

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-000059-D

FILED
APR - 2 2014
CLERK
SUPREME COURT

RICHARD C. OLIPHANT, M.D.
AND LOUISVILLE PHYSICIANS FOR
WOMEN, PLLC

APPELLANTS

v.

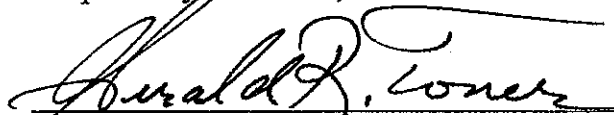
BILLIE JO RIES, INDIVIDUALLY AND AS
NEXT FRIEND OF INFANT CHILD, LAUREN
ELIZABETH RIES; AND KEVIN RIES,
INDIVIDUALLY AND AS NEXT FRIEND OF
INFANT CHILD, LAUREN ELIZABETH RIES

APPELLEES

APPEAL FROM COURT OF APPEALS NO. 2011-CA-000100-MR
JEFFERSON CIRCUIT COURT CIVIL ACTION NO. 05-CI-002925

REPLY BRIEF ON BEHALF OF APPELLANTS, RICHARD C. OLIPHANT, M.D. AND
AND LOUISVILLE PHYSICIANS FOR WOMEN, PLLC

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of this brief were served upon the following named individuals by first-class mail on this 1st day of April, 2014:

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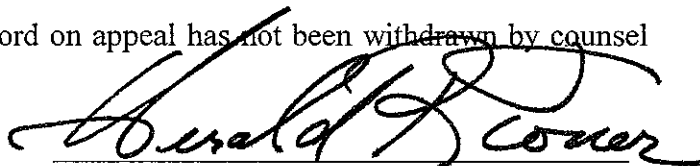
With five copies to:

Sam Givens
Clerk of the Kentucky Court of Appeals
360 Democrat Drive
Frankfort, KY 40601

With the original brief and ten copies sent via registered mail pursuant to CR 76.40(2) to:

SUPREME COURT OF KENTUCKY
Susan Stokley Clary
Supreme Court Clerk
State Capitol, Room 235
700 Capitol Ave.
Frankfort, KY 40601

It is further certified that the record on appeal has not been withdrawn by counsel for Appellants.



*Counsel for Appellants, Richard C. Oliphant,
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INTRODUCTION

All parties' experts agree that there was a fetal bleed wherein this baby lost one-third to one-half of her fetal blood volume before birth, but all of the experts had differing opinions as to *when* this fetal bleed occurred.¹

All parties agree that the primary issue on appeal is whether the admission of expert testimony by Jay Goldsmith, M.D.² (neonatologist) involving the scientific principle of equilibration relative to fetal blood loss in utero and his use of math to calculate the timing of the fetal bleed in this case, based upon evidence in Lauren Ries' medical records, including this baby's total blood volume, hematocrit level, and hemoglobin level, constituted reversible error. The Rieses contend that the trial court committed reversible error by admitting this testimony because they believe that 1) the record was insufficient for the trial court to determine if the selected testimony was reliable, and 2) that this particular testimony is not reliable under *Daubert* standards. Dr. Oliphant countered that 1) the trial court had sufficient evidence upon which to determine that Goldsmith's testimony was reliable, 2) the selected testimony was, indeed, reliable, and 3) the trial court's decision to admit Goldsmith's testimony on this issue, even assuming it was in error, was harmless in light of the voluminous and more persuasive causation evidence presented to this jury throughout a lengthy trial.³

Though Oliphant does not accept the Rieses' counterstatement of the case as an accurate recitation of the facts, for brevity, Oliphant will only address and clarify a few points:

¹ See Rieses' Brief, p. 2.

² Jay Goldsmith, M.D. is an expert who testified on behalf of Tonya Robinson, M.D. (neonatologist) at trial. To clarify the record, the expert's name is Jay **Goldsmith**, not **Goldstein** as the Rieses erroneously referred to him. See Rieses' Brief, p. 1, 10.

³ The Rieses take issue with Oliphant's calculation relative to the length of this trial; however, this trial began on Tuesday, August 31, 2010 and ended on Tuesday, September 28, 2010, a period of five weeks.

- The Rieses argue that the facts demonstrated “Oliphant’s failure to respond promptly to repeated emergency calls” from the hospital nurse.⁴ The evidence in the record and heard by this jury actually demonstrated that the first call to Oliphant occurred at approximately 06:05 when the hospital nurse informed him of Mrs. Ries’ arrival and relayed her initial assessment of the patient. The second and final call to Oliphant occurred at approximately 06:16 and requested his immediate presence as the patient’s condition had changed. Oliphant arrived at the hospital about 06:30, did a vaginal exam at 06:36, informed the patient of the plan and obtained her informed consent, prepared for surgery, and delivered the baby at 06:59.

- The Rieses argue that there was evidence of bleeding at the hospital as Mr. Ries testified that a nurse changed a chux pad that was under Mrs. Ries.⁵ Oliphant simply points out that there was no *medical* evidence or *medical* testimony of Mrs. Ries bleeding while at the hospital until the delivery occurred. The nurse testified at trial that there was no active bleeding,⁶ no other provider noted active vaginal bleeding in the medical record, and Oliphant testified that there was no active bleeding when he did his vaginal exam.⁷

- The Rieses argue that there was evidence of bleeding at the hospital as “the delivery record confirms up to a 300 milliliter loss of blood in the 15 minutes before Lauren’s birth.”⁸ The Rieses cite to the Delivery Record⁹ as if it is the smoking gun – the source of the fetal bleed – because it confirms a 300 mL blood loss. As a matter of course, the nurse records on the Delivery Record the amount of estimated blood loss from the surgery – the C-section, which involves an incision to deliver the baby. This 300 mL measurement is a typical estimate of maternal blood loss from a C-section. It is **not** the memorialization of how much fetal blood loss occurred. Besides, if the fetal blood loss occurred during the delivery (when the Rieses now say it may have happened),¹⁰ then the fetal blood loss is treated quickly and the baby suffers minimal damage, if any.

I. The trial court did not commit clear error in determining that Goldsmith’s testimony regarding equilibration and timing the fetal bleed was reliable.

⁴ See Rieses’ Brief, p. 2.

⁵ See Rieses’ Brief, p. 5.

⁶ Trial testimony by Sherry McGrath, RN, VR No. 160: 9/21/10, 4:05:15-4:07:27.

⁷ VR No. 162: 9/23/10, 5:15:28-5:17:50.

⁸ See Rieses’ Brief, p. 5.

⁹ Delivery Record, Plaintiff’s Trial Exhibit 5, attached hereto as **Exhibit A**.

¹⁰ See Rieses’ Brief, p. 5.

The Rieses incorrectly claim that the trial court made no findings of fact to support its decision that Goldsmith's testimony was scientifically reliable and, therefore, admissible. The trial court reviewed extensive evidence and repeated oral arguments before it appropriately determined, on several occasions, that the testimony was reliable.

The trial court's determination that Goldsmith's testimony was scientifically reliable was a finding of fact and is subject to a clear error standard of review,¹¹ the most deferential standard of review.¹² An appellate court may determine that a finding of fact is clearly erroneous only when the finding is without adequate evidentiary support or occasioned by an erroneous application of the law.¹³ An appellate court engages in a clear error review even where the trial court fails to make express findings of fact by reviewing the record to see if there is substantial evidence to support the lower court's ruling.¹⁴ Only after conducting a clear error review of the trial court's reliability finding, may an appellate court review the trial court's ruling as to whether the expert's opinions would assist the trier of fact under the abuse of discretion standard.¹⁵

All of Goldsmith's opinions had been under discussion before the trial court since Goldsmith's first discovery deposition (April 23, 2010). At that time, Robinson agreed to produce Goldsmith for a second deposition (May 26, 2010), thus providing the Rieses an opportunity to examine Goldsmith's opinions relative to timing the fetal bleed. The Rieses examined Goldsmith about his calculations and timing the fetal bleed for nearly three additional hours (a total of 7 ½ hours for both depositions).

¹¹ *Miller v. Eldridge*, 146 S.W.3d 909, 915-16 (Ky. 2004).

¹² *Edwards v. Hickman*, 237 S.W.3d 183, 191 (Ky. 2007).

¹³ *Rogers v. Lexington-Fayette Urban County Gov't*, 175 S.W.3d 569, 571 (Ky. 2005).

¹⁴ *Miller*, 146 S.W.3d at 917.

¹⁵ *Id.* The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

Thereafter, the trial court set a deadline of July 12, 2010, for all motions regarding expert testimony. The Rieses moved to strike the testimony of Goldsmith and Strong.¹⁶ The motion sought, *inter alia*, to strike Goldsmith's calculations regarding timing the fetal bleed.¹⁷ The motion was not based on *Daubert* grounds of reliability, rather that Goldsmith's opinions were improperly disclosed.

The trial court held a final pretrial conference on August 11, 2010, at which time the parties argued motions in limine and the Rieses' motion to strike. Rieses' counsel stated she might file a *Daubert* motion in the future and discussed the basis of her anticipated challenge; it remains a mystery as to why a *Daubert* challenge was not made then. The parties focused their arguments on the substance of Goldsmith's expert disclosure, the manner in which his calculations were disclosed, and whether the Rieses incurred any prejudice based on the timing of the disclosure. The court determined that – in part because both the Rieses' experts (Brown and Crawford) had unveiled previously undisclosed opinions during their depositions and because the Rieses now had fully examined Goldsmith's opinions – that Goldsmith would be allowed to testify fully at trial. Moreover, as the Rieses had discussed the basis of their anticipated *Daubert* challenge on this and prior occasions, the court indicated that it had considered the validity of *all* proposed expert testimony and made the following express determination:

The Court has made a preliminary assessment that **all proposed expert opinion testimony is reliable and relevant.** *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed 469 (1993); *Mitchell v. Commonwealth*, Ky. 908 S.W.2d 100 (1995).¹⁸

¹⁶ Dr. Strong was a maternal-fetal-medicine expert disclosed on behalf of Baptist Hospital East.

¹⁷ Rieses' Motion for *Daubert* Hearing Regarding the Mathematical Model for Intra-Uterine Bleeding Proposed by Jay Goldsmith, M.D., 9/13/10, R. at Vol. 6, 2789-2795; *see*, Rieses' Brief, Exhibit 3.

¹⁸ Final Pretrial Conference Order, 8/23/10, R. at Vol. 21, 3014-3021 (emphasis added), previously attached as Exhibit C to Oliphant's Brief.

Of note, the Rieses avoid any mention of this specific finding of reliability and relevance of the expert testimony in their brief.

The third week of trial the Rieses filed a *Daubert* motion as to Goldsmith's testimony, including multiple excerpts of deposition testimony, Goldsmith's two depositions, and Phelan's deposition.¹⁹ Robinson's responsive brief included excerpts of deposition testimony and medical literature.²⁰ The trial court heard extensive oral arguments on the motion.²¹ The Rieses provided specific citations to pertinent deposition testimony by almost every involved expert on this issue and Robinson detailed deposition testimony and medical literature in support of her position.²²

The court ruled that the motion was untimely and denied the Rieses' request; yet, it went on to address the substance of the *Daubert* motion. As it had done in its final pretrial order, the court based its decision on the extensive materials it had reviewed and the lengthy oral arguments conducted throughout the proceedings.²³ The court *again* determined that Goldsmith's testimony was "appropriate", i.e., reliable:

I also feel that based upon the alternative ruling that is based upon the arguments and the materials that I've reviewed, it's that his testimony is appropriate and that the arguments that were made by plaintiffs' counsel go to the weight the jury should afford his testimony as opposed to its admissibility.²⁴

The court had: 1) the Rieses' motion to strike, 2) the Rieses' *Daubert* motion, 3) the parties' expert disclosures, 4) two depositions of Goldsmith, 5) deposition of Phelan, 6)

¹⁹ Rieses' Motion for *Daubert* Hearing Regarding the Mathematical Model for Intra-Uterine Bleeding Proposed by Jay Goldsmith, M.D., 9/13/2010, R. at Vol. 6, 2789-2795; *see*, Rieses' Brief, Exhibit 3. Dr. Phelan was another expert, a maternal-fetal-medicine physician, retained by the Rieses.

²⁰ Dr. Robinson's Objection and Response to *Daubert* Motion, 9/20/2010, R. at Vol. 19-20, 2809-2883; *see*, Rieses' Brief, Exhibit 4.

²¹ VR No. 159: 9/20/10; 10:07:30-10:43:40.

²² VR No. 159: 9/20/10; 10:07:30-10:43:40.

²³ *Id.* *See also*, VR No. 1: 9/10/10; 12:53:33.

²⁴ VR No. 159: 9/20/10; 10:41:12-10:41:35.

Robinson's response to the *Daubert* motion, 7) medical literature, and 8) arguments of counsel at several hearings. Just as in *Gunderson*,²⁵ the court had before it concrete materials, extensive briefs with supporting authority, and multiple, lengthy arguments by the parties – i.e., sufficient evidence to find Goldsmith's testimony reliable.²⁶

Contrary to the Rieses' argument that the record was insufficient, the court did exactly what *Gunderson*²⁷ requires when determining the reliability of expert testimony: affirmatively stating on the record that it had reviewed the material submitted relative to the testimony of this expert and concluding that the testimony was reliable.²⁸

Moreover, Goldsmith's testimony is based upon sound, generally accepted scientific principles applied to the factual medical evidence in this case. Goldsmith derived his opinions and calculations from uncontroverted, scientific principles relating to total fetal blood volume, hematocrit and hemoglobin levels, and the process of equilibration. "*Daubert* does not require proof to a scientific certainty or even proof convincing to the trial judge . . ."; rather, it requires that "the expert's opinion be based on sound methodologies of the type used by experts in the field in which the opinion is offered."²⁹ The Rieses complain that there is a lack of scientific studies proving that a human fetus equilibrates at the same rate as adult humans and animal fetuses.³⁰ They also challenge, *for the first time*, whether equilibration even occurs in human fetuses.³¹ No such studies exist because it is highly unethical to conduct bleeding studies on human

²⁵*Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 101 (Ky. 2008).

²⁶ *Id.*

²⁷ *Id.*

²⁸ "The trial court affirmatively stated on the record that it had reviewed the material submitted by the parties relative to the testimony of the Gundersons' causation experts and concluded that the testimony was reliable. This is the minimum required for a *Daubert* ruling." *Gunderson*, 279 S.W.3d at 101.

²⁹ *Gunderson*, 279 S.W.3d 105 (quoting *Brasher v. Sandoz Pharmaceuticals Corp.*, 160 F.Supp.2d 1291, 1296 (N.D. Ala. 2001)) (emphasis added).

³⁰ See Rieses' Brief, p. 11-12.

³¹ See Rieses' Brief, p. 8-9, 11-12.

fetuses. Ethical obstacles in medical research, however, do not prevent the development of scientifically reliable opinions. The law recognizes that experts must rely on general scientific principles, as well as animal studies, to develop scientific opinions that cannot be tested due to, e.g., medical ethics.³² The Court of Appeals even acknowledged that no research about equilibration is done on human fetuses because “death of the fetus would be the usual outcome”³³ – a point which the Rieses chose to wholly ignore. The Court of Appeals also failed to propose any scientific alternative for how Goldsmith, or any other expert, could provide the evidence it required without conducting unethical studies on human fetuses, essentially requiring proof of the impossible – how is that a just evaluation of whether a scientific opinion is reliable?

As a final point, the trial court correctly concluded that any questions regarding the rate of equilibration in human fetuses went to the weight of Goldsmith’s testimony rather than its admissibility. In *Gunderson*, this Court affirmed the trial court after it made a similar determination:

You’ve got eminently well qualified experts and the subject of the majority of the attack with these experts is going to be on cross-examination in terms of the appropriate weight that the jury ought to afford their testimony and whether it is affected by this data on which they rely.³⁴

The trial court wisely determined that although there are disagreements in the fields of science and medicine, such is not a sign of unreliable pseudoscience. The court articulated that the Rieses had an adequate opportunity to cross-examine Goldsmith on this portion of his testimony, or any other subject that reflects on the expert’s

³² *Gunderson*, 279 S.W.3d at 105 (quoting *Brasher v. Sandoz Pharmaceuticals Corp.*, 160 F.Supp.2d 1291, 1296 (N.D. Ala. 2001)).

³³ Opinion at 9 n. 8.

³⁴ *Gunderson*, 279 S.W.3d at 105 (quoting *Brasher v. Sandoz Pharmaceuticals Corp.*, 160 F.Supp.2d 1291, 1296 (N.D. Ala. 2001)).

credibility.³⁵ The Rieses did just that on cross-examination.³⁶ Thereafter, it was up to the jury to judge the expert's credibility for themselves.

II. The Court of Appeals' decision is inconsistent with well-established Kentucky law requiring a finding of harmless error when a verdict is supported by other sufficient evidence.

Not only must the Rieses prove that Goldsmith's testimony was unreliable, but they must also prove that allowing the jury to hear it went beyond harmless error. Under this standard, if even in the absence of the allegedly impermissible testimony there is sufficient evidence for upholding the verdict, then this Court must affirm.

The Rieses entire appeal hinges on causation – a plaintiff needs both causation and negligence (duty/breach) to prevail. In an effort to emphasize their argument that any error – even if harmless – requires reversal, the Rieses creatively, but speciously, discuss the idea that an “implicit holding” in *Kemper v. Gordon*³⁷ requires reversal if there is any error when there is a general verdict.³⁸ No such implicit holding exists. In *Kemper*, this Court found that the trial court erred in excluding evidence showing an expert's bias and inconsistent statements on the same issue in a different case.³⁹ This Court emphasized that a party is “entitled to cross-examine an expert on any subject that reflects on the expert's credibility” as “credibility of a witness's relevant testimony is always at issue.”⁴⁰ We agree, but contrary to the Rieses' argument, *Kemper* contains no discussion, implicit or otherwise, supporting their argument that a single error – especially one that is, if error, harmless – taints a general verdict and requires reversal.

³⁵ VR No. 159: 9/20/10; 10:41:26; *Tuttle v. Perry*, 82 S.W.3d 920, 923-24 (Ky. 2002).

³⁶ VR No. 159: 9/20/10; 2:02:07-3:49:58, 4:35:50-4:51:44.

³⁷ *Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008).

³⁸ See Rieses' Brief, p. 28-29.

³⁹ *Kemper v. Gordon*, 272 S.W.3d 146, 155 (Ky. 2008).

⁴⁰ *Id.* (internal citations omitted).

Any error in the admission of Goldsmith's testimony is harmless unless the Rieses are able to convince this Court that **the outcome of trial would have been different** had the trial court disallowed Goldsmith's testimony.⁴¹ The "admission of incompetent evidence is harmless if the facts are otherwise shown by proper evidence, or when the verdict or judgment is supported by **other sufficient evidence.**"⁴² Moreover, appellate courts may affirm a judgment below for **any reason** supported by the record.⁴³

The Court of Appeals emphasized, and the Rieses adopted, the argument that Goldsmith's testimony involved "mathematical certainty" and was, therefore, overly persuasive to this jury.⁴⁴ There is nothing magical about the math that Goldsmith utilized relative to lab values in the medical records and the scientifically accepted principle of equilibration to formulate his opinions about timing the fetal bleed. Besides, at no point does Goldsmith testify that he knew with "mathematical and scientific certainty," as the Rieses argue, exactly when the bleed occurred. Rather, he testified that the bleed "more likely than not" happened around 5:00-5:15 a.m., not after 6:45 a.m.⁴⁵

The Rieses would have this Court believe that Goldsmith was the *only* expert who testified about timing the fetal bleed,⁴⁶ or that no other testimony was "of the same quality of character" as Goldsmith's such that its superior "quality of character" could not be challenged by other experts or cross-examination and, therefore, the jury must have

⁴¹ *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 776 (Ky. App. 2007).

⁴² *Conley v. Fannin*, 215 S.W.2d 122, 123 (Ky. 1948) (quoting *Honaker v. Crutchfield*, 57 S.W.2d 502, 504 (Ky. 1933)) (emphasis added).

⁴³ *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 575-76 (Ky. 2009) (citing *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 (Ky. 2009)).

⁴⁴ Opinion at 13-14; Rieses' Brief, p. 32.

⁴⁵ VR No. 159: 9/20/10; 10:46:48-5:00:01; See also, excerpts from transcript of Goldsmith's trial testimony, p. 104, lines 16-19 (VR 159: 9/20/10; 1:42:35-1:42:50), p. 237 lines 14-16 (VR 159: 9/20/10; 4:27:40-4:27:47), attached hereto as **Exhibit B**.

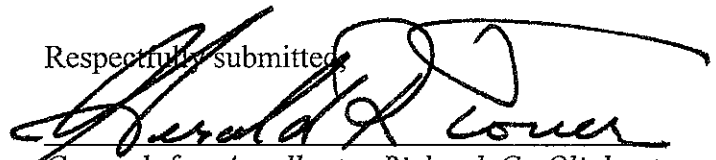
⁴⁶ Rieses' Brief, p. 3.

believed Goldsmith *and only Goldsmith*.⁴⁷ In reality, all three defendants and the Rieses had experts regarding timing the fetal bleed.⁴⁸ The portion of Goldsmith's testimony at issue is but one piece of evidence out of many that supported the same conclusion – that the injury occurred *before* Mrs. Ries got to the hospital.⁴⁹ The discussion of math and equilibration simply added a detail to the substantial testimony and medical evidence that already existed. Goldsmith gave his opinion, but at least *eight* other qualified doctors did as well.⁵⁰ The cumulative nature of this evidence renders its admission harmless, and not grounds for a new trial.

CONCLUSION

WHEREFORE, Appellants, Richard Oliphant, M.D. and Louisville Physicians for Women, PLLC, for the reasons stated in their original brief and herein, respectfully request that this Court reverse the Court of Appeals' Opinion 2011-CA-000100 rendered on December 21, 2012 and affirm the trial court's Judgment and Jury Verdict in their favor.

Respectfully submitted,


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Counsel for Appellants, Richard C. Oliphant,
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⁴⁷ Rieses' Brief, p. 32.

⁴⁸ Dr. Oliphant presented Drs. Bendon (VR No. 162: 9/23/10; 9:50:16-1:08:46) and Elliott (VR No. 156: 9/15/10; 10:54:00-5:20:50); Dr. Robinson presented Drs. Goldsmith (VR No. 159: 9/20/10; 10:46:48-5:00:01) and Barnes (VR No. 157: 9/16/10; 10:58:46-2:46:42). Baptist Hospital East presented Drs. Ferrara (VR No. 160: 9/21/10; 9:22:45-2:35:31) and Strong (VR No. 154: 9/13/13; 4:21:41-4:55:50). The Rieses presented Drs. Brown and Crawford (VR No. 149: 4: 9/3/10; 4:38:29; VR No. 151: 4: 9/8/10; 2:15:20). *See also* Rieses' Brief, p. 31; Brief for Appellants to Court of Appeals, p. 4.

⁴⁹ *See*, Oliphant's Brief, p. 11-14.

⁵⁰ *See, e.g.*, Oliphant's Brief, p. 11-14. Many experts gave their opinion on when they thought the timing of the bleed (or injury) occurred. Dr. Brown at VR No. 149: 9/3/10; 3:30:15, 3:34:14; Dr. Crawford at VR No. 150: 9/7/10; 4:29:02, 4:56:50; Dr. Puri at VR No. 151: 9/8/10; 11:11:22-11:15:45, 11:55:07-11:55:43; Dr. Phelan at VR No. 154: 9/13/13; 11:17:56; Dr. Elliott at VR No. 156: 9/15/10; 11:21:47-11:23:18; Dr. Barnes at VR No. 157: 9/16/10; 11:00:59-11:01:31, 11:35:47; Dr. Robinson at VR No. 163: 9/24/10; 3:47:33; Dr. Bendon at VR No. 162: 9/23/10; 10:01:48-10:02:40, 10:29:00-10:31:00, 11:09:05-11:11:45, 11:15:30-11:16:32.

APPENDIX

Exhibit A: Delivery Record, Plaintiffs' Trial Exhibit No. 5

Exhibit B: Excerpts of Transcript of Dr. Goldsmith's Trial Testimony, 9/20/10, p. 104, lines 16-19 (VR 159: 9/20/10; 1:42:35-1:42:50), p. 237 lines 14-16 (VR 159: 9/20/10; 4:27:40-4:27:47)