

1 SUPPLEMENTAL REPORTER'S RECORD

2 VOLUME 4 OF 15

3 COURT OF APPEALS CAUSE NO. 05-12-01394-CV

4 TRIAL COURT CAUSE NO. 08-8056-E

5 MARCELA and JOSE BUSTAMANTE,) IN THE DISTRICT COURT
as Next Friends of DANIELLA)
6 BUSTAMANTE,)
Plaintiffs,)

7 VS.)

8 JORGE FABIO LLAMAS-SOFORO, M.D.;) DALLAS COUNTY, TEXAS
9 JORGE FABIO LLAMAS-SOFORO,)
M.D., P.A. d/b/a EL PASO)
10 EYE CARE CENTER;)
ENRIQUE N. PONTE, JR., M.D.;)
11 PEDIATRIX MEDICAL SERVICES, INC.)
and PEDIATRIX MEDICAL GROUP, INC.)
12 Defendants.) 101ST DISTRICT COURT

13
14 OPENING STATEMENTS OF COUNSEL,
15 TESTIMONY OF DR. DARIUS MOSHFEGHI
16 and TESTIMONY OF DR. ENRIQUE PONTE
17 which were heard on
18 Wednesday, October 26, 2011

19
20 On the 26th day of October 2011, the following
21 proceedings came on to be heard in the above-entitled
22 and numbered cause before the Honorable Martin Lowy,
23 Judge Presiding, held in Dallas, Dallas County, Texas.
24 Proceedings reported by machine shorthand
25 utilizing computer-assisted realtime transcription.

1 for these rulings. These are purely matters of law.

2 Lastly, no statement, ruling, or remark
3 that I make during the entire time this case is on
4 trial is intended in any way to indicate my opinion
5 about the facts. The Court has no right to indicate
6 an opinion as to the facts. You will decide the facts
7 in the case, and in this determination you alone will
8 determine the believability of the evidence and its
9 weight and value.

10 At this time, ladies and gentlemen, we
11 are going to begin to hear the opening statements of
12 the attorneys. Mr. Girards will go first on behalf
13 of the plaintiffs.

14 MR. GIRARDS: Thank you, sir. May it
15 please the Court. Good morning, ladies and gentlemen.

16 A doctor is never allowed to expose his
17 patient to a needless risk of danger, a needless risk
18 of harm. If a doctor exposes his patient to a needless
19 risk of harm, then he is responsible for the harm that
20 results.

21 In this case a baby is born at 23 weeks
22 and one day. A normal pregnancy takes 40 completed
23 weeks. And this is a grid with 40 seven-day weeks.
24 Daniella was born 23 completed weeks and one day.
25 She weighed less than 750 grams. That's less than two

1 pounds.

2 Whenever a baby is born at 23 weeks and
3 less than 750 grams, that baby has a 90 percent -- that
4 baby has a 90 percent chance of developing retinopathy
5 of prematurity. When a doctor is caring for a -- is
6 taking care of a baby born at 23 weeks, he must always
7 make sure the baby's eyes get checked by seven weeks of
8 age, and the baby's eyes are rechecked every other week
9 until the risk of retinopathy of prematurity goes away
10 or retinopathy of prematurity is diagnosed and treated.

11 If he does not check the baby's eyes by
12 seven weeks of age and again every other week until
13 the risk of retinopathy of prematurity goes away, then
14 the baby may go needlessly blind. Retinopathy of
15 prematurity is diagnosable, and it is treatable.

16 Let me show you what retinopathy of
17 prematurity is so you can see how that works.

18 (The videotape was played for the jury.)

19 MR. GIRARDS: This is a baby's eyes, and
20 the blood vessels in the eye start growing from the
21 back of the eye here. (Indicating) This is the optic
22 nerve, and the blood vessels grow out and until this
23 whole area is vascularized, until the whole area has
24 the arteries.

25 This normally happens between 14 weeks

1 and after during the pregnant -- during the 40-week
2 pregnancy. When a baby is born early, then this takes
3 place while the baby is outside the womb in the
4 neonatal intensive care unit.

5 The reason these blood vessels grow is
6 because this tissue out here that doesn't have blood
7 vessels makes a chemical that says, we need blood
8 vessels. Grow out to us. Grow, grow, grow, grow,
9 grow.

10 And in some patients, sometimes in some
11 babies -- well, 90 percent or nine out of ten of the
12 23-weekers, the chemicals make these blood vessels grow
13 too fast, too aggressively, and it starts to form scar
14 tissue--which I'm going to show you in just a moment.
15 And the scar tissue contracts, and it pulls the retina
16 away from the back of the eyeball, causing the baby to
17 be blind.

18 And so that's what you are going to see
19 here, the blood vessels growing.

20 Now the blood vessels are getting jumbled
21 up, and scar tissue is forming, and a ridge is created
22 here. (Indicating)

23 Okay. Now, what has happened here is
24 that the scar tissue started with a little line that
25 we saw, and then it grew further into a ridge. Then

1 the scar tissue forms, and you see the retina being
2 pulled off of the back of the eyeball, here.

3 (Indicating) And this is when the baby goes blind.

4 The treatment to stop this, to preserve
5 the vision of the baby, to maximize the vision of the
6 baby, is to take a laser and zap all of this tissue
7 here, every bit of it. (Indicating) Not just little
8 spots where you poke and destroy some of it. But you
9 take the laser, and you destroy all of this tissue
10 right here so that it stops making that chemical that
11 says, grow, grow, grow, blood vessels. Blood vessels,
12 we need blood vessels and arteries and veins coming out
13 here. (Indicating)

14 And if that happens at the correct time,
15 then this laser therapy is effective and stops the
16 progression of ROP in most babies. This is a condition
17 that's diagnosable, and it is treatable. Most babies
18 that have it, get diagnosed and treated on time. Most
19 babies that get treated have functional good vision.

20 It was known by PMG -- let me back up
21 a second. I want to show you something. (Writing
22 on the easel sheet)

23 This is the hospital. Inside the
24 hospital is the PMS neonatal intensive care unit.
25 Inside the intensive care unit is Dr. Ponte's office.

1 Dr. Llamas's office is ten miles away.

2 PMS had complete responsibility for the
3 professional services in the unit, everything that had
4 to do with diagnosis and treatment of babies.

5 Dr. Ponte was the medical director, and
6 he was also Daniella's attending physician. PMS and
7 Ponte knew--90 percent--knew that Daniella was going
8 to -- most likely was going to need laser therapy
9 sometime down here.

10 Now let's go back to our safety rule.
11 The baby's eyes must be checked by seven weeks of age,
12 and then every other week thereafter until the risk of
13 retinopathy goes away.

14 Dr. Ponte -- Daniella, after she was
15 born, was moved into the neonatal intensive care unit
16 because she had all of the problems that you would
17 expect in a baby that young: respiratory, heart,
18 infections, and all of those were treated by protocol.

19 And Dr. Ponte asked Dr. Llamas to be the
20 one to do the eyes, the eye checks. Dr. Llamas came
21 in when the baby was seven weeks of age and checked
22 her eyes, and he wrote, "Fetal fundi, follow up in
23 four weeks." And he wrote that in the medical record.
24 And she did not have retinopathy of prematurity on the
25 first exam.

1 Dr. Llamas returned four weeks later, and
2 he wrote in the medical record that Daniella now had
3 severe end stage ROP that was so severe that she needed
4 laser treatment as soon as possible, even if it
5 required her to be transferred to another hospital.

6 (Pointing to the calendar chart)
7 Daniella did not receive laser treatment on this day,
8 and she was not transferred to another hospital on this
9 day.

10 She did not receive laser therapy on this
11 day, and she was not transferred to another hospital on
12 this day.

13 She did not receive laser therapy on this
14 day, and she was not transferred to another hospital on
15 this day.

16 She received laser therapy on this day.
17 (Highlighting a day on the calendar chart)

18 The laser therapy -- Daniella went on to
19 go completely blind in her right eye. The scar tissue
20 pulled the retina off the back of her eyeball in her
21 right eye. Her eye is now shriveled. It is going to
22 have to be removed.

23 Her left eye, she is legally blind, and
24 she can only see things when they are about this far
25 in front of her face. (Indicating)

1 We have on Daniella's behalf sued PMS,
2 the corporation that runs the neonatal intensive care
3 unit, and the medical director and the attending
4 physician, Dr. Ponte. And we have sued Dr. Llamas
5 because the three of them together were required to
6 follow the safety rule of examining the baby's eyes
7 during the seventh week of life, and then every other
8 week until the risk of retinopathy of prematurity had
9 gone away.

10 Had they followed the safety rule,
11 Daniella's retinopathy of prematurity would have been
12 diagnosed more likely than not at a mild stage when
13 it could be treated, and she would have functional
14 vision. An exam that would take place no later than
15 here (pointing to a date on the calendar chart). And
16 then when the retinopathy of prematurity is diagnosed,
17 then more frequent follow-ups happen every few days
18 until it is at the treatable stage and her vision is
19 preserved. We have sued them for violating this clear
20 safety rule.

21 We are also suing Dr. Ponte and PMS
22 because the reason why Daniella didn't get laser
23 therapy on this day and she didn't get it on this day,
24 is because back here, when Daniella was born and they
25 all knew she had a 90 percent chance of developing

1 retinopathy of prematurity, that there was a high
2 degree that she was going to need laser therapy,
3 PMS and Ponte never checked to make sure that the
4 laser was going to be available down here when it
5 would have been needed.

6 And so the reason Daniella didn't get
7 laser therapy on this day is because nobody knew where
8 the laser was. And Dr. Ponte didn't transfer her to
9 another hospital for that emergency laser therapy.
10 We have sued them because if they had made a phone
11 call to make sure that the laser was available, then it
12 would have more likely than not been found back here,
13 and it would have been available when it was needed
14 here. (Pointing to dates on the calendar chart)

15 We are going to show you something --
16 I want to show you this diagram. This is the eyes.
17 Can you think of like sunglasses. When you look in
18 the eyes, this is a medical diagram that the doctors
19 use for a classification, just the special words used
20 to describe retinopathy of prematurity. And I want to
21 show you this because --

22 Remember when I said back at the first
23 exam, Dr. Llamas wrote in the medical records, "Fetal
24 fundi, follow up in four weeks." There were two really
25 big problems with that. Two clear safety rules were

1 violated. You have already heard about the "follow up
2 in four weeks." Dr. Ponte and PMS should have seen
3 that. That was a red flag, and an alarm should have
4 gone off.

5 But when he wrote "fetal fundi," this is
6 in the year 2005. Back in 1984, all the doctors who
7 assess and check these babies' eyes agreed to use a
8 special international classification. Because back at
9 that time doctors would look at a baby's eyes, and then
10 they would write down in the medical record, Bad ROP.
11 Very bad ROP. Oh, my god, unbelievably bad ROP. And
12 nobody knew exactly what it was. They were all looking
13 at the same eye.

14 So they decided to come up with a
15 classification system so that everybody--not only the
16 doctors but also the nurses, the technicians, the
17 hospital administrators, the PMS folks--would be
18 able to look at the record and know what the baby's
19 eyes looked like, and know when the baby's eyes were
20 supposed to be checked again. And that's what this is
21 here.

22 The first thing Dr. Llamas was supposed
23 to write in the medical record--and Dr. Ponte was
24 supposed to insist that he write down in the medical
25 record--number one, the zone. This is zone I. This

1 is zone II. And this is zone III.

2 So remember when we looked at the diagram
3 with the blood vessels growing in the back of the eye?
4 The zone means how far those blood vessels have gotten.
5 If the blood vessels have only gotten here -- if any of
6 the blood vessels haven't crossed this line, then it is
7 a zone I eye. If the blood vessels have crossed that
8 line -- have crossed this line and are here, that's a
9 zone II eye. And if the blood vessels have crossed
10 this line and gotten out here, that's a zone III eye.

11 The blood vessels never go backwards.
12 So if you have a zone II eye on any given date, you are
13 not going to have a zone I eye later. That's going to
14 be important to you because we are going to show you
15 some photographs of this baby's retinas that were taken
16 the day after this second exam, that show that on this
17 date--the second exam, four weeks later--she had zone I
18 eyes. Her blood vessels were still in zone I.

19 Which means -- which means that the safety
20 rule for this particular baby required Dr. Llamas to
21 check her eyes at least every week instead of every
22 other week. So at the end of the day, we have sued
23 Dr. Llamas and Dr. Ponte because they didn't make sure
24 Daniella's eyes were checked every single week until
25 the risk of ROP goes away.

1 Now, the risk of ROP going away happens
2 down here after -- after week 34. That's when it
3 starts to go down.

4 The safety rules that I'm telling you
5 about are going to be explained to you by a couple
6 of experts that I have asked to come and talk to you.
7 One is a fellow named William Good, who is one of the
8 country's premier pediatric ophthalmologists. He is
9 the Smith-Kettlewell Chair of Ophthalmology at a big
10 medical school. He is the chair of the committee that
11 wrote the "Early Treatment of ROP Protocol," and he is
12 going to explain to you the safety rules.

13 I have also asked a neonatologist to come
14 and visit with you during the trial. Her name is Dale
15 Phelps. She is also one of the premier neonatologists
16 in the area of retinopathy of prematurity. She is the
17 one who authored -- co-authored many of the leading
18 studies and papers on retinopathy of prematurity, and
19 she will tell you these safety rules.

20 I'm also going to ask that the expert
21 ophthalmologist that Dr. Llamas and PMS hired --
22 His name is Graham Quinn. And the words that I have
23 explained to you are the very words from Dr. Graham
24 Quinn. And they are the very words from the vice
25 president of this corporation.

1 Everybody is going to agree at the end
2 of the day that these are the safety rules. When a
3 23-week baby is born at less than 750 grams, 90 percent
4 chance probability of ROP, you should check the baby by
5 seven weeks of age and then at least every other week
6 until the risk of ROP is gone.

7 The only difference is, Dr. Quinn is
8 going to come into the courtroom and try to tell you
9 something different than what he was telling the
10 doctors and the hospitals. And the evidence is going
11 to show you, there is nothing more dangerous than a
12 doctor coming into a courtroom and saying something
13 different than he said to his buddies in the hospital.
14 But we will get to that later.

15 The other thing -- I have gotten ahead
16 of myself, which I'm bad about doing, and I'm going to
17 try not to do it too much. We talked about the zone,
18 which is what Dr. Llamas was supposed to write in the
19 records, where the zone was. He was also supposed to
20 write in the medical record the stage.

21 Remember the video about the stages?
22 This disease goes through stages that takes a while.
23 It doesn't happen overnight. And when the ridge forms
24 at stage 1, when the ridge widens at stage 2, and when
25 the blood vessels start shooting out these scar tissue

1 little fibers/stage 3, eventually to stage 3 where the
2 retina is pulled off the back of the eyeball.

3 So since around 1984, the pediatric
4 ophthalmologists are supposed to write not only the
5 zone but the stage that you are looking at. And then
6 the doctor is supposed to write in the medical record
7 whether those arteries are big and fat and twisted, or
8 whether they are not--because that makes a difference.

9 And then, finally, the doctor is supposed
10 to write the extent of the disease. And you will see
11 the clock hours here: 3:00, 6:00, 9:00, 12:00. And
12 he should write in the record the disease is present
13 between 12:00 and 3:00 or 12:00 and 6:00 or 3:00 and
14 7:00, so that anybody who looks at the record will know
15 exactly what that eye looks like, and so that everybody
16 will know when that baby's eyes are supposed to be
17 rechecked and what the risk profile is. Not just the
18 doctors but technicians, nurses, everybody.

19 We have sued Dr. Llamas because he didn't
20 switch in 1984, or at any time after that, to the new
21 classification. And PMS and Dr. Ponte didn't make him
22 do it. And so that when he writes "Fetal fundi, follow
23 up in four weeks," nobody really knows what's in Dr.
24 Llamas's head.

25 And the reason -- and because of that,

1 nobody at PMS--not the ROP person, not the nurse, not
2 the technicians--nobody was able to look at the record
3 and say, hey, wait a second, where is Dr. Llamas? He
4 is supposed to check this kiddo's eyes, and he is not
5 here. It's been a week; it's been two weeks; it's been
6 three weeks.

7 That is another reason why Daniella fell
8 through the cracks, is because Dr. Ponte and PMS were
9 supposed to make sure -- it was their job to make sure
10 she did not fall through the cracks.

11 We also sued Dr. Ponte and PMS because
12 they knew or should have known something about Dr.
13 Llamas. In 2005, Dr. Llamas had not had any formal
14 training to treat babies with a laser in their eyes.
15 You will hear that he went to a one-day seminar, and
16 a professor showed him how to do it, and he practiced
17 on a little plastic eye.

18 And then he went back home, and sometime
19 over the next couple of years he started shooting
20 lasers in babies' eyes with retinopathy of prematurity.
21 And he didn't have any preceptor or proctor, like
22 normally physicians do to get trained. He didn't have
23 anybody who actually knew how to do the laser following
24 him around for a period of time to check that he was
25 doing it right, to watch him do it, to look in the

1 baby's eyes after he did it to make sure it was done
2 correctly.

3 The reason why that is very important is
4 because -- the reason that is critically important is
5 because if you don't zap all of this tissue, the tissue
6 that's still alive is still making that chemical, and
7 it is still saying, we need blood vessels over here.

8 So if you have skip areas, if you have
9 shot it so it looks like a bunch of polka dots like a
10 leopard or if you leave large sections untreated, the
11 ROP is still going to progress because that chemical
12 is still being produced.

13 So when Dr. Llamas did the laser therapy,
14 it was too late. He did it incorrectly. And we are
15 going to show you photographs of the retina, and you
16 are going to see polka dot/leopard spots all through
17 here and large areas that didn't get zapped with the
18 laser at all. When it is done correctly, all of this
19 turns white off the photographs. All of it.

20 But Dr. Llamas left the polka dot/
21 leopard pattern, and that's one of the reasons why
22 Daniella's ROP didn't stop when she got laser therapy,
23 and that's another reason why she is permanently blind,
24 legally blind in her left eye and completely blind in
25 her right eye.

1 Now, Dr. Ponte and PMS should have known
2 about Dr. Llamas's training because they had the
3 responsibility to ask. They are supposed to know. And
4 it really wasn't any secret, and Dr. Llamas would have
5 told him if he would have asked him.

6 There is another reason that we have sued
7 Dr. Ponte and PMS, and that is this clear safety rule
8 violation: the one where a baby is born with a 90
9 percent probability of ROP and has to be examined by
10 seven weeks of age, and then at least every other week
11 and sometimes every week.

12 Dr. Llamas had violated that safety rule
13 before, a lot, and he would -- when a baby is born down
14 here, he had the same pattern: take a look and write
15 "Fetal fundi and follow up in four weeks."

16 It was no secret to PMS and to Dr. Ponte
17 that Dr. Llamas was violating a clear-cut safety rule
18 that was in lots of medical literature. And so those
19 events happened before Daniella came along. And by the
20 time Daniella came along, PMS and Dr. Ponte should have
21 been watching Dr. Llamas real closely.

22 And they should have said, Look, Llamas,
23 you've got to use the international classification so
24 we will know what you are doing. You've got a
25 23-weeker, and you have written down that you are not

1 coming back for four weeks.

2 It was their job to say, No, no, no, no,
3 no. You've either got to do it right, or we are
4 getting somebody else. And there were others in town
5 who were available to do that correctly.

6 Now, what is so dangerous about
7 violating these safety rules? I want you to imagine
8 from the evidence that you are going to hear what it
9 means for doctors to fail to diagnose disease as soon
10 as it is diagnosable, and fail to treat it as soon as
11 it is treatable because they are not paying attention.
12 They have complete control of the patient 24 hours a
13 day, seven days a week.

14 Imagine what it means for people who go
15 into the hospital with chest pains, getting dizzy and
16 passing out. The doctor says, Oh, I will have a look
17 at you, and I will come back in four weeks. Would any
18 of us be able to survive that kind of practice?

19 All right. So what do they have to say
20 about this? Well, they are going to say that -- they
21 are going to deny they did anything wrong, and they are
22 going to pull out some general guidelines that they are
23 going to tell you apply to Daniella. But they are
24 going to ignore the specific guidelines that say that a
25 23-weeker at less than 750 grams has to have an exam at

1 seven weeks and every other week, and sometimes every
2 week through this entire period.

3 They are going to make a lot of excuses.
4 Dr. Ponte is going to say that all he had to do in
5 order to do his job was to make sure Llamas came in to
6 look at the baby the first time, and then everything
7 else is up to Dr. Llamas.

8 But we are going to show you that that
9 ignores the clear safety rule that the neonatologist,
10 Dr. Ponte, and the eye specialist, Dr. Llamas, have
11 to work together, and they are both responsible for
12 the schedule of screening. Even though Dr. Llamas
13 is the one who actually looks in the eyes, they are
14 both responsible to make sure the screening and the
15 diagnostic examinations happen when they are supposed
16 to. Because Dr. Ponte is the one who is ultimately
17 in charge of all the medical care the patient -- his
18 patient gets as the attending physician during that
19 admission to the hospital.

20 And PMS, they are going to tell you that
21 all we do is send out bills. All we do is, we have a
22 staff of 250 bill collectors. That's all we do. They
23 are going to say, it doesn't matter what happens in the
24 NIC-U. We have no responsibility whatsoever.

25 But we are going to show you that this

1 corporation has an exclusive contract with this
2 neonatal intensive care unit where they are responsible
3 for all of the professional services in that unit, and
4 they are responsible to make sure the medical care
5 meets or exceeds the standards of care, the safety
6 rules.

7 And we are going to see that they control
8 NIC-Us in 33 states and Puerto Rico, and they control
9 over 2,000 neonatologists. And they have done
10 absolutely nothing all these years to make sure that
11 everybody knows the treatment schedule, the eye exam
12 schedule on these very premature babies--even though
13 they see them all the time.

14 Dr. Quinn, Dr. Llamas, and PMS's eye
15 specialist and the vice president of this medical
16 corporation, are going to tell you -- at least they
17 tell their buddies in writing that if you follow --
18 that they proved -- they proved that following this
19 exam schedule--checking the eyes at seven weeks and
20 then every one to two weeks thereafter until the risk
21 of ROP has gone away--that if the safety rule is
22 followed, they proved that they could prevent 300
23 babies per year from going blind.

24 And they will tell you -- at least they
25 tell their buddies -- that if you follow the schedule,

1 not only will the babies not go blind, but they will
2 save up to \$65 million a year in medical expenses.
3 They knew that.

4 And even today, PMS doesn't have the
5 protocol in place for any of the NIC-Us, including this
6 one. Had they had that treatment protocol in place,
7 and had they enforced it, Daniella would not be blind.
8 She would have functional function more likely than
9 not.

10 PMS is so uninterested in this lawsuit
11 that they don't even have a representative here in the
12 courtroom. And when you hear the evidence, I think you
13 will understand when I ask you to get their attention.
14 If this little blind baby is not even important enough
15 for them to be here, then we've got to do something so
16 they can prevent these blind babies from happening,
17 from diagnosable and treatable ROP.

18 Now, we mentioned -- we mentioned the
19 fact that Daniella, when she was born, she had all
20 of the issues that a 23-weeker is expected to have.
21 Now, one of those things is, when you are born that
22 early, the blood vessels in your brain are very
23 fragile. Frequently the babies get bleeds in their
24 brain, and it causes some degree of brain damage
25 ranging from mild to severe, to even death sometimes.

1 And Daniella had some bleeding in her brain, and she's
2 got some mild cerebral palsy.

3 Now, lots of kids do well with mild
4 cerebral palsy and go on to have functional lives.
5 They need some help, and they need some guidance, and
6 they need some housing sometimes, and it depends upon
7 the range. Some of them live independently, completely
8 independently.

9 And the evidence is going to show you
10 that Daniella has mild CP and that she is going to need
11 -- but that her blindness has made it many times worse,
12 her functioning many times worse. Because as a child,
13 you learn so much by watching others and repeating the
14 behaviors, mimicking, practicing. And she can't do
15 that.

16 And it is even more important for a child
17 with mild CP to be able to see because it is more
18 important for someone who is having a diminished
19 ability to work with language, to learn tasks, that
20 she would otherwise learn fairly easily with therapy.

21 And because she is blind, she needs
22 someone with her 24 hours a day because she can't
23 master the skills. It's much, much more difficult
24 for her to master life's skills. And that's going to
25 be the case for her whole entire life, and the main

1 reason -- one of the main reasons is because of her
2 blindness.

3 And so she -- we are going to be looking
4 20 years, 30 years, 50 years, 60 years down the road
5 because this is the only time that she can be
6 compensated, the only time we can meet her needs --
7 her future needs with money.

8 Now, there are also future therapies that
9 we know are going to be available. They are here now.
10 They are just not ready to be used on people.

11 You remember, you see people now walking
12 around with the cochlear implant. They put a little
13 computer in your brain and a little thing on the
14 outside so they can hear.

15 Those devices are in development now for
16 retinas, artificial eyes, and they are going to be
17 extremely expensive. But those are the things that are
18 here now. They are just not ready for Daniella yet,
19 but they will be 10, 15, 20 years, 30 years, 50 years
20 down the road.

21 But Daniella won't be able to come back
22 here 50 years down the road and say, hey, they've got
23 this artificial eye, and I would like to see. It is
24 not my fault. I would like to see. I would like to
25 see now. So we have to decide those things now.

1 Today is Daniella's some day, and we are
2 going to talk about -- those are the things that we
3 are going to want you to look at and really give some
4 thought to, about what she is going to need for those
5 future medical needs and therapies.

6 And she is going to need somebody to be
7 with her 24 hours a day for the rest of her life. Her
8 parents do it now, and they love to. But they are not
9 going to be able to do that her whole life, and there
10 is nobody that cares for her like they do, or will care
11 for her like they do. So we need to look at when she
12 is an adult, when she is 20, 30, 40, 50, and who is
13 going to be doing that and how that is going to be paid
14 for.

15 This lawsuit ultimately is about the
16 harms and losses and the fixes and the helps for her.
17 We are going to show you these violations of the safety
18 rules and how she -- how they caused her to be blind.
19 But we are here to fix the things that can be fixed, to
20 help the things that can be helped, and to compensate
21 her for the things that cannot be fixed and cannot be
22 helped.

23 And the evidence is going to show you
24 that she will be blind until such a time as they have
25 some of these super devices that are way, way down the

1 road. She is going to need the help that we have been
2 talking about so far and more, and there is lots of --
3 You remember the \$65 million medical bill that I talked
4 about earlier. That includes lots and lots of
5 therapies for lots and lots of kids who have this
6 blindness and need these helps and these fixes.

7 And then we will talk about the things
8 that can't be fixed or helped that we want -- that the
9 law requires that she be compensated for, and justice
10 requires that she be compensated for.

11 All right. I appreciate your being so
12 patient with me, and I'm going to turn this over to the
13 Court and opposing counsel.

14 THE COURT: Very well. Ms. Fraley, does
15 Dr. Llamas wish to make an opening statement at this
16 time?

17 MS. FRALEY: He does, Your Honor, through
18 me.

19 THE COURT: Please proceed.

20 MS. FRALEY: Thank you.

21 My goodness. That sounded awful, didn't
22 it? It sounded like there were doctors out there
23 blinding babies and ignoring safety rules and knowing
24 that they were doing that. It felt very uncomfortable,
25 didn't it?

1 I want to go back to the life care plan. I've got the
2 designation at page 11.

3 THE COURT: Please approach.

4 (There was a discussion off the record.)

5 THE COURT: The objection is sustained.

6 Q. (BY MR. GIRARDS) Are there -- I want to visit
7 with you briefly about some of the technologies that
8 are being worked on today that are not quite ready for
9 being put in patients. Can you tell us about what some
10 of the technologies are that are promising and will be
11 on the -- that are on the horizon?

12 A. I would be happy to. The horizon is not
13 nearby, but there are a number of technologies that
14 are really coming along that are hopefully going to be
15 remarkable advances for visually impaired, children and
16 adults.

17 One is a gene therapy. There is already
18 a gene therapy that is available for retinopathy --
19 not retinopathy of prematurity but a certain retinal
20 disease that occurs at birth. The gene therapy works
21 remarkably effectively in dogs. I know that sounds
22 like a -- it is a lot, but it also is now being tried
23 in phase 1 trials in humans, and it seems to have an
24 effect for human beings as well.

25 And while gene therapy has had its ups

1 and downs in terms of safety factors, it seems to be
2 safe. So I think there will be a molecular management
3 for Daniella that may come along sometime in the next
4 hopefully 10 or 20 years or so.

5 Secondly, there are microchips that
6 can be placed in the eye that are photoresponsive.
7 Initially, these were actually placed on the foreheads
8 of patients, and that somehow allowed the patient to
9 experience at least some sort of visual sensation.
10 But now they can be placed in the eye, and they are
11 being made with greater and greater sophistication.

12 And for reasons that are not clear, these
13 microchips do hook up to the optic nerve and allow
14 patients, who have them implanted, to have better
15 vision than they would have had without it. They
16 still don't have very good vision, but they can see
17 the direction of movement of things. They can see
18 lights off and on. I believe they can see some color
19 also.

20 So, you know, with the technology going
21 the way that it is, we can be hopeful that at some
22 point on the horizon, there will be things like that
23 that will be available for Daniella.

24 Q. I forgot to ask you. What do you think more
25 likely than not would be -- would Daniella's visual

1 acuity be had she been treated appropriately by these
2 defendants?

3 A. I would say more likely than not, she would
4 have had visual acuity better than 20/200.

5 Q. Okay. What does that mean for us? What does
6 that look like?

7 A. Well, again, this is a linear scale, so 20/200
8 means a person like Daniella -- if her vision, let's
9 say, was 20/100, she could see something at 20 feet
10 that anyone with normal vision could see at 100 feet.
11 Now, that doesn't sound too good, but that puts her in
12 the domain of having the ability to have a sighted
13 life.

14 It is a lot different for a child who
15 grows up with 20/100 visual acuity and then, as an
16 adult, acquires that kind of loss of visual acuity.
17 It is much more difficult for an adult to cope with
18 that.

19 Q. How is that? What does that mean for us?
20 Help us to understand that part, where you have the
21 difference between going blind later or starting out
22 as a kiddo like Daniella.

23 A. Children are just tougher. You know, they are
24 more malleable. They are more flexible. They learn to
25 cope with various impairments. They learn to adapt.

1 They do get a lot of assistance from the environment.

2 In most states they have various forms
3 of rehabilitation and services that give them the
4 chance to have extra time to learn to read and so on.
5 And growing up, it is a lot different than say if you
6 are 80, developing bilateral macular degeneration, and
7 going from being able to read to not being able to see
8 clearly at all.

9 Q. All right. And then what about -- what is
10 your experience with the kids? How does the loss of
11 vision impact the way they learn and develop? You
12 mentioned that a little bit earlier.

13 A. Total loss of vision?

14 Q. Like Daniella's loss of vision.

15 A. Again, the question is, how does it impact
16 their --

17 Q. Yes. You said it made it more difficult or
18 took longer or something like that.

19 A. Yes, it will take her much longer. Let's say
20 she is driven to learn to try to read or something like
21 that. It is going to take her a whole lot longer to
22 be able to read across the page -- or across a line to
23 even find her place in a book if she is trying to read
24 a book or to read a page.

25 It is going to take her longer to find

1 the sorts of things that she needs to do her school-
2 work, longer to find crayons, pencils. Everything is
3 going to get slowed down.

4 Q. Okay. Now, do you deal with CP kids who have
5 functional vision, who have a sighted life as well?

6 A. Yes.

7 Q. And do those kids, are they -- do they require
8 attendant care and things on a level like Daniella does?

9 A. No.

10 Q. What's the difference?

11 A. Well, the difference is that a child who has
12 cerebral palsy who is sighted can see what's going on
13 in his or her environment. And most of the children
14 I see with cerebral palsy have -- are either in a
15 wheelchair, or they can ambulate with a lot of
16 assistance. And so they can get around without having
17 to have someone with them, helping direct them to where
18 they are going.

19 As they get older, they can do activities
20 of daily living on their own in many cases without
21 assistance, again depending upon what limbs are
22 affected by the cerebral palsy.

23 But they can -- they can see what time it
24 is. They can straighten out -- straighten up a house,
25 do all kinds of things that just go into your daily

1 life that you don't think about, but that are major
2 obstacles to children who are significantly visually
3 impaired.

4 Q. What about safety issues?

5 A. There are safety issues for children who are
6 profoundly visually impaired, yes.

7 Q. Compared to someone who is mildly sighted?

8 A. Yes, sure.

9 Q. What are some of those? What does that look
10 like?

11 A. Well, very -- very much trouble ambulating or
12 getting around.

13 At our institute, we are trying to make
14 things like talking signs and things that give feedback
15 to visually impaired people so that they know that
16 when they are crossing the street, there might be a
17 car coming. That would be, I guess, maybe one easy
18 example.

19 They have to be very careful when they
20 are moving around crossing streets and so on. Safety
21 issues related to using the stove, to everything you
22 can think of.

23 Q. Okay.

24 MR. GIRARDS: Your Honor, subject to our
25 bill, I pass the witness.

1 At this time, ladies and gentlemen, you
2 will hear the closing arguments of the attorneys.
3 Mr. Girards will go first on behalf of the plaintiff.

4 MR. GIRARDS: May it please the Court,
5 Counsel.

6 Ladies and gentlemen, good morning. The
7 first thing I want to do is say thank you. You guys
8 really paid a lot of attention, and you really wrote
9 a lot of notes; and, you know, most of the time y'all
10 were just -- everybody was referred to by name except
11 for you guys, the jury, and you had the hardest part.
12 So I wanted to thank you all, first of all, for doing
13 such a great job.

14 Mrs. Vasquez, you really paid close
15 attention.

16 Mr. Patel, I think you wrote down every
17 question.

18 Mrs. Strickland, you did a great job.

19 Mrs. Elswick, I saw you leaning forward
20 from the very first witness.

21 Mrs. Macedon, thank you for paying close
22 attention.

23 Mrs. Glenn, you wrote a lot of notes.

24 Ms. Snipes, you really paid attention.

25 I saw you looking around and looking at the witnesses.

1 And, Ms. Fryer, I think you probably
2 wrote almost everything down.

3 Mrs. Hill, thank you for paying such
4 close attention.

5 And Ms. Gonzalez and Mr. Kersey and Mr.
6 Lafayette, you did a really great job during the trial.

7 And I know that it is hard for two weeks
8 to write so much down and to pay such close attention.
9 Because we've had a couple of years to digest all the
10 information, and you all had it just firing at you as
11 quickly as we could to try to be efficient and yet, you
12 know, get you the information you need for the verdict.
13 So I want to thank each and every one of you.

14 And Mr. Lewis and Mr. Carter, thank you
15 so much. I feel kind of bad for you guys because I'm
16 assuming y'all will be dismissed shortly, and y'all
17 will have paid such close attention and not get to
18 participate in the verdict. So thank you for paying
19 such close attention to you two folks as well.

20 Well, I want to -- since this whole case
21 really is going to come down to what happens with this
22 charge -- what you folks do with the charge, I want to
23 address my attention to the charge mostly; and I don't
24 want to insult you by going over two weeks of -- two
25 weeks of testimony and what witnesses were here and

1 what they told you, although I do want to reference
2 some of the testimony that I thought was particularly
3 important.

4 The first thing that you are going to do,
5 when you go back to the jury room -- and you probably
6 have figured out by now that the most important room
7 in this whole courthouse is not this courtroom at all.
8 It is that room, the jury room. That's the most
9 important room. That's the room where y'all have
10 complete control, and it is the most secure, private
11 room. During this trial we are not allowed to go in
12 there, only you folks, and we won't be in there for
13 deliberations. Only you folks are allowed in there
14 for deliberations, and the door is protected by a
15 bailiff.

16 That's the most important room in the
17 courthouse because that's where you folks directly
18 decide what your government is going to do about this
19 case--the only time where you have a direct say in
20 government. And it is so important because this is
21 where justice occurs, and it is the best way to do
22 justice that has been devised in recorded history.
23 And so it is very, very important.

24 So y'all will go back to the jury room,
25 and the first thing you are going to do is, you are

1 going to elect a foreperson. And that is an election.
2 That is something that you are allowed to run for, if
3 you think about it. If you want to be the foreperson,
4 you are allowed to say so.

5 And I would like -- Daniella would like
6 somebody who, if you feel real strongly in the justice
7 of her case, I want you to volunteer for that. I want
8 you to volunteer for that and be the foreperson. So
9 consider doing that during this time before y'all go
10 back there.

11 And then after -- after the foreperson
12 is elected, then you will read the whole charge. And
13 once again, we have spent years with these kinds of
14 documents, and y'all have had this fired at you. If
15 you are like me, it takes a little while for it to
16 start to sink in before you start to understand what
17 some of the meaning -- the real meaning of some of
18 this language is.

19 So I want to address with you some of
20 these things that are going to be real important.
21 Let me see if I can pull this up.

22 Okay. This is page 2 of the charge, or
23 it's supposed to be. There it is. Okay. And if you
24 look at the very top -- there we go.

25 All right. What you are going to see

1 here is something which we have been talking about
2 from the very beginning, that is this burden of proof.
3 You will decide if a fact is more likely true than not
4 true, and so that's what we have been talking about.
5 And that's where we had testimony, and I asked, you
6 know, some of the witnesses, is that more likely true
7 than not true what you are telling us, because that's
8 the -- that's the legal standards. Once you have
9 decided or you can agree that something is more likely
10 true than not true, then we have met that burden of
11 proof.

12 And if you go down to -- if you go down
13 to this paragraph right here, this paragraph is one of
14 the most important paragraphs for you. Okay. If a
15 juror breaks any of these rules, then it is your job--
16 every single one of you--it is your job to tell that
17 person to stop. And if he or she doesn't stop, then
18 it is your job to get the bailiff and have the bailiff
19 notify the judge.

20 Now, what does that mean, though? Why
21 would you want to do that? Well, for example, if you
22 are deliberating and someone says, you know what, he
23 probably messed up but I'm not going to find him
24 negligent, more likely than not he probably did mess up
25 but I'm not convinced, I think a doctor has to intend

1 to cause harm and there has been no evidence that he
2 intended to cause harm, that's where this comes into
3 play.

4 You say, wait a second, that's not --
5 That's violating the Court's instructions. This is
6 more likely true than not. And if that person doesn't
7 stop, then you get the bailiff and say, we need to talk
8 to the judge. And Judge Lowy will be glad to visit
9 with you about that.

10 Now, the next paragraph is a good one and
11 an important one. It says, a fact may be established
12 by circumstantial evidence that may be reasonably and
13 fairly inferred from other facts in the case. What
14 that means is, the witnesses say what they have to
15 say. They establish facts that you have heard, and
16 the documents in this notebook establish things that
17 happened.

18 But you folks are allowed to connect the
19 dots because, you know, this is something that's been
20 going on for years with this child, and there are --
21 Imagine just how many stacks of medical records there
22 are and things that happened. And so what you are
23 allowed to do is to listen to the testimony, listen
24 to the evidence, and make reasonable inferences from
25 those -- from that testimony.

1 For example, just one example, you
2 remember when Dr. Ponte was on the stand, he said in
3 2005 and up until 2010 he thought this baby had zone I
4 eyes. He thought fetal fundi meant zone I eyes. And
5 then he told you that somewhere between 2010 and today,
6 he had changed his mind, and he now understands that's
7 zone 2 eyes.

8 And we talked about that and what
9 happened that made him change his mind and what the
10 inferences are of that. And we will get into that
11 maybe in a little bit more detail in a little while.

12 But that's one example. You are allowed
13 to infer what's gone on. You are allowed to look
14 behind what the witnesses have told you and, using
15 common sense and reason, and really figure out what's
16 going on there. So that's what this instruction is
17 about.

18 Now, the next one is also one that we
19 have talked about a lot, and that's the standard right
20 here. The standard for negligence is what would an
21 ophthalmologist, for Dr. Llamas--a neonatologist for
22 Dr. Ponte--what would a doctor of ordinary prudence
23 do in the same circumstances? What would a careful
24 doctor do? What would a prudent doctor do? That's the
25 question that you will be asking yourself every time we

1 get to a negligence question and the topic is were they
2 negligent or not.

3 And so when -- if someone in the jury
4 room wants to talk about some higher level, intent or
5 other types of issues, then it is your job to say,
6 wait a second. The instructions are, what would a
7 prudent doctor do. That's the question. And if these
8 doctors didn't do what a prudent doctor would do, then
9 they are negligent, and you answer those questions
10 "yes."

11 But I'm getting ahead of myself. But
12 that's what this means.

13 And when we go on to proximate cause,
14 proximate cause simply means that it is a cause that
15 produces an event, and the event would not have
16 occurred but without that cause. And this is a really
17 important part right here. (Indicating)

18 Well, I don't have that on this one. Let
19 me see here.

20 All right. This part right here, there
21 may be more than one proximate cause of an event. That
22 means that lots of different factors can come together
23 to produce an event. But if the negligence of the
24 doctors was one of those causes, one of those proximate
25 causes, then proximate cause exists, and you move on to

1 the damages questions -- the apportionment question and
2 then the damages questions.

3 So there may be more than one proximate
4 cause. It is kind of like I envision, you know, if
5 we were out at Lake Ray Hubbard and, you know, there
6 is a power plant out there. If there were two or three
7 other power plants out there and they were all dumping
8 poisonous stuff into the lake, and at the south end of
9 the lake somebody got sick from the poison, it would be
10 impossible to tell which power plant the actual poison
11 came from. But they were all producing it, and all of
12 them were causes -- were proximate causes of the
13 sickness. That would be just one example of how that
14 works.

15 Now, when we are talking about what a
16 prudent doctor would do, we are talking about using
17 the level of care that is appropriate for the level of
18 danger. And the danger here is, we've got a baby who
19 needed to be closely monitored, her eyes, or she would
20 -- could go blind forever. And that's a big danger.
21 And so we look at the danger and compare the level of
22 care that was exercised. And then -- we will get into
23 some more details about that in a minute.

24 Once you are satisfied that they violated
25 -- they didn't use the level of care that a prudent

1 doctor would use, then the focus will be on what are
2 the harms and losses to Daniella that resulted from
3 their not using the appropriate level of care.

4 Now, that's important because when we get
5 to the damages questions over here -- let me flip over
6 to those. When we get to these questions here, these
7 are the harms and losses questions. And in answering
8 the harms and losses questions, the only thing -- the
9 only thing you are allowed to consider is, what are the
10 harms and losses.

11 Now, we go back to the part that we
12 talked about earlier where you have to follow the
13 Court's instructions, and each of you have an
14 obligation to alert the Court--Judge Lowy--if somebody
15 doesn't. This is one of those areas where it is
16 really important that you focus on those two different
17 instructions, because the harms and losses are the only
18 things that you are allowed to consider for these
19 questions.

20 And if someone says, well, we need to
21 change the damages number because of X, Y, Z, because
22 of something that's not in evidence, because of
23 concerns about, you know, the effects of your verdict
24 or anything other than just the harms or losses, that's
25 where each of you have an obligation to say, Oh, hold

1 on a second. We are just supposed to focus on harms
2 and losses. That's our instructions from the Court,
3 and we need to not talk about these other things.
4 And if you don't stop, we are going to have to talk
5 to the bailiff and get the judge to visit with us.
6 And I know Judge Lowy will be pleased to visit with
7 you and explain that. Harms and losses only for these
8 questions.

9 Well, all right. So we started at the
10 beginning of this process talking about the safety
11 rules that apply to this case. A doctor is never
12 allowed to expose his patient to needless risk of harm.
13 Never allowed to expose his patient to a needless risk
14 of blindness. ROP must be diagnosed as soon as it is
15 diagnosable and treated as soon as it is treatable.
16 Those are the safety rules that everybody agreed to.
17 Even their witnesses agreed to it. There is no
18 question that those are the safety rules.

19 And the safety rules were violated in
20 this case, and we will talk about some of the reasons
21 why in just a minute. But let's talk about why the
22 safety rules are important.

23 How important are they? What does it
24 mean for us to have these safety rules in place? So
25 imagine what would happen if all doctors just abandoned

1 the safety rules. Didn't stop diagnosing disease as
2 soon as it was diagnosable or treating it as soon as
3 it was treatable.

4 Most diseases are progressive diseases.
5 Most diseases require timely follow-up. And so what
6 if doctors just stopped doing that and just followed
7 up whenever they felt like it? Diagnosed disease as
8 soon as they felt like it, not as soon as it was
9 diagnosable? What would that mean for our brothers
10 and sisters, our grandchildren?

11 Would anybody be safe if doctors just
12 violated the safety rules like that? If it just became
13 too inconvenient for them because maybe they are too
14 busy, there are too many people in the waiting room or
15 whatever, and they just stopped following those safety
16 rules, stopped doing what was safest for the patient,
17 stopped making decisions based upon what was the safest
18 thing for the patient.

19 All right. So we began with -- if you
20 will remember when I first visited with you, I said,
21 they are going to spend all of their time focusing on
22 a general guideline, and they are going to ignore the
23 specific rule that applied to Daniella. And so I don't
24 think we were disappointed. They spent all their time
25 talking about the 2001 guidelines--which are here.

1 Now, due to a -- I don't know how you
2 might characterize it, but a funny thing, I will say.
3 A funny thing is, you are not going to be able to have
4 this in the jury room to deliberate with. So if there
5 is something off of this thing that you wanted to have
6 to help Daniella, you need to write it down so you can
7 have it back there with you.

8 So I want to spend a few minutes visiting
9 with you about the specific information and write it
10 down -- all right. Here we are. Well, we are supposed
11 to be here, but where are we? All right. There we go.

12 The 2001 guidelines. Now, if you will
13 look, one thing that we didn't really hear much about,
14 but if you look in the very lower corner here, it
15 says -- I don't know if you can see this very well.
16 It says, "This is not to be used as a standard of
17 care."

18 Let me see if I can make that a little
19 bit bigger. No, I can't do that, but we can look at
20 it down here if that's too blurry for you.

21 You see it says, all right, "The
22 recommendations in this statement do not indicate an
23 exclusive course of treatment or serve as a standard
24 of medical care."

25 Now, why is that important? Right down

1 here, see? Why is that important? Because the defense
2 has been saying, hey, look, this is the standard of
3 care and, by god, we met the standard of care; because
4 we have the 2001 guideline, and it is in writing, and
5 we can show the jury; they will believe it, and we will
6 be okay.

7 But what guidelines are is a starting
8 place. That's common sense. You take the guidelines
9 where you start, and then you take the additional
10 information that comes out between 2001 and 2005, and
11 you apply that. And then you look at your patient, and
12 then you decide what the appropriate, safest course of
13 action is.

14 And, in fact, they violated the 2001
15 guidelines, and they didn't tailor it to the specific
16 patient. And, see, you see all of this highlighting
17 here, but what the defense hasn't highlighted is here.
18 The timing of the initial screening examination may be
19 adjusted appropriately on the basis of other reliable
20 data, such as local incidence--how many babies in your
21 community get ROP--and risk factors. Risk factors like
22 how sick is the baby. The sicker the baby, the more
23 likely the baby gets ROP.

24 So every time you hear the defense stand
25 up in front of you and say, oh, my goodness, that baby

1 was sick, sick, sick; you say, yeah, the baby was
2 going to get ROP. Oh, that baby was early, small.
3 Absolutely, that baby was going to get ROP, wasn't it?
4 That's what this means. So you tailor the examination,
5 the initial examination to the risk profile of that
6 particular baby.

7 All right. And then the initial
8 examination -- or the follow-up examinations are also
9 set out here; and they violated that, too, because it
10 tells you what we are supposed to do with follow-up.
11 For example, if the retinal vasculature is immature
12 and it extends into zone 2 with no ROP, the follow-up
13 examination should be planned at approximately two-
14 to three-week intervals.

15 Follow-up exam in two to three weeks for
16 zone 2. And Dr. Llamas and Dr. Ponte said that this
17 was a zone 2 baby after the first examination. And if
18 that's true, the follow-up would be two to three weeks.
19 Okay. And so in a minute, I want to visit with you
20 about whether they followed up in two to three weeks.

21 But we want to talk about zone I eyes
22 because Dr. Ponte thought, in 2005, that fetal fundi
23 meant zone I eyes, and because of the photographs which
24 I will visit with you about in a minute.

25 So down here we've got another repeat of

1 zone 2, no ROP, follow-up visit in two to three weeks.
2 And then over here it says, "Those without ROP" --
3 right here -- "Those without ROP but with incomplete
4 vascularization in zone I should be seen at one- to
5 two-week intervals."

6 So we have a one- to two-week follow-up
7 or a two- to three-week follow-up. So we are going
8 to ask ourselves in a few minutes, was there a repeat
9 examination in one to two weeks or in two to three
10 weeks. And, if not, what was the result.

11 Now, before I put the guideline down,
12 there are two other things I wanted to visit with you
13 about. I'm sort of getting ahead of myself, but it
14 looks like somebody underlined this, and they want to
15 talk to you about the treatment -- the laser treatment
16 within 72 hours. But, remember, common sense tells us
17 when the baby's eye is dying, you want to get the laser
18 done as soon as you can. And that's what Dr. Good told
19 you, and that's what Dr. Phelps told you.

20 And then you remember the video guy from
21 Thursday. You remember, Mrs. Vasquez, he said -- and I
22 saw a change in a lot of you. He said, yeah, I wrote
23 that you have to do the laser within a day or two,
24 because you don't want to sit on your hands for 72
25 hours. Anyway, we will revisit that in just a minute.

1 Now, over here, "The responsibility for
2 the examination and follow-up of infants at risk for
3 ROP must be carefully defined -- carefully defined by
4 each NIC-U." And it says, "Unit specific criteria for
5 examination of ROP should be established for each NIC-U
6 by consultation," communication between neonatology--
7 Dr. Ponte, and ophthalmology--Dr. Llamas--and others
8 in the department.

9 The criteria should be recorded. You
10 remember the written criteria we talked about, written
11 protocol, and it says, "should trigger" -- here we go.
12 "Should automatically trigger scheduled ophthalmology
13 examinations." Automatically trigger.

14 It is not supposed to have to be anybody
15 sitting around going, gee, I wonder what you do about
16 fetal fundi. It is supposed to be a protocol that is
17 written that triggers automatic follow-up examinations.
18 And we will visit with you some more about that in just
19 a few minutes.

20 So here we go. In order to figure out if
21 they did the screening examinations, I have prepared a
22 chart. And the defense didn't like the chart, but it
23 is a chart of 40 weeks of pregnancy. This is not the
24 baby's age over here. This is just the week of the
25 pregnancy.

1 So, for example, a baby born in week --
2 in the 23rd week is not 23 weeks old until day seven of
3 week 23. This was just to refer to what week we are
4 talking about in the pregnancy. So when a baby is 23
5 weeks and one day, the baby is in the first day of the
6 24th week.

7 Now, Dr. Ponte actually agrees with that.
8 I mean, it is just common sense. Simple math. But if
9 you look at Dr. Ponte's calendar here, I was originally
10 going to do it this way, but I thought this was easier
11 to follow. But if you look here, date of birth was
12 May 19th, 29 weeks and one day.

13 So when we look at the guideline -- of
14 course, the one thing I didn't talk to you about is
15 right here. Now, if you want to help Daniella, you
16 can write this down in quotation marks. The first
17 examination should be within the 31st to 33rd week.
18 Within 31 to 33.

19 So if we look at the weeks of the
20 pregnancy, the green zone is week 31 and 32 and 33.
21 Now, were there any examinations at all within week 31,
22 32, or 33?

23 Exam one was here, 30 days -- I mean, 29
24 weeks and five days. Exam 2 was 33 weeks plus five
25 days. So was there any examination in the green zone?

1 If there was not an examination in the green zone, then
2 they violated the rule.

3 Now, did they modify the rule -- okay.
4 You will probably remember, we didn't really quibble
5 too much about this first examination, the one during
6 the 29th week plus five days. I'm sorry, in the
7 30th week, week 29 plus five days. The reason why
8 is because that was a good exam. When you have a
9 23-weeker that's got 100 percent chance of getting
10 ROP, you want to evaluate that kid early and often.

11 And if you look at the red book, which
12 is Dr. Quinn's chapter--the defense expert--he says
13 you evaluate the kid by week seven, and then every
14 other week thereafter until the risk of ROP is gone.

15 And this first examination was during
16 week seven. See how that works? One, two, three,
17 four, five, six, seven. During the seventh week there
18 was an exam. So the question is, was there an exam
19 every week or every other week afterwards? Well, no.
20 Dr. Llamas didn't come back for four weeks.

21 Now, Dr. Ponte told Dr. Llamas, I want
22 you to screen the kid on July 11th. You remember,
23 originally, it was come and see the kiddo on July 11.
24 Well, July 11th is this square right here. That would
25 be five days into this 31st week. That would have been

1 right in the green zone. But Dr. Llamas didn't do
2 that; he came in early. But we are not going to really
3 quibble about that, because what was supposed to save
4 Daniella were the follow-up examinations.

5 And if they did -- if she had a zone I
6 eye, then she would have been seen within two to three
7 weeks right here. And we will talk about what they
8 would have seen more likely than not in just a minute.
9 And if it was a zone I eye, then there would an exam
10 every single week to diagnose as soon as diagnosable
11 and to treat as soon as treatable.

12 So rather than take our word for whether
13 she really did have a zone I eye or not, you remember
14 Dr. Moshfeghi, the first witness. He had his laptop,
15 and he taught you how to figure out if the baby had a
16 zone I eye. And he took the images, and he put them
17 together.

18 You remember, he said there is 120
19 degrees across from edge to edge. Half of that is
20 going to be 60 degrees. And so if you put that over
21 the optic nerve, you have 30 degrees all the way
22 around. And you can see the vasculature stops before
23 that 30-degree border. That is the definition of a
24 zone I eye.

25 So a zone I eye needed to have an exam,

1 a follow-up exam every single week. And so remember I
2 had Dr. Good and Dr. Phelps tell me where to put these
3 yellow squares because these are the examinations that
4 should, at a minimum, have occurred.

5 Now, once ROP is diagnosed, depending
6 upon how bad it is, you are going to reexamine the kid.
7 If it is not treatable, you reexamine the kid every two
8 to four days or up to a week, just depending upon how
9 bad it is.

10 And Dr. Good said there would be in
11 reasonable medical probability a diagnosis and laser
12 treatment by the middle of week 33, which it would
13 have been right in the middle of the green zone,
14 right in the middle of when you expect to see ROP
15 in most babies.

16 And remember this square right here
17 represents a notation that was in the record, every
18 single day starting on June the 3rd, I believe.
19 Somebody decided that this kiddo needed an ROP eye exam
20 on July 26th, which is that square right there, which
21 would have been right toward the tail end of week 33.

22 And even if -- even if the eye exam had
23 occurred then, there would have been a diagnosis and
24 there would have been treatment back here, and we
25 wouldn't have had to worry about whether her -- whether

1 she needed that shunt. We wouldn't have to worry about
2 where was the laser, because we would have got a little
3 bit more of a head start.

4 But the laser would have been ready if
5 Dr. Ponte had done his job. And I want to talk about
6 that for a few minutes, because we never really did
7 talk about what the Xes are. The Xes are the days
8 that nobody called for the laser but they knew they
9 might need it. When she was born this week, they
10 had a handful. They had a handful getting the baby
11 stabilized.

12 But by the end of that week and the
13 start of the second week, Dr. Ponte should have been
14 thinking, I know this child is going to get ROP, a
15 hundred percent certainty she is going to get ROP.
16 Babies who have ROP have a one-in-five chance of
17 requiring laser to save their vision. So let's make
18 sure that down here, when it is most likely she is
19 going to need treatment, we have a laser available.

20 You remember Dr. Quinn said his
21 department has got two lasers. They have a backup.
22 The options are, let's be prepared.

23 So if somebody in your deliberations --
24 If somebody says, hey, you know, they didn't have the
25 laser, they got the laser as soon as they could, they

1 did it within 72 hours, three days later; you say, wait
2 a second. Dr. Ponte was the attending physician, the
3 director of the service. He is supposed to plan ahead.

4 Henry Ford said, The key to success is
5 always being ready ahead of time. JFK said, You put
6 the roof on the house -- you repair the roof on the
7 house while the sunshine is out.

8 You get ready because you know that you
9 might need something really important, or this baby
10 is going to be blind forever. So you plan ahead. It
11 would have just taken a phone call, and the backup plan
12 would have been to go to Providence, like they had sent
13 the other kids over to Providence. And the worst case
14 scenario would be, they call Dr. Radenovich and say,
15 "Can we borrow your laser." But nobody made a call
16 on the days with the X, so nobody was prepared.

17 How would you feel, for example, if you
18 got on a plane to fly to--I don't know--New York or
19 Miami or Chicago or somewhere, and you got halfway
20 there and the pilot said, Boy, you know what, it is
21 really storming in Chicago today and, well, we knew
22 there was a 20 percent chance of rain, but we didn't
23 bring the chart. So we are going to have to turn
24 around and go back or take a poll and see where you
25 guys want to go today.

1 You wouldn't think much of that, would
2 you, because the pilot is supposed to check to make
3 sure he has the charts before he leaves the ground.
4 And if you don't need them, you haven't lost anything.

5 And what about this 20 percent chance of
6 requiring a laser? How would you feel about somebody
7 who runs a red light but only hits a kid one time out
8 of every five? You wouldn't think much of that.

9 So this child was -- had a large chance
10 of needing the laser, and nobody made any preparation
11 to take care of that. Now --

12 THE COURT: Mr. Girards --

13 MR. GIRARDS: Yes, sir.

14 THE COURT: -- you are coming up on 35
15 minutes.

16 MR. GIRARDS: Thank you, sir. I am going
17 to speed up. All right.

18 So -- all right. So Dr. Llamas comes in
19 here and writes "Fetal fundi, follow up in four weeks."

20 Now, Dr. Ponte knows that Dr. Llamas is
21 20 years behind on describing the baby's eyes in an
22 ROP examination. You remember the international
23 classification which came out in 1985. We are 20 years
24 down the road, and Dr. Llamas is still not using the
25 international classification.

1 So why is that important? The
2 international classification is what gives you an
3 additional safety net. Dr. Ponte, the attending
4 physician, responsible for all of the medical care
5 of the baby, responsible for coordinating the care,
6 responsible for getting the eye specialist to come
7 in, the heart specialist to come in, he is the safety
8 net number one.

9 Dr. Llamas is safety net number two
10 because he is going to focus specifically and only
11 on the eyes. But because Dr. Llamas didn't use the
12 international classification and Dr. Ponte didn't say,
13 Hey, wait a second. Hey, Llamas, what are you doing
14 here? We need to know what zone. We need to know the
15 international classification, and we need you to write
16 it down in the record. Because Dr. Ponte didn't do
17 that, this safety net was absent.

18 This is Dr. Ponte as medical director of
19 their service, but it is also the scheduling nurse,
20 the unit clerk who looks at the record and says, aha,
21 zone I eye, follow up in one week, let's check the
22 calendar. And because they did that, there were only
23 two levels of safety net. That's why it is important
24 that they use the correct terminology.

25 And when you have a high-risk baby, a

1 23-weeker less than 750 grams that's going to get ROP,
2 you can't take a look in week seven and not come back
3 for four weeks. Because, you remember, the disease
4 process takes two- to four-ish weeks to start into the
5 mild and the moderate and then the severe and then plus
6 disease and bleeding and vitreous hemorrhaging and all
7 the bad things that happen. It takes two to four weeks
8 for that child for the process to go through.

9 Well, if you go in and take a look at
10 that baby in week seven and then you don't go back for
11 four weeks, it is not a question of if the baby is
12 going to go blind. The only question is whose baby
13 is going to go blind.

14 When Dr. Llamas writes, "I take a look
15 at the baby, fetal fundi, follow up in four weeks,"
16 somebody is going to go blind. We just don't know
17 whose baby it is until you have situation that becomes
18 a disaster like Daniella.

19 Now, if somebody in the deliberations
20 says, listen, Dr. Ponte only said he was responsible
21 for the first scheduling of the first exam, and then
22 after that it is all Dr. Llamas, I want you to remind
23 them of what the defendants' own expert wrote. And
24 the book that got -- you remember the book that got
25 mailed for Christmas presents to all the Pediatric

1 neonatologists, it says that the neonatologist and
2 the ophthalmologist have to work together as a team
3 to take an active role to prevent -- to stop this
4 disease as soon as possible.

5 And we see that that's also true because
6 the guidelines require the cooperation of neonatology
7 and ophthalmology just to get the guidelines into
8 place. It is a job for both of them.

9 All right. Now, if someone in
10 deliberations says, you know, you remember the early
11 treatment of ROP study that we talked about, ETROP,
12 if somebody says, look, early treatment doesn't really
13 matter, then remind them. Early treatment of ROP was
14 shown to stop the progression of ROP in most babies.

15 And Dr. Quinn, their own expert, agreed
16 that if you treated timely with eyes -- type 1 eyes
17 just like Daniella had, you get a 91 percent success
18 rate. And then there were a couple of other studies
19 we talked about--85.4 percent success rate, 83.3
20 percent success rate. Either way, if there is early
21 treatment, the diagnosis is timely, and the laser
22 treatment is instituted correctly.

23 All right. So what about the laser?
24 It is the hospital's fault. If somebody back in
25 deliberations says, yeah, you know, it is the

1 hospital's fault, the laser wasn't there, it should
2 have been there and wasn't, just remind them about
3 the Xes. Nobody made a plan. The person whose job
4 it was to make the plan, Dr. Ponte, didn't do it.
5 He didn't plan in advance, and of course they were
6 caught flat-footed.

7 All right. One other thing that I wanted
8 to talk about is -- let me talk about the harms and
9 losses. I need to jump ahead to that. The harms and
10 losses questions are on the charge, and let's get to
11 them because I want to talk with you about them. There
12 are a number of different harms and losses questions.

13 You know, before I do that, let me show
14 you this. This is the apportionment question. We are
15 asking you to put a finding of negligence against Dr.
16 Llamas and Dr. Ponte, and you can think the hospital
17 was negligent because they were flat-footed and put a
18 "yes" on their blame as well.

19 But on this apportionment question right
20 here, you have to decide who is responsible on what
21 level. And I'm going to suggest to you that if you
22 find the hospital negligent, it is not really worth
23 fighting about. Maybe they were. Maybe they are
24 responsible for 1, 2 percent, maybe 5 percent. It
25 is not really worth arguing about, so put something

1 like that in there if you are convinced of that.

2 But on Dr. Ponte and Dr. Llamas, Dr.
3 Llamas was one safety net layer. Dr. Ponte was the
4 attending physician. He had that hat on. He was
5 supposed to coordinate the care. He was supposed to --
6 He had the authority to get rid of Llamas and say,
7 you are not doing it right, let me get somebody else.
8 But he didn't do that either. He was another safety
9 net.

10 Ponte was also a third safety net. He
11 was the director of services at Del Sol Hospital for
12 Pediatrix Medical Services. He was the third safety
13 net. Because he had much more responsibility to
14 Daniella, then I'm going to suggest to you that you
15 put something in the neighborhood of 55 percent for
16 Dr. Ponte and something in the neighborhood of 45
17 percent to Dr. Llamas; because Ponte was two layers
18 of safety net, two to Llamas's one.

19 Now, I don't want you to think that I'm
20 letting Llamas off the hook because he is responsible
21 for what he did and what he failed to do.

22 And when we get to the damages questions,
23 the harms and losses questions, there are a number of
24 these that --

25 THE COURT: That's 42 minutes, Mr.

1 Girards.

2 MR. GIRARDS: All right. Thank you, sir.

3 There are a number of these that I'm not
4 going to spend much time with you because I think it
5 is something that y'all will use your common sense
6 and decide what the appropriate damages figures are:
7 physical pain and mental anguish, disfigurement,
8 physical impairment, on those.

9 I want to spend a couple of minutes
10 talking with you, though, about the most important
11 ones in my view and I think based upon the evidence,
12 and that is the medical care expenses and the attendant
13 care expenses.

14 I saw a lot of you writing down what
15 Helen Woodard said. You remember on the first day,
16 she is the rehabilitation specialist. Now, we didn't
17 total up her numbers. I don't suppose any of y'all
18 did that based upon her testimony.

19 But I totaled up these numbers, and what
20 these -- what I did here was on the low end. I took
21 the minimum amounts that she had testified about, and I
22 used an 80.1 life year -- 80.1 years of life expectancy
23 for a female. You remember, Dr. Tomasovic admitted she
24 had a normal life expectancy. And I subtracted 18
25 years because we are talking about age 18 and beyond.

1 And then on the high end, I took the
2 larger numbers that Helen Woodard talked about, and
3 I extended Daniella's life span to 90 years of age
4 because -- and I hope I'm not blocking anybody --
5 because when you have an 80.1-year life expectancy
6 statistically as a female, that means that at 80.1
7 years from 2005, half of those females are dead, and
8 the other half are still alive. So I just picked 90
9 years life expectancy on the high end just because
10 that made some sense to me.

11 And y'all are free to use your own
12 judgment about how that works. So I took the numbers,
13 and I put this chart together. And what you will see
14 here is, assistance care right there, we are going to
15 talk about that separately.

16 On the low end, that leaves about \$50,000
17 of medical expenses on the low end -- here -- and about
18 \$150,000 in medical expenses on the high end over here.
19 And we will separate out \$2.6 million for assistance
20 care on the low end and \$3.8 million for assistance
21 care on the high end.

22 Now, this is up to y'all to figure out
23 what you want to do to satisfy yourself that Daniella
24 has all the medical care that she might need and the
25 assistant care that she might need because of the

1 blindness. But these are the numbers that I'm asking
2 you to consider.

3 And then the last thing is, what I think
4 is really, really important for you to consider are the
5 future medical expenses. Because with about 80 years
6 to go, we heard testimony about her medical expenses in
7 the future. We heard testimony about the technology
8 that is being worked on now, being tested on animals.
9 It is going to be used on human beings as soon as it
10 is ready, and it will be available for human beings
11 within Daniella's lifetime.

12 THE COURT: You have used 45 minutes,
13 Mr. Girards.

14 MR. GIRARDS: Thank you, sir.

15 Artificial retinas, artificial eyes, they
16 are all in existence now, and they are being tested.
17 They will be perfected sometime in the next 20, 30, 40,
18 80 years.

19 And Daniella ought to be able to take
20 advantage of those things. Those things are going to
21 be expensive. They are going to require surgery. They
22 are going to be painful. But if she chooses to take
23 advantage of those things, I want her to be able to do
24 that because she won't be able to come back and say,
25 hey, wow, look what we've got now that's available, and

1 I can't pay for it because nothing was put in there for
2 me to pay for it.

3 So I'm asking you to do that. And I am
4 going to suggest to you that a figure somewhere in the
5 neighborhood of \$1,000,000 will be enough to pay for
6 all of her medical needs for the next 90 years.

7 And so I want you to think about that
8 because we are not talking about a blind little girl
9 who is six years old now. We are talking about a blind
10 young lady who is in her 20s, and a blind woman who is
11 in her 30s, in her 40s, in her 50s, and in her 60s.
12 She will be someone who you will choose whether she
13 is isolated and immobile and trapped in a living
14 situation, either her own apartment or group living
15 where she doesn't have what she needs to go outside
16 and be safe from strangers, be safe from stepping in
17 traps, to be able to do the things that she ought to
18 be able to do but for her vision.

19 Or you will set her on a path and make
20 sure she has an assistant to be with her that she can
21 be mobile, she can get out and she can go to all of
22 the events that she is capable of doing but for her
23 blindness. So that is the -- those are the decisions
24 that you have to make, what her life is going to be
25 about, and so those are -- that's why I suggested those

1 numbers for you.

2 Now I'm out of time, and I have used up
3 some of my additional time. But when I visit with you
4 in just a couple of minutes, I will address what the
5 other lawyers have said and give you a final word.

6 Okay. Thank you.

7 Thank you, Your Honor.

8 MS. FRALEY: Your Honor --

9 THE COURT: All right.

10 MS. FRALEY: -- I don't believe he fully
11 opened on the issue of gross negligence.

12 MR. GIRARDS: Oh, I can do that, if you
13 will give me two minutes, Your Honor.

14 THE COURT: You can have two minutes.

15 MR. GIRARDS: Okay. Gross negligence.
16 I got a little flustered running out of time. Let me
17 address this because this is going to be important.

18 Why were they grossly negligent? They
19 were grossly negligent because of what they actually
20 knew.

21 I think we are all satisfied that what
22 they should have known was that you have to carefully
23 monitor this baby or she might go blind forever. There
24 is a diagnosis; there is available treatment. And if
25 she doesn't get it timely, she will go blind forever.

1 But the testimony shows they actually
2 knew that. They actually knew for a fact that she was
3 going to get ROP, that she had a one-in-five chance
4 of needing the laser; that if she didn't get it, she
5 would go blind. That if you don't -- if you don't
6 screen the babies with follow-up timely, then babies
7 will go blind.

8 They also knew, right here in the red
9 book -- we talked about this, and I will show it to
10 you. Starting with the cryo-ROP study, right there.
11 The cryo-ROP study showed that if they screen the
12 babies properly, they could save 300 babies from a
13 lifetime of blindness every single year. And they
14 could save up to \$64 million in needless health care
15 expenses if they did it correctly.

16 They actually knew it. They actually
17 knew that if they didn't do it right, they could cause
18 this kind of tragedy in these lives. That's why they
19 were grossly negligent, and that's why I'm asking you
20 to write "Yes" in each of the blanks on that page.

21 Thank you, Your Honor.

22 THE COURT: All right. Ms. Fraley, are
23 you ready to proceed?

24 MS. FRALEY: I am, Your Honor.

25 Good morning. There is a phrase Mr.

1 Girards has used over and over again in this trial.
2 Needlessly blinding babies. Needlessly blinding
3 babies. You have heard it again and again. The
4 safety nets so we don't needlessly blind babies.

5 What has happened, though, is that he
6 has, by refusing to meet his burden of proof, tried
7 to needlessly blind you to the truth. Because his
8 experts agree that what these doctors did met what
9 the published guidelines were at the time, met what
10 the collective wisdom of the Academy of Ophthalmology,
11 the American Academy of Pediatrics, the American
12 Academy of Pediatrics and Strabismus. They did what
13 should have happened.

14 The safety net that he drew actually
15 worked, because this is not some sort of, let's have a
16 checklist and check off when we should screen or what
17 we should do. There is a bigger issue here. And the
18 issue is, can we identify children, that small number
19 who might need treatment, and can we get to them before
20 their retinas detach.

21 Dr. Phelps told you that. She told you,
22 look, the bigger picture here is that up to the time
23 the retinas detach, treatment provides the benefit we
24 can give. It's all over the published guidelines. The
25 guidelines don't say, this is a meaningless checklist.

1 The guidelines specifically say that the point of this
2 is to treat before retinal detachment. That is the
3 why.

4 This is not a cookbook. And while it
5 makes for a nice sound bite to say that these are
6 safety rules, the truth is, we are not treating a
7 cookbook. We are not mixing eggs and flour and hoping
8 to get cake. We are treating people. We are treating
9 babies.

10 Look to your left. Look to your right.
11 Do you truly think that the care that would be perfect
12 for you would be the same care for you, for you, or for
13 you? Or do you look at people and treat the people,
14 the babies who are in the NIC-U?

15 That's why the guidelines give us an end
16 point. That's why they give us vision and insight into
17 the truth. Because what we know is that if you can
18 treat before there is retinal detachment, that's where
19 the benefit can be had. If the retinas detach before
20 you treat, that's when you have lost your window of
21 opportunity.

22 And so for all of this statement about
23 treat as soon as it is treatable, diagnose as soon as
24 it is diagnosable, that's not in any of the medical
25 literature. That's not in anything that's published.

1 The only end point that is published is, the timeliness
2 is before the retinas detach. And to say anything else
3 is to be needlessly blinded to the truth and to the
4 science.

5 And so when we look at the plaintiffs'
6 burden of proof, have they convinced you that the
7 things they are complaining about actually made a
8 difference? That they fell below the standard of
9 care? And that they could have changed Daniella's
10 outcome?

11 You heard testimony from a number of
12 different experts about this window of screening. And
13 it is clear that one of the things that comes out is,
14 we know there is a time period when it is too early.
15 We know there is a time period where the view to the
16 back of the eye is going to be so hazy that we can't
17 see where the vessels are. It is like looking through
18 a haze. You get back to the back of the eye, and you
19 simply can't see the vessels. They are so immature,
20 you can't see them.

21 And while Mr. Girards tells you that Dr.
22 Llamas was 20 years behind and didn't know the ICROP
23 designation, the gentleman who created ICROP--or ICROP,
24 that's probably the right way to say it--Dr. Quinn
25 said, no, that's exactly the terminology we use.

1 We call it fetal fundi. We call it incomplete
2 vascularization.

3 And to say, well, you should have said
4 zone I or zone II, it's a trick question. The point
5 is, they are immature. They are incomplete, and you
6 can't see zone I or zone II.

7 The author of ICROP said, that's the
8 right designation.

9 He also told you something else that's
10 important about that. He said, we really try to
11 discourage the neonatologists from looking that early
12 because we know there is not going to be anything to
13 see. But if they want us to come, we will. And then
14 what do we do? We try to get the baby back on the
15 right schedule, which is 31 to 33 weeks.

16 Now, how do you know that Dr. Quinn was
17 telling you the right thing about this getting them
18 back on the right screening schedule? Well, you know
19 that from the plaintiffs' expert, Dr. Phelps. Do you
20 remember what she said? We had the calendar up. You
21 remember the calendar we were using to talk to Dr.
22 Phelps? And she said, the first exam was a little
23 early. This is before the 31 to 33 weeks.

24 And then she said something very telling.
25 If Dr. Llamas had simply come in on August 1st, that

1 would have met the standard of care. If he had done
2 the minimum, if he had only come in, this was in the
3 31st to 33rd week, and this would have been acceptable.

4 So then what is the standard that you
5 hear from that message? Don't do anymore than the bare
6 minimum, Doctor, because it is a trap. If you had just
7 come in here according to Dr. Phelps, she would have no
8 complaint whatsoever. That would have been fine.

9 He came in, he screened, he did the
10 appropriate thing. And Dr. Phelps said, that is
11 perfectly appropriate. It is only if you do more than
12 the minimum that she says he is negligent. When he
13 came in here, it became a trap to the unwary.

14 But what Dr. Quinn told you is, sure,
15 we will come in early if a neonatologist asks us to,
16 because we are working together. If a colleague says,
17 Will you come look, the answer is, Sure, I would be
18 happy to. Then we try to get them back on schedule.

19 Because what are we trying to figure
20 out? Have we identified a type 1 eye, an eye that
21 is going to need treatment, and have we treated
22 before retinal detachment?

23 Dr. Phelps and Dr. Good, both the
24 plaintiffs' experts agreed, had he come back two weeks
25 later and screened again, there was going to be nothing

1 to see and nothing to treat.

2 And so then you have the question of,
3 had he just come in on the 1st, would that have been
4 sufficient? And their experts say it would have been.

5 Then we go to the "what if." What if he
6 had come in one more time? Because it feels very good
7 to think, well, what if? Could we have done a little
8 bit more? Could we have looked a little bit earlier?
9 Would there have been something to find?

10 Dr. Good is the only expert who said he
11 believes there might have been treatable disease here
12 on the 25th. But he never told you why. He never
13 told you how is it, what's the science, what's the
14 factual basis that leads him to believe that there was
15 something there to treat.

16 Well, the answer is because he knew there
17 wasn't.

18 Do you remember Dr. Quinn testified --
19 Dr. Quinn and Dr. Good wrote an article together. It
20 was called "Progression of Type 2 ROP to Type 1," and
21 it followed out of the ETROP data that Dr. Good is so
22 proud of. And what it said is, we have found that when
23 you have a baby who shows up with type 1, it means a
24 week earlier they were type 2. They wrote that paper
25 together. They published that paper together. And

1 Dr. Good could hardly go back on what he had published.
2 Because everyone knows the rule of ETROP is: you
3 observe type 2, and you treat type 1.

4 Dr. Good cannot pick and choose from his
5 own literature. He has to be consistent. And as the
6 only doctor who told you that one week before would
7 have made a difference, he owes you facts and he owes
8 you evidence. And the reason he never told you why
9 is because his own writings prove it not to be true.
10 Type 2 goes to type 1 in about one week. Not in a day,
11 not in an hour, in a week.

12 Why is this important? Because there
13 are a lot of different parts to Question Number 1.
14 It says, first of all, did the negligence, if any, of
15 Dr. Llamas proximately cause the injury? And so first
16 you have to decide, what was the standard that was
17 applicable to Dr. Llamas at the time, and did the
18 plaintiff prove to you that there was one single
19 standard?

20 I got a little confused hearing him
21 talk about the guidelines. Is it a rule? Is it a
22 guideline? Is it not a standard of care? Which is
23 it? We have heard all three. It is a constantly
24 moving target of whether it is a guideline or a rule.
25 With the burden of proof, which one is it?

1 Is it reasonable if the three main
2 national organizations, dedicated to preserving the
3 sight of children, agree on it? Is it one reasonable
4 approach to follow it?

5 The second part of Question Number 1 on
6 your charge is, did the negligence, if you think it
7 occurred, proximately cause an injury?

8 Well, on the screening issue, the only
9 way for negligence to have caused an injury is if there
10 was treatable disease a week earlier. And no one
11 explained to you the science of how there was treatable
12 disease earlier. The only expert who gave you a basis
13 for his opinion was Dr. Quinn, and he said, Dr. Good
14 and I wrote the article together. There would not have
15 been anything there.

16 Did you notice that you didn't hear
17 anything about whether Dr. Llamas had adequately
18 performed laser? Do you remember what a big part of
19 the case that was initially? Dr. Llamas is no good
20 with the laser; he didn't do laser adequately. It is
21 because he didn't do enough laser or the right laser
22 that Daniella doesn't have vision.

23 Through 48 minutes of Mr. Girards'
24 closing argument, did you hear that get mentioned even
25 once? Not even once. And do you know why? First of

1 all, because they didn't have the facts.

2 Dr. Moshfeghi did a photoshopping of
3 some images. He couldn't tell you what he did. He
4 couldn't tell you what he put in, what he left out.
5 But one thing everybody told you is, he only used the
6 images from August 4th, which is too early to see the
7 treatment. Even Dr. Good told you, yeah, we really
8 don't expect to see the full effect of the treatment.
9 That takes days or even weeks before you see that.

10 So what we showed you were the images
11 from the 26th, when you could actually see the
12 treatment. And you can see. You don't have to be an
13 eye doctor. You can see the difference and the tiny
14 white spots to the big areas.

15 But more important is what you don't see.
16 You don't see a ridge anymore. You don't see those
17 thick, dilated, tortious blood vessels. And you don't
18 see ROP. Because that's the goal of treatment, is to
19 eradicate enough of the retina that the ROP is gone.

20 That might have been a montage worth
21 seeing had Dr. Moshfeghi decided to put it together,
22 but he didn't.

23 That makes an even more interesting
24 question. Why then did the left eye do well and the
25 right eye do badly? We know it's not an adequacy of

1 lasering issue. I think they have even dropped that.
2 And part of that is that Dr. Radenovich's records show
3 that. Do you remember her note where she looked at
4 Daniella's eyes under anesthesia? She said there is
5 a significant amount of laser, and then she actually
6 draws 360 degrees around all of the laser that's there.

7 So why did it work in the left eye and
8 not in the right eye? Well, I think there are a couple
9 of reasons for that. We know it's not inadequate
10 laser. The right eye actually got 350 more spots of
11 laser than did the left. Can you imagine in that
12 little 12-millimeter eyeball the patience and the
13 painstaking technique to put 2000 laser spots in one
14 eye? The time and the effort to painstakingly treat.

15 The best answer we have for why the right
16 eye did badly came from Dr. Good. Somehow this didn't
17 survive our flipping the flip chart -- pardon me -- so
18 I put it up here.

19 What we know is that some eyes, despite
20 the best treatment, don't do well. We know that babies
21 who have zone I disease -- which is what they say
22 Daniella had -- never do as well. We know that babies
23 who bleed, whether it is in their brains where it
24 causes brain damage or in their eyes where it causes
25 retinal damage, don't do well.

1 We know babies who have bled into their
2 brains do poorly with their eyes. And while the
3 connection is not clear, bleed in the brain, brain
4 damage. Bleed in the eye, eye damage, is one of the
5 working theories.

6 We know that plus disease gives you a
7 worse outcome. Now, this was really interesting. You
8 remember Mr. Girards got up here and crossed this out
9 and said, well, they shouldn't have let it get to the
10 point where she has plus disease.

11 Folks, if you don't have plus disease,
12 you don't get treatment. Remember, that's the driver
13 of treatment. You have to have plus disease. That's
14 part of what makes it a type 1 eye. You can't take
15 this out of the mix. There is no science to let you
16 take this out of the mix.

17 Small babies who rapidly progress and
18 have low gestational age are all at risk, and these
19 are variables that no one can control. How do we know
20 that? Because in the ETROP study, despite the best,
21 most advanced rigorous of a clinical trial, out of
22 401 babies, 89 are retinas detached. That's not a
23 91 percent success rate. 89 retinas detached.

24 Now, understand, we are not even
25 including in that unfavorable structural outcomes,

1 unfavorable visual outcomes, babies who were still
2 legally blind. We are simply talking about in Dr.
3 Good's ETROP study, the number of babies where they
4 could not keep the retinas on, was nearly a quarter.

5 They didn't talk quite so much about the
6 other bad outcomes. But to say that laser treatment is
7 some kind of guarantee ignores the science and ignores
8 the truth. It is hands down the best that we have,
9 and it is absolutely something that Daniella needed
10 and got. But it is not a guarantee. It just isn't,
11 because there are factors that are out of everybody's
12 control.

13 The other issue we have then is this idea
14 of the 72 hours. Now, Dr. Good is the only doctor you
15 heard from who thinks that 72 hours is somehow a
16 standard of care. Dr. Phelps said that was never a
17 standard. That was never supposed to be applied to
18 clinical practice. It was just part of the trial.
19 It was a study design.

20 How do we know that 72 hours was never
21 shortened? Because in 2006 the AAO, the AAP, the
22 American Academy of Pediatric Ophthalmology and
23 Strabismus had had three years to consider ETROP;
24 and it said, no, it's still 72 hours.

25 And Dr. Quinn told you why. Again, why

1 is there science? He said, yeah, we studied this. We
2 actually looked at 24 hours versus 48 hours versus 72
3 hours, and we found out it didn't make any difference.
4 Well, okay. Then there is the science.

5 Did Dr. Llamas say, I would like to treat
6 her as soon as possible? You bet, and he did. But to
7 somehow say that it was negligent when the hospital
8 didn't have the laser, when the neurosurgeon had to
9 come in and look, when all the things that took place,
10 that's why there is 72 hours. Because you don't want
11 to needlessly expose a baby to danger like doing eye
12 surgery when maybe you needed brain surgery instead,
13 when there is not a reason.

14 You know, it sounds really good, oh, we
15 wanted to treat as soon as treatable. But you know
16 that's not true. We have talked about cancer here.
17 I think Mr. Girards even talked about it. You find a
18 mass, you maybe even get your mammogram results saying,
19 oh, this is very worrisome for cancer. You are not
20 rushed into surgery that day.

21 There are diseases that, while treatment
22 is important, it's not an emergency. It's not a next
23 five minutes got to get you in there.

24 There are times when the prudent thing to
25 do is to stop, look at the whole situation, and then

1 move forward with treatment. That's how treatment of
2 ROP is designed. It's how all the science supports it.
3 And it's what happened here.

4 And so the three criticisms that they
5 have made--did he screen on time, 72 hours, did he
6 adequately treat with laser--the answer is he did do
7 the right things. And how do we know that? Because
8 Daniella's retinas had not detached. Did not detach.
9 She made it through the surgery, and she lived.

10 Not only does she live, but she lives a
11 sighted life. Did anyone keep track of how many times
12 you have heard Daniella called blind? And yet her
13 parents say she runs and plays hide and seek with her
14 cousins. Her parents say she matches her own clothes.

15 You saw her on the video running on her
16 driveway and going down steps.

17 Dr. Good told you the definition of
18 functional vision, and that is a child who leads a
19 sighted life, one who gets around without a cane or
20 some other ambulatory assistance, and one who can see
21 symbols.

22 What did Daniella's school records show
23 you? She can see symbols that are a half an inch. She
24 does better when they are bigger, but she can see them.

25 If you look at her day-in-the-life video,

1 the books are down here. (Holding hands down) They
2 are not here. (Holding hands in front of her face)
3 They are here. (Holding hands down) She colors here.
4 She performed the Peabody picture vocabulary test,
5 eight-and-a-half-by-eleven sheet of paper with four
6 images on it.

7 Her parents tell you, her school records
8 tell you that she lives a sighted life. And that is
9 very clear from the pictures as well.

10 This is in evidence. And here is
11 Daniella walking along: no parent, no assistance,
12 nothing.

13 And, more importantly, look at her face.
14 Where are her glasses? You remember, she has glasses
15 to correct her vision. The testing at school says she
16 wears them for that.

17 These are wonderful parents. And if she
18 needed to correct her vision to be safe outside like
19 this, she would have her glasses on.

20 Look at all the pictures that are in the
21 notebook. Out of the five or six, she is wearing them
22 in one. And that, ladies and gentlemen, is excellent
23 evidence of a sighted life. She sees the Christmas
24 trees. She sees her baby brother. She sees the words
25 in books. She sees the family that loves her. She

1 sees.

2 What then is the issue with Daniella?
3 It's wiring. It's comprehension. It is the ability
4 for her brain to take the image that her eye clearly
5 sees and process it.

6 If you have a chances, look at the
7 day-in-the-life video, that little few-minute clip.
8 Daniella is singing the ABCs, and she is tapping her
9 crayons and letters. But she doesn't match the letters
10 of the song to the corresponding letter.

11 When my three kids were little, we would
12 read books over and over again. I don't know if y'all
13 have had that experience. But we had favorites, and
14 you would read them 10 or 20 or 50 times. And when
15 they were two or three, they would get to the point
16 that they had them memorized, we had read them so much.
17 And they would say, Mommy, let me read this book to
18 you.

19 And they could open a page, and they
20 could say the words, and sometimes they could even turn
21 the pages with the right corresponding pictures, and
22 they would say they were reading.

23 They weren't reading yet. They had
24 memorized, but that is not the same brain processing
25 as reading.

1 Daniella does very well. She can
2 memorize. She can keep a lot of things straight. And
3 she has been given tremendous, tremendous parents. But
4 at the end of the day, the damages that the plaintiffs
5 are asking you to compensate for are not related to her
6 vision. The attendant care, if we want to talk about a
7 safety rule, this is not a child where it would be safe
8 for her to be alone, and that is independent of her
9 vision.

10 You know, with the plaintiff having the
11 burden of proof, you would have thought that if Dr.
12 Tomasovic or the school records or the testing or any
13 of that was not accurate, didn't fairly tell you about
14 Daniella, they would have had an expert up here. I
15 mean, it is their burden of proof. There was no one,
16 and that's because the testing wasn't reliant on
17 Daniella. It wasn't skewed. It wasn't something where
18 they weren't aware or didn't take into account the
19 problems she has. It's from her mother. It's from
20 her teacher. And it is from Daniella herself.

21 When you think about where she was 6.67
22 standards below the mean, she could improve two or
23 three or four full standard deviations and not
24 cognitively be in the first percentile. That is where
25 Daniella will need attendant care.

1 And when you look at the other issues of
2 damages, when you look at what her eyes need, the only
3 thing an expert told you that she would need more
4 likely than not is the conformer and the porcelain
5 shell for cosmetic reasons.

6 While we love to think about all of this
7 idea of she needs a retina transfer or she needs a
8 false eye, no doctor told you that that was probable or
9 feasible or that Daniella would be a candidate. And so
10 consider the facts, not the hope or the speculation.

11 When you go through the charge, the very
12 first question, Question Number 1 will ask you about
13 Dr. Llamas. And we think that the only evidence shows
14 that, no, there wasn't any act or omission by him,
15 negligence that caused injury to this child. And
16 at that point, that is the last question from our
17 perspective you would need to answer.

18 But I want to turn your attention to that
19 last question, the gross negligence question, where
20 plaintiffs have taken the position that by following
21 the published guidelines, by keeping up with year after
22 year all of the education, all of the conferences,
23 all of the academy meetings, Dr. Llamas was just
24 indifferent to Daniella. He was consciously
25 indifferent to Daniella.

1 And let me tell you, first of all, if
2 he is, then every ophthalmologist, pediatrician, and
3 member of the American Academy for Pediatric
4 Ophthalmology and Strabismus is consciously indifferent
5 to children, too, because they keep publishing these
6 guidelines. And what he is saying is, they are
7 needlessly trying to blind children. These are meant
8 to educate. These are meant to keep doctors current.
9 And they are meant to help them know what to do in a
10 complex situation.

11 And so, first of all, you have to believe
12 that all three organizations are just indifferent to
13 babies. They don't care.

14 But then I want you to think more
15 specifically about Dr. Llamas because, folks, he is
16 not indifferent. He's invested. He could have gone
17 to UCLA. He could have been a teacher. He could have
18 been many things, I'm sure, at a big university like
19 that. But he was invested in his community. He came
20 back to El Paso.

21 He could have been indifferent when Dr.
22 Ponte asked him to come in on July 4th, which is what
23 the testimony was. He called and said, hey, will you
24 come in even earlier than the 11th, come in on the 4th.

25 And he didn't say, hey, it is a national

1 holiday, and there is nothing to see anyway. He said,
2 "Of course I will come" because he is invested in these
3 babies.

4 He could have been indifferent to the 72
5 hours, but he was invested. Even Dr. Good said that
6 his plan was careful and thoughtful and just what we
7 should have seen from the eye doctor. We need to do
8 this as soon as possible.

9 THE COURT: That's your 30 minutes,
10 Ms. Fraley.

11 MS. FRALEY: Thank you, Your Honor.

12 Did they get the laser they have been
13 telling us they were going to get? If so, let's do the
14 laser surgery. If not, can we transfer to Providence?
15 He was invested. Even though Dr. Good and everyone has
16 said that it was not his job to get the laser, he is
17 still invested in the process.

18 And, folks, he has been invested every
19 day here. He has been here. He has sat and listened
20 while people said things that were not true.

21 Oh, Dr. Llamas thought this baby was 26
22 weeks. No. No one said that.

23 Oh, Dr. Llamas didn't do adequate laser
24 treatment. Let me show you this montage that I made up.

25 No. That isn't true.

1 Because at the end of the day, as
2 invested as Dr. Llamas is in the babies and in his
3 community, he, like you, is invested in the truth. And
4 that's why Mr. Girards was not able to cross-examine
5 him at all about his care for Daniella.

6 Think about the hours that Mr. Girards
7 spent cross-examining him. It wasn't about what he did
8 for Daniella. It wasn't about how did you put those
9 laser spots in, how did you get the angle, did you
10 really get 2,000 in. It wasn't about that at all.
11 Let's talk about a PowerPoint that came out in 2011.

12 If he were not a truth teller, if he
13 were not invested in the truth, if he had not cared
14 appropriately for Daniella with the burden of proof,
15 the party with the burden of proof should have been
16 able to question him about that, and they didn't.

17 And so at the end of the day, your search
18 for credible evidence, for believable evidence goes
19 back to, did he use ordinary care? Are the damages
20 they are really complaining about, things he could have
21 done anything differently about? Are they holding him
22 to a standard that they couldn't even achieve in the
23 clinical studies? And is he consciously indifferent,
24 or is he invested?

25 Mr. Girards and I will agree on at least

1 one thing in this trial, and that is how much we
2 appreciate you. You have been prompt and thoughtful
3 and diligent.

4 Don't stop that now. Be rigorous in your
5 search for the truth. Be invested in your search for
6 the truth. And hold the party with the burden of proof
7 to actually proving to you the facts and not inuendo,
8 not gossip, not things that were not proven in court.
9 When you hold them to their burden, we believe you will
10 answer "No" to Question Number 1, and your work will be
11 done.

12 Thank you.

13 THE COURT: Thank you, Ms. Fraley.

14 Ladies and gentlemen, we are going to
15 take a ten-minute recess before we hear the remaining
16 arguments, which will be about 45 minutes. We will
17 reconvene at two minutes after 11:00.

18 You are still under my instructions not
19 to discuss anything about the case among yourselves or
20 with anyone else. Please don't try to form or express
21 any opinions or conclusions just yet.

22 We will see you in a few minutes.

23 (The jury was recessed, after which
24 time the following proceedings were
25 had out of the presence of the jury.)

1 THE COURT: All right. Ms. Cooley,
2 you've got roughly 28 minutes.

3 MS. COOLEY: Thank you.

4 THE COURT: Mr. Girards, you've got
5 roughly 12 minutes remaining.

6 MS. COOLEY: How much time does he have
7 left?

8 THE COURT: He has 12 minutes remaining.
9 (There was a discussion off the record.)

10

11 (There was a recess at 10:52 a.m.)

12

13 THE COURT: Thank you. Please be seated
14 for a moment.

15 Are we ready to proceed? Please rise.
16 (The jury returned into court.)

17 THE COURT: Please be seated.

18 Ms. Cooley, you may proceed with your
19 closing argument.

20 MS. COOLEY: May it please the Court.

21 Ladies and gentlemen, we are all familiar
22 with that old adage that there are two sides to every
23 story. Obviously, that's true in this case as well.
24 You have now heard both sides of the story. On behalf
25 of Dr. Ponte, I want to thank you for being so patient

1 and attentive in listening to both sides.

2 I told you all at the beginning of jury
3 selection that I was proud and honored to be here
4 representing Dr. Ponte. And I just want to reiterate
5 that I am still proud and honored, and actually maybe
6 even prouder now.

7 Dr. Ponte has had to sit here for a
8 number of days, the days that he could be here, when
9 he could get somebody to take care of the babies in
10 El Paso; and he had to listen to plaintiffs' counsel
11 mischaracterize, misrepresent, miscount. He had to
12 hear from plaintiffs' expert who came in here and said
13 that he was not only negligent, one of them in fact
14 said he was grossly negligent. Now, interestingly, it
15 was the ophthalmology expert who said that, not the
16 neonatologist expert.

17 But through all of that, Dr. Ponte was
18 very stoic, in control of his emotions. There was
19 only one time in the last two weeks that Dr. Ponte
20 became emotional, and that was the day that the DVD
21 of Daniella was played. And I don't know if any of
22 y'all even knew that, but Dr. Ponte watched a little
23 bit of it and then got up and left the courtroom,
24 composed himself, and then came back in.

25 Why do you think he did that? Well,

1 perhaps he did it because he was remembering Daniella
2 when she was barely big enough to hold in his hand,
3 weighed a little bit more than one pound, when he
4 was having to tell her parents that she only had a
5 5 percent likelihood of surviving.

6 Perhaps he was remembering when she
7 couldn't breathe on her own for two months. She
8 developed seizures. She was so anemic that he had to
9 order blood transfusions for her. She was bleeding
10 into her brain, and then developed fluid on the brain
11 as a result of that and had to be treated.

12 Perhaps he was remembering when he had
13 to give anesthesia to her for -- in order for her to
14 have heart surgery. Perhaps those were the things
15 that he was thinking of.

16 The last time that Dr. Ponte saw
17 Daniella, he didn't know whether she would ever be able
18 to walk, let alone run. He didn't know whether she
19 would be able to even use her hands and arms, let
20 alone color or feed herself or try to brush her teeth.
21 He didn't know whether she would be able to talk, let
22 alone sing songs with her daddy.

23 So when Dr. Ponte saw that she could do
24 that, he was very gratified. He was very emotional
25 because that's what Dr. Ponte does. Dr. Ponte takes

1 care of these little babies that are born before they
2 are supposed to be. He takes care of these little
3 babies that aren't supposed to live outside their
4 mother's wombs. That's what he does. That's what he
5 did with Daniella, and I'm proud to represent somebody
6 who is as devoted to these children as Dr. Ponte is.

7 What do we know about Dr. Ponte other
8 than what I have just told you? We know that Dr. Ponte
9 is double Board certified in pediatrics and in
10 perinatal and neonatal medicine. We know that he has
11 been practicing for more than 25 years and has taken
12 care of hundreds, if not thousands, of these little
13 babies.

14 We know that Dr. Ponte was an assistant
15 professor of pediatrics at LSU until he went to El Paso
16 in 1989 and started working at Providence Hospital.
17 He worked at Providence Hospital until about 1994 when
18 he went over to Del Sol to establish their neonatal
19 intensive care unit. He grew it from a level 1 to a
20 level 2 to a level 3, and it grew from a neonatal unit
21 that had only one neonatologist to one that currently
22 has four neonatologists and four neonatal nurse
23 practitioners, and they are providing care 24 hours a
24 day, seven days a week.

25 There is no dispute about Dr. Ponte being

1 a qualified, competent physician. In fact, Dr. Phelps,
2 the plaintiffs' neonatologist expert, indicated that
3 herself when she came here to testify.

4 There is also no dispute about any of the
5 other care that Daniella received while she was in the
6 NIC-U. In fact, Dr. Ponte -- or Dr. Phelps said that
7 she believed it was a direct quote when I said, "Did
8 you previously say that Daniella's survival is a
9 testament to the exceptional care that she received
10 in the neonatal intensive care unit?"

11 And she said, "Yes, I agree. That sounds
12 like a direct quote from me." And it was.

13 Now, what is in dispute in this case with
14 regard to Dr. Ponte? Well, the plaintiff is claiming
15 that there was no written policy and procedure
16 regarding the screening of these babies in the NIC-U.

17 Well, what did Dr. Ponte tell us about
18 that? Dr. Ponte told us that they did in fact have a
19 policy in place, that they have a discharge planning
20 nurse. The discharge planning nurse works for the
21 hospital, and she is the nurse who, at the very onset
22 of these babies coming into the NIC-U, is already
23 thinking long term about what things need to be
24 accomplished over the time this baby is in the NIC-U
25 to ensure that it can go home, to ensure that it can

1 leave in the best shape possible.

2 And so this nurse has a notebook. And
3 in the notebook, she has a copy of the guidelines--the
4 guidelines that y'all have been seeing for the last
5 two weeks. This was in 2005, and so it was those 2001
6 guidelines. And so based upon the guidelines, the
7 nurse knows that these babies need to be screened
8 between 31 and 33 weeks, makes an appointment --
9 doesn't make an appointment, makes an entry into the
10 medical record of that date. And we know that happened
11 in this case because we've got the medical records from
12 June 4th--daily note, June 4, 2005--that indicates
13 "Obtain eye exam at 33 to 34 weeks of age (7-26)."

14 We have already talked about the 33 to 34
15 weeks that is not what should have been in there. But
16 we know that's what they were relying on, the 31 to 33
17 weeks, because we have our calendar that's in evidence
18 that will show us that July 26th, which is the date
19 that initially was in the records for when this child
20 should be screened, would have been at 32 weeks 6 days,
21 which falls in between the 31 and 33 weeks for the
22 babies to be screened.

23 So we know in fact that there was a
24 policy in place. Otherwise, that entry wouldn't be
25 in the medical record. So there is no question that

1 there was a policy in place.

2 In fact, I believe Dr. Phelps even
3 testified that she had a similar policy in that the
4 discharge planning nurse in her NIC-U was the one that
5 arranged these appointments and scheduled for the
6 babies to be screened.

7 Now, what is the next criticism plaintiffs
8 have of Dr. Ponte? Well, they say that Dr. Ponte
9 should have made sure that Dr. Llamas came in sooner
10 than four weeks to evaluate Daniella.

11 Well, ladies and gentlemen, we heard from
12 both Dr. Ponte and Dr. Llamas that over the years that
13 they had worked together, they talked. They talked
14 about the babies, and they talked about the screening,
15 and they talked about the follow-up. Dr. Ponte was
16 comfortable with Dr. Llamas's recommendation.

17 Dr. Ponte, despite what the plaintiffs'
18 counsel is continuing to say, Dr. Ponte understood what
19 fetal fundi means. He understood what Dr. Llamas meant
20 by fetal fundi. That meant no ROP. He knew that
21 that's what he meant by that.

22 And so in a situation where there is
23 no ROP, it was perfectly reasonable to follow the
24 guidelines, go back to the guidelines to screen this
25 baby between 31 and 33 weeks.

1 Do you really think that if Dr. Ponte
2 had any concern about that, that he wouldn't have said
3 something to Dr. Llamas? We already know that Dr.
4 Ponte went outside the guidelines and asked Dr. Llamas
5 to see this baby early. Well, if he was willing to do
6 that, he certainly, if he would have had grounds for
7 concern, would have asked him to come and see the baby
8 early again.

9 There was no reason for Dr. Ponte to
10 believe that this child needed to be screened any time
11 other than the 31 to 33 weeks after the initial exam
12 was performed, and he understood that this baby had no
13 ROP.

14 Now, a final issue of criticism with
15 Dr. Ponte was this issue of having the laser available.
16 Well, ladies and gentlemen, I think that it's been
17 pretty well established that the hospital is
18 responsible for the laser.

19 Plaintiffs' counsel said, well, he didn't
20 plan. The reason that Dr. Ponte should be 55 percent
21 liable here is because he had the ability to plan for
22 this. We knew this baby was going to have ROP, and why
23 wasn't he making sure that that laser was available and
24 getting it in place.

25 Well, we know from Michael Lason who

1 testified, he said that in fact the hospital had
2 ordered the laser some time before, but it hadn't come
3 in yet. No one knew where it was.

4 Dr. Good said that Dr. Ponte should have
5 had everybody out looking for the laser. Well, Dr.
6 Ponte did have everybody out looking for the laser.

7 We heard again from Michael Lason, I'm
8 really not sure why I'm the one who was looking for the
9 laser, but Dr. Ponte asked me to, so I was. He even
10 said it typically would have been the hospital's head
11 nurse, the NIC-U's head nurse; but it was him because
12 Dr. Ponte was doing exactly what Dr. Good said he
13 should be doing.

14 Well, it is kind of interesting, and
15 maybe we should have explored it further. You remember
16 Dr. Radenovich that you heard abandoned these babies,
17 Dr. Radenovich who would not come in and --

18 MR. GIRARDS: Your Honor, I will object.
19 There is no evidence that Dr. Radenovich abandoned any
20 babies. That was one of those tricky questions that
21 Ms. Fraley asked like "When did you stop beating your
22 wife."

23 THE COURT: I will sustain the objection.
24 You may continue, Ms. Cooley.

25 MS. COOLEY: All right. Dr. Ponte was

1 doing everything within his control to try to get the
2 laser there for treatment. And, in fact, the laser
3 was brought in in time for Daniella to be treated
4 within the 72 hours that the guidelines recommend.

5 Let's talk a second about this issue of
6 maybe transferring the baby to Providence. You have
7 all seen the records. There was no question that
8 between July 30th and August 4th, there were serious
9 concerns about Daniella's increasing pressure in her
10 brain. Dr. Ponte didn't know whether this little girl
11 was going to need a shunt or whether it was going to
12 reduce on its own. That's why he ordered a neuro-
13 surgery consult. And you have all seen that note as
14 well.

15 Now, the neurosurgeon opted to wait on
16 the shunt. Perhaps Dr. Ponte should have said, no,
17 no, no, no, no, no. Wait, you don't know what you're
18 doing. I need to tell you, you need to put this shunt
19 in this baby's head.

20 Well, ultimately, Daniella never even
21 needed a shunt. That was the neurosurgeon's decision.
22 Dr. Ponte realizes that you need specialists to make
23 special decisions. He doesn't interfere in that, just
24 like he wouldn't have interfered with the decisions
25 that Dr. Llamas would have made with regard to the

1 treatment of this baby.

2 But the fact of the matter is that he
3 ordered a neurosurgery consult because he was concerned
4 about increasing pressure in Daniella's brain. You
5 have the ultrasounds. They are in evidence. You can
6 look at them.

7 We saw a graph that the plaintiff showed
8 you where they were measuring this baby's head
9 circumference, the outside of the brain. But what
10 Dr. Ponte was looking at was the inside of Daniella's
11 brain when he was looking at the ultrasounds. He
12 was able to see exactly what was going on in the
13 ventricles, the size, when they were increasing and
14 decreasing.

15 And those ultrasounds are also in
16 evidence so that you can look at those. But looking
17 inside the brain is much more reflective of what was
18 going on with Daniella than looking outside by
19 measuring the circumference.

20 I want to remind you that the jury
21 charge, in paragraph number 1, says, "Do not let bias,
22 prejudice, or sympathy play any part in your decision."
23 These are, again--we have said it many times, and no
24 one has disputed it--these are very, very nice folks.
25 They are very good parents. They have taken very good

1 care of this little girl, which is one of the reasons
2 that she is doing as well as she is doing.

3 But just because you may feel sorry for
4 them, you cannot award them money based upon that.
5 As nice as they are, that is not a valid reason for
6 awarding money.

7 Now, with regard to the negligence
8 questions, the question regarding Dr. Ponte, Question
9 Number 2, I believe it is going to be very evident when
10 you get back and look at the evidence and think about
11 the testimony that the answer to Question Number 2 is
12 very clearly "No." If you answer "No" to Question
13 Number 2, you won't even get to Question Number 6,
14 which is the question about whether Dr. Ponte acted
15 consciously indifferent.

16 But I would like to remind you, if there
17 is anybody in the courtroom that made it very clear
18 that Dr. Ponte did not act consciously indifferent when
19 he was caring for Daniella, it was Daniella's mother.
20 And Daniella's mother said on the stand that Dr. Ponte
21 told her that as long as Daniella would fight, he would
22 fight for Daniella.

23 Do you remember that testimony? Does
24 that sound like conscious indifference to you? I think
25 clearly the answer to that is "No."

1 Thank you.

2 THE COURT: All right. Rebuttal, Mr.
3 Girards?

4 MR. GIRARDS: Yes, sir.

5 Well, Ms. Cooley never explained why it
6 was that Dr. Ponte sat and watched Dr. Llamas ignore
7 this child for four weeks when he knew that she was
8 going to get ROP and that it might blind her before he
9 came back.

10 Dr. Ponte knew that because it was in the
11 medical record. He saw that Dr. Llamas wasn't coming
12 back for four weeks. That's more than enough time for
13 a baby to go from perfect, pristine, God-given eyes to
14 blind.

15 Now, Ms. Fraley, what she told you seems
16 to me to reflect a big problem in credibility that we
17 have seen throughout the trial. First of all, she said
18 that Daniella was out wandering in the street. But,
19 I mean, who do you think took the photograph? Right,
20 Jose.

21 You know, on the one hand Daniella is
22 so damaged by her brain that she can't function. But
23 look at her, and then a minute later Ms. Fraley is
24 talking about how great she is doing. So which is it?

25 Now, Dr. Llamas writes down in the

1 record, look at number 6 over there, rapid rate of
2 progression. That's what he wrote in the medical
3 record on August 1. But how would he know if it was
4 rapidly progressing, because he didn't look but four
5 weeks earlier when there was nothing. Is that one of
6 those notes that the doctors just write to do that,
7 to protect themselves?

8 And then here is something that might
9 have slipped by, that I think gives us a clue as to
10 what the defense was trying to do. You remember, we
11 saw that the August 1 examination occurred in the
12 middle of week 34. At 33 weeks plus five days. And
13 yet when they got on the stand, they actually wrote
14 on here that the August exam happened before week 34
15 even began.

16 What are they trying to do, do you think,
17 with you guys?

18 All right. I would like you to -- I
19 would like to address the laser issue because you
20 can tell -- you can tell whether Dr. Llamas did it
21 right because Dr. Moshfeghi taught you, and because
22 of something that happened when Dr. Llamas was on the
23 stand.

24 And when Dr. -- do you remember Dr. Quinn
25 on the video, he said, yes, there are skip areas. Skip

1 areas mean you didn't do it right. Skip areas means
2 you didn't stop the progression of ROP.

3 So look at Defendants' -- this is the
4 defendants' notebook binder. Look at Defendants'
5 Exhibit 8A. See, that's the one that they brought you,
6 and you can see the laser burns. When you see the dark
7 areas in between, those are skip areas, especially when
8 the dark area is one and a half times the size of the
9 burn area that's adjacent to it.

10 The burns are supposed to be right next
11 to each other. Ideally, you want it all -- ideally,
12 this is all supposed to be whited out over here, not
13 looking like a leopard, and not with the brown spots.
14 Look how big these brown spots are. Look, there is a
15 whole area of untreated retina. You remember, these
16 are the cells that are still producing that chemical
17 that say, blood vessels, keep growing, keep growing,
18 which is the big problem with ROP.

19 So look at Exhibit 8A, and you can
20 measure it for yourself. Just use a piece of paper,
21 and you can measure it for yourself. And then look at
22 that. Look how big an untreated area is left there.

23 You can figure all of this out for
24 yourself, and that's what I want you to do. That's why
25 I wanted Dr. Moshfeghi to teach you the principles, is

1 so you can do it yourself and you won't have to take
2 anybody's word for it.

3 Dr. Good explained why -- he did explain
4 why this kiddo would more likely than not have had ROP
5 diagnosed back here and more than likely not be treated
6 with laser right here. This is a disease that takes
7 approximately two weeks to develop. So if you look a
8 week earlier, you know you are going to see it because
9 she was so severe here.

10 Their only job -- remember, they had
11 complete control of this baby 24 hours a day, seven
12 days a week. Their only job -- Dr. Llamas's only job
13 was to diagnose ROP as soon as it developed and treat
14 it when it was treatable. That was his only job.
15 That's all he had to do. That was his only focus.

16 Dr. Ponte had more focus, but Dr. Ponte
17 had red flags that were going up like July the 4th
18 fireworks. I'm not coming back for four weeks, or
19 likely that we may need the laser but where is it.
20 There is a note for 7-26. When 7-26 came and went,
21 Llamas didn't show up. Nobody called him. Ponte
22 didn't call him. These are -- these are the things
23 that shouldn't have happened.

24 Now, what we did was -- and did Dr.
25 Llamas know better? In the plaintiffs' binder here,

1 number 38, Exhibit Number 38. These are the excerpts
2 from the annual meetings of the American Academy of
3 Ophthalmology for 2003 and 2004. We pulled out the
4 pages that related to ROP, the classes that were going
5 on. And at the end of this document, you will see the
6 registration records where Dr. Llamas was actually at
7 these meetings. He knew. He knew the ETROP guide-
8 lines. He was there. He was taught.

9 Now, this binder right here, this gray
10 one, these are the Plaintiffs' Exhibits. And what
11 I mean by that is, these are the exhibits that we
12 offered. And what we did was, we put them in a
13 notebook for you to take back into the jury room.
14 And at the beginning of the trial, I tried to arrange
15 them in an order that was more important in the front
16 and lesser important as we went along.

17 But along the way we found the need for
18 addition records. So in the back of the binder, you
19 will see some of the documents that turned out we
20 needed to stick in the binder during the trial. So
21 I guess my goal wasn't perfect, but if you take this
22 notebook, you will see the records that we put into
23 evidence. And then the black one is the defendants'
24 exhibits.

25 All right. You know, the thing -- I

1 mentioned something to you earlier. You know, this is
2 about safety, saving the babies. And there are folks
3 who say that the jury system is here to protect babies,
4 to protect the babies. And I mentioned earlier at the
5 beginning of the trial, there is nothing more dangerous
6 than a doctor who comes into a courtroom and says
7 something different than he tells this doctor or where
8 he writes in the medical literature something that he
9 writes.

10 You remember Dr. Quinn, I was begging
11 them to bring him live because we wanted to talk to him
12 about the book. You remember in the video that was
13 choppy on Thursday, he never specifically addressed
14 this baby's screening schedule. He only said is this
15 a good guideline, and did it apply.

16 Well, we already knew that. He didn't
17 have to ask the question. Yeah, we already knew that
18 good guidelines apply.

19 But Dr. Quinn completely avoided saying
20 anything about the chapter he wrote, Chapter 51 of
21 the neonatology book that says you have to look at
22 the kid's eyes by seven weeks and every other week
23 thereafter until ROP is gone -- the risk of ROP has
24 gone away.

25 THE COURT: Five minutes, Mr. Girards.

1 MR. GIRARDS: He never said that. He
2 completely avoided it. And he gave you the impression
3 that he thought the screening schedule that Dr. Llamas
4 did was okay. But it wasn't, and he knows it.

5 And then remember when he had amnesia
6 about the publication he did that said, you have to
7 laser within a day or two? You don't sit on your hands
8 for 72 hours. That is a doctor who is dangerous to
9 babies because he comes in here and misleads you.

10 The rules are the same on both sides of
11 the table. Right there in the red book, you look at
12 the babies' eyes by seven weeks and every other week
13 until the diagnosis of ROP or the risk is gone. That's
14 how the babies are saved. And he knew it because he
15 put it in the book. Three hundred babies are saved
16 from blindness each year if you do the screening like
17 he says you do it.

18 All right. What's the nature of --
19 What's the nature of the safety rule violations? How
20 much harm was caused? How much harm could have been
21 caused? Those are the questions that I want you to
22 think about when you are thinking about answering these
23 questions. Think about their negligence and what
24 damages they caused this little girl and what the
25 meaning of your verdict is. Your verdict is going

1 to -- there are people watching your verdict.

2 You remember, we haven't seen anybody
3 from Pediatrix either. The only person from Pediatrix
4 who showed up was a guy who I had to subpoena and drag
5 down here, Dr. Michael Stanley. Those people are
6 paying attention, and you will give them permission
7 by your verdict to keep a loosey-goosey, no rules
8 screening of babies with ROP, and more babies will
9 go blind.

10 Or with the strength of your verdict,
11 you are going to say, tighten this up. Use the known
12 guidelines to save the babies. You already proved that
13 babies are saved if you use the screening protocol, so
14 use the screening protocol.

15 This was totally needless. This was
16 totally unnecessary. Daniella Bustamante should live a
17 functional, sighted life, but she is not because they
18 didn't do the screening that was simple as coming back
19 every other week until the ROP risk went away, or she
20 -- or it was treated. And we know for a fact the laser
21 stops the progression of ROP in its tracks. They just
22 didn't do it.

23 And so when you go back to the jury room,
24 we will be out here thinking about you, praying about
25 you. We will look forward to visiting with you. And

1 when you get through with your verdict, if you do the
2 kind of verdict that is going to make sure that you
3 know that Daniella will have the means she needs
4 because of her blindness, then we are going to feel
5 good about it. You are going to feel good about it.

6 And when your family and friends ask
7 you, you know, why did you give such a strong verdict
8 for this little girl, you can tell them. I saw the
9 evidence. They didn't do the every-other-week
10 screening, and they knew they were supposed to or she
11 would go blind. And they didn't do it, and she went
12 blind. It is important that we give a strong verdict.
13 And if you would have heard the evidence like I did,
14 you would have concluded the same thing.

15 So I look forward to visiting with you
16 after your verdict today.

17 Thank you, Your Honor.

18 THE COURT: All right. Ladies and
19 gentlemen, you have now heard all the evidence in this
20 case, the Court's charge, and the closing arguments
21 of the attorneys. And in a moment the case will be
22 submitted to you for your deliberations and your
23 verdict.

24 Mr. Carter and Mr. Lewis, I'm sure you
25 have figured out quite some time ago that you were

1 alternate jurors in this case. I'm glad that we didn't
2 need you, and I'm sorry that we have taken so much of
3 your time without your being able to deliberate on the
4 case. But if you will wait a minute after the jury
5 goes back to the jury room, I will discharge you and
6 give you your final instructions.

7 Ladies and gentlemen, those of you who
8 will be deliberating the case, at this point in the
9 trial you pretty much take control of your own
10 schedule, within certain limits.

11 For example, if you decide you want to go
12 to lunch and then begin deliberating, you can do that.
13 If you decide you want to begin your deliberations and
14 go to lunch later, you can do that. You can take
15 breaks when you feel like you need them for reasonable
16 amounts of time.

17 I never try to guess how long it is going
18 to take a jury to reach a verdict. In this case,
19 should it get to be somewhere close to 5:00, if you
20 think you might be able to reach a verdict by
21 continuing sometime between 5:00 and 6:00, let the
22 bailiff know that. We can stay with you until 6:00.
23 If we go much past that, the bailiff and the court
24 reporter both have a hard time getting home for the
25 night, and so that's kind of our outside limit.

1 If you don't reach a verdict today, then
2 I will ask you to return tomorrow morning and continue
3 until you do.

4 At this time, ladies and gentlemen, the
5 bailiff is going to show you into the jury room. He
6 is going to give you the original of my Charge, and we
7 will also send in the exhibits that have been admitted.
8 It will take us a few minutes to make sure those are
9 all in proper order, but we will get them in to you
10 shortly, and we will await your verdict.

11 Thank you very much.

12 (The jury was recessed to the jury room
13 to begin its deliberations at 11:30 a.m.)

14 THE COURT: All right. Gentlemen, please
15 be seated.

16 You have completed your service in this
17 case, and in a moment I'm going to discharge you.
18 Once you are discharged, you will be released from
19 your secrecy concerning the case.

20 However, in that the jury will be
21 continuing its deliberations, I'm going to ask you
22 to observe my instructions until the end of the day
23 tomorrow unless you hear from me or one of the court
24 staff.

25 If you want to hear what the verdict is,

1 let me or let David know, and he will tell the bailiff,
2 and we will give you a call so you can find out what
3 the jury does.

4 But I would say by the end of the day
5 tomorrow, probably we will have a verdict. And at that
6 point, if you want to talk to anybody about the case,
7 you are free to do so. If you choose not to talk to
8 anybody about the case, that's also your privilege.

9 At some point the attorneys or others may
10 contact you to ask you whether you observed anything
11 that would constitute jury misconduct in this trial.
12 You are free to answer such questions. If you tell
13 them about anything that they believe might be jury
14 misconduct, they may ask you to give an affidavit,
15 and you are free to do that. You are also free not
16 to answer those questions, and you are also free not
17 to give an affidavit if that's your preference.

18 I want to thank you very much for your
19 time. I know it is very difficult to sit through a
20 two-week trial and then not to participate in the
21 deliberations.

22 I will just tell you, particularly if
23 the trial had gone to three weeks, we were expecting
24 it would not be at all uncommon to lose a juror to an
25 illness or some kind of an emergency, and so that's why

1 we do seat alternates. We were fortunate in this case
2 that we didn't lose anybody, and so you folks are done.
3 Thank you very much.

4 JUROR CARTER: Do we go out this way or
5 that way?

6 THE COURT: You can go out that way. The
7 bailiff probably will have your final paperwork.

8 JUROR CARTER: Thank you.

9 THE COURT: David will let you back into
10 the jury room. Okay. Thank you very much.

11 (There was a discussion off the record.)

12 THE COURT: Counsel, does anybody have
13 anything for the record at this time?

14 MR. GIRARDS: No, sir.

15 MS. FRALEY: No, Your Honor.

16 MS. COOLEY: No, Your Honor.

17 THE COURT: Very well then. We will be
18 in recess and await the verdict of the jury.

19 Thank you.

20

21

22 (There was a recess at 12:33 p.m.)

23

24

25