Introduction to *Hastings v. Hayton, M.D.*

Following is an edited version of one of my closing arguments. In this particular case we not only sued the negligent doctor, but also his professional corporation. By naming the professional corporation we were able to reinforce a theme of the doctor and his corporation being more concerned about profit than patient safety.

The complaint alleged that the doctor failed to adequately monitor the problems of a late term unborn child, and thereafter failed to do a timely cesarean delivery. As a result, the unborn child suffered a lack of oxygen prior to the delivery, resulting in cerebral palsy. The child was born severely compromised with the need of lifelong care. Both the doctor and his clinic denied any fault. The matter was tried for two and a half weeks, resulting in a plaintiffs' verdict for $8,455,797.80.[1]

This argument demonstrates the effective use of the court's instructions. These included the "weaker and less satisfactory evidence," "witness false in part," and "hypothetical question" rules. The defendants relied on the records they produced which didn't include all the tests, phone calls, and other encounters with the plaintiff mother. As you'll see, the court's instructions enabled me to make a compelling argument that the defendants' evidence and experts were not reliable.

This closing additionally shows how to use demonstrative exhibits to pull together and synthesize weeks of testimony. By creating graphic charts that summarized the key points and opinions of all who testified, I was able to organize the testimony in an easy to understand format for the jurors.

The defendant doctor in this case disappeared during the plaintiff mother's labor. After reading this closing, where do you think he was, and more important, why?

When it comes to the damages, notice how the verdict form is used as a template to structure the argument.

[1] Two months after the verdict, the case settled for $8,000,000. The defendant doctor had a one million dollar policy and the clinic had a one million dollar policy. We were able to collect $8,000,000 because we had also developed the case with an eye toward a "bad faith" claim if the jury awarded more than the defendants' policy limits. The strength of our "bad faith" evidence enabled us to collect from the defendants' insurance company.

Hastings v. Hayton, M.D.

Douglas County Circuit Court

Case No. 99CV0117MA

Edited Closing Argument

This case is about a baby boy and what predictably happened to him during his delivery when his healthcare providers based his mother's care on previous business decisions. What happened to this child wasn't an accident. What happened to this baby boy happened because the professionals entrusted with his care put profit ahead of safety. This youngster is now a statistic, a very inconvenient economic statistic for these professionals. His plight was determined far upstream of his birth by business decisions. What we're saying to you is, when professionals who we trust with our health and loved ones choose to put profit ahead of doing what's right, the result is a baby boy like this one.

His name is Cody. He has a name and a mother, a father, a brother, and grandparents who love him dearly. But, for purposes of the defendants' economic analysis, he's simply a statistic…he could have been any baby boy or baby girl.

What happened here is the result of doctors and clinics favoring profitability by not using common assessment devices. These doctors and nurses were playing "ostrich" medicine. I call it that because it's like putting your head in the sand. You choose not to look.

The baby can't tell you what's going on inside his mother and what he feels. The only person who can say is the mother; but, if you don't examine the mother, you'll never know what the child's condition is. So, you have to listen to your patient, the mother, and you have to use appropriate assessment devices.

If, for business purposes, you choose not to do this, then there will be predictable statistical consequences. You may be able to dodge the bullet 95% of the time, but when the bullet hits, it's not an accident. It's not an accident, it's a statistic. It's an economic consequence flowing from earlier economic choices. It's what happens when you play roulette with your patient's health by making economic decisions based on profit at the risk of your patient's health.

Cody is a predictable consequence of prior choices. He's not an accident. Everyone's entitled to make a profit, but not a profit wrongfully earned. Patients have a right to expect their healthcare providers to put their health interests ahead of profitability.

Patients have to be able to trust their doctors and nurses. Every patient has this right because every healthcare professional has that responsibility. That's what this case is about.

The economic consequence of the defendants' prior business decisions now amounts to $18,455,797.80. $18,455,797.80, that's an economic wallop for sure, but they chose to take the risk when they mandated profits before reasonable health care. They're the ones who chose to risk patient welfare. Now that risk has produced real life consequences and it's financially inconvenient. You [pointing at defendants] created the risk by your prior business decisions.

There are two defendants. One is Dr. Hayton and the other is a professional corporation, a business. It's this corporation that employs Dr. Hayton and also employs Dr. Hollander. These are the doctors. There were about 25 other employees who worked at four or five different clinic offices. They had an office manager who was in charge of people and paper, not healthcare. This was a corporate entity and that's important because when we're talking about business choices. We're not attacking any one person…we're attacking a systemic value system that puts profit first and creates this roulette situation that resulted in Cody.

First, I want to talk about a medical device called the fetal monitor. It's a fine threshold device to screen for problems. It's important because it is a threshold device. It doesn't cure anything; it's simply for learning more. It helps to zero in on whether or not the baby is having a problem requiring immediate intervention. You have to listen to the patient and understand the patient's concerns so you can promptly use the fetal monitor to help determine if there is a problem.

Now, why didn't they use the fetal monitor to determine if there was a problem? That's really the first question. Why wouldn't they just use it? It's the threshold device that lets you see if the baby is in distress.

Why? Well, it's because of money. You heard the doctor from Medford say that medical costs are outrageous and it would be expensive for the patient. I ask what's more expensive for the patient, a fetal monitor test or a baby with brain damage like Cody?

You see, it's about the margin of profit for the two defendants. Cody's mother paid the defendants $2,500 to deliver her baby. The doctor chose to enter into a contract to deliver her baby for that amount. It's called capitated healthcare. He agreed to provide necessary health care services for Cody's mother during her pregnancy and Cody's delivery for a fixed fee. So how do the defendants make a profit? Well, if you're the doctor, you increase your profitability by seeing more patients for a shorter period of time. You also increase your profitability by not using devices such as the fetal monitor

machine. So, there's a lot of cramming lots of patients into your workday with appointments that each last from 5 to 7 minutes. That's important for a couple of reasons I'll talk about later.

What level of service did the defendants' nurses provide? That's an important question because on January 28th Cody's mother called the defendants with concerns. She never talked to a doctor; she talked to an employee of the defendants, a nurse. That's part of the level of service the corporation sold. It's okay to do that, but if the nurse is responsible for the patient, then she should have ordered the patient to be put on a fetal monitor. Every other nurse in town says you put the patient on a fetal monitor. Georgine Watson, Bonnie Raney, Dr. Sohl, and the perinatologist from Medford, they all said that's what you do. You have protocols.

But not these defendants. You walk in their door and the nurse you meet doesn't do what every other nurse does. Why is that? She's simply working for an employer. She's an attractive woman, a good person, but every other nurse in town does it differently. It's not her fault. She did what she was told to do as an employee of a business.

If she'd done what every other nurse in town does, she would have Cody's mother tested by the fetal monitor and it probably would have shown a problem. Now, the doctor then may have had to do some more tests, because if you actually examine the patient and find something un-reassuring, then you explore further. You order an ultrasound. It's non-invasive, it's easy to do, and it's relatively inexpensive. The equipment is right there in the office and it allows you to actually see the baby.

There were a number of ultrasounds done earlier on Cody. [pointing to ultrasound images] Some when he was a tiny little guy on July 19th. They show his head, his body, his legs, his feet and his arms. Even though he was just a first trimester baby you still can see a rich amount of detail.

At 39 weeks, Cody's ultrasound showed a full term baby. See the profile, [indicating] the head with a little nose. His fingers and the way he's sucking his thumb. You can even count the toes on his feet. This is what you can do and it doesn't cost much. For the defendants to suggest this is rocket science and not using it actually protects the patient is foolish … what planet are they on?

Now the ultrasound should've been done the same day the fetal monitor test should have been done. It's not difficult; we're not asking for high end tests. Once you discover a problem from the fetal monitor strip, then it's incumbent upon you to take the next step; and then, if you don't like what you see, you've got to go to the next level of testing which is the biophysical profile that Dr. Martin discussed.

Now, the biophysical profile is a bit costly and the test would cut into your profitability if you've charged this patient a flat fee of $2,500. So, the defendants have a financial disincentive to provide the test. The fiscal disincentive is structurally built into the business operation. Not doing the test clearly enhances business profit, it's the bottom line.

By choosing ostrich medicine and not doing the inexpensive threshold tests such as a fetal monitor and an ultrasound, the defendants insulate themselves from having to do more expensive tests like a biophysical profile. They're playing roulette with Cody by playing the odds and choosing not to look. That's what Dr. Bodenstein meant when he said 95% of the time a bad fetal monitor strip doesn't mean you have a problem. But, if you don't investigate, you don't know. And by making the business decision the defendants did, you're playing roulette. This is the one office where the nurse isn't going to quickly administer a fetal monitor test. It's a business choice made by her employer.

The defendants' expert testified that the cost of the fetal monitor test was exorbitant even though he later admitted that he didn't know what the cost was. Once his lack of knowledge was established, he then said that he wouldn't want to burden the patient with the test. Well, remember, the patient is asking for the test! That's what informed consent is all about. Give the patient the choice. She'd already had 2 prior normal fetal monitor tests when she had some cramping earlier in her pregnancy.

Look here, on 11/25 she went in and on the next day's chart it says, "Patient was in hospital last night for pre-term labor. Sent home on magnesium plus per Dr. Hollander. Dr. Hayton orders refill." She didn't get a fetal monitor test at the defendants' office, she had to go to the hospital. The machine is in the office and they won't use it!

Interestingly, she went back 4 days later. She still had a problem so he brought her back in which is what you should do. It's not even charted here. Remember, in his opening statement, defense counsel said the defendants are defending by relying on their medical records. Yet, if you look on 11/29, the date she was in the hospital, that fact doesn't even exist in her office chart notes which they're now attempting to use as a defense. We didn't create that records omission. She had to go to the hospital 2 times for fetal monitor testing, and one of those tests doesn't even show up in her office chart.

What we have here is essentially a $35 service for a fetal monitor test. Let me analyze the economics with you. Actually, the test is cheaper than that because it's an in-house in-kind cost which was prepaid. What it actually costs is the paper. The machine is sitting there, it's an asset, like a car. Once you buy it and pay for it, you don't have to pay anymore. It's an asset you buy and then the more you use it, the more profit you make from it. It isn't as if you buy it and then have an incentive not to use it.

The doctors don't even do the fetal monitor or ultrasound tests; their staff does. The nurses are the ones who do the tests, not the doctor---the same doctor who doesn't work on Wednesday. All the fetal monitor test really costs is paper and staff time. It's not a cost from another provider that the doctor has to pay to provide the service. It should legitimately be included in the $2,500 pre-pay. It isn't as if the doctor is going to get stiffed financially. It was an economic decision not to use the fetal monitor. The defendants were cutting costs, including cutting service to improve their profitability at the expense of their patients' care. They played roulette with the welfare of their patients.

If Cody's parents hadn't purchased a pre-paid or capitated delivery package, the defendants would've had a business incentive to do additional testing because the patient would've paid for it. The defendants' motivation to provide the service is contradicted by the patient having a pre-paid plan…it cuts into profitability. We think this economic analysis helps explain why nobody associated with the defendants is really a bad person, but the healthcare was. The business is appropriately sued because the business played medical roulette. Cody was not an accident. He was an economic statistic and the resulting consequence of business choices that disregarded patient health.

So what's the best defense they've got? They're attacking what's called legal causation. They say, "We just don't know when this baby's injuries really occurred." Well, the reason you don't know is because you didn't look, you didn't assess. The defendants profit economically by providing substandard healthcare, and then they seek to profit in this courtroom by standing behind a legal defense that says, "Nobody knows." "It's God or something…" That's not fair. If nobody knows, it's because the defendants didn't do their job. It was their job to know. All Cody's mother can do is tell them she thinks something's wrong.

That's the defense…now they say we can't tell when the baby was hurt. Was it on the 28th? The 31st? The 4th? If there's any doubt, we say it's because they didn't do their job. It's the darndest defense when they seek to profit by their own wrongdoing, medical incompetence, and later attempt in court to use their earlier medical misconduct as a legal shield.

Let's talk about the baby's kick count. We call it medicine by the numbers. Ten in ten. Ten in twenty-four. It's confusing. Not every patient has the same level of sophistication or ability to understand, and when she's stressed you can't assume the mother is going to understand what you mean. No other nurse in any other clinic in this medical community would practice medicine by the numbers. They'd put her on a fetal monitor. Cody's mom never got to talk to a doctor, so when she was told to do kick counts, there are different ways to do that…how was she to know? It doesn't matter

because there's only one nurse in the community who gives advice by the numbers, and it's the nurse in the defendants' clinic. If you go to any other clinic, they'd put you on a fetal monitor. They don't play kick count number games. If the pregnant woman has a complaint, they put her on the monitor. Why? To find out if there's a problem instead of relying on the mother to count. Sure, it's cheaper to play the numbers game. That's the answer…follow the bucks. It maximizes profitability to practice medicine by the numbers instead of actually monitoring the baby's health.

The defendants also defend by saying most cerebral palsy can't be prevented. That's true. That's why we tested Cody with every test known to medicine and ruled out every cause other than medical negligence. We've eliminated every alternative explanation other than the defendants' negligence.

Remember, when I picked you as a jury we agreed we'd try this specific case. We aren't trying the McDonald's hot coffee spilling on your lap case. We're trying this particular case on these particular facts. To say most cases of cerebral palsy can't be prevented is true as a general statement, but it doesn't apply to these particular facts.

Cody has no genetic defects. Dr. Glass from Seattle said all the genetic tests, including a Lyden mutation test, were done. Genetic defects or infection, sepsis they call it, were eliminated as a cause of Cody's condition. Inadequate health care caused it. That happens. Not very often, thank goodness, but it does, and that's what happened to Cody.

The defendants keep saying, "This is all very sad." How many times have we heard it? We knew it was sad before we walked into court. Sadness is not a defense; it's not an anything except an appeal for your sympathy by the defendants.

Another defense is that the baby's cord gas didn't meet the 7.29 criteria outlined by ACOG. For two days we talked about the ACOG criteria and Cody's cord gas number. Then, we realized the blood drawn from Cody's cord was venous, not arterial. That makes a big difference. Cody's cord blood gas numbers aren't even reliable. Our experts researched the literature, and based upon that research, they say that the ACOG numbers are merely guidelines. Even the defendant's expert, Dr. Martin, has written and published articles about babies that don't fall into the ACOG guidelines. So, it isn't one size fits all.

Now, I want to talk about the court's rules concerning how to evaluate the weight you give to each document and each person's testimony. The rule for documents is called the "weaker and less satisfactory evidence" rule. It means, if one side has the ability to produce better evidence and they don't, then what they do produce can be viewed with distrust. This rule also has some application to people. If a witness doesn't take the stand, such as Dr. Hollander, who was in the surgery room, who was the one defendant

Dr. Hayton allegedly faxed the strip to, and who is also an officer of the defendant corporation; then you can consider his absence.

Remember, Brenda Hastings says Dr. Hayton told her he had faxed a strip to Dr. Hollander and Dr. Hollander said, “This is an emergency C-section.” The last question we asked defendant Dr. Hayton was, “Well, wasn’t your buddy, Dr. Hollander, sitting behind you here during the trial?”

Dr. Hollander was sitting right over there [indicating], directly behind the defendant, Dr. Hayton. You folks didn’t know that because you don’t know who all these people are. That’s why we asked that last question, hoping you’d remember it… “Dr. Hayton, isn’t it true that the same doctor who was in the surgery room with you has been sitting back in this courtroom right over there?” They’ve been chatting away during the breaks, but Dr. Hollander didn’t take the stand did he? That’s an example of how the weaker and less satisfactory evidence rule applies to people.

There’s also the “witness false in part” rule. It’s says, “If you should find that a witness has been false in part of their testimony, you may then distrust the rest of their testimony.” That’s your call to make as jurors. You’re the judges of witness credibility.

These rules apply to the evidence you’ve seen and heard. One focuses on documents but includes people. The other one directly deals with witnesses and their testimony.

Using the overhead projector, I want you to actually see what the weaker and less satisfactory evidence rule says: “In evaluating the evidence you may consider the power of each side to produce evidence. If weaker and less satisfactory evidence is offered by either side when it appears to you that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust.” This is a rule, it’s an instruction, it’s the law. It’s like playing football or basketball. There are rules you have to go by. So, how does that rule apply to these particular facts?

Pam Hickman was the office manager who testified. She said, “It’s not okay to lose documents. It’s not okay to throw them away. I don’t care if it’s a sticky, and I don’t care if it’s a spiral, and I don’t care if it’s a yellow tab, all of those documents are important and we keep them for ten years. We keep every darned document. And I’m in charge of paper and I’m in charge of people and I run this business and losing things is not the way we do business here.” I asked her if one of the reasons she kept all those documents and records for ten years was in case some lawyer like me had her sitting in front of a jury and was asking her what happened many years before? You remember her answer…

Why is this rule of law important in this specific case? Well, on 1/28 a lady named Janette Reed answered the phone call from Cody's mother. You didn't see her. She didn't testify. She wrote a message and passed the phone to nurse Lynn Herscher who then responded with medicine by the numbers. The defendants think her kick count advice on 1/28 is a big deal. We don't think so. Why? Because no other nurse in town practices medicine by the numbers.

"My baby has stopped moving to almost nothing and I'm very concerned." That's what we say Cody's mother said in that phone call. Now, that should be on a sheet of paper. The receptionist would have written that down and it should have been preserved. Then, the nurse would have been summoned to talk to Cody's mother and she would have made a chart note. There should have been two separate documents generated in response to the phone call. Now, there is a fact question as to what Cody's mother actually said during that phone call. The defendants bring only one of the two documents that clearly existed. Remember, it's not okay to lose the receptionist's note.

You might think it's lost because it was just a sticky. No, that's not okay. Pam Hickman, the office manager, told you the form of the document or its size doesn't matter. It could be a spiral, a yellow pad, or a sticky; it's the content that's important. It's not right to say that it's okay to lose important information if it's written on small pieces of paper. That's a business choice their employees made. It's how they chose to do business, and their boss says it's not okay to lose that document. That's why this instruction applies here, especially when the defendants are attempting to defend themselves based on records. We're saying, "Where are all your records?" Preserving all the records was within their power. We didn't have the responsibility to make notes on the phone call or to keep those notes for ten years. The defendants were in control of their own records, and now they have only brought in documents that favor them.

If you find that Kim Hastings told the truth, that she was accurate and that the missing phone message would have reflected this, then you can distrust the charted nurse's notes. You can distrust the nurses note that says "Patient states baby isn't moving as much as usual," because they've lost the prior document that states specifically what Kim said. The law doesn't cut them much slack here, and neither does the defendants' own office manager. That's the application of the "weaker and less satisfactory" rule to these facts, and that's why it's important.

You know, there should've also been a fetal monitor strip taken on 1/28 in the records. There isn't one, because the test was never done. It was a business choice. We wouldn't have to be speculating and engaging in guesswork and conjecture if the nurse had done what she should have done. We also should be looking at an ultrasound done on 1/28. It should be here now, in front of us. But it's not. It's not a missing record, no, it's actually worse, it was never done.

Who had the power to perform a fetal heart monitor or an ultrasound? Was it Kim Hastings? Could she give herself her own ultrasound? Isn't that the logical extension of their defense? How about a biophysical profile? It might have been financially inconvenient but totally necessary and appropriate.

There should have been a birth certificate for a healthy baby boy born on 1/28 instead of a birth certificate issued for a badly injured baby born on 2/4. This is what should have happened. There should have been a birth certificate for a birth dated 1/31 at the very latest, a birth certificate for a healthy baby like the baby shown on these earlier ultrasounds. This baby was perfectly healthy. Now, he can't even suck his thumb. He could do more in his mother's womb than he'll be able to do for the rest of his life. Isn't that strange? Birth is supposed to be the beginning, and in a way that's almost cruel, it was the end for Cody.

Much of the same argument concerning missing records repeats itself for Kim Hastings' contact with the defendants on 1/31. If the baby wasn't delivered on 1/28, then certainly on 1/31 she should've had fetal monitoring done. On 1/31 she went to see the defendant, Dr. Hayton. If there was any doubt about kick counts and the number game, then it should've been settled on that day. Kim's mother-in-law, Brenda went with Kim that day to the doctor. Remember, Brenda has mentored over 70 women through their pregnancies. She went with Kim that day because Kim didn't see a doctor on the 28th and Brenda knew that wasn't right.

Brenda is no shrinking violet; this defacto mother of 70 pregnant girls walked in with Kim and told the doctor about her concerns. The doctor says he assured her face to face and yet she isn't even charted as having been there. There's no chart note indicating Brenda Hastings even talked to the doctor that day or the doctor talked to her. It's as if Brenda never existed, and yet, now the defendants are trying to defend on their records. Brenda Hastings put up her hand and swore under oath saying, "I went in. I said it. I told him." Dr. Hayton now says, "I don't remember anything. I'm defending on my record, and I don't remember." Brenda Hastings doesn't even exist according to their records. Not likely! Have you ever seen a mother bear get mad? That's how Brenda Hasting felt given her concerns for Kim. Later, on 2/4, her concern repeats itself, but now with even more vigor.

On 2/4 Kim called into the clinic that morning and complained, "My baby still isn't moving and I need to know what to do." She received assurances that it was okay, "babies slow down during the last trimester because they have less room to move." This phone call should have been documented. It should be in the record. Dr. Hayton says they really tried to find these phone messages. Ten years of records you're supposed to keep. Now there are two phone calls coming in and both messages are lost. How do you lose two in one file?

Once again, this is what the “weaker and less satisfactory” rule is all about. It’s the law. It’s an important rule when you have a corporate defendant that loses important records and then tries to defend its actions on the records it still has. The first thing opposing counsel said when we began this trial was “We’re defending on the records.” The law has an answer for that. The “weaker and less satisfactory” rule as applied to the evidence in this particular case instructs you to distrust the evidence the defendants do bring in. Why? Because of what they didn’t bring in.

There’s also a second rule that’s important. It’s called the “witness false in part” rule and it says: “If you find that any person has intentionally given false in some part, you may distrust the rest of that person’s testimony.” Let’s see how that rule of law has application to this case. The doctor knew he was in big trouble. He knew it. And we’re claiming that the records they’re defending on were, using their word, “doctored.” He knew he was in big trouble and he tried to create a Hansel and Gretel breadcrumb trail in the records so that later he could find his way out of this mess. Down the road, if Cody’s family realized something went wrong, Dr. Hayton was going to blame it on fate, cerebral palsy happens, anesthesia, or whatever. That’s the reason we’re saying he shouldn’t be trusted.

He medically abandoned his patient between 3:00 and 4:00. He just disappeared! He doesn’t remember where he went. Pretty strange. He claims he was at the hospital at 2:00, and if you study the records you’ll see where he says “The patient then began having moderate to severe variables both of which are associated with contractions…At approximately 2:00 I discussed…” Not true doctor. It wasn’t until after 3:00, an hour later, that he showed up. Now, they are defending on documents. This is what he wrote. Not even a nurse could help him out on that one because they keep track of what time he actually shows up. That’s a false bread crumb dropped into the record to create the notion he was at her bedside because he knew he should have been there the entire time, and the earlier the record shows he got to the hospital, then the more caring he looks. It makes him look like he was really on top of the situation, when he wasn’t.

That’s why, in addition to missing documents, the documents which are here are “doctored.” This is the reason why you should distrust Dr. Hayton, because of this rule of law.

Now, I’m going to tie everything to evidence so that you can form your own opinion. If I make an argument without evidence to support it, you know what to do with it.

Then the doctor has the respiratory therapist draw the blood for the cord gas test when he knows they do it wrong. He knows they draw venous blood instead of arterial. Look at the form for the test; it says arterial blood gas for a reason. There’s a difference

between the cord gas from arterial blood and venous blood. The defendant doctor delivers 180 babies a year. He knows the respiratory therapists don't do it right. He could have drawn the blood himself like Dr. Martin does. Doctors do that. He is the captain of the ship. By choosing to have the respiratory therapist draw the blood, even though he knows it won't be done correctly and, therefore, is inaccurate, he determines what the future evidence will be. He knows they do it wrong and, therefore, it will generate evidence supporting the defense that a blood gas of 7.29 doesn't fit within the ACOG guidelines. He knew that. One more false bread crumb he's created.

Selective memory. Do you believe the doctor really doesn't remember where he was between 3:00 and 4:00 on February 4th? Hard to believe his amnesia when within an hour of that missing hour, he handed Cody over to Dr. Hall, the pediatrician. Dr. Hayton says he has no memory of it. Dr. Hall, the pediatrician, called the experience a nightmare…but somehow the defendant has no memory of this nightmare. Do you believe that's a credible statement? If you think any portion of Dr. Hayton's testimony is "false in part," then you're free to distrust the rest of his testimony.

Selective memory. He now remembers nothing. Contrast this with Dr. Garloc, Dr. Hall, and Nurse Watts. They all seem to have good memories. In fact, one of them even went home and typed up an extra report in case later there was any doubt about what had really happened. Dr. Garloc did that and he then put the report in a special file. Why would a doctor do that? And this is an event the defendant doctor has forgotten, just wiped it out of his mind, so he can defend on his records that say he showed up at the patient's bedside at 2:00.

There's something else I find interesting. If you look at this diagram of the surgery room you'll see the patient, the surgical assistant, the surgical nurse, the pediatrician, the pediatric nurse, and Dr. Hayton with his assisting doctor, Dr. Hollander. One person is missing from the diagram, it's Darla Smuck. The defendant doctor does recall her, "Oh yea, I remember her." Why was she there? How did she know that an unscheduled emergency c-section was going to happen at 5:01? It was an emergency, it was unscheduled. The records say that. So how did she happen to be there…it was unscheduled, it was unannounced. "Oh yeah, I remember her." I again ask you, where was the defendant doctor between 3:00 and 4:00?

Now the biggest discrepancy in the records is when it comes to describing Cody. It's like having two different babies. Dr. Hall was handed Cody and remembers a nightmare. Dr. Hayton reports that Cody cried and sucked his thumb. Compare Dr. Hall's report with Dr. Hayton's and it's like the defendant was on a different planet. Dr. Hall reports "Operative delivery, the amniotic fluid was noted to be green and colored although thin and watery. The baby was born flaccid without any attempt to breathe." That's important. The defendant claims he heard several cries. If you can't breathe,

you can't cry. Think your way through that. When you go back to the jury room, put your hand over your mouth, you can't breathe and you can't cry. Dr. Hayton claims he heard several cries. No one else in the room could back him up on that. Not one person. Dr. Hollander didn't come into court to testify that he heard it. Nobody in that room wearing a gown heard it. The father didn't. The defendant claims he heard not one cry, but several…One more example of "doctored" records.

Dr. Hall, the pediatrician says in his records, "The baby was born flaccid without any attempt to breathe. …The baby was delivered by emergency c-section. It was flaccid without detectable pulse." Cody didn't even have a pulse and Dr. Hayton claimed he was crying and sucking his thumb? Not likely…

Compare the two records when you go back to the jury room. Dr. Hall says "Flaccid without any ability to breathe." Dr. Hayton says "The baby initially has several cries and seemed to have good tone as it was being delivered with his mouth sucking on my finger." Not likely. Cody couldn't even breathe. He had no muscle tone. It was like Dr. Hall's report said. It was a limp baby with no muscle tone. He didn't suck on somebody's finger and cry several times. That, we submit, is the most blatent of Dr. Hayton's statements that has no one else to support it. Not Dr. Hollander, not Darla Smuck, not anyone else in that room.

Only one person in this courtroom claims "The baby initially had several cries and seemed to have good tone as it was being delivered with its mouth sucking on my finger." One person makes this claim. The reason why this is important is the cry. You don't have to be a doctor to hear a cry. It's not rocket science. Everyone in that room could have and would have heard that cry. It's a fact question for you. Only one person in that delivery room hears several cries. Dr. Hall tells you squarely, "The baby was flaccid." He couldn't even breathe. There it is, two different babies delivered. One for Dr. Hayton that nobody else saw, and the real Cody everybody else now has to live with.

"If you find that any person has intentionally given false testimony in some part, you may distrust the rest of it." Pretty aggressive arguments, but I'm supporting them with facts … (1) He showed up at 2:00. Not likely. (2) He didn't deliver a baby that was pink, good tone, sucking his thumb, cried several times. Not true. Cody couldn't even breathe, he was almost dead. That's why the witness false in part rule has application to this particular case when they're defending on these records.

A third point, Dr. Hayton has no recall of faxing a fetal monitor strip to Dr. Hollander. Both of these doctors worked for the same corporate defendant. Brenda Hastings says Dr. Hayton told her that he faxed a fetal monitor strip to Dr. Hollander who replied, "We

have to do an emergency c-section." This fact does not exist in these records. There is no fax. Why's that important? Because then we'd know what Dr. Hollander actually saw. We'd know what time Dr. Hayton made the call and sent the fax. Because it was a fax, we know there had to be a document on both ends. Dr. Hayton sent a fax and Dr. Hollander received a fax.

Within this corporate entity it's not okay to fail to keep documents for a full ten years. Both documents concerning this fax communication about Cody are missing. Dr. Hollander didn't testify. That's important because of both rules we've been talking about, the "weaker and less satisfactory evidence" instruction and the "witness false in part" rule. Paper trails are important. That fax is a big deal. We don't know what it contained or when it was sent, but we do know a board certified obstetrician (Dr. Hollander) said, "Do an emergency c-section." And yet neither doctor has any recall of faxing the fetal monitor strip. That's not okay because we now have two doctors, employees of the same corporate defendant, both giving medical advice to the patient and both have lost their records.

Dr. Hayton also changed his diagnosis. His opinion before the c-section was cord compression. The umbilical cord was around Cody's neck just like in our model here. Just because the cord is looped around the neck doesn't mean it's compressed. The cord can be loose or not loose. But, because the mother was complaining about reduced fetal movement, the best judgment was the cord was compressed. The doctor got it right. Even after looking at the fetal monitor strips on 2/4 his diagnosis was cord compression. At the time of the c-section there was a cord around Cody's neck but the doctor couldn't tell us how many times it was wrapped around Cody's neck. He answered, "I don't know."

So what does he come up with for his post c-section diagnosis? He says, "Term pregnancy. Viable male infant." No Dr. Hayton, Cody was not viable. He couldn't breathe; yet his records state: "Meconium stained fluid." No doctor, no one said it was meconium stained, no one but you. There was some presence of meconium but he had to say it was stained because, if it's stained, then it later allows him to say the time of the in utero injury to Cody is earlier.

Remember, we talked about how if you bleed, the fresh blood is red and then it turns brown as it ages. Meconium was present but there was no stain. Dr. Roos, the pathologist, and Dr. Altshuler, the Australian fellow, both agreed that there was no meconium stain. In fact, Dr. Altshuler was adamant that the meconium could not have been there for more than ½ an hour. More "doctoring" the records. More false bread crumbs dropped in the records trying to cover his negligence.

A cord around the neck isn't a big deal. It happens in 15% of all babies delivered but you have to be very careful with that 15%. That's why you do the diagnostic tests, the fetal monitor and ultrasound. But, if you're not going to be careful, then you're playing roulette. Maybe you'll dodge the bullet, and maybe you won't. You're going to deliver a good baby 95% of the time. Babies like Cody will show up every once in awhile and, when it happens, it's not an accident. It's an economic choice made with a predictable, statistical variance rate and the result of that choice has a name, it's Cody.

It's strange isn't it, no defense witness remembers anything. They're struggling with amnesia but not Dr. Garloc, Dr. Hall, and the other nurse who was in attendance. Everyone who was there has a memory of this event except for the defendants and their employee who testify as if this nightmare didn't happen.

They're using their omissions in their records to defend themselves. Their chart notes don't even acknowledge Brenda Hastings being present. The first call Kim made on 1/28 isn't noted in the record. The notes are supposed to be quotes of what was said. No note in the record to even know what was said. On the 1/31 note there's no discussion about the prior 1/28 phone call. The doctor wasn't privy to that earlier phone call and that's why it should be charted; so that when he sees his patient on 1/31, he knows what she's been complaining of and how she's been doing. There's no mention of Brenda Hastings being there on 1/31. And now he says he's defending on his records…he defends on false breadcrumbs. By the way, that little plus sign there on the chart notes, right there…he claims that means he listened carefully to his patient. It's obvious from the facts he really didn't hear anything that was said, and you know, with concerned mother-in-law Brenda in the exam room, plenty was said.

Next, the defendants' lawyers only asked their experts questions based upon the defendant doctor's version of the facts. I underline the word version here. Dr. Hayton's version, which is dependent on the records his lawyer gives to his experts. I'm sure you noticed that his experts all walked up to the stand with a skinny pack of records…that's all Mr. Cowling, the defendants' attorney, gave them. Seeing that, I knew when the defense experts took the stand that they couldn't have been given all the important documents and records. I watched Dr. Dan Tomlinson take the stand and saw the one inch thick packet of documents he'd reviewed. Both sides have generated boxes of depositions, sworn testimony about the facts of this case. Dr. Tomlinson wasn't given the whole story by Dr. Hayton or his lawyers. I knew that before he ever took the witness stand, and that's why I called Brenda Hastings back to the witness stand a second time.

I asked the defendants' experts to show you, the jury, all they'd been provided. I didn't know exactly what they had but I knew it couldn't be much and I was willing to bet my last dollar that Brenda Hasting's depo wasn't part of their documents. Remember, we

went through all their documents, one by one, we listed them all. Sure enough, Brenda Hasting's deposition was not there. The same people that ignored Brenda back on 1/31 chose to ignore her again when they brought their experts to court. The first time she was ignored wasn't an accident, and you know the second time couldn't be an accident either.

It's one thing for there to be, say, five pieces of information and I give you all five pieces of information and then ask you in a hypothetical question to assume only two of the five pieces of information are accurate. That's quite different from giving you only two bits of information, thereby ignoring the other three entirely. The defendants' expert was only given two bits of information. He wasn't given all the reports or depositions. That's the reason I use the word "brotherhood" to describe the defendant doctor and the defendants' medical witnesses.

The defendants aren't really interested in all the facts. Limiting information given to the expert to be sure his answers serve only your client is unfair. All the defendants' experts, the "brotherhood," are within the same medical referral system. One of them even called the defendants' lawyer by his first name. "Well Bob, you know this." Dr. Katz even admitted he runs a referral center. This relates to the bias, interest, or motive of a witness. It should assist you in determining whether or not these defense witnesses are credible.

Let's discuss credibility. I'm a lawyer, I'm not naïve. I know jurors are reluctant to trust lawyers. That means I have to earn your trust. It's not easy to do. You have every right to be suspicious of me. None of you have ever met me before, except for Mr. Steen, juror #10, and we met 30 years ago. You won't see me again and I won't see you again. I'm trying to give you a precise closing argument and be as data driven as possible. Mr. Johnson, Mr. Cobb, Mr. Strever, and I have all worked long and hard on Cody's case. We understand that eighteen plus million dollars is a lot of money. We understand that our credibility is at the heart of this case.

We say you should give no credibility to the defense. This was manufactured defense. Neither Cody's injuries nor the manufactured defense were accidents.

We provided our experts with all the information. When we hired a life care planner we gave him all the information. The numbers generated by his evaluation are huge. They're enough to blow your socks off; however, the defendants failed to bring in any expert to challenge any of his assumptions or conclusions. They didn't contest Cody's life expectancy and they never challenged the reasonableness of the present value of the plan. We used a median to allow you to make the choice. If you want to go high, you can award a Cadillac. You want to go low, you can award a scooter. You make the call. That's your job as jurors, it's not mine. My job is to give you all the facts.

The defendants never attacked our projected present costs, they invited you to “cut them a little slack” and assume some very favorable future economic forcasts. I’m going to attack our life care plan for them. For the sake of credibility, I’m going to show you some weakness in our plan.

We didn’t provide for possible future surgeries Cody might need. Dr. Glass talked about hip and ankle surgery and the need for a body cast. These surgeries may or may not happen. They would add fifty to seventy–five thousand to our projected costs. We just don’t know if he’ll need them. By the way, can you imagine helping someone in a full body cast? Helping them with bowel movements? Combine that with how Cody’s mother answered her door when Dr. Rollins came to visit. Cody had just had a spastic bowel movement and she was covered in feces. How is Kim Hastings going to do with a baby in a full body cast?

We’ve tried to keep appeals to your sympathy out of this case. We had our expert physician administer the same test here in the courtroom that he did in his office. You actually saw the clinical forensic exam so you can form your own opinions. Can you imagine what a good lawyer could do with this case in the name of sympathy? My mind races. The only honest way to represent Cody is to understate his claim. To be credible. To be modest. That’s why we had Dr. Glass present Cody. We didn’t make a circus out of the exam. It was clinically and medically appropriate. We hope you respect our effort. Cody could have been presented many different ways. We didn’t keep Cody in the courtroom, sitting here all day long, inviting you to feel sorry for him, as anyone naturally would.

The defendants brought in experts from the “brotherhood,” all from within the southern Oregon medical referral system. Who were our experts? One was Dr. Hayton’s instructor who taught him in medical school. Our experts are men in the eleventh inning of their careers. They’re not part of the feeder referral system. They could spit in the eye of the devil, the defendants, or anyone else, because they don’t need money from tomorrow’s referrals. Did you see how mad our expert, Dr. Thornton, got? He pretty much said, “That isn’t the way you practice medicine, son. That isn’t the way you were taught.” It might be your medicine, but it’s not good medicine.

That’s the difference in the experts you heard. Our experts don’t really give a damn because they’re at a stage in their careers where they can honestly call it the way they see it. All the defendants’ experts are part of a referral system and they definitely give a financial damn. That’s the difference in credibility. Dr. Thornton asked, “What planet was this guy on? He medically abandoned his patient.” This was a fellow who used to be Dr. Hayton’s instructor when he went through his residency program. These doctors are teachers who practice medicine they way it should be practiced and call it the way they see it.

I've made some charts to discuss the medical proof. One is for the nurses and it compares their testimony. As you can see, all the nurses named on this chart---Bonnie Raney, Georgine Watts, the nurses at Rogue Valley and Providence---all these nurses say it's the protocol for a fetal monitor test to be administered when there is any complaint of reduced fetal movement. The only nurse on this chart who doesn't test immediately when there is a complaint of reduced fetal movement is Lynn Herscher, the employee of the defendants who does medicine by the numbers.

This chart is a graphic comparison of economic decisions, these are all business decisions. I've discussed the nurses first because Cody's mother, Kim Hastings, never talked to a doctor on the 28th. She talked to a nurse who worked for the business which had, in effect, a standing order to practice medicine and nursing care by the numbers.

The only nurse who works for defendant Roseburg Women's Healthcare Clinic is also the only nurse who practices healthcare by the numbers. There's only one nurse on the chart who has Dr. Hayton as her boss. There's only one nurse on the chart that works for the same business as Dr. Hayton. There's only one nurse on the chart who doesn't do what every other nurse does. It's Lynn Herscher, the defendants' employee. Those are facts.

The second chart discusses the doctors. I've again listed all the doctors on the chart in the order in which they testified: Dr. Tarnasky, one of Dr. Hayton's residency instructors; Dr. Bodenstein, the perinatologist from Spokane; Dr. Glass, the Seattle pediatric neurologist listed in the "Best Doctors in America;" Dr. Bennett, the developmental pediatrician who is also a professor at the University of Washington; Dr. Altshuler, a world renowned placental pathologist; Dr. Thornton, another one of Dr. Hayton's residency instructors who wanted to know what planet Dr. Hayton was from when he abandoned his patient; and, Dr. Nichols, the Eugene doctor who was number one in his medical class, and who actually treats Cody.

Across the top I've listed various issues such as the mechanism of injury, dates of patient contact, and whether there was cord compression. As you can see, all the doctors agreed that this was a case of cord compression but there was some suggestion that the compression wasn't real abrupt, that it was an ongoing, intermittent process. You can also see that everyone agrees Cody suffered a hypoxic ischemic encephalopathy, meaning the blood supply to Cody's brain was cut off resulting in an insufficient supply of oxygen to his brain. This caused Cody's cerebral palsy. Everyone agrees.

Doctors Tarnasky, Glass, Bennett, and Altshuler all agree that Cody's injury could have been prevented had his mother received proper care when she called her doctor on 1/28. The quality of care she received on that day was inadequate. If the doctor

wanted to play the numbers game, he would have told her to do kick counts for one half hour and then test further if fetal movement is decreased. Kim had already done kick counts. There was decreased fetal movement. You don't do medicine by the numbers once a kick count has been done.

Now let's go to 1/31. Dr. Tarnasky says the standard of care was violated and harm could have been prevented. Cody could have been delivered by c-section. He used the analogy of a boxer taking a couple of punches and being in trouble but not yet permanently injured. Dr. Bodenstein says most of the damage could have been prevented, perhaps not all, but most. Dr. Altshuler talked about ongoing injury on 1/31 but that most of the damage occurred after 1/31. The harm could've been prevented.

By 2/3 the standard of care was certainly violated and Cody was suffering ongoing harm. Again, drawing on the boxer analogy, Cody is getting knocked silly. To suggest that Cody was not permanently damaged until 2/4 is against the medical evidence. This child was figuratively still on his feet, but by the time his mother was seen in the emergency room on 2/4, he was on his knees trying to get back up again. How many eight counts can any child take? He kept going down for six and eight counts. They kept getting longer. Six counts, seven counts, eight counts. Pretty soon the unborn child could no longer get up. This is my attempt to summarize the testimony. If your memory is different, rely on your own memory.

Let's talk about the defendants' experts, the "brotherhood." I've made a graphic chart for them too. You heard testimony from Dr. Martin, a perinatologist; Dr. Katz, a perinatologist; Dr. Sohl, a perinatologist; and Dr. Tomlinson, an obstetrician. As to the standard of care on 1/28, Dr. Martin said it was met if the chart note was a quote. This is defendant Dr. Hayton's chart note he's talking about. He said, "yeah, I'll cut you some slack on this one. If this chart note is a quote, then it's okay with me what you did."

In fact, all the defendants' experts said the standard of medical care was met if the chart note was a quote. So, that's the reason why they're trying to defend on records only--- all these experts came in and only had the defendant's chart note instead of actually knowing all the facts as you now do. I remind you the chart note is not a quote and you already know the rule concerning weaker and less satisfactory evidence.

What if Cody had been delivered on 1/31? His injuries could have been prevented. Remember Ex. 46? It involved the biophysical profile with its multi-factorial analysis. All the various criteria set forth on Ex. 46 supported an onset of injury between 18 and 72 hours prior to Cody's delivery at 5:01 on 2/4. According to the defendants' best experts, that is the window of time when Cody's injuries were commencing. That window does not reach back to 1/31. That's an uncontested fact.

Dr. Martin's testimony helped Cody's case because it completely eviscerated any defense argument that it was too late to have helped Cody even if the defendants had done a c-section on either 1/28 or 1/31. We say if Dr. Hayton had properly evaluated Kim Hastings at any point in time when she had contact with the defendants, then Dr. Hayton would have delivered a healthy Cody, just like his older brother Levi.

Here's a picture of Cody and his brother Levi. Cody should look just as healthy and normal as his older brother. If Cody had been delivered on 1/31, we wouldn't have the Cody you saw in court. We'd see a child just like his older brother. A sweet child. Levi is a southpaw. It appears that Cody is right handed. That's what you'd have, two normal boys. Here's Cody at the end of his day at school. Remember, Cody's educational supervisor, Phil Cusac, says that there is no harder worker than Cody. He gets an A for effort every time. He works hard and tires easily. This is Cody at the end of the day. He can't even lift his head. Now, look at the picture of Levi. This is the boy Cody should have been. His older brother, Levi, is a fine, healthy boy.

Cody wasn't their first delivery, their first baby. There was nothing unusual about Kim's pregnancy with Cody. Look at all the normal ultrasounds. Here he is sucking his thumb. He's almost four years old now and he still can't do that. The ultrasound images show the healthy baby Kim and Shawn had long before his delivery. Dr. Hayton gave them the Cody they now have. This healthy baby was something that belonged to these parents, just like their other son Levi does.

The last issue on this chart is whether an earlier delivery on 2/4 would have prevented any of Cody's injuries. The "brotherhood" all say that it wouldn't have made a difference. That's different from what our experts say. Our experts say Cody was suffering harm then. That's why Dr. Hayton had to run over to the hospital at 2:00 as he wrote in the records---until he got nailed on that point later---that he was over there at 2:00 beside the mother's bed. Not likely. That right there is clear proof that Dr. Hayton knew Cody's life was slipping away. By his own hand, he dummied that record up to say he was at the mother's bedside at 2:00. False breadcrumbs…

Dr. Hayton says, "At approximately 2:00 I discussed the situation." Not likely. He knew Cody was going down, he knew the baby was hurting, and that's why he made this notation. It's also why he wrote in the record that he delivered a pink baby that was sucking his thumb, a healthy baby who cried several times. By making these notes, the defendant doctor knew he could suggest that the anesthesiologist's later spinal block was responsible for causing Cody's injury. Babies are delivered every day with that type of spinal block and they don't look like Cody. But that's why Dr. Hayton wrote what he did, so later he could find something new, something downstream from his earlier misconduct. Dr. Hayton had to lie because he knew Cody was injured.

Dr. Tomlinson also said it made no difference…right…and that's why you see Dr. Hayton making a false entry that he was at the bedside at 2:00. Defendants' own expert, Dr. Sohl, got fairly close to the truth. He said, "Well, ideally, it would have been good if we could have delivered the baby earlier." Ideally? Right! How about trying a little common sense.

Our allegations of negligence are here before you. I'm showing them to you now because the judge will later instruct you that we need to prove by a preponderance of the evidence only one of the five allegations for Cody to win. We don't have to prove that the defendant clinic and Dr. Hayton intended to harm Cody. While we're proving a strong case, we don't have to prove intent, merely negligence.

We say Dr. Hayton was negligent and at fault in one or more of the following five ways: (A) in failing to adequately assess and diagnose a decrease in fetal activity and distress; (B) in exposing Cody to unnecessary prolonged intrauterine distress; (C) in failing to recognize or respond appropriately to symptoms of umbilical cord compression; (D) in failing to timely perform or arrange for a cesarian delivery; and finally, (E) in failing at the hospital to access the mother and her unborn baby in a reasonable and timely manner.

We're not talking about 2:00 here. While 2:00 would have certainly been better than 3:00. Don't forget, we only need to prove one of these allegations by a preponderance of the evidence, this means that the greater weight of the evidence is on our side…51% versus 49%.

You've seen what a good fetal monitor strip looks like. Kim went in on 11/25 and 11/29 and had fetal monitor testing done. We've seen the strips. There's no reference in Dr. Hayton's chart that she had a fetal monitor test on 11/29. Kim's hospital visits during her pregnancy don't even exist in Dr. Hayton's chart notes. And he seeks to defend himself on his records and their accuracy.

Now I want to talk to you about hypothetical questions. When you've heard us lawyers say, "Doctor, isn't it true that your opinions are worth no more than the facts upon which they're based?", that question pertains to hypothetical questions. With a hypothetical question we ask the expert to assume this, this, and this---A, B, and C. The rule allows us to ask the witness to assume that certain facts are true and to then give an opinion based on those assumed facts; however, if you jurors find any of the facts assumed and relied upon by a witness in forming an opinion were not established by the evidence or were untrue, you must disregard the opinion.

We're asking you to disregard the opinions of the defendants' expert witnesses because none of them were given the whole story. They are all assuming that Brenda Hastings wasn't there and didn't say what she says she said. They also assume that Kim Hastings didn't say what she says she said. They have to do this because if they didn't,

they'd have to agree with us that a treating doctor had to do more than what Dr. Hayton did. That's why the application of this hypothetical question rule is so important. It's directly responsive to all four of the defendants' experts and their opinions that the standard of care was met. It's your decision to decide whether or not Brenda Hastings was telling the truth when she said she went in with her daughter-in-law on 1/31 and told Dr. Hayton what she says she did.

The other rule I want to talk about is the "standard of care." It's a legal rule or concept. The judge will tell you that obstetrics is a medical specialty. If the doctor was just a regular family doctor or a general practitioner, then the standard of care would be different from what it is for a specialist. Specialists are supposed to know more because they have more training. Now, if a doctor is a specialist in a particular field of medicine such as obstetrics, then he has the duty to use that degree of care, skill, and diligence which is used by an ordinarily careful specialist practicing in the same medical field in a similar community. A failure to use such care, skill, or diligence is negligence. I emphasize the words care and diligence here.

Just because the "brotherhood" says the way Dr. Hayton practices medicine is wonderful, doesn't make it so. The rule concerning the evaluation of expert opinions based on hypothetical questions and assumed facts allows you to say no to these doctors. You can tell them no, it's not okay to practice medicine the way they say. You're basing your opinions on assumed facts which we, the jury, say are not true. We think Brenda Hastings was there. We believe she told the truth. If you believe Brenda Hastings, then out go all their experts' opinions because of the hypothetical questions they were asked and the way the defendants' attorney carefully chose his words and crafted the questions.

The defendants' attorney read our First Amended Complaint to you toward the end of his part of the case. You heard that Kim Hastings told defendants' staff on 1/28 that the baby's movement had simply slowed rather than the baby's movement had slowed to almost nothing. It really doesn't matter which version of what Kim said is accurate. The defendants were practicing medicine by the numbers under either version.

There's one last question I've pondered and I still don't have an answer. I'm going to ask you if you have an answer to this question because I don't. It's not a simple question…I'm wondering about the events of 2/4. Cody was delivered at 5:01. Where was Dr. Hayton between 3:00 and 4:00? He says he has no memory of where he was. The question really isn't about where he was because, apparently, he doesn't know. But that's the wrong question. The real question is "Why did Dr. Hayton leave the mother's bedside at 3:00?" We really don't care where he went because all we need to know is that he wasn't with his patient, he abandoned her. But why would he abandon his patient? That's the better question because at least we know he wasn't there.

The probable reason why Dr. Hayton medically abandoned Kim Hastings is because he saw something ominous on the ultrasound. The hospital records show an ultrasound done at 3:10 but he doesn't write a report or assessment note about it. That's a choice he made. Nothing was preserved. No ultrasound report prepared. None of that was done. The report was never prepared even though he was in control and responsible for seeing that the report was prepared and preserved.

We know that at 3:10 Dr. Hayton finally does show up. Then, he disappears again for an hour. Why would he do that? It's just after he saw the ultrasound. We know these facts by looking at the records we do have. He sees something on the ultrasound and then disappears and medically abandons his patient. He has no recall of where he was between 3:10 and 4:00.

We're here because Cody is one tough kid and he didn't die. Most babies as compromised as Cody was die. Dr. Hayton said during his testimony on the first day of trial that we're here because Cody has cerebral palsy, that all this misfortune has rolled downhill, and as a result, now he's being sued. But we're not here because Cody has cerebral palsy. We're here because he wouldn't die. You turned your back on the wrong child this time Dr. Hayton.

What's the defendants' response? "It's all so sad." What's sad are the economic reasons Cody ended up like this. Where he ended up is very sad; but it's more sad when earlier business choices produced Cody as a predictable statistical result to enhance profitability. That's what's really sad! And if Cody had died, sure, it also would be sad, but not so expensive.

As Dr. Tomlinson said, "You know, if I saw those tracings I'd be worried that this baby's ultimate injuries would be blamed on me." So why then did Dr. Hayton leave his patient after the 3:10 ultrasound? Well, Cody is a little boy who just wouldn't die. Why would the doctor abandon his patient? He abandoned Cody's mother just after he dummied up the record. He sees her at 3:00. There's an ultrasound at 3:10 and then he simply disappears. Why would he do that? I leave it to you to figure that one out.

As you know, we're asking for a very, very large sum of money. I've broken the damages down item by item. The first area involves economic damages. I'm going to use the verdict form the judge will give you to present my discussion of the damages. The verdict form first asks whether you find the defendants negligent in one or more ways and if so, was such negligence a cause of damages to the plaintiff. We say the answer to question number one is yes.

Question two concerns damages. It asks, "What are Cody Hastings' damages?" It then instructs that nine of you, and it has to be the same nine of you who answered question one "yes," agree as to the amount of damages entered on the verdict form. I'm going to

use my overhead projector to display the verdict form with the numbers penciled in that I'm now going to argue in support of. I'm doing this so you'll know not just what I'm asking you for, but why.

First are Cody's economic damages of $1,386,011.20. Next are Cody's non-economic damages of 15 million dollars which I'll talk about later. There is one other aspect of Cody's economic damages concerning past expenses. Because Cody is legally a minor, his parents are responsible for his health care expenses up until the day of his 21st birthday. His parents therefore have a claim of $184,000 for his past health care expenses and also for his future health care expenses from the present until he reaches the age of 21, which, because he's now 4, are the next 17 years.

Once Cody turns 21, even though he won't be legally competent, he will be responsible for his health care needs. His conservator, appointed by the court, will manage his affairs once he is 21. These are the reasons why the damages part of the verdict form is divided up the way it is.

When we talk about past and future economic damages, we're talking about health care related costs and the cost of custodial care for Cody because he'll never be able to take care of himself. Cody was born in 1997. This is 2001. He's 4 years old and in those four years between 1997 and 2001 his parents have incurred $184,180.53 in health care expenses. That's the number we're asking for this past time period.

From the age of 4 to 21, we then apply Dr. Rollins' middle average numbers for the next 17 years. These future costs are expressed in present day dollars. Our forensic CPA explained to you that when you reduce future dollars to present value and consider future inflation and the return on money given today for future expenses, it's roughly a wash. The amount of money needed to care for Cody from today at age 4 until he reaches age 21 is $1,885,606.15.

Then we have to consider Cody's future from age 21 to the time of his death. We don't know how long Cody's going to live. Our experts say he'll live to at least age 30, which is an additional 9 years. Dr. Nichols' testified that he could easily live into his third or fourth decade of life. We've picked 30 because we want to be conservative and credible. It's a tough call to make. I'm sitting here arguing for my client's future and not wanting him to be short changed, but then again, I want to be completely credible. I'm not God, I don't know. The additional amount for Cody's future needs, from age 21 is to age 30, is $1,386,011.20. That will take Cody to age 30 but not beyond that. These are conservative estimates.

There are a couple of medical facts that drive the argument for Cody's future healthcare needs. It's uncontested that Cody's life expectancy is directly anchored to the quality and type of future healthcare he receives. This places you folks as close to being God

as you'll probably ever be. The quality of the future healthcare you decide he should receive will determine how long he'll live. You'll probably never have to make a decision of this nature again in your lifetime. It must be very sobering.

I ask that you remember that his parents will also be getting older. This is a cruel argument, but a necessary one. Cody's parents' ability to lift him when he weighs 100 pounds will be less than now, when he weighs 32-34 pounds. None of us are getting younger. Cody's parents may not be around to care for him, depending on how long they live. You know your ability to do what you used to do is now probably less than when you were younger. All Cody needs is for his mother to have a bad back and then he has some really serious problems. Cody's dad is out on the road, working overtime, gone from the house much of the time trying to pay all the bills. Kim is doing the best she can. Parents age. These implications are important.

Whatever economic damages you award, no matter how much, will only allow Cody to keep what the negligent defendants didn't take from him. It merely allows him to live. There's nothing extra in it. There is no free lunch. There isn't a dime in there for Cody's brother Levi. There isn't a dime in there for Cody's father Shawn. There isn't a dime in there for Brenda, his grandmother. We do ask for funds that will allow Cody's parents to occasionally have respite care for Cody so they can have some kind of a normal life like most of us have, but these damages amounts don't reward them. There's nothing within these numbers for mom, nothing for dad, nothing for Levi, nothing for future surgeries, and the numbers are based on Cody dying at age 30.

You know, there might be some good news in all of this. Well, depending on your point of view, we'll call it good news. Cody is getting better. His health is improving. Dr. Bennett has already upgraded his assessment of Cody's life expectancy based on improvements Cody's made in the last six months. These improvements are in four different areas.

First, his seizures are now under control. He used to have up to 30 seizures a day. Now he only has a couple per day and they're more benign.

Second, the prospect for Cody being orally fed in the future is improving. Soon, he may not need the gastric feeding tube. Eating by mouth cuts down on the risk of infections and the possibility of tubes coming out. This directly impacts Cody's life expectancy.

The next one is Cody is now 4 years old. Most children with severe cerebral palsy like Cody's die before they reach their first birthday. Cody has faced and overcome most of the challenges that kill children with cerebral palsy during their first years of life.

Fourth and finally, are the improvements in Cody's respiratory symptoms. Many of these children die because of respiratory challenges. They can't clear their throats.

They can't do all the things that we normally do. They can't spit out their phlegm. The get respiratory infections and don't recover.

Another damages area I now want to be clear with you about is the intersect of Cody's medical needs with his educational needs. Dr. Rollins worked up his medical needs and Phil Cusak, Cody's occupational therapist, worked up his educational needs. When you compare the two models you'll see that the Educational Services District provides some equipment that we are also asking for money to purchase. It may look like we're double dipping or trying to collect for medical services for Cody that will already be provided. There is a slight overlap and I want to show you where that occurs. Phil Cusak said Cody's school will provide lift slings for at school, but Cody is in school for only half a day and those slings stay at school. The school will also provide some orthotics such as a splint made at school that Cody can take home. That's it. That is the only overlap in services that Cody will receive for the rest of his life.

Three doctors, Dr. Green, Dr. Bennett, and Dr. Nichols, all approved Cody's medical care plan prepared by Dr. Rollins. Phil Cusak, the special education expert, also approved the plan. No one has argued that Cody's future life care plan is a Cadillac.

Now I want to discuss the cost of Cody's future health care needs starting now, at age 4, through the rest of his life, which we expect to be age 30. The cost to provide for those needs is $3,271,000 according to Dr. Rollins. The defendants' economist, Dr. Knowles, projects Cody living to age 36. His opinion is that the present value cost of Cody's life care plan is $2,928,747. In summary, we're saying it will take 3.2 million to provide for Cody's life care plan up to age 30 and the defendants say 2.9 million will last Cody until age 36. You may recall, the defendants' expert, Dr. Knowles, is the same expert who conceded that the quality of care will determine Cody's life expectancy. You don't want to take any future risk with this boy's health---it's a matter of life and death for Cody.

Ironically, the defendants are, once again, playing the numbers game with Cody. Mr. Knowles discounts the present value of Cody's life care plan by a higher percentage even though he has no way to know what the future holds. 2.9 million gets Cody to 36 years under their scenario, assuming the economy performs exactly as they predict. Nice try. The last presidential debate concerned rising health care costs and senior citizen's right to medications. Who in their right mind can take a position that health care costs aren't going up? Of course, the defense economist doesn't see it that way. Not one defense doctor disagreed with Dr. Rollins life care plan. They want to save money by, once again, playing the numbers game and placing Cody at risk in the future by asking you to bet on their economic view of the future.

We're not asking you to look that far into the future. The fact that we're not asking you to believe that Cody's going to live past 30 years is a sad argument for me to make. There's good testimony that he will, but that's your call to make.

The next area of damages involves non-economic damages which is where the 15 million comes in. So far I've discussed economic damages such as health care expenses. Up to now it's just been a matter of math. You can check my math when you get back to the jury room, add, subtract, deal with numbers attached to services, medical supplies, and such. But now we're dealing with the kinds of damages which have no exact standards. There is no formula for arguing these kinds of losses. The value of these losses Cody suffers is left to your considered judgment, that's what the judge will tell you.

I want you to suspend any need for certainty that you might have because the law doesn't ask this of you. You may have a fine intellect that craves linear, deductive reasoning, but here there are no formulas to guide you. The law only asks that your judgment be reasonable.

It's simply not true to say that money is not going to really change anything. Money can change things. Money can keep Cody alive. But, the things I'm going to talk about now, money can't bring back. We're now at the heart of who we are as people.

We all enjoyed Phil Cusak's good humor when he testified that Roseburg is the biggest and the best. What he was really saying is that people here in Roseburg have values and character. It's a quality place to live. You couldn't tell Roseburg is best by looking at a map. You have to drive into town. You'd have to see Sunrise Enterprises providing employment for handicapped and disabled people. You'd have to see the VA hospital. That's what Phil Cusak was talking about…that's what he sees from his vantage point as someone helping the disadvantaged. You know, he's one of the best young occupational therapists in America. Pacific University, my college alma mater, named him as one of the finest graduates they've had in its first 150 years. What does this institution of higher learning know, and what does Phil Cusak know about the values of a community? That's what we mean when we talk about judgment.

While money won't bring back what Cody has lost, money is our way of acknowledging the value we place on these losses. I've asked different people what comes to their minds when I mention Cody's name. Some say he's loving. Some say he's brave. You get a sense of the kind of boy he is. Look at him there in the photos.

Cody won't ever wrestle or play one-on-one basketball with his brother. That's not going to happen, and it's a loss for both boys. He's not going to play T- ball. He'll never have a first date. He'll never go to the movies in 7th grade and meet a girl there and not

tell his parents. All the age-appropriate things we do that ultimately make us who we are---Cody won't do them.

15 million dollars may strike you as outlandish. You might be thinking about the McDonald's case with the hot coffee we talked about during jury selection. Let me tell you what's reasonable. Consider this, when you read the newspaper you see young athletes signing multi-million dollar contracts. Some of them can't even conjugate a verb! Alex Rodriguez, a fine short-stop who's now with the Texas Rangers signed a contract for 252 million dollars to throw a ball and swing a bat. Then there's Derek Jeter, the great short stop for the Yankees; he has a 180 plus million dollar contract.

When a military B-1 bomber goes down, the pilot doesn't go down with the 100 million dollar aircraft, he bails out. Why? Because the pilot is more important than the airplane. He doesn't ride it to the ground; he may even get court marshalled if he tries to land the plane when he should have bailed out.

I like art. About 10 years ago Van Gogh's painting of flowers sold to the Japanese for something like 48 million dollars at a Sotheby's auction in New York. That painting can't cry, it can't breathe, it doesn't live.

What's important in life is playing in a high school football game, going on a date, or sitting in the stands to cheer for your school. Growing up, having a job, raising a family. These are the kinds of values this community knows. What the defendants took from Cody is more important than any oil on canvas. In fact, we believe defendants took the most important parts of life and living from Cody.

I realize that most of you have never in your lives been asked to deal with a financial issue of this magnitude. It's in front of us now, and it's your job.

The defendants ignored opportunities to save Cody. He was drowning in his mother's womb, and they abandoned him. The doctor didn't want to be financially inconvenienced. The corporation didn't want to be financially inconvenienced. They were cutting corners at the risk of their patients' health to enhance profitability on an HMO package deal that created disincentives to provide quality care.

I know this is circumstantial, we don't have all the data. The doctor testified he delivers 180 babies a year. Cody's delivery was a pre-paid package deal for $2,500. If all the doctor's deliveries were like Cody's, he'd generate $450,000 per year. This doesn't include his earnings from his gynecological practice. Also, remember, the doctor doesn't work on Wednesday. Now that's profitability. That's what he's really seeking to protect---this style of life at the risk of Cody's health---and that's the reason the medical "brotherhood" comes running in here to say what he did was just great, even though

there isn't another nurse who wouldn't have put Kim Hastings on a fetal monitor. That isn't working for the patient, that's working for the profit.

Perhaps most important, the defendant doctor still thinks he did nothing wrong. He still thinks he did nothing wrong. Consider what the defendant has taken from Cody. He can't see. He can't talk. He can't walk. The cruelest irony is Cody is so compromised, he can't even lie. Is this like the McDonald's coffee case where, if you return a large verdict, Cody's going to dance out of the courtroom? He'll never play with his brother, he can't even be average. Not everyone is a valedictorian. Cody can't even be a "D" student. All he can do is get an "A" for effort.

What Cody does have is a sense of humor and a loving family. He lucked out in that he was born to a family rich in character, which is why Roseburg is great. A real professional in this case is Sally Church, the woman who babysits Cody for free because Kim can't afford to pay her. She's of modest means. She babysits for a living. This is a woman who really has character, she's a real professional but you couldn't prove it from her tax returns. How do we know she's a real professional? She puts people ahead of profit. She baby sat Cody for three months for free. That's a professional. That's someone who really cares about kids. When Cody's parents couldn't afford her, she stepped up and did the right thing.

Another professional is Cody's grandmother, Brenda Hastings. She's Douglas County's foster mother for unwed mothers. She's out there giving of herself. Again, you couldn't prove it from her tax returns, but you can prove it by her attitude and values.

One thing you can be sure of, Cody is tough. You can have confidence that he'll handle future surgeries and medical procedures with grit and grace. How many prior chances did Cody have to die? He's missed every one of them, hasn't he? You have every reason to believe this is one tough little boy. He's entitled to the best future health care because he's earned it. Cody's a survivor. Most children with cerebral palsy like Cody's would have already died.

I want to close with this. When I met you three weeks ago, I was very careful to thoroughly discuss with you our request for 18 million dollars. I asked each of you if asking for this much money was going to put us at any disadvantage. "Is this the kind of case you're uncomfortable hearing because the numbers are too big?" I attempted to discuss every issue that might prompt you to be reluctant in giving less than a full, fair verdict. We talked about the McDonald's hot coffee verdict. Some of you thought that verdict was excessive, some called it ridiculous…but that case is not this case. This is where your judgment is crucial. This case demands your very best judgment, nothing less.

Now, let's talk about sympathy. It's not lost upon me that the doctor's family has attended this entire trial in support of their dad, their son, and husband. It's not lost upon me that the doctor has a fine family. They're obviously quality people. I'm prepared to stipulate that the doctor and his family are good people. I'm sure they're equally willing to stipulate that Cody's parents are just as good; but these are sympathy arguments---nothing more, and nothing less---and I won't make them. That's the reason why the Judge will instruct you there's to be no bias, sympathy, or prejudice in your deliberations. There's plenty of sympathy for all the families before you; however, it must not become a factor in your deliberation.

Cody and his family are nice people. The doctor is a quality man. I'm prepared to agree that his entire family and his many friends who attended to show their support for Dr. Hayton are also fine people. But that's not what you're here to decide.

In the courtroom we judge the defendants' acts, both the acts he did, and those he did not do, and the business decisions he made. So, any officer of the court, meaning the lawyers before you, who tries to tempt you into coming back with a verdict that's less than full, fair, and supported by the evidence, is asking you to break your oath as a juror and not follow the Court's instructions because those arguments are based on sympathy. They're arguments based on prejudice. They're arguments based on bias. You must follow the evidence and apply your considered judgment. That will lead you to the proper verdict.

I've tried to be as data driven as I can be. Here's the evidence, here's the result. Make no mistake. Cody's case is a direct assault upon a medical business that chooses to compromise health care for profitability.

You've been patient with me. Now I trust you'll give the same kind attention to Mr. Cowling as you've given to me. Thank you.