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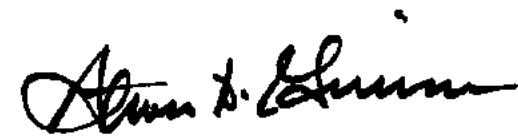
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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

CHRISTIAN CERVANTES-LOPEZ,)
)
Plaintiff,)
vs.)
)
EVANGELINA ORTEGA,)
)
Defendant.)
_____)

CASE NO. A-12-667141
DEPT NO. XXIII

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 2

TUESDAY, FEBRUARY 24, 2015

APPEARANCES:

For the Plaintiff:

DANIEL S. SIMON, ESQ.
ASHLEY M. FERREL, ESQ.

For the Defendant:

ROBERT KADE BAIRD, ESQ.
CHARLES A. MICHALEK, ESQ.

Also Present:

Lorena Pike, Interpreter

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I N D E X

OPENING STATEMENTS:

By Mr. Simon

111

1 **LAS VEGAS, NEVADA, TUESDAY, FEBRUARY 24, 2015, 1:21 P.M.**

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: Okay. So we left off you were talking
5 about the records from -- the photographs from the Las Vegas
6 Metropolitan Police Department, correct?

7 MR. SIMON: Correct. Basically how this came about
8 is when preparing for trial and looking at all of the evidence
9 there were a lot of pictures produced of the cars. We assumed
10 the Defendant's vehicle was one of them. They were not. And
11 so we confirmed with Mr. Baird and his client -- Farmers?

12 MR. BAIRD: State Farm.

13 MR. SIMON: State Farm. They don't have any pictures
14 in their file, and he went and looked through them and
15 confirmed that. So looking at the police report we noticed
16 that the police did take pictures of the scene, so we
17 requested those. We got them. We handed them over last week.

18 And so my position is is that the police report was
19 produced. All the witnesses and officers on the police report
20 were produced at the very beginning. We both equally had
21 access to the pictures and the statements attached to the
22 police report.

23 So I understand they're late and after the discovery
24 cut-off, but they existed at the time, both parties had
25 access, and it wasn't until recently we didn't realize we

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1 didn't have any pictures of the Defendant because there were a
2 lot of pictures produced. And, in fact, there was a third
3 vehicle that was produced and then initially it was
4 represented as if it was her vehicle and then he corrected
5 that in a pleading after that, so that -- that's the issue,
6 Judge.

7 MR. BAIRD: Your Honor, first off, my client is Ms.
8 Pizarro-Ortega over there, not State Farm. But, more
9 importantly, in December -- well, I guess it was in late
10 November, the parties signed a stipulation to continue trial
11 and in that stipulation there was a date certain for all
12 supplementations of witnesses, documents and reports. All the
13 parties signed that. Your Honor signed that. It became an
14 effective order.

15 They did not -- they did not produce it. We
16 supplemented the surveillance video at that point. They
17 supplemented nothing. They had three years to get these
18 pictures and they didn't, and now it's late.

19 Now, the other issue to consider, Your Honor, is what
20 is the probative value. We've admitted fault. Their doctors'
21 testimony has been limited via motions in limine and they
22 don't get to testify about biomechanical opinions.

23 So there are pictures of the Plaintiffs' vehicle that
24 are already admitted, we've agreed to that, and I fail to see
25 the purpose of admitting additional pictures that were

1 produced late, as well as I think weren't the -- I think that
2 the witness statements were also obtained at the same time,
3 which is what? Two weeks before trial.

4 It's egregiously late. They had ample opportunity.
5 The fact that either party could have requested them doesn't
6 change the fact that they simply failed to comply with the
7 rules.

8 THE COURT: Tell me what the prejudice is.

9 MR. BAIRD: Well, the prejudice is it encourages the
10 jury to assign [inaudible] and assign relevance to pictures
11 that really mean nothing. They have pictures of the
12 Plaintiffs' vehicle.

13 Plaintiff, I guess, should tell you what material
14 fact is going to be supported by these late-obtained pictures
15 and statements when we've admitted fault and there's no
16 biomechanical experts at all in this case, especially where
17 we've already taken longer than we expected on every aspect of
18 this case. The less extraneous evidence, I say the better.

19 THE COURT: Let me ask this -- hold on a second. One
20 of the arguments has been by Defense counsel that this is --
21 you haven't used the word "minor," but it's not a huge motor
22 vehicle accident as far as cases go, okay? So are you going
23 to -- what's your argument going to be?

24 Are you going to get up there and argue that the --
25 well, you're admitting fault. So are you going to argue that

1 the forces involved in the accident were not sufficient to
2 cause the injuries to the Plaintiff or that the Plaintiff had
3 a huge pre-existing condition? So what's your position?

4 MR. BAIRD: My position is not really going to be
5 related to the force of the accident. My position is going to
6 be these pictures don't show injury. That's all. That's --
7 that's not an injury, that's a car accident; and the doctors
8 are going to have to diagnose the injury and give us good
9 evidence on causation.

10 But, you know, we have -- if we're going to be
11 allowing in evidence that was disclosed late, I mean, our
12 video should come in.

13 MR. SIMON: And, Judge, there's a complete
14 distinction to that. Their video that they, I guess,
15 surreptitiously taped with the sub rosa with an investigator,
16 they never disclosed until a couple weeks before trial. That
17 -- what?

18 MR. BAIRD: Until December. We disclosed in
19 December.

20 MR. SIMON: Okay. That evidence is something that's
21 manufactured by them that was taken by them. The person who
22 did it and the report they did is by a person retained by
23 them. That is something that is completely different. That's
24 evidence that they went out and got on their own. I didn't
25 have access to this.

1 The investigative photos are something both of us had
2 access to. It was all disclosed in the police report. And
3 Dr. Duke received that police report and the photos of my
4 clients' vehicle, and in his IME report he does discuss that
5 this is a minor impact and his injuries are -- or his opinions
6 are this accident didn't cause these injuries.

7 And so I think it's important to say, hey, you need
8 to see both cars --

9 THE COURT: Two questions.

10 MR. SIMON: Sure.

11 THE COURT: Number one, I don't think you're the
12 original attorney, but do you know: Was the police report --
13 must have been obtained by subpoena otherwise you'd have like
14 lines across it. So was the police report request --
15 specifically requested from the police department and it just
16 did not include the entirety?

17 I mean, usually -- let me spit it out. Usually
18 you're requesting everything related to the investigation of
19 that event number. Is that what happened in your case --

20 MR. SIMON: I don't know. Mr. --

21 THE COURT: -- and they only sent -- Metro sent parts
22 of it?

23 MR. SIMON: Yeah, Mr. Lavigne did the initial filing
24 of the complaint and handled that part of it. But typically
25 you'll request a police report, they give that back to you,

1 and then you'll see the little boxes at the bottom, photos
2 taken, yes; statements taken, yes; and then I think you have
3 to re-request that.

4 THE COURT: I haven't requested records in a long
5 time. Do they require that you request them separately?
6 Because they used to just request it under the event number.
7 I mean, you would request the police report and that would
8 include everything but the officer's notes.

9 MR. SIMON: I'm not exactly sure what he did. You
10 know, of course, we want the -- the report and everything that
11 comes with it, but the report itself was the only thing that
12 came in, and that's been fully disclosed from the very
13 beginning. And the fact that there were photos and witness
14 statements that were part of the investigation, you know, they
15 knew about equally from the very beginning.

16 THE COURT: Did you get the statements when you got
17 the police report?

18 MR. SIMON: I did.

19 THE COURT: You just didn't get the photographs.

20 MR. SIMON: No, no.

21 MR. BAIRD: You just got the statements.

22 MR. SIMON: No, no. I just got the statements and I
23 just got the photos.

24 MR. BAIRD: Recently.

25 MR. SIMON: Recently.

1 THE COURT: Okay.

2 MR. SIMON: Yeah, within the last couple weeks. The
3 report itself we did get at the very beginning. That's been
4 disclosed.

5 THE COURT: How did Dr. Duke get the photographs and
6 the statements?

7 MR. BAIRD: He didn't have the photographs that they
8 just got. He has the photographs that we've already agreed
9 will be admitted, photographs of the Plaintiff's' vehicle.

10 MR. SIMON: So that --

11 MR. BAIRD: Under your order, Your Honor, regarding
12 biomechanical opinions -- I mean, he's not going to be able to
13 testify any differently than Dr. Lanzkowsky, who has also
14 reviewed the photographs. So, I mean, that's already there
15 and the two doctors are going to testify -- based on
16 objections maybe they're going to be limited, but it's the
17 same thing.

18 Additional pictures do nothing. They do absolutely
19 nothing. What we end up with, though, is trial by ambush
20 because just weeks before trial, like ten days, they're
21 discovering new evidence that they're now trying to
22 incorporate into their case, which we have no -- for years no
23 idea that this was going to be an issue, and now we don't know
24 how they're going to use it. And -- and, like I said, I don't
25 see a material fact to which you can apply any of this

1 evidence.

2 THE COURT: Are you going to introduce the repair
3 estimate?

4 MR. BAIRD: There isn't a repair estimate. That's
5 another problem. The -- what we have is documentation from
6 when State Farm totaled the vehicle, but we don't have a
7 repair estimate. They don't have a repair estimate. There's
8 no repair estimate. So all we --

9 MR. SIMON: The estimate -- I'm sorry.

10 MR. BAIRD: Pardon? So we don't have anything that
11 actually shows any structural damage to the car. All we have
12 is what you can see from the outside.

13 THE COURT: They totaled out the vehicle?

14 MR. BAIRD: They did total out the vehicle.

15 MR. SIMON: And -- and I guess what we don't have,
16 which we always have, is the picture of both vehicles that are
17 involved in that accident. And I think that's imperative for
18 Dr. Duke who's going to get up there and say these injuries
19 weren't caused from this accident, and he describes the damage
20 to their vehicle as minor in his report. And so that is a
21 basis for his opinion.

22 Whether it's a biomechanical opinion, of course, he's
23 not talking about specific forces, but he certainly needs to
24 have a foundation of the type of accident. And to say, oh,
25 well, I saw the Plaintiffs' vehicle only and that's what my

1 opinion is based on and not both vehicles involved in the
2 accident because, I mean, that's what this is about. It's --

3 MR. BAIRD: But, Your Honor, here's the thing. Dr.
4 Duke has only seen the pictures that are admitted. So that
5 means whether his opinions are reasonable or not, he would be
6 surprised at trial or surprised very soon by having to
7 possibly change his opinion based on evidence that should have
8 been disclosed years ago and wasn't. And it's the same with
9 their doctors.

10 So they're trying to surprise and impeach someone and
11 say, You thought this looked minor, now look at all this other
12 stuff; and that's unfair as well. We have timely disclosed
13 Dr. Duke. He's reviewed all the evidence. The fact is
14 they're trying to turn late-disclosed evidence into something
15 that is, a, very important to their case and, b, something
16 that will be prejudicial to the Defendant.

17 They're doing it years after it should have been
18 disclosed. They had notice from the outset that the traffic
19 accident report might have additional information. They
20 didn't get it. They didn't decide to do anything about it
21 until not only after discovery closed, Your Honor, but after
22 they signed a stipulation that would have allowed them to get
23 this information and disclose it back in December. Still
24 didn't do it.

25 And now just a week before trial we're hit with more

1 treatment records, more photos, witness statements that nobody
2 has seen until just now.

3 THE COURT: Hold on. Let's focus. We're going
4 beyond what we started. The treatment records we're not
5 discussing in this conversation.

6 MR. BAIRD: Right.

7 MR. SIMON: Right.

8 THE COURT: Let's discuss the photos. I -- I'm going
9 to allow them, and I'll tell you why. I have a hard time
10 believing that it's a real surprise to the insurance company
11 about whatever's depicted on those photographs.

12 The bottom line is after that accident was involved,
13 the insurance company had the ability to have that vehicle
14 inspected, to inspect it itself. In fact, there was obviously
15 an inspection done because they came to the determination that
16 the vehicle was a total loss.

17 So I'm kind of at a loss to even guess how -- what
18 they had the ability to see and they've probably already seen
19 is any different than what's depicted in the photos.

20 MR. BAIRD: Your Honor, I --

21 THE COURT: Secondarily -- hold on -- as far as the
22 police report, I think it's distinctive from the sub rosa.
23 Sub rosa was done by the Defense counsel or -- I don't know if
24 you're the one who did it or the insurance company ordered it,
25 but the sub rosa was done.

1 It was known -- you knew what -- you knew it was
2 done. It was something you possessed and had knowledge of and
3 yet it wasn't turned over. I don't know if it was you or the
4 insurance company, but the insurance company should have
5 turned it over to you guys if you asked and they had it.

6 But the difference is is Plaintiff requested that
7 police report, and Metro, which I've seen them do before, they
8 didn't send the entirety of the police report. So I am going
9 to allow it. I just simply don't see how there's a prejudice.

10 MR. BAIRD: But, Your Honor, one thing, though.
11 You've -- you're -- you're making your decision based on what
12 you think the insurance company, a non-party, could have found
13 out. Plaintiff, a party who owned that vehicle also could
14 have found this out. They also could have gotten an estimate
15 on the car. They could have requested and gotten their own --
16 they have an estimate probably. I mean, that's how these
17 things get done.

18 THE COURT: Wait. The photographs are of his
19 vehicle, the Defendant's vehicle?

20 MR. SIMON: Both vehicles --

21 MR. BAIRD: Both vehicles.

22 MR. SIMON: -- at the scene. They're just pictures
23 taken --

24 MR. BAIRD: Really all three vehicles.

25 MR. SIMON: Yeah, all three vehicles at the scene.

1 So it shows the jury really the full picture of the accident
2 at the scene, which is imperative to everything that flows
3 from there.

4 MR. BAIRD: But, Your Honor, to put this on the
5 insurance company, I mean, they have -- we all requested the
6 same police report. We all ended up with the same police
7 report without those photos, without those statements. To
8 say, well, the insurance company could have done something
9 different, that's putting --

10 THE COURT: That's not what I'm saying. As far as
11 the photographs of your vehicle, I don't frankly see how
12 that's going to surprise anyone. I mean, we all -- I mean,
13 the insurance is not admissible in the trial. We all know
14 that when one of our vehicles is involved in an accident, they
15 get an estimate on it, they make the decision whether or not
16 to total it or repair it.

17 And so they -- I mean, there was -- I -- I don't know
18 where there's a shock, at least with respect to your vehicle,
19 because the insurance company, I'm sure their estimates are
20 going to be whatever is reflected in the photographs of your
21 vehicle.

22 MR. BAIRD: We don't have any estimates of my
23 client's vehicle. So we --

24 THE COURT: Well, there's something that came to the
25 decision totaling it out.

1 MR. BAIRD: I don't think we have anything.

2 THE COURT: But let me see the photographs. I mean,
3 I don't see -- and then the Plaintiffs'. Okay. So what does
4 the photograph just show? The three vehicles involved?

5 MR. SIMON: Yeah, it shows --

6 MR. BAIRD: In dark lighting.

7 MR. SIMON: Yeah, it happened at night. Shows the
8 accident scene. Shows all three vehicles that were involved
9 in the accident.

10 THE COURT: Presumably you already have photographs
11 of your client's vehicle that were timely turned over.

12 MR. SIMON: Correct.

13 MR. BAIRD: They're admitted. We -- we've stipulated
14 to them.

15 MR. SIMON: So this is only the pictures of at the
16 accident scene by the police that show her vehicle. And --
17 and the --

18 THE COURT: "Her" being the Defendant?

19 MR. SIMON: Yes. Sorry about that. And the need
20 that we have is because they did not take any pictures and I
21 don't think that they can benefit from not taking pictures and
22 turning that over.

23 They did take pictures, coincidentally, of my
24 clients' vehicle. They did take pictures of the third
25 vehicle. They just omitted her pictures. And so, you know,

1 we assumed that they -- in all of those pictures -- there were
2 a ton of them -- included hers, but then we realized it
3 didn't, so we raced and got these.

4 MR. BAIRD: Well, a little bit of diligence would
5 have prevented all of this years ago. I mean, they could have
6 gotten it. There was no obfuscation or hiding.

7 MR. MICHALEK: Your Honor, I understand your ruling;
8 but, you know, I just want to make a motion that pursuant to
9 the same rule, you know, the video surveillance gets
10 introduced. It was timely produced in December, according to
11 the stipulation that we had between the parties. So I think
12 that's the misconception that we didn't turn it over. We
13 turned it over to prior counsel and we turned it over prior to
14 the --

15 THE COURT: I have to go back and look.

16 MR. MICHALEK: -- to the January --

17 MR. SIMON: What stipulation are you referring to?

18 MR. BAIRD: The stipulation to continue trial that
19 set a new deadline for supplementation of documents, expert
20 opinions and everything, and then it set another date for
21 pretrial motions. I mean, that was one of the things we
22 argued at the -- your most recent motion in limine hearing.
23 We said this is -- this is [inaudible].

24 THE COURT: Let me go back and look at the dates. My
25 recollection on that would have been that it was -- it was

1 post -- it was after the time for discovery to close, if I am
2 correct. I will go back and look.

3 MR. BAIRD: Sure. But just to be clear, we -- my
4 office, neither myself nor anyone in my office ordered that
5 surveillance. That was something the insurance company did
6 and they thought they had given it to me and I didn't know
7 about it until they said, Well, why --

8 THE COURT: I don't think you did it.

9 MR. BAIRD: Right.

10 THE COURT: I think that it just sometimes happens,
11 unfortunately.

12 MR. MICHALEK: And just for the point of the record
13 that the -- if we're going to allow the impeachment of Dr.
14 Duke with evidence that was submitted afterwards, I think it's
15 only fair that we get to use impeachment evidence against the
16 Plaintiff, i.e., the surveillance video.

17 THE COURT: It depends.

18 MR. MICHALEK: I -- and I understand.

19 THE COURT: Again, I think that for the reasons I've
20 previously indicated, I think that the situations are markedly
21 different; however, like I said, if -- if you guys agreed to
22 extend the discovery deadline and it was to a later date and
23 it was turned over prior to the discovery deadline, then I
24 would reconsider my opinion. That was not my recollection.

25 MR. SIMON: But just so we're clear, Your Honor, we

1 did bring a motion to exclude the sub rosa. You granted that.

2 THE COURT: Yeah, I don't remember the reasons,
3 though.

4 MR. SIMON: Oh. Well, the --

5 THE COURT: I mean, my assumption --

6 MR. SIMON: -- the reasons would -- they had --

7 THE COURT: -- would have been because it was
8 untimely.

9 MR. SIMON: Well, they had it --

10 MR. BAIRD: That was your -- that was your order.

11 MR. SIMON: They had it for a year, and then in
12 December for a January trial is when they disclose it and you
13 didn't serve it on me. You served it on prior counsel. So
14 when I came to that motion, I didn't even -- I hadn't even
15 seen the video.

16 THE COURT: Was it prior to the time for the closing
17 of discovery?

18 MR. SIMON: It was -- it was after the close of
19 discovery.

20 THE COURT: Okay. That is my recollection. If I'm
21 hearing Defense counsel correctly, they're saying something
22 different.

23 MR. MICHALEK: Correct, Your Honor. And -- and as
24 far as the ruling on the motion in limine, as we understood,
25 we filed our motion in limine on the jury selection and jury

1 questions, and that's changed. So Your Honor certainly has
2 the right to revisit a motion in limine if there was an
3 improper ground.

4 If it is timely, certainly you have the right to
5 revisit that and potentially allow it in, and you'll do that,
6 you'll take a look and see whether it was timely produced.

7 THE COURT: Well, I will. I'll have to look at it.

8 MR. MICHALEK: Yes. Thank you, Your Honor.

9 THE COURT: And I can do that tomorrow morning or
10 tonight, whenever I have a chance. Are you guys ready for the
11 jury? Are they here? Do we have Juror No. 1?

12 THE MARSHAL: You don't, Judge.

13 THE COURT: I do not?

14 THE MARSHAL: I checked with Jury Services. She's
15 not down there and they do not have email or a phone number to
16 reach her.

17 MR. MICHALEK: Ask to let her go and move on.

18 THE COURT: Yeah, we have to. I'm going to run to
19 the restroom. Give me 30 seconds before you bring the jury
20 out. I'll use the restroom real quick.

21 (Pause in proceedings.)

22 THE COURT: [Inaudible] Juror No. 1, okay? So we're
23 going to bring them in. The other issues you brought up in
24 the medical records and everything else, we'll have to discuss
25 that at a break.

1 MR. BAIRD: Yes, Your Honor.

2 MR. SIMON: And, Your Honor, and just real quick, the
3 order I think that they're referring to is for us to
4 supplement any records with the stuff that came in after that
5 time frame.

6 THE COURT: Medical records?

7 MR. SIMON: Yeah, whatever the -- the supplemental
8 report from an expert or a supplemental record or supplemental
9 evidence that was basically discovered after that cut-off.

10 THE COURT: Is that stipulation -- that was filed,
11 right?

12 MR. BAIRD: Right. You signed it, so you can just
13 read the text.

14 MR. SIMON: Yeah, but -- but it's not -- so my
15 position would be it doesn't mean that you can supplement
16 something that you had for a year and never disclosed and then
17 disclose it after. You supplement based on new information
18 discovery, not something that they've had in their file for a
19 year and never disclosed and kept it until the last minute.

20 MR. MICHALEK: Your Honor, we didn't have it in our
21 file for a year; but that being said, the jury is waiting for
22 us. We can -- Your Honor can --

23 THE COURT: You can bring the jury in.

24 MR. MICHALEK: -- Your Honor can read the order --

25 MR. BAIRD: But we didn't have it -- we got it right

1 before and that's how we found out about it.

2 THE COURT: I have to go back and look. I'm sorry.

3 MR. MICHALEK: No. You'll -- you'll see the order
4 and the text is plain.

5 THE COURT: I'm sure, at least in my mind, I had a
6 reason for doing what I'm doing. I just don't recall
7 specifically what it was.

8 MR. BAIRD: Well, and part of it was it wasn't a full
9 motion. It was just a throw-on to a reply. So it wasn't
10 fully briefed, so it was kind of an impromptu thing.

11 THE COURT: Okay. Because, again, my recollection
12 was similar to Mr. Simon's, that it was subsequent to the --
13 the cut-off. So that's what I would have to go back and look
14 at and that would be consistent with what I do in every case.

15 Ma'am, you're Evangelina Ortega?

16 MR. BAIRD: Miriam.

17 THE COURT: Miriam. Okay. So you might want to
18 introduce her.

19 MR. BAIRD: Yeah, I will. Thank you, Your Honor.

20 (The jury reconvened at 1:43 p.m.)

21 THE COURT: All right. Welcome back, ladies and
22 gentlemen.

23 Mr. Simon, I'm going to ask you to sit down. We need
24 to replace some jurors and I'm going to quickly question them
25 and I'll hand the panel back over to you.

1 Let's see, it looks like Seat No. 1, Kimberly Ellis,
2 Badge No. 042, she failed to show up for jury duty, so we're
3 going to have to substitute a new one.

4 And can you call the substitute for the -- I'm sorry
5 -- the new jurors, please?

6 THE CLERK: Badge No. 892, Richard Spiher. Seat No.
7 1, please. Badge No. 897, William Mitchell.

8 PROSPECTIVE JUROR NO. 897: Here.

9 THE CLERK: Seat No. 12, please. Badge No. 899, Jose
10 Cosenza.

11 PROSPECTIVE JUROR NO. 899: Here.

12 THE CLERK: Seat 16.

13 THE COURT: You can have a seat down here on the
14 bottom, sir. All right.

15 Good afternoon. And I'm going to have a few
16 questions just of my three new jurors. Of my three new
17 jurors, do any of you believe you may have heard anything
18 about this case before coming into court? No? Everyone says
19 no. Good.

20 Have any of you ever been involved in a lawsuit
21 before?

22 PROSPECTIVE JUROR NO. 897: I have.

23 THE COURT: And you are Badge No. 897, Mr. William
24 Mitchell. Sir, tell me what happened.

25 PROSPECTIVE JUROR NO. 897: I was rear-ended and sued

1 by someone who locked up their brakes after rear-ending me and
2 rolled over on the top of their car.

3 THE COURT: Okay. Did you ever have to go to an
4 arbitration or a trial for that matter?

5 PROSPECTIVE JUROR NO. 897: No trial, but
6 arbitration.

7 THE COURT: And the fact you went through that
8 litigation, does that affect your ability to listen to
9 evidence presented by the Plaintiff and Defendant and render a
10 verdict based upon what you hear, being fair to both sides?

11 PROSPECTIVE JUROR NO. 897: I think it might, Your
12 Honor.

13 THE COURT: Okay. Would you tend to favor one side
14 or the other?

15 PROSPECTIVE JUROR NO. 897: Perhaps the Defense.

16 THE COURT: Well, okay. Do you think that -- what's
17 going to happen is the jury is the one who gets to decide the
18 facts in the case. There's going to be facts presented to you
19 by the Plaintiffs' side and the Defense side. Do you think
20 you can listen to it with an open mind, both sides?

21 PROSPECTIVE JUROR NO. 897: Yes.

22 THE COURT: Okay. Because obviously every single
23 case is different and every case has facts that are unique to
24 them. So do you think you can keep an open mind to the facts
25 presented by both the Plaintiff and the Defense?

1 PROSPECTIVE JUROR NO. 897: Yes.

2 THE COURT: All right. Thank you. Did anyone -- has
3 anyone else been involved in a lawsuit? No one else besides
4 Mr. Mitchell? All right.

5 Have any of my three jurors ever been jurors before?
6 I have a hand in the back. Yes, sir. Mr. Spiher.

7 PROSPECTIVE JUROR NO. 892: I was a juror probably in
8 1983, '84, Aurora, Colorado.

9 THE COURT: Civil or criminal?

10 PROSPECTIVE JUROR NO. 892: Civil.

11 THE COURT: Did your jury reach a verdict?

12 PROSPECTIVE JUROR NO. 892: Yes, ma'am.

13 THE COURT: Were you the foreperson?

14 PROSPECTIVE JUROR NO. 892: No, I was not.

15 THE COURT: Thank you. Any other times you've been
16 on jury duty, sir?

17 PROSPECTIVE JUROR NO. 892: No.

18 THE COURT: All right. Anyone else ever been a juror
19 before? No. Okay.

20 And [inaudible] Mr. Spiher. Sir, are you employed?

21 PROSPECTIVE JUROR NO. 892: I'm retired.

22 THE COURT: What did you retire from?

23 PROSPECTIVE JUROR NO. 892: I was an investigator for
24 a company that did national security background investigations
25 for United States Office of Personnel Management for five

1 years.

2 THE COURT: Okay. What else?

3 PROSPECTIVE JUROR NO. 892: Prior to that, I built
4 golf clubs for Las Vegas Golf and Tennis for a couple of
5 years. And then prior to that I was a real estate appraiser
6 for 25 years in Colorado.

7 THE COURT: That is the main careers you've had?

8 PROSPECTIVE JUROR NO. 892: Yes.

9 THE COURT: All right. And you -- you said you're
10 retired?

11 PROSPECTIVE JUROR NO. 892: Yes.

12 THE COURT: Are you married?

13 PROSPECTIVE JUROR NO. 892: I am.

14 THE COURT: Does your -- is your spouse retired?

15 PROSPECTIVE JUROR NO. 892: She is retired, but she
16 works part-time for Goodwill.

17 THE COURT: Okay. And before retiring, what did she
18 do for a living? Did she work?

19 PROSPECTIVE JUROR NO. 892: She's a financial
20 analyst.

21 THE COURT: Do you have children?

22 PROSPECTIVE JUROR NO. 892: I have two. One that is
23 living.

24 THE COURT: Okay. And how long have you been in
25 Clark County, sir?

1 PROSPECTIVE JUROR NO. 892: Since 1998.

2 THE COURT: Thank you, sir. Let's go down to Mr.
3 William Mitchell. You're Badge No. 897. Mr. Mitchell, sir,
4 are you employed?

5 PROSPECTIVE JUROR NO. 897: Yes.

6 THE COURT: What do you do for a living?

7 PROSPECTIVE JUROR NO. 897: A 3D additive
8 manufacturer, rapid prototyping.

9 THE COURT: Rapid prototyping. So tell me a little
10 bit about your job.

11 PROSPECTIVE JUROR NO. 897: I work from home for
12 myself on the side. I do rapid prototyping for anything
13 plastic, objects from toys to graphic art designs, just any
14 random object I'm offered.

15 THE COURT: How long have you done that?

16 PROSPECTIVE JUROR NO. 897: For seven years now.

17 THE COURT: Did you have a job before that one?

18 PROSPECTIVE JUROR NO. 897: Yes.

19 THE COURT: What did you do?

20 PROSPECTIVE JUROR NO. 897: Worked for Kinetico Water
21 Corporation.

22 THE COURT: And what did you do there?

23 PROSPECTIVE JUROR NO. 897: I was a plumber there.

24 THE COURT: And how long were you with Kinetico?

25 PROSPECTIVE JUROR NO. 897: Six months, I'd say.

1 THE COURT: And before that?

2 PROSPECTIVE JUROR NO. 897: Unemployed.

3 THE COURT: All right. And so before your period of
4 unemployment, what were you doing? Were you in school? Were
5 you working?

6 PROSPECTIVE JUROR NO. 897: School and work.

7 THE COURT: Where did you work before then?

8 PROSPECTIVE JUROR NO. 897: Worked for Fleetwood
9 Travel Trailers of Oregon.

10 THE COURT: Sales?

11 PROSPECTIVE JUROR NO. 897: No. Manufacturing.

12 THE COURT: All right. Any jobs that I've missed,
13 sir? Are you married?

14 PROSPECTIVE JUROR NO. 897: Yes.

15 THE COURT: Does your wife work?

16 PROSPECTIVE JUROR NO. 897: Yes.

17 THE COURT: What does she do?

18 PROSPECTIVE JUROR NO. 897: She's a teacher for Clark
19 County School District.

20 THE COURT: What does she teach?

21 PROSPECTIVE JUROR NO. 897: Kindergarten.

22 THE COURT: All right. And do you have children?

23 PROSPECTIVE JUROR NO. 897: Two.

24 THE COURT: Minors or adults?

25 PROSPECTIVE JUROR NO. 897: Minors. One minor, one

1 adult now.

2 THE COURT: Okay. And how long have you been in
3 Clark County?

4 PROSPECTIVE JUROR NO. 897: Ten years.

5 THE COURT: Thank you very much, sir. And lastly,
6 Mr. Cosenza. Good morning, sir. You're Badge No. 899. Sir,
7 are you employed?

8 PROSPECTIVE JUROR NO. 899: Yes.

9 THE COURT: What do you do?

10 PROSPECTIVE JUROR NO. 899: I'm a bus driver.

11 THE COURT: For the?

12 PROSPECTIVE JUROR NO. 899: For the open top
13 sight-seeing big bus.

14 THE COURT: Oh, the tour buses?

15 PROSPECTIVE JUROR NO. 899: Yes.

16 THE COURT: How long have you done that?

17 PROSPECTIVE JUROR NO. 899: Right now with them six
18 years.

19 THE COURT: And before that what job?

20 PROSPECTIVE JUROR NO. 899: Working for [inaudible]
21 transit, nine years.

22 THE COURT: Okay. Before that?

23 PROSPECTIVE JUROR NO. 899: Before that I was a food
24 supervisor in a company in California.

25 THE COURT: All right. This pretty much all your

1 main jobs?

2 PROSPECTIVE JUROR NO. 899: Yes.

3 THE COURT: Are you married?

4 PROSPECTIVE JUROR NO. 899: Yes.

5 THE COURT: Does your wife work?

6 PROSPECTIVE JUROR NO. 899: No.

7 THE COURT: She a homemaker?

8 PROSPECTIVE JUROR NO. 899: Yes.

9 THE COURT: And do you have children?

10 PROSPECTIVE JUROR NO. 899: Two adults.

11 THE COURT: And how long have you been in Clark
12 County, Nevada?

13 PROSPECTIVE JUROR NO. 899: Fourteen years.

14 THE COURT: Thank you very much. And one more
15 question. I know that Mr. Mitchell said he's been involved in
16 a motor vehicle accident. Either Mr. Spiher or Mr. Cosenza
17 been involved in motor vehicle accidents?

18 PROSPECTIVE JUROR NO. 892: One.

19 THE COURT: Okay. Mr. Spiher. I'm sorry, I was
20 looking at the word -- letters incorrectly. What -- tell me
21 about your accident. When was it?

22 PROSPECTIVE JUROR NO. 892: [Inaudible] years. I've
23 been involved in four. Two minor ones and two that totaled
24 the car.

25 THE COURT: All right. Did you -- did you ever have

1 to go into any litigation as a result of the accidents?

2 PROSPECTIVE JUROR NO. 892: No.

3 THE COURT: Were you injured in any of the accidents?

4 PROSPECTIVE JUROR NO. 892: No, ma'am, I wasn't.

5 THE COURT: Thank you very much. All right. Mr.

6 Cosenza, have you been in a motor vehicle accident?

7 PROSPECTIVE JUROR NO. 899: Minor.

8 THE COURT: And were you ever involved in any

9 litigation because of that accident?

10 PROSPECTIVE JUROR NO. 899: [Inaudible.]

11 THE COURT: All right. Did you ever have to act as a

12 witness because of that -- well, I guess not litigation. All

13 right. So hold on. Let me make sure I've asked you guys

14 everything I need to.

15 And I think I asked everyone yesterday, but let me

16 ask the three of you again. Do you know either any of the

17 attorneys involved in this case or the clients in this case,

18 the Plaintiffs and the Defendant? Everyone says no. Okay.

19 And do any of you know anyone on the court staff or

20 the Court? All right.

21 Mr. Simon, I'm going to turn it back over to you,

22 sir.

23 MR. SIMON: Thank you, Your Honor. Mr. Mitchell?

24 PROSPECTIVE JUROR NO. 897: Yes, sir.

25 MR. SIMON: Thanks for being here. You told us you

1 kind of had a bad experience at one point involving an
2 accident?

3 PROSPECTIVE JUROR NO. 897: Yes.

4 MR. SIMON: And so you initially suggested to the
5 Court you might have a problem being a juror on this case to
6 be fair and impartial because you might favor the Defense
7 right out of the gate?

8 PROSPECTIVE JUROR NO. 897: That's correct.

9 MR. SIMON: All right. How long ago was that
10 accident?

11 PROSPECTIVE JUROR NO. 897: Three years ago.

12 MR. SIMON: And then how long ago until it was
13 resolved?

14 PROSPECTIVE JUROR NO. 897: A year ago.

15 MR. SIMON: And when you went through that process,
16 did you have a deposition taken?

17 PROSPECTIVE JUROR NO. 897: Yes.

18 MR. SIMON: And the lawyer was asking you questions?

19 PROSPECTIVE JUROR NO. 897: Yes.

20 MR. SIMON: Probably didn't like him very much?

21 PROSPECTIVE JUROR NO. 897: Well, probably not, no.

22 MR. SIMON: All right. And so some of the questions
23 I asked earlier, you know, whether anyone had any feelings,
24 strong feelings towards lawyers or towards the system, is that
25 what you were thinking about out there?

1 PROSPECTIVE JUROR NO. 897: With the system, yes.
2 Specific lawyers and judges, no.

3 MR. SIMON: Okay. So the fact that I'm here
4 representing clients who were injured in an accident, would
5 you automatically have, you know, problems being fair with
6 that --

7 PROSPECTIVE JUROR NO. 897: No animosity towards you,
8 sir, no.

9 MR. SIMON: Not yet.

10 PROSPECTIVE JUROR NO. 897: No.

11 MR. SIMON: All right. In regard to the system, how
12 do you feel about people who bring lawsuits?

13 PROSPECTIVE JUROR NO. 897: I believe it should be
14 resolved outside of the State.

15 MR. SIMON: And so when someone comes into court and
16 files a lawsuit, how does that make you feel?

17 PROSPECTIVE JUROR NO. 897: [Inaudible] I'm not
18 involved, I have no feeling [inaudible].

19 MR. SIMON: So why do you think that you would just
20 favor the Defense? Just based on your experience?

21 PROSPECTIVE JUROR NO. 897: Yes.

22 MR. SIMON: And at the outcome?

23 PROSPECTIVE JUROR NO. 897: Possibly.

24 MR. SIMON: So if you were sitting -- if you were my
25 clients and you were the person sitting on the jury, would you

1 want yourself judging this case based on your past experience?

2 PROSPECTIVE JUROR NO. 897: I don't think I would
3 take the system.

4 MR. SIMON: What does that mean?

5 PROSPECTIVE JUROR NO. 897: I don't think I would
6 take the suit to court [inaudible].

7 MR. SIMON: So --

8 PROSPECTIVE JUROR NO. 897: Settle out of court.

9 MR. SIMON: All right. So the fact that my clients
10 are here in court, you would personally have a problem with
11 that?

12 PROSPECTIVE JUROR NO. 897: Possibly.

13 MR. SIMON: Okay. And that is a belief that you've
14 had [inaudible] other than court today obviously?

15 PROSPECTIVE JUROR NO. 897: Yes.

16 MR. SIMON: And that's not something that's going to
17 change over the course of the week?

18 PROSPECTIVE JUROR NO. 897: Probably not.

19 MR. SIMON: All right. So at least in this
20 particular case, you would have a very difficult time setting
21 that aside and being fair to my clients in this particular
22 case, fair to say?

23 PROSPECTIVE JUROR NO. 897: I'm here to obey the law.

24 MR. SIMON: But obeying the law and being fair to a
25 party because you have certain personal beliefs that might not

1 make you fair?

2 PROSPECTIVE JUROR NO. 897: That could be.

3 MR. SIMON: Nothing against you. I mean, it's just
4 -- it's just who you are and your past experiences are your
5 past experiences. And so what our goal is here today is to
6 find people who can sit on a jury and be fair and impartial.
7 And you heard some people say, Hey, I -- I could be fair, I
8 don't have any preconceived notions about anything. But your
9 situation is a little bit different?

10 PROSPECTIVE JUROR NO. 897: Yeah.

11 MR. SIMON: Right? And so, in all fairness to both
12 parties, you would agree you can't be fair in this case?

13 PROSPECTIVE JUROR NO. 897: Probably not.

14 MR. SIMON: Okay. We also talked a little bit
15 yesterday, I don't know what you heard or didn't hear, but the
16 standards that we have to prove the case. So the Plaintiff
17 has a standard of [inaudible] standard of 51 percent, which is
18 just more likely than not. Is that something you could
19 follow?

20 PROSPECTIVE JUROR NO. 897: I'll follow the law.

21 MR. SIMON: Okay. [Inaudible.] But since you were a
22 person that was actually sued and my clients are asking for a
23 sum of money, would you hold them to a higher standard before
24 you would give them a large sum of money?

25 PROSPECTIVE JUROR NO. 897: Probably.

1 MR. SIMON: So you would -- because of your
2 preconceived notion, you would have a difficult time being
3 fair on that side, as well?

4 PROSPECTIVE JUROR NO. 897: I could. Like I said, I
5 will obey the law.

6 MR. SIMON: Okay. Is it Mr. Spiher?

7 PROSPECTIVE JUROR NO. 892: It is.

8 MR. SIMON: All right. You've had a few accidents?

9 PROSPECTIVE JUROR NO. 892: I have.

10 MR. SIMON: And you weren't injured?

11 PROSPECTIVE JUROR NO. 892: No.

12 MR. SIMON: So the fact that you weren't injured in
13 those accidents and we're coming in claiming that we were
14 injured, would you still be able to be fair or would you have
15 a preconceived notion that, you know, maybe this can't
16 [inaudible]?

17 PROSPECTIVE JUROR NO. 892: Just because I walked
18 away unscathed doesn't mean that other people can't be hurt or
19 injured. In -- in fact, in those accidents there were people
20 that were injured.

21 MR. SIMON: Okay.

22 PROSPECTIVE JUROR NO. 892: I have no problem of a
23 person, you know, having the capability of being injured in an
24 accident, so.

25 MR. SIMON: All right. Do you have any problems with

1 the standards that we have for these type of cases where we
2 just have to show we're more right than wrong?

3 PROSPECTIVE JUROR NO. 892: To me, whoever, you know,
4 proves their -- their side.

5 MR. SIMON: And would you have the capability of
6 returning a large sum of money if the evidence supported it?

7 PROSPECTIVE JUROR NO. 892: If the evidence supported
8 it, yes.

9 MR. SIMON: And you could still abide by that same
10 low standard?

11 PROSPECTIVE JUROR NO. 892: I could.

12 MR. SIMON: Has anyone close to you been seriously
13 injured in an accident?

14 PROSPECTIVE JUROR NO. 892: No.

15 MR. SIMON: I don't know if I asked this --

16 PROSPECTIVE JUROR NO. 892: You know, my nephew, but
17 that wasn't an automobile accident, so. Workmen's comp
18 accident.

19 MR. SIMON: Was he seriously injured?

20 PROSPECTIVE JUROR NO. 892: He was. I mean, he broke
21 his back.

22 MR. SIMON: So you had firsthand the opportunity to
23 see how a serious injury can affect somebody's life?

24 PROSPECTIVE JUROR NO. 892: Yes.

25 MR. SIMON: Lifelong injuries?

1 PROSPECTIVE JUROR NO. 892: Yes.

2 MR. SIMON: Thank you. I don't know if I asked the
3 rest of the panel, but has anybody had anybody close to them
4 seriously injured in an accident? Yes, sir.

5 PROSPECTIVE JUROR NO. 899: It wasn't an accident.
6 My son, when he was a child [inaudible] part of finger. He
7 put in -- his finger in a plate when he was in a pool.

8 MR. SIMON: Okay.

9 PROSPECTIVE JUROR NO. 899: He was four years old.

10 MR. SIMON: How old is he now?

11 PROSPECTIVE JUROR NO. 899: He's 23.

12 MR. SIMON: Okay. And how has that affected his
13 life?

14 PROSPECTIVE JUROR NO. 899: Pretty much because
15 missing one part of finger, you know, people sometimes look at
16 him like, you know.

17 MR. SIMON: Sure.

18 PROSPECTIVE JUROR NO. 899: You're not [inaudible].

19 MR. SIMON: Okay. Thank you for that. And you've
20 also heard my questions yesterday, probably ad nauseam.
21 Everybody sick and tired of these questions, but something we
22 got to do. Are you able to follow that standard?

23 PROSPECTIVE JUROR NO. 899: Yes, but -- yeah, but my
24 thing is money don't recompense [phonetic] the injured for the
25 rest of their life. You can have \$1 million, but still things

1 in the mind affect him and his life and his work. For me,
2 too, because as a parent, you know, seeing him, you know, like
3 that, it's really hard.

4 MR. SIMON: Okay. Well, in cases like these we're
5 allowed to come to court, that's what the law provides, to ask
6 for compensation, and it's based on evidence. And is that
7 something you could do is wait to hear the evidence?

8 PROSPECTIVE JUROR NO. 899: Yes.

9 MR. SIMON: And also asked questions whether or not
10 you can only consider the harms and the losses, which is only
11 the evidence. Could you do that?

12 PROSPECTIVE JUROR NO. 899: Yes.

13 MR. SIMON: And not consider other factors?

14 PROSPECTIVE JUROR NO. 899: No.

15 MR. SIMON: Okay. Nobody is going to be allowed to
16 know whether or not anyone, my clients or other clients, were
17 carrying insurance or other sources to pay. Is that something
18 you can do is not consider that?

19 PROSPECTIVE JUROR NO. 899: Yes.

20 MR. SIMON: All right. And you're not going to give
21 any sympathy to my clients, right, just because they're
22 injured? You would rely on the evidence?

23 PROSPECTIVE JUROR NO. 899: Evidence first, you know.
24 See what happens.

25 MR. BAIRD: Your Honor, may I approach?

1 THE COURT: Yes, of course.

2 (Bench conference.)

3 MR. BAIRD: He's bringing up insurance again.

4 [Inaudible.] I don't know how many times we have to

5 [inaudible] jury [inaudible] considering [inaudible].

6 THE COURT: Can you just ask a more -- I get really
7 nervous putting that thought in their head. Just tell them
8 they can't consider anything else.

9 MR. SIMON: Other factors. Sure.

10 THE COURT: Thanks.

11 (End of bench conference.)

12 MR. SIMON: And, likewise, you're not going to be
13 extra sympathetic to the Defendant?

14 PROSPECTIVE JUROR NO. 899: No.

15 MR. SIMON: You'll just rely on the evidence?

16 PROSPECTIVE JUROR NO. 899: [Inaudible.]

17 MR. SIMON: Because you can't consider other factors?

18 PROSPECTIVE JUROR NO. 899: No.

19 THE COURT: All right. Mr. Spiher, is that something
20 you can do?

21 PROSPECTIVE JUROR NO. 892: Yes.

22 MR. SIMON: All right. Mr. Mitchell, is that
23 something you can do?

24 PROSPECTIVE JUROR NO. 897: Yes.

25 MR. SIMON: Thank you. Does anybody have any

1 experience, on the -- on the whole panel, any experience
2 treating with a chiropractor? Okay.

3 UNIDENTIFIED SPEAKER: Being treated by one?

4 MR. SIMON: Yes. Okay. I'll just have them call it
5 out.

6 THE COURT RECORDER: Who was that answering? I
7 didn't -- [inaudible].

8 MR. SIMON: Okay. I'll just have them call it out.

9 THE COURT RECORDER: Yes, because I'm having a hard
10 time keeping the record.

11 MR. SIMON: Okay. I will make an extra effort.
12 Sorry.

13 Okay. Ms. James, what's your badge number?

14 PROSPECTIVE JUROR NO. 861: 861.

15 MR. SIMON: Thank you. You raised your hand?

16 PROSPECTIVE JUROR NO. 861: Yes.

17 MR. SIMON: And I think you told me earlier when you
18 were in Florida you had an incident?

19 PROSPECTIVE JUROR NO. 861: Yes, I had a car
20 accident.

21 MR. SIMON: All right. And you treated with a
22 chiropractor for that?

23 PROSPECTIVE JUROR NO. 861: Yes.

24 MR. SIMON: And -- and did you ever get referred out
25 for MRI's or for pain management?

1 PROSPECTIVE JUROR NO. 861: No pain management, but I
2 did get an MRI.

3 MR. SIMON: Okay. And did you rely on your
4 chiropractor's advice?

5 PROSPECTIVE JUROR NO. 861: I did.

6 MR. SIMON: Okay. Did you have a good experience or
7 bad experience with your chiropractor?

8 PROSPECTIVE JUROR NO. 861: I had a good experience.

9 MR. SIMON: Now, because you have some medical
10 training and knowledge, you're going to hear throughout the
11 course of this case a lot of medical information.

12 PROSPECTIVE JUROR NO. 861: Okay.

13 MR. SIMON: Is that -- is your medical knowledge
14 something you can, you know, set aside and listen to the
15 doctors who take the stand?

16 PROSPECTIVE JUROR NO. 861: Yes.

17 MR. SIMON: And weigh what they have to say and use
18 your common sense?

19 PROSPECTIVE JUROR NO. 861: Yes.

20 MR. SIMON: Yes. Okay. Mr. Ching, you said you --
21 I'm sorry. Your badge number?

22 PROSPECTIVE JUROR NO. 857: 857.

23 MR. SIMON: Thank you. You said you treated with a
24 chiropractor?

25 PROSPECTIVE JUROR NO. 857: Yes.

1 MR. SIMON: And what -- did you have a good or bad
2 experience?

3 PROSPECTIVE JUROR NO. 857: Bad.

4 MR. SIMON: Bad. And why is that?

5 PROSPECTIVE JUROR NO. 857: I just didn't feel that
6 he did [inaudible] referred to him by my lawyer, and I just
7 don't feel he did the treatment that should have been dealt
8 with in my situation, and he got paid for it. Kind of pissed
9 me off.

10 MR. SIMON: Okay. You were injured, correct?

11 PROSPECTIVE JUROR NO. 857: [Inaudible.]

12 MR. SIMON: Was there anything wrong about the lawyer
13 referring you there?

14 PROSPECTIVE JUROR NO. 857: Well, disappointing.

15 MR. SIMON: Okay. Ms. Ramos?

16 PROSPECTIVE JUROR NO. 887: Yes.

17 MR. SIMON: Okay. I thought I saw you waving your
18 hand.

19 PROSPECTIVE JUROR NO. 887: I did.

20 MR. SIMON: All right. And what's your badge number?

21 PROSPECTIVE JUROR NO. 887: 887.

22 MR. SIMON: Thank you.

23 PROSPECTIVE JUROR NO. 887: And just an accident that
24 I had mentioned. I was referred to a chiropractor.

25 MR. SIMON: Okay. And who referred you?

1 PROSPECTIVE JUROR NO. 887: The lawyer.

2 MR. SIMON: Okay. Was that a bad thing that the
3 lawyer did that?

4 PROSPECTIVE JUROR NO. 887: Not at all.

5 MR. SIMON: Okay. And why not?

6 PROSPECTIVE JUROR NO. 887: I actually had a good
7 experience. I was in pain and he fixed me, so --

8 MR. SIMON: All right.

9 PROSPECTIVE JUROR NO. 887: -- it was good.

10 MR. SIMON: So the lawyer wasn't trying to do
11 anything sneaky with you?

12 PROSPECTIVE JUROR NO. 887: Not that I know.

13 MR. SIMON: Okay. Ms. Norman?

14 PROSPECTIVE JUROR NO. 888: Yes.

15 MR. SIMON: Your badge number, please?

16 PROSPECTIVE JUROR NO. 888: 888.

17 MR. SIMON: Thank you.

18 PROSPECTIVE JUROR NO. 888: Chiropractic, compressed
19 vertebrae in my back [inaudible].

20 MR. SIMON: Did you have a good experience with the
21 chiropractor?

22 PROSPECTIVE JUROR NO. 888: Chiropractor was great.
23 I do more than I was told I would be able to do.

24 MR. SIMON: Did you end up seeing other physicians?

25 PROSPECTIVE JUROR NO. 888: Yes.

1 MR. SIMON: Pain management doctor, spine surgeon,
2 that type of thing?

3 PROSPECTIVE JUROR NO. 888: Surgeons and ortho
4 specialists.

5 MR. SIMON: Did you have a good experience with them?

6 PROSPECTIVE JUROR NO. 888: Uh-huh.

7 MR. SIMON: And did you rely on your doctor's advice?

8 PROSPECTIVE JUROR NO. 888: Yeah.

9 MR. SIMON: And did you believe what they had to tell
10 you?

11 PROSPECTIVE JUROR NO. 888: To a degree.

12 MR. SIMON: Okay.

13 PROSPECTIVE JUROR NO. 888: I was told not to have
14 children. I had two children afterwards. I was told my spine
15 wouldn't be able to take it.

16 MR. SIMON: Thank you. Anyone else? All right. Mr.
17 Mitchell?

18 PROSPECTIVE JUROR NO. 897: Yes.

19 MR. SIMON: Ladies first, so I'll ask Ms. Banzon.
20 All right.

21 PROSPECTIVE JUROR NO. 867: 867.

22 MR. SIMON: All right. Thank you. What was your
23 experience?

24 PROSPECTIVE JUROR NO. 867: With a chiropractor. It
25 was good, and they do -- did refer me for pain management and

1 MRI. So I did not follow what the doctor said to have
2 injections, pain injections, because I didn't want it.

3 MR. SIMON: Okay. But your experience with the
4 chiropractor was favorable?

5 PROSPECTIVE JUROR NO. 867: It was good.

6 MR. SIMON: Mr. Mitchell?

7 PROSPECTIVE JUROR NO. 897: Yes.

8 MR. SIMON: And you treated with a chiropractor?

9 PROSPECTIVE JUROR NO. 897: What's that?

10 MR. SIMON: You treated with a chiropractor?

11 PROSPECTIVE JUROR NO. 897: Yes.

12 MR. SIMON: And what's your badge number?

13 PROSPECTIVE JUROR NO. 897: 897.

14 MR. SIMON: Okay. And how was your experience?

15 PROSPECTIVE JUROR NO. 897: Negative.

16 MR. SIMON: All right. And so this -- you may learn
17 throughout the course of this case deals with chiropractic
18 treatment. Your negative experience with chiropractic
19 treatment, would that also maybe be a reason you might not be
20 able to be fair and listen to all the evidence? I'm sorry?

21 PROSPECTIVE JUROR NO. 897: No.

22 MR. SIMON: No. Okay. Why not?

23 PROSPECTIVE JUROR NO. 897: Every doctor is an
24 individual. There's good and bad doctors.

25 MR. SIMON: All right. And was the chiropractic

1 [inaudible] that you treated with here in town?

2 PROSPECTIVE JUROR NO. 897: No.

3 MR. SIMON: Did I miss anyone else? Sorry. Mr.
4 Reeder?

5 PROSPECTIVE JUROR NO. 881: Badge No. 881.

6 MR. SIMON: Thank you. And how was your experience?

7 PROSPECTIVE JUROR NO. 881: It was good. It was
8 thirty plus years ago.

9 MR. SIMON: That doesn't count.

10 PROSPECTIVE JUROR NO. 881: I was in high school.

11 MR. SIMON: All right. Thank you for that. Mr.
12 Mitchell?

13 PROSPECTIVE JUROR NO. 897: Yes.

14 MR. SIMON: Do you think it is okay for someone to
15 needlessly endanger somebody on the roadway?

16 PROSPECTIVE JUROR NO. 897: No.

17 MR. SIMON: Okay. And why not?

18 PROSPECTIVE JUROR NO. 897: That's an unusual
19 question. Because of life, liberty and property are worth
20 preserving.

21 MR. SIMON: And so would you agree that if someone
22 does do that, they should be responsible for the harm they
23 cause?

24 PROSPECTIVE JUROR NO. 897: Yes.

25 MR. SIMON: Would you agree that if they're not

1 responsible, that could have an effect on the community?

2 PROSPECTIVE JUROR NO. 897: Yes.

3 MR. SIMON: And would you agree that it's important
4 to hold people responsible --

5 PROSPECTIVE JUROR NO. 897: Yes.

6 MR. SIMON: -- for their actions? Does anyone else
7 on the panel disagree with that concept? Mr. King, do you
8 agree with that?

9 PROSPECTIVE JUROR NO. 637: There's only two things
10 I've disagreed with. Everything else I agree with you.

11 MR. SIMON: Okay. Thank you for that.

12 PROSPECTIVE JUROR NO. 637: Like I said, descriptive.

13 MR. SIMON: What's that?

14 PROSPECTIVE JUROR NO. 637: Like I said, descriptive
15 disagreement.

16 MR. SIMON: All right. And remind me again what that
17 was?

18 PROSPECTIVE JUROR NO. 637: Why is that? I'm never
19 moving on.

20 MR. SIMON: Okay.

21 PROSPECTIVE JUROR NO. 637: You know your answers.

22 MR. SIMON: All right. Other than Ms. James, has
23 anybody else been told that they have an injury to their disc?
24 Okay. I think you told me about that already [inaudible].
25 Other than Ms. Norman and Ms. James, anyone else? No.

1 I think where we left off yesterday was we were
2 talking a little bit about bumper stickers. And, Mr. Johnson,
3 you were laughing a little bit at me.

4 PROSPECTIVE JUROR NO. 176: Yes.

5 MR. SIMON: What was your bumper sticker?

6 PROSPECTIVE JUROR NO. 176: I have never had one.

7 MR. SIMON: You've never had one.

8 PROSPECTIVE JUROR NO. 176: Never once.

9 MR. SIMON: Okay. Because I thought I saw you raise
10 your hand. No? All right. My mistake.

11 Ms. James, if you're selected as a juror, you have
12 certain rights when you listen to the evidence and go to
13 deliberate. And some of those rights are if other people
14 aren't following the law or doing what the Judge told them to
15 do, your right is to speak up and make sure they all do that.
16 Is that -- is that something you could do if you're picked and
17 have to go back and deliberate?

18 PROSPECTIVE JUROR NO. 861: Yes. I don't have a
19 problem with that.

20 MR. SIMON: Okay. Ms. Dvorak, do you think that's
21 something you could do?

22 PROSPECTIVE JUROR NO. 865: No.

23 MR. SIMON: No. Why not?

24 PROSPECTIVE JUROR NO. 865: Because I just like to
25 keep to myself.

1 MR. SIMON: Okay. Mr. Izquierdo?

2 PROSPECTIVE JUROR NO. 880: Yes.

3 MR. SIMON: If somebody -- if you're selected as a
4 juror, everybody has their own experiences. And Mr. Mitchell
5 has his experience that he's brought in and shared with us
6 today, a lot of you have shared that. But part of bringing
7 your experience is for you to apply your common sense in
8 reaching a fair and just verdict. Can you apply your common
9 sense from your everyday experiences over the course of your
10 life?

11 PROSPECTIVE JUROR NO. 880: I think I can.

12 MR. SIMON: Okay.

13 PROSPECTIVE JUROR NO. 880: Because everybody is
14 different.

15 MR. SIMON: Okay. And that's important because we
16 don't want you to leave your common sense at the door when
17 you're coming in here. So that's something you can do for me
18 if you're selected? Yeah.

19 PROSPECTIVE JUROR NO. 880: Yeah, [inaudible].

20 MR. SIMON: Okay. Can everyone else do that? Does
21 everyone agree with that general proposition?

22 Your Honor, should we approach?

23 THE COURT: You may.

24 (Bench conference.)

25 MR. SIMON: I guess this would be the time I

1 challenge for cause?

2 THE COURT: Sure.

3 MR. BAIRD: [Inaudible] anybody is stricken.

4 THE COURT: Yeah. Is there anyone that stands out?

5 MR. BAIRD: Well, I guess if he wants to --

6 THE COURT: Because there might be some you guys
7 agree about, so.

8 MR. SIMON: Right. So I would say Mr. Mitchell right
9 out of the gate. He's the new juror, Mr. Mitchell. Because
10 of his prior experiences he's already told us he can't be
11 fair. He got sued. He's bitter. He's already, you know,
12 siding with the Defense.

13 MR. BAIRD: He also said he's going to follow the law
14 and be fair [inaudible].

15 THE COURT: Okay.

16 MR. SIMON: Well, but he said he would have a tough
17 time setting all of that aside, so. Mr. Mascella from
18 yesterday. He's agreed --

19 THE COURT: Mascella.

20 MR. SIMON: He's Juror No. 3.

21 MR. BAIRD: I don't stipulate to that.

22 THE COURT: You won't?

23 MR. BAIRD: No.

24 THE COURT: Okay.

25 MR. SIMON: And Juror No. 7, Mr. Ching.

1 THE COURT: The gentleman back there on the top.

2 MR. BAIRD: Yeah. No, I know. You know, I'll
3 stipulate to him.

4 THE COURT: You will? Okay. So that's -- I'll give
5 him a chance to voir dire Mitchell and Mascella.

6 MR. SIMON: Okay.

7 THE COURT: Mascella.

8 MR. SIMON: All right. I have a few more.

9 THE COURT: Okay.

10 MR. SIMON: Ms. Banzon.

11 THE COURT: Uh-huh.

12 MR. BAIRD: I don't stipulate.

13 THE COURT: Okay.

14 MR. SIMON: And Ms. Norman.

15 MR. BAIRD: No.

16 THE COURT: Okay.

17 MR. SIMON: And then Mr. King. He undoubtedly said
18 he can't follow the -- you know, the preponderance of the
19 evidence rule, follow the law on that issue. And I've
20 questioned him ad nauseam and he's not budging at all on that,
21 so.

22 MR. BAIRD: I agree.

23 THE COURT: Okay.

24 MR. SIMON: You agree with that one or no?

25 MR. BAIRD: King? Yeah.

1 MR. SIMON: Oh. Okay. So you're stipulating to that
2 one?

3 THE COURT: He stipulated to two.

4 MR. SIMON: Okay. And then -- and then I think there
5 was Mr. Reeder had a tough time with that, the standard, as
6 well. I don't know if he's changed his mind --

7 THE COURT: Okay.

8 MR. SIMON: -- today but, you stipulate to him or no?

9 MR. BAIRD: No.

10 MR. SIMON: No. Okay.

11 THE COURT: Anything else?

12 MR. SIMON: I think that --

13 THE COURT: So we stipulated to Ching and King. So
14 same thing, I'll query them real quick and hand them over to
15 Danny, and then you can go.

16 MR. SIMON: Okay.

17 THE COURT: Okay? Thanks.

18 (End of bench conference.)

19 THE COURT: All right. By way of stipulation, agreed
20 to challenges for cause on Ching and King.

21 All right. At this time I'm going to thank and
22 excuse Mr. Dale King, Badge No. 637. And I'm going to thank
23 and excuse Badge No. 857, Anthony Ching. Sirs, please go
24 downstairs to Jury Services.

25 THE CLERK: Badge No. 904, Ryan Rayo in Seat 5.

1 Badge No. 906, Carpricia Lanza, Seat 7.

2 THE COURT: What's Mr. Rayo's badge number?

3 THE CLERK: 904.

4 THE COURT: 904. All right. Good afternoon. And
5 these questions are directed to just Ms. Lanza and Mr Rayo.

6 Do -- well, let me start with: Do either of you know
7 the attorneys involved in this case?

8 PROSPECTIVE JUROR NO. 904: No.

9 PROSPECTIVE JUROR NO. 906: No.

10 THE COURT: Okay. Do either of you know the
11 Plaintiffs and the Defendant, the clients in this case;
12 Christian Cervantes-Lopez or Ms. Ortega, the Defendant? Okay.

13 Does anyone know the Court, court staff? Okay. Have
14 either one of you ever been involved in litigation before?

15 PROSPECTIVE JUROR NO. 906: As we speak.

16 THE COURT: As you speak. Okay. And you are badge
17 number -- Mr. Rayos said no. And Badge No. 906, Ms. Lanza --
18 sorry.

19 PROSPECTIVE JUROR NO. 906: 906.

20 THE COURT: 906. All right. So you said you're
21 engaged in litigation as we speak. Tell me a little bit more
22 about that.

23 PROSPECTIVE JUROR NO. 906: Two weeks ago as I was
24 traveling down Bermuda, I was right turn red and I was slammed
25 into and my car was totaled. And as of now, they -- the cops

1 will not show up to the scene of the accident, so there's no
2 police report. So when I called the insurance, they refused
3 to [inaudible].

4 THE COURT: Okay. Were you injured?

5 PROSPECTIVE JUROR NO. 906: My back and shoulders
6 have been like pain -- I have been in pain, but not to the
7 point where I have the time to go out and try to [inaudible]
8 take care [inaudible].

9 THE COURT: Okay. So the fact that you're involved
10 in that accident, do you think you can listen to the -- the
11 facts presented by the Plaintiffs and the facts presented by
12 the Defendant, and render a verdict that is fair to both?

13 PROSPECTIVE JUROR NO. 906: Yes.

14 THE COURT: Thank you very much. Any other times,
15 ma'am, you have been involved in a lawsuit, either as a
16 Plaintiff or a Defendant?

17 PROSPECTIVE JUROR NO. 906: No.

18 THE COURT: All right. And Mr. Rayo, did you say no,
19 you've never been involved in a lawsuit?

20 PROSPECTIVE JUROR NO. 904: No.

21 THE COURT: Okay. So I know Ms. Lanza was involved
22 in a prior motor vehicle accident. Mr. Rayo, have you ever
23 been involved in a motor vehicle accident?

24 PROSPECTIVE JUROR NO. 904: Yeah, like a minor one.

25 THE COURT: All right. Tell me what happened.

1 PROSPECTIVE JUROR NO. 904: [Inaudible] I was just --
2 it was a stoplight and the -- the light turned green and then
3 there was a car that was -- he was [inaudible]. He was
4 probably like three, four cars in front of me. So I -- I went
5 to the left lane to pass him, and then someone apparently --
6 like they went over here to the right, but there is no right
7 lane. It's like a solid line. And we went -- I went to merge
8 back into the right lane, and then he -- she merged back into
9 her left lane and she hit my back.

10 THE COURT: Okay. Did -- were you involved in any
11 type of lawsuit or litigation because of that?

12 PROSPECTIVE JUROR NO. 904: No.

13 THE COURT: Were you injured?

14 PROSPECTIVE JUROR NO. 904: No.

15 THE COURT: All right. The fact that you were
16 involved in that accident yourself, does that -- do you think
17 you can still listen to the facts presented by the Plaintiff,
18 listen to the facts presented by the Defendant, be fair to
19 both?

20 PROSPECTIVE JUROR NO. 904: Yes.

21 THE COURT: Thank you. And have either of you been
22 jurors before?

23 PROSPECTIVE JUROR NO. 904: No.

24 THE COURT: No. And Mr. Rayo, are you employed?

25 PROSPECTIVE JUROR NO. 904: No. I'm a full-time

1 student.

2 THE COURT: Where?

3 PROSPECTIVE JUROR NO. 904: [Inaudible.]

4 THE COURT: So what are you going to be when you get
5 out of school?

6 PROSPECTIVE JUROR NO. 904: After this, physical
7 therapist assistant, then I'm going to do a bridge program and
8 be a PT.

9 THE COURT: So how far along are you in your studies?

10 PROSPECTIVE JUROR NO. 904: I just -- I just started
11 the beginning of January.

12 THE COURT: When are your classes?

13 PROSPECTIVE JUROR NO. 904: 8:30 to 12:30 every day,
14 Monday through Thursday.

15 THE COURT: Are you missing classes?

16 PROSPECTIVE JUROR NO. 904: Yeah.

17 THE COURT: Counsel, I'm just going to let him go.
18 He's in classes.

19 PROSPECTIVE JUROR NO. 904: I actually have a letter
20 if you want.

21 THE COURT: Do you have a letter showing your
22 classes? Can you give it -- well, I don't know where Jason
23 is.

24 PROSPECTIVE JUROR NO. 904: I did have it yesterday.

25 THE COURT: Well, I'd like to see the letter, please.

1 I'm going to open these up, okay? All right. So I do have a
2 letter from Pima Medical Institute. Looks like it's signed by
3 your physical therapist assistant program director, who is Dr.
4 Rebecca Chema [phonetic], and she does indicate on letterhead
5 that you are involved in school and you have classes from 8:30
6 to 12:30 every day. All right.

7 Sir, thank you so much for your time. We're going to
8 give these back to you. Go down to Jury Services and check
9 out.

10 PROSPECTIVE JUROR NO. 904: Thank you.

11 THE COURT: Okay. I think the gentleman up there
12 knows he's about to move.

13 THE CLERK: Badge No. 916, Vorshon Cole, in Seat 5,
14 please.

15 THE COURT: All right. Good afternoon, Mr. Cole. A
16 few questions for you. Do you know the attorneys involved in
17 this case?

18 PROSPECTIVE JUROR NO. 916: No.

19 THE COURT: Do you know the clients in this case,
20 which are the Plaintiff, Christian Cervantes-Lopez, and the
21 Defendant, Ms. Ortega?

22 PROSPECTIVE JUROR NO. 916: No.

23 THE COURT: Okay. And you don't know anyone in the
24 court, either, correct?

25 PROSPECTIVE JUROR NO. 916: Correct.

1 THE COURT: Okay. And do you believe you may have
2 heard or read anything about this case before coming into
3 court?

4 PROSPECTIVE JUROR NO. 916: No.

5 THE COURT: And, sir, have you ever been a juror
6 before?

7 PROSPECTIVE JUROR NO. 916: No.

8 THE COURT: And are you employed, sir?

9 PROSPECTIVE JUROR NO. 916: Yes.

10 THE COURT: All right. Mr. Cole, what do you do for
11 a living?

12 PROSPECTIVE JUROR NO. 916: System -- systems analyst
13 [inaudible].

14 THE COURT: And how long have you done that?

15 PROSPECTIVE JUROR NO. 916: Eight years.

16 THE COURT: Eight years. All right. And before
17 that, did you have any other jobs?

18 PROSPECTIVE JUROR NO. 916: Yes. I was employed as a
19 -- as a consultant, so I had a bunch of different law offices,
20 actually, that I -- that I administered computer work for,
21 server work, computer server work.

22 THE COURT: Okay. Well, I believe at the -- the
23 beginning of this case, Mr. Simon and Mr. Baird, they
24 indicated the names of all the lawyers involved in their firm.
25 Do you know any of those lawyers?

1 PROSPECTIVE JUROR NO. 916: No.

2 THE COURT: Okay. Did you do work for their firm, to
3 the best of your knowledge?

4 PROSPECTIVE JUROR NO. 916: No.

5 THE COURT: Okay. And before -- so before working
6 with the lawyers on their computer systems, what else did you
7 do?

8 PROSPECTIVE JUROR NO. 916: And before that I
9 [Inaudible] Pharmaceuticals, that's in Lake Forest, Illinois;
10 Chicago.

11 THE COURT: What did you do with the pharmaceutical
12 company?

13 PROSPECTIVE JUROR NO. 916: Computer work,
14 [inaudible] support.

15 THE COURT: Have you always been in computers?

16 PROSPECTIVE JUROR NO. 916: When I was at -- right
17 when I was around 20, 21, I was a building maintenance guy,
18 so, downtown-highrise Chicago.

19 THE COURT: Okay. Are you married?

20 PROSPECTIVE JUROR NO. 916: No.

21 THE COURT: Do you have children?

22 PROSPECTIVE JUROR NO. 916: Yes.

23 THE COURT: How many?

24 PROSPECTIVE JUROR NO. 916: Three.

25 THE COURT: Minors or adults?

1 PROSPECTIVE JUROR NO. 916: One adult, two minors.

2 THE COURT: And how long have you been in Clark
3 County, Nevada?

4 PROSPECTIVE JUROR NO. 916: Nine years.

5 THE COURT: Nine years. And I didn't ask you. Sir,
6 have you ever been involved in a lawsuit?

7 PROSPECTIVE JUROR NO. 916: No.

8 THE COURT: Have you ever been involved in a motor
9 vehicle accident?

10 PROSPECTIVE JUROR NO. 916: No.

11 THE COURT: All right. Thank you. Ms. Lanza, you're
12 Badge No. 906. Ma'am, are you employed?

13 PROSPECTIVE JUROR NO. 906: Yes.

14 THE COURT: What do you do?

15 PROSPECTIVE JUROR NO. 906: I work at [Inaudible].

16 THE COURT: Sorry?

17 PROSPECTIVE JUROR NO. 906: I work at [Inaudible].

18 THE COURT: Okay. How long have you been there?

19 PROSPECTIVE JUROR NO. 906: A month.

20 THE COURT: And what do you do there?

21 PROSPECTIVE JUROR NO. 906: I work [inaudible].

22 THE COURT: Okay. And before that job, did you have
23 a different job?

24 PROSPECTIVE JUROR NO. 906: Yeah. I worked for the
25 YMCA [inaudible] Las Vegas and Tropical [Inaudible].

1 THE COURT: And are you married?

2 PROSPECTIVE JUROR NO. 906: No.

3 THE COURT: Children?

4 PROSPECTIVE JUROR NO. 906: No.

5 THE COURT: And how long in Clark County, Nevada,
6 ma'am?

7 PROSPECTIVE JUROR NO. 906: [Inaudible.]

8 THE COURT: [Inaudible] plus years. Thank you very
9 much.

10 Mr. Simon, do you have any questions of our new
11 jurors?

12 MR. SIMON: Yes, Your Honor. Thank you. Ms. Lanza,
13 I'm born and raised, too. I went to a school, Valley High
14 School. Probably -- not sure what's going on there these
15 days. Where did you go to high school?

16 PROSPECTIVE JUROR NO. 906: Durango.

17 MR. SIMON: And the car accident that you were in,
18 you mentioned you were having a difficult time with the
19 process?

20 PROSPECTIVE JUROR NO. 906: Yes.

21 MR. SIMON: Okay. Is there anything about that
22 experience that you would hold anything against my client for?

23 PROSPECTIVE JUROR NO. 906: [Inaudible] every --
24 every case is different [inaudible].

25 MR. SIMON: All right. You were listening to my

1 questions --

2 PROSPECTIVE JUROR NO. 906: Yes.

3 MR. SIMON: -- earlier and yesterday?

4 PROSPECTIVE JUROR NO. 906: [Inaudible.]

5 MR. SIMON: Multiple times. Multiple, multiple. Is
6 there anything about that that you disagree with?

7 PROSPECTIVE JUROR NO. 906: [Inaudible.]

8 MR. SIMON: You're able to follow that low standard?

9 PROSPECTIVE JUROR NO. 906: Yeah.

10 MR. SIMON: You're able to consider [inaudible] the
11 harms and the losses?

12 PROSPECTIVE JUROR NO. 906: [Inaudible.] I -- I
13 believe that, you know, I do believe that you can't really put
14 a -- I do believe you can't put like a money -- a monetary
15 value on the injuries, even though I feel injured [inaudible].
16 I was told specifically by my lawyer actually when I just now
17 this past week have been calling around to lawyers asking them
18 to help me, I've been seriously told they won't help me
19 because I'm not injured or because I refuse to say that I
20 [inaudible], you know, [inaudible]. So if anything, I'm just
21 more of a [inaudible] not specific [inaudible].

22 MR. SIMON: All right. Well, in this particular
23 case, my clients have a lawyer and we're representing injury
24 claims, and we're going to be asking you if you're selected at
25 the end to award, you know, a sum of money based on the

1 evidence. Is that something you can do? Or, would your
2 experience that you're going through now --

3 PROSPECTIVE JUROR NO. 906: Well, [inaudible]
4 experience would be different [inaudible].

5 MR. SIMON: Okay. So you, if selected, you can
6 promise me now that you can set that aside for me and only
7 look at the evidence here?

8 PROSPECTIVE JUROR NO. 906: [Inaudible.]

9 MR. SIMON: Would you also be able to set aside any
10 sympathy that you might have for the Defendant in this case?

11 PROSPECTIVE JUROR NO. 906: Yes.

12 MR. SIMON: And if I prove to you based on the
13 medical evidence that my clients were seriously injured, would
14 you hesitate to return a verdict for me if I prove that?

15 PROSPECTIVE JUROR NO. 906: Show me the proof and
16 [inaudible].

17 MR. SIMON: Mr. Cole?

18 PROSPECTIVE JUROR NO. 916: Yes.

19 MR. SIMON: What's the highest level of education
20 that you had?

21 PROSPECTIVE JUROR NO. 916: Three years of college.

22 MR. SIMON: All right. And where did you go?

23 PROSPECTIVE JUROR NO. 916: I went to -- I went to
24 DeVry for a year, and then I went to Coyne American Institute
25 in Chicago. I'm sorry. And then I went to college at Lake

1 County, did two years of that, two years there.

2 MR. SIMON: And where's Lake County?

3 PROSPECTIVE JUROR NO. 916: Lake County is in
4 Illinois.

5 MR. SIMON: All right. Are you from Chicago?

6 PROSPECTIVE JUROR NO. 916: Yes.

7 MR. SIMON: And how long have you been in Vegas?

8 PROSPECTIVE JUROR NO. 916: Nine years.

9 MR. SIMON: You're happy to be here now than in
10 Chicago?

11 PROSPECTIVE JUROR NO. 916: I am. I was 30 years in
12 Chicago and I hated it. Well, I didn't hate it, but the
13 weather got to me, and I just came back and I think that's
14 where I got my cold from. It was so cold there.

15 MR. SIMON: You have any problem with people bringing
16 lawsuits?

17 PROSPECTIVE JUROR NO. 916: I do not.

18 MR. SIMON: Someone who's injured you believe has a
19 right to come into court?

20 PROSPECTIVE JUROR NO. 916: Absolutely.

21 MR. SIMON: All right. Is there anything about my
22 questions earlier about the standards, the lower standards
23 that you would have trouble following?

24 PROSPECTIVE JUROR NO. 916: No.

25 MR. SIMON: And if I prove to you and the evidence

1 supports it and I ask you for a large sum of money, would you
2 hesitate to return a verdict of a large sum of money if I
3 prove it?

4 PROSPECTIVE JUROR NO. 916: I would not.

5 MR. SIMON: And you can also set aside any sympathy
6 you might have for the Defendant?

7 PROSPECTIVE JUROR NO. 916: Absolutely.

8 MR. SIMON: And you can only -- and you can only
9 consider the harms and the losses, not how things are going to
10 get paid or how prices go up or anything like that?

11 PROSPECTIVE JUROR NO. 916: I would never take that
12 into consideration. I don't know what number to put on any
13 one person's pain and suffering. I don't know what that
14 number is, so.

15 MR. SIMON: But that's the type of compensation that
16 you would be open to awarding if the evidence showed that?

17 PROSPECTIVE JUROR NO. 916: Yes.

18 MR. SIMON: And the law allowed it?

19 PROSPECTIVE JUROR NO. 916: Yes.

20 MR. SIMON: Okay. And you would be able to follow
21 the Judge's instructions?

22 PROSPECTIVE JUROR NO. 916: Absolutely.

23 MR. SIMON: And also use your everyday common sense
24 in making decisions?

25 PROSPECTIVE JUROR NO. 916: Yes.

1 MR. SIMON: And if you get selected as a juror, you
2 can go back in that jury room and talk about this case with
3 the other people openly?

4 PROSPECTIVE JUROR NO. 916: Yes.

5 MR. SIMON: And if somebody else wasn't following the
6 law, would you be able to stand up and make sure the others do
7 follow the law?

8 PROSPECTIVE JUROR NO. 916: Yes.

9 MR. SIMON: Okay. Have you ever had, Mr. Cole, have
10 you ever had any spinal injuries?

11 PROSPECTIVE JUROR NO. 916: Yes.

12 MR. SIMON: Okay. And are they -- were they caused
13 from any accidents or injuries?

14 PROSPECTIVE JUROR NO. 916: No, no. They -- I play a
15 lot of sports and I think my -- my sports activity may have
16 caused degeneration in my back.

17 MR. SIMON: Okay.

18 PROSPECTIVE JUROR NO. 916: And so I was in a Chicago
19 hotel one year and I was bent over at a 90-degree just washing
20 my face, and all I did was this, and it went away. The --
21 like my back went out and so kind of digressed from there.

22 MR. SIMON: Did you end up treating with physicians
23 for that?

24 PROSPECTIVE JUROR NO. 916: Yes.

25 MR. SIMON: Getting MRI's?

1 PROSPECTIVE JUROR NO. 916: Yes.

2 MR. SIMON: Seeing orthopedic spine surgeons?

3 PROSPECTIVE JUROR NO. 916: Yes.

4 MR. SIMON: Getting injections?

5 PROSPECTIVE JUROR NO. 916: Yes.

6 MR. SIMON: Okay. And how was your experience with
7 all of that?

8 PROSPECTIVE JUROR NO. 916: Great. My -- my problem
9 now is my knee.

10 MR. SIMON: Okay. So you are able to function now
11 with regard to your back?

12 PROSPECTIVE JUROR NO. 916: Yes.

13 MR. SIMON: Did they tell you whether or not you had
14 a herniated disc or a disc protrusion?

15 PROSPECTIVE JUROR NO. 916: Compressed.

16 MR. SIMON: Compressed disc. Anybody ever tell you
17 you needed surgery?

18 PROSPECTIVE JUROR NO. 916: Yes.

19 MR. SIMON: Is there anything about that experience
20 when considering spinal injuries in this case that you might
21 have a hard time being fair?

22 PROSPECTIVE JUROR NO. 916: No.

23 MR. SIMON: You think you're able to listen to the
24 physicians in this case and decide what the specific injuries
25 are in this case?

1 PROSPECTIVE JUROR NO. 916: Yes.

2 MR. SIMON: Do you have an understanding that certain
3 disc injuries or spine injuries can be different?

4 PROSPECTIVE JUROR NO. 916: Yes.

5 MR. SIMON: Different to certain people?

6 PROSPECTIVE JUROR NO. 916: Absolutely.

7 MR. SIMON: And you can keep an open mind to weigh
8 the evidence?

9 PROSPECTIVE JUROR NO. 916: Absolutely.

10 MR. SIMON: Thank you for your time, sir.

11 THE COURT: Whenever you gentlemen are ready.

12 MR. BAIRD: I'm not limited, right, Your Honor?

13 THE COURT: Yes, that's correct. And, no, you're not
14 limited.

15 MR. BAIRD: Okay. Let's start out by talking about
16 bumper stickers that you almost put on your cars, but didn't
17 quite put on your cars. I'm just kidding. We're not going to
18 talk about bumper stickers.

19 Ladies and gentlemen, let's start out with, first
20 off, we're here because there's a dispute between the
21 Plaintiffs and from [inaudible]. And you know what? Let me
22 introduce you to my client. She was able to make it. She's
23 back from the frigid north. Miriam Pizarro-Ortega. So this
24 is my client and she's the Defendant in this case.

25 I mentioned it earlier, but sometimes I talk fast and

1 [inaudible] heard that part. But there's been some discussion
2 about people who act negligently or carelessly. Do any of you
3 have the belief or understanding that we are here to punish
4 Ms. Pizarro? Does anybody feel like the purpose of this
5 lawsuit is to punish her for something that she did?

6 THE COURT: Counsel, and I'm sorry, you're going to
7 have to explain to the jury. I have been calling her by the
8 wrong name.

9 MR. BAIRD: They're both her name, but she puts
10 Pizarro in front of Ortega, so I was -- kind of took a
11 shortcut.

12 THE COURT: Oh. Okay. I just wanted them to realize
13 we were referring to the same individual.

14 MR. BAIRD: Okay. That's probably wise, yeah. Her
15 name is Pizarro-Ortega. Some times we might accidentally
16 refer to her as Ms. Ortega, but it's the lady over there in
17 the courtroom.

18 Who here thinks that prejudice is bad? Yeah, that's
19 about what I expected. We've all heard -- at least we're
20 aware of over the last 50 or so years prejudice has been an
21 issue that's been dealt with a lot in our society. And
22 certainly it usually means something like racism, something
23 akin to that, an unfair prejudice; something that doesn't have
24 a basis in reality.

25 Now, that's not -- that is bad and it's something

1 that our society frowns upon. Now, when we ask you about your
2 personal feelings and your beliefs -- and -- and I want to
3 thank you for being honest because I know some times you might
4 feel like you're being picked on when we start to ask you all
5 these detailed questions about a feeling or position you might
6 hold.

7 When we talk about prejudice with you guys today,
8 we're not accusing you of something we all frown on in that
9 societal way. What we're really trying to do here is find out
10 is anybody unwilling to give both sides a fair shake.

11 Is there anybody in the jury today, in the box here
12 in front of me, that is simply unwilling to give both sides
13 the opportunity to present their evidence before you make a
14 decision? Yes. Oh. Sorry. What's your badge number?

15 PROSPECTIVE JUROR NO. 899: 899.

16 MR. BAIRD: All right. Tell me about that. Why --
17 why do you think -- who -- who can you not give a fair shake?

18 PROSPECTIVE JUROR NO. 899: As a driver, as a bus
19 driver, could be many reasons why the accident happened
20 [inaudible] both or both of them. In that case we have to see
21 the facts. Could be so many things that maybe your Defendant
22 was thinking she got up [inaudible] in her mind at the time of
23 the accident or the other person was, you know, speeding too
24 much at the time of the accident. So in that case, for me,
25 that's a hard decision because it's -- it's -- for me, it's

1 hard to tell which one why they have been the blame of the
2 accident, you know.

3 MR. BAIRD: Okay. Now, what if we make this easy for
4 you? Mr. Cosenza, right?

5 PROSPECTIVE JUROR NO. 899: Yes.

6 MR. BAIRD: Okay. Mr. Cosenza, we are here, and Ms.
7 Pizarro has already admitted fault, okay? So she's already
8 said, I made a mistake when I made that left turn. So we're
9 only here to determine whether if the Plaintiffs were injured
10 and, if so, to what extent, put a value on that.

11 So with finding out who is at fault, with that not
12 being an issue you have to worry about, can you now -- are you
13 comfortable saying you'll give both sides a fair shake as they
14 present their evidence?

15 PROSPECTIVE JUROR NO. 899: Yes.

16 MR. BAIRD: Okay. So as you sit here today, you
17 haven't decided, oh, the Plaintiffs are right; or, oh, the
18 Defendant is right? You -- you don't think already that
19 someone is entitled to money, right?

20 PROSPECTIVE JUROR NO. 899: Yeah.

21 MR. BAIRD: Now, I talked a little bit about
22 prejudice and -- and our individual beliefs. And clearly,
23 everybody has beliefs. We don't expect to find a bunch of
24 people today who don't have any feelings, any strong feelings
25 about anything ever, okay? We're not looking for, you know,

1 sacks of flour that don't think or feel.

2 We understand that you're human beings, the jurors.

3 And we're looking for human beings. We're only concerned
4 about the sort of prejudices or strong feelings you simply
5 can't ignore. If, for example -- and this is a pretty common
6 analogy people use. If you -- and, frankly, I'm one of those
7 people.

8 If you really hate cherry pie, just can't stand
9 cherry pie, perhaps you shouldn't judge a pie contest or a
10 baking contest. Now, if cherry pie is not your favorite, but
11 you don't hate it, and you can put aside your feelings and
12 judge each pie on its own merits, then you can still be a
13 judge of that.

14 Now, in this case maybe your beliefs would, if we
15 were outside of this courtroom, make you want to lean a
16 certain way to one side or the other; but what I want to know
17 is if any of you lean so far that you couldn't straighten up
18 and be fair to both parties in this case.

19 Is there anybody that has that feeling? Do any of
20 you hate the Plaintiffs? You don't know them, right? You
21 haven't received any evidence. And do any of you hate my
22 client, Ms. Pizarro? Do any of you hate bald guys with a
23 beard? All right. I'm making progress.

24 Based on the questions Mr. Simon asked you yesterday,
25 did any of you feel already that the Plaintiffs are entitled

1 to money? You did. Tell me about that.

2 PROSPECTIVE JUROR NO. 142: Well, because of my
3 injury. Every day I wake up and I feel you're entitled to the
4 pain and suffering that -- that they have to go through. I
5 mean, when you talked even about injections, reminded me I had
6 injections [inaudible] something.

7 MR. BAIRD: Okay. So as we sit here today before
8 we've presented evidence, you feel already the Plaintiffs have
9 been injured and would be entitled to something?

10 PROSPECTIVE JUROR NO. 142: [Inaudible.]

11 MR. BAIRD: Okay. And you couldn't set that aside
12 and wait and find out based on evidence that's presented
13 whether or not [inaudible]?

14 PROSPECTIVE JUROR NO. 142: I already feel that if
15 they've taken it this far.

16 MR. BAIRD: Okay. So the fact that they've gone as
17 far as bringing this lawsuit to court --

18 PROSPECTIVE JUROR NO. 142: Yeah.

19 MR. BAIRD: -- you feel like, well, they must have
20 something?

21 PROSPECTIVE JUROR NO. 142: Yeah.

22 MR. BAIRD: Have you ever heard the phrase: Takes
23 two to tango?

24 PROSPECTIVE JUROR NO. 142: Yes.

25 MR. BAIRD: Could it possibly be a little bit of both

1 sides is the reason we're here today?

2 PROSPECTIVE JUROR NO. 142: Yeah, but you clarified
3 that -- that she was already -- she admitted she was guilty.

4 MR. BAIRD: All right. She was at fault for causing
5 the accident?

6 PROSPECTIVE JUROR NO. 142: Yes.

7 MR. BAIRD: Yeah, we're not going to send her to
8 jail.

9 PROSPECTIVE JUROR NO. 142: Sorry.

10 MR. BAIRD: That's all right. Do you believe that
11 every time there's a car accident someone's going to get
12 [inaudible]?

13 PROSPECTIVE JUROR NO. 142: No, some times they
14 don't, but if -- if they cause an injury, you know, there's a
15 lot of pain and suffering that happens later on.

16 MR. BAIRD: Okay. And in your mind already, the
17 Plaintiffs have suffered some sort of injury. The question
18 for you is just what --

19 PROSPECTIVE JUROR NO. 142: Yeah.

20 MR. BAIRD: -- and how much?

21 PROSPECTIVE JUROR NO. 142: Yeah, because if not,
22 they wouldn't go through all of this because you're busy.

23 MR. BAIRD: If someone makes a mistake, but no one is
24 harmed, should the person who makes the mistake have to
25 compensate someone else? And would you feel that any time you

1 make a mistake you have to pay something for it?

2 UNIDENTIFIED SPEAKER: No.

3 UNIDENTIFIED SPEAKER: No.

4 MR. BAIRD: Pardon?

5 PROSPECTIVE JUROR NO. 888: No harm, no foul.

6 MR. BAIRD: Okay.

7 THE COURT RECORDER: Who was that?

8 MR. BAIRD: That was --

9 PROSPECTIVE JUROR NO. 888: 888.

10 MR. BAIRD: Sorry about that. Do any of you believe
11 that no matter what evidence is presented to you over the next
12 few days of this trial, that you are obligated to award
13 something to the Plaintiffs as you sit here today before
14 you've heard the evidence?

15 PROSPECTIVE JUROR NO. 888: Yes, because of the fact
16 you're saying there's 49, 50 percent, somebody is going to
17 walk out of here with money somehow one way or the other.

18 MR. BAIRD: Okay. I will tell you that my client is
19 not here to get money. And so, let's talk a little bit about
20 this burden, the 51 percent that Mr. Simon was talking about.
21 He kept -- Mr. Simon -- and Mr. Simon and I get along fine. I
22 hope that the fact that we get along fine doesn't make you
23 think that we don't care about this -- this case and that we
24 -- that we and our clients don't have strong feelings about
25 how this ends.

1 But he kept saying that easy 51 percent standard,
2 that easy standard of over 50 percent. Do any of you have the
3 feeling that it is easy for a -- for a Plaintiff to prove
4 their case?

5 PROSPECTIVE JUROR NO. 142: He made it sound that it
6 was easier for you than it was for him.

7 MR. BAIRD: Okay.

8 PROSPECTIVE JUROR NO. 142: I don't know why.

9 MR. BAIRD: Okay. And let me ask you this: How many
10 -- oh. Yes.

11 PROSPECTIVE JUROR NO. 881: No, I was just
12 [inaudible].

13 MR. BAIRD: Okay. You almost had to [inaudible].
14 When we talk about this burden, and maybe it's a little bit
15 awkward when we talk about percentages, how many decisions
16 that you make do you reduce down to a percentage of
17 persuasion? Do any -- any of you do that on a regular basis?

18 So when we talk about this 51 percent, is it safe to
19 say that it's kind of a foreign concept to all of you; is that
20 a fair statement?

21 UNIDENTIFIED SPEAKER: Yes.

22 MR. BAIRD: Now, you had been on a jury, correct?
23 Didn't -- didn't you sit in a civil trial once before, Mr.
24 Mascella?

25 PROSPECTIVE JUROR NO. 163: Yes. Steven Mascella,

1 163.

2 MR. BAIRD: Okay. So you did have some experience
3 with that 51 percent, more than 50 percent standard, correct?

4 PROSPECTIVE JUROR NO. 163: Yes.

5 MR. BAIRD: Okay. But that's not something you use
6 in your daily life?

7 PROSPECTIVE JUROR NO. 163: No.

8 MR. BAIRD: Okay. When you -- if you -- have any of
9 you made -- had to make a big purchase and then have you had
10 to kind of gather the pros and cons for this purchase before
11 making your decision? Have you had to do that ever? Maybe
12 buying a car or buying an appliance? Mr. Johnson, was it?

13 PROSPECTIVE JUROR NO. 176: Uh-huh.

14 MR. BAIRD: Okay. You were nodding your head.
15 What's your badge number?

16 PROSPECTIVE JUROR NO. 176: I'm 176.

17 MR. BAIRD: 176. How did that go? You took the pros
18 and cons? Did you have a make-believe scale in your head?

19 PROSPECTIVE JUROR NO. 176: You just see if the pros
20 outweighs the cons.

21 MR. BAIRD: Okay. All right. Mr. Simon talked a
22 little bit yesterday about that, lady justice and her scales,
23 she's got her blindfold on. That's what we're going to do.
24 We've got a scale. Both parties are going to throw their
25 evidence up. You guys will decide whether it goes on the

1 Defense side or the Plaintiffs' side. In the end, whichever
2 way it tips, that's going to be the winner.

3 Now, it's easier to think of it that way or think of
4 it as more than [inaudible] percent. It's all the same thing
5 and that's the standard, that's the burden that Plaintiff has
6 to carry.

7 Having explained it that way, are you comfortable
8 using that standard to determine who prevails in this trial,
9 whether or not the Plaintiffs are awarded anything? Anybody
10 have an issue with that? Okay. Let's -- let's talk about
11 that.

12 What's your badge number?

13 PROSPECTIVE JUROR NO. 865: 865.

14 MR. BAIRD: And you're Ms. Dvorak?

15 PROSPECTIVE JUROR NO. 865: Yeah.

16 MR. BAIRD: Are you related to the composer?

17 PROSPECTIVE JUROR NO. 865: [Inaudible.]

18 MR. BAIRD: Okay.

19 PROSPECTIVE JUROR NO. 865: I don't know. I just
20 have a problem with deciding either way because I don't want
21 it to impact either one of them, so it like bothers me that I
22 have to impact one or the other.

23 MR. BAIRD: Right.

24 PROSPECTIVE JUROR NO. 865: It makes me feel
25 uncomfortable.

1 MR. BAIRD: It's probably going to make us all
2 uncomfortable. The Plaintiffs might be a little bit
3 uncomfortable. My client might be a little bit uncomfortable.
4 It's not a lot of fun that we have to resolve these disputes,
5 but we don't have any other method at this point to resolve
6 this issue for the parties.

7 Do you feel there's no way that you could apply the
8 rules and the instructions that the Court gives you to this
9 case?

10 PROSPECTIVE JUROR NO. 865: I don't think I could.

11 MR. BAIRD: When we're talking about these scales,
12 all I'm asking, you might have a predisposition that you wish
13 a certain party will come out ahead. As we're putting the
14 evidence onto these scales, really all we're saying is: don't
15 put your finger on the scale, okay?

16 Can you guys do that? Keep your finger off the scale
17 and let the evidence tip it? Anybody have a problem with
18 that?

19 Ms. Norman, is that name right?

20 PROSPECTIVE JUROR NO. 888: Yes.

21 MR. BAIRD: Are you comfortable with that standard?

22 PROSPECTIVE JUROR NO. 888: Yeah.

23 MR. BAIRD: I mean, we all have -- have our feelings.
24 We all have our beliefs about how things should be, but if you
25 can all just let the Court do what it asks you to do.

1 Here's another question. Have you ever been driving
2 on a stretch of road -- how about Mr. Reeder?

3 PROSPECTIVE JUROR NO. 881: Reeder.

4 MR. BAIRD: Reeder.

5 PROSPECTIVE JUROR NO. 881: 881. Sorry.

6 MR. BAIRD: Thank you. You're driving on a stretch
7 of a road and you think, This speed limit seems a little too
8 low. Ever had that feeling?

9 PROSPECTIVE JUROR NO. 881: Uh-huh. Yes.

10 MR. BAIRD: Even though you might think the speed
11 limit should be a little bit higher, you still obey the speed
12 limit?

13 PROSPECTIVE JUROR NO. 881: Yes.

14 MR. BAIRD: All right. That's really what we're
15 asking you to do. You might wish it was a little bit
16 different. We're just asking you to just follow the speed
17 limit. The Judge is going to give it to you. The Judge will
18 give you instructions when we're done after we've given you
19 all the evidence.

20 There has been questions given to you guys about
21 evidence that we're not going to be able to consider. And
22 some of you have expressed concerns that you wish you could
23 have more evidence than we -- than we can give you.

24 Have any of you heard of the discovery process?
25 Prior to a trial the parties engage in discovery where we --

1 both sides -- have the opportunity to get all the evidence
2 they can, all the evidence that they want to use in
3 preparation for this --

4 MR. SIMON: Your Honor, may we approach?

5 THE COURT: Yes.

6 (Bench conference.)

7 MR. SIMON: I think he's arguing the facts in the
8 case and trying to argue to the jury this point.

9 THE COURT: What are you trying to ask?

10 MR. BAIRD: I'm trying to let them know that we've
11 had time to give them all the evidence [inaudible]. We don't
12 need any evidence that's not [inaudible] to be presented. I'm
13 asking them to follow your instructions and consider only the
14 evidence that we present to them.

15 THE COURT: Okay. Say it like that.

16 MR. BAIRD: Yeah.

17 THE COURT: Okay. Say it like that.

18 MR. BAIRD: That was what my next sentence was going
19 to be.

20 THE COURT: Okay.

21 (End of bench conference.)

22 MR. BAIRD: And what that means, ladies and
23 gentlemen, is that you need to consider only that evidence
24 that you're presenting that we used the discovery process to
25 gather. That will be all of the little chips that you're

1 going to put on the scale. We'll give them to you. Don't
2 bring your own, okay?

3 Does anybody have any issues with that? Any
4 questions or concerns? Yes?

5 PROSPECTIVE JUROR NO. 906: I just want to bring up
6 that based on what -- that whole 51/49 thing, is that -- it's
7 kind of presented like you're saying that's not -- like how it
8 says that's not enough evidence. He kind of made it seem like
9 you're saying like, well, we're going to give you this little
10 amount of evidence and that that would be enough. When really
11 you're not talking about 51 over 49 percent of a hundred
12 percent of evidence.

13 You're talking about 59 over 49 meaning you proved
14 your side to be more, which is that's why we're here. Once
15 you've proved that your side, you have more proof than the
16 other, that's exactly what you're doing. It's not, oh, you
17 have 51 percent of the evidence. Like 15 is good, okay, it's
18 yours. No. It's you have 51 over 49. Like you have more
19 evidence, not that you have -- it's not like you only have 51
20 percent out of 100. [Inaudible] 51 over 49.

21 MR. BAIRD: Yes. Yeah.

22 PROSPECTIVE JUROR NO. 906: And that's what I think
23 -- I think that we spent a lot of time yesterday talking about
24 that and I think that kind of just like confused everyone
25 because that's not what is --

1 THE COURT: Counsel? I'm sorry to cut you off,
2 ma'am. I think a couple of our jurors have an urgent need to
3 use the facilities.

4 MR. BAIRD: Sure.

5 THE COURT: So, ladies and gentlemen, let's take a
6 10-minute break. Come back at three o'clock.

7 You're admonished not to converse or -- hold on. I
8 have to give you this. Don't converse amongst yourselves. Do
9 not form or express an opinion on this case and do not do any
10 research on this case. See you back in ten.

11 (The prospective jury panel recessed at 2:51 p.m.)

12 THE COURT: All right. Let's go off the record.

13 MR. MICHALEK: Your Honor, can I make a record?

14 THE COURT: Yes.

15 MR. MICHALEK: Real brief. And I will make it real
16 brief.

17 THE COURT: That's okay.

18 MR. MICHALEK: But the "I" word came up, you know,
19 the insurance and -- there's already been --

20 THE COURT: Talking about Mr. Simon's voir dire?

21 MR. MICHALEK: Simon raised the insurance issue that
22 the parties aren't -- that the jury is not allowed to know
23 whether the Defendant has the insurance. Obviously we object
24 to that. I'm not -- I'm not sure what the Court wants to do
25 about that, whether it's going to be an instruction, you know.

1 I don't -- I don't want to call too much attention to
2 it, but it is a problem that he leaves the impression that you
3 don't get to know whether [inaudible] has insurance,
4 wink-wink, nod-nod, that she does, don't worry about awarding
5 money. I mean, that's usually where these -- these inferences
6 tend to go.

7 He got warned yesterday about not using the word
8 "insurance," and he used it today, and I'm concerned whether
9 the jury is now thinking, oh, wait a minute, there's insurance
10 coverage, we don't have to worry about whatever monetary award
11 we might --

12 THE COURT: So what are you asking for?

13 MR. MICHALEK: Well, I mean, to make the record I got
14 to ask for a mistrial or some sort of instruction regarding
15 the improper use of the insurance. I don't know what the
16 Court's going to do with it, but, I mean, for the record I got
17 to -- I'm just making my record on it.

18 MR. SIMON: Your Honor, can I just clear the record
19 here?

20 THE COURT: Yes.

21 MR. SIMON: First of all, there was no wink-wink,
22 nod-nod after I stated that, so for you to suggest I was doing
23 that to the jury is improper. Number two, the exact question
24 I asked was: Either party, they don't get to know if either
25 party. And that is a jury instruction that I'm allowed to

1 give to the jury at the end of this case. I didn't do
2 anything improper, and that is an actual jury instruction
3 that's given. So I just followed the law in asking that same
4 exact question. Thank you, Judge.

5 THE COURT: Okay. So that --

6 MR. MICHALEK: Just rebuttal. My -- the Plaintiffs'
7 insurance coverage is not an issue. My party's insurance
8 coverage is an issue. That's where the jury gets the
9 impression, Oh, it's okay to award money because there is
10 insurance. And I'll leave it at that.

11 THE COURT: Okay. The objection you're making, it
12 came up, it was -- an objection was contemporaneously made by
13 the Defendant. It was brought up at a bench conference. At
14 the bench conference, Mr. Simon was instructed to kind of move
15 away from the topic of insurance, which he did.

16 He ended -- I think he modified the question to: You
17 can't consider anything outside in coming to a decision. And
18 I believe that Defense counsel has also been trying to kind of
19 hit home that point through your recent questions as far as
20 they can't consider anything outside what's presented in court
21 in order to come to their decision for the Plaintiff or the
22 Defendant. So at this point, I don't think there's a ground
23 for mistrial. I don't think the jury has been tainted.

24 The -- the issue of insurance has been kind of
25 brought up sua sponte by some of the jurors over the course of

1 the day, so in some ways it's necessary to focus them on the
2 fact that they can only consider what happens in this
3 courtroom. Thank you.

4 Anything else?

5 MR. MICHALEK: No, Your Honor.

6 THE COURT: Okay. See you in a second.

7 (The Court recessed at 2:55 p.m. until 3:11 p.m.)

8 (In the presence of the prospective jury panel.)

9 THE COURT: All right. Looks like our jury is back.
10 Counsel, if you would like to continue.

11 MR. BAIRD: Thank you, Your Honor.

12 Okay. We left off, we were speaking with Ms. Lanza,
13 and I think we -- we were just talking about whether you call
14 it 51 percent or just more evidence than going the other way,
15 that's the same. Was there anybody that had any questions or
16 concerns with that understanding of the Plaintiffs' burden of
17 proof?

18 Have any of you worked in medical billing? Yes.

19 PROSPECTIVE JUROR NO. 881: [Inaudible] hospital.

20 MR. BAIRD: Okay. So you have been involved in --

21 PROSPECTIVE JUROR NO. 881: [Inaudible.]

22 MR. BAIRD: Okay. You audit?

23 PROSPECTIVE JUROR NO. 881: Yes.

24 MR. BAIRD: Okay. Is anything you've seen or
25 experienced in your work at Healthsouth, is that going to

1 affect your ability to consider just the evidence that's
2 presented in this --

3 PROSPECTIVE JUROR NO. 881: As far as [inaudible]?

4 MR. BAIRD: If -- if medical billing and the way
5 things are charged, if that becomes an issue, you can -- you
6 can set your personal experiences aside?

7 PROSPECTIVE JUROR NO. 881: [Inaudible.]

8 MR. BAIRD: Mr. Simon has mentioned or implied that
9 surgery might be an issue in this case. The burden to prove
10 the need for surgery is not just satisfied by someone saying
11 "I need surgery." It's a province of doctors, of surgeons.

12 Do any of you have a problem waiting until surgeons
13 have offered their opinions in this case before deciding
14 whether a surgery is really needed in this case?

15 What's your badge number? Sorry.

16 PROSPECTIVE JUROR NO. 899: Yeah. Some times the
17 doctor can say something, but the patient feels something
18 different. And I have a brother-in-law that happen to him
19 that, you know, he have surgery on his spine and right now
20 after the surgery he wasn't doing [inaudible], but doctor
21 pushing him to do it. And after that he get worse.

22 MR. BAIRD: Okay.

23 PROSPECTIVE JUROR NO. 899: That's -- that's my
24 experience, stuff like that, you know, so I'm against that
25 because some times doctors pushing -- I'm not against them,

1 but they -- they do tell you to do some things that really you
2 don't feel it and you went to do it and it's worse.

3 MR. BAIRD: Okay. So doctors aren't perfect. Does
4 anybody disagree with that? They're people. They're humans.

5 Now, your experience with -- was it your
6 brother-in-law?

7 PROSPECTIVE JUROR NO. 899: Right.

8 MR. BAIRD: Is that going to make it hard for you to
9 take the evidence that is given by the doctors? Are you going
10 to be able to set your brother-in-law's experiences --

11 PROSPECTIVE JUROR NO. 899: Yeah, little bit, you
12 know -- yes, yeah. It's going to be a little affected because
13 I saw him before the surgery was better. [Inaudible] has
14 pain, but after the surgery even worse.

15 MR. BAIRD: Okay. If the testimony is that -- first
16 off, in your mind every time a doctor recommends surgery,
17 should the patient not do it?

18 PROSPECTIVE JUROR NO. 899: In some cases, not.

19 MR. BAIRD: It depends on the evidence, right?

20 PROSPECTIVE JUROR NO. 899: Yes.

21 MR. BAIRD: Every case is going to be a little bit
22 different too; is that a fair statement?

23 PROSPECTIVE JUROR NO. 899: Yes.

24 MR. BAIRD: So you're going to get some evidence in
25 this case about whether or not surgery is the right thing.

1 Can you wait until you get that evidence before you decide
2 whether it's the right thing to do or not?

3 PROSPECTIVE JUROR NO. 899: Yeah.

4 MR. BAIRD: Now, the Plaintiffs may claim they were
5 just following their doctors' orders. Is doing what a doctor
6 recommends proof by itself that the treatment was necessary in
7 your minds?

8 PROSPECTIVE JUROR NO. 888: No.

9 MR. BAIRD: Okay. And why is that?

10 PROSPECTIVE JUROR NO. 888: Because I was told I'd
11 never use my arm again, and I'm a firearms instructor. I was
12 told I could never walk again and I walk and I chase people
13 down and everything else. Doctors are not always right. Mind
14 over matter in a lot of areas. Don't let someone brainwash
15 you so easily.

16 MR. BAIRD: Okay. Is it safe to say that -- well,
17 let me ask -- let me ask this question: You're going to
18 listen to all the evidence, right? What the Plaintiffs say,
19 what other people say, [inaudible], demonstrate their
20 injuries, you're going to take all that evidence in; is that a
21 fair statement? Are you guys comfortable doing that?

22 Mr. Escalante, what's your badge number, please?

23 PROSPECTIVE JUROR NO. 874: 304.

24 MR. BAIRD: Mr. Escalante, are you comfortable -- do
25 you feel like you can understand complex medical terms as

1 they're spoken in English?

2 PROSPECTIVE JUROR NO. 874: Sometimes.

3 MR. BAIRD: Sometimes.

4 PROSPECTIVE JUROR NO. 874: Sometimes.

5 MR. BAIRD: Now, there's going to be a lot of
6 discussion in this case, we're going to be using medical terms
7 for procedures and -- and anatomical parts. Do you have any
8 concern that there is going to be testimony given by doctors
9 that you're not going to understand?

10 PROSPECTIVE JUROR NO. 874: Probably not hundred
11 percent.

12 MR. BAIRD: And if you don't understand 100 percent
13 of the evidence, do you think that might affect your ability
14 to -- to render a fair verdict in this case?

15 PROSPECTIVE JUROR NO. 874: Could be, because I can't
16 understand, but I be sure that I will try to do the best of
17 me, use of common sense, [inaudible] evidence, [inaudible] and
18 I do.

19 MR. BAIRD: Mr. Izquierdo?

20 PROSPECTIVE JUROR NO. 880: Yes.

21 MR. BAIRD: I'm sorry. I had a thought as you told
22 -- as you told everybody what -- what it was your job was, and
23 I just --

24 PROSPECTIVE JUROR NO. 880: Waiter.

25 MR. BAIRD: You're a waiter. Okay. And for how

1 long?

2 PROSPECTIVE JUROR NO. 880: Forty years.

3 MR. BAIRD: Forty years. You ever serve somebody
4 food that you didn't think they were going to like, but
5 because they asked for it, you gave it to them?

6 PROSPECTIVE JUROR NO. 880: Yes.

7 MR. BAIRD: Okay.

8 PROSPECTIVE JUROR NO. 880: And even though after I
9 told them they shouldn't have that, they still [inaudible].
10 Well, I told you you shouldn't have this.

11 MR. BAIRD: So even though --

12 PROSPECTIVE JUROR NO. 880: Going back about the
13 doctors.

14 MR. BAIRD: Yes.

15 PROSPECTIVE JUROR NO. 880: Giving you procedures
16 they know you don't need.

17 MR. BAIRD: Okay.

18 PROSPECTIVE JUROR NO. 880: I had an incident with my
19 dentist. I had -- I don't have a couple wisdom tooth in the
20 back, so he wanted to pull the molar on top.

21 MR. BAIRD: [Inaudible.]

22 PROSPECTIVE JUROR NO. 880: And I said, Why? He
23 said, Because you don't have anything at the bottom. And I
24 said, What's the difference? He said, Well, you have no use
25 for it. So then I said -- well, I said, Do you also use your

1 pinky? He goes, No. I said, You going to cut it off? He
2 says, No. I said, Well, have a nice day then. I left.

3 MR. BAIRD: Wow. I think you called it the right
4 way. Mr. Izquierdo, obviously that was not a great experience
5 for you.

6 PROSPECTIVE JUROR NO. 880: Not [inaudible].

7 MR. BAIRD: Now, luckily there's no dentists that
8 anybody's going to call to testify in this case. So are you
9 comfortable in understanding -- that's not going to change the
10 way you evaluate the case that we're going to present; is that
11 a fair statement?

12 PROSPECTIVE JUROR NO. 880: I can come back to I
13 don't know a lot of medical terms, but I think by asking
14 questions you can comprehend and decide what -- what is right
15 or wrong, I think.

16 MR. BAIRD: And both sides are going to work hard to
17 make sure that it's presented in a way that you can understand
18 it. I know yesterday you were indicating you -- you tend to
19 second guess yourself. And there will be plenty of times for
20 that afterwards, but when it comes -- when you're deciding the
21 verdict, can you just consider each piece of evidence on its
22 own merit and just -- and do what the Judge orders you to do?

23 PROSPECTIVE JUROR NO. 880: I try to do the best of
24 my ability.

25 MR. BAIRD: Okay. Very good. Thank you. Mr.

1 Mascella, I know that -- that you and Mr. Simon spoke a fair
2 amount yesterday. Are you comfortable with following the
3 Judge's orders and instructions in this case in spite of your
4 own personal beliefs?

5 PROSPECTIVE JUROR NO. 163: Yes.

6 MR. BAIRD: Okay. You understand that it's okay to
7 have personal beliefs as long as we don't let them make us
8 treat the parties unfairly as we're evaluating the evidence;
9 is that your understanding?

10 PROSPECTIVE JUROR NO. 163: Yes.

11 MR. BAIRD: Mr. Johnson, you -- you mentioned a fine
12 with respect to, you know, finding out who's at fault. And
13 you understand that that what the purpose of this is not to
14 punish anybody, correct?

15 PROSPECTIVE JUROR NO. 176: Yes.

16 MR. BAIRD: Is it your understanding it will be --
17 part of your job will be to determine whether or not the
18 Plaintiffs were injured, and if so, to what extent?

19 PROSPECTIVE JUROR NO. 176: Yes.

20 MR. BAIRD: I think that's all I have, Your Honor.
21 Thank you.

22 THE COURT: All right. Counsel want to approach?

23 (Bench conference.

24 THE COURT: Any challenges for cause? [Inaudible.]

25 MR. MICHALEK: What was established in Mr. Baird's

1 cross was that all of the jurors, despite their personal
2 [inaudible] with following the instructions [inaudible] need
3 to strike for cause [inaudible]. I don't think there is
4 [inaudible] strike anybody for cause. We both have five
5 peremptories, which we [inaudible], you know, so I don't think
6 there is. If they do, then you have to strike [inaudible],
7 would be [Inaudible], Taunti Dvorak. I -- I think this would
8 be better served by us just using our peremptories [inaudible]
9 as opposed to us striking for cause.

10 THE COURT: Okay.

11 MR. BAIRD: So Escalante is the one that we're
12 [inaudible] at this time just because he doesn't understand
13 English.

14 MR. MICHALEK: He -- medical terms as far as he's
15 unsure. And you want to be, you know, we want to be sure that
16 every juror understands 100 percent of the [inaudible]. You
17 know, we will do our best, but he's still non-committal.

18 THE COURT: Okay.

19 MR. SIMON: First of all, every single juror is not
20 going to understand the medical terms and he's -- as you said
21 yesterday, he's been here for a long time working in our
22 industry and our hotels. He's responded to every single one
23 of his questions. He understands. It's up to the lawyers to
24 explain what these medical terms mean. So if it's -- their
25 only basis is to say he's not going to understand complex

1 medical terms, nobody does. Lawyers don't. Doctors don't.
2 So that's -- he did not say anything that would justify cause
3 in our mind.

4 MR. BAIRD: When you compare his demeanor and the way
5 he responds to [inaudible], I mean, there's a -- there's a
6 demonstrable difference. And Mr. Simon said -- he said
7 specifically [inaudible] English [inaudible]. I think he
8 demonstrates [inaudible] understanding so [inaudible].

9 MR. SIMON: He responded to every single one of your
10 questions without hesitation. He understands the English
11 language.

12 MR. MICHALEK: He -- he does, but he said "somewhat".
13 He goes, no, I'm not going to be able to say I understand
14 them. It's his doubt that we're raising, so [inaudible] is he
15 saying I'm not sure I can understand.

16 THE COURT: Okay. I don't think that there's -- I'm
17 not going to -- as far as the Plaintiffs, I'm not going to
18 allow any of those for cause other than the ones we've already
19 done. We can make a record at break. Enough keep us going
20 [inaudible], as well.

21 MR. BAIRD: Okay.

22 THE COURT: So at this point, you're going to pass
23 for cause?

24 MR. BAIRD: Yes.

25 MR. MICHALEK: Yes.

1 THE COURT: And we'll make a record.

2 MR. BAIRD: Great.

3 (End of bench conference.)

4 THE COURT: Thank you. All right. Ladies and
5 gentlemen -- and for the record, both sides have passed for
6 cause at this point subject to the objection that was made at
7 the bench.

8 At this time, ladies and gentlemen of the jury, we're
9 going to go ahead and select a jury. What you're going to see
10 over probably the next several minutes is you'll see the
11 attorneys passing a sheet of paper back and forth. And what
12 they're going to do is they're going to put names on that
13 sheet of paper. Those are individuals who will be excused as
14 jurors in this case.

15 If your name is on the sheet of paper and you are
16 excused as jurors, please don't take any offense to it. It
17 does not mean you're a bad person. It doesn't mean you're
18 even a bad juror. It just means that you're perhaps not
19 suited to be a juror in this particular case.

20 So feel free to make yourself comfortable. Please
21 stay in your seats. If you want to talk to your neighbor, if
22 you want to -- I don't know -- stand up and stretch, please,
23 that's -- that's fine. The process should be over -- I don't
24 know -- in a few minutes. Thank you very much for your
25 patience.

1 And, Ms. Lanza, did you raise your hand or are you
2 just stretching? Okay.

3 (Pause in proceedings.)

4 THE COURT: Ladies and gentlemen of the jury, if your
5 name is called, please stand up, move to the back of the room;
6 however, don't leave at this time.

7 THE CLERK: Badge No. 892, Richard Spiher. Badge No.
8 142, Maya Richardson. Badge No. 163, Steve Mascella. Badge
9 No. 865, Taunti Dvorak. Badge No. 867, Joy Banzon. Badge No.
10 897, William Mitchell. Badge No. 874, Oscar Escalante. Badge
11 No. 881, Russell Reeder. Badge No. 899, Jose Cosenza. Badge
12 No. 887, Virginia Ramos. Badge No. 888, Mary Norman.

13 THE COURT: All right. Counsel for the Plaintiff,
14 Counsel for the Defendant, is this the jury you selected?

15 MR. SIMON: Yes, Your Honor.

16 MR. BAIRD: Yes, Your Honor.

17 THE COURT: All right. Ladies and gentlemen of the
18 jury, thank you so much for your time. Please go back
19 downstairs to Jury Services before you leave the courthouse.
20 Have a wonderful day.

21 (Pause in proceedings.)

22 THE COURT: All right. Ladies and gentlemen of the
23 jury, as you've probably figured out by this point you've been
24 selected as the jurors in this case. I'm going to ask you to
25 please stand, raise your right hand to be sworn in.

1 (The Clerk administered the oath.)

2 THE COURT: Please sit down. Make yourself
3 comfortable. All right. Ladies and gentlemen of the jury,
4 this is what's going to happen. We're going to give you a
5 schedule. Jason will give you a schedule at the end of the
6 day.

7 Not every single day is going to be a full day. Some
8 days are going to be half days and we'll give you -- try to
9 give you as much -- many specifics as possible so you guys can
10 make arrangements with childcare, your employer, whatever else
11 you need. If you do need a letter for your employer, let us
12 know so we can get you that letter.

13 What's going to happen right now is I'm going to read
14 you some instructions. These instructions are intended to
15 guide you during the course of the trial. When we're finished
16 -- I don't know if we'll have time today or if the Plaintiffs
17 have decided whether or not they're going to do openings
18 today.

19 What's going to happen next is the attorneys will
20 have a chance to do opening. The Plaintiff will present their
21 opening and the Defense counsel will have an opportunity if
22 they decide to do an opening at this time.

23 Counsel, had you anticipated doing openings today?

24 MR. SIMON: Only if we can get both openings in.

25 THE COURT: How long do you think you're going to be

1 for each of them?

2 MR. SIMON: I may be forty minutes.

3 THE COURT: Yeah. How long will you be?

4 MR. BAIRD: I can -- twenty or thirty, I think. I
5 don't know.

6 THE COURT: Okay. It will take me a few minutes to
7 read these instructions. We're at 20 till 4:00 right now.
8 Let's see where we are after the instructions are read, all
9 right? Thank you.

10 Ladies and gentlemen of the jury, you're admonished
11 that no juror may declare to any fellow juror any fact
12 relating to this case of his own knowledge and if any juror
13 discovers during the trial or after the jury has retired that
14 he or any other juror has personal knowledge of any fact or
15 controversy in the case, he shall disclose the situation to me
16 in the absence of the other jurors.

17 This means that if you learn during the course of the
18 trial that you're acquainted with the facts of the case or the
19 witnesses and you've not previously told us of that
20 relationship, you must declare that fact to me.

21 The way you communicate with the Court throughout the
22 trial is through Jason, the marshal. Jason or another marshal
23 in his place will be present at all times when we're in
24 session. During the course of the trial the attorneys for
25 both sides, court personnel, other than the marshal, are not

1 permitted to talk to you.

2 It's not that they are being antisocial. It is
3 simply that they are all bound by ethics and the law not to
4 speak to you because doing so may contaminate your verdict.
5 We are not even allowed to say hello if we should pass you in
6 the hall or see you in the elevator.

7 If you should recognize a witness or be familiar with
8 the facts of the case when the witness is testifying, please
9 make a note to yourself that you recognize the witness and how
10 you recognize that witness. At the next break in the trial,
11 please give that note to the marshal and he will get that note
12 to the Court.

13 Sometimes, and it's not uncommon, people don't
14 recognize or remember names of individuals who may be called
15 in this case, but once they see them on the witness stand,
16 they recognize their face. If that happens in this case,
17 please, again, just write down -- write it down, give it to
18 the marshal, and let the Court know.

19 You're also going to be admonished that you're not to
20 visit the scene of any of the acts or occurrences mentioned
21 during the trial unless specifically directed to do so by the
22 Court. The reason that we do not want you going out to any
23 particular scene or location referenced during the trial is
24 not because we don't want you to know everything there is
25 about the location, but simply that there's no guarantee the

1 intersection, the street, the apartment complex, the
2 restaurant, whatever, looks the same today as it did at the
3 time of the accident.

4 Usually photos are taken at the time of an incident
5 or shortly thereafter. And we will use those photographs
6 during the trial rather than going to the site to look at it
7 firsthand. The parties may sometimes present objections to
8 some of the testimony or other evidence.

9 At times I may sustain those objections or direct you
10 to disregard certain testimony or exhibits. You must not
11 consider any evidence to which an objection has been sustained
12 or which I have instructed you to disregard. It is the duty
13 of a lawyer to object to evidence which he believes may not be
14 properly offered and you should not be prejudiced in any way
15 against a lawyer who makes objections on behalf of the party
16 which he represents.

17 I may also find it necessary to admonish the lawyers.
18 If I do, you should not show prejudice to the lawyer or his
19 clients because I found it necessary to admonish him.

20 Throughout the trial, if you cannot hear a question
21 asked by the attorney or the answer given by a witness, please
22 raise your hand as an indication. If I don't see your hand
23 up, please say "excuse me, I didn't hear that," and we'll ask
24 that question be repeated or the answer repeated.

25 If you wish, you may take notes to help you remember

1 what any witness has said. If you do take notes, please keep
2 those notes to yourself until you and your fellow jurors go to
3 the jury room to decide this case.

4 Do not let note taking distract you so that while
5 you're writing down the answers to one question, you don't
6 hear the answers to the other questions. You should rely upon
7 your own memory of what was said and not be overly influenced
8 by the notes of other jurors when you go back to deliberate.

9 The case is going to proceed in the following order.
10 First, the Plaintiff has an opportunity to make an opening
11 statement outlining the case and suggesting to you what it
12 believes the evidence will be. The Defendant may then make
13 their opening statement or they can reserve their right to
14 make an opening statement until after the Plaintiff has put on
15 his case.

16 Opening statements are a synopsis, an overview of
17 what the attorney believes the evidence will be. Opening
18 statements of the attorneys are not evidence. After all, the
19 attorneys are not the witnesses to any of the facts in
20 controversy in the case.

21 The Plaintiff will then introduce evidence and call
22 witnesses. At the conclusion of Plaintiff's case, the Defense
23 may then call any additional witnesses and submit additional
24 evidence if it wishes to do so. After the Defense rests, the
25 Plaintiff has a right to call rebuttal witnesses.

1 After all the evidence is in, I'll instruct you on
2 the law that applies to this case. You must not be concerned
3 with the wisdom of any rule of law stated in these pretrial
4 instructions or in the instructions given to you at the end of
5 the trial.

6 Regardless of any opinion you may have as to what the
7 law ought to be, it would be a violation of your oath to base
8 a verdict upon any other view of the law than that given to
9 you by the Court. After the instructions on the law are read
10 to you, each party has the opportunity to argue orally in
11 support of their case. This is called closing argument or
12 summation.

13 What the attorneys say in closing argument is not
14 evidence. Their arguments are designed to summarize and
15 interpret the evidence for you and show you how the evidence
16 and the law relate to one another. Since the Plaintiff has
17 the burden of proof, the Plaintiff gets to argue to you twice
18 at the end of the trial.

19 Plaintiff will argue, the Defense will argue, and
20 then the Plaintiff has the opportunity to rebut the
21 Defendant's argument. After the attorneys have presented
22 their arguments, you will retire to select a foreperson to
23 deliberate and arrive at your verdict.

24 Faithful performance by you of your duties is vital
25 to the administration of justice. It is your duty to

1 determine the facts and determine them from the evidence and
2 the reasonable inferences arising from such evidence, and in
3 doing so, you must not indulge in guesswork or speculation.

4 The evidence which you're to consider consists of the
5 testimony of witnesses and exhibits admitted into evidence.
6 The term "witness" means anyone who testifies in person or by
7 way of a deposition and it may include the parties to the
8 lawsuit.

9 A deposition is simply an examination of the witness
10 taken at a prior date under oath with the attorneys present
11 where the testimony is taken down in written format and those
12 written questions and answers will be read to you during the
13 trial.

14 Admission of evidence in court is governed by rules
15 of law. From time to time it may be the duty of the attorneys
16 to make objections and my duty as the Judge to rule on those
17 objections and decide whether a certain question may be
18 answered and whether certain evidence may be admitted.

19 You must not concern yourself with objections made by
20 the attorneys or with the Court's reasons for its rulings.
21 You must not consider testimony or exhibits to which an
22 objection has been sustained or which has been ordered
23 stricken. Further, you must not consider anything which you
24 may have seen or heard when the Court is not in session, even
25 if what you see or hear is said or done by one of the parties

1 or by one of the witnesses.

2 While you're here in the courtroom -- I'm sorry -- in
3 the courthouse, please always wear the badge that Jason, the
4 marshal, gave to you which will identify you as a juror. When
5 you come in the morning and during breaks during the daytime
6 or during noon recesses, no matter where you are in the
7 courthouse, please don't make conversations with people unless
8 they have a badge on that says they're a juror.

9 In every case there's two types of evidence. There's
10 direct and circumstantial evidence. Direct evidence is
11 testimony by a witness about what the witness personally saw,
12 heard, or did. Circumstantial evidence is testimony or
13 exhibits which are proof of a particular fact from which if
14 that fact is proven, you can infer the existence of a
15 [inaudible].

16 For example, if you are up late at night and you see
17 the rain fall, it's coming -- you know, you see the rain fall
18 and there's water everywhere. That's direct evidence because
19 you know it rained because it's something you saw, heard or
20 did.

21 In contrast, circumstantial evidence would be you
22 wake up in the morning, you see that there's water all over
23 the ground. There's water dripping from the leaves. That's
24 circumstantial evidence. You can find from those facts that
25 it rained during the course of the night, even though you did

1 not personally see it rain.

2 You may consider both direct and circumstantial
3 evidence in deciding this case. The law permits you to give
4 equal weight to both types of evidence, but it is for you to
5 decide how much weight to give to any particular piece of
6 evidence.

7 Opening statements and closing arguments are intended
8 to help you in understanding the evidence and in applying the
9 law, but please understand that what the attorneys tell you is
10 not evidence. They are not witnesses. They have no firsthand
11 information and they're -- and therefore what they tell you is
12 not evidence.

13 I may during the trial take notes of what the
14 witnesses are saying. Do not make any inference from this
15 action on my part because I'm required to be prepared for
16 legal arguments of the attorneys during the trial. For that
17 reason, I sometimes take extensive notes.

18 Again, let me remind you that until this case is
19 submitted to you, do not talk to each other about it or about
20 anyone who has anything to do with it until the end of the
21 case when you go to the jury room to decide upon your verdict.

22 Do not talk with anyone else about this case or about
23 anyone who has anything to do with it until the trial is ended
24 and you've been discharged as jurors. Anyone else includes
25 members of your family and your friends. Those of you who are

1 employed, you need to tell your boss and let them know you're
2 in a trial; however, again, you cannot give any details about
3 the trial.

4 Do not let anyone talk to you about the case or about
5 anyone who has anything to do with it. If someone should try
6 to talk to you about this case while you're serving as a
7 juror, it's very important that you report that to Jason
8 immediately who will then report it to the Court.

9 Do not read any news stories or articles or listen to
10 any radio or television or Internet reports about the case or
11 about anyone who has anything to do with it. Do not do any
12 research or make any investigation about the case on your own.

13 All right. It's very important nowadays with the
14 Internet that you don't do any type of research on this case.
15 You don't Google the parties. You don't Google any of the
16 terms you may hear during the course of the case. Everything
17 that you need to know in order to come to your decision will
18 come from what you hear inside the walls of this courtroom.

19 The other thing you cannot do with social media. You
20 can obviously say on social media that you're involved in a
21 trial; however, you cannot give any other details, thoughts,
22 opinions, et cetera, about this trial. Do not make up your
23 mind about what the verdict should be until after you've gone
24 to the jury room to decide this case and you and your fellow
25 jurors have discussed the evidence.

1 It is important throughout the trial to keep an open
2 mind. At the end of the trial you have to make your decision
3 based upon what you recall of the evidence. You will not have
4 a written transcript to consult. Even though we have a court
5 recorder who takes down the testimony, it's not typed up in a
6 readable format and is very difficult and time consuming for
7 the recorder to read back testimony; therefore, I urge you to
8 pay close attention to the testimony as it's given.

9 Counsel, are we going to have time before 5:00 to do
10 both openings?

11 MR. SIMON: I think we should, right.

12 MR. BAIRD: Could we approach, Your Honor?

13 THE COURT: Of course.

14 (Bench conference.)

15 MR. MICHALEK: [Inaudible.]

16 THE COURT: You guys haven't agreed upon with
17 yourself.

18 MR. BAIRD: A lot of things -- don't know if any
19 [inaudible].

20 THE COURT: Are they?

21 MR. SIMON: Like what?

22 MR. BAIRD: The pictures are in. We know that.
23 [Inaudible]refer to [inaudible].

24 MR. SIMON: No.

25 MR. BAIRD: [Inaudible.]

1 MR. SIMON: No.

2 MR. BAIRD: [Inaudible.]

3 MR. SIMON: Yes.

4 MR. MICHALEK: We would have an objection because
5 [inaudible] now [inaudible] after opening.

6 THE COURT: Well, is it going to affect openings?

7 MR. BAIRD: Well, we're going to object and go to
8 sidebar, I guess.

9 THE COURT: I don't want to do it in the middle of
10 openings.

11 MR. MICHALEK: Okay. So you want to preserve --

12 THE COURT: You want to just let them go for the day
13 and come back fresh tomorrow? I -- I cannot stay beyond 5:00.

14 MR. BAIRD: We have to both go, but I'm comfortable
15 trying [inaudible].

16 THE COURT: Going tomorrow if Mr. Simon has to leave.

17 MR. SIMON: I don't understand what the issue is as
18 far as future surgery?

19 MR. MICHALEK: We have an issue with what evidence
20 [inaudible] objection damages and future surgery, but there is
21 a motion [inaudible] in our objection. And we don't want any
22 exhibits that would reference such items because we have the
23 objection.

24 MR. SIMON: I'm not referring to any exhibits and the
25 Judge already ruled that the future surgery and the doctors

1 can testify to the cost of that. She already ruled in that on
2 a motion in limine. This has all been heard.

3 MR. MICHALEK: I understand, but we have to preserve
4 our objection for trial, which is what we're doing, and I
5 don't want to in counsel's opening. So that's fine. We'll go
6 through openings --

7 THE COURT: And then you'll make an objection after?

8 MR. MICHALEK: Make objections either tonight, in the
9 morning?

10 THE COURT: Okay. I mean, when you make your
11 objection, obviously that's the standard I would use. So you
12 can make -- I mean, how do you want to do it? We can either
13 let the jury go today, we can resolve it now, the openings
14 will have to be tomorrow. If you're going to make an
15 objection, you're going to need to make your objection
16 probably contemporaneously.

17 MR. MICHALEK: Right.

18 THE COURT: And we can elaborate upon it at the
19 break.

20 MR. MICHALEK: That would be fine. That would put
21 [inaudible] come up with an objection and then collaborate
22 [inaudible]. That's fine.

23 THE COURT: Is that agreeable to you or you just want
24 to --

25 MR. SIMON: I'd say let's just get going. This is an

1 issue that's already been raised and decided by you. If he
2 wants to make the objection now --

3 THE COURT: Yeah, because it affects the standard
4 [inaudible].

5 MR. SIMON: Right, and just -- I mean, I'll stipulate
6 that he made an objection during opening.

7 THE COURT: Make the objection contemporaneously,
8 though.

9 MR. BAIRD: Okay. I will stand up and make my
10 objection, Judge.

11 THE COURT: Okay.

12 MR. BAIRD: Okay.

13 (End of bench conference.)

14 THE COURT: All right. Ladies and gentlemen, at this
15 time, Mr. Simon is going to -- or Mr. Simon, I don't know
16 which of you is going to do it, but please present your
17 opening.

18 MR. SIMON: Thank you, Your Honor. May I proceed,
19 Your Honor?

20 THE COURT: You may.

21 MR. SIMON: Thank you.

22 PLAINTIFFS' OPENING STATEMENT

23 MR. SIMON: Good afternoon. Congratulations. You
24 are the jury. This case involves Christian Cervantes and
25 Maria Abarca versus Miriam Ortega. Those are the parties.

1 That's who you've been selected to decide this case.

2 Let me tell you a little story. There's a young
3 couple going out for a fun night out. They're going out to
4 the Texas Station to go watch a fight, pay-per view fight.
5 They cash their -- their paycheck and they're on their way to
6 have a nice night out.

7 Suddenly and without any warning, a car comes out of
8 nowhere right in front of them and they smash right into the
9 side of it. From that point on, their life has changed
10 forever. The person who made a left turn needlessly
11 endangered everybody on the roadway that night.

12 As she came across, there was no time to avoid the
13 accident. She deflected off of that car and went into even
14 another car. This is not a little light tap or bumper
15 situation in a parking lot. This is a serious accident that
16 resulted in serious harm.

17 The ambulance comes. The police come. The fire
18 department comes. They all investigate. The passenger inside
19 the car is crying, scared. The ambulance takes her out of the
20 car, puts her on a backboard. That's right.

21 (Pause in proceedings.)

22 MR. SIMON: At the scene of the accident, the fire
23 department comes. The police comes. The ambulance comes.
24 They take the passenger out of the front seat. Upon impact
25 their body was thrown forwards and backwards and locked up by

1 the seatbelt. They were scared. They were crying. She's
2 taken out of the car, put on a backboard, put a cervical
3 collar on, and transported to UMC trauma.

4 The driver of the vehicle, he was scared. He was
5 scared for his wife in the passenger seat. He talked with the
6 police. He drove his car home and then met his wife at the
7 hospital. The young couple who all they wanted was a fun
8 night out, their life changed forever at that point.

9 That young couple is my clients, Christian and Maria,
10 and that is why we're here. This is why we're here. That is
11 their vehicle. After this accident, their car was totaled.
12 The Defendant -- there's a picture of the front of their car
13 after impacting the side of the other car.

14 The Defendant's car, which is Ms. Ortega's vehicle,
15 and she was the one who pulled needlessly in front of them
16 causing the impact with no time to react, that's her vehicle.
17 And her vehicle was towed from the scene and also totaled.

18 This was a serious accident that resulted in serious
19 injuries, and that's what the evidence will show in this case.
20 I think you heard a little bit in voir dire. She is not going
21 to tell you it's her fault because it would be silly if she
22 tried to come before you at this stage and say it's not
23 because the evidence is clear.

24 When disputes can't get resolved, what happens is
25 people have to file a lawsuit. That's the only way it can get

1 resolved. And if the parties can't come together and resolve
2 it, we have trials and we have juries just like you to help
3 decide the case.

4 What's fair and reasonable based on the events that
5 happened? There's no dispute this accident happened. There's
6 no dispute that it was serious. And there's not going to be
7 any dispute that she is at fault.

8 So this lawsuit was filed alleging that she was at
9 fault and they claim serious injuries. This was filed on
10 August 20th of 2012. Yes, it takes a long time to come
11 through this judicial process. And it's not easy coming
12 through this judicial process. It's not easy being in their
13 position. They don't want to be here and in this position.
14 This is not easy on anyone.

15 So they filed a lawsuit. And what they alleged is
16 that on November 12, 2011, they were traveling in their white
17 Impala heading westbound on Lake Mead, suddenly and without
18 any warning, Ms. Pizarro-Ortega made an improper left turn
19 causing a violent collision with the Plaintiffs' vehicle.

20 Seems pretty obvious from the pictures and what
21 happened. Ms. Ortega knew what she did. She made an improper
22 left turn. And as a result of her acts, the Plaintiffs
23 suffered severe injuries, including injuries to their neck,
24 back, heads and shoulder.

25 She knows they were injured at the scene because they

1 left in an ambulance; however, her lawyers filed an answer for
2 her because that's what's required. Plaintiff files a
3 complaint. The lawyers file an answer.

4 MR. BAIRD: Objection, Your Honor. May we approach?

5 THE COURT: Hold on. Yes.

6 (Bench conference.)

7 MR. BAIRD: This is improper. [Inaudible.] There's
8 nothing prejudice -- there's nothing wrong with defending
9 yourself in a lawsuit. He's trying to prejudice my client,
10 make her look bad [inaudible] defending herself [inaudible]
11 answer to their [inaudible].

12 MR. SIMON: These are the pleadings in the case. I
13 can use them however I want at trial. These are the pleadings
14 that they filed.

15 MR. BAIRD: He's arguing admitted facts, which is
16 pure prejudice.

17 MR. SIMON: They're not --

18 MR. BAIRD: [Inaudible.]

19 MR. SIMON: They're not admitted facts.

20 THE COURT: I don't want to sound like they're
21 avoiding responsibility by filing -- by answering the
22 complaint.

23 MR. SIMON: I'm just pointing out what they filed in
24 a -- in a pleading. That's all I'm doing. I could have the
25 clerk read the pleadings if I wanted to.

1 THE COURT: Yeah, you can.

2 MR. BAIRD: [Inaudible.]

3 MR. SIMON: So I'm just -- I'm just showing them the
4 pleadings and how this lawsuit starts.

5 THE COURT: You can like that, but don't argue
6 they're avoiding liability.

7 MR. SIMON: Okay.

8 THE COURT: Avoiding responsibility because they have
9 a right to answer --

10 MR. SIMON: Of course they do.

11 THE COURT: -- and not to settle.

12 MR. SIMON: Of course they do.

13 THE COURT: Okay.

14 (End of bench conference.)

15 MR. SIMON: So in their answer that they filed on
16 12/31/2012 -- Ms. Ortega's represented by this law firm. They
17 filed a response to the lawsuit. And what they say is that to
18 the extent they contain allegations of fact, Defendants
19 neither admit or deny the allegations because they don't have
20 sufficient information to form a belief.

21 I submit to you that they do have sufficient
22 information to form a belief and this is something that was
23 just filed and at this time not admitting to what happened.
24 Realizing how silly that would appear in front of people like
25 you --

1 MR. BAIRD: Objection, Your Honor. May we approach?

2 THE COURT: Yes.

3 MR. SIMON: -- they file --

4 (Bench conference.)

5 MR. BAIRD: To call my client silly for what's in a
6 pleading [inaudible] trying to -- defame is not the right
7 word. He's trying to [inaudible] the jury that my client
8 simply answered with what information she had at that time.
9 This is totally inappropriate. He can say she did not
10 [inaudible]. "Silly" is inappropriate.

11 MR. SIMON: Judge, just because they want to come in
12 now and -- and concede fault, they didn't do that in the
13 initial pleading. And he filed an amended answer that --
14 without leave of court -- that's not even a legitimate answer
15 that ever got approved. He just decided to file it. Those
16 are inconsistent pleadings that I can argue goes to their
17 credibility. It's their defense, just like any other pleading
18 in the case.

19 MR. BAIRD: [Inaudible] credibility.

20 MR. SIMON: Of course they can.

21 MR. BAIRD: You can't -- you can't impugn someone.
22 You can't say, how dare they, how dare they plead in their own
23 defense. This is not how you do it.

24 MR. SIMON: That's what the evidence is going to
25 show.

1 THE COURT: Okay. I think there's a distinction.

2 MR. BAIRD: [Inaudible.]

3 THE COURT: I think -- I think it's fair game to
4 point out distinctions. Obviously you could do that too,
5 okay? I don't think -- I don't really care for the use of the
6 word "silly." And there's something else you brought up.
7 There's another point you made, and I'm sorry, I just lost it.

8 MR. SIMON: It's okay. I lose -- I lose my points
9 now and then.

10 THE COURT: I'm sorry. I was just thinking on it
11 again. My biggest concern is I don't want to go into the fact
12 they're trying to avoid responsibility for this accident.

13 MR. SIMON: Well, no, but --

14 MR. BAIRD: Using those words, Your Honor, we're
15 arguing. We're not talking about evidence [inaudible].

16 MR. SIMON: I'm showing them the evidence. The
17 pleadings are the evidence in this case. They are. They are.
18 That's what started the lawsuit.

19 THE COURT: Well, the pleadings can be read into
20 evidence, if you guys wish.

21 MR. BAIRD: They can be read. They can be read, but
22 he's commenting on them. This isn't evidence they're going to
23 receive. This is just him trying to [inaudible] --

24 MR. SIMON: Judge, this is opening statements.

25 MR. BAIRD: It's not supposed to be argument.

1 MR. SIMON: It's not argument. This is what the
2 evidence is going to show them. I'm showing them what it is.

3 THE COURT: Okay. See, if you're showing them the
4 evidence is going to show they went from disputing liability
5 to admitting liability, right?

6 MR. SIMON: Right.

7 THE COURT: And that's it.

8 MR. SIMON: Right.

9 THE COURT: And that's it.

10 MR. SIMON: Right.

11 MR. BAIRD: No name calling. No saying they're silly
12 or it's foolish.

13 MR. SIMON: Judge, if he's going to object to every
14 word I use throughout the whole trial, this is going to be a
15 long time. This is opening statements. This is --

16 THE COURT: I understand that. I think you
17 understand --

18 MR. SIMON: -- I know. I believe the evidence is
19 going to show that their position is silly and that's what the
20 position is going to be. It's just opening statements.

21 MR. BAIRD: [Inaudible.]

22 MR. SIMON: I won't use the word "silly" if you don't
23 want me to use the word "silly".

24 THE COURT: Okay.

25 MR. SIMON: Okay.

1 (End of bench conference.)

2 MR. SIMON: Realizing that their position initially
3 is unfounded, they then file an amendment to the initial
4 response. This was filed on January 24th changing their
5 position. Now they decide that they want to admit to who
6 caused the accident.

7 To the extent they contain allegations of fact, Ms.
8 Ortega admits breach of duty, liability for negligence, and
9 neither admits or denies the remaining allegations contained
10 in the complaint. So now they've decided to admit a portion
11 of the allegations, but still want to continue to fight the
12 rest. The evidence is going to show that they have no basis
13 to continue to fight the rest of the case either and that the
14 sole purpose is going to be to save money.

15 Now, I ask -- I told you about Christian Cervantes.
16 He's a gentleman of 27 years of age. These are young people.
17 He works full time at Pioneer Gypsum Mine. For seven years he
18 works there. He's a machine operator where he operates a
19 forklift.

20 He's been doing that before the accident without any
21 issues. He continues to work afterwards. However, you will
22 hear that he does have issues, but he's never stopped working
23 because he couldn't. What he enjoyed doing before the
24 accident is playing soccer, going to the movies, and walks.

25 He is married to Maria Abarca. She is 29 years of

1 age. And so what she did is she's an aspiring mom and you're
2 going to learn that she's been trying to get pregnant for a
3 while. She is married and desperately they want to have a
4 family and at the time of this accident she was actually
5 getting injections for fertility.

6 And when she was in this accident, when the seatbelt
7 locked up and caused abdominal injuries, she was scared.
8 We're not claiming that she can't have kids because of this
9 accident, but that was an issue that was going through her
10 mind at the time.

11 She does do housekeeping and cleans houses. And she
12 also enjoys walks with her husband, among other things that
13 you will learn throughout the course of the trial. They've
14 dated since 2008 and they were married after this accident.
15 So despite being in the accident together and having these
16 injuries, they still nurture their relationship and went onto
17 get married.

18 November 12, 2011, is when this accident occurred.
19 Facts about Christian before: He was in good health. He was
20 young. He was enjoying life. He had no prior injuries to his
21 neck and back. He was not treating with any doctor. He did
22 not have a disc injury before this accident. Nobody gave him
23 an MRI. Nobody recommended injections. Nobody recommended
24 surgery. He was in good health as a 27-year-old.

25 After this accident, when he went to the hospital to

1 check on his wife, he started feeling nauseous and started
2 vomiting at the hospital. He was then seen by the doctors at
3 the hospital for those complaints. Within three days, he
4 started developing neck pain and low back pain. His neck pain
5 has gone away. His low back pain has not.

6 He underwent a short course of chiropractic treatment
7 and his neck pain went away. And his pain, what we call waxes
8 and wanes. It comes and goes. It's some times more severe
9 than others. And some times it's bearable, and some times
10 it's not; but this is something that's never gone away since
11 the accident. It is still an ongoing lingering effect of the
12 accident.

13 Christian's injuries for the low back is what we
14 describe as multiple components of the low back. On the
15 outside we have muscles and ligaments. And when you're in an
16 accident and your body is thrown around, those muscles and
17 ligaments are torn and stretched. Sometimes people refer to
18 that as soft tissue injuries.

19 But the same forces that cause those injuries, also
20 cause ripping and tearing sometimes in a disc, and that is an
21 underlying spinal condition that happens at the same time.
22 Christian had both of these injuries. A lumbar strain, and he
23 treated with a chiropractor for that.

24 But when that pain didn't ultimately go away, the
25 doctors started looking a little bit deeper. And what they

1 found is that he has a disc bulge and that is causing his low
2 back and leg pain. They've even identified the exact level of
3 this injury, which is the L5-S1 level. They also identified a
4 little bit at the L4-5 level.

5 And they know this because it's proven by several
6 different tools they use to identify these injuries. An MRI
7 is one such tool and diagnostic test. The MRI's don't lie.
8 Also, this is proven by what's called a discogram where pain
9 management specialists can stick a needle in your spine and
10 inject dye into your disc space and they test the integrity of
11 your disc.

12 And if your disc can't hold up to the dye that's
13 being injected, they know that that disc is now bad and torn
14 and injured. The only possible way this disc can now be
15 injured is from the car accident because there's no other
16 cause.

17 You'll learn that Christian also saw Dr. Coppel,
18 who's another pain management specialist. I'll go into him a
19 little bit later. But he also did injections and he did
20 diagnostic injections into the right area that relieved some
21 of the pain for a short time and that helps the doctors learn
22 that what's causing the pain is that specific disc. Both of
23 these doctors learned that.

24 There is really no question that their injuries
25 occurred from this accident. The other thing is that once the

1 disc is torn, it doesn't really get better. And as people age
2 over time, it worsens when they do their normal daily
3 activities, their normal work duties, it can worsen.

4 Maria was also in good health. She had no prior
5 injury to her neck or back. She was not treating with anyone
6 and she did not have a disc injury before this collision;
7 however, after she had immediate pain in her neck, abdomen and
8 back pain.

9 She's taken by ambulance to UMC trauma noting these
10 complaints. Her pain also waxes and wanes. The only
11 conclusion that you will reach at the end of this case is that
12 Christian and Maria both sustained permanent injuries and now
13 have to suffer with this for the remainder of their life.

14 So how these injuries happened is that when you're in
15 a violent collision where you are hitting something suddenly
16 and without any warning at 35 miles per hour and then you
17 stop, your whole body is being thrown forward and backwards
18 being caught by the seatbelt.

19 They were both wearing their seatbelt and their body
20 was thrown forwards and backwards. This causes the stretching
21 of the spine and the ripping of the discs. And you'll hear
22 from the doctors who will tell you all about that. As I
23 mentioned before, this type of force tears the muscles,
24 ligaments and the disc, all at one time.

25 You will also see on the MRI as presented where there

1 are findings that support and are consistent with the cause of
2 the pain that they're reporting. Here's a normal disc where
3 you have the nucleus of the disc that's filled with fluid,
4 kind of like a jelly donut. And when that disc is ripped, the
5 fluid starts seeping out like a jelly donut.

6 And the fluid inside has chemical -- chemicals in it
7 that irritate the nerves and the spine and over years that
8 chemical gets worse, and that's the reason that you have to
9 have surgery is you have to take out the bad disc that's
10 leaking and put in a bone graft. Dr. Coppel will be here to
11 explain that process. Here are the type of disc disruptions
12 that you can have. So here you see the fluids leaking out.

13 Christian went to UMC trauma the day of complaining
14 of nausea and headaches. He did not complain of neck or back
15 pain at UMC. His adrenaline is still going and he is
16 basically throwing up after the accident. UMC trauma, all
17 they really are concerned about is making sure that you don't
18 need emergency surgery, you're not paralyzed, you can actually
19 walk out of the hospital.

20 They instruct you to follow up with a primary care
21 physician because they know that these injuries can get worse
22 in the next few days, and that's exactly what happened. He
23 went to Dr. Adair, who you'll hear from tomorrow. She's a
24 chiropractor who specializes in these type of car injuries.
25 He complained of headache, neck pain and low back.

1 In addition to Dr. Adair, he was also treating with
2 Dr. Koka's group. Dr. Koka is a doctor who oversees the
3 chiropractic treatment and he also administers pain
4 medications to help them through this process. He was the
5 primary care physician initially. You will also hear from him
6 describing the injuries from the accident.

7 Dr. Coppel, he's a pain management specialist from
8 John Hopkins who operates his own surgery center and performs
9 injections. So when a patient doesn't respond with
10 chiropractic care, they send them to Dr. Coppel. He's the
11 specialist. Dr. Coppel did injections in the lumbar spine
12 which gave temporary relief, and that tells these doctors that
13 this is a permanent problem that can't be fixed with just
14 injections.

15 Dr. Lanzkowsky, another board certified pain
16 management doctor. He later saw Dr. -- or Christian after Dr.
17 Coppel had released him, and he also specializes in that. And
18 he did something a little bit different. He did the discogram
19 test. And the discogram is what confirmed the bad disc that
20 Christian has.

21 Dr. Lanzkowsky, after performing his discogram
22 confirming the bad disc at L5-S1 level, says, you know what?
23 We need to get a neuro surgeon involved. Dr. Lanzkowsky sends
24 Christian to Dr. Kaplan. He's a board certified neurosurgeon
25 from Harvard. Very well credentialed. And he's confirmed

1 Christian needs surgery.

2 The problem with this is that although he needs the
3 surgery --

4 MR. BAIRD: Objection, Your Honor. May we approach?

5 (Bench conference.)

6 MR. BAIRD: [Inaudible] my objection about future
7 surgeries. [Inaudible.]

8 THE COURT: Okay.

9 MR. BAIRD: [Inaudible.]

10 THE COURT: Yeah. Yes, that's fine.

11 MR. BAIRD: Thank you.

12 MR. SIMON: Thank you, Your Honor.

13 (End of bench conference.)

14 THE COURT: And, Counsel, you said objection
15 [inaudible]?

16 MR. BAIRD: Pardon?

17 THE COURT: Objection regarding future surgery and
18 we'll discuss that later.

19 MR. BAIRD: Yes.

20 THE COURT: Thank you.

21 MR. SIMON: Dr. Kaplan, who looks at the MRI, he
22 looks at the discogram, he looks at all of the records, he
23 determines that Christian is a candidate for a L5-S1 fusion.
24 It is a very serious operation that carries with it serious
25 consequences.

1 The difficult situation is that he's 27 years old,
2 and to race in for a surgery like this is a very difficult
3 thing. He's going to want to wait as long as he possibly can
4 for this type of surgery. So what he has to do at this stage
5 is to deal with the pain, try and enjoy life as he can now.

6 So the orders from the doctors is that they initially
7 -- they performed exams. They ordered tests. They ordered
8 MRIs. They ordered therapy. And they all concluded after all
9 of their treatment that he has this disc problem that is
10 permanent, and they all agree that it was caused from the
11 accident and that's why we're here.

12 His treatment timeline I'll just go over real
13 quickly. Started on the day of the accident and develops neck
14 pain within a day. He sees a chiropractor within three days.
15 She orders tests and x-rays. He sees Dr. Koka within ten
16 days, who confirms everything that's already been going on.
17 Then they get an MRI when all of it is not going away. Comes
18 back positive. This is all within a few months of the
19 accident.

20 Dr. Adair is concerned and refers to Dr. Coppel. Dr.
21 Coppel does his own examination. He also -- then he does the
22 injections. And then after the injections, he was instructed
23 to return, if necessary. He was never pain free in his low
24 back during any of this treatment and he's never been pain
25 free today in his low back.

1 He then saw Dr. Lanzkowsky at the end of '13. So
2 there is what some people call a gap in treatment, but the gap
3 in treatment is because he already did what he was supposed to
4 initially. And they said there's nothing more we can do for
5 you, try to go back to your life as normal, and if things
6 worsen, come back. And that's exactly what he did.

7 He then performs the discogram, which was positive,
8 and then they send him to Dr. Kaplan. That's basically the
9 end of the time line for active treatment. These are the
10 specialists in this case who do this for a living. They treat
11 people with spinal disorders and disc injuries and they both
12 confirm that, yes, he's a candidate for disc injury.

13 So the future treatment that you will likely see from
14 the evidence is that he's going to need a lumbar fusion,
15 surgical procedure. He may need some injections to help
16 maintain that to hopefully avoid this for some time. He's
17 going to still take medications when he has flare-ups or he is
18 in pain. He may have some chiropractic or physical therapy.
19 Not every day, not every week, but maybe for a month here and
20 there; and then he has to see physicians and they are still
21 going to order tests for him.

22 So now turning to Maria. She goes to UMC trauma and
23 then also follows up with Dr. Adair within three days. Her
24 pain complaints are consistent with what she had at UMC and
25 then she has back pain and right shoulder pain because of the

1 seatbelt locking up and her body being thrown forward. She
2 had abdominal pain and the shoulder pain. She had bruising.
3 There's no doubt that her body [inaudible] traumatized from
4 this violent impact.

5 Dr. Koka also oversaw his care -- or her care. Dr.
6 Coppel also saw her because her MRI was also positive. She
7 went through the conservative treatment that you are expected
8 to from an accident like this. They performed physical
9 therapy. They ordered the MRI's that shows the injury, and
10 she too has a permanent injury to her low back. They all
11 agree that it was caused from this accident and nothing else.

12 She had somewhat similar treatment, but they had
13 different complaints. She had a shoulder injury. Christian
14 did not. She had abdominal that Christian did not. Her
15 [inaudible] were different in the neck and back, which you'll
16 see.

17 But one thing they do have in common is that the same
18 level of their discs, although slightly different in
19 appearance and finding, were both injured and damaged. And
20 the reason that that happened to both of them is because they
21 were both sitting, thrown forwards and backwards, and that
22 part of the spine is the bottom disc and it's the first one to
23 go.

24 There's no mistake why it happened to both of them.
25 She goes to the conservative therapy. Gives her some

1 momentary relief and, in fact, the chiropractic treatment that
2 she was receiving is excellent. And you'll hear from Dr.
3 Adair how she responded. She was doing great. She even got
4 to some days levels of being pain free and was excited about
5 that.

6 But, unfortunately, the pain did return because when
7 the [inaudible] stops taking the medications and the treatment
8 stops and she tries to go back to her normal daily activities
9 going back to try and clean a house and do what she does to
10 earn money, guess what? The pain is there.

11 And what you need to keep in mind throughout this
12 whole case, she did all of those things without pain before
13 the accident. But when she tries to go back and do it after
14 the accident, she's in pain, and that's changed her life
15 because mobility is a key issue that everyone needs to
16 survive.

17 And these people are young people. As they grow
18 older, which we're going to ask you to consider at a later
19 time, as they grow older, things will get more difficult.
20 Their injuries will likely worsen. Their ability to do what
21 they can do now is more difficult. And those are some of the
22 things we're going to ask you to think about.

23 Dr. Adair also refers her to Dr. Coppel, and he
24 confirms the injury too. He does some steroid injections at
25 that level which only provided temporary relief, but she's

1 released from treatment and has ongoing pain in a very similar
2 way as Christian.

3 Dr. Coppel only did one round of injections with her.
4 He did two rounds with Christian. And then she followed up
5 with Dr. [Inaudible] and his partner did some injections, as
6 well, in January of '14. He will be here to describe the
7 nature of the injuries, his treatment, his injections, the
8 reason for his injections, and why it's all related to this
9 accident.

10 Maria did not see Dr. Kaplan. She did not have a
11 discogram, but she did have an MRI that was positive, and so
12 you'll hear from Dr. Lanzkowsky telling you about what
13 reasonable future treatment she may need.

14 There's no doubt about it that this accident was a
15 life-changing event. To the degree of how it changed their
16 life is going to be for all of you to decide. Because they
17 are so young, you may look at it and say, well, they look
18 pretty healthy to me. They're walking around. They're not in
19 a wheelchair. These are real injuries that only worsen over
20 time.

21 So we talked a lot about in jury selection the easy
22 standard more likely than not, the 51-percent rule. When you
23 hear the word "probability," that is evidence that says I met
24 my standard. When you heard the term "reasonable degree of
25 medical probability" or "more likely than not," that means the

1 evidence I get from the stand from these witnesses means I'm
2 meeting my burden.

3 Possibility is nothing but speculation and
4 conjecture. You just heard one of the instructions the Judge
5 read to you, says you can't consider speculation. So when you
6 hear the words "possible, isn't it possible," that's nothing
7 but guesswork that you can't rely on.

8 In personal injury cases like this when someone's
9 injured in an accident, we prove the cases through the
10 doctors. How we do that is the patient goes to the doctor.
11 They report their pain complaints on any given day. The
12 doctor writes it down. He performs a physical examination,
13 looks at all the evidence, and he renders a diagnosis. Then
14 he also gives them a recommended treatment plan.

15 That medical record is our evidence in the case.
16 These doctors who testify is the evidence in the case. These
17 doctors are trained professionals. They know how to do
18 examinations in diagnosing.

19 In fact, they have an obligation to make the correct
20 diagnosis. They take an oath, a hippocratic oath to try and
21 get these people better and they have an obligation to be
22 truthful and honest with you. And when you hear them, that's
23 the proof that we're giving you: The treating physicians who
24 have actually treated them, examined them, and they're the
25 ones that make the recommendations.

1 You're going to hear from Dr. Lanzkowsky. He
2 specializes in pain management. Did the discogram. You're
3 going to hear from Dr. Kaplan, the neurosurgeon. Dr. Koka,
4 also a physician, he's a physician that owns several different
5 urgent cares. He doesn't just do personal injury accidents.
6 It's a small portion of his business.

7 Dr. Adair, a chiropractor. She does specialize in a
8 lot of these type of cases that treats -- so she's a good
9 person to identify the type of injuries that stem from
10 traumatic events, and you'll hear from her.

11 Dr. Coppel, we took his deposition. You're not going
12 to hear from him personally, but we're going to read a portion
13 of his deposition for you to consider. And the Judge will
14 tell you that reading the deposition is like him appearing
15 here in court. You consider his evidence as read from the
16 stand the same as if he was here testifying.

17 Christian and Maria had zero pain until the
18 collision. They had no new accidents, new traumas, nothing
19 else they can blame their current condition on. This is an
20 easy case for you guys. Discovery, which you heard a little
21 bit from Mr. Baird about what the evidence is in this case,
22 this is a process to learn facts. So either they can
23 undermine the case or we can support it.

24 We have subpoenas. You're going to learn that we can
25 go out and get whatever records we want. They had the same

1 opportunity to go out and get whatever records or information
2 they want. They get to learn the medical history of my
3 clients.

4 They get to take their depositions. Have them
5 testify under oath, which is not a fun process to be grueled
6 and cross-examined about their medical history and their
7 history, and then they have to go see their doctors.

8 They get to interview witnesses. They hire their own
9 experts where they had to go and meet with them and be
10 questioned again about their medical history and whether
11 they're being truthful. No stone was left unturned and nobody
12 could find a history that they had any neck or back complaints
13 prior to this accident. The reason for that, they don't have
14 one.

15 MR. BAIRD: Objection, Your Honor. May we approach?

16 (Bench conference.)

17 MR. BAIRD: This line is what the Defendant goes to
18 great lengths to protect against.

19 THE COURT: What?

20 MR. BAIRD: He says the Defendant goes to great
21 lengths [inaudible]. That is a clear reference to insurance
22 right there.

23 THE COURT: I didn't even pick up on that.

24 MR. BAIRD: That's what he said.

25 MR. SIMON: Okay.

1 MR. BAIRD: I mean, [inaudible] he's trying to make
2 them think about the fact that [inaudible] corporation
3 insurance company.

4 MR. SIMON: Well, the fact is, you know, you have
5 lawyers, you got the Plaintiff, the Defendant.

6 MR. BAIRD: He said the Defendant [inaudible], not
7 defense team [inaudible].

8 THE COURT: You know, I'm reluctant to even bring it
9 up to the jury because I don't want to call attention to it.

10 MR. BAIRD: [Inaudible] we can argue it later, but
11 it's starting to look like a pattern [inaudible], but I don't
12 think he should refer to "it" as the Defendant any more.

13 MR. SIMON: Okay.

14 THE COURT: Fair enough.

15 MR. BAIRD: Thank you.

16 (End of bench conference.)

17 MR. SIMON: At the end of the day, Ms. Ortega made
18 certain choices on the day of this accident that needlessly
19 endangered all of the people on the roadway. Not just my
20 clients, but they just happened to be the ones that were there
21 that day.

22 What is clear is my clients didn't do anything wrong.
23 They didn't ask for this. They didn't go out that night
24 hoping to get into an accident and have to be taken by
25 ambulance and go to the hospital. They didn't ask for this.

1 The only issue for you people to decide at the end of
2 this case is what's fair for their injuries based on the
3 evidence that you hear from the doctors and you'll hear from
4 them. And then you have to all agree on a sum of money that's
5 fair and keeping in mind that they're young and these are the
6 type of injuries that get worse, and as they get older, how is
7 that going to affect their lives.

8 What the evidence is also going to show is that the
9 Defense is going to have different positions. They're going
10 to argue -- well, at least initially -- maybe I'm not at
11 fault. But if I am at fault, they weren't injured. If they
12 were injured, they're not injured as bad as they're saying
13 they're injured. But if they're injured as bad as the medical
14 records prove and the doctors prove, then the treatment they
15 got wasn't necessary, wasn't reasonable. But, wait a minute.
16 If the treatment they underwent was reasonable, it's now with
17 the costs, maybe the cost of it is not reasonable.

18 It's just an ongoing -- what I call the onion defense
19 because when one thing on the outer layer doesn't work, they
20 just peel it off and try to go to the next layer. Then they
21 peel that off if that doesn't work and they go to the next
22 layer.

23 You'll see when the witnesses hit the stand what
24 these excuses are. Dr. Duke is a retained expert by the
25 Defendants. He's a neurosurgeon, does spine surgery, but what

1 you'll learn is his services are for sale. The Defendants in
2 these types of cases like to use Dr. Duke and the reason they
3 like to use Dr. --

4 MR. BAIRD: Objection, Your Honor. Can we approach?

5 THE COURT: Yes.

6 (Bench conference.)

7 MR. BAIRD: First off, this is a lot of argument in
8 opening, but now he's making [inaudible] --

9 MR. SIMON: I didn't make it. I did not say that.

10 MR. BAIRD: "Services are for sale," you don't have
11 to quote another case to violate the law, and that's what he's
12 doing.

13 THE COURT: I think this is exceeding the scope of
14 openings.

15 MR. SIMON: Well, that's what the evidence is going
16 to show. Dr. Duke is going to come in here and --

17 MR. BAIRD: All of his doctors --

18 THE COURT: Hold on. Dr. Duke is going to come in,
19 that's what the evidence will probably show, but it's -- I
20 think it's argument that he's a hired gun, that he always
21 testifies for the defense. I think that's improper.

22 MR. SIMON: But that's what the evidence is going to
23 show.

24 MR. BAIRD: No.

25 MR. SIMON: No?

1 THE COURT: That's argument.

2 MR. SIMON: Okay. All right.

3 (End of bench conference.)

4 MR. BAIRD: Your Honor?

5 THE COURT: I'm sorry?

6 MR. SIMON: What?

7 MR. BAIRD: Oh, yeah. Could we approach?

8 THE COURT: Sure.

9 (Bench conference.)

10 MR. BAIRD: My objection, he puts a whole line of
11 dollar signs --

12 MR. SIMON: I just whipped through this. I just had
13 to get to the next line.

14 MR. MICHALEK: You showed the jury everything that
15 they were going to say.

16 MR. SIMON: I just whipped through it to get to the
17 next line. I didn't -- it was like this quick, seconds.

18 THE COURT: It was pretty fast. It's just a line and
19 then a quarter of the line.

20 MR. MICHALEK: When the jury has reached [inaudible]
21 show the entire document [inaudible] he went very slowly, it
22 was up there --

23 MR. SIMON: That's not true. That's not true.

24 MR. MICHALEK: -- it was up there for [inaudible]
25 seconds.

1 MR. SIMON: And you know what, Judge? I'm tired of
2 -- I'm tired of this double-teaming. One -- one lawyer one
3 cause.

4 MR. BAIRD: [Inaudible.]

5 THE COURT: All right. So what -- okay.

6 (End of bench conference.)

7 MR. SIMON: Throughout the course of this trial, the
8 one thing that is important for all of you is you're to rely
9 on the evidence. And what lawyers say, myself, or other
10 counsel is not evidence. What comes from the witness stand or
11 the documents that you get to look at or that you're shown,
12 that's the evidence that you have to rely on.

13 I talked a little bit about harms and losses, that
14 you can't consider any other factors except the harms and the
15 losses. What you're going to find is the harms and losses in
16 this case, that's what goes into the verdict, the amount of
17 money that you have to decide on to go into the verdict.

18 Past medical expenses are one of the items. You're
19 going to learn that Christian now has over \$56,000 in medical
20 expenses to date. Maria has 43,000 incurred to this day. You
21 will also at the end of the trial think about future medical
22 expenses.

23 You will also have to think about pain and suffering.
24 That's the amount of money for pain and suffering for what
25 they've been through, for the procedures they've gone through,

1 for having to undergo injections, to have needles stuck in
2 you; to be stuck in a cylinder to have an MRI; to have to go
3 to doctors' visits. And these are all things they don't want
4 to go to. These aren't fun things for them to do to spend
5 their day. Those are the type of things for you to consider.

6 You'll also hear how their life has been disrupted
7 and how the injuries have affected their enjoyment on life.
8 You'll also have to consider that. Those are the type of
9 things that go into the verdict. What the impact these
10 injuries have had on their life now and in the future.

11 Now, you as jurors, you have your own rights. You
12 have a right to hear everything from the stand. So if you
13 can't hear anything, you raise your hand and the Judge will
14 call on you.

15 We're not allowed to talk to you, so you might see me
16 out in the hallway. I'm not being rude, but we're not allowed
17 to talk to you. That goes for me or other counsel. But you
18 have the right to hear everything from the stand. If you
19 can't hear it, ask them, and the Judge will help you out.

20 You also have the right to make sure other jurors are
21 only considering the harms and the losses. So when you go
22 back in that deliberation room, you have a right to say, hey,
23 you're thinking about other stuff. We're only supposed to
24 consider the harms and the losses.

25 And you have the right to make sure everyone else is

1 using the correct standard, the 51-percent standard, we're
2 more right than wrong. You don't have to be sure when you go
3 in that jury room. You only have to know was it more right
4 than wrong, 51 percent.

5 If somebody refuses to follow this law and these
6 rules, you go get the bailiff. You tell the bailiff these
7 guys aren't following the law and they'll go get the judge
8 because it's a very serious situation and I think that all of
9 you will take your oath serious.

10 Your verdict, which we'll be asking you for, will
11 ultimately affect the community. And the reason it will
12 affect the community because --

13 MR. BAIRD: Objection, Your Honor.

14 THE COURT: Yes.

15 (Bench conference.)

16 MR. BAIRD: [Inaudible] argument in opening. Someone
17 needlessly endangers all of us, this is clear golden rule.
18 [Inaudible.]

19 MR. SIMON: It's not a golden rule argument. I'm not
20 asking them to put themselves in the place of the Plaintiffs.
21 That's the golden argument.

22 MR. BAIRD: [Inaudible.]

23 THE COURT: How is it going to affect the community?

24 MR. SIMON: All these decisions -- well, it's going
25 to affect the community because all verdicts affect our

1 community. This is going to be another verdict.

2 THE COURT: Objection sustained.

3 (End of bench conference.)

4 THE COURT: Ladies and gentlemen of the jury, you
5 will be instructed to disregard the prior statements by
6 Counsel. Please continue.

7 MR. SIMON: Thank you, Your Honor. I submit to you
8 that it's a contract when somebody does something that hurts
9 anyone else, they are responsible for the harm. And that's
10 all we're here for. That's our social contract. That's what
11 the law requires and that's why we're here, because if you
12 breach your social contract and get away with it, it harms
13 everybody.

14 So the power of the jury is you guys. The reason
15 that you have power in this case is because you get to decide
16 the fate of Christian and Maria. Your decision will affect
17 their lives forever and they are putting their fate in your
18 hands to reach a fair decision in this case. However, your
19 power is limited because you can't make or apologize for what
20 she did. She may apologize, she may not, but you can't make
21 her.

22 You can't put them in a place that they were before
23 the collision and kind of erase this and say it never
24 happened, which is what they would like. The law only allows
25 you to award money. That's it. And those are the harms and

1 losses that you're going to learn throughout the course of
2 this case, and that's where your power is. Thank you for your
3 time.

4 THE COURT: All right. Thank you, Counsel. Ladies
5 and gentlemen of the jury, unfortunately we don't have time
6 for Defense counsel to do his opening, so we'll do it
7 tomorrow.

8 Again, you're going to hear this admonishment so many
9 times over the course of the trial you will probably be able
10 to say it for me, but I am obligated to tell you. Again,
11 you're obligated -- you are instructed not to converse among
12 yourselves or with anyone on any subject connected with the
13 trial. Do not read, watch, or listen to any report of or
14 commentary on the trial. Do not form or express an opinion on
15 this case until it's submitted to you.

16 We'll see you tomorrow at one o'clock. Thank you.

17 (The jury adjourned at 4:51 p.m.)

18 THE COURT: Okay. The jury is out of the room.
19 Let's take these additional ten minutes to make some records.
20 I want to just put on the record the challenges for cause.
21 Plaintiff made a challenge for cause for Juror Mitchell, Juror
22 Mascella, Juror Ching, Juror Banzon, Juror Norman, Juror King
23 and Juror Reeder.

24 Defense counsel stipulated to remove Juror Ching and
25 Juror King for cause. Defense asked to remove Juror Escalante

1 for cause and with Defense counsel indicating they had
2 concerns about Escalante's ability to understand English.

3 Other than Ching and King, no other challenges for
4 cause were granted by this Court.

5 Let's go onto the -- the objections that were made
6 contemporaneously during the course of the opening statements.

7 The first objection was Plaintiff had on the screen
8 and there was a discussion of both the complaint and the
9 answer and there was -- and then the change in the answer, I
10 guess it was the second amended answer to Plaintiffs' -- I
11 mean answer to Plaintiffs' complaint. The Defense counsel
12 contemporaneously objected. If you'd like to make a record on
13 that?

14 MR. MICHALEK: Yes, Your Honor. We filed a motion in
15 limine on responsibility avoidance. The arguments that the
16 Plaintiff were making were exactly that, that we were denying
17 responsibility then for some monetary reason or because it was
18 in our greatest benefit to do so, whatever the argument was,
19 that we suddenly changed our denial into an admission.

20 As the Court knows, complaints and answers are simply
21 just pleadings that the parties file. The initial answer --
22 the Plaintiff -- I'm sorry -- the Defendant neither defends --
23 admits or denies because, you know, that's typically what
24 every defense counsel files. It's just a pleading. It
25 shouldn't have been used against the Defendant. It was

1 certainly improper to do so. It -- it goes to essentially
2 responsibility avoidance.

3 THE COURT: Okay. By the Plaintiff. Mr. Simon, as
4 you're probably aware, you were allowed to show the instrument
5 complaint for the sole purpose, which you ultimately did, of
6 the fact that the Defendants initially denied liability and
7 subsequently admitted liability, and that's where we stand at
8 this point. You were specifically directed at sidebar that
9 you could not argue -- well, or say to the jury that they were
10 avoiding responsibility and I don't recall that you did at
11 that point. Would you like to make a further record?

12 MR. SIMON: No. That I -- I didn't use that wording
13 at all. And, I guess, if I could get some clarification from
14 the Court, what avoiding responsibility, you know, really
15 means because at the end of the day, you know, going forward,
16 because at the end of the day they're denying they're
17 responsible for certain aspects of this case and I don't know
18 how I can be limited to -- to use that theme because that's
19 what they're doing. That's what the facts are. So I -- I'm
20 not sure what "avoiding responsibility" means, and just so
21 they can tell me what their concerns are so I --

22 THE COURT: My concern is I never -- I never want to
23 put in the jury's mind -- and I guess it's how you present to
24 the jury. I mean, I believe that a person legally has the
25 right to challenge the Plaintiffs' complaint, you know, file

1 an answer and go to litigation. And I think it's improper to
2 leave in the minds of the jury that the whole litigation
3 process with the Defendant not accepting responsibility from
4 the get-go, I think that's improper.

5 I think they have a right to challenge your case.
6 That's kind of what I'm going -- I understand that -- I think
7 it's relevant in the pleadings that they initially denied
8 liability, now they've admitted liability, that's why I let
9 you bring that up in your openings. Did I help clarify a
10 little bit?

11 MR. SIMON: Well, a little bit. I mean --

12 THE COURT: It's not improper for them obviously to
13 file an answer. It's not improper for them obviously not to
14 settle the case. I don't want it put into the jury's mind
15 that it is somehow improper. I mean, what it comes down to,
16 this is a dispute in the value of this case.

17 MR. MICHALEK: Let me -- let me help Your Honor out
18 and counsel so he can sort of understand this. He's making
19 his opening statement where he's saying specifically that the
20 Defendant knew right at that point in time that she had caused
21 injuries, she had caused all of these damages to the
22 Plaintiffs. Well, certainly that's not the case.

23 The Defendant knew at the time of the accident she
24 caused an accident. She didn't know what the pre-existing
25 conditions of the Plaintiffs were. She never met them before.

1 And so for Defendant to insinuate she had all of this
2 knowledge, she knew when she had caused an accident she knew
3 she had caused all of these damages, and then she's denying
4 liability -- oh, and then she's admitting liability for all of
5 it. See, that's -- that's how you go to avoiding
6 responsibility.

7 You make a chain of assumptions that the Defendant
8 knew things about the Plaintiffs' condition, their medical
9 bills, the treatment, the disc injury right at the time of the
10 accident; that somehow that was magical information that she
11 had. Well, she didn't. There's nothing wrong with the
12 Defendant going through litigation and that's why we're here.

13 We're here because we denied that they -- the damages
14 are what they say they are. Sure, there was an accident.
15 Sure, there was some damage that we were responsible for;
16 others we are not responsible for. That's why you're here.
17 That's why the jury is here.

18 But to insinuate that we had some special -- or my
19 client had some special knowledge at the time and now she's
20 denying liability because of that special knowledge is, I
21 think, improper. Oh, yeah. Good point. It flips the burden
22 of proof that we're trying to say, you know, from their --
23 instead of their proving their case, we're having to disprove
24 ours.

25 MR. SIMON: I don't think I went into any of that,

1 but I think at the end of this case I'm going to say that
2 they're responsible for this.

3 THE COURT: And I believe that's fair game.

4 MR. SIMON: Okay. Thank you.

5 THE COURT: Again, I think that you understand or I
6 hope that I'm making myself clear enough as far as the
7 distinction. You know, I've had plaintiffs want to come in
8 here and say, you know, try to make it seem as though it was
9 improper somehow or nefarious on behalf of the defendant to
10 file an answer and ultimately be involved in litigation.
11 Certainly that is not the case. They have a right to do that.

12 MR. SIMON: Sure.

13 THE COURT: I do recognize -- so I think you do
14 understand the distinction, I hope.

15 MR. SIMON: Yeah. I -- I get that point.

16 THE COURT: If not, I'll try to clarify myself.

17 MR. SIMON: I didn't do any of that.

18 THE COURT: No, I don't believe that you did. I
19 think that was Defense's further concern. Am I making myself
20 clear enough? Some times it's clear to me, but it's not as
21 clear to everyone else.

22 MR. MICHALEK: It's clear to me, Your Honor.

23 THE COURT: Okay. So if it comes up again, please
24 ask me and I will try to clarify myself even further. Okay.

25 And again, I want to indicate that Plaintiff did not

1 make the argument in opening that, I guess, Defense counsel
2 was concerned about.

3 There was another objection made by Defense counsel
4 as far as Plaintiff referring -- Plaintiff counsel referring
5 to things as "silly". The Plaintiff redirected and did not
6 use that phraseology again after the objection when the Court
7 indicated or asked him to use a different phrase. I don't
8 know that that phrase in and of itself is improper. It's just
9 it was changed by the Defendant -- I'm sorry -- by the
10 Plaintiff.

11 The Defendant also objected to the use of the word
12 "it" by Mr. Simon. I think the Defense counsel believed that
13 somehow by using the word "it," it implied the existence of
14 insurance, which would be impermissible.

15 MR. MICHALEK: Yes, Your Honor. Their -- the -- I
16 don't recall it. It flashed on my screen, but it said
17 something to the effect of the Defendant's here because it
18 wants to protect its money. I -- I apologize if I don't have
19 the exact wording of it. Maybe if Mr. Simon would be happy
20 enough to put his opening on the screen, I could get the exact
21 wording, but that's how I remember it. It, Defendant is
22 trying to protect its money.

23 There were three serious violations, not just that,
24 but the hired gun and the golden rule arguments, all of which
25 since I've been practicing in this jurisdiction for 20 years

1 have been prohibited and it was shocking to me during the
2 opening statement that Mr. Simon, who I have known for the
3 past 20 years since I started with Mr. Dubrinsky [phonetic],
4 would go through in opening statement and make arguments which
5 are specifically precluded from being argued in closing
6 argument.

7 The bell cannot be un-rung. It was -- it was at
8 least eight seconds that I saw after the Court made its
9 determination that --

10 THE COURT: [Inaudible.]

11 MR. MICHALEK: -- on the hired gun that the
12 Plaintiffs went through and just listed all of the rest of
13 that argument under there, all of the things that were
14 improper that Mr. Simon was going to make.

15 And just so I know the Court has to get on with it
16 and -- and so I'll keep this brief. Those three things
17 combined, the bell cannot be un-rung. It was improper and
18 we're moving for a mistrial.

19 THE COURT: Okay. Counsel?

20 MR. SIMON: Your Honor, I never used the word "hired
21 gun," first of all. So that is a -- a misstatement of fact.
22 What the wording was is that his services were for sale, which
23 his services are for sale because you can hire him for his
24 service to be an IME doctor.

25 And then at that point you -- they made their

1 objections. You said it was more argument, not that it was
2 improper, but that it was argument, and then we moved on and I
3 raced through the rest of the slide to get to the next
4 subject. So nothing was ever left up there or discussed.
5 What was the other one?

6 THE COURT: It.

7 MR. SIMON: And the golden rule argument, I mean, I'm
8 not sure where that comes from. I never did ask this jury to
9 put themselves in the place of this Plaintiff. I never did
10 that and I don't believe that these are golden rule arguments.

11 THE COURT: Okay.

12 MR. MICHALEK: Your Honor, he did not race through
13 the slide. It was up there a good eight seconds. I would ask
14 the Court, Mr. Simon can provide his opening statement to the
15 Court, that slide. The Court can look and see exactly what
16 the jury saw, which was eight seconds worth of impermissible
17 arguments. As I say, it -- the -- the -- we ask that be
18 preserved.

19 The bell can't be un-rung with that. There were
20 multiple violations of clear Nevada case law that should not
21 have been presented in the opening statement, it was
22 presented, and we have -- we have to request a mistrial. I'll
23 leave it at that.

24 THE COURT: All right. I'm going to deny the request
25 for mistrial at this point. As far as the use of the word

1 "it," it was really just in passing by the Plaintiffs'
2 counsel. The Plaintiff was -- it was brought to the
3 Plaintiffs' attention and I don't recall that wording being
4 used for the balance of the openings.

5 And, indeed, there was really no instruction given by
6 the Court because I was kind of at a loss as to how to
7 instruct the -- the jury, and I believe Counsel agreed without
8 further calling attention to the use of the word "it" and what
9 it could possibly mean.

10 As far as the dollar signs on the screen, I -- I did
11 seem them. The dollar signs went across approximately the
12 length of, you know, the length from left to right and then a
13 portion of another line underneath that, but I -- I don't
14 think it was really up there that long to really prejudice the
15 jury. I mean, I just saw it quickly in passing.

16 As far as affecting the community, the Plaintiffs --
17 that was sustained and the Plaintiff was directed to change
18 his opening and the jury was instructed to disregard the
19 statements by Plaintiffs' counsel.

20 As far as Dr. Duke, the hired gun, the reason I
21 didn't allow it is because I did feel that it was argument --
22 more argument, which would be more appropriate in closing.

23 MR. MICHALEK: And -- and my objection, I'll just --
24 just so we have the record, I -- I object as not just improper
25 argument -- not just argument, but improper argument. There's

1 a Nevada Supreme Court case I'm happy to provide Your Honor a
2 copy of that. And I suggest we take up the issue of the
3 medical bills tomorrow maybe --

4 THE COURT: Can we -- do you guys want to get here a
5 little before 1:00?

6 MR. MICHALEK: Yes, I was going to suggest that.
7 Maybe like 12:30?

8 THE COURT: 12:30 is fine.

9 MR. SIMON: Sure. All right.

10 THE COURT: That's fine with me. Did I cover
11 everything for today? I think --

12 MR. MICHALEK: I believe so.

13 THE COURT: -- I think I got all the objections.

14 MR. MICHALEK: Sure. And it wasn't just "it" as the
15 Defendant corporation, it was "it" protecting its money, which
16 I think it is an assertion that there's an insurance company
17 behind my client as opposed to her, you know, herself.

18 THE COURT: Thank you.

19 MR. SIMON: Thank you, Your Honor.

20 MR. MICHALEK: Thank you, Your Honor.

21 THE COURT: Oh, I want to go over this real quick
22 because if you want to look into it. As far as what I can
23 tell from the computer on the issue of the sub rosa video,
24 it's indicated in the February 3, 2015 notes from the hearing
25 that that is when Mr. Simon brought up the fact that he was

1 given a video the week before. Defense counsel indicated that
2 it had been disclosed in December. Mr. Simon said he only
3 received it the week before, so that would be the end of
4 January.

5 As far as what I see, a stipulation to continue the
6 trial was filed November 5, 2014. In that stipulation,
7 assuming it includes evidence, it says the last day to
8 supplement documents, witness list was January 9, 2015.

9 I think there was a dispute at the February 3, 2015
10 hearing about whether or not the video, assuming that it was,
11 in fact, disclosed in December, who it was turned over to.
12 Mr. Simon says it wasn't him and it was turned over to prior
13 counsel. I show that Mr. Simon showed up as attorney in this
14 case in August 30, 2013, so it should have been [inaudible] to
15 him.

16 MR. BAIRD: Mr. Lavigne has never withdrawn.
17 Everything we've ever served in this case has gone -- like all
18 the disclosures went to Mr. Lavigne, that no one has ever said
19 we're not getting your stuff, so we had no idea there was a
20 problem.

21 THE COURT: That's what I can tell from the court
22 record, which is -- without going and looking at the video and
23 seeing the argument, that is likely the reason that I ruled
24 the way I did because it was turned over -- even using the
25 later date of January 9, 2015, it was disclosed subsequent to

1 that date.

2 MR. BAIRD: Well, it was disclosed in December. It
3 was -- it was disclosed.

4 THE COURT: Oh. There was a dispute about that in
5 the hearing.

6 MR. BAIRD: Okay. All right. We can work it out
7 later.

8 THE COURT: At least that's what I can tell from
9 what's written in the minutes.

10 MR. BAIRD: Okay. Sure. And if we can show Your
11 Honor it was provided in December, you will reconsider.

12 THE COURT: I'll think about it.

13 MR. BAIRD: Okay. Thank you.

14 MR. SIMON: Thank you, Your Honor.

15 THE COURT: Thank you.

16 (Court recessed for the evening at 5:06 p.m.)
17
18
19
20
21
22
23
24
25

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

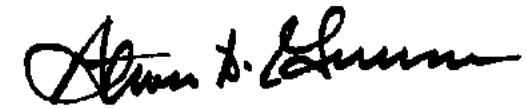
AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**KARR REPORTING, INC.
Aurora, Colorado**


KIMBERLY LAWSON

KARR Reporting, Inc.



CLERK OF THE COURT

BREF
DANIEL S. SIMON, ESQ.
Nevada Bar #004750
BENJAMIN J. MILLER, ESQ.
Nevada Bar #010406
SIMON LAW
810 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Telephone (702) 364-1650
Fax (702) 364-1655
dan@simonlawlv.com
Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

CHRISTIAN CERVANTES-LOPEZ,
an individual,
MARIA ABARCA, an individual

Plaintiffs,

vs.

EVANGELINA ORTEGA, an individual;
MIRIAM PIZARRO-ORTEGA, an individual
DOES I through V; inclusive
and ROE CORPORATIONS I through V,
inclusive

Defendants.

Case No.: A667141
Dept. No.: XXIII

**PLAINTIFFS' TRIAL BRIEF
REGARDING THE EXCLUSION
OF DEFENDANTS' EXPERT
TAMI ROCKHOLT, R.N.**

Plaintiffs, CHRISTIAN CERVANTES-LOPEZ and MARIA ABARCA, by and through their attorneys of record, SIMON LAW, hereby file their Trial Brief regarding the Exclusion of Defendants' Expert Tami Rockholt, R.N. This Brief is based upon the pleadings and papers on file in this action, the Points and Authorities set forth herein, and argument to be made by counsel at the time of the hearing or trial in this matter.

///

///

///

///

SIMON LAW
810 S. Casino Center Blvd.
Las Vegas, Nevada 89101
702-364-1650 Fax: 702-364-1655

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 LEGAL AUTHORITY

4 This trial Brief is filed and served pursuant to Eighth Judicial District Court Rule 7.27, which
5 specifically states:

6 Unless otherwise ordered by the Court, an attorney may elect to submit to the court in
7 any civil case, a trial memoranda of points and authorities at any time prior to the
8 close of trial. The original trial memoranda of points and authorities must be served
upon opposing counsel at the time of or before submission of the memoranda to the
court.

9 II.

10 STATEMENT OF FACTS

11 On November 20, 2011, Plaintiffs Christian Cervantes-Lopez and Maria Avarca were
12 traveling westbound on Lake Mead Blvd., when suddenly without warning Defendant Miriam Pizaro-
13 Ortega, who was operating a motor vehicle owned by Defendant Evangelina Ortega, made an
14 improper left turn, thus causing a violent collision with Plaintiffs' vehicle. As a result of the collision
15 Plaintiffs have sustained severe and debilitating injuries.

16 On March 6, 2014, Defendants' disclosed Tami Rockholt, R.N., as an expert in this matter
17 to testify generally with regard to "Plaintiffs' alleged injuries and damages, consistent with the
18 opinions expressed in her Medical Records Reports." See, Defendants' Initial Expert Disclosure,
19 attached hereto as **Exhibit 1**. However, despite her general designation set forth in Defendants'
20 expert disclosure, Defendants truly seek to have Nurse Rockholt testify to the reasonableness of
21 Plaintiffs' medical expenses and to determine whether these charges are reasonable and customary
22 in this matter. Specifically, Nurse Rockholt reviewed the invoices of the medical providers "for
23 appropriate billing practices and to assure that the services billed for were supported by the clinical
24 documentation." See, Nurse Rockholt's Report in Cervantes-Lopez and Nurse Rockholt's Report in
25 Avarca, attached hereto as **Exhibits 2 and 3**, respectively. Interestingly, Nurse Rockholt's entire basis
26 for her opinions are founded upon the national CPT coding system, as opposed to any review or
27 inquiry in the Las Vegas medical community standards. This is problematic as CPT codes are used
28 solely for insurance billing purposes and to suggest that insurance codes are the standard for

SIMON LAW
810 S. Casino Center Blvd.
Las Vegas, Nevada 89101
702-364-1650 Fax: 702-364-1655

1 reasonableness of total charges for a medical provider in a particular specialty violates the requisite
2 foundation for her opinions. CPT codes are for reimbursement purposes by insurance companies and
3 have nothing to do with total charges incurred by a patient involved in a motor vehicle accident. All
4 physicians charge the same or similar amounts as the providers in this case in Las Vegas and merely
5 because an insurance company refuses to reimburse the total due to a CPT code is of no
6 consequence. Moreover, she is a Nurse licensed in Oregon and cannot give opinions for Las Vegas
7 billing standards. *Id.* As discussed in further detail below, Nurse Rockholt is not qualified and does
8 not meet the requisite Hallmark standard and since her opinions are speculative she should be stricken
9 from offering testimony in this matter.

10 III.

11 LEGAL ARGUMENT

12 **A. THE COURT SHOULD EXCLUDE DEFENDANTS' EXPERT, TAMI ROCKHOLT, 13 R.N., BECAUSE HER OPINIONS VIOLATE NEVADA LAW AND THE LAW OF 14 THE CASE.**

15 Nevada law is abundantly clear that expert testimony must provide only expert assistance
16 which is necessary to help the trier of fact in understanding the evidence. Specifically, Nevada
17 Revised Statute 50.275, "testimony by experts," provides:

18 If scientific, technical or other specialized knowledge will assist the trier of fact to
19 understand the evidence or to determine a fact in issue, a witness qualified as an
expert by special knowledge, skill, experience, training or education may testify to
matters within the scope of such knowledge.

20 The Nevada Supreme Court held in *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008),
21 that for an expert witness to testify pursuant to NRS 50.275, the witness must satisfy the following
22 three requirements: (1) he or she must be qualified in an area of "scientific, technical or other
23 specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must
24 "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance
25 requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her
26 specialized] knowledge" (the limited scope requirement). *Id.* at 10. In *Hallmark*, the Supreme Court
27 expounded upon the assistance requirement as follows:
28

1 If a person is qualified to testify as an expert pursuant to NRS 50.275, the district
2 court must then determine whether his or her expected testimony will assist the trier
3 of fact in understanding the evidence or determining a fact in issue. An expert's
4 testimony will assist the trier of fact only when it is relevant and the product of
5 reliable methodology. In determining whether an expert's opinion is based upon
6 reliable methodology, a district court should consider whether the opinion is (1)
7 within a recognized field of expertise; (2) testable and has been tested; (3) published
8 and subjected to peer review; (4) generally accepted in the scientific community (not
9 always determinative); and (5) based more on particularized facts rather than
10 assumption, conjecture, or generalization.

11 If the expert formed his or her opinion based upon the results of a technique,
12 experiment, or calculation, then a district court should also consider whether: (1) the
13 technique, experiment, or calculation was controlled by known standards; (2) the
14 testing conditions were similar to the conditions at the time of the incident; (3) the
15 technique, experiment, or calculation had a known error rate; and (4) it was developed
16 by the proffered expert for purposes of the present dispute.

17 *Id.* at 13-14.

18 The Supreme Court concluded in *Hallmark*, that the district court committed reversible error
19 when it allowed the expert to testify without proper qualifications or foundation to assist the trier of
20 fact to make its determination.

21 In *Porter v. State*, 94 Nev. 142, 576 P.2d 275 (1978), the Nevada Supreme Court also
22 examined the admissibility of expert testimony. In *Porter*, the Supreme Court held that the district
23 court properly excluded the proffered expert testimony because the expert would have improperly
24 testified about the general unreliability of eyewitness accounts, without specifically addressing the
25 particular witness's perception and recollection. *Id.* at 147. The Court continued, that although expert
26 witness, Dr. Hess, had previously qualified in district court as an expert in the field of psychology,
27 he had never testified as to the reliability of eyewitness identification. *Id.* As in this case, Dr. Hess
28 was not acquainted with the victim, nor had he ever examined the victim's retention ability. *Id.* His
testimony was to consist of a review of authored works written by other persons which concluded that
eyewitness identification is unreliable. *Id.* Defense counsel then intended to propound a hypothetical

1 question to Hess describing the circumstances of the identification in the instant case. *Id.* The Porter
2 court further stated that without deciding whether the subject matter of Dr. Hess' testimony would
3 have been a proper one for expert testimony, the Appellant simply failed to establish a viable
4 foundation for the elicitation of the desired opinion, not only in terms of whether this type of expert
5 testimony is within a recognized field of expertise but moreover respecting the witness' competency.
6
7 *Id.*

8 Nurse Rockholt is not qualified to render the opinions she intends to offer at trial, nor do her
9 opinions assist the trier of fact understand a fact in issue, as she has failed to set forth a viable
10 foundation.¹ Therefore, Nurse Rockholt should be excluded from offering testimony in this matter.

11
12 **1. Nurse Rockholt is Not Qualified to Testify as an Expert in this Matter.**

13 Defendants' "expert" in this matter, Tami G. Rockholt, is a registered nurse, a nurse
14 consultant, and a "medical bill review expert," based out of Oregon. *See*, Curriculum Vitae of
15 Tamera G. Rockholt, attached hereto as **Exhibit 5**. However, Nurse Rockholt is not qualified as an
16 expert in this field. It is the most elementary of rules governing expert testimony that an expert must
17 be qualified to testify to a particular standard within the actual community in which the opinions are
18 given. *Flamingo Realty v. Midwest Dev.*, 110 Nev. 984, 988 (Nev. 1994). In this case, the subject
19 community is the billing standards of Las Vegas medical providers. Nurse Rockholt, however, has
20 no experience or training practicing nursing in the State of Nevada or the Las Vegas community.
21
22
23

24 1. Nurse Rockholt has previously been excluded from providing substantially similar opinions in the
25 Eighth Judicial District Court. Specifically, Judge Barker excluded Nurse Rockholt from offering
26 substantially similar opinions relating to the reasonableness and necessity of the medical procedures in
27 Las Vegas. *See*, Minute Order Granting Plaintiff's Motion to Exclude Defense Expert Tamera G.
28 Rockholt, R.N., B.S.N., in *Remmer v. Fink* (Case No. A514382), attached hereto as **Exhibit 4**.

1 Moreover, the usual and customary billing rates vary depending upon the community; therefore, it
2 is essential that an expert who is intended to testify to the usual and customary billing rates of a
3 particular community be knowledgeable and familiar with those billing rates. Given her lack of
4 experience, training, and unfamiliarity with the billing standards in this community, Nurse Rockholt
5 is not qualified to offer an opinion regarding such and must be precluded from testifying at trial.
6

7 **2. Nurse Rockholt's Opinions Will Not Assist the Trier of Fact**

8 Nurse Rockholt has failed to provide the proper foundation for her opinions in order to assist
9 the trier of fact in determining whether the cost of Plaintiffs' medical treatment is customary and
10 reasonable in the Las Vegas community. In her reports, Nurse Rockholt, does not, because she
11 cannot, make any representations that she has any basis for determining the reasonable and customary
12 charges for medical care in the Las Vegas community, aside from the national CPT codes, her
13 education and her experience (outside of Nevada). Nurse Rockholt has no personal knowledge of
14 what the usual and customary billing standards are in this community.
15

16 **Insurance industry billing codes cannot provide the proper foundation for Rockholt**

17 The entirety of Nurse Rockholt's reports and the opinions she intends to offer in this case
18 consist of a history of the CPT code system in the United States and then nearly six pages of her
19 review of "appropriate billing practices" pursuant to these CPT codes. *See, Exhibits 2 and 3.*
20 Nowhere in her reports does Nurse Rockholt even mention reviewing the rates with respect to the Las
21 Vegas medical community. Instead, Nurse Rockholt relies on the national standard for health
22 insurance companies coding practices and completely ignores the usual and customary charges in the
23 area. Specifically Nurse Rockholt's opinion with regard to Christian Cervantes-Lopez, based upon
24 a selective and arbitrary review of the specific CPT codes from Plaintiff's medical records and a brief
25 history of CPT codes, is that only \$13,005.48 of Christian's \$55,784.45, incurred medical costs are
26
27
28

1 related to the subject incident. *See*, **Exhibit 2**, at p.8. Similarly, Nurse Rockholt opines that only
2 \$10,018.38 of Maria's \$41,596.47, incurred medical costs is related to the subject incident. *See*,
3 **Exhibit 3**, at p.8.

4
5 Nurse Rockholt's analysis is based solely on the reimbursement standard for insurance
6 companies and ignores the proper analysis of the total charges incurred by the Plaintiff for treatment
7 in a personal injury case in Las Vegas. Thus, Nurse Rockholt is not able to offer any opinions
8 concerning what is reasonable and customary in the Las Vegas community, where Plaintiffs'
9 treatment was based. Pursuant to *Hallmark*, there has not been any showing that Nurse Rockholt's
10 testimony is based upon reliable methodology and thus, would not assist the jury. *Hallmark*, 189 P.3d
11 at 651-2; *see also*, *Choat v. McDorman*, 86 Nev. 332, 335, 468 P.2d 354, 356 (1970) (concluding that
12 an expert's testimony is inadmissible if it rests more on assumptions than facts); *Valentine v. Pioneer*
13 *Chlor Alkali Co., Inc.*, 921 F.Supp. 666, 672, (D. Nev. 1996) (concluding that a physician's testimony
14 was unduly speculative and did not reach the level of "scientific knowledge" because he opined that
15 the plaintiffs abnormalities "could have occurred as a result of the toxic event" without knowing of
16 any scientific research that would support his conclusion (quoting witness's testimony)).
17

18 19 **3. Nurse Rockholt's Opinions Are Precluded by Nevada's Collateral Source Rule**

20 Nurse Rockholt's reliance on CPT codes is misplaced given the fact that evidence of CPT
21 codes, is inadmissible pursuant to the well-established Collateral Source Rule, as the mention of CPT
22 codes would inform the jury of a collateral source of payment. In *Proctor v. Castellelli*, 112 Nev. 88
23 (1996), the Nevada Supreme Court held that the admission of a collateral source of payment for an
24 injury into evidence for any purpose is improper. *Id.* at 90. The court further held:
25

26 We now adopt a per se rule barring the admission of a collateral source of payment
27 for an injury into evidence for any purpose. Collateral source evidence inevitably
28 prejudices the jury because it greatly increases the likelihood that a jury will reduce

1 a plaintiffs award of damages because it knows the plaintiff is already receiving
2 compensation. *Id.*

3 The *Proctor* court made clear that there are no circumstances under which a district court may
4 properly exercise discretion to find that relevant collateral source evidence outweighs its prejudicial
5 effect. Furthermore, this Court clearly ruled on October 14, 2014, that any reference to insurance is
6 precluded by the collateral source rule. *See*, October 14, 2014 Transcript at 9:21-24, attached hereto
7 as **Exhibit 6**.

8
9 Based upon Nevada law and the law of this case, any testimony of CPT codes, including
10 Nurse Rockholt's, should be precluded pursuant to the Collateral Source Rule because the purpose
11 of CPT coding is so that the health insurance industry can identify a particular medical procedure for
12 standardized billing. Generally speaking, a treating physician bills an insurance company through a
13 CPT code which corresponds to a particular type of treatment and then the insurance company pays
14 the treating physician by the code provided. It is clear that the mention of CPT codes at trial would
15 inform the jury of a collateral source of payment. This is highly prejudicial and *Proctor* has made it
16 clear that there are no circumstances under which a district court may properly exercise discretion to
17 find that relevant collateral source evidence outweighs its prejudicial effect.
18

19 **IV.**

20 **CONCLUSION**

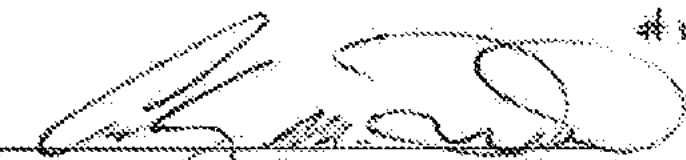
21
22 Based upon the foregoing, Nurse Rockholt has failed to set forth any basis that she has
23 specialized knowledge with regard to the reasonable and customary cost of medical treatment within
24 the Las Vegas community and only offers opinions that are in clear violation of this Court's prior
25 rulings. Therefore, Nurse Rockholt should be precluded from testifying with regard to the reasonable
26 and customary cost of medical treatment within the Las Vegas community at the time of trial.
27
28

SIMON LAW
810 S. Casino Center Blvd.
Las Vegas, Nevada 89101
702-364-1650 Fax: 702-364-1655

1 In the alternative, if the Court does not strike Nurse Rockholt's testimony in its entirety,
2 Plaintiffs request that the Court permit counsel to voir dire the witness outside the presence of the jury
3 prior to her testimony.

4 Dated this 23rd day of February 2015.

Respectfully submitted,

6 By:  #12207
7 DANIEL S. SIMON, ESQ.
8 Nevada Bar No. 4750
9 BENJAMIN J. MILLER, ESQ.
10 Nevada Bar No. 10406
11 810 South Casino Center Blvd.
12 Las Vegas, Nevada 89101
13 Attorneys for Plaintiff

14 CERTIFICATE OF E-SERVICE

15 Pursuant to NEFCR 9, NRCF 5(b) and EDCR 7.26, I certify that on this 25th day of February,
16 2015, I served the foregoing PLAINTIFFS' TRIAL BRIEF REGARDING THE EXCLUSION OF
17 DEFENDANTS' EXPERT TAMI ROCKHOLT, R.N., on the following parties by electronic
18 transmission through the Wiznet system:

19 Stephen Rogers, Esq.
20 Kade Baird, Esq.
21 Rogers, Masterangelo, Carvalho & Mitchell
22 300 S. Fourth Street, Suite 710
23 Las Vegas, NV 89101
24 (702) 383-3400
25 Fax (702) 384-1460
26 Attorneys for Defendants

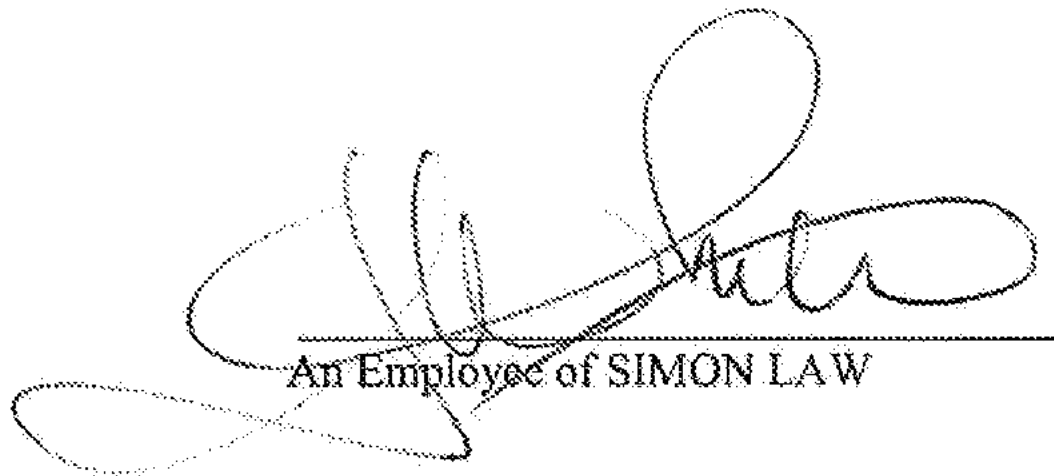
27 
28 An Employee of SIMON LAW

Exhibit 1

1 STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
2 ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
3 Las Vegas, Nevada 89101
Phone (702) 383-3400
4 Fax (702) 384-1460
Attorneys for Defendants
5

6
7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 CHRISTIAN CERVANTES-LOPEZ,
10 an individual; MARIA AVARCA, an individual,

11 Plaintiffs,

12 vs.

13 EVANGELINA ORTEGA, an individual;
14 MIRIAM PIZARRO-ORTEGA, an individual;
DOES I through V, inclusive; and
15 ROE CORPORATIONS I through V, inclusive,

16 Defendants.
17

CASE NO.: A-12-667141-C

DEPT. NO.: XXIII

18 **DEFENDANTS' INITIAL LIST OF EXPERT WITNESS DISCLOSURES**

19 Defendants EVANGELINA ORTEGA and MIRIAM PIZARRO-ORTEGA, by and through
20 their attorneys, the law firm of ROGERS, MASTRANGELO, CARVALHO & MITCHELL, hereby
21 provides their expert witness disclosure to include the following:

22 **I.**

23 **WITNESSES**

- 24 1. DEREK A. DUKE, M.D., F.A.C.S
861 Coronado Center Dr., Suite 200
Henderson, Nevada 89052
25 Telephone: (702) 896-0940
26 Facsimile: (702) 896-6173

27 Dr. Duke will testify regarding the Plaintiffs' alleged injuries and damages, consistent with
28 the opinions expressed in his IME and Medical Record Reports. A copy of Dr. Duke's Medical

1 Chronology, Curriculum Vitae, Deposition/Trial Log and Fee Schedule are attached hereto.

2 Defendant reserves the right to call any and all other witnesses who may have relevant
3 knowledge of the facts and circumstances surrounding the allegations contained in Plaintiffs'
4 Complaint.

5 Defendant reserves the right to utilize any and all witnesses named by any other party to this
6 action.

7 Defendant reserves the right to supplement his list of witnesses as new witnesses become
8 known, including expert witnesses.

9 Defendant also identifies and incorporates the documents produced by all other parties.

10 Defendant reserves the right to supplement its list of documents as additional documents
11 become known.

12 2. TAMI ROCKHOLT, R.N.
13 10940 SW Barnes Road, Suite 106
14 Portland, OR 97225
Telephone: (503) 781-0357
Facsimile: (503) 906-5348

15 Ms. Rockholt will testify regarding the Plaintiffs' alleged injuries and damages, consistent
16 with the opinions expressed in her Medical Record Reports. A copy of Ms. Rockholt's Medical
17 Chronology, Curriculum Vitae, Deposition/Trial Log and Fee Schedule are attached hereto.
18

19
20 **II.**

21 **LIST OF DOCUMENTS**

- 22 1. Curriculum Vitae of Derek A. Duke, M.D., F.A.C.S;
23 2. Biography of Derek A. Duke, M.D., F.A.C.S;
24 3. Deposition/Trial Log of Derek A. Duke, M.D., F.A.C.S;
25 4. Fee Schedule of Derek A. Duke, M.D., F.A.C.S;
26 5. IME and Medical Records Review of Plaintiff Cervantes dated February 25, 2014
27 authored by Derek A. Duke, M.D., F.A.C.S; and
28

- 1 6. IME and Medical Records Review of Plaintiff Avarca dated February 24, 2014 authored
2 by Derek A. Duke, M.D., F.A.C.S.
- 3 7. Curriculum Vitae of Tami G. Rockholt, R.N.;
- 4 8. Biography of Tami G. Rockholt, R.N.;
- 5 9. Deposition/Trial Log of Tami G. Rockholt, R.N.;
- 6 10. Fee Schedule of Tami G. Rockholt, R.N.;
- 7 11. Deposition (11/14/13) Review of Christian Cervantes authored by Tami G. Rockholt,
8 R.N.;
- 9 12. Medical Record Chronology of Christian Cervantes dated December 24, 2013 authored
10 by Tami G. Rockholt, R.N.;
- 11 13. Medical Record Review of Christian Cervantes dated December 24, 2013 authored by
12 Tami G. Rockholt, R.N.;
- 13 14. Medical Billing Analysis dated December 24, 2013 of Christian Cervantes authored by
14 Tami G. Rockholt, R.N.;
- 15 15. Medical Record Chronology of Maria Avarca dated December 23, 2013 authored by
16 Tami G. Rockholt, R.N.;
- 17 16. Deposition (11/14/13) Review of Maria Avarca authored by Tami G. Rockholt, R.N.;
- 18 17. Medical Record Review of Maria Avarca dated December 23, 2013 authored by Tami
19 G. Rockholt, R.N.; and
- 20 18. Medical Billing Analysis dated December 23, 2013 of Maria Avarca authored by Tami
21 G. Rockholt, R.N.

22 Defendants also identify and incorporate the documents produced by all other parties.

23 Defendants also identify and incorporate Plaintiffs' medical records.
24
25
26
27
28

1 Defendants reserve the right to supplement its list of documents as additional documents
2 become known.

3 DATED this 6th day of March, 2014.

4 ROGERS, MASTRANGELO, CARVALHO &
5 MITCHELL

6
7 R. KADE BAIRD, ESQ.
8 Nevada Bar No. 8362
9 300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendants

10 **CERTIFICATE OF SERVICE**

11 Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of Rogers,
12 Mastrangelo, Carvalho & Mitchell, and on the 6 day of March, 2014, a true and correct copy of
13 the foregoing **DEFENDANTS' INITIAL LIST OF EXPERT WITNESS DISCLOSURES** was
14 served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel
15 of record:

16 Daniel S. Simon, Esq.
17 Nevada Bar No: 4750
Simon & Associates
18 810 South Casino Center Blvd.,
Las Vegas, NV 89101
19 P: (702) 364-1650
F: (702) 364-1655
Attorneys for Plaintiffs

20
21 Melodie Fursatcia

22
23 An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

Exhibit 2

December 24, 2013

Mr. R. Kade Baird
Attorney at Law
Rogers, Mastrangelo, Carvalho, & Mitchell
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101

RE: Claimant: Christian Cervantes
 Claim #: None indicated
 DOI: 11/12/11

Dear Mr. Baird:

As per your request, I have reviewed the medical records for the above-named claimant with regards to a motor vehicle accident that occurred on 11/12/11. The records have been summarized in the attached Medical Records Chronology, for your review.

Mr. Cervantes received medical treatment from 11/12/11 through 11/26/13. I have also reviewed the billing invoices for these medical services.

In order to understand medical billing, one must first understand medical coding systems. In 1966, the American Medical Association (AMA) developed and published the CPT (Current Procedural Terminology) coding system. This system was designed to help standardize terminology among physicians and to serve as a type of shorthand that would simplify medical records for physicians and record clerks.

The current CPT code set consists of five-digit numbers, for example 99205, that accurately describe medical, surgical, and diagnostic services, and communicates uniform information about these services and procedures among physicians, coders, patients, accreditation organizations, and payers for administrative, financial, and analytical purposes.

Another component of the medical billing coding system is the HCPCS (pronounced hic-pix) code set. This acronym stands for Healthcare Common Procedure Coding System. Established in 1978 by the Health Care Financing Administration (now known as the CMS, or Centers for Medicare and Medicaid Services), HCPCS consists of alphanumeric codes; each code is made up of one letter and four numbers, for example: A4556.

Claimant: Christian Cervantes
Claim #: None indicated
DOI: 11/12/11
TGR

These codes are used for non-physician services that are not identified with a CPT code, such as ambulance, prosthetic devices, supplies, and medications.

The initial purpose of the coding systems had nothing to do with reimbursement, and the use of these codes was voluntary. However, in 1983, the federal government mandated that the codes be used for all Medicare billing. A similar mandate extended this system to Medicaid billing in 1986. With the implementation of the Healthcare Insurance Portability and Accountability Act (HIPAA) of 1996, the use these coding systems for transactions involving healthcare information became mandatory.

All providers are subject to billing requirements, and are bound by the coding rules, guidelines and definitions contained within CPT. All providers are required to maintain medical records in compliance with record-keeping standards, which at a minimum, support the services represented by the codes presented. Healthcare claims which fail to comply are considered non-compensable.

The invoices were reviewed for appropriate billing practices and to assure that the services billed for were supported by the clinical documentation. This review does not address medical necessity or relatedness of the treatment to the 11/12/11 incident, except when the services were clearly not related.

As the invoices were reviewed for the summary, some issues with billing coding and documentation were noted. The issues are summarized as follows:

University Medical Center

Date of service: 11/12/11
Emergency Room services

The emergency evaluation was billed with CPT code 99284. This code is defined as the emergency examination of a patient with a presenting problem of high severity that requires an urgent evaluation by the physician.

CPT further defines a problem of high severity as one where the risk of morbidity without treatment is high to extreme; there is a moderate to high risk of mortality without treatment OR high probability of severe, prolonged functional impairment.

Mr. Cervantes presented to the ER with complaints of headache and nausea; he denied neck pain, chest pain, shortness of breath, abdominal pain, and extremity weakness or numbness. He had suffered no loss of consciousness, had no respiratory compromise, there was no indication of open, bleeding wounds or lacerations, and no obvious broken bones. His presenting problem, as documented, did not appear to be of high severity by CPT definition, but rather of low to moderate severity, CPT code 99283.

Claimant: Christian Cervantes
Claim #: None indicated
DOI: 11/12/11
TGR

The head CT scan was billed with the appropriate CPT code. However, the code should be modified with CPT modifier TC to indicate the technical, or taking, component only. Absent the proper modifier, the code as presented includes the physician's professional fees.

The Neck & Back Clinics

Dates of service: 11/15/11 – 3/20/12

Chiropractic services

Massage services

The initial evaluation was billed with CPT code 99203. This new-patient code requires that the provider document these three elements: a detailed history, a detailed examination, and medical decision making of low complexity.

The documentation met the criteria for a detailed history.

CPT defines specific examination findings that must be documented to meet the criteria for the examination component of the documentation; a comprehensive examination requires that all of findings must be noted. In this case, the examination report included enough of the findings to meet the criteria for an expanded problem-focused examination.

The documentation met the criteria for the level of medical decision making defined by this code.

Coding rules state that the lowest of the criteria that is met determines which code to use. In this case, the expanded problem-focused examination is one that is identified with CPT code 99202.

X-rays were taken on 11/15/11. The code used for the lumbar x-rays was code 72100; this code was supported. The films were interpreted by an independent radiologist. Therefore, the code from this provider should have been modified with CPT modifier TC to reflect the technical, or taking, component only.

The chiropractic manipulation code includes a pre- and post-treatment examination; therefore the re-evaluation code is not to be used on the same dates when a chiropractic code is used.

This provider billed for a re-evaluation with CPT code 99212 on each date of service that chiropractic manipulation was not billed. Typically, billing for an examination on each date of service is not appropriate unless the patient's presenting condition changes or warrants an updated examination.

Code 99212 identifies the examination of an established patient, and requires that the provider document two of these three elements: a problem-focused history, a problem-focused examination, and / or medical decision making that is straightforward.

The documentation that was presented included no history, a check mark indicating "tenderness" and "muscle spasms" next to various spinal regions. There were no changes or new assessment documented and no plan recommended. The documentation did not provide the clinical rationale for a re-evaluation on every date of service, and the reports that were provided did not meet the criteria for history or medical decision making; therefore no re-evaluation code was supported.

Of note, the invoice dated 2/28/12 included charges for both 99212 and 98940; as noted, these two codes are mutually exclusive.

On each date of service, the invoice included charges for code 97010, hot and cold packs, and for code 97014, electrical stimulation. The documentation included a check mark next to the initials for these two modalities. There was no indication what specific regions were treated; the use of these two codes was only marginally supported.

On some dates of service, the invoice included charges for CPT code 97110, therapeutic exercises. This is a timed code; each time the code is used represents one 15-minute increment. Coding rules state that the documentation must indicate how long a timed modality was done in order to support this element of the code definition. The documentation referred the reader to an Exercise Log; the time was not documented on this form. The time element was not supported by the documentation that was submitted.

The documentation dated 11/22/11 included a check mark next to 'therapeutic exercises' but the code was not billed.

On some dates of service, the provider billed with CPT code 97140, manual therapy, and the documentation included a check mark next to 'myofascial release.' This is also a timed code; the check mark alone does not support the time element of the code description.

In addition, coding rules state that the manual therapy and chiropractic manipulation codes are mutually exclusive and cannot be billed on the same date of service unless the documentation clearly indicates that two separate regions were treated and with different modalities. The check marks next to each modality did not meet these criteria.

The dates on which code 97140 was billed were consistent with the dates on the treatment notes from the massage therapist. If these charges were to represent the massage services, then the incorrect code was used. The proper code for massage is code 97124. Based on the benefit of the doubt, code 97140 was changed to reflect the appropriate code on the dates when massage was performed.

There were no invoices for dates of service after 3/6/12.

Primary Care Consultants

Dates of service: 11/22/11 – 3/27/12

Medical services

The initial evaluation was billed with CPT code 99204. This new-patient code requires that the provider document these three elements: a comprehensive history, a comprehensive examination, and medical decision making of moderate complexity.

The documentation that was provided included a description of the MVA and Mr. Cervantes' past history. There was no Review of Systems documented; therefore, the report met the criteria for a problem-focused history. The examination findings were problem-focused, and the medical decision making was of low complexity.

Based on the lowest of the criteria, the problem-focused examination, this report met the criteria for CPT code 99201.

The follow-up examinations were billed with CPT code 99214, a code that requires two of these three to be documented: a detailed history, detailed examination, and / or medical decision making of moderate complexity.

The follow-up notes were pre-printed forms on which the provider checked or circled pertinent information. The examination findings were minimal and the instructions that were check marked were to continue physical rehabilitation and current medications. These reports met the criteria for CPT code 99211.

The documentation for CPT code 99211 does not have any specific key-component requirements. Rather, the note just needs to include sufficient information to support the reason for the encounter and evaluation and management service and any relevant history, physical assessment and plan of care.

Las Vegas Radiology

Date of service: 11/15/11 – 11/26/13

Radiology services

Claimant: Christian Cervantes
Claim #: None indicated
DOI: 11/12/11
TGR

The code presented for the professional, or interpretation, component of the 11/15/11 imaging studies was supported by the documentation and was properly modified with CPT modifier 26 to represent this component only.

There was no invoice for date of service 11/26/13.

Nevada Comprehensive Pain Center / Alain Coppel, MD

Dates of service: 2/22/12 – 6/4/12

Pain Management services

The initial consultation was billed with CPT code 99244. This code requires that the provider document a comprehensive history, a comprehensive examination, and medical decision making of moderate complexity.

The history and the medical decision making that were documented met the criteria for this code.

The examination included enough of the CPT-defined examination findings to meet the criteria for an expanded problem-focused examination.

Based on the lowest of the three elements that is required for this code, the expanded problem-focused examination is identified with CPT code 99242.

On 3/2/12 and on 5/18/12, Mr. Cervantes underwent a bilateral single level epidural steroid injection. The proper code was used for the injection, but the code should have been modified with CPT modifier 50, to represent a bilateral procedure. Codes appended with this modifier are typically reimbursed at 150 percent: 100 percent for the first side and 50 percent for the second side.

The invoice included the charge for the facility fees for this injection, billed with CPT code 99070. This is a supply code; the proper way to bill for the facility services is with the procedure code.

The provider billed with CPT code 72275, epidurography. According to the American Medical Association, an epidurogram is more than visualizing the contrast flow in the spine during and / or after an injection; it's a diagnostic study to be used to aid the physician in finding a reason for what may be causing pain in the spine that may be missed by other imaging methods (CT/MRI). It's designed to be a help in deciding further treatment for the patient. Because it's not meant to be a routine procedure, it's not expected to see these done in conjunction with epidural injections.

The 3/2/12 invoice did not include a charge for the moderate sedation services, identifiable with CPT code 99144.

Claimant: Christian Cervantes
Claim #: None indicated
DOI: 11/12/11
TGR

There was no charge for a re-examination dated 3/20/12. The documentation included examination notes dated 3/20/12 and 3/21/12; these notes were identical. It was thought that Mr. Cervantes was seen only one time, and the note dated 3/20/12 was an error.

The 3/21/12, 5/2/12, and 6/4/12 follow-up examinations were billed with CPT code 99213. The history component of the documentation was verbatim from the 2/22/12 report, likely computer generated. The examinations were problem-focused. The 5/2/12 plan was to repeat the lumbar epidural injections; the 3/12/12 and 6/4/12 plans included no further intervention; the medical decision making was straightforward. This report met the criteria for a problem-focused examination, CPT code 99212.

The invoice included the charge for the facility fees for this injection, billed with CPT code 99070. This is a supply code; the proper way to bill for the facility services is with the procedure code.

The provider billed with CPT code 72275, epidurography. According to the American Medical Association, an epidurogram is more than visualizing the contrast flow in the spine during and / or after an injection; it's a diagnostic study to be used to aid the physician in finding a reason for what may be causing pain in the spine that may be missed by other imaging methods (CT/MRI). It's designed to be a help in deciding further treatment for the patient. Because it's not meant to be a routine procedure, it's not expected to see these done in conjunction with epidural injections.

Advantage Diagnostic Imaging Center

Date of service: 2/7/12
Radiology services

The code presented for the 2/7/12 lumbar MRI scan was supported by the documentation.

Issue of Consideration

- The file included a radiology report for a post-discogram lumbar CT scan that had been ordered by David Lanzowsky, MD. There was a gap in the treatment documentation between 6/4/12 and 11/26/13; there were no records from Dr. Lanzowsky. The relatedness of this imaging study to the MVA could not be determined.

Analysis and Conclusions

- My opinion, based on my experience, is that the reasonable and customary medical charges from the accident of 11/12/11 are \$13,005.48, which is supported with all of the recommendations in the accompanying Medical Bill Analysis.

This report is based solely on a review of the records and bills that have been provided. Should additional information or other clinical documentation become available at a later time, I will be more than happy to review that and provide you with an addendum to this report. Thank you for the opportunity to assist you in the medical management of your file. Should you have further questions, or need clarification, please do not hesitate to contact me.

Best regards,



Tami Rockholt, RN, BSN
Nurse Consultant

Exhibit 3

December 23, 2013

Mr. R. Kade Baird
Attorney at Law
Rogers, Mastrangelo, Carvalho, & Mitchell
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101

RE: Claimant: Maria Avarca
 Claim #: None indicated
 DOI: 11/12/11

Dear Mr. Baird:

As per your request, I have reviewed the medical records for the above-named claimant with regards to a motor vehicle accident that occurred on 11/12/11. The records have been summarized in the attached Medical Records Chronology, for your review.

Ms. Avarca received medical treatment from 11/12/11 through 5/18/12. I have also reviewed the billing invoices for these medical services.

In order to understand medical billing, one must first understand medical coding systems. In 1966, the American Medical Association (AMA) developed and published the CPT (Current Procedural Terminology) coding system. This system was designed to help standardize terminology among physicians and to serve as a type of shorthand that would simplify medical records for physicians and record clerks.

The current CPT code set consists of five-digit numbers, for example 99205, that accurately describe medical, surgical, and diagnostic services, and communicates uniform information about these services and procedures among physicians, coders, patients, accreditation organizations, and payers for administrative, financial, and analytical purposes.

Another component of the medical billing coding system is the HCPCS (pronounced hic-pix) code set. This acronym stands for Healthcare Common Procedure Coding System. Established in 1978 by the Health Care Financing Administration (now known as the CMS, or Centers for Medicare and Medicaid Services), HCPCS consists of alphanumeric codes; each code is made up of one letter and four numbers, for example: A4556.

Claimant: Maria Avarca
Claim #: None indicated
DOI: 11/12/11
TGR

These codes are used for non-physician services that are not identified with a CPT code, such as ambulance, prosthetic devices, supplies, and medications.

The initial purpose of the coding systems had nothing to do with reimbursement, and the use of these codes was voluntary. However, in 1983, the federal government mandated that the codes be used for all Medicare billing. A similar mandate extended this system to Medicaid billing in 1986. With the implementation of the Healthcare Insurance Portability and Accountability Act (HIPAA) of 1996, the use these coding systems for transactions involving healthcare information became mandatory.

All providers are subject to billing requirements, and are bound by the coding rules, guidelines and definitions contained within CPT. All providers are required to maintain medical records in compliance with record-keeping standards, which at a minimum, support the services represented by the codes presented. Healthcare claims which fail to comply are considered non-compensable.

The invoices were reviewed for appropriate billing practices and to assure that the services billed for were supported by the clinical documentation. This review does not address medical necessity or relatedness of the treatment to the 11/12/11 incident, except when the services were clearly not related.

As the invoices were reviewed for the summary, some issues with billing coding and documentation were noted. The issues are summarized as follows:

Desert Radiologist

Date of service: 11/12/11
Radiology services

This invoice included a charge for the physician's professional interpretation services for the ER cervical CT scan. The code presented was appropriate but should have been modified with CPT modifier 26 to reflect the physician's service only.

North Las Vegas Fire Department

Date of service: 11/12/11
Ambulance services

The post-MVA ambulance invoice did not include the appropriate HCPCS billing code. The documentation supported that this was a BLS, or Basic Life Support, service. This is identified with HCPCS code A0429.

The invoice was not itemized; it could not be determined if this provider billed for the mileage or any supplies.

Claimant: Maria Avarca
Claim #: None Indicated
DOI: 11/12/11
TGR

University Medical Center

Date of service: 11/12/11

Emergency Room services

The emergency evaluation was billed with CPT code 99284. This code is defined as the emergency examination of a patient with a presenting problem of high severity that requires an urgent evaluation by the physician.

CPT further defines a problem of high severity as one where the risk of morbidity without treatment is high to extreme; there is a moderate to high risk of mortality without treatment OR high probability of severe, prolonged functional impairment.

Ms. Avarca presented to the ER with complaints of right shoulder pain and abdominal pain consistent with a seatbelt injury. She had suffered no loss of consciousness, had no respiratory compromise, there was no indication of open, bleeding wounds or lacerations, and no obvious broken bones. Her presenting problem, as documented, did not appear to be of high severity by CPT definition, but rather of moderate severity, CPT code 99283.

The imaging studies were billed with the appropriate CPT codes. However, the codes should be modified with CPT modifier TC to indicate the technical, or taking, component only. Absent the proper modifier, the code as presented includes the physician's professional fees.

Las Vegas Radiology

Date of service: 11/15/11

Radiology services

The codes presented for the professional, or interpretation, component of the 11/14/11 imaging studies were supported by the documentation and were properly modified with CPT modifier 26 to represent this component only.

The Neck & Back Clinics

Dates of service: 11/15/11 – 2/28/12

Chiropractic services

Massage services

The initial evaluation was billed with CPT code 99204. This new-patient code requires that the provider document these three elements: a comprehensive history, a comprehensive examination, and medical decision making of moderate complexity.

Claimant: Maria Avarca
Claim #: None indicated
DOI: 11/12/11
TGR

According to CPT definition, a comprehensive history includes an extended history of the present illness, a complete Review of Systems, and complete past, family, and / or social history. Absent one of these elements, the history does not support one that is comprehensive.

A complete Review of Systems is to include at least 10 organ systems; this report listed findings of six CPT-defined systems, representing an extended Review of Systems; this meets the criteria for a detailed history.

CPT defines specific examination findings that must be documented to meet the criteria for the examination component of the documentation; a comprehensive examination requires that all of findings must be noted. In this case, the examination report included enough of the findings to meet the criteria for an expanded problem-focused examination.

The documentation met the criteria for the level of medical decision making defined by this code.

Coding rules state that the lowest of the criteria that is met determines which code to use. In this case, the expanded problem-focused examination is one that is identified with CPT code 99202.

X-rays were taken on 11/15/11. The code used for the cervical x-rays was code 72040, cervical films, two or three views. According to the documentation, five views were taken; the proper code would be 72050.

In addition, the films were interpreted by an independent radiologist. Therefore, the codes from this provider should have been modified with CPT modifier TC to reflect the technical, or taking, component only.

The 11/15/11 invoice included charges for two modalities: application of hot / cold packs, CPT code 97010, and electrical stimulation, code 97014. The documentation that was provided did not indicate that these two modalities were done; the codes used were not supported.

The chiropractic manipulation code includes a pre- and post-treatment examination; therefore the re-evaluation code is not to be used on the same dates when a chiropractic code is used.

This provider billed for a re-evaluation with CPT code 99212 on each date of service that chiropractic manipulation was not billed. Typically, billing for an examination on each date of service is not appropriate unless the patient's presenting condition changes or warrants an updated examination.

Code 99212 identifies the examination of an established patient, and requires that the provider document two of these three elements: a problem-focused history, a problem-focused examination, and / or medical decision making that is straightforward.

The documentation that was presented included no history, a check mark indicating "tenderness" next to various spinal regions. There were no changes or new assessment documented and no plan recommended. The documentation did not provide the clinical rationale for a re-evaluation on every date of service, and the reports that were provided did not meet the criteria for history or medical decision making; therefore no re-evaluation code was supported.

On each date of service, the invoice included charges for code 97010, hot and cold packs, and for code 97014, electrical stimulation. The documentation included a check mark next to the initials for these two modalities. There was no indication what specific regions were treated; the use of these two codes was only marginally supported.

On some dates of service, the invoice included charges for CPT code 97110, therapeutic exercises. This is a timed code; each time the code is used represents one 15-minute increment. Coding rules state that the documentation must indicate how long a timed modality was done in order to support this element of the code definition. The documentation referred the reader to an Exercise Log; the time was not documented on this form; the time element was not supported by the documentation that was submitted.

In addition, there was no Exercise Log for dates of service prior to 12/7/11

The documentation dated 11/22/11 included a check mark next to 'therapeutic exercises' but the code was not billed.

On some dates of service, the provider billed with CPT code 97140, manual therapy, and the documentation included a check mark next to 'myofascial release.' This is also a timed code; the check mark alone does not support the time element of the code description.

In addition, coding rules state that the manual therapy and chiropractic manipulation codes are mutually exclusive and cannot be billed on the same date of service unless the documentation clearly indicates that two separate regions were treated and with different modalities. The check marks next to each modality did not meet these criteria.

The dates on which code 97140 was billed were consistent with the dates on the treatment notes from the massage therapist. If these charges were to represent the massage services, then the incorrect code was used. The proper code for massage is code 97124. Based on the benefit of the doubt, code 97140 was changed to reflect the appropriate code on the dates when massage was performed.

Claimant: Maria Averca
Claim #: None indicated
DOI: 11/12/11
TGR

The final evaluation was billed with CPT code 99213, an established-patient examination that requires two of these three elements to be documented: an expanded problem-focused history, an expanded problem-focused examination, and / or medical decision making that is of low complexity.

Ms. Avarca was being discharged from care. The documentation was most consistent with CPT code 99212, a problem-focused examination with straightforward medical decision making.

Primary Care Consultants

Dates of service: 11/2/11 – 2/14/12

Medical services

The initial evaluation was billed with CPT code 99204. This new-patient code requires that the provider document these three elements: a comprehensive history, a comprehensive examination, and medical decision making of moderate complexity.

The handwritten documentation that was provided a brief description of the MVA and check marks next to prior history components; there was no Review of Systems documented, meeting the criteria for a problem-focused history. The examination findings were problem-focused, and the medical decision making was of low complexity.

Based on the lowest of the criteria, the problem-focused examination, this report met the criteria for CPT code 99201.

The follow-up examinations were billed with CPT code 99214, a code that requires two of these three to be documented: a detailed history, detailed examination, and / or medical decision making of moderate complexity.

The follow-up notes were pre-printed forms on which the provider checked or circled pertinent information. The examination findings were minimal and the instructions that were check marked were to continue physical rehabilitation and current medications. These reports met the criteria for CPT code 99211.

The documentation for CPT code 99211 does not have any specific key-component requirements. Rather, the note just needs to include sufficient information to support the reason for the encounter and evaluation and management service and any relevant history, physical assessment and plan of care.

Advantage Diagnostic Imaging Center

Date of service: 2/3/12

Radiology services

Claimant: Maria Avarca
Claim #: None indicated
DOI: 11/12/11
TGR

The code presented for the 2/3/12 lumbar MRI scan was supported by the documentation.

Nevada Comprehensive Pain Center / Alain Coppel, MD

Dates of service: 2/22/12 – 5/18/12

Pain Management services

The initial consultation was billed with CPT code 99244. This code requires that the provider document a comprehensive history, a comprehensive examination, and medical decision making of moderate complexity.

The history and the medical decision making that were documented met the criteria for this code.

The examination included enough of the CPT-defined examination findings to meet the criteria for an expanded problem-focused examination.

Based on the lowest of the three elements that is required for this code, the expanded problem-focused examination is identified with CPT code 99242.

The 3/28/12 follow-up examination was billed with CPT code 99213. The history component of the documentation was verbatim from the 2/24/12 report, likely computer generated, with the exception of mention that Ms. Avarca was no longer attending chiropractic treatment. The examination was problem-focused, and the medical decision making, including a notation that an epidural injection was pending and no further treatment or medications were required, was straightforward. This report met the criteria for a problem-focused examination, CPT code 99212.

On 5/8/12, Ms. Avarca underwent a bilateral single level epidural steroid injection. The proper code was used for the injection, but the code should have been modified with CPT modifier 50, to represent a bilateral procedure. Codes appended with this modifier are typically reimbursed at 150 percent: 100 percent for the first side and 50 percent for the second side.

The invoice included the charge for the facility fees for this injection, billed with CPT code 99070. This is a supply code; the proper way to bill for the facility services is with the procedure code.

The provider billed with CPT code 72275, epidurography. According to the American Medical Association, an epidurogram is more than visualizing the contrast flow in the spine during and / or after an injection; it's a diagnostic study to be used to aid the physician in finding a reason for what may be causing pain in the spine that may be missed by other imaging methods (CT/MRI). It's designed to be a help in deciding

Claimant: Maria Avarca
Claim #: None Indicated
DOI: 11/12/13
TGR

further treatment for the patient. Because it's not meant to be a routine procedure, it's not expected to see these done in conjunction with epidural injections.

There was no charge for the 5/18/12 follow-up examination included on the invoice.

Analysis and Conclusions

- My opinion, based on my experience, is that the reasonable and customary medical charges from the accident of 11/12/11 are \$10,018.38, which is supported with all of the recommendations in the accompanying Medical Bill Analysis.

This report is based solely on a review of the records and bills that have been provided. Should additional information or other clinical documentation become available at a later time, I will be more than happy to review that and provide you with an addendum to this report. Thank you for the opportunity to assist you in the medical management of your file. Should you have further questions, or need clarification, please do not hesitate to contact me.

Best regards,



Tami Rockholt, RN, BSN
Nurse Consultant

Exhibit 4

05A514382

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability COURT MINUTES

July 14, 2009

05A514382

Harrel Remmer

vs

Gustav Fink, Gustav Fink Trust, et al

July 14, 2009

8:15 AM

All Pending Motions

HEARD BY: Barker, David

COURTROOM: RJC Courtroom 11B

COURT CLERK: Sharon Chun; Maria Garibay/mg

RECORDER: Richard Kangas

REPORTER:

PARTIES

PRESENT: CRAFTON, BRICE J. Attorney for Plaintiff
Eglet, Robert T. Attorney for Plaintiff
Hall, Michael R Attorney for Defendant

JOURNAL ENTRIES

- PLTF'S MOTION IN LIMINE TO EXCLUDE DEFENSE EXPERT, ANTHONY SERFUSTINI, M.D. OR IN THE ALTERNATIVE, TO LIMIT HIS TESTIMONY...PLTF'S MOTION IN LIMINE TO EXCLUDE DEFENSE EXPERT TAMERA G. ROCKHOLT, R.N., B.S.N....PLTF'S MOTION IN LIMINE TO LIMIT DEFENSE EXPERT THOMAS CARGILL PH.D. AND STRIKE HIS SUPPLEMENTAL EXPERT REPORT...DEFT'S MOTION IN LIMINE NO. 1 TO COMPEL PRODUCTION OF DEMONSTRATIVE EXHIBITS AT PRETRIAL CONFERENCE...DEFT'S MOTION IN LIMINE NO. 2. TO PRECLUDE PARTIES FROM MAKING IMPROPER ARGUMENTS DURING VOIR DIRE OR OPENING STATEMENT...DEFT'S MOTION IN LIMINE NO. 3 TO PRECLUDE ARGUMENT THAT DEFTS' SHOULD HAVE RETAINED LOCAL EXPERTS...DEFT'S MOTION IN LIMINE NO. 4 TO LIMIT PLTF'S EXPERTS OPINIONS TO THE SCOPE OF TOPICS PREVIOUSLY DISCUSSED...DEFT'S MOTION IN LIMINE NO. 5 TO PRECLUDE PLTF'S COUNSEL FROM MAKING SPEAKING OBJECTIONS...DEFT'S MOTION IN LIMINE NO. 6 TO PRECLUDE PLTF FROM RAISING PER-DIEM TIME UNIT OF DAMAGES ARGUMENTS...DEFT'S MOTION IN LIMINE NO. 7 TO LIMIT VOIR DIRE EXAMINATION TO REASONABLE AMOUNT OF TIME...PLTF'S MOTION IN LIMINE TO PRE-INSTRUCT THE JURY ON THE LAW OF STRICT PRODUCTS LIABILITY...PLTF'S MOTION TO STRIKE WITNESSES FOR AND COKER...PLTF'S

PRINT DATE: 07/21/2009

Page 1 of 3

Minutes Date: July 14, 2009

05A514382

MOTION IN LIMINE TO EXCLUDE DOCUMENTS, SURVEILLANCE VIDEOS, AND WITNESSES NOT DISCLOSED BY THE DEFENSE IN A TIMELY MANNER...PRETRIAL/CALENDAR CALL

AS TO PLTF'S MOTION IN LIMINE TO EXCLUDE DEFENSE EXPERT, ANTHONY SERFUSTINI, M.D. OR IN THE ALTERNATIVE, TO LIMIT HIS TESTIMONY:

Following arguments by counsel, COURT ORDERED, Motion DENIED.

AS TO PLTF'S MOTION IN LIMINE TO EXCLUDE DEFENSE EXPERT TAMERA G. ROCKHOLT, R.N., B.S.N:

Following arguments by counsel, COURT ORDERED, Motion GRANTED.

AS TO PLTF'S MOTION IN LIMINE TO LIMIT DEFENSE EXPERT THOMAS CARGILL PH.D. AND STRIKE HIS SUPPLEMENTAL EXPERT REPORT:

Following arguments by counsel, COURT ORDERED, Motion CONTINUED. Court noted ruling withheld until Calendar Call.

AS TO DEFT'S MOTION IN LIMINE NO. 1 TO COMPEL PRODUCTION OF DEMONSTRATIVE EXHIBITS AT PRETRIAL CONFERENCE:

Following arguments by counsel, COURT ORDERED, Motion GRANTED equally to both sides.

AS TO DEFT'S MOTION IN LIMINE NO 2. TO PRECLUDE PARTIES FROM MAKING IMPROPER ARGUMENTS DURING VOIR DIRE OR OPENING STATEMENT:

Following arguments by counsel, COURT ORDERED, Motion GRANTED.

AS TO DEFT'S MOTION IN LIMINE NO. 3 TO PRECLUDE ARGUMENT THAT DEFTS' SHOULD HAVE RETAINED LOCAL EXPERTS:

Following arguments by counsel, COURT ORDERED, Motion DENIED.

AS TO DEFT'S MOTION IN LIMINE NO. 4 TO LIMIT PLTF'S EXPERTS OPINIONS TO THE SCOPE OF TOPICS PREVIOUSLY DISCUSSED:

Following arguments by counsel, COURT ORDERED, Motion DENIED.

AS TO DEFT'S MOTION IN LIMINE NO. 5 TO PRECLUDE PLTF'S COUNSEL FROM MAKING SPEAKING OBJECTIONS:

Following arguments by counsel, COURT ORDERED, Motion GRANTED.

05A514382

AS TO DEFT'S MOTION IN LIMINE NO. 6 TO PRECLUDE PLTF FROM RAISING PER-DIEM TIME UNIT OF DAMAGES ARGUMENTS:

Following arguments by counsel, COURT ORDERED, Motion DENIED.

AS TO DEFT'S MOTION IN LIMINE NO. 7 TO LIMIT VOIR DIRE EXAMINATION TO REASONABLE AMOUNT OF TIME:

Following arguments by counsel, COURT ORDERED, Motion DENIED but may be re-addressed.

AS TO PLTF'S MOTION IN LIMINE TO PRE-INSTRUCT THE JURY ON THE LAW OF STRICT PRODUCTS LIABILITY:

Following arguments by counsel, COURT ORDERED, Motion DENIED.

AS TO PLTF'S MOTION TO STRIKE WITNESSES FOR AND COKER:

Following arguments by counsel, COURT ORDERED, Motion GRANTED.

AS TO PLTF'S MOTION IN LIMINE TO EXCLUDE DOCUMENTS, SURVEILLANCE VIDEOS, AND WITNESSES NOT DISCLOSED BY THE DEFENSE IN A TIMELY MANNER:

Following arguments by counsel, COURT ORDERED, Motion GRANTED.

Colloquy regarding trial date. Mr. Hall advised Trial should take 6 - 7 days. Court noted Trial date STANDS.

CONTINUED TO: 7/27/09 10:00 AM PLTF'S MOTION IN LIMINE TO LIMIT DEFENSE EXPERT THOMAS CARGILL PH.D. AND STRIKE HIS SUPPLEMENTAL EXPERT REPORT

Exhibit 5

Tamera G. Rockholt. R.N., B.S.N.

QUALIFICATIONS

- Founder of Health Cost Management; Currently Nurse Consultant and former Owner.
- Qualified to testify as a medical bill review expert witness in five states
- Dedicated professional with excellent assessment and teaching skills
- Tested ability to perform efficiently as a nurse in patient care, community health, occupational health, and medical insurance account auditing
- Capable of functioning independently or in a team capacity
- Ability to communicate and negotiate effectively throughout all layers of complex hospital organizations
- Flexible and adaptable to a wide range of duties

ACHIEVEMENTS

- Certified in performing physical assessments for medical monitoring program, Spirometry Certification, C.P.R., A.C.L.S., as well as several other areas related to the medical profession
- Moderator of several maternal-child conferences in the Portland area.
- Planned and created monthly "SAFETY & HEALTH NEWSLETTER" for Intel Corporation
- Speaker at a national symposium on the role of a NICU nurse in medical bill auditing. (10/92 & 8/94)
- Organized and co-presented medical training for fraud investigators in 2004. This training was for the State of California, Department of Insurance, Fraud Investigators Division, the Oakland Alameda County District Attorneys Office and several large auto insurance companies. More than 90 investigators and attorneys attended.
- Invited speaker at 2007 and 2010 IASIU international conference.
- Testified as a medical bill review expert witness in over 30 depositions, arbitrations and trials.
- Awarded "Outstanding Service Award" at the Oregon IASIU Meeting, in appreciation of dedication and service to the insurance industry and the fight against insurance fraud. October 2011.

(800) 458-1261

EXPERIENCE

1/11 – Present	INFORM. At the present time, Tami is continuing her practice as a Nurse Consultant, reviewing medical records and bills and testifying as a medical billing expert witness. In addition, she is now representing INFORM Software Corporation, a provider of automatic fraud detection software.
1/11 – Present	ExamWorks. Independent Contractor Nurse Consultant doing Medical bill review, chronologies and expert testimony regarding reasonable and necessary medical charges for insurance carriers, Plaintiff and defense counsel, and private pay.
9/10 – 1/11	ExamWorks. RN Consultant specializing in nurse case management and expert testimony regarding reasonable and necessary medical charges for insurance carriers, plaintiff and defense counsel.
1/97 – 8/10	Health Cost Management. Founder and former owner of company specializing in cost containment services for payers of claims, inclusive of health carriers, auto carriers and worker's compensation carriers.
1/95 – 12/96	Medical Management Online. Co-founder of new company specializing in cost-containment services for payers of claims, inclusive of health carriers, auto carriers and worker's compensation carriers.
12/90 – 1/95	Registered Nurse Auditor for several insurance claims auditing firms. Conducts medical insurance billing audits as an independent contractor. Evaluations and references upon request
6/77 – Present	Thirty years experience in acute hospital nursing care including CCU, PCU, PACU, NICU, and Labor & Delivery. Significant experience with a wide variety of hospital procedures protocols and expected outcomes.

EDUCATION

Associate Degree, Nursing
Bachelors Degree, Nursing

Oregon Institute of Technology
Oregon Health Sciences University

Course work completed in presentation skills, time management and conflict resolution.

11/08 Course completed and certificate received for Testimony Skills Workshop for Medical Experts – Fighting and Preventing Expert Witness Abuse, Meritage Resort, Napa, California. Class taught by James Mangraviti, Esq., SEAK Inc.

9/2011 Course completed and certificate received for continuing efforts toward professional excellent in the battle against insurance fraud by 20 hours of fraud related training at IASIU's 26th Annual Seminar on Insurance Fraud.

10/2011 Attended class/seminar entitled "About Face – The Supreme Court Reverses Direction in Howell."

3/2012 Attended Oregon Medical Association Webinar "ICD-10 CM Preparation for Coders"

3/2012 Attended Medicaid Recovery Audit Contractor (RAC) program

3/2012 Attended Basic Medical Bill Review Course (Bill Review in Legal Setting) by Western Regional Legal Nurse Consultants

4/2012 Attended 16 hours of Fraud Course of Instruction. Classes included topics of: analytics, fraud investigations, DME issues, Ethics, Preparing Fraud for Prosecution, Prescriptions and Fraud Issues

5/2012 Received Certificate of Completion of Continuing Education for 2012 Health Care Fraud Training Symposium (8 hours), Salt Lake City, Utah

SPEAKER HISTORY

1/05 – 12/06: 41 educational presentations on various topics such as medical terminology, CPT codes and billing fraud

1/07 – 12/07: 32 educational presentations to various insurance companies, law firms and associations.

1/08 – 12/08: 43 educational presentations to various insurance companies, law firms and associations.

1/09 – 12/09: 14 educational presentations to various insurance companies, law firms and associations.

1/10 – 4/10: 13 educational presentations to various insurance companies, law firms and associations.

Tami has presented at the following venues:

- Claims Conference of Northern California (CCNC)
- Puget Sound Special Investigators (PSSI) Conference
- Northern California Fraud Investigators Association (NCFIA) Conference
- Association of Certified Fraud Specialists (ACFS) Conference
- International Association of Special Investigation Units (IASIU) Annual Conference
- Southern California Fraud Investigators Association (SCFIA) Monthly Luncheon
- Utah Association of Special Investigation Units (UASIU) Annual Conference
- Rocky Mountain Association of Special Investigation Units (RMASIU) Monthly meeting
- Oregon State Bar CLE session
- State Accident Insurance Fund (Oregon SAIF) Worker Compensation required training for IME physicians
- Nevada Chapter of the International Association of Special Investigation Units (NV-IASIU) monthly meeting
- International Assoc. of Special Investigation Units (IASIU)

ASSOCIATIONS

Tami is a member of the following associations:

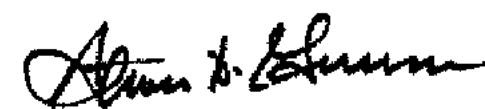
- Oregon Casualty Adjusters Association
- Western Regional Legal Nurse Consultants
- Cascade Employers Association (Board member)
- Pacific Northwest Paralegal Association
- Southern California Fraud Investigators Association
- Sacramento Claims Association
- Oregon Nurses Association
- COMSF (Carole Orton Memorial Scholarship Fund)
- The Organization of Legal Professionals

CLASSES TAMI HAS TAUGHT IN 2011:

4/12/2011	Accidental (?On Purpose) Errors in Medical Billing & Coding NV IASIU Monthly Luncheon	Las Vegas, NV
4/13/2011	Medical Fraud and Trends in Billing and Coding Liberty Mutual SIU Yearly Meeting	Portland, OR
5/5/2011	Prosecuting Medical Billings and Coding Fraud TX IASIU Yearly Meeting	Houston, TX
5/11/2011	Accidental (?On Purpose) Errors in Medical Billing & Coding HI IASIU Monthly Luncheon	Honolulu, HI
5/11/2011	Accidental (?On Purpose) Errors in Medical Billing & Coding HI GEICO PIP & BI & SIU	Honolulu, HI
5/11/2011	Accidental (?On Purpose) Errors in Medical Billing & Coding HI Farmers PIP & BI & SIU	Honolulu, HI
6/1/2011	Accidental (?On Purpose) Errors in Medical Billing & Coding OR Trial Lawyers Association Quarterly Meeting	Portland, OR
7/26/2011	Impact of Fraud on Medical & Auto Insurance Hawaii Assoc. of Health Underwriters	Honolulu, HI
8/22/2011	Accidental (?On Purpose) Errors in Medical Billing & Coding AZ IASIU Yearly Fraud Meeting	Phoenix, AZ
9/2011	Co-Presented with David Kassabian "Prosecuting Medical Fraud" IASIU	San Antonio, TX

Last updated 5/2012

Exhibit 6



CLERK OF THE COURT

1 TRAN

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EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

4

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CHRISTIAN CERVANTES-LOPEZ,
MARIA AVARCA,

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Plaintiffs,

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vs.

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EVANGELINA ORTEGA,
MIRIAM PIZARRO-ORTEGA,

11

Defendants.

12

13

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

14

TUESDAY, OCTOBER 14, 2014

15

TRANSCRIPT RE:

16

DEFENDANTS' MOTIONS IN LIMINE NO. 1 THROUGH 9

17

PLAINTIFFS' MOTIONS IN LIMINE NO. 1 THROUGH 9

18

19

APPEARANCES:

20

For the Plaintiffs:

BENJAMIN J. MILLER, ESQ.

21

For the Defendants:

R. KADE BAIRD, ESQ.

22

23

24

RECORDED BY: Maria Garibay, Court Recorder

1 LAS VEGAS, NEVADA

TUESDAY, OCTOBER 14, 2014

2 PROCEEDINGS

3 (PROCEEDINGS BEGAN AT 9:41 A.M.)

4 THE COURT: All right. Sorry you had to wait that extra thirty seconds.

5 THE MARSHAL: A667141, Cervantes-Lopez, Christian versus Ortega,
6 Evangelina.

7 MR. MILLER: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. MILLER: Ben Miller from Danny Simon's office on behalf of the
10 plaintiffs.

11 MR. BAIRD: Kade Baird for the defendants.

12 THE COURT: All right. Good morning, everyone.

13 So this is defendants' motions in limine, the omnibus motion in limine
14 and the oppositions to the motions in limine. Okay, let's just go one by one.

15 MR. BAIRD: Okay.

16 THE COURT: Okay. So the first one I have defendants asking for a motion
17 in limine is to preclude plaintiff from, number one, eliciting the same testimony from
18 more than one witness, including but not limited to expert opinions, as it would be
19 duplicative evidence impermissible pursuant to 48.035, subsection 2.

20 MR. BAIRD: Yes. And, Your Honor, this is admittedly somewhat generic,
21 but because we want to not waste time when we're scheduling witnesses, even
22 though we don't know exactly what each person is going to say, it's just a simple
23 they shouldn't put up twenty witnesses that say the exact same thing. Their
24 argument in response is just that, you know, all their doctors need to testify about

1 their bills and causation, and that's fine if they're talking about something that's
2 specific to that witness. But to just say, well, here's an avalanche of witnesses
3 on one particular point, that's going to make the jury feel like it's the quantity of
4 witnesses, not the quality of the testimony that's important.

5 THE COURT: Okay.

6 MR. BIARD: And it leads to error. That's all.

7 MR. MILLER: Simply, Your Honor, the request is over-broad. I mean, he's
8 trying to shut down every possible witness when we really don't know what's going
9 to be cumulative. In terms of the witnesses we have, each physician provided
10 specific treatment to these plaintiffs. If we need to call them and have them to
11 testify to the treatment they provided, so be it. That's not going to be cumulative
12 or somehow overlapping or be the same testimony regarding each physician's
13 treatment that they provided. That's the only way I see that going. I don't even
14 know where else it would be going in terms of potentially cumulative testimony.

15 THE COURT: Okay. Anything else?

16 MR. BAIRD: No. I mean, I think just a general order. I know it sounds over-
17 broad, but there's a lot of witnesses that are listed and we don't know who's going to
18 testify. And if this motion is granted, it doesn't keep them from testifying to material
19 things that aren't duplicative. It just gives the party an order to follow that helps
20 make this trial go in a more streamlined fashion.

21 THE COURT: And perhaps this would be a better issue to bring up as we get
22 closer to trial and both sides start hammering down who they're really going to call
23 as witnesses. At this point it's going to be denied. Obviously the plaintiff is going
24 to have -- they're going to have to get their medical testimony in through the various

1 doctors who treated the plaintiff. And if they have any percipient witnesses to the
2 accident, those witnesses would have to testify. And my experience is usually you
3 don't have a multitude of witnesses who all say all the same thing. So -- and we
4 can always readdress this at the time of trial.

5 MR. BAIRD: Sure.

6 THE COURT: The next one is defendants are requesting the Court to
7 preclude plaintiff from offering multiple doctors who offer the same testimony,
8 as it would be cumulative evidence. That's basically the same as the first one.

9 MR. BAIRD: That's the same. Yeah.

10 THE COURT: All right. So that's going to be denied as well for the same
11 reasons.

12 The next one, to prohibit -- to preclude plaintiff from prohibiting
13 defendant from asserting that plaintiffs are seeking an excessive amount of money
14 for damages. Now, this one kind of comes down to phraseology.

15 MR. BAIRD: Yes, Your Honor. You know, basically if plaintiffs are allowed
16 to keep defendants from making that argument, what they're allowed then to do
17 is make the jury play a percentage game instead of weigh the evidence.

18 THE COURT: Well, let me ask this, because this one -- this motion in limine
19 comes up a lot. To me there's a difference between getting up and saying, hey, the
20 jury is asking for more than they reasonably expect you to give versus an argument
21 as to you disagreeing as to the value of the case, which I think is fair game. Do you
22 see the distinction?

23 MR. BAIRD: Right. But, see, the implication in their argument is that it is
24 acceptable for them to ask for something that is completely divorced from reality

1 and hope that the jury will ignore the facts and offer a verdict on sympathy. And if
2 this motion isn't granted, then the defendant has nothing they can do to counter that
3 position, that argument that would be presented by the plaintiff.

4 THE COURT: But aren't you going to have an expert that comes in and --
5 usually they come in and totally disagree with the plaintiff's value of the case.

6 MR. BAIRD: Sure. Well, I mean, not the value of the case --

7 THE COURT: And you can obviously argue that in closing.

8 MR. BAIRD: Sure. The value of the case, though, there's not going to be
9 any expert who is going to testify to general damages, you know, And so that is
10 solely going to be the province of argument at the end of the trial. And that's our
11 concern is they are allowed to make an argument and then they can preclude us
12 from responding to that argument. It's true we will have evidence, we will have
13 experts who will testify about the special damages issues and perhaps a little bit
14 about whether they are in the amount of pain they claim to be. But they're not
15 going to present an expert on -- specifically on general damages.

16 And so at closing argument they can get up and say, ladies and
17 gentlemen, fifteen million dollars, and then we're not allowed to say this is obviously
18 a tactic, you know, this is an argument, this isn't evidence. If we're precluded from
19 saying that, then the jury can say, well, let's give them ten percent out of sympathy.
20 I mean, that's what it encourages is the jury to render a verdict based on sympathy
21 instead of evaluating the evidence. Our argument encourages the jury to look at
22 the evidence; theirs does not.

23 THE COURT: So, okay, how exactly would you bring it up? I mean, because
24 people get up there and they argue damages and they argue, look, there's no way

1 that's not too much, the request for pain and suffering is not too great because
2 obviously look at them, they're walking fine and --

3 MR. BAIRD: Right.

4 THE COURT: -- I'm just making things up; the accident wasn't significant,
5 look at the pictures. But -- and I think that's fair game, obviously, because the jury
6 gets to make the ultimate decision. But my concern is always when you get into that
7 very specific argument of plaintiff is going to ask you to give a million dollars and
8 they really only expect you're going to give seven hundred dollars, I think that's a
9 little bit inappropriate. I think that you can get up there and argue what you believe
10 the value to be based upon the expert testimony and the evidence that's presented
11 and everything else that comes out in the case.

12 MR. BAIRD: I guess, you know, the most important thing to me, Your Honor,
13 is if I can -- if we can get up and say, ladies and gentlemen, we want you to consider
14 whether what they have asked, in light of the evidence that's been presented, is
15 really what they want, you know. And that's not saying they're asking too much.
16 We're just saying we want you to look at is this just an argument or is this -- are
17 they asking you to make a verdict based on the evidence? And I think that's not
18 very far off from what you just enunciated.

19 THE COURT: Okay. By the plaintiff?

20 MR. MILLER: I think it's extremely far off from what you just said, Your
21 Honor. I think you're on point, Your Honor. I think what defense is trying to do is
22 actually kind of negate one of our motions in limine in here about coming in and
23 arguing at some point that plaintiffs only really want this much money, even though
24 they're asking for this much money. Instead of arguing -- arguments are supposed

1 to be based on the evidence presented at trial. That's the whole point. And I think,
2 Judge, you've already touched on that. They can argue the value of the damages.
3 Absolutely. And they have experts that are going to do so. No problem there. But
4 then to come in and say, well, plaintiffs don't even believe that, because that's really
5 what it boils down to, plaintiffs don't believe that. They're just putting up some large
6 numbers so in reality you get to this. That argument is improper and not based
7 upon the evidence. It can't be presented. It's simply an attempt to prejudice the
8 jury and make them think that plaintiffs don't even think the medical bills and the
9 damages they're going to present are credible, and that's completely improper and
10 incorrect.

11 And so what you have here is some attempt to introduce improper
12 argument. It's not even evidentiary based, what this request is. It doesn't even --
13 it really shouldn't even fall under the province of this type of motion here. But that's
14 what they want to do. They want to say we want to be able to come in and argue
15 that we think plaintiff is really only wanting this much money. In reality at closing
16 plaintiffs are going to ask for a certain amount. That's what they intend to ask for,
17 that's what they want. What the jury decides is up to the jury. But they shouldn't
18 be able to come in and just say they don't even believe that number; that number
19 is nuts.

20 THE COURT: Okay. Anything else?

21 MR. BAIRD: Just the only issue is when they get to ask any number they
22 want for general damages, for total damages, that's never based on any evidence.
23 They're not going to put up an expert on general damages. So I don't know why
24 we are then precluded from making a similar argument that's just contrary.

1 THE COURT: You know, I'm not going to allow it the way you've presented
2 it to me as you'd want to ask, so the motion will be denied. However, I do allow you
3 to argue the evidence as presented in the case, and it sounds like one of the issues
4 which evidence will be presented upon is the value of the case, and I think that's fair
5 game to argue, and anything in the case that comes out that's related to the value
6 of this case. So it's going to be denied, but I will allow what I've indicated.

7 The next one is the fourth one. Defendant wants the Court to preclude
8 plaintiff from making any comments about defendant's insurance coverage, as it's
9 impermissible under 48.135. And also they brought up the issue of plaintiff's
10 medical liens.

11 MR. BAIRD: Right. Plaintiff -- the only opposition plaintiff offers is they think
12 that liens should be covered under the Proctor v. Castelletti, you know, per se
13 exclusion of collateral sources. The fact is Proctor v. Castelletti does not have the
14 word liens in it. Liens are not a collateral source. Liens are the plaintiff themselves
15 paying this, or I guess defendants paying following a judgment or a settlement.
16 So there is not a second payer at issue in a lien. However, what we do have are
17 all of the witnesses that will be testifying about damages and most of them have
18 a financial interest in this case. They are more likely to get paid when the plaintiffs
19 recover or can pressure a settlement out of my clients. This isn't collateral source,
20 this is having an interest, this is bias. This goes to credibility and the weight of the
21 testimony that will be offered by their witnesses.

22 THE COURT: Okay.

23 MR. MILLER: Simply, Your Honor, the minute you start talking about liens,
24 which has nothing to do with the treatment provided, it introduces the concept of

1 insurance to the jury. The jury starts sitting there, well, if there's liens, why wasn't
2 there insurance or was there insurance? Why didn't insurance pay? That's
3 immediately what starts getting introduced. They want to say, well, we just want to
4 attack the credibility of the physicians and talk about liens. The simple fact is if you
5 start diving into all of this it easily goes into the insurance, which is impermissible
6 before the jury.

7 Simply, it's not relevant to the facts of this case. The facts are was the
8 treatment and the bills and everything charged related and reasonable? Plaintiff
9 obviously is going to present testimony that it was. Defense can cross on that.
10 They have defense experts who can then present testimony to rebut that. They
11 have the full ability to litigate that without diving into this whole lien issue. It doesn't
12 need to be done in front of the jury.

13 THE COURT: Okay. Anything else on this issue?

14 MR. BAIRD: Your Honor, I think in every jury trial I've done there has been
15 a jury instruction telling the jury not to consider insurance, whether it exists or could
16 apply for either party in the case. So the word insurance will be at the trial. So as
17 long as the evidence, A) doesn't mention insurance, doesn't ask the jury to think
18 about insurance and in fact is not an actual collateral source, there's no reason that
19 it can't be discussed at trial, especially when it goes to the material fact of -- issue
20 of are these witnesses biased, do they have an interest, can they be believed?

21 THE COURT: Okay. There's kind of two parts to this request, so let me
22 address one. Obviously you can't bring up any discussion of insurance. I think
23 that is clearly precluded under the collateral source rule.

24 As far as the medical liens, I'm going to give a qualifier. If you've

1 appeared before me years ago, I've changed my position on this issue, to be very
2 frank with you. I am not going to allow discussion on the medical liens for the
3 following reason. I don't know that I agree that it's a collateral source; however, I do
4 think it's extremely prejudicial to the plaintiff. When I've looked at those liens -- you
5 know, I know the argument is always made during the course of the trial that the
6 doctor has assented to say whatever because that's how they get paid in the case.
7 Most of those liens don't even provide that. Although they indicate that the doctor
8 will be paid out of the proceeds from any settlement or verdict, you know, if there is
9 in fact one, a lot of those liens also say that the patient is ultimately responsible for
10 those medical bills should there not be a sufficient settlement or judgment or any
11 settlement judgment whatsoever. So I just think it is highly prejudicial and it seems
12 to put a bad taste in people's mouths that the doctors would have a motivation to lie.
13 And quiet simply, I think that the doctors are entitled to get paid. So I'm not going
14 to allow it as far as prejudicial.

15 Let me make sure. Did I cover all your motions in limine, defense
16 counsel? I believe that I did.

17 MR. BAIRD: On motion one. Yes, Your Honor.

18 THE COURT: Okay. Yeah, you have a few. Okay. So I have defendant's
19 motion in limine number two, to prevent plaintiff from introducing future damages
20 at trial, and plaintiff's opposition.

21 MR. BAIRD: Yes, Your Honor. Plaintiff has not disclosed any calculation of
22 future damages. There have been vague references to medical care that may be
23 required in the future.

24 THE COURT: Um-hm.