

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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: BILLY KARL BOONE, :  
: :  
: Plaintiff, :  
: :  
: v. :  
: : Civil No. 238960  
: SETH M. GOLDBERG, MD, ET AL., :  
: :  
: Defendants. :  
: :  
-----X

JURY TRIAL

Rockville, Maryland

April 15, 2004

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 COPY

1 come in and do this which he has inferred over and over again.  
2 And that leaves the basis of the new trial granted in  
3 (inaudible) and I have the opinion here but it was the other  
4 way around. The plaintiff's fair a lot better than the  
5 defendants in these cases and that --

6 THE COURT: All right.

7 MR. MALONE: Thank you, Your Honor.

8 (Bench conference concluded.)

9 THE COURT: Mr. Malone, would you like to close?

10 MR. MALONE: I would, Your Honor and thank you very  
11 much. Just grab my notes.

12 CLOSING ARGUMENT BY PATRICK A. MALONE, ESQ.

13 ON BEHALF OF THE PLAINTIFF

14 Good afternoon, morning, however it may be. First  
15 theme I want to talk about in this case is the importance of  
16 treating doctors. And you've seen a theme in this case where  
17 treating doctors have come in after Dr. Goldberg's care and  
18 have given certain honest conclusions about what he did. And  
19 then you've had other treating doctors come in after that and  
20 talk about what injuries have been permanently caused to  
21 Mr. Boone as a result of what Dr. Goldberg did. And I want to  
22 talk about the importance of understanding the role fo the  
23 treating doctor in this case in both aspects of the case. What  
24 he did and what harm he caused.

25 We go back to January 17, 2000. Seth Goldberg got a

1 telephone call. He tells us he didn't get the call but be that  
2 as it may, a doctor named Sintiski, (phonetic sp.) a  
3 neurologist called Dr. Goldberg. He said I looked at the CT  
4 scan that was done on your patient Billy Boone after the  
5 surgery you did 11 days ago and I hate to tell you this but the  
6 CT scan shows a tractive air through the left temporal bone  
7 into the man's brain.

8           And he was concerned about what had happened.  
9 There's a big collection of blood that he would already have  
10 seen on the MRI scan and Dr. Sintiski was worried about the  
11 possibility of an infection and that's why he talked in his  
12 note about headaches with fever. He wanted to make sure that  
13 an infection didn't develop so he wanted to keep the man on  
14 antibiotics because his brain had been exposed to the outside  
15 air.

16           And then later on Dr. Sintiski came into Court. Yes,  
17 I think he was our very first witness. You could see how  
18 reluctant he was to testify against a man that he was on first  
19 name basis with, Seth Goldberg but he gave us honest testimony  
20 and he said that what I thought then is still what I think  
21 that, unfortunately, something penetrated this man's brain and  
22 put a hole in there and caused an injury Mr. Boone.

23           Now it wasn't just Dr. Sintiski, it was a very  
24 experience neuro-radiologist named Citrin, who reached the same  
25 conclusion. This air which we later learn might be air mixed

1 with gel foam, extends through this area to lie within the  
2 brain parenchyma, we learned that's brain tissue, a hole that's  
3 been put in the man's brain. Two treating doctors who had no  
4 interest in the case. All they're there for is to try to treat  
5 the patient and give him whatever care he needs. That's the  
6 conclusion they came to.

7 Another doctor came along and reached the same  
8 conclusion, Dr. Kooney. (phonetic sp.) You heard about him,  
9 the neurosurgeon. He looked at the MRI scans he says, you  
10 know, there's an injury through that left temporal bone that  
11 goes right into the man's brain. Even Dr. Sayah, (phonetic  
12 sp.) one of the last witnesses we heard of, the internist,  
13 wrote in his notes, quote "something pierced the dura,  
14 something pierced the covering over the man's brain."

15 Now none of these people were paid by lawyers to come  
16 up with their conclusions about the case. They were paid to  
17 treat the patient. If anything, you would think that since  
18 they all knew Dr. Goldberg and practiced in the same community  
19 that they might try to, you know, back off and go easy on him  
20 but they didn't do that. They just gave their honest  
21 conclusions about what they thought had happened.

22 And the question for us in this case is how likely is  
23 it, when you apply that preponderance of the evidence standard  
24 that the Judge said where the plaintiff, and you weigh the  
25 evidence on both sides that I think the Judge said, the

1 plaintiff has to just have a hair's breadth tilt in the  
2 plaintiff's favor for us to win this case. So one of the first  
3 questions to ask yourself when you talk about the case in the  
4 jury room is how likely is it that four independent treating  
5 doctors would reach the same conclusion? Which happens to be  
6 the same conclusion that we've told you as seems to be the  
7 evidence. When you look at the evidence, really even much more  
8 closely and look at it really, really in depth and get that CT  
9 scan raw data and, you know, look at every single little image,  
10 turning it every which to make sure that that's right. That  
11 was the evidence that we showed you.

12 So it's actually Dr. Goldberg versus the medical  
13 world except for his paid opinion witnesses on this one issue,  
14 but it's also Dr. Goldberg against the world, against the  
15 medical world on the issue of what injuries he caused to this  
16 man because on Billy Boone's side of this case, we have his  
17 treating neurologist, Dr. Podilikio. We have an independent  
18 brain rehab person, Ms. Whitlock, not paid to be any kind of  
19 expert witness or anything like that.

20 She did an evaluation. She reached some conclusions  
21 about what was wrong with the man and what kind of treatment he  
22 needs and we also got the reports of Dr. Griffith, the  
23 neurologist/psychiatrist. We didn't get them until fairly late  
24 but we did get his evidence and we'll talk about that a little  
25 more later. On the other side, the only thing that Dr.

1 Goldberg has is paid witness whose sole job is to come in and  
2 minimize the damage that was caused and talk about what's right  
3 with Mr. Boone and not what's wrong with him.

4           Now a treating doctor's job is different than a paid  
5 witnesses job. A treating doctor's job is to find out what's  
6 wrong with the patient and make it better. Nobody goes to the  
7 doctor to figure out what's right with you. You go to the  
8 doctor to figure out what's wrong and how can the doctor help  
9 me. And they don't have any ulterior motive. They're there to  
10 try to help the patient.

11           And the other thing about treating doctors that's  
12 important, and we'll talk about this more later when we talk  
13 about the injuries, is that a treating doctor doesn't just take  
14 a one time snap shot of the patient based on a single visit  
15 when there might be some ulterior motive to make sure you're  
16 minimizing what's wrong with the patient. A treating doctor  
17 sees the patient over a period of time and gets to know the  
18 patient and gets to know the patient a lot better than you can  
19 know someone with just one little snap shot.

20           Now, let's go back and talk about what Dr. Goldberg  
21 did to Mr. Boone. We told you a straight forward story and it  
22 wasn't just a story. It was medical records and it was x-rays  
23 and that's all it was. I've got to ask another question at  
24 this point.

25           If Dr. Goldberg had a good answer to what he did to

1 Mr. Boone, how come we didn't hear one good, simple, straight-  
2 forward explanation from him and his paid witnesses. Why did  
3 we keep hearing a series of different stories from his people  
4 and from him himself? Why did only one side of this case focus  
5 on the films and the data that you could see on the CT scan and  
6 show you over and over the actual photographic evidence, while  
7 the other side focused on what hypothetically might have  
8 happened and what some illustration that an illustrator drew  
9 might have shown to be the possible cause?

10 Let's talk a little bit about Dr. Goldberg's shifting  
11 explanations for what happened. I made a quick little slide I  
12 want to show you if I can get this up. His first defense was  
13 that the injury was completely unrelated to the surgery. You  
14 heard him say that on the deposition testimony that I played  
15 for you. I think I even played it in the opening statement but  
16 I certainly played it during the testimony of the expert  
17 witness Dr. Seleznick. Now remember Dr. Seleznick? He's the  
18 man who does a hundred of these kinds of surgeries a year. He  
19 knows what he's talking about.

20 Second thing Dr. Goldberg said was well, okay, maybe  
21 there's air inside the skull but maybe there was some pinhole  
22 leak in the dura that let the air in. The third he said was  
23 that, well, maybe there was a defect in the tegmen. Although,  
24 I admit I never saw a hole in the tegmen and his notes are all  
25 over the place saying the tegmen has never transgressed.

1 Tegmen's intact, that kind of thing but still he tried that  
2 defense, that maybe there was hole in the tegmen and, in fact,  
3 you'll see it on the medical illustration. I'll show you that  
4 that was one of their theories.

5           The fourth, and this is something that he didn't say  
6 until actually during trial when he's on the witness stand, he  
7 talked about a loculated (phonetic sp.) hematoma. That's like  
8 a ball of blood, because he has to try to get that gel foam  
9 outside the brain. First off the penetration, as you know, is  
10 in the wrong place. It's not the area where he was supposed to  
11 be doing the surgery, number one. And number two, this gel  
12 foam stuff doesn't just get in there unless you push it in  
13 there. If it's in the brain, it's bad, it's negligent. It  
14 shouldn't be in there. So the way to get it out of the brain  
15 is to say that, well, maybe the brain's not there so let's push  
16 the brain away. How do we push the brain away? We say there  
17 is a hematoma, a collection of blood under the surface of the  
18 skull, under the surface of the dura and it's pushing the brain  
19 away.

20           Well, the problem with that theory was that he and  
21 every other person who read the MRI would have had to have been  
22 wrong, because nobody saw an extra axial collection of fluid.  
23 That's what it means, a collection of fluid outside the brain.  
24 All they saw was bleeding inside the brain. Dr. Isaacs was the  
25 official reader of the that January 12th MRI. I showed you his



1 report. You can see it again, no extra axial fluid  
2 collections. Goldberg himself read the film, didn't see any  
3 such thing. Dr. Kooney, the neurosurgeon read the film, didn't  
4 say anything about blood outside the brain.

5           And this goes back to the importance of treating  
6 doctors and why we have to pay close attention to what the  
7 treating doctors said, because if there was a collection of  
8 blood right outside the surface of the brain and it's pressing  
9 on the brain, well, wouldn't you want to know that right away  
10 so then you could call up the neurosurgeon, he can drill a hole  
11 in the skull, and drain the blood, relieve the pressure on the  
12 brain and save some injury to the patient. So obviously, that  
13 was something they were looking for. This is just a litigation  
14 theory come up with four years later to try to avoid Dr.  
15 Goldberg responsibility for the injury that he caused to this  
16 man four years ago. That's what a reasonable person could  
17 conclude from that.

18           But we've got still more theories. Wandering gel  
19 foam theory. I actually did another slide that I'll show you  
20 on that. That somehow the gel foam, which was packed in the  
21 surgical area somehow migrated around and got up to the area of  
22 the hole in the side of the skull and was under such tremendous  
23 pressure that it caused a bruise to the brain or a bleeding of  
24 some blood vessel under the surface of the dura, some kind of  
25 peel (phonetic sp.) vessel and that bleed was so bad that it

1 dissected into the brain but not bad enough that anybody could  
2 ever see it or notice it at the time.

3           Sixth and final defense which his expert, his former  
4 buddy from medical training, Dr. Lambert and said was that  
5 there was actually more tumor in there that snaked around above  
6 the surface of the tegmen. The tegmen you know is the hole of  
7 the floor of the temporal lobe, that it was -- because they're  
8 trying to push that brain up out of the way, you see. You've  
9 got to push the brain out of the way to make sure the gel  
10 foam's not there. So the cholesteatoma did it. Well, the  
11 problem with that it he never saw it. He never took it out so  
12 that's what Dr. Goldberg said.

13           Here's Dr. Lambert. His initial theory of the case  
14 and you see he got the site of the injury completely wrong  
15 coming in under this tegmen which, and again let's go back to  
16 what the treating people said. There was a CT scan  
17 preoperatively December 7, 1999. There's an official report of  
18 that CT scan. It says thinning of the tegmen. It doesn't say  
19 anything about a hole in the tegmen. And by the way, when you  
20 look at our model of this actual temporal bone which you'll get  
21 to see, I'm not going to open the envelope now but stick your  
22 finger in there the way you say me do it and you'll see how  
23 think that tegmen is anyway. It's a thin bone and it's  
24 naturally a thin bone but there weren't any holes in it that  
25 let brain leak through.

1           Dr. Lambert's drawing became the basis of the  
2 illustration that we got Friday, a week before trial, that  
3 showed a hole in the tegmen -- somebody try to find my pointer  
4 I think it's in my outside pocket of my bag -- hole in the  
5 tegmen there with the brain dipping down through there and that  
6 this allegedly, the packed gel foam -- the gel foam, all it is  
7 is jell-O but under the defense theory it's like got this like  
8 volcanic like force that it just poof, you know, explodes out.

9           It's just an amazing concept that it could have that  
10 kind of pressure but in any case, the problem of course with  
11 that theory is that the tegmen was in tact. And even if it was  
12 true, the surgery should not cause a huge bleed to exposed  
13 brain. Dr. Seleznick talked about this. He says that what  
14 this is called if you have brain that is exposed and dipping  
15 down below the tegmen, not what we have here but if you do have  
16 it, he's seen it. He operates on it. In fact, I think he said  
17 he operated on one a few weeks ago and you don't get brain  
18 injury from that. You've got to be careful but you can lift  
19 the brain out of the way. If there 's a little bit of scar  
20 tissue from being in that area, you can very carefully slice  
21 the scar tissue off. Remember, he told us all about this.  
22 You're not going to get some huge bleeding going up several  
23 centimeters, several inches into the brain. No way.

24           The other problem with that theory is well, how did  
25 the gel foam get into the brain? It just doesn't explain that.

1 How can jelly-like substance get into the brain unless  
2 something has pushed it in there? So then the other problem is  
3 that they got the site of the injury wrong from the x-ray  
4 films. So here it is, they came up with a new theory right  
5 before trial where all they did was they just moved it over a  
6 little bit. They added this lateral skull defect here which  
7 they didn't have on their old illustration. You see the old  
8 illustration? There isn't even any hole here in the side of  
9 the skull where the brain came in but they still have the entry  
10 point of the injury wrong. Everybody testified, once they  
11 finally got down to it, that this man's brain injury was  
12 entered through that hole in the side of his skull.

13 Remember, we had some disagreement about that though?  
14 About whether or not Dr. Goldberg had any business being there.  
15 We didn't have any disagreement about that being the source of  
16 the penetration but Dr. Goldberg said I got no where near  
17 there. I left the soft tissues covered in that area. No way,  
18 no how did that happen. Actually though, his man Dr. Lambert  
19 came in and said, well, he would have had to fold that area up,  
20 fold up the musculature and the skin and what not so yes, it  
21 would have been exposed. All right. There's still no hole in  
22 the tegmen. There's still a problem with not enough pressure  
23 and there's still no answer as to how the gel foam got into the  
24 brain and the site of the injury is still wrong.

25 Now, let's talk about Dr. Goldberg's description of

1 the defense theory. He came up with another theory during his  
2 testimony which is that the gel foam expanded from the surgical  
3 site two or three days after the surgery and it moved around to  
4 the lateral skull hole, where he had never uncovered the soft  
5 tissues and then this moving gel foam then put pressure on the  
6 brain. So here's the gel foam moves up and then the gel foam  
7 moves over and this gel foam has just such pressure packed that  
8 it put this big injury in Mr. Boone's brain.

9           Still a problem. How did it get into the brain  
10 itself rather than just putting a bruise on the outside? Well,  
11 now Dr. Lambert came in and he came up with an idea. That the  
12 cholesteatoma down here, snakes around to the side here,  
13 through the skull hole and came around above the tegmen and  
14 then pushed the brain up out of the way and then it just sat  
15 there. And it sat there for three years until Dr. Schessell  
16 (phonetic sp.) allegedly came along. Well we know  
17 Dr. Schessell came along. We don't know that Dr. Schessell  
18 found anything up there. What Dr. Schessell described was  
19 finding recurrent palesteatoma (phonetic sp.) in the same  
20 mastoid cavity but the other problems with this theory about  
21 the moving cholesteatoma are many.

22           One is how did it stay there three years without  
23 infecting the brain? Remember how Dr. Goldberg told us that  
24 doing this surgery was, you know, not quite an emergency but  
25 close to an emergency because this cholesteatoma is such nasty

1 stuff, it erodes bone and then once it gets -- if it gets past  
2 bone and gets in contact with the dura then it can erode the  
3 dura. And then it can eat into the brain and you can get an  
4 abscess and you can just have huge problems. That's what he  
5 told us when they had the other theory but then all of a  
6 sudden, we have the idea that well, maybe it just sat in there  
7 benign on him for three years without causing a problem to the  
8 man.

9           At this point, Dr. Levee brought some facts to the  
10 rescue again. We hadn't even heard this theory before a trial  
11 at any time but we brought him back. I think it was -- wasn't  
12 it just yesterday? And he showed you the February MRI scans  
13 and we looked and he looked all over on those scans right above  
14 the tegmen, remember palesteatoma is like any kind of tumor  
15 whether it's cancerous tumor or non-cancerous tumor, is going  
16 to be a different shade of gray than brain tissue. You can  
17 tell the difference. And all he saw on those scans was tegmen  
18 and brain right up against it. So the palesteatoma theory is  
19 just gone. This is another subject I'll get to a little later.

20           All right. Now, yes, can we have the lights back  
21 please?

22           What happened in this case was exactly what the  
23 treating doctors post-surgically said happened. Somehow in  
24 surgery, something strayed out of where it should have been and  
25 it penetrated the brain and it caused a bad bleeding in this

1 man's brain and that is a violation of the standard of care.  
2 Now there's another problem I want to mention with all these  
3 defense theories that I told you about because you're going to  
4 be considering two issues here about Dr. Goldberg's negligence.

5           One is just his negligence in doing the surgery. And  
6 the second is his negligence in talking to the patient before  
7 the surgery and giving the patient the tools that the patient  
8 needs to make an informed decision about whether or not to have  
9 this man do the surgery on me. All these defense theories  
10 assume that Mr. Boone had some terrible vulnerability to this  
11 injury because of his thin tegmen or because of the hole in the  
12 side of his skull, and they need to have those vulnerabilities  
13 there to explain why an ordinary surgery would cause such an  
14 extraordinary outcome because if he wasn't unusually vulnerable  
15 to it, hey, there's you know, there's just no reason for it  
16 except surgical negligence.

17           Now Dr. Seleznick told you that with that hole in the  
18 side of the skull, yes, there was some increased risk and yes  
19 that's the kind of thing a patient ought to know about. Here's  
20 a patient who, the hole is small enough that he didn't notice  
21 that he had a hole in the side of his skull. And he didn't  
22 know that Dr. Goldberg was a general ear, nose, throat surgeon.

23           He asked Dr. Goldberg, just in general, about his  
24 experience. Dr. Goldberg said I've done a bunch of these.  
25 Well, that wasn't quite right, was it? Remember we showed you

1 that the statistics from Shady Grove Hospital where he operated  
2 and a revision mastoidectomy, which is what this was when you  
3 follow-up and do another one years later. He'd only done one  
4 of those in the last three years. Now there are other surgeons  
5 here in this area, in the mid-Atlantic area or anywhere up and  
6 down the east coast who do this kind of revision mastoidectomy  
7 or who do complex mastoidectomies where you've got little  
8 problems there. They do them a hundred times or more a year.

9           And all we're saying is well, why not give Boone the  
10 knowledge to let -- he's a patient. It's his body, let him  
11 make the decisions but to let him make the decisions, you've  
12 got to give him the information. And the key information was  
13 not given to him. So the Defense can't have it both ways.  
14 They can't say he was vulnerable and then excuse the fact that  
15 Dr. Goldberg did not discuss with the patient anything about  
16 brain injury or anything about his lack of experience on this.

17           Now, let me just mention one more thing before I go  
18 on. Although you've had the reconstructions that Dr. Levee  
19 did, you also had the basic simple scans that Dr. Sintiski saw  
20 and told us about in Court. And we stacked them up for you  
21 just from the bottom of the brain up to show how, if you look  
22 at it, you see that the hole that starts in the side of the  
23 skull and I think we may have missed getting all of these on  
24 there but we're going to give you a light box and we're going  
25 to give you the film. You can look at all of them yourself.



1           By the way, let me just mention, if you look at the  
2 overall sheet, don't be confused but there's one in the right-  
3 hand corner, bottom right-hand corner that is a repeat of one  
4 up above. It might be confusing if you're trying to follow  
5 them in order but otherwise, if you ignore the repeat, you'll  
6 see that they track in order going up. And the way to follow  
7 it is there's a little tiny little thing that says image number  
8 and if you -- it's right over here. Yes, you can see it right  
9 here, image 8-7-6-5- et cetera, et cetera, but what you see  
10 going in here is you see a tract and you see that it's not only  
11 going into the brain, it's going into the brain in an upward  
12 direction and an inward direction and also, do you see this? A  
13 slightly forward direction.

14           When Dr. Levee did the -- may I have Plaintiff's  
15 Exhibit No. 36, please? When Dr. Levee did the  
16 reconstructions, he was able to slice the CT on the computer at  
17 the exact angle of the penetration so you could see the entire  
18 tract of the thing going in there, and I want to show you one  
19 thing that he did that's at the back of this Plaintiff's  
20 Exhibit No. 36 which are the prints, some of the prints that he  
21 did? He shows you on here -- let me show you this one.

22           To be really scientific about this, to show you the  
23 exact angles he was using unlike this guy Landee (phonetic sp.)  
24 who came in and -- well, I'm not even going to talk about him  
25 but what he shows you here is that here's the coronal image but

1 it's tilted slightly forward and all it's doing here is showing  
2 you that the angle of penetration moved in a slight forward  
3 direction. You can see it on here, you know, that it's kind of  
4 tiling a little bit forward but this gives it so you very  
5 precisely. See how this is the back of Mr. Boone's head?  
6 Here's his nose and teeth and what not? All this is showing  
7 you is that he has cut right through in this direction and that  
8 this, over here is what he got out of that. And that, you see,  
9 is the same as this. So do you see how these match up? This  
10 right here is a cut running through, just tilted slightly  
11 forward in Mr. Boone's brain showing how it comes in through  
12 that hole in the side of the skull and goes right into the  
13 brain tissue. So that's the science of the case. That's the  
14 films of the case. That's the evidence and what the evidence  
15 shows.

16 Now the Judge has instructed you -- and by the way,  
17 is the verdict form available yet? I don't know.

18 THE CLERK: Right here.

19 MR. MALONE: Thank you. The Judge has already  
20 instructed on what you need to find to rule for Mr. Boone and I  
21 want to run over the first couple of things for a second.  
22 Question No. 1 on the verdict form. Do you find that Dr.  
23 Goldberg breached the standard of care in his performance of a  
24 radical mastoidectomy performed upon Billy K. Boone, Sr.?  
25 What's the answer to that, yes or no? Who wins that question

1 on the preponderance of the evidence?

2           Then the next question for you to consider is if he  
3 did breach the standard of care, was his negligence, was his  
4 violation of the standard of care a proximate cause of the  
5 plaintiff's injuries? All a proximate cause means, the Judge  
6 instructed you is, a cause. Was it a cause of his injury? And  
7 certainly, of course, it was.

8           Then there's another question on the form, question  
9 No. 3, did he fail to adequately advise the patient of the  
10 risks of the procedure that he was undertaking? And the  
11 question of risks really includes risks and alternatives,  
12 alternatives of going to someone else. You heard that in the  
13 instruction. And if he did fail to adequately inform him of  
14 the risks, was that a proximate cause of the plaintiff's  
15 injuries? And, of course, it was because -- well, actually the  
16 issue for you to consider is, you know, Mr. Boone didn't come  
17 in here and give self-serving testimony. Well, of course, if  
18 he'd told me I wouldn't have had the surgery with him because  
19 that's not the issue.

20           In Maryland, the issue is what would a reasonable  
21 patient have done in these circumstances? Well, I've got nine  
22 reasonable patients right here and that's for you to think  
23 about. If I had a hole in my skull and I didn't know about it  
24 and I needed to have a revision mastoidectomy, what would I  
25 have wanted to know about and what would a reasonable patient

1 have decided based on that? That's for the jury's  
2 consideration. If you decide you would have had the surgery  
3 anyway with Dr. Goldberg, then you should say no on that  
4 particular question and we would win on that issue but these  
5 are separate issues, the negligence in doing the surgery and  
6 the negligence before the surgery. Our evidence suggests to  
7 you that it's very powerful that we win on both.

8           Okay. Now, one defense we've heard that I want to  
9 talk about for a minute is that the plaintiff's evidence of Dr.  
10 Goldberg's conduct is so bad that it's hard to imagine that it  
11 really happened. It's almost criminal, they said. They said  
12 it themselves. I never said anything about that.

13           Well, the thing is ladies and gentlemen, this is not  
14 criminal court. This is Civil Court. We're not here to put  
15 anybody in jail. We're not here to punish anybody. We're here  
16 to decide if a doctor was negligent. Did he do something that  
17 a reasonably careful doctor, acting under the same or similar  
18 circumstances, would not have done? And whether or not it  
19 might have been extra bad of what he did, is not any issue that  
20 the Judge has instructed you about.

21           So it's just not an issue in the case and if somebody  
22 in the jury room says well, gee, I, you know, I just can't  
23 imagine that he would have done this, the answer to that is  
24 look, we've got to focus on the evidence and what the films  
25 show and what the medical records say and let the chips fall

1 where they may. Was he negligent or was he not negligent?  
2 That's the issue for you. And if you follow the instructions  
3 on the preponderance of the evidence, what is more likely so  
4 than not so, we think you'll reach the right answer.

5 I want to talk about the consequences of  
6 Dr. Goldberg's negligence. For four years this man has avoided  
7 responsibility for what he did to Billy Boone. And now it's  
8 time for him to have a day of reckoning about his  
9 responsibility. The Defense lawyer to you, well, it's all  
10 about money. The case is all about money in his opening  
11 statement.

12 Yes, it's all about money. Why is that? Well, we're  
13 not in an era any more of an eye for an eye or a brain for a  
14 brain, for that matter. We live in an age when if you injure  
15 someone, you must pay them for the consequences of the injury  
16 and the law is that you have to pay them for all of the  
17 consequences of what you have done to the person, not just part  
18 of the consequences of what you have done. Compensation, in  
19 the law, means to restore an injured party, an injured person,  
20 to their former position with money. To the place that they  
21 were in before the injury. In other terms, you hear lawyers  
22 use a lot in these kinds of cases is that the purpose of the  
23 money damages is to, quote, "make the plaintiff whole."

24 Now you ask, well, how can you do that with money  
25 because you can't turn back the clock? And you can't make him

1 right but there's a lot of stuff that you can do with money and  
2 I'm going to spend the rest of the argument telling you what is  
3 necessary here for a fair verdict for both accountability for  
4 Dr. Goldberg and for fair for justice for Billy Boone.

5 Here's our instruction that the Judge gave you. I  
6 got one word wrong up at the top, actually the word is,  
7 "should." In an action for damages in a personal injury case  
8 you should consider the following. And the first three items  
9 are the ones I want to talk a little bit about right now.

10 The personal injury sustained and their extent and  
11 duration. The effects such injuries have on the overall  
12 physical health and mental well-being of the plaintiff. And  
13 physical pain, mental anguish in the past and what can  
14 reasonably be expected of that, in the future. That's one  
15 whole area that actually should be lumped together. We should  
16 only have one line for this. You'll see it on your verdict  
17 form. It's called non-economic damages and all that means is  
18 that it's the damages for this kind of elements in the case,  
19 which I'm going to spend a lot more time talking about because  
20 it's really important, but those things that economists can put  
21 numbers on but reasonable people, like you, can put a number on  
22 in fairness of justice.

23 Then there's two more elements that we'll talk about  
24 a little bit. Medical expenses and medical and related  
25 expenses that may be expected in the future, and loss of

1 (inaudible). Now these last two are pretty easy to deal with,  
2 especially loss of earnings. Look, you saw the evidence on his  
3 loss of earnings. You can write a check to cover that.  
4 There's some controversy about how much he would have made.  
5 Defense expert wants to take three low years when his wife is  
6 sick with cancer and call those the average and project from  
7 that. It's up to you to figure out how fair that it is to  
8 Mr. Boone and also look at it in light of how loyal his clients  
9 were and how they had job after job after job after with this  
10 guy, and how he was so proud of the fact that his business  
11 thrived on one thing, word of mouth.

12 Now, let's talk about what the consistent picture is  
13 that we've seen of what is wrong with Billy Boone because of  
14 this injury. I've got to keep that whistle wet. You have seen  
15 a lot more evidence than all of those paid expert witnesses put  
16 together on what is wrong with this man. You've seen a  
17 consistent picture of what's wrong with this man from multiple  
18 angles on him.

19 First off, when Billy Boone sat up there on the  
20 witness stand, and I hope you could understand why I did not  
21 want to have him in court to listen to some of that painful  
22 evidence from family members and his former customers about why  
23 they wouldn't hire him anymore and doctors about what is wrong  
24 with him and why I even asked him for the closing argument,  
25 please don't come Mr. Boone. It's not going to be good for you

1 to hear this stuff. It's painful for you. And we'll hear more  
2 about that because there's an issue in this case about his  
3 understanding of his own injury and why he needs more help to  
4 understand it and deal with it and get some therapy for it and  
5 try to bring it under a little better control. That's called  
6 insight. We talked about that a little bit.

7 But when he did come in, you saw a guy who could  
8 barely control his emotions on the witness stand, at certain  
9 points. You saw flashes of a wonderful, sly sense of humor  
10 which he still has. He's the same man but he's a man with an  
11 injury put on top that. Remember when he was asked about his  
12 pills for anti-depression and he kind of slyly offered the  
13 defense lawyer one, in case he needed it. That's the kind of  
14 sense of humor this guy had but then you saw when he was  
15 confronted with the testimony about his memory problems. He  
16 just couldn't deal with it and he broke down.

17 And when I had to ask him some questions about his  
18 temper problems, painful questions to ask. He knew they were  
19 coming. I asked him the questions and he was able to see some  
20 of it but he couldn't see all of it. He couldn't see and I'll  
21 talk about this a little more later but didn't you notice the  
22 contrast when his sister, Brenda Cooper, a woman he loved very  
23 much, daily phone calls, went to West Virginia all the time,  
24 baby sister, took care of her, all kinds of free work on her  
25 house, she came and said she has problems with him emotionally



1 almost every time she talks to the man and then he came in and  
2 said I'm not aware of any problems at all that I have with my  
3 sister.

4 That's part of the injury. That's part of the brain  
5 reacting to the injury and walling itself off in not being able  
6 to recognize stuff that is so hard and horrible to confront  
7 that you can't control your own emotions and so you just can't  
8 even see it. It's a defense mechanism. It's a natural  
9 mechanism but it's one he needs some help with.

10 So what has he lost? He's lost the ability to  
11 control his own emotions. Sometimes it's okay when he's in a  
12 controlled environment. When there are certain rules. Here in  
13 court, he knew exactly what was going to happen. He didn't  
14 have any outbursts but he thought about it a long time and you  
15 could see him doing his best to control himself but everyday  
16 life is what this man has problems with. Every time he steps  
17 out of his house, the pharmacy, the grocery store, trying to  
18 talk on the phone to PEPCO about a bill, waitress hasn't  
19 brought the food, every single time, or a lot of the times,  
20 there's some kind of blow up.

21 And, of course, he doesn't shout. He's not that kind  
22 of guy. He doesn't throw things. The defense loved to make it  
23 a point about that. We're glad for that. We're glad it's not  
24 quite that bad. It's just bad enough that he is really hard to  
25 be with and it's hard to be with himself and that's why he

1 isolates himself off and doesn't go places as much as he used  
2 to.

3           So, you know, his sister tries to tell him on the  
4 phone, that she's just learned that a friend of his has died.  
5 She read it in obit page and he gets mad at her because she  
6 hadn't told him before. And she says, Billy, I just read about  
7 it in the paper. And he can't understand that and he can't  
8 follow it and he just stays mad about it. He's got a brain  
9 injury here and it's causing a serious problem for him in his  
10 interactions with other people.

11           Why is this important? The ability for all of us to  
12 cope with the little stresses and strains of everyday life is  
13 our very ability to live in civilization with each other. Can  
14 you imagine what life would be like if we all had this kind of  
15 injury? And we all lashed out all the time? Now you see some  
16 people out there on the street honking their horns and, yes,  
17 those people have problems. And there are people who naturally  
18 have, you know, nasty personalities and you know about that.  
19 And you avoid those people, don't you?

20           Billy Boone wasn't like that and he doesn't like this  
21 in himself but it's hard. It's hard for him and it's hard for  
22 his family. He knew all of this before. Remember what his son  
23 said about how he raised his children. He raised his children  
24 to respect their elders, to open doors for people, to show  
25 common courtesies, to take the friction out of every day

1 encounters.

2           When he would show up at a client's house to do work  
3 on a job Mr. King, the retired FBI agent, said he was so  
4 friendly that it was almost too friendly. They're trying to  
5 get out the door to get to work and Billy Boone wants to sit  
6 there and have a cup of coffee and chat over things and talk  
7 about what he'll be doing for them and all this kind of stuff.

8           And remember, the construction business is a business  
9 of constant stresses and strains. Nothing ever goes according  
10 to schedule, never. The supplies don't come in. You find a  
11 problem when you dig a hole that wasn't there before. The  
12 client says, like Mr. Grubenhoff (phonetic sp.) said, gee, you  
13 know, Billy we'd like to -- he'd already dry-walled all this  
14 in. Remember the testimony from Mrs. Grubenhoff? He'd  
15 already, and Billy Boone talked about this, he'd already dry-  
16 walled it all in over here but then Mr. Grubenhoff said, gosh,  
17 it'd be great to have a window there and looked out over the  
18 thing. Hey, no problem, let's do it. That's the kind of Billy  
19 Boone that existed before this surgery.

20           Now, every single month, when the bank statement  
21 comes in, his daughter-in-law has to explain the statement to  
22 him. The same stuff that she had to explain the last time.  
23 He's got a little paranoid streak in him now. He thinks the  
24 accountant is trying to cheat him and the accountant is not and  
25 she explains it over and over and over but that is part of this

1 limbic structure disorder that you heard Dr. Podilikio talking  
2 about.

3           Things like medical appointments? Somebody else has  
4 go to do that for him. He can't stand the stress of dealing  
5 with it. Dr. Griffith in his notes, talks about some stuff.  
6 Well, I'll sure show you some of his notes. Simple memory  
7 issues like what kind of tools am I going to need to go change  
8 the battery in my daughter's car. She testified on Monday how  
9 he had to go back and get the tools, got the wrong tools. The  
10 strike plate on her door, two simple screws, didn't have the  
11 right tools for that. It took him forever to do it.

12           He tried to do a job for Mr. and Mrs. King after the  
13 surgery. Here's a man who is meticulous, perfectionist, kept  
14 the job site spotless and he tried to do the job. He did an  
15 incomplete job. He lacked the judgment to have a common sense  
16 judgment to not ask the client to help carry this big window.  
17 The client gets injured. Then he leaves a mess afterwards  
18 because he forgets about it. Forgot to finish the Hubert job.  
19 Mrs. Hubert came in and said she still has the window panes  
20 wrapped up that he had promised to fix for her. And he never  
21 did the window wells right either. He is now not the  
22 meticulous, master carpenter that he was before.

23           And this is a man who worked with his hands all his  
24 life. You heard his daughter say he expressed his love by  
25 making things for people. He made a bed for his grand-

1 daughter. She loved to run and jump and she ruined the old  
2 bed. And he made a bed that would withstand that. His son, he  
3 built a deck for his son and daughter-in-law. Hey, you want  
4 the backyard enclosed? No problem, I'll enclose it.

5 Did a bunch of free work. I think his sister  
6 testified he put a new roof on her house. This is a man who  
7 loved to do things for people because he wasn't an educated  
8 man. He was just a guy who learned that he had a particular  
9 talent with his hands and a way that he could deal with people  
10 and please people and make them happy by making their homes  
11 more comfortable and making their homes more beautiful and more  
12 liveable. And he's lost that.

13 I want to go back to this lack of insight issue. He  
14 can't understand how badly his brain has been damaged. I told  
15 you about eh episode with his sister. Now, somebody could  
16 argue, well, this thing with his sister, he's just insensitive.  
17 He's just not paying attention to what he's doing but that's  
18 not true. If he was deliberately insensitive, he wouldn't  
19 recognize any problem at all. He'd say, ah, you know, I'm a  
20 point spoken guy and I call it like I see it and that's the way  
21 it is. He would apologize to anybody at anytime for anything  
22 but he recognizes the problem. He's sorry about it but he just  
23 can't see the full scope of the problem.

24 It's the damaged brain has set up a coping mechanism.  
25 This injury is so foreign to his normal personality that he has

1 to wall it off. Can you imagine how threatening it would be to  
2 some man who, according to his son, had never lost his cool,  
3 was always the guy in control. Sure he could find a -- I think  
4 we had one little thing from his internist saying that he had a  
5 disagreement with a nurse one day about taking the blood  
6 pressure with his feet on the floor versus on the table. Well,  
7 it turned out Boone was right. He didn't like to be  
8 condescended to. He could be plain spoken about that but there  
9 were major blow-ups. No huge anger. No big arguments, nothing  
10 like that in Mr. Boone's past.

11           Imagine how frightening it is to this man to realize,  
12 in two-part, that part of his thinking process and some of his  
13 emotional process that is the very part of him is now outside  
14 his control. So part of this brain's natural defense mechanism  
15 is to just, you know, refuse to see that that's there. If this  
16 man was confronted with the full extent of his problem, if he  
17 realized that his daughter-in-law will not let him.

18           MR. BRAULT: Pat's going to start crying.

19           MR. MALONE: I don't mean to -- this case has got to  
20 be decided on rationality and we are not asking for sympathy.  
21 We're asking for justice. It was hard for Susan, it was hard  
22 for her to get up and say how they have no social life together  
23 any more. How they don't have Christmas. How they don't have  
24 Easter. And how she won't let him be around the grand kids  
25 because she's so worried he's going to blow up at these little

1 children.

2           If he was confronted with the full extent of it. If  
3 he realized that his sister dreads him coming to West Virginia,  
4 it would devastate him and that's why we had to shelter him  
5 from some of this. That's why he needs professional help to  
6 see some of this and to deal with it. That's why it's been  
7 hard for him to accept treatment because accepting treatment  
8 requires him to accept the that he's got a bad injury to his  
9 brain. That he's got a hole in his brain that's causing  
10 uncontrollable reactions that are foreign to his normal self.

11           And it also explains why he needs a lot more help  
12 coping with daily life than he thinks he needs. He thinks he's  
13 pretty fine but according to Dr. Podilikio, the treating  
14 neurologist, he had damage to the dominant side of brain. To  
15 the part of the brain that's involved with emotion, with verbal  
16 memory and with language. Those are his three problems.

17           Emotional disturbance includes anger flashes. It  
18 includes depression. It includes some paranoia. The memory  
19 tests are all consistent. They show no real improvement over  
20 the years. He is easily frustrated due to the memory problems  
21 and to his more subtle word finding problems. I didn't notice  
22 any word finding problems on the witness stand. You have to be  
23 around him a while to see that but all the health care  
24 providers talk about it and family members have talked about  
25 it. So you can judge that evidence.

1           Let's look at a few things that Dr. Griffith said  
2 about him. We didn't call Dr. Griffith to testify but we did  
3 get his records and let's see what he said. Not quite as bad  
4 as my handwriting but -- where is that one?

5           MR. MITCHELL: Over there?

6           MR. MALONE: Did I already lose it again?

7           MR. MITCHELL: Your pocket? It was underneath the  
8 piece of paper there next to the computer.

9           MR. MALONE: All right. Since surgery, he's had  
10 difficulty remembering conversations and lists but not  
11 activities. He has difficulties with complex problem solving  
12 involving physical problems, lawnmower, walk, and has  
13 conceptual ones, financial problems. He began having problems  
14 with anger, became short and irritable and then he goes on from  
15 there. Let's look at -- that's his very first evaluation, says  
16 Dr. Griffith, initial evaluation at the top up there.

17           Let me fix this a little bit, bring this one down,  
18 okay. Dr. Griffith's diagnosis, dementia secondary to brain  
19 injury and he's giving him an anti-depressant. He's  
20 considering a memory drug. They talk about that but they  
21 haven't done it yet. They are still talking about it.

22           Then his February note, still having the same  
23 problems with short term memory. He notices that memory  
24 problems are not so bad if he can stay calm. He wants to see  
25 how well tenalol and boosebar work together and we'll wait to



1 see how the effects plateau before considering these two memory  
2 drugs. Impression, anger, dis-control from brain injury.

3 Okay. That is a doctor who is not paid any money to  
4 do anything but was just hired by another treating doctor,  
5 Dr. Podilikio to treat this man and to try to help him and try  
6 to make honest evaluations of what he found. Now here's  
7 another interesting thing. There is only one side in this case  
8 that has presented to you any evidence from any medical  
9 doctors, and by medical doctor I mean that's the guy with the  
10 MD after their name, who have seen this patient.

11 Dr. Podilikio testified on behalf of Billy Boone. He  
12 is the only neurologist who has seen him who had testified for  
13 Billy Boone. Dr. Podilikio took the objective test results by  
14 these testers, Shretland (phonetic sp.) the guy from Hopkins  
15 and Dr. Fetio, (phonetic sp.) the man that Podilikio referred  
16 him to for the regular testing as part of the treatment. And  
17 he would up giving him four sets of testing over the last few  
18 years. He put the tests together for us on the witness stand  
19 and he said that they're all consistent and they show two  
20 things. They show the man can't work and they show the man  
21 needs a lot of help.

22 Now the Defense did not have the ability to hire any  
23 neurologist, any neurosurgeon in the country that they wanted  
24 to, to come in and examine Mr. Boone and opine on his injuries,  
25 not one. The only MD they brought in on this issue was

1 Dr. Fallick, the neurosurgeon. How many times has he seen  
2 Mr. Boone? Zero. He's the man who told you, you can lop off  
3 three, four, five centimeters of the left temporal lobe, no big  
4 deal. I think I'll decline that particular surgery.

5           So you have heard from the entire United States  
6 neurological community about this man's brain injury in the  
7 form of Dr. Podilikio and the medical records that you've seen  
8 from the other doctors, Dr. Griffith, his colleague who's both  
9 a neurologist and a psychiatrist. And there's one more  
10 independent person here that I want to mention, and that's  
11 Beverly Whitlock. The lady who came in, I think, on Wednesday  
12 the third week of trial. She is the head of this outfit. I  
13 think they're changing their name. It used to be Head Injury  
14 Rehab and now it's called Brain Injury Rehab.

15           She told you, it's right over here, on Church Street,  
16 right across over by the Metro. The longest free-standing  
17 brain injury facility in the state of Maryland. She's  
18 evaluated Mr. Boone. This lady Greenbaum, the lady who only  
19 testifies for defense on life care plans or actually, excuse  
20 me, slightly an inaccuracy. Thirty-one to one, you saw.  
21 Thirty-one defense, one for the plaintiff. She said it would  
22 be a good idea for him to go to Ms. Whitlock's agency so he  
23 went there. And he was seen there on four occasions, had an  
24 evaluation. She came in and talked about what he needed.

25           Ms. Phillips, the nurse that we hired to prepare the

1 life care plan for Mr. Boone, she talked to Ms. Whitlock  
2 herself and put together a care plan that put everything  
3 together. Ms. Whitlock said that he needs someone to manage  
4 his interventions with the outside world and he needs daily  
5 help in his home, because he needs someone to intervene on his  
6 behalf with the outside world. He needs somebody to handle  
7 phone calls for him. He needs somebody to manage his medical  
8 appointments. He needs someone to do kinds of things that he  
9 did quite well on his own during his wife's final illness when  
10 his daughter referred to him as superman, because he ran the  
11 entire household and for months took care of woman on her death  
12 bed.

13 Here is a giving man who has given and given and  
14 given and now he needs some serious help. He also needs  
15 somebody to push him out the door and find non-stressful things  
16 for him to do outside the home otherwise he sits at home,  
17 because he's afraid of his own temper and he's frustrated at  
18 the inabilities that he has that come out when he gets out into  
19 a non-structured environment.

20 There is a safety issue for Mr. Boone. There is no  
21 way, according to his treating doctor and according to  
22 Ms. Whitlock, that he could be by himself in this outside  
23 world. He gets into verbal arguments all the time. Left to  
24 himself, he would stay by himself. He needs help initiating  
25 things and this care is needed because of under the law, you

1 don't just give a little bit of help to somebody. You are  
2 required, when a defendant has injured somebody, you're  
3 required to put them back in as close to a place that they were  
4 in before the injury, as money can do.

5           Sure he can pour himself a bowl of cereal in the  
6 morning and he can probably run a load of laundry. He can  
7 handle controlled, predictable situations, as long as his  
8 memory's not called on. Yes, he can drive in traffic. He can  
9 take trips. He can't handle stressful traffic because it's  
10 difficult on his temper situation. The problem is in  
11 controlling the unpredictable situations, in other words, real  
12 life.

13           So at home he can be safe and comfortable by himself  
14 and then he feels like, well, gee I ought to be able to go  
15 outside and do stuff but then when he tries to go outside, then  
16 the damaged part of his brain goes haywire and he has an  
17 outburst and that's embarrassing and so he just wants to go  
18 home and stay at home.

19           Now that's the kind of care Eloise Dishman (phonetic  
20 sp.) gives him. To intervene for him with outsiders. To  
21 mediate disputes that he has, to try to calm him down and to  
22 push him to have some kind of semblance of a normal life. We  
23 know she won't be there forever but the law on this issue makes  
24 it easy for you to decide how much care he needs because you  
25 don't have to make any kind of prediction about, you know,

1 what's going to happen with her cancer or her other health  
2 problems. You know, how much longer might she be there. You  
3 don't have to decide that issue because the Judge gave you a  
4 key instruction that I'm going to mention to you. If I can  
5 find it. That's not it. That's it.

6 Judge Dugan told you this. If you find from the  
7 evidence that because of his injury, Mr. Boone needs certain  
8 services, you should award him whatever amount you find is  
9 reasonable and necessary to pay for those services without  
10 regard to whether or not he may receive any such services from  
11 friends or family members. That is the law and you are  
12 required to follow it.

13 Why is that fair? Why is that common sense? Well,  
14 when a defendant, and let's just switch gears for a second and  
15 think about it like an auto accident, what if -- we can put the  
16 lights up again. What if somebody plowed through an  
17 intersection on a red light and hit a pedestrian and the  
18 pedestrian is then rendered home-bound for a long time? Well,  
19 fortunately, they have a big family. Family can take of them.  
20 Is the defendant, under Maryland law, then allowed to say,  
21 well, you guys go ahead? Take care of it. Thank you very  
22 much. Uh-huh, no, that ain't fair.

23 The law is that the defendant has to pay for the harm  
24 that the defendant caused without regard to whether or not some  
25 family members might step into the breach and help out. It

1 just isn't fair. You can't hurt somebody and then take  
2 advantage of the fact that they have a family because if they  
3 didn't have a family, of course, you would have to, obviously,  
4 pay for the services but that just isn't fair to make other  
5 people clean up the mess that you made by your negligence.  
6 That's what the law is on this issue.

7 I just have a few more points. What has happened to  
8 Mr. Boone's world? His world has shrunk. He has no more  
9 clients. He has less contact with his family than he has a  
10 right to have. He has no telephone contact with the outside  
11 world unless she makes the call and she mediates all the  
12 disputes that come up.

13 One little thing. You may have seen him waiting to  
14 testify outside and seeing his old customers rallying around  
15 him and gosh it brightened him up, but that kind of contact is  
16 rare is for him now because those clients don't come around any  
17 more. They don't call him up and he doesn't see them because  
18 he can't work for them anymore. You heard from two clients.  
19 They said, man, we loved this guy before, great work,  
20 trustworthy. You could leave him in the house all day long,  
21 really meticulous, great woodworking, fair price but would I  
22 hire him now? I'm sorry, not after what happened when I  
23 brought him in after the surgery and gosh, he just wasn't the  
24 same guy but they thought enough of the old Billy Boone to come  
25 in and testify for him and tell you what they knew about him

1 before. And what they have seen this brain injury do to him.

2 Now there's been some kind of hints here, and maybe  
3 more than hints, that there's some kind of fakery involved.  
4 There's some kind of exaggeration involved here. I've got a  
5 couple of questions about that. And you saw it because the  
6 professional witnesses, the guy from Hopkins and this lady  
7 Greenbaum, hey, he's got no problems. He's wonderful. He knew  
8 that Saddam Hussein had climbed out of a hole and all this kind  
9 of stuff.

10 By the way, on that issue, it's great that he knows  
11 current events but how much do current events help you manage  
12 real life and there's something a little bit different and a  
13 little tricky about giving somebody a test on that kind of  
14 stuff. Tricky, it's a little subtle but think about this for a  
15 minute. All this stuff in current events is stuff we get  
16 bombarded with, especially somebody sitting at home all day  
17 with the TV on. CNN all day. You've got your newspaper.  
18 You've got your radio 24 hour news. You've got your news  
19 magazines. How many times did we hear that Saddam Hussein got  
20 pulled out of hole? Well, many, many, many. How many times  
21 did we hear that John Edwards and Senator Kerry were running  
22 against each other for the presidential nomination? Many, many  
23 times.

24 Repetitive information does sink through. And the  
25 actual test results on him showed that when he gets

1 something -- he had a list of words repeated to him. You  
2 remember we talked about that a little bit? That's a standard  
3 test. Dr. Shretland gave him the test. Twelve words, just  
4 simple words, you know, cat, dog, mouse, whatever. Rattle off  
5 a list of words. Okay Mr. Boone, I've just given you 12 words.  
6 Tell me as many of the words as you remember. He got three on  
7 the first try. Oh, that's only mildly abnormal. Nothing wrong  
8 with that, according to Dr. Shretland.

9           But the issue is that in real life we have  
10 conversations with people, people ask us to do things. They  
11 expect that we're going to know it the first time. They don't  
12 expect that they're going to have to repeat two, three, four,  
13 five times before it sinks in. That's the kind of problem that  
14 he has with short term memory. And if he wanted to fake it or  
15 exaggerate his problem, would the current events clues have  
16 been the perfect opportunity to just sit there and say, gee, I  
17 thought Bill Clinton was still president or, you know,  
18 something like that just to -- it'd be child's play for him to  
19 do something like that but that's not the kind of man he is.

20           He does his best, put his best foot forward, to look  
21 better than he really is. He answered those questionnaires  
22 saying, yes, I can do all that stuff because he's ashamed to be  
23 a person with brain damage. He's got dignity and he craves  
24 human respect.

25           And by the way, has that been an issue in this case?



1 Has Mr. Boone gotten respect from the Defense in this case? He  
2 hasn't even gotten an apology about this whole thing but has he  
3 gotten respect from the defense in this case for what has  
4 happened? Even if it's without their fault, has he gotten the  
5 respect about what has happened? Or has it been a story of oh,  
6 of we've got this witness saying one thing. And we've got line  
7 12 of the deposition saying something slightly different and,  
8 well, better not believe them.

9 Well, let me mention a couple of other quickies. I  
10 did a little score card on the opportunity to observe Mr. Boone  
11 by health care providers. Here it is. Podilikio, four to five  
12 visits. He actually forgot his last visit in March this year  
13 that you heard about from one of the lay witnesses.  
14 Dr. Griffith's four times, Feticio four times, Whitlock's agency,  
15 four times and she was there each time. Nurse Phillips who did  
16 the care plan, two personal visits plus several phone calls  
17 plus she worked with Whitlock and Podilikio. And we go to the  
18 other side and what do we have? One visit with Shretland, one  
19 visit with Greenbaum, zero with Dr. Fallick.

20 Now, I want to talk a little bit more about the jury  
21 instruction and I want to suggest it to you this way, as a way  
22 of considering this part of the jury instruction. The way to  
23 think about it is to think about up front. Think about the  
24 night of January 5, 2000, the night before the surgery.  
25 Somebody comes to Billy Boone and they say, Mr. Boone,

1 something bad is about to happen to you. I know that things  
2 are going great for you right now. You've got a new love in  
3 your life with this widow. You're a widow. You've gotten  
4 together. Your work's picking back up. Things are going great  
5 for you right now. You've got this ear surgery that you had  
6 been led to believe was totally routine, in and out one day  
7 surgery, no big deal but I've got some bad news for you.  
8 Something bad is about to happen to you and we're going to have  
9 to put you into a new career and a whole new job.

10           Through negligence, this surgery that you're going to  
11 have tomorrow is going to damage your brain and you're not  
12 going to be qualified for your old life any more. You're not  
13 going to be qualified for your old career any more. This  
14 damage is going to ruin some of the things that you prize most  
15 in your life. Your ability to show your love by what you do  
16 with your hands. Your ability to deal smoothly and happily  
17 with your clients. You're going to develop a fight or flight  
18 problem that's going to make you want to stay at home most of  
19 the time. It's going to make you walk out on meetings when  
20 people are trying to help you. You're going to avoid  
21 interactions with people. You're going to lose confidence in  
22 your ability to work. You're going to need to go to a whole  
23 raft of new doctors and you're going to need to have somebody  
24 speak on your behalf to outsiders, because you just have such a  
25 hard time controlling yourself and this is going to be your new

1 job that we're putting you into and we're taking you out of  
2 your old job but there is one piece of good news, Mr. Boone.  
3 We will pay you the full value of this new job because when  
4 someone negligently harms someone else, they're required to pay  
5 them back and pay them the full value of the new job that the  
6 person is involuntarily forced into.

7           This job has full medical benefits, this new job.  
8 However, there's one wrinkle now. All the medical benefits are  
9 only going to be paid in one lump sum. So somebody's going to  
10 have to figure out all of your medical needs in advance,  
11 project them out over your lifetime, make a reasonable  
12 projection and then figure out what one sum of money would be  
13 enough to pay you for those medical benefits. And it's going  
14 to have to be enough because he can't come back later on, 10  
15 years, 20, 15 years down the road and say, you know, the  
16 estimate was too low, I need more money now. It doesn't work  
17 that way. It's a one shot deal. All the wages that you fairly  
18 lost from your old career, those will be reimbursed, too.

19           And let's talk a little bit about the -- can I have  
20 the lights back up please? Let's just talk a little bit about  
21 this. Here's how we'll do it, Mr. Boone. We're going to hire  
22 people who will talk to all your treating doctors. They'll do  
23 their own independent evaluation. You'll have somebody, by the  
24 way Mr. Boone, you're going to get somebody's who's experienced  
25 in the health care field, a lady named Phillips, on your

1 behalf, who's a nurse. And she's going to help you out on  
2 this.

3 Now because the Defense has a right to dispute it,  
4 they'll bring in somebody from a special education field who  
5 only works with defendants and who only does minimal life care  
6 plans that are always cheaper than the health care providers  
7 think you need. That's their right to present the evidence but  
8 here's how we're going to do it, Mr. Boone. We're going to  
9 have a group of fair minded people, drawn at random from the  
10 community, come in and they will consider the evidence and they  
11 will make a reasoned judgment about what justice requires for  
12 you, Mr. Boone. And if any one item on the list is something  
13 that this independent panel of people decides is not necessary?  
14 We'll just cross it off and they will lower the total amount.  
15 But we've talked a little bit about all the therapy that this  
16 man needs to really help him deal better with his situation.

17 The care management, which is managing his life as  
18 opposed to attending being there day to day with his life.  
19 Those are two separate elements that you heard about. We'll  
20 even pay you \$0.37 a mile for your medical appointments,  
21 Mr. Boone. Now the big item? Your personal care attendant?  
22 You may not need that now because you've got Eloise but under  
23 the law and the jury, the independent panel that we're going to  
24 bring in to decide this, they are going to be sworn at the  
25 beginning of the case when they stand up and take their oath as

1 jurors, we're going to have them swear that the beginning of  
2 the case, Mr. Boone, that they will follow the law. And so  
3 don't worry about it. If the jury decides that you really need  
4 somebody with you every day because of this problem you have?  
5 Even though it's kind of expensive, if they decide that you  
6 need it and you can't function on yourself by yourself, they'll  
7 pay for it if it's reasonable.

8           Now, since these fringe benefits, the medical plan  
9 and the pay for the old job will not begin to pay you a fair  
10 wage for this new uncomfortable, miserable job that we're  
11 involuntarily putting you into, you will be paid for the new  
12 job itself. And under this the independent panel will consider  
13 all of these elements. They're going to consider what affect  
14 this has had on your overall physical and mental health and  
15 well-being and they will come up with a fair sum of money for  
16 this new job.

17           Oh, I forgot one thing, Mr. Boone, I'm sorry. On the  
18 new job, no days off. No vacations. No retirement. It's a  
19 24/7 job, Mr. Boone. And it's a lifetime job, Mr. Boone.  
20 Statistics are that you'll probably live to about 81, so you'll  
21 be living with this injury from January 6, 2000 for 20 years.  
22 Twenty years worth of time for you in this new job and you're  
23 never -- you're going to see glimpses of the old self. Every  
24 time you see an old job site of yours that you did, you'll  
25 remember it. Every time you see an old client, you'll brighten

1 up at that and you'll remember what you used to be able to do,  
2 but you're not going to be able to do it anymore but the jury  
3 will come up with a fair amount to pay you for what's fair for  
4 you having to involuntarily go into this job.

5           And they'll decide the full measure of accountability  
6 for the person who's negligence put you into this job and they  
7 will realize that money does help people cope with  
8 uncomfortable and difficult jobs. There are a lot of things  
9 that can be done to make your life better, Mr. Boone, in this  
10 new job. That's not just about paying for attendance and  
11 paying for doctor visits and paying for going to therapy and  
12 getting counseling. There are things that can be done to make  
13 this job comfortable and to make this job fair. And that's  
14 what this jury is going to do for you, Mr. Boone.

15           That's what the law is. The law says that the job of  
16 the fact finder, the jury, is to put things back to where they  
17 were before. And that if there's parts that they can't put  
18 back to where they were before, they've got to do the best they  
19 can to make up for the harm that has been caused.

20           I'm not even going to mention a number on this. Some  
21 people would think that it might be a lot more than the life  
22 care plan just putting somebody into this kind of job Mr. Boone  
23 has. Some people might say it's less. I trust you to come  
24 with a fair and reasonable verdict on that. And I thank you  
25 for your attention to Mr. Boone's case.