

2018

State of Utah, Plaintiff and Appellee, v. Tisha Morley, Defendant and Appellant. : Appellant Brief

Utah Supreme Court

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No. 20170957

IN THE
COURT OF APPEALS OF THE STATE OF UTAH

**State of Utah,
*Plaintiff and Appellee,***

v.

**Tisha Morley,
*Defendant and Appellant.***

BRIEF OF THE APPELLANT

**On appeal from the Second Judicial District Court, Weber County,
Honorable Scott Hadley, District Court No. 141900806**

Ms. Morley is currently incarcerated

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ORAL ARGUMENT REQUESTED

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Tisha Morley

Represented by Emily Adams and Cherise Bacalski

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Introduction

Appellant Tisha Morley left eight-month old Child on the ground unsupervised, with several three- and four-year-old children playing rough games around him, while she went downstairs. When she returned fifteen minutes later, she found Child crying hard. From that point on, Child was fussy, vomited repeatedly, had a hard time eating, and seemed lethargic. When Child's father picked Child up several hours later, Child was unresponsive.

Medical professionals determined that Child had a skull fracture and that fracture caused Child's brain to swell. Child eventually passed away from complications caused by the fracture.

The State charged Ms. Morley with child-abuse homicide. The State alleged that Ms. Morley got so frustrated that she shook Child and slammed his head against a changing table.

At trial, the State presented the testimony of several experts. The State's medical experts all believed that Child's skull fracture was caused by someone else, but none of them could definitively say who did it or how it happened. Then the State presented the testimony of a biomechanical engineer, who testified, outside his expertise and without objection, that Child's injuries were caused by an adult grabbing his arms, shaking him, and impacting his head with a hard surface.

Because the biomechanical engineer's testimony was beyond the scope of his expertise, trial counsel should have objected. A biomechanical engineer can testify about force and how a body in general would respond to that force. But a biomechanical engineer without medical training cannot testify about how a specific person received certain injuries. Yet during the testimony, Ms. Morley's trial counsel failed to object to the engineer testifying beyond the scope of his expertise. And the engineer was the only witness to definitely state that an adult grabbed, shook, and slammed Child's head into a hard surface.

What's more, the State introduced irrelevant and highly prejudicial evidence in the form of photographs and a video depicting a doll that was much smaller and much creepier than Child. Throughout the State's case, the State showed photographs of a doll that the police had positioned on the changing table. The way that the police positioned the doll aligned the doll's head with the crack in the changing table perfectly. But the doll was several inches shorter than Child—who was only one inch shorter than the changing table itself. What's worse, the police positioned the doll with its legs spread apart so that it was even shorter so that its head would fit into the crack. Trial counsel did not object to these photographs being admitted into evidence.

The State also showed a video of the police having Brother attempt to lift up the doll. But the doll was a different weight than Child, and all the doll's weight was centered in the doll's chest rather than being spread throughout the

doll's body. Furthermore, Brother's motivation to pick up the doll was vastly different than Brother's motivation to pick up Child. But the State—calling this video a “reenactment”—relied on this video to argue that Brother could not have picked up Child and injured him. And an expert relied on that video to decide that Brother could not have lifted Child. According to the State, Ms. Morley was the only person who could have harmed Child in light of this video “reenactment.”

After hearing all the evidence, the district court instructed the jury on child-abuse homicide and the lesser-included offense of negligent homicide. The jury convicted Ms. Morley of child-abuse homicide.

This Court should reverse Ms. Morley's child-abuse homicide conviction because of two instances of ineffective assistance of counsel. First, her counsel performed deficiently by not objecting to the biomechanical engineer's testimony. Second, her counsel performed deficiently by not objecting to the photographs of the doll on the changing table and the video demonstration of Brother picking up the doll. These failures prejudiced Ms. Morley.

Ms. Morley requests that this Court either (1) direct the district court to enter a conviction for the lesser-included offense of negligent homicide and remand for the limited purpose of resentencing, with a direction that all time Ms. Morley has served will be counted as time served towards her new sentence or (2) remand this case for a new trial.

Issues Presented

Issue 1: Was trial counsel ineffective when he failed to object to a biomechanical engineer testifying beyond his expertise?

Issue 2: Was trial counsel ineffective when he failed to object the photographs and video of the doll when the doll was a different height and weight than Child?

Standard of Review: “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law.” *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

Preservation: These issues are not preserved. But an “exception to the preservation requirement is where trial counsel’s failure to preserve the issue in the trial court is the result of ineffective assistance of counsel.” *State v. Kozlov*, 2012 UT App 114, ¶ 35, 276 P.3d 1207.

Statement of the Case

1. Child Is Injured While at Ms. Morley's Daycare

Ms. Morley had an in-home daycare. (R. 4273.) Around 7:00am one morning in 2014, Mother dropped off eight-month old Child and three-year-old Brother at the daycare. (R. 4264, 4269, 4287.) That day was the third day Ms. Morley had cared for Child and Brother. (R. 4281.) Brother had been in Ms. Morley's daycare as an infant for nine months; Mother expressed no dissatisfaction with Ms. Morley's care of Brother when he was an infant. (R. 4316.)

At eight months old, Child was small for his age. (R. 4649.) At his six-month-old doctor's visit, there was concern about his marginal weight gain. (R. 4646.) And at eight months, Child could not crawl, but he could sit up with some support. (R. 4648–49.)

After Mother dropped off Child with Ms. Morley, Child napped from 7:30 until 9:00am. (R. 4371; Exh. 142.) After he woke up, he ate normally. (R. 4373.) Then around 9:30am, Ms. Morley laid him down on a playmat on the ground, with five children—ages three and four—playing red light, green light around him. (R. 4373, 4386.) Leaving Child on the playmat with the children playing around him, Ms. Morley went downstairs to sanitize toys for about 15 minutes. (R. 4373–74.)

Then she heard Child crying. (R. 4374.) She came back upstairs, and Child was on his playmat, but he was very fussy and would not stop crying until she held him. (R. 4374.) Child acted tired but did not go back to sleep. (R. 4374.)

Ms. Morley tried to feed him at 10:30am, but he refused food and threw up; Ms. Morley changed his clothes and gave him a bath. (R. 4374.) At 11:30am, he ate a little and would not take a bottle; he threw his head back in his highchair and cried and did not console easily. (R. 4374.)

Child slept from 1:00pm until 3:00pm. (R. 4374.) He woke up, had a snack but was very fussy, and went back to sleep at 4:20pm. (R. 4374.) Ms. Morley sent Mother a text message around that time, telling her that Child seemed to be doing okay but slept a lot. (Exh. 35; R. 4292–93.)

When Father arrived to pick up Child and Brother at 5:00pm, Ms. Morley went to get Child up from his nap. (R. 4337–38.) Child had vomited in his sleep. (R. 4339.) But Child would not wake up. (R. 4339.) Ms. Morley tried to sprinkle some water on his face, but he still would not wake up. (R. 4339–40.) Ms. Morley was concerned and very worried. (R. 4360.)

Father then held Child, and Child was limp and cold to the touch. (R. 4339.) Father, with Mother joining him, took Child to the hospital. (R. 4346.) The doctors at the hospital discovered that Child had a skull fracture. (R. 4346.)

2. Ms. Morley Allows the Police to Interview Her and Search Her Home

That evening, an officer visited Ms. Morley's home. (R. 4366.) When he arrived, Ms. Morley had a timeline of the day prepared. (R. 4369–70; Exh. 142.) She talked freely with the officer about what had happened that day, showed him around her house, and allowed a CSI investigator to enter her home without a warrant. (Exh. 134; R. 5069–70.)

The officer asked if Ms. Morley remembered any time Child knocked his head other than during lunch in the highchair, when he threw his head back and hit the chair. (Exh. 134 at 4:10.) Ms. Morley responded by asking her husband if he had seen the crack in the changing table that was attached to the crib. (Exh. 134 at 4:13–40.) She said she assumed that her three-year-old daughter had climbed up on the changing table and cracked it because her daughter climbed up on the changing table all the time. (Exh. 134 at 4:48, 8:20–29; R. 4407; 4413-4.) She noted that her daughter often jumped from the changing table into the crib. (Exh. 134 at 8:30–36.) She said she had just noticed the crack that day. (Exh. 134 at 5:11.) She told the officer that the changing table generally had a blanket on it, so she normally wouldn't see the crack. (Exh. 134 at 8:10–27.)

The officer asked Ms. Morley if Child had been on the changing table that day. Ms. Morley said that she had changed his clothes on that changing table earlier that day, after he had thrown up around 10:30am and she had given him a

bath. (Exh. 134 at 8:11.) But she said she did not change him on that table at any other point. (Exh. 134 at 7:10–58.)

3. The Police Interview Some of the Children at the Daycare

The police started interviewing the five children, ages three and four, who were at the daycare the day Child got hurt; they knew who was there because they had taken a picture of the daycare attendance log. (R. 5152–56.)

The police first interviewed Brother the day after Child got hurt. (R. 4784–85.) In that interview, Brother did not disclose that anyone harmed Child. (Exh. 131; R. 4784.) He did mention, however, that Child was sick and crying. (Exh. 131 at 8:30–45.) The officer asked Child directly about daycare, and Brother said he liked to go to Ms. Morley's. (Exh. 131 at 14:40–48.)

That same day, the officer interviewed a three-year-old girl who was at the daycare when Child got hurt. (R. 4386, 4785.) She said that Child was crying and that kids were playing with Child. (Exh. 133 at 12:15–45.) She confirmed that the kids were playing with Child. (Exh. 133 at 14:00–02.) She seemed to say the kids played red light, green light with Child. (Exh. 133 at 14:03–09.) She said Child seemed sad. (Exh. 133 at 14:20–24.) The officer asked her if any of the kids tried to pick up Child or lay him down or “something different,” and she responded, “Something different.” (Exh. 133 at 14:50–58.) She did not elaborate.

The next day, the police interviewed Ms. Morley's three-year-old daughter,¹ who was also at the daycare the day Child got hurt. (R. 4385, 4786.) She told the officer that the babies at the house play on the ground. (Exh. 132 at 9:15–19.) She said that Child cries and screams “a whole bunch.” (Exh. 132 at 10:28–31, 10:40–58.)² She said she broke the changing table when she climbed into the crib. (Exh. 132 at 12:15–28; 12:54–13:01.)

The police did not immediately interview the other two children, ages three and four, who were at the daycare the day Child got hurt.

While the investigation continued, Child was in the hospital on life support. (R. 4349-50.) After nine days of being on life support, Mother and Father removed the life support and he passed away. (R. 4349–50.) Child passed away because of complications from blunt force injury to the head. (R. 5385.)

Shortly after Child died, the police were informed that one of the children not interviewed—a four-year-old girl (hereinafter “Witness”)—spontaneously told her mother that she knew how Child was injured. (R. 4386, 4789–90, 4824, 5078.) The officer interviewed Witness sixteen days after Child got hurt and six days after Child died. (R. 5152–56.) In that interview, Witness said that Brother had picked Child up by the arms, thrown Child on the floor, kicked him, and

¹ The record alternately says that the daughter is three or four. The events in this case occurred in February 2014. The daughter turned four in March 2014.

² The time reflected is not the time stamp on the video but the amount of time elapsed on the video player.

closed a door on him. (Exh. 128 at 10:17.) Witness said that Ms. Morley was downstairs texting someone when that happened. (Exh. 128 at 13:00.) Witness also said that Child was hurt after breakfast but before lunch. (Exh. 128; R. 4815.) Although Witness also said that Child was bleeding and drawn on, no one disputed that Child was not bleeding and had no coloring marks on him. (R. 4794–95.)

After the police interviewed Witness, no police officer checked the door in Ms. Morley's home to see if it could have been the instrument that hurt Child. (R. 4817–18, 5081–82.) The police did not believe Witness. (R. 5137.)

4. The Police Investigate the Changing Table and Videotape Brother Lifting a Doll

Rather than following up on Witness's information, the police seized the changing table. (R. 4410-11.) They found a CPR doll that was several inches shorter than Child and put it on the changing table. (R. 4428.) The officers put the doll's feet at the base of the changing table and spread the doll's legs apart, and its head fit into the crack. (Exh. 84.)

Then the police put weights in the doll's chest cavity so that it weighed about 5 pounds lighter than Child. (R. 4429, 4434-5, 5086.)

Eighteen days after Child passed away, an officer brought the doll in a large box to Brother's house and had him try to pick it up. (R. 5156.) The officer took

the doll out of the box and placed it on the ground next to Brother. (Exh. 135 at 1:20.)

In the less-than-three-minute interaction, Brother put his arms around the doll's chest and lifted it several inches off the ground and then dropped it. (Exh. 135 at 1:33–37.) The detective asked Brother to pick up the doll again and Brother said he couldn't and Brother did not get the doll off the ground. (Exh. 135 at 1:47.) But during this experiment, Brother was sitting down and wanted to get back to playing with his cars—he was completely uninterested. (R. 4819.) He was also taken aback that the doll's legs kept falling off. (Exh. 135.) And he was curious about the cord coming out of the doll's arms. (Exh. 135 at 2:25.) Ms. Morley, however, had seen Brother pick up Child. (Exh. 144 at 29:00.)

5. Ms. Morley Is Tried for Child-Abuse Homicide

The State charged Ms. Morley with child-abuse homicide.

The case proceeded to trial. The State theorized that Ms. Morley was inexplicably frustrated at some point during the day, grabbed Child by his arms, shook him, and slammed his head into the changing table, causing his skull to fracture. (R. 4245.) Ms. Morley countered that Child's injuries were caused by the other children at the daycare during the time she went downstairs for fifteen minutes, leaving Child unsupervised on the playmat with the children playing red light, green light around him. (R. 4257–60.)

5.1 The State's Forensic Evidence Showed Child's DNA on the Crib but No Fibers or DNA on the Changing Table

At trial, the State presented evidence that a bag hanging from the changing table had Child's DNA on it, but it did not have Ms. Morley's DNA on it. (R. 5261–62, 5277–78.)

There was also a blue-and-white blanket on top of the changing table the day Child was injured. (R. 4407, 5095–96; Exh. 163.) Although the State's forensic scientist tested other blankets for Child's DNA, the scientist did not check that blanket for DNA. (R. 5254.)³ In fact, it appears that no forensic testing was done on that blanket at all. (R. 5254 (describing items that were tested forensically without any mention of the blue-and-white blanket).)

Moreover, the police examined the crack in the changing table for hair follicles, skin tissue, or any fibers. (R. 5083, 5240.) They found nothing. (R. 5083, 5240.)

5.2 The State's Ophthalmologist, Physician, Medical Examiner, and Radiologist Opine About Child's Injuries

The State brought in four medical experts to testify: the medical examiner who conducted Child's autopsy, an ophthalmologist, a physician, and a radiologist (the radiologist was the State's rebuttal witness).

³ The blue and white blanket that was on the changing table was labeled as Exh. 163. (R. 5095–96.) The white terry cloth blanket the forensic scientist tested was labeled as Exh. 151. (R. 5193–94.) It is unclear where the white terry cloth blanket was when the Child was at the daycare. But that blanket did have Child's DNA on it. (R. 5275–76.) A police officer incorrectly testified to the jury that the blue-and-white blanket was tested for vomit. (R. 5108.)

The medical examiner. The medical examiner testified that Child died because of blunt force injury of the head. (R. 5385.) She identified several injuries.

First, she found a fracture in the back of Child's skull, along the base of the skull. (R. 5401.) There was pooling of blood in the brain, and the brain had swelled. (R. 5410–12.)

Second, she found blood pooling in Child's lower back. (R. 5397–98.) The examiner opined that blood may have come through blunt force injury. (R. 5398.) She also stated, "There's some speculation that it could be associated, possibly, with shaken baby syndrome, but I don't really have a good feel for that to know whether that's plausible or not." (R. 5398.)

Third, the medical examiner found small fractures in both of Child's upper arms. (R. 5419–20, 5464.) She commented that the fractures in the arms were "generally associated with more of a . . . twisting that happens when the arm is extended." (R. 5432.)

Fourth, she testified that she removed Child's eyes and sent them to the ophthalmologist to examine the bleeding and folds in the eyes. (R. 5417–18.)

Based on these injuries, the medical examiner concluded that Child died from "inflicted trauma." (R. 5433.) She testified, "[W]ith the information that I have, I had no explanation for any other accidental injury or anything like that, so blunt force injury of the head." (R. 5427.)

The medical examiner testified that bleeding and folds in the eye could be caused by accidental injuries, crushing, falls, and increased cranial pressures. (R. 5466-68.) She admitted that she could not say whether Child was forced onto something or something was forced onto him. (R. 5474.) She could not say whether the changing table was involved. (R. 5478.) She admitted that Child's injuries could have been caused by a toddler jumping off a table and landing on Child's head. (R. 5480.) She also agreed that an eight-pound bowling ball dropped onto a head of an eight-month-old could cause a skull fracture. (R. 5479-80.) But she did not believe that Child's injuries could have come from a short fall or being stomped or kicked. (R. 5489.)

She opined that with these head injuries, "I can't say for sure, but my expectation is that he would have basically instantly been unconscious." (R. 5425.) She testified that she would not expect Child to be eating after the injuries, but he might be lethargic or vomiting. (R. 5422-23, 5431.) But she testified that in Child's case, she would not expect him to have a lucid interval—an interval where he might be acting somewhat normally after the brain injury. (R. 5423-24.) That is because although Child had bleeding in the brain, she did not believe the bleeding was significant enough to cause a lucid interval. (R. 5424.)

The ophthalmologist. The State then had the ophthalmologist who examined Child's eyes testify. (R. 4498, 4500.) He found that Child had hemorrhages—bleeding—in his eyes. (R. 4505-06.) Bleeding in the eyes raises

suspicion for abusive head trauma. (R. 4506.) He testified that the center of the retina had a few large folds, and those folds can occur when a child's head has been severely accelerated or decelerated. (R. 4508–10.) Because Child had retinal bleeding and folds in both eyes, the ophthalmologist concluded that his injuries were consistent with non-accidental trauma. (R. 4517.) He testified that slamming an infant's head into a table would likely cause the bleeding and folds he saw. (R. 4547.)

He also testified that “it would be very doubtful that a three-year-old could generate enough force and enough trauma to cause these particular” injuries. (R. 4517.) He testified that when there is extensive bleeding in the eyes, ninety-four percent of cases involve significant head trauma. (R. 4554.)

However, the ophthalmologist acknowledged that a door hitting a head with sufficient force could cause the folds in the eyes. (R. 4523.) He admitted that something being smashed into the head causing a back-and-forth motion could cause the injuries. (R. 4531.) He acknowledged that a recent study found that a four-month-old child had severe hemorrhages in his eyes when a six-year-old fell on him. (R. 4547.) He also said that he could not possibly tell whether the injuries were intentionally inflicted. (R. 4548.)

The physician. Another expert for the State was a physician from Primary Children's Hospital who examined Child. (R. 4588.) He testified that the fracture in Child's skull started at the base of the skull, which is thicker and

harder to crack. (R. 4604.) He also testified that when Child had a CT scan at the beginning of his hospital stay, “he had significant intracranial hemorrhage.” (R. 4610.) He also testified that testing showed “evidence of ligamentous strain” high in the neck, which could be caused by shaking and impact. (R. 4613.)

The physician concluded that any child that suffered the kind of trauma that Child suffered “would not have been normal afterwards.” (R. 4620.) The physician could not say that Child would be completely unconscious, but he would not have been able to “eat on his own” and he would be vomiting. (R. 4620, 4623.) The physician admitted that during a lucid interval, an individual could vomit, be lethargic, and cry inconsolably. (R. 4664.)

He also opined that a baby could not have sustained such injuries from a three-year-old dropping him. (R. 4627.) The physician acknowledged that the injuries could have been caused by crushing. (R. 4664.) He also admitted that hemorrhaging in the eye can also be caused by accidental injury. (R. 4665.) He testified that Child could have been injured by someone other than Ms. Morley. (R. 4678.)

The radiologist. During its rebuttal case, the State called a radiologist. (R. 6173.) The radiologist testified that Child had swelling around the ligaments in his neck, meaning that his neck moved in an abnormal way. (R. 6213–14.) He also testified that the bleeding around the spine was not a flow down from the head but the result of a “forward, backward kind of movement.” (R. 6218.) But he

admitted that the medical examiner found no abnormalities with the soft tissues in the neck. (R. 6256.)

He testified that with the type of skull fracture Child had, “it implies a significant deposition of energy, more so than one might see, let’s say, with a, quote, simple household fall.” (R. 6224.) He testified that Child’s injuries point to “abusive trauma or inflicted injury.” (R. 6235.) The radiologist testified that after receiving the skull fracture, Child could have been irritable and lethargic and could have vomited. (R. 6239–40.) He noted that the lethargy would “likely progress throughout the day.” (R. 6251.)

The radiologist did testify that he did not think Child experienced a lucid interval because the type of bleeding in his brain would not cause a lucid interval. (R. 6245.) He also testified about the fractures in Child’s arms not being caused by a pulling motion. (R. 6246–50.)

But he testified that he could not “say specifically” what happened. (R. 6259.)

5.3 The State’s Biomechanical Engineer Testified About What Caused Child’s Injuries

The State then introduced the testimony of a biomechanical engineer, who had degrees in mechanical engineering, physics, and bioengineering but who had no medical degrees or training. (R. 4853–55.)

The engineer opined that Child’s injuries were “all very easily explained and simply explained by one—one event. And that is an adult grabbing [Child] by

the arms, shaking [Child], and while shaking, forcibly causing his head to strike a—a firm object. And to strike that object, the object has to have essentially an edge or a lip so that it struck [Child] right back here on the mastoid bone.” (R. 4914.) The engineer testified that the fractures in Child’s arms are “perfectly explained by grabbing [Child] and shaking forcibly.” (R. 4919.)

He continued to testify: “[T]he injuries that [Child] had . . . are best explained by shaking accompanied by a strike. That explains the fracture. It explains the diffuse injuries. It explains the hematomas. It explains . . . the entire constellation. It can also be associated and . . . is a perfect explanation for the retinal hemorrhaging and folds. And while those can be caused, again, independently by other means, it fits into the constellation of shaking and hitting [Child’s] head.” (R. 4923.)

The engineer further testified that Child’s blood vessel ruptures in his lower back “fit[] perfectly with the idea of grabbing [Child’s] arms and shaking.” (R. 4925.)

He then reiterated that Child’s injuries were caused by “effectively a single event where an adult grabbed [Child], shaking him, forcibly causing his head to strike a firm object which is perfectly explained by the fracture in this changing table.” (R. 4944.)

During his testimony, Ms. Morley’s trial counsel did not object that the engineer was testifying outside the scope of his expertise—that he was testifying

about the specific cause of an individual's particular injury, and he was doing so without the required medical background.⁴

5.4 Ms. Morley's Medical Expert Testifies that the Cause of Child's Death Is Undetermined

Ms. Morley's medical witness was a forensic pathologist with special training and expertise in injuries in children. (R. 5737–38.) She testified that Child died “of complications of blunt force trauma to the head. The . . . circumstance of death is undetermined.” (R. 5759.)

The pathologist testified that although the Child's skull was fractured, the brain itself did not have any trauma. (R. 5775.) So the brain did not shut down because it was damaged by the fractured skull. Instead, the pathologist testified that the Child's brain shut down because of lack of blood flow throughout the brain caused by seizures, brain swelling, and increased intracranial pressure. (R. 5774–75.)

Intracranial pressure is linked to a system specific to the brain called intracranial equilibrium. (R. 5782.) Intracranial equilibrium keeps the pressure in the head correct so that blood can flow to and through the brain. (R. 5783.) Intracranial equilibrium can fail when a head is injured. (R. 5783.) But the failure of the intracranial equilibrium can be delayed. (R. 5783.) The delay depends on “how fast the blood builds up, how fast the swelling occurs, how long it takes for

⁴ Although Ms. Morley was represented by two attorneys, she will refer to them collectively as “trial counsel” in the singular for ease.

the circulation to slow down and stop.” (R. 5868.) Symptoms of that failure occurring—a “lucid interval” after a traumatic event—include “[p]eriods of inconsolable crying, lethargy, irritability, diminished appetite, vomiting.” (R. 5868.) Child exhibited some of those symptoms after Ms. Morley picked up Child after leaving him alone for 15 minutes on the ground with the other children playing around him. (R. 5868, 5870.) In the pathologist’s opinion, a lucid interval occurred here. (R. 5870.)

Increased intracranial pressure is also reflected in the eyes; the nerves that run through the brain form the optic nerve in the eye, so what is happening in the brain is reflected in the eyes. (R. 5787.) She testified that Child did not have folds in his eyes in the hospital, but he had folds at the time of the autopsy. (R. 5789.) So the folds in the eyes changed over time. (R. 5789.) She testified, “[T]here are a lot of reasons why there was blood in [Child’s] eyes, and it doesn’t help me make a determination as to whether or not the blow that caused his fracture was an accident or not.” (R. 5790.) She also noted that there has never been an “experimental model that would create bleeding in the eyes from shaking.” (R. 5788.)

The pathologist also testified that a one to two-foot fall for an eight-month-old is sufficient to cause a skull fracture, even a fatal injury. (R. 5803.)

The pathologist testified that the fractures in Child’s arms were likely caused by grabbing and pulling. (R. 5842.) She testified that she did not see

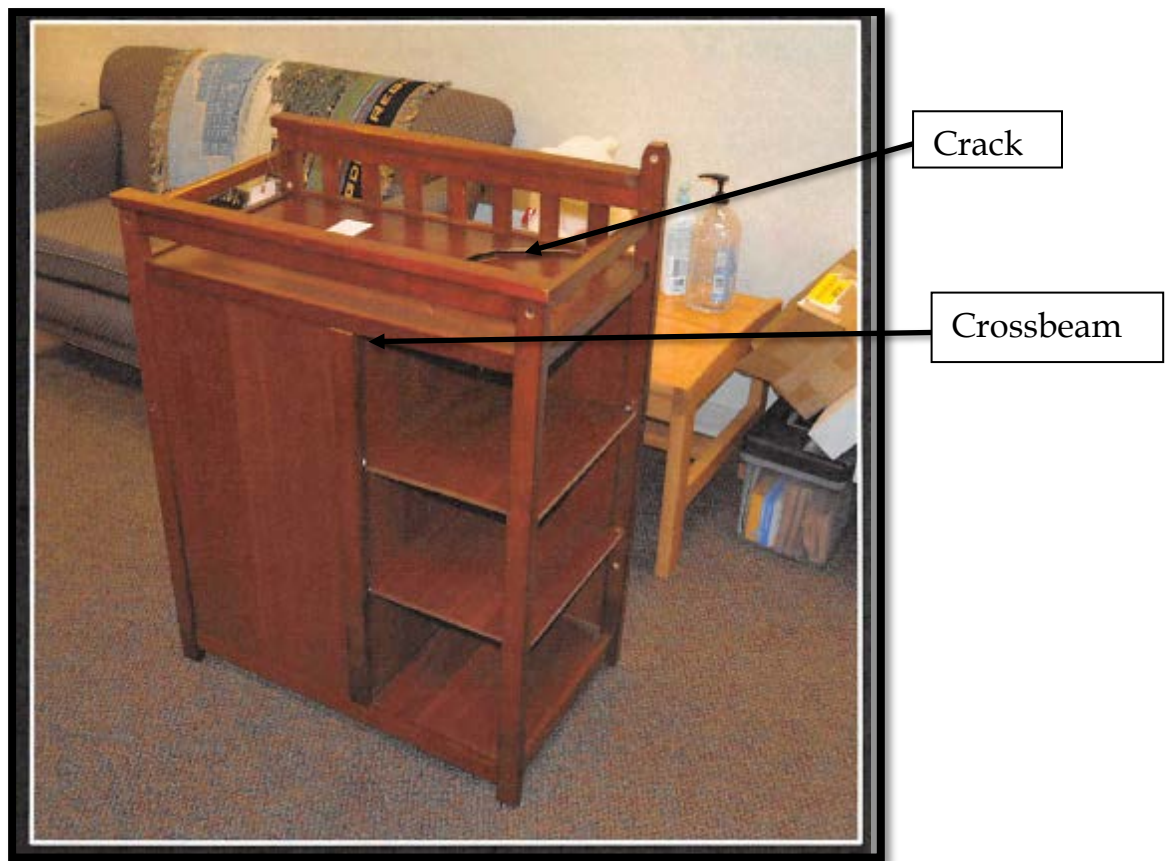
evidence of shaking, because she saw no grab marks or bruising on Child's arms. (R. 5843.) She testified that Child's injuries could have come from Brother, and Child's injuries were possible from a short fall. (R. 5859.)

She also testified that the blood pooling in Child's lower back was the consequence of staying in the hospital. (R. 5930.) She further testified that there was no trauma to Child's spinal cord or ligaments. (R. 5930.)

Finally, she testified, "[T]here is no scientific way to conclude that the statements provided that [Brother] caused injuries that resulted in a fatal injury to [Child] did not occur. There is no scientific way . . . to say that that isn't the cause of his fatal injuries. That's, I think, the simple and fundamental basis for my opinions here is that little kids hurt kids." (R. 5912–13.)

5.5 The State Theorizes About Where Child's Head Hit on the Changing Table

According to the State, Child received his skull fracture from the changing table. The top of the changing table was very weak—a "very thin particle-type board." (R. 4937.) According to the State's biomechanical engineer, it was not reasonable that the top of the changing table "could resist with enough force to cause any fracture in any skull." (R. 4937.) But running horizontally across the middle of the changing table is a crossbeam. (R. 4937.) The engineer theorized that a "hard ball on a pole was struck right at that point [at the beam] and left that fracture pattern in the . . . changing table." (R. 4938.)



(Exh. 80.)

5.6 The State Admits Photographs of the Doll on the Changing Table

Throughout trial, the State showed photographs of the doll on the changing table: Exhibits 84, 85, and 86. The State admitted these photographs without objection from trial counsel. (R. 4430, 4940.) These photographs showed the doll's head aligning perfectly with the crack in the changing table:



(Exh. 84.)



(Exh. 85.)



(Exh. 86.)

The problem is that the doll's legs are spread apart in a strange way so that the doll's head is lower on the changing table.

And the doll itself was several inches shorter than Child. (R. 4428.)

Child was just over 27 inches long. (R. 5895.) The entire changing table itself was 28 inches long:



(Exh. 55.) The way that the doll was positioned on the changing table in Exhibits 84, 85, and 86 made it at least six inches shorter than Child. Had the doll been the actual size of Child, the crack in the changing table would have been below the doll's lower back.

The State showed Exhibits 84, 85, and 86 multiple times during the testimony of the police officers who investigated the case (R. 4429–30, 5133, 5233–34.)

It also showed Exhibits 85 and 86 during the testimony of the biomechanical engineer so that he could explain to the jury how Child was injured. (R. 4935–40.) The engineer stated that Exhibit 85 “is an example of a surrogate infant showing that the physical dimensions and location of the head in relationship to the fracture and the length and breadth of the changing table are consistent with—the opinion I had formed that [Child] was grabbed, shaken, and—and was forcibly caused to strike some firm object. This changing table becomes a—is becoming more and more likely to be the location where the injury occurred.” (R. 4941–42.)

5.7 The Jury Sees the Children’s Interviews and the Video of Brother Picking Up Child and Is Instructed on Child-Abuse Homicide and Negligent Homicide

During the trial, the jury heard from multiple medical experts and police officers who worked on the case. Father and Mother testified that they never saw Brother try to pick up or harm Child. (R. 4278–79, 4331–32.)

The jury also saw the videotaped interviews of the children who were at the daycare the day Child was injured. (R. 4782–86, 4790.)⁵ And the jury saw the

⁵ Ms. Morley’s trial counsel had to deal with several unique issues throughout this case. It took time for trial counsel to find qualified experts who would be willing to testify in Ms. Morley’s case. Although the experts were hard to find and the experts’ schedules were full, the State continually objected to Ms. Morley’s request for extensions. (R. 2296, 2482.) In one case where the State argued vehemently against the continuance, the district court granted the continuance and noted that “in the immediately preceding hearing the State requested and was granted a continuance in a case that is 1 year older than the case at bar, involves serious crimes against children, the defendant is out of custody, and the request was based on the unavailability of the State’s experts.”

video of Brother picking up Child. (R. 5241.) The State asked the medical examiner if the “reenactment” on the video—Brother lifting the doll a few inches off the ground—would cause the fracture in Child’s skull. (R. 5488–89.) The medical examiner said no. (R. 5489.)

At the end of the evidence, the district court instructed the jury on child-abuse homicide and the lesser-included offense of negligent homicide. (R. 1584, 1586.)

During closing statements, Ms. Morley focused on Witness’s interview. Ms. Morley analogized Witness’s statements in her interview to that of a small girl who was taking her first ride on an airplane. (R. 6384.) After getting buckled in her seat, the little girl asked her mother, “When do we get smaller?” (R. 6384.) The little girl had seen airplanes fly away, and from her perspective, the airplane got smaller, so in her mind, she would get smaller, too. (R. 6385.) Ms. Morley commented that this little girl, like Witness, was “[o]bservationally accurate, but not always 100 percent factually correct.” (R. 6385.) Ms. Morley emphasized that Witness saw the children do something to Child while Ms. Morley was out of the room, and although some parts of her statement may not line up with the facts,

(R. 286.) After receiving one such continuance, the State moved to disqualify defense counsel. (R. 247–61.) The district court denied the motion. (R. 2625-26.) When the district court granted trial counsel’s motion for the county to pay fees for an expert, the county intervened and asked the court to reconsider its order. (R. 393–405.) The district court denied that motion. (R. 3216.)

she was “observationally accurate, but not always 100 percent factually accurate.”

(R. 6385–87.)

The jury found Ms. Morley guilty of child-abuse homicide. (R. 1602.)

This appeal follows.

Summary of the Argument

Ms. Morley received ineffective assistance of trial counsel. For an ineffective assistance of counsel claim, Ms. Morley must show both deficient performance and prejudice. Ms. Morley can show both.

First, trial counsel was ineffective when he did not object to the biomechanical engineer's testimony on the specific causes of Child's particular injuries.

For the deficient performance prong, prevailing professional norms directed trial counsel to object to the engineer's testimony. During the last two decades, a national consensus has emerged: biomechanical engineers can testify to forces and the impact of those forces generally on the body, but engineers without medical training cannot testify about the specific causes of an individual's particular injuries. In this case, the State's biomechanical engineer had no medical training, and he testified about the specific causes of Child's injuries. That testimony was beyond the engineer's expertise. But trial counsel did not object.

Ms. Morley was prejudiced by trial counsel's failure to object. The physical and forensic evidence against Ms. Morley was not strong. The statements from the children who were at the daycare the day Child was injured support Ms. Morley's story. The State's medical experts—the medical examiner, the ophthalmologist, the radiologist, and the physician—could not definitively say

who or what caused Child's injuries. The symptoms Child would have experienced after a head injury appeared after Ms. Morley left Child unsupervised on the ground with the other children playing around him—he was fussy, lethargic, and vomiting. And the engineer was the only expert who testified exactly how Child received his injuries. This testimony was crucial to the State's case against Ms. Morley.

Second, trial counsel was ineffective when he did not object to the admission of the photographs of the doll on the changing table and to the admission of the video of Brother picking up the doll. The doll was not substantially similar in height, weight, or proportion to Child. And in the photographs, the much-shorter doll was manipulated in such a way that its head aligned perfectly with the crack in the changing table. The State relied on these photographs during the testimony of the medically unqualified biomechanical engineer, when he was explaining how Child was injured. And the State medical examiner relied on the video to discard the theory that Brother picked up Child. But because the doll in the photographs and the video was not substantially similar to Child, the photographs and the video were more prejudicial than probative.

Because Ms. Morley received ineffective assistance of counsel, Ms. Morley requests that this Court reverse her child-abuse homicide conviction.

Ms. Morley requests that this Court either (1) direct the district court to enter a conviction for the lesser-included offense of negligent homicide and remand for the limited purpose of resentencing, with a direction that all time Ms. Morley has served will be counted as time served towards her new sentence or (2) remand this case for a new trial.

Argument

1. Trial Counsel Was Ineffective by Not Objecting to the Forensic Engineer's Medical Causation Testimony that Exceeded the Scope of His Expertise

The State's engineer—a person who could only opine about the forces that could be generated by an accident and the general impact of those forces on the body—improperly testified about the specific causes of Child's injuries. That testimony exceeded the scope of the engineer's qualifications. But trial counsel never objected to that testimony. That failure constituted ineffective assistance of counsel.

In all criminal cases, “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. The right to counsel includes the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To demonstrate that her counsel was ineffective, a defendant must prove that (1) counsel's performance was objectively deficient, and (2) there is a reasonable probability that, but for counsel's deficient performance, the defendant would have received a more favorable outcome at trial. *State v. Burnett*, 2018 UT App 80, ¶¶ 21–22, ___ P.3d ___.

When analyzing these claims, appellate courts “indulge in a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance, and that, under the circumstances, the challenged action

might be considered sound trial strategy.” *Met v. State*, 2016 UT 51, ¶ 113, 388 P.3d 447 (quotation omitted).

1.1 Trial Counsel Performed Deficiently

Ms. Morley’s trial counsel was ineffective by not objecting to the engineer’s testimony about the specific cause of Child’s particular injuries. In so doing, the engineer exceeded his expertise and qualifications. Although the engineer was qualified to testify about the effect of certain forces generally on the human body, the engineer lacked the medical training necessary to opine about the exact causes of Child’s specific injuries. Trial counsel’s failure to object to the engineer’s testimony constituted deficient performance.

To prove deficient performance, a court must “first determine whether counsel’s representation fell below an objective standard of reasonableness.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). This determination “is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* (quotations omitted).

To determine whether trial counsel performed deficiently in this context, this Court must consider the prevailing professional norms relating to the admission of expert testimony. To admit expert testimony in Utah, the proponent of the testimony must first show that an expert is qualified to testify about a certain subject. Utah R. Evid. 702(a); *State v. Guard*, 2015 UT 96, ¶ 64, 371 P.3d

1. An expert may be “qualified” to testify about a certain subject through “knowledge, skill, experience, training, or education.” Utah R. Evid. 702(a). Experts who are not qualified are subject to exclusion or limitation.⁶

In this case, the prevailing professional norms directed that trial counsel object to the engineer’s testimony about medical causation and the specific causes of Child’s injuries. In 1999, the Utah Supreme Court noted that a district court prevented a biomechanical engineer from testifying about medical causation. *Fitz v. Synthes (USA)*, 1999 UT 103, ¶ 12, 990 P.2d 391. In 2006, the Utah Court of Appeals approved of a biomechanical engineer’s testimony that talked generally about forces on the body; notably, the engineer did not discuss the forces that caused the plaintiff’s specific injuries. *Balderas v. Starks*, 2006 UT App 218, ¶ 9, 138 P.3d 75. And this Court has said, “the diagnosis and potential continuance of a disease are medical questions to be established by physicians as expert witnesses and not by lay persons.” *Beard v. K-Mart Corp.*, 2000 UT App 285, ¶ 16, 12 P.3d 1015 (quotation omitted).

⁶ See *De Adder v. Intermountain Healthcare, Inc.*, 2013 UT App 173, ¶ 16, 308 P.3d 543 (doctor not qualified to testify as an expert in a malpractice action against a nurse); *Evans ex rel. Evans v. Langston*, 2007 UT App 240, ¶ 12, 166 P.3d 621 (anesthesiologist not qualified to testify about the cause of a patient’s death when patient died of a heart problem); *Kent v. Pioneer Valley Hosp.*, 930 P.2d 904, 907 (registered nurse not qualified to testify about cause of nerve damage).

For years, Utah district courts have limited biomechanical engineers—including the engineer who testified in this case, David Ingebretsen—from testifying about the exact cause of a specific injury.⁷

Not only have Utah courts limited the testimony of biomechanical engineers, but the great majority of state and federal courts have similarly limited a biomechanical engineer’s testimony for the last two decades. A national consensus has emerged. A simple all-state, all-federal search on Westlaw for “biomechanic” results in over 1,400 cases, the first several dozen being devoted to the proper scope of a biomechanical engineer’s testimony.

Those results produce an influential opinion by the Sixth Circuit, which held that biomechanical engineers are “qualified to render an opinion that made

⁷ ***Crandall v. American Family Mutual Insurance Co.*, No. 2:11-CV-497 (D. Utah May 30, 2014)** (transcript of hearing at page 13) (granting motion to exclude testimony of biomechanical engineer on specific causation of injury); ***Campbell v. Scott*, Civ. No. 140907592 (Utah Dist. Ct. Apr. 21, 2017)** (noting that the court did not allow a biomechanical expert to opine “that it was unlikely that plaintiff would ‘struck his head against anything with sufficient force to *cause a traumatic brain injury*.’ The Court reasoned that [the biomechanical engineer] was not a medical doctor and thus could not state an opinion of medical causation.”); ***Horrocks v. Prothero*, Civ. No. 140400447 (Utah Dist. Ct. May 4, 2015)** (ordering that defense biomechanical engineer “may testify as to impact speeds related to the accident and what movements this may have subjected Plaintiff to inside her vehicle but he *may not* testify as to whether such impact and movements caused the complained of injuries”); ***Kranendonk v. Gregory & Swapp, PLLC*, Civ. No. 100923050 (Utah Dist. Ct. Jan. 22, 2015) (Himonas, Deno, J.)** (“Mr. Ingebretsen may not offer medical testimony.”); ***Nguyen v. Pulkrabek*, Civ. No. 04-0908835 (Utah Dist. Ct. Aug. 24, 2007)** (“David Ingebretsen may testify and or opine about the forces of impact; [he] may not testify or opine about medical causation; [he] may not testify than an injury was or was not medically caused . . .”).

use of [their] discipline’s general principles, describe[] the forces generated in [accidents], and sp[ea]k in general about the types of injuries those forces would generate.” *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 305 (6th Cir. 1997), *abrogated on other grounds*, *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 515 & n.4 (6th Cir. 1998). However, biomechanical engineers who are not medical doctors are not qualified to “testify about the cause of [an individual’s] specific injuries.” *Id.*

Since the 1990s, federal and state courts around the country have supported this distinction: biomechanical engineers—who are experts in force—are qualified to testify about forces and how the body in general responds to those forces; however, biomechanical engineers lack the medical training that qualifies them to talk about the “precise cause of a specific injury.” *Hankla v. Jackson*, 699 S.E.2d 610, 615 (Ga. App. 2010) (quotation omitted).⁸

⁸ **FEDERAL CIRCUIT COURT CASES**

***Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 198 (4th Cir. 2001)** (noting that biomechanical engineer who was not a medical doctor “was found unqualified in the multidistrict litigation to opine as to causation in any individual plaintiff or to testify outside the area of orthopedic bioengineering); ***Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 305 (6th Cir. 1997);** ***Wettlaufer v. Mt. Hood R. Co.*, 77 F.3d 491 (9th Cir. 1996)** (“Piziali’s qualifications in mechanical and biomechanical engineering and accident reconstruction do not, in themselves, qualify him to testify about what forces could produce thoracic outlet syndrome.”)

FEDERAL DISTRICT COURT CASES

***Kelham v. CSX Transp., Inc.*, No. 2:12–CV–316, 2015 WL 4426027, at *6 (N.D.Ind. July 17, 2015)** (biomechanical expert “may testify about the forces involved in the accident and, in general, what injuries those forces were expected to cause. Therefore, he may indicate what types of injuries were likely to

occur based on the forces involved in this accident. However, [he] may not testify about the specific cause for ... [plaintiff's] specific injuries.”); **Roach v. Hughes, 4:13–CV–00136–JHM, 2015 WL 3970739, at *11 (W.D.Ky. June 30, 2015)** (noting that biomechanical engineers are qualified to testify in general terms that “X” forces would generally lead to “Y” injuries and “Y” injuries are consistent with those the persons incurred); **Smith v. BNSF Ry. Co., No. CIV-08-1203-D, 2011 WL 7053631, at *6 (W.D. Okla. Sept. 14, 2011)** (limiting biomechanical engineer from testifying about medical causation); **Berner v. Carnival Corp., 632 F.Supp.2d 1208, 1212–13 (S.D.Fla. 2009)** (“[The biomechanical engineer] may testify that the energy on Berner’s head upon striking the floor was sufficient to have caused his mild to moderate traumatic brain injury. Dr. Williams will not testify that Berner *has* a mild to moderate traumatic brain injury—or a brain injury at all. She will not testify that Berner’s brain injury (if any) *was caused* by his head striking the floor.” (quotation omitted).); **Burke v. Transam Trucking, 617 F.Supp.2d 327, 333-334 (M.D.Pa. 2009)** (“Dr. Ziejewski may not testify as to the extent of injuries suffered by Plaintiff, which would require the identification and diagnosis of a medical condition, but may testify that the force sustained by Plaintiff in the subject accident could potentially cause certain injuries as this amounts to a biomechanical determination.”); **Burke v. TransAm Trucking, Inc., 617 F.Supp.2d 327, 334 (M.D.Pa.2009)** (noting that a biomechanical engineer “may not testify as to the extent of injuries suffered by Plaintiff, which would require the identification and diagnosis of a medical condition, but may testify that the force sustained by Plaintiff in the subject accident could potentially cause certain injuries as this amounts to a biomechanical determination.”); **Wagoner v. Schlumberger Tech. Corp., No. 07-CV-244-J, 2008 WL 5120750, *1-2 (D. Wyo. June 19, 2008)** (ordering that “[n]either designated biomechanics expert, Dr. Miller nor Dr. Ziejewski, will be permitted to testify regarding the alleged brain injury sustained by plaintiff Larry Wagoner in this case or as to the cause of that brain injury. Neither of these professionals are qualified to provide medical opinions. Their testimony will be limited to testimony regarding those matters that are indeed within their respective areas of expertise, biomechanics. They may, for example, testify as to the forces involved in the low speed accident and how those forces may affect an individual or object; they may not express any opinions regarding whether plaintiff Larry Wagoner has suffered a brain injury in this case or as to the probable the cause of the alleged brain injury.”); **Morgan v. Girgis, No. 07 CIV. 1960 (WCC), 2008 WL 2115250 *2-6 (S.D.N.Y. May 16, 2008)** (“[The biomechanical engineer] is clearly qualified to testify about the nature and amount of force generated by the accident in question and the observed effect of that force on a human body in comparable accidents. . . . But because Dr. Fijan is not a medical doctor, he may not testify as to whether the accident caused or

contributed to any of plaintiff[']s injuries.”); ***Bowers v. Norfolk Southern Corp.*, 537 F.Supp.2d 1343, 1377 (M.D. Ga. 2007)** (noting that a biomechanical engineer “may testify as to the effect of locomotive vibration on the human body and the types of injuries that may result from exposure to various levels of vibration. However, he may not offer an opinion as to whether the vibration in Plaintiff's locomotive caused Plaintiff's injuries. Such an opinion requires the identification and diagnosis of a medical condition, which demands the expertise and specialized training of a medical doctor.”); ***Wilcox v. CSX Trans., Inc.*, No. 1:05-CV-107, 2007 WL 1576708, at *9 (N.D. Ind. May 30, 2007)** (“What the court *will* permit [a biomechanical engineer] to testify to is his knowledge of the causes of plantar faciitis in general. That is, he may testify about the ways in which an individual may develop the condition or, more precisely, the body mechanics or risk factors that can lead to the condition. He cannot, however, offer any opinion regarding the cause of Wilcox's particular condition nor may he offer speculative testimony on the cause of Wilcox's condition.”); ***Layssard v. United States*, No. CIV.A. 06-0352, 2007 WL 4144936, at *3 (W.D. La. Nov. 20, 2007)** (“[A] bio-mechanical engineer may state the scientific measurements and calculations of the forces involved and state whether or not injuries generally would or would not be expected from such forces. As for the specific question of whether or not a particular accident caused a particular injury to a particular plaintiff, the bio-mechanical engineer's calculations are simply one factor to consider, another being the testimony of physicians as to medical causation. For these reasons, we would at least preclude Dr. Baratta from testifying as to medical causation and would limit his testimony to the forces involved in the collision and whether or not these would generally lead to injury.”); ***Shires v. King*, No. 2:05-CV-84, 2006 WL 5171770, at *3 (E.D. Tenn. Aug. 10, 2006)** (“[A biomechanical engineer] clearly should be allowed to testify regarding the forces applied to plaintiff's head by the falling tent pole, and how a *hypothetical* person's body would re-pond to that force. He cannot offer opinions, however, ‘regarding the precise cause’ of plaintiff's injury.”); ***Luman v. CSX Transp., Inc.*, No. 1:03-CV-725, 2005 WL 5981334, at *1 (S.D. Ohio Nov. 29, 2005)** (limiting biomechanical engineer's testimony to the “parameters of *Smelser*”); ***Yarchak v. Trek Bicycle Corp.*, 208 F.Supp.2d 470, 501 (D.N.J.2002)** (permitting biomechanical engineer to testify generally about types of injuries that may be caused by a bicycle seat).

STATE COURT CASES

***Gostyla v. Chambers*, 171 A.3d 98, 103–04 (Conn. App. 2017)** (“[A biomechanical expert's] causation testimony was, therefore, a medical opinion, not a biomechanical one. Because, as he readily admitted, he was not a medical doctor and did not have experience diagnosing or treating injuries, he did not

In comparison, courts around the country have allowed experts to testify about what forces created a specific injury when that testimony came from a medical doctor who also had biomechanical training. *Maines v. Fox*, 190 So.3d 1135, 1141–42 (Fla. App. 2016); *Wilson v. Rivers*, 593 S.E.2d 603, 605–06 (S.C.

possess the ‘reasonable qualifications’ required to offer such an opinion.”); ***Valdez v. Curameng*, No. B261227, 2016 WL 3960039, at *3 (Cal. Ct. App. July 21, 2016)** (“Plaintiff’s first objection lacks merit for the simple reason that defendant’s biomechanics expert did not offer a medical opinion. The expert opined that the forces he determined were at issue were ‘not consistent’ with a ‘traumatic shoulder injury,’ *not* that those forces did or did not specifically cause plaintiff’s injury. These are distinct topics, and most of the cases plaintiff cites allow a biomechanics expert to testify to the former, but not to the latter.”); ***Pratt v. Culpepper*, 162 So. 3d 616, 628 (La. App. 2015)** (approving biomechanical expert’s testimony that “the statistical analysis indicates that, at these collision levels, force levels, and acceleration levels, the probability of injury is low”); ***Santos v. Nicolos*, 879 N.Y.S.2d 701, 704 (N.Y. Sup. Ct. 2009)** (“This court also agrees with the conclusions reached by courts in other jurisdictions that the testimony should be precluded on the ground that a biomechanical engineer is not a doctor and is therefore not qualified to testify about the causal relationship between a motor vehicle accident and the injuries that the person sustained.”); ***Norfolk and Western Railway Co. v. Keeling*, 576 S.E.2d 452, 457 (Va. 2003)** (excluding biomechanical expert’s testimony on “the cause of a human physical injury”); ***Cromer v. Mulkey Enterprises, Inc.*, 562 S.E.2d 783, 787 (Ga. App. 2002)** (“We find limited evidence in the record that the field of biomechanics includes a technique of determining if specific injuries result from specific accidents, let alone that that technique has reached a scientific stage of verifiable certainty.”); ***Rybaczewski v. Kingsley*, No. L-97-1048, 1998 WL 200227 at *17 (Oh. App. Apr. 24, 1998)** (noting that biomechanical expert “did offer a ‘medical opinion’ when he stated that Mr. Rybaczewski was not injured by the accident. This is a question that requires expert medical testimony by a physician. The most that [the biomechanical expert] should have been permitted to testify to was the amount of force appellant experienced in the accident.”); ***Doherty v. Municipality of Metropolitan Seattle*, 921 P.2d 1098, 1101 (Wash. App. 1996)** (upholding striking of biomechanical engineer’s affidavit about medical causation).

2004); *Brown v. Professional Building Servs., Inc.*, ___ So.3d ___, 2017 WL 4641265 (Miss. App. Oct. 17, 2017).⁹

In this case, the engineer was not a medical doctor; he received degrees in mechanical engineering, physics, and biomechanics. (R. 4854–55.) He admitted that he was “not trained in any capacity in medicine.” (R. 4873.) He testified, “I’m not a medical doctor. . . . I’m a force guy. I’m a break guy.” (R. 4857.)

Even though he had no medical training, the engineer testified several times about the exact causes of Child’s particular injuries, contrary to the limitations on biomechanical testimony set forth in dozens of cases around the country. *See* footnote 6.

He opined that Child’s injuries were “all very easily explained and simply explained by one—one event. And that is an adult grabbing [Child] by the arms, shaking [Child], and while shaking, forcibly causing his head to strike a—a firm object. And to strike that object, the object has to have essentially an edge or a lip so that it struck [Child] right back here on the mastoid bone.” (R. 4914.) The

⁹ In Delaware, biomechanical experts may “testify *generally* about how the human body will react to the impact of forces exerted upon it during an automobile accident.” *Eskin v. Carden*, 842 A.2d 1222, 1229 (Del. 2004). In some instances, a biomechanical expert may testify about specific injuries as long as the methods employed are reliable. *Id.* at 1229. However, the Delaware Supreme Court cautioned “that even competent, qualified biomechanical testimony may not be admissible when that testimony purports to bridge the analytical gap between an engineer’s application of constants to, and a physician’s artful evaluation of, a specific individual.” *Id.* at 1225–26.

engineer testified that the fractures in Child's arms are "perfectly explained by grabbing [Child] and shaking forcibly." (R. 4919.)

He further testified that "the injuries that [Child] had . . . are best explained by shaking accompanied by a strike. That explains the fracture. It explains the diffuse injuries. It explains the hematomas. It explains . . . the entire constellation. It can also be associated and . . . is a perfect explanation for the retinal hemorrhaging and folds. And while those can be caused, again, independently by other means, it fits into the constellation of shaking and hitting [Child's] head." (R. 4923.)

The engineer further testified that Child's blood vessel ruptures in his lower back "fits perfectly with the idea of grabbing [Child's] arms and shaking." (R. 4925.)

He then reiterated that the Child's injuries were caused by "effectively a single event where an adult grabbed [Child], shaking him, forcibly causing his head to strike a firm object which is perfectly explained by the fracture in this changing table." (R. 4944.)

In all these instances, the engineer testified without objection from trial counsel and without any motion to limit his testimony.

And that was not reasonable. The engineer clearly exceeded the scope of his biomechanical expertise and testified about the "precise cause of a specific injury." *Hankla*, 699 S.E.2d at 615.

Trial counsel should have objected. Trial counsel had two decades of cases, showing a national consensus that the engineer was not qualified to offer the testimony he did. See footnotes 5 & 6.¹⁰ Because trial counsel had such strong legal support behind an objection to limit the engineer from testifying about specific causes of Child’s particular injuries, any objection would not have been futile. *State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546, 552 (“Failure to raise futile objections does not constitute ineffective assistance of counsel.”).

Trial counsel’s failure to object was not reasonable, especially when the engineer improperly opined on the **only** issue in this case: who caused Child’s injuries—another child in some accident, or Ms. Morley in some act of frustration?

¹⁰ To the extent that trial counsel did not research the limitations of biomechanical experts, that failure to research also constitutes deficient performance. “An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.” *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

And this is not a case where trial counsel had to look for a needle in a haystack. *Maryland v. Kulbicki*, 136 S. Ct. 2, 4–5 (2015). Two decades’ worth of orders and opinions on the limitations of biomechanical experts was easily available on Westlaw or another legal database. *See id.* (holding that attorney was not ineffective for not finding a report before the era of the Internet, when the report was buried in the basements of a few unidentified libraries). Neither was challenging the qualifications of a biomechanical engineer to opine on specific causes of injury a novel concept when the trial in this case occurred. *See id.* (noting that attorneys are not ineffective when they do not challenge science that is firmly established at the time of trial, even though that science may be debunked later).

1.2 Trial Counsel Prejudiced Ms. Morley

Trial counsel performed deficiently by not objecting to the engineer's improper testimony about the specific causes of Child's particular injuries. That failure prejudiced Ms. Morley, to the extent that this Court should reverse Ms. Morley's conviction for ineffective assistance of counsel.

To prove prejudice, Ms. Morley must show that there is a reasonable probability that, but for counsel's deficient performance, she would have received a more favorable outcome at trial. *Burnett*, 2018 UT App 80, ¶¶ 21–22, ___ P.3d ___. Ms. Morley can make this showing.

First, the physical evidence in this case was not strong.

The physical evidence that Child was injured and that Child's injuries caused his death is strong. But the physical evidence that *Ms. Morley* caused Child's death was not strong.

The State hypothesized that Ms. Morley hurt Child by slamming his head against the changing table. But when the police examined the crack in the changing table for hair follicles, skin tissue, or any fibers, they found nothing. (R. 5083, 5240.) If Child had been slammed into the changing table, something—some DNA, some hair, some fibers—would have been in or on that crack. (R. 5840–41.) Moreover, the blanket that covered the top of the changing table—the blanket that was between Child and the changing table—was never tested for DNA. (R. 4407, 5095–96, 5254; Exh. 163; *see supra* footnote 3.) *See Burnett*,

2018 UT App 80, ¶ 39 (holding that expert’s improper testimony was prejudicial when the physical evidence against the defendant was not strong).

Second, the testimony from the children who were at the daycare the day Child was injured supported Ms. Morley’s story.

The police immediately interviewed only three of the five children. (Exh. 131, 132, 133.) Those three children were Brother, a three-year-old girl, and Ms. Morley’s three-year-old daughter. (*Id.*)

Brother did not disclose who harmed Child. (Exh. 131; R. 4784.)

The three-year-old girl testified that the kids were playing with Child, and she seemed to say that the kids were playing red light, green light with Child. (Exh. 133 at 12:15–45, 14:00–09.) She said Child seemed sad. (Exh. 133 at 14:20–24.) The officer asked her if any of the kids tried to pick up Child or lay him down or “something different,” and she responded, “Something different” but did not elaborate. (Exh. 133 at 14:50–58.)

Ms. Morley’s three-year-old daughter said that the babies at the house play on the ground. (Exh. 132 at 9:15–19.) She said that Child cries and screams “a whole bunch.” (Exh. 132 at 10:28–31, 10:40–58.) And she said she broke the changing table when she climbed into the crib. (Exh. 132 at 12:15–28; 12:54–13:01.)

None of these witnesses claimed that Ms. Morley hurt them or Child. And the three-year-old girl’s interview and the three-year-old daughter’s interview

align with Ms. Morley’s theory of the case—that Child was hurt by other children while left unsupervised on his playmat, and that the crack in the changing table was not from Child but from the three-year-old daughter climbing in the crib.

Weeks after Child got hurt, and days after Child died, the police finally interviewed one of the older children at the daycare, four-year-old Witness, who told her mother that she had seen something. (R. 4386, 4789–90, 5078.) Witness told the police that she had seen Brother pick up Child by the arms, drop him, and kick him. (Exh. 128 at 10:17.) She also said that Child was hurt after breakfast but before lunch. (Exh. 128; R. 4815.) Trial counsel emphasized to the jury that Witness saw something; her statement was “[o]bservationally accurate, but not always 100 percent factually correct.” (R. 6385.)

The statements of Witness, the three-year-old girl, and the three-year-old daughter all reflect one theme: something happened to Child when he was left playing on the ground unsupervised with the other children running around him.

Third, the State’s primary medical experts—the ophthalmologist, the physician, the medical examiner, and the radiologist—could not definitively say who or what caused Child’s injuries; likewise, Ms. Morley’s pathologist opined that she could not determine who or what caused Child’s injuries.

In general, the State’s primary medical experts all testified that Child suffered from inflicted trauma, but they all acknowledged that either he could

have been injured accidentally or that they could not state specifically how Child was injured.

For example, the medical examiner testified that Child died from “inflicted trauma.” (R. 5433.) But she admitted that she could not say whether Child was forced onto something or something was forced onto him. (R. 5474.) She could not say whether the changing table was involved. (R. 5478.) She admitted that Child’s injuries could have been caused by a toddler jumping off a table and landing on Child’s head. (R. 5480.) She also agreed that an eight-pound bowling ball dropped onto a head of an eight-month-old could cause a skull fracture. (R. 5479–80.)

Similarly, the ophthalmologist testified that the bleeding and folds in Child’s eyes were consistent with non-accidental trauma. (R. 4517.) However, the ophthalmologist acknowledged that a door hitting a head with sufficient force could cause the folds in the eyes. (R. 4523.) He admitted that something being smashed into the head causing a back-and-forth motion could cause the injuries. (R. 4531.) He acknowledged that a recent study found that a four-month-old child had severe hemorrhages in his eyes when a six-year-old fell on him. (R. 4547.) He also said that he could not possibly tell whether the injuries were “intentionally inflicted.” (R. 4548.)

Likewise, the physician said that the constellation of findings made it very plausible that Child was injured by being slammed into a table. (R. 4628.) But the

physician acknowledged that the injuries could have been caused by crushing. (R. 4664.) He also admitted that hemorrhaging in the eyes can also be caused by accidental injury. (R. 4665.) And he testified that Child could have been injured by someone other than Ms. Morley. (R. 4678.)

Finally, the radiologist testified that Child's injuries point to "abusive trauma or inflicted injury." (R. 6235.) But he also testified that he could not "say specifically" what happened. (R. 6259.)

None of the State's medical experts could point to Ms. Morley and say that she slammed Child's head into the changing table. They all acknowledged that Child's injuries could have been caused by other forces or that they simply could not determine exactly what happened.

Because of indefinite medical and forensic evidence in this case, Ms. Morley's pathologist testified that "to a reasonable degree of medical certainty . . . [Child] died from complications of blunt force trauma to the head, and it is my opinion to a reasonable degree of medical certainty that the manner of death should be certified as undetermined." (R. 5836.)

Fourth, the symptoms Child would have experienced after the head injury appeared after Child was left unsupervised on the playmat and Ms. Morley found him crying.

The jury heard testimony from the State's experts and Ms. Morley's pathologist about how Child would have reacted after receiving the head injury.

Those symptoms line up with how Child was reacting after Ms. Morley found him crying on the playmat after being left unsupervised.

The State's medical experts agreed that after suffering a head injury, a person might be lethargic or vomiting and may not eat. (R. 4620, 4623, 4664, 5422–23, 5431, 6239–40.) The radiologist testified that the lethargy would “likely progress throughout the day.” (R. 6251.) The experts disagreed about whether Child would have been instantly unconscious after receiving the blow that caused the skull fracture. (*Compare* R. 4620 *with* R. 5425.) The physician noted that Child could cry inconsolably. (R. 4664.)

Similarly, Ms. Morley's pathologist testified that after a head injury, Child may have had “[p]eriods of inconsolable crying, lethargy, irritability, diminished appetite, vomiting.” (R. 5868.)

The symptoms the experts identified as being indicative of a head injury appeared after Ms. Morley left Child on the playmat with other children playing around him. All testimony at the trial was that before Child arrived at Ms. Morley's home, he was not vomiting or overly fussy. (R. 4283-4, 4334-5.) Around mid-morning, Ms. Morley put him on the playmat and left him unsupervised for 15 minutes while the older children played red light, green light around him. (R. 4373–74.) She came back upstairs when she heard Child crying. (R. 4375.) He was very fussy and would not stop crying until she held him. (R. 4374.) Child acted tired but did not go back to sleep. (R. 4374.)

Ms. Morley tried to feed him at 10:30am, but he refused food and threw up. (R. 4374.) At 11:30am, he ate a little and would not take a bottle; he threw his head back in his highchair and cried and did not console easily. (R. 4374.) Child slept from 1:30pm until 3:00pm. (R. 4374.) He woke up, had a snack but was very fussy, and went back to sleep at 4:20pm. (R. 4374.) At 5:00pm, when Father arrived, Child had vomited in his sleep and would not wake up. (R. 4337–39.)

The symptoms of a head injury occurred after that 15-minute period of unsupervised play.

Fifth, the engineer was the only expert who definitively identified who injured Child and where and how Child was injured.

The engineer was the State’s only witness who absolutely linked Ms. Morley with Child’s injuries. He was the only expert who testified how the injuries occurred—by an adult grabbing Child by the arms, shaking him, and causing Child’s head to strike an object. (R. 4914.) He even asserted that the injuries were “easily explained,” that his scenario was the “perfect explanation,” and that his scenario “fits perfectly” with the injuries. (R. 4919, 4923, 4925.)

And the State relied heavily on the engineer’s testimony during closing. The State told the jury, “[The engineer opined that all Child’s injuries] were caused in one event that is explained by grabbing [Child] around the arms, shaking him, and impacting him into a hard surface.” (R. 6344.) The State’s “emphasis in closing argument of Expert’s testimony . . . is not only an indicator

that the State considered that testimony important corroborative evidence, but also that the testimony was important enough to make a difference.” *Burnett*, 2018 UT App 80, ¶ 40.

Under these circumstances, there is a reasonable probability that, but for the biomechanical engineer’s out-of-scope testimony, Ms. Morley would have been convicted of negligent homicide instead. *See id.* at ¶¶ 21–22. The physical evidence against Ms. Morley was not strong: police never found Child’s DNA where the alleged homicide occurred. And the testimony from the children who were at the daycare supported Ms. Morley’s story. The symptoms Child would have experienced after the head injury appeared after Child was left unsupervised on the playmat and Ms. Morley found him crying. What’s more, none of the State’s medical experts could say who or what caused Child’s injuries; and neither could Ms. Morley’s pathologist.

Only the engineer identified who injured Child and how Child was injured—and he did so beyond the scope of his expertise.

Trial counsel’s failure to object to the engineer’s testimony constituted ineffective assistance of counsel. Consequently, this Court should reverse Ms. Morley’s child-abuse homicide conviction.

2. Trial Counsel Was Ineffective When He Did Not Object to the Photographs of the Doll on the Changing Table or the Video of Brother Lifting the Doll

Trial counsel was also ineffective when he failed to object to the State's three exhibits—Exhibits 84, 85, and 86—that depicted the doll on the changing table. Trial counsel also failed to object to the admission of the video of Brother lifting the doll.

To prove ineffective assistance of counsel, Ms. Morley must show both deficient performance and prejudice. *Burnett*, 2018 UT App 80, ¶¶ 21–22. She can do both.

2.1 Trial Counsel Performed Deficiently by Not Objecting to the Photographs

Throughout trial, the State showed photographs of the doll on the changing table: Exhibits 84, 85, and 86. The State admitted these photographs without objection from trial counsel. (R. 4430, 4940.) These photographs showed the doll's head aligning perfectly with the crack in the changing table. (Exh. 84, 85, 86.) The problem is that the doll was several inches shorter than Child. Child was just over 27 inches long. (R. 5895.) The entire changing table itself was 28 inches long. (Exh. 55.) But the crack is in the middle of the changing table. (Exh. 84.) And in Exhibits 84, 85, and 86, the doll is slightly over half the length of the changing table—several inches shorter than Child would have been had Child been lying in the changing table. Had the doll been the actual length of Child, the

crack would be somewhere around the doll's lower back, not neatly under the doll's skull.

Evidence is admissible if it is relevant. Utah. R. Evid. 402. All relevant photographs are subject to the balancing test in Utah R. Evid. 403. *Met*, 2016 UT 51, ¶ 89. Rule 403 allows the admission of relevant evidence if “its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Utah R. Evid. 403.

In this case, the photographs were neither relevant nor probative, and their prejudicial value was high.

The State showed Exhibits 84, 85, and 86 multiple times during the testimony of the police officers who investigated the case (R. 4429–30, 5133, 5233–34.) The photographs of the doll on the changing table are not relevant because the doll is nowhere near the actual height of Child. In fact, the doll was several inches shorter. The way that the doll was positioned on the changing table in Exhibits 84, 85, and 86 made it at least six inches shorter than Child. Had the doll been the actual size of Child, the crack in the changing table would have been below the doll's lower back.

The photographs are also not relevant because the police officers had to manipulate the doll to make its head fit the crack—they had to spread the legs of the doll wide so that it would fit neatly where they wanted it to fit. (Exh. 84.)

Because the photographs are not relevant, they have no probative value. They do not accurately inform the jury about what could have happened to Child.

And these photographs are incredibly prejudicial. Exhibits 84 and 86 are birds-eye views of the doll on the changing table, showing the doll's head lining up perfectly with the crack. Exhibit 85 shows the doll from a horizon-line angle, and the doll's skull sinks perfectly into the crack. These photographs purport to tell the jury what happened in a powerful, visual way. But the doll was significantly shorter than Child, and its limbs were manipulated in a way so its head would perfectly align with the crack, suggesting that Child's head would also perfectly align with the crack. But Child barely fit onto the changing table, as he was only one inch shorter than the table itself. Because of the significant size difference between Child and the doll and the manipulation of the doll's limbs to have it fit the table in relationship to the crack, the photographs misled the jury. The circumstances surrounding the doll and Child—namely the height and bodily contortion required—render the exhibit completely irrelevant but highly prejudicial. Trial counsel was ineffective for not seeking to have the photographs excluded under Rule 403.

2.2 Trial Counsel Performed Deficiently by Not Objecting to the Video

For similar reasons, trial counsel performed deficiently by not objecting to the video of Brother picking up the doll. Several times throughout the trial, the

State referred to the video as a “reenactment.” (R. 5488, 5894.) But the video was far from a reenactment.

The officers brought the doll to Brother in a box 18 days after Brother saw Child in a box at his funeral. (R. 5156.) Brother was not interested in lifting or touching the doll. (Exh. 135.) He was playing with his cars and didn’t want to be interrupted. (*Id.*) And he was taken aback by the doll’s legs falling off twice and a cord extending from the doll’s arms. (*Id.*)

The entire interaction was less than three minutes. And it was nothing like the scenario that occurred at the time Child was on the playmat. There were no other rowdy three- and four-year-olds around playing rough games. Brother had no incentive to either pick up Child as part of the play or try to move him to protect him from the rough play. Brother’s motivation in those three minutes to pick up and move the doll was completely different than his motivation would have been at the daycare to pick up and move Child.

Although the doll was five pounds lighter than Child, the doll’s weight was centered in its chest cavity rather than being spread throughout the doll’s body. (Exh. 87.) And while Witness stated that Brother picked up Child by his arms, in the “reenactment” Brother either sat down or knelt down and tried to pick up the doll by around its chest. (*Compare* Exh. 128 at 10:17 *with* Exh. 135.)

Because the circumstances were so dissimilar and the motivation to lift the doll was so dissimilar, trial counsel should have objected to the admission of the

video. Its probative value was marginal, because the video did not show Brother attempting to pick up the doll the way Witness saw him pick up the doll. And, most importantly, Brother was completely disinterested and did not want to engage with the doll at all.

On the other hand, the video's prejudicial value was great. The officers relied on that video to conclude that Brother could not have injured Child. The State asked the medical examiner if the "reenactment" on the video would cause the fracture in Child's skull. (R. 5488–89.) The medical examiner said no. (R. 5489.) But we do not know that the "reenactment" was a reenactment, because the circumstances and personal motivation were not the same. Because the State asserted that the video was a reenactment—or at least definitive as to whether Brother could lift Child—it also misled the jury. *See Utah R. Evid. 403.* Trial counsel was ineffective for not seeking to have the video excluded under Rule 403.

2.3 Ms. Morley Was Prejudiced

Ms. Morley was prejudiced by the admission of the photographs and the video. The photographs depicted in a vivid way how Child could have been injured. And the video was seen as the definitive answer to whether Brother could lift Child.

Moreover, the State's experts relied on these exhibits during trial. And the State treated them as truth.

For example, the biomechanical engineer used Exhibits 85 and 86 to explain to the jury how Child was injured. (R. 4935–40.) The engineer stated that Exhibit 85 “is an example of a surrogate infant showing that the physical dimensions and location of the head in relationship to the fracture and the length and breadth of the changing table are consistent with—the opinion I had formed that [Child] was grabbed, shaken, and—and was forcibly caused to strike some firm object. This changing table becomes a—is becoming more and more likely to be the location where the injury occurred.” (R. 4941–42.)

And the State used the video to ask the medical examiner if Brother could have caused Child’s injury, and the medical examiner said no. (R. 5489.)

The jury had these photographs with them in the deliberation room. It had seen the video throughout trial. Visual images are powerful. *See Emotional Evidence and Jurors’ Judgments: the Promise of Neuroscience for Informing Psychology and Law*, 27 BEHAVIORAL SCIENCES AND THE LAW 273, 277 (2009) (reporting more guilty verdicts in mock trials where all other evidence remains constant except the addition of gruesome photos).

But, importantly, the jury was never instructed that the photographs or the video were only used to illustrate the State’s theory of the case and not to recreate events.

Ms. Morley was prejudiced by trial counsel’s failure to object to photographs and video that purportedly recreated the events surrounding Child’s

injury and Brother's ability to lift Child. But those recreations were inadequate: the doll was too short and too manipulated to fit the crack in the changing table, and Brother was not interested in touching the doll. What these recreations did was mislead the jury.

Consequently, Ms. Morley's trial counsel was ineffective for failing to object to the photographs and the video.

Conclusion

Because Ms. Morley's trial counsel was ineffective by failing to object to the biomechanical engineer's testimony and for failing to object to the photographs and the video of the doll, this Court should reverse her conviction for child-abuse homicide.

Ms. Morley requests that this Court either (1) direct the district court to enter a conviction for the lesser-included offense of negligent homicide and remand for the limited purpose of resentencing, with a direction that all time Ms. Morley has served will be counted as time served towards her new sentence or (2) remand this case for a new trial.

DATED this 5th day of November, 2018.

/s/ Emily Adams

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Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(a)(11) and 24(g) because this brief contains 13,667 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21.

DATED this 5th day of November, 2018.

 /s/ Emily Adams

Certificate of Service

This is to certify that on November 5, 2018, I caused two true and correct copies of the foregoing to be served on the following via first class mail, postage prepaid, along with a courtesy brief on CD, which was also filed with the Court of Appeals:

Utah State Attorney General’s Office
Appeals Division
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6th Floor
P.O. Box 140854
Salt Lake City, UT 84114

 /s/ Emily Adams

Addendum A
Biomechanical engineer's testimony

1 **MR. BUSHELL:** We can ask it.

2 **THE COURT:** Okay.

3 (Proceedings resume in open court at 1:49:56.)

4 **THE COURT:** Detective?

5 **THE WITNESS:** Yes.

6 **THE COURT:** They have one question: Does the vomit
7 on shirt, sheets, and terry cloth get analyzed?

8 **THE WITNESS:** That's why we took it to the Northern
9 Utah Crime Lab.

10 **THE COURT:** Any other questions from any member of
11 the jury? Okay. Seeing none, may the detective be excused,
12 then?

13 **MR. MILES:** No further questions.

14 **MR. BUSHELL:** That's fine.

15 **THE COURT:** Okay. Thank you, Detective, for coming.
16 Other witnesses or evidence, from the State?

17 **MS. TOOMBS:** Yes, Your Honor. The State would call
18 David Ingebretsen.

19 **THE COURT:** Okay.

20 **DAVID INGEBRETSEN,**

21 being first duly sworn, testifies as follows:

22 **MR. BUSHELL:** And, Your Honor, I -- I don't mean to
23 interrupt, but the defense is requesting an opportunity to
24 voir dire Mr. Ingebretsen just prior to being qualified as an
25 expert but after Ms. Toombs has had a chance to establish his

1 credentials.

2 **THE COURT:** Any problem with that? Okay. Just pop
3 up when you're ready.

4 **DIRECT EXAMINATION**

5 **BY MS. TOOMBS:**

6 **Q.** Good afternoon.

7 **A.** Good afternoon.

8 **Q.** For the record, I did warn you that the
9 air-conditioning was out in this building, didn't I?

10 **A.** You did. That's why I'm without a coat.

11 **Q.** Okay. Will you please state your name for the
12 record?

13 **A.** David Michael Ingebretsen.

14 **Q.** And what is your current occupation?

15 **A.** I'm -- I'm a forensic engineer. The bulk of my work,
16 probably 100 percent of my work actually anymore is actually
17 consulting as an expert. If a -- if something happens that
18 involves dynamics, how something breaks or how something
19 moves, I'm contacted by either a defendant or a plaintiff in a
20 case to analyze it and apply my education and experience to
21 understand how the objects were moving and how they broke
22 and -- and what happened. To reconstruct it.

23 A lot of my work is automobile accidents, civil
24 litigation. I work about half and half for the plaintiff and
25 for the defendant in that. A very small percentage of my work

1 is criminal. In the past 20-plus years, you know, a handful
2 of criminal cases. The ones that stand out in my mind I'm
3 still about half and half for the defendant and for the
4 prosecution.

5 Q. Okay. Do you have -- you indicated forensic
6 engineer. What is your educational background to get to that
7 point?

8 A. Oh, I have a bachelor's of science degree in
9 mechanical engineering. And -- and don't hate me. I got it
10 from the University of Utah back in 1983.

11 On completing that degree I went into graduate school. I
12 was accepted into the physics department at the University of
13 Utah and I obtained a master's of science degree in physics.

14 At this time I was working. I had a job as a -- a rock
15 mechanic at TerraTek. I did a lot of work for the defense
16 nuclear agency. One of my principal projects was looking at
17 the stress in soils that are built around our nation's missile
18 defense silos to see if they could withstand a nuclear attack
19 on the silo, to see if the silo would withstand the stress.

20 I worked at Hercules Aerospace. I was the proverbial
21 rocket scientist for a number of years. I worked on a lot of
22 our nation's missile defense systems, the solid-fueled rocket
23 motors. The shuttle rocket motors, the filament-wound casing,
24 I was -- specifically in -- in conjunction with my physics
25 degree I was looking at how these filament-wound carbon

1 composite rocket motors could be damaged in -- in re-entry and
2 whether or not they could be reused. I was devise -- devising
3 nondestructive testing using computed tomography, ultrasound,
4 and other techniques to examine these casings after the fact
5 to see if they were still structurally sound enough to re-use.

6 After doing that for a while, I worked at Evans &
7 Sutherland doing vehicle dynamic simulation, human perception,
8 modeling.

9 I then stopped and I started to do this in about 1993.
10 Late 1990s I went back to school at the University of Utah and
11 earned a master's degree in my bioengineering where I
12 specifically studied biomechanics which is -- mechanics is the
13 study of motion.

14 So I built on in mechanical engineering and physics and
15 started applying that to people, how forces affect us, how our
16 materials -- and as part of my engineering, I studied material
17 science, solid mechanics which is the study of how stress and
18 strain and deformation affects a material and a structure, at
19 what point does it fail, what causes it to fail, how these
20 things propagate through different structures.

21 Studied statics and dynamics, all sorts of different
22 dynamics, fluid dynamics, arrow dynamics.

23 And when I got to the bioengineering, we took the human
24 body and -- and looked at it in terms of those engineering
25 disciplines, biomaterial science, how the tissues -- how our

1 tissues respond. We all live in the same universe and the
2 same universal laws apply to us as well as any structure. So
3 we applied those. Biofluid dynamics, how blood flows.

4 The intricacies and nuances of viscoelastic materials.
5 We're familiar with steel and aluminum that you bend it and it
6 flips right back again. Well, viscoelastic materials have
7 some different properties we'll -- we'll get into. And human
8 tissues are viscoelastic. They behave a little differently
9 depending on how fast you try to make them change their shape.

10 So I got that degree in -- in bioengineering and have
11 been doing this job really full time for almost 20 years
12 exactly. Now this fall it will be 20 years that I really
13 started doing this job full time. I've been doing it off and
14 on at least since 1993.

15 **Q.** Okay. And have you -- in doing this job, have you
16 been recognized as an expert for testimony in court
17 specifically in the field of biomechanical damages to the
18 human body, prior to today?

19 **A.** Every -- every time. I've testified in court
20 somewhere between 2- and 300 times over the last 20 years.
21 And the courts routinely recognize that I am qualified as a
22 biomechanical engineer. I've got a degree in it. I've
23 studied on my own. I have experience in it and I've spent a
24 life looking at how and why things break and move.

25 A court has never said I am not a biomechanical engineer.

1 Where the hiccup comes is where -- where biomechanics stops
2 and where medical testimony begins. I'm not a medical doctor.
3 I don't treat, I don't diagnose, I don't determine any medical
4 aspect of the case.

5 I'm -- I'm a force guy. I'm a break guy. I -- I look at
6 how things break. I look at forces and dynamics independent
7 of what a medical doctor may determine or opine to. So that's
8 where any hiccup comes in. I'm not a medical doctor, and
9 that's fine. But I am an engineer and the courts always have
10 recognized that I am a biomechanical engineer.

11 **Q.** And your intent isn't to testify here today as a
12 medical doctor providing diagnosis or anything of that nature.

13 **A.** No. I'm -- I don't question the medical diagnoses.
14 I accept those. When -- when I have a structure that's
15 failed, I need to know what broke. And then I examine the --
16 the features of the -- of the fractures and -- and the
17 material properties. I don't look at the medicine behind it.
18 I look at the engineering behind it.

19 **Q.** Okay. Were you contacted by me to review the
20 injuries sustained to an eight-month-old infant by the name of
21 Lincoln Penland?

22 **A.** I was.

23 **Q.** Okay. And what was the requested assignment in this
24 case?

25 **A.** I -- I was just asked to consider the medically

1 diagnosed injuries and what types of forces, what the
2 character, what pattern, what sort of dynamic environment or
3 static environment would have caused these injuries and was
4 there one type of -- one event that could have -- that could
5 explain everything or these, by necessity, separate events
6 that occurred.

7 Q. Okay. And did you do that?

8 A. I did. I did.

9 Q. Was -- was that anything outside of your wheelhouse,
10 if you will? Anything outside your expertise?

11 A. Oh, absolutely not. I mean, I -- I don't want to
12 trivialize this, but -- but the human body is -- is a
13 structure and I look at it as a structure. I -- I -- these
14 are very hard cases and I have to emotionally remove myself
15 from the -- the living, breathing person and look at it as an
16 engineering structure and design, just the pure science behind
17 it.

18 And so it's just a straightforward application of
19 material science and solid mechanics and strength and
20 materials and dynamics, multibody dynamics, flexible multibody
21 dynamics, things that I've done since the early 80s.

22 Q. Okay. Were you provided materials to review in this
23 case?

24 A. I was.

25 Q. And did you review those?

1 **A.** I did.

2 **Q.** Okay. Specifically, were you provided materials to
3 review the injuries that the doctors diagnosed?

4 **A.** Oh, yeah, ab -- absolutely, I was.

5 **Q.** Okay. And --

6 **MS. TOOMBS:** Do you want to -- are you satisfied with
7 the foundation?

8 **MR. BUSHELL:** I'm not, but --

9 **MS. TOOMBS:** Okay.

10 **MR. BUSHELL:** Is this -- maybe this is a good point
11 to interject. Is the intention that from here going forward
12 you want to qualify him now?

13 **MS. TOOMBS:** Yes. Well --

14 **MR. BUSHELL:** Okay.

15 **MS. TOOMBS:** Yeah -- well, I think he --

16 **MR. BUSHELL:** So procedurally, I believe the State
17 would be asking the Court to now, based upon that testimony,
18 testify (sic) Mr. Ingebretsen as a -- as an expert.

19 **MS. TOOMBS:** And I -- I believe, Your Honor, that
20 that's actually not correct. I think that the -- in fact, the
21 Court has previously said -- has said you're not going to put
22 a stamp on anybody, you're just going to say he can -- whether
23 he can testify or not. But you're not -- I don't know that
24 we're asking you to say -- although I would be happy if you
25 want to say -- Mr. Ingebretsen is clearly an expert.

1 **THE COURT:** No. We don't put our stamp on them
2 anymore. Just like the previous experts that have testified,
3 we -- you lay down your foundation and if there's no
4 objection, typically they're allowed to opine, and if there is
5 an objection or if you want to do voir dire, you can do that.

6 **MR. BUSHELL:** I would like an opportunity.

7 **THE COURT:** Do you want to do that now?

8 **MR. BUSHELL:** Yes, please.

9 **THE COURT:** And there's no objection from the State?

10 **MS. TOOMBS:** Well, I -- I would ask what his
11 objection is? Typically voir dire is based on an -- an
12 objection. We would just ask what the objection is.

13 **MR. BUSHELL:** At this stage, I don't believe that the
14 doctor has established the necessary criteria to be qualified
15 as a -- as an expert and opine on some of the issues.
16 Especially under the -- the rules, Rule 701, more importantly
17 702. I'd like an opportunity to flesh out some of those
18 details. That's what voir dire is for.

19 **THE COURT:** Okay. I'll allow the voir dire.

20 **THE WITNESS:** And, Counselor, it's -- it's mister.
21 Two masters' degrees still don't add up to a doctor --

22 **MR. BUSHELL:** Oh.

23 **THE WITNESS:** -- but I appreciate the honor.

24 **MR. BUSHELL:** Well, you're welcome.

25 **THE WITNESS:** Honorary degree.

1 **MR. BUSHELL:** I wish I could say the same. Give me
2 just one moment. And I, too, am a U of U grad, so I do not
3 hate you. In fact --

4 **THE WITNESS:** Thank you.

5 **MR. BUSHELL:** -- I think we're on the same team here.
6 Had you said something a little bit further south, that would
7 be a different story.

8 **THE WITNESS:** Okay.

9 **MR. BUSHELL:** In Utah County, maybe.

10 **VOIR DIRE EXAMINATION**

11 **BY MR. BUSHELL:**

12 **Q.** And I know this seems odd. I will try to keep this
13 brief and try to keep it in a fashion that makes sense. Let
14 me just ask you this. You indicated that Ms. Toombs contacted
15 you with a specific request. I believe you said, asked you to
16 consider the medical diagnoses, the forces, the character, the
17 static dynamic, et cetera, in this case.

18 **A.** Almost. I'm not considering the -- I'm not
19 considering the medical diagnoses and that may have been
20 misstated. I accept the medical diagnoses. They come into
21 play only in the fact that they -- they define what the
22 injuries are. I'm not determining what the injuries are.
23 Whether or not Lincoln was injured or not, the extent of those
24 injuries, what specific injury caused the -- Lincoln to pass
25 away.

1 Q. Okay.

2 A. I'm just saying, this is what's broken and, then,
3 what forces are needed to cause those breaks.

4 Q. So that's -- so that's my question. So that was
5 your task; is that right?

6 A. Yes. Yes.

7 Q. That was the -- the key question here that -- that's
8 why you're here.

9 A. Yes.

10 Q. Okay. And you indicated you have legal -- you've
11 testified -- I believe you said -- between 2- and 300 times in
12 court.

13 A. Yes.

14 Q. Courts have routinely categorized you as an expert in
15 your field, biomechanic engineering.

16 A. Yes.

17 Q. Yet you said you have -- it's very rare that you have
18 testified in a criminal case; is that right?

19 A. Yeah. I don't pick the cases. I don't get contacted
20 very often on criminal matters.

21 Q. What are most of the cases that you find yourself in
22 court? What -- what's --

23 A. They're civil litigation.

24 Q. Civil litigation?

25 A. Yeah.

1 Q. Personal injury?

2 A. Yeah.

3 Q. Product liability?

4 A. Not -- not so much product liability. It --

5 Q. Personal injury?

6 A. It's almost always somebody has an injury, something
7 is broken in a person, what forces are -- are consistent with
8 causing that type of failure in the -- in the material.

9 Q. Okay. Mr. Ingebretsen, have you ever provided your
10 expert opinion in biomechanic engineering in a child abuse
11 homicide criminal case?

12 A. Not homicide, but child abuse.

13 Q. Child abuse homicide, that's never happened. This
14 will be the first for you.

15 A. To testify, yes.

16 Q. Okay.

17 A. I think I've had a couple of other child abuse
18 homicide, but I've never testified in those before.

19 Q. Okay. And walk me through the materials that you
20 reviewed. In fact, I have your report right in front of me.
21 I'm assuming you do, as well?

22 A. Yeah, I do.

23 Q. What materials did you review in providing your
24 report and your analysis?

25 A. Well, the bullet list and I may add a little bit to

1 the description.

2 Q. Okay.

3 A. And we have the autopsy --

4 Q. Okay.

5 A. -- which includes a description of what the injuries
6 were, what broke, where the fractures were, where the other
7 injuries were and what they were.

8 A CSI report which documents the police investigation,
9 what they did, numerous photographs taken at the -- the
10 residence and of other items that were believed to be --
11 alleged to be involved in the incident.

12 Serology report. Several reports from the Intermountain
13 Health Care, Primary Children's Medical Center, I believe.
14 Intermountain West Regional Forensics Laboratory examination
15 reports and doctors' notes.

16 The extensive photographs of the scene and -- and also
17 the autopsy which gave me a visual appreciation of what the
18 injuries were and what they were finding.

19 Q. Okay.

20 A. The medical imaging, which wasn't as much help to me
21 in this as the photographs and the doctor reports. And then
22 those are used because fracture surfaces tell me the kinds of
23 forces that are causing the -- the fractures, but the -- the
24 reports were more useful to me than the actual imaging.

25 Q. Okay.

1 **A.** A videotape depicting Boston Penland trying to lift a
2 surrogate infant dummy. A video interview of -- of Boston
3 Penland. The Roy City Police Department investigation. A
4 transcript of the preliminary hearing. Subsequent to this
5 report, I also had a chance to personally inspect the changing
6 table.

7 **Q.** This one right here?

8 **A.** Uh-huh. The highchair, the folding crib.

9 **Q.** When did that happen?

10 **A.** How I -- I -- I'd have to look at the date on the
11 photographs, but it's been within, like, the last month or
12 two.

13 **Q.** Okay. So within the last month or two, subsequent to
14 providing your report, you examined these two things?

15 **A.** And the folding crib.

16 **Q.** And the folding crib.

17 **A.** Yes.

18 **Q.** Anything else that wasn't included in your report
19 that you -- that you reviewed?

20 **A.** Well, that -- that was the provided material. I
21 mean, I did extensive research on my own. I researched
22 additional papers, current literature talking about
23 non-accidental trauma to -- to infants. Looked up in my -- in
24 reference books about material properties of bone, blood
25 vessels, ligaments, tendons, those sorts of things. I mean,

1 I -- I did my own homework and made sure that my understanding
2 was current, as current as it could be, as well as my
3 technical understanding was also correct.

4 Q. Okay. Did you watch any other videos or -- of
5 interviews with other children?

6 A. I had some transcribed testimony or videos, I can't
7 recall. I didn't review them for trial today because they
8 don't necessarily affect my opinion as to what forces are
9 going to cause it.

10 Q. Oh, okay.

11 A. And that's -- the bottom line is what forces are
12 causing the fractures, but I did have some from -- and I'm not
13 going to remember the names correctly -- but a couple of other
14 individuals. One young girl, Brylee --

15 Q. Shepherd.

16 A. Yes. I did have her statement as well.

17 Q. Her statement. Where did you get the statement?

18 A. Well, it was -- it was something. I -- I can't
19 remember, but it was a -- it's something from Brylee. I can
20 pull it off my laptop if you want to see it.

21 Q. Oh, I'm sure I have seen it. Don't -- don't stress
22 it.

23 A. Yeah.

24 Q. You're okay.

25 A. I just can't remember if it was a video or not. I

1 didn't review that, like I said, for -- for trial today.

2 Q. Okay. But you didn't watch her video, correct? You
3 didn't see the actual interview that she had with law
4 enforcement?

5 A. Well, that's what I'm trying to remember. Like I
6 say, I'd look at it again on my laptop.

7 Q. Go ahead. Yeah, that's fine.

8 A. It will just take a minute to -- (pause in
9 proceedings). Almost there.

10 Q. Take your time. There's no rush.

11 Sir, do you have some water up there, if you want?

12 A. Oh, I do. Thank you.

13 They are actually transcriptions. I have -- the -- the
14 name are Bentley, Boston, Bristol, Brylee, Jodi.

15 Q. Transcripts, though, not actual video footage.

16 A. No.

17 Q. Okay.

18 A. No, they were not the actual --

19 Q. And those were provided to you by who?

20 A. By Ms. Toombs.

21 Q. Ms. Toombs?

22 A. Yeah.

23 Q. Okay. You indicated -- right out the gate I called
24 you doctor, but you do not have a Ph.D.; is that correct?

25 A. No. No.

1 Q. Okay.

2 A. Long story, but no, I stopped --

3 Q. A couple --

4 A. -- at a master's degree.

5 Q. A couple of master's degrees?

6 A. Yeah.

7 Q. So no dissertation that you've done.

8 A. No. Just a project and a thesis.

9 Q. Okay. What about publications? Do you have any
10 publications?

11 A. Just one a long time ago. The field that I'm in and
12 the jobs that I had do not lend themselves to academic
13 publications.

14 Q. And that was -- in fact, I'm looking at your CV.

15 A. Yeah. It was in regard to the vehicle dynamics. I
16 did notes on real-time vehicle dynamics --

17 Q. So here --

18 A. -- multibody simulation model.

19 Q. So in 1989 --

20 A. Right.

21 Q. -- you were a co-author and the title was Notes on
22 Real-time Vehicle Simulation. It was a textbook.

23 A. Correct. Yeah. Yeah, it was.

24 Q. Okay. And that was used in a -- in a course taught
25 at a conference.

1 **A.** Yes.

2 **Q.** Okay.

3 **A.** I had a couple of citations in other books, too,
4 which kind of made me happy, but --

5 I also had two other things. I had Dr. Haber's report
6 and Dr. Ophoven's report.

7 **Q.** Okay.

8 **A.** And I heard her interview. I was provided a -- a
9 copy of her interview.

10 **Q.** That would have had to have been rather recently,
11 correct?

12 **A.** Yeah. Within the last week, I guess.

13 **Q.** Okay. And did you ever generate a -- after getting
14 all this new information, other sources, materials that you've
15 reviewed, the changing table, the highchair --

16 **A.** Right.

17 **Q.** -- the Pack 'n Play, a few transcripts from the
18 interviews, Dr. Ophoven's report --

19 **A.** Right.

20 **Q.** -- did you prepare a new report?

21 **A.** No. My opinions didn't change. That --

22 **Q.** Okay.

23 **A.** -- that information doesn't affect the engineering
24 analysis.

25 **Q.** Gotcha.

1 **A.** It helps provide background and -- and an
2 understanding of the circumstances, but the actual calculation
3 and understanding of the forces is not dependent upon that. I
4 had a lot of photographs of those that showed me everything I
5 needed to see when I started.

6 **Q.** Okay. Sometimes -- often in academia there's a
7 confusion between papers and publications.

8 **A.** Correct.

9 **Q.** Do you have any publications in journals, in reviews,
10 that have been peer reviewed or is it -- is this the only --

11 **A.** That -- that's really the only thing.

12 **Q.** -- publication?

13 **A.** Working at Hercules and TerraTek there were national
14 security issues. I couldn't just publish things.

15 **Q.** Sure.

16 **A.** They were classified.

17 **Q.** Any other --

18 **A.** And -- and at ENS, they were very protective of their
19 intellectual property. So I prepared a lot of papers and
20 presentations and documents for internal use, but none of them
21 could be published.

22 **Q.** Okay. And Hercules Aerospace, you worked there from
23 1983 to 1986?

24 **A.** Yes.

25 **Q.** And TerraTek from 1981 to 1983.

1 **A.** Yes.

2 **Q.** Okay. Have you ever been -- well, let me see how to
3 phrase that.

4 Have you ever taught as a professor?

5 **A.** Not as a professor. I -- there -- there was a course
6 at the University of Utah, Physics of the Human Body. I guest
7 lectured in that several times. I taught the course
8 completely once or twice, but I haven't done that for a number
9 of years.

10 **Q.** Okay.

11 **A.** I've just simply been too busy --

12 **Q.** Yeah.

13 **A.** -- with my -- my day job.

14 **Q.** Okay. And did you -- I know -- I know in your line
15 of profession you do a lot of accident re-creations.

16 **A.** I do.

17 **Q.** Did you do that in this case?

18 **A.** By that, do you mean like a -- a visual animation?

19 **Q.** Simulation.

20 **A.** No.

21 **Q.** Okay.

22 **A.** No. I just did -- it was more just simple
23 calculations and application of scientific principles.

24 **Q.** Okay. When you examined the changing table, for
25 example --

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A. Yes.

Q. -- did you determine what type of wood this is?

A. I did. It's a fairly thin -- I think it's about an eighth-inch particle-type board, pressed wood, where you take saw dust and chips and glue them together into a -- a thin board.

Q. Okay. Did you conduct a stress test of any kind on -- on -- on this table?

A. No, I did not.

Q. Did you conduct --

A. It was clear -- it was clear that the particle board couldn't provide enough of a resistive force to cause a fracture in the skull. The particle board is by far weaker --

Q. Exactly.

A. -- than -- than the skull, but what was interesting to me is you've got --

Q. Well, I -- I don't mean to cut you off --

A. Oh, yeah. That's fine.

Q. My fear is that you're going to follow up that statement with some evidence that might come out in a minute.

A. That's fine. I understand.

Q. Okay.

A. No, that -- interrupt me. I -- I -- I --

Q. And I'm not trying to be rude. I'm just --

A. I understand.

1 Q. But did you conduct a stress test of any kind on
2 materials similar to this changing table?

3 A. No, I did not. I did not. It was just not part of
4 the analysis. It was not needed.

5 Q. And you indicated you are not trained in any capacity
6 in medicine, in the medical field.

7 A. No. I said I'm not a medical doctor. As part of my
8 bioengineering degree, I had to take --

9 Q. Sure.

10 A. -- physiology, microcell biology, biochemistry,
11 histology, immunology. I -- I -- my son just graduated med
12 school and I compared his coursework with mine in his first
13 two years and I took almost the same classes. I mean gross
14 anatomy. I dissected cadavers. I did all of that in an
15 engineering context, not in a --

16 Q. Medical.

17 A. -- medical context. But I did have medical training,
18 the same as most med students.

19 Q. When I asked you what materials you reviewed, most,
20 the vast majority, the bulk of what you listed were medical in
21 nature.

22 A. Oh, absolutely. That -- that's --

23 Q. Did you consult --

24 A. -- what it almost (sic) is.

25 Q. Sorry. Did --

1 **A.** Almost always it's that way. I have to know what
2 broke and the doctors are the diagnosticians. They tell me
3 what broke. I -- I mean that's almost what I always review.

4 **Q.** Did you consult with somebody to help you interpret
5 the medical material provided to you?

6 **A.** Oh, I don't have to because I'm not looking at it in
7 terms of medicine. I'm looking at it in terms of engineering.
8 And I've had the classes. I know the medical terminology.
9 I -- I use engineering terms preferably because I'm more
10 comfortable with that, but I had to learn all of that when I
11 was in bioengineering. That -- that was the purpose of the
12 bioengineering school.

13 **MR. BUSHELL:** Your Honor, can we approach?

14 **THE COURT:** Yes.

15 (Discussion at the bench at 2:19:48.)

16 **THE COURT:** Do I need my book? Are we going to be
17 looking at books?

18 **MS. TOOMBS:** Apparently.

19 **MR. BUSHELL:** I'm going to be asking that he be
20 excluded. He does not meet the criteria of Rule 702. The
21 reason I asked to approach is to do that, to make that
22 argument, I -- I don't want to disparage Mr. Ingebretsen,
23 especially in front of the jury, should Your Honor ultimately
24 decide that he can. I mean, I think that's unfair to the
25 State. I would like to excuse the jury and then make this

1 argument.

2 **THE COURT:** Okay. How much time do you think you
3 need?

4 **MR. BUSHELL:** Five minutes -- well, on my end, five
5 minutes. I just --

6 **THE COURT:** Are you all right with that process?

7 **MS. TOOMBS:** Probably -- probably 15 minutes, yeah.

8 **THE COURT:** Okay.

9 (Proceedings resume in open court at 2:20:37.)

10 **THE COURT:** Members of the jury, we're going to take
11 our midafternoon break now. We're -- we need to huddle about
12 a legal issue and this is about the time we're at for the
13 midafternoon break anyway.

14 So we'll try to resume at -- let's try to be back at
15 2:20 -- or 2:40. Excuse me.

16 (Pause in proceedings)

17 **THE COURT:** Okay. We're still on the record. We're
18 outside the presence of the jury.

19 Do you want to make the argument from there or do you
20 want to come back up?

21 **MS. TOOMBS:** Actually, Your Honor, if we -- if I may,
22 I -- I'd like to just flesh out a couple of questions with
23 Dr. -- or Mr. Ingebretsen before we make argument.

24 **THE COURT:** Okay. And are these questions that you
25 did not want the jury to hear?

1 **MS. TOOMBS:** I -- I don't know that -- I think it's
2 more relevant to the -- the legal argument as opposed to the
3 jury, so --

4 **THE COURT:** Okay.

5 **EXAMINATION IN RE LEGAL ARGUMENT**

6 **BY MS. TOOMBS:**

7 **Q.** Good afternoon. Now, you have talked in detail about
8 the education that you've received, the degrees that you've
9 received, the training that you've undergone, and your
10 experiences. Is that fair to say?

11 **A.** Yes.

12 **Q.** Probably not enough to totally cover the last 20
13 years --

14 **A.** No.

15 **Q.** -- but a smattering.

16 **A.** Little bit.

17 **Q.** Okay. You're basing -- I think as you've said --
18 your -- your testimony on scientific, technical, or other
19 specialized knowledge. Fair to say?

20 **A.** Absolutely it is.

21 **Q.** And you do that -- do you do -- are the -- is the
22 science that you use information that is used by other
23 biomechanical engineers in your field?

24 **A.** Absolutely. I mean, it -- it is. The medical
25 information absolutely tells me what broke and -- and that

1 gives me the engineering understanding of how to then look at
2 what pattern, what character of forces, what directions, what
3 had to be constrained, other things. Even without a specific
4 number of pounds to cause something, I can still look at and
5 tell you what kind of forces, what had to have been done, what
6 direction, where the application had to be, what -- if -- if
7 an object was constrained or unconstrained. Those things are
8 very clear by what I see in the medical records taken in an
9 engineering context.

10 Q. And that's something that other engineers, or in more
11 particular, other biomechanical engineers, would also -- a
12 technique that they would also use.

13 A. Absolutely.

14 Q. So --

15 A. It's what I've learned in school; it's what I've
16 learned in the -- the additional training I've done and the
17 papers I've read and the presentations I've witnessed.
18 It's -- it's how this job is done. You -- you -- you look at
19 what's broken and then you understand what type of forces were
20 applied to make that object break the way it did. It's a very
21 clear and simple application of the science of the things that
22 I've studied since I started college.

23 Q. Okay. And is that a reliable science? Is
24 engineering a field that is generally accepted in the
25 scientific world?

1 **A.** It's application of Newtonian physics to the human
2 body. And -- and for hundreds of years Newtonian physics has
3 been shown to be universally applicable. It's just a question
4 of how you extend it to a specific problem.

5 The bioengineering gave me the tools to extend that to
6 biological systems, to take material science and apply it to
7 biomaterials, to take solid mechanics and apply that to the
8 structure of the human body, dynamics, multibody dynamics.
9 In -- if Newton is valid, then what I do is valid.

10 **Q.** Okay. And you're certainly not the only one that has
11 extended it, if you will, to biomechanics?

12 **A.** Oh, absolutely not.

13 **Q.** You're not the only one in your field?

14 **A.** No. It started with da Vinci when he started looking
15 at the human body and the human motion. It -- it's an
16 accredited degree at numerous colleges throughout the country.
17 It's been around for -- since the turn of the century is when
18 universities started offering degrees in bioengineering and
19 biomedical engineering and biomechanics, from the University
20 of Utah to Stanford to MIT; it is a -- a universally accepted
21 application of Newtonian physics to the human body.

22 It -- it's why we have safety systems in cars. It's why
23 we have sports equipment and athletic protection equipment.
24 It's why we have everything from bulletproof vests for -- for
25 our law enforcement to -- to the arch support in your running

1 shoes. It's all done with biomechanics. Artificial hip
2 implants, shoulders, knees, joints, tissues, organs. It's all
3 an application of engineering to the human body.

4 I mean, it just -- it just is.

5 **Q.** And did you have sufficient facts and data upon which
6 to base your -- your testimony here today?

7 **A.** Oh, absolutely. To -- to the extent of my report,
8 what I said in my report, I had more than enough information
9 to render those opinions.

10 **Q.** And have you reliably applied that data to the facts
11 of -- the -- the numbers, if you will, the math to the facts
12 of the case?

13 **A.** Absolutely I have. I -- I applied standard
14 scientific procedure. I started with the evidence. I applied
15 the scientific principles to understand what forces could be
16 associated with each of the individual injuries and then
17 considered that in the context of the -- the circumstances
18 that we have.

19 **Q.** And is there anything different about the fact that
20 this child died versus a child that you've testified about in
21 a criminal case previously that would negate your findings?

22 **A.** Oh, no, ab --

23 **Q.** In other words, homicide versus abuse, what does it
24 mean to you?

25 **A.** And I don't want to be callous, Your Honor. Nothing.

1 I'm not asked to determine whether or not these injuries were
2 fatal or why they were or why they weren't. I am asked to
3 determine what pattern of applied and inertial forces are
4 consistent with the injuries we see in Lincoln.

5 The -- the fact that Lincoln died is absolutely tragic.
6 The fact the other child did not die is -- is fortunate. But
7 the fact that it's fatal or not is irrelevant to my analysis.
8 I'm not trying to determine that these injuries were or were
9 not fatal. That's a medical question. And that's simply not
10 anything I address.

11 **Q.** And to your knowledge -- so you had indicated that
12 you have testified in at least some, a handful, I think,
13 criminal cases. To your knowledge, is there actually a
14 published appellate decision regarding -- in fact, in a case
15 in which you testified previously?

16 **A.** I -- I believe there is.

17 **Q.** And in that case, you were recognized as an expert.

18 **A.** I was. I -- I think both in the lower court and the
19 appellate court recognized me.

20 **Q.** And is that here in Utah?

21 **A.** Yes. Fourth District.

22 **Q.** Fourth District?

23 **A.** Yeah.

24 **Q.** And would there be anything in your testimony today
25 as far as the -- the science of it that would differ from the

1 testimony that -- or the underlying facts, science, and data
2 that you used for your testimony in that case?

3 **A.** No. In fact, one of the injuries in Lincoln was
4 similar to one of the injuries in the other case, a -- a
5 fracture through the -- the growth plate. And in that case I
6 testified that it was from a bending motion, and in this case
7 my testimony is that it's from a bending motion. I -- I think
8 it's perfectly consistent.

9 **Q.** Okay.

10 **MS. TOOMBS:** Thank you, Your Honor.

11 **THE COURT:** Okay. Now, did you want to go to
12 argument at this point?

13 **MR. BUSHELL:** No, I had a -- some follow-up.

14 **THE COURT:** Follow-up?

15 **MR. BUSHELL:** Yes.

16 **THE WITNESS:** Excuse me.

17 **EXAMINATION IN RE LEGAL ARGUMENT**

18 **BY MR. BUSHELL:**

19 **Q.** Doctor --

20 **A.** It's okay.

21 **Q.** Sorry. Mr. Ingebretsen.

22 **A.** My brother is a doctor.

23 **Q.** Okay. You indicated -- I should have asked you this
24 before, but you indicated that you reviewed transcripts from
25 Brylee's statement -- Brylee Shepherd's statement about what

1 she observed?

2 **A.** Yes.

3 **Q.** And you -- you did go and, I guess, check out and
4 analyze or look at the changing table. Did you ever go to the
5 Morley's home and look at the door that Brylee Shepherd claims
6 slammed Lincoln Penland's head?

7 **A.** Oh, absolutely not. I didn't have to. I ruled out a
8 constrained fracture on Bry -- on Lincoln's head.

9 **Q.** You ruled that out without -- without examining the
10 door. So you can't tell me what the door was made of?

11 **A.** That doesn't matter. The -- the fracture was not
12 constrained. Whether it was steel, whether it was wood,
13 whatever it was, you have to have equal and opposite forces.
14 It's the application of the science.

15 If -- if it's a standard wooden door in a doorframe,
16 you're still going to have equal and opposite forces. And
17 you've got to have a force here and then a force here. And
18 when you have equal and opposite forces, these bones are
19 weaker. This bone broke, these ones did not, and there was no
20 other evidence. I -- I ruled out a -- a constrained fracture,
21 a constrained force on Lincoln's head.

22 **Q.** Well, and that -- that might be true, assuming -- and
23 I'm not an engineer. I'm just a lowly -- lowly defense
24 attorney, but that may be true assuming --

25 **MS. TOOMBS:** Your Honor --

1 **Q. (BY MR. BUSHELL)** -- if, according to your report --

2 **MS. TOOMBS:** -- I apologize. I ob -- I would object
3 at this point. I think at this point his questions are going
4 more to the weight that would be placed on it as opposed to
5 the -- the 702 science of it.

6 **MR. BUSHELL:** I'm not, Your Honor. I'm going towards
7 whether the facts or data have been sufficiently laid out and
8 whether he's relying upon those facts. The report -- well,
9 I'll leave it at that and let the judge rule.

10 **THE COURT:** Okay. I'll overrule the objection. You
11 can keep asking.

12 **Q. (BY MR. BUSHELL)** Mr. Ingebretsen -- well, let me just
13 turn your attention, then -- (unintelligible).

14 **A.** Okay.

15 **Q.** Turn your attention to the last page, actually, page
16 8, paragraph 6. You're -- you're ruling out the door scenario
17 and you point out -- and, again, probably -- well, correct me,
18 I don't know. But you rule -- you point out that there would
19 be indication of a doorjamb on the other side of that
20 (unintelligible).

21 **A.** Yes.

22 **Q.** Here's my point. You're assuming that when -- when
23 Brylee Shepherd said "slam a door" on his head, that it was as
24 you would normally imagine, you know, similar to that door
25 closing on his head against the doorjamb.

1 **A.** Right. What -- what if it was an unconstrained?

2 **Q.** Or what if the door was opened the opposite way and
3 he was against the wall on this end and it came and hit him
4 here? Or if he was not quite against the -- the wall, but in
5 the middle --

6 **A.** Okay.

7 **Q.** -- and the door hit him here. My point is, you
8 didn't examine any of that material, correct?

9 **A.** I did. And that's what I'm saying. This -- this has
10 to be an unconstrained impact. If the door hits Lincoln's
11 head, it has to accelerate his head sufficiently to -- to
12 essentially give it an 80g acceleration. And that means it
13 needs to be accelerated from zero to about 13 miles an hour.
14 And that means Boston has to be able to swing that door hard
15 enough to transfer enough momentum to create an 80g impact, at
16 least, on Lincoln's head. Probably more. And that's at the
17 very, very low end. And -- and so that's just not reasonable.

18 **Q.** Okay.

19 **A.** I talk about an adult standard in here. I talk about
20 the 2,600 pounds. You --

21 **Q.** Yeah, that's my other --

22 **A.** -- you can reduce that by -- Ommaya reduces that by a
23 factor of about 11 which brings us down into the 250-pound
24 range which then brings us to that 80g which brings us to the
25 13 miles an hour.

1 And so those sorts of situations are eliminated in -- in
2 the other scenarios. Slamming his door -- slamming his head
3 in the door suggested very strongly that Lincoln's head was
4 pinned, constrained. If it wasn't, Boston has to push on that
5 door and he can only generate about 10 pounds of force. A
6 two- to five-year-old can only generate about 10 pounds of
7 force with one arm pushing.

8 **Q.** How -- how much did Boston Penland weigh in 2014?

9 **A.** I don't recall, but he can't push it -- in the
10 studies that I've seen, you can't -- a four-year-old -- two-
11 to five-year-old can't push more than about 10 pounds per arm,
12 20 pounds total. That's their pushing strength, regardless
13 how much they weigh.

14 So it just can't add up to the energy needed to create
15 the momentum transfer in -- in Lincoln's head. And that's why
16 those things are eliminated.

17 **MR. BUSHELL:** At this point, Your Honor, I am ready
18 to argue the issue, unless the State has --

19 **THE COURT:** Any other questions, Ms. Toombs?

20 **MS. TOOMBS:** No.

21 **THE COURT:** Okay. With argument, then, Mr. Bushell?

22 **MR. BUSHELL:** Your Honor, thank you. Let me turn
23 everyone's attention to Rule 702.

24 **THE COURT:** Okay.

25 **MR. BUSHELL:** Paragraph (a), "Subject to the

1 limitations in paragraph (b), a witness who is qualified as an
2 expert by knowledge, skill, experience, training, or education
3 may testify in the form of an opinion or otherwise if the
4 expert's scientific, technical, or other specialized knowledge
5 will help the trier of fact to understand the evidence or to
6 determine a fact in issue."

7 I don't think any one of us would disagree that
8 Mr. Ingebretsen is certainly very qualified in -- in his -- in
9 his field, but he is going to be testifying in this trial, a
10 child abuse homicide trial, a criminal case, in his
11 scientific, technical, or specialized knowledge realm.

12 That bumps us down to sub -- paragraph (b).
13 Mr. Ingebretsen may serve as a -- I'm sorry, his technical,
14 scientific, or specialized knowledge may serve as the basis
15 for expert testimony only if there is a threshold showing that
16 the principles or methods that are underlying in the
17 testimony, (1), are reliable; (2), are based upon sufficient
18 facts or data; and have been reliably applied to the facts.

19 Mr. Ingebretsen, by his own admission, is a very busy
20 man in his career, that he has never, ever -- this will be the
21 first time testifying in a child abuse homicide case. I get
22 that he's been in a lot of civil litigation cases, personal
23 injury, injury cases. Civil.

24 The standard here is very different. The stakes are
25 very different. This is a criminal matter. He said he has

1 testified a few times in other criminal cases, but never child
2 abuse homicide.

3 Mr. Ingebretsen has one publication to his name from
4 1989. How that meets the standard of being an expert in a
5 case like this, I don't -- I don't understand. And it was a
6 publication, it was co-authored, regarding vehicles, the --
7 I'm assuming the impact of force and, you know, in vehicle
8 collisions, not in pediatrics, not in child abuse, not in
9 criminal matters in any way, not -- not involving the head of
10 eight-month-old children, not involving shaking, not involving
11 retinal hemorrhaging, but on vehicles in 1989, one
12 publication.

13 Mr. Ingebretsen is not trained in medicine.
14 Obviously, his -- his courses in getting the degrees that he
15 does have, you know, encapsulated and incorporated some realms
16 of medicine, but he does not have a medical degree. He does
17 not have a Ph.D. There has been no rigorous dissertation
18 process.

19 Master's degrees -- and, again, I -- I know this is
20 going to come off as disparaging and I don't mean that in any
21 way, but a case of this magnitude, we need to -- we need to
22 make sure that the people who are testifying and instructing
23 these jury members are being instructed by qualified experts.

24 Sub -- that (b) (2) paragraph: Based upon sufficient
25 facts or data; that have been reliably applied to the facts.

1 Mr. Ingebretsen never looked at the door that Brylee
2 Shepherd alleges cause -- caused these incidents. Never did a
3 stress test of any kind on the proverbial smoking gun, the
4 mechanism that the State is alleging that's where this
5 homicide occurred. Never -- there was never any testing done.
6 How that can be considered as reliably applied to the facts of
7 this case -- it is of this case. I mean, the -- this is --
8 well, let's get ahead of ourselves and go to paragraph (c).

9 The threshold showing required by paragraph (b) is
10 satisfied if the underlying principles or methods, including
11 the sufficiency of facts or data and the manner of their
12 application to the facts of the case, are generally accepted
13 by the relevant expert community.

14 There's been no showing by the State that
15 Mr. Ingebretsen meets those criteria. He did not do a stress
16 test, not only one on -- on this table -- the specific table
17 the State claims that's where the homicide happened -- so not
18 even on material similar to that changing table. Tests --
19 tests were done -- or, I'm sorry, calculations were provided,
20 but even at Mr. Ingebretsen's own admission, those
21 calculations in the report pertain to adult skulls -- adult
22 skulls. This is a case involving an eight-month-old child.
23 His testing or his -- his analysis in his report is flawed and
24 is based on adults.

25 None of those things, when you factor them together,

1 rise to the level of qualifying Mr. Ingebretsen as an expert
2 biomechanic engineer in this case. He's clearly
3 well-qualified. I mean no disrespect to Mr. Ingebretsen. He
4 is, no doubt about it. But in this case, he is not.

5 Your Honor, I'll turn everyone's attention -- so in
6 the advisory committee notes of Rule 702 it instructs the
7 Court --

8 **THE COURT:** You know, I -- I don't have access to
9 those.

10 **MR. BUSHELL:** Oh. Well --

11 **UNIDENTIFIED SPEAKER:** Just read it.

12 **MR. BUSHELL:** I'll just read it out loud.

13 **THE COURT:** Okay.

14 **MR. BUSHELL:** So the State is with me?

15 Like its federal counterpart, Utah's rule, Rule 702,
16 assigns to trial judges a gatekeeper responsibility to screen
17 out unreliable expert testimony. In performing their
18 gatekeeper function, trial judges should confront proposed
19 expert testimony with rational skepticism.

20 And the fact that testimony may be -- I'm jumping
21 over now to the discretion of the Court section. The fact
22 that testimony may be helpful to the jury does not require
23 admission of the testimony.

24 **MS. TOOMBS:** Where are you -- where are you at?

25 **MR. BUSHELL:** Discretion of the Court.

1 Look, the reality is this, and I'll leave it at this.
2 Mr. Ingebretsen, despite being qualified elsewhere and perhaps
3 in other legal realms, is unfortunately not qualified to
4 testify in a child abuse criminal -- a criminal child abuse
5 homicide case. He just does not rise to Rule 702 and the
6 standard laid out there.

7 Our request, Your Honor, is that Mr. Ingebretsen not
8 be allowed to testify here at trial.

9 **THE COURT:** Okay. It would help me -- and I think
10 both sides probably assume I know what his opinion is, but I
11 don't.

12 **MR. BUSHELL:** That --

13 **THE COURT:** I've never been provided his report and I
14 don't know exactly what he's going to say. I'm --

15 **MR. BUSHELL:** That -- that reminds me of --

16 **THE COURT:** I'm kind of assuming where he's going,
17 but --

18 **MR. BUSHELL:** -- there was one other -- one other
19 issue. It's if -- if Your Honor does, indeed, decide to allow
20 Mr. Ingebretsen to testify, we are very specifically and
21 adamant that -- well, that he doesn't rise to that level, but
22 if he does testify, his second to the last line in his report,
23 I'll just read it. "The physical evidence, the medical
24 opinions, and the biomechanics required to cause the whole
25 injury pattern in Lincoln Penland, quote, is in my opinion

1 beyond a reasonable doubt the result of non-accidental trauma
2 inflicted by an adult."

3 That's a legal conclusion for the jury to determine.
4 If Mr. Ingebretsen is allowed to remain as an expert in this
5 case, there has to be a ruling from Your Honor that he is not
6 allowed to use those words.

7 But I hope that answers Your Honor's question. That
8 is his overall opinion.

9 **THE COURT:** It does. May -- do you have an extra
10 copy of that or can I look at that while we go -- while I
11 listen to the remaining arguments?

12 **MR. BUSHELL:** Let's see if I have one.

13 **THE WITNESS:** My report, Your Honor? I -- I have a
14 copy here, sir.

15 **THE COURT:** This is on the last page? Is that where
16 we were looking at? Thank you. Careful when you throw
17 things. You might get tased.

18 Okay. Let -- let me just look at what you were
19 reading from. Okay. Can I hold on to this for a minute?

20 **THE WITNESS:** Yes, you --

21 **THE COURT:** Okay.

22 **THE WITNESS:** Absolutely, Your Honor.

23 **THE COURT:** Ms. Toombs?

24 **MS. TOOMBS:** Your Honor, Mr. Ingebretsen has two
25 engineering degrees, one specific to bioengineering and one

1 specific to mechanical engineering. Those are both master's
2 degrees -- or, excuse me, that is -- he's got a master's
3 degree in bioengineering and a master's degree in physics. He
4 also has a bachelor's degree in mechanical engineering. He
5 has practiced in this field of engineering since at least
6 19 --

7 **THE WITNESS:** '93.

8 **MS. TOOMBS:** -- '93 and has been specifically
9 practicing with biomechanics under his master's since at least
10 2001.

11 Your Honor, he has continued to follow the science.
12 He's attended courses and updated his training as recently as
13 2013. He is continuing his education. This may be an older
14 CV. He also has continuing education specific to the fields
15 of biomechanics, biomaterials, and the effects of dynamic
16 loads and vibration on human tissue.

17 He has been a lecturer on the physics of the human
18 body at the University of Utah. He is a lecturer on modeling
19 and control of dynamic systems. He has also been -- done
20 various presentations in the areas of accident reconstruction
21 investi -- excuse me, investigation, and biomechanics. He is
22 a physicist. He is an engineer. He is a biomechanical
23 engineer, more specifically.

24 The level of education alone that Mr. Ingebretsen has
25 qualifies him under Rule 702 for purposes of whether or not he

1 is -- he has the education. There's nothing in Rule 702 that
2 requires publication in papers. There's nothing in -- in
3 Rule 702 that requires whether or not he has testified in
4 criminal versus civil litigation. In fact, he has testified
5 in criminal litigation and his testimony here today was that
6 he has testified not only in -- in criminal for the defense --
7 or for the prosecution, but also for the defense.

8 If this were switched around and Mr. Bushell had --
9 had hired Mr. Ingebretsen, he would be arguing that this is
10 the most reliable source of information that you could have.
11 He is, as Mr. Bushell indicates, clearly qualified.

12 So then you look at whether or not those scientific
13 principles and other specialized knowledge are reliable. His
14 testimony before you today -- which is uncontested. There's
15 no testimony beyond what he has already said. There's been
16 no -- nothing other than argument that Mr. Bushell disagrees
17 with Mr. Ingebretsen, but that's not evidence. The only
18 evidence before the Court today is that this is reliable
19 evidence.

20 I don't know that you can -- that anyone, by any
21 stretch of the imagination, would argue that engineering is
22 some novel new science that is not tested. Engineering has
23 been around since Newton. The -- based upon sufficient facts
24 or data.

25 Now the question that Mr. Bushell is raising is

1 whether or not he tested loads. Mr. Ingebretsen is going
2 to -- to opine that he doesn't -- he's looking at the forces
3 that cause the break. And based on his analysis, he doesn't
4 need to look at the common household door. Although I think
5 that, in and of itself -- there's nothing unique about any
6 building. Building materials are building materials are
7 building materials.

8 A -- a layperson can understand what a door looks
9 like. Whether -- and -- and, frankly, there's not clear
10 testimony from Brylee Shepherd whether it was an outside door
11 or an inside door, so what good does it do for Mr. Ingebretsen
12 to test outside door versus inside door.

13 That all goes to weight, not whether or not there is
14 a science and whether or not there's information that -- that
15 can be applied to that science. In this case, he has received
16 information -- in his testimony -- that is sufficient for him
17 to apply data -- the data into the science and he is able to
18 reach a conclusion.

19 The Courts have -- in fact, the -- both the advisory
20 note and the -- the opinions all indicate that this is a
21 gatekeeping role. This is not such a rigorous standard
22 that -- excuse me. This degree of scrutiny is not so rigorous
23 as to be satisfied only by scientific or other specialized
24 principles or methods that are free of controversy or that
25 meet any fixed set of criteria fashioned to test reliability.

1 That's exactly my point when I say nothing says he
2 has to have testified. He doesn't even have to have testified
3 before to be able to be qualified as an expert. He doesn't
4 have to have testified in a criminal case. He doesn't have to
5 have testified in a homicide case.

6 He is simply being asked to testify as to whether --
7 as to what the bodies that -- that he is trained and clearly
8 qualified to talk about did and how they would react to
9 various different forces.

10 Now, I don't know that -- that -- excuse me -- that
11 Mr. Ingebretsen is going to say beyond a reasonable doubt, it
12 was inflicted trauma. That would be a -- I -- I -- in my
13 questioning of him, that's a -- a conclusion that he provided
14 to me. This ex -- this expert report itself is not being
15 admitted into evidence; only his testimony is being admitted
16 into evidence for the jury to consider.

17 Your Honor, the rules of evidence require only a
18 basic foundational showing of indicia of reliability for
19 testimony to be admissible. It is up to the trier of fact.
20 These nine, which will be whittled down to eight, members of
21 the jury weigh out whether -- how much weight they're going to
22 give it.

23 It is not required that you have to have a golden
24 standard, although the State would argue Mr. Ingebretsen has
25 more than met the golden standard. At this level for a 702

1 objection, it is only a gatekeeper function which requires
2 only a basic foundational showing of indicia of reliability.
3 That is a quote from Gunn Hill Dairy Crops, LLC, versus LA
4 Department of Water and Power, 2012 Utah Court of Appeals 20.
5 That is a Court of Appeals decision. It is a civil decision.
6 They say that evidence can come in. There's nothing within
7 Rule 702 that talks about the stakes being high.

8 In a civil case, millions of dollars at stake, the
9 stakes are high as well. Although I'm not comparing the two,
10 there is no requirement under 702 that is different for the
11 analysis from civil versus criminal.

12 Your Honor, the courts -- the Gunn court also went on
13 to be -- to state that the scrutiny -- that while the Court --
14 the judge should approach expert testimony with rational
15 skepticism, this scrutiny should not be so rigorous as to be
16 satisfied only by scientific or other specialized principles
17 or methods that are free of controversy or that meet any fixed
18 set of criterion.

19 In this case, Your Honor, there's no question, the
20 science is valid. There's no question that he is more than
21 qualified to opine about the science and in -- and that he has
22 been given data and facts that, for -- for purposes of 702,
23 more than meet the reliability standard for your gatekeeper
24 function.

25 And I apologize, Your Honor, as I -- as I scan

1 through some of my notes, there -- in this case, you're
2 required to make a finding that in -- in order to exclude at
3 this point the proffered testimony, it's unchallenged. So you
4 have to now make a finding that his testimony is so unreliable
5 that the jury cannot even consider it. If there is no
6 testimony to controvert at this point, that is simply we --
7 Your -- Your Honor must take that for the testimony that it's
8 given and provide a certain rational skepticism.

9 But again, Your Honor, law enforcement are often
10 test -- allowed to testify as expert. CSIs are allowed to
11 testify as experts. None of them publish. None of them,
12 likely -- I -- I shouldn't say none -- but most likely none of
13 them have doctorate level degrees, Ph.D.'s, et cetera. That
14 is not the standard that is applied.

15 Your Honor, in State versus Adams, 2000 UT 42, the
16 expert's testimony was properly admitted because the testimony
17 was not based upon new or novel scientific principles or
18 techniques and the Rimmasch standard for admitting novel
19 scientific evidence did not apply.

20 There has been no question that the science is
21 accepted. There's been no doubt that it's reliable.
22 Mr. Bushell's entire argument has simply gone to the weight
23 that the jury, not the Court, should place on the evidence.
24 Those are all perfect cross-examination questions, but they
25 are not part of the gatekeeper function of the Court.

1 As such, the State would argue that the --
2 Mr. Ingebretsen -- I will add, again, that the testimony from
3 Mr. Ingebretsen was that he has testified in child abuse
4 cases. In fact, there is a published opinion from the Utah
5 Courts of Appeals in which he -- his testimony was considered
6 against that of another. That was a child abuse.

7 His testimony is that for his purposes, he doesn't --
8 as sad as it is that Lincoln died, he doesn't factor that into
9 his -- his conclusions. His science doesn't matter. The
10 break is the break is the break. Whether he died or whether
11 he lived, the break is the break, the science is the science.

12 As such, we would ask that the Court deny the
13 defense's request and allow Mr. Ingebretsen to testify.

14 **THE COURT:** And before you sit down --

15 **MS. TOOMBS:** Sure.

16 **THE COURT:** -- do you agree with the defense about
17 the reasonable doubt, that he cannot opine on that?

18 **MS. TOOMBS:** Yes. I think that beyond a reasonable
19 doubt -- and I -- I don't think that he would -- I would
20 certainly not ask him to -- again, that would be -- that would
21 be stepping into the purview of the jury.

22 **THE WITNESS:** I would not offer that, Your Honor.

23 **THE COURT:** Okay. Yes, please don't. Because --

24 **THE WITNESS:** No, I -- I understand.

25 **THE COURT:** -- that could cause great problems. You

1 would be taking the jury's role out of the case. You would be
2 telling them as an expert that the standard that the State is
3 supposed to prove has been met, which you can't do. We've
4 given them a definition of reasonable doubt and we haven't
5 given that to you, so don't opine on that.

6 **THE WITNESS:** I will not, Your Honor.

7 **THE COURT:** Okay.

8 **THE WITNESS:** Thank you for the explanation.

9 **THE COURT:** Now, here's the part that's bothering
10 me -- and you haven't touched on it, Ms. Toombs, is 702(b)(2),
11 where it says that the principles and methods are reliable,
12 that's number one; then, two, are based upon sufficient facts
13 or data.

14 I understood the exclusion of the door explanation
15 that was given by Mr. Ingebretsen, but I -- I'm concerned
16 about -- and, again, I -- I'm just being told what the opinion
17 is. But isn't it -- the State's theory is that the changing
18 table is -- is where this occurred? And he says he has not
19 tested that. So does it meet that threshold showing --
20 (b)(2). I'm concerned about that. He says he's not tested it.

21 **MS. TOOMBS:** Your Honor, I --

22 **THE COURT:** I -- I get where he can rule things out,
23 but can he also rule things in without looking at them?

24 **MS. TOOMBS:** Your Honor, I would -- first, I would
25 say yes, he can because he is aware that it's a very thin

1 waferboard that -- and that there's some structural support
2 underneath it and he can testify based upon his science and --
3 and his education -- whether Mr. Bushell agrees with that or
4 not -- he can testify what his conclusion is. But I would --

5 **THE COURT:** Based on photographs.

6 **MS. TOOMBS:** -- also point --

7 **THE COURT:** Based on photographs.

8 **MS. TOOMBS:** Well, and he has now had a chance to --

9 **THE COURT:** But his opinion was --

10 **MS. TOOMBS:** -- opine --

11 **THE COURT:** His opinion was released prior to him
12 looking at it.

13 **MS. TOOMBS:** Correct, but that is -- again, it hasn't
14 changed his opinion. But I would --

15 **THE COURT:** Well, I get that, but I -- I haven't
16 heard anything from him that says he can do that. He said how
17 he could rule things out. He didn't say how he could rule
18 things in without examining them. And it's counterintuitive
19 to me to say, well, I can tell what forces go into that
20 without examining it.

21 **MS. TOOMBS:** Okay.

22 **THE COURT:** So I don't know if we need to ask him
23 further questions, but that's a -- that's a blind spot for me.
24 It's counterintuitive. I don't understand his science. I --
25 I -- but I -- I don't know how you can opine about that

1 something happened there without testing it or looking at it
2 live other than just photographs of it.

3 **MS. TOOMBS:** Okay. And I'm happy to ask more
4 questions or the Court can ask the questions.

5 **THE COURT:** Could you explain that, Mr. Ingebretsen?

6 **THE WITNESS:** Absolutely, Your Honor. Thank you.

7 My opinion overall is that the injuries that Lincoln
8 sustained were a result of an adult grabbing, shaking, and
9 striking his head on something firm, hard. What that object
10 was is not relevant to the opinion that it had to include a
11 strike as well as the shaking to -- to completely
12 (overtalking) --

13 **THE COURT:** So does your opinion leave out the
14 changing table, then?

15 **THE WITNESS:** It -- it absolutely could. When I look
16 at the changing table, though, when I apply my science, I note
17 the fracture pattern in the top of the table. I note there's
18 a semicircular fracture and crushing pattern right at a
19 structural member that would be significantly stiffer and
20 stronger than the flat panel which is only an 1/8-inch thick
21 piece of waferboard.

22 And so what I can tell just from the photographs is,
23 one, that an object did not fully penetrate through the
24 waferboard. It wasn't like an object fell through it because
25 the waferboard is hinged still. The object had to be round

1 because of the shape of the crushing pattern, applying just
2 principles of -- of stress and strain and material science.
3 So I know that a round object struck the changing table at
4 that location right at the very stiff -- stiffest and
5 strongest location. I know that that object had to be
6 constrained. It had to be attached to something because it
7 didn't go all the way through. If it had, the -- the top
8 wouldn't be hinged anymore. There'd be a fracture on the
9 opposite side and -- and there is none. So even just from the
10 photographs I can tell that. Examining it just reinforced
11 what I had.

12 So my opinion would then be extended to say that the
13 changing table is absolutely consistent with a child's head
14 striking right at that -- at that location. It would leave a
15 semicircular crush pattern of about 6 or 7 inches in effective
16 diameter, would not penetrate all the way through, would break
17 the waferboard very easily, but would -- would create extreme
18 force at the location of the stiffest and strongest
19 cross-feed.

20 **THE COURT:** Did you consider other possible causes of
21 the fracture in the change -- changing table?

22 **THE WITNESS:** Absolutely, Your Honor. It -- it just
23 needs to be something that allows the stress to be
24 concentrated on the mastoid.

25 **THE COURT:** No, I mean, things that could have caused

1 the crack in the changing table --

2 **THE WITNESS:** Oh, yes.

3 **THE COURT:** -- other than Lincoln.

4 **THE WITNESS:** Yes, I did. I -- I considered a child
5 stepping on it. I -- I considered another object being set on
6 it or dropped on it. I did all of those.

7 **THE COURT:** Okay.

8 **THE WITNESS:** And -- and just from the photographic
9 evidence and the pattern of crush, I was able to determine
10 beyond -- to a reasonable degree of scientific probability
11 that it had to be something round, attached, that struck right
12 at that crossover.

13 **THE COURT:** Okay. Anything else that you wanted to
14 argue?

15 **MS. TOOMBS:** Yes, Your Honor.

16 **THE WITNESS:** Thank you, Your Honor.

17 **MS. TOOMBS:** I would, also -- we -- we have been
18 discussing at length subsection (b). Subsection (a) says
19 subject to the limitations in paragraph (b), a witness who's
20 qualified as an expert by knowledge, skill, experience,
21 training, or education may testify in the form of an opinion,
22 et cetera.

23 However, if you look at subsection (c), the threshold
24 showing required by (b) is satisfied if the underlying
25 principles or methods, including the sufficiency of facts or

1 data and the manner of their application, are generally
2 accepted by the relevant expert community.

3 Your Honor, the testimony from Mr. Ingebretsen is
4 that this is common practice within his field. I would argue
5 that we don't have to go through (b) because, as I stated
6 before, engineering is not new, it's not novel, these are
7 generally accepted in the scientific community and he is
8 qualified under his training and experience and that the
9 information would help the trier of fact to understand a fact
10 in issue.

11 **THE COURT:** Okay. Thank you.

12 Final reply, Mr. Bushell?

13 **MR. BUSHELL:** A few things. Let me be clear here and
14 maybe I misspoke. I don't think I did, but maybe I did.

15 Our position is not that biomechanic engineering, the
16 science, isn't sound. There's no dispute about that. We're
17 not -- we're not standing here saying, Your Honor, this is
18 fuzzy science that -- that shouldn't be relied upon. Clearly
19 biomechanic engineering is a sound science.

20 Ms. Toombs is claiming that that's our allegation.
21 That's not. What we're claiming is that Mr. Ingebretsen is
22 not qualified as an expert in that field.

23 I'm a trained lawyer. I'm a trained attorney, and
24 there's no dispute that the realm of law of tax law or
25 intellectual property isn't a sound area of law. It is

1 well-established, but I don't know anything about those areas
2 of law. I practice criminal defense and other -- immigration,
3 some family stuff. I don't know anything about those other --
4 other areas of law. Those areas of law are -- are
5 well-established. That's not -- that's not our dispute.

6 Biomechanic engineering is well-established. And I
7 don't mean to imply that Mr. Ingebretsen knows nothing about
8 biomechanic engineering. The argument, though, is that it
9 doesn't meet the rule.

10 Tish -- Ms. Toombs did not address at all in her
11 response the defense's concern that Mr. Ingebretsen's
12 report -- turning the Court's attention to page 6. His report
13 is relying upon faulty data. Second to last paragraph, quote,
14 "Fatal injuries without skull fractures occur in falls from as
15 low as a few feet onto hard or firm surfaces. However, the
16 energy and strain required to cause skull fractures in
17 addition requires much higher energies and forces. Given the
18 rapid development of the skull during the first few months, it
19 is difficult to assign a specific number to the force required
20 to cause the skull fractures in Lincoln."

21 **MS. TOOMBS:** Where -- where are you at?

22 **MR. BUSHELL:** Page 6, second to last paragraph.

23 **MS. TOOMBS:** Okay.

24 **MR. BUSHELL:** Moving on to the last paragraph, so --
25 well, let's recap.

1 It's difficult to assign a specific number to the
2 force required to cause the skull fractures in Lincoln, an
3 eight-month-old child. And then it goes on: However, for
4 context, widely reported results of testing on adult cadaver
5 skulls with forces of the order of 2,600 pounds to cause
6 fractures.

7 And he goes on to explain that. He uses an equation,
8 scientifically, as it pertains to adult skulls and draws
9 conclusions off of that and forms an opinion. That's
10 problematic. That does not meet the rules here in any
11 fashion.

12 Ms. Toombs -- and so when they said, look, this
13 is -- they said look, this is argumentative. These are issues
14 of -- for the jury to decide. That's not what we're doing.
15 These are issues that were raised and that we feel do not rise
16 to satisfy Rule 702. Calculations used for adult skulls don't
17 apply here. It's an eight-month-old child and to form an
18 opinion on that and an entire report is problematic.

19 I wholeheartedly disagree with Ms. Toombs when she
20 says, building materials are building materials, building
21 are -- there's clearly a very stark difference between that
22 door that I've gone through hundreds of times as an attorney
23 in your court and the door in my home. That one is weighted
24 very, very differently from the door in my home. And I know
25 Ms. Toombs agrees with that.

1 Building materials are not all the same. Concrete is
2 very different from plywood. There's a difference between a
3 quarter of an inch -- I mean, you -- if you just double stack
4 that thin surface we have a very different equation. So to
5 say that building materials are all the same, no big deal, he
6 can just look at it and make a determination is not accurate.

7 Dr. -- or Mr. Ingebretsen testified about -- his
8 opinion was formed. He generated this report based off of
9 photos, everything that he responded to Your Honor's
10 questioning was all about his opinion that was generated and
11 formed prior to fully analyzing all the data.

12 We're concerned that he also had, you know, access to
13 cooperative consultations between counsel with defense
14 counsel's experts, but those -- the -- the materials
15 reviewed -- as your Honor pointed out, he can exclude some,
16 but I don't think that allows him to include others.

17 There's a -- well, this Gunn Hills (sic) case I think
18 is certainly -- I think -- I think it's applicable, but the
19 portion that Ms. Toombs read that the Rules of Evidence
20 require only a basic foundational showing of indicia of
21 reliability for testimony to be admissible, it's up to
22 Your Honor, the trier of fact, to determine the -- I'm sorry,
23 the jury to determine the reliability of the evidence.

24 The context of that case is a dairy farmer's expert
25 witness, the Court found should not have been precluded from

1 opining that stray current caused decreased milk production
2 and increased mortality rates in dairy herds. I -- I don't
3 think I could contrast this case from that case anymore. It's
4 a case involving dairy herds and milk production.

5 This is a case involving an eight-month-old child
6 whose head was crushed. Child abuse homicide is alleged by
7 the State for occurring on that very surface, right there.
8 The State believes Lincoln Penland's head was crushed right
9 there. And Mr. Ingebretsen didn't -- he formed an opinion
10 before even looking at it. And then his opinion is still the
11 same and there has not been a single test done to actually
12 support that, and he relies upon data that supports adult
13 skulls.

14 Ms. Toombs -- well, I think the State has a very
15 different reading of what Rule 702 actually requires. Let me
16 just read it again. "A witness who is qualified as an expert
17 by knowledge, skill, experience, training, or education may
18 testify in the form of an opinion or otherwise if."

19 So we're -- before we get to the "ifs," it's -- this
20 is -- this paragraph is allowing Mr. -- Mr. Ingebretsen, in
21 this scenario, to testify in the form of an opinion, who is
22 already qualified as an expert because of his knowledge,
23 skill, experience, or expertise -- so we're two layers deep --
24 if -- and that's not what the State's proposing, by the way --
25 but if the expert's scientific, technical, or other

1 specialized knowledge will help the jury to understand the
2 evidence. That paragraph really doesn't apply. That's not
3 what the State is alleging. Paragraph (b) is what -- what
4 applies here.

5 "Scientific, technical, or other specialized
6 knowledge may serve as the basis for expert testimony only if
7 there is a threshold showing that the principles or methods
8 that are underlying in the testimony, one, are reliable."
9 Mr. Ingebretsen's testimony is relying on equations pertaining
10 to adult skulls. So we can -- that's out.

11 "Are also based upon sufficient facts or data." He
12 based his opinion before even looking at the facts or data.
13 He didn't do a stress test. And he based it off of
14 photographs.

15 And strike three, "have been reliably applied to the
16 facts." There has been no application to the facts in this
17 case. So (b) (1), (b) (2), and (b) (3) are not met. There is no
18 question.

19 Mr. Ingebretsen, despite being very well-educated,
20 despite being -- being a biomechanic engineer is not a
21 biomechanic engineer expert in this case and should not be
22 allowed.

23 **MS. TOOMBS:** Your Honor, may I respond? Some of that
24 was a completely new argument.

25 **THE COURT:** There's no need. I --

1 **MS. TOOMBS:** Okay.

2 **THE COURT:** I think that the threshold showing has
3 been met as required under 702, so I'm going to allow him to
4 testify but with the strong caution to both State's counsel
5 and Mr. Ingebretsen, do not opine on reasonable doubt.

6 **THE WITNESS:** Those words will not leave my mouth.

7 **THE COURT:** And do not ask questions about reasonable
8 doubt.

9 **MS. TOOMBS:** They will not, Your Honor.

10 **THE COURT:** Okay. Okay. With that said, are we
11 ready to bring the jury back in?

12 **MS. TOOMBS:** Yes. Yeah.

13 **THE COURT:** Dave, if you'll hand that back to
14 Mr. Ingebretsen?

15 **MR. MILES:** Does he need more water? Do we need --

16 **MS. TOOMBS:** Mr. Ingebretsen, do you need more water
17 before we start?

18 **THE WITNESS:** No.

19 **MS. TOOMBS:** Okay.

20 **THE WITNESS:** I'm good.

21 (Pause in proceedings)

22 **MS. TOOMBS:** Oh, can I come sit where you're at?

23 **UNIDENTIFIED SPEAKER:** (Unintelligible) --

24 **MS. TOOMBS:** Oh.

25 **UNIDENTIFIED SPEAKER:** -- so the temperature drop.

1 **THE COURT:** For tomorrow you should all bring
2 (unintelligible).

3 **MR. BUSHELL:** Where do you have that?

4 **MS. TOOMBS:** And just stuff them in our --

5 **THE COURT:** That's what I -- that's what I have
6 (unintelligible) --

7 **MS. TOOMBS:** Ah, he's sitting on an ice pack.

8 **THE COURT:** I'm going to put one in front of the fan,
9 as well.

10 **MS. TOOMBS:** Actually a good idea.

11 **THE COURT:** Crude engineering, but my version.

12 **THE WITNESS:** That's the best engineering,
13 Your Honor.

14 **THE COURT:** Simple.

15 **THE WITNESS:** Simple is best.

16 (Pause in proceedings)

17 **THE BAILIFF:** The jury is present, Your Honor.

18 **THE COURT:** Thank you, Dave.

19 Members of the jury, welcome back. Were you in
20 air-conditioning while you were gone?

21 **UNIDENTIFIED JUROR:** Yes.

22 **THE COURT:** Okay. Sorry to bring you back here.
23 We've -- we've been heating up the room with legal arguments.
24 I -- I didn't estimate very well, so it's -- I was just off by
25 three times, so I apologize for that. We'll try to do better.

1 Go ahead and sit back down, Mr. Ingebretsen.

2 **THE WITNESS:** Thank you.

3 **THE COURT:** We'll resume with the questioning.

4 Ms. Toombs?

5 **MS. TOOMBS:** Thank you.

6 **DIRECT EXAMINATION, CONT'D**

7 **BY MS. TOOMBS:**

8 **Q.** I'm going to probably go back and repeat some of what
9 we have already talked about just because I've lost track of
10 where we were when the jury left. So you -- you were able to
11 review a number of materials in order to reach your
12 conclusions. Is that fair to say?

13 **A.** That's correct.

14 **Q.** And I think that we've touched on this, but bear with
15 me, bear with me. What is biomechanical engineering?

16 **A.** Bio is biological; engineering is engineering.
17 Biomechanical engineering, mechanics is the study of motion.
18 So biomechanics simply takes principles of mechanical
19 engineering, chemical engineering, the other engineering
20 fields and applies it specifically to the -- to the human
21 body. It's a field that develops and -- and produces all
22 sorts of products from the arch supports in your shoes to
23 safety equipment for sports and other athletics to safety
24 equipment in our cars: the airbags, the seat belts, the padded
25 dashboards. Those are all products of bioengineering and

1 biomechanics.

2 Artificial joints. I've got an artificial knee.
3 Artificial hips and other joints and tissues are all
4 engineered. And so it -- it's a field that requires an
5 intimate knowledge not only of the human structure, but also
6 of the engineering principles that go behind it. We need to
7 be able to understand how our body responds to the
8 environment, forces, and other stimuli that come into our
9 bodies and how that -- how we respond so that we can
10 understand, for my part, how things break and how things move.

11 Q. Okay. And, again, we covered, you're not here as a
12 doctor, a medical doctor. You're not changing diagnoses or
13 anything of that nature.

14 A. No, I'm -- I'm not. I don't -- I accept the medical
15 opinion as a -- as a medical fact and I just take that and go
16 on with my job.

17 Q. In the materials -- in -- in addition to the
18 materials that you were provided by our office, did you rely
19 on anything else in forming your opinion?

20 A. I -- I did. I -- I did. I -- I'm 60 years old this
21 year, and not that that's an excuse, but there's a lot of
22 information out there, a lot of principles, a lot of new
23 research, a lot of new things that are coming up all the time.
24 And so I try to keep up to date on new papers and new things
25 that are out there.

1 So on my own, I did research. I went back and pulled my
2 books off the shelf. I reviewed information about the
3 material properties and various tissues that were involved
4 here that broke in Lincoln Penland. I looked at some of the
5 newer papers. I did searches and downloaded things and
6 reviewed and reread papers, provided those to you to provide
7 to defense counsel, just to help make sure that the foundation
8 on what I was going to do my analysis was solid.

9 **Q.** Now, having reviewed all of those materials, your own
10 as well the ones that were provided, were you able to make any
11 conclusions regarding the mechanisms of the injuries sustained
12 by Lincoln Penland?

13 **A.** I was.

14 **Q.** Okay. And what were those conclusions?

15 **A.** That they're all very easily explained and simply
16 explained by one -- one event. And that is an adult grabbing
17 Lincoln by the arms, shaking Lincoln, and while shaking,
18 forcibly causing his head to strike a -- a firm object. And
19 to strike the object, the object has to have essentially an
20 edge or a lip so that it struck Lincoln right back here on the
21 mastoid bone.

22 And -- and that's the overall conclusion, that an adult
23 had to do that, to shake and cause his head to strike a firm
24 object.

25 **Q.** Let's unpack that a little bit. You -- what is your

1 understanding of the injuries that were caused?

2 **A.** My understanding is that Lincoln sustained several
3 injuries. One was a fracture which -- may get into that, but
4 in my opinion started here in the mastoid bone and extended
5 into the lambdoid suture, the suture that goes across the --
6 the back of our head. And I think it actually extended into
7 another plate just a little bit, a small fracture.

8 He had bilateral upper humerus fractures that is in the
9 growth plate. The growth plate fractured. He had blood
10 ruptured -- ruptured blood vessels in his lumbar spine and in
11 his cervical spine. He also had ligament damage in his
12 cervical spine. He also had traumatic brain injury. He had
13 contusions, he had retinal hemorrhages, retinal folds,
14 hematomas, significant brain trauma.

15 **Q.** So as -- let's -- let's talk about all of the
16 injuries. Is it important to consider the entire
17 constellation of the injuries?

18 **A.** Well, eventually it is, yeah. I -- you can contrive
19 a scenario where you could create each of the injuries
20 independently, but when you've got a linked system, a linked
21 rigid body system with compliant joints, right? You've got
22 bones with joints with soft tissue between them. You look at
23 all these injuries and -- and the question I was asked is
24 could they be explained by one type of reasonable event or did
25 they have to be caused independently of each other? So,

1 eventually, yeah, you do have to put them all together and you
2 put them all together and the question is, is there an event
3 that explains all of them or do I have to separate them out?

4 So once I determine what would cause each of the injuries
5 I then look at them as a whole and say, are they really
6 independently caused? Are they separate events or can they be
7 explained by one event?

8 Q. Okay. So let's look at them individually first. You
9 indicated -- I -- and I -- I think I -- I would like to
10 explore this a little bit more. You talked about the fracture
11 of the skull --

12 A. Yeah.

13 Q. -- and why you felt that it had to have started down
14 just in this -- in this bone. I think it's the --

15 A. Mastoid.

16 Q. -- mastoid bone. Sorry.

17 A. Right.

18 Q. I'm not a doctor. Can you explain to the jury
19 why you -- why it's your opinion that it started here?

20 A. Yeah. It's a simple principle and I think it -- it's
21 one that if you sit down and think about it you might
22 recognize other examples in your own life.

23 When a crack propagates, when you -- when you take an
24 object, and particularly like on a -- a shell -- the skull is
25 a shell, a bony shell, and you -- and you create a fracture,

1 you -- you push on it, you create a force enough to cause a
2 fracture, that fracture is going to propagate in the easiest
3 path possible. It's not going to go from an area of the skull
4 that's easy to fracture and then go into a part of the skull
5 that is difficult to fracture. Goes the other way.

6 The fracture ex -- extends through the suture and into
7 the mastoid bone. The mastoid bone is one of the thickest
8 parts of the skull, one of the most difficult to fracture.
9 That fracture will not start in the suture and then propagate
10 into the thick bone. It has to go the other way. It's just
11 property of material science. So the fracture had to start in
12 the mastoid, and that means that's where the force was
13 applied.

14 **Q.** Okay. So let's talk about that. Why do you say that
15 that's where the force had to have been applied?

16 **A.** Well, there are two general ways that -- that you can
17 cause an injury, and we'll talk about a skull. You can have
18 a -- a constrained force; that is, you've got one -- one --
19 one side of the head is against another object that is
20 difficult to move or immovable and then a force is applied
21 opposite that. And so when that occurs, you not only would be
22 applying forces here, but you'd have to be applying forces
23 opposite the mastoid bone. That is on this part of Lincoln's
24 face. These are weak bones, so --

25 **Q.** And I note that -- for the record, because we're not

1 recording it --

2 **A.** Oh.

3 **Q.** -- you're pointing to your cheek.

4 **A.** The -- the facial bones. If you push on the mastoid
5 you're going to have an equal and opposite force on the face.
6 When -- when that kind of a force is applied sufficient to
7 break this bone, which is essentially the strongest bone in
8 the skull, there are no fractures in Lincoln. So that
9 automatically rules out a constrained fracture. It's also a
10 very awkward spot to apply a force. It's not -- it's just an
11 awkward spot because the head is -- is essentially round and
12 it's protruding and to get into this area you have to work at
13 it.

14 So I rule out the constrained forces because there are no
15 other fractures. We only have a -- a simple fracture, what's
16 called a linear fracture. It isn't compound, it isn't
17 crushing. It's a linear fracture. It's from an impact, then
18 propagates up into the suture.

19 The other type is unconstrained; that is, the head
20 doesn't have a -- a resistive force on the other side. It's
21 being struck. Either that the head is being forced into an
22 object or an object is being forced into the head. And --
23 and so when we look at that, this fracture is consistent with
24 and tells me that this was an -- that's okay.

25 **UNIDENTIFIED JUROR:** (Coughing) Sorry.

1 **THE WITNESS:** No, it's okay.

2 **A.** That this was an unconstrained impact, that there was
3 a force applied to Lincoln back here that then propagated into
4 the suture.

5 **Q. (BY MS. TOOMBS)** Okay. And that explains the skull.
6 Let's talk about the fractures of the arms, if we could.

7 **A.** Sure. And, in fact, that was one of the first things
8 I looked at was starting with the arms. The -- the arm -- the
9 shoulder joint is -- is one of the most flexible joints we
10 have in our body. In fact, it's probably the sloppiest joint
11 we have.

12 To cause -- to cause a fracture up here, you have to
13 constrain the torso and the head of the humerus. You have to
14 somehow constrain that little short piece of bone -- which it
15 is in an infant -- or you constrain the humerus. In -- in
16 Lincoln's case, both humeri, you have to constrain those and
17 then move the torso. That occurs if you grab the arms and
18 shake.

19 And in doing that, you create a bending moment right up
20 here in the weakest spot is the -- the growth plate. And so
21 that -- that injury is perfectly explained by grabbing Lincoln
22 and shaking forcibly. And it has to be a relatively large
23 force.

24 **Q.** Okay. What about the -- you talked about the
25 hematomas in the brain.

1 **A.** Yes.

2 **Q.** Did you -- were you able to form any kind of an
3 opinion about those?

4 **A.** I was.

5 **Q.** Okay. If you'll explain to the jury.

6 **A.** Brain -- brain injury has been studied for decades
7 and decades. The -- the most pertinent studies are -- are
8 done trying to -- to compare humans to primates. They've also
9 done cadaver studies. They will take -- as gruesome as it may
10 sound, they will take adults and -- and young adults --

11 **MS. BLUM:** Can I have a minute?

12 **MS. TOOMBS:** Yes.

13 **THE WITNESS:** Okay.

14 **MS. BLUM:** Sorry.

15 **MS. TOOMBS:** Your Honor, if we could take a break
16 real quick? Sorry.

17 **THE COURT:** Go ahead, Ms. Blum.

18 **MR. BUSHELL:** Do you need some water?

19 **UNIDENTIFIED SPEAKER:** Do you need water?

20 **MS. BLUM:** I've got a tickle in my throat.

21 **THE COURT:** Can we get you anything or --

22 **MS. BLUM:** Yeah. Some water would be great.

23 **MS. TOOMBS:** Okay. Here we go.

24 **THE COURT:** Okay.

25 **MS. TOOMBS:** Sorry, I thought you had some.

1 **MS. BLUM:** I apologize.

2 **MR. MILES:** Judge, I've also got Halls.

3 **MS. TOOMBS:** Don't apologize.

4 **THE COURT:** Well, if she trusts that, that's fine.

5 **MR. MILES:** Is it -- we would offer Halls.

6 **MS. TOOMBS:** She's got --

7 **THE COURT:** We've got some lozenges.

8 **MS. TOOMBS:** -- a Halls.

9 **MS. BLUM:** I'm good.

10 **THE COURT:** Are you okay?

11 **MS. BLUM:** I will be.

12 **THE COURT:** Okay.

13 **MS. BLUM:** Okay. Hopefully I'm good.

14 **MS. TOOMBS:** Do you want to take just another minute?

15 **MS. BLUM:** No, I'm good.

16 **THE COURT:** Okay. Just raise your hand, again, if

17 we're -- if you need a break.

18 **MS. BLUM:** Okay.

19 **Q. (BY MS. TOOMBS)** I think we were talking about the

20 hematomas in the brain.

21 **A.** Right. So the -- the research has shown over -- over

22 the years with primates and cadavers and analytical methods

23 using finite element modeling and -- and all the rest that

24 you -- there are two basic categories. You can have

25 diffuse -- diffuse injuries in the brain or you can have

1 focused, focal injuries, bruising and contusions and broken
2 blood vessels that bridge between the brain and the skull.
3 And -- and they're caused by different types of forces.
4 Diffuse injuries are -- are associated with angular motions.
5 Focused injuries are associated with direct impact, a hematoma
6 or contusion, those sorts of things.

7 What these researchers have also found is that typically
8 in an infant that when you have diffuse injuries and focal
9 injuries and the -- and the constellation that we see in
10 Lincoln, that that is usually a result of not only shaking,
11 but also an impact. And it doesn't have to be on cement or
12 something really hard. It could be on a changing table with
13 a -- with a pad or on a carpet, on a -- on a hard floor. But
14 it's that extra push with the impact that actually causes
15 the -- the final energy input into the system to cause the
16 injuries.

17 The brain is a -- is a funny structure. It's not a -- it
18 isn't meant to withstand forces. In fact, it's cushioned and
19 protected in our skulls with cerebral spinal fluid and -- and
20 the rest. But -- but it -- it's a viscoelastic substance and
21 so it -- it responds differently how fast you try to make it
22 move.

23 A single shake probably won't cause any substantial
24 significant injury in an infant. Multiple shaking actually
25 could because you start setting up vibrational resonances

1 which increase the energy that is -- that is absorbed by the
2 system.

3 But in a case like this, the injuries that Lincoln had
4 had -- are -- are best explained by shaking accompanied by a
5 strike. That explains the fracture. It explains the diffuse
6 injuries. It explains the hematomas. It explains the -- the
7 entire constellation. It can also be associated and is a --
8 is a perfect explanation for the retinal hemorrhaging and
9 folds. And while those can be caused, again, independently by
10 other means, it fits into the constellation of shaking and
11 hitting Lincoln's head.

12 **Q.** Okay. Now, you talked about the ligament -- ligament
13 strain and the blood -- the damage in the cervical area as
14 well as in the lower lumbar spine.

15 **A.** Yes.

16 **Q.** When -- did you provide us with a, I guess, diagram
17 of the spine when we met?

18 **A.** Yeah, I -- I did. I did.

19 **Q.** And would it be helpful for you if -- if I put that
20 up on the screen so you could explain to the jury?

21 **A.** Probably, yeah.

22 **MS. TOOMBS:** Your Honor, may he stand down and -- and
23 approach the screen as we go through this?

24 **THE COURT:** Yes.

25 **THE WITNESS:** Thank you, Your Honor.

1 **Q.** (BY MS. TOOMBS) Does this look familiar to you?

2 **A.** It does. Thank you.

3 **Q.** Okay. And we are looking at Exhibit 92. I think
4 that this has been previously admitted. Okay.

5 Is this a -- a diagram that you're familiar with?

6 **A.** Yes, it is.

7 **Q.** Can you explain to the jury what we're looking at?

8 **A.** Yes. The -- the key feature here is to note that we
9 have bones, rigid bodies is what I'll refer to them. They're
10 the vertebrae, but they're -- they're rigid bodies and there
11 are compliant joints, the discs or soft tissue, in a -- a
12 wonderfully designed, developed mechanical structure to bear
13 axial loads and to allow extreme flexibility.

14 Coming down the back we have the spinal cord, and
15 throughout the whole structure, we have blood vessels and
16 other supporting structures: ligaments, tendons, cartilage,
17 joints that -- that constrain and help determine the motion of
18 the supporting musculature.

19 We have bleeding in Lincoln in the lumbar spine and in
20 the cervical spine. Blood vessels -- I've used the word a
21 lot -- are viscoelastic. And what that really means is they
22 become stiffer and stronger the faster you try to stretch
23 them. I'm still able to bend over and bend backwards and move
24 my head back and forth, and I'm not rup -- rupturing blood
25 vessels or nervous tissues or muscles or anything else. I'm

1 doing it slowly. I'm doing it physiologically.

2 When we try to make these tissues, particularly the soft
3 tissues, move rapidly, they don't want to move. They get
4 stiff and you have to pull on them harder to get them to move.
5 And so to get the same bending motion, if I do it rapidly, I'm
6 going to put a lot more stress and force on those soft
7 tissues.

8 It -- it's kind of a -- a very simplistic, I guess,
9 example, but Silly Putty. You take a piece of Silly Putty and
10 you pull it and it will stretch for a long ways. If you pull
11 it rapidly, it breaks with a very flat, almost rough surface.

12 A bowl full of corn starch paste is the same. You can
13 push your finger into it slowly, just goes in. If you do it
14 rapidly, it almost turns into cement.

15 Water is another. You can get into a pool from the side,
16 slip in and you don't feel any resistance. But if you try to
17 walk or run through the water, it resists you, a belly flop.
18 It's almost like hitting cement.

19 So in Lincoln, when I see blood vessel ruptures here and
20 here, that tells me that we were focusing motion in those
21 areas and that that motion was rapid beyond what those blood
22 vessels would normally see in just bending over, twisting, and
23 doing that.

24 That, again, fits perfectly with the idea of grabbing
25 Lincoln's arms and shaking, the head moving backward and

1 forward rapidly, the pelvis and the legs bending the lumbar
2 spine rapidly, the -- the thorax is stiffened naturally
3 because of the rib cage and, also, that's where the force is
4 being applied. So the legs are left to whip back and forth
5 and the head is left to whip back and forth causing the blood
6 vessel failure at those two locations.

7 Q. Thank you.

8 So at this point, you have examined all of the injuries.
9 Would you have an opinion as to -- and I think you've already
10 clearly stated what your opinion is, but I'd like to unpack it
11 a little bit more.

12 I term it in terms of direct versus indirect injury,
13 specifically to the vertebral column. Do you have an opinion
14 as to whether or not it's an indirect versus a direct
15 meaning -- and maybe I should ask, do you understand what I'm
16 saying when I say direct versus indirect?

17 A. I -- I don't.

18 Q. So could those -- those injuries have been caused,
19 for example, by a kick in that area?

20 A. No.

21 Q. Why not?

22 A. Well, the -- the bruising and the bleeding is -- is
23 too deep. It isn't a superficial bruise or blood vessel.
24 They're deep blood vessels that have been stretched and -- and
25 ruptured that way.

1 **Q.** Okay. So you -- your -- you're confident that you
2 have ruled out other causes other than what you have described
3 to the jury at this point?

4 **A.** Yes.

5 **Q.** In that.

6 **A.** Yes.

7 **Q.** Okay. Have you been -- are you aware, I guess, that
8 there was a comment on February 19th that Lincoln had been
9 rocking back and forth in his chair, bumped his head and began
10 crying. Are you aware of that --

11 **A.** Yes.

12 **Q.** -- statement?

13 Have you had an opportunity to examine the highchair?

14 **A.** I have.

15 **Q.** Okay. And I'm going to show you what's been marked
16 State's Exhibit 147. Does this look familiar to you?

17 **A.** Yes, it does.

18 **Q.** Okay. As we look at this highchair, is -- is that
19 the highchair that you examined previously?

20 **A.** Yes.

21 **Q.** Were you able to make any conclusions as to whether
22 or not Lincoln could have fractured his skull by rocking back
23 and forth and hitting his head on that highchair?

24 **A.** Yes.

25 **Q.** What was your opinion?

1 **A.** You can't. You can't develop sufficient energy and
2 speed or momentum. The -- it's a -- I mean, you could call it
3 a firm surface, but it -- Lincoln doesn't have the energy or
4 the muscular strength at nine months to -- to generate enough
5 speed in his head to cause a fracture by striking his head
6 there.

7 **Q.** Would that explanation, assuming the -- the forces
8 aligned, explain any of the other injuries that you saw in
9 Lincoln?

10 **A.** No. It wouldn't explain the arms, it wouldn't
11 explain the bleeding in the -- in the lumbar spine. It -- it
12 very remotely might explain the cervical spine because he is
13 moving his head rapidly, but in a single strike backwards like
14 that, it just -- it's not reasonable. For Lincoln's head
15 scaling is based on what Ommaya has said. He -- he'd need to
16 have the speed against a hard object, like a cement object, of
17 about 13 miles an hour linear velocity on his head to create
18 enough force to start causing a skull fracture. And that
19 would be -- probably higher, certainly higher, in the
20 strongest part of the skull.

21 **Q.** So it would take -- and I -- I want to make sure I
22 understood. How -- in your scientific professional opinion,
23 you have -- you've reviewed the materials. In fact, you've --
24 counsel has asked other witnesses if they are familiar with
25 Ommaya. Are -- and I believe you just used Ommaya's name in

1 discussing this. In reviewing all of the facts and the
2 science and the scaling, your opinion is that Lincoln's head
3 would have had to have been going how fast?

4 **A.** Well, against a hard object, about 13 miles an hour.
5 Whether he is struck on the head -- his head has to go from
6 about zero to 13 miles an hour in -- on the order of about
7 five to 10 milliseconds, five to 10,000th of a second. And
8 then that's -- that's represented by -- you know, a fall
9 directly onto his head from about 5 feet, maybe 6 feet, or it
10 would be comparable to something striking his head with enough
11 momentum and energy to accelerate his head with that kind of a
12 force.

13 **Q.** Just not possible for him to self-inflict on -- on
14 this highchair.

15 **A.** Not -- not physically, not on that highchair.

16 **Q.** Okay. Did you also learn about the -- an allegation
17 that a three-year-old brother may have caused some of these
18 injuries?

19 **A.** Yes.

20 **Q.** Specifically, did you look at various different
21 scenarios which may have explained some of the injuries that
22 Lincoln sustained being caused by a three-year-old?

23 **A.** Yes.

24 **Q.** Okay. Let's go through what you -- what scenarios
25 you considered, if you would. I think that we've already

1 covered the -- the highchair fairly well. Did you also
2 consider a kicking by a toddler?

3 **A.** Yes.

4 **Q.** Okay. Please explain to the jury what your
5 conclusion is and what under -- what underwent (sic) that
6 conclusion.

7 **A.** Sure. When -- when an individual kicks an object you
8 look at the effective masses of the leg and the object that's
9 being kicked. When you kick an object, you're -- you're not
10 really getting the full mass and momentum of your body. Maybe
11 a soccer player running down a field kicking a ball, but just
12 standing there and kicking, you really only have the momentum,
13 the energy that develops in your leg. And so you look at the
14 effective mass of -- of Boston's leg as opposed to the mass of
15 Lincoln's head and what the relative speed would have to be of
16 Boston's foot striking Lincoln's head.

17 So in -- in order to -- in an unconstrained -- remember,
18 we don't have anything on the other side of Lincoln, otherwise
19 we'd get those injuries that are missing. So to kick
20 Lincoln's head, Boston would had to have kicked Lincoln's head
21 and Boston's foot would have to have been traveling about
22 twice the 13 miles an hour. Because, remember, when you --
23 when two objects collide, there's an equal and opposite force.
24 Billiard balls. Two billiard balls hit, you hit one, the one
25 stops, and the other one goes off at the same speed.

1 It's that sort of a situation, except that it's not hard.
2 It's compliant. We've got Boston's foot which is going to
3 bend. We have that mass hitting Lincoln's head which is about
4 the same effective mass as Boston's leg.

5 So when you have two objects of about the same mass,
6 Boston's leg is going to slow down by about as much as
7 Lincoln's head speeds up. Lincoln's head has to speed up to
8 about 13 miles an hour. Boston's foot has to be going about
9 26 in order to get Lincoln's head up to 13 in that kind of a
10 time frame. And that's not physically possible.

11 **Q.** And to be fair, you are -- you -- you're basing this
12 off of the average three-year-old toddler. You didn't measure
13 Boston's mass or --

14 **A.** No. No, using biometric data.

15 **Q.** Biometric data. Something that you rely on in your
16 field.

17 **A.** Yes.

18 **Q.** Okay. What about the theory that Boston -- and were
19 you -- were you notified that Boston was about 30 pounds?

20 **A.** Yes.

21 **Q.** Okay. What about the theory that Boston picked up
22 Lincoln and threw him down?

23 **A.** Again, we -- we come back to that scaling of forces.
24 Lincoln's head needs to go through a change in velocity. It
25 has to go from 13 miles an hour to zero. It needs to fall

1 from a height of about 6 feet, 5 feet, to achieve that speed
2 onto a hard surface.

3 So Boston would have to have -- one of a couple of
4 things -- picked Lincoln up and forcibly thrown him down or
5 lifted him up to a sufficient height and oriented Lincoln just
6 so that he would strike with full force right there on his
7 head first.

8 The -- the body is a link rigid body so it doesn't
9 necessarily play into the mass, but Lincoln's head has to hit
10 here at that speed. A typical two- to five-year-old male has
11 a pushing and pulling strength, both arms, of about 21 pounds.
12 That means he can push on Lincoln with about 20 pounds of
13 force.

14 In order for an individual to push Lincoln down through a
15 distance of about two-and-a-half feet, you'd have to push on
16 Lincoln with about 40 pounds of force. Through a distance of
17 two feet, about 50 pounds. Through a distance of
18 one-and-a-half feet, you'd have to push him with 66 pounds.
19 And that's -- that's beyond the physical capability of an
20 average two- to five-year-old.

21 **Q.** So your conclusion is that's not --

22 **A.** It -- it didn't happen. And with a push-pull
23 strength of 20 pounds, Lincoln is about 17 or 18 pounds. I
24 mean, we're almost at the limit of what an average two- to
25 five-year-old could lift anyway. And then to try lift that up

1 onto a -- an object that is four, five, six feet off the
2 ground, it just doesn't become physically reasonable.

3 Q. Did we also ask you to consider other scenarios that
4 hadn't been presented in this other statement? For example,
5 jumping on Lincoln's head.

6 A. Yes, I -- I did. I considered several.

7 Q. Okay. And what were those -- those things that you
8 considered?

9 A. Well, again, Lincoln would have to be positioned --
10 well, the jumping. First of all, it's ruled out because
11 that's a constrained impact. Boston would have to hit Lincoln
12 exactly right and have Lincoln's head positioned so that
13 Lin -- so that Boston lands here or lands here and -- and
14 pinches Lincoln's head between the two forces. And then you
15 would see other injuries. The skull would be fractured, maybe
16 even, at that point, crushed.

17 Boston would have to jump from a height sufficient to
18 achieve the kinds of speeds we're talking about. So he would
19 have to jump from a height of four, five feet. He'd have to
20 land stiff-legged on Lincoln and land perfectly so that he
21 came to a stop on Lincoln. All that energy would have to go
22 into the force on Lincoln's head. And -- and it's just not
23 physically reasonable to -- to consider that kind of a
24 scenario.

25 Q. In those kinds of scenarios, even -- even the

1 scenario of kicking, would those also -- would you also expect
2 to see injury to Boston?

3 **A.** Possibly, yeah. Particularly jumping. I mean, he's
4 jumping from quite a height and unless he's a -- an extremely
5 unique and advanced young man, he's going to tumble and fall.
6 He may fall onto his hands, fall onto his head as he stumbles,
7 trying to land on Lincoln's head. We're going to see equal
8 and opposite forces on Boston and -- and that's going to cause
9 injury, in many of those scenarios.

10 **Q.** Okay. Did you also consider the possibility that
11 something else caused the fracture? For example, a door
12 slamming on Lincoln's head?

13 **A.** Yes.

14 **Q.** First off, let's talk about how Lincoln would get to
15 the door. Boston picked up or dragged Lincoln. Did -- were
16 you able to come to any conclusions based on the likelihood of
17 that happening?

18 **A.** Well, I -- I don't know that Boston could pick
19 Lincoln up and carry him for very far just simply because of
20 the -- the strength consideration and the weight of Lincoln.
21 He certainly could drag him. And, I mean, I -- that's --
22 that's not out of the realm of possibilities. Certainly could
23 have dragged Lincoln over to a door and either -- and -- and
24 swung the door onto Lincoln.

25 But, again, the door -- if it's a constrained sort of a

1 situation, that's eliminated because it's not a constrained
2 impact injury pattern. It has to be unconstrained where
3 there's nothing resisting Lincoln on the other side. The door
4 would have to hit Lincoln at such a speed so that the
5 effective mass of the door would generate a change in speed on
6 Lincoln's head of about 13 miles an hour, producing forces in
7 the 2- to 300-pound range at the very least because, again,
8 we're striking Lincoln here. The door -- Lincoln's head would
9 have to be positioned exactly right so that the door would hit
10 here and do the damage.

11 It's -- it's an awkward position on a floor to -- to
12 position Lincoln like that so that only that is -- is exposed.
13 It's -- the simplest answer is that Lincoln's head was thrown
14 down over the edge of a -- of something firm or hard.

15 **Q.** I'm going to show you some (unintelligible).

16 **MR. MILES:** Do you want this handout?

17 **MS. TOOMBS:** The handout.

18 (Off-the-record discussion)

19 **MR. MILES:** Eighty-six.

20 **MS. TOOMBS:** I apologize.

21 **MR. MILES:** Not 85. Eighty-six.

22 **MS. TOOMBS:** Okay. I'm going to take 85 and 86.

23 **Q. (BY MS. TOOMBS)** Now, were you also informed that law
24 enforcement located a changing table that had a crack in
25 the -- in the top of the changing table?

1 **A.** Yes.

2 **Q.** Okay. And were you provided a number of photographs
3 of that changing table?

4 **A.** Yes.

5 **Q.** Did you also personally examine the changing table?

6 **A.** I did.

7 **Q.** And when you talk about a force or -- or an impact
8 that would hit Lincoln's head in such a way that it would
9 allow his neck -- I believe. I've now lost track of what you
10 said. But I'm going to -- let me just do this.

11 Let me show you what's been marked State's Exhibit 85 and
12 86 and ask if those pictures would help you inform the jury
13 what you're talking about when you refer to the extension of
14 the head.

15 **A.** Well, they would eventually.

16 **Q.** Okay.

17 **A.** There -- there's some other, I think, foundation they
18 need to understand first.

19 **Q.** Okay. Let's go through that.

20 **A.** Okay. I was provided photographs of the changing
21 table. And as an engineer, I looked at it the same way I did
22 everything. I didn't just assume or conclude or -- or accept
23 that that was where the event occurred. I wanted to look at
24 the evidence on the changing table and I could see a couple of
25 very important features to me.

1 First of all, the top of the table is very weak. It's a
2 very thin particle-type board, pressed board. Would not
3 require very much energy to break through. And it just wasn't
4 reasonable to me that -- that the top of that changing table
5 could resist with enough force to cause any fracture in any
6 skull, no matter how hard it hit.

7 I understood too, though, that down the middle,
8 crossways, there is a -- a one-by-one, I think -- I forget the
9 exact dimensions, but not very big. But there is a
10 crossmember where a strap is also attached and the crossmember
11 adds some stiffness. Underneath that is a vertical panel, and
12 underneath the vertical panel is another piece of wood. It's
13 effectively an I-beam. And so you get the webbing, that
14 vertical panel, and in connection with the top crossmember and
15 the bottom crossmember provides a very stiff and strong
16 structural member to that changing table.

17 I looked at the fracture on the table. There's a
18 semicircular section about six, seven inches in effective
19 diameter right at the crossmember and just beyond it. It's
20 crushed. You can see where a round object was forced into the
21 table at that point. You could see fractures radiating away
22 in through that weaker part suggesting some other object also
23 struck and punched partway through the top of the table.

24 Didn't go all the way through. If a child had stepped on
25 it or some object had fallen on it or a different shape object

1 was slammed onto it, you would see different fracture
2 patterns, stress concentrations, other lines and fractures in
3 it. This was a round object that hit right at that
4 crossmember, didn't break the crossmember, but broke partway
5 through the changing table top.

6 Because it is still hinged, I could tell that a big
7 object didn't fall all the way through. It would have broken
8 it, broken at the hinge point.

9 So what that told me was that a round object hooked to
10 something was -- struck that. You know, think of a ball on a
11 pole, a hard ball on a pole was struck right at that point and
12 left that fracture pattern in the -- in the changing table.

13 **Q.** Okay. Now you've mentioned this a couple of times, a
14 body or a -- or a foot stepping on it. Were you also informed
15 that there was a claim that the defendant's, Tisha Morley's,
16 four-year-old daughter broke the changing table by climbing on
17 it and using it to get into the crib?

18 **A.** I was. And -- and, honestly, a four-year-old
19 stepping on that and pushing off of it probably could step
20 through that -- that panel, but it wouldn't leave this
21 pattern. It was a very unique pattern. That round crushing
22 was far too wide for the -- the heel or foot of a
23 four-year-old. And the four-year-old, the leg would have
24 continued all the way through. Probably the entire
25 four-year-old would have gone through. There would be nothing

1 left to support the weight.

2 And -- and that just didn't occur so that -- that was an
3 event that I ruled out as being associated with the damage
4 that I saw on the changing table.

5 Q. Okay. So I'm going to actually now drag out the
6 changing table. We've talked a lot about it. Is this the
7 changing table that you had an opportunity to examine?

8 A. Yes, it is.

9 Q. Okay. And the fracture that you have referred to
10 is -- is right here?

11 A. Yes.

12 Q. You've also talked about a secondary fracture.

13 A. Yes.

14 Q. And you've talked about a center structure, correct?

15 A. Yes.

16 Q. If I -- if I'm looking at this, I guess, bolt, are
17 you aware of where that bolt goes into?

18 A. Yes.

19 Q. And where does it go?

20 A. It goes into that crossmember.

21 Q. Okay.

22 MS. TOOMBS: At this point, Your Honor, I would ask
23 that the jury be allowed to step down and press -- I -- I
24 encourage you to press on the bolt itself -- don't move any
25 further -- as hard as you want and then just very gently press

1 on the -- the pressed board, if you would.

2 **THE COURT:** Okay. From the defense, any objection?

3 **MR. BUSHELL:** No.

4 **THE COURT:** Okay. The jury may step down, then, and
5 examine the changing table in the fashion mentioned by
6 Ms. Toombs.

7 (Pause in proceedings)

8 **Q. (BY MS. TOOMBS)** After examining this changing table,
9 in light of all the evidence -- well, let me step back a
10 little bit and refer you back to Exhibits 85 and 86.

11 **A.** Yes.

12 **Q.** Do those pictures represent what you have just talked
13 to the jury about, about a round object with a fixed body at
14 the end of it?

15 **A.** Absolutely.

16 **MS. TOOMBS:** Permission to admit -- or move to admit
17 Exhibits 85 and 86.

18 **THE COURT:** Okay. Have you seen those?

19 **MR. BUSHELL:** I don't believe so.

20 **MS. TOOMBS:** Let me refresh them.

21 **THE COURT:** Okay.

22 **MS. TOOMBS:** He has, but it's been a minute.

23 **MR. BUSHELL:** It's been a long week.

24 **THE COURT:** Any objection from the defense?

25 **MR. BUSHELL:** No, Your Honor. Thank you.

1 **THE COURT:** Okay. State's Exhibits 85 and 86 are
2 received.

3 **MS. TOOMBS:** Permission to approach?

4 **THE COURT:** Yes.

5 **MS. TOOMBS:** Thank you.

6 **THE COURT:** Thank you.

7 **MS. TOOMBS:** And publish.

8 **THE COURT:** Any objection to the publication?

9 **MR. BUSHELL:** No, Your Honor. Thank you.

10 **THE COURT:** Okay. May be published to the jury.

11 **MS. TOOMBS:** Okay.

12 **Q. (BY MS. TOOMBS)** Looking specifically at 85, what
13 are -- what are we looking at here?

14 **A.** May I step down?

15 **Q.** Yes, please do.

16 **THE WITNESS:** May I step down, Your Honor?

17 **THE COURT:** Yes.

18 **THE WITNESS:** Thank you.

19 **A.** Eighty-five is an example of a surrogate infant
20 showing that the physical dimensions and location of the head
21 in relationship to the fracture and the length and breadth of
22 the changing table are consistent with the -- the opinion I
23 had formed that Lincoln was grabbed, shaken, and -- and was
24 forcibly caused to strike some firm object.

25 This changing table becomes a -- is becoming more and

1 more likely to be the location where the injury occurred.

2 Q. And moving to Exhibit 86, can you ex -- use that to
3 explain what you mean.

4 A. I will. There are a couple of features to look at.
5 You pushed on there vertically. I saw -- I watched you all.
6 Remember, though, that if -- if -- if Lincoln -- assuming
7 Lincoln was shaken and thrown down on the table like this,
8 it's happening in an arc. And as his head strikes, you can
9 see that the mastoid -- that the head here is perfectly
10 straight up. It wouldn't be unusual if the head were rotated
11 to one side or another.

12 But you not only get a vertical force, but because it's
13 in an arc, you're also getting part of the force directed this
14 way. So the resulting force is not straight down on here, but
15 it's coming at an angle onto the corner, essentially, of that
16 support beam. So you not only have vertical, but you also are
17 coming this way, which explains why the force was concentrated
18 here.

19 Q. Thank you. You may retake your seat.

20 MS. TOOMBS: I just want to review and make sure I've
21 covered everything that -- if I may have just one second.

22 (Pause in proceedings)

23 Q. I -- I need to just kind of loop back and make sure.
24 I think we've covered some of this, but I'd like to go through
25 it in a little bit better detail.

1 You talked about the bilateral fractures and how the --
2 bilateral humeral fractures and how those are consistent
3 with -- I believe you described it as a -- in the shaking as a
4 bending break? Is that --

5 **A.** Yes.

6 **Q.** Okay. And I apologize because I don't remember if
7 that was without the jury or with the jury, so I'm going to
8 ask you to go over it again, if we could.

9 **A.** Sure. The -- the fractures in the upper humeri are
10 consistent with one of two mechanisms. We either -- like I
11 was saying -- constrain the upper body and the -- and the head
12 of the humerus. You have to grip that so it doesn't rotate in
13 the shoulder and then bend the arm back and forth.

14 Or you grab the arms and shake the torso and that creates
15 a bending moment. I -- I believe it was characterized as a
16 bucket-handle fracture --

17 **Q.** Uh-huh.

18 **A.** -- which is consistent with a bending-type fracture.
19 I -- I didn't bring my chalk. Fracture surfaces tell you a
20 lot about the forces that are applied. If you twist a piece
21 of chalk you get a nice spiral fracture. If you push on a
22 piece of chalk you get an oblique fracture at an angle. If I
23 snap a piece of chalk or pull on it, I get a -- a -- basically
24 a flat fracture surface. And -- and the bucket-handle
25 fracture is most consistent with a bending motion. So that's

1 taking the -- the upper arms, constraining them by holding
2 them, and then shaking the body causing that bending moment up
3 there.

4 **Q.** And would any of the scenarios that you looked at
5 previously explain the presence of those two bilateral
6 fractures?

7 **A.** No. No, not at all.

8 **Q.** Having reviewed all of the materials, having looked
9 at the changing table, having examined the -- the injuries to
10 Lincoln, as well as your own research, were you able to come
11 to a conclusion regarding the causation mechanism of the
12 injuries sustained by Lincoln Penland on February 19th, 2014?

13 **A.** Yes.

14 **Q.** And what was that conclusion?

15 **A.** The -- the conclusion is -- it was effectively a
16 single event where an adult grabbed Lincoln, shaking him,
17 forcibly causing his head to strike a firm object which is
18 perfectly explained by the fracture in this changing table.

19 **Q.** Are you familiar with the term Ockham's razor?

20 **A.** I -- I am.

21 **Q.** And what is that?

22 **A.** It's actually a scientific principle I learned one of
23 the first days in my first physics course I took. It's a
24 principle that states, in effect -- and it's not absolute.
25 It's almost philosophical. But it states, basically, if you

1 have competing theories to explain a phenomenon, the simplest
2 theory is the most likely explanation.

3 The simplest theory here is that an adult grabbed
4 Lincoln, shook him, and slammed him onto the changing table.
5 We can contrive other very complicated individual and
6 independent scenarios to explain all of the other injuries,
7 but -- but none of them are -- are simple, none of them
8 explain all of the injuries, and all of them have problems,
9 physically, and -- and reasonably. They -- they just don't
10 explain it adequately.

11 So by Ockham's razor, the -- the solution is what I've
12 stated. An adult caused those injuries to Lincoln.

13 **MS. TOOMBS:** No other questions, Your Honor.

14 **THE COURT:** Okay. From the defense?

15 **CROSS-EXAMINATION**

16 **BY MR. BUSHELL:**

17 **Q.** Mr. Ingebretsen, I -- bring me up to speed. Remind
18 me again, how did this matter come to you?

19 **A.** Ms. Toombs, I believe, called me or called my office
20 and asked me if I could take a look at a case and answer some
21 questions that she had.

22 **Q.** Okay. And that occurred when?

23 **A.** That occurred October 8th, 2015.

24 **Q.** Okay. Did you ask Ms. Toombs how she had come to
25 you?

1 **A.** I think she had already hired me on a case.

2 **Q.** Previously.

3 **A.** Yeah. If not her, maybe somebody from her office.

4 **Q.** From the Weber County Attorney's Office?

5 **A.** I think so. I'm not -- I mean, we've already
6 discussed this. I've had just a handful of criminal cases in
7 my career.

8 **Q.** Okay. And I know we've already discussed this. It's
9 true that none of those criminal cases -- even though there's
10 just a few -- none of them, ever, have involved child abuse
11 homicide.

12 **A.** That's true. One was a homicide, one was a child
13 abuse -- two were homicides, actually, and one was child
14 abuse.

15 **Q.** And -- but you have testified lots of times in court.
16 I think your testimony was in civil matters, primarily,
17 correct?

18 **A.** Yes.

19 **Q.** Have you ever testified as a biomechanical engineer
20 in a child abuse case that involved shaking?

21 **A.** No. The child abuse case I had wasn't shaking. It
22 was a femur fracture, actually.

23 **Q.** So this is the first case of this kind for you to
24 testify as a biomechanical engineer, correct? In a child
25 abuse case -- a child homicide case?

1 **A.** Right. I mean, I've -- I've testified a lot about
2 brain injuries and shaking and those sorts of issues, but not
3 in a -- specifically not in a child abuse fatality shaken
4 baby.

5 **Q.** Okay.

6 **A.** I mean, I -- I could say that about every case I
7 almost testify in. Each one is very unique and embodies
8 unique characteristics, some similarities, but each case is
9 different. Otherwise, I'd be out of a job. If each case were
10 the same, I'd testify once and then I'd be done for my career.

11 **Q.** Well, in those few criminal cases that you have
12 testified in as a biomechanic engineer, have you ever
13 testified on behalf of defense counsel?

14 **A.** Yes.

15 **Q.** You have?

16 **A.** Yeah.

17 **Q.** What was that case?

18 **A.** And you said child abuse?

19 **Q.** Criminal case -- criminal case.

20 **A.** Criminal case.

21 **Q.** Have you ever testified on behalf of defense counsel
22 in a criminal case?

23 **A.** Well, never on behalf of the counsel -- on behalf of
24 the defendant.

25 **Q.** Sure.

1 **A.** Yeah, and I -- I don't want to pick bones, but --

2 **Q.** Have you been hired by defense attorneys --

3 **A.** Yes.

4 **Q.** -- in a criminal case?

5 **A.** Yes.

6 **Q.** Okay.

7 **A.** At least twice.

8 **Q.** And -- but in this scenario you were hired by the
9 State of Utah?

10 **A.** That's correct.

11 **Q.** Prosecuting attorneys.

12 **A.** That's correct.

13 **Q.** And you're being compensated financially for your
14 services.

15 **A.** Yeah. This is my job.

16 **Q.** Sure. And this afternoon -- in fact, just a few
17 minutes ago, I believe you testified that these injuries were
18 consistent with Lincoln being -- I believe your familiar
19 refrain was grabbing -- grabbed, shaken, and slammed; is that
20 correct?

21 **A.** I may have said slammed. I think I said forcibly
22 caused to strike.

23 **Q.** Okay.

24 **A.** I try to -- I try to avoid those sorts of emotional
25 terms because they don't have engineering meaning. If I said

1 slam, I -- I'll replace it with forcibly strike.

2 Q. But your -- your refrain was grabbed, correct?

3 A. Held.

4 Q. And then shake -- okay. And then shakes and then
5 forcibly --

6 A. Caused to strike.

7 Q. -- caused to strike. I know we went over this, but
8 just looking over your -- you do not have a Ph.D. in
9 biomechanic engineering, true?

10 A. That's -- that's -- long story, but that's true.

11 Q. Okay. And throughout your entire career spanning
12 several decades, you have published one official paper,
13 correct?

14 A. That's correct.

15 Q. And that was 1989, correct?

16 A. That's correct.

17 Q. The title of that was Notes on Real-time Vehicle
18 Simulation.

19 A. Correct.

20 Q. To which you were a co-author, true?

21 A. That's true.

22 Q. So it's not as though your CV is lacking anything --
23 or that this is up to date?

24 A. Yes, it -- it should be. What -- there's a date on
25 the bottom of it. It's November something. It's --

1 Q. November 10th, 2015.

2 A. Yeah, that's correct.

3 Q. Okay.

4 A. I don't think I've --

5 Q. But since that time, you have not published any

6 papers in any peer review publications, true?

7 A. That's true.

8 Q. No publications in any peer-reviewed research

9 publications regarding biomechanics.

10 A. That's true.

11 Q. Or in any medical journals.

12 A. Oh, absolutely true. I am busy now. I've never been

13 in academics.

14 Q. Are you considered --

15 A. When I did other work I was classified -- I mean,

16 I -- I just never have published.

17 Q. Would you consider yourself -- well, we've addressed

18 a few of those issues. We'll move on.

19 Just to confirm, you've never been trained in medicine,

20 correct?

21 A. That's incorrect.

22 Q. Okay. You don't have a medical degree?

23 A. That's correct.

24 Q. You're not a medical doctor in any fashion?

25 A. No, I'm -- I'm not.

1 **Q.** What is a radiologist?

2 **A.** Well, when I taught the lab on ionizing radiation
3 transducers, which covered the physics behind magnetic
4 resonance imaging and X-rays, and when I dealt with computed
5 tomography and other of those technologies in my career, a
6 radiologist is a medical doctor who is trained to read MRIs,
7 computed tomography, and X-rays on people to identify
8 different pathologies and different structural abnormalities.

9 So, you know, the -- the radiologist learns the medicine
10 behind it whereas as an engineer, I learned the engineering
11 behind it to use that as an engineering tool to look at
12 engineering structures to determine structural abnormalities
13 and things like that. And I've also learned, in an
14 engineering context, and have qualified in courts to discuss
15 fracture surfaces read from X-rays and computed tomographies.

16 **Q.** Mr. Ingebretsen, I -- and I don't mean any offense.

17 **A.** I'm sorry. I went off.

18 **Q.** I would just ask that maybe your -- your response
19 is -- one, because we're under time restraints --

20 **A.** Right.

21 **Q.** -- but also that you keep your responses constrained
22 to the questions asked.

23 But you did a very -- you are right. So the question
24 was, what -- what is a radiologist and you explained that.

25 **A.** Right.

1 **Q.** Fair to say, you are not a -- a radiologist.

2 **A.** Not medically, no --

3 **Q.** Okay.

4 **A.** -- but I use them in my work.

5 **Q.** And you're not a -- you are not a pediatric
6 radiologist.

7 **A.** No.

8 **Q.** It's also true that you are not trained or licensed
9 to read X-rays, correct?

10 **A.** Well, that's a two-part question. I -- I'm
11 absolutely trained to read them and I do so in my field of
12 biomechanics. But I am not licensed. There is no license for
13 a biomechanical engineer physicist. A radiologist has a
14 medical license because they use that to treat and diagnose
15 people. That's not what I use it for.

16 **Q.** Looking at your report, Mr. Ingebretsen, on page 5.

17 **A.** Right.

18 **Q.** You indicated that in forming your opinion and in
19 your report you relied upon the testimony of Dr. Bruce Herman,
20 correct?

21 **A.** Well, I mean, I -- I did take his testimony into
22 consideration and relied -- I relied on everything. So, yeah,
23 I don't -- I don't have those specific words, but I think that
24 that's implied in what I write. I don't put it in there if
25 I'm not considering it or using it as part of the foundation.

1 **Q.** Your testimony here this afternoon was, quote, "I
2 accept the medical opinion as though it was a fact and I apply
3 it." True?

4 **A.** Correct.

5 **Q.** And in forming your report, you reviewed the medical
6 opinion of Dr. Bruce Herman, true?

7 **A.** That's true.

8 **Q.** You also reviewed the opinion, in forming your
9 report, of Dr. Pamela Ulmer, correct?

10 **A.** Yes.

11 **Q.** And you accept the medical opinion as though it was a
12 fact and you applied it, correct?

13 **A.** I -- I certainly tried to.

14 **Q.** Okay.

15 **A.** I don't -- I don't dispute -- sometimes doctors
16 dispute what their findings are and I try to take all that
17 into consideration, but I stay out of that argument.

18 **Q.** Do you consider yourself an expert in the mechanics
19 of traumatic brain injury?

20 **A.** Yes.

21 **Q.** You do?

22 **A.** Yeah. It's part of the biomechanical engineering.
23 It's what I look at; it's what I've studied. It's what I'm
24 taking about today.

25 **Q.** Well, do you consider yourself an expert in all areas

1 of injury biomechanics?

2 **A.** Yeah. I mean, that's the focus of my career is
3 injury biomechanics.

4 **Q.** Okay. So backing up a bit, you indicated that there
5 was a whole list of materials that you have reviewed prior to
6 today's testimony.

7 **A.** Yes.

8 **Q.** Let's go even further back. Prior to preparing your
9 report and forming your opinion, there was a number of
10 materials provided.

11 **A.** Yes.

12 **Q.** You would agree that the majority of which were
13 medical in nature?

14 **A.** Yes, they have to be.

15 **Q.** Okay. At the time you formed your report and your
16 opinion, you had not physically examined this table; is that
17 true?

18 **A.** Oh, absolutely correct. I had a --

19 **Q.** Okay. I --

20 **A.** -- wealth of photographs.

21 **Q.** We'll just leave it there. So based off of
22 photographs, that's what you reviewed and you formed an
23 opinion.

24 **A.** Right.

25 **Q.** Then you --

1 **A.** Absolutely.

2 **Q.** And then you generated a report and this is the
3 report.

4 **A.** That's absolutely correct.

5 **Q.** Okay. Subsequently, you did have a chance to go to
6 Roy Police Department and take a look at this table.

7 **A.** That's correct.

8 **Q.** And at no point have you done a stress test on this
9 material?

10 **A.** That's absolutely correct. I -- that wasn't part of
11 my opinion. I was looking at this to see if it was
12 consistent -- if I saw evidence mechanically that was
13 consistent with a head striking it. And that was absolutely
14 apparent just from a macroscopic inspection.

15 **Q.** So the surface -- in other words, the surface of this
16 doesn't matter much.

17 **A.** What do you mean "the surface doesn't matter"?

18 **Q.** Well, strike that. I'll move on.

19 **A.** Okay.

20 **Q.** Do you -- can you tell me what this is made out of?

21 **A.** Which part?

22 **Q.** Well, let's start with the -- the actual changing
23 table. This handle right here.

24 **A.** Yeah, it's a --

25 **Q.** What is it made out of?

1 **A.** It's a thin particle board. Pressed -- pressed wood,
2 shavings, chips that are glued together in a thin sheet. I
3 think it's approximately an eighth of an inch thick, maybe
4 3/16th.

5 **Q.** You don't know?

6 **A.** It wasn't critical. As you said, I didn't test it.
7 I didn't test it because I didn't need to test it because I'm
8 not looking at what force it takes because I know just by
9 looking at it that that table top is not going to create a
10 force on Lincoln's head to cause a fracture.

11 But looking at the shape of the fracture surface in
12 macroscopic tells me worlds of information about what the
13 object's shape was, where it struck, where the fracture
14 generated from. And looking at the structure in that I-beam
15 tells me that that could very easily resist 2-, 300 pounds of
16 force right where that rigid structure is.

17 **Q.** So how thick is that crossbeam?

18 **A.** I -- I'd have to look in my notes. What do you mean
19 how thick? How wide?

20 **Q.** Sure.

21 **A.** Wide where, where, where?

22 **Q.** The height of it.

23 **A.** The --

24 **Q.** Crossbeam that runs this way?

25 **A.** The crossbeam? Yeah. Let me look, see if I've got

1 that easy here. It's going to take me a minute to find the
2 right image here. Looks like it's about an inch, inch and a
3 quarter, I think, square.

4 **Q.** Well, you think or you know? Did you measure this
5 (overtalking)?

6 **A.** Well, I did. I did. I'm -- I'm -- I'm trying to
7 find the exact photograph. I did. I mean, you can -- you can
8 see my measurements. I mean, I'm measuring everything I can
9 find on there. I'm just -- when I'm trying to go through it,
10 I don't have the -- the thumbnail of an image. I've got to
11 hit every one of my images to find it.

12 **Q.** You're not prepared to say definitively right now at
13 trial as you testify about the dimensions of that changing
14 table. Is that true?

15 **A.** No, it's absolutely not true. I just -- it's going
16 to take me a minute to find the right image because I didn't
17 know you were going to ask me. I can't know what you're going
18 to ask me.

19 **Q.** Sure.

20 **A.** If it's important to something, I will find the
21 answer for you.

22 **Q.** Well, if I can just ask you about that last comment.
23 It's your opinion that the dimensions of this material is not
24 important to testify at trial?

25 **A.** No. That's not what I said. I said I don't know

1 what questions you're going to ask me or what's important to
2 you to know.

3 Q. Ah, fair enough.

4 A. I'm the expert, apparently --

5 Q. Sure.

6 A. -- and when I do this, I know the information that's
7 important to support my opinion. My opinion that this is a --
8 an exact explanation for the firm surface that Lincoln's head
9 hit doesn't require me to remember the dimension of that
10 support beam. If we had a tape measure, I could just measure
11 it for you here.

12 Q. Well, we'll move on.

13 A. Okay.

14 MS. TOOMBS: So can he stop looking for the
15 measurements?

16 MR. BUSHELL: Yeah, you're -- you're fine.

17 THE WITNESS: I'll put it away.

18 MS. TOOMBS: Thanks.

19 THE WITNESS: Thank you.

20 Q. (BY MR. BUSHELL) Can you tell me how many pounds per
21 square inch it would take to break through this particle
22 board?

23 A. I -- I'd have to look it up again, but I could.

24 Q. Look it up -- so you've done that. You know -- you
25 have calculated that?

1 **A.** Well, I've got the wood handbook on my computer. I
2 can't download it right now or I could probably tell you
3 exactly, but --

4 **Q.** Okay.

5 **A.** -- that's information that's readily available that I
6 do look up.

7 **Q.** And is it -- correct me if I'm wrong. Your testimony
8 today is that only Lin -- only Lincoln Penland's head could
9 have caused this?

10 **A.** No, absolutely not. That misrepresents. What I told
11 the jury was that this fracture pattern was caused by a round
12 object connected to something. And I suggested a -- a hard
13 round ball connected to a pole. That is the type of an object
14 that caused that fracture, that damage. It's the only --

15 **Q.** So --

16 **A.** -- it's the only thing that could have. Lincoln, his
17 head attached to his cervical spine being forcibly struck on
18 that table is another perfect example and explains the --
19 helps -- helps explain the constellation of injuries that he
20 sustained.

21 **Q.** Okay. Well, let's shift gears from the changing
22 table to the door.

23 **A.** Okay.

24 **Q.** There's been some talk and -- and testimony about
25 this door. Your testimony and your conversation with

1 Ms. Toombs was -- I believe you said it's possible that the
2 door could have caused the fracture if it struck Lincoln just
3 right. Is that accurate?

4 **A.** Yes.

5 **Q.** It's also accurate, Mr. Ingebretsen, that you at no
6 point actually went to examine that door at Ms. Morley's home.
7 Is that true?

8 **A.** That's true.

9 **Q.** So you don't know what that door was even made of,
10 true?

11 **A.** That -- that's true. It didn't -- it was not
12 relevant to my opinion --

13 **Q.** Okay.

14 **A.** -- whether it was steel, wood, foam, home -- you
15 know, hollow core, solid. It -- it's a question of
16 momentum --

17 **Q.** Again, Mr. Ingebretsen --

18 **A.** -- how fast Boston could push that door.

19 **Q.** If you could just keep --

20 **A.** I just wanted to tell the whole truth.

21 **Q.** Well, that's -- that's fine.

22 **A.** And I'm trying to make sure the jury has --

23 **Q.** I just need you to answer my questions.

24 **A.** I -- I understand. And I apologize if I'm going off
25 on you. I -- that's rude of me and I apologize.

1 Q. Is it true that you don't know what that door is made
2 out of?

3 A. That -- that's true.

4 Q. Okay.

5 A. And I explained why.

6 Q. And it's also true that you're not aware -- because
7 you haven't been there -- the layout of that home, true?

8 A. That's true.

9 Q. You testified that you -- in preparation for today,
10 you reviewed, quote, "recent papers or publications" prior to
11 testifying; is that right?

12 A. I tried to. There are thousands of papers out there.
13 I don't see them all. I try to pick ones that seem pertinent
14 to the question.

15 Q. You try to stay apprised of the current developments
16 in your field?

17 A. I try.

18 Q. Okay. Who do you -- who do you rely upon? You know,
19 who do you consider kind of leading experts in your field?

20 A. It depends upon the area. If we're talking about
21 head trauma, Ommaya and -- and I can't -- I always massacre
22 his name. It's a -- it's a -- it's like my name. It's --
23 it's -- it's unusual --

24 Q. Story of my life.

25 A. -- but used to work with Ommaya. Duhaime is one

1 who's done a lot of work on infant -- and some of her
2 associates.

3 Q. Okay. Well, let me ask you about a few --

4 A. Patrick was another one.

5 Q. Let's talk about a few significant and recent
6 findings in your -- your field.

7 A. Sure.

8 Q. Duhaime, for example.

9 A. Yeah.

10 Q. Are you aware of -- of her article, The Shaken Baby
11 Syndrome: A Clinical, Pathological, and Biomechanical Study.
12 Are you familiar with that article?

13 A. I think I attached it to my report.

14 Q. And you're aware, then, that this study found that
15 shaking alone cannot generate enough acceleration sufficient
16 to meet estimated injury thresholds?

17 A. Well, it -- and I don't disagree with that, actually.
18 I think that that's not unreasonable. I think I explained
19 that to the jury. A single shake, probably not. Multiple
20 shakes, maybe. Depends upon the baby, the size, and the
21 person doing it. Duhaime's work was -- was not unreasonable,
22 but it had some odd constraints to it, too.

23 Q. You're familiar with M.T. Prange? Prange? Maybe I'm
24 butchering that last name.

25 A. No. That name doesn't --

1 Q. Okay.

2 A. -- ring a bell.

3 Q. Well, here's one you may be familiar with. It's
4 actually Prange. Published in a car crash journal. Right up
5 your alley. Found also that shaking alone cannot generate
6 enough acceleration sufficient to meet estimated injury
7 thresholds.

8 A. On an infant or an adult?

9 Q. Both. Are you aware of that?

10 A. I -- I'm not. I would disagree with the adult.

11 Q. Okay.

12 A. I've seen other studies where they've documented
13 shaking alone causing diffuse axonal injuries. But again, it
14 depends on the circumstances and who's doing the shaking.

15 Q. Are you familiar with Leuder?

16 A. No.

17 Q. Okay. A recent study found that a four-month-old
18 child killed when a six-year-old fell on him. Upon
19 examination the four-month-old had severe retinal
20 hemorrhaging, similar to those in Lincoln Penland. Were you
21 aware of that? Yes or no.

22 A. I actually have heard of that one.

23 Q. Okay. Based upon your report, it's your opinion that
24 falls of only a few feet cannot cause these damages; is that
25 correct?

1 **A.** No, that misstates my report. I said falls from a
2 few feet can cause serious and fatal injuries without
3 fractures.

4 **Q.** Okay.

5 **A.** That in order to cause the fracture, too, you've got
6 to have additional energy sufficient to actually cause the
7 bone to break.

8 **Q.** Is it your opinion that short falls from only a few
9 feet cannot cause death?

10 **A.** I don't think so. I don't think that's what I wrote.

11 **Q.** No, I know. I'm asking, is that your opinion?

12 **A.** No. No. I think a few feet -- I think today I was
13 talking, if Lincoln fell from five feet which, I mean, is not
14 a tremendous fall, if he hit cement, that could certainly
15 cause fatal injuries.

16 **Q.** So it's not required to fall from a story or more?

17 **A.** Oh, no. No, but there are also anecdotal stories of
18 falling from a story or more where there are no injuries. I
19 mean, it --

20 **Q.** Okay.

21 **A.** -- you have to look at the -- it's what we said.
22 Each case is different.

23 **Q.** Exactly.

24 **A.** You have to look at the pattern of injury. The
25 pattern of injury here is only explained by holding, shaking,

1 and forcibly striking an object.

2 Q. Those three things?

3 A. Yeah, I think so.

4 Q. In that order.

5 A. No, combined. Not in any order. I mean, it's --
6 let's -- the striking I think comes at the end, but the
7 shaking and holding have to be done at the same time.

8 Q. Let's keep talking about some literature. I think
9 there's some -- are you familiar with Ibrahim, Margulies?

10 A. Oh, yeah. Yeah, yeah.

11 Q. Found that measuring the accelerations from a known
12 videotaped short fall killed a toddler determined that falls
13 from just a few feet exceed predicted injury thresholds. You
14 would agree with that finding?

15 A. Well, I'd have to re-read the paper.

16 Q. Okay.

17 A. I think the video would probably speak for itself.
18 I'm not disagreeing that short falls can't cause fatal
19 injuries. I -- I have a pedestrian accident where a very
20 short lady was bumped, destabilized, and fell and hit her head
21 on the asphalt and she died. I mean, it's -- that happens,
22 but you need to look at each one separately.

23 Q. And you've read Plunkett, as well, I'm assuming? Are
24 you familiar with Plunkett?

25 A. The name -- the name is familiar, but you'd have to

1 remind me of the study.

2 Q. Well, 2001, so actually quite awhile ago, a study
3 found 18 -- 18 documented cases of child deaths from short
4 falls, most of which were presenting subdural hematoma?

5 A. Sure.

6 Q. Retinal hemorrhaging?

7 A. Sure.

8 Q. Four out of the six eyes that were surveyed found
9 retinal hemorrhaging.

10 A. Tell me more about the study. What -- what did they
11 hit? How -- how high were these short falls?

12 Q. Multitude of surfaces. Multitude.

13 A. Okay.

14 Q. But in -- in this case, for example, case study
15 number 5, a 23-month-old child fell from a small plastic toy,
16 hit his head on a car -- on a, in fact, a carpeted floor.
17 That fall was captured on videotape. The child suffered
18 subdural hematoma --

19 A. Okay.

20 Q. -- with midline shifts and bilateral retinal
21 hemorrhaging.

22 A. Did --

23 Q. Are you familiar with that study?

24 A. Well, no. Did the child also have humeral fractures
25 and -- and the other injuries we have?

1 Q. Well, if -- if you --

2 A. I mean, I can't compare them --

3 Q. -- if I were sitting there --

4 A. I can't compare -- I mean, you're giving me isolated
5 situations which are fine on their own, but -- but there's an
6 implication that these somehow represent --

7 Q. Doctor --

8 A. -- what happened here.

9 MR. BUSHELL: Your Honor, I didn't want to have to
10 come -- can we have the Court, perhaps, instruct
11 Mr. Ingebretsen to please keep his answers confined to my
12 questions?

13 MS. TOOMBS: Again --

14 THE COURT: I think that's appropriate.

15 Mr. Ingebretsen, you're going far beyond what's asked. Most
16 of the questions are either yes or no, or I can't answer yes
17 or no. But even then, that doesn't mean you're allowed to
18 give your explanation or a comment. So please confine your
19 answers strictly to the question.

20 THE WITNESS: That -- that's right. And I appreciate
21 that, Your Honor. I'll -- I'll try to just give the truth as
22 best as I can. If I can't, I'll inform counsel.

23 THE COURT: Mr. Ingebretsen.

24 THE WITNESS: I'm doing it to you.

25 THE COURT: That's a very good example --

1 **THE WITNESS:** I'm sorry.

2 **THE COURT:** -- and that's the second time --

3 **THE WITNESS:** I'm sorry.

4 **THE COURT:** -- you've commented on what the truth is.

5 And the purpose of this trial is for those people over there
6 in the jury box to ascertain what is the truth as you testify
7 to facts and opinions.

8 **THE WITNESS:** Thank you, Your Honor. (Overtalking)

9 **THE COURT:** So please stay away from comments like
10 that. But that's the danger of going beyond the question, so
11 stay right with the question.

12 **THE WITNESS:** I apologize.

13 **Q. (BY MR. BUSHELL)** Doc -- Mr. Ingebretsen, you would
14 agree that shaking could cause significant brain injuries
15 without first causing massive injuries to the neck and
16 cervical spine? Yes or no.

17 **A.** I don't think I testified to that. I -- I don't
18 understand your question.

19 **Q.** Let me -- let me phrase it this way. True or false.
20 Shaking could cause significant brain injuries without first
21 causing massive injuries to the neck and cervical spine.

22 **A.** If I understand it --

23 **Q.** Doc --

24 **A.** Ask it again, then, another way because I -- I want
25 to make sure I'm understanding your question.

1 **Q.** I'm not sure how else to phrase this,
2 Mr. Ingebretsen.

3 **A.** Well, I -- I'm not able to explain so I can't -- I
4 can't answer the question because there are clarifications I
5 need.

6 **Q.** Can shaking, this act, cause significant brain
7 injuries without first causing massive injuries to the neck
8 and cervical spine?

9 **MS. TOOMBS:** And, Your Honor I think that the witness
10 has clearly stated -- I mean, he's stated it the same way. I
11 think the witness has clearly stated, without clarification,
12 he -- he's not capable of answering that question. If -- if
13 the Court is going -- and -- and Mr. -- and counsel are going
14 to constrain Mr. Ingebretsen to yes/no, true/false, then there
15 has to be an ability for him to say examples.

16 **MR. BUSHELL:** Is there an objection?

17 **THE COURT:** Okay. Let's take a break and please come
18 up to the bench.

19 (Discussion at the bench at 4:42:16.)

20 **THE COURT:** Okay. Everybody calm down, but that's a
21 clear example of a speaking objection. I didn't constrain
22 Mr. Ingebretsen. I brought him within the rules. That's a
23 very unfair comment to make and it's a speaking objection. I
24 don't -- that's really wrong to do in front of the jury. That
25 indicates that I'm helping the defense in constraining him in

1 some way.

2 He's supposed to answer the questions. That's a
3 simple thing. He hardly has at all on cross-examination.
4 It's -- it's been very rare that he has. You can bring out
5 all these things on redirect, but he really hasn't answered
6 questions. And I'm not constraining him other than saying
7 please answer the questions. He's supposed to answer the
8 questions. He can answer that he -- he can say, I would need
9 clarification to answer that. But he can't question
10 Mr. Bushell. He can't go off on his own. For instance, when
11 asked what is radiology, he went all into his experiences in
12 school, he went onto these other things, and in -- in the
13 middle of all of that was the definition. That's unfair.
14 He's going way beyond what he's asked. And I think
15 Mr. Bushell was very constrained in trying to get him to
16 answer in the interest of time and fairness.

17 **MR. BUSHELL:** And I'm trying to be as tactful as
18 possible here.

19 **THE COURT:** Well, and then he comes back with, well,
20 I'm trying to give the truth. And then when I combine that
21 with your saying, well, I'm constraining him, you're putting a
22 very unfair image to the jury.

23 **MS. TOOMBS:** And I apologize if that -- that was not
24 my intent. But the Court did order him to answer yes or no,
25 Your Honor, and so --

1 **THE COURT:** If it can be answered that way.

2 **MS. TOOMBS:** And he had -- he had already responded
3 to that question by saying I would need clarification. And my
4 objection was that Mr. Bushell is just asking it again the
5 same way. It does no good.

6 **THE COURT:** And I'm fine with that objection. And if
7 it is identical, ask it one last time and then --

8 **MR. BUSHELL:** It wasn't, but I will ask it another
9 time.

10 **THE COURT:** Okay. And I am going to mention to the
11 jury that I have not been constraining him. These are the
12 rules.

13 **MS. TOOMBS:** I appreciate that.

14 **THE COURT:** Okay.

15 (Proceedings resume in open court at 4:44:43.)

16 **THE COURT:** We just had a little legal huddle. I was
17 a little bit worried about the comment that the Court has
18 constrained this witness. I've not done anything of the sort.
19 These are the rules of cross-examination and it's a very
20 simple thing that if a cross-examiner asks a question, the
21 witness is to respond to that question, not expound on it, not
22 comment on it, not ask questions back to the questioner, but
23 to stay within that.

24 So those are the rules we come into the court with.
25 It's not a constraint that the Court is placing onto this

1 witness. So he's not constrained from answering. He can
2 answer however he wants to the question posed to him, but he
3 can't, every time a question is asked, say whatever he wants.
4 He must stay within the question.

5 Okay. Go ahead, Mr. Bushell.

6 **MR. BUSHELL:** Thank you, Your Honor.

7 **Q. (BY MR. BUSHELL)** I'm just going to move on from that
8 question.

9 **A.** Okay.

10 **Q.** Your report indicates that the -- in fact, just to
11 make sure that I'm not misquoting you, your own words, "That
12 given the rapid development of the skull during the first few
13 months, it is difficult to assign a specific number to the
14 force required to cause the skull fractures in Lincoln."

15 Is that what you wrote?

16 **A.** That's part of the sen -- that is the last sentence
17 there, yes.

18 **Q.** Thank you.

19 **MS. TOOMBS:** May I ask what page you are on so that I
20 can --

21 **MR. BUSHELL:** Page 6. Second to last paragraph on
22 page 6.

23 **Q. (BY MR. BUSHELL)** You then follow up that paragraph,
24 Mr. Ingebretsen, after saying that it's difficult to
25 assign -- assign a specific number to the force required to

1 cause the skull fractures in Lincoln, you then say, "However,
2 for context, Whiting reported results of testing on adult
3 cadaver skulls with forces on the order of 2,600 pounds to
4 cause fractures when dynamically loaded."

5 Is that what you wrote?

6 **A.** Right.

7 **Q.** Okay. Are you aware, Mr. Ingebretsen -- yes or no --
8 that multiple experimental studies on adult heads have
9 reported skull fractures as commonly occurring at less than
10 1,000 pounds?

11 **A.** Yes, that's possible.

12 **Q.** And am I then to understand from your report that you
13 expect fractures of an eight-month-old skull to occur at
14 approximately the same level of force as -- level of force as
15 for an adult?

16 **A.** Absolutely not.

17 **Q.** Okay. Are you familiar with any -- a Duke University
18 study, a publication on skull fractures in infants?

19 **A.** That's not enough information.

20 **Q.** Doesn't ring a bell? Pardon?

21 **A.** That's not enough information.

22 **Q.** Okay. It's a study at Duke University where the
23 heads of infant cadavers were dropped from heights of 6 and
24 12 inches. Does that ring a bell?

25 **A.** Keep going.

1 **Q.** Okay. Well, these drops of 6 to 12 inches in the
2 heads of infants corresponded with impact forces of
3 approximately 250 pounds. And many of these drops, in fact,
4 resulted in fracture in some of the skulls, including some
5 diastatic fractures similar to those observed in this case.
6 Does that ring a bell?

7 **A.** No, but it supports my testimony that 2- to
8 300 pounds would be a fracture level.

9 **Q.** Okay. So it rings a bell, was the question.

10 **A.** Well, the -- the data don't necessarily ring a bell.
11 I don't know -- you haven't given me all the information on
12 the study.

13 **Q.** Okay.

14 **A.** But the information is not unreasonable.

15 **Q.** Okay. Are you familiar with the publication and the
16 works of Prange, Luck, Dibb, and Nightingale? I think it was
17 a joint effort?

18 **A.** Possibly. I've read a lot of papers. I don't
19 memorize names.

20 **Q.** The title -- the title of it was Mechanical
21 Properties and Anthropometry of a Human Infant Head.

22 **A.** Likely. It sounds like something that I would read,
23 but I don't specifically remember it.

24 **Q.** How much did Lincoln Penland weigh in 2014?

25 **A.** The autopsy had him a little over 17, almost

1 18 pounds.

2 Q. And how much did Boston Penland, his older brother,
3 weigh in 2014?

4 A. I think it was about 40 pounds -- 30 pounds.

5 Q. And where are you getting that information from?

6 A. It was provided in the documentation I received, I
7 believe, or perhaps from Ms. Toombs. I don't recall
8 specifically.

9 Q. Okay. So somebody weighed Boston Penland and
10 provided you with that information in 2014?

11 A. They must have, otherwise I wouldn't know it.

12 Q. How much force can a three-year-old boy generate from
13 kicking the head of an infant?

14 A. I -- I can't answer that question with (sic) a lot of
15 other information.

16 Q. Mr. Ingebretsen, are you familiar with any
17 experimental research on retinal hemorrhaging in infants?

18 A. A little bit. It's not something I've studied
19 extensively. It isn't necessarily useful to the analysis that
20 I performed, nor really to this analysis.

21 Q. Well, "a little bit." You are familiar with "a
22 little bit."

23 A. I am.

24 Q. Okay. But you don't consider it useful to this
25 analysis, correct?

1 **A.** It -- that's correct.

2 **Q.** Okay.

3 **A.** It wasn't important to my analysis here.

4 **Q.** Do you know whether retinal hemorrhaging has ever
5 been observed in a child where a third party witnessed shaking
6 as the cause of the hemorrhages?

7 **A.** It sounds like a very specific example. I'm -- no.

8 **Q.** So no. That's a negative to that. Okay.

9 How much -- how much acceleration is required to produce
10 retinal hemorrhaging by the retinal traction theory in an
11 eight-month-old boy?

12 **A.** I don't have that number on the top of my head.

13 **Q.** Okay.

14 **A.** It's something I could look up for you, but I don't
15 know right here.

16 **Q.** I'm assuming in your field of expertise you're aware
17 that retinal hemorrhages -- true or false. Are you aware, or
18 you are aware, that retinal hemorrhaging has been reported as
19 a result of crushing injuries such as when a child -- a
20 television falls on a child's head.

21 **A.** I -- I think I can understand a mechanism to cause
22 that. I'm not aware of those studies, but looking at it as an
23 engineer that seems like that could be explained by the
24 pressures created inside the skull.

25 **Q.** Okay. There are different strength levels in

1 particle boards. Are you aware of that?

2 **A.** You've got to give me more information. I'm sorry.

3 **Q.** Okay. In the construction industry, different
4 lumber, for example, has different ratings -- strength
5 ratings.

6 **A.** Yes.

7 **Q.** The same goes for particle boards. Composites, as
8 you testified to, glues and composites that make up, for
9 example, this changing table.

10 **A.** Yes.

11 **Q.** What are the different strength ratings?

12 **A.** I'd have to look those up in my wood handbook.
13 That's not a table that I memorize.

14 **Q.** Well, which -- which strength rating is this table?

15 **A.** I don't know.

16 **Q.** Okay. Which strength rating is that board, the beam,
17 the support beam that goes underneath?

18 **A.** I don't know. I have no way of knowing that. It
19 won't be on -- I mean, it won't be printed on anything that I
20 could read.

21 **Q.** What strength rating are these ladder-like shelves?

22 **A.** I don't know.

23 **MR. BUSHELL:** That's all the questions I have.

24 Thank you.

25 **THE COURT:** Okay. From the State.

1 falls and studies that have found that short falls can cause
2 fractures, can cause injuries to child -- children. I guess
3 this is -- my question is, short falls -- does that encompass
4 a number of different considerations?

5 **A.** Yes.

6 **Q.** And I believe in direct testimony you talked about
7 a -- a fall with impact from, I think you said, two-and-a-half
8 feet would require -- and I'm going to get it wrong, so how
9 about if I just have you repeat to me what the -- the forces
10 would be or the -- the necessary forces would be.

11 **A.** The -- looking at scaling and looking at data, even
12 as I was queried on, forces of 2- to 300 pounds can produce
13 fractures in infant skulls. And I don't disagree with that.
14 I already offered that to you.

15 To get that kind of a force requires an acceleration.
16 That means it has to go from some speed to zero or zero to
17 some speed with an applied force. Just because I push on
18 something with 250 pounds of force, you get motion besides
19 that. You have to look at this exchange of energy, exchange
20 in momentum.

21 To generate a speed of 13 miles an hour, which -- which
22 on a fall onto a relatively hard surface -- not cement, but
23 like a -- a thin carpet on a hard floor, takes about a fall of
24 five feet.

25 On cement, that would be considerable shorter because the

1 time duration is much shorter, like a millisecond instead of
2 five to 10 milliseconds. So you could reduce that five feet
3 by a factor of 10, maybe even a little more.

4 So what I was talking about is if I were to -- to drop
5 Lincoln onto a relatively padded carpeted surface, he'd have
6 to fall from a greater height. He'd have to fall probably
7 from about five or six feet. If it were thin carpet, it would
8 be a little bit shorter. If it were cement, even shorter, but
9 you'd still have to have that energy. You'd have to develop
10 that force which is a function of how fast he's going when he
11 hits and stops, and the time duration. You -- you divide it.
12 And -- and that's how you come up with those numbers.

13 Q. And in any of the scenarios that you came up with,
14 did a short fall account for all of the injuries that Lincoln
15 Penland sustained?

16 A. Absolutely not.

17 Q. I'd like you to go back to page 6 of your report.
18 While examining you about your paragraph that talks about the
19 scaling by Whiting, I think counsel referred to the Mechanical
20 Properties -- an article, Mechanical Properties of Anthro --
21 this is why I'm a lawyer, not a --

22 A. Anthropometric.

23 Q. Sorry?

24 A. Anthropometric.

25 Q. Anthropometric of the Hu -- or of the Human Infant.

1 **A.** Yes.

2 **Q.** And you said you hadn't reviewed that article, right?

3 **A.** Right.

4 **Q.** Okay. Would it be important for you when you're
5 looking at that to know that they were studying infants that
6 were one to 11 days old?

7 **A.** Yes.

8 **Q.** Okay. As opposed to Lincoln, who was eight months
9 old.

10 **A.** Absolutely, it would. The skull, the bones, the
11 sutures increase in strength tremendously over that first
12 year. And -- and that's why I wrote in my report, given the
13 rapid development of the skull during the first few months,
14 it's difficult to assign because it is changing literally
15 daily; it's getting stronger. Infants at a -- at a few days
16 would have a much weaker structure than an infant at -- at
17 Lincoln's state.

18 **Q.** Okay. And you took all those things into
19 consideration when you made your analysis and came to your
20 conclusions?

21 **A.** Absolutely.

22 **Q.** We also talked about short falls causing diastatic
23 fractures. What is your -- well, let me just ask it this way.
24 Are all skull fractures created equal?

25 **A.** No. No, they -- they aren't, and I'll refer to them

1 as complex and linear, whether they go through multiple
2 surfaces or whether they don't.

3 When you look at a simple linear fracture, that is
4 indicative of an unconstrained, single-point load. A complex
5 fracture is more indicative of a constrained load or a much
6 higher energy type of a -- a loading.

7 When the cracks don't propagate across different plates
8 and across the sutures, that's a lower energy type of a
9 fracture. When they fracture into multiple plates and -- and
10 sutures, then it's a much higher energy. It helps me
11 understand the relative magnitude.

12 This -- this was not necessarily a real high energy, high
13 velocity type of an impact, but it was sufficient to -- to
14 fracture the mastoid and then propagate into the sutures and
15 create the other injuries.

16 So Lincoln didn't fall from one story or two stories onto
17 cement. It -- it fits perfectly with the type of dynamic and
18 forces that an adult can inflict onto a child by holding,
19 shaking, and forcibly causing a head strike on a firm surface.
20 This is a firm surface. I don't know exactly what level it
21 breaks, but I know structurally it's a lot stronger at that
22 bar and this fits. The fracture surface fits with the other
23 information and facts that I have.

24 Q. So whether or not you can at this particular moment
25 tell us the -- the loads, et cetera, on this particular table,

1 doesn't affect your analysis.

2 **A.** No. No, it doesn't. This is a -- a perfect example
3 of the firm surface that would cause the type of injury that
4 we have. It could have been over a carpeted step. It could
5 have been over a table top. It could have been over anything
6 that had an edge, a lip that would contact on -- on -- the
7 name just went away from me. I'm sorry.

8 **Q.** Mastoid bone?

9 **A.** The mastoid. Yeah. Forgive me.

10 **Q.** That's okay. It happened to me earlier.

11 **A.** On the -- on the mastoid. And so it -- it just tells
12 me and this fits perfectly.

13 **Q.** And, again, your conclusion, based on everything that
14 you looked at, including the changing table, is what?

15 **MR. BUSHELL:** Your Honor, asked and answered. I'm
16 sorry. This has been asked and answered several times.

17 **THE COURT:** Response?

18 **MS. TOOMBS:** Your Honor, I'm just asking him after --
19 maybe I'll rephrase it.

20 **THE COURT:** Okay.

21 **Q. (BY MS. TOOMBS)** After being presented with the
22 literature and the -- and the studies that Mr. Bushell has
23 talked to you about and these -- these other scenarios that
24 you have talked about during cross-examination, does any of
25 that change your ultimate analysis or conclusion?

1 **A.** Not -- not at all. It -- it doesn't. It's nothing
2 that surprised me or gives me pause. It doesn't change my
3 opinions in any way.

4 **MS. TOOMBS:** Thank you. No further questions.

5 **THE COURT:** Okay. From the defense?

6 **MR. BUSHELL:** We have no further questions.

7 **THE COURT:** Okay. Does any member of the jury have a
8 question for Mr. Ingebretsen? It looks like they do.

9 Counsel, if you'll join me at the bench.

10 (Discussion at the bench at 5:05:55.)

11 **THE COURT:** Now, since I've admonished Ms. Toombs,
12 I -- I -- the crack about the school down south didn't go
13 unnoticed.

14 **MR. BUSHELL:** Fair enough.

15 **MS. TOOMBS:** It did by me. What did I do? What did
16 I do? What did I miss?

17 **MR. BUSHELL:** The BYU comment.

18 **MS. TOOMBS:** Oh. Oh. You went to BYU?

19 **MR. BUSHELL:** Yeah.

20 **MS. TOOMBS:** Okay. I did like (unintelligible).
21 It's a lengthy question.

22 **MR. BUSHELL:** Uh-huh. Or (unintelligible).

23 **THE COURT:** Go ahead and take it.

24 **MS. TOOMBS:** I want the record to reflect that was
25 Logan's voice.

1 **THE COURT:** Okay.

2 **MR. BUSHELL:** (Unintelligible)

3 **THE COURT:** Dave, I think Mr. Ingebretsen's cup's
4 empty.

5 **THE BAILIFF:** (Unintelligible)

6 **THE COURT:** We've got you on the hot seat. We better
7 keep you cool.

8 **THE BAILIFF:** He says --

9 **THE WITNESS:** Okay. I don't (unintelligible).

10 **THE COURT:** What?

11 **THE BAILIFF:** He says he's good.

12 **THE COURT:** Oh, you're okay?

13 **THE WITNESS:** (Unintelligible)

14 **THE COURT:** Okay. We're -- we're going to stay for
15 about three more hours. Are you sure you don't --

16 **MS. TOOMBS:** I can't read it. Sorry. It's too late
17 and I can't focus.

18 **THE COURT:** Better -- better give him a drink.
19 (Unintelligible discussion)

20 **MR. BUSHELL:** We're okay.

21 **MS. TOOMBS:** I have -- I'm fine with all those.

22 **THE COURT:** You're okay with those?

23 **MS. TOOMBS:** Yeah.

24 **THE COURT:** And you are too?

25 **MR. BUSHELL:** Yeah. Thank you.

1 **THE COURT:** Okay.

2 (Proceedings resume in open court at 5:07:20.)

3 **THE COURT:** Series of questions from the jury
4 members, so I'll -- I'll read them in the order that they're
5 here.

6 Question one: Is it accurate to say that the
7 crossbeam was solid enough to cause skull fracture and that
8 the particle board was not strong enough to cause skull
9 fracture?

10 **THE WITNESS:** Yes. Absolutely, it is.

11 **THE COURT:** Okay. Next question: Were you aware of
12 the crossbeam from the photographs provided for your analysis?

13 **THE WITNESS:** Absolutely, I was. That was depicted
14 and measured and I was able to determine that there was a
15 crossbeam there.

16 **THE COURT:** Third question: Is it your opinion that
17 a single event that included shaking and striking caused
18 Lincoln's injuries versus separate unrelated events?

19 **THE WITNESS:** That is my opinion because that is the
20 simplest solution. We can independently create events that
21 would cause each of those injuries independently, but it would
22 be a very difficult and convoluted process and they'd have to
23 be carried out independently. The -- the solution that best
24 fits is the one that I've opined to.

25 **THE COURT:** Thank you.

1 Were there any other questions from any member of the
2 jury? Looks like there are.

3 Counsel, again, if you'll join me at the bench.

4 (Discussion at the bench 5:08:47.)

5 **MR. MILES:** (Unintelligible) break it.

6 **MS. TOOMBS:** I'm not quite (unintelligible) I went up
7 to jump over.

8 **MR. MILES:** (Unintelligible)

9 **MS. TOOMBS:** What would explain -- oh. I think he's
10 answered it, but let's --

11 **THE COURT:** You okay with it?

12 **MS. TOOMBS:** Yeah.

13 **THE COURT:** Are you okay with it?

14 **MR. BUSHELL:** (Unintelligible)

15 (Proceedings resume in open court at 5:09:10.)

16 **THE COURT:** What would explain the fracture being
17 only on one side of the skull?

18 **THE WITNESS:** The explanation for that is because
19 there's not a resistive force on the other to put any force
20 there. It's -- it's being struck right here, so the energy
21 and the stress is highest at the point of contact.

22 The -- the fracture proceeds from there, and if
23 there's sufficient energy, it will go all the way over to the
24 other side. But unless there's some force pushing on the
25 other side of the head, you -- you won't see a significant

1 fracture on that side.

2 So you have to be pushing on both sides to get
3 fractures on both sides of the head. With just one fracture,
4 that tells me there was just one point of contact and that was
5 back here on the mastoid.

6 **THE COURT:** Okay. Any other questions from any
7 member of the jury?

8 Counsel, again, if you'll join me at the bench.

9 (Discussion at the bench at 5:10:09.)

10 **MS. TOOMBS:** There was another question?

11 **THE COURT:** Yeah. It's almost -- it's almost melted.
12 I have a larger one for tomorrow. It kind of helps. I'm
13 sitting on it, but --

14 **MS. TOOMBS:** It's cooler up here.

15 **THE COURT:** -- then it made a wet spot.

16 **MS. TOOMBS:** Thankfully you don't have to stand up
17 and stand in front of the jury.

18 **THE COURT:** What?

19 **MS. TOOMBS:** Thankfully you don't have to stand in
20 front of the jury.

21 **THE COURT:** Yeah, well, they have the
22 (unintelligible).

23 Are you folks going to the litigation section meeting
24 at 5:30?

25 **MS. TOOMBS:** Unfortunately, no.

1 **THE COURT:** I'm on the panel, so I'm a little
2 worried.

3 **MR. BUSHELL:** We'll get you out of here. Well,
4 maybe. (Unintelligible) them.

5 **THE COURT:** It's like Ms. Toombs said, there's just
6 one more question. I just have one more question.

7 **MS. TOOMBS:** Just one more question. Glad to know
8 it's not just lawyers that do that.

9 **THE COURT:** I think we all learned it in law school.
10 I'm really impressed with the questions they answer -- or --
11 or ask.

12 **MS. TOOMBS:** Yeah.

13 **MR. BUSHELL:** Yeah.

14 **THE COURT:** Are you guys?

15 **MR. BUSHELL:** Yeah. Very.

16 **THE COURT:** Do you think this is worth doing, having
17 jurors ask questions?

18 **MS. TOOMBS:** I think it is. I mean, I --

19 **THE COURT:** I mean, it takes longer, but --

20 **MS. TOOMBS:** I think it's beneficial in the long run.

21 **THE COURT:** I think they're really engaged. The
22 questions are I think remarkably good.

23 **MS. TOOMBS:** Really good.

24 **MR. BUSHELL:** Yeah.

25 **THE COURT:** Okay. Thanks.

1 **MR. WIDDISON:** It helps us do our job better.
2 **THE COURT:** Huh?
3 **MR. WIDDISON:** It helps us do our job better.
4 **THE COURT:** I think it does. It -- it's good to get
5 into the mind of the jury. (Unintelligible)
6 **MS. TOOMBS:** Good questions.
7 **THE COURT:** This one's --
8 **MR. BUSHELL:** Everyone okay to --
9 **THE COURT:** Are you both okay with this one?
10 **MS. TOOMBS:** Yes.
11 **THE COURT:** Okay.
12 **MS. TOOMBS:** (Unintelligible)
13 **MR. BUSHELL:** Which one?
14 **MS. TOOMBS:** Stop. The jury (unintelligible).
15 He answered that already so, yeah, I think we can --
16 we can (unintelligible) for the jury.
17 **THE COURT:** You okay with both of those?
18 **MR. BUSHELL:** We're good.
19 **THE COURT:** Okay.
20 **MS. TOOMBS:** Your Honor?
21 **THE COURT:** Oh, yeah.
22 (Unintelligible discussion)
23 **MS. TOOMBS:** Yeah. The injury's on the right.
24 **MR. MILES:** (Unintelligible)
25 **THE COURT:** Okay.

1 **MS. TOOMBS:** Just FYI.

2 **MR. MILES:** I didn't get to read the
3 (unintelligible).

4 **THE COURT:** I know. That's -- I believe that the --
5 the injury is behind his right ear.

6 **MR. MILES:** Yes.

7 **MS. TOOMBS:** Yeah.

8 **MR. MILES:** So I wasn't sure that that -- he's asking
9 about the absence of injury or presence of injury.

10 **THE COURT:** Do you want me to ask them if they want
11 to clarify it?

12 **MR. MILES:** Maybe.

13 (Proceedings resume in open court at 5:13:56.)

14 **THE COURT:** The question is from -- and I'm not sure
15 which jury member, but it indicates the -- the injury to
16 Lincoln was on the left side of his head. It was on the right
17 side.

18 Does any -- I'm not sure -- is that yours,
19 Mr. Hendricks?

20 **MR. HENDRICKS:** Yeah.

21 **THE COURT:** If we change that from left to right, the
22 rest of it would make sense, wouldn't it?

23 **MR. HENDRICKS:** Yes.

24 **THE COURT:** Okay. Counsel, are you okay if I do
25 that?

1 **MS. TOOMBS:** Yes.

2 **MR. BUSHELL:** Yes.

3 **THE COURT:** Okay. Okay. I'll start with that one
4 then since -- okay.

5 The question is this. It -- it's kind of a two --
6 well, it's not two part, but it's a paragraph long.

7 **THE WITNESS:** Okay.

8 **THE COURT:** Okay?

9 Why injury on one side? The injury was on the right,
10 not the center. Did Lincoln's head twist before impact to
11 cause injury on the right versus the center or the left?

12 **THE WITNESS:** I think it must have. That's what the
13 evidence tells me because otherwise you would probably expect
14 to see injury more back here. But I think because the injury
15 is on the mastoid here that his head must have rotated a
16 little bit to the right.

17 The -- the head is not perfectly spherical. The mass
18 is not distributed evenly. And on shaking and coming down,
19 the head is not going to remain perfectly aligned with the
20 body. It's going to rotate simply because of the dynamics and
21 the distribution of the mass within the skull.

22 **THE COURT:** Thank you.

23 Next question: If the blanket were on the changing
24 table, would it not increase the diameter of the crack if
25 caused by a foot?

1 **THE WITNESS:** Maybe a little bit, but -- but not by
2 much. There -- there's a concept in -- in material science
3 called save the notch principle that the further away you get
4 into a structure, if I push here, I've got focused stress
5 here, but way down here, the stress is distributed over the
6 entire wood. It -- it funnels out like that.

7 So if there's a thin blanket on there, you would get
8 a little bit of stress distribution, but not very much.
9 The -- the blanket is not stiff and it won't resist. It will
10 just make it a little thicker and maybe give you an extra, you
11 know, thickness of the blanket to the side, but not very much.
12 But it -- but it would increase slightly, I think. I think
13 that's right.

14 **THE COURT:** Okay. Next question: Would the blanket
15 most likely prevent the foot from falling all the way through?

16 **THE WITNESS:** Only if it caught on something and had
17 sufficient tearing resistance to -- to capture the foot.
18 That's an interesting concept, if there were a blanket on
19 there. But the blanket would have to be attached to the table
20 top, otherwise it would just be pulled through with the foot.

21 **THE COURT:** Any other questions from any member of
22 the jury? Okay.

23 From the State?

24 **MS. TOOMBS:** If I may have just one second.

25 **THE COURT:** Okay.

1 **MS. TOOMBS:** Attorney second.

2 **THE COURT:** Whatever.

3 **MS. TOOMBS:** Nothing from the State, Your Honor.

4 **THE COURT:** From the defense?

5 **MR. BUSHELL:** No, Your Honor. Thank you.

6 **THE COURT:** Okay. Thank you, Mr. Ingebretsen.

7 **THE WITNESS:** Thank you, Your Honor.

8 **THE COURT:** You're off the hot seat.

9 Okay. Folks, it's about 5:20. Is this a good time
10 to break for the day?

11 **MR. MILES:** Three more witnesses?

12 **MS. TOOMBS:** I think it is.

13 **MR. MILES:** Three more? No?

14 **MS. TOOMBS:** They'd be quick.

15 **THE COURT:** Okay. Three more witnesses. We'll be
16 quick.

17 **MR. MILES:** I know they're waiting for
18 Lieutenant Smith's cross-examination. I sent him away again.
19 So, no. For today, Your Honor, the State has nothing further
20 to present. We will pick up again tomorrow.

21 **THE COURT:** Okay. What starting time for tomorrow?

22 **MR. MILES:** Do you want to start earlier to get more
23 done?

24 **MS. TOOMBS:** I would leave it to the jury and see --

25 **MR. MILES:** Or we could start at 9:00.

Addendum B
Utah District Court orders limiting biomechanical engineers'
testimonies

APR 21 2017

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY

By  Deputy Clerk

DAVID CAMPBELL,

Plaintiff,

vs.

ERIN M. SCOTT,

Defendant.

MEMORANDUM DECISION OF
RULINGS MADE DURING TRIAL

Case No. 140907592

Judge Barry G. Lawrence

The Court made two significant oral rulings during trial. This memorandum incorporates the oral rulings made at trial and otherwise sets forth the bases for the Court's rulings.

1. Ruling Regarding Matthew Mecham, P.E.

Prior to trial, plaintiff moved to exclude or limit the testimony of Mr. Mecham, a biomechanical engineer. At a pretrial conference, the Court granted that motion in part, ruling that Mr. Mecham may testify on all matters stated in his report *except* his opinion that it was unlikely that plaintiff would have "struck his head against anything with sufficient force to *cause a traumatic brain injury.*" The Court reasoned that Mr. Mecham was not a medical doctor and thus could not state an opinion of medical causation.

During trial, Defendant asked the Court to reconsider that decision. The Court again reviewed the case law and reiterated its prior decision. The Court based its decision on *Beard v. K-Mart Corp.*, 2000 UT App 285, which held that a medical expert must establish medical causation:

In Utah, in all but the most obvious cases, testimony of lay witnesses regarding the need for specific medical treatment is inadequate to submit the issue to the jury. Certainly whether the need for complex neurological surgery was a result of the accident at K-Mart is not within the common experience of laypersons. *The diagnosis and potential continuance of a disease are medical questions to be established by physicians as expert witnesses and not by lay persons.* Thus, we conclude expert testimony on this medical causation issue was required before the issue of damages arising from these surgeries was submitted to the jury.

Id., ¶ 16 (citations omitted, emphasis added.)

While Mr. Mecham is an expert, his expertise is in biomechanics, not medicine; and there is nothing to indicate that his opinion was supported by *medical* science. Moreover, the Court notes that its concerns are heightened here, where the issue is whether an accident caused a *traumatic brain injury*. Perhaps a biomechanical engineer might be able to opine whether the forces from a collision were sufficient to break a bone or tear a muscle. However, whether or not a motor vehicle accident caused a closed head brain injury, is an issue that the Court believes requires *medical* expertise.

2. Ruling Regarding the Exclusion of a Non-Designated Rebuttal Witness.

At the beginning of trial, plaintiff announced that he intended to call rebuttal doctors to testify. (At that time, the Court assumed plaintiff had properly designated those experts as rebuttal witnesses pursuant to Rule 26.) The issue of witness scheduling was raised again after the plaintiff rested; plaintiff stated that he intended to call, as rebuttal witnesses, one treater who had testified in the case-in-chief (Dr. Drescher, a psychologist) and one who had not (Dr. Sam Goldstein (a neuropsychologist.) When asked about the nature of the rebuttal testimony, plaintiff stated that Mr. Goldstein would be called, at least in part, to opine concerning the qualifications of the defendant's medical expert, Dr. Adam Schwebach, a neuropsychologist. (Apparently, Dr. Goldstein and Dr. Schwebach worked together for an extended period of time.)

At that time, the Court raised concerns about the nature of the rebuttal testimony and whether this would devolve into a fight between two professional ex-partners. Accordingly, the Court asked plaintiff to provide the Court with a copy of his Rule 26

rebuttal expert witness designations. However, no such designation had ever been filed. While both Dr. Drescher and Dr. Goldstein were identified as treaters who would provide opinion testimony in support of plaintiff's medical claims under Rule 26(a)(4)(E), those designations only referenced opinions that would be rendered in plaintiff's case-in-chief. There was no separate "written summary of the facts and opinions to which the witness was expected to testify" concerning any rebuttal opinions. *Id.*

After the defense rested, plaintiff sought to rely on Dr. Drescher and Dr. Goldstein as rebuttal witnesses. The Court expressed its concerns: a) that the testimony was not truly rebuttal testimony, and b) if it was, it was not properly designated. The Court struck Dr. Goldstein but allowed Drescher to give rebuttal testimony. The basis for the Court's rationale is as follows:

First, the Court is uncertain whether this was even proper rebuttal expert testimony. In *Astill v. Clark*, 956 P.2d 1081, 1086 (Utah Ct. App. 1998), the Court stated:

Rebuttal evidence should be limited to evidence made necessary by the opponent's case-in-reply, and evidence required to counter new facts presented in the defendant's case-in-chief. The purpose of rebuttal evidence is not to merely contradict or corroborate evidence already presented, but to respond to new points or evidence first introduced by the opposing party. Where a defendant introduces evidence of an affirmative matter in defense or justification, the plaintiff, as a matter of right, is entitled to introduce evidence in rebuttal as to such affirmative matter.

Id. at 1086. There, the Court reversed a trial court's exclusion of a rebuttal witness. However, that expert was to respond to defendant's accident reconstructionist, who supported the defendant's affirmative defense; accordingly, the plaintiff was not required to have presented any such testimony in her case-in-chief. Unlike the requested rebuttal testimony here, the "clear purpose of [plaintiff's] rebuttal evidence was to

contradict and refute new evidence first presented to the jury by [defendant] in her case-in-reply.” *Id.*, at 1087.

Here, that is not the case. The plaintiff’s treaters all provided testimony on the focal issue in this case – medical causation – which was the focus of plaintiff’s case-in-chief. Dr. Schwebach addressed that very same issue; he did not address any *new* defense (like the reconstructionist did in the *Astill* case), and so it is unclear whether expert rebuttal testimony was appropriate.

In any event, whether or not this was proper rebuttal testimony, under the current Rule 26,¹ plaintiff failed to perfect his right to use rebuttal experts. The current rules require designation of all opinions that an expert will give at trial; whether direct or rebuttal, and whether by retained experts or non-retained experts. In fact, there is a specific rebuttal designation process. See U.R.C.P., Rule 26(a)(4)(C)(iii). Plaintiff argues that provision only applies to *retained* experts and not treating physicians, who are “non-retained experts” covered by a Rule 26(a)(4)(E). However, rebuttal opinions by non-retained experts must be specifically designated. The comments to Rule 26 makes that clear:

the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. . . . [the Rules] require that a party fairly inform its opponent that opinion testimony may be offered from a particular witness.

Rule 26, comments (emphasis added.) Thus, neither Dr. Drescher nor Dr. Goldstein were properly designated as rebuttal expert witnesses.

The Court however, in its discretion, allowed Dr. Drescher to provide brief rebuttal, because he had seen the plaintiff over 300 times and was acutely aware of the

¹ Moreover, *Astill* was not decided under the new Rules governing expert designation.

plaintiff's condition and could (and, in fact, did) respond to assertions made about the plaintiff in the defense case. Moreover, to be fair to the plaintiff, the Court gave Dr. Drescher some leeway and allowed him to respond to the testimony of Dr. Schwebach.

The Court, however, did not permit Dr. Goldstein to testify. He was designated as an expert for plaintiff's case-in-chief, but plaintiff chose not to call him. After the Court excluded him as a rebuttal witness, plaintiff's counsel remarked that he was prejudiced because, had he known, he would have called him in his case-in-chief. That caused the Court to wonder whether Dr. Goldstein's testimony was truly intended to be rebuttal, or whether plaintiff sought to recall him on issues that could have, and should have, been addressed in its case in chief (in an attempt to have the last word on the same issue.)

In any event, the Court excluded Dr. Goldstein because plaintiff failed to properly designate him as a rebuttal expert as required under Rule 26. Moreover, the plaintiff has not been prejudiced by the Court's ruling. First, Dr. Goldstein's two detailed reports were introduced into evidence and were argued to, and provided to, the jury. Second, Dr. Drescher was permitted to respond to Dr. Schwebach, and thus Dr. Goldstein's testimony would have been cumulative. Finally, any prejudice to plaintiff would have been outweighed by the unfairness to defendant to have to respond to rebuttal arguments of which she was not previously on notice.

For all of these reasons, the Court excluded Dr. Goldstein as an expert rebuttal witness.

DATED this 21ST day of April, 2017.


BARRY G. LAWRENCE
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140907592 by the method and on the date specified.

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04/21/2017

/s/ MEGAN R MORRELL

Date: _____

Deputy Court Clerk

Droge is granted, in part. Said defense expert witness may testify as to impact speeds related to the accident and what movements this may have subjected Plaintiff to inside her vehicle but he **may not** testify as to whether such impact and movements caused the complained of injuries.

APPROVED AS TO FORM:

MORGAN, MINNOCK, RICE & JAMES

/s/ Anna Nelson
Anna Nelson
Attorney for Defendant
(Signed with permission)

EXECUTED AND ENTERED BY THE COURT AS INDICATED BY THE DATE AND SEAL

AT THE TOP OF THE PAGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MELINDA CRANDALL AND
BENJAMIN CRANDALL,

CASE NO. 2:11-CV-497

PLAINTIFFS,

VS.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

SALT LAKE CITY, UTAH
MAY 30, 2014

DEFENDANT.

MOTIONS IN LIMINE
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:30 am)

3 THE COURT: Good morning everyone. We'll call case
4 number 2:11-CV-497. This is Crandall versus American family
5 mutual insurance company. This is the time set for hearing
6 on, what, nine or ten motions in limine I think as we near
7 trial.

8 Counsel, I have your names, but let me invite you to make
9 your appearances if you'd like.

10 MR. PECK: Shaun Peck for the plaintiff.

11 THE COURT: Good morning.

12 MR. PLANT: Terry plant and Jeremy Seeley for the
13 defendant, Your Honor.

14 The COURT: Nice to see all of you. And of course
15 we have the Crandalls with us again this morning. It's nice
16 to see you both. Welcome back, though we're in different
17 surroundings than we were when we last saw each other I
18 think.

19 Mr. Peck.

20 MR. PECK: My son, Loren peck. He's going to law
21 school. He's clerking with us this summer. And the Crandalls
22 you met before. Bretton Hadfield, one of my partners, is with
23 us today.

24 THE COURT: Very nice.

25 Mr. Peck, where are you in school?

1 LOREN PECK: I just finished my first year.

2 THE COURT: Where?

3 LOREN PECK: Washington Lee.

4 THE COURT: All right, back in Virginia. That's a
5 beautiful place right there. Welcome, it's nice to see you.

6 All right. I have good news I think and bad news.

7 You've heard --

8 MR. PLANT: Hear the bad first.

9 THE COURT: You heard this last time, didn't you?
10 The bad news is it's clear to me reading your motions that you
11 both think you're trying a different case. The good news is I
12 think we can move through a lot of this this morning pretty
13 expeditiously. So by way of housekeeping, some of your
14 motions are stipulated, some of them are unopposed, some of
15 them are quite simple.

16 I'm ready to rule on the basis of the papers on most of
17 what you've submitted. And I think there's at least one
18 motion that I'd like to seek some clarification from you
19 about. And then I think we need to have a meaningful heart to
20 heart about what this trial is going to be about, what issues
21 we're addressing, and I think that's largely what we'll spend
22 our time addressing today.

23 So by way of motions, let's start with docket number 104
24 and work backwards for a moment. Docket number 104 is the
25 Crandalls' motion in limine regarding the filings of motions

1 in limine. And there is no objection to the relief that the
2 Crandalls seek here, provided that it applies equally to both
3 parties. That will be my ruling. That motion is granted.

4 Docket number 103 is an unopposed motion in limine
5 relating to whether the award is subject to taxes. That
6 motion is unopposed, as I said. It is granted.

7 Docket number 102 is a motion concerning statements at
8 trial expressing, I think the word you used, Mr. Peck, is
9 sympathy for American Family. Here is my view about that.
10 The Crandalls are arguing in their motion that AMFAM -- I
11 don't mean to be informal, but that's going to be a mouthful
12 if I say the name every time.

13 MR. PLANT: That's just fine, Judge.

14 THE COURT: Crandalls argue that AMFAM should be
15 precluded from making statements at trial along the lines, I
16 think the suggestion for example in your brief was that
17 someone from AMFAM may say I represent the X number of great
18 men and women of AMFAM. American Family argues that the
19 relief sought is too ambiguous to decide on its face. I
20 agree. Moreover, I'm not usually in the business of muzzling
21 attorneys at trial. You're all advocates at trial.

22 I will say, I'll direct you both, to our local rule 43-1
23 and item number 13 in my trial order, which set forth
24 collectively I think some direction about what we think is
25 appropriate generally for attorneys to say and what I think

1 you ought to steer away from at trial. Short of that, we'll
2 take it up on a case by case basis. Obviously we're not going
3 to appeal to the jurors' sympathies in any inappropriate way,
4 but neither am I going to preemptively tell you that you can't
5 make your arguments. So that motion is denied without
6 prejudice to raise the issue again at trial on a rolling basis
7 as necessary.

8 Let's jump over docket number 101 for a moment. Docket
9 number 100 is an unopposed motion in limine relating to making
10 references to insurance rates. The motion is unopposed. It's
11 granted.

12 Docket number 99 is a motion in limine filed by the
13 Crandalls relating to certain so-called collateral sources.
14 Here the Crandalls are arguing that any evidence that United
15 Health Care paid the Crandalls' medical bills at a discounted
16 rate is collateral source evidence and that it's required to
17 be excluded or not allowed at trial for the jury in
18 considering the calculation of damages, if any, that they
19 choose to award to the Crandalls.

20 In Utah the collateral source rule -- this is a quote.
21 I'm reading a portion now from the Mahana case, Utah Supreme
22 Court in 2004, quote: The collateral source rule provides
23 that a wrongdoer is not permitted -- or not entitled, rather,
24 to have damages for which he is liable reduced by proof that
25 the plaintiff has received or will receive compensation or

1 indemnity for the loss from an independent collateral source.

2 Judge Stewart here on this court in 2010, without the
3 benefit of a ruling from the Utah Supreme Court, evaluated the
4 general rule in a number of jurisdictions in the Amos decision
5 and held that a majority of courts have concluded that
6 plaintiffs are entitled to claim and recover the full amount
7 of reasonable medical expenses charged based on the reasonable
8 value of medical services rendered, including amounts written
9 off from the bills pursuant to contractual rate reductions.
10 And Judge Stewart opined at the time that he believed the Utah
11 Supreme Court likely would follow that majority rule, and
12 indeed they did two years later in the Wilson case, 289 P.3d
13 369.

14 Here the Utah Supreme Court said, I'm quoting again: Two
15 policy rationales support the rule. First, public policy
16 favors giving the plaintiff a double recovery rather than
17 allowing a wrongdoer to enjoy reduced liability simply because
18 the plaintiff received compensation from an independent
19 source. Second, the rule encourages the maintenance of
20 insurance by assuring that a plaintiff's payments from a
21 collateral source will not be reduced by a subsequent
22 judgment.

23 The Supreme Court went on to note, the Utah Supreme Court
24 that is, citing to the Restatement of Torts, that the
25 restatement allows all injured plaintiffs to recover the

1 reasonable value of medical expenses and does not distinguish
2 between those who have private insurance and those whose
3 expenses are paid by the government or those who receive their
4 treatment on a gratuitous basis.

5 In other words, the Utah Supreme Court directs this court
6 and others applying Utah law on this point that for purpose of
7 calculating medical expense damages, it is the defendant's
8 responsibility to compensate for all harm that he causes, not
9 confined to the net loss that the injured party receives.
10 That's at page 382 of that Wilson decision.

11 On the basis of that authority and in light of the
12 court's -- or the parties' briefing and ruling, I conclude
13 that UHC's discounts for Ms. Crandall's medical bills are
14 collateral sources and they are -- they will be excluded from
15 trial for purposes of determining the amount Ms. Crandall may
16 be entitled to claim and recover from the jury. On that basis
17 that motion is granted.

18 I'd like to take up now I think the Daubert motion
19 relating to Dr. Hayes. And I have a ruling for you based on
20 your submissions, and then I'd like to explore with all of
21 you -- we'll come back to the Crandalls' motion in limine that
22 is docket number 101 relating to prior claims.

23 This is going to take a moment. You don't need to take
24 detailed notes. I'll be referencing in my ruling that
25 follows, I'll just say for the reasons stated, so I'm not

1 going to ask one of you to pour this back to me in a written
2 ruling.

3 By way of background, Dr. Hayes is a biomechanical expert
4 with a Bachelor's Degree and a Master's Degree in mechanical
5 engineering and a Doctorate degree in theoretical and applied
6 mechanics. He is, it appears to me, a very impressive person.
7 Dr. Hayes, however, has not graduated from medical school is
8 not a licensed physician, and does not treat patients. At one
9 point in his career he did, however, teach some courses in
10 medical school.

11 AMFAM, as best I understand, offers Dr. Hayes to testify
12 to two opinions that are the subject of this motion. Number
13 one, that the collision at issue most likely did not cause the
14 artery -- is it carotid?

15 MR. PLANT: Carotid.

16 THE COURT: Carotid. I should know that. The VERY
17 last medical malpractice case I had involved an aortic
18 dissection. I'm just going to say dissection. Because the
19 forces involved in the collision, Dr. Hayes opines, were of
20 the magnitude experienced in everyday situations, such as
21 plopping down on a chair. I kind of think of it also in terms
22 of a rigorous sneeze or something.

23 And, second, the opinion -- the second opinion that's the
24 subject of these motions is a causation opinion -- excuse
25 me -- his opinion that the causation opinions offered by

1 Dr. Collins and Dr. Carter fail to follow accepted accident
2 reconstruction and biomechanical principles.

3 So what standard are we to apply to the motion at issue?
4 It's under rule 702 of the Federal Rules, which provides that
5 a witness who is qualified as an expert by knowledge, skill,
6 expert training or education may testify in the form of an
7 opinion or otherwise if a number of conditions are satisfied.
8 First, the expert's scientific, technical or other specialized
9 knowledge will help the trier of fact to understand the
10 evidence or to determine a fact in issue.

11 Second, the testimony is based on sufficient facts or
12 data.

13 Third, the testimony is the product of reliable
14 principles and methods.

15 And, fourth, the expert has reliably applied those
16 principles and methods to the facts in the case before the
17 court.

18 Under rule 702 the Tenth Circuit directs me that district
19 courts are to assess whether a witness is qualified by
20 knowledge, skill, experience, training or education to offer
21 the expert opinion that's offered, and I'm told to act in a
22 gatekeeping role designed to ensure that expert testimony is
23 not only relevant but also reliable.

24 The Supreme Court in Daubert identified four specific
25 non-exhaustive factors that I am to consider in determining

1 the reliability of expert opinions that are offered. Number
2 one, whether the opinion at issue is susceptible to testing
3 And has been subject to testing.

4 Number two, whether the opinion has been subjected to
5 peer review.

6 Number three, whether there is known or potential rate of
7 error associated with the methodology used and whether there
8 are standards controlling the technique's operation.

9 And, finally, whether the theory underlying the opinion
10 that's offered has been accepted in the scientific community.

11 The Crandalls here argue that Dr. Hayes is a
12 biomechanical engineer, of course which is true. And the
13 Crandalls argue on that basis that he lacks the necessary
14 medical training to provide opinions on the precise cause of a
15 specific injury.

16 Dr. Hayes contends that he is more qualified to testify
17 concerning injury causation than the medical doctors.

18 There are cases all over the map on this issue. The case
19 that -- I found a couple that I thought were helpful, and one
20 in particular was the Layssard case from the Western District
21 of Louisiana in 2007. This is 2007 Westlaw 4144936. The
22 District Court there observed that on the one hand in a
23 situation like this the biomechanical expert is not a medical
24 doctor and cannot offer an opinion as to specific medical
25 causation.

1 On the other hand, the Court observed, the medical doctor
2 cannot offer an opinion as to medical causation without first
3 knowing whether the forces which are the subject -- proper
4 subject of a biomechanical engineer analysis, are sufficient
5 to cause the injury. It's this chicken and the egg problem.

6 The District Court there in Louisiana held that a
7 biomechanical engineer may state the scientific measurement
8 and the calculation of forces involved, and state whether or
9 not injuries generally would or would not be expected from
10 such forces. As for the specific question of whether or not a
11 particular accident caused a particular injury to a particular
12 plaintiff, the biomechanical engineer's calculations are
13 simply one factor to consider when a medical doctor testifies
14 as to specific causation. That's a direct quote from that
15 Louisiana decision.

16 Many other courts around the country have made similar
17 determinations, and just by way of example they're both in
18 district courts and in circuit courts. We see the Laski
19 decision in the Sixth Circuit from 2000 in which the Sixth
20 Circuit allowed a biomechanical expert to testify about the
21 forces necessary to produce certain types of injuries, and
22 whether those forces existed in the accident at issue there.
23 There was also the Morgan case from the Southern District of
24 New York in 2008. These cases, of course, are just merely
25 illustrative. As I said at the outset, cases seem to fall all

1 over the map on this.

2 In my view, however, this case is distinguishable from
3 many of those cases, including the Layssard case primarily
4 because there exists here a stipulation among the parties, and
5 I can -- I see a reasonable basis for that stipulation, that
6 Ms. Crandall had preexisting conditions that would materially
7 impact the causation analysis in this case.

8 It is not relevant in this case in my view whether or not
9 the forces generated in this accident between Ms. Henderson
10 and Ms. Crandall were generally sufficient to cause an injury.
11 Rather, in my view the relevant inquiry is whether, based on
12 Ms. Crandall's specific preexisting condition, the forces in
13 this accident could specifically cause her claimed injuries.

14 As to this question, what I found very persuasive to me
15 was the reasoning employed in the Middle District of Georgia
16 in the Norfolk Southern Corp. case. This is 537 F.Supp.2d
17 1343, a 2007 decision from one of my colleagues, where that
18 court found that, I'm quoting now, biomechanical engineers
19 typically are found to be qualified to render an opinion on
20 the forces generated in a particular accident and the general
21 types of injuries those forces may generate. However,
22 biomechanical engineers ordinarily are not permitted to give
23 opinions about the precise cause of a specific injury. This
24 is because biomechanical engineers lack the medical training
25 necessary to identify the different tolerance levels and

1 preexisting medical conditions of individuals, both of which
2 could have an effect on what injuries resulted from an
3 accident.

4 Having concluded that the relevant inquiry here is about
5 specific causation rather than general causation, I grant the
6 Crandalls' motion to exclude testimony of injury causation
7 from Dr. Hayes.

8 The Crandalls next argue that Dr. Hayes' methodology for
9 determining the likelihood of injury and causation are not
10 reliable under Daubert. But having already determined that
11 Dr. Hayes' testimony of causation is excluded, the Court need
12 not examine whether Dr. Hayes' methodology precludes his
13 testimony on causation.

14 The Crandalls also argue in their motion that Dr. Hayes'
15 methods for determining causation are not reliably applied,
16 and of course we need not reach that issue either. We do have
17 to reach, though, another issue raised by the Crandalls in
18 their motion, and that is the sufficiency of Dr. Hayes'
19 computer simulation and whether it fits the facts of this
20 case.

21 Here the Supreme Court tells us in Daubert that the
22 proponent of expert testimony bears the burden of establishing
23 the reliability and the admissibility of the expert's
24 testimony by a preponderance of the evidence, meaning more
25 likely than not. But a District Court's gatekeeping role is

1 not intended to supplant the adversarial system or the role of
2 the jury. Vigorous cross-examination, presentation of
3 contrary evidence, and careful instruction on the burden of
4 proof are the traditional and appropriate means of attacking
5 shaky but otherwise admissible evidence.

6 The Crandalls here argue that the GATB, which I
7 understand to be an acronym for Graphical Articulated Total
8 Body program that Dr. Hayes employed, has only been proven
9 capable of predicting gross occupant motion. The Crandalls
10 contend that the GATB program is being used here to predict
11 the actual movements of Ms. Crandall.

12 For his part Dr. Hayes declares that, I'm quoting from
13 his declaration at page 17, the GATB Occupant Dynamics Model
14 is widely accepted and has been validated for modeling
15 occupant dynamics in a wide range of complex accidents.
16 Further, the United States Department of Transportation and
17 the National Highway Traffic Safety Administration have
18 published studies analyzing the utility of ATB slash CVS
19 related to injury assessment.

20 And in fact both sides here in my view I think, as best I
21 can tell from the papers, agree about the scientific
22 reliability of this computer model generally. The dispute
23 here between the parties appears to be the extent of the
24 model's limitations. In my view that type of issue, that type
25 of dispute, is most appropriately addressed and resolved

1 through rigorous and healthy cross-examination at trial. And
2 I'm going to permit Dr. Hayes to talk about that model subject
3 to cross-examination, Mr. Peck.

4 The Crandalls also argue that the GATB model that
5 Dr. Hayes employed requires massive amounts of input data and
6 that Dr. Hayes lacked that data in this instance, at least in
7 a sufficient form to make his model reliable. But as I've
8 just stated, I find that the model is generally admissible,
9 with Dr. Hayes' testimony subject to cross-examination, so
10 long as Dr. Hayes clearly articulates his assumptions. And
11 then, Mr. Peck, those assumptions are subject to attack on
12 cross-examination, but they do not go to the underlying
13 reliability of the analysis in my view.

14 Moreover, I just -- on the record that is before me, I
15 find little evidence to suggest that Dr. Hayes made
16 unbelievable assumptions or incredible assumptions that render
17 the reliability of his model useless to the jury here. In
18 other words, I think the evidence and testimony will make
19 facts at issue more or less likely, and I think they are
20 sufficiently reliable.

21 There's a third and final point to the Crandalls' motion
22 and this relates to whether Dr. Hayes has ignored the guidance
23 in the literature warning that a single simulation should not
24 be used as a basis to show the only way an event could have
25 occurred, and, instead, people are instructed that several

1 runs must be performed changing the unknown or estimated
2 parameters to illustrate a range of possibilities. I'm
3 reading here I think from the materials that you cited,
4 Mr. Peck.

5 But, indeed, Mr. Hayes does not appear to vary his inputs
6 in order to calculate the error rates of his assumptions for
7 the modeling of this accident. I'll just note that those
8 error rates in the model are generally known, and that
9 Dr. Hayes is attempting to make a model of one particular
10 accident. It is, however, in my view within his expertise to
11 make those input assumptions. To the extent that those
12 assumptions are subject to criticism or attack, Mr. Peck is
13 welcome to explore that with him on cross-examination.

14 So I find that Dr. Hayes may testify as to the general
15 forces involved in the accident. He may calculate those. He
16 may determine those. He may articulate those. He may not
17 talk about whether those forces are generally or specifically
18 sufficient to cause injury or cause the injury that
19 Ms. Crandall is claiming here.

20 There was one final point raised in reply, that was the
21 Crandalls' argument that the Court should exclude evidence of
22 two new methodologies, this being the neck injury criterion
23 and the abbreviated injury scale for evaluating injuries. But
24 because those issues were first raised in reply, I will only
25 exclude testimony about those methodologies to the extent that

1 they were not disclosed as methods in Dr. Hayes' report. If
2 they were adequately -- they weren't? You're saying they
3 weren't?

4 MR. PECK: No.

5 THE COURT: We may be discussing that at trial is my
6 guess, maybe before he's called. Notice is going to be the
7 touchstone of my inquiry there. If there was reasonable
8 notice to the plaintiffs and an opportunity to examine
9 Dr. Hayes about that in deposition, he can testify about it.
10 If not, or if you just missed it and it was otherwise stated
11 in the report --

12 MR. PECK: It came in his affidavit for the first
13 time in response to our motion.

14 THE COURT: Okay. Well, I think I'm going to leave
15 that open. We'll have a chance to discuss that before
16 Dr. Hayes is on the stand. So that's a lengthy ruling. I
17 think that the net effect of all of that is, Mr. Peck, that
18 motion is granted in part and denied in part.

19 Mr. Plant, hi.

20 MR. PLANT: I have some questions about your ruling,
21 what that means in terms of some things we can and can't ask
22 him. Is this the appropriate time to bring that up?

23 THE COURT: This is a great time to do that.

24 MR. PLANT: By the way, Judge, I'm not comfortable
25 sitting down. Give me some direction. I'm going to stand.

1 THE COURT: We love to have you stand in Federal
2 Court. It's kind of a formal place. In fact I often invite
3 people to do that.

4 MR. PLANT: It feels very awkward to sit down and
5 address the Court.

6 THE COURT: If you're going to be away from the
7 microphone, I'll just ask you to speak up.

8 MR. PLANT: Let me come up here so I can be heard.

9 THE COURT: Thank you.

10 MR. PLANT: The issue I have for now, and obviously
11 I'll let this sink in and there will be others, is if he can
12 compare the forces that were generated to other forces that
13 she would reasonably expect in daily living. In other words,
14 you brought up a sneeze, and in coming up with our forces that
15 he calculates here, can he then say, and a sneeze or vomiting
16 or other things that she might experience in daily living
17 would have a similar force or effect on the body. That's the
18 question.

19 THE COURT: Mr. Peck.

20 MR. PECK: Well, the problem here is he testified
21 that he really didn't know what she was involved in in her
22 activities of daily living, and with her preexisting
23 conditions, he had no idea how she sat down, how she did
24 things. He said I don't know that. I don't know that
25 information.

1 THE COURT: So here is my view of that. As a
2 biomechanical engineer, I think he's expert on calculating
3 forces. He's expert at analyzing forces. He can talk
4 about -- it would make no sense to a jury, for example, it
5 would be out of context, for him to calculate a force of this
6 accident and produce it in some numerical quantifier, and then
7 not be able to give some context for what that means. What we
8 will not permit him to do is place it in the context of
9 testimony about whether it would be sufficient to cause any
10 injury. He can compare it to other events of similar force.

11 MR. PLANT: That's all I need, Your Honor. That's
12 helpful, thank you.

13 THE COURT: All right. There was one other motion
14 that I thought we should tackle at the outset. This is docket
15 number 101. This is the Crandalls' motion concerning prior
16 claims made by the plaintiff. Here the Crandalls are arguing
17 that the Court should exclude all evidence and argument
18 relating to other claims, lawsuits or settlements sought or
19 obtained by the Crandalls. The Crandalls contend this is
20 especially a well taken motion because there are stipulations
21 here about those preexisting conditions.

22 AMFAM for its part argues that the prior claims should be
23 admissible to prove preexisting conditions which it contends
24 are relevant to a damages determination by the jury. And in
25 particular AMFAM points to the IME report performed by Dr. --

1 is it Knorpp?

2 MR. PLANT: Yes.

3 THE COURT: I don't have enough information to rule
4 on this motion. I don't know, and would like to explore with
5 all of you, three things: What is the type of evidence
6 specifically AMFAM is intending to try to introduce regarding
7 previous claims? Second, what is the stipulation that you've
8 all reached about preexisting conditions? And, third, what is
9 in the IME report from Dr. Knorpp that is at issue? It wasn't
10 submitted to the court, at least I couldn't find it. So can
11 you help us understand those three issues.

12 I guess the question is what's the stipulation? Why
13 doesn't it cover what you want to introduce? And what's the
14 deal with Dr. Knorpp?

15 MR. PECK: I guess maybe the first question to ask,
16 I think the exhibit disclosure was made very early. I think
17 exhibit disclosures have changed on the part of AMFAM. I
18 don't know if they're still intending to introduce that
19 report.

20 MR. PLANT: Yes, we are.

21 MR. PECK: Then we do need to --

22 MR. PLANT: Let me suggest, Your Honor. Their quote
23 unquote stipulation isn't a stipulation per se as I understand
24 that term where we've written something and agreed, rather,
25 it's an acknowledgment on our part that she had preexisting

1 conditions. So I would more refer to an acknowledgment that
2 the evidence established that and not a -- when I hear the
3 term stipulation, that's something that's binding that we've
4 agreed to, and that's not occurred here.

5 The COURT: I appreciate the clarification. What
6 is the agreement? There were preexisting conditions, and
7 those will be identified from the medical records, which will
8 speak for themselves.

9 MR. PLANT: Right, correct.

10 THE COURT: Don't even think in this regard
11 Ms. Crandall, I mean she would have some testimony perhaps
12 about it, but the medical records would be the most reliable
13 source I would think of that information.

14 MR. PLANT: Medical records and doctors, and
15 including -- and if can jump to Dr. Knorpp, he is a doctor
16 that saw her and rendered testimony about her condition. And
17 like it or not, it's part of the record and part of the claim,
18 and I don't know how we get around that. And I realize I'm
19 jumping to another subject, and if that's inappropriate, you
20 can tell me. But that's why there is no quote unquote
21 stipulation, and I'm air quoting here for the record.

22 THE COURT: Mr. Peck, what is it you're specifically
23 trying to exclude?

24 MR. PECK: So Dr. Knorpp is a well known defense
25 doctor. He does work for insurance companies on the defense

1 side. During a previous claim, 2003 collision, Melinda
2 Crandall is injured. Dr. Knorpp is hired by State Farm. He
3 says, surprise, she's not injured. Well, her doctors, of
4 course, say she is. He writes his standard DME report and
5 that's the report we're talking about. He didn't see her as a
6 treater. This isn't a treating physician seeing her for the
7 purpose of giving medical advice. This is a typical DME
8 report that isn't allowed as admissible evidence under any
9 circumstances in court.

10 Doctors can come in and testify in those situations if
11 they're brought in as a defense expert. But they're not
12 brought in as a treater, their reports are not generally
13 admissible. This is that kind of thing. They got a hold of
14 that old report from Dr. Knorpp, and their contention is,
15 well, it shows that she has preexisting conditions. But as
16 typical in these kind of cases, what Dr. Knorpp does is he
17 gets all the other medical records, which, yeah, show the
18 preexisting conditions, and then he writes his report on
19 behalf of State Farm, it's self-serving, suggesting that she
20 doesn't have any injury.

21 And So what we're trying to do here is bootstrap somebody
22 else's opinion. And Dr. Knorpp hasn't been identified as an
23 expert witness in this case, and it wouldn't be -- it wouldn't
24 be relevant anyway. This is from an old injury, an old claim
25 that State Farm ultimately paid, despite what Dr. Knorpp said.

1 That opinion just has no place or relevance here but is likely
2 to cause a lot of confusion about what was going on in that
3 old collision? What was going on in that old accident? What
4 happened here?

5 You know, do we have to put on a sideshow to get around
6 or to oppose or rebut what Dr. Knorpp has to say in that case?
7 Nobody disputes that there are preexisting injuries. I don't
8 think there's any dispute about the scope of those preexisting
9 injuries. That has not been an issue in this case.

10 The COURT: What in your view could Dr. Knorpp
11 testify about here? What would be proper?

12 MR. PECK: Well, they have their own IME doctor in
13 this case who went back since -- I mean from -- so Dr. Knorpp
14 is talking about a 2003 collision. They've got somebody who
15 brought all that up to date, their own neurologist.
16 Dr. Knorpp is a psychiatrist. And Dr. Knorpp I don't think has
17 any relevant or valuable opinion in this case. And if it's
18 going to be an opinion, it hasn't been disclosed as an expert
19 opinion.

20 And so, you know, and since he's not a treater, what
21 factually does he have to offer? I just don't see any
22 relevant use of that opinion. It's hear -- the report itself
23 is hearsay, and the report itself I don't think has been
24 adopted properly by any expert.

25 THE COURT: Well, we're not going to be receiving

1 the report. I think the report is -- puts you on notice of
2 what Dr. Knorpp did and what he observed, but let's hear from
3 Mr. Plant. Thank you.

4 MR. PLANT: Your Honor, that's the difference here
5 and why it comes up in the context of claims. There are
6 business records, i.e. the claims records of state farm and/or
7 other insurance companies or other records that were -- that
8 were created as a result of a prior claim. That document
9 clearly falls within that -- in the purview of a business
10 record generated in the normal course of business.

11 THE COURT: What document?

12 MR. PLANT: The document of Dr. Knorpp, or the
13 report. And now it's here and part of the record that we
14 have.

15 THE COURT: I'm sorry. Let me keep up with you.

16 MR. PLANT: Please do.

17 THE COURT: The 2003 report that he generated is
18 part of the business records you think because it's in the
19 file that is an examination he conducted at the time?

20 MR. PLANT: It was part of the business record
21 produced by State Farm as part of their basis for how they
22 looked at this claim. There's a number of documents in those
23 claims documents that deal with that very issue.

24 THE COURT: Why is how State Farm dealt with that
25 claim in 2003 relevant to us?

1 MR. PLANT: Because what we have is we have a
2 medical record of a report of a doctor examining, looking at
3 the plaintiff. And, by the way, I take great umbrage with
4 what Mr. Peck is talking about with Dr. Knorpp and
5 characterizing him as a defense doctor. That's just not fair.
6 There's no evidence before this court.

7 The COURT: I really don't care about any of that.
8 Both parties show up here with folks they pay a lot of money
9 to come in and offer opinions. I understand.

10 MR. PLANT: Well said.

11 THE COURT: Go ahead.

12 MR. PLANT: So we've got that as part of the record
13 in this case that deals with the nature and extent of the
14 preexisting condition of Ms. Crandall. We have a record that
15 deals specifically with her preexisting injuries. I've
16 indicated at the outset, we acknowledge that she had prior
17 injuries. The scope, nature and extent of those injuries is
18 very much in dispute and whether or not it is those ongoing
19 injuries that continues to create her problems now.

20 Those documents that were created to deal with the very
21 issues of how her injury was, what happened, and medical
22 reports and/or -- and/or opinions concerning that are
23 absolutely part of that record, just like, I would submit, a
24 preexisting medical record. Mr. Peck is not going to contend
25 that a preexisting medical record can't be admitted because

1 it's by a defense doctor, or whatever he's saying here.
2 Rather, it is a document that is relevant to give -- that will
3 help the jury understand one way or another what the extent of
4 her injuries were or were not. That's all I'm saying.

5 THE COURT: Well, let me -- let me just make sure I
6 think I understand what you're saying. You wish to offer
7 Dr. Knorpp to testify here about an analysis he performed in
8 2003 in connection with another lawsuit and opinions he formed
9 at that time?

10 MR. PLANT: I would simply offer the report to say
11 what it says, no more, no less.

12 THE COURT: Well, why is a 2003 report relevant to
13 us about preexisting conditions when we're talking about an
14 accident that now occurred many years after that?

15 MR. PLANT: Because the very injury that she
16 sustained is to her cervical area that gave rise and was the
17 genesis, if you will, of all of this. This isn't something on
18 her toe that is uninvolved. This is directly related, and
19 it's the start.

20 THE COURT: Is his 2003 report and analysis just a
21 summary of existing medical records or did he conduct his own
22 examination in 2003?

23 MR. PLANT: The latter. Your Honor, you know what,
24 I owe the Court an apology, I think we both do. We're talking
25 about a document you haven't seen. I think what would be

1 best, frankly, would be to deal with this maybe next week at
2 the pretrial and get this document to you so you know of what
3 we speak.

4 THE COURT: Can you just -- can you tell me -- I
5 think -- thank you. I think that's a great idea. That will
6 be very helpful. Can you tell me today so I have in mind when
7 I read that report, if we allow you to put Mr. -- Dr. Knorpp
8 on the stand, you're going to elicit from him what opinions?

9 MR. PLANT: Well, the opinions that are set forth in
10 his IME report, nothing more, nothing less.

11 The COURT: You're going to ask him, did you
12 conduct an examination in 2003? Yes. What did you do?

13 MR. PLANT: What did you find?

14 The COURT: What did you observe?

15 MR. PLANT: Yes. But whether I call him or not, and
16 I don't want to mislead the Court here, I believe his report
17 is an admissible document either way.

18 THE COURT: You think it's a business record?

19 MR. PLANT: I truly do. When State Farm had that
20 and had that as part of their -- well --

21 THE COURT: It wasn't created and generated in the
22 normal course of business. It was created and generated for
23 litigation; right? This isn't -- State Farm is not in the
24 business of going around conducting medical examinations in
25 the normal course of its business. This is litigation

1 related; right?

2 MR. PLANT: Respectively disagree. That's what
3 claims people do in the normal course of their business.

4 THE COURT: I'll think about that.

5 MR. PLANT: Okay.

6 THE COURT: I think I understand what you intend to
7 offer him for. I'd like to read the report. Let's take this
8 up at the pretrial conference.

9 But, Mr. Peck --

10 MR. PECK: I made a misstatement. I think it was a
11 1999 collision that this applied to, so even older.

12 MR. PLANT: I believe, John, and you correct me if
13 I'm wrong, I think it's the first event that started all of
14 this, at least the car accident, that there were other things,
15 the chiropractic event.

16 The COURT: Is this a 2003 report of a 1999 event?

17 MR. PLANT: I believe so. But, Your Honor, and I
18 realize you think, well, what in the world could that have to
19 do with anything? What it has to do with is that's the first
20 event that started the issues that she had with her neck.
21 That's why.

22 The COURT: I suspect -- I mean we could argue
23 birth was the first event that -- I mean there has to be a
24 line at some point. Let's see what the report says, and let's
25 argue about this, by argue I mean have a spirited debate, when

1 we get together for our final pretrial conference.

2 Okay. This leaves us with the three motions that relate
3 to bifurcation, docket numbers 96, 97 and 98. What a hot
4 mess.

5 Mr. Plant, what do you think we're trying in this case?

6 MR. PLANT: I think we are trying a contractual
7 case, I will tell you that, an express contract, the issues
8 involving the express contractual provision, which basically
9 say --

10 THE COURT: Is it the plaintiff's first cause of
11 action for breach of contract? Is that what we're trying?

12 MR. PLANT: Not at all. It is the express -- the
13 express contract.

14 THE COURT: Why do you say that?

15 MR. PLANT: Because that's what we agreed to, number
16 one.

17 THE COURT: Where did you agree to that?

18 MR. PLANT: We agreed to that in the bifurcation
19 order taken as a whole. Please look at it as a whole.

20 THE COURT: I -- you can't imagine how many times I
21 have read this and my whole staff has read this.

22 MR. PLANT: Me and you both.

23 THE COURT: Where does it say that we are only
24 trying the express breach of contract claim?

25 MR. PLANT: It says it in the first paragraph. You

1 have to read the whole thing, Your Honor. And this -- it
2 says -- first off, it says are stayed on the plaintiffs' cause
3 of action for breach of the covenant of good faith and fair
4 dealing. That by necessity requires that any implied
5 provision of the contract has to be stayed. There is nothing
6 in the express terms of the contract that requires an
7 obligation to do all of the things that are implied under this
8 covenant of good faith and fair dealing.

9 More importantly, perhaps, is the whole concept of
10 bifurcation, the way it's been treated by this court up until
11 now.

12 THE COURT: I hate it. I hate bifurcation. I don't
13 think I would have signed this order, but Judge Benson did.
14 It's your stipulation. What I'd like to figure -- I haven't
15 treated it at all except to thus far respect the --

16 MR. PLANT: On the discovery issues you have, Your
17 Honor. There was an issue there about whether discovery could
18 go forward on a 30(b)(6) motion and a bunch of discovery that
19 pertained precisely to this. So what are we going to try?

20 If you let this in -- let me -- if you're leaning towards
21 saying they get to talk to all of our claims people, then
22 think of what we are now doing.

23 THE COURT: Well, let me tell you where I am on this
24 so I'm not going to hide the ball, and then you can all tell
25 me what you think.

1 MR. PLANT: Okay.

2 THE COURT: I wonder if there is any stipulation. I
3 mean I'm sort of evaluating this like I would a contract, I
4 suppose. It's the only thing I can come up with. The two of
5 you entered into a stipulation, you thought, only it now
6 appears to me you didn't because you both intended something
7 different I think. If that's true, there was no agreement.
8 If we talk about it in like contractual terms, there was no
9 meeting of the mind.

10 And as I read the stipulation, as I read Judge Benson's
11 order adopting your stipulation, I don't know what it means.
12 I honestly do not know what it means. I don't know how to
13 enforce it at trial. And so I'm wondering, if there -- if
14 there was no genuine agreement between all of you, if you're
15 standing here today and you still don't believe you each
16 understood what you were agreeing to, why can I enforce it?
17 How can I enforce it? And if I can't, then I'm troubled,
18 because Mr. And Mrs. Crandall have been waiting now for --
19 three years?

20 MR. PLANT: Four.

21 THE COURT: Four years to have this case tried.
22 You've all acted in reliance -- and I'm not blaming anybody.
23 I'm not pointing any fingers. I think you've had a spirited
24 disagreement amongst yourselves through discovery about what
25 was the subject of the stipulation and what have you. But I'm

1 now thinking about putting this case in front of a jury. I'm
2 thinking about the efficiency of the Court's time. Are we
3 going to have two separate trials where we're going to be
4 producing the same evidence and testimony and we're just going
5 to -- I mean I'm deeply concerned.

6 And if we can't try this case right now because there's
7 no agreement, I have -- I have in my mind a remedy that I
8 don't think anybody here will like for how quickly we're going
9 to get to trial.

10 But, Mr. Plant, let me start with the first question.

11 MR. PLANT: Okay.

12 THE COURT: Did you and the plaintiffs make a
13 specific agreement on a point that is enforceable? Is there a
14 stipulation here?

15 MR. PLANT: Is there a stipulation?

16 THE COURT: Is there an agreement? Was there an
17 agreement where you -- both sides in your view understood
18 whatever deal you were making, and what was that deal? Just
19 in plain language what did you agree to?

20 MR. PLANT: The answer to the question is first,
21 yes.

22 THE COURT: Okay.

23 MR. PLANT: And my understanding was, and it goes --
24 your Honor, I'm somewhat tainted a little bit by the fact that
25 I act as an arbitrator all the time in UIM cases. Never in my

1 career have I ever seen a UIM case go forward -- and the case
2 law supports this. And this is going to go to my agreement --
3 where there is -- where the first action isn't to see what
4 damages the plaintiff sustained as a result of an event. And
5 then, depending on how that comes out, then we go forth to the
6 next step as so whether or not the insurance company didn't
7 deal with it quickly enough and all the bad faith stuff.

8 So in my mind, because I have never seen anything
9 different in my 30 something years of practice, and
10 particularly in the last several years where I deal with this
11 stuff a lot, that I think there would be any notion that in
12 the initial cause of action, in the initial -- strike that --
13 in the initial phase that there would be anything other than
14 evidence that dealt with the liability, causation and damages.

15 THE COURT: Your own client in fact has done
16 something other than you just described. It was in front of
17 Judge Stewart in the Trujillo case. Now, he separated out the
18 claims and they took them in turn, same jury, same trial, all
19 at one time. He excluded in the first instance, until there
20 was an express breach determination by the jury, evidence of
21 bad faith, but then they just immediately moved into that
22 other evidence. So I respectfully think that there is
23 evidence that courts try these cases together.

24 MR. PLANT: I understand that, Judge, but nowhere in
25 the Trujillo case and the Christensen case that was followed

1 by Judge Stewart again, you'll notice he said -- he said in
2 that decision there is prejudice to the defendant if the first
3 phase goes forward with all the bad faith stuff coming in. So
4 in the Christensen case, following Trujillo, he then went on
5 to say -- he went on to say, yeah, I'm going to bifurcate it.
6 I'm going to grant the motion to bifurcate so that we have two
7 phases.

8 And I will agree with the court that what he then did say
9 is that we'll do phase one and the same jury will do phase
10 two. What we did here though pursuant to agreement is we
11 did -- we did the first step, and that's what I understand,
12 and then -- then, because we didn't want to do all the
13 discovery -- this is my mindset -- on experts and expert
14 claims handling and what's bad faith and all that, we were
15 going to see if they got a number up to 300 -- or \$332,000,
16 and if we -- if they didn't get that number in phase one, then
17 phase two didn't exist, and, hence, that's the -- that's the
18 hope for efficiency. There's no reason to do all of the other
19 discovery.

20 THE COURT: So I read your stipulation on its face
21 to refer to claims.

22 MR. PLANT: Right.

23 THE COURT: And, for example, the stipulation has a
24 number one. The parties stipulate and seek the order of this
25 court as follows, number one. That discovery, other pretrial

1 proceedings and deadlines, and trial be stayed on -- and then
2 you're quite specific -- plaintiffs' cause of action for
3 breach of the covenant of good faith and fair dealing and for
4 intentional infliction of emotional distress and punitive
5 damages, to the extent that those claims were allowed in the
6 amendment, which they were.

7 So I can look at the amended complaint and I can find
8 those two causes of action. And if I excise them from the
9 complaint -- let me just walk it through. You can explain to
10 me how I'm misunderstanding -- then we have two causes of
11 action left in the complaint. The first is -- first cause of
12 action, breach of contract. And then articulated in paragraph
13 27 are seven bases that are alleged as violations of breach of
14 contract.

15 MR. PLANT: For example it says bad faith.

16 THE COURT: It does. It's right there in the first
17 claim of action, which is not included in your stipulation.
18 How do I read out of the complaint part of a claim that you
19 left in?

20 MR. PLANT: Because we didn't. It doesn't say -- it
21 says cause of action for breach of covenant of good faith and
22 fair dealing and bad faith. What I understood that --

23 THE COURT: Not bad faith.

24 MR. PLANT: It says that, Your Honor. On page two
25 it says -- oh, fair dealing. You're right. You're right. It

1 doesn't say the words bad faith. My understanding then is
2 that any case -- anything that dealt with that concept,
3 covenant of good faith and fair dealing was being taken to the
4 second level.

5 And think of it this way, Judge. That's why I say you
6 have to look at the whole thing, and I think this will be
7 persuasive. We then go to say we won't even have experts on
8 those issues until we do phase one. So in my mind I thought,
9 well, then we certainly can't let all of this insurance
10 handling stuff in because you need experts to put the standard
11 of care of what they should and shouldn't have done. And
12 that's why in -- that's why I said at the outset, you have to
13 look at the thing as a whole. And the whole document suggests
14 exactly what I'm saying. We're going to try the express
15 contract claim. And then as to all the other stuff when we
16 need experts and stuff like that, we're going to have an
17 entirely separate schedule.

18 And that's what it says. That's -- and the difference
19 between this and Trujillo and the Christensen bifurcation.
20 And let's not forget, Judge Stewart did bifurcate the case on
21 the very basis that I'm saying. The only difference is that
22 he said the same jury will hear both. I got that.

23 THE COURT: He bifurcated the trial.

24 MR. PLANT: Right. Right. Here we bifurcated by
25 definition, and it's been ruled upon by this Court. We

1 bifurcated discovery. There was a motion filed. The Court
2 has so ruled. So again we thought, okay, we've got this. And
3 so now as we prepare for trial, that's what we have decided
4 and that's why we filed the motion to be clear.

5 I just don't -- I will agree there's some ambiguity in
6 this. If I didn't, I would lose all credibility with this
7 Court. But I think if you read the thing as a whole and at
8 least go into my mind -- and I know you can't do that, but as
9 an officer of this Court I'm bound to tell you what I
10 believed, and I am -- I thought we were doing exactly what --
11 what I'm saying we were doing.

12 And I -- and, frankly, I don't remember the conversations
13 well enough with Shaun to be able to make statements about
14 those so I'm not going to. But that was certainly, certainly,
15 certainly my intent, and I think the agreement as a whole
16 bears that out. It envisions something happening in the
17 future, and that has to be the bad faith aspects, the
18 implied -- breach of implied covenant of good faith and fair
19 dealing. That's what that is.

20 THE COURT: That's different.

21 MR. PLANT: It's not really.

22 THE COURT: It is. I mean there are claims for bad
23 faith. You're about to hear me press Mr. Peck about this. I
24 don't think there's a bad faith claim in a first-party
25 context, but there is such a thing as a bad faith claim.

1 There's a statutory bad faith claim in Utah. There are
2 independent bases for bad faith. That's different than breach
3 of the implied covenant of good faith and fair dealing, which
4 is focused on intentional or deliberate actions by a party
5 intended to deprive the other party of the benefit of the
6 bargain they struck. Bad faith, in my mind at least, not
7 coextensive with good faith and fair dealing. What I know
8 is -- well, I don't know what I know.

9 MR. PLANT: Judge, I think I know where you're going
10 from the outset, and that would be a shame. But at the same
11 time, at the same time, we are not prepared to try a bad faith
12 case. We don't have experts. We don't have anything. And I
13 will tell this Court that's a good faith reading of this
14 document, and -- because it says that. We're not even going
15 to have those experts until later if you get over \$332,000.

16 THE COURT: But this is what I think this agreement
17 says on its face if I read it like a contract, just the plain
18 language and not peer into your brain. It talks about claims.
19 It's clear. And in fact you use capital letters to refer to
20 the claims. So I can see that there are certain claims that
21 are the subject of the stipulation.

22 The breach of contract claim, as it's styled, is not
23 mentioned in this contract -- in this -- in paragraph one. It
24 is in paragraph two. And what the parties don't say is the
25 breach of contract claim minus things that are listed in the

1 amended complaint as the elements of that breach of contract
2 claim. So it really is puzzling. We'll hear from you again
3 before I make any decision. I'm supremely --

4 (multiple speakers)

5 MR. PLANT: -- I'd just like to know because --

6 THE COURT: I didn't catch what you said.

7 MR. PLANT: What are your thoughts on what you're
8 leaning at this point?

9 THE COURT: I am so dis -- I'm not angry at anybody
10 in this. I am displeased that we're all in the position we're
11 in right now. The Crandalls have been waiting four years for
12 a determination of this claim, and maybe their lawyer entered
13 into an agreement and they entered into an agreement that they
14 thought was different than what you thought, and maybe that's
15 just our reality.

16 I could not be more frustrated that we're on the eve of
17 trial and the parties that made the agreement can't agree what
18 the agreement is, and I can't understand it. Where I am right
19 now, but we'll hear from Mr. Peck, is -- well, it's not true.
20 I really want to hear from everybody and then I want to go
21 think. I want to deliberate about this. I don't want to do
22 anything reactionary. I want to try to find a result that is
23 the fairest thing I can come up with if we really are where I
24 think we are.

25 Mr. Peck, are we lost?

1 MR. PECK: I don't think so.

2 THE COURT: Okay.

3 MR. PECK: I think there are a couple of decisions
4 that do have to be made, but I don't think we're as lost as
5 maybe it feels right now.

6 THE COURT: I hope that's true.

7 MR. PECK: And I think maybe I can say a couple
8 things that might help simplify things. It is not our intent
9 to try a bad faith case next month.

10 THE COURT: Okay.

11 MR. PECK: Okay?

12 THE COURT: What do you think you're trying?

13 MR. PECK: Okay. So I think here is where the hitch
14 is. So, for example, we've got 27(A) and (b), clearly --
15 paragraph in the complaint, in the first cause of action,
16 clearly using bad faith type language. Okay. You just
17 referred to that a moment ago 27(A) says acting in bad faith
18 and in not dealing fairly with the Crandalls. That is in the
19 first cause of action. We do not intend to try that in this
20 first case.

21 Placing its own economic interests over those of the
22 Crandalls. To the extent that is a bad faith element, we do
23 not intend to try that next month.

24 Here is I think the issue. And I don't think it's -- I
25 don't think the stipulation is ambiguous. It's actually

1 pretty simple. We are dividing claims, and that's what we had
2 in mind. I think the language of the first cause of action to
3 the extent it also includes bad faith elements, I mean you can
4 breach a contract by breaching those elements. That's why
5 it's duplicated in there. That is a breach of contract. I
6 don't think it's improper to plead that there. The question
7 is what do we intend to do next month? And that's where the
8 Court needs some guidance.

9 THE COURT: How do you think your first cause of
10 action and second cause of action are different?

11 MR. PECK: Here is where. Both include the duty to
12 investigate and evaluate. Let me back --

13 THE COURT: Is that an express --

14 MR. PECK: It's an implied term.

15 THE COURT: Is it an express promise in the
16 contract?

17 MR. PECK: No, but it doesn't need to be in order to
18 be breached. This is the issue for the Court that the Court
19 has to decide.

20 The COURT: That sounds to me like an implied
21 covenant of good faith and fair dealing.

22 MR. PECK: It is an implied covenant, for sure.
23 Contracts can include implied covenants. The question is --

24 THE COURT: They all do.

25 MR. PECK: -- Can you breach an agreement without --

1 can you breach those covenants without breaching them in bad
2 faith? The answer is clearly yes. Any covenant can be
3 breached whether it's implied or oral. And under the
4 restatement and the cases cited, implied and express covenants
5 are on the same footing. They're the same. So can you
6 breach --

7 THE COURT: Except that breach of implied covenant
8 requires as a necessary element of your proof that the
9 insurance company intentionally or deliberately undertook some
10 act or omission that had the effect of depriving its insured
11 of the benefit of the policy.

12 MR. PECK: Are you talking about from a bad faith
13 standpoint?

14 THE COURT: No. I just --

15 MR. PECK: Just from a normal standpoint. Fine. If
16 that's --

17 THE COURT: It's an element of the claim under Utah
18 law, I think.

19 MR. PECK: For breach of contract?

20 THE COURT: Breach of the implied covenant of good
21 faith and fair dealing.

22 MR. PECK: Right. But what I'm saying is you can
23 breach those implied covenants, duty to investigate, evaluate,
24 even pay if -- there's no payment term in the contract. It's
25 implied.

1 THE COURT: Are we arguing about bad faith because
2 you think that there's a claim here for punitive damages?

3 MR. PECK: Not the first part of the case.

4 The COURT: Is there at all?

5 MR. PECK: Yes.

6 The COURT: Where?

7 MR. PECK: Under the intentional infliction of
8 emotional DISTRESS.

9 THE COURT: But not for any breach, either of
10 express contract or implied covenant. You're in a first-party
11 context.

12 MR. PECK: Right. The cases are pretty clear that
13 in the first-party context there's no punitives for breach of
14 implied covenant of good faith and fair dealing. You have to
15 have a tort that can support that, which we do.

16 THE COURT: So why are we arguing about --

17 MR. PECK: Okay. So here is the issue. The issue
18 is can they breach the duty to investigate and evaluate
19 without doing so in bad faith? Now, bad faith has its
20 elements, intentional or, you know, you've got maybe
21 motive-based considerations. Reasonable is the touchstone.
22 Reasonableness is the touchstone of a bad faith claim. Did
23 what they do -- did they do what they did reasonably? That's
24 what the cases talk about.

25 The COURT: You don't have a bad faith claim, do

1 you?

2 MR. PECK: I have a breach of the duty of good faith
3 and fair dealing claim, claim number two.

4 THE COURT: Bad faith is not an element of that
5 claim.

6 MR. PECK: Well --

7 THE COURT: Intentional -- I mean I can -- maybe I
8 should pull the --

9 MR. PECK: But they did not -- they did not -- that
10 they did not comply with their contractual duties in a
11 reasonable manner. That they did not comply with their duty,
12 implied duty of good faith and fair dealing are clearly
13 stated.

14 THE COURT: The touchstone of the implied covenant
15 of good faith and fair dealing in an insurance context
16 includes an obligation on behalf of an insurer to timely and
17 reasonably investigate, pay, decline or settle a claim.
18 That's almost exactly a direct quote from the Utah courts.
19 That doesn't tell us anything about bad faith.

20 MR. PECK: But what I'm saying, I guess, is, look,
21 you can -- for example, you can have a breach of contract by
22 failing to pay. You can have a breach of contract by failing
23 to pay in good faith. Separate. They're distinct claims.
24 The court has made that clear.

25 Can you not have a separate claim for duty to investigate

1 and evaluate? Has it not been -- has it been done correctly?
2 Has it been done correctly? That's what the Nevada District
3 Court said. Hey, I've got this distinction here. The
4 question for bad faith is whether it was done reasonably. But
5 in a breach of contract case whatever covenants are breached,
6 the question is not whether it was done reasonably but whether
7 it was done correctly.

8 And I don't intend next month to talk about whether
9 anything they did was reasonable or fair. That's not what
10 we're about, but whether they did what they agreed to do in
11 some cases at all, or whether they did it correctly. And I
12 don't have to -- I don't have to have bad faith experts. I
13 don't have to have anything other than the words out of their
14 own mouths for that.

15 The COURT: So help me understand. I'm so sorry if
16 I'm being slow or dense. Maybe I'm oversimplifying this in my
17 brain. I'm thinking about jury instructions that we'll give a
18 jury at the close of evidence. I'm thinking about a jury
19 verdict form. I'm going to tell them you are asserting what
20 claim at that trial?

21 MR. PECK: So breach of contract for the implied
22 duties to investigate and evaluate, which they admit are
23 duties under the contract, and failure to pay a viable claim.
24 That is what the verdict is going -- and I think that's what
25 the verdict we submitted says.

1 THE COURT: So now what I think you've just said is
2 you think you're going to trial on your implied covenant of
3 good faith and fair dealing claim.

4 MR. PECK: No, because we're not dealing with
5 reasonableness. We're not dealing with fairness.

6 The COURT: Here is the distinction I draw at law.
7 Maybe I am completely up in the air. There are breach of
8 contract -- both are breach of contract claims in Utah. One
9 is often styled breach of express claims of a contract. And
10 in that context we instruct the jury you look at the four
11 corners of the document. If it's clear and unambiguous, what
12 did the parties promise to do? Did they do it? That doesn't
13 sound like what you want to try. It sounds to me like you
14 want to try something else.

15 MR. PECK: No, I think that's exactly what I want to
16 try. That is what they promised to do. They promised to
17 investigate, evaluate and pay.

18 THE COURT: Is that in the contract? Will you be
19 putting section 2.4 of the policy in front of the -- I made
20 that up, of course -- in front of the jury and say here is the
21 promise in the policy. Ask yourselves did they do it? That's
22 not what you're going to do, right?

23 MR. PECK: No, that is what I'm going to do with
24 respect to obligation to pay.

25 THE COURT: Okay.

1 MR. PECK: It is express.

2 THE COURT: All right.

3 MR. PECK: With the obligation to investigate and
4 evaluate.

5 THE COURT: Is that expressly stated in the policy?

6 MR. PECK: No. They are implied terms that AMFAM
7 agrees are obligations they have under the -- irrespective of
8 bad faith -- that they have under the --

9 The COURT: This is where I'm trying to go. Give me
10 just a moment, please. So we got partway down the street. I
11 think there are express breach of contract claims. There are
12 other obligations that inure in contracts in Utah. They are
13 implied obligations. That's a separate cause of action for
14 breach of the implied covenant of good faith and fair dealing.
15 These are the obligations that parties undertake when they
16 contract with each other without expressly stating it.
17 They're implied in every contract. That is styled at law in
18 Utah breach of the implied covenant of good faith and fair
19 dealing.

20 Your stipulation says, if I read it on its face, we're
21 not going to try that claim until we prevail, unless or until
22 we prevail on our express breach of contract claim. So am I
23 misreading your stipulation?

24 MR. PECK: No, I don't think so, but let me go back
25 to the implied terms, because there are a number of cases in

1 Utah that are breach of contract on implied terms that have
2 nothing to do with bad faith.

3 THE COURT: I agree.

4 MR. PECK: So why can't we state a breach of an
5 implied term that does not involve bad faith?

6 THE COURT: You can.

7 MR. PECK: And that's what I'm saying we have.

8 THE COURT: You're welcome to, only I think you've
9 stipulated you won't. Mr. Plant maybe disagrees. Maybe he
10 thinks --

11 MR. PECK: Well --

12 THE COURT: -- That's not what you all meant --

13 MR. PECK: That's --

14 THE COURT: -- When you said -- hold on just a
15 moment -- we will not try our breach of the covenant of good
16 faith and fair dealing claim. Maybe that's not what you
17 agreed to.

18 Is that what you agreed to, Mr. Plant?

19 MR. PLANT: I agreed not to try that claim in the
20 first instance.

21 MR. PECK: So 27(E) --

22 The COURT: What does that mean?

23 MR. PECK: 27(E) of the first cause of action says
24 failing to properly, correctly investigate and evaluate
25 Ms. Crandall's claim. It's right there, first cause of

1 action.

2 THE COURT: Is that an express promise or an implied
3 promise in the contract?

4 MR. PECK: Implied, on the same footing as express
5 terms.

6 THE COURT: So what is the difference between your
7 first and your second cause of action?

8 MR. PECK: That's where the rubber hits the road.
9 First, correctly. Did they do it correctly? Just like the
10 Nevada District Court said. Second, reasonably or fairly.
11 Two different things. They're discrete causes of action
12 because they have different proof elements, reasonable, fair,
13 correct.

14 And I mean that's -- I thought the reasoning from that
15 Nevada case, recent Nevada case, was very clear on that. I
16 like the reasoning because it does clearly indicate, hey,
17 we're not talking about fairness and reasonableness. We're
18 not talking about motive. We're not talking about why you did
19 what you did to save the company money. That's not what I
20 intend to do.

21 Here is an example. Let me give the Court an example.
22 There will be evidence here that the claims adjuster is
23 supposed to fill out this matrix that shows she's supposed to
24 analyze the claim for value, and there's all the elements of
25 damages that are allowed under Utah law. You've got your wage

1 loss. You've got your economic damages. You've got your pain
2 and suffering, loss of enjoyment of life. They're all in this
3 matrix.

4 And the testimony from American Family themselves is that
5 you're supposed to fill this out because you're supposed to
6 evaluate the claim before you make the offer. And this matrix
7 gives you the tool that you're supposed to use to do that.
8 They didn't fill it out at all. Didn't do it at all. And
9 American Family themselves says it was supposed to be done.

10 Now, American Family, when we talk about, okay, the
11 \$200,000 that you offer, well, what's it based on? You're
12 supposed -- you admit that you're supposed to evaluate that
13 according to Utah law. Where is it? Well, they didn't.
14 Didn't do that kind of breakdown or analysis. That's simply
15 an incorrect way to have managed the claim, to have made it --
16 to have evaluated the offer.

17 I'm not going to talk about motive. I'm not going to
18 talk about why they did what they did. That's the
19 distinction. And I think that's the decision that you have to
20 make. If you're going to say --

21 The COURT: What will --

22 MR. PECK: -- I don't get investigation and
23 reasonableness --

24 THE COURT: What will you try in the second case if
25 we try the first case the way you say you want to try it?

1 What's left?

2 MR. PECK: The second --

3 THE COURT: There's nothing left with respect to the
4 contract, is there?

5 MR. PECK: Yes, the second cause of action, but now
6 we're talking about fairness. We're talking about
7 reasonableness and why they did what they did. That's where
8 your experts come in and talk about what insurance companies
9 do to people.

10 THE COURT: What recovery are you entitled to, and
11 what claim is that?

12 MR. PECK: The Utah cases state that these are
13 divisible causes of action. They're not the same cause of
14 action. So the first cause of action I'm entitled to general
15 and consequential damages for breach of those covenants, for
16 breach of those obligations under the policy.

17 For the second I'm entitled to damages, and the law
18 specifies different types of damages, general and
19 consequential, for breach of the duty or obligation of good
20 faith and fair dealing. They include the caps off the policy.
21 They include attorney's fees. They include -- now I've got
22 the intentional infliction claims.

23 So what we're really looking at is the motive of the
24 company, whether you can go beyond the damages that are
25 allowed in the first cause of action, for what? For the

1 insurance company's failure to fairly, to reasonably, deal
2 with the claim. That's the distinction. That's the
3 distinction under the law that it makes as to those two
4 claims.

5 And I think the question for the Court is whether it can
6 decide that there is a breach of contract claim for implied
7 terms that can be maintained without those having to be
8 brought in a bad faith context. And I think clearly, yes, the
9 law is pretty clear that any implied term of a contract can be
10 brought as a standard breach of contract action. And we're
11 dealing there with not motive, fairness, reasonableness, but
12 simply was it breached? That's my obligation to put on the
13 evidence to show that, of course.

14 THE COURT: So what did you agree to when you said
15 we won't try in the first case breach of implied covenants of
16 good faith and fair dealing?

17 MR. PECK: That's what I'm agreeing to. And as to
18 27(a) and (b), I'll remove those from the first -- the first
19 trial. I wasn't intending to try that, 27(A) and (b).

20 THE COURT: Do you think that your agreement was we
21 will not try a case in the first instance for breach of any
22 implied obligations under the contract?

23 MR. PECK: No, that's not true, because I've stated
24 the implied obligation is right there in cause of action one,
25 and I separated the causes of action. What I did agree to and

1 | what I do agree to is I'm not trying a bad faith case. And
2 | when the Court -- if the Court starts hearing me ask questions
3 | about motive, about why, about fairness, about reasonableness,
4 | then I think I've gone over the line. I'm not going to do
5 | that.

6 | The COURT: Do you want to introduce evidence about
7 | the initial settlement offer?

8 | MR. PECK: Well, this is related a little bit.
9 | There's another basis for that. I mean the Courts have said
10 | that in a UIM Claim that evidence of the settlement offer is
11 | allowable to establish a viable claim. And so, yes, but for a
12 | different reason.

13 | I mean here is the real hitch, and I think this is where
14 | the trouble came in terms of -- in terms of American Family
15 | really starting to get grief about this. Terry is right, the
16 | traditional way of looking at these cases was that you step
17 | into the shoes of the tortfeasor and try a tort case. That
18 | was the way the law developed in a lot of the country.

19 | Fairly recently the court moved away from that. And I
20 | don't know whether a lot of attorneys didn't pick up on that,
21 | whether the mediators didn't pick up on that, but with the
22 | Berkemeir decision, Lieber, Berkemeir, they clearly moved away
23 | from that and maintained, look, we're not going down that
24 | road. We're not going to confuse this. It's a breach of
25 | contract case.

1 Now, here is where the rubber hits the road in this case.
2 If You have an underlying tort action, the insurer's own
3 admissions, own documents may not be relevant, but in a breach
4 of contract case they are. The Federal Rules are not
5 suspended for a breach of contract action.

6 THE COURT: So I think that what's happening in our
7 discussion is we're having two discussions, I think, as best I
8 can tell. One is how we might ordinarily try this case. If
9 you all walked in and said, okay, we're ready for trial. How
10 are we going to deal with the evidentiary issues and concerns
11 so that we don't taint the jury when they're making
12 determinations about the express contract claims? And how do
13 we balance all of that and we approach -- courts do this in a
14 number of different ways. Judge Stewart provides us a good
15 example of one way to do that. We could be having that
16 discussion, and you could all be arguing about prejudice and
17 what should come in and when and splitting the -- of course we
18 have the stipulation in this case, and so part of our
19 discussion is what did you agree to? And I think when
20 Mr. Plant stands up in just a moment, he's going to say he
21 disagrees with nearly everything you just said about the
22 nature of your agreement.

23 So what am I to do with that? If you can't agree amongst
24 yourselves what it is you agreed to, how do you propose I deal
25 with that?

1 MR. PECK: I think this is the road map I'd propose,
2 Judge. I think you have to decide whether you will allow my
3 claims, my implied breach of contract claims to investigate
4 and evaluate, to move forward next month. I think whichever
5 way you decide, I can try this case next month.

6 THE COURT: Let me bounce an idea out there and let
7 you both think about -- and I am not going to make a decision
8 about this at the conclusion of this argument because I really
9 do want to think about it carefully. If you can't agree
10 amongst yourselves, and I can't read the stipulation on its
11 face in a way that makes sense to me, it seems to me that any
12 decision I impose on all of you is going to be unfair to one
13 side or the other because I'll just be making it up myself. I
14 mean we might as well just throw a dart. And you've all been
15 acting in reliance on what you independently thought your
16 stipulation was.

17 And I don't want -- I have to be careful not to prejudice
18 either party in this case on the eve of trial. And if we
19 can't agree about what you agreed to, and I think it's
20 improper for me to decide what I thought seems -- I mean what
21 I would ultimately be doing is just saying what I think is
22 fair, but only you're not both going to view it that way.
23 Your clients aren't both going to view it that way. The
24 Crandalls may think what I said is unfair.

25 So what I think I'm left with is an option of just

1 rescinding your stipulation or rescinding the order, and then
2 imposing on all of you a really, really, really rigorous
3 schedule for finishing your discovery and having this case
4 ready to try in three months, four months, and it's going to
5 be painful for everyone.

6 I don't know what else to do, but this case has to get
7 resolved. And if I choose a course based on your stipulation,
8 I'm just -- I'm telling you right now I'm making it up because
9 I can't tell what you agreed to. Is that unfair? What's the
10 most fair way to resolve this?

11 MR. PECK: Let me give you a couple thoughts from my
12 perspective about --

13 The COURT: Please, I welcome them.

14 MR. PECK: I'd love to see us proceed. First, I
15 think we can live with whatever decision the Court makes on
16 the issue of the implied obligation to investigate and
17 evaluate. We can try our case either way. We can try it only
18 on the obligation to pay next month. I'm prepared to do
19 that.

20 The COURT: What would that case look like? What's
21 the evidence? There's the contract. It imposes an
22 obligation to do what specifically?

23 MR. PECK: To pay UIM Proceeds if a viable claim --
24 if it's more likely than not that a viable claim with all the
25 elements has been submitted, they have an obligation to pay.

1 That's pretty simple. And the question then is what evidence
2 can be used to show that? The Berkemeir opinion I think is
3 pretty helpful there, because you have a breach of contract
4 case, you have the federal rules of evidence that apply,
5 admissions of the party come in, their claim file can come in
6 to help establish the elements of a viable claim were
7 established. We're ready to try that case, and that I think
8 is pretty clear.

9 They have cited no law to the contrary in Utah suggesting
10 that you can do it any other way. And the Federal court cases
11 that have interpreted Berkemeir since it came out have all
12 been pretty uniform. The obligations trigger when a viable
13 claim is -- is submitted. We have a duty to submit a claim,
14 no doubt about it.

15 But then the question is what information does the
16 insurance company have? And we can use their own actions,
17 their own admissions to establish whether there's a viable
18 claim. I think that's pretty easy. We've got good guidance.
19 We've got the Berkemeir opinion for good guidance. We've got
20 the federal courts that have looked at that issue and have
21 said the same thing.

22 So I'm ready -- we're ready to try that case next month,
23 and the Court I think simply could tell us whether it believes
24 investigate and evaluate are proper for that first case or
25 not. You know, really, Judge, I understand the consternation

1 with it, and maybe we are pushing frontiers a little bit in
2 terms of the way this has been looked at, but we're happy to
3 try the case on the obligation to pay if the Court finds that
4 investigate and evaluate are not proper at this time for
5 consideration.

6 Secondarily, I think, or the alternative would be, I
7 would agree, let's -- we need to get this case tried. So,
8 alternatively, if the Court feels that the case cannot be
9 bifurcated without causing grief, let's do a -- let's do a
10 quick schedule and get this case plus the bad faith case
11 tried. I think we could do that in fairly good order. We
12 just really need to get the experts going and finish up on
13 some depositions.

14 Really, you know, for us the duty to investigate and
15 evaluate, they are helpful in terms of some pieces of
16 evidence. And I believe that we're right on the law but, on
17 the other hand, I -- you know, it's not the case. It's not
18 the case. It's not the entire case. At any rate, we will
19 agree and stipulate that we are not intending to try a bad
20 faith case next month.

21 THE COURT: All right, thank you, Mr. Peck. I'm
22 sorry, I don't mean to be -- I don't mean to express
23 impatience with either you or Mr. Plant. What we want is to
24 try to get this right is what I'm most concerned with, of
25 course.

1 MR. PECK: And I appreciate that, Judge.

2 THE COURT: MR. PLANT, Is Mr. Peck a hundred percent
3 right about all of that?

4 MR. PLANT: Guess what my answer is, Judge,
5 absolutely not. And, you know, he keeps talking in his briefs
6 and here today about his Berkemeir case as being somewhat
7 dispositive on changing the whole procedural makeup for UIM
8 cases. All it does is says the survival statute doesn't apply
9 and limits a lady who died from other causes because it
10 doesn't rise out of tort. It's a contract case. That's all
11 it says. And in fact if it says anything, it talks and it
12 completely establishes, I can read, that the UIM case --
13 personal injuries are the catalyst for the contractual claim.
14 The contractual claims are contingent upon the personal injury
15 case. There's nothing in this case. The holding is
16 completely away from anything we're doing here.

17 So let me just tell you where I am, Judge. The real crux
18 of what I'm talking about is his going through my client's
19 process and procedures as of how they arrived at their
20 settlement offer. That is not relevant in any way, shape or
21 form as to what her claim -- what she is legally entitled to
22 collect as a result of the accident in question here, which is
23 what the policy says. That's what we're here to try, and
24 that's the case I'm ready to try. That does not involve a
25 single representative of American Family because they have

1 nothing to do with that.

2 The COURT: Say that one more time. What case are
3 you ready to try?

4 MR. PLANT: I am ready to try the case as to what
5 damages Ms. -- let me get -- let me get the -- the express
6 terms of the contract, Judge. The contract says we will pay
7 compensatory damages for bodily injury which an insured person
8 is legally entitled to recover from the owner or operator of
9 an underinsured --

10 The COURT: More slowly, please, so that our court
11 reporter can keep up.

12 MR. PLANT: I'm sorry. Let me say this. I'll read
13 it again. We will pay compensatory damages for bodily
14 injury -- that means it's defined in the policy -- sickness,
15 disease or death of any person which an insured person is
16 legally entitled to recover from the owner or operator of an
17 underinsured motorist vehicle. That's also a defined term.
18 The bodily injury must be sustained by an insured person and
19 must be caused by an accident and arise out of the use of the
20 underinsured motorist's vehicle. That's why everybody has
21 always assumed that the insurance carrier simply steps into
22 the shoes of the tortfeasor.

23 Now, I will admit Berkemeir in the limited context of the
24 survivorship statute as to whether or not that barred the
25 claim generally says no. Even though the catalyst is personal

1 injury and it's driven and contingent upon personal injury,
2 and those are the words, it's different. It's a contract
3 claim.

4 In fact if you look at Berkemeir, it goes on to say why
5 it's different. And it says on page -- and I've got the
6 Pacific Reporter version. It says: For example, unlike
7 damages for which a tortfeasor is responsible, an insurer's
8 liability is contingent upon performance of the insured's --
9 the insured's obligation under the contract. Moreover, an
10 insurer's exposure is limited to the amount of the premiums
11 the insured agreed to pay. These features of the underinsured
12 motorist contract, and actions for breach, illustrate that the
13 insurer does not simply step into the shoes of the tortfeasor.
14 Because the insured has obligations, there's a limit on
15 recovery. There is no recovery -- limit on recovery in an
16 under -- or in a tortfeasor claim.

17 And so that's what they say. So what I am willing to try
18 next month is just that, the express contract claim for
19 damages for which she is entitled to recover against the
20 tortfeasor, admittedly not stepping in the shoes, but that's
21 what the contract is.

22 So, for example, and something I need to be clear here
23 on, Mr. Peck has agreed to drop his loss of consortium claims.
24 I should put that on the record. That's a tort damage. He's
25 now dropping that, but that's what he pled. Those are tort

1 damages that arise. He is also, and I want the record to be
2 clear on this, and Mr. Peck if I'm saying this wrong, has
3 agreed to drop any claims associated with the failure to pay
4 PIP damages. He's told us that, and we've got writings to
5 that and now it's on the record. So all we're left with, all
6 we are left with, are the claims that Mrs. Crandall has
7 against the tortfeasor for which we are responsible to pay.

8 Now, he got up and talked about this viability of the
9 claim. I -- we have never said that. That's what there was a
10 lot of talk about in Trujillo and Christensen. We recognize
11 this is a viable claim, meaning it can be reduced to judgment.

12 THE COURT: Ms. Crandall is entitled to some payment
13 on her claim from you, is she?

14 MR. PLANT: Not necessarily some payment, but it is
15 the type of claim that can go forward and a judgment can be
16 considered.

17 THE COURT: Is she entitled to some payment from
18 AMFAM for her claim?

19 MR. PLANT: Yes, she is.

20 The COURT: And you just want a jury to tell you
21 the value of that claim?

22 MR. PLANT: Yes, how much.

23 The COURT: Mr. Peck, are we all strenuously
24 agreeing with each other? Do you want an opportunity to have
25 a jury determine the value of Ms. Crandall's claim? Is that

1 what we're -- we should do next month?

2 MR. PECK: Yes. I think we still will disagree on
3 the manner and method in which you get there because I think
4 evidentiary issues are what Mr. Plant is concerned about. But
5 in a breach of contract action, as in Berkemeir, insurance
6 companies' own actions are relevant to that determination.
7 And I think that's where the rubber hits the road in terms of
8 the disagreement why -- why Mr. Plant is so up in arms about
9 the issue.

10 THE COURT: Why is the insurance company's actions
11 relevant to the value of Ms. Crandall's claim?

12 MR. PECK: Well, so our job is to establish that
13 there is a viable claim and the elements of that claim,
14 liability, causation, damages. They have admitted -- and this
15 is -- I mean this is the first time I've heard that they admit
16 that we have a viable claim. You've got the elements of that
17 claim, liability, causation and damages. There is information
18 from their own files that establishes causation. They'd now
19 like to run from that. They'd like to have a clean slate
20 before the jury. That's the nature of admissions. And since
21 it's a breach of contract claim against AMFAM, their
22 admissions are fairly used against them. There are admissions
23 as to damages.

24 And it's just a simple analysis under the Federal Rules.
25 I mean we don't suspend the Federal Rules for this case

1 because it involves some elements of an underlying tort. And
2 that's what I'm saying Berkemeir was making clear. I'm sorry,
3 Judge, I'm sitting. We don't -- it's not the same case. It's
4 not stepping in the shoes of.

5 MR. PLANT: Maybe you can show --

6 MR. PECK: We don't suspend the --

7 (Multiple speakers)

8 THE COURT: One at a time. I'm sorry, counsel.

9 MR. PECK: We don't suspend the rules. We don't
10 suspend the rules of evidence. The reason why traditionally
11 evidence from an insurer's own claims files was not held to be
12 admissible in the UIM case was because they did step into the
13 shoes. They treated it simply as a case for damages.

14 But what Mr. Plant read, and the further language in
15 Berkemeir, makes it clear that we're not. We're not trying a
16 tort case. We're trying a breach of contract case. And,
17 insurer, you know what, if you've acted like there's a viable
18 claim, if you've done something that establishes the elements
19 of proof, that's fair game. That's what's at issue here.

20 The COURT: Is there a viable claim here,
21 Mr. Plant?

22 MR. PLANT: That's an issue, Judge, I'm not sure the
23 meaning of. Let me -- let me -- I'm not trying to waffle on
24 that. The viable claim concept as I understand it means does
25 she have the potential of the claim that can be reduced to

1 judgment? The answer to that question is yes. We can't move
2 for summary judgment, and -- because there are issues of fact
3 and other issues that must be determined by a court. That's
4 how I understand that concept. It has to be that way.
5 Otherwise, any claim that ever exists could be a viable claim
6 and immediately paid.

7 The COURT: No. But you've had a chance to
8 discover this case. When we get to trial, I think what you
9 said to me just a moment ago, the only issue left to try is
10 the value of her damages.

11 MR. PLANT: No. Let me be clear on that. I don't
12 want to be misunderstood on that, so thank you, Judge, for
13 clarifying that for me. What we will acknowledge, and I will
14 say this on the record as an admission, that the accident was
15 the fault of the tortfeasor, in this instance Shannon
16 Henderson.

17 The primary issues that will be tried are causation and
18 damages. And so if I misstated that, Judge, please accept
19 this as a correction. Causation is the central issue that we
20 will try. Hence, Dr. Hayes, all the doctors, all of the
21 information that we have really goes to what this accident
22 caused. And that's part of the legal entitlement language set
23 forth in the language, is she legally entitled to recover?
24 And causation is an element of that. Berkemeir says it's
25 contingent upon the personal injury case.

1 The Court: Mr. Peck says, I think, that AMFAM's
2 conduct, if it's challenging causation, is relevant to show
3 that it believes or did believe that there was causation. Why
4 isn't that relevant for the jury?

5 MR. PLANT: So our -- let me read something that the
6 Christensen case says, and this is your colleague, Judge
7 Stewart, finds when he determines to bifurcate the case. He
8 says: In granting the defendant's motion to bifurcate at
9 trial, the Court found that defendant would be unfairly
10 prejudiced if settlement negotiations were presented to the
11 jury prior to decisions of express breach of contract claim.

12 What we were doing and how we got to that, the decision,
13 is not relevant to what -- whether there was causation or not.
14 There's no -- there's no admission. What we produced was our
15 claims file that talked about our decision-making process.
16 That is irrelevant to whether there's causation or not. What
17 that is is our discussions on what we were doing and how we
18 were treating the claim. It's not relevant evidence as to
19 whether or not there's causation. It's a bunch of people
20 talking about it and trying to come to a decision. Certainly
21 doesn't rise to the level of admission. And if that's the
22 case, I guess I need their entire files on how they discussed
23 this case.

24 THE COURT: Mr. Plant --

25 MR. PLANT: You understand what I'm saying, I hope,

1 Judge.

2 THE COURT: I do. We're going to take a short
3 recess so my court reporter can rest his hands. I'm going to
4 collect my thoughts. Let's come back in about 15 minutes.

5 (RECESS FROM 11:04 am until 11:52 am)

6 THE COURT: Thank you for your patience. Appreciate
7 that as we try to unwind this. Here's what I've come up with.
8 We're going to do this in parts.

9 The first part is this. I am confident, based on what
10 I've heard from all of you today and read in your papers, that
11 there never was any meeting of the minds between the parties
12 about what it is you think you were stipulating or agreeing
13 to. You didn't have an agreement in the legal sense. I think
14 the court's order is void for that reason. I am rescinding
15 Judge Benson's order bifurcating the case.

16 We are going to have a trial on the date that's set. At
17 a minimum we are going to determine the extent of
18 Ms. Crandall's injuries that are causally related to this
19 event and the damages associated with that. We may try much
20 more than that. I'm thinking about what that trial should
21 look like. That's a baseline.

22 I'm evaluating in my mind whether we should also be
23 trying at the same time all of the contract issues, express
24 and implied, including the implied covenant of good faith and
25 fair dealing which requires an insurance company at a minimum

1 to timely investigate, evaluate, decline or settle claims.

2 I'm not saying that we're going to do that.

3 And, Mr. Plant, you'll have a chance to make your record
4 if that's what we decide.

5 I may come up with something else over the weekend. I'm
6 going to continue to think a lot about this case. But here is
7 what I'm going to do I think out of fairness to all of you.
8 Having just pulled the rug out from under both of you because
9 you each thought you had a different agreement in place, I'm
10 going to invite each of you to consult with your clients and
11 with each other and see if you can reach some agreement about
12 what this trial is going to be and how we'll proceed. If you
13 can't, I'll tell you what we're going to try, and I'll do it
14 next Tuesday.

15 So I want to give you some time, Terry -- I'm sorry. You
16 and I have known each other a long time. I don't mean to be
17 informal. Mr. Plant, I recognize that your client is an
18 insurance company. They're not known for being svelte and
19 swift on the move, and it is a Friday. I want you to have a
20 chance to really discuss this with your client. If you think
21 this discussion we're going to have should be on Wednesday, if
22 you need another day, there's a weekend ahead of us, I want
23 you to have a chance to speak with your client, with Mr. Peck.
24 I expect there will be some negotiating between all of you.
25 And if you can't reach an agreement, I'll give you an answer

1 sometime next week.

2 MR. PLANT: Can I ask one question, Judge?

3 THE COURT: Of course.

4 MR. PLANT: As I've been sitting here doing the same
5 thing you're doing -- I'm going to come up here simply to be
6 heard. I don't mean to be formal. I feel real formal, but no
7 mics back there. The one thing that is clear about that
8 order -- or excuse me -- the bifurcation order, which I now
9 understand what -- what you've done with that, but,
10 nonetheless, that's been the guiding document in this case is
11 that the implied obligation of good faith and fair dealing
12 would not be a part of this trial. That's for sure, at least
13 that's what it says. Well, maybe not, but at least that's how
14 I took it.

15 I'm wondering if the Court, so I can discuss this with my
16 client, would still consider some sort of a situation by
17 moving -- moving everything so that we can try this all at
18 once. I'm not even suggesting that. In other words, some
19 sort of a bifurcation like the Christensen case where we --
20 where we --

21 THE COURT: Have a single jury.

22 MR. PLANT: Have a single jury, have the express --
23 express contract claim heard. Depending on what the outcome
24 of that is, then go and do the other half. Now, I know our
25 order was an attempt to avoid that, but I simply don't see any

1 way of not really hurting somebody, particularly us, without
2 doing something like that. I just don't.

3 THE COURT: Let me touch on that for just a moment.

4 MR. PLANT: Okay.

5 THE COURT: One of the things I'll be thinking about
6 over the weekend is the harm to the parties if we go in
7 different directions. Mr. Peck also has a problem --

8 MR. PLANT: I understand.

9 THE COURT: -- If we do that. Mr. Peck has a
10 problem if we go forward and I put all the contract claims on
11 the table, because he hasn't taken full discovery of some of
12 that. Ordinarily the insurance company would here -- would be
13 here saying if you're going to try the implied covenant
14 claims, we're entitled to have some experts to tell the jury
15 something about how we do that.

16 MR. PLANT: Absolutely.

17 The COURT: All the rest of the information, of
18 course, is already known and available to you and your
19 insurance company. You know exactly what you did, and who did
20 it, and when you did it. You have all the documents. You
21 have access to the witnesses. Mr. Peck doesn't. I mean
22 there's a -- there are a number of balancing considerations
23 here. Nobody here is going to be pleased if I come up with
24 the solution because it's going to be difficult for both of
25 you is my best guess.

1 But I'm mindful of all that, and I'll allow both of you
2 to make your record. I'm telling you you have a strong
3 incentive to try to figure out some agreement between you.
4 But, by God, four years into this case we are going to start
5 answering questions. We are going to start the process of
6 resolving this case.

7 I really dislike the idea of having a trial, sending
8 everyone away, sending you out for more discovery and having
9 another trial in January. I will tell you one problem I have
10 is I can't give you a trial 60 days after this one is set. My
11 next trial setting I could give you is in January, and I'm not
12 going to send the Crandalls away for another seven months
13 before they get a chance to stand in front of a jury and make
14 their case. So we're having some kind of trial, unless you
15 all make some other agreement.

16 I am a little puzzled. I mean I'll tell you, I've just
17 really been thinking through this. If we have a trial that is
18 limited to the accident, the claimed injuries, causation and a
19 number, on the one hand, I don't see that there's any room for
20 any testimony or evidence in that trial about anything the
21 insurance company did. It doesn't have any relevance or
22 bearing on that question.

23 But then what do I do with a jury verdict in favor of
24 Ms. Crandall? Let's assume there is one. I don't --

25 MR. PLANT: We have to come back. I acknowledge

1 that.

2 The COURT: I don't know what that number is. And
3 now is the only reason for bifurcating the trial to talk about
4 attorney's fees and costs and other foreseeable damages if a
5 jury concludes the insurance company was unreasonable in
6 its -- the length of time it took? I mean is that what we're
7 really just arguing about? We're going to have an entire
8 second trial on that issue?

9 And then are you going to be arguing to the jury the
10 stipulation that you all reached? Are you going to be trying
11 to put in front of the jury Judge Benson's order and talking
12 about whether it was reasonable to wait for an extra four
13 years because you thought we had this agreement between -- I
14 mean I'm really --

15 MR. PLANT: It's problematic.

16 THE COURT: It's all bound up. I think you're smart
17 lawyers. You're both experienced and skilled lawyers. I'm
18 hopeful that you can all figure out something that best serves
19 your clients and get this resolved -- not resolved. I mean
20 that would be awesome. I don't expect that. I'm not asking
21 you to settle the case. But short of a stipulation between
22 your clients, I'll just announce what trial it is we're going
23 to have, and we're going to go forward with it. You can make
24 your objections and you can take your appeal if you think that
25 I've prejudiced you.

1 MR. PLANT: I truly understand where you are, and I
2 don't think the Court -- you know, the trial in and of itself
3 is expensive for everyone where there's doctors and the whole
4 thing. The last thing I think Mr. Peck and I want to do is do
5 something that's going to have to be redone. I think that's
6 reasonable.

7 Are you okay with that? We maybe get together on Monday
8 and see if we can work out something?

9 THE COURT: Well, I'm directing you to do that.

10 MR. PLANT: We will get together on Monday. Do you
11 have some time?

12 THE COURT: I'm ordering you to meet and confer with
13 your clients and with each other between now and -- my
14 question for you is how much time do you both want to talk
15 this through before I give you a decision? I can bring you in
16 on Monday. I can bring you in on Tuesday.

17 I know you're coming -- you're coming from Logan I think,
18 Mr. Peck, and I would ordinarily invite you to call in, but I
19 think this is going to be an important hearing so we'll ask
20 you to drive back down.

21 MR. PLANT: Next week is --

22 THE COURT: Ms. McNamee, can I --

23 MR. PLANT: I'll make it work, but I may -- Tuesday
24 afternoon work for the court and Mr. Peck? Got to become a
25 judge or something so I won't have this so hard out here, you

1 know. Tuesday afternoon works for me, judge.

2 THE COURT: This is what I'm going to do. I'm going
3 to do it on Wednesday unless you tell me you absolutely can't.
4 I have afternoon hearings that are quite intricate on Tuesday
5 and Thursday. I could do it almost anytime on Wednesday, but
6 let's have this on Wednesday.

7 MR. PLANT: I am complete -- I've got double
8 depositions with massive number of lawyers that start at 9:00,
9 and then the other one is -- I'm completely available on
10 Thursday, which is our pretrial date.

11 THE COURT: Oh, we are set to visit again at our
12 pretrial conference. This seems like a nice pretrial
13 conference --

14 MR. PLANT: It might work, right? Can we do it
15 then, Judge, on Thursday?

16 THE COURT: Mr. Peck?

17 MR. PECK: Yes, we can do that on Thursday at or
18 pretrial conference.

19 THE COURT: That will save you an extra trip down
20 also. All right. The expression on your face suggests to me
21 you have some question about what I've just said.

22 MR. PECK: Well, I think I've heard -- I think
23 I've -- Judge, I've heard what you just said. I think my
24 questions have to do with planning and preparing in the event
25 of the Court's order. I mean, for example, if I have to put

1 on my bad faith case next month, I can probably do it. I mean
2 I may have to disclose my expert right now, have to get a
3 report sometime out before trial. You know, I think it would
4 be very difficult, extremely difficult. But that's what I'm
5 thinking in preparation is I need to get going on that.

6 THE COURT: We long past the point in this case
7 where this was going to resemble other cases that might look
8 like this just because of the complexities, and I don't fault
9 either of you necessarily for that, but I think it's going to
10 be a good bit of sausage making. All I know is we are going
11 to get in front of a jury and present something and start
12 narrowing this case to conclusion.

13 MR. PECK: Fair enough.

14 THE COURT: All right. So we'll plan to meet
15 Thursday at 2:30 then. We'll issue an order summarizing our
16 rulings on the motions in limine, and we'll look forward to
17 visiting with you on Thursday. Is there anything more we
18 should take up today?

19 MR. PLANT: I'll look forward to the summarization
20 of what happened just now. No. Other than that, no, judge,
21 thank you.

22 THE COURT: All right. Thanks to all of you. I
23 hope you have a good weekend. We'll see you next week. We're
24 in recess.

25 (HEARING CONCLUDED AT 12:04 PM)

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Certificate of Reporter

I, Raymond P. Fenlon, Official Court Reporter for the United States District Court, District of Utah, do hereby certify that I reported in my official capacity, the proceedings had upon the HEARING in the case of Melinda Crandall Vs. American Family Mutual Insurance Company, case No. 2:11-CV-497, in said court, on the 30th day of May, 2014.

I further certify that the foregoing pages constitute the official Transcript of said proceedings as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name this 9th day of July, 2014.

/s/ Raymond P. Fenlon

The Order of Court is stated below:

Dated: January 22, 2015
09:00:59 AM

/s/ DENO HIMONAS
District Court Judge



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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE, STATE OF UTAH

JODI KRANENDONK,

Plaintiff,

v.

GREGORY & SWAPP, PLLC, a Utah
Professional Limited Liability Company dba
CRAIG SWAPP & ASSOCIATES, and
ERIK HIGHBERG, an individual attorney,

Defendants.

**ORDER ON PLAINTIFF'S MOTION IN
LIMINE RE: TESTIMONY AND
EXPERT OPINION OF DAVID M.
INGEBRETSEN**

Civil No. 100923050 MP
Judge Himonas

This matter came before the Court on *Plaintiff's Motion in Limine Re: Testimony and Expert Opinion of David M. Ingebretsen*. At a hearing on September 15, 2014, the Court ordered an additional hearing to be conducted pursuant to Rule 702, Utah Rules of Evidence. Plaintiff was represented at the Rule 702 hearing held on November 25, 2014 by Shaun L Peck, Brandon J. Baxter, and Matthew David Lorz. Attorneys Greg Sanders and Patrick Burt were present and represented the Defendants. David M. Ingebretsen ("Mr. Ingebretsen") was also present and testified under examination by the parties' counsel.

Based on the parties' briefing, oral arguments, testimony taken during a 702 evidentiary hearing, and being otherwise fully apprised in the premises, IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. Plaintiff's Motion in Limine re: Testimony and Expert Opinion of David M. Ingebretsen is hereby GRANTED in part and DENIED in part.
2. The Court grants Plaintiff's motion in regards to activities of daily living. Mr. Ingebretsen will not be allowed to introduce any evidence or testify regarding activities of daily living, nor will Mr. Ingebretsen be allowed to compare activities of daily living to the type of impact and injuries sustained by Plaintiff as a result of the collision.
3. The Court denies Plaintiff's motion in regards to prohibiting Mr. Ingebretsen from testifying at trial. Specifically, the Court finds Mr. Ingebretsen is qualified to testify and offer the opinion that, applying general principles of physics, the force of the collision was insufficient to propel Plaintiff's knees far enough forward

such that the knees could strike the vehicle's dashboard.

4. Mr. Ingebretsen may not offer medical testimony. However, Mr. Ingebretsen may testify that Plaintiff's knees did not move far enough forward to strike the dashboard. Ergo, Mr. Ingebretsen may testify that the collision could not cause patellar misalignment in Plaintiff's knees because there was no impact on Plaintiff's knees.

APPROVED AS TO FORM:

/s/ Brandon J. Baxter
Attorney for Plaintiff

January 21, 2015

/s/ Patrick C. Burt
Attorney for Defendants
Electronically signed by permission

January 21, 2015

Electronically DATED, SIGNED, and ENTERED BY THE COURT, as shown at the top of this Order.

-----END OF ORDER-----

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January 2015, pursuant to Rule 5(b)(1)(A)(i) of the Utah Rules of Civil Procedure, a true and correct copy of the foregoing **ORDER ON PLAINTIFF’S MOTION IN LIMINE RE: TESTIMONY AND EXPERT OPINION OF DAVID M. INGEBRETSEN** has been served upon all parties and/or attorneys with electronic filing accounts by submitting the same for electronic filing with the Court through Green Filing, LLC. Parties or attorneys without electronic filing accounts will be served with a true and correct copy of the foregoing **ORDER ON PLAINTIFF’S MOTION IN LIMINE RE: TESTIMONY AND EXPERT OPINION OF DAVID M. INGEBRETSEN** by email or by mailing via the United States Postal Service, postage pre-paid, at the addresses listed below:

Gregory J. Sanders
Patrick C. Burt
KIPP & CHRISTIAN
10 Exchange Place, 4th Floor
Salt Lake City, UT 84111

Electronic filing
 U.S. Mail service
 Email service

/s/Kristie Cook

VINH K. LY, #6922
ATTORNEY FOR PLAINTIFF
2900 SOUTH STATE STREET, SUITE 208
SALT LAKE CITY, UTAH 84115
TELEPHONE: (801) 487-9111

SECOND DISTRICT COURT
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**IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH**

HOA H NGUYEN, Plaintiff, vs. CINDY PULKRABEK, Defendant.	ORDER REGARDING PLAINTIFF'S MOTION IN LIMINE EXCLUDING OR LIMITING THE TESTIMONY OF RONALD PROBERT AND OR DAVID INGEBRETSEN Civil No. 04-0908835 PI Judge Earnest W. Jones
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The parties came before the Court by and through their respective counsel on July 16, 2007 and August 6, 2007. The Court having considered the supporting and opposing memoranda thereto and the oral argument made, hereby orders:

Plaintiff's Motion In Limine Excluding or Limiting the Testimony of Ronald Probert and or David Ingebretsen is denied in part and granted in part. Ronald Probert and David Engebretsen may testify and or opine about the forces of impact; they may not testify or opine about medical causation; they may not testify that an injury was or was not medically caused; they may not call themselves independent.

DATED this 21 day of August, 2007.

BY THE COURT

ISI EWS

Honorable Earnest W. Jones
District Court Judge

Approval as to form:

Richard S. Morris for
Nathan S. Morris
Lynn S. Davies
Richards Brandt Miller Nelson
Attorneys for Defendant