

ROBBINS VS. TIZZANO

JOHN P. ELLIOTT, M.D.

8/21/01

LEA, SHERMAN & HABESKI

PHOENIX, ARIZONA (602)257-8514

COPY

ROBBINS VS. TIZZANO

<p>1 IN THE COURT OF COMMON PLEAS</p> <p>2 OF WAYNE COUNTY, OHIO</p> <p>3</p> <p>4 ANGEL ROBBINS, etc., et al., }</p> <p>5 Plaintiffs, }</p> <p>6 vs. }</p> <p>7 ANTHONY P. TIZZANO, M.D., }</p> <p>8 et al., }</p> <p>9 Defendants. }</p> <p>0</p> <p>1 Phoenix, Arizona</p> <p>2 August 21, 2001</p> <p>3 6:00 p.m.</p> <p>4</p> <p>5</p> <p>6 DEPOSITION OF JOHN P. ELLIOTT, M.D.</p> <p>7</p> <p>8</p> <p>9</p> <p>0</p> <p>1 LEA, SHERMAN & HABESKI</p> <p>2 Registered Professional Reporters</p> <p>3 834 North First Avenue</p> <p>4 Phoenix, Arizona 85003</p> <p>5 (602) 257-8514 - Fax: 257-8582</p> <p>6 Reported by: JENNIFER LLOYD, RPR</p> <p>7 Certified Court Reporter</p> <p>8 Certificate No. 50165</p> <p>9</p> <p>0</p> <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>Page 1</p>	<p>1 DEPOSITION OF JOHN P. ELLIOTT, M.D.,</p> <p>2</p> <p>3 taken at 6:02 p.m., on August 21, 2001, at Good</p> <p>4 Samaritan Regional Medical Center, Division of</p> <p>5 Maternal-Fetal Medicine, 1111 East McDowell Road,</p> <p>6 Phoenix, Arizona, before JENNIFER LLOYD, RPR, a</p> <p>7 Certified Court Reporter in the State of Arizona.</p> <p>8</p> <p>9</p> <p>0 APPEARANCES:</p> <p>1 For the Plaintiffs:</p> <p>2 Becker and Mishkind Co., L.P.A.</p> <p>3 by HOWARD D. MISHKIND, ESQ.</p> <p>4 Skylight Office Tower</p> <p>5 1660 West 2nd Street, Suite 660</p> <p>6 Cleveland, Ohio 44113</p> <p>7 (216) 241-2600</p> <p>8</p> <p>9 For the Defendant Wooster Clinic:</p> <p>10 Roetzel & Andress</p> <p>11 by JOHN V. JACKSON, ESQ.</p> <p>12 1375 East Ninth Street</p> <p>13 One Cleveland Center, 10th Floor</p> <p>14 Cleveland, Ohio 44114</p> <p>15 (216) 623-0150</p> <p>16</p> <p>17 For the Defendant Wooster Community Hospital:</p> <p>18 Hanna, Campbell & Powell, L.L.P.</p> <p>19 by GREGORY T. ROSSI, ESQ.</p> <p>20 3737 Embassy Parkway</p> <p>21 P.O. Box 5521</p> <p>22 Akron, Ohio 44334</p> <p>23 (330) 670-7300</p> <p>24</p> <p>25</p> <p>Page 3</p>
<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>0</p> <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>0</p> <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>Page 2</p>	<p>1 JOHN P. ELLIOTT, M.D.,</p> <p>2</p> <p>3 called as a witness herein, having first been duly</p> <p>4 sworn, was examined and testified as follows:</p> <p>5</p> <p>6 EXAMINATION</p> <p>7 BY MR. JACKSON:</p> <p>8 Q. You are Dr. John Elliott; correct?</p> <p>9 A. Yes, I am.</p> <p>10 Q. Doctor, you've been identified as an expert</p> <p>11 in this case and I represent Dr. Tizzano and his group.</p> <p>12 It's my understanding that you're going to render</p> <p>13 opinions critical of Dr. Tizzano's care of</p> <p>14 Mrs. Robbins; is that a correct understanding?</p> <p>15 A. Yes, it is.</p> <p>16 Q. Are you going to opine that Dr. Tizzano fell</p> <p>17 below the standard of care in his care and treatment of</p> <p>18 Mrs. Robbins?</p> <p>19 A. Isn't that the same question you just asked</p> <p>20 me?</p> <p>21 Q. I think I asked you if you're critical,</p> <p>22 there is a difference.</p> <p>23 A. Yes.</p> <p>24 Q. At least I think there's a difference, how's</p> <p>25 that. What is your understanding of the standard of</p> <p>Page 4</p>

<p>1 care? How would you define it?</p> <p>2 A. Standard of care is that which would be</p> <p>3 provided by a reasonably competent physician under the</p> <p>4 same or similar circumstances.</p> <p>5 Q. Are you going to render opinions that anyone</p> <p>6 other than Dr. Tizzano fell below the standard of care?</p> <p>7 A. Yes.</p> <p>8 Q. Who?</p> <p>9 A. Nurse Moats and Nurse Gwin.</p> <p>10 Q. Anyone else?</p> <p>11 A. No.</p> <p>12 Q. Tell me in what way you feel Dr. Tizzano</p> <p>13 fell below the standard of care.</p> <p>14 A. My criticisms of Dr. Tizzano are the</p> <p>15 following: Number one --</p> <p>16 Q. Let me understand, Doctor, if you use the</p> <p>17 term "criticism" are you telling me that it is an act</p> <p>18 or omission that fell below the standard of care</p> <p>19 because I believe there's a difference between simply</p> <p>20 saying you're criticizing someone's act or omission and</p> <p>21 saying that that act or omission fell below the</p> <p>22 standard of care. So I would ask you if you're going</p> <p>23 to use the term "criticism," can we have the</p> <p>24 understanding that any time you use the term you are</p> <p>25 saying below standard of care?</p> <p>Page 5</p>	<p>1 Next item, 3 or 4, however you want to</p> <p>2 categorize them, rupturing her membranes at minus 2</p> <p>3 station. This is an unengaged fetal head and then he</p> <p>4 apparently leaves the area, I'm not exactly sure what</p> <p>5 he did after that, but he was not immediately available</p> <p>6 after rupturing her membranes at minus 2 station.</p> <p>7 And then the last criticism, failure to</p> <p>8 deliver in a timely manner. Membranes were ruptured at</p> <p>9 7:44 at minus 2 station, patient develops nausea when</p> <p>10 it had not been present before and then the tracing</p> <p>11 basically disappears. Scalp electrode is placed at</p> <p>12 7:59 and the tracing immediately is indicative of a</p> <p>13 very serious situation, either a prolapsed cord or a</p> <p>14 ruptured uterus, and the delay of delivery, calling the</p> <p>15 Caesarian section at 7:12 -- excuse me, 8:12 instead of</p> <p>16 at approximately 8:00 when it should have been called,</p> <p>17 if they had gotten to that stage, they never should</p> <p>18 have gotten there, but even at that point in time the</p> <p>19 delay was something that contributed to the outcome.</p> <p>20 Those are my criticisms of Dr. Tizzano.</p> <p>21 Q. Are those all of your criticisms of</p> <p>22 Dr. Tizzano?</p> <p>23 A. In broad categories, yes.</p> <p>24 MR. MISHKIND: Can I just in fairness to</p> <p>25 you, just so you're aware, there is an issue with</p> <p>Page 7</p>
<p>1 A. Yes.</p> <p>2 Q. If that's not the case, then tell me.</p> <p>3 A. That's fine.</p> <p>4 Q. Okay.</p> <p>5 A. Number one, if Dr. Tizzano was aware that</p> <p>6 Mrs. Robbins was in labor, this patient should have</p> <p>7 been assessed by the physician certainly by 4:15 in the</p> <p>8 morning. He should have taken into account the prior</p> <p>9 Caesarian section, floating unengaged presenting part,</p> <p>0 and the large baby that was present, 9 pounds 3 ounces.</p> <p>1 A C-section should be performed or certainly highly</p> <p>2 considered at that point in the morning at 4:15.</p> <p>3 Second criticism, failure to perform at the</p> <p>4 standard of care or he was below the standard in his</p> <p>5 performance at 6:00. He was told at a minimum that she</p> <p>6 had been complete since 4:15. This was one hour and 45</p> <p>7 minutes that she was at minus 3 to minus 4 station,</p> <p>8 that she also did not want to continue with a potential</p> <p>9 vaginal birth after prior Caesarian. Standard of care</p> <p>0 at that time calls for immediate evaluation and to me</p> <p>1 that is 15 to 20 minutes time. C-section was</p> <p>2 absolutely indicated at this point in time. There was</p> <p>3 a large baby, failure to descend, prior Caesarian</p> <p>4 section. Dr. Tizzano arrived an hour and 44 minutes</p> <p>5 later, that is below the standard of care.</p> <p>Page 6</p>	<p>1 regard to informed consent.</p> <p>2 MR. JACKSON: That's what I'm asking,</p> <p>3 Howard.</p> <p>4 MR. MISHKIND: Okay, I'll shut up, but there</p> <p>5 is.</p> <p>6 MR. JACKSON: I get to ask him questions,</p> <p>7 but I mean if that's an opinion he's going to render, I</p> <p>8 want to hear it, I'd prefer to hear it from him.</p> <p>9 MR. MISHKIND: Absolutely.</p> <p>0 A. Those are the ones that are clearly below</p> <p>1 the standard of care. The issue of informed consent is</p> <p>2 one that is not clearly documented and I do have</p> <p>3 opinions on that, but it's more difficult to establish</p> <p>4 what was said or wasn't said at what time.</p> <p>5 Q. BY MR. JACKSON: Well, are you going to</p> <p>6 render opinions that Dr. Tizzano fell below the</p> <p>7 standard of care as it relates to informed consent</p> <p>8 issue, the informed consent issue with Mrs. Robbins?</p> <p>9 A. I believe what is in the record and what was</p> <p>0 testified to in his deposition he would be below the</p> <p>1 standard of care in that regard.</p> <p>2 Q. Based upon the group's medical records</p> <p>3 related to Mrs. Robbins?</p> <p>4 A. Yes.</p> <p>5 Q. Based upon the hospital records?</p> <p>Page 8</p>

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<p>1 A. Yes.</p> <p>2 Q. Based upon his testimony?</p> <p>3 A. Yes.</p> <p>4 Q. What about her testimony?</p> <p>5 A. That would also enter into it, yes.</p> <p>6 Q. Did you read the testimony of Nurse Nancy</p> <p>7 Morgan?</p> <p>8 A. No, I did not.</p> <p>9 Q. Did you ask for it?</p> <p>0 A. When I was reviewing for this case it was</p> <p>1 yesterday and at that point I realized that I did not</p> <p>2 have that nor did I have the testimony of Alexis</p> <p>3 Robbins. And so I've asked for that, but I do not have</p> <p>4 that at this point in time.</p> <p>5 MR. ROSSI. Alexis or Angel Robbins?</p> <p>6 A. Did I say Alexis? I meant Angel.</p> <p>7 Q. BY MR. JACKSON: Let me start with the first</p> <p>8 opinion, Doctor, I want to explore these with you. You</p> <p>9 said that if Dr. Tizzano was aware at 4:15 of</p> <p>0 Mrs. Robbins' condition lie should have performed an</p> <p>1 examination and considered a C-section or perhaps even</p> <p>2 performed a C-section?</p> <p>3 A. If he was aware of her condition at 4:15 he</p> <p>4 should have performed a Caesarian section, yes.</p> <p>5 Q. Do you have any evidence that you can site</p> <p style="text-align: right;">Page 5</p>	<p>1 MR. MISHKIND: Objection, I think it's a</p> <p>2 different question.</p> <p>3 MR. JACKSON: It is a different question.</p> <p>4 A. It is a different question and, again, I get</p> <p>5 back to what he should have known as opposed to what</p> <p>6 necessarily was documented in the record and</p> <p>7 depositions.</p> <p>8 Q. BY MR. JACKSON: I just want to be clear,</p> <p>9 though. There is no evidence now that he knew of her</p> <p>10 condition; correct?</p> <p>11 A. I think we've said that three times.</p> <p>12 Q. I know we have and I tried to say that as</p> <p>13 you sit here, then, there's no evidence that you know</p> <p>14 of that supports your first criticism of Dr. Tizzano;</p> <p>15 is that also correct?</p> <p>16 A. Again, there's no evidence in the records</p> <p>17 that would support that, correct.</p> <p>18 Q. Or in the depositions?</p> <p>19 A. Or in the depositions.</p> <p>20 Q. What other source of evidence do you have in</p> <p>21 this case other than the records and the depositions?</p> <p>22 A. Well, I've got the nurse's -- again, we're</p> <p>23 going to have to decide who to believe, there's a</p> <p>24 conflict between what the nurse says that she did and</p> <p>25 what Dr. Tizzano says that happened. If the nurse is</p> <p style="text-align: right;">Page 1</p>
<p>1 me to which indicates that Dr. Tizzano did in fact have</p> <p>2 an awareness of Mrs. Robbins' condition at 4:15?</p> <p>3 A. In the record there is no evidence that the</p> <p>4 nurse contacted him at 4:15.</p> <p>5 Q. Is there any evidence that you're aware of</p> <p>6 from any source that suggests that Dr. Tizzano was</p> <p>7 aware of Mrs. Robbins' condition at 4:15?</p> <p>8 A. I think I -- I guess I didn't include the</p> <p>9 depositions.</p> <p>0 Q. No, you didn't.</p> <p>1 A. There's no evidence that I'm aware of, no.</p> <p>2 Q. So would I be correct that as you sit here</p> <p>3 today you know of no evidence which would support your</p> <p>4 first criticism of Dr. Tizzano? Am I correct in that</p> <p>5 understanding?</p> <p>6 A. Well, let me expound on that and why I feel</p> <p>7 that he should have known at 4:15.</p> <p>8 Q. Please answer my question first. As you sit</p> <p>9 here today am I correct that you know of no evidence to</p> <p>0 support the position that Dr. Tizzano knew of her</p> <p>1 condition at 4:15 a.m.?</p> <p>2 A. That is correct.</p> <p>3 Q. So there is no evidence in the record or in</p> <p>4 depositions or in this case supporting your first</p> <p>5 criticism of Dr. Tizzano; is that a correct statement?</p> <p style="text-align: right;">Page 10</p>	<p>1 correct and she does call Dr. Tizzano and notified him</p> <p>2 that this patient, Mrs. Robbins, was present and that</p> <p>3 she was in labor and delivery laboring as the nurse</p> <p>4 states that she did at approximately midnight, then</p> <p>5 Dr. Tizzano would have an obligation to have different</p> <p>6 expectations, different orders for the nurse.</p> <p>7 Certainly he should be aware of the epidural placement</p> <p>8 and that apparently was not -- he was not made aware of</p> <p>9 that.</p> <p>10 Q. Okay.</p> <p>1 MR. MISHKIND: John, don't interrupt him.</p> <p>2 MR. JACKSON: I am interrupting him because</p> <p>3 he just made a point I want to ask him a question on.</p> <p>4 A. Can I finish my answer?</p> <p>5 MR. JACKSON: You can. I want to ask you a</p> <p>6 question.</p> <p>7 MR. MISHKIND: Let's not talk at the same</p> <p>8 time.</p> <p>9 MR. JACKSON, We're not going to so don't</p> <p>10 interrupt and don't suggest testimony.</p> <p>11 MR. MISHKIND: I'm not, John. I'm going to</p> <p>12 continue to talk because you cut the doctor off. I'm</p> <p>13 not suggesting anything.</p> <p>14 MR. JACKSON: I didn't --</p> <p>15 MR. MISHKIND: Please, if the doctor is</p> <p style="text-align: right;">Page 12</p>

1 answering a question and you don't have the courtesy of
2 letting him finish it, then you're not being fair to
3 him. I'm not suggesting anything to the doctor.
4 MR. JACKSON: Howard --
5 MR. MISHKIND: Please.
6 MR. JACKSON: -- don't make those kinds of
7 statements on the record I'm not being fair to him. I
8 said I have a question of him, he can finish his answer
9 as he wishes. I would like to ask him questions
10 without your interruptions. I know he knows how to do
11 this and he'll do very well for you so please let me
12 answer my questions and if he has something additional
13 to say he can say it, and he apparently does. So
14 that's where we're going to go. I'm going to ask him a
15 question now about what he just said and he'll be
16 allowed to finish what he has to say and that's how we
17 are going to go.
18 MR. MISHKIND: Are you done?
19 MR. JACKSON: I am.
20 MR. MISHKIND: I'm not -- if you're going to
21 interrupt him, so he can get his train of thought back
22 if necessary we'll go back, we'll read where you
23 interrupted him so he can finish his thought. I'm not
24 suggesting anything to him, but if the doctor is
25 answering questions you should let him finish his

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1 answer. If that's how you want to handle it, fine,
2 I'll let you do it that way.
3 MR. JACKSON: If I'm going to ask him a
4 question, I'll ask him a question. If you want to
5 object, object and then let's stop there or we'll be
6 here all night.
7 A. Let me say something now. I'm going to
8 finish my first answer to you, then you can ask me
9 whatever question you want. I'm not going to be
10 interrupted in the middle of my answer, if you don't
11 mind.
12 MR. JACKSON. What is it you want to say,
13 Doctor, go ahead.
14 A. With a VBAC patient he should have had an
15 expectation or a verbal order of nurse to call him with
16 an epidural so that he would know at what particular
17 station, what was going on, when she had the epidural.
18 He also should have told the nurse a clear
19 understanding that he should be called at the time she
20 was completely dilated and that did not happen, so
21 those things should have occurred. If the nurse called
22 him the first time and he was aware that she was in
23 labor, he should have made those things known, at least
24 what his plan was when he wanted to be notified.
25 In his deposition he said that if he knew

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1 that she was completely dilated and minus 3 to minus 4
2 station at 4:15 that he would have come in and done an
3 evaluation. I would expect that he would have made the
4 nurse aware of his desires to know when she was
5 completely dilated. That is the indirect evidence that
6 if the nurse is correct, then Dr. Tizzano should have
7 made the nurse aware of his expectations of when he
8 would be notified, that would have included 4:15 when
9 she was completely dilated. Now I'm done.
10 MR. JACKSON: You're done, okay. Did you
11 want to add anything?
12 MR. MISHKIND: You don't hear me talking, do
13 you.
14 MR. JACKSON: I just wanted to be sure.
15 MR. MISHKIND: I appreciate that, but you
16 don't have to do that after each question.
17 MR. JACKSON: I don't intend to.
18 MR. MISHKIND: Good.
19 Q. BY MR. JACKSON: Are you saying it's
20 Dr. Tizzano's responsibility to tell the nurse,
21 assuming that he knew about this patient being there at
22 midnight or thereabouts, to specifically say to the
23 nurse that if there's going to be an epidural you must
24 call me? Is that what your testimony is?
25 A. I believe he said that he wanted to know

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1 when an epidural was being given.
2 Q. Is it your testimony, Doctor, that
3 Dr. Tizzano had an obligation to tell Nurse Moats if
4 they had a conversation at midnight that this patient
5 was there that he should be called if there was going
6 to be an epidural placed? Is that your testimony?
7 A. Unless he gave her different orders at
8 midnight he needs to be called, yes, and he should tell
9 her to call him if an epidural is placed, yes.
10 Q. That is true regardless of Nurse Moats'
11 experience, that is true in your opinion regardless of
12 his relationship with the staff and the nurses that man
13 the labor and delivery suite, he should have under
14 these circumstances if he knew that this patient was
15 there at midnight when he talked with Nurse Moats
16 specifically told her that she should call him
17 regarding an epidural, is that your testimony?
18 A. Unless he told her at midnight it's okay for
19 her to have an epidural at such-and-such a dilatation
20 or whatever his parameters were, then he needs to be
21 notified about that in a VBAC situation, yes.
22 Q. I agree with what you just said, Doctor, but
23 that wasn't responsive to my question. My question
24 was: Are you saying under the circumstances in this
25 case with the experience of the people that were

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<p>1 involved here that it was the obligation of Dr. Tizzano 2 to tell Nurse Moats if they had the conversation at 3 midnight to affirmatively say to her you must call me 4 if there's going to be an epidural placed in this 5 patient? Is that your testimony? 6 MR. MISHKIND. Objection. 7 A. I think I've answered that twice. 8 Q. BY MR. JACKSON: You have not answered that. 9 A. I'm sorry, I have. I don't want to get into 10 a confrontation with you. 11 Q. I don't either. 12 A. So I would like to maybe get a little more 13 relaxed with this. I've answered this twice. You've 14 asked the question twice and I've answered it. He has 15 an obligation if at midnight she calls him and asked 16 about an epidural, he has the obligation to say, yeah, 17 you can have it at any time or you can have it at five 18 centimeters or you can have it at two centimeters or 19 call me before she gets the epidural, I'd like to know 20 what's going on. He's got the obligation to tell her 21 some parameters that would allow her to have an 22 epidural placed. 23 Q. Doctor, I -- 24 A. If there's a standard order that says -- and 25 I don't understand why you don't understand what I'm</p> <p style="text-align: right;">Page 17</p>	<p>1 in her deposition states that she brought up the issue 2 of the epidural and so it is an issue that is brought 3 up, it is not on the record, it is in the deposition. 4 He does not have an affirmative action to tell her 5 that, but she says she brought it up to him and that 6 was why she didn't call him at 3:00 in the morning when 7 she got the epidural, so it is an issue in the case. 8 He does not have an affirmative action at midnight to 9 say it's okay to give an epidural, but if she brought 10 it up to him, then there is an affirmative action to 11 make some parameters so she can operate under that. 12 Q. BY MR. JACKSON: Do you believe Nurse Moats 13 had an obligation to call Dr. Tizzano before an 14 epidural was placed? 15 A. Yes. 16 Q. And did she do that? 17 A. No. 18 Q. Whose responsibility was it for her to call? 19 A. Well, it was her responsibility to call. 20 Q. Do I understand you to be blaming 21 Dr. Tizzano for her not calling him before the epidural 22 was placed? 23 A. If you believe Nurse Moats who says I talked 24 to him at midnight, I let him know she's there, told 25 him what was going on, asked about an epidural and he</p> <p style="text-align: right;">Page 19</p>
<p>1 saying to you. 2 Q. I do understand what you're saying, you're 3 not being responsive to my question because every time 4 you've answered that question you have put an issue in 5 there that is not a fact in this case. You say that he 6 should be made aware if an epidural is going to be 7 placed. You say that if she told him or suggested an 8 epidural was going to be placed at some time that he 9 should be made aware when that was going to be placed 10 or if she talked to him about an epidural he should 11 tell her he wants to be called, but none of those are 12 the facts in this case and I'm asking under the facts 13 of this case because what I heard you say a moment ago 14 was that he fell below standard of care because when 15 the telephone call, if it took place at midnight 16 between Nurse Moats and Dr. Tizzano, that he had an 17 affirmative obligation absent anything she said to tell 18 her you must call me if an epidural is going to be 19 placed. That's the question I'm asking you. Is that 20 your testimony? 21 MR. MISHKIND. Doctor, wait.. Before you 22 answer let me object on the record and I'll leave it at 23 that, John. I won't even state my multiple reasons for 24 my objection, but go ahead. 25 A. No, not an affirmative action. Nurse Moats</p> <p style="text-align: right;">Page 18</p>	<p>1 said it was okay to give it, then that would -- that 2 would be one set of facts. And that would be if 3 Nurse Moats did not say that, then he would not have an 4 affirmative obligation. 5 Q. Do I understand you to also say in this 6 first criticism that it was Dr. Tizzano's obligation if 7 this phone call took place at midnight to tell 8 Nurse Moats that when she's completely dilated you 9 should call me? 10 A. In a patient that was floating when he saw 11 her in the office that comes in in labor and is 12 floating again at minus 4 station who is a VBAC with 13 what should have been recognized as a large baby, he 14 never went in and evaluated the size of the baby, he 15 never went in and evaluated whether the patient was 16 still minus 4, in that circumstance absolutely he's got 17 an affirmative obligation to make sure of what she is 18 at the time she's completely dilated. 19 Q. Do you believe it was Dr. Tizzano's 20 obligation to tell Nurse Moats if they had a 21 conversation at midnight you must call me when she's 22 completely dilated? 23 A. I would be very -- I would have him go into 24 the hospital because she's floating when he saw her in 25 the office that day and she's floating when she comes</p> <p style="text-align: right;">Page 20</p>

1 in and he never goes in and evaluates the size of the
2 baby, there's never any indication of what the size of
3 the baby is. Turns out the baby is a pound heavier
4 than the prior baby that was a failure to progress for
5 a C-section. And for him to stay at home and not want
6 to come in and evaluate the patient and then to think
7 that when she gets to be complete if she's still
8 minus 4 station that he wouldn't want to be notified,
9 that's not a normal thing, let me put it to you that
10 way. He probably never should have let her labor, but
11 he did, and to be floating at minus 4 station when
12 you're entering labor is not a normal thing and for him
13 to not want to be called, especially if she doesn't
14 descend in a normal manner, would be below the
15 standard.

16 MR. JACKSON: Jennifer, would you read back
17 my last question to the doctor.

18 (Question read.)

19 Q. BY MR. JACKSON: Do you understand that
20 question?

21 A. Yes, I answered it for you.

22 Q. Do you believe you just answered it with
23 your discussion?

24 A. I believe I did.

25 Q. In a single word is your answer "yes" to

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1 that?

2 A. The answer is yes.

3 Q. Do you believe there was a conversation
4 between Nurse Moats and Dr. Tizzano at midnight?

5 A. I don't know how to answer that, I have no
6 way of knowing.

7 Q. Based upon what you saw in the case and how
8 Dr. Tizzano reacted, what's in the records, how he
9 dealt with this patient, do you believe there was a
10 conversation? Based on the information you have,
11 Doctor, do you believe there was such a conversation?

12 MR. MISHKIND: Let me just object and ask
13 when you say how he reacted, I'm not sure what you mean
14 by that, John.

15 Q. BY MR. JACKSON: Based upon everything that
16 you know about this case, do you believe there was a
17 conversation between Nurse Moats and Dr. Tizzano at
18 midnight or thereabouts?

19 MR. MISHKIND: Including how he explained in
20 his deposition?

21 MR. JACKSON: Read it back for Howard.

22 MR. MISHKIND: You don't have to do that.

23 MR. JACKSON: I said "everything."

24 MR. MISHKIND: I don't know --

25 MR. JACKSON: Did I say "everything?"

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1 Q. BY MR. JACKSON: Do you understand the
2 question?

3 A. I do.

4 Q. Would you answer it?

5 A. I'm going to give you my best estimate
6 because I wasn't there and I don't know. Based on what
7 Dr. Tizzano said in his deposition that he usually is
8 not asleep at that point in time, that he should have
9 remembered a conversation if he was not being awakened
10 in the middle of the night, based on that I am
11 supposing that the conversation did not take place.

12 Based on usual and custom I would expect the nurse to
13 call and I think Dr. Tizzano expected the nurse to
14 call. Based on how he responded after the nurse talked
15 to him at 6:00 in the morning I don't know the answer
16 because he didn't respond in an appropriate manner and
17 so it destroyed whatever credibility I would give him
18 based on your first question about the midnight phone
19 call.

20 Q. Let me move to your second criticism and
21 that involves the 6:00 phone call which is documented;
22 correct?

23 A. Yes, it is.

24 Q. Is it your understanding that in the 6:00
25 call to Dr. Tizzano the conversation -- he called in as

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1 a matter of fact; is that your understanding?

2 A. The nurse says she called him so he says he
3 called her.

4 Q. Is it your understanding that at 6:00
5 Dr. Tizzano was told or made aware that this patient
6 was complete since 4:15?

7 A. Yes.

8 Q. And that's based upon what testimony,
9 Doctor?

10 A. I believe his testimony.

1 Q. Would you show me? Do you have his
2 testimony here?

3 A. Certainly the nurse's testimony. I've got
4 his, I don't remember exactly what he said.

5 Q. I'd like to know the basis for the statement
6 you just made, Doctor, because I don't believe that's
7 in the records and if you can point it out to me, I'd
8 appreciate it.

9 A. It's in the nurse's testimony and I think he
10 says that he probably was told.

11 MR. JACKSON: Can I see it, Howard?

12 MR. MISHKIND: Sure.

13 MR. JACKSON: You're referring to?

14 MR. MISHKIND: The doctor's note at
15 6:00 a.m.

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<p>1 MR. JACKSON: This note doesn't reflect what 2 you're just saying so maybe there's some other 3 testimony. 4 Let me read the note into the record. This 5 is Dr. Tizzano's note at 0600: "Labor and delivery was 6 contacted. Report was gotten from the nurse in charge 7 of Mrs. Robbins stating that the cervix was completely 8 dilated; however, the vertex was at minus 3 to minus 4 9 station. Membranes were intact, reactive fetal heart 10 rate tracing was present." 11 Q. BY MR. JACKSON: Is that what you're relying 12 on, Doctor? 13 A. There's certainly that. I don't know what 14 he said in his deposition. 15 Q. So that we're clear, Doctor, and we don't 16 have any misunderstanding, your criticism of 17 Dr. Tizzano that you stated when I first asked you all 18 of them was that at 6:00 when he had the conversation 19 with Nurse Moats he was aware or told that she was 20 complete since 4:15 a.m. That's what I'm asking you to 21 show me in the records or in testimony, that that 22 information was transmitted to Dr. Tizzano. 23 MR. MISHKIND: Which deposition are you 24 looking at, Doctor? 25 A. I'm looking at Dr. Tizzano's.</p> <p style="text-align: right;">Page 25</p>	<p>1 "now, Dr. Tizzano has already testified that you did 2 not tell him that your vaginal exam at 4:15 showed that 3 she was complete, 100 percent effaced and minus 3 4 station and at 6:00 a.m. complete, 100 percent effaced 5 and minus 4 station. You just described that she had 6 been minus 3 to minus 4. If his testimony is to that 7 effect, would he be accurate in that recollection?" 8 Then there was an objection to what he said, "but go 9 ahead, you can answer if you understand." "Can you 10 rephrase the question?" Question, "Dr. Tizzano has 11 testified, and if necessary I can direct you to the 12 specific page, but to save time he indicated in his 13 testimony that you shared with him that she had been 14 minus 3, minus 4, but did not indicate that she 15 had -- from your vaginal exam at 4:15 had gone from 16 minus 3 to minus 4 at 6:00. Would that be an accurate 17 recollection on his part?" Answer, "I really don't 18 know." 19 Q. Those were questions, so that we're clear on 20 the record, asked of the nurse by Mr. Mishkind; 21 correct? 22 A. Correct. Now I was looking for where in 23 Dr. Tizzano's testimony he talked about that and I 24 couldn't find it quickly. 25 Q. But as Mr. Mishkind represented to the nurse</p> <p style="text-align: right;">Page 27</p>
<p>1 MR. MISHKIND: You want to know in terms of 2 communication by Nurse Moats to Dr. Tizzano; right? 3 MR. JACKSON: That was his testimony, 4 Howard. 5 MR. MISHKIND: Just asking. 6 MR. JACKSON: I want to know the basis for 7 that statement. 8 MR. MISHKIND: Doctor, you may want to look, 9 just to save some time, to page 73 of Nurse Moats' 10 testimony. 11 MR. JACKSON: Can I see that? 12 MR. MISHKIND: You don't have that? 13 MR. JACKSON: I don't. 14 MR. MISHKIND: Actually page 72 and 73. 15 A. Okay. I guess what the nurse testified to 16 in the question by Mr. Mishkind was "Dr. Tizzano --" 17 MR. JACKSON: Excuse me, Doctor -- 18 A. Page 72. 19 MR. JACKSON: What line are you starting? 20 A. Let's start at line -- let's start at 71, 21 line 21, "did you feel that there was any significance 22 at all in the difference in terms of station as 23 demonstrated on the record from 4:15 at minus 3 station 24 to 6:00 a.m. at minus 4 station?" Answer, "not given 25 the fact that her membranes were intact." Question,</p> <p style="text-align: right;">Page 26</p>	<p>1 in his questioning of her taken after Dr. Tizzano's 2 deposition, Dr. Tizzano indicated she did not tell him 3 that; correct? 4 A. From that -- 5 Q. If we believe what Mr. Mishkind said to the 6 nurse. 7 A. From what I took from that he was talking 8 about the minus 3, minus 4, not whether there was a 9 exam that she was complete at 4:15 or not. That's what 10 I took from that, whether that's what was meant or what 11 the nurse took from that I don't know. 12 Q. This is Mr. Mishkind's words to the nurse, 13 line 3, page 72, "now, Dr. Tizzano has already 14 testified that you did not tell him that your vaginal 15 exam at 4:15 showed that she was complete," and then he 16 goes on. Now, that testimony, if we believe what 17 Mr. Mishkind said, and he was going to go to a specific 18 line but he didn't have to, if we believe what he 19 represented to her in her deposition without even going 20 to Dr. Tizzano's testimony, Mr. Mishkind said 21 Dr. Tizzano told him in deposition he wasn't aware or 22 wasn't told about her being complete at 4:15; is that 23 correct? 24 A. No, that's not how I read that. I read that 25 as the minus 3 and minus 4, not that he was not told</p> <p style="text-align: right;">Page 28</p>

1 **that she was complete at 4:15.**
2 Q. Okay. So when you said "did not tell him
3 that your vaginal exam at 4:15 showed that she was
4 complete" --
5 A. **Keepgoing.**
6 Q. I understand there's more, but I'm talking
7 about complete, she says "was not told that she was
8 complete."
9 A. **That's not the whole statement.**
10 Q. That's true?
11 A. **I'm interpreting the statement, I'm just**
12 **telling you how I'm interpreted it. How she**
13 **interpreted and how the Court will interpret it may be**
14 **a different matter. I looked at it being the minus 3**
15 **and minus 4, not that he was not aware that she was**
16 **complete at 4:15.**
17 Q. The minus 3 and minus 4 is in his note. My
18 question to you that started all this was that in your
19 second criticism of Dr. Tizzano which I asked you about
20 your first comment was that knowing that she was
21 complete since 4:15 and then you went on to the
22 minus 3, minus 4 and other things.
23 A. **Yes.**
24 Q. My question to you that started all of this
25 was what's the basis for your saying that Dr. Tizzano

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1 was made aware at the 6:00 phone call that this patient
2 was complete since 4:15. Is that your only reference
3 to that, what you just said, what we just read in
4 Nurse Moats' deposition?
5 A. **I'd like to find what Dr. Tizzano says about**
6 **it.**
7 MR. JACKSON: Take your time, Doctor.
8 A. **It's going to take all night.**
9 MR. JACKSON: That's fine, take all night
10 because I consider this important. You made a
11 statement, I want an actual basis for that. If there
12 is none, say that, because I suggest to you there is
13 none, he did not say that, and when you read her
14 testimony as represented by Mr. Mishkind that's exactly
15 what was the testimony. But go ahead, if you think you
16 can find it, go ahead.
17 A. **I don't know where it is in here.**
18 MR. JACKSON: It's not there, Doctor. Maybe
19 Mr. Mishkind can help you.
20 MR. MISHKIND: It's your deposition, you're
21 going to represent it's not there.
22 MR. JACKSON: You represented it to her,
23 Howard, that's exactly what it is.
24 MR. MISHKIND: It's your deposition, I'm not
25 going to represent anything.

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1 MR. JACKSON: You just take your time then,
2 Doctor, because we're not going to do this on my
3 representations. I want you to find where there's any
4 evidence in these depositions that she told Dr. Tizzano
5 that this patient was complete since 4:15 when she
6 spoke with him at 6:00.
7 MR. MISHKIND: Which pages are you looking
8 at?
9 A. **I'm at 133 now, and basically his answer is**
10 **very general and vague and does not include what she**
11 **told him exactly. So I guess other than his note in**
12 **the chart, which does not detail whether he knew the**
13 **4:15 exam or not, there's nothing in his deposition**
14 **that will tell us one way or the other, at least that I**
15 **can find in quick perusal.**
16 Q. BY MR. JACKSON: If we rely on
17 Mr. Mishkind's statement to the nurse in her
18 deposition, then in his deposition somewhere is
19 testimony that she didn't tell him that; would you
20 agree with that?
21 MR. MISHKIND: Objection.
22 A. **I don't know how to agree with that or**
23 **disagree with that.**
24 Q. BY MR. JACKSON: Can you tell me as we sit
25 here today the basis for that comment that you made

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1 that she told him at 6:00 that this lady was complete
2 since 4:15?
3 A. **Well, number one, there would be no reason**
4 **for her not to if he calls --**
5 Q. The question, Doctor, can you point me to --
6 MR. MISHKIND: Objection.
7 MR. JACKSON: I'm not going to play this
8 game.
9 MR. MISHKIND: Let the record reflect you
10 cut him off.
11 Q. BY MR. JACKSON: I asked you a specific
12 question and I don't want to play games with you.
13 **As we sit here today right now can you tell**
14 **me what the basis is for your saying that she told**
15 **Dr. Tizzano at 6:00 that Mrs. Robbins was complete**
16 **since 4:15? Now, we've sat here for the last 10**
17 **minutes, Mr. Mishkind has gone through the depo, you've**
18 **gone through the depo, and I'm asking you what's the**
19 **basis for that statement in the records or the**
20 **depositions? Can you tell me as we sit here, yes or**
21 **no?**
22 A. **In the records or the depositions I cannot**
23 **tell you.**
24 Q. Okay. Is there anything other than the
25 depositions or the records that you have relied upon in

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<p>1 formulating these opinions?</p> <p>2 A. I've relied upon my experience in working</p> <p>3 with labor and delivery nurses and being a physician,</p> <p>4 doing Ob for the number of years that I've done it and</p> <p>5 that's where I'm going to come from here is that</p> <p>6 there's no reason for the nurse not to have told him.</p> <p>7 As a matter of fact it would be standard and below</p> <p>8 standard if she didn't tell him. We know there was a</p> <p>9 communication and if she didn't tell him it would be</p> <p>10 below standard for Dr. Tizzano not to ask, so if that</p> <p>11 communication didn't occur it's below standard for him</p> <p>12 not to say, well, how long has she been complete, five</p> <p>13 minutes, two hours, what's the story, I didn't even</p> <p>14 know she was here so I need to catch up on what's going</p> <p>15 on so --</p> <p>16 Q. So your opinion --</p> <p>17 MR. MISHKIND: Objection. You're cutting</p> <p>18 him off again. If you're going to do that I just want</p> <p>19 the record to reflect it.</p> <p>20 MR. JACKSON: He was done, I wasn't cutting</p> <p>21 him off.</p> <p>22 MR. MISHKIND: Yes, you were.</p> <p>23 MR. JACKSON: Is there something else?</p> <p>24 A. No, I'm done.</p> <p>25 MR. JACKSON: Please complete your answer.</p> <p style="text-align: right;">Page 33</p>	<p>1 effect, it will be reflected in whatever she wrote up,</p> <p>2 but no one else said anything.</p> <p>3 MR. MISHKIND: I was silent, as was</p> <p>4 Mr. Rossi, but our silence was not intended to mean a</p> <p>5 disagreement. The court reporter apparently felt that</p> <p>6 she needed to hear from everybody.</p> <p>7 MR. JACKSON: The court reporter did her</p> <p>8 job. This is not the court reporter's fault.</p> <p>9 MR. MISHKIND: I'm not suggesting anything,</p> <p>10 stop inferring things.</p> <p>11 MR. JACKSON: I don't want that to be</p> <p>12 suggested, she did exactly what she should have done.</p> <p>13 MR. MISHKIND: Go ahead, hopefully.</p> <p>14 Q. BY MR. JACKSON: Doctor, as it relates to</p> <p>15 your second criticism of Dr. Tizzano that dealt with</p> <p>16 the issue of the 6:00 telephone call, do I understand</p> <p>17 your testimony now to be that if the nurse did not tell</p> <p>18 the doctor that the patient was complete since 4:15, it</p> <p>19 was incumbent upon the doctor to ask how long she'd</p> <p>20 been complete?</p> <p>21 A. Yes.</p> <p>22 Q. And if he didn't do that, is it your</p> <p>23 testimony that he fell below the standard of care?</p> <p>24 A. Yes.</p> <p>25 Q. You said in response to my question earlier</p> <p style="text-align: right;">Page 35</p>
<p>1 You had nothing else to say, did you? I don't want to</p> <p>2 play this game.</p> <p>3 A. Can we go off the record?</p> <p>4 MR. JACKSON: I'll be happy to do that.</p> <p>5 (Discussion off the record.)</p> <p>6 (Recessed from 6:47 p.m. until 6:58 p.m.)</p> <p>7 MR. JACKSON: There was a conversation</p> <p>8 between the doctor and I, actually the three of us,</p> <p>9 Mr. Mishkind was involved.</p> <p>10 MR. MISHKIND: Minimally.</p> <p>11 MR. JACKSON: We don't have to get into</p> <p>12 that. After the doctor said "off the record" the</p> <p>13 doctor does not want that recorded in the transcript.</p> <p>14 We've agreed that that will not be a part of the</p> <p>15 transcript that goes to the doctor; however, it will be</p> <p>16 typed up and be provided to you. If the doctor wants</p> <p>17 to see it and wants a copy of it, wants to review it,</p> <p>18 he's welcome to do that, but it won't be a part of the</p> <p>19 official transcript per se; however, this agreement</p> <p>20 will be a part of the transcript.</p> <p>21 MR. MISHKIND: And just one other comment</p> <p>22 and then we can move on. In addition to the doctor</p> <p>23 saying "off the record" you had indicated as well that</p> <p>24 it was to be off the record.</p> <p>25 MR. JACKSON: I said "okay" or words to that</p> <p style="text-align: right;">Page 34</p>	<p>1 about that telephone call and what your criticisms were</p> <p>2 that Dr. Tizzano should have evaluated the patient</p> <p>3 immediately?</p> <p>4 A. Yes.</p> <p>5 Q. Would you explain what you mean by that?</p> <p>6 A. You have a patient with a prior Caesarian</p> <p>7 section who has a large baby who has progressed to</p> <p>8 completely dilated and is still floating the presenting</p> <p>9 part. This is an unusual circumstance and represents</p> <p>0 clearly a failure to progress in labor. It requires an</p> <p>1 immediate evaluation and by "immediate" I would say 15</p> <p>2 to 20 minutes.</p> <p>3 Q. And had he evaluated the patient in 15 to 20</p> <p>4 minutes as you suggested he should have, what do you</p> <p>5 say would have happened?</p> <p>6 A. I don't think I can tell you what would have</p> <p>7 happened, I can tell you what should have happened to</p> <p>8 be within the standard of care would be that he would</p> <p>9 elect to perform a Caesarian section given the factors</p> <p>10 that I've already mentioned, the large baby, failure to</p> <p>11 descend, and prior Caesarian section, she'd already</p> <p>12 been -- if we give him 20 minutes to get there and</p> <p>13 evaluate her she would have been two hours in the</p> <p>14 second stage of labor at presumably a minus 3 or</p> <p>15 minus 4 station at that point in time and a C-section</p> <p style="text-align: right;">Page 36</p>

1 was absolutely indicated at that time for failure to
2 progress.

3 Q. Do I understand your testimony to be that if
4 there was information such as the completeness or other
5 information that was not transmitted to Dr. Tizzano by
6 the nurse in the 6:00 phone call, he had an obligation
7 by the standard of care to request, specifically
8 request, all that information?

9 A. Yes. If you take his testimony that he did
0 not know until 6:00 that she was there, he needs to get
1 all the information essentially brand-new to him at
2 that point in time and so he would have to go back to
3 the heart rate tracing, looks, okay, she's now
4 complete, when did she become complete, what's her
5 station, membranes intact or not, what's her vital
6 signs, those kind of things he would have to catch up
7 on, how she got to where she is in order to comply with
8 the standard of care.

9 Q. You reviewed Dr. Tizzano's note reflecting
0 information he had at 0600?

11 A. Yes.

12 Q. Based upon the information reflected in that
13 note is it your opinion that it was incumbent upon
14 Dr. Tizzano to see that patient immediately?

15 A. Yes.

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1 complication such as a prolapsed cord, which did not
2 occur in this case.

3 Q. Is it your opinion that the fact that
4 Dr. Tizzano ruptured the membranes at 7:44 -- that's
5 the time we're talking about?

6 A. It is, yes.

7 Q. -- was below standard of care?

8 A. Yes.

9 Q. Is it your testimony that that was a
10 proximate cause of injury to Mrs. Robbins or her baby?

11 A. That's very difficult to say. Certainly
12 nothing had happened prior to that and immediately with
13 the ruptured membranes the rupture occurs so from
14 certainly a timing standpoint it appears to be cause
15 and effect, but I don't know that I can state to a
16 degree of certainty that it is cause and effect.

17 Q. I need to know whether you can state to a
18 reasonable degree of medical certainty or probability
19 that the rupture of the membranes at 7:44 by
20 Dr. Tizzano caused harm to Mrs. Robbins or her baby?

21 A. I can't be to a 51 percent medical
22 probability; however, given the events that unfolded
23 immediately after the ruptured membranes I believe that
24 there was an association of the ruptured membranes with
25 the uterine rupture.

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1 Q. Failure to do so was below standard of care?

2 A. Yes.

3 Q. Your third criticism of Dr. Tizzano dealt
4 with the fact that he ruptured the membranes at a
5 minus 2 station?

6 A. Yes.

7 Q. Did I understand that correctly?

8 A. Yes, you did.

9 Q. What is your criticism there and the basis
0 for that criticism?

1 A. You have an unengaged fetal head, he
2 ruptured the membranes in a circumstance when the most
3 common complication would have been a prolapsed cord.
4 He is not in a position at that hospital and with the
5 facilities available to do an immediate Caesarian
6 section, therefore it is below the standard to put this
7 patient at a risk of a prolapsed cord without having
8 the ability to proceed immediately with the C-section.

9 Q. What should he have done?

10 A. He should have called in the OR crew, the
11 anesthesiologist, and eventually if he felt -- again,
12 the standard would be to do a C-section. If he felt
13 compelled to do a ruptured membranes at that point in
14 time, he should have been ready to do a delivery
15 immediately, within 10 minutes, of having a

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1 Q. Do I understand you to be saying that you
2 are unable to state that it is more likely than not a
3 fact that the ruptured membranes at 7:44 or the
4 rupturing of the membranes at 7:44 was a cause of
5 injury to Mrs. Robbins or her baby?

6 A. I can't state that it is the only cause of
7 injury, I can state that it is a contributing cause.
8 Was it to a degree of probability that that was the
9 cause, I can't say that, no.

0 Q. Can you say that it is more likely than not
1 a cause of injury to Mrs. Robbins or her baby?

2 A. I would prefer to say it was a contributing
3 factor, not that -- and I'm distinguishing between that
4 and a cause. I guess it's a cause, okay, I'll state
5 it's a cause.

6 Q. I need to explore this with you, Doctor,
7 because it's important. The fact that it is a cause in
8 your opinion may not be enough legally because it is
9 necessary that you hold that opinion that it is more
10 likely than not a cause of injury and that's what I'm
11 trying to understand here. And I don't want to get
12 into a word game with you, I want to know if -- because
13 you've told me you can't hold that opinion more than
14 50 percent, but I need to know is it your opinion in
15 this case that more likely than not the fact that

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<p>1 Dr. Tizzano ruptured the membranes at 7:44 caused 2 injury to Mrs. Robbins and/or her baby? 3 A. Let me try to restate it for you. I can to 4 a degree of medical probability say that it was a 5 contributing factor. Is it the only cause of the 6 rupture, I can't state that to a 51 percent, but I can 7 to a degree of medical probability, meaning 51 percent 8 or greater, that it contributed to the rupture, yes. 9 Q. When you talk about contributed to the 10 rupture are you referring to the ruptured uterus? 11 A. Yes. 12 Q. What else do you say contributed to the 13 rupture? If this was not the proximate cause but a 14 proximate cause, what else contributed? 15 A. The other factor that I think contributed to 16 it was laboring this patient for three hours 17 and -- let's see, from 4:15 to 7:44, approximately 18 three hours and 30 minutes in the second stage with a 19 floating presenting head. 20 Q. Forgive me, Doctor, if I don't understand 21 what you're saying to me, but you're saying that the 22 fact that he ruptured the membranes in your opinion was 23 not a cause of injury, more likely than not, or more 24 than to a reasonable degree of medical certainty or 25 probability, is that what you said?</p> <p style="text-align: right;">Page 41</p>	<p>1 laboring this patient for that period of time was more 2 likely than not a cause of injury to her? 3 A. More likely than not it was the major factor 4 that caused the rupture, yes. 5 Q. Your fourth criticism of Dr. Tizzano was 6 that he failed to timely deliver this child? 7 A. Yes. 8 Q. And you talked about the membranes being 9 ruptured at 7:44 and then at 7:59 with the scalp 10 monitor placed the tracing were such that delivery 11 should have occurred immediately. Do I understand that 12 criticism correctly? Did I state that correctly or 13 not? 14 A. Yes. There's a little more in there, 15 please. 16 Q. Go ahead, please, I want to know what more 17 there is. 18 A. The scalp electrode should have been placed 19 sooner than that and they would have picked up the 20 nonreassuring fetal tracing, but definitely when they 21 did place the scalp electrode this should have been 22 recognized instantly as either a cord prolapse or a 23 ruptured uterus and a C-section should have been called 24 at that time. You must presume something bad and if 25 something not so bad happens you can always say, okay,</p> <p style="text-align: right;">Page 43</p>
<p>1 A. No. 2 MR. MISHKIND: Objection. For the record, 3 objection. That's not what his testimony was. His 4 testimony was -- I'm not going to state what his 5 testimony was, but his testimony is on the record. 6 MR. JACKSON: I think I had the preparatory 7 comment that perhaps I'm not understanding it, okay. 8 You've objected, he said, no, now he can explain it. 9 That's how it should work, don't you think? 10 MR. MISHKIND: I absolutely agree with you. 11 MR. JACKSON: Let's let it go like that. Go 12 ahead, Doctor. 13 MR. MISHKIND: I'm totally in agreement with 14 you for once. 15 MR. JACKSON: Good, thank you. 16 A. My opinion is that I can't say to a degree 17 of medical probability that that is the major cause, 18 the 51 percent or greater cause of the rupture. I can 19 say to a degree of medical probability that it was a 20 contributing cause. The other cause that probably has 21 more than a 51 percent contributory factor was laboring 22 this patient with a floating presenting part in the 23 second stage of labor for three-and-a-half hours 24 approximately. 25 Q. BY MR. JACKSON: Is it your opinion that</p> <p style="text-align: right;">Page 42</p>	<p>1 everything recovered and we're okay, but to presume 2 that it's going to recover in a circumstance when you 3 can't respond quickly is the wrong 4 glass half full/glass half empty supposition. So they 5 needed to recognize the potential for a disaster and 6 not assume something is going to recover when it has 7 every possibility of not recovering. 8 Q. When should the scalp electrode have been 9 placed? 10 A. When they lost the tracing which was pretty 11 much right after the ruptured membranes. It should 12 have been placed somewhere around 7:55. 13 Q. At what time do you say the C-section should 14 have been performed? 15 A. Well, he should have recognized immediately 16 when the scalp electrode went on the big prolonged 17 deceleration that was occurring at 7:58 but certainly 18 by 8:00, in the range, they should have been calling 19 for the troops to come in. If things had gone back to 20 normal they can always say thanks very much and 21 everything is okay, but given the prolonged 22 deceleration that's present when the scalp electrode is 23 first placed in a patient that had not had a single 24 deceleration until that point in time, this should have 25 been a very ominous finding, as I said, either a</p> <p style="text-align: right;">Page 44</p>

1 prolapsed cord or a ruptured uterus.
 2 Q. So the team should have been called in your
 3 opinion at 8:00?
 4 A. By 8:00, yes.
 5 Q. Had the team been called by 8:00 in your
 6 opinion how long would it have taken for the C-section
 7 to be completed?
 8 A. Making an assumption that the team would
 9 have been available in the same amount of time that
 10 they were in this case, it would have cut 12 minutes
 11 off of that delivery time.
 12 Q. How long was it from the time the decision
 13 was made to do a C-section until the incision was made?
 14 A. The decision was at 8:12 and the incision
 15 was at 8:34 so that would be 22 minutes.
 16 Q. Is that a reasonable amount of time from the
 17 decision to the incision?
 18 A. Given the circumstances of a small hospital
 19 and having to call people in from the outside, yes.
 20 Q. Am I correct in understanding, then, if the
 21 same period of time would have been required, rather
 22 than happening at 8:34 it would have been like 8:22
 23 incision?
 24 A. Yes.
 25 Q. That is your opinion in this case given a

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1 reasonable scenario given recognizing and calling a
 2 team and proceeding as it eventually did proceed after
 3 the team was called?
 4 A. If we get to this point in time and then the
 5 ruptured membranes occurs and all of this happens, then
 6 the delivery would have been 12 minutes sooner or about
 7 8:22 I think.
 8 Q. So do I understand that you're talking about
 9 in your criticism of a failure to timely deliver a
 10 delay of approximately 12 minutes?
 11 A. Yes.
 12 Q. Was the delay of 12 minutes in your opinion
 13 a cause of harm to the child?
 14 A. There's no question that that was a cause of
 15 harm to the child, yes.
 16 Q. Why do you say that?
 17 A. The baby was born profoundly acidotic.
 18 Subtracting 12 minutes from that would have improved
 19 the acidosis. Whether the baby would have ended up
 20 living or not, I think the baby probably would have
 21 lived if we had saved that 12 minutes. The overall
 22 outcome I can't possibly tell you, but it would have
 23 been less acidotic than it was.
 24 Q. What was the Ph when the baby was born from
 25 your understanding?

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1 A. I don't know, it was not obtained.
 2 Q. Is there a way to compute under these
 3 circumstances how the Ph would change over time?
 4 A. Not -- no.
 5 Q. Are you able to say how much of a difference
 6 in the Ph there would have been had this baby been
 7 delivered 12 minutes earlier?
 8 A. No.
 9 Q. When do you believe the injury occurred to
 10 the child?
 11 A. The injury occurred sometime after -- I
 12 can't really tell you precisely. Usually I can go to
 13 the literature and that's about what I can tell you
 14 based on a study out of University of Southern
 15 California that looked at uterine ruptures, if delivery
 16 occurred within 18 minutes of doing the -- of the heart
 17 rate going down they found no permanent neurologic
 18 injuries or death. When delivery occurred greater than
 19 that time there was the occurrence of neurologic injury
 20 and death, so that if we -- I don't know when the heart
 21 rate was completely down so sometime after 8:02 or
 22 something in that range, 18 minutes of that would have
 23 been about 8:20, in that range.
 24 Q. The study that you refer to says within
 25 18 minutes of what event?

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1 A. Of a bradycardia. This is not technically a
 2 bradycardia, it's preterminal tracing but not
 3 technically a bradycardia.
 4 Q. Do you believe that that literature and that
 5 study would apply to this circumstance?
 6 A. It's the only literature that I'm aware of
 7 that can give us any insight into length of time that
 8 babies can go. That's presupposing that it's not a
 9 complete cord occlusion or a complete abruption, and I
 10 don't know how to tell. This does not look like a
 11 complete cord occlusion immediately but it's the only
 12 data I'm aware of that gives us any kind of length of
 13 time. So I can't tell you the answer in this
 14 particular case. Does that data apply to this
 15 particular case, since it's not technically a
 16 bradycardia per se I don't know that I would say that
 17 it absolutely fits the criteria that they were looking
 18 at.
 19 Q. Would that mean that there would be more or
 20 less time in this case than what this study would
 21 involve?
 22 A. Again, theoretically it would give them more
 23 time.
 24 Q. Give the doctors in this case more time?
 25 A. Give the baby more time.

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1 Q. Excuse me, the baby more time?
 2 A. Yes.
 3 Q. If I understand you by saying
 4 "theoretically," theoretically based upon the
 5 conclusion from the study that it's 18 minutes from
 6 bradycardia?
 7 A. Yes. If the heart rate was normal prior to
 8 the bradycardia that's what they found. The first
 9 author on that is Leung, L-e-u-n-g.
 10 MR. ROSSI: Leung?
 11 A. Yes, sir.
 12 MR. ROSSI: Thank you.
 13 Q. BY MR. JACKSON: Do I understand
 14 theoretically in this case using the information from
 15 that study the baby would have had more time because it
 16 wasn't technically a bradycardia at 8:02?
 17 A. Yes.
 18 Q. Is it your opinion that the baby suffered
 19 the injury between 8:02 and 8:34?
 20 A. Yes, but let me -- I can't necessarily say
 21 that because the baby was acidotic into the neonatal
 22 period also so it certainly was within that time frame
 23 plus what went on in the neonatal period.
 24 Q. Are you talking about after birth?
 25 A. Right. So in other words I don't want to

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1 limit it to just that period of time, until the time of
 2 delivery, but I'm not critical of anything after the
 3 delivery.
 4 Q. So the care and treatment this child
 5 received after birth was within standard of care in
 6 your opinion?
 7 A. I did not evaluate it and I'm not critical
 8 of it.
 9 Q. Do I understand you to be saying that if the
 10 child had not suffered a period of acidosis or a level
 11 of acidosis between 8:02 and 8:34, in your opinion the
 12 result would have been different?
 13 A. If the baby did not suffer acidosis?
 14 Q. Here's what I'm trying to understand,
 15 Doctor, and then you can tell me how you explain it.
 16 If I understood you a moment ago, you said that you
 17 believed the baby suffered some injury between 8:02 and
 18 8:34; however, you said the baby also had acidosis in
 19 the neonatal period which was a factor in the outcome.
 20 Did I understand that correctly?
 21 A. Yes.
 22 Q. My question to you is: Is it your testimony
 23 that the situation the baby experienced regarding
 24 acidosis between 8:02 and 8:34 was such that it caused
 25 the eventual outcome?

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1 A. Yes.
 2 Q. And are you able to quantify what role the
 3 acidosis in the neonatal period played?
 4 A. No.
 5 Q. Is there any question in your mind that it
 6 did play a role?
 7 A. The knowledge that we have of acidotic
 8 injuries at or around the time of birth, simplistically
 9 put, the lower the Ph and the longer the baby remains
 10 at the low Ph, the greater the risk of harm. So that
 11 having been said, the baby was acidotic at birth
 12 presumably, although a Ph was not obtained, but based
 13 on the Apgar score and everything else we have in this
 14 case the baby was acidotic at birth. If the Ph had
 15 been higher, would the outcome have been different,
 16 well, it's based on the level of the Ph, the lower the
 17 Ph, the greater the risk of harm and the greater length
 18 of time it stays there. If we have 12 minutes we're
 19 able to cut off from that, the depth of the Ph will be
 20 less and the length of time will be saved by 12 minutes
 21 given the same resuscitation afterwards.
 22 Q. At what level of Ph is there damage?
 23 A. The best article I know about to assess that
 24 also comes out of USC by a perinatologist named
 25 Murph Goodwin in which he looked at the neurologic

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1 outcomes of babies born with various Ph on the cord gas
 2 and what he found basically was that above a Ph of 7
 3 that there was no risk of neurologic damage. Once you
 4 get below 7, how low you go, the risk of neurologic
 5 damage in the survivors increases and what he found was
 6 if the cord Ph was between 6.90 and 6.99, the risk of
 7 neurologic -- of a bad neurologic outcome was 12
 8 percent. If the Ph was 6.80 to 6.89, the risk went up
 9 to 30 percent. If the Ph was 6.70 to 6.79, the risk
 10 went up to 60 percent. And if it was 6.60 to 6.69, it
 11 went up to 80 percent. So the lower the Ph, the
 12 greater the risk of neurologic injury in that
 13 particular study.
 14 MR. ROSSI: Could you spell the first name
 15 and last name?
 16 A. G. Murphy Goodwin, G-o-o-d-w-i-n.
 17 MR. ROSSI: G period Murphy, M-u-r-p-h-y?
 18 A. I believe so, yes.
 19 Q. BY MR. JACKSON, Is there any other
 20 explanation for this child's outcome than the acidosis
 21 between 8:02 and 8:34 in your opinion?
 22 A. No.
 23 Q. In Goodwin's study is there any parameter as
 24 to the amount of time that is in these ranges?
 25 A. No, they did not look at that.

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1 Q. So time is not a factor per se?
 2 A. Of that study, no.
 3 Q. Is there any other study of which you're
 4 aware that factors time into these levels?
 5 A. Nothing specific, no.
 6 Q. Is there any other literature that you can
 7 site that would support the proposition that a
 8 12-minute delay under these circumstances would cause
 9 permanent injury or death to a child?
 10 A. There's nothing that's going to address
 11 specifically a 12-minute delay. And we're only going
 12 backwards from we know this baby was acidotic at birth,
 13 we don't know what level, we know it was at a Ph of **6.5**
 14 at 27 minutes of life. Cut 12 minutes off is going to
 15 make some difference, it might be a tremendous amount
 16 of difference, it might be only a tenth of a Ph unit,
 17 so I can't quantitate for you exactly the difference,
 18 but there's no question there would be a difference.
 19 12 minutes is not an inconsequential amount of time.
 20 Q. Those were the four initial criticisms you
 21 had and then there was a comment early on about
 22 informed consent?
 23 A. Yes.
 24 Q. Are you going to render an opinion in this
 25 case that Dr. Tizzano fell below the standard of care

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1 relative to informed consent of Mrs. Robbins?
 2 A. I'm going to render an opinion that there is
 3 a discrepancy in what was told. Based on what he says
 4 in his deposition and what's in the records there is
 5 not enough information to say that he gave adequate
 6 informed consent. Based on what Mr. Mishkind has
 7 represented to me is the testimony of the mother it
 8 would be consistent with a lack of informed consent.
 9 So, again, I'm not the finder of fact in this, but
 10 given what's in the records, given what's in the
 11 deposition and given what has been reported to me to be
 12 in the mother's deposition I believe that he failed to
 13 give adequate informed consent.
 14 MR. MISHKIND: John, before he answers let
 15 me just indicate on the record that for some reason the
 16 depo was sent but didn't reach Dr. Elliott. I do
 17 intend to send him the depo and if there is any change
 18 at all in his opinions based upon reading it as opposed
 19 to accepting my verbal representation I will notify you
 20 immediately. But go ahead.
 21 Q. BY MR. JACKSON: You have not read the
 22 parents' deposition?
 23 A. No, I have not.
 24 Q. Did you ever ask for the parents'
 25 depositions?

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1 A. Again, when I went to review this case,
 2 which is my habit and custom, prior to this I looked at
 3 the three depositions that I had and today told
 4 Mr. Mishkind that I did not have the depositions of the
 5 nurse practitioner nor of the mother.
 6 Q. What representations did Mr. Mishkind make
 7 to you regarding the mother's testimony that would
 8 cause you to -- what representations did he make to
 9 you?
 10 A. That there were probably two occasions that
 11 there was some discussion with Mrs. Robbins about
 12 VBACS, that on the first occasion she talked with the
 13 physician and with the nurse practitioner, she was
 14 given the ACOG information pamphlet concerning VBAC,
 15 that she was basically asked if there was any questions
 16 that she had and that she was encouraged to have a
 17 VBAC. She also -- it was represented that she was not
 18 informed of specific risk of rupture or harm to her
 19 baby and that she was again encouraged to have a VBAC
 20 and that if anything did happen that they could proceed
 21 to Caesarian section and deliver the baby that way.
 22 Q. Are you critical of the encouragement to her
 23 to have a VBAC?
 24 A. No.
 25 Q. Did you find any of the comments about what

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1 they told her to be issues with which you found
 2 criticism?
 3 A. I find criticism that there is no specific
 4 representation either verbally or in the deposition of
 5 specific risks given to the mother of VBAC both to
 6 herself and to the baby versus repeat Caesarian
 7 section, so there is certainly nothing documented in
 8 the record and the deposition testimony states what
 9 Dr. Tizzano's habit and custom would be, but even in
 10 that he did not state that he would tell her that there
 11 is approximately a one percent or whatever percent he
 12 would use risk of a uterine rupture and that there is a
 13 risk of catastrophic rupture, which occurred in this
 14 case, and that there is a risk that the baby cannot be
 15 delivered in time to prevent a catastrophic injury or
 16 death and those things are the most important part of a
 17 consent form and I don't believe that without
 18 documenting that that you can have given the patient
 19 fully informed consent.
 20 Q. Are you familiar with the VBAC pamphlet from
 21 ACOG?
 22 A. Yes.
 23 Q. Did you review that in this case?
 24 A. I've looked at it, yes.
 25 Q. You saw the one that they received?

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<p>1 A. I believe so, the one that was revised in 2 '95. 3 Q. When did you -- 4 A. Or reviewed in '95. 5 Q. Did you review that just in preparation for 6 this depo also? 7 A. Yes. 8 Q. Was that just before we came here today? 9 A. Yes. 10 Q. Prior to that you'd not seen the pamphlet 11 that she was given in terms of this case? 12 A. In terms of this case, correct. 13 Q. When did you form your opinion about 14 informed consent? Was that just today? 15 A. No. 16 Q. When did you form that opinion? 17 A. That was something that I-- since it was 18 not fully in the records I was not putting it down in 19 my opinions because it was an issue of what the patient 20 said and what the physician said with not much 21 documented in the records. I left that until I heard 22 at least what the patient had to say about it. And if 23 I find something in the deposition that is contrary to 24 that, then I may change my opinion. 25 Q. Forgive me, but the opinions that you just</p> <p style="text-align: right;">Page 57</p>	<p>1 risks of a procedure? 2 A. I believe that the patient should talk with 3 her physician about the procedure and expect that she 4 is going to get a realistic view of the risks and 5 benefits of the procedure. 6 Q. You're familiar with the ACOG pamphlet we've 7 talked about? 8 A. Yes. 9 Q. And you understand that Mrs. Robbins was 10 given a copy of that? 11 A. Yes, I am. 12 Q. What's your understanding as to whether or 13 not she read it? 14 A. I don't think that she read it thoroughly. 15 She may have glanced at it, but she certainly did not 16 read it thoroughly I believe is her testimony. 17 Q. Did she have an obligation to do that? 18 A. I think that she -- that would be 19 supplemental information to the discussion with the 20 physician or the nurse practitioner, whoever is giving 21 the informed consent. Does that substitute for the 22 physician or nurse giving adequate informed consent, 23 no. That pamphlet does not go into the risks of 24 uterine rupture or the incidence of uterine rupture so 25 it really is not an informed consent document. It</p> <p style="text-align: right;">Page 59</p>
<p>1 told me about regarding informed consent, when did you 2 first formulate those opinions? 3 A. When I read through this and read through 4 the depositions so after I received the depositions. 5 Q. Can you be more specific time-wise? Was 6 that this week, was it last week, was it a month ago, a 7 year ago? 8 A. It was -- I read the depositions yesterday 9 and the day before. 10 Q. So it was within the last couple of days 11 that you formulated the opinions about informed consent 12 that you just described? 13 A. Yes. 14 Q. And I raise that question, Doctor, because 15 we were told in a letter from Mr. Mishkind on 16 February 16th of 2001 that you were going to be 17 testifying about the issue of informed consent and you 18 just formulated those opinions -- 19 A. Well, from a final standpoint. I just 20 reviewed the depositions so that was an issue that was 21 raised and I as of the last day or two was able to feel 22 that that was a real issue and something below the 23 standard of care. 24 Q. What responsibility do you feel the patient 25 has as it relates to informing themselves about the</p> <p style="text-align: right;">Page 58</p>	<p>1 gives some information about what a VBAC is and some 2 terms that they can look at but it's certainly not an 3 informed consent document. 4 Q. What's the purpose of the pamphlet as you 5 understand it? 6 A. I believe it's to give information that you 7 can hand to your patient, would give some information 8 about VBACs and some of the alternatives and kind of go 9 through a general discussion of the issue. 10 Q. Does the patient have an obligation in your 11 opinion to read that information? 12 A. Again, I think that the patient can 13 certainly look at that, it's a source of information. 14 I think the number one source of information comes from 15 her physician. 16 Q. I understand that. My question is whether 17 you believe, and maybe you don't, that when you give a 18 pamphlet like that to a patient that the patient has 19 some obligation to read it? 20 A. If I expected her to read it I would tell 21 her so. If I gave it to her and said here's some 22 information, if you want to look at it at home or talk 23 it over with your husband, it depends on what my 24 purpose of giving it to her is. It's certainly not 25 informed consent.</p> <p style="text-align: right;">Page 60</p>

1 Q. What is your expectation when you give
2 written material to your patients, do you expect them
3 to read it?
4 MR. MISHKIND: Are you talking about the
5 VBAC pamphlet or any documents?
6 MR. JACKSON: Any documents.
7 Q. BY MR. JACKSON: When you give written
8 information about procedures or about what's going to
9 be happening with your patients to the patient why do
0 you do that and what is your expectation?
1 A. If I were to give written information like
2 that I would then say here's a pamphlet that contains
3 everything you need to know, please read it and we'll
4 talk about it at your next visit or I would say, look,
5 we've talked about VBAC or we've talked about
6 amniocentesis or we've talked about whatever we've
7 talked about and here's some additional information
8 that you can have and use it at your discretion. So
9 sometimes it would be specific that I want you to read
0 this and we'll talk about it, most of the time it's
1 here's some extra information, we've already talked
2 about this, but I want you to have this so you can look
3 at it at home.
4 Q. Is it your expectation that they will look
5 at it and read it at home?

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1 A. If I tell them to do that, it's my
2 expectation that they will do that. If I don't tell
3 them to do that, I'm not expecting them to read it, I'm
4 giving it to them for extra above and beyond what I've
5 already talked about.
6 Q. So if you don't tell them specifically read
7 it, you do not expect them to read it?
8 A. That's correct.
9 Q. And is that true with all the literature
0 that you give -- do you give your patients literature?
1 A. We have available many pamphlets, yes. I
2 don't expect the patients to read and figure it out for
3 themselves so I will always have a discussion with them
4 about the particular topic in question and I will often
5 give them something extra that they can read. They'll
6 ask for something, is there something I can have to
7 read later or is there more information about this,
8 then I will go through and give them what I can,
9 whether it's articles from the literature, pamphlets,
0 ACOG handouts, whatever it may be.
1 Q. If you give it to them and say words to the
2 effect here's some information, take a look at it, if
3 you have any questions let us know, would that give you
4 the expectation that they would do that, read it, ask
5 questions if they had questions?

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1 A. No, not unless I said I want you to read
2 this and we're going to discuss this later because we
3 haven't talked about this yet, I would not have that
4 expectation of a patient, no.
5 MR. MISHKIND: Let's go off the record.
6 (Recessed from 7:43 p.m. until 7:47 p.m.)
7 Q. BY MR. JACKSON: Doctor, have we discussed
8 all the criticisms you have against Dr. Tizzano or his
9 group?
0 A. I think contained within the informed
1 consent is the failure to address her issues of wanting
2 to have a C-section at 6:00 when certainly at 6:00 the
3 nurse was aware of her wanting to have a C-section and
4 I believe Dr. Tizzano was also aware of that. And,
5 again, I don't know what was said by who to whom, but
6 he apparently failed to take into account her desire to
7 abandon the VBAC trial and proceed with a C-section.
8 Q. And do you find that to be a deviation from
9 standard of care?
0 A. Oh, yeah, absolutely 100 percent. The
1 patient has every right to change her mind in the
2 middle of a labor and delivery process and move to a
3 C-section.
4 Q. What harm did that cause the patient?
5 A. She should have been delivered by C-section.

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1 She had an obstetrical reason to be delivered by
2 C-section at 6:00 or 6:20, whenever he got in to do it.
3 She also apparently revoked her consent and did not
4 want to continue so that in and of itself, even if
5 there was not an obstetrical reason, he should have
6 immediately performed a C-section.
7 Q. At 6:20 or thereabouts, whenever he got to
8 the hospital?
9 A. Whatever time he evaluated and found she did
0 not want to continue with a VBAC.
1 Q. Had that occurred it's your opinion that it
2 would have been a different outcome?
3 A. If at 6:20, whatever time he got in and
4 assessed things and made his decision, by doing what he
5 should have done and performed a Caesarian section for
6 the reasons mentioned delivery would have occurred
7 presumably within 30 minutes in which case it would
8 have been before uterine rupture and this baby would
9 have been to a degree of medical probability a healthy,
0 normal newborn.
1 Q. Any other criticisms of Dr. Tizzano or his
2 group?
3 A. No.
4 Q. Doctor, we have a copy of your CV here and I
5 assume that's your most current CV?

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<p>1 A. I believe it is, yes.</p> <p>2 Q. Do you have a copy in front of you also per</p> <p>3 chance?</p> <p>4 A. I do now.</p> <p>5 MR. ROSSI: Do you want this back, John?</p> <p>6 MR. JACKSON: I just want to have him refer</p> <p>7 to it.</p> <p>8 Q. BY MR. JACKSON: Have you authored any</p> <p>9 articles which you consider pertinent to the issues in</p> <p>10 this case?</p> <p>11 A. As far as VBAC goes, no VBAC articles, no.</p> <p>12 Q. Are there any other articles that you've</p> <p>13 authored which you believe are pertinent to the issues</p> <p>14 in the case understanding that you have not authored</p> <p>15 any VBAC articles?</p> <p>16 A. Directly, no.</p> <p>17 Q. Are there any presentations or any other</p> <p>18 references in your CV which you believe are pertinent</p> <p>19 to the issues in this case?</p> <p>20 A. I talk about VBACS, I lecture on them.</p> <p>21 Q. Which presentations are you referring?</p> <p>22 A. Page 21, 145 and 146.</p> <p>23 Q. For the record, 145 is a presentation given</p> <p>24 at the 16th Annual Beaver Creek Perinatal Conference in</p> <p>25 Beaver Creek, Colorado in January of this year entitled</p> <p style="text-align: right;">Page 65</p>	<p>1 A. I will.</p> <p>2 MR. JACKSON: Would you forward us a copy of</p> <p>3 that?</p> <p>4 MR. MISHKIND: I will get it and I don't see</p> <p>5 any reason why you're not entitled to it. I'll take a</p> <p>6 look at it, if I do have an objection, I'll let you</p> <p>7 know.</p> <p>8 Q. BY MR. JACKSON: Other than the handouts are</p> <p>9 there any slides or anything of that nature,</p> <p>10 statistical results, that would go along with that</p> <p>11 study?</p> <p>12 A. The handout is basically my slides.</p> <p>13 Q. That's everything?</p> <p>14 A. Yeah.</p> <p>15 Q. Any other items in your CV which you believe</p> <p>16 would be relevant to this case?</p> <p>17 A. No.</p> <p>18 Q. Is this your file that you have in front of</p> <p>19 you?</p> <p>20 A. Yes.</p> <p>21 Q. I see a three-ring binder. Is that the</p> <p>22 medical records that you reviewed?</p> <p>23 A. It is.</p> <p>24 Q. As far as you know is it a complete set of</p> <p>25 the medical records?</p> <p style="text-align: right;">Page 67</p>
<p>1 "VBAC (very bad alternative choice?)" correct?</p> <p>2 A. Correct.</p> <p>3 Q. What was your position in that presentation?</p> <p>4 A. Basically it went through the history of</p> <p>5 VBACS and kind of how we got to where we are, looked at</p> <p>6 risk factors that increase the risk of uterine rupture,</p> <p>7 and basically the conclusion is that VBAC can be a</p> <p>8 successful procedure, but we need to be aware of the</p> <p>9 risks of uterine rupture and certainly should not</p> <p>10 increase the risks of uterine rupture by some of the</p> <p>11 obstetrical things that we do.</p> <p>12 Q. Did you write a paper on that or was that</p> <p>13 just some type of talk?</p> <p>14 A. There was no paper, it was a talk.</p> <p>15 Q. And you gave the same talk at the</p> <p>16 Obstetrical Challenges of the New Millennium in</p> <p>17 Scottsdale, Arizona in April of this year?</p> <p>18 A. Yes.</p> <p>19 Q. Did you have handouts from that</p> <p>20 presentation?</p> <p>21 A. At both of them there was an outline, yes.</p> <p>22 Q. Do you still have that?</p> <p>23 A. I probably do, yes.</p> <p>24 Q. Would you dig out a copy of that and give it</p> <p>25 to Mr. Mishkind?</p> <p style="text-align: right;">Page 66</p>	<p>1 A. As far as I know, yes.</p> <p>2 Q. There's some notes?</p> <p>3 A. These are my notes.</p> <p>4 Q. There's some correspondence. You've made a</p> <p>5 copy of your notes for us, is that what this is --</p> <p>6 A. Yes.</p> <p>7 Q. -- that you've just handed me?</p> <p>8 A. Yes.</p> <p>9 Q. Doctor, you've given me eight pages Xeroxed</p> <p>10 which are apparently from a yellow pad?</p> <p>11 A. Yes, sir.</p> <p>12 Q. When did you prepare those notes?</p> <p>13 A. They were -- the initial notes were</p> <p>14 prepared, the kind of factual things, from my initial</p> <p>15 review of the record, the other notes were prepared</p> <p>16 after I reviewed the depositions of Dr. Tizzano,</p> <p>17 Nurse Moats and Nurse Gwin.</p> <p>18 MR. JACKSON: Why don't we number the ones</p> <p>19 that you gave Jennifer and then we can identify them</p> <p>20 that way.</p> <p>21 MR. MISHKIND: Off the record.</p> <p>22 (Discussion off the record.)</p> <p>23 Q. BY MR. JACKSON: Doctor, I'm marking these</p> <p>24 just as they were banded to us and I'm going to write</p> <p>25 at the bottom numbers with a circle around them 1</p> <p style="text-align: right;">Page 68</p>

1 through 8.
2 A. **I hope they're in reasonable chronological**
3 **order.**
4 Q. If you'd go through those for me and tell
5 us, referring to the numbers on the bottom of those
6 pages, when you generated those notes, I'd appreciate
7 it.
8 A. **Page 1 would be after I initially reviewed**
9 **the medical records. Page 2 the same --**
10 Q. Excuse me. When was that, do you recall?
11 A. **It would have been sometime after**
12 **August 14th of 2000, which is the date that the cover**
13 **letter was dictated. When it was sent out I can't tell**
14 **you and when I reviewed it I can't tell you.**
15 Q. You don't keep records of when you do the
16 various things on a particular case?
17 A. **Not when I get it.**
18 Q. Timerecords?
19 A. **Just in general, not in detail.**
20 Q. How about page 2, when was that?
21 A. **Again, with the initial review.**
22 Q. Okay.
23 A. **3 with the initial review, 4 with the**
24 **initial review, 5 was I believe after I read the**
25 **depositions so that would have been -- 5, 6, 7 and 8**
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1 would have been yesterday.
2 Q. Are these all the notes that you generated
3 in your review of this case?
4 A. **Yes.**
5 Q. May I see the correspondence that you have
6 there? Is there any correspondence between you and
7 Mr. Mishkind or his office which is not contained in
8 the materials you just gave me?
9 A. **No.**
10 Q. Was there any written communication of any
11 nature, not necessarily a letter, but perhaps notes
12 written or typed, a communication between you and
13 Mr. Mishkind that is not contained in these five
14 letters?
15 A. **No.**
16 Q. Do I understand from you that the first time
17 that you read the depositions that were sent to you was
18 yesterday?
19 A. **And the day before.**
20 Q. And the day before?
21 A. **Yes.**
22 Q. And if I'm clear from what I have in front
23 of me in terms of the materials that were sent to you
24 the only depositions that you reviewed in this case
25 were the depositions of Dr. Tizzano --
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1 A. **Yes.**
2 Q. -- Nurse Moats --
3 A. **Yes.**
4 Q. -- and Nurse Gwin?
5 A. **Yes.**
6 Q. Did you request any other depositions?
7 A. **As I said, at the time when I reviewed it I**
8 **didn't realize that I didn't have the other depositions**
9 **and I talked with Mr. Mishkind today about that and I**
10 **would like to review those depositions.**
11 Q. What other depositions did you request?
12 A. **The mother and of the nurse practitioner.**
13 Q. Any others?
14 A. **No.**
15 Q. The medical records you reviewed were the
16 Wooster Community Hospital records of the previous
17 delivery?
18 A. **Yes.**
19 Q. Wooster Clinic prenatal records?
20 A. **Yes.**
21 Q. Wooster Community Hospital labor and
22 delivery records?
23 A. **Yes.**
24 Q. Wooster Community Hospital newborn records?
25 A. **Yes.**
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1 Q. Children's Hospital Medical Center of Akron
2 discharge summary and placental path report?
3 A. **Yes.**
4 Q. And the autopsy?
5 A. **Yes.**
6 Q. Were there any other records that you
7 reviewed?
8 A. **No.**
9 Q. Those were apparently sent to you
10 August 14, 2000?
11 A. **Yes.**
12 Q. You're referring to what you handed me?
13 A. **Yes.**
14 Q. Did you review any other materials of any
15 nature, doctor? Did you review any literature? Did
16 you review any type of information other than what
17 we've talked about already in preparation for the
18 opinions that you're rendering today?
19 A. **No.**
20 Q. This is your complete file, the notes, those
21 five letters and the three-ring binder?
22 A. **And my notes, yes.**
23 MR. MISHKIND: And the depositions.
24 A. **And the depositions.**
25 MR. JACKSON: And the depositions.
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1 Q. BY MR. JACKSON: Has anything been removed
2 from your file before the deposition today?
3 A. No.
4 Q. Is anything missing?
5 MR. MISHKIND: Other than the two
6 depositions we talked about?
7 MR. JACKSON: He hasn't Seen those.
8 A. I've not gone back through to see if there's
9 something missing. I'm assuming it's a complete set of
10 records.
11 Q. BY MR. JACKSON: Your first contact from
12 Mr. Mishkind or someone in his office was when, do you
13 recall?
14 A. I would assume it would be sometime prior to
15 August the 14th.
16 Q. Do you make a request as to what you would
17 like to see when you agree to review a case?
18 A. No.
19 Q. Do you remember that initial contact?
20 A. No, I do not.
21 Q. Is it your custom to get some review of the
22 facts and circumstances of the case?
23 A. It depends on what the attorney wants to
24 tell me. Some attorneys want to tell everything, some
25 attorneys are I'll say not very expansive on the

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1 matters of the case.
2 Q. What was the circumstance in this case?
3 A. I don't really -- I don't care what the
4 attorney's opinion is so I don't necessarily want to
5 hear it, but if they want to talk to me I'll listen.
6 Q. DO you --
7 A. I have no recollection of the initial phone
8 call so I can't tell you.
9 Q. Were there any notes that you prepared that
10 you did not keep?
11 A. No.
12 Q. Doctor, would you go to your notes for a
13 second.
14 A. Yes.
15 Q. Do you have a note there 0744, it's in the
16 middle of page 2?
17 A. Yes.
18 Q. I don't understand, what are the two words
19 there at the beginning, something dash?
20 A. "Complete minus 2."
21 Q. What's below that?
22 A. AROM, artificial rupture of membranes.
23 Q. Under the 0834 on page 2 --
24 A. Yes.
25 Q. -- about incision --

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1 A. Yes.
2 Q. -- "cord and arm prolapsed into the ruptured
3 uterine" --
4 A. "Scar."
5 Q. "Scar"?
6 A. Yes.
7 Q. Is that of significance, the extent to which
8 the baby is into the uterine scar?
9 A. In an indirect way, the more important is
10 the cord.
11 Q. Explain the significance of the cord.
12 A. There are two ways that a baby can be hurt
13 by a ruptured uterus; one is if there's a placental
14 abruption that occurs and the other is if the cord is
15 compressed, and in this particular case it was most
16 likely cord compression. The cord was documented to be
17 herniated through the scar and occlusion of the cord
18 can occur in that anatomical circumstance.
19 Q. On page 3, would you read your last entry
20 there?
21 A. "Baby died at three weeks of age, cause of
22 death" -- I think I meant to write "anoxia," but I
23 wrote "an."
24 Q. A-n?
25 A. Yes.

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1 Q. Page 4 there are four times, 0758 and then
2 0802, 0806, 0812?
3 A. Yes.
4 Q. Is the first statement "prolonged decel"?
5 A. Yes.
6 Q. And the next statement?
7 A. "Preterminal tracing."
8 Q. 8:06, "O2 started"?
9 A. "O2 started, C-section called."
10 Q. Are you critical of when the O2 was started?
11 A. Yes.
12 Q. Why?
13 A. It was delayed. We had a prolonged
14 deceleration at 7:58 and they waited eight minutes to
15 start the oxygen.
16 Q. It should have been started when?
17 A. As soon as they saw the heart tone was down
18 when they put the scalp electrode on.
19 Q. Is the paragraph that's contained in writing
20 on page 5 your recitation of the facts as you
21 understand them in this case?
22 A. Did I miss -- mine is different. Yes.
23 Q. Your answer was "yes"?
24 A. Yes.
25 Q. Page 6 is apparently a continuation of that?

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<p>1 A. Yes.</p> <p>2 Q. The opinions that are listed</p> <p>3 apparently -- page 7 says "areas below standard" and</p> <p>4 then 7 has Nurse Moats and 8 has Dr. Tizzano. These</p> <p>5 were notes that you just prepared in the last two days</p> <p>6 or three days; is that correct?</p> <p>7 A. Yes.</p> <p>8 Q. Is that when you formulated these opinions?</p> <p>9 A. No.</p> <p>10 Q. Is that the first time you put them in</p> <p>11 writing?</p> <p>12 A. Yes.</p> <p>13 Q. Had you shared these opinions with</p> <p>14 Mr. Mishkind before these notes?</p> <p>15 A. Yes.</p> <p>16 Q. When was that done?</p> <p>17 A. My initial review of the records and</p> <p>18 discussion with him.</p> <p>19 Q. What's the nature of your practice, Doctor?</p> <p>20 A. I'm a partner in a large perinatal group</p> <p>21 that practices in Maricopa County, Arizona called</p> <p>22 Phoenix Perinatal Associates.</p> <p>23 Q. You personally, what's your normal workweek</p> <p>24 in terms of days and hours?</p> <p>25 A. I don't know that there's a normal workweek.</p> <p>Page 77</p>	<p>1 obstetrics and gynecology I am responsible for the</p> <p>2 curriculum and some of the lectures regarding high-risk</p> <p>3 obstetrics for the residents. There's a family</p> <p>4 practice residency here also and I'm not responsible</p> <p>5 for their curriculum but I teach probably four or five</p> <p>6 hour sessions a year to the family practice residents.</p> <p>7 I am involved in medical student education from the</p> <p>8 University of Arizona doing clinical education on our</p> <p>9 patients and also didactic education in their third</p> <p>10 year clerkship in Ob/Gyn and also I'm the head of the</p> <p>11 fourth year elective rotations for medical students</p> <p>12 both from the University of Arizona and from other</p> <p>13 medical schools that want to take rotations here at</p> <p>14 Good Samaritan.</p> <p>15 We have a Fellowship in maternal-fetal</p> <p>16 medicine that is through the University of Arizona and</p> <p>17 we are a partner in that Fellowship in which we</p> <p>18 participate in the education and training of that</p> <p>19 Fellow for variable periods of time. Somewhere between</p> <p>20 three and 27 months of the fellowship is spent at</p> <p>21 Good Samaritan and the remainder is spent at the</p> <p>22 University of Arizona. So I have an educational role</p> <p>23 in medical students, family practice residents, Ob</p> <p>24 residents, nurses and Fellows in maternal-fetal</p> <p>25 medicine.</p> <p>Page 75</p>
<p>1 Q. What's your schedule for a week?</p> <p>2 A. I usually will begin, if I'm in the clinic</p> <p>3 seeing patients, start probably about 7:30 in the</p> <p>4 morning and reviewing charts and getting ready to see</p> <p>5 patients. Basically see patients all day until 5:00,</p> <p>6 5:30, 6:00, depending on work-ins and emergencies and</p> <p>7 things like that. If I'm in the hospital I arrive at</p> <p>8 about 7:00 in the morning until I get relieved in the</p> <p>9 evening which is usually sometime around 6:00, I would</p> <p>10 be dealing with hospitalized patients.</p> <p>11 Q. How many days are you in the clinic?</p> <p>12 A. I'm either in the clinic or the hospital</p> <p>13 five days a week, then there's night call.</p> <p>14 Q. Do you have any administrative</p> <p>15 responsibilities in your group?</p> <p>16 A. I do. I'm the Director of Maternal-Fetal</p> <p>17 Medicine in the Department of Obstetrics and Gynecology</p> <p>18 here at Good Samaritan Medical Center.</p> <p>19 Q. How much time does that take weekly?</p> <p>20 A. Probably three to four hours.</p> <p>21 Q. Do you teach?</p> <p>22 A. Yes.</p> <p>23 Q. Whom do you teach?</p> <p>24 A. We have a freestanding residency here at</p> <p>25 the hospital with six residents at each level. In</p> <p>Page 78</p>	<p>1 Q. What kind of a time commitment per week is</p> <p>2 that for you?</p> <p>3 A. On a per week basis it would probably</p> <p>4 be -- well, with the Fellow it's more so I would say</p> <p>5 total maybe three to four hours.</p> <p>6 Q. All the teaching responsibilities that</p> <p>7 you've just described would be included in that?</p> <p>8 A. I'm approximating for you, yes.</p> <p>9 Q. How many patients do you see in the average</p> <p>10 week, you personally?</p> <p>11 A. Again, I don't know how to tell you that</p> <p>12 because if I'm in the hospital I would see -- well,</p> <p>13 maybe I'd see more in the hospital. We have an average</p> <p>14 census in the hospital of anywhere from 30 to 50</p> <p>15 patients, if I'm in the hospital I would see the</p> <p>16 majority of those patients on a daily basis, sometimes</p> <p>17 more than once a day. If I'm in the clinic my</p> <p>18 responsibility would probably be to see and evaluate</p> <p>19 between ultrasounds and office visits and consults</p> <p>20 probably 30 patients a day. So if I was in the clinic</p> <p>21 it would probably be 120 or more patients a week, if I</p> <p>22 was in the hospital it might be upwards of 180 or 200</p> <p>23 patients in a week.</p> <p>24 Q. How many partners do you have? I did not</p> <p>25 ask you that.</p> <p>Page 80</p>

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1 A. There are ten other perinatologists. There
2 are **11** perinatologists in our group.
3 Q. How many deliveries have you personally made
4 in the last year?
5 A. We do about in excess of **1500** deliveries for
6 the group and I would do one-eleventh of those
7 approximately so **130, 135**, whatever that works out to.
8 Q. Those are the number of babies you
9 personally deliver?
10 A. It wouldn't be babies, those would be
11 mothers. I do a lot of high-order multiples so I get
12 two or three or four babies for each delivery so it
13 would be more babies.
14 Q. How many of those were VBAC?
15 A. I don't know any way to estimate it for you.
16 About **50** percent of our patients will attempt a VBAC, I
17 don't know how many have a scar so I would assume that
18 given the statistics roughly 20 percent of patients
19 undergo Caesarian section so probably 20 percent of my
20 patients would have a scar, so that would be **135** times
21 **20** percent.
22 MR. ROSSI: About 26.
23 A. Okay. So **50** percent of that would undergo a
24 VBAC, so figure **13**.
25 Q. BY MR. JACKSON: The decision by Dr. Tizzano

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1 to allow Mrs. Robbins to attempt a trial of labor was
2 appropriate, was it not?
3 A. If she had been adequately informed of the
4 risks, yes, it was appropriate. She had no
5 contraindication per se to not attempt a VBAC.
6 Q. What areas of medicine do you consider
7 yourself to be an expert?
8 A. I'm not quite sure how to address that. I'm
9 a specialist in maternal-fetal medicine which relates
10 to all areas of obstetrics so I would consider myself
11 to be an expert in all areas of obstetrics.
12 Q. Any other areas of medicine in which you
13 consider yourself to be an expert?
14 A. I guess you'd have to tell me specifically.
15 There's some things that --
16 Q. I just need to know from your point of view
17 in what areas do you, Dr. Elliott, consider yourself to
18 be an expert? You've told me all areas of obstetrics
19 and I'm wondering --
20 A. I'm also a Board-certified gynecologist so I
21 will throw that in there. I've not specifically
22 practiced gynecology for **18** years, but I'm still Board
23 certified in it.
24 Q. You would consider yourself an expert in
25 areas of gynecology?

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1 A. I wouldn't say I was 100 percent up to date
2 because I don't follow all the gynecological
3 literature, but I think basically I am an expert in
4 most areas of gynecology, yes.
5 Q. Any other areas of medicine --
6 A. It would depend --
7 Q. -- in which you consider yourself an expert?
8 A. You'd have to go through everything.
9 There's some areas that I know an awful lot about yet
10 are not necessarily related to obstetrics.
11 Q. That's what I'm asking, I want to know what
12 you feel you're an expert in. You've told me all areas
13 of obstetrics.
14 A. Do I know an awful lot about anesthesia,
15 yes, do I know an awful lot about other things that
16 affect my practice, yes.
17 Q. Do you consider yourself an expert in those?
18 A. I'm not a Board-certified anesthesiologist.
19 If that's the criteria, then I'm not an expert. Having
20 gone through medical school and residency I'm certainly
21 more qualified than somebody who hasn't done that to
22 talk about any aspect of medicine. I don't hold myself
23 out to be an expert in anesthesiology, but I know an
24 awful lot about it so I don't know how to address your
25 term "expert," if you want to define that for me.

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1 MR. MISHKIND: Object on the record. I
2 think the term "expert" also has a legal connotation.
3 It sounds like the two of you may be referring to
4 different definitions.
5 Q. BY MR. JACKSON: What areas of medicine do
6 you hold yourself out to be an expert other than all
7 areas of obstetrics and most areas of gynecology, if
8 there are other areas?
9 A. I don't hold myself out to be an expert to
10 anybody unless they ask me.
11 Q. Do you consider yourself to be an expert in
12 all areas of obstetrics?
13 A. Yes.
14 Q. Do you consider yourself to be an expert in
15 most areas of gynecology?
16 A. Yes.
17 Q. Do you consider yourself to be an expert in
18 any other areas of medicine?
19 A. I've answered that. There are certain parts
20 of medicine that I consider myself to be very well
21 informed on and would be considered an expert, there
22 are other areas I don't. You'll have to go through it
23 one thing at a time.
24 Q. I'm not asking the question other than that.
25 What do you consider yourself to be an expert in,

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1 that's all I'm asking you. If you can't tell me, then
2 don't and if you can, just tell me what areas you
3 think.
4 **A. I think I've answered the question. I've**
5 **told you my answer and that's the best explanation I**
6 **can give you.**
7 MR. MISHKIND: Doctor, if you think you've
8 answered the question, that's fine.
9 Q. BY MR. JACKSON: How many cases do you
10 review per year for medical/legal matters?
11 **A. I would say roughly 32 to 36, somewhere in**
12 **that area.**
13 Q. How long has that been the case?
14 **A. Probably several years. I don't remember**
15 **exactly, but for a couple of years anyway.**
16 Q. Several or a couple? Just give me a number
17 if you can.
18 **A. I just gave you -- I don't know.**
19 Q. You gave me two. "A couple" means two to me
20 and "several" means as many as a lot.
21 **A. Several to me means three, two to three**
22 **years.**
23 Q. That's all I was asking, Doctor.
24 **A. I gave you that.**
25 Q. How many reports do you issue per year

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1 generally' written reports? Of the 32 to 36 cases that
2 you review how many do you issue reports on?
3 **A. I would say very few, most attorneys don't**
4 **want a written report.**
5 Q. How many depositions do you give per year?
6 **A. I would say in the range of 15 to 18, 20,**
7 **any given year.**
8 Q. How long has that been the case?
9 **A. Two to three years.**
10 Q. How many times do you testify in court per
11 year?
12 **A. I'd say that varies by year, anywhere from**
13 **one to four to five.**
14 Q. How many times have you actually testified
15 in court?
16 **A. I would say 30 plus, something in that**
17 **range.**
18 Q. Over how many years?
19 **A. Since 1981 I believe was the initial time**
20 **that I did any medical/legal review.**
21 Q. Has your frequency of testifying in court
22 increased or decreased over the past five years?
23 **A. I would say it has probably slightly**
24 **increased.**
25 Q. Define "slightly" for me.

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1 **A. Again, it varies by year so I can't say that**
2 **it's absolute. So it does fluctuate, but I would say**
3 **overall there's probably a slight increase from two to**
4 **three to maybe three to five.**
5 Q. How many times have you testified in court
6 this year?
7 **A. I don't know that I can give you an exact**
8 **answer. It's probably been three or four.**
9 Q. Any of those cases involve VBAC issues?
10 **A. I don't believe so, no.**
11 Q. How many depositions have you given this
12 year?
13 **A. I have no way of knowing. Probably 12, 13,**
14 **somewhere in there.**
15 Q. How many have you given this month, this
16 month being August?
17 **A. This is the second I've given in August. I**
18 **was going to go on vacation for three weeks and on**
19 **vacation for two weeks prior so everything is sort of**
20 **crammed in.**
21 Q. When was your last depo?
22 **A. Last week,**
23 Q. How many depositions did you give last
24 nionth?
25 **A. I think one.**

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1 Q. Can you tell me how many medical/legal cases
2 you currently have pending?
3 **A. These things run on for years so I would say**
4 **probably 50.**
5 Q. Do you keep records of your cases?
6 **A. Not after they're settled or go to trial,**
7 **no.**
8 Q. Do you keep any kind of a listing of the
9 cases in which you're an expert?
10 **A. No.**
11 Q. Where do you keep your records and the
12 things that -- you must keep some kind of system of
13 record keeping of the files that you have of perhaps
14 these 50 or so cases?
15 **A. Ongoing cases I've got the files, yes.**
16 Q. Where do you keep that stuff?
17 **A. Atmyhome.**
18 Q. Old cases, you don't keep any records of the
19 cases, your depositions, any of that stuff?
20 **A. I have no reason to do that.**
21 Q. Have you ever worked with Mr. Mishkind or
22 anyone in his office before?
23 **A. I believe this was the first case.**
24 Q. Do you have any other cases with
25 Mr. Mishkind and/or his office?

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1 A. I think I've reviewed another case for him
2 so I think there was one other case, yes.
3 Q. Does that involve issues of VBAC?
4 A. I don't know. I don't remember.
5 Q. Do you know the name of the case?
6 A. No.
7 Q. Do you know where it's venued?
8 A. No.
9 Q. Have you agreed to act as an expert in that
0 case?
1 A. To be honest with you I don't even remember.
2 Q. Have you given a deposition in that case?
3 A. No.
4 Q. Have you ever worked as an expert in Ohio in
5 a medical/legal case before?
6 A. Yes.
7 Q. Do you know where in Ohio, venue?
8 A. I've done several cases in Columbus, Toledo.
9 I think there have been others but I don't specifically
0 recall them.
1 Q. Have you ever given court testimony in Ohio?
2 A. Yes.
3 Q. Do you remember the last time you did that?
4 A. It was last year.
5 Q. Do you remember where?

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1 A. I don't remember, no.
2 Q. Do you remember the names of any of the
3 attorneys you've worked for in Ohio?
4 A. Other than Mr. Mishkind?
5 Q. Other than Mr. Mishkind.
6 A. I have worked for it's a defense firm in
7 Columbus, Lane, Alton and Horst. Am I saying that
8 right?
9 Q. There's a Lane, Alton and Horst, they do
0 both plaintiff and defense work.
1 A. I've only done defense work for them.
2 Q. I believe they do both. You've done defense
3 work for them'?'
4 A. Yes.
5 Q. Who else?
6 A. There are a couple other attorneys, I don't
7 remember though.
8 Q. Any other cases in Cleveland?
9 A. There was another case and I don't remember
0 it specifically that I think was from Cleveland.
1 Q. Who did you work with?
2 A. It was Mr. Corbett.
3 MR. MISHKIND: Corbett?
4 A. That may be the firm.
5 Q. BY MR. JACKSON: Plaintiff or defense?

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1 A. Plaintiff's case.
2 Q. The cases that you worked in Columbus other
3 than Lane Alton, was it only with them that you worked
4 with in Columbus?
5 A. I've done four or five cases for them.
6 Q. How about Toledo?
7 A. I don't remember specifically. Corbett was
8 the name of the case, that's what it was.
9 Q. Do you remember the name of the attorney?
10 A. I'll keep thinking.
11 Q. Did you do any medical research relative to
12 this case?
13 A. No.
14 Q. Did you review any articles for this case?
15 A. No.
16 Q. Do you belong to any groups or associations
17 which provide experts?
18 A. No.
19 Q. Have you ever belonged to such a group?
20 A. No.
21 Q. Do you advertise your services?
22 A. No.
23 Q. How did Mr. Mishkind come to you, do you
24 know?
25 A. I don't remember.

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1 Q. You'll notice that for all the talking he's
2 done he didn't volunteer there, did he.
3 What are your fees, Doctor, for reviewing
4 matters?
5 A. I charge \$1800 to review the case initially
6 and discuss my opinions with the attorney, I charge
7 \$400 an hour for other work on the case, \$400 an hour
8 for deposition testimony, \$5,000 per day plus expenses
9 for testimony at trial.
0 Q. How long has that been your fee structure,
1 what you just outlined?
2 A. I think approximately two years.
3 Q. You said that you have not authored any
4 articles regarding VBAC in your CV; correct?
5 A. That is correct.
6 Q. Are there any articles that are not
7 contained in your CV that would deal with VBAC which
8 you authored or contributed to?
9 A. No.
10 Q. Are there any pending articles or studies
11 that you're involved with regarding VBAC or the issues
12 in this case?
13 A. I am currently pulling data on VBACS at
14 Good Samaritan Medical Center, Desert Samaritan Medical
15 Center and Thunderbird Sainaritan Medical Center with

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1 one of our residents.
2 Q. What's the purpose of your collecting that
3 data?
4 A. We were interested in looking at the
5 question of the number of layer closure in the uterus.
6 There's been a trend to go from a two-layer closure of
7 the Caesarian section scar, the initial section
8 scar -- classically we've closed it in two layers and
9 there's a trend now to go to one single layer closure
10 and we wanted to look and see if we had enough data to
11 look and see whether that had an influence on the risk
12 of rupture with the VBAC.
13 Q. Where are you in your research?
14 A. We are really to the point of starting to
15 collect data, but we have recently sent a letter to the
16 head of the IRB and we have permission to do it at
17 Good Samaritan from the IRB, but at the other two
18 hospitals we're awaiting permission from the IRB to
19 pull charts and gather this data anonymously.
20 Q. Have you formulated any hypothesis for the
21 study?
22 A. The hypothesis was single-layer closure is
23 less secure and that there's a higher risk of rupture
24 with a single-layer closure.
25 Q. How long have you been engaged in this

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1 collection of data?
2 A. We haven't collected anything yet.
3 Q. You're just starting. Any other --
4 A. Let me go back. Each resident has to have a
5 research project in order to graduate and so this
6 particular resident was interested in this question so
7 that's how we got onto that.
8 Q. Any other pending studies, articles?
9 A. No.
10 Q. Have you ever been sued?
11 MR. MISHKIND: Objection, but you can answer
12 the question, Doctor.
13 A. I've been personally sued three times.
14 Q. BY MR. JACKSON: You qualified that meaning
15 that your group has been sued perhaps on other
16 occasions?
17 A. Yes.
18 Q. On any of those occasions were you involved
19 personally in the care of the patient where you were
20 not personally named?
21 A. In one case I was involved in the care of
22 the patient but I was not named.
23 Q. You've been personally named three times?
24 A. Yes, that I'm aware of.
25 Q. Where you were involved in the care of a

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1 patient where the group was sued but you were not
2 personally named?
3 A. Correct.
4 Q. So there have been four lawsuits involving
5 medical care and treatment of patients that have been
6 filed against you?
7 MR. MISHKIND: He said that he's aware of.
8 A. And I'm also -- I mean it was not filed
9 against me so my care was never questioned.
10 Q. BY MR. JACKSON: In the one?
11 A. Correct.
12 Q. I was going to explore that. When you say
13 or when Mr. Mishkind says that you're aware of --
14 MR. MISHKIND: It wasn't my statement, it
15 was his.
16 MR. JACKSON: I know and then you repeated
17 it. I'm trying to understand what that means.
18 Q. BY MR. JACKSON: You certainly would know if
19 you've been sued?
20 A. Those are the ones that I know about, yes.
21 Q. Can you tell me what the allegations against
22 you were in the three lawsuits? Before I ask that
23 question, the one lawsuit against your group, what was
24 the claim?
25 A. It was a patient who had a vaginal delivery,

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1 had a placental accreta that was handled by one of my
2 partners, he did a D&C, conservatively managed her,
3 eventually took her to the operating room when he
4 couldn't stop the bleeding, I received a call at 3:00
5 in the morning that he needed help in the OR and I came
6 in and spent eight hours trying to save this woman's
7 life, and eventually she walked out of the hospital
8 with a hearing loss and incurred a million dollars in
9 medical costs and sued.
10 Q. What was the resolution of the case or is it
11 still pending?
12 A. No, it went to trial and we lost the verdict
13 so we lost at trial.
14 Q. What was the verdict?
15 A. It was for \$4.5 or \$5.5 million.
16 Q. Was that here in Phoenix?
17 A. Yes.
18 Q. Do you remember the plaintiff's name?
19 A. Mary Prator.
20 Q. Were there expert opinions that you deviated
21 from standard of care in that case?
22 A. No.
23 Q. The experts were focused on your partner's
24 care?
25 A. Yes.

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<p>1 Q. Did you testify in that case?</p> <p>2 A. No.</p> <p>3 Q. The three lawsuits where you were personally</p> <p>4 named, tell me, if you would, the claims in those</p> <p>5 cases.</p> <p>6 MR. MISHKIND: John, let me just show a</p> <p>7 continuing line of objection to any questions relative</p> <p>8 to claims against the doctor. Go ahead.</p> <p>9 A. First one involved an amniocentesis that I</p> <p>10 did in the hospital down in radiology in a patient who</p> <p>11 was diabetic and at 38 weeks and wanted to establish</p> <p>12 fetal lung maturity prior to induction of labor. Put</p> <p>13 the needle in under ultrasound guidance, had to go</p> <p>14 through an anterior placenta, the baby moved,</p> <p>15 unfortunately the needle was located through a</p> <p>16 placental artery and when the baby moved it dragged the</p> <p>17 needle and lacerated the artery. We had an indication</p> <p>18 on the ultrasound that the heart tones went down, came</p> <p>19 back up again, we immediately rushed her to labor and</p> <p>20 delivery and delivered her within 12 minutes of the</p> <p>21 first decrease in the heart rate and the baby</p> <p>22 essentially bled to death in that period of time.</p> <p>23 Q. What was the resolution of that suit?</p> <p>24 A. I settled it the day before we were to go to</p> <p>25 trial for \$25,000. I was told that that would not</p> <p style="text-align: right;">Page 97</p>	<p>1 case?</p> <p>2 A. That I failed to ensure that a Rhogam shot</p> <p>3 was given to a patient who was Rh negative who</p> <p>4 delivered an Rh positive baby.</p> <p>5 Q. Is there an expert that believes your care</p> <p>6 was below standard of care?</p> <p>7 A. I don't know the answer to that. They're</p> <p>8 supposed to disclose experts this week, we're anxiously</p> <p>9 awaiting the name of such a person.</p> <p>10 Q. Do you believe your care fell below the</p> <p>11 standard of care?</p> <p>12 A. No.</p> <p>13 MR. MISHKIND: Objection.</p> <p>14 Q. BY MR. JACKSON: Who was the expert against</p> <p>15 you, Doctor, in the first case you told me about?</p> <p>16 A. I don't remember. He was an Ob/Gyn in a</p> <p>17 suburb of Los Angeles.</p> <p>18 Q. What is the incidence of uterine rupture?</p> <p>19 A. The quoted incidence in the literature is</p> <p>20 somewhere between .8 and 1.5 percent.</p> <p>21 Q. How about uterine rupture with VBAC?</p> <p>22 A. I'm sorry, that is with VBAC.</p> <p>23 Q. Have you had uterine ruptures in your</p> <p>24 practice?</p> <p>25 A. I've had myself one uterine rupture. I've</p> <p style="text-align: right;">Page 99</p>
<p>1 result in anybody making any money and so I agreed to</p> <p>2 settle it.</p> <p>3 Q. Was there an expert that said you were</p> <p>4 negligent in the case?</p> <p>5 A. Yes.</p> <p>6 Q. Were you?</p> <p>7 MR. MISHKIND: Objection.</p> <p>8 A. No. My expert was the person who this</p> <p>9 expert referred his amnios to so I was very anxious to</p> <p>10 go to trial.</p> <p>11 Q. BY MR. JACKSON: Tell me about the next or</p> <p>12 the other two.</p> <p>13 A. The second case involved a placental</p> <p>14 abruption in a patient who was in labor. The</p> <p>15 allegation was that we failed to diagnose the abruption</p> <p>16 and intervene in a timely manner. We performed a</p> <p>17 Caesarian section and delivered a baby that was not</p> <p>18 reaching its milestones.</p> <p>19 Q. How did that case resolve?</p> <p>20 A. It was, I guess, dropped with prejudice.</p> <p>21 Q. Was there any payment?</p> <p>22 A. No.</p> <p>23 Q. The third case?</p> <p>24 A. Third case is currently pending.</p> <p>25 Q. What are the allegations against you in that</p> <p style="text-align: right;">Page 98</p>	<p>1 had -- I guess I can't say that, excuse me. I've had</p> <p>2 one potentially catastrophic uterine rupture. I had</p> <p>3 one complete opening of the scar that I found on</p> <p>4 examination after delivery but the baby delivered</p> <p>5 vaginally without any consequence.</p> <p>6 Q. How about the other rupture that you had,</p> <p>7 the potentially catastrophic one?</p> <p>8 A. The other rupture was a patient in the</p> <p>9 second stage of labor that was pushing and she had a</p> <p>10 bradycardia and we immediately delivered her and the</p> <p>11 baby did well. There was a complete rupture of the</p> <p>12 uterus.</p> <p>13 Q. How long did it take to deliver that child?</p> <p>14 A. I don't know that I remember the exact</p> <p>15 amount of minutes, it seemed like an eternity, but the</p> <p>16 heart tones were down for about four minutes and then</p> <p>17 it took probably 10 minutes to get the C-section done</p> <p>18 to delivery so I'm going to say about total of 14</p> <p>19 minutes from when the heart tones went down.</p> <p>20 Q. Doctor, have you ever practiced at an</p> <p>21 address on North Tatum in Phoenix?</p> <p>22 A. No.</p> <p>23 Q. Are you familiar with the experts who have</p> <p>24 been retained by the defense in this case?</p> <p>25 A. I'm not sure I know -- I think Bruce Flamm</p> <p style="text-align: right;">Page 100</p>

1 is one of them. Bruce was a resident at UCI when I was
2 a Fellow there. The other experts I'm not familiar
3 with.
4 Q. You're not familiar with their names?
5 A. I'm not familiar with their names or with
6 them.
7 Q. You do know Dr. Flamm?
8 A. Yes, I do.
9 Q. What do you think of him?
10 A. I think Bruce is a very bright individual.
11 Q. You said you know him through some training?
12 A. He was a resident when I was a Fellow.
13 Q. Did you know him other than to know that he
14 was there at the same time? Were you friends, were you
15 colleagues, you just knew he was there?
16 A. He was a resident. I participated in some
17 of his education, but we were never close friends or
18 anything.
19 Q. Would you consider him to have a special
20 expertise in VBAC?
21 A. Bruce has written some very good papers on
22 VBACs, yes.
23 Q. Would you consider him to have a special
24 expertise in that area?
25 A. I know that he's written very good

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1 literature on it. I don't know -- that gives him
2 certainly a -- he's looked at statistics and that's
3 been very helpful to the medical literature and us as
4 practitioners.
5 Q. Would you consider him an expert in VBAC?
6 A. I think that he has good qualifications in
7 that, yes.
8 MR. JACKSON: Doctor, I'm going to let
9 Mr. Rossi go because I think I'm done, but rather than
10 just sit here and page through notes to make sure of
11 that I will let him go. And if I have more questions I
12 will ask them, but I think I've completed what I wanted
13 to ask.
14 A. Thankyou.

EXAMINATION

17 BY MR. ROSSI:
18 Q. Doctor, my name is Greg Rossi, I represent
19 Wooster Community Hospital in this case and I do have
20 some questions for you. I'll try not to repeat
21 anything that we've covered already, but in light of
22 the factual testimony there may be some carry-over.
23 A. Yes.
24 Q. You've gone through already everything that
25 you've reviewed. I take it based on your testimony

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1 you've not reviewed any policies or procedures from
2 Wooster Community Hospital; is that true?
3 A. No, I have not.
4 Q. Is it your intention to do that in this
5 case?
6 A. I don't think I need to do that to form my
7 opinions, but if I'm asked to do that I would.
8 Q. Is it your intention to render any testimony
9 tonight or at a later time in this case that the
10 policies and procedures of Wooster Community Hospital
11 were deficient or below any accepted standard of care?
12 MR. MISHKIND: Let me just object because he
13 hasn't reviewed any, but go ahead.
14 A. It's not my intention to criticize the
15 policies and procedures, I believe there's certainly
16 an issue of communication, I don't know if there's a
17 policy that addresses that. I am aware that they
18 changed their habits after this case so I don't know
19 how all that fits together, but my criticism is really
20 the lack of communication and if that translates to a
21 policy, as it apparently did, or at least a behavior
22 change, then I guess that does affect what you're
23 asking me.
24 Q. BY MR. ROSSI: Let me just conclude this
25 section by saying this: If Mr. Mishkind gives you the

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1 policies and procedures and you have some criticisms of
2 those procedures, will you let him know that?
3 A. Yes.
4 MR. ROSSI: And then, Howard, will you agree
5 to reconvene the deposition at that time either by
6 phone or in person if necessary?
7 MR. MISHKIND Yes.
8 Q. BY MR. ROSSI. You've reviewed the discharge
9 summary from Children's Hospital for Alexis, but as I
10 understand it you've not reviewed the entire chart for
11 her; is that correct?
12 A. That is correct, yes.
13 Q. As part of your review of the Wooster
14 Community Hospital records did you review baby's chart?
15 A. Yes, I did.
16 Q. As I understand your earlier testimony you
17 were not going to be rendering testimony at trial that
18 the care and treatment provided to Alexis by anyone at
19 Wooster Community Hospital was below accepted
20 standards?
21 A. Correct.
22 Q. Finishing up on some of your testimony
23 regarding VBAC deliveries, would you agree, Doctor,
24 that there are no randomized trials in the literature
25 which established that maternal and neonatal outcomes

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1 are better with VBAC delivery than repeat C-section and
2 vice versa?
3 A. Yes, I would agree with that.
4 Q. Would you agree that uterine rupture can
5 occur at any time during labor?
6 A. Yes.
7 Q. Would you agree that it can occur
8 unexpectedly?
9 A. It's hard to disagree with. I think it
10 is -- I don't know that anybody ever expects it so I
11 guess it would be unexpected.
12 Q. And you would agree that poor fetal
13 outcomes, including death, can occur in a VBAC after
14 uterine rupture even with the best care and treatment?
15 A. Yes.
16 Q. Generally you would agree that Angel Robbins
17 was an appropriate candidate for VBAC?
18 A. I think in general, yes.
19 Q. You sort of qualified that. Is there
20 something that troubles you about her undergoing a
21 trial of labor?
22 A. Yes.
23 Q. What?
24 A. I don't like the floating presenting part at
25 term in an unproven pelvis. She otherwise is an

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1 appropriate candidate for a VBAC.
2 Q. When did her health-care providers become
3 aware that there was a floating presenting part?
4 A. At her last prenatal visit.
5 Q. January 16th of '99?
6 MR. MISHKIND: That's the date.
7 A. I believe so.
8 MR. ROSSI: I just want to make Sure that he
9 thinks that's the date.
10 MR. MISHKIND: Sorry.
11 MR. ROSSI: That's okay.
12 A. January 16th record says "vertex floating,
13 desires VBAC."
14 Q. BY MR. ROSSI: Beyond that you would agree
15 there were no contraindications to her undergoing a
16 trial of labor?
17 A. I would agree, yes.
18 Q. You made some remarks earlier about informed
19 consent. Would you agree with me that there was no
20 obligation upon the nurses at Wooster Community
21 Hospital to go through any informed consent discussion
22 with Angel Robbins on the night she presented) 1-16-99?
23 A. No, there were no obligations to do that,
24 no.
25 MR. JACKSON: Can we take a quick break?

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1 MR. ROSSI: Sure.
2 (Recessed from 8:52 p.m. until 8:55 p.m.)
3 Q. BY MR. ROSSI: Doctor, would you state for
4 me each and every criticism you have of the Wooster
5 Community Hospital nurses and/or employees.
6 A. I've got three criticisms of Nurse Moats.
7 The first is -- I guess maybe I have four. The first
8 is the failure to communicate with Dr. Tizzano at the
9 time of an epidural in a VBAC patient. I think that
10 that is a different issue than a patient that is
11 unscarred and wants a VBAC because part of watching a
12 VBAC patient has to do with pain and it has to do with
13 the risk of rupture and so I believe the physician
14 needs to know about the circumstances at the time of
15 placement of a VBAC.
16 Q. I don't want to cut you off. What time are
17 we talking about with that first criticism?
18 A. When the epidural was placed.
19 Q. At or about 3:00?
20 A. 3:00 in the morning so just prior to that.
21 Q. Continue, please.
22 A. Let me start with the disputed initial
23 evaluation and phone call at or around midnight. If
24 Nurse Moats did make that phone call, then she would
25 not be below the standard of care. If she did not make

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1 it, then she would be below the standard of care. And
2 the reason for that is that this is a VBAC patient who
3 has a floating presenting part and the physician
4 absolutely needs to be aware of this. This is a
5 special circumstance, not a routine patient in labor.
6 The third area is failure to communicate her
7 examination at 4:15 when she was complete and at a
8 minus 3 station. This was a large baby with no prior
9 vaginal deliveries, the vertex was still unengaged.
10 The nurse should be aware that that is not a normal
11 progress of labor. She states in her deposition that
12 she was hoping that the baby would labor down and the
13 head would begin to descend, but that's not the way
14 labor goes when it's going normally. That should be
15 absolutely brought to the attention of the physician at
16 that time so she failed to -- I don't think there's any
17 dispute that she failed to notify the physician of that
18 happening at 4:15.
19 The last area was failure to contact
20 Dr. Tizzano when he did not arrive in a timely manner.
21 She told the patient that she was expecting Dr. Tizzano
22 to come in to talk with her about her change of heart
23 about a VBAC and to evaluate her and she also testified
24 in her deposition that that was her expectation, that
25 Dr. Tizzano would come in in a short period of time, I

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1 don't know that she really quantitated that amount of
2 time, and when he failed to appear in that short period
3 of time she should have recontacted him to have him
4 come in and address those issues.

5 Q. At the risk of having Howard yell at me, let
6 me interrupt you there for a minute. Are you looking
7 at page 7 right now?

8 A. Yes.

9 Q. Under your number 3 on that page, that third
10 line down that begins "certainly," what does that say?

11 A. "15 to 20 minutes."

12 Q. "Is adequate"?

13 A. "Is adequate," yes.

14 Q. Does that mean is adequate for the physician
15 to arrive following that phone call?

16 A. Yes.

17 Q. So what you're saying is if he doesn't
18 arrive in that time frame, the obligation is on the
19 nurse to telephone him again?

20 A. Yes. She apparently was expecting him to
21 come in rather promptly, which would have been
22 appropriate and within the standard, and when he did
23 not show up within that time frame I think she should
24 have contacted him again to find out why he was not
25 there and when he would be there.

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1 Q. Are those all your criticisms of
2 Nurse Moats?

3 A. Yes.

4 Q. You were going to begin to tell us your
5 other criticisms of other hospital nurses. Go ahead.

6 A. Nurse Gwin failed to institute fetal
7 resuscitation. She did not start oxygen until 8:06
8 when that should have been started at 7:58. She didn't
9 change position of the baby until 8:06 and then changed
10 it again at 8:10. These were both delayed responses to
11 try to resuscitate this baby.

12 Q. Is that your only criticism of Nurse Gwin?

13 A. I suppose she falls under the same
14 criticism, they had turned care from Nurse Moats to
15 Nurse Gwin and I believe Nurse Moats testified that she
16 told Nurse Gwin that Dr. Tizzano was supposed to be
17 coming in and Gwin did not call Dr. Tizzano when she
18 took over the care, so I guess she kind of dovetails
19 onto Nurse Moats' failure to get him in there in a
20 timely fashion.

21 Q. Any other criticisms of her other than those
22 two?

23 A. No.

24 Q. Any other criticisms of any hospital
25 employee?

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1 A. No.

2 Q. I'd like to go through these with you,
3 beginning with Nurse Moats at midnight. I believe you
4 just said, I want to make sure it's clear on the
5 record, if we assume that her testimony in her
6 deposition transcript is accurate, would you agree that
7 at midnight or thereabouts when she initially contacted
8 Dr. Tizzano that Nurse Moats complied with the standard
9 of care?

10 A. Yes.

11 Q. I'd kind of like to use that now to dovetail
12 into your next two criticisms. First the failure to
13 communicate with Dr. Tizzano at the time of the
14 epidural. Did you see in her deposition where she
15 indicated that she informed Dr. Tizzano during that
16 first telephone conference at or about midnight that
17 the patient was now desirous of an epidural?

18 A. I guess I don't recall the word "now" in her
19 deposition, I recall that she said that she had spoken
20 with Dr. Tizzano and got an okay for an epidural. I
21 don't know that it was necessarily that she wanted it
22 now.

23 Q. I'm sorry, it's midnight on the East Coast,
24 I didn't mean to imply that the patient wanted it at
25 that time, but do you recall in Nurse Moats' transcript

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1 where she indicated that she informed Dr. Tizzano that
2 the patient was desirous of an epidural for this
3 delivery?

4 A. Yes.

5 Q. But you're saying even if we accept that as
6 being true, there's an additional obligation upon
7 Nurse Moats to telephone Dr. Tizzano at or about the
8 time the labor is coming in such that the epidural
9 would be done?

0 A. If she provided that information to
1 Dr. Tizzano at midnight and if Tizzano fell below the
2 standard of care and said she can have an epidural any
3 time, don't bother calling me, then she would not be
4 below the standard of care if she received a blanket
5 order to let her have an epidural at any time. If,
6 however, Dr. Tizzano was not informed about that or if
7 he was not informed about the epidural or if he said if
8 she's going to get an epidural call me so that I know
9 what's going on, then she would be below the standard
0 of care.

1 Q. Did you see the intrapartum standing orders?

2 A. I think they're in here.

3 Q. Let's save some trouble here, let me show
4 you. Number 19.

5 A. Okay.

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<p>1 Q. I don't have a copy, can you read for the 2 record what 19 says.</p> <p>3 A. It says "epidural per anesthesia when labor 4 established, PRN," meaning at the discretion of the 5 nurse, "physician must be aware of epidural request." 6 Again I'll come back to if Dr. Tizzano gave his blanket 7 approval at 12:00 for an epidural, then I believe he's 8 below the standard of care again because pain is a 9 particular issue with VBAC and rupture. If he did not 10 give a blanket approval, then he should have been 11 notified at the time the patient says okay, I give up, 12 I need an epidural.</p> <p>13 Q. I want to make sure I understand what you're 14 saying. I want you to assume for a moment, again -- 15 obviously there's a factual dispute on this telephone 16 call at midnight --</p> <p>17 A. Yes.</p> <p>18 Q. -- but I want you to assume for a moment 19 that what Nurse Moats is saying in her deposition 20 transcript is accurate; okay?</p> <p>21 A. Yes.</p> <p>22 Q. Would you agree with me that if she is 23 accurate in what she is saying, that she complied with 24 the terms of order number 19 on the intrapartum 25 standing orders?</p> <p style="text-align: right;">Page 113</p>	<p>1 labor curve and that is something that should be 2 reported to the physician. The physician also has an 3 obligation if he was aware of the situation at midnight 4 to realize that he's going out a little bit fairly far 5 on a limb in allowing a labor of a woman with a 6 floating head that has never delivered vaginally before 7 so that he should be very aware of the parameters that 8 since he's not really within a normal labor for a VBAC, 9 a VBAC labor should be pretty normal, you just don't 10 want to go off doing something that's not very normal 11 as far as progress of labor and doing something that's 12 really not within the standard kinds of parameters, so 13 a VBAC should be conducted when things go very 14 normally. When they start going other than normally, 15 you have got to reassess things frequently and realize 16 that you may not want to be continuing that. So she 17 has an obligation to know that in somebody that's 18 complete and at minus 3 or minus 4, I think she thought 19 it was minus 3 at that time, that that is basically a 20 failure of descent of any kind in this patient who's 21 now completely dilated. And certainly the physician 22 needed to make her aware, look, I need to know if this 23 baby is still floating, I would like to be made aware 24 at these particular times.</p> <p>25 Q. I guess I'm confused because I specifically</p> <p style="text-align: right;">Page 115</p>
<p>1 A. Yes.</p> <p>2 Q. If she did that, did she then comply with 3 the standard of care even though she did not telephone 4 him at or about 3:00 or 3:15 a.m. when the epidural was 5 administered by anesthesia?</p> <p>6 A. If he gave her a consent at midnight that 7 epidural was fine with him, then she would comply with 8 the standard of care.</p> <p>9 Q. All right. Now, the next point in time of 10 significance in your criticisms of her is 4:15 a.m., I 11 believe; is that correct?</p> <p>12 A. Yes.</p> <p>13 Q. Back to this phone call at midnight in 14 reference to that 4:15 a.m. phone call. Understanding 15 this patient's status, whose obligation is it at 16 midnight to discuss whether or not and when the patient 17 becomes completely dilated? What I mean by that is 18 this: Is it Dr. Tizzano's obligation to tell her to 19 call him when this patient is dilated?</p> <p>20 A. I think it's a shared obligation. This is a 21 team effort and each should know what the issues are. 22 I think the nurse should have an independent knowledge 23 that she should call when the patient becomes complete. 24 She's got a VBAC patient that has never delivered 25 vaginally, she's got a big baby who has an abnormal</p> <p style="text-align: right;">Page 114</p>	<p>1 wrote down, and my notes could be wrong, but I 2 specifically wrote down earlier when Mr. Jackson was 3 questioning you about this that the obligation is upon 4 the physician.</p> <p>5 A. I believe that's all he asked me about, did 6 Dr. Tizzano have an obligation to specifically tell the 7 nurse and I said yes. The nurse also has an obligation 8 to know that this is not a normal labor pattern and 9 that this is a VBAC patient, this is a patient with a 10 big baby and the physician should know at 4:15 that 11 this is not a normal labor curve.</p> <p>12 Q. Well, if she's not made aware, how is she 13 supposed to know?</p> <p>14 A. She should have that knowledge 15 independently. This is just like failure to progress. 16 In her first pregnancy I believe she did not progress 17 beyond seven centimeters. A nurse will know and should 18 know that when you don't progress in dilatation that 19 that is a dystocia, that is a failure to progress, and 20 the physician needs to be notified about that. In this 21 case she did not descend in station appropriately and 22 that is a failure to progress and the physician needs 23 to know about that. So that is standard nursing 24 obstetrical knowledge that should be known by 25 obstetrical nurses and the fact that the physician</p> <p style="text-align: right;">Page 116</p>

1 needs to know that is the action that the nurse needs
2 to take.
3 Q. Is it your intention to testify at trial
4 that had she made him aware at 4:15 a.m. or thereabouts
5 that Mrs. Robbins was completely dilated that that
6 would have changed the outcome in this case?
7 A. If the physician had done the proper
8 management that was within the standard of care, yes,
9 but the physician even at 6:00 and even at 7:44 did not
10 do the proper management and fell below the standard of
11 care so the nurse must comply with her standard and at
12 least provide the information to the physician in a
13 timely manner. I would not hold her to be below the
14 standard if she had done that. Even if the physician
15 had not done the proper thing, I would not be
16 criticizing the nurse for her behavior in this case at
17 this particular time given that scenario.
18 Q. I understand that, but would you agree with
19 me that it would be mere speculation by you that this
20 nurse acting any differently at 4:15 a.m. would have
21 changed this baby's outcome?
22 MR. MISHKIND: Objection, that assumes that
23 Dr. Tizzano would not have acted at that point and that
24 calls for speculation.
25 MR. ROSSI: I'm not assuming anything, I'm

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1 just asking him if it's pure speculation by him.
2 MR. MISHKIND: Note my objection, but he can
3 answer the question.
4 A. Based on what Dr. Tizzano did in this case I
5 don't believe he would have done a C-section at 4:15 if
6 he had come in and evaluated the patient. That does
7 not mean that the nurse is not below the standard of
8 care. Does it alter the outcome, no, the outcome would
9 be the same,
10 Q. BY MR. ROSSI: Moving on to 6:00 a.m. now.
11 Did I hear you correctly earlier that if we assume that
12 the information -- well, let me stop the question
13 there, I don't want to assume anything.
14 Based on the information contained in
15 Dr. Tizzano's note what he was told at 6:00 a.m., do
16 you agree that the nurse complied with the standard of
17 care and the information that was imparted upon him,
18 just based solely on his note?
19 A. The information that he has in his note is
20 sufficient to comply with the standard of care, that he
21 had to come to the hospital in an expedite manner to
22 evaluate Mrs. Robbins. He should have been told that
23 she had already been in the second stage of labor for
24 an hour and 45 minutes, but he would have found that
25 out himself when he got to the hospital or he should

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1 have found it out himself when he got to the hospital.
2 Should she have told him that she was in the second
3 stage of labor for an hour and 45 minutes, yes, but
4 this information would be enough to have him come to
5 the hospital to meet the standard of care.
6 Q. And touching upon the caveat you added there
7 at the end, even if she had specifically told him when
8 this patient became completely dilated at or about
9 4:15 a.m., it still would have been incumbent upon him
10 to come within 15 to 20 minutes?
11 A. Yes. Whether she told him that or not, yes.
12 Q. In other words, it would not have changed
13 anything?
14 A. No.
15 Q. Once he's made aware of this information at
16 6:00 a.m., as a Board-certified obstetrician isn't it
17 really his decision then, his judgment, as to when he
18 needs to come to the hospital?
19 MR. MISHKIND: Objection. Go ahead.
20 A. Certainly that's the majority of it. The
21 nurse also has a role in getting the physician
22 appropriately in the hospital in a timely manner. In
23 this particular case the patient has essentially
24 revoked her permission to do a VBAC, that creates
25 essentially I'm not going to say emergency but very

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1 close to that where the physician must respond and
2 evaluate the situation and make a decision about what
3 he's going to do with the management. So most of that
4 is on the physician, but the nurse is an advocate for
5 her patient and -- her two patients, the baby and the
6 mother, and so again this is a team effort. Yes, most
7 of it is the physician's responsibility to come in in a
8 timely manner, but the nurse also has an independent
9 knowledge base and judgment to protect her two patients
10 and her expectation was that he would come in in a
1 short manner, that it would not take as long as it did.
2 She was surprised that it took so long for him to come
3 in and yet she did nothing about it.
4 Q. And that criticism that you have applies to
5 both nurses?
6 A. The other nurse was aware of the expectation
7 and really she is -- now time has passed and so we're
8 beyond two hours in the second stage and the physician
9 is not there to evaluate the patient let alone to talk
10 about the VBAC issue so it gets even worse the longer
1 this goes without some resolution.
2 Q. So I understand your testimony, after he
3 arrives at 7:44 a.m. is it your opinion that it would
4 have been reasonable to call for a crash C-section at
5 8:00 a.m.?

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<p>1 A. You mean once they did what they did?</p> <p>2 Q. Yes.</p> <p>3 A. I mean it was unreasonable to rupture the</p> <p>4 membranes, it was unreasonable to not stay right with</p> <p>5 the patient because he's now gone outside the standard</p> <p>6 of care, it was unreasonable not to have everybody</p> <p>7 available, then when we have the prolonged deceleration</p> <p>8 at 7:58 an emergency C-section, a crash C-section,</p> <p>9 whatever term you want to use, should be called, yes.</p> <p>10 Q. I want to touch upon something you just</p> <p>11 said. You said it was unreasonable to have the staff</p> <p>12 or the team assembled?</p> <p>13 A. No, I didn't say that. I'm sorry if I did,</p> <p>14 that's not what I meant.</p> <p>15 Q. You're not critical of this hospital for not</p> <p>16 having people standing by to do crash C-sections?</p> <p>17 A. No, but the physician should have called in</p> <p>18 the appropriate people prior to his ill-advised</p> <p>19 decision to rupture the membranes.</p> <p>20 Q. Do you think a C-section should have been</p> <p>21 called at 7:44 a.m. or thereabouts when he arrived?</p> <p>22 A. Let's go back. The C-section should have</p> <p>23 been called at 4:15, it then should have been called at</p> <p>24 6:15 or 6:20, whenever he got in there, or should have</p> <p>25 gotten in there, at 7:44 a C-section should have been</p> <p style="text-align: right;">Page 121</p>	<p>1 something in that range and I would agree with that.</p> <p>2 Q. So even if baby had been delivered as late</p> <p>3 as 8:14 a.m., you believe baby would have been normal?</p> <p>4 A. I believe that even later than that that the</p> <p>5 baby would have been normal to a degree of medical</p> <p>6 probability.</p> <p>7 Q. Can you give us a time to a reasonable</p> <p>8 degree of medical probability as the latest time baby</p> <p>9 could have been delivered and still have been normal?</p> <p>10 A. No, because even given the circumstances of</p> <p>11 this case the baby could have ended up being normal.</p> <p>12 Again, when we talked about the statistics and the Ph</p> <p>13 of 6.5 at the time of delivery, which we don't know</p> <p>14 what it was at the time of delivery, there's an</p> <p>15 80 percent risk of neurologic handicap, still 20</p> <p>16 percent of those babies end up being normal so there's</p> <p>17 just no way of being able to answer that. Even as long</p> <p>18 as it was in this case the baby could have ended up</p> <p>19 being normal. Statistically it was not likely the baby</p> <p>20 would be normal.</p> <p>21 Q. This failure to institute oxygen by</p> <p>22 Nurse Gwin, I just don't understand how it works. If</p> <p>23 the obstetrician is there and the nurses are there</p> <p>24 acting under his mandate or dictate, if you will, help</p> <p>25 me understand how it works. Is that something the</p> <p style="text-align: right;">Page 123</p>
<p>1 called, yes, without rupturing her membranes.</p> <p>2 Q. Let's take all the hypotheticals out of it.</p> <p>3 He arrives at 7:44 a.m.?</p> <p>4 A. Yes.</p> <p>5 Q. Are you saying that at that time when he</p> <p>6 arrived he should have called a C-section?</p> <p>7 A. Yes, that's the only thing to be within the</p> <p>8 standard of care.</p> <p>9 Q. If a C-section had been called at or about</p> <p>10 7:44 a.m., is it your opinion this baby would have had</p> <p>11 a normal outcome?</p> <p>12 A. Well, if we look at the timing of things the</p> <p>13 C-section was actually called at 8:12, incision was at</p> <p>14 8:34, so that's a total of 22 minutes from decision to</p> <p>15 incision. If the decision was at 7:44 even assuming</p> <p>16 that he did not rupture the membranes and that the</p> <p>17 rupture occurred and became apparent at the time 7:58,</p> <p>18 if we take 22 minutes from 7:44, that would be 8:06</p> <p>19 that the team would have arrived, been ready and</p> <p>20 incision would have been made. And very clearly this</p> <p>21 baby would have been normal at 8:06. Nothing -- the</p> <p>22 baby didn't even have time to start to develop</p> <p>23 significant problems and I believe that Dr. Tizzano has</p> <p>24 testified in his deposition that the baby -- he felt</p> <p>25 that the baby would be normal if delivered by 8:14 or</p> <p style="text-align: right;">Page 122</p>	<p>1 nurse has to do on her own or does the obstetrician</p> <p>2 direct that?</p> <p>3 A. No, it's basically a nursing function.</p> <p>4 There's certain things that the nurse has available to</p> <p>5 her to help increase the oxygen delivery to the baby;</p> <p>6 first is to add supplemental oxygen by face mask,</p> <p>7 second is to position the patient on one side or the</p> <p>8 other, knee-chest, Trendelenberg, any different</p> <p>9 position to try to move the cord if the cord is the</p> <p>10 problem with being squeezed. And increasing the IV</p> <p>11 fluids to increase the intravascular volume is the</p> <p>12 third thing that nurses can do and is really within</p> <p>13 their mandate and what they -- it's totally their scope</p> <p>14 of practice. Now, could the physician say give her</p> <p>15 oxygen, turn her on her side, open her IV up, call for</p> <p>16 a C-section stat, sure, the physician can also</p> <p>17 participate in those things, but they're generally</p> <p>18 nursing duties.</p> <p>19 Q. Even if the physician is at the foot of the</p> <p>20 bed?</p> <p>21 A. Yes.</p> <p>22 Q. When do you believe the oxygen should have</p> <p>23 been administered, 7:59 a.m.?</p> <p>24 A. Yes.</p> <p>25 Q. So we're talking about -- and I believe it</p> <p style="text-align: right;">Page 124</p>

1 was started at 8:06?
 2 A. Yes.
 3 Q. So we're talking about a seven-minute delay?
 4 A. Yes.
 5 Q. Are you prepared to state to a reasonable
 6 degree of medical probability that that delay in oxygen
 7 administration somehow played a part in this outcome?
 8 A. Since you phrased it that way, yes.
 9 Q. What is your opinion on that issue?
 10 A. I think it did play a part in it, it
 11 worsened the outcome.
 12 Q. Can you state to what degree?
 13 A. No.
 14 Q. How about the position changes, are you
 15 prepared to state to a reasonable degree of medical
 16 probability that the failure to position this patient
 17 differently during this period of time somehow played a
 18 part in this child's outcome?
 19 A. Again, phrased as such, yes.
 20 Q. And, again, can you state to what degree it
 21 played a part in the outcome?
 22 A. No.
 23 Q. We've been at this for roughly about three
 24 hours now. Have we covered all the opinions that you
 25 have in this case?

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1 MR. MISHKIND: Who's counting, but it's
 2 three-and-a-half hours.
 3 MR. ROSSI: I was being generous and taking
 4 out the break time.
 5 MR. JACKSON: And the arguments.
 6 MR. MISHKIND: The comments by Mr. Jackson.
 7 A. It's an hour **50** with the arguments now.
 8 Yes, I've given you all my opinions.
 9 MR. ROSSI: Just let me look through my
 0 notes, but I think that I'm probably done.
 1 Q. BY MR. ROSSI: There was something I've
 2 wanted to ask you, I've been looking at this the whole
 3 deposition.
 4 A. It's a sucker trap for lawyers.
 5 Q. Tell me about that. We're talking about a
 6 framed piece "congratulations, Dr. Elliott, retired
 7 June 20, 1998." It's got a shirt in the frame. What's
 8 that all about?
 9 A. My shirt was retired.
 10 Q. Is that a shirt you used to wear regularly
 11 or something?
 12 A. Quite regularly, yes, and the residents that
 13 year decided that they felt it should be retired so
 14 they got it from my wife and put it under glass so I
 15 could no longer wear it.

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1 Q. The reason I ask I notice also you've got a
 2 plaque over here from your group presented to you
 3 saying "in recognition of your 15 years of support and
 4 service" and that's also dated 1998. Was that just
 5 because coincidentally you had 15 years at that point?
 6 A. I've never noticed it's the same year. Our
 7 group kind of commemorates five-year anniversaries for
 8 all employees so I have a five and a ten-year also.
 9 And hopefully a 20-year.
 10 Q. As you sit here today you are not retired,
 11 are you?
 12 A. Oh, I wish, but, no, I'm not.
 13 MR. ROSSI: That's all I have, thank you.
 14 A. Thankyou.

FURTHER EXAMINATION

17 BY MR. JACKSON:
 18 Q. Just one question, Doctor. If you formulate
 19 any new opinions or change any opinions that you
 20 expressed today or alter them in any way, I assume
 21 you'll agree that we're entitled to know that and have
 22 an opportunity to talk to you. Do you agree with that?
 23 A. Certainly.
 24 MR. MISHKIND: Certainly if there are any
 25 based upon the deposition of Angel, Nancy Morgan and to

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1 the extent the policies are submitted or obviously any
 2 of the testimony of your experts I will immediately
 3 notify you and give you more than sufficient time to
 4 reconvene the deposition.
 5 Q. BY MR. JACKSON Would you also agree with
 6 me, Doctor, that Mr. Mishkind should bear the expense
 7 of any additional time for that?
 8 A. I don't want to get into that.
 9 MR. MISHKIND: You won't dignify his last
 0 comment. Are you done?
 1 MR. JACKSON: I am for now.
 2 MR. MISHKIND: Signature will be reserved,
 3 the doctor will read the deposition.
 4 (Exhibits 1 and 2 marked for
 5 identification.)
 6 (9:28 p.m.)
 7
 8
 9

 John P. Elliott, M.D.

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1 STATE OF ARIZONA }
2 COUNTY OF MARICOPA) ss.
3

4 BE IT KNOWN that the foregoing deposition was
5 taken before me, JENNIFER LLOYD, a Certified Court
6 Reporter in the State of Arizona; that the witness
7 before testifying was duly sworn by me to testify to
8 the whole truth; that the questions propounded to the
9 witness and the answers of the witness thereto were
0 taken down by me in shorthand and thereafter reduced to
1 print by computer-aided transcription under my
2 direction; that the deposition was submitted to the
3 witness to read and sign; that the foregoing 128 pages
4 are a true and correct transcript of all proceedings
5 had upon the taking of said deposition, all done to the
6 best of my skill and ability.

7 I FURTHER CERTIFY that I am in no way related
8 to any of the parties hereto nor am I in any way
9 interested in the outcome hereof.

0 DATED at Phoenix, Arizona, this 23th day of
1 August, 2001.

2 _____
Certified Court Reporter

3 Certificate No. 50165
4
5

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