

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PLANNED PARENTHOOD OF  
WISCONSIN, Inc., et al.,

Plaintiffs,

Case No. 13-CV-465-WMC

vs.

J.B. VAN HOLLEN, et al.,

Madison, Wisconsin  
May 29, 2014  
10:35 a.m

Defendants.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT EXCERPT FROM COURT TRIAL  
- **TESTIMONY OF DR. JOHN THORP** -  
HELD BEFORE CHIEF JUDGE WILLIAM M. CONLEY

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1 (Called to order.)

2 **DR. JOHN THORP, DEFENDANT'S WITNESS, PREVIOUSLY SWORN**

3 THE COURT: You remain under oath, Dr. Thorp,  
4 and we will now proceed with direct examination, which  
5 will be brief.

6 THE WITNESS: Your Honor, something mysterious  
7 happened when I went to the rest room.

8 THE COURT: Let's go off -- hang on -- let's go  
9 off the record.

10 (Discussion held off the record.)

11 DIRECT EXAMINATION

12 BY MR. KEENAN:

13 Q. Dr. Thorp, you may not be able to see me very well,  
14 but this is Brian Keenan. I'm an assistant attorney  
15 general for the State of Wisconsin. I'm going to just  
16 ask you a few brief questions in this case. The judge  
17 has taken your expert report as the direct testimony.  
18 You've also given substantial testimony this morning, so  
19 we don't need to belabor a whole lot.

20 But I would like -- you didn't get a chance to  
21 introduce yourself. Could you just state what your  
22 position is that you currently hold?

23 A. I'm a professor in the School of Medicine and School  
24 of Public Health at the University of North Carolina.

25 Q. And then what's your specialty?

1 A. Obstetrics, gynecology, and I have a subspecialty  
2 certificate in maternal fetal medicine.

3 Q. And at the University of North Carolina Hospital  
4 that you work at, are there abortion providers that work  
5 there?

6 A. Yes, sir, there are.

7 Q. Okay. And so you gave some testimony earlier about  
8 your experience with residents that come through your  
9 University of North Carolina Hospital. So that  
10 experience -- do those residents have the opportunity to  
11 train with the physicians who perform abortions?

12 A. They do.

13 Q. Okay. I just wanted to clarify one point that came  
14 up during the colloquy with the Court relating to the  
15 comparing the safety of abortion to some other outpatient  
16 procedures like colonoscopies, et cetera. Do you recall  
17 that testimony?

18 A. Yes, sir.

19 Q. Okay. And the Court had referenced paragraphs 46  
20 and 47 of your report which deal with your opinions about  
21 comparing -- the ability to compare the safety of  
22 abortion to the safety of specifically hysteroscopies and  
23 D&Cs performed in the U.S. Could you just explain what  
24 your position is on why those aren't comparable, aren't  
25 able to be compared appropriately?

1 A. Well, it gets back to the blood flow argument that I  
2 think the colloquy (verbatim) all reached consensus on;  
3 that the uterus, by the time placentation is established,  
4 gets around 10% or more of the cardiac output, making  
5 comparisons to nonpregnant procedures not valid, to my  
6 mind.

7 MR. KEENAN: And so I'm going to -- those are  
8 the end of my questions. I'm going to sit down and  
9 Ms. Flaxman will ask some questions and then I will have  
10 an opportunity to clarify some more, so thank you.

11 THE WITNESS: Thank you.

12 CROSS-EXAMINATION

13 BY MS. FLAXMAN:

14 Q. Doctor, this is Carrie Flaxman. I represent Planned  
15 Parenthood. We met before at your deposition in North  
16 Carolina. The binder that --

17 A. I can't see you to know whether I ever met you or  
18 not.

19 MS. FLAXMAN: Okay. I don't know that I could  
20 fix that right now.

21 THE COURT: But we'll work on that in the  
22 meantime.

23 BY MS. FLAXMAN:

24 Q. I just ask that if you can't hear me to please let  
25 me know. I unfortunately am wearing taller shoes than I

1 even was yesterday. So if you can't hear me, let me  
2 know. And the documents, the binder that you had, I  
3 believe it's on the clerk's bench?

4 A. Where would the clerk's bench be?

5 Q. The deputy's bench?

6 A. There's not a deputy in here. I'm alone.

7 Q. Is there a chair where the deputy would have sat?

8 A. And I've looked all over the courtroom for the  
9 binder. That's what I was doing when the judge came in.  
10 And I don't see the binder in here.

11 THE COURT: While they're trying to get it, why  
12 don't you do the best you can with other matters.

13 MS. FLAXMAN: Okay. I think I can start.

14 BY MS. FLAXMAN:

15 Q. Doctor, you have offered testimony and have been  
16 retained to do so in support of abortion statutes in  
17 several different states in the last five years; isn't  
18 that correct?

19 A. I wouldn't know about the word *several*, but I would  
20 say in four or five I think.

21 Q. You've offered testimony or been retained to do so  
22 in support of similar admitting privileges bans in four  
23 other states, right?

24 A. Three or four.

25 Q. Well, Mississippi; is that correct?

1 A. Yes, ma'am, I think.

2 Q. And in that case it would shut down the only  
3 remaining abortion provider, correct?

4 A. I don't know whether that's true or false.

5 Q. And in Alabama, aren't you scheduled to give  
6 testimony there next week?

7 A. Yes, ma'am. I'm well aware of that one. I think  
8 that's where we met, wasn't it?

9 Q. Indeed it was.

10 A. Okay. See I have a good memory.

11 Q. And in Texas, correct, you've given testimony in two  
12 different cases in Texas about admitting privileges,  
13 correct?

14 A. I think so.

15 Q. And how about in North Dakota?

16 A. I don't know, but I think there are two different  
17 North Dakota laws being -- I can't specifically recall,  
18 but I worked with the attorney general in North Dakota.  
19 I don't know whether it's an admitting privileges case.

20 Q. You said there are two cases there. There's an  
21 admitting privileges case, right?

22 A. Yes, ma'am, and I think there's a second case.

23 Q. There's also a case involving a criminal ban when  
24 the embryo's heartbeat can be detected, correct?

25 A. I would use the word *fetus*.

1 Q. But you've given testimony in that case, correct?

2 A. I think so. I've provided opinions. I don't know  
3 what you legally mean by "giving testimony."

4 Q. You've submitted a declaration with your opinions in  
5 that case, correct?

6 A. I think I have.

7 Q. And that law in North Dakota that criminalizes  
8 abortion as soon as the heartbeat is detected would ban  
9 abortion in North Dakota at around five or six weeks LMP,  
10 correct?

11 A. It would ban abortion when the fetal heart rate was  
12 detected.

13 Q. And that can be detected around five or six weeks  
14 LMP, correct?

15 A. I'd say more like six to seven, but we're in the  
16 same ballpark.

17 Q. And the only exception to that ban is for abortions  
18 necessary to prevent a woman's death or to prevent a  
19 serious risk of substantial and irreversible impairment  
20 of a major bodily function, correct?

21 A. I don't have it in front of me to read it, but  
22 that's my recollection.

23 Q. And it has no exception for a woman pregnant as a  
24 result of rape or incest, correct?

25 A. I don't recall.



1 THE COURT: Counsel, we're not going to go much  
2 further down this road anyway, so --

3 MS. FLAXMAN: I just have one.

4 THE COURT: If this is leading to a question,  
5 you can certainly ask it.

6 MS. FLAXMAN: It's difficult without having  
7 the --

8 THE COURT: Understood.

9 BY MS. FLAXMAN:

10 Q. You opined in that case that the North Dakota ban  
11 served several interests, including protecting women's  
12 health, correct?

13 A. I couldn't hear you. Somebody just came in. Would  
14 you repeat the question?

15 Q. Did they come in with the binder?

16 A. She came in and found the binder.

17 Q. Could you go get it, sir?

18 THE COURT: Could someone --

19 A. She's bringing it to me.

20 THE COURT: Thank you, very much. Let's proceed  
21 now.

22 THE WITNESS: I now have the binder.

23 MS. FLAXMAN: Okay. Thank you.

24 BY MS. FLAXMAN:

25 Q. Just getting back quickly to that North Dakota ban

1 we were talking about, in your declaration submitting  
2 your opinions you opined that that ban served the  
3 protection of women's health, correct?

4 A. Yes, ma'am.

5 Q. And you've also given testimony in states in support  
6 of other abortion regulations, correct?

7 A. Yes, ma'am.

8 Q. Now, you refer to these cases as *constitutional*  
9 *cases* to distinguish them from the malpractice cases you  
10 also give testimony in, correct?

11 A. That's a distinguishing factor my medical school  
12 makes.

13 Q. Well, let me get to that. In those constitutional  
14 cases you provide testimony, including this one, you  
15 receive payment, correct?

16 A. Yes, ma'am.

17 Q. And in this case you're being compensated at the  
18 rate of \$500 per hour for work formed and \$5,000 per day  
19 for time spent testifying, correct?

20 A. I'd have to look and see, but I think so.

21 Q. I can point you to your report if you need to take a  
22 look.

23 A. No, ma'am. I believe you.

24 Q. And unlike the money you receive for the medical  
25 malpractice cases in which you testify which goes to your

1 employer, you personally keep the money you receive in  
2 these constitutional cases, correct?

3 A. That's the way my employer prefers it.

4 Q. And you've also sought to participate in your own  
5 name in some abortion litigation, correct?

6 A. I don't know what you meant by that question.

7 Q. Well, for example, you submitted an amicus brief in  
8 the U.S. Supreme Court during last year's term in support  
9 of restrictions on the use of medication abortion in  
10 Oklahoma. And this is at Tab 15 of your binder if you  
11 need to refresh your recollection. There's a *Brief of*  
12 *Amici Curiae Dr. John Thorp, M.D.* and others. Do you  
13 recall submitting that?

14 A. Yeah. Everything I'm doing, I'm doing in my own  
15 name.

16 Q. And so you submitted that amicus brief, correct?

17 A. Yes, ma'am.

18 Q. And you also submitted an amicus brief in the  
19 U.S. Supreme Court this term opposing a Massachusetts  
20 statute that limited protesting within a certain distance  
21 of abortion clinics, correct?

22 A. Yes, ma'am.

23 Q. And you also moved to intervene in your home state  
24 of North Carolina in support of a statute that requires  
25 women to view an ultrasound prior to an abortion, whether

1 or not she wants to view it, correct?

2 A. That was one portion of a very extensive law and I  
3 don't think she had to view it against her will.

4 Q. But you moved to intervene as a party in that  
5 litigation, correct?

6 A. Yes, ma'am.

7 Q. You have never performed an induced abortion,  
8 correct?

9 A. Not that I'm aware of.

10 Q. And you're a member of the American Association of  
11 Pro-Life OB/GYNs; isn't that correct?

12 A. Yes, ma'am, I am.

13 Q. And can I refer to that as *AAPLOG*?

14 A. If you so desire.

15 Q. But you understand that that's what I'm referring to  
16 if I state -- if I use the term *AAPLOG*?

17 A. We can agree for you to call it that.

18 Q. Thank you. And no member of *AAPLOG* has ever been  
19 killed because of their views on abortion, correct?

20 A. I don't know.

21 Q. You're not aware of anyone, right, sir?

22 A. I'm not aware of anyone. But I'm also not aware of  
23 no one -- I don't know.

24 Q. Can you point me to where, on your CV, you state  
25 that you're a member of *AAPLOG*? And I'll turn your

1 attention to Tab 1, which is your report, which is  
2 Exhibit 1059 in the courtroom. It's on page 5 of your CV  
3 you list your professional organizations.

4 A. Okay. I'm there, *Memberships*.

5 Q. You don't list AAPLOG, correct?

6 A. No, ma'am, I don't. I don't know why I don't, but I  
7 don't.

8 THE COURT: Just for the record, is that -- by  
9 "the report," it's 1059?

10 MS. FLAXMAN: Oh, I may have gotten the wrong  
11 one. I mean the original report.

12 THE COURT: 1058.

13 MS. FLAXMAN: 1058. Thank you, Your Honor.

14 BY MS. FLAXMAN:

15 Q. You know Vincent Rue, correct?

16 A. You would have to define *know*.

17 Q. Have you spoken to Mr. Rue?

18 A. Yes, ma'am, but I've never met him.

19 Q. He contacted you to be involved in this case,  
20 correct?

21 A. I don't recall how I got contacted to be in this  
22 case.

23 Q. He has contacted you in other of your constitutional  
24 cases to be involved in them, correct?

25 A. I don't specifically recall how I was contacted for

1 any of the so-captioned *constitutional cases*.

2 Q. You have never worked as an OB/GYN in the state of  
3 Wisconsin, correct?

4 A. No, ma'am.

5 Q. Now, Doctor, this came up this morning during the  
6 colloquy, but I just wanted to confirm: you believe that  
7 the CDC's abortion-related surveillance is incomplete,  
8 correct?

9 A. Yes, ma'am.

10 Q. In fact you believe that the CDC deliberately  
11 promotes an unjustified confidence in abortion safety,  
12 don't you?

13 A. I don't know where you're quoting from and that  
14 doesn't sound like my words to me.

15 Q. I'm going to ask you to turn to Tab 21 of your  
16 binder.

17 A. It is a big binder.

18 Q. Tab 21 an article called *Deaths Associated with*  
19 *Abortion Compared to Childbirth*?

20 A. Yes, ma'am.

21 Q. I'm going to point to the top of page 8.

22 A. I'm getting to page 8. I'm at the article.

23 MS. FLAXMAN: Your Honor, do you have the paper?

24 THE COURT: Yes. Thank you.

25 A. Which column?

1 THE COURT: The question is, "Which column."

2 BY MS. FLAXMAN:

3 Q. Yes. Oh, I'm sorry. Yes, the bottom of the first  
4 full paragraph. And I'll read it to you there. It says,  
5 "While the research articles published by investigators  
6 within CDC's Family Planning Evaluation Division  
7 consistently reflected a favorable opinion of abortion,  
8 the egregious misapplication of statistical methods in  
9 this particular study strongly suggests that their  
10 analyses were being used to deliberately promote an  
11 unjustified confidence in abortion safety." That was an  
12 article that you were an author of, correct, sir?

13 A. Yes, ma'am.

14 Q. Now, I want to go back to your expert report, which  
15 is Tab 1.

16 A. Okay.

17 Q. That's Exhibit 1058 here in the courtroom. If you  
18 could turn to page 8 in paragraph 20. Are you there?

19 A. I'm getting there.

20 Q. Okay. Let me know when you're there. Are you  
21 there, sir, now?

22 A. Yes, ma'am, I'm there.

23 Q. Right after the reference for Footnote 24 you state,  
24 "Complication rates range from 2-10% and most  
25 complications can be managed without major surgery." Do

1 you see that, sir?

2 A. Yes, ma'am.

3 Q. You don't cite anything for that 2 to 10 percent  
4 figure, correct?

5 A. No, ma'am.

6 Q. And you would agree that the risk of complications  
7 for just first-trimester abortion is less than 2 to  
8 10 percent, correct?

9 A. Yes, ma'am. I think that ought to say .2 to  
10 10 percent and I ought to say "depending upon the  
11 gestational ages of the population to which termination  
12 of pregnancy was provided."

13 Q. Right. So you would agree with me that that  
14 first-trimester abortion is in the low -- lower end of  
15 that range you've given, correct?

16 A. Yes, ma'am.

17 THE COURT: Since we're clarifying, you said it  
18 should be .2 to 1 percent?

19 THE WITNESS: .2 to 10 percent, sir.

20 THE COURT: That's quite a range.

21 THE WITNESS: And I think I've talked at length  
22 about what I perceive to be the problems in the  
23 estimates, which is part of the variability. And then  
24 there is a mix within any population, any single clinic,  
25 of the gestational ages.



1 THE COURT: You may proceed, Counsel.

2 MS. FLAXMAN: Thank you.

3 BY MS. FLAXMAN:

4 Q. And you would agree, Doctor, that about 90% of the  
5 abortions in the U.S. take place in the first trimester,  
6 correct?

7 A. In the first trimester there is a wide range between  
8 6 weeks and 12 weeks, both of which are in the first  
9 trimester.

10 Q. Would you agree that --

11 A. As the judge ruled or said in the  
12 colloquy (verbatim) and got us to consensus, it's linear  
13 with gestational age.

14 THE COURT: I just want to make sure you're  
15 listening to the question that she's asking and answering  
16 it. Understanding that the first trimester involves a  
17 range, can you answer the question that was asked? And  
18 if you need it to be repeated, that's fine.

19 THE WITNESS: I thought I gave a great answer,  
20 sir.

21 THE COURT: Well, let's -- why don't we try the  
22 question again and see if perhaps you can be more  
23 succinct in your response.

24 MS. FLAXMAN: Thank you.

25 THE WITNESS: I'll do the best I can.

1 BY MS. FLAXMAN:

2 Q. Doctor, the question was, about 90% of the abortions  
3 in the United States take place in the first trimester,  
4 right?

5 A. I don't know the answer to that.

6 Q. Well, then I want to point --

7 A. I think it's true.

8 Q. Let's point you -- I want you to turn to the other  
9 end of your binder to Tab 22 at page 2 in the last  
10 paragraph of that page. This is an article that you have  
11 written?

12 A. Yeah.

13 Q. And it states there, "Almost 90% of TOPs are done in  
14 the first trimester." You see that, correct?

15 A. I don't see where we are.

16 Q. Are you on page 2 of your *Scientifica* article?

17 A. Yes, ma'am, I am.

18 Q. The last paragraph on that --

19 A. Which column?

20 Q. Second column, last paragraph on that page, "Almost  
21 90% of TOPs are done in the first trimester." Do you see  
22 that?

23 A. Well, my piece of paper says "around 90%."

24 Q. Okay. Well, you would agree with me then that  
25 around 90% of the abortions in the U.S. take place in the

1 first trimester, correct?

2 A. With the reporting liabilities described earlier, I  
3 would.

4 Q. I want to turn back to your estimate of 2 to  
5 10 percent complication rate, which you've now said in  
6 the courtroom for the first time is .2% to 10%; is  
7 that -- am I getting that right?

8 A. Yes, ma'am. That thing misses a decimal.

9 Q. And if we went through, you have reports -- you have  
10 a number of your expert reports there from other cases.  
11 They all miss a decimal, don't they, sir?

12 A. They're consistently missed the decimal --

13 Q. So --

14 A. -- as did this *Scientifica* article, to whom I've  
15 submitted an erratum. I'm just telling you -- I'm  
16 answering your question. Throughout the report was where  
17 you were going, so I'm trying to fix it.

18 Q. Well, we'll get to that. So I want to just confirm,  
19 this complication rate that you mentioned in your report  
20 without a cite, you base that estimate on studies you  
21 cited in your 2012 *Scientifica* article, correct?

22 A. Yes, ma'am.

23 Q. So let's turn back to that. It's Tab 22.

24 A. I'm there.

25 Q. If you could look at page 4.

1 A. I'm there.

2 Q. Let me get myself there. So the Section No. 5  
3 called *Short-Term Harms*, this is the specific section of  
4 your *Scientifica* piece that cites the studies you used to  
5 support your complication rate, correct?

6 A. Yes, ma'am.

7 Q. Now, the acceptance rate for articles in *Scientifica*  
8 goes over 60%, isn't it?

9 A. Never looked at the acceptance rate, so I don't know  
10 that.

11 Q. Okay. Well, why don't we look at it. If you could  
12 go to Tab 23.

13 MR. KEENAN: I'm going to object to the extent  
14 that they've provided us with some documents they said  
15 they were going to use with Dr. Thorp and we didn't get  
16 these ones.

17 MS. FLAXMAN: I just gave them to you right now,  
18 sir.

19 MR. KEENAN: This one? Okay.

20 THE COURT: All right. Then why don't we  
21 proceed.

22 MS. FLAXMAN: Mm-mm.

23 BY MS. FLAXMAN:

24 Q. Are you at Tab 23?

25 A. I'm there.

1 Q. Okay. So this is a page from the *Scientifica*  
2 website. Do you see it there that it says that it  
3 "currently has an acceptance rate of 61%"?

4 A. That's what it says.

5 Q. And do you know what the acceptance rate is of the  
6 *New England Journal of Medicine*?

7 A. A lot lower than that.

8 Q. Right. Does about a 5% rate sound right?

9 A. I don't know.

10 Q. If you want to look at Tab 25, there's a web page  
11 there. And this is at the third bullet point in the  
12 bullet points. It states there, "We publish only the top  
13 5% of the 5,000 research submissions." Do you see that  
14 part?

15 A. Okay.

16 Q. Now, you also paid *Scientifica* several-hundred  
17 dollars in article processing costs to have your article  
18 published, correct?

19 A. I most certainly did not.

20 Q. Authors pay *Scientifica* only if their articles are  
21 accepted, right?

22 A. I didn't pay *Scientifica* a penny.

23 Q. All right. Let's look at Tab 24.

24 A. I'm there.

25 Q. In the last paragraph on that first page it says,

1 "Scientifica is an Open Access journal. Publishing an  
2 article in *Scientifica* requires Article Processing  
3 Charges that will be billed to the submitting author upon  
4 acceptance of the article for publication in accordance  
5 with the following table." And it states that the fees  
6 are \$800. Does that refresh your recollection?

7 A. You read accurately, but I haven't paid anybody to  
8 publish anything.

9 Q. Are you aware of anyone else paying this fee?

10 A. I don't know anything about this fee.

11 Q. Now, your brief to the Supreme Court in the Oklahoma  
12 medication abortion case cited to your *Scientifica*  
13 article, correct?

14 A. I don't recall.

15 Q. If you want to look at Tab 15 at page 1.

16 A. Okay. I'm there.

17 Q. We're scrolling there in the courtroom. Give me one  
18 second. In your interest of *amici curiae* you're listed  
19 there and at the very end of that paragraph it lists --  
20 it cites to this article, correct?

21 A. Yes, ma'am.

22 Q. So, Doctor, if we could turn back then to the  
23 *Scientifica* article.

24 A. What Tab is it?

25 Q. Is that at 22?

1 A. It is.

2 Q. Okay. Thank you. This article does not itself  
3 state that abortion has a complication rate of .2 to  
4 10 percent or 2 to 10 percent, right?

5 A. I think it talks about the range and the  
6 limitations.

7 Q. But it nowhere says .2 to 10 or 2 to 10, correct?

8 A. I don't think it does.

9 Q. And in fact no published study says that, correct?

10 A. Well, the decimal place is the problem, which I've  
11 admitted as an error and plan -- and trying to correct.

12 Q. Well, the 2 to 10 percent -- the 2 to 10 percent is  
13 nowhere listed. I'm going to direct you to page 4, your  
14 section on *Short-Term Harms*. It does not say --

15 A. Page 4 writes the harms down by category. And if  
16 you summate them and put the decimal place in the right  
17 place, I think you'll come up with that.

18 Q. Okay. So you arrived at that "2 to 10" figure by a  
19 process of adding up the various rates that are cited in  
20 Section 5; is that what you're saying?

21 A. Yes, ma'am, and let's not perpetuate the error.  
22 .2 to 10.

23 Q. I'm just going by what you report. I can say  
24 "2 to 10" or ".2 to 10" each time if you'd like, sir.

25 A. Well, I'd like to make the record accurate.

1 Q. All right. Well, let's --

2 A. And I apologize for my inaccuracy.

3 Q. Let's look at one of the four complication rates  
4 that you cite to in this section on *Short-Term Harms* is  
5 for cervical trauma, correct?

6 A. Yes, ma'am.

7 Q. And in the third paragraph of *Short-Term Harms* in  
8 the paragraph beginning "Likewise, the cervix," it says,  
9 "Up to 3% of second trimester TOP procedures are  
10 complicated by cervical trauma," and you have a  
11 reference --

12 A. Yes, ma'am.

13 Q. -- you have a reference 56. And reference 56 --

14 A. Yes, ma'am.

15 Q. -- is a 2004 article by Caitlin Shannon and others.  
16 That article is at Tab 28 of your binder. Is that the  
17 article cited at -- referenced at 56?

18 A. Yes, ma'am.

19 Q. Can you review that article at Tab 28 and tell me  
20 where it discusses cervical trauma in second-trimester  
21 abortions?

22 A. That's another error in this publication and I've  
23 submitted an erratum to the publisher.

24 Q. And you submitted an erratum to the publisher after  
25 we discussed this at your deposition, sir?



1 A. Yes, ma'am, because you're the first person that  
2 pointed it out to me.

3 Q. So you would agree that the Shannon article does not  
4 support the proposition you cited it for in your  
5 *Scientifica* article, correct?

6 A. True.

7 Q. All right. I want to move then from cervical trauma  
8 to perforation, if we could go back to Tab 22 --

9 A. I'm there.

10 Q. -- on page 4. On the second paragraph of page 4,  
11 right after reference 51, it says, "Uterine perforation  
12 or puncture by the suction cannula or sharp curette  
13 during the TOP occurs in 10 to 15 of the 1,000  
14 procedures." Do you see that?

15 A. Yes, ma'am.

16 Q. So that's effectively in 1 in 100 cases, correct?

17 A. Yes.

18 Q. Or 1 to 1 and-a-half in 100 cases, right?

19 A. Yes.

20 Q. So reference 52, there's no reference after that  
21 sentence. But if you turn to reference 52, that's at Tab  
22 27, it's a 1995 article by Goldchmit and others whose  
23 title begins *Management of Uterine Perforation*, if you  
24 could go to Tab 27?

25 A. Yes, ma'am.

1 Q. And this is a 1995 study involving approximately  
2 4,600 abortions from Israel, correct?

3 A. Yes, ma'am.

4 Q. And if you could turn to page 233, which is the  
5 second page of that article --

6 A. Yes, ma'am.

7 Q. -- under *Results* it states that "The rate of uterine  
8 perforation was 2.6 per 1,000 procedures." Do you see  
9 that?

10 A. Yes, ma'am.

11 Q. But you asserted that the range for perforation was  
12 10 to 15 per 1,000, didn't you?

13 A. Yes, ma'am.

14 Q. All right. Doctor, let's move on to excessive  
15 bleeding or hemorrhage back in your *Scientifica* article  
16 at page 4. You want to look at the -- actually it's the  
17 first sentence of the second paragraph. It says,  
18 "Bleeding or hemorrhage occurs in up to 1% of TOPs in the  
19 first trimester and up to 2.5 of second trimester TOPs."  
20 That's your statement right?

21 A. You read accurately. Yes, ma'am.

22 Q. Thank you. And the supporting reference for that  
23 statement is Footnote 51, correct?

24 A. Yes, ma'am.

25 Q. So if we could turn -- so reference 51 is a 2002

1 article by Flett and Templeton. The title is *Surgical*  
2 *Abortion*, correct? It's at Tab 26 of your binder. So if  
3 you could turn to page 256 of that article. Are you at  
4 256?

5 A. I'm looking for it.

6 Q. Okay.

7 A. I'm there.

8 Q. And so in the second sentence, in the first full  
9 paragraph, it states, "Hemorrhage associated with  
10 abortion is not common and the RCOG guideline group  
11 reported this complication as 1.5 per 1,000 abortions  
12 overall." Do you see that, sir?

13 A. In England and in Wales.

14 Q. Well, but that's what you cited for your -- your  
15 bleeding rate of 1% to 2.5%, correct?

16 A. Yeah, but this is, like, 12 pages. I'd have to read  
17 it again to figure out where I got it. Termination of  
18 pregnancy is seldom done in the United Kingdom after the  
19 first trimester.

20 Q. I'm just pointing you to what you cited for for  
21 this, sir.

22 A. And I can't just digest ten pages before you to  
23 figure out where I got it.

24 Q. Why don't we then look back to your *Scientifica*  
25 article again.

1 A. So 22?

2 Q. 22 on page 4 again, the first sentence of the last  
3 paragraph on that page. The first sentence states,  
4 "Infection is the most common short-term complication  
5 after TOP."

6 A. Yes, ma'am.

7 Q. And your supporting reference for that is 51. Again  
8 that's the Flett article at Tab 26.

9 A. And that's inappropriately labeled and part of the  
10 erratum.

11 Q. So that article does not make that statement,  
12 correct?

13 A. No, ma'am.

14 Q. And then again let's go back --

15 A. But in Tab 29, and again it's the decimal point  
16 problem that I'm correcting at Lisa Rahangdale's article,  
17 top of page 199, .1 to 4.7. So it should have been .1  
18 to 5.

19 Q. Okay. Well, let me ask you that. So it says, "It  
20 occurs after" -- in the second sentence of the last  
21 full -- last paragraph on page 4 of your *Scientifica*  
22 article -- it says, "It occurs after 1 to 5% of surgical  
23 TOPs and is usually polymicrobial in nature." That  
24 references to, I'm not going to pronounce the doctor's  
25 name right, *Rahangdale* --

1 A. *Rahangdale*.

2 Q. -- refers to her article. And that article, which  
3 is at 29 in your binder --

4 A. Yes, ma'am.

5 Q. -- that states, "Approximately .1-4.7% of surgical  
6 abortions worldwide are affected by uterine infection."  
7 This is on page 2 of that.

8 A. Yes, ma'am.

9 Q. So you took that .1 and you rounded up to 1 for your  
10 article, correct?

11 A. No. I misplaced the decimal. I didn't round it.

12 Q. Well, let me -- if we could pull up the deposition.

13 A. I made a mistake. I didn't round.

14 Q. Well, let's go back to your deposition in the  
15 Alabama case, sir, at page 142 -- 143. And I asked you  
16 during that deposition:

17 "If you could find in the Exhibit 6," which is the  
18 article we're talking about now, "where" --

19 THE COURT: I'm sorry. Line what?

20 MS. FLAXMAN: I'm sorry. Line 2 of page 143.

21 THE COURT: Thank you.

22 BY MS. FLAXMAN:

23 Q. I asked you: "If you could find in the Exhibit" --

24 A. At what tab number?

25 Q. Oh, I'm sorry, sir. That's my mistake. It is at

1 Tab 5. Tab 5, sir.

2 A. Okay.

3 Q. If you go to page 143. I got everyone in the  
4 courtroom there, but not you. Sorry.

5 A. That's okay.

6 Q. Are you there now, sir?

7 A. I am right there.

8 Q. Okay. Line 2 I said: "If you could find in Exhibit  
9 6 where she said that in the article?"

10 And your answer was: "Well, I think I extrapolated  
11 the first sentence on page 199."

12 Do you see that, sir?

13 A. Yes, ma'am.

14 MS. FLAXMAN: No further questions, Your Honor.

15 THE COURT: All right. Redirect.

16 REDIRECT EXAMINATION

17 BY MR. KEENAN:

18 Q. Dr. Thorp, after having your deposition taken in the  
19 Alabama case did you go back and relook at this article,  
20 the *Scientifica* article? And I'm sorry, I don't know  
21 which tab.

22 THE COURT: 22.

23 BY MR. KEENAN:

24 Q. 22.

25 A. Yes, sir, I did.

1 Q. Could you just explain what you did in response to  
2 that deposition in terms of this article?

3 A. I contacted the editor, a Ms. Magdall, M-A-G-D-A-L,  
4 and have submitted an erratum, which is Latin for "when I  
5 was wrong I admitted it," so that this will be a more  
6 accurate document than it was prior to my errors.

7 Q. Okay. And I just want to walk through the  
8 right-hand column, sub 5, *Short-Term Harms*, in the  
9 *Scientifica* article, Tab 22. It's on page 4 of that  
10 article.

11 A. Yes, sir.

12 Q. Okay. And so I'm just going to try to walk through  
13 to see if we can explain how you get to the -- we'll go  
14 for the 10% high range of your complication rate that you  
15 list in the report.

16 A. Yes, sir.

17 Q. Could you just explain; going through, like, the  
18 bleeding and hemorrhage, the cervical injuries and then  
19 infection; how you arrived at that 10% high range?

20 A. Well, if you take the bleeding/hemorrhage number in  
21 a mixed case -- a mixed population of first and  
22 second-trimester terminations, let's make that .5%. If  
23 you take the uterine perforation in the Israeli article;  
24 I don't know which tab number, but it was the one on  
25 perforation; in the first paragraph the author says this

1 is a gross underestimate, so let's make that 1 -- 1%. If  
2 the cervical tearing can make it a mixed case, let's make  
3 it 2%. And let's take Lisa's 4%. 4 plus 2 plus 1 plus  
4 .5 gets to 7 and-a-half percent. And that's right in the  
5 middle of my estimate range.

6 Q. And if you --

7 A. I think in fairness to my intent, and it sticks with  
8 my testimony during the colloquy (verbatim), that this  
9 is not systematically looked at, sought for, and these  
10 are broad estimates and estimates tend to be  
11 underestimates.

12 THE COURT: Is it -- why is it appropriate to  
13 add them -- the percentages together? Wouldn't there be  
14 overlap in many cases?

15 THE WITNESS: No, sir. I think they're each  
16 distinct pathological entities.

17 THE COURT: No, I understand that.

18 THE WITNESS: I think you could have one or more  
19 of them.

20 THE COURT: That's my point. I'm not sure I  
21 understand why you believe it's accurate to assume  
22 they're all separate events so that you total up --

23 THE WITNESS: Because it's commonly held in  
24 Madison that a procedure can cause somebody to bleed, can  
25 result in infection and can result in unintended organ



1 damage and that they are separate categories of harms.

2 THE COURT: But they could also, and often do,  
3 happen all in the same procedure, right?

4 THE WITNESS: They often don't happen in the  
5 same procedure. They -- often only one of them happens.

6 THE COURT: All right.

7 THE WITNESS: Somebody would be particularly  
8 unlucky to get two or three of them to happen.

9 THE COURT: All right. So that's why you  
10 believed it accurate not to account for any overlap?

11 THE WITNESS: Yes, sir.

12 THE COURT: Understood.

13 THE WITNESS: So make it to account for overlap  
14 and knock a point off and make it 6%.

15 THE COURT: Very good. Thank you. You may  
16 proceed, Counsel.

17 BY MR. KEENAN:

18 Q. And, Dr. Thorp, why do you think it's appropriate to  
19 use ranges of complication rates in determining  
20 complication rates for abortion?

21 A. Because I think it reflects the underlying  
22 uncertainty inherent in, I think the CDC word is,  
23 *abortion surveillance*, but trying to find out what the  
24 complication rate is. And so that's commonly done in  
25 Madison when there's uncertainty.

1 Q. And we went over all the reasons for the uncertainty  
2 this morning, so I don't think we need to go over those  
3 again, correct?

4 A. Yes, sir.

5 MR. KEENAN: Okay. That's all.

6 THE COURT: Very good. Thank you, Dr. Thorp,  
7 very much for your time this morning. It's greatly  
8 appreciated. You're welcome to stay on the line --  
9 although it looks like we may have a timer operating on  
10 our end, I'm not sure why -- if you wanted to stay on the  
11 line. But you have discharged your obligations and  
12 you're free to leave at this time. We'll either turn it  
13 off --

14 THE WITNESS: What should I do with the  
15 notebook, sir?

16 THE COURT: Why don't you just leave them there,  
17 sir. Thank you.

18 THE WITNESS: Okay. Thank you. Good-bye.

19 THE COURT: Good-bye.

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1 I, CHERYL A. SEEMAN, Certified Realtime and  
2 Merit Reporter, in and for the State of Wisconsin,  
3 certify that the foregoing is a true and accurate record  
4 of the proceedings held on the 29th day of May, 2014,  
5 before the Honorable William M. Conley, Chief Judge of  
6 the Western District of Wisconsin, in my presence and  
7 reduced to writing in accordance with my stenographic  
8 notes made at said time and place.

9 Dated this 30th day of May, 2014.

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15 \_\_\_\_\_ /s/

16 Cheryl A. Seeman, RMR, CRR  
17 Federal Court Reporter  
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