

1 (October 8th, 2013, Judge Karalunas, continuation of trial)

2

3 THE COURT: Good morning. Okay. Is there  
4 anything to address before we start the closing arguments?

5 Mr. HIGGINS: Just very quickly, Judge. I just  
6 had some motion in limine as to the closings and the  
7 page-and-a-half that I referenced earlier; I don't know if  
8 the Court wanted an argument. I'll put it on the record  
9 very quickly --

10 THE COURT: I did read that. I didn't bring it  
11 down with me this morning, but I was prepared to rule on  
12 that. I'm going to grant the motion with respect to Item  
13 1, Item 2, Item 3, and Item 4.

14 Mr. HIGGINS: Judge, to save time, may I just  
15 have it marked as a Court Exhibit?

16 THE COURT: Yes.

17 (Court's Exhibit Number 2 marked for  
18 identification)

19 Mr. HULSLANDER: Did you just say we can't talk  
20 about the gummy bears?

21 THE COURT: Yes.

22 Mr. HULSLANDER: Even though it's contested;  
23 gummy bears cause cavities and their claim is this kid  
24 doesn't have cavities? How can gummy bears not be a part  
25 of the case, Judge?

1 THE COURT: It's not. You may not use it in  
2 your closing argument.

3 Mr. HULSLANDER: I can't refer to gummy bears  
4 when it's been a part of the case throughout the case?

5 THE COURT: Do you want an exception to my  
6 charge?

7 Mr. HULSLANDER: I'll take an exception, but  
8 it's one-sided, biased.

9 Mr. NOWOTNY: There was a limitation at the  
10 beginning of this trial that gummy bears could not be  
11 raised in a generic format but the exception was if there  
12 is a reference to that in the interactions with the  
13 dentists or healthcare providers, so in that limited  
14 scope, that's how it's come in through this trial, and, in  
15 fact, that is something that the defense believes is  
16 already out there and we would ask that that exception  
17 still be preserved for purposes of summation.

18 Mr. HIGGINS: Yes, Judge. And our motion is to,  
19 basically, attacking the parents' dental care of Jeremy,  
20 repeated reference to gummy bears; we did make a  
21 representation that was part of the ruling. So in other  
22 words, our concern is that they are going to use the gummy  
23 bears to --

24 THE COURT: Indict the plaintiff --

25 Mr. HIGGINS: Exactly.

1 THE COURT: Indict the plaintiff and his  
2 parents. That's exactly right. And if I had any  
3 confidence that the defendants would abide by that ruling,  
4 then we wouldn't have to have a blanket rule like that.  
5 But the problem is when I issue a limiting kind of ruling,  
6 it seems that it gets ignored.

7 So I guess if defense counsel wants to walk that  
8 line and take a chance on incurring the wrath of the judge  
9 in front of the jury, you're free to do that, consistent  
10 with my prior ruling.

11 Mr. FIRST: Judge, there's another part of that  
12 as well. There's been testimony by Ms. Varano that that  
13 information was given to the dentists.

14 THE COURT: I get it. I get it.

15 Mr. FIRST: That's history.

16 THE COURT: It is.

17 Mr. FIRST: It's history. They have to consider  
18 that.

19 Mr. HULSLANDER: This hasn't been an indictment  
20 of Kelly Varano ever. It has to do with the basics of  
21 this case. They claim there's no cavities, no problems  
22 with the teeth. To the extent they do, it's obvious that  
23 their own expert has said that cavities are caused by  
24 gummy bears. Not only are cavities caused by gummy bears,  
25 but we know that Mr. Varano, who -- Mr. Bohn, who wasn't

1 here, he talked a lot about gummy bears. Everyone has  
2 talked about gummy bears. We can't talk about gummy bears  
3 in our summation?

4 THE COURT: I ruled. Anything else?

5 Mr. FIRST: Judge, do you have a copy of the  
6 jury sheet because --

7 THE COURT: So I e-mailed a version of it today.

8 Mr. FIRST: I know you did.

9 THE COURT: I brought a single copy down, but I  
10 can have Terry e-mail my secretary and she can provide  
11 everybody with a copy of the verdict sheet.

12 Mr. FIRST: I would appreciate that.

13 THE COURT: Sure.

14 Mr. FIRST: I wasn't sure from it, have you  
15 ruled as a matter of law on the limited liability  
16 section --

17 THE COURT: Yes.

18 Mr. FIRST: -- because I thought maybe you  
19 changed your mind.

20 THE COURT: I hope I didn't. That was.

21 Mr. LEYENDECKER: Question 9 asks about New  
22 FORBA. New FORBA violated... and Number 10, was the  
23 violation a proximate cause, so it looks like 9 may be  
24 out.

25 THE COURT: Okay. Question -- yep, that's a

1 mistake.

2 THE COURT: So we're going to have to have the  
3 verdict sheet redone. They'll just be numbered. That one  
4 will come out, change all the back numbers again, and I  
5 took it out with respect to Old FORBA, but in the middle  
6 of the night, I didn't get that out. Anything else?

7 Mr. FRANKEL: Your Honor, are you hearing any  
8 discussion about the last version of the instructions,  
9 because we have some issues, some of which I think are  
10 probably agreeable to the other side, but the same kind of  
11 typos or --

12 THE COURT: Okay.

13 Mr. FIRST: I don't know if you're referring to  
14 the adverse inference, 1:77.

15 Mr. FRANKEL: No. Can I at least be heard real  
16 quickly?

17 THE COURT: Are these things that we have --  
18 because we're going to have to give everybody a break at  
19 some point. Is there anything that needs to be addressed  
20 before closing arguments?

21 Mr. LEYENDECKER: I just think that Question  
22 Number 9, if counsel intends, for example, to go through  
23 the questions with the jurors on the Elmo, that number  
24 nine, if that throws things off and we just go to 10 or  
25 whether we wait to get a new print-out -- I'm flexible,

1 since I'm going last, but --

2 THE COURT: What I can do is just probably to  
3 make it simpler for everybody is delete Question 9 but not  
4 take it -- just put "Question 9 deleted," so the jury  
5 verdict will be as it is, but Question 9 will just say  
6 "deleted."

7 Does anybody have any problem with that? That  
8 way it won't throw off all the numbering and you guys can  
9 refer to the jury verdict sheet as it is, just deleting  
10 Question 9.

11 Plaintiff have any objection to that?

12 Mr. LEYENDECKER: I think that's fine by the  
13 plaintiffs, your Honor, so long as there aren't other  
14 questions that get tangled up because there's a reference  
15 back to 9, as an example, and I don't know...

16 Mr. STEVENS: There's a reference to Question 12  
17 and Question 5, and I don't know if that's acceptable.

18 THE COURT: Question 12 --

19 Mr. STEVENS: And 5. There's a reference to --

20 Ms. MARANGAS: If you go to Question 5, right  
21 underneath the question itself, where -- it refers to  
22 Question 12...

23 THE COURT: Well, as I sent to everybody when I  
24 e-mailed this early this morning, after ruling with  
25 respect to the limited liability corporation, I switched

1 the order of the verdict sheet because I didn't think it  
2 was fair to the defendants to have the first question be a  
3 proximate cause question, as opposed to a liability  
4 question. So I had to move that, which threw all the  
5 numbers off. And as I told everybody, I was having my law  
6 clerk look over the verdict sheet this morning, so...

7 Mr. FIRST: Judge --

8 THE COURT: That will be changed.

9 Mr. FIRST: There's also no proximate cause  
10 question as to Old FORBA on the limited liability issue.  
11 I didn't see any proximate cause question there. I'm sure  
12 that's in the --

13 Mr. LEYENDECKER: It's there. It's Number 7.

14 Mr. FIRST: I'm sorry. I don't have a hard  
15 copy.

16 Mr. LEYENDECKER: I think it's Number 7. Back  
17 on the battery, Question 5, I think 12 there should just  
18 be a reference to Number 4.

19 THE COURT: Correct.

20 Mr. LEYENDECKER: If the answer to Question 4  
21 was no... Question 7 does appear to be a proximate cause  
22 question for Old FORBA on the 1203 violation.

23 THE COURT: I missed the last part of that, Mr.  
24 Leyendecker.

25 Mr. LEYENDECKER: Question 7 appears -- is the

1 proximate cause question for Old FORBA on the 1203  
2 violation. 8 is the participation question on 1203; 9 is  
3 going to be deleted or skipped, and then 10 is the New  
4 FORBA proximate cause on 1203 and then 11 begins the  
5 negative questions and then thereafter we have the  
6 malpractice questions and then the damages, et cetera.

7 THE COURT: Anything else to address before  
8 closing arguments?

9 Mr. STEVENS: I just want to confirm that the  
10 Court is reserving our rights to bring up dismissing  
11 motions, objections to the charge, objections to the  
12 verdict sheet that we would like to do beforehand but  
13 we've been directed to do later.

14 THE COURT: I did say you could come at 8:30  
15 this morning and you declined to do that. Yes, you have  
16 reserved your right to do that. And it will be done after  
17 closing arguments.

18 Anything else?

19 (Whereupon, the jury was then brought into the  
20 courtroom)

21

22 THE COURT: Good morning.

23 JUROR MEMBERS: Good morning.

24 THE COURT: Everybody had a nice long weekend?

25 JURY MEMBERS: Yes.



1 THE COURT: All right. We're about ready to  
2 begin our closing arguments. Counsel ready to proceed?

3 Mr. FIRST: Yes.

4 Mr. NOWOTNY: Yes. With the Court's permission,  
5 I would like to present the summation on behalf of Dr.  
6 Khan, Dr. Bonds and Dr. Aman.

7 THE COURT: Thank you.

8 Mr. NOWOTNY: Good morning, ladies and  
9 gentlemen. I would like to thank you for your attendance.  
10 It's quite remarkable; we've been here two-and-a-half  
11 weeks and everybody has been here on time pretty much and  
12 we have been able to get through with everybody showing  
13 up, showing extraordinary commitment to your civic duty.  
14 I and my clients appreciate that, but more so we  
15 appreciate the attention you all have given to this  
16 matter. I've had a chance sitting in the back corner  
17 there to watch you throughout this trial and it's been  
18 very reassuring to me and my fellow colleagues that you  
19 have been paying close attention throughout.

20 There's a lot of ground to cover. I'm going to  
21 try to get through my summation on behalf of Dr. Khan,  
22 Bonds and Aman as quickly as I can. I may be moving along  
23 quickly at some points because the Court has asked us to  
24 commit to a certain time limit. With that being said,  
25 thank you so much on behalf of my clients for your time

1 and attention.

2 Ladies and gentlemen, the name of this case is  
3 Jeremy Bohn versus Small Smiles et al. That is the case.  
4 That is the case that's been presented to you. What's  
5 interesting about the way the case has been presented,  
6 though, and I believe the evidence shows, is that it  
7 wasn't until we were into the fourth day of trial, four  
8 days into the evidence before you really heard anything  
9 about Jeremy Bohn, and it was at that time when my client  
10 Dr. Bonds took the stand and you finally started to hear  
11 what was the care of Jeremy Bohn.

12 Now, why is that significant? Ladies and  
13 gentlemen, plaintiff's counsel has presented to you many,  
14 many allegations; I believe that some of those being  
15 outrageous to compensate for the credibilities of  
16 questions of negligence, such as Dr. Bonds committing a  
17 battery on this boy as part of his care and treatment  
18 rather than just being unreasonable in his care and  
19 treatment, a battery, that you do that to compensate.

20 When you don't have a good case, you embellish  
21 the case. When you don't have a good case, you fabricate  
22 evidence. When you don't have a good case, you exaggerate  
23 the evidence. In this particular matter, I believe that  
24 once I present to you and reaffirm, hopefully, what you  
25 recall from the evidence that's been presented to you,

1 that the care provided to Jeremy Bohn throughout the time  
2 frame, the two years that he was coming to my client's  
3 facility and being treated by my clients, he received good  
4 care, reasonable care, appropriate care.

5 The fact that there was three-and-a-half days  
6 dedicated to undue influences will not matter at the end  
7 of the day for your deliberation because I believe once  
8 you have a chance to consider this matter and discuss it  
9 amongst yourselves, you will see that Dr. Bonds, Dr. Khan,  
10 and Dr. Aman provided appropriate and reasonable care,  
11 such that any outside influences would have no bearing and  
12 did not have any bearing on the care.

13 All these e-mails, and there were large numbers  
14 of them produced, many of them you saw in this courtroom.  
15 You did not see a single e-mail threatening the job of Dr.  
16 Bonds, Dr. Aman or Dr. Khan. There is no direct  
17 relationship of all that time spent on e-mails that  
18 directly implicate that any one of my clients would have  
19 been influenced because they knew their job was at stake  
20 because of an e-mail specifically warning them, "You're  
21 about to lose your job, so go do something horrible to the  
22 children coming into your clinic." Zero evidence of that.

23 Now, as the evidence has shown in this case,  
24 Small Smiles set up in this community in a much-needed  
25 area of the community to address the needs of the

1 underserved children of Syracuse and the greater Syracuse  
2 area. We heard from the curiously non-attending father,  
3 Mr. Bohn, that when he went to the Small Smiles clinic, it  
4 was full of kids. When he was there, he talked to other  
5 families who were coming from as far away as Auburn and  
6 some other locations because this need was not being met.

7 What we know is that my clients, Dr. Bonds, Dr.  
8 Aman and Dr. Khan, have each committed no less than five  
9 years of their professional career to treating kids  
10 through the Small Smiles clinics. We also know that  
11 although there was some suggestions about the credentials  
12 by the plaintiff's counsel of my clients, and I might  
13 point out, to keep this all in context, when Dr. Aman was  
14 on the stand, there were questions asked "where are you  
15 from?" to try to provoke the word Pakistan out of him as  
16 many times as possible. When Dr. Khan was on the stand,  
17 same thing. You didn't hear them ask where Dr. Bonds was  
18 from. Why is that?

19 How about this? Mr. Leyendecker, when he had  
20 Dr. Khan on the stand, one of the first questions he  
21 asked, knowing darn well Dr. Khan has lived out of state  
22 for several years now, "You don't have a New York license,  
23 do you?" He knew darn well it has nothing to do with this  
24 case, nothing to do with care of anybody, much less care  
25 of Jeremy. Why bring that to your attention other than to

1 prejudice you unnecessarily? Inappropriate.

2 Moreover, Dr. Slack, the non-board certified  
3 pediatric dentist that they brought into this room, had  
4 zero concerns about the credentials of Dr. Aman, Dr.  
5 Bonds, or Dr. Khan. No concerns about their education,  
6 their training, no concerns about their abilities at all.  
7 And in fact, ladies and gentlemen, the evidence is quite  
8 clear: Absolutely no criticism has been brought up by  
9 anybody sitting at that table about the quality of  
10 Jeremy's dental care. When he said, "They did a poor job;  
11 they used cheap stuff; none of that worked right; doesn't  
12 look good," none of that evidence has been brought to you.

13 So they can suggest to you whatever they will  
14 about whether the treatment is indicated or not, which is  
15 the entirety of the case as best I can tell, but what they  
16 cannot dispute is that the dental care itself provided by  
17 my clients was good and is not in dispute.

18 Now, as to the clinical picture here, this  
19 clinical picture starts about a year before this visit to  
20 Dr. Taylor, and we know that Dr. Taylor sees this young  
21 man, this boy, on May 17th, 2006. This is not in dispute.  
22 At that time, he's got facial swelling. His tooth issues,  
23 teeth issues, are so severe that his mother is concerned.  
24 He's got pain; he's got swelling. She takes him to the  
25 pediatrician. The mother states he has some tooth decay.

1 It was that apparent at this point in time. This wasn't a  
2 "Don't know anything is going on, had no idea; let me see  
3 what this problem is; this is irrecognizeable." This  
4 layperson, Ms. Bohn, recognized, "There is tooth decay in  
5 my child's mouth." Multiple -- not my client's words, not  
6 my expert's words; Dr. Taylor's words.

7 If they've got a problem with what Dr. Taylor  
8 saw, why didn't they bring Dr. Taylor in to explain  
9 "That's a different picture. That's not what I meant.  
10 When I say multiple, I don't mean more than one."  
11 "Multiple dental cavities. Dental abscess, need to stress  
12 proper dental hygiene in order to help address that."

13 Fact is, she was concerned enough about the  
14 condition of his mouth, at that time, she believed he had  
15 an abscess. As you have heard from everybody that's  
16 testified in this courtroom, that can be a very, very  
17 dangerous medical condition, and that was her belief on  
18 the first day.

19 Now, we know from Miss Varano's trial testimony  
20 that she said, "Before I even went to take Jeremy to  
21 Taylor's office --"

22 Mr. LEYENDECKER: Your Honor --

23 THE COURT: Yes, would counselors approach,  
24 please?

25 (Discussion off the record at the bench)

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Mr. NOWOTNY: So in her trial testimony, Miss Varano clearly stated that prior to going to see Dr. Taylor on May 17th, 2006, she had seen brown discoloration of his teeth, a gap in his two front teeth. She had been seeing that occur for over a year prior to this appointment on May 17th. And it was her impression, Miss Varano's, prior to this appointment, that the condition of Jeremy's mouth was due to cavities and decay.

So this suggestion that the counsel for plaintiff is trying to present, that there was nothing wrong with his mouth; there was one minor issue, treat it with some antibiotic, didn't need to do any of this care, because that's basically what they suggested to you, is completely contrary to Miss Varano's reality and the medical observations of people not associated with Small Smiles.

Also, at the time of this visit, there is no question he had pain; he had swelling. There is no question that there was a concern that he in fact had an infection. Now, she is told by Dr. Taylor to go see a dentist, and so Miss Varano does the reasonable thing: She goes to Dr. Patel, who has been treating her daughters prior to this occasion.

Now, Jeremy's three-and-a-half years old and

1 he's having his very first experience with the dentist.  
2 He's showing up with an active problem. He's not getting  
3 a benefit of "Let's see how you're doing; let's clean the  
4 couple of teeth you have, and here's a sucker" and kind of  
5 introduce him to the dental world that way. He's coming  
6 with a pain in his mouth, swelling and a presumed abscess  
7 present.

8 Now, during this exam, Miss Varano testified, in  
9 that seat right there, that while she was present in the  
10 room -- keep in mind, there's a big issue raised by  
11 plaintiff's counsel about, "Oh, you ought to let those  
12 parents back there because that might have some benefit."  
13 Well, here we have an example within our case, within the  
14 facts and evidence in front of you, that when Ms. Varano  
15 was in the room with the known dentist of her choice and  
16 her son, he is not cooperating. In fact, just the  
17 opposite. Not only is she observing him shaking his head,  
18 reaching up and moving away the hand of the dentist, not  
19 cooperating and opening his mouth, zero cooperation with  
20 her present, lending credibility to the concerns you have  
21 heard expressed repeatedly that one of the issues raised  
22 at Small Smiles is that -- and you also heard from our  
23 retained board-certified pediatric dentist that children  
24 may act up in the presence of their parents more so than  
25 outside their presence. We have that case; we have an



1 example of that very conduct, that very response, with  
2 Miss Varano and Dr. Patel.

3 Ms. Varano acknowledged even with her in the  
4 room, she had absolutely no effect on Jeremy's behavior  
5 with Dr. Patel. Now, when Dr. Patel has the opportunity  
6 to take a peek in Jeremy's mouth, you know, he's very,  
7 very uncooperative, right? We all know that now. Carious  
8 exposure, this word right here, at tooth I. B is also  
9 very bad. So in the limited moment he's able to look in  
10 this room -- because you can see, he didn't get any  
11 diagnosis. He didn't fill out the odontogram; he didn't  
12 do X-rays, have a chance to do any kind of assessment,  
13 other than look in the kid's mouth. And just from the  
14 brief moment he had, he saw enough trouble in there to  
15 recognize "You need to get this child treated."

16 What is also important about this? You heard  
17 Mr. Leyendecker ask Dr. Bonds on the stand, "Wouldn't a  
18 good, reasonable dentist go get the medical records as  
19 part of a prior dentist as part of your treatment? Isn't  
20 that what a reasonable dentist would do?" He's asking Dr.  
21 Bonds on the stand that very question knowing darn well,  
22 darn well this child had never been to a dentist and had  
23 no prior dental care. But he made an issue of it.

24 Why would he do that? Ladies and gentlemen, if  
25 you have a good case, you don't exaggerate the case; you

1 don't fabricate the evidence.

2 Dr. Slack, in that chair right there, she  
3 interpreted this phrase right here, looks like carious  
4 exposure, carious exposure with tooth I. She also  
5 acknowledged when you're removing the cavity, the cavity  
6 may extend to the nerve. That's important, ladies and  
7 gentlemen, because we know with the amount of decay that  
8 was so evident by Ms. Varano's own observations of her  
9 child's mouth, there was so much decay there, it needed to  
10 be removed, and as you did that, that's when you can  
11 appreciate, he saw in the limited time he had with this  
12 kid, with the uncooperative extent that he had, carious  
13 exposure.

14 Ms. Varano, when she left, she understood that  
15 Dr. Patel had observed what he thought to be a tooth  
16 abscess and that in fact he believed there were two teeth  
17 that might have abscess. She knew that. And in fact, she  
18 comes to Small Smiles; she's now been to her pediatrician.  
19 She's also been to Dr. Patel, and these are her words, "I  
20 and B abscess," not toothache. "I and B abscess." That's  
21 a pretty sophisticated mother and you all got to see Miss  
22 Varano on the stand. She's nobody's fool, folks, and  
23 that's important because when it gets to what kind of  
24 care, what were they doing, what does using a restraint  
25 have to do with papoosing, what's that photograph? Take

1 that all in mind, a lady sophisticated enough to come into  
2 a dentist office and say, "My child doesn't have a  
3 toothache. He has I and B abscess" speaks to the level of  
4 her sophistication.

5 Now, this form, this front page, it says right  
6 down here, "I have read and understand the pediatric  
7 dentistry patient management techniques on Page 2."  
8 Here's Page 2...

9 Now, resistive movement, refusing to open mouth,  
10 moving hands... that might require us to use one of these  
11 methods. This speaks for itself and you'll have a chance  
12 to look at it. It speaks to the physical restraint and  
13 she said, "I'm okay with that. Strangers I don't know can  
14 hold my child down and give him the care needed to be  
15 given, don't have a problem with that," but it was only  
16 the passive restraint.

17 But this document is more interesting than that.  
18 If you recall, last day of evidence, Dr. Davis is on the  
19 stand right there; Mr. Higgins over there paces around  
20 this courtroom. Hand-over-mouth, hand-over-mouth,  
21 bringing up this issue of hand-over-mouth. Don't you need  
22 to be more forthcoming about hand-over-mouth? You didn't  
23 talk about hand-over-mouth.

24 Ladies and gentlemen, we have been in trial for  
25 two-and-a-half weeks. You never heard that anybody used

1 hand-over-mouth with Jeremy at all. In fact, he was so  
2 agitated about that hand-over-mouth -- if you recall, he  
3 was over here -- there was a moment when I thought he was  
4 going to apply the hand-over-mouth method on Dr. Davis.

5 Now, why would you talk about hand-over-mouth?  
6 You all have been here two-and-a-half weeks listening to  
7 testimony and evidence. You bring up a brand-new issue of  
8 which there's no evidence; the mother has not even  
9 mentioned and nobody else, not even Dr. Slack, has ever  
10 suggested hand-over-mouth was ever used. Why would you  
11 bring that up on the last day of evidence? Ladies and  
12 gentlemen, if you have a good case, you don't fabricate  
13 allegations on the last day. If you have a good case,  
14 there's no need to exaggerate. If you have a good case,  
15 you don't bring up a whole 'nother theory of concern about  
16 care and treatment that never occurred, and there's been  
17 zero evidence before, but the last witness on the last day  
18 of evidence.

19 Ms. Varano acknowledged, "I read this form and I  
20 understood. You can hold down my child if you need to,  
21 grab him and hold him. I also know if you do that, he  
22 might get a bruise." That's understandable: Somebody  
23 resisting; somebody holding down physically, active  
24 restraint... you might get a bruise. She understood that.  
25 No question about that. She was okay with that, had no

1 problem understanding that was something they would need.

2 Ladies and gentlemen, after she filled out this  
3 paperwork and sent her son back to try to be examined,  
4 about ten minutes, Miss Varano acknowledged, ten minutes  
5 of effort to try to look in his mouth, Dr. Bonds comes out  
6 to talk to her. Miss Varano acknowledges Dr. Bonds comes  
7 out to let her know, "your son has been back there for ten  
8 minutes, plus-minus -- yes -- may have to utilize a  
9 papoose in order to get his hands out of the way so I can  
10 look at his mouth." Right. She acknowledged that. That  
11 conversation took place.

12 Dr. Bonds can't -- all he can do is say, "Look  
13 at this. If you have any questions about anything, please  
14 ask me. I'm going to sit down with you as long as we need  
15 to talk about it. Please ask me." What more can he do?  
16 What more can we do?

17 Then he said he spent five to seven minutes  
18 discussing this situation, which she said was an adequate  
19 amount of time. She didn't feel rushed. She didn't feel  
20 "I didn't get a chance to really get into it." Five to  
21 seven minutes simply to ask. "These are things I might  
22 need to do because I can't get your son to allow me to  
23 take a look in his mouth."

24 Another interesting thing: Here was a hygiene  
25 exam... they get the authority from the mom to look in

1 this child's mouth. He's got an infection, got a very  
2 serious health problem. Did you find it ironic that Mr.  
3 Higgins was up here talking to you all and addressing one  
4 of my clients' experts about the fact that there was no  
5 documentation -- the importance of documentation, if you  
6 use an immobilizing process, you have to document -- and  
7 this was blown up behind him the whole time? Speaks for  
8 itself.

9 Why would you do that? Why would you try to  
10 suggest there's not documentation when there is and it's  
11 blown up right behind you, "protective immobilization,  
12 he's out of control?" They're trying to suggest on every  
13 one of these exams, L.O.E., limited oral exam, you did no  
14 -- you didn't do any exam. You just opened wide and go  
15 right in.

16 That makes no sense. You can't diagnose if you  
17 don't examine. You can't treat if you're not looking at  
18 the mouth. And here, they know this was in here, complete  
19 oral examination. That's what was done in order to assess  
20 his condition on that day. So why would you keep  
21 emphasizing this little spot on this form, where it was  
22 explained multiple times by all three of my clients about  
23 limited oral exam? Trying to suggest you didn't take any  
24 time to look because it's in and out, in and out. You  
25 didn't take any time to look into his mouth.

1 Ladies and gentlemen, I believe that is beyond  
2 credibility that they kept bringing that up. If you open  
3 the mouth and you're going to treat the mouth, you're  
4 looking and assessing the mouth. If you're making a  
5 diagnosis, you're examining something.

6 Here it is. We didn't mark it, gratuitously  
7 apply the papoose -- by the way, why would they bring in  
8 the other papoose? It looks more like a Hannibal Lecter  
9 prop than knowing that this padded form with this colored  
10 rainbow straps, velcro, which is identified in the  
11 photographs, was in fact the one used. Other than to  
12 shock your attention, to irritate and upset you?

13 Now, here, Dr. Bonds has testified "When I  
14 utilize this device, it's after a variety of efforts have  
15 been made to calm the child. Moreover, never too tight,  
16 never too long, and I'm in direct observation of the  
17 child." Literally he is face to face.

18 We know at this time, twenty minutes, take out  
19 two teeth, numb him up and take them out. No marks or  
20 bruises.

21 Here's the form that's been much discussed.  
22 It's the first day, May 23rd. He did not cooperate; you  
23 need to protect the child and the staff by using this  
24 passive restraint. They said, "Well, where's the  
25 referral? Where's the options? Did you tell this mother

1       that we could go to the hospital and put this child under  
2       general anesthesia and all those risks to avoid putting  
3       him in a passive restraint that might bruise him?" Yes,  
4       we did. "Alternative management procedures are sedation  
5       and general anesthesia." It's right there on the form.  
6       But they have suggested we never made any such suggestion,  
7       never let Ms. Varano, who would have, had she known,  
8       despite signing less than a few millimeters below that,  
9       that was an option available to her and she didn't take it  
10       because she wanted her child treated and nobody wants to  
11       unnecessarily expose a loved one to general anesthesia.

12               We give this form, as you heard from the two  
13       board-certified pediatric dentists who came in here.  
14       N.Y.U., pretty nice establishment out here, doesn't even  
15       use a consent. Columbia, another pretty good place I  
16       hear, doesn't have these photos. Neither one of them  
17       require vital signs to be monitored. Neither one of them  
18       say there's any list of risks. You didn't hear them get  
19       out of my -- either of our board-certified pediatric  
20       dentists that there is a risk on the form that's used at  
21       Columbia, because there are no known risks of harm. You  
22       want to facilitate the treatment. This child needed that  
23       treatment badly on this day. He needed all the treatment  
24       badly throughout the course of his care. Don't scare  
25       people off, but yet if you want to, sedation and general



1 anesthesia, right there on this form.

2 Miss Varano testified in this courtroom that  
3 before a needle was put in her son's mouth and the teeth  
4 were pulled, Dr. Bonds came out and explained all of this  
5 content, talked about the forms, talked about the need of  
6 care, and there was an adequate amount of time spent, yes.  
7 That's Ms. Varano. "You understood, did you not, Miss  
8 Varano, again, that this use of the physical restraints of  
9 your son's extremities was to provide the care and there  
10 might be a risk of bruising or marks on his body?" "Yes."  
11 "You consented to that?" "Yes."

12 Ms. Varano, she was in here when Dr. Slack --  
13 when Dr. Slack was in here, the only risk she brought up  
14 of using the papoose is you might get bruises and you  
15 might emotionally upset the child. Well, don't you think  
16 it might emotionally upset the child if people they don't  
17 know are going to physically hold them down?

18 "Miss Varano" -- and this is an important theory  
19 throughout this case as presented to you. "Miss Varano,"  
20 question, "isn't it true that you did not see any marks on  
21 his skin or signs of bruising anywhere on his body after  
22 the May 23rd, 2006 appointment?" "No, I did not."

23 There is absolutely zero evidence that they have  
24 put in front of you that at any time Jeremy experienced  
25 any harm of any kind, not even a skin blemish, from being

1 placed in the protective immobilization device that they  
2 have made such a to-do about.

3 Now, that also confirms that Dr. Bonds was able  
4 to apply this properly, utilize it in its appropriate  
5 format, and he even was able to complete three fillings  
6 when he utilized this device. You can't do that with a  
7 kid who's not cooperative unless you're doing something  
8 right.

9 Dr. Slack, sedation, these options here...  
10 general anesthesia, those present serious risks, including  
11 death, yes. You can sustain cardio, pulmonary damage,  
12 brain damage? Yes. Significant respiratory distress.  
13 Yes. You didn't here her say any of that was possible  
14 with that, proper or improperly used, by the way.

15 Treatment sheet... Plaintiff's counsel would  
16 have you believe that this young man could have one  
17 abscessed tooth, one very bad tooth, and all the other  
18 teeth are just fine. It's beyond credibility. Dr. Taylor  
19 saw multiple cavities. Miss Varano saw lots of decay and  
20 cavities. Only Dr. Slack is the only one who came in this  
21 courtroom and didn't see anything. Oh, there was one  
22 cavity that was demonstrated on X-ray. That's the only  
23 thing she thought should have been treated. You don't see  
24 anywhere on there crowns, right? And yet Ms. Varano did  
25 testify on May 23rd, this first appointment, Dr. Bonds

1 mentioned, not only did he mention there were going to be  
2 crowns, which aren't listed on here, but there's also  
3 going to be on the four front teeth. That was part of  
4 this treatment planning discussed with Miss Varano the  
5 very first day because of the gaps and the brown and the  
6 other looked-different condition Miss Varano herself had  
7 seen.

8           When Dr. Bonds comes in to discuss this  
9 treatment plan, ten minutes at least, ten minutes, yes,  
10 "Ms. Varano, was that an adequate amount of time to  
11 discuss all these issues?" Miss Varano, "Yes, it was.  
12 Yes, it was."

13           And Mr. Bohn, on the other hand, when he  
14 testified, was brought before you through his deposition,  
15 "Did you ever discuss any of the extent of treatment being  
16 performed with Kelly?" "No." So either it wasn't that  
17 impressive or more likely wasn't that surprising to Mr.  
18 Bohn because of his own observations and Ms. Varano's  
19 observations before their three-and-a-half-year-old had  
20 their first dental visit at my client's facility.

21           You've seen this form. Okay, there's no ECC  
22 Where's the diagnosis? You show me where there's ECC  
23 anywhere on this paperwork? You've got generalized  
24 caries; you've got gingivitis, caries high-risk assessment  
25 marked. Even Doctor -- even their own doctor, Dr. Slack,

1 by definition, Jeremy had ECC; all these things are  
2 demonstrated. Right there. And we provided you this  
3 board to explain...

4 All of these findings are marked. You see the  
5 red areas marked. You see the blackouts. They're all  
6 explained. Mr. Davis went through this with you to  
7 explain. All these observations were made; they are  
8 documented, the diagnoses are documented; the treatment is  
9 documented throughout the chart. Suggesting otherwise is  
10 to ignore this information as related on that form.

11 Nothing is up here. Nothing is up here because  
12 the child never had any care. He didn't come in with a  
13 filling already. Dr. Slack, "Jeremy Bohn did have early  
14 childhood caries when he first went to Small Smiles in May  
15 of 2006?" "Yes." "Dr. Slack, you need to have immediate  
16 intervention to avoid further destruction of teeth when  
17 there's ECC?" "Yes." "You need immediate intervention to  
18 prevent the spread of the disease and further disruption  
19 of the disease?" "Preventively, yes."

20 Dr. Slack told you herself, when you get this  
21 trouble in a child of this age, you don't stand by and  
22 just say, "What happens?" And send the kid out because  
23 he's a little upset today. You have to treat. It's in  
24 the child's best interests. Treatment is done; "we  
25 removed I and B," Dr. Bonds' notes. Again, "I fully

1 understand this authorizes" --

2 This chart is replete with asking Ms. Varano,  
3 "Please tell us if you have questions about what we're  
4 doing; please let us know, and if you're not in agreement,  
5 okay. We've got a room full of kids" -- as you heard from  
6 Mr. Bohn -- "who need the treatment. We'll see you  
7 later."

8 The other risk -- okay, because again this goes  
9 in the context of "don't use this passive device; I want  
10 to put my child under general anesthesia if I have the  
11 option" argument, to look at these other risks, sticking  
12 needles in the mouth, nerve injuries, might be numb, may  
13 chew other parts of the mouth. Don't subject a child to  
14 local anesthesia if you don't need to. Again, "If you  
15 have questions, please ask. Please ask. And she never  
16 disputed she had an inadequate amount of time with any of  
17 my clients to discuss any of these forms.

18 Dr. Slack, the standard of care, dealing with an  
19 infection to the tooth or an abscess caused by a tooth, is  
20 extraction. Yes. Standard of care, ladies and gentlemen.  
21 Out of their expert's own mouth. "Mr. Bohn, did you have  
22 any -- did Jeremy or you have any complaints about that  
23 first visit after it was over? You were there." "No."

24 Now, in addition to providing the care that he  
25 came in for, with a mouth of pain and swelling that was

1       noted just a few days earlier, that continued being very  
2       clearly present at the time of Dr. Patel's visit, Dr.  
3       Bonds spends the time with Miss Varano to discuss oral  
4       hygiene, so he was able to cover brush the teeth more  
5       often, gave her the idea of using a gauze to wipe off the  
6       teeth. That was in addition. So this was a comprehensive  
7       approach to this child's dental care.

8               The child was upset for 20 minutes on a car ride  
9       back after having two teeth pulled and an injection the  
10       first time ever in his mouth, and they want to make you  
11       believe that's some kind of remarkable difference from any  
12       other child going to the dentist the very first time  
13       having two teeth pulled and injection of their mouth  
14       experienced. There's zero evidence that this child ever  
15       experienced any discomfort, misery, pain and suffering  
16       that wouldn't be part of routine dental care, zero  
17       evidence. Pain, no longer in pain. Our folks follow up  
18       to check on him and sure enough, the patient was in no  
19       pain.

20               Returns on August 31st. This is where Dr. Aman  
21       proceeds with doing more front teeth. Now, ladies and  
22       gentlemen, as part of this case, we had -- you had the  
23       opportunity to watch a fairly disturbing video of a child  
24       undergoing pulpotomy. Okay?

25               Now, I have a question for you: When they had

1 their expert on the stand, they had her look at these --  
2 this cherry-picked X-ray here. That's Jeremy over there.  
3 You can see a bit of his nose on the X-ray, so you don't  
4 get to see his tooth, compared to this child here. That  
5 looks like a pair of stairs. Look how black those are.  
6 Those are the teeth she's supposed to treat, and not the  
7 one on the left where she says there's no caries and two  
8 pediatric-certified dentists came in and showed you spots  
9 that could be seen. Why wouldn't they use this picture of  
10 this kid that had had a pulpotomy and look at that, on the  
11 back of that tooth, and you see the same whiteness.

12 There's hardly any difference between Jeremy's  
13 photo X-ray and this one from the evidence used. Why  
14 would you bring in this broken tooth, blackened teeth kid  
15 when you have the example they want to show you on video  
16 that's more consistent? When you do that... if you have a  
17 good case, you don't exaggerate the evidence; you don't  
18 fabricate the evidence.

19 THE COURT: About five more minutes.

20 Mr. NOWOTNY: Thank you.

21 Mr. Bonds -- Miss Varano, an August visit, "were  
22 you aware they were going to put some crowns on the front  
23 teeth?" Answer: "Yes." "Dr. Slack, is it unusual to find  
24 caries with cavities extending into the pulp once you look  
25 to excavate." At this time I would like to present the

1 jury with a spoon device. It's small.

2 THE COURT: Was that in evidence?

3 Mr. NOWOTNY: Yes, it was.

4 Mr. HULSLANDER: He can ask them on my time. We  
5 have two hours, so he can ask them on my time.

6 MR. NOWOTNY: You'll see on that device, there's  
7 a tiny little spoon on it, a tiny little spoon. Now, in  
8 order to provide the care and treatment, you heard they  
9 not only used the drills necessary but they can scrape  
10 with this spooning device, this tiny little spooning  
11 device.

12 Now, with respect to this, the crowns and stuff,  
13 that was performed, it was done, as Dr. Aman testified "I  
14 was trying to find the extent of that decay. I'm using  
15 this device, using my drill, and I'm realizing these  
16 cavities, of which were physically apparent, grossly  
17 apparent to the mother over the course of the developing  
18 year of time, were in fact extending into the pulp.

19 Now, going to the October 10th... now, by the  
20 way, while you're looking at that little device right  
21 there, you recall there was a time when Mr. Leyendecker  
22 got up here, "How big is a millimeter? About as big as a  
23 sheet of paper." Now, I'm not one generally to dispute  
24 that things can be bigger in the state of Texas, but I  
25 don't believe their paper is any bigger than the paper



1 we've got here in New York or anyplace else, and their own  
2 expert, Dr. Slack, brought to their attention, no, a  
3 millimeter is more like ten sheets of paper.

4 Evidence in this case from both sides,  
5 undisputed, the enamel can be anywhere from 1 to 1.5  
6 millimeters on these teeth. You have now seen this little  
7 spoon. You see where you can get that decay and start  
8 peeling back until you see, "I've got a little more going  
9 on here. Let me get a little deeper. I've still got room  
10 to work with to get that decay out of this kid's mouth."

11 Why would you come up here and hold one piece of  
12 paper and suggest that's the width? If you have a good  
13 case, you don't exaggerate and you don't fabricate. It  
14 was Dr. Slack who gave us that measurement, by the way.

15 Here we have Dr. Bonds on his third visit. We  
16 see that the heart rate is up, prior -- you see the "pre"?  
17 Before we put this on... before we put the device on,  
18 "pre," 204, 88. The kid is having a fit. What we know,  
19 one reason why this kid might be having an extra good fit,  
20 because Ms. Varano is lying to him, not helping prepare  
21 him at all for the visit, bringing in a loaded kid into my  
22 client's clinic to have them deal with it.

23 So he's upset. After we get the device on, his  
24 heart rate is down and, more importantly, his oxygen rate  
25 is normal. He settled down; it had the desired effect.

1       Within ten minutes Dr. Bonds was able to perform three --  
2       he was able to perform three cavity fillings. You can't  
3       do that if a kid is uncooperative and thrashing around,  
4       right?

5               Ladies and gentlemen, they never asked their kid  
6       "What happened when you went in that back room and I  
7       wasn't back there?" They never asked and there is no  
8       knowledge. Was there tell-show-do? What was done in the  
9       ten minutes? There's no evidence we didn't do  
10      tell-show-do. We didn't document it, but, ladies and  
11      gentlemen, they don't have any proof to the contrary to  
12      suggest anything other than what we have suggested all  
13      along, trying to provide this kid good care, what  
14      happened. Never asked their son "What did they do back  
15      there?" Same thing with Mr. Bohn. "Did you ever ask  
16      Jeremy what happens when he goes in the back?" "I don't  
17      recall."

18             After this October 10th visit, again,  
19      importantly, Miss Varano acknowledges, after this visit,  
20      where Dr. Bonds commits a battery -- not just didn't do  
21      the care but battery! -- despite all these consents --  
22      three or four in the norm, three or four of these, ladies  
23      and gentlemen, "Please ask us questions if you have them."  
24      Here's October 10th. Every time. "Okay, after this  
25      October 10th, 2006 visit with Dr. Bonds, do you see any

1 marks or bruises on your son?" "No." No.

2 Here we go; he comes back on the 23rd. Dr.  
3 Bonds treating him. No papoosing needed. How about that?  
4 His behavior is improving. He's understanding what's  
5 going on, like anybody -- "oh, yeah, I'm getting the  
6 dental stuff done. I understand a little better. I know  
7 Dr. Bonds." No papoosing, able to get the treatment done.

8 Chuck comes in. Chuck also signs all the same  
9 paperwork. He has a question, he has a chance, "Do you  
10 want to ask any questions? If you have anything you want  
11 to bring up, please ask us. We're going to have to use  
12 possible physical restraint on him. If you don't agree,  
13 please let us know." Never had any questions. "Oh, by  
14 the way, there's a couple of other teeth that we're seeing  
15 extension of that decay, the ECC." He signed off on it.  
16 He's okay and acknowledges might have to use local  
17 anesthesia with all of its risks.

18 Parents in the back. "Mr. Bohn, did you ever  
19 see a sign up in Small Smiles that says no, you're not  
20 allowed in the back?" "No." More importantly, Ms.  
21 Varano, very important, testifies "Only visit where you  
22 actually demanded to go in the back, my clients let you go  
23 in the back?" She said, "I demanded three times; I got  
24 one." No, no. "I told them I wanted to go back there."  
25 "And Small Smiles folks let you go back there, didn't

1       they?"   "Yeah."

2               That's the evidence in this case.  Made a big  
3 deal about it, but that's the evidence.  Nobody  
4 criticized Dr. Patel, never contacted him for questions,  
5 never had anybody express concerns or complaints, nobody.  
6 Dr. Taylor, who they saw multiple times, at least a half a  
7 dozen, attending to their child, "Small Smiles, don't know  
8 about that place.  You take the kid in the back and he  
9 comes back and sometimes he's upset and I'm worried."  
10 Never brought it up with the pediatrician.  Mr. Bohn, he  
11 never had anybody, told anybody he was critical of the  
12 care; nobody has told him they were critical of the care.  
13 Nobody ever said this treatment was unnecessary to him.

14               Went to Dr. Bellini afterwards.  Did he ever say  
15 any of this care was inappropriate or not needed?  No, he  
16 didn't say anything like that.  "Mr. Bond, has anyone told  
17 you any of the treatment at Small Smiles was unnecessary?"  
18 "Never did."

19               Dr. Slack.  Mind you, Dr. Slack is their only  
20 expert.  In the whole State of New York, they couldn't  
21 find a board-certified pediatric dentist to support their  
22 case?  In the whole State of New York, they couldn't find  
23 somebody who actually works with other dentists to talk  
24 about what's the interactions and how do you review your  
25 other dentists?  You get a solo practitioner who doesn't

1 know what she charges but knows our reimbursement rates  
2 for fillings. She teaches at the Monroe Community  
3 College. I'm sure it is a fine institution but doesn't  
4 quite rate with N.Y.U. or Columbia, does it?

5 Ladies and gentlemen, if you look at the  
6 reliability of the testimony, Dr. Slack -- you'll recall  
7 this, I'm sure. When Dr. Patel is using the term  
8 "bad" to describe the tooth, wouldn't most dentists  
9 understand that to be bad? No, it's not a clinical term.  
10 The reliability of the testimony, you get to assess that.

11 Told the jury for instance, the odontogram is  
12 essentially meaningless because it's not dated. Yeah?  
13 "No, I don't trust it; it's not dated."

14 Ladies and gentlemen, that goes to her  
15 reliability of all her opinions when she can't even  
16 realize and give us the acknowledgement that she couldn't  
17 have looked at those tooth and this treatment plan on  
18 October 23rd. According to the odontogram, the decay is  
19 located exactly where Ms. Varano and Mr. Bohn said the  
20 decay was observed. "Sounds like a coincidence." That  
21 is their expert. A coincidence, because I don't see  
22 anything else.

23 Ladies and gentlemen, we were privileged enough  
24 to bring you Dr. Davis. Not only is Dr. Davis  
25 board-certified in pediatric dentistry, but he also has

1 extensive teaching experience at one of the leading dental  
2 schools in the country, N.Y.U. -- excuse me, Columbia. On  
3 top of that, he's written eighty articles. On top of  
4 that, he's the past president of the A.A.P.D. He is in  
5 the best place to tell you these guidelines, how they're  
6 supposed to be used or not.

7 Ladies and gentlemen, we can't do any better  
8 than that? We cannot find you anybody more compelling  
9 with better credentials to come in here and sit in that  
10 chair and tell you my three clients complied with the  
11 standard of care than Dr. Davis, past president of the  
12 A.A.P.D. We just can't, and you get to factor that in on  
13 how you weigh the testimony of these experts.

14 You didn't hear them bring in Dr. Patel, "No, I  
15 didn't see that decay. I didn't see the bad tooth on one  
16 side and abscess on the other. I didn't mean multiple  
17 cavities." Dr. Patel. These questions demand answers.

18 Ladies and gentlemen, more importantly, you have  
19 zero evidence, zero, my clients in any way used Jeremy  
20 Bohn for P.P.P., just the opposite. Ms. Varano, question,  
21 "You asked the dentists at Small Smiles to do more  
22 procedures," to do what? With having increased their  
23 production per patient opportunity, and they declined?  
24 "Yes." She asked for more procedures. My clients said  
25 no. No out-of-pocket expenses, no pain and suffering,

1 cried five times, one was the first visit. They can't  
2 even tell you which of these visits, which of these visits  
3 did he cry more than I would expect? Certainly none were  
4 more than twenty minutes, had no bruises, no outward signs  
5 of injury, absolutely no evidence of any injury  
6 whatsoever, much less they have to show by substantial  
7 factor there was harm to this child. There was none, no  
8 emotional trauma. Dr. Taylor never discussed, no  
9 counseling, school grades good...

10 Ladies and gentlemen, I believe the strongest  
11 evidence in support of you finding the defense verdict on  
12 behalf of my clients as to any and all claims you find in  
13 that verdict form is right here... right there. A billion  
14 dollar smile. That's what Dr. Bellini called it. Look at  
15 that smile. We don't have any photos for the year and a  
16 half at issue. We have this photo. You heard Dr. Aman,  
17 very proud of that smile right there. That smile right  
18 there deserves a defense verdict on behalf of Dr. Aman,  
19 Dr. Bonds, and Dr. Khan.

20 Thank you very much.

21 THE COURT: Thank you, Mr. Nowotny. Now, Mr.  
22 Hulslander.

23 Mr. HULSLANDER: May it please the Court.

24 A glorious day in Syracuse, New York, another  
25 one just like we had on opening argument. Thank God it's

1 here; we're almost done. Thank God.

2 Thank you for your attention. You've really  
3 been attentive and listened to all the testimony, and it's  
4 incumbent on you to do that, to look at the testimony, to  
5 evaluate the witnesses and determine based on your own  
6 common sense, your own common sense, what's really going  
7 on here? Thank you on behalf of my clients.

8 Now, you know, I mentioned during my opening  
9 statement that, you know, do your best not to have tunnel  
10 vision, not -- don't wear blinders. You know, the  
11 plaintiffs really want you to see this case through a  
12 tunnel. And -- with blinders on -- and don't account for  
13 all of that stuff that you just heard from Mr. Nowotny...  
14 don't account for that, don't think about that; just think  
15 about big business and profits and let's distract you away  
16 from what really happened here.

17 This, ladies and gentlemen, is what this case is  
18 about... look at that young man! That's what this case is  
19 about. Look at that smile. Thank God he went to Small  
20 Smiles.

21 And what did they do? They called Dr. Slack.  
22 Dr. Slack, and what did she say to you? She said to you  
23 on four different occasions, "Well, ladies and gentlemen,  
24 if this -- if this -- if it's not in the chart, then it  
25 didn't happen." If it's not in the chart it didn't



1       happen? I mean use your common sense. Do the doctors  
2       write everything down? We know that Kelly Varano admits  
3       they had a long conversation or a substantial conversation  
4       with Dr. Bohn -- Dr. Bonds, and Dr. Bonds didn't write  
5       down that they had a conversation.

6                So if you listen to Dr. Slack, Dr. Slack would  
7       say, "Well, that conversation didn't occur because it  
8       wasn't written down." The doctor does a filling, doesn't  
9       write down that he does a filling, even though he did the  
10      filling and if he didn't write it down, he didn't do the  
11      filling, even though there's a filling there with silver  
12      in it? That's how absurd it is, what she's tried to tell  
13      you is absurd, and I'm telling you, they called this  
14      doctor to the witness stand, why? Because she fits inside  
15      that tunnel. Well, I suggest to you, ladies and  
16      gentlemen, to break out of that tunnel! Look at this  
17      entire case. If it's not in the chart it didn't happen;  
18      is that absurd?

19               Then she finally admitted on the very last page  
20      of her testimony, well, you know, dentists, they chart  
21      differently. Dentists, you know, every dentist charts  
22      differently. Well, if they all chart differently, hmm...  
23      what's that got to do with the standard of care? Nothing!  
24      It has everything to do with busting out of that tunnel,  
25      and you know why? Listen to me.

1 Oh, she says there's no abscesses, that this  
2 young man didn't have an abscess. That's what she said.  
3 And one of the things she said to you, ladies and  
4 gentlemen, "Well, they didn't write abscess in the chart,  
5 so he couldn't have had an abscess." Is that crazy? Is  
6 that just darn -- it's just -- you know, look at the stuff  
7 in the tunnel. If he didn't write abscess, he didn't have  
8 an abscess. And during direct examination, well, let's  
9 not look at the obvious, okay? Let's just ignore the  
10 obvious. Let's not look at anything outside the tunnel.  
11 Dr. Taylor's records, that's outside the tunnel... Dr.  
12 Patel's records, outside the tunnel. Kelly Varano's  
13 testimony, oh, outside the tunnel.

14 She testified that she saw decay and  
15 discoloration in these teeth for over a year prior to when  
16 they went to Small Smiles. She saw decay. She admits  
17 that. She admits that she believed the teeth were  
18 abscessed. She admits she believed that the teeth were  
19 decayed. And yet they would come before you, these men,  
20 and they would have you believe that this young man's  
21 mouth was in pristine condition, one cavity. Oh, could  
22 have been restored. This wasn't an abscess. Well, what  
23 about Dr. Patel? Dr. Patel was so certain that there was  
24 an abscess that she -- Dr. Patel told Kelly and Kelly must  
25 have -- it must have stuck in her head because we know

1 that she believed there were abscesses and what else did  
2 she believe?

3 I mean, sophisticated? This woman knew. This  
4 woman knew what was going on. She didn't want an abscess  
5 to continue in her child's mouth because she knew it could  
6 go to the brain. She knew that it was a safety risk, a  
7 health risk, a danger to this young man. Yet they would  
8 have you believe, oh, just a cavity. Just a cavity, not  
9 an abscess. Why? Because abscess wasn't written in the  
10 chart. That's just plain nonsense! It has nothing to do  
11 with the use of your plain common sense in rearing  
12 children and looking at what's going on with this child,  
13 for the year before.

14 And even more importantly, they would have you  
15 believe that despite the condition of his teeth where he  
16 has two abscesses, where it started with a cavity, went to  
17 a medium-sized cavity, went to a large cavity, went so far  
18 as to advance to an abscess, an infection, that the rest  
19 of his teeth are just fine. Oh, my Lord!

20 You know, we didn't -- where is Charles?  
21 Where's the father? Where's Charles Bohn? We didn't hear  
22 from him. His testimony was read. Where's the father?  
23 I'll tell you why you didn't hear from the father?  
24 R-o-t... rot! You know, that was outside the tunnel.  
25 Outside the tunnel, outside their whole program here,

1 their whole theme. Well, the father says, "Hey, his teeth  
2 looked rotted." Not just once, on multiple occasions.  
3 Rotted. That's sort of outside the tunnel, yet his teeth  
4 looked rotted to his father. His father admits that.

5 Hmmm. Yet he's got no cavities. You know,  
6 these dentists from Small Smiles, they're just out to make  
7 money. Let's not help this young man. Look at that  
8 smile! That's a beautiful smile. You can thank Small  
9 Smiles for that smile. I don't see any rot. I don't see  
10 any r-o-t there. You didn't hear about that from them.  
11 Nothing, not a peep. And where's the father? That's  
12 because it's outside the tunnel!

13 I suggest, ladies and gentlemen, that you keep  
14 your eye on the ball. Keep your eye on the ball. Don't  
15 get caught up in this drama that they're trying to suck  
16 you into about money and profits. Keep your eye on the  
17 ball.

18 And look what's really going on here and open  
19 the tunnel. Break out of it! I challenge you! I implore  
20 you. I urge you.

21 Now, let's talk about papoosing. Papoosing...  
22 jeez, you have heard a lot about it. They're papoosing  
23 for dough, just to move them in and out. That's what  
24 they're doing. What do I say in response? Actually, six  
25 words: Dr. Davis, Dr. Davis, Dr. Davis. Yale University

1 Dr. Davis, Columbia University Dr. Davis, president of the  
2 American Academy of Pediatric Dentistry Dr. Davis.

3 Do you think he'd be coming in here risking his  
4 reputation on behalf of dentists he didn't even know if he  
5 didn't firmly believe in the truth of what he was saying?  
6 You heard him. You heard him say, "Look it. Papoosing,  
7 look it." The only thing they have with respect to  
8 papoosing, the only thing they've got, and they keep  
9 referring to it over and over again, is the A.A.P.D.,  
10 okay? The A.A.P.D.

11 Well, we know that the preamble of the A.A.P.D.  
12 says it's only a guideline, not standard of care.  
13 Everyone agrees it's only a guideline, not standard of  
14 care. They want you to believe it's the standard of care.  
15 That's what they want you to believe. Mr. Higgins wants  
16 you to believe that it's up to the mother to determine  
17 what she should be told. It's up to Kelly Varano to  
18 determine what the risks are. Come on! First of all, the  
19 A.A.P.D. is only guidelines. It's just guidelines.  
20 That's all it is. It's not standard of care.

21 Even Dr. Slack admitted it. Reluctantly, but  
22 she admitted it. But more importantly, look at what's  
23 behind this. Okay? We know they cite a Joint Commission  
24 report that excludes dentists, so it's a miscite. It's  
25 controversial. Dr. Davis said that. Dr. Davis says he

1 doesn't follow the A.A.P.D. with respect to telling people  
2 about these alleged risks associated with papoosing.

3 Well, the plaintiffs haven't come forward with  
4 one bit of information to support this idea that there are  
5 risks. They just say, "Oh, look at the A.A.P.D." Where  
6 are the studies? Where are the reports? Where's the  
7 literature? Where's the confirmed scientific evidence  
8 that papoosing somehow causes injury to kids?

9 You know, Dr. Davis came before you and said,  
10 "Look it! Papoosing is fine within the judgment of the  
11 dentist. The dentist determines that it's in the best  
12 interests and safety of the child, then it's up to the  
13 dentist." That's what the A.A.P.D. says, too. And he  
14 says, "I don't tell them there are any risks. That form  
15 is better than the one we use at Columbia now."

16 We brought before you two pediatric  
17 board-certified dentists from the top institutions -- I  
18 mean Dr. Davis, one of the preeminent pediatric dentists  
19 in the world! Do you think he'd stake his reputation on  
20 this case if he didn't firmly believe in the truth of it?  
21 Oh, papoosing is bad! So let's just appeal to the drama  
22 of the papoose, and then they bring in this papoose that  
23 doesn't have anything to do with this case and show you  
24 the straps. Well, it doesn't have anything to do with  
25 this case. Why are they showing you the straps? To

1 inflame you. To appeal to your sense of drama. Oh,  
2 they're strapping this kid down. Where is that thing, by  
3 the way? Where is that other papoose? I don't see it. I  
4 mean, straps. This is velcro! Jeesh. I've got straps on  
5 my car seat. Come on! Don't get drawn into this nonsense  
6 about papoosing, when we know there's no evidence that it  
7 presents any risk! None.

8           And what did they do? Once the A.A.P.D. -- if  
9 you don't follow the A.A.P.D., which by the way is a  
10 guideline and not a standard of care, so the only evidence  
11 that they have that you're supposed to tell them about the  
12 risk is Dr. Slack. Well, Dr. Slack, there are 8,000  
13 pediatric dentists throughout the country, 8,000  
14 board-certified pediatric dentists throughout the country.  
15 They couldn't find one to support their case. Dr. Slack  
16 is not a board-certified pediatric dentist. They didn't  
17 tell you that until cross-examination. We brought two of  
18 them. They couldn't find -- you couldn't find anyone  
19 better than that? More qualified?

20           You know, the corporate side of this case, you  
21 have seen a lot of e-mails and I harken back to really Dr.  
22 Knott's testimony. You remember Dr. Knott, tall,  
23 grandfatherly type gentleman that came in from  
24 Albuquerque. There's no doubt that Dr. Knott wanted these  
25 dentists to work hard, like he does. There's no doubt

1       that Dr. Knott wrote e-mails encouraging production. You  
2       know, but what's interesting is not what's in those  
3       e-mails but what's not in those e-mails. We're talking  
4       about hundreds of thousands of e-mails, and I don't know,  
5       what did you see, a hundred, a hundred of them?

6                What's not in those e-mails is, you know, in  
7       these private e-mails, if they were really out to get the  
8       dentists to do things that were unnecessary, wouldn't  
9       there be one where they said, you know, "Do a pulpotomy,  
10      do pulpotomies whether they need it or not"? Or, you  
11      know, "I don't care if the treatment is unnecessary; do  
12      it," or, you know, "I don't care about the quality of  
13      care; just get it done." There weren't any e-mails like  
14      that. There weren't any zingers like that.

15               Look it: There's no doubt this was a business;  
16      men made money; people made money. But remember what Dr.  
17      Knotts said. He looked at you in the eyes and you could  
18      tell he truly meant it. He was dedicated to these kids,  
19      and you know what? Not only was he dedicated to the kids  
20      but he knew, and he got it, and he understood that if the  
21      business succeeded, that the kids succeeded. If the  
22      business did well, then the kids did well. That truly is  
23      America, and that's what it's all about. Let's help the  
24      kids.

25               Yes, people make money. Yes, businesses make



1 money and businesses want employees to work. And they  
2 want employees who don't work to be encouraged to work.  
3 Let's think about -- use your common sense here. I  
4 mean -- that's what businesses do. That's obviously what  
5 was done here. They were concerned about the number of  
6 procedures per patient, P.P.P., but that's what Kelly  
7 Varano wanted. She wanted more procedures per patient.  
8 It was better for the kid and better for her, so she  
9 didn't have to bring them back.

10 So yeah, they talk about -- they pick out little  
11 phrases and sound bites out of these e-mails, like  
12 "golden goose." Well, it's golden for the business, but  
13 it's golden for the kids. It truly is. It's a win/win.  
14 That's what it is.

15 And you heard Dr. Knott and he was truly -- he  
16 truly was a believer that he was helping these kids and  
17 that Small Smiles was helping these kids and yes, he was  
18 trying to get doctors to work and increase their  
19 production to help more kids, no doubt. But where's the  
20 zinger? Where's the really bad e-mail? There aren't any.

21 And even more importantly in this case, ladies  
22 and gentlemen, there's a big disconnect. A big  
23 disconnect. What do I mean by that? You can guess. You  
24 know, what's going on in Boise and other places, I don't  
25 know, other places... you've heard about them. You know,

1       where are the e-mails of Syracuse? Where's the effect in  
2       Syracuse? I mean do you really believe that these two  
3       dentists and Dr. Khan, who is back in Saudi Arabia, that  
4       these two dentists were hurting kids on purpose, deceiving  
5       people and hurting kids, on purpose? For money? That's  
6       what they would have you believe. Hurting kids for money.  
7       These guys back here. Dr. Aman, who got on the witness  
8       stand and said, "Look it: I just got paid the same amount  
9       of money year after year after year. Yeah, I talked too  
10      much; I was chatty; I had problems with the language. And  
11      yeah, they wanted me to do more procedures on each  
12      patient," well, what's wrong with that? That's good for  
13      the kids. And they certainly had opportunities with  
14      Jeremy that they didn't take advantage of to do more work  
15      on him.

16                So I mean, are these some evil characters back  
17      here? Are they some evil men that Jeremy should have been  
18      afraid of? Because they're out to make money? Did you  
19      take that from the witness stand, that they were somehow  
20      influenced by this big, bad corporation that cared about  
21      profits over children? Did you feel that? There's a big  
22      disconnect. There's a huge disconnect.

23                That's a problem in this case, a serious  
24      problem.

25                Now, you know, let's talk about Jeremy because,

1       you know, I mentioned Jeremy a fair amount during my  
2       opening and I sort of want to finish talking about him.

3                You know, what a good kid. Really. He's done  
4       well. He's doing well in school, going to the dentist,  
5       has no fear of the dentist, no sign of any issues or  
6       problems, good kid. No damages. How have they connected  
7       one bit of damage to Small Smiles? How have they  
8       connected one bit of injury to Small Smiles? I can tell  
9       you what they did connect... what you can connect is that  
10      smile right there to Small Smiles. That's what you can  
11      connect, right there.

12               I don't see rot there. No r-o-t.

13               You know, I'm just about done. I'll let Mr.  
14      First talk a little bit more, but, you know, if anything I  
15      said doesn't comport with what you believe was part of the  
16      evidence, then reject it. If I said a few things that you  
17      felt did comport with the evidence, then accept it and use  
18      your common sense and life experience to see through the  
19      nonsense here! Look through the nonsense! Break out of  
20      that tunnel!

21               You know, none of these defendants violated --  
22      certainly none of them committed battery; none of them  
23      committed malpractice; none of them committed any  
24      violation of the General Business Law. There was no  
25      negligent treatment here. You'll hear from Mr. First more

1 about the jury verdict form, which is really the guts of  
2 the case which you'll be asked to talk about -- address  
3 and answer.

4 Just think -- this is the last time I get to  
5 talk to you, and Mr. Leyendecker, you know, thank God, by  
6 the way, you abided by our instructions, to wait until the  
7 end to draw any conclusions. You know, I hope you didn't  
8 draw a conclusion before you heard from Dr. Davis. You  
9 know, and I'm asking you -- you know, I don't get to talk  
10 again. I don't get to stand up in response to what Mr.  
11 Leyendecker is going to say when he closes, but I do ask  
12 one thing: Don't take my silence sitting over there as  
13 acquiescence, like I'm somehow agreeing with him, because  
14 I'd like to stand up after he got done, believe me, but  
15 think about what I might say in response to his  
16 contentions.

17 In sum, ladies and gentlemen, this case really  
18 is about Jeremy Bohn; it really is. Jeremy. A Small  
19 Smiles success story ... truly a success story.

20 Thank you.

21

22 THE COURT: Thank you, Mr. Hulslander. Mr.  
23 First?

24

25 Mr. FIRST: Good morning, folks.

1 JURY: Good morning.

2 Mr. FIRST: When we started this process, I  
3 asked you to keep your eye on the ball. Mr. Hulslander  
4 has repeated it. The ball is Jeremy Bohn. This is a case  
5 brought by Jeremy Bohn, and that is where the ball lies  
6 because you have heard so much that has nothing to do with  
7 the care and treatment Jeremy Bohn received at Small  
8 Smiles. You have heard so many distortions and attempts  
9 to inflame you, to keep your eye off the ball.

10 I'm just going to cite a few examples of the  
11 attempts that have been made to distort the facts in this  
12 case and to inflame you. Do you remember early on in this  
13 case, Mr. Leyendecker asked whether or not or disputed  
14 whether or not Jeremy Bohn had early childhood caries.  
15 "Dr. Bonds, you didn't put that in the chart, did you?  
16 You didn't document that he had early childhood caries."

17 Well, now we know -- now we know Jeremy did have  
18 early childhood caries. Now we know not only did he have  
19 it, he had a severe form of it. He had a pattern of decay  
20 in his mouth that unfortunately is common and required the  
21 immediate attention that Dr. Bonds gave him.

22 Why would they dispute that? Why would they  
23 dispute that? Even their own expert said -- even more  
24 amazing, and this has been mentioned before, why would you  
25 deny that he has abscesses? You heard the proof! Jeremy

1       went with a swollen cheek, swollen gums to Dr. Taylor, the  
2       pediatrician. She looks and she sees multiple cavities on  
3       both sides of his mouth and documents that in her chart.  
4       She prescribes penicillin because he has an active  
5       infection that has spread from his tooth into his cheek  
6       and gums?

7                 Why would you deny that he had an abscess? Why  
8       would you fight -- it is, it's the tunnel vision that  
9       didn't fit. Don't you wonder, though? Why would they  
10      deny that? Because they're trying to tell you, I submit,  
11      there's some kind of standard about the use of the papoose  
12      that requires you have a dental emergency before it be  
13      used. None of the experts have said that. I don't  
14      believe that even Dr. Slack said that. Certainly these  
15      top experts from N.Y.U., these board-certified pediatric  
16      dentists do not support that notion. Even the A.A.P.D.  
17      guidelines, only guidelines, not standard of care, don't  
18      support that. But they suggest that to you. So do you  
19      know why they want to deny an abscess in their tunnel  
20      vision? Because if they admit there was an abscess, it  
21      means that Jeremy had an emergency condition that had to  
22      be treated and was treated appropriately by Dr. Bonds.

23                 It's the tunnel vision that Mr. Hulslander  
24      talked about. They don't want there to be an abscess. So  
25      they make it up; so they make it up that he didn't.

1 Distortions, and the papoose... it's used as an  
2 inflammatory issue in this case. It's interesting that  
3 they always refer to it as tying him down, tying him down.  
4 Why do you think that terminology is used? It's used to  
5 inflame you. We all know, either from our own experience  
6 with kids or seeing other kids that we every day put kids  
7 in car seats and strap them in for their own safety. Does  
8 anyone refer to that as tying them down? Tying them down  
9 with velcro, which is what's involved in this case? It's  
10 done to inflame you! It's done to make it seem like it's  
11 something that it really isn't.

12 And then they bring in a 30-year-old contraption  
13 that they knew was not an accurate reflection of a papoose  
14 because they knew exactly what the ones look like at Small  
15 Smiles; there were pictures of it. They brought in this  
16 30-year-old contraption. Why? Why? Why did they distort  
17 those facts? To try to inflame you, to get you to pursue  
18 this tunnel vision about what happened in this case.

19 And it goes further, too. Remember when Dr.  
20 Slack was on the stand and they put up an X-ray, and Dr.  
21 Slack looked at that X-ray and said "no decay apparent in  
22 the X-ray." The X-ray was of those top teeth and she  
23 said "no decay." Do you remember what that X-ray looked  
24 like? It was whited out; it was blurry; it certainly was  
25 not a clear copy of the X-ray, so you can be misled by Dr.

1 Slack, the only doctor in this courtroom who didn't see  
2 decay in that X-ray, and little wonder... they put up an  
3 X-ray you can't see anything on. It's whited-out and  
4 blurry. Why did they do that? Tunnel vision. They don't  
5 want you to see the facts of this case.

6 I heard Dr. Slack in the beginning of her  
7 testimony say something like "I never heard of spooning  
8 out the decay." Okay. It's really hard, though, when  
9 you're trying to pursue a story that isn't truthful,  
10 because by the end of her testimony, she admitted and was  
11 referring to spooning out decay in fixing a cavity. Very  
12 odd. Very odd.

13 That was the best expert that the plaintiffs  
14 could find. All the pediatric dentists, all the general  
15 dentists that work on children, they get a lone  
16 practitioner who treats maybe 5 percent, she said,  
17 Medicaid kids, and most of those are disabled kids, very  
18 small part of her practice. Nothing like what these  
19 doctors were doing. And that's the best they can find? I  
20 think that speaks volumes to you.

21 Now, we brought out testimony about early  
22 childhood caries, and you heard testimony that it is a  
23 widespread issue. There are millions and millions of kids  
24 that have it, but there's a very important part of that.  
25 That is that 80 percent of the decay in kids with early



1 childhood caries rests in 20 percent of the population.  
2 And that population tends to be poor. That's important,  
3 ladies and gentlemen, because it explains why when my  
4 clients came up with the concept of how to get these kids  
5 access to care, these kids have this problem for a lot of  
6 different reasons that are really beyond the case; it has  
7 to do with poverty; it has to do with diet; it has to do  
8 with lack of oral care; it has to do with lack of access.  
9 So when my clients came up with a way of getting these  
10 kids who have been denied care by society as a whole,  
11 really -- I'm not blaming anybody, but these kids had  
12 nowhere to go -- and my clients came up with an idea that  
13 if we build these clinics on a larger scale, have  
14 economies of scale, take into account that there's a 30 to  
15 40 percent broken appointment rate, have three or four  
16 doctors working there and multiple staff, and if we do it  
17 this way, maybe it could be done in an economically viable  
18 way, and these kids could get care.

19 And the reason why they did so well --  
20 everything is obvious in hindsight. It may not have been  
21 so obvious when they started out, although there was  
22 experience by Dr. Eddie DeRose going back to the mid-'90s  
23 and before, trying to get these kids access to care, and  
24 they traveled from all over. In hindsight, it's clear why  
25 these clinics did so well: The demand was overwhelming.

1 The demand was overwhelming. They were flooded with  
2 patients. They had incredible amounts of work to do,  
3 because this problem was so prevalent with a population  
4 that had no access to care.

5 And now they come in here and suggest that my  
6 clients encouraged people to hurt these kids, with the  
7 background they come from? With the background of  
8 providing access to these poor kids that no one else would  
9 care for? It's outrageous and it's certainly not  
10 supported by the evidence.

11 You have heard a lot about these productivity  
12 e-mails and I'm sure you're going to hear about them again  
13 when Mr. Leyendecker speaks to you. These e-mails were  
14 intended to prompt people to work. There was a lot of  
15 work to be done. It had to get done. It should get done  
16 for these kids. There was some 400,000 e-mails that were  
17 turned over. You heard Dan DeRose testify, and that's  
18 what they came up with. They cherry-picked a line here  
19 and a line there that relates to production. And they  
20 almost all involve a specific issue at a specific clinic  
21 that has nothing to do with Syracuse, that's far-flung  
22 from this location, but most importantly, never once, not  
23 one of them, not one of them said "do a procedure that is  
24 unnecessary. Do a procedure that in any way was not found  
25 to be needed by a dentist's dental judgment." People

1        were very loose in these e-mails; you have heard some of  
2        the language. And yet there's not one, not one that says  
3        that. No one anticipated when these e-mail were written  
4        that they were going to be viewed by a jury some day in a  
5        court of law. But yet it's not there.

6                The work that needed to be done, there's nothing  
7        wrong with trying to influence and pressure people to work  
8        hard because the work was needed; these kids needed to be  
9        cared for.

10                You think about their case, use your common  
11        sense. What they're claiming is that my clients could  
12        get -- by the end of FORBA when they had fifty clinics --  
13        some 200-odd dentists to hurt these kids improperly --  
14        that's what they're saying: That my clients could  
15        convince them to do unnecessary procedures and to act --  
16        jeopardize their careers, act immorally and hurt these  
17        kids. Does that make any sense? Does that make any  
18        sense, ladies and gentlemen?

19                Now, my clients are seated here; they've been  
20        seated here the whole time. You haven't heard from Dr.  
21        Mike DeRose or Mike Rounph. They of course sat here and  
22        the plaintiffs chose not to call them and there's really  
23        nothing more to add to the story other than what you've  
24        heard from Dr. Rudy Padula, Dan DeRose, and Dr. Mueller.

25                Now, I want to go to that jury sheet. Very

1 important, ladies and gentlemen. This is the jury sheet  
2 that the Court is going to give you, and I've had -- it's  
3 been said to you repeatedly by Mr. Hulslander and Mr.  
4 Nowotny about what happened, the care and treatment that  
5 Jeremy Bohn got. He is a Small Smiles' success story. He  
6 was treated appropriately; he had an emergent medical  
7 condition -- excuse me, dental condition, which was  
8 treated appropriately by the extractions. Step by step,  
9 his early childhood caries, his cavities were treated, and  
10 over time -- and it took some time -- he was cured,  
11 essentially cured of his early childhood caries, and it  
12 gave him a clear path and a fresh start to have those  
13 teeth fall out, have his adult teeth come in and do well  
14 with the dentist and have good treatment and good checkups  
15 and good oral hygiene. That is a success story.

16 And, ladies and gentlemen, if you find that the  
17 treatment that Jeremy Bohn got at Small Smiles was not  
18 malpractice but the result of good and accepted dental  
19 care, then there is no injury in this case; there is no  
20 injury in this case.

21 Every one of these questions about different  
22 theories of liability are followed by a question: Was  
23 this alleged violation a proximate cause? Was it a  
24 substantial factor in causing injury to Jeremy Bohn?

25 If he had good dental care, if he had the great

1 result that he so obviously did, there is no injury, and  
2 your answer will be no.

3 Now, the first question that you're asked is  
4 about a section of the General Business Law called Section  
5 349, and it involves consumer-oriented conduct which was  
6 materially misleading. That's the claim. There's some  
7 suggestion that the profits of the people in this case,  
8 that the dentists here who are dedicated to providing  
9 service to those unserved by dentists, somehow are  
10 materially misleading and somehow that resulted in injury.  
11 I submit to you there is absolutely no proof to that.  
12 There is nothing that my clients said that in any way  
13 would compromise the independent dental decisions that  
14 were made by these dentists.

15 You've heard -- I assume that much of this claim  
16 has to do with the consent form, no known risk to the  
17 papoose procedure. Well, ladies and gentlemen, you heard  
18 Dr. Davis. You heard Dr. Cisaeros, also on the board of  
19 trustees of the A.A.P.D.

20 There are no known risks. Dr. Mueller testified  
21 that there are no known risks. The only thing they have,  
22 as pointed out by Mr. Hulslander, is the A.A.P.D., which  
23 cites some potential risk that they got from another  
24 organization that specifically exempts dental procedures.

25 Now, ladies and gentlemen, the most important

1 part of that is not only have these renowned experts said  
2 that there's no known risk, but there's been a challenge  
3 laid out in this case. Dr. Mueller testified, and he  
4 testified before this trial ever began that there's not a  
5 single study, not a single report, no academic research,  
6 no studies supporting the proposition that there are risks  
7 to the protective immobilization procedure, and that has  
8 gone totally unchallenged. You know full well if there  
9 was a single bit of literature that supported that notion  
10 you would have heard about it in this courtroom and you  
11 never did. You never did because there isn't any.

12 The guideline is a guideline. It's not a  
13 standard of care. It can be accepted or rejected by the  
14 dentists. Dr. Davis said that that form that they  
15 challenge was the best form that he's ever seen for  
16 papoose. Dr. Cisaeros said they don't even have a written  
17 consent. I submit to you there's nothing materially  
18 misleading -- there's nothing misleading at all, but  
19 certainly nothing materially misleading, so when you get  
20 to that question, I suggest to you that the answer is no,  
21 that there was no violation of Section 349 of the New York  
22 Business -- General Business Law.

23 And don't forget, there's always the second  
24 question: Was that violation a proximate cause, a  
25 substantial factor in causing injury to Jeremy Bohn? I

1 addressed that before: I respectfully submit to you if  
2 his care was good and reasonable care, there's no injury.

3 The second thing that you're asked about on this  
4 jury form is battery. Battery is -- relates solely to, as  
5 I understand it as to my clients, to the May 23rd visit,  
6 and again it deals with the use of the papoose... Jeremy  
7 had a dental emergency at that time, at the time of that  
8 visit. You know, you can imagine this case differently,  
9 too, and it's significant to viewing it as it is. Let's  
10 say that Dr. Bonds said, "Oh, you know, I'm going to wait.  
11 I think you should just defer treatment here," like it's  
12 been suggested, even though -- and he wouldn't say this of  
13 course -- he has this emergency condition, and Jeremy left  
14 that day; he didn't diagnose him and he didn't treat him  
15 and Jeremy left that day and had one of the severe  
16 complications of these infections, these abscessed teeth.  
17 Up to and including death. I mean that has been testified  
18 to. Can you imagine if that -- God forbid, something like  
19 that happened? Yeah, Dr. Bonds would be questioned just a  
20 little bit about that, letting him go, with a history -- a  
21 history even by Mrs. Varano, that he had abscesses in two  
22 teeth.

23 There was no battery. There's no evidence of  
24 risk that's credible relative to that use of a papoose.  
25 It had to be used under these circumstances with an

1 emergency situation.

2 The next question after battery is once again a  
3 proximate cause, a proximate cause question. Was an  
4 alleged battery a substantial factor in causing injury to  
5 Jeremy? I submit to you that even though I say there's no  
6 battery at all, if there was no injury to him, the answer  
7 to that question, if you should get to it, would be no.

8 Now, there's a question related to the Limited  
9 Liability Law and once again, the question there is was a  
10 violation of the Limited Liability Law a proximate cause  
11 in causing injury to Jeremy Bohn? Once again, it's the  
12 same question. I know I sound like a broken record, but  
13 it is in here this many times. Was the alleged violation  
14 a cause of injury, substantial fact? I submit once again,  
15 if you find that this care was reasonable, that there is  
16 no injury.

17 And finally, there's a claim of negligence, and  
18 the question is was -- were my clients negligent? I  
19 submit to you that there's absolutely no proof that my  
20 clients were negligent in this case, that they ran these  
21 clinics the best -- they ran the clinics and they ran the  
22 management company as best they could. You heard Dan  
23 DeRose testify. He said that we certainly weren't  
24 perfect. We were kind of making it up as we went. They  
25 had no guides. They were the first ones to have done



1 that. I'm sure they made mistakes. But once again,  
2 there's no proof of negligence and certainly no proof of  
3 negligence that led to any injury to Jeremy Bohn, who had  
4 good dental care in his experiences at Small Smiles.

5 Now, Mr. Leyendecker is going to get up here and  
6 ask for money, and I'm sure he's going to -- I think he's  
7 going to suggest some amount. That's not evidence, and I  
8 don't think you're going to get to that issue because I  
9 don't think you're going to find that he's entitled to any  
10 money because really, even though I'm telling you the  
11 defendants should win this case, Jeremy is a winner  
12 because he was treated and he was cured and he had a good  
13 result.

14 But it doesn't end there. Mr. Leyendecker is  
15 going to ask for punitive damages, punitive damages  
16 against my client. The claim here is that they acted so  
17 wantonly, maliciously and recklessly that it resulted in  
18 damage to Jeremy Bohn. My clients, who dedicated their  
19 lives to providing access where access has been denied for  
20 years and years, and that effort was successful for  
21 thousands and thousands of kids... sure they made money.  
22 They made a lot of money! No doubt about that. That's  
23 what happens in America when you have an original idea,  
24 you have demand for that original idea. That's okay.  
25 That's okay because they provided a service that was

1 extremely important.

2 This case is about Jeremy Bohn. It's a Small  
3 Smiles success story. That's the ball. Keep your eye on  
4 the ball because that's who the case was brought on behalf  
5 of.

6 I want to thank you for all the attention you  
7 have provided to us. On behalf of my clients, Dr. Bill  
8 Mueller, Dr. Padula, Dr. Mike DeRose, and Mike Rounph. I  
9 would also like to thank you on behalf of Dan DeRose and  
10 Eddie DeRose. Dan is with his father who, as you know, is  
11 not doing well. You have paid careful attention to this  
12 case. I have seen it, my clients have seen it. We feel  
13 very comfortable with this decision in your hands. And  
14 because of the order of things, I have to sit down and Mr.  
15 Leyendecker will have a chance to address you, and I have  
16 to sit here and bite my lip and I can't respond, so I'm  
17 going to ask you, ask you something similar to what Mr.  
18 Hulslander asked you: When he speaks, put yourself,  
19 ourselves in my shoes. How would he respond to that?

20 Thank you.

21 THE COURT: Thank you, Mr. First. We're going  
22 to take a fifteen-minute recess.

23 (Recess taken)

24

25 THE COURT: Are we ready to bring the jury back

1 in?

2 Mr. FRANKEL: Will we have a chance to talk  
3 about the structure --

4 THE COURT: When Kevin has finished his closing,  
5 I'll dismiss the jury for ten or fifteen minutes. Tonya  
6 found some numerical order in here, but nothing big  
7 changed.

8 Mr. LEYENDECKER: There were some pagination  
9 issues -- Question 2 appears at the bottom of the page,  
10 not at the top --

11 THE COURT: Just the way it printed, you mean?  
12 I'll look at it right now.

13 Mr. LEYENDECKER: I'm going to put the form on  
14 the Elmo...

15 (Whereupon, the jury was then brought back into  
16 the courtroom)

17  
18 THE COURT: You may proceed.

19 Mr. LEYENDECKER: Thank you, your Honor. Good  
20 day.

21 I, too, want to thank you for your attentiveness  
22 throughout this trial. It's clear to me that you guys  
23 have been paying very close attention, and everyone that's  
24 a party to this lawsuit appreciates that, and so do I.

25 If being focused on the actual facts makes me

1 have tunnel vision, then I have extraordinary tunnel  
2 vision because I am focused on the actual facts of this  
3 case.

4 We're here because Jeremy filed this lawsuit for  
5 one simple reason: It's unlawful for a corporation to  
6 pressure and influence and threaten its doctors to treat  
7 patients in a way that will help maximize the  
8 corporation's profits. That's unlawful. Old FORBA did  
9 that and New FORBA did that, and as I'm going to talk  
10 about later, Jeremy suffered physical and emotional  
11 injuries and harm because of it.

12 Now, you actually have two jobs here today. Two  
13 jobs, not one but two. Your first job is going to be an  
14 answer to questions that the Court will give you once I'm  
15 finished and after the Court instructs you on the law.  
16 That's one job. Your second job is going to be to explain  
17 to each other why it is you believe the answers to the  
18 questions are as you believe they are.

19 Those are your two jobs for the day, and I would  
20 like to spend a little bit of time talking to you about  
21 why you may believe the answers to be what you think  
22 they're going to be. Before I do that, though, I want to  
23 address a few things that we heard from the defendants and  
24 one of which is I told you from the start that there is no  
25 dispute that Jeremy needed to see a dentist, that Jeremy

1 needed some dental treatment. That's not what's in  
2 dispute. What is in dispute is whether the manner in  
3 which he was treated and the amount of treatment that he  
4 received was appropriate and necessary or whether it was  
5 abusive. That's what is in dispute in this case.

6 Heard a lot about where's Jeremy father.  
7 Jeremy's father is a long-haul trucker. That's how this  
8 family is provided for. He hauls a truck for a living all  
9 over this country, so that's why he's not been here for  
10 the last month.

11 The best we can do is Dr. Slack? Well, you know  
12 what? Of the three experts you heard in this case,  
13 there's only one that for the last 30 years has treated  
14 patients, pediatric patients, that's a pediatric-trained  
15 dentist, treated patients day in and day out for the last  
16 30 years. It is certainly true she's not an academic in  
17 pursuit of publications and titles, and it's certainly  
18 true she is not an orthodontist, and so in my book, I'll  
19 take an actually -- a pediatric dentist that's actually  
20 practicing and treating patients day in and day out, every  
21 single day, over some academic who is going to take the  
22 stand and say, "I know I was the president of my  
23 organization and I know it's the preeminent organization  
24 in the country, maybe the world, but they're just wrong  
25 about there being risks of papoose, and they have been

1 wrong every single year for the last eight years. They're  
2 just wrong. Trust me on that." Do you really think that  
3 if there was no literature, no support for the  
4 proposition, that using a papoose on a child could cause  
5 physical and psychological harm, do you really think the  
6 preeminent organization in this country would say to all  
7 the pediatric dentists, "These are the risks of doing  
8 that," each and every year for the last eight years?

9 I heard a question about is this in the child's  
10 best interests? And it makes me -- it took me back to  
11 something that Dr. Mueller said, because I asked him, "If  
12 you have a young child and he is showing great fear and  
13 great anxiety and he's crying and he's screaming and he's  
14 very upset, is it worth the effort to try and calm him  
15 down, to try and talk to him, to see if you can make him  
16 feel better, to ease his fears? Is it worth the effort to  
17 allow his mother to come back to see if she might calm him  
18 down? Is it worth the effort to try and establish trust  
19 and rapport with him so that he might cooperate with you?"  
20 And I don't know if you remember what he said, but he  
21 said, "No. Strap him down." So that Dr. Bonds, a doctor  
22 who had all of one month of experience, a doctor who it  
23 took him seven years to get his license -- and I applaud  
24 him for stick-to-itiveness, but let's be honest: He's no  
25 child specialist and he wasn't one month after he finally

1 got his license. So he could brush his teeth and look  
2 into his mouth? Not worth the effort? Was it in Jeremy's  
3 best interests to take that time to calm him down? I  
4 think it is.

5 I think because they, that we will talk about  
6 later, they were taught to treat them so they could get  
7 them in and out quickly, with speed, that's not in  
8 Jeremy's best interests. That's what happens when you  
9 have corporations pressuring doctors on how they should be  
10 treating patients.

11 Now, let me tell you, I took on a lot of water  
12 about the papoose board that we had, but if I'm correct,  
13 not one of their dentists took the stand and said, "This  
14 is what we used." The closest they got is Dr. Mueller  
15 and he said "Well, that's more like the one we used than  
16 the one they showed." But the one thing I do want to show  
17 you that they didn't bother to show you, this device has  
18 got velcro straps that are used to strap a young child's  
19 arms and wrists, in addition to the velcro straps that are  
20 used to strap him from his ankles up to his chest. I  
21 don't know if that's what they used. You would think if  
22 that's what they used, you would think Dr. Bonds would  
23 say, "Yeah, that's what I used." "That's not what I  
24 used." We didn't hear that.

25 Now, this grandfather, Dr. Knott, I want you to

1 just keep one thought in mind. This is a man who took  
2 that stand and said, "I swore once, not twice that the  
3 light was red. I swore it when I gave my deposition and I  
4 swore it a few months later when I read through it and  
5 thought about all that I said, I thought it was still  
6 red." But he came in here and I said, "Trust me now, the  
7 light is green."

8 This whole business about ECC is an absolute red  
9 herring. One cavity in a child six or younger, six or  
10 under, is ECC. It's a complete red herring designed to  
11 mask this nonsense about, "Well, we had to do everything;  
12 we had to do it; that's why we did it." Red herring.

13 I have put together -- I'm not going to go  
14 through -- there is lots of evidence in the record. I'm  
15 not going to go through it all, but there are a handful of  
16 exhibits that I want to recommend that you ask for and  
17 that you look at, okay? Included in these exhibits are  
18 Jeremy's Small Smiles record. Included in these exhibits  
19 are the pediatrician's records from both the date that he  
20 was first seen there and from a date three months earlier,  
21 and I'm going to talk about that in a minute. Also  
22 included in here is Old FORBA Exhibit 1043. This is a  
23 picture of Jeremy a few months before he was treated at  
24 Small Smiles. Your Honor, may I publish this to the jury?

25 THE COURT: Yes.



1                   Mr. LEYENDECKER: You look at his teeth and you  
2 tell me whether they look like they're rotting and falling  
3 out to you?

4                   Mr. STEVENS: Objection to a few months before,  
5 your Honor.

6                   THE COURT: Is --

7                   Mr. LEYENDECKER: Now --

8                   THE COURT: Overruled.

9                   Mr. LEYENDECKER: One of the things that I am  
10 absolutely focused on are these facts, and in Exhibit  
11 Number 200 is Jeremy's original Small Smiles' record. We  
12 have heard repeatedly throughout this case that Jeremy had  
13 raging infections and abscesses and he had all this pain  
14 and he had all this discomfort. We've heard that  
15 repeatedly. There's no question that the pediatrician  
16 thought what she thought, seven days before. But I want  
17 to ask you to look at Exhibit Number 200 when you get back  
18 there. That's his original chart.

19                   Look for a single page, a single entry by any  
20 dentist, by any hygienist, by any nurse, by anyone that  
21 diagnoses Jeremy as having an infection or as having an  
22 abscess or as having pain or as having discomfort.  
23 Because I'm sorry, you don't get to come in here as a  
24 doctor and say, "I did this because he had raging  
25 infections," if you have examined this child and not

1 concluded he had raging infections. It doesn't work that  
2 way. Exhibit 200, I commend it to you.

3 Now, I didn't really want to get into this  
4 access to care stuff, but I feel I have no choice since  
5 Mr. First continues to raise this issue about overwhelming  
6 demand, crushing demand, nobody willing to treat these  
7 kids. "All we wanted to do was have an opportunity to  
8 help these young kids." So one of the things I have  
9 included in this small stack of exhibits -- and it's in  
10 evidence. Nobody has talked about it; that's true.  
11 Exhibit 1037, this is Dr. Bonds' employment agreement with  
12 the clinic.

13 Every dentist that ever worked in the Small  
14 Smiles clinic signed a contract that has these same basic  
15 terms. Obviously the start dates and the clinic and the  
16 salaries change, but the rest of it, it's fundamental for  
17 all of them, and what you're going to find here in Exhibit  
18 Number 14 is a fact that I believe cuts to the core of  
19 whether this was really all about helping some poor young  
20 children or whether this was all about something else.  
21 And what you'll find in Exhibit 14 is a covenant not to  
22 compete, a non-compete, and this non-compete says for Dr.  
23 Bonds, "You may not, you cannot, regardless of whether  
24 you're fired, whether you quit, whether you decide to go  
25 do something else, you are agreeing that you will not work

1 as a solo in a clinic in any organization that's focused  
2 on treating Medicaid children; you cannot treat those  
3 Medicaid children within ten miles of not just the  
4 Syracuse clinic but every clinic in the Small Smiles  
5 nation. You can't do that for a periods of five years."

6 Five years, ten miles... you can't compete; you  
7 can't work in a clinic that's focused on treating Medicaid  
8 kids. Every dentist that ever worked at Small Smiles has  
9 those same kinds of restrictions, and so if they are  
10 really interested in helping out young children, then I  
11 submit to you they would not make it so that dentists who  
12 gain that experience can't then go treat those same very  
13 children in the areas where they say have the greatest  
14 needs, five years, ten miles.

15 We've got a line here that every witness in this  
16 case has said cannot be crossed. It's the line between  
17 decisions that are within the domain of the dentist, the  
18 treating dentist, and those that are not. And you may get  
19 back in deliberations and somebody may say, "Yeah, we  
20 heard it was the FORBA way or the highway, but that really  
21 was just all about the non-dental," right? Well, if you  
22 hear that, I want you to think about these few exhibits,  
23 right, and what they stand for.

24 Exhibit 390, by the way, that's an e-mail from  
25 Dan DeRose, who unlike you hasn't seen fit to spend the

1 last week and a half of his time participating in this  
2 process. Exhibit 390: "We need to teach them how to do  
3 dentistry." Exhibit Number 59: "We don't need a-holes  
4 reinventing the wheel on restraints." Exhibit Number 44:  
5 "We need to diagnose so as to not leave money on the  
6 table." Exhibit 46: "We need to increase revenues by  
7 doing more procedures on these patients." That's what Dr.  
8 Aman and the lead dentist at the Syracuse clinic agreed  
9 would be his plan going forward. Exhibit Number 147:  
10 "Flip-flopping dentists away from what they were taught in  
11 dental school and to the FORBA model." Exhibit 169:  
12 "Lighting the clowns up." Exhibit 514: "Breaking them of  
13 their old ways and getting them onboard with the Old FORBA  
14 model." Exhibit 152: "The golden goose," and Exhibit 76:  
15 "The number one trigger point for fraud, production  
16 per dentist." Uncontroverted: Old FORBA and new FORBA  
17 were using the number one trigger for fraud to get  
18 dentists to do more work to increase their revenues.

19 Now, I want to apologize for something. My  
20 credibility means a great deal to me, and I did mislead  
21 you about the piece of paper. But I didn't do it on  
22 purpose. The piece of paper is actually point one  
23 millimeters thick and my mistake. I read that as  
24 one-millimeter thick, and so I am here to apologize for  
25 that and ask that you not hold it against my client. That

1        was my mistake. The point I was trying to make was that  
2        if I'm drilling -- if I'm taking a drill and drilling  
3        through a very thin surface, anybody that's ever used a  
4        drill knows I can't -- if these pieces of paper are the  
5        enamel and if my skin here is the dentin where there are  
6        nerves and where the patient would feel pain, if I use a  
7        drill to drill through this paper, it's physically  
8        impossible for that drill not to penetrate all the way  
9        through to get to where those nerves are because that's  
10       where I've got to get to remove the decay, and I've got to  
11       drill a big enough hole so that if I put a filling in  
12       there, it will hold onto the good structure. So the idea  
13       that I could take a drill and drill perfectly through the  
14       last tenth of a millimeter without coming all the way  
15       through, that's not physically possible. If you've ever  
16       used a drill, you know that it's got to go all the way  
17       through that first surface to make the full hole.

18                    Now, r-o-t indeed, Mr. Hulslander, r-o-t,  
19        indeed. What you heard was when Mr. Bohn, Jeremy's dad,  
20        was asked "What did you mean by that?" He said "His teeth  
21        were discolored." I submit to you if Jeremy did in fact  
22        have rotten front teeth, you've seen the picture, if  
23        Jeremy had rotten front teeth, would you expect that Dr.  
24        Taylor, the pediatrician, would have made a note that he's  
25        got rotten front teeth, because it's nowhere in here?

1        Would you expect Dr. Patel, if he had all these rotten  
2        teeth, would have made a note that he's got rotten teeth?  
3        Yeah, you would. And if by some chance Dr. Taylor missed  
4        it and Dr. Patel missed it, do you think maybe Dr. Bonds  
5        might make a note that he's got rotten front teeth? You'd  
6        think he might but he didn't. And how about Dr. Aman? If  
7        he had rotten front teeth, do you think he would make a  
8        note that he's got rotten front teeth? He didn't.

9                Part of what's in my small stack here, ladies  
10        and gentlemen, is Exhibit Number 1135A. This is a  
11        pediatrician record from February of '06, so about three  
12        months before he showed up with the swollen cheek. He's  
13        there because he's got a cough and a runny nose and he's  
14        got a cold, and the dentist is going to look in his mouth  
15        when he's got a cough and a runny nose and a cold.  
16        There's no notation of rampant decay or rotten teeth or  
17        blown-out mouth. None of that. Look at this when you get  
18        back there. This is Exhibit 1135A.

19                Okay. I now need to spend a little bit of time  
20        going through the questions that you're going to be asked  
21        to answer once we're finished, and so it's going to be a  
22        little methodical, but there's really no other way to do  
23        this because I have an obligation to try and explain to  
24        you why I believe the questions should be answered the way  
25        I'm going to ask you to answer them.

1           So the first question that you're going to get  
2           asked is -- can everyone see that okay? Is that  
3           reasonable to look at or should I blow it up some? I  
4           can't tell. Just a hair.

5           Did any of the following defendants violate New  
6           York General Business Law Section 349? What is that?  
7           Okay. I expect that the judge is going to instruct you  
8           that -- lawyers refer to that as G.B.L., that G.B.L. 349  
9           is a consumer-oriented statute that says it's unlawful for  
10          a person or an entity to engage in deceptive acts and  
11          practices that are consumer-oriented, that could mislead  
12          the public.

13          And so what is a deceptive act or practice? I  
14          suspect the judge is going to instruct you that a  
15          deceptive act of practice is making a representation of  
16          something that's not true or concealing information in a  
17          way that would mislead a typical person in the community,  
18          your typical, reasonable consumer. And I also expect that  
19          she'll instruct you that you don't have to be the one to  
20          either make the false representation or you don't have to  
21          be the one to conceal the information to violate the  
22          statute. I suspect she's going to instruct you that if  
23          you are a person or an entity and you act in concert with  
24          another or you encourage another to conceal information  
25          that would be misleading, then you, too, have violated the

1 G.B.L. 349.

2 So acting in concert, I expect you're going to  
3 hear from the Judge, is simply two or more people engaged  
4 in a common plan that's aimed at deceiving the public.

5 So what's the evidence that two or more of these  
6 people -- Dr. Bonds, Dr. Aman, Dr. Khan, the clinic, Old  
7 FORBA or New FORBA when new FORBA owned it -- is there any  
8 evidence that they were engaged in a plan to conceal  
9 information that would be misleading to the public? You  
10 bet there is. As I told you when we started, the very  
11 first thing that FORBA did was to lie to the authorities  
12 about who the real owner of the clinic was. I expect the  
13 judge is going to instruct you that as a matter of law,  
14 both Old FORBA and New FORBA violated the New York law,  
15 and we're going to look at that statute in a minute, 1203,  
16 violated the New York law as to who can own and who cannot  
17 own a dental clinic. As a matter of law, she's going to  
18 tell you they have violated that law.

19 Every one of these entities on this form knew  
20 that Dr. Padula was not the real owner. They were engaged  
21 in a plan to conceal, to deceive the public into believing  
22 that a dentist owned this clinic when in fact a  
23 corporation was owning it unlawfully. The very first  
24 thing they do was to deceive the public and the  
25 authorities about who owns it. What does that say about



1 their intentions?

2 If the authorities knew that FORBA, the  
3 corporation, was the real owner, guess what happens? The  
4 doors close on the clinic, and Jeremy never endures any of  
5 the things he endured as a result of that treatment.

6 Jeremy's mother told you, "Had I known that they  
7 were engaged in this business about pressuring and this  
8 FORBA model" -- and by the way, the FORBA model is pretty  
9 simple, right? Do more procedures to increase the  
10 revenues. Treat them in a way to get them in and out  
11 quickly. Right? Don't refer them to somebody who is more  
12 qualified that might be able to treat them without having  
13 to restrain them with a papoose; keep those revenues  
14 in-house. Use that papoose aggressively. Don't take the  
15 time to try and calm a young child's fears and anxieties  
16 and hysteria. Just put him in. Do it.

17 And conceal from these parents what they know.  
18 They can come in here all day long and say, "Well, I don't  
19 think this; I don't think that," and if you want to put on  
20 your form "in my opinion I don't think this," that's one  
21 thing. But if you want to put on a form "there are no  
22 known risks" when you know the preeminent organization in  
23 this country and perhaps the world says there are, then  
24 you are engaged in a plan to mislead the public in a  
25 material way and any parent that comes through those

1 doors.

2 The answer to this question, ladies and  
3 gentlemen -- and by the way, she told you "had I known any  
4 of that, I would have done something different. I would  
5 have gone somewhere else," and I'll tell you, with my  
6 tunnel vision on the facts, I see a mother who finds her  
7 young child one day with a swollen cheek and as you're  
8 going to see in those records from Dr. Taylor, that's the  
9 same day she took him to the pediatrician. She and her  
10 fiance, Jeremy's dad, two days later, drove him to a  
11 dentist, and three days after that, drove him to another  
12 doctor. Do you think that a mother who takes their child  
13 to three different doctors in six days, does that sound  
14 like a mother who cares about their child, who is going to  
15 see to it that their child gets the treatment that they  
16 need in an appropriate fashion? Absolutely it is.

17 All I've got to -- what more could we do? We  
18 could tell the truth. That's what we could do.

19 The answer to this question is yes ... for all  
20 of them. So when you get this form, it's yes. The next  
21 question was -- excuse me, Question 2 -- I don't know how  
22 that shadow got there but we can deal with it.

23 Question 2, "Was the violation you found to  
24 G.B.L. 349 a proximate cause of injury?" I anticipate the  
25 judge is going to instruct you that the proximate cause

1        simply means what reasonable people would conclude is a  
2        cause of the injury.  It doesn't have to be the only  
3        cause.  There can be more than one cause, but would a  
4        reasonable person conclude that a violation of this  
5        statute is a cause of the injury?  And I don't think  
6        there's any question but that Jeremy wouldn't have been  
7        treated at this clinic had they simply not deceived the  
8        public and the authorities about who the real owner was,  
9        because corporations can't own.  They would not have been  
10       in business.

11                    There's no question Jeremy wouldn't have endured  
12       what he endured if they had simply told her the truth  
13       about what was really going on, that these doctors were  
14       being pressured to treat in ways that were going to be  
15       good for the profits.  I think I'm entitled to know that.  
16       I think patients are entitled to know that.  I know they  
17       are.  If you want to go to a doctor and he wants to say  
18       "I'm being pressured and threatened and influenced to do  
19       what's good for this corporation that employs me" and you  
20       want to say "fine, I'll accept your word for it," then  
21       have at it.  But he doesn't get to conceal that from you.  
22       He does not.  And neither does the clinic.  Once he's in  
23       the system, and there's no question they're always  
24       operating the FORBA way or the highway, he is treated to  
25       get in and out quickly.  That's what this no-local

1 business is all about. Don't let this nonsense with the  
2 spoon fool you. I took their depositions. Not a frickin'  
3 word about a spoon in all these depositions that I took of  
4 all those doctors, not one word.

5 Was the mother mislead about the restraints, the  
6 risks? She was. Was he restrained unnecessarily? He  
7 was. Was he drilled on without local to get in and out  
8 quickly? He was. Did they fail to take the time to try  
9 and calm him down? The man who trained them always says  
10 "don't do it." You know he wasn't allowed to try and calm  
11 down or console or try to have his fears alleviated. The  
12 answer to these questions is yes.

13 May 23rd -- and by the way, you're going to see  
14 a variety of questions broken down by dates, and those  
15 dates reflect the doctors who provided the treatment on  
16 those dates, the clinic and whether Old FORBA or New FORBA  
17 owned it on that date. And so that's why you're going to  
18 see a lot of dates because we have to get your answers to  
19 these questions relative to all those dates. The answer  
20 to "did the violation cause him harm?" was you bet it did,  
21 because they concealed those risks, treated him to get him  
22 out quickly. They did unnecessary treatment on his  
23 teeth -- and I'm going to get to that later, all those  
24 things -- yes to every one of these defendants. So we go  
25 through May 23rd, August 31st, October 11th, October 23rd,

1 March 22nd, and January 28th (sic). That's yes to every  
2 one of those.

3 Now, as I say, when we get down to the  
4 malpractice, what did the dentists do wrong? I'm going to  
5 discuss what happened on each and every one of those days.

6 Next question -- and by the way, let me just  
7 back out and give you a little perspective on the way this  
8 chart works. There are about five different legal  
9 theories that the judge is going to ask you to rule on,  
10 right? There's a G.B.L. theory; there's a battery theory;  
11 there's a negligence theory, negligence per se, which is  
12 the violation that she has found as a matter of law  
13 occurred, and then there's the malpractice. And for each  
14 of those five theories, there's the same kind of follow-on  
15 questions: "Was there proximate cause," and then for most  
16 of those, there's a question like this, and that is: "Did  
17 any of the following defendants participate in Old FORBA's  
18 violation of G.B.L. 349?" And then we list the individual  
19 FORBA board members and the answer to this question is  
20 it's no question it's yes. These were FORBA board  
21 members; they directed the entire conduct. They're the  
22 ones that agreed that Padula would act like he would be  
23 the real owner when they knew he wasn't; they're the ones  
24 that drafted the consent form; they're the ones that  
25 insisted it be used by every dentist in every clinic;

1           these are the ones that were applying the pressure.

2           There's no question.

3                       Mr. HULSLANDER: I'm going to object, Judge,  
4           only one person should be writing -- that's the foreperson  
5           of the jury -- should be writing on that jury form. I  
6           think it's incredibly prejudicial and to be showing it up  
7           on the screen like that -- he certainly shouldn't be  
8           taking it away from the jury, the answers to those  
9           questions. Only one person can answer that.

10                      THE COURT: Well, the jury is going to be  
11           answering that, Mr. Hulslander, and I think it's just an  
12           argument, and as well, the jury has been instructed  
13           closing arguments are arguments, not evidence, and all  
14           counsel have suggested to the jury how they should answer  
15           the questions. He's just demonstrating it as well, so  
16           overruled.

17                      Mr. LEYENDECKER: Okay. The next question  
18           you're going to be asked is "did any of the following  
19           defendants commit a battery?" Now, I suspect that the  
20           judge is going to instruct you that a battery, a battery  
21           is simply intentionally touching another person in a way  
22           that is -- that causes offensive bodily contact,  
23           intentionally touching a person in a way that causes  
24           offensive bodily contact without their consent, all right?  
25           Now, restraining a child with a papoose is clearly an act

1 of intentionally touching another in a way that would  
2 cause, even if this is the one that they used -- I showed  
3 you the wrist straps. That's going to cause offensive  
4 bodily contact.

5 I think you're going to get a similar  
6 instruction that you don't have to be the person that does  
7 the intentional touching to violate this law to commit a  
8 battery. If you act in concert, if you encourage in a way  
9 that substantially causes the battery, then you're equally  
10 liable, so what you're being asked here is: "Did Dr.  
11 Bonds," and this Question 4 really only relates to the use  
12 of the papoose, and we'll get to the two dates in a  
13 minute, "did the defendants commit a battery?" Did Dr.  
14 Bonds, was he acting on a plan with Old FORBA when he  
15 worked for them, and with New FORBA when he worked for  
16 them, to conceal the risks of the papoose from Jeremy's  
17 mother? Because if the consent that is obtained -- we've  
18 seen she signed every one of those forms; there's no  
19 question. There's also no question every one of those  
20 forms contains a material misrepresentation of fact about  
21 there being no known risks. So if the consent that's  
22 obtained is fraudulently obtained and that simply means  
23 did you lie or mislead the parent about the risks to get  
24 her to agree, then there is no consent, and all you're  
25 left with is, did he intentionally -- when he strapped

1       Jeremy on this board or whatever board he used, because he  
2       didn't tell us, when he did that, was he intentionally  
3       doing that? You bet he was. "Did it cause offensive  
4       conduct?" Of course it did. The answer to this question  
5       is yes because Dr. Bonds did it and it's yes to Old FORBA  
6       and new FORBA because they were acting in a plan: "Use  
7       our form; don't refer, mislead the parents so that we keep  
8       those revenues." That's why it's yes to all three.

9               Five, "was the battery you found proximate cause  
10       of injury to Jeremy Bohn?" And that is, when you restrain  
11       somebody in a device and you didn't obtain consent to do  
12       that, you've committed a battery, okay? The notion that  
13       being placed in one of these things is no different than  
14       going to Baskin-Robbins and having ice cream is  
15       ridiculous. There's a reason that it's described as an  
16       aversive technique. There's a reason it's only used as a  
17       last resort and it's because it has the potential to cause  
18       physical and psychological trauma. And when you put  
19       somebody in that unnecessarily, particularly when they're  
20       upset, because you don't want to take the time to try and  
21       comfort them because you've been trained and instructed  
22       it's not worth the effort to try and ease their fears,  
23       when you do that, you're absolutely causing him harm,  
24       physical pain and emotional injury. The answer to that is  
25       yes, on both days Dr. Bonds restrained him.



1                   Six -- remember, we're following the pattern.  
2                   "Did they violate it?" "Was there proximate cause?" "Did  
3                   the individual defendants participate in it?" There's no  
4                   question they drafted the form; they insisted it be used.  
5                   That just could not be clearer. The answer is yes.  
6                   Every one of these individuals participated in Old FORBA's  
7                   battery.

8                   Now, this next question, Number 7, "Was Old  
9                   FORBA's violation of New York State Limited Liability  
10                  Company Law Section 1203 a proximate cause of injury to  
11                  Jeremy Bohn?" On this theory, this legal claim, there's  
12                  no question did they violate it because the judge, I  
13                  believe, is going to instruct you that as a matter of law,  
14                  the Old FORBA and new FORBA broke this law; they violated  
15                  this law which says only a dentist can own a dental clinic  
16                  in New York. The owner is the one that operates the  
17                  clinic and gets the profit, and I believe she's going to  
18                  instruct you that both Old FORBA and New FORBA violated  
19                  this law. It's not in dispute, right? They engaged in  
20                  that deceptive conduct. The only question is "did their  
21                  violation of this law, was it a proximate cause of injury  
22                  to Jeremy Bohn?"

23                  Well, I don't want you to take my word for it.  
24                  I want you to take Dr. Padula's word for it because on the  
25                  very first day of this trial, he took the stand and said,

1 "if a corporation owns a dental clinic, that's a very  
2 dangerous situation." And the reason it's a very  
3 dangerous situation is because corporations are interested  
4 and have a duty to their owners to maximize their profits,  
5 and if a corporation, if a dentist -- you okay? If a  
6 dentist is sitting here, "Am I going to be loyal to my  
7 employer and what they want, or am I going to be loyal to  
8 my patient?" That conflict is what this statute is  
9 designed to prevent. Don't put dentists in that position  
10 where their corporate employer can tell them "treat them  
11 to get them in and out quickly" or their corporate  
12 employer can tell them "diagnose so as to not leave money  
13 on the table," where their corporate employer can tell  
14 them, "we don't need you reinventing the wheel on how and  
15 when to use a restraint." "We don't want you deciding for  
16 yourself what to tell parents about the risks of a  
17 restraint." Okay? There isn't any question that Old  
18 FORBA's and new FORBA's violation of this statute was a  
19 cause of injury to Jeremy. The clinic wouldn't have been  
20 open -- if they put on the form that they filed with the  
21 state, "This Syracuse clinic is owned by FORBA  
22 Corporation" or whatever their formal name was, "Rejected.  
23 You don't get to open your doors."

24 The answer to this question is yes.

25 These two dates, May 23rd and August 31st, 2006,

1 those are the two dates that Jeremy was treated during Old  
2 FORBA's ownership, so you get this question for Old FORBA,  
3 to follow along again in our pattern: "Did any of the  
4 defendants participate in Old FORBA's deceiving the state  
5 and the public about who the real owner was?" And the  
6 answer is yes. You heard from all of them that we as a  
7 board decided that we would put Padula up to be the  
8 designated owner, that he would go get his license and act  
9 like he's the owner. He said "if I weren't on that form,  
10 we couldn't have had a clinic." There's no question that  
11 these gentlemen and Mr. Danny DeRose and his father,  
12 Edward DeRose, all of them on the board participated in  
13 that violation. That's a yes all the way down.

14 Question 9 has been deleted, so if you get there  
15 and you see, "oh, where's nine?" There's no longer a  
16 question nine.

17 Question ten, was New FORBA's violation of this  
18 ownership statute a proximate cause of injury? The answer  
19 is yes for the same reason. Because, hey, one day we've  
20 got pressure and influence to conceal the risks, pressure  
21 and influence to not refer, pressure and influence to get  
22 them in and out quickly, with Old FORBA, and one day  
23 later, it's the same thing with New FORBA, right? That  
24 same thing that makes it dangerous for Old FORBA made it  
25 dangerous for New FORBA. Dr. Knott was the transition.

1       Despite him saying "trust me, it was red, trust me, it was  
2       red, now I swear it's green," he did say one thing that  
3       was true. Sometimes when you're pushed and you're up here  
4       trying to spin a yarn, the truth comes out and what he  
5       said was they were trained to treat these kids to get them  
6       in and out quickly.

7               Now, let me just reflect on that for a minute.  
8       We all go to the doctor. Doctors can be busy people and  
9       they might have lots of patients, right, but I guarantee  
10      you that if we live in a society where doctors are being  
11      trained to treat children or adults, for that matter, so  
12      that you can get them in and out quickly, bad things are  
13      going to happen to the patients. There's just no question  
14      about that. It's not a matter of if but when and how  
15      often.

16              New FORBA and their violation, that same FORBA  
17      model, that same deception about who owned it, was the  
18      proximate cause of injury to Jeremy.

19              Next subject: "Were any of the following  
20      defendants negligent?" Negligent, I expect the judge will  
21      define for you as doing something that a reasonably  
22      prudent person or entity would not do, okay, or failing to  
23      do something that a reasonably prudent person or entity  
24      would do.

25              Now, there's a couple of concepts in there.

1       What does "reasonable" mean, reasonably? Reasonable  
2       doesn't mean average or moderate; it means with reason,  
3       based on logic. Prudent means proper, okay?

4               So negligence in this context as a practical  
5       matter, she's going to instruct you on the law. But as a  
6       practical matter, was it proper and logical -- is it  
7       proper and logical for either a clinic, because this  
8       question asks you about both the clinic and the two owners  
9       of the clinic, was it proper and logical for a clinic to  
10      pressure and influence and threaten dentists to do things  
11      that would be good for profits? Absolutely not. A  
12      reasonably prudent clinic or operator of 50 clinics would  
13      not be pressuring and threatening dentists, would not be  
14      telling dentists, "these are the risks that you have to  
15      conceal." That's negligent behavior.

16              Would a reasonably prudent -- would it be proper  
17      and logical for either a clinic or a company that's  
18      operating 50 clinics, would it be logical and proper for  
19      either of those to have a quality of care program in place  
20      to make sure that the children are being treated in an  
21      appropriate fashion and only receive that care which is  
22      necessary? You bet it would. That's what a reasonably  
23      prudent clinic or operator of 50 clinics would do, but  
24      they didn't, neither one of them.

25              The answer on whether the clinic and Old FORBA

1 and New FORBA were negligent is yes.

2           Again, sticking with our pattern: "Was the  
3 negligence you found a proximate cause of injury to  
4 Jeremy?" And I don't want to be a broken record but  
5 there's no question that Jeremy was treated to get him in  
6 and out quickly. That's what all those four separate  
7 visits of no local were about, right? There's no question  
8 he was improperly restrained three different times, twice  
9 on the first visit and once on the third. There's no  
10 question that he had unnecessary treatment, and I'm going  
11 to get into it in a little bit, but I'll just give you a  
12 preview. We'll take the world-renown orthodontist who got  
13 his pediatric certification however many years ago he did.  
14 You may or may not remember we were looking at some X-rays  
15 and he was comparing tooth A and tooth J, which are the  
16 first ones on either in the top, to tooth B and I, and he  
17 was trying to make the point that "look at how bad teeth B  
18 and I are." And as I said from the beginning, Jeremy did  
19 need to see a dentist; he did, okay? But what he told you  
20 was when you look at A and J, that's how good and healthy  
21 teeth are supposed to look. That's what he told you. And  
22 some of the fillings that Jeremy received were on teeth A  
23 and J. You heard Dr. Aman tell you that the x-rays for  
24 teeth J, K and L are clean. There's no question that  
25 Jeremy suffered from this FORBA way or the highway model

1 and it was negligent for this clinic and these operators  
2 to be doing what they were doing. The answer to that is  
3 yes on every single visit.

4 And there are a total -- just to put things in  
5 perspective, we have a total of six visits, and I'm going  
6 to get to them in a minute on the malpractice. Well, we  
7 can't see that. I'll get to it in a minute.

8 Now, same question: "Did any of these  
9 individual defendants participate in Old FORBA's  
10 negligence?" Who do you think made the decision not to  
11 have a quality of care program? Who do you think was  
12 applying the pressure? Who do you think was carrying out  
13 the terminations when they weren't treating the FORBA way?  
14 It was these gentlemen. They absolutely participated in  
15 Old FORBA's negligence.

16 Okay. Malpractice... malpractice is negligence  
17 committed by a doctor. Some states have laws that just  
18 call it negligence; other states have negligence for  
19 non-doctors and malpractice for doctors. And malpractice  
20 is simply a doctor failing to act like a reasonably  
21 prudent doctor would have acted under those same  
22 circumstances -- I expect that's what you're going to be  
23 instructed -- or acting in a way that a reasonably prudent  
24 dentist wouldn't have acted under those same  
25 circumstances, all right?

1           So we know, for example, and you've heard a lot  
2           of testimony about standard of care. Let me just go to  
3           some basic standard of care concepts because none of these  
4           are in dispute, right? Restraints are not appropriate for  
5           routine care. We heard that from the esteemed,  
6           world-renowned former president who says the A.A.P.D.  
7           doesn't know what they're talking about, who doesn't agree  
8           with any of this, their own guy, their academic, the guy  
9           who doesn't treat kids says "restraints are not  
10          appropriate for routine care." Whether you like it or  
11          not, you did hear from Dr. Slack, the only dentist who  
12          actually practices day in and day out on children, that  
13          restraints are only appropriate in emergencies, and as Dr.  
14          Bonds told you, he confirmed that and he said "they're  
15          only appropriate as a last resort after all attempts have  
16          been made to try and obtain a child's cooperation." But  
17          we know Dr. Mueller didn't want him doing that. "Put him  
18          in. Don't try to calm them down. Don't try to get their  
19          cooperation."

20                 We know a standard of care requires a dentist to  
21                 use local anesthesia if there's a chance that a patient  
22                 might feel pain. If you're going to drill into the  
23                 dentin, it's a medical certainty the patient is going to  
24                 feel pain, and the standard of care requires the use of  
25                 local. By the way, if your dentist doesn't comply with



1 the standard of care, he's committed malpractice. That's  
2 the concept.

3 Standard of care establishes you have to examine  
4 and confirm the need for treatment before drilling. Now,  
5 I want to just stop on that for a minute because there's a  
6 little bit of sleight of hand going on by one of the  
7 defense lawyers, and I just want to zero in on that for a  
8 minute. When you get to Exhibit Number 199, which is the  
9 copy of the chart, or 200, which is the original, okay, it  
10 is certainly true that on May 23rd, 2006, when Dr. Bonds  
11 first saw Jeremy, he circled on the hygiene report,  
12 "Complete oral exam," right, and then on that same day, on  
13 the operative report, he circled "no limited oral exam to  
14 confirm the treatment plan." Well, you wouldn't do a  
15 complete and a limited on the same day, but when you get  
16 to a point in the future, whereas Dr. Aman told you, Dr.  
17 Bonds is the one that diagnosed the need for these  
18 fillings; "I'm just the one that did it;" that's what he  
19 told you. He almost let the cat out of the bag right  
20 there; all right? "He diagnosed it; I'm the one who did  
21 it." This form, when you're not the doctor who does the  
22 treatment plan, let me get to it... I'm going to try to  
23 zoom in... okay. This is August 31st, 2006. "Yes or no,  
24 did you perform an L.O.E. to confirm the treatment plan  
25 and rule out other conditions."

1                   Now, they took the stand and said, "Ooh, ooh,  
2                   you're just mistaken about that. This only relates to  
3                   emergencies." Well, if this only related to emergencies,  
4                   then why would they be performing a limited oral exam to  
5                   confirm a treatment plan? If it's an emergency, there is  
6                   no treatment plan for an unanticipated emergency. There's  
7                   not. This is for when somebody else does a treatment  
8                   plan, he has a duty to examine him to confirm a need for  
9                   that treatment. That's what that means. And he didn't do  
10                  it.

11                  So not examining before you drill is a violation  
12                  of the standards of care.

13                  Dr. Bonds told you "it's a violation of the  
14                  standard of care to restrain a child if they have an  
15                  elevated heart rate." North of 150 is elevated. North of  
16                  200 is off the charts. And he did both. "Not supposed to  
17                  drill if they've got an elevated heart rate" and he did  
18                  both. I'll get to the details in just a second.

19                  Standard of care according to Dr. Bonds says "if  
20                  you're going to restrain a child with a papoose, give the  
21                  parent the option to come back." He didn't. Standard of  
22                  care says "document important facts in clinical notes." I  
23                  want you to go back and look at all the clinical notes  
24                  that you can find in that original, or the copy, and you  
25                  make whatever decisions you want to make about the

1 clinical notes, but they're supposed to be there, if in  
2 fact they observed things and they found things that were  
3 important to the care.

4 Standard of care also requires that a doctor  
5 fully and fairly disclose all known risks, right? It's  
6 not acceptable if I have, if I need heart surgery, for my  
7 surgeon who is the head of the best heart surgery in the  
8 world to say "I've never had a problems, so there are no  
9 risks." So that doesn't work. He has an obligation to  
10 tell me what's out there and when the preeminent  
11 organization says there are risks repeatedly and  
12 steadfastly, they have an obligation to say that. Their  
13 own expert acknowledged that. It's not even in dispute.  
14 You have to tell them that. Let them make their own  
15 decision. It's not up to you to decide.

16 So I'll tell you what, it might be easier to go  
17 back through the treatment dates because I want to -- this  
18 is the point that I want to get to the detail on these  
19 treatments, okay? The answer to this question is yes on  
20 all three, and we're going to go through that detail right  
21 now. May 23rd, 2006, Dr. Bonds restrains Jeremy for  
22 routine care. That's the hygiene portion of the visit.  
23 All right? Restrained Jeremy when there was no infection  
24 or abscess or emergency or pain or discomfort, right? He  
25 did that during the operative portion of his visit. The

1 idea that he had to have that care right then and there is  
2 nonsense. He'd been on penicillin for about a week,  
3 right? He had no infection. The reason -- if you have an  
4 out-of-control infection, yes. But if you're on  
5 medication, then guess what? It is in the child's  
6 interests to spend a little bit of time with him to see if  
7 you can't calm them down. It is. Right? He didn't do  
8 that. He just put him in the papoose. He concealed the  
9 risks of the restraints. He didn't get a diagnostic X-ray  
10 of the one tooth. You heard these people say "if you can  
11 get a diagnostic X-ray, get one." But he pulled the tooth  
12 without knowing if it's abscessed or infected or -- you  
13 can't see it. He violated the standard of care.

14 It is certainly true that hygiene report says  
15 they put him in a papoose. Dr. Bonds told you, if we  
16 accept his custom and habit, which he developed over the  
17 expansive time period of 30 days -- because that's how  
18 long he'd been a dentist, 30 days, he had this custom and  
19 practice and habit, if we accept what he says is true,  
20 you're supposed document and monitor the vitals. We don't  
21 know how long he was restrained during that visit. We  
22 don't know if his heart rate was 50 or 250. We don't.

23 He didn't allow Jeremy's mother in the room.  
24 All these were violations of the standard of care that  
25 were the proximate cause of the injury. I'm sorry, you

1 don't put somebody in one of these devices unless it's  
2 absolutely necessary. It wasn't absolutely necessary.  
3 You don't put them in one of these devices unless you've  
4 tried everything else and we know they were trained not to  
5 try everything else. So when he gets on the stand and  
6 says "Trust me, I tried everything else," that's nonsense.

7 Naveed Aman, August 31st, 2006. That's the date  
8 that we had the four pulps, pulpotomies, and the four  
9 crowns, okay? They can accuse us all they want of what  
10 the X-ray shows or doesn't show, but Dr. Aman testified  
11 that he couldn't see any decay on those X-rays, right?  
12 Dr. Slack said she didn't see any decay on those X-rays.

13 Now, this is a little interesting piece right  
14 here on this, these four pulps and four crowns, and this  
15 is the one area that I do want to show you one piece of  
16 evidence and put it up on the screen. That's in evidence.  
17 That's Exhibit Number 7. Mr. Hulslander says "Boy, how  
18 come they don't have a single zinger?" Exhibit 7 is Dr.  
19 Knott's e-mail to the doctors on the pulp crown ratio.  
20 "In my treatment plans, I like to reserve pulpotomies for  
21 those teeth that are obvious on X-ray." Right there. So  
22 if he can see it on the X-ray, then he'll put it on his  
23 treatment plan. Right? He goes on to say "but I  
24 personally believe any tooth with a crown needs a pulp."  
25 That's what he's saying in this next sentence. Down here

1 at the bottom, "However, I do not want to make my  
2 intention obvious."

3 Why would a legitimate doctor be instructing  
4 other doctors that if you can't see it on X-ray, hide your  
5 intentions about what you're going to do? I'm sorry, if  
6 that's not a zinger, there is no such thing as a zinger.  
7 What it goes on to say, the best part of this, "So unless  
8 it's obvious on X-ray, I only chart the tooth for an  
9 S.S.C., and that's what Dr. Aman did, "N.S.P. question  
10 mark." "I thought it needed a crown. I just wasn't sure  
11 about the pulp." "At the time of treatment if I perform  
12 the pulpotomy," which we know he did, "my progress,  
13 treatment" in parentheses, notes, indicate, justify the  
14 need for C.P.E." Have you seen those letters before?  
15 That's what he did. He couldn't see it on X-ray, he was  
16 trained to do a pulp whenever he did a crown, and this  
17 gentleman told these doctors, "Hide your intentions and  
18 when you're done, just put C.P.E. so you can say," "Hey,  
19 when I was drilling, that decay was in the pulp." That's  
20 what Dr. Aman did on this visit, absolutely committed  
21 negligence.

22 Koury Bonds, October 11, 1006. This is the  
23 episode --

24 Mr. FIRST: We were given strict time limits by  
25 the Court, and I think we're over now.

1 Mr. LEYENDECKER: I'm getting close.

2 Mr. HULSLANDER: We were limited.

3 THE COURT: Yes, but the defendants had two  
4 hours and the plaintiffs had one hour --

5 Mr. HULSLANDER: It's over one hour.

6 THE COURT: You're going to have to wind it up  
7 shortly.

8 Mr. LEYENDECKER: Okay. Thank you, your Honor.

9 Each of these defendants, no local, unnecessary  
10 fillings, unnecessary pulps and crowns, malpractice on  
11 every date.

12 This Question 16 relates to -- relates to  
13 damages, okay, and this may be the toughest issue in the  
14 case. You're going to be asked to compensate Jeremy for  
15 his damages, if any, that you find caused by this wrongful  
16 conduct. Compensate just means balancing the harm with  
17 the amount of money so that the two are in step: Small  
18 harm, small damages, large harm, large damages. I happen  
19 to think this is not a few thousand dollars worth of harm,  
20 nor do I think it's millions of dollars worth of harm; I  
21 think it's in the middle. So the way I look at this is --  
22 and these are just my beliefs, right? You're free to do  
23 whatever you think is right, if anything.

24 I think it's \$50,000 per unnecessary restraint;  
25 it's \$20,000 per this no local, which we know they did on

1 four different occasions, and I think it's \$10,000 for  
2 unnecessary treatment on a tooth, right? This first  
3 visit, two unnecessary restraints. Second visit, four  
4 unnecessary pulps and four unnecessary crowns... four  
5 teeth. I'm going to call that \$40,000. Visit three,  
6 restraint, no local, elevated heart rate, three  
7 unnecessary fillings, J, K and L. That's testimony you  
8 heard, corroborated in part by both Dr. Aman and their  
9 expert, so we have a \$50,000 restraint; a 20, no local,  
10 and three unnecessary treatments... that's \$100,000.

11 This last, October 23rd, that's tooth A,  
12 unnecessary per their own expert, no local, \$30,000. The  
13 next two are simply no locals where we've acknowledged  
14 those teeth had cavities and needed to be treated but the  
15 pain, no local, caused there by the drilling into the  
16 dentin, the pain, I think is \$20,000.

17 You -- that's your domain, absolutely. I think  
18 it's the hardest issue in the case. It's how you put a  
19 dollar figure on what a three-year-old goes through when  
20 he's treated unnecessarily and in an abusive fashion.  
21 It's a tough question but that's what I think and that's  
22 how I analyzed it.

23 Next question asks you about percentage of  
24 fault, and percentage of fault in my view is simple:  
25 Either Old FORBA or New FORBA has the lion's share, so for



1 every one of these questions, Old FORBA should be 60  
2 percent; the dentist should be 30 percent and the clinic  
3 should be 10 percent, across the board.

4 Question 18: "Did any of these defendants act  
5 with reckless disregard?" Right? That just means were  
6 they engaged in conduct -- was the dangerous situation  
7 that Padula told you did exist and if that dangerous  
8 condition existed, was it likely or more probable to cause  
9 someone to suffer an injury? Yes. Corporations illegally  
10 owning dental clinics are calculated to cause an injury  
11 and every one of these people knew that that dangerous  
12 condition existed and they were reckless in allowing it to  
13 go forward.

14 Last two questions: I'll combine it down to one  
15 and give you my thoughts. It's punitive damages, okay?  
16 Punitive damages are not to be taken lightly. It's  
17 entirely in your domain, but I want you to keep two  
18 thoughts in mind on punitives: I expect the judge is  
19 going to instruct you it's not designed to compensate  
20 Jeremy. That's not what punitive damages are designed to  
21 do. Punitive damages are designed to punish the defendant  
22 if they act recklessly, with indifference to the health  
23 and safety of others; they're designed to deter the  
24 defendants and others from engaging in that kind of  
25 conduct.

1 I submit to you, in my opinion, the facts of the  
2 case justify punitive damages as to each and every party  
3 in this case, and if you agree with me and you get to the  
4 point where you're asked to award punitive damages, how  
5 much, I've got one simple thought... each of these  
6 individual defendants who were putting between 300 and  
7 \$500,000 a month in their pockets at the time Jeremy was  
8 going through this treatment, I think one month,  
9 \$500,000... for each of the individual defendants... and  
10 for the doctors who frankly, in my view, surrendered their  
11 independent judgment by being a part of this process, I  
12 think half a year's worth of salary, and their salary at  
13 the time was about \$150,000, so if it were my call -- and  
14 it's not; you guys can award zero, you can award less than  
15 this, you can award more. This is entirely your call. My  
16 view would be that \$75,000, which is about half a year's  
17 salary for each of those doctors -- excuse me, \$75,000,  
18 and then \$500,000 grand each again for Old FORBA...and for  
19 the Syracuse clinic. It's entirely your domain.

20 If you think punitives are not appropriate, you  
21 aren't not going to get to this question, right? It's  
22 just that simple. If you get there and you think I'm  
23 crazy, this is more than necessary to punish or deter, you  
24 do whatever you think is right. This is your call.

25 This is an important case and you have an

1 opportunity to decide: Do you want corporations  
2 influencing your doctors in this community or not?

3 Thank you.

4 THE COURT: Thank you, Mr. Leyendecker. All  
5 right. We're going to take about a fifteen-minute recess.  
6 I have to review with the lawyers the charge.

7 Your lunch should be back there, so you can  
8 start working on it and I'll have you come back in as soon  
9 as we've gone over the charge, if we need to, and you'll  
10 come back in here for that. I would ask you not to start  
11 deliberating or talking about the case until you've gotten  
12 the charge on the law.

13 (Whereupon, the jury was excused at 12:23 p.m.)

14 THE COURT: All right. Let's take some time to  
15 address the charge and the verdict sheet.

16 Let's start with the verdict sheet so I can have  
17 copies made if there are any changes that need to be made  
18 to that.

19 Mr. FIRST: This is not for objections or  
20 exceptions or it is?

21 Mr. STEVENS: There's a preliminary issue, your  
22 Honor.

23 THE COURT: What's that?

24 Mr. STEVENS: Well, there was a material  
25 representation made, a material misrepresentation made by

1 Mr. Leyendecker that was so serious that it required an  
2 explicit curative charge. Mr. Leyendecker took the  
3 Exhibit 1043, a picture of Jeremy Bohn, smiling as a young  
4 child, and handed it to the jury and asked for permission  
5 to circulate it and the Court gave permission to circulate  
6 it and it was handed around to each juror and they looked  
7 at it. He told the jurors this was taken a few months  
8 before Jeremy went to Small Smiles and clearly the picture  
9 doesn't show decay in the teeth and Mr. Leyendecker made a  
10 comment to the jury to demonstrate the importance of that  
11 picture and what it shows. In fact, the record in this  
12 trial, page 1631 of the trial transcript, shows that this  
13 picture was identified by Jeremy's mother, Kelly Varano,  
14 as a picture depicting Jeremy at age two, and in fact she  
15 said it twice.

16 Now, throughout the course of this litigation,  
17 we've sought the picture of Jeremy from a relevant age  
18 because he was three years and eight months when he came  
19 to Small Smiles and there are no pictures depicting his  
20 front teeth during that period. Mr. Leyendecker is now in  
21 a way, intentionally or otherwise, he showed the jury a  
22 photograph and told them that this is from just a few  
23 months before. This is the type of -- it's something that  
24 requires a curative charge or a mistrial, your Honor.

25 This is --

1 THE COURT: I understand your point, Mr.  
2 Stevens.

3 Mr. STEVENS: There were others but this one was  
4 egregious because it's in the record, from his own client,  
5 and she testified to that twice.

6 THE COURT: I understand.

7 Mr. STEVENS: Thank you.

8 THE COURT: I did hear Mr. Leyendecker say that  
9 it was a photograph taken a few months, I think were the  
10 words that he utilized. The record reflects that the  
11 testimony was that the boy was two. Does that mean two  
12 and zero months, does that mean two and twelve months? Is  
13 it eight months? Is that a material misrepresentation? I  
14 don't think so. We don't have specific information on  
15 that. I also note that I think every counsel  
16 misrepresented, at least my recollection of the testimony,  
17 facts during their closing argument, so your motion is  
18 denied. Anything else?

19 Mr. STEVENS: A picture is really worth a  
20 thousand words and claiming that --

21 THE COURT: You made your point and I ruled,  
22 okay?

23 Mr. STEVENS: Respectfully except and  
24 respectfully move for a mistrial, your Honor.

25 THE COURT: Okay. Motion is denied. Anything

1 else?

2 Mr. FRANKEL: Verdict sheet.

3 THE COURT: Mr. Leyendecker, I gave you my copy.  
4 With respect to the verdict sheet, any objections,  
5 requests to change? Start with plaintiffs?

6 Mr. FRANKEL: As to the verdict sheet, your  
7 Honor?

8 THE COURT: Yes.

9 Mr. FRANKEL: Nothing, your Honor.

10 THE COURT: Old FORBA?

11 Mr. FIRST: Yes. We have objections. Your  
12 Honor, as we indicated in the charge conference, I  
13 respectfully submit that the way the jury sheet is set up  
14 in terms of my individual clients' so-called  
15 participation, it's an incorrect reading of the law and  
16 actually the question should be posed as to whether or not  
17 they violated whatever particular provision or torts that  
18 is involved. It shouldn't be broken down the way it is.  
19 The Court's talk in terms of participating in the context  
20 of when a corporate officer can be held liable for the  
21 torts of the corporation, and they say if the officer  
22 participated, then he can be held liable. But they also  
23 go on to say in every one of the cases we've seen, that  
24 the cause of action is the underlying theory, whatever it  
25 is, battery, negligence or statutory violation, and to

1 submit it to this jury in this way is misleading and not a  
2 correct -- and prejudicial to us also, when it comes to  
3 the percentages that are assessed later, and they are not  
4 included in the percentage breakdown, so I would object  
5 and except to the jury verdict sheet in that respect.  
6 Obviously, we have substantive objections to a number of  
7 these being submitted to the jury. I don't know if you  
8 want us to address that now because we have -- relative to  
9 motions to dismiss and the like.

10 On the pain and suffering part, there should be  
11 a cutoff date. It says up to the date of the verdict, and  
12 we have an end date that's been essentially stipulated to  
13 in this trial and it's not reflected by the jury sheet.

14 With respect to the punitive damages, I think  
15 that ought to be a two-step process. All the case law  
16 that I'm familiar with supports that. I would except to  
17 that portion that allows punitive damages, number one, for  
18 a yes/no question to be awarded and also for amount.  
19 Those are separate questions that should be done  
20 separately.

21 Also with respect to the order of the verdict  
22 sheet, I would except to the order that the Court has  
23 because I would respectfully submit that the malpractice  
24 claims should be posed first because they are dispositive  
25 of the other claims. If the jury should find that Jeremy

1 was treated in accordance with the standard of care, then  
2 the other questions, particularly the proximate cause  
3 question, becomes academic. So the way we proposed and  
4 the way I -- the reason I'm excepting is because the Court  
5 doesn't set it up so that the malpractice claims are  
6 addressed first and if the jury should find in favor of  
7 the doctors, I respectfully submit that's the way it  
8 should have been done.

9 And with respect to the phraseology "proximate  
10 cause," I think the courts have indicated that that  
11 question should be posed to the jury not with the language  
12 proximate cause but with the language, a substantial  
13 factor in bringing about injury to the plaintiff, and we  
14 except to all portions of the proximate cause questions  
15 that don't assert that language.

16 Thank you.

17 THE COURT: Thank you, Mr. First. Mr.  
18 Hulslander?

19 Mr. HULSLANDER: Yes, we adopt the same  
20 objections as Mr. First has stated. As I see it, we've  
21 essentially adopted the plaintiff's submission with a few  
22 changes. It's incumbent upon this jury determining  
23 whether these dentists committed malpractice in the first  
24 instance. Dentists were the only ones with contact with  
25 this child and if they didn't commit malpractice, then



1       there can be no injury and there can be no, absolutely no  
2       violation of any other law or cause of action, so,  
3       incorporate Mr. First's objections. I join in them and  
4       ask that they be changed.

5               THE COURT: Anybody on behalf of the dentists?

6               Ms. MARANGAS: Yes, your Honor, we have verdict  
7       sheets that have been submitted on behalf of our clients.  
8       We initially submitted a complete verdict sheet on October  
9       4th. Along with that, we submitted two separate verdict  
10      sheets that were proposed as verdict sheet one and verdict  
11      sheet two, consistent with our prior sequencing motion.  
12      Thereafter at the request of your Honor, all the  
13      defendants submitted a subsequent verdict sheet. We would  
14      like to have those marked as Court exhibits and take  
15      exception to all the questions on the current verdict  
16      sheet that are inconsistent with the proposed questions  
17      put forth by the defendants in this case.

18              Mr. STEVENS: And we respectfully adopt the  
19      objections, exceptions and arguments made by Mr. First and  
20      Mr. Hulslander. We urge the references to quote, a cause,  
21      close quote. It should be quote, a substantial factor,  
22      close quote on the jury sheet. We object and except to  
23      the names of Dr. Bonds, Dr. Aman and Dr. Khan being even  
24      listed in the punitive damages section for the reasons  
25      we've discussed. We object to the battery claim on the

1 verdict sheet without the consent predicate, and that's  
2 it.

3 THE COURT: Thank you, Mr. Stevens.

4 Mr. FIRST: If I may, I would like to add one  
5 more part to my objection and exception of the verdict  
6 sheet. To the extent that the verdict sheet indicates the  
7 Court has ruled as a matter of law that there was a  
8 violation of Section 1203 of the Limited Liability Company  
9 Law, I would except to the Court's jury verdict sheet, and  
10 I also, as we discussed in the precharge conference, we  
11 believe that any violation of Section 1203 is part of the  
12 negligence allegation and there shouldn't be a separate  
13 line item for that in the jury sheet. It's part of  
14 negligence; it's been construed as by the Court, and we  
15 disagree with it as a negligence per se, and as such it  
16 comes within the rubric of negligence and should be just  
17 charged as negligence on the verdict sheet.

18 THE COURT: Thank you.

19 Mr. FIRST: Thank you.

20 Mr. STEVENS: Not to belabor a point, but it  
21 will take three seconds. Your Honor, even if two years  
22 means two years and eleven-and-a-half months, and the  
23 misrepresentation was material and egregious.

24 Mr. HULSLANDER: We adopt Mr. First's newly  
25 stated objection as well.

1                   Mr. STEVENS: We adopt as well. Thank you.

2                   THE COURT: As all parties know, I met at length  
3 with counsel Sunday for four-and-a-half hours to work on  
4 the verdict sheet and the jury charges, that during the  
5 course of this trial, the Fourth Department issued a  
6 decision which took out some of the causes of action. I  
7 asked counsel to submit new verdict sheets and your  
8 proposed charges to me, which I received, I believe, on  
9 Friday, last week, and I considered the proposals. I note  
10 that the defendants' version of the verdict sheet was  
11 almost 100 pages and during our charge conference -- and I  
12 also asked counsel to meet with each other on Saturday  
13 before the Court met with you in an effort to try to see  
14 if an agreement could be reached with respect to the  
15 charges and the verdict sheet.

16                   I recall Mr. Hulslander saying in chambers that  
17 he thought that was possible, that a lot of what the  
18 plaintiff had included in their charges in chief were  
19 okay. With respect to the legal arguments that counsel  
20 make, the Court has considered them, and in determining  
21 what the charge should be and how the verdict sheet should  
22 look, I disagree with the viewpoint that in the absence of  
23 malpractice, none of the other causes of action stand, and  
24 so the Court notes the exceptions but is going to stick  
25 with the verdict sheet as prepared.

1                   Okay.

2                   Everybody has also had an opportunity to view  
3                   the copy of the proposed charge, which again is a draft in  
4                   large part but pretty consistent with what I'm going to  
5                   charge the jurors.

6                   Is there anything other than the arguments, the  
7                   legal arguments that you made that you want the Court to  
8                   address before I bring the jury back for the charge? Mr.  
9                   Frankel?

10                  MR. FRANKEL: Your Honor, we have three points:

11                  One is in the instructions on battery, Page 8 of  
12                  the latest version, the next to last paragraph, it starts  
13                  "if you find the defendant Dr. Bonds committed a  
14                  battery..."

15                  THE COURT: Yes.

16                  Mr. FRANKEL: There is a clause in there that  
17                  we, I think we submitted as a proposed clause that we  
18                  believe may be a misstatement of the law and we recommend  
19                  that it be deleted and that clause says, "or that  
20                  defendant provided insufficient information upon which  
21                  Jeremy's parents could have formulated an intelligent  
22                  consent." The words -- I believe that language is closer  
23                  to an informed consent than a battery, that a battery is  
24                  no consent and no consent can be when it's fraudulently  
25                  obtained.

1 THE COURT: I did find that specific language  
2 last night in the P.J.I. 3.3 in the commentary, which is  
3 why I left that language in there. However, if you're  
4 withdrawing it, it will be -- but I specifically saw that  
5 referenced in the commentary under 3.3, but I will take  
6 that out.

7 Mr. FRANKEL: The --

8 THE COURT: It was 2:30 in the morning and maybe  
9 I wasn't reading correctly.

10 Mr. FRANKEL: I think you were reading  
11 correctly. In paragraph 2.70, proximate cause, Page 10 of  
12 this.

13 THE COURT: Okay.

14 Mr. FRANKEL: The first sentence is probably  
15 historical or so. It is limited to negligence.

16 THE COURT: And I've added medical malpractice  
17 and/or G.B.L. 439.

18 Mr. FRANKEL: I think all the proximate cause  
19 issues, however many there are, four or five, I think, are  
20 governed by the definition of proximate cause.

21 THE COURT: My law clerk already pointed that  
22 out to me, that I left that out, but in the battery  
23 charge, I think there is -- the battery charge itself  
24 includes proximate cause, so I just added in the med mal  
25 and/or G.B.L. 349.

1 Mr. FRANKEL: Okay. Would it also be the 1203?

2 THE COURT: Okay. All right.

3 Thank you. Anything else?

4 Mr. FRANKEL: The last point is in paragraph 11,  
5 the instruction on stipulation of facts: That one I have  
6 spoken with opposing counsel -- I think that should come  
7 out. In other words, they have stipulated that the clinic  
8 is liable for the conduct of the dentists. The jury, if  
9 they're going to find clinic liability, it's for some  
10 other reasons, not for vicarious liability. We will ask  
11 the Court to enter a judgment against the clinic if we get  
12 findings against the dentists based on the stipulation,  
13 but I think the whole point of that stipulation was to  
14 avoid the jury evaluating the clinic's conduct based on  
15 the dentist's conduct, so that when -- if we get a finding  
16 that it was the clinic on any of these issues, it's  
17 separate and apart from vicarious liability. And so as I  
18 read the stipulation, it's telling the jury you should  
19 impose vicarious liability. You should -- anything the  
20 dentists did, you should find is the clinic's  
21 responsibility, and I think that would be sort of the  
22 opposite of what I believe we were all trying to  
23 accomplish in the way we were doing it.

24 THE COURT: Okay, what does defendant's counsel  
25 say about that because again this is something that we

1 talked about at the -- I can't remember whether that was  
2 Sunday or that was something we talked about yesterday. I  
3 think it actually was yesterday and Sunday.

4 So is it your position that what I have listed  
5 under stipulation of facts, and I did one as a  
6 stipulation, but one was more as an instruction, that that  
7 should come out of the verdict sheet?

8 Mr. HULSLANDER: I'm personally fine with it out  
9 of the verdict sheet. I'm fine with it out of the verdict  
10 sheet.

11 THE COURT: Okay. Dennis?

12 Mr. FIRST: I don't have any interest in that,  
13 so that's why I'm --

14 THE COURT: Mr. Stevens?

15 Mr. STEVENS: Looking for it, Judge.

16 THE COURT: It's on Page 11.

17 Ms. MARANGAS: Thank you, your Honor.

18 Mr. STEVENS: Okay with us that it's out.

19 THE COURT: Okay. The shorter the better.

20 Mr. FRANKEL: That's all I have, your Honor.

21 THE COURT: All right. Mr. First?

22 Ms. MEYERS: Your Honor, if I may approach?

23 THE COURT: Yes, you may.

24 Ms. MEYERS: With respect to the charge, the Old  
25 FORBA defendants would take exception first to P.J.I. 1:41

1 weighing testimony. The Court has omitted sections of  
2 that charge, and we would take the position that those  
3 sections should be in. We take exception with that.  
4 Specifically the portion: "You bring with you to this  
5 courtroom all of the experience and background of your  
6 lives. In your everyday affairs you decide for yourself  
7 the reliability or unreliability of things people tell  
8 you." And also at the end starting with "if it appears  
9 that there's a discrepancy in the evidence."

10 THE COURT: Okay. Before we go on, as I told  
11 counsel before, because of the length of the argument  
12 today and the charges and my general view is that the jury  
13 should focus on the substantive provisions, I tend to  
14 exclude parts of the boilerplate clauses. I recognize  
15 that the P.J.I. has them in there. Does everyone else  
16 take that same position, that they want me to include  
17 that, because technically, Ms. Meyers, you're correct; it  
18 is part of the P.J.I., but I think sometimes you want the  
19 jury to focus on the substantive piece and by the time we  
20 get there... So is there a consensus that I should put  
21 that in? Anyone else want that in?

22 Mr. HULSLANDER: Yes, Judge.

23 THE COURT: It's going in.

24 Mr. HULSLANDER: Not just 141. You've taken  
25 stuff out of all the standard charges that I think all



1       should go in. The P.J.I. Committee puts a lot of time  
2       into these and every judge reads them and I think they  
3       should be read.

4               THE COURT: All right. I understand. Okay.

5               Ms. MEYERS: We would also take that position.  
6       In terms of the adverse inference charge, we would take  
7       exception to the charge in total, and as we stated in our  
8       motion paper, we feel that it's highly prejudicial to the  
9       Old FORBA defendants and I won't reiterate those arguments  
10      because they've been made on the record already, but we  
11      would take exception to that charge.

12              Mr. HULSLANDER: Judge, don't we have an  
13      agreement on that, that that shouldn't be -- there was no  
14      discussion at all about the form issue --

15              THE COURT: Well, we tried to reach an agreement  
16      with respect to that yesterday but the defendants declined  
17      to accept the terms of the proposed --

18              Mr. HULSLANDER: Mr. Leyendecker did --

19              THE COURT: -- the terms of the proposed  
20      agreement.

21              Mr. FIRST: I told Kevin yesterday that would be  
22      fine. He may not have translated that to your Honor.

23              Mr. LEYENDECKER: No, you said you'd think  
24      about. In typical Dennis fashion, "Let me think about it.  
25      Let me think about it." That's what I heard from you;

1 I'm sorry. If you wanted --

2 Mr. FIRST: That's not so.

3 Mr. LEYENDECKER: That's what you said: "Let me  
4 think about it," in typical Dennis fashion. "Let me think  
5 about it."

6 Mr. HULSLANDER: There was no discussion at all  
7 about performance review in summations. None.

8 Mr. LEYENDECKER: Take it out, okay? Fair  
9 enough. Kevin makes a reasonable point. But let's be  
10 clear, you didn't say --

11 Mr. FIRST: I did.

12 Mr. LEYENDECKER: You didn't.

13 THE COURT: Nobody notified the Court. That was  
14 a subject of a discussion yesterday. Everybody knew I was  
15 working on the charge last night. I was getting e-mails.  
16 I think Mr. Higgins sent one at 3-something. I was asleep  
17 for that one, but the e-mails were coming back and forth  
18 all night long from all of you guys with respect to the  
19 charges and the verdict sheet and nobody told me that.  
20 Okay.

21 Mr. HULSLANDER: So is it out?

22 THE COURT: It's out.

23 Ms. MARANGAS: Thank you, your Honor.

24 Ms. MEYERS: Thank you. With respect to the  
25 burden of proof charge, I recognize that the 1:23 charge

1 is in there but defendants also requested the burden of  
2 proof, clear and convincing evidence charge also be  
3 included based upon the battery cause of action, which in  
4 this particular case, the basis is fraud; the G.B.L.  
5 claims and the punitive damages claims, so we would take  
6 exception to the omission of that charge.

7 With respect to the General Business Law, we  
8 would take exception to referring to the plaintiff as  
9 simply Jeremy. We'd ask that his full name or plaintiff  
10 be inserted.

11 We take exception to the charge in total and  
12 also we would ask that the portion starting with "a  
13 deceptive act or practice," is a representation or failure  
14 to disclose a fact as likely to mislead a reasonable  
15 consumer acting reasonably under the circumstance, the  
16 element of consumer-oriented conduct does not require  
17 plaintiff to show that defendant committed the deceptive  
18 act repeatedly to plaintiff or other consumers. Plaintiff  
19 instead must demonstrate the act or practice had a broader  
20 impact on consumers at large," we would ask that that not  
21 be read --

22 THE COURT: Is that not a correct statement of  
23 the law --

24 Ms. MEYERS: Well, the charge 225, if you look  
25 at that charge, what should be read to the jury is the

1 elements of the law, which you have in there. We don't  
2 take exception to that, and then how the facts of this  
3 case apply to the elements of the law, so I would -- we  
4 would object to that additional language in there.

5 And I would note that the defendants have  
6 requested and marked as an exhibit a request on this  
7 charge, so we would ask that it be charged as defendants  
8 had requested.

9 And this, unless the Court would like me to go  
10 through each one, in each one of the battery, the General  
11 Business Law and in the negligence per se and negligence  
12 charges, there's a section charging on concerted action.  
13 We would take exception to that.

14 THE COURT: I believe that was in your proposed  
15 charge, that that be included -- I take that back.

16 Ms. MEYERS: That was not in our proposed --

17 THE COURT: You had some proposed language in  
18 those charges that --

19 Ms. MEYERS: Yes, the concerted action. First  
20 of all, I think we would take the position that it  
21 misstates the law.

22 THE COURT: You had language that a person or  
23 entity also may be liable for violation of General  
24 Business Law 349, using that as an example where such  
25 person or entity encouraged the violation and such

1 encouragement was a substantial factor in the cause of...

2 Ms. MEYERS: I believe that's the aiding and  
3 abetting language that the P.J.I. provides for, but the  
4 concerted action language that's in here is not from a  
5 standard charge. I believe it was crafted -- a suggestion  
6 of the plaintiffs, a modification of the charge by the  
7 plaintiffs which has been adopted by the Court, and again  
8 we would take exception to that language as we feel it  
9 misstates the law.

10 In addition, that it's not appropriate in the  
11 General Business Law, under General Business Law, as well  
12 as its placement. They're charged twice on concerted  
13 action. You have it in both under the General Business  
14 Law and then you have a separate section of it, so we take  
15 exception and object to that as well.

16 With respect to the battery charge, again, we  
17 would take exception to that charge in total, and more  
18 specifically, I think a portion of this has been covered  
19 by Mr. Frankel. I understand that the Court is going to  
20 be omitting the proposed language or that defendant  
21 provided insufficient information upon which Jeremy's  
22 parents could have formulated an intelligent consent.  
23 Defendants would, just for the record, object to that  
24 language and take exception to it.

25 THE COURT: It's out.

1 Ms. MEYERS: Okay. And then also in that same  
2 paragraph, by performing dental procedures on plaintiff  
3 without the consent of his parents, in this particular  
4 case, the claim is not that it was without the consent of  
5 his parents but that the consent was fraudulently  
6 obtained, so I would submit that that language -- we take  
7 exception to that language as not being appropriate.

8 Again, the same issue arises in the battery with  
9 the concerted action. We would take exception to that.  
10 It's Paragraph 3 of the Court's proposed charge.

11 Going back to our exception on the language,  
12 that the procedures were performed without the consent of  
13 the parents, in Paragraph 4, the Court also states Dr.  
14 Bonds committed a battery by performing dental procedures  
15 on him without the consent of his parents and that the  
16 consent forms and statements presented to his parents were  
17 false; we would take exception with that and would request  
18 that that language be stricken and not read.

19 With respect to the paragraph where the Court  
20 sets forth the defendant's position, I note that some of  
21 our proposed changes were made but we had also requested  
22 that the Court charge that defendants claim that they  
23 appropriately advised Jeremy's parents, not just that  
24 claim they advised Jeremy's parents of the risk for the  
25 dental treatment provided and Jeremy's parents consented

1 to the treatment. Again, I note in that paragraph as well  
2 as all the paragraphs where Jeremy's name is used, but we  
3 would take exception to not utilizing the word  
4 "appropriate" as we submitted it should be utilized there.

5 In Paragraph 7, the last paragraph of the  
6 battery charge, it reads, "if you find the defendants New  
7 FORBA or Old FORBA encouraged such battery or acted in  
8 concert, then you will find that Old FORBA are also  
9 liable." I would submit that should read, "If you find  
10 the defendants New FORBA or Old FORBA encouraged such  
11 battery and such encouragement was a substantial factor in  
12 causing the battery, then you will find." That is the  
13 language for aiding and abetting that's set forth in the  
14 P.J.I., and I believe actually that's the language that's  
15 used by the Court later in the charge, but again we would  
16 take exception to the omission of the phrase, "such  
17 encouragement was a substantial factor in causing the  
18 battery."

19 With regard to the negligence per se charge,  
20 which is modeled after P.J.I. 2:25, we would take  
21 exception to the charge in total and also to the ruling,  
22 and we would also take exception and object to the Court  
23 charging that as a matter of law Old -- that Old FORBA  
24 violated Limited Liability Company Section 1203 because  
25 Old FORBA was the true owner. We would ask that it just

1 state owner of the Syracuse clinic.

2 The limiting instruction that the Court has  
3 indicated it will give on the A.A.P.D. guidelines, the  
4 Court has indicated and I think correctly that it will  
5 charge the jury that the violation of those guidelines do  
6 not establish proof of malpractice. We would ask that the  
7 Court include language that "the instructions are  
8 guidelines and not standards of care."

9 With respect to the comparative faults, and  
10 specifically reckless disregard charge, 2:275.2, we would  
11 take exception with the omission that the plaintiff has  
12 the burden of proving by a preponderance of the evidence  
13 that the plaintiff's burden should be set forth.

14 THE COURT: That is in the standard charge, but  
15 because plaintiff is the only party with a burden of  
16 proof, and I have burden of proof separately stated in  
17 here, are you asking me -- in some places you don't want  
18 me to duplicate but in other places you do, so... but it  
19 is in the standard charge, so I'm going to include it.

20 Ms. MEYERS: On the duplication issue, it's also  
21 because it misstates the law, which actually brings us to  
22 the concerted action charge, which is modeled after  
23 2:275.3 and modified from that charge. We would again  
24 take exception to the charge in total. We feel it  
25 misstates the law and we would also, for the reasons



1       stated by Mr. First, take issue and exception with the  
2       jury being charged that the individual defendants if they  
3       participated in a common plan or further such plan by  
4       requesting assistance or encouraging the violation, they  
5       would be liable. As we've placed on the record, we feel  
6       that it's not their participation in the acts but that  
7       their individual act should be what is considered by the  
8       jury and whether they individually were negligent, not if  
9       they were participating, and so we would take exception to  
10      that language.

11               THE COURT: Isn't that concerted action? I mean  
12      if you basically say unless they-- there's no such thing  
13      as concerted action? If you're telling me they violated,  
14      what do we need concerted action for?

15               Ms. MEYERS: You can have -- first of all, they  
16      would have to find that they actually -- they engaged in a  
17      tort. A concerted action, a person is engaging in a tort.  
18      You're just asking if participation --

19               THE COURT: You're asking me to charge that they  
20      violated the statute instead of that they were part of  
21      this scheme here, and I'm saying to you if they violated  
22      the statute, what do we need concerted action for? Why is  
23      there a separate claim? Are you saying there is no such  
24      thing as a concerted action claim?

25               Ms. MEYERS: I think that the Court is

1       misunderstanding our argument. The liability of these  
2       defendants is for their own individual acts. It's not if  
3       Old FORBA committed a tort and they were participating in  
4       Old FORBA's -- in Old FORBA's acts that they are liable.  
5       It's their own individual acts. And I would submit if you  
6       don't need concerted action -- if concerted action  
7       liability and participation are one and the same, then --  
8       the Court -- I would read from this -- thinks they're two  
9       different things because they're charged two different  
10      ways. But again, I would submit and I will mark it as an  
11      exhibit the case law that we cited in the e-mail that we  
12      had sent to you, in taking exception and objection to this  
13      language, they sent -- I believe it was on maybe  
14      yesterday, but I would respectfully disagree with the  
15      Court. I think they should be charged individually.

16                   THE COURT: Okay.

17                   Ms. MEYERS: With respect to P.J.I. Section 284,  
18      damages for personal injury, shock, emotional distress and  
19      physical consequences thereof, the defendants take  
20      exception to that charge being given. With regard to  
21      Section 2:262, defendants take exception to that charge  
22      being given as well. It's vicarious responsibility of the  
23      family relationship covered by infant. That charge and  
24      defendant's position is appropriate where there's some  
25      evidence, or the Court is permitting some evidence of the

1 child's negligence and you're instructing don't look at  
2 the parents' negligence, even if they may have had some.  
3 I submit that the defendants have been precluded from  
4 offering any such evidence and this charge is unnecessary  
5 and is inappropriate.

6 THE COURT: I think there were some rulings that  
7 the defendants were precluded from doing it. But I don't  
8 think that meant that they didn't.

9 Anything else?

10 Ms. MEYERS: Yes. The damages for the punitive  
11 damages, I note that as well that there's been a  
12 modification by the Court and we would take exception to  
13 that. It's specifically an omission. Omission, from  
14 that standard --

15 THE COURT: Are you saying that should be  
16 included --

17 Ms. MEYERS: Not that section. There's another  
18 section and I will have to pull the P.J.I. There's a  
19 section that's been omitted from this standard charge.

20 And I'll turn it over to my co-defendants.  
21 Thank you, your Honor.

22 THE COURT: New FORBA?

23 Mr. HULSLANDER: I'm going to incorporate her  
24 objections. Also, I think the G.B.L. should be, should go  
25 in under the clear and convincing evidence --

1 THE COURT: Do you have a case that supports  
2 that?

3 Mr. HULSLANDER: What?

4 THE COURT: Do you have any case law that  
5 supports that position?

6 Mr. HULSLANDER: No, but it's obvious from the  
7 P.J.I. that the G.B.L. is a fraud statute; it's within the  
8 fraud provision, and fraud is by clear and convincing  
9 evidence. And it says deceptive act, and deceptive act,  
10 that's fraud. Now, you've got to establish fraud  
11 everywhere in this country by clear and convincing  
12 evidence, so, you know, I think it doesn't take any kind  
13 of leap at all to conclude that it needs to be proven by  
14 clear and convincing evidence.

15 I also believe that --

16 THE COURT: You think there are cases, Mr.  
17 Hulslander, that say 349 does not require clear and  
18 convincing evidence, so that's why I'm asking if you have  
19 a case to see something contrary to the case that the  
20 Court saw, I would be happy to consider it.

21 Mr. HULSLANDER: I also think punitive damages  
22 should go by the standard of clear and convincing  
23 evidence. I note there's a dispute among the departments  
24 about that but I ask that that be included as well.

25 I know that you've confirmed that you're going

1 to read the standard P.J.I. with all the boilerplate, but  
2 there's also standard P.J.I. for pain and suffering, and I  
3 would hope you would read the entire pain and suffering  
4 charge. You deleted the part where it said the plaintiff  
5 needed to be aware of the pain and suffering and I think  
6 that charge should be given.

7 The -- certainly the limiting instruction with  
8 respect to the A.A.P.D., that needs to be stated very  
9 clearly that it's not the standard of care. You've let  
10 the guidelines in, reference to the guidelines in, and  
11 certainly they can be considered but they're not standard  
12 care, and the jury should be told that they're not  
13 standard of care. That's what the guidelines say.

14 I think the conclusion, standard boilerplate  
15 conclusion charge, all this should be read to the jury.  
16 And I understand that you're going to read the entire  
17 exclusivity charge as well as the other. Thank you.

18 THE COURT: Mr. Stevens.

19 Mr. STEVENS: Thank you, your Honor. We adopt  
20 the general objections and the line objections made by Ms.  
21 Meyers and Mr. Hulslander. We agree with Mr. Hulslander  
22 that the burden of proof for the G.B.L. should be fraud,  
23 although there's some case law that doesn't use the  
24 term -- the case law is not based on the case where fraud  
25 is being claimed as in this case. This case -- the Court

1 refused to tell the jury that there has been a withdrawal  
2 of the claims that were announced at the beginning of the  
3 case, and since there is no fraud it should be the clear  
4 and convincing standard and we believe it's the same as  
5 punitive. We would like to offer as a court exhibit the  
6 various advice to the Court in the form of an e-mail that  
7 went out last night and we'll provide a package of it if  
8 it pleases the Court. Would that be all right?

9 THE COURT: Certainly.

10 Mr. STEVENS: And we also object to the punitive  
11 damages of liability charges against Drs. Aman, Bonds and  
12 Khan as being inappropriate for them, and we separately  
13 object to the punitive damages, damages question, which  
14 would have required a hearing as to those individuals and  
15 there's been no evidence --

16 THE COURT: I'm going to interrupt for one  
17 second there because, you know, I have worked really hard  
18 with you guys over the last few weeks and you guys have  
19 done a really good job responding when I asked for things  
20 but I can't just sit here and say -- let you guys tell me  
21 that I should be doing things differently when I have  
22 repeatedly asked for material. The first time this issue  
23 came up with having punitive damages, which have always  
24 been in this case, was Sunday evening that somebody said  
25 to me that they didn't think that the issue of punitive

1 damages should go to the jury at that time. Proof was  
2 already done at that point.

3 The same thing with these references to what the  
4 case law should say. When I asked the counsel to try to  
5 get together to try to have for me a verdict sheet or jury  
6 charges, I asked for that before trial started and yes, I  
7 did get some material before trial started. I asked  
8 counsel repeatedly to work together to try to make this  
9 process more -- to go more smoothly. I don't know how you  
10 expect that the landscape to keep changing and keep  
11 raising new issues every day, that the Court is going to  
12 deal with those. So there are a lot of issues that you  
13 guys are raising now that have not been raised and I just  
14 want the record to reflect that as well.

15 Mr. STEVENS: Thank you. And we did want to  
16 make efforts to make this case go more smoothly when we  
17 submitted a sequencing motion which would have done just  
18 that.

19 THE COURT: And when was that sequencing motion  
20 submitted to the Court, Mr. Stevens?

21 Mr. STEVENS: Prior to jury selection.

22 THE COURT: But how much prior to jury  
23 selection? Days. Days before jury selection. There were  
24 a lot of issues that could have been dealt with in this  
25 case had parties made -- you know how to inundate me with

1 paper. I can't tell you the number of motions that I've  
2 gotten. How many motions in limine, a week before trial,  
3 also? 47, 74, I don't even remember what the number was,  
4 and I get it, but if you guys want me to decide certain  
5 things and you want the right result, which is what I want  
6 to try to do, you ought to be thinking about that before  
7 you submit new things, and again, you're standing here,  
8 Mr. Stevens. This is not just directed to you; it's  
9 directed to plaintiffs; it's directed to all the  
10 defendants.

11 I get this is an important case. You guys  
12 have -- I'm sure clients have spent millions of dollars in  
13 defending this case and in prosecuting this case, yet you  
14 want me to be able -- in years, you want me to make  
15 decisions in the space of three weeks on virtually every  
16 issue in this case. And I -- as I said to you previously,  
17 I'm one person and I have one law clerk.

18 Mr. STEVENS: I believe the motion was timely  
19 submitted, your Honor.

20 Ms. MARANGAS: Your Honor, with all due respect,  
21 the sequencing motion was filed August 19, 2013, and jury  
22 selection began on September 16th.

23 THE COURT: When was it returnable?

24 Ms. MARANGAS: September 11th, at the same time  
25 as the motions in limine set by the Court. Thank you,



1 your Honor.

2 Mr. STEVENS: Thank you.

3 THE COURT: Court is going to recess for five  
4 minutes.

5 Ms. MEYERS: One additional thing. Old FORBA  
6 would join in their exceptions and objections and I also  
7 note that the defendants had requested the P.J.I. charge  
8 on intentional torts factor opinion 3:20.1 and we object  
9 to that not being included.

10 (Whereupon, a short recess was taken at  
11 1:13 p.m.)

12 THE COURT: Are we ready for the jury to come in  
13 for the charge?

14 While we're waiting for some of the jurors to  
15 come back up, it's obviously 1:30 now. I'm going to be  
16 done with my charge by 2, for sure. What is your pleasure  
17 in terms of -- I want to give the jury some idea of what  
18 they can expect in terms of how long to deliberate today.  
19 I think, given the length of the verdict sheet and the  
20 charge, it's unlikely that they'll get through the thing.  
21 I don't want to put pressure on them, but I'm not going to  
22 be able to keep everybody here very late. What do you  
23 guys think?

24 Mr. HULSLANDER: Can you keep them until 5?

25 THE COURT: I can keep them until 5. I think I

1 can.

2 Mr. STEVENS: Thank you.

3 THE COURT: I did not give them any heads-up  
4 about that, though.

5 Mr. HIGGINS: Are you going to give them the  
6 choice or are you going to say "you can stay until 5 if  
7 you like or it's up to you" or whatever?

8 Mr. LEYENDECKER: I think 5 is fine, as long as  
9 they don't have any other commitment. You should give  
10 them whatever discretion they have or want.

11 Mr. HULSLANDER: I'll go with that.

12 Mr. FIRST: That's fine.

13

14 (Whereupon, the jury was then brought back into  
15 the courtroom)

16

17 THE COURT: All right. Last thing before you  
18 start your deliberations.

19 I want to start by thanking you. You guys have  
20 been incredibly attentive throughout this whole trial.  
21 You've all been timely but for one exception, and I'm just  
22 really pleased, given the length of this trial, with the  
23 attention that you've shown, the respect that you've shown  
24 the counsel, and for paying attention throughout the  
25 trial.

1 I also want to take this time to thank the  
2 lawyers. A lot of lawyers here, a lot of paper, and the  
3 lawyers have done an incredible job representing their  
4 clients. They have been prepared; they have been  
5 respectful of the Court and of your time, being here on  
6 time, working with me in the evenings to try to ensure  
7 that things go smoothly and we don't waste a lot of your  
8 time. So on behalf of the Court, I want to thank the  
9 lawyers as well for all their efforts in this case.

10 So we now come to that part of the trial where  
11 you're instructed on the law applicable to this case,  
12 after which you will retire for your final deliberations.

13 You've heard all the evidence that was  
14 introduced by the parties, and through argument of their  
15 attorneys, you have learned the conclusions which each  
16 party believes should be drawn from the evidence that was  
17 presented to you.

18 A lawsuit is a civilized method of determining  
19 differences between people. It is basic to the  
20 administration of justice that the decision on both the  
21 law and facts be made fairly and honestly.

22 You as the jurors and I as the Court have a  
23 heavy responsibility, to ensure that a just result is  
24 reached in deciding the differences between the plaintiff  
25 and the defendants in this case. As I told you in my

1 opening charge, as jurors, your fundamental duty is to  
2 decide from all of the evidence that you've heard and the  
3 exhibits that have been received into evidence what the  
4 facts are. You are the sole, exclusive judges of the  
5 facts. In that field, you are supreme and neither I nor  
6 anyone else may invade your province.

7 Together, as the sole judges of the facts, you  
8 must decide which of the witnesses you believed, what  
9 portions of their testimony you accept, and what weight  
10 you give to it.

11 On the other hand, and with equal emphasis, I  
12 charge you that you are required to accept the law as I  
13 give it to you in this charge and in any instructions as I  
14 gave them to you during the course of this trial. Whether  
15 you agree with the law as given to you by me or not, you  
16 are bound by it. You're not to ask anyone else about the  
17 law; you should not consider or accept any advice about  
18 the law from anyone else but me.

19 As I told you in my opening charge, the process  
20 by which you reach a verdict is, first, decide from all of  
21 the evidence, testimony and exhibits what the facts are  
22 and, second, to apply the law as I give it to you to the  
23 facts as you have decided them to be. The conclusion thus  
24 reached will be your verdict. Your verdict will be in the  
25 form of answers to written questions which I will submit

1 to you.

2 In reaching your verdict, you're not to be  
3 affected by sympathy for any of the parties, what the  
4 reaction of the parties or the public to your verdict may  
5 be, whether it will please or displease anyone, be popular  
6 or unpopular or indeed any consideration outside the case  
7 as it has been presented to you in this courtroom.

8 You should only consider the evidence, both the  
9 testimony and exhibits, from the facts and find the facts  
10 from what you consider to be the believable evidence, and  
11 apply the law as I now give it to you.

12 Your verdict will be determined by the  
13 conclusion you reach, no matter whom the verdict helps or  
14 hurts.

15 In deciding this case, you may consider only the  
16 exhibits which have been admitted into evidence and the  
17 testimony of the witnesses as you have heard it in this  
18 courtroom or was shown to you on video or read to you from  
19 examinations under oath before trial.

20 Under our rules of practice, an examination  
21 before trial is taken under oath and is entitled to equal  
22 consideration by you, notwithstanding the fact that it  
23 was taken before the trial and outside the courtroom.

24 However, arguments, remarks and summations of  
25 the attorneys are not evidence, nor is anything that I say

1 to you now or have said to you with regard to the facts  
2 evidence.

3 At times during this trial, I have sustained  
4 objections to questions asked without allowing a witness  
5 to answer them or where an answer was made instructed that  
6 it be stricken from the record and that you disregard it  
7 and dismiss it from your minds. You may not draw any  
8 inference or conclusion from my rulings or from any  
9 unanswered question or from testimony which has been  
10 stricken from the record in reaching your verdict.

11 The law requires that your decision be based  
12 solely upon the evidence before you. Such items as I have  
13 excluded from your consideration were excluded because  
14 they were not legally admissible.

15 The law does not however require that you accept  
16 all the evidence I admit. In deciding what evidence you  
17 will accept, you must make your own evaluation of the  
18 testimony given by each of the witnesses and decide how  
19 much weight you choose to give to that testimony. The  
20 testimony of a witness may not conform to the evidence or  
21 to the facts as they occurred because he or she is  
22 intentionally lying, because the witness did not  
23 accurately see or hear what he or she is testifying about,  
24 because the witness's recollection is faulty or because  
25 the witness has not expressed himself or herself clearly

1 in testifying.

2           There is no magical formula by which you  
3 evaluate testimony. You bring with you to this courtroom  
4 all the experience and background of your lives. In your  
5 every day affairs, you decide for yourself the reliability  
6 or unreliability of things people tell you. The same  
7 tests that you use in your every day affairs are the tests  
8 which you apply during your deliberations.

9           The interest or lack of interest of any witness  
10 in the outcome of this case, the bias or prejudice of a  
11 witness if there be any, the age, the appearance, the  
12 manner in which the witness gives testimony on the stand,  
13 the opportunity the witness had to observe the facts about  
14 which he or she testified, the probability or  
15 improbability of a witness's testimony when considered in  
16 the light of all of the other evidence in the case are all  
17 items to be considered by you in deciding how much weight  
18 if any you are to give to that witness's testimony.

19           If it appears there is a discrepancy in the  
20 evidence, you will have to consider whether the apparent  
21 discrepancy can be reconciled by fitting the two stories  
22 together. If however that's not possible, you will then  
23 have to decide which of the conflicting stories you  
24 accept.

25           If you find that any witness has willfully

1 testified falsely as to any material fact, that is as to  
2 an important matter, the law permits you to disregard  
3 completely the entire testimony of that witness upon the  
4 principle that one who testifies falsely about one  
5 material fact is likely to testify falsely about  
6 everything. You are not required, however, to consider  
7 such a witness as totally unbelievable. You may accept so  
8 much of his or her testimony as you deem true and  
9 disregard what you feel is false.

10 By the processes by which I have just described  
11 to you, you as the sole judges of the facts decide which  
12 of the witnesses you believe, what portion of their  
13 testimony you accept, and what weight you will give to it.

14 Now, facts must be proved by evidence. Evidence  
15 includes the testimony of a witness concerning what the  
16 witness saw, heard, or did. Evidence also includes  
17 writings, photographs, or other physical objects which may  
18 be considered as proof of a fact. Evidence can be direct  
19 or circumstantial. Facts may be proved by either direct  
20 or circumstantial evidence or a combination of both. You  
21 may give circumstantial evidence less weight, more weight,  
22 or the same weight as direct evidence.

23 Direct evidence is what a witness saw, heard or  
24 did, which if believed by you, proves a fact.

25 Circumstantial evidence is evidence of a fact which does



1 not directly prove a fact in dispute but which permits a  
2 reasonable inference or conclusion from the facts that  
3 exist. Those facts which form the basis of an inference  
4 must be proved, and the inference to be drawn must be one  
5 that may be reasonably drawn.

6 The plaintiff, Jeremy Bohn, and defendants  
7 Daniel E. DeRose, Edward J. DeRose, Adolph R. Padula,  
8 William A. Mueller, Naveed Aman, Koury Bonds, and Yaqoob  
9 Khan testified before you. As parties, they are  
10 interested witnesses. An interested witness is not  
11 necessarily less believable than a disinterested witness.  
12 The fact that a witness is interested in the outcome of  
13 this case does not mean that he or she has not told the  
14 truth. It is for you to decide from the demeanor of the  
15 witnesses on the stand and such other tests as your  
16 experience dictates whether or not the testimony has been  
17 influenced intentionally or unintentionally by the  
18 witness's interest.

19 You may, if you consider it proper under all of  
20 the circumstances, not believe the testimony of such a  
21 witness, even though it is not otherwise contradicted or  
22 challenged.

23 However, you are not required to reject the  
24 testimony of such a witness and may accept all or such  
25 part of that testimony as you find reliable and reject

1 such part as you find unworthy of acceptance.

2 You will recall that the witnesses Dr. Cynthia  
3 Slack, George J. Cisaeros, and Martin Davis testified  
4 concerning their qualifications as experts in their field  
5 of dentistry and gave opinions concerning issues in this  
6 case.

7 When a case involves a matter of science or art,  
8 or requires special knowledge or skills not possessed by  
9 the ordinary, average person, an expert is permitted to  
10 state his or her opinion for the information of the Court  
11 and jury. The opinion stated by the experts who testified  
12 before you were based on particular facts as the experts  
13 obtained knowledge of them and testified to them before  
14 you, or as the attorneys who questioned the experts asked  
15 them to assume. You may reject an expert's opinion if you  
16 find the facts to be different from those which formed the  
17 basis for the opinion. You may also reject the opinion  
18 if, after consideration of all the evidence in the case,  
19 expert and other, you disagree with the opinion. In other  
20 words, you're not required to accept an opinion of an  
21 expert to the exclusion of the facts and circumstances  
22 disclosed by other testimony.

23 Such an opinion is subject to the same rules  
24 concerning reliability as the testimony of any other  
25 witness. It is given to assist you in reaching a proper

1 conclusion; it is entitled to such weight as you find the  
2 expert's qualifications in the field warrant and must be  
3 considered by you but is not controlling upon your  
4 judgment.

5 During the trial, I allowed the parties to use  
6 various exhibits solely for demonstrative purposes. Those  
7 exhibits are not in and of themselves evidence but were  
8 permitted for the limited purpose of illustrating and  
9 understanding the testimony of that witness.

10 In this case, the burden of proof rests on the  
11 plaintiff. That means it must be established by a  
12 preponderance of the evidence, of the credible evidence,  
13 that the claim plaintiff makes is true.

14 The credible evidence means the testimony or  
15 exhibits that you find worthy to be believed.

16 A preponderance of the evidence means the  
17 greater part of the evidence. That does not mean the  
18 greater number of witnesses or the greater length of time  
19 taken by either side. The phrase refers to the quality of  
20 the evidence, that is its convincing quality, the weight  
21 and effect that it has on your minds.

22 The law requires that in order for the plaintiff  
23 to prevail on a claim, the evidence that supports the  
24 claim must appeal to you as more nearly representing what  
25 took place than the evidence opposed to the claim. If it

1 does not or if it weighs so evenly that you're unable to  
2 say that there is a preponderance on either side, you must  
3 decide the question in favor of defendants. It is only if  
4 the evidence favoring plaintiff's claim outweighs the  
5 evidence opposed to it that you may find in favor of  
6 plaintiff.

7 Plaintiff seeks to recover damages he claims  
8 were caused by a violation of General Business Law Section  
9 349 by the defendants. Plaintiff claims that defendants  
10 failed to comply with and thus violated General Business  
11 Law Section 349.

12 In order to recover for a violation of General  
13 Business Law Section 349, plaintiff must prove that  
14 defendants engaged in consumer-oriented conduct that was  
15 materially misleading that caused plaintiff injury.

16 A deceptive act or practice is a representation  
17 or a failure to disclose a fact that is likely to mislead  
18 a reasonable consumer acting reasonably under the  
19 circumstances.

20 The element of a consumer-oriented conduct does  
21 not require plaintiff to show that a defendant committed  
22 the deceptive act repeatedly to plaintiff or to other  
23 consumers. Plaintiff instead must demonstrate that the  
24 act or practice has a broader impact on consumers at  
25 large.

1           A person or entity may be liable for violation  
2           of General Business Law Section 349 where such person or  
3           entity acts in concert with the persons committing a  
4           violation of General Business Law Section 349. Two or  
5           more persons or entities act in concert when they actively  
6           take part in a common plan or further such plan by  
7           cooperating with one another or by requesting assistance  
8           or encouraging the other's actions.

9           A person or entity also may be liable for  
10          violation of General Business Law Section 349 where such  
11          person or entity encouraged the violation and such  
12          encouragement was a substantial factor in causing the  
13          violation.

14          In this action, plaintiff seeks damages for  
15          battery. A person who intentionally touches another  
16          person without that person's consent and causes an  
17          offensive bodily contact commits a battery and is liable  
18          for all damages resulting from that act.

19          Intent involves the state of mind with which an  
20          act is done. The intent required for battery is intended  
21          to cause a bodily contact that a reasonably similarly  
22          situated person would find offensive. An offensive bodily  
23          contact is one that is done for the purpose of harming  
24          another or one that offends a reasonable sense of personal  
25          dignity or one that is otherwise wrongful.

1           A person or entity may also be held liable in  
2 battery based on concerted action where such person or  
3 entity acts in concert with a person or persons committing  
4 the battery. Two or more persons act in concert when they  
5 actively take part in the common plan or further such plan  
6 by cooperating with one another or by requesting  
7 assistance or encouraging the other's actions.

8           A person or entity also may be liable for a  
9 battery where such person or entity encouraged the battery  
10 and such encouragement was a substantial factor in causing  
11 the battery.

12           Plaintiff claims that Dr. Bonds committed a  
13 battery by performing dental procedures on him without the  
14 consent of his parents and that the consent forms and  
15 statements presented to his parents were false and that  
16 any consent obtained from his parents were fraudulently  
17 obtained and was therefore no consent at all.

18           Plaintiff claims that defendants New FORBA and  
19 Old FORBA encouraged such battery and such encouragement  
20 was a substantial factor in causing the battery.

21           Plaintiff also claims that defendants New FORBA  
22 and Old FORBA engaged in concerted action as to the  
23 alleged battery committed by Dr. Bonds.

24           Defendants deny that they committed a battery on  
25 plaintiff. They claim that they advised plaintiff's

1 parents of the risks and benefits of the dental treatment  
2 provided; the plaintiff's parents consented to the  
3 treatment, and therefore consent was given. Defendants  
4 further deny that any contact they had with plaintiff was  
5 harmful or offensive. They further deny that they  
6 encouraged or otherwise engaged in any concerted action to  
7 commit battery.

8 I instruct you that intent to harm is not  
9 required so long as the act was done with intent to make  
10 the contact and the contact was offensive or so long as  
11 the defendant or defendants intended to make a contact  
12 that a reasonable person would find offensive. Consent,  
13 if not fraudulently obtained, is a full defense to a claim  
14 of battery.

15 If you find the defendant Dr. Bonds committed a  
16 battery by performing dental procedures on plaintiff  
17 without the consent of his parents or with the consent  
18 that was fraudulently obtained, then you will find Dr.  
19 Bonds committed battery.

20 If you find the defendants New FORBA or Old  
21 FORBA encouraged such battery or acted in concert to  
22 commit it, then you will find that New FORBA or Old FORBA  
23 are also liable to plaintiff for battery. If you find  
24 that Dr. Bonds performed dental procedures on plaintiff  
25 and the consent was not obtained by fraud or that the

1 contact was not offensive, then you will find the  
2 defendants did not commit a battery.

3 Limited Liability Company Law Section 1203  
4 states, "with respect to a professional service limited  
5 liability company formed to provide dental services, each  
6 member of such limited liability company must be licensed  
7 to practice dentistry in this state." The Court finds as  
8 a matter of law that Old FORBA violated Limited Liability  
9 Company Law Section 1203 because Old FORBA was the owner  
10 of the Syracuse clinic from the time it opened until  
11 September 26th, 2006.

12 The Court further finds as a matter of law that  
13 New FORBA violated Limited Liability Company Law Section  
14 1203 because New FORBA was the true owner of the Syracuse  
15 clinic from September 26th, 2006, through the date Jeremy  
16 was last treated at the clinic.

17 If you find that Old FORBA's violation of the  
18 Limited Liability Law was a proximate cause of injury to  
19 Jeremy, then Old FORBA is liable. If you find that New  
20 FORBA's violation of Limited Liability Law -- Limited  
21 Liability Company Law was a proximate cause of injury to  
22 Jeremy, then New FORBA is liable.

23 Negligence is the lack of ordinary care. It is  
24 a failure to use that degree of care that a reasonably  
25 prudent person would have used under the same



1        circumstances. Negligence may arise from doing an act  
2        that a reasonably prudent person would not have done under  
3        the same circumstances or, on the other hand, from failing  
4        to do an act that a reasonably prudent person would have  
5        done under the same circumstances.

6                Malpractice is professional negligence, and  
7        dental malpractice is the negligence of a dentist. Dental  
8        negligence is the failure to use reasonable care under the  
9        circumstances, doing something that a reasonably prudent  
10       dentist would not do under the circumstances, or failing  
11       to do something that a reasonably prudent dentist would do  
12       under the circumstances. It is a deviation or departure  
13       from accepted practice.

14               A dentist who renders dental service to a child  
15       is obligated to have that reasonable degree of knowledge  
16       and skill that is expected of an average dentist who  
17       renders dental treatment to a child in the medical  
18       community in which the dentist practices.

19               The law recognizes that there are differences in  
20       the abilities of dentists, just as there are differences  
21       in the abilities of people engaged in other activities.  
22       To practice dentistry, a dentist is not required to have  
23       extraordinary knowledge and ability that belongs to a few  
24       dentists of exceptional ability. However, every dentist  
25       is required to keep reasonably informed of new

1       developments in his or her fields and to practice  
2       dentistry in accordance with approved methods and means of  
3       treatment in general use.

4               A dentist may use his or her best judgment and  
5       whatever superior -- excuse me, a dentist must use his or  
6       her best judgment and whatever superior knowledge and  
7       skill he or she possesses, even if the knowledge and skill  
8       exceeds that possessed by the average dentist treating  
9       children in the community where the dentist practiced.

10              By undertaking to perform a dental service, a  
11       dentist does not guarantee a good result. The fact that a  
12       bad result -- that there was a bad result to the patient  
13       by itself does not make the dentist liable. The dentist  
14       is liable only if he was negligent.

15              Whether the dentist was negligent is to be  
16       decided on the basis of the facts and conditions existing  
17       at the time of the claimed negligence.

18              During this trial, I allowed into evidence  
19       certain portions of the guidelines of the American Academy  
20       of Pediatric Dentists. Violation of these guidelines does  
21       not establish proof of malpractice. However, the  
22       guidelines may be considered by you, together with all of  
23       the evidence on the issues in this case.

24              If the dentist is negligent and that is lacks  
25       the skill or knowledge required of him in providing a

1 dental service or fails to use reasonable care in  
2 providing the service or fails to use -- excuse me,  
3 exercise his or her best judgment, and such failure is a  
4 substantial factor in causing harm to the patient, then  
5 the dentist is responsible for the injury or harm caused.

6 If you decide the issue of negligence, the issue  
7 of Section 1203 violation, medical malpractice and/or  
8 General Business Law Section 349 in plaintiff's favor, you  
9 will be asked to determine whether the actions claimed  
10 were a proximate cause of Jeremy Bohn's injuries.

11 An act or omission is regarded as a cause of an  
12 injury if it was a substantial factor in bringing about  
13 the injury. That is if it had such an effect in producing  
14 the injury that reasonable people would regard it as a  
15 cause of the accident.

16 There may be more than one cause of injury. To  
17 be substantial, a cause cannot be slight or trivial. You  
18 may however decide that a cause is substantial even if you  
19 assign a relatively small percentage to it.

20 There may be more than one cause of an injury.  
21 Where the independent and negligent acts or omissions of  
22 two or more parties cause injury to another, each of those  
23 negligent acts or omissions is regarded as a cause of that  
24 injury, provided that it was a substantial factor in  
25 bringing about that injury.

1           If you find that more than one defendant is at  
2           fault, you must decide what part of the total fault each  
3           bears. In making that decision, you will weigh the degree  
4           of the fault of each defendant. Once you've considered  
5           all the facts and circumstances, you will decide what is a  
6           fair division of the fault of each defendant for causing  
7           Jeremy's -- plaintiff's injuries.

8           In your verdict, you will state the percentage  
9           of fault of each defendant. The total of those  
10          percentages must add up to 100.

11          In this case, plaintiff claims that not only the  
12          defendants were negligent but that the defendants acted  
13          with reckless disregard for the safety of others. A  
14          person or entity acts with reckless disregard for the  
15          safety of others when he intentionally or with gross  
16          indifference to the rights or safety of others engages in  
17          conduct that makes it probable that injury will occur.

18          Plaintiff has the burden of proving by a  
19          preponderance of the evidence that the defendant acted  
20          with reckless disregard for the safety of others.

21          Two or more persons act in concert when they  
22          actively take part in a common plan or further such plan  
23          by cooperating with one another or by one requesting  
24          assistance or encouraging the other's actions. If you  
25          find that Old FORBA violated General Business Law Section

1 349, is liable for battery, or was negligent, you are  
2 instructed that Daniel DeRose, Michael Rounph, William  
3 Mueller, Adolph Padula, Michael DeRose or Edward DeRose  
4 are liable for their respective violation if they actively  
5 participated in the common plan or furthered such plan by  
6 requesting assistance or encouraging the violation.

7 My charge to you on the law of damages must not  
8 be taken as a suggestion that you should find for the  
9 plaintiff. It is for you to decide on the evidence  
10 presented and the rules of law I have given you whether  
11 plaintiff is entitled to recover from defendants. If you  
12 decide the plaintiff is not entitled to recover from  
13 defendants, you need not consider damages. Only if you  
14 decide the plaintiff is entitled to recover will you  
15 consider the measure of damages.

16 If you find the plaintiff is entitled to recover  
17 from defendants, you must render a verdict and a sum of  
18 money that will justly and fairly compensate plaintiff for  
19 all losses from the injuries he sustained.

20 During his closing remarks, counsel for  
21 plaintiff suggested a specific dollar amount he believes  
22 to be appropriate compensation for specific elements of  
23 plaintiff's damages. An attorney is permitted to make  
24 suggestions as to the amount that should be awarded, but  
25 those suggestions are argument only and not evidence and

1       should not be considered by you as evidence of plaintiff's  
2       damages. The determination of damages is solely for you  
3       as the jury to decide.

4               If you decide the defendant is liable,  
5       plaintiff's entitled to recover a sum of money which will  
6       justly and fairly compensate him for any injury and  
7       conscious pain and suffering to date caused by defendant.

8               If you find that plaintiff is entitled to  
9       recover from the defendant, you must also include in your  
10      verdict damages for any mental suffering, emotional and  
11      psychological injury, and any physical consequences  
12      resulting from the emotional distress by the wrongful act  
13      of the defendants.

14              If you find the plaintiff is entitled to recover  
15      under the rules of law I have given you, the sum you award  
16      as damages should not be reduced even if you also find  
17      there was negligence on the part of or conduct by  
18      plaintiff or plaintiff's parents which contributed to  
19      plaintiff's injury.

20              In addition to awarding damages to compensate  
21      the plaintiff for his injuries, you may but you are not  
22      required to, award plaintiff punitive damages if you find  
23      that the acts of the defendants that caused the injury  
24      complained of were wanton and reckless or malicious.

25              Punitive damages may be awarded for conduct that

1 represents a high degree of immorality. The purpose of  
2 punitive damages is not to compensate the plaintiff but to  
3 punish the defendants for wanton and reckless or malicious  
4 acts and thereby to discourage defendants and others from  
5 acting in a similar way in the future.

6 An act is malicious when it is done  
7 deliberately, with knowledge of the plaintiff's rights,  
8 and with the intent to interfere with those rights. An  
9 act is wanton and reckless when it demonstrates conscious  
10 indifference and utter disregard of its effect upon the  
11 health, safety and rights of others.

12 If you find the defendants' acts were not wanton  
13 and reckless or malicious, you need proceed no further in  
14 your deliberations on this issue. On the other hand, if  
15 you find the defendants' acts were wanton and reckless or  
16 malicious, you may award plaintiff punitive damages.

17 In arriving at your decision as to the amount of  
18 punitive damages, you should consider the nature and  
19 reprehensibility of what defendants did. That would  
20 include the character of the wrongdoing, such as whether  
21 defendants' conduct demonstrated an indifference to or  
22 reckless disregard of the health, safety or rights of  
23 others, whether the acts were done with an improper motive  
24 or vindictiveness, whether the act or acts constituted  
25 outrageous or oppressive intentional misconduct, how long

1 the conduct went on, defendants' awareness of what harm  
2 the conduct caused or was likely to cause, any concealment  
3 or covering up of the wrongdoing, how often defendants had  
4 committed similar acts of this type in the past, and the  
5 actual and potential harm created by defendants' conduct,  
6 including the harm to individuals or entities other than  
7 plaintiff.

8           However, although you may consider the harm to  
9 individuals or entities other than plaintiff in  
10 determining the extent to which defendants' conduct was  
11 reprehensible, you may not add a specific amount to your  
12 punitive damages award to punish defendants for the harm  
13 defendants caused to others.

14           The amount of punitive damages that you will  
15 award must be both reasonable and proportionate to the  
16 actual and potential harm suffered by plaintiff and to the  
17 compensatory damages you award plaintiff. The  
18 reprehensibility of defendants' conduct is an important  
19 factor in deciding the amount of punitive damages that  
20 will be reasonable and proportionate in view of the harm  
21 suffered by plaintiff and the compensatory damages you  
22 have awarded plaintiff.

23           You may also consider the defendants' financial  
24 condition and the impact your punitive damages award will  
25 have on defendants.



1           In reporting your verdict, you will state the  
2           amount awarded by you as punitive damages. If your  
3           verdict is in favor of plaintiff, plaintiff will not be  
4           required to pay income taxes on the award and you must not  
5           add or subtract from the award any amount on account of  
6           income taxes.

7           This case will be decided on the basis of  
8           answers to questions that you will be given and I think  
9           counsel have already gone over the questions, so I'm not  
10          going to really spend much time on that, but while it's  
11          important that the views of all jurors be considered, five  
12          of the six of you must agree on the answer to any  
13          question. But the same five persons need not agree on all  
14          of the answers.

15          When five of you have agreed on an answer, the  
16          foreperson of the jury will write the answer in the  
17          appropriate place, and if appropriate, a dissenting juror  
18          will sign where designated. When you have answered all  
19          the questions that require answers, report to the Court.

20          Now, I'll outline for you all the rules of law  
21          that apply to this case and the process by which you weigh  
22          the evidence and decide the facts.

23          In a few minutes you're going to retire to the  
24          jury room to begin your deliberations. Your first order  
25          of business when you get into the jury room is to select a

1 foreperson. You must have a foreperson, but of course the  
2 vote of the foreperson is entitled to no greater weight  
3 than the vote of any other juror.

4 Your function, to reach a fair decision from the  
5 law and the evidence, is an important one. When you're in  
6 the jury room, listen to each other and discuss the  
7 evidence and the issues in this case among yourselves. It  
8 is the duty of each of you as jurors to consult with one  
9 another and to deliberate with a view of reaching  
10 agreement on a verdict, if you can do so without violating  
11 your individual judgment and your conscience.

12 While you should not surrender conscientious  
13 convictions of what the truth is and of the weight and  
14 effect of the evidence, and while each of you must decide  
15 the case for yourself and not merely consent to the  
16 decision of your fellow jurors, you should examine the  
17 issues and evidence before you with candor and frankness  
18 and with proper respect and regard for the opinions of  
19 each other.

20 Remember during your deliberations that the  
21 dispute between the parties is for them a very important  
22 matter. They and the Court rely on you to give full and  
23 conscientious deliberation and considerations to the  
24 issues of evidence before you. By doing so, you carry out  
25 to the fullest your oath as jurors, to truly try the

1 issues of this case and to render a true verdict.

2 Now, if during the course of your deliberations,  
3 your recollection of any part of the evidence should fail  
4 or you have any questions about my instructions to you on  
5 the law, you have the right to return to the courtroom for  
6 the purpose of having such testimony read to you or to  
7 have such question answered.

8 The process by which you communicate with the  
9 court during your deliberations is to write a note, to  
10 place that note in an envelope, and to give the note to  
11 the court security officer who will be sitting outside the  
12 jury deliberation room. The court security officer will  
13 deliver the note to me; I'll read the note, and if  
14 appropriate, bring you back into the courtroom for the  
15 purpose of having testimony read back to you or to have  
16 your question answered.

17 If your request is merely to have exhibits  
18 delivered to you in the jury room, then the exhibits you  
19 request will be delivered to you and you will not of  
20 course return to the courtroom.

21 When you have reached a verdict, you follow the  
22 same process. You put the signed verdict sheet in a  
23 sealed envelope, and deliver it to the Court security  
24 officer.

25 Once I have looked at the verdict to be sure

1       that it's been completed, the Court security officer will  
2       bring you into the courtroom and the foreperson will  
3       announce the verdict.

4               At this point, I have to excuse our alternate  
5       jurors. As I told you before, when we began this trial,  
6       your service was very important. I'm glad to know that  
7       nothing happened to any of the first six jurors that  
8       required them to not be able to conclude their service  
9       during this trial, but what that means for you is that  
10      you're not able to go into the jury deliberation room and  
11      deliberate with them on the issues in this case.

12              Your role was just as important, however, and I  
13      want to thank you for your participation for being here.

14              I'm going to ask now the court security officer  
15      to take you back to get your personal belongings and then  
16      I'm going to ask if you would to stand out in the hall  
17      where I'll come out and personally thank you. On that  
18      score -- and this applies to you guys, too -- when you're  
19      excused from service, and that will be for the alternates  
20      in a few moments, you are free to speak with the lawyers  
21      if you choose. However, you're not obligated to do so.

22              And for the jurors, when your verdict has been  
23      announced, you are free, if you choose, to speak with the  
24      lawyers, but you are not obligated to.

25              So at this point, do we have another court

1 security officer here. Why don't we have the court  
2 security officers sworn in first?

3 (Swearing in of court security officers by the  
4 clerk)

5 (Whereupon, the alternates were then excused  
6 from the courtroom)

7 THE COURT: I understand there's some smokers on  
8 the jury.

9 And what I'd ask you to do is if you can, we are  
10 going to deliberate -- as you know, court generally closes  
11 at 4. Is there a problem if we stay until 5, and if there  
12 is, just let me know because we won't and we'll resume  
13 deliberations tomorrow. Whether we break at 4 or 5, if  
14 you're not completed, we'll resume deliberations tomorrow.

15 If there's -- any juror has an objection to  
16 staying until 5, let me know... we have two -- okay, so  
17 we're going to break at 4 and we'll resume again tomorrow  
18 morning at 9 a.m. if you have not yet reached a verdict.

19 On that subject, you were asking about the  
20 breaks. Since we'll really only have about a couple of  
21 hours, if you need to take a break, you may do so. A  
22 court security officer will walk with you downstairs, to  
23 have your cigarette or break, but let's try to keep it to  
24 one.

25 Ready to go?

1           A JUROR: I just have one other question. Can  
2 we have like a written copy of the laws to review --

3           THE COURT: No, but if you want any of the law  
4 read back to you, I can have it read back to you, okay?

5           A JUROR: And how do we -- the evidence, again,  
6 how do we -- we don't know these numbers.

7           THE COURT: You mean if you want any exhibits?

8           A JUROR: Yes.

9           THE COURT: You can identify the exhibits by  
10 either numbers or substance. If you say "I want all the  
11 photographs" or "I want the e-mails" or "the medical  
12 record," so however you can identify it, and if there's an  
13 issue, again, that you have a question, "we want certain  
14 exhibits but we don't know how to describe them," write  
15 that in a note and we'll come out here.

16           A JUROR: Are we supposed to take these that are  
17 left here?

18           THE COURT: Until you request exhibits, we're  
19 not sending them back.

20           A JUROR: Okay.

21           (Whereupon, the jury was then excused from the  
22 courtroom)

23           THE COURT: Okay. I am not going to keep Terry  
24 and Val any longer, so to the extent anybody wants to put  
25 motions on the record or anything else with respect to the

1 charges, I'm going to give them their hour lunch break  
2 right now and I'll be back here at 3 o'clock and we can  
3 put stuff on the record then. 3:10.

4 (Court's Exhibits 3, 4 and 5 marked and received  
5 in evidence)

6 (Recess taken)

7 \* \* \*

8

9 (Whereupon, while the jury was deliberating, a  
10 note was sent out to the Court)

11 (Court's Exhibit Number 6 marked and received in  
12 evidence)

13 THE COURT: We marked Court Exhibit 6. The jury  
14 has asked for the following exhibits: The original  
15 charts, original X-rays, papoose board, and a stack of  
16 exhibits by the witness stand, and so with all counsel  
17 present, I sent them back.

18 \* \* \*

19 (Whereupon, while the jury was deliberating, a  
20 note was sent out to the Court)

21 \* \* \*

22 (Court's Exhibits 7, 8, 9 and 10 received in  
23 evidence)

24 THE COURT: Okay. We have four notes from the  
25 jury.

1 Note 7 says, "Please bring all pictures of  
2 Jeremy Bohn and indicate exact dates pictures were taken."

3 Note 8 says, "Are there statements or  
4 depositions from Dr. Taylor, Dr. Patel, Edward DeRose? We  
5 would like to review them."

6 Another one, "We request a copy of the Court's  
7 transcript of the Judge's statement prior to dismissing  
8 the jury to deliberate," and "We request all exhibits of  
9 Old FORBA board meeting minutes, notes and votes."

10 I'm going to have the jurors come back in. I'm  
11 going to have all counsel work to get the exhibits of the  
12 Old FORBA board meeting minutes, notes, and votes  
13 together. Why don't you start working on that right now?

14 I'll ask what part of the transcript they want,  
15 but we didn't read in testimony of Taylor, Patel or  
16 DeRose.

17 Mr. HIGGINS: There is no testimony of Dr.  
18 Taylor or Patel and there's been no readings of --

19 Mr. McPHILLIAMY: Edward DeRose was not deposed.

20 THE COURT: I'll tell them that, and as to the  
21 picture dates, I'll have Val read back off of the  
22 transcript. Why don't you have the jurors back in?

23 (Whereupon, the jury was brought back into the  
24 courtroom)

25



1 THE COURT: I'm glad you consolidated your  
2 notes. I think the first note that came out was -- and I  
3 would just ask that counsel continue to work until they  
4 locate those, if they don't mind, while we're addressing  
5 these -- to please bring all pictures of Jeremy Bohn and  
6 indicate exact dates pictures were taken. We have the  
7 pictures here and testimony about when these were taken  
8 but not exact dates, just an age, a year. I'm going to  
9 have the court reporter read back the ages of -- the age  
10 Jeremy was when the picture was taken according to the  
11 testimony of his mom.

12 (Whereupon, the court reporter read back the  
13 requested portion of the testimony)

14 A JUROR: So how old on 1047?

15 (Whereupon, the court reporter read back that  
16 portion of testimony)

17 A JUROR: And 1046?

18 (Discussion off the record between court  
19 reporter and Court regarding 1046)

20 (Whereupon, the court reporter reread portions  
21 of the requested testimony)

22 THE COURT: So what that means is that the  
23 photographs were introduced into evidence but there was no  
24 testimony that related to a couple of those exhibits. So  
25 I'll send those exhibits back with you.

1 JURORS: Thank you.

2 THE COURT: Your next note was, "Are there any  
3 statements or depositions from Dr. Taylor, Dr. Patel,  
4 Edward DeRose? We would like to review them." There was  
5 no trial testimony, or no testimony offered during the  
6 course of the trial from those three individuals, so there  
7 is nothing that I can provide to you. I believe that some  
8 of the medical records of those two doctors are in  
9 evidence but no statements or depositions.

10 A JUROR: You said there's some medical records?

11 THE COURT: I believe some medical records of --

12 Mr. FIRST: Taylor and Dr. Patel.

13 THE COURT: Taylor and Dr. Patel. And if you  
14 would like, we can send those back.

15 The next note, "We request all the exhibits of  
16 Old FORBA board meeting minutes, notes and votes, and the  
17 lawyers are working to get those together for you and  
18 those will get sent back with you.

19 Now, with respect to the next note, "We request  
20 a copy of the Court's transcript of Honorable Karalunas's  
21 statement prior to dismissing the jury to deliberate, so  
22 that would be my jury charge and Val can certainly read  
23 that back to you, but what I would ask is if there's some  
24 particular portion of that charge you would like read  
25 back, and if there is, I would just ask that --

1 technically, you should write it, if there are certain  
2 portions of the testimony, of my charge, that you would  
3 like read, certainly.

4 A JUROR: We were looking for a copy.

5 THE COURT: Okay. I don't have a copy that I  
6 can send back to you.

7 A JUROR: Just what laws were what? The  
8 definition of the laws.

9 THE COURT: Okay, so that the -- we call them  
10 the substantive statutes. I can have Val read --

11 A JUROR: Print out a copy.

12 THE COURT: So if I understand, are you --  
13 requesting -- for example, there was a charge with respect  
14 to General Business Law 349.

15 A JUROR: Yes.

16 THE COURT: Battery; negligence per se, which  
17 was the Limited Liability Company Law; there's negligence  
18 claim, and a malpractice claim, so those substantive  
19 statutes or claims is what you would like and I can have  
20 Val read that back to you, but I can't send you a copy of  
21 the... would all counsel approach?

22 A JUROR: So we're going to just start with the  
23 first substantive something-something and then we'll take  
24 it from there, but just one at a time, I think, for now.

25 THE COURT: One at a time, then?

1           A JUROR:  Because they kind of flow together a  
2           little too much --

3           THE COURT:  When you hear them all together.  I  
4           understand that.  I understand that.

5           (Whereupon, the court reporter read back the  
6           requested portion of the record)

7           THE COURT:  And that ends the charge on 349.  
8           We're going to get you the photographs, the board meeting  
9           minute notes and votes and send it back off.

10          A JUROR:  Thank you.

11          (Whereupon, the jury was then excused)

12                                   \*       \*       \*

13          (Whereupon, the jury brought back into the  
14          courtroom at 3:59)

15          THE COURT:  Okay.  We're going to break for the  
16          day.  We'll resume tomorrow morning at 9 a.m., but we did  
17          get agreement that we can provide to you as necessary some  
18          typed versions of the charges.  So you don't have to  
19          write --

20          A JUROR:  My hand thanks you.

21          THE COURT:  But it's very, very important that  
22          tonight you don't, again, talk about the case with  
23          anybody.  In the old days, they used to sequester you and  
24          you'd be stuck here overnight.  We don't do that, but  
25          don't talk about the case; don't do any independent

1 research. We'll see you tomorrow morning at 9 o'clock.

2 THE JURY: Thank you.

3 (Whereupon, the jury was then excused from the  
4 courtroom)

5

6 Mr. FIRST: Judge, I don't believe we agreed to  
7 that. I said I would research.

8 THE COURT: That's right; you did say that.  
9 Well, we might --

10 Mr. FIRST: Did you decide?

11 THE COURT: If you give me something that says I  
12 can't do it, then I won't do it, but otherwise, I'm going  
13 to send it in to them.

14 Mr. FIRST: Okay.

15 THE COURT: If you find something that says I  
16 don't have the power to submit the written charge to the  
17 jury or parts of a charge, and I will do either one  
18 because Val is going to send me the full charge tonight,  
19 and I -- we'll do it however you guys agree or if not...  
20 if we don't agree, I'm going to send the full charge in to  
21 them, the transcript of it, not my typed version.

22 Mr. HIGGINS: We'll do some research on that  
23 tonight, too, just to --

24 THE COURT: I know it's done in other courts in  
25 the state, so I can't imagine there's a prohibition

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against it.

Mr. HIGGINS: We'll take a look, Judge.

THE COURT: Have a good night, everybody.

Ms. MARANGAS: Good night, your Honor.

(Conclusion of proceedings)

\* \* \*

CERTIFICATE

I, VALERIE WAITE, an Official Court Reporter  
in and for the State of New York, Fifth Judicial District,  
do hereby certify that I recorded stenographically the  
foregoing proceedings, at the time and place noted in the  
heading hereof, and that it is a true and correct

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transcript of the proceedings therein to the best of my  
ability.

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Valerie Waite,  
Senior Court Reporter

Dated: October 8, 2013