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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF WYOMING

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THE ESTATES OF DEBORAH MARIE TOBIN,  
and ALYSSA ANN TOBIN, deceased, by  
TIMOTHY JOHN TOBIN, personal  
representative; and THE ESTATES OF  
DONALD JACK SCHELL, and  
RITA CHARLOTTE SCHELL, deceased,  
by NEVA KAY HARDY, personal representative,

Plaintiffs,

vs.

Case No. 00-CV-0025-BEA  
June 5, 2001  
Excerpt of Volume XI

SMITHKLINE BEECHAM PHARMACEUTICALS,

Defendant.

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EXCERPTED TRANSCRIPT OF TRIAL PROCEEDINGS  
CLOSING ARGUMENTS

Excerpted Transcript of Trial Proceedings in the  
above-entitled matter before the Honorable William C. Beaman,  
Magistrate, and a jury of eight, at Cheyenne, Wyoming,  
commencing on the 21st day of May, 2001.

Court Reporter: Ms. Janet Dew-Harris, RPR, FCRR  
Official Court Reporter  
2120 Capitol Avenue  
Room 2228  
Cheyenne, Wyoming 82001  
(307) 635-3884

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10:54:11 1

P R O C E E D I N G S

14:59:23 21 I think at this point we'll take a 15-minute recess  
14:59:25 22 and come back and allow the plaintiff to present rebuttal  
14:59:31 23 argument and then the court will instruct the jury.  
14:59:36 24 (Recess taken 2:55 p.m. until 3:15 p.m.)  
15:17:48 25 THE COURT: Mr. Fitzgerald.

15:17:50 1 MR. FITZGERALD: Your Honor. Is this acceptable,  
15:18:04 2 Your Honor? Can the Court see the jury?

15:18:07 3 THE COURT: That's fine.

15:18:08 4 MR. FITZGERALD: Well, ladies and gentlemen, you came  
15:18:09 5 out and looked at me and looked at these notes and thought,  
15:18:13 6 "My gosh, is this guy going to talk a whole bunch about stuff  
15:18:19 7 we've already heard for two and a half weeks?" I'm not. I'm  
15:18:21 8 going to talk about a couple things.

15:18:23 9 We join in the defense and we trust you not to let  
15:18:27 10 sympathy govern you here. And I'll tell you why. It is  
15:18:30 11 because sympathy is what we feel when we see a situation that  
15:18:34 12 we can't help. When we see an orphan child, of course we're  
15:18:38 13 going to feel sympathy.

15:18:40 14 It is not sympathy when you have the power to do  
15:18:43 15 something about it. You have the power. You have the power  
15:18:45 16 to right a wrong here. You have the power to make a  
15:18:48 17 difference. And you will never have this kind of power again  
15:18:58 18 in your lives. You will have other kinds.

15:19:05 19 This courtroom right here is a United States  
15:19:09 20 courtroom. It is the same as a United States courtroom in  
15:19:15 21 Washington, D.C. You have the power that a jury would have  
15:19:21 22 anywhere in the United States to right this wrong. You have  
15:19:27 23 the power.

15:19:31 24 And will you exercise that power? Yes, you will, in  
15:19:38 25 one way or another. And I'm here to tell you why they're  
15:19:43 1 wrong and we're right, but I do want you to know, that your  
15:19:53 2 verdict is so important that it will live forever. That's  
15:20:04 3 how important this case is.

15:20:10 4 The defense says they're not here to blame Don  
15:20:18 5 Schell, but we've heard a lot of blaming of Don Schell. You  
15:20:21 6 know, one of the most important things that happened in this  
15:20:24 7 courtroom happened yesterday. And that's when Dr. Merrell  
15:20:28 8 testified about the practice of medicine and here's what he  
15:20:40 9 said.

15:20:45 10 "Question: In order to do a detailed mental status  
15:20:49 11 examination you have to get the information from the patient  
15:20:51 12 or his family, true?"

15:20:53 13 And Dr. Merrell said, "That's true. And not only  
15:20:56 14 that, you're not going to get a detailed mental examination  
15:21:01 15 from an internist. This is where psychiatry training will  
15:21:04 16 come into the picture."

15:21:06 17 Maybe the most important thing that was said in the  
15:21:12 18 trial, once you understand, if you do, basic facts about  
15:21:18 19 Paxil and all of this stuff that's been talked about -- and  
15:21:21 20 I'm not going to talk about it in great detail again, but  
15:21:24 21 what does this mean? What does this mean?

15:21:28 22 SmithKline Beecham's own witness comes in here and  
15:21:31 23 says an internist is not going to have enough information.  
15:21:36 24 So where would the internist get the information that the  
15:21:41 25 internist needs? There's only one place. And that's from  
15:21:48 1 SmithKline Beecham.

15:21:52 2 This proves, ladies and gentlemen, that the  
15:21:54 3 defense -- that the SmithKline Beecham should have put more  
15:22:01 4 information in the product instructions, in the Physician's  
15:22:10 5 Desk Reference, the blue book that all practicing physicians  
15:22:13 6 have in their office about drugs and their side effects,  
15:22:17 7 because an internist is not going to get the detailed  
15:22:21 8 information.

15:22:22 9 You have to tell the internist, Dr. Patel, or others  
15:22:26 10 throughout this nation, "Dr. Patel, this drug has no sedative  
15:22:32 11 effect. You may wish to consider giving a sedative."

15:22:38 12 Dr. Patel said, "If I would have known that, I would  
15:22:42 13 have handled the case differently."

15:22:44 14 "Dr. Patel, you are like many general practitioners  
15:22:48 15 or internists and you're not going to have the information  
15:22:52 16 you need unless we tell you in the package insert if you're  
15:22:56 17 going to prescribe the drug, and we hope you do" -- and I  
15:22:59 18 hope they do because it does a lot of people a lot of good --  
15:23:02 19 "but if you're going to prescribe it, please sit down with  
15:23:05 20 your patient and get a detailed history."

15:23:12 21 Think about it, ladies and gentlemen. We've all been  
15:23:14 22 to the doctor. You go in and you sit down and you answer the  
15:23:17 23 doctor's questions. If only SmithKline Beecham had said,  
15:23:25 24 "Get a detailed history, you internists and general  
15:23:29 25 practitioners, it is very important and watch out for these  
15:23:32 1 things. Find out if there's been a bad reaction in the past  
15:23:35 2 on an SSRI."

15:23:37 3 Dr. Patel said, "If I had been given that kind of  
15:23:39 4 information, it would have made a difference in how I handled  
15:23:42 5 this case."

15:23:43 6 And what kind of information was he talking about?  
15:23:45 7 He wasn't talking about Don Schell hiding something or  
15:23:48 8 filling out a questionnaire to minimize his condition or  
15:23:53 9 misleading the doctor or withholding information. He was  
15:23:56 10 talking about "If SmithKline Beecham had told me this  
15:23:59 11 information, Mr. Vickery," and he sat right there and  
15:24:02 12 answered the questions, "I would have handled this case  
15:24:05 13 differently." And that, ladies and gentlemen, is the crux of  
15:24:07 14 our case.

15:24:10 15 It is very important for me to try to clarify exactly  
15:24:13 16 where we stand. SmithKline Beecham says that their product  
15:24:20 17 is not defective. Let's get real clear about one thing.  
15:24:25 18 There is nothing wrong with the Paxil pill. We're not  
15:24:31 19 claiming there's anything wrong with the Paxil pill.  
15:24:34 20 Nothing.

15:24:37 21 So why are we here? We are here because a product  
15:24:44 22 consists of the pill and the instructions and warnings that  
15:24:47 23 go along with it and those are inadequate and defective.

15:24:55 24 That's why we're here.

15:24:58 25 When they say that the product is not defective and  
15:25:05 1 they argue the facts, they're leaving out a very important  
15:25:09 2 part of the picture, and that is that a product maker must  
15:25:22 3 foresee the uses of its product.

15:25:30 4 You don't have to take my word for this. His Honor  
15:25:33 5 will be giving you comprehensive instructions on product  
15:25:37 6 liability law. When SmithKline Beecham says their product is  
15:25:45 7 not defective, they overlook the fact and the law that an  
15:25:52 8 inadequate or improper warning can make a product defective.  
15:26:08 9 A defective product can include a product which has  
15:26:11 10 inadequate or improper warnings.

15:26:19 11 When they say their product is not defective, they  
15:26:22 12 overlook the fact that a manufacturer like SmithKline Beecham  
15:26:31 13 has an obligation to give appropriate warnings of any, any  
15:26:49 14 dangerous condition -- I have to abbreviate -- which is  
15:27:02 15 likely to be encountered and sometimes it will.

15:27:05 16 Sometimes because Paxil, a good pill, is given, but  
15:27:12 17 there are inadequate instructions, inadequate warnings,  
15:27:18 18 inadequate information is given out, it becomes a defective  
15:27:24 19 product, not the pill per se, but because it doesn't have the  
15:27:31 20 proper warning.

15:27:32 21 So, ladies and gentlemen, I just wanted to clarify  
15:27:36 22 where we stood. We're not attacking Paxil as a drug, per se.

15:27:44 23 Now, the defendant says we didn't cause -- that  
15:27:58 24 SmithKline Beecham did not cause these deaths. It is very  
15:28:03 25 important that we talk for a minute about what that means.  
15:28:10 1 You will hear later what goes into cause and a cause is  
15:28:18 2 something that plays a substantial part in bringing about an  
15:28:28 3 event like happened here.

15:28:30 4 It doesn't mean -- and I want to make this very clear  
15:28:33 5 because you're going to hear the word "strict liability."  
15:28:37 6 When we're talking about strict causation and SmithKline  
15:28:40 7 Beecham defends on the issue of causation, we're not talking  
15:28:44 8 about absolute liability. That's not what it means. And  
15:28:49 9 we're not here to tell you that strict product liability  
15:28:54 10 means absolute liability.

15:29:01 11 If the Paxil lacking the defective instructions for  
15:29:07 12 Dr. Patel played a substantial part, then it is a cause.  
15:29:16 13 SmithKline Beecham defends on the grounds that they didn't  
15:29:18 14 cause this. SmithKline Beecham's lack of instructions and  
15:29:22 15 warnings only need be a cause. As Mr. Vickery told you, you  
15:29:29 16 might find that Mr. Schell was somewhat at fault here and he  
15:29:36 17 would be, if you did, a cause. SmithKline Beecham would be a  
15:29:43 18 cause.

15:29:46 19 We are not saying that you must absolutely find it is  
15:29:49 20 100 percent SmithKline Beecham's fault here. Our view as we  
15:29:58 21 put this case to you is that it is, but you have the power.  
15:30:01 22 I don't have the power. I don't go back to the jury room.  
15:30:04 23 My job here is to try to clarify some points that may not be  
15:30:09 24 all that clear once we have all sat courageously through two  
15:30:16 25 and a half weeks of some very tedious testimony, important  
15:30:20 1 but sometimes a little hard to listen to.

15:30:23 2 But you have the power. You can walk back in here  
15:30:29 3 with your verdict form and put any percentages that you want  
15:30:33 4 to on that verdict form.

15:30:38 5 So was it defective? Yes, it was defective. Not as  
15:30:42 6 a pill but because of what wasn't said. And that is defect.  
15:30:48 7 And then causation, it only has to be a cause. And when you  
15:30:56 8 find those two things, then you can turn to the question of  
15:31:01 9 whether Don Schell should be blamed to some degree. It is  
15:31:09 10 your power.

15:31:17 11 Now, let's look at a couple of common-sense things --

15:31:24 12 MR. FITZGERALD: May I have, please, a ten- or  
15:31:26 13 five-minute warning? Would the Court indulge me in that?

15:31:30 14 THE COURT: Sure, I will ask the clerk to do so.

15:31:34 15 MR. FITZGERALD: Sherry McGrath. Let's recall, she's  
15:31:38 16 on the witness stand, brought up here by SmithKline, and  
15:31:41 17 there's some suggestion that Rita was out that evening and  
15:31:44 18 who knows where she was.

15:31:45 19 Let's test this testimony against our common sense  
15:31:53 20 because it is pretty likely that Rita was out showing the  
15:31:55 21 house that evening. That's why she wasn't home.

15:32:00 22 Well, let's think about it in terms of our everyday  
15:32:05 23 lives. Here's Sherry McGrath and here's Rita Schell and  
15:32:10 24 they're having this conversation that Sherry describes around  
15:32:15 25 6:30 in the evening.

15:32:18 1 What didn't we hear from Sherry McGrath? "Well,  
15:32:21 2 Rita, is Mr. Jamieson showing some interest in the house?  
15:32:31 3 Did he have any questions about it? Does he want some more  
15:32:31 4 information? Does it look like we might get a sale out of  
15:32:33 5 this? Is there anything I can do to help you?"

15:32:37 6 No, we didn't hear any of that because Rita hadn't  
15:32:42 7 been out there yet to show the house. But we do have the  
15:32:47 8 innuendo that she's a missing person somewhere. So if you  
15:32:54 9 really think about it, I hope SmithKline Beecham is not  
15:32:59 10 blaming Rita Schell. But in a way they are. They say well,  
15:33:02 11 she was on the phone for 20 minutes and that certainly would  
15:33:06 12 have made Mr. Schell upset.

15:33:09 13 I'm not trying to imitate Mr. Preuss here. I'm  
15:33:13 14 talking about SmithKline Beecham as a party. Mr. Preuss is a  
15:33:21 15 consummate gentleman. Nevertheless, SmithKline's defense is  
15:33:26 16 that Rita would have been in trouble and probably was for  
15:33:30 17 being on the phone for 20 minutes. Why would she stay on the  
15:33:35 18 phone for 20 minutes if she's going to be in trouble?

15:33:40 19 That wasn't the rule. Tim Tobin lived out in that  
15:33:44 20 house and said that wasn't the rule. People in the real  
15:33:47 21 estate community, try not to call after 9:00. We can accept  
15:33:52 22 that. Whose rule? If it was Don's rule, don't you think she  
15:33:57 23 would have been off the phone as soon as possible -- "I got  
15:33:59 24 to go" -- not 20 minutes. Doesn't make common sense.

15:34:05 25 Let me tell you about one thing that doesn't make any  
15:34:09 1 sense in human affairs. Now, I am a parent but I'm obviously  
15:34:24 2 not a mother but I'm married to the mother of my children and  
15:34:33 3 I have seen in my lifetime that the strongest instinct that I  
15:34:41 4 know of, and we've all experienced quite a number of  
15:34:45 5 instincts, is the bond between a mother and the baby.

15:34:54 6 Now, if Deb Tobin --

15:35:06 7 THE CLERK: Ten minutes.

15:35:08 8 MR. FITZGERALD: Thank you very much.  
15:35:09 9 If Deb Tobin had had any idea that her baby was in  
15:35:13 10 danger in that household, she wouldn't have stayed. She  
15:35:19 11 would have left that evening. She would have gone somewhere  
15:35:23 12 else.

15:35:25 13 Now, SmithKline Beecham tells you that the pills are  
15:35:29 14 prescribed, and it is true, to be taken at bedtime. So  
15:35:35 15 here's the mother, newborn child, it is like -- it is just a  
15:35:43 16 powerful instinct. She's going to take care of that newborn  
15:35:48 17 child. And some of you have had that experience.

15:35:53 18 If that baby were in danger, she wouldn't have  
15:35:57 19 stayed. They went to bed. They were in their bedclothes.  
15:36:00 20 Don Schell took his second dose of Paxil. It was in his  
15:36:08 21 system, caused him agitation. There's evidence in this  
15:36:16 22 courtroom in Exhibits 12 and 14 that it can cause  
15:36:20 23 hallucinations. Something went terribly wrong and he killed  
15:36:28 24 1, 2, 3, 4 people. The unsuspecting mother of the infant.  
15:36:46 25 Something went terribly wrong.

15:36:49 1 Dr. Mann says that suicide is multi-factorial, it has  
15:36:57 2 a biological component. Let's think about it. What is  
15:37:00 3 different in the biology of Don Schell that wasn't present  
15:37:03 4 for these whatever number of years, depressions that he  
15:37:05 5 suffered. Depression is such a terrible thing. I'm sorry  
15:37:11 6 for people who suffer it. But what changed in his biology?  
15:37:17 7 It is multi-factorial, has a biological component.

15:37:21 8 Well, throughout all of those depressions he never  
15:37:27 9 harmed a flea, but he takes Paxil pills, and these are  
15:37:37 10 established facts in this case and you will be hearing them  
15:37:39 11 again from His Honor, two of the prescribed Paxil pills and  
15:37:43 12 two of the Ambien pills were not accounted for at the time  
15:37:46 13 the bodies were discovered and presumed to be ingested by  
15:37:50 14 Donald Schell. The toxicology report for Donald Schell  
15:37:54 15 indicated that he had 13 nanograms per milliliter of

15:37:59 16 paroxetine and 11 nanograms per milliliter of Ambien in his  
15:38:06 17 blood at the time of his death. Such levels are consistent  
15:38:11 18 with the ingestion of Paxil and Ambien.

15:38:19 19 Well, they say the plaintiffs have no evidence. You  
15:38:21 20 know, we look at these Exhibits 12 and 14, and you will see  
15:38:25 21 them, and it is all these studies with all of those 5s on  
15:38:28 22 them. And you don't have to take my word for it. You can  
15:38:31 23 look at it.

15:38:32 24 But I went through some of them yesterday, and I've  
15:38:35 25 got -- I have two pages here and they say agitation,  
15:38:40 1 definitely related; restless, definitely related; anxiety,  
15:38:47 2 disoriented, confusion, definitely related;  
15:38:50 3 depersonalization, definitely related; attempted suicide,  
15:38:53 4 definitely related; attempted suicide, definitely related;  
15:39:01 5 suicidal ideas, definitely related; suicide attempt,  
15:39:01 6 definitely related; hallucinations, definitely related;  
15:39:06 7 hallucinations, definitely related.

15:39:08 8 They say, "Well, you can't just rely on a single  
15:39:10 9 report." Well, let's talk about this. Remember Dr. Tardiff.  
15:39:14 10 He came in here and he gave us the four different styles or  
15:39:18 11 types of murder/suicide. And so when they're defending this  
15:39:22 12 case, what do they do, they go to single case reports.

15:39:27 13 Let me look at this. I have it exactly right because  
15:39:29 14 I thought it was striking. He cited a single case report  
15:39:33 15 from Japan in 1956 for one of his categories. He cited a  
15:39:39 16 single case report from Australia of 1975 for one of his  
15:39:44 17 categories.

15:39:45 18 They can't pick and choose, ladies and gentlemen.  
15:39:47 19 And they want to. And they want you to. They want you to  
15:39:55 20 say well, there was that committee of scientists and that  
15:39:59 21 committee of scientists where they met and they voted 6 to 3.

15:40:07 22 Well, the 3 are sitting with us, not physically, but  
15:40:13 23 they're here in spirit, and you have the power to join them  
15:40:18 24 and to say, "Please just tell Dr. Patel and doctors like him  
15:40:25 25 the whole truth. Sometimes there is a connection. Sometimes  
15:40:33 1 people will have suicidal ideation. Sometimes they will have  
15:40:37 2 hallucinations. Sometimes they will need a sedative. So  
15:40:41 3 please, you internists out there who prescribe our pills,  
15:40:45 4 please take heed, please take heed and remember to get a  
15:40:51 5 detailed history and to monitor carefully and to empower the  
15:41:00 6 family."

15:41:01 7 Well, that's a perfectly good idea. We heard about  
15:41:04 8 that. Let's empower the family with the information so that  
15:41:09 9 Dr. Patel can say, "I'm going to prescribe Paxil."

15:41:14 10 Let's go to Dr. Patel's office. Here's Dr. Patel.  
15:41:18 11 "I have examined you now, Mr. Schell. And, Mrs. Schell,  
15:41:21 12 thank you so much for coming in. And I'm going to prescribe  
15:41:24 13 the medication. It is called Paxil. I think it will help  
15:41:27 14 you. It helps a lot of people. I do want to caution you  
15:41:31 15 about some things. For some people it causes hallucinations.

15:41:36 16 For some people it causes agitation or anxiety.

15:41:40 17 "Tell me, let's go through your history. Have you  
15:41:44 18 seen a psychiatrist? How many times? What for? What was  
15:41:48 19 the outcome? Have you had medications before? How did they  
15:41:51 20 work? Tell me about your experience on them."

15:41:55 21 You see, because Dr. Patel would be empowered by  
15:41:58 22 SmithKline Beecham and then he could empower the family and  
15:42:02 23 say, "Okay, Mrs. Schell, Mr. Schell, now that I have your  
15:42:06 24 history I want to tell you, I'm going to prescribe a  
15:42:09 25 sedative."

15:42:12 1 Dr. Patel: "If I had known this information, I would  
15:42:14 2 have handled the case differently."

15:42:16 3 "I'm going to prescribe a sedative and I'm going to  
15:42:20 4 make certain that you monitor Mr. Schell very carefully. And  
15:42:24 5 I'm going to check on you and I'm going to and I'm going to  
15:42:29 6 and I'm going to and I'm going to," because he would have had  
15:42:34 7 power.

15:42:47 8 Okay, you know, I can't rebut everything that was  
15:42:49 9 said. There has been a ton of evidence here. There are just  
15:42:56 10 some minor points.

15:42:57 11 And may I have two minutes, please? Maybe I'm there.

15:43:02 12 THE CLERK: Two minutes.

15:43:03 13 MR. FITZGERALD: Possessive, not according to Father  
15:43:06 14 Ogg. Rita was her own person according to Shirley Pettigrew.  
15:43:13 15 There are lots and lots of issues here and I know you will  
15:43:17 16 sort through them carefully.

15:43:22 17 Mr. Vickery asked for a lot of money. It is because  
15:43:27 18 there's a lot of justice to be done here. And I want to tell  
15:43:31 19 you that the eight of you have precisely the right instrument  
15:43:39 20 at precisely the right time in history with precisely the  
15:43:43 21 right kind of information and with precisely the right kind  
15:43:48 22 of courage to say to them, "Stand up and take responsibility  
15:43:55 23 for getting better information out to the Dr. Patels and the  
15:43:59 24 Don and Rita Schells and the Alyssa Tobins and the Deb Tobins  
15:44:03 25 of this world."

15:44:04 1 Now, I want to close with this: It is time to say  
15:44:09 2 good-bye to Don Schell, good-bye to Rita Schell, good-bye to  
15:44:19 3 Deb Tobin and good-bye to Alyssa Schell. But I ask you this,  
15:44:26 4 please make their lives and their deaths stand for something.  
15:44:42 5 You have the power.

15:44:47 6 THE COURT: Thank you very much, Counsel.

7 (Instructions to the jury not transcribed.)  
8 (Trial proceedings recessed 4:45 p.m., reconvened  
9 5:10 p.m., and recessed 5:15 p.m., June 5, 2001.)  
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C E R T I F I C A T E

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3 I, JANET DEW-HARRIS, a Registered Professional  
4 Reporter, and Federal Certified Realtime Reporter, do hereby  
5 certify that I reported by machine shorthand the excerpted  
6 trial proceedings, Volume XI, contained herein, and that the  
7 foregoing 92 pages constitute a true and correct transcript.  
8 Dated this 27th day of June, 2001.  
9

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11 JANET DEW-HARRIS  
12 Registered Professional Reporter  
Federal Certified Realtime Reporter

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