

IN THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 03 CA 1622

HAROLD DOLE SLAYTON and JULIE SLAYTON, as Personal
Representatives of the Estate of LEVI SLAYTON, deceased,
Plaintiffs,

vs.

PROFESSIONAL PARK PEDIATRICS, P.A., JOHN L. ELZIE, M.D.,
PEDIATRICS ON TIMBERLANE, P.A. and JAMES C. PENROD,
M.D.,

Defendants.

IN RE: Jury Trial Excerpt
Excerpt of Mr. Fox's Closing

BEFORE: Honorable Thomas Bateman

DATE: June 25, 2007

TIME: Commenced at 9:35 a.m.
Concluded at 1:05 p.m.

LOCATION: Leon County Courthouse
Tallahassee, FL

REPORTED BY: LISA D. FREEZE, RPR
Notary Public

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PROCEEDINGS

* * *

MR. FOX: May it please the Court.

THE COURT: Yes, sir.

MR. FOX: Ladies and gentlemen, before I begin, let me, on behalf of Julie and Dole Slayton, thank you for the time and attention you've given us in this case. You've been here for seven days, and they call it jury duty. But I think those of us who are involved in the process consider it more of an opportunity, an opportunity to participate in our democracy, because as we said before, this is one of the few countries on the planet that lets members of our community participate and make important decisions about rights and wrongs and gives them the opportunity to legally correct wrongs that have been done to people.

And for your attention, and you have been attentive, you've taken notes, you've listened. On behalf of the Slaytons, I want to express my sincere appreciation to you. And I know I speak for all of the lawyers in this case.

Now, after listening to all of the testimony, the issues that you have to decide,

1 you're going to be given a verdict form when
2 you go back to deliberate, and it looks like
3 this. And the first two questions are, was
4 there negligence on the part of Professional
5 Park Pediatrics that was the legal cause of
6 death of Levi Slayton. And the second question
7 is the same one except it pertains to
8 Dr. Penrod.

9 And after all this, that's what the case
10 has boiled down to: Two things. Was there
11 negligence that was a legal cause of injury and
12 death. So that's really two separate
13 questions, and I would like to address each of
14 them with you, because Judge Bateman has just
15 given you the law.

16 And what he has explained to you is that
17 negligence is the failure to use reasonable
18 care. And that's what is required of these
19 defendants. They don't have to be perfect in
20 their jobs. None of us have to be perfect.
21 But they have to be reasonable. They have to
22 exercise reasonable care.

23 What does reasonable care mean when you're
24 a doctor taking care of a patient like Levi
25 Slayton? Well, reasonable care means that you

1 know a couple things and that Levi Slayton was
2 a baby that requires special care. Why?
3 Because number one, he's premature; and number
4 two, he is the product of a pregnancy where the
5 mom had an infection.

6 And because of the prematurity and because
7 of the infection, as you know now, Levi was at
8 increased risk for infection. And every doctor
9 in this case knew that because premature babies
10 are -- their systems, their immune systems are
11 less developed than term infants. They don't
12 handle infections as well as others.

13 And I think every doctor who has testified
14 in this case has agreed, that if a premature
15 baby like Levi has an infection and that
16 infection goes undiagnosed and untreated, it
17 can cause the death of the baby.

18 So for that reason, reasonable care in
19 this case, as Dr. Trotter, our first witness,
20 explained to you, means you don't take chances.
21 You don't take chances. If you see signs of
22 infection with a baby, you can't just assume
23 that they're due to something else.

24 Not today when medical science has tests
25 that help doctors rule out infections. Today

1 doctors don't have to guess about whether or
2 not, for example, an elevated bilirubin is due
3 to infection. They have tests that help them
4 figure it out. Blood cultures, urine cultures,
5 all sorts of things that Dr. Trotter explained
6 to you. And the whole reason why medicine has
7 devised these tests is to aid doctors so they
8 don't have to guess, and they can exercise
9 reasonable care.

10 And one of the things you know by now, you
11 know more about bilirubin I suspect than most
12 people on the planet. You know more about
13 bilirubin than you ever wanted to know. But
14 one of the things you know without a shadow of
15 a doubt, and I think everybody in this case has
16 testified to, is that an elevated bilirubin can
17 be a sign of infection.

18 You remember I put this sign up on the
19 board, and I think almost everybody signed off
20 on it. Dr. Trotter, our expert, Dr. Pinar,
21 Dr. Elzie, Dr. Penrod, and Dr. Bunnell. No
22 dispute, I don't think, that an elevated
23 bilirubin is a sign of infection. And what
24 happened in this case, from the day that Levi
25 was discharged from TMH, on August 18th,

1 remember what happened, he started showing
2 jaundice for the first time.

3 And so, Dr. Elzie, you know, to his
4 credit, Dr. Elzie did the right thing, ordered
5 that bilirubin test, and what did it do? It
6 came back at 12.7, which is in the high
7 intermediate risk zone. So what does that
8 mean? That means in a premature baby like
9 this, he knows that Levi has got some
10 laboratory evidence of infection.

11 And he knows that if Levi does in fact
12 have infection and it's not diagnosed and
13 treated, very bad things can happen.

14 So at that point Dr. Elzie and Dr. Bunnell
15 are faced with a decision. They got a
16 premature baby at risk for infection. They now
17 got laboratory evidence of a possibility of an
18 infection. They don't know for sure he's got
19 an infection, but they know there's a good
20 possibility. So you're faced with a decision.
21 Do you discharge Levi and send him home, or do
22 you say, wait a second, let's follow up on
23 this. This is a 35-week-old, two-day baby.
24 He's now showing signs of infection. We know
25 that if he's got the infection, bad things can

1 happen. What do we do?

2 They made the decision to discharge Levi,
3 because they assumed, didn't they? They
4 assumed that that increasing bilirubin was
5 nothing to be overly concerned about. It could
6 just be treated later. Just give him another
7 bilirubin test the next day and send him home.

8 Well, they assumed wrong. One of the sad
9 things about this case is how little effort
10 would have been required of Dr. Elzie,
11 Dr. Bunnell, and Dr. Penrod to do the right
12 thing in this case.

13 Sometimes heroic things are required of
14 doctors to save babies' lives. But this was
15 not a case where Levi was in some catastrophic
16 automobile accident where pediatric
17 neurosurgeons had to perform complex
18 neurosurgery to save his life. It's not that
19 kind of case at all. All Dr. Elzie or
20 Dr. Bunnell had to do was pick up the phone
21 when the nurse calls to report the 12.7, say,
22 Nurse, listen, Levi is 35 weeks, you know, his
23 hospital course hasn't been totally normal.
24 He's got jaundice. He now has the elevated
25 bilirubin. Let's keep him for a day. Let's

1 keep him, see what the bilirubin comes back
2 tomorrow, and if it's normal or it drops
3 significantly, we can just discharge him and we
4 can breathe a sigh of relief. That's all that
5 would have been required.

6 All that would have been required, because
7 the next day we know the bilirubin goes up to
8 16.9, and if he had been in the hospital then
9 he would have stayed there. And they would
10 have reported the test the next day, and if it
11 was 21.7 he would have stayed there. And if he
12 stopped breathing and if he was in the
13 hospital, the overwhelming probabilities are
14 that he would be with us today.

15 And that's the tragedy of this case, how
16 little it would have required of Dr. Bunnell
17 and Dr. Elzie. All they had to do was keep him
18 in the hospital. Reasonably careful
19 physicians, ladies and gentlemen, don't
20 discharge babies under these circumstances.
21 That's what Dr. Trotter explained. Because
22 Levi Slayton was not the first baby to die when
23 his infection went undiagnosed and untreated.

24 So, Dr. Elzie and Dr. Bunnell in
25 discharging Levi would suggest to you did not

1 exercise reasonable care. As you know by now,
2 this is something we showed you in opening
3 statement, the lack of oxygen on the morning of
4 Levi's collapse -- because Levi was not in the
5 hospital -- led to his severe and irreversible
6 brain damage, and that led to the doctor's
7 recommendation that life support be removed.

8 That is why the decision to discharge Levi
9 from the hospital was a legal cause of Levi's
10 death.

11 Now, one of the things that the defendants
12 alluded to during the course of their case that
13 we need to talk about, you and I right now, is
14 the suggestion that if Levi had been in the
15 hospital he would have died anyway when he
16 collapsed.

17 Dr. Penrod had readmitted him. Had he
18 been in the hospital, at the instruction of
19 Dr. Elzie and Dr. Bunnell, he still would have
20 died. Ladies and gentlemen, I submit to you
21 that reason and ration and logic and common
22 sense say that that is not true. They say,
23 well, wait a second. They couldn't have put
24 him in some well baby nursery where he wasn't
25 going to be monitored. They could have put him

1 somewhere else where he wasn't going to be
2 monitored.

3 Folks, Levi Slayton was 35 weeks old.
4 He's gotten skyrocketing bilirubin, by at least
5 the 20th, he's got signs and symptoms of
6 infection. He's got breathing problems. He's
7 a premature baby. His mom has had an
8 infection. Is this a baby that they're going
9 to put in a nonmonitored bin? Does that make
10 any sense?

11 And if in fact Dr. Elzie or Dr. Bunnell or
12 Penrod had Levi in the hospital and they
13 allowed him to remain in a nonmonitored bed,
14 that in and of itself was negligence.

15 We asked Dr. Trotter, our expert, said:
16 How many times have you had a baby die when
17 he's been -- of a lack of oxygen, because you
18 remember, that's what we're talking about.
19 Lack of oxygen when Levi stops breathing. How
20 many times have you had a baby die of a lack of
21 oxygen in a hospital?

22 Dr. Penrod said none.

23 We asked the same question to Dr. Truman:
24 How many babies that you admit with mild
25 pneumonia who are not critically ill have you

1 had die of a lack of oxygen in TMH?

2 He says none.

3 Even Dr. Elzie. We asked him the question
4 when he was on the stand.

5 As we talked about before, Levi's death
6 resulted from severe brain damage that he
7 suffered when his lungs stopped working and the
8 brain didn't get oxygen. Right? Right. How
9 many patients have you had at TMH that have
10 been in the hospital -- for whatever reason,
11 whether cardiac or for whatever reason, that
12 have suffered brain death from a lack of
13 oxygen?

14 Answer: I haven't had any.

15 You haven't heard testimony from any
16 physician in this case that any baby who has
17 been properly cared for in the hospital in a
18 monitored bed has ever suffered severe and
19 irreparable brain damage as a result of a lack
20 of oxygen. That is why their negligence in
21 failing to keep Levi in the hospital and
22 Dr. Penrod's negligence in failing to readmit
23 them was a legal cause of Levi's death.

24 And the instruction that you got from
25 Judge Bateman -- keep in mind, of course, that

1 in a case like this, their negligence doesn't
2 have to be the only cause. It can be a legal
3 cause of injury, even though it operates with
4 some natural cause -- in this case the natural
5 cause was pneumonia -- if such other cause
6 occurs at the same time as the negligence.

7 So the pneumonia, the disease was going on
8 at the same time as the defendant's negligence.
9 Their failure to admit him to the hospital and
10 thus their negligence was a legal cause of
11 Levi's death.

12 What was the rush to discharge Levi? What
13 was the harm in keeping Levi in the hospital,
14 35-week-old preemie at risk for infection
15 because his mom was infected? Nobody has given
16 you any good reason for discharging this baby.
17 Nobody has given you any good reason. There
18 was no harm in keeping Levi, but there was a
19 lot of potential harm in discharging him.

20 Let me visit with you about Dr. Penrod.
21 What happens with Dr. Penrod? Dr. Penrod, as
22 you know, sees Levi two days after Levi's
23 discharge, and at this point Dr. Penrod knows
24 he's got a lot more information than Dr. Elzie
25 or Bunnell had. At this point Dr. Penrod knows

1 that Levi's bilirubin is no longer 12.7, it's
2 increased to 16.9, which is a 33 percent
3 increase. You remember from the day before?

4 He knows that Levi is being taken to his
5 office because Julie is concerned about his
6 breathing. He's got breathing problems. And I
7 hope that that at this point is no longer in
8 dispute, because even Dr. Penrod admits that
9 Julie was concerned about his breathing,
10 concerned about his lungs. Not concerned that
11 the breathing problems were caused by the nose,
12 but by lung problems.

13 And I asked Dr. Penrod that question when
14 he was testifying, and this is it. And just so
15 the jury is finally clear on this and there is
16 no ambiguity and there is no doubt about it,
17 when you were in your office with Julie and
18 Dole and Levi, she told you that she was
19 concerned about his breathing, Levi's breathing
20 problem. She wanted -- she was concerned about
21 whether his lungs -- not his nose but his
22 lungs -- were all right.

23 Is that correct?

24 Answer: That is correct.

25 So let's once and for all close this

1 business about whether or not Levi had
2 breathing problems, because it's not just Julie
3 who's told you that. Dr. Penrod has admitted
4 that was the reason that Levi was brought
5 there, because she was concerned about the
6 breathing problems.

7 So at that point Dr. Penrod knows that
8 Levi has got the breathing problems. He's got
9 a 33 percent increase in his bilirubin, which
10 he admits to knowing is a sign of infection.
11 He knows that mom had an infection, and he
12 knows that if Levi has got an infection -- and
13 he has admitted this before you -- he knew that
14 if Levi had an infection and his infection went
15 undiagnosed and untreated it could cause his
16 death.

17 He knew all of those things at the time
18 that he treated Levi. That was when he got the
19 16.9 bilirubin. And instead of doing at that
20 point as Dr. Trotter said he needed to do,
21 which is admit Levi to the hospital, his
22 response is, well, go get another bilirubin.

23 And, you know, that was wrong. The
24 evidence has shown that was the wrong thing to
25 do. But -- but he might have gotten away with

1 it if the bilirubin then drops. If the
2 bilirubin drops to nine or ten or eight or
3 seven, then you breathe a sigh of relief. And
4 even though maybe he should have been
5 hospitalized, at least there is no harm, no
6 foul.

7 That, of course, is not what happened.
8 What happened was a bilirubin was done again.
9 Sorry to be stumbling around here. Bilirubin
10 was done again, and what happens? Comes back
11 at 21.7. Now it has increased, ladies and
12 gentlemen, it has increased 70 percent over
13 what it is before. A 70 percent increase.

14 Now, if there were ever any doubt about
15 whether this baby needed to be hospitalized,
16 now Dr. Penrod has got all the -- he's got more
17 information than anybody could possibly want to
18 justify readmitting this baby.

19 And even his nurse -- look at this. His
20 nurse, when she gets the result, today's
21 results, and she double underlines -- this is
22 not our double underline, this is hers --
23 increase, 21.7. And she puts an explanation
24 point after it. She got it. She understood
25 that this was a baby who was at severe risk,

1 who needed to be in the hospital.

2 Dr. Trotter explained to you that this
3 baby needed to be in the hospital, or was it
4 just Dr. Trotter, our expert? The answer is
5 no. Dr. Maisels -- you remember Dr. Maisels
6 from Michigan? Their expert. He came down and
7 he testified that if Levi had been his patient,
8 number one, he would have started phototherapy
9 at 16.9, but number two, when the bilirubin
10 came back at 21.7, if Levi had been his
11 patient, he would have been in the hospital.

12 And, you see, that's pretty rare. When
13 one of defense experts -- an expert that's been
14 hired and paid by them -- comes in and says
15 exactly what the plaintiff's expert said. This
16 is a baby who needed to be in the hospital.

17 But, you know, that wasn't the end of it.
18 We asked the same questions of Dr. Elzie. When
19 Dr. Elzie was on the stand -- and I'm sure you
20 remember this -- Dr. Elzie, if Levi had been
21 your patient and you knew of the 21.7, would
22 you have hospitalized Levi?

23 And he said yes.

24 It's not just Dr. Trotter. It's Dr. Elzie
25 and whose employer, Professional Park

1 Pediatric, is a defendant in this case. And
2 Dr. Maisels is their own expert. Levi needed
3 to be in the hospital.

4 Dr. Elzie practices in the same community
5 as Dr. Penrod. If there were any way that he
6 could have justified Dr. Elzie not
7 hospitalizing this baby at 21.7 he would have
8 told you, because it's not easy for him to say
9 that, but he did. There's no question, ladies
10 and gentlemen, at that point Levi needs to be
11 in the hospital.

12 Dr. Penrod's examination of Levi, you
13 heard Julie describe it, he appeared to be
14 hurried, annoyed, examination took --

15 MR. DENNIS: Objection, Your Honor.

16 THE COURT: What's the grounds?

17 MR. DENNIS: That was not her testimony.

18 THE COURT: Well, let me just say this. The
19 testimony is what you remember it to be, and I
20 think you can make fair comment on what the
21 testimony was, so you can dispute -- make the
22 argument to the jury.

23 MR. DENNIS: Well --

24 THE COURT: You know, I don't know. What was
25 said was said, and the jury is going to --

1 MR. DENNIS: My objection for the record is
2 that was not her testimony in this courtroom.

3 THE COURT: Overruled. You may continue.

4 MR. FOX: Thank you, Your Honor.

5 Julie explained that she felt that the
6 examination was rushed and hurried, that it
7 took less than -- less than five minutes.

8 They -- she told Dr. Penrod just exactly
9 what we read to you, that she was there because
10 she was concerned about Levi's lungs and
11 breathing problems.

12 And Dr. Trotter, our expert, was asked by
13 one of the lawyers: Well, you're not
14 questioning how thorough Dr. Penrod's exam was,
15 are you, Dr. Trotter?

16 And Dr. Trotter said: Well, as a matter
17 of fact, yes, I am.

18 They said: Well, why was that?

19 Because during this exam, not only does it
20 turn out that Dr. Penrod mistakenly believed
21 that Levi is a term infant -- remember he tried
22 to tell you Levi was a term infant? The only
23 physician in this case to say Levi was a term
24 infant. He didn't even take a careful enough
25 history to understand this was a premature

1 baby.

2 And as Dr. Trotter said, when you treat a
3 premature baby as a term infant, that creates
4 all sorts of problems. And then perhaps the
5 most significant thing Dr. Trotter said is,
6 where are the vital signs?

7 You know, they call them vital signs for a
8 reason. Now, at this point Dr. Trotter ought
9 to know -- ought to know that Levi is at risk,
10 even though he never bothered to ask about the
11 gestational change, which is an important thing
12 to know. He ought to know Levi is at risk for
13 infection. So how does a careful physician
14 treat a baby like this who's at risk?

15 You do vital signs. They're called vital
16 for a reason. It doesn't take a lot of time;
17 it doesn't cost a nickel; and it provides
18 important information. And Dr. Maisels, their
19 expert, said vital signs are critical.

20 Why? Because sometimes a baby may be
21 really sick and you can't tell just by looking
22 at the baby. That's the whole reason for
23 taking vital signs, to give you information
24 that you can't get just by looking.

25 What's Dr. Penrod's justification for not

1 doing vital signs? Well, he says, I didn't
2 need to do vital signs because -- and this was,
3 I think, one of the most interesting things in
4 the case.

5 He said: I remember putting my hands on
6 Levi and Levi not feeling hot, with a
7 suggestion that was why he didn't even take a
8 temperature.

9 Well, I asked Dr. Penrod: How many exams
10 have you done in the course of your life?

11 He says: 150,000. And yet he says -- he
12 looks you in the eye and he says: I remember
13 this one exam, five years ago, and I remember
14 Levi not feeling hot.

15 You need to judge the credibility of these
16 things for yourself. Ask yourself whether that
17 kind of testimony makes any sense. Is that a
18 justification for not taking a temperature on
19 this baby who's brought to you because of
20 breathing problems, who's at increased risk for
21 infection, who's got a bilirubin that's
22 skyrocketing. You put your hands on the baby
23 and that's a justification for not doing vital
24 signs?

25 I don't think so. And Dr. Trotter

1 explained to you -- he didn't tell you anything
2 that your common sense wouldn't tell you. With
3 a baby like this, you need to do vital signs.
4 And even if he put his hand on him, and Levi
5 felt cool, how then do you justify with a baby
6 who's taken to you because of breathing
7 problems not even doing the respirations,
8 calculating what his respirations are? Which
9 is an important vital sign. Not doing a blood
10 pressure, not taking a pulse.

11 That's why this exam, ladies and
12 gentlemen, was far, far below the standard of
13 care.

14 You were told by Dr. Penrod that he
15 remembers Julie taking Levi to him. And I
16 asked him: Well, Dr. Penrod what was the
17 reason Julie was coming to you?

18 Well, Levi was happy and content.

19 That was his testimony. Happy and
20 content. Folks, I suggest to you that Julie
21 and Dole Slayton don't drive half hour, 45
22 minutes from Crawfordville to see a
23 pediatrician under these circumstances, because
24 Levi is happy and content. They went to see
25 Dr. Penrod because he wasn't happy or content,

1 because he was having breathing problems and
2 because they wanted to follow up with the
3 doctor because they were concerned about it.

4 This is the picture of Levi. It's in
5 evidence. Does that look like a happy and
6 content baby to you? And by the way, folks,
7 this picture, you know, it goes without saying,
8 this picture wasn't taken for this lawsuit. At
9 the time this picture was taken on August 20th,
10 you know, they were happy people. They had
11 just had their first baby. They had no idea
12 that two days later Levi would be dead.

13 This is not a happy and content baby.
14 This is a sick baby.

15 Not using reasonable care. When you
16 don't do a vital sign on a sick baby like this,
17 that's not using reasonable care. When you
18 allow a baby like this with skyrocketing
19 bilirubin not to be hospitalized, when you know
20 or should know -- know or should know that this
21 baby is premature, at risk for infection, and
22 he has now got a great marker of infection,
23 skyrocketing bilirubin, and you know, as he has
24 admitted knowing, that if a baby like this
25 isn't properly diagnosed and treated he can

1 die.

2 How can you justify not hospitalizing a
3 baby? You can't. And because Levi was not in
4 the hospital at the time he collapsed, he
5 suffered severe and irreversible brain damage
6 as a result of a lack of oxygen, and the
7 doctors recommended removal of life support.
8 That is why Dr. Penrod's negligence was a legal
9 cause of Levi's injury and death.

10 Much has been said to you about whether or
11 not Levi had pneumonia. At the time that
12 Dr. Penrod examined him -- and you've heard
13 Dr. Trotter and Dr. Pinar, our perinatal
14 pathologist, explain to you that, of course,
15 Levi had pneumonia then. That was what caused
16 his lungs to stop working. The pneumonia is
17 what caused his breathing problems that brought
18 Levi to Dr. Penrod in the first place.

19 Of course he had pneumonia. But it's not
20 just them. Even Dr. Radetsky -- do you
21 remember Dr. Radetsky? He was the last
22 physician to testify for the defense. I'm
23 going to have some more to say about
24 Dr. Radetsky in just a minute.

25 But Dr. Radetsky said that Levi had

1 pneumonia for at least a day or so before he
2 collapsed, even though he thought there were no
3 clinical manifestations. Even Dr. Radetsky
4 said that Levi had pneumonia.

5 But I don't want you to have to rely upon
6 your recollection, because I have to rely upon
7 mine, because he was asked the question:
8 Doctor, if I understand correctly, you don't
9 believe Levi had any illness up until the time
10 he stopped breathing?

11 This is Dr. Radetsky.

12 Well, in retrospect he must have had
13 pneumonia present there for a day or so, based
14 on what I understand to be the histology of the
15 lungs and of autopsy, but there were no
16 clinical manifestations of it.

17 Of course, at that point, he didn't
18 realize that Levi had these breathing problems.
19 He must have had pneumonia there for a day or
20 so before he collapsed, which is what puts the
21 pneumonia there at the time of Dr. Penrod's
22 office visit, which is consistent with what
23 Dr. Trotter said and what Dr. Pinar told you.

24 Now, there's something else I need to
25 visit with you about, and I'm reluctant to even

1 talk about it. But you will recall Dr. Penrod
2 told you that when he got that first bilirubin,
3 the 16.9, he ordered the phototherapy in
4 response to that.

5 Well, is that accurate? Is that accurate
6 testimony? We don't think so. You don't want
7 to tell our jury that home phototherapy after
8 you got the 16.9, that you set that up after
9 you got -- that wasn't your testimony.

10 Answer: Yes, that was my testimony.

11 Well, folks, I ask you the question. It's
12 undisputed that after that office visit, Julie
13 and Dole took Levi to get the next bilirubin
14 that ultimately came back at 21.7. If you
15 order phototherapy for a patient like this
16 before you leave the office, what do you do?
17 You tell the patient, stop at American Home
18 Patient, pick up the bili light and go home.
19 Didn't happen. Didn't happen.

20 They went to get the result, the next
21 bilirubin test, they drove back to
22 Crawfordville, and it wasn't until after the
23 21.7 result came back that Dr. Penrod ordered
24 the bilirubin light, and that's just crystal
25 clear, we suggest, from his records. Look at

1 this. Here's -- and by the way, these records
2 are going to be in evidence. This is
3 Dr. Penrod's chart.

4 8/20, call American Home Patient to set up
5 home phototherapy. And in parentheses you see,
6 bili 21.7. That was when the home phototherapy
7 was set up. It wasn't after the 16.9. But
8 that's the testimony that you're given.

9 Now, they say that when Dr. Penrod saw
10 Levi there was no urgency for him to be in the
11 hospital. He was okay. He was fine. What is
12 the proof on that issue? What evidence have
13 you heard? What is the best evidence that
14 you've got before you that Levi needed to be
15 hospitalized, that Dr. Trotter and Dr. Pinar
16 are absolutely correct, that Dr. Maisels was
17 correct when he said Levi needed to be in the
18 hospital, that Dr. Elzie was correct when he
19 said he needed to be in the hospital? What's
20 the best evidence you've got?

21 16 hours later Levi's lungs stop working.
22 16 hours after he sees Dr. Penrod. 13 or 14
23 hours after that 21.7 comes back, his lungs
24 stop working.

25 And, folks, that was entirely predictable,

1 entirely predictable, with the skyrocketing
2 bilirubin and the breathing problems. That's
3 why he needed to be in the hospital. And if
4 he's in the hospital gets the oxygen before --
5 if he collapses -- before he sustains severe
6 and irreversible brain damage. Why? Because
7 as Dr. Trotter explained, and as you know from
8 your own common experience, sick babies who are
9 in the hospital are monitored, and when they
10 stop breathing, they're all over it.

11 In fact, I think one of the things that
12 is -- is useful to you is to look back at what
13 happened when Levi was first hospitalized, and
14 this goes to the issue of what nurses -- how
15 nurses respond or should respond when babies
16 show signs that may be oxygen-related.

17 Now, I'm not talking about a complete
18 stopping of breathing here. I'm talking about
19 little signs that maybe the baby is not getting
20 enough oxygen. During the first
21 hospitalization what happened? And again, this
22 is going to be in evidence, not this thing but
23 the records are in evidence. On day one, Levi
24 had some problems and duskiness, and what the
25 nurses did, they gave him blow-by oxygen; and

1 they notified the charge nurse at the first
2 sign of an oxygen problem, because that's what
3 trained nurses do.

4 And this was a well baby. How much closer
5 would Levi have been monitored if he had been
6 in the hospital with these elevated bilirubins
7 and all the risk factors that we talked about?

8 The question I suppose you're asking
9 yourselves is, what was done by these doctors
10 to look for the cause of the elevated bilirubin
11 in this little boy? Think about it for a
12 second. What did they do to look for the cause
13 of the elevated bilirubin? The answer is
14 nothing. Nothing. This isn't the kind of case
15 where they tried real hard and ran a bunch of
16 tests. They tried real hard to look, and they
17 just couldn't find it. Where they tried their
18 hardest, did their best, couldn't find the
19 cause. They didn't even try. Dr. Maisels,
20 even their expert, says in every case you may
21 not find the cause but you got to look.

22 Here they didn't even look. Ladies and
23 gentlemen, that's not exercising reasonable
24 care. That's negligence. So little effort
25 would have been required of Dr. Penrod pick up

1 the phone. Tallahassee Memorial, Dr. Penrod
2 here. I'm sending over Levi Slayton. He's got
3 bilirubin that's increased 70 percent over the
4 last two days. He's a premature baby at risk.
5 Put him in a monitored bed. Repeat the
6 bilirubin tomorrow. Thank you. Goodbye.

7 That's all that would have been required,
8 and Levi's life would have been saved. The
9 failure to do that was failure to use
10 reasonable care, and that was a legal cause of
11 Levi's death.

12 Now, you may remember in opening statement
13 I told you that your biggest task in this case
14 was going to be this, avoidance of confusion.
15 Avoidance of confusion, because you've had so
16 much medicine thrown at you the last four or
17 five days. And the truth is, for us as lawyers
18 it's easy to confuse. We've been in this case
19 for three or four years, you've been in it for
20 four or five days. It's easy to confuse it,
21 isn't it?

22 The defendant's case, think about the
23 witnesses they called and what they said, and
24 ask yourselves, was that presentation of
25 witnesses designed to help you understand this

1 case or not? They start off by calling
2 Dr. Dolson. Dr. Dolson says, the cause of
3 Levi's death was fulminant pneumonia.

4 They then call Dr. Truman and Dr. Zak to
5 say, well, we think it was group B strep or
6 SIDS or this overlaying business. And then
7 Dr. Zak says something else. So you get
8 completely conflicting versions of what they
9 say during their case was the cause of Levi's
10 death. And then they call Dr. Radetsky to say
11 it was cardiac. It was cardiac.

12 Well, I suggest to you that we have given
13 you, through Dr. Trotter, through Dr. Pinar, a
14 logical medically justified explanation for why
15 their negligence caused or contributed to
16 Levi's death. And I suggest that the defense
17 in this case has been primarily one designed to
18 confuse you.

19 Let me start just by talking about this
20 business of the cause of Levi's death. How
21 many hours were spent during this trial where
22 they questioned witnesses about this overlying
23 business? Do you remember one witness after
24 another. Well, isn't it possible that Julie
25 accidentally suffocated Levi? One witness

1 after another, hours of that. And so you
2 probably thought after listening to that, well,
3 the defense contends that the overlying caused
4 Levi's death, right?

5 Well, then, boom, you get to the end of
6 their case and their final witness,
7 Dr. Radetsky, says, no, it wasn't overlying.
8 It was cardiac.

9 Well, folks, let me ask you this. Let me
10 ask you this. If it was cardiac -- and they --
11 they knew that Dr. Radetsky was going to come
12 in and tell you it was cardiac, but yet they
13 spent hour after hour talking to each of these
14 witnesses about overlying.

15 You're sitting there trying to figure it
16 out. You're taking notes. You're listening.
17 You're trying to figure it out. Does that help
18 you? Does that help you in your search for
19 truth?

20 Opening statement. Remember I wrote this
21 on the board. What do defendants say caused
22 Levi to stop breathing. Do you know? As you
23 sit here today, after listening to their entire
24 case, do you know what they say caused Levi to
25 stop breathing? Was it overlying? Do they

1 agree Levi had pneumonia at the time that
2 Dr. Penrod saw him? Because as even their own
3 expert, Dr. Radetsky testified. Or do they say
4 overlying caused it? Or is there something
5 else? Maybe we'll hear it finally during their
6 closing argument. Maybe they will tell you
7 now.

8 Because see -- see, as a jury you have a
9 right to know. You have a right to know. You
10 have a right to know what we say was the cause
11 of death. You've got a right to know what they
12 say was the cause of death. And I suggest to
13 you they've done everything they possibly
14 can -- not to clarify the issues for you, but
15 to make it more difficult.

16 Is it fair to you to talk all about this
17 overlying accidental suffocation? Is it fair
18 to Julie and Dole to talk about it? Think
19 about what they've done. They've accused her
20 of accidentally suffocating her baby, knowing
21 full well --

22 MR. DENNIS: Objection, Your Honor. I object
23 to that and ask the Court to instruct the jury to
24 disregard that comment. We have presented
25 evidence --

1 THE COURT: Well, okay. Let me say that it's
2 closing argument, that you have the right to make
3 an argument that -- that can be considered in
4 light of all the evidence, and so you can respond
5 to that. I think the jury can make that leap. So
6 I'm going to overrule the objection.

7 But, Mr. Fox, you need to be a little
8 careful.

9 MR. FOX: One witness after another -- thank
10 you, Judge -- they have called and questioned
11 about accidental suffocation. Julie and Dole were
12 sitting right there in the courtroom listening to
13 this. And then they call their last witness,
14 Dr. Radetsky, to say, no, it wasn't accidental
15 suffocation. It was this mysterious cardiac
16 thing.

17 Is that fair to you? Is it fair to Julie
18 and Dole? They say, well, you know, you ought
19 not believe this autopsy done by Dr. Dolson
20 because she -- she apparently was either not
21 very well trained or she was not careful or she
22 was incompetent. But don't believe her
23 diagnosis of fulminant pneumonia. That's just
24 flat wrong. Isn't that what you've been told?

25 So we hired Dr. Pinar, a perinatal

1 pathologist, the very best guy we could find, a
2 super specialist, to look at these slides, to
3 look at this evidence. And, mind you, that's
4 what he does. That's all he does. Perinatal
5 pathology. Deals with analyzing the causes of
6 death in stillborns up to babies that die
7 within the first 30 days of life that's all he
8 does.

9 Super specialist. What does he do? He
10 looks at the slides; he looks at the evidence
11 and says, Dr. Dolson was right. This baby died
12 from pneumonia. Baby died from pneumonia.

13 They also explained to you how, if Levi
14 had been in the hospital and properly
15 oxygenated, he never would have suffered the
16 brain damage; and it was the brain damage that
17 led to the disconnection of the life support.

18 So why, you ask yourselves as members of
19 this jury, why would they try so hard to
20 convince you that Dr. Dolson, the medical
21 examiner, is wrong? Why would they try so hard
22 to convince you that Dr. Pinar is wrong, and
23 Dr. Trotter? And even their own expert,
24 Dr. Radetsky, is wrong, because he said Levi
25 had pneumonia at the time that he saw

1 Dr. Penrod. Why? You probably asked yourself
2 that question. And you probably arrived at the
3 answer.

4 And that answer would be, because they
5 know that if Dr. Dolson is right and if
6 Dr. Pinar is right, and if in fact Levi died of
7 pneumonia, it was their negligence that was a
8 legal cause of his death. It's not much more
9 complex than that, ladies and gentlemen,
10 because you know now that one of the main signs
11 of pneumonia is the breathing problems which
12 Levi had, and it's actually -- it all fits
13 together in this case pretty well.

14 He got the infection while he was still
15 inside mom, because mom had an infection.
16 During the first couple days of life, the
17 infection progressed to where it got into his
18 lungs, created the breathing problems. His
19 lungs were not mature because he was premature.
20 And when those breathing problems went
21 undiagnosed and untreated, the lungs just
22 stopped working. He suffered a lack of oxygen
23 to the brain, and he died as a result. The
24 case is no more complex than that, even though
25 they have tried to make it so.

1 They tell you that both Dr. Dolson and
2 Dr. Pinar are wrong. Well, you know, they
3 could have hired a pathologist of their own to
4 come in and testify. Dr. Dolson and Dr. Pinar
5 are wrong. Here is the truth, ladies and
6 gentlemen, they could have hired the
7 pathologist. And you know what, as brought out
8 during the testimony --

9 MR. DENNIS: Objection, Your Honor. Improper
10 closing. Talking about witnesses not called.
11 Improper.

12 THE COURT: Okay. Well, I'm going to
13 overrule the objection to the extent that you
14 haven't really gotten into it, so I'm not sure
15 exactly what it is you're talking about.

16 MR. FOX: Well, we can address that, Your
17 Honor, at the appropriate time.

18 THE COURT: Okay.

19 MR. FOX: During the testimony of
20 Dr. Radetsky, you recall I asked him: What did
21 you look at?

22 He said: Well, I looked at the deposition
23 of Dr. Beckwith.

24 I said: Well, who's Dr. Beckwith?

25 He said: Well, he's a pathologist hired

1 by the defendants.

2 MR. DENNIS: Objection, Your Honor.

3 THE COURT: Overruled. All he's talking
4 about is the testimony, and that was the
5 testimony.

6 MR. DENNIS: At this point, yes, sir.

7 MR. FOX: Dr. Radetsky says: I have reviewed
8 the deposition of Dr. Beckwith.

9 And I asked him: Well, who is
10 Dr. Beckwith.

11 He explained that he was the pathologist
12 hired by the defense. And then he proceeds to
13 tell you what an exceptionally well-qualified
14 pathologist Dr. Beckwith is.

15 But Dr. Beckwith did not testify in this
16 case. I suggest to you, ladies and gentlemen,
17 that if there were any pathologists in Leon
18 County and Florida or anywhere else that would
19 dispute the findings of Dr. Dolson and
20 Dr. Pinar, they would have brought that
21 pathologist to you.

22 But how easy it is to say, just don't
23 believe Dr. Dolson and Dr. Pinar. No
24 explanation for why Dr. Beckwith did not
25 testify.

1 Ladies and gentlemen, they tell you
2 that -- let me just go over some of this stuff
3 quickly. I -- and I don't know how much of it
4 you got, how much of it you didn't. I mean, I
5 don't know. So forgive me if you understand
6 what's going on, but I don't know what you
7 know, so I have to go over some of these
8 things.

9 They tell you that there was no evidence
10 of pneumonia, because when Levi was readmitted
11 to TMH the X-rays didn't show pneumonia. What
12 the X-rays did show is atelectasis. They were
13 partially collapsed. It showed granulation,
14 and it showed inflammation and possibly
15 infection. Those were not normal X-rays.

16 As Dr. Zak and Dr. Pinar said, these
17 X-rays are consistent with pneumonia. They're
18 just not proof of it. Consistent with it.
19 They say, well, look at the fact that when Levi
20 was readmitted they put him on the vent, that
21 it was not hard to ventilate him, not hard to
22 ventilate him. Well, that's true, but that
23 doesn't help him.

24 All that shows is that his lungs had not
25 been irreparably damaged, so that if they had

1 put him in the hospital and he collapsed in the
2 hospital and his brain was oxygenated, his
3 lungs were not going to be a problem, because
4 his lungs were not damaged.

5 They looked for all sorts of problems at
6 TMH, all sorts of problems. And I asked
7 Dr. Truman, I said: Well, suppose Levi's brain
8 hadn't been damaged. Was there any other organ
9 system, his lungs, his heart, his liver, his
10 kidneys, anything else that would have posed a
11 threat to the life of this little boy?

12 And he said: No. He said no.

13 And finally, I need to talk to you about
14 this blood test. The white count. You
15 remember the white count came back at 6,000?
16 They said, ah-hah. We think that that's not
17 proof of infection because it's not elevated.
18 6,000 is within normal limits.

19 Well, Dr. Trotter and Dr. Pinar and
20 finally their own Dr. Truman who testified
21 said: You can't tell anything by that one
22 isolated white count. You need to know what
23 the one was before, if it had been taken a day
24 or two before it, because if it was 25,000 and
25 it had dropped to 6,000, that's very consistent

1 with an infection, but we don't have that data.
2 We don't have that test.

3 Why? Because Dr. Elzie and Dr. Bunnell
4 and Dr. Penrod did not hospitalize this little
5 boy and run the appropriate tests. That's why
6 we don't have that data.

7 That one white count, ladies and
8 gentlemen, I suggest to you means nothing.

9 Truth is that the folks at TMH were thrown
10 off track. They didn't know of Levi's
11 breathing problems. They didn't know -- see,
12 they were operating under the impression that
13 on this overlying business, the whole reason
14 this overlying business -- and you probably
15 heard enough of it. I'm sorry. I just -- this
16 hopefully is going to be about the last thing I
17 say about it.

18 The whole overlaying business, how did it
19 come up? Well, it came up in Dr. Truman's
20 discharge summary. Again, this is going to be
21 in evidence before you.

22 But here it says, does he say overlaying
23 caused the death or probably caused it, most
24 likely caused it? Heck, no. What he says is:
25 It remains a possibility, that if, in fact, the

1 baby had completed breastfeeding, which the
2 baby had not completed breastfeeding, because
3 she was in the middle of breastfeeding, and if
4 the baby was lying in bed with the mother, it
5 is possible that could represent a possible --
6 these are his words -- it is possible that it
7 could represent a possible overlying type of
8 airway obstruction.

9 Well, give us a break. None of that
10 happened. He wasn't finished feeding, and he
11 wasn't being fed in bed and so they knew -- you
12 know, I mean, I don't hold it against
13 Dr. Truman for saying this stuff because he
14 didn't have all the facts. But you have all
15 the facts. They have all the facts, and yet
16 they continue to suggest to you that this
17 overlying is a possibility. How unfair. How
18 unfair is that?

19 Probably the most important thing from
20 that hospitalization, ladies and gentlemen, I
21 suggest to you, is those docs, unlike you, they
22 didn't have all the facts. They didn't have
23 all the facts, but they did the best they could
24 with the information they had.

25 Here is the progress note from Dr. Truman.

1 Explain autopsy testing, unknown what exactly
2 etiology -- etiology means cause -- is for
3 Levi's event at house. Possible infection.
4 This is Dr. Truman. The only thing he talks
5 about in his note, possible infection. Autopsy
6 will be very helpful in trying to determine
7 cause of death.

8 They didn't know, so they got the autopsy,
9 and indeed the autopsy was useful in
10 determining what the cause of death was. And
11 that autopsy shows fulminant pneumonia, and
12 they haven't presented a single witness to you
13 to contradict that. And instead, as a defense
14 designed to confuse, and we knew that was
15 coming. That was why we said the main task in
16 this case, avoidance of confusion.

17 That autopsy that Dr. Truman requested
18 showed pneumonia, the same pneumonia, the cause
19 of breathing problems that brought Levi to
20 Dr. Penrod, and it's the same pneumonia that in
21 a fragile 35-week-old baby, premature baby,
22 caused him to stop breathing at home instead of
23 in the hospital.

24 There is an old expression in the law that
25 confusion is a negligent defendant's best

1 friend. Don't be confused. Keep your eye on
2 the ball, keep your focus -- because what you
3 do here is just so important. I mean, it's
4 just really important. Was there negligence on
5 the part of the defendants that was a legal
6 cause of injury? That is the focus.

7 But you know what? Perhaps the most
8 important thing I can tell you at this point,
9 is even if you want to do what Judge Bateman
10 has told you not to do, that is base your
11 verdict on something other than the evidence,
12 even if you want to disregard all the medical
13 record from the two days of Levi's
14 hospitalization before he left the hospital,
15 even if you want to disregard all the records
16 from Tallahassee Memorial, even if you want to
17 disregard the autopsy, even if you want to
18 disregard the testimony of Dr. Dolson and
19 Dr. Pinar that pneumonia -- undiagnosed and
20 untreated pneumonia -- caused Levi's death,
21 even if you want to reach out -- and I hope you
22 don't do this -- speculate about some other
23 cause for Levi stopping breathing, the truth
24 is, it doesn't help him. It doesn't help him
25 at all.

1 Why? Because the negligence in this case
2 involved the failure to hospitalize and the
3 lack of oxygen, so that even if something else
4 caused Levi to stop breathing, the brain damage
5 occurred because he wasn't in a hospital and
6 they weren't in a position to treat.

7 As to Dr. Radetsky and his cardiac cause
8 of death, let me just briefly comment on that.
9 There were -- you know, you got in evidence
10 before you now, or you will when you go back to
11 deliberate, two days' worth of records from
12 Levi's first hospitalization, a day and a half
13 of TMH. You're going to have the autopsy;
14 you're going to have all of these printed
15 medical records. And you will know that when
16 he was readmitted to TMH -- Dr. Truman pointed
17 this out -- when he was first readmitted, they
18 didn't know what the result was going to be.
19 They didn't know that he was -- that he
20 sustained severe brain damage.

21 So they still thought that they were going
22 to be able to fix him and bring him back. So
23 they were running every test imaginable to
24 figure out what could have caused his lungs to
25 stop working.

1 They found nothing -- none of the
2 physicians have in this case -- to even suggest
3 that a cardiac problem was the cause. The
4 autopsy, Dr. Dolson looked for the cardiac
5 cause. She said no. Levi's heart didn't stop
6 because of a cardiac cause. And she was aware
7 of this business that Dr. Radetsky talked about
8 that somehow, you know, heart can just stop for
9 whatever reason, even without a defect, and
10 then, of course, it restarts without a problem.

11 The defendants, when Dr. Maisels -- I
12 don't know if you remember this, but he was --
13 he was being questioned. I asked him about --
14 you remember, there was some medical articles
15 that they had sent to him dealing with heart
16 problems.

17 And I asked him: Well, why did they send
18 you those?

19 And he said: Well, I guess they wanted me
20 to look for a cardiac cause of death.

21 But Dr. Maisels, he doesn't buy into it.
22 He doesn't tell you there's a cardiac cause.
23 So now, of course, they got a problem, because
24 they got the medical examiner who says it's not
25 a cardiac cause. They got Dr. Truman and

1 Dr. Zak who say it's not a cardiac cause.

2 Their own expert, Dr. Maisels, for whom they've
3 sent records to try to suggest a cardiac cause,
4 he's not on board.

5 Dr. Pinar, the super specialized perinatal
6 pathologist, he says, no, no, no. There's no
7 evidence at all of a cardiac problem. And
8 Dr. Pinar, unlike Dr. Radetsky, Dr. Pinar has
9 testified three times in his life. Perhaps not
10 a very polished witness, but somebody who I
11 think the evidence has shown spoke to you from
12 the heart and certainly is the most experienced
13 physician in this case to advise you as to what
14 the cause of death was.

15 All of these physicians have said there's
16 no cardiac cause. So when that happens, who
17 are you going to call? Dr. Radetsky.
18 Dr. Radetsky. And he comes in and does what
19 every other physician in this case has refused
20 to do. Say that there was a cardiac cause.

21 The reason, ladies and gentlemen, that all
22 these other physicians have said there's no
23 cardiac cause of Levi's stopping breathing is
24 because it's not true. There's no evidence for
25 it. Dr. Radetsky, you recall that he told you

1 initially that this legal work I do, I do it at
2 4:00 a.m. and on the weekends and kind of
3 implied to you that it was just a sidelight of
4 his.

5 Well, we were prepared for him. And I
6 asked him the question. I said: We have 80
7 depositions here, Doctor. Would it surprise
8 you if every single one of these depositions
9 wasn't done at 4:00 a.m. or on the weekends but
10 was done between nine and five on Monday
11 through Friday?

12 This is a fellow -- this is a witness who
13 has testified by deposition or by trial 450
14 times. 95 percent he testifies for the
15 defense, comes in and does just exactly what he
16 did here, say nothing the defendants did caused
17 a problem. 95 percent of the time.

18 In fact, it's probably higher than that,
19 because you remember he said: Well, 5 percent
20 of the time I testify for the patients.

21 I said: Well, wait a second. Can you
22 remember the names of the lawyers or the
23 patients?

24 He said: Well, actually there are only
25 three patients I can remember.

1 The real number is probably 99 percent of
2 the time he testifies -- this witness who calls
3 himself a pediatrician. Comes into court and
4 testifies against brain-damaged babies and
5 against families of deceased children, 95 to
6 99 percent of the time.

7 I asked him, said: Well, Doc, you
8 testified for these law firms 23 times, haven't
9 you?

10 He said: Well, I don't think it's that
11 many.

12 Well, how many is it?

13 Well, I'm not really not sure.

14 Doctor, give us your best estimate. How
15 many times have you testified for these folks?
16 They have a right to know.

17 I'm really not sure.

18 What are you being paid to testify in this
19 case?

20 Well, Mr. Fox, I can't tell you. I didn't
21 bring my invoices with me.

22 Okay, Doc, well, just give our jury an
23 estimate about how much you're being paid.

24 Well, I just -- I'm sorry. I just can't
25 estimate.

1 Well, give us an estimate within \$5,000 of
2 what you're being paid.

3 And he would not even do that. Would not
4 even do that. This is the third time he's
5 testified for Dr. Penrod's lawyer within the
6 last 13 months. And he was in this very
7 courthouse last month doing the same thing,
8 telling another Leon County jury that some
9 defendant didn't do the right thing or didn't
10 cause an injury. Well, he's back. He's back.

11 You know, ladies and gentlemen, Dr. Dolson
12 was knowledgeable about cardiac causes, and she
13 rejected them for good reason. It's because
14 she found fulminant pneumonia in this baby's
15 lungs, and that was clearly the cause of death,
16 and that has now been confirmed for you by
17 Dr. Pinar. There's no evidence of a cardiac
18 cause.

19 Judge Bateman is going to tell you -- or
20 actually already told you. You should not
21 speculate on any matters outside the evidence.
22 Don't speculate, please. Please don't
23 speculate.

24 And that's all that cardiac causes is.
25 It's sheer speculation that has been rejected

1 by every medical witness who has had anything
2 to do with Levi, and every witness who has
3 testified in this case other than Dr. Radetsky.

4 I suggest to you that it's clear from all
5 the evidence that you've looked at that
6 pneumonia was the cause and there has been no
7 evidence from any doctor -- think about this
8 for a second. There has not been a shred of
9 evidence from any doctor that you've heard that
10 any of them have ever had a baby die from
11 pneumonia that's been properly diagnosed and
12 treated. It simply should not happen in the
13 year 2002. It's an infection. Should not
14 happen.

15 Dr. Dolson, they read parts of the
16 deposition to you, and you may hear some more
17 about this from them. But the suggestion was
18 that when Dr. Dolson said it was fulminant
19 pneumonia, she meant within an hour or so. It
20 all developed within an hour or so of when Levi
21 stopped breathing. That was the implication
22 that you were left with when they stopped
23 reading her deposition.

24 What is the truth? You know, there's an
25 old saying in the law that sometimes the truth

1 just doesn't walk into the courtroom.

2 Sometimes it's got to be dragged in.

3 Dr. Dolson -- all right. So if I
4 understand correctly, then you're not saying by
5 use of the term fulminant -- by the way, this
6 is from the deposition that was read to you.
7 These were the last questions that were read to
8 you, the ones we read.

9 So if I understand correctly, then you're
10 not saying by use of fulminant that this
11 process began within an hour or two hours. It
12 could have been an ongoing process.

13 Absolutely. It reached a critical mass or
14 it became apparent.

15 That's what she meant by fulminant. Just
16 exactly the same testimony that you've gotten
17 from Dr. Pinar and Dr. Trotter.

18 Question: All right. So by use of the
19 word fulminant, we're talking about a critical
20 mass or an infection that may be present in the
21 lungs prior to this particular period of time
22 you've been talking about reaches critical mass
23 and grows exponentially.

24 Answer: Correct.

25 It had been there, just as every doctor in

1 this case has testified, and sooner or later,
2 like every infection, every case of pneumonia
3 that's not properly diagnosed and treated, it
4 reaches a point, especially in the case of the
5 newborn, critical, a premature baby like Levi,
6 whose lungs aren't fully developed, where it
7 just causes them to shut down. Perfectly
8 predictable.

9 And unfortunately, because he was not in
10 the hospital, those lungs shut down in a small
11 house in Crawfordville that was not equipped to
12 deal with it.

13 The -- there are actually three defendants
14 in this case. One is Professional Park
15 Pediatrics. That's the professional
16 association. The other is Pediatrics on
17 Timberlane, also a professional association.
18 Pediatrics on Timberlane employs Dr. Penrod,
19 who's a general pediatrician. And Professional
20 Park Pediatrics employs Dr. Elzie and
21 Dr. Bunnell, who are also general pediatricians
22 who practice.

23 That's what Dr. Trotter who we brought to
24 you was. General pediatrician. That's what
25 this case is about is general pediatrics.

1 Think about this. In terms of trying to defend
2 what Dr. Penrod did, what Dr. Elzie did, what
3 Dr. Bunnell did, you didn't hear from a single
4 physician whose primary practice is general
5 pediatrics.

6 The only expert they called to talk about
7 the appropriateness of their treatment was
8 Dr. Maisels, a neonatologist. They didn't
9 bring a single pediatric practitioner. And it
10 wasn't as though, you know, they had to bring
11 in somebody from Leon County or the State of
12 Florida. They could have gone to Georgia or
13 Tennessee or Louisiana. They could have gone
14 anywhere.

15 I mean, they went to -- for crying out
16 loud, they went to New Mexico to get
17 Dr. Radetsky. Dr. Maisels' practice is in
18 Michigan. You haven't heard from a single
19 pediatric practitioner, somebody who does this
20 for a living, that what they did was
21 appropriate.

22 Even Dr. Radetsky -- think about this --
23 even Dr. Radetsky was not asked any questions
24 about whether Levi should have been
25 hospitalized by either Dr. Elzie or Dr. Bunnell

1 or Dr. Penrod. And if there were any way, I
2 suggest to you from the evidence, that
3 Dr. Radetsky could have helped them on that
4 issue, you would have heard him testify why it
5 was appropriate not to hospitalize Levi. But
6 even Dr. Radetsky is dead silent on it.

7 Now, for reasons we talked about, we think
8 that the answer to Question No. 1 should be
9 yes, was there negligence on the part of
10 Professional Park Pediatrics, there was a legal
11 cause. Same thing as far as Dr. Penrod and
12 Pediatrics on Timberlane is concerned.

13 And then the instructions on the verdict
14 form say that if you answered one and two
15 yes -- in other words, if you answered both
16 questions yes, indicating that they were both
17 responsible, then you need to go to Question
18 No. 3. And Question No. 3 asks you to assign
19 percentage of fault to Professional Park
20 Pediatrics and to Pediatrics on Timberlane. In
21 other words, what's their relative degree of
22 fault.

23 And I suggest to you that -- and again,
24 you're not bound by anything I tell you. As
25 the judge said, you know, you're not bound by

1 what I say. But I can make recommendations to
2 you because I've been in the court along with
3 you all this time, and my suggestion to you is
4 that Professional Park Pediatrics bears less
5 responsibility for Levi's death than
6 Dr. Penrod. They obviously didn't know about
7 the 16.9. They didn't know about the 21.7.
8 They didn't know about the breathing problems.
9 That's all Dr. Penrod.

10 But they still bear responsibility
11 because, had Levi been kept in the hospital,
12 none of this would have happened. They never
13 would have had any contact, at least on
14 August 20th, with Dr. Penrod, you see.

15 So what Pediatric -- Professional Park
16 Pediatrics' role in this is, they kind of
17 started the ball in motion by not keeping Levi
18 in the hospital, and so they bear some
19 responsibility. And I suggest that an
20 appropriate division between Professional Park
21 Pediatrics and Pediatrics on Timberlane is
22 20 percent to Professional Park Pediatrics and
23 80 percent to Pediatrics on Timberlane.

24 Let me talk to you a little bit about
25 damages. Doctor -- doctor. Judge Bateman has

1 already given you the law on damages, and in
2 this case, the damages boil down to this, pain
3 and suffering for Julie and Dole. And he's
4 explained to you that there's no exact standard
5 of measurement for determining this. We talked
6 a little bit about this in jury selection. No
7 exact standard.

8 But what you do should be fair and just.
9 That's what he says here. You should decide a
10 fair amount, and it should be just in light of
11 the evidence. Well, the more mortality tables
12 have also been introduced into evidence, and
13 Julie's life expectancy is 46 years and Dole's
14 is 47. And that's your job here, and it's --
15 it's not an easy one. You got to deliver
16 justice and figure out what's fair for a
17 lifetime of pain and suffering.

18 For most of us, loss of a child is just
19 incomprehensible, just flat incomprehensible.
20 Can't even imagine it. But for Julie and Dole,
21 it's a reality. When Levi was born, that was
22 about the happiest day of their life. You
23 heard the story about how hard they worked
24 during the pregnancy. She was on the
25 Terbutaline pump to prevent the premature

1 labor. Months and months of bed rest. She did
2 everything that she reasonably could to deliver
3 this baby.

4 And so when Levi was born -- I've asked
5 them to step outside the room because you can
6 imagine why. It would just be -- they don't
7 need to hear this, and I think it would be
8 cruel for me to have them sit there and listen
9 to me talk about this. They will, of course,
10 be here to receive your verdict.

11 It was an exciting time for them. They
12 worked so hard and Levi was delivered and that
13 excitement and that joy. Little did they know
14 that six days later it would be totally
15 shattered. Totally shattered by the events you
16 know about. And that loss now has produced
17 tremendous guilt for them. Dr. Herkov talked a
18 little bit about it. You know, they feel
19 guilty because they didn't insist that Levi
20 stay in the hospital. They feel guilty
21 because -- for believing Dr. Penrod when he
22 said their baby was okay.

23 It's like Dr. Herkov says, that's
24 irrational guilt. It doesn't make any sense.
25 They did the best they could. They believed

1 the doctors. They trusted them. They no idea
2 of what was going to ultimately transpire, but
3 yet they feel that irrational guilt. They're
4 wracked with this idea, if only I had done
5 more. Wasn't there something that I could have
6 done?

7 In analyzing these damages, you got to
8 keep in mind that etched in their memories
9 forever, like carved in stone, will be the
10 breathing problems that Levi had when he was
11 taken to Dr. Penrod. Etched in their memories
12 forever will be for Julie the sensation of
13 having Levi, feeding him, and all of a sudden
14 going limp in her arms.

15 Etched in their memories forever will be
16 Julie screaming and Dole come running in and
17 trying to give Levi CPR and as he's doing it,
18 Levi's -- like Dr. Herkov talked about -- the
19 fluids from Levi's mouth are going into his
20 mouth.

21 Etched in their memories forever will be
22 this scene unfolding where they try to call
23 Chad, Dole's brother, he's a firefighter, to do
24 CPR. They call 911, Julie screaming while all
25 of this is going on; and they're holding this

1 baby who's not breathing. And they're totally
2 helpless to do anything about it.

3 The ambulance comes. They take Levi.
4 They follow the ambulance until they hook up
5 with the helicopter, and then the drive to
6 drive to TMH these minutes ticking by as
7 they're driving to the hospital, not sure
8 whether Levi's going to live or die.

9 Etched in their memory forever will be
10 getting the good news that they got the heart
11 rate, they got Levi's heart rate back. So
12 they're thinking maybe. Maybe he's going to be
13 okay, only to have that hope dashed the next
14 day when the doctors say, I'm sorry.

15 Etched in their memories forever will be
16 conversation that they talked to you about in
17 which Dr. Truman and his folks said, I'm sorry.
18 Levi has sustained irreparable brain damage and
19 he has a zero percent chance of making a
20 meaningful recovery.

21 What does that do to a parent, to be
22 sitting there holding -- not holding but
23 watching your six-day-old baby and being told
24 by these doctors that this baby that you worked
25 so hard for, that you had such hopes and dreams

1 for, has a zero percent chance of making a
2 meaningful recovery?

3 Etched in their memories forever will be
4 the quiet that settled over that room when the
5 machines were turned off and Dole and Julie
6 held Levi as he took his last breaths. What
7 does that do to a parent?

8 Etched in their memories forever will be
9 their last goodbye to this little boy.

10 They got home to a house that was filled
11 with Levi's toys. You know, they prepared for
12 his birth, so they had toys and clothes and all
13 sorts of things for him. And the excitement
14 and the anticipation and the joy that had
15 filled that house just a day or two before was
16 just replaced by this God awful silence and
17 dread and grief.

18 Dr. Herkov talked to you about Malory,
19 their daughter, and how her birth, while it was
20 a happy time, while it was a happy time for the
21 Slaytons, it was tempered by the fact that
22 they, you know, they were brought back to Levi
23 and all the fear and the anxiety that
24 surrounded -- surrounded his death.

25 And, you know, the truth is, they're happy

1 over Malory, but every time she reaches a
2 milestone, every time she accomplishes
3 something, they think -- they can't help but
4 think, well, what would Levi be doing at this
5 point? What would Levi look like at this time?

6 The human mind is a funny thing. Try as
7 you might to get rid of this, they can't. They
8 know that Malory should have an older brother,
9 an older brother to look after her, protect
10 her, be good to her, love her.

11 You know, ladies and gentlemen, that Julie
12 and Dole will never see Levi again on this
13 earth, and they're never going to see him do
14 the things or see the things that parents watch
15 their kids do. See him push up from the floor
16 for the first time. Be able to hold Levi as
17 he's an infant, you know, like dads do, above
18 their head, lying on the floor, and see the
19 baby just laugh and giggle. That will never
20 happen for them.

21 They're never going to see him take his
22 first steps. They're never going to hear him
23 utter his first words. They're never going to
24 see him blow out the candles. They're never
25 going to see the first pony ride. They're

1 never going to see the first time that he goes
2 to the circus. The first Disney movie, or
3 Disneyworld.

4 Dads like to teach their sons how to do
5 stuff. Throw a baseball, throw a football,
6 swim, fish, play golf, whatever. That will
7 never happen for Dole.

8 The little things -- that's what we're
9 talking about here, isn't it? The little
10 things about having kids that make you happy as
11 a mom or a dad. Little things like having Levi
12 in their laps as they read to him. Better yet,
13 as Levi grows older, having Levi in their laps
14 and having Levi read to them.

15 There is no greater loss than a parent who
16 suffers. It doesn't go away, it can't go away,
17 and every year -- what makes it so tough?
18 Dr. Herkov explained this to you. And the
19 reason, by the way, that these mortality tables
20 are in evidence, that you know that Julie's
21 going to live for 56 years, or at least
22 statistically, going to live for 56 years and
23 Dole 47 is because the law recognizes that when
24 something like this happens, it stays with you
25 forever. Forever. Every year, August 16th,

1 Levi birthday, it all comes back.

2 Every year there's going to be an
3 August 21st, in the early morning hours, the
4 memory is going to be of Levi's collapse.
5 Every year there is going to be an August 22nd
6 and the memories of standing in that room with
7 Dr. Truman saying, I'm sorry, it's time to say
8 goodbye.

9 Christmas -- Christmas holidays. There
10 ought to be two kids in the Slayton family
11 sitting on the floor Christmas Day opening
12 presents. Levi ought to be there looking for
13 Easter eggs with Malory. They're going to see
14 Malory graduate but not Levi.

15 Dr. Herkov has made the diagnosis of
16 posttraumatic stress disorder, and that has
17 great significance for these folks. And as he
18 told you, he and I have worked on cases before;
19 but in none of the other cases where he and I
20 have worked together has he made the diagnosis
21 of PTSD in anybody I represent. And he says he
22 made it because in this case, his words were,
23 quote, the death of Levi for parents is, quote,
24 as bad as it gets.

25 This is not -- SIDS deaths are horrible.

1 You wake up and find the baby dead. That's
2 horrible, catastrophic. But it's a whole other
3 level when that baby dies in your arms, when
4 you have to watch that baby die. When you're
5 told by doctors that your baby has no chance,
6 say goodbye, we need your permission to
7 disconnect life support.

8 That's why Dr. Herkov says: Sure, with
9 time it may get a little less raw, but it's
10 going to be these folks. It's going to be with
11 them forever. It's going to be with them
12 forever.

13 The flashbacks, the sirens, Julie, every
14 time she hears a siren or a helicopter, she
15 flashes back to August 21st, because that's
16 what she remembers about that God awful
17 morning. Got so bad they had to move out of
18 the house, they couldn't even stay there,
19 because the memories were just so -- so
20 overwhelming.

21 Dole talks about -- or Dr. Herkov talked
22 about the problems Dole has in holding his
23 cousin's kids because he thinks -- he thinks
24 about what it would have been like to be
25 holding Levi, the dreams that they have about

1 him.

2 And, folks, what makes this thing so
3 difficult for them is that it was unexpected.
4 They couldn't prepare for it. They'd just been
5 told by Dr. Penrod that the boy's fine. No
6 problem. They wanted desperately to believe
7 him. They did believe him, so they couldn't
8 prepare themselves for it.

9 And the avoidability -- Dr. Herkov talked
10 about avoidability, the fact that they know
11 that Levi's death was avoidable and it never
12 should have happened. These are not parents,
13 ladies and gentlemen, who lost a child while
14 defending the country. These are not parents
15 who lost a child who died in the line of duty.

16 These are parents who lost a child because
17 of medical carelessness. And how do you live
18 with that? How do you deal with that? Your
19 baby should be here, but for medical
20 carelessness.

21 The medications that Julie and Dole are
22 on, you know, before this there isn't any
23 evidence that they were anything other than
24 just totally normal, like Dr. Herkov said, salt
25 of the earth people. Emotionally stable. Now

1 Dole is on Paxil. Julie is on Clonopin and
2 Celexa and some other medication. They have
3 difficulty dealing with it.

4 The hole in their hearts, ladies and
5 gentlemen, as you can imagine, is permanent.
6 It's going to be there. It's going to be there
7 forever, and they just cannot stop grieving.

8 Your power in this case is limited. It's
9 limited to money damages. If you had a
10 different power, if you had a wand that you
11 could wave, bring Levi back, that's all I'd ask
12 you to do, because that's all they want.
13 That's all they want. But you don't have that
14 power.

15 But you do have some power. And that
16 power is to render a full and complete verdict
17 for these folks. Five years down the road, as
18 Dr. Herkov said, it's been almost five years.
19 Two months it will be five years. They're not
20 much better.

21 The poem that Julie wrote that was read at
22 Levi's funeral, I don't know if you could hear
23 all of it. She obviously had trouble getting
24 through it. But let me read it to you again.
25 It's entitled "Little Levi."

1 The love Daddy and Mommy have for you will
2 never change. The time we spent with you will
3 be deep within our hearts. The last heartbeat
4 that Mommy felt will be cherished always, and
5 the last breath your daddy gave you he will
6 never forget. But as Mommy and Daddy know, you
7 are in a better place called Heaven and shining
8 down over us. August 16th, 2002, to
9 August 22nd 2002.

10 Bottom line, most important thing in life
11 has been taken from them. How much more --
12 think about this. How much more can you take
13 from a parent? How much more can you take from
14 a parent than this child or her child? The
15 worst possible loss they can suffer. I can't
16 decide what fair monetary damages are. That's
17 your job. But you got to decide that in this
18 case I would suggest because of the
19 overwhelming evidence of negligence that caused
20 death.

21 And you've got to decide on pain and
22 suffering compensation for the past and for the
23 future and for -- in Julie's case it's five
24 years past almost, 56 years future for a total
25 of 61 years. And in Dole's case it's five

1 years past and 47 future, for a total of 52
2 years.

3 And like I said, I can't decide what's
4 right. That's your job. But I have been in
5 this courtroom same as you. I've lived with
6 this family for four and a half years; and as
7 their representative, I'm obligated to make
8 recommendations to you, and I want to do that.

9 The verdict form is broken down into past
10 and future for Julie and for Dole. One line
11 for each, past and future, so you have a total
12 of four lines for damages. I suggest in this
13 case, because of everything you've heard, that
14 a fair figure for Julie for the loss of their
15 son is \$2 million, divided half in the past and
16 half in the future, 1 million past, 1 million
17 future, and the same for Dole.

18 And you know what? Those numbers may be
19 too high. They may be too low. This is the
20 year 2007. We value things different ways.
21 But I tell you what. One measurement of what's
22 fair and what's not -- and it's a measure that
23 you're bound by, but it's something I would
24 like you to consider.

25 One measure of assessing the value of

1 something is to try to figure out what the
2 person who lost it would pay to get it back,
3 and I don't have to tell you, after what you've
4 heard, that if Julie or Dole each had
5 \$2 million in their bank account and you the
6 jury said, folks, write us a check, 2 million
7 each, we'll give you your son back, that they
8 would whip out that checkbook faster than life
9 itself and write you that check.

10 During jury selection I asked you whether
11 there was any limit or any cap that you felt
12 coming into the courtroom you had for damages
13 in a case such as this. Each of you said no.
14 I have no cap in mind. I'll listen to the
15 evidence and award what's fair. And I asked
16 each of you, could you -- because I knew that
17 this point in time was going to come in the
18 case where I would be looking -- standing
19 before you, looking you in the eye, I knew this
20 would come, and I asked you: Are you able to,
21 if the evidence justifies it, to walk back into
22 court and return a substantial verdict against
23 Pediatrics on Timberlane and Professional Park
24 Pediatrics, and each of you said, yes, I could
25 do that. And I know you will. Why? Because

1 MR. FOX: May it please the Court.

2 THE COURT: Yes, sir.

3 MR. FOX: Briefly, Your Honor. Well, let me
4 try to connect a couple of dots for you.

5 You were told by Dr. Penrod's lawyer that
6 we were misleading you when we -- because of
7 this argument about mom passing pneumonia to
8 Levi, mom's pneumonia caused Levi's pneumonia.
9 That what's we contend that they say.

10 Well, we do have Dr. Trotter's testimony
11 typed up -- and let me read you something.

12 Because, again, the thing that we talked
13 about from the beginning, avoidance of
14 confusion. Let me read you a question and
15 answer from Dr. Trotter's testimony.

16 Question: My question to you is: Did
17 mom's pneumonia cause Levi's pneumonia?

18 Answer: I don't believe so.

19 Just exactly what Dr. Penrod's lawyer
20 says. The only difference is, he forgot to
21 point out to you that he didn't ask that
22 question, I did. That was during my
23 examination. We had never contended that mom's
24 pneumonia caused Levi's pneumonia.

25 Mom had an infection that was passed on to

1 Levi, because we all know that the number one
2 cause of infection in newborns is maternal
3 infections, and that's exactly what Dr. Dolson
4 says and what Dr. Pinar says. And for the
5 lawyer to stand up there and suggest that we
6 were the ones that suggested that mom's
7 pneumonia caused Levi's pneumonia is just very,
8 very misleading and is confusing, and it's flat
9 unfair.

10 Now, you've listened to defense counsel
11 for pretty much an hour and a half. Are you
12 clear now on what they contend is the cause of
13 death? You've listened to them for an hour and
14 a half. What is it -- what do they say? Is it
15 overlaying? Is it pneumonia? Is it cardiac?
16 What is it?

17 Why do you think at this late date --
18 we're at the end of the case -- that they
19 haven't given you a simple explanation for it.
20 They tell you on the one hand that we believe
21 Dr. Dolson, and shame on Mr. Fox for suggesting
22 that we don't think Dr. Dolson is right.

23 Well, what does Dr. Dolson say? It was
24 fulminant pneumonia. Not only was it fulminant
25 pneumonia, but Dr. Dolson -- not only was it

1 fulminant pneumonia, but it could have been, in
2 her words, an ongoing process, not something
3 that started just an hour or two before Levi
4 collapsed.

5 If they say, ladies and gentlemen, that
6 they have no quarrel with Dr. Dolson, then why
7 in the world would they call Dr. Radetsky?
8 Dr. Dolson says it was fulminant pneumonia. Of
9 course they've got a problem with her. That's
10 why they called Dr. Radetsky, because they know
11 that if it was fulminant pneumonia, it's a
12 condition that could have been timely diagnosed
13 and treated if Levi had been hospitalized, and
14 that collapse would have been avoided.

15 They still haven't given you an answer,
16 and you deserve an answer. I repeat that. You
17 deserve an answer. You're the jury.

18 Dr. Penrod's lawyer stands up and
19 passionately says Dr. Trotter is just flat dead
20 wrong when he says Levi needed to be
21 hospitalized at 21.7, just flat wrong. How
22 dare Dr. Trotter say that? These elevated
23 bilirubins were not a cause for
24 hospitalization.

25 Well, if they weren't a cause for

1 hospitalization, ladies and gentlemen, why
2 would Dr. Elzie and Dr. Maisels, their own
3 experts, have hospitalized Levi? Had Levi been
4 their patient, he would have been hospitalized.
5 Why? Because just like Dr. Trotter says, he
6 needed to be in the hospital.

7 Did they know that his lungs were going to
8 stop breathing? No. That was the problem.
9 They didn't know what might be wrong with him.
10 That's why he needed to be in a monitored bed,
11 so if for whatever reason he developed
12 problems, lung problems, kidney problems, heart
13 problems, and he stopped breathing, he was
14 going to be in an environment where he could be
15 treated.

16 And that is why, again, to try to get back
17 to the basics in this case, the lack of oxygen
18 on the morning of the collapse, because Levi
19 was not in the hospital, caused the brain
20 damage that caused the removal of life support.

21 And, ladies and gentlemen, the case is no
22 more complex than that. He wasn't in the
23 hospital as he should have been. As testified
24 to by Dr. Elzie, Dr. Maisels, and Dr. Trotter,
25 it was negligent. That negligence allowed him

1 to be home in an environment that was not
2 capable of dealing with the lack of oxygen.
3 That is why the negligence of Drs. Penrod and
4 Professional Park Pediatrics contributed or
5 caused the death of Levi Slayton.

6 And by the way, I listened real carefully,
7 and I didn't hear one word of explanation for
8 why Dr. Elzie would have -- would have
9 hospitalized Levi. The reason he would have
10 hospitalized him is because he needed to be
11 hospitalized. They don't address Dr. Maisels'
12 testimony, that he too would have hospitalized
13 Levi, not a suggestion as to why not.

14 I don't know. I mean, it's unclear to me
15 to this day whether they're saying Levi had
16 pneumonia or not when he saw Dr. Penrod.
17 You've seen Dr. Radetsky's testimony where
18 clearly even Dr. Radetsky says that this baby
19 had pneumonia. But they keep throwing all this
20 stuff up against the ceiling.

21 The business about, well, maybe he got
22 pneumonia when he was intubated, a
23 post-intubation pneumonia. Well, how can that
24 be when their own expert says, in retrospect,
25 he must have had pneumonia present there for a

1 day or so, a day or so before he stopped
2 breathing. Dr. Radetsky. Because it's just
3 that obvious.

4 Dr. Dolson knew it and Dr. Pinar knew it
5 and now you know it.

6 They tell you, again, unbelievably, that
7 there was no sign of infection when Levi was
8 admitted to TMH. I asked Dr. Truman: Was
9 there any sign of infection. Why did you --
10 you were concerned about infection, weren't
11 you?

12 And he said: Yes.

13 And I said: That's why you started him
14 on -- his words -- massive antibiotics, because
15 he suspected correctly that Levi was infected.

16 Unfortunately, by that time, it was too
17 late.

18 You've seen -- you know, counsel just told
19 you or implied to you -- well, no, she didn't
20 imply. She said it. Levi didn't have
21 breathing problems. That was something with
22 the suggestion that that was just made up for
23 this case. She really -- Levi never had
24 breathing problems, because there's no note of
25 it in the hospital records.

1 Well, folks, it's not just us that say
2 that Levi was taken to Dr. Penrod for breathing
3 problems, and hopefully this will put an end to
4 it. I thought I did it before, but apparently
5 not, so let's try it again.

6 Dr. Penrod, not Gary Fox, not Julie
7 Slayton, this is Dr. Penrod's testimony before
8 you, so there's no doubt about it. She
9 wanted -- she was concerned about whether his
10 lungs, not his nose but his lungs, were all
11 right. Is that correct? This is Dr. Penrod's
12 testimony.

13 They did observe the breathing problems.
14 The breathing problems went undiagnosed and
15 untreated until the point that the lungs just
16 flat -- flat gave out.

17 And, you know, I can't tell now whether
18 they're still making an issue over the
19 overlying business or not. If they are, shame
20 on them. Shame on them. Because there's no
21 evidence for it.

22 Oh, they talk about the increasing
23 bilirubin. Elevated bilirubin can be a sign of
24 infection and they say, well, that's not a big
25 deal in this case. The elevated bilirubin in

1 Levi didn't mean much. Well, if it didn't mean
2 much, think about this. Dr. Elzie would have
3 hospitalized Levi, not because Levi had any
4 clinical signs of pneumonia, but just based
5 upon the elevated bilirubin.

6 Just based upon those tests. Why?

7 Because those tests are important.

8 Dr. Maisels, one of the leading guys -- and
9 I'll tip my hat to him. He is a very
10 experienced, knowledgeable guy about bilirubin.
11 What did he say? Based upon the bilirubin
12 results alone, had Levi been my patient I would
13 have hospitalized him. And now they try to
14 make it appear like those bilirubin results
15 don't mean much. Just doesn't fly, ladies and
16 gentlemen.

17 You know, I could go on for quite some
18 time about the different things that have been
19 suggested to you. But let me just point this
20 out in terms of cause of Levi's death. Now
21 that Dr. Penrod's lawyer has told you finally
22 he has no disagreement with Dr. Dolson,
23 pneumonia was the cause of Levi's death.
24 Preventable, treatable pneumonia. Per
25 Dr. Dolson.

1 They disagreed with some of the things I
2 said, and that's their job. They're entitled
3 to come in and articulate those and argue them
4 forcefully, and they've certainly done that.
5 But one of the things I want to point out to
6 you is what they haven't argued. And that is,
7 I suggested figures to you.

8 MR. DENNIS: Objection, Your Honor.

9 THE COURT: Well, yeah.

10 MR. DENNIS: It's not rebuttal, Your Honor.

11 THE COURT: It's not rebuttal, and Mr. --
12 there was no -- there was nothing said about it.

13 MR. FOX: And that's what I wanted to say.

14 MR. DENNIS: Objection, Your Honor.

15 MR. FOX: There was nothing said about it.

16 THE COURT: Okay. You said it.

17 MR. FOX: I'm not going to speak to you
18 anymore about damages.

19 MR. DENNIS: Objection, Your Honor.

20 THE COURT: No more about that, Mr. Fox.

21 MR. FOX: Yes, sir.

22 But what I will tell you is this. You
23 heard about anchors. At some point Dr. Herkov
24 talked about anchors, things that bring you
25 back to an event. And what I'm hopeful is that

1 I don't know by what fate the six or seven of
2 you came to be the people that have decided
3 this case, but what I'm hopeful for is that
4 this courthouse will be an anchor for you at
5 some point in the future, that you're going to
6 be able to look back on June 25, 2007, think
7 back to this day that you returned a verdict,
8 and that you righted a tremendous wrong that
9 had been done to this family.

10 And I want to tell you that, in closing,
11 remind you that, you know, as I told you
12 before, you don't have the power to bring Levi
13 back, but you do have the power to render a
14 full verdict. And it's a verdict that tells
15 them as representatives of this state that you
16 recognize the importance of their loss, that
17 you share their grief, and that you place a
18 high value on the loss of Levi.

19 And you should render a verdict for them
20 in the amount that I suggested, and if you do
21 that, true, it will not -- it won't bring Levi
22 back. It won't cure them; it will not heal
23 them. But it will help, and if they can't have
24 their son, let them at least have justice. I
25 thank you. I wish you well.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, LISA D. FREEZE, Notary Public, certify that I was authorized to and did stenographically report the proceedings herein, and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS my hand and official seal this 11th day of January, 2008.

LISA D. FREEZE, RPR, NOTARY PUBLIC
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850-878-2221