

1 held liable for punitive damages?

2 Answer: Yes or no.

3 If the answer to Question Number 4 is no, you are
4 not to answer Question Number 5. Your foreperson must sign
5 this special verdict and you will all return to open court.

6 If your answer to Question Number 4 is yes, you
7 may proceed to answer Question Number 5 based on the
8 guidelines in the punitive damages instruction.

9 Question Number 5:

10 On the issue of punitive damages, and in
11 accordance with the Court's instructions on punitive
12 damages, we the jury award punitive damages against Pecos
13 Valley of New Mexico LLC as follows:

14 Answer: Dollar sign with a blank line.

15 When as many as ten of you have agreed upon each
16 of your answers, your foreperson must sign this special
17 verdict, and you will return to open court.

18 Mr. Buckingham, whenever you are ready for your
19 closing argument.

20 MR. BUCKINGHAM: Thank you, Judge. May it please
21 the Court.

22 Ladies and Gentlemen of the Jury, we're finally
23 here. This started out ten days ago. We have been
24 together. We've watched y'all; y'all have watched us. It's
25 been an interesting trial. We fought through the Sahara

1 heat. There was even a rumor that one judge had shorts on
2 underneath his black robe. I don't know who that was.

3 One thing that has impressed me, and if you will
4 notice, any time there was a question, even though it wasn't
5 my witness, I wanted to hear what you had to ask.

6 You are the most attentive jury that I think I
7 have ever had, and you are very attune to the facts of this
8 case, and I appreciate that. I know that's difficult to do,
9 especially in a medical malpractice case where the terms can
10 be confusing, but you picked it up, it appears, and your
11 questions were very astute.

12 I don't mind telling you, this was the most
13 important case I've ever had. I have known the Botello
14 family now for three years. I have really enjoyed getting
15 to know them. They're a good family.

16 And this trial team has brought to you a case
17 that I think is very, very important. For the first time in
18 my 33 plus years of trying medical negligence cases, the
19 defense did not call a liability expert to dispute what we
20 had to say.

21 Everything that we were presenting to you in
22 terms of the negligence came in undisputed, unchallenged,
23 but we still had to go through it because they denied they
24 did anything wrong. They denied that Dr. McLaughlin was
25 negligent.

1 Had this case been properly tried, that's what
2 you would have heard from the defense, "We're sorry." It's
3 evident to us, and I think it was evident to y'all that
4 Dr. McLaughlin was terribly negligent and changed the life
5 of a little boy, but we didn't hear that.

6 What we heard was, "We didn't do anything wrong."
7 And that put the burden on us to take up your time and
8 valuable days to show the things that Dr. McLaughlin did
9 wrong, and I was happy to do it.

10 So we need to get into the liability portion of
11 the trial and discuss what we proved to you, what is more
12 likely than not, and as we go through this -- if we can have
13 the verdict form, please. As the Judge read to you a moment
14 ago, there is a series of questions that you will be
15 addressing as a group. Ten of you have to reach an
16 agreement on this issue.

17 And so what I would like to do is to show you the
18 first question, and then we are going to go back to the
19 PowerPoint again.

20 Judge, we are going to keep you busy switching
21 back and forth. I'm sorry.

22 THE COURT: That's all right.

23 MR. BUCKINGHAM: Can you focus on that first
24 page? So that's going to be what we are going to be talking
25 about first is Dr. McLaughlin's negligence.

1 This is an instruction he just read to you, that
2 the Defendant denies our allegations, including specifically
3 that the alleged negligence, alleged negligence, when they
4 don't have anyone to come in and tell you otherwise, they
5 still tell you it's alleged. It ain't alleged; it's true.

6 The negligence of Dr. McLaughlin, they deny that,
7 was a cause of the birth injury as alleged. With regards to
8 Plaintiffs' claims for punitive damages, they deny that, but
9 if he has a managerial role, we'll get into that.

10 This is what we have to prove to you to show that
11 he was negligent, that Dr. McLaughlin, who held himself out
12 as a specialist, having undertaken to care for Lorenza, was
13 under the duty to possess and apply the knowledge and to use
14 the skill and care ordinarily used by reasonably well-
15 qualified specialists practicing under the same
16 circumstances. A doctor who fails to do so is negligent.

17 The only way in which you may decide whether or
18 not Dr. McLaughlin did this is through the experts, and
19 that's the only one you heard from, Dr. Gardner. I brought
20 his picture back, and you will see -- we're going to go
21 through some of the posters we used with Dr. Gardner because
22 it was so long ago, and you have heard so much information,
23 and there's been so much water under the bridge, I wanted to
24 refresh your memories about who he is and what he had to
25 say.

1 So these are the areas that we have to prove, one
2 or more of those four. And I will submit to you that we
3 have proved every single one. So we'll take them step by
4 step.

5 First of all we need to show that Dr. McLaughlin
6 violated the standard of care in failing to obtain serial
7 ultrasound examinations on Lorenza to monitor Jonathan's
8 fetal growth.

9 Remember gestational age in weeks, at 18 weeks,
10 20 weeks, 30 weeks, that kind of thing? And if you'll
11 remember, too, we talked about fundal height measurements.
12 Y'all remember that? You stretch the tape across the belly
13 and you measure from the top of the uterus down to the pubic
14 bone, and that's our fundal height, and they should be the
15 same for a normal-sized baby.

16 If the baby's fundal height is 28 weeks, then you
17 should be having a baby that's truly 28 weeks old. Y'all
18 remember all that? Coming back to you now? You probably
19 dreamed about it.

20 Let's go through all of the episodes that
21 Dr. McLaughlin had the opportunity to recognize this and to
22 deal with it appropriately. We have this one here on March
23 6, we have that discrepancy. And you'll remember Dr.
24 Gardner said, if it's two centimeters more, that's a
25 discrepancy that's trouble. That's telling you that the

1 baby's getting too big for that particular age.

2 Here's one. He's at 35 weeks and 4 days here.

3 At most he should be measuring 37 centimeters. He is
4 measuring 38. He is beginning to start to grow. That's too
5 big. There should have been a serial ultrasound right then.

6 The next two, here we are in the middle of March,
7 36 weeks 6 days. He is now at 41 centimeters. Bigger
8 discrepancy. Another red flag. Should have been an
9 ultrasound ordered because the ultrasound is the only way to
10 confirm that growth.

11 The next one, March 22, 37 weeks 6 days, that's
12 almost 38 weeks, but he is at 42 centimeters now, 4
13 centimeters difference. At that point right there he is
14 showing that he is a -- he is the size of a baby that would
15 be a month older than he is at this point. Red flags. All
16 of these just overlooked, forgotten, disregarded by
17 Dr. McLaughlin.

18 And then we have the very day of delivery when
19 Lorenza came in and Dr. McLaughlin measured her and he found
20 the gestational age of 38 weeks, and a 38-week-old infant
21 should be measuring 38 weeks, at most 40 if it's going to be
22 on the outside of all parameters. He measures 42.

23 That is a huge red flag. And the steps, as you
24 heard from Dr. Gardner, that should have been taken were,
25 we're either going to do an ultrasound on you, Lorenza,

1 because this baby is huge, or we're going to do a C-section.
2 That's what we need to do because of the risk of Jonathan
3 getting stuck. And we will go through it again, but you
4 know the risk of Jonathan getting stuck, the damage that
5 you've seen.

6 So for that first question, I asked Dr. Gardner
7 while he was on the stand, "Did the standard of care require
8 that Dr. McLaughlin obtain repeat ultrasounds every four
9 weeks after 20 weeks gestation to monitor the fetal growth
10 and to identify macrosomia?"

11 Remember macrosomia? Big baby. And he answered
12 yes. So I will check that off.

13 Did he violate that standard of care?

14 Dr. Gardner said yes.

15 That's his undisputed testimony. No one
16 challenged it. No one from that side had anybody come up
17 and tell you otherwise. So this is a fairly easy decision
18 for you. All of this should be because it's a given.

19 So for that first one, yes, we have shown that.

20 The next one, "Dr. McLaughlin violated the
21 standard of care for relying upon Leopold's Maneuvers to
22 estimate Jonathan's fetal weight without also performing an
23 ultrasound."

24 Y'all remember, we know that instead of it being
25 the 11 and a half pounds that Jonathan actually was,

1 Dr. McLaughlin recorded that he says it was about 8 pounds.

2 And I said, "Well, Dr. Gardner, how in the world
3 did he come up with that?"

4 And he said, "Well, here's the problem. He's 11
5 and a half pounds and he used Leopold's Maneuvers."

6 Leopold's Maneuvers is, back in the dark ages
7 where physicians just kind of probed and fondled the woman's
8 stomach and guesstimated what that baby weighed, but that's
9 what he used. He was using this determination and put
10 Jonathan and Lorenza at risk of terrible harm or death, when
11 all he had to do was an ultrasound.

12 That is far outside the standard of care. As a
13 matter of fact, this is Dr. Gardner's testimony from the
14 trial.

15 "So we have known for years that Leopold's are
16 just not a very good way of really diagnosing small babies
17 or large babies, and again, that's why we rely so heavily on
18 ultrasound these days.

19 "Question: And yet that's what he chose to do in
20 this case?

21 "Answer: Yes.

22 "In lieu of an ultrasound?

23 "Yes.

24 "Would that be a breach of the standard of care?

25 "Yes."

1 And I recorded, again, Dr. Gardner's testimony
2 here.

3 "It's a breach of the standard of care. He had
4 to do it. He failed to do it."

5 So in terms of that second issue, we've proved
6 that one, too.

7 The next one, "McLaughlin failed the standard of
8 care" or -- sorry -- "violated the standard of care in
9 failing to recommend that Lorenza deliver Jonathan by way of
10 cesarean section instead of a vaginal delivery."

11 And we know from Dr. Gardner's testimony that
12 Dr. McLaughlin had a duty to recommend to Lorenza that
13 Jonathan be delivered by C-section due to his large size,
14 what would your answer to that be? Absolutely, yes.
15 Unequivocal.

16 And if he failed to do so, would that be a
17 violation of the standard of care?

18 Yes.

19 And I failed to check it off here because I was
20 busy talking to him, so with y'all's permission, I'm going
21 to do it now. Is that okay? Because that's what Dr.
22 Gardner told us, he had that duty, and it was a violation of
23 the standard of care not to do it. So three out of four so
24 far have been unequivocally established to you.

25 So the fourth one, "Dr. McLaughlin violated the

1 standard of care in using a vacuum on Jonathan during his
2 delivery." And we heard about that. That was actually what
3 drove Jonathan into that final point of impaction, by using
4 that vacuum.

5 And you heard from Dr. Gardner that you do not
6 use a vacuum. And in this case, did Dr. McLaughlin have a
7 duty to not use that vacuum on Jonathan? That is correct.
8 And was it a breach of the standard of care for
9 Dr. McLaughlin to do so? Yes, it was.

10 And so, again, I was busy at the time, but I will
11 finish my job now, yes and yes. You don't use a vacuum on
12 the delivery of a diabetic mom. That's the standard of
13 care, and Dr. McLaughlin violated it.

14 So out of the four areas that the Judge told you
15 we had to prove one of them in order to find Dr. McLaughlin
16 negligent, we've proved every single one. And every single
17 one of those proofs was not challenged by the Defendant with
18 evidence. They will tell you they did nothing wrong, but
19 they didn't have the courage to bring evidence before you to
20 challenge this.

21 This is a question that was asked of Dr. Gardner
22 right at the very end, and I ran across it when I was
23 preparing for this closing. And I wanted to tell y'all
24 about it because I thought it was fascinating because one of
25 y'all asked a question, and it was about, when was the last

1 chance that Dr. McLaughlin had to not cause harm.

2 Do y'all remember that question? I don't know
3 who asked it, but one of y'all did.

4 And Dr. McLaughlin said -- sorry -- Dr. Gardner
5 said, "It became very" -- sorry -- "It becomes very, very
6 difficult once the head is out. Once that head is out,
7 that's about it. There is no going back to do the cesarean
8 section at that point. But as long as the head is still in,
9 you can still, even if you see the head, you can still do a
10 cesarean section at that time. It's difficult, but it can
11 be done."

12 And here's what I wanted to draw to your
13 attention. Earlier in that testimony Dr. Gardner said,
14 "After the vacuum was applied and the head was pulled out by
15 Dr. McLaughlin, this is what is the result."

16 So Dr. McLaughlin, in using that vacuum, took
17 away the last clear opportunity he had to undo all the
18 negligence he had done up to that point. Had he not used
19 the vacuum, he still could have done a C-section, but he
20 ruined that when he used the vacuum.

21 I'm going to go back here. At the very bottom,
22 "Plaintiffs have the burden of proving that such negligence
23 was a cause of his injuries."

24 So, I think I talked about this to you when we
25 were picking the jury, about burden of proof, 51 per

1 percent, what is more likely than not. Well, that applies
2 both to the liability issue -- was he negligent -- what is
3 more likely than not. This is 100 percent. But it also
4 applies to the damages and the causation issue. Did his
5 negligence cause the harm to Jonathan and to Lorenza?

6 And we know through Dr. Gardner, unequivocally,
7 yes, he caused the brachial plexus to Jonathan, he caused
8 the brain injury to Jonathan, and he caused that terrible
9 laceration that Lorenza endured. This is the evidence that
10 is before you on those issues.

11 Now, I think we also talked to Dr. McLaughlin
12 about it. This is the actual definition that the Judge gave
13 you for cause or what you can use in terms of figuring out
14 did he cause it.

15 "An act or omission is a cause of injury if it
16 contributes to bringing about the injury. It need not be
17 the only explanation for the injury nor the reason that is
18 nearest in time or place, it is sufficient if it occurs in
19 combination with some other cause to produce the result. To
20 be a cause, an act or omission, nonetheless, must be
21 reasonably connected as a significant link to the injury."

22 Well, we know that the brachial plexus occurred
23 when Jonathan was ripped out of his mom. That's when it
24 happened. You pull down too hard, pull that neck to the
25 side yanking him out and ripping the brachial plexus.

1 We know that the brain injury occurred -- and we
2 are going to go into this in greater detail -- during that
3 ten-minute period where Jonathan was being suffocated inside
4 his mama because of the compression of that lifeline. Once
5 the umbilical cord was compressed -- and we will go into
6 greater detail in just a minute, but when Jonathan is jammed
7 down in this area -- give me the one that has the
8 compression. I'll show you the slide a little bit later.

9 But when Jonathan is wedged, I guess for lack of
10 a better word, into the birth canal, the cord is completely
11 compressed. That's what Dr. Gardner told you. That's why
12 it's an obstetrical emergency, because, if you don't get
13 Jonathan out, he's suffocating and he is dead.

14 It's not an intermittent kind of thing like Dr.
15 Dingman tried to tell us without any evidence whatsoever to
16 support it. So it is a definitive point that once that
17 compression began, it was not let up for that ten-minute
18 period, and that's why he had APGARs of zero at one minute,
19 and zero at five minutes, and only three at ten minutes.

20 And the laceration injury occurred when a baby
21 the size of Jonathan was ripped out of Lorenza by that fact.
22 All that's undisputed or unchallenged. They say they didn't
23 do anything wrong, but they didn't bring anyone to challenge
24 that.

25 We also got causation from Dr. Woodruff.

1 So would it be from your review of the medical
2 records, including the labor and delivery records of
3 Jonathan, would it be the situation that the actions of
4 Dr. McLaughlin caused Jonathan to have a brachial plexus
5 injury?

6 It would be the force and the mechanical
7 stretching that took place at that time that would have
8 pulled those and broke those nerves, and that force would
9 have been applied by Dr. McLaughlin. That's my assumption.

10 Well, it's undisputed that it's Dr. McLaughlin.

11 The brain injury that you have seen evidenced in
12 Jonathan with your examination, with your review of the
13 medical records, what caused that brain injury?

14 And Dr. McLaughlin -- I'm sorry -- Dr. Woodruff
15 was very clear. Jonathan being deprived of oxygen, his
16 brain being neglected of the oxygen that he needed, and the
17 brain at the cellular level, cellular level -- and that's
18 important because, remember, Dr. Dingman was making a big
19 deal out of normal MRI, normal outcome.

20 But she failed to note that Dr. Volpe, the
21 definitive source of pediatric neurology, says, not so fast.
22 Because if you get down to the cellular level, particularly
23 with the basal ganglia and the thalamus, sometimes that
24 doesn't show up on the MRI.

25 And this is what Dr. Woodruff was saying here.

1 At the cellular level, brain tissue, cells died, and those
2 cells were there to help him think, help his attention, help
3 his behavior, all of those sorts of things, and he lost
4 those.

5 And along those lines, once again, an outstanding
6 question from y'all, at the very end of Dr. Dingman, if he
7 did have an injury to thalamus or the basal ganglia, what do
8 you see in terms of damage about the evidence itself?

9 And she just kind of, I don't know if wishy-washy
10 is the word you want to use, but she mentioned motor
11 troubles, which Jonathan has evidenced, she mentioned
12 behavior issues, which Jonathan has evidenced, and she
13 mentioned cognitive issues which Jonathan has evidenced.

14 So again, the first question and here is the
15 back-up proof.

16 And with that lack of oxygen, are you referencing
17 that ten-minute period where he was stuck in the mother's
18 birth canal?

19 Yes. The ten minutes plus the additional five
20 minutes of CPR when he had no signs of life. No signs of
21 life.

22 And compared to Dr. Dingman who said, no, he
23 comes out, his APGARs are zero, but that doesn't necessarily
24 mean he doesn't have a heart beat. He can be beating up to
25 99 beats per minute. Remember when she told you that in her

1 direct examination?

2 And then she told you that he was pink and
3 breathing on his own before five minutes, so the five minute
4 APGAR shouldn't have been zero; it should have been two.

5 When I heard those things I wrote them down
6 because I knew what we've had testify. We had someone who
7 was going to come in and distort the truth and try and sway
8 you with nonsensical, made-up alternative facts.

9 And did you notice her body language when I
10 started challenging her with the statements out of
11 Dr. Volpe's textbook about the things she was claiming? She
12 got very uncomfortable. Her voice changed, her demeanor
13 changed, and her answers sometimes changed. But we will get
14 into that in more detail.

15 So in terms of the damage, we've got the shoulder
16 dystocia causing the brachial plexus injury. We've got the
17 typical brachial plexus injuries, and we know that Jonathan
18 has what is undisputed to be the worst of the worst, an
19 avulsion. He's had an avulsion injury where the cord, the
20 spinal cord has the brachial plexus nerves coming out of it,
21 and due to Dr. McLaughlin's force in pulling Jonathan out,
22 he ripped the nerves right out of the spinal cord. Ripped
23 them out of spinal cord.

24 Even Dr. Wilson, the other defense expert said,
25 that's the worst injury you can have, an avulsion, an

1 avulsion injury. It's irreparable. And that was the key to
2 the source of the force right there was that vacuum that he
3 used.

4 I had this one up here because I constantly
5 reminded myself that Jonathan is going to grow up, and he is
6 going to grow up with an arm that is essentially
7 non-functional, especially his hand. Y'all seen pictures of
8 Jonathan, and even the defense expert agreed that that's
9 pretty much what it's going to be.

10 And that's something that's important for y'all
11 to consider when you go back and you start talking about
12 damages, because your determination today is not just for
13 today or next week or next month, your determination and
14 your verdict will outlive all of us in this courtroom if
15 it's the right one because Jonathan will outlive all of us.

16 That's what I was looking for earlier when I was
17 talking about, once that cord is wedged in there with the
18 baby, it is 100 percent occluded or blocked. There is no
19 oxygen getting through that, as Dr. Gardner told us.

20 And Dr. Gardner, if anyone is an expert on what's
21 going to happen during a birth, it's a guy that's delivered
22 10,000 babies, not a doctor who hasn't delivered anything.

23 This is a point that will haunt Jonathan, I
24 think. It would haunt me, if I were he, because at some
25 point as he ages, he may learn that all of this was

1 avoidable. All of y'all's time being here was avoidable.
2 All of this case, every -- all the expert's fees, all of
3 that was avoidable had a cesarean section been performed by
4 Dr. McLaughlin.

5 And I can just imagine at some point 20, 30 years
6 from now, that that will be laid on Jonathan because he is
7 having to go through life the way he is, and it was
8 avoidable.

9 Okay. I don't think it's disputed that Jonathan
10 has a brachial plexus injury. They say they deny
11 everything, but I don't think they can deny that. The proof
12 is in the visual, if you look at Jonathan and you see his
13 arm.

14 The way they are challenging this is on the brain
15 injury. And I want to talk about that, and I will in great
16 detail, but as we go through this evidence, I want you to
17 bear in mind what the Judge told you about the burden of
18 proof, that it is what is more likely than not.

19 And we will go through it in greater detail, but
20 I want you to see something here. So this is the burden of
21 proof on the brain injury. And I try and put myself in your
22 shoes because you've heard from our experts, and they all
23 say brain injury. And you've heard from their expert, and
24 their expert says no brain injury, or no brain injury that
25 should cause incapacity -- or I forgot how she worded it.

1 She changed it as she went along. At first it
2 was absolutely no brain injury whatsoever. But then when
3 she started hearing what Dr. Volpe actually had to say, she
4 started massaging her position a little bit, and I think it
5 was a brain injury that would not cause him to have troubles
6 in life.

7 So you've got basically laying out there, you've
8 got their experts telling you one thing, and you've got our
9 experts telling you another thing. How do you break that
10 tie? Any ideas?

11 Well, we are going to go into a little bit of
12 detail about the actual testimony, but this to me is the
13 key. We've got a doctor who knows Jonathan probably better
14 than any doctor, certainly any doctor that y'all heard from.
15 Dr. Patel saved Jonathan's life.

16 He was intimately caring for Jonathan for three
17 weeks, starting from the day Jonathan was born up until the
18 time that he got him well enough to be discharged from the
19 neonatal intensive care unit. And that's Dr. Patel. He is
20 a board certified neonatologist, and he is not paid by
21 anybody. He was in the case -- sorry -- he was on
22 Jonathan's case before there was any case. He is not paid
23 to come in and tell you one thing or another. He was caring
24 for Jonathan.

25 And back five years ago he reached this

1 diagnosis, that Jonathan has a hypoxic ischemic brain
2 injury. There is a lot of talk about truth these days,
3 truth isn't truth. You hear all kinds of things in the
4 political world, but that is truth because why would he say
5 anything else other than what the truth would be?

6 So we've got the medical records, and I believe
7 that that is the tiebreaker, because when you put the
8 medical records on our side, it breaks through that 50-50
9 tie and it makes more likely than not that Jonathan has a
10 brain injury. And here it is, what is more likely than not,
11 more likely true than not true.

12 So let's talk a little bit about brain injury.
13 Brain injuries with normal MRIs. Now, Dr. Dingman, the
14 defense expert today, was basically saying, look -- I wrote
15 it down several times -- normal MRI, normal outcome. Well,
16 all of a sudden we start seeing in Dr. Volpe's definitive
17 textbook that that's not true.

18 Thirty percent of the time when you've got
19 children that are injured, or a hypoxic ischemic injury,
20 that their MRIs are normal. And then we have that other
21 example where four out of 50 children with normal MRIs, what
22 Dr. Dingman was preaching as the definitive be-all of no
23 brain injury, either died or have severe cognitive problems
24 with a normal MRI.

25 And we learned that with a normal MRI, that's --

1 the increased likelihood of finding that is -- but most
2 importantly we learned that when you have a child such as
3 Jonathan who was asphyxiated -- no one's disputed that,
4 that's in the medical records -- when you have a child like
5 Jonathan who was asphyxiated, up to 88 percent of the time,
6 where will their damage be? In the thalamus or the basal
7 ganglia.

8 That's from Dr. Volpe who's been identified as
9 the definitive expert. And also from Dr. Volpe we know that
10 sometimes you have an injury to those areas.

11 Now, we know that Dr. Woodruff says, well, I have
12 treated kids that have injuries, cerebral palsy, with a
13 normal MRI. Dr. Dingman says, he probably misdiagnosed her.

14 But we also know that Dr. Kirk, their
15 neuropsychologist, told you, yeah, I have treated children
16 with brain injuries with a normal MRI. So their own expert
17 refutes what she was telling you today.

18 I knew this argument was coming, we had taken her
19 deposition so I knew what she was going to say. I didn't
20 know she was going to stretch the truth on the APGARs like
21 she did; that was a surprise.

22 But I had Dr. Woodruff come down, actually kneel
23 down and wrote down these objective signs of Jonathan --
24 Jonathan's brain injury, the hypotonia, and we have learned
25 that he still has that, even as late as Dr. Woodruff's exam.

1 So it's a brain injury that is showing itself
2 through hypotonia, and initially the defense expert today
3 agreed that that was an objective sign of brain injury.

4 Remember when she said that? I wrote it down real fast.

5 And then as she saw what was going to go on with
6 that, she started waffling around. I don't know if she ever
7 officially took that away and said, no, that's not true, but
8 she sure said it was true initially.

9 So we know that Jonathan is evidencing objective
10 signs of brain injury. We know that he has global
11 developmental delays. That will be in evidence before you
12 even see the medical records that you can look at when you
13 get back to the jury room. And we know that that can be
14 caused by a brain injury.

15 We know that he had the setup for a brain injury
16 from the severe fetal distress, and he had abnormal labs.
17 And I just wanted to touch on that just for a minute.
18 That's the blood gas. The blood gas that, according to
19 Dr. Volpe, I underlined it in red, is supposed to be drawn
20 at delivery, because you want the snapshot at what that baby
21 is like at that very moment when he comes out, because once
22 you start the compressions, and once you start giving him
23 oxygen, his blood gas changes. Everything changes.

24 But Dr. Dingman, the defense expert today, said,
25 oh, we can take it two or three hours later.

1 Well, Dr. Volpe says, at the point of delivery,
2 and she didn't really have a comeback for that, other than
3 then to say, well, his blood gasses weren't that bad, but
4 they were.

5 She tried to tell you that normal per base excess
6 was minus ten or better. Minus ten. You remember that,
7 because when you get back and start looking at the labs,
8 look at what the normal value is for base excess is, the
9 worst it's supposed to be is minus two. Minus two. And he
10 was minus 13. But she stretched it again a little bit
11 saying, no, minus ten is okay. He was close to that.

12 But just like the APGARs where she wasn't trying
13 to lead you astray, she said, she wrote down minus ten on
14 that whiteout board -- I wrote it down in my notes -- but I
15 knew at the time that normal was less than minus two. So,
16 she was erroneous again.

17 Resuscitation, the fact that he needed
18 resuscitation with the low APGARs, he needed CPR, he needed
19 a breathing tube, he was intubated, and he remained on that
20 intubation for four or five days, I believe, he finally did
21 start to breath on his own down at Odessa Regional.

22 But I went through with Dr. Dingman, and I said,
23 so, if you've got a child that doesn't start breathing for
24 20 minutes, 88 percent of the time that child is going to
25 have a neurological injury. Remember that? Volpe was a

1 goldmine for disputing all of the mischaracterizations you
2 were hearing.

3 88 percent of the time, if you've got a child
4 that doesn't breathe for 20 minutes, he is going to have a
5 brain injury. And Jonathan didn't start breathing on his
6 own for hours. Hours. He also showed these neurological
7 issues, feeding and cooling. He did have poor feeding. She
8 acted like he was eating turkey and dressing when we got
9 down to it, but it was days that went by before they were
10 able to start taking him off of the feeding tube. He didn't
11 have feeding capabilities. It was days before that finally
12 came back around. I'm going to show you something.

13 Your Honor, how am I doing time-wise?

14 THE COURT: You are at 43 minutes.

15 MR. BUCKINGHAM: Okay. I'm going to show the
16 first page so we know what they were talking about. Just
17 the top.

18 This is an article that was the key article,
19 according to Dr. Dingman, 2018, although, Dr. Volpe's book,
20 this edition is the 2018 edition, but she showed you this
21 article and talked at length about how predictive the MRI
22 that Jonathan had was showing no brain injury. Predictive.
23 She used that word a lot, saying, MRI, predictive, no brain
24 injury.

25 I read this article, and I wanted to show you all

1 something about it, that very last part. Jonathan's MRI
2 that she says was so predictive of him not having a brain
3 injury was taken in his second week of life. He was nine
4 days old, second week of life.

5 What Dr. Dingman failed to tell you about this
6 wonderful article that says MRIs are so predictive is that
7 that very article said, "The predictive value of scores for
8 MRIs taken in the second week after birth still needs to be
9 assessed." We don't know.

10 She told you that that MRI from Odessa Regional
11 was definitive, it's predictive, no brain injury, when, if
12 you read the actual article, which I guess she didn't think
13 we would, it says that the predictive value of a score in
14 the second week, we don't know. We've still got to assess
15 it. We don't know.

16 We heard a lot of statistics in this case. A
17 lot. So is it 98 percent that he didn't have a brain
18 injury? Is it 88 percent that he did? It was back and
19 forth, the numbers. But what it dawned on me was that,
20 their position is, it would just be so rare that Jonathan
21 would have a brain injury, so he doesn't have one. That's
22 their logic. He doesn't have one because it would just be
23 kind of rare.

24 But this is a definitive point that you need to
25 understand, Jonathan is rare. So out of all the babies that

1 are born, ten percent of them need resuscitation. I was
2 surprised it was that high actually. That's a lot of
3 babies. But one percent out of all the babies born, one
4 percent out of all the babies born need the type of
5 resuscitation that Jonathan needed, the chest pumping, the
6 oxygen, the intubation.

7 And of that one percent that needs that excessive
8 resuscitation, only one to three percent -- sorry -- only
9 one to three per hundred thousand -- only one to three per
10 thousand will develop signs of evolving encephalopathy
11 consistent with HIE.

12 So out of that one percent, only one to three per
13 thousand will develop the extensive damage that Jonathan,
14 admittedly by the defense expert, has. Tell me that's not
15 rare. He's a rare kid. He's a rare kid with a severe
16 brachial plexus injury and a brain injury, and he has to
17 live with both.

18 You will see in your jury instructions all the
19 different issues that you need to determine in order to
20 assess the value of Jonathan's damages in this case. Some
21 of them are fairly clear cut. They are hard numbers, what
22 we call economics, economic values. And you heard from the
23 various economists and life care planners what these numbers
24 are.

25 The present day value of the economic numbers is

1 around 4.2-, 4.3 million. That's just for the numbers that
2 will take care of Jonathan as he ages and starts requiring
3 attendant care that his brain injury will likely create.
4 That also takes into account, there is also the loss of
5 economics, because Jonathan, you heard, is going to find it
6 very difficult to get a job with that arm and hand and find
7 even greater difficulty to get a job because of his brain
8 damage.

9 So if you add all of those together, it's
10 probably around 5-, 5 million, somewhere in there. But
11 remember that the number that you award for the medical care
12 and attendant care, that's all paid out. Jonathan doesn't
13 get that; that goes to his healthcare. The bigger number
14 here is the -- you will see those kind of toward the bottom.

15 MR. DEKLEVA: Your Honor, I have an objection.

16 THE COURT: Approach.

17 (Sidebar.)

18 MR. DEKLEVA: You are going to need to tell the
19 jury to disregard his statement about all of that 5 million
20 going to healthcare providers. There has been no evidence
21 whatsoever of any sort of medical liens or that Jonathan has
22 incurred \$5 million in medical expenses, or that he will
23 incur \$5 million of medical expenses in the future.
24 Attendant care, yes, but that was a misstatement, and it
25 needs to be clarified by you, Your Honor, not by Mr.

1 Buckingham.

2 THE COURT: Mr. Buckingham?

3 MR. BUCKINGHAM: Your Honor, their own expert
4 talked about it, Judge. These are all damages for future
5 care of Jonathan, and I think it's a fair statement to say
6 that -- even your own guy talked about paying the attendants
7 20 bucks an hour.

8 MR. DEKLEVA: No, that's not what you said. You
9 made it sound like he had some medical providers that are
10 owed money, that this money, the \$5 million will go to. All
11 Christensen was doing --

12 THE COURT: Keep your voice down.

13 MR. DEKLEVA: All Christensen was doing was
14 reducing Isom's life care plan to present value and
15 accounting for the fact that Isom didn't know how to do
16 basic arithmetic. But on this subject, Judge, you have to
17 give a curative instruction on that because that is
18 misleading this jury.

19 MR. BUCKINGHAM: I never said anything about
20 past --

21 MR. DEKLEVA: Yes, it came out of your mouth that
22 way.

23 THE COURT: I'm going to -- I'm not going to give
24 a curative instruction. What I heard Mr. Buckingham say,
25 and fairly construed I heard was that was going to go to

1 future costs. He wasn't implying those were costs that were
2 already incurred. And I didn't hear that, and I don't think
3 that's a fair characterization of what he said.

4 He made a different point that a lot of that is
5 going to be attendant care. We had some debate when we were
6 finalizing the jury instructions whether that was a medical
7 expense or not. I'll allow you to clarify that, Mr.
8 Buckingham. I don't think that requires the Court to do
9 that, is that will go to costs for medical care.

10 (Sidebar concluded.)

11 MR. BUCKINGHAM: Your Honor, how much time is
12 left at this point?

13 THE COURT: You have eight minutes.

14 MR. BUCKINGHAM: Back where I was. We were
15 talking about the monies that we will be asking you to
16 award. That's hard money. The numbers that are easy
17 because you can look at the chart they will send back to
18 you. That's for both medical care and attendant care.

19 But the bigger number is the human losses, the
20 loss of enjoyment of life, the loss of the use of a hand and
21 arm, the value of a hug. Remember that in voir dire when we
22 were picking, the lady said a hug is pretty valuable.

23 And you, as a juror, will have to assess that. I
24 won't tell you what numbers to write in. That's for y'all;
25 y'all are the boss. I told you that from day one.

1 My suggestion, to make it easier for you when you
2 are back in the back is, I did a calculation. I won't put
3 it up, but he's got another 70 years of life. He has 16
4 years of waking time during the day that he doesn't have his
5 arm for 70 years. What's the value per hour of not having
6 that arm and hand? Ten dollars? Is that fair? 20 dollars?

7 Ten dollars for the rest of his life is a little
8 over \$4 million. The numbers get up there very fast. The
9 reason they get up there very fast is because that's the
10 significance of the damage.

11 And you heard from Dr. Wilson that, oh, I tried
12 to fold a towel with one hand, and it's easy. I don't know
13 if y'all noticed, but flesh and blood, right after that I
14 gouged my hand on the desk and I had a napkin or a kleenex
15 that I was holding. I was a Boy Scout, direct pressure.
16 That's what you do to stop a wound from gushing. So I'm
17 walking around the courtroom with a napkin on my hand. When
18 I'm listening to her, and stopping the blood, and it dawns
19 on me, Jonathan can't do that. He doesn't have it, and he
20 doesn't have it because of McLaughlin.

21 I need to get up in a while. I'm going to have
22 about five minutes to talk to you, and I'm going to tell you
23 about punitive damages. I think they are warranted here,
24 but again, the number, the amount is your discretion.

25 The damages for Lorenza, I didn't show you the

1 horrible laceration. Again, you don't have to see that.
2 Use your judgment, use your collective wisdom and put a fair
3 value on Jonathan's loss, his loss and Lorenza's loss.

4 And I thank you. Thank you.

5 THE COURT: Whenever you're ready, Mr. Dekleva.

6 MR. DEKLEVA: Thank you, Judge.

7 Good afternoon.

8 JURORS: Good afternoon.

9 MR. DEKLEVA: Thank you for being here, and I
10 want to start my presentation with thanking each and every
11 one of you for being here because I know you take a lot of
12 time out of your personal lives and professional lives to do
13 this, and it's a very important job.

14 You may be sitting there thinking, gosh, we
15 didn't hear very much from Mike this whole time, but I, like
16 you, have been sitting over there listening and actually do
17 have a lot of things I want to tell you right now.

18 I want to start by telling you that whenever a
19 lawyer gets up at a podium like this or maybe in front of a
20 podium like this, you should have a healthy degree of
21 skepticism for anything that they are saying. That's not to
22 say you should be cynical, but you should measure my words
23 and Mr. Buckingham's words with what you remember about the
24 evidence and what your notes say about the evidence. Don't
25 take our words for it.

1 I want to be very clear about something right up
2 front, and we were clear about this from the very beginning
3 of the case. My partner, Rebecca Kenny, when she got up and
4 gave the opening statement in this case, we are not calling
5 an expert witness to dispute what Dr. Gardner said. We are
6 not taking a position that -- we're not supporting the care
7 of Dr. McLaughlin, and I think that should be obvious to
8 everyone in this case.

9 When we don't call an expert witness and don't,
10 frankly, ask a whole lot of questions of the opposing side's
11 expert, we understand that when all of you go back into the
12 jury room at the end of this case, that you are going to be
13 checking that box, was Dr. McLaughlin negligent, you will
14 check it yes. I have no doubt about that.

15 On the whole aspect of, did this cause injury,
16 you are going to check that box yes, but that's not what
17 this case is about from our perspective.

18 This case is about really three things. The
19 first thing that it's about is this whole idea that Jonathan
20 had a birth-related brain injury, and I'm going to get into
21 a lot of detail about that as you might expect in the
22 next -- well, whatever time I'm up here talking to you.

23 I'm going to go into that, but also I want to
24 tell you what this case is about from our perspective is the
25 notion that Jonathan will have zero quality of life as a

1 result of his brachial plexus injury.

2 Now, don't get me wrong, I'm not minimizing that.
3 That's a permanent disability he has because of labor and
4 delivery, and you are going to need to award damages to him
5 for that. But I want to go through some of the information
6 that Dr. Wilson gave you because this little boy can still
7 have a good quality of life even with his disability.

8 And finally we are going to dispute -- and I'm
9 going to talk about this as we go through my part of the
10 presentation, this whole concept of punitive damages, but I
11 will get to that when I get to that.

12 I want to remind you of something that happened
13 on the very first day of this case. And we were all in the
14 jury selection room together, if you will remember, on that
15 Monday. It seems to me like about two months ago, but I
16 think it was only ten days ago, and Mr. Buckingham said, and
17 I'm going to ask you to test your own recollection at this
18 jury selection process because I'm paraphrasing it, but he
19 said something like, "You need to hold me to my burden of
20 proof. Make me prove my case."

21 Those were his words, and I think you need to
22 keep that in mind as we go through the evidence that was
23 presented in court during their case in chief about brain
24 injury.

25 Let's talk about that -- that evidence. I have

1 to tell you, I haven't done this as long as Mr. Buckingham
2 has. I have done it for about 25 years; he has done it for
3 33 years, so I'm not as experienced as him. I have done a
4 lot of jury trials, and I have never seen what just happened
5 in closing statement before in my entire career, and that
6 is, Mr. Buckingham's distanced himself from his own experts
7 in this case, and he tried to replace his experts with a
8 textbook with Dr. Volpe.

9 Dr. Volpe wasn't here to testify, and I think we
10 are going to go into some discussion as I talk to you about
11 this whole idea that this textbook that he keeps using, that
12 the little sound bites he is cherry-picking somehow drive
13 this whole proof that they have to make in this case.

14 But I'm going to go through these witnesses for
15 you because I think you need to know -- and all I'm trying
16 to do is summarize for y'all. I mean, you heard it, too,
17 and I'm giving you my perspective, but look at your notes
18 and test your own recollection with this.

19 The first witness they called was Dr. Joyce.
20 Now, when Mr. Buckingham got up to talk to you, I didn't
21 even hear the words Dr. Joyce come out of his mouth. He is
22 distancing himself from Dr. Joyce. And we know how
23 Dr. Joyce got involved in this case, don't we, because
24 Dr. Isom told us how Dr. Joyce got involved in this case.

25 They are office mates, and Dr. Isom said

1 something like, "Well, I referred Plaintiffs' counsel to my
2 office mate, Dr. Joyce, to do neurological testing because
3 he has all of these Spanish norm tests that he uses, and
4 Jonathan than is primarily Spanish speaking." And we will
5 talk more about that in a second.

6 Then, incredibly, Dr. Joyce gets in his car in
7 Dallas, Texas, drives to Midland, Texas, over to Mr.
8 Buckingham's office in Midland to administer tests to
9 Jonathan, but he doesn't bring those Spanish norm tests with
10 him, does he? He Leaves them back in his office in Dallas.

11 How do we know that? Because the testimony was
12 clear in this case that he gave, oh, I don't know, 41 tests
13 to Jonathan, 39 of which were in English, two or three of
14 which were in Spanish.

15 And then what does Dr. Joyce do? He gets on an
16 airplane in Dallas, he flies to Santa Fe, and he comes into
17 this courtroom and he tells all of you that Jonathan has
18 substandard scores on his neuropsych evaluation and that he
19 has a brain injury.

20 Let's really think about that for a second.
21 Let's address and clear up once and for all the idea that
22 Dr. Joyce put out there for you to consider that Jonathan is
23 fluent in English. Nobody is disputing and I'm not
24 disputing that Jonathan probably has the ability to converse
25 in English to some degree, but that's a far cry from being

1 fluent in a language.

2 And as Dr. Kirk testified, it takes about five
3 and a half years in the school systems for a Spanish-
4 speaking kid to become fluent in English. And we all sat
5 here when Mr. and Mrs. Botello testified in this case, and
6 they seem like very nice people, but they testified in
7 Spanish with an interpreter. Those are the two folks that
8 are Jonathan's primary caregivers. He has grown up speaking
9 in a household where they speak Spanish.

10 You know, the Judge read you the jury
11 instructions, and I have been over those not just in this
12 case, but in every case. But what's not in the jury
13 instructions is an instruction that tells you, the jurors,
14 to leave your common sense outside this courtroom on the
15 courthouse steps when you come in here to serve as a juror.
16 Apply common sense. Okay?

17 Is it any surprise that when Dr. Joyce got below-
18 average results -- that he got below-average results for
19 Jonathan when he tested him in English when he's only had
20 exposure to English through his sister who speaks to him
21 occasionally in English, his seven months in preschool,
22 half-day preschool, does that really surprise anyone?

23 Does anyone really believe that testing Jonathan
24 in English was appropriate if the goal was to measure
25 Jonathan's true cognitive abilities?

1 Now, common sense would say that a five-year-old
2 whose parents speak only Spanish, whose only exposure to
3 English is seven months in a half-day preschool and maybe
4 that his sister speaks English, he is not going to be fluent
5 in both. He is only in the beginning stages of learning
6 English.

7 But think about Dr. Joyce's statement, his
8 premise for just a second. If Jonathan truly is fluent in
9 English and Spanish, he doesn't have a brain injury. No.
10 If a five-year-old can learn both languages without being
11 exposed to one, he doesn't have a brain injury, does he?

12 I would tell you, and I think Mr. Buckingham has
13 told you this by not even mentioning the name Dr. Joyce when
14 he was up here talking to you, that Dr. Joyce's opinions in
15 this case should be given no weight whatsoever by you when
16 you consider this case and deliberate on this case.

17 Now let's talk for a minute about Dr. Isom,
18 Dr. Joyce's office mate. I mean, they've got quite a racket
19 going on in Dallas where they cross refer cases to one
20 another; one is a life care planner, one is a
21 neuropsychologist. I think the testimony was they've had 20
22 or more cases together. Dr. Joyce was Dr. Isom's graduate
23 student. I mean, I think you get my point.

24 I don't even really know where to begin with
25 Dr. Isom. I mean, he got up there, and what we learned from

1 Darius Garcia, our life care planner, was that Dr. Isom
2 created a bloated life care plan. And this is really
3 interesting because Dr. Isom recommended Dr. Joyce to
4 Plaintiffs' counsel, didn't he? But he didn't scrutinize
5 what Dr. Joyce did.

6 When he was asked by my partner, Rebecca Kenny,
7 on the stand during cross-examination, did you have any idea
8 about how many tests Dr. Joyce gave in English or Spanish,
9 he said no. But he adopted, didn't he, didn't he adopt
10 Dr. Joyce's opinions lock, stock, and barrel and didn't even
11 give any consideration to Dr. Kirk's neuropsychological
12 testing which we will discuss in just a minute.

13 He didn't even consider those pieces of
14 information to him, and he created, folks, an inflated life
15 care plan, a 5 point million -- \$5.1 million that our
16 expert told you is full of redundancy and extra services to
17 the point that if that life care plan were implemented,
18 Jonathan would be going to some form of therapy so often
19 that all he would do is go to school and go to therapy.

20 So, I mean, that's a very suspect premise right
21 there. Now, \$4.1 million of that is this attendant care
22 where it's their position that Jonathan's never going to
23 live independently and that Jonathan is never going to work.
24 And again, that was premised on, for Dr. Isom, on
25 Dr. Joyce's opinion which now we see the Plaintiffs are

1 running from. What's up? What's up with that?

2 And then, you know, you will recall that during
3 cross-examination my law partner, Ms. Armstrong, asked a
4 couple of questions of Dr. Isom, and then he started
5 testifying in what I interpret as meaning that anyone with
6 any form of mental disability is going to commit felony
7 sexual assault. How can you put any weight whatsoever on
8 anything Dr. Isom is telling you in this case?

9 Now I want to talk about Dr. Woodruff, because
10 Dr. Woodruff is in a category all by himself in this case.
11 He made a nice appearance, didn't he? He looked good. He
12 was a pretty smooth talker.

13 And what I saw when I was sitting over there was
14 a very carefully choreographed presentation by Mr.
15 Buckingham with Dr. Woodruff where they cherry-picked sound
16 bites from this Volpe textbook, and they cherry-picked
17 pieces of medical information without giving you the bigger
18 context for that medical information to make a presentation
19 for brain injury.

20 And you will recall, I think, that they spent an
21 inordinate amount of time trying to convince all of you that
22 MRIs are meaningless. And they went through this exercise
23 where, as Dr. Dingman pointed out, they listed every
24 conceivable medical diagnosis they could think of where you
25 have a normal MRI, most of which aren't even brain-injury

1 related, all to try to persuade you that Jonathan has a
2 brain injury.

3 But this, it turned out to be a false narrative,
4 didn't it? Because when my partner, Rebecca Kenny,
5 cross-examined Dr. Woodruff, he was forced to admit that in
6 other cases where he has been an expert, he thinks the MRIs
7 are really important. Remember that?

8 There was a jury instruction that the Judge read
9 you on impeachment. And it talks about a witness may be
10 discredited or impeached by contradictory evidence or
11 inconsistent conduct or by other evidence that other times
12 the witness has made material statements under oath or
13 otherwise which are inconsistent with the present testimony
14 of the witness.

15 That's what happened. You saw this expert, Dr.
16 Woodruff -- which, make no mistake about it, he is an expert
17 for hire, too -- when he was being questioned by Ms. Kenny,
18 he had to admit that he, in some other deposition or some
19 other court proceeding he gave in some other part of the
20 country, he testified that, in these types of cases, I
21 always get the MRIs, and I always review those MRIs myself,
22 except in this case where he came into the court and told
23 you that MRIs are meaningless.

24 We have had a lot of discussion about the Volpe
25 textbook, and I think Dr. Woodruff vouched in his direct

1 examination that Volpe is sort of the gospel of, you know,
2 textbooks on pediatric neurology. But then in
3 cross-examination did you catch what he said then? In other
4 cases where he is flying around the country testifying in
5 court and depositions, he's testified, if you recall, that
6 textbooks like Volpe, to him, aren't authoritative. So that
7 came out in cross-examination.

8 But I think that one of the most defining moments
9 in this case happened after that during cross-examination of
10 Dr. Woodruff. And, Your Honor, I'm going to try to put this
11 on here. I haven't used this. There we go.

12 And this is when Ms. Kenny asked the following
13 question of Dr. Woodruff:

14 "And while you don't consider MRIs to be the
15 be-all end-all, even the literature that you rely on in the
16 Volpe textbook, 70 to 85 percent of MRI scans are abnormal
17 in the situation where brain injury was caused by a hypoxic
18 ischemic event at the time of birth; right?

19 "Answer: Correct.

20 "So more likely than not, a child with a brain
21 injury caused by a hypoxic ischemic injury at the time of
22 birth would have an abnormal MRI scan; correct?

23 "Answer: Correct."

24 That's Dr. Woodruff, the expert witness for the
25 Plaintiff agreeing with our premise in the case about MRIs.

1 It's no wonder that this case has morphed in closing
2 examination by Mr. Buckingham into expert witness Dr. Volpe
3 through a textbook.

4 I want to make one more point with Dr. Woodruff,
5 and then I'm going to summarize what I think Dr. Woodruff,
6 what weight he should be given by you when you deliberate.
7 We've had a lot of discussion about the things that happened
8 around the time of Jonathan's birth, and, you know, all of
9 those factors that the Plaintiffs' lawyers want you to say
10 are definitive evidence of a brain injury, and one of those
11 factors is APGARs.

12 But when Dr. Woodruff was asked on
13 cross-examination by Ms. Kenny about APGAR scores and their
14 significance in correlation to brain injury, this is what he
15 said.

16 Your Honor, I'm putting the same -- I'm getting
17 old, I guess. I'm going to have to ask you to test -- oh,
18 of course, I have it on my iPad. I'm sorry, I apologize.

19 He was asked by Ms. Kenny:

20 "You agree that APGAR scores alone cannot give
21 the presumption of an injury; right?"

22 "Correct, they are one piece of puzzle.

23 "And APGARs don't have a lot of correlation to
24 long-term prognosis, do they?"

25 "Answer: Correct."

1 My point is that Dr. Woodruff is the kind of
2 expert that's going to tell a jury anything that he has to
3 to support the case of the people that hired him. It's just
4 that simple. When somebody gets cross-examined and revealed
5 to have given inconsistent testimony in other cases, that
6 expert is entitled to no credibility and entitled to be
7 given -- that expert's opinions are entitled to be given no
8 weight by you when you deliberate.

9 You know, there's been a lot of discussion today
10 for the first time about -- I'm going to try to pronounce
11 these terms correctly -- basal ganglia and thalamus issues.
12 Suddenly we have a trial about those two nonexistent MRI
13 findings in this case when no expert for the Plaintiff came
14 into court and even used those words.

15 Why are those words floating around the
16 courtroom? I'll tell you why. It's because Mr. Buckingham
17 is using those words. His experts aren't using those words.
18 There is no evidence in the record that Jonathan has a basal
19 ganglia or thalamus injury. All of that, I would submit to
20 you, is being taken out of context out of that Volpe
21 textbook.

22 Okay. So now we've focused a lot, haven't we, on
23 the discharge summary from Odessa. I mean, you are probably
24 sick of seeing that and sick of hearing about it where it
25 says -- I can't quote it -- it says hypoxic ischemic brain

1 injury, I think.

2 And Mr. Buckingham is telling you that that
3 discharge note with those words trumps every other piece of
4 medical evidence in this case, every other piece. And he's
5 really -- isn't he asking you to guess or speculate what was
6 in the mind of Dr. Patel when he authored that discharge
7 summary?

8 We do know Jonathan was discharged with a normal
9 neurological exam from Odessa. We do know Jonathan was
10 feeding when he was discharged from Odessa.

11 Why didn't Mr. Buckingham bring Dr. Patel into
12 court in his case in chief to testify? He has access to Dr.
13 Patel. He is a lawyer for Jonathan; he can talk to
14 Jonathan's doctors any time he wants. Where does Dr. Patel
15 work? Odessa. Mr. Buckingham has an office in Midland.
16 Are we to assume that Mr. Buckingham didn't go out the front
17 doors of his office in Midland, get in his car and drive the
18 20 minutes to Odessa and talk to Dr. Patel?

19 Why wasn't a deposition taken by Mr. Buckingham
20 of Dr. Patel on this issue rather than asking all of you to
21 speculate on what was in his mind at the time he authored
22 that when the jury instructions specifically tell you not to
23 speculate in rendering your verdict in this case?

24 Do you think Mr. Buckingham just didn't bother to
25 go talk to Mr. Patel? I don't know. I think he's a pretty

1 thorough guy. Look at the charts he prepared for this
2 trial. Or did he talk to Dr. Patel and just not like what
3 Dr. Patel had to say? I mean, I'm not going to answer that
4 question for you, but you should be thinking about those
5 things when you go deliberate on this case.

6 Sometimes it's not what is said in court; it's
7 what's not said. Sometimes it's not the evidence that's
8 presented in court; it's what evidence is not presented.

9 Ask yourself this question: If Jonathan had a
10 bona fide, dyed-in-the-wool diagnosis of a brain injury when
11 he left Odessa with a normal neurological examination, and
12 feeding, as we all heard, why are there not medical records
13 for follow-up care for brain injury?

14 That is the only record in this case that even
15 remotely says anything about Jonathan having a brain injury.
16 Wouldn't you expect there to be some follow-up care if he
17 had a brain injury, and yet we don't see another record
18 addressing this issue until he is two years old when he goes
19 to the University of New Mexico and he is seen by a
20 neurologist there for follow-up with his brachial plexus
21 injury.

22 So you are going to have that record when you go
23 back in the jury room, and it's Dr. Azizi. We have heard a
24 little bit about Dr. Azizi. And what Dr. Azizi did, he was
25 there seeing Jonathan for the brachial plexus injury, and he

1 was addressing concerns of the parents with regard to their
2 concern that Jonathan had mild developmental delays and
3 things of that.

4 So what did Dr. Azizi do? He ordered a rule-out
5 brain MRI that was normal. And then there is not another
6 medical record in this case after -- Jonathan is five now --
7 there is not another medical record in this case after the
8 UNM visit where he is being seen, treated, evaluated for
9 brain injury. Why is that? Because he doesn't have a brain
10 injury, folks. Apply your common sense. They did a
11 rule-out MRI at UNM.

12 I want to shift gears for a minute and talk a
13 little bit about our experts in this case. You heard them
14 testify. We had Dr. Kirk testify, and I think you will
15 recall that Dr. Kirk told you that he administered English
16 and Spanish tests because he wanted to get an idea of what
17 the correlation would be between the results.

18 And the results that he got was that Jonathan
19 tested solidly average with an average IQ when he was tested
20 in Spanish, his native language, and when he was tested in
21 English it was lower than that. Solidly average. And he
22 also testified that Jonathan was eager to show him what he
23 had learned in school.

24 He also told you that, in his opinion, Jonathan
25 isn't going to need attendant care for life, and that

1 Jonathan would be able to pursue his academic goals without
2 limitation based on the neuropsychological assessment that
3 he gave.

4 And then we had Dr. Wilson testify, and she was
5 unlike any other expert in this case in that she actually
6 works with these kids with brachial plexus injuries. And,
7 again, please don't take my statements about any of this to
8 mean that we are diminishing the fact that Jonathan has a
9 permanent disability caused by labor and delivery, he does.

10 But the thing that Dr. Wilson was able to do in
11 court was to demonstrate, first of all, the function and
12 movement that Jonathan did have in his arms. She came down
13 here, if you recall, and she demonstrated those things, and
14 his limitations. I mean, frankly, she told you that his
15 hand didn't have much function at all, so she was pretty
16 straightforward, you know.

17 And she also testified about her work for 20
18 years with these kids in the brachial plexus clinic at
19 Colorado Children's Hospital, or Children's Hospital of
20 Colorado, I guess it's called. And she talked about a
21 couple of things that I think are important to think of.
22 And the first is that these kids are adaptable. They're
23 adaptable.

24 Now, again, doesn't diminish his disability, but
25 they do learn to function with their disability pretty well.

1 The other thing she talked about was that a lot of these
2 kids go on to achieve some pretty remarkable things.

3 And I will tell you, it puts me in a little bit
4 of an unusual position, and my colleagues as well, because
5 we feel like we are the only ones in this courtroom, among
6 the lawyers, anyway, that really believe Jonathan does have
7 potential. And I think, with his great family, and the
8 great teachers he has in Hobbs that have worked with him,
9 that this young man can, this little boy can achieve his
10 potential. And I think Dr. Wilson highlighted that for all
11 of you, and I would say, take that into consideration when
12 you are considering this case.

13 Then we talked about Dr. Dingman, and, yes, Dr.
14 Dingman is a first-time expert. She has never been an
15 expert witness before, and she got it wrong. She made a
16 mistake about the APGAR scores, and we spent about 20
17 minutes of court time on that.

18 But think about what she said and what she does.
19 She works with these kids all the time. She's seen a
20 hundred of these kids, and her career is just getting
21 started, really. I mean, she is, in my estimation, one of
22 the leading young physicians on the subject in the country.

23 And she was unequivocal and unwavering. Yes, we
24 saw some cherry-picking of the Volpe textbook, and she told
25 you, well, you know, he is cherry-picking some things that

1 may have had to do with studies that happened in the '70s,
2 and he is not reading the whole context, and that's exactly
3 right.

4 I mean, you can take a proposition in a textbook
5 out of context and make it say virtually anything you want
6 it to, and that's what was going on in the courtroom here,
7 folks.

8 But what Dr. Dingman said, unequivocally, and I
9 wrote it down, "When you have HIE and a normal MRI, then you
10 have a 93 to 95 percent chance of normal outcome by school
11 age."

12 That's almost a certainty. That's not even this
13 51 percent issue -- and let me address that for a second
14 because Mr. Buckingham got up and he said, essentially, "Hey
15 guys, it's only 51 percent. I just have to barely clear the
16 bar, you know. Give me a break on this brain injury thing."

17 That's what lawyers say when they haven't proven
18 their case to you. That's not what lawyers say when they
19 have proven their case to you. And you know that from Mr.
20 Buckingham himself, because when it comes to Dr. Gardner,
21 he's beating a drum of, oh, 100 percent. We have him dead
22 to left on this whole standard of care issue, which he does,
23 and then he wants to say, well, wait a minute, we barely
24 cleared the bar.

25 No, they didn't barely clear the bar. You saw

1 the experts they called, most of whom they don't even want
2 to tell you about anymore, who they want to replace with
3 Dr. Volpe and a textbook at the last minute in the middle of
4 closing argument.

5 When you have HIE and a normal MRI, and you have
6 a 93 to 95 percent chance of a normal outcome by school age,
7 that's a certainty, folks, that's a certainty.

8 I think I have made this point, but I want to be
9 clear, not one treating provider in this case, and not one
10 expert witness in this case has ever suggested that Jonathan
11 has a basal ganglia or hypothalamus injury. That's Mr.
12 Buckingham telling you that at the 11th hour after the
13 evidence is closed and all the witnesses have testified, he
14 is pulling that from somewhere, I don't know where, to try
15 to throw a Hail Mary into the end zone to convince all of
16 you that Jonathan has a brain injury.

17 Let's talk about something that is a serious
18 issue here, and that is that you are going to have to award
19 damages to Jonathan to compensate him for his brachial
20 plexus injury. And you have to award fair and reasonable
21 damages, and I know you heard the jury instructions, it
22 can't be based on speculation, guess or conjecture, it can't
23 be a byproduct of sympathy or anything like that.

24 And I would suggest that you give consideration
25 to Dr. Isom's brachial plexus injury number when trying to

1 make this decision because that's the most amount of money
2 that they have asked you for in this case when it comes to
3 Jonathan's brachial plexus injury.

4 And it's a little confusing to me what that
5 number is, but I'm going to tell you what I think it is, and
6 I want you to check your notes. Our expert life care
7 planner, Darius Garcia, had it at around \$750,000, but our
8 economist, I think, pointed out to you that Dr. Isom, who
9 didn't do his math correctly, so when he reduced that number
10 to present value, it was \$946,350. That's what their
11 experts are saying the brachial plexus injury is valued at.
12 Dr. Isom is saying that, reduced to present value, and of
13 course taking out \$4.1 million of attendant life care.

14 Now let's talk a little bit about punitive
15 damages. I'm at a little bit of a disadvantage here because
16 I'm going to have to sit down in a minute, and I'm not going
17 to get to talk to y'all again, and Mr. Buckingham is going
18 to get to stand up and have the last word. And that's
19 actually fair because it is his burden of proof, so he
20 should get to talk last. Okay?

21 But I want to talk to you about punitive damages
22 because they are alleging punitive damages in this case
23 against Pecos Valley, my client. Those are meant to punish
24 a Defendant in a case, and they have to prove two things to
25 recover or to sustain an award of punitive damages, and

1 those things are that they are first going to have to show
2 that Dr. McLaughlin acted willfully, wantonly, or
3 recklessly.

4 There wasn't a witness in this case that said
5 Dr. McLaughlin was willful, wanton, or reckless. When we
6 went through the testimony of Dr. Gardner in Mr.
7 Buckingham's presentation, Dr. Gardner said Dr. McLaughlin
8 deviated from the standard of care. He didn't say that he
9 was reckless, wanton, or willful.

10 And would it really be even fair to say that
11 about Dr. McLaughlin when he is not here to be able to tell
12 you his perspective in this case? He can't come into court
13 and tell you what happened that day. Is it really fair to
14 label his care, wanton, willful, and reckless?

15 I think there is a whole part of this story
16 that's not being told. Listen, I get it, I get it that
17 Dr. McLaughlin should have known, he should have known that
18 this baby was a big baby. But we saw evidence, and it's
19 undisputed, that Dr. McLaughlin thought this baby was eight
20 pounds. That's a mistake, but that's not malicious, he just
21 got it wrong.

22 None of us go through life undefeated. None of
23 us bat a thousand. We all make mistakes, and unfortunately
24 when doctors make mistakes, yes, sometimes patients get
25 injured, and that's what happened here. But the narrative

1 that is getting lost in all of this because Dr. McLaughlin
2 is not here to testify is that, in those moments, in those
3 moments when he had to deliver Jonathan, he had to act
4 quickly and decisively to save Jonathan's life. At that
5 point he didn't a have a choice, he had to move forward to
6 try to deliver Jonathan.

7 You've heard a lot about this idea you can never
8 use a vacuum extractor on a diabetic woman. I'm not sure
9 what they expected Dr. McLaughlin to do at that point, but
10 let me leave you with this because I am not arguing that
11 Dr. McLaughlin met the standard of care; he deviated from
12 standard of care. What I am telling you is he didn't act
13 maliciously, wantonly or willfully.

14 You did hear Mrs. Botello testify, and she said
15 that she had a recollection of Dr. McLaughlin sweating and
16 working hard to deliver Jonathan. Sweating and working hard
17 to deliver Jonathan. That is not the act of a reckless,
18 wanton, willful man.

19 But that's not the only thing you have to decide
20 if you are going to award -- if you are considering punitive
21 damages. I would submit to you there is no reckless,
22 willful or wanton conduct, but that the second part of that
23 is -- and I will read the jury instruction because I want to
24 get it accurate. I don't want to paraphrase it. And you
25 will have these jury instructions back there with you when

1 you -- when you deliberate in the case.

2 The second prong, "In order to hold Pecos Valley
3 liable for punitive damages you would have to determine that
4 Dr. McLaughlin had sufficient discretionary or policy-
5 making authority to speak and act for it with regard to the
6 conduct at issue independently of higher authority."

7 There has been no evidence in this case that
8 Dr. McLaughlin had that role with Pecos Valley, no evidence
9 whatsoever, and you cannot base your decision in this case
10 on arguments of lawyers or speculation and conjecture.

11 So we have just gotten to and arrived at what for
12 me is the hardest part of these trials, and it's the part
13 where I have to go sit down and I can't speak to y'all
14 again. And I don't know what they are going to say. I have
15 no control over it. They can, they can call me names, they
16 can -- they can do anything they want, and I won't be able
17 to rebut anything they say. And as I told you, they should
18 be able to speak last because it's their burden of proof.

19 But I'll tell you what, why don't you do this
20 when I sit down and Mr. Buckingham gets up to have his last
21 say, why don't you ask him with your eyes why he is
22 distancing himself from Dr. Joyce. Ask him with your eyes
23 why he is still endorsing Dr. Woodruff who lied to you in
24 this case. Ask him with your eyes, when he is talking, Mr.
25 Buckingham, why have you distanced yourself from your own

1 experts and now you are trying to supplant those experts
2 with little sound bites out of the Volpe textbook after all
3 the evidence is closed and the witnesses are done
4 testifying?

5 Ask him with your eyes why there is not more
6 significance to the rule-out MRI that the folks at UNM did
7 that were normal, those findings were normal, and why there
8 are no records after that indicating Jonathan has a brain
9 injury, or has been seen for brain injury, or treated for
10 brain injury, or evaluated for brain injury.

11 So I, I'm going to sit down now, but I want to
12 reiterate what I told you when I stood up here and simply
13 say, thank you for your attention. This is an important and
14 serious case, and you have had to stick with us through
15 thick and thin. I won't make reference to the heat, you've
16 heard enough jokes about the heat in those two days, but I
17 can tell you that from the standpoint of the folks at our
18 table, and I can tell you from the standpoint of the folks
19 at this table, our adversaries, that we all appreciate your
20 time, your attention, and your service. Thank you.

21 MR. BUCKINGHAM: I heard my name a lot, but what
22 I didn't hear is, I'm sorry. I didn't hear an apology for
23 the damages they caused this family.

24 You are going to hear about punitive damages in
25 your sessions back in the back, and when you get to that

1 point, ask yourself, who else made the decisions about the
2 care that was involved, other than Dr. McLaughlin? Of
3 course he did, he was the decision maker. That's all the
4 records are Dr. McLaughlin. So that issue about was he the
5 decision maker for the care involved --

6 MR. DEKLEVA: Objection, Your Honor. We need to
7 approach.

8 (Sidebar.)

9 MR. DEKLEVA: That's not the standard. That's
10 not the jury instruction that they were given. That is
11 misleading the jury about punitive damages in this case, and
12 the problem with that is that they are now going to go back
13 there and be confused about what standard to apply.

14 And so to stand up there and equate
15 Dr. McLaughlin's, you know, decision making at the time of
16 delivery to some act that he is doing on behalf of the
17 corporation is inaccurate. And this kind of calls into a
18 lot of questions, similar things that we talked about
19 earlier.

20 If a truck driver is driving for his corporation
21 and he drives negligently, that doesn't make the
22 truck driver -- that doesn't make the corporation liable for
23 punitive damages if he is driving drunk if he doesn't have
24 the authority to speak for the corporation.

25 That's kind of where we are at with this, but

1 that's an improper characterization of the jury instruction
2 in this case. And I would ask Mr. Buckingham be bound to
3 talk about the language that's being used, because there is
4 no evidence of this in the record, Judge, none.

5 THE COURT: Mr. Buckingham?

6 MR. BUCKINGHAM: Your Honor, that is in the
7 record is that Dr. McLaughlin made the decisions to not
8 perform the care that was involved. He made the decisions
9 to not follow up with the UNM recommendations. And the
10 punitive -- do you have the punitive damage there with you?

11 THE COURT: I do. It's to act for it with regard
12 to the conduct at issue.

13 MR. BUCKINGHAM: The conduct at issue, that's
14 exactly what I'm talking about. The conduct at issue is
15 what this whole case is about.

16 MR. DEKLEVA: I just think it's misleading this
17 jury to stand there and say Dr. McLaughlin was acting on
18 behalf of this corporation in every decision he has made
19 with regard to any delivery that he has done of any patient,
20 Mrs. Botello or otherwise. That's misleading when it comes
21 to this topic of punitive damages. It's fine to talk about
22 with regard to negligence.

23 MR. BUCKINGHAM: Your Honor, I referenced the
24 conduct at issue.

25 THE COURT: Stick to the language in the jury

1 instruction, and it's, to act for it with regard to the
2 conduct at issue.

3 MR. DEKLEVA: And I don't mean to be flip in
4 saying this, but we will ask for a mistrial if we don't get
5 a good result in this because that is a misstatement of the
6 law.

7 (Sidebar concluded.)

8 THE COURT: You have four minutes.

9 MR. BUCKINGHAM: Thank you. Are the objections
10 counting against me?

11 THE COURT: That did not.

12 MR. BUCKINGHAM: We have four minutes. If I had
13 an hour, I could say a lot about the things that were said.

14 Dr. Kirk, you know what I remember about him, he
15 is the \$32,000 guy. \$32,000 to come in here and tell you
16 that Jonathan doesn't have a brain injury, but there were
17 some tests that I didn't like the results, so I didn't count
18 those, but I didn't have him come back the next day, but I'm
19 getting \$32,000 to come in and talk to y'all.

20 You don't pay a guy \$32,000 if you don't know
21 what he is going to say. No one else got that kind of
22 money. What I do remember about him saying is that Dr.
23 Joyce's numbers were valid. He didn't dispute any of that;
24 it was just the interpretation. And he is getting paid
25 \$32,000 to interpret it their way.

1 Dr. Woodruff, he is in a class by himself. He is
2 the only physician that came down here and examined Jonathan
3 on his own. Hands on. He is in a class by himself because
4 he can tell you first hand that Jonathan has a brain injury,
5 and he did.

6 I have been carrying Jonathan's concerns for
7 three years. Those concerns and that burden is now yours.
8 The decision you make back in that jury room for Jonathan's
9 care, his attendant care, for punitive damages because of
10 this terrible negligence of the employee, all of that number
11 that you come back with for his damage determines Jonathan's
12 life, that little boy.

13 I told you when I picked you as a juror that you
14 will have more power today than you will ever have in your
15 life because you can affect the entire life of a little boy.
16 We have done our best to bring you evidence that will drive
17 the verdict that Jonathan deserves. We did our best to do
18 that, and now I ask each of you to do your best for
19 Jonathan. That's all I ask. Thank you.

20 THE COURT: Members of the jury, it is now time
21 for you to retire to the jury room for your deliberations.
22 It's also, sadly, the time for me to announce who the
23 alternates are and who will be voted off the island at this
24 point relative to the deliberations.

25 Our two alternates are Stanley Karczewski and