

1 MS. KENNY: As a matter of fact, I will forward
2 you Mr. Barrera's e-mail to me because the changes he made
3 are in red so you can see what they are. I will do that
4 right now.

5 THE COURT: Thank you.

6 (Recess taken.)

7 THE COURT: All rise for the jury.

8 (Jury in.)

9 THE COURT: Thank you. You may be seated.

10 Ms. Kenny, whenever you are ready.

11 MS. KENNY: Thank you, Your Honor.

12 Good morning, ladies and gentlemen, and thank you
13 again for being here. Now your real work begins, and I know
14 you've heard a lot this morning about what Dr. McLaughlin
15 did wrong, and you are going to hear more about that in the
16 future when Dr. Gardner gets on the stand in pretty great
17 detail.

18 But as Judge Shaffer told you on Monday, and as
19 Mr. Buckingham told you this morning, we are not going to
20 have anyone up there, an expert to argue that Dr. McLaughlin
21 was within the standard of care. We're not. You are not
22 going to hear that.

23 And Dr. McLaughlin, he passed away, it wasn't
24 actually this year, it was January 20 of 2017, so almost two
25 years ago. You are not going to hear from, either, so he is

1 not going to be on the witness stand. But at the time that
2 he treated Mrs. Botello and delivered Jonathan, Dr.
3 McLaughlin worked for Pecos Valley Women's Clinic in Hobbs,
4 New Mexico. He was an employee there.

5 So what is this case about? It is about the
6 injuries. Jonathan suffered a brachial plexus injury.
7 Everyone saw that as he came in, and no one here -- we are
8 not going to dispute that he has the injury and he does have
9 limitations. We are not going to say that his arm is
10 perfect.

11 That injury is permanent. But what does that
12 mean? Does it mean that Jonathan can't have a happy life?
13 Does it mean he can't go to school? Does it mean he can't
14 have a job? Does it mean he can't have a family of his own?
15 No, of course not.

16 We are going to explain to you through our
17 experts, and some of these experts are incredible witnesses
18 who work in and are at the top of their fields. You are
19 going to hear from Dr. Wilson, the brachial plexus expert.

20 And Dr. Wilson, she's board certified in
21 pediatrics, physical medicine, and rehabilitation, and she
22 is an attending physician at Children's Hospital of Denver.
23 She is also the medical director of their their spinal
24 defect clinic there, and she is going to explain to you
25 exactly the type of brachial plexus injury Jonathan has.

1 And she is not going to say he doesn't have limitations, so
2 she's not going to come in here and say he's fine. She's
3 not. I'm going to put that to rest right now.

4 But what she is going to tell you is what he can
5 do, and she is going to tell you about the hundreds of kids
6 that she's worked with and that she continues to work with
7 that have this injury and how Jonathan himself can engage in
8 so many activities that he wants to do, and that, despite
9 this handicap, there are things that Jonathan is able to do.

10 She is going to give you a realistic picture of
11 what Jonathan's life can and may look like. He can play
12 sports. He can sing and dance with his older brother and
13 sister. He can have friends. He can go to school. He can
14 go to college if he so chooses. He can have a job. And he
15 can and should lead a happy and full life.

16 You may still be asking yourself what the issue
17 is and why we are here, and the biggest issue in this case
18 is the brain injury. And it's an alleged brain injury, and
19 I say it like that because frankly we don't believe that
20 there is a brain injury. And the objective tests will show
21 there isn't one, the imaging, Jonathan's imaging tests, and
22 you are going to get to see in the medical records the
23 results of the imaging.

24 Jonathan is a little boy who has a physical
25 injury that should not define who he is as a person. You

1 are going to learn through our neurology and neuropsychology
2 experts that even though there was an event that occurred,
3 and you heard about the event this morning, okay, such as
4 that one, that event is a hypoxic ischemic event, you are
5 going to be very familiar with those terms by the time this
6 trial is over. Just because an event occurs does not equal
7 a brain injury. It doesn't. That's a risk factor, the fact
8 that an event happens.

9 So you are going to learn about the risk factors
10 that physicians consider in determining whether or not a
11 brain injury has occurred and definitively diagnosing the
12 brain injury, but, most importantly, you are going to learn
13 how a brain injury is actually diagnosed, and that brain
14 imaging is the way that the diagnosis is actually
15 definitively measured.

16 So why is all of this important to this case?
17 Because obviously Jonathan had risk factors. When he was
18 born he had no APGARs. He was acidotic. And he did have a
19 diagnosis of hypoxic ischemic encephalopathy, another word
20 you guys are going to be really familiar with.

21 The APGARs, they indicate a rough birthing
22 process and will not, medically speaking, I don't mean to
23 sound harsh about that, but that's what it indicates to the
24 doctors. And so when Jonathan was stable after -- with all
25 of these risk factors in place, when he was stable, he was

1 transferred to Odessa, a hospital in Odessa where he first
2 underwent a cranial ultrasound.

3 So the cranial ultrasound upon Jonathan's arrival
4 at Odessa was normal. What they did was they cooled him for
5 three days, 72 hours, and Mr. Buckingham alluded to this,
6 but what it's called is therapeutic hypothermia, and it's --
7 it's when the body's temperature, as he explained to you
8 earlier, is brought down to anywhere between 34 to 36
9 degrees celsius. So that was going on for three days.

10 After the cooling, on April 1, 2013, Jonathan was
11 about eight days old at this time, they did an MRI of the
12 brain. And an MRI is the most sensitive measure of brain
13 injury after a hypoxic ischemic encephalopathy. It's the
14 most sensitive measure, and that's what we are going to ask
15 you to pay attention to and look at when you are deciding
16 this case.

17 Jonathan's MRI was normal. So that's really good
18 news, folks, really good news, and that was long before this
19 lawsuit was filed. So when he was still at the hospital in
20 Odessa, he had another test and it was a prolonged EEG. An
21 EEG is electroencephalography, and that was for two days,
22 from April 6 to April 7. This is in 2013, so you saw
23 Jonathan, he is about five years old now. This EEG was also
24 normal.

25 And when Jonathan was two, almost the day of his

1 second birthday, on March 23, 2015, he had another MRI, and
2 that was also normal. So what I have just described to you
3 are four objective imaging tests evidencing that Jonathan
4 does not have a brain injury. Thank goodness.

5 But the person that can explain all of this
6 better to you than me, I'm actually kind of shocked I got
7 all the words out right without tripping, so we will see how
8 it goes from here.

9 The doctor that is going to explain this to you
10 on the witness stand, her name is Dr. Andra Dingman.
11 Dr. Dingman is a neurologist who received her medical degree
12 from Stanford University in 2010. After that she completed
13 her residency in child neurology and a pediatric stroke
14 fellowship -- see what I mean, stroke was difficult for me,
15 but I've got encephalopathy -- she did a stroke fellowship
16 at Children's Hospital in Colorado.

17 Since then she has been on the teaching staff at
18 Denver -- at the -- hold on, let me hold up because she is
19 going to tell you all about her qualifications, but this is
20 by way of introduction. She actually sees patients at the
21 neonatal brain injury clinic where she primarily focuses on
22 outpatient care of children with hypoxic ischemic
23 encephalopathy.

24 So I'm going to call it HIE. And HIE means that
25 there is a period of time when it is suspected that a fetus

1 may have had a period of hypoxia. That's what it means.
2 That's the encephalopathy. It does not mean there is a
3 brain injury. Again, just because there has been an event,
4 and someone is encephalopathic doesn't mean there is an
5 injury. HIE is a risk factor and it should not be confused
6 with the definitive diagnosis of a brain injury.

7 Dr. Dingman is going to show you the imaging of
8 what a hypoxic ischemic brain injury looks like. She will
9 show you what the images look like. And she is going to
10 explain to you why the four tests I talked to you about
11 earlier, why they are important, and why they show that
12 Jonathan does not have a brain injury.

13 We also have a neuropsychology expert, Dr. John
14 Kirk. It is not that he is Dr. Kirk and his dad was James,
15 so -- Dr. Kirk received his doctorate of psychology from the
16 University of Denver in 2002. Dr. Kirk is not an M.D.; he
17 is a neuropsychologist. And he didn't go to medical school,
18 but what he did do, his postgraduate study was actually at
19 the Johns Hopkins Medical School in Baltimore. So he had
20 training for two years at Johns Hopkins Medical School
21 within his field of neuropsychology.

22 He is board certified in both clinical and
23 pediatric neuropsychology, and he is in current practice in
24 Louisville, Colorado, right outside of Boulder. I do not
25 have photos of our experts to show you on the screen here

1 because frankly I don't think they do them justice. I think
2 you will enjoy meeting them in person and having them speak
3 to you -- not being in 2-D picture.

4 Dr. Kirk is going to tell you about his
5 interactions with Jonathan and his family, and he is going
6 to tell you about the testing that he performed. He is
7 going to explain that when he tested Jonathan in his native
8 language of Spanish, that he tested solidly average.

9 He is going to tell you how Jonathan was excited
10 to show him what he knew. So, during the testing, Jonathan
11 just was vibrant with him. So while we are talking about
12 experts, I would like to explain a little bit the difference
13 between a neurologist and a neuropsychologist, so we are
14 clear.

15 A neurologist is a medical doctor, and the
16 medical doctor goes to medical school and holds those
17 degrees, and the medical doctor will diagnose injuries. And
18 that's Dr. Dingman. And a neuropsychology expert does not
19 go to medical school, they hold doctorates, and what they do
20 is they look at brain function and how it affects the
21 person, and that's Dr. Kirk.

22 So they can come to the same opinions in
23 different ways. They are different disciplines, but they
24 come at it from different perspectives. And you will learn
25 all about that, but I just wanted to be clear on who these

1 folks are.

2 You heard earlier that Plaintiffs have a
3 neurologist, Dr. Brian Woodruff, and he is going to testify
4 that the child does have a brain injury, and his opinions
5 are based on literature. They discuss the risk factors that
6 I told you about earlier, but it's very curious that Dr.
7 Woodruff completely discounts imaging as a definitive
8 diagnosis for brain injury, and completely discounts that
9 Jonathan's imaging is normal.

10 Plaintiffs also have a neuropsychology expert,
11 and Dr. Joyce, whose picture you saw, he works with people
12 who have traumatic brain injury, blunt force trauma. That's
13 not here. That's not an issue in this case. But he also
14 examined Jonathan, and you are going to hear about his
15 testing which we find to be questionable.

16 You are going to hear from all the Plaintiff's
17 experts first, and it's going to sound really bad for us, I
18 promise you. It's hard to sit over there sometimes. But I
19 ask, we ask, my colleagues, Mike and Holly, and you met
20 Shari yesterday. Shari is from Pecos Valley Clinic in
21 Hobbs. I ask that you wait to make up your mind until
22 you've heard from everyone.

23 I want you to understand that what the judge said
24 earlier on Monday was that lawyer argument is not evidence.
25 Okay? And I went to thank you for listening to me and

1 taking the time to give me your attention after the long
2 morning. I tried to keep it brief, I think I have
3 accomplished that.

4 But what is difficult or will be difficult for
5 you all is the medical testimony, it gets tedious. It gets
6 tedious for us standing up here asking you questions, but as
7 you listen you are going to learn, and you will understand.

8 One thing that kind of bothered me a little bit
9 this morning was the defense position. And I will tell you,
10 the brain injury and the defense position on that has never
11 changed in this case. It's never been anything -- it's
12 always been in dispute because the objective findings of the
13 imaging that I keep telling you about, they don't show brain
14 injury. And those existed long before this lawsuit was
15 filed. The last one was when Jonathan was two.

16 So for that reason, and after you have heard
17 witnesses, you are going to understand why it is that
18 Jonathan does not have a brain injury, and we are going to
19 ask you to render a verdict that reflects that. So again,
20 thank you, I will not get to talk directly to you again, and
21 if I pass you in the hallway and go like this, it's not
22 because I'm being rude or trying to hide from you, it's
23 because I very much respect and we very much respect your
24 role here as the judges of this case. And please feel free
25 to give us the evil eye if you think we are not telling you

1 something, but we are here to put on the best case we can,
2 along with Plaintiff's counsel. All right. Thank you very
3 much.

4 THE COURT: All right. I only make you do
5 pushups and sit-ups after lunch in order it stay awake.
6 Plaintiffs are going to call their first witness, and while
7 we they are doing that, I will ask you to stand and stretch.
8 I'm going to ask you to do that periodically as witnesses
9 are coming to help the blood flow.

10 No disrespect to any witness, I just know it's
11 hard to sit for hours on end and try to stay engaged. I
12 know you are going to do a great job, but I ask you again to
13 get the blood moving.

14 While the first witness is coming, I want you to
15 remain standing, but I want to give you a couple of interim
16 in trial instructions that are appropriate now.

17 First, you are going to see a lot of exhibits
18 during this trial and during witness' testimony. When an
19 exhibit is presented to you in open court you should not
20 discuss it with other jurors you should not point out to
21 another juror matters that seem important to you. You
22 should not whisper back and forth with other jurors about
23 the exhibit. You will have an opportunity to discuss the
24 exhibits in the jury room.

25 In addition, you are going to hear from a lot of