

1 follows:

2 THE CLERK: Thank you, sir. You may be seated.

3 And I ask you to please lean forward into the
4 mic and keep your voice up for the record. Can you state
5 your name and spell your last name for me please?

6 THE WITNESS: Allen Cole Burks. B-u-r-k-s.

7 THE CLERK: Thank you.

8 And your business address for the record?

9 THE WITNESS: 660 South Euclid Street, St.
10 Louis, Missouri 63110.

11 THE CLERK: Thank you.

12 DIRECT EXAMINATION

13 BY MR. GASTON:

14 Q. Good morning, Dr. Burks.

15 A. Good morning.

16 Q. Dr. Burks, is it true that you graduated
17 medical school in 2007?

18 A. Yes, sir.

19 Q. Is it also true that in medical school you were
20 taught the principles of internal medicine?

21 A. Yes, sir.

22 Q. Is it also true you were taught the signs and
23 symptoms of rhabdomyolysis?

24 A. Yes, sir.

25 Q. Also true you were taught how to read an EKG

1 strip, how to recognize an irregular heartbeat on an EKG?

2 A. Yes, sir.

3 Q. Is it also true that you were taught that
4 elevated potassium levels could cause an irregular
5 heartbeat and can pose an immediate danger to the
6 patient?

7 A. Yes.

8 Q. And you were also taught the proper medication
9 necessary to safely treat a patient with elevated
10 potassium levels?

11 A. Yes, sir. That includes all the medications
12 that I had ordered that day including the Kayexalate.

13 Q. And after medical school you went through a
14 three year family medicine residency program in Illinois
15 that completed in 2010?

16 A. Yes, sir.

17 Q. And in your family medicine program were you
18 exposed to patients with medical complaints similar to
19 that of Dennis Allen?

20 A. I was.

21 Q. And you were also supervised during that time
22 by other more experienced attending physicians on the
23 proper medical care that was required for patients such
24 as Dennis Allen?

25 A. I'm sorry. Could you say that again?

1 A. You were also supervised during your residency
2 program by other more experienced physicians on the
3 proper medical care and treatment that is required for
4 patients such as Dennis Allen.

5 A. Yes.

6 Q. And once you completed your residency program
7 you didn't need to be supervised by any other physician
8 in order to evaluate and treat patients in a hospital
9 setting; would that be true?

10 A. Following my family medicine residency I sat
11 for and took the family medicine boards and was board
12 certified in family medicine. And therefore could have
13 at that time been unsupervised in a hospital setting,
14 yes.

15 Q. Okay. And then you decided to travel to
16 Georgetown University Hospital in Washington, D.C. to
17 participate in an internal medicine residency program?

18 A. I did.

19 Q. And you completed that residency program?

20 A. I did.

21 Q. And you sat for and took your board
22 certifications for that program.

23 A. Yes, sir.

24 Q. Isn't it true that part of the examination to
25 be board certified you have to be familiar with diseases

1 of the heart such as irregular heart rhythms?

2 A. Yes, sir.

3 Q. You also have to be familiar with the diseases
4 of the gastrointestinal system; correct?

5 A. Yes, sir.

6 Q. And you also have to be familiar with
7 rhabdomyolysis and the medical condition of hyperkalemia.

8 A. Yes, sir.

9 Q. So by the time you completed your second board
10 certification you were board certified in two fields of
11 medicine where you were able to gain, you can correct me
12 with your wrong, all the information that you needed to
13 safely diagnose and treat patients with conditions
14 similar to Mr. Allen?

15 A. Absolutely.

16 Q. And UMMS, University of Maryland, is the third
17 hospital that you worked at as a physician?

18 A. No, sir. I worked at multiple hospitals
19 throughout the time that I obtained my training. So at
20 Georgetown I went through at least six different
21 hospitals.

22 I worked at three separate hospitals during my
23 family medicine training.

24 And so that'd be my tenth different hospital
25 working at.

1 Q. Tenth different hospital. And every time you
2 went to a hospital you went through some type of
3 orientation program; did you not?

4 A. Not necessarily. Orientation programs for
5 those hospitals rotate. Typically it would be just
6 simply how to use the electronic medical record.

7 Q. Okay. Are you -- you were aware because you
8 had worked at 10 different hospitals that hospitals
9 routinely have order sets and guidelines available for
10 doctors just like you who treat patients just like Mr.
11 Allen; would that be true?

12 A. They typically all have, yes, order sets that
13 facilitate the care. It makes it easier for -- for me to
14 provide the care that I intend to.

15 As far as the guidelines go those are -- may or
16 may not be readily available to us or we may not even
17 know that they are -- exist.

18 The hospital guidelines certainly don't take
19 precedent over the national societies that publish
20 guidelines for -- for treatment. So --

21 Q. Okay. And --

22 A. And typically are --

23 Q. -- what --

24 A. Let me --

25 MR. SHAW: May he finish, please?

1 THE COURT: Mr. Shaw --

2 MR. SHAW: I'm sorry?

3 THE COURT: He may finish. But you don't need
4 to hold your hand up in Counsel's face.

5 MR. SHAW: Okay.

6 THE COURT: Yes. Let the witness finish.

7 THE WITNESS: Well I mean -- I'm sorry. Those
8 guidelines are typically based on the national guidelines
9 that are published by international -- national and
10 international committees. Medical committees. And -- if
11 they exist. In which case I don't believe there is a
12 guideline that's published by an international medical
13 community for the treatment of hyperkalemia per se.

14 BY MR. GASTON:

15 Q. Well when you went to work with University of
16 Maryland Hospital back in 2012 did you even care to find
17 out whether the hospital had published guidelines for
18 medical conditions that would assist you in determining
19 the proper care and treatment for a patient who developed
20 a medical condition?

21 A. So your question is would I care to find out if
22 the hospital had it's own -- it's own guidelines separate
23 from those --

24 Q. Right.

25 A. -- others published?

1 In so much as if the situation were to arise
2 where I would need to seek that out, possibly.

3 But typically if I have medical question that
4 I'm trying to answer I don't go to the hospital for their
5 guidelines. I go to the medical literature and other
6 more thoroughly peer reviewed literature that's out
7 there.

8 Q. Well are -- are you telling us that the
9 guidelines that the hospital has in place for the
10 treatment of the condition of Mr. Allen had hyperkalemia
11 were not throughly researched?

12 A. I'm not saying that at all.

13 Q. Okay.

14 A. I'm just saying that I would -- at the time I
15 treated Mr. Allen I wasn't aware that those existed. Nor
16 did I necessarily need to be to perform my job because I
17 had access to other more widely published guidelines and
18 information.

19 Q. So you didn't need to look at any hospital
20 guideline because you already knew what would be required
21 to treat Mr. Allen if he had hyperkalemia; would that be
22 correct?

23 A. The way the questions asked is --

24 Q. Did you not understand my question?

25 A. No. Please repeat it.

1 Q. I'll ask it again. When you treated Mr. Allen
2 isn't it true you had all the information, education,
3 skills and talents required to treat a condition of
4 hyperkalemia without having to look at any guideline?

5 A. Yes. I was --

6 Q. Okay.

7 A. I was adequately trained in the management of
8 hyperkalemia, rhabdomyolysis, cirrhosis, amongst the
9 other conditions that he had.

10 Q. And if it ever came -- if you ever thought
11 during the treatment of Mr. Allen that you did not have a
12 sufficient knowledge to treat him safely you could have
13 searched the hospital's website to see if they had the
14 guideline and to see if they had the order set; correct?

15 A. I could have searched the hospital website.
16 But I would have used a more broadly accepted information
17 set. For instance, Up To Date is a widely peer reviewed
18 website that's readily available.

19 I would have gone there because it's -- it's
20 widely -- it's more thoroughly vetted, so to speak, than
21 an internal hospital guideline. Which often times would
22 be based on the same literature.

23 Q. Were you aware of the Up To Date publication
24 that specifically dealt with the use of Kayexalate to
25 treat patients like Mr. Allen at the time you treated

1 him? Because you mentioned Up To Date. Were you aware -

2 -

3 A. I didn't. Yes. I was.

4 Q. You were aware of it?

5 A. Yes.

6 Q. Before?

7 A. Yes.

8 Q. And you were aware that that guideline
9 cautioned against the use of Kayexalate when dialysis was
10 readily available? You were aware of that at the time?

11 A. No. I don't agree with that statement.

12 Q. I didn't ask if you agreed with the statement.
13 I asked you if you read that literature and were aware
14 that that was contained in literature that you say is
15 from a publication that you believe is usually reliable?

16 MR. SHAW: Objection as to compound nature,
17 Your Honor.

18 THE COURT: Sustained.

19 BY MR. GASTON:

20 Q. Were you aware of that publication -- Up To
21 Date publication with respect to the management and care
22 of a patient with hyperkalemia?

23 A. I was.

24 Q. And --

25 A. The reason I disagree with your previous

1 statement is because I disagree with the statement that
2 it warned against the treatment -- or the use of
3 Kayexalate when dialysis is readily available.

4 Q. Okay. So you didn't believe what the doctors
5 who put together that publication that you usually find
6 is reliable -- you didn't believe in that one statement
7 regarding Kayexalate should not be used when dialysis is
8 readily available?

9 A. No, sir. That's not what I said.

10 Q. Okay. Do you believe with that statement that
11 Kayexalate should not be used to treat patients with
12 hyperkalemia when dialysis is readily available?

13 A. I do not believe that statement is used as you
14 said it. That Kayexalate should not be used when it's
15 readily available. I disagree with that.

16 Q. And isn't that what one of the things in the
17 article says?

18 A. No. It does not say it should not be used.

19 Q. When dialysis is readily available. It didn't
20 caution physicians about doing that?

21 A. It didn't.

22 Q. Did it -- did it indicate that there was an
23 association between Kayexalate and intestinal necrosis
24 that it's been know for a while? Was that in -- in the
25 guideline?

1 A. That specifically mentioned an association.

2 Q. Right.

3 A. Which is to me not necessarily proof that it is
4 common enough that in an emergency situation such as Mr.
5 Allen's situation that it's something that I need to take
6 into significant consideration.

7 Q. Okay.

8 A. And so it was not something that I paid
9 particular attention to.

10 Q. All right. But at least you were aware of it
11 at the time you treated Mr. Allen; correct?

12 A. No. I won't say that.

13 Q. Well wait a minute. If you -- I thought you
14 told me you read the article and you were aware of the
15 article before you treated Mr. Allen; didn't you tell me
16 that, sir?

17 A. I did.

18 Q. Okay.

19 A. But again, I said I did not particularly pay
20 attention to that part of the article.

21 Q. Well did you read the whole article and just
22 ignore that part of it?

23 A. No, I wouldn't say that.

24 Q. So then you read the whole article. You read
25 every paragraph. And you were aware --

1 A. I'm not saying I read the entire article and
2 every paragraph.

3 Q. All right. Well -- but there was the article
4 that specifically dealt with treating patients who have
5 hyperkalemia; true?

6 A. And in regards to Mr. Allen and that not all of
7 the information in that article applies directly to him.
8 In which case I would have no need to read every single
9 thing.

10 And then in combination with all the other
11 medical literature I'm required to read on a daily basis
12 I certainly can't be expected to recall --

13 Q. All right. But in order to tell the jury that
14 portions of the article don't apply to Mr. Allen you have
15 to read the whole article; don't you?

16 A. Not necessarily, no.

17 Q. Okay. So just -- let me ask you a simple
18 question. Were you aware that one of the recognized
19 risks of administering Kayexalate to a patient such as
20 Mr. Allen -- one of the recognized risks was intestinal
21 necrosis and bowel perforation at the time you ordered
22 the medication for him?

23 A. At the time that I ordered I was not aware of
24 the association.

25 You keep calling it a risk. And I can't agree

1 with that statement.

2 Q. Okay. You were not aware of the association at
3 the time you treated Mr. Allen; correct?

4 A. Correct.

5 Q. The article directly comments on that
6 association; correct?

7 A. Fair enough.

8 Q. And you read the article before you treated
9 him; right?

10 A. I had read that article probably several times.
11 But again, that particular part of the article I --

12 Q. You forgot.

13 A. -- simply forgot.

14 Q. You forgot.

15 A. Or recall -- didn't recall it.

16 Q. Isn't it important for doctors such as you to
17 know an association? An association that can cause the
18 death of a person's colon and possibly the patient's
19 death for the drug that you're about to administer a
20 patient. Don't you think it's important for a doctor
21 such as you to know that?

22 A. The way you state you that, no. I don't --
23 don't think that's necessarily true because it's an
24 association. It's a weak association. And there was no
25 well published or disseminated information directly to

1 physicians to say this is something that you have to be
2 aware of. You have to make the patient aware of.

3 Q. Well. But there was articles published for
4 physicians right in the hospital that you were working
5 at. And the guideline was published a year before you
6 treated Mr. Allen. And you know -- you've seen these
7 guidelines now; haven't you?

8 A. I've seen --

9 MR. SHAW: Objection. That's a multiple --

10 THE COURT: Sustained.

11 MR. SHAW: -- questions.

12 THE COURT: That is a compound question.

13 Mr. Gaston, the question is not otherwise
14 objectionable. If you would cut it up so that the doctor
15 can answer each question.

16 MR. GASTON: Thank you.

17 BY MR. GASTON:

18 Q. Doctor, I think you testified that there was no
19 well known publications or articles that warned of a
20 major complication of intestinal necrosis and bowel
21 perforation when you treated Mr. Allen as a result of
22 Kayexalate; is that what you're telling me?

23 A. Yes.

24 Q. Okay. Were you aware that when you treated Mr.
25 Allen the hospital had a set of guidelines specifically

1 directed to the treatment of a patient with hyperkalemia?

2 A. I think I've answered that.

3 Q. Okay. But you --

4 THE COURT: Please answer it again.

5 THE WITNESS: Yes. Or I'm sorry. Ask the
6 question one more time.

7 BY MR. GASTON:

8 Q. Let me show you Plaintiffs' Number 65 which is
9 in evidence.

10 This guideline has been identified by
11 Pharmacist Young for guidelines that were in place at the
12 hospital a year before you started to work there.

13 Actually 2012. I apologize. They were in place in 2012.

14 When did you start to work at the hospital.

15 MR. SHAW: Objection. Compound again.

16 THE COURT: Overruled.

17 BY MR. GASTON:

18 Q. When did you start to work at the hospital?

19 A. July 2012.

20 Q. Okay. Does that guideline modify to the
21 management of hyperkalemia?

22 A. It does.

23 Q. Is that the exact condition that Mr. Allen had
24 on March 18th?

25 A. Yes.

1 Q. Is that guideline also comment on the drug
2 Kayexalate which is SPS?

3 A. It does.

4 Q. Flip to the next page.

5 I want you to read to the members of the jury
6 the first line in the box to the right that has to do
7 with major complications of this drug. And what does it
8 say?

9 A. "Major complications are intestinal necrosis
10 and bowel perforation."

11 Q. And you didn't know that at the time you
12 treated Mr. Allen; did you?

13 A. I did not.

14 Q. And you do not disagree with that statement; do
15 you?

16 A. I can -- I can't disagree with that statement
17 at this point, no.

18 Q. So it was true at the time you treated Mr.
19 Allen that a known major complication of the drug that
20 you were going to administer to him was intestinal
21 necrosis and bowel perforation?

22 MR. SHAW: Objection, Your Honor.

23 THE COURT: Overruled.

24 THE WITNESS: State it again please.

25 BY MR. GASTON:

1 Q. You did not know at the time you prescribed
2 Kayexalate for Mr. Allen that a known major complication
3 of that drug was intestinal necrosis and bowel
4 perforation?

5 A. That's correct. I did not know that.

6 Q. Don't you believe that any reasonable and
7 prudent doctor treating a patient such as Mr. Allen who
8 is going to administer Kayexalate to Mr. Allen should
9 know the known major complications of that drug is
10 intestinal necrosis and bowel perforation?

11 A. I can't agree with that, no. Not as the way
12 you state it.

13 Q. So --

14 A. I don't think that in -- in the situation that
15 Mr. Allen was in I don't think a reason -- any another
16 reasonable or prudent physician it would make one
17 difference whether they knew it or not. I think --

18 Q. I didn't --

19 A. -- in this situation --

20 Q. I didn't ask you whether it made a difference.

21 MR. SHAW: Your Honor, may he finish please?

22 MR. GASTON: I didn't ask him that.

23 MR. SHAW: May he finish please?

24 THE COURT: Let the witness finish his answer.

25 THE WITNESS: I think in the situation that Mr.

1 Allen found himself in, that I found Mr. Allen in whether
2 a physician knows about that risk or not was not
3 important because of how serious the condition was.

4 And --

5 THE COURT: All right. Let's move on to the
6 next question.

7 I think you've sufficiently answered and gone
8 beyond it.

9 Go ahead, Mr. Gaston.

10 MR. GASTON: Okay. Your Honor, I'm going to
11 show the witness three exhibits. Plaintiffs' 100,
12 Plaintiffs' 101 and Plaintiffs' 102.

13 (Plaintiffs' Exhibit Numbers 100 through
14 102 were marked for identification.)

15 MR. GASTON: Defense Counsel has a copy of
16 these exhibits.

17 THE COURT: Okay.

18 BY MR. GASTON:

19 Q. And this is simply a timeline --

20 THE COURT: Well let's be sure when you say
21 this I want to know specifically which exhibit you're
22 referring to.

23 MR. GASTON: Exhibit Number 1 is a timeline of
24 events from March 18, 2013. It has a time on the left
25 hand side. It has the event in the middle. And to the

1 extent that there's a page associated with the event it's
2 on the right hand side.

3 And I would like to offer to give Dr. Burks a
4 copy of Exhibit 44 so he can refer to the exact page on
5 the timeline. And I want to go over the timeline with
6 him.

7 THE COURT: Mmm-hmm.

8 MR. GASTON: And I'll put all three exhibits
9 before Dr. Burks.

10 BY MR. GASTON:

11 Q. And, Dr. Burks, here's Exhibit Number 44. And
12 if you need to to the extent you need to answer a
13 question the pages on the right are the pages here on
14 this document. So you can find the document if you need
15 to.

16 Actually the pages are even attached to the
17 exhibit. I think you can just flip right underneath you
18 there. And you have the exhibit.

19 So what I want to do is I would like to go over
20 the timeline of this case with Mr. Allen.

21 THE COURT: Ms. Zois, are these courtesy
22 copies?

23 MS. ZOIS: Yes, Your Honor. But I think we
24 need one set.

25 MR. GASTON: I need --

1 MS. ZOIS: You can hang on to that one.

2 MR. GASTON: Thank you very much.

3 BY MR. GASTON:

4 Q. Doctor, we're talking about March 18th. And
5 what I want to do is I'm going to ask you a question
6 about the time and the event. And you can tell me if you
7 agree. And if you knew.

8 We're going to show the members of the jury
9 that one.

10 On 4:30 a.m. on March 18th do you agree that no
11 blood was drawn from Mr. Allen at that time?

12 A. I agree.

13 Q. At 5:30 no blood drawn from Mr. Allen at that
14 time.

15 A. I agree.

16 Q. At 6:30 a.m. no blood was drawn from Mr. Allen
17 at that time.

18 A. I agree.

19 Q. Now approximately 7:00 a.m. you arrived at the
20 hospital?

21 A. Yes, sir.

22 Q. And between 7:00 and 8:00 a.m. the labs were
23 unknown; correct?

24 A. Correct.

25 Q. Between eight and nine the labs were unknown.

1 A. Yes, sir.

2 Q. Between nine and 10 the labs were unknown.

3 A. Yes, sir.

4 Q. Between 10 and 11 the labs were unknown.

5 A. Yes, sir.

6 Q. Between 11 and 12 the labs were unknown.

7 A. Yes, sir.

8 Q. Now isn't it your custom and practice when you
9 go into the hospital to start your shift the first thing
10 you do is check on the patient's morning lab because you
11 need that information in order to prepare a plan of care
12 for that patient that day?

13 A. And I did.

14 Q. Just a minute.

15 Isn't it true that -- and you did.

16 A. So the answer's yes and I did.

17 Q. And you checked. Okay. How did you check to
18 see whether the labs were done or not?

19 A. I looked into the computer -- into the
20 electronic medical record and there were no labs
21 resulted. Which typically when the lab is ordered at
22 4:30 in the morning, as this one was, the night -- the
23 day before it usually results by seven or 8:00 a.m.

24 Q. And these are actually labs that you had
25 ordered the day before because you worked the day before;

1 correct?

2 A. On the 17th.

3 Q. Yes, sir.

4 A. Yes. I worked -- I do believe I worked on the
5 17th.

6 Q. And that's your own practice if you're going to
7 be the attending the next day for a patient such as Mr.
8 Allen you would put an order for the blood work in so you
9 could have it when you come back to work the next
10 morning; correct?

11 A. Yes, sir.

12 Q. Okay. Now when did you realize that the
13 laboratory never had a sample of Mr. Allen's blood to
14 analyze?

15 A. I would have realized that probably somewhere
16 after 8:00 a.m. when the labs still hadn't returned. I
17 would have begun asking around to see why those had not
18 returned.

19 Q. All right. So did you call the lab at 8:30?

20 A. I don't recall if I called the lab or not.

21 Q. Did you call the lab at nine o'clock?

22 A. I don't recall calling the lab at all for that

23 --

24 Q. So you --

25 A. -- particular --

1 Q. You didn't call the lab from the time you
2 arrived in the morning until -- actually did you call
3 them at all during that day?

4 A. As I -- as I just said, I didn't call them at
5 all that day.

6 What I did do to check on the status was I
7 asked my -- I asked the nursing staff taking care of Mr.
8 Allen if the blood had been drawn. And I was informed it
9 had not been.

10 Q. Okay. And when did you learn that information?

11 A. It would have been between eight and nine
12 probably.

13 Q. Where in the medical chart does it say that you
14 learned that Mr. Allen's blood had not been drawn?

15 A. I don't believe it -- it does. We don't -- we
16 don't have the advantage of continuous audio/visual
17 recording. And so not everything gets recorded.

18 And something as minor as a lab not drawn would
19 not necessarily be recorded by me because there are
20 multiple patients that don't have labs drawn for various
21 reasons throughout the day. And I'm not -- I don't have
22 the time to sit down and write every single one of those.
23 It's just we don't have time.

24 Q. You don't have time to sit down and write in
25 the patient's chart that the labs weren't drawn that

1 morning; is that correct?

2 A. That's correct.

3 Q. And on the average you only had eight patients
4 to take care of that day. Only eight; right?

5 A. These are eight critically ill patients that
6 are -- granted they're stable. But critically ill.
7 That's the nature of the intermediate care center or care
8 unit.

9 IMCU is the name of the unit that I worked on.
10 And is just specifically designed to take care of
11 critically ill patients. These are patients with
12 multiple medical comorbidities making them very
13 complicated to manage each and every one of them. And
14 they were all equally as on average complicated as Mr.
15 Allen.

16 Q. You -- you -- you remember --

17 MR. SHAW: May he finish, Your Honor?

18 THE COURT: No. Let's move on to the next
19 question. He's answered the question.

20 MR. GASTON: Okay.

21 BY MR. GASTON:

22 Q. You're telling me that all the patients on that
23 unit were critically ill?

24 A. On average, yes.

25 Q. But no. No. We're talking about this day.

1 Those eight patients that you talked about you said that
2 they were critically ill; is that true?

3 A. I don't recall all eight of those patients from
4 that specific day.

5 Q. In fact, Mr. Allen was not critically ill until
6 March 19th; was he, not 'til the next day?

7 A. No, that's true. That is not true. He was
8 chronically, critically ill but stable. That's the --
9 that's why he was in the IMC and not in another part of
10 the hospital on a general ward.

11 Q. But if he didn't need the care of a critical
12 care doctor until the 19th; did he?

13 A. I can agree with that, yes.

14 Q. Okay. Now let's go back to your -- did you say
15 that the lab results weren't so important for you on that
16 morning?

17 A. No. I did not say that.

18 Q. All right. Then I don't want to misstate your
19 testimony. '

20 So you were aware that they didn't have any
21 labs at eight o'clock. And you're telling the members of
22 the jury you told the nurse to find out why?

23 A. No. I told -- I asked them why. I asked them.

24 Q. Okay. Who did you ask?

25 A. The nurse taking care of Mr. Allen.

1 Q. Ms. Frock (phonetic); correct?

2 A. I believe so, yes.

3 Q. Okay. And you know we took her deposition;
4 correct?

5 A. I'm sure you did.

6 Q. And -- and you've read it; right?

7 A. I did not.

8 MR. SHAW: Objection, Your Honor.

9 BY MR. GASTON:

10 Q. And you -- do you know --

11 THE COURT: Basis?

12 MR. SHAW: Using a deposition.

13 THE COURT: He's asking if he's reading it.

14 That's not objectionable.

15 Overruled.

16 Did you read the deposition?

17 THE WITNESS: I did not.

18 THE COURT: Okay.

19 BY MR. GASTON:

20 Q. Do you know the content of what she testified
21 to regarding that morning that she was taking care of Mr.
22 Allen?

23 MR. SHAW: Objection, Your Honor.

24 THE COURT: Overrule.

25 THE WITNESS: I'm -- I am not aware to the

1 extent of what she testified to, no.

2 BY MR. GASTON:

3 Q. Are you aware of anything of what she testified
4 to?

5 A. Could you be more specific?

6 MR. SHAW: Objection, Your Honor.

7 THE COURT: Sustained.

8 BY MR. GASTON:

9 Q. Okay. So you asked the nurse to find out why
10 no blood was drawn from Mr. Allen?

11 A. I asked her -- I asked her why the labs hadn't
12 been done, yes.

13 Q. Okay. Now when you knew the labs weren't done
14 did you put in another order so the phlebotomist could
15 come and take Mr. Allen's blood?

16 A. That's not typically necessary.

17 Q. I didn't ask if it was typically necessary.

18 I asked if you did it.

19 MR. SHAW: May he explain, Your Honor?

20 MR. GASTON: No.

21 THE COURT: Answer the question please, Dr.
22 Burks.

23 THE WITNESS: I -- I did not need to order
24 another lab -- another specific lab set. No.

25 BY MR. GASTON:

1 Q. Okay. So if the labs weren't done and you
2 didn't order a set how is the phlebotomist to know to
3 come back and draw the blood?

4 A. Typically I would ask again Nurse Frock to
5 request that they come back and -- and execute the order
6 that hadn't been done earlier.

7 Q. But --

8 A. Which is what I did.

9 Q. But wait a minute. You did that in this case?

10 A. Yes.

11 Q. Okay. So you told the nurse to call the
12 phlebotomist to come back and take the blood again -- try
13 to take the blood again?

14 A. Yes.

15 Q. Did you tell me that in your deposition?

16 A. I don't know that that question was asked in my
17 deposition.

18 Q. Okay.

19 A. If you could point -- point it out I could --

20 Q. Okay. Now this was at eight o'clock; correct?

21 A. This was in the morning time between seven and
22 9:00 a.m.

23 Q. Well that's a long time. You said you first
24 were aware that no blood had been drawn at eight o'clock;
25 correct?

1 A. No. I said that I first checked for the labs
2 at 7:00 a.m. And they hadn't been done. So I would have
3 been aware that they had not resulted.

4 Now whether that means that there was a hold up
5 in the lab or the blood didn't make it to the lab. The
6 blood wasn't drawn. That I wasn't aware of. I wasn't
7 aware that the blood had not actually been drawn until
8 after 8:00 a.m.

9 Q. Okay. And then when was Mr. Allen's blood
10 drawn that morning after you told the nurse to call the
11 phlebotomist and get them back to the floor?

12 A. It wasn't drawn until I had to have them draw
13 it immediately from his dialysis catheter after the
14 emergency arose.

15 Q. Four and a half hours later.

16 THE COURT: Is there a question?

17 BY MR. GASTON:

18 Q. Is that true? Is that time --

19 MR. SHAW: Objection.

20 MR. GASTON: -- was four and a half hours
21 later?

22 THE COURT: Overruled.

23 THE WITNESS: That time was four and a half
24 hours later.

25 BY MR. GASTON:

1 Q. Okay. So from seven o'clock through -- up to
2 1:30 no one in the hospital under your direction drew Mr.
3 Allen's blood; correct?

4 A. My direction was to have the blood drawn. It
5 wasn't drawn. I didn't have the control over that. Nor
6 did I have a -- a reason to have it drawn immediately or
7 on a STAT basis until he became critically ill.

8 Q. Well you knew he didn't have dialysis on the
9 17th; correct?

10 A. Correct.

11 Q. And you knew the last time he dialysis was on
12 the 16th; correct?

13 A. Correct.

14 Q. You knew one of the reasons for dialysis was to
15 lower the dangerous potassium levels; correct?

16 A. He wasn't receiving the dialysis for that
17 reason, no.

18 Q. Wasn't that one of the reasons?

19 A. Not at the time that he was receiving it prior
20 to the 18th.

21 Q. Okay. And so when the nephrologist came by at
22 11:30 to see Mr. Allen did you talk with her or him?

23 A. I don't necessarily recall a specific
24 conversation when they came by. But I know they came by
25 at 11:30.

1 Q. Well did you go into Mr. Allen's room between
2 seven o'clock and 11:30 and talk with him and his wife
3 who was there with him?

4 A. With Mr. Allen and his wife? Yes, I did.

5 Q. Okay. And -- and you do all your rounding is
6 usually over by 10 o'clock in the morning; correct?

7 A. It's a kind of an ongoing process throughout
8 the day. But the general rounds are completed around 11
9 o'clock, yes.

10 Q. Okay. And where is your note for that
11 examination of Mr. Allen that occurred between seven and
12 10? Did you write a note for that?

13 A. I did.

14 Q. Okay. And that's a note that you wrote that
15 appears later on in the chart after the emergency
16 happened?

17 A. Correct.

18 Q. Okay. And when you went into Mr. Allen's room
19 at 10 o'clock did you say, Mr. Allen, no one drew your
20 blood this morning. They should have drawn your blood.
21 But we're going to have it drawn pretty soon. Did you
22 have that conversation with him while his wife was
23 present?

24 MR. SHAW: Objection as to compound nature.

25 THE COURT: Over -- overruled.

1 THE WITNESS: I don't recall having -- saying
2 those specific words to -- to them. I certainly would
3 have said that we need to have those labs drawn. It's
4 important. But I don't -- I can't recall exactly that
5 conversation as you stated, no.

6 BY MR. GASTON:

7 Q. It's -- it's important to have the labs drawn
8 for a lot of reasons. One of them is because the blood
9 values are used by both you and the nephrologist to
10 determine whether Mr. Allen needs dialysis; correct?

11 A. That's correct. And up until that time I had
12 been doing everything per the usual practice when blood
13 is for whatever reason not drawn that morning in an un-
14 urgent situation.

15 Q. Now let's talk about the cardiac event. This
16 happens around 12 o'clock noon; correct?

17 A. Yes.

18 Q. Okay. And that cardiac event started when Mr.
19 Allen's cardiac monitor went off in his room; did it not?

20 A. The cardiac monitor would have gone off when it
21 recognized an abnormality in his rhythm, yes.

22 Q. Right. And either you heard it or the nurse
23 heard it and you went into Mr. Allen's room; correct?

24 A. Correct.

25 Q. And before you ordered the EKG --

1 And if you can go to Exhibit 101. 101

2 specifically deals with that time period, sir.

3 Before you ordered the EKG at 12:18 you already
4 made a differential diagnosis of hyperkalemia; correct?

5 A. Not necessarily. Not prior to the EKG. The
6 EKG would have been ordered prior to -- to 12:18. It was
7 performed at 12:18.

8 Q. Right. But I thought in your deposition you
9 said you already had that in your thought process.

10 A. I had -- I had a lot of things in my thought
11 process at that time based on the bradycardia, the slow
12 heart rate.

13 A. Right. And you were thinking about
14 hyperkalemia at that time too; correct?

15 A. One of the -- yes. One of the many things.
16 But the EKG was meant to help give me more information
17 than -- so that's why the EKG was ordered. Not because I
18 think this is a hyperkalemia. I'm going to order the
19 EKG. I ordered the EKG to help diagnose the slow heart
20 rate that he suddenly developed.

21 Q. Okay. And then -- well for sure after the EKG
22 you highly suspected hyperkalemia; correct?

23 A. Absolutely. Yes.

24 Q. And that's the elevated potassium that we've
25 been talking about; right?

1 A. Correct.

2 Q. Okay. Now -- and at that point you ordered
3 sodium bicarbonate on a STAT basis; correct?

4 A. Yes.

5 Q. You ordered insulin with dextrose on a STAT
6 basis; correct?

7 A. Correct.

8 Q. STAT means it has to be delivered ASAP right
9 away.

10 A. It -- well, yeah. ASAP is a more accurate.
11 Yeah. But yes, it means we want it as soon as we can get
12 it.

13 Q. All right. You ordered calcium gluconate on
14 STAT basis; correct?

15 A. Correct.

16 Q. And you ordered Kayexalate -- I'm sorry. You
17 ordered Kayexalate on a routine basis.

18 A. Yes. But you'll notice -- well if we had the
19 orders. They were all ordered at the same time. And
20 were administered within a six minute period of each
21 other. So it didn't matter how that -- whether it said
22 STAT or routine it was given in a STAT basis.

23 Q. Well it wasn't ordered on a STAT basis; was it?

24 A. But that doesn't matter.

25 Q. Well actually, Doctor, if you're claiming that

1 this was an emergency and these drugs had to be given to
2 Mr. Allen ASAP --

3 A. And they were.

4 Q. -- then you -- then you certainly would have
5 ordered the Kayexalate on STAT basis; right?

6 A. If the order said -- didn't specify STAT or not
7 because, again, I used the order set that we've all seen.
8 The order is designed to facility my care.

9 So to make it easier so I don't have to go and
10 find each one of these things individually. And they
11 have check boxes next to them. And I simply check the
12 box of the ones that I wanted him to get in a STAT
13 fashion.

14 Some of them said STAT. Some of them said
15 routine. In the end, it doesn't matter what the order
16 says. He got it in an as soon as possible fashion. They
17 got -- he got all of his medications within a six minute
18 time period.

19 Q. Okay. All right. But do you agree that he
20 received the sodium bicarbonate, the insulin and the
21 albuterol before the Kayexalate was ordered?

22 A. Six minutes prior, yes.

23 Q. Okay. Now the --

24 A. And actually to --

25 Q. Is that --

1 A. -- be -- to be perfectly clear he received the
2 sodium bicarbonate and the Kayexalate at the same time.

3 Q. Okay. At the same time.

4 But after the albuterol?

5 A. After the albuterol.

6 Q. And the albuterol is done through a nebulizer
7 treatment; correct?

8 A. Correct. It's a plastic -- it can be a tube
9 that you suck on or it can be a mask that has a -- as
10 you've shown before a little cup on the bottom with a
11 liquid that bubbles.

12 Q. Right.

13 A. So that mask would have prevented him from
14 being able to take anything by mouth.

15 Q. Right. And that takes about 10 or 15 minutes.

16 A. Approximately, yes.

17 Q. Okay. So he was -- before the Kayexalate was
18 administered he was sitting in his bed with the mask on
19 for 10 or 15 minutes?

20 A. Yes.

21 Q. All right. Now after the albuterol was
22 administered was that routine as well?

23 THE COURT: What was the question?

24 MR. GASTON: I'm sorry.

25 BY MR. GASTON:

1 Q. Was the albuterol ordered on a routine basis
2 too?

3 A. It may have been ordered on a routine basis.
4 But again, was given on a STAT basis.

5 Q. Okay. And -- and the -- according to the
6 hospital guidelines drugs that doctors like you order on
7 a routine basis the staff has up to two hours to give the
8 medication; isn't that true?

9 A. That may be true. But again, it was given on a
10 STAT basis. So they had two hours. But because I asked
11 them to give it in a more urgent basis it was, in fact,
12 given on a more urgent basis.

13 So you know, this was an emergency. I clicked
14 on the order set. It may have said routine. But I said
15 I want to give it now. And it was given as soon as it
16 became available to the nurse.

17 Q. Hemodialysis wasn't ordered until 1:30;
18 correct?

19 A. That would have been ordered by the -- the
20 kidney doctors that I spoke to at the same time that I
21 ordered these other medications.

22 Q. Okay. So I thought you said you couldn't tell
23 me the time that you spoke to the kidney doctor. That it
24 was somewhere between 12 and one o'clock in your
25 deposition; do you remember that?

1 A. I remember that.

2 Q. Okay. If -- and did you believe at 12:18 after
3 you had the EKG results that Mr. Allen was in a life
4 threatening condition?

5 A. I did.

6 Q. And you know -- and you diagnosed that life
7 threatening condition as hyperkalemia; correct?

8 A. Correct.

9 Q. And you know that with a hyperkalemic patient
10 you have to get the potassium out of the patient's body.
11 That is one of the goals; correct?

12 A. Absolutely. And that's why I -- I called the
13 nephrologist at the same time -- around the same time I
14 ordered the -- the medications. Again, I said between 12
15 and one at my deposition. The orders were placed at
16 12:30. Around there.

17 So it would have been around. To give you a
18 more specific time now that I've had a more detailed look
19 at the records it would be probably around 12:30.

20 Q. Okay.

21 A. To my best guess.

22 Q. Well I don't want to guess. I don't want you
23 to guess in this courtroom, Doctor.

24 A. To the best that I can recall.

25 Q. Okay. How come the best that you can recall

1 wasn't what you just told the jury wasn't what you told
2 me at your deposition?

3 Did your memory get better?

4 A. Well what I just told you was consistent with
5 what I told you at deposition. Between 12 and one.

6 Q. But now you're giving the exact time of 12:30?

7 A. Well I'm -- I'm -- I have records immediately
8 in front of me that narrows that down for me. So I can
9 tell you now that it's more likely -- it seems to me
10 that's what you're asking is to be specific about our
11 times.

12 Q. You had those same records in front of you when
13 I was asking you these questions under oath at your
14 deposition; didn't you?

15 A. Yes.

16 THE COURT: All right. Counsel, let's take a
17 brief recess to let the jury stretch their legs and use
18 the restroom.

19 Dr. Burks, I'm going to instruct you not to
20 have any conversations with anyone in or outside the
21 courtroom about the content -- pardon me, or purpose of
22 your testimony; do you understand?

23 THE WITNESS: Yes, ma'am.

24 THE COURT: Okay.

25 Ladies and gentlemen, I want to give you just a

1 reminder of the instruction not to discuss anything about
2 this case among yourselves or with anyone else until you
3 are released to deliberate. And that would include
4 during our recess.

5 Madam Clerk, as soon as you can have our fine
6 jury back in the box.

7 THE CLERK: Yes, Judge.

8 THE COURT: We'll do that.

9 Okay. Thank you.

10 Court's in brief recess.

11 THE CLERK: All rise.

12 (Whereupon, a brief recess was taken at 11:14
13 a.m., and the matter resumed at 11:38 a.m.)

14 THE CLERK: All rise.

15 Circuit Court for Baltimore City, Part 19, will
16 now resume it's morning session. The Honorable Julie R.
17 Rubin presiding.

18 THE COURT: Everyone please do have a seat.

19 Dr. Burks, you can resume the witness stand.

20 You remain under oath, sir; okay?

21 THE WITNESS: Okay.

22 THE COURT: Mr. Gaston, whenever you are ready.

23 MR. GASTON: Thank you.

24 BY MR. GASTON:

25 Q. Doctor, do you recall me asking you at your

1 deposition how soon you think you could have had the lab
2 results back if the blood had drawn at eight o'clock or
3 8:30? Do you remember the time frame that you provided
4 me at your deposition?

5 A. Could you point that out for me?

6 THE COURT: Are you standing for a reason?

7 MR. SHAW: Your Honor, as long as there's not a
8 question do you mind taking the demonstrative evidence
9 down?

10 THE COURT: Are you going to continue to use
11 it?

12 MR. GASTON: We're going to continue on with
13 it. But we can take it off for a moment.

14 THE COURT: All right. Very good.

15 BY MR. GASTON:

16 Q. Do you have your deposition in front of you?

17 A. Yes, sir.

18 Q. Page 106, Line 20.

19 A. Okay.

20 Q. And what I'll do is I'll read the question and
21 you read the answer to me what you told me during your
22 deposition.

23 A. Yes, sir.

24 Q. The question was:

25 "And how long does it take in your experience

1 for the lab in the hospital to complete a blood draw and
2 to get the results back? How long?"

3 And what was your answer?

4 A. My answer was:

5 "Once in the lab -- once in the lab has -- once
6 the lab has the blood it can result in as little as 30
7 minutes."

8 Q. As little as a half an hour.

9 So if his blood had been drawn -- if -- if the
10 phlebotomist had come back and draw his blood at eight
11 o'clock and got it to the lab by 8:30 then according to
12 your testimony you could expect to have the results back
13 by nine o'clock; correct?

14 A. Yes, sir.

15 Q. Okay. So you knew from nine o'clock on on that
16 day that the lab results should have been back for Mr.
17 Allen; correct?

18 A. Well so from at 7:00 a.m. when I first came in
19 I knew that they should have been back. I do not know
20 why they had not returned.

21 Q. And then when you asked the nurse to have them
22 taken again you know at least they should have been back
23 by nine o'clock that morning; true?

24 A. That all depends on when the -- the person who
25 draws the blood can come back up to the floor. Because

1 it wasn't at that time an emergency situation it would
2 have been a simple call to them. And they probably would
3 have finished whatever blood draws they were doing
4 elsewhere in the hospital prior to coming.

5 So as I said, once the blood reaches the lab it
6 takes 30 minutes for the machines to process the blood.
7 How long it takes for them to come back up and obtain
8 that blood, again, can take any -- there's a large range
9 of time it can take to make that happen on a non-urgent
10 basis.

11 Q. Non-urgent basis.

12 So when did you anticipate that the results
13 would be back? What time?

14 A. I was hoping they would be back early morning.

15 Q. Which would be by nine o'clock; right?

16 A. Early morning. I'm not -- I -- I'm going to
17 put a specific time on when I expected them to be back.
18 My hope was that they would be back by the time I
19 finished my morning rounds. Which would have been 10 or
20 11 o'clock.

21 Q. 10 o'clock. Okay.

22 When you came back from your morning rounds did
23 you check to see if the results were back or not?

24 A. I did.

25 Q. And they weren't back?

1 A. They were not.

2 Q. Okay. And then why weren't you concerned that
3 now this is the second time that you ordered blood test
4 results for Mr. Allen and you didn't have them back yet?

5 A. I was. And I asked once again to have them
6 drawn.

7 Q. Okay. So now this is the second time that day
8 that you're aware that the labs weren't back. And did
9 you write any of that in the chart?

10 A. No, sir. I was --

11 Q. Okay. So --

12 A. -- doing multiple other things.

13 Q. All right. So -- so the staff did not comply
14 with your initial order in a timely fashion.

15 They didn't comply with your second order in a
16 timely fashion.

17 Didn't you call the lab and say, listen, this
18 is Dr. Burks. I've asked for these labs twice and you
19 guys haven't done it. Tell me what's going on. Can you
20 explain to me why no one's come down and taken the blood
21 from my patient. Did you make that phone call to the
22 lab, sir?

23 MR. SHAW: Objection, Your Honor. Multiple.

24 THE COURT: Overruled.

25 THE WITNESS: I typically wouldn't have been

1 that antagonistic with them. I understand in the
2 hospital there's multiple things going on. And there
3 could be multiple reasons why that lab wasn't drawn.

4 And you know, I asked. And then I asked again.
5 At that point there was no reason for me to get upset
6 about that. So I -- I was asking. I was doing my part
7 to try to get those labs drawn. Again, I didn't have an
8 emergent reason to have them done. As soon as that
9 reason occurred it was done.

10 BY MR. GASTON:

11 Q. Okay. When you called the lab, although not as
12 emphatically as I presented it, what did the lab person
13 tell you when you asked them why haven't you come down
14 and drawn Mr. Allen's blood?

15 A. I don't recall having that conversation with
16 the lab.

17 Q. So you never called the lab; did you?

18 A. I don't recall.

19 MR. SHAW: Objection, Your Honor.

20 THE COURT: Overruled.

21 THE WITNESS: I don't recall having that
22 conversation with the lab.

23 BY MR. GASTON:

24 Q. Okay. And did you find out that -- on that
25 day, the 18th, why Mr. Allen's blood wasn't drawn?

1 A. I was told that he may have refused to have his
2 labs drawn that morning.

3 Q. Well wait a minute. He either may have or
4 refused. Which is it?

5 A. It was may have refused.

6 Q. May have refused. And when I asked you that
7 question in your deposition you didn't disclose to me the
8 person who told you that Mr. Allen may have refused his
9 blood; correct?

10 A. I'm going to assume that's correct. I don't
11 recall.

12 Q. Okay. You didn't write that in the chart on
13 March 18th; did you?

14 A. That he refused?

15 Q. Right. That doesn't appear in your record on
16 March 18th; does it?

17 A. No. That the labs were not drawn does.

18 Q. Okay. And a patient who refuses medical care
19 is a really big deal for hospitals and doctors like you;
20 correct?

21 MR. SHAW: Objection as to form, Your Honor.

22 THE COURT: Overruled.

23 THE WITNESS: What do you mean by big deal?

24 BY MR. GASTON:

25 Q. Well if a patient refuses care that you've

1 recommended for the patient because you believe the
2 patient needs it isn't that one of the most important
3 things you place in the patient's note because it
4 protects you as the doctor when there's a record of it?

5 A. I wouldn't say that's the most important thing
6 I can put in a chart is if someone refuses.

7 Certainly when I'm practicing my first and
8 foremost thought is not protecting myself. It would be
9 protecting the patient.

10 And to be honest, it doesn't matter to me why
11 the lab wasn't drawn. It's just that it wasn't there.

12 Q. Well, Doctor, it does matter why. If you, in
13 this case, have claimed Mr. Allen was negligent in his
14 refusing of the blood and his negligence caused his death
15 isn't that -- isn't that important why?

16 MR. SHAW: Objection, Your Honor.

17 THE COURT: Sustained.

18 BY MR. GASTON:

19 Q. Doctor, have you claimed in this case that Mr.
20 Allen was negligent in refusing to have his blood drawn
21 on the morning of the 18th? And his negligence was a
22 cause of his death?

23 MR. SHAW: Objection, Your Honor.

24 THE COURT: Sustained as compound.

25 BY MR. GASTON:

1 Q. Doctor, have you claimed in this case that Mr.
2 Allen refused to have his blood drawn on March 18th?

3 A. Have I claimed that he refused to have his -- I
4 claimed that I was told that he might have refused.

5 Q. And -- and that is what you have presented to
6 the Court in a defense to the actions against you; is
7 that true?

8 MR. SHAW: Objection, Your Honor.

9 THE COURT: Basis?

10 MR. SHAW: Leading. This is all leading.

11 THE COURT: Overruled.

12 THE WITNESS: I don't recall making that claim.
13 I never said he was negligent. I've never made that
14 claim at all.

15 MR. GASTON: Are you --

16 MR. SHAW: Objection, Your Honor.

17 THE COURT: Overruled.

18 BY MR. GASTON:

19 Q. Doctor, are you aware that that exact claim has
20 been made in this case on your behalf?

21 A. I can't say that I'm aware of that. I'm not
22 fully aware of everything that's been done. I think
23 we've talked about that. But I don't know that it's --

24 MR. SHAW: Objection.

25 THE WITNESS: -- we've made that motion.

1 MR. SHAW: Attorney/client, Your Honor.

2 THE COURT: Well it's your own client's
3 testimony. Overruled.

4 BY MR. GASTON:

5 Q. Doctor, isn't it true in this case up to this
6 minute in time you have claimed Mr. Allen has refused to
7 get his blood drawn; isn't that true?

8 A. It's true that I was told. And I've testified
9 that I was told that he did not draw -- he did not allow
10 them to draw his blood.

11 I did not make any claims to the validity of
12 that.

13 Q. Are you -- you're unaware that a -- that you --
14 your lawyer has raised a defense in this case that Mr.
15 Allen was negligent by refusing to have his blood drawn -
16 -

17 MR. SHAW: Objection, Your Honor.

18 MR. GASTON: -- and his --

19 THE COURT: I will sustain the objection as
20 asked and answered.

21 Move on, Mr. Gaston.

22 BY MR. GASTON:

23 Q. Doctor, did you sign in answers to questions
24 under the penalties of perjury in this case? Do you
25 remember answering those questions that I asked you

1 written point?

2 A. Are those the answers to interrogatories?

3 Q. They certainly are, sir.

4 A. Then yes.

5 Q. And I'll show you what's been marked as Number
6 97 which is a copy of your sworn answers to
7 interrogatories.

8 (Plaintiffs' Exhibit Number 97
9 was marked for identification.)

10 THE COURT: What's the exhibit number? I'm
11 sorry.

12 THE CLERK: 97.

13 MR. GASTON: 97.

14 THE COURT: Thank you.

15 BY MR. GASTON:

16 Q. I'm going to show you these, Doctor. I'll ask
17 you to look through these. And I'll ask you if your
18 signature, affidavit, appears on the last page of those
19 answers?

20 A. My signature appears, yes.

21 Q. And when you signed them you attested under the
22 penalties of perjury that the statements were true and
23 accurate; correct?

24 A. Yes.

25 Q. And I want you to go to -- if I could have it

1 back for just a second?

2 Actually I have my own copy.

3 I'm going to read the question if I could have
4 this back. And then I'll ask you to read your answer.

5 It's Question Number 23:

6 "If you aware of any instant during Dennis
7 Allen's inpatient stay where he refused any advice or
8 recommendations of any of the treating/attending
9 physicians, nurses? Please state and detail every
10 instance, date and time, what recommendations given by
11 who, what was refused. Any and all persons who have
12 knowledge of the instance and what effect of that you
13 contend that any such refusal had on the development of
14 ischemic bowel and resulting of death."

15 And I want you to read what's highlighted.

16 MR. SHAW: Well, Your Honor, I ask that he read
17 the whole quest -- read the whole answer.

18 THE COURT: I'll need to see it to rule on the
19 objection. Will Counsel approach unless Mr. Gaston
20 doesn't have a problem with that.

21 MR. GASTON: Go ahead. That's fine.

22 THE COURT: All right. That's fine. Thank you
23 very much.

24 Dr. Burks, if you would read the entire answer.

25 That's what you want, Mr. Shaw; right? The

1 entire answer?

2 MR. SHAW: Six lines.

3 THE COURT: Okay. Go ahead, Mr. -- Doctor.

4 THE WITNESS: This is -- this is Number 23;
5 correct?

6 THE COURT: I think that's what he said.

7 You said Number 23; right, Mr. Gaston?

8 MR. GASTON: Yes, Your Honor. It's actually
9 right up before the jury right here.

10 THE WITNESS: Okay. "Answer to interrogatory
11 Number 23, pursuant to Maryland Rule 2-421(c), this
12 defendant refers to the plaintiff's complete medical
13 records at the University of Maryland Medical Center and
14 the discharge summary of Dr. Burks dated March 19th,
15 2013, which notes that Mr. Allen refused to have his labs
16 done on or about the morning of March 18th, 2013.

17 "However, as discovery has just commenced, this
18 defendant reserves the right to amend or supplement this
19 answer to interrogatory."

20 BY MR. GASTON:

21 Q. You've never amended or supplemented that
22 answer, did you, to that question?

23 A. I don't know the answer to that. I'd have to
24 ask my attorney.

25 Q. You don't know if you ever signed?

1 A. Well I haven't signed anything, no.

2 Q. Okay. That's what I mean.

3 Okay. Now Tab Number 4 in that white book.

4 And go to Page 17 for me.

5 MR. SHAW: What's Tab 4?

6 MR. GASTON: I'm sorry. You should actually
7 have a copy. You should. It's Page 17. Tab 4.

8 BY MR. GASTON:

9 Q. And is this the discharge summary you wrote on
10 the 19th?

11 A. It is.

12 Q. Okay. Can you read what's in yellow for the
13 members of the jury?

14 A. Mine is not highlighted.

15 Q. I'm sorry?

16 A. And I don't have the --

17 Q. Okay. Second paragraph.

18 A. Okay.

19 Q. Midway down. It starts with "Laboratory data."

20 A. Okay.

21 Q. You see that sentence?

22 A. I do.

23 Q. Go ahead, sir. If you could read that sentence
24 for me.

25 A. "Laboratory data was unavailable as the patient

1 had refused his labs in the morning."

2 Q. Now that was what you wrote the day after the
3 18th and after Mr. Allen was sent to the ICU; correct?

4 A. Yes, sir.

5 Q. Okay. So now you claimed in the hospital chart
6 and you claimed under sworn answers to interrogatories
7 that he refused to have his blood drawn; correct?

8 A. Yes.

9 Q. Now you know that this issue is very important
10 in this case; do you not?

11 MR. SHAW: Objection, Your Honor.

12 THE COURT: Overruled.

13 THE WITNESS: Could you be more specific?

14 BY MR. GASTON:

15 Q. No.

16 A. I --

17 Q. No. I want to know if you know that issue is
18 very important in this case.

19 MR. SHAW: Objection.

20 MR. GASTON: Whether he refused his labs or
21 not.

22 MR. SHAW: Objection.

23 THE COURT: Counsel, can you approach please.

24 (Counsel approached the bench, and the
25 following ensued:)

1 THE COURT: So I don't know what that means. I
2 mean it's just -- it's kind of -- it's vague. And I
3 think you need to be more specific. I don't have a
4 general problem with you asking him about that area. But
5 is it important --

6 MR. GASTON: To the --

7 THE COURT: It's just so unspecific. And what
8 sense, why. I mean it's just -- I think it's a --

9 MR. GASTON: And I think at this time, Your
10 Honor, I would ask the Court to take judicial notice of
11 the answer that was submitted in this case on behalf of
12 Dr. Burks that contained contributory negligence as a
13 defense. And they raised this as a defense.

14 THE COURT: When you ask me to take judicial
15 notice I don't understand what you're asking.

16 MR. GASTON: It's a pleading in the file that
17 was served by the defense.

18 THE COURT: Okay. It's a pleading in the file.
19 I don't think there's any question that's an affirmative
20 defense that's been pled.

21 MR. GASTON: That -- but -- but --

22 THE COURT: But why are you asking me to take
23 judicial notice of it? I don't understand.

24 MR. GASTON: Because I want to instruct -- I
25 want to let the jury know that for my next question.

1 THE COURT: Well because either I'm going to
2 give an instruction on it or I'm not.

3 Look if -- if that's an affirmative defense
4 that entitles the defendant they are preserving their
5 right to make that argument in defense of the claims
6 against them. Either they will elect to enter evidence
7 that supports that affirmative defense or not.

8 But I'm not going to let the jury fault the
9 defendant for preserving it's right at the front end of
10 the case to assert an affirmative defense later so that
11 it is not waived.

12 I don't think that's relevant to whether or not
13 the allegations against these defendants can be proven by
14 a preponderance of the evidence.

15 Either the defense is going to be asserted or
16 it's not. And you will certainly be entitled to rail
17 against it if it happens. But I don't think the fact
18 that a legal position has been taken to preserve the
19 right to do so at trial is -- is proper at this point.

20 MR. GASTON: Thank you.

21 THE COURT: So I don't think so.

22 MR. GASTON: Thank you, Your Honor.

23 THE COURT: Okay.

24 (Counsel returned to the trial table, and the
25 following ensued:)

1 THE COURT: The objection is sustained to the
2 question.

3 BY MR. GASTON:

4 Q. Doctor, during your deposition do you remember
5 me asking you questions about this refusal?

6 A. I do.

7 Q. And do you remember me asking you questions
8 about what would you have done if you had the laboratory
9 results back by eight o'clock? What did you anticipate
10 that the lab results would show? And what action would
11 you have taken if you had them back at eight o'clock? Do
12 you remember that?

13 A. I do.

14 Q. Isn't it true that you told me that if you'd
15 had the labs back by eight that they would have
16 demonstrated an elevated potassium level to the point
17 that you would have called nephrologist and you would try
18 to get dialysis for Mr. Allen at that morning?

19 And then you told me that you expected that the
20 dialysis would have been done that morning. It would
21 have reduced the potassium levels and it would have
22 avoided the cardiac event at 12 o'clock.

23 THE COURT: Sustained.

24 MR. SHAW: Objection.

25 THE COURT: Compound, Counsel.

1 MR. GASTON: Okay. I'll do it -- I'll go one
2 at a time.

3 BY MR. GASTON:

4 Q. Isn't it true that you told me that the
5 laboratory results would most likely show an elevated
6 potassium level?

7 A. In the theoretical, yes. I would have expected
8 that it would have been higher than the day previous.

9 Q. And isn't it true that you told me with that
10 information you would then call the nephrology doctor for
11 a consultation?

12 THE COURT: The question is is that what you
13 said. Not whether or not you would do that. The
14 question is isn't that what you said.

15 THE WITNESS: Then, yes, if that's what I said.
16 Then, yes, I would have called the --

17 BY MR. GASTON:

18 Q. And then you would have wanted Mr. Allen to
19 have dialysis that morning; isn't that true? Isn't that
20 what you said?

21 A. Yes, sir.

22 Q. And you also said that Mr. Allen had had
23 dialysis that morning he would not have resulted in his
24 emergency state at 12 o'clock noon.

25 A. I said that, yes. And that most likely he

1 would not have developed the emergency.

2 Q. Okay. And knowing that and you knew that at
3 the time, that was your appreciation at the time that it
4 happened; correct?

5 A. At the time of the deposition or the time --

6 Q. Right. Time of the deposition. Time of the
7 deposition.

8 MR. SHAW: Well I object as to knowing what,
9 Your Honor.

10 THE COURT: Can you be more specific, Mr.
11 Gaston?

12 MR. GASTON: All right.

13 BY MR. GASTON:

14 Q. And -- sir, and if Mr. Allen hadn't had the
15 cardiac emergency at 12 o'clock I believe you agreed
16 there would be no need to administer the Kayexalate;
17 correct?

18 A. Correct.

19 Q. And also believe that you testified, although
20 you do not believe the Kayexalate was the most likely
21 cause of Mr. Allen's death, that it was a likely cause of
22 his death; correct?

23 A. No.

24 Q. You didn't say that in your deposition?

25 A. I didn't say that it was a likely cause. I

1 said it was a possible cause.

2 Q. Possible cause. Okay. Now was it one of the
3 cause of his death you believe? One?

4 A. You're asking if I believe that Kayexalate was
5 one of the causes --

6 Q. Possible -- possible causes.

7 A. One of the possible causes of his death?

8 Q. Yes, sir.

9 A. I think that it's possible but unlikely.

10 Q. Okay. Now before you signed your answers to --
11 no. Before you signed your answers to interrogatories
12 and swore under oath that Mr. Allen refused the blood
13 test did you ask anyone at the hospital to find the
14 phlebotomist who drew his blood in the morning to be sure
15 that he actually refused the blood test before you swore
16 under oath that he did?

17 MR. SHAW: Objection, Your Honor.

18 THE COURT: Overruled.

19 THE WITNESS: No. It's no uncommon to have
20 people withdraw -- or refuse to have their blood drawn.
21 Anybody whose in the hospital hates getting stuck with
22 needles. I -- so for him to refuse it would not have
23 been so unusual for me to make sure. I had no reason to
24 investigate further.

25 BY MR. GASTON:

1 Q. But -- but you didn't -- you didn't have any
2 personal knowledge of the refusal; did you? Because you
3 weren't there when the phlebotomist came down to draw his
4 blood in the morning; right?

5 A. That's correct.

6 Q. So didn't you want to be sure before you swore
7 under oath under the penalties of perjury that he refused
8 to check that out before you answered that question?

9 MR. SHAW: Objection, Your Honor.

10 THE COURT: Asked and answered, Counsel.

11 MR. GASTON: Okay.

12 BY MR. GASTON:

13 Q. And, Doctor, are you still claiming now before
14 the members of the jury that Mr. Allen refused his blood
15 test in the early morning hours of March 18, 2013?

16 A. I am testifying and claiming that I was told
17 that he may have refused his lab draw that day.

18 Q. That -- that --

19 A. And he did not have his labs drawn. That's
20 what I'm testifying to.

21 Q. Are you -- that's not the question I asked. I
22 asked are you claiming at this point in trial still
23 claiming that Mr. Allen refused to have his blood drawn
24 in the morning hours of March 18, 2013? It's a yes or no
25 answer.

1 MR. SHAW: Objection, Your Honor.

2 THE COURT: Overrule.

3 MR. SHAW: Asked and answered.

4 THE COURT: Overrule.

5 THE WITNESS: So yes or no am I claiming that
6 he refused. I'm claiming that I don't have any personal
7 knowledge of whether he truly refused or not.

8 BY MR. GASTON:

9 Q. So are you claiming it or not? It's are you
10 claiming it or not. That's what I want to know. Yes or
11 no?

12 A. I'm claiming it.

13 Q. Okay. Thank you.

14 Now with respect to the order of calcium
15 gluconate you knew that calcium gluconate was on the
16 order sheet; correct?

17 A. Correct.

18 Q. You knew that calcium gluconate was probably
19 the most important drug you could have administered to
20 Mr. Allen to protect his heart from heart attack and
21 death; right?

22 A. No. That's any one of them is the most
23 important.

24 Q. Okay. Was it --

25 MR. SHAW: Objection, Your Honor. Again,

1 demonstrative evidence that's --

2 THE COURT: All right. Let's wait until Doctor
3 -- has he given all the answers to those questions
4 already?

5 MR. GASTON: Yes, Your Honor.

6 MS. ZOIS: Yes, Your Honor.

7 THE COURT: I believe he has. Yes, he has.
8 Okay.

9 MR. GASTON: Okay.

10 THE COURT: I'll let it stay up.

11 BY MR. GASTON:

12 Q. Isn't it the very first medication that's
13 listed on the guideline to give to a patient?

14 A. Yes.

15 Q. In fact, it's a medication that works the
16 fastest. It works within two or three minutes to protect
17 the heart; doesn't it?

18 A. It does.

19 Q. It works faster than any of -- all the other
20 medications; correct?

21 A. Correct.

22 Q. And if you were so concerned that he was going
23 to have a heart attack in front of you and die then
24 wouldn't that be the most important medicine to give him
25 first and foremost?

1 A. I don't -- in this situation I don't give these
2 medications in order. I don't. It's given as -- as we
3 called it before as a cocktail. I ordered them at the
4 same time and to be given in rapid succession.

5 Because one -- one medication is not going to
6 be sufficient to stop the emergency.

7 Q. Did -- did you make a conscious choice not to
8 give him the medication that worked the fastest the
9 first?

10 MR. SHAW: Objection, Your Honor.

11 MR. GASTON: Did you make a conscious choice to
12 do that?

13 THE WITNESS: Absolutely not.

14 THE COURT: Over -- overruled.

15 THE WITNESS: I'm sorry.

16 Absolutely not. I did not make a conscious
17 effort to -- or decision not to give it, no.

18 BY MR. GASTON:

19 Q. And you made -- made no conscious effort to be
20 sure the nurse administered that medication first did
21 you; right?

22 A. I was called by the pharmacy to be informed
23 that calcium gluconate was not available.

24 MR. SHAW: Your Honor, can we approach?

25 THE COURT: Yes.

1 (Counsel approached the bench, and the
2 following ensued:)

3 THE COURT: What's up?

4 MR. SHAW: In the interest of full disclosure,
5 Ms. Jones just came into the courtroom who is the next
6 witness. She is the phlebotomist.

7 THE COURT: Okay.

8 MR. SHAW: So I don't know if he wants her in
9 the courtroom or not in the courtroom. So --

10 THE COURT: Well we have a sequestration rule
11 in place. So would you -- I'm happy to do it. But would
12 you just excuse her from the courtroom unless you want me
13 to.

14 MR. SHAW: No, I'll do it.

15 THE COURT: Okay. Thank you for letting me
16 know.

17 (Counsel returned to the trial table, and the
18 following ensued:)

19 MR. SHAW: One moment, Your Honor.

20 THE COURT: Yes.

21 (Brief pause.)

22 THE COURT: Thank you, Mr. Shaw.

23 Go ahead, Mr. Gaston.

24 MR. GASTON: Okay.

25 BY MR. GASTON:

1 Q. Doctor, I think you were explaining that you
2 received a call from the pharmacist regarding the
3 availability of the calcium gluconate; is that correct?

4 A. Correct.

5 Q. And the pharmacist told you that that drug they
6 didn't have it in stock in the pharmacy; correct?

7 A. Correct.

8 Q. And you knew the very next drug to use in its
9 place is calcium chloride; correct?

10 A. Correct.

11 Q. And there's no written documentation that you
12 ordered calcium chloride for Mr. Allen; correct?

13 A. There's no written documentation, no.

14 Q. Okay. Are you claiming that you actually
15 ordered calcium chloride for Mr. Allen?

16 A. Yes.

17 Q. Okay. And when -- and how did you -- you claim
18 that you told the nurse to administer it to him?

19 A. I claimed that I made what's called a verbal
20 order. Meaning that I asked for that medication. Now it
21 either would have -- typically a verbal order would go to
22 the nurse. It could either be the nurse or the
23 pharmacist.

24 In this case what -- and I don't recall
25 specifically. But the most likely thing that happened is

1 when the pharmacist called to tell me that the calcium
2 gluconate wasn't available so then I said well can I get
3 calcium chloride. And so that's how I would have
4 ordered that.

5 Q. Well -- but in -- in your chart there is -- you
6 didn't write that next sentence down in the chart after
7 the pharmacy told you calcium gluconate was not
8 available.

9 You did not write in the chart I asked the
10 pharmacist for calcium chloride; did you?

11 A. That's correct. I did not write in the chart
12 for the reasons we talked about earlier.

13 Q. And there is no record -- these are the
14 guidelines that we have here; correct, sir?

15 A. That's one page of the guideline, yes.

16 Q. So there's no record in the chart that you ever
17 ordered calcium chloride for Mr. Allen even though you
18 know he needed it; correct?

19 MR. SHAW: That's a compound question, Your
20 Honor. I object.

21 THE COURT: Sustained.

22 BY MR. GASTON:

23 Q. There's no record in the chart that you ever
24 order calcium chloride for Mr. Allen; isn't that true?

25 A. That's true. There's no record in the chart.

1 Q. You wouldn't have ordered calcium chloride
2 unless you believed it was an important medication for
3 Mr. Allen to have; correct?

4 A. I would have ordered it because it's an
5 important medication. However I think even Dr. Leo
6 admitted in this case --

7 MR. GASTON: Objection.

8 THE COURT: Sustained.

9 MR. GASTON: Okay.

10 BY MR. GASTON:

11 Q. Now. And it was an important medication to
12 order because you knew that Mr. Allen needed the
13 medication as one of the treatments to protect his heart
14 from an immediate heart attack; correct?

15 A. It's the second alternative to calcium
16 gluconate for that reason.

17 Q. Now -- and although -- now when you said you
18 did a verbal order the hospital rules require you to sign
19 the chart that you entered a verbal order; correct? That
20 you gave a verbal order?

21 A. If the verbal order is documented by the person
22 I gave it to then I am required to sign that. If it's
23 not documented then I can't sign it.

24 Q. Well when did you go back to the chart to
25 confirm that your verbal order had been document? At

1 what point in time?

2 A. It wouldn't have been until after the situation
3 had resolved and he was on dialysis.

4 Q. And did you then see that your verbal order was
5 not documented in the chart?

6 A. I don't recall specifically.

7 Q. Well it's not documented anywhere in the chart;
8 is it?

9 MR. SHAW: Objection, Your Honor.

10 THE COURT: Basis.

11 MR. SHAW: Third time.

12 THE COURT: Overruled.

13 MR. SHAW: Same -- same question.

14 THE COURT: Overruled.

15 THE WITNESS: It -- it's not documented
16 anywhere. But I wouldn't have taken specific note of
17 that because it didn't play a role in what ended up
18 happening to him.

19 BY MR. GASTON:

20 Q. Well if -- it certainly played a role in the
21 treatment that you ordered for Mr. Allen because it was
22 one of the most important drugs you could order for him
23 to help save his life at that time; correct?

24 A. No.

25 MR. SHAW: Objection, Your Honor. Asked and

1 answered.

2 THE COURT: Sustained.

3 MR. GASTON: Okay.

4 BY MR. GASTON:

5 Q. Now you're actually -- not only are you
6 claiming that you ordered the calcium chloride, you're
7 claiming that it was administered to Mr. Allen; correct?

8 A. I'm claiming that I had every reason to believe
9 that it would have been given according to my order.

10 Q. Right. And you claimed it actually was
11 administered because that's what you told me during your
12 deposition.

13 MR. SHAW: Objection, Your Honor.

14 THE COURT: Sustained.

15 As a question.

16 BY MR. GASTON:

17 Q. Did you tell me during your deposition that you
18 confirmed that calcium chloride was ordered -- was
19 administered to Mr. Allen.

20 MR. SHAW: Objection.

21 THE COURT: Basis?

22 MR. SHAW: Approach?

23 THE COURT: Yes.

24 (Counsel approached the bench, and the
25 following ensued:)

1 MR. SHAW: I don't want to waive my Motion in
2 Limine on this calcium chloride issue.

3 THE COURT: Okay. Fair enough. I will
4 overrule the objection. And your record is preserved.

5 MR. SHAW: But I'm going to have to keep saying
6 that over and over again.

7 THE COURT: So I will say this. On that line
8 of --

9 MR. SHAW: Anything about calcium chloride can
10 I continue an objection on?

11 THE COURT: So I will say this, and I don't
12 mean this to sound coy. To the extent the appellate
13 courts of the state honor that you may have it. But it
14 is somewhat at your own peril.

15 MR. SHAW: Oh I know.

16 THE COURT: So if it --

17 MR. SHAW: Understand.

18 THE COURT: Yes.

19 MR. SHAW: Can I -- I might say it quietly but
20 just so it's still on the record.

21 THE COURT: Well the problem --

22 MR. SHAW: Well I'll see.

23 THE COURT: -- though is then I run the risk of
24 having objections that were not adjudicated.

25 MR. SHAW: Oh no, no, no. I'm going to say it

1 loud enough. But I'm not going to stand up and raise
2 both arms and jump up.

3 THE COURT: Well I'll leave -- I'll leave it up
4 to you. But if I -- if I have -- if you do chose to
5 object and I do not rule on the objection please bring it
6 to my attention. Because I don't want objections to go -
7 -

8 MR. SHAW: Okay.

9 THE COURT: -- without a ruling.

10 MR. SHAW: Okay.

11 THE COURT: Okay.

12 (Counsel returned to the trial table, and the
13 following ensued:)

14 THE COURT: All right. The objection is
15 overruled.

16 Mr. Gaston, would you restate your question for
17 the jury and the doctor?

18 MR. GASTON: Sure.

19 BY MR. GASTON:

20 Q. Doctor, during your deposition you did testify,
21 did you not, that Mr. Allen was actually administered
22 calcium chloride in accordance with your verbal order?

23 MR. SHAW: Objection.

24 THE COURT: Overruled.

25 THE WITNESS: I -- I testified that --

1 MR. SHAW: Can we -- can we -- I would object
2 and ask for the spot in the deposition.

3 MR. GASTON: Not yet.

4 THE COURT: It's not required at this time, Mr.
5 Shaw, based on the Rules. So I won't require it.

6 THE WITNESS: Could you point specifically to -
7 -

8 BY MR. GASTON:

9 Q. No, sir. I want to know if you remember that.

10 A. I remember recalling that I had tried to recall
11 speaking with Nurse Frock about the calcium chloride and
12 whether it was administered.

13 I think I also testified that I don't recall
14 specifically that, the specifics of the conversation.
15 But I would have asked how everything was coming as far
16 as my orders went. And would have been given the
17 affirmative that everything that I had ordered had been
18 given.

19 Q. Did you confirm from Nurse Frock whether or not
20 calcium chloride was actually administered?

21 MR. SHAW: Objection.

22 THE COURT: Overruled.

23 THE WITNESS: In so much as the way I just
24 answered that is I asked if -- if he had gotten
25 everything I had ordered. And I would have gotten the

1 answer yes.

2 BY MR. GASTON:

3 Q. How did you order the calcium chloride to be
4 administered?

5 MR. SHAW: Objection.

6 THE COURT: Overruled.

7 THE WITNESS: So calcium chloride is typically
8 given IV. With a verbal order in this instance, as I
9 said, I think would have been given to the -- probably
10 the pharmacist. The specifics of that would have been
11 provided from the pharmacy to the nurse. So it would
12 have been calcium chloride IV.

13 BY MR. GASTON:

14 Q. But calcium chloride is not supposed to be
15 given in an IV. It's only to be given in a central line
16 according to what the hospital's guidelines; isn't that
17 true?

18 MR. SHAW: Objection.

19 THE COURT: Overruled.

20 THE WITNESS: That is true. But a central line
21 is --

22 BY MR. GASTON:

23 Q. Now in -- in --

24 A. -- a form of --

25 Can I finish? Because this is --

1 THE COURT: Go ahead, Dr. Burks. Answer your
2 question.

3 THE WITNESS: Because a central line is a form
4 of an IV. When you write IV on an order it doesn't
5 specify whether it should go through a central line or
6 through a peripheral IV.

7 If there is a reason that it should not go
8 through a peripheral IV that information is provided to
9 the nurse from the omniceil and the pharmacy. In which
10 case that would have happened here.

11 So -- yes. Yes. Calcium chloride can be given
12 through an IV.

13 BY MR. GASTON:

14 Q. But the danger is that the calcium is so
15 powerful that it will eat away a regular vein and cause
16 problems for the patient; isn't -- isn't that true?

17 MR. SHAW: Objection.

18 THE COURT: Overruled.

19 THE WITNESS: That may be true. But in this
20 case it -- he had a central line in place. And so it
21 wouldn't -- it wouldn't have gone through a peripheral
22 IV.

23 BY MR. GASTON:

24 Q. And what -- what was the central line that he
25 had in place?

1 A. The dialysis catheter.

2 Q. Okay. And did -- how was the calcium
3 administered? Was it an IV push or was it a bag? Chain
4 bag.

5 MR. SHAW: Objection.

6 THE COURT: Basis? Same basis?

7 MR. SHAW: Same.

8 THE COURT: Overruled.

9 THE WITNESS: That I -- I don't know. It
10 depends on how that would have come from the pharmacy. I
11 don't hang those bags or give those pushes personally
12 myself.

13 BY MR. GASTON:

14 Q. Well weren't you in Mr. Allen's room during
15 this emergency situation?

16 A. On multiple occasions. And he had multiple
17 things happening to him at the same time.

18 Q. And -- and weren't you monitoring the
19 medications that you ordered to be administered to him to
20 avoid this life threatening situation?

21 A. How do you mean monitoring?

22 Q. Keeping an eye on him.

23 A. I was keeping an eye on him, yes. I wasn't --

24 Q. All right.

25 A. I wasn't scrutinizing every action that the

1 nurse made because I was also taking into account other
2 things happening to him as well.

3 Q. But you have no personal knowledge of whether
4 he ever received calcium chloride or not; correct?

5 A. I have --

6 MR. SHAW: Objection.

7 THE COURT: Sustained.

8 BY MR. GASTON:

9 Q. Do you know for sure --

10 THE COURT: Pardon me. I'm sorry. Overruled.
11 You can answer that question.

12 Restate the question for me please, Mr. Gaston.

13 BY MR. GASTON:

14 Q. You have no personal knowledge whether your
15 patient ever received the calcium chloride that you say
16 you ordered by a verbal conversation?

17 MR. SHAW: Objection.

18 THE COURT: Overruled.

19 THE WITNESS: I did not push the medication
20 into him directly. I just have the verbal order and then
21 the verbal communication that my orders were followed.

22 BY MR. GASTON:

23 Q. Okay. According -- now you have reviewed Mr.
24 Allen's medical chart; correct?

25 A. Yes, sir.

1 Q. Would it be fair to say that you reviewed it
2 many, many times in preparation for your testimony today?

3 MR. SHAW: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: I've reviewed it many, many
6 times, yes.

7 BY MR. GASTON:

8 Q. Okay. Now it's true that there's no indication
9 in the chart that the calcium chloride came from the
10 pharmacy; correct?

11 MR. SHAW: Objection.

12 THE COURT: Overruled.

13 THE WITNESS: There -- that's true.

14 BY MR. GASTON:

15 Q. And the other place that the calcium chloride
16 could have come from would be the medication room on the
17 floor where you were working; correct?

18 A. Correct.

19 MR. SHAW: Objection.

20 THE COURT: Overruled.

21 BY MR. GASTON:

22 Q. And you've seen the -- the print out from the
23 medication room for the medications that were removed
24 from that room about the time when the calcium chloride
25 should have been administered; correct?

1 MR. SHAW: Objection.

2 THE COURT: Overruled.

3 THE WITNESS: Yes.

4 BY MR. GASTON:

5 Q. And you know that no calcium chloride was ever
6 taken out of the medication room by the nurse; correct?

7 MR. SHAW: Objection.

8 THE COURT: Overruled.

9 THE WITNESS: Yes.

10 BY MR. GASTON:

11 Q. And you --

12 A. As it's come -- as it come to my knowledge
13 after the fact is that apparently there was also a
14 calcium chloride shortage in the hospital at that time as
15 well.

16 Q. Hang on a second.

17 A. So it would -- it may not have been available
18 in that medicine room is what I'm trying to say.

19 I don't mean to cut you off. I'm sorry.

20 Q. Well you just brought me to another avenue.
21 Did you know whether or not when you ordered -- gave the
22 verbal order for calcium chloride whether it was even
23 available in the hospital at that time to be
24 administration to Mr. Allen?

25 MR. SHAW: Objection.

1 THE COURT: Overruled.

2 THE WITNESS: I don't recall, no.

3 BY MR. GASTON:

4 Q. Didn't you want to know that particularly
5 because the pharmacist just told you they didn't have
6 calcium gluconate?

7 MR. SHAW: Objection.

8 THE COURT: Overruled.

9 THE WITNESS: I would have -- yeah. That would
10 have been nice to know when it's quite possible --

11 I apologize that you find that funny.

12 It's quite possible that the pharmacist also
13 told me in the same conversation that calcium chloride
14 wasn't available. And I don't recall because at that
15 point it was a moot point. I didn't have it available to
16 me. So I needed to go on with the emergency situation
17 and treat him accordingly.

18 Q. Wait a minute. Did you just tell me that it's
19 possible that the pharmacist told you that they also
20 didn't have calcium chloride when you asked for the
21 calcium gluconate?

22 MR. SHAW: Objection.

23 THE COURT: Overruled.

24 THE WITNESS: That's what I said, yes.

25 BY MR. GASTON:

1 Q. Isn't that contradictory to your other
2 testimony that when you called the nurse to be sure that
3 everything you ordered was administered and she confirmed
4 that?

5 MR. SHAW: Objection.

6 THE WITNESS: That's not contradictory, no.

7 THE COURT: Overruled.

8 THE WITNESS: It's -- it's not contradictory
9 because I -- I didn't specify did you give this, did you
10 give that, did you give the other thing. I simply asked
11 was -- did he get the medications that was ordered to the
12 best of my knowledge.

13 So I'm certainly not trying to cover up
14 anything here if that's what you're implying.

15 BY MR. GASTON:

16 Q. Well with -- let me get to the point. Calcium
17 chloride is normally stored in the crash cart; right?

18 MR. SHAW: Objection.

19 THE COURT: Overruled.

20 Do you know?

21 THE WITNESS: Typically one form or the other
22 is -- is kept in the crash cart. Either calcium
23 gluconate or calcium chloride.

24 BY MR. GASTON:

25 Q. Now did you break the seal on the crash cart to

1 see if the calcium chloride was there so you could
2 administer it to Mr. Allen?

3 MR. SHAW: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: No. And let me qualify why.

6 BY MR. GASTON:

7 Q. I don't need you to explain why.

8 A. Well -- but I'd like to if that's okay.

9 Q. Later when your lawyer asks you some questions.

10 MR. SHAW: Objection, Your Honor.

11 THE COURT: The objection is overruled.

12 You can redirect on that point.

13 Move on, Mr. Gaston. Next question.

14 MR. GASTON: Okay.

15 BY MR. GASTON:

16 Q. Can you go to Page 100?

17 A. Of what?

18 Q. Number 4. Exhibit 34. The white book.

19 Are you there, Doctor?

20 A. Yes, sir.

21 Q. Is that your signature?

22 A. Yes, sir.

23 Q. Is that your handwritten note?

24 A. Yes, sir.

25 Q. You wrote that note at 1:45 p.m. on March 18th;

1 correct?

2 A. Yes, sir.

3 Q. This note doesn't contain anything about a
4 request for calcium chloride either written or verbal;
5 does it?

6 A. Objection.

7 Q. Overruled.

8 THE WITNESS: It does not.

9 BY MR. GASTON:

10 Q. And it's your custom and practice to -- to make
11 a note of the medicines that you ordered for the patients
12 and to put them in this note; is it not?

13 MR. SHAW: Objection.

14 THE COURT: Overruled.

15 THE WITNESS: Not necessarily, no.

16 BY MR. GASTON:

17 Q. But on this occasion you -- what you ordered:
18 insulin and glucose and albuterol and sodium bicarbonate
19 are right here in black and white; are they not?

20 THE WITNESS: They are.

21 MR. SHAW: Objection.

22 THE COURT: Overruled.

23 BY MR. GASTON:

24 Q. And what you ordered, calcium gluconate, was
25 unavailable is right there; isn't it?

1 A. Yes.

2 Q. The only thing that's missing is the calcium
3 gluconate -- I mean calcium chloride; right?

4 A. Correct.

5 MR. SHAW: Objection.

6 THE COURT: Overruled.

7 BY MR. GASTON:

8 Q. And if you followed your form here that you
9 followed on this date the next thing we should see here
10 if you actually ordered calcium chloride would be a note
11 regarding calcium chloride and whether it was ordered or
12 whether it was available; wouldn't that be true if you
13 followed the same form?

14 MR. SHAW: Objection.

15 THE COURT: Sustained.

16 BY MR. GASTON:

17 Q. Doctor, is there any evidence in the chart that
18 Mr. Allen's cardiac alarm continued to go off immediately
19 prior to the time you administered the Kayexalate?

20 A. No.

21 Q. According to the hospital records the cardiac
22 monitor alarms and prints a strip when an emergency
23 cardiac situation occurs; does it not?

24 A. That's correct.

25 Q. And if the -- this emergency had existed at the

1 time you gave Mr. Allen the Kayexalate there would be a
2 matching chart showing the alarm and showing the heart
3 rhythms in a strip that should be in his chart; isn't
4 that true?

5 A. That's -- that's true insomuch as the rhythm
6 would have been recognized by the computer to print out
7 as being dangerous.

8 It does not mean that the emergency was over
9 just because the computer didn't recognize it.

10 Q. Well the computer recognized the emergency
11 initially; right?

12 A. Yes, it did.

13 Q. And it was working properly; correct?

14 A. It's a -- it's a computer. And it doesn't have
15 -- it has one job and that's to monitor three leads on
16 the chest. And not everything that is occurring on those
17 three leads or with the patient is going to be seen by
18 that computer. That's why -- that's why the nurses and
19 the doctors are there.

20 It -- that alarm not going off means nothing
21 about whether or not he was out of his -- his emergent
22 situation.

23 Q. Well if the alarm -- the alarm sounded because
24 he was in an emergency situation; did it not?

25 A. It did its job. It --

1 Q. Okay.

2 A. -- alerted us to a situation that was going on.

3 Q. Did the alarm --

4 A. And then we were continuously involved from
5 there on out.

6 Q. And if -- and if you had an emergency situation
7 right before you gave the Kayexalate the computer would
8 still have that alarm and would still be notifying you;
9 correct?

10 A. No. No. Because the computer cannot tell
11 everything that's going on with the patient and then
12 determine whether there's an ongoing emergency.

13 Q. Doctor, where is the strip? If there was an
14 emergency enough to set off the alarm right before you
15 gave the Kayexalate that strip is not in this file; is
16 it?

17 A. It's not because, once again, that is a very
18 small part of the data set that we use as clinicians to
19 decide constitute an ongoing emergency.

20 So if that alarm wasn't going off I wasn't
21 going to go and sit down and have my coffee and ignore
22 Mr. Allen. That would -- that would be unthinkable. So
23 he had an ongoing emergency. Just because a bell and a
24 whistle is not going off doesn't mean that I'm not still
25 doing my job and taking care of the medical emergency.

1 Q. Now the strip should be in the file if it went
2 off; correct?

3 A. In your theoretical situation, yes, there would
4 be a strip.

5 Q. No.

6 A. That it would go there.

7 Q. Not my theoretical situation.

8 A. That's what it is.

9 Q. No, no, no, sir. In this case, according to
10 the -- the hospital guidelines when the alarm goes off a
11 strip is printed. And you know that to be true; do you
12 not?

13 MR. SHAW: Objection, Your Honor.

14 THE COURT: Overruled.

15 THE WITNESS: When an alarm goes off a strip is
16 printed.

17 BY MR. GASTON:

18 Q. Okay. Do you know what happened to those
19 strips that you say existed showing the emergency right
20 before you gave the Kayexalate or not?

21 MR. SHAW: Objection as to form.

22 THE WITNESS: Well now --

23 THE COURT: Overruled.

24 THE WITNESS: Well now you're -- you're
25 twisting my words. I never said those strips existed. I

1 never said that the alarm was going off immediately prior
2 to that.

3 BY MR. GASTON:

4 Q. Well --

5 A. That's what we were just talking about. I'm
6 saying he -- his alarm went off, as you say. And that's
7 correct, it went off. There was an emergency. And it
8 alerted to us. And it did its job so we could do ours.

9 I gave him the emergency medications that were
10 available at the time. And that temporarily quelled the
11 alarm.

12 They did their job. That did not mean that he
13 was out of the emergency at all. Because as you know and
14 as the jury has heard multiple times those emergency
15 medications don't do anything to remove the potassium
16 from the body.

17 So what he still had was an unacceptably
18 dangerously high potassium level that we had done nothing
19 about yet. And so just because the alarm wasn't going
20 off doesn't mean the potassium wasn't there posing an
21 immediate threat to him.

22 Q. An immediate threat.

23 A. So let's be very clear about that.

24 Q. I will be very clear about that.

25 So he continued to have an immediate threat of

1 death even at the time the Kayexalate was administered?

2 A. Yes.

3 Q. But he never received calcium gluconate or
4 calcium chloride?

5 MR. SHAW: Objection.

6 THE COURT: Sustained.

7 Asked and answered, Mr. Gaston.

8 MR. GASTON: Okay. All right.

9 BY MR. GASTON:

10 Q. Doctor, are you claiming the Kayexalate was
11 administered because of the immediate emergency life
12 threatening danger of a heart attack at that time?

13 A. No. I'm not claiming that it was given for the
14 immediate life threatening --

15 Q. Emergent --

16 A. -- heart attack. Which is not true. It
17 wouldn't have been -- I guess you could call it heart
18 attack. His heart would have stopped.

19 Q. Right.

20 A. It was given to remove the potassium and
21 prevent further deterioration. So it was given all at
22 the same time.

23 Q. Because Kayexalate --

24 A. So it's kind of a hard question to answer.

25 THE COURT: Doctor, let's -- I think you --

1 you've answered the question. You have able counsel who
2 will redirect if necessary.

3 Mr. Gaston --

4 THE WITNESS: I'm sorry. I apologize.

5 THE COURT: You do not need to apologize one
6 bit.

7 Go ahead, Mr. Gaston.

8 BY MR. GASTON:

9 Q. You know Kayexalate according to the hospital
10 guidelines won't start to work for two hours to remove
11 potassium from the body; correct?

12 A. I know that according to my medical training.
13 Not the hospital guidelines.

14 Q. Okay. And on occasion it may not start to work
15 for 24 hours after it's administered; correct?

16 A. On occasion it may start work as early as one
17 hour.

18 Q. But --

19 A. So I -- I agree with your statement it may on
20 occasion take up to 24 hours. But I would counter that
21 and say it could work as early as one hour.

22 Q. Now you didn't order Kayexalate because you
23 weren't -- you didn't how fast dialysis could have got
24 there; correct?

25 A. So let me understand the question. So you're

1 asking --

2 THE COURT: I don't understand the question.

3 MR. GASTON: Okay.

4 THE COURT: Can you restate it.

5 MR. GASTON: Fine.

6 BY MR. GASTON:

7 Q. Is the reason you ordered Kayexalate because
8 you had no idea how soon dialysis could have been
9 started?

10 A. That's one of the many reasons that I ordered
11 it, yes.

12 Q. Doctor, I asked you in your deposition if
13 dialysis could have begun 10 minutes after you made the
14 request you would still have given Mr. Allen the
15 Kayexalate; do you remember that?

16 A. I remember your hypothetical that you made
17 clear was hypothetical. And my answer was yes.

18 Q. Okay. So if you would still have given him
19 Kayexalate if you knew dialysis was going to be there in
20 10 minutes then there was no urgency to give the
21 Kayexalate; correct?

22 A. No, that's not true. As I said, so the -- in
23 this case the -- knowing when dialysis could get there
24 and start was only part of the issue. And certainly did
25 play a role in my decision at that time.

1 In this situation had dialysis been in the room
2 and could start immediately I would still have given the
3 Kayexalate because what's not been taken into account is
4 the -- what caused the potassium to rise.

5 And what was causing the potassium to rise as
6 we've heard multiple times is the muscle breakdown that
7 was going on in Mr. Allen's body. And we did not have
8 safe and effective way of treating that condition. The
9 rhabdomyolysis.

10 So that was ongoing. No matter what I did for
11 the potassium his muscle was going to continue to break
12 down. And there are labs that show that that had for --

13 MR. GASTON: Objection, Your Honor. Way beyond
14 the scope.

15 THE COURT: Sustained.

16 MR. GASTON: Okay.

17 BY MR. GASTON:

18 Q. Now --

19 A. Well --

20 THE COURT: Dr. Burks, you have an attorney who
21 can redirect your testimony.

22 MR. SHAW: I object. I --

23 THE COURT: Understood. Overruled.

24 MR. SHAW: He's not finished his answer.

25 THE COURT: Overruled.

1 Move on to the next question. The answer was -
2 - the answer to the question was --

3 THE WITNESS: So could you repeat the -- that
4 question?

5 BY MR. GASTON:

6 Q. Doctor, I'm going to ask you another question.
7 I'm going to ask you doesn't dialysis work much faster
8 than Kayexalate to remove potassium from the body?

9 A. Dialysis works immediately to remove potassium
10 from the body. But only for four hours. After four
11 hours, as soon as the machine stops, the effect goes
12 away.

13 Q. And that's what's called the rebound effect;
14 right? Because the potassium then can rise again;
15 correct?

16 A. Sure. You can call it the rebound effect.
17 That's fine.

18 Q. Right. And you knew about the rebound effect
19 that could happen to Mr. Allen on the 16th when the last
20 time he had dialysis. You knew that the potassium could
21 come back up from the 17th as well; did you not?

22 A. I was aware of it. But he wasn't receiving the
23 dialyses because of the -- a life threatening elevation
24 in his potassium.

25 Q. Yeah. Doctor, with respect to the dialysis the

1 time that the dialysis could arrive was very important
2 for you; correct?

3 A. Insomuch as -- as what?

4 Q. Well insomuch as knowing from the nephrologist
5 when you called and ordered it urgently how long it was
6 going to take to get there.

7 A. It would have been nice to know. But the
8 nephrologist wasn't able to give me a specific time.

9 Q. In fact, you didn't ask him for a specific
10 time; did you?

11 A. I don't -- I don't recall asking for a specific
12 time or not.

13 Q. And -- and -- and --

14 A. And I don't know that --

15 Q. Even though the specific time that dialysis was
16 going to arrive was important for you for the decisions
17 that you were going to make for this patient you never
18 asked the nephrologist how soon can you get here?

19 A. No.

20 MR. SHAW: Objection.

21 THE COURT: Sustained.

22 MR. GASTON: Okay.

23 BY MR. GASTON:

24 Q. All right. Now let's go back to -- Doctor,
25 dialysis doesn't have a risk of intestinal necrosis or

1 bowel perforation; does it?

2 A. That's not -- that's not necessarily true at
3 all.

4 Q. Now wait a minute. Are you telling me when you
5 ordered dialysis for Mr. Allen that you knew that it
6 could cause intestinal necrosis and bowel perforation?

7 A. I know that the risk of dialysis are much more
8 and well described than the risk for Kayexalate. And
9 that's one of those.

10 Q. All right. So you're telling me that a
11 material risk of dialysis is that it can cause intestinal
12 necrosis and bowel perforation?

13 A. I -- it has been described, yes. And to be
14 clear, when you say when I ordered. I did not order the
15 dialysis. I requested that the nephrologist order it.

16 Q. Well hold on a second now. Did -- did you
17 claim to have this knowledge when you asked for the
18 nephrologist to order the dialysis for Mr. Allen or is
19 this something you learned after the fact?

20 MR. SHAW: Objection, Your Honor, as far --

21 THE COURT: Over --

22 MR. SHAW: -- as this information. Unclear to
23 me.

24 THE COURT: Then I will ask Mr. Gaston to
25 clarify his question.

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BY MR. GASTON:

Q. Doctor, you just told the members of the jury that one of the risks of dialysis is intestinal necrosis and bowel perforation; is that true?

A. That's -- yes. That's one of the risks.

Q. All right. Is it a material risk?

A. Define material for me please.

Q. Well hold on a second. You're the physician.

MR. SHAW: Can we approach, Your Honor?

THE COURT: Let him finish the question. And then if there's an objection I'll consider it.

BY MR. GASTON:

Q. You're the physician. Part of informed consent in the medical profession requires you to know the material risks of complications from medications and treatment you are to order; correct?

MR. SHAW: Can we -- I object, Your Honor. Can we approach for a second?

THE COURT: No.

THE WITNESS: It's -- that's correct.

THE COURT: Overruled.

THE WITNESS: You should know the --

BY MR. GASTON:

Q. So I want you to use your definition of material risk that you use in your profession. Is it

1 your testimony to this jury that dialysis that you
2 ordered or requested to be ordered and was given to Mr.
3 Allen contained a material risk of intestinal necrosis
4 and bowel perforation?

5 A. It was a -- yes. It's a material risk. Along
6 with material risk of sudden cardiac death amongst other
7 material risks that hemodialysis poses.

8 Q. And it --

9 A. And again, I didn't order it. And therefore
10 would not responsible for consenting him for
11 hemodialysis.

12 Q. Oh. So -- so now you're telling me even though
13 you asked for dialysis and the nephrologist complied with
14 your request that you had no obligation to explain to Mr.
15 Allen the dialysis that you had requested that he receive
16 what the material risks are? Is that your testimony?

17 A. Well my -- that's my testimony. And to be
18 clear Mr. Allen had been receiving dialysis for several
19 days prior to that. He had received dialysis in another
20 hospital as well.

21 And typically, as you all know --

22 MR. GASTON: Objection.

23 THE WITNESS: -- that the nephrologist --

24 MR. GASTON: Objection. (Indiscernible at
25 12:37:40).

1 THE COURT: Overruled.

2 Go ahead, Mr. -- Doctor.

3 THE WITNESS: The nephrologists are physicians
4 that are specialized in kidneys and dialysis. They
5 typically obtain consent prior to initiating dialysis.

6 THE COURT: Okay. Thank you. I think we can
7 stop there, Doctor.

8 THE WITNESS: Yeah.

9 THE COURT: Go ahead, Mr. Gaston.

10 MR. GASTON: Okay.

11 BY MR. GASTON:

12 Q. Now --

13 THE COURT: Counsel, how much further do you
14 have -- I'm not asking you to limit your time. I'm just
15 trying to get an idea.

16 MR. GASTON: We have a little bit to go if Your
17 Honor is considering lunch.

18 THE COURT: I am.

19 MR. GASTON: It might be a good idea.

20 THE COURT: Okay. All right.

21 Ladies and gentlemen, we will break for lunch.

22 And again, continuing instructions as to no
23 conversations or research or sharing or communications
24 with anyone in or outside of the courtroom.

25 I will ask, ladies and gentlemen, that you be

1 back in your jury room at 1:30 if you would so that we
2 can continue on as promptly as possible.

3 And, Madam Clerk, I know you need to take our
4 jury to get their stipend; correct?

5 THE CLERK: You said 1:30, Judge?

6 THE COURT: 1:30.

7 And feel free -- you are always free to bring
8 your lunch and eat in the jury room if you wish. I'm
9 sure you'd like to get outside a bit. But you're free to
10 do that if you'd like.

11 The Court is in recess until 1:30.

12 THE CLERK: Yes, Your Honor.

13 All rise.

14 (Whereupon, the luncheon recess was taken at
15 12:39 p.m.)

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1 A F T E R N O O N S E S S I O N

2 (1:57 p.m.)

3 THE CLERK: Circuit for Baltimore City, Part
4 19, will now resume its afternoon session, the Honorable
5 Julie R. Rubin presiding.

6 THE COURT: Have a seat, everyone. I
7 appreciate your standing. And I'm sorry for the delay.

8 Recalling Allen versus University of Maryland
9 Medical System, Corp., et al. Case 24-C-15-003384.

10 Let the record reflect that all Counsel are
11 present.

12 Dr. Burks has resumed the witness stand.

13 Dr. Burks, you remain under oath; understood?

14 THE WITNESS: Yes, ma'am.

15 THE COURT: Okay.

16 Good afternoon again, ladies and gentlemen.

17 Mr. Gaston, whenever you're ready.

18 MR. GASTON: Thank you.

19 DIRECT EXAMINATION (Cont'd)

20 BY MR. GASTON:

21 Q. Doctor, do you have Exhibit 101 in front of
22 you? It's one of the timelines. Do you still have that
23 at the trial table?

24 I want to direct your attention to 101. We're
25 going to go down and finish the rest of the timeline. Do

1 you agree that at 1:30 in the afternoon hemodialysis was
2 ordered for Mr. Allen?

3 A. Yes, sir.

4 THE COURT: Mr. Gaston, keep your voice up for
5 me please, sir.

6 MR. GASTON: I'm sorry, Your Honor.

7 THE COURT: That's all right.

8 BY MR. GASTON:

9 Q. Do you agree that at 1:45 p.m. you wrote the
10 handwritten note we already showed the members of the
11 jury?

12 A. Yes.

13 Q. Do you agree that on the handwritten note you
14 wrote the words "labs unavailable?"

15 A. Yes.

16 Q. That you wrote the words "glucose, insulin
17 given and albuterol nebulizer and sodium bicarbonate?"

18 A. Yes.

19 Q. Okay. Did you also write the words "calcium
20 gluconate unavailable from pharmacy?"

21 A. Yes.

22 Q. Did you also write the words "All for urgent
23 HD", an that's hemodialysis; correct?

24 A. Correct.

25 Q. And you wrote "Hemodialysis was in route?"

1 A. Yes.

2 Q. Does that mean that the nephrologist told you
3 once you asked for hemodialysis that it was in route at
4 that time?

5 A. Those were the words that I can recall being
6 told.

7 Q. Okay. And then at 2:45 that's when Mr. Allen
8 first received hemodialysis that day?

9 A. Yes.

10 Q. Okay. Now can you go to Exhibit 102 please?
11 Another timeline.

12 Okay. I'm sorry. We're back with 102. 100,
13 I'm sorry. 100.

14 A. I'm sorry. Are we on 101 -- or 100 or 102?

15 Q. 100. My mistake, Doctor.

16 A. Okay.

17 Q. 100 please.

18 We have that at -- Mr. -- dialysis -- Mr. Allen
19 was in hemodialysis from three o'clock to 4:00 p.m.?

20 A. Yes.

21 Q. Okay. And he was still in dialysis from four
22 o'clock to 5:00 p.m.?

23 A. Looks like until 5:45.

24 Q. Okay. Thank you.

25 All right. Now also would it be fair to say

1 that in your note that day before 12:00 p.m. note you
2 wrote that no labs were drawn that day?

3 A. Correct.

4 Q. And --

5 A. That was my -- my daily note. Yes.

6 Q. Okay. And you also wrote "hemodialysis" and we
7 have "BM" would that -- would that be bowel movement at
8 4:25 and 4:55 p.m.?

9 A. According to your timeline that's what this
10 says.

11 Q. All right. Now at seven o'clock you left for
12 work that day; correct?

13 A. Probably closer to 7:30. Anywhere between
14 seven and eight o'clock depending on how long it takes to
15 sign out. But that's a good rough estimate.

16 Q. Okay. At the time that you ordered Kayexalate
17 were you aware that -- you were aware that it could
18 possibly cause intestinal ischemia; correct? Or one of
19 the possibilities; correct?

20 A. I think we established at the time that I
21 ordered it I was not aware that that was an association.

22 Q. Oh. You were not aware? Okay. Sorry.

23 So then you were unable to advise the doctor
24 who relieved you or the nurses to keep an eye out for Mr.
25 Allen in case he developed bloody diarrhea which would be

1 a sign and symptom of intestinal necrosis; would that be
2 fair?

3 MR. SHAW: Objection as to form, Your Honor.

4 THE COURT: Sustained.

5 MR. GASTON: Okay.

6 BY MR. GASTON:

7 Q. At the time you left from work did you give any
8 instructions to the doctor who relieved you with respect
9 to watching out for blood stool for Mr. Allen?

10 MR. SHAW: Object -- objection, Your Honor.

11 THE COURT: Basis?

12 MR. SHAW: Repetitive, Your Honor. We've been
13 through this.

14 THE COURT: Overruled.

15 You may answer, Doctor.

16 THE WITNESS: I would not have given any
17 specific recommendations about bloody stools, per se. I
18 would have been more concerned about the recurrence of
19 the hyperkalemia, the high -- the elevated blood
20 potassium levels.

21 BY MR. GASTON:

22 Q. Is -- is that a no to my question?

23 A. The answer is no, I did not give them any --

24 Q. All right.

25 A. -- instruction regarding bloody bowel

1 movements.

2 Q. All right. And then according to the timeline
3 between eight and nine o'clock Mr. Allen had a bowel
4 movement?

5 A. Yes.

6 Q. Between 10 and 11 o'clock Mr. Allen had a bowel
7 movement?

8 A. Yes.

9 Q. And we can go to 102. And now we're going into
10 the next day which is March 19 between midnight and 1:00
11 a.m. Mr. Allen had another movement?

12 A. Yes. None of this is unexpected given the fact
13 that he was on lactulose and he was given Kayexalate and
14 --

15 Q. I didn't ask for --

16 MR. SHAW: Your Honor --

17 MR. GASTON: -- an explanation. I'm just
18 asking --

19 MR. SHAW: Objection.

20 THE COURT: No the objection is overruled.

21 Let's --

22 Doctor, if you would just focus on the question
23 that's asked. Answer it to the best of your abilities.

24 Thank you.

25 BY MR. GASTON:

1 Q. Isn't it true that between one o'clock and 2:00
2 a.m. a prescription for an antacid tablet or for gas was
3 administered to Mr. Allen?

4 A. I believe my colleague may have ordered that.

5 Q. Okay. And between two o'clock and three
6 o'clock Mr. Allen had another bowel movement?

7 A. Correct.

8 Q. Between three o'clock and four o'clock Mr.
9 Allen had another bowel movement?

10 A. Correct.

11 Q. Between four o'clock and five o'clock he had
12 another bowel movement; is that true?

13 A. I'm sorry. I didn't hear that last one.

14 Q. Between four o'clock and five o'clock he had
15 another bowel movement?

16 A. Correct.

17 Q. Between five o'clock and six o'clock he had
18 another bowel movement?

19 A. Correct.

20 Q. Then there was a note in the file between six
21 o'clock and seven o'clock, at Page 102, which indicated
22 there were several episodes of stool mixed with blood
23 overnight. And that was a note at 6:12 in the morning.

24 THE COURT: Is there a question?

25 BY MR. GASTON:

1 Q. Is that true?

2 THE COURT: Is what true? Is it true that
3 there's a note or is it true that that took place?

4 BY MR. GASTON:

5 Q. Is it true that there's a note in the chart at
6 Page 102 that states several episodes of stool mixed with
7 blood overnight?

8 MR. SHAW: Objection, Your Honor. Record
9 speaks for itself.

10 THE COURT: Overruled.

11 THE WITNESS: There is a note that states that.

12 BY MR. GASTON:

13 Q. Okay. And that was a note that was from the
14 midnight internal medicine doctor who was caring for Mr.
15 Allen; would that be true?

16 A. That was from Kim Bizzle (phonetic), my -- my
17 colleague, yes.

18 Q. Now between 11 o'clock and noon that day, there
19 was another bloody bowel movement; correct? Page 104.

20 A. Correct.

21 Q. And then there was a family meeting that day;
22 correct?

23 A. That's on 104. I'm not sure of the family
24 meeting of which you're referring to.

25 Q. Well let's talk about -- did you have a family

1 meeting with the Allen family sometime during the morning
2 of March 19, 2013?

3 A. I met and spoke with them on at least one
4 occasion if not more.

5 Q. Now -- and that is a conversation where you
6 informed Ms. Allen and members of her family, number one,
7 that you'd made a mistake; is that true?

8 A. No.

9 Q. Isn't it also true that you informed them that
10 Mr. Allen developed a complication from the Kayexalate
11 that you administered to him?

12 A. No.

13 Q. Isn't it true that you told the Allen family
14 that Mr. Allen developed injury to his intestines?

15 A. I did tell them that he developed injury to
16 intestines. And I gave them a list of -- albeit
17 incomplete list of possible reasons. And amongst those
18 was Kayexalate as it had just been brought to my
19 attention of the association. And --

20 Q. Okay. So I'm going to show you -- can you go
21 to Page -- your discharge summary note which is Tab 4,
22 Page 18?

23 And does that -- is that type written note that
24 you wrote in his file?

25 A. That's a dictated note.

1 Q. And was it typed and did you review it for
2 accuracy?

3 A. It was.

4 Q. Did you make any changes to that note from the
5 time it was typed up and after you reviewed it for
6 accuracy?

7 A. I did not.

8 Q. Okay.

9 MR. GASTON: I'll show that to the members of
10 the jury.

11 BY MR. GASTON:

12 Q. Doctor, did you write as part of your
13 differential diagnosis for Mr. Allen that the cause of
14 his intestinal injury was intestinal ischemia due to
15 concomitant Kayexalate and lactulose?

16 A. If I can read more completely.

17 Q. Well I want to know if that --

18 MR. SHAW: Objection, Your Honor.

19 THE COURT: Overruled.

20 The question -- and I will allow follow up
21 question. But the question -- I think the question is
22 simply is that part of what you dictated.

23 THE WITNESS: That is part of what I dictated,
24 yes.

25 THE COURT: All right. So now, Mr. Gaston,

1 there is an objection because the doctor wishes to have a
2 more fulsome recitation of what was typed. So I'm going
3 to let you ask a follow-up but please keep that in mind
4 because I will sustain that objection.

5 MR. GASTON: Okay.

6 BY MR. GASTON:

7 Q. So that was one of the differential diagnosis
8 that you reached; is that correct?

9 A. Yes.

10 Q. You would not have placed that in Mr. Allen's
11 chart if you did not believe that to be true at the time;
12 is that correct?

13 A. I would not have placed that in the chart if I
14 did not believe that -- where it was a possibility that
15 it could be true.

16 Now I don't mean to go on too much but I do
17 feel that it's necessary to explain the context in which
18 I dictated this note.

19 Q. Well did you also --

20 MR. SHAW: Objection, Your Honor. May he
21 finish?

22 THE WITNESS: I was just --

23 THE COURT: Over -- overruled. That's not the
24 question. You can ask it on redirect.

25 THE WITNESS: Okay.

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THE COURT: What's the next question.

MR. GASTON: Okay.

BY MR. GASTON:

Q. Now you told the members of the jury that the day before when you gave the Kayexalate you were unaware of the association between Kayexalate and intestinal ischemia; is that true?

A. That's true.

Q. So sometime between the time you gave Mr. Allen the Kayexalate and the next day you gave the note someone informed you that the Kayexalate you gave him had a known association with intestinal ischemia; is that true?

A. I was -- yes. I was informed after the fact there was an -- a reported association.

Q. Who told you that?

A. I don't recall exactly who. The best to my ability the first place I read it was the MICU or the ICU admission note written by an intern physician.

Q. So an intern physician at the ICU had reached this conclusion as you wrote it here that one of the diagnosis was intestinal ischemia due to concomitant Kayexalate?

A. No. No. They didn't reach that conclusion. They, again, generated a differential diagnosis. Meaning a list of possibilities.

1 Q. Well wasn't one of those the same thing that
2 you have here, intestinal ischemia due to contumited
3 Kayexalate?

4 A. That was one of the possibilities, yes.

5 Q. So two physicians at the hospital who were
6 caring for Mr. Allen, one being you and the other an ICU
7 resident --

8 A. Intern.

9 Q. I'm sorry. An intern reached the same
10 differential diagnosis -- at least one of the same
11 differential diagnosis for Mr. Allen that his intestinal
12 injury -- one of the diagnosis was the ischemic --

13 THE COURT: Mr. Gaston, can you go back and
14 rephrase your question because I've lost you just a bit.

15 MR. GASTON: Okay.

16 BY MR. GASTON:

17 Q. So we have you reaching a differential
18 diagnosis that the ischemia was due to the Kayexalate.
19 And we have the ICU resident also reaching the same
20 differential diagnosis; would that be true?

21 MR. SHAW: Objection as to form, Your Honor.

22 THE COURT: Sustained.

23 BY MR. GASTON:

24 Q. Doctor, did you inform -- when did you inform
25 the Allen family that one of the reasons that Mr. Allen

1 could be suffering from his intestinal injury was due to
2 the Kayexalate that you gave him? When did you tell them
3 that?

4 A. It would -- I would have had that discussion
5 with them -- to my recollection it was after he had gone
6 to the ICU. I went to find them to talk with them
7 because when you're changing locations in a hospital a
8 bunch of new faces you don't know.

9 And because I had taken care of him for several
10 days we had had several discussions. I thought having a
11 familiar face to comfort them in this tragedy would have
12 been a good thing. And it would have at that time that I
13 would have done my best to explain what I understood to
14 have happened to him.

15 Q. And -- and did one of those things that you
16 explained to them as to what you understood what happened
17 to Mr. Allen is that his bowel was injured -- one of the
18 reasons was because of the Kayexalate that you
19 administered to him?

20 A. I would have explained that that was one
21 possibility that had been brought to my attention from
22 the intern in the ICU.

23 Q. Did you ever go back to the Allen family and
24 take this statement back and tell them that it's no
25 longer true, this is not what happened to Mr. Allen?

1 A. No. I had no need to. Because this is just a
2 list -- again, it's a list of possibilities. And I think
3 as we've heard --

4 Q. Just a minute, Doctor.

5 A. -- on multiple occasions that there's not -- we
6 still don't have a firm answer as to exactly what, aside
7 from what's listed in our autopsy report.

8 Q. Did you ever talk to the Allen family again
9 after you gave them one possible explanation for Mr.
10 Allen's injury due to the Kayexalate that you
11 administered?

12 A. Unfortunately no. He was -- he was in the ICU.
13 I had to return to my Immediate Care Unit to take care of
14 those other -- the patients that I still there. So
15 unfortunately I didn't have the opportunity.

16 Q. And you knew Mr. Allen was going in for
17 emergency surgery; correct?

18 A. I did.

19 Q. And you knew approximately how long the surgery
20 was going to take?

21 A. I'm not a surgeon. And so I -- I don't know
22 specifics. I had rough estimates on -- on how long it
23 might take. There's no way for me to know beforehand how
24 long it would take.

25 Q. When did you find out that Mr. Allen died?

1 A. It would have been late on the 20th or early on
2 the 21st.

3 Q. And were you working on the 20th?

4 A. On the 20th? I don't recall my schedule at
5 that time. I would have been on for three to four days
6 by that time. Oftentimes our schedule dictates after the
7 fourth day you're off. I may not have been at work. I'm
8 not sure.

9 THE COURT: Counsel, would you please approach
10 briefly?

11 (Counsel approached the bench, and the
12 following ensued:)

13 THE COURT: I'm sorry to interrupt. It's not
14 related to the testimony.

15 Madam Clerk just informed me that prior to us
16 resuming one of the alternates asked if she could move
17 because the air is making her uncomfortable. So I'm
18 going to invite the alternates to move to where it's more
19 comfortable for them.

20 And I just didn't want to get -- let the
21 afternoon progress too much. So I was waiting for a
22 pause to do that. Okay?

23 MR. GASTON: Thank you.

24 THE COURT: Thank you.

25 (Counsel returned to the trial table, and the

1 following ensued:)

2 THE COURT: Ladies and gentlemen, to our
3 alternate jurors, if you are uncomfortable because of the
4 air blowing on you feel free to move to another seat.
5 And if you wish to do that do that at this time and then
6 we'll continue.

7 Is that better? Okay. All right. Thank you
8 very much.

9 I apologize for the interruption, Counsel, of
10 Dr. Burks.

11 Mr. Gaston, whenever you're ready, sir.

12 MR. GASTON: All right.

13 BY MR. GASTON:

14 Q. Doctor, I want to go back to the timeline
15 that's in front of you. I believe it's Exhibit 102.

16 Do we have Mr. Allen being transferred to the
17 ICU between 12 and one o'clock on the 19th?

18 A. That's what you have here, yes.

19 Q. All right. And we have the time of anesthesia
20 for the surgery started in this case between two o'clock
21 and 3:00 p.m.

22 A. Yes, sir.

23 Q. And we have the surgery over between nine
24 o'clock and 10:00 p.m.

25 A. Yes, sir.

1 Q. Doctor, is it true that from March -- let me
2 show you a calendar.

3 That on March 12th, 13th, 14th, 15th, 16th, 17th
4 Mr. Allen did not complain of abdominal pain.

5 A. I'd have to look more closely at the notes. I
6 think he did complain of some cramping at some point
7 during that time.

8 Q. Is this true that on March 12th, 13th, 14th, 15th,
9 16th, 17th that Mr. Allen did not have any bloody stools?

10 A. That's true.

11 Q. Would you agree that the signs and symptoms of
12 intestinal necrosis are abdominal pain and bloody stool,
13 bloody diarrhea?

14 A. I would say that those signs and symptoms that
15 had had already developed and completed the necrosis or
16 death of the bowel. Meaning that you could have -- you
17 could have intestinal ischemia prior to developing
18 symptoms.

19 Q. Is it true that you did not diagnose Mr. Allen
20 with intestinal ischemia on March 12th, 13th, 14th, 15th,
21 16th or the 17th?

22 A. That's true. I had no indication.

23 Q. The first time that Mr. Allen showed any signs
24 and symptoms that were consistent with intestinal
25 necrosis or bowel ischemia wasn't until after he drank

1 the Kayexalate that you administered to him?

2 A. It was also -- in answer to the question, yes.
3 That's true.

4 But I will also say that the -- it didn't -- it
5 didn't start until after dialysis was complete. It
6 didn't start until after he had a life threatening heart
7 rhythm.

8 Q. Now, Doctor, do you understand that one of the
9 doctors that you retained in this case is going to come
10 to court and say Mr. Allen was going to die regardless of
11 whether he was given the Kayexalate?

12 A. I'm not sure what they're going to testify to.

13 Q. I want you to assume that's going to be the
14 testimony.

15 A. I don't know that I can do that.

16 Q. Well have you read the depositions of the
17 doctors that you've hired to come into court and testify?

18 A. I --

19 MR. SHAW: Objection, Your Honor.

20 THE COURT: Overruled.

21 MR. SHAW: As to form.

22 THE COURT: Overruled.

23 Have you read the deposition transcripts?

24 THE WITNESS: I'm not sure which -- I think
25 I've read one of them. I'm not sure which one.

1 But to be clear I didn't hire them.

2 BY MR. GASTON:

3 Q. I'm sorry?

4 A. I wasn't -- I'm not hiring anyone.

5 Q. Well the doctors your lawyer hired.

6 MR. SHAW: Objection, Your Honor.

7 THE COURT: Can you speak up, Mr. Gaston? I
8 cannot --

9 MR. GASTON: Yes.

10 THE COURT: -- hear you. So I can't rule on
11 the objection. Can you restate the question?

12 MR. GASTON: All right.

13 BY MR. GASTON:

14 Q. I'm getting back to the depositions for the
15 doctor that your lawyer hired to come in and testify.
16 Did you read any of those?

17 MR. SHAW: Objection. Objection.

18 THE COURT: Sustained.

19 MR. GASTON: Okay.

20 BY MR. GASTON:

21 Q. Doctor, did you ever inform the Allen family
22 before March 19th that Mr. Allen's condition was
23 terminal?

24 A. No.

25 Q. Did you ever ask for -- did you ever inform the

1 Allen family that Mr. Allen needed hospice care?

2 A. No, sir.

3 Q. Did you ever inform the Allen family that Mr.
4 Allen was going to have to be intubated before March
5 19th?

6 A. On March 18th I did have a talk with them about
7 what he would desire if it became necessary because of
8 the emergency that did develop. And I mentioned that
9 intubation was possible. So I'd say prior to the 19th I
10 did have that talk with them.

11 Q. Prior to the time you administered the
12 Kayexalate did you have that conversation with them?

13 A. Yes.

14 Q. Before the intubation? I mean before the
15 cardiac event? Let's go back to noon on the 18th.

16 A. It would have been -- no, not prior to the
17 cardiac -- not prior to it, no.

18 Q. Okay. Now prior to the 18th Mr. Allen was
19 never on a DNR order which means do not resuscitate; was
20 he?

21 A. And that is exactly why we did everything we
22 did.

23 Q. Okay. Because you wouldn't have done
24 everything you were going to do on the 18th if he was
25 terminally ill and on an DNR order; correct?

1 MR. SHAW: Objection, Your Honor.

2 THE COURT: Sustained.

3 MR. SHAW: Compound question.

4 THE COURT: Sustained.

5 BY MR. GASTON:

6 Q. Would you have done everything for Mr. Allen
7 you did on -- on the 12th if he was already terminal -- I
8 mean on the 18th if he was already terminally ill?

9 A. It depends on what his wishes would be at that
10 time.

11 Q. Okay. Now would it be fair to say that before
12 March 18th you never had an end of life discussion with
13 Mr. Allen or his family?

14 A. It would be fair to say I never had an end of
15 life discussion. But we did talk about his medical
16 condition everyday that I was there with them.

17 Q. Okay. Is it fair to say that when you first
18 saw Mr. Allen you wrote a note and you indicated that he
19 was on the transplant list? Kidney and liver transplant?

20 A. That note would have -- first of all, there is
21 a note that says that. That note would have indicated
22 that in my discussion with him when I first met them that
23 they would have indicated to me that he was on a
24 transplant list. I would have taken that at face value.
25 Had no reason not to believe them. But I wouldn't have

1 had confirmation at the time I wrote that note.

2 Q. Okay. Now, Doctor, are you familiar with the
3 medical obligation that's called informed consent?

4 A. Very much so.

5 Q. And are you familiar with the medical
6 obligation of informed consent that applies to doctors
7 such as you in the State of Maryland for treating
8 patients such as Mr. Allen?

9 A. Yes.

10 Q. Okay. I want to show you what's marked as
11 Plaintiffs' Number 25. And did you see this chart when
12 Dr. Leo was testifying?

13 A. I don't know if you had it in a place where I
14 could physically see it.

15 Q. Do I have it in a place where you could see it
16 now?

17 A. Yes, you do.

18 Q. Okay. Now it says required elements of
19 informed consent. Do you agree that the five elements of
20 informed consent on this case are the five elements of
21 informed consent for doctors such as you for treating a
22 patient such as Mr. Allen in the State of Maryland?

23 MR. SHAW: Objection. Legal question.

24 THE COURT: Overruled.

25 THE WITNESS: So those are -- those are five

1 criteria. Those are not the entire criteria that applies
2 to informed consent that applies to physicians such as
3 myself in treating patients such as doctor -- Mr. Allen.

4 MR. GASTON: Okay. And these on the board for
5 the members of the jury.

6 BY MR. GASTON:

7 Q. And I know you can't see it. So I'm going to
8 hold it here so you can see it and they can look at it.

9 A. Yes. Again, those are the five that you've
10 included. It's not the entire --

11 Q. But you do admit that you at least have to
12 comply with these five elements for the care that you
13 were providing to Mr. Allen?

14 A. No, not in this specific case. That -- because
15 you're leaving out a significant portion of what applies
16 to informed consent I can't agree with that.

17 Q. Okay. So let's go over them one by one.

18 Do you agree that you were required to reveal
19 the nature of the ailment to Mr. Allen between 12 o'clock
20 and 1:15?

21 MR. SHAW: Objection, Your Honor.

22 THE COURT: Sustained.

23 BY MR. GASTON:

24 Q. Do you agree under informed consent that you
25 were required to reveal the nature of the proposed

1 procedure to Mr. Allen? That means the Kayexalate that
2 you were going to give him.

3 MR. SHAW: Objection, Your Honor.

4 THE COURT: Basis?

5 MR. SHAW: Is he referring only to Kayexalate?

6 THE COURT: Yes. So --

7 MR. GASTON: Yes.

8 THE COURT: The original reason that I
9 sustained the first question -- the objection to the
10 first question was --

11 MR. SHAW: (Indiscernible at 2:25:20)

12 THE COURT: -- from lack -- lack of
13 specificity.

14 So if you can --

15 MR. GASTON: Let's go back to number one.

16 THE COURT: -- state the question with more
17 specificity. And we'll see where it goes.

18 BY MR. GASTON:

19 Q. What I'm referring to on informed consent is a
20 consent that you were required to give for Mr. Allen on
21 March 18th based upon the medical condition that existed
22 immediately before you -- you administered him the
23 Kayexalate.

24 A. There was no requirement that I obtain informed
25 consent.

1 Q. I didn't ask you that question, Doctor, yet.

2 But let's go to --

3 A. Well but you implied --

4 Q. -- (indiscernible at 2:25:49).

5 A. -- that it was required.

6 Q. Let's go -- let's go through the questions one
7 by one.

8 Did you reveal to Mr. Allen the nature of his
9 ailment which -- and I would specifically add that he had
10 elevated potassium levels that was causing him life
11 threatening cardiac arrhythmias.

12 A. Yes.

13 MR. SHAW: Objection. Lack of specificity.
14 Again I object.

15 THE COURT: I'll object because the witness
16 answered the -- I mean I will overrule the objection
17 because the witness has answered the question.

18 MR. GASTON: Okay.

19 BY MR. GASTON:

20 Q. And did you also reveal the nature of the
21 proposed procedure which is the nature of the Kayexalate
22 that you were going to give to him?

23 MR. SHAW: Objection, Your Honor.

24 THE COURT: Sustained.

25 Counsel, please approach.

1 (Counsel approached the bench, and the
2 following ensued:)

3 THE COURT: So I'm having trouble with the
4 timing.

5 MR. GASTON: What's --

6 THE COURT: I made myself a note. I appreciate
7 that there's sort of a sweet window that you're talking
8 about. But it's not -- the question needs to be
9 impregnated with that.

10 MR. GASTON: I understand, Your Honor.

11 THE COURT: Because --

12 MR. GASTON: I will be specific as to the exact
13 time.

14 THE COURT: Okay. Is there any other basis to
15 your objection but specificity?

16 MR. SHAW: It -- he's saying -- he's -- because
17 he's singling out Kayexalate?

18 MR. GASTON: Yes.

19 MR. SHAW: Or the other drugs?

20 MR. GASTON: No.

21 MR. SHAW: Or dialysis. That's what my -- my
22 question is about specificity.

23 THE COURT: Okay. Okay. So I want you to be
24 specific about timing, the ailment.

25 MR. GASTON: Okay.

1 THE COURT: Or whatever it is he was proposing
2 to administer.

3 MR. GASTON: Understand.

4 THE COURT: Because I want to make sure that
5 Dr. Burks question -- or rather answer is absolutely
6 customized, tailored to that --

7 MR. GASTON: Understand.

8 THE COURT: -- question. Okay.

9 MR. SHAW: Thank you, Your Honor.

10 (Counsel returned to the trial table, and the
11 following ensued:)

12 THE COURT: All right. Dr. Burks, we're going
13 to -- we're going to rewind and try it one more time;
14 okay?

15 THE WITNESS: Okay.

16 BY MR. GASTON:

17 Q. Dr. Burks, the time frame that I'm talking
18 about with respect to my question about informed consent
19 is the 10 minutes where you -- before the time you
20 administered Kayexalate to Mr. Allen on March 18th I want
21 to bring you back to that period of time.

22 And when we're talking about all these elements
23 it has to do with the Kayexalate for treating Mr. Allen's
24 condition at that time; okay?

25 Now with respect to that did you reveal the

1 nature of his condition or ailment that required the
2 Kayexalate?

3 A. Yes, I did.

4 Q. What did you tell him?

5 A. I told them that he had a life threatening
6 condition in his heart related to elevated potassium in
7 the blood because of the ongoing breakdown of muscle. Or
8 the rhabdomyolysis.

9 Q. And Ms. Allen was right by his side at this
10 time; wasn't she?

11 A. She was -- she was there every single day.

12 Q. Okay. Now did you also reveal the nature of
13 the proposed procedure which is the nature of the
14 Kayexalate and why it was -- you were going to give it?

15 A. I appreciate the specificity of the question.
16 The answer is I would have -- I explained the nature of
17 the treatment in total that I was giving all at the same
18 time which included Kayexalate.

19 And the nature of that was one to three
20 different ways that you treat hyperkalemia is to protect
21 the heart, shift the potassium out of the blood stream
22 and then get it out of the body. And I would have
23 explained the goals of my treatment in those terms.

24 Q. Well, Doctor, I don't --

25 A. Including Kayexalate.

1 Q. Most respectfully, I don't know what you -- I
2 don't want you to say what you would have done. I'm very
3 specific as to what you did, in fact, do.

4 A. Okay. I --

5 Q. And what --

6 A. -- did, in fact, explain those things to Ms.
7 Allen and Mr. Allen.

8 Q. What did you explain about the reason why you
9 wanted to give him Kayexalate? Can you be specific? And
10 don't group it with all the others. I want you to carve
11 that out specifically.

12 A. I don't know that I can. I lumped them
13 altogether and said that the goal was to do all of that.

14 Q. So you didn't explain to him the difference in
15 the timing that the medications worked? That there was a
16 different timing of onset? There was a different timing
17 of how long it would take the medications to work
18 effectively? And you didn't explain to them whether the
19 two medications worked to do the same thing at the same
20 time?

21 MR. SHAW: Objection. There are about five
22 questions.

23 THE COURT: Sustained.

24 MR. GASTON: Okay.

25 BY MR. GASTON:

1 Q. Did you explain to him that Kayexalate may --
2 may not -- will not start to work for one to two hours?
3 And may not even start to work for 24 hours? Did you
4 explain that to him?

5 MR. SHAW: Objection.

6 THE COURT: Sustained.

7 BY MR. GASTON:

8 Q. Did you explain to Mr. Allen that Kayexalate
9 may not begin to work for one hour?

10 A. No, not specifically. Because I mean I don't
11 mean to make light of this. I certainly am not trying
12 to. But this is not like a video game that you can push
13 pause and take your time and explain all of that. This
14 is going on in an emergent fashion.

15 So a lot of things were going on. So the
16 explanation would have been much briefer than that. I
17 would not have pulled out a -- a checklist of this is
18 what this medication does, this is what that medication
19 does. This is what the other medication does. This is
20 how long I expect it to take.

21 Can you -- I mean -- just imagine if you're in
22 the middle of an emergency and you're hearing that coming
23 from --

24 MR. GASTON: Objection.

25 THE WITNESS: -- a physician.

1 MR. GASTON: As to imagine.

2 THE COURT: Overruled. Overruled.

3 Dr. Burks, I'm going to stop you right there.
4 I think we get the gist of your answer. You have
5 answered the question asked. I'm not going to strike
6 your testimony. But your counsel can redirect as
7 necessary.

8 What's the next question, Mr. Gaston?

9 BY MR. GASTON:

10 Q. Doctor, is the reason you didn't reveal how
11 long it would take the Kayexalate to start to work is
12 because you didn't have the time to do so?

13 A. No.

14 Q. So you had the time to explain to Mr. Allen the
15 nature of the Kayexalate, how long it would take to work
16 and how effective it was going to be to remove the
17 potassium?

18 A. No.

19 Q. But -- well wait a minute. You just said two
20 different things. I thought you said you didn't have the
21 time to do it; is that true?

22 MR. SHAW: Objection.

23 THE COURT: Sustained.

24 THE WITNESS: No.

25 THE COURT: The objection is sustained. That

1 is not what he testified.

2 BY MR. GASTON:

3 Q. Did you have time to explain to Mr. Allen how
4 quickly the Kayexalate would work to eliminate the
5 potassium from his body?

6 A. In the situation I was in, no.

7 Q. Okay.

8 A. It would have been an unnecessary delay.

9 Q. All right. Now we -- the Kayexalate wasn't
10 administered until after his albuterol treatment;
11 correct?

12 A. Correct.

13 Q. That took at least 10 minutes; correct?

14 A. Correct.

15 Q. He was in his bed laying down with either a
16 pipe or mask in his mouth and you had to wait 10 full
17 minutes until that treatment was done before he could
18 drink the Kayexalate; right?

19 A. Correct. Have you ever --

20 Q. So you --

21 A. Let me ask you this --

22 THE COURT: Dr. Burks, you can't ask a
23 question.

24 THE WITNESS: Okay.

25 THE COURT: You are here to answer them.

1 So I'm going to let Mr. Gaston go on to ask his
2 next question.

3 BY MR. GASTON:

4 Q. During that 10 minute period of time did you
5 come into his room, pull up a chair and sit down next to
6 him, and say, Mr. Allen, I've got another drug that I
7 want to give you. It's called Kayexalate. And we have
8 some time now and I want to tell you what the purpose of
9 the Kayexalate is why I want to give it to you. Did you
10 do that?

11 A. Again, this is not -- this not something you
12 just hit pause and stop and sit down. And --

13 MR. GASTON: Objection. It's not responsive.

14 THE COURT: Overruled.

15 BY MR. GASTON:

16 Q. Go ahead, Doctor. Did you do that or not?

17 A. I did not. I did not saunter into Mr. Allen's
18 room and take a chair, sit down and go over the -- all of
19 the -- all of the emergent treatments I was giving him in
20 an at length and in detail basis. No, I did not.

21 Q. All right. Now did you reveal to Mr. Allen the
22 probability of success as to how -- what the chances are
23 for Kayexalate for removing potassium from his body?

24 A. No. And I did not apply at this time.

25 Q. Doctor, did you reveal to Mr. Allen the

1 alternatives that were available to him instead of giving
2 the Kayexalate? What were his other options?

3 A. The only other option that he wasn't already
4 planning on getting was furosemide which was not -- which
5 is Lasix which is what you give to make him pee out the
6 potassium.

7 We've established his kidneys weren't working.
8 So that wasn't an option. So no, I didn't discuss that.
9 He received all the other options that were available.

10 Q. The other option that he had was dialysis;
11 isn't that true?

12 A. That's correct.

13 Q. And did you explain to him that instead of
14 giving him the Kayexalate that you already ordered
15 dialysis that was going to remove the potassium from his
16 body? And let him know that that was an alternative
17 procedure?

18 A. I --

19 MR. SHAW: As to the compound nature, Your
20 Honor.

21 THE COURT: Overruled.

22 THE WITNESS: I explained -- I explained that I
23 had spoken with a nephrologist and the plan was to get
24 dialysis started as soon as possible.

25 BY MR. GASTON:

1 Q. Did you give him the option of going to
2 dialysis instead of drinking the Kayexalate?

3 A. Again, in the emergent situation I did not, no.

4 Q. And the material risks. Doctor, it's my
5 understanding that you didn't explain any -- any risk of
6 Kayexalate to Mr. Allen; is that true?

7 A. That's true.

8 Q. Thank you, Doctor.

9 THE COURT: Mr. Shaw.

10 MR. SHAW: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. SHAW:

13 Q. Good afternoon, Dr. Burks.

14 A. Hello.

15 Q. Shortly after noontime on March 18, 2013 was
16 Mr. Allen experiencing an immediately life threatening
17 emergency?

18 A. Yes, sir.

19 Q. We've heard that was the potassium level that
20 he had; correct?

21 A. Well it was -- it was the heart rhythm that
22 resulted because of the potassium.

23 Q. And you took prompt and urgent action to
24 respond to that life threatening emergency?

25 A. Yes.

1 MR. GASTON: Objection. Leading.

2 THE COURT: Sustained.

3 BY MR. SHAW:

4 Q. Did you take prompt and urgent action to
5 respond to that emergency?

6 MR. GASTON: Objection.

7 THE COURT: Overruled.

8 THE WITNESS: Yes, sir, I did.

9 BY MR. SHAW:

10 Q. And in your opinion and that included that
11 giving Kayexalate, insulin, glucose, albuterol, sodium
12 bicarbonate?

13 MR. GASTON: Objection. Leading.

14 THE COURT: Sustained.

15 BY MR. SHAW:

16 Q. What did --

17 MR. SHAW: I'm just following up on the
18 plaintiffs' testimony.

19 BY MR. SHAW:

20 Q. You testified earlier that you gave insulin,
21 glucose, albuterol, Kayexalate and sodium bicarbonate;
22 correct?

23 MR. GASTON: Objection again.

24 THE COURT: Overruled.

25 THE WITNESS: Yes, sir, I did.

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BY MR. SHAW:

Q. In your opinion did giving all of those medications, including Kayexalate, meet with the standard of care under the circumstances?

MR. GASTON: Objection. Form and leading.

THE COURT: Sustained.

Counsel, would you approach briefly.

(Counsel approached the bench, and the following ensued:)

THE COURT: I don't have an issue with you sort of recapping what he said and leading in that sense. The reason I sustained this objection is because it's a little ambiguous about whether or not the standard of care is met because of the totality of medications he's given versus each one. So if you could be more specific.

MR. SHAW: I'm going to do it both ways, Your Honor.

THE COURT: Okay. Well I'll -- then I'll sustain the objection.

MR. SHAW: I can't ask him everything he did (indiscernible at 2:38:41).

THE COURT: Well --

Can you stop doing that.

MR. GASTON: I'm sorry.

MR. SHAW: -- bring it down to Kayexalate?

1 THE COURT: You can. But what you didn't do
2 was to -- your question did not say is the standard of
3 care met because of the -- the combination of drugs.

4 You just said was giving all these drugs
5 consistent with the standard of care or something to that
6 effect.

7 So it's ambiguous as to whether you intended to
8 ask him does the basket of drugs together meet the
9 standard of care or whether each one meets the standard
10 of care.

11 So just rephrase the question if you would.

12 MR. SHAW: All right.

13 THE COURT: Okay.

14 MR. GASTON: I do have an objection, Your
15 Honor, as to questions regarding whether he complied with
16 standards of care when we've been alleged there were
17 other breaches of the standard of care because it doesn't
18 matter --

19 THE COURT: All right. We'll --

20 MR. GASTON: -- if what else --

21 THE COURT: We'll get there.

22 Right now I'm going to overrule that objection
23 because I'm not quite sure it's relevant.

24 MS. ZOIS: Your Honor, may I --

25 THE COURT: Hang on, Mr. Shaw.

1 Yes. Yes, ma'am?

2 MS. ZOIS: Can I go sit with my clients?

3 THE COURT: I'm sorry?

4 MS. ZOIS: Can I go sit with my clients in the
5 gallery (inaudible at 2:39:34).

6 THE COURT: May you?

7 MS. ZOIS: Sit with my clients in the gallery?

8 THE COURT: Why?

9 MS. ZOIS: Just -- they can't sit at counsel
10 table, and I'm kind of feeling in the way.

11 THE COURT: That's fine. Just don't have talks
12 because we can hear.

13 MR. SHAW: Your Honor --

14 THE COURT: Yes.

15 MR. SHAW: -- so Your Honor has already
16 cautioned Dr. Burks about reacting. So --

17 THE COURT: Well I've only -- I think I've let
18 him --

19 MR. SHAW: So that the plaintiff --

20 THE COURT: -- generally testify fairly far
21 afield of the question asked because I hate to interrupt
22 witnesses. But --

23 MR. SHAW: My -- my -- well I'm going somewhere
24 else.

25 I would ask that the Court instruct Plaintiffs

1 Counsel not to permit the plaintiffs to demonstratively
2 exhibit emotions. Because Dr. Burks hasn't been able to
3 do that. And so if they're going to sit back there and
4 cry then --

5 THE COURT: What do you mean he hasn't been
6 able to do that?

7 MR. SHAW: You instructed him not to nod and/or
8 shake his head.

9 THE COURT: I didn't -- I didn't instruct him
10 not to nod. I instructed him to stop shaking his head no
11 when somebody was saying something because it is a form
12 of communication to a jury that I can't record and is not
13 subject to cross.

14 I can't control if someone is distraught.
15 Certainly if they're disruptive of the court proceeding I
16 would ask them to step out. But simply displaying, you
17 know, a sense of grimace I can't -- I can't tell them
18 they can't do that.

19 MR. SHAW: I think -- I think Your Honor is not
20 being fair to me because to apply it to defense --

21 THE COURT: Well okay. So let me say this.
22 I'm not going to instruct the plaintiffs not to have an
23 emotional process. So if there is something that's in
24 progress that you find objectionable I absolutely will
25 consider it at that time.

1 But you know if they're -- if they're going to
2 have an emotional process I can't control that. If it
3 becomes demonstrable or demonstrative, as you've said, in
4 a way that I find obstructive in the way that I found Dr.
5 Burks to be obstructive, unintentionally mind you. I
6 don't mean to suggest anything untoward. I absolutely
7 will stop it and ask that they step out.

8 MR. SHAW: Okay. Thank you, Your Honor.

9 THE COURT: Okay.

10 (Counsel returned to the trial table, and the
11 following ensued:)

12 THE COURT: Ms. Zois, if you'd like to take a
13 moment to discreetly share with your clients what I've
14 just discussed at the bench that would be fine.

15 MS. ZOIS: Yes, Your Honor.

16 THE COURT: And at this time we'll let Mr.
17 Gaston remove that device.

18 (Brief pause.)

19 THE COURT: All right. Mr. Shaw, whenever
20 you're ready.

21 MR. SHAW: Thank you, Your Honor.

22 BY MR. SHAW:

23 Q. Dr. Burks, you used the word cocktail earlier
24 in response to the immediate life threatening emergency
25 that you diagnosed with Mr. Allen on March 18 afternoon.

1 You ordered a cocktail of drugs; correct?

2 A. Yes, sir.

3 Q. And what were those -- what was that cocktail?

4 A. It was insulin with glucose, albuterol --
5 excuse me, sodium bicarbonate and Kayexalate and the
6 calcium gluconate which was not available.

7 Q. Okay. And do you have an opinion to a
8 reasonable degree of medical certainty whether the
9 ordering of that cocktail met with accepted standards of
10 care?

11 MR. GASTON: Objection.

12 MR. SHAW: In other words, what a reasonably
13 competent physician in the same field as you would do
14 under the same or similar circumstances.

15 MR. GASTON: Objection.

16 THE COURT: Overruled.

17 THE WITNESS: I do.

18 BY MR. SHAW:

19 Q. Can you tell us what your opinion is?

20 A. In this -- in this situation that Mr. Allen was
21 in any reasonable and competent physician would have
22 given the same cocktail of medications including the
23 Kayexalate. And also calling for a nephrology consult to
24 begin dialysis.

25 Q. And, Dr. Burks, if no cocktail of medications

1 had been ordered hypothetically do you have an opinion to
2 a reasonable degree of medical certainty whether Mr.
3 Allen would have survived that immediately life
4 threatening condition?

5 MR. GASTON: Objection. Relevance.

6 THE COURT: Overruled.

7 THE WITNESS: I do. Without any of the
8 emergency treatment that we provided he was certain to
9 die from the elevated potassium level.

10 BY MR. SHAW:

11 Q. Okay. And so I'm going to go back. I want to
12 ask you some basis for those opinions. And I first want
13 to follow up with respect to some questions that Mr.
14 Gaston had about your background.

15 I'm going to show you what's been marked as
16 Defense Exhibit Number --

17 THE COURT: Whoops. Are you all right?

18 MR. SHAW: Yeah.

19 THE COURT: I don't care about the equipment.
20 Are you okay?

21 MR. SHAW: I'm okay. I'm just going to move
22 this a little bit.

23 Sorry.

24 THE COURT: All right. That was Defense what?

25 MR. SHAW: Defense Exhibit 47.

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(Defendants' Exhibit Number 47
was marked for identification.)

THE COURT: Okay.

THE WITNESS: This is a copy of my resume.

BY MR. SHAW:

Q. And is it a current and accurate copy?

A. As of -- as of May 4th of 2016, yes.

MR. SHAW: Your Honor, I'd move into evidence
Defense Exhibit 47.

THE COURT: Any objection?

MR. GASTON: No.

THE COURT: So admitted. Defense 47.

(Defendants' Exhibit Number 47
was received into evidence.)

BY MR. SHAW:

Q. So you are -- how old are you?

A. I'm 35.

Q. And where were you born?

A. I was born in Batesville, Arkansas.

Q. And before you started medical school where did
you go to college?

A. I went to the University of Central Arkansas.

Q. And after you finished college where did you go
-- where did start medical school?

A. St. Louis University Medical School -- School

1 of Medicine.

2 Q. And how long is medical school?

3 A. Four years.

4 Q. And after you finished medical school can you
5 briefly describe your training that led up to you being
6 at the University of Maryland in 2012 to 2013?

7 A. Sure. So I went into family medicine first.
8 That's a three year residency learning to take care of
9 people from birth until death. Including pregnant women
10 and their children.

11 After those three years were complete I took --
12 took the board exam for that and passed on my first
13 attempt.

14 And then came to Baltimore and commuted down to
15 D.C. for two years at Georgetown University Hospital for
16 internal medicine. Which is the treatment of adults.
17 Just the general treatment of adults and their illnesses.

18 And I completed that in 2012. Finished the
19 board exams. Passed. And then was offered a job at the
20 University of Maryland Medical System in the Intermediate
21 Care Unit.

22 Q. All right. I want to ask you specifically
23 about that position in the Intermediate Care Unit at the
24 University of Maryland. What is the Intermediate Care
25 Unit at the University of Maryland?

1 A. It's a -- it's a specialized floor that can
2 house up to 16 patients at a time. It's specifically
3 designed to free up space in the ICU's for more acutely
4 or severely critically ill patients.

5 So therefore it's designed to take care of
6 patients who have multiple medical problems that may be
7 critically ill. Meaning they need not necessarily a
8 critical care physician but a more frequent monitoring by
9 the nursing staff.

10 And so therefore our unit had a lower nursing
11 staff to patient ratio. Only -- each nurse only took
12 care of two to three patients at the most. So it was a
13 more intensive or a higher level of care so to speak.

14 And there we would take care of patients that
15 were either stabilized in the ICU and then downgraded to
16 us. Or became more ill on the general floors than they
17 could take care of but not so ill that they needed to be
18 in the ICU. We would then also take care of them.

19 And that's -- that's our -- that's kind of the
20 long and the short of the IMC.

21 Q. Mr. Gaston asked you if you were responsible
22 for caring for only eight patients. Did caring for eight
23 patients keep you busy?

24 A. Very busy. You may notice that the note on the
25 day of the 18th was written at 4:00 p.m. That doesn't

1 mean that's when I saw Mr. Allen. I saw him throughout
2 the day. But it wasn't until 4:00 p.m. that I had the
3 time to sit down and gather my thoughts about each of my
4 patients and put them down into -- into writing.

5 Q. So when -- when was the first time that you met
6 Mr. Allen?

7 A. I believe he was admitted the evening of the
8 11th. I would have met him on the 12th. If I --

9 Q. Were you -- I'm sorry. Did you finish?

10 A. I just wanted to make sure that's true. But --
11 let's see here.

12 Q. I'll move on. I'll show you that in a moment.

13 A. Okay.

14 Q. You don't remember the first day. But you had
15 seen Mr. Allen a number of times before March -- were you
16 then Mr. Allen's -- let me strike that.

17 You had been Mr. Allen's immediate or
18 intermediate medical care physician a number of shifts
19 before March 18 of 2013; is that correct?

20 A. Yes, sir.

21 Q. And did you know from taking care of Mr. Allen
22 what his medical conditions were?

23 A. Yes. He had end stage liver disease or
24 cirrhosis from Hepatitis C.

25 He had advanced kidney disease that had

1 required hemodialysis on one or two hospital admissions
2 prior.

3 At the time that he came to the University of
4 Maryland he was not getting daily or regular dialysis.
5 But that started later in the admission.

6 He had high blood pressure. All these things
7 kind of contribute to his -- his overall condition.

8 Although he had problems with -- with water
9 retention he was overweight to begin with which is a risk
10 factor for bad outcomes.

11 MR. GASTON: Objection. Move to strike.

12 THE COURT: Overruled.

13 BY MR. SHAW:

14 Q. So with the Court's permission I'd like to go
15 over some records that you authored concerning Mr. Allen.
16 And I want to start with the first time of the record
17 that you'd seen Mr. Allen.

18 MR. SHAW: With the Court's permission if I can
19 have him --

20 THE COURT: That's fine.

21 MR. SHAW: -- off the witness stand.

22 THE COURT: Doctor, just be sure to keep your
23 voice up since you won't be on the mic.

24 THE WITNESS: Yes, ma'am.

25 THE COURT: Okay.

1 Mr. Shaw, I think you want to push the middle
2 of that easel down so that the --

3 MR. SHAW: I'm sorry?

4 THE COURT: The joint -- there you go.

5 BY MR. SHAW:

6 Q. You want to stand on this side? I'd like you
7 to try to face the jury and face the microphones.

8 I'll try to keep my voice up so that the jury
9 can hear and I can be recorded.

10 And if the jury wants to follow along in the
11 jury extract I'm going to refer to the page numbers.
12 This is Page 263 of the jury extract. And it is Defense
13 Exhibit Number 20.

14 I'm also going to ask you about Page 264 which
15 is the second page of this Defense Exhibit Number 21.

16 First of all, can you tell us if you authored
17 this document?

18 A. Yes, sir, I did.

19 Q. And that's your signature there at the bottom?

20 A. Yes, sir.

21 Q. And what is the purpose of this note?

22 A. This is our daily rounding note that keeps --
23 keeps track of the medical conditions. Typically we try
24 to keep it in the order of most urgent to less urgent.

25 And so it serves multiple purposes. One, for

1 that reason, to keep track of -- of the things going on
2 with Mr. Allen in the hospital. But also to document
3 things that happened overnight. To keep track of why he
4 originally presented. And just overall kind of give us a
5 frame work with which to perform our plans.

6 Q. And so there's a number of categories down the
7 left hand side of this page.

8 Page 263. My number is not there. But it's on
9 yours. It's the same book. The number of Page 1545 is
10 to the right hand on the jury extract.

11 These are various conditions -- or various
12 parts of Mr. Allen's body that you would have looked at?

13 A. Yes. This is our -- so PE stands for physical
14 exam. So that's when we go into the room and physically
15 examine Mr. Allen. And these are -- so this is a
16 different organ systems. And this is obviously a pre-
17 generated list of common findings to begin to help speed
18 along to prevent us from having to write all of that out
19 every single day.

20 And obviously we can add notes when there's
21 something abnormal that wasn't listed there.

22 Q. And with what -- what brought Mr. Allen to the
23 hospital on March 11th, 2012?

24 A. The biggest complaint that he had was muscle
25 weakness and inability to do things that he had

1 previously been able to do. Otherwise he had ongoing
2 problems with -- with water retention, things like that.

3 Q. And what is myolysis (phonetic)? Or myositis
4 and rhabdomyolysis?

5 A. So myositis is -- means inflammation of the
6 muscles. Myo means muscle. Itis means inflammation.

7 And then rhabdomyolysis, as you've heard, is
8 when the muscle is being broken down due to inflammation.
9 So -- which causes weakness. And sometimes can cause
10 muscle aches and pains. Not necessarily.

11 Q. And did you have access to Mr. Allen's prior
12 medical records from University of Maryland when he was
13 admitted for the first time on January 23, 2013? And
14 then again on February 27, 2013?

15 A. Yes, I would have.

16 Q. And you would have been familiar with what his
17 conditions were that brought him to the hospital twice in
18 the previous two months?

19 A. Yes.

20 Q. And would you have been familiar with what his
21 kidney function was, what his liver function was even
22 before you saw him based on the -- those hospital records
23 from --

24 MR. GASTON: Objection.

25 MR. SHAW: -- January and February of 2013?

1 MR. GASTON: Objection. Compound and leading.

2 THE COURT: Sustained.

3 BY MR. SHAW:

4 Q. Were you familiar with Mr. Allen's prior
5 medical condition based on his hospitalization from
6 January 23, 2013?

7 A. Yes.

8 Q. Were you familiar with his prior medical
9 condition based on his hospitalization from February 27,
10 2013?

11 A. Yes.

12 Q. On the second page, Page 364, there's some
13 typed portions of this note. Can you tell me what those
14 are?

15 A. So these are -- these are my assessment and
16 plan for the day. This being the first note. Some of
17 these are -- can be preliminary because obviously as
18 things develop in the hospital we change our assessments.

19 But as of the first time I met on the 12th this
20 is what I thought of Mr. Allen's conditions.

21 Q. And can we -- I don't want you to read
22 verbatim. But can you describe for us what conditions
23 Mr. Allen had when you first saw him on March 12, 2013?

24 A. So first is -- again is the myositis and
25 rhabdomyolysis. Although I misspelled it here as

1 myositis. It's easy to do.

2 CKD stands for chronic kidney disease. And
3 this little arrow points to what we're planning on doing.
4 So UOP stands for urine output which is a marker for how
5 well his kidneys are working. If you're not making good
6 -- if you're not making a lot urine your kidneys aren't
7 working well.

8 I wanted to -- and then my plan is to follow
9 out from there.

10 Another citing. Initially consulted the kidney
11 doctors immediately upon meeting him because of the
12 combination of his CK -- the chronic kidney disease and
13 the rhabdomyolysis because rhabdomyolysis can go on to
14 cause end stage renal disease.

15 So he was making good urine when he started. I
16 was afraid that he would stop making urine and need
17 dialysis. That's why I called the kidney doctors to
18 begin with.

19 And he has Hepatitis C cirrhosis. Of course I
20 write here, as was pointed out earlier, currently on a
21 transplant list. Again, this is what I was told. I
22 hadn't had the opportunity to confirm that. The way I
23 was going to confirm that was by consulting the liver
24 doctors themselves. I did and ultimately I was informed
25 that he was not --

1 MR. GASTON: Objection. Hearsay.

2 THE COURT: Overruled.

3 THE WITNESS: I was informed that he was not
4 yet on the transplant list at that time. But --

5 BY MR. SHAW:

6 Q. Was Mr. -- well how was Mr. Allen's health as
7 of this hospitalization? He had been a candidate for a
8 trans -- a liver transplant or kidney transplant?

9 A. In my humble opinion, because I'm not a liver
10 doctor --

11 MR. GASTON: Objection.

12 THE COURT: Can Counsel approach on this issue?

13 (Counsel approached the bench, and the
14 following ensued:)

15 THE COURT: I think your question is kind of
16 broad in terms of time. At this time was he a -- can you
17 just --

18 MR. SHAW: I will.

19 THE COURT: -- be a little more specific?

20 MR. SHAW: Thank you, Your Honor.

21 MR. GASTON: I'm going to object to any expert
22 opinions other than the ones about that he followed the
23 standard of care because --

24 THE COURT: All right. Well --

25 MR. GASTON: -- he -- he hasn't disclosed that

1 he was going to give any expert opinions on whether he
2 was a liver candidate or how good his liver doing or how
3 bad his kidneys doing. So, Your Honor, this is not
4 something that was disclosed.

5 If he was going to be identified as an expert
6 they should have identified him and told me the opinions.
7 And I would have deposed him as an expert not as a
8 defendant.

9 MR. SHAW: He was identified as an expert, Your
10 Honor.

11 THE COURT: As to what?

12 MR. SHAW: He was identified as an expert as
13 the standard of care and any other opinions concerning
14 the patient's condition.

15 THE COURT: Okay. But he's just disclaimed
16 having knowledge of the area as far as being able to give
17 -- he said in my humble opinion because I'm not this kind
18 of doctor.

19 MR. SHAW: Well he hadn't finished yet, Your
20 Honor.

21 THE COURT: Well I know. But he's about to
22 give an opinion that he just said he has no basis to have
23 -- a basis of knowledge for. So --

24 MR. SHAW: And -- and --

25 THE COURT: -- I will sustain the objection on

1 that issue.

2 MR. SHAW: I'll try asking him it again or a
3 different question.

4 MR. GASTON: If he's going to be qualified we
5 need a --

6 THE COURT: Let me finish what I'm saying.

7 If you're going to ask him more or less whether
8 in his opinion Mr. Allen was a candidate for transplant I
9 do find that he needs to be qualified as an expert to
10 render that opinion.

11 If you'd like to qualify him I will give you an
12 opportunity to do that. And I will allow Mr. Gaston an
13 opportunity to voir dire as well.

14 MR. SHAW: But there's a case where it says I
15 don't have to qualify a defendant as an expert.

16 THE COURT: Okay. If you can show me the
17 authority.

18 I don't think -- I somewhat suspect that
19 there's not a case that says you generally don't have to
20 qualify a defendant as an expert as to any old subject
21 matter.

22 But I'm happy to consider whatever authority
23 you are relying on.

24 MR. SHAW: I just don't have -- I don't have it
25 memorized or (indiscernible at 3:01:41).

1 THE COURT: Well we can take a recess if you
2 would like to pursue the line of questioning.

3 MR. SHAW: I'm going to -- I'll move around
4 that, Your Honor.

5 THE COURT: Okay.

6 (Counsel returned to the trial table, and the
7 following ensued:)

8 THE COURT: Go ahead.

9 BY MR. SHAW:

10 Q. So you testified that he wrote on transplant
11 list. Where did you get that information from? Was that
12 from the family?

13 A. It would have been from patient.

14 Q. Okay. And did you verify or did you determine
15 after that whether, in fact, Mr. Allen was on the
16 transplant list at the University of Maryland as of March
17 13 -- March 12, 2013?

18 MR. GASTON: Objection. Asked and answered.

19 THE COURT: Overruled.

20 THE WITNESS: Yes, I would have spoken with the
21 -- with the liver doctors at University of Maryland and
22 found out --

23 MR. GASTON: Objection to would have.

24 THE COURT: Overruled.

25 BY MR. SHAW:

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Q. You can finish.

THE COURT: So, Doctor, the objection is because the question has to do with your personal knowledge. Not -- not a speculative issue. So I think -

THE WITNESS: Oh.

THE COURT: I understand you to use that word as sort of a turn of phrase. But can you be more specific?

THE WITNESS: Yes, ma'am. I apologize.

So, yes, I spoke with the hepatologists and found out that that was -- that he -- they had discussed that with him. But he was not yet on a list.

BY MR. SHAW:

Q. And then -- so, Dr. Burks, are you familiar with any weight requirements as to how heavy or how -- weight beyond which a transplant is not acceptable in a patient?

MR. GASTON: Objection.

THE COURT: Basis?

MR. GASTON: Expert opinion.

THE COURT: Overruled.

THE WITNESS: Typically -- I pause because I -- I'm now a pulmonologist. And in the pulmonology world you do not transplant in someone if they're over a

1 certain BMI or considered -- medical term morbidly obese
2 or very overweight.

3 And in my knowledge of the liver transplant
4 world it's -- it's similar. Because of the metabolic
5 demands, the stress that's put on the body to undergo a
6 transplant really stresses the body's ability to survive
7 it. And when you're obese or carrying too much weight,
8 that becomes an added stressor.

9 So typically -- exceptions can be made. But
10 usually --

11 MR. GASTON: Objection to usually.

12 THE COURT: Overruled.

13 MR. SHAW: (Indiscernible at 3:04:25), Your
14 Honor.

15 BY MR. SHAW:

16 Q. Okay. Go ahead, Doctor.

17 A. Right. So a BMI of 35 and above is typically a
18 cut off for organ transplant. And that is a calculation
19 made based on height and weight for which it --
20 unfortunately Mr. Allen was above.

21 Q. Okay. You also write Hepatitis C cirrhosis.
22 And you consulted hematology. And you consulted renal.
23 So was there -- was there -- were there teams of doctors
24 in addition to you caring for Mr. Allen?

25 A. Yes, it was both -- both the liver service and

1 the kidney service were involved.

2 In a few days we do get our muscle and bone and
3 joint experts involved, they're called rheumatologists,
4 because of the ongoing muscle breakdown.

5 Q. So the -- what were -- what were the teams that
6 were involved?

7 A. So over the course of this hospitalization he
8 had -- he had the liver team, he had the kidney team, he
9 had the muscle and joint team, he had the surgical team
10 involved. I believe we also consulted neurology, the
11 nerve doctors, because that generalized weakness and
12 muscle breakdown can also be related to certain
13 conditions of the nervous system. So I believe we had
14 those five.

15 Q. So what shift did you -- what shifts were you
16 working on these days?

17 A. On these days I was working from 7:00 a.m. to
18 7:00 p.m.

19 Q. And would there -- would there be another
20 physician that would work the night shift from 7:00 p.m.
21 to 7:00 a.m.?

22 A. Yes. Yes, we would alternate those shifts.

23 Q. Let me show you another record. This is Page
24 273 of the jury extract or Page 1555 of the records.

25 THE COURT: 273?

1 MR. SHAW: Yes, Your Honor.

2 THE COURT: Okay.

3 BY MR. SHAW:

4 Q. And then 274 which is the second page of that
5 which is Page 1556. Marked as Defense Exhibits 22 and
6 23.

7 (Defendants' Exhibit Numbers 22 and
8 23 were marked for identification.)

9 BY MR. SHAW:

10 Q. First let me ask you is this your note?

11 A. Yes, it is.

12 Q. And this looks like the same format as the note
13 from before.

14 A. Yes.

15 Q. And what date was this note prepared?

16 A. This is on the 17th.

17 Q. Okay. So this would have been --

18 A. Sunday.

19 Q. -- on a Sunday; correct?

20 And what did you write under CC?

21 A. So CC means chief complaint. Continues to be
22 weakness.

23 Q. And then you wrote no new events. What did you
24 mean by that?

25

1 A. No new major events as in the alarms didn't go
2 off. He didn't have any new complaints arise. He didn't
3 have any new procedures or anything like that to take
4 note of.

5 Q. Then you write moving arms and legs more but
6 still very weak.

7 A. Correct.

8 Q. CK rose again. What is CK?

9 A. That's the muscle enzyme marker that we use in
10 the labs to determine how much muscle is being broken
11 down. So this is just an indication that the muscle is
12 continuing to breakdown.

13 Q. Now when you say muscles breaking down what
14 muscles and what do you mean by breaking down? Well let
15 me break that into two questions.

16 What muscles?

17 A. Generally all of the muscles. The ones that
18 are going to be affected most notable first is going to
19 be the shoulder muscles, the chest muscles, the thigh
20 muscles, the back of the thigh muscles. Because those
21 are the strongest ones, we tend to notice when those go
22 weaker first. But, generally speaking, all of the
23 muscles in the body would be affected.

24 Q. And what was causing that?

25 A. At this point, we still don't have a diagnosis

1 for that. And unfortunately as scientific as medicine
2 is, we don't always have the answer.

3 Q. So is that a normal condition?

4 A. It's not.

5 Q. Is that a serious condition?

6 A. It is.

7 Q. And why is it serious?

8 A. Because it can lead to a lot of the same things
9 that happened to Mr. Allen. It can shut the kidneys
10 down. Especially if he already has kidneys that aren't
11 100 percent, which was learned, they're going to shut
12 down faster. Unfortunately they did.

13 And then it will -- can release into the blood
14 and cause the -- you know, and then get into all the
15 problems that we've talked about with high potassium.

16 Q. So is there -- are there treatments for that
17 muscle breakdown?

18 A. It depends on what causes it. In this case we
19 didn't -- we didn't have a good treatment.

20 The most common reason we're going to see
21 somebody's muscles break down would be if they have heat
22 stroke or they suffer a crush injury. Something like
23 that. And that is simply you just give it some time and
24 eventually the muscles could break down -- break down was
25 stopped because information was stopped.

1 If there's any medications that may be related
2 to it we stop those medications. And again usually over
3 a few days it stops.

4 Unfortunately in very rare cases such as Mr.
5 Allen's that condition continues and can actually
6 accelerate or get worse. And -- which he did prior to
7 the 18th.

8 Q. But was there any treat -- did -- were -- was
9 there anything about his health condition that prevented
10 certain treatments for that condition? For the
11 rhabdomyolysis.

12 A. Right. So the one treatment that has been
13 supposed and inflammatory myositis would be giving high
14 dose steroids. The problem with giving high dose
15 steroids is they have their own -- they have their own
16 problems. They can cause weakness as well. Certainly
17 that wouldn't necessarily us from giving it to someone
18 like Mr. Allen.

19 The problem is Mr. Allen had Hepatitis C. And
20 unfortunately he had treatment for it and failed. And so
21 he still the virus. Steroids -- when you give steroids
22 in the setting of Hepatitis C, Hepatitis C can go crazy
23 and start replicating over and over again. And then that
24 can cause the condition called cryoglobulinemia. It's a
25 fancy word for the blood gets -- gets sludged up with

1 proteins that are made by the virus. And when that
2 happens the organ systems shut down because you get
3 sluggish blood flow.

4 We didn't want that to happen to him. And
5 because we weren't sure that the steroids were going to
6 work we -- and at the advice of -- of our muscle and
7 kidney doctors we didn't pursue that treatment for him.

8 Q. So are you a kidney specialist?

9 A. No, sir.

10 Q. Are you a liver specialist?

11 A. No, sir.

12 Q. Were you relying on the recommendations of the
13 liver and kidney and muscle and the neurology teams?

14 MR. GASTON: Objection. Leading.

15 THE COURT: Overruled.

16 THE WITNESS: Typically we -- yes. That's what
17 -- we ask their opinions because they are the specialists
18 in this. And so we do typically rely on what they
19 recommend. It's not very often you go against what your
20 consultant recommends.

21 BY MR. SHAW:

22 Q. So Mr. -- the second page, 37 -- excuse me, 274
23 of the jury extract under the assessment and plan are
24 there any difference from what you had written a few days
25 earlier?

1 A. Not as far as the conditions. The -- again the
2 CK or the muscle markers were markedly higher today.
3 That's this number here, 48,000. Normal is less than --
4 I'd have to look at our -- at the specific lab range for
5 University of Maryland. But I believe it's less than
6 300.

7 And that was a markedly increase over the --
8 over the last 48 hours suggesting that it was getting
9 worse.

10 Rheumatologic labs. Those are labs that our --
11 our muscle doctors recommended that we get to try to seek
12 out the reason for that. Those kinds of -- those are
13 send out labs oftentimes. They take a long time to come
14 back. Up to a week sometimes.

15 At this point is where we consult neurology to
16 get what's called a -- it's special test called an
17 electromyogram. And that's a test of the muscles to see
18 if the muscle are the problem or the nerves are the
19 problem to give us more information about what brought
20 him into the hospital to begin with.

21 And then ACES is the surgery team. So it's
22 Acute Care Emergency Surgery. It's easier to say ACES.
23 And we consulted them for a muscle biopsy. Again, to try
24 to find out why his muscles were breaking down. And what
25 we can do to stop that from happening.

1 Here I -- I spoke with the kidney doctors
2 because of the treatments for rhabdomyolysis is to give
3 IV fluids to help the kidneys flush out. They told me --
4 they recommended against that because his kidneys weren't
5 working. By giving him more fluids it would have just
6 ended up in his lungs and caused some more problems. So
7 again, I followed their recommendations.

8 Here I added with same AKI. AKI means acute
9 kidney injury in the short term. Happened just since he
10 was in the hospital because of the rhabdomyolysis.

11 I tried to hydrate him initially. It didn't
12 work. His body overloaded again because of his
13 underlying liver disease, his kidneys not able to handle
14 the fluids. It's still a problem.

15 Continue hemodialysis for nephrology. So
16 nephrology schedules that or doesn't schedule it at their
17 discretion.

18 I believe on this day and the 17th they elected
19 not to based on his laboratory data and other reasons not
20 necessarily beknownst to me.

21 And then I believe that's the major changes.

22 Q. Now you testified earlier that when Mr. Allen
23 presented to the hospital he wasn't on dialysis outside
24 the hospital. Did that change during his hospitalization
25 before March 18?

1 A. It did. It did. I believe on the 13th he
2 received his first round of hemodialysis because the
3 hydration wasn't working. His urine output was still
4 low. So he had to go on hemodialysis.

5 Q. And do you know how many times Mr. Allen was on
6 dialysis before March 18?

7 A. I believe he went on the 13th, the 14th, 15th and
8 16th. Did not have that on the 17th.

9 Q. Now are various laboratory values looked at
10 each day with Mr. Allen and with patients in general in
11 your unit?

12 A. Yes.

13 Q. And in the upper right hand corner of this
14 page, Page 274, there are a bunch of numbers and some
15 charts and graphs. Can you -- can you tell us what those
16 are?

17 A. Sure. So in specific regard to Mr. Allen's
18 case one of the things that would be important to look at
19 are going to be (1) his -- his CP -- so CPK, CK, but it's
20 the same thing, it's that muscle marker. All right.

21 This graph here is what we call basic metabolic
22 panel. And that includes all his -- all the salts and
23 electrolytes in his blood. So sodium is here, 138.
24 That's normal. Between 135 and 145.

25 Potassium, 4.9. That's still within normal

1 range. But kind of on the upper end.

2 Q. Let me stop you with potassium. Was Mr.
3 Allen's potassium tested each day up til March 18th?

4 A. It was.

5 Q. And was Mr. Allen's potassium elevated before
6 March 18, 2013?

7 A. It was not.

8 Q. So when Mr. Allen's potassium became elevated
9 on March 18 or was diagnosed as being elevated on March
10 18 was that the first time?

11 A. Yes.

12 Q. Okay. And was that anticipated?

13 A. Not necessarily anticipated. It wasn't
14 unsurprising because all of his labs prior to that the
15 potassium had not been rising significantly between
16 dialysis sessions.

17 Q. You also write at the bottom full code on this
18 page, Page 274; what does that mean?

19 A. That means that it was -- Mr. Allen's desire to
20 have everything done in an emergency. So full code in
21 our code status things like that.

22 Full code means that if he -- if his heart
23 stops beating we're going to give him CPR. If his -- he
24 stops breathing or is unable to breath for himself we're
25 going to give him a breathing tube and breathe with him

1 with the machine. If his blood pressure needs support
2 we're going to give him artificial adrenaline or
3 pressers.

4 And so those were his -- those were his express
5 wishes.

6 Q. Now I'm going to direct your attention to Page
7 255 and 256 of the jury extract. This is Defense
8 Exhibits 24 and 25.

9 (Defendants' Exhibit Numbers 24 and
10 25 were marked for identification.)

11 BY MR. SHAW:

12 Q. This says, "Nephrology transplant medicine
13 daily progress note"; correct?

14 A. Yes, sir.

15 Q. Now I'm not going to ask you about prior ones.
16 But is there a progress note like this from the
17 nephrology for each prior day after nephrology was asked
18 to see Mr. Allen?

19 A. I believe so.

20 Q. So can you tell us if each day Mr. Allen was
21 there the nephrology team saw him and made a note similar
22 to this before March 18, 2013?

23 A. Since I had called them on the 13th, yes.

24 Q. Okay. And on March 18, 2013 the time is 11:30?

25 A. Correct.

1 Q. A.M.; correct?

2 Had Mr. Allen experienced a life threatening
3 heart rhythm as of that time?

4 A. No, sir.

5 Q. Okay. You were asked about lab draws or
6 laboratory -- what is a laboratory draw by the way?

7 A. It's a -- it's a blood draw. It's just
8 obtaining blood from -- from a patient.

9 Q. Okay. And you were asked on examination by Mr.
10 Gaston about any blood draws on the morning of March 18,
11 2013.

12 A. Yes.

13 Q. And your testimony was that there was no blood
14 draw that you were aware of at that time; correct?

15 A. Correct.

16 Q. And was it an emergency or not for Mr. Allen
17 too have a blood draw as of eight or nine or 10 o'clock
18 that morning?

19 A. It was not.

20 Q. Why not?

21 A. He had no visible signs of an emergency going
22 on. And the alarms were not picking up an abnormal heart
23 rhythm. So it was not a -- did not require ordering a
24 STAT or an emergent blood draw.

25 Q. Had a decision been made as to whether Mr.

1 Allen required hemodialysis on March 18, 2013 as of 11:30
2 a.m.?

3 A. It had not. They -- I believe on the next page
4 the -- the -- the fellow and the attending stated that
5 they were waiting for labs. Pending labs means waiting
6 on labs. Maybe they should meet today, assess RRT which
7 is renal replacement therapy. Fancy word for
8 hemodialysis.

9 And so at that point as of 11:30 my
10 nephrologist had not decided that he needed hemodialysis.

11 Q. Now whose decision was it whether or not Mr.
12 Allen needed hemodialysis on any given day? Was that
13 your decision?

14 A. No, sir.

15 Q. Who made -- who would make that decision?

16 A. My -- my kidney specialist colleagues.

17 Q. Move forward to -- this is Page 283 of the jury
18 extract. What is this?

19 A. This is the -- the EKG that was obtained in
20 response to the alarms.

21 Q. And tell us what an EKG is?

22 A. It's a --

23 Q. I mean every -- most people have had an EKG if
24 they reach a certain age. But can you explain what the
25 purpose of an EKG is?

1 A. It's -- the purpose of an EKG is to get -- to
2 get detailed information about the -- the electronic
3 functioning of the heart. And to some degree structural
4 function of the heart.

5 What it is is it monitors electrical activity
6 in the heart with 12 different electrodes. And so each
7 of the -- I don't know if you see it. It didn't copy
8 very well. But each one of these blips are -- is --
9 represents one heartbeat.

10 The concerning thing about -- now -- the
11 concerning thing about this particular EKG was the --
12 this rate up here. The 34 beats per minute. Normal is
13 about 60. Most of you all's is probably sitting at 80 or
14 90. I know mine is probably 120 right now. Forgive me
15 taking that lightly. But --

16 So that's highly un-normal. That's immediately
17 life threatening. What took -- that doesn't necessarily
18 mean that he's hyperkalemia. What drove me closer to
19 that diagnosis were these little hills here. Let me show
20 you a good example here.

21 Those look like they would hurt to sit on. And
22 that's one of the things that we're taught in medical
23 school to look -- when we look for it. It's something
24 called peak skiways. It's a sign of hyperkalemia or
25 elevated potassium.

1 Usually these are much more rounded off. A
2 gentle sloping hills.

3 And so that kind of -- that and with the --
4 what I knew of his clinical picture it became the most
5 likely thing was the hyper -- the elevated blood
6 potassium level.

7 Q. So what led you to take this EKG at two -- at
8 12:13? Not for you to take it. But for you to ask for
9 an EKG to be done at 12:18 p.m. on March 18th, 2013?

10 A. The alarm -- the continuous telemetry which is
11 the -- a mini version of an EKG that was on Mr. Allen
12 continuously picked up that his heart rate had dropped
13 below a certain level. Again, below 60 it would have
14 alarmed.

15 The thing that made it more concerning to me at
16 the time was not that it was just continuously low. It
17 had been continuously low that would have made me think
18 that there are other things that would be equally as
19 dangerous but would have managed differently.

20 His was bouncing around between the 30's, into
21 the 60's, sometimes it was higher than that. And this is
22 just a snapshot -- a 60 second snapshot of what -- or a
23 10 second snapshot of what was going on at that time.

24 And so -- and that's the problem with elevated
25 blood potassium level is it causes an erratic heart rate

1 -- heartbeat. It causes it to be slow one moment, it
2 causes it to be fast the next. And that switching back
3 and forth is what ultimately can just stop the heart
4 immediately.

5 Q. So, Dr. Burks, I want to ask you to look at
6 some laboratory results from earlier before March 18 of
7 2013. That would be on Pages -- Page 211 of the jury
8 extract which has been marked as Defense Exhibit Number
9 33.

10 (Defendants' Exhibit Number 33
11 was marked for identification.)

12 BY MR. SHAW:

13 Q. So specifically I'm looking at the potassium
14 levels. So just to help orient the jury there are dates
15 across the top. On top of this column a lower list. And
16 then a higher list. From March 13, 14, 15, 16 and 17.

17 Can you tell me what the potassium values were
18 on those prior days?

19 A. So on the 14th it was 3.7.

20 On the 15th it was 3.9.

21 On the 16th it was 4.1.

22 And on the 17th it was 4.9.

23 Q. And what's the normal range?

24 A. Normal range is right here. It's 3.5 to 5.1.

25 Q. Are those life threatening potassium levels?

1 A. Those are not.

2 Q. I'm going to show you what is marked as Defense
3 Exhibit Number 34. It's Page 210 of the jury extract.

4 (Defendants' Exhibit Number 34
5 was marked for identification.)

6 BY MR. SHAW:

7 Q. Did you obtain a blood draw on Mr. Allen on
8 March 18 after the EKG?

9 A. I did.

10 Q. And what did that blood draw show?

11 A. That blood draw confirmed my concern about high
12 -- high blood potassium. And you see here it's 7.3. The
13 C means critical. And it's well outside the range of
14 5.1.

15 Q. And so when was that blood draw?

16 A. That was at one --

17 Q. Reported?

18 A. It was reported at 1:26.

19 Q. Did you wait for this blood draw to come back
20 before you initiated treatment?

21 A. No, I did not.

22 Q. Why not?

23 A. Because my medical training and my instinct
24 told me that this is what he had. And I needed to treat
25 it immediately.

1 Q. Now while it's still up here let me ask you
2 about this though. At 6:03 p.m. on March 18 there are
3 more laboratory values. What was his potassium level at
4 that time?

5 A. So this is after dialysis had completed. It
6 brought it down to 4.5.

7 Q. Okay. And had Kayexalate also been given?

8 A. It had been, yes.

9 Q. And then after 6:03 p.m. on March 19 was there
10 another lab value drawn?

11 A. There was. At 3:00 a.m., what is the math
12 there is nine hours after -- after the last lab value.
13 It was up to 5.7. So it was -- it was again it was
14 elevated. It was 5.7. That's high. And it happened
15 pretty quick after dialysis had stopped.

16 Q. Do you have an opinion whether or not
17 Kayexalate worked beyond the time that dialysis is
18 working to reduce the potassium level?

19 MR. GASTON: Objection.

20 THE COURT: Basis.

21 MR. GASTON: Basis of knowledge.

22 THE COURT: Overruled.

23 THE WITNESS: Yes. The Kayexalate although
24 we've heard that its onset, meaning when it starts to
25 work, can be between one hour -- one to two hours and 24

1 hours. The actual duration of how long it has that
2 effect is also up to 24 hours or even beyond.

3 BY MR. SHAW:

4 Q. So do you have an opinion to a reasonable
5 degree of medical certainty whether or not Kayexalate
6 would have been working after the dialysis had been
7 finished to affect the potassium level?

8 MR. GASTON: Objection. Again same basis.

9 THE COURT: Overruled.

10 THE WITNESS: Yes. I would have expected that
11 the Kayexalate was continuing to work to lower the blood
12 potassium because he was having bowel movements. And
13 that's the only evidence with the Kayexalate that we have
14 that the potassium has actually left the body.

15 BY MR. SHAW:

16 Q. In fact, you were asked a number -- about a
17 number of bowel movements that Mr. Allen had after the
18 Kayexalate was given. Was that expected or unexpected?

19 A. That was expected. Because you give -- you
20 give the Kayexalate to cause bowel movements. The
21 concern is if you Kayexalate and there is no bowel
22 movement.

23 Q. So can you describe for us why the Kayexalate -
24 - you chose the Kayexalate in this case? And first I'll
25 ask that. And then I'm going to ask you after that how

1 it works.

2 A. Okay. So -- there were a lot of reasons that I
3 ordered Kayexalate in this case. One of which is because
4 the uncertainty of how quickly I could get the dialysis
5 started.

6 The second would have been because of the
7 ongoing process of the muscle breakdown that was leading
8 to more potassium being released. And so I knew that
9 hemodialysis stops working as soon as the machine is
10 turned off. Which means that the potassium level can
11 rise again.

12 So I wanted the Kayexalate to slow that rise.
13 Okay? So -- to at least -- so that he wouldn't end up in
14 the same situation in the middle of the night. And so
15 that's -- those are the two main reasons why I ordered
16 the Kayexalate for Mr. Allen.

17 Q. So can you explain to us what the function of
18 Kayexalate is in this case?

19 A. The -- meaning how it works or --

20 MR. GASTON: Objection. Basis of knowledge.

21 THE COURT: Overruled.

22 Mr. Shaw, I think the witness has asked you to
23 clarify your question.

24 THE WITNESS: Sorry. Did you mean --

25 BY MR. SHAW:

1 Q. I wanted to know --

2 A. -- how it worked?

3 Q. Yeah. How -- why did -- why did you -- why did
4 you order it. You've already told us why -- how -- why
5 you ordered.

6 How does it work in conjunction with a
7 patient's bowel movements is what I'm asking.

8 A. Right. So the Kayexalate crystal itself
9 essentially, as you've seen the name probably several
10 times, is sodium poly phosphate.

11 This is sodium that gets exchanged for
12 potassium. So what you end up pooping out is potassium
13 poly phosphate. And so that -- that's how it works is it
14 exchanges the sodium on it, takes out the potassium. And
15 then you get rid of it by bowel movement.

16 And that's why the thought is it doesn't -- it
17 doesn't work immediately because it takes time to get to
18 -- get to the gut.

19 He was having frequent bowel movements and so
20 that time was expected to be shorter than most.

21 Q. Dr. Burks, in response to the -- your diagnosis
22 of elevated potassium or hyperkalemia you've already
23 testified that you ordered a cocktail of medicine. I'd
24 like to go over with you from the medical records when
25 you ordered that cocktail.

1 So look at --

2 THE COURT: Mr. Shaw. Mr. Shaw, before you do
3 that would now be a good time to take brief recess?

4 MR. SHAW: Now would be a fine time, Your
5 Honor.

6 THE COURT: You seem to need to organize as
7 well. So maybe we'll take a little comfort break just
8 for five or 10 minutes.

9 Madam Clerk, if you would please.

10 THE CLERK: Yes, Your Honor.

11 THE COURT: Thank you very much.

12 Court's in brief recess.

13 THE CLERK: All rise.

14 (Whereupon, a brief recess was taken at 3:33
15 p.m., and the matter resumed at 3:55 p.m.)

16 THE CLERK: All rise.

17 Circuit Court for Baltimore City, Part 19, will
18 now resume its afternoon session. The Honorable Julie R.
19 Rubin presiding.

20 THE COURT: Thank you everyone. Please have a
21 seat.

22 Counsel, just for a brief moment would you
23 approach please.

24 (Counsel approached the bench, and the
25 following ensued:)

1 THE COURT: Just wanted to remind everyone. I
2 have to break at five. So just to remind you. That's
3 all.

4 MR. SHAW: So can I ask just for the
5 convenience I guess, Ms. Jones has been here since 12
6 o'clock sitting outside.

7 THE COURT: Oh is this Demetrius Jones?

8 MR. SHAW: Yeah. We're not going to finish her
9 today.

10 THE COURT: I can't imagine.

11 MR. SHAW: Can I send her and have her back
12 first thing tomorrow morning?

13 THE COURT: I'm sure.

14 MR. GASTON: Um.

15 THE COURT: Well how -- how much more are you
16 going to have?

17 MR. SHAW: I've got another 30 minutes at
18 least.

19 MR. GASTON: Oh. All right. Well if he's 35
20 minutes then -- then we probably should start her today.

21 THE COURT: Okay. Yeah. I would think not.
22 Yes. Absolutely.

23 MR. SHAW: Okay. So she's angry enough as it
24 is.

25 THE COURT: We don't want that. Yeah. You can

1 send her home.

2 MR. SHAW: Can I -- may I go out and talk to
3 her very briefly?

4 THE COURT: Yeah. Absolutely.

5 MR. GASTON: Before we break, sir. I'd like to
6 address something with the judge.

7 I have the defendants' expert witness
8 designation with respect to Dr. Burks.

9 THE COURT: Okay.

10 MR. GASTON: I'd like to read it into the
11 record. Then I'll hand Your Honor a copy if that's okay?

12 THE COURT: Okay.

13 MR. GASTON: It says:

14 "It is also anticipated that Allen C. Burks
15 will testify that his respective care and treatment was
16 within the applicable" --

17 THE COURT: I can't hear you. I'm sorry.

18 MR. GASTON: That was -- "his respective care
19 and treatment was within the applicable standards of care
20 and as to causation and damages."

21 THE COURT: Mmm-hmm.

22 MR. GASTON: There was no other category that
23 Dr. Burks was going to give expert opinion in. And I
24 think Counsel has gone far afoot from the designation as
25 to whether he's a candidate for liver transplant, as to

1 his opinion on the status of his kidneys, as to what can
2 happen with the kidneys.

3 I mean, it's just -- it's far afoot and I would
4 ask Your Honor to preclude any further expert testimony
5 from Dr. Burks outside of the expert designation.

6 THE COURT: Okay.

7 MR. SHAW: Well that's part of his standard of
8 care because care and treatment nobody accepts the
9 standards of care unless you're talking about what his
10 care and treatment was. And that's exactly what I've
11 been -- done. I submit, Your Honor, is talking about his
12 care and treatment and what his understanding was about --
13 -- you know.

14 He's also interacting with the nephrology team,
15 the kidney team, the -- the liver, kidney, neurology and
16 muscle and one other.

17 THE COURT: All of them. Okay. Well what
18 we'll do is we'll go forward and see where the questions
19 take us.

20 MR. SHAW: Okay.

21 THE COURT: And I appreciate the record being
22 made. And that's informative. So --

23 MR. GASTON: Thank you, Your Honor.

24 THE COURT: -- let's see where the questions --

25 MR. SHAW: Okay. Thank you, Your Honor.

1 (Counsel returned to the trial table, and the
2 following ensued:)

3 (Brief pause as the Court speaks with the
4 clerk.)

5 THE COURT: Ladies and gentlemen, just so that
6 you can prepare or know where we're headed. We will
7 break at 5:00 p.m. today.

8 Dr. Burks, you remain under oath; okay?

9 Mr. Shaw, whenever you're ready.

10 BY MR. SHAW:

11 Q. Doctor, if you could rejoin me at the easel
12 please. I have a few more I want to show him -- show to
13 you.

14 THE COURT: That's fine. Okay. All right.

15 BY MR. SHAW:

16 Q. So, Dr. Burks, you've testified that you gave a
17 cocktail medication to Mr. Allen after the life
18 threatening arrhythmia was diagnosed by you.

19 A. Yes, sir.

20 Q. And we've already had introduced into evidence
21 --

22 MR. GASTON: Objection.

23 MR. SHAW: (Indiscernible at 3:59:43).

24 MR. GASTON: Is there a question somewhere?

25 THE COURT: All right. Overruled. I think

1 we're gearing up to a question.

2 BY MR. SHAW:

3 Q. There's a hyper -- is there a hyperkalemia
4 order set? Well the jury had already been shown a
5 hyperkalemia order set that was in use at the University
6 of Maryland as of March 2013.

7 A. Yes, sir.

8 Q. And this was developed by who?

9 A. The -- probably a committee of physicians and
10 pharmacists whenever they develop the (indiscernible at
11 4:00:15) medical record agreed upon this. And I don't
12 think it's the (indiscernible at 4:00:20).

13 Q. Okay. And can you tell me how -- how -- how
14 does this appear? I mean, it doesn't appear in a 30 inch
15 by 40 inch placard. How did you see this on March 18,
16 2013?

17 A. On a -- on a computer screen. Just as that. I
18 would have -- in the physician order entry section of the
19 medical record I can type in certain key words that will
20 bring up certain order sets if they exist such as this.

21 Q. And we -- are you familiar with electronic
22 medical records?

23 A. Yes.

24 Q. With what they are?

25 A. Yes.

1 Q. And you're familiar with handwritten records?

2 A. Yes.

3 Q. And how did University of Maryland keep records
4 as of March 18 of 2013?

5 A. A combination of the two. The orders and labs
6 and x-rays, things like that, were maintained on a
7 computer. The handwritten notes or the physician's
8 notes, nurse's notes and things like that would go into a
9 paper chart.

10 Q. Okay. So looking at this hyperkalemia order
11 set that you accessed by the computer can you tell us if
12 you followed this?

13 A. Well it's not -- it's an order set. It's not
14 something you follow. It's something -- it's a tool for
15 me to use to make it easier to get things ordered
16 quickly.

17 Q. And so how did you use the hyperkalemia order
18 set?

19 A. Once it came up I would have selected the EKG -

20 -

21 Q. And what --

22 A. I don't recall if I did that in this case or if
23 I ordered the EKG independently.

24 And then went back and pulled this up. Because
25 as I said, other things can cause low heart rate.

1 And so I would have -- once I got here as far
2 as ordering the cocktail I would have clicked this box.
3 I would have clicked --

4 Q. Well this box is?

5 A. Calcium gluconate.

6 Q. So let me ask you about that. What happened
7 after you clicked that?

8 A. Well the box lit up with the checkmark. I went
9 through -- I did all of them at the same time. I would
10 have clicked that, the glucose, the insulin, the sodium
11 bicarbonate, the albuterol and the Kayexalate. Which is
12 the sodium poly phosphate. So I would have selected all
13 those together.

14 And those would have been -- gone to the
15 pharmacy. It would have popped up on the pharmacy
16 computer screen for a pharmacist to review and verify and
17 then release the medications for the nurse to obtain.

18 Q. So when you ordered these -- this cocktail of
19 medications you clicked each box? One right after
20 another in a manner of a minute or less?

21 A. Correct.

22 Q. Okay. And you recall if there was a category
23 for you to select Kayexalate either routine or STAT?

24 A. I do not recall if there was one. I -- as I'm
25 looking at it you can see some of these have STAT

1 priority. The Kayexalate did not have that listed on
2 here.

3 Q. And was the Kayexalate given on a STAT basis?

4 A. Yes.

5 Q. And did you intend for Kayexalate to be given
6 on a STAT basis?

7 MR. GASTON: Objection. Calls for speculation.

8 THE COURT: Overruled.

9 BY MR. SHAW:

10 Q. I'm sorry. Did you intend it for the
11 Kayexalate to be given on a STAT basis?

12 A. Absolutely.

13 Q. And STAT means?

14 A. As soon as possible.

15 Q. Okay. Now we've heard testimony before about
16 the calcium gluconate availability. Can you -- I want to
17 give you a chance to explain that. What were you told --
18 were you told anything about calcium gluconate after you
19 ordered it?

20 A. I was told by the pharmacist that there was a
21 national shortage and it wasn't available.

22 Q. How --

23 A. At which --

24 Q. I'm sorry.

25 A. Go ahead.

1 Q. How can there be a national shortage of a
2 medication?

3 A. I don't -- that is -- I don't think I can
4 answer that. I don't know. That would be speculation on
5 my part.

6 Q. Okay. How -- are there other medications
7 besides calcium gluconate that are not available from
8 time to time in hospitals?

9 MR. GASTON: Objection. Relevance.

10 THE COURT: Sustained.

11 BY MR. SHAW:

12 Q. What did you do after you were told that
13 calcium gluconate was not available?

14 A. Again, as I said earlier, my recollection is
15 not 100 percent. But I spoke to the pharmacist and said
16 what about calcium chloride. That's the next step. And
17 either he told me or didn't tell, I don't remember, at
18 that point I would have -- I went about treating the
19 emergent -- emergent condition with what I had available.

20 Q. Now do you have an opinion to a reasonable
21 degree of medical certainty whether Mr. Allen suffered
22 any injury or any damage because he was not given calcium
23 chloride or calcium gluconate?

24 A. He did not. He did not.

25 Q. Explain that.

1 A. So the other medications, which is why we give
2 them altogether, did work to temporarily lower his risk
3 of death from the -- from the hyperkalemia, the
4 potassium.

5 Q. And then did you give Mr. Allen informed
6 consent before you gave any of these medications to Mr.
7 Allen?

8 MR. GASTON: Objection. Leading.

9 THE COURT: Overruled.

10 THE WITNESS: I did not.

11 BY MR. SHAW:

12 Q. And --

13 MR. GASTON: Withdrawn.

14 THE COURT: I'm sorry?

15 MR. GASTON: Never mind.

16 BY MR. SHAW:

17 Q. Are there risks to all these medications?

18 A. To some degree all of them will have some risk.
19 Insulin can cause --

20 MR. GASTON: Objection. Relevance.

21 THE COURT: Overruled.

22 THE WITNESS: Insulin can cause a very low
23 blood sugar which anybody who is diabetic will know that
24 that's very -- a very bad thing that can happen. And can
25 be just as life threatening.

1 The albuterol can cause problems with the heart
2 rhythm itself as well. But the risk of that over the
3 benefit of -- of stopping what was immediately happening
4 dictated that I-- I would give it without -- without
5 needing to mention that.

6 BY MR. SHAW:

7 Q. Now you were asked about material risks. In
8 your opinion to a reasonable degree of medical certainty
9 is an association of Kayexalate and ischemic colitis a
10 material risk?

11 A. In -- in this situation, no.

12 Q. Why not?

13 A. It's not. Because -- because the emergent
14 nature of it. You know, the -- the way I look at it to
15 use an analogy is if I'm swimming at a beach and there's
16 a child that's 10 feet away from me struggling I'm going
17 to yell for the lifeguard because the lifeguard can save
18 him. But I can swim and I'm within 10 feet. I'm going
19 to go and stop the child from drowning until the
20 lifeguard can get there.

21 And I don't know how long it's going to take
22 for that lifeguard to get there or not. I mean,
23 obviously he's going to make it there as quickly as he
24 can. But you know, he's got to come down from his perch,
25 he's got to make it through the -- make it through

1 everybody on the beach that's probably alerted them now
2 that's something's going on.

3 And something else doesn't have to come up that
4 takes him away from that situation.

5 So you know to use that, you know, Mr. Allen in
6 that situation was drowning. And I had a tool that I
7 could potentially stop or slow the drowning process until
8 dialysis could arrive. And also prevent him from
9 drowning later on in the evening after the dialysis had
10 stopped and gone away.

11 And so that is why I wouldn't have gotten
12 consent. I wouldn't have asked the child -- I'm not --
13 I'm not a lifeguard, do you want me to stop you from
14 drowning or not. You know.

15 So that's, I guess, the compound answer.
16 That's why I would -- wouldn't have gotten consent. And
17 I wouldn't have -- or and I would have given the
18 Kayexalate in the face of the -- of being told that
19 dialysis would wear out.

20 Q. Now you testified earlier that you weren't
21 aware before you gave Mr. Allen Kayexalate that there was
22 an association with ischemic colitis. Had you ever
23 learned anything about that at -- with -- during your
24 education, your training or the 10 hospitals that you'd
25 worked at previously?

1 A. Apparently not. I hadn't learned of any risks
2 up until then.

3 Q. And what is -- what is it meant by an
4 association?

5 A. An association means that one -- when one thing
6 happens another thing happens at the same time. It
7 doesn't necessarily mean it's related. So an association
8 -- when people say association of Kayexalate and ischemic
9 bowel it means that there are people who have received
10 Kayexalate who developed ischemic bowel later.

11 And we don't know why that association exists.
12 It could be coincidence.

13 MR. GASTON: Objection.

14 THE WITNESS: Because other --

15 THE COURT: Sustained.

16 MR. GASTON: Thank you.

17 BY MR. SHAW:

18 Q. Did you have something else other than that?
19 Than saying other than coincidence?

20 MR. GASTON: Objection.

21 THE COURT: Counsel, could you approach?

22 (Counsel approached the bench, and the
23 following ensued:)

24 THE COURT: All right.

25 MR. GASTON: Now I think I'm hearing the

1 witness is going to give expert opinions on -- to
2 describe the association of Kayexalate and why something
3 happens in some people and it doesn't in others when he
4 didn't even know there was an association at the time
5 this occurred.

6 I think he was going to start going down that
7 road he's going to have been qualified as an expert in
8 Kayexalate. And I don't think he is. And he hasn't been
9 identified as one.

10 MR. SHAW: I just wanted to finish that answer.
11 And I'm moving on to another topic.

12 THE COURT: All right. Well I guess my point
13 though is --

14 MR. SHAW: I'm sorry.

15 THE COURT: I don't think -- I'm happy to let
16 you proceed to the rest of the answer. But I'm not going
17 to let say that it could be speculative. I mean that's -
18 - that's --

19 MR. SHAW: Even though that may be the truth?

20 THE COURT: Even though.

21 (Counsel returned to the trial table, and the
22 following ensued:)

23 MR. SHAW: Thank you, Your Honor.

24 BY MR. SHAW:

25 Q. So if hypothetically you had known of an

1 association between Kayexalate and ischemic colitis on
2 March 18, 2013 before you gave the -- or ordered the
3 Kayexalate for Mr. Allen would you have given it to him?

4 MR. GASTON: Objection.

5 THE COURT: Overruled.

6 THE WITNESS: So the question was if I knew
7 about the association beforehand would I still have it
8 given it to him?

9 BY MR. SHAW:

10 Q. Right.

11 A. I still would have given it to him.

12 Q. Why is that?

13 A. Because the very low risk beforehand that he
14 would develop an injury to his bowel from Kayexalate was
15 far outweighed by him dying immediately from the heart
16 rhythm or later on in the evening redeveloping that heart
17 rhythm when there's less help available.

18 And so even had I know I would have still given
19 it because it works.

20 Q. Is -- was Kayexalate given in other hospitals
21 that you've worked at before March 18 of 2013?

22 MR. GASTON: Objection.

23 THE COURT: Basis?

24 MR. GASTON: Relevance.

25 THE COURT: Overruled.

1 THE WITNESS: Yes. And as far as I know all of
2 them.

3 BY MR. SHAW:

4 Q. Okay.

5 A. Except maybe the NIH. I don't know that NIH
6 has a lot of use for it.

7 Q. All right. And have you given Kayexalate to
8 patients before in settings similar to Mr. Allen?

9 A. Yes. I had given it. Not -- and I had never
10 encountered a situation as serious as this prior to Mr.
11 Allen. But I had given to people who have kidney disease
12 and liver disease before.

13 Q. So when you give a medicine is there a -- and
14 if there's a risk to that medicine is -- is it required
15 by a doctor to engage in an risk benefit analysis?

16 A. It depends on -- it depends on the risk. Which
17 is -- determine material is that we talked about. And so
18 not always, no.

19 To give a for instance --

20 THE COURT: Is it --

21 MR. GASTON: Objection. Beyond.

22 THE COURT: I will sustain that objection.

23 And I will also ask is it necessary that the
24 doctor remain standing or can he resume the witness
25 stand?

1 MR. SHAW: I'm going to move on to another --

2 THE COURT: Okay.

3 MR. SHAW: -- topic in a moment, Your Honor.

4 THE COURT: All right. Well let's move on.

5 MR. SHAW: All right.

6 BY MR. SHAW:

7 Q. So my question is did you engage in a risk
8 benefit analysis -- or do you engage in a risk benefit
9 analysis in giving medicine?

10 A. No. Not always. Actually most often not.

11 Q. But in this case had you hypothetically known
12 about the association with Kayexalate and ischemic
13 colitis you would have given the Kayexalate anyway?

14 MR. GASTON: Objection. Asked and answered.

15 THE COURT: Sustained. And leading.

16 BY MR. SHAW:

17 Q. Now when you ordered the Kayexalate did you
18 know how soon dialysis would be available?

19 MR. GASTON: Objection. Asked and answered.

20 THE WITNESS: Not a --

21 THE COURT: Overruled.

22 THE WITNESS: Not a specific time.

23 BY MR. SHAW:

24 Q. Now we heard -- if we heard hypothetically
25 testimony from Dr. Leo on Tuesday that you shouldn't have

1 ordered Kayexalate because hemodialysis was readily
2 available. Do you agree with that opinion?

3 A. I do not.

4 Q. Now --

5 A. Because readily available, aside from the
6 machine being there in his room or on the IMC unit
7 physically I can't say that hemodialysis was readily
8 available.

9 THE COURT: Counsel, what is the -- that
10 exhibit that you have up? I mean that's --

11 MR. SHAW: It's similar to Mr. -- asked him
12 sort of a time -- a summary.

13 THE COURT: All right. Well I think earlier
14 you objected to it being displayed until testimony was
15 given to support it. So I think you should have
16 testimony first.

17 MR. SHAW: Thank you.

18 BY MR. SHAW:

19 Q. So can you tell me the reasons why you gave
20 Kayexalate even knowing that University of Maryland had
21 dialysis?

22 A. Well aside from the reasons I talked about with
23 the worry for later on after the dialysis had stopped the
24 other reason was I wasn't sure of when the dialysis would
25 get there and be able to start.

1 And if -- a number of reasons for that. And
2 it's not anybody's fault. It's the result --

3 MR. GASTON: Objection.

4 THE COURT: Overruled.

5 Go ahead.

6 THE WITNESS: It's not -- it's not anybody's
7 fault as a result of it being a hospital. Which is a big
8 machine so a lot of a moving parts. A lot of things can
9 go wrong in the process to get the machine from the last
10 unit up to the -- up to the room. The IMC didn't have
11 them stationed in the -- in our unit.

12 So you know, first off I've got to call the
13 nephrologist. Which I did.

14 Sometimes nephrologists, kidney doctors,
15 disagree with --

16 MR. GASTON: Objection.

17 THE COURT: Sustained.

18 Counsel, can you ask a more direct question?

19 At this point your witness is -- is --

20 BY MR. SHAW:

21 Q. No. I'm asking the basis for why you didn't
22 know when dialysis was going to be available.

23 MR. GASTON: Objection. Asked and answered.

24 THE COURT: I'll overrule the objection.

25 But I don't think that was exactly the question

1 or at least I didn't understand it to be. So could you
2 just pose it fresh?

3 BY MR. SHAW:

4 Q. My question is what were the reasons -- let me
5 ask you this. What were the steps that needed to be done
6 in order for dialysis to be started on Mr. Allen?

7 A. Number one I had to speak with the
8 nephrologist. Have them agree with me. That might
9 involve them coming to the bedside to confirm my
10 findings.

11 Then they need to order the dialysis. I
12 believe that's a written order at the University of
13 Maryland at the time anyways.

14 Which would then have to make it the dialysis
15 unit. There there would have to be a dialysis machine
16 available. If there are a lot of other inpatients that
17 are on dialysis they're not going to stop one necessarily
18 early --

19 MR. GASTON: Objection.

20 THE COURT: Sustained.

21 The question is what were the steps that were
22 necessary. Not --

23 MR. SHAW: He's explaining, Your Honor, with
24 all due respect.

25 THE COURT: Okay. But the steps that were

1 necessary does not include the potential outcomes of each
2 line. Just the steps that were necessary.

3 THE WITNESS: So the machine would have to be
4 available. Once that machine becomes available it would
5 have to be cleaned and sterilized. And then it would
6 have to be transported to the patient's room. To Mr.
7 Allen's room.

8 Mr. Allen had a dialysis catheter in there. So
9 that's one less step. But that dialysis catheter can and
10 I've seen happen multiple times clot either before
11 dialysis starts or during. If it clots during he's not
12 going to get a complete session and it won't be
13 effective.

14 If the line continues to work throughout the
15 dialysis session the machine has to continue to work
16 throughout the dialysis session. Machines break down.
17 We all know that.

18 And the other thing that also plays a -- maybe
19 a step but it also plays a role is the plumbing in the
20 room as to where it can continue working.

21 And certainly I would hope and expect all of
22 those things to go smoothly. But I can never be certain.
23 Especially when I have another tool at my disposal that
24 can begin to work in the time frame that is considered
25 acceptable.

1 BY MR. SHAW:

2 Q. So, Dr. Burks, showing you Defense Exhibit
3 Number 48. Is this an accurate reflection of the -- your
4 testimony as to the steps that need to be taken in order
5 for STAT dialysis to be available?

6 (Defendants' Exhibit Number 48
7 was received into evidence.)

8 THE WITNESS: Yes, sir. I think this --
9 everything is on there except for the plumbing.

10 BY MR. SHAW:

11 Q. Now, Dr. Burks, after the Kayexalate was -- the
12 cocktail was ordered -- do you recall what times these
13 various medications were given to Mr. Allen based upon
14 your review of the medical records?

15 I'm trying to save some time so we don't have
16 to look at each record.

17 THE COURT: Well then can Dr. Burks resume the
18 witness stand?

19 MR. SHAW: At this point yes, Your Honor.

20 THE COURT: Okay. Let's -- let's do that.

21 BY MR. SHAW:

22 Q. Do you want me to repeat the question?

23 A. Yes, please.

24 Q. Can you tell us -- when you said that you had
25 ordered the various cocktail medications by clicking on

1 that hyperkalemia order set and just clicking the boxes
2 in a matter of under a minute can you tell us based on
3 your review of the medical records when those medications
4 were actually given to Mr. Allen?

5 A. So in the record there's a nurse's note that
6 records when she had administered them. 1309, or 1:09
7 p.m., and then 1315, which would be 1:15 p.m. were -- I
8 believe there was -- the albuterol was given first.
9 Actually I think that one was at 12:55 because that would
10 have taken some time to go -- to go through the mask.

11 The insulin and glucose were given at -- at
12 1:09. And then the Kayexalate and the sodium bicarbonate
13 were given at 1:15.

14 Q. Okay. And you testified earlier that the
15 dialysis was started at 2:45 p.m.?

16 A. I believe that's correct. Yes.

17 Q. When you ordered the dialysis did you know how
18 soon it could be started?

19 A. When I spoke to the kidney doctor and asked
20 them to order it I was instructed that it would be in
21 route.

22 Q. Okay.

23 A. But there was range given.

24 Q. So I misspoke. You didn't actually order the
25 hemodialysis. You asked for a consult by the hemo doctor

1 -- by the nephrologist; correct?

2 A. Correct.

3 Q. And the nephrologist who -- who actually
4 ordered the hemodialysis; is that correct?

5 A. Correct. Yes, sir.

6 Q. And you testified that you worked 7:00 a.m. to
7 7:00 p.m. shift. The hemodialysis went on for how long
8 that day?

9 A. Until I think 5:45 is what we said.

10 Q. And does -- how long does the effect of
11 hemodialysis have on lowering potassium in a body?

12 A. For only the time that the machine is running.

13 Q. Do you have an opinion to a reasonable degree
14 of medical certainty whether the Kayexalate would work or
15 have an affect after the hemodialysis had been stopped?

16 A. Yes, I have an opinion that it was continuing
17 to work after that had stopped given the number of bowel
18 movements.

19 Q. And I asked you about the bowel movements that
20 Mr. Allen was having. That was -- was that expected as a
21 result of the Kayexalate and the Sorbitol?

22 A. Yes.

23 Q. Were you there when Mr. Allen first began
24 having some blood with his stool?

25 A. No, sir, I was not.

1 Q. And you left what time that night? You said
2 seven to 7:30?

3 A. Yes.

4 Q. And when you arrived the next day did you --
5 did you have a conversation with Ms. -- Ms. Allen, Mr.
6 Allen's wife, on that day --

7 THE COURT: Which day?

8 BY MR. SHAW:

9 Q. -- about what had happened? On March 18.

10 A. I -- yes. I would have been talking with them
11 as the process was ongoing.

12 Q. And do you recall what that conversation was?

13 Let me ask you this. Was there more than one
14 conversation?

15 A. I don't recall the number of conversations. I
16 know that when the emergency arose I would have spoken
17 with them about what was going on and what I was planning
18 on doing.

19 And --

20 THE COURT: Doctor, let me interrupt you.

21 Are you saying that you would have or you did?

22 THE WITNESS: I spoke with them, yes.

23 I apologize.

24 THE COURT: You don't have to apologize.

25 Go ahead, Mr. Shaw.

1 MR. SHAW: I think it's his manner of speaking.

2 THE COURT: I -- I agree. I just want to be
3 sure --

4 MR. SHAW: Midwestern.

5 THE COURT: -- we're clear. That's all. I
6 understood.

7 There's no apology necessary.

8 Go ahead.

9 BY MR. SHAW:

10 Q. So I'm sorry. If you've answered I didn't
11 hear. How many -- do you know --

12 A. So --

13 Q. -- many conversations you had with Ms. Allen
14 and the family on March 18 before you left at seven or
15 7:30 that night?

16 A. At least one. The second part of the
17 conversations if I can lump them because, I'm sorry, I
18 don't recall the number into what I was discussed that
19 day over the course of the day would have been the issue
20 at hand. The emergency, the treatments.

21 And then it would have been to ask, you know,
22 if this continues to worsen -- in the worst case scenario
23 if it were to worsen and need CPR and -- and the advanced
24 life saving measures is that something that Mr. Allen and
25 his family would want. And they said they would. And so

1 --

2 Q. And --

3 A. -- that's what I recall of the conversations
4 that day.

5 Q. And that was before 7:30 you left that day on
6 March 18 that you recall?

7 A. Yes.

8 Q. When you came the next -- did you mention
9 anything about Kayexalate causing any issues or being a
10 possible cause of any issues?

11 A. Not on the --

12 Q. On that day?

13 A. Not on the 18th, no.

14 Q. Okay. Then you came back to the hospital the
15 next morning as scheduled before 7:00 p -- 7:00 a.m.?

16 A. Yes.

17 Q. And how did you learn about Mr. Allen's
18 condition overnight?

19 A. A direct face to face talk with my colleague
20 that was working that night.

21 Q. And do you recall that? Or maybe not
22 specifically but in general what you learned?

23 A. I learned about the blood bowel movements. And
24 at that point the two of us were considering that he --
25 his bowel maybe dying. And that was of concern.

1 Q. All right. At some point was Mr. Allen
2 transferred from the IMC out of your area of care?

3 A. Yes. He was transferred to the ICU.

4 Q. When did that happen?

5 A. I think the -- according to the time line it
6 was around noon.

7 Q. Okay. Now --

8 THE COURT: Is -- is that the 19th? The move
9 on the 19th?

10 BY MR. SHAW:

11 Q. The 19th?

12 A. On March 19th.

13 THE WITNESS: Yes, ma'am.

14 THE COURT: Okay.

15 BY MR. SHAW:

16 Q. So when Mr. Allen was transferred around noon
17 on March 19 to the -- for outside the IMC to the ICU did
18 you have any further responsibility for caring for Mr.
19 Allen?

20 A. Technically once he leaves the IMC he's no
21 longer under my care. So technically I wouldn't have any
22 responsibilities to see them.

23 Q. Okay. Did you have other patients in the IMC
24 on March 19, 2013?

25 A. I did.

1 Q. Okay. Was it expected for you to follow Mr.
2 Allen from the IMC to the ICU when he was transferred
3 there?

4 A. At the -- at the moment that he was
5 transferred, yes. I accompanied him to the ICU.

6 Q. All right. And how long did you remain with
7 him in the ICU?

8 A. That I don't recall. I know that once I left
9 his room I -- I looked for the family to talk with them
10 and let them know what was going on.

11 Q. And do you recall having a conversation with
12 Ms. Allen and her family on March 19th, 2013?

13 A. I do.

14 Q. How many -- do you remember whether there was
15 more than one conversation?

16 A. I don't.

17 Q. Do you remember if you had any conversations
18 with Ms. Allen by herself?

19 A. To be honest, I don't recall. I know that Ms.
20 Allen was a -- was a part of the conversation. I don't
21 recall other parties that were in the room with me at the
22 time.

23 Because although we like to believe we're above
24 -- above things as physicians. It's -- it's certainly
25 not nearly as traumatic for them. But it was a traumatic

1 event for me as well. And so I don't recall specifically
2 who all I was speaking with at the time.

3 Q. And what was traumatic about what was going on?

4 A. Well it was -- it was an unexpected turn for
5 the worse.

6 MR. GASTON: Objection. Move to strike.

7 THE COURT: Overruled.

8 Let's move on though.

9 BY MR. SHAW:

10 Q. And did you -- where did you -- do you remember
11 where you had a conversation with Ms. Allen and her --
12 and/or her family?

13 A. I don't recall the specific location. I
14 believe it would have been in -- in and around the -- the
15 ICU.

16 Q. So Ms. Allen testified at her deposition that
17 you told her you had made a mistake in giving the
18 Kayexalate; did you say that?

19 A. I wouldn't have said -- I did not say that I
20 made a mistake.

21 Q. Do you think today you made a mistake in giving
22 the Kayexalate to Mr. Allen?

23 A. No.

24 MR. GASTON: Objection.

25 THE COURT: Basis.

1 MR. GASTON: Is he sick?

2 THE COURT: Overruled.

3 BY MR. SHAW:

4 Q. Do you have an opinion to a reasonable degree
5 of medical certainty today whether it was a mistake to
6 give Kayexalate to Mr. Allen?

7 MR. GASTON: Objection to form.

8 THE COURT: Overruled.

9 THE WITNESS: No, I don't think it was mistake.

10 BY MR. SHAW:

11 Q. And Ms. Allen testified at deposition that you
12 told her that the cause of the bowel injury was
13 Kayexalate; is that -- was that your conversation with
14 her?

15 A. No. We spoke about Kayexalate as being a
16 possibility. Because, again, I had just learned of the
17 association. And as a physician when you learn something
18 new and learn that, you know, it may pertain to your
19 patient you -- you think about it. And it's on your
20 mind. So at the time I certainly mentioned that it was a
21 possibility. And it had been rose -- brought to my
22 attention.

23 So in the sense that I'm -- I don't believe
24 that the Kayexalate was the cause. And I don't believe
25 it was a mistake to give. I think at the time it was my

1 only option.

2 MR. SHAW: One moment, Your Honor.

3 THE COURT: Take your time.

4 MR. SHAW: I do have to, unfortunately, Your
5 Honor, ask Mr. -- Dr. Burks to come up to show him
6 another document.

7 THE COURT: That's fine.

8 MR. SHAW: If you can --

9 So if the jury wants to follow along these are
10 Pages 290, 291, 292 and 293. I'm sorry. 291, 29 --
11 yeah. 293 are the medical records toward the end of the
12 packet.

13 BY MR. SHAW:

14 Q. Can you explain what this is?

15 A. This was the discharge summary which would
16 really serve more as a transfer summary to the ICU from
17 when he left the -- my care in the IMC.

18 So this is the -- the discharge summary that we
19 spoke about earlier.

20 Q. Okay. Now you describe in here -- I'm not
21 going to -- it's in evidence. So I'm not going to have
22 you go for -- go through each item.

23 But these four pages include a history of the
24 present illness, past medical history, family history,
25 social history, review of systems, physical examination.

1 And then his hosp -- laboratory data and then his
2 hospital course over the next several pages; correct?

3 A. Yes, sir.

4 Q. And then I'm going to ask you about Page 293.
5 You've been asked about this. You write -- first of all,
6 what is a differential diagnosis?

7 A. It's -- it's a list of possibilities for what
8 could be going on in a certain instance.

9 Q. And you wrote the differential diagnosis for
10 his blood values and decompensation including intestinal
11 ischemia due to Hepatitis C related to vasculitis versus
12 intestinal ischemia due to concomitant Kayexalate and
13 natulose juice versus hepatic decompensation with
14 coagulopathy and lower GI bleed.

15 So that's a lot of medical terms thrown into
16 four lines. First I'd like you to explain your
17 differential diagnosis of intestinal ischemia due to
18 Hepatitis C related vasculitis. What is that?

19 A. So again I talked a little bit earlier about
20 how Hepatitis C when it goes crazy it can cause -- it can
21 cause the blood to get very thick and sludgy and cause
22 problems that way.

23 But what it can also do is it can cause either
24 directly by itself or by the formation of antibodies
25 which the body creates to try to fight the Hep C. And

1 those sometimes can get fused and attack the body itself.
2 Usually it attacks the blood vessels because it has the
3 most contact with them.

4 And when it does that it can cause inflammation
5 of the blood vessels. Which then causes a narrowing.
6 And then -- and therefore decreases the blood flow to the
7 different organs.

8 So that's what I meant by that.

9 Q. And then you also --

10 A. Because also in consideration for what was
11 going on. It was an overall problem as far as the muscle
12 breakdown as well.

13 A. And you also wrote hepatic decompensation with
14 coagulopathy and lower GI bleed. Can you explain what
15 you meant by that?

16 A. Right. So hepatic means liver. Decompensation
17 means it's worsening. So he already had end stage liver
18 disease. Meaning his liver was functioning at a very low
19 level. And it -- therefore he would be at very high risk
20 for that to get much worse much -- or very quickly.

21 And with the various times where the blood
22 pressure was low throughout the hospitalization also in
23 association with when his heart rate was very low that
24 decreased blood flow to the liver causes it to be pushed
25 kind of over the edge. And then that would -- could lead

1 to the coagulopathy which means he can't -- his ability
2 to stop bleeding goes away. He stops making the factors
3 that allows you to stop bleeding. And when that happens
4 then you can -- you can develop spontaneous bleeding from
5 your bowels.

6 And so at this point as this is -- this is
7 being dictated as or immediately after he's leaving my
8 IMC. So I tried to be as complete with it as I could.
9 But again I didn't have the advantage of looking back
10 through everything and completing it -- a complete
11 differential diagnosis.

12 Q. All right. Thank you, Doctor.

13 MR. SHAW: One moment, Your Honor.

14 THE COURT: Okay.

15 MR. SHAW: I know it's late. But --

16 THE COURT: That's okay.

17 MR. SHAW: Thank you, Doctor.

18 That's all the questions I have. Thank you,
19 Your Honor.

20 THE COURT: All right. Thank you very much.

21 Counsel, just come up for one brief moment.

22 (Counsel approached the bench, and the
23 following ensued:)

24 THE COURT: So I don't think 20 -- 19 minutes
25 is going to make or break our lives in this case. Would

1 you like to wait to start tomorrow so that we don't split
2 or do you want to keep going to five?

3 MR. GASTON: Okay. All right. I will finish -
4 - I will try to finish my cross -- I mean --

5 THE COURT: Okay.

6 MR. GASTON: Yeah.

7 THE COURT: I know what you mean.

8 (Counsel returned to the trial table, and the
9 following ensued:)

10 THE COURT: Mr. Gaston, whenever you're ready,
11 sir.

12 MR. GASTON: Thank you.

13 REDIRECT EXAMINATION

14 BY MR. GASTON:

15 Q. Doctor, I understand that you're -- you're not
16 a nephrologist; correct?

17 A. I'm sorry. I'm not a what?

18 Q. You're not a nephrologist.

19 A. A nephrologist, no.

20 Q. So you can't even order dialysis without
21 permission from a nephrologist; correct?

22 A. That is correct.

23 Q. And nephrologists are the doctors who make
24 decisions as to whether or not patients are a candidate
25 for kidney transplant; correct?

1 A. Some of them, yes.

2 Q. Okay. But you don't make that decision in your
3 normal practice of medicine; do you?

4 A. That's correct.

5 Q. And you would never make that decision for Mr.
6 Allen; correct?

7 A. No, sir.

8 Q. And you can't make that decision in this case;
9 can you?

10 A. No, sir.

11 Q. Same thing with respect to a liver transplant.
12 You're unable to make that decision in this case;
13 correct?

14 A. I never claimed to, sir.

15 Q. Okay. Well now actually you claimed that he
16 was not candidate for a kidney transplant because of his
17 BMI. His body mass index; right?

18 A. No, sir, I didn't claim that he was not a
19 candidate. I said that typically speaking above a BMI of
20 certain type people are typically not. But I also
21 specifically said they do make special cases for that.

22 Q. Okay.

23 A. So I made no claim about his ability to receive
24 a liver transplant.

25 Q. Now with respect to the potassium levels. The

1 15th, the 16th and the 17th Mr. Allen's potassium levels
2 are constantly rising even though he's getting dialysis;
3 isn't that true?

4 A. Little by little, yes.

5 Q. So you would then anticipate on the 17th that
6 the levels would be even higher because he didn't get
7 dialysis on the 14th.

8 A. I'm sorry. I don't understand that question.

9 Q. If they're constantly going up by -- and the
10 17th they're still going up even though he's getting
11 dialysis. 13th, 14th, 15th, 16th. But he didn't get
12 dialysis on the 17th. You could expect when you came in
13 the next day that the levels were going to be even
14 higher; right?

15 A. That played part of my role in -- in the
16 diagnosis that I came to.

17 Q. Right. And because you knew they were -- they
18 were higher that's even a more reason to have those blood
19 test results back by the 18th; correct?

20 A. Correct. I have little control over that at
21 the time.

22 Q. Little -- little control over the -- the blood
23 draw? Is that what you're claiming?

24 A. I'm saying that, again, because of the way a
25 hospital works and moving parts I -- at the time it was

1 not an urgent issue. And I requested it be redrawn
2 according to the original lab order.

3 Q. Doctor, as Mr. Allen's patient you had complete
4 control over whether or not to order that blood draw STAT
5 on the 18th.

6 A. I don't think that you have the authority to
7 say that.

8 Q. I'm saying did you have the authority to order
9 it STAT if you wanted to on the 18th?

10 A. And I did. And it was done on STAT on the
11 18th.

12 Q. Not until 1:27 in the afternoon after he
13 already had experienced this emergency life threatening
14 cardiac condition; correct?

15 A. After I suspected it, yes.

16 Q. Now did I hear you correctly when you said that
17 you reviewed Mr. Allen's medical charts from his prior
18 admissions to University of Maryland Hospital?

19 A. Was that a -- I didn't understand the --

20 Q. Yeah. Did I -- did I understand you correctly
21 when you -- when your lawyer asked you did you have
22 access to and review Mr. Allen's medical charts from his
23 prior admissions to University of Maryland Hospital in
24 January 23rd to February 16th of that year?

25 A. Yes, I did.

1 Q. So you had time to review and read 874 pages of
2 medical records? But you didn't have --

3 A. No, sir.

4 Q. -- one -- is that true?

5 A. No, sir.

6 Q. Okay. Well that's the number of pages that are
7 contained in the chart; isn't it?

8 A. I'll take your word for that.

9 Q. Okay. So did you read the 874 pages or did you
10 not read the 874 pages?

11 A. I did not read all 874 pages of the chart.

12 Q. Okay. And when did you find time to do all of
13 this in your busy schedule, sir?

14 A. I don't understand the question.

15 Q. When did you -- you said you were busy that
16 day; correct? And you were very busy which is one of the
17 reasons why you didn't have time to call down to the lab
18 and check every half hour for the blood results; correct?

19 A. All right. So --

20 MR. SHAW: Your Honor, that's a
21 misrepresentation. I object.

22 THE COURT: Overruled.

23 BY MR. GASTON:

24 Q. Is that true?

25 A. Yes, I said I was very busy that day.

1 Q. All right.

2 A. I had no reason to review the medical records
3 from earlier in the year on the 18th.

4 Q. All right. Sir, it would have taken you one
5 minute to pick up the phone and call the lab to check on
6 the blood test; wouldn't it?

7 MR. SHAW: Objection.

8 THE COURT: Basis?

9 MR. SHAW: Scope and repetitiveness.

10 THE COURT: Sustained.

11 BY MR. GASTON:

12 Q. Okay. Doctor, how much time did you spend
13 reviewing Mr. Allen's previous medical records?

14 A. I can't quantify that.

15 Q. You don't know whether you spent 10 minutes or
16 10 hours?

17 A. 10 minutes or 10 hours, no, I can't specify
18 those two time periods.

19 Q. Okay. Can you tell me when if you can't
20 specify when you were able to fit that into your schedule
21 if you don't know whether it's 10 minutes or 10 hours?

22 A. I don't --

23 MR. SHAW: Objection.

24 THE WITNESS: -- understand the question.

25 MR. GASTON: Never mind. I'll withdraw the

1 question.

2 BY MR. GASTON:

3 Q. Doctor, you gave an analogy to the members of
4 the jury of a drowning child at a beach; correct?

5 A. Yes, sir.

6 Q. And you gave a decision based on whether or not
7 you were going to go out and save the child or whether
8 you were going to call for the lifeguard; correct?

9 A. No, sir.

10 Q. Okay. What decision were you making about
11 saving the child? What decisions were you making and how
12 did you analogize that to Kayexalate in this case?

13 A. So I had called -- so in the analogy I had
14 already called out to the lifeguard. And the lifeguard
15 in this situation would be the dialysis or the
16 nephrologist.

17 Q. Okay.

18 A. Okay. So -- and when I'm the -- the -- for me
19 because I have control over the Kayexalate. I can order
20 the Kayexalate. The Kayexalate would be me reaching out
21 to stop the child from drowning.

22 Q. Okay. But in your analogy if you relate this
23 to the real time issues in this case it would take an
24 hour before you, the Kayexalate, could get to the child.
25 And that child would drown; wouldn't the child?

1 A. I don't --

2 Q. Kayexalate doesn't work for at least an hour.
3 So that child would have drown before you, the
4 Kayexalate, before you got to him; right?

5 A. I wouldn't be giving the child Kayexalate. I
6 would be swimming over to get the child. So certainly
7 the child could drown in between the time it takes me to
8 swim to over to get the child.

9 Q. Then in the analogy -- this medical analogy
10 what are you? What part -- what part of the medication
11 are you? If you're not the Kayexalate and you're not the
12 hemo -- not the hemodialysis what part are you in this
13 case where you're saving this child's life?

14 A. I'm the bystander that's there at the time that
15 the child is drowning. And I'm reaching out,

16 Q. Okay.

17 A. And so the reaching out would be the
18 Kayexalate. And swimming over and reaching out. So --
19 so I don't understand what you're -- I don't understand
20 what's not clear to you about the analogy.

21 Q. I'm going to make it real clear.

22 A. I don't think you are.

23 Q. This -- just a second now. You're the
24 Kayexalate; correct? You're on the beach.

25 A. No. I'm -- I'm --

1 THE COURT: Counsel.

2 MR. GASTON: I didn't understand.

3 THE COURT: All right. Let's move on.

4 MR. GASTON: Okay.

5 BY MR. GASTON:

6 Q. The reason you were uncertain about the time
7 for the dialysis to arrive is because you never asked the
8 nephrologist how long it was going to take to get there.

9 A. False.

10 Q. Okay. You asked him how long; correct? Is
11 that true or not?

12 A. Yes, sir.

13 Q. And -- and he gave you a time or he did not
14 give you a time?

15 A. He did not give me a time.

16 Q. And when he did not give you a time can you
17 say, sir, I need to know the time because what you're
18 going to tell me is going to affect the next course of
19 treatment for my patient. And I need to know --

20 A. No, sir.

21 Q. -- the approximate time.

22 A. Because a hospital is not a courtroom. And to
23 -- and -- no. Because I understand how a hospital works.
24 And so when someone says in route I understand they're
25 going to do their going to their best ability -- their

1 ability to get to me. So I'm going to trust that he's
2 doing everything he can.

3 But to blindly trust that when I have a tool on
4 my belt that I can use to help a patient I'm not going to
5 sit there and hope that everything goes to plan.

6 Q. And in this case you did not do a risk analysis
7 benefit for Mr. Allen before you gave him the Kayexalate;
8 is that true?

9 A. If you're going to -- if you're referring to me
10 not knowing about the risk of ischemic bowel, I think
11 we've been over that, I did not know the risk.

12 Did I go over a benefit analysis of whether or
13 not I should give the Kayexalate or not? I absolutely
14 did. And I went over that with you. I went over that
15 with all of you.

16 Now it wasn't just an emergently treatment for
17 him. It was to prevent from him from having another
18 emergency later in the night. So absolutely I went
19 through a benefit analysis with him.

20 Q. Okay. Now --

21 THE WITNESS: I apologize.

22 THE COURT: No need to apologize.

23 BY MR. GASTON:

24 Q. Doctor, are you familiar with the term
25 preventative medicine?

1 A. Yes, sir. That's the basis of most of family
2 medicine.

3 Q. It is? And what you try to do as a doctor you
4 try to prevent horrible things from happening during your
5 care and treatment of the patient; correct?

6 MR. SHAW: Objection. Scope. Relevance.

7 THE COURT: I'll overrule the objection as to
8 scope.

9 I'll let you go a little bit, Mr. Gaston. But

10 --

11 BY MR. GASTON:

12 Q. And isn't in this case one of the goals for the
13 treatment of Mr. Allen because you knew rhabdomyolysis
14 could cause toxic elevations of his potassium level.
15 Wasn't one of the goals to prevent that from happening in
16 this case?

17 MR. SHAW: Objection, Your Honor. Scope.

18 THE COURT: Overrule.

19 THE WITNESS: Yes. I think that we had been
20 doing that.

21 BY MR. GASTON:

22 Q. And -- and you're --

23 A. And that's why we called nephrology early so
24 that he could dialysis on the 13th, on the 14th, on the
25 15th, on the 16th. And all of that had been going well.

1 Q. Yeah. But on the 18th in order for the
2 nephrologist to make a decision he needed the important
3 information from the blood test results when they arrived
4 at 11:30.

5 A. I'll agree with you with that, yes.

6 Q. Well let me finish the question before you
7 agree.

8 They needed the important blood test results so
9 the nephrologist could make the decision; correct?

10 A. Yes, sir.

11 Q. And you, as his attending physician, were
12 responsible and in charge of getting those results
13 available for the nephrologist so the nephrologist could
14 do his or her job?

15 MR. SHAW: Objection, Your Honor. Repetitive.

16 THE COURT: Overruled.

17 BY MR. GASTON:

18 Q. Is that true?

19 A. Yes.

20 Q. Your defense attorney told the members of the
21 jury that you used your very best efforts in this case
22 for the care you provided to Mr. Allen; did you hear him
23 tell that to the ladies and gentlemen of the jury?

24 A. Yes.

25 Q. And you believe that you did in this case use

1 your very best efforts for this man?

2 A. Do you expect me to say no to that? Yes. I
3 did everything I could for him.

4 Q. You did everything you could?

5 And knowing what you know now if you had it to
6 do all over again you'd do the exact same thing; wouldn't
7 you?

8 MR. SHAW: Objection, Your Honor.

9 THE COURT: Basis?

10 MR. SHAW: Relevance as to --

11 THE COURT: I think you asked him the same
12 question.

13 MR. SHAW: -- would have to know perspective.
14 Pardon me?

15 THE COURT: You asked him the same question.
16 Overruled.

17 BY MR. GASTON:

18 Q. Is it true you would do the exact same thing if
19 you had it to do all over again?

20 MR. SHAW: Well exact -- so broad, Your Honor.

21 THE COURT: Overruled.

22 THE WITNESS: So that is so hindsightful. It's
23 very easy to -- to pick things apart and talk about this
24 happened at -- during this time and things like that. We
25 have the ability to do that. We've got all these things

1 that are directly in front of us and all that.

2 So you know, if you were to sit me down -- take
3 me back to March 18th, 2016 --

4 MR. SHAW: 13.

5 THE WITNESS: 13 and have me go through it all
6 over again with the exact same knowledge that I had at
7 that time, yes, I would do it all over again.

8 BY MR. GASTON:

9 Q. And, in fact, with the knowledge you -- you do
10 have now about Kayexalate you're lawyer asked you even
11 with that knowledge would you still give it. And you
12 said yes to him; correct?

13 A. I did. And I'll say it to you too. I did and
14 I would do it again. There's -- with the knowledge that
15 I gained now there's very little that would change my
16 practice. Except for now I'm a critical care physician.
17 And oftentimes have a dialysis machine at my behest when
18 I need it.

19 Q. And, Doctor --

20 A. Depending on -- but in this specific case with
21 the things that I've talked about, about the rising
22 potassium and being concerned that he's going to get into
23 another issue with it, I still would have given it.

24 Q. And, Doctor, it's true that you cannot rule out
25 that Kayexalate caused the bowel ischemia in this case?

1 MR. SHAW: Objection as to form, Your Honor.

2 THE COURT: Overruled.

3 THE WITNESS: Could you ask the question again
4 please?

5 BY MR. GASTON:

6 Q. Sure. You cannot rule out and exclude that
7 Kayexalate as a cause of Mr. Allen's bowel ischemia in
8 this case; isn't that true?

9 A. That's true. And by the same token, you cannot
10 rule in and say that it is.

11 Q. That's -- that's your opinion that you can't
12 rule --

13 A. Is that not what you asked?

14 Q. No. I didn't ask you if you could rule it in.
15 I asked you if you could rule it out. And you said no.

16 Thank you very much.

17 A. Thank you.

18 THE COURT: Anything else, Mr. Shaw?

19 MR. SHAW: May the witness be excused? I
20 reserve the right to recall if -- if necessary. But may
21 he be excused as of this evening?

22 THE COURT: You mean as -- as a witness for the
23 plaintiff?

24 MR. SHAW: As the witness for the plaintiff.

25 THE COURT: Yes. All right.

1 So I think we are right on target for time.

2 All right. Dr. Burks, you are excused as a
3 witness.

4 THE WITNESS: Thank you.

5 THE COURT: For this day. And I -- I certainly
6 understand that Defense may recall the doctor. And
7 that's fine.

8 Ladies and gentlemen, we will adjourn for the
9 evening.

10 To the extent it's necessary, although I
11 suspect it's not, Dr. Burks, I will instruct you because
12 this case is ongoing and you may be recalled not to share
13 or discuss your testimony with anyone in or outside the
14 courtroom. Do you understand?

15 THE WITNESS: Including my counsel?

16 THE COURT: Including your counsel.

17 MR. SHAW: I'm sorry. Say again?

18 THE COURT: He cannot discuss his testimony
19 with you to the extent he may be recalled.

20 (Whereupon, the witness was excused from the
21 witness stand at 4:55 p.m.)

22 MR. SHAW: That's fine.

23 Be -- I know you're going to excuse the jury.

24 I have an issue after the jury is excused.

25 THE COURT: Okay. Well I may not have time to

1 address it this evening. We'll do our best.

2 Ladies and gentlemen, just the continuing
3 standard instructions that I've given you many times over
4 about research and communications.

5 We wish you a safe evening.

6 As per usual, 9:00 a.m. tomorrow morning we
7 will see you.

8 Have a safe evening.

9 Tangier, leave the record on if you will.

10 THE CLERK: Yes.

11 THE COURT: So I can try to address Mr. Shaw's
12 issue.

13 THE CLERK: Okay.

14 All rise.

15 (Whereupon, the jury was excused from the
16 courtroom at 4:56 p.m.)

17 THE COURT: I'm going to stay on the -- I'm
18 going to stay on the bench.

19 THE CLERK: Okay.

20 MR. SHAW: I promise I'll take one -- one
21 minute.

22 THE COURT: Don't fall down that step. It's
23 happened before. I don't want to see it happen again.

24 MR. SHAW: Your Honor --

25 THE COURT: Yes.

1 MR. SHAW: -- this is with respect to Ms.
2 Demetrius Jones.

3 THE COURT: Yes.

4 MR. SHAW: Who is the --

5 THE COURT: You can all have a seat please.
6 Thank you.

7 MR. SHAW: Who is the phlebotomist who was --

8 THE COURT: Yes.

9 MR. SHAW: -- subpoenaed.

10 THE COURT: Demetrius Jones.

11 MR. SHAW: So Dr. Burks testified on
12 examination by Mr. Gaston that he was told but has no
13 personal knowledge that there was no blood draw.

14 THE COURT: Right.

15 MR. SHAW: Ms. -- and on that basis I don't
16 believe Ms. Jones adds much to the equation because all
17 that she's going to say is that there was a -- and she
18 doesn't remember this case at all. But there's a note
19 from her saying dialysis done. Which you probably
20 remember it from the motions in limine. So I'm not sure
21 the relevance or the probative nature of her testimony at
22 this point.

23 If Dr. Burks is not contending the blood wasn't
24 actually drawn he's only contending and he was only asked
25 that by Mr. Gaston that he was informed that the patient

1 refused. He has not claimed that the blood was not
2 drawn. So it -- it does not become a probative or
3 relevant issue at this point.

4 THE COURT: So I take it that you are not going
5 to seek an instruction as to contributory negligence?

6 MR. SHAW: If I don't seek -- well I may. But
7 not on that issue, Your Honor. On the issue of the blood
8 draw.

9 So for that basis I don't see why she would --
10 if I decide not to do that, and I actually had circulated
11 a stipulation to Mr. Gaston saying if I stipulated to
12 that -- I'm not going to stipulate to that if she -- if
13 he calls Ms. Jones.

14 THE COURT: Well I think the other issue though
15 is to the extent that whether or not she has a memory or
16 not, I mean I don't know what she's going to say, I
17 appreciate your representation. And I don't mean that I
18 doubt it.

19 But to the extent that it reflects generally on
20 the believeability of Dr. Burks independent recollection
21 of things I think that has a general blanket sense of
22 relevance. Because there are issues that have come up in
23 the case where Dr. Burks -- and I -- please, with all due
24 respect, I don't mean to suggest anything untoward. But
25 that to some extent Dr. Burks has testified that he

1 recalls something that -- that occurred that may or may
2 not have made it's way into the medical records that have
3 been admitted. But are of note or important for purposes
4 of the case generally.

5 So to the extent that he has given testimony or
6 made sworn statements regarding whether or not the
7 decedent did or did not refuse certain care I -- I think
8 I -- I'm going to allow the plaintiff to probe that issue
9 if they wish. So I'm not going to release --

10 MR. SHAW: But I --

11 THE COURT: -- her.

12 MR. SHAW: So I do absolutely positively do not
13 withdraw my contributory negligence issue on that.

14 THE COURT: That's fine.

15 MR. SHAW: And secondly, Your Honor, I do
16 except and I think I'm going -- I don't want to be heard
17 to agree with the Court's ruling that this -- the -- that
18 Ms. Jones testimony goes to his credibility. This is not
19 a criminal case. I don't believe the law permits other
20 extraneous issues to -- to reflect on his credibility.

21 So I -- I want to take exception to that, Your
22 Honor.

23 THE COURT: All right. Well let me then hear
24 then what the proffer is from the plaintiff as to whether
25 or not they intend to call her for any other reason.

1 MR. GASTON: Well --

2 THE COURT: I mean, are you content to release
3 her? Because I --

4 MR. GASTON: I do not. Oh no. Oh no. There's
5 a lot of reasons that I want to call her. Particularly
6 for some of the testimony that we heard from Dr. Burks
7 today. Some of the statements he made today we heard for
8 the very first time. It was not disclosed during his
9 discovery.

10 THE COURT: All right. So here's what --
11 here's what I'm going just sit on this issue.

12 I'm not going to release her from -- from her
13 trial subpoena.

14 But to address the issue of your objection to
15 what I just said.

16 MR. SHAW: Right.

17 THE COURT: I absolutely will listen to any
18 objection that you have in the trial. So there's no
19 ruling.

20 MR. SHAW: Okay.

21 THE COURT: Okay. I just want to be clear
22 about that. You are welcome to object and I will
23 consider it when the testimony or the question is
24 actually posed.

25 MR. SHAW: So my next question is just as a

1 matter of scheduling.

2 THE COURT: Yes.

3 MR. SHAW: When does -- when does Mr. Gaston --
4 she just sat here half a day. I just want to know when
5 she's going to be called. I don't want her sitting here
6 all day tomorrow and not called.

7 THE COURT: I understand.

8 MR. SHAW: And day Monday and not called.

9 THE COURT: I understand.

10 Mr. Gaston, do you have a schedule in mind?

11 MR. GASTON: Your Honor, if -- if Ms. Jones --
12 I know she works the 5:30 to one shift. And I can call
13 her after her shift tomorrow. She doesn't be here and
14 sit through --

15 THE COURT: All right. Well then what I'll do
16 is ask --

17 MR. SHAW: She's off tomorrow, Your Honor.
18 She's off tomorrow.

19 MR. GASTON: All right.

20 THE COURT: So then it's not inconvenient for
21 her to come in at any particular point in time is what I
22 hear you saying?

23 MR. SHAW: I -- well she would disagree with
24 that.

25 THE COURT: Well desire and --

1 MR. SHAW: But it's one day off.

2 THE COURT: I understand. But we're in trial.
3 So she'll have to be available.

4 MR. SHAW: So what time?

5 THE COURT: What time do you wish to call her?
6 You just finished with -- with Dr. Burks. So are you
7 going to call her next?

8 MR. GASTON: No, Your Honor. She'll be second
9 witness tomorrow.

10 MS. ZOIS: Okay.

11 MR. GASTON: Second witness tomorrow. 10
12 o'clock -- 10 -- 11 o'clock depending upon how long on
13 cross-examination.

14 THE COURT: Well I don't want to have any gaps
15 in time. We've got to keep this moving.

16 MR. GASTON: There will be no gaps in time.

17 THE COURT: Well there will be if she's here
18 after when, you know, you're finished. So why don't we
19 ask her to arrive at 10:00 a.m. tomorrow.

20 MR. SHAW: All right. And can we have a
21 proffer as to who the witnesses are tomorrow?

22 THE COURT: All right. I'm going to let you
23 guys talk about that offline as --

24 MR. SHAW: Okay.

25 THE COURT: -- professional people.

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MR. SHAW: Hopefully.

THE COURT: I would expect so.

All right. Court's adjourned until tomorrow morning.

Have a safe evening.

MR. SHAW: Thank you, Your Honor.

MR. GASTON: Thank you.

(Whereupon the matter concluded for the day at 5:03 p.m.)

REPORTER'S CERTIFICATE

I, Patricia A. Trikeriotis, Chief Court Reporter of the Circuit Court for Baltimore City, do hereby certify that the proceedings in the matter of Cynthia Allen, et al. vs. Allen Burks, M.D., et al., Case Number 24-C-16-003384, on September 15, 2016, before the Honorable Julie R. Rubin, Associate Judge, were duly recorded by means of digital recording.

I further certify that the page numbers 1 through 301 constitute the official transcript of excerpts of these proceedings as transcribed by me or under my direction from the digital recording to the within typewritten matter in a complete and accurate manner.

In Witness Whereof, I have affixed my signature this 15th day of June, 2017.



Patricia A. Trikeriotis
Chief Court Reporter

