

1 any comments along those lines? About asking to enter a
2 judgment on an area that you have little experience or
3 exposure to.

4 MR. EGLET: May we approach, Your Honor?

5 THE COURT: Yes.

6 [Bench Conference Begins]

7 MR. EGLET: Your Honor, at this time I'm going to ask
8 that the Court give an instruction to the jury panel that
9 they're not permitted to go do their own research, do their
10 own investigation, do any of that stuff, we just had a juror
11 Mr. Aquino who just stated that if he had a question he would
12 go and research is own text and look at his own text and see
13 what was right.

14 They need to be informed of that right now. This
15 jury needs to be informed of that to let them know that they
16 can't do that.

17 THE COURT: Well I think not only that but the other
18 prospective juror that asked if she could speak to her
19 colleagues about the case in --

20 MR. EGLET: Yeah.

21 THE COURT: -- and refer to the case --

22 MR. EGLET: Right.

23 THE COURT: That needs to be addressed too. Because
24 that's one of the admonishments the Court gives the jurors,
25 too.

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1 MR. EGLET: And I would request it be addressed now --

2 THE COURT: Sure.

3 MR. EGLET: While the subject's coming up.

4 MR. WALL: I mean it might come across as a rebuke,
5 but --

6 THE COURT: I don't it would be -- I wouldn't
7 [indiscernible].

8 MR. WALL: I trust. Okay.

9 [Bench Conference Ends]

10 THE COURT: You know, ladies and gentlemen it occurs to
11 me that probably there are some instructions that I should
12 give you now since you're going to hear them later after the
13 jury is impaneled. And a couple of you have addressed some
14 questions, I think they're good questions.

15 One of them was, can you take notes? And the answer
16 is: Yes you can take notes. And after your impaneled and
17 while the Court gives you some preliminary instructions you
18 will actually be given notepads and pencils so you can take
19 notes.

20 You're not to rely entirely on the notes. You're to
21 rely on your own recollection, because sometimes people write
22 things down incorrectly. So you're obligated to rely on your
23 own recollection.

24 One of the other questions was can you discuss the
25 case with each other. You may discuss the case with each

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1 other. You may not discuss the case with anyone during the
2 course of the trial. The only time you can talk about the
3 case with each other is when you get the case and go
4 deliberate.

5 So the rest of the -- in fact the Court gives you
6 daily instructions on these types of things. You're not
7 allowed to do any independent research on the case. You're
8 not allowed to consult the internet or do any research
9 whatsoever. You're not allowed to talk to anybody about the
10 case. You're not allowed to consult with anybody about the
11 case. And you're to determine the facts of the case on only
12 what you see and hear in this courtroom. Not on anything
13 else. So there are a number of instructions the Court gives
14 you. It's probably good to give you those thoughts now, since
15 you're obviously thinking about it.

16 I'm glad you're thinking about it. And I think
17 that's enough said. All right? Okay.

18 Sorry for the interruption, Mr. Rogers. Please
19 proceed.

20 MR. ROGERS: Okay. I want to switch to the burden of
21 proof now. The Plaintiffs burden is to convince you that his
22 claim is right. Now, does anyone here, just by raising hands
23 think it should be the other way? That the Defendant, Ms.
24 Rish, should have a burden?

25 There are some who think: Well, if it seems even.

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1 If the Plaintiff says look I've got just enough evidence here,
2 but on the same token there's just enough question about that
3 evidence that, oh I could side for the Plaintiff on this one.
4 It kind of gets back to Plaintiff counsel's discussion about
5 the burden.

6 Does anybody here believe that they will lean in
7 favor of the Plaintiff even if his evidence is only 50
8 percent?

9 There was an example that the Plaintiff gave that a
10 lot of you, I think, intuited the difference in. And that was
11 the fellow with the knees complaints in the hallway versus the
12 knee complaints here in court.

13 Mr. Barrett [phonetic], I haven't call you out yet.
14 But what in your view is the difference?

15 PROSPECTIVE JUROR BARRETT: Well I think if someone's
16 just discussing something on the street with you, an
17 acquaintance, you would tend to take their -- what they say at
18 face value.

19 Whereas if it's on a stand they have a burden of proof.
20 They are testifying under oath. And people are allowed to
21 dispute their version of things and decide if they're telling
22 the truth or not.

23 MR. ROGERS: Okay. Ms. K --

24 PROSPECTIVE JUROR KUNGLE: Kungle [phonetic].

25 MR. ROGERS: Kungle. Yes.

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1 PROSPECTIVE JUROR KUNGLE: Yeah.

2 MR. ROGERS: Okay. And what's your take on that?

3 PROSPECTIVE JUROR KUNGLE: As far as someone saying to me
4 outside, that their knee would be hurting, I would have no
5 reason to doubt them. Like I won't walk up to somebody and
6 say, "Gee my knee hurts." For no reason at all. I just have
7 that kind of faith in people.

8 And as far as on the stand, if it's a professional
9 that were -- are we speaking about a professional saying --

10 MR. ROGERS: Oh, yeah. Let me clarify. Just a person
11 who's making the claims for themselves. They're saying no this
12 -- it's my knee that hurts. Not an expert or a professional
13 saying that person's --

14 PROSPECTIVE JUROR KUNGLE: Oh okay.

15 MR. ROGERS: -- knee hurts.

16 PROSPECTIVE JUROR KUNGLE: Well I would like to believe
17 them if they were under oath and they were saying, "My knee
18 hurts." I don't lie if I was under oath.

19 MR. ROGERS: Okay. And what -- how do you bring the
20 burden of proof into that. In other words, do you take the
21 person in the hallway for face value.

22 PROSPECTIVE JUROR KUNGLE: Right.

23 MR. ROGERS: You're taking them at their word.

24 PROSPECTIVE JUROR KUNGLE: Right.

25 MR. ROGERS: In this case, in the courtroom, you've got a

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1 burden of proof.

2 PROSPECTIVE JUROR KUNGLE: Okay.

3 MR. ROGERS: And this is where evidence comes into play.

4 PROSPECTIVE JUROR KUNGLE: Okay.

5 MR. ROGERS: And this is an --

6 MR. EGLET: Your Honor, I'm going to object. Testimony
7 is evidence.

8 THE COURT: Would counsel approach, please?

9 MR. ROGERS: Sure.

10 [Bench Conference Begins]

11 MR. EGLET: Counsel's attempting to imply that witness's
12 testimony is not evidence. And that's not something that goes
13 toward Plaintiff establishing their case, is if -- there has
14 to be more than just testimony. And that's not the case.
15 Okay?

16 He's differentiating -- he says, "Well okay. You'd
17 take him at face value. But if somebody who is testifying,
18 well there has be evidence." Well that is evidence.

19 THE COURT: Well it --

20 MR. ROGERS: No. That's -- I'm sorry.

21 THE COURT: Go ahead.

22 MR. ROGERS: That wasn't the implication at all. It's
23 whether that alone would be sufficient evidence for her.
24 That's the question. Whether she might require something more
25 -- this relates back to his 50 or 60 or 70 percent question.

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1 MR. WALL: That's a question that I decided and
2 anticipated verdict under 770 --

3 MR. EGLET: Yeah.

4 MR. WALL: Is testimony enough or do we need expert
5 testimony. Is it going to be enough that he says that?
6 That's a question on an ultimate issue of fact. And
7 essentially under 770, I don't know if it's B or C, it's an
8 anticipate a decision based on certain evidence. If that is
9 what the question is, then it's appropriate.

10 MR. ROGERS: See my hypothetical was totally different
11 than he was giving.

12 THE COURT: Uh-huh.

13 MR. EGLET: My hypothetical was simply would your first
14 thought/impression be to believe them without -- or would you
15 tend not to believe them and require additional proof.

16 He's actually commenting on the actual evidence in
17 this case and a party testifying are you going to believe them
18 on that or are you going to require more proof.

19 And as Mr. Wall says that touches directly on the
20 Nevada statute and he can't do that.

21 MR. WALL: Especially against the backdrop of 50/50 and
22 it's even, or you know, is that going to be enough.

23 THE COURT: Uh-huh.

24 MR. WALL: Because I was in that area immediately prior to
25 this.

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1 THE COURT: Well I'm inclined to sustain the objection.
2 I think I have to sustain the objection. I think this is a
3 fair area -- I think this is a fair subject matter for you to
4 follow up on, but I think you're going to need to redraft your
5 questions in order to be able to properly follow up.

6 I understand, I think, where you want to go. But I think
7 you need to refocus your questions.

8 MR. EGLET: All right. Thank you, Your Honor.

9 MR. ROGERS: Well hold up. Let me --

10 MR. EGLET: Well I think it -- I'm sorry.

11 MR. ROGERS: -- fine tune it here --

12 MR. EGLET: Did you just rule, Your Honor?

13 THE COURT: Uh-huh.

14 MR. EGLET: Okay.

15 MR. ROGERS: Well I'm going to ask then if this is
16 appropriate, and that is if the -- if Plaintiff counsel, for
17 example were able to ask about quantifying the persuasion,
18 you'd have to persuade at least 70 percent or 80 percent,
19 Defense counsel should be permitted to inquire, well are you
20 going to require additional evidence that is the same thing.
21 Only this just puts a concrete example to the number that the
22 Plaintiff already inquired to.

23 MR. EGLET: No. It doesn't -- it's a total -- you --

24 MR. ROGERS: Of course it does.

25 MR. EGLET: No. It doesn't. Okay. Once again counsel

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1 is comparing apples to oranges, Your Honor. He's specifically
2 asking well if -- did -- if the party alone says this, are you
3 going to require additional evidence. And he's not even
4 giving a hypothetical. He's talking about, you know, in a
5 case like this. So it's a totally different situation. And
6 the Court's already ruled on it. So --

7 THE COURT: Well here's the thing, I think part of the
8 problem is that, I'm not sure if one or several -- at least in
9 my mind it's several issues, because I think the burden of
10 proof is a very different subject matter than one's
11 credibility.

12 MR. EGLET: Yes.

13 THE COURT: One's credibility is a separate matter apart
14 from whether or not you have expert testimony. So I think
15 there's a lot of things you're kind of lumping together.

16 I think the question you just posed now, it would
17 also be objectionable and the Court would be inclined to
18 sustain that objection if you posed that particular question.
19 So let's -- you know what, let's take about a ten minute
20 break.

21 MR. ROGERS: All right.

22 MR. EGLET: For the record, Your Honor. The objection is
23 sustained?

24 THE COURT: Objection is sustained for the record.

25 [Bench Conference Ends]

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1 Let's take about a ten minute break ladies and
2 gentlemen. Remind you of your obligation not to talk to
3 anyone about this case. Not to form or express any opinion.
4 Not to do any research on any subject connected with this
5 case. Thank you.

6 [Recess]

7 THE MARSHAL: Remain seated. District Court X is back in
8 session.

9 THE COURT: Thank you. We're ready for our panel, aren't
10 we?

11 UNIDENTIFIED SPEAKERS: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. ROGERS: I believe so.

14 THE MARSHAL: The jury is coming in.

15 [Prospective Jury In]

16 THE COURT: Okay. Please be seated. Mr. Rogers,
17 whenever you're ready to resume.

18 MR. ROGERS: Thank you, Your Honor. All right, Ms.
19 Gilmore [phonetic].

20 PROSPECTIVE JUROR GILMORE: Yes.

21 MR. ROGERS: Where you and I left off was a discussion of
22 the burden of proof and at the end of the case if the
23 Plaintiff asks for two million dollars, but you find the
24 Plaintiff didn't meet his burden of proof, would you have any
25 difficulty finding against him? If I'm not clear, just tell

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1 me.

2 PROSPECTIVE JUROR GILMORE: Okay. Can you just say it --
3 repeat it once more for me?

4 MR. ROGERS: Yeah. Let's say at the end of this case --

5 PROSPECTIVE JUROR GILMORE: Okay.

6 MR. ROGERS: -- the Plaintiff does as was discussed
7 earlier and asks for a million or two million dollars.

8 PROSPECTIVE JUROR GILMORE: Okay.

9 MR. ROGERS: You find that the Plaintiff didn't meet his
10 burden of proof.

11 PROSPECTIVE JUROR GILMORE: Okay.

12 MR. ROGERS: Will you have any difficulty saying you
13 didn't meet your burden, you're not entitled to an award of
14 money?

15 PROSPECTIVE JUROR GILMORE: I wouldn't have any
16 difficulty.

17 MR. ROGERS: Okay. Ms. Grant [phonetic], same question
18 to you.

19 PROSPECTIVE JUROR GRANT: I wouldn't have any difficulty.

20 MR. ROGERS: All right. There are a couple I still
21 haven't spoken with today. Ms. Bell, same question. If the
22 Plaintiff doesn't meet its burden of proof, let's say you
23 sympathize for him but you decide, you know what, I don't
24 think you established this accident caused what you're
25 claiming, will you have any difficulty entering a judgment

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1 that he's not entitled to an award of money?

2 PROSPECTIVE JUROR BELL: It would have to be based on
3 proof somehow.

4 MR. ROGERS: That -- and the question if -- I may not
5 have been clear. The question presumes that because the
6 Plaintiff didn't meet his burden of proof. It's the Plaintiff
7 who has to convince you of this.

8 MR. EGLET: Your Honor, I'm going to object to the term
9 convince. It's not the burden of proof in Nevada. It's not --

10 MR. ROGERS: It absolutely is, Bob.

11 MR. EGLET: It is not, counsel.

12 MR. ROGERS: You objected to open --

13 MR. EGLET: May we approach?

14 THE COURT: Hold on, hold on, hold on. Heard enough
15 arguing for one day.

16 [Bench Conference Begins]

17 MR. EGLET: We would object to him using the word --

18 THE COURT: Wait for everybody.

19 MR. EGLET: I'm objecting to him using the word convince,
20 okay, because that implies a higher standard than just more
21 likely than not. Preponderance of the evidence, nowhere does
22 it say convince. It says just more likely than not.

23 THE COURT: It's usually argued as persuade.

24 MR. EGLET: Yes.

25 MR. ROGERS: That'd be convince is synonymous with

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1 persuade.

2 MR. EGLET: Convince implies clear and convincing --

3 THE COURT: Wait, wait, wait. Keep your voices down.

4 MR. EGLET: Convince implies clear and convincing

5 evidence which is well above the standard okay?

6 THE COURT: I think I know where Mr. Eglet's coming from.

7 I'm thinking of clear and convincing standard and I don't know

8 if that's what you were thinking. But I think persuade is

9 probably a better term. Let's go with that.

10 MR. ROGERS: Let's go back to something though.

11 Plaintiff earlier objected to Defense counsel making

12 objections in open Court and asked that we approach.

13 Plaintiff's counsel walked away from the last objection and

14 announced proudly in front of the jury, so the objection is

15 sustained. Completely a double standard here. If they want

16 to keep the objections at the bench, then you do it, too.

17 You're the one who asked for it.

18 MR. EGLET: We're making our argument at the bench.

19 MR. ROGERS: And you didn't though. You still have a --

20 MR. EGLET: You're right. I will make my argument at the

21 bench.

22 THE COURT: There's no double standard here. If you want

23 to relay what we've done on the record after you walk away,

24 I'm fine with that.

25 MR. ROGERS: No, the double standard is their request.

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1 It's not you. It's the question that we approach on
2 everything to keep things away from the jury. And then when
3 it's my turn to vet them, the Plaintiff starts objecting in
4 open Court and asking Your Honor to announce your ruling.
5 That's contra --

6 MR. EGLET: And now let's see who is making the record,
7 Your Honor.

8 THE COURT: What we talked about was no speaking
9 objections.

10 MR. EGLET: Yes.

11 THE COURT: And I think we were all on the same page with
12 respect to no speaking objections. I think what I stated was
13 you can state an objection and the lawyer [indiscernible] then
14 it's probably acceptable. Nothing's changed.

15 MR. ROGERS: All right.

16 MR. EGLET: Thank you.

17 [Bench Conference Ends]

18 MR. EGLET: For the record, Your Honor, the objection's
19 sustained.

20 THE COURT: It is for the record. The objection's
21 sustained.

22 MR. ROGERS: The word then is persuade. If the Plaintiff
23 doesn't persuade you that this accident caused the injuries
24 that he's claiming and he asks for an award of a million or
25 two million, will you have any difficulty, even if you have

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1 sympathy, in finding that he did not meet his burden of proof?
2 And that he is not entitled to an award of money?

3 PROSPECTIVE JUROR BELL: I will not have any difficulty
4 whatsoever.

5 MR. ROGERS: And Mr. Johnson, same question.

6 PROSPECTIVE JUROR JOHNSON: If he was asking for a sum of
7 money and I don't think after everything's been displayed that
8 he deserves that amount of money, no, I would not have any
9 problem saying no.

10 MR. ROGERS: Okay. Let me go back to something that we
11 discussed a little bit earlier to the same question. And that
12 is the difference between mediating and judging. Would you
13 have any difficulty setting aside sympathy and entering a
14 judgment of no award for damages instead of saying you know
15 what, maybe I could just split this one in half and call it
16 good.

17 PROSPECTIVE JUROR JOHNSON: No, not at all.

18 MR. ROGERS: All right. Let's see who has not spoken.
19 Ms. Ellis. I don't think we've discussed anything today.
20 Same question then to you.

21 PROSPECTIVE JUROR ELLIS: No, I wouldn't. I wouldn't
22 have a problem.

23 MR. ROGERS: Okay. And Ms. Sweet [phonetic].

24 PROSPECTIVE JUROR SWEET: No, I wouldn't have any
25 problems.

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1 MR. ROGERS: Now something that was discussed at length
2 during the Plaintiff's questioning is personal responsibility.
3 Everyone naturally is in favor of personal responsibility.
4 Somewhere along the way, the example of the broken window came
5 up. If you do that, if you break someone's window, you should
6 take responsibility for it. And Ms. Nolte, this one is for
7 you. Let's say that you do break someone's window and you
8 accept responsibility for that. Then that person says it's
9 going to cost \$10,000 to fix. But you don't believe that.
10 You think fully accepting responsibility for your actions
11 means that you're obliged to accept the amount that that
12 person demanded.

13 PROSPECTIVE JUROR NOLTE: No, in speaking from like the
14 window incidence, something like that, I would be going out
15 and getting my own appraisals and finding out what something
16 like that would cost. And that's what I would present to the
17 person who owns the window that I broke. I'd say, you know,
18 here's several of these appraisals that I've gotten, I'm
19 willing to pay even the highest of those. I'm not going to be
20 paying something that is way over and above the damages that
21 I've caused.

22 MR. ROGERS: Okay. Ms. [indiscernible], any thoughts on
23 that same subject? You've done this thing, you've broken
24 someone's window, but they are requesting an amount that you
25 think is excessive? Do you have to accept their amount to

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1 have accepted responsibility?

2 UNIDENTIFIED PROSPECTIVE JUROR: I would probably do the
3 same thing that she mentioned. Just like if you're in a car
4 accident, you get different appraisals for your insurance
5 company. I would have someone come, you know, do the
6 diameters, you know, what we're talking about, a little
7 window, a huge window. See how much it costs and also, you
8 know, see where our differences are and say, you know, how are
9 you coming at your estimate when my estimates, you know, are
10 much lower.

11 MR. ROGERS: Okay. It sounds like a common theme in both
12 of these answers is that you would take it upon yourselves to
13 go out and insure that what you're responsible for is really
14 what they're asking. Is there anybody here who views this any
15 different than the comments that we've gotten so far. Ms.
16 Rosinski.

17 PROSPECTIVE JUROR ROSINSKI: No, I would definitely take
18 care of it myself. I would not just take by word what he --
19 well the person that had the broken window. I would
20 definitely take care of that myself. And no, I would not have
21 a problem, what was the -- I would not have a problem -- yeah,
22 saying no to that or whatever it was that you said. Okay.

23 MR. ROGERS: All right. Ms. Zere [phonetic], same
24 question then for you.

25 PROSPECTIVE JUROR ZERE: Yes.

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1 MR. ROGERS: You've broken the window, they've asked for
2 what appears to you to be more --

3 PROSPECTIVE JUROR ZERE: Yes, I'd take responsibility and
4 I would pay and I would get several prices for that window
5 that fits that window instead of working that window. And I
6 would pay for that with that.

7 MR. ROGERS: Okay. Now is there anybody here who views
8 this different in any way from the comments that we've heard
9 so far? All right.

10 UNIDENTIFIED PROSPECTIVE JUROR: I do have one more
11 comment.

12 MR. ROGERS: Yes.

13 UNIDENTIFIED PROSPECTIVE JUROR: When they were going out
14 to find the window, it would have to be of the same quality
15 window and quote that they broke. Not just, you know, they
16 say \$10,000. Well, there are windows out there that do cost
17 that kind of money if it was like, you know, a big house, you
18 know, and they had those big huge glass windows. I'm not
19 going to expect them to come back with a quote of \$2,000 to
20 replace the window because then the window won't be the same
21 quality. So it's got to be the same quality that it was
22 before.

23 MR. ROGERS: Like for like.

24 UNIDENTIFIED PROSPECTIVE JUROR: Yep.

25 MR. ROGERS: Okay.

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1 UNIDENTIFIED PROSPECTIVE JUROR: Because I didn't damage
2 my own window. Someone else did it.

3 MR. ROGERS: Okay. Very good. Any other comments on
4 this line? Okay. Now in this case, you've seen plenty
5 already of objections. And we've got some sports fans here I
6 know and nobody really much likes to watch a game that's
7 muddled up with a lot of fouls and a lot of time out. Now
8 there will be times I anticipate throughout this trial where I
9 may object because there are rules to be enforced and some
10 people might not like that. Might take offense, you know,
11 just like they might at a football game because too many fouls
12 are getting called. Is anybody here going to hold it against
13 Mrs. Rish, because this isn't about me, if during the course
14 of the trial I stand up for an objection to things that I
15 perceive to be inappropriate? Okay. Yes.

16 UNIDENTIFIED PROSPECTIVE JUROR: Basically, you each have
17 to do what you feel is best your claim so that's what pulls
18 them too.

19 MR. ROGERS: Okay. I didn't know if that was a hand
20 or --

21 UNIDENTIFIED PROSPECTIVE JUROR: No, I was just getting
22 my hair out of my eyes.

23 MR. ROGERS: Okay.

24 UNIDENTIFIED PROSPECTIVE JUROR: Sorry.

25 MR. ROGERS: All right. Now revisiting just briefly the

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1 burden of proof, because this is a case at law, it begins with
2 pleadings where one party files a complaint, that would be the
3 Plaintiff and then the Defendant files what's called an
4 answer. And in the pleadings, the parties can assert their
5 rights to put the other onto their burden of proof.

6 MR. WALL: Your Honor, may we approach please?

7 THE COURT: Yes.

8 [Bench Conference Begins]

9 MR. WALL: I'm objecting somewhat anticipatory because I
10 believe that this is going to be testimony as to why certain
11 things are put in the pleadings for the client. The client
12 shouldn't be held to what the lawyer did on behalf of the
13 client. That testimony in any form much less during jury
14 selection is inappropriate.

15 THE COURT: Is that where you're going?

16 MR. ROGERS: No, it's not. The question is whether they
17 would just like the objections, hold that against me, whether
18 they would hold it against the Defendant if she held the
19 Plaintiff to the burden of proof.

20 THE COURT: Why were you talking about the pleadings
21 then?

22 MR. ROGERS: Because she denied the allegations. She was
23 entitled to hold the Plaintiff to the burden of proof. Is the
24 jury going to hold that against her?

25 THE COURT: Why don't you ask her this. Am I

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1 understanding the case -- is [indiscernible].

2 MR. EGLET: She has not. He hasn't --

3 MR. ROGERS: She actually did and the problem is that she
4 did not stipulate to their form of it. In her -- I'm not
5 quite done. In her [indiscernible] she admitted she was
6 informed. The Plaintiff then submitted a stipulation that was
7 over reaching and we said, look -- she's going to admit
8 liability and she already did. You have the deposition. You
9 don't need a broad sweeping stipulation that encompasses more
10 than that. And they chose not to accept. And they said well
11 we have her testimony. She's admitted the [indiscernible].

12 THE COURT: Well, here's a thought. I think --

13 MR. EGLET: We have that recorded.

14 THE COURT: -- if that's where you're -- no, you can
15 address that when you examine your client. You can ask him
16 all the questions you want to about the pleadings, that's
17 fair. But I think this is where you're headed. I'm going to
18 sustain the objection. However, you know, you told me the
19 substance of your question had to do with [indiscernible] to
20 hear that and I tried to [indiscernible] first.

21 MR. ROGERS: Okay.

22 MR. EGLET: Well, it really the way the question is
23 intended is will you hold it against the Defendant if she
24 denies the claims against her and holds the Plaintiff to his
25 burden of proof.

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1 MR. ROGERS: And that he is giving you the pleadings
2 which is [indiscernible]. Those questions are that the Court
3 says are appropriate [indiscernible].

4 MR. WALL: See, because the inference is when she denied
5 it, she didn't really mean to deny it.

6 THE COURT: Uh-huh.

7 MR. WALL: She and so that's testified on her behalf.

8 THE COURT: Yeah, I follow you.

9 MR. ROGERS: That's argument on it though. She has an
10 absolute right. It seems that if they're going to challenge
11 this, the question is will the jury be offended at her
12 absolute right to deny allegations of [indiscernible].

13 THE COURT: Well, and I think you can ask that question.
14 But I think you need to stay away from the pleadings and if
15 you use them, we would [indiscernible] if you want to address
16 that issue.

17 MR. ROGERS: Thank you, Your Honor.

18 MR. EGLET: Okay.

19 [Bench Conference Ends]

20 MR. EGLET: Objection sustained, Your Honor?

21 THE COURT: Yes.

22 MR. ROGERS: The question then is and I can't recall
23 right now the gentleman from up there. Who was I speaking
24 with? Anyone directly? Okay. We'll keep this one to
25 everyone.

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1 UNIDENTIFIED PROSPECTIVE JUROR: I thought you were
2 directing it to me.

3 MR. ROGERS: Okay. Good

4 UNIDENTIFIED PROSPECTIVE JUROR: Maybe I'm misunderstand.

5 MR. ROGERS: That will be great.

6 UNIDENTIFIED PROSPECTIVE JUROR: Maybe I'm
7 misremembering.

8 MR. ROGERS: Would you hold it against Mrs. Rish if she
9 denied any claims against her and held the Plaintiff to his
10 burden of proof?

11 UNIDENTIFIED PROSPECTIVE JUROR: No.

12 MR. ROGERS: Okay. Mr. Johnson.

13 PROSPECTIVE JUROR JOHNSON: I don't know -- just hear it.

14 UNIDENTIFIED PROSPECTIVE JUROR: Say again, I can't hear
15 you back here sometimes. Please.

16 MR. ROGERS: Yes. Okay. Is there any part of you that
17 would hold it against Mrs. Rish if she denied the claims that
18 Plaintiff has brought against her and put him to his burden of
19 proof?

20 UNIDENTIFIED PROSPECTIVE JUROR: I guess I'm not getting
21 it. Say it again please.

22 MR. ROGERS: All right. And sometimes I don't speak loud
23 enough. Is there any part of you that would be offended is
24 Mrs. Rish denied the claims the Plaintiff has brought against
25 her and put him to his burden of proof?

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1 UNIDENTIFIED PROSPECTIVE JUROR: Is that from the
2 Defendant -- it's --

3 MR. ROGERS: Okay.

4 UNIDENTIFIED PROSPECTIVE JUROR: Because I don't
5 understand.

6 MR. ROGERS: Okay. Let's take it to that window example
7 we discussed. Someone asks you for \$10,000 and you say, well
8 I've got this receipt here or this estimate that shows it's
9 not worth quite that so I'm denying that I owe you \$10,000.

10 UNIDENTIFIED PROSPECTIVE JUROR: Uh-huh.

11 MR. ROGERS: Do you view that as denying or avoiding
12 responsibility?

13 UNIDENTIFIED PROSPECTIVE JUROR: No.

14 MR. ROGERS: Okay. Does anybody here just by a show of
15 hands have any concern that they might hold it against Mrs.
16 Rish if she denies the claims brought against her and puts the
17 Plaintiff to his burden of proof? All right.

18 Now before I leave the sports example, that we left
19 off with the objections. Like all metaphors, they fall apart
20 under really close scrutiny. And one thing I want to dispense
21 with right now is this. This is not a competition. This is a
22 search for the truth. And is there anybody here views it
23 otherwise?

24 You were asked by Plaintiff's counsel during
25 questioning about experts, experts who are going to be paid,

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1 paid for their time to come in and testify. And if I
2 understood you all right, that's okay with you, you don't have
3 -- that's not going to cause you to question their
4 reliability. Was that everyone's answer?

5 PROSPECTIVE JURORS: Yes.

6 MR. ROGERS: Okay. What if I were -- yes.

7 UNIDENTIFIED PROSPECTIVE JUROR: When you say question
8 their reliability, I think the question was brought up from
9 what I understood was would we have a problem with having them
10 paid to come in and speak. Was that -- that's what I
11 understood as an expert.

12 MR. ROGERS: Okay.

13 UNIDENTIFIED PROSPECTIVE JUROR: Because sometimes you
14 have to pay an expert to come in or you have to pay somebody
15 to come in. It wasn't their reliability because sometimes I
16 could be an expert on third grade because I've taught for 16
17 years and you could pay me to be an expert. But what
18 characterizes them as an expert? Do we have any kind of
19 documentation that shows that they're an expert? And how do
20 we prove that they're an expert as compared to your expert and
21 their expert. So it's like of --

22 MR. ROGERS: No, you make a good distinction here. Let
23 me change the word reliability to credibility. Will the fact
24 that this person has been paid money in your view diminish
25 that person's credibility? Yeah, that is a good distinction

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1 and I think that's what you guys all said, you know, in a word
2 we understand these people get paid and if they're here that
3 means they're not elsewhere where they could be earning a
4 living.

5 Now the next question to that is this. What if I
6 were to bring in a witness who was a friend? A friend of
7 mine? Would that in your view weigh on that witness'
8 credibility? Yes.

9 UNIDENTIFIED PROSPECTIVE JUROR: Are they an expert?

10 UNIDENTIFIED PROSPECTIVE JUROR: How would we know -- how
11 would we have evidence that this witness is a friend of yours?

12 MR. ROGERS: Well, the only evidence you'll get from the
13 witnesses is their testimony aside from whatever documents
14 they might bring. So the testimony is this. This is a friend
15 of mine. Might that cause you to think that does affect my
16 view of his credibility.

17 UNIDENTIFIED PROSPECTIVE JUROR: But do they not have to
18 show us their credentials?

19 MR. ROGERS: Yes.

20 UNIDENTIFIED PROSPECTIVE JUROR: What their training is,
21 their experience and all that?

22 UNIDENTIFIED PROSPECTIVE JUROR: Even though they're a
23 friend?

24 MR. ROGERS: I'm sorry.

25 UNIDENTIFIED PROSPECTIVE JUROR: Even though they're a

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1 friend of yours, their credentials are still going to be out
2 there for us to look at.

3 MR. ROGERS: Okay. And let's assume that you guys make a
4 good point that these people are qualified. They went to
5 school. They got their degrees. They know the area that
6 they're talking about.

7 MR. WALL: Your Honor, may we approach, Your Honor?

8 THE COURT: Yes.

9 UNIDENTIFIED PROSPECTIVE JUROR: Sorry.

10 [Bench Conference Begins]

11 MR. WALL: These are questions that ask them their
12 opinion --

13 THE COURT: Okay.

14 MR. WALL: That ask them their opinion about inadmissible
15 testimony. I made a motion -- or a mention of this during the
16 motion hearing almost a month ago and you told him that if he
17 wanted to bring that up, he would need to file a separate
18 motion about any relationships between witnesses and counsel.
19 And you would consider it. He has not done so. That means
20 it's inadmissible unless and until he did it and he didn't.
21 So this is questioning about -- it's at the very least sending
22 an inference that somehow witnesses that testify who's a
23 friend of one of the lawyers. That can't come in. And since
24 it's inadmissible, it's no different than asking a question
25 about something else that might be inadmissible. Whether it's

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1 how much or if you know if the Defendant had insurance. He
2 can't ask her that because whether she had insurance is
3 inadmissible. It's the same, same theory.

4 MR. EGLET: It's absolutely --

5 THE COURT: This came out in a roundabout way. It wasn't
6 the subject of any pretrial motions.

7 MR. WALL: It was. It was mentioned in his opposition to
8 a motion.

9 THE COURT: Uh-huh.

10 MR. WALL: He wanted to bring out a relationship between
11 counsel and one of the physicians.

12 MR. EGLET: It was the motion on --

13 MR. ADAMS: The Senate investigation I thought.

14 MR. EGLET: -- lawyers who have been medical billed out.

15 THE COURT: Right, but there wasn't --

16 MR. EGLET: He argued well I should be able to
17 [indiscernible] had relationships that Plaintiff's counsel had
18 with the treating physicians. But you told him specifically
19 that he would have to file a separate motion on the issue for
20 you to consider whether you would allow him to do that. He
21 never filed a motion. That is exactly what the
22 [indiscernible] on that case.

23 THE COURT: When I say it came up in a roundabout way, it
24 was a subject motion but this particular issue wasn't argued
25 in the pleadings. It just came up in oral argument.

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1 MR. EGLET: It did.

2 MR. WALL: Yes, it actually came up in his opposition to
3 the medical buildup motion. I'm not going to call it medical
4 buildup but I do have the right to bring out the relationships
5 between counsel. And at the hearing if you'll recall, we
6 actually took a break at one point because he was really
7 reluctant to say who it was or what the relationship was, came
8 back and he -- I think he did it on the record or whether he
9 told me during the break, I don't remember which. And you
10 said and I argued vociferously against that, saying it wasn't
11 relevant to anything. It is brought in only essentially to
12 bring up medical buildup. There's no other inference. And
13 you told him if he wanted that in and I think it's in the
14 order, you told him that if he wanted to bring that up, he
15 needed to file a separate motion to admit evidence of the
16 relationship between a lawyer and their counsel. So as it
17 stands, that wasn't filed, that makes it inadmissible. He
18 can't cross-examine an expert doctor, a witness, saying aren't
19 you friends with so and so.

20 MR. ROGERS: May I?

21 THE COURT: Uh-huh.

22 MR. ROGERS: There is no order on this question and it is
23 absolutely unlike insurance where there's a black letter rule
24 against it whereas with witnesses, the rule is that a jury is
25 charged to consider all the evidence about the witness

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1 including bias or prejudice, relationships and so forth.
2 Relationships is in the instruction. There is no order from
3 this Court contrary to the jury instruction and I don't
4 believe -- I think I -- I believe you're correct, this issue
5 was never addressed in a motion.

6 MR. EGLET: It was the [indiscernible] opposition, okay,
7 specifically I would argue it was made in his opposition
8 [indiscernible] that it was in -- it's on the motion for
9 lawyer [indiscernible]. If he says [indiscernible] to cross-
10 examine the witnesses about what relationship and specifically
11 relationship came up with Dr. McNulty about his
12 [indiscernible] for Dr. McNulty [indiscernible]. So he said I
13 should have cross-examined our relation -- what is there to
14 bring that up and trying to argue that Mr. Eglet has some
15 relationship with Dr. McNulty. If not, to leave in the jury's
16 mind that well maybe this was some sort of buildup at least
17 between Mr. Eglet and Dr. McNulty. Okay. Will you let me
18 finish please?

19 MR. ROGERS: Yes.

20 MR. EGLET: So what basis is there to do that other than
21 to imply that there is some, you know, that maybe Dr. McNulty
22 had this unnecessary surgery which his experts are claiming
23 because it's Mr. Eglet's friend. You granted that motion on
24 the medical buildup.

25 THE COURT: Yeah.

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1 MR. EGLET: You specifically told him that he -- if he
2 wanted to address this issue, he was going to have do a
3 separate motion. That's in the record. It's on the record.

4 THE COURT: Right.

5 MR. EGLET: And let me finish. And most importantly, why
6 this is so ridiculous is because we didn't have this case
7 until Dr. McNulty had already done the surgery and almost had
8 it done. So it's totally irrelevant. Thank you.

9 THE COURT: I think Mr. [indiscernible]. It was a really
10 nebulous sort of issue that was proposed. I didn't have any
11 idea what Mr. Rogers -- where he was headed and even though he
12 say to me on the record so we had some kind of discussions
13 with Mr. Wall though I stepped down.

14 MR. ROGERS: Correct.

15 THE COURT: And then you addressed it but in a very
16 negative sort of fashion. If that's the ruling that I made
17 and I don't have any doubt that that was the ruling that you
18 were in front of me, the objection is sustained.

19 MR. ROGERS: Thank you, Your Honor.

20 [Bench Conference Ends]

21 MR. ROGERS: You were asked earlier if anyone here has
22 had neck surgery or is close to anyone who's had neck surgery.
23 Let me change that just a little bit. Has anyone here had a
24 history of headaches bad enough that you needed to undergo
25 medical care for it?

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1 MR. EGLET: Objection, Your Honor, may we approach?
2 THE COURT: Yes. It's been so long. I was missing you.
3 [Bench Conference Begins]
4 MR. EGLET: Maybe I didn't hear the question correctly
5 but did you just say migraine headaches?
6 THE COURT: Yeah, that's what I heard him say.
7 MR. EGLET: All right. Well and this like the earlier
8 question, this is somewhat of an anticipatory objection and if
9 he's going to get into asking people about their migraine
10 headaches and how it's affected them or whatever, that is an
11 issue that's with this in this case and I guess I'm trying to
12 understand where you're going with this.
13 MR. ROGERS: It's the same place you went with the neck
14 surgery question.
15 MR. EGLET: Which is what?
16 MR. ROGERS: Well, you went there.
17 MR. EGLET: Well, I'm asking -- just give us an offer of
18 proof exactly what the basis --
19 MR. ROGERS: You asked the jury whether any of them or
20 anyone close to them had neck surgery.
21 MR. EGLET: Actually the question I asked them was does
22 anyone on this panel know anyone who's had any neck surgery
23 before. That was the question.
24 THE COURT: Well, you know, refresh my recollection on
25 the migraine issue because we discussed that issue in some of

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1 the pretrial motions that were argued. Is this -- I mean is
2 this an issue that's going to come up?

3 MR. ROGERS: It's a preexisting condition exacerbated by
4 the accident.

5 MR. EGLET: Right.

6 THE COURT: So why is it not fair game?

7 MR. EGLET: Well, it's fair game except that I'm trying
8 to figure out if he's going to -- if his question is going to
9 be, you know, well how do you deal with your headaches and
10 things like that. That's not appropriate because their
11 headaches -- there's no relevance as to whether their
12 headaches are the same as our client's headaches. If he's
13 simply asking do you know anybody who's ever suffered from
14 migraine headaches and they're going to raise their hands on
15 that, I don't have any problem with that question. But his
16 question I think was do any of you -- have any of you suffered
17 from migraine headaches and I that I think is different.

18 MR. ROGERS: The question was asked of the jury to insure
19 that their impartiality of the case is whether you or anyone
20 close to you has undergone a similar thing. And can you still
21 be impartial without that, even with that.

22 MR. EGLET: Well, that's a question I have -- I have no
23 problem with that question.

24 THE COURT: That's fair game, Mr. Rogers. That's fair
25 game.

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1 MR. ROGERS: And the next question -- that's not the end
2 of it though. The next question is --

3 THE COURT: There's more?

4 MR. ROGERS: Yeah, sure. The next question is what kind
5 of treatment have you undergone or this person close to you.
6 Because the question was treatment sufficient for medical or
7 pardon me the condition that was bad enough that you needed
8 treatment for.

9 MR. EGLET: Say that again. That was two questions.

10 MR. ROGERS: I think that was two questions. The
11 question was have you or anyone --

12 MR. EGLET: No, I heard that part.

13 MR. ROGERS: -- close to you had headaches bad enough
14 that you have needed medical treatment for them.

15 MR. EGLET: Okay.

16 MR. ROGERS: And then the question following is what kind
17 of treatment and I'm not --

18 MR. EGLET: And I don't have a problem with that. That's
19 fine.

20 THE COURT: Thanks.

21 [Bench Conference Ends]

22 MR. ROGERS: All right. Same question. Have you or
23 anyone close to you had headaches bad enough you've required
24 medical care for them? Yes, and I'm not going to pry or I'm
25 going to try not to pry. What just generically what kind of

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1 medical care have you had for them?

2 UNIDENTIFIED PROSPECTIVE JUROR: Just Imitrex.

3 MR. ROGERS: Medications?

4 UNIDENTIFIED PROSPECTIVE JUROR: Yeah.

5 MR. ROGERS: There were a couple other hands on this.

6 UNIDENTIFIED PROSPECTIVE JUROR: My dad and I both.

7 MR. ROGERS: Okay. So it runs in the family? All right.

8 Yes.

9 UNIDENTIFIED PROSPECTIVE JUROR: I had a headache that
10 wouldn't go away for two, three months. And I finally went to
11 the doctor after I passed out at work and found out that it
12 was viral spinal meningitis. So I had a spinal punch.

13 UNIDENTIFIED PROSPECTIVE JUROR: [Indiscernible].

14 UNIDENTIFIED PROSPECTIVE JUROR: No, I was too
15 [indiscernible], I had a tap. Spinal tap. And then from --
16 since then I've had migraines off and on since then.

17 MR. ROGERS: Okay.

18 UNIDENTIFIED PROSPECTIVE JUROR: So yeah, I had to have
19 medical care.

20 MR. ROGERS: And do you have to get any ongoing medical
21 care for that?

22 UNIDENTIFIED PROSPECTIVE JUROR: No, just enough just if
23 the migraines shows up to take it like when I have minor
24 migraine but that was due to the infection.

25 MR. ROGERS: Okay. Any other pains [indiscernible]?

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1 UNIDENTIFIED PROSPECTIVE JUROR: Migraines but it turned
2 out to be food allergies. So as long as I don't eat those
3 foods, then I don't get the migraines.

4 MR. ROGERS: And you don't require ongoing medication?

5 UNIDENTIFIED PROSPECTIVE JUROR: No.

6 MR. ROGERS: [Indiscernible].

7 UNIDENTIFIED PROSPECTIVE JUROR: My husband and my
8 mother-in-law and my daughter all have migraines. My mother-
9 in-law has medical care for that. She lives in Texas so I'm
10 not involved but my husband, his medical care is ice pack and
11 my daughter she gives, you know --

12 MR. ROGERS: Like over the counter?

13 UNIDENTIFIED PROSPECTIVE JUROR: Yeah, you know, just
14 Ibuprofen.

15 MR. ROGERS: Okay. And any others?

16 UNIDENTIFIED PROSPECTIVE JUROR: My daughter suffers from
17 migraines?

18 MR. ROGERS: I'm sorry.

19 UNIDENTIFIED PROSPECTIVE JUROR: My daughter suffers from
20 migraines. She has to medicate [indiscernible].

21 MR. ROGERS: Okay. And --

22 UNIDENTIFIED PROSPECTIVE JUROR: My brother is constantly
23 having headaches, these are from high school and it's once in
24 a while he actually gets where you take medication
25 [indiscernible]. Some doctors say, you know, it's actually

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1 some combination of allergies and something else. He is
2 getting medications for it.

3 MR. ROGERS: Okay. All right. Very good. I'm actually
4 very nearly done. Has anyone here and this one I'm not going
5 to ask the specifics on because this one can [indiscernible]
6 and that's not the intention of this. All right. It's simply
7 to gauge whether any of you have experience with this problem.
8 Has anybody here had a medical condition that the doctors did
9 not figure out? Okay. And now let's broaden that out. It's
10 not just you but you and people you know who have had a
11 problem where the doctors just haven't been able to figure it
12 out? Okay.

13 And then finally, has anybody here been involved in
14 a claim like that window example that we discussed earlier
15 where they felt that someone was taking advantage? All right.
16 Ladies and gentlemen, thank you very much for your time.

17 Your Honor, can we approach?

18 THE COURT: Yes.

19 [Bench Conference Begins]

20 MR. ROGERS: Before the Defense passes for cause, we were
21 going to hear this motion that was brought this morning and --

22 THE COURT: You mean the motion for the mistrial?

23 MR. ROGERS: Right. And I haven't prepared it. I'm not
24 going to argue it. But --

25 THE COURT: You didn't do what?

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1 MR. ROGERS: I didn't prepare it so I'm not going to be
2 arguing it. Mr. Michalek did that.

3 THE COURT: Who?

4 MR. ROGERS: Charles Michalek from my office is going to
5 be arguing it.

6 MR. EGLET: He sat in the back row [indiscernible].

7 THE COURT: Oh. How do you spell that name?

8 MR. ROGERS: It looks like Mikelek [phonetic]. It's
9 Michalek.

10 THE COURT: Michalek.

11 MR. ROGERS: Yes.

12 MR. EGLET: Charles Michalek.

13 MR. ROGERS: And so he's going to make that motion. It's
14 a motion the procedurally must be made before the jury's
15 impaneled. So I'd prefer to do it before we excuse for cause.

16 THE COURT: Sure. Let's wait a few minutes though. We
17 need to do it on our break.

18 MR. WALL: Yeah, because if it were to be denied, then
19 the next part of the process would be exercising preempts and
20 that may take a little while. So I don't know break -- you
21 might want to tell them it's going to be.

22 MR. EGLET: Well, I think we want the jury in here when
23 we exercise our preempts [sic]. Because what I think is
24 [indiscernible].

25 MR. WALL: Okay. All right.

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1 MR. EGLET: That's fine.

2 MR. WALL: So probably 15 minutes.

3 THE COURT: How long do you think Mr. Michalek will take
4 for arguments?

5 MR. ROGERS: I don't think it's a long motion. I don't
6 know it well enough to give you a good gauge on that. But 10
7 to 15 minutes at the very outside.

8 THE COURT: Okay.

9 [Bench Conference Ends]

10 THE COURT: Well, there's good news and bad news, ladies
11 and gentlemen. The good news for you is that you get to take
12 a little break here while counsel and I discuss some issues we
13 must discuss outside your presence as a matter of law. I'm
14 going to guess that it probably will take about 15 minutes.

15 [Court Admonishes Jury]

16 THE COURT: So please return back here at 2:45 if you
17 would. Thank you.

18 [Prospective Jury Out]

19 THE COURT: Okay, so outside the presence of the jury,
20 Mr. Michalek.

21 MR. MICHALEK: Yes, good afternoon.

22 THE COURT: Good afternoon.

23 MR. MICHALEK: I believe there's a number of issues. The
24 ones I'm going to discuss involve the jury voir dire. And
25 then Mr. Rogers can take up the issue of whatever the opening

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1 statement arguments will be.

2 THE COURT: I thought this was going to be your argument.

3 MR. MICHALEK: It is and I don't know -- I didn't know
4 whether we were going to do the opening statements at the same
5 time. There's two separate issues.

6 MR. EGLET: No.

7 MR. WALL: No.

8 MR. MICHALEK: There's two separate issues. There is
9 the --

10 THE COURT: What am I missing?

11 MR. MICHALEK: Okay, that's fine.

12 THE COURT: What am I missing, Mr. Wall?

13 MR. EGLET: You're not, Your Honor. Mr. Michalek is
14 missing. He doesn't realize, he wasn't at the bench
15 conference, he doesn't realize we're just doing the motion on
16 the voir dire.

17 MR. WALL? Correct.

18 THE COURT: Okay.

19 MR. MICHALEK: I will start with the statute which is NRS
20 16.030 and that states that both parties including the
21 Defendant is entitled to the right of voir dire. And there's
22 been no flurry from the other side saying that that does not
23 apply to a civil case. In fact, both parties have conducted
24 voir dire.

25 The second part of that statute or second statute

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1 after that is NRS 16.050 and the subsection I will point to a
2 subsection f and g of that statute. Now this is when a
3 challenge for cause can be made. F states having formed or
4 expressed an unqualified opinion or belief as to the merits of
5 the action or the main question involved therein. And g is
6 for the existence of a state of mind in the juror evidencing
7 enmity or a bias towards either party.

8 Then we turn to NRS 16.060 which says that the
9 challenges for cause are to be tried by the Court, that would
10 be you, Your Honor. And of course it states that in
11 determining whether there should be a challenge for cause,
12 there can be examination of witnesses or the juror to
13 determine whether a cause is valid.

14 The problem in this case is that we were denied the
15 opportunity to conduct voir dire into the I believe it's 11
16 jurors that have been stricken for cause. One, Mr. Rogers was
17 actually able to conduct some voir dire.

18 But I want to get to the standard because the
19 Plaintiffs say in their brief, well the test for cause is
20 whether a prospective juror's views would prevent or
21 substantially impair the performance of his duties as a juror.
22 And I'm going to agree with that standard. And that's the
23 important point, Your Honor, is that think about what that
24 means. Prevent or substantially impair the performance of his
25 duties as a juror. That means that a juror can't have bias,

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1 just not bias that's going to substantially impair that
2 juror's ability. And the jurors have a right to that bias but
3 the issue is where they can set that bias aside and listen to
4 the evidence and determine from that evidence which party's in
5 the right.

6 The problem in this case is that allegedly the
7 Plaintiffs were able to establish some sort of bias in an
8 answer to a yes or no question. But what wasn't asked of
9 these jurors was well, can you set that bias aside. If I
10 present you the evidence and I instruct you this way, can you
11 set your bias aside. And that is the issue. Not that there's
12 a bias. But can the bias be set aside. And I will cite to
13 you two Nevada cases that say that.

14 And the first one is Bean v. State, this is 86 Nev.
15 80 and it says that before a juror is going to be excluded for
16 cause, it must be unmistakably clear that he would
17 automatically vote for or against capital punishment. Now
18 this is from the 1970s and this is how this whole thing
19 started, Your Honor.

20 You know, there would be a question to a juror, the
21 juror they would ask well, can you -- you think you could
22 invoke capital punishment? Or if you think you've have a
23 problem invoking capital punishment. Some jurors would say
24 yeah, you know, I couldn't fry anybody. And one other juror
25 would say well, no, no, no. I have an objection to capital

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1 punishment. Another juror might say no, no, no, I have no
2 problem. If it's warranted, fry them every time. I don't
3 even worry about life sentences.

4 And so the Court said well wait a minute, that's a
5 problem. But in Bean v. State, when the Judge asked well, do
6 you have a problem with the death penalty and the juror said
7 yes, I do. And then the Judge said well, do you feel that you
8 cannot render a decision for the death penalty and the juror
9 said, I'm afraid not. And the Court said all right, well you
10 answered yes, you couldn't. I'm going to strike you. And the
11 Supreme Court said no, that that was an improper striking.
12 And it said if they simply state that they are against capital
13 punishment and are thereby excused, reversible error is
14 committed.

15 So what does the Supreme Court tell us to do, Your
16 Honor? Well, they say that in order for a challenge to be
17 properly asserted, under the statute, there must be a thorough
18 examination of each juror who asserts a bias for or against
19 the death penalty. And to determine whether or not his bias
20 can be set aside. And whether the juror could nevertheless
21 determine the issue of innocence or guilt and penalty upon the
22 evidence presented to him. Again, we're not talking about Mr.
23 Eglet standing up in front of the jury asking them the
24 questions are you biased, you know, he's got a list of
25 questions he's going through and he gets a checkmark to one of

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1 the Dr. Phil philosophical questions and says okay, that
2 juror's biased. I'm going to move for cause. That's not
3 enough.

4 The standard is can that juror set aside that bias
5 assuming its correct? Mr. Eglet's not going to ask those
6 questions. We wanted to and we were denied that opportunity
7 and under the case law from the Supreme Court, Bean, that's an
8 error.

9 I'll cite to you again a second Supreme Court
10 decision, Blake v. State, 121 Nev. 779.

11 MR. WALL: What was that?

12 MR. MICHALEK: Blake.

13 MR. WALL: I'm sorry.

14 MR. MICHALEK: And it states that once again the hold
15 that the mere existence of any preconceived notion as to the
16 guilt or innocence of an accused without more is not
17 sufficient and rather it is sufficient if a juror can lay
18 aside his impression or opinion and render a verdict based
19 upon the evidence presented in Court.

20 What we have is an admonishment from the Supreme
21 Court that says it's not enough to just say someone's biased.
22 They check a yes question on a questionnaire or answer a
23 question in Court. But you've got to take the totality of
24 their answers and determine whether if they have a bias, but
25 too, whether they can set it aside.

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1 Now a couple of things. There's an important reason
2 as to why rehabilitation has got to go forward and why Mr.
3 Rogers should have been able to rehabilitate these jurors.
4 And I think that the jurors' responses today show that.
5 Because when Mr. Rogers was up there asking the questions
6 about their yes answers on the forms, some of them said well
7 I'm not sure I really meant that, I think I misunderstood the
8 question or they may have said well, I understood that I wrote
9 that but maybe after listening to him, I understand that my
10 job is to listen to the evidence without any bias or prejudice
11 and if I have any, I can set it aside.

12 The fact is is we don't what they're meaning of bias
13 or prejudice was. Was there a language barrier they may have
14 had? Did they have a different definition of bias? The Court
15 and counsel and lawyers have one definition. But certainly
16 lay jurors may have a different one. And so what do they
17 think? Does it mean that they lean one way or another? Or
18 does it mean that they have a hatred or some prejudice towards
19 somebody? We don't know because we were not allowed to
20 explore those.

21 And so the nuances about what bias means or a yes
22 answer means was never answered. And what it would do was
23 show any possible misunderstandings. Oh, no, no, no, I didn't
24 mean that, Mr. Eglet. And now that you mentioned it, I
25 misunderstood your question. Certainly I can be fair. But he

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1 didn't explore that. He took the yes answer and wanted to
2 move for cause. And we were denied that opportunity.

3 Now, as the point of our motion, I cited Nevada
4 statutes, I cited Nevada case law and I cited four cases from
5 other jurisdictions that specifically said when you dismiss a
6 juror for cause and the Plaintiffs have had an opportunity to
7 question and the Defense hasn't, that's a violation. That's
8 an error. And not only in Nevada cases and my cases that have
9 been cited, there was a 14-page opposition from the
10 Plaintiffs. And I read their brief this morning. And they
11 didn't cite to you one single case, not one that says it's
12 okay for the Court to dismiss a juror for cause when the
13 Plaintiffs have inquired and not the Defendant. They did not
14 cite a single case or statute that says no, that's proper.

15 Here's what they cited. They cited Weber and they
16 cited Thompson. Two Nevada criminal cases. Of course, the
17 way our laws in Nevada and most cases go up on appeal are
18 criminal. But Weber and Thompson talked about the detached
19 language of the juror. And I'll explain that in a little bit.
20 What that means is when the Court and the counsel were
21 questioning the juror, they said well, yeah, I may have some
22 bias and they went through the list of the things that may
23 have been wrong. And at the very end, they said well, yeah, I
24 guess I can be fair.

25 Well, the distinction between what happened in Weber

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1 and Thompson as opposed to this case is there was the
2 dialogue. The Defendants got the chance to rehabilitate and
3 ask them questions. And the Court got to look at this
4 totality of the circumstances and say well, you may have said
5 one time that you can be fair but you were asked 12 or 13
6 times whether you thought the Defendant looked like a thug or
7 whether he looked like he might have committed the crime. And
8 you answered yes to all those. So the Court had a totality of
9 circumstances to determine bias from.

10 In fact, the Court distinguished the Snow v. State
11 case and this is the one, the Thompson case, where they talked
12 about how there was rehabilitation conducted by the Court,
13 which showed the juror could set aside the bias.

14 And again we're talking about these two cases that
15 are talking about not the yes answer. Not the yes, there's
16 bias. But whether the juror could set that bias aside. And
17 that hasn't been established. That was not established with
18 the 11 jurors that were improperly kicked off, Your Honor.

19 They haven't got a statute. The statute clearly
20 says we're entitled to voir dire. They haven't got a single
21 case that says no, no, no, we're allowed to kick off a juror
22 without you asking any questions. Certainly the Court can
23 kick off a juror for bias. But the question is can they not
24 set aside that bias. And that wasn't established.

25 I have the second issue about the indoctrination. I

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1 can go into that or we can give Mr. Eglet a chance to respond
2 to the first issue.

3 THE COURT: I'd like you to finish all of your argument
4 before I hear from Plaintiff's counsel.

5 MR. MICHALEK: Certainly, Your Honor. The indoctrination
6 issue. I cited in our brief the duty of the trial judge to
7 restrict voir dire. And certainly although the parties have a
8 right to voir dire, it's not limitless. There are certain
9 things that should not be asked in the courtroom. And one of
10 the things that Lamb v. State and this is a very new case,
11 Your Honor, it's 129, I'm sorry, 127 Nev. Adv. Op. No. 3, it's
12 from March 3rd, 2011. What it says is that you should exclude
13 voir dire aimed at what's called indoctrination.

14 And I'm going to explain to you a little bit about
15 what that means. Mr. Eglet had approximately three and a half
16 days of questioning the jury all by himself. And he
17 monopolized the time, no doubt about it, that's fine. We
18 could take three days of our own to go through each and every
19 juror and take voir dire to next week. But the point is he
20 was setting the jury up for an indoctrination as to I want you
21 to believe certain things when I get done with my examination.
22 And we saw that when Mr. Rogers finally got his chance.
23 Because he asked the jury well, do you believe that the
24 Plaintiff has been injured? And that this case is worth two
25 million dollars? And all of the panel said yeah, you know,

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1 we were kind of under that impression. You know, this case is
2 worth two million dollars now.

3 MR. WALL: Actually, Judge, just to interject, I mean
4 I've tried to be patient but you were here --

5 THE COURT: Uh-huh.

6 MR. WALL: -- and you heard them. And that wasn't their
7 response from the 24 individuals.

8 THE COURT: That's correct.

9 MR. MICHALEK: Your Honor, and Mr. Rogers can discuss it
10 if you want to, he was here.

11 MR. WALL: Well, that's the point is he's making a record
12 about what took place without having been here and that's what
13 I'm objecting to.

14 THE COURT: Well, and your objection is well taken. I
15 understand that. Please proceed.

16 MR. WALL: Thank you.

17 MR. MICHALEK: There were questions to the jurors and we
18 can go back and look at the record. I think the record will
19 reflect it, that Mr. Rogers asked the jurors what their
20 impression was. And they gave -- the first jurors that were
21 asked the question, said yeah, I kind of was given that
22 impression that this case is worth two million dollars. That
23 the Plaintiff had been injured. We can look back at the voir
24 dire. It's there. I can't testify about it and we can look
25 at the record. Mr. Rogers has that recollection. He can come

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1 up here and tell you about it. But it was certainly there.
2 They had that impression. And that's what indoctrination is.
3 It tells the jury okay, I'm going to give you a certain
4 viewpoint for three days before the Defendants even get a
5 chance to speak to you.

6 In trying to combat that prejudice, Mr. Rogers
7 attempted to ask some questions of the jury this afternoon and
8 he was prohibited from going into the same issues that the
9 Plaintiffs were allowed into. And those objections have been
10 noted at the bench and I'm not going to go through those
11 again. But there were several objections made by Plaintiffs
12 during the examination.

13 So I want to be clear about what we're asking for,
14 Your Honor, because I think the purpose of this is not to go
15 up on appeal. The purpose is to fix whatever errors there are
16 now. And we still have a chance to have an unbiased panel.
17 We haven't started evidence yet. We could start over with a
18 new panel that hasn't been improperly influenced and a new
19 panel where the jurors won't be excused for cause without the
20 opportunity of the Defendants to question them.

21 So I'm first asking for a mistrial, that we start
22 over fresh on Monday and we have a new set of jurors and we go
23 through this process without the problems. If that's going to
24 be denied, Your Honor, then I ask the standard that the
25 Plaintiff used regarding the yes or no questions be applied.

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1 There were jurors who answered yes to questions. Now under
2 the standard by Mr. Eglet, once you've said yes to an answer,
3 you can't really explain it or get away from it. It's an
4 answer and it shows a bias. We have seven jurors that we
5 would move to exclude for cause based upon those yes answers.
6 Not only in the courtroom but in their jury questionnaires.

7 THE COURT: Well, let me interject just for a moment. Do
8 you mean that the very answers that Mr. Rogers inquired into
9 and clarified?

10 MR. MICHALEK: There were -- under the standard by the
11 Plaintiff's counsel that once there's been a yes answer, that
12 there's no way for the juror to sort of explain or kind of get
13 around that bias. They were answers --

14 THE COURT: I'm not sure, Mr. Michalek, you answered my
15 question.

16 MR. MICHALEK: Sure. And maybe I misunderstood your
17 question.

18 THE COURT: Are you talking -- when you talk about the
19 yes answers that the jurors gave, do you mean the very
20 questions that they filled out on their forms --

21 MR. MICHALEK: Their questions and the questionnaire.

22 THE COURT: -- and that Mr. Rogers clarified when he
23 examined them?

24 MR. MICHALEK: Yes, I do and that's exactly my point,
25 Your Honor. Because when Mr. Eglet was moving to exclude the

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1 jurors for cause, we were stuck with the yes answer. And when
2 Mr. Rogers was able to clarify, he showed that the yes answer
3 - well they were under a mistaken assumption. But if the rule
4 is well, a yes answer excludes you, then it doesn't matter
5 what they said during Mr. Rogers' examination. The juror
6 questionnaires showed the bias already and those seven must be
7 excluded. It's got to work the same way. It's got to be fair
8 for both sides. If a yes answer excludes a juror and nothing
9 they say afterwards matters, such that we weren't entitled to
10 voir dire, then the same thing applies on the Plaintiff's
11 side. These jurors said in their questionnaires yes, they
12 have a bias. It doesn't matter what they say on the stand.
13 They should be excluded as well. It's just the fairness, Your
14 Honor.

15 THE COURT: Okay. Well, I just have one comment I guess
16 based on that last argument regarding the yes answers and that
17 is several of the jurors conceded that those questions were so
18 poorly drafted, that they had trouble understanding them. And
19 then Mr. Rogers had an opportunity to clarify what their
20 through process was.

21 But the other question that I had for you is this.
22 It's true we've had almost -- well we've had four days not
23 including today but only half days of voir dire. My question
24 is were you present during these past four days? Monday
25 through Thursday?

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1 MR. MICHALEK: No, I wasn't.

2 THE COURT: When Plaintiff's counsel was examining the
3 panel?

4 MR. MICHALEK: No, I wasn't, Your Honor.

5 THE COURT: Okay. That's all I have. Thank you. Mr.
6 Wall.

7 MR. MICHALEK: May I respond to your first question?
8 When you have a rehabilitation.

9 THE COURT: It wasn't really a question. It was a
10 comment.

11 MR. MICHALEK: Okay.

12 THE COURT: Thank you. Mr. Wall.

13 MR. WALL: Your Honor, with all due respect, Mr. Michalek
14 fails from a lack of perspective on two different issues. One
15 of them is the one that you just hit. He wasn't here. Look,
16 we all understand what the statute is on voir dire. And the
17 fact that no one should be completely denied their right to
18 voir dire. That's what Whitlock says and there's other
19 District Judges in this community who feel perhaps that all of
20 the voir dire questions should be done from the bench and none
21 from the lawyers. So that's the absolute right that the law
22 protects.

23 Here there isn't obviously a denial of the right to
24 conduct voir dire because Mr. Rogers has had the opportunity
25 to conduct voir dire. So all of that under the statute and

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1 under Whitlock doesn't apply in this case. What they're
2 saying is that a mistrial is necessary because of a denial of
3 a right to rehabilitate jurors who otherwise were excused for
4 cause.

5 First of all, and I took his last comments about the
6 yessed [sic] answers to mean that if Mr. Eglet asked a
7 question and they responded yes, that's it and no one was
8 allowed to ask them how their answers were explained. That
9 never happened with any of the jurors who were excluded for
10 cause.

11 What also didn't happen is that there wasn't a
12 situation where there was a language barrier or a lack of
13 understanding of the question that led to a juror being
14 stricken for cause. For each of the jurors that was stricken
15 for cause, there was an argument at the bench. There was
16 careful consideration by the Court of the reasons why that
17 particular juror under the law that's been provided had a view
18 that might impair their ability to be fair and impartial,
19 which is the standard under which they are disqualified as a
20 matter of law.

21 The issue that was discussed at the bench and for
22 the record the Court considered this, is that this right to
23 rehabilitate a juror that they're claiming is grounds for a
24 mistrial is completely incorrect. They try to bootstrap cases
25 that say we have a right to voir dire the prospective jury.

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1 And they do. And that has been provided. What they do not
2 necessarily have a right to do is to take a juror who has
3 already indicated through their answers that they cannot be
4 fair and impartial and that they ought to be stricken and try
5 to rehabilitate them. Because the case law is even if they
6 get a contrary answer, well could you follow the law, are you
7 saying you're not going to follow the Judge's law? And they
8 get a contrary answer, it doesn't matter. It doesn't matter.
9 Because at that point they've still stated that position that
10 caused them to be disqualified. And as the case law suggests,
11 and Bean isn't the law anymore in the State of Nevada, that it
12 doesn't have to be shown with unmistakable clarity that they
13 have a particular view that disqualifies them. And any doubt
14 must be waived by the trial judge in favor of
15 disqualification. So even if they say on the one hand when
16 they're being examined by Plaintiff's counsel that they have
17 this disqualifying bias, if on questioning from the Defense,
18 they say well, maybe I don't, it doesn't matter. Because at
19 that point, they've already stated that bias and any doubt is
20 in favor of disqualification. That's why the Court did not
21 allow rehabilitation of those jurors for that reason. Mr.
22 Michalek wasn't present for that.

23 And virtually all of them, if not all of them, were
24 asked by Mr. Eglet regarding the bias whether or not they
25 could set it aside and they said no.

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1 The other perspective that he does not have I do not
2 believe and with respect if I'm wrong, I'll withdraw it, is
3 that he's never picked a jury in a death penalty case.
4 Because the law is fundamentally different in a capital case
5 when it comes to selecting a jury. I've selected about 25
6 capital juries. So I understand the difference. And they
7 cite to the Florida cases from the death penalty citing to
8 Witherspoon, the United States Supreme Court case that says
9 just because a juror says I don't think I could impose the
10 death penalty, you don't get to exclude them until the Defense
11 has the opportunity to ask if they would at least consider all
12 of the possible punishments.

13 And as the Florida cases, I think it's Summers that
14 they cited, suggest which comes straight out of Witherspoon,
15 we're not going to allow someone state, to say well just
16 because someone doesn't necessarily believe in the death
17 penalty, that they're not going to be a juror in a death
18 penalty case because a person's life is at stake. And the
19 laws and the rules for picking a jury in a capital case are
20 fundamentally different. And that's the only case law they've
21 given you that says when someone has shown an unmistakable
22 bias, we have a right still to ask them questions. You can't
23 strike them until we have the ability to rehabilitate. And if
24 you look at Witherspoon, it is very clear to say the reason
25 they're allowed the right to rehabilitate is because it's a

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1 death penalty case. And because the laws are fundamentally
2 different when it comes to death qualifying a jury.

3 And there isn't any case law that he has cited to
4 you that says in a civil case, once the bias has been made
5 clear, that the Court can't exercise its discretion to strike
6 that juror for cause before rehabilitation takes place. Not
7 one.

8 And by the way, Bean and Blake weren't in their
9 brief but I happen to be familiar with Blake.

10 Now, on this second issue of indoctrination, they
11 cite to you the Lamb case. And what's important about this is
12 that when they cite Lamb, what Lamb tells you is decisions
13 concerning the scope of voir dire and the manner in which it
14 is conducted are reviewable only for abuse of discretion. And
15 the Supreme Court even went further. It says considerable
16 deference is given to the trial court in matters under the
17 scope of voir dire. But Lamb isn't factually on point with
18 this case at all.

19 And I have to ask about this indoctrination, whether
20 this is really sort of an untimely and inappropriate motion
21 for reconsideration of the questions contained within the jury
22 questionnaire. Because this same argument came up at that
23 point if you'll recall. Or is this reconsideration on the
24 motions in limine regarding the appropriate scope of voir
25 dire? We have had four days, four half days, essentially two

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1 days where there was no inappropriate indoctrination. The
2 Court has already ruled on the areas of inquiry in the
3 questionnaire and generally those in many respects for the
4 live voir dire in the motions in limine. And so any
5 suggestion that you should reconsider that after voir dire has
6 already been completed is completely inappropriate.

7 The final question that I would have because I saw
8 nothing in their trial brief that suggested to you that
9 anything that has happened here reaches the standard of
10 manifest necessity that you would have to find to grant a
11 mistrial. I didn't see anything about mistrial or the scope
12 of it or the authority for it in their motion.

13 So I'd ask that the motion be denied.

14 THE COURT: Mr. Michalek.

15 MR. MICHALEK: Yes, Your Honor. First of all, in regards
16 to the last point, you know, I did that as a courtesy. It was
17 4:00 yesterday. I knew this issue had arisen. I wanted to
18 get at least a brief out so that the parties would have
19 something in case the issue was going to be argued last night.

20 The opportunity for the Plaintiffs, however, to
21 submit a 14-page brief I note was given and nowhere in that
22 brief again was there any specific case in Nevada or from
23 another jurisdiction that said what they did was proper.

24 Now, I'll admit I haven't been a judge. And I'll
25 also admit I haven't picked a death penalty jury. I do civil

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1 law. But I have practiced appellate law for quite some time
2 and I have been a PI lawyer. And the first thing that a judge
3 wants to know when I come into a courtroom or when I go to
4 talk to Steve and Dan is, well do you have any authority for
5 the proposition that you're citing? And I will note that I
6 gave Nevada law, Nevada statutes and four cases that
7 specifically said yes, in a criminal context but you can't
8 dismiss a juror for cause without giving the other side a
9 right to voir dire especially when the Plaintiff or the
10 prosecutor has already got their opportunity.

11 Now, he says well this is not a criminal case. It's
12 a civil case. But Mr. Eglet made the argument that voir dire
13 is the Constitutional right. They have the right to do it.
14 Well, if it's a Constitutional right, it's the same whether it
15 applies in criminal or civil. You can't violate someone's
16 Constitutional rights. And I haven't heard any argument that
17 says the Nevada cases that I've cited to you, Blake or Bean or
18 the statutes that I cited, don't apply in civil cases. They
19 haven't made that argument. They said well you cited criminal
20 cases. But the statutes apply to both civil and criminal
21 cases. There's no limitation in Blake or Bean that says well,
22 it's only the criminal context.

23 I'm not here to reargue motions in limine. I'm here
24 to preserve the record. That's how I was taught as appellate
25 counsel and that's what I'm doing. Just because you file a

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1 motion in limine doesn't mean that the issue is solved. In
2 fact, sometimes when you raise the issue during trial, the
3 Courts have the opportunity to rethink it and take a look at
4 it and said, you know what, I may have made the wrong
5 decision. I'm going to reverse myself. That's why you raise
6 objections during trial in addition to filing motions in
7 limine. That's what I'm hoping the Court will do here. The
8 Court will say, you know what, on reflection, I think I should
9 have given Mr. Rogers that opportunity.

10 MR. WALL: Could I just make one final comment, Judge?

11 THE COURT: Sure.

12 MR. WALL: Because it strikes me that what you haven't
13 heard is that any of the grounds for excluding those jurors
14 for cause were incorrect. So you start from a premise that,
15 because they haven't even raised it, that all of the reasons
16 that they were stricken for cause were correct. And so what
17 they're saying is we have the right to bring in an
18 rehabilitate and try to either change their mind or get a
19 contrary answer. And that's our position. That doesn't
20 matter. That once they've expressed that belief which would
21 disqualify them for cause, it doesn't matter whether you get a
22 different answer from them when someone else is asking them a
23 pointed question. I'll just submit it on that.

24 MR. MICHALEK: Let me respond to that last point, Your
25 Honor.

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1 THE COURT: Any last comments, yes.

2 MR. MICHALEK: Yeah. The point is is that we were not
3 able to discuss with the jurors whether they had any
4 misapplication or whether they misunderstood the question or
5 whether there was a language barrier or anything. We were
6 denied the opportunity to say anything to those jurors
7 whatsoever. And so how we can establish to Your Honor in a
8 bench conference whether they were mistaken or misunderstood
9 something without the opportunity to actually ask them first
10 is I think disingenuous on the part of Plaintiff's counsel to
11 say.

12 We weren't given that opportunity. Certainly if
13 Mr. Rogers had asked, I am sure he would have been able to
14 discover those reasons and some of those jurors like the
15 jurors today may have said, yeah, I misunderstood the
16 question.

17 THE COURT: Well, it strikes me that we haven't heard any
18 specific instances of any of the particular jurors who were
19 excused for cause. We haven't heard argument about any of
20 them. And I understand, Mr. Michalek, you weren't here during
21 the voir dire examination, the past four days. But we haven't
22 heard any specific argument.

23 When a prospective juror states that he or she can't
24 be fair to a party or that he or she cannot follow the law as
25 given by the Court, that's cause for excusal. The motion is

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1 denied.

2 MR. EGLET: Your Honor, and I just want to make sure that
3 this is clear for the record because Mr. Michalek has implied
4 or argued multiple times that the Court excused these jurors
5 for cause based on their answers in the questionnaires. And
6 that is not the case on any one of the people --

7 THE COURT: No.

8 MR. EGLET: -- who were excused for cause. They were
9 excused for cause for what they said in the courtroom. We
10 have people still on this panel who answered questions that
11 they think there should be caps on damages, that they would
12 have a hard time with a multimillion dollar verdict. No juror
13 was excused for cause based on an answer, any one answer to a
14 question on the questionnaire. That is just an absolute
15 misrepresentation of what occurred here in this courtroom.

16 THE COURT: That is true. That is correct.

17 MR. MICHALEK: Your Honor, I think counsel misunderstood
18 what I was saying. I didn't say that they were excluded based
19 upon the jury questionnaires. What I asked you was if you
20 were going to deny my motion, then I wanted the jurors who
21 circled yes as a bias towards the Defendant to be excused
22 based on the questionnaires. I never said that Mr. Eglet got
23 jurors excused based upon that ground. I'm saying I'm asking
24 for that ground. If the answer is going to be you've given a
25 yes answer, and you can't be rehabilitated, then I'm moving

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1 the seven jurors who have those yes answers in those
2 questionnaires be excluded. I never said Mr. Eglet did that.
3 I think he misunderstood.

4 THE COURT: And my response to that is that's what Mr.
5 Rogers has had every opportunity to do during his examination.
6 And in fact, that's what he did do. He did explore specific
7 questions with prospective jurors. That's exactly what he
8 did. Let's take about a ten minute break.

9 MR. WALL: Thank you.

10 [Recess]

11 [Outside the Presence of the Prospective Jury]

12 [Court and Court Deputy Confer]

13 THE COURT: Okay. We're outside the presence of the
14 jury. It's my understanding counsel wishes to exercise their
15 preemptory challenges outside the presence of the jury; is
16 that correct?

17 MR. ROGERS: Correct, Your Honor.

18 MR. EGLET: Yes, Judge.

19 THE COURT: Okay. First the Plaintiff.

20 MR. ROGERS: Your Honor, just to make certain I'm clear
21 on this, the stipulation and the order is that each party has
22 six?

23 THE COURT: Correct. That's what I understood counsel to
24 stipulate to.

25 MR. ROGERS: Very good.

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1 [Counsel Confer]

2 THE COURT DEPUTY: Could I ask you a question?

3 THE COURT: Yes.

4 [Court and Court Deputy Confer]

5 [Counsel Confer]

6 MR. ROGERS: Your Honor, one more clarification, if I
7 remember right the parties agreed that it would be the last
8 four jurors would be seated as alternates. It wouldn't be a
9 lottery; is that correct?

10 THE COURT: Is that counsel's recollection?

11 MR. WALL: Right. It's the last four, and they'd be one,
12 two, three, four.

13 MR. EGLET: The first --

14 MR. WALL: I guess --

15 MR. EGLET: The lowest number is Juror Number --

16 Alternate Number 1, and -- in other words, the last four
17 seats.

18 THE COURT: So it would be seats 21, 22, 23, and 24?

19 MR. EGLET: Well, when we're done it's going to be seats
20 9, 10, 11, and 12.

21 MR. WALL: Right.

22 MR. EGLET: They'll move up.

23 THE COURT: Right.

24 MR. EGLET: And then 9, and then 10 -- and then they'll
25 be in the order of their numbers for their order of

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1 alternates.

2 MR. WALL: Right.

3 MR. ROGERS: And in the order of the number that they
4 presently have?

5 MR. WALL: Right. So Ms. --

6 MR. EGLET: Like Ms. Zwifel [phonetic throughout] --

7 MR. WALL: -- Zwifel can only be the Number 4 alternate.

8 MR. ROGERS: Yes, okay. I think I get it.

9 [Counsel Continue to Exercise Preemptory Challenges]

10 MR. ROGERS: Your Honor, there's something about this
11 form that's -- it might be different from our agreement on
12 this. It appears that there are alternate -- there are
13 additional strikes for alternates. That's not so, is it?

14 MR. EGLET: No.

15 MR. WALL: No.

16 THE COURT: No.

17 MR. ROGERS: Just six for --

18 MR. WALL: Right.

19 MR. EGLET: Just six per side.

20 MR. ROGERS: -- six for whatever?

21 THE COURT: There's six total.

22 MR. ROGERS: Got it.

23 MR. WALL: No, per side.

24 THE COURT: Right, per side. The four each, and then two
25 for the alternate -- two each for the alternates.

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1 MR. EGLET: No, there's six total, Your Honor.

2 MR. WALL: That's how you --

3 MS. EGLET: For each, yeah.

4 MR. WALL: We stipulated just six total to use however we
5 wanted.

6 THE COURT: Each side. Each side has six.

7 MR. WALL: Yeah, right, each. Yeah.

8 THE COURT: Yeah.

9 MR. EGLET: Your Honor, could we -- we see the sheets so
10 we could see the last strike?

11 THE COURT: Yes.

12 MR. EGLET: Thank you.

13 MR. ROGERS: Thank you.

14 THE COURT: Marshall.

15 Let me ask you this, does either side have any
16 objections to the use of the other side's preemptory
17 challenges?

18 MR. WALL: No.

19 MR. EGLET: No, Your Honor.

20 THE COURT: Do you have any objections to their exercise
21 of any of the preemptory challenges?

22 MR. ROGERS: No, Your Honor.

23 [Counsel Reviews Document]

24 [Court and Court Deputy Confer]

25 [Court and Clerk Confer]

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1 [Counsel Confer]

2 THE COURT: All right. Are we ready for our panel,
3 counsel?

4 MR. ROGERS: Yes.

5 MR. EGLET: Yes, Your Honor.

6 MR. WALL: Yes.

7 THE COURT: Very well. Marshall, will you be so kind.

8 [Prospective Jury Panel Enters Courtroom]

9 [Within the Presence of the Prospective Jury Panel]

10 THE COURT: Please be seated, ladies and gentlemen.

11 Ladies and gentlemen, on behalf of the Court and
12 counsel, I apologize for the delay. But the good news is,
13 we're very close to empanelling a jury.

14 So will counsel stipulate that the preemptory
15 challenges were exercised on the record outside the presence
16 of the jury?

17 MR. EGLET: Yes, Your Honor.

18 MR. ROGERS: Yes.

19 MR. WALL: Yes. If we may approach for a moment, please?

20 THE COURT: Yes.

21 MR. WALL: Sorry.

22 [Bench Conference Begins]

23 MR. WALL: I don't think Mr. Rogers passed for cause on
24 the record.

25 THE COURT: All right.

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1 MR. WALL: He didn't, Judge. He didn't pass --
2 THE COURT: I think you're right.
3 MR. WALL: -- the panel for cause.
4 THE COURT: Thank you.
5 MR. ROGERS: Okay. I can do it right here.
6 THE COURT: Is that acceptable?
7 MR. WALL: I'm not sure that's on the record. He needs
8 to do it up here.
9 MR. ROGERS: Okay.
10 [Bench Conference Ends]
11 THE COURT: I forgot to ask you, Mr. Rogers, if you pass
12 this entire panel for cause?
13 MR. ROGERS: Yes, Your Honor.
14 THE COURT: Very well. All right, even closer.
15 I'm going to ask the Clerk to read the names of those
16 jurors remaining in the order in which their names were
17 called.
18 Madam Clerk.
19 THE CLERK: Melton Daniels; Debbie Kissler; Josie Nolty;
20 Charlotte Lewis; Jenny Prince; Charles Barrett; Tamera Bell;
21 Matthew Johnson; Ebony Jones; Gustavo Miranda; Angela Ellis;
22 and Janelle Zwiffel.
23 THE COURT: Okay. Thank you.
24 Ladies and gentlemen, if your name was not called,
25 please step to the spectator section just for a few moments.

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1 Ladies and gentlemen, those of you who are seated in
2 the gallery, it's not likely that I or counsel will have an
3 opportunity to thank you. But we surely could not have
4 reached this point in the proceedings without your
5 participation. And, frankly, you've been incredibly patient
6 and tolerant of all of us, and we appreciate it more than we
7 can say.

8 We finally reached the stage of the proceedings
9 where the parties may have their constitutional jury trial
10 right exercised. So it wouldn't have been possible without
11 your help and participation.

12 You may be excused with the thanks of the Court and
13 counsel.

14 [Excused Prospective Jury Panel Exit Courtroom]

15 PROSPECTIVE JUROR/LEWIS: That includes me, too, right?

16 THE COURT DEPUTY: Yes.

17 PROSPECTIVE JUROR/LEWIS: Okay.

18 THE CLERK: Thank you.

19 THE COURT: Yes, Mr. Lewis, right? Yes, sir. You may be
20 excused as well.

21 It's been a long afternoon, and I think this is a
22 good time to break for the day. I'm inclined to, you know,
23 ask you to return Monday promptly at 1:00 so that the Court
24 may give you some initial instructions, and then you will hear
25 opening statements, I would imagine, probably by both counsel.

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1 Wouldn't you think, counsel?

2 MR. ROGERS: Yes.

3 MR. EGLET: Yes, I would just request the jury be sworn
4 and the admonition be given before they are --

5 THE COURT: Very well.

6 MR. EGLET: -- excused, Your Honor.

7 THE COURT: Ladies and gentlemen, will you please stand,
8 raise your right hand, and be sworn by Madam Clerk.

9 [Empanelled Jury Sworn]

10 THE CLERK: Thank you.

11 THE COURT: Just a couple of thoughts, I wanted to
12 refresh your recollection that I -- I said earlier that the
13 marshal is the only point of contact you may have during these
14 proceedings. That remains the case throughout the entire
15 trial. He's the only one in this room that may have any
16 direct contact with you. So if we see you in the hallway of
17 the courthouse, please don't think us discourteous if we don't
18 chat with you. We're not allowed to.

19 You're advised again of your ongoing obligation not
20 to discuss this case with anyone; not to form or express any
21 opinion until this case is given to you. You're instructed
22 not to do any research on any subject connected with this
23 case, meaning not the internet, not newspapers, not radio, not
24 television, not anything. All right?

25 Thank you, ladies and gentleman. And we'll see you

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1 on Monday at 1:00.

2 [Jury Out]

3 THE COURT: You might check with jury services when you
4 take them down. Thank you.

5 See you Monday.

6 MR. WALL: There may be a couple issues.

7 THE COURT: All right. Outside the presence of the jury?

8 MR. WALL: Yes. I received a, and I don't know if the
9 Court received, a trial brief from the Defense this morning
10 regarding the issue of minor impact. And --

11 THE COURT: I didn't -- well, I received one that's
12 titled "Trial Brief on Percipient Testimony Regarding the
13 Accident".

14 MR. WALL: Correct.

15 THE COURT: Is that the one?

16 MR. WALL: Yes, that's the one.

17 THE COURT: Okay.

18 MR. WALL: And so I don't -- I don't know procedurally
19 exactly what it was when we got it. I'm not sure if it's a
20 motion for reconsideration styled as a motion -- as a trial
21 brief. And we already had a motion for on the minor impact.
22 So I don't know -- what I get from this brief is that they
23 want to introduce testimony to support a minor impact defense.
24 If that's going to come up during opening statement, then I
25 think it's appropriate to reach that issue now.

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1 The Court was very clear in granting our motion to
2 preclude the Defendant from raising a minor or low-impact
3 defense, which included the testimony of witnesses, any
4 physicians who might want to testify as experts regarding some
5 bio-mechanical opinion that a minor impact, which it isn't,
6 whether that could have caused certain injuries. The --
7 whether they want to introduce testimony from either the
8 Defendant or her -- I think it's daughter-in-law. Daughter-
9 in-law, Linda -- daughter-in-law who was present in the car
10 about this being a minor impact. That's the -- exactly what
11 was precluded in the motion.

12 So -- so I don't know what it is. If it's a motion
13 for reconsideration, it's not only -- well, it's probably
14 timely, frankly, if it was. And I think it's within ten days
15 of the notice of entry of order. But it doesn't have any of
16 the procedural requirements for a motion for reconsideration
17 because the first step is to seek leave from the Court. You
18 can't just argue the same matters over again.

19 So -- so I don't know what it is. But before
20 there's an opening statement made by the Defense that raises
21 issues that this Court has already precluded, I think we need
22 to -- to make sure that the Court's order that was entered
23 granting our motion to preclude the Defendant from raising a
24 minor or low-impact defense remains. And I have a copy of the
25 order where it says that "The request to preclude the

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1 Defendant from raising a minor or low-impact defense is
2 granted; and further that the property damage estimates and
3 photographs are excluded."

4 THE COURT: You know, it's interesting, Mr. Wall, because
5 I saw this this morning also for the very first time. And as
6 I read it I wondered what it was also because the title
7 doesn't really go along with anything that's contained in the
8 motion or even really reflect the law that's cited in the
9 motion. So I'm not really sure what the intent is either.

10 Mr. Rogers?

11 MR. ROGERS: Okay. Let's see if I can spell that out,
12 and this is the very issue that Mr. Polsenberg's office has
13 come here to discuss with you on the issues of law. I want to
14 address how this motion came to be, though.

15 What happened was, there was a motion to exclude a
16 defense that a minor impact cannot cause injury. The
17 Plaintiffs' argument in the motion was that because the
18 Defense did not retain a bio-mechanical engineer they would
19 not be permitted to argue the general proposition that minor
20 impacts cannot cause injury.

21 The Defense appeared at the hearing and said, "This
22 is not a bio-mechanical case. The Defense is not going to
23 argue that no minor impact can cause injury. The defense is
24 that this minor impact did not cause injury."

25 And our understanding of your order was that on a

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1 bio-mechanical basis, that general proposition, that minor
2 impacts can't cause injury, is not going to be admitted.

3 At the 267 conference, which counsel reported so
4 there is a record of this, there was a point where Plaintiff's
5 counsel asked me whether -- whether we were calling the
6 Defendant to the stand. And when he first asked the question
7 I thought it was a -- I didn't even think he was serious. He
8 then asked later on, "Are you going to call the Defendant?"

9 And I said, "Well, of course I am."

10 "Well, what is she going to testify to?"

11 I said, "The facts of the accident."

12 And he said, "Well, what's the relevance of the
13 facts of the accident?"

14 And I said, "My goodness, you are not taking the
15 position that this jury will not hear a single fact about this
16 accident; are you?"

17 And he said, "Yes, that is the meaning of the
18 order."

19 And I said, "That is not at all what happened at
20 that hearing. And if that is your position, you'll be
21 inviting the jury to do nothing but speculate. How could they
22 possibly reach a determination on the elements of this
23 negligence claim when they don't know a single thing about the
24 car accident?"

25 He said, "That's our very position."

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1 And so I brought Mr. Polsenberg's office here to
2 address the law, but those -- that's the reason that that
3 brief is before you, is because of this surprise discussion at
4 the 267 conference.

5 THE COURT: Well, it looks to me like there's two things
6 going on. One, it looks like this is indeed then a disguise,
7 a motion for reconsideration. Number two, there's a whole
8 separate issue about whether or not the defendant testifies.
9 That's all kind of jumbled up in this one motion?

10 MR. ROGERS: Right. We're not asking for reconsideration
11 about the photos or about the property damage; the things that
12 were excluded as a result of the motion. Perhaps it would be
13 better phrased a motion for clarification because the
14 plaintiff's interpretation of the order is not at all my
15 understanding of what occurred at that hearing. I did not
16 hear Your Honor say that no facts of this accident will be
17 admitted, testimonial or otherwise. I understand that photos
18 are excluded, but not at all the testimony won't be admitted.

19 THE COURT: Well, I wasn't at the conference. Mr. Wall?

20 MR. WALL: Well, I have the transcript. May I approach,
21 Your Honor?

22 THE COURT: Sure. Thank you.

23 MR. WALL: See, the reason that the photos and the
24 estimates are kept out is because you can't just raise an
25 inference. Look at these photos, it was a minor crash. He

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1 couldn't have been injured the way you say he was. That's why
2 they're out because there's no expert who correlates a minor
3 impact, although this one, even in the police reports is
4 described as moderate. There's no correlation between the
5 size of the impact and the amount of injured. All the doctors
6 have even said there's no -- generally no rule of thumb.
7 There's no correlation. So that's why the photos and damage
8 estates are out.

9 The motion was to preclude a minor impact defense.
10 That's the title of the motion. The motion itself is very
11 clear when it says the defense and/or experts should be
12 precluded from presenting testimony or argument; that the
13 subject crash was merely a minor impact and not sufficient
14 enough to cause plaintiff's injuries.

15 The defense must be precluded from commenting upon
16 the dynamics of the motor vehicle crash and from arguing,
17 suggesting, or insinuating at trial that the crash was a minor
18 impact or low impact collision and not significant enough to
19 cause injuries.

20 So that issue, that argument, this crash was too
21 minor to cause these injuries is out. And it's reliably out,
22 and it's correctly out because under Hallmark and Higgs
23 [phonetic] even, they can't make that without an expert since
24 there is no correlation. That argument doesn't make sense
25 scientifically and so it's not admissible.

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1 So the only point to having either the defendant or
2 her daughter-in-law testify that this was a minor impact, this
3 was a tap, we didn't hit him very hard is the exact same
4 conclusion that the photos in the estimates would be for, to
5 say this was too small a crash for him to have been hurt in.
6 That's the only point to it. It's not relevant because
7 relevance is it makes a fact of consequence more or less
8 probable. The only reason to have the defendant or a
9 passenger in her car say this was a minor crash -- the only
10 fact that it might make more probable is the one that can't
11 come in. The defense that it's a minor impact and therefore
12 he couldn't have been hurt.

13 And in the 267 conference we discussed that because
14 I asked what Jenny Rish, the defendant, or her daughter-in-
15 law, Linda Rish's testimony would be. And on Page 32 of the
16 transcript, Mr. Rogers says:

17 "She's going to be able to describe the accident.
18 This is what happened. And I mean, how else? The jury's got
19 to know something about this. I know the Judge took the
20 photos away, but the jury is still going to hear about the
21 accident.

22 I said, "She won't be able to testify to it being a
23 minor impact or anything like that."

24 Mr. Roger's says, "She might not be able to use that
25 term, but she's going to be able to say this is the accident.

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1 This is what happened. Did you guys take what the Judge said
2 to me that the jury can't hear a thing about this accident?"

3 I said, "Well, there can't be a defense presented
4 saying this was a minor impact. She granted that motion, I
5 believe, in its entirety."

6 Mr. Rogers goes on to say, "But the motion was that
7 the defense is precluding that a minor impact can't cause
8 injury. It's not that the jury can't hear the nature of the
9 accident. I mean, the way I look at that if she said that, or
10 if there were an order interpreting things that way, there'd
11 be no way around trying this thing twice. How can the jury
12 not know anything about the accident?"

13 I responded, "Because there's no correlation between
14 the type of impact and damages. I mean, if you don't have an
15 expert to correlate this impact, was too minor to cause this
16 injury and the testimony of the defendant or the passenger in
17 her vehicle about what the impact, how minor the impact was
18 has no relevance to any fact in issue."

19 And that's the whole point. So you can't get around
20 your order saying that a minor impact defense can't be
21 presented by presenting witnesses to say it was a minor
22 impact. And the only way that you could is if we somehow
23 opened the door to it. But as it stands -- and I know the
24 Court indicated earlier today that you weren't going to rehear
25 motions, but that's what this is. This is a motion for

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1 reconsideration. And before it comes up in opening and rings
2 a bell that can't be unring, we wanted to -- and I know -- I
3 guess they wanted to present it as well today. So --

4 THE COURT: Mr. Rogers?

5 MR. HENRIOD: Your Honor, may I? Joel Henriod for
6 defendant?

7 THE COURT: Sure. Why not? Why not? I say, why not?

8 MR. HENRIOD: Thank you, Your Honor. I'll be very brief.
9 I don't think it goes just to the ultimate issue of whether or
10 not a minor accident could ever cause, or even the ultimate
11 issue for the jury whether or not it did in this case.

12 I think it goes intermediately, and at very least to
13 plaintiff's creditability. And causation here, the causation
14 of damages, creditability plaintiff -- or plaintiff's
15 creditability is key to that determination. Because when you
16 look at the opinions -- the causations opinions of plaintiff's
17 doctors, ultimately what their assessment is is two factors, a
18 doctor's general notion of what types of accidents can cause
19 what types of injuries. Plus then plaintiff's statements and
20 representations to the doctor about what their symptoms were
21 before the accident, what they were after the accident, and
22 what other events were taking place in their lives in the
23 relevant time period.

24 So the doctor takes a general knowledge about what's
25 possible and then relies upon the representations of the

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1 plaintiff, what my symptoms were before, what my symptoms were
2 after, the other things that were happening in my life and the
3 relevant time periods. And the doctor says, "Well, then given
4 all of that, yes, I would attribute these damages to that
5 accident."

6 And I believe that plaintiff's doctors will come in,
7 as they do in every case, and say, "Yes, I attribute all of
8 these damages to that accident." But based entirely on the
9 creditability of plaintiff's representation to the doctor,
10 here we have a representation to one of the care givers that
11 this was a 55 mile an hour accident.

12 Now, this is why I think it is at most a motion to
13 clarify because I understand having read the briefing on the
14 motion in limine that there is authority for the determination
15 that Your Honor made on the accident photos. I think there's
16 counter authority. I don't think that Nevada would
17 necessarily go that way, but I do see that there is Illinois,
18 Delaware authority keeping out the accident photos.

19 But there is no authority for is keeping out the
20 percipient witness. The testimony of a percipient witness to
21 say, "This is my recollection of the day." Why? Because it
22 bears on the creditability of the representations about that
23 day the plaintiff is making to his doctors. None of those
24 cases suggest that a defendant can't say, "This is my
25 recollection of the event."

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1 Hallmark doesn't say that. What Hallmark says is
2 that you cannot come in and elevate somebody to the lofty
3 status of an expert and have that expert say to a jury, "Take
4 away from them the ultimate determination in an opinion as to
5 whether or not this accident could have possibly caused these
6 injuries."

7 But what it doesn't say and what no case that's been
8 cited to you says is that the percipient witness can't come in
9 and say, "This is my recollection of the day." And if that is
10 necessarily out -- I'm sorry, I'll be very brief. If that is
11 necessarily out because there is no correlation between the
12 type of impact and the type of damages you could have, then I
13 think Your Honor would have to reconsider whether or not the
14 subsequent accident comes in.

15 Because my understanding, having read the motions in
16 limine is that the reason that is out is unrelated, is because
17 a plaintiff's characterization, both the counsel and the Court
18 and to his doctors, that that was just a ding. That it wasn't
19 significant.

20 Well, I think what's good for the goose is good for
21 the gander. If plaintiff can keep out that second accident on
22 the representation that it was just a small accident and
23 therefore irrelevant, then -- and keep that information from
24 his doctors, then that must come in. Either they're both in
25 or they're both out if the reason that we're doing it is a

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1 categorical rule that there is no correlation between the type
2 or severity of the accident and the type of damages. Thank
3 you, Your Honor, unless you have questions.

4 THE COURT: Not yet. Mr. Wall?

5 MR. WALL: Briefly, Your Honor. First of all with regard
6 to the subsequent accident, the subsequent accident is out
7 because neither of their experts related to any condition that
8 he has. That's why it was kept out.

9 THE COURT: Subject of yet another pretrial ruling.

10 MR. WALL: Not one doctor was going to testify on behalf
11 of the plaintiff -- and I'm not aware of one in the entire
12 case, and he's had 141 medical visits since the crash that are
13 related to the crash -- says I formed my opinion based on the
14 mechanism of the crash. Not one.

15 Every single one is talking about the fact that he
16 was asymptomatic before the crash, symptomatic after the
17 crash, looking at what he was treated for on the day of the
18 crash and all of the treatment subsequent to that. So it
19 isn't relevant.

20 And I've got to tell you, if this is a motion for
21 reconsideration, what I haven't heard yet is why this couldn't
22 have been raised in the prior pleadings, which is one of the -
23 - I'm paraphrasing it, but that's one of the considerations
24 under 80CR224 when it talks about motions for reconsideration.

25 Now, keep in mind that since the Court correctly

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1 granted the motion restricting the minor impact defense -- and
2 it's very clear in the motion that we're not just talking
3 about some theoretical minor impacts and injuries generally.
4 It is testimony and evidence to preclude that exact defense.

5 But not only could it have been put in here, but
6 based on the Court's order, as you are aware, we withdrew our
7 biomechanical expert at -- maybe not specifically withdrew
8 him, but we haven't contacted him to prepare for trial. We've
9 prepared for trial in line with the Court's order. So that's
10 why the law in a motion for reconsideration under 80CR224
11 would be that it has to be something that couldn't have been
12 raised in the initial briefs.

13 THE COURT: Any final thoughts?

14 MR. POLSENBERG: Your Honor, just a few if I may?

15 THE COURT: I hope they're brief, Mr. Polsenberg. It's
16 been a long week.

17 MR. POLSENBERG: I understand. And you can tell it's
18 Mr. Henriod's brief because it's so well written.

19 THE COURT: Yes.

20 MR. POLSENBERG: Judge, if we're talking about Rule 224,
21 really what the Supreme Court has said repeatedly, and most
22 especially in Insurance Companies of the West versus Gibson
23 Tile, is that Rule 224 doesn't preclude the trial judge from
24 the obligation to make the right ruling. And in fact, Justice
25 Moffin [phonetic] concurring in that opinion said it's the

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1 controlling rule is Rule 54. You can't stick with the wrong
2 ruling.

3 Even if we were required to bring in a reason for
4 why this wasn't raised before, it's obviously what we are
5 saying is that we thought that that original motion that they
6 made went to photographs and to estimates.

7 Now, you can see why you would need an expert to
8 make the leap from photographs and estimates to the speed.
9 But we don't have that here. We have percipient testimony of
10 the speed. And the fact of an accident is not something you
11 need an expert for.

12 In United Exhibition Services they talk about two
13 different ways to cause causation. Now, I don't think the
14 defendant has the duty to prove causation, only to refute what
15 they're arguing. But the two different ways are through an
16 expert or through the facts. And so I think it would be a
17 grievous error for the Court to preclude those facts. Thank
18 you, Your Honor.

19 THE COURT: Okay. Thank you. I appreciate the brief
20 argument.

21 Here's the thing, I don't know that this motion was
22 really even necessary because the Court's ruling was based on
23 the written pleadings and the argument that the Court heard.
24 And it was a very specific ruling. And I never said defendant
25 can't testify. I don't know what she's going to testify to.

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1 I sure hope she complies with the Court's pretrial orders.

2 MR. WALL: Well, she can't testify that it was a minor
3 impact.

4 THE COURT: Right.

5 MR. WALL: All right.

6 THE COURT: Right. But I don't know what else she may
7 say. I don't know.

8 MR. ROGERS: But, Your Honor --

9 THE COURT: This motion didn't really talk anything at
10 all about what Jenny Rish might testify to, although it's
11 titled trial brief on percipient testimony regarding the
12 accident.

13 MR. ROGERS: Okay. Let me tell you one thing she has
14 said and then the defend- -- plaintiff's counsel actually used
15 the word. She described the impact as a tap. And what we're
16 not clear on now is what can she say and what can't she say.
17 If she's going to appear before this jury and be asked please
18 describe this accident, where can she begin and where does she
19 end?

20 THE COURT: I urge you to re-read the order.

21 MR. ROGERS: Well, the -- you can see that the order has
22 confused plaintiff's counsel and us.

23 MR. WALL: Not one bit. Not one bit.

24 MR. ROGERS: That's why we're here.

25 MR. WALL: No, I'm here because I've got a brief telling

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1 me that what's inadmissible is going to come in and that there
2 was going to be an opening that referenced it.

3 MR. ROGERS: It's --

4 MR. WALL: That's why we're here. I'm not confused one
5 bit on a very clear order.

6 THE COURT: I didn't think you were, Mr. Wall.

7 MR. ROGERS: The 267 discussion that he just recited to
8 you show that the parties are not clear on this.

9 THE COURT: Well, I don't know what to tell you then.

10 MR. POLSENBERG: And I think, Your Honor, it is
11 admissible for the witnesses to say it was a minor impact.

12 THE COURT: Well, I don't know what to tell you. I'm not
13 going to tell you how to defend your case. I sure would never
14 presume to tell anybody how to try or defend a case. But, you
15 know, I think the order is pretty clear. There was plenty of
16 opportunity to brief it and respond to it. The Court gave
17 counsel lots of time to argue it because that's my standard
18 procedure. I think we've made a pretty clear record. And I
19 just really hope that, you know, both sides would honor the
20 Court's pretrial orders.

21 MR. POLSENBERG: But, Your Honor, on what we've done
22 today, if I were doing the opening statement I would say to
23 the jury that this was a minor accident.

24 MR. WALL: And then I would seek contempt.

25 THE COURT: I would say that would be a problem.

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1 MR. POLSENBERG: And that's why we're asking for
2 direction from you.

3 THE COURT: I'm not going to -- you know, I can't tell
4 you you can say this, you can't say that, you can say the
5 other. I mean, you're all very smart individuals. You're
6 very respectable lawyers. You're very capable and you're
7 certainly capable of reading and comprehending the Court's
8 order that all the parties briefed and argued.

9 MR. POLSENBERG: Well, Your Honor, I don't think we
10 briefed and argued this issue. And we certainly would be able
11 to say to the jury that this was just a tap.

12 THE COURT: Well, I don't think so, Mr. Polsenberg. But
13 I really don't want to engage in any sort of argument. That's
14 not the Court's rule. I think I've done my job to the best of
15 my ability and I would expect all of you to do the same.

16 MR. POLSENBERG: Here's the problem I have though, the
17 Court said that you wouldn't tell us how to try the case.

18 THE COURT: Right.

19 MR. POLSENBERG: I've suggested two things that I would
20 say in opening statement and you've told me both of those I
21 couldn't say. I can't figure out what I can say.

22 THE COURT: Are you the attorney making the opening
23 statement?

24 MR. POLSENBERG: No.

25 THE COURT: Well, then it's not really an issue.

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1 MR. POLSENBERG: Well, it is an issue, Your Honor.

2 THE COURT: Well, Mr. Polsenberg, I don't want to argue

3 with you.

4 MR. POLSENBERG: Well, I'll let you argue with Mr. Rogers

5 then.

6 THE COURT: Well, that's fine.

7 MR. POLSENBERG: All right.

8 THE COURT: I've made my ruling. Unless there are any

9 other issues we need to address, I'm inclined to call it a

10 day.

11 MR. WALL: Judge, in the same order that precluded the

12 low impact defense, there was also a preclusion of any sub-

13 rosa or surveillance video until after the direct testimony of

14 the plaintiff to see whether or not video would impeach any of

15 his testimony. And it wasn't going to be discussed with

16 witnesses or shown during opening or referenced during

17 opening. And I just want to make sure that that order is

18 still in place.

19 THE COURT: Yes. I'm not revisiting any other pretrial

20 rulings.

21 MR. WALL: All right.

22 THE COURT: We've made a very clear record along the way.

23 MR. ROGERS: I don't --

24 THE COURT: Mr. Rogers?

25 MR. ROGERS: Yeah. I don't believe that order, which I

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1 did not sign, accurately reflects our discussion at that
2 hearing. What actually occurred was you said, "I haven't seen
3 the DVD of the surveillance yet." I said, "Okay. I'll send
4 it over today." Sometime after today, plaintiff's counsel
5 submitted this order, which again, I don't recall. And the
6 DVD has been in chambers ever since.

7 Our position on the surveillance was that the
8 foundation, which was your concern -- you said, "Well, look, I
9 haven't seen the surveillance so I'm not sure what it's
10 relevant to." I said, "Okay. Here's what it's relevant to:
11 The medical records from before and after the surveillance
12 repeatedly state that the plaintiff is in severe and
13 intolerable pain, that he is at wits end. And then you go to
14 the surveillance and you see what he can do in there in that
15 footage."

16 That's why we provided that to you, not knowing that
17 this order was submitted. We were actually waiting on an
18 order from Your Honor so that we would know whether we could
19 show that in the opening.

20 THE COURT: No. You weren't waiting on anything from me.
21 It was pretty clear that I don't know what the defendant --
22 what the plaintiff's going to testify. I don't know what he's
23 going to say. So I don't know that anything that's contained
24 within that video is going to serve to impeach him. I don't
25 know what he's going to say until he gets here in the

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1 courtroom and we all hear what he has to say.

2 MR. ROGERS: But it's what he's already said is the point
3 in the medical records. When he reports to a medical provider
4 that he is suffering severe and intolerable pain and is at
5 wits end, then we know what he has said.

6 THE COURT: The jury hasn't seen or heard anything, nor
7 have I. So he can't very well be impeached until there is
8 something to impeach him with.

9 MR. WALL: That's correct. And that was the -- that's
10 the -- I mean, that's what the order says. That's what the
11 discussion was at the close of the hearing, then I recall the
12 Court saying, "You know, I haven't even seen this video. So
13 if I can get it ahead of time so that after his direct I will
14 have seen it and you can point me, Mr. Rogers, to what
15 impeaches his testimony because that's the only thing that
16 makes it admissible."

17 There was no -- it was quite clear that the order was --
18 and I've got to tell you, I -- I'm going to keep my voice nice
19 and calm, but I resent a little bit the insinuation that I
20 somehow slipped an order to you that wasn't what you said
21 during the course of the hearing because that isn't what
22 happened. The Court can -- we can get a transcript of the
23 hearing. And I'm telling you that it will justify what's in
24 the order that I presented and the order the Court signed.

25 THE COURT: You know, I review all those orders

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1 carefully. I didn't sign anything that isn't consistent with
2 my recollection of what was argued and ruled on.

3 MR. ROGERS: But -- well, the concern here then, Your
4 Honor, is the logical extension of this position. If what the
5 plaintiff has said is -- in the medical records is not
6 admissible, then can the plaintiff get up in the opening and
7 say, "This doctor has recommended surgery based on what the
8 plaintiff said. He said he was in severe and intolerable
9 pain." Well, the plaintiff hasn't taken the stand and said
10 those words, yet the very foundation for the admissibility of
11 that expert opinion is in the record only.

12 THE COURT: It sounds --

13 MR. ROGERS: In other words --

14 THE COURT: It sounds like now you're asking me what is
15 the plaintiff going to say in his opening statement?

16 MR. ROGERS: Well, I am. What can he -- I'm sorry. Go
17 ahead.

18 THE COURT: I don't know the answer to that. I don't get
19 a preview of his opening statement.

20 MR. WALL: This was just about sub-rosa. I can guarantee
21 you I'm not going to violate the Court's order and mention the
22 surveillance video.

23 THE COURT: I wouldn't expect you to.

24 MR. ROGERS: Right. But if he is going to state what the
25 plaintiff said in those records and that there's a surgical

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1 recommendation based on it, then he is using those very words
2 that make the surveillance admissible.

3 THE COURT: I don't know what he's going to say in his
4 opening statement. The Court's not privy to that. I don't
5 guess you're privy to that either.

6 MR. ROGERS: I'd welcome it.

7 THE COURT: Just as he's not privy to your opening
8 statement.

9 MR. WALL: Right. I mean, the surveillance video doesn't
10 show that my client had no pain. I don't know how any video
11 of anyone could say -- as I stand here now, do I have back
12 pain? Does my knee hurt? Just because there's a video of me
13 standing here doesn't mean that it doesn't exist.

14 So it's not as though the fact that he had a surgical
15 recommendation in November of 2008 and the video was taken in
16 July of 2008 is somehow -- if I say he had a surgical
17 recommendation, that means I'm able to be -- I don't know
18 where it goes. I don't see the connection in that and the
19 surveillance video that the Court has kept out and deferred a
20 ruling on until after the plaintiff testifies. But --

21 THE COURT: I haven't really kept it out because I don't
22 know whether it's impeachment material.

23 MR. WALL: Right. You deferred a ruling until that time.

24 MR. ROGERS: Is it until the plaintiff himself testifies?
25 Or can a doctor get on the stand and say this is what he told

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1 me?

2 THE COURT: How can you impeach a doctor's statement
3 about the plaintiff by virtue of video of the plaintiff?

4 MR. ROGERS: If the doctor's understanding from the
5 plaintiff's representation is that the plaintiff's pain was
6 severe and intolerable, then the question becomes how reliable
7 is that doctor's understanding of the plaintiff's condition.

8 THE COURT: I don't think you answered my question.

9 MR. ROGERS: Okay. I can try again.

10 THE COURT: I don't see how you can impeach a doctor's
11 statement with the video of the plaintiff.

12 MR. ROGERS: Well, it's that the doctor's statement that
13 we're discussing is actually the plaintiff's statement. The
14 doctor is reciting and/or paraphrasing what the plaintiff is
15 telling him. This is that history part or subjective part of
16 every medical note. It's not the diagnosis that we're
17 discussing. It's not the physical exam. It's the doctor
18 communicating with the patient and then reporting what's
19 communicated.

20 THE COURT: I think the answer to the question may be in
21 order to impeach the plaintiff with that video it would have
22 to be done after the plaintiff testifies because I haven't
23 really heard you answer the question of how you would do it
24 through a doctor's statement. So I think the answer is it
25 would have to be after the plaintiff testifies before you

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1 could attempt to impeach him with that video. Because I don't
2 know what he's going to say. You know, is he going to say --
3 I don't have any idea what he's going to say.

4 MR. WALL: Thank you, Your Honor.

5 MR. ROGERS: Well, let's move on to the next issue. We
6 have something that we need to clear up on the -- I've got
7 several things here. Sorry to have jumbled. When are the
8 jury instructions due? I just have a note here on that.
9 That's an easy one.

10 THE COURT: We should have had them already. But as soon
11 as practically possible. I mean, I realize there may be some
12 additional ones submitted, but there should really have been a
13 set submitted before now.

14 MR. ROGERS: Okay. And next, both parties are having
15 difficulty with scheduling. We want some assurance that we'll
16 get at least a day's notice of the witnesses to come the
17 following day.

18 THE COURT: I think that's reasonable.

19 MR. WALL: I've assured Mr. Rogers that we will provide
20 him the day before the witnesses for the next day because of
21 the -- because of the fact we're not doing openings on Monday,
22 we and he --

23 MR. HENRIOD: Wait, we are doing openings.

24 MR. WALL: I mean, that we didn't do openings today. We
25 had Dr. Grover scheduled for Monday, and now that has been

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1 thrown all off. We don't have a new date for him yet. We are
2 -- and they'll be no witnesses on Monday. And we're, you
3 know, scrambling who we're going to get on Tuesday because we
4 had a problem with Dr. Zehr [phonetic]. So right now we don't
5 know whether the doctor that we want to call on Tuesday is
6 available or not because he's out of town.

7 THE COURT: I think both sides have to roll with the
8 punches. There's certain even flow to the trial work. And
9 the Court certainly is sensitive to the fact that these expert
10 witnesses are difficult to schedule. So I don't really
11 anticipate any problems, Mr. Rogers. I'm not going to try --
12 I'm not going to tell you you have to hurry up and try your
13 case in two days. That's just not going to happen.

14 MR. ROGERS: Oh, no. Yeah, that's not what I'm asking.
15 It's just advance notice so that we can --

16 THE COURT: I think you're entitled to that and it sounds
17 like counsel is amenable.

18 MR. ROGERS: Okay. Very good. And one other issue I
19 want to address is we filed a motion to exclude the
20 investigation evidence relating to a defense expert, Dr. Wong.
21 And there was a wrinkle in that the opposition to that motion
22 introduced something unrelated to that investigation and it
23 was a stipulation and decision.

24 The Court hasn't yet entered an order relating to
25 the admissibility of that stipulation. If the plaintiff

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1 intends to introduce any evidence of that, I ask that that be
2 excluded from the opening statement and that it be brought up
3 outside the presence of the jury in an offer of proof because
4 our position in the reply brief, remember, the motion was to
5 exclude a senate investigation. The opposition was, well,
6 here's this California State stipulation and decision. Our
7 reply said that's not responsive to the motion, but that's not
8 admissible either.

9 Your Court granted -- or Your Honor granted the
10 motion as written, I believe it read, which leaves that -- the
11 investigation is out, but now we don't know about the
12 stipulation.

13 So my request then is that the plaintiff not be
14 permitted to bring that up in the opening. They have not
15 established any relevance to it. Remember that the decision
16 actually reads that there was no wrongdoing. And they need to
17 establish some proof that it's relevant to something before
18 they can bring it up to the jury because if you tell the jury
19 that some expert has done something wrong, it doesn't matter
20 if he didn't.

21 You have the state's imprimatur on this stipulation
22 and decision that may mean absolutely nothing at all, but the
23 jury is -- has heard a bell that can't be unrung.

24 THE COURT: The Court previously granted your motion to
25 exclude the senate investigation. Did you submit an order?

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1 MR. ROGERS: I believe I did. I hope so, Your Honor.

2 THE COURT: Well, if you submitted one and I reviewed it,
3 I signed it.

4 MR. WALL: And the senate investigation didn't result in
5 any penalty.

6 THE COURT: Right.

7 MR. WALL: And when we were at the hearing -- and I feel
8 as though I've been transported back in time to the motion in
9 limine hearings. Being transported back in time sometimes can
10 be a good thing. I'm not so sure today.

11 But what we argued at length and what we argued in
12 the opposition -- supplemental opposition after Dr. Wong's
13 deposition was that the stipulation in California as an
14 admission of what he did -- and I take a little issue with the
15 fact that it said that he had no wrong doing. In fact, what
16 it said is they didn't believe that it compromise the actual
17 research that he did on behalf of the companies that he had an
18 interest from.

19 But there's three separate companies for whom he had
20 received a financial benefit or had a financial interest, that
21 he didn't disclose before accepting on behalf of the State of
22 California as an employee of the University of California Los
23 Angeles before accepting money from them to do research with
24 the UCLA imprimatur on it.

25 So it does admit wrong doing and he paid an

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1 administrative fine. He was fined in the amount of, it was
2 either 10- or \$15,000. I don't remember which. And what we
3 argued at the hearing -- and the Court ruled that the senate
4 investigation was in fact out. Although this is a similar
5 topic, this was a different proceeding by the California Fair
6 Political Reform Committee or under the Political Reform Act
7 of the State of California.

8 And what I argued in the brief and what I argued at
9 the hearing was that it's a specific instance of conduct that
10 can be inquired into on cross-examination under 50.215 I
11 think, but I can't remember off the top of my head. That's --
12 and I'm basically stuck with the answer. I can't present
13 extrinsic evidence to prove it up, but I can inquire about the
14 specific instances of conduct. And I'm essentially stuck with
15 his answer.

16 And what the Court ultimately ruled after we argued
17 about that for a lengthy period of time was that the motion
18 was as to the senate investigation and it was out. And I
19 essentially conceded that since I thought the two were
20 connected. As it turns out it wasn't.

21 But there was no preclusion of the cross-examination
22 about the specific instances of conduct. And that was the way
23 it was left. So our offer of proof was all of the exhibits
24 that we attached to the supplemental opposition. Oh, I wasn't
25 even close; 50.085 subsection 3. Specific instances of the

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1 conduct of a witness for the purpose of attacking or
2 supporting his creditability, other than conviction of a
3 crime, may not be proved by extrinsic evidence. They may,
4 however, if relevant to truthfulness, be inquired into on
5 cross-examination of the witness himself. Thank you.

6 THE COURT: Yes. And I think what I said was that
7 creditability is always an issue. So --

8 MR. WALL: Right.

9 MR. ROGERS: But the point here is whether it has
10 anything to do with creditability. If relevant to
11 truthfulness is the operative phrase and the meaning -- it's
12 clear that nobody has demonstrated to the Court that this
13 stipulation and decision has anything to do with truthfulness
14 because contained within the very decision it says there's no
15 evidence of bias.

16 The suggestion being there is no wrongdoing. This
17 could be a clerical error for all anybody knows. But if
18 plaintiff's counsel gets up in the opening and shows this or
19 talks about this to the jury, it's at least the same problem
20 as the surveillance video.

21 THE COURT: I don't see how you can --

22 MR. WALL: You can't show it.

23 THE COURT: I don't see how you can put that in your
24 opening statement. I don't see that you can.

25 MR. WALL: Can't show it. You're right.

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1 THE COURT: And I don't know whether it's an appropriate
2 area of inquiry. I guess -- I suppose it depends on what the
3 witness testifies to.

4 MR. ROGERS: At least outside the presence if they intend
5 to bring it up. That's all this discussion is about is if
6 they're going to bring it up, don't do it in the opening
7 because there's no offer of proof on it. And if they're going
8 to bring it up with him on the stand, do it outside the
9 presence of the jury so the Court can make an informed
10 decision on it.

11 THE COURT: Well, they can't -- I don't see how you can
12 put it in your opening statement. I think that's -- that's
13 pretty clear.

14 MR. WALL: We don't intend to. I don't intend to. I
15 couldn't -- I can't introduce the stipulation that he signed
16 anyway. So no, that's -- we won't even raise it in the
17 opening. But --

18 MR. ROGERS: And then on the stand as well. That's --

19 MR. WALL: No, that's a whole different thing.

20 MR. ROGERS: That's outside the presence as we request.

21 MR. WALL: No, you don't get to give your witness two
22 ways to try to explain it. You know, one outside the presence
23 of the jury and well, if that doesn't work too well then
24 another way. He's knows the question is coming. He knows the
25 question is coming obviously, so --

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1 MR. ROGERS: The question is not relevant if it doesn't
2 go to truthfulness though.

3 MR. WALL: It absolutely goes to truthfulness. On three
4 separate occasions he took money, had an interest in the
5 companies, and told his university conflict of interest
6 committee that he didn't have any interest so that it would be
7 okay to do research for that company with UCLA's stamp on it.
8 So that I think it absolutely goes to truthfulness.

9 THE COURT: Well --

10 MR. ROGERS: That's a spin on it.

11 THE COURT: Yes.

12 MR. ROGERS: And that's the point, is does it really say
13 what the plaintiff says? And can this offer of proof
14 establish that?

15 THE COURT: I think --

16 MR. ROGERS: Let's do it outside the presence.

17 THE COURT: I think you can address it when the time
18 comes. We can have a sidebar if we need to hear from him
19 outside the presence of the jury. We can consider it at that
20 point in time.

21 Let me ask you this, there was something in the
22 letter that Mr. Wall sent to you, Mr. Rogers, and copied me
23 on.

24 MR. WALL: Yes.

25 THE COURT: About this very Dr. Wang [SIC], and I didn't

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1 -- I totally didn't understand that paragraph regarding Dr.
2 Wang.

3 MR. WALL: Oh, no, all I said was in terms of trying to
4 -- the letter was basically about all the things we had to do
5 today and whether I should be prepared with my opening and
6 whether anything that happens today was going to change it.
7 And the suggestion was basically let's do both of them on a
8 Monday. Since Dr. Wang was -- we were going to take Dr. Wang
9 -- Wong, I'm sorry -- Dr. Wong out of order on Monday, his
10 father had the stroke that we found out about the day before
11 yesterday. We're scrambling to try to fill up Monday anyway,
12 so let's do the openings Monday. That was the substance of
13 it.

14 THE COURT: So --

15 MR. WALL: Does that make sense?

16 THE COURT: He is going to testify at some point?

17 MR. WALL: He is. On the 29th.

18 MR. ROGERS: He has a firm date now. It's the following
19 week on Tuesday. I think the 29th.

20 MR. WALL: Right.

21 MR. ROGERS: He'll be here, it's just not on -- well,
22 thankfully not on Monday now.

23 THE COURT: All right. Anything else we need to discuss?

24 MR. WALL: No, Judge.

25 MR. ADAMS: Yes.

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1 MR. WALL: Oh, yes.

2 MR. ADAMS: Just one issue, Your Honor, and I'll be very
3 brief.

4 THE COURT: Mr. Adams?

5 MR. ADAMS: Early in the week Mr. Rogers brought to my
6 attention that there were some potential redacting errors in
7 the exhibits. I've combed through them and I've had one of my
8 meticulous assistants comb through them. It looks like there
9 were a few redacting errors. I have them here. I'll provide
10 them to Mr. Rogers at sometime, not today, but sometime before
11 our opening statement I'll get with the clerk and put those
12 in. There's not that many.

13 But I would like to -- some clarification from Mr.
14 Rogers here. At our 2.67 he brought certain exhibits with
15 him. Exhibit O was medical records, but there was nothing
16 contained within the tab of Exhibit O. So I'm assuming, since
17 I haven't received any medical exhibits from the defense that
18 they're going to be using plaintiff's exhibits throughout this
19 trial. And anything they show in front of this jury through
20 Power Point or other media is going to be through plaintiff's
21 exhibits of which we properly did give them a copy of at our
22 2.67 exchange, Your Honor.

23 THE COURT: Mr. Rogers?

24 MR. ROGERS: They actually altered the medical records.
25 That is why we produced -- it's a charge, I know. And it does

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1 give you pause. It certainly did me. And so in response to
2 that, the defense, which had already identified those treating
3 records as exhibits, but said okay to the plaintiff, if you're
4 going to just do a joint exhibit on that that's fine. Give us
5 the records.

6 We discovered that the plaintiff deleted all the
7 medications that he was taking from the records. And we said,
8 well, that's not acceptable to us because that's not the -- an
9 accurate copy of those records at all. And so we produced a
10 COR copy, that's it, of the Southwest Medical Associates
11 records. We said we're going to rely on the actual custodian
12 of records documents.

13 Plaintiff's counsel, if they want to introduce these
14 redacted copies with no medications in them, they can do that,
15 but we are going to introduce the actual and appropriate
16 records. That's where we are.

17 The only records the defense has added are the
18 Southwest Medical Associates records. We haven't gone through
19 the remaining records with -- as fine tooth and comb to
20 discover whether there are any alterations there as well.

21 THE COURT: What about that, Mr. Adams?

22 MR. ADAMS: Yes, Your Honor. First of all, I take
23 offense with the altering of records. I redacted the records
24 in accordance with this Court's order. I've tried many cases
25 in this department. As you know, I handle the exhibits during

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1 trial. I make sure that I comply with all the Court's orders.

2 I will say that there was eight records where two
3 medications were taken out and that's part of which we're
4 adding in in correcting those records. Now, in -- when Mr.
5 Rogers brought this up to me earlier in the week, I then went
6 through every record exhibit that we have in the four binders
7 over there. And what I found was additional things that
8 needed to be redacted to comply with the court orders. In
9 other words, things taken out like I missed a few insurances,
10 some conditions not related to this accident. And I actually
11 have a chart here for Mr. Rogers to show what actual motion in
12 limine we're complying with.

13 Mr. Rogers has not produced one medical record to
14 us, one medical exhibit to be used in this trial. I --
15 there's no doubt in my mind, okay, that I'm going to get
16 medical records at some point from him now over the weekend it
17 sounds like from Southwest that aren't redacted in complying
18 with this Court's order.

19 On more than one occasion Mr. Roger's has looked at
20 me and go, "What do you mean redacted?" Like this is
21 something new. I mean, that's why we do motions in limine so
22 we fan out the issues to be -- to resolve at trial and
23 evidence to be used at trial. If he's saying that I altered
24 records, I altered them in accordance with this Court's
25 orders, Your Honor.

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1 MR. ROGERS: I think the proposed correction is an
2 acknowledgement that it was not in accordance with this
3 Court's orders because what I saw in the medical records was,
4 for example, I'm looking right now at a date of treatment
5 dated May 4, 2005. There are roughly ten medications being
6 taken on that date. In its place, in the plaintiff's
7 production was a big empty box. It was the same on May 12.
8 It was the same on April 15, the date of the incident. An
9 empty box where the actual record with the custodian of
10 records affidavit signature on it contains, again, seven or
11 eight medications.

12 Your Honor didn't exclude medications relating to
13 migraines. And I'm happy to present these to you so that you
14 can see what was redacted. And that is why the defense
15 produced this record that the plaintiff is objecting to now.

16 MR. ADAMS: Medications, as this Court knows and this
17 Court has ruled in motions in limine to exclude subsequent and
18 unrelated conditions and other medical conditions not related
19 to this incident. My client has high blood pressure. He has
20 diabetes test. He has allergies. I've taken all those
21 medications related to those conditions out of the records.

22 Why would I take the fact that he's suffering from
23 allergic reaction today out of the records to comply with the
24 court orders and not take the medication that he's using to
25 treat that same condition out of the records? It makes no

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1 sense.

2 So when he talks about that I'm redacting out
3 prescription drugs, it's because they're related to conditions
4 that aren't pertaining to this case which are in accordance
5 with this Court's orders.

6 THE COURT: It looks like we're going with plaintiff's
7 medical records.

8 MR. ROGERS: The redacted? The altered one?

9 MR. WALL: The redacted, not altered, counsel. You say
10 that one more time and we're going to meet out in the street.

11 MR. ROGERS: Hold on. Hold on.

12 THE COURT: Anything else?

13 MR. ROGERS: Let's go. Let's go.

14 MR. WALL: Yeah. We will. We'll take it outside.

15 THE COURT: Anything else?

16 MR. WALL: That would be a pleasure.

17 MR. ROGERS: Let's do it.

18 MR. WALL: We will.

19 MR. ROGERS: Now, Your Honor, the point is the
20 plaintiff's records and redaction don't redact a select kind
21 of medication. It erases all of them.

22 THE COURT: That's not what I heard Mr. Adams state.

23 MR. ROGERS: But that is what happened.

24 MR. ADAMS: I just provided you with a packet. There was
25 eight medical records of -- that I made an error on. Eight

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1 medical records related to his migraine headaches. That's it.
2 The rest are all other redactions that pertain to other orders
3 of this Court. And I'm giving you a matrix of that.

4 MR. ROGERS: The new production?

5 MR. ADAMS: Right there. That's it. Yeah, out of my
6 four binders I have maybe 30 pages here or 40 pages, most of
7 which if you look at the chart are related to other things,
8 not even things that you've been arguing here today.

9 MR. ROGERS: Well, I haven't seen these to know anything
10 about whether they're reliable and whether a custodian of
11 record affidavit signature even belongs on them because they
12 aren't an accurate copy. So if you would allow me to look
13 them over and see because the first copy they sent was
14 provably not correct.

15 THE COURT: I think you're entitled to look them over
16 carefully over the weekend, but --

17 MR. ADAMS: I agree. And I'm willing to work with him,
18 Your Honor. I made that offer early on this week on Monday
19 and Tuesday and got no response. But, I mean, if he's going
20 to look at documents that I just produced to him and I
21 produced all my other exhibits to him, you would think that if
22 he wants to use an exhibit in this department, in this Court,
23 in this trial, he would give me the same courtesy and give me
24 the documents he plans on showing this jury.

25 MR. ROGERS: There's an ROC today -- signed today.

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1 THE COURT: I would think they would have been provided
2 before today.

3 MR. ROGERS: It just arrived today. It's my -- I was
4 just told by someone that there's an ROC signed today.

5 THE COURT: Anything else?

6 MR. WALL: No, Judge.

7 MR. ROGERS: Not from me.

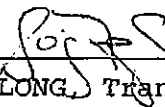
8 THE COURT: All right. See you Monday.

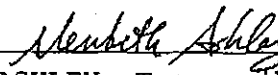
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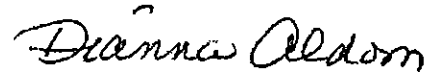
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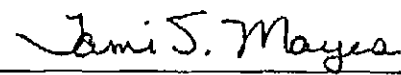
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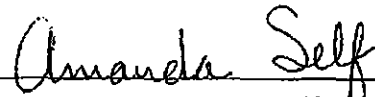
1 ATTEST: I do hereby certify that I have truly and correctly
2 transcribed the audio/video recording in the above-entitled
3 case to the best of my ability.
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9 BONNIE FURLONG, Transcriber

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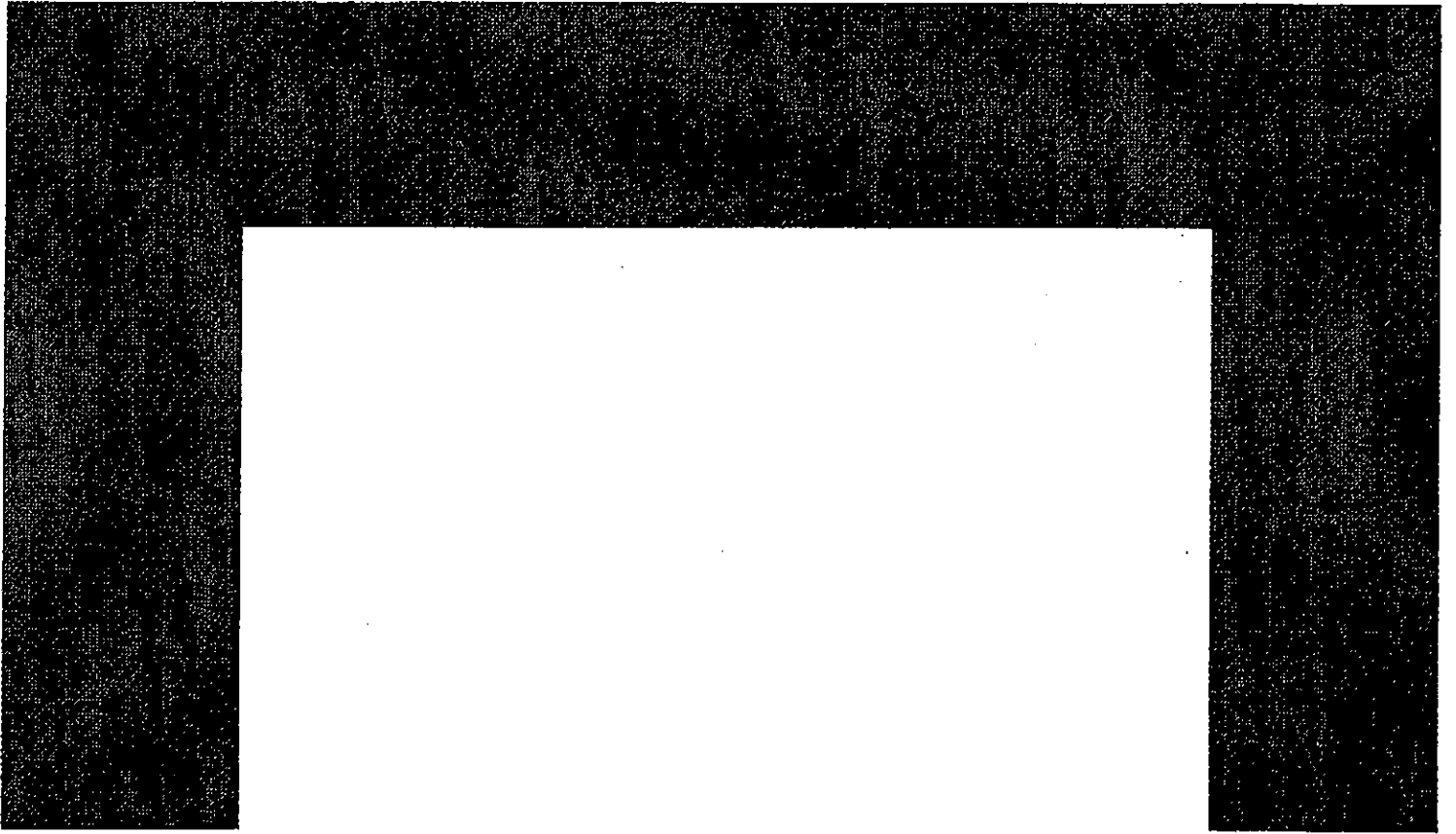
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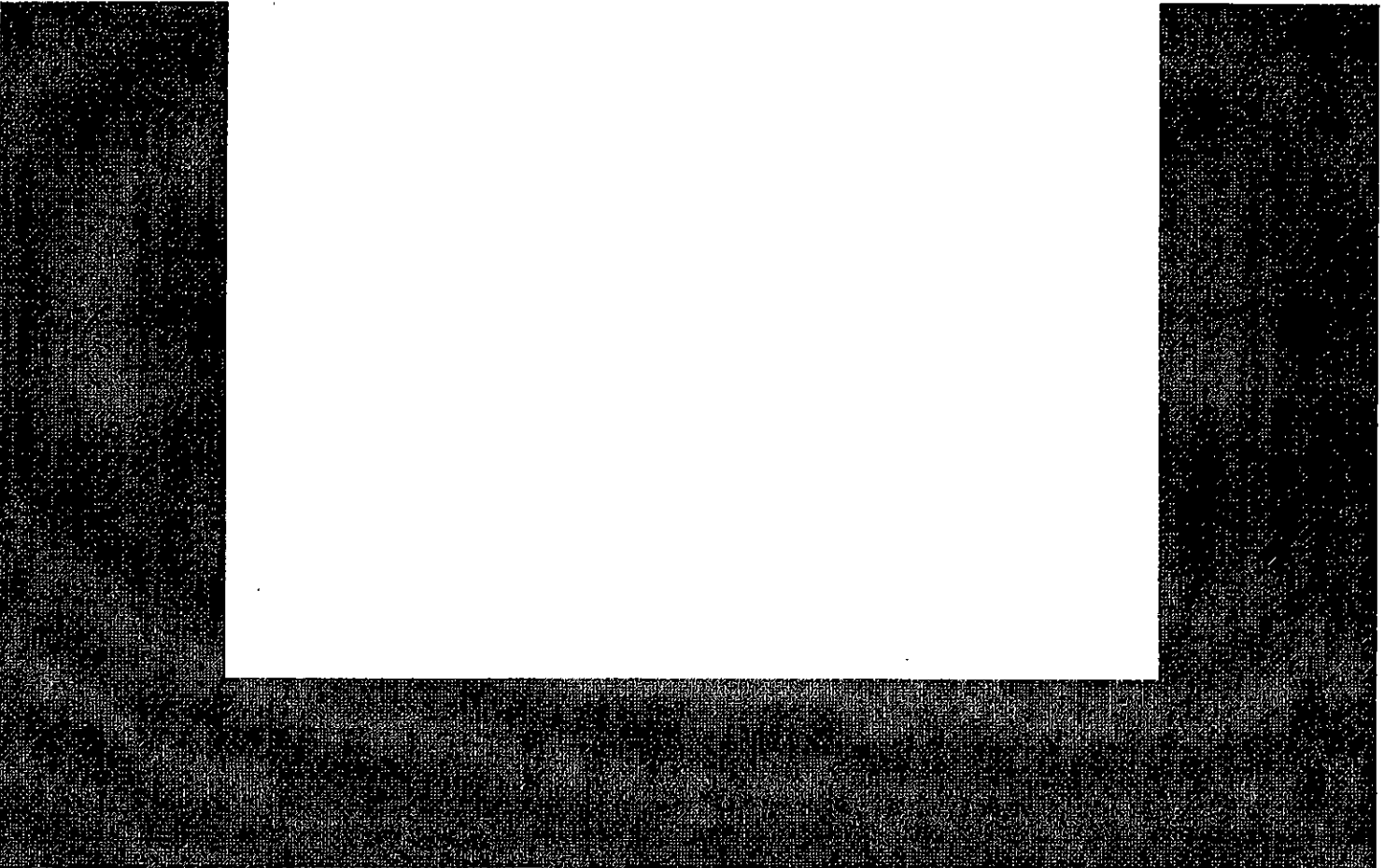
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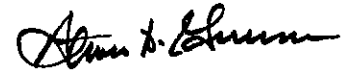


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CLERK OF THE COURT

1 NEO

2 **ROBERT T. EGLET, ESQ.**

3 Nevada Bar No. 3402

4 **DAVID T. WALL, ESQ.**

5 Nevada Bar No. 2805

6 **ROBERT M. ADAMS, ESQ.**

7 Nevada Bar No. 6551

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11 Ph: (702) 450-5400

12 Fx: (702) 450-5451

13 dwall@mainorlawyers.com

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15 Nevada Bar No. 4900

16 **AARON & PATERNOSTER, LTD.**

17 2300 West Sahara Avenue, Ste.650

18 Las Vegas, Nevada 89102

19 Ph.: (702) 384-4111

20 Fx.: (702) 384-8222

21 *Attorneys for Plaintiffs*

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 WILLIAM JAY SIMAO, individually and
25 CHERYL ANN SIMAO, individually, and as
26 husband and wife,

27 Plaintiffs,

28 v.

29 JENNY RISH; JAMES RISH; LINDA RISH;
30 DOES I through V; and ROE CORPORATIONS I
31 through V, inclusive,

32 Defendants.

CASE NO.: A539455

DEPT. NO.: X

NOTICE OF ENTRY OF ORDER

MAINOR EGLET

001410

1 PLEASE TAKE NOTICE that an Order Regarding Plaintiffs' Omnibus Motion in Limine
2 was entered on March 11, 2011, a copy of which is attached hereto.

3 DATED this 14 day of March, 2011.

4 MAINOR EGLET, LLP

5
6 BY: 
7 DAVID T. WALL, ESQ.

8
9 **CERTIFICATE OF SERVICE**

10 Pursuant to N.R.C.P 5(b), I hereby certify that I am an employee of MAINOR EGLET
11 and that on the 14th day of March, 2011, I deposited for mailing, postage prepaid thereon, at
12 Las Vegas, Nevada the foregoing **NOTICE OF ENTRY OF ORDER** in the above matter
13 addressed as follows:
14

15
16 Stephen H. Rogers, Esq.
17 **ROGERS, MASTRANGELO,**
18 **CARVALHO & MITCHELL**
19 300 South Fourth Street, Suite 710
20 Las Vegas, Nevada 89101

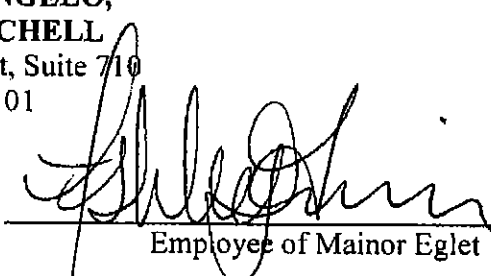
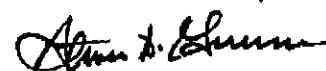
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22 Employee of Mainor Eglet
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EXHIBIT "1"

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CLERK OF THE COURT

1 **ORDR**

2 **ROBERT T. EGLET, ESQ.**

3 Nevada Bar No. 3402

4 **DAVID T. WALL, ESQ.**

5 Nevada Bar No. 2805

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7 Nevada Bar No. 6551

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21 *Attorneys for Plaintiffs*

22 **DISTRICT COURT**
23 **CLARK COUNTY, NEVADA**

24 WILLIAM JAY SIMAO, individually and
25 CHERYL ANN SIMAO, individually, and as
26 husband and wife,

27 **Plaintiffs,**

28 **v.**

JENNY RISH; JAMES RISH; LINDA RISH;
DOES I through V; and ROE CORPORATIONS I
through V, inclusive,

Defendants.

CASE NO.: A539455

DEPT. NO.: X

ORDER REGARDING
PLAINTIFFS' OMNIBUS MOTION
IN LIMINE

This Honorable Court, having read the pleadings and papers on file herein regarding

MAINOR EGLET

001413

1 Plaintiffs' Omnibus Motion in Limine, the parties appearing before the Court on February 15,
2 2011 for hearing, DAVID T WALL, ESQ. and Mainor Eglet appearing for Plaintiffs, STEVE
3 ROGERS, ESQ. and Rogers, Mastrangelo, Carvalho and Mitchell appearing for Defendants, and
4 good cause appearing therefore, the Court rules upon the Plaintiffs' Motion as follows:

5 **IT IS HEREBY ORDERED** that Plaintiffs' request to exclude prior and subsequent
6 unrelated accidents, injuries and medical conditions and prior and subsequent claims or lawsuits
7 is GRANTED in all respects;

8 **IT IS FURTHER ORDERED** that Plaintiffs' request to preclude reference to William
9 being a malingerer, magnifying symptoms or manifesting secondary gain motives is GRANTED,
10 such that medical witnesses may testify to medical inconsistencies, but references to Plaintiff
11 being a malingerer, magnifying symptoms or manifesting secondary gain motives are excluded.

12 **IT IS FURTHER ORDERED** that treating physicians do not need to prepare expert
13 reports separate from and in addition to their medical records and dictated reports.

14 **IT IS FURTHER ORDERED** that Plaintiffs' request to preclude reference to defense
15 medical examiners as "independent" is GRANTED.

16 **IT IS FURTHER ORDERED** that Plaintiffs' request to preclude argument that this case
17 is "attorney driven" or a "medical-buildup" case" is GRANTED.

18 **IT IS FURTHER ORDERED** that Plaintiffs' request to preclude references to collateral
19 sources of payment or medical bills and all other expenses, including health insurance, liens
20 and/or Medicare is GRANTED.

21 **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude evidence of when
22 Plaintiffs retained counsels is GRANTED.

23 **IT IS FURTHER ORDERED** that Plaintiffs' request to preclude Defendants from
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1 arguing that Plaintiffs are asking the jury for an amount greater than they anticipate receiving is
2 GRANTED.

3 DATED this 9th day of ^{Mar}~~February~~, 2011.

4
5 
6 DISTRICT COURT JUDGE

7
8 MAINOR EGLET

9 

10 DAVID T. WALL, ESQ.

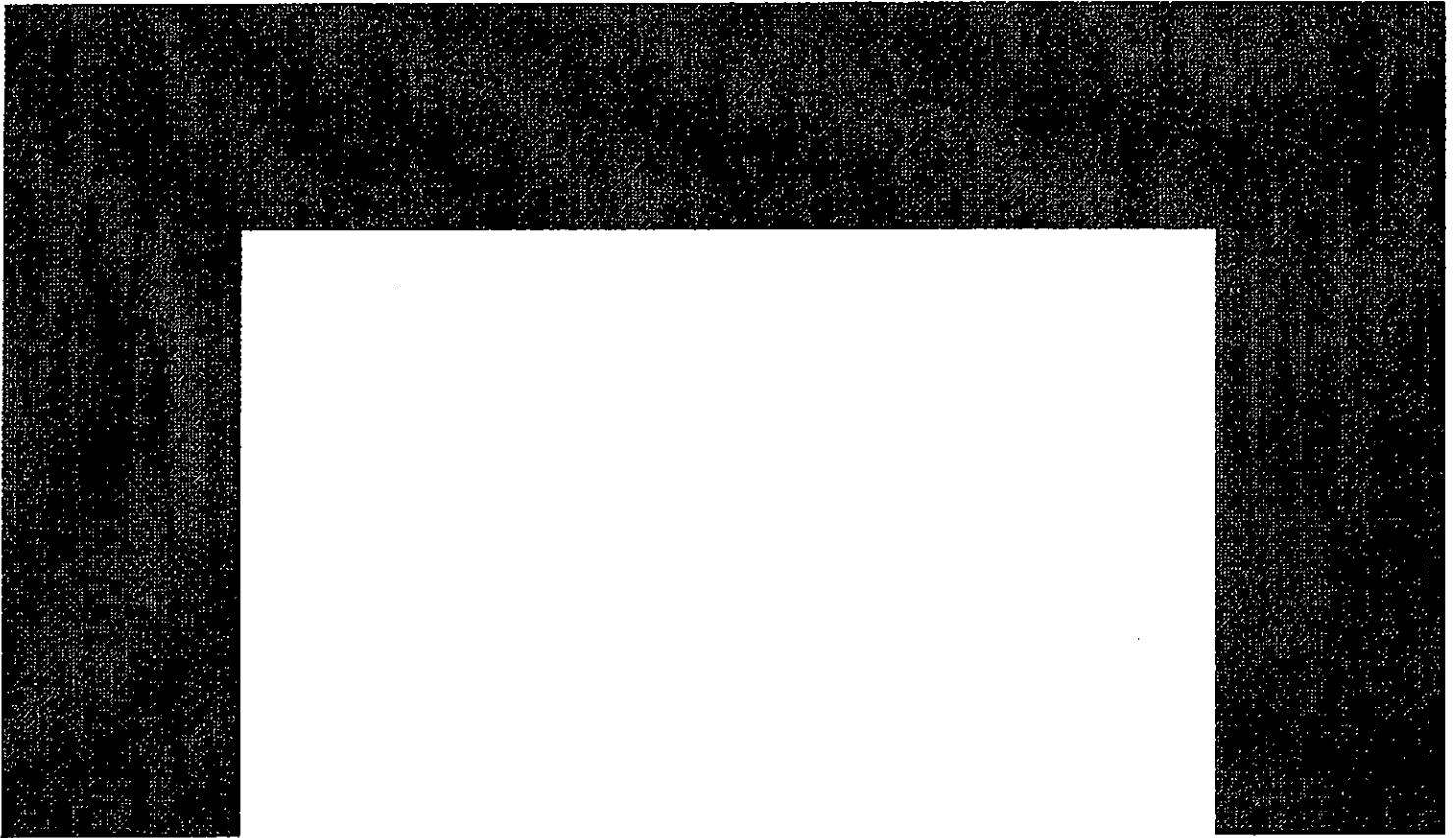
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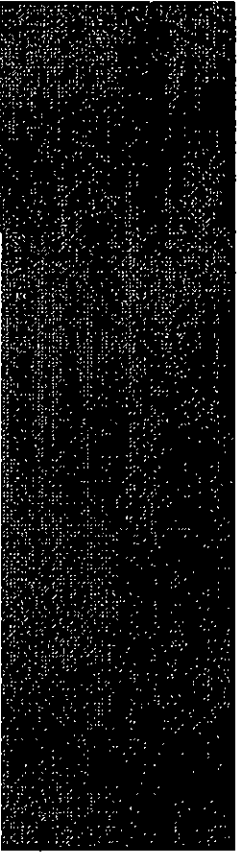
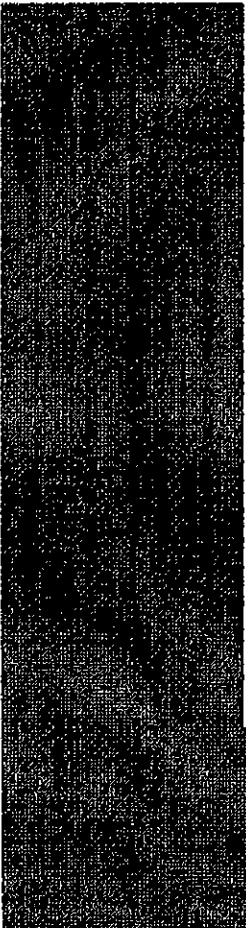
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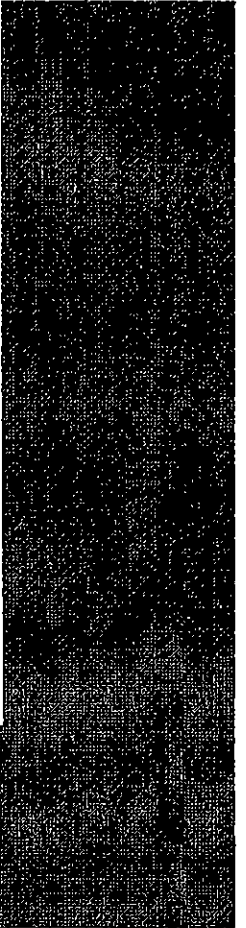
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MAINOR EGLET



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ORIGINAL

BREF

STEPHEN H. ROGERS, ESQ.

Nevada Bar No. 5755

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

300 South Fourth Street, Suite 710

Las Vegas, Nevada 89101

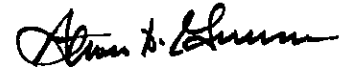
Phone (702) 383-3400

Fax (702) 384-1460

Attorneys for Defendant Jenny Rish

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and
 CHERYL ANN SIMAO, individually, and as
 husband and wife,

Plaintiff,

v.

JENNY RISH; JAMES RISH; LINDA RISH;
 DOES I - V; and ROE CORPORATIONS I - V,
 inclusive,

Defendants.

CASE NO. A539455
 DEPT. NO XX

DATE OF HEARING:
 TIME OF HEARING:

TRIAL BRIEF IN SUPPORT OF ORAL MOTION FOR MISTRIAL

COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H. ROGERS, ESQ., and hereby Moves this Court for an Mistrial based upon the dismissal of nine jurors for cause. The Reasons in support of said request are contained in the attached Memorandum of Points and Authorities, all pleadings and paper on file, as well as arguments presented at the time of the hearing.

DATED this 17th day of March, 2011.

ROGERS, MASTRANGELO, CARVALHO &
 MITCHELL


 STEPHEN H. ROGERS, ESQ.
 Nevada Bar No. 5755
 300 South Fourth Street, Suite 710
 Las Vegas, Nevada 89101
 Attorneys for Defendant Jenny Rish

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

During voir dire, at least nine (9) jurors have been struck for "cause" as allegedly being unable to fairly determine the outcome of this trial. Defendants have been denied the opportunity to question these jurors to properly determine whether these jurors could follow the law. Denial of Defendant's right to voir dire mandates a mistrial. Secondly, by allowing Plaintiff to question the jurors uninterrupted for the past 4 days has irrevocably biased the jury pool, as improper questioning of the panel has continued despite numerous objectionable questions.

II. LAW AND ARGUMENT

A. Defendant's right to voir dire has been unreasonably restricted in violation of NRS 16.030.

NRS 16.030 states:

The judge shall conduct the initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted.

Where a trial judge unreasonably restricts or denies supplemental attorney voir dire, she commits reversible error. Leone v. Goodman, 105 Nev. 221, 773 P.2d 342 (1989).

This court has unreasonably denied Defendant's right to voir dire jurors for cause before their dismissal. The right to voir dire by a Defendant is required by NRS 16.030 and it's legislative history:

A review of the legislative history "convinces us that there was no mistake by the Legislature as to the language used in the statute: it gives attorneys a *right* to conduct supplemental examination of prospective jurors."

Whitlock v. Salmon, 104 Nev. 24, 752 P.2d 210 (1988).

Sister states likewise hold that excusing jurors for cause without allowing inquiry by Defendants is reversible error. See Sanders v. State, 707 So.2d 664 (Fla. 1998); People v. Lefebre 981 P.2d 650 (Colo App. 1998); O'Connell v. State, 480 So.2d 1284 (Fla. 1986); State v. Anderson, 4 P.3d 369 (Ariz. 2000).

As nine jurors have already been excused under this method, Defendant has been unfairly and irrevocably prejudiced. A mistrial is the only remedy.

1
2 **B. This court has failed to properly restrict Plaintiff's voir dire.**

3 While each side has a right to voir dire, unreasonable voir dire can and must be restricted by
4 the trial court. The trial judge has the duty to restrict attorney-conducted voir dire to its permissible
5 scope: obtaining an impartial jury. "NRS 16.030(6) clearly contemplates that the trial judge will
6 supervise the process and that he may reasonably restrict supplemental examination of prospective
7 jurors by the litigant's counsel." *Whitlock v. Salmon*, 104 Nev. 24 (1988). See also *Lamb v. State*, 127
8 Nev. Adv. Op. 3 (March 3, 2011 Nev. 2011) (Proper to exclude voir dire "aimed more at
9 indoctrination than acquisition of information concerning bias or ability to apply the law".)

10 Plaintiff has irrevocably tainted jury pool with an improper voir dire. Plaintiff has taken the
11 better part of four days to improperly influence the jury pool, asking questions designed to
12 "indoctrinate" the jurors rather than determine bias or prejudice. In addition, the jury pool has been
13 improperly advised on the burden of proof. Plaintiff has advised the jury the parties are "equal", yet
14 the Plaintiff has burden of proof on negligence. See *Joynt v. California Hotel & Casino*, 108 Nev. 539
15 (1992). Once again, a mistrial is the only appropriate remedy.

16 **III. CONCLUSION**

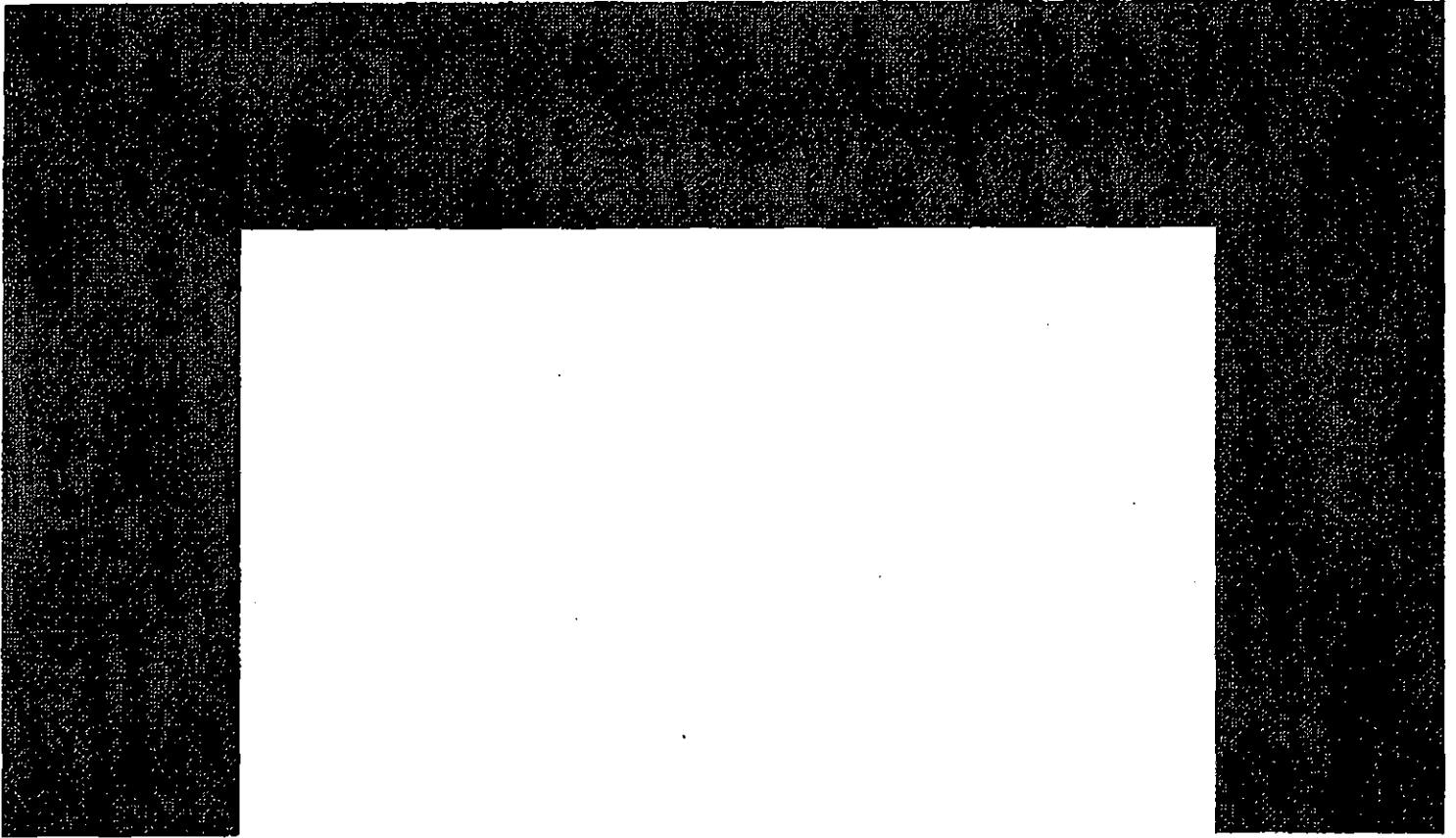
17 Defendant respectfully requests a mistrial due to irrevocable errors in voir dire.

18
19 DATED this 17th day of March, 2011.

20 ROGERS, MASTRANGELO, CARVALHO &
21 MITCHELL

22 
23 STEPHEN H. ROGERS, ESQ.
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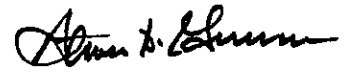


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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and
CHERYL ANN SIMAO, individually and as
husband and wife,

Case No. A539455

Dept. No. X

Plaintiffs,

vs.

JENNY RISH; JAMES RISH; LINDA RISH;
DOES I through V; and ROE
Corporations I through V, inclusive,

Defendants.

TRIAL BRIEF ON PERCIPIENT TESTIMONY REGARDING THE ACCIDENT

Based on statements of plaintiff's counsel at the pre-trial conference, defendant expects that plaintiff may contend that defendant Jenny Rish should be precluded from testifying about the subject accident.

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///

///

1 Plaintiff must be allowed to testify about her recollection of the accident.
2 DATED this 1st day of March, 2011.

3 ROGERS, MASTRANGELO,
4 CARVALHO & MITCHELL
5 

6 Stephen H. Rogers, Esq.
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11 I.

12 **A DEFENDANT MAY TESTIFY ABOUT THE SUBJECT ACCIDENT**
13 **WITHOUT PRESENTING A BIOMECHANICAL EXPERT**

14 **A. Expert Testimony Is Necessary Only in Limited Circumstances**

15 The rational behind plaintiff's argument is the faulty assumption that, if an
16 expert can't offer opinion testimony about a subject, then the jury may not learn facts
17 on the subject. Plaintiff offers no authority for this proposition, and it simply isn't
18 true. For instance, outside the context of medical malpractice, a medical expert is not
19 necessary even to prove medical causation: "A testifying physician must state to a
20 reasonable degree of medical probability that the condition in question was caused by
21 the industrial injury, *or sufficient facts must be shown so that the trier of fact can*
22 *make the reasonable conclusion* that the condition was caused by the industrial
23 injury." *United Exposition Service Co. v. S.I.I.S.*, __ Nev. __, 851 P.2d 423, 425
(1993).

24 One of the courts' general concerns about "expert" testimony is the effect of
25 putting a particular witness's opinion on a pedestal. As some courts have indicated,
26 "the problem here (as with all expert testimony) is not the introduction of one man's
27 opinion on another's future dangerousness, but the fact that the opinion is introduced
28 by one whose title and education (not to mention designation as an "expert") gives

1 him significant credibility in the eyes of the jury as one whose opinion comes with the
2 imprimatur of scientific fact.” *Flores v. Johnson*, 210 F.3d 456, 465-466 (5th Cir.
3 2000). Thus, the court’s hesitancy to admit expert testimony is not to shelter juries
4 from facts, but rather to prevent uninformed *opinions* from invading the province of
5 the jury. *Cf., Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992) (danger of
6 speculative expert testimony is the risk that it can “lend a stamp of undue legitimacy”
7 to conclusions that should be left to the jury)(criminal). The court does not bestow the
8 honor “expert” lightly.

9 Rather, An abundance of Nevada case law has held that in negligence actions,
10 issues of causation are factual issues for the jury to determine. *See Nehls v. Leonard*,
11 97 Nev. 325, 328, 630 P.2d 258, 260 (1981) (stating that in Nevada, issues of
12 negligence and proximate cause are considered issues of fact for the jury to resolve);
13 *see also Barreth v. Reno*, 77 Nev. 196, 198 (1961); *White v. Demetelin*, 84 Nev. 430,
14 433 (1968). More specifically, in automobile accident cases, the issue of proximate
15 cause as well as the cause of the damages for which compensation is sought, are issues
16 of fact for the jury to decide. *See Fox v. Cusick*, 91 Nev. 218, 220, 533 P.2d 466, 467
17 (1975).

18 With regard to the matter of injury and damage, it is within the province of the
19 jury to decide that an accident occurred with or without compensable injury. *Id.* It is
20 for the jury to evaluate the evidence presented and to assess the weight to give that
21 evidence. Thus, an expert need not testify as to causation and damages in order to
22 admit relevant evidence. *See Krause Inc. v. Little*, 117 Nev. 929, 938-39, 34 P.3d
23 566, 572 (2001) (concluding that a jury did not require a medical expert’s testimony to
24 appreciate the extent to which a broken bone causes pain and suffering and what
25 amount of future damages would be appropriate).

1 **B. Plaintiff Cites No Authority that Would Justify Limitation**
2 **of the Defendant Driver's Percipient Testimony**

3 At most the authorities cited by plaintiff in his motion in *limine* stand only for
4 the proposition that, without testimony from a biomechanical expert, a defendant may
5 not extrapolate from the amount of *damage to a vehicle* the likely severity of resultant
6 physical injury. See *Davis v. Maute*, 770 A.2d 36 (Del. 2001) (vehicle photographs
7 inadmissible); *Eskin v. Carden*, 842 A.2d 1222 (Del. 2004) (same); *DiCosola v.*
8 *Bowman*, 794 N.E.2d 875 (Ill. Ct. App. 2003) (same). And, even that appears to be a
9 minority position.¹

10 Undersigned counsel is aware of *no* authority that would curtail the testimony
11 of the defendant driver, based on independent recollections.

12 **C. The Jury May Decline to Accept Even Unrebutted Expert Testimony**

13 In Nevada, juries need not check their common sense at the door and are not
14 obligated to accept the conclusions of plaintiff's experts, even though (1) they spout
15 the magic words "reasonable degree of medical probability." and (2) the defendant has

16 ¹ For example, in *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 564, 895 N.E.2d 1125, 1129 (Ill. App. Ct. 2008),
17 the court held that expert testimony on the correlation between vehicular damage and plaintiff's injuries was not needed
18 in order to admit photographs of the parties' damaged vehicles. Similarly, the court in *Ferro v. Griffiths*, 361 Ill.App.3d
19 738, 742, 297 Ill. Dec. 194, 836 N.E.2d 925 (2005), stated that a trial court has to determine "whether the photographs
20 make the resulting injury to the plaintiff more or less probable" and "whether the nature of the damage to the vehicles
21 and the injury to the plaintiff are such that a lay person can readily assess their relationship, if any, without expert
22 interpretation." *Id.*

23 In this case, the jury is entitled to hear testimony and to see evidence that establishes causation or establishes the extent
24 of damages. There is no requirement that such relevant evidence is admissible only if an expert is willing to testify as to
25 its relevance. See, e.g., *Brennan v. Demello*, 921 A.2d 1110, 1120, 191 N.J. 18, 28 ("We cannot subscribe to the limits
26 of Davis' s logic. In the main, the fundamental relationship between the force of impact in an automobile accident and
27 the existence or extent of any resulting injuries does not necessarily require 'scientific, technical, or other specialized
28 knowledge' in order to 'assist the trier of fact to understand the evidence or to determine a fact in issue' ... expert proofs
... address the weight to be given to photographs of impact, not their admissibility."); *Marron v. Stromstad*, 123 P.3d
992, 1009 (Alaska 2005) ("[W]e decline to adopt the rigid approach represented by [Davis]. We are unaware of any
other jurisdiction which has adopted a rule that collision evidence is per se inadmissible without expert testimony, and
we decline to do so. The trial court properly has the discretion to weigh the prejudicial and probative value of
photographs and other evidence of the severity of an accident."); *Murray v. Mossman*, 329 P.2d 1089, 1091 (Wash.1958)
(affirming admission of photographs of accident scene for the limited purpose of showing the force of the impact that
caused plaintiff's whiplash injury); *DiCosola v. Bowman*, 794 N.E.2d 875, 881 (Ill.App.2003) ("[W]e are rejecting a
bright-line rule ... We do not hold that expert testimony must always be required for such photographic evidence to be
admissible.") (ultimately upholding trial court's use of discretion to require expert testimony). Thus, once the evidence
is shown to be relevant and admissible under Nevada's Rules of Evidence, expert testimony is not required.

1 does not call opposing experts. A trier of fact "has the right to consider the credibility
2 of witnesses and disbelieve testimony, even though uncontradicted." *Fox v. First*
3 *Western Sav. & Loan Ass'n*, 86 Nev. 469, 472, 470 P.2d 424, 426 (1970). And, that
4 includes un rebutted expert testimony. *Smith v. Andrews*, 959 A.2d 597, 606 (Conn.
5 2008) (quotations omitted) ("the jury is under no obligation to credit the evidence
6 offered by any witnesses, including experts; even if that evidence is uncontroverted");
7 *Dionne v. LeClerc*, 896 A.2d 923, 929 (Me. 2006) ("a fact-finder, whether it be a jury
8 or a court, is "not required to believe witnesses, even if the testimony of those
9 witnesses, be they experts or lay witnesses, is not disputed ...and has the prerogative
10 selectively to accept or reject it, in terms of the credibility of the witnesses or the
11 internal cogency of the content"); *Olander Contracting Co. v. Gail Wachter*
12 *Investments*, 643 N.W.2d 29, 41 (N.D. 2002) ("The jury need not accept undisputed
13 testimony, even of experts."); *Lucks v. Lakeside Mfg., Inc.*, 830 N.Y.S.2d 747, 749
14 (N.Y. App. Div. 2007) ("the jury was entitled to discredit the testimony of the plaintiff
15 and his expert, in whole or in part, even though the defendant adduced no
16 contradictory evidence").

17 As this Court will instruct, the jurors "are not bound" by the experts' opinions:

18 A person who has special knowledge, skill, experience, training or
19 education in a particular science, profession or occupation may
20 give his or her opinion as an expert as to any matter in which he or
21 she is skilled. In determining the weight to be given to such
22 opinion, you should consider the qualifications and credibility of
23 the expert and the reasons given for his or her opinion. You are not
24 bound by such opinion. Give it the weight, if any, to which you
25 deem it entitled.

26 Nev. J.I. 2.11 (emphasis added).

27 To exercise that right of skepticism, the jury is entitled to know the bare facts.
28 And, a defendant is entitled to introduce those facts.

29 **C. A Defendant May Undermine Medical Expert**
30 **Testimony Merely Through Cross-Examination**

31 The defendant may contest the conclusions of plaintiff's medical expert's
32 without calling his own witnesses, and without proposing affirmative, alternative

1 theories. Even where medical causation is at issue, "a defendant is not obligated to
2 put on testimony about the cause of an injury or to provide an alternative theory about
3 causation," but may dispute plaintiff's causation theory "through cross-examination,
4 presentation of contrary evidence that the negligence was not the probable cause of
5 the injury, or presenting evidence of alternative causes of the injury." *Werth v.*
6 *Davies*, 698 N.E.2d 507, 511 (Ohio Ct. App. 1997). It is well settled that a defendant
7 may cross-examine, rebut and criticize plaintiff's theory of the case without having to
8 prove an alternative theory:

9 The defendant ordinarily need not prove, with certainty or
10 otherwise, that he or she is innocent of the alleged wrongdoing.
11 Absent an affirmative defense or a counterclaim, the defendant's
 case is usually nothing more than an attempt to rebut or discredit
 the plaintiff's case.

12 *Neal v. Lu*, 530 A.2d 103, 109 - 110 (Pa. Super. Ct. 1987). Indeed, "evidence
13 that rebuts or discredits is not necessarily proof" at all, as "it simply vitiates the effect
14 of opposing evidence." *Neal*, 530 A.2d at 109-10; see also 29A AM. JUR. 2D *Evidence*
15 § 1373 ("Reasons not to accept the plaintiff's evidence, through cross-examination and
16 argument, may suffice to prevent the meeting of a plaintiff's burden of proof, even
17 without affirmative countervailing evidence").

18 II.

19 **HALLMARK DOES NOT CONDITION ADMISSIBILITY OF TESTIMONY REGARDING** 20 **AN ACCIDENT ON THE INTRODUCTION OF A BIOMECHANICAL EXPERT**

21 Nothing in *Hallmark v. Eldridge* even suggests that biomechanical expert
22 testimony is a prerequisite for percipient testimony about the facts of an accident.
23 Instead, *Hallmark* teaches that biomechanical engineering is probably not an
24 appropriate subject for "expert" *opinion* testimony. Indeed, the Nevada Supreme
25 Court cast doubt that expert testimony from a biomechanical expert would ever be
26 admissible: "this court has not yet judicially noticed the general reliability of
27 biomechanical engineering[.]" *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646,
28 653 n. 27 (2008) (expressing skepticism whether "biomechanics was within a

1 recognized field of expertise" and whether "these types of opinions were generally
2 accepted in the scientific community"). Holding open even the possibility, the
3 supreme court suggested a standard that would be practically insurmountable. To be
4 admissible, an biomechanical opinion would require knowledge and assessment of (a)
5 "the speeds at impact," (b) "the length of time that the vehicles were in contact during
6 impact," (c) "the distances traveled," (d) "the angle at which the vehicles collided,"
7 and possibly even an attempt to "recreate the collision by performing an experiment."
8 *Hallmark*, 189 P.3d at 649, 653. In many cases this information simply isn't
9 available, and the cost of experiments would be cost-prohibitive, especially to
10 plaintiffs.

11 Under plaintiff's reading of *Hallmark*, no fact testimony about an accident
12 would ever be allowed, because obtaining proper biomechanical expert testimony
13 would be unfeasible. There is no language in *Hallmark*, or any other case from our
14 supreme court, contemplating that absurd result.

15 **III.**

16 **CONCLUSION**

17 Defendant must be allowed to testify about her recollection of the accident.

18 DATED this 18th day of March, 2011.

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20 CARVALHO & MITCHELL
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In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

JENNY RISH,

Appellant,

vs.

WILLIAM JAY SIMAO, individually, and
CHERYL ANN SIMAO, individually and as
husband and wife,

Respondents.

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Tracie K. Lindeman
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JESSIE WALSH, District Judge
District Court Case No. A539455

**APPELLANT'S APPENDIX
VOLUME 6
PAGES 1187-1427**

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94	Notice of Entry of Order to Modify Briefing Schedule	04/25/11	16	3663-3669
95	Notice of Entry of Order to Modify Briefing Schedule	04/26/11	16	3670-3674
96	Notice of Entry of Order Regarding Motion to Strike	04/26/11	16	3675-3714
97	Plaintiffs' Memorandum of Costs and Disbursements	04/26/11	16	3715-3807
98	Minutes of Hearing Regarding Status Check	04/28/11	16	3808-3809
99	Judgment	04/28/11	16	3810-3812
100	Defendant's Motion to Retax Costs	04/29/11	16	3813-3816
101	Notice of Entry of Judgment	05/03/11	16	3817-3822
102	Stipulation and Order to Stay Execution of Judgment	05/06/11	16	3823-3825
103	Notice of Entry of Order to Stay Execution of Judgment	05/09/11	16	3826-3830
104	Plaintiffs' Opposition to Defendant's Motion to Retax Costs	05/16/11	16	3831-3851
105	Defendant's Motion for New Trial	05/16/11	17	3852-4102
			18	4103-4144
106	Certificate of Service	05/17/11	18	4145-4147
107	Subpoena Duces Tecum (Dr. Rosler)	05/18/11	18	4148-4153
108	Plaintiffs' Motion for Attorneys' Fees	05/25/11	18	4154-4285
109	Defendant's Reply to Opposition to Motion to Retax Costs	05/26/11	18	4286-4290
110	Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jan-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time	05/26/11	18	4291-4305
111	Notice of Appeal	05/31/11	19	4306-4354
112	Case Appeal Statement	05/31/11	19	4355-4359
113	Judgment	06/01/11	19	4360-4373
114	Defendant's Opposition to Motion to Quash	06/01/11	19	4374-4378
115	Minutes of Hearing Regarding Motion to Retax	06/02/11	19	4379-4380
116	Notice of Entry of Judgment	06/02/11	19	4381-4397

117	Plaintiffs' Reply to Defendant's Opposition to Motion to Quash Defendants' Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Spine Institute on Order Shortening Time	06/06/11	19	4398-4405
118	Transcript of Hearing Regarding Motion to Quash	06/07/11	19	4406-4411
119	Defendant's Opposition to Motion for Attorney Fees	06/13/11	19	4412-4419
120	Order Denying Defendant's Motion to Retax Costs	06/16/11	19	4420-4422
121	Notice of Entry of Order Denying Motion to Retax Costs	06/16/11	19	4423-4429
122	Plaintiffs' Opposition to Defendant's Motion for New Trial	06/24/11	19	4430-4556
			20	4557-4690
123	Amended Notice of Appeal	06/27/11	20	4691-4711
124	Amended Case Appeal Statement	06/27/11	20	4712-4716
125	Defendant's Motion to Compel Production of Documents	07/06/11	20	4717-4721
126	Receipt of Appeal Bond	07/06/11	20	4722-4723
127	Defendant's Reply to Opposition to Motion for New Trial	07/14/11	20	4724-4740
128	Plaintiffs' Reply to Defendant's Opposition to Motion for Attorneys' Fees	07/14/11	20	4741-4748
129	Minutes of Hearings on Motions	07/21/11	20	4749-4751
130	Order Granting Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time	07/25/11	20	4752-4754
131	Notice of Entry of Order Granting Motion to Quash	07/25/11	20	4755-4761
132	Plaintiffs' Opposition to Defendant's Motion to Compel Production of Documents	07/26/11	20	4762-4779
133	Minutes of Hearing on Motion to Compel	08/11/11	20	4780-4781
134	Order Denying Defendant's Motion for New Trial	08/24/11	20	4782-4784
135	Notice of Entry of Order Denying Defendant's Motion for New Trial	08/25/11	20	4785-4791
136	Order Denying Defendant's Motion to Compel Production of Documents	09/01/11	20	4792-4794
137	Notice of Entry of Order Denying Defendant's Motion to Compel Production of Documents	09/02/11	20	4795-4800
138	Second Amended Notice of Appeal	09/14/11	21	4801-4811

139	Second Amended Case Appeal Statement	09/14/11	21	4812-4816
140	Order Granting Plaintiffs' Motion for Attorney's Fees	09/14/11	21	4817-4819
141	Notice of Entry of Order Granting Plaintiffs' Motion for Attorney's Fees	09/15/11	21	4820-4825
142	Final Judgment	09/23/11	21	4826-4829
143	Notice of Entry of Final Judgment	09/30/11	21	4830-4836
144	Notice of Posting Supersedeas Bond	09/30/11	21	4837-4845
145	Request for Transcripts	10/03/11	21	4846-4848
146	Third Amended Notice of Appeal	10/10/11	21	4849-4864
147	Third Amended Case Appeal Statement	10/10/11	21	4865-4869
148	Portion of Jury Trial - Day 6 (Bench Conferences)	03/21/11	21	4870-4883
149	Portion of Jury Trial - Day 7 (Bench Conferences)	03/22/11	21	4884-4900
150	Portion of Jury Trial - Day 8 (Bench Conferences)	03/23/11	21	4901-4920
151	Portion of Jury Trial - Day 9 (Bench Conferences)	03/24/11	21	4921-4957
152	Portion of Jury Trial - Day 10 (Bench Conferences)	03/25/11	21	4958-4998
153	Portion of Jury Trial - Day 11 (Bench Conferences)	03/28/11	21	4999-5016
154	Portion of Jury Trial - Day 12 (Bench Conferences)	03/29/11	22	5017-5056
155	Portion of Jury Trial - Day 13 (Bench Conferences)	03/30/11	22	5057-5089
156	Portion of Jury Trial - Day 14 (Bench Conferences)	03/31/11	22	5090-5105

1 MR. EGLET: And when you hear someone who's been hurt,
2 injured, or become ill, do you ever think to yourself that
3 probably happened to them because there's something bad they
4 did earlier in their life?

5 PROSPECTIVE JUROR NO. 398: No.

6 MR. EGLET: Okay. Some people think that when someone is
7 killed or injured that it's fate, destiny, God's will, and it
8 was going to happen anyway, so even if it was because of the
9 negligence of someone else they shouldn't sue. Do you agree
10 with that?

11 PROSPECTIVE JUROR NO. 398: No.

12 MR. EGLET: Who's the public figure you admire most,
13 living or dead?

14 PROSPECTIVE JUROR NO. 398: I would say Gandhi.

15 MR. EGLET: And why Gandhi?

16 PROSPECTIVE JUROR NO. 398: [Indiscernible] to use his
17 influence violent and has [indiscernible] people and
18 [indiscernible].

19 MR. EGLET: All right. Thank you very much.

20 PROSPECTIVE JUROR NO. 398: Uh-huh.

21 MR. EGLET: Ms. Jones. Good afternoon.

22 PROSPECTIVE JUROR NO. 395: Hi.

23 MR. EGLET: Can you tell us your date of birth?

24 PROSPECTIVE JUROR NO. 395: 12-2-1977.

25 MR. EGLET: Okay. And any other names you've been known

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1 by?

2 PROSPECTIVE JUROR NO. 395: No.

3 MR. EGLET: Okay. And how often do you wash your car?

4 PROSPECTIVE JUROR NO. 395: Every couple months.

5 MR. EGLET: Okay. And you work for the Detention
6 Department for the State of Nevada, is that correct?

7 PROSPECTIVE JUROR NO. 395: Yes.

8 MR. EGLET: State of Nevada -- what does D-E-T-R stand
9 for?

10 PROSPECTIVE JUROR NO. 395: Department of --

11 MR. EGLET: Transportation?

12 PROSPECTIVE JUROR NO. 395: No. Department of Employer
13 and Rehabilitative Training.

14 MR. EGLET: Oh, I see. Okay. So you take unemployment
15 claims over the phone.

16 PROSPECTIVE JUROR NO. 398: [Indiscernible].

17 MR. EGLET: How long have you been doing that?

18 PROSPECTIVE JUROR NO. 395: A little over two years.

19 MR. EGLET: What makes you good at your job?

20 PROSPECTIVE JUROR NO. 395: Being able to anticipate the
21 needs of the people that are calling on the phone, attention
22 to detail, and methodical, and I carry a mentality of trying
23 to be -- to understand before being understood, and just, you
24 know, [indiscernible].

25 MR. EGLET: Okay. What did you want to be when you were

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1 in high school?

2 PROSPECTIVE JUROR NO. 395: I wanted to go into medicine.

3 MR. EGLET: Okay. And what made you decide not to do
4 that?

5 PROSPECTIVE JUROR NO. 395: The lab was really boring.

6 MR. EGLET: Okay. Good reason. Do you belong -- strike
7 that.

8 What are your five-year goals?

9 PROSPECTIVE JUROR NO. 395: To spend as much time as I
10 can with my family, to become debt-free, possibly go back to
11 school, and travel.

12 MR. EGLET: Clubs or organizations you belong to?

13 PROSPECTIVE JUROR NO. 395: No.

14 MR. EGLET: Okay. What about earlier, earlier in life?

15 PROSPECTIVE JUROR NO. 395: I used to do a bit of acting,
16 so Young Thespians, played basketball from middle school
17 through high school, participate in band [indiscernible].

18 MR. EGLET: Okay. Your favorite charity? Someone said
19 mine too.

20 PROSPECTIVE JUROR NO. 395: I actually have three.

21 MR. EGLET: Okay.

22 PROSPECTIVE JUROR NO. 395: Breast Cancer, Pancreatic
23 Cancer Network and Hands and Feet.

24 MR. EGLET: Okay. And why those three charities?

25 PROSPECTIVE JUROR NO. 395: I have a lot of cancer in my

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1 family. I -- but I have lot of survivors as well. So I do
2 support those organizations.

3 MR. EGLET: Very good. What's the worst tragedy you've
4 ever had to experience?

5 PROSPECTIVE JUROR NO. 395: Well, like I say, going
6 through my uncle's cancer returning, and he ended up dying of
7 pancreatic cancer.

8 MR. EGLET: When you hear that someone's been killed,
9 injured or become sick, do you ever think to yourself, that
10 probably happened --

11 PROSPECTIVE JUROR NO. 395: No.

12 MR. EGLET: Okay. Some people feel that when someone is
13 killed or injured that it was fate, destiny, God's will, and
14 so even if it was because of negligence of someone else they
15 shouldn't sue. Do you agree with that?

16 PROSPECTIVE JUROR NO. 395: No.

17 MR. EGLET: Who's a public figure living or dead you
18 admire?

19 PROSPECTIVE JUROR NO. 395: Jesus.

20 MR. EGLET: Jesus. And why Jesus?

21 PROSPECTIVE JUROR NO. 395: He paid the ultimately
22 sacrifice to give your life to people [indiscernible].

23 MR. EGLET: Thank you.

24 And Ms. Frehner. Did I say that --

25 PROSPECTIVE JUROR NO. 403: Frehner.

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1 MR. EGLET: Frehner?

2 PROSPECTIVE JUROR NO. 403: Uh-huh.

3 MR. EGLET: Good afternoon. Ms. Frehner, can you tell us
4 your date of birth?

5 PROSPECTIVE JUROR NO. 403: January 4th, 1989.

6 MR. EGLET: Okay. And have you known by any other names?

7 PROSPECTIVE JUROR NO. 403: [Indiscernible].

8 MR. EGLET: All right. And how often do you wash your
9 car?

10 PROSPECTIVE JUROR NO. 403: [Indiscernible].

11 MR. EGLET: Okay. And you are -- you work at Francesca's
12 Collections?

13 PROSPECTIVE JUROR NO. 403: Uh-huh.

14 MR. EGLET: And what is Francesca's Collections?

15 PROSPECTIVE JUROR NO. 403: It's a little boutique --
16 clothes, purses [indiscernible].

17 MR. EGLET: Okay. It's not a collection business then?

18 PROSPECTIVE JUROR NO. 403: Yeah, no.

19 MR. EGLET: You're selling collectibles, right?

20 PROSPECTIVE JUROR NO. 403: No.

21 MR. EGLET: You're not repossession people's cars and
22 things then. Okay. Very good.

23 How long have you been doing that?

24 PROSPECTIVE JUROR NO. 403: I worked there for about two-
25 and-a-half years and then I just went back a few months ago.

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1 MR. EGLET: Okay. What makes you good at your job?

2 PROSPECTIVE JUROR NO. 403: I know the product. I know
3 what we have in the store [indiscernible], what people are
4 looking for [indiscernible] I can [indiscernible].

5 MR. EGLET: What are your -- what did you want to be in
6 high school?

7 PROSPECTIVE JUROR NO. 403: A teacher.

8 MR. EGLET: A teacher. And why did you not go down that
9 road?

10 PROSPECTIVE JUROR NO. 403: Well, I'm going to school --

11 MR. EGLET: Are you?

12 PROSPECTIVE JUROR NO. 403: -- now to be a teacher.

13 MR. EGLET: Are you?

14 PROSPECTIVE JUROR NO. 403: Uh-huh.

15 MR. EGLET: Are you in school full time or part time?

16 PROSPECTIVE JUROR NO. 403: Full time.

17 MR. EGLET: Full time, okay. Where do you go to school?

18 PROSPECTIVE JUROR NO. 403: CSM right now.

19 MR. EGLET: CSM, okay. Do you work during the day and go
20 to school at night?

21 PROSPECTIVE JUROR NO. 403: I have night classes and day
22 classes [indiscernible].

23 MR. EGLET: All right. What are your five-year goals?

24 PROSPECTIVE JUROR NO. 403: To finish school and just be
25 closer to [indiscernible].

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1 MR. EGLET: Any clubs or organizations you belong to?

2 PROSPECTIVE JUROR NO. 403: No.

3 MR. EGLET: What are the two most important values to
4 you?

5 PROSPECTIVE JUROR NO. 403: Respect for yourself and for
6 others and probably personal responsibility.

7 MR. EGLET: And what do you mean by "personal
8 responsibility"?

9 PROSPECTIVE JUROR NO. 403: Just when you do something,
10 owning up to it, not trying to blame other people or other
11 things for why you did what you did.

12 MR. EGLET: Can you tell us situations that you think
13 you're regarded as a leader.

14 PROSPECTIVE JUROR NO. 403: At work. I know a lot of our
15 product, more than some other [indiscernible]. Friends
16 sometimes as far as [indiscernible].

17 MR. EGLET: Your favorite charity?

18 PROSPECTIVE JUROR NO. 403: Probably like humane society.

19 MR. EGLET: Like animals?

20 PROSPECTIVE JUROR NO. 403: Uh-huh.

21 MR. EGLET: Have you had animals?

22 PROSPECTIVE JUROR NO. 403: Yeah.

23 MR. EGLET: What's the worst tragedy you've ever had to
24 experience?

25 PROSPECTIVE JUROR NO. 403: When my father died when I

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1 was eight.

2 MR. EGLET: When you hear that someone has been hurt,
3 injured or killed or becomes sick, do you ever think to
4 yourself that that probably happened to them because of
5 something bad they did earlier in their life?

6 PROSPECTIVE JUROR NO. 403: No.

7 MR. EGLET: Some people think that if someone is injured
8 or killed by -- because of someone else's fault, that it was
9 -- it was God's will, it was destiny, it was fate, it would
10 have happened anyway, so they shouldn't bring a lawsuit. Do
11 you agree with that?

12 PROSPECTIVE JUROR NO. 403: No.

13 MR. EGLET: Who's a public figure you admire?

14 PROSPECTIVE JUROR NO. 403: I'd probably say Elvis is
15 (indiscernible).

16 MR. EGLET: Elvis?

17 PROSPECTIVE JUROR NO. 403: Because he did good with his
18 money, like he would give to the community, and he paid for
19 Pearl Harbor or whatever when that happened, so I just like
20 when people have the means --

21 MR. EGLET: Okay. Now I'm just talking to the three new
22 people now, and I'm going to kind of go through these same,
23 those same things. Do all of you recall the hypothetical I
24 gave to everybody about the -- if a juror comes out, one of
25 your fellow juror panel members comes out to you in the hall

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1 and says their knee hurts, are you going to have any reason at
2 that point to disbelieve them or are you going to take them at
3 face value when they say that? Ms. Frehner.

4 PROSPECTIVE JUROR NO. 403: I would believe them.

5 MR. EGLET: Okay. Ms. Jones?

6 PROSPECTIVE JUROR NO. 395: I'd believe them.

7 MR. EGLET: Okay.

8 PROSPECTIVE JUROR NO. 389: I would believe them.

9 MR. EGLET: Okay. Now, change the hypothetical. It's a
10 party testifying under oath and they say, "My knee hurts."
11 Are you going to believe them until some other evidence comes
12 along that disproves what they say or are you going to tend to
13 not believe them until evidence comes along that proves what
14 they're saying? Ms. Jones?

15 PROSPECTIVE JUROR NO. 395: I would believe them until
16 I'm given a reason not to.

17 MR. EGLET: Ms. Frehner?

18 PROSPECTIVE JUROR NO. 403: I would be more skeptical
19 [indiscernible].

20 MR. EGLET: Okay. And Ms. Parrette?

21 PROSPECTIVE JUROR NO. 389: I would believe them
22 [indiscernible].

23 MR. EGLET: Okay. All right.

24 Did -- do -- you heard the discussion I had with
25 respect to there's going to be experts or people here,

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1 professionals who are paid for their time. Any of you have
2 any problems with that? Is that going to cause you to be --
3 discount their testimony or not believe them?

4 PROSPECTIVE JUROR: No.

5 MR. EGLET: Okay. Do all of you believe in personal
6 responsibility? I know you do. [indiscernible] okay. Do all
7 of you believe as part of personal responsibility that you
8 should be held accountable for your actions, or do you
9 disagree --

10 PROSPECTIVE JUROR: -- with that? Okay. We talked at
11 length, the longest discussion we had, on the subject of
12 lawsuit reform. Jackpot justice, verdicts out of hand, the
13 McDonald's hot coffee case, Chili's thumb in the chili case,
14 all these different things and how it affected -- this case is
15 about money -- whether there should be caps on damages, and
16 multimillion verdicts, big verdicts, how comfortable you would
17 feel being on a jury that was asked to put that kind of money
18 in the verdict.

19 What are your thoughts on this, Ms. Frehner?

20 PROSPECTIVE JUROR NO. 403: As -- I think -- well, as far
21 as the million -- the multimillion, you know, a case for that,
22 I think initially without any evidence I would feel kind of
23 uncomfortable because I think that people in an opportunity to
24 sue or whatever will try to ask for more money just because
25 they're an opportunity to do so.

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1 MR. EGLET: Uh-huh.

2 PROSPECTIVE JUROR NO. 403: Whether or not it's
3 [indiscernible].

4 MR. EGLET: The question really is, is would you feel
5 uncomfortable being on a jury that was asked to put that
6 amount of money in the verdict form if it was justified by the
7 evidence? Would you still feel uncomfortable?

8 PROSPECTIVE JUROR NO. 403: A little bit [indiscernible].

9 MR. EGLET: Okay. Would you ever do it if it was -- if
10 that was the appropriate amount?

11 PROSPECTIVE JUROR NO. 403: Yeah.

12 MR. EGLET: And Ms. Jones, how do you feel about this
13 issue?

14 PROSPECTIVE JUROR NO. 395: I wouldn't have a problem
15 doing it --

16 MR. EGLET: Okay.

17 PROSPECTIVE JUROR NO. 395: -- no.

18 MR. EGLET: What do you think about the whole idea of
19 lawsuit reform and that verdicts are out of hand and, you
20 know, lawyers are taking advantage?

21 PROSPECTIVE JUROR NO. 395: Well, I mean in general
22 there's always going to be somebody that's there that's going
23 to try to get what they can, but you have to -- when you're
24 looking at the case, you have to look at the evidence that's
25 presented and make a decision from there. So I mean there's

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1 always going to be somebody that's going to, you know, get out
2 of hand with what they're trying to do [indiscernible] trying
3 to make the best choice possible with the information that
4 you're given.

5 MR. EGLET: Ms. Parrette, how do you feel about these
6 issues?

7 PROSPECTIVE JUROR NO. 389: I think one of the great
8 things about our country is that individuals can do that, and
9 I mean there is hype, all the negative press about those
10 cases, but I think the majority of the cases are not, and I
11 think the [indiscernible] would be judged by case-by-case.

12 MR. EGLET: Okay. Okay. Thank you.

13 The Defendant didn't hurt -- Mrs. Rish didn't hurt
14 Mr. Simao on purpose. Nobody's going to claim that.

15 MR. ROGERS: Objection, Your Honor.

16 MR. EGLET: All right. I'll withdraw.

17 Some folks have a problem -- some folks --

18 MR. ROGERS: No, I want to approach on this.

19 THE COURT: Very well.

20 [Bench Conference Begins]

21 MR. ROGERS: [Indiscernible] just said to the jury that -
22 - I'll just say to the jury that the --

23 MR. EGLET: My name is Robert, by the way.

24 MR. ROGERS: -- Defendant hurt the Plaintiff. He
25 actually testified to that jury.

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1 THE COURT: He -- I thought --

2 MR. EGLET: I said --

3 THE COURT: I thought that he said that no one's going to
4 suggest that she intentionally hurt him.

5 MR. ROGERS: He said she didn't hurt him on purpose --

6 MR. EGLET: I said no one's --

7 MR. ROGERS: -- presuming --

8 MR. EGLET: I said no one's going to --

9 MR. ROGERS: -- the jury --

10 MR. EGLET: I said no one is going to say that she hurt
11 him on purpose is what I said.

12 THE COURT: That's what I -- that's what I recollect.

13 MR. ROGERS: I heard that he said that Mrs. Rish didn't
14 hurt the Plaintiff on purpose.

15 MR. EGLET: I said --

16 MR. ROGERS: He has suggested --

17 MR. EGLET: -- no one is going to say --

18 MR. ROGERS: -- over and over that cause is more or less
19 presumed. This --

20 THE COURT: Overruled the objection. Let's proceed.

21 [Bench Conference Ends]

22 MR. EGLET: No one is going to suggest that Mrs. Rish
23 hurt Mr. Simao on purpose. Do each of you -- raise your hand
24 -- understand the difference between intentional act and
25 negligence? Okay. You have -- just these three.

1 PROSPECTIVE JUROR: Oh.

2 MR. EGLET: We already --

3 PROSPECTIVE JUROR: Sorry.

4 MR. EGLET: Confuse me if other hands start to go up.

5 Do any of the three of you feel like that you
6 wouldn't be able to hold a Defendant in a personal injury
7 lawsuit responsible if they didn't do the act on purpose, it
8 was just negligence? Anybody feel that way? Okay.

9 Did you hear the discussion I had a few minutes ago
10 about the issue of jury nullification and that you must follow
11 the rules that the judge gives you, even if you disagree, you
12 know? And chances are -- not necessarily you three -- but
13 chances are there's going to be some people who are going to
14 disagree with at least one or two of the instructions or the
15 laws. Even if you disagree with them, are you still going to
16 follow those laws?

17 PROSPECTIVE JUROR: Yes.

18 MR. EGLET: Okay. You heard me go through the discussion
19 with the jury regarding decision-making standards and how, you
20 know, sure different people like to be when they make their
21 decisions. And so the question is to each of you: How sure
22 do you have to be when you have to make a decision that -- a
23 very important decision, and it could affect the life or
24 welfare of other people?

25 Ms. Frehner?

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1 PROSPECTIVE JUROR NO. 403: Of other people?

2 MR. EGLET: Yeah.

3 PROSPECTIVE JUROR NO. 403: I would have to be 100
4 percent sure.

5 MR. EGLET: Ms. Jones?

6 PROSPECTIVE JUROR NO. 395: I'd want to be pretty sure.

7 MR. EGLET: You'd like to be pretty sure?

8 PROSPECTIVE JUROR NO. 395: Uh-huh.

9 MR. EGLET: And Ms. Parrette?

10 PROSPECTIVE JUROR NO. 389: I think I'd want to be at
11 least 70 percent sure.

12 MR. EGLET: Okay. Now -- and you heard the follow-up
13 questions. I told the jury that you're going to be told in
14 this type of case that you're going to -- that you will make
15 your decisions based on just more likely than not, that that's
16 the standard that you will have to apply. That's the
17 instruction that you'll get in every decision that you have to
18 make as a jury -- juror in this case.

19 And so Ms. Jones, can you do that? Yes?

20 PROSPECTIVE JUROR NO. 395: Yes.

21 MR. EGLET: Ms. Parrette, can you do that?

22 PROSPECTIVE JUROR NO. 389: Yes.

23 MR. EGLET: And Ms. Frehner, can you do that?

24 PROSPECTIVE JUROR NO. 389: Yes.

25 MR. EGLET: Okay. I talked to the panel a few minutes

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1 ago about the subject of when making a decision -- the jury
2 making the decision of how much money should be put in the
3 verdict form, that some folks think you should just consider
4 the amount of harms and losses that the injured party has and
5 put the amount -- right amount of money in there to balance
6 those harms and losses, and other folks think you should
7 consider other things like, you know, how much sympathy you
8 have for the injured party, how much sympathy you have for the
9 Defendant, whether you think the Defendant is able to pay that
10 amount of money, whether it might make prices go up, insurance
11 rate go up, or affect other factors other than the people in
12 this courtroom.

13 Ms. Jones, which are you closer to, just the harms
14 and losses, or do you think that you ought to consider all
15 those other things?

16 PROSPECTIVE JUROR NO. 395: Well, I mean we're human.
17 We're going to -- you know, we're going to think about the
18 other things as well. But I mean what we actually have to do
19 is we have to weigh the losses, you know. It's kind of like
20 with -- you know, I'm a scientific kind of thought process
21 type person. So, you know, if you are testing something and
22 you only have three variables, then, you know, you have to,
23 you know, look at the outcome on those three variables
24 [indiscernible]. So I mean some -- I mean in a perfect world,
25 you know, that -- that's great, but, you know, sometimes there

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1 are -- there are grey areas as well.

2 MR. EGLET: That's a very good analysis, very, very good.
3 So you would -- you would be able to do it just on the harms
4 and losses if --

5 PROSPECTIVE JUROR NO. 395: I think I would.

6 MR. EGLET: -- that's what you're told, because that's
7 what you're going to -- everybody agrees that that's what
8 [indiscernible]?

9 PROSPECTIVE JUROR NO. 395: Yes.

10 MR. EGLET: Ms. Frehner?

11 PROSPECTIVE JUROR NO. 403: I don't think I could do
12 that. I just -- I couldn't put the Defendant's -- just what
13 would happen to them out of my mind. I couldn't -- I don't
14 think I could just think about harms and losses because just
15 growing up, that's how I was raised, to think of both sides --

16 MR. EGLET: Uh-huh.

17 PROSPECTIVE JUROR NO. 403: -- to [indiscernible] people.
18 So I don't think I could.

19 MR. EGLET: And even if the -- you're told that that's
20 how we -- everybody here expects --

21 PROSPECTIVE JUROR NO. 403: Uh-huh.

22 MR. EGLET: -- you to make your decision and the judge is
23 going to instruct you that that's how you have to make a
24 decision --

25 PROSPECTIVE JUROR NO. 403: I -- it would be really hard.

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1 I don't know that I could.

2 MR. EGLET: Okay. You can't commit to us that you would?

3 PROSPECTIVE JUROR NO. 403: Right.

4 MR. EGLET: Ms. Parrette?

5 PROSPECTIVE JUROR NO. 389: I think I could do it on
6 harms and losses.

7 MR. EGLET: You'd be able to do it just on the harms and
8 losses?

9 PROSPECTIVE JUROR NO. 389: Yes.

10 MR. EGLET: Okay. Do any of the three of you know anyone
11 who has had a neck surgery? Raise your hand. Okay. Or a
12 spine surgery of any kind, raise your hand.

13 Ms. Jones.

14 PROSPECTIVE JUROR NO. 395: My aunt.

15 MR. EGLET: Your aunt?

16 PROSPECTIVE JUROR NO. 395: Uh-huh.

17 MR. EGLET: And in her low back, mid-back or --

18 PROSPECTIVE JUROR NO. 395: She actually had a piece of
19 her tailbone that broke out.

20 MR. EGLET: Okay.

21 PROSPECTIVE JUROR NO. 395: [Indiscernible] and was
22 pressing on some nerves.

23 MR. EGLET: Is she doing okay now?

24 PROSPECTIVE JUROR NO. 395: Uh-huh.

25 MR. EGLET: Okay. Any of the three of you have -- other

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1 than the normal understanding -- but any specialized
2 understanding about MRIs? Raise your hand. Or discography or
3 discograms? Raise your hand. Or spine surgery? Raise your
4 hands. Okay.

5 Court's indulgence for a moment, Your Honor.

6 THE COURT: Sure.

7 MR. EGLET: Ms. Jones, in your jury questionnaire you
8 indicated that you knew Gary R. Skoog, Ph.D.

9 PROSPECTIVE JUROR NO. 395: No.

10 MR. EGLET: Do you recall that?

11 PROSPECTIVE JUROR NO. 395: No. [Indiscernible].

12 MR. EGLET: Can we have that jury questionnaire?

13 UNIDENTIFIED FEMALE: She doesn't know him.

14 UNIDENTIFIED FEMALE 2: No, doesn't know him.

15 MR. EGLET: You don't know him? Okay. All right.

16 Court's indulgence, on moment, Your Honor.

17 THE COURT: Sure.

18 MR. EGLET: Okay. Your Honor, may we approach?

19 THE COURT: Yes.

20 [Bench Conference Begins]

21 MR. EGLET: Your Honor, at this time I'd like to make a
22 motion to excuse juror in seat number 22, Cayla Frehner, based
23 on the fact that she's indicated she wouldn't be able to
24 follow the law on considering only harms and losses and she
25 would consider outside factors.

1 THE COURT: Mr. Rogers?

2 MR. ROGERS: I'd simply make the same objections I have
3 before about rehabilitation.

4 THE COURT: Noted for the record. The motion is granted.
5 [Bench Conference Ended]

6 THE COURT: At this time the Court would like to thank
7 and excuse Ms. Frehner. Please return to jury services.

8 We need a replacement for seat number 22, please.

9 THE CLERK: Gustavo Miranda, badge number 1404.

10 THE COURT: Bet you didn't think we'd get to you, Mr.
11 Miranda.

12 PROSPECTIVE JUROR NO. 404: No. I know. It's Miranda.

13 THE COURT: Miranda?

14 PROSPECTIVE JUROR NO. 404: Yeah.

15 THE COURT: Okay. Whenever you're ready, Mr. Eglet.

16 MR. EGLET: [Indiscernible] I apologize. [indiscernible]
17 get this far.

18 Let me run through these questions real quickly. I
19 know you've probably got them memorized you heard them so many
20 times.

21 What's your date of birth?

22 PROSPECTIVE JUROR NO. 404: November 10th, 1978.

23 MR. EGLET: Ever been known by any other names?

24 PROSPECTIVE JUROR NO. 404: Rick.

25 MR. EGLET: Okay. How often do you wash our car?

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1 PROSPECTIVE JUROR NO. 404: Once or twice a month.

2 MR. EGLET: You work at the Aria Hotel and Casino as a
3 warehouse attendant?

4 PROSPECTIVE JUROR NO. 404: Correct.

5 MR. EGLET: Okay. What makes you good at your job?

6 PROSPECTIVE JUROR NO. 404: Good customer service skills
7 and attention to detail.

8 MR. EGLET: Where did you work before the Aria opened up?

9 PROSPECTIVE JUROR NO. 404: Arajo [phonetic].

10 MR. EGLET: And the same type of position?

11 PROSPECTIVE JUROR NO. 404: I was a runner for Arajo
12 also.

13 MR. EGLET: Very good. And what did you want to be when
14 you were in high school?

15 PROSPECTIVE JUROR NO. 404: Top gun pilot.

16 MR. EGLET: [Indiscernible] my father. But he was a fire
17 -- Navy fighter pilot. He was an airline pilot.

18 PROSPECTIVE JUROR NO. 404: Okay.

19 MR. EGLET: And why didn't you go that route?

20 PROSPECTIVE JUROR NO. 404: [Indiscernible] the Air
21 Force. Was focused more on graduating high school and
22 [indiscernible].

23 MR. EGLET: What are your five-year goals?

24 PROSPECTIVE JUROR NO. 404: Travel more and start a
25 family.

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1 MR. EGLET: Are you -- you're single right now, right?

2 PROSPECTIVE JUROR NO. 404: Yeah.

3 MR. EGLET: Okay. The -- any clubs or organizations you
4 belong to?

5 PROSPECTIVE JUROR NO. 404: I thought about this one,
6 LVAC, Las Vegas Athletic Club.

7 MR. EGLET: Okay. Like to work out?

8 PROSPECTIVE JUROR NO. 404: Yes, I do.

9 MR. EGLET: All right. What are the two most important
10 values that you hold?

11 PROSPECTIVE JUROR NO. 404: Integrity and being good to
12 others.

13 MR. EGLET: And can you tell us, is there situations you
14 think you're regarded as a leader?

15 PROSPECTIVE JUROR NO. 404: I'm the oldest in my family.
16 I have three sisters, younger sisters, so they look up to me a
17 lot.

18 MR. EGLET: Your sisters don't boss you around? Usually
19 younger sisters boss their older brothers around.

20 PROSPECTIVE JUROR NO. 404: No, not too much.

21 MR. EGLET: Okay. All right.

22 PROSPECTIVE JUROR NO. 404: [Indiscernible].

23 MR. EGLET: Okay. If someone offers to send money to
24 your favorite charity, what's that?

25 PROSPECTIVE JUROR NO. 404: Make a Wish Foundation.

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1 MR. EGLET: Why the Make a Wish Foundation?

2 PROSPECTIVE JUROR NO. 404: Because they like a lot of,
3 you know, younger kids [indiscernible], you know, bring some
4 happiness to them.

5 MR. EGLET: Okay. Worst tragedy you've ever had to go
6 through?

7 PROSPECTIVE JUROR NO. 404: My brother died in a car
8 accident.

9 MR. EGLET: How long ago was that?

10 PROSPECTIVE JUROR NO. 404: 1992.

11 MR. EGLET: And how old were you?

12 PROSPECTIVE JUROR NO. 404: Thirteen.

13 MR. EGLET: How old was your brother?

14 PROSPECTIVE JUROR NO. 404: Seventeen.

15 MR. EGLET: Okay. And was it a single car accident or --

16 PROSPECTIVE JUROR NO. 404: Uh-huh.

17 MR. EGLET: He was driving or a passenger?

18 PROSPECTIVE JUROR NO. 404: He was driving by himself.
19 Fell asleep.

20 MR. EGLET: [Indiscernible]. Fell asleep. I'm sorry.

21 When you hear someone has been hurt or killed or
22 become ill, how often do you think that well, it probably
23 happened to them because of something they did earlier in
24 their life, something bad they did? No?

25 PROSPECTIVE JUROR NO. 404: No.

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1 MR. EGLET: Some people think that if a person is injured
2 or killed that it's fate, destiny, God's will, even if it was
3 because of the negligence of someone else, that they shouldn't
4 sue because it would have happened anyway. Do you agree with
5 that?

6 PROSPECTIVE JUROR NO. 404: [No audible response]

7 MR. EGLET: Who's the public figure you admire most?

8 PROSPECTIVE JUROR NO. 404: Teachers [indiscernible].

9 MR. EGLET: [Indiscernible].

10 PROSPECTIVE JUROR NO. 404: Teachers.

11 MR. EGLET: Teachers is kind of a career.

12 PROSPECTIVE JUROR NO. 404: Oh.

13 MR. EGLET: Can you tell me a specific person?

14 PROSPECTIVE JUROR NO. 404: I'll go with [indiscernible]
15 person [indiscernible].

16 MR. EGLET: Very good. The hypothetical I gave all the
17 other panel members about a juror out in the hall saying, "My
18 knee hurts," would you have any reason initially to
19 disbelieve?

20 PROSPECTIVE JUROR NO. 404: No.

21 MR. EGLET: A party on the stand under oath says, "My
22 knee hurts." Are you going to believe them initially until
23 some truth comes and shows that they're --

24 PROSPECTIVE JUROR NO. 404: Yeah, I'd believe them, uh-
25 huh.

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1 MR. EGLET: Okay. You believe in personal
2 responsibility?

3 PROSPECTIVE JUROR NO. 404: Yes.

4 MR. EGLET: Do you believe in accountability?

5 PROSPECTIVE JUROR NO. 404: Yes.

6 MR. EGLET: Okay. The subject of lawsuit reform that
7 we've been talking about, the McDonald's hot coffee, the thumb
8 in the chili case, and jackpot justice, frivolous lawsuits,
9 whether there should be caps on damages, how do you feel about
10 all that?

11 PROSPECTIVE JUROR NO. 404: I don't think there should be
12 caps.

13 MR. EGLET: What's your thought on this idea of --

14 PROSPECTIVE JUROR NO. 404: There's --

15 MR. EGLET: -- frivolous lawsuits?

16 PROSPECTIVE JUROR NO. 404: Yeah, there's lawsuits out
17 there, you know, [indiscernible]. It's case-by-case.

18 MR. EGLET: Case-by-case. Okay. Would you be
19 comfortable being on a jury that was asked to place in the
20 verdict form in excess of \$2 million even if that was
21 justified by the evidence?

22 PROSPECTIVE JUROR NO. 404: I would.

23 MR. EGLET: You'd feel okay with that?

24 PROSPECTIVE JUROR NO. 404: [Indiscernible]

25 MR. EGLET: Okay. All right. The fact no one's going to

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1 claim that Ms. Rish hurt Mr. Simao on purpose, it's a claim
2 called negligence, did you hear my kind of hypothetical
3 [indiscernible] negligence intentionally?

4 PROSPECTIVE JUROR NO. 404: Yeah.

5 MR. EGLET: Do you have a problem requiring the Defendant
6 to compensate the Plaintiff even if the Defendant were just
7 negligent?

8 PROSPECTIVE JUROR NO. 404: No.

9 MR. EGLET: Okay. Did you hear the discussion about jury
10 nullification?

11 PROSPECTIVE JUROR NO. 404: Yes.

12 MR. EGLET: Do you understand the judge is going to
13 decide the law and give you those instructions, and you agree
14 to follow that law --

15 PROSPECTIVE JUROR NO. 404: Yes.

16 MR. EGLET: -- even if you disagree with i?

17 PROSPECTIVE JUROR NO. 404: Yes.

18 MR. EGLET: Okay. You heard the discussion I had
19 regarding the decision-making standard. How sure do you have
20 to be before you make a decision that's going to have a effect
21 on other people?

22 PROSPECTIVE JUROR NO. 404: About 80 percent.

23 MR. EGLET: Okay. In this type of case everyone agrees,
24 and the judge will tell you that you'll base your decisions on
25 just the more-likely-than-not standard, just tip the scales.

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1 Will you be able to do that --

2 PROSPECTIVE JUROR NO. 404:

3 MR. EGLET: -- if that's what you're instructed to do?

4 PROSPECTIVE JUROR NO. 404: Yes.

5 MR. EGLET: Okay. The discussion I had with the other
6 panel members about some folks think when you decide how much
7 money should go in the verdict form for the injured party that
8 you should only consider the harms and losses that party has
9 and put it up in there and balance those harms and losses, and
10 other folks think you should consider other things like how
11 sorry you feel for the injured party, how sorry you feel for
12 the -- for the Defendant, whether the Defendant can afford to
13 pay, whether it's going to drive insurance rates up, the cost
14 of business products and things like that. Which do you --
15 which category do you fall into?

16 PROSPECTIVE JUROR NO. 404: Harms and losses.

17 MR. EGLET: All right. Just the harms and losses?

18 PROSPECTIVE JUROR NO. 404: Yeah. [indiscernible]

19 MR. EGLET: If you're instructed that that's all you can
20 consider, you will do that?

21 PROSPECTIVE JUROR NO. 404: Yeah.

22 MR. EGLET: Okay. Do you know anyone who's ever had to
23 have a neck surgery or spine surgery?

24 PROSPECTIVE JUROR NO. 404: No.

25 MR. EGLET: Okay. Do you have any more than ordinary

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1 familiarity with MRIs?

2 PROSPECTIVE JUROR NO. 404: No.

3 MR. EGLET: Or discography or discogram?

4 PROSPECTIVE JUROR NO. 404: No.

5 MR. EGLET: Or spine surgery?

6 PROSPECTIVE JUROR NO. 404: No.

7 MR. EGLET: Okay. [indiscernible]

8 Okay. I'm going to go through very quickly and I'm going
9 to ask two questions of all of you, and I just kind of what a
10 quick, brief answer. And the two questions are this. I'm
11 going to ask each of you this. What is there about you that
12 might help you being a juror in a case like this other than
13 your ability to be fair and listen to both sides? And the
14 second question I'm going to ask you is whether -- what is
15 there about you that you think might make it just a little
16 hard for you to be a juror in a case like this?

17 So Ms. Dearing, what is there about you that might
18 help you being a juror in a case like this?

19 PROSPECTIVE JUROR NO. 841: [Indiscernible]

20 MR. EGLET: Okay.

21 PROSPECTIVE JUROR NO. 841: [Indiscernible] make
22 decisions right away. I'm patient.

23 MR. EGLET: Okay. And what about -- what do you think --
24 what is there about you that you might think it may be --
25 it'll make it a little bit hard for you to be a juror in a

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1 case like this?

2 PROSPECTIVE JUROR NO. 841: Honestly, sometimes I'm a
3 little slow. That's how I think I am.

4 MR. EGLET: Okay.

5 PROSPECTIVE JUROR NO. 841: I mean I'm not --

6 MR. EGLET: No, I understand.

7 PROSPECTIVE JUROR NO. 841: You know.

8 MR. EGLET: My wife tells me I'm slow [indiscernible].

9 PROSPECTIVE JUROR NO. 841: Okay.

10 MR. EGLET: Mr. Daniels, what is there about you that you
11 think might help you be a juror in a case like this?

12 PROSPECTIVE JUROR NO. 338: I usually weigh things and
13 listen carefully.

14 MR. EGLET: Okay.

15 PROSPECTIVE JUROR NO. 338: I'm thoughtful.

16 MR. EGLET: All right. And what about you do you think
17 will make it hard for you to be a juror in a case like this?

18 PROSPECTIVE JUROR NO. 338: I like to -- I like to move
19 forward fast. I like to, you know, get things done.

20 [indiscernible] something that I know is, you know, in the
21 right direction, I just want to move along instead of, you
22 know [indiscernible] I want to move forward.

23 MR. EGLET: Ms. Kistler, do you remember the first
24 question I asked?

25 PROSPECTIVE JUROR NO. 884: Yeah. I think it's because

1 I'm patient and I can -- I can see both sides of a question.

2 MR. EGLET: Okay.

3 PROSPECTIVE JUROR NO. 884: And the part that might
4 hinder me is like him. I prefer something at a little faster
5 pace.

6 MR. EGLET: Okay. You're probably real frustrated with
7 me, right? A little?

8 PROSPECTIVE JUROR NO. 884: Well, I understand every time
9 you select someone knew you have to start all over again
10 [indiscernible] everything up, but it's like --

11 MR. EGLET: Takes some time.

12 PROSPECTIVE JUROR NO. 884: Yeah.

13 MR. EGLET: And I -- remember, I warned you that this
14 would be the longest part of the --

15 PROSPECTIVE JUROR NO. 884: Yes.

16 MR. EGLET: -- case, the very beginning.

17 Ms. -- Mr. Aquino, do you remember the first
18 question?

19 PROSPECTIVE JUROR NO. 884: Yes. Well, based on the
20 question being that [indiscernible]

21 MR. EGLET: You've got experience in this being a
22 [indiscernible] professional, okay. All right. And then what
23 about -- what do you think would make it hard for you --

24 PROSPECTIVE JUROR NO. 883: Just my schedule.

25 MR. EGLET: Just your schedule. All right.

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1 Ms. [indiscernible], what would help you?
2 PROSPECTIVE JUROR: Understand the details.
3 MR. EGLET: Okay.
4 PROSPECTIVE JUROR: Other than that, I think what would
5 hurt me is actually these chairs. They're very uncomfortable.
6 [indiscernible] the whole time so -- that's --
7 MR. EGLET: I know.
8 PROSPECTIVE JUROR: -- that's about it. I have long
9 legs, I'm hanging, so --
10 MR. EGLET: Yeah.
11 PROSPECTIVE JUROR: -- that's the --
12 MR. EGLET: I think -- I think they have these footrests
13 they can give you.
14 PROSPECTIVE JUROR: I gave her one because she was just
15 dangling, but --
16 MR. EGLET: I also think that the bailiff [indiscernible]
17 going to raise --
18 PROSPECTIVE JUROR: Oh.
19 MR. EGLET: -- and lower those chairs too so -- they
20 don't raise and lower? My mistake. Okay. Special order.
21 Special order.
22 Ms. Parrette, what will help you in your --
23 PROSPECTIVE JUROR NO. 389: My objectivity.
24 MR. EGLET: I'm sorry?
25 PROSPECTIVE JUROR NO. 389: My objectivity.

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1 MR. EGLET: Okay.

2 PROSPECTIVE JUROR NO. 389: I'm very objective when I
3 make decisions. And what would probably hurt me is empathy.

4 MR. EGLET: Okay. All right.

5 Same question, Ms. Nolte.

6 PROSPECTIVE JUROR NO. 903: I like to feel I have an open
7 mind.

8 MR. EGLET: All right. And what do you think will make
9 hard -- what will make it hard for you?

10 PROSPECTIVE JUROR NO. 903: I think with everybody else,
11 the slow pace of this.

12 MR. EGLET: Okay. It's going to pick up after this, I
13 promise.

14 Mr. Doty?

15 PROSPECTIVE JUROR NO. 905: My objectiveness, you know,
16 ability to just, you know, weigh everything out, be objective,
17 not get too wrapped up in anything. And my weakness would
18 probably be kind of like her, for example, empathy, a
19 forgiving nature at the same time.

20 MR. EGLET: All right.

21 Ms. Lewis?

22 PROSPECTIVE JUROR NO. 354: Well, I would say what
23 they've said. I'm always [indiscernible]. One side
24 [indiscernible] I don't hear the other side, so I'm
25 [indiscernible] and empathy.

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1 MR. EGLET: Okay. And Mr. Brieese?

2 PROSPECTIVE JUROR NO. 388: Yeah, I like what she said.
3 Basically the variables on both sides, you've got to look at
4 what the defense is doing and what the offense is doing.
5 Basically you're the offense. The defense has another game
6 plan.

7 MR. EGLET: Are you implying that I'm offensive?

8 PROSPECTIVE JUROR NO. 388: Yeah. I'm not saying you're
9 like Glen Lerner but -- but then again, I hear the money
10 train. My opinion is that, you know --

11 MR. EGLET: I have told you I've heard everything. I
12 hadn't heard that.

13 PROSPECTIVE JUROR NO. 388: You haven't made a commercial
14 with chasing --

15 MR. EGLET: No, I don't --

16 PROSPECTIVE JUROR NO. 388: -- an ambulance --

17 MR. EGLET: I don't-

18 PROSPECTIVE JUROR NO. 388: -- yet either.

19 MR. EGLET: I don't do that.

20 PROSPECTIVE JUROR NO. 388: And the other part would be
21 like the other jurors said, the empathy for the --

22 MR. EGLET: Mr.-- Ms. Rosinski?

23 PROSPECTIVE JUROR NO. 918: I -- same with everybody. I
24 want to be objective with everyone, both sides, and I am very,
25 very sensitive for both parties.

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1 MR. EGLET: Okay. All right.

2 Ms. Frey, what do you think about -- what is it
3 about yourself that helps you be a juror in a case like this?

4 PROSPECTIVE JUROR NO. 060: I'm pretty fair. I like to
5 hear both sides and see -- figure out from there. You know,
6 hearing both sides.

7 MR. EGLET: But remember the question. Other than the
8 ability to be fair and listen --

9 PROSPECTIVE JUROR NO. 060: Oh.

10 MR. EGLET: -- to both sides?

11 PROSPECTIVE JUROR NO. 060: I'm a good listener. The
12 same as them, being objective, listening to just the facts.

13 MR. EGLET: Okay. And what is there about you that would
14 make it a little hard for you to be a juror in a case like --

15 PROSPECTIVE JUROR NO. 060: Caring about other people,
16 about their feelings not --

17 MR. EGLET: Okay. All right.

18 Ms. Smith?

19 PROSPECTIVE JUROR NO. 925: I'm fact-oriented, so I like
20 to know the facts and [indiscernible] both sides. And then --

21 MR. EGLET: What would make it hard for you? What about
22 you --

23 PROSPECTIVE JUROR NO. 925: I think -- I've never done
24 this before, so I'm only imagining that when we go back in the
25 room and we're talking, I speak low and it's hard for people

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1 -- like when I try to talk they talk over me. So I want to
2 make sure that I am heard.

3 MR. EGLET: Assertive?

4 PROSPECTIVE JUROR NO. 925: Yes.

5 MR. EGLET: All right. Very good.

6 Ms. Prince?

7 PROSPECTIVE JUROR NO. 928: I think my attention to
8 detail would help me, and the ability to weigh the facts on
9 both sides. And like the other gentleman, I -- once I have
10 the facts and I know what my decision is, I kind of like to
11 let it be known so --

12 MR. EGLET: Get there.

13 PROSPECTIVE JUROR NO. 928: Yeah.

14 MR. EGLET: Get to the end.

15 PROSPECTIVE JUROR NO. 928: Yeah.

16 MR. EGLET: Okay. All right.

17 Ms. Kunkel, what about yourself will make it -- do
18 you think will help you being a juror in a case --

19 PROSPECTIVE JUROR NO. 051: I told you I was a good
20 listener earlier.

21 MR. EGLET: Okay.

22 PROSPECTIVE JUROR NO. 051: And I pay a lot of attention
23 to detail. I drive my husband insane with that. So I think
24 that would help me. On the other hand, I like to believe I
25 have a good heart, so the compassion part is where I believe

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1 would be the hard part.

2 MR. EGLET: All right.

3 Mr. Barrett, what about you will help you be --

4 PROSPECTIVE JUROR NO. 943: I'd say my ability to reason.
5 I think I [indiscernible] quite a lot. I can't talk very
6 well. Sorry about that.

7 MR. EGLET: That's okay. What is there about you
8 thinking make -- you think would make it hard for you to be --

9 PROSPECTIVE JUROR NO. 943: I tend to be kind of a
10 natural -- a natural skeptic. I think I'm open-minded, but I
11 tend to see all sides.

12 MR. EGLET: Okay. Ms. Bell, what is it about you that
13 you think will help you in being a juror in a case like this?

14 PROSPECTIVE JUROR NO. 953: The ability to be -- to have
15 a sense of wait and see, to weigh all the evidence before us.

16 MR. EGLET: Uh-huh. All right.

17 PROSPECTIVE JUROR NO. 953: But on the flipside of that,
18 I think that I would be a deep thinker, you know, as far as
19 the -- want to get it finished, you know, to hurry up so it
20 goes -- the process, to speed along with it.

21 MR. EGLET: Sure. Understood.

22 Mr. Johnson, what about yourself do you think will
23 help you be a juror in a case like this?

24 PROSPECTIVE JUROR NO. 956: I don't like to jump to
25 conclusions. I like to take my time. But because I like to

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1 take my time, I tend to overthink the situation.

2 MR. EGLET: So you think the overthinking, is that what
3 you're saying, that that would make it difficult for you?

4 PROSPECTIVE JUROR NO. 956: A little.

5 MR. EGLET: Okay. Ms. Hubbert?

6 PROSPECTIVE JUROR NO. 293: I have to agree with them.
7 I'm too slow sometimes. I mean not -- but when I think, I
8 like to take my time, and I'm not -- a lot of people would
9 probably get really upset with me because I don't want to jump
10 the gun and hurry things along too fast.

11 MR. EGLET: Ms. Manful, what about yourself do you think
12 would help you be a juror in a case like this?

13 PROSPECTIVE JUROR NO. 963: Well, I've served on a jury
14 before.

15 MR. EGLET: Have you? Okay.

16 PROSPECTIVE JUROR NO. 963: Yes. And was able to come to
17 a decision --

18 MR. EGLET: Okay.

19 PROSPECTIVE JUROR NO. 963: -- although it was very
20 difficult. So -- and the hardest part is I have empathy for
21 all parties.

22 MR. EGLET: Ms. Jones, what about you?

23 PROSPECTIVE JUROR NO. 395: My attention to detail, you
24 know, becoming -- what I do, I'm a very good listener. And
25 keeping an open mind. And again, I would say as a negative,

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1 it would probably be empathy.

2 MR. EGLET: Empathy. Okay.

3 Okay. Mr. Miranda, what is it about yourself do you
4 think would help you being a juror on a case like this?

5 PROSPECTIVE JUROR NO. 404: Help me would be attention to
6 detail and being able to, you know, [indiscernible] looking at
7 --

8 MR. EGLET: What do you think would make -- about
9 yourself would make it harder for you to be a juror in a case
10 like this?

11 PROSPECTIVE JUROR NO. 404: Like somebody else said, when
12 you go to the back, and I don't like to, you know, follow
13 everybody just because they all want to go one way, you know.
14 They all want to get it over with. I don't like to pull the
15 gun. I like to argue about it. Make sure everything's right.

16 MR. EGLET: You like to deliberate.

17 PROSPECTIVE JUROR NO. 404: Yeah, yeah.

18 MR. EGLET: Okay. All right.

19 PROSPECTIVE JUROR NO. 404: And another fact is, just
20 being honest, the Defendant, she kind of looks like she could
21 be related to my mom or somebody.

22 MR. EGLET: So that can cause you to be a little --

23 PROSPECTIVE JUROR NO. 404: Yeah. Because every time --
24 yeah.

25 MR. EGLET: Yeah, sure. Understood.

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1 PROSPECTIVE JUROR NO. 404: I'm totally being honest.

2 MR. EGLET: No, absolutely.

3 Ms. [indiscernible].

4 PROSPECTIVE JUROR: I think because I know nothing about
5 suing anybody, I think that's what would be good. On the
6 other side, I'm very emotional and very sensitive. I think
7 that could hurt.

8 MR. EGLET: Okay.

9 And Ms. Zweifel? Zweifel, sorry.

10 PROSPECTIVE JUROR NO. 002: My attention to detail. And
11 I, compassionate.

12 MR. EGLET: Okay. All right.

13 Raise your hand -- raise your hand if there's
14 anything that you think we should know about you that I
15 haven't asked you about yet, that I haven't probed with you,
16 you think would be important for either side to know before we
17 make our decision on which of you out of this group is going
18 to sit on this jury? Is there anything else about yourself
19 that you're thinking, gees, if I was in Mr. Eglet's position
20 or if I was in Mr. Rogers' position, or their client's
21 position, I would want to know this about me? Raise your hand
22 if there's something that we haven't covered. Most of the
23 time -- you're not in the box yet so --

24 PROSPECTIVE JUROR: Oh, okay. No disrespect to the
25 Court. I've got to pee real bad.

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1 THE COURT: Too much information. Go right ahead, sir.

2 MR. EGLET: [Indiscernible] when we get to this stage
3 nobody raises their hand, so that means hopefully I've done my
4 job with you.

5 All right. I've got one more area to talk to you
6 about and it involves four questions, and they're group
7 questions, so pretty easy, and we're going to be done, okay?

8 As jurors, you have certain rights as jurors, and we
9 want to make sure that each of you are willing to exercise
10 those rights.

11 The first right you have as a juror is you have the
12 right to see and hear all the testimony, to see all the
13 exhibits that are displayed and hear all the testimony.
14 Everybody understand that? So if you do not or cannot see an
15 exhibit or you cannot hear the testimony of the witness or the
16 question of the attorney asking the witness, will each of you
17 agree to raise your hand, notify Deputy Diamond of the
18 situation so we can rectify that? Everybody who's willing to
19 do that, raise their hand. Okay. Very good. Thank you.

20 The second right you have as jurors is you have the
21 right to ask questions of witnesses, as jurors, okay.

22 PROSPECTIVE JUROR: Yeah.

23 MR. EGLET: You get to ask questions now. And it's a
24 good thing, because I will tell you that none of us are --
25 none of the lawyers in here or so presumptuous to think that

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1 we know every single question to ask. We're not perfect. So
2 you get to ask questions. You have to wait till we're done,
3 and there's a procedure the judge will tell you on how to do
4 it. You have to submit them in writing to the bailiff, and
5 she'll explain that to you. And then she'll make the -- the
6 judge will make the ultimate decision on whether she asks the
7 question. And she may not ask the question because of some
8 procedural thing or it's not appropriate or it's not the
9 appropriate question for this witness or it's going to be
10 covered by another witness later. If your -- if you do a
11 written question and it doesn't get asked, don't be
12 discouraged from not asking any more questions. But if you
13 have a question you feel is important and it hasn't been asked
14 by the attorneys -- and the judge will ask you when we're done
15 asking questions, "Is there any questions from the jury?" and
16 the bailiff will collect them up there. Is everybody here
17 willing to do that, write those questions down? If you are,
18 raise your hand. It's important you participate in this
19 project, in this trial, and we want you to participate. We're
20 interested in what you have to say and questions you want
21 answered. We don't always think of every question, believe
22 me.

23 All right. Now, the third right you have is you
24 have the right to know and understand the law. As I told you,
25 at the end of the evidence in this case the judge is going to

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1 read to you and she's going to provide you written
2 instructions. You have the right not only to get those
3 instructions and have them read to you and read them yourself,
4 but you have the right to understand them. If you don't
5 understand one of those written instructions, you can send a
6 note to the bailiff from the deliberation room who -- he'll
7 notify the judge that you need an explanation of the law on
8 one of those instructions if you don't understand it. It's
9 important to all of us that you understand the law. Is
10 everybody willing to do that, if they don't understand the law
11 or a written an instructions, one of the rules, will they do
12 that? Raise your hand if you're willing to do that. All
13 right. Everybody. Thank you.

14 Finally, the last right you have as a juror is each
15 of you have the right to not only follow the law, but insist
16 that your fellow jurors follow the law. So if you're back in
17 the deliberation rooms -- deliberation room and one of your
18 fellow jurors says, "I don't care that that's the law. I
19 don't agree with that. I'm not going to do that," you have
20 the right to insist that they abide by their oath and follow
21 the law. And if they still refuse, you have the right to
22 notify the bailiff who will get the judge. Is everybody here
23 willing to do that if that occurs in the deliberation room?
24 Raise your hand. All right. Thank you.

25 Believe it or not, ladies and gentlemen, I'm

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1 finished. Thank you.

2 Your Honor, Plaintiffs pass this panel for cause.

3 THE COURT: Very well. Let's take about a five-minute
4 break, shall we, Mr. Rogers --

5 MR. ROGERS: Sure.

6 THE COURT: -- before you're examined by Mr. Rogers.
7 Remind you of your duty not to discuss this case.

8 [Recess]

9 [Prospective Jury In]

10 THE MARSHAL: Please remain seated. This court is back
11 in session.

12 THE COURT: Whenever you're ready Mr. Rogers.

13 MR. ROGERS: Thank you, Your Honor.

14 Why I am I grateful? I'm grateful that Jenny Rish,
15 now, gets to participate. And it's not -- I'm humbled by my
16 responsibility to her, to ensure that she gets a fair trial.
17 I'm mindful of your responsibility. It's a hard thing to
18 stand in judgment of another person and I don't take that
19 lightly. And really judgment is what this part of the
20 proceeding is all about. The only real question is: Does
21 anyone bring any prejudgment, because that would be the one
22 thing that would ensure that no one here would get a fair
23 trial.

24 And you've been examples, by plaintiff's counsel, of
25 prejudgments. They've talked about frivolous lawsuits and

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1 things like that. There are countless variations. An easy
2 example for me would be that I have young children and if I
3 were asked to sit in a jury where, if someone injured a child,
4 I like most of you would say I'm not sure. I'm not sure I'm
5 the right guy for this one, because it's a little close to
6 home. And so let's focus on this prejudgment issue.

7 To begin with, is there anybody here, just by a show
8 of hands, who have the perception, after all these days, that
9 the plaintiff was injured in a car accident? Just raise your
10 hand if that's your perception of this case. Okay.

11 Is there anybody here who has the perception that
12 this is a case worth over a million dollars? Just raise your
13 hand if that's the perception that you've gotten so far.
14 Okay.

15 I want to go with each one of you -- and obviously,
16 I'm not going to go, but a fraction as long as the questions
17 so far. But I do want to get a moment with each one of you to
18 discuss this perceptions and its effect on your being able to
19 be impartial. Okay.

20 Mrs. Dearing, if you would, the first question was:
21 Did you have a perception, given what's been discussed over
22 the past few days that someone has been injured -- I'm going
23 to sit down if that's okay you guys -- and tell me about that
24 perception: How you got it and what it is.

25 PROSPECTIVE JUROR NO. 0841: Yes, just because he kept

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1 talking about it and a similar case.

2 MR. ROGERS: All right.

3 PROSPECTIVE JUROR NO. 0841: Okay.

4 MR. ROGERS: Okay. Okay. So saying it enough can create
5 the perception; is that what happened?

6 PROSPECTIVE JUROR NO. 0841: Yes.

7 MR. ROGERS: And what about that second question, whether
8 there's an idea in your head, already, that this case has a
9 given value?

10 PROSPECTIVE JUROR NO. 0841: Excuse me?

11 MR. ROGERS: Yeah, I might not have been very clear.

12 I asked whether you had a perception, of any kind, any
13 idea in your head that this was a case worth one or two
14 million dollars.

15 PROSPECTIVE JUROR NO. 0841: Yes, because he asked if we
16 had any problem with that decision of money.

17 MR. ROGERS: Okay. Now, I'm going to go down the line
18 and it'll be the same two questions, just so that we can go
19 through as fast as we can. And I -- actually, I want to add a
20 third one to it and we'll make it that much faster. The third
21 one is, if you think in any way that this discussion has
22 affected your ability to come to this case without any
23 judgment, without any leaning one way or the other on who's
24 right and who's wrong. So if you would answer that third
25 question.

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1 PROSPECTIVE JUROR NO. 0841: If I have any --

2 MR. ROGERS: Right. Has this perception that you've
3 gotten --

4 PROSPECTIVE JUROR NO. 0841: Oh.

5 MR. ROGERS: -- over the past few days affected your
6 ability to be impartial and to judge this case?

7 PROSPECTIVE JUROR NO. 0841: No.

8 MR. ROGERS: Okay. Very good. All right.

9 Mr. Daniels, same questions: The perceptions about was
10 the plaintiff injured; and is there a value to the case; and
11 have these perceptions affected your ability to be impartial?

12 PROSPECTIVE JUROR NO. 1338: When we talk about motor
13 vehicle accidents, my assumption of that, and it's been
14 mentioned a few times, so this case has to be about Mr. Simao
15 in a motor vehicle accident.

16 MR. ROGERS: All right.

17 PROSPECTIVE JUROR NO. 1338: And as far as perception of,
18 if there is a value placed on it, no, I do not any
19 preconceived notion as of that. So --

20 MR. ROGERS: Okay. The discussion about money didn't
21 have any effect on your understanding of what this case is
22 about?

23 PROSPECTIVE JUROR NO. 1338: As far as high value on it,
24 no.

25 MR. ROGERS: But what about as far as low value?

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1 PROSPECTIVE JUROR NO. 1338: No, I've got no perception
2 of the value.

3 MR. ROGERS: Okay. No value is the way you are walking
4 in?

5 PROSPECTIVE JUROR NO. 1338: Uh-huh.

6 MR. ROGERS: Okay. Very good. All right.

7 Mrs. Kistler.

8 PROSPECTIVE JUROR NO. 0864: Hi.

9 MR. ROGERS: Same questions.

10 PROSPECTIVE JUROR NO. 0864: Oh, the same questions.
11 Someone being injured, yes. How, no, not really, because he -
12 - you can use any kind of scenario of, maybe, something that's
13 a way from it, so I never really thought that this was
14 definitely an automobile accident, but there's definitely an
15 injury somehow.

16 Do I have any pre-conceptions about amount, yes. How,
17 the questionnaire, number one. The questionnaire had it right
18 on there.

19 Am I able to judge or be able to come up with an amount
20 that's less or more; am I set on a set amount, no. I have no
21 pre-conceptions about that.

22 MR. ROGERS: Now, has this sense that the plaintiff was
23 hurt affected your ability to be impartial when you're called
24 upon to enter a judgment on the question, was the plaintiff?

25 PROSPECTIVE JUROR NO. 0864: No.

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1 MR. ROGERS: In other words, can you come into that --
2 PROSPECTIVE JUROR NO. 0864: That hasn't been proven yet,
3 so no.

4 MR. ROGERS: Okay.

5 PROSPECTIVE JUROR NO. 0864: That hasn't been proven.
6 That's the only thing -- we're only here because that's what
7 the case is, that it hasn't been proven, whether or not
8 they've been injured or not.

9 MR. ROGERS: Okay.

10 PROSPECTIVE JUROR NO. 0864: So no.

11 MR. ROGERS: Okay. Very good. All right.

12 Mr. Aquino, our medical expert.

13 PROSPECTIVE JUROR NO. 1332: Regarding the first
14 question, yes. It seems like it was being addressed like a
15 car accident. The perception regarding the amount of a
16 million or two more and -- you know, I'm not really-- I'm not
17 really -- actually -- it's not actually clouding my judgment
18 as far as that that's concerned. Then regarding your third
19 question, sir --

20 MR. ROGERS: I think you're last answer sort of did just
21 that.

22 PROSPECTIVE JUROR NO. 1332: Oh, okay.

23 MR. ROGERS: Is this perception going to affect your
24 ability --

25 PROSPECTIVE JUROR NO. 1332: No.

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1 MR. ROGERS: -- to remain -- well, I guess, unaffected to
2 walk-in with no prejudgment at all.

3 PROSPECTIVE JUROR NO. 1332: No, it won't.

4 MR. ROGERS: Okay. Very good.

5 Ms. Tatum.

6 PROSPECTIVE JUROR NO. 1036: Yes. When he was talking
7 about the -- about my job and he was asking me certain
8 questions about -- about learning about different accidents,
9 that's why I assumed it must have been an accident that this
10 whole thing was going on.

11 About the money situation, no, I don't think, you know --
12 I was -- I just thought he threw two million out there.

13 And can I come into this case open-minded throughout
14 everything I listened to this whole week, yes.

15 MR. ROGERS: Okay. Good. All right.

16 Mrs. Parrette.

17 PROSPECTIVE JUROR NO. 1389: I think he opened with, that
18 there was an accident on 215 and Cheyenne, so I assume that
19 that is what it was.

20 And the money thing I think it's just, well, are we able
21 to come to a conclusion if we side with plaintiff -- with
22 plaintiff, so -- but it hasn't really affected my decision one
23 way or the other and I have made no judgment about that.

24 MR. ROGERS: Okay. I think I get you. One thing I want
25 to explore a little bit more is that question, though, of

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1 injury. Do you have a perception, after all these -- do you
2 have a perception after all of these days and all of these
3 questions, that the plaintiff was injured in this car
4 accident?

5 PROSPECTIVE JUROR NO. 1389: Yeah, I do have that
6 perception. That's -- yes, because that's -- it seems all the
7 questions are around that. And one can say they have three
8 different perceptions that it's more with the spinal, because
9 there's a lot of questions about that. So yes.

10 MR. ROGERS: Okay. And then let's go revisit that last
11 question, prejudgment, again. If you have that understanding
12 and you have now, I gather, for some time, can you still walk
13 into this case completely impartial with no preconception or
14 leaning on a question of, was the injury actually caused?

15 PROSPECTIVE JUROR NO. 1389: I think so, because -- just
16 because one person says their view of the perception, that's
17 doesn't mean that that is the truth or that I can't make up my
18 mind up myself.

19 MR. ROGERS: All right. Very good.

20 And Ms. Nolte.

21 PROSPECTIVE JUROR NO. 0903: After coming in here, yes, I
22 perceived that it was an auto accident and that's what a lot
23 of the questions were directed for.

24 As for the dollar amount, it comes for three mill --
25 it comes from -- going up as much of the two million, the

1 question on the two million. And -- because I came in here
2 not thinking of that kind of a dollar amount, that somebody go
3 after something like that or that big of a dollar amount. But
4 I can -- but I have an open mind as to what we can all agree
5 on as a jury as to what the figure should be, but I was just a
6 little awestruck by that.

7 MR. ROGERS: Okay. And there's something you said there
8 I want to follow-up on. And that is, what the figure would be
9 and that brings me back to the same question I followed up on
10 with Ms. Parrette, and that is, do you have the perception,
11 after these days of questioning, that there is a figure that,
12 in fact, is owed?

13 PROSPECTIVE JUROR NO. 0903: I do.

14 MR. ROGERS: Okay.

15 PROSPECTIVE JUROR NO. 0903: I do have that perception.

16 MR. ROGERS: Well, and what -- what gave that to you?

17 PROSPECTIVE JUROR NO. 0903: I think just a lot of the
18 questions that were asked of us, you know, about awarding for
19 harm. That's --

20 MR. ROGERS: Okay. All right. Very good.

21 Mr. Doty, the same questions.

22 PROSPECTIVE JUROR NO. 0905: Yeah, like we said, I think
23 that a lot of the statements that were stated, and all the
24 answers to the questions, different various examples we were
25 given, I perceived it was an auto accident and claiming to be

1 an injury from it.

2 From the questions I gathered, yeah, my initial
3 impression, is that it might be an asking for an excessive of
4 two million dollars.

5 Will that have an effect on my impartiality to the
6 case, I don't -- not, it will not.

7 MR. ROGERS: Okay. Now, there have been some comments,
8 on the back row, all the way back to you, and they are things
9 like, you know, I've gotten the idea that injury was caused
10 here and you've gotten that same idea.

11 PROSPECTIVE JUROR NO. 0905: Well, obviously that -- why
12 else would we be here if that wasn't -- in my understanding,
13 we wouldn't be here if that wasn't what was being claimed, and
14 so, yeah, I've gotten that perception, but like everyone said
15 before, but that doesn't necessary mean automatically that I
16 believe being that that's the truth. So I have to be -- I
17 have to see everything going on first before -- but I was --
18 yeah, we wouldn't be here if that wasn't the plaintiff's
19 claim, that that accident caused his injuries.

20 MR. ROGERS: You know what, I think my question wasn't
21 very clear, because your answer was right. It seems that my
22 question was not. It's this: We are here because of a claim.
23 The question is whether you, now, have a perception that
24 injury was caused, not simply a claim that it caused.

25 PROSPECTIVE JUROR NO. 0905: Yeah, I think if there's

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1 questions of the plaintiff's injuries and then my perception
2 would be towards that, yeah.

3 MR. ROGERS: Okay.

4 PROSPECTIVE JUROR NO. 0905: If I'm understanding.

5 MR. ROGERS: I think you are, yeah. And that's really
6 brings us to that final question, now, is if you have this
7 perception that there was a car accident that caused injury,
8 can you come to the table as a juror or judge -- which is what
9 all of you are, you will be judges -- with no prejudgment
10 about cause. Can you, now, sit on this case and decide, you
11 know, we're going to have to decide whether injury was caused
12 to him.

13 PROSPECTIVE JUROR NO. 0905: Yeah, absolutely.

14 MR. ROGERS: Okay. All right.

15 Mrs. Lewis.

16 PROSPECTIVE JUROR NO. 1354: Yes. Through everything
17 I've heard, like they've said, we think that it's about a car
18 accident on 215 and Cheyenne and thinking a lot about someone
19 having an issue with a car accident. They were questioning a
20 little bit more of that, so yeah, I think it was the car
21 accident.

22 MR. ROGERS: Right.

23 PROSPECTIVE JUROR NO. 1354: Money amount -- amounts were
24 thrown around. Of course, that's -- you think about that
25 amount. Am I assuming that's the amount and stuff, no. I'm

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1 waiting to hear what's going on and so forth.

2 As for, am I already thinking, yeah, the person -- that
3 they were injured in the accident, again, I'll listen to you,
4 give me the facts, and I'll make a decision from that.

5 MR. ROGERS: Okay. So this is something, then, that you
6 can come to with no prejudgment?

7 PROSPECTIVE JUROR NO. 1354: Correct.

8 MR. ROGERS: Okay. Very good. All right.

9 And, Mr. William Cool Briese. That does have a flow.

10 PROSPECTIVE JUROR NO. 1388: Well, as what everybody had
11 stated, the questionnaire was a dead giveaway. We are here
12 for an accident case. We are here for a money judgment on the
13 plaintiff. The counsel has already explained it's in the
14 around ballpark figure of two million dollars. Like the woman
15 said next to me, it was on Cheyenne and 215, I think it was.
16 And I have no prejudgment or I'm not, basically, making my
17 mind up before I walk in the courtroom, who's innocent, who's
18 guilty. I'm open minded. Let's hear the testimony. Let's
19 get on with it.

20 MR. ROGERS: Okay. So while the ideas have been
21 presented, your judgment has not affected?

22 PROSPECTIVE JUROR NO. 1388: No, not --

23 MR. ROGERS: You can come into this thing with no
24 judgment?

25 PROSPECTIVE JUROR NO. 1388: Clear mind. Clear

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1 conscience.

2 MR. ROGERS: Okay. Very good.

3 Mrs. Rosinski.

4 PROSPECTIVE JUROR NO. 0918: Yes, and they stated that
5 the car accident was in '05, so, yes, therefore, I think that
6 it was a car accident, that he was injured, and they talked
7 about the two million or more, and to weigh the money amount.
8 And does it have a judgment on me, no. No, it has no bearing
9 on me. I can come with no judgment in mind, because I haven't
10 heard the other story.

11 MR. ROGERS: Okay. I appreciate that. All right.

12 And, Mrs. Frye.

13 PROSPECTIVE JUROR NO. 1050: I'm the same as everybody
14 else. I know it's a car accident. I kind of figured that
15 out, you know. I know that it's a multimillion dollar,
16 they're asking for that. I know there's a claim that there
17 might be an injury, but I don't have any proof or anything
18 yet, so I have no judgment on either side. I want to see
19 proof of everything.

20 MR. ROGERS: All right. Good.

21 And, Mrs. Smith.

22 PROSPECTIVE JUROR NO. 0928: Yes. The same thing, he had
23 mentioned about car accidents. And the two million dollars, I
24 believe he was just throwing out a figure. Would we be
25 objectable -- objectionable to not award that? I don't care

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1 if it's \$10 or two million, it depends on the facts of the
2 case. I have no perception or preconceived notion of what,
3 you know, I'm going to go for or whatever. I have no idea. I
4 don't know who's who, or who was hurt, I don't know what
5 happened, so, you know --

6 MR. ROGERS: It's all theory right now.

7 PROSPECTIVE JUROR NO. 0928: Yeah, everyone is innocent
8 until proven guilty, so I want to see the facts and, you
9 know --

10 MR. ROGERS: Okay. Okay. Very good.

11 And, Ms. Prince.

12 PROSPECTIVE JUROR NO. 0928: Yeah, I'm -- from the
13 statement, it said it was a car accident, 215 and Cheyenne.
14 The money has no bearing on me. I have no preconceived notion
15 of who's guilty, or who's not, or who's innocent, or who's
16 not. I don't have any of the facts. So I would just into
17 with an open mind.

18 MR. ROGERS: Okay. Very good.

19 And, Mrs. Kunkel or is it -- am I pronouncing it right?

20 PROSPECTIVE JUROR NO. 1051: Kunkel.

21 MR. ROGERS: Kunkel. Very good.

22 PROSPECTIVE JUROR NO. 1051: I also remember it being
23 said about a car accident on the 215 and Cheyenne. The money,
24 I remember him asking us a lot, if we would have a problem
25 putting in a judgment for two million, or over two million,

1 for a judgment. I don't know if that's what they're asking.
2 I was just -- I'm thinking that's was him asking us our
3 opinion, if we would be able to do something like that. But
4 as far as, I don't know who -- if someone was hurt or if
5 someone wasn't hurt. I haven't heard any facts, I haven't
6 heard any testimony, and I don't know. So I'm able to listen
7 to evidence before I make a decision on anything.

8 MR. ROGERS: Okay. And even though this jury selection
9 has gone on exceptionally long, you will be able to come to
10 judgment, in this case, with a free and open mind and just
11 base your decision on the evidence when it's presented?

12 PROSPECTIVE JUROR NO. 1051: Oh, absolutely.

13 MR. ROGERS: All right. Very good. Okay.

14 Mr. Barrett.

15 PROSPECTIVE JUROR NO. 0943: Yes. I assume that it was
16 an auto accident from the initial statement. And as far as
17 the money amount, the two million dollar figure, I didn't
18 necessarily apply to this case. It could be over or under.
19 And as far as the parties are concerned, they're the same to
20 me, right now, until I get the facts.

21 MR. ROGERS: Okay. Did you have any perception about
22 whether injury was caused?

23 PROSPECTIVE JUROR NO. 0943: I assumed would be, at
24 least, a claim to injury, but I don't know the facts. So --

25 MR. ROGERS: All right. Very good. Okay. And, you

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1 know, I have two names written down for you and I believe Bell
2 is the right one.

3 PROSPECTIVE JUROR NO. 0953: It's Bell.

4 MR. ROGERS: All right. The same questions.

5 PROSPECTIVE JUROR NO. 0953: I gathered, from the
6 statements, that the -- that that occurred at Cheyenne and the
7 215. And I -- the statements were made that, you know, we're
8 here for a claim. No proof has -- no evidence has been put
9 before us yet. So am I able to come to the table with no
10 judgment, absolutely.

11 MR. ROGERS: Okay. And, again, let's just keep with
12 this. We're nearly done. Mr. Johnson, all the questions
13 about any perceptions that have been given.

14 PROSPECTIVE JUROR NO. 0956: It seemed like it's a
15 covered thing. All of the follow-up questions had to do with
16 traffic reconstruction and things of that nature. But I don't
17 know what happened. I don't know what's worth what. It
18 could have to do with the blender exploded could be involved
19 in this for all I know. So I can't put a dollar amount on any
20 of that.

21 As far as preconceived notions, I work in retail, so
22 everyone is [indiscernible].

23 MR. ROGERS: All right. I'm going to let that one hang
24 and we'll come back. Okay.

25 And Mrs. Hubbert.

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1 PROSPECTIVE JUROR NO. 1293: Yeah, as everyone said,
2 from the first, he mentioned that there was an incident on 215
3 and Cheyenne, that the plaintiff was in a van, so I gathered
4 it was a car accident. There's been a claim -- to me, there's
5 a preconception that there may be an injury due to all the
6 questioning regarding, if we were familiar with spinal
7 injuries, or MRIs, and the list of doctors on the
8 questionnaire. As for the money amount, I was a little iffy
9 on it like someone else had mentioned that there was two
10 different issues on the questionnaire, regarding if we would
11 have an issue being on the jury about multimillion dollar
12 lawsuit. And then, of course, here during questioning, I was
13 thinking to myself, after you had asked that, I didn't raise
14 my hand, and I thought, well, yeah, I should have raised my
15 hand, because I do have preconceived notion that that's what
16 they're going to ask for, at least something close to that.
17 But as everyone else has mentioned, I come in here, there's no
18 -- I don't know either person on either side, so I can't say -
19 - I cannot have a preconceived notion that there's fault on
20 either side, or on one side, or the other at this time. You
21 have to look at the evidence. None of that has been presented
22 to any of us yet, so I can't come in here and make a judgment
23 until we see it. That was longwinded.

24 MR. ROGERS: All right. Okay.

25 Mrs. Manful.

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1 PROSPECTIVE JUROR NO. 0963: Yes.

2 MR. ROGERS: Same questions.

3 PROSPECTIVE JUROR NO. 0963: So the only thing I see is
4 that, apparently there was an accident and there's a claim for
5 money for injury, but like -- you know, like she said, we
6 haven't seen any evidence yet or anything that's like
7 injuries. As far as the two million, I think that was a
8 hypothetical question, so -- oh, would you be going in, or can
9 you go in and vote on that. And I don't have any feelings one
10 way or another. I to listen to the facts to make a decision.

11 MR. ROGERS: Okay. So when the number was presented, you
12 didn't get the idea that a bar was being set?

13 PROSPECTIVE JUROR NO. 0963: No, I thought it was just
14 like a hypothetical question: Would you have a problem being
15 on a jury, you know, and possibly deciding on a settlement of
16 two million dollars?

17 MR. ROGERS: Okay. Very good. Okay.

18 Ms. Jones.

19 PROSPECTIVE JUROR NO. 1395: As of right now, the only
20 things that I know is, that there was a car accident; there's
21 -- it's alleged that there's an injury. Whether or not
22 there's an injury, whether or not there's -- it's a civil
23 case, so that undoubtedly deciding someone feels that there's
24 a monetary value. What that value is, or if there is -- if
25 it's even merited that there is, you know, to be a cash award,

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1 I don't know that. I haven't seen anything. I can't -- I
2 can't make, you know -- I can't say that, you know, I am for
3 or against anybody right now. I don't have anything, nothing
4 has been given to me to make a decision.

5 MR. ROGERS: Okay. That is the very thing. You're named
6 after one of the most famous legal cases ever.

7 PROSPECTIVE JUROR NO. 1404: That's right.

8 MR. ROGERS: So what is your answer to all these
9 questions?

10 PROSPECTIVE JUROR NO. 1404: What's the three questions
11 again?

12 MR. ROGERS: Yeah.

13 PROSPECTIVE JUROR NO. 1404: Because --

14 MR. ROGERS: They can get lost and they do sort of
15 dovetail in the end, really.

16 PROSPECTIVE JUROR NO. 1404: -- I am lost --

17 MR. ROGERS: It is: Given your role to come to this case
18 with no prejudgment at all, has the past several days'
19 exposure to these questions about two million dollars, about
20 injury, about things like that, given you the perception that
21 the plaintiff was injured and that this case has a value of
22 two million dollars?

23 PROSPECTIVE JUROR NO. 1404: Yeah, there's a perception
24 there that somebody got -- somebody was injured, the plaintiff
25 was injured, with all the questions that are going on. Two

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1 million dollars, I just figured that that was just a number
2 that was thrown out there, you know, if it's under that or it
3 could be like five or six million dollars, and that's not
4 going to cloud my judgment.

5 MR. ROGERS: All right. And then on the question of
6 judgment, can you set aside that perception, that you've been
7 given, and come to this case with no judgment, at all, and
8 just simply wait on the evidence?

9 PROSPECTIVE JUROR NO. 1404: Yeah.

10 MR. ROGERS: All right. Very good.

11 Ms. Ellis.

12 PROSPECTIVE JUROR NO. 1017: I kind of thought a car
13 accident, but I think it has something to do with a carwash,
14 and the two people in back of me, because they said they
15 washed the car. That's my perception.

16 MR. ROGERS: No, I'm not getting into high school
17 ambivalence.

18 PROSPECTIVE JUROR NO. 1017: No, no, no, no --

19 MR. ROGERS: -- or carwashes.

20 PROSPECTIVE JUROR NO. 1017: -- but I'm just saying, a
21 car accident and had to do with a carwash and what --

22 MR. ROGERS: I got you.

23 PROSPECTIVE JUROR NO. 1017: Yeah. What was the point?

24 MR. ROGERS: Yeah. It's whether you have been given this
25 perception, this idea, that, okay, we're here for an accident,

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1 injury was caused, and there's about two million dollars.

2 PROSPECTIVE JUROR NO. 1017: Yeah, I get -- like
3 everybody else, yeah, I got that same perception with all the
4 questions I asked, and they talked about frivolous, and money,
5 and, you know, pain and suffering. So, yeah, I figured it
6 obvious -- that there was a cranial injury and that it could
7 be in excessive of two million. And it gave me -- when that
8 two million came out, I'll be honest, I was like, you know,
9 just -- and I said it earlier, it did -- I did think about
10 that, and not just for the pain or the -- or not the -- I
11 can't remember what I said now, my mind is all -- but for all
12 of it. I have to look at everything. Would it weigh my
13 judgment, no, because I still have to listen to facts and that
14 it presented that, you know, that is still important. But,
15 yeah, right now I do have a perception. I don't know if that
16 will cloud my judgment, as of -- I mean, I still have to
17 listen to everything. But --

18 MR. ROGERS: So when you come into this case to begin
19 with, you might bring some of that perception or prejudgment
20 with --

21 PROSPECTIVE JUROR NO. 1017: I don't know if it's a
22 prejudgment. I know it's a perception that I've gotten from,
23 you know, all of this. I mean, I'm not judging anybody, but I
24 do have a perception of what's going on and just -- I mean,
25 does that mean -- I mean, are those two different things:

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1 Perception of prejudging? I mean --

2 MR. ROGERS: Do you have the idea --

3 PROSPECTIVE JUROR NO. 1017: I mean --

4 MR. ROGERS: I'm trying to make it so --

5 PROSPECTIVE JUROR NO. 1017: I don't want to get into a
6 vocabulary lesson, but --

7 MR. ROGERS: I'm trying to make it so, but the
8 distinction is very small. If the perception is there, can it
9 cloud your judgment, as you put it?

10 PROSPECTIVE JUROR NO. 1017: No, I don't think so. I
11 mean, I think I'm still going to take facts. I mean, facts
12 are going to have weight, I think, than the perception that I
13 have --

14 MR. ROGERS: All right.

15 PROSPECTIVE JUROR NO. 1017: -- once I hear, because I
16 haven't heard any facts. I mean, I don't -- I'm not -- in my
17 mind, I don't anybody who's innocent, or guilty, or any of
18 that, but I just, you know, the money thing is just, for me, I
19 don't know. That's hard for me.

20 MR. ROGERS: And what about cause of injury, can you put
21 aside this perception of that, as well, and say, well, he's
22 going to have to prove that he was actually injured, too?

23 PROSPECTIVE JUROR NO. 1017: Yes, it needs to be proven.

24 MR. ROGERS: I will mispronounce your name, but we -- I
25 might give a stab at it, Zweifel.

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1 PROSPECTIVE JUROR NO. 1002: Very close, Zweifel.

2 MR. ROGERS: Zweifel. That wasn't so close, but you were
3 kind to say so. Okay. Yes, what's your answer to these
4 questions?

5 PROSPECTIVE JUROR NO. 1002: Well, given the statements
6 by the other attorney, about -- yeah, that it's probably a car
7 accident, and that there was an injury claim. But, at this
8 point, there's no evidence to say that there was injury. And
9 the money, yeah, I didn't feel very good. As they said, I
10 would say that the perception is probably in the million
11 dollar range. I wonder if, can I put all that aside and come
12 to -- with no preconceptions, yeah, I could.

13 MR. ROGERS: Okay. I'm going to put a -- you know what,
14 I'm going to take more than seven minutes.

15 THE COURT: Would counsel approach, please.

16 MR. ROGERS: Yes.

17 [Bench Conference Begins]

18 THE COURT: So I don't have any idea, you know, what your
19 schedules are looking like. I wanted to ask up here instead
20 of in front of the jury.

21 MR. ROGERS: How much longer --

22 MR. EGLET: I'm sorry.

23 THE COURT: I'm just wondering how long -- whether Mr.
24 Rogers has a lot more or just a little bit more?

25 MR. ROGERS: I actually have quite a bit more, yes. For

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1 example, I don't think we'll have time tomorrow for both
2 parties to open. And if they don't want to split it up, I
3 suppose --

4 MR. EGLET: Well, we can split it up, but that's going to
5 cause us a big problem on Monday when the witness -- you know,
6 we had mentioned earlier in the week about starting at noon on
7 Friday. Could we start tomorrow at noon instead of 1, and
8 then I think we'll have time for openings.

9 THE COURT: Well, are you going to be more than an hour
10 in concluding the examination?

11 MR. ROGERS: Yes. Yes.

12 THE COURT: Then it's going to have to.

13 MR. EGLET: Well, we still have time to get, at least,
14 the plaintiff's opening in.

15 THE COURT: Yeah, but you said you're opening will only
16 be about an hour-and-a-half.

17 MR. EGLET: Hour-and-a-half to two hours. How much time
18 do you think you have still?

19 MR. ROGERS: It's hard for me to gauge right now. I
20 think there's a fair chance that they could get their opening
21 in, but I don't want to -- I don't want to close off the door
22 to myself, to finish this -- I wish I could be more exact --

23 MR. ROGERS: That's fine. That's fine. So if we start
24 at 12, then I think that we could at least get the plaintiff's
25 opening done.

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1 THE COURT: That's a long day if we go until 5.

2 MR. EGLET: What's that?

3 THE COURT: That's a long day if we go until 5.

4 MR. EGLET: Well, I mean, that's what time a jury goes.

5 We usually go in the morning. We usually -- it takes six,
6 seven hours. I mean, we're already going --

7 THE COURT: You're usually lucky if you get five or six.

8 MR. EGLET: Well, I know.

9 THE COURT: Let's try and find another day.

10 MR. EGLET: Well, we've got an expert that has moved
11 surgeries to meet with our schedule for one day.

12 THE COURT: Okay. If you can do your opening tomorrow,
13 Mr. Rogers doesn't get to do his until Monday afternoon --

14 MR. WALL: Do you have a sense of how long yours is?

15 MR. ROGERS: Well, the same.

16 MR. EGLET: Same.

17 MR. ROGERS: Yeah, I would say it's about an hour-and-a-
18 half.

19 THE COURT: You won't get a witness in on Monday, that's
20 the problem, if we got to start at noon tomorrow.

21 THE COURT: Even if we start at noon tomorrow, if we stop
22 after you do your opening --

23 MR. EGLET: You see, I don't think that he's -- I don't
24 think he knows for sure. I mean, let's just assume --

25 MR. ROGERS: I don't. I've got to be honest, I don't.

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1 MR. EGLET: He doesn't know. So if we start at noon
2 tomorrow, even if we went two hours, and each opening was an
3 hour-and-a-half long, we would get them both done tomorrow.

4 THE COURT: And don't see that we would, Mr. Eglet.

5 MR. EGLET: Well, and he doesn't know. I mean, he may
6 be --

7 THE COURT: Right.

8 MR. EGLET: -- he may only be a another hour. I'm just
9 asking, let's give it a shot as opposed to just -- because I
10 then I have a huge problem with a witness on Monday. I mean,
11 I don't know what I'm going to do.

12 THE COURT: I don't know what you are, too, but I think
13 you need to give it some thought. We'll start at noon
14 tomorrow.

15 MR. EGLET: Okay.

16 THE COURT: And we'll just do the best we can.

17 MR. EGLET: Okay. All right.

18 THE COURT: All right. So shall we break for the
19 evening?

20 MR. ROGERS: Yes.

21 THE COURT: Okay.

22 [Bench Conference Ends]

23 THE COURT: A lot of discussion about scheduling, ladies
24 and gentlemen. What we're going to do is, break for the
25 evening and ask you to return tomorrow at noon, in the hopes

1 of getting through this jury selection process, and hearing,
2 at least, maybe one of the two opening statements.

3 So with that in mind, I'll remind you of your obligation
4 not to discuss this case with anyone; not to form or express
5 any opinions until this case is given to you for decision; and
6 to not to do any research on any subject connected with this
7 case.

8 See you tomorrow at noon, please.

9 [Proceedings Concluded at 4:53 p.m.]

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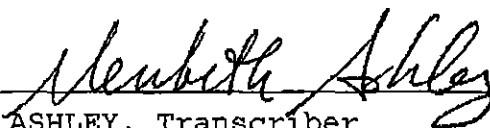
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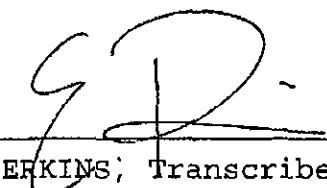
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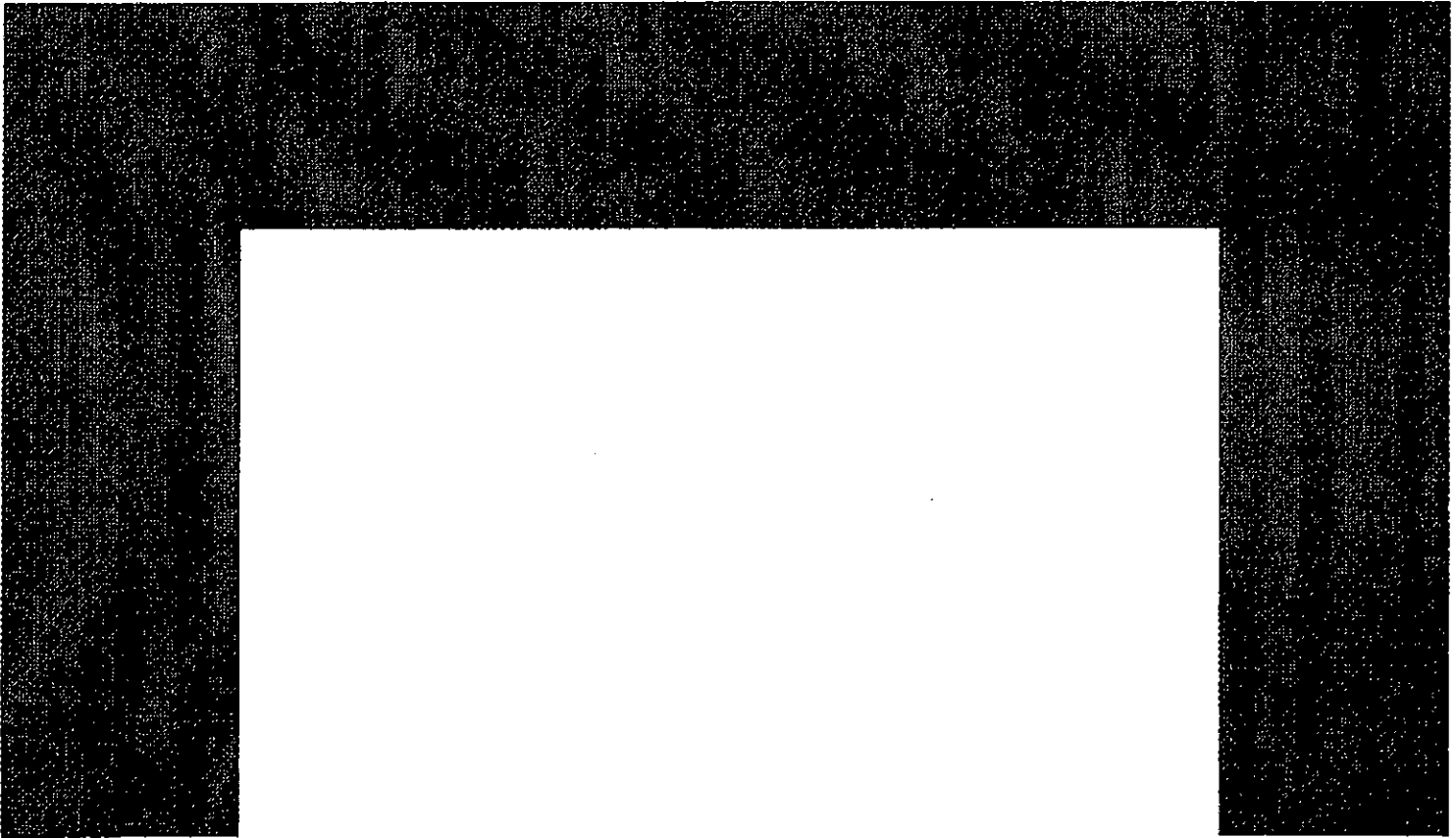

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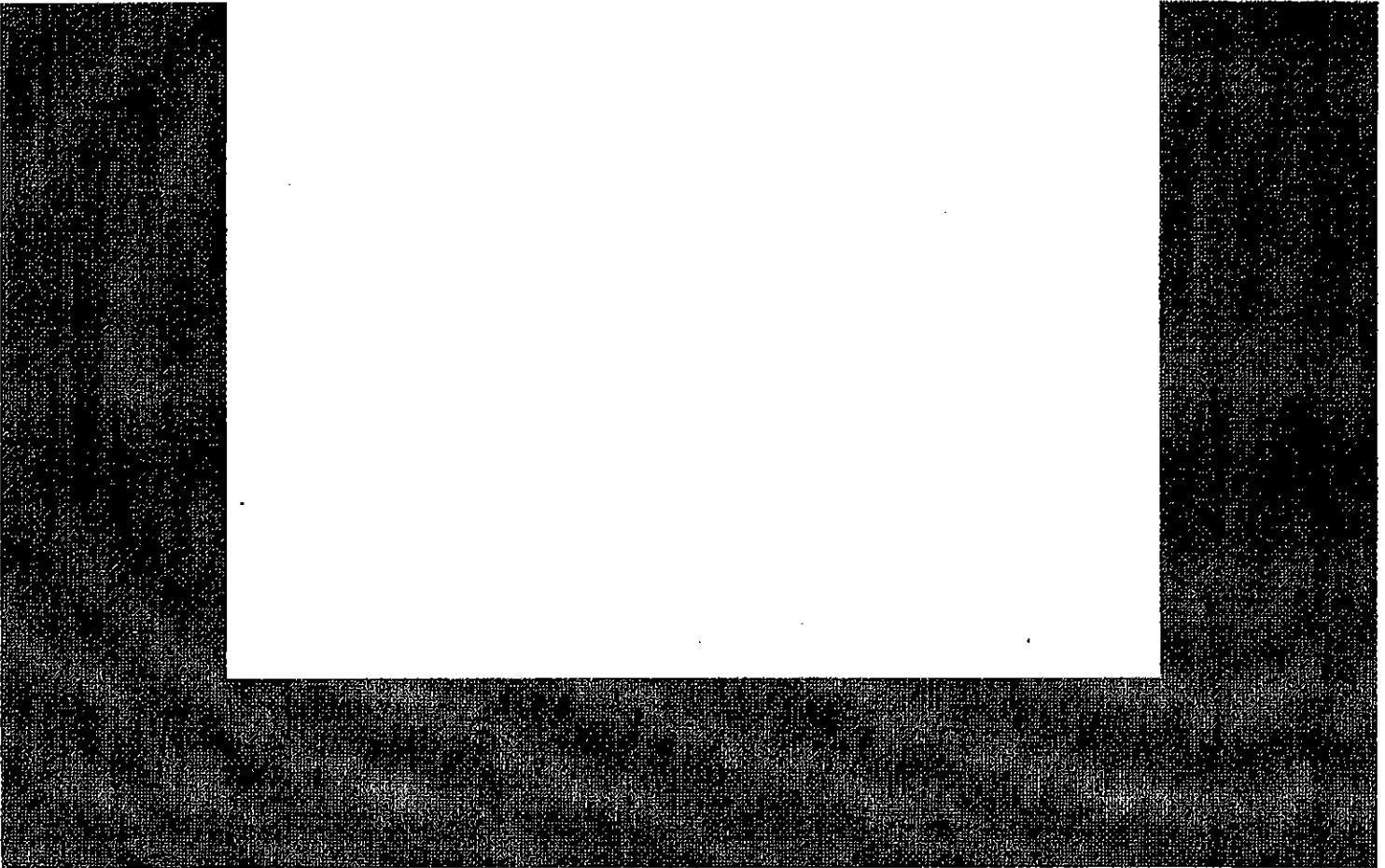

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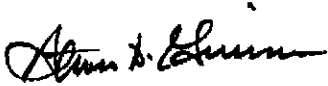


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04/05/2011 11:36:02 AMDISTRICT COURT
CLARK COUNTY, NEVADA
CLERK OF THE COURTCHERYL A. SIMAO and
WILLIAM J. SIMAO,

Plaintiffs,

v.

JAMES RISH, LINDA RISH
and JENNY RISH,

Defendants.

CASE NO. A-539455

DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

FRIDAY, MARCH 18, 2011

REPORTER'S TRANSCRIPT
TRIAL TO THE JURY
JURY PANEL VOIR DIRE

APPEARANCES:

For the Plaintiffs: DAVID T. WALL, ESQ.
ROBERT M. ADAMS, ESQ.
ROBERT T. EGLET, ESQ.
Mainor EgletFor the Defendants BRYAN W. LEWIS, ESQ.
James and Linda Rish: Lewis and Associates, LLCFor the Defendant STEVEN M. ROGERS, ESQ.
Jenny Rish: CHARLES A. MICHALEK, ESQ.
Hutchison & Steffen, LLCAlso Appearing: JOEL D. HENRIOD, ESQ.
DANIEL F. POLSENBERG, ESQ.
Lewis and Roca, LLP

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1 FRIDAY, MARCH 18, 2011 AT 12:10 P.M.

2 [Outside the Presence of the Prospective Jury Panel]

3 THE MARSHAL: -- presiding, District Court X is now in
4 session.

5 THE COURT: Please be seated.

6 Before we bring our jury panel in, I was going to
7 inquire of counsel how long you think it may take to argue
8 these issues we need to discuss outside their presence,
9 because perhaps we should let them take a 30-minute break or
10 something, unless you think it'll take longer than that.

11 Mr. Wall?

12 MR. WALL: Well, apparently there's a few issues, Judge.
13 There is a -- what I perceive to be forthcoming, an oral
14 motion for a mistrial. There's also the remaining issues, I
15 guess, that we were going to argue Thursday morning that have
16 to do with what may or may not be admissible, or revisiting
17 certain motions in limine.

18 Obviously I'd submit it to you, but it may take a
19 substantial period of time to argue all of those. So I don't
20 know whether it should be done after jury selection, so
21 they're not waiting around; at least take up some or all of
22 these issues at that time, rather than argue these for
23 45 minutes, an hour, hour and a half, and then have them just
24 sit and wait. So.

25 THE COURT: Well, you know, I hate to have them wait,

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1 because I'm doing my best to try to move it along and be
2 sensitive to the fact that their time is very valuable. There
3 are times during the course of the trial anyway where they
4 often have to wait while we discuss issues and hear arguments
5 on issues.

6 So, what about that, Mr. Rogers? Can we bring the
7 panel in and allow you to continue examining them, and then
8 address these issues afterwards?

9 MR. ROGERS: Well, one of the two issues must, as a
10 matter of course, be brought before the Jury is impaneled. If
11 we could address that motion only, which is the motion for a
12 mistrial, which I don't believe should take long -- I don't
13 know how long that'll take, but it shouldn't be but a few
14 minutes.

15 We've, we have, as you can see, invited
16 Mr. Polsenberg here to address one issue. I don't know what
17 the several are that Mr. Wall's referring to about the
18 admissibility of evidence that, really, you and I discussed
19 before and our thought was it's best to address this before
20 the opening, simply because the parties aren't yet clear on
21 what evidence they can discuss in the opening.

22 MR. WALL: We're clear.

23 THE COURT: Let me say this. Let me say this. First of
24 all, I don't anticipate revisiting any issues. The Court's
25 already ruled on motions in limine. That's number one.

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1 Number two, let's bring our jury panel in and allow
2 you to continue your examination of them. Before we impanel a
3 jury you'll have an opportunity to address these issues which
4 you have raised.

5 MR. MICHALEK: Thank you, Your Honor.

6 [Pause; Jury Panel In]

7 THE COURT: Please be seated, everybody.

8 Good afternoon, ladies and gentlemen.

9 [Simultaneous Response]

10 THE COURT: Great response. I appreciate that.

11 Thank you for returning, each and every one. I want
12 to apologize for getting a late start. We'd asked you to be
13 here at noon, but there were still some issues we needed to
14 discuss outside your presence, so I apologize for the brief
15 delay.

16 We're ready to proceed, then, Mr. Rogers.

17 MR. ROGERS: Thank you, Your Honor.

18 All right. Good afternoon, everyone.

19 [Simultaneous Response]

20 MR. ROGERS: While I tidy up, yesterday where we left off
21 was we were addressing some concerns about the potential for
22 pre-judgment, for any problems that might be presented in that
23 regard, given your history and given the history of this case
24 until it's over.

25 And I want to bring that now to a finer point, and

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1 that's this. There have been the questionnaires that have
2 been filled out by everyone here. And some of the responses
3 to those questions -- and I don't mean to single anyone out or
4 make you feel uncomfortable, but I do want to visit some of
5 those responses.

6 And again, keep in mind that, as has been said over
7 and over, that there truly is no dishonor and no shame in
8 feeling the way you feel and being the person you are. The
9 only question here is whether you're a good fit for this case.

10 Now, in order. Mr. Daniels, in response to the
11 following questions -- and these are actually the questions
12 I'll be addressing to just about anybody where there's a
13 concern -- you answered affirmatively. Let me read this to
14 you and make sure that I understand. You were asked, in the
15 questionnaire:

16 "Do you have any beliefs that would make it
17 difficult for you to return a verdict in favor of
18 the Defendant if the Plaintiff's injuries were
19 caused by something other than the Defendant's
20 conduct even though you may feel sympathy for the
21 Plaintiff?"

22 Your answer to that question was yes. Is that
23 correct?

24 PROSPECTIVE JUROR DANIELS: That I feel sympathy?

25 MR. ROGERS: Let me repeat it. And go off -- because

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1 this is a question we'll be addressing more than with just
2 you. Here goes.

3 "Do you have any beliefs that would make it
4 difficult for you to return a verdict in favor of
5 the Defendant if the Plaintiff's injuries were
6 caused by something other than the Defendant's
7 conduct even though you feel sympathy for the
8 Plaintiff?"

9 PROSPECTIVE JUROR DANIELS: I may have misunderstood that
10 question. Because I don't have any beliefs as far as one way
11 or the other as far as, you know -- right now, to me it's an
12 open book right now. I don't -- as far as believing that one
13 person is right over the other one on the evidence I don't
14 have any fact in the matter right now. I may have been --
15 mistook when I read it.

16 MR. ROGERS: Okay. Well, what do you understand the
17 question to mean right now, then?

18 PROSPECTIVE JUROR DANIELS: Do I have beliefs that would
19 stop me from making the correct decision? Is that what you're
20 trying to say?

21 MR. ROGERS: Right. It's -- it focuses mostly on this
22 clause -- or my question does, anyhow: Do you have any beliefs
23 that would make it difficult for you to return a verdict in
24 favor of Jenny Rish if the Plaintiff's injuries were caused by
25 something or someone other than Jenny Rish?

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1 PROSPECTIVE JUROR DANIELS: No. I don't care
2 [indiscernible].

3 MR. ROGERS: And there was a second one, and it's this:

4 "Do you have any beliefs that would prompt you
5 to return a verdict of money damages even if damages
6 are not justified by the evidence?"

7 And your answer to that question was yes.

8 PROSPECTIVE JUROR DANIELS: [Indiscernible].

9 MR. ROGERS: Don't feel awkward about this. Really.

10 PROSPECTIVE JUROR DANIELS: No.

11 MR. ROGERS: This isn't to --

12 PROSPECTIVE JUROR DANIELS: [Indiscernible] at the time.

13 I don't -- maybe I misunderstood the question. In other
14 words, would I give an answer and would I award something that
15 I think wasn't justified? Is that what the question is trying
16 to say?

17 MR. ROGERS: Yeah. I think that's a fair way of looking
18 at it.

19 PROSPECTIVE JUROR DANIELS: No.

20 MR. ROGERS: Your answer today to that question then
21 would be no?

22 PROSPECTIVE JUROR DANIELS: Wouldn't be a fair assessment
23 unless it was justified. Right. Correct.

24 MR. ROGERS: Okay. Very good.

25 Now I'm going to single just a few more on the same

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1 questions.

2 Ms. Kissler.

3 PROSPECTIVE JUROR KISSLER: Yeah, something tells me I
4 misread the question. Go ahead.

5 MR. ROGERS: Yes. They're the same questions, actually.
6 The first one is number 43:

7 "Do you have any beliefs that would make it
8 difficult for you to return a verdict in favor of
9 the Defendant if the Plaintiff's injuries were
10 caused by something other than the Defendant's
11 conduct?"

12 PROSPECTIVE JUROR KISSLER: And I put?

13 MR. ROGERS: You put yes.

14 PROSPECTIVE JUROR KISSLER: I meant no. I misread the
15 question.

16 MR. ROGERS: Okay. That's a question that can use some
17 tidying up.

18 PROSPECTIVE JUROR KISSLER: Yeah.

19 MR. ROGERS: Okay. Let's go to 46, then. It's the
20 second question we just discussed.

21 "Do you have any beliefs that would prompt you
22 to return a verdict of money damages even if damages
23 are not justified by the evidence?"

24 PROSPECTIVE JUROR KISSLER: That would be no, and I
25 probably put yes.

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1 MR. ROGERS: Okay.

2 PROSPECTIVE JUROR KISSLER: I just read it again. I'm
3 dyslexic, so I have a tendency to not -- to get everything, so
4 [indiscernible] misread it.

5 MR. ROGERS: And it was question 46 --

6 PROSPECTIVE JUROR KISSLER: Right. I am dyslexic, so
7 that could have been just I didn't read it right. I thought I
8 went slowly. It took me almost an hour and a half to let up,
9 so I thought I -- I guess I didn't.

10 MR. ROGERS: Okay.

11 PROSPECTIVE JUROR KISSLER: It was toward the end, I was
12 probably getting rushed.

13 MR. ROGERS: Right. Right. Okay.

14 Next, Ms. Karett [phonetic]. You answered yes only
15 to that second question. That is:

16 "Do you have any beliefs that would prompt you
17 to return a verdict of money damages even if damages
18 are not justified by the evidence?"

19 And your answer to that was yes. Why was that?

20 PROSPECTIVE JUROR KARETTE: The -- if -- so, how I read
21 it was if there wasn't --

22 MR. EGLET: Would you read that --

23 MR. ROGERS: Sure.

24 MR. EGLET: Could we approach, Your Honor?

25 THE COURT: Yes.

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1 [Bench Conference Begins]

2 MR. EGLET: That's two in a row where he said a question
3 was answered one way and we got it down that the answer was
4 another way. Is this the actual question and --

5 MR. ROGERS: This is just one --

6 MR. EGLET: Let's see the actual question, because I
7 don't think you're right.

8 THE COURT: These questions are rather confusing.

9 MR. EGLET: Yes.

10 MR. ROGERS: I believe we had it there was --

11 UNIDENTIFIED SPEAKER: [Indiscernible] yeah.

12 THE COURT: Really? [Indiscernible].

13 MR. ROGERS: What question was this?

14 UNIDENTIFIED SPEAKER: 46.

15 UNIDENTIFIED SPEAKER: Okay. I thought you were asking
16 question 43, [indiscernible] difficulty --

17 THE COURT: Could I see the question you read? I found
18 it confusing also.

19 MR. ROGERS: These need -- 44 was very confusing. Now
20 that I've read it out loud, it really has struck me how
21 confusing --

22 MR. EGLET: Right. These are the questions you --

23 MR. ROGERS: Should I ask [indiscernible]. I don't
24 recall if that's true or not.

25 UNIDENTIFIED SPEAKER: It wasn't on the questionnaire.

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1 THE COURT: Those are difficult for me to understand. I
2 didn't have the questionnaire in front of me as you were
3 reading it.

4 MR. ROGERS: Do you want to keep that copy?

5 THE COURT: You know, like -- well, maybe I should if
6 you're going to be asking lots of questions from it. Okay.

7 MR. EGLET: Could I see the questionnaire for
8 Ms. Kissler?

9 [Pause]

10 THE COURT: It's a good thing we're not going to try to
11 do openings today.

12 MR. EGLET: Now, he just quoted -- he just said to
13 Ms. Kissler that she answered yes to 43. And she didn't
14 answer yes to 43, she answered no. And that was what's in my
15 notes, and that's why I wanted to approach.

16 MR. ROGERS: She answered yes to 46. That was --

17 MR. EGLET: You asked 43 first, Counsel, not 46. You're
18 inaccurate. You need to do this --

19 THE COURT: So you need to just correct --

20 MR. EGLET: Use the actual question.

21 THE COURT: Yeah. And you need to correct it with her so
22 that she is not left thinking that she mis-answered a
23 question. Yeah.

24 UNIDENTIFIED SPEAKER: I don't have a problem --

25 MR. EGLET: Okay, she answered no, not yes.

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1 THE COURT: Okay.

2 MR. ROGERS: Okay.

3 THE COURT: All right, then. Back on the record.

4 [Bench Conference Ends]

5 MR. ROGERS: Okay. We've gone through my notes, and it

6 appears I made a mistake. Ms. Kissler, you didn't answer yes

7 to one of those two questions.

8 PROSPECTIVE JUROR KISSLER: Okay.

9 MR. ROGERS: So that was my fault.

10 PROSPECTIVE JUROR KISSLER: Okay.

11 MR. ROGERS: It's not yours. I apologize.

12 UNIDENTIFIED SPEAKER: [Indiscernible].

13 UNIDENTIFIED PROSPECTIVE JUROR: Who said you guys were

14 infallible? Wrong.

15 MR. ROGERS: All right. And again, this isn't to single

16 anybody out. It really isn't. It's, again, just to make

17 absolutely certain that everybody here really does fit this

18 case.

19 And Ms. Karette, I don't recall whether we got an

20 answer before we approached the bench.

21 THE COURT: You did.

22 PROSPECTIVE JUROR KARETTE: How I read that question

23 was --

24 THE COURT: May I interrupt for a minute. You did.

25 Will counsel approach, please?

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1 [Bench Conference Begins]

2 THE COURT: I forget whether it was 43 or 44, but one of
3 these you said she had answered yes to and she answered no.

4 MR. EGLET: Yeah, but that was Ms. Kissler.

5 THE COURT: Also Ms. Karette.

6 MR. EGLET: You also said it to Ms. Karette.

7 MR. ROGERS: Okay -- no, that one was Karette.

8 THE COURT: Okay. We can take a break and look at the
9 record, but I have pretty good recall even without the
10 questionnaire. You told her she answered one of these
11 questions yes, and she answered both of these questions no.

12 MR. ROGERS: I [indiscernible].

13 THE COURT: You didn't ask her about 46. You asked her
14 either 43 or 44, or both of them. But I think it was 44,
15 which you said she answered yes to. So you need to correct it
16 with her so she doesn't think that she's mis-answered the
17 question.

18 MR. ROGERS: Sure.

19 THE COURT: Yeah. Okay.

20 [Bench Conference Ends]

21 MR. ROGERS: All right. Ms. Karette, let me repeat the
22 question. This is question 46.

23 PROSPECTIVE JUROR KARETTE: Okay.

24 MR. EGLET: Well, Your Honor, can Counsel do what you've
25 instructed him to do?

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1 THE COURT: Well, I wish you'd address just the first
2 issue first, because we hadn't gotten to 46 yet.

3 MR. ROGERS: Okay. I -- okay. I recalled asking if you
4 had answered a question wrong. And it may be that I read the
5 wrong question. Let's see. Question 46, which reads:

6 "Do you have any beliefs that would prompt you
7 to return a verdict of money damages even if damages
8 are not justified by the evidence?"

9 Was that the question that I read to you earlier?

10 PROSPECTIVE JUROR KARETTE: Yes.

11 MR. ROGERS: Okay. And your response to that was yes,
12 that you have some beliefs that would prompt you to return a
13 verdict of money damages even if the evidence didn't support
14 it.

15 Okay, why is that?

16 PROSPECTIVE JUROR KARETTE: Maybe I misread the question.
17 How I took that question was, would you not give the damages
18 to the Plaintiff if there was not enough to evidence to
19 support it. I think the burden of proof would be on the
20 Plaintiff to prove that that injury was caused by whatever, to
21 [indiscernible] the accident.

22 MR. ROGERS: Okay.

23 PROSPECTIVE JUROR KARETTE: So that's -- so, did I
24 misread the question?

25 MR. ROGERS: Well, you know what? It seems to me that

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1 there's a running theme here, and that it's not uncommon in
2 legal documents that things can get a little jumbled. And if
3 that's so, that's fine. And it sounds like that's your
4 response, is that your take on it wasn't exactly what we
5 thought it was.

6 PROSPECTIVE JUROR KARETTE: I think -- so from this
7 dialogue, I'm receiving that you wanted -- the key word is do
8 I have any beliefs -- pre-existing beliefs.

9 MR. ROGERS: You got it.

10 PROSPECTIVE JUROR KARETTE: Right? So how I -- I didn't
11 focus on that word. I focused on if there was not enough
12 evidence to support the Plaintiff's case, would I have an
13 issue giving that award to the Plaintiff. And I said yes, I
14 would. Because the evidence would have to support -- support
15 it.

16 MR. ROGERS: Okay. Okay, I got it. Right.

17 Next is Mrs. Frye [phonetic]. And these are the
18 same questions -- well, not exactly the same that we've been
19 discussing, but let's focus on the question that Ms. Karett
20 just responded to. And that --

21 PROSPECTIVE JUROR FRYE: I didn't understand a lot of the
22 ques -- I just couldn't comprehend them the right way. Maybe
23 I was rushing.

24 MR. ROGERS: Okay.

25 PROSPECTIVE JUROR FRYE: But I don't have any -- I

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1 wouldn't award anyone something that had nothing to do with
2 the case. Is that what the question is?

3 MR. ROGERS: It is.

4 PROSPECTIVE JUROR FRYE: Yeah. I would never do that.
5 If it has to do with -- you know, if there's injuries that
6 happened that had nothing to do with this at all, then no,
7 that would not be my feeling to award from this case.

8 Does that make sense?

9 MR. ROGERS: It does.

10 PROSPECTIVE JUROR FRYE: Okay.

11 MR. ROGERS: It does.

12 Okay, and then Ms. Manfil [phonetic]. This is
13 question 43, which is the first [indiscernible] read. The
14 question is:

15 "Do you have any beliefs that would make it
16 difficult for you to return a verdict in favor of
17 the Defendant, Mrs. Rish, if the Plaintiff's
18 injuries were caused by something other than the
19 Defendant's conduct?" than Mrs. Rish's conduct.
20 I believe your answer to that was yes.

21 So, let's get to --

22 PROSPECTIVE JUROR MANFIL: Maybe I misunderstood. Yeah.
23 It's the way it's worded, I think.

24 MR. ROGERS: Okay. We're going to have work this
25 questionnaire over.

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1 PROSPECTIVE JUROR MANFIL: Maybe -- yeah, reword it a
2 little different.

3 Okay. So, do I have any beliefs -- what was that?

4 MR. ROGERS: Let me cast it this way. This is the main
5 concern about this question. It is, if the Plaintiff claims
6 injuries which were conditions, but does not meet his burden
7 of proof in establishing that his conditions or injuries were
8 caused by this car accident, would you still have difficulty
9 in not awarding him compensation for those conditions?

10 PROSPECTIVE JUROR MANFIL: Oh. No.

11 MR. ROGERS: Okay.

12 And Mr. Miranda [phonetic]. Yours was a question of
13 the presentation of the evidence. That's kind of where I
14 started yesterday. Where we were talking about that metaphor
15 of a race, and it might seem unfair if someone gets to start
16 ahead of you. You're competing against someone and he gets to
17 start, let's say, three seconds before you. I imagine you'd
18 say that doesn't seem fair.

19 One of the questions that was presented in this
20 questionnaire was whether you would be able to wait until the
21 end of the case before making a decision. Your answer to that
22 question was no, you would have difficulty waiting until the
23 end before deciding the case. Why is that?

24 PROSPECTIVE JUROR MIRANDA: Difficulty waiting till the
25 end?

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1 MR. ROGERS: Right.

2 PROSPECTIVE JUROR MIRANDA: Well, I mean, I'd wait for,
3 you know, both -- both parties to bring in things that argue
4 the case, but I'm going to have -- after, you know, somebody
5 presents their evidence in that case I'm going to have some --
6 you know, something going on, you know, to where, okay, do I
7 believe this person. I know when, you know, that person goes,
8 you know, it's kind of like arguing back and forth. So I
9 would have a little bit of difficulty waiting, but at the end
10 I'll bring everything together.

11 MR. ROGERS: Okay. Super.

12 PROSPECTIVE JUROR MIRANDA: Make my decision.

13 MR. ROGERS: Well, but do you think you'll have any
14 difficulty, then, waiting until the end before you formulate
15 your opinion?

16 PROSPECTIVE JUROR MIRANDA: [No audible response].

17 MR. ROGERS: All right. That's the end of that.

18 Let's turn to some questions that you guys have
19 answered while you've been here.

20 Ms. Jones. One is for you. You mentioned that your
21 aunt had back surgery, is that right?

22 PROSPECTIVE JUROR JONES: Uh-huh. Uh-huh.

23 MR. ROGERS: Do you know who the surgeon is?

24 PROSPECTIVE JUROR JONES: No, it's in Michigan.

25 MR. ROGERS: Oh, okay. Wouldn't be anybody involved in

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1 this case.

2 PROSPECTIVE JUROR JONES: No.

3 MR. ROGERS: And when -- did you say it was -- what kind
4 of surgery?

5 PROSPECTIVE JUROR JONES: She had a piece of her I want
6 to say the tailbone that broke off and was pressing on a
7 nerve, and they just went in and removed that piece.

8 MR. ROGERS: Okay. And I remember you said she's doing
9 fine now?

10 PROSPECTIVE JUROR JONES: Uh-huh.

11 MR. ROGERS: And Mr. Atina [phonetic]. You mentioned
12 that you work with surgeons in town. Do you work with any
13 pain management doctors?

14 PROSPECTIVE JUROR ATINA: No.

15 MR. ROGERS: Do you work with any spine surgeons other
16 than Drs. McNulty and Grover?

17 PROSPECTIVE JUROR ATINA: Yes. I have.

18 MR. ROGERS: Okay. Do you specialize in a given area of
19 orthopedics? Like, you mentioned joints earlier.

20 PROSPECTIVE JUROR ATINA: Yes.

21 MR. ROGERS: But I don't think Grover and McNulty do
22 joints.

23 PROSPECTIVE JUROR ATINA: No.

24 MR. ROGERS: So do you do spine as well?

25 PROSPECTIVE JUROR ATINA: Yes. I do.

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1 MR. ROGERS: Okay. And who are the other spine surgeons
2 you work with?

3 PROSPECTIVE JUROR ATINA: Dr. Vasquez, Dr. Changus
4 [phonetic], Dr. Duke, Sy [phonetic], Kaplan, a few more in
5 CNI --

6 MR. ROGERS: Okay. Quite a few, then.

7 PROSPECTIVE JUROR ATINA: Yeah.

8 MR. ROGERS: Ms. Frye, we -- you mentioned that your
9 husband is treated with pain management now. Do you know now
10 who his physician is?

11 PROSPECTIVE JUROR FRYE: I don't. I don't. He just went
12 for the second time on Monday. I don't know who it is.

13 MR. ROGERS: And I forgot, was it neck or low back?

14 PROSPECTIVE JUROR FRYE: It's nerve damage throughout his
15 back. He just got pain shot -- or, shots, cortisone shots in
16 his head on Monday for the first time, and it was -- I think
17 it's mostly his upper back.

18 MR. ROGERS: How long ago was that car accident?

19 PROSPECTIVE JUROR FRYE: November.

20 MR. ROGERS: Okay. Were you in the car?

21 PROSPECTIVE JUROR FRYE: [No audible response]

22 MR. ROGERS: Was anyone else in the car with him?

23 PROSPECTIVE JUROR FRYE: Nope. He was in it by himself.

24 MR. ROGERS: Okay. Did he sustain any injuries other
25 than the back injuries?

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1 PROSPECTIVE JUROR FRYE: Minor. He had a -- he hit his
2 head on the rearview mirror, so he had like a big lump on his
3 head but no concussion. And he had like a cut on the inside
4 of his eye. But it's all healed.

5 MR. ROGERS: Okay.

6 PROSPECTIVE JUROR FRYE: It's mostly back problems that
7 he's having. And it doesn't stop him from doing anything.
8 It's just uncomfortable all the time. He's not limited; just
9 very uncomfortable. And they said it will never not be that
10 way.

11 MR. ROGERS: This is a permanent condition?

12 PROSPECTIVE JUROR FRYE: Pretty much.

13 MR. ROGERS: Do you recall the example that I brought up
14 yesterday of cases that I might have difficulty sitting in
15 judgment on? Things that are a little too close to home? In
16 this case, you have something going on at home, close to this
17 case --

18 PROSPECTIVE JUROR FRYE: Uh-huh.

19 MR. ROGERS: -- that there are neck claims in this case.
20 Do you think that your experience can in any way affect your
21 complete impartiality?

22 PROSPECTIVE JUROR FRYE: No. Because it's like I said
23 before, I have to see the facts. I'm just -- everything is
24 facts. You know, that's what I go through with my kids, show
25 me the facts. If they get, you know -- if something's going

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1 on in their lives and they get -- it's like, show me why you
2 want to do something or why not. Like, you have to make a
3 case for me.

4 MR. ROGERS: You bring up a good topic, and it's
5 something I wanted to discuss with all of you. Mothers,
6 especially, have a lot more experience with moderating
7 disputes. School teachers, I imagine, as well.

8 And a question I have is, I imagine there have been
9 instances where your children, like mine, have come to you
10 with different stories about something that's happened. How
11 do you moderate or judge those kinds of situations?

12 PROSPECTIVE JUROR FRYE: Well, yesterday you were asking
13 if you -- or he was asking if you're 50 percent sure or 100
14 percent sure. I'm never 100 percent sure with any of the
15 decisions I make with my kids. When they get their driver's
16 license, I'm never 100 percent sure that you want to let them
17 out there driving. Everything has -- I always tell my kids
18 that they earn any kind of privileges, so they have to prove
19 to me that they're capable of doing whatever they want to do.

20 So, again, everything is facts. Facts. Show me why
21 you want to do it, show me that you're going to be responsible
22 doing it, and prove to me.

23 MR. ROGERS: Okay, good. Let's take the scenario where
24 maybe there's an argument. You know, he it me or she pushed
25 me; that kind of thing. And they come to you with completely

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1 polarized versions of what happened. What do you generally do
2 in those circumstances to figure out what happened?

3 PROSPECTIVE JUROR FRYE: I don't figure it out at that
4 point. I go deal -- if no one's really hurt, I don't want to
5 be bothered with it.

6 MR. ROGERS: Okay.

7 PROSPECTIVE JUROR FRYE: Sorry. That's probably not what
8 you're looking for.

9 MR. ROGERS: Well, no, there is no perfect answer to this
10 one. Because people come with different qualities. Some
11 people, I think, approach things with more emotion, whereas
12 others approach it a bit more with reason.

13 I read an educator's book a while back that said the
14 goal of education is to harmonize those two qualities in a
15 person, the emotional and the rational. And none of us are
16 perfect. None of us have completely harmonized those two
17 qualities. And so we bring one or the other to bear more
18 where it has to make decisions.

19 Would you put yourself more in the emotional or in
20 the rational camp?

21 PROSPECTIVE JUROR FRYE: Oh, it depends on the situation.
22 You know. Like you just said, my kids are older now so it's
23 been a long time. When they were little, if they were
24 fighting and I didn't know who started it they both got time
25 out. You know, that's it. Don't bother me.

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1 If they were fighting over a toy, the toy would go
2 in time out, you know?

3 But now you're talking about -- I said earlier that
4 I have a child who had cancer last year, and that was an
5 emotional thing and, you know, there was issues, if there was
6 something that came down to my kid's health or things like
7 that, then I'm emotional. If it's stupid things that I can't
8 figure out, you know, who was right or wrong, then you're both
9 being punished.

10 MR. ROGERS: That makes sense. Okay.

11 PROSPECTIVE JUROR FRYE: I don't know if I'm helping you
12 out or --

13 MR. ROGERS: No, no, no, you are. You are.

14 It's Ms. Smith? Yeah. You're a school teacher,
15 right? How do you deal with this at school?

16 PROSPECTIVE JUROR SMITH: Every day.

17 MR. ROGERS: Sure.

18 PROSPECTIVE JUROR SMITH: I'm lawyer, I'm judge. Every
19 day. He hit me, he cried, you know, blah blah blah blah. All
20 right.

21 I know my kids. I know who did it, usually. I know
22 why. When I don't, and it's like a surprise, like really, you
23 two were fighting? I'm shocked. I have them write it down.
24 Do you have any witnesses? I love that. You know. Give me
25 the witnesses. Who saw it, who was there, go get them. They

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1 write it down, because then I can get the story, you know.

2 And it did happen once, two totally different
3 stories. So then I try to get witnesses and find it -- find
4 out. I have to hear it first verbally to see if it matches
5 what they wrote. And then if I totally have no idea and I
6 cannot make a decision, I set them down in the hall, one over
7 there and one over there, and we think about it. That's part
8 of living [indiscernible] logic. You know. And then I say --
9 I come up and I say, ready to tell me the story?

10 But he -- I'll come back to you.

11 Are you ready to tell me? Well, I really --

12 You know, someone will confess. Eventually. You
13 leave them out there long enough; they're kids; they'll
14 confess. They want to get back in the class.

15 You kind of have -- you know the people, you listen
16 to the evidence, you kind of know, depending on what it is and
17 how bad it is, you know. And if I really don't know and I'm
18 just -- don't have time for it, send them to the alternate
19 judge: the principal. He will figure it out. So, you know,
20 it's kind of like -- yeah, that'll do it.

21 MR. ROGERS: You know, in this experience -- and I have a
22 fourth-grader, so they're not too far removed from where you
23 are. You teach third grade?

24 PROSPECTIVE JUROR SMITH: Yeah.

25 MR. ROGERS: In your experience you have the advantage of

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1 a history with these kids. And you've developed an
2 understanding of their personalities and what they're more or
3 less likely to do.

4 In this case, you're going to be meeting people
5 you've never met before. And you're probably going to be
6 hearing evidence, for example, of medicine that you never
7 heard of before. How would you bring your experience in
8 moderating or being a judge to that kind of a scenario?

9 PROSPECTIVE JUROR SMITH: That's where listening, taking
10 notes, weighing, you know, both sides. I don't know if we can
11 take notes or not. I'm not sure. We're allowed to? You
12 know, listening to both sides. Weighing evidence on both
13 sides. Making a fair judgment. Talking, discussing with -- I
14 want to say co-workers, but jurors; you know, co-jurors. Just
15 hearing both cases. I have to hear both sides. I have to
16 hear all the evidence.

17 Just like with the students in my class. I have to
18 investigate in my -- in my classroom, I investigate. You
19 know. Okay, tell me who was there, go find the other person
20 in the other class, bring them here, ask them, have them write
21 it down -- you know, as much as I can.

22 In this situation, I've never been in this
23 situation. I'd have to just use my ears and my eyes, and just
24 listen, take it all in, discuss it. See what others have to
25 say. Talk about it. Come to my conclusions, with others.

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1 MR. ROGERS: Okay. Good.

2 Mr. Breeze [phonetic], I think you said you were a
3 supervisor at work?

4 PROSPECTIVE JUROR BREEZE: Yeah.

5 MR. ROGERS: You probably run into this stuff in that
6 setting.

7 PROSPECTIVE JUROR BREEZE: Uh-huh.

8 MR. ROGERS: Tell me about your experience moderating
9 disputes between --

10 PROSPECTIVE JUROR BREEZE: Well, here's one that you'll
11 love. I always come in and we have six lanes, and the NASCAR
12 people just came back, and they were all running late. Six,
13 seven, eight, ten cars come in. So I'm dealing with one
14 customer, knock him out. Deal with another customer, knock
15 him out. Send him on his way.

16 Then the next thing I know I kind of lose track of
17 who's where. So I just say, raise your hand, who's next? And
18 guess what happens.

19 PROSPECTIVE JUROR UNIDENTIFIED: Everybody raises --

20 PROSPECTIVE JUROR BREEZE: Everybody raises their hands.
21 I'm like, well be honest now. And they all start laughing;
22 they go, well, I was next, I was --

23 I just -- I look at their faces. I could tell who's
24 lying and who's not. Believe me.

25 But you know, you try to be a moderator and you say,

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1 okay, who's really -- you know, who needs to go really fast,
2 who needs -- then I send them on their way if they're nice.
3 And then, you know, you just -- you could judge by their
4 character or how they're acting that, you know, you pinpoint
5 who's the next one, who's the next one?

6 It's kind of like a balancing act, you know. And it
7 works out fine, you know? And you deal with people's problems
8 right then and there, you evaluate what's going on with the
9 car or the people or something. If the person needs to go to
10 the airport and they're handicapped, we send them on their
11 way, you know. We get another driver and we send them right
12 to the airport. We take care of them. You know.

13 Some guy comes in, he's 20 years old, 21 years old,
14 and he's running late. Well, you know, he should have got up
15 early, you know. Just because you're late, oh, you're going
16 to take that person? Yeah, that person's handicapped. Look
17 at all that luggage she's got. What do you got, a briefcase?
18 Send them on their way.

19 You just judge. I'm a good judge of character, a
20 good judge of people. I could tell when you're lying too,
21 pretty much. And I met a lot of liars in the airline -- in
22 the rent-a-car business.

23 How'd that dent get there, Mr. Smith?

24 Oh, I didn't do it.

25 Yeah, well. You know what, I wasn't born yesterday.

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1 You had this car out for seven days, you went 1,500 miles,
2 want to tell me another story? You want to -- you know.

3 MR. ROGERS: You bring up a good point. And that's a
4 departure from mediation and doing what you guys are actually
5 going to be doing here, and that's judging. And for some
6 people that is an awful task, to make not a middle-of-the-road
7 decision, but to make a final decision that is going to affect
8 people. That's a difficult proposition for some --

9 PROSPECTIVE JUROR BREEZE: I do that every day at work.

10 MR. ROGERS: It sounds like it.

11 PROSPECTIVE JUROR BREEZE: Every day. Every day I gotta
12 make a split decision whether you did that accident, whether
13 you caused that, you know, tire to be out of alignment.

14 A guy came in, brand-new Camaro, 60 miles. He goes,
15 all of a sudden this speed bump came out of nowhere.

16 Well, the wheel didn't come out of the factory with
17 a tilt like that. You know, come on. Tell me another one.

18 Oh, okay, I was doing 60 miles an hour and I hit the
19 curb.

20 Okay. Do you have insurance?

21 No.

22 Well, we're going to fill out this little form here.

23 Oh, am I liable?

24 Duh.

25 MR. ROGERS: Well, it sounds like you don't have much

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1 difficulty, then --

2 PROSPECTIVE JUROR BREEZE: No. I --

3 MR. ROGERS: -- making a judgment.

4 PROSPECTIVE JUROR BREEZE: We only have a certain amount
5 of time, and we have to make sure that we're correct almost
6 all the time. If I'm, say, not sure of something, we send
7 them upstairs, especially with like the bill, like they want
8 their GPS taken off or they some of the insurance taken off or
9 a gas receipt that I didn't see taken off. We have to send
10 them upstairs. That's a decision I make right then and there.

11 But accidents, damage to the car, damage inside the
12 car, how did the upholstery get ripped or burned, I'm right
13 there. I make a decision right then and there, either you did
14 it or that was there before. I could either tell if they're
15 lying or they're not lying. It -- you just get a feel for the
16 people. You could just tell, just looking at them.

17 I had a guy come in and he was from New York City
18 and he said, everything's great with the car, everything's
19 great. So we're talking about New York and I got kind of
20 caught up with that. Five minutes later I walk around the
21 car. I said, well, what happened here?

22 Oh. Oh, I was going to tell you about that. I
23 backed into a parking pole and took off the bumper, almost.

24 MR. ROGERS: Slipped his mind.

25 PROSPECTIVE JUROR BREEZE: Yeah. I thought you told me

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1 it was okay, the car was okay?

2 Oh, I forgot about that.

3 Well, that's why we do our walk-around. You know.
4 Were you gonna lie to me?

5 MR. ROGERS: Now, you clearly have no reservations and no
6 problem judging, and that's what you'll be called on to do
7 here. And as I said, there are some people who aren't so
8 comfortable with that, and I want to know by a show of hands,
9 is there anybody here who would, for any reason, be more
10 inclined to just say, you know what, I don't want to make the
11 decision here. I just want to cut this in half and call that
12 good. Let's just mediate this thing instead of judging.

13 Everybody here is okay making a judgment? Okay.

14 Now, I want to switch over to you, Mr. Dobie
15 [phonetic]. You said you used to work in construction. Did
16 you ever work in the flooring trade?

17 PROSPECTIVE JUROR DOBIE: In the what trade?

18 MR. ROGERS: Flooring installation, things like that.

19 PROSPECTIVE JUROR DOBIE: Asphalt, concrete, stuff like
20 that. Putting drywall up. But no flooring.

21 MR. ROGERS: Okay. All right. I lost my place here.
22 Just one moment.

23 It's Ms. Lewis. I believe you wrote that your
24 husband is in the police department?

25 PROSPECTIVE JUROR LEWIS: Yes, he is.

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1 MR. ROGERS: And he has experience in accident
2 reconstruction?

3 PROSPECTIVE JUROR LEWIS: He's a motor officer. So he
4 gets called to accidents and so forth all the time.

5 MR. ROGERS: How long has he done that?

6 PROSPECTIVE JUROR LEWIS: He's on his fourth year right
7 now. Doing that.

8 MR. ROGERS: And you heard some questions earlier on
9 about advanced training that's provided to some police
10 officers. Has your husband undergone any of that treatment?

11 PROSPECTIVE JUROR LEWIS: Yeah, he's gone to training for
12 accident reconstruction and things like that, yes.

13 MR. ROGERS: Okay. And does he investigate accidents
14 where the parties claim injury?

15 PROSPECTIVE JUROR LEWIS: He will do like the initial
16 reports and things like that, but he's not one of the officers
17 that comes out and reconstructs the accident and things like
18 that. He'll help along, like if he's the initial officer
19 there and everything. But he hasn't gone through as much at
20 school as some of the other officers who come out and they do
21 the investigation of the accident and so forth.

22 MR. ROGERS: Okay.

23 PROSPECTIVE JUROR LEWIS: But he does, I mean, get called
24 to court and things like that for accidents and things.

25 MR. ROGERS: Okay. And he's been qualified as an expert,

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1 gotten on the stand and testified about accidents?

2 PROSPECTIVE JUROR LEWIS: He's been called in for a few,
3 yes.

4 MR. ROGERS: All right. Is anybody else here experienced
5 or related to anyone with experience in accident
6 reconstruction? Yeah, Mr. Milly [phonetic].

7 PROSPECTIVE JUROR MILLY: My brother. He's a motor cop
8 for Metro, he's been in it for four years and he does the same
9 as what she said. I don't think if -- I know he's been in to
10 court a couple times, but I don't know what exactly it's
11 related to or what -- probably somebody wants to dispute the
12 ticket that he wrote, he has to go in. I think that's the
13 main -- for most of his court appearances.

14 But as far as like coming back and doing, you know,
15 if there's a -- a big injury, I don't think he's done anything
16 like that, but he does the same thing, initial reports, he has
17 all the training to look at the scene and, you know, if the
18 car's not broken, get it off the road. Because, you know, if
19 they trained us to do -- to reconstruct [indiscernible]. I
20 know I could find out what happened with you off the road.
21 Because that's what that looks [indiscernible] parked in the
22 middle of the road. If it's running, looks like a dent in the
23 bumper, well, I go and tow the car myself. But that is beside
24 the point.

25 Yeah, he has, you know, he has I guess the -- I

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1 don't know exactly what levels of training he has but he's a
2 motors cop and that's all he does all day is write tickets.
3 Violations and accidents.

4 MR. ROGERS: Okay. And anyone else here? Yes. Ms. --

5 UNIDENTIFIED PROSPECTIVE JUROR: My brother's a police
6 officer for the school district, school police.

7 MR. ROGERS: Okay.

8 UNIDENTIFIED PROSPECTIVE JUROR: I don't know what he --
9 I'm sure if there was an accident on the school grounds he
10 would write the tickets, you know, for high school. But I
11 never talk to him about it and I don't know. But he is a
12 school police.

13 MR. ROGERS: Anything to do with cars? Or is this more
14 premises kind of stuff?

15 UNIDENTIFIED PROSPECTIVE JUROR: It's premises, yeah.
16 He, he's the -- works at the high school so if maybe like in a
17 parking lot two kids in their cars, you know, hit each other,
18 he probably has to write the report and then call Metro, I
19 think. I don't know; I've never talked to him about it. He
20 always tells me about the bad kids at school that get busted
21 for drugs or something, but I never hear about accidents. I
22 would assume he probably has to do some kind of reports.

23 MR. ROGERS: I gotcha. He hasn't told you, then, whether
24 he has any experience or training in accident reconstruction?

25 UNIDENTIFIED PROSPECTIVE JUROR: No, we don't really talk

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1 about that.

2 MR. ROGERS: I see. Okay. I imagine -- yes, it's
3 Ms. Tatum, that your answer is going to be yes to that too.

4 PROSPECTIVE JUROR TATUM: Yes.

5 MR. ROGERS: Now, tell me about your experience.

6 PROSPECTIVE JUROR TATUM: I usually deal with the school
7 buses, and whenever there is a traffic violation or if there
8 is an accident, if it's on school grounds or even if it's
9 outside the school grounds we have to go to those accidents
10 and we take photos, we do reports. If there's witnesses we
11 get witnesses. Forms. Take photos of the students and the
12 injured parties.

13 And if it's students on board we have to call Metro
14 in Henderson or whoever jurisdiction that we in, and they'll
15 come out. If it's on school property, we call school police,
16 and school police will come and do their incident report or
17 their accident report. And I do have a couple gentlemen in my
18 job that have went through the training to reconstruct
19 accidents, and they will do it at work and they will ask us
20 what happened and how to get there and this and this and that.

21 MR. ROGERS: Okay. Have you had any exposure to what's
22 called biomechanical engineering, where an accident
23 reconstructionist will go out and examine an accident and then
24 offer an opinion about whether he --

25 PROSPECTIVE JUROR TATUM: No, I have not.

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1 MR. EGLET: Your Honor, I'm going to object to this
2 question.

3 THE COURT: Counsel approach, please.

4 [Bench Conference Begins]

5 MR. EGLET: There's no relevance to this question. It's
6 an improper question. There was no [indiscernible]
7 Biomechanical engineers in this case who are going to be
8 offering any expert testimony. In fact the Court has ruled
9 that the medical doctors -- or the Defendant's experts cannot
10 offer biomechanical engineer --

11 MR. WALL: We are not calling --

12 MR. EGLET: And we're not --

13 THE COURT: You don't have one either?

14 MR. EGLET: We're not --

15 MR. WALL: Yeah.

16 MR. EGLET: We're not calling one.

17 THE COURT: I thought you had one.

18 MR. EGLET: We're not calling --

19 MR. WALL: We did. And we're not calling him because --

20 MR. EGLET: We're not calling him.

21 MR. WALL: -- there's been --

22 MR. ROGERS: They do. That was the purpose of the
23 question.

24 MR. EGLET: Well we're not calling him. So there's --
25 it's a --

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1 THE COURT: Okay. Well that may --

2 MR. EGLET: I thought you knew that, so --

3 THE COURT: That may change things up. I hadn't realized
4 that there had been a change. I thought it was a fair area of
5 inquiry given her expertise. So I thought it was fair. But
6 if you're not calling him. What's the response?

7 MR. ROGERS: I didn't know.

8 THE COURT: Okay.

9 MR. ROGERS: I thought --

10 MR. EGLET: I assumed he knew. So --

11 MR. ROGERS: I mean, we discussed it, but I still don't
12 have a list of witness who are actually going to appear.

13 THE COURT: You don't?

14 MR. ROGERS: We've exchanged witnesses. But in our
15 discussions --

16 MR. EGLET: We've exchanged our witness lists.

17 MR. ROGERS: -- he's included.

18 MR. EGLET: Well --

19 MR. ROGERS: The biomechanical engineer is.

20 THE COURT: Does the --

21 MR. EGLET: Well at the 2.6 --

22 THE COURT: Does the representation change your view of
23 the question?

24 MR. ROGERS: Well I don't need to continue on it with it
25 if they're not going to call one.

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1 THE COURT: Okay.

2 MR. EGLET: Okay.

3 THE COURT: Thank you.

4 [Bench Conference Ends]

5 MR. ROGERS: And was there anyone else with a hand up on
6 that question, about accident reconstruction?

7 Okay.

8 Now, Something that you guys will encounter here,
9 that I touched upon with some of you is this, other than Mr.
10 Aquino [phonetic] I don't believe that any of you have
11 experience in medicine. But -- am I right?

12 All right. What you're going to see is witnesses
13 who are testifying about medicine who have some disagreement
14 and --

15 UNIDENTIFIED PROSPECTIVE JUROR: I didn't hear you,
16 I'm sorry.

17 UNIDENTIFIED PROSPECTIVE JUROR: Yeah. Can you
18 repeat that?

19 UNIDENTIFIED PROSPECTIVE JUROR: Can you repeat that?

20 MR. ROGERS: Oh I'm sorry, who absolutely disagree. And
21 this kind of gets back to the same question that you and I
22 discussed earlier and that is how are we going to make a
23 decision on a medical question where two doctors have polar
24 opposite positions?

25 Yes?

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1 UNIDENTIFIED PROSPECTIVE JUROR: Excuse me, I believe
2 the gentleman over there tells us that we can ask questions.
3 So if something we don't understand or know, we can write it
4 down hand it to the Bailiff and the Bailiff and then we can
5 ask questions about something we don't know about. That's how
6 we can find out on a medical question or subject matter.
7 Correct? I mean --

8 MR. ROGERS: Okay.

9 UNIDENTIFIED PROSPECTIVE JUROR: Further explanation, if
10 needed?

11 MR. ROGERS: Okay. And I think most of you said you'd
12 have -- and all of you actually said you will not hesitate to
13 ask questions if there are things you don't quite get.

14 UNIDENTIFIED PROSPECTIVE JUROR: Are we allowed to discuss
15 -- I know can't discuss the case outside of this, but will we
16 have time once it's started?

17 THE COURT: None until you deliberate.

18 MR. ROGERS: There's a point at the very end after all
19 the evidence comes in. And at that point you'll all meet.
20 And at that you'll deliberate. You'll say, "Okay, this is my
21 position." And someone else will say, "Well hold it, I didn't
22 see it exactly that way." And you'll come to your decision
23 after meeting together. Until then --

24 UNIDENTIFIED PROSPECTIVE JUROR: Well we can also, if we
25 have issues regarding like if somebody forgets something that

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1 was said we can go back and have somebody bring in transcripts
2 or look at evidence afterwards while we're deliberating?

3 MR. ROGERS: Yes. Yes. I'm really encouraged that you
4 guys are as interested as you are. Because this is going to
5 get interesting. It's going to get complicated, because it
6 involves an area that very few people have exposure to. And
7 that brings me to you, Mr. Aquino.

8 I've had this kind of close to home discussion with
9 a few of the others. And this is an area that is very close
10 to home for you.

11 Will your experience in this area, and particularly
12 with some of the local physicians have any effect on your
13 ability to be impartial and unbiased in this case?

14 PROSPECTIVE JUROR AQUINO: As far as what? The
15 performance in the surgery and then how they [indiscernible]
16 or --

17 MR. ROGERS: Okay. Let me clarify that. If in this case
18 there is a doctor who disagrees with a doctor you know is that
19 going to effect your ability to be unbiased in deciding which
20 doctor is correct?

21 PROSPECTIVE JUROR AQUINO: As far as what they know and
22 what I know, we're all actually reading the same texts. It
23 just depending on how they actually approach a particular
24 issue, like say if it's a surgery that -- depending on how
25 they're training at the same, too. I mean if it's -- the

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1 correct diagnosis and outcomes it's usually textbook at one
2 point, but if there is disagreement it's probably because of
3 the approach or the plan.

4 Any bias? No. Not really. It all depends on the
5 facts. If I see reasonable why he did it and what not it
6 wouldn't -- or if it's something that I disagree upon, I'd go
7 back to my own texts and find out if it's -- I would try and -
8 - I would seek more from them.

9 MR. ROGERS: Okay.

10 PROSPECTIVE JUROR AQUINO: Seek more information.

11 MR. ROGERS: It sounds like your decision is going to be
12 made more on the facts than the people.

13 PROSPECTIVE JUROR AQUINO: Yes.

14 MR. ROGERS: It's not a person you know or don't know.
15 But rather the information --

16 PROSPECTIVE JUROR AQUINO: Right.

17 MR. ROGERS: The texts.

18 PROSPECTIVE JUROR AQUINO: Because I mean it's one --
19 it's one thing that I like exploring every area. I guess
20 that's the reason why I am in where I am at right now. Mine
21 actually is a tendency trying to learn a lot more than -- I
22 mean if it's something new I try to like explore more, if it's
23 actually something that is true and worked, I'd supported it.
24 But if it's not I wouldn't.

25 MR. ROGERS: Okay. All right. Does anybody else have

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