IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 830744

PARVIZ MODABER, M.D.,

Appellant,

v.

JESSIE MARIE KELLEY,

Appellee.

APPENDIX - VOLUME I

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William Alden McDaniel, Jr., Esquire
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Counsel for Appellant

Billie Lee Dunford-Jackson
DAVIS, BARRELL, WILL
and DUNFORD-JACKSON, P.C.
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Counsel for Appellee

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MOTION FOR JUDGMENT

COME NOW the plaintiffs, JESSIE MARIE KELLEY and RONALD H. KELLEY, by counsel, and move for judgment against the defendant, PARVIZ MODABER, M.D., on the grounds and in the amount herein set forth:

1. Plaintiff JESSIE MARIE KELLEY is, and at all relevant times hereinafter was, a citizen of the Commonwealth of Virginia and a resident of Culpeper County, residing at Box 376, Rixeyville, Virginia 22737.

2. Plaintiff RONALD H. KELLEY is, and at all relevant times hereinafter was, a citizen of the Commonwealth of Virginia and a resident of Culpeper County, residing at Box 376, Rixeyville, Virginia 22737.

3. Plaintiff JESSIE MARIE KELLEY is now, and at all times mentioned herein was, lawfully married to and living with plaintiff RONALD H. KELLEY.

4. Defendant PARVIZ MODABER, M.D., is a naturalized citizen of the Commonwealth of Virginia, residing at 137 Timber Trail Court, Culpeper, Virginia. All services performed by him which are the basis of this suit occurred in Culpeper County.

5. Defendant PARVIZ MODABER is licensed to practice medicine in the Commonwealth of Virginia. He carries on such practice at 767 Madison Road, Culpeper, Virginia.

6. At all times mentioned in this Motion for Judgment, defendant MODABER was licensed to practice medicine in the Commonwealth of Virginia, and did practice medicine in the Commonwealth of Virginia.

7. During all times mentioned in this Motion for Judgment, defendant MODABER held himself out to the public in general, and to plaintiffs in particular, as a medical doctor specializing in obstetrics, and as a medical doctor capable of providing a high degree of skill, care, and knowledge in the area of obstetrics.

8. In May 1978, defendant MODABER was engaged in the practice of obstetrics with John Payette, M.D., in offices located at in Culpeper, Virginia.

9. In or about March 1978, plaintiff JESSIE MARIE KELLEY and her husband, plaintiff RONALD H. KELLEY, conceived a male child.

10. In or about May 1978, plaintiffs JESSIE MARIE KELLEY and RONALD H. KELLEY contracted with defendant MODABER and John Payette, M.D., as physicians, to provide plaintiffs with obstetrical and surgical care in connection with the pregnancy of plaintiff JESSIE MARIE KELLEY and with the care and delivery of plaintiffs' unborn male child.

11. No later than August 1978, defendant MODABER knew that plaintiff JESSIE MARIE KELLEY had undergone three full term pregnancies prior to her conception of a child in March 1978.

12. No later than August 1978, defendant MODABER knew that plaintiff JESSIE MARIE KELLEY had in those previous pregnancies suffered from a form of pregnancy-induced hypertension known as toxemia, or preeclampsia.

13. No later than August 1978, defendant MODABER knew that plaintiff JESSIE MARIE KELLEY had a history in her prior

pregnancies of premature deliveries and rapid labors. Specifically, defendant MODABER was aware that plaintiff JESSIE MARIE KELLEY's first child was born prematurely after a labor of three (3) hours; that plaintiff JESSIE MARIE KELLEY's second child was born prematurely after a labor of two and one-half (2 1/2) hours; and that plaintiff JESSIE MARIE KELLEY's third child was born prematurely after a labor of two and one-half (2 1/2) hours.

14. No later than August 1978, defendant MODABER knew that plaintiff JESSIE MARIE KELLEY previously had had an abortion, and that this abortion was recommended by her physician because she suffered from toxemia, which had started during a previous pregnancy, and continued after that pregnancy and into the pregnancy that subsequently was aborted.

15. On November 9, 1978, defendant MODABER examined plaintiff JESSIE MARIE KELLEY at his office. At this examination, Defendant MODABER learned that plaintiff JESSIE MARIE KELLEY had developed and was then suffering from toxemia.

16. Toxemia, or preeclampsia, is a condition which poses a threat to the life of both a mother and the fetus during pregnancy. Toxemia creates a condition known as a "high-risk pregnancy."

17. When defendant MODABER diagnosed plaintiff as having toxemia in November 1978, he was aware that this condition posed a severe threat to plaintiff JESSIE MARIE KELLEY and to the unborn child of plaintiff JESSIE MARIE KELLEY and RONALD H. KELLEY, and that plaintiff's pregnancy was therefore a high-risk pregnancy.

18. On November 21, 1978, defendant MODABER again examined plaintiff JESSIE MARIE KELLEY at his office. In this examination, defendant MODABER learned that plaintiff JESSIE MARIE KELLEY's toxemia had worsened and that the threat to her and the plaintiffs' unborn child had increased.

19. At no time after defendant MODABER learned of plaintiff JESSIE MARIE KELLEY's toxemic condition did he order that she be hospitalized.

20. At no time after defendant MODABER learned that plaintiff JESSIE MARIE KELLEY's toxemia was worsening did defendant MODABER order her hospitalized.

21. At no time after he learned of plaintiff JESSIE MARIE KELLEY's toxemic condition did defendant MODABER administer proper care or treatment for the disease of toxemia.

22. On November 27, 1978, at approximately 5:10 a.m., plaintiff JESSIE MARIE KELLEY went into labor, when her membranes ruptured.

23. When plaintiff JESSIE MARIE KELLEY went into labor on November 27, 1978, her labor was approximately five (5) weeks premature.

24. On November 27, 1978, at approximately 5:15 a.m., plaintiff JESSIE MARIE KELLEY notified defendant MODABER's answering service that she had gone into labor at 5:10 a.m. and that her membranes had ruptured. Defendant MODABER's answering service then instructed plaintiff JESSIE MARIE KELLEY to go to Culpeper Memorial Hospital.

25. On November 27, 1978, at approximately 5:15 a.m., defendant MODABER was notified by his answering service that

plaintiff JESSIE MARIE KELLEY had gone into labor, and that she had been instructed to proceed to Culpeper Memorial Hospital.

26. On November 27, 1978, at approximately 5:50 a.m., plaintiff JESSIE MARIE KELLEY was admitted to Culpeper Memorial Hospital, accompanied by her husband, plaintiff RONALD H. KELLEY. The physical examination of plaintiff JESSIE MARIE KELLEY when she was admitted showed that she was in active labor; that her blood pressure was greatly elevated over what it previously had been at her last visit to defendant MODABER's office on November 21, 1978; that her membranes had ruptured; and that plaintiff JESSIE MARIE KELLEY was in premature labor.

27. On November 27, at approximately 5:50 a.m., the licensed practical nurse ("LPN") who admitted plaintiff JESSIE MARIE KELLEY and gave her an examination, Janice Strother, telephoned defendant MODABER.

28. When LPN Strother telephoned defendant MODABER, he was asleep in his residence.

29. Defendant MODABER's residence on November 27, 1978, was approximately 5 miles from Culpeper Memorial Hospital.

30. When LPN Strother telephoned defendant MODABER at 5:50 a.m. on November 27, 1978, she told defendant MODABER that plaintiff JESSIE MARIE KELLEY had been admitted in active labor, that her labor had commenced at 5:10 a.m. when her membranes broke, and that her blood pressure was 160/110.

31. When he received this information from LPN Strother, defendant MODABER stayed in bed. He did not get out of bed and get dressed. He did not go into the Culpeper Memorial Hospital. He did not order that the hospital and hospital staff

be prepared for the possibility of a cesarean section, or other surgery. He did not order that hospital staff be alerted for possible surgery.

32. When he received the telephone call at 5:50 a.m. from LPN Strother, defendant MODABER was aware that there was no physician on duty at Culpeper Memorial Hospital attending to plaintiff JESSIE MARIE KELLEY. Defendant MODABER was also aware that the hospital staff needed to assist in a cesarean section or other surgery was not at the hospital, and would not be at the hospital until approximately 7:30 a.m., unless he ordered that the staff be telephoned and told to be at the hospital before that time.

33. On November 27 at approximately 6:50 a.m., defendant MODABER was telephoned for a second time by hospital personnel. This second call was made by Registered Nurse ("RN") Barbara Amos.

34. Between the first call at 5:50 a.m. and the second call at 6:50 a.m., defendant MODABER had remained in bed. He had made no attempt to telephone or otherwise communicate with the hospital, or to monitor the condition of plaintiff JESSIE MARIE KELLEY.

35. In the second call to defendant MODABER at 6:50 a.m., RN Amos told defendant MODABER that there was fetal distress, and that she had obtained a fetal heart reading of 60 beats per minute, down from a normal expected rate of 120-160 beats per minute.

36. When he received this information from RN Amos, defendant MODABER again stayed in bed. He did not get out of bed

and get dressed. He did not go into the Culpeper Memorial Hospital. He did not order that the hospital and hospital staff be prepared for the possibility of a cesarean section, or other surgery. He did not order that hospital staff be alerted for possible surgery.

37. When he received the telephone call at 6:50 a.m., from RN Amos, defendant MODABER was aware that no physician was on duty at Culpepper Memorial Hospital attending to plaintiff JESSIE MARIE KELLEY. Defendant MODABER was also aware that the hospital staff needed to assist in a cesarean section or other surgery was not at the hospital, and would not be at the hospital until approximately 7:30 a.m., unless he ordered that the staff be telephoned and told to be at the hospital before that time.

38. On November 27, 1978, at approximately 7:10 a.m., RN Amos telephone defendant MODABER for the third time. RN Amos told defendant MODABER that fetal distress continued, and that the fetal heart rate continued to be recorded at approximately 60 beats per minute.

39. When he received this information from RN Amos, defendant MODABER finally got out of bed and got dressed. He did not order that the hospital and hospital staff be prepared for the possibility of a cesarean section, or other surgery. He did not order that hospital staff be alerted for possible surgery.

40. When he received the telephone call at 7:10 a.m. from RN Amos, defendant MODABER was aware that no physician was on duty at Culpeper Memorial Hospital attending to plaintiff JESSIE MARIE KELLEY. Defendant MODABER was also aware that the hospital staff needed to assist in a cesarean section or other

surgery was not at the hospital, and would not be at the hospital until approximately 7:30 a.m., unless he ordered that the staff be telephoned and told to be at the hospital before that time.

41. Defendant MODABER finally arrived at Culpeper Memorial Hospital no earlier than 7:25 a.m. Upon arrival, defendant MODABER monitored the fetal heart rate and recorded it at 60 beats per minute.

42. When defendant MODABER arrived at Culpepper Memorial Hospital, sufficient personnel were present at the hospital to enable him to perform a cesarean section immediately.

43. Defendant MODABER delayed performance of a cesarean section after he arrived at the hospital. Instead of proceeding to surgery, defendant MODABER left the hospital and went to his office, located in another building outside the hospital, to obtain consent papers for elective, nonemergency surgery unrelated to the cesarean section. Defendant MODABER wished to perform this surgery at the same time he performed the caesarean section.

44. Shortly after defendant MODABER left the hospital, and before defendant MODABER returned to the operating room, plaintiff JESSIE MARIE KELLEY vaginally delivered a stillborn male. Defendant MODABER was not present when this stillborn male was delivered.

45. On November 21, 1980, plaintiffs filed a Notice of Medical Malpractice Claim against defendant MODABER pursuant to Va. Code Ann. §§ 8.01-581.1 et seq. (1977-1978 Cum. Supp.). A copy of that notice is attached hereto as Exhibit A and incorporated herein by reference.

46. On October 9, 1981, plaintiffs filed an Amended Notice of Malpractice Claim against defendant MODABER. A copy of that amended notice is attached hereto as Exhibti B and is incorporated herein by reference.

47. On October 16, 1981, a Medical Malpractice Review Panel, selected by the Chief Justice of the Supreme Court of Virginia, was convened to consider plaintiffs' medical malpractice claim against defendant MODABER. After having considered the statements of facts and written materials submitted by the parties, and after having conducted an ore tenus hearing and heard the testimony of witnesses and statements of counsel, the Panel unanimously found in favor of plaintiffs. The Panel unanimously determined that the evidence supported a conclusion that defendant MODABER failed to comply with the appropriate standard of care and that such failure was the proximate cause of the damages claimed by plaintiffs. A copy of the Report of the Proceedings and the Opinion of the Panel is attached hereto as Exhibit C.

COUNT I
MEDICAL MALPRACTICE

48. Plaintiff JESSIE MARIE KELLEY realleges and incorporates herein the allegations contained in paragraphs 1 through 47 of this Motion for Judgment.

49. By his alleged conduct, defendant MODABER failed to comply with the appropriate standard of care reasonably to be expected of a physician in his circumstances and that failure was the proximate cause of the death of the male child of plaintiff JESSIE MARIE KELLEY.

50. Through his failure to comply with the standard of care reasonably to be expected of him, defendant MODABER negligently inflicted physical pain, suffering, and harm on plaintiff JESSIE MARIE KELLEY, and proximately caused her to suffer, and to continue to suffer, severe permanent mental and physical injuries, including extreme emotional distress, pain and suffering, mental anguish, and extreme shock and fright.

WHEREFORE, plaintiff JESSIE MARIE KELLEY prays that this Court enter judgment against defendant for $1,000,000 (One Million Dollars) compensatory damages; her costs in this behalf expended, including reasonable attorney's fees; and such other and further relief as this Court deems just and proper.

COUNT II
MEDICAL MALPRACTICE-PUNITIVE DAMAGES

51. Plaintiff JESSIE MARIE KELLEY realleges and incorporates herein the allegations contained in paragraphs 1 through 47 of this Motion for Judgment.

52. By his alleged conduct, defendant MODABER failed to comply with the appropriate standard of care reasonably to be expected of a physician in his circumstances and that failure was the proximate cause of the death of the male child of plaintiff JESSIE MARIE KELLEY.

53. The conduct of Defendant MODABER in treating plaintiff JESSIE MARIE KELLEY and her unborn infant was wanton, willful, malicious, unreasonable in the extreme, and reckless.

54. The conduct of Defendant MODABER exhibited a reckless disregard for and complete indifference to the health of plaintiff JESSIE MARIE KELLEY and her unborn child, and the probable and foreseeable consequences of his acts.

WHEREFORE, plaintiff JESSIE MARIE KELLEY prays that this Court enter judgment for the plaintiff against defendant MODABER in the amount of $1,000,000 (One Million Dollars) punitive damages; her costs in this behalf expended including reasonable attorney's fees; and such other and further relief as this Court deems just and proper.

COUNT III
WILLFUL, WANTON AND/OR INTENTIONAL
INFLICTION OF EMOTIONAL DISTRESS

55. Plaintiff JESSIE MARIE KELLEY incorporates herein and realleges the allegations contained in Paragraphs 1 through 47 of this Motion for Judgment.

56. By his alleged conduct, defendant MODABER did willfully, wantonly, intentionally, and unreasonably subject plaintiff JESSIE MARIE KELLEY to severe emotional distress and thereby caused mental and physical harm to plaintiff, including injury to her unborn child.

WHEREFORE, plaintiff JESSIE MARIE KELLEY prays that the Court enter judgment for the plaintiff against the defendant in the amount of $1,000,000 (One Million Dollars) compensatory damages; for her costs in this behalf expended, including reasonable attorney's fees; and for such other and further relief as the Court deems just and proper.

COUNT IV
OUTRAGEOUS CONDUCT

57. Plaintiff JESSIE MARIE KELLEY incorporates herein and realleges the allegations in paragraphs 1 through 47 of this Motion for Judgment.

58 By his alleged conduct, defendant Modaber did willfully, wantonly, intentionally, and unreasonably subject plaintiff JESSIE MARIE KELLEY to severe emotional distress and thereby caused mental and physical harm to plaintiff, including injury to her unborn child.

WHEREFORE plaintiff JESSIE MARIE KELLEY prays that the Court enter judgment for plaintiff against defendant MODABER in the amount of $1,000,000 (One Million Dollars) compensatory damages; her costs in this behalf expended, including reasonable attorney's fees; and such other and further relief as the Court deems just and proper.

COUNT V
BREACH OF CONTRACT

59. Plaintiff JESSIE MARIE KELLEY incorporates herein and realleges the allegations contained in Paragraphs 1 through 47 of this Motion for Judgment.

60. In May 1978, plaintiff JESSIE MARIE KELLEY did enter into an agreement and contract with defendant MODABER whereby defendant promised to render proper obstetrical care and treatment to plaintiff in connection with her pregnancy and delivery of her unborn child.

61. Defendant MODABER breached that agreement through his failure to render proper obstetrical care as alleged herein. Defendant's breach proximately caused mental and physical harm to plaintiff, including severe emotional distress, pain and suffering, and mental anguish.

WHEREFORE, plaintiff JESSIE MARIE KELLEY prays that the Court enter judgment for the plaintiff against the defendant in

the amount of One Million Dollars ($1,000,000) compensatory damages; for her costs in this behalf expended, including reasonable attorney's fees; and for such other and further relief as the Court deems just and proper under the circumstances.

COUNT VI
BREACH OF CONTRACT-PUNITIVE DAMAGES

62. Plaintiff JESSIE MARIE KELLEY incorporates herein and realleges the allegations contained in Paragraphs 1 through 47 of this Motion for Judgment.

63. In May 1978, plaintiff JESSIE MARIE KELLEY did enter into an agreement and contract with defendant MODABER whereby defendant promised to render proper obstetrical care and treatment to plaintiff in connection with her pregnancy and delivery of her unborn child.

64. The conduct of defendant MODABER in treating plaintiff JESSIE MARIE KELLEY and her unborn infant was wanton, willful, malicious, unreasonable in the extreme, and reckless.

65. The conduct of defendant MODABER exhibited a reckless disregard for and complete indifference to the health of plaintiff JESSIE MARIE KELLEY and her unborn child, and to the probable and forseeable consequences of his acts.

WHEREFORE, plaintiff JESSIE MARIE KELLEY prays that this Court enter judgment for the plaintiff against defendant MODABER in the amount of $1,000,000 (One Million Dollars) punitive damages; her costs in this behalf expended, including reasonable attorney's fees; and such other and further relief as this Court deems just and proper.

COUNT VII
WILLFUL, WANTON, AND/OR INTENTIONAL
INFLICTION OF EMOTION DISTRESS

66. Plaintiff RONALD H. KELLEY incorporates herein and realleges the allegations contained in Paragraphs 1 through 47 of this Motion for Judgment.

67. Plaintiff RONALD H. KELLEY is the husband of plaintiff JESSIE MARIE KELLEY and was present at Culpeper Hospital on and the morning of November 27, 1978. At that time he witnessed the critical and worsening condition of his unborn child, including the reduction in his child's heart rate and the nurses' anxiety at their inability to monitor that heart rate. He witnessed the resulting emergency and the failure of defendant MODABER to respond promptly when called. He further witnessed the extreme pain and trauma of his wife, plaintiff JESSIE MARIE KELLEY, that was caused by defendant MODABER's wrongful acts and omissions and by the death of plaintiffs' child. Plaintiff thus witnessed defendant MODABER's willful, wanton, and intentional mistreatment of plaintiff's wife and their unborn child.

68. As a direct result of defendant MODABER's willful and wanton negligence toward plaintiff's wife and unborn child, plaintiff RONALD H. KELLEY was caused to suffer mental and physical injuries and damages, including severe emotional distress, pain and suffering, and mental anguish.

WHEREFORE, plaintiff RONALD H. KELLEY prays that the Court enter judgment for the plaintiff against the defendant in the amount of $1,000,000 (One Million Dollars) compensatory damages; his costs in this behalf expended, including reasonable attorney's fees; and for such other and further relief as the Court deems just and proper under the circumstances.

COUNT VIII
OUTRAGEOUS CONDUCT

69. Plaintiff RONALD H. KELLEY incorporates herein and realleges the allegations of paragraph 1 through 47 and 66 through 68 of this Motion for Judgment.

70. Defendant MODABER conduct was outrageous in the extreme and the defendant's thereby intentionally and recklessly caused injury to plaintiff RONALD H. KELLEY, including severe emotional distress, pain and suffering and mental anguish.

WHEREFORE, plaintiff RONALD H. KELLEY prays that this Court enter judgment for the plaintiff against defendant MODABER in the amount of $1,000,000 (One Million Dollars) compensatory damages; his costs in this behalf expended, including reasonable attorney's fees; and such other and further relief at this Court deems just and proper.

COUNT IX
BREACH OF CONTRACT

71. Plaintiff RONALD H. KELLEY incorporates herein and realleges the allegations in Paragraphs 1 through 47 and 66 through 68 f this Motion for Judgment.

72. Beginning in May 1978, and again on November 27, 1978, plaintiff RONALD H. KELLEY did enter into an agreement and contract with defendant MODABER to render proper obstetrical care and treatment to plaintiff's wife, JESSIE MARIE KELLEY, in connection with her pregnancy and the delivery of plaintiffs' unborn child.

73. Defendant MODABER breached that agreement and/or contract through his failure to render proper obstetrical care as

previously alleged in this Motion for Judgment. Defendant's breach proximately caused mental and physical harm to plaintiff, including severe emotional distress, pain and suffering, and mental anguish.

WHEREFORE, plaintiff RONALD H. KELLEY prays that the Court enter judgment for the plaintiff against the defendant in the amount of One Million Dollars ($1,000,000) as compensatory damages; for his costs in this behalf expended, including a reasonable attorney's fee; and for such other and further relief as the Court deems just and proper under the circumstances.

COUNT X
BREACH OF CONTRACT-PUNITIVE DAMAGES

70. Plaintiff RONALD H. KELLEY incorporates herein and realleges the allegations in Paragraphs 1 through 47 and 66 through 68 of this Motion for Judgment.

71. Beginning in May 1978, and again on November 27, 1968, plaintiff RONALD H. KELLEY did enter into an agreement and contract with defendant MODABER to render proper obstetrical care and treatment to plaintiff's wife, JESSIE MARIE KELLEY, in connection with her pregnancy and the delivery of plaintiffs' unborn child.

72. The conduct of defendant MODABER in treating plaintiff JESSIE MARIE KELLEY and her unborn infant was wanton, willful, malicious, unreasonable in the extreme, and reckless.

73. The conduct of defendant MODABER exhibited a reckless disregard for and complete indifference to the health of plaintiff JESSIE MARIE KELLEY and her unborn child, and to the probable and foreseeable consequences of his acts.

WHEREFORE, plaintiff RONALD M. KELLEY prays that this Court enter judgment for the plaintiff against defendant MODABER in the amount of One Million Dollars ($1,000,000) punitive damages; his costs in this behalf expended, including reasonable attorney's fees; and such other and further relief as this Court deems just and proper.

JESSIE MARIE KELLEY
RONALD H. KELLEY
By Counsel

By: Billie Lee Dunford-Jackson
Billie Lee Dunford-Jackson

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By: John J. Buckley
John J. Buckley, Jr.

By: William Alden McDaniel Jr.
William Alden McDaniel, Jr.

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(202)-331-5000

Attorneys for Plaintiffs

Filed in the Clerk's Office the 25th day of November 1981

Writ Tax $ 25.00
Fee 30.00
Suppl. Supp. 2.00
Total Paid $ 57.00

Teste: Dorothy A. Faulconer Clerk
Freda M. Furr D. C.

NOTICE OF CLAIM
VCA § 8.01-581.2

TO: PARVIZ MODABER, M.D.
767 Madison Road
Culpeper, Virginia 22701

PLEASE TAKE NOTICE that the undersigned represents Jessie Marie and Ronald H. Kelley, Box 376, Rixeyville, Virginia, in all matters pertaining to your treatment of Jessie Marie Kelley and her deceased male child on and before November 27, 1978. The said Jessie Marie and Ronald H. Kelley do hereby make a claim against you for your negligent treatment of Jessie Marie Kelley and the deceased, unnamed, male child on or about said date. The claimants reserve the right to rely on any theory of negligence as the facts may reveal, but do contend that you negligently delayed attention to the birth of the baby while, without authority, you attempted to arrange for an elective consentual, procedure resulting in the infant being stillborn.

Unless you make the election as set forth by law or unless you compromise this action before the expiration of the statutory period, an action will be filed against you in the appropriate court to recover damages suffered by the parents, as well as to the statutory beneficiaries for the wrongful death of said child.

You are further requested to advise your liability carrier of this Notice of Claim.

JESSIE MARIE KELLEY and RONALD H. KELLEY

By _____

Date: 11-21-80

I hereby certify that the above Notice of Claim was mailed mail to Parviz Modaber at his last known address on the 21 November, 1980.

_____
Dixie Coyle Barnett
Atty's at Law

Filed in Culpeper County
Circuit Court Clerk's
Office November 25 1981
Gleda M. Furr Deputy Clerk

EXHIBIT A

AMENDED NOTICE OF
MEDICAL MALPRACTICE CLAIM

EXHIBIT B

Claimants, Jessie Marie Kelley and Ronald H. Kelley, through their undersigned counsel, hereby submit this Amended Notice of Medical Malpractice Claim against Parviz Modaber, M.D. under Va. Code Ann. §§ 8.01-581.1 et seq. (1977 & 1978 Cum. Supp.).

1. Claimants contend that Dr. Modaber negligently and recklessly failed to comply with the appropriate standard of obstetrical care and thereby proximately caused the death of the Claimants' infant son on November 27, 1978.

2. Beginning in late August 1978, Mrs. Jessie Marie Kelley received obstetrical care from Dr. Modaber in connection with her pregnancy. At this time Dr. Modaber was informed of Mrs. Kelley's history of toxemia or preeclampsia, premature deliveries, and rapid labors in her prior pregnancies. By November 9, Dr. Modaber diagnosed Mrs. Kelley's condition as preeclampsia and recognized that he was required to treat a high-risk pregnancy.

3. Dr. Modaber negligently and recklessly failed to comply with the required standard of obstetrical care when, on November 21, 1978, he did not administer proper treatment for Mrs. Kelley's continuing preeclamptic condition and did not order hospitalization.

4. Dr. Modaber negligently and recklessly failed to comply with the required standard of obstetrical care when, on November 27, 1978, he was notified at 5:50

a.m. that Mrs. Kelley had been admitted to Culpeper Memorial Hospital in active labor, that she had elevated blood pressure, that her membranes had ruptured, and that she was having a premature delivery. Aware of Mrs. Kelley's preeclamptic condition and her prior history, Dr. Modaber nevertheless failed to come to the Hospital to attend his patient and failed to alert the Hospital to prepare for a possible cesarean section.

5. Dr. Modaber negligently and recklessly failed to comply with the required standard of obstetrical care when, approximately an hour after Mrs. Kelley had been admitted to the Hospital on November 27, he was alerted by the registered nurse on duty to the occurrence of fetal distress and a fetal heart rate of 60. At this time, Dr. Modaber, who was still at home, did not direct the Hospital staff to prepare for a possible cesarean section, did not immediately depart for the Hospital, and did not order the proper obstetrical care for Mrs. Kelley.

6. Dr. Modaber negligently and recklessly failed to comply with the required standard of obstetrical care when, having finally arrived at the Hospital and examined Mrs. Kelley at approximately 7:25 a.m., he delayed performing a cesarean section. Instead, Dr. Modaber left the Hospital and went to his office to obtain consent papers for a non-related operation that he wished to perform on Mrs. Kelley.

7. If, as Dr. Modaber claims, the death of the Kelley infant resulted from an "occult prolapsed cord," then Dr. Modaber failed to comply with the required standard of

obstetrical care when he did not diagnose that condition during his initial examination of Mrs. Kelley at approximately 7:25 a.m. on November 27. Moreover, he delayed attending to Mrs. Kelley when she was first admitted to the Hospital, delayed attending to her when fetal distress was reported to him at 7:00 a.m., and did not alert the Hospital staff to prepare for a possible cesarean section. Furthermore, after he arrived and was aware of critical fetal distress, Dr. Modaber failed to administer remedial treatment and failed to proceed with a cesarean section in a timely fashion.

8. In these and other respects, as shown by the evidence, Dr. Modaber negligently and recklessly failed to provide proper obstetrical care and proximately caused the death of the Kelleys' infant son.

WHEREFORE, Claimants Jessie Marie Kelley and Ronald H. Kelley demand judgment against Parviz Modaber, in accordance with Va. Code Ann. § 8.01-581.7, sub. 2.

Respectfully submitted,

RONALD H. KELLEY
JESSIE MARIE KELLEY

BY COUNSEL:

By Billie Lee Dunford-Jackson
Billie Lee Dunford-Jackson

Davies, Crigler, Barrell & Will, P.C.
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By _____
John J. Buckley, Jr.

By _____
William Alden McDaniel, Jr.

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839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Attorneys for Claimants

CERTIFICATE OF SERVICE

I hereby certify that on this, the 9th day of October, 1981, I have served a true and accurate copy of the foregoing Amended Notice Of Medical Malpractice Claim upon counsel, by first-class mail, postage prepaid, as follows: R. Harrison Pledger, Jr., Esq., 1481 Chain Bridge Road, Suite 200, McLean, Virginia 22101.

_____
JOHN J. BUCKLEY, JR.

REPORT OF PROCEEDINGS

On October 16th, 1981, came Herbert G. Hopwood, T. Stacy Lloyd, Walter M. Zirkle, Jr., Benjamin H. Woodbridge, Jr., James T. Robertson, Jr., Stefan C. Long, and J. M. H. WILLIS, JR, Chairman, having been duly selected by the Chief Justice of the Supreme Court of Virginia to serve as a Medical Malpractice Revue Panel in this case, pursuant to Notice duly given;

Whereupon the Chairman convened the Panel and administered to each member thereof the following oath:

> I do solemnly swear to render an opinion faithfully and fairly on the basis of the evidence presented.

The Panel, having considered the statements of facts and written material submitted by the parties, and having conducted an ore tenus hearing and heard the testimony of witnesses and statements of counsel, unanimously determined as follows:

> The evidence supports a conclusion that the Health Care Provider failed to comply with the appropriate standard of care and that such failure is a proximate cause in the alleged damages.

The opinion of the Panel, signed by all members, setting forth the aforesaid conclusions, is attached to and made a part of this Report.

The cost of this proceeding shall be assessed against the Respondent Health Care Provider.

I, JERE M. H. WILLIS, JR., Chairman of the Medical Malpractice Revue Panel, certify that the foregoing is a true and correct report of the proceedings and opinion of this Medical

EXHIBIT C

Malpractice Review Panel, and further certify that copies hereof were mailed this 21st day of October, 1981, to Mr. John J. Buckley, Jr., 839 Seventeenth Street, N. W., Washington, D. C. 20006 and to Miss Dunford-Jackson, c/o Mr. B. Waugh Crigler, P. O. Box 712, Culpeper, Va. 22701, counsel for Claimants, and to Mr. R. Harrison Pledger, Jr., 1481 Chain Bridge Road, McLean, Virginia 22101, counsel for Respondent.

J. M. H. WILLIS, JR.
CHAIRMAN OF MEDICAL MALPRACTICE REVUE PANEL

Virginia

IN A MEDICAL MALPRACTICE REVUE PANEL

JESSIE MARIE KELLEY and
RONALD H. KELLEY

v

PARVIZ MODABER, M.D.

OPINION OF PANEL

1. The evidence does not support a conclusion that the Health Care Provider failed to comply with the appropriate standard of care.

2. The evidence supports a conclusion that the Health Care Provider failed to comply with the appropriate standard of care and that such failure is a proximate cause in the alleged damages.

DEMURRER

Comes now the defendant, Parviz Modaber, M.D., by counsel, and demurs to the Motion for Judgment filed herein and says that it is not sufficient in law and ought not to be prosecuted on the following grounds:

1. The Motion for Judgment as to Counts II-X, does not meet the requirements of Rule 1:4(d) of the Supreme Court of Virginia in that it fails clearly to inform this defendant of the true nature of the claim against him.

2. The Motion for Judgment as to Counts I-X fails to state claims upon which relief can be granted.

3. Counts II-X plead conclusions of law without stating sufficient allegations to state a claim.

4. The Motion for Judgment fails to allege any facts which would form the basis for punitive damages.

5. In their Motion for Judgment plaintiffs improperly seek to recover for one injury, namely, emotional distress, ten different times through Counts I-X.

Respectfully submitted,

Parviz Modaber, M.D.
By Counsel

R. Harrison Pledger, Jr.

R. Harrison Pledger, Jr. (JJP)

Joseph J. Perez
1489 Chain Bridge Road
Suite 204
McLean, Virginia 22101
821-1250

Counsel for Dr. Modaber

TRIAL COURTS OPINION AND RULING
ON DEMURRER AND STATUTE OF
LIMITATIONS

Gentlemen:

I have made the following rulings upon the demurrer and Plea of Statute of Limitations to the several counts.

A notice of a claim filed pursuant to the provisions of the medical malpractice statute is sufficient to toll the running of the statute of limitations if the injuries alleged in the subsequent suit are reasonably related to the negligent conduct charged. The focus is on the negligent conduct. Liberality should be allowed as to the resulting injuries so long as they are interrelated with the alleged injuries.

It is immaterial whether the claim for damages in a suit later filed be predicated upon tort or upon breach of contract founded upon the same tortious conduct, since the purpose of the review panel is to ascertain the existence of negligent conduct and causal connection to resulting injuries. The health care provider's defense is the same whether the claim later be called a tort or a breach of contract.

It is therefore my finding that the plea of statute of limitations must be overruled as to counts 1, 2, 3, 5 and 6.

I am further of the opinion that the allegations in the foregoing counts are sufficient to charge a cause of action. The defendant may obtain specificity by a bill pf particulars. Accordingly the demurrer will be overruled to so many of the foregoing counts as were demurred to.

The demurrer will be sustained as to count 4. There is no separate tort of outrageous conduct. This term has been used in discussing those instances in which a recovery for emotional distress is or is not allowed. It is related to the descriptive words used to support a finding of gross negligence or conduct sufficient to sustain punitive damages-i.e., heedless, wilful, wanton, reckless, utter disregard, etc.

The plea of the statute of limitations as to counts 7, 8, 9 and lo is overruled for the reasons previously stated, Ronald H. Kelley having been a party to the malpractice review proceeding and having giving the same notice as given by Jessie Kelley.

The defendant also demurs to counts 7, 8, 9 and 10. The demurrer to count 8 is sustained for the same reason that the demurrer to count 4 is sustained. The demurrer to counts 7, 9 and 10 will be overruled. The four elements set out in the Womack case are those facts necessary to be proven in a trial for there to be a recovery for emotional distress. This does not require that they be enumerated in the Motion for Judgment.

Accordingly, demurrers to counts 4 and 8 are sustained and demurrers to counts 1,2,3,5,6,7,9 and 10 are overruled.

I would envision that in the trial of this case, the issues to be submitted to the jury would in essence be whether the defendant was guilty of negligence and if so whether it was so gross as to to justify punitive damages.

The point has not been raised but unless there is some statutory proceeding allowing it, the question arises of the joinder of two plaintiffs in one cause of action whose damages necessarily are different, requiring separate verdicts by the jury as to each plaintiff.

Mr. Buckley will prepare the orders.

Judge Vance M. Fry

2-9-82

DEMURRER

Comes now the defendant, Parviz Modaber, M.D., by his counsel and demurs to the Motion for Judgment filed herein and says that it is not sufficient in law and ought not to be prosecuted on the following grounds:

The Motion for Judgment appears to seek recovery against defendant on behalf of both plaintiffs for their separate claims of personal injury, all of which constitutes a misjoinder of causes of action which bars plaintiffs from recovery in this action.

Respectfully submitted,
Parviz Modaber
By counsel

R. Harrison Pledger Jr.

ANSWER AND GROUNDS OF DEFENSE OF PARVIZ MODABER, M.D.

Comes now the defendant, Parviz Modaber, M.D., by counsel, and for his grounds of defense to the Motion for Judgment filed herein says as follows:

1. Defendant admits the allegations contained in paragraphs 1 through 6, 8, 29, and 45 through 47 of the Motion for Judgment.

In response to paragraph 7 he admits that he is a physician practicing in the specialty of obstetrics and denies the remaining allegations of that paragraph.

2. The defendant neither admits nor denies the allegations contained in paragraphs 9, 11, 12, 13, 14, 16 and 22 through 28 and 30 through 40 of the Motion for Judgment, and demands proof thereof.

3. Defendant denies the allegations contained in paragraphs 10, 15, 17 through 21, and 41 through 44 of the Motion of Judgment.

4. In response to paragraph 48 of Count I of the Motion for Judgment, defendant adopts and incorporates by reference herein his answers to

the allegations contained in paragraphs 1 through 47 of the Motion for Judgment; and denies the allegations contained in paragraphs 49 and 50.

5. In response to paragraph 51 of Count II of the Motion for Judgment, defendant adopts and incorporates by reference herein his answers to the allegations contained in paragraphs 1 through 47 of the Motion for Judgment; and denies the allegations contained in paragraphs 52, 53, and 54.

6. In response to paragraph 55 of Count III of the Motion for Judgment, defendant adopts and incorporates by reference herein his answers to the allegations contained in paragraphs 1 through 47 of the Motion for Judgment; and denies the allegations contained in paragraph 56.

7. In response to Count IV of the Motion for Judgment, defendant says nothing further, because said Count was dismissed by Judge Fry in his Memorandum dated February 9, 1982.

8. In response to paragraph 59 of Count V of the Motion for Judgment, defendant adopts and incorporates by reference herein his answers to the allegations contained in paragraphs 1 through 47 of the Motion for Judgment; denies the allegations contained in paragraphs 60 and 61.

8. In response to paragraph 62 of Count VI of the Motion for Judgment, defendant adopts and incorporates by reference herein his answers to the allegations contained in paragraphs 1 through 47 of the Motion for Judgment; and denies the allegations contained in paragraphs 63, 64, and 65.

9. In response to paragraph 66 of Count VII of the Motion for Judgment, defendant adopts and incorporates by reference herein his answers to the allegations contained in paragraphs 1 through 47 of the Motion for Judgment; and denies the allegations contained in paragraphs 67 and 68.

10. In response to Count VIII of the Motion for Judgment, defendant says nothing further, because said Count was dismissed by the Memorandum of Judge Fry dated February 9, 1982.

11. In response to paragraph 71 of Count IX of the Motion for Judgment, defendant adopts and incorporates by reference herein his answers to the allegations contained in paragraphs 1 through 47 of the Motion for Judgment; and denies the allegations contained in paragraphs 72 and 73.

12. In response to paragraph 70 of Count X of the Motion for Judgment, defendant adopts and incorporates by reference herein his answers to the allegations contained in paragraphs 1 through 47 of the Motion for Judgment; and denies the allegations contained in paragraphs 71, 72, and 73.

13. Further, by way of answer and grounds of defense to the Motion for Judgment, defendant avers that any disability, injury, suffering, nervousness, mental anguish, or other alleged damage sustained by plaintiffs was not and is not due to any negligence or carelessness on the part of defendant and were and are unavoidable as to him, and that no improper action of defendant was the proximate cause of any damage to plaintiff.

14. Defendant alleges that the claims contained in the Motion for Judgment are barred by the applicable statute of limitations.

WHEREFORE, defendant demands judgment in his favor and his costs in his behalf expended.

Parviz Modaber, M.D.
By Counsel

R. Harrison Pledger, Jr.

Dennis A. Coryell

1489 Chain Bridge Road
Suite 204
McLean, Virginia 22101
821-1250

Counsel for Defendant

FINAL ORDER

ON September 21, 1982, came the parties, in person and by counsel, pre-trial motions having been filed and argued, and Counts IV and VIII of the Plaintiffs' motion for judgment having been struck; and upon the issues joined, there were empaneled seven (7) jurors who were duly sworn to try the issues in this case.

WHEREUPON, the Plaintiff presented her evidence to the jury. After the Plaintiff rested, the Defendant moved that her evidence be struck and summary judgment entered in his behalf. The Court denied his motion and noted his exceptions. The Defendant then presented his evidence to the jury and, at the close of all evidence, renewed his motion that the Plaintiff's evidence be struck and summary judgment entered in his behalf. The Court again denied his motion and noted his exceptions.

— The Court ~~then~~ at the conclusions of Plaintiff's evidence struck Counts VII, IX and X and the Plaintiff voluntarily dismissed Counts III, V and VI at the conclusion of all the evidence. The Court, having considered the instructions tendered by counsel, then instructed the jury on the law of the case. After the jury was instructed and heard argument by counsel, they retired to the jury room to consider their verdict with regard to Counts I and II, all other Counts having been struck or voluntarily dismissed. After a period of time, the jurors returned into the Courtroom with the following verdict:

"We the jury, on the issue joined, find for the Plaintiff, Jessie Marie Kelley, and award damages as follows:

Compensatory	$ 750,000.00
Punitive	$ -------none

The Court then dismissed the jury and made inquiry as to further motions from counsel. Counsel for the Defendant responded that post-verdict motions would be filed and requested and received leave of court for a thirty-day extension for their filing.

Came again the parties ~~this day~~ on the 23rd day of December, 1982 in person and by counsel, upon Defendant's post-verdict motions that the Court set aside the verdict for Plaintiff and enter a judgment for the Defendant and/or for a new trial and/or for remittitur; upon memoranda by the Defendant in support of and by the Plaintiff in opposition to the aforesaid motions; and upon argument by counsel.

WHEREFORE, for reasons satisfactory to the Court, the Defendant's motions that the Court set aside the verdict for Plaintiff and enter judgment for the Defendant and/or that the Court grant a new trial and/or that the Court grant remittitur are denied and the Defendant's exceptions noted.

And it is hereby ADJUDGED and ORDERED that the Plaintiff recover of the Defendant, Parviz Modaber, M.D., the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00) compensatory damages, together with interest at ten percent (10%) per annum from September 24, 1982, that being the date the jury returned their verdict for the Plaintiff.

It is the further ORDER of this Court that, should the Defendant appeal the judgment herein entered against him, his appeal bond be and hereby is fixed at One Million Dollars ($1,000,000.00) with surety. The transcript is hereby made a part of the record.

This is a final Order.

ENTER: David F. Dewey
Judge

DATE: 2-8-83

We Ask for This:

Copy del.'d 2/9/83

B. L. Dunford-Jackson
DAVIES, BARRELL, WILL
& DUNFORD-JACKSON, P.C.
122 West Cameron Street
Culpeper, Virginia 22701
Counsel for Plaintiff

Copy mailed 2/9/83

John J. Buckley, Jr.
WILLIAMS & CONNOLLY
Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006
Counsel for Plaintiff

Copy mailed 2/9/83

William Alden McDaniel, Jr.
WILLIAMS & CONNOLLY
Hill Building
839 Seventeenth Street, N.W.
Washington, D. C. 20006
Counsel for Plaintiff

Seen and Objected To:

Copy mailed 2/9/83

R. Harrison Pledger, Jr.
Suite 204
Chain Bridge Road
McLean, Virginia 22101
Counsel for Defendant

-1046-

LOR #48, Page

NOTICE OF APPEAL

Comes now defendant, Parviz Modaber, M.D., by and through counsel, pursuant to the provisions of Rule 5:6 of the Rules of the Supreme Court of Virginia and gives notice of his appeal to the Supreme Court of Virginia from the final Order of this Court entered on February 8, 1983.

A transcript of the testimony and proceedings at trial will be filed hereafter in compliance with the Rules of the Supreme Court of Virginia.

Respectfully submitted,

Parviz Modaber, M.D.

By Counsel

R. Harrison Pledger, Jr.

Dennis A. Coryell

Suite 204
1489 Chain Bridge Road
McLean, Virginia 22101
821-1250
Counsel for Defendant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice was mailed, postage prepaid, this 16th day of February, 1983, to: B.L. Dunford-Jackson, Esquire, and William Alden McDaniel, Jr., Esquire, Davies, Barrell, Will & Dunford-Jackson, P.C., 122 West Cameron Street, Culpeper, Virginia 22701; John J. Buckley, JR., Esquire, Williams & Connolly, Hill Building, 839 17th Street, N.W., Washington, D.C., counsel for plaintiff.

R. Harrison Pledger, Jr.

ASSIGNMENTS OF ERROR

1. Is it error to instruct a jury that the prenatal death of a fetus constitutes a direct physical injury to the mother?

2. Is it error to permit an expert medical witness to state his opinion as to the standard of care where the witness does not sufficiently demonstrate knowledge of or familiarity with said standard?

3. Is a jury verdict of $750,000 to compensate a mother for her emotional injury associated with a stillbirth so large as to shock the conscience of the court and to require a remittitur or a new trial?

ASSIGNMENT OF CROSS-ERROR

I. THE CIRCUIT COURT ERRED IN EXCLUDING EVIDENCE THAT (1) DR. MODABER'S HOSPITAL PRIVILEGES WERE REVOKED; (2) DR. MODABER THREATENED A NURSE WHO CRITICIZED HIS TREATMENT OF MRS. KELLEY; AND (3) DR. MODABER TOOK A GUN AND DAGGER INTO THE HOSPITAL NURSERY LOOKING FOR DR. BURKE.

PRINTERS NOTE:

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to follow along with reading the charts and seeing who was going where and so forth and I just wanted to raise it at this time in case Mr. Pledger has any objection.

THE COURT: Is that to be used in opening statement by any chance.

MR. BUCKLEY: No, Your Honor. As soon as I call the Record Custodians and rather than disrupt in the testimony of a witness I would like to know in advance if there is going to be an objection.

THE COURT: We will take that up when we get to the evidentiary stage. What I plan to do now is have the jury sworn, complete opening statement, take a lunch recess and then start with the testimony immediately after lunch. Before we start the testimony we can review that in case you all have any disagreement. All right call the jury and we will have them sworn and proceed with opening statements.

Jury brought into the courtroom at this time.

THE COURT: All right ladies and gentlemen if you all again will stand and face the Clerk to be sworn as the jury to try this case.

THE CLERK: Raise your right hand please. Do you swear that you shall well and truly try the issue joined between Jessie Marie Kelley and Ronald H. Kelley, the plaintiffs and

Parviz Modaber, M.D. the defendant and a true verdict render according to the law and the evidence so help you God.

Jurors answered in the affirmative.

THE COURT: All right you may have a seat ladies and gentlemen. Now members of the jury I have several points to make with you before we proceed with the beginning of this case. You have now been sworn as the jury to try this case and in case any of you are wondering how we have eight instead of seven as I previously mentioned, by the Court's own caution and counsel we have decided to have an extra juror in this case in case anybody is taken with a sudden illness or any other matter that would require the juror to be excused and once we start this case we would not want to have to delay it unduly, so in order to accommodate anyone who might have an emergency that could not otherwise be handled by excusing - other than excusing that juror we have eight of you. Now we don't want anyone to take advantage of that of course by responding to what is not truly an emergency. As the jury in this case you are now sworn to try this case according to the law and the evidence.Until the case is completed you are under the control and discipline of the court through the Sheriff. Your conduct and your activities must be very carefully monitored by you and the Court officials. You are not to be exposed to any extraneous evidence, any outside discussions or outside influence until you reach a proper verdict in this case after hearing the

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evidence in the courtroom and the instructions given to you by the court and final argument of counsel. Your duty is to listen carefully to the evidence with an open mind, not undertaking to judge either side until you have been instructed to do so at the conclusion of the case. During any recess or any time that you are sent to the jury room while the Court considers matters of law or admissibility of evidence, you are not to discuss the case even among yourselves. You should not permit anyone else to discuss it with you or in your presence. If for instance during the lunch recess you are somewhere where the case is being discussed, it is your duty to tell the person discussing the case that you are a juror and cannot remain while that discussion takes place and if that doesn't stop it, it is your duty to remove yourself from that discussion or area where you overhear it. As one juror has previously asked you can be alleviated of any concern that you might have about having to spend the night somewhere else as a jury panel, you will be released at the conclusion of the day when we get to the proper point of adjournment to return to your normal activities but you will be expected to talk about matters other than the case and to refrain from being exposed to any news or other discussions about the case. It is your duty to try this case on what is presented in the courtroom. That is a very important and a large responsibility. The plaintiff in the case having the burden of proof gets the first go as to opening statement and the

presentation of evidence, then follows the defendant's evidence. The opening statement is about to take place. That opening statement is to give you an outline of what the evidence will be and is not evidence but it will help you assimilate the evidence as it is presented and to have a better understanding of what the case is about. But again I remind you, do not undertake to judge the case but merely listen carefully with an open mind. Keep in mind also for the benefit of those who are use to instant replays on TV that we don't rerun the case in court. We don't have instant replay. You must listen carefully and I do not allow the attorneys to go over evidence repeatedly. Sometimes they may do that but it is not intentional. The evidence is presented to the jury one time so it is very important for you to listen carefully. All right the attorneys may proceed with opening statement. Mr. Buckley.

MR. BUCKLEY: Ladies and gentlemen of the jury my name is John Buckley. I am the counsel for the plaintiffs in this case whom I would like to introduce you, Jessie Marie Kelley and Ronald Kelley. I would like you also to meet my co-counsel in the case Bill McDaniel and Billie Lee Dunford-Jackson. As your Honor has explained this is the opening statement in which each side is allowed to give a brief summary of what we believe the evidence will show. This case is about a stillbirth that occurred on November 27, 1978 in Culpeper Memorial Hospital. The plaintiffs in this case have been married

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for fourteen years and they have five children all of whom are girls. The claim here involves the child they did not have, a son, whom Mrs. Kelley had carried for eight months in 1978. Now it is the plaintiffs contention that the reason the Kelleys do not have this son is because the defendant in this case, Parviz Modaber failed to render the appropriate obstetrical care he was required to render under the laws of this state. Now that failure was in two forms, first it is our contention that the defendant failed to give Mrs. Kelley the proper care during her pregnancy to treat a disease called toxemia. That disease is in essence a hypertension that is induced by pregnancy and his failure resided in the fact that he did not perform certain tests that were required during her pregnancy to detect how she was responding to that disease and by his failure at a critical point in her pregnancy to hospital her. It is our contention that had he performed these tests and had he hospitalized Mrs. Kelley at the appropriate point during her pregnancy, the events that ensued on November 27, 1978 would never had occurred. The second part of her case relates to that date itself and to Dr. Modaber's response or likely response that morning. Now on that day Mrs. Kelley was admitted to Culpeper Memorial Hospital at 5:45 a.m. She had had a history of toxemia in her pregnancy and Dr. Modaber had already made that diagnosis of toxemia. He knew as well that Mrs. Kelley was a high risk case and by high risk case I mean that her toxemic condition presented

a high risk of death or serious injury not only to the mother but to her unborn child as well. He was called at 5:50 a.m. on that morning. He was told that Mrs. Kelley had been admitted to the hospital in active labor, labor with contractions two to four minutes apart and with a blood pressure reading of 160/110, which is extremely high. Now you will hear from the expert testimony that this condition, toxemic woman in labor with that sort of elevated blood pressure presented a medical emergency, a grave situation, direct threat to her life and to the life of her unborn child. The evidence will also show that the standard of care required of that physician having been notified of the patient in this condition, that had been admitted to the hospital, that he was required by that standard of care to come to the hospital immediately to attend to his patient and further that he was required to make preparations for the performance of a caesarean section, an abdominal delivery so that the first sign of trouble with the labor or with the way that unborn child was responding to that labor, he could surgically intervene and take that baby out and not force that baby to go through the rivers of labor and face events which it was not prepared to face. And it is our contention that because he failed to do that, Mrs. Kelley's child was born dead and was born by itself without Dr. Modaber's presence at all.

Now I want to go back and explain something some of the medical terminology you will be hearing about in this case.

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It is our view that this is not a hard case. You don't have to know a lot about medicine in order to decide it. Mrs. Kelley had in two earlier pregnancies a condition called toxemia. As I said before toxemia is a form of hypertension that is induced by pregnancy. It is a disease of the blood vessels and it composed a threat to both the mother and to the unborn child. To the mother the threat is that the untreated toxemia can become very severe and can cause damage to the brain by a stroke, to the eyes, it can cause blindness because of the detachment of the retina. It can cause a heart attack and it can cause damage to the kidneys including a permanent hypertension, an actual shutting down of the kidneys in death! Now toxemia poses a threat to the unborn child as well, because the unborn child during pregnancy is developing and receives its nourishment from the mother. Because toxemia is a disease of the blood vessels it interferes with the nourishment that the baby is receiving during pregnancy, so that at the time the toxemic mother begins to go into labor that baby has not been able to build up the nutrients that a normal baby would have built up. It is vulnerable. It is very, very vulnerable to the rigors of labor. The baby is not sick but it is mal-nourished and also often in a toxemic pregnancy the babies can be born prematurally, weeks or month in advance of a term. It means the baby has not been able to develop the way a normal child would, not able to take on the weight and the other nutrients that are required for it

to survive the process of labor. Now there is no cure for toxemia but it can be treated. The treatment is a careful monitoring by the doctor of the patient during her pregnancy and careful monitoring of that unborn child. And then if the toxemic condition is not responding to bedrest that as has been prescribed, the hospitalization of that patient which was not done in this case. And secondly, it requires the doctor to be very attentive to the moment that pregnant mother goes into labor because there is the greatest threat of all to that unborn child. It requires the doctor's personal presence at the hospital to monitor that pregnancy because the critical question is how is this baby, this unborn child, going to respond to this labor, and the evidence will show by experts that that diagnosis must be made by the doctor coming to the hospital and looking at his patient, doing the tests and seeing what has developed. Again our proof will show that was not done in this case and that was the cause of the injuries that were suffered. Now let me give you a bit of chronology about the events and times and dates you will be hearing about again. In 1978 the Kelleys were going to move to Culpeper. Mrs. Kelley had contracted toxemia in her first two pregnancies. She knew as well that those children had been delivered early and she was very concerned about choosing a hospital that was close to where she lived. So she chose Culpeper Memorial Hospital. Secondly, she was very concerned about choosing a doctor who practiced in that hospital.

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So she chose Dr. John Payette and she went for her first office visit on May 30, 1978 at Dr. Payette's office. Now at that time Dr. Payette's office, his practice was called Piedmont Obstetrics and at that time Dr. Parviz Modaber was an employee of Piedmont Obstetrics. On her first visit Mrs. Kelley had of course her history taken by the nurses and she gave her background that she had two children delivered with a history of toxemia during that pregnancy. A third pregnancy that on advice of doctors had to be aborted because her blood pressure was very high and finally a fourth pregnancy which she had carried to term without contracting toxemia. She saw Dr. Payette on the first visit on May 30, 1978. She saw him again on the subsequent visit. When she came in August she was referred to the defendant in this case who then examined her. He noted on that first visit two items which are very important even from the start, the symptoms of toxemia are first an elevation in the blood pressure and secondly, a swelling or edema in the body, also evidenced by the weight gain of the mother, a very rapid and unusual weight gain during pregnancy. And thirdly, if the toxemia becomes very severe protein in the urine, proteinuria which indicates there is some damage to the kidneys during pregnancy. Even on that first visit in August you will hear that Dr. Modaber noted the elevation in the blood pressure of Mrs. Kelley and that she had some edema swelling in her ankles. He did not mention those things to her in August but instead noted in her chart that she

had had a prior discussion with Dr. Payette about doing the possibility of a sterilization operation. Now that had been considered, merely suggested by Dr. Payette because Mrs. Kelley had a history of - had problems with hypertension and could not take a birth control pill and therefore Dr. Payette had suggested that maybe she would want to consider an operation called a bituberal ligation or BTL which means having your tubes tied. She said to Dr. Payette in the earlier visit that she would consider that operation but it never really entered her mind seriously before. This visit in August with Dr. Modaber, he notes in the chart this discussion and he raises the idea with Mrs. Kelley of having a sterilization operation, tying the tubes. She said she hadn't thought very much about it. The following visit was in September. Again she was referred to the defendant in this case who examines her. Here again out of the blue he brings up this idea of having a sterilization operation, the extra operation he wanted to perform and asked her to sign a consent form. Now Mrs. Kelley knows from prior discussions that both the husband and the wife in this case would have to sign the form and she has been told as well that a doctor would have to speak to both her and her husband before they could sign the form, it would take the signatures of both and those signatures would have to be witnessed as well. Well, because she had been asked again for the second or third time about it, she agreed to sign the form. In her own mind she had not decided at all about

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doing the operation and would only had done it,if at all, if the child she was carrying proved to be a boy. Of course she didn't know at that time she was in fact carrying a male child. Now she goes again in October to Piedmont Obstetrics and this time sees Dr. Payette. In early November she realizes she is experiencin some problems in her pregnancy. She knows first of all that her blood pressure is up. She herself had taken the habit of taking her blood pressure during the pregnancy. She had not been told to do so by Dr. Modaber or Dr. Payette, but she had read some medical books and thought it was a good thing to do because of her toxemic history. She noticed that it was elevated. She also noticed that she was gaining weight very much and she had edema or swelling. She called up and after having made two phone calls got an appointment on November 9th. When she went in on November 9th her blood pressure was taken and it was 160/94. Very high. As well she had swelling or edema and her weight gain was rapid and unusual. She knew in her own mind or suspected that she had toxemia. She was examined by Dr. Modaber. He made the diagnosis right then and there that she had toxemia. Now you will hear expert testimony, the standard of care would have required the physician to perform certain tests on that mother and that unborn child to see how they were responding to this toxemic condition. And you will also hear testimony that those tests were not done. Some tests were done but they were not the tests that the standard of care would require.

Secondly, you will hear testimony that the reasonable and prudent physician would have given serious consideration to hospitalization even on November 9th. Instead what the defendant does is to give her a prescription for phenobarbital, send her home and told her to get rest. He also orders a urine test called Estriol Test but no other tests were administered. She returns on the 14th of November and was examined again. Her blood pressure is still high. She is still showing a rapid and unusual gain of weight and she has all the symptoms of toxemia here again. Now you will hear expert testimony that certain tests should have been done at this time. Tests with regard to/non-stress tests, a machine called the fetal monitor, tests on serum estriols, etc. which were not done. Secondly, you will hear the standard of care required hospitalization of Mrs. Kelley, at that time to treat her toxemia. You will hear that that was not done. Instead what the defendant did was to give her more - another prescription for phenobarbital and send her home. She comes again for another visit, another chance on the 21st of November, 1978. This time her blood pressure was up. Her weight gain is up and she is swelling then as well. You will hear expert testimony that this time she should have been hospitalized for her toxemic condition and that/was knowing negligent but it was reckless for the defendant to have failed to have done so. Moreover he did not even perform the tests the standard of care would have required him to perform on Mrs.

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Kelley and on her unborn child. The evidence will further show that had he hospitalized her on the 21st, the events of a week later on November 27, 1978 would never have happened and it should never have happened had he followed the standard of care. Instead what did he do, being satisfied that she had all of these bottles of phenobarbital at home on her shelf, he told her to continue to take them and go home. He sent her home. He didn't send her to the hospital. Now a week passes and on November 27, 1978 Mrs. Kelley is woken about five o'clock in the morning when she realizes that her water is breaking. She calls Dr. Modaber's answering service and says that she now realizes that she is in labor. She is told to go to Culpeper Memorial Hospital and so she goes to the hospital and is admitted at 5:45 a.m. that morning. There is a nurse on duty, Janice Strother. The nurse takes Mrs. Kelley's blood pressure which is 160/110, enormously high. It is obvious just from the blood pressure alone that her toxemia condition has worsened seriously. She also discovers that Mrs. Kelley is - has had hard contractions two to four minutes apart. Now the expert testimony is going to show that her situation at this point was grave and this constituted a medical emergency and that the standard of care required a reasonable and prudent physician to come to that hospital to attend his patient. Now there are two facts that you should know about Culpeper Hospital at this hour of the morning. One, there is no doctor on duty there so that the

patient in this case is totally dependent upon the defendant. The second, there is no OR crew, operating room crew on duty. If the physician wants to perform a caesarean section to get that baby out rather than expose it to labor he has to call the hospital and tell them to alert that OR crew and it it going to take between twenty minutes and a half hour for that OR crew to go in. Testimony is going to show that at this point Dr. Modaber should have come to the hospital to attend his patient and should at the very least have alerted the OR crew to the possibility of a caesarean section. The evidence will further show however that instead upon being notified of this information he told the nurse to follow his standing orders, routine procedure and he would be in later. In other words he refused to come to the hospital. At that point that was the only negligent which reckless and indifferent. . .

MR. PLEDGER: Your Honor I have to object to that.

THE COURT: Objection sustained, now don't get into the argument at this stage Mr. Buckley. You are getting over into your assertions, you have to stick to what the evidence will show.

MR. BUCKLEY: The evidence is going to show the comment to the defendant was not merely negligent in this case but was reckless as well and show really a conscious disregard of the rights of Mrs. Kelley.

THE COURT: You are going over into that same category

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of argument.

MR. BUCKLEY: I apologize, Your Honor.

THE COURT: Don't get into that area of the case. Go ahead with your witnesses and what they will testify.

MR. BUCKLEY: At 6:35 Mrs. Kelley's blood pressure was taken again and was shown still to be high. At 6:40 the fetal monitor was applied. Now the fetal monitor is a machine in the hospital that is hooked up to a woman in labor. There is an external one and an internal one. The external one was hooked up at this point. There were several belts that will be described that go along the stomach or abdomen of the woman and it records the fetal heart rate, that is the beat of the baby's heart and it records the number of beats every minute and makes a tracing on a chart and you will see that chart. It shows how many beats per minute on the fetal heart and it also co-ordinates that with the contractions. As soon as that fetal monitor was applied at 6:40 the evidence will show that baby was in trouble. That heart rate was down below the normal which was 120 to 160 beats per minute. Instead it was down to 60 to 80 range. The expert testimony is going to show that right there there is a baby in that mother's womb that is dying and that is evident from the fetal heart monitor and would have been evident even earlier if Dr. Modaber had come in to the hospital when he should have according to the standard of care. The nurses come back to the labor room, they are giving Mrs.

Kelley oxygen and turning her on her side. They call Dr. Modaber at home again. They tell him the fetal heart is at 60. The expert evidence is going to show that that constitutes the term, the term we use, fetal distress. That baby is in distress. The standard of care at this point as testimony will show would have required him to go immediately to the hospital and to notify the OR crew immediately to go on. In fact he should have already done it. Instead the evidence will show that Dr. Modaber's response was to check it again and call me back. Now when this phone call reached Dr. Modaber at home at 7 o'clock, it is going to be shown that he was still in bed. He was in bed at 5:50 when he was called and he was still in bed at 7:00 o'clock when he was called. He never got out in the hour and ten minutes and never came to the hospital and never called until he was called again and told of the fetal distress. The nurses go back they try to get the reading on the fetal heart. At this time they take another reading. It appears to be zero on the fetal heart. They can't pick it up. They call him again. The nurse Barbara Amos called him again at 7:10 and she says doctor the fetal heart - I can't get the fetal heart, it is zero. The evidence will show by expert testimony the standard of care should have required, that would have required that doctor to be running out that door to that hospital and ordering that OR crew right then and there to get in. Another chance, instead the evidence will show that Dr. Modaber says to the nurse, hold

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the phone up to the fetal monitor. She is calling from the nurses' station. She puts that extension on hold, goes back to the labor room where Mrs. Kelley is. She already told the doctor the evidence will show there was no fetal heart and she couldn't hear anything. The fetal monitor has both a tracing and it is audible as well, it amplifies the sound of the fetal heart. She holds the phone extension to the fetal heart monitor. Dr. Modaber at this time himself confirmed that he can't hear anything on the phone and he says all right I'm coming. Still then he doesn't call the OR crew. The evidence will show the nurse, Barbara Amos took it upon herself to call the OR crew and get them in there. The next thing that happens is that the defendant - that the OR crew arrives at the hospital. Then the defendant arrives at the hospital. He goes in to see Mrs. Kelley. He hooks up at this time an internal monitor which is attached to the head of the baby still in the womb and he gets a fetal heart rate of 60 which is less than half of what it should be, 60 beats per minute and the normal is 120 to 160 beats per minute. He says okay, we are going to do a caesarean section. Does he proceed with the caesarean section, no. The evidence will show instead that he leaves the hospital to go over to his office at Piedmont Obstetrics to retrieve a sterilization form Mrs. Kelley had signed because he wants to do the sterilization, the tube tying - the BTL at the same time he does the caesarean section, because it is an extra operation he can perform. And

he needs Mr. Kelley to sign the form. Now Mr. Kelley had never been to Piedmont Obstetrics and never signed the form and never even decided whether to sign the form. The defendant goes over and retrieves that form and comes back to the hospital for Mr. Kelley to sign it and gives it to him and asked him to sign the extra form so Dr. Modaber can do the/operation. While he was left however the OR crew was ready, Mrs. Kelley was brought over to the OR and there as her bed is being wheeled up to the doors of the OR at the hospital the baby starts to come and Dr. Modaber was not there. And that baby ladies and gentlemen of the jury delivers itself and it is dead. Dr. Modaber comes, sees the scene, picks up the baby. Mrs. Kelley is lying there conscious, views the child. Dr. Modaber, who is referring to Mrs. Kelley, says get her out of here. Mrs. Kelley is wheeled to a room and left by herself. Then Dr. Modaber goes back to see Mr. Kelley who is in the lobby and tells him that their child is head. They both go then back to see Mrs. Kelley who has been alone in this room and the defendant comes into the room and tells her the baby is dead. The evidence is going to show he didn't say I'm sorry, it's my fault. He didn't even say how it happened. His very next remark was "Well, I didn't tie your tubes, so at least you can try again for a boy." And that child that was born dead that morning was a boy. Now the evidence is next going to show after this incident that very same morning, Barbara Amos, the nurse who had called Dr. Modaber at 7:00, at 7:10 and took it

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upon herself to call that OR crew in there, says to Dr. Modaber, "Doctor the next time I call you," and Dr. Modaber responds "Yes, I know, come." And she says "Yes, Doctor please." And the evidence is further going to show in this case that following this incident there were revisions in the records of the hospital. Documents disappeared from the hospital files, and file of Piedmont Obstetrics. It is going to show that these changes in the files, revisions and the destruction of these documents were done by the defendant because he knew that a claim could be filed by either the plaintiffs in this case or by the hospital itself. Now the second reason why this case is unusual, it is unusual because of the statute in the Commonwealth of Virginia and that statute provides that if a patient wants to file a medical malpractice claim against the health care provider, a doctor, the physician is entitled to have that heard first before a panel, before he can proceed with a court suit and trial by jury. In this case Mr. and Mrs. Kelley notified Dr. Modaber that they were considering filing a claim. He requested that a panel be appointed and so he wrote a letter to the Chief Justice of the Supreme Court of Virginia and the Chief Justice appointed a Judge to preside over the panel and selected members of the panel. The panel consisted of three physicians who are practicing obstetricians and gynecologists in the Commonwealth of Virginia, three lawyers who practice in the Commonwealth of Virginia. None of these individuals has any connection with this case whatsoever.

They knew nothing about it in advance. Dr. Modaber also asked for a hearing before that panel as well. So a hearing was held on October 16, 1981. The Judge presided over the hearing and three doctors sat just as you are ladies and gentlemen of the jury as judges in that case and three lawyers sat as judges in that case and the judge presiding just as Your Honor is presiding today. Now under the statute both sides present any witnesses they want. We called witnesses. I was there, I called Mr. and Mrs. Kelley, I called some of the nurses who were there that day. I called expert witnesses. Dr. Modaber was there represented by the same lawyer as he is today and he put on his case as well. No restrictions were put upon the panel as to any documents, any witnesses, fact witnesses, expert witnesses whoever you wanted to call, you could call, to present your case. Dr. Modaber himself testified and gave his version of the events. Another one of his witnesses Barbara Kidwell, who he will probably call today, she came and she testified before the panel as well. Just like the trial in this case and at the end of all the evidence that panel went back to deliberate. Now beforehand they had taken a special oath that was required by the laws of the Commonwealth of Virginia. Each member of that panel was required to swear to render an opinion faithfully and fairly on the basis of the evidence presented. Well that panel came back with their decision and the decision was unanimous. The decision was that the evidence supports the conclusion that

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the Health Care Provider, Dr. Modaber, failed to comply with the appropriate standard of care and that such failure is the proximate cause of the alleged damages in this case, the death of the Kelleys' child. You will be able to consider the decision of the panel as evidence in this case. Moreover we are going to present to you the witnesses that we presented to the panel that led to their unanimous conclusion. You are going to see the medical records from the hospital, from Piedmont Obstetrics. You are going to hear from the Kelleys, you are going to hear from the nurses who were on duty that morning. You are going to hear from two expert witnesses who testified before that panel, Dr. Declan Burke, who is a practicing obstetrician in the Culpeper area, who testified before the panel and Dr. David Abramson, who is a licensed practitioner in the Commonwealth of Virginia, a man whose credentials are extraordinary, the former chairman of the Department of Perinatal and Newborn Medicine of Georgetown University Hospital, a man, who is also as I've said, practice and treat patients in the Commonwealth of Virginia as well. And an expert who is so universally recognized as an authority that he is frequently asked by courts and lawyers to testify. He testified before the panel and you will hear him as well. But then a very special expert witness you are going to hear from as well, a member of that panel, Dr. Herbert Hopwood, a practicing obstetrician in Virginia who is going to present the decision of the panel and who is going to explain the basis for

his opinion. This is a very special witness in anotherway, because he came to this case not because I asked him to come, or Mr. Pledger asked him to come, he came to this case because the Chief Justice of the Supreme Court of Virginia asked him to sit as Judge in this matter and to judge the law and to apply his expertise. This man's expertise I will say exceeds probably in his field any doctor that you are ever likely to encounter in your lifetime. This physician has delivered in his career close to ten thousand babies, a man whose experience dwarfs I would say probably 99% of the physicians in this country. And he will give you his opinion as a practitioner, a man with enormous experience, as an impartial judge of the facts and as a past president of the Medical Society of Arlington County. Now after you hear this evidence, I will get a chance to talk to you again at the conclusion of this case in regard to damages. The law provides for two types of damages, the first is compensatory damages which are to compensate the plaintiffs in this case for the mental anguish, the suffering, mental pain that they have experienced at the hands of the defendant and the second type of damages that are called punitive damages, that are awarded in cases where the conduct is so reckless as to evince the conscious disregard of the rights of the plaintiff. Now in a few minutes you will be hearing about the defendant's case. And at the panel he tried to blame . . .

THE COURT: Mr. Buckley you are getting into an area

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of argument. You are asserting on your own behalf what your analysis is. The jury will disregard that characterization. You may state what his testimony was.

MR. BUCKLEY: When you hear the evidence in this case you will be sitting as was the medical malpractice panel to hear the experts, to examine the evidence, to hear from them, the members of the panel themselves the basis of their decision and I look forward to presenting that evidence to you in this case. Thank you.

THE COURT: All right Mr. Pledger.

MR. PLEDGER: Ladies and gentlemen my name is Harrison Pledger and I represent Dr. Parviz Modaber in this case. As the Court has told you in the beginning it is a case called medical malpractice case. As with any situation there are always two sides. The Court has defined for you the thought that you will hear from the plaintiff first, then you will hear from the defendant. My object in addressing you at this time in opening statement is to try to tell you what the evidence will be that you will hear throughout the case, so you will know that the defendant is going to present evidence after the plaintiff and you will have some idea of what that evidence is. Now let me start with the last part of this case. There was a medical malpractice review panel which considered the case. You will hear that. You will hear from the Court that that decision of that panel is entitled to consideration by you as evidence

DAVID C. ABRAMSON, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Buckley

Q Please state your full name?

A Dr. David C. Abramson.

Q And your current address?

A 4010 Linean Avenue, Northwest, Washington, D. C.

Q Are you licensed to practice in the Commonwealth of Virginia?

A Yes, I am.

Q Could you tell me what your present position is?

A I'm Chairman of the Department of Emergency Medicine and Medical Services at the Southern Maryland Hospital Center.

Q Doctor, would you give me a summary of what your educational background is?

A Yes, I graduated from Muhlenberg College in Allentown, Pennsylvania, and then went to Georgetown University School of Medicine and its graduate school as a life insurance scientist, leading to an M.D. Ph.D. degree. I graduated from the medical school in 1966 and then did residency in pediatrics, P. L. Level one and P. L. Level two, two years; then a fellowship in newborn and perinatal medicine at Columbia Hospital; then became the Physician-in-Chief for Nurseries at Georgetown

University School of Medicine and its affiliated hospitals. I then became the Chief of the Division of Newborn and Perinatal Medicine at Georgetown, remained there until 1978. At that time I took leave of absence or at that time, I announced that I would not return and took the position that I now hold, first as an Associate Director to Southern Maryland Hospital Center, and then I became director and chairman about a year later.

Q Doctor, would you tell us what perinatal medicine is?

A Yes, perinatal medicine is the name that's given . . .obstetrics and gynecology is a recognized specialty in medicine that covers problems with women and with pregnancy and the health of women and reproductive health of women. Pediatrics is a recognized specialty that deals with infants, babies and older children and their development. There is a time during pregnancy when you have a fetus who is a patient and a mother who is a patient, and there is some overlap in there where the two specialties overlap. The perinatal period is defined as the period from the onset of labor through the first twenty-eight days of neonate's life, and during that period, obviously, there are questions that relate to both specialties, to the classical specialty of obstetrics and gynecology and the classical specialty of pediatrics. And in the late 1960's and early 1970's, a new specialty grew up, and obstetricians who were particularly interested in fetal and maternal health and pediatricians who

were particularly interested in newborn and perinatal medicine asked for separate boards as a separate specialty in perinatal medicine, and that was my chief interest in that time. And I became board certified in perinatal and newborn medicine.

Q Doctor, would you tell us what your responsibilities were as the Chairman of the Division of Newborn and Perinatal Medicine at Georgetown?

A Yes, I had several sets of responsibilities. I had teaching responsibilities, patient care responsibilities and research responsibilities. My teaching responsibilities, I was appointed in the faculty of the Department of Obstetrics and Gynecology and the Department of Pediatrics. And my major teaching responsibility was to teach graduate physicians, residents and fellows in pediatrics and newborn perinatal medicine and obstetrics-gynecology, things about the fetus and newborn infant. My major patient care responsibility was in consulting on women in labor and taking care of and directing the health care of all the neonates in the intensive care nursery and in the regular nursery and directing the rest of my faculty. Then I bore a research responsibility to my fellows and my personal research.

Q Doctor, can you tell us whether you are familiar with the standard of perinatal care as administered by an obstetricians in Virginia in 1978 and 1979?

A Yes, of course.

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Q Please tell us how you gained that familiarity?

A Well, we had several affiliated hospitals in Virginia. Fairfax Hospital, the Arlington County Hospital. I lived in Virginia at that time and saw many patients in Virginia, and the greater metropolitan area basically has a single standard.

Q Would you tell us the hospitals which you were involved with?

A The Georgetown University Hospital, Fairfax Hospital, Arlington Community Hospital, D. C. General, Greater Southeast Community Hospital, Providence Hospital and the District of Columbia Hospital for Women, and then the military hospitals, the Naval Institute at Bethesda, the National Institutes of Health in Bethesda, the Walter Reed Army Medical Center. I believe, but I'm not certain, that that's all.

Q Have you ever been on any types of committees on fetus and newborn health?

A Yes.

Q Relating to Virginia?

A Yes. I have chaired the committee, the three state committee on the, for the newborn and fetus from 1974 or '5 through 1976 or '7.

Q Have you testified before as an expert in the area of perinatal medicine as administered by obstetricians in Virginia?

A Yes, many times.

Q Have you testified before in this case with regard to that expertise?

A Yes, I have.

Q And was that before the medical malpractice review panel in October of 1981?

A I believe those are the right dates, but it was before the panel, yes.

Q Your Honor, I move that the witness be accepted as an expert in the area of perinatal medicine as administered by obstetricians in the Commonwealth of Virginia in the 1970's.

THE COURT: Mr. Pledger?

MR. PLEDGER: May I inquire of him first, Your Honor.

THE COURT: Yes sir, you may do so.

Questions by Mr. Pledger:

Q Doctor, you graduated from medical school at Georgetown, I believe you said, is that correct?

A That's correct, yes.

Q Upon completion of that, you did a residency in what?

A In pediatrics.

Q And when did you complete your residency in pediatrics?

A It would have been at the end of June, I believe, of 1968 or '9.

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Q Now, in 1969, where did you go?

A I then did a year of fellowship training at Columbia Hospital for Women.

Q Where is that located?

A That's in Washington, D. C.

Q And that fellowship was in?

A Newborn and perinatal medicine.

Q Was it at that time called neonatal?

A I don't know. The board was newborn and perinatal and I think that's what we called it, but I don't even know that it was officially named.

Q Now doctor, you said that after that, you became director of the nurseries at Georgetown, and you were there until, remained there until 1978, is that correct?

A I remained physically in the building on an every-day basis until mid-1976. Then I took a leave of absence that started being until 1977, but I notified them during that period that I would not be returning in '77, and I think I left it open that I might. . .that I would need at least another year and then I said that I wouldn't be coming back after I took the position at Southern Maryland.

Q Doctor, you left Georgetown University Hospital in July of 1976, did you not, sir?

A That's when my leave of absence began.

Q And you have never been back since then, is that

correct?

A Certainly I have been back many times since. I have not been back as an active, day-to-day faculty member.

Q In July of 1976, where did you go?

A I took my family to Africa.

Q How long did you remain in Africa?

A I don't recall exactly. A period of just a few months.

Q And when you came back to this country, what did you do?

A When I came back to this country, I was on a year's leave from Georgetown. I began work on a book that I was finishing, and I went to work to do a job for a firm called, Medical Legal Consulting Service.

Q What was your job with the firm, Medical Legal Consulting Service?

A Medical Legal Consulting Services was a company that was formed by someone who felt strongly, as I do, that physicians should be willing to speak in matters of standard of care, and there was a great deal of difficulty apparently in getting them. They had asked me if I would, in fact, go around the country or speak to my colleagues around the country and see if I could get them to agree to honestly come forward and speak and address issues of standard of care throughout,you know, in an unbiased way and be willing to come forward if asked

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in Court and that sort of thing.

Q Doctor, your role and responsibility with Medical Legal Consultants was to find doctors to testify in malpractice cases, was it not?

A It was not, no. It was to find doctors who were willing to on request and without knowing from which side they came to review medical case histories and tell the people who had asked them whether or not the medical care that was given was within the standard that would have been appropriate, and if it wasn't within the standard, whether or not the breach of the standard of care or the substandard care was responsible and contributed to or actually caused an injury to the patient. The assumption was - and what I went over with them very carefully - if they felt that the care was substandard and that it did result in an injury, that they would be willing to come forth publicly, in a form such as this or whatever was appropriate, and have the courage to come forward and say so. And that's - and I went around the country and found a number of physicians, academic physicians mostly, like myself, who felt strongly that we had an obligation to do that and were willing to do that.

Q So from 1976 to what period of time were you out looking for doctors who would come forward publicly as you say?

A That is one of the things I was doing in that period of time, and I think I stayed actively associated with that company doing that job for about ten months, nine or ten months.

Q Then where did you go?

A Then I went to Southern Maryland Hospital Center.

Q And what was your initial role at Southern Maryland?

A Associate Director of Emergency Services.

Q Isn't it a fact that you went down there first, you were asked to come down and work in the emergency room by the doctor who had the contract with the hospital to provide that service?

A What happened is I was going to go to work at Arlington Hospital, and they said, you need to be certified in advanced cardiac life support, and at that point, though I had taught it, I wasn't certified. I went to take the course to become certified, and the...one of the instructors of that course, the director of that course, was the Chairman at Southern Maryland. He said before - we became friends - and he said before you go to work at Arlington, come down and see what we have. I went down there, I did. He asked me to join the staff which I did, and a week later or so, he asked me to be his associate director, and I readily agreed to that.

Q As Chairman of the present department of the emergency room at Southern Maryland Hospital, you see to manning of the emergency room, is that correct?

A That's one of my functions, yes.

Q Is that your full-time job?

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A Um. . .

Q Or is that part-time?

A Well, I bear full responsibility for it, but it takes - that particular function, of course, does not take very much time. I have a good and adequate staff.

Q Yes sir. How many hours are you in the emergency room?

A It's very, very variable. It will depend on need, and I'll spend somewhere between ten and sixty hours a week there.

Q Now, when was the last time you admitted a patient to a hospital for care and treatment in the Commonwealth of Virginia?

A Oh...it certainly has been many, many years since I personally had admitted a patient. I see patients in hospitals in Virginia relatively frequently, as recently as last month. But I don't...I have not admitted a patient under my name certainly since I went to Southern Maryland because I precluded that when I went there.

Q So that would be since 1977?

A It would be since 19...certainly since 1978. I don't believe I admitted anyone in 1977, but I may have.

Q When was the last time you cared for a woman as the primary physician who was suffering from preeclampsia?

A As a primary physician?

Q Yes sir.

A I only see women suffering from preeclampsia as a consultant physician in perinatal medicine or as an emergency physician. In the emergency room, I saw such a woman this morning in my role as an emergency physician.

Q Was that at Southern Maryland Hospital?

A That was at Southern Maryland, yes.

Q Okay. When was the last time that you saw a woman in Virginia as a primary physician?

A It would be many years.

Q 1976? '75?

A As a primary physician?

Q Yes sir.

A (Pause) I really couldn't remember. I couldn't tell you specifically.

Q When was the last time you were asked to consult by an obstetrician gynecologist on a patient who was suffering from preeclampsia and that consultation took place in Fairfax or Arlington Hospitals where you said you've been. . .

A I got such a call from a Virginia physician yesterday.

Q And who was that physician?

A As you know, it's my policy never to reveal the names of medical specialists who consult me.

Q Was that consultation over a medical malpractice

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case?

A No, it was a consultation over the management of a patient.

Q Did you go to a hospital in Virginia yesterday?

A I did.. . .

Q To see that patient?

A I didn't have to because he sent the patient to my hospital in Maryland. We are only about four miles or five miles apart.

Q So this was a physician in Virginia who called you at Southern Maryland and sent you a patient at Southern Maryland, is that correct?

A That's correct.

Q Did you admit that patient to Southern Maryland Hospital?

A No, I did not.

Q Did she have preeclampsia?

A No, she did not.

Q Well, so then that's not a patient with preeclampsia, is that correct?

A Not, no, you said a patient, a pregnant patient, I thought what the question was.

Q When was the last time that you consulted with a physician in Virginia about a patient with preeclampsia?

A I don't know. It would be...my best recollection,

it would probably be last year. I don't remember one this year.

Q Where did the one that you recall last year take place?

A Oh, that would have been at Fairfax Hospital.

Q And who was the physician involved in that one?

A Again, the physicians who consult me I believe is a private matter between them and me.

Q You mean that if a physician calls you for a consultation, you go to the hospital, and you fill out a consultation form, don't you?

A That's correct, yes.

Q That becomes a part of the hospital record?

A To my best knowledge, it does, yes.

Q Yes sir. And the patient that you went over there to see had preeclampsia?

A The patient that I went over there to see had hypertension. I am not certain that it was preeclampsia.

Q Do you know the name of that physician that called you?

A Yes, I do.

Q And you can tell us, is that correct?

A I could, but I won't.

Q Your Honor, I'd ask that he be - -

THE COURT: Overruled. That doesn't have anything to

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do with the case.

Q You'll note my exception?

THE COURT: Yes sir, it's noted. The jury is instructed that who the identification of that physician is, is not material to this case. You may proceed, Mr. Pledger.

Q Doctor, have you ever made the initial diagnosis that a particular patient was suffering with preeclampsia?

A Only retrospectively as students or other physicians present the findings to me or the record to me, not personally myself as the first physician seeing such a patient.

Q Your disgnosis then has only been based upon a review of the records some time later after the case had been taken care of, is that correct?

A Or based on the review of a younger physician or a physician in training presenting the patient to me in the high risk obstetrical clinic or something like that. They come in and they say, Dr. Abramson, I have a patient in examining room four who is twenty-six weeks pregnant, whose blood pressure is such and such, whose pressure on the last visit was such and such, whatever the case may be. In that instance, it is retrospective because I expect that the student or the young physician will already have made the diagnosis. So it's retrospective, but it's not me personally as a practicing obstetrician-gynecologist, which I'm not and never have been. I don't go and make that diagnosis routinely.

Q Did this case that you are referring to occur in Virginia that you were called in by a junior doctor, as you say?

A No, that wouldn't have been a junior doctor. That would be a senior practicing obstetrician gynecologist.

Q And where did that take place?

A That takes place on a, virtually on a daily basis. I get calls from obstetrician gynecologists for consultations in terms of my view on what should be done.

Q At Southern Maryland Hospital?

A Yes.

Q So you are a consultant there about this situation?

A I'm a consultant - I'm called from all over the area; the three-state area functions as a single unit basically.

Q Have you ever managed a woman with preeclampsia in the State of Virginia?

A I don't know what you mean by managed, but I certainly have been involved in the management.

Q Have you ever been the primary physician in caring for a woman with preeclampsia in the Commonwealth of Virginia?

A No, I would not be the primary physician for such a patient.

Q That's because that would be done by an obstetrician gynecologist?

A Or a family physician that I would be the consultant to but not the ...not the primary physician.

Q Your Honor, I would submit that the doctor has not shown the qualifications that, to know the standard of care in the Commonwealth of Virginia in 1978.

THE COURT: Mr. Pledger, your motion is based upon his lack of practice in Virginia. I don't equate the two. As he says, he consults with physicians across the line, and I rule that the fact that he doesn't practice in Virginia is not essential to his knowledge of the standard of care in Virginia so long as he's conversant with those who do practice in that regard and who consult him as part of his official duties. The motion is overruled as to his lack of knowledge of the standard of care. Anything further?

MR. BUCKLEY: Your Honor, he's accepted as an expert then?

THE COURT: The Court acknowledges him as qualified to testify in the field of the. . . .

MR. BUCKLEY: Perinatal medicine as administered by obstetricians.

THE COURT: . . .perinatal medicine or the treatment of the pregnancy and the events leading up to childbirth as are involved in this case. Go ahead sir.

Questions by Mr. Buckley continued on direct:

Q Are you experienced with the care that is provided to pregnant women with toxemia in Virginia?

A Yes, I am.

Q Can you tell me how you gained that expeience?

A First, because Virginia is the same as women with toxemia or women with hypertension in pregnancy in Virginia are not different than women every place else. Medical knowledge is disseminated now and has been for some time on a national basis as are . . .and all of the physicians that I know from Virginia and from elsewhere, we speak virtually on a daily basis and we do what the physiology dictates and what the problem dictates, and we - we don't pay attention to the state lines, in other words.

Q And how about with particular reference to the late 1970"s as to your experience in that area in Virginia?

A The same was true then. We didn't take care of patients differently in, at Georgetown and differently in Fairfax or Arlington or. . .

Q Doctor, let me ask you whether you have previously reviewed some medical records relating to Jessie Marie Kelley in this case?

A Yes, I have.

Q Would you please tell us what records you reviewed?

A Yes, I reviewed the Culpeper Hospital record, the office record from the Piedmont Obstetrical Association, Dr. Modaber and Dr. Payette. I reviewed some deposition testimony, the deposition testimony of Nurse Strothers and Nurse Amos. I

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reviewed the deposition testimony of Dr. Modaber. I have reviewed my own testimony from the panel. I reviewed the testimony of several obstetricians, Dr. Peterson, Dr. Willoughby, Dr. King, who have given testimony in this case. I believe that's all that I have reviewed. I mean, I certainly reviewed the complaint, and I reviewed the findings of the panel, the malpractice panel that I testified before.

Q Let me show you what's been marked previously as the original to Exhibit Number 1, and ask you if those are the hospital records which you reviewed?

A Well, I reviewed photocopies of these, yes.

Q And let me show you what's been marked as Plaintiff's Exhibit No. 9 which are the records from Piedmont Obstetrics and ask you if those are the records you reviewed?

A Yes, these are.

Q And, doctor, after reviewing those records, have you been able to form an opinion as to whether or not the standard of care in 1978 was violated or not? With respect to the care administered to this patient?

A Yes, I have.

MR. PLEDGER: Your Honor, I wonder if I might object at this point and determine whether the Court is going to proceed by virtue of a hypothetical question or whether the witness can just testify without giving us the basis or facts upon which he is testifying.

THE COURT: I will allow him to testify and then to justify it with a further statement or to answer it on cross examination. Your objection is overruled at this point, Mr. Pledger. He may state his opinion.

A I have formed such an opinion, and my opinion is that Dr. Modaber fell below any acceptable standard for the delivery of perinatal care in 1978.

Q Could you tell us how, in your opinion, he fell below that standard?

A Yes, I think the major way he fell below the standard was on the day of delivery when he failed to recognize or realize the magnitude of the problem that is presented when someone who has what we call pregnancy induced hypertension or toxemia is the common word for that, who goes into premature labor, labor more than two weeks before the estimated date of confinement or the due date, and that is by anyone's perinatal standard, that is a major, major potential catastrophy, and Dr. Modaber, when notified of her labor, did not come to the hospital; when notified later that she was in trouble with that labor again didn't come to the hospital. He finally did come to the hospital and recognized the problem and hadn't gotten things set up so that he could intervene and save the baby's life in a timely way. For that reason, the baby died.

Q Doctor, you use the term toxemia. Can you tell us what that is?

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A Toxemia is a word that we use to describe a set of conditions that occur only during pregnancy. There is a rise in the blood pressure, and usually an accumulation of excess water and, therefore, extra weight gain as well as a problem with the kidneys so that there is protein in the urine. You don't need all of those things for it to be called toxemia or pregnancy induced hypertension, but that's usually what develops, and it's a very, very dangerous condition for both - well, used to be a very dangerous condition for both mother and for baby, and for the fetus. In modern days, mild preeclampsia or mild toxemia can't be prevented. There's no way to prevent that. What can be prevented absolutely is the progression on to serious consequences for mother and what can be prevented almost completely are the consequences for the baby, not the consequences of being a fetus inside a uterus where your mommie has toxemia; the baby is going to be affected. But the major effect on such a baby is that - the baby isn't hurt, but the baby is rendered very vulnerable or very likely to be hurt once labor starts. During normal pregnancy, during pregnancy with toxemia, mild toxemia, the baby doesn't get hurt, but the baby doesn't get as much blood flow from the mother as is usual. And it's usually not enough for the baby to build up the stores, especially of sugar and starch, that a normal baby needs to get through, even in normal labor. So that what happens at the end, or when a mother goes into labor, when she's had toxemia, is you have this very

vulnerable baby who is perfectly fine, but may or may not have enough stores of sugar and carbohydrate to get through even in normal labor, assuming that the labor is normal and not bad. So that the physician responsible for caring for that mother who goes into labor simply has to make a series of decisions. How is this particular baby, this particular fetus, responding to this labor? If the fetus is responding well and normally to the labor, wonderful; let's go on and have a normal baby. If the first sign of anything that the fetus isn't responding well to the labor, then you must monitor the labor very, very carefully, electronically. The first sign of any problem, you go ahead and deliver the baby. If it's easily deliverable through the vagina, fine. If not, by caesarean section. And in that way, injury is prevented both for mother and for baby, although you have an operation, and the mother is going to recover from that, certainly.

Q Could you tell us with a little more particularity what effect the toxemic condition of the mother has on the child in its development?

A Yes, the infant in - or the fetus inside the womb of a mother who has toxemia is receiving less than a normal amount of nutrition. Normally, what the normal human fetus does during the last three months of pregnancy is grow and build up stores of starch. Those stores of starch are very, very important because once labor starts, and only after labor starts, when the

uterus starts to contract, the pressure inside the uterus goes up; blood flow can't take place between mother and baby. So what's really happening is the baby can't breathe while the uterus is contracting. But that's not very serious because when the baby is deprived of oxygen like that, if and only if the baby has the sugar and starches stored up, the baby can use those sugar and starches to get energy without oxygen, and in that way, the baby can keep his heart rate up, keep the blood circulating, keep his brain healthy, stay alive, until the uterus relaxes and baby gets oxygen again. With oxygen, as long as there is oxygen, you can get energy, that same kind of energy from fat and protein and many other things that the body has. It's only when you deprive the baby of oxygen that he needs the sugar, only the sugar; it's the only food source you can get energy from in the absence of oxygen. So the poor baby whose mother has had pregnancy induced hypertension or toxemia, like Mrs. Kelley's baby, is perfectly fine when labor starts, but when the uterus contracts, and the baby doesn't get oxygen during that brief period, we know - and we have a perfect record here, a graphic record, from the fetal monitor, that this baby couldn't tolerate that; that when this baby's oxygen supply was cut off, the heart rate dropped way down; the baby couldn't get energy from any other source because there was no oxygen, and didn't have any of these stores of sugar to utilize to keep up his heart rate and keep his brain intact. This baby was very, very,

vulnerable. That's noticeable in the first five minutes after the monitor was put onto her in this particular case. And the breach of the standard of care that Dr. Modaber did was not realizing the significance of this and the danger of this, and getting to the hospital, being sure that he could get that baby out, and out safely, at the first sign of fetal compromise.

Q Can you tell us what was significant about the history of this patient before Mrs. Kelley was admitted on the morning of November 27th?

A Yes, she had had four prior pregnancies before this one, and in two of those pregnancies, she - they were in the very early 1970's. She had also had hypertension or high blood pressure, probably toxemia, and those pregnancies came out okay. She then had a pregnancy in which her toxemia was so bad that abortion was recommended and performed. And then she had a pregnancy in which she didn't have any problems at all in 1975. She had no hypertension; she didn't go into premature labor, and that worked out wonderfully. And then she had this pregnancy, and in this pregnancy, of course, she developed, in November, she developed toxemia, went into labor, and again, though, everything could have been okay and would have been okay had the standard been applied which is when a toxemic patient goes into premature labor, you monitor very, very carefully the entire labor, and at the first sign of fetal compromise, you deliver the infant. That's the cure for both mother and baby. It's the cure for the

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mother's toxemia, and it's the cure - it prevents the baby from being injured by the process of labor which is the big danger of when you have toxemia.

Q Can you tell us what the symptoms are again of toxemia?

A Toxemia usually develops, well, by definition, it's hypertension that develops in pregnancy after the twenty-fourth week, and it usually develops, first, with what's called edema, or an excess collection of fluid, especially of the hands and feet and face; then hypertension and the appearance of protein in the urine. And that's the so-called tried, tri meaning three, three things that go along with the diagnosis of pregnancy induced hypertension or toxemia.

Q Just so we understand the mechanism of this. How does the toxemia relate to the increasing fluids and the swelling and the edema or to the protein in the urine?

A I certainly wish I knew, but I don't. We don't understand what causes toxemia. We don't know how to cure it. Except by terminating the pregnancy. And we really don't understand those things. It certainly is a disease of the mother's blood vessels, including those blood vessels that go to the uterus and have to nourish the baby. But other than that, we are quite ignorant really about the mechanism of it. We know how to get women through it safely nowadays, but we still don't basically understand it.

Q Can you tell us what Mrs. Kelley's condition was on the morning of her admission?

A On the morning of her admission to the hospital, she was very hypertense, and she was no longer in the mild preeclamptic stage. Her blood pressure was alarmingly high. The low number on her blood pressure, the diastolic blood pressure was 110 when she came in. That's scary. That's real, real scary to any doctor that would be taking care of her. Now, some women who go into labor, their blood pressures go up because they are excited when they first come into the hospital, and then it comes right down. But that didn't happen with Mrs. Kelley. Her blood pressure wasn't taken and recorded again for nearly an hour, and the diastolic pressure, that bottom number, was still at 110. And that's enough to - that sure would scare the . . .that would freighten me to death if I were being responsible for that labor. That's real scary stuff. That's in the range of severe moderate or severe toxemia.

Q Is the . . .

THE COURT: Dr. Abramson, in that context that you just made the statement, would you relate it more specifically to the practice generally, not what you react to personall-, but how would a doctor in the practice normally react to it?

A That changes the characterization of, by standards. That changes the characterization from mild preeclampsia or mild toxemia into a blood pressure reading that now is in the

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moderate to severe range. It's the moderate to severe toxemia that can have horrible consequences, both for mother and infant. At that point, you have a first-rate emergency on your hands. / You've got a hundred and twenty-five years of potential life / there, in that mother and baby that you're taking care of. / When her diastolic pressure is at 110, you have to be worried.

Q What is - you use the term preeclampsia. How does that relate to toxemia?

A They are basically interchangeable at this time. Toxemia is the triad that I talked about that's preeclampsia. The reason it's called preeclampsia is because in the days before we knew anything to do about it, it would frequently progress to the condition known as eclampsia which is the same three things getting worse and worse, and then the mother starts to seize and have seizures and fits with horrible consequences for the baby, and those babies usually die, almost ninety percent of them would die if you let the mother get to that stage.

Q Doctor, referring you to the labor record in this case which are the hospital records. . .would you please tell us what else it shows with respect to the condition of the patient at five forty-five a.m. that morning?

A At five forty-five a.m. what it tells us is that her blood pressure is 160/110. The fetal heart rate is 120 beats per minute. The contractions that she's having are hard and every two to four minutes. And the mouth of the womb which has to

open up for the baby to get born is not - is open very, very little, only about two centimeters open. It's got to get open to ten centimeters before the baby could safely come out. And that's what it tells us is the way she comes into the hospital.

Q Does it further indicate that this information you just related was given to Dr. Modaber at five fifty?

A It does, indeed. Yes, it has Dr. Modaber notified at five fifty in the morning.

Q In 1978, what did the standard of care require of this physician at that time?

A That's a complicated question, and rather than answer you specifically, I'll tell you what he needs to do. He needs to know - what he already knows is that he's got a woman in premature labor. She's well prior to her due date, who is hypertensive and has been, and who now is more hypertensive, who is in a very dangerous condition. What's got to happen is he has to answer the big question, can this baby make it through this labor safely or will he have to intervene? What he has to assure himself of - and how he does it is unimportant - is that the progress of this labor and the status of this baby are going to be watched like a hawk, and that he's going to be in a position to intervene if he has to, to get that baby out in not more than five minutes. No matter what happens in a healthy tracing, if you are looking at a healthy monitor tracing, no matter what happens, if we can deliver the baby within five minutes, we know

we can have a healthy baby. Nothing can happen in the five-minute period that's going to hurt the baby. Basically, for all practical purposes, that's a truism, so as long as he knows that that mother is being watched every second, and that he's in a position to deliver that infant safely within a five minute period, he doesn't have to do anymore.

Q Can you tell us whether or not at five fifty a.m. the conduct of the defendant violated that standard of care?

A I believe it did. Definitely, yes.

Q What's the reason it did?

A Because he did not - he didn't put the patient into a position where she could safely be delivered at the first sign of fetal compromise, either by his own actions - he didn't even come to the hospital - or by anything that he ordered. He didn't order the hospital to be prepared to deliver the baby. He didn't assemble the right people; he didn't get the right monitoring done, and he didn't stress the tremendous, the magnitude of this emergency. This is a first class medical emergency of the highest magnitude.

Q Doctor, what's the next significant event in your opinion on the labor record?

A On the labor record itself, there's. . .(Pause). . . if we can find it in this particular part of the labor record, the next significant event is at seven a.m., the fetal heart rate is sixty beats per minute. That's a horror. And Dr.

Modaber is again notified.

Q What's the normal fetal heart rate?

A There is no such thing as a normal fetal heart rate nowadays. That's an archaic term. There's a range of heart rates where fetal heart in a healthy baby usually is beating between contractions, and that range is taken as 120 to 160 beats per minute. But, as we knew then, and was well known long before this, it's not what the fetal heart rate is beating at, but it's the response of the fetal heart to the contractions of the uterus to tell us what condition the baby is in and what kind of shape the baby is in and whether or not the baby can withstand labor. It's not the rate measured at any given minute inbetween contractions. That was the old way, long before we appreciated, in the 50's and 60's, before we appreciated what we learned from fetal monitors.

Q What does the 60 indicate?

A The 60 is decidedly abnormal. It's far lower than a fetal heart rate should ever be in a healthy labor, and we know, since we have the tracing, we know at that point that it shows us an absolutely, unequivocal, you know, terrible fetal distress.

Q Does the chart indicate when that fetal monitor was applied?

A Well. . .it doesn't per se, but we can count backwards. There are some times in the record that we know with

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certainty. We know she went to the delivery room at seven twenty. . and that the monitor was taken off at seven twenty. We know the rate at which the paper moves, so we can count back and say we have about . . .I think it's just over fifty minutes of tracing.

THE COURT: Fifteen did you say?

A Fifty. I think we have about fifty-four minutes of tracing.

THE COURT: Fifty-four minutes?

A Yes.

Q Doctor, I'm going to ask you to look at what's previously been marked and admitted into evidence as Plaintiff's Exhibit No. 8, which is a photographic enlargement of that fetal monitor strip. Let me ask you first if you can explain why, what was the fetal monitor?

A This is what we call an electronic fetal monitor tracing. There are two separate things that are recorded here. This top line is the recording of the fetal heart rate. That's how fast the baby's heart is beating. Now, this paper is moving so that as the pen moves up and down with the fetal heart rate, the paper moves, and it draws a line like this. And this bottom line shows us the contractions of the uterus. So that as the uterus contracts and the pressure goes up, it lifts the pen, and as it falls down, the pen drops, and the paper is being pulled along. What I was telling you before is that...this line

right here, this heavy line is 120; this heavy line is 160. The normal range for purposes of talking about monitors of the fetal heart is between 120 and 160. You can see that this baby's heart is virtually never normal.

Q Doctor, the labor record indicates that the fetal monitor was . . .

MR. PLEDGER: Your Honor, I have to object. . .to... I think that the witness should testify.

THE COURT: What's the question?

Q I was going to refer him to that time. . .

THE COURT: Just ask the question.

Q All right. Does the medical chart indicate about what time this fetal monitor strip was applied?

A It doesn't. It doesn't give what time it was applied. The only time that I could, from the record , that I could put on here would be to say that it was disconnected and she was taken to the delivery room at seven twenty, so that if we count backwards from seven twenty, and each one of these little squares is a minute, so between these numbers that you see here is six minutes. So we can count back six, twelve, eighteen, twenty-four, thirty, thirty-six, forty through forty-eight, fifty-four...about fifty-five minutes. So this is seven twenty. We would count back fifty-five minutes. This is six twenty-five...when we first see the first beginning of the tracing.

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Q Doctor, I ask you to look at the copy of the medical records. . .

MR. PLEDGER: Your Honor, I have to object to this. It's very obvious the doctor has made a mistake, and they want to give him the correct figure. In fact, the tape says on it that it starts at seven forty. The records that he has reviewed says it starts at seven - six forty. It says it's disconnected at seven forty.

THE COURT: The objection is sustained. Now, Mr. Buckley, you must let the witness testify. And you'll have to allow the matter to be corrected by any recollection he might have during the course of the rest of the questions. You can't testify for him. Go ahead with your next question, sir.

Q Does reviewing the chart refresh your recollection as to when the monitor was applied?

A I'm well aware of what the chart says. The chart here says the timing, six forty, fetal monitor applied. And that's one way to time it. If we did that, we'd start up here and say that starts at six forty. The other thing we know and what I believe is probably more reliable than the way the nurse writes it here is we know that at seven twenty, we know that from this record and from a lot of the sworn testimony that Dr. Modaber was there and that she apparently was going to be sent to the O.R. At that point, they have to take off the monitor and wheel her down to the OR. We know that the baby was born in

the hall at about seven forty-three, so that we can count back from there. There's no way to accurately time it. We know - - this could be seven twenty or seven forty. This could be six twenty for, you know, the appropriate time interval from there. What's clear is that the tape runs at a constant rate. It represents fifty-six minutes of tape. But we don't know since the tape itself isn't marked and nothing is marked with absolute precision, we don't know. My guess would be to come back from here gives us the most accurate rendition. But certainly, you can move it ten minutes in either direction.

Q What does the fetal monitor strip indicate as to when it was first applied as to the condition of the unborn child?

A Okay, the first contraction that we can clearly see - and again, the important thing about fetal heart rate is how it responds to contractions. The first contraction that we have clearly recorded is this one. That's followed by a drop in the fetal heart rate from an overly slow rate down even further. That's called delayed deceleration. That means to those of us who are interested in this sort of thing uteroplacental insufficiency. If it's persistent it means that the baby is not getting enough nourishment from the placenta. The placenta is inadequate. In a case like this where you know that this is a mother who's had toxemia, and you see a late deceleration like that, the fetal heart rate going slow, getting slower

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when it contracts, that says trouble right away. That says the chances of our getting through this labor safely for mother and baby are almost none. We are going to have to deliver this baby. If you want to watch another one or two and be sure that it's not, you know, something wrong with the machine or something like that, that's fine, but you go ahead and make your preparations to deliver this lady by caesarean section...at that point.

Q Referring to the medical chart, does it indicate that Dr. Modaber was notified then?

A Well, we know we have two things that correspond exactly because this right here says oxygen was started. In other words, the nursing personnel recognized how serious this was; that it was an emergency. Oxygen was started, and Dr. Modaber was notified, and that's very appropriately written right on the monitor record, right where it should be. After you see this deceleration on the monitor, this slowing down of the fetal heart, there is no question that your baby is in trouble, and the right thing to do is start oxygen, get the doctor in and get the baby out.

Q Why did the standard of care require that the physician was notified as indicated on this fetal monitor strip?

A Well, he must - he already should have been in the hospital if he was notified that this pregnant hypertense lady was in premature labor or he should have had things set up. But if there were residents or someone in the hospital who could

take care of it, that would be fine. But he should have had it set up so that at this point, he could have proceeded to a timely delivery in a very minimal amount of time.

Q Doctor, if the physician, if so notified at seven o'clock, had not come to the hospital immediately and had not made the immediate preparations for the calling in of the operating room crew, how would that have comported with the standard of care?

A Again, I'm not willing to testify, Mr. Buckley, in terms of what you have to do in terms of who you have to call and that sort of thing. I'm willing to testify what the standard requires you to assure for your patient. And how you do that, I could care less. You have to be sure that your patient is watched by someone who knows what they are looking at and can interpret what they are watching...every minute at a time. And you have to be sure that on five minute's notice you can deliver this baby by caesarean section if that's what's indicated. As long as you assure that. . .

THE COURT: You've been over that, now Mr. Buckley. That's about the third time you've been over it. The doctor has explained that very adequately. Thank you doctor. Go ahead with any other questions.

Q Okay, doctor, do you have an opinion as to whether or not the failure to comply with the standard of care to which you have testified as of five fifty resulted in the death of

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the baby in this case?

MR. PLEDGER: Your Honor, I have to object to the form of the question.

THE COURT: I think you are giving him a leading question there, Mr. Buckley. You may ask him what the effect in his opinion was of the failure to render the proper standard of care, but you are leading him with a specific suggestion.

Q Okay. Let me ask you as to what the effect was of the physician's failure to observe the standard of care.

A Yes, because he didn't do what the standard demanded of him, she was allowed to continue in labor; this horrible insufficiency of the placenta and cord problems were allowed to develop in the baby, eventually leading to the death of the baby. When a perfectly normal baby could have been delivered.

MR. PLEDGER: Your Honor, I'd have to move to strike the question and answer as being improper. If I may approach the bench, I'll explain my objection.

THE COURT: You can't do it at the bench conference, but I'll be glad to consider it. We'll let the jury be recessed for a moment. Sheriff take the jury out and we will consider this on the record.

JURY RETIRES TO THE JURY ROOM.

THE COURT: Suppose we take another brief break. I have a telephone call I need to make if the doctor will just be

comfortable where he is we will take it up in just a moment.

RECESS.

THE COURT: All right, Mr. Pledger, you indicated that you have an objection to be noted out of the presence of the jury with respect to the last line of questions and answer given by Dr. Abramson.

MR. PLEDGER: Yes sir. I wonder if we might make that at the bench, either that or exclude the witness?

THE COURT: All right, counsel may approach the bench. I think you all are aware of the fact that due to the proximity of the jury, a bench conference is virtually impossible, but with the jury out you can, of course.

MR. PLEDGER: My objection to the question and to the answer is, it's our basis that reasonable medical certainty... he says my opinion that he does not relate it actually to a standard of care, he simply says it's my opinion, but that last particular question, there was a loaded statement in there. . . (inaudible) ...and that this was based upon reasonable medical certainty.

THE COURT: Well, do you want to respond to that, Mr. Buckley?

MR. BUCKLEY: I'm going to ask him.

THE COURT: Do you think it would be more appropriate to consider that from the standpoint of the answer after the examination has been completed. If you want to pursue that on

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cross, restate it in a fashion that his answer is almost unbelievably absolute. He hasn't been asked a hypothetical, and he hasn't been asked to, to state as an approximation, he just says categorically that's the cause of it. It seems to me that until you can expose some lack of certainty. As far as the question and the answer now stand, it seems to me that it's obviously very, very certain. If you want to expose the weakness of it, I think you have to do it. There's an answer made and accepted. I don't see any problem. I note your objection and I might reconsider it if he shows some equivocation.

MR. PLEDGER: My understanding of the rule still in Virginia is that it has. . .his opinion has to be delivered with reasonable medical certainty or reasonable medical probability.

THE COURT: What is the basis in this case of the action, is it limited to the baby's death from the manner in which treatment was rendered, and that's one aspect of the damage.

MR. PLEDGER: I understand that aspect of it.

THE COURT: In other words. . .

MR. PLEDGER: My question goes to the form and where we're going to go in this examination with this witness. Now I know the witness very well, I have had him in many,many cases.

THE COURT: I see. You all may have a better understanding of that than I do at this point.

MR. PLEDGER: He will be always very positive, there's no doubt about that.

THE COURT: I see.

MR. BUCKLEY: Your Honor. . .

MR. PLEDGER: But I think the form of the question must be posed by the examining counsel when he seeks to put into evidence the opinion of this witness, it must be with that formality that it is with reasonable medical certainty or reasonable medical probability. It's the same reason I object to not going on the basis of hypothetical questions. Now I know the Federal Courts have abolished the hypothetical question and he can just testify on anything he wants to and then you've got to sit there and dig it out.

THE COURT: That's the actual record here rather than a hypothetical.

MR. BUCKLEY: Your Honor, I would note that there was no objection to the question. It was only after the question was answered that there was a motion to strike. The motion to strike was not on the basis that it was not responsive to the question. There was no objection taken to the question.

THE COURT: I think his objection is timely on the basis of what the answer represents. In other words, it does not, if that's the thrust of what you're designed to show, but that occurred as a result and it's got to be framed within the context of a damaging question, that is, did the injury complained of arise from the conduct as a reasonable medical certainty, just as any other personal injury case, and it seems to me that if that

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is the thrust of your complaint. . .

MR. BUCKLEY: I have no problem. . I have no problem in asking him whether the stillbirth of this child was the result of the failure to follow the standard of care and ask that opinion to a reasonable degree of medical certainty. Be glad to ask him that.

THE COURT: This witness is only testifying as to the standard of care.

MR. BUCKLEY: Right.

THE COURT: Now the problem, of course, is where the evidence is going to come that caused the injury to the plaintiff, who is the mother. That's where the. . .

MR. BUCKLEY: That relates to her, her reaction to the stillbirth.

THE COURT: . . .whatever the reaction she had, what are her injuries. Her injuries are somewhat indirectly related to the death of the child, but the action if not maintainable in the name of the child.

MR. BUCKLEY: Right.

THE COURT: If it were, this would have to rise to that. My question is that not being on the basis of the child's action, it's not necessarily related to the injury in this case.

MR. BUCKLEY: Certainly it is. I mean, the grief, the anguish. . .

THE COURT: Depends on how you . . .what your thrust is.

MR. BUCKLEY: Well, there have been demurrers filed and Judge Fry held that our complaints stated a cause of action, and. . .

THE COURT: Well, the thing about it is, if you expect that to stand though as a means of showing the damage to her, if that per se is part of the damage, then it must be attributed by reasonable medical certainty to the lack of action or the negligent action taken. But I'll leave it to you.

MR. BUCKLEY: Right. When Mrs. Kelley testifies, she'll testify. . .

THE COURT: I think it's subject to being attacked at any stage of the proceeding when you get ready to move for your damages. He's forewarned you, of course, and when you get to that stage on the damage instruction and anything else that you have to deal with.

MR. BUCKLEY: This witness has testified that this was a medical emergency, that this physician should have been in. He didn't come in, he testified that failure caused the death of the child and then we're going to show that the grief, the anguish, the suffering that the plaintiffs have suffered as a result of that conduct.

THE COURT: Well, you've got to make that leap, though, when you get to the injury to your plaintiff, that the injury is a , is a matter that can be related to reasonable medical certainty.

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MR. BUCKLEY: Well, she can testify as to why she's sorry. You don't need a medical expert to testify as to why she's sorry. . .

THE COURT: How do you get. . .

MR. BUCKLEY: . . .why she's suffered grief and anguish. That's in any personal injury case, you don't need to say that . . .an expert to say that the plaintiffs. . .

THE COURT: Well, I don't know what your evidence is, whether she has psychological, psychiatric injury, or whether it's strictly going to be related to what she says about her own diagnosis. A whole lot depends on who else follows. If that's an essential step, then you'd better be mindful of it. That's all I can say. If that...and that event is a significant part of the element of damage to your client, then you must be mindful of the fact that you must rise to the level of reasonable medical certainty.

MR. BUCKLEY: Now Your Honor, in terms of the mental anguish that she has suffered, she's going to testify about that and the jury can draw inferences.

THE COURT: As to her testimony.

MR. BUCKLEY: That's right.

THE COURT: But who else are you calling?

MR. BUCKLEY: Well, we're going to show that this failure to follow the standard of care resulted in the death of this child and that approximate, approximate cause of that. . .

THE COURT: Is there any expert, is there medical testimony on the question of the injury to Mrs. Kelley?

MR. BUCKLEY: No, there's not going to be medical testimony on that.

THE COURT: I see. So this event is the significant transition from the child to her, her injury, by reason of failure to follow the standard of care. . .

MR. BUCKLEY: That's right, that's right.

THE COURT: . . .through the death of the child.

MR. BUCKLEY: That's right, that's correct, Your Honor.

THE COURT: Well, don't you consider that an essential part, then?

MR. BUCKLEY: We're going to have her. . .have her testify.

THE COURT: The death is an essential step, somewhere along the line it's got to be linked to a reasonable medical certainty that death occurred as the result of the maltreatment.

MR. BUCKLEY: That's right, I just asked that question. I just asked that question.

THE COURT: That's what I say, if you want to reask it, as it stands now I'm not going to say yeah or nay. I'll allow you to reask the question, but I'll have to rule on that again when the evidence is complete.

MR. BUCKLEY: Maybe I was misunderstanding, Your Honor, but now that I understand what Your Honor is saying, I'm happy

to ask the physician. . .

THE COURT: I think Mr. Pledger's position is sound in view of what he might expect the evidence to be at the conclusion, but I'm not privy to that yet, so I can only point out to you that you have an area that you must be cautious about, in order to rise to the level you need to. You'd better ask it if you want to now.

MR. BUCKLEY: I'm going to ask this physician to . . . his opinion to a reasonable degree of medical certainty as to whether the failure to . . .

THE COURT: However you ask it, it's subject to being reconsidered. Now you must be mindful of the basis upon which his testimony can stand as to supporting that event. That is whatever, if it's the death, by that, then the injury to the mother. If it were, for instance, after the child had had live birth something occurred, and you were suing in the name of the child, you'd certainly have to prove it, that the injury caused the death as of reasonable medical certainty. Since this is not maintainable in the name of the child, that's about the only distinction in what you would have were you suing him and the mother suing for the damage she sustained by reasonable, having witnessed, or suffered the loss, of the child.

MR. BUCKLEY: She was a witness to this, and was hurt deeply. . .

THE COURT: I suppose you might say it would be a

similar situation in the case of a delivery inflicted wound and you were suing, as to what. . .or the death of the person who was wounded and you would have to say that the death occurred as a reasonable medical certainty by a reason of the wound that was inflicted.

MR. BUCKLEY: Right. No problem, Your Honor.

THE COURT: All right sir.

MR. PLEDGER: Thank you, Your Honor.

THE COURT: All right, Sheriff, call the jury.

JURY RETURNS TO THE COURTROOM.

THE COURT: All right, you may proceed, Mr. Buckley, with further questions of the witness.

Questions by Mr. Buckley Continued:

Q Dr. Abramson, do you have an opinion to a reasonable degree of medical certainty as to what the effect was of the defendant's failure to follow the standard of care as you testified?

A Yes, I do.

Q Would you tell us what that opinion is?

A What happened as a direct result of the doctor not doing what the standard calls for, the infant was allowed to die inutero. And was born dead.

Q Doctor, to be specific, which failure to follow the standard of care are you referring to?

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A Well, there are a whole series. There's a whole period of time that goes all the way to the end of this tracing here at seven twenty or at seven forty in the morning when operative delivery could have been carried out and the baby delivered alive so that Dr. Modaber's failure to come in or set up the situation which I described to you as standard at, you know, just before six in the morning. That certainly caused it. His failure to come in immediately and have it set up at seven o'clock caused it. His failure at seven ten or when he got there and if he delayed caesarean delivery longer than was absolutely necessary, that caused it, too. In other words, he could have delivered the baby alive and well any time up to near the end of that tracing and alive certainly any time - the baby is still alive when the fetal monitor is taken off, and Mrs. Kelley is started to be wheeled to the delivery room. . .to the operating room. The baby was still alive. So any time before that certainly, he would have delivered a live baby had he comported with the standard.

Q Doctor, do you - directing your attention to the labor record, do you note that any drugs were administered to the patient?

A Yes, there were many drugs given to her during the course of the labor.

Q Do you see there that there was any indication that the drug Decadron was given to the patient?

A It was in fact administered to the patient very early in the course of the labor, yes.

Q Do the records indicate on whose orders that Decadron was administered?

A It was administered - Dr. Modaber ordered it.

Q What is the significance of the use of that drug in this context?

A Well, it has no known benefits whatsoever in this situation. I have never seen it recommended to be given in this situation. I have. . . do not have any understanding why it was given in this situation.

Q Does that indicate anything to you of significance?

A Just. . .Decadron, by the way Decadron works, if it would do anything in this situation, it would make things worse. And it just is a - you know, it's a needless, unindicated drug. If it has any effect, it would be expected to be bad. I can't see why it was given, truly.

Q Does it give any indication as to the standard of care being followed by the physician?

A I believe that all drugs must be given for reasonable indication and with reasonable expectation that they will be helpful. And otherwise, that departs from the standard of care. In that way, this certainly departs from the standard of care.

Q I have no further questions at this time.

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THE COURT: All right, Mr. Pledger, you may cross examine.

CROSS EXAMINATION

By: Mr. Pledger

Q Doctor, Decadron is a drug used in obstetrics, is it not?

A It has certain limited uses in obstetrics, yes, sir.

Q What is it used for?

A It's used in women who go into premature labor in a situation where you are going to act actively to try and stop that labor, and you have a reasonable expectation of being able to stop that labor for at least twenty-four hours and the pregnancy is not more than thirty-three weeks of gestation. In that situation. The situation that we now have is pre-term labor with the membranes intact where you are going to stop the labor, either by giving drugs to stop it or giving alcohol to stop it or you are going to do something very active to stop it. And your expectation is that you are going to be able to stop it for at least twenty-four to forty-eight hours. If you give Decadron to those women, there is some evidence that the incidence of respiratory distress in the baby can be eliminated. You can make the baby - what the Decadron does is by crossing the placenta and getting to the fetus, it matures the baby's lungs, in a twenty-four to forty-eight hour picture. And for the very

premature baby, it makes it safer for them to be born. For a baby of this gestational age, it has absolutely no indication, and in the hypertense pregnancy, it has no indication.

Q Well, doctor, is it your opinion or did the Decadron in any way affect the outcome of this particular labor and delivery?

A In my opinion, it did not, Mr. Pledger.

Q It did not?

A That's correct.

Q All right. Now, doctor, you have told us that Dr. Modaber deviated from the accepted standard of care, and I want to get it pinned down with you, sir. Did he deviate because he wasn't at the hospital at six o'clock in the morning?

A Not necessarily. He may have because he wasn't at the hospital at six o'clock in the morning. It depends. He knows that hospital, those nurses and its capabilities better, I think, probably than any of us. If he was sure, if he was sure for himself and his patients that those things which I said are essential, that she was being adequately monitored and that she could be delivered on a minute's notice if she got into trouble, if he were sure of that, there was no need for him to be in the hospital at six o'clock.

Q All right, so if he was assured that she was being adequately monitored by the nursing personnel, that's generally what happens, is it not?

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A Um. . .

Q The nurse monitors?

A It may be. Sometimes, it's resident physicians. Sometimes, it's medical students. As long as he knows that somebody competent to watch the monitor, do internal monitoring, and go ahead and get everything moving if need be is there and with the patient, then that's fine. Then he's comported with the standard.

Q All right. You have testified that at seven o'clock according to what you have reviewed, he received a telephone call, is that correct?

A Approximately, that's when it's noted in the record.

Q That's when he's notified that there's a fetal heart rate of 60, is that correct?

A That's correct.

Q Now, at that point, I believe you have testified that he should have come in, is that correct?

A Yes sir, he should fly in at that time.

Q Now, you say that he should fly in. I assume that you would anticipate that he would put on whatever clothes are necessary to come outside in order to get to the hospital?

A No, Mr. Pledger, I would assume that when he was notified at five forty-five in the morning that his patient, who was in premature labor with a diastolic blood pressure of

110 and whom he knew had toxemia, that from that point on, he was ready to fly to the hospital at a minute's notice and so that he wouldn't have had to put on any clothes.

Q All right.

A He would have been ready and waiting.

Q Then is it his failure at five fifty when he is notified that the patient has come to the hospital to get dressed the deviation from the standard of care?

A No, Mr. Pledger, I - let me help you if I can. I'm not going to tell you how because he knows better than we do how he could have arranged for his patient to be watched every minute and be no more than five minutes from delivery. Now, however he assured that is fine. I'm not going to testify that any little thing that he did was below the standard of care. I'll tell you the duty that the standard of care demands he gives to his two patients, that mother and fetus. And he could have answered it any way he wanted to.

Q Well, let me ask the question this way then, doctor. What was it at five fifty that created this, I believe you said first class medical emergency? What factor or factors were there at five fifty that created that?

A A woman who is known to have toxemia pregnancy who is in labor, decidedly in labor, whose diastolic blood pressure is - and I'll quote Dr. Modaber, "alarmingly high." And I totally and completely agree. That is alarmingly high. And

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she's in labor. We all know, all of us who are involved in reproductive medicine, know that this is dangerous. We know that we know how to manage it. We can keep the mother from getting into serious problems. We can keep the baby from being hurt. What we need to do is adequately and carefully monitor, and at the first sign of fetal compromise, deliver the infant by whatever means is easiest and best at that time. And that's all we have to do, and we can prevent injury to both of our patients. And that's what I say Dr. Modaber should have done.

Q Doctor, she had toxemia before she came to the hospital, didn't she?

A She did, yes.

Q So it wasn't a first class emergency because she had toxemia?

A She had toxemia that would be - in terms now, we have to separate mother and fetus in terms of talking about it. But for the mother, Dr. Modaber had classified her as a mild toxemia, and I concur with that. She was. When she came to the hospital, she was no longer mild. Her diastolic blood pressure was 110, and not only was it a 110, it stayed a 110. That's real, real dangerous. So, for the mother, that represents some danger. For the baby, the difference between before she came to the hospital and her arrangement in the hospital, why that becomes an emergency is that you don't expect the baby to be hurt before labor. The real danger to this baby is that

he doesn't have the stores to get him through normal labor. So that it's after labor starts, the start of labor represents an emergency to this baby until you know from watching the monitor and seeing the uterus contract, seeing the baby behave absolutely normally, until you know that the baby is responding, that this particular baby is responding normally to this particular labor, you don't know; you have got an emergency. Had he determined whether or not this baby was responding normally to this labor, he could have told as soon as that monitor went on that this baby wasn't responding normally to labor; that this baby was in trouble and that he was going to need to deliver this baby operatively. Had he come to the hospital; had he chosen that way to comport with the standard, he would have delivered her, and we wouldn't be here today.

Q Doctor, what was the baby's heart rate when the mother came to the hospital?

A We only have the one recorded heart rate. That one recorded heart rate was 120 beats per minute.

Q Is that in the normal range?

A No, there is no normal range for the pregnant hypertensive in labor. What we have known for many, many years, and what was standard at this point is that you must monitor it. You must describe how the fetal heart behaves in response to uterine contractions. She's contracting every two to four minutes and hard when she gets into the hospital. She's in

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well-established labor. At that point, the only way it's permissible to use normal range is in describing what we see on the fetal tracing. There is no instantaneous normal heart rate. Fetal well-being is conditioned and well-known to be conditional on how the fetal heart rate behaves in response to contractions of the uterus.

Q Doctor, at five fifty, the information provided by the nurse at the hospital as to the fetal well being was in reference to a fetal heart rate, was it not?

A That is all that we know that she told Dr. Modaber. It's not enough to establish fetal heart rate.

Q Now, would you agree with me that it's normally accepted by text writers that fetal heart range, normal range is 120 to 160?

A With the limitations that I've just given you. That is defined as the normal range. It doesn't tell us that the baby is well, okay. But it certainly is defined, as I defined it I think for the jury, 120 to 160 is defined as the normal heart range, but that doesn't tell us that the baby is healthy. It simply tells us what an instanteous measurement is.

Q All right, sir. Now, you started earlier in your testimony to explain to the jury that it's not uncommon for a woman who starts labor and first comes into the hospital to have an elevated blood pressure. Is that true?

A That does happen, and anxiety can cause - well, both

anxiety and pain can cause the blood pressure to go up. And frequently, it does. And many women do come in and have an initial reading in the hospital of a blood pressure that's slightly elevated; much more commonly and physiologically, the top pressure goes up, the systolic pressure goes up much more than the diastolic, or the bottom pressure. The diastolic is much more serious. The top one moves around much more...so that initially that 110 would just alarm me. I'd want to watch it very carefully and take it again in five minutes or ten minutes and see what was happening. That's why I would come to the hospital so that I could be right on top of that, and if it demanded intervention, I could do it and see what happened.

Q Instead of coming to the hospital, you could have a nurse check the blood pressure? And alert you or advise you of any changes upward in that, could you not?

A Again, as long as you know that the hospital is set up and everything is set up so that if it's not going the way you want to, you are in shape to move instantly and protect your mother and fetus, sure. Absolutely, you can do it from home.

Q So, we would want to determine then whether this initial blood pressure is a true blood pressure recording or is a blood pressure recording showing the anxiety of coming into the hospital in labor and pain, as you say, is that correct?

A No, it's a true blood pressure recording. We know

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that. We want to know whether it represents a dramatic worsening of her eclamptic condition and, therefore, a danger to her health or whether it's due to her anxiety, and it's going to drop, it doesn't represent an immediate danger to her health. That's what we need to know. You can believe that it's a true recording.

Q Now, how do you go about determining whether it is a true blood pressure recording reflecting a change in her condition or simply reflecting the anxiety of being there in labor and in pain?

A Repeat it in ten to fifteen minutes.

Q All right. Now, what does a woman go through who is being prepared in the labor room for delivery?

A It all depends on what you are preparing her for. And why. It can go from very minimal to preparation for operative delivery which involves frequently some shaving of the hairs on the perinium and being washed down. It will vary depending on what you think you are going to have to do. You may need to put a catheter into the bladder. You may need to give an enema. It depends on what you are going to do and why.

Q Now, these things, the preparation, do they keep a woman moving? Do they produce pain in some instances, further anxiety, do they not?

A Not the general routine things. They might with the first mother, but in someone who has had three previous

infants and who has been through it and knows the ropes, being in a labor room with a friendly nurse and getting an enema, that sort of thing, is not anxiety producing. You expect someone whose blood pressure is up when she first hits the labor and delivery floor, for it to be calmed down in ten or fifteen minutes.

Q Do you determine your true blood pressure after a patient has been at rest and has been quiet for a period of time to determine whether you've got a true elevated blood pressure or an anxiety elevated blood pressure?

A Again, what you are worried about is the blood pressure up just for a minute or is it up and staying up? And you keep checking it. And if it stays up, you keep checking it, and you treat it. And if it doesn't stay up, that's fine. Maybe it was due to anxiety, and you just watch it very carefully and measure it every fifteen minutes.

Q All right, so you'd measure it every fifteen minutes. Now, does a period of rest and quiet help to bring a blood pressure down?

A It certainly may, yes.

Q And is it common for obstetricians to use drugs like Demerol and Sparine to quiet the woman down who has come in in pregnancy or in labor to determine whether the blood pressure is just anxiety related or whether it is a true elevation of the blood pressure as a result of other causes?

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A It certainly isn't common, but it is done. And it does not deviate from the standard to do that.

Q Now, what medications were given by Dr. Modaber or ordered by Dr. Modaber that would have that effect in this case?

A Demerol and Sparine might.

Q Based on your review of the hospital records, what time was that medication actually given?

A I'd have to look.

Q I think you'll find it at six fifty-five.

A Six fifty-five yes. Some more than an hour and ten minutes or an hour and ten minutes after the blood pressure was noted to be at an alarmingly high level.

Q Now, what happened to this woman immediately prior to six fifty-five? What was going on at that time?

A What we have from the record is that the fetal monitor had been applied.

Q All right. And that was at six forty, is that correct?

A That's the notation in the nurses' notes.

Q That's what the nurse wrote?

A That's what the nurse wrote, yeah.

Q Are you saying that the nurse has written different things on different places here, one on the chart and one on the fetal monitor strip?

A Oh, no.

Q What is it you are saying about this?

A All I'm saying is that these times are, you know, the times are representing something that was done. We don't know if it was exactly six forty when she wrote this note or if it means that she did it at exactly six forty, and we can't tell. All we can say is if we take - there's no notes on the fetal monitor that give us an exactly accurate time record. If we assume that this means that the fetal monitor went onto the patient at six forty and not that she noted it at six forty, then we'd have fifty-six minutes from there. If we assume that it came off at seven twenty, or seven forty, then we have fifty-six minutes back from there, and they all give us a little bit of variation. I don't say there's anything wrong with that, and it's not abnormal, or unusual to have that kind of deviation. An exact note of the time on the fetal monitor tracing would obviate it, but there's nothing that we need to interpret that's dependent on that.

Q So your opinion then is based on the understanding that the monitor strip cannot be determined or it cannot be determined from the monitor strip when these certain things occurred, that is, even when it was put on or taken off?

A It certainly can be determined with all the accuracy that we need to talk about every single point that we need to talk about here in any way that makes any difference.

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But in terms of precisely, within a minute, no, I don't think we have anything that let's us say within a minute what that is. But it is more than accurate enough for everything we need it for.

Q Now, do I understand you to say that it's because of the blood pressure, the initial blood pressure that Dr. Modaber should have taken steps to make certain that he could perform a caesarean section as you said within five minutes?

A No, you don't understand that at all.

Q All right, straighten me out.

A Yes. She is a woman in labor prematurely, with toxemia pregnancy who is more hypertense now than before. We already know that the fetus is in jeopardy simply by the onset of labor. That can spell catastrophe for the fetus. You have to answer that question first. If the mother's blood pressure is truly that high, 110, that's not anxiety caused. She, too, may be in danger. Which would be a little bit unexpected. I mean, you know when your toxemic patients go into labor that the fetus is in jeopardy until you determine that they are not by looking at the tracing and saying this baby is doing fine with this labor, and let's watch it, and if anything happens, we'll deliver her. But for now, what we need to do is watch it. You don't expect your mothers to get in potential trouble... as readily, especially not if they are cared for in the hospital. But here you've got a mother with a diastolic blood pressure

that's in the moderate to severe range. That's dangerous. She could go on and seize and kill them both.

Q Did she go on to seize, doctor?

A No, she only went. . .only one of them went on to die.

Q All right. A prolapsed cord is what caused the death, isn't it?

A Certainly not. I don't think so. A prolapsed, cord in and of itself and by itself would probably not have caused the death. A prolapsed cord can lead to progressive asphyxia, easily determined by a monitor. I mean, yes, we can see on this monitor tracing an hour of a baby dying from deprivation of oxygen. We also know from Dr. Modaber that there was a prolapsed cord, when in fact the baby was delivered, or he saw a flattening of the cord suggesting that. But we see almost an hour's worth of tracing that shows us the clear case record of the baby being killed inutero from lack of sufficient blood supply and, you know, through tens of thousands of fetal monitors, I can't interpret this any other way. This baby is dying from lack of oxygen. It could be a cord. It could be a placental separation. We can't tell why from this. All we know is that the baby needs to be delivered.

Q Doctor, did a prolapsed cord in your opinion cause the death of this baby?

A It's very possible that a prolapsed cord did. I

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don't think we can say with certainty. All we can say is that whatever it was, it was lasting for - the baby had it for at least an hour, and it was clearly preventable?

Q Doctor, do you remember testifying back in October of 1981?

A Yes.

Q Let me ask you if you remember this question. Page 151 for the record, Your Honor. "Now, you have indicated that the prolapsed cord might be the ultimate cause of death, is that correct?" And your answer is, "Yes."

A I still do. It certainly might be the cause of death. The prolapsed cord deprives the baby from oxygen. And that's what we see here, the record of a baby dying from lack of oxygen. I still say that the prolapsed cord might very well have been the cause of death.

Q When did this baby die?

A The baby died some time after the monitor was taken off and at, the time of delivery.

Q What time was delivery?

A The delivery apparently was about seven forty - three. We don't know exactly when the monitor was taken off. Again, it depends on the . . .

Q What time do the nurses' notes indicate the monitor was taken off?

A The nurse doesn't say what time the monitor was

taken off. She says at seven forty they moved the mother out to the delivery room. We know the monitor was taken off some time before that, but we don't know exactly how long. That's why I say we can't be that precise.

Q What is the practice as you have observed it in the labor and delivery rooms in Virginia insofar as the disconnection of the monitor as the patient is being taken to the delivery room?

A Oh, it's almost always done, and it's thoroughly appropriate to take off the monitor on the way to the delivery room.

Q But done at what time?

A Oh, it will depend on what else you are doing and what else is happening. You know, clearly it depends on that. Sometimes, you take it off well before and take the monitor and machine into the delivery room and, so that you can have it as soon as you have transferred the mother to the table and leave the electrode in place. You know, that is variable. It's not so standard how you do that that I could be more accurate about the times.

Q Looking at the fetal monitor strip in this case, did the baby have a fetal heart rate before the monitor was disconnected?

A Yes, the baby did.

Q Now, for a point of reference so that you are look-

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ing at the tape and the jury is looking at . . .Plaintiff's Exhibit No. 8. There are some serial numbers on the right hand side, 76593, do you see those?

A Yes.

Q Now, at that point on the tape, the baby is alive, is that correct?

A The baby is alive, yes.

Q And the baby has a heart rate?

A That's correct.

Q And that heart rate is varying from what to what?

A Well the heart rate is very, very low. It never goes into. . .it never goes above...where do you want me to start?

Q Well, my question to you is what the fetal heart rate had varied between there and the few minutes before it was disconnected?

A The average fetal heart rate is probably somewhere around 80. There's one tiny brief period of about fifteen seconds where it gets up to a hundred, but most of the time, it's way, way down below 80, except for this little rise to 90 in here. Again, if you smoothed it, probably an average of 80 and has been for a very, very long time.

Q Now, at the very end there, the fetal heart rate according to that tracing is going back up, was it not?

A Um. . .

Q The moment it's disconnected, it's what?

A At the moment it's disconnected, it's about 85.

Q And that's on an upward trend, is it not?

A We don't know. You can't say about an instantaneous time whether it's up or not. In other words, like here it came up to 85 and then was going back down. It could be starting back down there, starting to level there or going up. You can never say that about an instantaneous point. I mean like, suppose she had cut the monitor off here, it would say, you know, it's at 85, but is it going up or down? Before it's on the way up, and now it's on the way down. You can't say about an instantaneous time.

Q All right sir. What is an occult prolapsed cord?

A An occult prolapsed cord is a cord that - prolapsed means that the umbilical cord comes down into the birth canal along with some part of the baby or in front of some part of the baby. But the whole cord comes out, and you can feel it. It's in the vagina. That's a prolapsed cord. If it comes down alongside a part of the baby, either alongside the leg if it's a breech or alongside the face, so that you can't feel it when you put your hand in, that's an accult prolapsed cord.

Q Can you tell the ladies and gentlemen of the jury any statistics as to the number of babies who die each year as a result of an occult prolapsed cord?

A No.

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Q Now, if I understood your testimony, when Mr. Buckley asked you which failure it was that was the proximate cause of the infant dying inutero, you began and gave him several. You said the whole period of time, failure to come in, failure to set up, failure to come in and set up, and that the baby was alive and well when the monitor was removed. Let me ask you something, is it your opinion that had Dr. Modaber been there at seven fifteen that the operation could have been performed, caesarean section to be specific, and that this baby would have been born alive?

A Had he done a section at 7:15?

Q Yes sir.

A Had he done a section at 7:15, there is no doubt whatsoever that the baby would have been born alive. The baby was alive at 7:15, we have the tracing to show that.

Q Yes sir. The baby was alive at 7:40 too, wasn't it? Let's assume. . .

A Let's assume that this says the time at which it was disconnected...

Q Yes sir, right. All right.

A If we assume that this is the time at which it was disconnected, the baby was still alive at 7:40, yes.

Q Yes sir. And so making the decision to do it at 7:15 when the baby was still alive, or making the decision to do it at 7:40 when the baby was still alive, you're saying that if

he'd done it at 7:15 the baby would have lived, but although it was alive at 7:40 and he made the decision then, the baby died?

A Well yeah, and perfectly predictably, and look what happened between 7:15 and 7:40.

Q What happened?

A You have a baby who was dying from lack of oxygen. It's clear as a bell, there's no question whatsoever about that. The baby is dying from lack or oxygen.

Q What is there that you see in this last ten to fifteen minutes there that tells you that the baby is dying from lack of oxygen and had he operated at 7:15 , the baby would not have died of a prolapsed occult cord?

A If you will, you can't separate it from ...in time periods, but we'll take the whole thing. Now remember that this is the. . .we'll put this where the definition of the normal heart range is. Now remember that the definition of a normal heart range is that where we look to find it on the tracing between 120 and 160, and we say that from this point on, okay, the baby never has a normal heart range. The other thing that defines fetal well being is how the heart behaves in response to the contraction. If it slows and stays down after a contraction, either kind of the bad contraction, if it slows after the start of the contraction or stays down after the contraction is over, that means fetal distress. That means real trouble for the baby, and we see here for as long as you want to look, from the very

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beginning, you see this baby is dying. This baby is in bad trouble, this baby is not getting enough oxygen across the placenta into the baby to keep it healthy. You're not getting enough oxygen to maintain the life of the brain. Now I said if he had come in here, he could have delivered a healthy, happy baby, undoubtedly. We can say that pretty well. As they get along here, the baby gets more and more injured. The baby is well on his way to dying from lack of oxygen and it's as clear as a bell, I mean you just look at it right along there and at some point, just after this is taken off and before they got to the delivery room and did the cesarean section, the baby in fact did die, and anyone looking at this trace will predict that the baby is going to die, the baby is getting killed right along in here all along.

Q Where is 7:15 on that tracing, Doctor?

A Well, tell me . . .what assumption do you want to make? Do you assume this is 7:40 or 7:20.

Q Doctor, let me rephrase my question. In response to my question a few minutes ago, you said that if he had done a cesarean section at 7:15, the baby would have lived. With reference to that seventeen that you were talking about, where is it on this chart?

A Probably. . .it's, you know, it's in this time frame.

Q Well, let's see if we can. . .you would then say

that it is to the left of the serial number 76592, is that correct?

A Yeah, I'd have to count now, and . . .

Q Well, tell me how many of these bars over to the left you're saying this 7:15. . .

A I'm telling you that I can't be within ten minutes on this thing because there's contradictory evidence in the record. You can't be that precise. But anywhere in here certainly, you would have gotten a normal baby had he delivered. Out here you start to get into persistent fetal bradycardia, clear fetal distress, lack of oxygen, the fetal brain is getting knocked out and dying and it's going to lead to death, very predictably. You know it, it did, and anyone can look at this and tell you that's what's going to happen.

Q Doctor, when you told us that at 7:15 surgery would have saved the baby, what was the fetal heart rate?

A At 7:15? Again, can't tell you. It's somewhere in this pattern. We now have a history certainly of less than an hour, less than a half an hour, of persistent bradycardia. We have a relatively reactive heart rate. It's not down at 60 and staying there, it's coming back into the 90 or hundred range after the contractions. This baby I would predict very easily born in here is going to be normal. Maybe a little depressed at birth. You should have the internal monitor on at this time, but Dr. Modaber who was the only one who could put the internal monitor on is home in bed.

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THE COURT: Dr. Abramson, it doesn't come through for the record where you are talking about when you say in here. Would you describe it in reference to that exhibit by reference to some number or period of. . .

A Sure. When the nurse...when the nurse recognizes dramatic emergency and starts oxygen for the mother and calls Dr. Modaber, in there, if he were in the hospital at that point. . .

THE COURT: All right, if you can count the time from that point on in reference to the graph, can you not?

A Sure. This is six minutes later, I would predict the baby would be fine; twelve minutes later, I would still predict the baby would be fine; eighteen minutes later, I think the baby would be fine, I'm not real sure; twenty-four minutes later I'm much more doubtful; half an hour later, this is. . .it gets to be anybody's guess and another half an hour after that, the baby is going to die. That's all there is to it.

Q How many minutes are shown on that type, Doctor?

A About 50. . . between 54 and 56.

Q So you can't be going and adding a half hour and a half hour, correct? That would. .. .

A Well, it doesn't. . .it doesn't go from here to better. It wouldn't have been there back here, but we can say that this is where it's getting bad. It gets real bad and gets worse and worse and worse and worse and worse, it's never normal after this monitor is put on.

Q Doctor, you read the testimony I believe you said, of Janice Strothers, is that correct?

A That's correct.

Q What did she say in her testimony with respect to the fetal monitor when she arrived that night before at the hospital?

A She was allowed to put on the external fetal monitor but not the internal fetal monitor, and that she was having trouble with the fetal monitor. . .oh, and she had to readjust it several times.

Q Did she say she was having trouble, or she was told when she came in that it didn't seem to be working correctly?

A I don't recall what her testimony was.

MR. BUCKLEY: Your Honor, I'm going to object. It's perfectly proper for counsel to ask the witness as to the facts upon which he is relying, but to have him recount hearsay just because counsel wants to inquire into it is wholly improper.

THE COURT: I'll allow it only if you're going to tie it in to his answer as part of his assumption, Mr. Pledger, otherwise the objection is well taken.

Q Yes sir, I was going to do that. Doctor, you are assuming in what you're saying then, that this is an accurate recording, that there is nothing wrong with this fetal monitor and you make your opinion based upon what you see there, you're assuming that that's correct, are you not?

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A No, I'm really not. What I'm assuming is that in order to meet the standard of care, Dr. Modaber has to have assured himself that this labor was being accurately and adequately monitored minute by minute by someone who knew exactly what they were doing. That's what the standard calls for in a premature hypertense pregnancy in labor.

Q Prior to the development of the electronic fetal monitor, how did nurses monitor the fetal heart rate of a mother in labor?

A Again, it would...nurses monitor it the same as all of us, that you. . .what you did, depending on what you knew. The common way, the way that started in the early part of this century, was to listen and count the fetal heart rate and report it and originally we did that in the period in between contractions and we said anything out of the 120 to 160 range was abnormal and might indicate fetal distress. Through the late '60's we learned much better than that, and we learned that not where the heart rate is at any given minute, but how it responds to the contractions is much more important. So then we started to listen during contractions. By the early 1970's and certainly by the mid 1970's, we became aware of the additional information that you could get by recording them and looking at how the baby's heart rate was doing in regard to fetal contractions, and certainly by this time, we knew very well that it was silly to talk about normal heart ranges. What counts is how the baby is

doing in regard to the labor, and that is how does the baby's heart rate respond when the uterus contracts. That's what gives us the best information on the external monitor, and if that's inadequate or suggestive, you've got to put on the internal monitor and see how the baby's heart is behaving in and of itself and whether or not it indicates distress. And if it does, if your fetus is compromised in a hypertense premature labor, you go ahead and deliver the baby. That's the only safe thing to do.

Q Doctor, was there an internal fetal monitor on this baby?

A Not initially, no, not until Dr. Modaber came to the hospital.

Q And when did you first learn that the electronic fetal monitor, the internal portion had been put on?

A When I first reviewed the record.

Q Did you remember that when your deposition was taken?

A Possibly not.

Q Is that a factor you've just recently acquired following your deposition a couple of weeks ago?

A No, I think you pointed it out to me during the deposition.

Q Now doctor, if Dr. Modaber had performed the cesarean section when he came in and what time was it when he come in?

A Again, I can't know with certainty. He certainly

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was there at 7:20.

Q All right, sir. It is your opinion that this baby would have been alive if delivered by cesarean section?

A At, at the time that he walked in the door, yes. Albeit injured, I think.

Q And how badly injured would the baby have been?

A And who can say? There's brain injury taking place from the time that fetal heart rate starts to go down and they are progressive over time. It just, every minute that you delay after the development of fetal distress on that trace is, is bad for the baby. That's all you can say, is that you know that you've got...you have a horror, you're watching a baby die right along the bottom of that...of that line there and every minute the baby is in there is going to be worse for him and every second you can save him getting him out is going to be better for him.

THE COURT: Dr. Abramson, from the standpoint of the notation on the chart that the nurse made, was that with respect to administering oxygen?

A That was. . .yes, Your Honor, it was.

THE COURT: What's the. . .

A That's where the...the nurse at that point realizes that the...what's happening on the tracing is trouble, that the baby is in distress. That's the right treatment for her.

THE COURT: All right. Is the oxygen administered for the mother or the child or both?

A The child, Your Honor, at this point is still inside the uterus. You can't, unfortunately give oxygen to the baby.

THE COURT: Yes, so it accomplishes both. All right.

A The baby is not breathing. The baby is depending on the placenta, which in this case is not a good placenta. We know that because of the hypertension to get his oxygen, and what you do is give oxygen to the mother in the hope that getting her blood oxygen up to the highest point you can, you'll get a tiny little bit more oxygen over to the baby, and we've measured that...

THE COURT: But your main objective....your main objective is to get oxygen to the fetus?

A To the baby, yeah, you want oxygen to the fetus. That's your objective.

THE COURT: I see. That's the only...

A The mother is not in trouble, it's the fetus that's in trouble at that point.

Q When on this chart, and if we may use it and use some reference point, do you say that there was fetal distress that would be of sufficient magnitude to order a cesarean section?

A That's a hard question to answer. I can't give you a real positive answer. At this point here. . .

Q Now when you say this point, let's get a marker.

A That's where it's written 02, around six liters, at that point the fetal heart decelerates, it slows down, it stays down. At that point I'm very worried. At that point the

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appropriate thing to do is to say, does this or doesn't this represent a major emergency, can I afford to wait and watch it a little bit, turn the mother on her side, breathe her on oxygen, see if it disappears, is the baby really doing okay or not. What you do in that situation is come in, put in the internal monitor as opposed to the external monitor which is used over here, and from the internal monitor we can add one more piece of information, which is what is the so-called beat-to-beat variability of the fetal heart rate. If the beat-to-beat variability is normal at this point, I would watch another two or three contractions. As soon as I did that, I would see that it's getting worse and worse. Here I know for sure I've got to deliver this baby. This is a point. . .

THE COURT: Give a more specific indication where here is.

Q All right, now when you say it's here for sure, that's. . .

A Seven minutes, eight minutes, two contractions. . . three contractions after the, the oxygen at 6 liters.

Q All right, well let's, with reference to the serial number 65. . .excuse me, 76592, you're talking about one, two, three minutes. . .

A Before that.

Q . . .to the left of that?

A That's correct.

Q All right.

A At that point you know that this baby is not going to withstand this labor. It's still early in labor, you've got to deliver the baby, the baby is in trouble, you've got to move.

Q All right, sir. It's at that point then that you would make the decision to do a cesarean section?

A No, it's at that point with this information whether it's. . .You forget, Mr. Pledger, that the place where the decision should have been made is back here. This. . .if she came into the hospital at 5:45, we don't have this period from here to here on the monitor trace. If we did as we should, I tell you, he should have made the decision to do a section back here.

Q Well then you're saying that the nurse in this case when she was ordered to put the monitor on at 5:50 by Dr. Modaber didn't do what she was told to do because she didn't put it on until 6:40? Is that what you're saying?

A Again, I'm not sure. . .the note here says it was 6:40, depending on how we time that. It could have been as early as 6:25. If she understood that Dr. Modaber wanted that fetal to go on monitor/instantly and wanted to watch the entire course of that pregnancy, of this premature labor, hypertense patient as he should have, then, in fact, she didn't do what she was told, and then Dr. Modaber didn't do what the standard required. He didn't have her monitored minute to minute in an appropriate fashion.

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Q Does not a physician, Doctor, have the right to rely upon trained nursing personnel to a, know what their job is, b, to follow their training and c, to follow his orders?

A I believe so, and I believe that the placing on of a monitor some 25, 35, 40 minutes after a woman is admitted in labor when the monitor has been ordered by the doctor as a routine measure, and without having anything told to her to the contrary, without saying, get the monitor on instantly and let me know what's going on, in another five minutes we have to repeat the blood prssure, if she's not told that, then what nurses do in my experience when there's...when people come into labor and delivery, if the doctor wants her monitored, they prep them, they do all those things, make them comfortable, and then when they're getting them finally into bed to rest and relax and labor, they go ahead and put the monitor on, and that's the routine, and unless they're instructed that this patient is out of the ordinary and out of the routine, the nurse would have no reason to do otherwise.

Q Well, is this patient out of the routine because she had toxemia, because she had a high blood pressure, or because she was in labor?

A And prematurely, all of those reasons.

Q All of those reasons?

A Yes.

Q All right. And the only new reasons then is the

blood pressure and the fact that labor had started, that appeared on November the 27th?

A You have two things that have happened to intervene, one for each patient. Labor has started, that's an emergency for the fetus, the blood pressure has risen, that may or may not be an emergency for the mother.

Q But doctor, my question a few questions ago was, and I thought you pointed to about three lines to the left of the serial number, was that that was the point where you would make the decision that there was fetal distress and you would do the C section.

A Well you asked me to predicate it based on this thing. This tracing is not the tracing we should have, but we should never have gotten to this tracing probably. Probably Dr. Modaber should have been in before this tracing even started, made the decision and had it delivered about the time this tracing starts, and we'd have a healthy mother and baby.

Q What was it that he would have made the decision to do a cesarean section on if he had come in, let's say at 6:30?

A Probably we can say, he would have seen variable / deceleration patterns indicating that there was a cord problem./

Q And you say probably?

A Probably.

Q It may not have been?

A If, if in fact it was the cord, if it was the occult

prolapse of the cord that caused this baby to get asphyxiated and die from this lack of oxygen that we see for this 56 minutes, we know with more than 95 percent certainty that had we had the monitor on out here at least an hour before severe fetal distress was discovered, we would have seen benign variable deceleration very predictive of that particular event, and then you make your decision that we have to section her, and you get it delivered and she's delivered in here or in here, here some place when you've got a normal baby. That's what I would expect to have happened and that's what should have happened and that's what the standard demands happen, but it's not what did happen.

Q Doctor, at what point in time would this cord have dropped into the position to become an occult prolapsed cord?

A If, in fact, it was causing this, all we know is that it was some time before this.

Q Now you pointed to the last few minutes on the tape ...or the first few minutes of the tape you're looking at, is that correct?

A Yeah, at this point we have...this is what we call a suggestive pattern. Here's the deceleration. We don't see whether or not there's a contraction here, they're still adjusting the machine, but here's the fetal deceleration followed by what's called a shoulder, the fetal heart rate comes back into normal. This tells us that the fetus is reactive and healthy, but maybe not reacting well to this labor. Then we see this

contraction, we see this drop, this tells us that there's a problem but the baby probably is still okay, but there really is a problem and we probably would have seen this. As I said, we would have seen this pattern, just not nearly as big, but a clear predicted pattern of a cord problem. If it's the occult prolapse of the cord, it starts killing this baby at this point, we would have seen it an hour earlier. And certainly the ...something caused this. This baby is dying of hypoxia, and something is causing it. I'm not saying that I can be certain that it is the prolapsed cord. Might be total placenta insufficiency. It could be a lot of things. Might not be the prolapsed cord. The baby might be...might have an arm hung up in the cord some place, but if it is the prolapsed cord, cord problems we can predict early in labor, simply by fetal monitor. That's why we monitor.

Q Now doctor, is there a rule of thumb used in interpreting the fetal monitor's strips, that you are allowed so many contractions or so much time to elapse before you seek to make an interpretation of what you see?

A Depends on the situation. There are certain rules of thumb that you, you follow.

Q What are those rules?

A If you see a normal tracing and then get some indication of fetal distress, everything is going along well and then you see a late deceleration. The appropriate thing to do is try to resuscitate the baby inutero. What we mean by that is, what

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the late deceleration says is, the baby might be in trouble, turn the mother on her side, breathe her on oxygen and watch the next three contractions. This...in this situation now, we know that the baby has been normal, because we've been watching a normal tracing. All of a sudden there's an indication that there might be a problem. We turn the mother on her side, breathe her on oxygen, watch the next three contractions. If it's persistent, proceed the delivery. If it disappears when we breathe the mother on oxygen and turn her on her side, let her labor again and see what happens. If it reappears, deliver. If it doesn't reappear and you safely deliver the baby from below, wonderful, you've saved her an operation. If you start out in trouble like you do here, that rule of thumb is inapplicable. You-don't know what shape that baby is in. If you've been watching a normal tracing, you know the baby was well up to that point, you're not going to do any harm turning her on her side, breathing her on oxygen and watching, you know. It doesn't happen that fast. It takes a long time, as you see on this tracing, for a baby to die from what's happening inutero.

Q Isn't it your opinion that this baby was alive and well when the mother came to the hospital?

A Yes, it is, certainly.

Q How long does it take the uterus, the cervix to be specific, to go from a five centimeter to a ten centimeter dilation?

A Depends on how premature you are or whether you are at term, and it depends on many, many things. The average for a normal, a normal woman in average health, in labor, at term during the active phase of labor, is to dilate between one and two centimeters per hour during the active phase of labor, so that it is as little as two and a half hours, or it may take as much as five hours.

Q All right, so it would go from one and a half to two, was it, centimeters per hour?

A Centimeters per hour for the average lady who had been pregnant and delivered before, healthy woman at term, laboring normally with a normal size baby and normal size mother's bones.

Q Yes sir. Now it's not until the baby's head drops into the birth canal, the cervix has dilated, that you can get the prolapsed cord as a result of the cord coming down along the face or shoulders, is that correct?

A The cord can prolapse at any time. The cord can prolapse prior to engagement of the head in the pelvis. It can come down with a breech, it can come down with an arm, it can come down along and be a prolapsed cord. What we call occult prolapse, means that some part of the baby is already in the birth canal, and the cord comes down alongside it and we can't feel it for that reason. We can see it on the fetal monitor whenever it occurs, but we can't feel it with our hands.

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Q Now as it comes...if it's going to be an occult prolapsed cord, that means the head has come down into the cervix, is that correct?

A The head is down into the bones of the birth canal. The head is engaged in the bony pelvis. Doesn't necessarily have to be in contact with the cervix at that point, that's not essential. It just has to be down into the bony pelvis.

Q Can the cord come down after the baby's head has become engaged?

A In preemies, probably so.

Q Is there a weight range that would go along with preemies, as you use it there?

A No, preemies usually infers smaller. . .the answer to your question is that if the baby's head is small and the mother's pelvis is big, it's conceivable that the head could come down first and then the cord could come down. Usually engagement of the fetal...certainly engagement of the head at term, precludes cord prolapse. Doesn't happen after that, or either they come down together and they have an occult prolapse, or it's not going to happen after the baby's head is engaged. In a pre-term labor, it's very difficult to say.

Q Doctor, if you're going to get cord compression as a result of occult prolapse, you've got to get that baby down into the birth canal in order to get sufficient pressure on that cord to cause the loss of circulation to the baby, don't you?

A Yeah.

Q All right, sir, and you've told us that it's one and a half to two centimeters of dilation per hour, is that correct?

A That's the cervix. The, the birth canal itself. The bones don't move at all.

Q Oh, I understand that.

A They stay, they stay constant, and it's the pressure against the bone, not the pressure against the cervix that's responsible for the problem in, in, in occult prolapse, as far as we can tell.

Q Yes sir, and if there had been an occult prolapse of the cord immediately prior to the disconnection of the monitor here, which was sufficient to completely cut off the circulation to the baby, you would have had no fetal heart rate after a matter of seconds, would you not?

A No, that...that's not true.

Q All right, tell us how long you can have a complete compression of the cord and still have a fetal heart rate?

A Of course we never would do that to a human knowingly, but we can do it with other animals. We can do it with monkeys and you maintain a low heart rate, you can maintain a low heart rate even with the cord absolutely tied off, complete cessation of flow. Routinely you see it for 30 minutes, you can see it for as long as an hour and a half. . .

Q All right sir.

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A . . .of the heart beating very slowly, I mean going along beating, you know, 40, 50, like that. It's so-called agonal rhythm. You see that with adults too when they die, the heart keeps beating long after breathing has stopped. Not beating in the sense that they're actually circulating blood and doing that, but still beating so we can detect it with a monitor or with an electro. . .

Q Now is it your opinion that the fetal heart rate that you see on this tracing was the fetal heart rate of a baby who had a complete strangulation of the cord?

A I think, I think I've made it clear, maybe I haven't, but we can't tell, there's no way to tell from these squiggles on this line what it cutting off the baby's oxygen. It could be that the mother has totally stopped sending blood to the uterus because of her hypertension and everything else is working fine. It could be an occult prolapse of the cord, could be that the placenta has separated, it could be that the pressure inside the uterus is a little higher than the blood pressure of the baby and therefore the baby can't circulate the blood back. All we can say from this tracing is that here we have evidence that there have been periods that the baby hasn't had enough oxygen but is still okay. Here we have evidence that the baby is getting real sick from not having enough oxygen and from here on, we have wonderful evidence that the baby is dying from lack of oxygen. We can't say anything about the cause of it. All we know is that

it's killing the baby.

Q Doctor, while you're here, where there is no tracing here, are you saying there was no heart rate?

A No, I'm not saying there was no heart rate. This is what we call pen lift phenomenon, and you're perfectly entitled to just go ahead and say, had the pen not been lifting off the paper at this point, it would have been consistent with what we see for the rest of this tracing. It, it doesn't mean that the heart stopped. It's just called pen lift.

Q In other words, that...what the jurors look at on that tracing and where there is a broken line, you're not saying that that's where the heart stopped beating, you're just simply saying the pen came off the paper so it didn't put a tracing there?

A Absolutely, or the tambour came off the mother or, you know, something happened. That's mechanical, it doesn't mean that the baby's heart stopped where there's no. . .where there's no tracing.

Q All right. Now Doctor, would you agree with me that the complete strangulation of the cord as the result of an occult prolapse, could cause the death of this baby subsequent to the disconnection of the monitor?

A That it could?

Q Yes sir?

A You mean with something else having been responsible

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up till then, something else on its way to killing the baby. . .

Q Yes, yes. ..

A . . .and then all of a sudden in the last minute.

Q . . .if you'd like to phrase it that way.

A That certainly is possible. It's very unlikely that something new happened, though. Most, it's most probable that the occult prolapse of the cord was causing the whole problem, I mean, it was killing the baby and clearly killing the baby all the way along. It didn't happen suddenly at the time of . . .after they detached the monitor, no, there's not some other horrible thing going on and then the prolapse of the cord. It's silly to postulate that. Probably the cord was prolapsed occultly and that's what was getting the baby into trouble, it does get babies into trouble. It's clear and obvious from the trace that the baby is in trouble, needs delivery and resuscitation and it eventually makes him die.

Q Doctor, are there any patterns on that monitor strip that show an occult prolapsed cord?

A There's no such thing, there's no way to tell. I'll say it again, the tracing tells us that the baby is not getting enough oxygen. We can't say, there's no way in the world that we can say from this tracing what it is that's causing the baby not to get enough oxygen. We know whatever it is, it's present from the time that monitor is started and continues and is worse and worse and worse, the baby is just responding horribly to the

amount of oxygen he's getting, be it little or none. That's all we can say, and it's going to kill the baby, we can predict that way back there, unless something is done. Nothing is done and it does kill the baby. I don't think it's reasonable to say that something else was causing that, although it's possible, and then at the last minute the cord prolapsed. Sure, that could happen. It's still preventable, the baby should have been delivered way out there, and then the cord wouldn't have prolapsed.

Q You said 7:15 earlier.

MR. BUCKLEY: Your Honor, I object. We've been over this again and again and again and again.

THE COURT: Objection sustained, that's repetitious. Move on to other areas. Mr. Pledger, I've waited patiently for you to complete your cross examination. By that I assume that you've completed it because you're repeating. When you start doubling back, you've obviously gone far enough. You're certainly doubling back. Now unless you've got something to go forward on let's end the cross examination.

Q Yes sir. I have two more subjects that I'd like to cover.

THE COURT: All right, fine. Go right ahead now.

Q Now doctor, you told us in voir dire that you had worked for Medical Legal Consultancy.

A That's right.

Q And you have testified in the past, have you not,

that part of your job was to coach doctors and tell them how to testify in front of juries?

MR. BUCKLEY: Your Honor, this is the same area we went over before.

THE COURT: Not necessarily. Objection is overruled but let's, let's move it along.

Q Is that correct?

A I have testified before that that was not one of my specific jobs, but that I do do that. I teach medical students, I teach interns and residents and other physicians who are generally afraid of the courtroom as a forum, how to be a witness and how to explain things to juries and not use medical language and that sort of thing, yes.

Q Now Doctor, do you charge to review records?

A Yes, I do.

Q What is your charge?

A I charge $150.00 an hour for the time I spend reviewing records.

Q And how much on the average does it . . .time does it take you to review records?

A Depends on obviously on how big the case is, somewhere between two and five or six or seven hours to review a record if it contains discovery or depositions or something like that.

Q To review the record then, would you say on the

average you charge $450.00?

A I don't know, I've never averaged it, but I would think that's probably fair, yes.

Q All right sir. And it's a fact that you charge $750.00 for a half a day for a deposition, isn't it?

A It is, yes.

Q And it's a fact that you charge fifteen hundred dollars to come to court, isn't it?

A No, court and deposition. . .anytime in testimony is fifteen hundred dollars a day, divisible by half days.

Q So your full day in court is fifteen hundred dollars is that correct?

A That's correct.

Q Now doctor, you and I have met before in the court room?

A We have, indeed.

Q And the last time we met, you gave me a figure as to how many cases you have reviewed. Do you remember what that figure was?

A What I told you the last time we met is that I really don't have any idea how many cases I reviewed, and when you keep pushing me and you asked me to estimate and guess, and I make it very clear that I'm estimating and guessing and I will, you know, give you a number based on my . . .

THE COURT: Now Mr. Pledger, unless you can relate it

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to this case, I'm going to cut you off. What you said in other cases has nothing to do with this case.

Q I believe. . .

THE COURT: If he said it before in this case, you may bring it up to impeach him, but when you met before in court has nothing to do with this case. Now let's keep that in mind.

Q Doctor, how many cases have you reviewed?

A I don't know, I review many. I'm asked by lawyers throughout the country to review cases on a continuing basis and I've done it for ten years.

Q Let me ask you, does 642 cases sound familiar?

A That sounds like a figure that you may have come up with based on my guesses at some point in time as to how many cases I was reviewing on a monthly basis. I certainly would never have said I reviewed 642 cases. I don't have a record or any way of knowing how many cases I've reviewed over the ten or twelve years that I've been doing it.

Q One last question, Doctor. Do you, as a physician, make decisions based on one finding, laboratory finding, on blood pressure reading, one pulse reading?

A When the safety of my patient or patients demands it . . .

THE COURT: Mr. Pledger, and again I remind the Doctor too, we're not talking about what he does, it's what the standard of care requires. What he does personally is of no concern.

Now keep that in mind.

Q Let me rephrase the question, Your Honor.

THE COURT: Yes sir.

Q Doctor, does the standard of care in the Commonwealth of Virginia require an obstetrician gynecologist to make a decision as to whether he should perform a cesarean section on the basis of one blood pressure reading?

A Isolated with no other data, I can't answer the question.

MR. BUCKLEY: Your Honor, this is just needlessly exploring hypothetical questions that don't relate to this. . .

THE COURT: Not necessarily. I'll allow the question.

MR. BUCKLEY: . . .the testimony of this witness. It's not what he's testified to.

THE COURT: Depends on how you interpret the evidence in this case. Go ahead, Mr. Pledger.

Q I have nothing further, Your Honor.

THE COURT: Nothing further? Redirect?

REDIRECT EXAMINATION

By: Mr. Buckley

Q Doctor, let me ask you what you do with any fees earned from testimony in Court?

A All fees that I earn in testifying either in court or by deposition go to charity in the form of supporting medical

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education. Most of it at Georgetown University Perinatal Center in the form of an endowed insurance policy given them, the rest of it goes to supporting other professional students on contract that they'll do the same when they commence their professional income.

Q Doctor, do you review cases only for plaintiffs?

A No, I'll review cases for any party that I believe is legitimate, legitimately has a need or interest in knowing whether or not standard medical care was administered.

Q And have you been a consultant, and are you now consulted by physicians as well?

A Yes, I am.

Q With respect to defending against claims in medical malpractice?

A Certainly so, yes.

Q Was it your testimony in this case that ....strike that. Assume at 5:50 a.m. in the morning that the doctor, Dr. Modaber knows that if he simply gave standing orders, it will be 50 minutes before a fetal monitor is applied, would that comport with the standard of care?

A Certainly not, not as I've stated, which is that he has to have minute-to-minute watching of that fetus and that fetus's well being from the time that hypertense labor starts.

Q No further questions, Your Honor.

THE COURT: Any recross?

RECROSS EXAMINATION

By: Mr. Pledger

Q Doctor, you say you have been asked to assume that there was. . .Dr. Modaber knew that there would be 50 minutes before the fetal monitor was applied. Have you seen any evidence of that in any of the matter that you have reviewed?

A And that is including depositions?

Q Yes sir.

A Not that I specifically recall, no, Mr. Pledger.

Q Thank you sir.

THE COURT: Any other questions on direct?

MR. BUCKLEY: No further questions, Your Honor.

THE COURT: Any objection to Dr. Abramson being excused?

MR. PLEDGER: No, Your Honor.

MR. BUCKLEY: No sir.

THE COURT: You may stand aside and we'll consider adjournment for the day at this point. I have some instructions to the jury before they're excused and then Court will remain in session briefly while the Court meets with counsel. Ladies and gentlemen, we are about to conclude the proceedings for the day and the jury will be allowed to return to their normal activities. I caution you, however, that you should not be preoccupied with the case or the testimony for the simple reason that you've only heard part of it and it would not be appropriate for you to con-

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cern yourselves about that testimony during this interim. Do something else or let your mind be relaxed so you're not concerned or dwelling on this particular part of the case, however, do not let anyone discuss it with you and refrain from reading about it or listening to any news accounts. I'm not sure how much publicity might be generated, but if some does occur, then it's your duty to refrain from being exposed to it, certainly from discussing it and if you have any hesitation about what you should do, just inform everybody in your family that you're on jury duty and you're not supposed to be discussing the case. That ought to put it to rest. It's a very important responsibility and you may be questioned about it when you return. And keep in mind also that if you don't obey that admonition, the next jury may have to be sequestered, that is to be kept locked during the interim, so your behavior influences what happens in other cases. Might be you on the jury next year, and as long as this system works successfully, then we will adhere to it, and it has. It depends on your honest adherence to it. All right, the jury is recessed until 9 o'clock tomorrow morning. We'll try to get underway again in the morning at 9 o'clock. Sheriff, if you will conduct the jury out, they may pick up anything from their jury room, the Court will remain in session briefly.

JURY RETIRES FROM COURT ROOM.

~~THE COURT: All right now, Mr. Buckley,~~ can you give me

September 22, 1982

Court convened at 9 a.m.

THE COURT: All right gentlemen.

MR. BUCKLEY: Your Honor I have a housekeeping matter. Previously we introduced the copies of the hospital records as Exhibit No. 1 and copies of the records of Piedmont Obstetrics as Exhibit No. 9. I want to introduce the originals as well of the hospital records, the originals of those being Plaintiff's Exhibit No. 11 and the originals of the Piedmont Records being Plaintiff's Exhibit No. 12.

MR. PLEDGER: No objection to doing that Your Honor.

THE COURT: All right will be admitted into evidence as Plaintiff's Exhibit 11 and 12.

Plaintiff's Exhibits Nos. 11 and 12 admitted into evidence at this time.

MR. PLEDGER: Your Honor I have one request of the Court if I may, I had subpoenaed about five people for today. I think the subpoenaes required them to attend at 10 o'clock, it is quite obvious that we are not going to reach anybody and hopefully we have caught two of them in time and told them to be on phone notice. What I would request of the court if at about quarter after ten we could take a five minute recess.

THE COURT: Certainly we will try to arrange our recess

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about that time if you will remind me.

MR. PLEDGER: Yes sir.

THE COURT: That's as good a time as any if we get started now. All right if you will remind us on the time we will see about a recess at that time Mr. Pledger. Are you all ready to proceed with the next witness. Call the jury.

JURY CONVENES IN THE JURY BOX AT THIS TIME.

THE SHERIFF: The jury is in the box.

THE COURT: All right we look like we have a wide awake jury this morning, we are ready to proceed. Good morning ladies and gentlemen. All right we will hear your next witness Mr. Buckley.

MR. BUCKLEY: Jessie Marie Kelley.

JESSIE MARIE KELLEY, having been duly sworn, testifies as follows:

DIRECT EXAMINATION

By: Mr. Buckley

Q Would you please state your full name?

A Jessie Marie Kelley.

THE COURT: Mrs. Kelley would you speak a little more loudly, it is difficult to hear you this distance and the jury needs to hear you.

Q Would you please state your current address?

A Route 1, Rixeyville.

Q And are you married Mrs. Kelley?

A Yes.

Q For how many years?

A Fourteen.

Q How many children do you have?

A Five now.

Q Are they girls?

A Yes.

Q Let me direct your attention to 1968, in that year was your first child born?

A Yes.

Q What is her name?

A Katherine.

Q Will you tell us where you were living then?

A Roanoke, Virginia. Well Salem, just out of Roanoke.

Q And who was your obstetrician at that time?

A Dr. Hamlett.

Q Did you have any problems with that pregnancy?

A Yes.

Q What were the problems that you had?

A I had toxemia. It started about in September.

Q What were the symptoms that you were experiencing?

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A When I went to the doctor I had high blood pressure and it was in my urine.

Q Is there anything else during your pregnancy that you experienced?

A I had some swelling at that time.

Q When was your first child born?

A October 8th of '68.

Q Was that early or was that later?

A I was twenty days early.

Q Twenty days early. What is the name of your oldest child?

A Katherine.

Q And how did your labor begin at that time?

A Well I went to the doctor in the morning time and he told me that he was going to put me in labor the next morning but he wanted me to come in that evening, be admitted so he could get my blood pressure down before he put me in labor.

Q And how many hours were you in labor?

A They induced me at 8 o'clock and I had her at a minute before eleven that morning.

Q And in 1971 you were pregnant again?

A Right.

Q And when was the second child born?

A June 15th.

Q And her name is Alison?

A Alison.

Q And at that time where were you living?

A In Salem, same place.

Q Who was your obstetrician then?

A I had Dr. Hamlett and Davis. He had brought in an associate with him.

Q And did you have any problems with that pregnancy?

A Yes, I got toxemia again.

Q What were the symptoms that you experienced?

A Well I got it in April,the last of April this time and I had it a lot longer. I was swelling and high blood pressure which was even higher this time. About a month before I had Alison he said he was going to put me in labor because it was too high. He give me a day to go home and try to get it down and come back the next morning.

Q What was it you were suppose to reduce when you went home?

A My blood pressure, and stay completely in bed and not do anything, at all.

Q And you came back the next day?

A Yes, come back the next morning and it was down so he said he wouldn't put me in labor. I mean he wouldn't put me in the hospital.

Q And labor wasn't induced then?

A No. A month later it was.

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Q A month after that?

A Yes.

Q And how long was labor in that instance?

A He induced me about quarter to nine and I had her a minute to eleven too.

Q In terms of the expected date, was that early again?

A Just a week.

Q A week early. And then did you become pregnant again in 1971?

A Yes, we were in the process of moving then. I become pregnant so I went back to Roanoke to - and he confirmed that I was pregnant. After I had Alison and I went back for my six week's checkup I still had toxemia. Usually in six weeks its gona away so he wanted me to come back in two months. So I come back in two months and I still had high blood pressure so he thought it was still all right that we go ahead and move to northern Virginia. So we went ahead and moved. I got pregnant and I went back to him and he confirmed that I was pregnant.

Q And who is this physician that you went back to see?

A Dr. Hamlett.

Q So he confirmed that you were pregnant and what happened next?

A He said with my high blood pressure that he thought it would endanger my life to try to carry it and since we had moved to northern Virginia, that Virginia State Law, you had a lot

more to go through to get it aborted and he thought I should go over into D.C. and have it done.

Q So after he gave you that advice did you go over to Washington?

A Well I called Northern Virginia Planned Parenthood and they told me where to go.

Q You went to Washington, D. C.?

A Yes, I went to Washington Hospital Center.

Q And after that did you become pregnant again at a subsequent time?

A In '75.

Q And when was your delivery, what was the date your child was born?

A She was born May 22nd '75.

Q And what was her name?

A Christine.

Q And did you have any problems with that pregnancy?

A No, I didn't.

Q Who was your obstetrician at that time?

A Rhoads, Regan & Bentrem, in Manassas. We had moved to Manassas.

Q You had moved to Manassas at that time?

A Yes.

Q Now directing your attention to 1978, did you - were you then in the process of moving to Culpeper?

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A Yes.

Q Did you become pregnant about that time?

A I become pregnant in March and we moved in May.

Q And at thattime did you go about choosing a hospital or obstetrician?

A First I was mainly concerned about choosing a hospital because when I had Christine I went into natural labor and I went in labor at quarter after ten and I had her at twelve thirty. So I knew I needed the closest hospital I could find, because I had had them real quick.

Q What was the hospital that you chose?

A Culpeper, which is the County that we live in, and it seemed to be the closest.

Q It was the closest hospital?

A Yes.

Q Did you next go about choosing an obstetrician?

A Yes, then I called Rhoads, Regan and Bentrem if they could suggest a doctor and they didn't know one. He didn't have one to suggest and then I called our family physician Dr. Lyons in Gainesville and they didn't give me any answers there either. So then I went to the library there in Manassas and the librarian helped me find the book and looked up - they keep a book of physicians in Virginia and we looked up Culpeper and I picked Dr. Payette because he seemed to have the most schooling.

Q And did you know at that time whether it was a name

to his practice?

A No, just Dr. Payette is all it had in the book.

Q And did you make an appointment then?

A No, I went to Remington Medical Center and had it confirmed that I was pregnant and the woman that I went to is a friend of mine too and she is a physician assistant and she had been a nurse at Culpeper and she suggested me going to Payette too. So she called and made the appointment.

Q And did there come a time when you had an office visit with Dr. Payette?

A Yes.

Q Do you recall what that date was?

A May 30th.

Q And when you went into the office was your history of your prior pregnancies taken?

A Yes.

Q Do you recall the information that you provided for them?

A I give them all the information about having the toxemia and about the abortion and I told them I had natural delivery with Christine. So they knew all the information.

Q Did you tell them the hours as to the length of your labors in each othe cases?

A Right.

Q And did you tell them in terms of the dates whether

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how early you were in each of those occasions?

A I'm sure I did.

Q And who did you see on that first visit?

A Dr. Payette.

Q Was any test performed at the office?

A Yes, they took my weight and my blood pressure and they took blood from me for lab work.

Q And when you went in to see Dr. Payette did he perform an examination?

A Yes sir.

Q Did he give you any advice at that time? On your first visit?

A Nothing particular.

Q Did you have any discussion as to your condition?

A I think he did ask me about or either I told him that I - why I chose Culpeper, because I had the babies quick. That was my main concern then was getting there on time since we did live farther out than we had from the hospital ever before.

Q Did you have any discussion at that time with respect to any other possible operations or procedures?

A Yes, he asked me if I had considered having my tubes tied. Then he went on to explain the different ways that it was done.

Q And who initiated this conversation?

A He did.

Q Did you have an understanding as to why there was a discussion?

A Well I didn't know why, I didn't really think it was any of his business what I did.

Q What was your response to the discussion about the sterilization or tube tying?

A I just told him I would think about it.

Q In your own mind what was your intent at that time?

A Well I kind of like the idea of if I considered having it done that he said there was a new procedure that they went down through your - after you had your baby and when you went back for your six weeks check up they would go down through your navel and tie your tubes and I thought well if I had a boy then four was enough, that I would have it done that way. But then I would have six weeks to think about it too, after I had the baby.

Q So if you had had a boy you would have considered having it done?

A I would if I had a boy.

Q Had you reached any decision at that time?

A Had I what?

Q Reached any final decision at that time?

A No.

Q And after the visit in May do you recall the next time you went back to Piedmont Obstetrics?

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A I guess I went in June.

Q Do you know who you saw then?

A Dr. Payette.

Q And when you went there were again certain tests taken at the office?

A Yes, the normal that they do, they weigh you, take your urine sample and they take your blood pressure.

Q And were you then examined by Dr. Payette?

A He come in and said that I was doing all right.

THE COURT: Mrs. Kelley it is difficult to hear you. You are going to have to stand in a position - she is talking this way more. I'm afraid some of the jurors on my left may not hear it Mr. Buckley. It is difficult for me to hear her. Can the jury hear her statements. All right go ahead.

Q Did you have any other discussion with Dr. Payette at that time?

A I think he brought up about signing the papers again.

Q Did you mention that to him when you came in?

A No, he just mentioned it. I think he still asked me had I considered it. I don't remember saying anything about it.

Q After that visit in June did you return again the following month?

A Yes.

Q And when you came to the office were certain tests performed?

A Yes.

Q Do you recall what those were, were they the same as before?

A Same ones as before.

Q Who were you seeing on that occasion?

A Is this June or July?

Q This is July?

A Dr. Payette.

Q Did he perform an examination?

A Right.

Q Did you get any advice?

A No.

Q Did he say how you were doing?

A I assumed I was doing all right.

Q Was there any discussion as to the sterilization, the tube tying?

THE COURT: Mr. Buckley, you are very close to leading your witness in an area that may be a - some consideration as an issue in this case. Let her give her own statements, on a narrative basis. Go ahead.

Q Was there any discussion with Dr. Payette?

A He still asked me again had I considered having my tubes tied.

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Q And what was your response?

A I told him no.

Q I'm sorry?

A I told him no. He didn't say anything else.

Q Did there come a time that you returned again to Piedmont Obstetrics for a visit?

A Yes, in August.

Q In August. And when you came to the office were certain tests done again?

A Yes, the same as before.

Q And who were you seen by on that occasion?

A Dr. Modaber.

Q Did you understand why you were seeing Dr. Modaber?

A When I first went to the office visit he said I would have to see him once so if he was on call that night or day or whenever I went into labor.

Q Who was the one that told you, you would have to see him once?

A Payette.

Q And when you saw Dr. Modaber on the August visit did he perform any examination?

A The normal things were done as before.

Q And did you have any discussion with him as to your condition?

A Not that I remember.

Q Did you have any discussion as to your history?

A I really don't remember discussing it.

Q Were there any other matters which were discussed at that office visit?

A I think it was brought up again about if I was considering having my tubes tied.

Q Is that something that you had mentioned?

A No.

Q What was the discussion?

A I think he just asked if I had been thinking about it, if I had decided.

Q And what was your response in this office visit?

A No, I really hadn't decided.

Q Were you given any instructions as to what you were to do thereafter? Any advice or recommendations?

A No.

Q And. . .

A I assumed that I was doing allright and also I assumed that he read my files, you know.

Q And when is the next time that you returned?

A September.

Q And in September were there again certain tests performed before you saw the doctor?

A Same old things.

Q And who did you see on this occasion?

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A Dr. Modaber.

Q And did he perform an examination?

A What do you mean by examination?

Q Do you recall any procedures that he performed?

A Nothing than what had been done before when I went.

Q Did you have any discussion with him as to your condition?

A No.

Q Were any other matters discussed in the September visit?

A Yeah, they asked again if I was considering having my tubes tied.

Q Which one asked you that question?

A Modaber.

Q Had you mentioned that before?

A No.

Q What did he say with respect to having your tubes tied?

A I really was getting tired of being asked so I just went ahead and signed it.

THE COURT: The question is what you said Mrs. Kelley when he told you about it, what did you say to the doctor. That's the question, keep in mind what the question is and answer the question.

Q I'm sorry. I meant to ask Your Honor what the

doctor said to Mrs. Kelley.

THE COURT: All right go ahead. What did the doctor say to you?

A He asked me if I wanted my tubes tied.

Q What was your response?

A I told him that . . . .(witness gets upset)

MR. BUCKLEY: May we have a recess Your Honor.

THE COURT: All right, the jury will take a five minute recess.

RECESS

Jury is reconvened in box.

THE COURT: All right, Mr. Buckley you may proceed with your questions.

Q (Mr. Buckley continued on direct examination of Mrs. Kelley) Mrs. Kelley, when we broke we were discussing the office visit of September 21st, I believe and you were about to answer the question as to whether you had a discussion with the defendant with regard to a sterilization at that time. Would you please tell us, what if anything, he said to you in regard to that?

A He asked if I had considered having it done again and I told him no. They had the form there so I just went ahead and signed it, just to keep them - I just didn't want them asking

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me no more.

Q Now did you have an understanding as to whether or not the signing of that form would authorize the performance of the operation?

A I knew it couldn't be because my husband had to sign it and Dr. Payette had already told me that he had to talk to Ronnie before it could be done. So I knew with me signing it that it couldn't be done until he signed it.

Q Had your husband come to the office on any of these visits?

A No, it wasn't his policy to go with me. He always went to work and I always went to the office.

Q Did he stop by the offices of Piedmont Obstetrics, Drs. Payette and Modaber on any other occasion up to this time?

A No, he never had even seen them before.

Q Do you know whether or not subsequent to this date he ever went to the offices of Piedmont Obstetrics, Drs. Payette and Modaber?

A No.

Q Let me show you documents marked Plaintiff's Exhibit 12 on the offices of Piedmont Obstetrics and ask you if you can identify that document?

A Yes, this is the permission for sterilization operation.

Q And does it show that - does it show a date on top?

A Yes, September 19, 1978.

Q And does it indicate whether your signature was witnessed?

A Yes.

Q Now at the time - again at this time what was your intent as to whether or not you wanted to have this operation?

A I thought if I had a boy I would have it done in six weeks, when I went back for my check up.

Q Did Dr. Modaber give you any other advice with - give you any advice with regard to what you should be doing at this time, during your pregnancy?

A No.

Q What was the next time you returned to Piedmont Obstetrics?

A In October.

Q Who saw you on that occasion?

A Dr. Payette.

Q At that time were you given any advice or recommendations?

A No.

Q After the October visit, did you have occasion to return again to Piedmont Obstetrics?

A Yes, I knew how to take my blood pressure so I for curiosity just checking it making sure that it was all right.

Q Would you explain how you were taking your blood

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pressure?

A Well I had the blood pressure kit and I would pump it up and have the stethoscope and listened to it as it went down. I knew how to take it.

Q Well where did you obtain the stethoscope and pump- the blood pressure pump?

A I got it when I was in Manassas. I took it when I was carrying Christine.

Q Were you given those materials by a doctor?

A No, I just got it at People's Drug Store.

Q Now when you say you had been taking your blood pressure in 1978 then during this pregnancy?

A Right.

Q When did you start doing that?

A When I first - probably after my first visit.

Q Had you been told by anyone at Piedmont Obstetrics to do that?

A No.

Q When you left in October were you given another regularly scheduled appointment at Piedmont Obstetrics?

A Yes.

Q Do you know when that was?

A November 14th.

Q Now what if anything happened in early November?

A I had took my blood pressure that morning. I hadn't

took it for a while and I took it and it was high and I noticed I was swelling some in my legs so I was almost sure that I had toxemia. So I called the office to get an appointment.

Q Do you recall the date on which you called?

A On the 7th. And I told them that I thought I had toxemia and I had took my own blood pressure. And they said they would talk to the doctors and call me back.

Q What happened thereafter on the 7th?

A They never did call me back. So I waited a day and then I called them on the 9th.

Q And what happened when you called on the 9th?

A I told them the same thing and they told me to hold - they put me on hold.

Q When you said you told them the same thing, what did you tell them?

A That I had took my blood pressure and it was up and I had swelling in my legs and I thought I had toxemia.

Q What was the response on the 9th?

A They put me on hold and come back and told me to come in that evening.

Q And when you arrived that evening what happened?

A They weighed me and took my blood pressure and then the doctor came in.

Q Who were you seen by on that occasion?

A Dr. Modaber.

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Q Did he do any tests?

A He - one thing I remember him doing, he checked the reflexes in my legs.

Q Do you recall anything else that he did?

A Seemed like he measured my stomach.

Q Did he use a stethoscope at any time during the examination?

A I know the nurse did it before he came in but I don't remember him doing it.

Q Do you recall Dr. Modaber putting his hand on your stomach or your abdomen for five minutes or ten minutes and listening with a stethoscope to the baby's heart?

A No.

Q Is that something you would have recalled?

A I think if he had his hand on my stomach I would have remembered it.

Q Did you have any discussion with him as to your condition?

A No I was listening to what he had to say.

Q Did he say anything with regard to toxemia?

A Yeah, he said that I had toxemia and he said that he wanted me to take bed rest and he give me a prescription for phenobarbital. He told me to go by the lab at the hospital and pick up a box and he wanted me to run - it was for a urine sample and I had to run it for twenty-four hours and he told me to do it

on the week-end, on Saturday and return it to the lab on Sunday.

Q And prior to this visit on November 9th, had you been doing anything special with regard to your diet or other care of yourself?

A Yeah, I knew I shouldn't use a lot of salt and I knew pork was easy to make your blood pressure go up.

Q Well with that knowledge what were you doing during your pregnancy?

A Well I wasn't using very much salt because I already knew not to.

Q How about pork?

A No, I never bought it.

Q Other than giving you a prescription for phenobarbital were there any other prescriptions or drugs that were given to you by Dr. Modaber on November 9th?

A No.

Q Other than getting some bed rest at home was there any other advice that he gave you at that time?

A To come back the next week for another appointment.

Q Can you tell us whether or not there was any discussion as to hospitalization on that visit?

A No. I think he did explain to me why they were taking the urine sample.

Q And after that visit on November 9th what did you do?

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A I got my prescription filled and I went home.

Q Were you taking it at that time - did you take the prescription?

A I started taking the prescription that day.

Q Did you at that point have another scheduled visit back at the office?

A Yeah, on the 14th.

Q And during this period of time between the 9th and 14th what were you doing at home?

A I was taking bed rest and taking my medication. You had no choice when you took the medication, it knocked you out anyway whether you wanted to do something or not, you had no choice it knocked you out.

Q And you went back on the 14th to the office again?

A Yes.

Q And who did you see on that occasion?

A Dr. Modaber.

Q Would you tell us what if any tests Dr. Modaber performed?

A He asked me if I was taking my phenobarbital and I told him yes. He give me another prescription for that. I can remember him measuring me again. I guess he was looking to see if I had swelling.

Q Do you recall whether or not he put his hand on your stomach or . . .

THE COURT: Mr. Buckley you are getting into an area where you are leading the witness. You have given her an opportunity to answer what he did. Now that's all you need to do. You are getting in an area where there are apparent issues in the case. Your leading questions are certainly not appropriate.

Q I apologize Your Honor.

THE COURT: Go ahead sir.

Q Were there any other procedures that you recall being performed on that date? By Dr. Modaber?

A I don't remember any.

Q Did he tell you anything with regard to your condition on that date, November 14th?

A He said I still had - my blood pressure was still up and that I should go by the hospital again and do the same as I did before.

Q What was the same as you did before?

A On the week-end I had to collect my urine for a period of twenty-four hours and then I had - then it had to be taken back to the lab the next day - to the lab and run or whatever they had to do.

Q Did he give you any additional advice or recommendation?

A To take my phenobarbital and bed rest.

Q Did he state whether he was considering any other course of treatment?

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A I don't remember any.

Q And did you get another scheduled visit?

A Yes, for the 21st.

Q And following the office visit on the 14th, did you - what did you do with regard to the recommendation you were given by Dr. Modaber?

A I took my phenobarbital and had bed rest.

Q And did you return on the 21st?

A Yes.

Q And who were you seen by at that time?

A Well when I went in I asked if I could see Payette because I thought it was,when I started going to the office that Payette was my doctor and I understood that I would only have to see Modaber once. Also a friend of mine, she is a physician assistant she had talked to Payette and I just assumed that he was my doctor.

Q And did you see Dr. Payette on that occasion?

A Yes, he walked in but no sooner than he walked in he walked back out.

Q And then were you seen by Dr. Modaber?

A Modaber came in a little bit later.

Q Would you tell us what, if any, tests he performed at that time?

A They had already took my urine and they had weighed me and the nurse had listened to the baby's heart beat. I think

he just did the same things he had done before.

Q Could you tell us what those were again?

A He measured my stomach I guess to see if it was growing. He asked if I was taking my medication, if I was still taking bed rest and I also had a cold then too and he give me a prescription for - he only give me that one prescription that time and that was for penicillin because he said he couldn't give me an antihistamine.

Q Did he provide you with any other advice or recommendations?

A To go back by the lab again and get the box that I had to collect the urine in and do the same as before.

Q Did he tell you how you were doing during your pregnancy?

A He could have but I just don't remember what he said.

Q Was there any discussion as to a possible another course of treatment that he was considering?

A He did say that he would put me in the hospital since it was the week-end he would wait until he saw me the next time.

Q What was the week-end which he was referring to?

A Well it was Thanksgiving Holiday.

Q What was your response to his statement?

A I guess if he would have thought it was necessary

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he would put me in.

MR. PLEDGER: I have to object Your Honor, it is not responsive.

THE COURT: Sustained. The jury will disregard, that is not responsive. It is not what she thought it is what she said or what her response was at the time.

Q Let me ask you what, if anything, you said to Dr. Modaber?

A When he asked me?

Q Yes.

A When he mentioned about putting me in the hospital?

Q Right. Did you say anything to him at that point?

A No. I don't remember it if I did.

Q Did he give you any other advice or recommendations as to what to do following that visit?

A To take my phenobarbital and bed rest.

Q Now after that visit what did you do?

A I went home.

Q And with regard to recommendations and advice what did you do?

A I took my phenobarbital and took my bed rest.

Q Can you tell me in this period of early November 1978 what was your daily routine at that time?

A You mean starting with morning?

Q Yes.

A Well I would get up and get the kids off to school.

Q How many kids were off to school?

A Two.

Q And the third was at home?

A The third one was at home.

Q How old was she at that time?

A Three.

Q This is Christine?

A Christine.

Q After the kids were off to school what did you do then?

A I would take my phenobarbital then and I would lay on the couch because all of our bedrooms were upstairs, so I would lay on the couch and I would have the TV on for her and she would lay behind me and after about thirty minutes the phenobarbital would take over so you would know what was going on but still you were kind of knocked out. So I could tell whether she would move or something but she was very good not to - I mean she would lay there behind me most of the morning watching Sesame Street and stuff and I had no problems with her whatsoever.

Q Tell us where in the house was the couch?

A In the living room.

Q Is that downstairs?

A Yes.

Q Did you do any house cleaning at this time?

A I couldn't. Even if I wanted to I couldn't with the phenobarbital I couldn't.

Q Did you do any cooking?

A No.

Q How were your meals prepared then?

A Ronnie always fixed her a sandwich or something before he left.

Q How about for dinner, did you cook in the evening?

A No.

Q How were your meals prepared?

A Well he bought a lot of TV dinners and frozen stuff so it could be put in the oven. Kathy a lot of times would do it if he wasn't at home.

Q Let me direct your attention then to the period following the office visit on November 21st, what is the next thing you recall happening in regard to your pregnancy?

A I didn't hear you.

Q With regard to your pregnancy what was the next thing that happened?

A Then on Sunday night I had done laid down and I remembered I had to take my phenobarbital so I went back downstairs and got it because I had to take two at night time.

Q You referred to Sunday evening, do you know the date you are talking about?

A Yes, the 26th.

Q The 26th. And what happened after you took the phenobarbital?

A I went back to bed. It was around - I'm not sure what time it was but anyway I went to bed and I started having contractions but I thought it was false labor. But then after a little while the phenobarbital knocked me out for a couple of hours.

Q Did you wake up after that?

A Then I woke up again and it was contractions again but I couldn't get no set rhythm to it so I just assumed it was false labor. So I know that you can go in and have false labor pains before you. . .

Q What happened after that?

A Then around - well it was ten minutes after five when my water broke then I knew I was in labor. So I woke Ronnie up and he told me to call the doctor and he would get the kids and put them in the car and get my suitcase. For me to go call the doctor, which I called the exchange.

Q You called an exchange?

A Yes, the number they had given me.

Q This is the number you had received from Piedmont Obstetrics?

A Yes.

Q And what were you told to do when you called the exchange?

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A They told me to go on to the hospital.

Q What did you do after that?

A We got in the car and went on to the hospital.

Q Do you know approximately what time you arrived?

A No.

Q Tell us the first thing that happened when you arrived at the hospital?

A Well we got to the hospital to the emergency room and the - we couldn't get in because the door was locked.

Q How did you get in the hospital?

A Ronnie kept banging on the door and finally an orderly or - it was a colored man come and opened the door for us and he got a wheel chair and got me in it and started down the hall with me.

Q Where did your husband go at this time?

A He was right behind me.

Q Where were the kids?

A They were coming with him.

Q And after you were wheeled down the hall, what is the next thing that happened?

A He was hollaring for the nurse or something, anyway a nurse met us.

Q And what did the nurse do?

A They took me on into a room and started - she told me to take off my gown and put their gown on and I laid down on

the bed.

Q What did your husband do at this point?

A I don't know.

Q Was he there in the room?

A No.

Q What is the next thing that happened?

A The nurse proceeded to do, she prepped me, she checked to see how far I had dilated, whatever else she had to do.

Q Besides the nurse was there anyone else there at the hospital?

A She was the only one in the room.

Q Did you have any understanding at this point as to where Dr. Modaber was?

A No, I didn't know where he was.

Q Did you have any understanding as to whether or not he was coming to the hospital at that point?

A No, she went on in the hallway then and made a telephone call and I heard her talking. . .

MR. PLEDGER: Your Honor I have to object, it would be hearsay.

THE COURT: The objection is overruled as to what she heard the nurse say at that point, if she could understand it.

A I heard her tell him what she had done and as she hung up there was another woman in the hall and she said. . .

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MR. PLEDGER: Your Honor, I would have to object to that.

THE COURT: Sustained as to that yes. What any other woman said, now what she told - what she heard the nurse say the jury may consider but nothing else. Go ahead. What anyone else may have said to the second person in the hall the Court sustains the objection as to hearsay.

Q Did you hear anything else that was said by this nurse?

A Yes, when she hung up the phone. . .

MR. PLEDGER: Your Honor, I have to object.

THE COURT: Yes sir, the objection is sustained to that. Only the call that was allegedly made to the doctor is admitted into evidence.

Q Did you hear any part of the conversation of that telephone call?

A Yes.

Q What part of that conversation by the nurse did you hear? During that telephone call?

A I heard her say - I heard her tell what she had done to me.

Q At this point did you have any understanding as to what Dr. Modaber was going to do?

MR. PLEDGER: Your Honor there would be no way of her to know that.

THE COURT: No sir, I don't think anything has been brought out, that's a leading question. You already asked it once and nothing has been indicated to the contrary Mr. Buckley.

Q What happened following this telephone conversation?

A The nurse came back in and she asked another nurse to put the IV's in. So the other nurse put the IV's in my left hand.

Q Do you know the room at the hospital you were in at this time?

A No, I know what it looks like.

Q Was it a labor room?

A I assumed it was.

Q Now after this IV was inserted what is the next thing that happened?

A She kept taking my blood pressure and checking to see how far I had dilated.

Q And following that? Were any other devices or apparatus brought into the room?

A They hooked up a monitor on my stomach and she was telling me what she was doing because I had never had it hooked up before.

Q Would you describe this machine for us?

A Well it has a belt like thing that goes around the middle of you and she put some kind of an ointment or something on my stomach and she said that was so it wouldn't pick

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up other things, it would just pick up the heart beat and then she proceeded to pick up the heart beat. And it was hooked to a machine over to the left of me.

Q After she hooked up the machine did you hear anything?

A Yeah, I heard the heart beat.

Q You heard the baby's heart beat?

A Yes.

Q How did that sound?

A Real loud. It sounded good. It sounded like my oldest daughter did. She had a real strong heart beat and it reminded me of it.

Q Did anyone else come into the room other than the nurse at this point?

A There could have been I don't remember.

Q What is the next thing that happened after the machine was hooked up and you were listening to the heart beat?

A (No answer)

Q Let me ask you this, did there become a time when any other personnel from the hospital came into the labor room?

A Yes, there was another woman who came in and later on they were trying to pick up the heart beat.

Q And had you been listening to the heart beat before this?

A Off and on but it wasn't really that important to

me I guess to listen. There was other people and it seemed like it was more going on and more commotion going on, people was stirring than it had been when I first went in.

Q Can you tell us what people were doing in the room?

A It seemed like they were trying to pick up the heartbeat. Somebody put a mask over my face and they rolled me over to my side. They didn't tell me what they were doing so I don't know what they were doing.

Q Did you have any understanding as to what was happening?

A No.

Q After they rolled you over on your side and put the mask to your face, what happened following that?

A Seemed like everything got frantic because they couldn't pick up the heart beat. Still I didn't know to be that concerned because I just didn't know what was going on.

Q Do you know whether or not there was an effort at this time to call Dr. Modaber?

A I know they had been trying to call him before but since there was more noise and stuff, I guess it must have been - I just didn't know what they were saying. It was a lot more commotion going on.

THE COURT: Who is they if you can explain that Mrs. Kelley.

A The nurses have the responsibility to call him.

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THE COURT: Who are the ones you are referring to that you actually observed, were they all nurses or some other personnel.

A All nurses.

THE COURT: All nurses. And how many?

Q Do you recall the names or have you since learned the names of any of the nurses who were in the room at this time?

A I know the names now but I didn't know them then.

Q Have you subsequently had a chance to meet them and been introduced to them or find out what their names were?

A One of them I haven't seen since then but I know her name.

Q What is the name of the one you haven't seen since?

A Janice Strothers, she is the one there first.

Q She was the first one you met at the hospital?

A Yes.

Q How about the other nurse that came in later on?

A The one that put the IV in, I still don't know who she was. I just know she was a colored nurse.

Q Were there any other nurses who came in who you have since learned their names?

A Barbara Amos and Barbara Kidwell.

Q Now what happened after this period when the nurses were there and the commotion you described? Did any other personnel come into the room?

A Yes, Dr. - the anesthesiologist come in and he pushed the bed out from the wall and he introduced hisself and told me he was Dr. Petkov and that he was going to have to change my IV's and he changed my IV from my left hand to my right hand and he proceeded to do that.

Q When you were admitted to the hospital an IV was put in your left hand - your left arm?

A It was put in my right.

Q Your right?

A Um-huh.

Q And it was transferred to your left?

A To my left.

Q What happened after this anesthesiologist, Dr. Petkov came in and performed this procedure?

A Well he kept hovering around there. I don't know why but I guess he had put medication or something maybe in the IV's or something. I don't know why he stayed in there.

Q He was there for awhile?

A Yes.

Q Where was your husband at this point?

A He was in the room off and on. Sometimes he would be in the room and sometimes he would be outside. I could see him outside the door. Sometimes I couldn't see him.

Q I asked you before about the hospital personnel, can you tell us in terms of when the fetal monitor was applied as

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to when your husband may have come back to that room?

A I think they just had applied the fetal monitor. He might have been in there one time before this but I know he came in right after the fetal monitor was applied.

Q And left the room on occasion?

A Yes.

Q Do you know where he went when he left the room?

A No, once in a while I could see him in the doorway. But then some of the times I couldn't see him.

Q Directing your attention to the time when the anesthesiologist came into the room, do you know where your husband was when that first happened?

A Seemed like he could have been standing over - he was standing over from - to my right. Seemed like sometimes - seemed like after they took it off he was holding my hand. The way he was squeezing it seemed like I was having contractions or something. Seemed like I remember him squeezing my hand real hard.

Q And was the fetal monitor still on at this time?

A I'm sure it was.

Q Could you hear anything?

A I don't remember hearing it.

Q After the anesthesiologist came into the room, who was the next person who entered?

A Modaber came in.

Q What did he do?

A The nurses rushing around there was trying to pick up the heart beat and then he came in and he inserted a device and then I remember hearing a heart beat.

Q Did this have anything to do with the fetal monitor we have been discussing?

A Right.

Q Before this you have described some belts you had on?

A Right.

Q And when Dr. Modaber came in he changed the machine somehow you say?

A Yes.

Q Would you explain again what he did?

A It was a stick like thing and he stuck it up inside me, and he picked up the heart beat.

Q And after he did that did you hear anything?

A Yes.

Q What did you hear?

A I heard the heart beat.

Q Did Dr. Modaber do anything else?

A No, he got up and left again. It seemed like no sooner than he came in, he was gone.

Q Did he say anything to you?

A No.

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Q Where was your husband at this time?

A In the doorway.

Q Did Dr. Modaber say anything to him?

A Yeah, I heard him talking to him.

Q What did Dr. Modaber say to your husband?

A He said that I had to have a caesarean, something about that I was - I didn't hear that because they were facing to the outside.

Q After this discussion in which Dr. Modaber had with your husband, did you observe anything as to what Dr. Modaber did?

A I don't know where he went. He wasn't there in the room so I don't know where he went.

Q Did you then have any conversation with anyone else after Dr. Modaber left?

A My husband came back in sometime later and he wanted to know - well he didn't want to know, he told me that I had to have a caesarean.

Q Your husband came back and told you you had to have a caesarean?

A Right.

Q Please describe that conversation? Do you recall his words?

A No, he just said that I had to have a caesarean and after - and I had heard Modaber say that I had to have a

caesarean and I knew that my husband was upset about it because some people. . .

MR. PLEDGER: Your Honor, I have to object to hearsay.

THE COURT: You have been asked what was said Mrs. Kelley, you must state what was said, not what you thought about it but what was said. Go ahead and if you can answer it in that regard, objection is sustained as to what she thought about it Mr. Buckley.

Q Can you tell us Mrs. Kelley at this time you had the conversation with your husband, can you tell us what he said to you when he first came over?

A When he came over he said I had to have a caesarean.

Q Did he say anything else?

THE COURT: Now Mr. Buckley, you are belaboring the point. It is already stated three times to that extent and hasn't said any more. You have given her every opportunity to state what was said and I've asked her what was said. And if she doesn't choose to give any more you can't lead her into anything else. Move on to another question.

Q Your Honor there are a multiple of conversations.

THE COURT: I know it but she is not going to be allowed to respond to a yes or no question Mr. Buckley. You have got to let her tell it in a narrative form. Go ahead with your questions.

Q What did your husband do after that?

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A Then he proceeded to tell me that Dr. Modaber had asked him if I wanted to have my tubes tied and he wasn't going to go through with it again so he might as well.

Q What did your husband do after this? In terms of what you observed him do?

A He was, I guess. . .

Q Let me withdraw the question. After he said this what was your response to him?

A I told him it was up to him whatever he did.

Q What did you observe your husband do after that?

A He kept walking the floor.

Q What is the next thing that happened?

A Then somebody give him a clip board that had some papers on it and he signed it and he said that he was going - he asked me again if I wanted to have this - my tubes tied and I told him it was up to him but his main concern was getting something done for me.

MR. PLEDGER: Your Honor, I would have to object to that.

THE COURT: The jury will disregard that unless you can state what he said, what his concern was, was your impression and it may or may not be what was objectively rendered, Mr. Buckley. Now that is not responsive. The jury is required to disregard that response.

MR. BUCKLEY: Only the last sentence Your Honor.

THE COURT: Yes sir, just the last sentence.

MR. BUCKLEY: Only the last sentence referring to what she thought Mr. Kelley thought?

THE COURT: Yes sir. She has been asked a number of times to state objectively what was said and in that context I've allowed it. She cannot state her impressions unless she can relate it to words actually spoken. That ought to be clear. Go right ahead if you can pursue it in that manner otherwise don't ask for her impressions.

Q What is the - did your husband have a clip board in his hand?

A Right.

Q Do you know what he did?

A I saw him signing some papers but I didn't see what the papers were.

Q And after he signed the papers what happened next?

A Then they made him leave. They had somebody that pushed the bed in and they put me in the bed and was getting ready to take me to OR.

Q And what next happened?

A Then after they got me on the bed and started pushing me - I don't know seemed like a lot of doors and on the way down the hall I told them I was having it. The only thing I can remember just everybody was asking where the gloves were at and I wondered why in the world did they want gloves at this time.

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Q Mrs. Kelley at the time you made this statement was Dr. Modaber there?

A No.

Q When was the last time you had seen Dr. Modaber?

A When he left the room.

Q When he left the room at what point?

A After he inserted the fetal monitor.

Q You say at this time you yelled out some words - what were the words?

A I told them I was having the baby.

Q Who were you telling?

A Whoever was there. It didn't matter who it was.

THE COURT: Who were you aware of, if you were aware of anyone being there?

A Well I knew there was a man pushing the bed and there was a nurse beside of him.

Q Are you aware of anybody else?

A No.

Q What happened in response to your statement?

A People started rushing around and I had the baby and then I looked up and I saw Dr. Modaber holding the baby.

Q How was he holding it?

A He was holding it by its feet. Then he saw me looking and he handed the baby over to another man who was standing there at a sink and then he told somebody to give him a pan

and he took the afterbirth out and he told them to get me out of there and they took me to a room. I didn't see nobody then.

THE COURT: Now where were you Mrs. Kelley when you said they took you out of there?

A When I looked up there was a sink in there and over to this way there was real bright lights - I don't know what room we was in.

THE COURT: You were at a different place than you had been when you first started having the baby or the same place?

A When I had the baby.

THE COURT: All right go ahead Mr. Buckley.

Q Where were the sinks in relation to the bed you were on?

A It was over to my right.

Q Now when you looked up and saw the baby did you know whether it was a boy or girl?

A Yes. I could see what it looked like. It had some hair.

Q Did the baby make any noise?

A No.

Q Did you know what the baby's condition was?

A I knew it didn't cry.

Q Did you know whether it was alive or not?

A I guess deep down I knew it.

Q I'm sorry.

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A Deep down I knew there was something wrong.

Q Did Dr. Modaber say anything to you?

A Only thing he said was to get me out of there. That's all.

Q Where were you taken then?

A To a room. I don't know where it was in the hospital. I don't guess I would know now because I had never been back in there before or since. I hadn't been in there before.

Q Who was in the room?

A No one. I was there by myself.

Q For how long did you stay in the room by yourself?

A It seemed forever. I don't know how long it was.

Q Who came in next to the room?

A Dr. Modaber came in and Ronnie.

Q What did Dr. Modaber say?

A He said that we had lost our boy. He was dead.

Q Did he say how it happened?

A No. I don't know how it happened.

Q Did he say anything else?

A No. They stood there for a while. I guess because I was crying. Then him and Ronnie started out the door and he said to Ronnie well at least I didn't tie her tubes, you can try again for a boy.

Q Then he left the room?

A Yes.

Q Was your husband there in the room too?

A No, he left with him.

Q Now what happened after that?

A Some nurses came in and they started taking me down to another room. Ronnie was with them. They took me to a private room somewhere in the hospital.

Q Do you know where in the hospital it was?

A I know it was in the newer part of the hospital.

Q Do you know how many days you were in the hospital?

A Until Thursday. That was on Monday so I stayed until Thursday.

Q Did Dr. Modaber come back at any time after this conversation you related to see you again?

A I think he came that evening.

Q Did he talk to you?

A What he said I don't know. I don't remember him saying anything. I remember him pushing on my stomach, checking my stomach. Other than that I just don't remember.

Q After that time did you ever again have a discussion with Dr. Modaber?

A I never saw him again.

Q Did anyone at the hospital give you an explanation as to why your baby was born dead?

MR. PLEDGER: Your Honor I would have to object to that.

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THE COURT: Objection sustained.

A No.

THE COURT: I think that has to be a matter of direct communication with the defendant.

Q While you were at the hospital did you learn why your baby was born dead?

A No.

Q Did Dr. Modaber after this point ever tell you why your baby died?

A No.

Q Who was the first person who told you why your baby died?

A No doctors told us and the first person we found out was our lawyer Mr. Crigler, our first lawyer.

Q Mrs. Kelley after these events did you try to make any inquiry regarding what had happened?

A Yes, we wrote to A.M.A.

Q You are referring to the American Medical Association?

A Yes.

Q Do you recall when you wrote to the A.M.A.?

MR. PLEDGER: Your Honor I would have to object to that.

THE COURT: Objection sustained,if the communication was addressed to the defendant and he failed to respond I may

reconsider it but there has been no indication that the defendant failed to answer such an inquiry Mr. Buckley.

MR. BUCKLEY: Your Honor, it is not being offered for that purpose.

THE COURT: It is inappropriate to do it. It is irrelevant unless you can show that the defendant refused to respond. If he wasn't asked, the question would be why ask anybody else.

MR. BUCKLEY: Your Honor this relates to other evidence in the case.

THE COURT: Objection sustained. I don't think that is material as to her making an inquiry somewhere else. If she did make it to the defendant or another doctor who was attending her it seems to me that that's irrelevant for the jury to consider unless that person is here to testify in this case. You may go on to other areas.

Q Did anyone make any inquiry of you in regard to the treatment you had received?

A My husband called Piedmont Obstetrics and wanted to talk to Payette and he didn't want to talk to him and he told him he had better be over there that night and talk to us about it. This was on a Wednesday night. He was there at 5 o'clock, to talk to us about it and he tried to smooth things over and tell us that Dr. Modaber should have been there on time - that he had the right to decide when he got there. That he didn't have

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to be there at any certain time. He just kept on going over that.

Q Did anyone else inquire or ask you about the treatment you received from Dr. Modaber?

A Yes, a friend of mine had called Piedmont Obstetrics . . .

MR. PLEDGER: I have to object to that Your Honor.

THE COURT: Objection sustained. Mr. Buckley you are getting off the point here. Now if there was a response or inquiry made by Mrs. Kelley or her husband I will allow it. If there was a response coming from Dr. Modaber or that firm I'll allow it but now you can't get third parties in. Go ahead sir.

Q Did there come a time when anyone on your behalf made an inquiry to Dr. Modaber about the treatment you received?

A Anybody on my behalf?

Q Yes, who asked for any information from Dr. Modaber?

A Our lawyer.

Q And you are referring to who now?

A Mr. Crigler.

Q And do you know when this inquiry was made by Mr. Crigler on your behalf to Dr. Modaber?

MR. PLEDGER: Your Honor, I would have to object to this. This has got to be hearsay.

THE COURT: I will allow it as to the fact of the inquiry but not what transpired between the parties but the fact that an inquiry was made by her agent and attorney. I'll allow

that. She can give the time or date of it Mr. Buckley.

Q Do you know when that inquiry was made?

A I talked to him the last of May.

THE COURT: The question is do you know when the attorney made the inquiry?

A June 9th he sent a letter out.

Q What year are we talking about, June 9th?

A '69.

Q June 9, 1969 or '79?

A Yes, '79.

Q Do you know the form of the inquiry?

A Yes, I received a letter.

Q You received a copy of a letter the lawyer sent.

A A copy of the letter that was sent to the hospital and Modaber ,Rhoads, Regan and Bentrem.

Q What was the form of the inquiry made in the letter of June 9, 1979?

A It was asking for records from the hospital and from Modaber, requesting my medical records.

Q Do you know if there was any response to that?

A I don't know. I guess there wasn't because. . .

THE COURT: Now don't speculate Mrs. Kelley. If you know a response was made you may tell us, but don't speculate or guess at it. You must be positive, before you can answer. Do you know that a response was made or do you not?

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A I do not.

THE COURT: All right, go ahead Mr. Suckley.

Q Mrs. Kelley since 1978 have you had any more children?

A Yes.

Q When were they born?

A October 31, 1980.

Q What are their names?

A Jacqueline and Victoria, twins.

Q Directing your attention again to 1978 when you became pregnant at that time what were your feelings as to the child you were anticipating?

MR. PLEDGER: Your Honor, I would have to object to that.

THE COURT: Objection overruled, it's the matter of the damage aspect, the plaintiff's own reaction and her expectations are a proper consideration. You may proceed.

Q What were your feelings and expectations at that time when you became pregnant?

A I was hoping I would have a boy because we already had three daughters and most men, I don't care what they say, still want a son.

Q Have you and your husband discussed any names for the baby?

A Yes.

Q. If it's a boy?

A We were going to name it Christopher Patrick. Never did have a girl's name picked out for any of the girls, we just always had a boy's name.

Q Didn't have any names picked out for the girls?

A Never did.

Q How did you choose Christopher and Patrick?

A It was just a name that my husband liked and always wanted to name a boy.

Q And during this period when you were carrying the baby did you know whether it was a boy or girl?

A No.

Q When was the first time you learned when it was delivered?

A When I saw it.

Q Had you made any other plans in your house for the delivery?

A Yes, a friend of mine had given some things for the baby and another friend had given me a gift. And I had got out all the other clothes and washed them up and had them ready.

Q Did you have a room picked out for a nursery?

A Yes.

Q Mrs. Kelley, what were your feelings when you saw your baby was dead?

A No answer.

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Q Let me ask you, have you and your husband discussed this since then?

A Yes. I guess a day don't go by that we don't some way or another remember it.

MR. BUCKLEY: I have no further questions, Your Honor.

THE COURT: All right, you may cross examine. Mr. Pledger did you get the other witnesses attendance clear. Would you like to have a recess before you start?

MR. PLEDGER: Yes sir, I think so. If we can excuse them and not inconvenience them I would like to do that.

THE COURT: All right, we will take a recess then before you start your cross examination. Since you might need some additional time we will take a ten minute recess.

RECESS

Jury reconvened in jury box.

CROSS EXAMINATION

By: Mr. Pledger

Q Mrs. Kelley, during your pregnancy in 1968 you told us that you learned you had toxemia? It was a Dr. Hamlett that told you that?

A Right.

Q When you learned that was it in September of 1968?

A September '68.

Q '68. And the baby was born in October of '68 is that correct?

A Yes.

Q What treatment or what recommendations did Dr. Hamlett give you when he told you you had toxemia?

MR. BUCKLEY: Your Honor, I object, what the standard of care was back in 1968 has nothing to do with the standard of care ten years later in 1978 with all of the advancements of medical science and knowledge and what we know about this disease and how to treat it, so I think it is totally irrelevant for counsel to explore what the ancient standard of care may have been ten years before the events in this case.

THE COURT: Objection is overruled. It relates to how the patient herself in her own method of dealing with her problem may have educated her since the doctor's treatment and the patient's response is a combined effort, I will allow the question to be asked, you may proceed.

Q Can you tell us what he told you about what you should do or how you should treat yourself.

MR. BUCKLEY: Your Honor, I object.

THE COURT: Overruled. Go ahead.

A I was to. , ,

Q Care for yourself?

A Care for myself?

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Q Yes ma'am.

A He explained to me what toxemia was because I never had heard it before.

Q All right, can you remember what he told you that toxemia was?

A Word for word what he said then.

Q No, I'm sure you can't tell us word for word, can you give us the idea that he gave you?

A The idea was that it was a toxic in my urine that made my - that made me have - made my blood pressure go up.

Q And he had found something in your urine at that time that he told you was the reason he said you had toxemia?

A Yes.

Q Did he discuss with you the affect that it had on your blood pressure?

A He told me that when toxin got in my system that it made my blood pressure rise.

Q And did he tell you what you could do that would keep your blood pressure down?

A Yes.

Q And what was that?

A He told me that salt would help it and eating pork would make it go up and that bed rest would help bring it down.

Q Now you said salt and pork, did he tell you not to eat those kinds of foods?

A Yes.

Q And bed rest, did he give you any medication that you were to use along with bed rest?

A Yes, he give me two prescriptions.

Q And do you know what those prescriptions were?

A I know what one of them was. It was phenobarbital. But I don't know what the other one was.

Q And after he told you about that did you follow his instructions?

A Yes.

Q What happened to your blood pressure?

A Then?

Q Yes ma'am. Do you recall?

A I just don't remember.

Q But in September then you began rest and did you do that on a daily basis?

A Yes.

Q Did you take your phenobarbital on a daily basis?

A Yes.

Q And it was in October that you went to the hospital?

A Yes.

Q Do you know why you went to the hospital?

A Yes, because it had got so high that he thought that I should go the day I went to him he thought I should be admitted that evening but he wanted to watch me and make sure -

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I guess he wanted to get my blood pressure down.

Q All right.

A So he could induce me the next morning.

Q Did he tell you when he put you in that he was going to induce labor?

A You mean the next morning?

Q Yes.

A Yes.

Q He told you that?

A Yes.

Q Did you ask him what inducing the labor had to do with your condition since it was some twenty days before the baby was due?

A Seemed like I remember him telling me why he was going to induce it but as far as remembering exactly what he said now, I don't remember.

Q Did you ask him whether there was any way that you could be cured of this toxemia?

A He had told me that the only way I could get rid of the toxemia was to have the baby and it would still stay in my system and probably be gone by the time I went back for my six weeks check up.

Q And did you understand from that that the cure for it then was going to be to have your baby?

A Yes.

Q Did he explain to you what he meant when he told you he would induce the baby?

A Not exactly. I knew he was going to take it, that I was going to have it but it was my first baby so I really didn't understand it.

Q Now you became pregnant again in 1971 is that correct?

A I guess it was. . .

Q Late 1970. And you went back to Dr. Hamlett is that true?

A Yes.

Q At that time Dr. Hamlett had with him a partner by the name of Dr. Davis?

A Yes.

Q And during that pregnancy I think you testified you also had toxemia is that true?

A Yes.

Q Would you tell the ladies and gentlemen of the jury what recommendations or treatment Drs. Hamlett and Davis gave you in 1971?

A They give me the very same thing as before, the bed rest, the phenobarbital and I don't remember them giving me something extra this time. Just the phenobarbital.

Q Do you remember with relationship to when the baby was born as to when you first developed or were told that you had toxemia?

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A It was the last week of April.

Q And the baby was born in June?

A June the 15th.

Q And so from April when you learned that you had toxemia until June did you rest at home and have to take phenobarbital and avoid salty foods?

A Did I follow his directions?

Q Yes.

A Yes.

Q And were those his directions?

A Yes.

Q What happened in June just before the baby was born?

A My blood pressure got extremely high and that was when I was at an office visit and he told me that he would give me a day to get it down. For me to go home and stay completely in bed, not to move and to get it down and come back the next morning and if I hadn't got it down he would admit me to the hospital and he would proceed to deliver the baby.

Q Did you stay in bed that next day?

A Yes.

Q And did you get your blood pressure down?

A Yes.

Q Did he put you in the hospital at that time?

A No.

Q When did he put you in the hospital?

A On June 15th, the morning of June 15th.

Q Did he tell you why he was putting you in the hospital?

A He thought it was safe to go ahead and deliver the baby then.

Q And did he tell you whether he would induce the baby at that time?

A Yes.

Q Now the first two pregnancies that you had, the first two babies that you delivered, those were both induced, that is the doctor in some manner started your labor is that correct?

A Yes.

Q Do you remember what the doctor did to start your labor?

A He put a medication in my IV's.

Q And what happened when he did that?

A Then it started contractions.

Q Do you know whether the membranes ruptured by themselves, your bag of waters or whether the doctor ruptured them?

A The doctor ruptured the membranes.

Q Both times?

A Yes.

Q Now you told the ladies and gentlemen of the jury

that you became pregnant again in 1971?

A Yes.

Q And that you went back to see Dr. Hamlett is that correct?

A Yes.

Q And that he told you because you had toxemia or because your blood pressure was still up, that he didn't think you should carry that baby?

A When I went back for my six weeks check up I still had toxemia in my system. I went back in two months, I don't know whether he said toxemia or blood pressure.

Q When you went back to him for your six weeks check up were you already pregnant?

A No.

Q When you went back for your eight week check up is that when you were pregnant?

A I guess when I went back for my six week check up it would be the last of July wouldn't it.

Q I think that would probably be correct.

A Then I went back at two months it would be the second week of August, I don't guess I was pregnant then.

Q Do you know how many weeks after your first baby was born that you went back and you were told that you were pregnant?

A I know when I went back I was five weeks. I got

pregnant around the first of September.

Q So you would have gone back sometime in the fall of 1971?

A It must have been the first of October I went to see him.

Q And at that time did Dr. Hamlett tell you that you had toxemia?

A I guess he said I had high blood pressure.

Q High blood pressure. All right, and he recommended to you that you not carry the baby?

A Yes.

Q Now in 1975 then you again became pregnant is that true?

A Yes.

Q Would you tell the ladies and gentlemen of the jury whether you at the beginning of that pregnancy began taking your own blood pressure?

A I remember now why I started taking my blood pressure. After they did the abortion they told me at the hospital clinic that I should take the birth control pills and so I kept having high blood pressure then I went to Planned Parenthood in Northern Virginia and they checked my blood pressure. They kept saying my blood pressure was up so I finally went to Roanoke to Dr. Johnson and he said it was the pills that was keeping my blood pressure up and that's when I started taking my

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blood pressure. It was because of that.

Q Over the period of time that you were taking your own blood pressure did you watch to see whether it would go up or down depending on how much rest you got?

A Did I notice what?

Q When your blood pressure would go up if you didn't get much rest, whether it would go down if you rested a lot?

A I could tell if I was tense or upset or something it would go up more than if I was relaxed.

Q So the more relaxed you were the lower your blood pressure would go down?

A Yes sir.

Q Now in 1978 you said that you went to see Dr. Payette from the recommendation of a friend is that true?

A Yes.

Q And when you saw Dr. Payette you gave him the history of your previous pregnancies?

A I also went too because I had looked in the book at the library.

Q What did the book in the library tell you about Dr. Payette?

A It. . .

MR. PLEDGER: Objection Your Honor, this has nothing to do with anything.

THE COURT: I'm not sure Mr. Buckley, it was brought

up before but it was brought up on your part. You mentioned that in direct examination. You may proceed.

MR. PLEDGER: I didn't ask the contents of the book.

THE COURT: She pointed out as to what inquiries she had made and why she chose him. Go ahead Mr. Pledger.

A What schooling he had had.

Q Anything else about him?

A No.

Q How many obstetricians did you find in that book that were in the Culpeper area?

A Two.

Q And who was the other one?

A Dr. Burke.

Q Now when you sought to - you chose Dr. Payette on the basis of what had been recommended to you by this friend?

A Not at first. First of all I got the book.

Q You got the book first?

A Right.

Q And then you talked to the lady at the Remington Clinic?

A Yes.

Q When you saw Dr. Payette you gave him a history of your previous pregnancies?

A Yes.

Q Did you simply tell him that you had toxemia and

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what the dates of birth were, what had happened insofar as the babies being induced or did he discuss it in more detail with you?

A I told him that I had all my babies early and that was one reason I wanted to go to the Culpeper Hospital was because - that was more my concern then was getting to the hospital and having it. I didn't want to be out on the road and have the baby.

Q Did you tell him that the first two babies had been induced by the doctor, that is that he had given you medication and had ruptured your membranes himself, so as to cause the babies to be born?

A Well they broke my membranes.

Q Yes, I understand that. Did you tell Dr. Payette that?

A I don't remember about telling him about breaking my membranes.

Q Did you tell him those babies had been induced?

A Yes.

Q Did you describe for him the pregnancy that you had in 1975 and what symptom you would have had or not had during that pregnancy?

A No.

Q Did you ask Dr. Payette whether you would have any problems with toxemia because you had had it in your first two but you hadn't had it in the last one?

A No, because I assumed I wouldn't have it because

I know the doctor had told me before that it was rare to have it the second time so I just assumed that I wouldn't have it any more.

Q Did you ask Dr. Payette anything about whether that was true, that you wouldn't have it again because you had had it before?

A No, I just took the other doctor's word.

Q Now you saw Dr. Payette on the first two or three visits and you told us that he asked you or brought up to you the subject of sterilization?

A Yes.

Q Of having your tubes tied, is that correct?

A Right.

Q Did you ask him why he thought you should do that?

A No. I just assumed he thought I had too many kids.

Q Did he suggest that to you after you gave him the history of having high blood pressure?

A No.

Q Did you tell Dr. Payette that you had been unable to take the birth control pill because you had high blood pressure?

A He asked me.

Q He asked you?

A Yes.

Q What did you tell him?

A At first it came out he asked me what I was going

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to do after I had the baby, what was I going to take for precaution, which I really didn't think it was any of his business, at that time.

Q How did the subject of birth control pills come up?

A He was telling me about different things, the IUD, birth control pills and it seemed like it was a diaphram.

Q So he was telling you the various things that you could use to avoid having another baby?

A Yes.

Q Did the subject of having your tubes tied come up as a part of that discussion with Dr. Payette?

A Yeah, that was part of it. And then he proceeded to say that the different ways you could have your tubes tied.

Q So the discussion was not just about having your tubes tied but it was various ways in which you could avoid becoming pregnant again?

A Yes.

Q Now you said when you came back to see Dr. Payette on some of the return visits he would again ask you about whether you were going to have your tubes tied?

A Right.

Q Would you again have these discussions as to what type of contraceptive method you would follow after this baby was born?

A No.

Q Did you - when this subject came up on later visits did he again discuss with you the various ways that you could use to avoid becoming pregnant?

A No, he just asked had I considered having my tubes tied.

Q So on the subsequent visits there was no discussion about a diaphram or IUD or any type of contraceptive method that you could use, just having your tubes tied?

A Yes.

Q Did you ask Dr. Payette on any of these subsequent visits why he thought you should have your tubes tied as opposed to doing something else?

A No.

Q Now you testified that you understood that you would see Dr. Modaber during the course of your prenatal care?

A He told me I would see him once.

Q Why did he tell you it would be only one time?

A He said so if he was on call when I delivered he had seen me once.

Q Now did Dr. Payette actually use the word you would see him only once?

A Yes.

Q Or did he say you will see him at least once?

A I just remember him saying that I would only have

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to see him once.

Q When you would leave Dr. Payette's office after the prenatal visit you would get an appointment for the next visit is that correct?

A Yes.

Q And when you got that visit would - or the next appointment would you ask as to which doctor was going to be there?

A No.

Q Did you know that you were going to see Dr. Modaber in August, I believe you said was the first time you saw him, did you know you were going to see him before you got to the office that day?

A No.

Q Do you know whether Dr. Payette was in the office on that day?

A I don't know.

Q Now you described the examinations, the tests that were done by the nurse, now the nurses every time you would come in would have a routine they would follow, would they not?

A Pretty much the same routine.

Q And that routine was to weigh you, to check your blood pressure?

A Well they weighed me and took my urine sample first.

Q Weighed you and took your urine sample first. Then

what was the next thing they would do?

A Then they took me to whatever room I was going to.

Q All right, then what would happen?

A Then they would - well I think I had to change clothes first. They left then and then they came back and check my blood pressure. I just remember checking my blood pressure, I can't remember what else they did. It seemed like it was something else they did but I just can't remember what it is.

Q You would come in and you would have these things done before your blood pressure was taken?

A Yes.

Q Would you then be put on the examining table, covered with the sheet and you would remain there for a few minutes and then they would come back and check your blood pressure?

A Yes.

Q Now you testified that on these various visits Dr. Modaber would measure your abdomen. Now can you tell the jury in what direction he would measure it, was he putting the tape around your abdomen?

A No, from the top down.

Q He would measure from the top down. Had Dr. Payette ever measured you?

A Yes.

Q So this was something that began as a part of your

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prenatal care that you would be measured is that correct?

A I don't think he did it at the very first. I don't remember him doing it at the very first.

Q Had that ever happened to you in any of your previous pregnancies?

A No, I guess it is why I remember it. It could have but I just don't remember it.

Q The doctor in order to measure you would put his hands on your abdomen would he not?

A He would have to hold it up here and put it down this way.

Q Now Mrs. Kelley you told us that sometime in early November you took your blood pressure?

A Yes.

Q Now had you been taking it all along prior to that time?

A Yes.

Q Would you take it every day?

A Not every day.

Q Was there a certain time of the day that you would take it?

A No.

Q When you got up in the morning or before you went to bed?

A No.

Q Were you recording what your blood pressure was?

A No, I was just doing it for curiosity.

Q Do you say that you told the person who answered the phone at Dr. Payette's office that you thought your blood pressure was up, do you remember whether you told them what the reading was?

A I don't remember telling them what it was. I could have but I don't remember.

Q Do you recall whether you told them that you had actually taken your own blood pressure?

A Yes, I told them I taken it.

Q Do you remember whether you told them what the blood pressure had been the day before as opposed to the day you were calling?

A No, I didn't tell them that.

Q Now in that conversation did you tell them anything else other than you had taken your blood pressure?

A That my ankles were swelling.

Q Had you in your previous pregnancies ever had swelling in your feet or ankles?

A Yes, I had it with the others.

Q You had it with the first two or all three of them?

A I had it worse with the second one than I did with the first.

Q How about the third when you were pregnant in 1975

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did you experience any swelling at that time?

A I don't remember any.

Q On November 9th you came to the office and you saw Dr. Modaber is that correct?

A Yes.

Q And the nurses followed this routine you described when you came in, did they not?

A Yes.

Q And after you saw Dr. Modaber and you described that he checked your reflexes, do you remember whether he took your blood pressure?

A I don't remember him taking it. It stands out in my mind him checking my reflexes.

Q You remember him checking your reflexes?

A Yes.

Q Do you have any recollection of anything else that Dr. Modaber did?

A Other than checking the measuring on my stomach.

Q That's all that you can recall at this time?

A Yes, that's all I can think of.

Q Now did you have a discussion with Dr. Modaber after he examined you, after he had made these measurements about your condition?

A He confirmed that I had toxemia.

Q Did you tell him at that time or discuss with him

your previous pregnancies that you had toxemia in?

A I don't remember doing it. I could have but I just don't remember it.

Q Did you ask him why you had toxemia in this pregnancy when you didn't have it the last or when you had been told by this other doctor that it was unusual or would be unusual for you to get it again?

A Did I have any discussion with him?

Q Yes.

A That - why I had toxemia and I didn't have it before?

Q That's right?

A No.

Q Did you tell him what the other doctor had told you about it would be unusual if you got it again?

A No.

Q Now he told you I believe to rest, did he tell you to avoid salty foods?

A He was telling me about my foods.

Q He was telling you about your foods? And he gave you a prescription for phenobarbital?

A Yes.

Q Did you recognize that medication?

A Yes.

Q You knew that is what you had had before?

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A Yes.

Q Did you tell Dr. Modaber that you had had that medication before?

A I told him I knew what it was.

Q Did you tell him that you knew that you had to take that and have to rest and if you did that you could control the toxemia?

A No. I just knew what it was.

Q Had you as of that time read anything about toxemia in any books?

A Yes.

Q Can you tell the ladies and gentlemen of the jury what kind of books you had read?

A Medical books. Medical encyclopedia Britannia, that had some medical books on it.

Q Did you go to the library to read about it?

A I had these books from the Britannia.

Q Now you came back on November 14th, had you taken your blood pressure before you went back?

A Yes, I kept checking on my blood pressure every day.

Q Do you recall whether there had been a change in your blood pressure between the 9th and the 14th?

A I can't tell you now, it has been too long. I just don't remember.

Q All right, did you discuss with Dr. Modaber on the 14th when you saw him what the findings were when you came to his office with respect to your blood pressure or your weight?

A No.

Q When Dr. Modaber told you to follow the same routine you had been following the previous week, did you ask him any questions about that routine?

A He told me to do the same as before.

Q Did he tell you that you were keeping it under control?

A Did what now?

Q Did he tell you that you were controlling the condition, that it hadn't gotten any worse. Did he make any comment to you about your condition?

A I don't remember him saying it was any worse or any better.

Q When you went home on the evening of the 14th did you continue to follow the recommendations that Dr. Payette had given you insofar as taking the phenobarbital, resting and your diet?

A Payette never did tell me.

Q Excuse me, Dr. Modaber?

A Yes.

Q Did you follow your own blood pressure at home?

A Yes, I did check it.

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Q Between the 14th and the 21st when you returned?

A I checked it.

Q Do you remember whether it stayed the same or got worse or got better?

A I don't remember it getting any worse.

Q Now you came into the doctor's office on November 21st and you told the ladies and gentlemen of the jury that you asked to see Dr. Payette on that visit is that true?

A Yes.

Q Who did you ask?

A Whoever the nurse was standing there.

Q When you came into the office did you go up and register with the nurse, tell her who you were and that you were there?

A Yes.

Q Did you ask her if Dr. Payette was there?

A I told her I wanted to see Dr. Payette.

Q What did she say?

A Nothing.

Q She made no reply?

A No.

Q She said nothing?

A No.

Q Do you know whether she heard you?

A She was looking at me, I guess she did.

Q Now you went through the routine that you already described and you were on the table - examining table and you say Dr. Payette came in?

A Yes.

Q Could you tell us what Dr. Payette said?

A He didn't say anything. He just looked at me real funny and walked back out.

Q Did you say anything to him?

A No.

Q When Dr. Modaber came in did he examine you on that day?

A Yes.

Q What did he do to examine you?

A I just remember and I don't know why it stands out in my mind, just checking my stomach and measuring it.

Q Do you remember whether he did a pelvic examination?

A No, I don't remember him doing it.

Q Do you know what I mean by a pelvic examination?

A Yes.

Q You had had that before is that correct?

A With the other babies yes and on the first visit they check it.

Q You have no recollection then one way or the other whether a pelvic examination was done on November 21, 1978?

A I just don't remember it no.

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Q When you left the office on that day did you understand you were to follow the same routine that you had been following?

A Yes.

Q Now you told Mr. Buckley there was some mention of hospital, how did that come on?

A He said something about hospitalizing me. But I don't know why it came up. I don't know what was said before that to make it come up.

Q Did he say something to you similar to what Dr. Hamlett had said that if you didn't go home and rest and get your blood pressure down, he would have to put you in the hospital?

A Was my blood pressure up high?

Q Do you recall?

A No, I don't remember being told.

Q Do you recall whether Dr. Modaber said something to you like if you don't go home and rest and get your blood pressure down you are going to have to go in the hospital?

A No.

Q Did you continue to take your blood pressure from the 21st of November to November 26th?

A Yes.

Q What do you recall about your blood pressure during that period of time?

A I guess if it was a whole lot higher I would have

remembered it. I don't remember it being a whole lot higher.

Q All right so you are saying that you have no recollections today of it being any higher than before when you took it?

A Not extremely high. I think I would have remembered it if it was.

Q Okay. Did you continue to follow Dr. Modaber's recommendations that you take the phenobarbital, that you rest, that you avoid salty foods?

A Yes.

Q On November 26th you said you took the phenobarbital and went to bed is that correct?

A Yes, I had to take two at night time.

Q And was that what Dr. Modaber had told you to do?

A Yes.

Q Two at night?

A Yes.

Q Did you take both of them at the same time?

A Yes.

Q Do you remember what time it was that you took that medication?

A It must have been around nine.

Q Nine o'clock?

A I can't say definitely nine.

Q Then you went to bed and I believe you said that

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you woke up, and you thought that you were having false labor?

A I hadn't been in the bed too long. I still thought I felt some then but then the medication takes over and I went to sleep. You have no control, it just makes you go to sleep, you know, it knocks you out.

Q Did you feel that you had what you characterize as false labor pain before you took the medication?

A I didn't notice it until I laid down.

Q Now on that morning you described having difficulty getting into the hospital. Can you tell the ladies and gentlemen of the jury approximately how long you were outside the door at the hospital trying to get in?

A It probably was at least ten minutes.

Q And during that period of time were you having contractions?

A Yes.

Q Were you having pain?

A What's the difference in pain and contractions?

Q In other words you are using the word contractions, does that mean pain too? Did it hurt?

A Yeah, it hurts.

Q Were your children there with you at that time?

A Yes.

Q And your husband was banging on the door?

A Yes.

Q Did you try to go around to any other entrance?

A My husband sent the oldest one around to the other doors in front.

Q Your oldest daughter?

A Yes.

Q Did she then come back to you?

A I guess. Then the doors were open there and there was so much confusion I don't remember.

Q Now the first nurse you saw was Janice Strothers is that correct?

A I didn't know her name.

Q You did not know her name then but you do now, is that correct?

A Yes.

Q Now would you tell the ladies and gentlemen of the jury what Janice did before she went and made the telephone call you told us about?

A She took my blood pressure, she checked me.

Q Did she give you a vaginal examination?

A Yes, to see how far I had dilated, and she prepped me.

Q Are you saying she prepped you before she went to make the phone call?

A I don't know. I know she checked my blood pressure before.

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Q Did she listen to see if she could hear the fetal heart?

A Yeah.

Q How did she do that?

A She had that thing on her head and listened. I don't know what it is called. It is different from a stethoscope.

Q You know what a stethoscope was, that was the thing you had been using to check your blood pressure?

A Yes.

Q And this is a different thing, is that correct?

A Yes.

Q Did it have pieces that went in the ears like a stethoscope?

A It had a metal like thing that kind of went across the . . .

Q The top of her head?

A The top of her head.

Q And she would put that down on your stomach and listen?

A Yes.

Q You couldn't hear what she could hear could you?

A Not then no.

Q Then you heard her go and make a telephone call?

A Yes.

Q What did she do when she came back?

A She proceeded to put IV's in my arm. But she didn't do it, she had another colored lady to come in and do it for her. I know she give a reason why she didn't do it but I just can't remember what it is.

Q She put the IV's in and what else did she do?

A She might have prepped me then. She was checking my blood pressure and to see how far I had dilated.

Q So she did that more than once, to see how far you had dilated?

A Yes.

Q Did she check your blood pressure more than once?

A Yes.

Q Did she listen to the baby's heart?

A In fact I think she left the clip thing on my arm. I don't think they ever took it off.

Q Did she listen to the baby's heart?

A I don't remember her doing it but one time, she could have and I just don't remember it.

Q In other words some of your recollection of that time is hazy, is that what you are saying?

A I can't remember it now because it has been four years.

Q I understand. After a while you told us she put on the electronic fetal monitor?

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A Yes.

Q Did you have any conversation with her about that other than what you described? That is her telling you how it worked?

A She was telling me about the lotion she was putting on my stomach and why they put in on there. I had never had it done before. This was something new.

Q Do you recall now whether the IV, that is the medicine or the tube that is put in your - the back of your hand, whether that was put on before or after the fetal monitor?

A She put it on before.

Q That was done before?

A Yes.

Q Then the fetal monitor was put on?

A Yes.

Q Do you remember anything else that happened?

A I remember when she come back after the telephone call that was the first thing she did was to do the IV.

Q All right.

A I know they put the fetal monitor on.

Q Do you remember being given any medication?

A Do I remember the medication?

Q Do you remember somebody giving you medication?

A I just can't remember.

Q Now there came a time when another nurse came in.

A Yes.

Q And who was that nurse? Do you know today who that was?

A I just know it was a nurse. As knowing exactly which one it was today since I know their names, no, I can't tell you which one it was.

Q But a nurse came in and what did that nurse do?

A They started moving the thing around trying to pick up the baby's heart beat and also put a mask on my face and turned me over on this side.

Q Did you understand or ask anybody why they were moving the belt around that was on your abdomen?

A I didn't ask.

Q Did anybody explain to you why they were doing that?

A They were telling my husband why they were doing it, they didn't tell me directly.

Q What did they tell your husband that you recall, why they were doing that?

A They were - just sometimes it was hard to pick up the baby's heart beat and they moved it around to try to find it again.

Q Did you see or feel anybody check the fetal heart rate with the instrument that Mrs. Strothers had used when you first came in?

A I don't ever remember it being used again. It

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could have but I don't remember it.

Q I'm sorry.

A It could have but I just don't remember seeing it used.

Q Do you remember anybody using anything other than the fetal monitor in an attempt to find the baby's fetal heart rate?

A The nurses using something else?

Q Yes.

A It seems like there was another belt or something put around me and they were using it too. I didn't really raise up and look down.

Q Now you told us that there came a time when a third nurse came in, is that true?

A Yes.

Q When did that happen? Can you give us a time relationship at all?

A It wasn't too long after the other one was in. Now how long it was I don't know. It seemed like everything got dizzy, a lot of noise going on. I guess more people were coming in the hospital or something.

Q You mean there were more people coming to the hospital that morning?

A Yeah.

Q Did you have a conversation with the second nurse

- excuse me, the third nurse that came in?

A No.

Q Do you remember what she did?

A What she did do?

Q Yes ma'am.

A There was more nurses in there and they were trying to pick up the heart beat.

Q And how were they doing that?

A They were moving around on my stomach, different ways.

Q Now when Mrs. Strothers first put the monitor on, you said you could hear the baby's heart?

A Yes.

Q When the nurses were moving it around did you from time to time hear the heart beat and then it would fade away and you would hear it again?

A As definitely remembering what I heard, I don't remember now.

Q After the third nurse came in, who was the next person to come into your room that you remember?

A There was a man came in and he pushed the bed out and he introduced hisself as the. . .

Q Anesthesiologist?

A . . .anesthesiologist and he also said his name.

Q Did you ask him what he was going to do?

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A Well when he started messing around I asked him what he was going to do.

Q What did he tell you?

A He said he was moving my IV's to my other hand.

Q Did you ask him why?

A I don't remember asking him why. I don't think I did.

Q Did you ask anybody why he was doing that?

A I was just in general listening. I think maybe they might have answered my question and I didn't ask. I don't remember talking to him any more after that.

Q Who came in after Dr. Petkov, the anesthesiologist?

A A little bit later Dr. Modaber came in.

Q And what did he say to you?

A Nothing.

Q What did he say to anyone else in the room that you remember?

A I didn't hear him say anything to anybody.

Q You recall him putting on or you said felt like a stick, did you ask anybody why?

A I heard the nurse say they could pick up the heart beat with that.

Q And after he put that on did you hear the heart beat?

A Yes.

Q Did it sound like it had sounded to you when you first heard the heart beat?

A It wasn't as loud.

Q Not as loud. All right, now you heard Dr. Modaber say to your husband that you were going to have to have a C-section is that correct?

A As he [illegible] yes.

Q As he went out the door. Was Dr. Petkov still there? Or had he gone?

A No, he was there. I don't know what he was doing but he seemed like he was kind of moving around there. I don't know what he was doing.

Q You told us that a nurse gave your husband a clip board, that you saw your husband writing on that clip board, is that so?

A I saw the clip board. He was over to the right of me.

Q And did you see your husband write on that clip board?

A Yes.

Q Was Dr. Petkov still there?

A It seems to me like he was.

Q And you told us that a man and a nurse pushed your bed or stretcher out of that room, is that true?

A Yes.

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Q How did you get from the bed you had been in onto that stretcher?

A Him and the nurse picked me up and put me on there, or rolled me or some way another.

Q Were you still having contractions at that time?

A Yes, because they had to stop between a contraction to get me over there.

Q Had they removed the fetal monitor, disconnected it?

A I guess they had. I guess they would have had to to get me on there.

Q Were you aware of having heard the fetal heart rate and then you didn't hear anything before you left the room?

A I don't remember hearing anything before I left the room.

Q But you don't remember seeing anybody disconnect or do something with this fetal monitor?

A I don't remember anyone.

Q Now you told the ladies and gentlemen on the jury that this man and nurse pushed you down the hall through a lot of doors?

A Yes.

Q Did you know where you were going?

A No. Well I assumed that I was going to have the baby wherever they would take me to have the baby.

Q You went through some doors just before you had the baby?

A No.

Q No?

A It seemed like it had been a little ways back.

Q Now you told us that when you raised up you saw a sink in this room and a lot of bright lights?

A Yes.

Q And was it just before you looked up that you had told or said that the baby is coming?

A I had done had the baby.

Q You had already had the baby at that point?

A Yes.

Q How long had you been in that area before you actually had the baby?

A I had it going down the hall.

Q So you were being actually pushed down the hall at the time you felt the baby was coming?

A Yes.

Q And the baby was actually born as you were coming down the hall or after you got into this room you have described?

A I hadn't gone through no doors so I don't guess I had got in that room quite yet.

Q Now as soon as the baby is born did you look up?

A After it was out, I guess it just had come out.

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Everybody was hunting for gloves, and I was thinking to myself why did they want to get gloves.

Q Was that before or after you had the baby?

A Right when I was having the baby.

Q You were having the baby?

A I could hear to a distance wanting gloves, it wont nobody standing right over me saying it.

Q Were those female voices that were talking about gloves?

A Yes.

Q Did you look up as soon as you felt the baby had been born?

A I don't know if it was exactly as soon as it was born that I looked up.

Q How much time elapsed do you know?

A I couldn't tell you.

Q Was it a long time or a very short time?

A No, it wasn't a long time.

Q A very short time?

A I just know I looked up.

Q When you looked up you saw Dr. Modaber holding the baby by the ankles is that correct?

A Yes.

Q Was Dr. Modaber dressed in the same clothing he had been dressed in when you saw him in the room?

A I can't tell you that, I don't remember. I can just see him, his face and I could see him holding the baby, that's all I can remember.

Q Mrs. Kelley you told us that sometime in May of 1979 you went to see a lawyer, is that correct?

A Yes.

Q And after seeing him you received a copy of a letter?

A Yes.

Q That went to the Culpeper Memorial Hospital?

A It showed that it went to three different places.

Q All right to Culpeper Memorial Hospital?

A Yes.

Q Dr. Regan in Manassas?

A Yes.

Q And to Piedmont Obstetrics? To Dr. Modaber at Piedmont Obstetrics?

A It said Payette and Modaber.

Q It said Payette and Modaber on it?

A I'm not positive that it had both names on it.

Q Do you have that letter?

A At home.

Q You haveit at home?

A Yes.

Q Do you know where it is so you can bring it?

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A Yes.

Q Now you told us that the only person who had told you up to a certain point and time, the only person who ever told you what happened to the baby was your lawyer?

A Yes.

Q You told us about Dr. Modaber coming to your room immediately after the baby was born and you said that you saw him again that evening, did you ask him that evening what had happened to the baby?

A I didn't say anything.

Q Did you see Dr. Modaber the next day, that would be November the 28th?

A I just don't remember seeing him again. I was drugged so I don't know.

Q Is it possible that Dr. Modaber did come and see you on the 28th?

A He could have come in that morning but I know he didn't come in that evening.

Q Do you know whether he came to see you on the 29th?

A What day is that?

Q That would be two days after the baby was born?

A No.

Q Were you taking medication at that time on the 29th?

A I don't think they had me as drugged as much that

day as they did the day before.

Q But you have no recollection of seeing Dr. Modaber on the 29th?

A I saw Payette I know.

Q And that is the day you did see Dr. Payette, is that correct?

A Yes.

Q Did you ask Dr. Payette what had happened to the baby?

A He was talking to my husband.

Q Did you ask him any questions?

A So far as I can - ask him questions, I know that I laid there and the questions I wanted to ask him whether they came out or not I don't remember.

Q I'm sorry I didn't understand your answer, could you repeat it.

A I know I was laying there thinking of the things I wanted to ask but whether it came out or not I don't remember.

Q You don't recall whether you asked Dr. Payette any questions?

A No, I can't say that I can remember.

Q Have you asked your husband whether he knew what had happened to the baby?

A No, he was so upset.

Q Did you hear your husband ask Dr. Modaber or Dr.

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Payette what had happened to the baby?

A No.

Q Can you tell the members of this jury that when Dr. Payette came on the afternoon of the 29th he told you and your husband that it was up to Dr. Modaber to decide when he should come to the hospital, is that what you recall him saying?

A Yes, he kept going over that, trying to convince us that that was normal procedures.

Q So he told you that that was the normal procedure?

A Yes.

Q Nothing further of the witness Your Honor.

THE COURT: All right Mr. Buckley.

MR. BUCKLEY: I have nothing further Your Honor.

THE COURT: All right the witness may step down.

MR. BUCKLEY: Your Honor I would like to call an expert witness who has to see patients and I would like to call him out of order. It will take a few minutes to set up and I wonder if I could have the Court's indulgence for just a few minutes.

THE COURT: We will stand by while you get set up and if you need additional time we will recess and if you want to get your witness lined up you may proceed to do so.

RECESS

HERBERT G. HOPWOOD, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By; Mr. Buckley

Q Would you please state your name, Doctor?

A Herbert G. Hopwood, Jr.

Q And your present address?

A 3539 North 36th Street, Arlington, Virginia.

Q You are a practicing physician?

A I am.

Q Tell us where you practice?

A I practice at 3801 North Fairfax Drive, Arlington, Virginia.

Q What is the specialty in which you practice?

A I practice in obstetrics and gynecology.

Q In October of 1981, did you sit as a member of a medical malpractice panel in the case of Kelley versus Dr. Modaber?

A Yes, I did.

Q Doctor, would you give us a summary of your educational background?

A I attended college in Lancaster, Pennsylvania. I graduated from Thomas Jefferson University in Philadelphia in 1953. I then went, interned in a naval hospital in Oakland,

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California, had two years of general surgery residency there, also. After that, took a - had three years of general surgical, obstetrics and gynecologic residency at the Great Lakes Naval Hospital, Great Lakes, Illinois, and the Cooke County Hospital in Chicago, Illinois, and from there, I was stationed at the Naval Hospital of Bethesda, Maryland for four years, from 1964 to '68. I went into private practice of obstetrics and gynecology in 1968 in Arlington, Virginia.

Q Have you remained in practice there since that time?

A Yes.

Q Tell us the states or jurisdictions in which you are admitted to practice?

A I'm admitted to practice in the State of Virginia, Maryland, District of Columbia, Pennsylvania and California.

Q And could you tell us the hospitals where you hold privileges?

A I have privileges now at Arlington Hospital, Northern Virginia Doctors Hospital and Fairfax Hospital. I'm on the faculty at Georgetown University.

Q I was going to ask you, doctor, if you've held any positions as a lecturer or a professor in this area.

A I am Clinical Assistant Professor of Obstetrics and Gynecology at Georgetown University Medical School.

Q Have you ever in the past held any positions in

connection with any hospital in Virginia?

A Yes. I . . would you rephrase that again?

Q Well, in the past in terms of being a lecturer and so forth, have you held such a position with respect to any hospitals in Virginia?

A In Virginia? Yes, I have been amid the staff of Columbian Hospital and have lectured to medical students and to residents. I've been in charge of taking. . .teaching residents and interns and medical students at both Arlington and Fairfax Hospitals.

Q Have you published any articles in your field of specialty?

A Yes, I have.

Q Could you tell us some of the journals in which your articles are published?

A I have published in the American Journal of Radiology. I have two articles published - or three articles. I published one that's coming out this, the 15th of September in the American Journal of Obstetrics and Gynecology, and two others in the American Journal of Obstetrics and Gynecology. I have one in the Annals of Internal Medicine. I have one in Obstetrics and Gynecology.

Q Have you lectured in your field from time to time at conferences and so forth?

A Yes, I have.

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Q Would you tell us whether you belong to any medical societies in the Commonwealth of Virginia?

A I am the past president of the Arlington County Medical Society, a member of the American College of Obstetricians and Gynecologists, American College of Surgeons, International College of Surgeons, American Fertility Society, Medical Society of Virginia and the South Atlantic OB-GYN Society.

Q We've had a long statement of your qualifications, but I do want to ask you one additional question. In your years of practice, can you tell us how many babies you have delivered?

A If things keep going the way they are now, within the next two and a half years, I will have delivered my ten thousandth child.

Q Your Honor, I move that the witness be accepted as an expert in the field of obstetrics and gynecology in Virginia.

THE COURT: Any questions on his qualifications?

MR. PLEDGER: No, Your Honor.

THE COURT: The witness is admitted as an expert in his field, Mr. Buckley.

Q Doctor, have you had occasion to sit on medical malpractice review panels in Virginia?

A Yes, I have.

Q Are you familiar with the procedure that is used on those panels?

Q Would you please tell me how many members the panel has?

A It has actually seven members, three physicians, three attorneys and a judge.

Q Would you tell us how the physicians are chosen?

A Generally, physicians are chosen in the specialty of which the malpractice panel is coming. Generally, they are people from the community or from the...or a locality very close to the community where the case is being presented or has been filed, as far as that were concerned. And generally, they are members of, not only their local medical societies, but also the Medical Society of Virginia and other professional organizations.

Q Would you tell us how the doctors are nominated to be eligible to sit on such panels?

A Well, I don't know how everybody else was. I know that I was selected because I am a member of the . . .by the American College of Obstetricians and Gynecologists and because I happen to belong to the State Commission on Maternal Mortality and Perinatal Mortality.

Q And how are the members of the panel actually appointed?

A They are appointed by the Governor.

Q Doctor, would you tell us whether or how the panel decides a case?

A After hearing the testimony from both the plaintiff

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and defendant, witnesses being presented on both sides, the next . . .the panel goes into deliberation, and finds one of four things: whether there was not a cause, whether the action of the physician was not a cause of the result; whether the action of the physician was a cause of the result; whether there was liability - excuse me, whether the action gave a deleterious result but was not the direct cause of the problem, and there's one more and I'm sorry, I can't remember that. It's a corporate type of thing, but I, and I'm an obstetrician, I'm not an attorney.

Q All right. Doctor, I'm going to ask you whether the plaintiff or the patient has the right to call witnesses before the panel?

A Yes sir.

Q Is that, does that apply to both fact and expert witnesses?

A Yes sir.

Q And does the physician have the right to also call such witnesses?

A Yes sir.

Q Is there any restriction that's placed by the panel on the types of witnesses that may testify?

A Not to my knowledge.

Q Is there an oath which the members of the panel take in connection with this proceeding?

A Yes, there is an oath that they will strive to impartially arrive at a just result. That's paraphrasing it, but that's what it is.

Q And do any of the attorneys or the physicians have any prior connection with the matters or . . .

A Absolutely not. Absolutely not.

Q Doctor, let me direct your attention to the present case and the panel which you sat on on October 16, 1981. Aside from yourself, who were the other physicians who sat on that panel?

A Dr. Zirkle from Harrisonburg and Dr. Stacy Lloyd from Fredericksburg, Virginia.

Q Can you tell us the areas of specialty of these two physicians?

A They are both obstetrician-gynecologists.

Q And what is the reason in this case that all were chosen from that specialty?

A Because it was a case which involved an obstetric calamity.

Q Doctor, did the panel in this case hear testimony?

A Yes sir.

Q And you personally sat and heard the testimony in the case?

A Yes sir.

Q Did it hear from the Plaintiffs, Jessie Marie Kelley

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and Ronald Kelley?

A Yes sir.

Q Did it hear from a Dr. Abramson?

A Yes sir.

Q And from a Dr. Burke?

A Yes sir.

Q And did it hear from other nurses that day as well?

A Yes sir.

Q Do you remember if it heard the testimony of Barbara Amos?

A Yes sir.

Q And did it hear from the physician involved, Dr. Modaber?

A Yes sir.

Q And did he also call a witness? Aside from himself?

A Yes, he did call a witness.

Q And did the panel also have an occasion to examine any documents or records in the case?

A Yes sir.

Q Do you recall what those records were?

A Before the panel meets, a lot of documents are sent out to the panel, first, to save time essentially, and what were sent out first and what were admitted into evidence there were the prenatal record and the labor and delivery records at the time.

Q Doctor, did the panel refuse to consider any documents?

A Absolutely not.

Q And did it refuse to hear any witnesses?

A Absolutely not.

Q Let me show you what has been marked in these proceedings as Plaintiff's Exhibit No. 11. The records from Culpeper Hospital. And let me ask you if those appear to be the records which were examined in connection with this case?

A Can I look at my own records here?

Q Sure, you may.

A (Witness reviews records,) Yes.

Q Doctor, after hearing the testimony at the panel and reviewing the documents, was the panel able to reach a conclusion in the matter?

A Yes, they were.

Q Can you tell us. . .let me move back before I forget...as to whether you also examined certain records in that case that came from Piedmont Obstetrics?

A (Pause.)

Q And which has previously been identified in these proceedings as Exhibit No. 12?

A Yes.

Q Now, was the decision of the panel expressed in a written document?

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A Yes sir.

Q I show you what has been previously marked as Plaintiff's Exhibit No. 14 in this proceeding, and ask you if you can identify that document?

A Yes sir.

Q Does that appear to be a copy of the decision rendered by the panel?

A Yes sir.

Q Can you tell us what that decision is?

MR. PLEDGER: Your Honor, the exhibit has been admitted into evidence. It speaks for itself.

THE COURT: It does, Mr. Buckley. There's no use to have that. . .

Q Your Honor, I'd like to have the witness read from the document. . .

THE COURT: You may present it to the jury, it speaks for itself, and it certainly doesn't require the witness to read it. It's being admitted into evidence and . . .

Q Your Honor, I move Plaintiff's No. 14.

THE COURT: Any objection, Mr. Pledger?

MR. PLEDGER: No objection, Your Honor.

THE COURT: Fourteen is admitted into evidence.

FINDINGS OF PANEL RECEIVED INTO EVIDENCE AT THIS TIME AND MARKED AS PLAINTIFF'S EXHIBIT NO. 14.

Q Doctor, can you tell us whether the decision of the panel was unanimous?

A It was.

Q Can you tell us what that decision was?

MR. PLEDGER: Your Honor, the document has been admitted into evidence.

THE COURT: I will allow the general statement of what the decision was just for clarity.

A The decision was that the. . .if I may read it, "The evidence supports a conclusion the health care provider failed to comply with the appropriate standard of care; that such failure is a proximate cause in the alleged damages."

Q Were there any dissents in that finding?

A Not one.

Q Was your finding made through a - did you agree with that finding?

A Yes sir.

Q Was your agreement based on a conclusion you had formed to a reasonable degree of medical certainty?

A Yes sir.

Q Let me ask you whether then, therefore, in this case you have reached an opinion as to with a, to a reasonable degree of medical certainty as to whether the standard of care had been complied with?

MR. PLEDGER: Your Honor, that's been asked and

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answered.

THE COURT: I think it has, but I'll certainly allow the witness to give his personal opinion as a witness here today.

A Yes sir. I do not feel the standard of care had been come up to.

Q In general terms, can you tell us why that standard was violated?

A There are two aspects of the case which are very troublesome to me. The first involves the past history of the patient having had two children in which she had had at least moderately severe toxemia or preeclampsia pregnancy. The third pregnancy having been terminated as an abortion because of hypertension; the fourth one, evidently doing well. And this one, when the patient first came in on the first visit, the patient showed at that time, I feel, signs of hypertension, perhaps pregnancy induced, but at least hypertension...which she exhibited throughout the rest of her prenatal course. That's the first part. The second part, was at the time of labor, the onset of labor. I feel that treatment of toxemia was not initiated properly; that perhaps not at that same minute, but at least within a very short period of time, someone should have been there with some medical expertise to stabilize this patient. And if there was anything good that came out of this case, I think the good thing is that this woman didn't die because in

the United States today, the three leading causes of maternal mortality are hemorrhage, infection and, unfortunately, toxemia. And toxemia is one of the leading causes of death, maternal death, in the State of Virginia at this time. I happen to sit on the Maternal Mortality Commission. And we have a number of cases every year in Virginia in which people die with toxemia.

THE COURT: Is that generally known in the profession of obstetrics, doctor?

A Yes sir.

THE COURT: Go ahead, Mr. Buckley.

Q Doctor, we had some testimony yesterday from Dr. Abramson about toxemia, but I think it would be helpful if you would again explain what this disease is for all of us.

A Toxemia is a very difficult disease...to...to discuss from only one aspect in that no one really knows exactly what causes the toxemia pregnancy. But it is characterized by three things generally. One is hypertension; two is by edema or weight gain or, three, the person has protein, usually albumin, in the urine. And it is a condition when several things happen in the body. Most often the blood pressure goes up because the vessels constrict. The blood volume generally is decreased. The vessels constrict. The blood pressure goes up. The kidneys fail to work at their best possible. And because of that, you not only have a maternal danger as far as the mother is concerned , with the problems of hypertension, kidney failure or

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stroke, but you also have the baby being affected. So everybody is - when you've got a case of toxemia, everybody has got a problem, both the mother and the baby. The mother from the hypertension, the baby from the hypertension secondarily because first of all, there's inadequate profusion as far as the blood going through the placenta to the baby; and secondly, inadequate waste removal from the baby, and then the baby developing acidotic condition, which is of course very dangerous to life.

Q In terms of the threats to the developing baby, what are the threats during a pregnancy in a woman who has toxemia?

A As far as the baby is concerned?

Q Yes.

A Well, of course, failure to grow , failure to develop, failure to have adequate profusion as far as the brain is concerned so that the baby has a very high chance of being born brain damaged. Not really as far as the ...more as far as development of the baby is concerned.

Q Can you tell us what the course of treatment is in such a disease?

A Depending upon the severity of the toxemia, it depends upon whether the patient should be managed in or out of the hospital. Warning signs in toxemia pregnancy are, in the second trimester or the second three months, the fourth, fifth and sixth month, for example, the body, the mother's body works

as far as blood pressure is concerned by increasing the stroke volume of the heart; more blood is not available. At the same time, the vessels, the peripheral vessels dilate. The blood pressure in a patient who is pregnant in the second trimester should go down and stay down. And that's why most people who have been pregnant realize at that time several things happen. One thing is they notice that their hands turn red and they feel kind of flushed most of the time. If they get up real rapidly, they'll notice that their heart, they'll feel faint and their heart beats fast. This is all because of this peripheral dilation of the vessels, the blood going out, profusing well, getting a lot of oxygen in there, getting a lot of oxygen in, getting a lot of the waste material out at the same time. On this case, when this patient first came in, it was in the middle of her second trimester there, she had an elevated blood pressure, and that's the first warning that you have, this. So you have got a past warning of the toxemia. Which she, which is bona fide with the first two pregnancies that she had and then with an abortion because she had developed it before. The second thing was that when she first came in the first time, she had what I would consider to be an elevated blood pressure for somebody in the second trimester of pregnancy. Now, obviously, this is not the same type of blood pressure you would haveif somebody was seventy-five years of age. But a woman who is thirty-three or thirty-four years of age should certainly not have a

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blood pressure this high and not at least have it investigated.

Q And, doctor, would it help if I were to refer to the prenatal chart here and show us what you mean. I have a blow up...if you would explain. Your Honor, the only thing I would ask is if Dr. Hopwood could be permitted to come down and. . .

THE COURT: Yes sir, you may. Now, can you refer to which exhibit you are now placing. . .

Q Now, I'll be referring to Exhibit No. 3, and I'm wondering if some of the members of the jury can't see, if they could move a little closer or something.

THE COURT: They may sit in the box anywhere the jurors choose to sit.

Q All right.

THE COURT: Turn it a little different angle, if you will Mr. Buckley, now , that's better.

Q Oh, right here. I want to find a spot where everybody can see.

THE COURT: Now, you need to face it directly this way.

Q Okay.

THE COURT: All right, now the doctor can stand inside the rail if it would be helpful. Or however he wishes. All right, now proceed with your questions.

Q Okay.

A Let's start a little earlier than that. First of

all, the patient first came in on the 30th of May, 1978, and has a blood pressure of 134/72. Now, the 72 diastolic, lower pressure doesn't bother us too much, okay. But 134 systolic means that there is some resistance developing up as far as the arteries are concerned. As we look in here, look at 8/22, here, okay, she put on four pounds here. Look what the blood pressure is right here. It's 144, 140/68. In other words, at no time... a patient generally in the second trimester is going to have a blood pressure of about 110 at the most. In other words, at 60 to 70, that pressure really goes down. So this is a warning sign. Plus, here, on the 22nd here, we notice here that she is developing, all right, some elevation of blood pressure, but look here. You can also see she is having a trace of protein in her urine. Now, some people say, well, just because you've got a trace of protein, it doesn't mean anything. Well, in my experience it means something. It means something, and somebody's got to start looking for what's going on here.

Q Is there an entry on the chart next to that, doctor?

A Yeah, it says doing fine. The next time which becomes a little bit more concerned is between 9/19 and here, we have 155 pounds, okay. That's a six pound weight gain. Again, the blood pressure as far as it's concerned here is still not what we'd consider the reasonable place here. But, if you go to 11/9, she has gone here in less than six weeks period, she's

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gained fifteen pounds. Well, you are really going to have to do an awful lot of chowing down to put on fifteen pounds, a pregnant woman, in this period of time. Some of us think we can do it, but I don't think we can do it. But a pregnant woman just doesn't do this type of stuff. Also, look at her blood pressure here. It's 160/94. This means that her blood pressure has raised. The classic definition of hypertension is an increase of more than 30 points or 10 points in the diastolic range here. And she's already qualified here. Okay. Things are still - and right here we are looking here, and we are getting edema. Edema means that her kidneys are not profusing well. This means that she is retaining fluid. She's not getting the fluid out, and something's got to be done. About this stage here, you have to make some kind of decisions. You've got to get that blood pressure down. You've got to take this patient and get that blood down. What's the best way to do that? Get her in the hospital, and stabilize her condition. That's the only chance this baby is going to get.

THE COURT: And what date are you referring to when you say that?

A. 11/9, right here. So she comes back in five days. Okay?

Q Doctor, let me just ask you to - for some legal formalities here. In terms of what the standard of care requires, can you give us an opinion as to what the standard required, the

standard of care required on 11/9?

A On this one here. I personally think in this situation this patient should have been. . .

THE COURT: Now doctor, let me ask you to not refer personally but what. . .

A The standard of care. . .

THE COURT: . . .the general standard of care within your profession.

A The general standard of care in this situation would mean that this patient should have been admitted to the hospital for stabilization of blood pressure.

THE COURT: And you would say that's the general opinion of the practitioners?

A Yes sir.

THE COURT: All right. Go ahead, Mr. Buckley.

A Okay.

Q Let me ask you, doctor, just to pause on 11/9. Aside from the hospitalization, were there any other things that the standard of care would require on 11/9?

A Well, you've got to get that blood pressure down. You've got to treat that.

Q How about - I'll let you proceed.

A All right. Five days later, she returns. Okay? Five days later, she returns, and instead of losing weight, in here, she has gained. . .

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THE COURT: Excuse me a minute. Mr. Buckley, I think in order to be cautious about any communication, you should stand outside the jury box. We don't want to hear any communication between you and co-counsel.

Q Oh, sure, All right, Your Honor.

THE COURT: And that can be avoided if you all need to confer by waiting outside the jury box. Go ahead, sir.

A And here, okay? So she's gained instead of losing or stabilizing, she's gained again, okay?

THE COURT: Now, when you say here, give us a date, if you will sir.

A 11/14, sir. 11/14. Okay. She also at this time continues to have swelling which means that she again is not profusing her kidneys. I mean, you can get a plus two, it means you can take your finger and push it into the ankle in there and, say, the ankle for example and it will go in almost a centimeter. That's a significant defect. Okay? Now, on 11/21, she. . .

Q Doctor, let me just impose a legal formality again. May I ask you whether you've got an opinion to a reasonable degree of medical certainty as to what the standard of care required on November 14?

A The same standard of care that was required on the 9th of November.

Q Would you tell us the treatment that was required?

A She should have been admitted to the hospital. Her blood pressure should have been stabilized, and she should nvae been put on a very strict bedrest here. Finally, on the 21st, she comes in; one week later and she has gained five pounds. You see, this whole thing, there is obvious ways that things can get better, but they aren't getting better. You have got somebody here who is sick, who is very sick and who is risking great problems.

Q Doctor, do you have an opinion to a reasonable degree of medical certainty as to what the standard of care required for the treatment as of November 21st?

A Well, that was mandatory, that she should have been in the hospital on the 21st absolutely. Now, there are people that would say, well, gee, you've got a family to take care of and everything like that, but, you know, I've always been impressed that the kids don't do very well without a mother.

Q Doctor, what do you mean as of this visit, November 21, what is the condition of Mrs. Kelley?

A Well, she's showing great evidence of severe toxemia, severe preeclampsia. She has an elevation of blood pressure. She has a weight gain, and she's also developed protein in the urine.

Q In terms of the particular threats to her well-being, could you tell us what they are?

A Well, her own particular well-being, one great

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problem that she would work into very easily would be kidney failure, requiring dialysis. Another would be that she could very possibly go into eclampsia with convulsions, which still in the United States today has a ten percent mortality rate. And about a fifty percent mortality rate as far as the baby is concerned. And the third, which if you are thirty-four years old, is that she was very, she is very likely to develop a stroke.

Q Now, are these risks you mentioned something that were. . .

THE COURT: Mr. Buckley, it would be more appropriate for the doctor to resume the witness stand on these general questions, wouldn't it. Unless it relates to . . .

Q I have a few more particular questions I want to ask him bout. . .

THE COURT: All right, go ahead.

Q Now, the risks you mentioned as of November 21, are these risks that were recognized in the profession at that time?

A Yes sir.

Q In '78 and '79. Doctor, this chart also indicates that - there is an entry for estriols. Can you tell us what that means?

A Estriols are a state of well-being supposedly of the baby. Because estriol is a chemical which is manufactured in the human body to a certain extent, but more likely by the

fetal adrenal gland which shows good or fair condition as far as the baby is concerned. And as I recall, there are several estriol figures in here. These estriol figures, you take estriol figures, are on the low, very low, normal side, very low normal side. They certainly are not what I would like to see as far as someone who had all these little things going on at the same time.

Q Are the estriol tests that are shown on this chart something that is to be relied on by the treating physician?

A Well . .

MR. PLEDGER: Your Honor, I would have to object to the leading form of the question.

THE COURT: I think we'll have to remind the doctor again not to relate it to what you would do but what the general standard of the practice would require, doctor. It's a matter of terminology. If you'll relate it to that, please. And go ahead with your question, Mr. Buckley.

A They would not be the - they are not the sole cause or the sole thing that you would rely upon...as far as fetal well-being.

Q Is there anything else in this chart that in your opinion you would like to call to our attention?

A Um. . .

Q Would you tell us in general terms what the condition of the patient was on the 9th through the 21st, was it im-

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proving or getting worse or the same?

A It appears to be getting worse.

MR. MCDANIEL: Your indulgence, Your Honor.

(Witness returns to stand)

Q Doctor, let me ask you whether there are tests during the period we are talking about to determine the extent of the toxemia or how the baby is responding to it?

A Okay, well, the simplest test, of course, is taking the patient's blood pressure. That's a very simple situation. The second test is checking the patient's urine. The third test is taking the patient's weight, all those three things. The fourth test is looking at the patient, seeing if she is swollen or if she has edema in her lower extremities or upper extremities. Now, lower extremity edema, or swelling of the ankles, is a rather common finding among pregnant patients, particularly in the last trimester of pregnancy. If it occurs late in the day, it's not usually an - as worrisome a thing because what has happened there is that the uterus is pushing down on the lower pelvic vessels, and you don't have as much drainage. One of the great problems that arises with the swelling is if you're swelling, not only of your lower extremities, but of your upper extremities, because, of course, the upper extremities are above this, and this means that there is some problem as far as profusion again.

Q Doctor, are you familiar with a test called the

non-stress test?

A Yes sir.

Q Can you tell us what that test is?

A A non-stress test involves a fetal monitor, two belts placed on the mother's abdomen. One belt gets the baby's heart rate. The other belt will measure contractions but also will measure in case the baby is kicking. And when the mother feels the baby kick or move, she pushes a button, and a dot comes up. At that point, you want to look at the fetal heart rate and see if there is any change, particular change of the fetal heart rate. If the fetal heart rate is reactive, it will change anywhere between five and ten beats as far as that were concerned. If it beats and then goes down and stays under, this is a sign that the placenta reserve is in compromise because one of the first things that happen of worry is that the placenta is not profusing well, the baby is not reacting well. A reactive stress test would be one therefore which you'd have five to ten beats for a while, and then it would change, but if it goes down and stays down, it's very worrisome.

Q Can you tell us what, if any, role such a test would have in Mrs. Kelley's case?

A Well, it gives you an immediate idea about what's going on as far as the baby is concerned. Estriols generally do not return for two, three or four days after you've collected them. There is always a problem with urinary estriols to most

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of us in that you're wondering if the patient has collected all the urine during that time so we can measure the estriol which she has. That's always been a problem. The other problem is it takes at least two to four days to have them back. Now, lately - this has only been within about the last two or so years that it's been available to everyone. . .

MR. PLEDGER: I'd have to object to that, Your Honor.

THE COURT: Objection sustained as to what the recent developments are. We are relating this to 1978 standards, doctor.

Q Just referring to 1978.

A Okay.

Q And relating to your opinion to a - whether you have an opinion to a reasonable degree of medical certainty as to whether or not the non-stress test which you've described should have been used in this case.

A I think it would, yes sir.

Q And are you familiar with a 1978, with a non-stress test that could be applied without using a fetal monitor as you have described it?

A I have never heard of it.

Q Have you ever heard of a test where the physician puts his hand on the stomach or abdomen of the patient for five, ten, fifteen, twenty minutes and listens to the fetal heart with his stethoscope? As being a non-stress test?

A No sir.

Q Just in terms of the prenatal course of care which you've testified to so far up until the 21st, do you have any opinion as to whether or not the failure to follow the standard of care as you've testified was the cause of the baby's death in this case?

A I feel it was a cause.

Q And is that opinion to a reasonable degree of medical certainty?

A Yes sir.

Q Doctor, now I'm going to ask you to refer to the labor record in this case. And if I could ask you again to explain this to the jury...would you please tell us, doctor, what the first entry in that chart is?

A The first entry here is with the admission of Mrs. Kelley to the hospital at five forty-five. She has a blood pressure of 160/110 with a fetal heart rate of 120, is having hard contractions every two to four minutes, and is dilated approximately three centimeters.

Q Would you please tell us the significance of those findings?

A This means to me that the patient has two things going on. First of all, that she is in active labor, and two, at the same time, she has an elevation of her blood pressure.

Q How would you describe the patient's condition at

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this time?

A I would say her condition at that time was serious.

Q Do you have an opinion to a reasonable degree of medical certainty as to what the standard of care would require if the doctor is notified at five fifty a.m. and given that information?

A I will go a little bit further than that. Knowing the past history of this patient, the history of the rapid deliveries, the history of toxemia, I would think that he would be making some effort to one, come in so he could stabilize - and so he could treat the patient and stabilize her blood pressure.

Q And does that indicate in the chart there that the doctor was notified with this information at five fifty?

A Yes sir.

Q Okay. Now, do you have an opinion as to whether that standard of care as you described was violated in this case?

A Yes sir.

Q What is the basis for that opinion?

A Well, there is a hiatus here of about an hour. . . as far as I can tell an hour and twenty minutes before the doctor arrives at the hospital. Even though he has been told that she has an elevated blood pressure, even though he has been told that she has, that she is having hard contractions and having known the past history of his patient.

Q Do you have any opinion as to whether this failure which you just described was the cause of the baby's death in this case?

A (Pause). I feel there was an opportunity here to salvage this case, yeh.

Q Okay. And had the standard of care that you described been followed, it's your opinion then that there would have been an opportunity to save this baby?

A I think there is an opportunity available here.

Q Doctor, let me ask you to assume that the physician was called at seven o'clock and given information that there was a fetal heart rate of ninety, even though you have earlier testified that the standard of care would have earlier required hospitalization or earlier required the physician to come to the hospital, assuming the physician was home at the time, that those things had not been done, what would the standard of care have required at seven o'clock?

A Immediate arrival of the physician at the hospital and stabilization of the patient's blood pressure. Now, there's going to be people who are going to say that the patient should have had a caesarean section at this minute as far as that were concerned. But I personally feel. . .

THE COURT: There again, doctor, relate it to the general standard. . . .

A I've got to be careful about that, yeah, okay.

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THE COURT: Not your personal thoughts.

A Okay.

THE COURT: What your opinion of the standard of the profession would have required.

A Okay, I think that the physician should have been there to treat his patient at that time and to make a decision as far as her future care.

Q I think that's all I have in reference to this chart. I'm afraid I have one more exhibit I'd like to refer you to. Doctor, I'd like you to look at what's been marked previously as Plaintiff's Exhibit 8. Would you please explain what this is?

A Okay. This is a fetal heart tracing. This shows a) the frequency of contractions, and these are one minute apart. And this shows the amplitude of the contractions. This top part shows the rate of the fetal heart rate. And very frankly, it also shows the contraction, the reaction of the baby's heart rate to the contractions at this time.

Q Doctor, could you tell us the significance of this chart as related to the present case?

A Well, it shows that she's having very active contractions. If you look here very carefully, it's been between every two and a half to three minutes. And these are sufficient hard contractions. They are at least seventy-five millimeters of mercury pressure here. At the same time, it shows that with

the contractions beginning here and beginning here, if you notice here, that there is some decrease in the baby's heart rate. More than that ten beats per minute that we were talking about a little while ago. As you notice here, they keep getting lower and lower and lower and lower. One of the reasons that babies' heart rates are like 120 or 140 is because having a small heart, they have to put the same amount of blood through their body that you and I do. Consequently, it has to beat faster, and that's why that's a sign of well-being generally as far as the baby is concerned up to a certain point. And you notice that this means the baby at this point in here is not profusing its body as well as it could. Now, these are external. In other words, the heart rate is being measured by a Doppler, which is getting a baby's heart rate here. A more accurate way is here in which a scalp clip comes in. Now, a scalp clip does something else. Not only do you get a very accurate rate as far as the baby is concerned, but you also can get an electrocardiograph, and this can a lot of times show you if there's any abnormalities as far as the baby's heart rate is concerned.

Q Can you tell us where that scalp clip was applied?

A As far as I can tell, it's about here.

Q So, the section of the tape that's marked 76593?

A Yes.

Q It's just at the beginning of that particular segment?

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A Uh-huh.

Q Okay. Doctor, just assume for present purposes that this fetal monitor strip is applied and it begins taking a measurement at six forty. Let's assume that. Please tell us what the condition of the baby is at that time.

A Well, you notice this dip, these dippings coming in. These are what they call variable decelerations. Then all of a sudden here you see how they scoop in here like this. These dips in here like this mean that the baby is having some problem as far as profusion is concerned because it dips but it comes back up. But you'll notice it starting to go down and scoop down and scoop down and scoop down and scoop down which means that there is not adequate profusion coming through the placenta to the baby.

Q Would you tell us what the standard of care would have required if that had been applied when those readings had been determined?

A I think the patient should have been examined.

Q What type of examination?

A A vaginal examination.

Q To detect what?

A Well, to detect, first of all, a ...dilatation as far as the patient is concerned to see if labor, if delivery was imminent. Two, to determine if there were any problems as far as a prolapse of the cord or something like that.

THE COURT: What type of delivery according to the standard of care generally expected would have been called for in that situation?

A I cannot say, Judge. I would have to say that you'd have to be there to examine her, then you make your decision.

THE COURT: It's an on-the-spot decision that you would have to make at the time. All right, go ahead, Mr. Suckley.

Q May I have a moment, Your Honor? Doctor, may I ask you, according to the standard of care, who is it who must make that decision?

A The doctor.

Q Doctor, would you please tell us with regard to your opinion that the failure to follow the standard of care, prenatal care prior to November 27th as to how that failure related to the death of the baby in this case?

A Well, there's two aspects of that, Counselor. One aspect is that there are so many places in here that could have been salvaged. With the decrease in profusion, with a small baby, they are not going to tolerate delivery well. And then when a person comes in with a full-blown, fulminant, severe toxemia, it makes delivery that much more difficult. There is another condition that occurs quite frequently with the - which is called abruptio placenta, premature separation of the placenta

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which very possibly could have occurred in this case. There is no pathology report on this case at all which rather surprised me.

Q Doctor, the panel, you will recall there was. . . various witnesses testified as to what happened after seven a.m. on November 27th. Do you recall that?

A Yes sir.

Q And do you recall also that there were various versions of what occurred?

A Yes sir.

Q Do those various versions of the events after seven o'clock, do they relate in any way to your conclusion as to whether there was any violation of the standard of care in this case?

A I can make no comment on that.

Q I'm not asking you whether there was a violation of the standard of care after seven p.m., I'm asking you as to whether your opinions here today are dependent upon accepting one version or the other of the events past seven a.m.?

A Yes sir.

Q No further questions at this time, Your Honor.

THE COURT: All right, you may cross examine, Mr. Pledger.

CROSS EXAMINATION

By: Mr. Pledger

Q Thank you, Your Honor. Doctor, let me first go to the panel hearing and ask you if you went through in response to Mr. Buckley's questions that you'd heard from the Kelleys, Dr. Abramson, Dr. Burke, the same as Dr. Modaber, and you were asked if there was another witness called. Do you remember who the other witness was?

A There was another nurse.

Q Does the name Barbara Kidwell sound familiar to you, sir?

A Just to the extent that she and I were sitting back in the witness. . .

Q All right, you don't remember whether she is the one that testified at the panel?

A I'm sorry, I can't.

Q Doctor, would you tell the jury what time this panel started?

A It was in the morning, Fredericksburg, approximately ten o'clock.

Q What time did it finish?

A It was done about. . .between five thirty and six o'clock.

Q All right, now, during that period of time you heard from these witnesses who were listed and, as you say, another witness. Let me ask you, did you hear from Mrs. Moran, a nurse? Do you remember that?

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A I'm sorry, I can't recall that.

Q Do you recall hearing from a Joyce Sites, another nurse?

A No.

Q Do you remember hearing from Janice Strothers, the nurse that was on duty when Mrs. Kelley came in.

A No.

Q Do you remember hearing from Dr. Markham, the pediatrician who came to the hospital?

A No, I do not.

Q Did you hear from Mrs. Garnett, the nurse that attended to Mrs. Kelley?

A No.

Q Did you hear any expert witnesses presented by the defendant, such as Dr. William Peterson?

A No.

Q Do you know Dr. Peterson? The Washington Hospital Center?

A I know of him, yes.

Q Did you hear Dr. Theodore King from, or hear from Dr. King from Johns Hopkins?

A You mean at that time?

Q Yes sir?

A No sir.

Q Did you hear from Dr. Michael Willoughby at the

time of the hearing?

A No, I did not.

Q Doctor, have you been given anything to review since October of last year?

A Yes.

Q What have you reviewed?

A Well, I got a transcript of the trial.

Q You have a transcript of what was presented?

A Yes.

Q And have you reviewed anything else?

A The transcript of the trial. I have another copy of the hand-out that you all gave me before the trial, and I have had the opportunity to look at the depositions of Dr. Peterson, Dr. King and Dr. Willoughby which were taken about two weeks ago.

Q All right, and who gave you those depositions to review?

A Mr. Buckley.

Q Mr. Buckley did?

A Uh-huh.

Q All right sir. Now doctor, you have looked at the records of the hospital, and in particular, I believe you have looked at Dr. Petkov's note.

MR. BUCKLEY: Your Honor, I believe the name is Petkov. I have been hearing the wrong name again and again and unless

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I'm mistaken, this rings false in my ear.

THE COURT: Can we clarify the name then for the record? Do you want to clarify it, Mr. Pledger?

Q Well, I'm not sure that I can. Let me just see if I can get a spelling on it.

MR. BUCKLEY: In the courtroom, there is a former attorney who represented Dr. Petkov. We've been told by Dr. Petkov's attorney his name is Dr. Petkov, so. . .

THE COURT: All right.

Q All right, well, I stand corrected, and I will try to call him Dr. Petkov from now on.

A Have I - you asked me if I received a note from. . .

Q Did you see the note that Dr. Petkov had written in the chart?

A No, I did not.

Q So when you looked at that today, that was the first time that you had had an opportunity to see that particular note?

A I'm looking at it now. I have never seen this note before.

Q You have never seen it before, all right sir. Now, in that note, doctor, does that identify who he is? -

A Excuse me, I'll have to read it first.

Q All right, take your time.

A It says, I guess it's Petkov, the bottom here,

and I. . .okay. . .

MR. BUCKLEY: Can I see what you are referring to?

A Well, the interesting part about this to me is that the first sentence says, "Responded to emergency call for acute fetal distress." If I didn't know that he was the anesthesiologist, I'd never guess from this note.

Q All right sir. And what time does he say that he responded?

A Seven twenty-five.

Q And what does it say he did?

A He gave intermittent positive pressure breathing and cardiopulmonary massage.

Q If I may take you back after seven twenty-five, what does he write that he was doing?

MR. BUCKLEY: I'm sorry, I didn't hear the question.

THE COURT: What does it indicate that he was doing after seven twenty-five.

Q Yes, after the notation of seven twenty-five on the thing, does it say, "In labor room?"

A "Responded to emergency call for acute. . .

MR. BUCKLEY: Your Honor. . .

THE COURT: What's your objection, Mr. Buckley?

MR. BUCKLEY: The objection is to having him read from the document which Your Honor prevented me from doing earlier, and it's having him explain a document that he didn't prepare.

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THE COURT: If he can explain it from his general expertise, I'll allow it. The question being asked. . .

MR. BUCKLEY: I think it's improper though to have him read from the document, Your Honor, and allow him.

THE COURT: Well, you may certainly have it admitted into evidence if you wish to, but in order to explain the course of treatment, any doctor who is qualified certainly may read from it and enlighten the jury and the Court. You may proceed.

Q It is in evidence, Your Honor. The thing is that this witness had never seen it before. That is why I was trying to get him to read it and to ask him questions about it.

THE COURT: All right,you may proceed. The objection is overruled.

Q Does it indicate there that he did that in the labor room, that he started an IV with a number 16 caliber catheter? In the back of the left hand?

A At seven twenty-five in the delivery. . .

Q And that's stricken out and then labor is written in?

A Yes, labor room, started IV number 16 in the left hand.

Q It says immediate preparation for C-section, is that right?

A It says some kind of preparation for C-section,

yes sir.

Q All right. Then the next line is what?

A Approximately seven forty-three baby delivered in the hall of the OR but baby was Apgar zero.

Q Doctor, will you just take a moment and tell us about what an Apgar is?

A Apgar is a rating of the child when it's born that involves approximately five things, fetal heart rate, muscle tone, color, reflex irritability and respiration.

Q Doctor, the anesthesiologist goes on to tell what he did in attempts to resuscitate this child, did he not?

A Yes sir.

Q Now, you have looked at the tracing. Do you have a copy of the tracing in front of you, sir?

A Okay. Yes sir.

Q Now, does that tracing show that there is a fetal heart rate up to the moment that she goes to the delivery room or to the OR?

A It shows that there is a heart rate up to the time of the delivery room or the OR.

Q Yes, now, based on your review of the records, and particularly the nurses' labor and delivery records, do you know what time that the nurses say they took her to the operating room?

A (Pause).

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Q I don't think it's marked on that, doctor. I think you'll have to look at the nurses' notes.

A I guess I will. Seven forty. . .is when they took her to the OR.

Q Yes sir. Now, looking at that time frame and Dr. Petkov's note, would it be your opinion that the baby died within those three minutes after the fetal monitor was disconnected? And before she gets to the operating room?

A There's another possibility here.

Q What is that, sir?

A That the fetal monitor, the scalp electrode was not placed on the baby's head at all, it was on the mother's cervix.

Q And if that happened, what would you be watching there, sir?

A You'd be looking at the maternal heart rate.

Q Would that indicate to you that the baby was already dead?

A If that indeed had happened, possibly.

Q Now, doctor, let me ask you whether the mother's heart rate would have been as low as indicated on there?

A Eighty, yes sir.

Q So it would be your opinion that you cannot tell from this whether that was the baby's heart rate or the mother's heart rate?

A I would think in a situation like this that - there's

another part of this that bothers me very much, and that is why, did the contractions stop?

Q Do the contractions diminish before they stopped?

A Did they diminish before they stopped?

Q Yes sir.

A There is no recording of the contractions here for the last five minutes.

Q Yes sir, and that immediate period prior to that shows what about the contractions?

A It shows that either they have stopped or the belt had been removed.

Q Do you know which?

A No sir.

Q Do you have an opinion with reasonable medical certainty as to what caused this baby's death?

A I am of the impression that she had premature separation of the placenta.

Q What is the evidence of that?

A Very strong, heavy contractions, a prolonged deceleration phase, and when the fetal head was, I assume was displaced to put the fetal scalp on there, there was no alteration of the fetal heart rate. I have no pathologic result from that because neither the - as far as I can tell, neither the baby or the placenta were submitted for pathologic analysis which I find to be very unusual.

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Q All right sir. So it would be your opinion that there was a premature separation of the placenta, and that's - you mean coming off the uterine wall?

A Shearing off the wall.

Q And what usually happens when it shears?

A Usually you have extravasation of blood at the same time.

Q Was there any evidence of such blood in this case?

A There is none recorded.

Q What else usually precedes the shearing of the placenta?

A Very hard, very strong, very hard contractions. Prolonged over a short period of time.

Q Is there any evidence of such contractions?

A Yes sir.

Q And where is that evidence of hard and strong, long-lasting contractions?

A Beginning right in here.

Q All right, now, so we can get a reference point, would you say beginning right in here?

A Yes, that's right.

Q There is a serial number of 76592 on here and you would say that in the four, five, ten minutes prior to that is where you are talking about?

A Uh-huh.

Q So that in your opinion it is at that point that the placenta sheared from the uterine wall?

A Was shearing.

Q All right, sir.

A If it had sheared completely, there would have been no fetal heart rate.

Q And is there a point where you would say it sheared completely?

A There's nothing I can demonstrate in the record, no.

Q All right sir. When Mrs. Kelley came to the hospital, did she have what would be defined as severe toxemia?

A Yes sir.

Q And what was it, what factor there defines it as severe toxemia?

A She had severe toxemia. The levels of her blood pressures at that point.

Q Now, doctor, is there a text that is basically recognized by all obstetricians as being a Bible, so to speak?

A There are several texts that are.

Q All right, sir, and can you tell me the names of those texts?

A I think one is probably, "Pregnancy Induced Hypertension," which is by Manuel Friedman.

Q All right, sir.

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A Another one perhaps would be Diechman's Textbook of Toxemic Pregnancy.

Q Now, is there a more generalized text that is used by. . .

A Oh, yes, Williams.

Q Williams. And Williams is the full title, let me ask you if you recognize this. Is this the Williams you are talking about?

A That's an older edition, yes.

Q Yes sir. And what edition would have been in effect in 1977, do you know?

A I can't. . .

Q Is Williams recognized by most obstetricians as being a good text?

A Yes sir.

Q And does Williams define in that text what severe toxemia, preeclampsia is?

A Yes sir.

Q I'm not going to quiz you and ask you if you remember it by heart, sir but. . .

MR. BUCKLEY: Your Honor, there are several editions of this. What edition is Mr. Pledger referring to?

Q I am referring to the 14th, but I'll be happy to get the 16th.

THE COURT: Well, that's up to counsel, now. The

question is whether that is one that the doctor can answer or whether he agrees that that was the edition that was accepted at the time we are inquiring into. Which is 1978. So I'll leave that to him. He's an expert, and we are not.

A I accept that.

Q You say you do accept that?

A I accept that, yes.

Q Now, doctor, let me ask you, as I say, I'm not going to give you a test here. Let me just ask you, under the classification of severe toxemia, what is the first item that is listed by way of. . .

A Okay, it says blood pressure of 160 milligrams of mercury or more of systolic or 110 or more of diastolic.

Q And so at the time this lady arrived at the hospital, her blood pressure just met the bottom line of that criteria, is that correct?

A No sir, she had severe toxemia.

Q Well, the blood pressure there is 160/110.

A Yes sir.

Q Is that correct? And that's what Williams writes there?

A Yes sir.

Q Doctor, the next thing that he writes is what?

A What. . .

Q The next criteria there?

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A On at least two occasions at least six hours apart with the patient at bedrest.

Q All right, now, what is the purpose of suggesting that there be more than two readings and that there be some time interval between them?

A You mean in the patient in labor or not in labor?

Q Well, let's take a patient in labor.

A In labor?

Q Yes.

A It should be repeated again probably in five minutes.

Q All right, sir. And what is the purpose of doing that?

A To determine if it's just a matter of excitation or some problem like that. Something else would be checked on at the same time.

Q All right sir.

A Protein would be looked for in the urine, and reflexes would be looked for.

Q Should look at the protein? What does Williams say about protein?

A Okay, this is very good. Protein in urea of five grams or more in twenty-four hours. She would have been discharged from the hospital by then.

Q All right. Now what was her protein at the hospital? Was it checked?

A When she was first admitted? I do not see that.

Q Well doctor, let me have the hospital chart. Let me see if I can find it.

A Okay.

Q And, doctor, let me show you, let me get the right one here for us. I believe it's the one in the center of the page, is that correct?

A Yes.

Q What do they say about the protein?

A It says trace.

Q How does a trace stack up or equate to what Williams is saying?

A I don't think that has any - there's protein in the urine. Period.

Q What does a trace as opposed to the comment that Williams makes that proteinuria of five grams or more in twenty-four hours, three or four plus on quantitative examination? Did that come to a three or four? A trace?

A If she had just voided ten minutes before, it could come as a trace. And then if you repeat it again in another half an hour, it could come back to your four plus.

Q All right. Let me ask you then is your opinion that she had severe toxemia mainly predicated on the blood pressure when she arrived?

A Yes sir.

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Q All right. Is it known by you and other obstetricians that ladies who come into the hospital in labor generally have an elevated blood pressure?

A No sir. Some, obviously, some will have an elevated blood pressure. But it is not a common finding.

Q All right, sir. Those that do have it, do some of them have it because it's induced by anxiety at the beginning of labor?

A Not with both numbers up, not with both systolic and diastolic up.

Q So you'd say in your experience it's only when the systolic is up but not when the diastolic is up?

A Yeah, and then in monitoring it with the pulse rate at the same time.

Q Now, doctor, the way to cure if that's a good phrase for it, toxemia or preeclampsia is to deliver the baby, is that not right? To empty the contents of the uterus.

A Now, that's not quite that simple, counselor. The first thing is to stabilize the patient, then deliver them.

Q What would you do first to stabilize the patient?

A What would I do to stabilize the patient?

Q Yes sir. What does the standard of care require?

A The standard of care, starting an IV, starting the patient on magnesium sulfate.

Q And do you start a patient on magnesium sulfate right

away?

A I do.

Q Now, the standard of care does that?

A Yes sir.

Q All right, so you are saying that all of the obstetricians who practice in this area would start the patient on magnesium sulfate with. . .

THE COURT: That doesn't necessarily equate, Mr. Pledger. It does not require all to conform, but generally.

Q Generally.

THE COURT: Yes sir.

Q I'm sorry, Your Honor. Let me rephrase the question. Are you saying that the standard of care would require generally those obstetricians. . .

A The standard of care is admission; the standard of care is starting an IV; the standard of care is checking the patient's reflexes, putting a catheter in to measure their output. The standard of care means starting the patient on magnesium sulfate and possibly an antihypertensive agent at that time. Seeing whether the patient is ready for delivery or to be gone to delivery and stabilizing them until delivery is effected.

Q Are there other physicians who would disagree with that and say that you would not start them on magnesium sulfate; that you would simply start them on a narcotic such as Demerol and perhaps augmented with Sparine or something of that type,

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to determine whether that conservative treatment would bring the blood pressure down.

MR. BUCKLEY: Your Honor, is this question related to the present case? As to whether the Sparine and Demerol. . .

THE COURT: That can come up later, but the question seems to be appropriate. Your objection is overruled for now, Mr. Buckley.

A In situations like that?

Q Yes sir.

A You mean as an accepted standard of care?

Q Are there physicians? Is there. . .

A I'm sure there are.

Q Is there a school of medical thought. . .

A No. There is not a school of medical thought. There are physicians who would think that.

Q All right sir. Is it your feeling that the standard of care in that respect, that is, the treatment that would be accorded to a woman who comes in to the hospital in early labor with a blood pressure reading that we have here and the urine reading that we have here, would that differ in this community - that is, the Commonwealth of Virginia, as opposed to other communities or is that universally known, to do it that way?

MR. BUCKLEY: Your Honor, I'm going to object. Is Mr. Pledger asking for a state wide standard of care?

THE COURT: If you are relating it to the standard of

care in Virginia, then you may proceed on that.

A I can give that, Your Honor. I'm on the perinatal mortality commission for the state, so I know what's going on in the state.

THE COURT: Yes sir, you may relate it to that, doctor.

A Okay. The standard of care in a situation like that is yes, it does involve that. It also involves examination by the doctor at that time.

Q And is that a universal treatment?

A Yes sir.

Q The use of mag sulfate under these circumstances?

A Yes sir.

Q And you don't believe there's any recognized school of medical opinion in which they say that's not the way. . .

A You are asking for the standard of care in the State of Virginia? That is the standard of care in the State of Virginia, yes sir.

Q All right, sir. Now, you are licensed in the District of Columbia, did you say?

A Surely.

Q Maryland?

A Yes sir.

Q Would that be the same standard?

MR. BUCKLEY: Your Honor, I'm going to object to what they are doing in Maryland.

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THE COURT: Objection sustained. What's being done elsewhere is not material. Now, doctor, the question, though, that's been properly asked if you, if it's needed for clarification, is there a recognized difference of opinion within the profession as to what you might do in a situation like this?

MR. BUCKLEY: Is this in Virginia, Your Honor?

THE COURT: Yes sir, under Virginia standards. Is there a diversity of opinion on that point?

A Not in that point. Certain others would add some other drugs to this, but that's the foundation of care, giving the patient magnesium sulfate to prevent convulsions from eclampsia.

THE COURT: All right, Mr. Pledger, you may proceed from there.

Q All right, let me move on then, sir, to ask you whether toxemia in pregnancy can cause a prolapsed cord?

A No sir.

Q Was there testimony at the medical malpractice review panel that there was in fact a prolapsed cord in this case?

A Yes sir.

Q Do you remember who so testified?

A Dr. Modaber did.

Q Did anyone else testify. . .

A No sir.

Q Do you recall the testimony of Barbara Amos?

A Barely, but I don't recall any aspect of a prolapsed cord.

Q All right. You said that you had received from Mr. Buckley a copy of the transcript.

A Yes.

MR. BUCKLEY: Your Honor. . .

Q Do you have that with you sir?

MR. BUCKLEY: Is there a page number? Could we ask counsel for a page number?

Q Yes sir, just a moment. Doctor, do you have page 198 there? Do you have that page?

A Yes sir.

Q And do you see line eight where there is a question to Ms. Amos?

A Line eight, yes.

Q And beginning at line nine, does Ms. Amos testify with respect to what happened when the baby was delivered? What she said?

A Yes.

MR. BUCKLEY: Your Honor, I'd object to the hearsay, if he is going to start reading from the transcript.

THE COURT: Overruled, if it's based upon what the medical review panel had in the way of evidence since that's been eluded to on many occasions.

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Q Doctor, before now, had you realized that Mrs. Amos says that she asked the doctor at the, when the baby was delivered whether the cord was down beside the baby's head and that whether that's why he couldn't feel it?

MR. BUCKLEY: Your Honor, that's not a correct statement of this page.

THE COURT: All right, counsel. . .

Q Your Honor, I will read it verbatim.

THE COURT: All right, you may. . .

Q Question, beginning on line eight, "I'm sure you were. What happened then, Mrs. Amos?" Answer, "I...the baby was delivered, and I can't remember exactly what I said, but I said to Dr. Modaber, 'was it a prolapse?', and he said yes'. The cord was down beside the baby's head. That's why we couldn't feel it." Do you recall that?

A I can recall it from reading it here, yes.

Q You see it there now?

A Yes.

Q Do you know whether you considered that testimony at the time that you reached your opinion on the part of this medical malpractice review panel?

A Yes sir.

Q So you were aware then at the time of the panel hearing that she had said that?

A Yes sir. We thought it unlikely it was a prolapsed

cord because if the head, that was indeed a prolapsed cord, why, the displacing of the head and putting the clip on, the fetal heart rate should come back up.

Q What is the percentage of prolapsed cords that are occult?

A The percentage of a prolapsed cord in the United States today is approximately two percent. The occult, no one can tell, by the definition of the word occult.

Q All right. And are you familiar with what Williams says with respect to the percentage of occult prolapsed cords?

A I can't give you a percentage, I'm sorry.

Q An occult cord by definition is something that those caring for the patient, the mother, are unable to detect, is that correct?

A (Nods head to indicate an affirmative response).

Q An occult cord is one that is compressed between the baby and the bony parts of the mother, is that correct?

A (Nods head to indicate an affirmative response).

Q Pressure in that manner or strangulation of the cord can cause death, is that true?

A Yes, certainly, it may.

Q You were asked about non-stress tests.

A There's one more thing about occult prolapse.

Q All right, sir.

A In this situation, this patient precipitated the

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baby on the cart, essentially unattended. I don't know how you could get a, how you could define an occult prolapse if the baby was out already.

Q Do you know whether there was anyone who observed the condition of the cord at the time the baby was delivered? Or within seconds or moments thereafter?

A There was no testimony to that effect.

Q Now, doctor, let. . .

THE COURT: Let me ask for clarification, Mr. Pledger, on that point. Doctor, to what extent was it clarified in the panel's hearing as to who was present, if anyone, when the baby was in fact delivered?

A That wasn't clarified at all, Your Honor. The impression, that's all I can say is the impression we got was that the patient was essentially unattended.

THE COURT: And to what extent was the statement considered then that the cord was prolapsed? Was that merely discounted?

A Discounted, yes sir.

THE COURT: You discounted that statement?

A Yes sir.

THE COURT: As being not supported?

A It would be something followed in retrospect.

THE COURT: Would it be classified as speculation or is that. . .

A Speculation would be - yes sir.

THE COURT: All right, go ahead, Mr. Pledger.

Q And that's because there was no evidence of this before the panel?

A Yes sir.

Q As to who was present. All right sir.

A At the actual delivery of the baby. The baby's dead.

Q Now, were you given a copy of Mrs. Kelley's deposition that was taken several weeks ago prior to the time of Dr. King's deposition?

A No sir.

Q So you don't know what she has said about the problems?

A No sir.

Q If I may go to the non-stress tests that you spoke of, is there a time factor or a number of minutes that is used to determine whether you have a reactive or non-reactive stress test?

A It's usually a minimum of ten minutes.

Q A minimum of ten minutes?

A A minimum of ten minutes.

Q Do some other people consider it a minimum of three contractions?

A Three contractions generally is for not the non-stress test but for the oxytocia challenge test.

Q All right, so an oxytocia challenge test is a test

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that's performed when you give an oxytocic agent to the patient to cause contractions, is that correct?

A Yes.

Q Now, doctor, you were asked whether caesarean section should have been performed at seven a.m. and I gathered it was your opinion or your opinion that the standard required some assessment at the time of the events that occurred around seven a.m. is that true?

A That's right.

Q And not necessarily that the section would be prescribed at that time?

A Not necessarily.

Q All right.

A That is one of the options available to you.

Q So at that time you would be assessing the options that you have open to you, and what you might do would be to continue to let the patient labor, to do other things or to make the decision to do a caesarean section?

A Yes sir.

Q Your Honor, indulge me one minute. I have nothing furtherof the witness, Your Honor.

THE COURT: Any redirect Mr. Buckley?

MR. BUCKLEY: Yes, Your Honor.

REDIRECT EXAMINATION

By: Mr. Buckley

Q Is there anything in Dr. Petkov's note that changes your opinion in any way?

A No sir.

Q You received a copy of Dr. King's deposition?

A Yes sir.

Q Have you discovered anything about Dr. King's view that changes your opinion?

A No sir.

Q Have you received a copy of the deposition of Dr. Willoughby?

A Yes sir.

Q Have you discovered anything about Dr. Willoughby's views that would change your opinion?

A No sir.

Q Have you received a copy of Dr. Peterson's deposition?

A Yes sir.

Q Is there anything about his views that would change your opinion?

A No sir.

Q You mentioned before a shearing off of the placenta in this case, how does that relate to toxemia?

A In elevation of blood pressure, the vessels in the

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placenta are quite brittle. At the same time, you have a decrease in oxygen going to the uterine wall which then causes it to contract, and this is in itself, this is what causes the premature separation of the placenta before the baby is delivered.

Q Were there any indications in this case of such a condition?

A Well, so much in this case. . .could have been. . . I mean. . .I preface it by saying one thing, I cannot understand why in a stillborn and in a case like this, why no pathology specimens were sent. I just don't understand that.

THE COURT: You are saying that that would have been needed to answer the question?

A Yes sir.

THE COURT: All right, not having that, you are unable to answer the question?

A Yes sir.

THE COURT: All right.

Q How does the use of Sparine and Demerol in this case relate to a placental separation or shearing in a toxemic woman?

A Well, Demerol itself is not going to cause any marked change in the blood pressure as far as I'm concerned. Sparine has been known in some cases when given in tremendous doses to at least temporarily decrease the blood pressure. The blood pressure is decreased quickly in a situation like that.

Sometimes, this could precipitate a decrease in the blood supply going to the uterus, initiating the problem there. If you look at the fetal heart tracing, the...although things are not going well, very shortly after the patient has received the intravenous Sparine and Demerol, there is a precipitous decrease in the baby's heart rate.

Q Is there anything you draw from that?

A Well, it just means to me that there is less profusion at that time.

Q What effect would it have on the baby?

A It's going to make it worse.

Q You use the word profusion. Would you please explain that?

A Profusion means the passage of blood into an area for nutrition. At the same time, passage out of the area as far as taking out the waste material.

Q So the tendency would be to decrease the nutrition received by the baby?

A That's right, yes. The oxygen going to and accumulating carbon dioxide there. Less oxygen coming in and increasing carbon dioxide.

Q The tendency in the use of Sparine would be to make the situation worse?

A Well, it's not a great big dose of Sparine. But I can't recall ever seeing anybody getting Sparine intravenously

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unless it was for an acute problem like protracted vomiting or for acute psychosis. Sparine is generally considered to be a tranquilizer.

Q You testified before that magnesium sulfate would have been the standard of care here?

A Yes sir.

Q Was that administered?

A No sir.

Q At the panel, did you hear the testimony of Dr. Modaber? Did you hear his testimony at the panel hearing?

A Yes sir.

Q Did you hear his testimony with regard to the events surrounding the delivery?

A Yes sir.

Q Now, Mr. Pledger elicited to the fact that the panel rejected the occult prolapsed cord in this case?

A Yes sir.

Q Would you please explain the basis for that?

A The thought was that as the patient delivered, that occult prolapse is usually made with one hand in the vagina feeling the . . .you can actually feel the cord down there like that. There was no notation or mention the baby being delivered that there was any. . .that the cord was down before anything. As far as we can tell, the baby's head was out before the patient . . .before she was attended at all.

Q Was there any indication in this case of an occult prolapse?

A I could find none.

Q Now, an occult prolapse is different from a prolapse, isn't that true?

A No, they are both the same thing. Both means that the . . .there's pressure on the umbilical cord, either by the head, or if it's a breech presentation, by the foot or the buttocks or something of that nature. But it's the soft, it's the vascular structure being compressed against a bony structure.

Q And is there some way to detect a prolapse?

A You have to examine the patient to do that.

Q And if you find such a prolapse, is there a way to treat that?

A Yes sir. If you find a prolapse, what you want to do is relieve the pressure on that umbilical cord. The way you do that is by either yourself or someone else displaces that presenting part out of the pelvis, holding it out there, while preparing the patient for caesarean section delivery.

Q May I have a moment, Your Honor. I'm just about finished. Is there anything on the fetal monitor strip which indicates a prolapse of the cord?

A The only thing that shows on that fetal monitor strip is that there is a compromise of the baby.

Q Is that compromise of the baby consistent with the

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placental separation which you have testified to?

A I think so yes.

Q If it takes an half an hour to have an OR crew come in here to the hospital at Culpeper, . .

MR. PLEDGER: Your Honor, I'd have to object to it being beyond cross examination.

THE COURT: I think it is, it's beyond the scope of the cross examination.

Q Your Honor, he brought up seven o'clock. Tell us what the. . .

THE COURT: Go ahead, I'll allow it. I think it's material to the question of what has been brought up as to what should have been done, if you want to expound upon that.

Q Let me ask you what the standard of care would have required at seven a.m. if Dr. Modaber had been notified of the fetal heart rate of 90?

THE COURT: With respect to what now? He's already testified on most categories, are you referring to some specific preparation?

Q Let me ask you, if it took a half hour to assemble the OR crew here, and it had not been called in by . . .if it took a half hour to assemble the OR crew, what time should that have been called in this case?

A Counselor, let's start from some place else. Let's not talk about seven o'clock. Let's talk at six fifteen.

You've got to have somebody there to make an assessment. Let's work on that. You make your decisions after you've made an assessment.

Q Who has to make the assessment?

A The doctor.

Q No further questions, Your Honor.

THE COURT: All right, you may cross examine further.

MR. PLEDGER: No questions Your Honor.

THE COURT: All right any objection to Dr. Hopwood being excused.

MR. BUCKLEY: No your Honor.

THE COURT: Mr. Pledger?

MR. PLEDGER: No sir.

THE COURT: Thank you doctor, you are excused and may remain or leave as you like. We will also consider our lunch recess at this time. Now we will again consider the forty-five minute period here which gets us awfully close to 1 o'clock.

MR. PLEDGER: Two o'clock.

THE COURT: Two o'clock as the time to reconvene. Members of the jury are instructed as they were yesterday that you are to refrain from any discussion of the case, do not let anyone discuss it in your presence and you can use your own judgment about your lunch recess. Recess until two o'clock Sheriff.

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LUNCH RECESS

Jury reconvened in jury box.

THE COURT: Do you have a witness you wish to call at this time Mr. Buckley?

MR. BUCKLEY: Ronald Kelley.

RONALD HENRY KELLEY, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Buckley

Q Would you state your full name?

A Ronald Henry Kelley.

Q And your address?

A Route 1, Rixeyville.

Q How long have you lived there Mr. Kelley?

A Approximately five years.

Q Tell us where you are now employed?

A Virginia Department of Highways.

Q How long have you been employed there?

A Twenty years.

Q Can you tell us what you do in your job?

A I'm an inspector, construction inspector.

Q How old are you Mr. Kelley?

A I'm forty.

Q Let me direct your attention to 1978 and ask you whether there was a time when your wife became pregnant that year?

A Yes sir.

Q Now do you remember the time later on when she came under the care of Piedmont Obstetrics?

A Yes sir.

Q And do you recall a time when she went there for office visits?

A Yes sir.

Q At any time did you ever go to the offices of Piedmont Obstetrics?

A No sir.

Q Did you ever see prior to November 27, 1978, did you ever see the defendant in this case, Dr. Modaber?

A No sir.

Q Did you ever see Dr. Payette?

A No sir.

Q Prior to November 27, 1978 did you ever sign any consent form relating to a sterilization operation or bituberal ligation?

A No sir.

Q Now when your wife became pregnant early that year did you have any discussions with her about whether the child she was carrying would be a boy or girl?

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A Yes sir. We discussed it and we picked names and so forth.

Q And how often did you discuss that?

A I don't know, probably every week or so.

Q And directing your attention to November of that year did your wife at that time - what was her condition at that time in early November of 1978?

A She was - she had toxemia, was swollen and generally just kind of laid around the house, didn't do too much of nothing.

Q Who was doing the house cleaning?

A Me and the girls.

Q And who was doing the cooking?

A I was.

Q What were you eating at that time?

A TV dinners.

Q What were your hopes with respect to that child your wife was carrying?

A We wanted a boy, bad.

Q Did you at any time discuss with your wife whether or not she should eventually have a BTL or sterilization?

A Well we talked in general about having her tubes tied but she explained to me thatshe wanted to wait for six weeks after she had the baby and to see if it was a boy or girl and then there was a new process or something where they go down through your navel and tie the tubes and she was going to have

that done if it was a boy.

Q What were your own feelings about such an operation?

A I didn't really care, really one way or the other.

Q Directing your attention to November 27th of that year, tell me how the events began that day?

A Well early that morning Jessie woke me up and she had - her water had busted in the bed and she said that she had to go to the hospital, it was time so I told her to call the doctor and I would get the kids and put them in the car and get the bag and put it in the car.

Q Did you do that?

A Yes sir.

Q And you went down to the hospital?

A Yes sir.

Q What happened when you arrived at the hospital?

A Well we had trouble getting in the door, so I sent my oldest girl around front to see if she could arouse somebody. I banged on the door for a while, probably about five minutes.

Q Did you finally get into the hospital?

A Yes sir.

Q Somebody came?

A Yes sir, we went inside and the orderly opened the door for us and he put my wife in a wheel chair and then sometime from there to the room, delivery room, the nurse came out and met us and then they took her inside the delivery room and I wasn t

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allowed in there, at that time.

Q Okay.

A So I turned around and went back out and got my girls and went down to the - down the hall and there is a little place there they got soda pop and junk food and I got them some junk food and took them back to the lobby and set them down.

Q Where did you go then?

A I went back into the hallway outside the delivery room.

Q Who was in the room at this time with your wife?

A Janice Strothers. I didn't know her name then but I do now.

Q Is she one of the nurses at the hospital?

A Yes sir.

Q Did you observe any equipment in the room?

A When I finally got in there they had the monitor on.

Q Did you hear something on the monitor?

A Yes sir, you could hear the heart beat.

Q Can you describe how it sounded?

A Very strong.

Q What is the next thing that happened?

A Well they put a belt on her. I believe they put a belt on her or it was already on her. I guess it was already on her and things were going along pretty good. I kind of walked

from the delivery room out to the hallway and I was kind of pacing back and forth, back and forth. Then they started having trouble and started moving the belt around.

Q How did you know they were having trouble?

A Well Barbara Kidwell came in about that time and they started having trouble picking up the heart rate.

Q Can you tell us who Barbara Kidwell is?

A She is a nurse at the hospital. I didn't know who she was at that time either. They moved the monitor around.

Q Are you referring to the belts?

A Yes sir, and I was getting pretty excited and I thought maybe something was wrong and I asked her and she said well sometimes it was hard to pick up the heart rate.

Q Was Dr. Modaber there at that time?

A No sir.

Q Had you ever met him before?

A No sir.

Q What is the next thing that happened?

A Well she - somebody went and got Barbara Amos. She came back and they turned my wife over on her side facing the wall, still trying to pick up the heart beat. They couldn't seem to get one and I think during this time, I don't know exactly when but they called in the doctor trying to get him in.

Q Who were they calling?

A Dr. Modaber.

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Q Who was doing the calling?

A The nurses.

Q Did you hear any of those conversations?

A No sir, I did not.

Q What is the next thing that happened?

A Well I walked back to the door, I was walking back and forth and. . .

Q Do you recall if you could hear anything on the monitor at this time?

A No sir, I don't recall that I could hear anything.

Q Did there come a time subsequently when Dr. Modaber arrived?

A Yes sir, he came in.

Q Where were you when he came in?

A I was in the door way to the labor room.

Q And what did he do when he came in?

A Well he came through the door and hung up his coat and put on a gown. And he went by me and went over to my wife and he did something. I know now that he inserted the internal monitor.

Q In terms of what you knew then, did you know what he was doing?

A No sir, I didn't know what he was doing. He turned and came back to the door and said that he had to perform a caesarean or C-section and I was pretty - I had heard some bad

things.

Q Well without reference to what you heard, what someone else said, just tell us the next thing that happened?

A Well I asked him why and he said because she wasn't big enough. And he asked me if I wanted to have her tubes tied.

Q Had you mentioned this before?

A No sir.

Q What was your response to that?

A I told him that - I asked him if I had time to talk to my wife.

Q What did he say?

A He said yes and he disappeared.

Q What did he do then?

A He just disappeared. I don't know where he went to.

Q Did you go over to your wife?

A Not directly. I went around to the nurses' quarters and I picked a nurse, at random and it turned out to be Barbara Amos and I asked her if she thought my wife had to have a C-section and . . .

Q Without reference to what she said in response, what happened after that?

A I turned and went back into where my wife was and I told my wife that she had to have the C-section and while we were talking I asked her if she wanted to have her tubes tied and

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she said she would leave it up to me and I told her I wasn't going to go through it no more.

Q You said you weren't going through it any more?

A No sir, I was going to sign the paper.

Q What is the next thing that happened?

A Well, I kind of walked around, there was a period of time there and then a nurse came in and I don't know who she was - it might have been one of the nurses I had seen before but I can't remember now who it was. She handed me a paper, a clip board with two papers on it, and I signed it.

Q How many papers were on that clip board?

A Two.

Q Do you know what they were for?

A One was the tube tying paper and one was the caesarean section.

Q Let me show you a document marked as Plaintiff's Exhibit 12, records of Piedmont Obstetrics and ask you if you can identify that document?

A Yes.

Q Is that the document you signed that day?

A Yes sir.

Your Honor

Q Now/I would like permission to pass the document to the jury.

THE COURT: All right do you have extra copies or are you going to hand the one.

MR. BUCKLEY: Just going to hand the one.

THE COURT: And that is Exhibit No. what?

MR. BUCKLEY: This is one of the documents in Exhibit No. 12.

THE COURT: All right it is already Exhibit 12.

Q All right, after you signed that what did you do?

A They told me I had to leave the room, somebody told me. I got the impression I had to leave the room. Somebody might have told me and they might not have but I left. I went out to the waiting room.

Q And who was back in the waiting room is that where your children were?

A My children were out in the waiting room. And then about five minutes later Barbara Kidwell came out and said - started talking to me.

Q Is this one of the nurses?

A Yes sir.

Q Did you know her name at that time?

A No sir.

Q She had a conversation with you?

A Yes sir.

Q What is the next thing that happened?

A A little bit later on Dr. Modaber came out and - came out into the lobby and told me we had lost the baby, that my wife was all right.

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Q Do you remember his words?

A No sir, I don't remember the exact words.

Q Did he say anything else?

A Uh. . .

Q At that particular time?

A He said that he didn't want to put her in a room with the ladies on the maternity side, he wanted to put her in a private room to keep her away from the others, you know the other mothers.

Q What happened after that?

A We walked down to the room where my wife was and we went in and he told my wife that they had lost the baby.

Q Who was in the room with your wife when you entered the room?

A I don't really remember if anybody was in there or not.

Q What did Dr. Modaber say at that time?

A Well he told my wife that the baby was dead.

Q Did he say how the baby died?

A No sir.

Q What happened next?

A We was in the room and went towards the door and he told me that at least he hadn't tied her tubes so she could try for that boy.

Q What was your reaction when you heard that?

A I was so shook up that I didn't have any reaction.

Q What is the next thing that happened?

A I think I grabbed his hand and shook it as a matter of fact. I felt like hitting him but grabbed his hand.

Q You grabbed his hand and shook it?

A Yes sir.

Q What did you do that for?

A I had to do something. You know that was better than - I just had to get rid of something.

Q Did you leave the room then?

A Yes sir.

Q Did you see Dr. Modaber on a subsequent occasion?

A Outside in the hallway he asked me to sign a form to dispose of the baby.

Q Did you sign the form?

A Yes sir, I signed it.

Q At that time did he give you any explanation as to what caused the baby's death?

A No sir.

Q After that did you again see Dr. Modaber during this period?

A No sir, I didn't see him no more.

Q When was the next time that you saw Dr. Modaber?

A I never did see him again.

Q Did you make any effort to find out what had happened?

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A No sir, I guess I just accepted that the baby was dead and I probably wouldn't have known if I had asked.

Q Did you later on have a conversation with any of the doctors at Piedmont Obstetrics?

A Yes sir, I called over there and told them I wanted to talk to Dr. Payette and he came to the hospital and talked to me.

Q Can you tell us what day this was?

A It was two days after, so I guess it would be the 29th. The next day I had to go get my mom to babysit. My little girl had a high temperature and we had to stop at Charlottesville at the University of Virginia Hospital and get her looked into so we didn't get back until late and I think I called him that evening and he came the next day.

Q Did Dr. Payette give you an explanation as to why the baby died?

A No sir, I never asked him, so that's the reason he didn't give me no explanation. He was more or less trying to smooth over the reason Dr. Modaber didn't get to the hospital on time.

Q What did he say in that regard?

A He said well the only thing that stands out in my mind he said if your baby was crying you wouldn't rush it off to the hospital and I told him no but I would get up and go see what was wrong with it.

Q Did you ever thereafter have any communication with Piedmont Obstetrics?

A No sir.

Q Have you and your wife spoken since that time about your baby's death?

A Yes sir.

Q How often do you talk about it?

A We talk about it not that much but we think about it a lot. I would say maybe once a week or so. It depends, sometimes you go for three or four days and discuss things like that and then you put it away and it comes back on you. It kind of depends on where you are at too.

Q No further questions at this time.

THE COURT: Mr. Pledger.

CROSS EXAMINATION

By: Mr. Pledger

Q Mr. Kelley let me show you Exhibit 11 and I call your attention to a page in there called "Request for Disposal of Remains". If I understood you correctly you said Dr. Modaber gave you this form?

A I don't know who gave it to me, I signed it in the hallway.

Q Would you look at it and see who witnessed your signature on that form?

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A Barbara Amos, and Jane Griffith.

Q Do you know whether in fact Barbara Amos asked you about this form and would you sign it?

A Dr. Modaber asked me if I wanted - possibly wanted to get rid of the remains and she might have asked me the same but I don't remember it.

Q Did Dr. Modaber ask you that question?

A Yes sir.

Q And sometime later Barbara Amos brought you this form?

A I don't remember.

Q Did you ever tell your wife Mr. Kelley that you would not consent to her having her tubes tied?

A No sir.

Q You told us that you had conversations with her about this subject is that correct?

A Yes sir.

Q In the summer of 1978?

A Yes sir.

Q And you told us that she was - understood that this would take place six weeks after the baby was born, is that correct?

A That's what she told me.

Q When Dr. Modaber asked you if you wanted or agreed to having her tubes tied on the morning of the 27th of November

did you ask him whether he was talking about at that time or six weeks from then?

A No sir, I didn't ask him anything.

Q Did you ask your wife when you talked with her about it whether it was to be done then or six weeks from then?

A I figured it was then, that's the way it came across to me. It was at that time, because he said in the doorway, he said do you want me to tie her tubes while I'm in there.

Q Would you tell me that again?

A Do you want me to tie her tubes while I'm in there.

Q He asked you while he was in there, did you understand/to mean that while he was doing the section?

A I don't know what he meant inside or inside the room.

Q And you didn't ask?

A No sir, I did not.

Q Now you were given a clip board by a nurse and it had two forms on it is that correct sir?

A That's the way I remember it sir.

Q And one of the forms was what Mr. Buckley has passed to the jury is that what you are saying?

A Yes sir, that's what I remember.

Q And what was the other form?

A It was the C-section form.

Q Did you sign that?

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A Yes sir.

Q And who did you give it to when you finished signing that?

A I don't remember whether I handed it back to the nurse or what I did with it.

Q No recollection today of anything other than you did sign it?

A Yes sir.

Q And you signed that at the time that Dr. Petkov was in the room?

A I don't know whether he was in the room at that instant or not. He could have been.

Q After Dr. Modaber said to you this C-section was necessary where did you go?

A I went around behind where the nurse was standing and I believe they had a big desk and coffee pot and a few things there and telephone and I went around there and grabbed the nurse to ask her to think this was necessary.

Q Do you remember what that nurse said to you?

A Barbara Knos?

Q Yes.

A She told me that it was necessary, that that was the only way.

Q Did anyone ever explain to you that morning what was - what the fetal monitor was showing?

A What the fetal monitor was showing?

Q Yes, did anybody take you and show you this strip and explain to you what that showed?

A I think Barbara Kidwell was telling me something about it, how the fetal monitor worked but I really wasn't paying that much attention to it.

Q Was that part of the explanation as to why a C-section was needed?

A No sir, she never mentioned C-section. I didn't mention it to her.

Q Let me ask you this and see if it refreshed your recollection on page 50 of your deposition sir. We will start on page 49, I ask if you remember these questions and these answers, Question, line 17, "And you signed it at the same time you signed the authorization for tying the tubes? A Yes sir. Q What did you do with that after you signed it? A I handed it to a nurse, I believe."

A I said that same thing this time.

Q All right sir. Do you know which one?

A No sir.

Q Did it have to be. . .

MR. BUCKLEY: Your Honor, what is the purpose behind this - reading from this transcript. There is no purpose whatsoever.

THE COURT: State your objection now.

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MR. BUCKLEY: I object Your Honor.

THE COURT: All right Mr. Pledger what is the purpose of this line of questioning.

MR. PLEDGER: The purpose Your Honor is to refresh the recollection of the witness. He testified in his deposition that he signed it when the anesthesiologist was in the room. He had said that he didn't.

THE COURT: All right, if it is in the previous testimony and you want to show that.

MR. BUCKLEY: Your Honor he didn't say that this time. That is not the witness' testimony.

Q Let me ask the question again.

THE COURT: Why don't you ask him if he has previously stated that he signed where the anesthesiologist and if - you must make sure you ask it in a way you have got to elicit the same answer Mr. Pledger. Because if he said it differently to a different type of question, then you make your question comport with the previous one.

MR. PLEDGER: Yes sir, I will do that.

THE COURT: All right sir, objection overruled for that purpose.

Q Who was in the room when you signed the two consent forms?

A I don't know.

Q Where did you go after you signed the two consent

forms?

A Where did I go?

Q Yes sir.

A I left the room and went out to the lobby.

Q When you left the room was your wife still in the room?

A I think they were getting ready to roll her out, I'm not sure. I don't know - yeah, she was still in the room.

Q She was still in the room. Was there anybody else in the room with her?

A I don't remember.

Q Let me ask you on page 50 of your deposition if this refreshes your recollection. Question from line 9 "When you left the room was your wife still in the room? A Yes sir.

MR. BUCKLEY: Your Honor, the proper procedure is to show the witness, not to begin reading it. Show the witness the deposition.

THE COURT: The question is what to ask the witness if he ever answered the question different and if you have the same question, you may ask him did he previously answer differently and if he says he didn't, then you can pull the question and answer on him Mr. Pledger.

Q Mr. Kelley did you ever answer the question was there anybody else in the room with her when you left differently than you did today sir?

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A No sir, I didn't.

Q The anesthesiologist was in the room when you left isn't that correct?

A I said I believed he was.

Q And you had signed the forms while the anesthesiologist was in the room is that correct?

A I don't know. Evidently if I said - I believed he was in there, I don't know whether he was in there or not.

THE COURT: Do you have any different recollection today as to whether he was in there?

A No sir.

THE COURT: All right go ahead Mr. Pledger.

Q Were you in the labor room prior to the time that the electronic fetal monitor had been placed on your wife?

A No sir, I don't know. I don't remember.

Q Let me ask it this way then, was the first time that you noticed or looked at your wife in bed was the electronic fetal monitor on?

A I don't remember.

Q Did you discuss with Dr. Modaber what he meant when he said she wasn't big enough?

A No sir.

Q What did you understand him to mean by that?

A I understood that the opening wasn't big enough, for the baby.

Q Did you understand that the cervix had not dilated enough?

A I believe that's what that means isn't it.

Q All right sir. If Your Honor will indulge me one moment. Did you ever ask Dr. Modaber what happened to the baby?

A No sir.

Q I have nothing further Your Honor.

THE COURT: Any redirect?

MR. BUCKLEY: No Your Honor.

THE COURT: All right Mr. Kelley you may stand aside.

MR. BUCKLEY: I call Barbara Amos Your Honor.

BARBARA AMOS, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. McDaniel

Q State your name please?

A Barbara Amos.

Q Where do you live?

A Charlottesville, Virginia.

Q How long have you lived there Mrs. Amos?

A Two years.

Q What is your occupation?

A I'm a registered nurse, University of Virginia Hospital.

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Q Tell us please what your educational background was leading up to becoming a registered nurse?

A I graduated from an accredited community college and took the state board exam and became a registered nurse.

Q What year did you take the board exam?

A 1972.

Q Did you become licensed?

A Yes, I did.

Q What jurisdiction licensed you?

A State of Virginia.

Q And what year was that?

A 1972.

Q Tell us also if you would what your work history has been since the time you were licensed as a registered nurse?

A I went to work at Culpeper Hospital and worked in labor and delivery until October of 1980 and I went to Charlottesville.

Q Did you hold any positions on the staff other than registered nurse?

A About 1974 I became the head nurse of the labor and delivery.

Q Have you taken any courses related to your work as a registered nurse since you were licensed?

A Yes, I have taken several courses in fetal monitoring. I went to a seminar in Atlanta, Georgia.

THE COURT: Your voice wasn't quite clear, you said fetal monitoring?

A Yes sir, fetal monitoring in Atlanta, Georgia. And I took a course at the University of Virginia in perinatology.

Q What is that?

A It's more or less how to handle high risk babies.

Q In your work as a registered nurse at Culpeper Hospital prior to 1978 did you work with electronic fetal monitors?

A Yes, I did.

Q Now nurse were you scheduled to work on November 27 1982 at the hospital?

A Yes, I was.

Q What shift were you working?

A Seven to three.

Q What time did your work day actually begin?

A Quarter of seven.

Q And on that specific day, November 27th, what time did you come in?

A I usually always went to work about 6:30 in the morning.

THE COURT: Mr. McDaniel I believe you may have used year 1982.

Q I'm sorry, Your Honor, that's this year, that's the year I remember best. I go back to 1978.

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THE COURT: All right let's be clear about that, somebody reading this transcript may wonder what we are talking about but you meant 1978 I take it.

Q Okay, nurse you can correct me too if I make a mistake. November 27, 1978 you usually arrived at 6:30 you said?

A Yes.

Q When did you arrive that day?

A About 6:30 in the morning.

Q Now when you arrived at the hospital that day what personnel were on duty in the labor delivery area?

A Janice Strothers was on duty in the labor room, Barbara Kidwell was in the nursery.

Q Who is Janice Strothers?

A She's an LPN at the Hospital.

Q What is an LPN?

A Licensed Practical Nurse.

Q And what is the difference between a licensed practical nurse and a registered nurse?

A Education, they basically do the same thing that a registered nurse would do except for giving IV medication, that's basically the only thing I can think of right now.

Q When you say they basically do the same thing except for that, what are the distinctions between an LPN and RN of giving IV medication?

A LPN's at Culpeper Hospital could not give IV push

medications directly into the line going into the patient unless it was under the supervision of a physician.

Q Now you say also Barbara Kidwell was there?

A Yes sir.

Q What was her job?

A She was taking care of the babies in the nursery.

Q Is she a nurse?

A Yes.

Q Is she an LPN or RN?

A She is an LPN.

Q Were there any doctors on duty?

A No sir.

Q What personnel were on duty in the operating room?

A There were no people there at that time of morning.

Q Is it a fact / that there was nobody there was that standard at that time of day?

A Yes sir.

Q Was there a time that the operating room crew was expected to come on?

A They were usually there by 7:30 in the morning.

Q And when you arrived that morning what is the first thing you did?

A I went to the nurses' station and made coffee and put my coat away and got ready for the day.

Q What happened then?

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A No.

Q Was there anything printing out on the monitor?

A It was just static, we weren't able to pick one up with that.

Q Did there come a time when you were able to pick one up?

A I used the - we have a hand monitor that we use - it's not a monitor per se - it's a stethoscope, a fetoscope.

Q Did there ever become a time when they began to print out on the chart on the machine?

A We were with a lot of interruptions, we were getting a very, very low heart rate.

Q To your knowledge Mrs. Amos, was that machine operating properly that day?

A Yes, it was. The problem with this patient was that we had her turned on her side and you have to get directly on the baby's back, the way the baby's positioned in order to pick it up and we were having difficulty picking up an audible tracing of any length without interruption but we could hear it intermittently.

Q Is it your belief that that machine was working that morning?

A Yes.

Q Now I want to show you what has been received into evidence as Exhibit 11, the hospital records and ask you to look

in there for the labor record. Have you got that nurse?

A Yes sir.

Q Now do you see any handwriting on that labor record that is your handwriting?

A Yes.

Q What is the first line you see on there and if you wouldn't mind come down and point to it on this Exhibit - use this pointer so the jury can see it.

THE COURT: What is the exhibit number Mr. McDaniel.

Q It is Exhibit 4a which is the blow up of the labor record. What is the first line in which your handwriting appears?

A Right there.

Q Read it please?

A 0_2 at 6 liters per minute.

Q What does that represent?

A We put oxygen on her, oxygen at 6 liters per minute.

Q And did you do that?

A Yes.

Q Are there any other entries - examine that and the next page also, which is 4b right behind it and tell me if your handwriting appears anywhere else on there?

A This is all my handwriting.

Q Now look at Exhibit 4b?

THE COURT: You say all of that is your handwriting?

A From that Your Honor.

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THE COURT: All right go ahead Mr. McDaniel.

Q Exhibit 4b, the second page of the labor room?

A Yes, that's my handwriting.

Q Is your signature on there?

A Yes.

Q Now stay right there if you would nurse, are there entries on there at 7 a.m.?

A Yes.

Q And what do they say?

A Dr. Modaber notified.

Q Did you notify Dr. Modaber?

A Yes, I did.

Q Were any other entries on the chart at 7 a.m.?

A Fetal heart rate 60.

Q I'm sorry, baby's heart rate?

A Yes, fetal heart rate.

Q Did you take the measurements?

A Yes.

Q Where did you telephone Dr. Modaber?

A At home.

Q Had you ever talked to Dr. Modaber before on the telephone?

A Yes sir.

Q Did you notice anything about his voice on the phone?

A He sounded like he had been asleep.

Q What did you say to him on the phone?

A I gave him a summary of what was happening and told him that we were having difficulty finding the fetal heart rate.

Q What did Dr. Modaber say to you in response?

A He told me to check it and call him back.

Q What did he say to you about alerting the OR crew?

A Nothing.

MR. PLEDGER: Now I object to the leading question.

THE COURT: I don't believe the question was leading necessarily but you are getting close to that area, be mindful of it Mr. McDaniel. Go ahead,the question and answer will stand but do not trespass into that area without being mindful of it.

Q What did he say to you about the OR crew?

A Nothing.

Q Did Dr. Modaber say anything else to you other than check it again and call me back?

A No.

Q What did you do at that time nurse?

A I went back into the labor room and tried to find it again and went back and called him again.

Q Now when you say tried to find it again, what are you referring to?

A The baby's heart rate.

Q Were you able to find it?

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A No sir.

Q Are there any notations on the record that refer to what you did between the first and second call?

A I've got written zero for fetal heart rate.

Q What time did you make a second call to Dr. Modaber?

A About ten after seven.

Q Where did you call him?

A I called him at home.

Q And who answered the phone?

A He did.

Q Did you speak with him?

A Yes.

Q What did you say?

A I said we still can't find the fetal heart and we are only getting a heart rate of 40 to 60. That's all I said.

Q Did he make any response?

A Yes, he asked me to put the phone up to the monitor.

Q Let me take you back for a second, was there a phone in the labor room where Mrs. Kelley was?

A Yes, there was.

Q Did you use that telephone when you made the first call to Dr. Modaber?

A No sir.

Q Where did you go to call him?

A I went out to the desk, outside the room.

Q How far away was that from where Mrs. Kelley was?

A About as far as from where I'm sitting to where you are standing.

Q Now when you made the second call, at ten after seven, which of the two telephones did you use that time?

A The same one.

Q Now after Dr. Modaber said to you - well let me ask you again, you told him what your findings were and what was his response to you?

A Put the phone up to the monitor.

Q What did you do then?

A I put the phone down on the desk and went into the labor room and took the phone down off the wall and put it up to the monitor.

Q Well then what happened?

A I put the phone back to my ear and he said I'll be right there.

Q Did he say anything else to you?

A No sir.

Q Did you say anything else to him?

A No.

Q All right nurse what were the next steps that you took?

A I probably went back in and hung the other phone up and at that point I called the supervisor.

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Q Why did you call the supervisor?

A Our standard practice when you are having a problem is to let the supervisor know. I had wanted her to call the OR crew.

Q What did you tell her?

A I told her the situation and asked her if she would call the OR crew in.

Q Were you acting on anyone's instructions when you made this call to the supervisor?

A No.

Q Did you say anything else to her?

A I don't remember saying anything else.

Q What did you do next?

A I probably called - that's probably when I called Dr. Wallace.

Q Is that indicated on the labor record?

A No - yes it is, down at the bottom.

Q Who is Dr. Wallace?

A Dr. Wallace is the family practice physician.

Q Is it indicated on the labor record that you telephoned the supervisor?

A Yes, it is.

Q And why did you telephone Dr. Wallace?

A He was the doctor that the Kelleys had indicated on our records that they wanted him to take care of their baby

when it was born.

Q And did you speak with him?

A Yes.

Q Where did you telephone him?

A At home.

Q What was your purpose in calling Dr. Wallace?

A To see if there was anything else I could do.

Q After you telephoned Dr. Wallace and the supervisor, what was it that you did next?

A Probably went back in and checked Mrs. Kelley again and Mr. Kelley was very obviously distressed as she was, as we were anticipating a caesarean section and I probably changed into a scrub suit at that point.

Q Now you testified before nurse that there were no OR personnel on duty?

A No.

Q How many people in your normal routine would the supervisor have alerted to come in - let me rephrase that - how many people would have been required in a normal routine to perform a caesarean section?

A An anesthesiologist, the physician, a scrub nurse and a circulating nurse.

Q Okay, explain if you would what the difference is between a scrub nurse and a circulating nurse.

A A scrub nurse prepares herself for surgery by scrubbing

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her hands and she is the one who passes the instruments to the surgeon.

Q And what does a circulating nurse do?

A She helps in the operating room handing things to the scrub nurse, tying her gown, opening sterile packages for her and so forth.

Q Is anybody else needed other than other four people to perform a C-section?

A No.

Q Did there become a time that morning when these four people arrived?

A Yes.

Q Who arrived first?

A Dr. Petkov.

Q And who is Dr. Petkov?

A The anesthesiologist.

Q And who arrived next?

A Someone from the operating room. I believe it was Wayne Weaver who is the supervisor there. He is a registered nurse.

Q Where did he fit into this group of people. Is he a scrub nurse or circulating nurse?

A He could have done both. He usually circulates. They use technicians to scrub.

Q Who arrived next?

A Dr. Modaber.

Q Indulge me for one moment Your Honor. During this time, this entire morning did you know who the patient was in the labor room?

A No.

Q Did you know her name?

A Mrs. Jessie Kelley.

Q Had you ever met her before?

A No.

Q Did you know anything about her condition before?

A No.

Q Did you know anything about the procedures to be performed on her that day?

A No.

Q Had you ever met Mr. Kelley?

A No.

Q Now when Dr. Modaber arrived what did he do?

A He put a fetal scalp electrode on the baby's head.

Q What is a fetal scalp electrode?

A To put it simply it is a piece of wire that one end is attached to the skin on top of the baby's head and the other end is connected to a leg plate that is strapped to the patient's leg that is connected to a fetal monitor.

Q Is this the same fetal monitor you were using before?

A Yes.

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Q What did he do about the previous arrangements you had with regard to a fetal monitor?

A Sir.

Q My question is did he have to unhook the other one to hook this one in?

A We had to unhook the transducer from the machine and hook the leg plate or the internal fetal electrode.

Q Why didn't you hook up the internal monitor before this time?

A Nurses in Culpeper don't put fetal scalp electrodes on.

Q Why don't they?

A It is not standard procedure.

Q Now did that internal monitor make tracings?

A Yes.

Q Were they made on the same sheet or a different sheet?

A Same sheet, same graph paper. Here it is right here.

Q Do you see both readings on that graph paper?

A Yes.

Q Now after Dr. Modaber applied that internal monitor to Mrs. Kelley nurse, did he say anything?

A He explained to the patient that it was necessary to do an emergency C-section.

Q Did he say anything else?

A He turned to me and said get BTL papers signed.

Q What are BTL papers?

A Tuberal ligation papers.

Q Had you heard any discussion prior to that time about tuberal ligation?

A No.

Q Any discussion prior to that time about BTL papers?

A No.

Q Did you make any response to Dr. Modaber?

A I couldn't believe it. I can't remember exactly what I said but I probably at a time like this, I couldn't understand it.

Q Why couldn't you nurse?

A Because of the state of the emergency that's the last thing I was thinking about.

Q What was the state of the emergency at this time?

A We had a baby dying.

Q And how does that relate to the request to get BTL papers?

A It's preposterous.

Q I'm sorry, I can't hear you?

A I couldn't believe it.

Q Did Dr. Modaber say anything else at that time?

A I think that's when he said I'll - I'm going to go get the records and the papers or something.

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Q What did you understand him to mean when he said that?

A That he was going to the office and get the papers.

Q What office?

A His office.

Q Where was his office located?

A At that time it was in Dr. Payette's office so it was around behind Dr. Cramer's office, the southside of the hospital a good ways.

Q Why did you interpret his remarks to mean he was going outside the hospital to get the papers?

A We don't. ..

MR. PLEDGER: Your Honor, I think we have to leave it with what was said, it is for the jury to interpret.

THE COURT: The jury will disregard her interpretation as to where he was going. She may state the facts and circumstances.

Q Where was the place that doctors at Culpeper Hospital kept BTL papers?

A Signed BTL papers?

Q Yes.

A In their office.

Q Tell us if you would what happened next?

A We prepped her for surgery and shaved her abdomen and put a catheter in her bladder.

Q Then what happened?

A We took her to the operating room.

Q How did you. . .

THE COURT: Would you explain who is we? Who was with her when you took her, if you did take her.

A Yes, I took her. I can't remember who accompanied me.

Q How did you physically get her from the labor room to the operating room?

A In her bed. The bed she was in in the labor room.

Q Did you push it?

A Yes.

Q Describe for us, if you would, the journey, in terms of physical layout, in pushing that bed over to the operating room?

A The physical layout.

Q Yes. In terms of just right and left and so forth.

A Okay, we went out of the labor room and took a right and went down the hall to the doors to the maternity floor; took a left and went into the corridor and in through the OR suite and took another left into the operating room area.

Q Okay, did you pass through any doors?

A Yes.

Q During that trip, did you see Dr. Modaber?

A No.

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Q As you were pushing the patient along, Mrs. Kelley along, did there come a time when you saw anybody?

A When we went through the double doors going into the operating corridor, Wayne Weaver and I believe one of the technicians were at the scrub sink at the other end of the room.

Q Okay, now, in terms of where you were with Mrs. Kelley, where was Weaver, was he in front of you or behind you or to your side or what?

A He was in front of me.

Q And where were the scrub sinks?

A Behind him.

Q And where were the doors into the operating room itself?

A Behind me. We had just gone in the door. They are right directly. . .

Q Is that the door into the corridor? I think that's what you said. Into the corridor?

A It's into the area before you go into the operating rooms themselves.

Q Okay. Where are the doors that lead into the operating rooms themselves? In terms of where Wayne was and where you were?

A To Wayne's right.

Q Now, did you see anybody else other than Wayne Weaver and the technician standing at the scrub sinks?

A No.

Q Did you see Dr. Modaber at that time?

A No.

Q Okay, nurse, what happened next?

A We pushed her on - I pushed her on up, and Wayne Weaver took over the patient, took the patient. He came toward the bed. I went back through central supply that leads into the labor area.

Q Okay, let me stop you right there, if I can. Did you go back the way you came?

A No.

Q How did you go?

A I took a shortcut. I crossed over between central supply. . .between the operating room and the labor area... labor and delivery area, there is central supply and there are doors.

Q Well, why hadn't you brought Mrs. Kelley through that shortcut instead of going around?

A The doors are too small for the beds.

Q Okay, I'm sorry. What did you do next?

A I went to get the infant resuscitation equipment.

Q Okay.

A And as I was coming back, I had a rather large, incubator-type piece of machinery - well, it's not an incubator. It's called a Kreiselman but it has oxygen and suction and so

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forth on it. And I heard Mrs. Kelley yell, "The baby's coming." So I grabbed a suction bulb in my hand and ran back into the operating area and. . .

Q Okay, let me stop you right there.

A Okay.

Q When you ran back into the operating area, did you run into the corridor or did you run into the operating room or where exactly did you first emerge into?

A Right in front of the scrub sink.

Q Okay. Now, what did you see when you came out? Right at that point, right there by the scrub sink, did you see anybody?

A I saw Mrs. Kelley in the bed.

Q Where was she?

A Lying in the labor bed.

Q And was there anybody standing around the labor bed?

A I don't remember seeing anybody, but. ..

Q Was Dr. Modaber at the labor bed?

A No.

Q Did you see Dr. Modaber?

A He was running towards the bed.

Q Where was he coming from?

A The doors that we had taken her through to get her into the OR.

Q Well, as you emerged into the corridor, was Dr. Modaber on your right or on your left?

A On my right.

Q And was Mrs. Kelley on your right or on your left?

A She was straight in front of me. The bed was right here, she was in front of me, the doorway; she was in front of the doorway.

Q Did you notice anything about Dr. Modaber?

A He was running.

Q Anything else?

A He was out of breath; he was running.

Q Did you hear anything?

A The OR doors flapping. They make a lot of noise.

Q Now, what happened next?

A Dr. Modaber ran up to the other side of the bed, and I was on the other side, and the baby just delivered, and somehow, we got the cord cut and the baby into the operating room, and we tried to resuscitate it.

Q Okay, now, when you say the baby just delivered, what do you mean by that exactly? Could you explain that a little more?

A She was. . .she was delivering the baby, and it just slipped out. Dr. Modaber was right there, and it just - I mean, he didn't even have time to put gloves on.

Q Did Dr. Modaber say anything at this time?

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A No. I asked him, I said, "Was it a prolapsed cord?" And he said, "Yes".

Q Did you see the cord?

A No.

Q Did you see a prolapse?

A No.

Q Now, I guess we know that resuscitation was not effective that day?

A No.

Q Did there come a time later that day when you saw Dr. Modaber again?

A Later on that morning.

Q Where?

MR. PLEDGER: Now, Your Honor, may we approach the bench?

THE COURT: We will have to take it up in chambers, gentlemen or have the jury go out. I believe it is more convenient to have the jury - do you need to take it up out of the presence of the witness?

MR. PLEDGER: Yes sir.

THE COURT: All right we will take it up in chambers with counsel. The Court will remain in session, I'll see counsel in chambers.

(Court and counsel retire to chambers.)

MR. BUCKLEY: Your Honor, I know your policy about mentioning the committee but if that is something the defendant here opens the door on. . .

THE COURT: I've already told you.

MR. BUCKLEY: I want to be heard in chambers on it.

THE COURT: Certainly.

MR. MCDANIEL: It can always come up again Your Honor.

THE COURT: Well don't you all threaten each other but if you have an occasion to be heard again, you have the opportunity to present the matter again.

(Discussion on how many more witnesses in the case)

COURT AND COUNSEL RECONVENE IN COURT.

THE COURT: All right Mr. McDaniel you may proceed with the question that was asked just before the objection and the objection doesn't apply to this question and you may repeat the question.

Q (Mr. McDaniel still on direct examination) Did there come a time later in the day after the death of the baby, nurse, where you saw Dr. Modaber again?

A Yes.

Q Where was that?

A In the nurses' station.

Q And what were you doing?

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A Writing up the delivery, finalizing the paper work.

Q And what was he doing?

A He was doing the same thing.

Q And did he say anything to you - I'm sorry, did you say anything to Dr. Modaber?

A Yes.

Q What did you say?

A I said, Dr. Modaber from now on when I call and he said, yes Barbara I know, come, believe you.

Q Did you say anything else?

A And I said please yes, believe me.

Q Now Ms. Amos, I would like for you to look again at the labor record, Exhibit 4a. Come down here please if you don't mind. Looking at Exhibit 4a which is the first page, do you see your name on that first page?

A Yes.

Q Where?

A Right there.

Q Did you write that?

A No.

Q What does your name indicate in terms of what is written there?

A That I gave Demerol 25 milligrams, Sparine 25 milligrams IV push.

Q Did you give Demerol and Sparine IV push?

A No.

Q Is an LPN qualified to give Demerol and Sparine IV push?

A No.

Q Is an RN?

A Yes.

Q Were any other RN's - what time does the chart indicate that IV push was given?

A Between 6:55 and 7 o'clock.

Q Were you in the labor room at that time?

A Yes.

Q Were there any other RN's in the labor room?

A I don't remember it being any others.

Q Thank you, you may resume the stand. No further questions, Your Honor.

THE COURT: All right you may cross examine Mr. Pledger.

MR. PLEDGER: Thank you, your honor.

CROSS EXAMINATION

By: Mr. Pledger

Q Mrs. Amos you came in at 6:30 that morning?

A Yes sir.

Q Would you tell the ladies and gentlemen of the jury

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what the first thing you did was?

A I hung my coat up.

Q And then where did you go?

A I hung my coat up in the nurses' station.

Q Then where did you go from there if anywhere?

A I didn't go anywhere.

Q You stayed right there?

A Yes.

Q And what did you do?

A I made coffee, smoked a cigarette.

Q And after you had made the coffee and smoked a cigarette, what happened?

A I sat down at my desk to get reports for the day.

Q And who do you get reports from?

A The nurses on duty, on the 11 to seven shift.

Q And those nurses were Barbara Kidwell and Janice Strothers?

A Yes sir.

Q Was Janice Strothers there at your desk to give you a report that day?

A No sir.

Q Who gave you the report?

A Nobody did.

Q There was no report that morning at all?

A No sir.

Q Did Barbara Kidwell come up to the nurses' station?

A I don't remember.

Q No recollection of seeing her around the nurses' station in the time that you were there making coffee and having a cigarette?

A She may have been but I don't remember it.

Q If there was no report that morning, how did you learn about the night before, what had happened on that shift?

A I didn't.

Q What happened then after you had - let me withdraw that - you made the coffee and smoked your cigarette and then what happened?

A The telephone rang, the intercom phone rang and it was Janice Strothers.

Q And what were her exact words to you?

A I don't remember her exact words.

Q What did you do?

A I answered the telephone. I don't understand what you mean.

Q After you talked with Janice Strothers, what did you do?

A I got up and went to the labor room.

Q Did you walk to the labor room?

A No.

Q Did you run?

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A Yes.

Q Why did you run?

A Because she said that she couldn't find the fetal heart.

Q She said that she could find or could not find it?

A Could not find the fetal heart.

Q Could not find the fetal heart. What time is this?

A About ten minutes to seven.

Q And when you got in the room were you able to find the fetal heart?

A Intermittently.

Q Intermittently. And this was at ten minutes of seven?

A Approximately.

Q And when you say intermittently, are you talking about looking at the tape or are you talking about the audible sound of the machine?

A The audible sound.

Q Did you look at the tape?

A Off and on, I looked at it.

Q Well when you went in there and Janice said I can't find the fetal heart and you said that you didn't hear one, is that correct?

A Off and on I did.

Q Did you look at the tape?

A When /I walked in the room, no.

Q When you couldn't hear a fetal heart did you look at the tape to see if there was one on the tape?

A No sir.

Q Did you ever look that morning to see if there was a fetal heart rate being recorded on the tape?

A Yes.

Q And was there a fetal heart rate on that tape as of the time that you had come into that room?

A From the time until we left?

Q No ma'am. From the time when you first entered the room until you looked at the tape, was there a fetal heart rate recorded?

A There was static, artifact and somewhere in there there was a fetal heart, yes.

Q Would you tell the jury what static looks like on the tape?

A I can't tell you what it looks like. I can show you what it looks like.

Q Can you tell us what artifact looks like on the tape?

A No, I can't.

Q Do you have the hospital file in front of you?

A Yes.

Q Would you look at the tape - first off does the tape indicate the name of the patient?

A Yes, it does.

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Q And what does it say?

A It says Jessie Kelley, 11/27/78, No. 41347.

Q Does that tape indicate what time the fetal monitor was started?

A 6:40 a.m.

Q All right, and it is your testimony that you went down to the room at what time?

THE COURT: You have just covered that Mr. Pledger, move along. She said she entered at 6:50, that has clearly been discussed.

Q All right, would you count off on that tape, starting at the 6:40 or the beginning of it, the ten minutes?

A Okay. One, two, three, four, five, six, seven, eight, nine, ten.

Q Okay, now the ten minutes that is shown on that tape is there any point of reference you can use whether it is a serial number or something like that?

A There is a point of reference right here where somebody wrote something on the tape.

Q Now I wonder if you might step down and take a look at Plaintiff's Exhibit No. 8,and I believe counsel has a pointer, and have you point out where it is that you are referring to where something is written on there.

A There is something written right here.

Q Now looking at that tape is there a fetal heart rate

recorded?

A From here to here there was nothing. It is hard to say if it was artifact.

Q Which portion of that is artifact? Can you tell the jury that?

A Right here, right here, right here, here, here, here.

Q And by artifact do you mean, the machine wasn't recording properly?

A It wasn't recording right through here.

Q All right so it is your interpretation that those lines, that there was no fetal heart at that point?

A No, that is not my interpretation.

Q Well would you explain it to us?

A Explain what?

Q What you mean by those lines that come down that you say are artifact? I believe you pointed to this line that comes down. What does that mean?

A The machine walks on an echo. If it can't pick up anything to record, it is not going to record. It will record what it hears. I'm not an electrician but I can tell you that when it doesn't have the proper sound, the pen comes off the paper and it drops down, it goes up and down, up and down, up and down.

Q In other words it goes up and down not because of

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the heart rate going up and down but simply because it can't pick up whatever the sound is?

A It can't pick it up, no.

Q You may resume the stand. Now you said there is something written on the tape?

A Yes.

Q Whatis written there so we will have that in the record?

A Dr. Modaber notified.

Q And is there anything else written there?

A O2 at 6 liters.

Q Were either of those entries in your handwriting?

A Yes.

Q Which one?

A O2 at 6 liters.

Q You did not write, Dr. Modaber notified?

A No, that is not my handwriting.

Q All right, do you recognize the handwriting?

A Yes sir.

Q And whose handwriting is that?

A Joyce Sites.

Q Joyce Sites?

A Right.

Q Is the 02 at 6 liters written on that tape at the time that you put it on?

A I probably. . .

Q Or is it just a notation that you made on the tape?

A It is not just a notation, it is noted there that at that point we put oxygen on the patient.

Q So by counting from the beginning we can tell precisely what minute you put it on, is that true?

A No.

Q Why not?

A The tape,when you put the monitor on the tape is moving the whole time. You put the oxygen on the patient, it takes a few minutes maybe a minute, two minutes, and by the time you turn around and write it, it might be off a minute or two I can't swear that at this point in time, that's when the oxygen began.

Q Let me ask you then physically if we are looking at the machine I assume the paper is coming through a portion of it and then it comes out on the end and folds into a box or something is that correct?

A Yes.

Q Is it where it is on the machine and the needle is recording that you write or is it where it comes out and goes into the box that you write?

A There is a space about this wide and it is the top of the paper and then it's the bottom and the stylus is up here the pen, and you write it when you can. You write it on that

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portion, unless at some earlier point you may have written something down here and you can count the minutes.

Q Can you tell us how many minutes are displayed in that box?

A Not approximately, I don't remember how big the monitor was. Do you want an approximate number.

Q An approximation.

A I really don't know.

Q All right if you could just me an approximation?

MR. MCDANIEL: Your Honor, the witness has said that she doesn't know.

THE COURT: If she can estimate it, if she can make a reasonable effort or estimate from the use of the tape she may do so.

MR. MCDANIEL: Thank you, Your Honor.

THE COURT: But do not speculate Mrs. Amos. If you can estimate it you can do so.

A Maybe ten or twelve minutes.

Q So that that notation then would be within ten or twelve minutes of when you actually made that or did that activity of putting the 02 on?

A No.

MR. MCDANIEL: Your Honor, I object, I don'tthink that has been her testimony. She said that the box was ten or twelve minutes long.

THE COURT: She has indicated such. She has already corrected that, that is not her testimony.

Q Can you tell me approximately how many minutes would have elapsed between the time you put it on and when you wrote it on the tape?

A I said earlier that it takes maybe one or two minutes.

Q So that the notation would be within one or two minutes of when you put it on?

A I suppose yes.

Q Did you make a note in your nursing notes as to the time that you put the oxygen on?

A Yes.

Q What time did you write in your notes?

A Between 6:55 and 7 a.m.

Q And on the tape we have between - six minutes?

A Four to six, I can't count right now, 6:46.

Q All right so there is ten minutes difference between what is written on the tape and what you have written in your notes is that correct?

MR. MCDANIEL: Your Honor, I object, the witness has testified that the notation on the tape could be the exact time and it could be afew minutes later.

THE COURT: I think you are misstating the answer Mr. Pledger.

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MR. PLEDGER: I'm sorry.

THE COURT: If you don't want to let it stand, don't try to add something to it.

MR. PLEDGER: I certainly don't mean to mistate it.

THE COURT: You may ask the question again to clarify it, but don't try to tell her what she said if you don't understand it.

Q How much time is there difference between what you have written on the nurses notes as to the time when you put the oxygen on and what you noted on the fetal monitor tape?

A According to what is written there it is about ten minutes.

Q What time did you call Dr. Modaber?

A About five minutes to seven.

Q Five minutes of seven?

A Yes sir.

Q What time did you write in your notes that you called Dr. Modaber?

A Seven o'clock.

Q Do you have some notation recorded somewhere also in your notes that tells you it was five minutes of seven rather than seven o'clock?

A There is a notation on here but that is not my handwriting so I can't say at that point.

Q At what point does that show on the tape that the

notation reads notification was made?

A 6:47.

Q Now when do you make up your notes, the nurses notes?

A Ordinarily.

Q In this case if you recall?

A When you have a chance.

Q Would that be an hour afterwards perhaps?

A It might be yes.

Q Could it have been five minutes after seven when you called Dr. Modaber?

A No sir, it couldn't have.

Q You have written in your notes that you called him at 7:10?

A I called him again.

Q And you reported in your notes that you called him at 7:10 is that correct?

A Yes.

Q Did you make that notation contemporaneously with calling him?

A At the same instant?

Q Within a minute before or a minute afterwards?

A I don't remember.

Q You told members of this jury when you called Dr. Modaber the first time, you explained to him you were having difficulty with what?

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A Getting a fetal heart.

Q Did you tell him that you did not have a fetal heart?

A At points we didn't yes.

Q All right. What did you tell him the fetal heart was?

A 40 to 60.

Q Now can you show us on that tape where that fetal heart rate was at 40 to 60 at 7 o'clock? Perhaps if you would step down it would be easier for the jury to see.

A I don't mind. I have forgotten what you asked me.

Q All right, my question was would you point out to us where the fetal heart rate was at 60 or 40 when you called or just before you called at 7 o'clock?

A Wherever it says 7 o'clock on here.

Q Well can you point out where 7 o'clock is?

A Well 6:40, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine, about right here.

Q All right so that would be just to the right of the serial number 76592?

A If I counted right.

Q Approximately?

A Right.

Q Now where is the recording of the fetal heart rate of 60?

A Right there.

Q Is this the eighty line?

A Yes.

Q And is this the sixty line down here?

A Yes.

Q All right now where is the sixty fetal heart rate?

MR. MCDANIEL: It has been asked and answered your Honor.

A Where is what?

Q Where is the forty to sixty fetal heart rate.

THE COURT: Can you point out on there any reading that you now can say is consistent with 40 to 60 at the time you made the call?

A Your Honor, you will have to understand that the monitor works was, the pen was jumping up and down and we were hearing,the monitor wasn't printing everything that occurred. It was picking up static and artifact because we were turning the patient and trying to find the place where the baby's heart would be normal. And the monitor can't print what it can't hear.

THE COURT: Let me clarify this, Mrs. Amos on what did you rely when you said the fetal heart rate was a certain reading? Or certain count?

A Baby's heart rate is exactly like our heart rate, it

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doesn't stay constant all the time. That baby's heart rate wasn't sixty all the time, it would jump up to eighty and maybe to a hundred. It goes back down to forty and then you couldn't hear it, that would mean. . .

THE COURT: Were you relying on what you heard or the chart or both?

A I was relying on what I could hear.

THE COURT: All right and the chart does not reflect - does it reflect the same thing you hear or is it always the same?

A It is not always the same, no.

THE COURT: You were not reading off the chart when you made the count?

A No. Sometimes you just can't trust the machinery, and I just felt like you can't trust it, so you listen with your ears and I listened with my ears.

THE COURT: Any other questions on the chart Mr. Pledger.

MR. PLEDGER: No, Your Honor.

Q Now it was five minutes to seven I believe you said when you called Dr. Modaber and told him of this problem and he told you to check it again?

A Yes.

Q And you called him back at 7:10?

A Approximately.

Q And why did you wait fifteen minutes to call him

again?

A I didn't wait fifteen minutes. Mr. Pledger, we have a terrible, terrible situation going on. I didn't wait fifteen minutes. I called him back within five or ten minutes. We were trying desperately to care for this patient. The times are not exact. We called - I called him at five minutes to seven, 7 o'clock. I don't remember. Five minutes to seven or seven o'clock, he told me to check it and call me back. And that is what I did. And I called him back.

Q Did you go and listen to the monitor, look at the tape and turn around and go back out and call him?

A No, I didn't.

Q What did you do?

A I tried to find it myself with the fetoscope. We moved the transducer around to the monitor.

Q So at 7 o'clock this period of time that we have just identified on this chart you are moving the transducers around on the abdomen, is that what you are saying?

A It is transducer.

Q The transducer?

A Yes.

Q You are trying to position that, I think you said over the back of the baby so you can get the best sound?

A Yes.

Q At that time you had the mother turned on her side?

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A Yes.

Q And that gave you difficulty in hearing?

A Yes.

Q So that what is recorded on that chart around that time is not necessarily accurate because you are moving this thing all around is that what you are telling us?

A Yes.

Q Now you have said that Dr. Modaber came in, what time was it?

A About seven twenty-five or seven twenty.

Q What time did you record in your notes?

A Seven twenty.

Q What did Dr. Modaber do that you saw?

A He put the fetal scalp electrode on the baby's head.

Q Did you play any role in assisting him in doing that?

A I handed it to him.

Q What else did he do? Other than placing that?

A He told the patient that he was going to do a caesarean section.

Q And did he stand there right beside Mrs. Kelley and say I'm going to have to do a caesarean section?

A I suppose he did.

Q Well now what did you hear?

A I heard a fetal heart.

Q And what did you hear about the section?

MR. MCDANIEL: Your Honor, I object, the question has been asked for the third time, Mr. Pledger.

THE COURT: Yes, Mr. Pledger, she has already stated what she heard him say, unless there is something we have escaped here, I think she has gone over many times.

Q Is that the only thing he said?

A To Mrs. Kelley.

Q Then what happened?

A He asked me to get BTL papers signed.

Q And was that in the room?

A Yes.

Q Now did you understand what he meant?

A Yes.

Q Did you get the papers for her to sign, the BTL papers?

A No.

Q Did you ever see them that morning?

A I don't remember seeing them no.

Q What else was required in order to do a caesarean section that morning?

A I don't . . .

Q Is there a consent required through the patient?

A You like to get consent yes.

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Q And did you have anything to do with getting the consent of the patient?

A I don't remember, no. I had too many other things to do.

Q Now you told us you went and changed into scrub clothes, where did you go to do that?

A To the bathroom between the two labor rooms.

Q And was that sterile garb that you were getting to put on?

A No, it wasn't.

Q In order to be a scrub nurse do you have to put on sterile clothes?

A I wasn't a scrub nurse.

Q You were not intending to act as the scrub nurse then that morning?

A No.

Q When did Dr. Petkov come in?

A Dr. Petkov came in sometime before Dr. Modaber came in.

Q Why did he come in?

A Because he heard that we were having a problem in the labor room and he came in.

Q And how did he hear this?

A I have no idea.

THE COURT: Was he on duty already?

A Sir.

THE COURT: Was he on duty at the hospital that night or early that morning?

A No, he came in early, about 7 o'clock, in the morning he usually came in.

Q Where was the room that the doctors went to to change their clothes to get into the necessary garb to perform an operation?

A Where in relation to the labor room?

Q Yes.

A Down the hall a short way.

Q Where in relationship to the operating room?

A At the end of - the labor room being here, it is here where the OB doctors change and you have to go through here the same way we took the patient or you could go through central supply.

Q If he would go the same way that you would go to take the patient you would pass through these doors is that correct?

A Yes.

Q To the operating room?

A Yes.

Q Swinging doors?

A Yes.

Q Did you speak with Dr. Wallace personally?

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A Yes, I did.

Q Did he - withdraw that. Your Honor indulge me one moment. I have nothing further Your Honor.

THE COURT: Any redirect?

MR. MCDANIEL: Yes sir, Your Honor, one or two questions.

REDIRECT EXAMINATION

By: Mr. McDaniel

Q I'm going to get this chart nurse and I'm going to ask you to come down and look at it again. This is Exhibit No. 8. Now I want you to look at the end down here, do you see any writing, all the way to the end?

A To OR.

Q Do you know who wrote that?

A I did.

Q Now look in your notes that you have here, your labor record, did you note on that record when the patient went to OR?

A 7:40 a.m.

Q And who wrote that?

A I did.

Q Now I want you to count backwards, take your time - how long is each one of these lines?

A I don't remember.

Q Okay.

A Each one is a minute.

Q Okay, I want you to start at the end here and count backwards, these heavy lines, is it easier to count by five?

A No, I can. . .

Q All right, count slowly backwards to where Dr. Modaber was notified and I'll keep the pointer at that point.

A One, two, three, four, five, six, seven, eight, nine, ten, eleven. . .

Q Okay, stop at ten. That's 7:30?

A Okay.

Q Now keep going?

A Eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, fifty.

Q Okay, so it was about fifty minutes from the end of the tape to when he was notified according to this diagram?

A Yes sir.

Q Now were you present when this was written down here? Can you read that down at this end?

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A Jessie Kelley, no I wasn't present, that was when the monitor was placed.

Q Okay, were you present when that was written?

A No.

Q Were you present when the monitor was placed?

A Not here no.

Q Do you know what time it was placed of your own knowledge, were you there at the time it was placed?

A It was already in place when I got in there.

Q Go to the labor record again, do you see a notation there as to when it was placed?

A 6:40.

Q Did you write that?

A No.

Q No further questions Your Honor

THE COURT: Any recross?

MR. PLEDGER: Yes sir.

RECROSS EXAMINATION

By: Mr. Pledger

Q Mrs. Amos, does the fact that he had you count from the other end give you a point of reference as to where you can show us where 7 a.m. is on this tape?

A I could count it back for you again.

Q Does it come out the same?

A I don't know.

Q To count it either way?

A I can go count it if you would like.

Q Have you ever counted it?

A No.

Q When you wrote to the OR on there was the tape still running?

A Yes.

Q When did you. . .

A No, it wasn't running.

Q You had already stopped it?

A You can't take a patient to the operating room connected to the monitor.

Q When did you make the note in your nurses notes that you took her at 7:40?

A Before we went out the door.

Q As you were going out the door. So that is accurate?

A Well approximately.

Q You looked at your watch and you wrote 7:40 to OR on the chart, so that is an accurate figure we can use that?

A To the best of my knowledge, yes.

THE COURT: It is our understanding you are saying you made that notation at the time.

A Yes.

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Q Now in your note above that entry, you have made the notation that you had done a prep is that correct?

A Yes.

Q And you noted that the C-section is scheduled?

A Yes.

Q What does the words C-section scheduled mean?

MR. MCDANIEL: Your Honor, my redirect was quite limited. I think this is getting back into cross examination.

THE COURT: You are exceeding cross examination Mr. Pledger.

MR. PLEDGER: Your Honor I think it deals with this point of reference as to when they go to the OR.

THE COURT: If it is referring to that, then the answer can be related to it, I'll allow it.

A Please repeat that.

THE COURT: What is the question again.

Q What does the words C-section scheduled mean that you have written in your notes?

A That means that Dr. Modaber said we are going to have a C-section.

Q How do you know what time to go to the OR?

A Someone tells you. When the patient is ready, they come and tell you.

Q When the patient is ready,. . .

A When the OR is ready or the patient is ready whichever

comes first, I'll call them if the patient is ready or they will come over. In this case they were in and out watching what was happening.

Q The OR crew people were in there?

A Yes.

THE COURT: Is it fair to say they were waiting?

A Yes. They were not ready as they should have been in an ordinary circumstance, but we could do - there was no reason why we couldn't take the patient to the operating room.

Q If the patient is taken to the operating room for a C-section, what happens to the patient. Is the patient operated on on the bed they are taken. . .

MR. MCDANIEL: Your Honor, this is clearly out of the scope of my redirect.

THE COURT: I'll allow the question as to the preparation and the timing as to what is done.

A I don't. . .

Q When the patient comes to the operating room is there anything that has to be done to the patient before the operation can start or does the patient stay. . .

A She has to be moved from the labor bed to the OR table.

Q All right. And for a caesarean section what next happens after she is moved over?

A At that point I'm sorry I can't tell you. At that

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point she is OR's patient.

Q All right, I have nothing further.

THE COURT: Your duties don't apply to the operating room as such.

A No, I was there or would have been there to take care of the baby.

THE COURT: All right, any redirect.

MR. MCDANIEL: No, Your Honor.

THE COURT: You may stand aside. Any objection to her being excused.

MR. MCDANIEL: No, Your Honor.

THE COURT: Thank you, you may be excused, that means you may remain or leave as you like.

MR. MCDANIEL: I call Wayne Weaver Your Honor.

WAYNE WEAVER, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. McDaniel

Q Tell us your name please?

A Wayne Weaver.

Q And where do you live?

A In Madison County, Virginia.

Q How old are you Wayne?

A I'm thirty-two.

Q Where do you work?

A At Culpeper Memorial Hospital.

Q What do you do there?

A I'm an RN and I'm the operating room supervisor.

Q How long have you been the operating room supervisor?

A Since May of 1978.

Q And how long have you been an RN?

A Since June of 1976.

Q Were you. . .

A Excuse me, 1975.

Q Were you - with special reference to November 1978 what were your duties as OR supervisor?

A My duties as supervisor were to watch over all the other nursing and non-nursing staff that work in the operating room, to schedule cases, make sure that all the equipment is available for these cases.

Q Did you have any nursing responsibilities in November 1978?

A In addition to being supervisor I also work as a circulating nurse and sometimes the scrub nurse.

Q During operations?

A Right.

Q Did you have any role in the events surrounding the death of Mrs. Kelley's baby on November 27, 1978?

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A Yes sir, I did.

Q Can you tell us how you first became involved in this chain of events?

A I was on emergency call that period of time and I got called around 7 o'clock a.m. that morning or shortly thereafter and was told that Dr. Modaber had an emergency stat C-section to do. And I left home and came to the hospital to prepare for the case.

Q What does the words stat C-section mean?

A It means as soon as possible, it is a life threatening situation.

Q Was there any OR crew on duty at the hospital that morning?

A No, we were all on call.

Q What time would the OR crew scheduled to go to work regularly?

A Eight o'clock.

Q Now at that time Mr. Weaver, how long could you expect it to take for the OR crew to get in once it received a stat call at home?

A The hospital regulations required that we be able to be there within twenty minutes of the time we are called.

Q Was that the normal time?

A That is the normal time.

Q How long would it take until the operating room

is ready to go for an operation?

A From the time we are called until the time we are ready to operate is generally not more than thirty minutes, thirty-five minutes.

Q Did you come in that morning?

A Yes, I did.

Q What did you do upon arrival?

A I came into the hospital, went into the surgeons lounge, changed into my scrub clothes, went back into the operating room, put the caesarean section operating instruments in the autoclave to be sterilized and got out the packs, basins and opened them up to prepare for the caesarean section.

Q In addition to yourself - let me ask you this, what was the role that you were going to perform in this operation?

A I was going to be the circulating nurse.

Q Who else would you need in order to do the C-section?

A We would need myself as circulating nurse,an operating room technician to act as scrub nurse, an anesthesiologist and a surgeon.

Q When you got there that morning, was there an anesthesiologist?

A Yes sir, there was.

Q Who was it?

A Dr. Petkov.

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Q Was there a person who could act as scrub nurse?

A Yes sir.

Q Do you recall who that was?

A I can't recall who that was.

Q Was there a doctor there?

A A surgeon.

Q A surgeon when you arrived?

A I don't recall seeing a surgeon when I got there.

Q Did you see Dr. Modaber?

A No, I don't recall seeing him.

Q Now did there become a time when you saw Mrs. Kelley being brought to the OR?

A Yes.

Q Where were you at that time?

A I was in the OR corridor outside of OR number one.

Q Where were you in relation to what are called the scrub sinks?

A Directly in front of the scrub sinks.

Q What are scrub sinks Wayne?

A They are deep sinks with knee operated faucets that surgeons and scrub people use to scrub for surgery.

Q Are there other scrub sinks in that part of the hospital that are used before surgery?

A No, only the three there.

Q Now when you were standing there and you saw Mrs. Kelley, where was she?

A She was in the labor bed being pushed down the hallway.

Q Was she being pushed away from you or towards you?

A Towards me.

Q Who else - well who was pushing her, let me ask you that?

A I can't remember specifically who was pushing her.

Q Was Dr. Modaber standing within your view?

A No.

Q Did you see Dr. Modaber?

A No, I don't remember seeing Dr. Modaber.

Q Could you see the area around the scrub sinks from where you were?

A Yes.

Q He wasn't standing behind you?

A No.

Q Could he have been underneath the scrub sinks and you couldn't see him?

A I don't think so.

Q Now were you aware of anything that was going on concerning Dr. Modaber at the time you saw Mrs. Kelley being brought up?

A Yes, I knew that the OB nurses were looking for him.

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Q How did you know that?

A One of the nurses who came over and told me they were looking for him and asked if I had seen him.

Q And had you seen him?

A No.

Q Did you hear his name being called?

A Yes, he was paged.

Q What do you mean by paged?

A There is a telephone paging system in the hospital and I can't remember who but somebody, one of the OB nurses paged him over the paging system.

Q Did you hear. . .

THE COURT: Is that a loud speaker type of page?

A Yes sir.

Q Did you hear that Mr. Weaver?

A Yes, I did hear the page.

Q And what did you hear?

A The page was Dr. Modaber, OR.

Q Now what happened next? I'm sorry, is that a usual type of page at the hospital?

A Yes, that's the normal protocol for paging someone.

Q What does that mean?

A It means that Dr. Modaber should report to the operating room.

Q Is that page given if the doctor is already in the

operating room?

A No.

Q Were you there Mr. Weaver when Mrs. Kelley's baby was delivered?

A Yes, I was.

Q Did you see the baby come out?

A Yes, I did.

Q Did you see anybody deliver the baby?

A I don't recall seeing anybody deliver the baby.

Q Was - did you see Dr. Modaber standing at the bedside at that time?

A I don't remember him being there.

Q Do you know what an umbilical cord is?

A Yes sir.

Q Did you see the cord that morning?

A I'm sure I did, but I can't recall.

Q Did there come a time later that morning when you saw Dr. Modaber?

A Yes.

Q Do you recall when that was?

A No, I don't.

Q Was it after the birth of Mrs. Kelley's baby?

A The first time that I was aware of Dr. Modaber's presence.

Q Was after?

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A Was after.

Q Did you hear him say anything about the cause of death?

A No, I did not.

Q I have no further questions at this time, Your Honor.

THE COURT: Mr. Pledger.

CROSS EXAMINATION

By: Mr. Pledger

Q Where was Mrs. Amos when you saw her and Mrs. Kelley was in the area of the operating room?

A She was in the OR corridor.

Q She was in the corridor?

A Yes sir.

Q Would you explain to us perhaps giving this distance in feet, how far that would have been from Mrs. Kelley's bed?

A Couldn't have been very far.

Q Two feet?

A Two, three feet.

Q Two to three feet?

A Yes sir.

Q And what was she doing?

A I can't recall precisely what she was doing.

Q Where were you standing by number of feet away from

that bed?

A I was in the vicinity of the bed but I wouldn't be able to even guess.

Q Two or three feet?

A I don't know.

MR. MCDANIEL: Your Honor, I would like to object to this line of questioning. There is testimony by the witness that the bed was pushed down the hall towards him. If Mr. Pledger wants to fix a time and ask him what time he was in a certain distance, I think that would be proper.

THE COURT: I'm not sure that is clear enough, I'll allow the questions, objection overruled. Go ahead Mr. Pledger.

Q Let me see if I can clarify it Mr. Weaver. Did you see the bed being pushed down the corridor towards the area where you were outside of the operating room?

A Yes sir.

Q Who was pushing the bed?

A I don't recall who was pushing it.

Q Was it a man or woman?

A I can't recall.

Q Was it more than one person there beside the bed?

A I can't really recall.

Q Did you hear Mrs. Kelley say anything as the bed was being pushed towards you?

A Not that I remember.

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Q Did you hear anybody asking for gloves?

A No sir, not that I remember.

Q Where was Dr. Petkov when the bed was being pushed towards you?

A He was within the OR suite. I can't recall specifically where he was.

Q Was he inside the operating room itself?

MR. MCDANIEL: Your Honor, I object, the witness has said that he can't recall specifically where he was.

THE COURT: He may make an inquiry if it can be refreshed. Objection again overruled.

A I can't recall.

Q Who picked the baby up?

A I don't remember that either sir.

Q Did you ever see Dr. Modaber holding the baby by its ankles?

A I don't remember seeing that no sir.

Q Would you say that didn't happen?

A I said I didn't remember.

THE COURT: Let me ask this for clarification Mr. Weaver, is it fair to say that it had not reached the stage where the operating room crew became functional, and you were merely standing by?

A She was in the OR corridor. Our responsibility in a caesarean section is primarily for the mother, the obstetrical

people are there to take care of the baby primarily.

THE COURT: You weren't involved in your official capacity then at the time all this was going on, you were merely waiting for the procedure to begin I take it?

A That's correct.

THE COURT: All right, go ahead Mr. Pledger.

Q Mr. Weaver, would you explain to the ladies and gentlemen of the jury what takes place after the mother is there and is taken into the operating room to get her ready to perform a caesarean section?

A The patient is moved from the - her bed she arrived in onto the operating room table.

Q Then what is the next step?

A The next step is to anesthetize her.

Q And that is done by the anesthesiologist?

A Yes.

Q And after that step is taken what happens?

A When she is anesthetized the caesarean section begins.

Q Before you begin the section do you not put restraining straps across the abdomen, over the thighs - not over the abdomen but over the thighs?

A Over the thighs, yes sir.

Q And isn't the arm the IV is in put on an arm board with a belt held in place?

A Yes sir, in some fashion.

Q And after that is all done, is it necessary to prep the abdomen by washing it with a sterile solution?

A Yes sir.

Q Once you have completed that, isn't it necessary for you to put sterile drape in place?

A Yes sir.

Q And it is not until you have got those sterile drape in place and the anesthesiologist tells you that the patient is anesthetized that the surgeon can start?

A That is true.

Q Who put out this page that you heard for Dr. Modaber?

A I said that I didn't recall.

Q Who were the OR nurses who came looking for him?

A No OR nurse came looking for him, I was the only OR nurse there.

Q Who were the labor and delivery nurses that came looking for him?

A I don't know.

Q Do you know who was on duty at that time?

A I remember Mrs. Amos being there.

Q When you saw her did she say I'm looking for Dr. Modaber?

A I don't remember specifically what she said.

Q All right. If Your Honor will indulge me a moment.

Nothing further Your Honor.

THE COURT: Any redirect?

MR. MCDANIEL: No sir.

THE COURT: All right the witness may stand aside, if there is no objection I'm going to excuse Mr. Weaver.

MR. MCDANIEL: No objection.

MR. PLEDGER: No objection Your Honor.

THE COURT: All right do you have another witness Mr. McDaniel.

MR. MCDANIEL: I do Your Honor, Dr. Burke.

THE COURT: Now if you will have him stand by I have to make a telephone call. It will only take a moment if you will have the witness stand by. Court will remain in session.

PATRICK DECLAN BURKE, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. McDaniel

Q Please state your name?

A Patrick Declan Burke.

Q Where were you born?

A In County Galway, in the Republic of Ireland.

Q What's your age?

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A I'm forty-two.

Q And where do you live?

A 1650 Rolling Hills Drive in Culpeper.

Q Where do you work?

A At Culpeper Memorial Hospital.

Q What do you do?

A I'm an obstetrician-gynecologist.

Q Are you licensed?

A Yes.

Q By whom?

A By the State of Virginia.

Q Any other states?

A I am licensed in the State of Ohio and Georgia. Either one of those may have lapsed. I haven't been terribly worried about them.

Q Doctor, what year did you obtain your license in Virginia?

A '68 or '69.

Q And have you practiced in Virginia since that time?

A No, I've practiced in Virginia since September, '71.

Q Until?

A Until this present date.

Q And are you engaged in full time practice?

A Yes.

Q Within your specialty?

A Yes.

Q Please, if you would, Doctor, summarize for us your education?

A I went to medical school at the University Collage of Galway in Ireland, which is part of the National University of Ireland, and graduated with a medical degree, M.B.B.C.H.B.A.O., which is the European equivalent of the M.D. given here, in June of 1962. Took a rotating intership in the Regional Hospital, Galway, which was the University Hospital, from June '62 to June, '63. June '63 to June, '64, I took a first year surgical residency. June '64 to June '65, I took one year of Otology and Bacteriology. June '65 to June '68, I took an approved Obstetrics and Gynecology residency at St. Elizabeth's Hospital in Youngstown, Ohio. From June '68 till about March of '69, I did a fellowship in the University Hospitals of Cleveland at Case Western Reserve in Obstetrical Anesthesiology. March '69 to February '71 I was Major in the U. S. Army Medical Corps, stationed at, initially Fort Sam Houston in Texas and then after six weeks training there, I transferred to Savannah, Georgia where I stayed till about February '71 when I took a job with a group in Warner Robbins in Georgia as an Obstetrician-Gynecologist until September '71 when I came to Culpeper. I joined Dr. Payette here then for about two years or so. I left him in August '74 and set up my own practice where I am since.

Q When you were in the Army, Doctor, what type of

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medicine were you practicing?

A Obstetrics and Gynecology.

Q Did you hold any positions at that time?

A At one stage I was Chief of the Department of Obstetrics and Gynecology at U. S. Army Hospital in Savannah, Georgia.

Q Are you certified by any medical board?

A Yes, I'm certified by the Board of Obstetrics and Gynecology.

Q When were you first certified, Doctor?

A November '71, I think.

Q Are you a Fellow in any organization?

A Yes, I'm a Fellow of the College of Obstetrics and Gynecology...American College of Obstetrics and Gynecology.

Q And how did you obtain that position?

A Based on a, a resume of my activities and recommendation by two Fellows with an application.

Q When did you become a Fellow, Doctor?

A Early this year.

Q Do you have privileges at any hospitals?

A Yes, at Culpeper Memorial Hospital. I may also have honorary privileges at Fauquier. Again, I may have let them lapse, too, inactivity.

Q When did you first obtain your privileges at Culpeper?

A March. . .sorry, September, 1971.

Q And have you enjoyed them continuously since that time?

A Yes.

Q Do you take any regular training outside Culpeper?

A Yes.

Q What do you do?

A I indul...indulge in a ...take, as often as possible, courses in continuing medical education that I can manage and then routinely, virtually every week, not every week, something, sometimes comes up and stops me, but every week that I possibly can, which is roughly at least three out of four, I go down to the University of Virginia for a conference, an Obstetrics and Gynecology conference on Wednesday morning.

Q And who are the other people that attend that conference?

A The chairman of the department of Obstetrics and Gynecology, the various professors in the system, professors of Obstetrics and Gynecology at the University, the residents, interns and students and various invited guests, out of town visiting professors.

Q Your Honor, at this time I'd like to offer Dr. Burke as an expert to give testimony with regard to the standard of care reasonably to be expected of an OB/GYN in the Commonwealth of Virginia.

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THE COURT: Any objection Mr. . . .

MR. PLEDGER: No objection.

THE COURT: All right, he's admitted as such, you may proceed.

Q Thank you, Your Honor. Dr. Burke, we've had testimony from two doctors in this case already, and I don't want to duplicate that, but I would ask you to explain, if you could, what toxemia is?

A Toxemia describes a condition in pregnancy that results from an adverse effect on the mother caused by the pregnancy. Its basic explanation appears to be conditioned wherein the blood volume, the amount of blood circulating in the mother's body is insufficient and the body, in order to keep the blood pressure up, causes the blood vessels to clamp down, thereby raising the blood pressure, further increasing the problems because there is less blood going through the blood vessels at a higher pressure and thereby resulting in further stimulus with a sort of a feedback mechanism, causing the condition to get worse and deteriorate in a sort of a vicious circle system.

Q Doctor, what is the threat to the mother, as distinct from the baby, of toxemia during gestation?

A There are multiple threats to the mother. The. . .as distinct from those regarding her pregnancy, there are threats of a blood vessel breaking in her brain causing a stroke, a blood vessel breaking in the retina behind the eye and causing

blindness, kidney damage due to the spastic, or clamped down blood vessels. Virtually any organ can be damaged. There are resulting damages from the kidney effects which feed farther the fire of toxemia. A kidney when it's damaged and lacking oxygen puts out a hormone that raises the blood pressure more and heaps fuel on the fire that's already burning.

Q Doctor, tell us, if it's your opinion to a reasonable degree of medical certainty, whether those risks were known, or should have been known, to a reasonable practitioner in OB/GYN in Virginia in 1978?

A Yes.

Q Now Doctor, explain if you would, what the risks are to the baby in the womb when the mother has toxemia?

A It can be divided into two broad classes, chronic or long term, and acute. The chronic or long term ones simply mean diminishment of the amount of nourishment getting into the baby, which it needs to grow in its rapidly growing state, and the acute ones result from sudden cut off of the amount of nourishment or oxygen, or both, due to a catastrophe such as hemorrhage between the afterbirth and the wall of the womb, shearing the afterbirth from its source of oxygen and nourishment.

Q Doctor, tell us your opinion as to whether...to a reasonable degree of medical certainty, as to whether those risks to the baby were known, or should have been known, to the reasonable OB/GYN practitioner in Virginia in 1978?

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A Yes, those should have been.

Q Doctor, what are the implications of toxemia for the mother who goes into labor?

A Well, it frequently escalates dramatically with the stress of labor, and . . .

Q By it, you mean the disease of toxemia?

A Toxemia, and by it getting worse, the risks and complications we have just discussed also increase at the same rate.

Q Now doctor, in the specialty of OB/GYN, do you classify pregnancies according to risk at any time?

A Yes, they are generally classified into low or no risk and high risk.

Q How is a toxemia pregnancy classified?

A Depending on the degree of toxemia, but generally speaking it's considered high risk.

Q And what is the risk to, what's it to and who is it to? What risk are we talking about?

A There's a risk to the mother and the baby.

Q Doctor, what are the signs of toxemia in a pregnant woman?

A The clinical signs of toxemia, which is all that can be detected by an observer, not the symptoms that the patient expresses herself, are a raised blood pressure, protein in the urine and swelling of the exter. . .of the legs, hands, face, or just generally swelling.

Q Is there another word for swelling, medical term?

A There's edema, used frequently.

Q Do you need all three of those signs in order to make a diagnosis of toxemia?

A No, two of three are considered sufficient.

Q Doctor, what is preeclampsia?

A Preeclampsia is an advanced degree of toxemia wherein it is judged that the patient is likely to go shortly into a convulsion.

Q Doctor, I want to show you Exhibit. . .I want to show you what's been marked and received into evidence as Exhibit 12, and ask you if you've been shown that before?

A I've seen copies of parts of this before. . .

Q Okay, have you seen. . .

A . . .but I have not seen this, I've not handled this, this document.

Q I refer you specifically to the prenatal record. Is it in there?

A Yes, it is.

Q Is it an original or a copy?

A This looks like a copy.

Q I want to show you, Doctor, what's been marked and received into evidence as Plaintiff's Exhibit 11, and ask you if that's the original of the copy of the prenatal chart?

A In my opinion, this is an original.

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Q Okay. I want you to look at that please, Doctor. Can you tell from that what organization that chart is from, doctor or company?

A It's from Dr. Payette and Modaber's office.

Q Here in Culpeper?

A Here in Culpeper.

Q You practiced with Dr. Payette at one time, didn't you?

A I did yes.

Q How are those charts filled out by the doctor, over what period of time are they filled out?

A There's an initial visit wherein initial particulars history, are taken down either by the doctor or nurse, and then at monthly intervals, usually the patient is seen, until the last month, wherein they are seen every week. That was the routine when I was there.

Q Do those charts that you have in front of you indicate that information was taken from the patient and recorded?

A Yes, indeed they do.

Q Now, you say you've seen copies of those before. Do you recall in what context you saw copies of those charts?

A In the Medical Board hearings and at the deposition.

Q By Medical Board hearings, are you referring to Medical Malpractice Review Panel?

A Yes.

Q Did you testify before that panel?

A Yes, I did.

Q Did you testify with reference to these documents?

A Yes, I did.

Q I would like you to look at the first page, we have a blowup here, and ask you, this is Exhibit 2, which is a blowup of the first page of the prenatal chart, and ask you to direct your attention to the history of the patient which is reported on that chart, Doctor. Do you see that?

A Yes, I see it.

Q Do you have an opinion as to what the implication of that history was for the treatment of Mrs. Kelley's pregnancy?

A Yes, indeed.

Q And what is your opinion?

A She is all set up to be a high risk case because she has had severe problems in the past necessitating at one time, abortion because of the severity of the problem.

Q And what are you specifically referring to when you say problems in the past?

A Referring to the notation of "had toxemia twice", opposite the first and second pregnancies and with the years '68 and '71, and also the year '71, "had abortion, blood pressure was so high doctors advised abortion."

Q Is there any information on there, Doctor, about the speed of her labors? With those previous children?

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A Yes, there is. Under a heading, labor hours, there is three hours for the first one, two and a half for the second, two and a half for the third, and somebody has underlined that with a blue penci...with a blue pen.

Q And does that have any implications for the treatment of this patient?

A It means that one should be on the alert for rapid deliveries, when she goes into labor.

Q Now, Doctor, I direct your attention to the second page of the prenatal chart which is in the folder you have and a blowup of which has been received into evidence as Plaintiff's Exhibiit #3. Do you have that in front of you?

A Yes.

Q I direct your attention specifically to the entries on 11/9. Do you see those?

A Yes, I do.

Q Doctor, in your opinion, to a reasonable degree of medical certainty, what is Mrs. Kelley's condition as of November 9th?

A She has toxemia of pregnancy.

Q And what is the basis for that conclusion, Doctor?

A A weight gain from 155 and three-quarters to 164 from the previous recording of it in October 17th; a blood pressure increase from 132 over 80 to 160 over 94; two plus edema; the notation, "retaining fluids, especially hands."

Q What's the significance of the blood pressure, Doctor?

A Blood pressure is significantly raised in the patient with a history of previous toxemia of at least one occasion and probably more severe degree.

Q And what is the significance of the edema?

A The edema can mean nothing more than simple fluid retention due to overindulgence in sodium containing fluids, but in this, this context, it is anomalous one, meaning that her kidneys most likely have already been affected by the condition and are beginning to leak protein.

Q Now Doctor, I ask you please to state your opinion to a reasonable degree of medical certainty, as to what standard of care was required from an OB/GYN in 1978 in Virginia in the treatment of this patient as of November 9th?

A Very likely she should have been put in hospital at that time in view of her history.

Q Why is that, Doctor?

A Because she has a significant past history of obstetrical problems.

Q What is the benefit to be derived from putting the patient in the hospital?

A One of the major problems with toxemia, as I said before, is the raised blood pressure. Now when a person is standing up, there are various mechanisms working in their body

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so that they don't get dizzy and faint. These mechanisms are essentially hormones that keep the blood pressure up so that that heart can continue to pump to the head. These are generally known as catecholamines and they are normally present in everybody. When you put a person like that on bed rest, the secretion of these things is decreased by at least 70 percent so that you're taking 70 percent of the stimulus to keep the blood pressure up by putting the person on bed rest.

Q Now you say, I think, in your opinion that most probably hospitalization is required. Would it have been compatible with the standard of care at that time, 1978, for another course of action to have been taken on November 9th?

A Marginally, yes.

Q What is that other course of action, Doctor?

A To order complete bed rest at home and instruct the patient to stay away from sodium containing fluids and monitor her very closely.

Q Are there any tests that would have been used in monitoring her to comply with the standard of care?

A The frequent recording of a blood pressure and in terms of the baby's health, a nonstress test or even, if one is feeling very adventurous, perhaps the stress test. . .

Q What is a nonstress. . .

A . . .an oxytocin stress test.

Q I'm sorry, Doctor, what is a nonstress test?

A A nonstress test is a very benign procedure, very nice and easy procedure that causes no harm to anybody, wherein you put a sound detecting instrument on the mother's abdomen and simply record every time she feels, or the observer notices the baby kick. The sound recording instrument should be printing out on a graph, in a graphic form, the rate of the baby's heart beat and when the baby is noticed to move or kick, there should be, within a few seconds, an elevation in this tracing that you would normally have. This occurring over a few kicks indicates what is called a reactive, meaning the baby is okay, he's awake, he's got lots of oxygen and he's got good reserves.

Q Now what does a non...what do the results of a nonstress test tell you in terms of the toxemia, evaluating the toxemia?

A If it's reactive or good, it means that as yet the baby has not been significantly affected.

Q And if it's not reactive or good?

A It means the baby has been significantly affected and you'd better get organized to get the baby out of there if you want to have a live one.

Q Now would those tests reasonably be expected of a practitioner in 1978 in Virginia?

A I believe so.

Q Now Doctor, do you see any notation on the chart that Mrs. Kelley was hospitalized as of November 9th?

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A I do not.

Q Do you see any notation on there indicating that non-stress tests were performed?

A I do not.

Q Do you see any notation on there indicating what was done. . .

A Yes.

Q . . .for Mrs. Kelley?

A I see a notation saying "rec.," I presume means recommend, "complete rest. Prescription, Phenobarbital," I think grains one, "Estriol," and there's 11-11 and an arror, 11-12 and 11-16.

Q Doctor, what do you interpret that last reference, estriol, 11 and so forth to mean?

A Estriol is a level of a hormone in the mother's circulating system that's present both in the blood and the urine that is a rough indicator of the, the health of the baby's cells, and by implication, the baby itself.

Q And what is its relationship to toxemia? The use of an estriol test?

A It's a clumsy way of monitoring what could be an ac.. what is an acute condition.

Q Why is it clumsy?

A Because as far as I can tell here, this was a urinary estriol, which has to be collected over 24 hours, then sent away,

and it's at least 48 hours behind times by the time you get a result, which could be a difficult 48 hours for a baby in trouble. At that time there was a serum estriol available which could be done and reported on, if necessary, that evening.

Q Doctor, is it your testimony that the standard of care required that the serum estriol be done at this time?

A I really can't say that for certain. I would have done them.

Q Doctor, in your opinion, to a reasonable degree of medical certainty, did the treatment Mrs. Kelley received on November 9th comport with the standard of care?

A On November 9th, it's borderline. It could be either way, one way or the other. Home care or hospital assessment is, is...you will find people who will go one way or the other, but with home care she should have had very close monitoring.

Q Would that include those tests you've discussed?

A It would include frequent measurements of her. . . of her blood pressure at least.

Q I direct your attention, now to November 14th, Doctor?

A Yes sir.

Q Do you see findings there?

A Yes. I note that she still has a raised diastolic, which is the pressure below the line, of 90. She has a continued weight gain, she is 136 over 90 in her blood pressure. The 90

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is the significant figure in my opinion. She is recorded as not having protein in her urine. She continues to gain weight, but she is. . .and she still has swelling of the . . of the..somewhere, it's recorded as plus one.

Q Doctor, do you have an opinion as to whether or not Mrs. Kelley had toxemia at this time?

A She, she certainly had it.

Q And do you have an opinion to a reasonable degree of medical certainty as to what the standard of care required to treat Mrs. Kelley?

A I, I believe at this time she should have been put in hospital.

Q What's the basis for that, Doctor.

A To assess her, to treat her, to get her off her feet, to make sure that there was...the treatment was definitely getting there. And if I may, I'd like to explain that.

Q Please do.

A When a woman has a group of children at home, with the best will in the world, I think it's next door to physically impossible for her to stay rested. Mother, what about my dinner; Johnny took something. I, I am of the opinion that with other children at home, it is physically impossible for a woman to rest, even with the best intentions.

Q And Mrs. Kelley had other children at home at this time?

A I have reason to believe so, yes.

Q Do you see any notation on there, Doctor, that indicates that Mrs. Kelley was hospitalized?

A I do not.

Q What treatment was given her at this time?

A I cannot determine that, but under..on the line underneath it, it says, "Estriol 11/18 to 11/19," and what looks like either 19.3 or 17.3.

Q Well Doctor, assuming, and I ask you to assume that Mrs. Kelley was not hospitalized at this time, did her treatment comport, in your opinion, with the standard of care?

A I don't think so. I think she should have been strongly considered for hospitalization at this time.

Q Should she have been hospitalized, in your opinion?

A Yes, I think so.

Q And that's required by the standard of care?

A I would think so. In my opinion it is.

Q Okay. Doctor, what about the nonstress test that you described before, were they required at this time by the standard of care?

A Certainly some form of monitoring is required, and the nonstress test is the most ideal form.

Q Are there alternatives that would have been compatible in the standard of care?

A Again, one would take a risk in using an oxytocin

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contraction test, but with extreme care you might get away with it, if you weren't going to use the nonstress test.

Q Is there a test where you put the hand on the belly of the mother and then listen to the heart beat for ten or fifteen minutes?

A Do you mean listen by ear or watch a graph?

Q Stethoscope.

A No, I've never seen that described in the literature. That would be equivalent to driving down the highway and being told your speed every fifteen minutes rather than having a speedometer read it out for you.

Q Now Doctor, I direct your attention to the final entry on the chart, 11/21, and I ask you to look at the findings there and tell me if you see anything that's significant to you?

A Yes, I do.

Q What is that, Doctor?

A I see a blood pressure of 150 over 90. Patient now is described as having proteinuria, that's protein leaking from the kidneys, that are damaged by the process that's been going on for at least the last two. . .since November 9th. She still has fluid in the tissues, edema, and she is described as having a cervix that does not indicate imminent labor. It's...F.T. generally means a fingertip dilated, and 50 percent means a fairly thick cervix. That's the neck of the womb that the baby comes through.

Q Is her blood pressure up or down from the visit on 11/14?

A The diastolic is the same, the systolic, which is the main pumping pressure, is up.

Q Is there any change in the proteinuria measurements? From 11/14 to 11/21?

A Yes, she now has protein in her urine once again... or for the first time, I'm sorry, recorded.

Q Has there been a weight gain?

A Yes, there has.

Q Is there any significance in that weight gain?

A A marked weight gain. Yes, indeed, there is.

Q In your opinion, Doctor, what is the standard of care, to a reasonable degree of medical certainty, required at that time of an OB/GYN in Virginia, faced with a woman, Mrs. Kelley, with these symptoms?

A She absolutely had to be in hospital at this stage.

Q Why is that, Doctor?

A Her toxemia has advanced at an alarming degree. She is getting into a more dangerous time in terms of being shortly going into labor. She is now on the verge of being...she is now essentially preeclamptic, but I don't have any view, any recording of the fundi, which are the blood vessels at the back of the eye. There is insufficient evidence. . .stuff written here to . . .incomplete, really, to. . .

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THE COURT: Now what is the date of that opinion.

A That's November 21, sir.

Q Anything else, Doctor?

A There's an estriol level given here as 20.8.

Q What does that mean?

A That probably means that it's bumping along around normal, low normal, which would serve just to give somebody a false sense of security. In medicine it is very unwise to hang your hat on a single test that favors your point of view, if there's a lot of other indicators that don't.

Q Doctor, you mentioned something about fundi. What are fundi?

A Fundi is the globe at the back of your eye. It's the only place in the body that blood vessels can be directly studied.

Q And what is the relevance of studying the fundi to toxemia?

A Toxemia, the major part of that disease is disease of blood vessels, and looking at these blood vessels at the back of the eye, one can assess the degree of severity of the disease process.

Q As of November 21st, Doctor, did the standard of care required the test on the fundi, or the examination to be performed?

A I think so, definitely.

Q Is there any indication in the chart that they were

done?

A I don't see any.

Q Is there any indication in the chart that she was hospitalized?

A No. Thats. . .

Q I'm asking you. . .I'm sorry, Doctor.

A As well as the fundi, the other test should have been done. . .should have been recorded here, such as the knee jerk, tapping the knee to see if the reflexes were super fast, tapping the side of the cheek here, which is a very simple one if you don't want to, to, to reach for a patient's legs. If you're too lazy to, you can get a Chvostek sign , which the face will grimace when you. . .when you tap over the facial nerve, if the nerves. . .the nervous system are unduly irritable to the disease process.

Q What about the nonstress test, was it required by the standard of care at this time?

A It's, it's almost past the time these are required.

Q Why is that, Doctor?

A You are now in deep and severe trouble. You are approaching first class medical emergency that if you don't. . . if you don't react quickly and wisely, will result in disaster.

Q Doctor, would it make any difference in what the standard of care required if 11/21, was a few days before Thanksgiving?

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A Thanksgiving has nothing to do with the standard of care.

Q Would it make any difference if you had a woman with children at home who wanted to stay home and take care of them at this time?

A It's regretable but she's got to part from the babies at this time. The one in her womb is more important. They're alive, the one in her womb is in danger.

Q Doctor, I want you to assume that Mrs. Kelley's baby died during labor, we'll go into that in a minute, but I'd like to know if you have an opinion to a reasonable degree of medical certainty, as to whether the failures to meet the standard of care you've discussed, played, caused the death of that infant?

A Yes, I do.

Q What's your opinion?

A I believe that caused it.

Q Why?

A The toxemia was essentially untreated and I would assume, based on what I've seen on this chart, that a rapid labor resulted from an abruptior, meaning a small hemorrhage between the placenta and the wall of the uterus, which eventually sheared off the placenta, gave rise to a tumultuous labor that resulted in the stillbirth.

Q And how did that abruptio relate to the unmanaged toxemia?

A The degree of fragility or the easy breakability of those blood vessels increased as the toxemia increased and when she. . .when one of them eventually broke and irritated the wall of the womb with a resulting clot and sheared off part or all of the placenta, it resulted in the baby's death.

Q Doctor, I'd like you to look at another portion of the exhibit in front of you. That's the labor record, which I believe is two pages long. I'm sorry, it's front and back, one page.

A Yes.

Q And blowups of those have been introduced and received into evidence as Plaintiff's Exhibits 4-A and 4-B. Now have you seen that labor record or a photocopy of it before, Doctor?

A I have, yes.

Q And do you know when you saw it?

A At the times I've mentioned previously on this... on this, and likely I've seen it in various committee meetings at the hospital as a staff member.

Q Now Doctor, I direct your attention to the entry at 5:45 a.m. Do you see that?

A Yes, I do.

Q At 5:45 a.m. on November 27, 1978, would a doctor at Culpeper Memorial Hospital have expected there to be other doctors on duty in the labor and delivery room?

A I don't see any reason why he would expect that.

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Q Were they normally on duty then?

A No. There's nobody normally on duty. We come in to attend to our cases.

Q Was there a staff doctor who was there to be on duty?

A There may have been an emergency room doctor, whose primary source of duty was the emergency room.

Q What about the operating crew, would they have been there at that time?

A They, they are not routinely there at that time, no.

Q In November, 1978, how long would it take from the time you summoned the operating room crew in, when they were outside the hospital, to get the OR set up, from the time you summoned them until the time the OR is set up and ready to go, how long would you routinely expect that to be?

A Well routinely, about an hour, but in an emergency, if I pull out all the stops, I have done it myself in half an hour.

Q Now Doctor, I direct your attention to the entries at 5:45 a.m.

A Yes.

Q What is the blood pressure?

A 160 over 110.

Q And what are the other indications?

A Fetal heart rate is given as 120, contractions are recorded as hard, two to four minutes. Dilatation of the cervix

recorded as two centimeters and medication and comments, 35 year old white female is admitted to the labor room for services, Dr. Modaber-Payette, no known allergies, membranes ruptured at 5:10 a.m., 11/27, no bloody show at present. Dr. Modaber notified opposite of time of 5:50.

Q Okay, Doctor, I'd like to know your opinion, again to a reasonable degree of medical certainty, as to what Mrs. Kelley's toxemia, what the degree of it was, or how it was doing when she was admitted to the hospital that morning?

A In my opinion, she is now preeclamptic. She's an ongoing medical emergency of the first degree and requires immediate treatment.

Q What do you base that on, Doctor?

A Her raised blood pressure, her hard two to four minute contractions, a cervix that's not particularly well dilated.

Q What does it mean in terms of severity with going from toxemic to preeclamptic?

A It means she's on the verge of having a convulsion. Rule of thumb is the first convulsion kills the baby, the second convulsion may kill the mother.

Q Doctor, what's the standard of care reasonably required of a physician who is notified at 5:50 a.m. of these findings under the circumstances you've described at Culpeper Memorial Hospital that morning, what does he have to do in

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your opinion?

A In my opinion, he has to get there immediately. To do so...to not do so is reckless and bizarre and callous, and strange.

Q Why is that, Doctor?

A Patient is in acute danger. Her baby is in acute danger.

Q And what is it that the doctor has to be there for?

A If nothing else, simply to verify the information he's gotten from the nurse. The patient is his patient, not the nurse's patient, and it's his, his job to get in there. Now the only reas...the only reason he should delay is to give on-going orders, such as type and cross match for blood, start an intravenous, while he's getting there in order to save time. But it's of paramount importance that he get in there with the greatest possible speed.

Q Now doctor, I direct your attention to the entry a little bit further down the page, 7 a.m., where it says, "Dr. Modaber notified again."

A Yes.

Q Do you see any entry there as to the fetal heart rate?

A Yes, it says 60.

Q Do you see any entry of the blood pressure, shortly above that, I believe a little after 6:30?

A At 6:35 it's recorded as 158 over 110.

Q Now at 7 o'clock, what's your opinion of what the standard of care required Dr. Modaber to do when he heard that information?

A To, to, to burn rubber all the way in to Culpeper Hospital to take over the care of this patient and to get that baby out by the quickest possible manner, probably by caesarean section.

Q And in your opinion, to a reasonable degree of medical certainty, did his failure to come in between 5:50 when he was first called and 7 a.m. when he was called the second time, comply with the standard of care?

A It did not.

Q Why not?

A It should be obvious. The patient needs him acutely. She's in danger, there is no...there is no justification for staying away from her.

Q Now doctor, I ask you to look at the entry at 7:10 which indicates Dr. Modaber was called again at home at 7:10.

A Yes.

Q And I ask you to assume that he was at home at 7:10 when he was called that third time that morning. I'd like you to tell me whether in your opinion it would comply with the standard of care for Dr. Modaber to still be at home after having received two telephone calls, one at 5:50 and one at 7 a.m., which reported to him the findings that the charts indicate he

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received?

A Not at all.

Q Why not?

A He should have been in. The patient needs him acutely. She is in danger and her baby is in danger. He has no business not being with her.

Q Now doctor, what is. . .what does the standard of care require in your opinion, to a reasonable degree of medical certainty, in terms at 5:50, focusing on that, in terms of preparing for or thinking about a cesarean section?

A It's a reasonable thing to do at that time, to tell the hospital, by telephone, to tell the nurse there to get people set up for a cesarean section, the possibility of a cesarean section. The physician should head on in immediately himself to verify the findings that the nurse has reported to him. I would not at that time myself, say to the operating room crew to come in right now. There is the possibility that the nurse is mistaken in her blood pressure reading, and at 5:50 it behoves the doctor, the prudent doctor, to get in there himself, verify those readings, and then based on that, make his decision regarding whether to call the emergency...or the operating room crew immediately or tell them they don't have to break their necks on the way in. An hour, an hour might be sufficient.

Q Doctor, I want to show you. . . I'll ask you to look at the exhibit you have, at the fetal monitoring page that's

in there, and that's also, a blowup of that has been offered and admitted as Plaintiff's Exhibit No. 8. I ask you to assume, Doctor, that the labor record shows that that tape was started up about 6:40 a.m.

A Yes.

Q Have you ever seen a printout like that before?

A Yes, frequently.

Q And do you know what kind of machine it was made on?

A Yes, it's made on a sonocade one that we had at that time that progressed at one centimeter per minute, and that's the distance between the vertical divisions that you see on the tape.

Q Okay. Now focusing on the first few minutes of that tape. . .

A Yes.

Q . . .what is your opinion, to a reasonable degree of medical certainty, as to what that tape tells us about the condition of Ronald Kelley and Jessie Kelley's baby?

A The first two minutes about, are essentially unremarkable, but then comes a dip to 70 or about, or 68, which is most ominous. The rate of the heart goes back up again to its base line of about 120 and dips again with a record of contraction. This tape is meas. . .this machine is measuring the echoes of the baby's heart from an ultrasound wave and is also measuring movement under the skin, represented as contractions on the bottom half of the tape, the, the sawtoothed effect on the

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bottom half of the tape. They are contractions. However, after the peak of the first recorded contraction, there is yet another dip to about 75, and that, in my opinion, is what's called a Class 2 dip, which indicates acute fetal distress and the necessity to get that baby out at the greatest possible speed.

Q Doctor, I ask you to step down here if you would, and point out on this blowup, these two dips that you're talking about.

A This one here is without a contraction. I would have expected a contraction showing here at this area had the machine been monitoring at that time, but here is a very suspicious, uneasy feeling dip, which had a contraction been here, would indeed have been a classical Type 2, or dangerous marked indication of acute danger signal. When it's repeated here, there's no doubt that this is a baby in severe trouble. We can see them in between other contractions as well everywhere until the trouble the baby is in becomes so manifest, so clear, that the heart rate is no longer recording well.

Q Now, Doctor, what does the standard of care require as of 5:50 a.m. when the doctor is notified of the fact you've talked about before, in terms of having this monitor started up on the patient?

A Well, the patient is a high risk patient, and therefore the first instruction to the nurse should have been, get the monitor started right away.

Q Okay. Now I ask you, you testified that the physician should have been in by 6:40 when this tape begins to be charted, is that correct?

A As soon as this is seen, he should have been alerted and there without any doubt whatever.

Q Alerted to what, Doctor?

A Alerted to the fact that there is acute fetal distress indicated by this. There may be acute fetal distress indicated by this. It's up to him to verify it.

Q And how would he do that?

A By being physically present and seeing what's happening.

Q Now, what did the standard of care require the physician to do who is physically present, watching that tape, in your opinion to a reasonable degree of medical certainty, what does it require him to do and when does it require him to do it as that tape is recorded?

A Make all preparations for as quick as possible delivery of this baby. If it were quicker to deliver the baby by a forceps delivery than a cesarean section, then he should go ahead and do a forceps delivery. If a cesarean section is more likely to deliver the baby quickly, get it out, because this baby is strangulating.

Q And how early can you tell the baby is strangulating on there, Doctor?

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A Well, from the very first Type 2 dip, and then when it's repeated, this baby is in bad trouble.

Q Assuming, Doctor, that when that first Type 2 dip and then the repetition appears, that the doctor is there, but assuming that the OR crew has not yet been called in, and assuming again that your 30 minute standard is what we're operating under, what does the standard of care require the doctor to do when that second dip appears, or when the first dip appears, with regard to calling in the OR crew?

A He is to make immediate preparations to get them in, to tell whoever does it or do it himself. And indicate strongly the nature of the emergency so that people won't think that it's something they can delay on.

Q Doctor, in your opinion, could this child have been delivered alive and healthy by cesarean section, let's say at this second Type 2 dip?

A Yes.

Q Why is that?

A Baby should have been.

Q Why?

A The variation in the rate indicates a reasonable, some degree of reserves in the baby, and I have frequently seen babies as bad as this, or even perhaps worse, perhaps out to here, I feel that you have a saveable baby, because we have delivered them with very low Apgar ratings and our pediatric

service has been able to get them back virtually from the dead.

Q What does the chart indicate after the point where you think the baby would have come out healthy?

A After this it becomes very problematical as to whether you get a good baby or not. This back here I am assuming is, is the. . .is the direct monitor on the baby's head and that, to my mind, is the last few dying flutters of a, of a heart.

Q Now Doctor, we know here that Mrs. Kelley's child died. What is your opinion, to a reasonable degree of medical certainty, as to whether Dr. Modaber's failure to comply with the standard of care on the morning she came in in labor as you've described it, caused the death of that baby?

A In my opinion, his conduct of the case contributed to a very marked degree to this baby's death.

Q And why is that?

A Her toxemia was neglected badly and then the resulting problems that led directly to the baby's demise.

Q Focusing on the morning of November 27th, how did his failure to come in when called at 5:50 contribute to the death of the baby?

A I think at that time he had a slim chance of saving a disastrous situation. At 5:50 there was a slim chance had he come in and made his diagnosis properly from what we see here and pushed for an immediate cesarean section, he had a. . .per-

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haps better than a slim chance, a fairly good chance of having ' a live baby in good condition. '

Q Your Honor, would bear with me for one moment. Doctor, do you have an opinion as to what caused fetal death in this case, based on the records you've reviewed?

A Yes.

Q What is that?

A I think the baby died from a hemorrhage between the afterbirth, or placenta, and the wall of the womb. . .

Q Do you hold that opinion to a reasonable degree of medical certainty?

A I believe so, yes, it's one of the most common causes of death in, in toxemia where this type of situation occurs.

Q What's the basis for that opinion in this case?

A The absence of evidence otherwise.

Q What do you mean by that?

A I believe it's alleged that the baby died of "prolapse of the cord." There is no evidence to that degree and nobody else was given a chance to examine the placenta.

Q What do you mean no one else was given a chance to examine the placenta?

A I see no pathologist report on the placenta.

Q Is it normal that. . .

A I believe it was discarded in the manner we discard a placenta after a normal birth.

Q Was there a pathology done on the baby himself?

A I don't believe so.

Q Was that normal at that time at Culpeper not to do autopsies on children who were born dead?

A I don't believe so, we usually do them on, on some. . .on most stillborns, especially if there's any question as to the cause of death.

Q Doctor, if you wanted to know the cause of death in this case after the child died, what would you as a doctor do to find out what the cause of death was?

A I'd ask for an autopsy.

Q Is there any other way to find out at that point?

A There's no legal way, because once a dead body is there, it is the property of the parents and to touch it other than in the normal way is an assault, I believe, is the legal position.

Q Doctor, have you ever served on any committees at the hospital that deal with medical records?

A I probably have. I believe I have served on all the committees at the hospital and as President of the Medical Staff at one time, I was ex officio member of all the committees.

Q Are there medical records that are called discharge summaries?

A Yes, sir, there are.

Q What are they?

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A They are summaries of what happened to the patient during his or her hospital stay in a narrative form, dictated within a reasonable time after the patient leaves the hospital.

Q Was there any policy at the hospital that was in effect in 1978 as to when the discharge summary was to be dictated?

A I don't recall the exact policy but within one or two or three weeks was recommended and if you went over that you got a letter from the medical records advising you that you were out of line.

Q I'd like for you to look at the file you have in front of you and see if you can locate in there a discharge summary?

A Yes.

Q Is that the form in which they were typed up at the hospital?

A In general, yes.

Q You say it would be dictated, who would do the typing?

A The typist in the medical staff typing pool.

Q And then would the doctor who dictated the summary ever see it again?

A Yes. It is presented to him for signature and also usually there are two copies given him for his use in his own records in the office.

Q Well, if there were typographical mistakes or editorial mistakes, or mistakes, in one of these discharge summaries that were typed up, what procedure would a doctor follow to make corrections?

A The correct procedure he should follow is to underline the error and write a correction on the margin, initial it and date it.

Q Would the document then be retyped in a clean form?

A Not necessarily. If there were a lot of them, yes. If there weren't very many, then it probably would be let stand.

Q What if there were a material omission of some importance in one of these summaries, how would the doctor go about preparing that material on there?

A He simply dictates an addendum, indicates the patient's name, hospital number, who he is, the date, indicates it is an addendum, dictates his addendum of whatever it is and signs. . .it's typed up and comes to him for signature and copies go to his office as well.

Q Are there standard abbreviations on these forms that indicate the dates of dictation or typing is done?

A Yes. The usual manner in any business office, the date it's dictated is typed in, the date it's typed is typed in.

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Q Do you see that on that document?

A Yes, I do.

Q And how was the date of dictation indicated?

A 12/13/78.

Q Is there a symbol for dictation?

A Yes, D.

Q Are there any other symbols?

A Yes, there is a T. 12/27/78.

Q What does that mean?

A I take it to mean the date it was typed and then there is RE T. 6/20/79.

Q Is the use of the D. a standard procedure at the hospital at that time?

A Yes, it was.

Q How about the use of the T.?

A Yes.

Q How about the use of the RE T?

A I have never seen that before except on this chart.

Q Doctor, what is an operative note?

A An operative note is a dictated narrative summary of the operation or description of an operation or anything that goes on in the operating room or its environments that you wish to have in a typed form, such as by way of explanation, a physician may look down somebody's lung with a bronchoscope. He doesn't take any tissues away but nevertheless describes the

procedure he does.

Q Doctor, in this case there has been testimony that Mrs. Kelley never got to the operating room to have a cesarean section?

A No, she did not have a cesarean section but she got, as far as I know, into the corridor of the operating room.

Q Well, what implications does the fact that she was in the corridor have with the requirement to do an operative note?

A It would be optional on the part of the physician under those circumstances I think to do an operative note, under those circumstances. I think he would be very well advised to do so to establish a permanent record of what actually happened but I don't think he is actually required. It's a very rare occurrence and it never occurred before or since under these circumstances so, therefore, there is no precedent.

Q Doctor, is there any policy with regard to operative notes similar to the discharge summary policy with regard to how long afterwards you have to have one done?

A Yes, it's much more intense on the operative note. It should be done within 24 hours of the operation by law requirement.

Q And do you use the same symbols on there, D and T to show when they were dictated and when they were typed?

A Well, I don't, but the typing staff does.

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Q Do you see any symbols on the document in front of you?

A I'm looking at the discharge summary. . .

Q I'm sorry, would you locate the operative note? Perhaps it would be quicker Doctor, if you would just step right down here, the blowup which is Plaintiff's Exhibit No. 7, which has been received in evidence already as the operative. . . operating record. Tell me if you see the symbol D on there?

A Yes, it's here, just over the name Kelley.

Q What's the date after D?

A 4/7/79.

Q What does that indicate to you?

A That it was dictated on 4/7/79.

Q And do you see another symbol on there?

A Yes, there is a T.

Q What does that indicate?

A It indicated that it was typed 4/12/79.

Q Is there a third symbol?

A Yes. There is RE-T., meaning I take it retyped, 6/19/79.

Q You testified before, Doctor, that you weren't familiar with that symbol on a discharge summary, are you familiar with it on operation records, RE-T?

A No, I have never seen it before. I'm assuming that's what it means.

Q Thank you, Doctor. Doctor, I want to show you a portion of Plaintiff's Exhibit No. 1, a copy of the hospital record, and direct your attention to a chart headed pre-delivery, and ask you if you see handwriting on there regarding birth weight?

A Yes.

Q And what does that say?

A Five pounds, fifteen ounces.

Q And does that indicate anything to you about the relative health of this baby prior to labor?

A Yes. If I may look at the estimated due date on the . . .

Q Yes, please, Doctor.

A . .. chart, which was the 22nd. . .this is the 27th . ..this is about appropriate for gestational age. This baby is probably at the right size, more or less at this time in Mrs. Kelley's pregnancy.

Q And what is gestational age at this time?

A I'm assuming around 36 or 37 weeks.

Q And how long is the gestational period normally?

A Forty.

Q Are babies delivered alive at this gestational age?

A Yes.

Q Are babies five pounds, fifteen ounces delivered alive

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and healthy at this gestational age?

A Yes indeed. One definition of complete maturity is 6 pounds or over and this baby is only an ounce off.

Q One moment, if Your Honor, please.

THE COURT: All right.

Q I have no further questions at this time, Your Honor.

THE COURT: Mr. Pledger, we will consider whether or not to continue the cross examination this evening or take it up tomorrow. Do you have any thoughts on that?

MR. PLEDGER: I have two thoughts, Your Honor. At this moment I have a lot of questions. I think perhaps I may be able to boil them down to fewer questions if I have the time overnight to do so. I think perhaps we would be better off to . . .

THE COURT: Well, I can give you an option to do as much of it as you want to tonight and recall him tomorrow morning, if you need to, but I'd like to push on if we can without imposing on anybody's schedule. What's Dr. Burke's schedule?

MR. MCDANIEL: Your Honor, I believe Dr. Burke is scheduled in surgery tomorrow.

THE COURT: I see.

MR. MCDANIEL: Relatively more difficult to change than simple office appointments.

THE COURT: I see. Is that the situation, Dr. Burke?

DR. BURKE: Yes, indeed, sir.

THE COURT: All right, let's see if we can't push on this evening, Mr. Pledger, and go as far as we can in view of that.

MR. PLEDGER: All right.

THE COURT: We don't want to unduly burden any witness.

MR. PLEDGER: All right.

CROSS EXAMINATION

By: Mr. Pledger

Q Doctor, can you tell me whether the term "Toxemia" has a different meaning than the term "Preeclampsia"?

A Yes.

Q What is the difference?

A It's a lesser degree of the same disease.

Q What is the dividing line between toxemia and preeclampsia then? When do you change your classification from toxemia to preeclampsia?

A When you judge the patient is likely to have convulsions.

Q And at what point in time is it likely that the patient will have convulsions?

A When her reflexes and her fundi reflect changes

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that are significant.

Q Was there ever a point when Mrs.Kelley's reflexes showed a change?

A There may have been though it wasn't recorded.

Q Do you know whether anybody ever checked her reflexes?

A It is not recorded. I have no knowledge of anything other than what is recorded, sir.

Q Before accepting your role as an expert witness in this case and appearing here in court today, did you review any materials?

A Yes, I did.

Q Would you tell the ladies and gentlemen of this jury what it was you reviewed?

A I reviewed this chart in copied form and I have reviewed some of my evidence that I have given in depositions, both recently to you and at the Medical Board Hearing.

Q Were you given a copy of Mrs. Kelley's deposition to read?

A No, I was not.

Q Were you given any facts that she testified to in that deposition?

A I don't believe so.

Q All right sir. Did she on November 9th have toxemia as you classified it or preeclampsia as you have defined that?

MR. MCDANIEL: Are you talking about November 9th?

Q Yes.

A On November 9th, she had toxemia.

Q What is the symptoms or findings that you see that tell you she had toxemia on that date?

A Raised blood pressure, weight gain, edema.

Q Did she have toxemia or preeclampsia on November 14th?

A She was edging toward preeclampsia but there is insufficient data recorded to tell me one way or the other. . . to tell me that it is preeclampsia yet. It is, however, an advancing degree of toxemia.

Q What is it you are looking for to make that...that she is edging towards, that if she had gone over, you would say it's preeclampsia?

A Well, I'm looking for what's not recorded here. I am looking for reflexes and blood vessels in back of the eye.

Q Oh, I see. So without knowledge of what the reflexes were or what the eye might have revealed, you cannot make the diagnosis of preeclampsia?

A I would not be doing it this way. I would be looking at the fundi and recording the reflexes.

Q My question was, without those findings are you unable to make the diagnosis?

A I cannot. . .I'm sorry, were you finished?

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Q Yes.

A I cannot exclude it because there was insufficient data.

Q But you cannot make the diagnosis?

A I cannot make it or unmake it.

Q All right. Now, on November 21st, is she suffering from toxemia or preeclampsia?

A She is suffering from toxemia of a more severe degree, most likely heading into preeclampsia if she is not already there.

Q All right. Is there a recording of what her eye looked like when someone examined the fundi?

A No sir, there is not.

Q Is there a recording of the reflexes. . .what the reflexes were?

A No sir, there is not.

Q So again, you do not have sufficient information to make the diagnosis of preeclampsia?

A I do not have sufficient information to rule it in or rule it out. I have insufficient information but I have enough to strongly suspect it and were this my case, I would require that these things be done, yes.

Q Now, on November 27th, when she comes to the hospital, does she have toxemia or preeclampsia?

A She has a more advanced degree of what she had. In

the case of the few observations made, she most likely is pre-eclamptic. Again, I have no recording of the fundi or the reflexes here to make that diagnosis.

Q All right.

A It's a presumptive diagnosis, based on reasonable clinical certainty.

Q At that point on the 27th of November, your diagnosis because of the absence of anything would still be toxemia with a suspicion of preeclampsia?

A A strong suspicion of it.

Q All right sir, what should the treatment have been on the morning of November 27th?

A The treatment should have been the very minimum least treatment, would be intravenous magnesium sulfate. That's ...starting from absolute scratch treatment.

Q What are you giving magnesium sulfate for?

A To displace the calcium at the neuromuscular junctions and to displace calcium generally in the body with the chemical magnesium, thereby decreasing the excitability and lessening the chance of convulsions.

Q So you are giving the magnesium sulfate for convulsions?

A There is a secondary effect as well. It acts on the kidney and causes increased urine excretion, thereby at least temporarily lowering the blood pressure by decreasing

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the amount of volume going, although it's not the best mechanism to use.

Q Doctor, do you have textbooks in your office that you use as references?

A Most likely I do.

Q Most likely.

Q Yes sir. Textbooks by the time they are printed are five years out of date. I don't need anything that is five years out of date to tell me what to do. I rely on continuing medical education and on the journals that are current.

Q Do you have textbooks in your office?

A I do.

MR. MCDANIEL: Your Honor, that's been asked and answered.

MR. PLEDGER: He said most likely, Your Honor.

MR. MCDANIEL: It's an answer, Your Honor.

THE COURT: Objection overruled, go ahead, sir and proceed.

Q Do you have textbooks in your office?

A I haven't looked at them specifically but I believe I have. They may be at my home instead.

Q All right sir. Is there a medical library at the Culpeper Memorial Hospital?

A Yes, there is.

Q Do they have textbooks on obstetrics and gynecology?

A Yes, they do.

Q Have you ever looked at them?

A I have on occasion.

Q What is the - what are recognized textbooks on obstetrics and gynecology?

A Williams is one, Jesscoat is another, there are many of them.

Q So you recognize Williams as a textbook, is it a book that you have consulted in the past?

A Yes, but. . .you have raised this question before Mr. Pledger. The textbook to a specialist is five years out of date by the time it's printed and the information is of use to the resident and the intern and the medical student. I don't know what analogy I can draw but I presume you don't have to consult anything on courtroom courtesy everytime you come into court. I don't know but I am assuming that. By the same context, somebody who deals day in and day out with conditions of female medicine doesn't have to look up page 76 of a reference textbook that is out of date to find out any particular point. He may need something to jog his memory but that's about it.

Q Are there medical students and residents at the Culpeper Memorial Hospital?

A No sir, there are not.

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Q What is the purpose of having the textbooks?

A For the occasional jogging of the memory of somebody who wants to look something up. Other specialists may need to look up something in another field and will go and look up in obstetric textbooks.

Q Do you occasionally jog your memory by looking in textbooks?

A Occasionally.

Q Have you ever looked at Williams to see what the authors of that text said about the use of magnesium sulfate in order to decrease the water retention?

A I do not recall.

Q Do you know whether you would disagree with what they said?

A I know what's right and that's . .

Q And they would be wrong if they disagreed with you?

A . . .based on the research at the University of Virginia which is quite recent.

Q Was that research known in 1978 that you said was done recently at the University of Virginia?

A I believe so. Magnesium sulfate is one of the oldest treatments for toxemia pregnancy and they basically confirmed what was known previously.

Q So it would be your thought that that study was available or the knowledge of the physicians practicing obstetrics

and gynecology in November of 1978?

A I believe so, yes.

Q Do you know where that was printed?

A I beg your pardon?

A Do you know where that was printed?

A In the green or gray journal.

Q Do you recall reading it in there?

A I read it somewhere. I don't know where I read it.

Q All right, now - let me ask you this question, are there people who do not believe magnesium sulfate has any effect on edema or water retention in a woman with toxemia or preeclampsia as you have pointed out?

MR. MCDANIEL: Your Honor, I object. I think the question to this witness ought to go to what the standard of care requires or doesn't require, not whether there is a guy down here on the street who thinks you don't have to use it. . .

THE COURT: I think we can take it in that context but let's clear it up Mr. Pledger by relating it to a difference of opinion that is recognized in the profession. I think that's what you are driving at.

MR. PLEDGER: Yes sir, let me do it that way. Doctor, is there a difference of opinion recognized within the profession of the obstetrician gynecologist as to the effect of magnesium sulfate on water retention on a preeclamptic woman?

MR. MCDANIEL: Your Honor, I ask that the question be

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qualified with regard to 1978, with regard to the Commonwealth of Virginia.

THE COURT: It's being answered now. I will allow it in either context with regard to what he is now looking at and with the knowledge. . .what his knowledge has been. Dr. Burke has said that it goes back some years, so it's a matter of confirming what has been known. He's answered it in the context and I will allow the answer to be made in this context.

MR. MCDANIEL: Well, in that case, Your Honor, I ask that it be confined to the Commonwealth of Virginia.

THE COURT: Well, that's the standard, Mr. Pledger.

MR. PLEDGER: I understand that's the standard but we are not exploring the standard right now. We are testing the knowledge of this person as an expert. . .

MR. MCDANIEL: Well, Your Honor. . .

THE COURT: As long as it's in that context I will allow it but keep in mind-in mind that you must eventually come down to the standard in Virginia but you may proceed.

MCDANIEL: Thank you, Your Honor.

A Any method of treatment is bound to have controversy. The vast majority of specialists in obstetrics and gynecology and I recall from a course I took in Chicago, of the-the Chicago area medical schools this summer, addressed the question of magnesium sulfate and there was complete anonymity among the three or four hundred of the eligible physicians there as to the

usefulness of the nagnesium sulfate in the treatment of toxemia of pregnancy. Does that answer your question sir?

Q You are saying that that group was unanimous, I am simply asking you whether there is a recognized. . .

A I answered that too. I said that in any method of treatment there is bound to be somebody who dislikes it. I'm trying to imply, if I might, that the vast majority of people who are with it in obstetrics and gynecology are fairly unanimous in their view that magnesium sulfate is a number one type treatment for toxemia pregnancy, preeclampsia.

Q Let me just phrase this one more question, Doctor. Do the text writers then differ on the treatment of preeclampsia and the use of magnesium sulfate for water retention?

A Very likely they do. They differ on everything.

Q All right sir.

A This is one of the reasons doesn't pay too much attention to hardbound textbooks that are out of date.

Q Yes sir. Doctor, is one reading and one lab finding sufficient to make decisions on with respect to the treatment of a patient when you are talking in terms of urinalysis or blood pressure?

A Sir, I have to answer that question by saying yes and no. I regret the duplicity. You've got to take a worse case view of whatever you get until you prove otherwise. In other words when you get protein in the urine of a woman in a

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voided specimem, it means that her kidneys are leaking the protein, until you put a tube into her bladder and take out what you know to be an uncontaminated specimen by protein on the vulva and test that. But until you have that test done, until you have confirmed it, you must take a worse case view and act accordingly. . .by acting accordingly, I mean going ahead and doing the more thorough investigation.

Q Doctor, do I understand you then to be saying that unless it is a clean catch or a catheterized urine specimen, the protein that would be on the vulva may contaminate your specimen?

A No sir, that wasn't my answer.

Q All right.

A I said that a physician must take a worse case view of anything that he finds until he proves it otherwise.

Q How does he prove it otherwise in the case of a urinalysis?

A By taking a specimen directly from the bladder with a tube.

Q All right sir. And is that because protein can get into the urine as a result of coming in contact with other tissues prior to going into the sample?

A Yes, indeed sir.

Q Does a trace of protein then in the urine mean much in the way of a diagnosis?

A It can mean an awful lot.

Q Can it mean nothing?

A It can.

Q If it had been contaminated as a result of having come into contact with the vulva, would it mean nothing?

A Yes sir.

Q Can one blood pressure reading be inaccurately taken?

A Yes, indeed, it can.

Q Is there a period of time. . .

A I'm sorry, can I expound on that answer?

Q Sure.

A That is why it behoves a physician to check on any abnormal blood pressures and repeatedly and in different positions, especially in a pregnant woman.

Q All right, sir.

A The normal standard of care would require that.

Q All right, now, Doctor, you have practiced in the Culpeper Memorial Hospital for a number of years, is that correct?

A Yes sir.

Q Can you tell me what the personnel manual of the hospital, nursing manual of the hospital requires of the nurses in labor and delivery insofar as the monitoring of a patient in labor is concerned?

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A I cannot tell you directly. I can only tell you my understanding of it.

Q All right, sir, your understanding.

A All right, my understanding of the situation is that the nurses only requirement is to receive the patient, check vital signs that are relevant, report to the physician; at that stage her responsibilities in regard to the care of that patient become secondary to those of the physician in charge.

Q Does the nurse have any responsibility for the ongoing monitoring of the patient in labor by checking the vital signs of the mother, including the blood pressure and the fetal heart?

A If the physician requires her to do so, yes. She does not practice medicine on her own.

Q It's only if the physician requires her to do that?

A Or for humanitarian reasons she may feel the requirement to do so if she cannot get the physician to move but she is not required to practice medicine.

Q Is the taking of vital signs the practice of medicine or the gatherine of information?

A It may or may not be but once the physician has been notified it is no longer the nurse's prime responsibility to do so, at whatever frequency. She must act on the order of the physician.

Q Is it your testimony then that the physician has no right to rely upon the nurse insofar as monitoring the patient in the hospital is concerned?

A That was not my testimony, sir.

Q Is it your testimony then. . .

A My testimony was that she has the responsibility of taking vital signs, recording them, notifying the physician as soon as reasonably possible after the patient comes into the hospital in labor.

Q You are a member of the American College of Obstetricians and Gynecologists, are you not?

A Yes sir, I'm a Fellow of the American College of Obstetricians and Gynecologists.

Q And have you ever received from them their publication entitled Standards of Obstetrical Care?

A I believe I have.

Q Have you read that where it states that a nurse is required or that the fetal heart rate is to be monitored every fifteen minutes in the first stage and every five in the second stage. . .

MR. MCDANIEL: Your Honor, I object. What the relevancy of that statement in that magazine is, to this case is beyond me. I don't know whether Mr. Pledger is going to put that in evidence now or what. . .

THE COURT: It comes awfully close to testifying,

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objection sustained.

MR. MCDANIEL: Thank you, Your Honor.

Q Have you reviewed that?

MR. MCDANIEL: Well, Your Honor, I object to the. . .

THE COURT: The objection having been sustained, you will have to restate the question. That question is no longer answerable, Mr. Pledger.

Q Have you read that manual or that publication from the American College to which you belong?

A I don't recall specifically reading it.

Q Do you know whether they prescribe any kind of standards?

A I do. I believe they are shortly going to change it because essentially they are outdated.

Q What are the standards that they are going to change?

A I believe everybody is going to go to constant fetal monitoring on most cases.

Q And what is it now that they are going to change to constant fetal monitoring?

A I beg your pardon.

Q What are the standards now that they are going to change to constant fetal monitoring?

A From fifteen minute monitoring to monitoring every... whatever you said, five minutes I accept as. . .

Q All right. Has it been your experience over the last eleven years that the nurses at Culpeper Memorial Hospital monitored your patients in labor, that is to ascertain their vital signs, to check the fetal heart rate periodically?

A They have done so on my order.

Q And only on your order?

A Other than on the initial admission and arrival of the patient at the hospital.

Q All right sir.

THE COURT: Is it correct then, Doctor, that once the attending physician is notified the nurse acts under his authority and his direction from then on?

A Yes, indeed, sir.

THE COURT: Is it fair to say that only under his authority or is it a divided authority?

A I don't believe it's divided at all, sir.

THE COURT: So she is answerable solely to the attending physician once he is notified?

A I believe so, yes. That is my belief. That is how I act.

THE COURT: All right, go ahead, Mr. Pledger.

A Sir, may I. . .

THE COURT: If you want to explain it further, you may do so.

A If indeed in the event that a cardiac arrest occurred,

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then the hospital organization is managed so that the nurse can call what's called a Code 4 and commence cardiac resuscitation in an emergency like that.

THE COURT: That procedure then, depends on the magnitude of the emergency, would it?

A Well, it's specifically for cardiac resuscitation where the person would come in and have their heart stop and fiddling around with calling doctors and things would waste precious time, and it's set up specifically in that situation for the nurse to proceed with cardiac resuscitation.

THE COURT: That's a special category?

A Yes sir.

THE COURT: All right, go ahead, Mr. Pledger.

Q Does a first class emergency fall within this special category that would require a nurse to take some action like monitoring the patient?

A I have difficulty in answering that question. I would like if you could rephrase it so I can frame an answer.

Q Does a first class medical emergency give the nurse the authority to act so as to monitor the patient, to check the vital signs?

A I have already specified that a cardiac arrest is dealth with under those circumstances. The nurses other actions, once she has notified the physician, will be based on her own humanitarian impulses because the physician is in

charge of that case from that time on. She is not.

THE COURT: You have already classified this at one stage as a first class medical emergency?

A Yes sir.

THE COURT: In that context, would that change the authority of the nurse and doctor?

A In this context, no, because it is not a cardiac arrest.

THE COURT: All right, go ahead Mr. Pledger.

Q Would a patient who is strangling, would that come within a. . .

MR. MCDANIEL: Well, Your Honor, I object. He has testified that the cardiac emergency is that. He has said it four or five different ways and I don't know why we have to go into a hundred other ways.

THE COURT: Dr. Burke has indicated some difficulty with the question and I will allow him to clarify it, go ahead sir.

A Yes sir. The ordinary humanitarian impluses of an ordinary person certainly govern one's activities. If a patient was choking on a piece of potato, I believe it would be reasonable for a nurse or anybody else there to try and hook that piece of potato out of the throat and save their life without orders from a physician.

Q Under your interpretation, would any life threatening

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situation give to the nurse the right to act, to check vital signs without a specific order from a doctor?

A You have got to specify the type of life threatening situation. Every illness is a life threatening situation. A simple pimple on the face can result in thrombosis of the veins in the brains which is a life threatening situation.

Q Very well, doctor, is the standard of care in Culpeper any different than it is elsewhere?

A You've asked me that in a different form in depositions, sir. I've been thinking about the answer I gave you. I have not been in other than five states I believe, therefore, I can't speak for the whole country. In Virginia I have not been in every last town here. I have been in Lynchburg, Charlottesville, and to a small degree in Richmond. Charlottesville I know reasonably well, it's the University of Virginia. I go there every week so I am reasonably familiar with the care there. I believe Culpeper, within the limitations imposed by being a small hospital, namely, we don't have a new-born intensive care unit, comes up to that standard quite well. In fact I think in certain areas exceeds it.

Q Is the standard of care in Culpeper different from the standard of care elsewhere in the State of Virginia?

A Well, I thought I had answered that question. Based on going to Charlottesville each week, and assuming that the University of Virginia represents a reasonable sample of

the standard of care in Virginia, I believe Culpeper measures up quite well.

Q Have you ever answered that question differently, Doctor?

A When you asked that type of question before I answered that I wasn't an authority but I don't think anybody on this earth is an authority on that because there is no published evidence of what a particular standard is for the State of Virginia that I know of.

Q Are you. . .do you now feel you are qualified to answer that question?

A Well, in the way I have answered it, that is the qualification I think I have.

Q All right sir. Now, based on that, can you tell the ladies and gentlemen of the jury, whether the practice in the hospital at the University of Virginia in Charlottesville is that the physician in obstetrics and gynecology must instruct the nurse to monitor the vital signs of the mother and fetal heart rate after the initial taking of it?

MR. MCDANIEL: Your Honor, this witness has testified to the statewide standard of care. You could go around to a hundred and two hundred hospitals in the state and in each one you find variations. Mr. Pledger accepted him as an expert on that and he has testified to it. If he wants to challenge what the standard of care is here, he can do so, as to what's required

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but what's required in Charlottesville or what's required in Danville or what's required in Pound, Virginia is not relevant.

THE COURT: I am going to allow one reference point, Mr. Pledger, because Dr. Burke, himself, has alluded to it as one which he is very familiar with, and for that reason I will allow it but otherwise you stop at Charlottesville.

Q Yes sir.

THE COURT: Go ahead, sir.

A Do you mind repeating the question?

Q Yes sir.

A Perhaps in a shorter form.

Q I'll try. Is it your opinion that at the University Hospital in Charlottesville, the nurses in labor and delivery do not monitor the vital signs of a patient in labor and the fetal heart rate after the initial taking thereof, without the specific order from the physician?

A I don't know the exact mechanism by which they run their hospital but one has to bear in mind that that is a hospital with a resident staff and medical students and, therefore, these people are physically present in the hospital with their patients. I do not know their standing orders and I think you are talking about a totally different situation.

Q All right sir. Doctor, what is the normal fetal heart rate range?

A Roughly a 100 to 160 is acceptable where range is

good because it varies quite a bit.

Q And has it been your experience to see fetal heart rates dip as low as 70 with no apparent adverse effect on the baby after the baby is born?

A Under very special circumstances, yes.

Q Now, doctor. . .

A In that area anyway.

Q . . .the fetal monitor strip that you have to your righthand side, what speed was that running at?

A When the patient was initially admitted it was varying around 120 for about two minutes, with a range of 116 to 123.

Q I'm sorry, Doctor, I didn't make my question clear.

THE COURT: You mean the speed of the tape?

Q What speed was the tape proceeding through the machine?

A I have already said this machine does it at a rate of one centimeter a minute.

Q All right sir. Now, have you checked on that since your deposition was taken?

A It was checked at some stage for, I think, unrelated reasons and it came out reasonably close to one centimeter a minute. No, I have not checked on the machine since my deposition with you, sir.

Q Didn't you tell me in your deposition that you didn't

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know what the speed was?

A I don't recall that, sir. There are two machines and one of them runs at one to two centimeters, and the other one, the older one, that I now hold the tape for, runs at one centimeter.

Q Yes sir. Let me ask you if you recall this question. "Do you remember what speed they operated it at?" Referring to the sonocade...that is the sonocade tape, is that correct?

A Yes sir.

Q Your answer "Unless it's here, I don't, unless it's recorded here." Is it recorded on that tape?

A I don't believe it is sir.

Q All right sir. What is an artifact with respect to fetal monitoring?

A It's a spurious reading.

Q A spurious reading?

A A spurious reading.

Q Is that a reliable reading, an artifact?

A No, it is not.

Q Do you rely upon artifacts in making your interpretations and making a diagnosis?

A I tend not to but with the proviso of taking a worse case view until I prove otherwise.

Q In your opinion is there an artifact on that tape?

A There is absence of recording at times which could be

construed as an artifact.

Q You would interpret the artifact on that tape to be the absence of a recording or the breaking of the continuous line, is that correct?

A Yes sir.

Q So that we can put some definition to this in our record, the artifact that you are speaking of, would that be to the righthand side of the serial number 76592?

A Yes, to a certain degree.

Q And over towards the serial number 76593?

A It exist there, yes.

Q And that's the area where there is no ink on the paper?

A There are several areas where there is no ink on the paper. There is a burst of what appear to be fetal heart rates recorded about half way between those two numbers which look fairly genuine to me.

Q Doctor, what effect does it have if you removed the belt or undo it, and move the transistor or this. . .

A It will cause absence of recording of the fetal heart rate.

Q And if you are moving that around in order to find the fetal heart rate, what do you see on the tape?

A Absence of recording.

Q And if that is being moved around and yet you have

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a complete line and continuous unbroken ink line on the paper, what does that tell you?

A You are getting a recording.

Q You are getting no recording?

A You are getting a recording.

Q What is it you are recording?

A If you are getting a continuous line, you are recording the fetal heart rate.

Q All right now, Doctor, at the end of that tape I believe. . .

A With certain reservations.

Q . . .at the end of the tape. . .

A Yes sir.

Q . . .that is in the vicinity of the serial number 76593, you have a continuous line, is that correct?

A Yes sir.

Q What is that representative of?

A Probably the baby's heart.

Q Now, you say probably, is there a question in your mind?

A It may be the mother's uterine artery.

Q How would you distinguish between those two?

A You would do so by putting a probe on the baby's head.. .

Q How else. ..

A . . .to get a correct reading. However, that reading may be spurious again if the baby is dead because the machine is set up to reject the higher voltage, EKG reading, it gets if there are two of them. If there is only one, it will willy-nilly record the one it's getting. That's my understanding of how the machine works.

Q When did fetal distress first appear on that tape?

A I believe it appeared at about two minutes and twenty seconds after the cardiac rating was started.

Q When was the reading started?

A I can't make out on this. . .I was asked to assume it started at a time that I have already given evidence on.

Q But from that tape you are unable to determine when it was started?

A There is a notation here that says 6:40 a.m., 11/27, so I assume that 6:40 a.m. is around the time that started.

Q All right sir. What time do you assume that the tape was discontinued?

A My calculation would be to count the number of vertical lines, called the minutes and enumerate that out.

Q Now, the fetal distress you say is two minutes after . . .

A About two minutes here at this stick, which we have already. . .

Q So that would mean if it started at 6:40, that would

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be a 6:42, is that correct?

A Approximately, yes.

Q When was fetal distress first noted on the 27th?

A I'm sorry, sir, do you wish me to refer to the chart?

Q You may refer to whatever you want sir.

A Well, I noted at that time at 6:42 on the chart.

Q Doctor, have you ever responded to that question differently?

A I don't know.

Q Let me read you this question from page 77 of your deposition, line 23. "When was fetal distress first noted on the 27th? Answer "According to this 7:00 a.m. but that's. . . I would say it's possible for fetal distress to have been noted somewhere between 6:45 and 7:00 a.m. because if this started at 6:40, according to the notation on the monitor strip, he was notified at 6:48, at which time there had been at least one type two dip, or what could be interpreted as a type two dip. Certainly with fetal heart rate going down well below a hundred...

MR. MCDANIEL: Your Honor, I object. The proper purpose to impeach a witness is to read the inconsistent statement from a deposition. This statement is not by any stretch of the imagination inconsistent.

THE COURT: I don't gather that it is either but I will let the doctor answer that. Is that the same answer that

is consistent with what you have said today, Dr. Burke?

A I think so, but I am not sure of the question.

THE COURT: All right.

MR. MCDANIEL: Your Honor, if I may, we have proceeded this way a couple of time, I think if Mr. Pledger wishes to refresh the recollection of the witness, he can show this to him, have him look at it, and see if he is refreshed. If he wishes to impeach him, I think the question. . .

THE COURT: He answered in this case he wasn't sure. You are right, Mr. McDaniel. In order to allow the witness to respond properly, if he doesn't know what his previous answer was, then I think he is entitled to review the question and the answer, Mr. Pledger.

MR. PLEDGER: Thank you , Your Honor, I will be happy to have him do that, Your Honor. What time was Dr. Modaber notified of fetal distress?

A I assume from this at 7:00 a.m.

Q You say you assume from this, are you referring to the nurse's notes?

A Yes, I am referring to the nurse's notes in the chart.

Q And you have indicated that there was fetal distress for perhaps as early as 6:42, is that correct?

A Yes, indeed, according to this, yes.

Q Now, would it be incumbent upon the nurse to notify Dr. Modaber of fetal distress prior to 7:00 a.m. if it's there at

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6:42?

A I have difficulty in answering that question because I think he should have been in at 5:50 when he was notified of the problem that was going on. This is merely a continuation of the same problem, as expected getting much worse. Now, I think a nurse would have assumed that having called an ordinary physician that he would leap from his bed and come immediately on hearing this five bell alarm going off of 160 over 110 at 5:45.

Q It would have been inappropriate for him to leave her in the hands of the nurse to monitor for him and to notify him if there were changes in the condition?

A I believe so, at 5:50 when it's mentioned here that he was notified.

Q And why would the physician be expected to come in and immediately take charge of the monitoring of this patient at 5:50?

A Because he's got a fulminating medical emergency going.

Q Doctor, let me show you your testimony before the panel, page 238, at line. . .

THE COURT: Mr. Pledger, you haven't asked him whether he has answered that differently.

MR. PLEDGER: I was going to do it this way to see if I could refresh his recollection.

THE COURT: Ask him whether he has ever answered it differently.

Q Have you ever answered that question differently, Doctor?

A I don't know.

THE COURT: All right, now you may show it to him. Let him see the question and the answer.

A Yes, I did answer it somewhat differently but in the same vein.

Q Well. . .

A He's got to take charge of the patient. The difference between taking a minute extra on the telephone before you get dressed to give preliminary orders are. . .as Dr. Modaber and I both live about five minutes from the hospital, is a question of values.

Q Would you read your answer?

A Give preliminary orders regarding the care of the patient, setting up for a possible cesarean section and immediately come in and take charge of the case and monitor it himself. I think that's the same answer.

Q Doctor, let me point a little further down the page then, sir, the question, "And why would the physician be expected to come in immediately and take charge of the monitor?" What is your answer?

MR. MCDANIEL: Well, Your Honor, I ask that the witness

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be allowed to read his answer.

MR. PLEDGER: That's what I asked him to do.

THE COURT: I take it we are in the same category, the same continuation. Go ahead and read it, Doctor Burke.

A If he had any doubt about the way the nursing staff was handling it; if perhaps they were applying it to her left ear, instead of her abdomen, he would be able to indicate that that was the wrong place to put it and he would put it on her abdomen and hear the right sounds. Mistakes like the monitor might not be plugged in. In the rush and bother somebody would say there is no heart rate, it's not working. He might see that in a perfectly normal case but in taking. . .the physician in my opinion has taken a worse case situation when he. . .has to take a worse case situation when he hears bad news and it's nice to go in and reassure one's self that it's not that way, that somebody has used the monitor incorrectly or something like that.

MR. MCDANIEL: Now, Your Honor, I hate to prolong this cross examination but that appears to me to be the same answer that was given. In addition the question Mr. Pledger asked was why does the physician have to come in. That wasn't the question asked here. Why would he have to come in and take charge of the monitor and that's different, and Dr. Burke's answer is focused only on the monitor. . .

THE COURT: It's noted but any further objection is

overruled. Now, let's proceed with the cross examination.

Q Thank you, Your Honor. Doctor, have you looked at the discharge summary that is in the hospital chart?

A Yes sir.

Q Have you looked at the discharge summary that is in Dr. Payette's office records?

A I believe so at sometime in the past, not recently.

Q Have you compared them to see whether there is any difference and, if so, what the difference is?

A I believe so in the past and if I could see. . .

MR. MCDANIEL: If I may, Your Honor, I'll give the witness Dr. Payette's chart.

THE COURT: Yes sir. It is noted that he has them now.

A I believe I saw some differences in the past.

Q Would you tell us what those differences are?

A I will attempt to do so, sir. They both refer to the same chart number, the same admission date and the same discharge date. They are essentially identical in looking at them except there are some changes, which I will need to read line by line to come up with. Line 4, there is a different word used, estriol determination in the hospital one, estriol continuously without the word determination in Dr. Payette's copy. Line 3 in Dr. Payette's copy and line 4 in the hospital discharge summary. Line 8, I believe, the last estriol determination is

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in the hospital chart, reads the last estriol result in Dr. Payette's chart. The second paragraph of the hospital chart, after admission I was notified at 5:55 a.m. and in Dr. Payette's copy,/after admission I was notified at 6:00 a.m. it reads There is a difference...after 6:00 a.m. that the patient goes in with two c centimeters dilatation. ..in the Payette copy, that the patient was in cervix two centimeters dilated in the hospital copy. There is a difference there. I have to say that this isn't the most comfortable place to hold two charts and try to read them.

THE COURT: Mr. Pledger, I am not sure the doctor has had a fair opportunity to compare these. He's obviously making a quick reference. Is there anything that is appropriate to require him to make that comparison without having previous access to it?

MR. PLEDGER: Your Honor, I believe he said he had made it once before.

THE COURT: You are trying to use this to refresh him?

MR. PLEDGER: I just want him to look at it. It's been made a big issue here. It was made an issue through him. They had him testify that they were two different ones and I thought it was time that we found out precisely what differences there are.

MR. MCDANIEL: Well, they are in evidence, Your Honor.

THE COURT: I think he has testified on this point

before and we will allow him to retrace his steps if he can.

MR. MCDANIEL: Your Honor, he has testified only on direct as to the different typing dates. He has not testified before as to the difference in these documents. He has not. . . and my direct examination was a long time ago but I don't think I have forgotten it. He didn't testify as to the difference in these two documents, it never came up.

THE COURT: Isn't that the inference that you are undertaking to project though, Mr. McDaniel?

MR. MCDANIEL: But this witness. . .through the documents themselves, Your Honor.

THE COURT: Unless you withdraw that inference, I am going to allow cross examination to explore it.

MR. MCDANIEL: I want that inference to stand, Your Honor, so I don't withdraw it.

THE COURT: All right, that being the case, Mr. Pledger may pursue it.

A There is a difference in Dr. Payette's chart. . . by 7:10 I applied the internal monitor. I arrived, in the hospital chart, at 7:00 and it looks like it could be 25, it's a handwritten thing that's not dated or initialed and applied the internal monitor. Then there is a handwritten something 7:20 a.m. That's different in both of these. . .and could hear the fetal heart. There is a difference here in Dr. Payette's copy, the cord could not be felt at examination. By the time

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the patient was moved to the operating room -, there was no dash in the hospital one, and after I applied the internal monitor, I was on my way to the operating room to start washing my hands. Dr. Payette's one says. .by the time the patient was moved to the operating room-because the nurse on call at 7 o'clock, when she called me and notified me of the fetal distress, she also notified the operating group and the operating room was ready, and after I applied the internal monitor I was on my way to the operating room to start washing my hands. Those sentences differ.

Q If I might stop you right there, do you see any material difference in what was said in those sentences?

A There is quite a difference in there about the nurse doing something or other. I can't concentrate on it. I am trying to read both things at the same time. I am simply trying to pick out differences as you requested, sir.

THE COURT: Do you have all the questions, Mr. Pledger, on that point?

MR. PLEDGER: No sir. He says he can't do it that way, so we will let it ride for a minute.

A I am hoping there is a method of auditing, I can't absorb what I am saying and pick up the differences in both of these at the same time. The time on Dr. Payette's copy on the door just outside the operating room at 7:45 is written in, and at 7:40 on the discharge summary. She delivered a stillborn male infant, 5 pounds, 15 ounces. Dr. Payette's copy. . .

apparently, although she was receiving oxygen and out, the hospital copy, apparently, although she was receiving oxygen, she was lying on the left side. This did not help. There is a difference there.

Q The only difference is the word out, is it not?

A And out.

Q And out. All right, sir.

A And because of the . . . .there is a paragraph difference here then, the patient herself.

Q That's in the same language as the. . .

A I'm just telling you the difference sir, like you asked me to get.

Q All right sir.

A There is an extra sentence, she was somewhat anemic and in Dr. Payette's one, she was somewhat anemic and there was a trace of protein on urinalysis, which is compatible with her mild preeclampsia.

Q Would you say that that is the only sentence that is different between the two?

A Sir, I can't answer that question. I will require time to sit down and study this but sitting here on a witness stand and looking for the differences you asked me. . .I called them out as they came.

Q Well, doctor, let me ask you to look at the admitting laboratory studies in the hospital chart, and tell me whether

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they could be characterized as all within normal limits?

A There are three laboratory results here, I see dated November 27th. There is a serology which is a test for syphilis done on every patient, with the time of 2:03 p.m. written on it, which is recorded as non reactive. There is a urinalysis which apparently was. . .I thought the voided specimen was checked. . .it doesn't say, which was recorded as 9:44 a.m., which shows a trace of protein and occult blood, red cells in the urine and 7 to 10 white cells. It's borderline whether you can call that normal or not and there is a fifteen thousand, five hundred white count when the normal might be somewhat lower. These are very skimpy tests and you could die with tests like this showing perfectly normal.

Q Could you classify those, reasonably classify those as within normal limits?

A I classify them as essentially unremarkable.

Q All right, sir. Now. . .

THE COURT: Now, would you clarify that word in lay language, the word unremarkable, insignificant or. . .

A They came after the delivery, sir, so therefore their significance on the clinical course doesn't mean much.

THE COURT: Irrelevant?

A Yes.

THE COURT: That would be more. . .

A Yes, I think so.

THE COURT: All right, the word unremarkable is particularly akin to medical terminology, is it?

A Right, I'm sorry. I slipped into it. I'm getting tired and so is everybody else.

THE COURT: That's all right.

Q I think I have one last question, Your Honor, one last subject, I shouldn't say question. Doctor, you indicated there was a slim chance, then you changed it to a fairly good chance of saving this baby at 5:50, can you tell us at what point that slim chance or that fairly good chance disappeared?

A It obviously disappeared forever when she delivered the stillborn child.

Q Are you saying then that there was a slim chance or a fairly good chance all the way up until the baby died?

A No sir, I can't determine exactly when that was and the use of the words chance, themselves, the use of the word chance, itself, indicates that I'm not sure, with certainty, but had I. . .had this been my case and had I seen that, I would have been reasonably hopeful of a good baby going for an immediate cesarean section. That's what I meant by what I said.

Q At 5:50 a.m.?

A Yes sir.

Q And you would have made the decision on the basis of what, to go for a cesarean section?

A Just very likely, the type two dips, especially when

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I had seen more than one of them.

Q At 5:50 a.m. you didn't have any type two dips, did you sir?

A Well, you can trip me up on various times. I am assuming you are talking about the type two dips here, whatever times they came in, sir.

Q Well, then would you say as of 7:00 a.m. that there was a fairly good chance of saving him?

A 7:00 a.m. probably.

Q How about 7:10?

A I can't advance it anymore, sir. I've given you my answer. The same chance decreasing, I don't know at what degree.

Q Was there perhaps no chance of saving this baby?

MR.MCDANIEL: As of when, Your Honor.

THE COURT: Can you give a time, now. Again, it's related to time, Mr. Pledger.

MR. PLEDGER: Can you tell us whether there was a time when. . .let me withdraw the question and rephrase it. You have said that originally there was a slim chance of saving him at 5:50?

A Yes, I did and then I modified it and I. . .

MR.MCDANIEL: Your Honor, I think his testimony was slim and he modified it to fair at 5:50. . .

THE COURT: That's noted, sir, go ahead.

Q Now, was there at some point in time or are you saying when you say there was a slim chance and then changing it to a fairly good chance, that there was also perhaps no chance of saving the baby at 5:50?

A If you want to infer that from my words, yes, what I would have done is something different and what I would have thought is something different, sir. I wasn't finished with my answer, do I continue.

THE COURT: You may complete your answer, Dr. Burke.

A This baby is already a risk from the toxemia or or pregnancy induced hypertension and this would mitigate against his chances of survival, to what degree I can't tell at this time. It's already a compromised baby. I believe my answer is as complete as I can make it but by saying I think I would have had a reasonable chance of getting that baby out alive and in reasonably good condition at the time I specified.

Q What do you mean in reasonably good condition?

A With a good to excellent chance of being fully recovered in all of its functions and growing up as a normal person.

Q So there is a chance that had you saved it at 5:50 the baby would have sustained some type of damage,right?

A There is that chance in every delivery, sir.

THE COURT: How about in this case? Was there more

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likelihood because of the pre-existing . . .

A Yes sir, it was.

Q I have nothing further, Your Honor.

THE COURT: Mr. McDaniel.

MR. MCDANIEL: Yes, just one or two your Honor.

REDIRECT EXAMINATION

By: Mr. McDaniel

Q Why was there a greater chance in this case, Doctor, of there being a baby born damaged?

A Because of her continued toxemia in pregnancy or pregnancy induced hypertension.

THE COURT: I think he has covered that fully previously, Mr. McDaniel.

Q Would you step down here please, Doctor, and take a look at these two. What. . .

THE COURT: Refer to the record what you are referring to.

Q Yes, I am about to, Your Honor. What's the date on Plaintiff's Exhibit No. 6?

MR. PLEDGER: Your Honor, there is no question about the dates. It's been discussed. The witness has testified to them.

THE COURT: It is for clarity. You may pursue it for clarity. Go ahead sir.

A On this one, Exhibit 6, typed 12/27/78.

Q Now, does this, right above his signature have the words mild preeclampsia?

A Yes, it does, sir.

Q And what was the disease that Mrs. Kelley suffered from when she came into that hospital?

A I believe preeclampsia.

Q Is it mentioned in that last sentence anything about protein in the urine?

A Says she was somewhat, I can't make out that word . . she was somewhat. . .and there was a trace of protein on the urinalysis which is compatible with her mild preeclampsia.

Q Now, look at this one, Doctor, this is Exhibit No. 5, when was it retyped?

A According to this June 20, 1979.

Q Tell me if the words mild preeclampsia appears above Dr. Modaber's signature on the earlier one, appears on the later one?

A It does not, sir.

Q And does the sentence . . .

A Sir, may I qualify that?

Q Yes.

A The signature is not on this one.

Q But this is, but above his name, does the words mild preeclampsia appear?

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A No sir, it does not.

Q And does the sentence containing the protein in the urine and the reference to the preeclampsia appear on this later document?

A No sir, it does not.

Q Thank you, very much, Doctor, you may go back to the witness stand. Doctor, if you would, look at the hospital record, do the nurses write down what they are told to do by doctors?

A Yes sir.

Q And do they write it down as they go along?

A Yes sir.

Q Would you find in here, please, and I will show you a copy, if I can find one quickly, the nurses instructions. . .

A Yes sir.

Q I represent to you that that is a copy of Plaintiff's Exhibit No. 1, where are the prenatal charts kept, Doctor?

A Usually in a physicians' office, is the system with Dr. Payette's office, when I was there, and I believe it continued while Dr. Modaber was with him.

Q And when are they transferred to the hospital?

A The system at that office was that they were transferred when the patient went into labor.

Q Now, if a patient comes in at 5:50 a.m. in the morning in labor of Dr. Payette or Dr. Modaber, is that prenatal

chart going to be there to tell that nurse that this woman is a preeclamptic woman?

A Nos ir.

Q How is that nurse going to know that this woman is a high risk pregnancy?

A She has no way of knowing unless she is told previously by Dr. Payette or Modaber.

Q Now, look on the notations, if you would here at the top, and you see on that exhibit a number of items written in?

A Yes sir.

Q Are they numbered?

A Yes sir.

Q Is there a signature below that?

A Yes sir.

Q Can you make it out?

A It's what I know to be Dr. Modaber's signature.

Q Is there anything above that?

A Yes, there is a sign indicating, verbal or vocal order by Dr. Modaber and J. Strothers, what looks like an LPN degree after that, meaning that the nurse took the orders by verbal order over the telephone.

Q Who is J. Strothers?

A She is one of the practical nurses that worked at that time in the obstetrical department.

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Q What are the orders that are given there, Doctor?

A One, admit, two, CBC, meaning complete blood count, urinalysis, UA, plus VDRL, which is the serology test for syphilis, which is done routinely on every hospital admission, three the mini prep, meaning a small amount of the hair is removed where you anticipate that you will require to do an episiotomy at the delivery of the baby, four, Decadron 1 c.c. in. which is a cortisone type of preparation, five, start IV, 1,000 c.c. of D5W and keep the vein open and then I believe the word rate but it doesn't specify which rate, six, Demerol 25 milligrams, plus Sparine 25 milligrams, IV push by one and seven apply fetal monitor.

Q Is there anything on there Doctor, about the emergency in which these should be done?

A No sir.

Q Is there anything on there, Doctor that indicates these are anything other than routine instructions from the doctor?

A No sir.

Q Thank you, I have no further questions of this witness.

THE COURT: Any recross, Mr. Pledger?

MR. PLEDGER: Just one, Your Honor.

RECROSS EXAMINATION

By: Mr. Pledger

Q You have just looked at Plaintiff's Exhibit No. 6 and Plaintiff's Exhibit 5 and you've been asked whether the words mild preeclampsia is on Exhibit 6, above the typed name Dr. Modaber, is that correct?

A Yes sir.

Q And you pointed out that it is not on Exhibit 5, is that correct?

A Yes sir.

Q Where on your discharge summary do you put your admitting and discharging diagnosis?

A Usually at the top.

Q Now, would you compare the two, the discharge diagnosis for this jury and tell them what is on there?

A Admitting diagnosis, intrauterine pregnancy, ruptured membrane in labor, discharge diagnosis the same, male infant stillborn, mild preeclampsia.

Q Mild preeclampsia appears on both, does it not, sir?

A Yes sir.

Q Thank you, sir. I have nothing further, Your Honor.

THE COURT: Any redirect?

MR. MCDANIEL: Your Honor, I thought of some questions

PRINTERS NOTE

TRANSCRIPT CONTINUED IN VOLUME II