.

12 (The lunch recess was taken at 11:54 a.m.)

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1 CARSON CITY, NEVADA; TUESDAY, MARCH 15, 2016  
2 12:20 P.M.

3 --oOo--

4 THE COURT: The record reflect we're outside the  
5 presence of the jury.

6 Counsel, are you ready to proceed? Mr. Durney?

7 MR. DURNEY: Yes, Your Honor.

8 MR. KELLY: Yes, Your Honor.

9 THE COURT: Thank you.

10 (The following proceedings were held  
11 within the presence of the jury.)

12 THE COURT: Will counsel stipulate to the presence  
13 of the jury?

14 MR. DURNEY: Yes, Your Honor.

15 MR. KELLY: Yes, Your Honor.

16 THE COURT: Okay. At this time we're going to go  
17 ahead and continue with the video of Dr. Capell at this  
18 time. Everybody ready?

19 THE WITNESS: Yes. He went the day after he was  
20 discharged, those 42 days at Renown, to Dr. Amrhein who  
21 is his pediatrician in Carson City, Dr. Kathi Amrhein.  
22 And she recommended he be referred immediately to the  
23 Nevada Early Intervention Service, and he was.

24 And actually I'm impressed that within two weeks

1 they had a full program going. And this is in the home  
2 where different therapists would come to the home  
3 different days of the week. Excuse me. And so he  
4 was -- Lyam was receiving, even in that first year,  
5 physical therapy once a week, occupational therapy once  
6 a week, and speech therapy, which was primarily for  
7 swallowing, once a week. And then once it became clear  
8 that he had a visual cortical impairment, the  
9 blindness, he started getting visual therapy also. And  
10 that took about five or six months to see the  
11 ophthalmologist to declare that he had cortical visual  
12 impairment and to start the visual services through the  
13 NEIS.

14 And he had a service coordinator also who made sure  
15 all the four therapists saw the patient. I think the  
16 visual therapy was every other week. It was twice a  
17 month, but the other three were every week.

18 BY MR. DURNEY:

19 Q Maybe you could explain something --

20 A Sure.

21 Q -- that might be confusing. If he can't  
22 swallow --

23 A Yes.

24 Q -- what was the point of speech therapy? I

1 mean, if you can't speak, what is the point of speech  
2 therapy? Is there more than one component to speech  
3 therapy, I suppose, is my question.

4 A Well, early on, particularly in a youngster  
5 with a gastrostomy, or the MIC-KEY tube in his case,  
6 the focus of the speech therapist is actually on  
7 swallowing. There is always the goal of eliminating  
8 the gastrostomy and for the youngster to eventually  
9 take more and more of his nutrition and fluids by mouth  
10 and eventually to take all of his nutrition and fluids  
11 by mouth. That was an original goal. It doesn't seem  
12 to be a practical goal at this point. So he's probably  
13 going to always be gastrostomy dependent.

14 But the other thing the speech therapist does is  
15 work on the steps to swallowing such as taste and  
16 desensitizing the mouth, because initially the speech  
17 therapist report was that when you touched this  
18 youngster around his mouth -- ordinarily a newborn, if  
19 you touch him around the mouth, their mouth kind of  
20 goes to the direction you've touched them. It's called  
21 the rooting reflex. He had no rooting reflex. And, in  
22 fact, when you touched him around the mouth, he would  
23 just kind of clamp his lips and clamp his teeth  
24 together. That's because of hypersensitivity about the



1 mouth. That's -- that's from his neurologic injury.

2 And so desensitizing the mouth was part of her  
3 therapy and then introducing like a swizzle stick  
4 that's dipped in some nectar or something like that so  
5 he gets tastes of things. And that was part of the  
6 therapy too, and to the point where he actually could  
7 swallow a little bit, not much, and certainly not  
8 nutritionally significant, but that was the focus.

9 Now, when it becomes appropriate to introduce  
10 speech and language, which start to happen -- some kids  
11 as early as eight or nine months are saying some words.  
12 Sometimes it takes until they're 14 or 15 months --  
13 then a speech therapist will address this. Speech and  
14 language has never been appropriately a goal because  
15 speech has never emerged.

16 Q I guess the same question. You mentioned that  
17 he had vision therapy, that he's been having vision  
18 therapy in the past.

19 And now I have marked as Exhibit 3 to the  
20 deposition a life care plan for Lyam that was prepared  
21 by Carol Hyland. First of all, do you know Carol  
22 Hyland?

23 A I do.

24 Q And can you tell us before we discuss this in

1 general terms your understanding of Carol Hyland's  
2 qualifications?

3 A Yes. She is a certified life care planner and  
4 her discipline is that she is a vocational  
5 rehabilitation specialist. And she prepares life care  
6 plans for both plaintiff and defense. And I have  
7 worked both with her and against her over the years in  
8 a number of different legal situations where her life  
9 care plan has been either something that I reviewed or  
10 participated in the preparation of.

11 Q What is a life care plan?

12 A It's an estimate from where we sit now. In  
13 other words, it's an estimate of the future of what  
14 various specialists and experts think is going to be  
15 necessary for a youngster in this case -- it could be  
16 an adult also -- for his or her lifetime in major areas  
17 of physician care, hospital care, laboratory studies,  
18 equipment, supplies, therapies like physical and  
19 occupational therapy, attendant care, in other words,  
20 what they're going to need help with both now and in  
21 their adult life, nursing care. Sometimes it also  
22 includes modifications to the home which may be  
23 necessary because of the youngster or an adult's  
24 mobility needs, things of that nature.

1 Q All right. Now, let me hand you what has been  
2 marked as Exhibit 3 which for the record is the life  
3 care plan of Ms. Hyland. Did you work with Ms. Hyland  
4 in the preparation of that life care plan?

5 A Yes, I did.

6 Q Tell me what role you played in the preparation  
7 of that life care plan.

8 A I actually had a conference with her, a phone  
9 conference, in this case. And I'm looking at a  
10 document called Phone Log in my -- in my chart here.  
11 On 3/23/15, which would have been soon after I saw  
12 Lyam -- I saw him on 3/20/15, so it was three days  
13 later. And then about a week later, 3/27 -- it's like  
14 four days later -- 3/27/15 I had a second phone  
15 conference with her to review the life care plan and  
16 provide my input to it.

17 And I understand that she also obtained input from  
18 a Dr. Rodriguez who is a pediatric neurologist who had  
19 seen Lyam. And she apparently from what I can see in  
20 this report, which is April 7, 2015, combined both my  
21 suggestions and Dr. Rodriguez's suggestions in  
22 determining the life care plan.

23 Now, it's important to note that I -- the input I  
24 provided was what services he would need or what

1 equipment or what operation or what doctor he might  
2 need to see and how often or when those needs would  
3 occur. She actually did the footwork in terms of  
4 determining the actual cost of those.

5 Q All right. So, in other words, you told her  
6 what he needs and she went out to find out what that  
7 would cost?

8 A That's correct.

9 Q All right. Let's -- let's talk about what you  
10 think he needs. And perhaps the easiest way to do it  
11 would be to go through the life care plan itself  
12 beginning -- I think the first element of the life care  
13 plan is under medical services and that is physical  
14 medicine and rehabilitation needs. Should we start  
15 there? Is that appropriate?

16 A That's fine.

17 Q All right. What do you think Lyam's lifetime  
18 needs will be in that area?

19 A Well, I think he needs to see a physical  
20 medicine and rehabilitation specialist, and my estimate  
21 is four times a year. Now, that's -- that's an  
22 average. I expect that he needs to see the doctor at  
23 least three times a year for regular scheduled  
24 appointments. And I put four because very often

1 something else comes up or some recheck has to be done  
2 or some intervention occurs and a recheck needs to be  
3 done. So I think on the average it will be four times  
4 a year.

5 Q Does he see a physical medicine and  
6 rehabilitation physician now?

7 A Yes, he does.

8 Q Where?

9 A He goes to Sacramento actually. His mother  
10 takes him to Sacramento to the Shriners Children's  
11 Hospital, which is in Sacramento, which is in a complex  
12 which is part of the University of California Davis  
13 Medical Center.

14 Q And is the -- based upon your review of the  
15 records and your conversation with mom, is the person  
16 in charge of his care at Shriners -- what's the  
17 speciality of the person in charge of his care at  
18 Shriners?

19 A The doctor he sees who is director of the  
20 cerebral palsy clinic there is Dr. Loren Davidson who  
21 is a physiatrist, as I am. He's also a pediatrician.

22 Q He's not a pediatric neurologist? He's a  
23 physiatrist like you?

24 A Yes.

1 Q All right. And when you say four visits a  
2 year, are you talking about for life?

3 A Yes.

4 Q All right. Let's go on to the next element  
5 of -- of medical services.

6 A I think he needs to see a gastroenterologist.  
7 That's a specialist in the GI system, gastrointestinal  
8 system, primarily because he has a gastrostomy. And as  
9 he gets bigger -- excuse me -- his feeding needs are  
10 going to change. He's absolutely dependent on what's  
11 fed to him. He's not like an average four-year-old  
12 saying, "I want this, I want that," or, "I don't want  
13 that anymore." What he gets nutritionally is what's  
14 poured into him.

15 And so a gastroenterologist would be one who is  
16 looking at laboratory studies and who is prescribing  
17 what his feeding elements are or what vitamins and  
18 other nutritional supplements need to be, who deals  
19 with the gastrostomy tube, looks to see if it's  
20 irritated, looks to see if there needs to be seen by a  
21 surgeon, things of that nature.

22 Q And you estimate that he'll need to see a  
23 gastroenterologist how many times a year?

24 A Twice a year for life.

1 Q What about a neurologist?

2 A He has a seizure disorder, and he has been seen  
3 Dr. Rodriguez for this. He's taking medication. It's  
4 a difficult seizure disorder because he's actually been  
5 in the hospital for it once. Dr. Rodriguez sees him  
6 about four times scheduled per year, in other words,  
7 every three months, and has seen him a few extra times.  
8 And so I decided six visits a year with a neurologist  
9 which would take those extra times into consideration  
10 also.

11 Q And, again, that would be for life?

12 A That would be for life.

13 Q How about an endocrinologist?

14 A Well, he has seen an endocrinologist,  
15 Dr. Eckert, Kathryn Eckert, because there was some  
16 question about -- in terms of the profound anoxia that  
17 he received, that this also affected the part of the  
18 brain which supplies information to his pituitary  
19 gland.

20 The pituitary gland is -- it's technically outside  
21 of the brain, but it's connected to the brain. And the  
22 pituitary gland produces six, seven, eight -- eight  
23 different hormones actually. One of those is a growth  
24 hormone. There's a bunch of others. And she has been

1 watching this carefully.

2       There was one point where she thought he did need  
3 pituitary supplementation, and then later on she  
4 decided not. But she does see him every six months.  
5 And I think this should be continued. I would -- I  
6 would yield to Dr. Eckert if she said, you know, "I  
7 don't need to see him every six months for the rest of  
8 his life," but that's the pattern that's occurred up to  
9 now, and so that's why I put that in the life care  
10 plan.

11       Q   And there are two visits per year?

12       A   For the rest of his life.

13       Q   For life. So yours is an average, perhaps  
14 more, perhaps less? Fair?

15       A   Yes.

16       Q   Okay. What about an orthopedist, a bone  
17 doctor?

18       A   Well, this young man has various contractures.  
19 An orthopedist is technically a bone doctor, but  
20 they're also joint doctors, because the joints are the  
21 connection between bone. And he has a number of  
22 problems. As I said, in examining him he has  
23 contractures of his elbows and his hips, his knees, his  
24 feet, his ankles actually. And an orthopedist would be



1 the right person to appropriately sequence and put in  
2 surgical interventions.

3 The rehab doctor could prescribe braces and therapy  
4 and things like that. An orthopedist could do that  
5 also. Sometimes -- or many times the number of the  
6 patients I see are in conjunction with an orthopedist.  
7 But there are going to be some surgeries that he needs  
8 in the future. And this is not the surgeries I'm  
9 talking about, but this is anticipating that there are  
10 going to be surgeries. And I say twice a year with the  
11 orthopedist for that.

12 Q And that likewise is for life?

13 A Yeah, I believe it's for life, yes.

14 Q How about an ear, nose and throat specialist?

15 A Well, because of this young man's swallowing  
16 problems, he has had what we call serous otitis media.  
17 Serous, s-e-r-o-u-s. And that means that his ears have  
18 filled with fluid. And because of that he has required  
19 placement of tubes to ventilate his -- well, his middle  
20 ear. And he's seen Dr. Eckert for that. Not  
21 Dr. Eckert. I'm blocking on her name. Courtney  
22 Garrett. That's it, Dr. Garrett. And she actually has  
23 operated on him and follows him once or twice a year,  
24 and sometimes there's extra visits. So I said twice a

( 1 year. Again, I would yield to Dr. Garrett if she said,  
2 "I don't think I need to see him twice a year for  
3 life," but at this point it looks as if these are  
4 ongoing problems, and that's why I said twice a year  
5 for life.

6 Q All right. How about a pulmonologist?

7 A Well, he's seen Dr. -- it starts with a B. I  
8 can't remember her name, and I don't see it there -- a  
9 pulmonologist, because he's actually been in the  
10 hospital twice -- no, three times -- for pulmonary  
11 problems, respiratory distress. Two of those turned  
12 out to be pneumonia. One turned out to be a viral  
13 bronchiolitis or inflammation of the upper airways  
14 rather than the lungs themselves. And I expect that  
15 he's going to need to see a pulmonologist four times a  
16 year for life.

17 Now, most of those are going to be as-needed kinds  
18 of visits. In other words, I don't think every three  
19 months he needs to see a pulmonologist. He probably  
20 needs to see a pulmonologist just once a year or  
21 something like that. But there are going to be visits  
22 in the hospital and post hospital where he has lung  
23 problems. And for that reason, I want him to see a  
24 pulmonologist. And I expect they anticipate -- and I

1 anticipate that it would average out to be four times a  
2 year.

3 Q For life?

4 A For life.

5 Q How about an ophthalmologist?

6 A Well, he's already seen an ophthalmologist who  
7 has seen him -- Dr. Johnson was seeing him twice a  
8 year, but the last visit that I had records of said he  
9 should be seen again once a year, so I'm leaving it at  
10 that, once a year for the ophthalmologist.

11 Q How about a developmental pediatrician?

12 A Well, he has seen -- do I have her name  
13 there? -- I think Dr. Kimmel who has seen him. She is  
14 part of the NEIS program. She's actually the medical  
15 director of that. She's seen him on two occasions  
16 during the first three years of life and believes he  
17 should continue to see a developmental pediatrician. I  
18 don't believe she's available except for clients of the  
19 NEIS program, and so I suggested that they might want  
20 to go to UC Davis since he's already going to UC Davis.  
21 And that could be done at the same time that he sees  
22 Dr. Davidson, the physiatrist. And so I say that  
23 should be once a year.

24 And that's working on his developmental skills

1 which at this point are fairly limited but certainly  
2 need to be preserved as much as possible. And so once  
3 a year, and I believe that should be for life.

4 Q How about a generalist, a general pediatrician?

5 A Well, he's seeing Dr. Amrhein. And some of  
6 that is for what she calls well-child care. He's  
7 hardly a -- a well child, but she sees him for his  
8 periodic medical needs which are much in excess of what  
9 an average or neurotypical child would have. But in  
10 some of those visits she also does his immunizations  
11 which are the same as any other youngster would have  
12 and, you know, measures his height and weight and  
13 things like that. But I believe he needs to be seen  
14 about four times a year beyond what a youngster would  
15 ordinarily need.

16 And by the age of four a youngster should be seen  
17 once a year by a pediatrician regularly. And mostly  
18 that's to make sure that their immunizations and shots  
19 are up to date. But I expect that he needs to be seen  
20 much more than that, and that seems to be the pattern  
21 thus far. She's seen him actually six or eight times a  
22 year, but I think over a lifetime it will be about  
23 four.

24 Q All right. What about a dietitian? Should he

1 see a dietician periodically?

2 A Yes. As I explained, his -- all of his  
3 nutrition, all of his fluid, is via the gastrostomy  
4 tube. And the dietician would be the one who would  
5 evaluate his height and weight, his growth, and make  
6 changes about what the feeding is. As he gets a little  
7 bit older -- right now he's getting the formula, but as  
8 he gets a bit older, his mother will or whoever is  
9 feeding him will be starting to put other pureed things  
10 into the formula so that he gets vegetables and he gets  
11 protein and he gets pieces of meat, not chunks of meat,  
12 but pureed meat. And that's what the dietician would  
13 recommend.

14 That often is associated or in the same office as  
15 the gastroenterologist, but it would be a separate  
16 specialist that sees him.

17 Q And how frequently do you think he should see a  
18 dietician on an annual basis?

19 A Over his lifetime, probably twice a year, more  
20 often at this point, but about twice a year.

21 Q All right. Let's go to physical and  
22 occupational therapy. What are your estimates for  
23 Lyam -- for the annual needs in that area?

24 A Well, he -- well, he was a client of NEIS. He

1 was getting physical therapy once a week, and I thought  
2 that was entirely appropriate. Now that he's started  
3 with the Douglas County School District, he is  
4 receiving physical therapy once a week which I think  
5 continues to be appropriate. I think that should be  
6 continued for a lifetime. And so for physical therapy,  
7 I think once a week for life.

8 Q Do we make a distinction between physical and  
9 occupational therapy?

10 A Yes. Early on, what they're doing is almost  
11 the same thing, but as he gets older, the distinction  
12 really becomes important. The physical therapist deals  
13 mostly with the legs and the hips and the feet and the  
14 ankles and devices that stand him up and things of that  
15 nature.

16 The occupational therapist deals mostly with the  
17 hands and the head and the arms and shoulders. So  
18 these disciplines just turned out to divide a youngster  
19 basically in half. Occupational therapy will be  
20 basically the same thing. He has some use of his  
21 hands. It appears to be volitional, in other words,  
22 willful.

23 When I was monkeying with the stomach, he was  
24 pushing me away. It's very early, it's kind of a

1 primitive reflex, but it does seem to be specific to  
2 what I was doing to him.

3 And so I think that should be encouraged and that  
4 should be continued. Also, you need to maintain his  
5 range of motion in his wrists and his elbows and his  
6 shoulders, and that's what the occupational therapist  
7 would do. He was getting that once a week at NEIS  
8 which I thought was appropriate. He's now getting it  
9 once a week in the school program which I think is  
10 appropriate, and I think it should be continued for his  
11 lifetime.

12 Q All right. Let's go on to speech therapy.  
13 We've touched upon it, but let's -- what is your  
14 estimate as to his annual requirements in the area of  
15 speech therapy?

16 A I -- I think once a week. That's what he got  
17 with the NEIS program in his home. And in the school  
18 program he's getting it once a week. I think that  
19 should continue. That is primarily for swallowing,  
20 mouth desensitization, safely offering tastes of things  
21 to him and things of that nature.

22 I don't expect that he's going to speak or respond  
23 to commands, but because he has some use of his hands,  
24 he may be able to make some choices, that is, push a

1 button or something like that. That's what a speech  
2 therapist would work on, push a button that makes a  
3 noise or starts a tape recording of a song that he  
4 likes or things of that nature. That's what the speech  
5 therapist would work on. And I expect that's going to  
6 be a necessity for lifetime also.

7 Q And what about vision therapy? What will his  
8 annual lifetime needs be?

9 A Well, he's actually getting more vision therapy  
10 than I would have recommended. He's getting vision  
11 therapy once a week now. I recommended it be about  
12 twice a month because that was the frequency of the  
13 NEIS program. But he seems to respond to lights, he  
14 seems to respond to high contrast. He does fix and  
15 follow. He seems to enjoy light displays. He smiles  
16 for that. He seems to alert to that and those kinds of  
17 displays. So I think those should be continued just  
18 for his enjoyment of life. And I would stick with my  
19 every other week. I think that was sufficient.

20 Q What would you say to the naysayers who say  
21 that since his prognosis with regard to vision is so  
22 grim that he shouldn't be getting this therapy?

23 MR. McBRIDE: Object. Object. Lacks foundation.

24 THE WITNESS: Well, I -- that -- if the reason you



1 do therapy is to -- to cure -- and sometimes physical  
2 therapy is to help a fellow who had shoulder surgery to  
3 get back to what he was doing before. That's one  
4 philosophy. With youngsters who have the kinds of  
5 disabilities that I treat, the therapy doesn't cure  
6 them. They don't end up having no neurologic  
7 impairment; they don't end up having no developmental  
8 delay. The therapy is to optimize what function they  
9 do have and then to prevent further deterioration. And  
10 sometimes those two goals run quite together; sometimes  
11 it's more one than the other.

12 In this case I would say that he clearly enjoys the  
13 visual stimulation. He smiles to it. He alerts to it.  
14 He seems to -- well, he seems to enjoy it. And I think  
15 that if that's something that he enjoys, it's worth  
16 doing for that reason.

17 BY MR. DURNEY:

18 Q All right. Let's move on to acute  
19 hospitalizations.

20 A Sure.

21 Q Do you expect that Lyam will require acute  
22 hospitalizations for the rest of his life? And -- and  
23 before you answer that question, tell us what is meant  
24 by acute hospitalizations.

1       A   Well, acute meaning not scheduled or routine.  
2 I think he's going to need some surgeries just as an  
3 example as a contrast here, but those aren't acute  
4 hospitalizations. For instance, he's going to have  
5 surgery on his hips. He needs to probably be in the  
6 hospital two or three days for that. That's not acute  
7 hospitalizations.

8       This is for an illness, a seizure that is  
9 refractory, in other words, unable to be controlled, or  
10 respiratory illness or pneumonia or something of that  
11 nature would be the reason for an acute  
12 hospitalization. And just looking at his last four  
13 years, it appears that there's between six and ten days  
14 a year of hospitalization. And so that's what I  
15 recommended. I would hope over the years it would be  
16 less, but that's what the empirical data at this point  
17 suggests, and I think that's necessary.

18       In every case, all but one case of his  
19 hospitalizations, much of it was in intensive care. I  
20 think part of it will have to be in intensive care even  
21 in the future. And just as an estimate, I've said  
22 three days of those six to ten days will have to be in  
23 ICU.

24       Q   Again, annually?

1 A Annually.

2 Q And what about emergency room visits? And how  
3 do they differ from acute hospitalizations?

4 A Well, very often one is attached to the other.  
5 He's been to the emergency room, I count, about seven  
6 times. Five of the seven times he has actually been  
7 admitted to the hospital after that emergency room.  
8 But I'm estimating about three emergency room visits a  
9 year. That would be two a year that he doesn't get  
10 admitted to the hospital but are something that  
11 couldn't wait until the next morning when the  
12 pediatrician's office is open, or over the weekend.  
13 And one would be where it's acute and he has to be in  
14 the hospital because he can't be sent home. That's my  
15 estimation. Again, it's based on what has happened up  
16 to now.

17 Q Do you consider the possibility or, perhaps,  
18 probability that an ambulance transport would be  
19 required for those emergency room visits?

20 A Yes, I do.

21 Q Tell us about that.

22 A Let me see. What do I have here? I think it's  
23 more likely than not if he can't wait until the next  
24 morning, if his medical condition is such that he can't

1 wait to the next morning, more likely than not it will  
2 have to be an ambulance that transports him, because  
3 where he lives, it's quite a long way. And if he's  
4 urgent enough to have to go to a hospital, an emergency  
5 room, it probably has to be through an ambulance  
6 transport. All of his emergency rooms but one has been  
7 ambulance transport up to now, and that's why I'm  
8 recommending it.

9 Q So just to summarize, you -- you believe that  
10 this young boy will require three emergency room visits  
11 a year for life?

12 A Yes.

13 Q With ambulance transport in connection with  
14 each or --

15 A Well, in certainly at least one of them.

16 Q Okay.

17 A Primarily because of the distances that are  
18 involved.

19 Q All right. Let's turn to laboratory and  
20 diagnostic testing. What are your annual expectations  
21 in that area?

22 A Well, actually on page 15 there's a listing of  
23 the things that I recommended. And these are tests  
24 that he has had up to now and very often needs them

1 with those emergency room visits, but he has them also  
2 on an outpatient basis. And they include really  
3 searching for infections. And that's a chest x-ray and  
4 a sputum culture where you're actually trying to --

5 (Pause in proceedings due to video interruption.)

6 MR. DURNEY: My name is Peter Durney and I --

7 THE WITNESS: -- primarily because of the distances  
8 involved.

9 BY MR. DURNEY:

10 Q All right. Let's turn to laboratory and  
11 diagnostic testing. What are your annual expectations  
12 in that area?

13 A Well, actually on page 15 there's a listing of  
14 the things that I recommended. And these are tests  
15 that he has had up to now and very often needs them  
16 with those emergency room visits, but he has them also  
17 on an outpatient basis. And they include really  
18 searching for infections. And that's a chest x-ray and  
19 a sputum culture where you're actually trying to  
20 identify what bacteria might be present; urine analysis  
21 and urine culture, and that's looking for a urine  
22 infection; and then other tests of his condition, the  
23 so --

24 MR. DURNEY: Your Honor, could we take a moment to

1 get this right? I apologize, but this isn't right.

2 THE WITNESS: -- the so-called CMP which is  
3 comprehensive metabolic panel. That's -- that's --

4 (Pause in the proceedings due to video interruption.)

5 THE WITNESS: That's looking at the protein in his  
6 urine, the sodium --

7 MR. IVEY: It's synced, but I'm trying to get it to  
8 go further back right where we were.

9 THE WITNESS: -- the potassium, things of that  
10 nature, because, again, he's -- he's completely  
11 dependent on what he's fed --

12 MR. DURNEY: My name is Peter Durney and I  
13 represent Tawni --

14 THE COURT: This isn't working, Mr. Durney.

15 MR. IVEY: I apologize.

16 (Video unreportable.)

17 THE WITNESS: -- and they include really searching  
18 for infections. And that's a chest x-ray and a sputum  
19 culture where you're actually trying to identify what  
20 bacteria might be present; urine analysis and urine  
21 culture, and that's looking for a urine infection; and  
22 then other tests of his condition, the so-called CMP  
23 which is comprehensive metabolic panel. That's --  
24 that's looking at the protein in his urine, the sodium,

1 the potassium, things of that nature, because, again,  
2 he's completely dependent on what he's fed and he can't  
3 say, "I've had enough," or, "Gee, I'm craving carbs,"  
4 or something like that. I don't think a four-year-old  
5 would say, "I'm craving carbs," but you can see that  
6 they're craving carbohydrates.

7 So those have to be assessed by the numbers and  
8 have to be assessed by laboratory studies. So that's  
9 why there's so many laboratory studies here.

10 Also, we want to get some x-rays of his bones, and  
11 we have that, because we know that he's got  
12 contractures in his hips and his knees and his back  
13 is -- he's inevitably going to develop scoliosis. And  
14 so I have those series in there also.

15 There's also -- I think at least one additional MRI  
16 of his brain will be necessary.

17 BY MR. DURNEY:

18 Q Okay. So all of the things that we see listed  
19 on page 15 of Ms. Hyland's report would be the lab and  
20 diagnostic testing requirements as you would expect  
21 Lyam to need annually?

22 A Yes.

23 Q Again, for the rest of his life?

24 A Yes.

1 Q All right. What about special surgical  
2 procedures? You touched on it earlier --

3 A Yes.

4 Q -- when we were talking about one specialty,  
5 the orthopedic speciality, but let's go into special  
6 surgical procedures. What special surgical procedures  
7 do you expect Lyam to need over his lifetime?

8 A Well, he -- his hips already are starting to  
9 what we call sublux, which means that they're not  
10 dislocated, but the hip joint instead of being a  
11 regular ball joint is allowing the head of the femur to  
12 slide out.

13 Maybe I should draw this.

14 Q Hang on to that board. There you go.

15 A The hip joint is -- is -- any joint has two  
16 parts. Sometimes it's more than two parts. But one  
17 part is in his pelvis, and that's this socket. This is  
18 called the acetabulum. And then a bone goes into this.  
19 And the proportion here isn't quite right, but this is  
20 called the femur. This is the head of the femur. This  
21 is the hip joint. And this is what you spread your  
22 legs with, cross your legs, flex your hips and extend  
23 your hips with.

24 When I test that, I find it starts to slip



1 somewhat. Because of all of his spasticity, even under  
2 the best of control, I expect that this condition is  
3 going to worsen and his hips are either going to  
4 dislocate or nearly dislocate. And the way to stop  
5 that is a surgery. And it's called a varus derotation  
6 osteotomy. And those are three things saying what's  
7 actually being done.

8 And you -- you actually cut the bone here. You  
9 take a wedge out of it. So -- the wedge is the other  
10 way. So the hip is further out. This is one hip. The  
11 other hip would be here. So the hip when you bend this  
12 is further out. And you rotate it somewhat so the hip  
13 head of this bone, head of the femur, is more directly  
14 into that socket. So by this derotation wedge, you  
15 tilt the head of the femur inwardly and bend it into  
16 the socket.

17 At the same time another procedure is done. The  
18 muscles that pull the hips together are right here.  
19 There's actually three different groups. They go from  
20 the pelvis to the top of this bone, the femur. Those  
21 are the muscles that cross your legs over. That's what  
22 happens when you stand him up, his legs cross over.

23 And so in spite of the other therapies, which I  
24 think are going to be helpful for his spasticity, when

1 this procedure has been done -- is being done, this is  
2 often done at the same time. So you do -- and these  
3 muscles are called the adductors. And cutting or  
4 lengthening the tendons where these adductors attach is  
5 called a tenotomy.

6 So he would have an adductor tenotomy and a varus  
7 derotation osteotomy. Exactly how much of an osteotomy  
8 is done here, how much rotation is done, how much of  
9 the adductors are actually cut or tenotomized, it is --  
10 is a surgical decision, but the fact that he's going to  
11 need it because he's going to be subluxing or even  
12 dislocating his hips, which is a painful thing, and  
13 because his hips cross over which makes trying to  
14 change a diaper on him a wrestling match almost, that  
15 it would be appropriate to do this procedure.

16 It probably only needs to be done once. And I  
17 estimate it's going to be done when he's six or seven  
18 years old.

19 Q And, of course, that would be bilateral, both  
20 hips?

21 A It would be on both hips, but you do both at  
22 the same time, because after this is done, you put the  
23 youngster in what's called a spica cast, which is a  
24 cast from the waist down to the thighs, with an

1 opening, of course, to change a diaper and things like  
2 that. And the hips are spread apart. And so it can be  
3 done just on one side, but since you're going to put  
4 him in a cast anyway, you usually do it on both sides  
5 at the same time.

6 Q All right. He's now almost four years old.

7 A Yes.

8 Q You would estimate that he will require that  
9 adduction surgery at what age?

10 A Six, six or seven, right in there. It would  
11 depend on the orthopedic surgeon's analysis, but in my  
12 experience youngsters with this level of spasticity  
13 need it at about that age.

14 Q All right. Let's go next to what -- what  
15 additional surgical procedures do you expect him to  
16 require in his life?

17 A Well, she's got some other procedures in here  
18 which aren't necessary surgical procedures which I'm --  
19 I'm going to skip over for now and tell you what the  
20 next surgical procedure is. He's going to need what's  
21 called a tendon Achilles lengthening.

22 I'm going to erase this to just show it to you.

23 Part of his spasticity -- well, spasticity is  
24 always in a pattern. And the pattern he is in is in

1 the lower extremities, at least the legs are squeezed  
2 together, the knees are flexed, and he's up on his  
3 toes. So when I pick him up, I see that pattern. When  
4 he's lying down, you also see that pattern.

5 The going up on toes is caused by the tendon  
6 Achilles. If this is the foot, there's a bone here  
7 called the calcaneus. And this is your heel bone. And  
8 there's a lot of others. I'm not going to draw that  
9 now. And there's several other bones here. And then  
10 there's a tibia and a fibula. These are the both in  
11 the shin.

12 The tendon Achilles comes from both of these bones,  
13 a muscle called the gastroc muscle, and it attaches on  
14 both of these up just about the level of the knee,  
15 slightly below the knee. This is the -- this is the  
16 tendon Achilles right here.

17 And Achilles was a mythologic character that was  
18 apparently held by his heels and dipped in a river to  
19 make him invulnerable, and that's why the only way to  
20 hurt him was to shoot him in the heel with an arrow.  
21 And so this structure has always been called the tendon  
22 Achilles just from -- almost from the beginning of  
23 history.

24 And what a surgeon would do would be to lengthen

1 this and to basically do what's called a Z-plasty. If  
2 this is a tendon, if you do this to it, make a Z in it,  
3 you can lengthen it and connect this part to this part,  
4 and you've got a longer tendon. That's what the  
5 Z-plasty does. And I expect that's going to need to be  
6 done because other treatments for this like the Botox  
7 and the stretching and the medication are going to  
8 become ineffective.

9 Now, the reason you would do this in a youngster  
10 who isn't walking is that he is standing. He's not --  
11 you don't stand him up and watch him walk away. He's  
12 in a device that stands him so he's bearing weight on  
13 his feet and, of course, through his entire body when  
14 he is in a device that tilts him either fully upright  
15 or almost fully upright. If he's on his toes, you  
16 can't do that. It causes all kinds of problems.  
17 And so the tendon Achilles lengthening is so he can  
18 be on his flat foot, on his heel, in the standing  
19 device which is part of his therapy.

20 Q How -- how many times a year will he require  
21 this tendon Achilles lengthening?

22 A Well, no, not many times a year. He'll  
23 probably require it once when he's five or six and  
24 probably once again when he's 10 or 12. So I'm

1 estimating twice in his lifetime, and on both sides.  
2 And they can both be done at the same time. They're  
3 not two separate anesthetics, two separate  
4 hospitalizations. Very often they're done both at the  
5 same time.

6 Q All right. All right. Let's continue --  
7 continue with our surgical procedures that are  
8 anticipated.

9 A Another one is not an orthopedic procedure at  
10 all. It's a gastrostomy revision. And that's because  
11 the gastrostomy tube can erode and become larger and  
12 needs to be repaired. Ordinarily what they do is  
13 simply make another gastrostomy tube, a new one, and  
14 then close or seal up the old one and allow it to heal.

15 I expect that's going to be necessary at least two  
16 and more likely three times in a lifetime. His  
17 gastrostomy tube has already eroded somewhat. That is  
18 why he coughed it out even though the balloon was  
19 partially inflated. So he's probably going to require  
20 one in the next year or so. But I think three times in  
21 a lifetime.

22 I think he's also going to need, talking about this  
23 kind of surgery, the fundoplication because it's  
24 already loosened and he's still very vulnerable to

1 getting pneumonia from vomiting. And the  
2 fundoplication is loosened, so he can vomit. And so  
3 that really needs to be fixed. And I expect that  
4 should be fixed in the near future, in the next year or  
5 so. And I expect it's going to loosen as he grows.  
6 It's part of growing. And it's probably going to be  
7 need to be replaced at least one more time after that  
8 first time and maybe even a third time. So I expect  
9 two to three in a lifetime.

10 Q Of --

11 A Additional fundoplication revisions.

12 Q Are those included in Ms. Hyland's report?

13 A Yes, on page 28.

14 Q All right. We'll get to that.

15 A Finally on page 30 is another orthopedic  
16 procedure. It's called scoliosis surgery. Actually we  
17 had a bit of a disagreement when we made this life care  
18 plan. Dr. Rodriguez felt that he will require  
19 scoliosis surgery. And at the time I made my report  
20 and my input to Carol Hyland, I was opposed on that. I  
21 thought probably not, it's not more likely than not  
22 that he'll need a scoliosis surgery.

23 In adding up the numbers --

24 MR. McBRIDE: Your Honor, may we stop for a second?

1 Thank you.

2 (A discussion was held off the record  
3 between the Court and counsel.)

4 THE COURT: Just for the jury's edification, there  
5 were certain portions of the testimony that the Court  
6 ruled on in respect to that. They're trying to fix it  
7 so -- certain portions aren't allowed based on rulings  
8 that I made, so I think he's going to fix it now, and  
9 then we'll keep going.

10 Let me ask, is everybody all right to keep going  
11 for a little bit? I don't know where we are in respect  
12 to the video, but hopefully we're at a point where we  
13 can take a break sometime.

14 THE WITNESS: That he probably wouldn't need  
15 scoliosis surgery. And if we do it, we ordinarily do  
16 it when the youngster is 17, 18, 19, 20, right --  
17 BY MR. DURNEY:

18 Q All right. Any other surgical procedures that  
19 you expect will be required in Lyam's lifetime?

20 A Well, there's two other things that I think  
21 should be done, and they are procedures. And in one  
22 sense they're surgical procedures. One is Botox  
23 injections. And he's already had, I think, one set of  
24 these from Dr. Davidson in Sacramento. And actually he



1 was scheduled to have a second one, but I think that  
2 got canceled because of an illness.

3 This is something that -- and I'll use this as an  
4 example here. This muscle here is called the gastroc,  
5 or the longer name for it is the gastrocnemius muscle.  
6 And it's spastic. It points his toe down because it's  
7 contracting all the time.

8 One of the things that you can do with Botox -- in  
9 fact, this is why that medicine was first developed was  
10 for treating spasticity. It's only in the last maybe  
11 ten years that they've discovered you can inject faces  
12 and make wrinkles go away and some other uses for  
13 headaches where you inject all the way around the head  
14 for migraine headaches. But it originally was  
15 developed for that.

16 It will basically paralyze part of a muscle for up  
17 to six months. And that's what's been done for his hip  
18 adductors, the muscles that pull his hips together, and  
19 for his gastrocs with Dr. Davidson. And I think that  
20 should be done more. As time goes on it becomes less  
21 effective. When it's done it lasts for three to six  
22 months. And so I made an estimate, I think, of -- I  
23 did, again, some quick arithmetic of maybe 12 or 13 of  
24 these procedures.

1       What number did I come up with?

2       Q    It's page 18.

3       A    About 16 to 20. Eighteen. Until the point  
4 where it's no longer effective. You can't -- you can't  
5 do Botox for a lifetime. It just doesn't work. It  
6 stops becoming effective. You develop allergies to it.

7       We actually have three different variations of  
8 Botox. One is called Myobloc, and the other one I  
9 can't remember the name of it, which are similarly  
10 effective but different medications. So if you develop  
11 an allergy to one, you can use the other for a while  
12 until you develop an allergy to that. But the 16 to 20  
13 I think is appropriate for the Botox.

14       For those procedures the youngster is partially  
15 anesthetized, because it is an injection. Adults can  
16 tolerate it; kids can't without some kind of  
17 anesthesia. So that's a procedure.

18       And the other procedure, which I have on page 34,  
19 is called an intrathecal pump. This is because of his  
20 spasticity. He has severe spasticity, as I say. He's  
21 taking a medicine now called baclofen. The other name  
22 for baclofen is Lioresal. But baclofen is the common  
23 name nowadays.

24       He takes actually an increasing dose of that. When

1 I spoke with his mother, she said actually the dose of  
2 baclofen has been doubled. He was taking 1 milliliter  
3 three times a day. He's taking 2 milliliters three  
4 times a day now. And that seems to have some effect,  
5 but at some point it's going to have to be increased  
6 again and increased again. And at some point you get  
7 side effects. It's sedative. It can increase  
8 seizures. It can do a number of things which aren't  
9 good. And so as you continually increase this  
10 medicine, you get to the point where you've given about  
11 as much as you can.

12 A new tech -- it's not very new, but maybe a  
13 15-year-old technique is to actually put the Botox --  
14 I'm sorry -- the baclofen directly into the fluid that  
15 bathes the spinal cord and the brain. And that's  
16 called the intrathecal space. That's just the word for  
17 it.

18 And when you do that, it is literally a thousand  
19 times more effective than when you take it by mouth.  
20 In other words, what a hundred milligrams in an  
21 adult -- you wouldn't get a hundred milligrams -- of  
22 baclofen does a hundred micrograms, in other words, one  
23 one-thousandths of a hundred milligrams does. And so  
24 it's very effective. It's effective when youngsters

1 have become refractory to oral baclofen. And so I  
2 think that's the thing that's going to be appropriate.  
3 I don't know exactly when that's going to happen, but  
4 it probably will be when he's eight or ten years old.

5 Q So not quite --

6 A I'm recommending that.

7 Q If I can make sure I understand what you said.  
8 So he's taking baclofen now?

9 A He's taking baclofen now, but it can be  
10 delivered in a pump.

11 Q And he's taking it orally?

12 A He's taking it -- well, he's taking it in his  
13 gastrostomy, but we call that oral.

14 Q I'm sorry. It's through the gastrostomy tube?

15 A Sure.

16 Q With all of the other nutrients that are  
17 administered. I assume that he receives his  
18 medications at the same time as he receives his  
19 nutrition?

20 A Yes.

21 Q All right. So -- and, again, the baclofen has  
22 what purpose?

23 A It reduces spasticity.

24 Q All right.

1 A It relaxes his muscles.

2 Q And -- and, of course, taking it through the  
3 gastrostomy tube at larger doses means that he's  
4 subject to greater risks, I assume, than if he gets  
5 smaller doses?

6 MR. McBRIDE: Objection. Leading.

7 BY MR. DURNEY:

8 Q Is that right?

9 MR. McBRIDE: Objection. Leading.

10 MR. DURNEY: I'll rephrase the question.

11 BY MR. DURNEY:

12 Q Explain again why you want to reduce the dose  
13 over time and why the intrathecal pump achieves that.

14 A Well, he has increased his dose from when I  
15 first saw him to lately. I didn't ask his mother  
16 exactly when that increase occurred. But it's double  
17 what it was before. And it -- this medicine has side  
18 effects as you increase the dose. The higher you get,  
19 the more often you have side effects. And side effects  
20 are sedation. Basically it just makes you sleep all  
21 the time. It can also decrease your seizure threshold,  
22 in other words, increase the number of seizures you  
23 have with the medication you're taking.

24 And so the intrathecal baclofen, if you put it

1 directly into the cerebrospinal fluid, the fluid  
2 bathing the spinal cord and brain, is much more  
3 effective. And consequently -- and so it's much more  
4 effective without the side effects. That's the whole  
5 point, that you don't get the sleepiness when you put  
6 it directly in at the same dose. So you can increase  
7 the dose without getting the side effects. That's why  
8 it's useful.

9 Q All right. And you expect that that will --  
10 that the intrathecal pump will have to be inserted at  
11 some point in his life?

12 A Yes.

13 Q All right.

14 A And once you have that, you need to put  
15 medicine into it. I think I said -- yeah, refill for  
16 it. I think initially I said the refill is every month  
17 or so. There is newer pumps that you refill only every  
18 three months. And that's what Carol has here.

19 Q All right. Does Carol take into consideration  
20 in the plan the -- the baclofen itself?

21 A The drug itself and the need to be refiling.  
22 You actually -- the pump, it lives in your abdomen.  
23 It's beneath the surface. And the way you refill it is  
24 actually through a needle through the skin.

1 Q All right. Have we gone through all the  
2 anticipated surgical procedures?

3 A I believe we have.

4 Q What's left?

5 A Well, medicines --

6 Q Supplies, medical supplies?

7 A Well, yes, medical supplies or medication and  
8 supplies, yes.

9 Q All right. Let's talk about medications then.

10 A For the medication I have listed basically what  
11 he's taking now, or as time goes on, modifications of  
12 those medications. So there's really no change there.  
13 It includes the antiseizure medicine.

14 Q All right. And these medications that we see  
15 on page 41 of Ms. Hyland's report reflect the annual  
16 cost of those medications?

17 A Yes.

18 Q All right. And those will continue annually --  
19 the same medications will be required annually for  
20 life?

21 A Yes.

22 MR. McBRIDE: Objection. Leading.

23 THE WITNESS: Yes, that's my anticipation.

24 /////

1 BY MR. DURNEY:

2 Q All right. Let's go on to bowel and bladder  
3 supplies.

4 A Well, I expect he's never going to be continent  
5 of his bowel or bladder and he's going to be in  
6 diapers. Of course, all youngsters have diapers until  
7 they're two or three. Here he is four. Ordinarily  
8 you'd expect that he would be potty trained, so to  
9 speak. He's not going to be.

10 And so at that point -- at the age where he  
11 ordinarily would be potty trained and he wouldn't need  
12 diapers, then they become an appropriate expense.  
13 Prior to that time they're just part of raising a  
14 child.

15 And so we have both the diapers, the kinds of cream  
16 you might use and gloves for changing the diaper which  
17 would be more appropriate for a caregiver than perhaps  
18 a parent.

19 Q So you begin --

20 A It has that.

21 Q So you begin those costs at age two?

22 A Yeah, probably.

23 Q All right. And so -- so these costs reflect  
24 the bowel and bladder supplies that will be -- that



1 have been required since he was two and will continue  
2 annually for the balance of his life; correct?

3 A Yes.

4 Q All right. What about gastrostomy supplies?

5 A Well, he needs, of course, the formula that  
6 he's getting. Right now he's getting a formula called  
7 EleCare Jr. And let's see. He also needs the  
8 equipment, the gastrostomy tube, the MIC-KEY tube, and  
9 the other connecting tubes, the pump, syringes for  
10 flushing the tube and putting extra water in.

11 And we also have a pole. Sometimes you can just  
12 connect it to the wall or something, but it's easier if  
13 you have an actual pole that you connect it to. It can  
14 travel around with him so you don't have to put him  
15 just in one spot for the feeding.

16 Q I'm looking at the line item for that pole, and  
17 I see a fraction, 1/5 a year. What's that mean?

18 A The pole should last five years. You need one  
19 every five years.

20 Q Okay.

21 A So it ends up costing very little per year.  
22 And these are per year costs.

23 Q So you begin the gastrostomy supply  
24 requirements at age two. Why is that since he's needed

1 the gastrostomy since his first day of life?

2 A You know what, I don't know why. He -- he  
3 certainly had the gastrostomy when he came out of  
4 Renown at the age of 42 days of life, so I don't know  
5 why she has that.

6 Q So that would be a mistake that would require  
7 revision?

8 A It might.

9 Q All right. But otherwise, the gastrostomy  
10 supplies that we see at page 42 and at the top of page  
11 43 of Ms. Hyland's report do reflect what you believe  
12 to be the gastrostomy supplies that will be required  
13 annually of Lyam for the balance of his life?

14 A Yes.

15 Q And also reflective of the gastrostomy supplies  
16 that he has needed up until this very day from his  
17 first hospitalization at Renown?

18 A Yes.

19 Q All right. Let's go on to the next anticipated  
20 expense, respiratory equipment and supplies.

21 A Yes.

22 Q Tell us about that.

23 A He has a suction machine. The suction machine  
24 has a tube which you actually put into his throat to

1 suction out mucous or secretions. That's listed there.  
2 He has a nebulizer which is for administering medicine  
3 that is nebulized like albuterol and the medicines  
4 we've already listed. So that would be what he needs  
5 for respiratory. And I think those will be for the  
6 rest of his life also.

7 Q And those reflect the annual cost?

8 A Yes.

9 Q And, again, Ms. Hyland begins those costs at  
10 age two. Do you think that they should be reflective  
11 from day one of life?

12 A I think you'd have to ask her. My assumption  
13 is that since the life care plan is looking forward  
14 rather than looking backward, its costs from now to the  
15 future, but he was actually three at the date of this  
16 report, and so I'm not certain why she has two.

17 Q Understood. We can talk to her about that.

18 How about medical equipment?

19 A Well, these are devices he needs. He needs a  
20 device -- it's a pediatric wheelchair. A company named  
21 Ottobock makes it. It's called the Kid Cart. It's a  
22 positioning wheelchair. It -- usually you use it until  
23 the youngster is about six or seven. And then he's  
24 going to need a regular wheelchair. It's for children

1 as small as Lyam is at that point.

2 And then he needs a manual wheelchair when he gets  
3 to be six. She has five. He's four now. If he needs  
4 the Kid Cart for about three years, he'll be six or  
5 seven when he's appropriate for the manual wheelchair.  
6 And that needs to be a particular kind of chair that  
7 tilts him back by pushing a lever.

8 So he's sitting almost upright, but when you're  
9 feeding him, you want him to be reclined. And it's  
10 called Quickie. That's the name of the company. TS is  
11 tilt and space. And it has what's called a seating  
12 system which does support the trunk and the back and  
13 the hips and actually the head also.

14 I also think he needs a standing frame. We've kind  
15 of talked about that when we talked about tendon  
16 Achilles lengthening. That's for the benefits of  
17 standing. It has benefits in the bone and helps bone  
18 growth and development.

19 Q And how many of -- how long does the standing  
20 frame last?

21 A It would last five years. Let's see. What did  
22 she say? Well, he's probably going to outgrow -- you  
23 see, they come in sizes. He's so small now. Oh, seven  
24 years. Okay, that's appropriate.

1 Q Every seven years he'll need to replace the  
2 standing frame?

3 A Yes.

4 Q Okay. Do you know if he has one now?

5 A Yes. Well, no. He had one that was lent to  
6 him by the NEIS program. He doesn't have that anymore.  
7 And when I spoke with his mother, she said she  
8 understood one was coming, but he didn't have it yet.  
9 That's my -- I think that's my recollection.

10 Q Okay. Very good.  
11 Keep going. What about a bed?

12 A Well, when he gets to be about 40 or 50 pounds,  
13 he's going to need a hospital bed. And that's because  
14 the hospital bed goes up and down and moves around.  
15 When he gets to be that size, it's hard to transfer  
16 him. You can't pick him up as you do now and just put  
17 him on the bed.

18 So what a hospital bed does is it goes down to the  
19 point that he's -- it's a level transfer. Transfer  
20 means go from one place to another. So from his  
21 wheelchair he is -- he can be slid over to the bed.  
22 And then the bed can be elevated so you can do whatever  
23 procedure you need to do, in this case -- in most  
24 cases, feeding or diaper change or things like that.

( 1 So he needs that kind of machine that raises the bed,  
2 lowers the bed, and tilts the bed. He doesn't need it  
3 now. He can be picked up. He's -- his mother told me  
4 how much he weighed, and I forgot. I think it's about  
5 30 pounds.

6 Q With regard to weight, is this something  
7 that -- at least with regard to anticipated weight, is  
8 that something that will be similar to normal  
9 able-bodied children?

10 A Yes, pretty much. He'll probably be a little  
11 less. And he certainly will not be obese, because you  
12 can control that. There's no reason to feed him --  
13 feeding him so much that he gets overweight, but you  
14 have to feed him so much that he grows and other  
15 metabolic processes occur. You can't stunt his growth  
16 by feeding him so little that he doesn't grow much,  
17 because other things go wrong when do you that. He was  
18 29 pounds when I saw him.

19 So you would expect he would grow. And I expect by  
20 about nine years of age he will be 80 to 100 pounds.  
21 And at 80 to 100 pounds, that's too much for his mother  
22 to lift him. That's the reason for the hospital bed.  
23 And then for other transfers, he needs another --

( 24 Q Let me stop you, because I'm curious. Even

1 with a hospital bed, at 80 to 90 pounds, how is he  
2 transferred from hospital bed to chair, chair to the  
3 bathtub, those kind of practical things that we can  
4 think of?

5 A There are other places besides in bed and out  
6 of bed that he needs to make transfers, like into a tub  
7 and things like that. For that we use another kind of  
8 device for transferring.

9 Q What's that called?

10 A That's called a Hoyer lift.

11 Q So he'll need one --

12 A He'll need one of those about the same time,  
13 about the same age.

14 Q And the Hoyer lift, how long does that last?

15 A Gee, they last a long time.

16 Q Tell us how this --

17 A Ten or 15 years.

18 Q All right. Tell us how this Hoyer lift works  
19 and what its application is.

20 A Well, it's -- there's two parts to it. One is  
21 a sling that you put under the person. If they're  
22 really big, like 200 pounds, you roll them to one side,  
23 stuff the sling under them, roll them to the other  
24 side, stuff the sling under there. And then you have

1 this -- basically a cloth seat which has rings that you  
2 put a hook through. And you have four of these hooks,  
3 four of these rings, one hook that goes through that.  
4 So that's the sling part.

5 Very often you leave the sling in place so that the  
6 person is sitting in his wheelchair in the sling. In a  
7 smaller person you can fit them into it, you don't need  
8 to leave the sling in place all the time. But the  
9 second part of a Hoyer lift is where you hook that to a  
10 hook and that goes to this -- basically an A-frame.  
11 It's like for pulling an engine from a car that's  
12 heavy. You -- it goes up to a pulley. And some Hoyer  
13 lifts you have to crank; some you have to pump. In  
14 other words, they're hydraulic, but they lift up by  
15 pumping a fluid. Some are actually electric.

16 Let's see. What did she get? Totally electric.  
17 She got the power -- one touch-power lift is the  
18 electric type.

19 Q And you think that's appropriate?

20 A I think that's appropriate. That's the  
21 easiest. And that means anybody, not just a really  
22 strong person, can lift him in the Hoyer lift. So his  
23 grandmother, his grandfather as time goes on can  
24 operate that kind of device.



1 Q And that, again, is once in a lifetime?

2 A Yeah, I think so. I think it will last.

3 Q Any other type of lift required in your  
4 opinion?

5 A There's a problem with some Hoyer lifts --  
6 well, the problem isn't with the Hoyer lift, it's with  
7 the person's bathroom, that you can't really fit it in  
8 there because it's got forks that go down on the floor.  
9 So when you pick the person up, the device doesn't  
10 tilt, which are struts going out. There are some  
11 places where you might want to transfer a youngster  
12 where you can't fit the Hoyer lift in safely. You can  
13 always move the forks so they fit, but then it's not  
14 safe and it can tilt over and you can have an accident.

15 So one solution -- and it's really only one  
16 solution. There are other ways to do this is to use a  
17 ceiling lift so there's no -- nothing on the ground  
18 that does the lifting. And you have the ceiling lift  
19 go from the bed to the bathroom to the toilet.

20 Q Don't you have to modify the house with a  
21 ceiling lift?

22 A Yes. It's a certain amount of weight. And you  
23 build it into the ceiling. And depending on how much  
24 weight you anticipate, you know, a structural engineer

1 has to look at the house and make a decision whether  
2 you need to put in extra beams or not. Sometimes you  
3 do, sometimes you don't, depending on how the house is  
4 built.

5 Q So if I understand you correctly, the Hoyer  
6 lift, the limitations are that it may not be able to  
7 fit into a room like a bathroom?

8 A Yes.

9 Q And to compromise the Hoyer lift, it creates a  
10 risk that it will tip over?

11 A It will tip over and cause an accident, right.

12 Q So, I guess, one of the alternatives would be  
13 to modify the house?

14 A An alternative is to actually modify the house,  
15 yes --

16 Q But basically --

17 A -- for the ceiling lift.

18 Q All right. Basically --

19 A These are just two ways of doing the same  
20 thing.

21 Q All right. So you're saying either he needs a  
22 Hoyer lift or a ceiling lift, but that's going to  
23 depend upon a house modification?

24 A Exactly.

1 Q So we'll get to house modifications, I assume.

2 A Yes.

3 Q All right.

4 THE COURT: Why don't we stop right here.

5 Ladies and gentlemen of the jury, we're going to  
6 take a short recess at this time. During this recess  
7 you're admonished not to talk or converse among  
8 yourselves or with anyone else on any subject connected  
9 with this trial; or read, watch, or listen to any  
10 report of or commentary on the trial by any person  
11 connected with this trial or by any medium or  
12 information, including, without limitation, newspapers,  
13 television, and radio; or form or express any opinion  
14 on any subject connected with this trial until the case  
15 is finally submitted to you. You may not do research  
16 about any issues involved in the case. You may not  
17 blog, tweet or use the internet to obtain or share any  
18 information.

19 (The following proceedings were held  
20 outside the presence of the jury.)

21 THE COURT: The record will reflect we're outside  
22 the presence of the jury.

23 It looks to me like we have about another hour and  
24 a half, Mr. Durney. Is that correct?

1 MR. IVEY: I would say that's accurate.

2 THE COURT: Yeah, a little bit more. I thought it  
3 was represented to be just about two and a half, three  
4 hours, and it's going to be more like four hours.

5 MR. DURNEY: It shows you my knowledge of technical  
6 stuff, Your Honor. Sorry.

7 MR. McBRIDE: And, Your Honor, I just want to make  
8 sure -- it may be less than that actually if we're  
9 clear about the objections and the life expectancy  
10 information, the reasonableness and the necessity of --

11 THE COURT: We'll see what happens.

12 MR. McBRIDE: Make sure that that's taken all out  
13 of my questioning, because it's quite a bit.

14 MR. IVEY: I'll doublecheck.

15 MR. McBRIDE: But at least an hour, I would say.

16 THE COURT: I'm watching the jury, and I'm telling  
17 you, and I don't mean this derogatory, they're just --  
18 they tapped out an hour and a half ago.

19 MR. DURNEY: Well, I have another issue, Your  
20 Honor, and that is that we have an economist that has  
21 flown up from Las Vegas, and he's waiting outside right  
22 now. So I do need to get him on the stand today. And  
23 I wonder if it might be prudent to take him out of  
24 order after the break and come back to this.

1 MR. McBRIDE: Well, my only problem with that, Your  
2 Honor, is that in part his economic figures are based  
3 on Dr. Capell and Carol Hyland's numbers, so I think in  
4 order to lay the proper foundation we need to finish  
5 with this first.

6 MR. DURNEY: I think that goes to the weight rather  
7 than the admissibility, Your Honor, but, in any  
8 event -- I mean, if we have to keep him over, it just  
9 costs me a lot of money.

10 THE COURT: How long is he going to be in his  
11 testimony?

12 MR. DURNEY: Half hour for me.

13 MR. McBRIDE: Probably --

14 THE COURT: Well, let's keep going on this until  
15 about 3:30 and then we'll see where we are. If we have  
16 to -- we'll get into your cross.

17 MR. McBRIDE: Right. And that's another thing. I  
18 would like to have at least -- since we've heard all  
19 the plaintiff's --

20 THE COURT: We'll get into part of your cross and  
21 then we'll see where we're at in respect to that.

22 MR. McBRIDE: Thank you, Your Honor.

23 THE COURT: I think that's fair.

24 Court will be in recess.

1 MR. McBRIDE: Mr. Durney and I are having to relive  
2 it again, so --

3 (A recess was taken.)

4 THE COURT: We're outside the presence of the jury.  
5 Counsel, are you ready to proceed?

6 MR. DURNEY: Yes, Your Honor.

7 THE COURT: Okay. Go ahead and bring the jurors  
8 in.

9 (The following proceedings were held  
10 within the presence of the jury.)

11 THE COURT: Will counsel stipulate to the presence  
12 of the jury?

13 MR. DURNEY: Yes, Your Honor.

14 MR. KELLY: Yes, Your Honor.

15 THE COURT: Okay. Go ahead and continue with the  
16 video.

17 THE WITNESS: Well, he needs ankle braces to hold  
18 his feet as much as possible in the foot flat position.  
19 He needs other devices, and I have them listed, a  
20 portable ramp, so, in other words, you can get him into  
21 the house in a wheelchair. He needs a shower chair.  
22 That's a device you transfer him to when you wheel him  
23 into the shower.

24 A feeding chair would be a positioning chair that

1 you could fit him into so the wheelchair wouldn't have  
2 to have all those features to it. A long hosed shower  
3 nozzle, that's just simply hand held, so that someone  
4 else can wash him. In other words, he is sitting in  
5 the shower. And ordinarily you turn around and move  
6 your arms and you do things like that to shower  
7 yourself. When a person is as dependent as he is, an  
8 attendant would take that handheld shower and wash him  
9 down completely that way. So that's why the shower  
10 nozzle.

11 There are a number of devices that the therapists  
12 have suggested. I talked about the contrast lights and  
13 I talked about the objects. There's pillows and things  
14 like that. We call those stimulation toys. I don't  
15 know exactly what he is going to need, so we just gave  
16 an allowance for it, about \$350. These things end up  
17 costing more than you'd expect from just going to the  
18 hardware supply place and stringing some lights  
19 together, but not a lot more, so I think that's a  
20 reasonable amount.

21 Other devices he needs is he needs a wheelchair  
22 cushion that needs to be replaced every six months,  
23 cover for the cushion. Let's see. What do we have  
24 here? Oh, covers for the shower chair and the feeding

1 chair. Oh, I see how she did it. She has two to five  
2 and she has five to ten, five to lifetime.

3 BY MR. DURNEY:

4 Q All right. Let's break it down. We're talking  
5 about a cushion cover, a shower chair, a feeding chair,  
6 a long hosed shower nozzle, portable ramps, stimulation  
7 toys. Are these things that -- the expenses that  
8 Ms. Hyland listed on page 47 to 48, are these all  
9 things that you recommend?

10 A Yes. And it has usage. That's how often you  
11 need to replace them. Like a shower chair will last  
12 one every five years; feeding chair, one every six  
13 years; the nozzle, one every three years; things like  
14 that.

15 Q I understand. All right. And you agree with  
16 Ms. Hyland's statement as to how long each of these  
17 recommended items will last?

18 A That's my experience, yes.

19 Q All right. You know, we've been going quite a  
20 long time. I just looked at my watch. Do you want to  
21 take a break?

22 A I'm fine to continue.

23 Q All right. So the next thing on Ms. Hyland's  
24 list is mobility equipment. I assume you talked to



1 Ms. Hyland about that?

2 A Yes.

3 Q What are your opinions about the annual needs  
4 or lifetime needs of Lyam in the area of mobility  
5 equipment?

6 A Well, she lists mobility equipment as big  
7 mobility equipment, in this case a van. At some point  
8 he's going to be too big to transfer easily in and out  
9 of a car. And although you can use, you know, the  
10 ceiling lift and the Hoyer lift or the hospital bed for  
11 making transfers when he's too big to pick up within  
12 the house, you can't easily do that in a car. And so  
13 the solution is a van which has a built-in lift. And  
14 this is what people who have locomotion problems in  
15 wheelchairs use.

16 And I don't think he needs it right away. I think  
17 it's probably appropriate, again, when he's over  
18 60 pounds which is going to be somewhere between the  
19 age of five and eight.

20 And then she has a listing of these -- the device,  
21 how long it lasts, things of that nature.

22 Q All right. That's her area of expertise, not  
23 yours, I assume?

24 A Exactly. What they cost and what you have to

1 put together, yes. My expertise is he is going to be  
2 too big to transfer about the time he is eight to ten.

3 Q And so he is going to need the van, he is going  
4 to need a van that's retrofitted to allow for a lift  
5 and --

6 A Yes.

7 Q -- those kinds of things that Ms. Hyland had  
8 put down in page 48?

9 A So he can get to school and doctor visits and  
10 family activities and things like that.

11 Q All right. Let's go to attendant care. So far  
12 Lyam has been attended to by Tawni with, to some  
13 extent, help from her family?

14 A Yes.

15 Q What do you anticipate Lyam needs in the area  
16 of attendant care?

17 A I think he is going to need exactly what he has  
18 now. He needs to have someone who is knowledgeable and  
19 trained and able to make appropriate decisions 24 hours  
20 a day, seven days a week.

21 Q And what are the qualifications of the person  
22 that you envision for Lyam?

23 A Well, I think his mother is doing a superb job.  
24 She is, quite frankly, a remarkable person in my

1 estimation. But if you were to hire someone to do the  
2 job that she is doing, to be safe, it would have to be  
3 someone with some medical training. And I think the  
4 degree of medical training that person needs would be  
5 appropriate to in your state an LPN, a licensed  
6 practical nurse -- that's a two-year -- well, it's  
7 about almost a two-year degree -- as opposed to an RN,  
8 which would be a four-year degree.

9 An RN, of course, a registered nurse, could take  
10 care of him also, but I think a licensed practical  
11 nurse would be appropriate, because he has gastrostomy  
12 feeding and that has to be mixed and it has to be  
13 judged how much he needs.

14 There are several things that have to be done with  
15 nursing judgment. For instance, if he has a seizure  
16 that lasts a certain amount of time or if it looks like  
17 it's causing respiratory distress, then he needs to  
18 have the medicine put in as a suppository. And that's  
19 in the medicine part. It's called Diastat. That's a  
20 nursing judgment. A mother can learn to do that, but  
21 to be safe, it really requires a nursing judgment.  
22 Someone has to decide if, you know, a mild cold or a  
23 cough has gotten to the point where it's causing  
24 respiratory distress and he needs to go to a doctor or

1 an emergency room or call an ambulance. Those are all  
2 nursing judgments. That's why I think it should be an  
3 LPN.

4 Q Now, mom is doing it now.

5 A Yes.

6 Q I'll rephrase the question. In your opinion,  
7 Doctor, why is it reasonable to call for attendant care  
8 in addition to mom 24 hours a day, seven days a week?

9 A Because that's what he needs over and above  
10 what a mother or parents or a family would provide an  
11 ordinary able-bodied child. By the time a child is  
12 four years old, you're not having to change their  
13 diaper, you're not having to dress them, you're not  
14 having to bathe them, you're not having to feed them  
15 through a gastrostomy. These are all -- and you're not  
16 needing to give them extensive medications, you're not  
17 needing to make nursing judgments, you're not needing  
18 to take them to the doctor frequently. And so these  
19 are over and above what ordinarily would be part of  
20 parenting.

21 And the reason I am saying that it should be  
22 provided by someone is because of that. The reason it  
23 should be provided by someone other than the mother is  
24 really up to her. She can provide all these cares if

1 she really wants to devote her life to that. I would  
2 hope she doesn't. I hope she would provide some of the  
3 care, just for her own development, but not all of the  
4 care and not consume her life with this -- what is  
5 clearly a burdening kind of treatment.

6 Q All right. Let's go on to housing  
7 modifications. We've touched on it earlier when we  
8 talked about the Hoyer lift versus the ceiling lift.  
9 Why do you believe that this life care plan should  
10 include the cost and expense of housing modifications?

11 A Well, he's going to be in a wheelchair. And  
12 when he's not in a wheelchair, he is going to be in a  
13 hospital bed. When he's not in a hospital bed, he is  
14 going to be in his shower chair getting a shower or in  
15 his feeding chair. And so the house -- these things  
16 are large, and so the house has to be accessible for  
17 that. You have to be able to get up the stairs or over  
18 a threshold, and that's why there needs to be some  
19 modifications made.

20 My understanding is that this house that she lives  
21 in right now with her parents is not accessible to a  
22 wheelchair. Now, he's so small, 29 pounds, you can  
23 pick him up and walk upstairs with him or walk in the  
24 house or all those other things, but as he gets bigger,

1 that's not going to work anymore. And that's why I'm  
2 saying wheelchair accessible home.

3 Exactly what that means, it means a lot of  
4 different things. I left it up to Carol, because she  
5 actually has information about the house. And so her  
6 understanding is certain doorways need to be widened.  
7 There needs to be a ramp. What's the other thing?  
8 Widen the doorway for a ramp and remodel bathroom so  
9 its accessible to a wheelchair.

10 Oh, she has one other thing, a concrete walkway.  
11 And that's because it's in a rural area and there is  
12 not a clear concrete wheelchair accessible route from  
13 where the car would be parked to the house itself.

14 Q All right. And you agree with all of the --

15 A I agree with those, yes.

16 Q -- assumptions that Ms. Hyland made in the  
17 report?

18 A Not the cost, because that's really not my  
19 area.

20 Q I understand. But with the exception to the  
21 cost set forth in Ms. Hyland's report that we marked as  
22 Exhibit 3 to this deposition, are you in agreement with  
23 each and every item that is included in that life care  
24 plan?

1       A    Yeah.  And I think we've already talked about  
2 where there's any change I might make, but, yes, with  
3 that understood, I am in agreement with this life care  
4 plan.

5       Q    Now, the defense has hired a pediatric  
6 neurologist by the name of Harriet Cokely to express  
7 opinions like -- some of which go over the same subject  
8 as yours.  Have you read her deposition?

9       A    I've read her report and her deposition, yes.

10      Q    Doctor, have all of the opinions that you have  
11 expressed today been stated to a reasonable medical  
12 probability?

13      A    Yes.

14      Q    Just one last question.  I assume that you  
15 provide input for life care plans to both defendants  
16 like Carson Tahoe Regional Medical Center and  
17 plaintiffs like Tawni McCrosky in your career.

18      A    Oh, yes, I certainly do.

19      Q    How do you divide -- is there an allegiance to  
20 one side or the other?

21      A    Certainly not.  The division is pretty even.  I  
22 think in the last five years I've done a few more  
23 defense life care plans that I've participated in than  
24 plaintiff life care plans, but probably out of those

1 five years, two of them -- two years have been a little  
2 bit more plaintiff than defense. So, in other words,  
3 it's pretty even. And when I'm making a life care  
4 plan, I am recommending what I think is appropriate for  
5 this youngster for his lifetime.

6 Now, that's not the same as in a regular medical  
7 practice. When I say, "I think you need a wheelchair,"  
8 I don't say, "I think you need 11 wheelchairs for the  
9 rest of your life," and say, "I think you need a  
10 wheelchair now and next time I see you we'll rethink  
11 that."

12 A life care plan is an estimate of what the future  
13 would hold rather than what -- until the next visit  
14 with the doctor holds. But when I prepare a life care  
15 plan for defense and for plaintiff, if that's what  
16 you're asking me, they're exactly the same. I don't  
17 modify it. I don't stack it one way or another  
18 depending on whoever is asking my opinion. In fact,  
19 when I prepare a life care plan, it would be what I  
20 would estimate for a patient who I were treating  
21 myself. In other words, if this were my patient -- if  
22 Lyam were my patient, this is exactly the life care  
23 plan. And it's exactly the life care plan I would do  
24 for my grandchild if I needed to do that sort of thing.



1 Q Thank you, Dr. Capell. That's all I have.

2 MR. McBRIDE: Do you want to take a quick break or  
3 keep going?

4 MR. DURNEY: I would like a comfort break as, you  
5 know, Chelsea calls it. I like what Chelsea calls it.

6 MS. PIERCE: We're going off the record, and the  
7 time is 12:48 p.m.

8 We are back on the record in the matter of Tawni  
9 McCrosky versus Carson Tahoe Regional Medical Center,  
10 and the time is 12:55 p.m.

11 CROSS-EXAMINATION

12 BY MR. McBRIDE:

13 Q Good afternoon, Dr. Capell. How are you?

14 A I'm well. Thank you.

15 Q Good. Now, we haven't met before today;  
16 correct?

17 A That's right, we haven't.

18 Q But you were in a deposition that was taken by  
19 my associate, Chelsea Hueth; is that right?

20 A Correct.

21 Q Okay. Do you recall that was July of last  
22 year?

23 A Yes.

24 Q July 15th, as a matter of fact; correct?

1 A Yes.

2 Q And prior to that deposition you had also  
3 prepared a written report with all of the opinions  
4 which you had formulated up to that date which you  
5 intend to offer at the time of trial; correct?

6 A I believe so, yes.

7 Q Okay. And since that report -- that's the one  
8 that we've already been going through with Mr. Durney;  
9 right?

10 A Yes.

11 Q Since that report have you authored any  
12 additional supplemental reports?

13 A I've reviewed additional information. What was  
14 the date of my deposition?

15 Q July 10, 2015. I'm not asking if you've  
16 reviewed additional information. I'm asking if you  
17 have prepared a supplemental report with any different  
18 opinions or new opinions.

19 A No. I have reviewed additional records,  
20 dictated a report. Those have been blended into my  
21 review of records and supplemental review of records.  
22 And I provided those to Mr. Durney, but they don't  
23 change my opinions.

24 Q Okay. And prior to your deposition you

1 testified that you had met with Mr. Durney for at least  
2 an hour before the deposition. Do you recall that?

3 A Yes.

4 Q Okay. And, in fact, prior to your  
5 deposition -- well, let me ask you this: When were you  
6 shown a --

7 MR. McBRIDE: Your Honor, can we approach?

8 THE COURT: You may.

9 (A discussion was held off the record  
10 between the Court and counsel.)

11 THE WITNESS: -- same as in California.

12 BY MR. McBRIDE:

13 Q And, in fact, with regard to your role in this  
14 case, you understood and you testified that your role  
15 was to testify as to the present and future medical  
16 needs of Lyam McCrosky; correct.

17 A Among others, yes.

18 Q Okay. Well, that was what you told us several  
19 times, that that was your main function and  
20 responsibility as an expert in this case; correct?

21 A Well, I think I explained my responsibility was  
22 to review medical records, to examine the youngster,  
23 and then to be available -- or to prepare a report and  
24 be available for deposition and court testimonies.

1 Q Right.

2 A It's really quite a breadth of things I was  
3 anticipating, yes.

4 Q And, in fact, in this case -- well, you've been  
5 giving depositions in medical-legal cases since  
6 approximately 1979; is that about right?

7 A In California, yes.

8 Q Okay. And you also gave some depositions or  
9 offered some testimony even when you were in Minnesota;  
10 correct?

11 A Yes.

12 Q And there was a period of time during your  
13 career where you tried to limit the amount of expert  
14 review that you did to about 5 to 10 percent of your  
15 income because of other obligations; correct?

16 A Yes.

17 Q And, in fact, now that number has increased by  
18 your own testimony to approximately two-thirds of your  
19 income that you receive each year; correct?

20 A That's correct.

21 Q Okay. And the other one-third -- and that has  
22 been since the past ten years as I understand it.

23 A Ten years.

24 Q It's been reduced -- your clinical experience

1 or practice has been reduced to about one-third of your  
2 income; correct?

3 A Yes.

4 Q All right. In fact, you also worked with Carol  
5 Hyland on many occasions over the years; correct?

6 A I have.

7 Q Okay. In fact, that goes back to at least  
8 1993; isn't that true?

9 A I'm not certain of the year, but it seems like  
10 it's been quite a long time. Twenty years would be --  
11 that would be 22 years. That's probably correct.

12 Q Okay. And do you recall over the years  
13 approximately how many times over those 22 years you  
14 worked with Ms. Hyland?

15 A Boy, I would have to estimate. It seems like  
16 four or five times a year.

17 Q Okay. Do you recall testifying in the case  
18 entitled Christopher Bruno versus North Broward  
19 Hospital?

20 A That would be in Florida, but --

21 Q January of -- January 5 of 1993. Do you recall  
22 that?

23 A I don't remember the case, but I do remember  
24 testifying in Florida on several occasions.

1 Q In fact, that was a case in which you testified  
2 on behalf of the plaintiff; correct?

3 A I have done both plaintiff and defense in  
4 Florida. Probably plaintiff.

5 Q Okay. And, in fact, there was a period of  
6 time, at least back in the '90s, for instance, where  
7 you refused to act as an expert in any medical-legal  
8 case that involved a physician or hospital here in  
9 Fresno; isn't that right?

10 A Yes. It was my practice not to be involved in  
11 suits of patients -- I'm sorry -- physicians that I  
12 would be referring patients to. I had that advice from  
13 another physician, and I think it was wise, and I  
14 certainly followed that for a long time.

15 Q So the only cases in which you testified on  
16 behalf of a plaintiff, at least up until -- has that  
17 been fairly the case, you still hold that practice  
18 where you don't testify on behalf of a plaintiff here  
19 in Fresno in a medical-legal case?

20 A I think in most cases it's true, although there  
21 have been several where I have testified.

22 Q Okay. But the majority of the cases in which  
23 you act as an expert on behalf of the plaintiff in a  
24 medical-legal case are in other jurisdictions like

1 Carson City, Nevada; correct?

2 A Well, the majority of the medical-legal cases I  
3 do are not in Fresno.

4 Q Right.

5 A Probably a small minority is, but, yes, your  
6 statement is correct.

7 Q But you still do defense work on behalf of  
8 physicians here in Fresno; correct?

9 A Again, a tiny proportion of the medical-legal  
10 work I do is in our area here, but probably more  
11 defense than plaintiff, yes, in Fresno.

12 Q Exactly. And, in fact, do you recall  
13 testifying in the case in -- in a case here in Fresno  
14 called Frazier versus MacBoo1 -- do you recall that?  
15 -- on behalf of the defendants?

16 A It doesn't ring a bell. When would that have  
17 been?

18 Q Let me get the exact date for you. That would  
19 have been your deposition on February 25, 1991.

20 A I wouldn't be surprised. I don't recall that,  
21 but, as I said, I think my legal practice has been more  
22 defense than plaintiff.

23 Q Okay. And, in fact, prior to today you have  
24 provided us with the list of cases in which you've

1 testified at least from 2011 to 2014; correct? Do you  
2 remember that?

3 A I believe so, yes.

4 Q And by my calculations -- we'll get to this  
5 later. By my calculations there were approximately 13  
6 cases that you reviewed in 2011, or at least provided  
7 testimony, sworn testimony. Feel free to look at  
8 your -- at your testimonial history.

9 A I think I brought that with me today.

10 Q If you don't have a copy, I have one for your  
11 review.

12 A And it starts with 2011?

13 Q Correct.

14 A And it ends with 2015?

15 Q Correct. And by my count, in 2011 there were  
16 13 cases where you gave sworn testimony; correct? You  
17 can count them up if you want or you can accept my  
18 representation.

19 A I'll accept your representation.

20 Q And I'll represent to you that by my count  
21 there were 18 cases in 2012, sworn deposition  
22 testimonies.

23 A Yes.

24 Q Okay. And 15 in 2013.



1 A I'm just looking in general and scanning these,  
2 but, yes.

3 Q Sure. And 15 in 2014.

4 A Yes.

5 Q Okay. And at least -- the report goes up to  
6 June of 2015. And by my count, including this case,  
7 which was in -- you testified in July of last year,  
8 that would include nine cases.

9 A Yes. There's eight listed, so this would be  
10 the ninth.

11 Q Okay. So is it your testimony then that --  
12 Okay. And, again, I just want to make sure,  
13 because you said that you were prepared at the time of  
14 your deposition to provide your full and complete  
15 opinions in this case; correct?

16 A Yes.

17 Q As well as the basis for those opinions;  
18 correct?

19 A Yes.

20 Q Okay. Now, going to your practice at least  
21 through -- over the years, you already testified that  
22 you treated both adults and children; correct?

23 A Yes.

24 Q And, in fact, when you were actually practicing

1 full-time, you had testified previously in -- that the  
2 practice was devoted to more adults than children;  
3 correct?

4 A There have been times in my practice where  
5 there was -- the preponderance were adults, yes.

6 Q Okay.

7 A Often adults with developmental disabilities,  
8 but adults.

9 Q All right. And that practice, has that changed  
10 in any respect over the past 10 years?

11 A Yes. The majority of the patients I see now  
12 are children.

13 Q Okay. And are the majority of those cases that  
14 you see children, are they cases in which those  
15 children have suffered the same problems as Lyam  
16 McCrosky?

17 A Some of them, yes.

18 Q Okay. Not all of them?

19 A Not all of them.

20 Q Okay. You said that -- and I think you  
21 testified here today that it isn't your job to  
22 determine the reasonable costs of Lyam's future needs,  
23 and you leave that to Ms. Hyland; correct?

24 A Yes.

1 Q Ms. Hyland, she is not a physician, though;  
2 correct?

3 A That's correct, she is not.

4 Q But you -- it's your job to identify what those  
5 needs are and then get in touch with Ms. Hyland and  
6 work together on an appropriate report; correct?

7 A That's part of my job, yes.

8 Q Okay. And that means whether it's a report on  
9 behalf of the plaintiff or a report on behalf of the  
10 defense; correct?

11 A Yes.

12 Q Okay. Have you -- you've not seen any videos,  
13 a day-in-the-life video or anything of that such, of  
14 Lyam, have you?

15 A I believe I have. As I sit here, I think I've  
16 seen an interview with Tawni's father, Lyam's  
17 grandfather.

18 Q Did you identify that in your deposition or in  
19 your report or materials that you provided, that you  
20 have reviewed those videotapes?

21 A I did not.

22 Q Why not?

23 A I usually don't consider that a part of the  
24 medical documentation.

1 Q Okay. You spent approximately two hours with  
2 Lyam when you evaluated him; correct?

3 A I think during the evaluation, yeah. There is  
4 probably another half hour with that incident that  
5 occurred at the end where I was helping his mother, but  
6 I don't count that as part of the evaluation.

7 Q Okay. That examination was not in a doctor's  
8 office, it was at Mr. Durney's office; correct?

9 A Yes, in a conference room in his office.

10 Q You had no special equipment with you to  
11 perform any tests, specific tests, on Lyam in that  
12 two-hour period; correct?

13 A I brought my doctor bag me which have basically  
14 the same tools I use when I examine any youngster,  
15 which included an ophthalmoscope for looking in the  
16 eyes, an otoscope for looking in the ears, a  
17 stethoscope for listening to the heart, a tape measure  
18 for measuring, a reflex hammer, a -- I use a wooden  
19 Q-tip for measuring sensation. I probably had a few  
20 other things in there for measuring visual stimulation,  
21 but I didn't have any instruments, in other words, I  
22 didn't bring an MRI or a reflex -- or an x-ray machine.  
23 I didn't even bring a scale. I had to rely on his  
24 mother to tell me what his last weight was.

1 Q Okay. And you didn't bring a tuning fork to  
2 test his hearing, did you?

3 A I probably had a tuning fork. I do have a  
4 tuning fork in my doctor bag, but I don't believe I  
5 used it. I used the tape measure. When you pull it  
6 quickly, it makes a loud click. And I usually use that  
7 to assess hearing. It's called the auditory blink.

8 Q But no other special equipment to test Lyam's  
9 eyesight; correct?

10 A No.

11 Q In fact, prior to the evaluation of Lyam, you  
12 didn't correspond with any of Lyam's treating  
13 physicians; correct?

14 A Except in the one-way sense of me reading their  
15 reports, but, yes, I did not.

16 Q But what I'm referring to -- you did not  
17 personally pick up a phone, call them up, say, "Hey,  
18 this is Dr. Capell. I'm doing an evaluation. What do  
19 you think this child's needs are?"

20 You don't do any of that, did you?

21 A I did not.

22 Q All right. And did you ever ask to do that?  
23 Did you ever ask permission from Tawni McCrosky to do  
24 that?

1 Q All right. Have you -- has the medical  
2 community sought your help in educating its physicians?

3 A Yes.

4 Q And tell us what you've done in connection with  
5 educating physicians on the subject of life expectancy.

6 A Well, firstly, we're often invited to write  
7 articles on a topic that is of interest to medical  
8 doctors. Secondly, some of our articles are designated  
9 for CME credit, continuing medical education. So the  
10 doctor will read the article in the journal, take a  
11 quiz and get CME hours. Thirdly, we're asked to speak  
12 at medical conferences nationally and internationally  
13 for medical doctors. Again, they get credit.

14 Q Your methodologies and principles, how do they  
15 compare with the methodologies and principles set forth  
16 in the professional literature?

17 A We all use the same standard scientific  
18 methods. The details may vary a little depending on  
19 the data and the questions of interest, but in general,  
20 to be published in a major peer-reviewed medical  
21 journal one has to use standard and accepted methods  
22 and to document those clearly.

23 Q And what other groups or entities utilize these  
24 same methods?

1       A   Well, for example, the federal government does  
2 when it constructs its general population life table,  
3 and the researchers at medical schools around the world  
4 all use the same standard scientific methods to look at  
5 survival.

6       Q   That you use?

7       A   Yes.

8       Q   All right. Let's talk about this case. I  
9 retained you specifically to determine Lyam's life  
10 expectancy; correct?

11      A   Yes.

12      Q   And how much time have you spent dedicated to  
13 this question?

14      A   About 40 hours prior to today.

15      Q   And what materials have you reviewed in  
16 connection with this assignment?

17      A   The report of Dr. Cokely and also her  
18 deposition, the report of Dr. Capell and his  
19 deposition, medical records, life care plans,  
20 day-in-the-life video.

21      Q   And for clarification, Dr. Cokely is the doctor  
22 retained on the other side of you by the defense in  
23 this case?

24      A   Yes, that's my understanding.

1 Q And did you -- did you examine Lyam?

2 A No, I did not personally examine him.

3 Q Why not?

4 A Well, firstly, I'm not qualified to. I'm not a  
5 treater in any capacity. Secondly, it wasn't necessary  
6 for me to examine him, because he already had been  
7 examined by Dr. Cokely and Dr. Capell and by his  
8 treaters.

9 Q And you considered the thoughts generated in  
10 all of the medical records, the thoughts of Dr. Cokely,  
11 the thoughts of Dr. Capell?

12 A And the treaters, yes.

13 Q And the treaters. What are the factors with  
14 the biggest effect on Lyam's life expectancy?

15 A It would be his motor function and his feeding  
16 ability. Those are two easily observed measures of the  
17 severity of disability, motor function and feeding  
18 ability.

19 Q Okay. Can you give us an example of well-known  
20 people who have become immobile by virtue of disease or  
21 accident that you have -- that you are aware of?

22 MR. KELLY: Objection. Vague and relevancy.

23 THE COURT: I'm going to --

24 MR. DURNEY: I'll rephrase the question. I



1 struggled with that one.

2 THE COURT: I was going to sustain the objection.

3 BY MR. DURNEY:

4 Q Yeah, let's go back to Lyam. How would you  
5 characterize Lyam's motor function?

6 A Well, I understand at least at presently his --  
7 at present his motor function is rather limited. He's  
8 developing head control and hand use, but at present  
9 it's limited.

10 Q And his feeding ability, how do you  
11 characterize that?

12 A Again, he has made some minimal progress. He  
13 requires a feeding tube for most of his nutrition at  
14 least at present.

15 Q And describe the studies on life expectancy  
16 that are relevant to this case.

17 A Well, there are many. There are more than 50  
18 studies of survival of children with cerebral palsy,  
19 but the ones in recent years -- there's about 30, I  
20 believe, I listed in my report. And of those, about  
21 five are principally important, I would say, five  
22 studies that look at similarly disabled children and  
23 follow them for a sufficient amount of time and  
24 stratify or break things up according to severity of

1 disability.

2 Q And who has -- all articles that are published  
3 in the peer-reviewed literature?

4 A All these are, yes.

5 Q All articles that have been authored by who?

6 A Well, I was a co-author on two of them, but not  
7 on the others.

8 Q Obviously authored by people similarly educated  
9 and experienced as you on the subject of life  
10 expectancy?

11 A Right, myself or other medical researchers on  
12 the topic.

13 Q All right. I understand that you have prepared  
14 a table that summarizes -- well, first of all, let me  
15 ask you this: What is Lyam's life expectancy based on  
16 all these factors?

17 A Approximately 15 additional years.

18 Q And you can state that to a reasonable degree  
19 of scientific certainty?

20 A Yes.

21 Q So what does that mean, 15 additional years?  
22 What exactly does that mean?

23 A That is the average survival time. Of course,  
24 he could live longer or shorter.

1 Q Okay. And I understand that you've prepared a  
2 table that summarizes your analysis?

3 A Yes.

4 Q I think you'll find it at Exhibit 51.

5 A Yes.

6 Q Explain what this table is.

7 A It is a life table. It has all of the same  
8 columns as a normal complete life table, but this table  
9 is specific to children like Lyam. It's not for all  
10 males. It's not for all males with cerebral palsy.  
11 It's for all males with cerebral palsy who are like  
12 Lyam who have his pattern of abilities and  
13 disabilities.

14 Q And where did you get the information that is  
15 summarized on Exhibit 51?

16 A Well, it represents a summary of my opinion  
17 based on the information from the medical literature on  
18 the survival.

19 Q And do you believe this exhibit would better  
20 enable the jury to understand the opinions that you've  
21 expressed and continue to express in this courtroom?

22 A Yes.

23 MR. DURNEY: I would offer 51, Your Honor.

24 THE COURT: Any objection?

1 MR. KELLY: No objection.

2 THE COURT: 51 will be admitted.

3 (Exhibit 51 was admitted.)

4 BY MR. DURNEY:

5 Q Let's take a look at 51. What is this -- first  
6 of all, it has a title at the top "Life Table for Lyam  
7 McCrosky," just as you said. Please explain it to us.

8 A Well, as I said, it's a standard life table in  
9 the sense that it has all of the columns that a  
10 standard life table would have. I realize it's a  
11 rather dizzying array of numbers. Generally all one is  
12 interested in is the left-most column, which is age,  
13 and the right-most column. It's denoted "E of X,"  
14 which means the life expectancy, E at age X. Generally  
15 one only cares about the first and last columns. And  
16 we can see the number 15 in the top right corner there  
17 as the remaining life expectancy. But the other  
18 columns I could explain and give definitions of if need  
19 be.

20 Q First of all, Lyam is now almost four. And I  
21 think we've highlighted the life expectancy at age two,  
22 but now he's almost four.

23 A Right. And we can see that at age four the  
24 life expectancy is still roughly 15 additional years.

1 It doesn't change very much with the passage of time or  
2 with advancing age.

3 Q And so you were about to explain the other  
4 columns and what they mean and why they are of  
5 assistance in expressing an opinion on life expectancy.

6 A Well, the second column is called the  
7 survivorship column. By convention and demography it  
8 begins with 100,000 persons alive at the initial age.  
9 It's merely a convention. And then it tracks that  
10 group of people forward.

11 The third column, "D of X," is the average number  
12 of deaths in each one-year interval. "Q" is the annual  
13 mortality probability. "M" is the annual mortality  
14 rate. Capital "L" and capital "T" are not interesting  
15 in and of themselves. They date from the time when  
16 life tables were actually constructed by hand.

17 This goes back more than 200 years to the Roman  
18 prefect Opianus who was studying a group of Roman  
19 soldiers and how long they lived. But they're just  
20 placeholders.

21 "L" is the number of person years lived during a  
22 one-year age interval. "T" is the number of person  
23 years lived from that point forward. And then "E" is  
24 just capital "T" divided by little "l," so it seemed to

1 be a true average.

2 Q Now, all of this is very difficult for me to  
3 understand, and I would think it difficult for anybody  
4 listening to what you just said to understand. So my  
5 question is basically this: Is all of this information  
6 that which you believe any well-educated individual  
7 expressing an opinion on life expectancy should know  
8 and understand?

9 A Of course. It's the basics.

10 Q It's the basics. All right. Well, now, you  
11 understand that there's an opposing expert in this  
12 case, and her name is Dr. Harriet Cokely, who has given  
13 an opinion on Lyam's life expectancy. First of all,  
14 let's talk about what points of agreement that you have  
15 with Dr. Cokely.

16 A Well, several.

17 Q All right. What are they?

18 A Well, firstly, I read her report, and what she  
19 wrote in her report about Lyam seems to match up with  
20 what everybody else wrote. I have no reason to  
21 disagree with what she said about his physical  
22 functioning or his need for a feeding tube, the  
23 presence of comorbidities, his illnesses, his history.  
24 It seems to be correct.

1       Secondly, as you know, she indicated that Lyam's  
2 life expectancy is, unfortunately, reduced compared  
3 with normal. Obviously I agree with that.

4       Thirdly, and most importantly, she looked to the  
5 medical literature to determine his life expectancy, so  
6 she looked at peer-reviewed articles in medical  
7 journals to determine what his life expectancy is.  
8 And, in fact, she cited several articles that I myself  
9 had written some years ago. I was rather flattered.

10       Q   All right. So you have an understanding of the  
11 literature that Dr. Cokely relied on in expressing her  
12 opinion?

13       A   Yes.

14       Q   And which studies did she rely on?

15       A   Well, she cited a couple studies by myself and  
16 our research group, but it appears that she didn't rely  
17 on those specifically, a study from 1998, in fact, two  
18 studies from 1998. She relied on some much older  
19 studies from 1990 and 1993 -- that's 23 and 26 years  
20 ago -- studies by a Dr. Richard Eyman.

21       Q   And the studies -- well, first of all, did you  
22 work with Dr. Eyman in your career?

23       A   I did. He was one of our predecessors at the  
24 Life Expectancy Project at UC Riverside.

1 Q And I assume that you have read Dr. Eyman's  
2 1990 and 1993 studies that Dr. Cokely relied on?

3 A Yes, in detail.

4 Q And that you have in this case analyzed the  
5 same underlying data that he used to do his 1990 and  
6 1993 studies?

7 A I have in the past. In fact, when I joined the  
8 Life Expectancy Project 20 years ago, there were some  
9 concerns raised about those two studies, and so  
10 Dr. Strauss and I, my senior colleague, Dr. David  
11 Strauss, we reanalyzed the data that Dr. Eyman had  
12 analyzed when he published those papers. We reanalyzed  
13 the data and published corrections, because it turns  
14 out that both the 1990 and the 1993 studies have errors  
15 that make the numbers in them far too low.

16 Q And have you as a result of your reevaluation  
17 of the Eyman studies written articles or letters  
18 regarding the accuracy of the studies?

19 A Yes. We wrote at least two letters to the  
20 editor. We included a comment in some of our follow-up  
21 studies. And then we also posted a correction on the  
22 Life Expectancy Project website, lifeexpectancy.org.

23 Q All right. And so the correction to Eyman, is  
24 that what you're referring to when you indicate that



1 you posted a correction?

2 A Yes.

3 Q All right. And take a look at Exhibit 58, if  
4 you would, please.

5 A Yes, that's the correction I mentioned.

6 Q And this is reflective of the work you did  
7 correcting the work that Eyman did as published in his  
8 1990 and 1993 studies?

9 A Yes.

10 Q And, again, that's based upon your scientific  
11 research and the evaluation of the Eyman studies?

12 A Yes.

13 Q First of all, how old was the Eyman -- the  
14 cohort or group of patients studied by Eyman and first  
15 published in 1990, how old was the data that he was  
16 evaluating?

17 A It was data from 1984 through 1987.

18 Q So to summarize, how old was the data that he  
19 was -- that he was discussing in his 1990 article?

20 A Thirty years old, thirty years ago from now.

21 Q Thirty years from now. And what about as of  
22 the date of publication? How old was it?

23 A Three to six years old.

24 Q So roughly data from 36 years ago as of today?

1 A Well, 30 years ago from today. Twenty-four  
2 from the --

3 Q Oh, I see.

4 A Twenty-six from the publication.

5 Q From publication, 30 years, but the data that  
6 was reported in the publication had an age of itself as  
7 well, didn't it?

8 A Right.

9 Q And what was the age of the data that was being  
10 discussed in the Eyman article?

11 A As I said, it was from 1984 through 1987. And  
12 that was three to six years prior to 1990. 1990 is 26  
13 years ago. So we add three to six to 26 and we get 29  
14 to 32.

15 Q All right. Well, you're a statistician, so I  
16 am, perhaps, being a little too picky. Anyway, forgive  
17 me.

18 So in any event, you and your group at the Life  
19 Expectancy Group researched and ultimately came up with  
20 a publication called "Corrections to Eyman"?

21 A Right.

22 Q And that would be our Exhibit 58?

23 A Yes.

24 MR. DURNEY: I would offer it, Your Honor.

1 MR. KELLY: Objection. Hearsay.

2 THE COURT: The objection is hearsay?

3 MR. KELLY: Yes.

4 THE COURT: He's laid the foundation in respect to  
5 that. The Court is going to go ahead and allow it.

6 (Exhibit 58 was admitted.)

7 BY MR. DURNEY:

8 Q All right. Now, there's a lot of information  
9 on our Exhibit 58 in evidence. In fact, it's very  
10 difficult to see. What portion of it -- perhaps you  
11 could come down here.

12 MR. DURNEY: And if we could blow the tables up a  
13 bit, Mr. Ivey.

14 BY MR. DURNEY:

15 Q He's got a pointer.

16 All right. Please explain to us how you and your  
17 group corrected the Eyman studies --

18 A Well --

19 Q -- and then why it was wrong.

20 A Well, as I said, it was a study that spanned  
21 over three years, 1984 to 1987. That's three years.  
22 And what they did was they collected information on how  
23 many people died over those three years. And they knew  
24 how many people were alive at the beginning. But the

1 problem they made -- the error they made,  
2 unfortunately, was that they forgot to divide by three,  
3 so they didn't annualize it. They collected deaths  
4 over a three-year period, but they didn't divide by  
5 three. So all of these mortality rates are too high by  
6 a factor of three or the mortality probabilities are  
7 too high by a factor of three. And, as a result, all  
8 of these life expectancies -- pardon me.

9 This is the correct version. In their table it was  
10 incorrect. These were too high.

11 Q We have two tables on the exhibit. Do you want  
12 to see the bottom one?

13 A No, this is the right table. So the corrected  
14 life expectancies turn out to be about three times  
15 higher than theirs. All of their numbers were very  
16 low, three, four, five, in this column. And you can  
17 see that these numbers are much higher. They're higher  
18 by about a factor of three, as I say, because they  
19 forgot to divide by three.

20 And that was pointed out fairly soon after the  
21 publication in 1990, and we published this correction  
22 shortly thereafter.

23 Q So the --

24 Go ahead and retake the stand. Thank you, Doctor.

1        So the Eyman study and its conclusions were wrong  
2 by a factor of three?

3        A    Roughly.

4        Q    Now, you're aware that Dr. Cokely has expressed  
5 the view that Lyam's life expectancy is an additional  
6 five to seven years. You're aware of that?

7        A    Yes.

8        Q    Is there any scientific basis for this opinion?

9        A    Well, I think she obtained it from the two  
10 Eyman studies which were incorrect, so I would say  
11 there's not a correct scientific basis for the  
12 opinions. And because it's well known that the Eyman  
13 studies had the errors, and they've since been  
14 corrected, one should know that. All of the other  
15 literature points to much higher numbers, numbers  
16 around 15, as I said.

17        Q    Are you aware of any other medical literature  
18 other than the two -- the 1990 and the 1993 Eyman  
19 studies that would support Dr. Cokely's opinion of five  
20 to seven years?

21        A    No.

22        Q    Now, we've been talking about life expectancy,  
23 and you've said to a reasonable scientific certainty  
24 Lyam's life expectancy is an additional 15 years. Does

1 that mean that we can expect him to live exactly 15  
2 more years?

3 A If by "expect" you mean the average, then, yes,  
4 but the 15 is not meant as a prediction. As I said, he  
5 could live longer or shorter.

6 Q So to be clear, an opinion on life  
7 expectancy -- well, is it possible to predict how long  
8 Lyam will live?

9 A Well, in terms of probabilities, yes, but in  
10 terms of certainty, no. As I said, he could live  
11 longer or shorter.

12 MR. DURNEY: The Court's indulgence for one moment,  
13 Your Honor.

14 BY MR. DURNEY:

15 Q All right. Please compute or elaborate how you  
16 figured Lyam's life expectancy in this case.

17 MR. KELLY: Objection. Cumulative. Asked and  
18 answered.

19 THE COURT: I'm going to sustain that, Mr. Durney.  
20 Go ahead and rephrase the question, if you can.

21 BY MR. DURNEY:

22 Q Well, did your analysis take into consideration  
23 every conceivable factor that might be relevant to life  
24 expectancy?

1 A I took account of the main factors and I listed  
2 some others.

3 Q All right. And what are the main factors that  
4 you take into consideration in computing the 15-year  
5 life expectancy in this case? I assume there's both  
6 positive and negative factors. Let's talk about the  
7 positives ones.

8 A Well, the main factors were the severity of his  
9 disability, his motor function and his speaking ability  
10 and his age as we can see from the life table. Those  
11 are the main things. And that's how I matched him up  
12 with similarly situated children in the medical  
13 literature. And, by the way, I used the recent  
14 literature which shows that kids are living longer now  
15 than they used to. That's another reason why one  
16 shouldn't use the older studies; one should use the  
17 updated studies.

18 Q It makes sense that kids are living longer now  
19 than they used to. Why is that?

20 A Well, the entire population of the United  
21 States is living longer now than it used to. At the  
22 turn of the century, for example, life expectancy was  
23 about 50 years. And nowadays, as we saw from the  
24 exhibit, life expectancy is 76 for men and 81 for

1 women. That's about a 50 percent increase over the  
2 last hundred years.

3 Q And the factors that can be pointed to for the  
4 continued rise in life expectancy would be what?

5 A Well, there's a reduction in the defects of  
6 heart disease and cancer. These are the number one and  
7 number two causes of death.

8 Q Medical technology?

9 A Medical technology, medical care, surveillance,  
10 cleaner water, air, vaccinations, other public health  
11 things. It's a huge area of study.

12 Q All right. I think I'm about done.

13 How about the peer-reviewed literature? What does  
14 the peer-reviewed literature say about Lyam's life  
15 expectancy?

16 A Well, this is exactly how I derived my opinion.  
17 As I said, I matched him up with similarly situated  
18 people. And, as I said, I used five major studies to  
19 do that matching. I have printed copies of them here.  
20 I think they're also exhibits. I think there's a  
21 summary slide that shows it. I would be happy to  
22 explain -- to go one by one through the studies or just  
23 to talk about the summary.

24 Q Let's talk about the summary. Let's talk about



1 the summary. Take a look, if you would, please -- I  
2 think -- look at No. 55 in the list of exhibits.

3 A Yes, that is it.

4 Q Is that the summary?

5 A Yes.

6 Q All right. Let's just talk about it. Explain,  
7 as I asked -- or tell us whether or not the  
8 peer-reviewed medical literature supports your opinion  
9 or agrees with your opinion in this case.

10 A Absolutely. That's how I derived my opinion.  
11 I looked to the medical studies to find the survival of  
12 similarly situated young boys.

13 Q And those peer-reviewed studies are listed on  
14 Exhibit 55 --

15 A Yes.

16 Q -- before you?

17 All right. Very well.

18 MR. DURNEY: I think that's all I have, Your Honor.  
19 Thank you very much.

20 THE COURT: Thank you. Cross-examination.

21 MR. KELLY: Thank you very much.

22 CROSS-EXAMINATION

23 BY MR. KELLY:

24 Q Good morning, Doctor.

1 A Good morning.

2 Q How are you doing today?

3 A Very good. Thank you.

4 Q Good. Mr. Durney just started to ask you about  
5 factors and characteristics that are important for your  
6 analysis in terms of life expectancy; correct?

7 A Yes.

8 Q And you mentioned to us that the main factors  
9 include motor function, the patient child's ability or  
10 inability to feed him or herself; correct?

11 A Yes.

12 Q And also their age?

13 A Yes.

14 Q Now, the life expectancy analysis is in large  
15 part a function of the characteristics and these  
16 factors that you learn about a particular patient who  
17 has CP; correct?

18 A Yes.

19 Q And, in fact, you had prepared a report in this  
20 case dated March 5th, 2015; correct?

21 A Yes.

22 Q And you have a copy of that in front of you?

23 A Yes.

24 Q And other factors that in your opinion would be

1 very significant in assessing someone's life expectancy  
2 would be the frequency of emergency room visits or  
3 hospitalizations; correct?

4 A Could be, yes.

5 Q And that is true because kids or individuals  
6 who have CP, if they tend to have frequent  
7 hospitalizations or emergency room visits, it suggests  
8 that they have, perhaps, more complications as it  
9 pertains to their respiratory status; true?

10 A Yes.

11 Q Or if they have fundoplication; correct?

12 A Most of the time a gastrostomy is performed  
13 with fundoplication now to reduce the gastroesophageal  
14 reflux.

15 Q But one of the leading causes of death for  
16 these kids, and it's unfortunate, but it's their  
17 respiratory status; true?

18 A Yes. In young age it's probably one-third of  
19 the causes of morbidity and mortality.

20 Q And the reasons -- one of the reasons that kids  
21 with severe CP have a G-tube is because they're not  
22 able to take food by mouth; correct?

23 A Either not able to take it by mouth or not able  
24 to do so safely.

1 Q And they can't do so safely because of the  
2 possibility of aspiration; true?

3 A Exactly.

4 Q So if they take anything by mouth, whether it's  
5 food or even secretions, there is a very profound  
6 possibility of aspiration; correct?

7 A Yes.

8 Q And aspiration can develop into pneumonia and  
9 other respiratory problems and can cause death?

10 A Yes.

11 Q I think you said it's about a third of the  
12 patients -- kids who have CP die as a result of  
13 respiration or aspiration pneumonia?

14 A Yes.

15 Q Now, in terms of hospitalizations, in your  
16 report you mention that one of the positive factors for  
17 Lyam was that he has not had many hospitalizations; is  
18 that correct?

19 A Well, no. When I wrote my report I actually  
20 wrote that he had no hospitalizations since April of  
21 2013. I've since corrected that. But when I wrote my  
22 report I was not aware of any hospitalizations in the  
23 past almost two years.

24 Q And since that time of your report you've come

1 to learn that Lyam had an emergency room visit in  
2 February of 2014 for respiratory problems, shortness of  
3 breath; correct?

4 A Yes.

5 Q And April 2015, again for respiratory problems?

6 A Yes.

7 Q And again in March of 2015; correct?

8 A Yes.

9 Q And he also had an hospitalization in January  
10 because of seizure activity?

11 A Yes.

12 Q Okay. So you subsequently became aware of  
13 these hospitalizations after you wrote your report?

14 A Yes.

15 Q Now, if a patient such as Lyam continues to  
16 have frequent hospitalizations, emergency room visits,  
17 that would certainly affect his or her life expectancy;  
18 true?

19 A Well, a very incomplete answer is yes. It's  
20 obviously a negative factor.

21 Q It's a negative factor; correct?

22 A Yes.

23 Q And I think you put in your report that a  
24 positive factor would be a child not having frequent

1 hospitalizations; correct?

2 A Right.

3 Q Now, I think you told us you read Dr. Capell's  
4 deposition.

5 A Yes.

6 Q By any chance were you provided with  
7 Dr. Hyland's or Ms. Hyland's life care plan?

8 A Yes.

9 Q So I want you to assume hypothetically that  
10 Ms. Hyland told us yesterday based upon Dr. Capell's  
11 opinions that in the next year between ages four and  
12 five and for every year thereafter he anticipates three  
13 emergency room visits, six to ten days as an inpatient  
14 in a hospital and three days in an intensive care unit.  
15 That's what she told us yesterday.

16 If hypothetically Lyam, unfortunately, in the next  
17 year spends six to ten days as an inpatient, three days  
18 in a intensive care unit, plus three emergency room  
19 visits, you would agree, would you not, that that is a  
20 very bad characteristic with respect to a child's life  
21 expectancy?

22 A It could be. I'm afraid I need clarification  
23 about the frequency of these. Was it per year?

24 Q Yes, annually, every year.

1 A Yes, that would be a negative factor.

2 Q That would be a significant negative factor,  
3 would it not?

4 A If that were true every year, depending on the  
5 reasons, yes.

6 Q And if the reasons -- and the primary concern  
7 for Lyam is his respiratory status; correct?

8 A I would have to defer to the medical doctors on  
9 that.

10 Q Fair enough. Fair enough.

11 But if hypothetically Dr. Capell is correct and  
12 Nurse Hyland is correct that for every year he's going  
13 to be going to the emergency room three times, he's  
14 going to spend three days in the intensive care unit  
15 and he's going to have six to ten days as an inpatient,  
16 you would agree, would you not, Dr. Shavelle, that a  
17 patient like that is going to have a significantly  
18 reduced life expectancy than 15 years?

19 A Well, that's why I said my answer earlier was  
20 incomplete, because most kids who are severely disabled  
21 have a couple of events per year, a couple of ER visits  
22 or hospitalizations. And, secondly, I'm not aware of  
23 any evidence to show that those kids do significantly  
24 worse. There's limited evidence to show that that

1 history is a significant negative factor.

2 Obviously it's a negative factor if one has more  
3 events, but there's not evidence to show how much of an  
4 negative factor it is, and there is evidence to show  
5 that it's more common in childhood than in the teen  
6 years or adulthood. So things tend to wear off.

7 Q Well --

8 A I know that's not a simple answer to your  
9 simple question, but that is what the evidence says.

10 Q Maybe I can simplify it. In your report you  
11 stated that a positive factor for Lyam was no  
12 hospitalizations since April of 2013; correct?

13 A Yes.

14 Q And so the reverse of that would be true? If  
15 he has had hospitalizations, which we know about, and  
16 if he continues to have multiple hospitalizations, that  
17 would be a negative factor; true?

18 A A very incomplete answer is true, correct, yes.

19 Q All right. What is your understanding as to  
20 why Lyam needs a G-tube?

21 A Because of his inability to take sufficient  
22 nutrition orally either because it's not safe or  
23 because his swallow hasn't developed.

24 Q And you told us that is one of the main factors



1 that one has to consider when assessing life  
2 expectancy?

3 A In children and adults with cerebral palsy,  
4 yes, it is.

5 Q And can you explain to the ladies and gentlemen  
6 of the jury, why is it that the ability or inability to  
7 feed is such an important factor in determining life  
8 expectancy?

9 A Well, firstly because the evidence shows this;  
10 secondly, because it's a measure of the severity of  
11 brain damage; and, thirdly, as we've discussed, it has  
12 biological underpinning or medical reasons. The  
13 feeding tube doesn't completely eliminate the risk of  
14 aspiration for people.

15 Q And up to or more than a third of the deaths  
16 are caused by respiration problems or aspiration  
17 pneumonia; true?

18 A In childhood, yes.

19 Q Now, another main factor you considered was --  
20 well, let me back up. You said also -- I think you  
21 told us, Doctor, that you did review the  
22 day-in-the-life video?

23 A Yes.

24 Q And in the day-in-the-life video you observed

1 very noisy breathing from Lyam, did you not?

2 A I believe so. I understand that to be true.

3 MR. KELLY: Your Honor, may I approach?

4 THE COURT: You may.

5 BY MR. KELLY:

6 Q Let me show you a document that was attached to  
7 your deposition dated July 28th, 2015. And please  
8 correct me if I'm wrong. These would be your notes?

9 A Yes, they are.

10 Q And I'm referring to a page at the top that  
11 says "March 2nd, 2015"; is that correct?

12 A Yes.

13 Q Do you have that in front of you?

14 A I do.

15 Q And then it references -- it says  
16 "Day-in-the-life video, undated." Is that accurate?

17 A Yes.

18 Q And does this reflect notes that you prepared  
19 as part of the 40 hours or so that you have spent  
20 reviewing this case?

21 A Yes.

22 Q And in reviewing the day-in-the-life video, you  
23 specifically made an entry that when Lyam was lying in  
24 the crib there was very nosey breathing; true?

1 A Yes.

2 Q And that was medically significant to you  
3 because of your concern about Lyam's ability to breathe  
4 and his respiratory status; correct?

5 A It was just an observation I made. As to how I  
6 would use it later, it remained to be seen. Yes,  
7 that's why I noted it.

8 Q And have you come to learn that Lyam requires  
9 frequent suctioning because he's not able to mobilize  
10 and swallow his secretions?

11 A Yes.

12 Q Now, we touched upon this, but it is true, is  
13 it not, that respiratory problems like that are the  
14 most common cause of death in kids with CP?

15 A I think it's roughly a third, yes.

16 Q In fact, it's closer to 50 percent, is it not?

17 A It depends on which source. If I could be  
18 directed.

19 Q I would like to read from your deposition, page  
20 44, lines 16 to 22. May I read?

21 A Yes.

22 Q Thank you.

23 "QUESTION: In your experience, based on the  
24 materials that you provided, what is the most common

1 cause of death among children with the same problems  
2 that Lyam suffers from?

3 "ANSWER: Respiratory problems are one of the  
4 leading causes. It does not make up over 50 percent of  
5 the deaths to my knowledge in any subgroup."

6 Is it closer to 50 percent than 33 and a third  
7 percent?

8 A No. That's why I said it does not make up over  
9 50 percent of the deaths.

10 Q Is there -- I'm sorry. Was there something in  
11 the deposition that referenced the third, one-third?

12 A I don't know.

13 MR. DURNEY: Objection, Your Honor. It depends on  
14 whether it was asked. If Mr. Kelly could be so kind as  
15 to point to that point in the deposition where it was  
16 asked.

17 THE COURT: I'm going to sustain the objection. To  
18 the extent you can rephrase it, go ahead, Mr. Kelly.

19 MR. KELLY: Thanks.

20 BY MR. KELLY:

21 Q Let me come back to another characteristic.  
22 Another characteristic that could significantly affect  
23 and, in fact, reduce life expectancy in a child with CP  
24 would be whether or not they have scoliosis; correct?

1 A It could, yes.

2 Q And I think you told us that it could, but it  
3 doesn't necessarily affect life expectancy unless it's  
4 to the degree and severity that it requires surgery;  
5 correct?

6 A Yes.

7 Q And if a child with CP has scoliosis to the  
8 degree that it requires surgery, that would and could  
9 substantially affect a child's life expectancy; true?

10 A Depending on the severity, yes.

11 Q The severity is such that it requires surgery;  
12 right?

13 A Yes.

14 Q I want you to assume that with respect to  
15 scoliosis we heard yesterday from Carol Hyland that  
16 according to her information from Dr. Rodriguez that,  
17 unfortunately, Lyam's scoliosis is so severe and it is  
18 expected to become more severe that he expects more  
19 likely than not that Lyam will require surgery.

20 MR. DURNEY: Mischaracterization. Mischaracterizes  
21 the testimony, Your Honor. She did not say it was so  
22 severe. She said that there is a likelihood in his  
23 life expectancy that he will require scoliosis surgery.  
24 There was no discussion about severity.

1 THE COURT: Well, again, without going back and  
2 looking at it, we'll use that as example, Mr. Kelly,  
3 and you can ask on that basis.

4 MR. KELLY: I can rephrase it.

5 BY MR. KELLY:

6 Q I want you to assume hypothetically -- well, in  
7 your opinion, if a patient's scoliosis requires  
8 surgery, that would be a characteristic that would  
9 adversely affect their life expectancy; true?

10 A True.

11 Q So if hypothetically Ms. Hyland told us  
12 yesterday that based upon Dr. Rodriguez's opinion that  
13 Lyam will require surgery for scoliosis, that would  
14 also in your opinion reduce his life expectancy; true?

15 A Not necessarily for two reasons.

16 Q But it is true that in your opinion that if a  
17 patient has scoliosis requiring surgery, it is a factor  
18 that will reduce his life expectancy -- correct? --  
19 generally speaking?

20 A If it were true now of him, yes, but I don't  
21 understand that to be true now.

22 Q All right. I want to ask you some questions  
23 about academic studies that you and others have  
24 performed with respect to life expectancy. We have

1 spent most of the morning talking about an average life  
2 expectancy; correct?

3 A By definition life expectancy is an average,  
4 yes.

5 Q The medical literature, including the  
6 literature that you have written, focuses on a median  
7 life expectancy, not an average life expectancy;  
8 correct?

9 A No, that is incorrect.

10 Q What's the difference between average and  
11 median?

12 A The median is the 50 percent mark. The life  
13 expectancy is the average. So if we, for example,  
14 lined people up from shortest to tallest, the person in  
15 the middle is the 50 percent mark. It's the median.  
16 Just like the median strip on the highway, it's in the  
17 middle of the highway with half the lanes on one side  
18 and the other. Whereas, the average is when you add up  
19 all their heights and divide by the number.

20 Q Right. And when we talk about the analysis and  
21 the analytics that you performed in this case as  
22 reflected in your report on March 5th of 2015, you  
23 included both the average and the median survival time;  
24 correct?

1 A Yes.

2 Q And in your article, April 15th, 2014, when you  
3 talk about the results of your analysis, you talk about  
4 the median age of death having increased; correct?

5 A I think we're talking about the 2014 study with  
6 Jordan Brooks as first author and I'm the third author?

7 Q Yes.

8 A Yes.

9 Q So when we talk about literature that -- let me  
10 back up. In your report of March 5th, 2015, you do  
11 state that the average life expectancy is 15 years  
12 approximately.

13 A That's correct.

14 Q And you also mentioned that the median survival  
15 is approximate 11 years; correct?

16 A Yes.

17 Q And, in fact, can you explain to the ladies and  
18 gentlemen of the jury why it is that the median  
19 survival is lower than the average?

20 A Certainly. May I write on the chart?

21 Q Sure.

22 A So if we think about the standard bell-shaped  
23 curve that everyone knows and hates, the -- it would  
24 look like this. And on the other side it would be



1 symmetric. I'll do it lighter. And so here would be  
2 centered around the 11, and 50 percent would be here,  
3 and 50 percent would be on the other side. So half  
4 live longer than 11 years, half live shorter. But in  
5 this case with the survival distribution of children  
6 like Lyam, it's not bell shaped, it's not symmetric.  
7 It's asymmetric or, some would say, skewed to the  
8 right. So if you can imagine grabbing this tail and  
9 pulling it to the right, so it might look like this.  
10 And then it would go out a lot farther.

11 And what happens is some of the weight that was  
12 here, some of the mass that was shifted here, like on a  
13 teeter-totter, if you're sitting here and here, it  
14 balances, but as soon as you sit farther away, it pulls  
15 it out. And what this shifting of mass, this skewing  
16 to the right pulls out is the average. It doesn't  
17 change the median, because 50 percent is still there.  
18 It changes the average. So if you were doing a  
19 teeter-totter, it would balance on 15, not on 11.

20 Q And the reason for that -- part of the reason  
21 for that is the average -- unlike the median, the  
22 average takes into account outliers; correct?

23 A Yes.

24 Q So people who live much longer past the life

1 expectancy or people who are -- who die much sooner,  
2 the outliers are included in an average; true?

3 A Exactly.

4 Q But in a median the outliers are not included;  
5 correct?

6 A Correct.

7 Q And in most studies, in terms of statistical  
8 analysis, the academic preference is to go with the  
9 median because you want to exclude the outliers; true?

10 A No. I'm sorry. I misanswered your prior  
11 question. You asked if the outliers are excluded in  
12 the median.

13 Q No.

14 A They're not excluded. They're not ignored.  
15 It's just that they don't matter.

16 Q I agree.

17 A The outliers could be far away, but the median  
18 stays the same. So they're not excluded. It's just  
19 they don't have as much weight.

20 Q Okay. And earlier we referred to Exhibit 55.  
21 Do you recall that? And you set forth --

22 A Yes.

23 Q In the notes that you prepared and the report  
24 that you prepared, you included the median, not just

1 the average; correct?

2 A I reported both figures, yes, for interest.

3 Q Right. But the only information that  
4 Mr. Durney asked you about today was the average, not  
5 the median; true?

6 A I think that's right, yes.

7 Q Okay. Let me show you your notes. Exhibit 55  
8 that's on the board -- I'm not even sure it was  
9 offered, but it's on the board.

10 THE COURT: It's not been offered at this time.

11 BY MR. KELLY:

12 Q That exhibit only includes the average, it  
13 doesn't include the median; correct?

14 A Correct.

15 Q And let me show you what I think you have in  
16 your file, the notes that went into preparing Exhibit  
17 55 -- is that accurate? -- with the same literature  
18 cited.

19 A Yes.

20 Q And in preparing your notes, you included the  
21 median as well as the average for each of these authors  
22 that you quoted; correct?

23 A Yes.

24 Q So in the first one, the Brooks, the average

1 was 18; is that accurate?

2 A Yes.

3 Q But the median was only 13; correct?

4 A Correct.

5 Q The next table, the average was 14 but the  
6 median was only 11; correct?

7 A Yes.

8 Q The next one, average, 14, median, 11; true?

9 A Yes.

10 Q Another one, average, 14, median, 11; correct?

11 A Median, 10, yes.

12 Q Median, 10, correct. I'm sorry.

13 Then the Hutton table, average, 15, median, 11;  
14 correct?

15 A Yes.

16 Q So in all of these articles and, in fact, in  
17 your own report you included the average as being  
18 approximately 15 but the median is actually  
19 approximately 11; true?

20 A Yes.

21 Q And by the way, with respect to the questions  
22 about Dr. Cokely, you're aware that Dr. Cokely didn't  
23 base her opinion on life expectancy solely upon  
24 literature; true?

1 A Correct.

2 Q She, in fact, examined Lyam; right?

3 A Well, that's not how I answered the prior  
4 question, so I don't know how to answer this one.

5 Q I'll rephrase it. It was probably another bad  
6 question on my part.

7 It is your understanding that Dr. Cokely is a  
8 clinical professor of pediatric neurology at UCLA;  
9 correct?

10 A Yes.

11 Q You read her deposition?

12 A Yes.

13 Q And she has been for over 40 years; right?

14 A I don't recall the number of years, but I'm  
15 willing to accept that.

16 Q And are you -- do you recall that she testified  
17 that over her some 40 years at UCLA and St. John's she  
18 has taken care of many, many patients who have the same  
19 disability as Lyam McCrosky?

20 A Yes, of course.

21 Q And you are aware, are you not, that her  
22 opinion on life expectancy was not based solely on  
23 literature; correct?

24 A Correct. She said based on the literature and

1 her experience.

2 Q And her exam; correct?

3 A I only have a partial summary of her deposition  
4 testimony. I could look through the deposition itself  
5 to see exactly what she said.

6 Q That's okay. I'll represent to you that she  
7 examined Lyam.

8 A Well, I understand that, yes.

9 Q And she prepared a report?

10 A Yes.

11 Q Okay. And so to suggest to the jury that  
12 Dr. Cokely reached her opinion on life expectancy --  
13 and, unfortunately, it is significantly shorter than  
14 the life expectancy you have told us today. Her  
15 opinion was not based solely on medical literature; you  
16 would agree with that?

17 A According to her testimony, yes.

18 Q All right. And I think you told us you've  
19 never examined Lyam; correct?

20 A I haven't done a physical examination. As I  
21 said, I read the reports and I watched the video.

22 Q Okay. And I would think in -- with all due  
23 respect to your background, experience and training,  
24 you wouldn't be qualified to examine him as a

1 healthcare provider; true?

2 A True.

3 Q And so your opinion regarding his life  
4 expectancy really is just limited to statistics; right?

5 A No, I'm afraid that doesn't seem correct.

6 Q In your experience you do recall people who  
7 have passed away before your estimate as to what their  
8 life expectancy was; true?

9 A Yes, anecdotally.

10 Q I'm sorry?

11 A Anecdotally I have information like that, yes.

12 Q But anecdotally you don't recall any specific  
13 individual who actually lived longer than your  
14 estimated life expectancy; true?

15 A No, I do.

16 Q I would like to read from your deposition, page  
17 53, lines 15 to 25, and 54, lines 1 to 8.

18 MR. KELLY: May I?

19 THE COURT: You may.

20 BY MR. KELLY:

21 Q "QUESTION: And, again, going back to it again,  
22 and it's not a scientific basis, but based on anecdotal  
23 information that you have been provided over the years,  
24 can you identify any cases on there where the patients

1 have lived longer than what you projected life  
2 expectancy or the life expectancy opinion you had  
3 arrived at in those particular cases?

4 "ANSWER: I don't know that I can recall any  
5 individual name.

6 "QUESTION: Okay. How about the other side? Those  
7 who have lived less than the life expectancy  
8 projection, any that stand out in your mind?

9 "ANSWER: I recall two names. One is blank and the  
10 other is blank. And I think blank lived shorter and  
11 blank actually lived longer, and they might be on this  
12 list. Okay.

13 "ANSWER: But otherwise I don't have any  
14 recollection of any names without going through a  
15 list."

16 Doctor, am I correct that most good academic  
17 studies utilize and publish their results in median as  
18 opposed to average?

19 A Only if they can only calculate the median.  
20 Generally one is interested in both measures, and  
21 especially in the latter. For example, the United  
22 States Government life tables have life expectancies.  
23 So when one does academic research, one would like a  
24 life expectancy ideally in order to compare.



1 Q And the median, which you told us like driving  
2 down the middle, half on one side, half on the other,  
3 is in your opinion in this case not 15 but 11; true?

4 A Yes.

5 MR. KELLY: Nothing further, Your Honor.

6 THE COURT: Ladies and gentlemen, we're going to  
7 take a recess at this time. During this recess you're  
8 admonished not to talk or converse among yourselves or  
9 with anyone else on any subject connected with the  
10 trial; read, watch, or listen to any report of or any  
11 commentary on the trial by any person connected with  
12 the trial or by any medium or information, including,  
13 without limitation, newspapers, television, and radio;  
14 or form or express any opinion on any subject connected  
15 with this trial until the case is finally submitted to  
16 you. You may not do research about any issues involved  
17 in the case. You may not blog, tweet or use the  
18 internet to obtain or share any information.

19 We'll take a short recess.

20 (The following proceedings were held  
21 outside the presence of the jury.)

22 THE COURT: The record will reflect we're outside  
23 the presence of the jury.

24 We had two bench conferences. I just want to go

1 back to that. One reference was in respect to Exhibit  
2 50 which is the U.S. life expectancy table. There was  
3 a hearsay exception -- objection. Pursuant to NRS  
4 51.155 and NRS 165, it's an exception to the hearsay  
5 rule in respect to that. It's a report and compilation  
6 by the U.S. government. Also, public records and  
7 reports can be an exception.

8 Additionally, Exhibit No. 58 was objected to as  
9 being a hearsay document. There is another exception  
10 that pertains to that, NRS 51.225, which allows  
11 basically -- learned treatises basically are an  
12 exception to the hearsay rule. This is a correction of  
13 a treatise that was produced. So the Court allowed  
14 both of those in in respect to this matter.

15 Court will be in recess. Thank you.

16 MR. KELLY: Thank you.

17 (A recess was taken.)

18 THE COURT: Back on the record outside the presence  
19 of the jury with respect to Case No. 13 TRT 000281.

20 Counsel, are you ready?

21 MR. KELLY: Yes, Your Honor.

22 MR. DURNEY: Ready on behalf of the plaintiff, Your  
23 Honor.

24 THE COURT: Go ahead and bring the jury in.

1 (The following proceedings were held  
2 within the presence of the jury.)

3 THE COURT: Counsel, stipulate to the presence of  
4 the jury?

5 MR. DURNEY: Yes, Your Honor.

6 MR. KELLY: Yes, Your Honor.

7 THE COURT: Mr. Durney, redirect.

8 REDIRECT EXAMINATION

9 BY MR. DURNEY:

10 Q Dr. Shavelle, does in your opinion Dr. Cokely's  
11 examination of the patient qualify her to express an  
12 opinion on life expectancy?

13 MR. KELLY: Objection. Lacks foundation. Calls  
14 for speculation and outside the purview of the  
15 deposition.

16 THE COURT: I'm going to sustain the objection.

17 MR. DURNEY: Your Honor, I'll lay further  
18 foundation.

19 THE COURT: Okay. But is it outside any opinions  
20 that he's done in respect to this report?

21 MR. DURNEY: Well, Your Honor, the subject was  
22 raised on cross-examination and direct examination and  
23 so --

24 THE COURT: Lay a foundation and we'll see where we

1 go.

2 MR. DURNEY: I appreciate it.

3 BY MR. DURNEY:

4 Q Based upon the work you do in connection with  
5 life expectancy and insurance companies, when an  
6 insurance company sells a life insurance policy, does  
7 it base it in part on a medical examination?

8 A In part, yes. Not in total; in part.

9 Q And does it sell that life insurance policy  
10 exclusively based on the medical examination?

11 MR. KELLY: Objection. Lacks foundation. Calls  
12 for speculation. Beyond the scope.

13 MR. DURNEY: Well, Your Honor, the subject has been  
14 raised; and that is, the adequacy of a medical  
15 examination for the purpose of expressing life  
16 expectancy opinions. And so --

17 THE COURT: Well, I'll allow a little latitude,  
18 Mr. Durney, but not much. I'm going to tell you, I  
19 think you're going beyond where you should.

20 MR. DURNEY: I'll try to be brief. Thank you.

21 BY MR. DURNEY:

22 Q Go ahead. What else do they rely on?

23 A Well, the information from the medical  
24 examination or the paramedical -- the blood work,

1 urinalysis, EKG, all that is transferred to the  
2 underwriters or the actuaries, the people who quantify  
3 the risk. Those are not medical doctors. They're  
4 people who have medical training and experience and  
5 work, similar to my own.

6 Q Actuaries, that's -- maybe there's some of us  
7 that don't know what an actuary is.

8 A An actuary is someone who deals with risk, your  
9 car insurance, life insurance, health insurance,  
10 pensions, financial things where events could happen,  
11 whether it be a car crash or a hospitalization or life  
12 and death.

13 Q And tell me if I'm summarizing correctly. And  
14 those like you who have scientific information about  
15 life expectancy?

16 MR. KELLY: Objection. Calls for speculation.  
17 Beyond the scope.

18 MR. DURNEY: That's my last question.

19 THE COURT: I'm going to overrule it. You can  
20 enter to the extent you can.

21 THE WITNESS: Well, yes, exactly. These are people  
22 who are certified life underwriters, the same people  
23 who ask for my help in pricing their life annuities or  
24 their pensions.

1 BY MR. DURNEY:

2 Q All right. Mr. Kelly has made a big point of  
3 median, the concept of median. What effect does this  
4 have on life expectancy?

5 A Well, the median and the life expectancy are  
6 two different summary measures of the same survival  
7 distribution. Both numbers come from the same place.  
8 That's why when I did my analyses I reported both  
9 numbers. Some studies only have a median; other  
10 studies report the median and the life expectancy.

11 As I said, ideally we would like both. Ideally we  
12 would like the whole curve, the whole set of  
13 possibilities. But life expectancy is the average.  
14 It's what's in the U.S. government life tables, for  
15 example, the numbers that we saw earlier, the 76 for  
16 men and 81 for women. Those are averages, not medians.  
17 And the 15 here is the average. It's a fair number.

18 Q It's the fair number?

19 A Right. For example, if we wanted to compensate  
20 Lyam one dollar per year or a group of people like Lyam  
21 one dollar per year, the fair number would be one  
22 dollar times 15 or \$15. And then at the end of the  
23 day, we wouldn't run out of money, nor would there be  
24 money left over. Whereas, if we use the 11, it

1 wouldn't work out correctly. We would be short by four  
2 dollars.

3 Q By the way, when Mr. Kelly's partners hired you  
4 to express an opinion on life expectancy, did they ask  
5 you questions about median?

6 A I don't recall.

7 Q All right. When Mr. McBride hired you to  
8 express an opinion on life expectancy, did he ask you  
9 questions about median or the concept of median?

10 A It was several years ago. I don't recall. I  
11 would have presented the same information I did in this  
12 case that would have the life expectancy and the  
13 median.

14 Q All right. Now, Mr. Kelly also raised the  
15 issue of negative risk factors in Lyam's case. You  
16 indicated in response to questions posed by me that  
17 there were two types of risk factors to consider.  
18 Again, would you state the categories of each. We have  
19 negative, we know. What else?

20 A Well, we talked about the main factors, the  
21 motor and feeding ability. And then later on we were  
22 talking about other factors, other things that could  
23 matter, both positive and negative. And I only listed  
24 a few in my report, but at the time of my deposition I

1 had a much longer list.

2 I think there's an exhibit of that, if that's of  
3 interest. But I had many positive factors listed, no  
4 tracheostomy, that he can lift his head a bit, that he  
5 rolls from side to side and back to side, that he  
6 doesn't have any ulcers. And I listed some negative  
7 factors, the microcephaly, the visual impairment, the  
8 epilepsy and the hospitalizations that I was aware of  
9 at the time of my deposition but that I wasn't aware of  
10 when I wrote my report.

11 So when my deposition was taken, I mentioned the  
12 hospitalizations in the past two years as a negative  
13 factor. Of course, now as I sit here, I understand he  
14 hasn't been hospitalized in the emergency room for the  
15 last 11 months, so that factor goes from a positive in  
16 my report to a negative at the time of my deposition,  
17 and now it's neutral again, back not mattering.

18 Q All right. So in expressing the opinion that  
19 to a reasonable scientific certainty Lyam's life  
20 expectancy is 15 years, does that take into  
21 consideration the risk of hospitalization?

22 A Yes.

23 Q Does that take into the risk -- into  
24 consideration the risk of scoliosis and the potential



1 need for scoliosis surgery?

2 A Yes.

3 Q Does it take into consideration all of the  
4 negative factors that apply to Lyam?

5 A Well, implicitly it takes into account all of  
6 the positives and negatives both now and in the future.

7 Q Now, there was another thing that Mr. Kelly  
8 raised and that was anecdotal information about people  
9 that you've studied that live longer than you predicted  
10 by virtue of the life expectancy opinion and people who  
11 live shorter. I don't think Mr. Kelly was clear on  
12 that. Can you tell us what you said in your deposition  
13 about the anecdotal information?

14 A I was asked about my testimony on life  
15 expectancy in past cases, like this, and whether I knew  
16 about any of the people living longer or shorter than  
17 the life expectancy I gave which here would be 15  
18 years. And initially I said I wasn't aware of any  
19 living longer and then upon reflection I mentioned two  
20 names, one who had lived shorter and the other who had  
21 actually lived longer. So it was one of each is what I  
22 recalled.

23 Q So just like you've said here, Lyam could live  
24 longer or perhaps shorter?

1 A Right.

2 Q That's why it's an average?

3 A Yes.

4 Q That's why it's not an opinion on his actual  
5 survival or length of actual survival?

6 A It's not meant to be a 100 percent certainty  
7 prediction.

8 Q Now, Mr. Kelly also said something to the  
9 effect that basically your opinion is simply related to  
10 statistics. Is that true?

11 A Well, it's related to statistics, I've relied  
12 on statistics, but that's not --

13 Q I guess the implication was it exclusively  
14 related to statistics. Is that true?

15 A Well, no. It's based on all the information I  
16 received about Lyam and a large body of medical  
17 literature, some of which I've authored. It's based on  
18 my education, training, experience and expertise, my  
19 life's work on life expectancy.

20 Q Dealing as well with children with medical  
21 conditions like Lyam?

22 A Yes.

23 Q And actually studying those medical conditions  
24 in a scientific way?

1 A Yes. That's a major focus of our research.

2 Q And factoring all those things together into an  
3 opinion on life expectancy that can be stated to a  
4 reasonable scientific certainty?

5 A Yes.

6 MR. DURNEY: I think that's all I have, Your Honor.  
7 Thank you.

8 THE COURT: Any recross?

9 MR. KELLY: Nothing further, Your Honor. Thank  
10 you.

11 THE COURT: Thank you, sir. You can step down.

12 Mr. Durney, do you want to call your next witness.

13 MR. DURNEY: We think we have the technology fixed,  
14 Your Honor. We're going to play the deposition of  
15 Dr. Capell.

16 THE COURT: Okay. We will watch that until  
17 about -- for about an hour, a little more than an hour,  
18 maybe about ten or five to 12:00, and then we'll take a  
19 break from it and come back to it after lunch in  
20 respect to that. So are you ready to proceed?

21 (The following is a transcription of the  
22 video-recorded deposition of Joseph Capell, M.D.,  
played in open court.)

23 My name is Peter Durney and I represent Tawni  
24 McCrosky and her child Lyam.

1 And I am Robert McBride. I am one of the attorneys  
2 for Carson Tahoe Regional Medical Center.

3 DIRECT EXAMINATION

4 BY MR. DURNEY:

5 Q Dr. Capell, let's begin. Please state your  
6 name.

7 A Again, it's Joseph Capell, C-a-p-e-l-l.

8 Q And, Dr. Capell, what is your occupation or  
9 profession?

10 A I am a specialist in physical medicine and  
11 rehabilitation, particularly children's rehabilitation  
12 medicine.

13 Q Explain to us what that specialty is all about,  
14 that specialty of physical medicine and rehabilitation  
15 medicine.

16 A It's relatively new speciality in medicine.  
17 Well, not that new. It goes back to 1947. And it  
18 grows out of the World War II experience, that there  
19 were no physicians who were specific specialists in the  
20 field of treating people with handicapping conditions  
21 that wars, unfortunately, generate. And so the field  
22 of physical medicine really began with a report that  
23 the president at the time, who was President Roosevelt,  
24 formed a commission called the Baruch, after Bernard

1 Baruch, who was a financier and advisor to the  
2 president, to study this problem.

3 And they made a number of suggestions, but one is  
4 that there should be a separate specialty of medicine  
5 whose only job is the nonsurgical treatment of people  
6 with handicapping orthopedic and neurologic conditions,  
7 people with spinal cord injury, brain injury, things of  
8 that nature.

9 They recruited a hundred physicians who went to, I  
10 think, the Mayo Clinic in the middle of the winter and  
11 spent a hundred days learning to be physicians in this  
12 speciality and then went to the various war theaters.  
13 And when the war was over, they went back to their  
14 medical centers and started the speciality. 1947 was  
15 the actual first certified physical medicine and  
16 rehabilitation specialist. And it remains today  
17 exactly what it was then, that is, the nonsurgical --  
18 we're not surgeons -- treatment of people, in this case  
19 children, with handicapping neurologic and orthopedic  
20 conditions such as spinal cord injury, brain injury,  
21 things of that nature.

22 It's a small specialty. There's only 5,000  
23 certified physical medicine specialists in the country  
24 as opposed to, just to give you a perspective, 150,000

1 internal medicine specialists. And it's just recently,  
2 maybe in the last 15 years, 14 years, perhaps, that  
3 there have been subspecialties of physical medicine and  
4 rehabilitation.

5 Q And how long have you been practicing physical  
6 medicine and rehabilitation?

7 A I was first certified in 1978. I did my  
8 training in Minnesota at the University of Minnesota  
9 hospitals from 1973 through 1979. So -- and then I've  
10 been in Fresno where I'm practicing right now since  
11 1979.

12 Q Are you board certified in the specialty of  
13 physical medicine and rehabilitation?

14 A Yes, I am.

15 Q Tell us, Doctor, what it means to be board  
16 certified in a medical specialty.

17 A Well, it means different things to different  
18 people, but I think the general meaning -- the purpose  
19 board certifications were first established was to  
20 signal or help the public understand that a particular  
21 physician has had both the appropriate training and  
22 passed the certifying examinations to become a  
23 specialist in that field.

24 This whole movement started perhaps in the late --

1 well, right before 1920. And before that time, if a  
2 person wanted to say they were a neurosurgeon, they  
3 could hang a sign out that said, "I'm a neurosurgeon."  
4 And that might mean that they read the chapter in the  
5 book or it might mean they spent five years at Harvard  
6 Medical School learning to be a neurosurgeon. And so  
7 there was no real standardization.

8 And so it remains what it is today. It remains  
9 today what it was then, I should say, and that is, that  
10 it's a way of the public understanding that an  
11 individual has had the appropriate training and then  
12 been tested on that training to practice in a  
13 particular specialty.

14 Q Are all physicians who practice physical  
15 medicine and rehabilitation board certified in that  
16 speciality?

17 A No. No. There -- there are some that are not.  
18 I would say the majority are, but not all of them.

19 Q Is it an honor to be board certified in a  
20 speciality?

21 A I believe it is. Certainly it takes a lot of  
22 effort, and I believe it is an honor.

23 Q And you've been board certified in your  
24 speciality since -- did you say 1978?

1 A 1978, yes.

2 Q Are you board certified in any other areas of  
3 medicine?

4 A Yes, I am. I -- I have board certification in  
5 pediatrics. I did a pediatric residency at University  
6 of Southern California's teaching program at  
7 Los Angeles Children's Hospital in Los Angeles prior to  
8 going to Minnesota and doing a residency in physical  
9 medicine. And then, as I said, our board, the physical  
10 medicine and rehabilitation board, just in the last 15  
11 years has allowed subspecialties. It was so small,  
12 there weren't such to start with.

13 And the second one that they established was  
14 children's rehabilitation medicine. I was eligible for  
15 that. I had the appropriate training. I passed the  
16 examination and I got that endorsement on my primary  
17 physical medicine boards. And that was a 10-year  
18 certification. I took that about 12 years ago. It  
19 expired about two years ago, and I haven't renewed it.

20 I also did the same thing with spinal cord injury  
21 medicine which is not germane to this case. But it  
22 actually was the first subspecialty that was available  
23 in the field of physical medicine and rehabilitation  
24 about 15 years ago. I was eligible for that because of



1 my training. I sat for the examination, passed the  
2 examination and was endorsed for that, but that expired  
3 about three years ago. And at this point in my career  
4 I'm not going to go back and take examinations like  
5 that. So I did not renew it either.

6 Q But at least at some point you did receive  
7 board certification in the subspecialty of pediatric  
8 rehabilitation medicine and the subspecialty of spinal  
9 cord injury medicine?

10 A Yes.

11 Q All right. And you mentioned that you simply  
12 allowed those to expire in roughly 2012 or 2013. You  
13 said two years ago. Would that be -- I don't want to  
14 put words in your mouth, but was that an accurate  
15 interpretation?

16 A Yes. One -- one expired the year before the  
17 other, but yes.

18 Q All right. And the reason that you chose not  
19 to re-sit for recertification was what?

20 A It -- I was 68 years old and it wasn't  
21 important to continue in having that active  
22 certification.

23 Q And I suppose I should mention the reason why  
24 we're talking your deposition today. Trial in this

1 matter begins on the 8th of March and is scheduled for  
2 a number of weeks. I understand that for medical  
3 reasons you are not able to make an appearance at that  
4 trial. Would that be true?

5 A That's correct. I'm going to be having surgery  
6 next week, and I can't really guarantee that I'll be  
7 ready and up and around to testify. So I notified you  
8 late last week -- yes, late last week that we'd have to  
9 make other arrangements.

10 Q All right.

11 A Excuse me.

12 Q Now, let's talk about what you've done in your  
13 career as a board-certified physician practicing  
14 physical medicine and rehabilitation as well as  
15 pediatrics. Do you have a clinical practice?

16 A I -- I do, yes.

17 Q Was it -- for those of us that might not  
18 understand what it means when we use the term "clinical  
19 practice," explain that.

20 A Well, it means I'm seeing patients. And I see  
21 adults and children with handicapping conditions such  
22 as brain injury, spinal cord injury, other problems  
23 like amputations, chronic pain, things of that nature,  
24 that are within the specialty of physical medicine and

1 rehabilitation.

2 Q How long have you had a clinical practice?

3 A Well, training is clinical practice, but I  
4 finished my training in 1976, 1977 actually, in  
5 Minnesota. And then I was on the faculty of the  
6 University of Minnesota until 1979 as an assistant  
7 professor of physical medicine and rehabilitation. And  
8 in that capacity I taught residents and medical  
9 students as well as was the assigned physician treating  
10 individuals who were in the hospital and also  
11 outpatients.

12 Q When did you first take up clinical practice  
13 here in Fresno?

14 A In late 1979. I came here in August of '79.

15 Q So you came from Minnesota directly to Fresno?

16 A From Minnesota to Fresno.

17 Q And since arriving in Fresno, describe your  
18 professional activities.

19 A Well, part of my practice has been remaining in  
20 teaching. There -- there is a teaching program at the  
21 Fresno Community Hospital where I was working initially  
22 as a rehabilitation physician. It was affiliated with  
23 the University of California at San Francisco.

24 And then for five years actually I traveled to

( 1 Sacramento to the University of California at Davis  
2 Medical Center -- the medical center is in Sacramento.  
3 The medical school is in Davis, which is about three  
4 miles from Sacramento -- and taught there in the field  
5 of physical medicine, attending, meaning being the  
6 faculty physician on patients who were in the hospital  
7 as well as teaching residents in outpatient situations.  
8 And I was doing that -- well, there were different  
9 times during those five years, but I was going there up  
10 to once a week, but more often it was twice a month.

11 Q All right. And then --

12 A Well, I haven't answered the question. But the  
13 majority of my practice has been the clinical practice,  
14 seeing patients, although I've had some administrative  
15 duties also. I was director of the medical center that  
16 I talked about which was the Fresno Community  
17 Hospital's rehab center which has a separate name.  
18 It's called the Leon S. Peters Rehabilitation Center.  
19 I was codirector of the children's hospital in Fresno  
20 which is called Valley Children's Hospital's  
21 Rehabilitation Medicine Center. And then I was also  
22 outpatient director of rehab services at the San  
23 Joaquin Valley Rehab Hospital. And those were all in  
24 the past. I'm not currently in any administrative

1 position.

2 Q And in connection with your clinical practice,  
3 how many patients did you typically take care of in any  
4 given time that presented to you for -- as a result of  
5 rehabilitation needs? And I may not have posed that  
6 question very well. But I'm interested in knowing the  
7 kinds of patients that you had been taking care of over  
8 the years and -- and the number of patients that you  
9 were taking care of in any given period.

10 A Well, when -- when I have patients in the  
11 hospital, either children or adults, I would be the  
12 primary or the attending physician for those individual  
13 patients, I would have perhaps five or six children and  
14 eight or ten adults at a given time for the majority of  
15 the years I practiced here in Fresno.

16 In the last eight to ten years I've decreased my  
17 hospital practice to where now I am going once or twice  
18 a month to the rehabilitation hospital. And I see  
19 patients and I do quality control and review cases and  
20 sometimes substitute on weekends for patients when a  
21 physician is out of town who's, you know, one of my  
22 colleagues in rehab medicine. In children, I see once  
23 or twice a week. I have a full clinic where I see  
24 between 12 and 18 patients a given day. So perhaps 40

1 a month, 50 a month of children these days.

2 Q These days -- has that been generally true  
3 dating back to when you first became board certified in  
4 physical medicine and rehabilitation?

5 A No. About ten years ago I decreased my  
6 practice. I had a health problem and decreased my  
7 practice from about 60 hours a week to about 30 hours a  
8 week. And that's what I've been doing the last ten  
9 years and what I just described is what I'm doing  
10 nowadays.

11 Q Now, did you at my request examine Lyam  
12 McCrosky?

13 A I did.

14 Q Tell us what you did in connection with the  
15 examination and evaluation of Lyam.

16 A Well, first of all, I read quite a few records.  
17 There was -- these were on a disk by this time.  
18 That -- that's been something that's happened in the  
19 last five years, that most medical records are  
20 electronically recorded rather than on paper, which is  
21 quite a benefit. Probably eight to ten, maybe more  
22 than that, hours of records review. And those were  
23 both medical records, that is, from the  
24 hospitalizations and from outpatient treatment of this

1 young man as well as some depositions of his -- well,  
2 of his mother, other members of his mother's family and  
3 other individuals.

4 And before I had read those -- I had read those, I  
5 should say, both the depositions and the medical  
6 records and completed that evaluation on February 20th.  
7 Then I saw this young man --

8 Q Of 2015?

9 A Of 2015, yeah. This is all in 2015. And then  
10 I actually traveled to Reno and saw Lyam and his mother  
11 on March 20th, 2015. I examined him. I spoke to his  
12 mother extensively. And then about a week later I  
13 prepared a report, March 25, 2015, and sent that to  
14 you, Mr. Durney. And then I've been available also for  
15 viewing additional records which have come in.

16 Q In that -- in that regard, would it be fair to  
17 say that it you've made a concerted effort to read and  
18 review every medical record that has been generated on  
19 this little boy from the first day of his life up to  
20 the current time?

21 A Yes.

22 MR. McBRIDE: Objection. Calls for speculation.

23 BY MR. DURNEY:

24 Q Go ahead.

1       A    I certainly reviewed all the records which had  
2    been provided me, and a document which I called Review  
3    of Records has all the records that I have reviewed.  
4    There probably are a few over the last six months or so  
5    that I haven't read, but I did speak with Tawni  
6    McCrosky, Lyam's mother, and she updated me about what  
7    his medical care has been in these last six or eight  
8    months.

9       Q    At least you made an effort to see all the  
10   medical records and have reviewed, in fact, all the  
11   records provided to you pertaining to Lyam's care and  
12   treatment since the first day of his life; would that  
13   be a fair statement?

14       A    I believe I have, yes.

15       Q    All right. And before we go into that  
16   evaluation, in your practice as a board-certified  
17   physician in physical medicine and rehabilitation, have  
18   you evaluated and provided opinions as to the medical  
19   needs of youngsters like Lyam?

20       A    Yes, I have.

21       Q    Is that something that you typically do in your  
22   practice?

23       A    Well, I do it in two different ways. In the  
24   patients that I am treating, from time to time there is



1 a request from an insurance company or -- or an agency  
2 to make an estimate of what future medical needs will  
3 be, not just until I see the youngster the next time,  
4 but an overall view. But more often I'm asked by  
5 attorneys to review a case, as I have in Lyam's case,  
6 and provide my input to a life care planner as to what  
7 in my field, the physical medicine and rehabilitation  
8 field, I believe future medical needs are going to be.

9 Q And have you done that on numerous occasions?

10 A I have.

11 Q Can you give us an estimate?

12 A Probably once or twice a month over the last  
13 ten years.

14 Q All right. Now let's go back to Lyam. As a  
15 result of -- and by the way, you mentioned that you not  
16 only reviewed what you understand to be his history as  
17 reflected in his medical records but that you actually  
18 did an examination.

19 A Yes, I did.

20 Q Can you tell us about that?

21 A Well, there were actually two parts to the  
22 examination. And this occurred in a -- in a conference  
23 room. The first was my asking Tawni McCrosky about  
24 Lyam's medical care. And by that I mean what doctors

1 he was seen by, what times he had been in the hospital,  
2 the times he had been to the emergency room, what  
3 therapist he was seeing. The time I saw him he was  
4 just about to graduate from a program called Nevada  
5 NEIS, Nevada Early Infant Program or System.

6 Q I think Nevada Early Intervention Services.

7 A That's it, Nevada Early Intervention Services.  
8 I've been using the abbreviation mostly. And also what  
9 equipment he had, the term "equipment" meaning what  
10 devices. He had a nebulizer for breathing. He had a  
11 tube feeding machine called a Kangaroo pump for feeding  
12 him directly into the stomach. And he had other  
13 devices, a suction machine, and things like that. I  
14 also asked what medicine he was taking, and I have a  
15 list of that. I asked what his function as far as his  
16 mother was concerned, what she could tell about his  
17 ability to see, his ability to hear, his ability to  
18 move, things of that nature.

19 Q And let me interrupt you just a minute. You  
20 indicated that you -- in asking mom questions, is that  
21 particularly important to you? And don't you have to  
22 make a judgment when you receive information like that  
23 as to the reliability of that information?

24 A I absolutely do. And that's a judgment that I

1 think physicians are making all the time when they're  
2 doing what we call the history, the historical portion  
3 or the -- the speaking portion of an examination. And  
4 my estimation was that Lyam's mother was very, very  
5 knowledgeable in his treatment.

6 I already had many records. The records weren't  
7 complete at that point. They were about a year --  
8 maybe 12 months of time that had passed that I did not  
9 have records, but I had records up to about 12 months  
10 ago when I first saw him in early March of 2015.

11 But when the mother was telling me about his  
12 current treatment, she knew the names of every single  
13 therapist he had, she knew the dosage of every single  
14 medicine, she knew the dates that he had been to see  
15 the different specialists. She knew about the dates of  
16 his surgeries and things of that nature, his time in  
17 the hospital's emergency room.

18 So I judged that she was a very competent mother in  
19 terms of remembering things and remembering what Lyam's  
20 treatment had been.

21 Q All right. Let's go back to the examination.  
22 You were telling us in general terms what you did in  
23 connection with his --

24 A Sure.

1 Q -- physical examination.

2 A Well, during the historical portion -- there's  
3 one more comment -- Lyam was present. And, of course,  
4 I'm watching him during this as I'm asking questions  
5 and writing things down. So the historical portion,  
6 which lasted perhaps an hour and a half, really was  
7 part physical examination too. But at one point I was  
8 doing an actual hands-on examination. And I assessed  
9 the young man's ability to move, his tone, which means  
10 the resting tension in his muscles, his reflexes, his  
11 ability to see, his ability to hear. I examined his  
12 stomach and his back and his hips and his ability to  
13 hold his head up and things of that nature.

14 At one point it was time for Lyam to be fed. And  
15 his mother actually said, "I'd like to stop now so I  
16 can do the feeding."

17 And I asked if I could observe that, because I  
18 wanted to see how she did that. And I thought she did  
19 it very, very competently. Unfortunately, the feeding  
20 seemed to start a retching, an emesis episode. And he  
21 didn't really vomit very much, but that contraction  
22 to -- to retch actually popped out his feeding tube.  
23 The feeding tube is anchored on the inside by a balloon  
24 which apparently had lost some of its air over -- it

1 was about three weeks old at that point -- had lost  
2 some of its -- it's not air. It's fluid. The balloon  
3 fills up so it can't be pulled out. It got to the  
4 point where actually his abdominal contractions popped  
5 out the balloon. And so his mother said she had  
6 another one. I said, "I could reinstall that for you  
7 if you want."

8 And she said, "No. I've done this a number of  
9 times and I can."

10 So I basically stood there as an assistant and  
11 helped her reinsert the feeding tube, which is called a  
12 MIC-KEY, M-I-C-K-E-Y, not Mickey Mouse, but those  
13 letters mean something. In fact, I've forgotten what  
14 they mean. But that's the type of device. And she put  
15 it in absolutely as competently as any time I've seen a  
16 nurse do it or as I could have done it.

17 Q We'll talk about the gastrostomy tube in a  
18 little while, but the point of you telling me this  
19 is -- is -- is what, that you recognize the competency  
20 of this mom?

21 A It was part of my evaluation, usually not a  
22 part that I usually do, and it certainly underscored  
23 her competency in administering to little Lyam.

24 Q All right. Is there any other part of the

1 evaluation that you haven't described to us yet?  
2 You've talked about reviewing the medical records,  
3 actually examining the boy, talking to mom, reading --  
4 reading the depositions. You mentioned depositions.  
5 Did you -- what was your focus in reviewing  
6 depositions? The family?

7 A Well, my focus was primarily to understand what  
8 his current medical needs are as they're administered  
9 by the family, but also it reflects what doctors he's  
10 seeing and things of that nature, also what equipment  
11 he has. So it's kind of a cross-reference to the  
12 information which I gathered in the historical portion  
13 of the examination.

14 Q All right. Fine. Now, if you would, please,  
15 would you give us an overview of -- of -- of the  
16 disabilities that this young boy has.

17 A I'm looking at my report, and I came to a  
18 section which I call impression. And "impression" is a  
19 word that doctors use. And it is pretty much the same  
20 as a diagnosis. So I have 11 diagnoses here.

21 The first one is hypoxic ischemic encephalopathy at  
22 or near birth with resultant significant supratentorial  
23 encephalomalacia. A lot of complicated words there  
24 which I'm happy to explain.

1 Q So please explain.

2 A Well, the main diagnosis is this condition of  
3 ischemia. Ischemia means lack of oxygen. It actually  
4 means lack of blood flow, but the result is lack of  
5 oxygen. Hypoxic, the word before ischemia, is specific  
6 for lack of oxygen.

7 Q In other words, you don't have -- blood  
8 delivers the oxygen, so if you have an ischemic  
9 condition, which means no blood, you get no oxygen?

10 A Yes.

11 Q Go ahead. I'm sorry.

12 A And the other -- and the third word there is  
13 encephalopathy. Encephalo is just a Greek word for the  
14 brain, the central nervous system, and it means injury  
15 to the central nervous system. So hypoxic ischemic  
16 encephalopathy is his main diagnosis. I say, from my  
17 review of the records, it appears to have been at or  
18 near birth. In other words, it doesn't seem to be way  
19 earlier in the pregnancy as can occur in some cases.  
20 It didn't seem to be significantly after the birth. In  
21 other words, it wasn't when he was a year old or  
22 something like that.

23 And I say "with resultant significant  
24 encephalomalacia." Encephalomalacia means injury or

1 subtraction from the brain. There is parts of his  
2 brain which simply are not working. And I localize it  
3 and say "supratentorial." That just means the front  
4 part of the brain rather than the back part of the  
5 brain or the cerebellum. It primarily coordinates  
6 resources. I think that part is healthy. So that's  
7 the first diagnosis.

8 And the rest all say secondary to No. 1. So these  
9 are the results of that first diagnosis.

10 Q So --

11 A Should I keep reading?

12 Q So -- well, what I want us all to understand  
13 is -- is -- is all of the constellation of disabilities  
14 that this little boy has to deal with and his mother  
15 has to deal with. So to the extent that going through  
16 all of your impression helps us do that, I don't care  
17 if you follow 2--all the way to 10 in numerical order,  
18 but just to give us all an understanding of what this  
19 little boy deals with.

20 A Certainly. The kind of injury he has to his  
21 brain leads to certain problems or disabilities, and I  
22 have those listed. One is he has a seizure disorder.  
23 In other words, he has epilepsy. And that's from the  
24 brain injury. Epilepsy is always from some kind of



1 brain injury. In this case it's from the hypoxic  
2 ischemic encephalopathy.

3 The next thing he has is spastic quadraplegic  
4 cerebral palsy. Now, those are three terms that I  
5 probably should explain. Spastic -- now, a person can  
6 have a brain injury and a paralysis that leaves them  
7 flaccid, in other words, they're like a noodle. But in  
8 this case it's a spastic kind of paralysis. He doesn't  
9 use his arms and his hands very effectively. He can  
10 move them.

11 When I was feeling his stomach, he with both hands  
12 pushed me away. He can move his hands somewhat but  
13 certainly not like an almost three-year-old should be  
14 doing. Almost three-year-olds are coloring and drawing  
15 and cutting and doing all kinds of things. They're  
16 dressing themselves. He's not doing any of those  
17 things.

18 Quadriplegic is the second word there. And that  
19 means that all four limbs are involved. Sometimes a  
20 paralysis is just one-half of the body. Sometimes it's  
21 just the lower half and sometimes it's just the upper  
22 half. In his case it's all four limbs. In fact, it's  
23 all of his body.

24 And the actual kind of administrative diagnosis he

( 1 has -- and by "administrative" I mean it's -- it's a  
2 big diagnosis that includes all kinds of things, but  
3 the -- it's -- it's an appropriate diagnosis for him,  
4 is that he has cerebral palsy.

5 And the implication of cerebral palsy is it's a  
6 brain injury that occurs in the developmental period of  
7 his life. In other words, in the first six years  
8 cerebral palsy occurs. And it doesn't get worse with  
9 time. There's a certain damage that occurs and that  
10 certain damage remains.

11 Now, it may evolve in a sense that newborns don't  
12 write and they don't walk and they don't talk and they  
13 don't do calculus and things like that, which  
14 eventually he might have done all of these things, but  
15 you don't see those deficits at birth. You see the  
16 deficits of movement and heart rate and swallowing and  
17 those kinds of problems, which he clearly had,  
18 breathing problems, which he clearly had. But when he  
19 gets to the age where ordinarily were he not injured he  
20 would walk, like which is about one year old, he  
21 doesn't walk. So that's not a worsening of his  
22 condition. That's really an evolving of his condition,  
23 But the hallmark of cerebral palsy is it doesn't get  
( 24 worse with time.

1       The next one is he is very involved in his eyes,  
2 his vision. And we call that cortical visual  
3 impairment. Cortical means from the brain, visual, of  
4 course, eyes. And he has a limitation. His limitation  
5 isn't that his eyes don't work. The lenses and the  
6 retina and the globe and the muscles that move them,  
7 all of those things seem to work well, but he is unable  
8 to perceive any but very strong, clear, contrasting  
9 stimuli, visual stimuli. He can see light and he will  
10 follow a light, but he doesn't see more subtle things  
11 than that. And that's called CVI or cortical visual  
12 impairment.

13       Q   Let me interrupt you just for a minute. So are  
14 you telling us that atomically his eyes appear normal?

15       MR. McBRIDE: Object. It goes beyond this  
16 witness's area of expertise.

17 BY MR. DURNEY:

18       Q   You may answer.

19       A   From the --

20       Q   Let me ask it a little bit differently in light  
21 of Mr. McBride's objection.

22       Why don't the eyes work like an able-bodied  
23 person's eyes would work --

24       MR. McBRIDE: The same objection.

1 BY MR. DURNEY:

2 Q -- with cortical blindness?

3 MR. McBRIDE: I'm sorry. The same objection. It  
4 goes beyond this witness's area of expertise.

5 THE WITNESS: And he has been seen by an  
6 ophthalmologist, an eye specialist, in fact, a  
7 pediatric ophthalmologist. And that's Dr. Johnson in  
8 Reno. And he has seen Dr. Johnson about six or seven  
9 times, I believe. Dr. Johnson is seen regularly twice  
10 a year.

11 And Dr. Johnson has made that diagnosis of cortical  
12 visual impairment. And in his discussion he says the  
13 eyes seem to be normal, but he has a brain injury which  
14 is diagnosed as cortical visual impairment. So I  
15 include it for that reason. That is not a diagnosis  
16 that I ordinary would make without the consultation  
17 with an ophthalmologist.

18 BY MR. DURNEY:

19 Q But if the -- if the anatomical feature of the  
20 eye appear normal, why doesn't the eye work in the case  
21 of hypoxic encephalopathy, ischemic encephalopathy --

22 MR. McBRIDE: Again, the same objection.

23 BY MR. DURNEY:

24 Q -- that we have here?

1 MR. McBRIDE: Again, the same objection. It goes  
2 beyond this witness's area of expertise, lacks  
3 qualifications to speak to this.

4 THE WITNESS: The --

5 BY MR. DURNEY:

6 Q Let me ask a preliminary question in light of  
7 Mr. McBride's objection. Do you in your practice  
8 typically deal with cortical visual impairment in your  
9 patients?

10 A Yes.

11 Q And -- and -- and doing so, have you by virtue  
12 of your training and experience become aware of not  
13 only what is needed for cortical blindness or the  
14 treatment of the visual impairment associated with  
15 cortical blindness but also evaluated the -- the -- the  
16 cause of it as well?

17 A Well, in my regular practice had I seen a  
18 youngster similar to -- to Lyam, I -- I would have an  
19 ophthalmologist evaluate them simply to make sure that  
20 there's not some operable problem like cataracts or  
21 something like that or something like a bleed in the  
22 retina in the back of the eye that perceives light that  
23 is fixable. So that's personally happened hundreds --  
24 maybe more than hundreds of times in my practice.

1       So I work with an ophthalmologist. But I have  
2 virtually never sent a youngster to an ophthalmologist  
3 and the ophthalmologist sent back a letter or a note or  
4 phone call that said, "There's nothing wrong with him.  
5 He's fine."

6       There's always a problem which I am referring for.  
7 And in my practice I virtually have never been wrong  
8 about it being appropriate to refer.

9       Q All right.

10      A If that's what you're asking.

11      Q And -- and -- and can you relate the brain  
12 injury that you described to us to the cortical visual  
13 impairments that you see?

14      MR. McBRIDE: Again, objection. It goes beyond  
15 this witness's area of expertise, lacks foundation.

16      THE WITNESS: Yes, I can. My understanding of the  
17 neurology in the brain injury he has is that the  
18 portion of his brain that is the primary visual cortex  
19 which is in the back of the brain -- it's called the  
20 occipital cortex -- is significantly impaired. And  
21 that's based on electroencephalograms and magnetic  
22 resonance imaging scans of his brain.

23 BY MR. DURNEY:

24      Q That have actually been done of Lyam's brain?

1 A That's correct.

2 Q All right. Let's go down to -- continuing with  
3 your description of his disabilities and impairments.

4 A I have No. 5 -- this is actually the fourth  
5 thing that is secondary to that hypoxic ischemic  
6 encephalopathy -- as significant dysphagia, G-tube  
7 dependent, secondary to No. 1. And --

8 Q Again, secondary to the hypoxic ischemic  
9 encephalopathy?

10 A Exactly. And dysphagia means difficulty  
11 swallowing. And he has -- it is almost impossible for  
12 him to swallow any more than his own secretions. And,  
13 in fact, he has even difficulty swallowing his own  
14 saliva. He's on a medication to decrease his  
15 salivation, something that gives him -- well, it would  
16 give me or you probably a dry mouth. For him, it --  
17 his mouth isn't particularly dry, but it decreases some  
18 of the secretion. He can taste things. He can swallow  
19 a very little bit, primarily for taste, but virtually  
20 all, almost a hundred percent of his nutrition and his  
21 fluid, his hydration, has to be given to him through  
22 the gastrostomy. That's why I say he is G-tube -- that  
23 means gastrostomy tube -- dependent.

24 Q And earlier in -- in our conversation you

1 talked about seeing Tawni actually replace the G-tube  
2 during the course of your examination and you began to  
3 tell us about the -- you began to describe that G-tube  
4 to us. Maybe you could utilize the board in very rough  
5 fashion to show us how this G-tube works and how the  
6 tube provides the source of this young man's nutrition.

7 A And I'll -- I'll stand there. Is this pretty  
8 good?

9 This is called the MIC-KEY tube. And, again,  
10 those -- those letters mean something, but I've  
11 forgotten what they abbreviate. This is a device  
12 that's part of a group of devices called gastrostomy.  
13 And a gastrostomy is a surgical procedure. And it's  
14 gastro, which is stomach, stomy, creating a stoma or an  
15 opening. Stoma is another word, Latin word, for mouth.  
16 But it's food going directly into the stomach.

17 And a surgeon did this, a Dr. Hulka, Frieda Hulka,  
18 I believe, during his first hospitalization at Renown  
19 Medical Center because it was very clear he was not  
20 going to be able to swallow and they were unable to  
21 establish feeding or a swallowing pattern.

22 When Dr. Hulka first did this, she put a device,  
23 which is a fairly long tube, and it has a balloon at  
24 the end, and -- well, I'll show you what the -- the



1 original one looked like. It's a tube like this. And  
2 then the tube goes into the stomach. And it has an  
3 opening there and it has a balloon right here.

4 And there's actually two different openings into  
5 this tube. One you inject water and it blows up the  
6 balloon. The other you do the feeding through. And  
7 then the feeding is pumped into the stomach, comes out  
8 the orifice in the gastrostomy tube.

9 You insert the tube with the balloon deflated so it  
10 just looks like -- it looks like a tube. But after  
11 it's in, you inflate the balloon, inflate it with water  
12 through this other tube, and then the balloon keeps it  
13 from slipping out, being pulled out or being retched  
14 out when the stomach contracts.

15 Now, the MIC-KEY tube is basically the same thing,  
16 only a little more elegant in that it's a --

17 I'll get this right. How about now? Can you focus  
18 on that or am I too much out?

19 It's -- it's about as big as your thumb. And it's  
20 a tube on the outside and it has a cap to it which  
21 plugs it so it can be plugged. It's on the outside of  
22 the stomach. It goes in. There's an opening. There's  
23 a balloon right there. And it's got another side port  
24 here for the inflation. So the child's abdomen is

1 right there; the stomach is right here.

2 And so what basically this does is it's -- it's a  
3 retained tube. It's always there. It's closed. It  
4 goes through the stoma, a hole in the abdomen, which  
5 goes directly into the stomach. It's usually in the  
6 right upper quadrant right in here, although it could  
7 be over here in the left upper quadrant.

8 And when the child is fed, you don't monkey with  
9 the inflation part. That's something you only work on  
10 maybe once a month when you change the tube. The tube  
11 has to be changed once a month or it has to be changed  
12 more often if it gets irritated on the skin or if it  
13 gets plugged. In other words, you can't force anything  
14 into it. And you connect this to a pump system.

15 And so there is -- there is apparatus that Tawni  
16 McCrosky has to carry around for Lyam which is a  
17 feeding pump which operates on batteries. You don't  
18 have to plug it in all the time, but you have to charge  
19 the batteries. You have to have a tube from a bag of  
20 formula which he's fed with and plug that into the  
21 MIC-KEY tube after you extract or pull off the cap.  
22 When you're done usually you flush it with some water  
23 so there's not formula still in the tube. And then you  
24 put the tube -- the cap back on.

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7 **IN THE SUPREME COURT OF THE STATE OF NEVADA**  
8

9 TAWNI McCROSKY, individually and  
10 as the natural parent of  
LYAM McCROSKY, a minor child,

11 Appellants,

12 vs.

13 CARSON TAHOE REGIONAL  
14 MEDICAL CENTER, a Nevada  
business entity,

15 Respondent.  
16

Supreme Court Case No.: 70325

FJDC Case No. 13TRT000281B

17  
18 **APPELLANT'S APPENDIX**

19 **VOLUME 10**  
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21  
22

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3.	Defendant Carson Tahoe Regional Medical Center's Answer to Plaintiff's Complaint	May 30, 2013	1	AA000030 – AA000038
4.	Defendant Carson Tahoe Regional Medical Center's Answer to Plaintiff's First Amended Complaint	April 30, 2015	1	AA000050 – AA000065
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10.	Defendant Carson Tahoe Regional medical Center's Reply in Support of Motion to Include Co-Defendant Amy Sue Hayes, MD on the Verdict Form	August 28, 2015	3	AA000530 – AA000537
11.	Defendant Carson Tahoe Regional Medical Center's Reply in Support of Motion in Limine No. 7 to Permit the Introduction of Collateral Source Payments as Evidence at the Time of Trial	October 29, 2015	5	AA000799 – AA000804
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20.	Order Granting Defendant Carson Tahoe Regional Medical Center's Motion to Include Co-Defendant, Amy Sue Hayes, MD on the Verdict Form	September 22, 2015	4	AA000628 – AA000630
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25.	Plaintiff's Opposition to Defendant CTRMC's Motion to Include Co-Defendant Amy Sue Hayes, MD on the Verdict Form	August 21, 2015	2	AA000214 – AA000263
26.	Plaintiff's Reply to Defendant Carson Tahoe Regional Medical Center's Opposition to Plaintiffs' Omnibus Motion in Limine	November 16, 2015	5	AA000883 – AA000954
27.	Plaintiffs' Omnibus Motion in Limine	October 19, 2015	5	AA000771 – AA000798
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4.	First Amended Complaint	April 17, 2015	1	AA000039 – AA000049
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11.	Plaintiff's Opposition to Defendant Carson Tahoe Regional Medical Center's Motion for Summary Judgment	August 25, 2015	2	AA000264 – AA000313
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44.	Fetal Monitor Strips	N/A	15	AA003134 – AA003199





1 THE COURT: Mr. Durney, do you want to call  
2 your next witness?

3 MR. DURNEY: We'll call Les McCrosky.

4 THE COURT: Sir, please come forward. Stop  
5 right there, raise your right hand and be sworn.

6  
7 LESLIE McCROSKY,  
8 having been first duly sworn,  
9 was examined and testified as follows:

10  
11 THE COURT: Please take the witness stand,  
12 state your full name and spell your last name, please.

13 THE WITNESS: Excuse me, sir. State my last  
14 name?

15 THE COURT: Spell your last name.

16 THE WITNESS: Spell it. M-c-C-r-o-s-k-y.

17 THE COURT: Your witness, Mr. Durney.

18 MR. DURNEY: May it please the Court.

19

20 DIRECT EXAMINATION

21 BY MR. DURNEY:

22 Q Good afternoon, Mr. McCrosky.

23 A Good afternoon.

24 Q Your relationship to Tawni is what?

1 A Father.

2 Q And tell us a little bit about yourself.

3 What do you do?

4 A I am a construction worker. We do sewer and

5 water projects, erosion control projects for

6 municipalities, and work in the dirt, run equipment.

7 Q Do you occupy a managerial position within

8 the construction trades?

9 A Yeah. I'm a job supervisor.

10 Q And how long have you been involved in the

11 construction trades?

12 A Pretty much all my life. I grew up with it.

13 Q Where do you live?

14 A I live out at Double Springs, South

15 Gardnerville.

16 Q About how many miles south of Gardnerville is

17 that?

18 A About 12 miles.

19 Q With your wife? You're like me, you're

20 struggling to hear.

21 A I'm hard of hearing. Sorry.

22 Q Too many hunting rifles.

23 Who lives with you?

24 A My wife does and my daughter and my grandson.

1 Q And you have -- and Casey, your --  
2 A Yes. I have -- well, I have two daughters.  
3 One lives in the guesthouse.  
4 Q All right. On the property would be my  
5 question.  
6 A Yes.  
7 Q So Casey; Tawni; your grandson, Lyam; and  
8 your wife, Kelly?  
9 A Wife Kelly.  
10 Q Do you remember when Tawni was pregnant?  
11 A Yes, I do.  
12 Q Do you remember the day that Tawni went into  
13 labor?  
14 A Yeah, I do.  
15 Q Tell us about that.  
16 A When she went into labor, we come in in the  
17 evening, and Tawni and Casey drove down in one car and me  
18 and my wife drove down in the other vehicle, and we spent  
19 the night there just waiting. And then in the morning  
20 she started having some problems, and I went and got a  
21 cup of coffee, and when I come back, I didn't get to go  
22 back in her room.  
23 Q Were you in the room all night?  
24 A Yes.

1 Q When you say they began to have some  
2 problems, what made you think that there were -- that  
3 problems were occurring?

4 A Because of the strip that was on -- recording  
5 Lyam, the baby.

6 Q And how did you know that the strip indicated  
7 that a problem was occurring?

8 A Because I just heard the nurses talking.

9 MR. McBRIDE: Objection, Your Honor.  
10 Hearsay.

11 THE COURT: Sustained. Speculation,  
12 Mr. Durney, but he can rephrase it so that -- lay a  
13 little better foundation.

14 MR. DURNEY: These are adverse parties, Your  
15 Honor.

16 THE COURT: Well, go through the strip a  
17 little bit and ask him what he saw and lay a little bit  
18 of foundation.

19 MR. DURNEY: All right.

20 BY MR. DURNEY:

21 Q Did you see the strip? Could you see the  
22 strip when you were in the room?

23 A Yeah, I could. Kind of partly because it was  
24 up in the corner. It was a little hard to see part of

1 the time.

2 Q Did you have any reason to believe that night  
3 that there was anything unusual or that there were any  
4 problems with Tawni's pregnancy?

5 A Not during the night, no.

6 Q Everything based on your observation and the  
7 things you heard and saw suggested that things were  
8 normal?

9 A Yes.

10 Q And did you have any reason to think that any  
11 of the nurses there in labor and delivery were providing  
12 anything other than top-notch care?

13 A No.

14 Q You trusted that they were?

15 A I trusted that they did.

16 Q And so there came a point in time when you at  
17 least recognized there was a problem.

18 When that happened, what did you do?

19 A I didn't do a whole lot of anything.

20 Q Does that bother you?

21 A Yeah.

22 Q Why does that bother you?

23 A Because I wished I had spoke up and voiced my  
24 opinion. I figured she was in good hands.

1 Q What would you have said?

2 A What would I say?

3 MR. McBRIDE: Objection, Your Honor. Calls  
4 for speculation.

5 MR. DURNEY: I think the man has had ample  
6 opportunity to think about the answer to that question,  
7 Your Honor. It doesn't call for speculation.

8 THE COURT: Well, he can give his own opinion  
9 to some extent or what he thinks he would have said, but  
10 the problem is that presupposes, in respect to this,  
11 Mr. Durney -- did he say anything or didn't he say  
12 anything?

13 Did you say anything?

14 THE WITNESS: No.

15 MR. DURNEY: My question, Your Honor, is,  
16 he's already testified that he wishes he had, and my  
17 question is, having been given all this time to think  
18 about it, what do you wish you had asked.

19 MR. McBRIDE: And, again, it calls for  
20 speculation.

21 THE COURT: Again, I think it is speculation  
22 as to now that he's thought about it. You have to look  
23 at the time when that happened, what he would have said  
24 at that time, and we're down the road a considerable

1 period of time in respect to that, so I'm going to  
2 sustain the objection. I think that that's fair.

3 MR. DURNEY: I'll move on, Your Honor.

4 BY MR. DURNEY:

5 Q At least you wish you had spoken up?

6 A Yes, sir.

7 Q And was that something that you had wished  
8 shortly after Lyam was taken from that hospital?

9 A Yes.

10 Q And when Lyam left the hospital that  
11 April 25th day, did you go with him?

12 A Yes. I followed up in my own vehicle.

13 Q And by the way, before we leave, you  
14 indicated that you went to the cafeteria or you went to  
15 get some coffee, I think you said.

16 Do you remember that?

17 A Before he was born.

18 Q Yes. You mentioned that you had reason to  
19 believe there was some sort of a problem and you went and  
20 you left.

21 A Yes.

22 Q And you went where?

23 A I went down to the gas station down on the  
24 corner and got a cup of coffee.



1 Q When you came back what happened?

2 A They didn't let me back in the room. I was  
3 told I couldn't go back in the room.

4 Q All right. And were you ever able to go back  
5 in the room that morning?

6 A No.

7 Q And what happened next -- what did you see  
8 happen next?

9 A They put me in a waiting room off to the  
10 side, and I didn't really get to see anything that was  
11 going on until they come and got me and told me -- told  
12 me my wife needed some help.

13 Q And did you render some help to your wife?

14 A Yes.

15 Q What kind of help did you have to render to  
16 your wife?

17 A Just go get her and bring her back to the  
18 waiting room.

19 Q What was her condition?

20 A She evidently passed out as she was coming  
21 out of the emergency room, operating room.

22 Q We'll talk to her tomorrow, so I'll leave  
23 that for her.

24 So you went to Renown with Lyam?

1 A Yes.

2 Q And did you stay with Lyam at Renown?

3 A Yes.

4 Q Did you stay with Lyam at Renown 24 hours a  
5 day?

6 A Not exactly 24 hours a day, but almost.

7 Q Well, if you weren't there, where were you?  
8 If you weren't there at the hospital, where were you?

9 A If I wasn't at the hospital, I was over at  
10 McDonald house, had a room over there. I'd go get a  
11 couple hours sleep and then come back.

12 Q How long did you continue on that schedule, a  
13 couple of hours at McDonald house and the balance in the  
14 hospital with Lyam?

15 A For approximately two weeks.

16 Q And then what happened after two weeks?

17 A Well, I had to go back to work.

18 Q What kind of a relationship do you have with  
19 your grandson?

20 A Very close.

21 Q And can you be a little more specific? Tell  
22 us about how you interact and how frequently, and just  
23 give us a broad description of your relationship with  
24 your grandson.

( 1           A     Okay.  Basically in the wintertime, when I've  
2     got a lot of free time and I'm not working all the time,  
3     I will hold him and take care of him and feed him and  
4     just basically tend to his needs and love him.  
5     Summertime, I don't have as much time because I'm working  
6     all the time.  I'm gone early, home late.  I get to hold  
7     him hour, hour and a half in the evenings, love him and  
8     talk to him.

9           Q     Does he recognize you?

10          A     He recognizes my voice, yes.

11          Q     And is there anything that you and your  
12     family wouldn't do for Lyam?

13          A     There's nothing.

14          Q     And it's always been that way?

15          A     Yes.

16          Q     And always will be that way?

17          A     Always will be that way.

18          Q     Are you able to do things with Lyam?

19          A     Not the things that I'd like to.

20          Q     Can you elaborate?

21          A     What's that?  Excuse me.

22          Q     Can you elaborate on that?

23                MR. McBRIDE:  Your Honor, can we approach  
24     real quick?

1 THE COURT: You may.

2 (An off-the-record discussion was held  
3 between the Court and counsel.)

4 BY MR. DURNEY:

5 Q I asked you what kinds of things you do with  
6 Lyam, and you said, "Not the kind of things I'd like to  
7 do," and I asked you to elaborate.

8 What kind of things do you wish you could do  
9 with Lyam?

10 A What type of --

11 Q What types of things would you like to do  
12 with Lyam?

13 A Would I like to do? I'd like to be able to  
14 take him hunting, fishing, take him out on the equipment,  
15 let him ride on the equipment with me. I'd like to be  
16 able to take him out, show him how to fix things, play in  
17 the dirt with him, just things that little boys do.  
18 Everything like that, camping and stuff, teach him how to  
19 survive, all those things.

20 MR. DURNEY: I think that's all I have.  
21 Thank you, Your Honor.

22 THE COURT: Cross?

23 MR. McBRIDE: Thank you, Your Honor. Just a  
24 few questions.

1 MR. DURNEY: I did forget -- I did forget one  
2 question, Your Honor. May it please the Court.

3 THE COURT: Go ahead.

4 BY MR. DURNEY:

5 Q You are the sole provider for the family,  
6 aren't you, Mr. McCrosky?

7 A Yes.

8 MR. DURNEY: Thank you.

9 THE COURT: Go ahead.

10 MR. McBRIDE: Thank you, Your Honor.

11

12 CROSS-EXAMINATION

13 BY MR. McBRIDE:

14 Q Good afternoon, Mr. McCrosky.

15 A Good afternoon.

16 Q We met before at your deposition about a year  
17 ago.

18 Do you remember that?

19 A No, I don't.

20 Q You had your deposition taken, though, in  
21 this case; right?

22 A Yes.

23 Q And you understood that was a time when the  
24 other attorneys could ask all the questions of you and

1 ask your recollection of what occurred?

2 A Yes.

3 Q And at that time you gave us your best  
4 recollection of what occurred at the hospital when Tawni  
5 was in labor; right?

6 A Yes.

7 Q Do you recall testifying in your deposition  
8 that you could not describe the care or treatment or what  
9 was said by any of the nurses at the hospital while you  
10 were there, when I asked you that question; do you  
11 remember?

12 A I believe that's probably correct, yes.

13 Q And, in fact, you also told me, at that time  
14 when I asked you specifically, that you couldn't remember  
15 a time where either you, your wife or Tawni had any  
16 criticisms of the care and treatment provided by the  
17 nurses.

18 Do you remember telling me that, too?

19 A No, sir.

20 Q You stated also that no physician was ever  
21 critical of the care and treatment provided by the nurses  
22 at Carson Tahoe.

23 Do you remember telling me that?

24 A No, sir.

1 Q Since Lyam was born, has he -- you've been  
2 involved to a certain degree in going with him to  
3 hospital visits when he's had to be hospitalized; true?  
4 A Yes.  
5 Q Since 2012 how many times has he had to be  
6 hospitalized; do you recall?  
7 A I don't remember. I know of probably four  
8 times that I can recall of.  
9 Q And on those occasions, they were occasions  
10 where he was admitted with pneumonia; true?  
11 A Yes.  
12 Q And RSV; do you remember that?  
13 A Yes.  
14 Q And also where he was admitted for other  
15 respiratory problems; true?  
16 A Yes.  
17 Q And in March of 2015 he was also  
18 hospitalized. Do you recall that occasion, approximately  
19 a year ago?  
20 A Yes.  
21 Q Since that time has Lyam been hospitalized  
22 any additional times?  
23 A Not that I can remember, no, sir.  
24 MR. McBRIDE: Okay. Mr. McCrosky, that's all

1 I have. Thank you very much.

2 THE WITNESS: Thank you.

3 THE COURT: Mr. Durney, redirect?

4 MR. DURNEY: Just a couple, Your Honor.

5

6 REDIRECT EXAMINATION

7 BY MR. DURNEY:

8 Q Mr. McCrosky, when Lyam has required  
9 hospitalization, has there been any hesitancy by you or  
10 any member of your family to get him to the hospital just  
11 as soon as he can be transported to that hospital? Do  
12 you understand my question?

13 A No, I didn't.

14 Q When Lyam has required medical attention to  
15 include hospital attention, would it be fair for me to  
16 conclude that you and your family have moved as quickly  
17 as possible to the hospital setting or to wherever you  
18 have to go to assure that he gets that?

19 A Yes, sir.

20 Q You're not a nurse and you're not a doctor,  
21 are you?

22 A No, sir.

23 Q You're not qualified to comment on what  
24 doctors or nurses should do?



1           A     No, sir.

2           Q     I would imagine you're not happy with what  
3 the doctor and nurses did in this case, though, are you?

4           MR. McBRIDE:  Objection, Your Honor.  That's  
5 irrelevant.

6           MR. DURNEY:  He opened the door.

7           THE COURT:  I'll overrule the objection.  He  
8 can state his opinion.

9     BY MR. DURNEY:

10          Q     I would imagine you're not happy with what  
11 the doctor and nurses in this case did?

12          A     No, sir.

13          MR. DURNEY:  Thank you.

14          THE COURT:  Any recross?

15          MR. McBRIDE:  Nothing, Your Honor.

16          THE COURT:  You can step down.

17          Do you want to call your next witness?

18          MR. DURNEY:  Karen Barbee would be the next  
19 witness.

20          THE COURT:  Ma'am, please come forward, raise  
21 your right hand and be sworn.

22

23                       KAREN BARBEE,

24                       having been first duly sworn,

1 was examined and testified as follows:

2

3 THE COURT: Please take the witness stand.  
4 Please state your full name and spell your last name,  
5 please.

6 THE WITNESS: Karen Barbee, B-a-r-b-e-e.

7 THE COURT: Your witness, Mr. Durney.

8

9 DIRECT EXAMINATION

10 BY MR. DURNEY:

11 Q Good afternoon, Ms. Barbee.

12 A Good afternoon.

13 Q Make yourself comfortable. It's not a place  
14 you're accustomed to, I'm sure.

15 A No.

16 Q What do you do? What's your occupation or  
17 profession?

18 A Teacher.

19 Q Where?

20 A Douglas County School District.

21 Q And what kind of a teacher are you?

22 A I'm a teacher of the blind and visually  
23 impaired, and I'm also a speech pathologist.

24 Q How long have you been a teacher? Let's

1 start with that.

2 A Oh, a long time. This is my 45th year.

3 Q And you're a speech pathologist?

4 A I am.

5 Q What's that?

6 A Help children learn to speak properly, some  
7 children to learn to speak at all.

8 Q So you assist children who -- some of whom  
9 can't speak at all?

10 A Right.

11 Q In efforts to teach them how to speak?

12 A Correct.

13 Q And you said something about vision therapy  
14 as well.

15 A Yes. I'm a teacher of the blind, visually  
16 impaired. For students who are visually impaired, we  
17 provide equipment and techniques to help them learn in  
18 the regular classroom if that's what's appropriate. We  
19 help children learn to use their sight appropriately,  
20 and, also, if a child needs Braille or that sort of  
21 thing, I teach Braille as well.

22 Q You've been subpoenaed to be here, haven't  
23 you?

24 A Pardon me?

1 Q You received a subpoena to be here?  
2 A I did.  
3 Q All right. And I understand that in  
4 connection -- how long have you been with the Douglas  
5 Counties School District?  
6 A I was figuring it up when I was sitting out  
7 there. I think I've been with Douglas County 29 years.  
8 I was three years in Las Vegas and three years in Lyon  
9 County as well.  
10 Q So over 30 years here in Nevada?  
11 A Absolutely.  
12 Q Where were you before that?  
13 A In Oklahoma and in Texas.  
14 Q Teaching?  
15 A Yes.  
16 Q Doing the same thing?  
17 A Yes.  
18 Q You've been providing vision therapy and  
19 speech therapy for how many years now?  
20 A All but six years. The first six years that  
21 I taught I was in regular ed and had classrooms. I'm  
22 certified to teach kindergarten through eighth grade in  
23 regular ed.  
24 Q All but six years. Please remind us because

1 sometimes it's difficult to remember everything.

2 A Right. It's hard for me.

3 Q It's hard for me.

4 How many years have you been providing speech  
5 and vision and that type of therapy to disabled  
6 youngsters.

7 A All but six years of the 45.

8 Q Of the 45?

9 A Of the 45, yeah. That will end this year.

10 Q Thirty-nine years?

11 A Uh-huh.

12 Q All right. And in connection with the work  
13 you do at Douglas County and have been doing here for  
14 many, many years, have you come in contact with Lyam  
15 McCrosky?

16 A Yes, I have.

17 Q When?

18 A May of last year, April or May.

19 Q April of last year he would have been three?

20 A Right.

21 Q Is there any significance in that age  
22 vis-a-vis or in connection with the kind of work you do?

23 A Right. Normally if they're multi-handicapped  
24 such as Lyam, they are taken care of by the Nevada -- I

1 always get this backwards --

2 Q Early Intervention Services?

3 A Thank you. I always want to call it NIS, and

4 that's the TV program.

5 Q The NEIS folks?

6 A Right. And then we take over at three years

7 old in public school.

8 Q So Douglas County has assumed the role that

9 NEIS had before he turned three?

10 A Correct.

11 Q Tell us what you've done for Lyam since you

12 assumed -- what role did you assume --

13 A Well, I started --

14 Q -- in Lyam's care?

15 A I started in working on vision with him, and

16 in that capacity you try to stimulate his vision and get

17 him to look at things, to try to track things with his

18 eyes, and to just generally use his vision on a daily

19 basis.

20 And then also I was asked to come in as the

21 speech pathologist. It normally would require two

22 people. This way I could come in as one person and

23 actually cover both areas for Lyam. Also the speech and

24 language.

1                   And I've been working on having the family  
2                   and myself using my hands and -- to help him feel the  
3                   vibration of the throat when you speak and to feel it on  
4                   the lips as well, and to start making more sounds.

5                   Q     So you've been at this now for about a year?

6                   A     Since May, uh-huh.

7                   Q     Did you set up some goals when you started  
8                   this work in May?

9                   A     Yes, I did.

10                  Q     What were the goals in the area of vision?

11                  A     For him to make eye contact with people when,  
12                  you know, you're talking to him, trying to get his  
13                  attention and getting him looking toward you, to get him  
14                  to look at pictures and things about the room, to have  
15                  him track. Also to try to reach for things, to hold  
16                  things, to interact with his environment, which is  
17                  difficult for a student who is visually impaired or  
18                  blind.

19                         And he is cortically blind, which means he  
20                         has intermittent ability to see. Sometimes the synapses  
21                         within the brain are met and he can see some things, and  
22                         some days, sometimes during the day, there are not as  
23                         many synapses taking place. So the vision can be pretty  
24                         good on some days and not so good on others.

1 Q Has he met or exceeded the goals you set with  
2 him when you began his program back in May of 2015?

3 A He's beginning to meet some of them, yes.  
4 One thing I've done, which I didn't see a lot of, is he's  
5 making more eye contact. Part of it is familiarity with  
6 the people that are around him, the people that come in,  
7 and it took a while to establish a relationship with him  
8 because he is with his family, but that was established,  
9 and he seems to recognize my voice and he seems to -- you  
10 know, on his good days, when he's feeling -- when he's  
11 seeing pretty well, he, you know, is very cooperative.

12 Q And do you have goals for him in the area of  
13 vision going forward?

14 A Yes. Yes.

15 Q What are they?

16 A For him to be able to look at a book and  
17 follow some of the pictures in it and to be able to see  
18 as much as possible of his surroundings and track what's  
19 going on.

20 Q And track?

21 A Uh-huh. Which I see that happening when his  
22 family are there and -- he has a very nice little  
23 relationship with his grandfather, and when he comes into  
24 the room, he will turn and he will follow his grandfather



1       wherever he goes to sit down or when he leaves the room,  
2       so I know he's tracking.

3               Q       And using the word "tracking" in perhaps  
4       another context, is he on track towards meeting the goals  
5       that you've got presently set for him?

6               A       Yes.

7               Q       And so are you optimistic about his prognosis  
8       or future?

9               A       I'm always optimistic because these kids  
10       always surprise you.

11              Q       By the way, he doesn't come to school, does  
12       he?

13              A       He does not.

14              Q       So you have to go to him?

15              A       I go to the home, yes.

16              Q       So we talked a little bit about vision, the  
17       goals you originally set up and the goals you have today.

18                      What about speech? Do you provide therapy in  
19       that area as well?

20              A       Right. And I'm teaching the family, because  
21       they're with him mostly, how to use his hand to place it  
22       on their throat or on their lips so he gets the idea of  
23       how we make speech with the lips, the tongue, the mouth,  
24       not just the vocal folds.

1 Q And like with vision, did you set up goals  
2 when you first started working with Lyam in May of last  
3 year?

4 A Yes, I did.

5 Q What were the goals that you set up back  
6 then?

7 A For him to start babbling, actually using his  
8 sounds in a communicative manner, and a give and take  
9 also, and I'm beginning to see that with him.

10 Q So he's starting to meet some of those goals?

11 A Right.

12 Q Describe what you have seen or describe  
13 his -- his advancement towards achieving these goals.

14 A The first few months that I saw him, I didn't  
15 hear a whole lot of sounds out of him. His breathing  
16 sounds were more what I heard than anything else, and he  
17 shows his anxiety in his breathing, so it took a while  
18 before he kind of calmed with my presence, but I've seen  
19 a change there.

20 And then I have been able to observe him with  
21 his mom and his grandmother and grandfather, but  
22 especially with his mom, and I actually, probably about  
23 three weeks ago, saw a real good little give and take  
24 exchange of communication with her where there was

1 actually some intonation or change in his vocalization,  
2 and there was give and take in the fact he would wait and  
3 she would say something to him, and then he would give  
4 her a response. Certainly it was not, you know, anything  
5 that you could understand, but he definitely thought and  
6 believed that he was communicating, and he was.

7 And he does communicate otherwise with the  
8 family by cues. Mother can ask him to lift his head, and  
9 he will lift his head. She can ask him, when she's  
10 dressing him, to lean forward or do some things like  
11 that, and he is able to minimally pull himself up and  
12 show her he does know what she's saying.

13 Q And is that responsive to what we've been  
14 calling speech therapy?

15 A Oh, absolutely, yeah.

16 Q And tell us how speech therapy helps a child  
17 respond to a command like you just said.

18 A Well, just the routines themselves. She  
19 talks to him all the time, and he's learning his  
20 routines, whether it's changing his diaper or dressing in  
21 the morning, whatever it happens to be, bathing, that  
22 sort of thing. Those all go into communication. And  
23 she's telling him what she's going to do before she does  
24 it, and he's learning to anticipate and be able to

1 respond when she asks for something. It's kind of a  
2 natural consequence.

3 Q And the services that you provide, how  
4 frequently do you go out to the home?

5 A I'm there once a week.

6 Q For both vision and speech?

7 A Correct.

8 Q In the same --

9 A Correct. Because communication is not  
10 something that you do for 30 minutes a week and then you  
11 don't communicate the rest of the week. So it's ongoing,  
12 and that's part of the learning cycle.

13 Q And so that's what you meant by the  
14 importance of teaching Tawni and the family how to  
15 continue the work that you have modeled and begun?

16 A Right.

17 Q Now, I assume, because you're a teacher in  
18 the school district, that you're paid by the school  
19 district?

20 A I am.

21 Q The family doesn't have to pay you?

22 A That is correct.

23 Q This is sort of Lyam's opportunity to go to  
24 school, I guess?

1 A It is.

2 Q Do you think he's going to continue improving  
3 in both vision and speech with continued therapy?

4 A I do.

5 Q Do you think he would benefit if he had more  
6 than just you coming once a week with regard to -- with  
7 those two therapy treatments that you provide?

8 MR. KELLY: Objection. Lacks foundation.  
9 Calls for speculation.

10 THE COURT: I'm going to sustain that  
11 objection.

12 Lay a foundation, Mr. Durney.

13 MR. DURNEY: Sure.

14 BY MR. DURNEY:

15 Q Have you worked with other children similarly  
16 disabled?

17 A I have.

18 Q Give us a sense of how many kids you've cared  
19 for like Lyam.

20 A Probably within Douglas County, around four.  
21 I had -- when I was in Clark County School District, I  
22 had two children that I went to the home for that were  
23 similar, and also then before that when I was in  
24 Oklahoma.

1 Q In Oklahoma you had some as well?  
2 A Right.  
3 Q Disabled and perhaps even more so?  
4 A Correct.  
5 Q And did they benefit by your therapy?  
6 A Yes.  
7 Q Did they benefit by continued therapy?  
8 A Yes.  
9 Q And did you ever have a situation where the  
10 therapy that you provided stopped and you came back some  
11 period of time after some hiatus after this therapy  
12 interruption to see what the status of the child was?  
13 A Unfortunately, that hasn't happened to me  
14 before.  
15 Q All right.  
16 A Okay.  
17 Q What happened to Lyam in the absence of  
18 the -- with regard to -- never mind.  
19 My question, ma'am, is, based upon your  
20 experience in this area dealing with not just Lyam, but  
21 other similarly disabled children, do you think that Lyam  
22 will continue to benefit from the care that you afford  
23 him?  
24 A Absolutely.

1 Q For how long?

2 A Well, at least with the school district,  
3 until age 22, because we serve children until their 22nd  
4 birthday.

5 Q And that's their going to school?

6 A That's their going to school. Because he is  
7 learning at a different rate than a nonhandicapped child.

8 Q Learning but at a different level?

9 A Exactly. At a different rate and level.

10 MR. DURNEY: I think that's all I have.  
11 Thank you very much.

12 THE COURT: Cross?

13 MR. KELLY: No questions, Your Honor. Thank  
14 you.

15 THE COURT: Thank you, ma'am. You can step  
16 down.

17 Let me ask the jury, everybody all right?  
18 You need a break?

19 Everybody is nodding they're okay.

20 MR. DURNEY: Your Honor, may we approach?

21 THE COURT: You may.

22 (An off-the-record discussion was held  
23 between the Court and counsel.)

24 MR. DURNEY: Your Honor, at this point we

1 would like to play the deposition of Dr. Capell.

2 THE COURT: And I will relate to the jury  
3 it's been represented to me it's about two and a half,  
4 three hours, so we're going to go to 5 o'clock, and we'll  
5 take a break, and then we'll pick it up, the rest, in the  
6 morning with respect to -- it's a video. That way we're  
7 not burning daylight, so to speak, in respect to that.  
8 So we'll basically go about an hour, and then we'll pick  
9 up the balance, if that's okay. So I want you to  
10 understand that.

11 Is everybody okay without a break for about  
12 an hour? Everybody is nodding okay.

13 So at this time, Mr. Durney, we'll go ahead.

14 And I just want the record to be clear.

15 There were some -- I just want to make sure -- there were  
16 some accommodations we had to make based upon the Court's  
17 ruling. Have we done that?

18 MR. DURNEY: Can I make a short statement why  
19 we're playing this for the jury?

20 THE COURT: I will tell the jury this witness  
21 basically has some health issues. As a result of that,  
22 he was planning to -- couldn't be here today because of  
23 those health issues. As a result of that, the video was  
24 done in lieu of him being present.



1 Does that take care of it, Mr. Durney?

2 MR. DURNEY: Thank you, Your Honor. Yes.

3 (The following is a transcription of the  
4 video-recorded deposition of Joseph Capell, M.D., played  
5 in open court.)

6 THE VIDEOGRAPHER: We are now on the record  
7 in the record of Tawni McCrosky vs. Carson Tahoe Regional  
8 Medical Center. My name is Karen Pierce. I'm a  
9 videographer and officer of the court. I work for  
10 e-depositions (inaudible) --

11 THE COURT: I can't understand a word.

12 MR. DURNEY: Your Honor, might it be a good  
13 idea to take a break?

14 THE COURT: Why don't we take a five-minute  
15 break.

16 MR. DURNEY: I apologize.

17 THE COURT: Ladies and gentlemen, we're going  
18 to take a short recess.

19 You are admonished during this recess not to  
20 talk or converse among yourselves or with anyone else on  
21 any subject connected with this trial, read, watch, or  
22 listen to any report of or commentary on the trial by any  
23 person connected with this trial or by any medium or  
24 information, including, without limitation, newspapers,

1 television, and radio, or form or express any opinion on  
2 any subject connected with the trial until the case is  
3 finally submitted to you. You may not do research about  
4 any issues involved in the case. You may not blog,  
5 tweet, or use the internet to obtain or share  
6 information.

7 Once we get it worked out, we'll bring you  
8 back.

9 Court will be in recess.

10 (A recess was taken.)

11 (The following proceedings were held outside  
12 the presence of the jury.)

13 THE COURT: The record will reflect we're  
14 outside the presence of the jury at this time.

15 Counsel, it's my understanding that what  
16 everybody would like to do is go ahead basically and  
17 conclude today and then come back tomorrow and start with  
18 a different witness.

19 From that standpoint, I'm just trying to  
20 figure out where you are. How many more witnesses do you  
21 have tomorrow? Where are we?

22 MR. DURNEY: We have Dr. Shavelle and we have  
23 Dr. Capell, which is about a two-and-a-half, three-hour  
24 deposition. Then we have Mr. Kirkendall, who is the

1 economist who is going to introduce the numbers, and then  
2 we have grandma, and that is it.

3 But we also have Dr. Johnson's deposition,  
4 and it's -- as a matter of fact, I think this -- if you  
5 want to use the time, we could go through Dr. Johnson's  
6 deposition and deal with their objections so we can read  
7 it without problems.

8 THE COURT: I haven't seen it. I'm willing  
9 to take the time and do that. So we'll go ahead and see  
10 where we go with that. So go ahead and bring them in.

11 (The jury entered the courtroom.)

12 (The following proceedings were held in the  
13 presence of the jury.)

14 THE COURT: Will counsel stipulate to the  
15 presence of the jury?

16 MR. DURNEY: Yes, Your Honor.

17 MR. KELLY: Yes, Your Honor.

18 THE COURT: Ladies and gentlemen of the jury,  
19 for a variety of reasons we're going to go ahead and  
20 break for the day at this time to make sure everything is  
21 running. We have a different witness coming tomorrow  
22 morning first, so we're just going to -- I think it's  
23 better for continuity in respect to this matter, so  
24 you're admonished not to talk or converse among

1 yourselves or with anyone else on any subject connected  
2 with this trial, read, watch, or listen to any report of  
3 or commentary on the trial by any person connected with  
4 this trial or by any medium or information, including,  
5 without limitation, newspapers, television, and radio, or  
6 form or express any opinion on any subject connected with  
7 the trial until the case is finally submitted to you.  
8 You may not do research about any issues involved in the  
9 case. You may not blog, tweet, or use the internet to  
10 obtain or share information.

11 You're directed to return here tomorrow  
12 morning. Be here by, again, quarter to 9:00, 8:45. Pick  
13 whichever one you want. It's the same time. So be here  
14 before by quarter to 9:00 tomorrow morning.

15 (The following proceedings were held outside  
16 the presence of the jury.)

17 THE COURT: Let the record reflect we're  
18 outside the presence of the jury.

19 Again, I always put bench conferences on. We  
20 had one bench conference in regards to there was a  
21 question raised in respect to Lyam's grandfather in  
22 regards to things he'd like to do with him. There was an  
23 objection with respect to relevancy and not a party.

24 The Court allowed it based upon it goes --

1 the Court felt it was relevant to some extent and also  
2 goes to the family care respect of that, and that's why I  
3 allowed it.

4 What's this about a deposition? I don't have  
5 any deposition.

6 MR. KELLY: Here's a thought, Your Honor.

7 There's another expert witness, Dr. Johnson.  
8 He's actually a treater. He provided some  
9 ophthalmological care and evaluation of Lyam.  
10 Dr. Johnson has retired to Napa Valley and his deposition  
11 was taken on September 3, 2015.

12 Counsel and I agreed that certain portions of  
13 his deposition could be read if counsel wished to do  
14 that. I have some objections to some of the testimony,  
15 not a lot, probably -- I don't know -- eight or ten  
16 passages or so. Of course, whatever the Court would like  
17 to do is fine, but one suggestion would be, I have a copy  
18 of the deposition, and I have a copy of my objections in  
19 writing. If the Court would like me to submit those, the  
20 Court could read the deposition and read my objections  
21 and make its ruling.

22 THE COURT: That's what I'd like to do is get  
23 it ahead of time so I can look through it. I found this  
24 last one was pretty easy for me to go through, figure out

1 what it was. If you could make me a copy for me, make a  
2 copy of your objections, then I will go ahead and take a  
3 look at it. We'll give everybody an opportunity to argue  
4 any points in respect to that or anything else in regards  
5 to the objection. I won't make any ruling until I kind  
6 of hear from everybody where they are in respect to that.

7 Again, if you get his objections and get a  
8 copy, you can email me what your response would be so I  
9 can take a look at it. That kind of helps me a little  
10 bit. I went through it fairly quickly as a result of  
11 that.

12 Why don't we do that. We'll go ahead and  
13 break at this time for the evening. We'll have the law  
14 clerk make me a copy. You can go ahead and provide me  
15 what your proposed objections are.

16 Mr. Durney and Ms. Brennan, if you have any  
17 responses to those objections, you can email them to me.

18 MR. DURNEY: All right, Your Honor.

19 Mr. Kelly, will you give me those objections  
20 right now so we can get busy?

21 MR. KELLY: I think I already emailed them to  
22 you.

23 MS. BRENNAN: I have the objections and I'll  
24 email you tonight with our reply.

1 THE COURT: That's fine. I come to work  
2 early. I always have. So we'll look at it tomorrow  
3 morning before -- he'll make a copy for me.

4 Court will be in recess. Why don't we meet  
5 about 20 to 9:00, a little earlier, so --

6 Also, on another point, I had provided to  
7 each of you a new set of instructions. I don't know if  
8 you've had a chance to go through that new set of  
9 instructions with an index and that. I'd like you to at  
10 least try to go through that.

11 My plan is Wednesday morning that we will try  
12 to go through and see where we are on the instructions  
13 again. I'll meet with you one more time. If you have  
14 any authority in opposition to any of the instructions,  
15 I'd like you to have that. If you have any additional  
16 instructions with authority, I'd like to look at that as  
17 well.

18 MR. KELLY: And also the verdict form, Your  
19 Honor?

20 THE COURT: And the verdict form.

21 MR. KELLY: I did look over the verdict form  
22 over the weekend.

23 THE COURT: It's a little confusing, so I  
24 think you better take a look at both of them, and we'll

1 be glad to do that Wednesday morning. We'll probably --  
2 my guess, 8:30 is plenty of time in respect to that on  
3 Wednesday morning, but, again, go through them, read  
4 through them because every time I ever tell everybody  
5 this, somehow there's a typo here or there, and I try to  
6 pick them up and all that, but if there's any you feel  
7 you object to, I want to know the basis for it. If  
8 there's any you want to add, I want to know the basis and  
9 authority for that in respect to that. If you have any  
10 additional ones -- and if you have any additional ones.  
11 Are we clear?

12 MR. KELLY: Yes.

13 MR. DURNEY: What time tomorrow morning?

14 THE COURT: 20 to 9:00. And the reason for  
15 that is so we can make some rulings with respect to  
16 what's going on with respect to this deposition.

17 Any questions?

18 MR. DURNEY: No, Your Honor.

19 MR. KELLY: No, Your Honor.

20 THE COURT: Thank you.

21 (The proceedings were adjourned at 4:20 p.m.)  
22  
23  
24



1 STATE OF NEVADA )  
2 ) ss.  
3 COUNTY OF WASHOE )

4 I, PEGGY B. HOOGS, Certified Court Reporter  
5 in and for the State of Nevada, do hereby certify:

6 That the foregoing proceedings were taken by  
7 me at the time and place therein set forth; that the  
8 proceedings were recorded stenographically by me and  
9 thereafter transcribed via computer under my supervision;  
10 that the foregoing is a full, true and correct  
11 transcription of the proceedings to the best of my  
12 knowledge, skill and ability.

13 I further certify that I am not a relative  
14 nor an employee of any attorney or any of the parties,  
15 nor am I financially or otherwise interested in this  
16 action.

17 I declare under penalty of perjury under the  
18 laws of the State of Nevada that the foregoing statements  
19 are true and correct.

20 Dated this 5th day of May, 2016.

21  
22 /s/ Peggy B. Hoogs

23 Peggy B. Hoogs, CCR #160, RDR  
24

1 LORI URMSTON, CCR #51  
2 Hoogs Reporting Group  
3 435 Marsh Avenue  
4 Reno, Nevada 89509  
5 (775) 327-4460  
6 Court Reporter

CERTIFIED  
COPY

7 FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR CARSON CITY

9 HONORABLE JAMES T. RUSSELL, DISTRICT JUDGE

10 TAWNI McCROSKY, individually  
11 and as the natural parent of  
12 LYAM McCROSKY, a minor,

13 Plaintiff,

Case No. 13 TRT 00028 1B

14 vs.

Dept. No. I

15 CARSON TAHOE REGIONAL MEDICAL  
16 CENTER, a Nevada business  
17 entity,

18 Defendant.

19

20 TRANSCRIPT OF PROCEEDINGS

21 TRIAL - DAY 6

22 TUESDAY, MARCH 15, 2016

23 CARSON CITY, NEVADA

24

Reported by:

LORI URMSTON, CCR #51

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1 CARSON CITY, NEVADA; TUESDAY, MARCH 15, 2016;  
2 8:45 a.m.

3 --o0o--

4 (The following proceedings were held  
5 outside the presence of the jury.)

6 THE COURT: We're back on the record in respect to  
7 Case No. 13 TRT 00028. At this time we're outside the  
8 presence of the jury.

9 At this time the Court has reviewed the objections  
10 that were filed in respect to the deposition of Leonard  
11 Johnson, M.D., in respect to this particular matter. I  
12 went through that.

13 Ms. Brennan, thank you for getting me your  
14 objections. It came at 10 o'clock last night. I  
15 didn't read them at 10 o'clock last night. I read them  
16 this morning in respect to that.

17 The Court is going to make the following ruling in  
18 respect to the issues in regards to that. First of  
19 all, specific objection 8-05 through 9-06 is going to  
20 be admissible in respect to this particular matter. I  
21 think the Court -- at least I believe that it's  
22 relevant, and I also believe it's not separate opinion.  
23 It's just comments in regards to Facebook in regards to  
24 his photo.

1 Exhibit 19-10 through 20-03, this is going to be  
2 inadmissible. The Court is going to go ahead and  
3 sustain the objection. I think it goes to again -- and  
4 I'll explain this at the end. In respect to this  
5 matter, it's an opinion that was not expressed pursuant  
6 to NRCP 16.1.

7 Number 3-29, 24 through 30-19 will be inadmissible.  
8 In respect to that, he's commenting in respect to a  
9 treatment, so I'm not going to allow that.

10 30-01 through 04, that's the same, I'm going to  
11 allow that. That's just kind of a duplicate.

12 33-04 through 18, that's going to be admissible.  
13 The Court is going to allow that. He can testify as to  
14 his understanding in respect to Nevada Early  
15 Interventional Services in respect to this matter. The  
16 Court is going to go ahead and allow that.

17 36-06 through 37-18 is inadmissible. Again, the  
18 Court believes that's a failure to disclose an opinion  
19 under NRCP 16.1.

20 38-15 through 41-12 is going to be inadmissible.  
21 The Court is going to sustain that objection as well.  
22 Again, this deals with NRCP 16.1.

23 41-17 through 42-19 is going to be inadmissible.  
24 The Court is going to sustain the objection. Again,

1 the Court believes that that's failure to disclose.

2 And, again, all the ones that I have held that --  
3 I'm sustaining the objection on, it's not that the  
4 Court believes that he can't testify to these opinions,  
5 it's the fact they were not disclosed. And as a result  
6 of not being disclosed, under NRCP 16.1 the Court is  
7 going to disallow in respect to that.

8 So do you need me to go back through those?

9 MS. BRENNAN: No.

10 THE COURT: Okay. You got them, Ms. Brennan?  
11 Okay. Thank you.

12 MR. DURNEY: Thank you, Your Honor.

13 MR. KELLY: Thank you.

14 THE COURT: Counsel, any other issues we need to  
15 bring up before the jury is brought in?

16 MR. DURNEY: No, Your Honor.

17 MR. KELLY: No, Your Honor.

18 THE COURT: Counsel, are you ready to proceed? The  
19 jury is all here, so we'll bring them in.

20 MR. DURNEY: All right.

21 (The following proceedings were held  
22 within the presence of the jury.)

23 THE COURT: Will counsel stipulate to the presence  
24 of the jury?

1 MR. DURNEY: Yes, Your Honor.

2 MR. KELLY: Yes, Your Honor.

3 THE COURT: Thank you.

4 Good morning, ladies and gentlemen. Thank you  
5 again for being very prompt. And I'm not making this  
6 up. You're the most prompt jury I've ever had with  
7 respect to being here on time in respect to that. The  
8 Court appreciates it and counsel appreciates it in  
9 respect to that very much.

10 So, Mr. Durney, do you want to call your next  
11 witness?

12 MR. DURNEY: Dr. Robert Shavelle.

13 THE COURT: Sir, please come forward. Stop right  
14 there and please raise your right hand and be sworn.

15 (The oath was administered to the witness.)

16 THE WITNESS: Yes.

17 THE COURT: Please take the witness stand. Please  
18 state your full name. Spell your last name, please.

19 THE WITNESS: I am Robert Michael Shavelle,  
20 S-h-a-v-e-l-l-e.

21 THE COURT: Your witness, counsel.

22 MR. DURNEY: May it please the Court.

23 /////

24 /////



1 ROBERT MICHAEL SHAVELLE, Ph.D.,  
2 having been called as a witness herein,  
3 being first duly sworn, was examined  
and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. DURNEY:

6 Q Good morning, Dr. Shavelle. Let's begin with a  
7 description of your occupation and profession and just  
8 an overview of why you're here. What do you bring to  
9 this case?

10 A I do medical research and consulting. Actually  
11 we do it. I'm part of a research group.

12 Q And what's the research group?

13 A It's called the Life Expectancy Project.

14 Q So you're here to tell us or give an opinion  
15 about Lyam's life expectancy?

16 A Yes.

17 Q All right. Let's start with your education.  
18 Can you give the jury, perhaps in chronological order,  
19 a description of your education.

20 A Sure. I was born and raised in southern  
21 California, Long Beach. I went to Cal State  
22 University, Long Beach, which was right across the  
23 street from my childhood home. I earned a bachelor's  
24 degree in mathematics.

1       And then I didn't know what I wanted to do with my  
2 life, so I got a single subject teaching credential and  
3 I taught math at the high school level in Long Beach  
4 for two years. And at that point I decided I wanted to  
5 go back to school, to graduate school, so I went to the  
6 University of California, Riverside, and studied  
7 statistics. My plan was to get a master's degree, but  
8 I ended up enjoying it, so I stayed for a Ph.D., a  
9 doctorate degree.

10       And my doctorate was in applied statistics with  
11 substantive field epidemiology. So it wasn't  
12 mathematical statistics, which is how statistics is  
13 often taught, it was more applied. And the application  
14 for my work was life expectancy. So I studied methods  
15 to calculate life expectancy. And my doctoral  
16 dissertation was on a method to calculate life  
17 expectancy. And that dissertation was actually  
18 published later in a demography journal.

19       And later on after that, mostly just for personal  
20 interest, I earned an MBA, a masters in business  
21 administration, from UC Irvine, also in southern  
22 California.

23       Q     Let's talk about your professional history. I  
24 understand that you were elected a fellow of the

1 American Academy of Cerebral Palsy.

2 A Yes.

3 Q And perhaps you can explain what that  
4 organization does.

5 A Certainly. There are all sorts of medical  
6 societies or medical groups, and the requirements  
7 differ. This one, the American Academy for Cerebral  
8 Palsy and Developmental Medicine, is a medical society  
9 that's devoted to the diagnosis, treatment and outcomes  
10 of children and adults with developmental disabilities  
11 like cerebral palsy.

12 Most of the members are medical doctors or medical  
13 people like treaters, therapists, case workers, but the  
14 society is also open to people like myself who have a  
15 doctoral degree, a doctorate, and who demonstrate by  
16 their life work an interest in the goals of the  
17 academy.

18 So I was nominated by a peer and then I was voted  
19 on by a committee based on my life work. That's why I  
20 was designated a fellow, which is a category of  
21 membership.

22 Q Perhaps you could discuss the requirements --  
23 although you touched on it, the requirements for  
24 fellowship.

1       A    It's based on one's life work, to see if what  
2 you do is in keeping with or fostering the goals of the  
3 academy, which is, as I said, diagnosis, treatment and  
4 outcomes of children and adults with cerebral palsy or  
5 other developmental disabilities.

6       Q    Your CV also indicates that you were an  
7 assistant professor of statistics at the University of  
8 California and a post-doctoral fellow. Is that  
9 accurate?

10      A    Yes.

11      Q    First of all, you've identified the topic, but  
12 let's explain it. What is statistics?

13      A    Generally, statistics is a collection of  
14 methods, scientific methods, that we use to analyze  
15 data and then to draw the proper conclusions from that  
16 analysis. Statistical methods vary quite a bit. They  
17 were used in designing experiments for crops. They are  
18 used in clinical trials to see if a new drug is  
19 effective. They're used in political polling which is  
20 of interest these days. They're used in all sorts of  
21 applications.

22      Q    And you mentioned that you do research. What  
23 do you do research in?

24      A    We do research in life expectancy of mostly

1 children and adults who have developmental  
2 disabilities. So we've studied children who have  
3 autism, also children and adults who have Down  
4 syndrome. A good portion of our work has been children  
5 and adults who have cerebral palsy, also spina bifida,  
6 traumatic brain injury, spinal cord injury.

7 Q And you're not a medical doctor?

8 A Correct, I'm not a medical doctor. I'm a  
9 medical researcher and consultant on life expectancy.

10 Q What's the difference?

11 A Well, most medical doctors are involved in  
12 diagnosis and treatment, the first two parts of the  
13 academy's goals, but medical researchers like myself  
14 and some medical doctors, frankly, are also involved in  
15 the prognosis as in what might happen, so looking at  
16 the efficacy of a drug long term or the efficacy of the  
17 therapy long term or, in our case, we look at survival.

18 So we look at what are the factors that affect  
19 survival and how much do they affect survival. And  
20 then we quantify that survival so that people can use  
21 that information, so that medical doctors can use that  
22 information in their counseling of patients and  
23 families, so that governments and nonprofits can use it  
24 for planning purposes.

1       Q    So do you work with medical doctors in your  
2 field?

3       A    Yes, we do. In most of our medical studies we  
4 have a medical doctor who is on our team who is a  
5 co-author of the study. So we have a medical doctor at  
6 UC San Francisco just down the street, Yvonne Wu, who  
7 is a pediatric neurologist. We work with Lewis  
8 Rosenbloom who is in a neurologist in London; we work  
9 with John White who is a physiatrist, I believe, on the  
10 east coast; and others internationally and locally.

11       Q    Can you give us an example of what you mean by  
12 working in conjunction -- what kind of work do you do  
13 in conjunction with doctors? Just explain that a bit.

14       A    Sure. Well, we analyze databases, data on  
15 thousands of patients treated by hundreds of  
16 physicians. And so sometimes it's a treating physician  
17 for one of the databases that we work with. Other  
18 times it's someone who just has a particular interest,  
19 like Bill Cable who is a neurologist in southern  
20 California, worked out of California Developmental  
21 Center full-time. And so some of the data we analyzed  
22 was data on his patients.

23       And the medical doctors often have ideas or  
24 hypotheses that they want to test. For example, does

1 it matter where the child lives, in their own home or  
2 an institution or a developmental center or community  
3 care facility? Does it matter if the child can lift  
4 their head? Does it matter if they require a feeding  
5 tube? These sorts of things.

6 Q And how about the professional literature? Are  
7 you published in any of the medical journals?

8 A Yes. We are an active research group. And I  
9 myself -- since I joined the project 20 years ago, I've  
10 done over 75 studies. Most of those have been  
11 published in major peer-reviewed medical journals.

12 Q All peer reviewed?

13 A Those have, yes. I've done probably a dozen  
14 others that were in other types of journals.

15 Q Can you give us some examples?

16 A Yes. We've published in Neurology, Pediatric  
17 Neurology. Developmental Medicine and Child Neurology  
18 is a major journal. We've published in a journal  
19 called NeuroRehabilitation, another journal called  
20 Archives of Physical Medicine and Rehabilitation.

21 Q All right. And how about conferences? Do you  
22 speak at conferences?

23 A I do.

24 Q Can you give us some examples?

1       A    Mostly medical conferences but also conferences  
2 for life care planners or nurses. I spoke a couple  
3 years ago in southern California at the brain injury  
4 conference at Scripps Medical Center in San Diego  
5 County. I spoke at UC Santa Clara to neurologists and  
6 pediatric neurologists. I spoke at UC San Francisco  
7 during their ground rounds for neurologists and medical  
8 students. And all of those talks are for CME,  
9 continuing medical education, so medical doctors get  
10 credit for attending the lectures.

11       Q    Very well.

12       Your CV lists projects that you've worked on. Can  
13 you describe just a few?

14       A    Well, in addition to the research, we've done  
15 some consulting. We've worked with WHO, the World --  
16 pardon me. WHO is the World Health Organization. They  
17 study causes of death of children with Down syndrome  
18 and also with cerebral palsy.

19       I've done consulting work for Allergan  
20 Pharmaceuticals. We did projects for ARC, the  
21 Association of Retarded Citizens, in California. We've  
22 done work for a couple of nonprofits in terms of life  
23 expectancy for allocation, a couple of birth injury  
24 funds nationally.



1 Q I see here mentioned Harbor UCLA Medical  
2 Center.

3 A Yes. That was research I did with some  
4 cardiologists there. That was while I was still in  
5 graduate school.

6 Q So this type of work that you're now  
7 describing, that's not part of litigation?

8 A No. Those were all research projects or other  
9 types of projects that were not related to litigation.

10 Q And in that connection, I gather some of your  
11 professional activities are indeed dedicated to  
12 litigation such as this?

13 A Right, about half my time.

14 Q And so the other half of your time, if you  
15 could capsulize, is dedicated to what?

16 A Well, as I say, about 50 percent of my time is  
17 consulting on life expectancy in the litigation setting  
18 like this. Twenty-five percent is consulting on life  
19 expectancy outside the litigation setting, so other  
20 people who are interested in life expectancy  
21 commercially. And then the final 25 percent roughly is  
22 devoted to research, the research we talked about.

23 Q What other kinds of people are commercially  
24 interested in life expectancy?

1       A   Well, for example, life annuity companies. A  
2 life annuity, as you know, is like purchasing a  
3 pension. Mostly it's elderly people who would purchase  
4 a pension so they don't run out of money. They  
5 purchase a life annuity, I should say. They put down a  
6 fixed sum, and in exchange for that, they get an annual  
7 payment. But young people can do it, disabled people  
8 can do it, purchase a life annuity.

9       Q   And so the people who sell annuities desire  
10 your opinions on the life expectancy of the people  
11 they're selling those annuities to?

12       A   Right, and it's life expectancy of children  
13 with cerebral palsy or adults who have brain injury.

14       Q   Very well.

15       Your CV also indicates that you've given lectures  
16 at the National Structured Settlements Trade  
17 Association annual conference. First of all, what's  
18 that organization?

19       A   That's the organization representing companies  
20 that sell life annuities or those pensions I was  
21 mentioning.

22       Q   And you've touched on that already, but what do  
23 you speak to those people about when you go to those --  
24 to the conferences at the National Structured

1 Settlements Trade Association?

2 A Life expectancy, life expectancy of people with  
3 children with cerebral palsy or adults who have a brain  
4 injury or a spinal cord injury.

5 Q I see. So in the discussion of life expectancy  
6 to, say, those groups that sell annuities, what happens  
7 to those companies if they don't get it right, if they  
8 get the life expectancy too high or they get the life  
9 expectancy too low?

10 A Well, they're selling a product. They're  
11 selling an annuity. If they price the product too  
12 high, no one will buy it, and so they go out of  
13 business that way. If they price the product too low,  
14 then they're giving it away at less than it really  
15 costs them, and then over time they'll lose money and  
16 they'll also go out of business. So either too high or  
17 too low and they go out of business. They have to get  
18 it just right.

19 Q So they got to get it just right. And they  
20 rely on you for that?

21 A Yes, in part. I'm not their sole underwriter,  
22 I'm not their sole source of life expectancy, but they  
23 rely on me, they rely on our group, they rely on our  
24 publications in the medical journals and other

1 professionals.

2 Q So they are a component of the industry that  
3 relies on you so that they can get it right?

4 A Yes.

5 Q All right. Your CV or your resume also  
6 indicates that you're a technical director of the Life  
7 Expectancy Project. What's the Life Expectancy  
8 Project?

9 A That's our research group I was mentioning a  
10 moment ago. It's a group that began in the 1950s with  
11 a medical doctor at UCLA. And then it was on campus at  
12 UC Riverside for many years. And then for the past 15  
13 years we've been in San Francisco, northern California.

14 Q All right. And that was begun, according to  
15 your resume, under a grant from the National Institute  
16 of Health?

17 A Yes. It was federally funded through the year  
18 2000.

19 Q All right. And the purpose of that grant and  
20 study?

21 A Was to study children and adults who have  
22 developmental disabilities like cerebral palsy.

23 Q Very well.

24 And I understand from your resume that you work

1 with a large database. Can you explain what that  
2 means?

3 A Sure. We work with all sorts of databases, but  
4 the largest one is from the state of California  
5 Department of Developmental Services. So this is an  
6 agency in California that provides money or services to  
7 children and adults who have developmental disabilities  
8 like cerebral palsy.

9 And by state law anyone who receives the money or  
10 services has to have this annual evaluation. And those  
11 evaluations are collected and sent to Sacramento, the  
12 state capitol, and then collated and made electronic,  
13 and we obtain it from them. So it's a huge database.  
14 It's more than 200,000 people followed for more than 30  
15 years. It's the largest of its kind in terms of  
16 tracking children and adults with developmental  
17 disabilities.

18 Q And you indicated earlier that you have  
19 personally been involved in the publication of 75  
20 peer-reviewed articles. What about your group as a  
21 whole? How many peer-reviewed articles has your group  
22 been -- since you've been involved with that group has  
23 your group been responsible for authoring?

24 A Overall, more than 150. Since I've been

1 involved, I believe more than 100.

2 Q So we talked about -- strike that. So what  
3 percentage of your work is related to life expectancy?

4 A Nearly all of my work, nearly all of my time,  
5 is devoted to life expectancy in one way or another.  
6 It's my life's work.

7 Q That's what you do?

8 A Yes.

9 Q How many times have you been retained as an  
10 expert witness to testify in cases such as this where  
11 the issue of life expectancy is involved?

12 A I'd say I've been doing this for almost 20  
13 years, and it's been at least once a week. So that's  
14 50 times a year, so at least a thousand.

15 Q In fact, have you done this very type of work  
16 at the request of Mr. McBride when he was with the firm  
17 of Mandelbaum, Ellerton & McBride?

18 A Yes.

19 Q Do you recall when that was?

20 A It was about three and a half years ago.

21 Q And is it true that in that case Mr. McBride  
22 worked for the defense and wanted your opinion about  
23 life expectancy as to one of the parties to the  
24 litigation?

1 A Yes.

2 Q And do I also understand that you have done or  
3 rendered opinions on life expectancy at the request of  
4 the firm of Carroll, Kelly, Trotter, Franzen, McKenna &  
5 Peabody, Mr. Kelly's law firm?

6 A Yes.

7 Q On how many occasions have you rendered life  
8 expectancy opinions on behalf of Mr. Kelly or his law  
9 firm?

10 A Perhaps a dozen, a dozen times over the years.

11 Q And in terms of the percentages of retentions,  
12 what percentage of the time are you retained by the  
13 defense to render an opinion on life expectancy and  
14 what percentages of the time are you retained by the  
15 plaintiff such as Ms. McCrosky in this case?

16 A Most of the time it's defense, about 90 percent  
17 defense, and 10 percent plaintiff.

18 Q Does it make any difference who retains you as  
19 to your opinion?

20 A No. No. The evidence is what it is; the  
21 numbers are what they are. I would be happy to explain  
22 and show in this case.

23 Q Well, let's discuss the basic ideas of life  
24 expectancy. In general terms describe how you analyze

1 a database in order to compute life expectancy.

2 A Very briefly, we identify a group of interests,  
3 say a group of children with cerebral palsy. We follow  
4 them forward in time keeping track of how long they  
5 live. And then we analyze the various factors along  
6 the way to see how they affect survival. And then we  
7 summarize that in what's called a life table. Life  
8 expectancy comes from a life table.

9 Q And are there life tables published by the  
10 United States government?

11 A Yes, every year.

12 Q And I understand that you've prepared an  
13 exhibit that represents this.

14 MR. DURNEY: And that would be Exhibit 50, Your  
15 Honor.

16 What's the Court's pleasure? Do you wish me to  
17 offer it before we show it?

18 THE COURT: That's fine.

19 MR. DURNEY: I'll offer it.

20 THE COURT: Is there any objection?

21 MR. KELLY: Yes, Your Honor. Can we approach?

22 THE COURT: You may.

23 (A discussion was held off the record  
24 between the Court and counsel.)



1 THE COURT: Mr. Durney, lay a foundation before you  
2 start questioning.

3 MR. DURNEY: Yes. May we have Exhibit --

4 May I approach, Your Honor?

5 THE COURT: You may.

6 BY MR. DURNEY:

7 Q I'll set it up here if that's all right. If  
8 you're more comfortable with it, put it where you wish.

9 Dr. Shavelle, you have in front of you now  
10 Plaintiff's Exhibit 50. Can you tell us what that is  
11 and why it would be useful in explaining life  
12 expectancy to this jury.

13 A It's a table I prepared based on information  
14 from the National Center for Health Statistics from the  
15 federal government. It has life expectancies for the  
16 general population based on age and sex.

17 Q And is that in your view something that will  
18 assist this jury in understanding what the term "life  
19 expectancy" is.

20 A Yes.

21 MR. DURNEY: I would offer it, Your Honor. Offer  
22 it.

23 MR. KELLY: No objection.

24 THE COURT: It will be admitted.

1 (Exhibit 50 was admitted.)

2 BY MR. DURNEY:

3 Q All right. Tell us what this exhibit -- what  
4 information and conclusions would come from this  
5 exhibit.

6 A Well, the federal government prepares a life  
7 table every year for the entire population, and this is  
8 just a part of that life table. It has just the age  
9 and the life expectancy. It doesn't have all the other  
10 columns and technical details. And it has just the  
11 life expectancies for every tenth year, so it's  
12 abbreviated so that it would fit on one page and we  
13 could see it from this distance.

14 For example, it shows that at birth males have a  
15 life expectancy of 76 additional years which means that  
16 on average a male would live 76 years. Of course, a  
17 male could live longer or shorter, all the way to age  
18 100, or the age of 10 or 20. Nevertheless, 76 is the  
19 average.

20 And as is quite clear, the numbers for females are  
21 all higher than the numbers for males.

22 Q I always had an opinion about that, but maybe  
23 an expert might shed some light. Why do women live  
24 longer than men statistically?

1       A    It's a vast field of study.  Some have  
2 suggested it's because women have less stress.  Others  
3 have suggested that women are simply hardier than men,  
4 and that's why, for example, women are the ones who  
5 give birth, not men.

6       Q    My wife might disagree with you.

7       All right.  Let's continue.  So every -- even a  
8 person 100 years old has a life expectancy?

9       A    Right.

10      Q    Okay.  And statistically we know that a male --  
11 we've reached parity at 100, two for a female and two  
12 for a man.

13      A    When rounded to the nearest integer, yes.

14      Q    So what is life expectancy?

15      A    Expectancy is a scientific term.  It means  
16 average literally.  So life expectancy is the average  
17 life, the average length of life.  So, as I said, for  
18 males at birth it's 76.  It's like an average height or  
19 an average weight or a grade point average or a batting  
20 average.  Some can live longer; some can live shorter.

21      Q    I see.  So for a man of, for example, age 50,  
22 as we see on Exhibit 50, he has a life expectancy of  
23 what?

24      A    Thirty additional years.

1 Q If he were 80?

2 A Eight more years on average.

3 Q Eight more years. So are these scientifically  
4 fair numbers?

5 A Yes. They're based on the entire population of  
6 people in the United States by age and sex, of course,  
7 by Dr. Argus.

8 Q So younger people have longer life expectancies  
9 than older people?

10 A Yes. They have longer to go, so to speak.

11 Q And we've already noted that they vary by sex.  
12 Does it vary by anything else?

13 A Yes. It varies by -- life expectancy varies by  
14 quite a bit else. There are all sorts of other factors  
15 that come into play.

16 Q All right. Would you turn to Exhibit 53. What  
17 does this document -- it's not up on board until you  
18 first describe the document to us and why it's  
19 significant in your presentation. What is it, first?

20 A It's a table I prepared that shows life  
21 expectancies and how they vary. And this is just for  
22 children with cerebral palsy.

23 Q Such as Lyam?

24 A Yes.

1 MR. DURNEY: I would offer it, Your Honor.

2 THE COURT: Any objection?

3 MR. KELLY: I'm sorry. Just lay a foundation.

4 Objection. Foundation.

5 THE COURT: Okay. Mr. Durney, he prepared it. Why  
6 don't you go through what evidence he looked at and lay  
7 a little bit better foundation in respect to that.

8 MR. DURNEY: Thank you, Your Honor.

9 BY MR. DURNEY:

10 Q You heard the Court. What did you look at in  
11 the preparation of that document?

12 A I looked at the medical literature that our  
13 group and other groups have authored that looks at the  
14 life expectancy of children with cerebral palsy,  
15 children who are Lyam's age.

16 Q And so is the information contained on that  
17 proposed exhibit backed by scientific research?

18 A Yes.

19 Q And reflects -- reflective of the opinions that  
20 you have reached by virtue of your education, training  
21 and experience and that scientific literature?

22 A Yes.

23 MR. DURNEY: I would offer it, Your Honor.

24 MR. KELLY: No objection.

1 THE COURT: It will be admitted.

2 (Exhibit 53 was admitted.)

3 MR. DURNEY: Let's show it, please.

4 BY MR. DURNEY:

5 Q All right. So we talked about life expectancy  
6 varying by virtue of sex. Does this -- what does this  
7 exhibit show us?

8 A Well, this is for males age three. Lyam will  
9 soon be four. This is for males age three. And all of  
10 the groups there have cerebral palsy except for the  
11 first line. The first line is the general population.  
12 That says 73 additional years from age three. It would  
13 be 72 additional years from age four, so about a year  
14 less.

15 And then the next line shows that if we look at all  
16 cerebral palsy patients, it's lower, because cerebral  
17 palsy refers to developmental disabilities, limitations  
18 of one kind or another.

19 Then moving all the way to the bottom, the most  
20 severely disabled three-year-old males with cerebral  
21 palsy, the ones who cannot lift their heads in prone,  
22 who require a feeding tube, who require a tracheostomy  
23 and a ventilator for breathing support, they have a  
24 life expectancy of only ten additional years.

1 Obviously that's not Lyam's case, thankfully. He's not  
2 that severely disabled. But it shows that the life  
3 expectancy varies quite a bit from the norm of 73 all  
4 the way down to ten in the worst case.

5 Q All right. We'll come back to Lyam. We might  
6 as well continue with this exhibit, though. Then you  
7 mentioned -- and I want to make something clear. You  
8 said with regard to the seventh category of cerebral  
9 palsy that they have a life expectancy of ten  
10 additional years?

11 A Right.

12 Q That's not how long they'll live, that's how  
13 much longer they have to live?

14 A Right, ten additional years from age three --  
15 or four.

16 Q And does Lyam fall in the sixth category?

17 A No. He's not in group seven or group six.  
18 He's in group five.

19 Q All right. We'll come back. Which would  
20 suggest that Lyam has an additional -- statistically an  
21 additional 15 years to live?

22 A Right.

23 Q From this day, the present?

24 A Yes.

Electronically Filed  
Dec 19 2016 02:33 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

TAWNI McCROSKY, individually and  
as the natural parent of  
LYAM McCROSKY, a minor child,

Appellants,

vs.

CARSON TAHOE REGIONAL  
MEDICAL CENTER, a Nevada  
business entity,

Respondent.

Supreme Court Case No.: 70325

FJDC Case No. 13TRT000281B

**APPELLANT'S APPENDIX**

**VOLUME 9 PART 3**

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1 -oOo-

2 CARSON CITY, NEVADA; FRIDAY, MARCH 11, 2016; 1:15 P.M.

3 -oOo-

4  
5 (The following proceedings were held outside  
6 the presence of the jury.)

7 THE COURT: For the record, we're outside the  
8 presence of the jury in respect to Case No. 13 TRT 00028.

9 Counsel, are you ready to proceed?

10 MR. DURNEY: Yes, Your Honor.

11 MR. KELLY: Yes, Your Honor.

12 THE COURT: Okay. At this time --

13 MR. DURNEY: Your Honor, I just want to say  
14 one thing, and I just want to make sure the Court is and  
15 staff is okay with what we're going to do.

16 We want to introduce Lyam to the jury, and  
17 we're going to do that, and when Tawni finishes with her  
18 testimony, we're going to have her sister come. Her  
19 sister brought Lyam today, so Tawni will take Lyam and go  
20 home because somebody has to be with Lyam while her  
21 sister Casey testifies. So that's the reason that Tawni  
22 will be absent, and I just wanted the Court to understand  
23 that.

24 THE COURT: I have no problem with that.

1 MR. DURNEY: Maybe it would be a good idea to  
2 have that -- let's just get that --

3 THE COURT: We can state it to the jurors  
4 just so they know why she's gone. That's appropriate. I  
5 have no problem with that.

6 MR. KELLY: What is the thought of -- when he  
7 comes in, will he be in a chair, or is somebody going to  
8 hold him, or what's your thought on that?

9 MR. DURNEY: Casey will bring him in in her  
10 arms, pass him off to Tawni, and Tawni can introduce him  
11 to the jury.

12 MR. KELLY: From the witness stand?

13 MR. DURNEY: What do you want?

14 MR. KELLY: I hadn't thought about it. I was  
15 asking you what you plan to do.

16 THE COURT: My suggestion would be to just  
17 bring him in and have Tawni just bring him in and present  
18 him to the jury, and then have her hand him back off, and  
19 then have her back on the stand is what I think.

20 MR. DURNEY: That's fine.

21 THE COURT: That kind of makes sense to me,  
22 so we're not handing him back and forth, so that kind of  
23 makes sense to me.

24 MR. DURNEY: So do you want Casey to bring

1 Tawni -- excuse me -- Lyam in now?

2 THE COURT: Why don't you go out and take  
3 care of it at this time. We'll bring the jury in. We'll  
4 indicate that -- basically I'll do it -- you're basically  
5 going to bring the child in.

6 MR. DURNEY: Okay. That would be great, Your  
7 Honor.

8 (The jury entered the courtroom.)

9 (The following proceedings were held in the  
10 presence of the jury.)

11 THE COURT: Will counsel stipulate to the  
12 presence of the jury?

13 MR. DURNEY: Yes, Your Honor.

14 MR. KELLY: Yes, Your Honor.

15 THE COURT: At this time I'm going to explain  
16 to you that basically Ms. McCrosky is going to bring the  
17 child in at this time, and so I want to notify you of  
18 that.

19 MR. DURNEY: Thank you, Your Honor. May it  
20 please the Court.

21 THE COURT: The record will reflect that.

22 (Ms. McCrosky brought Lyam McCrosky into the  
23 courtroom.)

24 MR. DURNEY: You don't need to take the

1 witness stand, but just introduce Lyam to the jury.

2 THE WITNESS: Let's turn you around, Honey.

3 This is Lyam. I know. I'm meeting a bunch  
4 of strange people. Yeah. You're okay. Yes. Oh, you're  
5 good. You're okay.

6 MR. DURNEY: All right. Thank you.

7 THE WITNESS: Is he done?

8 MR. DURNEY: I think so.

9 THE WITNESS: All right. Okay. Come on.

10 MR. DURNEY: If I could just explain what --  
11 go ahead.

12 THE COURT: That's fine, Mr. Durney. Go  
13 ahead.

14 MR. DURNEY: Thank you very much, Your Honor.

15 And so Tawni is going to give Lyam to her  
16 sister Casey, and Casey will remain outside until Tawni  
17 is finished, and then Tawni will leave. She won't be  
18 here this afternoon so that she can take Lyam home while  
19 Casey comes in to testify.

20 Thank you.

21 THE COURT: You're still on the witness  
22 stand. You're still under oath.

23 (Ms. McCrosky took Lyam McCrosky out of the  
24 courtroom.)

1 THE COURT: Mr. Durney, your witness.

2 MR. DURNEY: May it please the Court.

3

4 DIRECT EXAMINATION

5 (Resumed)

6 BY MR. DURNEY:

7 Q Good afternoon.

8 A Hi.

9 Q Before we played the video, we were talking  
10 about your daily activities.

11 A Yes.

12 Q Let me ask a question before you go back to  
13 those.

14 How much does Lyam weigh now?

15 A He's 35 pounds.

16 Q Is it getting difficult to transfer and carry  
17 him?

18 A It hurts my back daily, yes. He's heavy and  
19 he's big.

20 Q Let's go to your daily activities.

21 The day-in-the-life film was literally a day.  
22 It was filmed in the day.

23 What about the nights? Describe a night to  
24 us.

1           A     It varies on the night. We don't know if it  
2 will be a good night or bad night. What do you want an  
3 example of, a good night or a bad night?

4           Q     Well, you earlier testified that in your  
5 opinion Lyam has to be watched and cared for 24 hours a  
6 day.

7           A     Yes. He needs to be monitored constantly.

8           Q     All right. And that includes the night?

9           A     Yes.

10          Q     Does he sleep in your room?

11          A     Yes, he does.

12          Q     And the reason for that?

13          A     Just so that he can be monitored. I mean, he  
14 has breathing troubles. He has troubles with his  
15 secretions. He needs to be suctioned. He just needs to  
16 be looked after to make sure he doesn't have a seizure or  
17 he doesn't choke in the middle of the night.

18          Q     So describe a good night.

19          A     A good night, we get -- you know, we get at  
20 least six hours of solid sleep without him waking up and  
21 without him having to be suctioned, without having to  
22 have any breathing treatments or anything during the  
23 evening.

24          Q     What do you mean when you say "suctioned"?

1           A     We have a suction machine. He doesn't handle  
2 his secretions, so we have to suction out his mouth, his  
3 nose, to help him to be able to breathe.

4           Q     And six hours is a good night?

5           A     Yes.

6           Q     Describe a bad one.

7           A     A bad night, we could have less than two  
8 hours of sleep, if any sleep at all. Some nights we --  
9 some nights I lay Lyam down and he's perfectly fine, and  
10 then within about 30 minutes he is having struggles  
11 breathing, he's having struggles clearing any secretions.

12                     So from there, you know, I have to take  
13 certain interventions to try and help him to be able to  
14 breathe and be able to rest. You know, it can -- I mean,  
15 it starts out -- I suction him to make sure I get rid of  
16 any of the secretions that might be blocking his airway,  
17 and that's not the easiest thing because Lyam has figured  
18 out biting down or pursing his lips prevents mom from  
19 getting that suction tube in his mouth.

20           Q     And he knows that?

21           A     Huh?

22           Q     And you believe he knows that?

23           A     Oh, most certainly.

24                     Then from there, if suctioning doesn't seem

1 to work, he gets a breathing treatment, so a nebulizer  
2 with Albuterol treatments, he gets one of those, and  
3 hopefully that helps him, and if that doesn't help, you  
4 kind of have to wait and see. And then from there he  
5 gets an oral -- not an oral -- it's a liquid dose through  
6 his G-tube, feeding tube, basically to help reduce  
7 secretions.

8 And so that's normally what causes a bad  
9 night is just the problems with his respiratory and with  
10 his breathing.

11 Q And in the movie or -- excuse me -- in the  
12 day-in-the-life segment that we played, we saw you  
13 feeding Lyam.

14 A Yes.

15 Q How is Lyam fed?

16 A Lyam is fed -- it's called a G-tube, a  
17 gastrostomy tube. It goes right directly into his  
18 stomach, and then from there we do what's called a bolus  
19 feed. It's with a syringe. You fill up a syringe with  
20 his formula and then from there allow gravity to  
21 basically feed him.

22 Q Have you ever been able to feed him by mouth?

23 A No, I have not.

24 Q Has Lyam ever been able, with the help of



1 anyone else, ever been able to take food by mouth?

2 A No, he has not.

3 Q And based upon your understanding of his  
4 condition, do you ever expect him to?

5 A No.

6 Q How frequently do you feed him?

7 A Every three and a half to four hours during  
8 the time that we're awake.

9 Q And then at night does he require feeding as  
10 well?

11 A If he's had three feedings throughout the  
12 day, he gets one at night. He has a feeding pump that  
13 will -- you know, I have to program it basically to  
14 release a certain amount of food over a certain amount of  
15 time, and, you know, we'll give him his last feeding  
16 through that if he hasn't received the last feeding and  
17 if we go to bed early or something, and he also receives  
18 free water through that during the evening.

19 Q And in terms of medication, how frequently do  
20 you medicate him and how do you do it?

21 A Every four hours he gets medication. Would  
22 you like to know what he receives?

23 Q Yes, please.

24 A Okay. He receives Baclofen. It's a muscle

1 relaxer because, as Lyam has CP, his tone is extremely,  
2 extremely tight. His legs are completely scissored all  
3 the time, which means his hips are moving out of the  
4 sockets, so the muscle relaxer kind of helps to reduce  
5 that tone ever so slightly.

6 He also gets an acid reducer because, having  
7 the G-tube, he also had what's called a fundoplication.  
8 They basically tie a knot at the top of the stomach to  
9 reduce any acid erosion in the esophagus. So he gets the  
10 acid reducer for that, to help with that.

11 And then he also gets a seizure preventative  
12 medical called Keppra.

13 And those all go through the G-tube, and they  
14 all have to be flushed through the G-tube with water as  
15 well.

16 Q How frequently does he get those medications  
17 on a daily basis?

18 A Every four hours he gets medications.

19 Q Every day of the week?

20 A Every day of the week.

21 Q No exception?

22 A No.

23 Q And you mentioned a G-tube going -- tell us a  
24 little bit --

1 First of all, that G-tube, is that something  
2 you can insert?

3 A Well, the doctors had to surgically place it.  
4 I can change it, yes.

5 Q How frequently do you have to do that?

6 A Every three months you have to change it.

7 Q Have you had to do that on an emergent basis?

8 A Most certainly, as you have seen.

9 Q And are you always equipped, whenever you go  
10 any place with Lyam, to be prepared for that potential  
11 emergency?

12 A I most certainly am. I've learned my lesson.

13 Q All right. And we also spoke, before the  
14 film was played, about the therapy that Lyam gets, and  
15 you said basically there's two physical therapists, you  
16 being one, two occupational therapists, you being one,  
17 two vision therapists, you being one, and one speech  
18 therapist.

19 Let's go through your role in providing  
20 speech therapy.

21 A Speech therapy, mostly we're -- you know,  
22 Lyam, not being able to be verbal, he's nonverbal, you  
23 know, we work on trying to present sounds and noises that  
24 he -- that any child, any baby, would pick up, you know,

1 in the beginning of -- you know, when they start to  
2 communicate with you through vocal sounds, "mama,"  
3 "dada," he says, "uh-huh" and "uh-uh," you know, kind of  
4 accordingly to what we're talking to him about in his  
5 communications, but he makes those noises through his  
6 breathing.

7           So, you know, with working on that with Lyam,  
8 you know, you put Lyam's hand up to your throat so he can  
9 get that vibration to feel it, you know, to feel what --  
10 basically in an aspect, you know, what it would be like  
11 for it to come out of his mouth, to be able to feel those  
12 vibrations and -- you know, so that he -- I mean,  
13 hopefully one day he can somewhat get -- I don't know if  
14 he'll always be nonverbal or not, but hopefully.

15           Q     And do you provide that speech therapy to him  
16 daily?

17           A     Yes.

18           Q     You've learned it through the professional  
19 speech therapist that also attends to him?

20           A     Yes.

21           Q     How about vision therapy? What do you do for  
22 Lyam in that area?

23           A     Trying to engage Lyam sometimes can be quite  
24 difficult. He has what's called cortical vision

1 impairment. From children and adults who have it that  
2 have been -- that are actually verbal, that are able to  
3 somewhat describe it, some of them have tunnel vision;  
4 some of them can only see -- maybe they can see an  
5 object, but they can't see the full definition of it.  
6 Some of them can only see the differences in light.

7           So with Lyam, we -- when we first started out  
8 with him, we started working with lights, and that was  
9 one of the big things that he started to really notice  
10 and focus on, because focusing and tracking wasn't there  
11 at a normal age when he was supposed to be able to  
12 recognize a face or anything like that. So we very much  
13 so worked on lights with him, and that was the first  
14 thing that he started to interact with and started to  
15 seem to enjoy.

16           And then from there, you know, you use things  
17 that are shiny or things that make noise or now we're  
18 working on switch -- using adaptive switches with him,  
19 basically to show cause and effect and so maybe he could  
20 turn on a light or maybe he can, you know, hit the switch  
21 and activate music on a toy that has lights that, you  
22 know, are interactive with him.

23           Q     Has he progressed over the almost four years  
24 of his life with regard to any of these areas?

( 1           A     Absolutely.

2           Q     Tell us about the progression that you have  
3 witnessed and seen as Lyam has aged in all the areas for  
4 which you provide therapy.

5           A     In all the areas, okay. Okay. As far as  
6 vision, at one point in time Lyam could do nothing but  
7 stare up to the right at the ceiling. You would never  
8 get Lyam to look at your face or look at anything for  
9 that matter. You know, now he -- you hold him or, you  
10 know, somebody else might be holding him, and he'll look  
11 across the room to see who walked in the door. He  
12 focuses in on a face. He tries his best to track as far  
13 as he can side to side.

14                     Physical therapy, just being able to tolerate  
15 time of the standard you saw on the video, that's huge  
16 because at one point in time there's like a bolster in  
17 the middle of it, and he would just sit down on it  
18 instead of bearing that weight on his legs.

19                     You know, for him to even just be able to  
20 roll from side to side on his back, that's a huge  
21 improvement for him because at one point in time he  
22 couldn't move.

( 23                     Occupational therapy-wise, like I said  
24 earlier, we work a lot on oral therapy with him because

1 he had to be suctioned approximately every five minutes  
2 when he was first born. He couldn't handle those  
3 secretions like a normal developing child should be able  
4 to handle those secretions when they're born.

5           And, you know, all babies drool, but Lyam is  
6 four -- almost four years old, and he drools constantly,  
7 but we work on the oral -- you know, the oral aversion so  
8 that, you know, when mom needs to suction his mouth out,  
9 he doesn't bite down, but recently we've been suctioning  
10 more, so he's basically getting back to that.

11           But as you saw in the video, I could only  
12 brush Lyam's teeth with a gauze pad at that point in time  
13 because he wouldn't allow anything into the mouth. The  
14 textures were just overwhelming for him. So now we're up  
15 to using the regular toothbrush, and he -- you know, he  
16 is okay with the taste of the toothpaste, so, I mean,  
17 that's another huge progress that we've made.

18           There's more. I just can't think.

19           Q     Has he been able to communicate with you and  
20 your family as he has aged?

21           A     Most certainly.

22           Q     Describe the evolution -- first of all, how  
23 does he communicate and describe the evolution of that.

24           A     Okay. Lyam communicates mostly through his

1 breathing and his body language. He -- as you saw,  
2 introducing him to you guys, he very much so -- he knows  
3 when he's in an environment that he's not used to. He  
4 very much loves home because that's what he's used to.

5 But he uses his breathing. He gets anxiety.  
6 He starts to almost hyperventilate sometimes. He  
7 wheezes. He does it with his therapist even when he's,  
8 you know, like having a rough day or he doesn't want to  
9 participate. If he's around people or say I have to take  
10 him to the grocery store or something, he shuts down, he  
11 plays possum, he closes his eyes because everybody always  
12 makes a comment, "Oh, he's sleeping," you know, and I  
13 think he recognizes that and he seemed to learn that as a  
14 coping mechanism when he was in the NICU.

15 You know, so very much so it's been a lot of  
16 learning, a lot of paying attention, a lot of watching  
17 Lyam just to be able to learn what's going on with him  
18 because he can't just tell you, you know, "I don't feel  
19 good" or "My head hurts" or "My ear hurts" or -- you  
20 know, so it's very much just paying attention to body  
21 language and, you know, paying attention to his  
22 breathing. He lets you know when he's having a tough  
23 time or anything like that.

24 Q Does he recognize voices?



1           A     Most certainly.

2           Q     Tell us about that. How long did it take for  
3 that to happen?

4           A     It's been happening mostly over the last year  
5 that he seems to very much so recognize his people, like,  
6 you know, my dad, my mom, my sister, even some of the  
7 people who are with him on a regular basis, say his  
8 therapists.

9                     We -- his three-year birthday this last  
10 April, he had to switch from Nevada Early Intervention  
11 Services -- they were providing therapists -- he had to  
12 switch over to the school district. This means a whole  
13 new group of ladies that would be his therapists and  
14 working with him.

15                    So, you know, the beginning obviously was  
16 difficult. He didn't cooperate, he shut down every time  
17 on them. But now they walk in, you know, and they each  
18 kind of have their own routine with him, letting him, you  
19 know, have a few minutes just to adjust to them being  
20 there, but you can tell that he recognizes their voices  
21 now because he's willing to cooperate and pay attention  
22 and do the best that he can in his therapies if he's  
23 feeling well.

24           Q     So you believe he can recognize voices?

1 A Oh, certainly.

2 Q What about your dad? Does he recognize your  
3 dad's voice?

4 A My dad has -- you know, he's got a very  
5 distinct voice to Lyam, and that is the first person who  
6 sat and talked to him, so he most certainly recognizes  
7 him. My dad walks in the door, and whoever might be  
8 holding Lyam at that point in time, if he's awake, Lyam  
9 will turn directly toward the door, you know, and my dad  
10 always makes sure to let him know that grandpa's home  
11 when he gets home, too, so Lyam definitely recognizes  
12 grandpa.

13 Q You indicated that the therapies --  
14 occupational, physical, speech, and vision -- were  
15 provided by Nevada Early Intervention for the first three  
16 years.

17 A Yes.

18 Q What happened after that?

19 A At three years old Nevada Early Intervention  
20 Services no longer carries the children, so they have to  
21 basically be switched over to the school district. So in  
22 this case Douglas County School District carries him and  
23 provides therapists from the school that would either  
24 work with him in the school setting or work with him at

1 home to get him prepared for a school setting.

2 Q And does the Douglas County School District  
3 essentially provide the same type of therapies that were  
4 being provided by Nevada Early Intervention up to the  
5 third birthday?

6 A No, they do not.

7 Q What's the difference?

8 A They are school based, so they focus more so  
9 on getting Lyam ready for a school environment, working  
10 on being able to get him to sit comfortably, getting him  
11 to interact.

12 You know, that's why we work with switches as  
13 well. It's another form of communication that would be  
14 used especially a lot in schools when there's no other  
15 ability to communicate with a child.

16 You know, so physical therapy is definitely  
17 working on sitting, standing, being able to tolerate  
18 that, because not all the time can he -- his hips aren't  
19 fully -- they're not fully in place, so sitting all the  
20 time is not an option for him. But compared to our  
21 household where he's able to be held, that wouldn't be  
22 happening at the school district, and they need him to be  
23 able to engage in activities and engage with anything  
24 that happens at a school, and so, you know, they kind

1 of -- they work on that.

2 Q He doesn't go to school, does he?

3 A No, he does not.

4 Q The therapists come to the house?

5 A Yes, they do.

6 Q Even though they're associated with the  
7 school district?

8 A Yes.

9 Q Is it your expectation that one day he will  
10 go to school?

11 A I would love for Lyam to be able to go to  
12 school like any normal kid.

13 Q I understand that. Is it your expectation  
14 that he will to some degree?

15 A Depends.

16 Q Let's talk about you for a minute. Okay?

17 What effect has this had on you? It's a big  
18 question.

19 A Yeah. It's -- it's hard to raise a child  
20 with special needs, it takes a lot, and I have a great  
21 family who stands behind me, but as far as being able to  
22 do any usual activities or being able to do something as  
23 simple as getting daycare or a babysitter to be able to  
24 to go do something for the evening, you don't get that.

1           You know, I have my family who helps me out,  
2 but mostly I don't like to take advantage of that, so,  
3 you know, my time ends up being I go to the store and run  
4 errands, and that means picking up prescriptions or  
5 getting groceries or -- you know, I don't have time for  
6 just me.

7           You know, some days are very taxing, watching  
8 my son go through hard times, just -- it's just taxing.  
9 It breaks my heart because nobody wants to see their  
10 child have to suffer the way Lyam suffers.

11           You know, I can't work. I can't go on dates.  
12 I can't hold a relationship. My sole focus, my time,  
13 everything is dedicated to Lyam.

14           Q     Do you take days out with Lyam?

15           A     Days out with Lyam are incredibly difficult.  
16 As you know, a normal three-and-a-half, almost  
17 four-year-old, kids can get in and out of a car pretty  
18 easily, you know, because they're walking at this point  
19 in time. Lyam, not so much.

20           Obviously I have to lug 35 pounds and try to  
21 get him into his car seat, and getting him in and out of  
22 the car, getting him in and out of his car seat, getting  
23 him into his wheelchair and out of his wheelchair is  
24 incredibly difficult.

1                   So days out normally consist of he's got an  
2 appointment or I have an appointment and we go out and we  
3 try to make the best of it by having lunch together.

4           Q     Have you sought therapy for yourself?

5           A     Over the last year, yes, I have.

6           Q     And what are some of the issues that -- who  
7 have you seen, first of all?

8           A     Her name is Erin Levenberg.

9           Q     What are some of the issues that you've been  
10 working on with therapist Levenberg?

11          A     She definitely has encouraged me that  
12 self-care is very important as far as taking care of a  
13 child with needs like Lyam's. You know, we don't want  
14 mom to get burned out, basically. So we -- you know, a  
15 lot of what we talk about, too, is just, you know,  
16 there's always constantly things happening with Lyam,  
17 things that break my heart, honestly and -- you know, so  
18 just trying to deal with basically the emotional toll  
19 that this has taken, anger that I have toward it.

20                   You know, I mean, it's sadness because I feel  
21 that Lyam's life, his life quality has been robbed, as  
22 well as taking care of him, we've been robbed in means of  
23 me as a mom, my parents as grandparents, my sister as an  
24 aunt.

1                   Lyam doesn't get to do the things that a  
2 normal, you know, three-, four-year-old should be doing  
3 and you get to enjoy. Like I can't even color with my  
4 son, you know, something as simple as that, and that  
5 breaks my heart.

6           Q       Has Dr. Levenberg been able to help you?

7           A       We're working a lot on self-care. I did  
8 recently just -- as I said, Lyam's 35 pounds. He hurts  
9 my back constantly picking him up. I have to rely on my  
10 mom in the morning, you know, before Lyam's awake so that  
11 I can go to the gym to try to strengthen myself so that I  
12 can handle him because he's only getting bigger and he's  
13 constantly getting bigger. Also just trying to work on a  
14 lot of anxiety that I have built up because of this.

15           Q       Have you thought about what you're going to  
16 do when Lyam gets to be 50 pounds?

17           A       I have no idea what I'm going to do at that  
18 point.

19           Q       How about your mom? Your mom gives you some  
20 respite?

21           A       Yes, she does.

22           Q       Do you worry about her health and her  
23 continued ability to do that?

24           A       Absolutely.

1 Q How about your sister? She provides you some  
2 respite, Casey?

3 A Yes.

4 Q Do you worry about her ability to continue to  
5 do that?

6 A I mean, she -- Casey, you know, she lives her  
7 own life. She's 28, she has a boyfriend, and, you know,  
8 her -- she's not always going to be around. The same  
9 with my parents, they will not always be around.  
10 Something will either take them from me or prevent them  
11 from being able to continuously help me with Lyam the way  
12 they do now.

13 Q You indicated that your father, Les, provides  
14 you some respite?

15 A Yes.

16 Q Typically describe a day where -- or  
17 typically describe what type of things Les is able to do  
18 with the boy.

19 A You know, with my dad, he very much so --  
20 because Lyam doesn't have that fatherly role model in his  
21 life, my dad has taken on that for Lyam and myself. It's  
22 wonderful. He's just -- he tries to -- regardless of,  
23 you know, where Lyam's at in life, he tries to teach him  
24 all the guy things, you know, and he -- you know, he



( 1 definitely helps with feedings and just -- Lyam needs  
2 comfort, you know, he needs -- he needs that love and  
3 affection, and everybody's great at helping provide that,  
4 my dad especially.

5 Q Has anybody suggested to you that you should  
6 place Lyam in some type of home so that you can lead a  
7 normal life?

8 A No.

9 Q What would you say to somebody who suggested  
10 that?

11 MR. McBRIDE: Objection. Calls for  
12 speculation.

13 MR. DURNEY: I don't think it calls for  
14 speculation.

15 THE COURT: I'm going to overrule it.

16 MR. DURNEY: Thank you.

17 BY MR. DURNEY:

18 Q What would you say to somebody who suggested  
19 that maybe you ought to give Lyam up or give him to  
20 someone else so that you can lead a normal life?

21 A It wouldn't be very nice.

22 Q It wouldn't be pretty?

23 A No.

( 24 Q A thought that you would never consider?

1 A Absolutely not.

2 Q How about, have you sought out a professional  
3 program or professional organizations that might provide  
4 you some respite care?

5 A When I was with Nevada Early Intervention  
6 Services, Lyam had a service coordinator who was  
7 wonderful at trying to just make sure that we knew about  
8 all the resources that we could have and making sure that  
9 she kind of got the ball rolling on a lot of them.

10 There's a place called Eagle Valley  
11 Children's Hospital, I do believe, here in Carson City,  
12 and they do provide nurses for respite care, but as of  
13 right now I've been with Lyam for the last four years.  
14 I'm not comfortable leaving him with anybody but my  
15 family.

16 Q Have you inquired into any other programs  
17 that might provide some form of respite care?

18 A There's also another program in Reno. It's  
19 called RAVE. They provide basically respite relief  
20 through either a family member or friend, and, I mean,  
21 they can't be living in the home with you. That's the  
22 stipulation. Basically they --

23 Q What's that mean?

24 A What's --

1 Q That they can't be living at home?

2 A Well, say my mom, who looks after Lyam. She  
3 would not be eligible.

4 Q Through the RAVE program?

5 A Through the RAVE program, basically --  
6 because I don't work, I stay home with Lyam. This would  
7 provide her, basically, compensation, a small  
8 compensation for looking after Lyam while I have to go  
9 out and run errands or whatever.

10 They also have what's called RAVE Center, and  
11 for three hours -- this is in Reno -- like I said, if you  
12 want a date night or something, you can have -- you can  
13 drop your child off for three hours and they will look  
14 after your child. Lyam is not eligible for it, however.

15 Q So you've inquired?

16 A Yes, I have.

17 Q And you determined after the inquiry that  
18 Lyam wasn't eligible?

19 A Yes.

20 Q What was the reason?

21 A Lyam is considered medically fragile. He  
22 requires feedings through a tube, he requires medications  
23 that -- you know, every three, four hours he requires  
24 medications, and everything goes through the tube, and

1 this place in particular does not have a nurse on staff  
2 or somebody who is able to administer medications, plus  
3 he's in a diaper still, so they don't do changings.

4 Q Tawni, what are your expectations for this  
5 little boy?

6 A I want the world for Lyam. I expect him  
7 to -- I mean, I want -- I want every opportunity possible  
8 for Lyam to progress to the best of his ability, to be  
9 the best him. I want to see -- honestly, I mean, I want  
10 to see him walk, I want to see him talk, I want to see  
11 him enjoy food and eat. I want anything and everything  
12 for him. I want all of the opportunity for him to  
13 progress to the best of his ability.

14 Q So would it be fair to say that you're going  
15 to do everything in your power to give every opportunity  
16 for Lyam to achieve and appreciate the best quality of  
17 life that he can possibly appreciate?

18 A Absolutely.

19 MR. DURNEY: That's all I have at this point,  
20 Your Honor. Thank you.

21 THE COURT: Cross-examination?

22 MR. McBRIDE: Thank you, Your Honor.

23 /////

24 /////

## CROSS-EXAMINATION

1  
2 BY MR. McBRIDE:

3 Q Good afternoon, Ms. McCrosky.

4 A Good afternoon.

5 Q We met a little over a year ago during your  
6 deposition; right?

7 A Yes.

8 Q And you remember -- I think you mentioned  
9 something about it today -- that you testified that when  
10 you felt your bag of waters between your legs, that you  
11 called out or used the call light to get the nurses to  
12 come into the room; right?

13 A That is correct.

14 Q Okay. And you've seen the pictures -- you've  
15 been here for the trial. You've seen the pictures that  
16 we've shown of the labor and delivery floor, haven't you?

17 A Yes.

18 Q And do you recognize from those pictures the  
19 room that you were in relative to the nurses' station?

20 A Yes.

21 Q And that appears to be accurate based on what  
22 you can recall of that moment?

23 A From what I can recall, yes.

24 Q And you said that once you made that call or

1 someone pushed the button, that they were within minutes  
2 into your room; true?

3 A Yes.

4 Q And you also testified that there were at  
5 least -- there was a minimum of two nurses that came into  
6 your room when your bag of water broke; is that right?

7 A Yes, as I recall.

8 Q Okay. So you said at a minimum there were  
9 two. It's possible there could have been more than two;  
10 right?

11 A I only recall two.

12 Q But also Dr. Hayes was in the room; correct?

13 A I just recall two people in the room. I  
14 don't recall what their professions were.

15 Q But you do recall Dr. Hayes being in the room  
16 at some point; right?

17 A At some point, yes.

18 Q And, in fact, you recall Dr. Hayes being in  
19 the room at some point to place the IUPC; do you recall  
20 that?

21 A Yes.

22 Q And, also, Dr. Hayes was there when various  
23 maneuvers were attempted, position changes; right?

24 A I don't remember her being in the room at

1 that point in time.

2 Q I can imagine your mind was elsewhere at the  
3 time.

4 A Most certainly.

5 Q A lot of things you probably don't recall  
6 exact specifics, as to how many people were there and who  
7 was there; true?

8 A It's four years and it was chaos, yes.

9 Q You also testified that you felt the nurses  
10 were concerned for both Lyam and you.

11 Do you recall testifying to that?

12 A I felt they started doing interventions. I  
13 don't know if that's necessarily out of concern or out of  
14 obligation.

15 Q Well, they were taking care of you, though;  
16 right?

17 A Yeah.

18 Q And, Ms. McCrosky, just in response to  
19 Mr. Durney's questions a few minutes ago, you believed  
20 that all of the doctors, the therapists, yourself, your  
21 family are providing Lyam with the best possible care he  
22 can get right now; true?

23 A As of now, true, yes.

24 Q And you also testified in your deposition

1 that the vast majority of Lyam's medical expenses have  
2 been paid by Medicaid; is that right?

3 A Yes.

4 Q You haven't had to pay any out-of-pocket  
5 expenses other than diapers and clothes and bathing  
6 equipment, things of that nature? Do you remember  
7 testifying to that?

8 A Yes. And things that -- basically insurance  
9 only sees specific things as medically necessary. So, I  
10 mean, like a chair for Lyam to be able to sit, that comes  
11 out of pocket.

12 Q But you haven't paid -- at least as of up to  
13 February of last year, your deposition, you haven't had  
14 to expend anything out of pocket? That's what you  
15 testified to; do you remember that?

16 A On his medical care.

17 Q Okay. You also are aware that a special  
18 needs trust has been set up for Lyam to take care of Lyam  
19 into the future?

20 MR. DURNEY: Objection, Your Honor. May we  
21 approach?

22 THE COURT: Yes.

23 (An off-the-record discussion was held  
24 between the Court and counsel.)



1 MR. McBRIDE: Ms. Court Reporter, can I have  
2 the last question read back?

3 (The record was read by the reporter.)

4 THE WITNESS: Yes.

5 MR. McBRIDE: Thank you. That's all I have.  
6 Thank you.

7 MR. DURNEY: No questions, Your Honor.

8 THE COURT: Thank you. You may step down.

9 MR. DURNEY: Your Honor, as I indicated  
10 earlier, Tawni is going to go out in the hall and take  
11 Lyam home so that sister Casey can come in, and Tawni  
12 will not be back today.

13 THE COURT: Mr. Durney, do you want to call  
14 your next witness?

15 MR. DURNEY: Casey McCrosky, Your Honor.

16 THE COURT: As soon as they exchange.

17 MR. DURNEY: It will be just a moment, yes.

18 MR. KELLY: Your Honor, while we're waiting,  
19 can we approach for a minute?

20 THE COURT: You may.

21 (An off-the-record discussion was held  
22 between the Court and counsel.)

23 THE COURT: Ma'am, please come forward. Stop  
24 right there and raise your right hand to be sworn.

1 CASEY McCROSKY,  
2 having been first duly sworn,  
3 was examined and testified as follows:  
4

5 THE COURT: Please take the witness stand,  
6 state your full name, spell your last name, please.

7 THE WITNESS: My name is Casey McCrosky. The  
8 last name spelling is M-c-C-r-o-s-k-y.  
9

10 DIRECT EXAMINATION

11 BY MR. DURNEY:

12 Q Good afternoon.

13 Casey, how old are you?

14 A Twenty-eight.

15 Q And you are Tawni's sister?

16 A Yes.

17 Q Describe your relationship that you enjoy  
18 with your sister.

19 A My sister is my best friend. I mean, we do  
20 everything together. She's my -- we call each other  
21 soulmates.

22 Q And has it always been that way?

23 A Always.

24 Q Even when you were little?

1           A     I mean, we argued, but we've always been very  
2 close.

3           Q     Are you employed?

4           A     Yes.

5           Q     Where do you work?

6           A     I work for the State of Nevada.

7           Q     Here in Carson City?

8           A     Yes.

9           Q     What do you do?

10          A     Yes.

11          Q     What do you do for the State?

12          A     I work for -- I work for the Department of  
13 Employment Training and Rehabilitation. I'm an admin  
14 assistant.

15          Q     And how long have you been doing that?

16          A     I've been with the State for four years now.

17          Q     And you live in the family home?

18          A     Yes. I live in the guesthouse.

19          Q     In the guesthouse. All right.

20                 And how long have you been there at the  
21 guesthouse.

22          A     Two years.

23          Q     Where did you live before living in the  
24 guesthouse?

1           A     I lived in my old room in my parents' house  
2 as a kid.

3           Q     Oh, I see. So you still lived at home; it  
4 was just a different portion?

5           A     Just a different -- yes.

6           Q     When did you move home?

7           A     A few months before Lyam was born.

8           Q     And you've been there ever since?

9           A     Yes.

10          Q     Was that your intention?

11          A     My intention was to go home to be with my  
12 sister and Lyam. I wanted to be around him.

13          Q     But was it your intention to stay for a  
14 little over four years?

15          A     No, definitely not.

16          Q     But you've done that because of Lyam's  
17 special needs?

18          A     Absolutely.

19          Q     And your sister's need for help?

20          A     Absolutely.

21          Q     How much help are you able to provide to your  
22 sister?

23          A     Any spare time I have. I mean, I work a  
24 full-time job, I work a 40-hour week, so weekends,

1 evenings, any spare chance I have.

2 Q Are you in a relationship with a young man?

3 A Yes, I am.

4 Q Serious?

5 A Very serious..

6 Q How long has that been?

7 A For a year.

8 Q I won't ask you if a proposal has been made,  
9 but is it your hopes that --

10 A My hopes is it will be.

11 Q All right.. Fine.

12 Describe, if you would, briefly Tawni's  
13 prenatal period in terms of what kind of time that was.

14 A She had a great pregnancy. I remember she  
15 worked up until maybe a few days before she even went  
16 into delivery. We did a lot of shopping for Lyam, lots  
17 of getting prepared and a lot of excitement, a lot of,  
18 you know, going in for little checkups and hearing  
19 heartbeats.

20 Q You went to some of the prenatal visits with  
21 her?

22 A Yes, I did.

23 Q All right. And you went to the hospital with  
24 her?

1 A Yes, I did.

2 Q And you spent the night with her at the  
3 hospital?

4 A Yes.

5 Q You were in the room when her water broke?

6 A Correct.

7 Q You were there all the way through that hour  
8 before they made the decision to take her to surgery?

9 A Correct.

10 Q Describe that hour. Describe your  
11 recollection -- first of all, were you in the room the  
12 whole time?

13 A I was in the room the whole time.

14 Q Describe that hour.

15 A I remember it almost seemed like a lot of  
16 chaos, you know. A lot of things were going on, and I  
17 was unsure of what exactly was happening, but I knew  
18 something was going on. It seemed almost as though  
19 things were a little frantic.

20 Q Did you ever ask any questions?

21 A I recall asking at one point, you know, what  
22 might be going on, but I didn't really ask any questions.  
23 I thought that I was leaving it, you know, to the  
24 professionals to take care of that.

1 Q Do you recall who you directed that "What is  
2 going on?" question to?

3 A I recall it was maybe to some of the nurses.

4 Q Some of the nurses?

5 A Yes.

6 Q Did you get a response?

7 A Not that I recall.

8 Q And we know from the testimony of Tawni and,  
9 to a limited extent, others that Tawni remained in the  
10 hospital after Lyam was born.

11 A Correct.

12 Q That Lyam was taken immediately to Renown?

13 A Yes.

14 Q And followed there by your father, Les?

15 A Yes.

16 Q So did you stay with Tawni for the two days  
17 that she had to remain in Carson Tahoe Hospital?

18 A I did.

19 Q Describe for us, if you would, the move.

20 A Depressing, sad, a lot of tears, a lot of  
21 uncertainties, a lot of consoling and comforting each  
22 other.

23 Q And were you getting information back from  
24 your father at Renown?

1 A Yes, I was.

2 Q What was your understanding that -- I assume  
3 that you shared whatever information was coming to you, I  
4 assume you shared that with Tawni?

5 A I did.

6 Q And what was your understanding of what was  
7 happening with Renown while you were with Tawni at  
8 Carson?

9 A My understanding was things were very grim,  
10 things did not look good. We were told to prepare for  
11 the worst.

12 Q All right. And then I gather you went to  
13 Renown?

14 A Correct.

15 Q And were you working at that time?

16 A I was. I would go to my state job, and I  
17 would immediately drive to Reno after work, and I would  
18 stay there until the next day I had to go to work.

19 Q Spent the nights there?

20 A Yes.

21 Q For the whole five weeks that Tawni was a  
22 patient?

23 A As much as I could, absolutely.

24 Q And have you attended doctors' visits and



1 hospital visits and the like with Tawni and Lyam since  
2 June of 2012 when Tawni and Lyam were finally -- excuse  
3 me -- when Lyam was discharged from Renown?

4 A I have gone to some appointments.

5 Q Over the years?

6 A Over the years. Not as many as maybe my mom  
7 or someone else has because I do work, but, yeah,  
8 absolutely. Any time I have a chance, I'm at therapies  
9 or doctors' appointments.

10 Q Have you ever gone to Shriners with Tawni and  
11 Lyam?

12 A I have not yet.

13 Q What is your understanding of what has to be  
14 done when they go to Shriners? What kind of preparations  
15 need to be made and how is it done?

16 A It's always a big task, you know. Any time  
17 we have to take that kind of a trip, it's -- there's a  
18 lot of things that have to be packed. It's -- you know,  
19 days ahead of time we have to be prepared for this trip.  
20 We usually have to go to stay overnight because we have  
21 an early morning appointment the next morning. We have  
22 to be ready, I believe, at 6 o'clock in the morning for  
23 the CP clinic. And then there's -- I know Lyam has been  
24 getting Botox injections in his legs and different areas

1 of his body to help loosen the muscles so he's not  
2 spasming as much.

3 Q And those are received at Shriners?

4 A Correct.

5 Q How frequently do they go to Shriners for  
6 that purpose?

7 A I believe every three months, three to six  
8 months.

9 Q And how long have they been doing that?

10 A I would say probably a year and a half now  
11 since they've been going there.

12 Q Let's talk a little bit about the impact of  
13 all this on your sister.

14 You're very close to her?

15 A Uh-huh.

16 Q Describe for us what your perceptions are  
17 with regard to the impact of all of this on your sister.

18 A My sister is definitely -- you know, she's  
19 not the same person she was. She's Lyam's mom now, you  
20 know. I almost feel as though she's lost her title as  
21 "Tawni." She's Lyam's mom. Her entire life is dedicated  
22 to that little boy, anything he needs. It's 24/7. She  
23 is always on the clock, doctors' appointments, therapy  
24 appointments, you know, ordering medications or medical

1 supplies or -- I mean, her life is filled taking care of  
2 Lyam all the time.

3 Q Has that always been the case ever since Lyam  
4 came home?

5 A Yes.

6 Q What, based upon your observations and your  
7 familiarity with Tawni and her activities, is as close as  
8 you can describe to normal in Tawni's life.

9 A There is no normal in our life. There's  
10 nothing normal about how our lives have changed, I don't  
11 think.

12 Q Do you remember what Tawni's hopes and  
13 aspirations were before Lyam was born?

14 A I believe, just like any normal parent, you  
15 know, you want to have -- be able to take your child to  
16 the park and take them to do things. You know, you don't  
17 think about different things of -- you know, your child  
18 eating different things, trying different baby foods,  
19 and, you know, Lyam's not able to experience any of that.

20 Q Does Lyam in your view -- based on your  
21 observations and experiences with Tawni, Lyam, and the  
22 family, is he a 24-hour-per-day or does he require  
23 24-hour-per-day attention?

24 A Absolutely.

1 MR. McBRIDE: Objection. Lacks foundation.

2 THE COURT: Overruled. Go ahead.

3 MR. DURNEY: Thank you very much.

4 BY MR. DURNEY:

5 Q He does require 24-hour-a-day attention. And  
6 just give us your reasoning behind that answer.

7 A Lyam is tube-fed. He has to be fed every  
8 four hours. He has to be suctioned. He has a lot of  
9 secretions. He has to have breathing treatments for when  
10 he's having difficulties breathing. He has to be  
11 changed. I mean, he's -- there's a lot of care that goes  
12 into -- you know, bathing and therapies and baby  
13 massages. You have to, you know, rub his little muscles  
14 to stretch him out so he's not spasming so much. There's  
15 constantly things you're doing.

16 Q And that's every single day?

17 A Every day.

18 MR. DURNEY: Thank you very much, Casey.

19 THE WITNESS: Thank you.

20 MR. McBRIDE: No questions, Your Honor.

21 THE COURT: Thank you, ma'am. You can step  
22 down.

23 MR. DURNEY: The next witness will be Dennis  
24 Bertucci.

1           Would you see if Marilyn McDonald is out  
2 there.

3           If Marilyn McDonald is out there, we'll take  
4 her first. Otherwise it will be Mr. Bertucci.

5           THE COURT: Everybody all right? Do we need  
6 a break? We'll try to get to about quarter to 3:00, and  
7 then we'll take a break if everybody -- if you need a  
8 break, don't forget to raise your hand.

9           MR. DURNEY: Your Honor, if Ms. McDonald is  
10 not out there and only Mr. Bertucci -- that must be the  
11 case -- I won't be able to go until she gets here.

12           Mr. Bertucci, would you please step forward.

13           THE COURT: To the best of your ability,  
14 please raise your right hand and be sworn.

15  
16                   DENNIS BERTUCCI,  
17           having been first duly sworn,  
18           was examined and testified as follows:

19  
20           THE COURT: Please state your full name,  
21 spell your last name, please.

22           THE WITNESS: My name is Dennis Bertucci,  
23 B-e-r-t-u-c-c-i.

24   /////

## DIRECT EXAMINATION

1  
2 BY MR. DURNEY:

3 Q Good afternoon, Mr. Bertucci.

4 Everybody wants to know why you're on  
5 crutches.

6 A I had knee surgery four weeks ago, and it  
7 didn't go as well as I hoped, so -- I'm getting there.  
8 I'm getting there.

9 Q What do you do for a living?

10 A I'm -- I have a machine shop, but I've been a  
11 pastor for 20 years, and I minister to teens and kids and  
12 young couples in their 20s and 30s. I counsel them and  
13 been doing it for a long time.

14 Q And in that capacity did you come to know the  
15 McCrosky family?

16 A Yes, I did.

17 Q All of them? Some of them? How many of  
18 them?

19 A All of them: Aunts, uncles, moms, dads,  
20 grandpas, sisters. All of them.

21 Q How long ago did that relationship begin?

22 A With Tawni and Casey, about six years ago.

23 Q All right. And you say counseling?

24 A Yes.

1           Q     Perhaps you can elaborate a little bit and  
2 tell us what type of counseling you provide or at least  
3 provided to Casey and Tawni.

4           A     Sure. Well, what I did was -- well, I met  
5 Casey at a memorial. Her fiance was -- was killed in an  
6 automobile accident, and I met her there, and she wanted  
7 someone to talk to, and I was recommended. So we began a  
8 conversation, and that went on for at least, at least  
9 four to five years. Every week we would meet, the two of  
10 us, and we would just go through their life, the things  
11 they're going through in life and helping her get back on  
12 track and giving her a focus. You know, she found -- she  
13 found God, she found the Lord, and it was a tremendous  
14 help, and that's what I do. I minister to young people,  
15 I encourage them, I try to strengthen them.

16                   I've been constantly seeing her for at least  
17 five years, and the family. I've done some services for  
18 some of their family members, and we've become extremely,  
19 extremely close.

20           Q     Does that include Tawni?

21           A     Yes. Tawni was there every meeting, every  
22 meeting.

23           Q     With her sister?

24           A     With her sister.

1 Q Are they close?

2 A You know, I've ministered to, I know, a  
3 couple thousand people over the last 20 years, young kids  
4 in their 20s and 30s and teens. I have never seen a  
5 sister love a sister so much. I have never seen two  
6 brothers or two sisters with such an extreme love for  
7 each other. It is -- you know what? It makes me  
8 extremely happy to see a family so close because I  
9 minister to a lot of families that have a lot of  
10 dysfunctions and a lot of issues. These two are in love  
11 with each other. They would do anything for each other.  
12 Incredible, incredible young ladies.

13 Q Have you ministered and provided counsel and  
14 advice to Tawni one on one?

15 A Absolutely. Yes.

16 Q And did that occur prior to the birth of  
17 Lyam?

18 A Yes, it did.

19 Q And then have you done it since the birth of  
20 Lyam?

21 A Yes. Yes, I've continued that.

22 Q Have you been able to provide assistance to  
23 Tawni with regard to coping with her obligations as a  
24 mother?



1 A Absolutely.

2 Q Tell us about that.

3 A Absolutely. You know, being a pastor, you  
4 know, and a believer, family is very important, and  
5 whenever she would -- that's why we would meet once a  
6 week. She would come, and the things that she would go  
7 through in her daily schemes, and this was before --  
8 before she had Lyam. I mean, they were young kids, they  
9 were 19, 20 years old.

10 Remember back when we were there and the  
11 stuff that young people can get involved in. You know  
12 what? She never got involved in that kind of stuff, but  
13 when she began counseling with me -- and my wife was also  
14 there, and the two of them -- I mean, she would have so  
15 many questions, you know, about life and that.

16 When she became pregnant, I mean, we prayed  
17 for her, for the child, we prayed over her, and we  
18 continue to minister all through the time, and no matter  
19 what, this young woman, no matter what, there's nothing  
20 more important in her life than Lyam.

21 I mean, we were just watching them getting in  
22 and out of the car today. It's incredible, it's  
23 absolutely incredible how -- when she was 19 years old, a  
24 teenager, when that child was born, she was a mother

( 1 immediately. She was full on. She was involved. There  
2 was nothing more important to her than her child, and  
3 it's wonderful to see that, because, unfortunately, I've  
4 seen the opposite.

5 But we've continued to pray for years and  
6 years. She's a believer. We keep in contact, if not in  
7 person, you know, Facebook at least, and we know what's  
8 going on. But, yes, we are very, very close, and I  
9 ministered through the years, as well as my wife, and  
10 they came to church, they came to church. They sat with  
11 us, you know. I mean, wonderful to watch this girl turn  
12 into a mother the day that that child came, the day that  
13 little boy was born.

14 Q Have you ever seen such dedication to a  
15 little boy as you see on a day-to-day basis with  
16 Lyam McCrosky?

17 A Never. This is really, really special. This  
18 woman is special. I mean, there is nothing that is more  
19 valuable and more important, more loving than her love  
20 for this child. I know she would do anything, as well as  
21 the family. I mean, they're a wonderful family, but  
22 Tawni, devotion -- there's got to be better words. She  
23 loves this child.

( 24 MR. DURNEY: Thank you, sir. That's all I

1 have.

2 THE COURT: Cross-examination?

3 MR. McBRIDE: No questions.

4 THE COURT: You can step down. Thank you.

5 MR. DURNEY: I'll look outside if you'd like,  
6 Your Honor.

7 THE COURT: That's fine.

8 MR. DURNEY: She's not out there, Your Honor.

9 THE COURT: We'll take a break at this time.  
10 Ladies and gentlemen of the jury, we're going  
11 to go ahead and take a break and wait for the next  
12 witness to be there.

13 Ladies and gentlemen, you are admonished  
14 during this recess not to talk or converse among  
15 yourselves or with anyone else on any subject connected  
16 with this trial, read, watch, or listen to any report of  
17 or commentary on the trial by any person connected with  
18 this trial or by any medium or information, including,  
19 without limitation, newspapers, television, and radio, or  
20 form or express any opinion on any subject connected with  
21 the trial until the case is finally submitted to you.  
22 You may not do research about any issues involved in the  
23 case. You may not blog, tweet, or use the internet to  
24 obtain or share information.

1           As soon as the witness gets here, we'll come  
2 back, so we'll treat this as an afternoon break.

3           (A recess was taken.)

4           (The following proceedings were held outside  
5 the presence of the jury.)

6           THE COURT: May the record reflect we're  
7 outside the presence of the jury. I just want to put the  
8 bench conference on the record again with respect to this  
9 matter.

10           There was an objection made. Mr. McBride  
11 asked a question as to whether or not a special needs  
12 trust had been set up. There was an objection by  
13 Mr. Durney. We had a bench conference in respect to that  
14 particular matter.

15           The Court indicated that previously, as a  
16 result of the statement made by Mr. Durney during the  
17 course of the opening statement whereby Dr. Hayes had  
18 settled her obligation in this matter -- in this case,  
19 excuse me -- I indicated at that time, when we talked  
20 about that point, that the door was open, and I wasn't  
21 sure exactly how this would happen. However, Mr. McBride  
22 indicated that was the only question he was asking in  
23 that area, and so the Court did not do anything.

24           Also, an issue was raised in regards to a

1 misstatement by Mr. McBride. He indicated in his  
2 question that after the button was pressed that the  
3 nurses were there within minutes. I believe the prior  
4 testimony was a matter of seconds, so I indicated that  
5 that could be argument and taken care of through argument  
6 in respect to this matter.

7 MR. DURNEY: Your Honor, I want to put one  
8 thing on the record, if I could, please.

9 The Medicaid issue is a puzzler to me, and I  
10 just want it clearly understood that we object to the  
11 admission of any collateral source information, and  
12 certainly Medicaid, but if I understand the Court's order  
13 correctly, I want it clearly understood that the only  
14 reason I went into the Medicaid issue was because of the  
15 perceived need in light of the Court's ruling, but I just  
16 want the record to be clear that I have a standing  
17 objection to collateral source information, especially  
18 Medicaid information.

19 THE COURT: Mr. Kelly, any comment on that?

20 MR. KELLY: No, Your Honor. The Court has  
21 made its ruling, and we will comply with the ruling.

22 MR. DURNEY: I will comply with the ruling as  
23 well, Your Honor. I'm just saying --

24 THE COURT: That's fine. And, again, I read

1 the statute, and I've also looked at -- I think I  
2 mentioned earlier that California Supreme Court case,  
3 which is kind of interesting -- it was back some time --  
4 in regards to that *Fein, F-e-i-n, vs. Permanente Medical*  
5 *Group*, 38 Cal.3d 137. It's interesting.

6 Back then they had the identical issue, and  
7 then they also had the issue at the same time on what do  
8 we do about a lien or don't do about a lien. As a result  
9 of that, that has never been overturned. I've looked at  
10 it, we've researched it, we've tried to Shepardize it,  
11 tried to find out.

12 Also, it's fascinating to me -- and, again,  
13 I'm just putting this on the record because one of these  
14 issues was raised at the same time that the supreme court  
15 came out with the -- I think it was the *Tam* case. I  
16 don't want to misquote, but it indicated in one of the  
17 footnotes that there was going to be a separate  
18 determination in respect -- correct -- page 4, whereby it  
19 indicated on page 4 in the footnote:

20 "As part of his motion in limine, Dr. Tam  
21 also requested that he be allowed to introduce collateral  
22 source evidence pursuant to NRS 42.021. The district  
23 court denied this request, deeming NRS 42.021  
24 unconstitutional. Dr. Tam separately petitioned this

1 court for a writ of mandamus on this denial."

2 They go on to say:

3 "We resolve Docket No. 66.065 separately from  
4 the petition now before the court."

5 I can find no ruling by the Nevada Supreme  
6 Court in respect to that issue. I mean, it's fascinating  
7 to me to say we're taking care of it in respect to this  
8 matter, but they didn't take care of anything. So,  
9 again, I'm complying with what I think the statute  
10 indicates clearly, and as a result of that, that's where  
11 we are.

12 I did get a note from Juror No. 19. She  
13 says, "I used to work with Casey at DETR," Department  
14 of --

15 THE CLERK: -- Employment, Training --

16 THE BAILIFF: Department of Training and  
17 Rehabilitation.

18 THE COURT: "I only knew her well enough to  
19 say good morning. I do not think this will influence my  
20 decision."

21 I think we have everybody trying to be as  
22 honest as possible with respect to this matter, so my  
23 intent is not to do anything with this note. I don't  
24 think it does anything, just indicates very clearly -- it

1 must be tough by telling them to disclose things, but I  
2 don't intend to do anything with this note. So thank  
3 you.

4 MR. DURNEY: Thank you, Your Honor.

5 MR. KELLY: Thank you, Your Honor.

6 MR. KELLY: We'll be in recess until  
7 Mr. Durney is ready.

8 (A recess was taken.)

9 (The following proceedings were held outside  
10 the presence of the jury.)

11 THE COURT: For the record, we're back on the  
12 record with respect to Case No. 13 TRT 00028.

13 I did receive a courtesy copy of defendant  
14 Carson Tahoe Regional Medical Center's Objections to  
15 Testimony of Joseph Capell, M.D.

16 My problem in looking at it is I don't know  
17 what the question was and what the answer was, so it's  
18 kind of hard to follow because I don't have a copy of the  
19 deposition -- the transcript.

20 Do you have a copy of the transcript of it?

21 MR. McBRIDE: I do, Your Honor.

22 THE COURT: I was thinking maybe I could have  
23 a copy made just so -- I'm thinking ahead because I'm  
24 reading the objection and going --



1 MR. DURNEY: That's a great idea, Your Honor,  
2 so we can officially go through it. That's the issue we  
3 will prepare a brief on and have to you by Monday  
4 morning.

5 THE COURT: That's great. I'm just trying to  
6 get ahead of the game. I'd rather read the objections,  
7 and not knowing what the question was or --

8 MR. McBRIDE: Yeah. It will help.

9 THE COURT: We can have somebody make a copy.

10 MR. DURNEY: You are busy on Monday morning;  
11 right?

12 THE COURT: Monday morning, but we will start  
13 at 1:30 on Monday afternoon. Monday morning is my law  
14 and motion calendar. We do probate, we do uncontested  
15 matters, and then we do criminal calendar in respect to  
16 that.

17 MR. DURNEY: Could we please have a copy of  
18 what you've filed with the Court?

19 MR. McBRIDE: Yeah. We actually emailed it  
20 to you as well. It got emailed to you.

21 MS. BRENNEN: The one that got mailed today?

22 THE COURT: Is this the trial one?

23 MR. McBRIDE: Yes, this is the trial one.

24 THE COURT: Do we have that in the record at

1 all?

2 MR. McBRIDE: We haven't lodged it yet. We  
3 can go ahead and lodge that and maybe use that.

4 THE COURT: Why don't you lodge it, and then  
5 I can just take that, and you can make a copy of that for  
6 Mr. Durney.

7 THE CLERK: This is the deposition?

8 THE COURT: It is a trial deposition.

9 MR. McBRIDE: Correct.

10 THE COURT: It's a little different than a  
11 regular deposition, so we'll lodge it in and just put it  
12 in. I think it's under their exhibit list, if I'm not  
13 mistaken.

14 MR. DURNEY: Your Honor, I spoke to Mr. Ivey  
15 about that deposition, which of course was videoed, and  
16 he tells me that he can edit -- if you say, for example,  
17 at page 9 take out lines 6 through 12, he can do that  
18 very quickly, almost on the spot.

19 THE COURT: That's great.

20 MR. DURNEY: As long as he has the script  
21 going in, so --

22 THE COURT: We'll get you a copy and we'll  
23 figure out where everybody is. I think I told you about  
24 the bad experience in a trial. It just went on forever

1 and lost everybody, including the Court, to be honest  
2 with you. It was a disaster.

3 So we'll make a copy for you, Mr. Durney.  
4 We'll mark this, I guess -- it's Mr. Durney's evidence,  
5 isn't it?

6 MR. McBRIDE: It would be his evidence, yes.

7 THE COURT: So we're just going to lodge  
8 that. We'll indicate under the plaintiff -- we'll have  
9 to lodge it under the plaintiff, and then --

10 MR. DURNEY: We should make sure -- I don't  
11 know why Mr. McBride would have the original of the trial  
12 depo. He would have the original of the discovery depo.

13 MR. McBRIDE: Maybe -- actually, you know  
14 what? Maybe that is --

15 MR. DURNEY: That's not the right depo.

16 MR. McBRIDE: You know what Judge? I  
17 apologize for that. I didn't even look at the date of  
18 that.

19 MR. DURNEY: I apologize. I didn't bring it,  
20 but if you'd like --

21 MR. McBRIDE: I can have a copy emailed to  
22 your clerk.

23 THE COURT: That would be great.

24 MR. McBRIDE: That would probably work best.

1 I'm so sorry.

2 MR. IVEY: I have it if you want me to email  
3 it to you? I just need an email address.

4 MR. McBRIDE: Judge, we also have -- again,  
5 you're aware we're waiting for their opposition to our  
6 original motion to exclude, too?

7 THE COURT: Right. I understand all that. I  
8 was just trying to get a handle on the objections to --

9 MR. McBRIDE: And I apologize for that. I  
10 had my office do that since we were here in court all  
11 day, so --

12 THE COURT: I figured that. I just kind of  
13 wanted to put a document to the objection.

14 MR. McBRIDE: Makes sense.

15 THE COURT: If you could email that to me. I  
16 don't know when that would be done by.

17 MR. McBRIDE: I think he's going to email it  
18 right now.

19 MR. IVEY: I'm emailing it right this second.

20 THE COURT: That's great. I just want -- I  
21 come in and work on the weekend.

22 THE CLERK: Do you want the whole deposition  
23 or just a portion?

24 THE COURT: You don't have to worry about it.

1 MR. IVEY: Do you want the full or do you  
2 want the condensed transcript?

3 THE COURT: I want whatever -- the full so I  
4 can look at it in light of the --

5 MR. IVEY: It's on its way.

6 THE COURT: Appreciate it. We'll get it  
7 printed out. No hurry.

8 Also, I'm presuming -- I don't know,  
9 Mr. Durney. Do you have any other witnesses besides  
10 Ms. McDonald?

11 MR. DURNEY: No, Your Honor.

12 THE COURT: Okay. Well, I kind of  
13 presupposed that, where we are to some extent, so we'll  
14 go ahead and take this witness, and then we'll take our  
15 weekend break and go from there in respect to that.

16 Again, just for the record, we'll start -- be  
17 here by 1:15 on Monday. We'll start then and we'll go  
18 forward from there.

19 I don't know where you are in your case,  
20 Mr. Durney. I don't know how many more witnesses you  
21 have, but, again, if you can let the defense know as best  
22 you can so they can start lining their witnesses up.

23 MR. DURNEY: I will. I hope to be finished  
24 depending -- I have a lot of witnesses lined up for

1 Monday. It's interesting because as the proof is  
2 received, decisions can be made to drop a witness, and  
3 we've dropped some, so I'm hopeful to be done by Tuesday  
4 at 5 o'clock.

5 THE COURT: I think you indicated you had an  
6 expert on Tuesday coming in.

7 MR. DURNEY: We have an expert on Monday  
8 afternoon and an expert on Tuesday.

9 THE COURT: Okay. And then we can deal with  
10 Joseph Capell, M.D. We'll take a look at that and see  
11 where we are.

12 MR. DURNEY: The witness that's coming in on  
13 Monday afternoon is Carol Hyland. She is the one who  
14 priced out the life care plan. The life care plan, the  
15 life care medical needs and special care needs, is  
16 Dr. Capell's work, and so I guess we should find out if  
17 there's an objection to Ms. Hyland testifying before  
18 Dr. Capell's testimony comes in.

19 MR. McBRIDE: Well, I think that may be one  
20 of the issues and concerns I have. If she is going to  
21 testify in the afternoon, we might need to have a ruling  
22 on Capell's testimony and our objections to portions of  
23 his testimony.

24 THE COURT: Again, I'll try to take a look at

1 it this weekend. I'll try to look at it. Get your  
2 response in as quickly as you can, and hopefully --

3 MR. DURNEY: How will I get that to you, Your  
4 Honor, over the weekend?

5 THE COURT: Email it. You can send it to  
6 both. That's a direct email to me in respect to that.  
7 When I come in I check my emails and that.

8 MR. DURNEY: Thank you.

9 THE COURT: I'll take a look at it, and,  
10 again, thank you for providing that.

11 MR. IVEY: He's got it.

12 THE COURT: It will make it a lot easier for  
13 me to look at it and presuppose where we're going.

14 MR. DURNEY: I will try to do something this  
15 weekend, and that will be swap Ms. Hyland from Monday to  
16 Tuesday so that -- I don't know if I can do it, but I'm  
17 going to try to do it.

18 THE COURT: Whatever we can in respect to  
19 that.

20 Again, I will tell you, I'm using a phrase  
21 from my good friend Justice Rose that I use in settlement  
22 conferences all the time. My preliminary impression is  
23 that you're going to be bound by his original opinions,  
24 just like -- I've been consistent -- whatever your

1 original opinions and report were prior to the close of  
2 discovery, that's where we're going to be. That's just  
3 my preliminary impression, so to speak.

4 Okay. Are we ready?

5 Go ahead and bring the jury in.

6 (The jury entered the courtroom.)

7 (The following proceedings were held in the  
8 presence of the jury.)

9 THE COURT: Will counsel stipulate to the  
10 presence of the jury?

11 MR. DURNEY: Yes, Your Honor.

12 MR. KELLY: Yes, Your Honor.

13 THE COURT: Thank you.

14 Mr. Durney, call your next witness.

15 MR. DURNEY: Marilyn McDonald, will you step  
16 forward?

17 THE COURT: Ma'am, please come forward.  
18 You'll have to stop right there. Please raise your right  
19 hand and be sworn.

20 /////

21 /////

22 /////

23 /////

24 /////



1                               MARILYN McDONALD,  
2                               having been first duly sworn,  
3                               was examined and testified as follows:  
4

5                       THE COURT: Please take the witness stand,  
6                       state your name and spell your last name, please.

7                       THE WITNESS: My name is Marilyn McDonald.  
8                       The last name is M-c-D-o-n-a-l-d.

9                       THE COURT: Your witness, Counsel.

10                      MR. DURNEY: May it please the Court.

11

12                               DIRECT EXAMINATION

13                      BY MR. DURNEY:

14                      Q     Good afternoon, Ms. McDonald.

15                      A     Good afternoon.

16                      Q     Thank you for coming in.

17                             You were subpoenaed to be here, but thank you  
18                      for coming in.

19                             Ms. McDonald, what is your occupation or  
20                      profession?

21                      A     I am a pediatric physical therapist.

22                      Q     And how long have you been one?

23                      A     Forty-one years.

24                      Q     And what does a pediatric physical therapist

1 do?

2 A We work with children. I specifically work  
3 with children from birth to three for the State of  
4 Nevada, but I also work privately at times with older  
5 children.

6 Q How long have you worked as a pediatric  
7 physical therapist for the State of Nevada?

8 A About 15 years.

9 Q And what does a pediatric physical  
10 therapist -- it's almost a self-explanatory term, forgive  
11 me -- what does a pediatric physical therapist do?

12 A We work on promoting an infant or child's  
13 mobility, their ability to roll, crawl, and walk,  
14 basically, and we have to work through various challenges  
15 such as abnormal muscle tone or neurological  
16 disabilities, etcetera.

17 Q And did you have the opportunity to provide  
18 care to Lyam McCrosky?

19 A Yes, I did.

20 Q When did you begin providing care to Lyam?

21 A When he was two months old.

22 Q And at that time you were working for the  
23 State?

24 A Yes.

1 Q We've heard the term "Nevada Early  
2 Intervention Services."

3 What's that?

4 A It is a program where -- it's actually a  
5 nationwide program, and in this state we provide services  
6 in the home, and it involves all of the therapy  
7 disciplines: Physical, occupational, speech therapy,  
8 vision therapy, and dietitian, as well as developmental  
9 specialists.

10 Q And did all those specialists that you just  
11 identified provide therapeutic care to Lyam beginning  
12 about the same time as you?

13 A Yes, they did.

14 Q A couple months after -- about two months  
15 after?

16 A About two to three months for all the  
17 services.

18 Q Two to three months of age. All right.

19 And how long did you continue providing  
20 pediatric physical therapy to Lyam?

21 A Until he turned three years of age, I  
22 provided it with the State, and that was two to four  
23 times a month, and then I did a little bit of private  
24 physical therapy with him after he turned three.

1 Q Do you continue doing private therapy with  
2 him now?

3 A Yes. The last time I saw him was in  
4 February.

5 Q And when you provided therapy to him through  
6 the State, I assume you were paid by Medicaid?

7 A I'm paid by the State. Medicaid reimburses  
8 the State.

9 Q And then what about now? How are you paid,  
10 doing it privately, as you described?

11 A That's through Medicaid.

12 Q Still?

13 A Right.

14 Q How frequently do you see him now?

15 A I would like to see him twice a month, but  
16 it's been about once a month.

17 Q And does he receive physical therapy from any  
18 other service at this time?

19 A No. Yes. Actually, he receives what's  
20 called school-based therapy. He's not going to school,  
21 but he has a physical therapist and an occupational  
22 therapist and a dietitian, I believe, and a vision  
23 therapist that come from the school, and it's a  
24 school-based model. So they're just working on academics

1 and not real therapy services like we did, not in the  
2 same manner.

3 Q You've been a pediatric physical therapist  
4 for how many years, forty --

5 A Forty-one years.

6 Q -- one years.

7 And in your 41 years have you provided  
8 physical therapy to children with the same or similar  
9 disabilities as Lyam?

10 A Yes, I have.

11 Q Through what ages?

12 A Through Nevada Early Intervention Services,  
13 in private practice, and when I worked for the school  
14 district in California.

15 Q And spanning what ages?

16 A From birth to 21.

17 Q And I'm talking about children with the same  
18 or similar disabilities as Lyam. Yes?

19 A Yes.

20 Q Describe the therapy programs that you  
21 initially set up with Lyam, and perhaps to minimize my  
22 questions, I'd like to go through the progression of  
23 therapy that began at two or three months of life.

24 A Okay. He's evaluated to determine what the

1 limitations are in his range of motion and muscle tone  
2 and reflexes and voluntary movements and visual and  
3 auditory capabilities, and after an evaluation, then you  
4 set up a treatment plan.

5           For him, the treatment plan was to work on  
6 strategies and exercises that help to reduce or soften  
7 his abnormal muscle tone and to help promote some  
8 voluntary control such as head control and the ability to  
9 roll, the ability to gaze at an object, and the ability  
10 to use an arm or a leg functionally.

11           Q     Those would have been the goals that you  
12 initially set up after you gave your initial evaluation?

13           A     Yes.

14           Q     And have those goals changed?

15           A     Those goals are continuing, and he has made  
16 progress in all of those areas, but the goals do  
17 continue.

18           Q     And I'd like to know what kind of progress  
19 he's made in each and every one of the goals that you've  
20 established for Lyam.

21           A     Okay. An example is the -- when we first  
22 evaluated him, he was unable to regulate his body  
23 temperature, unable to obtain an alert and aroused state  
24 of consciousness. He had a very erratic respiratory

1 pattern. His tolerance to physical handling or any kind  
2 of touch or noise was very fragile. He would go into a  
3 startle reflex and basically shut down neurologically.

4 He had essentially no muscle control, no head  
5 control, so if you moved his body in space, he wasn't  
6 able to control his head. It would flop in one direction  
7 or another. He had no voluntary control of his arms or  
8 his legs, so that means he wasn't able to -- even as an  
9 infant, you have reflexive movements, and he had none of  
10 the normal reflexive movements that an infant has, and,  
11 in fact, he had very strong abnormal reflexes.

12 He had no sense of cues to give his parents  
13 or family members that he was uncomfortable or hungry or  
14 tired or what have you. He had no apparent method of  
15 showing any affection. He was unable to make eye contact  
16 and unable to visually focus or follow a moving object.

17 After a period of therapies, he made progress  
18 in all of those areas. They're very subtle, but they're  
19 all recordable and measurable. So his temperature  
20 regulation has improved to the point that he can now be  
21 in a room and have his clothes removed without going into  
22 a state of shock, or he can be in various kinds of  
23 temperatures. He can now go into a hot tub or a  
24 therapeutic swimming pool and show a sense of enjoyment

1 instead of a medical fragile state.

2           As far as his alertness and arousal, he's  
3 awake more during the day and, with appropriate kinds of  
4 stimulation, physical handling, and loving him, he's able  
5 to have his eyes open more and be awake more during the  
6 day.

7           As far as his respirations go, he used to  
8 have very erratic respirations as soon as anything new  
9 was introduced or a person walked into the room, and now  
10 he will have a modulated respiration, and he is able to  
11 demonstrate, through his more regular respirations, that  
12 he's tolerating the procedure that we're doing.

13           He has increased tolerance for all of  
14 physical handling and activity in that he doesn't shut  
15 down immediately when he's provided with stimulation,  
16 physical stimulation. He -- his head control has  
17 improved in that he's able to hold it upright, especially  
18 when he's asked to hold it upright, or with a little bit  
19 of bouncing and movement, then he can bring his head  
20 upright. That's in this flexion/extension position. So  
21 his head may be in a fully flexed position, and then with  
22 verbal cues or a little bit of physical stimulation, he's  
23 able to pick his head up and hold it up.

24           He still has a very strong primitive reflex,



( 1 an asymmetric reflex, that makes him turn his head to the  
2 right, but with a little bit of stimulation and verbal  
3 cues, again, he can bring his head to the middle. Those  
4 are very important neurological signs, when a child has  
5 some head control.

6 He used to be extremely hypersensitive around  
7 his mouth and it was very difficult to even brush his  
8 teeth, and now he's able to tolerate toothbrushing and  
9 able to tolerate people touching his mouth and kissing  
10 him and so forth without going into a fragile state.

11 He now is able to show his own form of  
12 communication, which is to have his eyes more open, to  
13 lean. He can -- even though he can't really roll around  
14 on the floor, he can lean his body towards the person  
15 that he wants to be closest to. An example: If he's got  
16 his grandmother in one side and his grandfather on the  
17 other and they're both talking to him and loving him, he  
18 will choose which person he wants to lean to.

19 And he's now able to show signs of affection  
20 in that if his mom says, "I want to pick you up, Lyam,"  
21 he'll begin to raise his arms up now to reach for her,  
22 whereas previously he had no voluntary control of his  
23 arms. If she places his arm around her neck, he will  
24 give her a big squeeze, which is a hug, and he doesn't do

1 that for other individuals except maybe his grandpa.

2 He previously had no use of his arms, and now  
3 he can voluntarily swipe at or bat at a dangling object  
4 if it's something that's shiny, like a shiny pompom or  
5 some other real bright, lighted toy. It's not always  
6 consistent, but you know that he's making that effort,  
7 and he can bring his arm and kind of swipe at it.

8 He's gained some visual control in that or  
9 visual ability. He has what's called cortical blindness,  
10 which means that the brain's not interpreting what the  
11 eyes might be seeing, and he now appears to be able to  
12 see his parents, his mom or his grandparents, at times  
13 and follow them across the room a little bit, and if a  
14 shiny object is in his view, he can follow that object.  
15 He can even follow a moving figure on an iPad with his  
16 eyes, and this was documented by our vision specialist.  
17 So he's gained some capabilities as far as his vision  
18 goes as well.

19 He had essentially no movements of his body  
20 whatsoever or his arms or his legs, and like I said, he  
21 can now do a half roll from his back to his side and from  
22 his back to the other side.

23 If he's placed in a kneeling position over a  
24 little footstool and his arms are placed on the edge of

1 the footstool, he can raise his head up, and he appears  
2 to be looking at the object we have in front of him if  
3 it's a book or an iPad or a bright-colored object.

4 He has demonstrated the ability -- if I place  
5 him between my legs and I give him the right verbal and  
6 tactile cues, he's able to go from sitting on my lap to  
7 standing with maximum support on my part, but I can feel  
8 and his mom can see that he's making an effort and he's  
9 doing some of the standing, and this is in spite of  
10 having severe spastic muscle tone.

11 So those are some of the areas in which we've  
12 seen progress.

13 Q And do you feel, with the type of therapy  
14 that you have provided, that he will continue to make  
15 progress with continued therapy?

16 A I do. And I can say that on two accounts.  
17 One is, I stopped the physical therapy when he turned  
18 three, and there was a period of about six months where  
19 he wasn't receiving that kind of intensive physical  
20 therapy. He was only receiving the school therapy, which  
21 is more academic, where they just put an object in front  
22 of him and see how he responds.

23 And so during that time when he didn't have  
24 the therapy services, he actually had a little decline in

1 that he was less -- a little less responsive in those  
2 areas that I mentioned, and his muscle tone had increased  
3 to where he -- it looked like he was developing  
4 contractures, which is where you can't fully straighten  
5 your arms and your legs and your hips and so forth. And  
6 he does indeed have some contractures in those areas, but  
7 they were very marked after not having therapy. So when  
8 we reinstated that, he gained back the range of motion  
9 that he had previously.

10 And the other thing I can tell you is I do  
11 have long-term experience with the other children that  
12 I've worked with that have spanned from birth to -- you  
13 know, they're in their 20s now, and I either have worked  
14 with them or I'm in close contact with the families, and  
15 I have witnessed that these children who are at the same  
16 level of disability that Lyam is at in terms of having  
17 severe spastic cerebral palsy, cortical blindness, and  
18 some of them are on G-tubes for feeding, they -- at the  
19 age of 20 and 21 they are still showing progress.

20 One little girl is now able to talk a little  
21 bit in short sentences and able to use her hands now to  
22 feed herself, and prior to -- when she was about Lyam's  
23 age, she had none of those capabilities.

24 Another boy is -- he's about the same age,

1 he's 20 now, and he hasn't really gained many other  
2 strengths, but he's still alive and well, and he's living  
3 in his home, but he has extra care in the home.

4           There's another child who is very similar to  
5 Lyam in his level of spasticity, and he is 19, and they  
6 place him in a walker, and it's not normal walking, but  
7 he's able to push himself around a little bit in the  
8 walker.

9           And there's another little boy that I'm  
10 currently in close contact with who's five years old who  
11 is very much like Lyam, and when he left our program at  
12 age three he was very similar to Lyam, and he didn't have  
13 a whole lot of functional capabilities. He's now in a  
14 walker and pushing himself around, and he actually can  
15 make a couple of signs for sign language. That's the  
16 report that the mother gave us recently.

17           So what I've learned in my 41 years is you  
18 just don't know, and the more love and stimulation these  
19 children are given, the more they can continue  
20 blossoming, and it may not be in the way that you and I  
21 would consider is significant, but it's really  
22 significant to these families.

23           Q     And how about this family? Does this boy  
24 have the kind of love that you think would be ideal?

1           A     Oh, I think this family loves this boy more  
2 than anything on the planet, and I do believe it's that  
3 love that they have that has kept him going because  
4 they -- they see so much -- they see the little boy  
5 that's locked inside his body, that's what they see, and  
6 they just love him to pieces.

7                     MR. DURNEY: Thank you very much,  
8 Ms. McDonald.

9                     THE WITNESS: Thank you.

10                    THE COURT: Cross-examination?

11                    MR. KELLY: Thank you.

12

13                                   CROSS-EXAMINATION

14 BY MR. KELLY:

15           Q     Good afternoon, Ms. McDonald.

16           A     Hello.

17           Q     You mentioned a minute ago that you were able  
18 to see Lyam in February of this year.

19           A     Yes, I did.

20           Q     And do you continue to see him on a monthly  
21 basis?

22           A     Yes.

23           Q     And is that the plan going forward?

24           A     Yes.

1 Q And I think you said, when you see him once a  
2 month, that that is private, but it's technically paid  
3 through Medicaid?

4 A Yes.

5 Q And in physical therapy generally, is one of  
6 the goals to teach family members how to perform  
7 range-of-motion exercises and stretching so that when the  
8 physical therapist isn't there that they can continue  
9 with the physical therapy in the therapist's absence?

10 A Absolutely. That's an important part of the  
11 therapy program.

12 Q Can you explain that to us, please? How does  
13 that work?

14 A Yes. The physical therapy is not effective  
15 at all unless the family members are involved, and so an  
16 important part of every physical therapy session is to  
17 demonstrate the exercises, to have the parent demonstrate  
18 that exercise and to show competence in what they're  
19 doing so they can carry it out on their own.

20 Q And it sounds like you've been very  
21 successful in training the McCrosky family how to care  
22 for Lyam and incorporate physical therapy into his daily  
23 life?

24 A I believe so.

1 Q And it appears, as a result of that, he has  
2 shown some improvement?

3 A Uh-huh.

4 Q And your plan is to continue to assist with  
5 Lyam and assist with the family approximately once a  
6 month?

7 A Yes, if that's what the family would like.

8 The Medicaid that I have -- PAR is what it's  
9 called -- has just expired, and so I'm right at the point  
10 of asking the mother whether she wanted to continue with  
11 that.

12 MR. KELLY: Thanks so much for your time.

13 THE WITNESS: Thank you.

14 MR. KELLY: Nothing further, Your Honor.

15 THE COURT: Any redirect?

16 MR. DURNEY: May it please the Court.

17

18 REDIRECT EXAMINATION

19 BY MR. DURNEY:

20 Q In other words, Ms. McDonald, the Medicaid  
21 has run out, and they would have to come out of pocket in  
22 order to continue with therapy?

23 A No. I would have to establish a new PAR,  
24 prior authorization, so I do a new physical therapy



1 evaluation and submit the request for continued therapy,  
2 then I wait to see if they're going to provide that or  
3 not.

4 Q Typically how long does it take to administer  
5 that type of request?

6 A Takes about three weeks.

7 Q Okay. And you would anticipate continuing to  
8 do that?

9 A Yes, if that's what the mother would like.

10 MR. DURNEY: Thank you.

11 THE WITNESS: Thank you.

12 THE COURT: Recross?

13 MR. KELLY: Nothing further. Thank you.

14 THE COURT: Thank you, ma'am. You can step  
15 down.

16 Ladies and gentlemen of the jury, she's the  
17 last witness we have today. We will reconvene on Monday,  
18 and this is very important and pay attention.

19 The Court has its law and motion calendar on  
20 Monday mornings in respect to this particular matter, so  
21 you will come back here at 1:15, 1:20 on Monday. So  
22 Monday morning we will not -- you will not come at all.  
23 Again, I'll say it three times just so we don't have any  
24 confusion. Everybody nod if you understand. Basically

1 come back Monday about 1:15, 1:20. All right.

2 Ladies and gentlemen, you are admonished  
3 during this recess not to talk or converse among  
4 yourselves or with anyone else on any subject connected  
5 with this trial, read, watch, or listen to any report of  
6 or commentary on the trial by any person connected with  
7 this trial or by any medium or information, including,  
8 without limitation, newspapers, television, and radio, or  
9 form or express any opinion on any subject connected with  
10 the trial until the case is finally submitted to you.  
11 You may not do research about any issues involved in the  
12 case. You may not blog, tweet, or use the internet to  
13 obtain or share information.

14 You're directed again to return Monday and be  
15 here by 1:15.

16 If you would, again, I want to remind you,  
17 it's very important not to talk to anybody else about  
18 this case. Very important.

19 Thank you.

20 (The jury exited the courtroom.)

21 (The following proceedings were held outside  
22 the presence of the jury.)

23 THE COURT: The record will reflect we're  
24 outside the presence of the jury at this time.

1           Counsel, I've done a new draft, and, again,  
2 this is not a final draft, but I've been working on a  
3 draft in respect to the instructions with a new index for  
4 you. I have two copies for each of you, and I've  
5 incorporated -- tried to combine a couple of the ones  
6 that Mr. Durney provided in things that we had.

7           So take a look at it. Again, this is not  
8 final. Take a look, go through them, and most of them --  
9 I have authority for most of them. There's one I  
10 couldn't find the case I took it from, couldn't find it,  
11 I don't know why I couldn't find it, but I've tried.  
12 Anyway, take a look at them, again, this is not final,  
13 we'll talk about it again. I just want you to have a new  
14 complete index.

15           MR. KELLY: Thank you.

16           MR. DURNEY: Thank you, Your Honor.

17           MR. KELLY: Have a nice weekend.

18           (The proceedings were adjourned at 3:30 p.m.)  
19  
20  
21  
22  
23  
24

1 STATE OF NEVADA )  
2 ) ss.  
3 COUNTY OF WASHOE )

4 I, PEGGY B. HOOGS, Certified Court Reporter  
5 in and for the State of Nevada, do hereby certify:

6 That the foregoing proceedings were taken by  
7 me at the time and place therein set forth; that the  
8 proceedings were recorded stenographically by me and  
9 thereafter transcribed via computer under my supervision;  
10 that the foregoing is a full, true and correct  
11 transcription of the proceedings to the best of my  
12 knowledge, skill and ability.

13 I further certify that I am not a relative  
14 nor an employee of any attorney or any of the parties,  
15 nor am I financially or otherwise interested in this  
16 action.

17 I declare under penalty of perjury under the  
18 laws of the State of Nevada that the foregoing statements  
19 are true and correct.

20 Dated this 30th day of April, 2016.

21  
22 /s/ Peggy B. Hoogs

23 Peggy B. Hoogs, CCR #160, RDR

24

1 PEGGY B. HOOGS, CCR #160  
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6 Court Reporter

CERTIFIED  
COPY

7 FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR CARSON CITY

9 HONORABLE JAMES T. RUSSELL, DISTRICT JUDGE

--oOo--

10 TAWNI McCROSKY, individually  
11 and as the natural parent of  
12 LYAM McCROSKY, a minor,

Case No. 13 TRT 00028 1B

Dept. No. I

13 Plaintiff,

14 vs.

15 CARSON TAHOE REGIONAL MEDICAL  
16 CENTER, a Nevada business  
17 entity,

18 Defendant.

19 TRANSCRIPT OF PROCEEDINGS

20 TRIAL - DAY 5

21 MONDAY, MARCH 14, 2016

22 CARSON CITY, NEVADA

23  
24 Reported By: PEGGY B. HOOGS, CCR 160, RDR, CRR

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2 CARSON CITY, NEVADA; MONDAY, MARCH 14, 2016; 1:15 P.M.

3 -oOo-

4  
5 (The following proceedings were held outside  
6 the presence of the jury.)

7 THE COURT: We're back on the record in  
8 respect to Case No. 13 TRT 00028.

9 The Court has reviewed the information in  
10 regards to Dr. Capell in regards to that. Thank you for  
11 getting the objection and the response and everything  
12 else. I did review it. I reviewed it yesterday and I  
13 reviewed everything else this morning in respect to this  
14 particular matter.

15 I can go ahead and make a ruling with respect  
16 to what I'm going to allow or not allow in respect to  
17 that, so I'm going to do that so that they can get it  
18 ready and see where they are in respect to that and go  
19 through specifically each one of the objections in  
20 regards to that.

21 If you're ready, basically one was -- and I'm  
22 going to do it with respect to the page and the lines and  
23 all that.

24 The first one was 7-06 through 07. The Court



1 is going to overrule any objection. It's relevant.

2 11-13 through 12-22 the Court is overruling.

3 It's relevant --

4 15-2 through 06 the Court is going to  
5 overrule. It's relevant.

6 21-12 through 22-01 the Court is going to go  
7 ahead and allow. There is no objection, plus the Court  
8 feels it's appropriate.

9 24-11 through 27-19, it's overruled. It was  
10 disclosed.

11 27-23 through 28-04, it's overruled. I'm  
12 going to allow that. I went through this report in  
13 detail. It was covered.

14 36-04 through 39-01, it's overruled. The  
15 Court is going to allow that.

16 42-20 through 43-24, the Court is going to  
17 overrule and allow that.

18 43 through 46-14, the Court is going to  
19 sustain and not allow that. That deals primarily with  
20 the billings in respect to medical expenses. It was not  
21 disclosed either in the report or the deposition, so as a  
22 result of that, I'm not going to allow that.

23 58-25 through 59-17, it's overruled. I'm  
24 going to allow that.

1           69-20 through 71-10 I'm going to sustain in  
2 part and overrule in part. Basically, I believe in his  
3 deposition taken on February 29th of this year,  
4 Dr. Capell stood by his former testimony that scoliosis  
5 surgery is not needed until the age of 17 or 20. I'm  
6 going to allow it as to that. Anything beyond that I'm  
7 not going to allow.

8           73-13 through 74-04, I'm going to overrule  
9 and allow that.

10           In respect to 74-23 to 75-03, there was no  
11 objection to basically that, so the Court is going to  
12 overrule. You can have it if you want, but I've looked  
13 at it. It wasn't anything major, so I'm just going to  
14 overrule that.

15           75-23 through 76-01, no objection was lodged  
16 or anything, and I'm going to allow that.

17           77-06 through 08 is overruled, and I'm going  
18 to allow that.

19           91-11 through 17 I'm going to sustain.

20           94-06 through 97-11, I'm going to sustain  
21 that. It wasn't disclosed. That's basically  
22 contradicting different opinions that were given. I  
23 don't think that was ever in the original report or the  
24 deposition.

1 156-03 through 157-23 I'm going to sustain.

2 No objection.

3 158-11 through 159-11, sustained. There was  
4 no objection.

5 So that's the Court's ruling with respect to  
6 that. You can fill that in and fix it with respect to  
7 that. I went through it in detail.

8 MR. DURNEY: Your Honor, can I make certain  
9 that we have the Court's ruling correctly noted?

10 Since the vast majority of the objections  
11 were overruled, would you be so kind to say which ones  
12 were sustained?

13 THE COURT: The only ones that were sustained  
14 are the following, Mr. Durney. I overruled all of them  
15 except page 43 through 46-14. That dealt with the  
16 medical bills and that.

17 MR. DURNEY. Yes. Right.

18 THE COURT: The next one that I sustained was  
19 69 -- page 69-20 to 71-10 I sustained in part and  
20 overruled in part. I'm going to allow part of it.  
21 Whatever was discussed in his deposition I'm going to  
22 allow, but I'm not going to allow anything beyond that.

23 And then 91-11 through 17 was sustained;  
24 94-06 through 97-11 was sustained; 156-03 through 157-23,

1       sustained; and 158-11 through 159-11, sustained.

2               You indicated in yours you felt that was  
3       fine, so...

4               MR. DURNEY: Your Honor, can I bring up one  
5       point, and that is having to do with the reasonable and  
6       necessity issue.

7               We have -- I'd like to approach to have a  
8       document marked, if I could, Your Honor --

9               THE COURT: You may.

10              MR. DURNEY: -- plaintiff's next in order.

11              THE CLERK: 62.

12              MR. DURNEY: Your Honor, what this is is a  
13       copy of the Medicaid lien. The Medicaid lien is an  
14       evolution of the May 7, 2015, January 13, 2016, and  
15       March 1, 2016, Medicaid liens.

16              These liens have been produced in discovery  
17       continuously to the defense. They are accompanied by  
18       the -- the history of the care provider, amount billed,  
19       and the amount paid.

20              In any event, we are obligated under federal  
21       law to repay Medicaid in the event we obtain a judgment  
22       in this action, and to not allow that would really  
23       frustrate the search for the truth as well as would  
24       actually perpetrate a fraud on the taxpaying public and

1 the federal government.

2 So I don't know exactly what to do, and I'm  
3 asking for the Court's guidance what we should about  
4 Medicaid in light of the Court's ruling about reasonable  
5 and necessity.

6 Does that mean that the past medical bills do  
7 not come into evidence?

8 THE COURT: I'd just indicate that that  
9 witness is the one who basically hadn't made any report  
10 of it and it wasn't disclosed in his deposition. I  
11 couldn't find it in the deposition. I couldn't find it  
12 anywhere in respect to his report.

13 MR. DURNEY: No, no, you're absolutely right,  
14 it wasn't, because in my almost 40 years of trying cases,  
15 I have never had a defense lawyer not stipulate or  
16 attempt to at least reconcile the admission of the bills,  
17 and that didn't happen here. I understand that. I told  
18 them on September 2nd, and that didn't make any  
19 difference either.

20 It's only one question, but it wasn't in the  
21 report -- I give you that -- but it's one question:  
22 Doctor, were these bills necessary? Was this treatment  
23 necessary? Were these charges reasonable? I mean,  
24 there's hardly any cross-examination about that.

1 But this is -- this is what I'm perplexed  
2 about now. What do we do about this lien?

3 THE COURT: Well, Mr. Kelly, I'm going to  
4 allow you an opportunity with respect to that.

5 Again, I would offer it under NRS 42.021,  
6 which clearly allows, if the defendant elects to  
7 introduce such evidence, which they did, the plaintiff  
8 may introduce evidence of any amount that the plaintiff  
9 has paid or contributed to secure plaintiff's right to  
10 any insurance benefits.

11 It doesn't seem to cover these, and so I  
12 understand there's kind of a Catch-22, if you want to  
13 call it, in respect to the law in regards to that.

14 So, Mr. Kelly, any comment on Exhibit 62?

15 MR. DURNEY: Your Honor, before that, I would  
16 offer it.

17 MR. KELLY: I'd object to it being offered at  
18 this time. It's hearsay.

19 Your Honor, I would suggest that we hold off  
20 on this for now. I know the jury is waiting, but it  
21 seems to me that, in the event that there's a plaintiff's  
22 verdict, it's true, they would be responsible for  
23 repaying this. In the event that there's a defense  
24 verdict, they would not be obligated to pay this back.

1                   So one thought would be to hold off on this  
2 for now, perhaps even until after the verdict is rendered  
3 and we can deal with it at that time. In the meantime,  
4 perhaps Mr. Durney and I can talk about it and see if  
5 there's some stipulation we can reach, but I don't  
6 believe that the Court needs to make a ruling on this  
7 right now.

8                   MR. DURNEY: Your Honor, I respectfully  
9 disagree because the matter has been thrown out there on  
10 numerous times, and so this jury has a right to know what  
11 this Medicaid business is all about.

12                   And Mr. Kelly is absolutely right about one  
13 thing, and that is, we are obligated to repay it, and  
14 that in the event a judgment is not rendered in favor of  
15 the plaintiff, she is not obligated to repay it, and I  
16 think we need to address that in instructions. But  
17 because the issue has been brought forth in the trial, I  
18 think this must be -- I appreciate Mr. Kelly's  
19 willingness to discuss it, and I'll be pleased to do that  
20 with him, and I will.

21                   THE COURT: I'm going to withhold ruling on  
22 it until you two have time to talk about it.

23                   I do think to some extent it goes after any  
24 verdict to some extent to be considered, but I also

1 understand that it has been put out there, there's been  
2 discussion about that, in regards to that, and maybe the  
3 way to do it is by and through a stipulation of the  
4 parties to the fact that the Medicaid bills to date are  
5 such an amount without having the actual document to  
6 indicate what's the Medicaid amount paid, just so that  
7 may take care of it. I'm not ruling. I'm just throwing  
8 that out as a possibility with respect to the matter.

9 So we'll go ahead. 62 is not going to be  
10 admitted at this time. It's open for argument in respect  
11 to that when we get to that.

12 MR. DURNEY: I forget. What exhibit number  
13 was it?

14 THE COURT: 62.

15 MR. DURNEY: 60?

16 THE COURT: 62.

17 MR. DURNEY: It's Exhibit 2?

18 THE COURT: 62.

19 MR. DURNEY: Oh, because our last exhibit  
20 marked was 71.

21 THE CLERK: We're going to just continue down  
22 with the numbers.

23 MR. DURNEY: I see. All right.

24 THE COURT: It was 71, so it should be 72.



1 THE CLERK: Well, we can just -- it's up to  
2 you. I mean, we can -- yeah, we can do plaintiff 72.  
3 THE COURT: Plaintiff 72.  
4 MR. DURNEY: That would be great, Your Honor.  
5 Thank you.  
6 (Exhibit 72 was marked.)  
7 THE COURT: Counsel, are you ready to bring  
8 the jury in?  
9 MR. KELLY: Yes, Your Honor.  
10 MR. DURNEY: Yes, Your Honor.  
11 (The jury entered the courtroom.)  
12 THE COURT: Will counsel stipulate to the  
13 presence of the jury?  
14 MR. DURNEY: Yes, Your Honor.  
15 MR. KELLY: Yes, Your Honor.  
16 THE COURT: Good afternoon. Thank you all  
17 for being promptly back. We had some matters we had to  
18 take care briefly before we brought you in.  
19 At this time, Mr. Durney, are you ready to  
20 call your next witness?  
21 MR. DURNEY: We are, Your Honor. We would  
22 call Carol Hyland, Mr. Bailiff.  
23 THE COURT: Ma'am, please raise your right  
24 hand and be sworn.

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CAROL HYLAND,  
having been first duly sworn,  
was examined and testified as follows:

THE COURT: Please take the witness stand.  
Please state your full name and spell your last name,  
please.

THE WITNESS: It's Carol Hyland, H-y-l-a-n-d.

THE COURT: Your witness, Mr. Durney.

MR. DURNEY: Thank you, Your Honor. May it  
please the Court.

DIRECT EXAMINATION

BY MR. DURNEY:

Q Good afternoon, Ms. Hyland.

A Good afternoon.

Q Ms. Hyland, what is your occupation or  
profession?

A I'm a rehabilitation counselor, a Certified  
Disability Management Specialist, and a Certified Life  
Care Planner.

Q Explain to the ladies and gentlemen of the  
jury what a Certified Life Care Planner is or each of the  
things that you describe yourself to be if there's no

1 overlap?

2 A Basically I've, over the course of my career,  
3 worked with people with disabilities doing really one of  
4 the two things, either helping coordinate services that  
5 they need to be as independent in the community as they  
6 can be, and that includes everything from medical  
7 services to equipment and supplies and attendant care and  
8 housing modifications; and I've also worked with people  
9 with disabilities in return-to-work programs, so folks  
10 that have some limitations, but are not catastrophically  
11 disabled, where they have employment potential, helping  
12 them find work.

13 The certified life care planning is really  
14 taking a look at the same thing you do as a  
15 rehabilitation counselor or as a case manager, but  
16 looking at it not only for now but over the course of  
17 what somebody's anticipated lifetime will be.

18 So obviously the needs for children are  
19 different than the needs for adults, and the needs for an  
20 adult with a disability may not be the same at the time  
21 the disability occurs as it can be several years down the  
22 line because of complications or just the process of  
23 aging.

24 Q How long have you been a Certified Life Care

1 Planner?

2 A Since the very first time it was available,  
3 which was 1996.

4 Q So describe in chronological order the  
5 history of your upbringing, if you will, to becoming a  
6 Certified Life Care Planner.

7 A I finished a master's degree in  
8 rehabilitation counseling that I got from San Francisco  
9 State University, and that was back in 1975. And I went  
10 to work for the California State Department of  
11 Rehabilitation as a rehabilitation counselor, and then I  
12 was promoted to what's called a senior counselor, which  
13 meant that I worked with folks that were the most  
14 catastrophically disabled, a rehabilitation supervisor,  
15 and then for the last ten years that I was with them I  
16 was what they called a district administrator. So I  
17 managed the rehabilitation program for three counties in  
18 the kind of San Francisco/Bay Area: Solano, Alameda, and  
19 Contra Costa Counties.

20 I also, in between there, worked for the  
21 State of California Department of Education at the  
22 California School for the Deaf, which was a residential  
23 educational program for deaf and hearing-impaired  
24 children, and we had what was called a special unit there

1 which was for kids who were not only deaf but had other  
2 neurological disabilities, including cerebral palsy and  
3 things like that, and I worked with them for about two  
4 years as what they call a pupil personnel counselor.

5 I've also taught at San Francisco State  
6 University in the master's degree program in  
7 rehabilitation counseling. I, over the years, have been  
8 what they call a ten-percent faculty person, which really  
9 means you teach one class every other semester to  
10 second-year people in the master's degree program.

11 And I've also worked privately as a  
12 rehabilitation counselor doing private case management  
13 and disability case management, and then also working  
14 with people who were disabled through the -- on-the-job  
15 injuries through the California workers' compensation  
16 system.

17 Q You called yourself a Certified Life Care  
18 Planner. Tell us about the certification.

19 A The certification was first made available in  
20 1996, and you had to complete, I think it was about 160  
21 hours of curriculum that was specific to life care  
22 planning and sit for and pass an examination, and then  
23 you could recertify by -- every five years now, it used  
24 to be every three -- by either reexamining or doing a

1 certain amount of continuing education credits.

2 The value to me of the certification -- and  
3 it's through a group called the International Commission  
4 on Health Care Certification, and they're out of the  
5 Virginia area -- the value to me of the certification is  
6 that it binds you to standards and practices of how you  
7 approach looking at long-term disability-related needs.

8 There is a group called the International  
9 Association of Rehabilitation Professionals. There are  
10 standards and practices and standard methodologies that  
11 are used and ethics that are associated with that as  
12 well.

13 Q Have you been involved in the process of  
14 developing -- first of all, are these standards and  
15 practices always evolving?

16 A You know, I think we are on the third  
17 rendition of it, so I would say yes. I mean, they're --  
18 they're refinements, if you will. Nobody's kind of  
19 throwing everything out and starting again with it, but,  
20 yes, it's -- I think it's now the third rendition.

21 Q And have you personally been involved in this  
22 refinement process to the point of reaching the third  
23 rendition?

24 A I have.

1 Q And what role have you played in refining the  
2 standards?

3 A I was a part of the committee that worked on  
4 the last version of it, so it's not -- nothing's ever  
5 decided by one person. You do a lot of surveying of  
6 folks, a lot of finding out what practices are in place,  
7 a lot of kind of roundtable work about what you think the  
8 best practices are, and then it all comes together into a  
9 document that's reviewed and then voted on by the  
10 membership of the organization.

11 Q Have you, at my request, evaluated the needs  
12 of Lyam McCrosky by virtue of his disabilities?

13 A Yes.

14 Q I assume you've charged me for that?

15 A I have.

16 Q I assume that you charged me at a standard  
17 rate for which you charge others who request the same or  
18 similar service?

19 A True.

20 Q And what do you charge?

21 A Two fifty an hour.

22 Q And that's been the case since you were first  
23 given the assignment, I assume?

24 A Yes, it is.

1           Q     And when did you first get that assignment  
2     from me?

3           A     Oh, back in 2014.

4           Q     And since getting that assignment, what did  
5     you request and what did you obtain to review, to enable  
6     you to render opinions as to Lyam McCrosky's lifetime  
7     needs as a result of his disabilities?

8           A     I've reviewed a number of medical records  
9     from Associated Anesthesiologists, Carson Medical Group,  
10    Carson Medical Group Pediatrics, the regional health care  
11    for Carson Tahoe, the pathology, Carson Valley Medical  
12    Center records, Care Flight, Dr. Eckert's records, ear,  
13    nose and throat records, East Fourth Paramedic, Nevada  
14    Early Intervention Services, Renown Regional Medical  
15    Center, Dr. Rodriguez's records, Ronald McDonald House  
16    records, Sierra Eye Associates, records for Walmart,  
17    which are mostly pharmaceutical records, a report from  
18    Dr. Joseph Capell, a report from a Dr. Harriet Cokely and  
19    from White & Sims, and then a report from Dr. Shavelle.

20          Q     Can I summarize by saying you've looked at  
21    all the medical records?

22          A     You know, I don't know if I truly have all,  
23    but I have an awful lot. I mean, I suspect I don't have  
24    what's from 2016.



1 Q Can we reasonably say that you have  
2 endeavored to look at them all except, perhaps, the most  
3 recent?

4 A Yes.

5 Q And as a result of your work, did you prepare  
6 a summary of a report?

7 A I did.

8 MR. DURNEY: Your Honor, may I approach?

9 THE COURT: You may.

10 We have marked as Exhibit 62, Your Honor, a  
11 rather voluminous group of records generated by  
12 Ms. Hyland. I simply want to take out the last seven  
13 pages of that exhibit and call those to the witness's  
14 attention, if we could utilize the Court's copy.

15 May I approach the clerk, Your Honor?

16 THE COURT: You may.

17 MR. McBRIDE: Counsel, are you referring to  
18 the summary?

19 MR. DURNEY: I am.

20 BY MR. DURNEY:

21 Q Does this seven-page summary, Ms. Hyland,  
22 summarize the work you did in evaluating the lifetime  
23 needs of Lyam as a result of his disabilities?

24 A It does.

1 MR. DURNEY: Your Honor, I wish to go through  
2 this with Ms. Hyland as she testifies. It will certainly  
3 assist the jury in understanding her complex testimony,  
4 and I would proffer it.

5 THE COURT: Any objection?

6 MR. McBRIDE: No, Your Honor.

7 THE COURT: It will be admitted.

8 MR. DURNEY: All right.

9 THE COURT: Just so we understand and are  
10 clear, it's only the summary that is --

11 MR. DURNEY: That's correct, Your Honor.

12 THE COURT: -- coming in. So any pages  
13 before that summary have not been admitted.

14 THE CLERK: I'm going to mark it separately.

15 (Exhibit 62A was marked and admitted.)

16 MR. DURNEY: I'd like to put up the first  
17 page, Mr. Ivey, of our exhibit.

18 And for identification, Your Honor, what  
19 number have we attached to this exhibit?

20 THE CLERK: It will be 62A.

21 MR. DURNEY: 62A. Thank you.

22 All right. I don't know if you can make it  
23 any bigger, Mr. Ivey. It's difficult to see even by me  
24 from here.

1 BY MR. DURNEY:

2 Q Let's talk about the first section -- first  
3 of all, your summary talks about qualifications,  
4 introduction, and demographics.

5 Are you referring to your qualifications? We  
6 talked about those. And in your introductory, was that  
7 essentially a summary of your review of the medical  
8 records?

9 A It is.

10 Q And then demographics. Explain what  
11 demographics were pertinent to you in performing your  
12 work.

13 A Really, just kind of a summary of Lyam's  
14 condition as it is now, and then also comments from both  
15 Dr. Joseph Capell, who is a physical medicine and  
16 rehabilitation physician, on whom I relied to talk about  
17 what the -- from his medical standpoint, what the future  
18 needs would be, and also from Dr. Rodriguez, who is  
19 Lyam's treating neurologist. So it would include all of  
20 that medical record.

21 Q So tell us what the foundation for your  
22 opinions are with regard to Lyam's lifetime  
23 disability-related needs.

24 A So everything that is in this plan is an

1 anticipated need either by Dr. Capell, who is a pediatric  
2 physical medicine and rehabilitation specialist, or by  
3 Dr. Rodriguez, who is the -- is a pediatric neurologist  
4 and is Lyam's treating neurologist.

5 And you'll see as we go through here,  
6 sometimes there's a little bit of a difference of opinion  
7 between Dr. Capell and Dr. Rodriguez about what would be  
8 needed going forward, so it will say "or" in there  
9 depending on whose opinion it is.

10 Q Is that unusual?

11 A No, not at all.

12 Q Elaborate, please. In other words, is it  
13 unusual for two physicians to perhaps have a bit of a  
14 different opinion on what long-term medical needs might  
15 be?

16 A No, it's not. I mean, they speak from a  
17 slightly different perspective. I mean, neurology and  
18 physical medicine and rehab are not one and the same, and  
19 so -- and they're really not that different from each  
20 other in their opinion. Sometimes one is a little more  
21 in terms of a frequency of a visit and sometimes one is a  
22 little less, and then sometimes it's the reverse of that.

23 Q Let's talk about the physical medicine and  
24 rehabilitation specialist category that you've identified

1 as No. 5 on the summary here at the top.

2 What does the \$1,129.59 figure represent?

3 A So this is based on Dr. Capell's view that  
4 there should be four visits a year with a physical  
5 medicine and rehabilitation specialist, really, a  
6 physician who would help monitor Lyam's therapies and  
7 other things like that.

8 So the cost here is based on a survey of  
9 three physical medicine and rehab specialists in Reno at  
10 an average follow-up visit cost of \$223.17, that times  
11 basically four visits in a year, and then adding mileage  
12 at the Internal Revenue Service business rate, which at  
13 the time I did the report was 57-and-a-half cents a mile  
14 for the 103 miles round trip to get there.

15 Q All right. Let's break that down.

16 First, you indicated that Lyam will require  
17 four visits a year to a physical medicine and  
18 rehabilitation specialist.

19 A Correct.

20 Q And that information comes from where?

21 A That is from Dr. Capell.

22 Q That comes from Dr. Capell.

23 So now you got the information from  
24 Dr. Capell. How do you determine, given the location of

1 Tawni McCrosky, i.e., where she lives, what the costs of  
2 those four visits are going to be? What's your  
3 methodology?

4 A All of Lyam's care in terms of physicians or  
5 at least almost all of it has been in Reno as being kind  
6 of the closest larger medical center. So I look at  
7 physicians in Reno.

8 Now, what I was looking for here and could  
9 not find was a pediatric physical medicine and rehab  
10 doctor. I cannot find one in the Reno area. The closest  
11 I could find is at UC Davis and Shriners Hospital in  
12 Sacramento, which is a real trip.

13 So I averaged the costs of three adult  
14 physical medicine and rehab providers, took a midpoint of  
15 their average rate, and then added in the mileage. And  
16 so, for example, there is a Dr. Mars, physical medicine  
17 and rehab, in Reno; a Dr. Arraiz; and then Dr. Burns.

18 Of the amount there, the \$1,129.58, \$892.68  
19 is the cost of the actual visit to the doctor, and the  
20 other, the \$236.90 that adds to that, is that cost of  
21 mileage to go back and forth to Reno.

22 Now, the other option I had would be to look  
23 at a physical medicine and rehab physician at UC Davis or  
24 at Shriners. The cost there was \$441.50 a visit, and

1 your mileage, of course, is greater because it's further  
2 to go, and that would have been \$2,356 a year, so I  
3 elected not to do that, but these are adult providers  
4 that are listed here, not pediatric providers.

5 Q So to break it down, you analyzed the cost of  
6 three physical medicine and rehabilitation physicians in  
7 the Reno area and determined what the cost of the visit  
8 would be here in the Reno area?

9 A Yes.

10 Q You gave the defense the benefit of the doubt  
11 with regard to the fact the nearest pediatric physical  
12 medicine and rehabilitation specialist is either at  
13 Shriners in Sacramento or UC Davis?

14 A Yeah. I could not find anybody closer than  
15 that.

16 Q So tell us -- because as we go through these  
17 doctor visits, the methodology would apparently be the  
18 same. You awarded mileage or you believe that mileage  
19 should be considered by the jury, and tell us about that.

20 A Yeah. You know, it's part of the cost of  
21 obtaining the medical care is the cost of getting there,  
22 and often we just kind of assume that that's not a big  
23 deal and kind of incorporate it into our activities, but  
24 it adds up over time, and so I included it because I

1 think it's a cost of actually obtaining the medical care.

2 Q And so you simply multiplied four visits,  
3 added mileage for four times in and out?

4 A Yes.

5 Q And Tawni lives where?

6 A In Gardnerville.

7 Q And the round-trip mileage between Reno and  
8 Gardnerville is what?

9 A One hundred three miles.

10 Q And the rate you charge per mile is what?

11 A It was 57-and-a-half cents per mile, which is  
12 the Internal Revenue Service rate.

13 Q 57 and a half cents a mile, is that fair in  
14 your opinion?

15 A Yes.

16 Q Why?

17 A Well, usually the federal government's view  
18 of what is legitimate to look at in terms of a business  
19 expense for that mileage, I think, is a fair standard to  
20 use.

21 Q All right. Fine. Let's go on to the second  
22 category, No. 6. It's entitled "Gastroenterologist."

23 Do you see that?

24 A Yes.



1 Q Now, tell us -- here's an example of  
2 apparently information received from both Dr. Capell and  
3 Dr. Rodriguez?

4 A Yes.

5 Q And apparently they differ?

6 A Yes.

7 Q What was Dr. Rodriguez's thoughts as to  
8 annual --

9 And by the way, these are annual figures, all  
10 annual figures?

11 A Yes.

12 Q What each year will cost. All right.

13 What was the difference between Dr. Capell  
14 and Dr. Rodriguez with regard to gastroenterology  
15 followup?

16 A Dr. Capell thought two visits a year and  
17 Dr. Rodriguez thought four, so that -- they're  
18 essentially double. Dr. Rodriguez's view was double that  
19 of Dr. Capell's.

20 Q And in each case you added mileage like you  
21 did in the physical medicine and rehabilitation  
22 specialist category?

23 A Correct. And for the rates here, if Lyam had  
24 a treater in place, I used the rates of that treater.

1 And he does have a treating gastroenterologist, who is  
2 Dr. Hulka, I believe is how she pronounces it, with  
3 Western Surgical Group, and so these are her rates at the  
4 follow-up visit rate.

5 Q Let's go to neurologists.

6 Again, where did you get the information  
7 relating to the neurology needs of Lyam?

8 A This is exclusively from Dr. Rodriguez, who  
9 said that there would be six visits a year, and these  
10 are -- the cost here is based on his follow-up visit  
11 rate, which was \$80 per visit.

12 Q So these figures came directly from  
13 Dr. Rodriguez, the neurologist, that Lyam sees?

14 A Yes.

15 Q His treater?

16 A Correct.

17 Q And then the next is -- the next category?

18 A This is the endocrinologist.

19 Q What's an endocrinologist, first of all?

20 A It's an individual who regulates the hormonal  
21 levels and assists with that.

22 Q Again, this is something that Dr. Capell  
23 indicated to you was needed?

24 A Yes.

1 Q By the way, you indicated, in preparing for  
2 the work that you've done, that you talked to Dr. Capell,  
3 there was communication with Dr. Rodriguez, etcetera.

4 Did you ever talk to Tawni?

5 A Oh, yes.

6 Q Tell us just briefly about that.

7 A I met her and Lyam back in May of 2015, I  
8 think it was.

9 Q And how much time did you spend with both of  
10 them?

11 A A couple of hours.

12 Q What kind of information were you eliciting?

13 A I wanted to know how she was managing Lyam's  
14 care, who the doctors were that were on board, who her  
15 medical team was, whether there were therapies in place  
16 and who was providing them.

17 Q I interrupted. Let's go on. You were  
18 telling us about the endocrinologist.

19 On recommendation of Dr. Capell, what will  
20 his annual cost of care be?

21 A This is based on anticipation of one visit  
22 per year, and, again, it's with Lyam's treater,  
23 Dr. Eckert, and the cost there is \$100 a visit, so,  
24 again, with our mileage, it would be \$159.23.

1           Q     Next category, orthopedist. Most of us know  
2     what an orthopedist is, but, nevertheless, let's be  
3     certain.

4           A     Well, basically a bone doctor is what an  
5     orthopedist is.

6           Q     Did Dr. Capell have some views about that?

7           A     He did. Two visits a year with an  
8     orthopedist. And there was not a treating orthopedist in  
9     place, and so I, again, averaged the cost of three. The  
10    midpoint of the average follow-up cost was \$140.67, and  
11    so, again, with mileage, it puts us at \$399.79 a year.

12          Q     Maybe you should describe for us the process  
13    of actually getting these figures from the doctors whose  
14    offices were called.

15          A     So the offices were Tahoe Fracture Orthopedic  
16    Medical Clinic, Orthopedic Surgical Associates, and Great  
17    Basin Orthopaedics were the three that were surveyed,  
18    and, again, it's the midpoint of their follow-up visit  
19    rates.

20                     When you go to -- for any medical  
21    appointment, there's actually 15 visit -- 15 codes, what  
22    they call CPT codes, Current Procedural Terminology  
23    codes, that govern what the doctor does with you, and  
24    they're specific as to the amount of time spent with you

1 and the amount of complexity of what's being done. So  
2 there's five for a consultation, five for initial --  
3 first visits with the doctor, and so five for follow-up.

4 So in all of these cases, what we looked for  
5 was kind of the midpoint of that follow-up visit range.  
6 Not the 5-minute visit and not the 40-minute visit, but  
7 kind of the 15- to 20-minute visit in the middle, and  
8 that's the figure that we used.

9 Q All right. Very well.

10 And you surveyed these physicians' offices.  
11 Briefly tell us what you mean by that.

12 A These are actual calls to the office,  
13 speaking to their office personnel -- obviously not the  
14 doctors themselves -- for that and getting what their  
15 costs are.

16 There are -- these codes, these Current  
17 Procedural Terminology codes are very helpful, and you  
18 don't necessarily have to survey a doctor's office to get  
19 those costs, but the problem is that those same 15 codes  
20 are used by every doctor no matter what kind of doctor  
21 they are.

22 So if it's a neurosurgeon or a family  
23 practice doctor, it's the same codes that govern, and  
24 obviously a neurosurgeon usually charges more than your

1 family practice doctor, so if you want to get specific as  
2 to the cost of that particular specialist, then you kind  
3 of have to do the labor of calling and asking people who  
4 are in that specialty.

5 Q So you said something about -- I've lost the  
6 names, but the acronym is "CPT"?

7 A Yes. Current Procedural Terminology.

8 Q So those codes were factored into your  
9 thinking?

10 A Correct.

11 Q As well as information obtained directly from  
12 the physician's office?

13 A Correct.

14 Q And the annual cost of the orthopedist was  
15 \$399.79.

16 What about ENT, ear, nose, and throat?

17 A This is based, again, on both Dr. Capell and  
18 Dr. Rodriguez's view. Dr. Capell thought there would be  
19 a need for two visits a year, Dr. Rodriguez thought there  
20 would be four, and they're the rates of Dr. Garnet, who  
21 is Lyam's treating ear, nose, and throat physician.

22 Q And the cost of travel to and from the  
23 appointment was factored in?

24 A That's correct.

1 Q And can we say the cost of travel to and from  
2 are factored in with regard to all of these physicians?

3 A Yes.

4 Q The defense has hired your counterpart, and  
5 her name is White, Ms. White. She believes that these  
6 visits could be bundled, if I'm using a proper word, that  
7 Tawni could make several of these appointments at the  
8 same time and thus reduce the trips.

9 Do you agree with that?

10 A You know, I mean, certainly that would be  
11 desirable, to be able to do that. I think sometimes it's  
12 very difficult to get appointments with physicians, and  
13 if you're trying to get two on the same day, I mean, good  
14 luck. If you can do it, great, and you ought to do it  
15 that way to save the trips, but I wouldn't count on it,  
16 basically.

17 Q All right. Fine.

18 Let's go on to pulmonology, lungs.

19 Lifetime needs?

20 A Yes. And this is based on Dr. Capell, his  
21 opinion of four visits a year, and also the midpoint of  
22 three different providers. The midpoint rate was \$193.25  
23 and, again, mileage to get there.

24 Q Let me go back.

1                   You have differences of opinion as to the  
2                   annual needs for an ear, nose, and throat specialist from  
3                   Dr. Capell and from Dr. Rodriguez.

4                   What figures should we pick? Can we average  
5                   them? If so, is that good methodology? What do you  
6                   think?

7                   A     You know, it's obviously a range of opinion,  
8                   and I would personally suggest the midpoint of that  
9                   range.

10                  Q     All right. Let's go on to an  
11                  ophthalmologist.

12                  A     This is based on Dr. Capell's view that there  
13                  would be one visit per year, and the treating  
14                  ophthalmologist is Dr. Johnson at Sierra Eye Associates,  
15                  and these are his rates for that visit and, again, the  
16                  mileage to get there.

17                  Q     Developmental pediatrician?

18                  A     This is, again, based on Dr. Capell's view  
19                  that there should be one visit a year. I couldn't find a  
20                  developmental pediatrician in Reno or anyplace close.  
21                  The only one I could find was, again, through the  
22                  University of California at Davis, so not even --  
23                  obviously with a developmental pediatrician, you're not  
24                  going to have an adult version of that, so that was the



1 closest, and there's no substitute in the area.

2 So for the one visit at a rate of 450 for the  
3 visit and, again, the mileage to get there is the \$597.20  
4 figure annually.

5 Q So the only option was to go to UC Davis  
6 or -- did you say Shriners or just UC Davis?

7 A This is UC Davis. They share staff often  
8 between UC Davis and Shriners.

9 Q Aren't the two facilities across the street  
10 from each other?

11 A They are.

12 Q In Sacramento?

13 A Yes.

14 Q On Stockton Boulevard?

15 A Yes.

16 Q All right. Let's go on, then, just to the  
17 pediatrician.

18 What's the difference, by the way, between a  
19 pediatrician and a developmental pediatrician?

20 A A developmental pediatrician specializes in  
21 kids with special developmental needs and challenges is  
22 essentially what it is. So it's somebody who is familiar  
23 working with children but is most familiar working with  
24 children with developmental delays. So a regular

1        pediatrician just may not have that same scope of  
2        experience.

3                Q        All right. So Dr. Capell and Dr. Rodriguez,  
4        differences of opinion again?

5                A        Yes. Dr. Capell thought four additional  
6        visits a year, and Dr. Rodriguez thought six.

7                Q        And then the costs, annual costs, listed for  
8        each are in the right-hand column?

9                A        Correct.

10              Q        Fine.

11                      And then the next category, dietitian?

12              A        This is based, again, on Dr. Capell thinking  
13        twice a year and Dr. Rodriguez thinking monthly visits,  
14        so 12 times a year until the age of 12, and then four  
15        visits a year thereafter.

16              Q        So the actual treating physician,  
17        Dr. Rodriguez, who has seen the boy since shortly after  
18        birth, is of the opinion that Lyam will require monthly  
19        visits for 12 years and then four visits a year  
20        thereafter --

21              A        That's correct.

22              Q        -- if I understood that correctly?

23              A        You did.

24              Q        So you calculated in the mileage for the

1 opinions of both Capell and Rodriguez, and those are  
2 included in those costs that we see highlighted in  
3 yellow?

4 A Correct.

5 Q And then the next category is physical and  
6 occupational therapy.

7 Again, relying on Dr. Capell and  
8 Dr. Rodriguez?

9 A Correct. And here Dr. Capell thought that  
10 Lyam would need both physical and occupational therapy  
11 once a week for his lifetime, and then Dr. Rodriguez  
12 thought that the physical therapy would be once a week  
13 for lifetime, but the occupational therapy would be once  
14 every two weeks.

15 So that's the difference in the opinion and  
16 reflected in the difference of the cost, and, again, this  
17 is an average of three providers, including a group  
18 called Children in Motion, and it's \$169.33 per physical  
19 therapy session and \$107.67 for the occupational therapy.

20 Q And then speech therapy, the next category,  
21 paragraph 12, section M?

22 A This, again, is based on Dr. Capell and  
23 Dr. Rodriguez. Dr. Capell thought speech therapy once a  
24 week for lifetime; Dr. Rodriguez thought speech therapy

1 once every two weeks for two years and then once a month  
2 for lifetime. And also based on the average fee for  
3 providers.

4 Q And then the vision therapy?

5 A This is based on Dr. Capell's view that Lyam  
6 would need vision therapy twice a month for lifetime, and  
7 there would also be a one-time-only cost, which is an  
8 equipment charge that goes with it, but those are the  
9 rates there.

10 Q What was the one-time cost? I'm sorry.

11 A \$90, and it's for some equipment.

12 Q I see. All right. Let's move on, then, to  
13 acute hospitalizations.

14 A So this is based on, again, both Dr. Capell  
15 and Dr. Rodriguez. Dr. Capell thought there would be six  
16 to ten days a year of acute hospitalization with three of  
17 those days being in an intensive care unit.  
18 Dr. Rodriguez thought there would be ten days a year, so  
19 not -- the upper end of Dr. Capell's range for the next  
20 eight years, and then five days a year after that over  
21 his lifetime.

22 Q When we say or describe care as "acute" in  
23 this context, what does that mean?

24 A It means he's been admitted to a hospital,

1 basically.

2 Q Acutely as opposed to a plan?

3 A Well, meaning he's being served inpatient in  
4 an acute care setting.

5 Q I mean, I guess it might not be worth  
6 spending much time on, but sometimes you will plan to go  
7 to the hospital because of a planned procedure, and then  
8 sometimes you have to go because it's an emergency.

9 When you say "acute," does that connote an  
10 emergency?

11 A Yeah. I mean, either would be an acute care  
12 setting, but the number of days here are in addition to  
13 the days he would need to be hospitalized for the special  
14 procedures that either Dr. Rodriguez or Dr. Capell think  
15 will be needed, so it doesn't include the planned  
16 surgical issues, if that helps.

17 Q We'll get to that, then. All right.

18 And so moving on from acute hospitalizations,  
19 the next category that you have is -- yes, up at the  
20 top -- emergency room visits.

21 A This is based on Dr. Capell's view that there  
22 would be three emergency room visits a year via ambulance  
23 transport and Dr. Rodriguez's view that there would be  
24 four emergency room visits, but he didn't comment one way

1 or the other whether he thought it would have to be by  
2 ambulance, so when I costed it, I left that out.

3 And the figures here as well as the figures  
4 under the acute hospitalization that we were just talking  
5 about came from a directory which is called the American  
6 Hospital Directory, and this is a databank where any  
7 hospital that's a recipient of any federal dollars,  
8 meaning they either have a federal grant or they may work  
9 with Medicare patients, has to report to the federal  
10 government the average charges for anything they do at  
11 least ten times in a year.

12 So if they do ten X-rays in a year or they  
13 have ten ER visits or there's ten admissions to their  
14 medical units, they have to tell what the average charges  
15 are, and these figures came from there.

16 So just, for example, the closest ER is the  
17 Carson Tahoe Regional Medical Center, and the average  
18 visit there is \$526, in case anybody needed to know that,  
19 so it's looking at that plus the cost of the ambulance to  
20 get there.

21 Q And then laboratory and diagnostic testing is  
22 the next category in your plan. Tell us about that.

23 A This is based on Dr. Capell's view about what  
24 will be needed, and it includes everything from chest

1 X-rays to complete blood counts and chemistry panels,  
2 urinalysis, cultures and sensitivities, X-rays of the  
3 hip, CTs of the hip, CAT scans of the hip, an MRI of the  
4 brain, a scoliosis surgery, which is a series of X-rays  
5 of the spine, and bone density testing.

6 Some of it is stuff that has to be repeated a  
7 number of times a year, like the chest X-ray he's  
8 recommending four times a year; sputum cultures, twice a  
9 year; urine cultures, twice a year; long-bone X-rays,  
10 every other year. So it's looking at the charges and  
11 then sort of analyzing them. So that one figure of  
12 \$1,091.08 is kind of looking at those on an annual basis.

13 The other are things that Dr. Capell thought  
14 would be needed so many times in Lyam's lifetime: Six  
15 X-rays of the hips; three CAT scans of the hips; three of  
16 the bone density tests. So it's a total of about 16  
17 different diagnostic imaging studies that go into that  
18 \$11,065 figure there.

19 Q And those would be one-time costs only,  
20 according to Dr. Capell?

21 A Yeah. Nonannual reoccurring costs,  
22 basically.

23 Q And then the next category, special  
24 procedures, what do you take into consideration under the

1 category of special procedures?

2 A There are a number of different procedures  
3 here, and the reason that there is a difference in the  
4 range is that between Dr. Capell and Dr. Rodriguez there  
5 was a little bit of variance, again, in how many of some  
6 of these that Lyam would need.

7 So part of what goes into that is a hip  
8 adduction release. Dr. Capell and Dr. Rodriguez thought  
9 that these would be required and could be done  
10 bilaterally with his hips at the same time and that they  
11 would be required -- what's the language on here -- I  
12 think they both agreed that it would be -- I'm sorry,  
13 yeah -- so I think just once on that and then a couple of  
14 months of casting afterwards..

15 Q In other words, they both agree on one hip  
16 adduction release?

17 A Right.

18 And then Dr. Capell thought there were a need  
19 for Botox injections, 16 to 20 in Lyam's lifetime, and  
20 the purpose of the Botox is to try to reduce the  
21 spasticity in the various limbs, and so you usually  
22 repeat it once every three months in order to keep the  
23 spasticity down.

24 And then the next item --



1 Q Before we shoot on, though, you explained  
2 Botox injections to reduce spasticity. We talked a  
3 little bit about hip adduction and that one-time surgical  
4 need.

5 Briefly, what is that?

6 A So this is a procedure -- because of the  
7 spasticity, the hips will tend to either pop out of place  
8 or be so tight that he becomes difficult to dress, so  
9 it's an attempt to address those types of issues that  
10 develop because of his neurological deficit.

11 Q The femur will actually dislocate from the  
12 hip socket?

13 A Correct.

14 Q All right. Botox you just talked about, and  
15 the Botox injections?

16 A Yes. So there would be -- what goes into  
17 that total are basically 16 to 20 or a midpoint of 18 of  
18 those in a lifetime, and they cost \$4,339.86 per. So of  
19 the figures you see up there, 78 -- a little over 78,000  
20 is the cost of doing 18 of those Botox injections.

21 Q What other special procedures are included in  
22 this category?

23 A Tendon Achilles lengthening. And Dr. Capell  
24 thought there would be two bilaterally in a lifetime,

1 Dr. Rodriguez thought there would be one, and the cost of  
2 that procedure is \$13,689.60.

3 But the majority of the cost in any of these,  
4 is always the facility fee, the operating room in which  
5 you're doing it, and these are all done on an outpatient  
6 basis. You don't have to generally admit somebody for  
7 these.

8 But nevertheless -- for example, there were  
9 three different costs -- one for a little over 9,000, one  
10 for a little over 11-, and one for about 20- -- and the  
11 facility fees were \$4,738 on one and \$3,082 on another,  
12 and 14,000 on another. So the majority of the cost goes  
13 to the facility in which the procedure is being done.

14 Q All right. Any other special procedure  
15 contemplated in these two figures from Dr. Capell and  
16 Dr. Rodriguez?

17 A Yes. Dr. Capell also thought there would be  
18 a need for a gastrostomy revision.

19 Q What's the gastrostomy? We've discussed it a  
20 bit, but elaborate.

21 A It's the feeding tube, it's where the feeding  
22 tube goes in, and sometimes you have to go in and replace  
23 them, and so Dr. Capell thinks that's likely three times  
24 over a lifetime. So the cost of that is -- and, again,

1 this is -- the cost was \$43,395 each, so basically a  
2 little over 86,000, almost 87,000 for two of them.

3 Q Okay. And then what other special  
4 procedures?

5 A And then the last one is a scoliosis surgery,  
6 and that's to go in and correct a curvature in the spine,  
7 and that makes up probably the most expensive of the  
8 different procedures at \$170,949.

9 Q All right. There was another special  
10 procedure I thought we had, and that had to do with the  
11 fundoplication?

12 A That's part of the gastrostomy revision.

13 Q I see. Fundoplication is.

14 You talked about the gastrostomy tube, the  
15 tube that goes directly from the outside directly into  
16 the stomach. What is the fundoplication?

17 A The fundoplication is where they take the  
18 stomach and they wrap it around the esophagus, and the  
19 reason that they do that is to stop you from throwing up,  
20 basically. So for kids who have lots of problems with  
21 vomiting, it helps to control that, and, of course, that  
22 helps the vomiting not to get into your lungs so that you  
23 don't get pneumonia and that type of thing. But what  
24 happens is they loosen over time, so you have to go back

1 and tighten them up is eventually what they do.

2 Q So it's the connection between the top of the  
3 stomach and the esophagus?

4 A Correct.

5 Q And then the next category? Did we cover all  
6 the specialty procedures that you've included in  
7 paragraph 16 of your summary?

8 A Yes.

9 Q So the next is the intrathecal pump. What's  
10 an intrathecal pump?

11 A This is based on Dr. Capell's recommendation  
12 for what's called an intrathecal Baclofen pump, and  
13 Baclofen is a medication that to a certain degree you can  
14 give orally or you can install a pump that allows you to  
15 put a catheter into the spinal canal and you can do a  
16 slow drip of this medication. It's to help reduce  
17 spasticity. So it's used with kids with cerebral palsy  
18 to help reduce their spasticity in hopes of giving them a  
19 little bit more movement.

20 Q And explain your calculations in connection  
21 with the intrathecal pump.

22 A So Dr. Capell anticipates that this would not  
23 be done until Lyam was six. You have to be a certain  
24 weight in order to have this done because of the device

1 that they implant.

2 So what they do initially is a trial, and if  
3 the person doesn't get good benefit from the trial for  
4 whatever reason, then they obviously stop with that and  
5 don't go any further, but if they get the benefit that  
6 they need from the trial, then they'll go ahead and do  
7 the installation.

8 Now, for Baclofen, it's most typical that the  
9 trial is done inpatient because if somebody gets too much  
10 Baclofen, they have no muscle control because it loosens  
11 you up too much. You're looking for that sweet spot  
12 right where it's the right amount to reduce the  
13 spasticity but not so much that you're flaccid, and they  
14 have to play with that a little bit to have it work out  
15 right.

16 So the \$149,000 figure there covers that  
17 trial, it covers the initial installation of the pump,  
18 and then what happens is that that's all good and stays  
19 in place for someplace between four and seven years, and  
20 then what happens is that the pump itself has to be  
21 replaced, and it's subcutaneous, so they go in and put it  
22 under the skin again.

23 So the first set of figures, the  
24 one-time-only costs, are the cost of the trial, the cost

1 of the initial implantation, and the cost of replacing  
2 those catheters, you know, once to twice during the time  
3 that somebody is using the pump.

4 The cost from age 5 to 8 to 10-1/2 to 13-1/2,  
5 that \$12,000 a year, is the cost of refilling that pump  
6 and going to the physician for those refills and doing  
7 all that.

8 Then starting basically at age 10-1/2 or  
9 13-1/2, depending on where we are in the pump  
10 replacement, that \$19,000 figure reflects the cost of  
11 refilling the pump, because you still have to do that,  
12 and then it annualizes the cost, that extra -- basically  
13 a little shy of \$7,000 there is how much money you have  
14 to save every year to replace that pump again in five and  
15 a half years. It's a little complicated, but that's what  
16 goes into it.

17 Q Most importantly, we're not duplicating  
18 numbers in the three numbers we have under the  
19 intrathecal pump category?

20 A That's correct.

21 Q And then we go into another category of  
22 requirements called medical supplies.

23 What are medical supplies in general?

24 A This is looking at medications and bowel and

1 bladder supplies and feeding supplies, so it's all kind  
2 of the disposable stuff, and respiratory supplies as  
3 well.

4 Q Let's start with medication.

5 A This is looking at the actual medications  
6 that Lyam was taking and continuing them at kind of the  
7 same dosage and usage, and it's the cost of four  
8 different medications, and it was \$2,529.13 per year,  
9 using like Walmart and Walgreen's for the sources for  
10 that.

11 Q These are the medications that he's on now?

12 A Or at least was at the time the report was  
13 done.

14 Q And the assumption is that he'll continue on  
15 those medications throughout his life?

16 A Or something substantially similar,  
17 basically.

18 Q Fair enough.

19 Bladder?

20 A This is looking at diapers and at barrier  
21 cream and gloves, and, unfortunately, the bigger you get,  
22 the more expensive the diapers get, and it's \$2,797.98  
23 annually.

24 Q That sounds like more than just -- so bowel

1 and bladder supplies include what in addition to diapers?

2 A The gloves and the barrier cream and Chux,  
3 which is something you put, like, on a bed to protect  
4 from leakage and things like that.

5 Q Okay. Let's go to the next section.

6 A So this is a gastrostomy --

7 Q Yes, gastrostomy supplies.

8 A Correct. And this is basically his feeding.  
9 So what this figure represents, the \$3,891 figure, is the  
10 cost of the formula, the cost of the delivery, if you  
11 will, so the feeding bags and the tubing and a pump to do  
12 slow drips of the formula, syringes to administer the  
13 medications and all of that.

14 And then what I did was to subtract out from  
15 all that amount what the U.S. Department of Agriculture  
16 will tell you is the kind of average cost of what's  
17 called a moderate diet, so not a high-priced diet, not a  
18 low-priced diet, but a moderate-priced diet. So that's  
19 subtracted out, a little shy of \$3,000 a year, but the  
20 balance that's here, the 3,891, would be the additional  
21 cost of the supplies.

22 Q So in other words, you recognize that an  
23 able-bodied child will require so much to feed?

24 A Correct.



1 Q And you backed those out of this figure?

2 A Correct.

3 Q Next, respiratory equipment and supplies?

4 A This is looking at things like the suction  
5 machines, nebulizers, and kind of the tubing and stuff  
6 like that that goes with it, and it's the \$1,131.97  
7 figure.

8 Q All right. Very well.

9 And then the next category, medical  
10 equipment, moving on?

11 A These are mostly based on Dr. Capell's  
12 recommendations.

13 A kid cart, which is kind of an early version  
14 of a wheelchair, to help transport him because, of  
15 course, as he gets bigger and heavier, he's harder for  
16 people to carry. That's a one-time-only -- not an annual  
17 cost but a one-time-only cost of \$1,785.

18 And then starting at age 5 Dr. Capell is  
19 suggesting a manual wheelchair with a seating system for  
20 him and what's called a tilt-in-space feature, and the  
21 cost of buying that is the \$2,949 figure. During -- he's  
22 anticipating about a three-year useful life of this,  
23 according to Dr. Capell, so basically you have to save  
24 \$983 every year to replace it, and your maintenance will

1 be about 10 percent of the cost of the equipment or \$294  
2 per year.

3 Q Let me stop you for a moment.

4 We talked earlier about your methodology in  
5 determining what doctors' offices in the local area  
6 charge for a doctor visit and a follow-up visit.

7 We're talking now about medical equipment  
8 and, in fact, we talked about medical supplies, medicines  
9 and the like.

10 How did you go about pricing these categories  
11 of needs?

12 A Most of these are mail order providers. You  
13 generally get your best pricing that way, and even if  
14 there's -- some have delivery charges, some don't, but  
15 even if they do, it's generally less expensive than going  
16 local. So unless there's some compelling reason you have  
17 to do it some other way, that would be the preferred way.

18 Q So you attempted to price these requirements  
19 out at the most economic method and way?

20 A Correct.

21 Q So you explained a manual wheelchair.

22 The next section is what you call a standing  
23 frame. What is that?

24 A Basically a stander is a device in which you

1 can secure somebody so that they are on their feet, but  
2 they're extremely strapped in. They generally have an  
3 activity table so that you can do some activity or try to  
4 do some activity with somebody. It's good to have people  
5 upright, helps the kidneys drain, helps with bone  
6 density, things like that, so it's usually always  
7 recommended for somebody who is not able to stand and  
8 walk on their own, based on Dr. Capell.

9 Q Again, based on Dr. Capell's recommendation?

10 A Yes.

11 Q And the next section is a bed, a hospital  
12 bed.

13 A Correct.

14 Q Who recommended a hospital bed and why  
15 couldn't he use a bed that a normal able-bodied person  
16 could utilize?

17 A Recommended by Dr. Capell, and this is a bed  
18 that will have the -- both the head and the feet come up,  
19 and also the bed itself will go up and down. And it's  
20 usually -- especially the feature for going up and down  
21 with the bed is really for the benefit of the caregiver  
22 so it makes the transfer easier for somebody who can't  
23 help with their own transfers.

24 Q As will be the situation with Lyam?

1 A Correct.

2 Q And the cost for a hospital bed?

3 A \$1,482. It has about an eight-to-ten-year  
4 useful life, so assuming nine at the midpoint, you've  
5 have to again save \$164.70 a year to replace it.

6 And then maintenance is anticipated at about  
7 2- to \$300 over and above whatever those warranties are  
8 over the life of the bed, so it's \$27.78 a year you have  
9 to save for that.

10 Q Costing methodology the same?

11 A Yes.

12 Q Let's go to the next section, Hoyer Lift?

13 A Now, this and the following section is really  
14 an either/or. So Dr. Capell anticipates that Lyam is  
15 going to get to the size where it's too hard for people  
16 who are caring for him to lift him independently, so a  
17 Hoyer Lift is a patient lift, and it has a sling that  
18 goes under you as the patient and -- it always reminds me  
19 a little bit of a stork -- it gathers up, and then it  
20 hooks to a device on wheels so that you can lift somebody  
21 out of bed using an electric lift and then transfer them  
22 to the wheelchair or to a shower chair or that type of  
23 thing.

24 So you can either use that or you can use a

1 ceiling lift, and the ceiling lift, they install tracks,  
2 and generally it will go, like, from a bedroom to a  
3 bathroom where, again, you can gather somebody up in one  
4 of these hoists, and then using the ceiling device will  
5 allow you to move them to the bathroom and then, when  
6 you're done, back. So it's labor saving, really, for the  
7 attendants.

8 Q When you spoke with Tawni, I assume she  
9 didn't have either of these lifts?

10 A Correct.

11 Q And was actually manually transferring Lyam  
12 from bed to shower and carrying him around?

13 A Correct. And Dr. Capell's anticipation is  
14 that with the hospital bed -- with all the lifting  
15 devices -- with the hospital bed, which helps with the  
16 transfers, and the lifting devices, that we would be  
17 starting these at age nine, so it's anticipated that he's  
18 bigger than he is now.

19 Q I didn't understand that. Anticipating  
20 charging to age 9?

21 A Starting.

22 Q Starting at age nine?

23 A At nine, yes.

24 Q He's now almost four?

1 A Correct.

2 Q All right. So explain. Do you mean  
3 Dr. Capell doesn't believe that the lifts will be needed  
4 until he reaches the age of nine?

5 A That's correct. Because his weight won't --  
6 at the age of nine he thinks that Lyam will be too heavy  
7 to manage his care without the lifts.

8 Q Gotcha.

9 A And the same is true with the hospital bed;  
10 it starts at age nine.

11 Q So the ceiling lift and the Hoyer Lift are  
12 alternatives?

13 A That's correct.

14 Q Both not needed?

15 A That's correct.

16 Q So you then go on to the next section,  
17 orthotics.

18 What's an orthotic?

19 A This is basically both hand splints and  
20 braces and foot splints and braces and, again, to try to  
21 help with contractures so -- they're positioning devices  
22 for him, essentially.

23 Q Again, is this pursuant to Dr. Capell's  
24 opinion?

1 A Yes.

2 Q And this is the annual cost of orthotics --

3 A Yes.

4 Q -- that have been highlighted in yellow,

5 3,000 and change?

6 A Correct.

7 Q And then we come to a section called

8 miscellaneous equipment.

9 What falls into that category?

10 A These are various and assorted things, some

11 up until the age of five and some starting after the age

12 of five. So the shower chair, a feeding chair, a

13 long-handled shower nozzle for the shower, portable

14 ramps.

15 And then Dr. Capell recommended an allocation

16 of about \$350 a year for stimulation and toys, things

17 that play music, things that may have flashing lights,

18 things that vibrate, I mean anything that would help

19 engage Lyam with his environment.

20 At age five we add in, like, a wheelchair

21 cushion because the wheelchair doesn't start until age

22 five, and then I think everything else in there is about

23 the same.

24 Q I see in the miscellaneous equipment you have

1 ramps.

2 A Portable ramps, yes.

3 Q Explain.

4 A So a portable ramp is a ramp -- it's a  
5 lightweight metal, and it folds so that you can carry it  
6 with you. So it may be four feetish long, folded.

7 So if you're going to go visit friends or  
8 family that don't have a level home, you can take the  
9 ramp out, put it down, go up a couple -- it won't go up a  
10 whole flight of stairs, but it will go up two or three  
11 stairs to an entrance to the home. So you can have Lyam  
12 enter the home being pushed in the wheelchair is the  
13 purpose of it.

14 Q Then we go from miscellaneous equipment to  
15 mobility equipment.

16 Generally, an overview, what is mobility  
17 equipment?

18 A This is really looking at a van modified for  
19 Lyam's use, and, again, starting between the ages of five  
20 and eight, again, according to Dr. Capell. And based on  
21 the fact that at that age he's going to be heavy enough  
22 that he's too hard to transfer, again, from whatever  
23 mobility device you're using into a car and also  
24 corresponds kind of with the use of the wheelchair.



1                   So this is a van that can have a lift.  
2       There's a couple of different kinds. Some have actually  
3       a lift where you place the person in the wheelchair on  
4       the lift, and it will automatically get you up to the  
5       level of the floor of the van, and then there are  
6       tie-downs so that you can secure the chair in place so  
7       you're safe in transporting somebody.

8                   There's also a kind of van that has a  
9       suspension that, when you park it, the van essentially  
10      kneels, and then what comes out is a little ramp like  
11      this that you could just go up like your portable ramp.

12                  So the cost of these with the modifications  
13      is about \$64,700. The life expectancy is between eight  
14      and ten years, so I used nine. So basically you have to  
15      save \$7,188 a year to replace it, and then there are some  
16      additional costs of \$1,265 a year for things like repairs  
17      on the modifications -- not to the van itself, but to the  
18      modifications -- extra gas.

19                  What happens with these, you're adding  
20      weight, and so your repair costs tend to be a little bit  
21      higher, your insurance costs are higher because the value  
22      of the vehicle is greater, and by the time all that's  
23      done, you've got some additional expense.

24                  What I've left to the economist to do is take

1 out from this figure the value of a car that would  
2 otherwise be purchased, because if you want to capture  
3 the true, just disability part of this, you know, this  
4 will replace whatever transportation somebody would have  
5 otherwise used, so you have to subtract that part out.

6 Q So these are expenses over and above that  
7 which would be incurred in the acquisition of a car not  
8 similarly equipped?

9 A Correct.

10 Q Let's go on to attendant care.

11 What does Dr. Capell recommend with regard to  
12 attendant care?

13 A Both Dr. Capell and Dr. Rodriguez believe  
14 that if Lyam's mom and family were not providing his  
15 care, that it would have to be done by a Licensed  
16 Practical Nurse, what's called an LPN, and the cost of  
17 that through the various home health agencies in the area  
18 comes out to \$47 an hour. If you were to replace the  
19 services of the family on a 24/7 basis, that would be  
20 that \$412,002 figure.

21 Q Annually?

22 A Correct.

23 Q The defense suggests that attendant care  
24 could be provided by a CNA. You've said LPN.

1                   What's the difference?

2                   A     Well, LPN is the lowest level of what's  
3     considered to be skilled nursing care. So a home health  
4     aide or a CNA, which stands for a Certified Nursing Aide,  
5     these are all folks who can perform custodial duties, but  
6     they can't perform anything that's considered a sterile  
7     or obtrusive procedure and they can't administer  
8     medications.

9                   So if it was a CNA, that person could not  
10    suction Lyam, could not feed him, could not hydrate him,  
11    and couldn't give him medications. They could do  
12    everything else. I mean, they could bathe, they could  
13    dress, they could do all of that, but they couldn't do  
14    those.

15                  Q     Are you saying they're not licensed to do  
16    that?

17                  A     That is correct.

18                  Q     It would be against the law for them to do  
19    it?

20                  A     Correct.

21                  Q     So, annualized, \$412,000.

22                        Next part, housing modifications. Have you  
23    given some thought as to what would be required there?

24                  A     This is -- the \$43,000 figure here is looking

1 at two modifications, each of \$21,970, and it includes  
2 things like changing the bathroom so that you have a  
3 roll-in shower, concrete walkways around a house that are  
4 wide enough for a wheelchair, and then widening doorways  
5 and hallways so that you can get a wheelchair through.

6 So it's the cost from a couple of local  
7 providers and kind of their best estimate, without having  
8 a particular residence to look at, about what the typical  
9 costs of that would be.

10 Q You didn't visit the residence yourself, did  
11 you?

12 A No. I saw the day in the life video that  
13 showed some of the residence, but I did not see the  
14 residence myself.

15 Q Did the methodology that you utilized in  
16 calculating or approximating the cost of house  
17 modifications a methodology that's customarily used by  
18 life care planners such as yourself?

19 A It is, unless you know where somebody is  
20 going to be and stay in all likelihood. And, of course,  
21 that changes over time. People, sometimes they move for  
22 various and assorted reasons. So, yes, I think it is.

23 MR. DURNEY: Court's indulgence for just one  
24 moment, Your Honor. Thank you.

1                   Your Honor, I'd like to approach before I ask  
2 the next question.

3                   Would this be an appropriate time for you to  
4 take a break?

5                   THE COURT: Well, do you have much more?

6                   MR. DURNEY: No, I don't, but I do have  
7 another question.

8                   THE COURT: For the Court or --

9                   MR. DURNEY: I would like to make sure that I  
10 don't overstep my bounds.

11                  THE COURT: Why don't you approach and we'll  
12 find out where we are.

13                  (An off-the-record discussion was held  
14 between the Court and counsel.)

15                  THE COURT: Ladies and gentlemen of the jury,  
16 at this time we're going to take a short break. During  
17 this recess you are advised not to talk or converse among  
18 yourselves or with anyone else on any subject connected  
19 with this trial; read, watch, or listen to any report of  
20 or commentary on the trial by any person connected with  
21 this trial or by any medium or information, including,  
22 without limitation, newspapers, television, and radio, or  
23 form or express any opinion on any subject connected with  
24 the trial until the case is finally submitted to you.

1 You may not do research about any issues involved in the  
2 case. You may not blog, tweet, or use the internet to  
3 obtain or share information.

4 We'll take a short recess.

5 (The jury exited the courtroom.)

6 (The following proceedings were held outside  
7 the presence of the jury.)

8 THE COURT: The record will reflect we're  
9 outside the presence of the jury.

10 We did have a bench conference, and the  
11 conference centered around Mr. Durney requesting -- his  
12 ability to ask some questions of this witness concerning  
13 Medicaid with respect to this particular matter. We took  
14 a break so that we could discuss it on the record to some  
15 extent.

16 Again, we've opened the door for Medicaid  
17 coming in to a certain extent. It's clearly been opened  
18 from that standpoint, and, in fact, there's some  
19 discussion of it.

20 I think even if you look at -- I was looking  
21 at 42.021, which says basically defendants would offer  
22 the bills, defendant offers those bills, so I'm kind of  
23 at the point where I think it's been opened, so I think  
24 maybe those bills come in, that 62 comes in to a certain

1 extent.

2           The question that I have on this witness is  
3 if she's being asked questions that were beyond her  
4 deposition again and beyond her report. That's the  
5 question I've got. And, again, I've been pretty strict  
6 about everybody on that for a reason because I think  
7 those rules are there for a reason.

8           So with that in mind, I guess I would ask  
9 Mr. Kelly what the defense's thoughts are in respect to  
10 her -- allowing Mr. Durney to ask some questions in  
11 regards to Medicaid.

12           The problem that it raises -- and, again,  
13 this is in my mind -- it's kind of from the standpoint,  
14 if there's a defense verdict in this case, then Medicaid  
15 would continue to provide a certain amount of benefits.  
16 There's no doubt about that. I mean, there's a doubt,  
17 but I think those would be available.

18           Depending on the nature of the verdict in  
19 respect to this matter, then whether they would provide  
20 or not provide these services, I guess that would be a  
21 question and -- I don't know the answer to that question,  
22 and I don't know if anybody does.

23           MR. DURNEY: Can I put that question on the  
24 record, Your Honor, so that we know what we're talking

1 about, the question that I desire to ask?

2 THE COURT: The question you asked is whether  
3 or not you have the ability to ask her some questions in  
4 regards to whether or not Medicaid would continue to  
5 provide -- would provide these benefits and whether or  
6 not these benefits are different from Medicaid benefits.  
7 At least that's what I understood.

8 MR. DURNEY: My question is simple, and that  
9 is, in the event that this jury elects to render a  
10 verdict in favor of the plaintiffs, will Medicaid  
11 continue to pay for the medical expenses? She knows that  
12 Medicaid is means tested and that they would no longer be  
13 eligible.

14 THE COURT: Doesn't that presuppose --

15 MR. DURNEY: One thing you could do --

16 THE COURT: It puts in the jury's mind, in  
17 order to get certain benefits, then they have to  
18 supersede that and give you these benefits in respect to  
19 that, and I'm not sure that that's the way to go from the  
20 Court's standpoint because I think that's a jury question  
21 again. And, again, we're treading on new territory based  
22 upon a Nevada law that I didn't adopt, that was adopted  
23 by the Nevada Legislature.

24 I've looked at that California case again,



1 and what the California case says is kind of interesting.  
2 I read it again in respect to that. It says "Although...  
3 as ultimately adopted" -- this is the section in the  
4 California case -- "does not specify how the jury should  
5 use such evidence...the Legislature apparently assumed  
6 that in most cases the jury would set plaintiffs' damages  
7 at a lower level because of its awareness of plaintiff's  
8 'net' collateral source benefits."

9 Now, what does that mean? You know, again,  
10 we're in an area where, again, there's no Nevada law. If  
11 there was, I assure you I would find it and know it, and  
12 I don't mean that I've looked in respect to that.

13 Mr. Kelly, you haven't had a chance to talk.

14 MR. KELLY: Thank you very much, Your Honor.

15 I think that it would be appropriate for  
16 Mr. Durney and the defense to bring up Medicaid and the  
17 fact that Medicaid has covered the vast majority of the  
18 bills and will continue to do so, but I think it would be  
19 improper to ask the witness, "What effect would a defense  
20 verdict have?" What effect would a plaintiff's verdict  
21 have?" Because now we're putting -- we're putting in  
22 this possibility and putting in the jurors' minds, well,  
23 it really may depend on how you rule in this case. I  
24 don't think that's appropriate.

1 THE COURT: That's exactly my problem in  
2 regards to allowing that, because it puts the -- it  
3 creates an impossible situation.

4 So what I prefer essentially is that the  
5 Medicaid bills come in in respect to this matter, and you  
6 can talk about the fact that all the bills have been paid  
7 to date, and you can talk about the amount of those in  
8 respect to this matter.

9 And I'm kind of looking at that statute, and  
10 it kind of implies the bills come in, now that I really  
11 read it again with respect to this matter, but I think  
12 asking this witness what the effect of a verdict would  
13 do -- and I'm not aware of any case law that under any  
14 circumstances would ever allow a jury to hear anything in  
15 respect to those. I just don't think that's true.

16 MR. DURNEY: Could I ask this question:  
17 Ms. Hyland; is Medicaid means tested? And that's a yes  
18 or no, and I won't ask any more.

19 THE COURT: I didn't hear that, Mr. Durney?  
20 Is Medicaid what?

21 MR. DURNEY: You and me both.

22 Is Medicaid means tested? In other words,  
23 eligibility is predicated upon means.

24 THE COURT: Well, I'm not sure any of the

1 jurors would even understand the question, to be honest  
2 with you.

3 Mr. Kelly.

4 MR. DURNEY: I do, and I could argue it.

5 MR. KELLY: Yeah. I don't think that would  
6 be appropriate or not. Whether Medicaid is means tested  
7 or not is really not the subject for this particular  
8 witness, and I think it's going to be beyond the scope of  
9 her deposition for certain.

10 Also, I'd like to point out, one of our  
11 jurors does work with Medicaid, so I think we're treading  
12 on very dangerous territory if we're going to allow this  
13 witness to talk about the legal effect of Medicaid,  
14 whether or not it applies if there's a plaintiff's  
15 verdict or not and whether it's means tested. I don't  
16 think there's any reason to go there with this witness.

17 THE COURT: And, again, this was an  
18 opinion -- and we're not going back -- this was not an  
19 opinion she expressed in her report or her deposition in  
20 respect to that.

21 Additionally, I think if you are -- if we get  
22 into this area, again, I think the bills should come in,  
23 now that I've really thought about it, but I don't think  
24 we should be asking her in respect to what happens if

1 there's a verdict one way or the other. Any implication  
2 of that is inappropriate.

3 MR. KELLY: I would agree, and I would  
4 withdraw my objection to the bills. I think the Court's  
5 probably right in light of that analysis.

6 MR. DURNEY: Thank you, Your Honor. I will  
7 not ask those questions.

8 Can I move for the admission of these bills,  
9 please?

10 THE COURT: I'm going to allow -- 62A would  
11 be allowed and be admitted.

12 MR. DURNEY: Thank you.

13 MR. KELLY: Your Honor, before they're  
14 actually admitted, can we -- I think there were a whole  
15 series.

16 THE COURT: Why don't you go through them  
17 and make sure they're --

18 MR. KELLY: I think we only need one page,  
19 which will give us what the current lien is.

20 MR. DURNEY: Your Honor, the bills are  
21 attached to that lien.

22 THE COURT: I'm going to allow them all in.  
23 62A is admitted in respect to this matter. I think it's  
24 a fair way to handle it in respect to that, and I'm not

1 going to allow any further questions in regards to that.  
2 We'll be in recess for about five or ten minutes.

3 MR. DURNEY: Thank you, Your Honor.

4 (Exhibit 72 was admitted.)

5 (A recess was taken.)

6 (The following proceedings were held outside  
7 the presence of the jury.)

8 THE COURT: I just want to correct the  
9 record. It's Exhibit No. 72, not 62. The plaintiff's  
10 should be 72, not 62.

11 Counsel, are you ready to bring the jury in?

12 MR. DURNEY: Yes, Your Honor.

13 MR. KELLY: Yes, Your Honor.

14 Mr. McBride will be handling the cross.

15 THE COURT: Thank you.

16 (The jury entered the courtroom.)

17 (The following proceedings were held in the  
18 presence of the jury.)

19 THE COURT: Will counsel stipulate to the  
20 presence of the jury?

21 MR. DURNEY: Yes, Your Honor.

22 MR. KELLY: Yes, Your Honor.

23 THE COURT: Mr. Durney.

24 MR. DURNEY: May it please the Court.

1 BY MR. DURNEY:

2 Q I have one more question, Ms. Hyland.

3 Have all the opinions that you've expressed  
4 here in court been stated to a reasonable probability?

5 A Yes.

6 Q As reasonable as life care planners can  
7 express?

8 A Yes.

9 MR. DURNEY: Thank you.

10 THE COURT: Okay. Mr. McBride.

11 MR. McBRIDE: Thank you, Your Honor.

12

13 CROSS-EXAMINATION

14 BY MR. McBRIDE:

15 Q Ms. Hyland, how are you?

16 A Well. Thank you.

17 Q Good.

18 Ms. Hyland, I just want to clarify one thing  
19 for the jury if we can.

20 When you were talking about the costs to be  
21 expected in the future for Lyam's care, we're talking  
22 about the costs estimated that will be billed, not  
23 actually what will be paid; correct?

24 A Well, they're the usual -- what they call

1 usual, customary, and reasonable charges and --  
2 Q Charges?  
3 A Yes.  
4 Q But not what is actually paid?  
5 A Well, it may or may not be what's actually  
6 paid because it depends on who the payer is.  
7 Q Correct.  
8 Now, you had your deposition taken in August  
9 of last year; correct?  
10 A Yes.  
11 Q And then prior to that you had prepared your  
12 report, which Mr. Durney had walked us through in some  
13 detail, and that was prepared in April of 2015; right?  
14 A That's correct, yeah.  
15 Q And prior to that you had received materials  
16 from Mr. Durney in approximately 2014; correct?  
17 A Yes. '14 and continuing after that, but  
18 starting in '14.  
19 Q Now, you have not received any additional  
20 documents to review since your deposition; true?  
21 A I have. I received the report of Ms. White  
22 and Mr. Sims and her -- Ms. White's deposition and --  
23 sorry, there may be one more.  
24 Q But you've not prepared any supplemental

1 reports to those original opinions and to the opinions  
2 you expressed in your deposition; correct?

3 A That's correct. The other was Mr. Sims'  
4 deposition and Dr. Capell's deposition, and those all  
5 happened after my deposition, so...

6 Q Correct. But you haven't prepared any  
7 supplemental report commenting on any of that  
8 information; correct?

9 A That's correct, yeah.

10 Q And just so we're clear, too, you're not a  
11 Registered Nurse; right?

12 A Correct.

13 Q You're not a licensed health care provider of  
14 any kind; true?

15 A Correct.

16 Q And in your experience, for instance,  
17 pediatricians do not regularly consult with a life care  
18 planner as part of their practice; right?

19 A I think it varies depending on the  
20 pediatrician.

21 Q Well, the pediatrician in this case --  
22 Who is the pediatrician in this case for  
23 Lyam?

24 A Lyam did not have an active pediatrician at



1 the time I interviewed with mom.

2 Q Did you investigate or ask to find out if  
3 Lyam had a pediatrician of any kind?

4 A He has had a pediatrician, but he didn't --  
5 he didn't have -- historically he had, but he did not  
6 have anybody on board at the time.

7 Q And that pediatrician, do you know who the  
8 pediatrician is now?

9 A I don't know if there is one now. There  
10 wasn't one at the time of my interview with the mother.

11 Q I'll represent to you that Dr. Amrhein is  
12 Lyam's pediatrician.

13 A Currently.

14 Q Does that name sound familiar?

15 A His name's in the records I reviewed, yes.

16 Q You reviewed those records, but you did not  
17 consult with Dr. Amrhein regarding any of the needs that  
18 were set out or estimated costs of needs that were set  
19 out by Dr. Capell and Dr. Rodriguez?

20 A Correct. It was only Dr. Capell and  
21 Dr. Rodriguez.

22 Q And most children's physicians, an  
23 endocrinologist, a neurologist, they don't regularly  
24 consult with a life care planner as to what this child

1 will need in the future, correct, as part of their  
2 practice, as part of their care and treatment of their  
3 patient?

4 A Well, you know, often they do with case  
5 managers. So, for example, especially with children with  
6 disabilities, there are often case managers involved,  
7 sometimes from services for developmentally disabled,  
8 so -- and they're looking kind of at care planning for  
9 the foreseeable future.

10 Q I guess what I'm asking you, ma'am, is not if  
11 they're dealing in conjunction with some other disability  
12 program or something of that nature. I'm saying, they  
13 don't seek out a life care planner in order to develop a  
14 plan of care for their patients; true?

15 A Sure. Because they're looking more at the  
16 foreseeable future.

17 Q Right. And, in fact, a life care planner's  
18 business really is to testify here in court; true?

19 A No. Life care planners are used in a number  
20 of arenas. Litigation is certainly one of them.

21 Q That's the main reason; correct?

22 A No.

23 Q Well, you've testified in court numerous  
24 times over the years, right?

1 A I have, yes.

2 Q And, in fact, over the years, since at least

3 1990?

4 A The rest of the question? I'm sorry.

5 Q Have you testified in court since at least

6 1990?

7 A Yes. I'm trying to remember. The first time

8 was probably before that, but, yes, at least since 1990.

9 Q And, in fact, you've worked with Dr. Capell

10 at least since 1990 over the years; isn't that true?

11 A I have, yeah.

12 Q Many times?

13 A You know, we've been on the same side and the

14 opposite side of cases a fair number of times. I don't

15 know if I could tell you realistically a number, but it's

16 been both.

17 Q But you've worked with him on many occasions,

18 correct, in developing a life care plan, and you consult

19 with him as part of that; correct?

20 A You know, I would say probably over the years

21 it's been in the neighborhood of 20 to 30 times would be

22 my best estimate.

23 Q Still a number of times; true?

24 A Yeah.

1 Q And as part of a life care plan, you don't  
2 treat patients? You're not a licensed health care  
3 provider; correct?

4 A I don't treat them like a physician does,  
5 absolutely.

6 Q Right. And you also don't follow patients  
7 regularly after you prepare a life care plan to determine  
8 if your life care plan has been followed; true?

9 A That's correct. I work with special needs  
10 trusts, and groups like that sometimes will look at  
11 expenditures on people's behalf, but that's a more  
12 limited-term involvement. It's kind of going in and  
13 trying to solve an issue. Now, that may happen  
14 repetitively, you know, over time, but it's not an  
15 intentional following that way.

16 Q And you rely on the input from physicians in  
17 order to prepare your life care plan; correct?

18 A Yes.

19 Q And in this case you chose to rely on the  
20 opinions of Dr. Rodriguez, a treater, and Dr. Capell, an  
21 expert witness hired by Mr. Durney's office; right?

22 A Correct.

23 Q And, in fact, at the time when you were first  
24 contacted in this case, Mr. Durney told you -- when you

1 asked, "Whose medical opinion should I rely on in order  
2 to formulate my life care plan?" Mr. Durney suggested  
3 Dr. Rodriguez; correct?

4 A True.

5 Q And that was before he hired Dr. Capell;  
6 true?

7 A Yes.

8 Q And you made an effort to contact  
9 Dr. Rodriguez, or at least your staff did; true?

10 A My staff tried to set up an in-person call --  
11 I'm sorry -- not an in-person call -- a voice-to-voice  
12 call with him, and he asked that I submit my questions to  
13 him in writing, which I did.

14 Q And you submitted all those questions to  
15 Dr. Rodriguez, and he responded to you?

16 A He did.

17 Q And that's where we see what Dr. Rodriguez  
18 recommended in terms of the future care and needs for  
19 Lyam into the future; correct?

20 A Correct.

21 Q In looking at your report --  
22 Do you have your report in front of you?

23 A I do.

24 Q -- the summary that Mr. Durney was walking us

1 through, I noted that there was approximately 34  
2 categories of medical needs, surgeries, all sorts of  
3 modifications to the house, laboratory results, things  
4 like that. There was approximately 34 categories.  
5 Does that sound about right?  
6 A I haven't counted it, but it sounds about  
7 right, yeah.  
8 Q And in looking through that, it appears that  
9 Dr. Rodriguez only offered opinions on 9 of those 34  
10 categories; isn't that right?  
11 A I don't believe so.  
12 Q Go ahead and count them up. I'm talking  
13 about specifically the summary.  
14 A It's easy for me to work from his response to  
15 my questions.  
16 Q Well, Doctor --  
17 Your Honor, may I approach real quick --  
18 THE COURT: You may.  
19 MR. McBRIDE: -- just to help move things  
20 along?  
21 THE WITNESS: Twenty-five is what I found.  
22 BY MR. McBRIDE:  
23 Q Twenty-five total?  
24 A Yeah.

1 Q Well, if you look here -- and that's 25 that  
2 Dr. Rodriguez participated in?

3 A Yeah. 25 specific sets of recommendations  
4 from his written response to me.

5 Q Okay. So 25. But if you look at the report  
6 here, the summary we just went through, we have one -- do  
7 you see that? -- we have two on the second page, we have  
8 three, we have four, five, six, seven, eight, nine.

9 A That only is when there was a difference of  
10 their opinion. It doesn't mean that Dr. Rodriguez didn't  
11 opine on the others. It's just -- I did a range of an  
12 either/or where there was a difference in their opinion.

13 Q Well, Ms. Hyland, you didn't refer to that  
14 specifically in your report, that -- and identify that:  
15 It's true that you identified the areas where  
16 Dr. Rodriguez had differences of opinion but also where  
17 Dr. Rodriguez had an opinion where Dr. Capell did not;  
18 true?

19 MR. DURNEY: Your Honor, there's two  
20 questions there. I object. Compound.

21 THE COURT: Sustained.

22 BY MR. McBRIDE:

23 Q Let me rephrase.

24 Dr. Rodriguez is the only one of Lyam's

1 providers that you attempted to reach out to; correct?

2 A Yes, that's correct.

3 Q And you personally never spoke to him?

4 A That's correct.

5 Q And you also never spoke to any of Lyam's

6 other treating physicians; isn't that true?

7 A That's correct.

8 Q And that would include Dr. Amrhein?

9 A Correct.

10 Q Okay. And that would also include Lyam's

11 endocrinologist; correct?

12 A Correct.

13 Q It would also include the ENT, Dr. Garrett;

14 correct?

15 A Correct.

16 Q It would also include the gastroenterologist,

17 Dr. Hulka; correct?

18 A Yes.

19 Q Dr. Johnson, the ophthalmologist; correct?

20 A Correct.

21 Q And the nutritionist, Betsy Violet; correct?

22 A Correct.

23 Q So as part of your work on this case, you

24 never attempted to verify the accuracy or verify if those



1 physicians and their particular specialties felt that any  
2 of the additional needs that Dr. Capell or Dr. Rodriguez  
3 suggested were necessary; true?

4 A That's correct. I'm relying on both  
5 Dr. Capell and Dr. Rodriguez's view of what will be  
6 needed.

7 Q Okay. Now, you never read Dr. Rodriguez's  
8 deposition either, did you?

9 A That's correct.

10 Q In the course of preparing your report, you  
11 had others in your office assist you with the preparation  
12 of this report; right?

13 A Correct.

14 Q In other words, there were at least three  
15 other people in your office who basically gathered the  
16 data in this case; right?

17 A That's correct.

18 Q Okay. And they're the ones who made the  
19 calls to the physicians or the other physicians to locate  
20 if there were suitable physicians in the area to be able  
21 to treat Lyam; correct?

22 A Correct.

23 Q You never actually spoke, though, and your  
24 office staff never actually spoke to any of Lyam's actual

1 treating providers to determine the actual costs of their  
2 treatment; correct?

3 A Well, it was from their office staff to get  
4 their usual and customary charges, not from the  
5 physicians themselves, that's correct.

6 Q And you never spoke to them to determine  
7 whether or not any of that information would be changed  
8 over the years compared to what Dr. Rodriguez or  
9 Dr. Capell had recommended; correct?

10 A I did not discuss Dr. Capell or  
11 Dr. Rodriguez's recommendations with them, that's  
12 correct.

13 Q As well as to whether they agreed or  
14 disagreed with Dr. Capell's recommendations; true?

15 A Or Dr. Rodriguez's, correct.

16 Q Now, Dr. Capell recommended a physiatrist  
17 treat Lyam; true?

18 A Yes.

19 Q That's Dr. Rodriguez's specialty, isn't it?

20 A Yes.

21 Q To your knowledge has Lyam seen a physiatrist  
22 since he was born?

23 A He has not.

24 Q Do you know of any physician other than

1 Dr. Capell, plaintiff's expert, who has recommended that  
2 Lyam see a physiatrist?

3 A Dr. Rodriguez did not address PM&R, so --  
4 didn't address physiatry, so I think the answer is no.

5 Q And then when you went -- in an effort to  
6 identify physiatrists in the Reno area who could provide  
7 treatment, you never made any effort to confirm if in  
8 fact they would treat Lyam for any condition; true?

9 A I was looking at the cost of that specialty,  
10 so that's correct.

11 Q Right. So we don't know, based on that  
12 recommendation, whether or not Lyam would be treated by  
13 those physiatrists in the Reno area; correct?

14 A Right. And if not, the only solution would  
15 be, unfortunately, the trip to Shriners or UC Davis.

16 Q And that's based on the recommendation, the  
17 sole recommendation of Dr. Capell; correct?

18 A That's correct.

19 Q Not Lyam's pediatrician; right?

20 A Correct.

21 Q Or any other provider; right?

22 A Correct.

23 Q You also haven't done any research in this  
24 case into the average lifetime cost for a cerebral palsy

1 patient; true?

2 A No, but I want -- I wouldn't do that. I  
3 mean, it needs to be specific to the individual and based  
4 on the physician's view of what that particular  
5 individual's needs would be.

6 Q And you haven't done any investigation into  
7 what those costs would be on an average; true?

8 A That's correct.

9 Q Now, going through your report just very  
10 briefly, if I can, there's a couple of things that  
11 Mr. Durney went through with you.

12 Again, the issue with regard to the  
13 gastroenterologist and the opinions held by Dr. Capell in  
14 that regard as well as Dr. Rodriguez, just to clarify,  
15 you did not speak to Dr. Hulka about those needs and  
16 whether or not she agreed with the recommendations by  
17 Dr. Rodriguez, a neurologist, or Dr. Capell; true?

18 A That's correct.

19 Q Is there a reason why not?

20 A Because I was relying on both Dr. Capell and  
21 Dr. Rodriguez for their overview. I mean, if you look at  
22 her billing records, she's been seeing him more than  
23 twice annually, but I did not call to confirm with her  
24 how she viewed the future.

1 Q And the same thing with the orthopedist.  
2 Lyam is not currently treating with an orthopedist;  
3 correct?

4 A That's correct.

5 Q And, in fact, to your knowledge no physician  
6 has recommended that Lyam be treated by an orthopedist to  
7 date; true?

8 A Well, Dr. Rodriguez is recommending  
9 orthopedic procedures, which means obviously you're going  
10 to have to be seen by the orthopedist, but he didn't  
11 recommend separate visits for that. That was on the  
12 basis of Dr. Capell's recommendation.

13 Q Exactly. And he hasn't been referred to one  
14 by his pediatrician; true?

15 A That I don't know.

16 Q Because you didn't ask Dr. Amrhein?

17 A That's right.

18 Q And in terms of a pulmonologist, the  
19 suggested annual cost for a pulmonologist, again, Lyam's  
20 not treating with a pulmonologist currently; true?

21 A The last treatment I have a record of a  
22 pulmonologist is from August of 2014.

23 Q And was that pursuant to a hospitalization  
24 that Lyam had?

1           A     I can't tell that from the billing record  
2 because it wasn't billed through a hospital. It was  
3 billed through the physician.

4           Q     So that was 2014, but up until 2016 you have  
5 not been provided any information he's been treating with  
6 a pulmonologist; true?

7           A     That's true.

8           Q     And just to be clear, too, you would agree  
9 with me you're not offering any opinions of the medical  
10 necessity of this future care for Lyam; correct?

11          A     I would leave that to Dr. Capell and  
12 Dr. Rodriguez, correct.

13          Q     And you recall during your deposition being  
14 asked a question that -- well, let me ask it this way.

15                 In terms of the 24/7 attendant care that Lyam  
16 is expected to have based on what Dr. Capell opines,  
17 would you agree that it is not uncommon for family  
18 members to provide treatment to their child and they  
19 actually desire to be involved in the child's treatment;  
20 correct?

21          A     Yeah, of course. I mean, this is -- this is  
22 what the cost would be if somebody else did it and also  
23 the cost of value of the services that they're actually  
24 providing to Lyam.

1 Q And I'll actually represent to you that  
2 Ms. McCrosky testified, in fact, that she wants to  
3 continue to be involved in Lyam's care in the future, and  
4 that's typical of what you've found; correct?

5 A Oh, of course.

6 Q So in terms of the amount of care that would  
7 be suggested, you're also aware that Lyam is entitled to  
8 and receives -- he's involved in or enrolled in a program  
9 through the school district where he receives care,  
10 attendant care?

11 A You know, when I met with him, that was not  
12 the case. I don't know if it is now or not.

13 Q But you haven't been told that that's the  
14 case?

15 A Correct.

16 Q If I were to represent to you that he  
17 actually is receiving treatment through the Douglas  
18 County School District or through the school district,  
19 that would be something that would also lessen the need  
20 for 24/7 care; correct?

21 A It doesn't lessen the need for 24/7 care. It  
22 just means the school is providing and whatever nurse  
23 staff are there with him for that program is being  
24 provided in that setting. I mean, he always needs the

1 24/7 care.

2 Q So assuming, hypothetically, that  
3 Ms. McCrosky provides, at a minimum, eight hours -- and  
4 that would be roughly from the time Lyam goes to sleep,  
5 during the evening, while he's asleep, up until he  
6 wakes -- and then an additional four hours through the  
7 school district for 12 hours, you would agree with me,  
8 then, the amount that you listed for 24/7 care could be  
9 reduced by nearly half? You would agree with that?

10 A No. I mean, again, this is the value of the  
11 care regardless of who's providing it. I mean, this is  
12 what -- and the definition to me of that is what would it  
13 cost to replace that, and that would be at those LPN  
14 rates.

15 Q Okay. But you would expect an economist to  
16 make a reduction of any of those items that, for  
17 instance, would not be needed or that were not supported  
18 by the evidence? You would expect an economist to make a  
19 reduction in his calculations about future medical costs;  
20 right?

21 A I think I didn't understand the question.  
22 I'm sorry.

23 Q Well, if any of these items that you've  
24 listed out here are determined not to be medically



1 necessary or needed in the future, you would agree and  
2 you would expect that that would be a reduction in the  
3 future medical costs than an economist would have to take  
4 into consideration?

5 A You mean if there was a difference in medical  
6 opinion?

7 Q Correct.

8 A Sure.

9 Q Have you done any sort of research into the  
10 programs that are offered here in Nevada to an individual  
11 like Lyam in his condition?

12 A No. But, I mean, obviously as much as he's  
13 able to participate, he's eligible for special education  
14 like any other child would be, and he's obviously  
15 received services through Nevada Early Intervention  
16 Services.

17 Q But you haven't done any research into what  
18 additional services Nevada provides to developmentally  
19 disabled children such as Lyam into the future?

20 A No.

21 Q You would agree that Ms. McCrosky and her  
22 family seem to be providing excellent care; correct?

23 A Yes.

24 Q And you would expect that to continue; right?

1           A     Yes.

2           Q     And your estimate of costs in this case, you  
3 would agree, are based on the opinions of plaintiff's  
4 expert, Dr. Shavelle, correct, in terms of life  
5 expectancy?

6           A     Well, mine aren't, but the economist's would  
7 be. I mean, everything here is either in an annual  
8 reoccurring amount or something that is needed but isn't  
9 annually reoccurring. I mean, what an economist will use  
10 to multiply by would be related to the life expectancy  
11 estimates.

12          Q     And if there were any disagreements with  
13 regard to the life expectancy between Dr. Shavelle and  
14 Dr. Harriet Cokely --

15                You said you reviewed her report?

16          A     I did, yes.

17          Q     -- you're not making any determination as to  
18 which one is more reliable than the other; is that right?

19          A     No.

20          Q     That's not within your expertise; correct?

21          A     That is correct.

22                MR. McBRIDE: That's all the questions I  
23 have. Thank you.

24                THE COURT: Mr. Durney, redirect?

REDIRECT EXAMINATION

BY MR. DURNEY:

Q Ms. Hyland, I just have a few.

Mr. McBride made a point that you didn't consult with his treaters, the doctors.

Did you, on the other hand, consistent with your role as a life care planner, contact the treaters whenever possible, by and through their billing office, in order to obtain their prices?

A I did.

Q In fact, you gave preference to treaters, didn't you?

A I did.

Q And if Lyam, as Mr. McBride suggests, isn't able to get treated in Reno, he'll have to go all the way to Shriners or UC Davis?

A For a physical medicine and rehab physician, that would be correct, and that's also true for the developmental pediatrician.

Q And then Mr. McBride made a point that litigation is the reason for life care plans, and you disagreed with him.

There are other reasons for life care plans; correct?

1 A Yes.

2 Q What are they?

3 A So life care planning, although it's  
4 sometimes called by different names, is used routinely.  
5 We do rehabilitation plans with all the state departments  
6 of rehabilitation; we do individual educational plans,  
7 the plans for children with disabilities through the age  
8 of 22; we do discharge planning, which is looking into  
9 the future and coordinating somebody's needs. I mean,  
10 there's all of that.

11 We do plans for -- the med care program  
12 requires, any time there is a secondary payer, that a  
13 plan be developed so that a set-aside can be developed  
14 for those funds at the usual and customary rates, so it's  
15 used quite broadly.

16 Q You're engaged by all those entities?

17 A Yes.

18 MR. DURNEY: That's all I have. Thank you  
19 very much.

20 MR. KELLY: Excuse me, Your Honor. Court's  
21 indulgence.

22 MR. McBRIDE: No questions, Your Honor.

23 THE COURT: Thank you. You may step down.

24 THE WITNESS: Thank you.