

Case No. 79424

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

DESIRE EVANS-WAIAU,  
individually; GUADALUPE PARRA-  
MENDEZ, individually,

Appellants,

vs.

BABYLYN TATE, individually,

Respondent.

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**APPEAL**

From the Eighth Judicial District Court, Clark County  
The Honorable Mary Kay Holthus, District Judge  
District Court Case No. A-16-736457-C

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**APPELLANTS' APPENDIX  
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DENNIS M. PRINCE  
Nevada Bar No. 5092  
KEVIN T. STRONG  
Nevada Bar No. 12107  
**PRINCE LAW GROUP**  
10801 W. Charleston Boulevard, Suite 560  
Las Vegas, Nevada 89135  
Attorneys for Appellants

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1 MR. PRINCE: Okay.

2 MR. HENRIOD: Although, I will say that I like the current  
3 stock instruction on this better than the stock from the set that this came  
4 from. I think it's more complete. So, actually, what I would propose in  
5 lieu of what is on page 36 of the agreed upon set --

6 THE COURT: Uh-huh.

7 MR. HENRIOD: -- is what is at page 9 of our proposed not  
8 agreed to. And that is the corollary instruction from the --

9 MR. PRINCE: You know what? I'm sorry.

10 MR. HENRIOD: -- 2018.

11 MR. PRINCE: Joel, just if you have another set of your  
12 instruction. We've got ours at home for some reason. Sorry.

13 MR. HENRIOD: That's cool.

14 THE COURT: Do you have a copy? Otherwise, I can take  
15 these stickies off --

16 MR. PRINCE: No, I --

17 THE COURT: -- and make a copy of that.

18 MR. PRINCE: Yeah, I'm here. I've got it.

19 THE COURT: All right.

20 MR. PRINCE: What was yours? Yours was 10, Joel?

21 MR. HENRIOD: Yeah. So, Mr. Prince, I'm suggesting what is  
22 at page 9 of that set. It is the concluding instruction regarding this  
23 concept but from the most recent stock set, 2018.

24 MR. PRINCE: Well, where -- where's that instruction at?

25 MR. HENRIOD: It's at page 9 of --

1 MR. PRINCE: That's not the -- that's not the concluding  
2 instruction.

3 MR. HENRIOD: No, it is the --

4 MR. PRINCE: It's the comparative negligence instruction.

5 MR. HENRIOD: Yeah. Okay. So --

6 MR. PRINCE: So, no, you'd have to -- there's a very specific  
7 language about that. They're not -- you don't even have a proposal  
8 which -- a concluding instruction including that language at this point.  
9 So --

10 MR. HENRIOD: No.

11 MR. PRINCE: No, no. You're -- it's your 21.

12 MR. HENRIOD: No, no. Whoa, whoa, whoa, whoa, whoa.  
13 Can I finish? I get to finish, too. This is the exact corollary of the  
14 instruction that is at page 36. Now, I don't need to include everything  
15 after it to substitute out one stock for the exact same stock in a more  
16 modern set.

17 MR. PRINCE: Which one are you talking about, 21?

18 MR. HENRIOD: I'm talking about what is at page 9.

19 MR. PRINCE: But that's a comparative negligence  
20 instruction.

21 MR. HENRIOD: It is -- it is -- CB4.8 is exactly the corollary to  
22 the stock that you have at page 36.

23 MR. PRINCE: No, actually, it's your 21 is -- if you look -- no.  
24 Judge, you have to compare -- Joel, please look at your 21. That's the  
25 corollary. That's the corollary. Your 21 -- your -- Defense proposed not

1 agreed upon 21 is the corollary. Not 9. "When you retire, " that's the --  
2 that's your --

3 THE COURT: I think we're --

4 MR. PRINCE: No. There's --

5 THE COURT: What -- I think -- yeah, I think --

6 MR. PRINCE: There's something --

7 MR. HENRIOD: Yep, yep, yep, yep, yep, yep, yep.

8 THE COURT: You're off, Joel -- Mister --

9 MR. HENRIOD: Pardon me.

10 THE COURT: -- Henriod.

11 MR. HENRIOD: That is absolutely right.

12 THE COURT: So that was not --

13 MR. HENRIOD: Excuse me. Yeah, and I apologize for my  
14 tone there. Yes. So it is at page 21. Forgive me.

15 THE COURT: Okay. That -- I see that. And I think, Mr. Prince,  
16 assuming, depending on how we rule, you agree?

17 MR. PRINCE: I agree that that's the correct --

18 THE COURT: Correct?

19 MR. PRINCE: -- the language. I'm not disagreeing  
20 substantively. I'm just saying I don't think you should give a  
21 comparative negligence instruction.

22 THE COURT: Right.

23 MR. PRINCE: So therefore --

24 THE COURT: That's what I'm saying. So the --

25 MR. PRINCE: Yes. So, yes. Yes.



1 THE COURT: Okay.

2 MR. PRINCE: So it's not a language problem. I have no  
3 problem with the language.

4 THE COURT: All right. So this would, theoretically, replace  
5 36, depending.

6 MR. PRINCE: Right.

7 MR. HENRIOD: And those are the only two issues that I have  
8 with the agreed upon set.

9 MR. PRINCE: So we've agreed to make the change to the  
10 agreed upon number -- what was that?

11 THE COURT: Okay.

12 [Pause]

13 MR. PRINCE: Number 26.

14 THE COURT: Okay. Now, now can we go through Plaintiff's  
15 proposed --

16 MR. PRINCE: Right.

17 THE COURT: -- not agreed upon?

18 MR. HENRIOD: Yes.

19 THE COURT: All right.

20 MR. PRINCE: Okay.

21 THE COURT: The first one, at page 2, do we -- do we really  
22 need a --

23 MR. PRINCE: Yes.

24 THE COURT: -- instruction that says that?

25 MR. PRINCE: Yes. Because part of the other agreed upon is

1 things you need to anticipate, and this case illustrates what you should  
2 reasonably anticipate to pose this case.

3 THE COURT: I don't know that it matters either way. To me,  
4 it's pure common sense, and I don't even know why we have to instruct  
5 them on it.

6 MR. PRINCE: But I mean --

7 THE COURT: But what's the objection from the Defense?

8 MR. HENRIOD: I think that it unduly emphasizes a particular  
9 aspect. I think that it is within the common notions of ordinary prudence  
10 already contemplated by the instructions. I'm also thinking that it's a  
11 sweeping overstatement in dicta and reflects the danger of incorporating  
12 paragraphs wholesale out of opinions. I don't think that it adds, really,  
13 anything substantive. It merely unduly emphasizes a particular theory.

14 MR. PRINCE: Right. I think that it goes to, while the Court  
15 does describe a driver has a duty to anticipate, it doesn't like illustrate  
16 the types of offense that pose this case in discussing motor vehicle  
17 collision, someone who came to a stop, allegedly, quickly in response to  
18 something else, was rear-ended. And the question was, couldn't you  
19 give a sudden emergency instruction, the Court said no. There's certain  
20 things that you need to reasonably anticipate.

21 So the fact the Plaintiff came to a stop sooner than expected  
22 is the type of hazard that should be anticipated under the circumstances  
23 of ordinary driving. So they kind of -- drivers must anticipate certain  
24 emergency situations such as emergency appearances of obstacles or  
25 persons, darting children, crowded intersections, and sudden stops. So I

1 think this is kind of a description of the duty. This is taken directly from  
2 the language of the *Posas* case, talking about -- like in this case, the  
3 argument is, she came to a sudden stop, I'm not at fault. That's the  
4 argument.

5 THE COURT: Right.

6 MR. PRINCE: Well, we're saying we had to stop for a  
7 pedestrian. So I think it -- they're not saying the language is inaccurate.  
8 They're not saying that that's not part of the holding, because they quote  
9 that language.

10 THE COURT: Right. And I think that this is something you  
11 can argue, but I think there are other instructions in here that enable you  
12 to argue it, and I do think it potentially highlights -- I'm not going to give  
13 a specific instruction on every fact for either side.

14 MR. HENRIOD: Okay.

15 THE COURT: So --

16 MR. HENRIOD: Okay. Good.

17 THE COURT: -- we're going to give the general --

18 MR. PRINCE: This is about what --

19 THE COURT: -- and we're already got 40 instructions.

20 MR. HENRIOD: Right. Your Honor, may I --

21 MR. PRINCE: Yeah, but not on this issue.

22 MR. HENRIOD: -- respond? Are you --

23 MR. PRINCE: Right. I mean, the only thing we're giving on  
24 this particular issue, Judge, says the driver has a duty to avoid placing --  
25 to avoid an accident, to keep a proper lookout. I mean, there's no --

1 there's no expression of what -- what a driver should anticipate. There's  
2 nothing. So we can't even identify any instruction that -- so far that  
3 would even be applicable. So it's just the one instruction, proposed 27,  
4 is a -- are the conditions reasonably to be anticipated. I mean, I guess  
5 that's the only -- that's the only language it has.

6 THE COURT: I mean, isn't that exactly what it is, though,  
7 reasonable --

8 MR. HENRIOD: Well, and --

9 THE COURT: That combined with the ordinary, prudent,  
10 responsible, reasonable person negligent standard?

11 MR. PRINCE: Yeah, but they're arguing that it was so  
12 sudden --

13 MR. HENRIOD: Precisely. And what this language is --

14 MR. PRINCE: -- and so fast --

15 MR. HENRIOD: -- is it's the rationale for saying that a sudden  
16 -- a sudden emergency instruction is not appropriate. And we're not  
17 proposing a sudden emergency instruction.

18 THE COURT: I'll -- my ruling right now is I'm not giving it. I  
19 will read -- if I ever get a break -- the *Posas/Horton* again and make sure.  
20 But that's my inclination as to page 2.

21 Okay. Page 3. Why -- what's wrong with this one? I don't  
22 know what's -- and let me understand this. You all are both going to  
23 claim the other driver has violated rules of the road, I presume; is that  
24 right, counsel?

25 MR. PRINCE: I'm -- I'm claiming that for sure.

1 MR. HENRIOD: Yes. Yes.

2 THE COURT: So does that mean you both -- you both can  
3 just put in the rules of the road as law in instructions?

4 MR. PRINCE: You have to decide whether the evidence  
5 supports an instruction.

6 THE COURT: Okay.

7 MR. PRINCE: You have to make that decision.

8 MR. HENRIOD: But the set does entirely have to be  
9 evenhanded.

10 MR. PRINCE: No.

11 MR. HENRIOD: Yes, it does. The set has to be evenhanded.  
12 Now, I'm not saying -- I'm not saying that anything that, by itself, is not  
13 justified should be in there. But what I'm saying is, is that another  
14 consideration for a jury set of instructions is the evenhandedness of the  
15 set overall. It certainly is.

16 THE COURT: Okay.

17 MR. PRINCE: Your Honor, that -- that's not, in my opinion,  
18 accurate. If -- we're entitled to be -- have an instruction on any issue  
19 supported by the evidence. It doesn't mean that they get a -- another  
20 instruction to balance it out in some way. It's not conditional. It's based  
21 on what you determine --

22 THE COURT: Right.

23 MR. PRINCE: -- from the evidence. So, I mean, he's not --  
24 he's not disagreeing that this is a correct statement of the law. It's a  
25 statute dealing with not following another vehicle too closely. It's an

1 NRS automobile -- motor vehicle, excuse me, code section.

2 MR. HENRIOD: But I will also say that I think it is within your  
3 discretion to find that if the statute doesn't add substantively to the  
4 ordinary negligent standard, that it doesn't need to be given. And here --

5 MR. PRINCE: Well --

6 MR. HENRIOD: Here what you have is -- and this is my issue  
7 with it. Read the statute. The driver of a vehicle shall not follow another  
8 vehicle more closely than is reasonable and prudent --

9 MR. PRINCE: Well, the point of this statute --

10 MR. HENRIOD: -- having due regard for the speed of such  
11 vehicles and the traffic upon the condition of the highway.

12 MR. PRINCE: Well --

13 MR. HENRIOD: It's not adding anything, really, to the  
14 ordinary standard to have to act with care.

15 MR. PRINCE: Well --

16 THE COURT: But doesn't that get to negligence per se?

17 MR. PRINCE: Yes. That's exactly right. A violation of a  
18 statute is a negligence per se concept, and it's negligence as a matter of  
19 law once they find it.

20 THE COURT: And is it --

21 MR. HENRIOD: But the violation of this statute is to act  
22 imprudent.

23 THE COURT: I mean, I get that it -- I get it, but I don't think  
24 it's -- I don't see any big deal, frankly.

25 MR. PRINCE: But it's a per se issue. The law deems it to be a

1 violation of the statute.

2 THE COURT: All right. No, I -- I know. I --

3 MR. PRINCE: You gave a common law standard. This is a  
4 specific statute which gives rise to additional remedies -- or additional  
5 rights. And it tells the jury you -- it's your duty to find to be negligent, so  
6 it has those concepts in it.

7 THE COURT: All right. I'm inclined to give this one.

8 MR. PRINCE: Okay. Good.

9 THE COURT: I do want to figure out, though -- to the extent  
10 we're going to do these violation of law things, I'd like to get them all on  
11 one page, so I don't have to read the violation of law multiple times.

12 MR. PRINCE: Okay. With regard to number 4, our proposed  
13 4, I'm going to drop that.

14 THE COURT: You're going to what?

15 MR. PRINCE: We're going to -- we're going to withdraw it.

16 THE COURT: Withdraw?

17 MR. PRINCE: Yes. I think it's covered. No, I'm fine. So now  
18 we're on our proposed five.

19 THE COURT: Right. Do we dispute that that's the law?

20 MR. HENRIOD: If we are -- I dispute again, that it adds  
21 anything more to the ordinary person.

22 MR. PRINCE: Oh.

23 MR. HENRIOD: But I do not disagree that it is an articulate  
24 statement of the statute.

25 THE COURT: Okay, then I'm going to give it.

1 MR. PRINCE: Okay.

2 THE COURT: Same with the next one.

3 MR. HENRIOD: So let me state my objection to this one.

4 THE COURT: Sure.

5 MR. PRINCE: This is proposed -- for the record, this is

6 Plaintiff's proposed --

7 THE COURT: Six.

8 MR. PRINCE: -- not agreed upon six.

9 THE COURT: Correct.

10 MR. HENRIOD: Right. And it is - -it is a concept also found in

11 the stocks. But in the stocks it includes another paragraph that I think is

12 relevant here. And I think that if the Court gives --

13 THE COURT: Okay, and just to make --

14 MR. HENRIOD: -- the instruction --

15 THE COURT: -- when you -- when you say stocks, are you

16 talking about the agreed upon, or are you talking about these other

17 things that --

18 MR. PRINCE: He's talking about something completely

19 different.

20 THE COURT: Okay.

21 MR. HENRIOD: I'm talking about the Nevada State Bar's

22 Stock Civil Jury Instructions.

23 THE COURT: That's what we've got, right?

24 THE CLERK: Yes, I think so.

25 THE COURT: Okay.



1 MR. HENRIOD: And -- and you see at page eight of our  
2 proposed --

3 THE COURT: I probably don't have -- okay.

4 MR. HENRIOD: That is -- that is the stock instruction. The  
5 first paragraph of which is also Plaintiff's proposed page 20 -- 37.

6 THE COURT: Page 8?

7 MR. HENRIOD: Yes.

8 MR. PRINCE: What? Where are you at?

9 THE COURT: Is that there may be more than one person?

10 MR. HENRIOD: Yes.

11 MR. PRINCE: Oh.

12 THE COURT: Okay.

13 MR. PRINCE: Okay.

14 THE COURT: So what --

15 MR. HENRIOD: And -- and what this includes is the notion of  
16 sole proximate cause, because this instruction actually goes to people,  
17 actions, and forces, aside from the two -- aside from the parties.

18 THE COURT: Okay.

19 MR. HENRIOD: Third parties.

20 THE COURT: Right.

21 MR. HENRIOD: It's not necessary just to talk about how  
22 someone can still be partially liable, even if another party is, because  
23 you also find that in the proximate cause instruction that is given the  
24 page before this.

25 MR. PRINCE: Yeah, we --

1 MR. HENRIOD: If we give -- if we give this, then I think it  
2 needs to include the other side of the exact same coin.

3 THE COURT: So if we give 6 of Plaintiffs', not agreed upon,  
4 you want 8 of Defendant's, not agree upon?

5 MR. HENRIOD: No, no. Because we're already -- I'm saying  
6 that my only --

7 THE COURT: I'm not really sure what that --

8 MR. HENRIOD: -- disagreement with their 37 --

9 MR. PRINCE: With what? We're on proposed 6 We're on  
10 Plaintiff's proposed, not agreed upon 6.

11 MR. HENRIOD: Oh, I'm looking at your old proposed set. I  
12 see what you're saying.

13 THE COURT: This is the, when official traffic control devices  
14 are not in place, right?

15 MR. PRINCE: Yeah, we're --

16 THE COURT: Is that what we're on?

17 MR. PRINCE: -- and then we're on to C, whenever a vehicle  
18 is stopped at a marked crosswalk, the driver of any vehicle approaching  
19 that car has the duty to stop.

20 MR. HENRIOD: I'm talking about their proposed 8. Pardon  
21 me, again. All these sets are messing me up.

22 THE COURT: I know, we got too many. So do you agree this  
23 is the law? Accurate statement of the law?

24 MR. HENRIOD: Yes, if we're going down this route, it's an  
25 accurate statement of the law.

1 THE COURT: Okay. I do -- I'm inclined to give it, do you have  
2 any -- do you want to make any record, or say why not?

3 MR. HENRIOD: Only conditionally, because the set at the end  
4 of the day will have to be even-handed.

5 THE COURT: Okay.

6 MR. PRINCE: I don't under -- I don't know what that legal  
7 standard is, Judge. I just don't know what it means to be even-handed.

8 MR. HENRIOD: I can get you the chapter from the --

9 THE COURT: Well, when we get to it, maybe -- maybe he'll  
10 agree that it's even-handed, and we won't even have to worry about it.

11 MR. PRINCE: All right, I --

12 THE COURT: So let's go positive. Okay, 7. This is another  
13 one of those, that I mean I don't --

14 MR. PRINCE: Well, it is, because you're talking about  
15 braking, and I was going slower than the speed limit, and other things,  
16 so I think that it does -- it goes to decrease speed, when hazards exist, or  
17 with respect to traffic and other conditions. So they're suggesting she  
18 was going the speed limit, therefore she's doing nothing wrong. Or even  
19 lower, so I feel it's --

20 THE COURT: That seems common sense to me, but what's  
21 the other side?

22 MR. PRINCE: But this is a -- okay.

23 THE COURT: Now we're on page 7. Mr. Winner, can you  
24 help Mr. Henriod out here, please?

25 MR. HENRIOD: And now I understand, I'm trying to find --

1 MR. WINNER: The proposed --

2 MR. HENRIOD: The marked page that I had from the  
3 previous set.

4 THE COURT: This is Plaintiff's proposed --

5 MR. HENRIOD: I understand.

6 MR. PRINCE: Proposed, not agreed upon.

7 THE COURT: Not agree. It's actually one of the thinner  
8 packets.

9 MR. HENRIOD: Do you have page 35, that last one?

10 MR. PRINCE: Yeah, but here, do you -- I have another copy  
11 of this, so you can --

12 MR. HENRIOD: I am looking at it, right? It says my notes are  
13 your -- on your --

14 MR. WINNER: I think he's offering me another copy.

15 MR. HENRIOD: Again, you'll notice that the last clause is,  
16 and the duty to all persons to use due care. I think there's a huge  
17 overlap between the statutory scheme and the ordinary prudence  
18 standard -- or ordinary prudent person standard. And I think that we  
19 ought to streamline the instructions by eliminating that overlap, which is  
20 why I wouldn't give this. But if we're just going to give statutes, I agree  
21 that it's an accurate articulation of the statute.

22 THE COURT: Okay, that's a -- that's a -- was that taken  
23 directly out of the statute?

24 MR. PRINCE: Yes, that's verbatim.

25 THE COURT: Okay, then I'm going to give that one. I

1 thought it was just your commonsense argument.

2 MR. PRINCE: No, no.

3 THE COURT: Who knew there was a statute out there that  
4 just really is common sense argument. Okay. 8, more than one person  
5 may be to blame. That is the one that I think goes with the other 8. With  
6 your 8.

7 MR. PRINCE: Yeah, I don't agree -- I don't agree with his 8.

8 MR. HENRIOD: I don't see why we would give the  
9 incomplete instruction if we're giving it at all.

10 MR. PRINCE: But there is no other person to blame.

11 THE COURT: Who's the --

12 MR. PRINCE: You agree to just withdraw them both?

13 MR. HENRIOD: So --

14 MR. PRINCE: Do you agree -- no, do you agree to withdraw  
15 them both? Tom's saying yes.

16 MR. HENRIOD: Sure. Sure, just --

17 MR. WINNER: We're not blaming the car in front; we're not  
18 blaming the pedestrian. I don't intend to.

19 MR. HENRIOD: Well, I --

20 MR. PRINCE: Okay. I'm fine with that. Then I'll agree to  
21 withdraw -- I'll withdraw your --

22 MR. HENRIOD: Well, hold on, my one concern is, and this --  
23 this comes up a lot during trial is blame, right. Inculpable versus  
24 causative factors. So --

25 MR. WINNER: I see what you mean.

1 MR. HENRIOD: I heard another groan. So if the -- if the --  
2 your -- there is evidence the jury could look at the -- the factor of the car  
3 that was in the -- that we say was in between us.

4 THE COURT: Uh-huh.

5 MR. HENRIOD: And --

6 MR. PRINCE: She said that was not a factor. That was not a  
7 factor. Made a normal lane change.

8 MR. WINNER: Well, she didn't say it wasn't a factor. She  
9 said it made the lane change. She didn't says it wasn't a factor. She  
10 might have -- she said lane change, yeah.

11 MR. PRINCE: But didn't -- wasn't -- didn't affect her view or  
12 vision .

13 MR. HENRIOD: It wasn't --

14 THE COURT: I don't know that she directly said that. She  
15 simply said that --

16 MR. PRINCE: Made a normal lane change.

17 MR. PRINCE: Correct.

18 MR. HENRIOD: She said that this car only came, yeah, into  
19 view once that one had moved. And if that one was going at 35, giving  
20 us no reason to believe that there was no impediment in front of the  
21 SUV, the SUV moves, and then very suddenly, we're faced with  
22 somebody going at a ridiculously slow speed on that street --

23 MR. PRINCE: Oh, please.

24 MR. HENRIOD: -- then the jury could say, well, what do we  
25 do with that driver.

1 MR. PRINCE: Well, Judge --

2 MR. HENRIOD: And what this tells them that is the fact that  
3 that driver's there doesn't necessary relieve -- relieve us of liability.

4 MR. WINNER: Which is true.

5 MR. HENRIOD: But the other side of that law is that they  
6 could find that that is the distinguishing factor that removes culpability  
7 unreasonableness from the other factor.

8 MR. PRINCE: That's actually --

9 THE COURT: Right.

10 MR. HENRIOD: And that's why --

11 MR. PRINCE: But that's not how the language reads.

12 MR. HENRIOD: -- in the stock it's all given.

13 THE COURT: Okay, so here's the deal. I -- if -- I'll -- if I'm  
14 going to give it, I'm going to give the whole thing, or if you guys want to  
15 agree not to give it. What do you want to do?

16 MR. PRINCE: Well --

17 MR. HENRIOD: We want to give it.

18 MR. PRINCE: I'm objecting. I don't think there's any basis to  
19 give -- really to give it, because there's no evidence of anybody else's  
20 negligence. And even the Defendant says --

21 THE COURT: Well, it doesn't have to be negligence to be a  
22 cause of injury, does it?

23 MR. HENRIOD: No.

24 MR. PRINCE: If you decide the sole proximate cause --

25 MR. WINNER: No.

1 MR. PRINCE: -- was the conduct of some person other than  
2 the Defendant, then your verdict should be for the Defendant. Sole  
3 proximate cause. She's already admitted she caused this collision. The  
4 Defendant already admitted that. So you can't have -- it's not even  
5 supported by that. She admitted she caused this collision and could  
6 have avoided it. So therefore, there's not going to be a sole cause from  
7 anybody else. She admitted that.

8 MR. HENRIOD: No, I --

9 MR. PRINCE: So they have no evidence to support that  
10 aspect of it. And moreover, that's a bracketed part of the -- I have the --  
11 if you want me to show you the actual book, that's a bracketed part,  
12 meaning that at your discretion, you don't have to give that part of it.  
13 That's a discretionary component. So the second part is the sole  
14 proximate cause. She's already admitted she was the cause of this  
15 collision.

16 THE COURT: She could say whatever she wants to. The  
17 jury's still free to come back and based upon the facts find another way --

18 MR. PRINCE: How -- how is that?

19 MR. HENRIOD: You can look at any of the three sentences if  
20 you want.

21 THE COURT: So -- so we're going to give that one, and I'm  
22 going to give --

23 MR. PRINCE: Giving Defendant's proposed 8, I just made my  
24 objection to that.

25 THE COURT: Yes. Correct. So does that just add on that last



1 paragraph? Is that what it does?

2 MR. PRINCE: Yes.

3 MR. HENRIOD: Yes.

4 THE COURT: Okay. Plaintiffs' 9. I'm not inclined to give  
5 that.

6 MR. PRINCE: Okay.

7 THE COURT: I don't know -- I don't necessarily think it's -- I  
8 don't -- I'll hear from Mr. Prince.

9 MR. PRINCE: No, I just -- those are questions about the right  
10 to rely on recommendations. There's been some evidence that, like for  
11 example, Dr. Wong says, I think it's reasonable to offer her injections and  
12 surgery. I personally would have done it. I don't think he offered  
13 personal preference, as opposed to what's reasonable, because that's  
14 what the legal standard is, is what's reasonable. And we're saying she  
15 had the right to rely on recommendations when making medical care  
16 decisions for herself.

17 THE COURT: Well, you can --

18 MR. PRINCE: They've raised that issue.

19 THE COURT: You can argue that.

20 MR. PRINCE: The case that -- what?

21 THE COURT: I'm sorry. I interrupted you.

22 MR. PRINCE: Okay, I believe it's an accurate statement of the  
23 law supporting that issue.

24 THE COURT: Okay, I think it's -- I think it's pure argument,  
25 and certainly something you can put in your argument, but I don't think

1 it rises to the level of a jury instruction. Did you want to add anything,  
2 Defense?

3 MR. HENRIOD: Just that I don't think that the authorities  
4 given for it support the statement itself, so I think that it is problematic  
5 also because *Massey v. Litton* and *J.M. Martanek*, (phonetic) for instance  
6 are both statute of limitations cases, and what counts for notice under  
7 those circumstances. So I also don't think that it is supported. Especially  
8 by the Nevada authority that is provided for.

9 MR. PRINCE: Okay.

10 THE COURT: Well, like I said, I don't see how anything like  
11 that becomes law, but -- page 10.

12 MR. PRINCE: Yeah, the only issue we have here, Judge, is  
13 the last paragraph, the loss of enjoyment of life. Do you see that?

14 THE COURT: Yes.

15 MR. PRINCE: Right. That's the *Banks* case, dealing with,  
16 they call it Hedonic, which is loss of enjoyment of life. We don't have a  
17 calculate -- you know, we didn't use an economist to do that, but it is an  
18 accurate statement of the law. It is there. She has had a severe injury,  
19 will continue to suffer its effects into the future. And I believe virtually  
20 every case that I'm involved in, they give that instruction, where there's a  
21 permanent injury being claimed.

22 MR. HENRIOD: So, yes, our concern is in particular, with the  
23 last paragraph --

24 THE COURT: Okay.

25 MR. HENRIOD: -- that I think not just goes to the Hedonic

1 damages notion in *Banks*, but belabors that point significantly. If you  
2 look at the new stock instruction from the 2018 set .

3 THE COURT: Did you include it in your packet?

4 MR. HENRIOD: I did. It's at page 12.

5 THE COURT: Okay.

6 MR. HENRIOD: What that -- what that does -- what they have  
7 recently done is incorporated the *Banks vs. Sunrise* Hedonic Damages  
8 aspect into the stock instructions and made it streamlined. And you see  
9 that, it's at our page 12.

10 THE COURT: Okay.

11 MR. HENRIOD: In paragraphs numbered 2 and 3. Where it  
12 says the physical and mental pain, suffering, anguish, disability and loss  
13 of enjoyment of life endured by the Plaintiff from the date of the collision  
14 to the present. And then the next paragraph is the future. That loss of  
15 enjoyment of life incorporates Hedonic damages from *Banks*, but doesn't  
16 belabor it for a paragraph. So I would suggest that we use the stock  
17 from the new set.

18 MR. PRINCE: I think what -- I guess there's no -- they agree  
19 that you can include loss of enjoyment of life. This is more complete,  
20 and you have discretion to do it. So all you're giving the jury is some  
21 guidance as to what is the loss of enjoyment of life. And what's the --  
22 what's the -- how it effects them. And it just gives them context to  
23 understand what it means. And so that doesn't add -- it's not additive,  
24 it's not -- it's not ambiguous. It just gives them some definition to the  
25 law -- the term loss of enjoyment of life.

1 THE COURT: I --

2 MR. PRINCE: I can expand any preferred defense instruction  
3 to take a few words and write a paragraph on it.

4 THE COURT: I'm going to give the shorter version. We're  
5 going to be here for six hours reading instructions. You're free to argue  
6 all that and explain that to them. I think that's what you -- what --

7 MR. PRINCE: Okay.

8 THE COURT: -- what I expect you will do, but I don't need  
9 to --

10 MR. PRINCE: So give --

11 THE COURT: So I'm giving Defense proposed, not agreed  
12 upon 12, in lieu of Plaintiff's not agreed upon 10. And that covers  
13 everything else, right, within that? Everybody agrees?

14 MR. PRINCE: Yes. Yes.

15 MR. HENRIOD: Okay. And, Your Honor, we will withdraw  
16 out objection to the last one, that is the life table.

17 THE COURT: Okay.

18 MR. PRINCE: Jessica, are you there? I'm sorry. Can you  
19 email us your Defendant's proposed upon jury instructions not agreed  
20 upon? Can you email them? I know we have hard copies, could you do  
21 that for me us? We just need a PDF, so we can fix something. Thank  
22 you.

23 THE COURT: Okay, and then --

24 MR. PRINCE: All right. So we're on Defendant's now?

25 THE COURT: We're on -- 12 you're agreeing to -- can I just --

1 somebody explain to me -- I was trying to figure out --

2 MR. PRINCE: Where were you on?

3 MR. HENRIOD: We're on your --

4 THE COURT: On the life table.

5 MR. HENRIOD: -- on page 12, the life table.

6 MR. PRINCE: Yeah.

7 MR. HENRIOD: And I was just agreeing to it.

8 THE COURT: The motion was granted to take judicial notice  
9 of the life table.

10 MR. PRINCE: We have a stipulation now.

11 THE COURT: Have we done that?

12 MR. PRINCE: Yeah.

13 MR. WINNER: It was actually denied, but given what Dr.  
14 Kloretti (phonetic) was going to testify to, I stipulated that were he called  
15 to testify, he would say X.

16 MR. PRINCE: Yeah, we're going to offer that into evidence.  
17 We have a copy of that over --

18 THE COURT: Okay, I just wanted to know if there was  
19 anything relevant. But it said that it could come in, but then it said  
20 something about not her specifics. I don't really understand that.

21 MR. PRINCE: I think this is a general life table. It's not like  
22 you can say, hey this is your general life expectancy for all comers.

23 THE COURT: So you could say this is a general life table, but  
24 we're not allowed to --

25 MR. PRINCE: No.

1 THE COURT: -- do the math?

2 MR. PRINCE: Well, right. Her life expectancy --

3 THE COURT: We're not going to say she's going to live this  
4 long.

5 MR. PRINCE: -- according to statistical date is 54.8 years.  
6 That's what Dr. Kloretti would have said, as well as Dr. Garber has said,  
7 it, so -- so the answer is yes.

8 MR. HENRIOD: I stipulated.

9 THE COURT: Well, as long as y'all agree amongst  
10 yourselves, I don't really understand it, but I'll --

11 MR. WINNER: Right. And the instruction says that it's not  
12 dispositive. Right, that it is one piece of evidence.

13 THE COURT: I -- I don't think -- it wasn't that clear. It was  
14 kind of like it comes in, but you can't consider it with respect to this  
15 Plaintiff, sort of in my mind is how it read. All right. Then that's a non-  
16 issue. So we've gone through Plaintiff' proposed. Now we will do  
17 Defendant's proposed --

18 MR. WINNER: Your Honor, before we move on, Your Honor,  
19 if that stipulation is being shown to the jury, I don't think there's a reason  
20 to do that, if it is, I want it to reference to Mr. Prince's name, and his firm  
21 name, and everything else taken off of the -- like it's a simple stipulation.

22 MR. PRINCE: But the parties stipulated. We'd signed it, and  
23 so we have it. I'm not going to have my firm name on it. I'm just going  
24 to show this -- what we agreed on. I'm just going to show the jury just  
25 the part that we agreed to.

1 MR. WINNER: Okay.

2 MR. PRINCE: Just the language that we agreed to. Not like  
3 all the pleading part of it, or anything like that.

4 MR. WINNER: Okay. Fine, thank you.

5 THE COURT: All right. Now, we're at Defendant's proposed,  
6 not agreed upon?

7 MR. HENRIOD: Yes.

8 MR. PRINCE: So they've agreed to 12 then, right? Our  
9 proposed 12?

10 MR. HENRIOD: Yes.

11 THE COURT: Yeah.

12 MR. PRINCE: Okay, that's fine.

13 THE COURT: Yes. So that's a yes. Now, number one, I'm  
14 not inclined to give that, but --

15 MR. HENRIOD: Which one?

16 THE COURT: It's if weak or less satisfactory evidence is  
17 offered by a party when it was within the party's ability to produce  
18 stronger or more satisfactory evidence, the evidence offered should be  
19 viewed with distrust. The only thing I could think of is you're talking  
20 about the MRI that's missing from 2010.

21 MR. PRINCE: Uh-huh.

22 THE COURT: But as far as I'm concerned there hasn't been a  
23 hearing or any evidence sufficient to say that the Plaintiff had any control  
24 over that, or any responsibility for it, or anything else. So I don't think  
25 you've met the burden on that, if that's where you're going. Unless you

1 guys have a different argument. I mean I'm not saying there couldn't  
2 have been, but I don't see it in the record right now, because I don't  
3 know when it was destroyed.

4 MR. HENRIOD: That is -- that is the evidentiary issue that we  
5 have in mind. Here I think that it was within Plaintiff's power to have the  
6 treating physician who had done that keep it, before it was destroyed.  
7 And her previous law firm on the 2010 case, Glen Lerner's office, was  
8 required to possess it five or seven years. So I do think that it was within  
9 her control.

10 MR. PRINCE: Well, the --

11 THE COURT: Like I said, that hasn't been litigated to the end,  
12 so barring that, I don't think we have a basis for it here.

13 MR. HENRIOD: Okay. Understood.

14 MR. PRINCE: In light of what we did before, do you still need  
15 to do 2 --

16 MR. HENRIOD: Nope, nope. In light of what we did before,  
17 we can skip pages 2 and 3.

18 THE COURT: Okay. And we can skip 4 --

19 MR. PRINCE: 4, right?

20 THE COURT: -- because we addressed that.

21 MR. HENRIOD: And skip 4, yes. And so now we are at the  
22 *Gunlock* instruction. I found this to be very standard --

23 MR. PRINCE: No.

24 MR. HENRIOD: -- and this is an -- this is an instruction that  
25 we give all the time. Since *Gunlock* and the cases that are cited under --



1 under this *Gunlock* citation are two other cases that included this exact  
2 instruction.

3 MR. PRINCE: Yeah.

4 MR. HENRIOD: And it was never reversed, based on this  
5 instruction being given. And the concept is vital. The concept is that this  
6 is not a strict liability tort. This is what distinguishes -- this line right here  
7 is what distinguishes between negligence -- even negligence per se and  
8 strict liability. You don't infer that someone must be liable or "to blame"  
9 must be somehow culpable or negligent merely because an accident  
10 happened. What this says, and it's absolutely the law. It's not in any  
11 others, and it's really important for them to know, is that accidents do  
12 happen. The law recognizes that. It's not about an accident happening  
13 so then who is to blame, because somebody must be to blame. You  
14 never presume liability or even that it exists. And this says nothing more  
15 than that.

16 And let me also put in here, and Babylyn said she couldn't  
17 have avoided it. Now, in the -- in the case *Carver vs. El-Sabawi*  
18 (phonetic), that is in my string site, the Court looked expressly at this  
19 instruction to make sure that it wasn't an overstatement. It pointed to  
20 the term that is in the second sentence of itself, not of itself. That makes  
21 this pass muster as a permissible jury instruction. It's given all the time.  
22 It's been reviewed several times. It's not anywhere else. It's essential.

23 MR. PRINCE: Yeah, it's not essential, because you're telling  
24 the jury first, that the Plaintiff has the burden to prove negligence. The  
25 burden to prove it.

1 THE COURT: Right.

2 MR. PRINCE: And when you tell them that it's by a  
3 preponderance of the evidence, all of the elements of negligence. So  
4 there's nothing -- so there's no presumption -- they don't need to be  
5 illustrated that the facts of the accident -- there's nothing inferred or  
6 presumed, because there is nothing presumed. We have the burden in  
7 and of itself. This is -- I'm saying just because there was an accident,  
8 doesn't mean anything. That's for -- it's for argument, right? That's  
9 exactly what you said to me on issues. These are common sense things.  
10 The Plaintiff has the burden.

11 Just because there's an accident, doesn't mean anybody was  
12 negligent. They have to prove it That's an argue -- this is an argument.  
13 This is not just because an event happened. It doesn't add to the  
14 negligence instructions in any manner. You're already telling the jury  
15 what the elements are, and what the burden of proof is. And so  
16 therefore, and then use the word liability. And we're talking about  
17 negligence, so that's -- anyway.

18 MR. HENRIOD: Well, it --

19 MR. PRINCE: It's argument --

20 THE COURT: Let --

21 MR. PRINCE: It's argument. It's not adding to the law.

22 MR. HENRIOD: Yeah, it is --

23 THE COURT: And my inclination -- I'm inclined to give 5, but  
24 not 6 and 7. The next two.

25 MR. WINNER: 6 and 7.

1 MR. HENRIOD: Okay.

2 THE COURT: I think you're kind of saying the same thing  
3 three ways. I'm going to give it once, but not three times.

4 MR. HENRIOD: Okay, yes. That's -- that's reasonable.

5 THE COURT: Do we need any further argument on 6 and 7?

6 MR. PRINCE: No.

7 MR. HENRIOD: No.

8 THE COURT: All right. We've already dealt with 8, right?  
9 We've added --

10 MR. PRINCE: Yes.

11 THE COURT: -- up the partial language? And I'm assuming 9  
12 is just an alternative to something that we've already covered?

13 MR. PRINCE: No. No, it's not.

14 MR. HENRIOD: Okay. So now -- this is --

15 THE COURT: Oh, is this our --

16 MR. PRINCE: Comparative --

17 THE COURT: Comparative --

18 MR. PRINCE: It's the comparative negligence.

19 MR. HENRIOD: This is -- this is the comparative negligence  
20 instruction. And so this I think is the -- is the heart of the issue.

21 THE COURT: Okay. Is this the comparative negligence -- if  
22 it's given, do you agree that this is the one, Mr. Prince? I know your  
23 position is it shouldn't be given at all.

24 MR. PRINCE: I believe that number 10 is.

25 THE COURT: Okay. So I'm assuming --

1 MR. HENRIOD: Yeah, I --

2 THE COURT: -- since you guys offered both, you don't care  
3 which one? We'll let him pick it.

4 MR. HENRIOD: Well, I do care. There's a reason why I have  
5 1 as alternative 1 --

6 MR. PRINCE: Well, 1 --

7 MR. HENRIOD: -- with -- alternative 1. Both of these are just  
8 right out of the State Bar stocks.

9 THE COURT: Okay.

10 MR. HENRIOD: The first one is the -- is the more modern  
11 one, the one from last year. That is jury instruction civil 4.8, 2018.

12 MR. PRINCE: I agree it's an accurate statement. I just think  
13 the better instruction, the simpler one is 10. So --

14 MR. HENRIOD: And I -- I think that that --

15 THE COURT: All right. Well --

16 MR. HENRIOD: What I like about the newer one, and I think  
17 that it is more comprehensive and at the same time streamlined, it  
18 includes the introduction about introducing the claim for comparative  
19 negligence before it goes on to discuss what limitations there are on  
20 the --

21 MR. PRINCE: So I guess my position is, Judge, regardless,  
22 they're both the correct -- they --

23 THE COURT: Okay.

24 MR. PRINCE: -- state it correctly, that there's no evidence of  
25 comparative negligence. She stopped for a pedestrian, she saw

1 pedestrians on the corner, someone walked out in front of her, she  
2 applied her brakes. She was in -- she was in a crosswalk. She was  
3 driving through one crosswalk and about to enter into another sidewalk.  
4 Even the Defendant saw the -- the people -- pedestrians on the corner.

5           So there's no comparative negligence. She stopped for a  
6 pedestrian. It wasn't like she stopped in the middle of the street. She  
7 stopped in a crosswalk in connection with making a turn, as she was  
8 obligated to do.

9           There's not -- I even asked the Defendant, who was the only  
10 one who was really watching what was going on, what did Desire do to  
11 cause or contribute, you know, was her driving -- and there's nothing  
12 about her driving, of stopping. That was reasonable for her to stop at  
13 that moment.

14           So I don't think there's any comparative negligence. They  
15 can argue, hey, we're not at fault, I guess, if that's their position, we're  
16 not negligent. But there's nothing that Desire did negligently.

17           THE COURT: All right.

18           MR. HENRIOD: That is their theory.

19           THE COURT: Right.

20           MR. HENRIOD: But -- but there is also evidence that she --  
21 the verb, as used by two witnesses -- slammed on her brakes. The law  
22 says -- as we're about to get to our instructions -- you're not allowed to  
23 abruptly stop. If you are turning -- if the reason that you are slow and  
24 going almost no speed in a 35-mile-an-hour major street on a green light  
25 is because you're turning, then you need to alert the people behind

1 you --

2 MR. PRINCE: Well --

3 MR. HENRIOD: -- that you will be turning by using a blinker.

4 And when it comes to the pedestrian, whether or not that  
5 pedestrian was close enough to excuse the abruptness of the stop is  
6 their burden of proof. And the passenger in the car, Guadalupe, said that  
7 this person was all the way on the other side of the intersection.

8 MR. PRINCE: Hadn't entered --

9 MR. HENRIOD: So the pedestrian --

10 MR. PRINCE: Hadn't entered the crosswalk.

11 MR. HENRIOD: -- is an excuse to the liability for shopping  
12 abruptly without a blinker. And whether or not there is -- whether or not  
13 the jury buys that that -- that the placement of that pedestrian over there  
14 excuses that abrupt stop is for the jury.

15 THE COURT: Agreed. Here's a -- here's my question: When  
16 am I going to make this decision on comparative?

17 MR. PRINCE: Right now.

18 THE COURT: Can I do it now?

19 MR. HENRIOD: You can.

20 MR. PRINCE: You can do it right now.

21 THE COURT: All right. I'm going to -- I'm going to give it.

22 So --

23 MR. HENRIOD: Very good.

24 THE COURT: -- I think there's some evidence of it.

25 So now do I need to do anything while I --

1 MR. HENRIOD: Okay. So that's -- that's number 9. We can  
2 use the -- the modern one.

3 THE COURT: Yeah, that's fine.

4 MR. HENRIOD: Okay. Then -- then we are on to ours that  
5 had the statutory --

6 THE COURT: So wait.

7 MR. HENRIOD: -- language.

8 THE COURT: Wait, wait, wait. So that means 10 is no,  
9 because it's already covered --

10 MR. HENRIOD: You're right.

11 THE COURT: -- right?

12 MR. HENRIOD: Right.

13 MR. PRINCE: We're already using 11.

14 THE COURT: 11 --

15 MR. PRINCE: That's already in.

16 THE COURT: It is?

17 MR. PRINCE: That's part of one of the proposal -- the agreed  
18 upon.

19 THE COURT: Oh, was it?

20 MR. HENRIOD: Oh, is it?

21 MR. PRINCE: Yes.

22 THE COURT: Because I wrote, no. Because it's --

23 MR. HENRIOD: Okay.

24 THE COURT: Well, it actually says, "Not different from 28."

25 MR. HENRIOD: Well --

1 THE COURT: So that was why --

2 MR. PRINCE: Well, you -- you gave that actually as a  
3 preinstruction, too.

4 THE COURT: Yeah. I was just going to say that -- I -- I see  
5 "No," because -- and it says, "Not different from 28." It's -- so I recognize  
6 that I did it already.

7 MR. HENRIOD: Now, on to page -- shall we go on --

8 MR. PRINCE: 12, we're going to --

9 MR. HENRIOD: -- to page 13?

10 MR. PRINCE: That's -- their 12 is what we're going to use for  
11 the damages.

12 THE COURT: Correct. Page 13?

13 MR. HENRIOD: Yes.

14 THE COURT: That seems to be -- is that -- we agree that's the  
15 law?

16 MR. PRINCE: Would say that's a correct -- that's a correct  
17 statute, yes.

18 MR. HENRIOD: Yeah. One -- one thing is I don't think that  
19 the -- that the first paragraph in there is necessary, as I read it again. I  
20 think we could probably do without the first paragraph. I don't mind  
21 keeping it, but I'm afraid it's --

22 MR. PRINCE: No. I want --

23 MR. HENRIOD: -- it's --

24 MR. PRINCE: I want to keep it. I want --

25 THE COURT: You want to --



1 MR. PRINCE: If we're going to --  
2 THE COURT: -- keep it.  
3 MR. PRINCE: -- keep it --  
4 MR. HENRIOD: Okay.  
5 MR. PRINCE: -- let's have it.  
6 THE COURT: Okay. Then we'll keep it as is.  
7 MR. HENRIOD: Okay. So the next --  
8 MR. PRINCE: But I don't agree with the "per se" part of it for  
9 them.  
10 MR. HENRIOD: I don't see why it would be any different.  
11 MR. PRINCE: Okay.  
12 THE COURT: Okay. So this is a yes. God, this is long.  
13 I might make you read these.  
14 15?  
15 MR. HENRIOD: Okay. So 15 -- and -- and if we want to use  
16 the language as is from the actual statute as opposed to my abbreviated  
17 version, we can pull that. The red lining is included in the authority  
18 below. But I have just removed irrelevant words from the statute for  
19 what is paragraph enumerated one:  
20 Every motor vehicle must be equipped with two tail lamps  
21 mounted on the rear, which, when lighted, emit a red light plainly visible  
22 from a distance of 500 feet to the rear.  
23 MR. PRINCE: And they have no evidence supporting that  
24 that wasn't the case. My client --  
25 THE COURT: Well --

1 MR. PRINCE: Both of my clients have testified that the  
2 taillights functioned correctly. Even though they had cosmetic lens  
3 cover, that the -- the lights worked correctly, the brake lights, as well as  
4 the turn signal.

5 THE COURT: Okay.

6 MR. PRINCE: There is no evidence to support a violation of  
7 this.

8 MR. HENRIOD: So I --

9 THE COURT: I'm going to --

10 MR. HENRIOD: So I think there --

11 THE COURT: I'm going to give it.

12 MR. HENRIOD: -- certainly is --

13 MR. PRINCE: What's?

14 THE COURT: I'm going to give it.

15 MR. HENRIOD: Very well.

16 THE COURT: So -- but here's -- here's -- this brings me back  
17 to this again. I will -- what I would like to do, because we have so many  
18 laws here --

19 MR. HENRIOD: Uh-huh.

20 THE COURT: -- is I would like to pull out those two  
21 paragraphs that we have inserted in every one of those --

22 MR. HENRIOD: Uh-huh.

23 THE COURT: -- at the beginning of them so that they --  
24 here's the laws and an unexcused violation constitutes negligence per  
25 se. But I don't want to read that after every law.

1 MR. HENRIOD: Right.

2 THE COURT: So you guys agree on how I'm going to do it.  
3 But I only want to read it once --

4 MR. HENRIOD: Okay.

5 THE COURT: -- because it applies to all those other  
6 instructions the same.

7 MR. PRINCE: Well, is this -- but this -- this relates to -- I don't  
8 think you can do it that way. You can't do it that way, Judge. And I'll say  
9 -- say why. Because this relates to comparative negligence, and it's their  
10 separate burden of proof. The other one was my burden of proof. So  
11 you have to read them separately. This goes to comparative negligence.

12 "If you find Defendant to be negligent, then you should  
13 consider the issue of whether that negligence was the  
14 proximate cause of the injuries or damages to the Plaintiff."

15 So you have to -- they have to -- it -- it is separate.

16 THE COURT: Can we -- can we make it two different ones at  
17 least? So we can do one for you all and one for you all.

18 MR. PRINCE: I think that --

19 MR. HENRIOD: I think we --

20 MR. PRINCE: I've never seen them done that way. I've  
21 always seen it done, the individual instructions, because there's only a  
22 couple of statutes. So --

23 THE COURT: There's not a couple. There's -- you've got like  
24 five.

25 You've got so far three.

1 All right. I'll make -- I'll ponder on this yet.

2 MR. PRINCE: Yeah. I've never seen it done like that.

3 MR. HENRIOD: I don't have -- I don't have a strong opinion  
4 either way.

5 THE COURT: It's just a lot.

6 MR. HENRIOD: I --

7 THE COURT: And here's the reality: I mean, I can talk all day  
8 and I don't like it, but the longer I engage them, the less inclined to listen  
9 to you all there might be. So it might behoove everyone to --

10 All right. So 16 is just a continuation of that. 17?

11 MR. HENRIOD: Yes. It's a -- it's a stock. I think it's important  
12 so that the jury knows that there is no guessing about --

13 MR. PRINCE: No.

14 MR. HENRIOD: -- a pain or suffering that will result from the  
15 adjacent segment breakdown --

16 THE COURT: Oh, God.

17 MR. HENRIOD: -- or other types of injuries that is not known  
18 to the layperson. You don't have to -- if you hurt your leg --

19 THE COURT: Okay. Well, is this really an issue? Because at  
20 the end of the day, if this is the law -- you have the expert. So is there  
21 any reason not to give this?

22 MR. HENRIOD: Yes.

23 MR. PRINCE: Well, we've already -- we'd satisfied it. So we  
24 -- we've already satisfied -- satisfied that.

25 MR. HENRIOD: So --

1 MR. PRINCE: If I understood, it's not readily observed. No  
2 test -- we've given expert testimony on it. So it doesn't even apply here.

3 THE COURT: Well, that's what I'm saying. So that's why --

4 MR. PRINCE: I'm saying so there's no basis to give it.

5 MR. HENRIOD: Well --

6 MR. PRINCE: If there's no expert testimony, you may want to  
7 consider giving that. But here, there is.

8 MR. HENRIOD: Well --

9 MR. PRINCE: And its objective.

10 THE COURT: Well, they're going to say there isn't. But at  
11 least they -- it lets them know that it's --

12 MR. PRINCE: No. There is expert -- we do have expert  
13 testimony on it.

14 THE COURT: No. I understand that.

15 MR. HENRIOD: Well -- right. But I mean, it's not just a check  
16 box as to whether or not an expert has testified. What it does is it points  
17 them back to the expert to evaluate whether or not they find that expert  
18 credible.

19 MR. PRINCE: Oh.

20 MR. HENRIOD: If, for instance, they don't find Dr. Wang  
21 credible, then any -- any legal analysis that would be based on his  
22 testimony is something that they would consider. What they -- what this  
23 tells them is that for pain relating to those things that are outside the  
24 akin of the layperson, it goes back to how much weight they place on the  
25 expert who testified.

1 MR. PRINCE: Judge, I guess the -- the expert --

2 THE COURT: I think this is --

3 MR. PRINCE: -- the expert has their own --

4 THE COURT: I think it's covered by others. And I think  
5 overall, it's kind of a commonsense thing. So I'm not going to give this.

6 Okay. This next -- 18 --

7 MR. HENRIOD: Uh-huh.

8 THE COURT: -- I don't understand the point of this one.

9 MR. HENRIOD: Okay. So the -- the point of this one is the  
10 assumption that if there is nothing in evidence, if there is anything that is  
11 not being told to us by this Plaintiff as a historian of her own medical  
12 background, that that is dispositive of it not existing. We're not  
13 suggesting affirmatively that there is, but they do need to understand  
14 that they can't take it as a given that it's all -- that it's the universe of  
15 everything --

16 THE COURT: But --

17 MR. HENRIOD: -- because you're -- and here's the thing,  
18 Judge, because otherwise defendants would have brought it in.

19 MR. WINNER: Let me -- let me --

20 MR. HENRIOD: And what they need to understand is that --  
21 is that we are hamstrung by the universe of history being disclosed to  
22 us.

23 THE COURT: Okay.

24 MR. WINNER: Let me -- let me --

25 THE COURT: I think that's fair.

1 MR. WINNER: Well, let me maybe -- let me maybe just save  
2 -- save it's --  
3 MR. PRINCE: You know, that --  
4 MR. WINNER: Let me save maybe some argument. If Mr.  
5 Prince is not going to get up on closing and say, Mr. Winner has had this  
6 case for four years and he hasn't found a single record for this four-year  
7 period --  
8 MR. PRINCE: Well --  
9 MR. WINNER: -- if he not going to say that, I don't need this.  
10 That -- I --  
11 MR. PRINCE: Well, I'm going to say there's no medical  
12 evidence between these five years.  
13 THE COURT: Okay.  
14 MR. PRINCE: So I'm going to say there is no --  
15 THE COURT: I'm going to --  
16 MR. PRINCE: And that's the --  
17 THE COURT: I'm going to give this.  
18 MR. PRINCE: And that is the evidence.  
19 MR. WINNER: That -- that's --  
20 THE COURT: I'm going to --  
21 MR. WINNER: That's different --  
22 THE COURT: -- give this. I don't think it's --  
23 MR. WINNER: -- from saying --  
24 MR. PRINCE: You're going to give it?  
25 THE COURT: I'm going to give it. I don't think it's --

1 MR. PRINCE: Judge, how do you -- oh, no. "A personal  
2 injury" -- you're not -- that's not the law, "A personal injury defendant  
3 has no legal ability to independently gather medical information." Yes,  
4 they do. And they were given permission in this case. They got an  
5 authorization.

6 THE COURT: Oh.

7 MR. PRINCE: There is no way that that's even a fact. They  
8 subpoenaed every doctor. So that's not even factually accurate. This is  
9 stunning. So now you're going to talk about the Defense conduct in the  
10 course of the case, and there are discovery --

11 THE COURT: Okay.

12 MR. PRINCE: -- efforts.

13 THE COURT: All right. You -- I think you -- you might be  
14 changing my mind.

15 MR. WINNER: If -- if Mr. --

16 THE COURT: Because I -- I --

17 MR. WINNER: -- Prince is not --

18 THE COURT: You know what I think --

19 MR. WINNER: -- going to say --

20 THE COURT: -- it does? I think it -- I think it makes it -- the  
21 other side look a little dirty for no reason. I -- I get what you're trying to  
22 say, but I don't like the way you're saying it.

23 MR. WINNER: If Mr. Prince is going to say there are -- you  
24 know, there are no reported -- there are no medical records for this  
25 period, no evidence for this period, I'm okay with that. If he's going to



1 say, Tom Winner and his firm have had this case for five years, and they  
2 -- they -- if they --

3 THE COURT: He's not going to say that.

4 MR. WINNER: -- have found anything --

5 MR. PRINCE: No.

6 MR. WINNER: -- or it would be out there, they would have  
7 found it, that -- then I want that instruction.

8 THE COURT: Okay. You're not going --

9 MR. WINNER: Because I don't --

10 THE COURT: -- to say that, right?

11 MR. WINNER: -- have any --

12 MR. PRINCE: I'm going to say --

13 MR. WINNER: -- other --

14 MR. PRINCE: -- that there's in medical evidence of it --

15 THE COURT: Right.

16 MR. PRINCE: -- and they -- right. They had the ability -- they  
17 -- they did have the ability to independently gather records, which they  
18 did.

19 MR. HENRIOD: No.

20 MR. WINNER: Well, no.

21 MR. PRINCE: Oh, yes, they -- yes, they did.

22 MR. HENRIOD: What -- what --

23 MR. PRINCE: No, not kind of --

24 MR. HENRIOD: No --

25 MR. PRINCE: Now, hang on.

1                   They didn't kind of. They did. They got an --

2                   THE COURT: Okay.

3                   MR. PRINCE: -- authorization, subpoena power, and they  
4 subpoenaed records and documents. And they got them and produced  
5 them.

6                   MR. HENRIOD: Based on the list that we were given.

7                   MR. PRINCE: Oh, no. See, then they -- right. You're talking  
8 about independently gathering personal -- may not independently  
9 investigate any medical history but rely on history provided by the  
10 Plaintiff. That is also not accurate.

11                  THE COURT: Okay. I'm not giving it. You all can argue from  
12 this side that we only could get to stuff that we knew about and I mean,  
13 you could kind of --

14                  MR. PRINCE: But that's speculating. That's inviting  
15 speculation. You didn't do that either.

16                  MR. WINNER: Well, wait.

17                  THE COURT: Well, that is --

18                  MR. WINNER: To -- to be fair --

19                  MR. PRINCE: How's that --

20                  MR. WINNER: To be fair, Judge, we have an ability to gather  
21 with an authorization records from doctors where the Plaintiff gives us  
22 an authorization for that doctor.

23                  THE COURT: And they don't, you could theoretically some in  
24 and get a court order for it as well.

25                  MR. PRINCE: Correct.

1 THE COURT: So --

2 MR. WINNER: But I don't know the name of the doctor. I

3 can't come in and get a --

4 THE COURT: And that's what I'm saying.

5 MR. WINNER: Yeah.

6 THE COURT: So --

7 MR. PRINCE: That's inviting the speculation.

8 THE COURT: -- I mean, that's kind of -- well, it's not

9 speculation. It's saying --

10 MR. PRINCE: Yes, it is.

11 THE COURT: -- we -- we can -- we only know about doctors

12 that she's provided. I mean, that's just a fact.

13 MR. WINNER: But if -- if Dennis isn't going to say --

14 THE COURT: They're not going to like --

15 MR. WINNER: -- he had the ability to go and investigate this

16 and he didn't, then I don't -- I don't need this. I don't have a problem

17 with it. If -- if he's just going to say there isn't evidence from this period

18 and leave it at that, fine. Is that cool?

19 THE COURT: Okay. That --

20 MR. PRINCE: Well --

21 THE COURT: Well, I'm got giving it. So --

22 MR. PRINCE: Well, I don't know.

23 THE COURT: -- that's it.

24 MR. PRINCE: Right. If you're going to get up there and say,

25 well, we -- we don't know if this is the universe of information, that -- I

1 think that violates your other order.

2 MR. WINNER: I'm not -- I'm not going to --

3 THE COURT: He's not going to --

4 MR. WINNER: -- to say --

5 THE COURT: -- argue that.

6 MR. WINNER: -- if that's it's the universe --

7 THE COURT: Why would he?

8 MR. WINNER: -- of information.

9 THE COURT: That wouldn't make any sense to argue that --

10 MR. PRINCE: Okay.

11 THE COURT: -- actually.

12 It's 10:30. The jury's going to kill us.

13 19?

14 MR. PRINCE: I offered to let Dr. Schifini go today, just so

15 you know. I proposed that. I was just like, let's just be done and give

16 this to the jury right now. So I don't know if that's an --

17 THE COURT: Okay. I don't --

18 MR. PRINCE: -- option right now. Let's see if maybe it is.

19 [Counsel confer]

20 MR. PRINCE: Tom, are you okay with just letting Schifini go?

21 THE COURT: Well, I've got to give the jury an opportunity --

22 MR. WINNER: He's here.

23 THE COURT: -- to ask him questions.

24 MR. PRINCE: Okay. All right. You're fine. We're good.

25 You're right. So I'm -- I'm going to finish my exam, and then I'm fine.

1 THE COURT: 19?

2 MR. HENRIOD: 19 is a mitigation of damages instruction.

3 This does not -- I -- I proposed another one today that is more accurate  
4 than this.

5 THE COURT: So we --

6 MR. HENRIOD: So --

7 THE COURT: -- don't need it?

8 MR. HENRIOD: So let me actually withdraw what is on page  
9 19 --

10 THE COURT: My pleasure.

11 MR. HENRIOD: -- and point the Court to what is on page 4 --

12 THE COURT: That we're already giving?

13 MR. HENRIOD: -- of the supplement. No. Of the supplement  
14 from this morning.

15 THE COURT: Okay.

16 MR. HENRIOD: It is --

17 THE COURT: Well, we'll get to -- we'll get to that when we  
18 get to it.

19 MR. HENRIOD: Very well. So -- so we'll draw -- withdraw  
20 that.

21 MR. PRINCE: Well, let's just deal with the concept of  
22 mitigation. There's no evidence that she didn't mitigate. They're saying  
23 that we're just not -- it's not cause. There's no -- there's no evidence of  
24 failure to mitigate --

25 THE COURT: Okay.

1 MR. PRINCE: -- if you didn't do enough.  
2 THE COURT: Wait. Hang on. Hang on.  
3 MR. PRINCE: They're saying you did too much.  
4 MR. HENRIOD: Okay. So I think --  
5 THE COURT: I guess we're going to go --  
6 MR. HENRIOD: I guess we are going with that one now.  
7 MR. PRINCE: Yeah, let's just deal with it.  
8 MR. HENRIOD: So that is at page 4 of the set entitled,  
9 "Defendant's supplemental proposed jury instructions not agreed upon."  
10 The authority cited is *Lublin v. Weber*. And it begins with the sentence,  
11 "It is the duty of a person who has been injured." Here I think the -- the  
12 mitigation issue is that she never gave conservative treatment a chance;  
13 is that there was -- at the earliest opportunity, there was a visit to  
14 somebody who would make her surgical. And always to doctors who  
15 would never tell her no. And it was as soon as possible on all of those  
16 even though the trajectory of her pain scores was going down.  
17 In *Lublin* --  
18 [Counsel confer]  
19 MR. HENRIOD: I -- I think Mr. Winner has something to add.  
20 MR. WINNER: Yeah. I think -- my recollection of Guadalupe,  
21 she testified that she found it odd that she was -- would have been sent  
22 to get another --  
23 THE COURT: She did.  
24 MR. WINNER: -- MRI two weeks after she --  
25 THE COURT: That's my recollection.

1 MR. WINNER: -- testified she stopped having symptoms.

2 MR. HENRIOD: Yeah. In --

3 THE COURT: Mr. Prince, do you disagree that this is  
4 accurate statement of law?

5 MR. PRINCE: I don't disagree if it's simply stated like that.  
6 But I don't think -- there's no evidence to support it in this case. They  
7 have no competent -- they have no expert to support any of that.

8 THE COURT: Okay. I'm going to -- I'm going to allow this.

9 MR. PRINCE: No, I'm sorry. The proposed -- the new  
10 proposed 4. Yeah, not --

11 THE COURT: Right. The new proposed. Twenty?

12 MR. PRINCE: So now, this is necessary --

13 THE COURT: I'm giving -- okay.

14 MR. PRINCE: You don't need 20. That's not even an element  
15 of damage. That's about awarding fees, Judge. No one ever instructs  
16 on not to consider attorney's fees. You tell them what the universe of  
17 damages are.

18 THE COURT: Yeah. I'm not planning to give that. Is there a  
19 reason to?

20 MR. HENRIOD: Yes. I think it's necessary. Just like  
21 insurance, right, there are notions from the common world that they may  
22 bring, that they may assume can influence their decisions that they need  
23 to know are not appropriate. And if it is an elephant in the room, like  
24 insurance --

25 MR. WINNER: One of the jurors mentioned it.

1 MR. HENRIOD: -- then I think it ought to be addressed here.  
2 We know during voir dire, from voir dire, that there was -- there had  
3 been experiences with personal injury claims and the concern about how  
4 the pie was divided at the end of the day, how big something needed to  
5 be in order for everyone to get their cut. And so here, I think they need  
6 to know that they are not supposed to be thinking about how this pie is  
7 cut after trial.

8 It is true that fees can be addressed under Rule 68. They can  
9 be addressed in any number of ways under the law after trial. If they're  
10 appropriate, costs are awarded. But just like they should not be  
11 wondering if an insurance company is going to pay, they shouldn't be  
12 wondering how much they need to give to make sure that Plaintiff  
13 actually gets a certain amount of money.

14 THE COURT: Okay. I'm going to give this.

15 MR. PRINCE: Judge, that's not damages, though. We're not  
16 claiming the fees as damages. I understand. We're just letting them  
17 know that it's not.

18 MR. PRINCE: Why would that even be an issue to instruct  
19 the jury on? You've told them the damage. That's not in any pattern  
20 instruction. I've never even seen that. How do you raise the issue of  
21 attorney's fees and costs at this point? How do they do that?

22 THE COURT: You --

23 MR. PRINCE: What's the damage? We're not even claiming  
24 that as a damage theory.

25 THE COURT: No. I understand.



1 MR. PRINCE: You told them -- you're telling them --

2 THE COURT: You're just telling them --

3 MR. PRINCE: -- the damage instructions. You've given the  
4 category of damages.

5 THE COURT: Right.

6 MR. PRINCE: Then why does this need in? There's no basis  
7 to even discuss attorney's fees or costs or expenses or otherwise. That  
8 is all after trial and I'm encouraging you to maybe talk to one of your  
9 colleagues about this, because that is never given. It's not even an  
10 appropriate damage. There might be cases where attorney's fees, like a  
11 commercial case, attorneys fees might be a component of your  
12 damages.

13 THE COURT: All right. I'll do that.

14 MR. PRINCE: And that's Sandy Valley. I want you to read  
15 Sandy Valley about that.

16 THE COURT: I'll colleague check this, okay?

17 MR. PRINCE: Because there's no way -- attorney's fees --

18 MR. WINNER: You know what --

19 MR. PRINCE: Excuse me.

20 MR. WINNER: -- let's --

21 MR. PRINCE: Attorney's fees can be --

22 MR. WINNER: This is not something I was going to highlight  
23 in closing at all. If it will save us time --

24 THE COURT: Okay.

25 MR. WINNER: -- it's fine.

1 THE COURT: Withdrawn.

2 MR. WINNER: Okay.

3 THE COURT: Perfect.

4 MR. PRINCE: Now, we're going to use their 21.

5 THE COURT: Yes. Their 21 now, because I've ruled the  
6 comparative comes in. And now we're down to four more. Adam, have  
7 we apologized to the jury? There's baby doughnuts, if they want some.  
8 Okay, now we have --

9 MR. WINNER: Are we at page 1?

10 THE COURT: Yeah.

11 MR. WINNER: This is the curative --

12 THE COURT: This is the curative for --

13 MR. WINNER: -- instruction.

14 THE COURT: -- the couple of --

15 MR. PRINCE: Well, I want to talk about that --

16 THE COURT: We can.

17 MR. PRINCE: -- because Dr. Khavkin clearly was talking to  
18 Desire and went into her decision making what surgery to have. His  
19 adjacent segment was C4-5 -- he -- because he was offering her a two  
20 level surgery at 5-6 and 6-7. So his discussion with her related to --

21 THE COURT: Okay.

22 MR. PRINCE: -- the 4-5 surgery.

23 THE COURT: I'm not going to relitigate this. I said no more  
24 surgeries.

25 MR. PRINCE: Well --

1 THE COURT: We rule that at the very beginning and it's  
2 been --

3 MR. PRINCE: No. But only the cost.

4 THE COURT: No.

5 MR. PRINCE: She's going to have an adjacent segment  
6 breakdown even after the second surgery.

7 THE COURT: That was not the ruling. The ruling was no. It  
8 was the one surgery. That was it and nobody was supposed to talk  
9 about it or opine or throw out or blurt. I assume you told all your  
10 witnesses and yet they've all blurted.

11 MR. PRINCE: But Judge, after the --

12 THE COURT: I get it.

13 MR. PRINCE: -- after she has the first adjacent segment  
14 surgery, the process starts over again.

15 THE COURT: I'm not reargue -- and that's what I told you  
16 you could say.

17 MR. PRINCE: You're saying I can't even talk about that?

18 THE COURT: I said you can say --

19 MR. PRINCE: For pain and suffering purposes.

20 THE COURT: -- there's another process.

21 MR. PRINCE: Yeah. Yeah. I'm going to talk about that.

22 MR. HENRIOD: And this argument --

23 THE COURT: The word multiple surgeries is not --

24 MR. HENRIOD: -- is why I'm afraid the whole thing was  
25 intentional.

1 THE COURT: -- I'm not going to rule. I'm assuming  
2 everybody's not doing intentional things. And I don't think that anything  
3 the Plaintiff did -- what's that word where you goad it on there? I don't  
4 think he was looking for those answers both times. I think it was a blurt  
5 at the end. I don't know if they didn't understand my ruling or maybe  
6 that wasn't made clear enough, but I definitely don't think that any of it  
7 was intentionally thought out by the Plaintiff.

8 MR. PRINCE: Yeah. But she can talk about the process, but  
9 I -- we need -- you've heard testimony and questions from counsel  
10 suggesting that Plaintiff might have multiple surgeries in the future. This  
11 Court has deemed this an allusion. That's not true, Judge.

12 THE COURT: Right. And I don't --

13 MR. HENRIOD: This allusion to multiple --

14 THE COURT: Right. And I'm going to give one, but I'm not  
15 going to give this one, so fix it up, because I don't --

16 MR. HENRIOD: What -- I mean, can you give me some  
17 guidance as to what the problem -- I didn't say it is --

18 THE COURT: She is --

19 MR. HENRIOD: -- an allusion -- I said it's an allusion to -- I  
20 mean, people --

21 THE COURT: I know.

22 MR. HENRIOD: -- may not know the difference between the  
23 words.

24 THE COURT: They don't and that's the problem. It sounds --

25 MR. HENRIOD: Uh-huh. Well, reference --

1 MR. PRINCE: Well, she's going to have one surgery --  
2 MR. HENRIOD: Reference.  
3 MR. PRINCE: -- and have an adjacent segment process after  
4 that, which she's going to have to live through. That goes to her pain  
5 and suffering damages.  
6 MR. HENRIOD: That's their theory.  
7 MR. PRINCE: So I am arguing that in the case.  
8 THE COURT: The second surg -- the first --  
9 MR. PRINCE: After the first --  
10 THE COURT: I guess it's the second surgery.  
11 MR. PRINCE: -- after the first surgery, I'm going to say she's  
12 going to say she's going to have adjacent segment breakdown and is --  
13 THE COURT: And she could require --  
14 MR. PRINCE: -- going to experience pain and suffering.  
15 THE COURT: -- a second surgery.  
16 MR. PRINCE: Huh? After the second surgery, she's going to  
17 have pain and discomfort and go through that process again. I'm going  
18 to stop short of saying she's having another surgery. I'm not going to  
19 say that. But I'm saying --  
20 THE COURT: That's fine.  
21 MR. PRINCE: -- the process starts over again.  
22 THE COURT: That's fine.  
23 MR. PRINCE: Okay.  
24 THE COURT: But they get a curative on the two blurts by  
25 your witnesses.

1 MR. PRINCE: But we need to talk about only the cost of the  
2 surgery. That -- they're not to consider whether there's going to be a  
3 third surgery.

4 THE COURT: They're not to consider a third surgery at all,  
5 but I don't think they probably want to say third surgery, but that's like --

6 MR. PRINCE: Well, no, but we put on evidence of one --

7 MR. HENRIOD: And that's the problem, right, is how do we  
8 cure this without ringing the bell again and highlighting --

9 THE COURT: I know. I know. I know.

10 MR. PRINCE: No, we have to be specific, Judge, because C5-  
11 6, I have evidence of that, clear evidence of a C5-6 need of an adjacent  
12 segment breakdown. We're only talking about a third surgery at C4-5, so  
13 it would have to be very specific.

14 THE COURT: Okay. Well I've said -- we're going to have to  
15 rework that, but we've got to get this jury in here for a little bit.

16 MR. PRINCE: Okay.

17 THE COURT: We can -- we'll leave this one as a yet to be  
18 determined. I'm going to give something, but I just -- and like I said, the  
19 world allusion is a little bit -- and I haven't deemed anything to be  
20 anything. I don't -- I'm not going to be -- I'm not a fact finder in here. I'm  
21 not an anything, so you need to get me out of it.

22 MR. HENRIOD: Okay, there is just one more, right? I mean,  
23 we're almost done. So on the next page is just one more statute.

24 THE COURT: Okay. And I'm going to give the statute.

25 MR. HENRIOD: Very good. So I think that's everything then.

1 THE COURT: Three --  
2 MR. PRINCE: Well, I object -- I get there's no problem with --  
3 THE COURT: -- are you pull -- 3 --  
4 MR. PRINCE: I'm objecting their --  
5 THE COURT: -- the burden of proof.  
6 MR. PRINCE: I'm objecting to their supplemental proposed  
7 2 --  
8 THE COURT: Okay.  
9 MR. PRINCE: -- because I don't think the evidence supports  
10 it, so --  
11 THE COURT: Okay. I'm going to give it. It's up to the jury.  
12 Three, burden of proof. Isn't that somewhere else?  
13 MR. PRINCE: Which one?  
14 MR. HENRIOD: No, so that is a continuation. It's on both  
15 pages.  
16 THE COURT: Oh. Okay. Never mind. Sorry. So I'm done,  
17 right?  
18 MR. HENRIOD: You're done.  
19 MR. PRINCE: Yes.  
20 MR. HENRIOD: And we agree on Plaintiff's proposed verdict  
21 form. Is there any disagreement on the two general defense verdict  
22 forms?  
23 MR. PRINCE: No.  
24 MR. HENRIOD: So we're done on verdict forms too, then.  
25 THE COURT: Okay. Do I have all the verdict forms? Because

1 I need to look at, because I -- these are super foreign to me.

2 MR. PRINCE: Let me give you a copy.

3 MR. HENRIOD: Yeah. So you'll be giving three. One that's  
4 two pages and then two that are single.

5 MR. PRINCE: Why would you need -- if it's defense verdict,  
6 it's defense verdict, right? For both. So you wouldn't really need a  
7 defense verdict form for the two defense verdicts. It's defense verdict for  
8 both, right? Otherwise, you're finding for the Plaintiffs --

9 THE COURT: I don't know. I'm hoping you guys are going to  
10 agree on this, because --

11 MR. HENRIOD: That's -- yeah, if you prefer that, that's fine.

12 MR. PRINCE: Let's just put both on one.

13 MR. HENRIOD: Okay.

14 MR. PRINCE: Both plaintiffs, you know, on one.

15 MR. HENRIOD: Okay. Sure.

16 MR. PRINCE: I'm giving you the Plaintiff's proposed verdict  
17 form --

18 THE COURT: Okay.

19 MR. PRINCE: -- which they've agreed to.

20 THE COURT: Okay. Thank you. And what did you guys  
21 decide to do about the jury and lunch?

22 MR. WINNER: We'll agree and pay for it. To have lunch  
23 here.

24 MR. PRINCE: We'll split it.

25 THE COURT: All right. Are you ordering it? Are you



1 handling it? Is somebody --

2 MR. PRINCE: No, usually the Court always handles that. We  
3 don't have the ability to do that.

4 THE COURT: My -- they tell me not. I can ask Kelly, but she  
5 tells me not.

6 MR. WINNER: I'll give you credit card or cash, if you want  
7 to --

8 MR. PRINCE: What do you want us to do?

9 MR. WINNER: Tell me what do to.

10 MR. HENRIOD: I hate to -- I feel like I might be arguing  
11 against my own interests, but just to be correct, because I don't want to  
12 steer you wrong. The defense verdict forms, because there is the  
13 comparative issue for Ms. Evans-Waiau, but not for Guadalupe --

14 MR. WINNER: We might need to defense forms, yeah.

15 MR. HENRIOD: -- I think we need two defense forms.

16 MR. PRINCE: No, no, no, because this is how this works.  
17 This is why this is wrong.

18 THE COURT: Does it matter? We're talking about papers.

19 MR. PRINCE: And the way you instruct is, you are to award  
20 damages and then find what the comparative negligence is. If it's zero --  
21 you know, whatever -- it's more than 50 percent negligence on the part  
22 of Desire, she can't recover, so it only applies to Desire. So -- and it'll  
23 be -- you'll have to deal with that. So it's not like you get a separate  
24 defense verdict like for Desire and then give one for Guadalupe. I mean,  
25 it's --

1 THE COURT: Okay. Well, I --

2 MR. HENRIOD: As long as there is no argument then that

3 you can't give a defense verdict, because one of the Plaintiffs is fault-

4 free.

5 MR. PRINCE: Well --

6 MR. HENRIOD: As long as I don't hear that, then there's no

7 problem --

8 MR. PRINCE: True. Oh, true.

9 MR. HENRIOD: -- giving only one defense verdict form.

10 THE COURT: Okay. So now you're agreeing on that.

11 MR. HENRIOD: You know, I'm afraid that that's incorrect, but

12 it only helps me, if he's not going to argue that, so I'll let it go.

13 THE COURT: Okay. And what about lunch? Because --

14 MR. WINNER: What would you like us to do? We're happy

15 to split --

16 THE COURT: Well, Kelly would like you all to handle it and

17 just have it sent over whenever you think you're going to be ready. If

18 you -- I will ask her. And she's very nice and does everything. If you

19 would like -- what time -- when are we going to be ready?

20 MR. HENRIOD: To start with the witness, he's here now.

21 THE COURT: Okay. And then what -- are we going right into

22 the closings without finalizing the jury instructions.

23 MR. PRINCE: No, you've gotta read them first.

24 THE COURT: Oh, that's right. I do, don't I? So they're going

25 to have to take a break then.

1 MR. HENRIOD: Take a lunch yeah. So I figure we could  
2 have -- maybe have --

3 THE COURT: Maybe we just let them take their own lunch,  
4 because it's going to be that long, isn't it --

5 MR. WINNER: That's fine.

6 THE COURT: -- to get these ready.

7 MR. PRINCE: That's fine.

8 MR. HENRIOD: That's fine.

9 MR. PRINCE: Then we've just got to number them all and I'd  
10 want them right before you start so --

11 MR. HENRIOD: Of course.

12 THE COURT: And I need you all to look at them -- you guys  
13 are preparing them, right?

14 MR. HENRIOD: Oh, yes. No, they're going to go on their  
15 own lunch. They're going to take their own lunch.

16 THE COURT: We're going to let them go on their own lunch,  
17 because they have plenty of time. We're not going to get this ready.

18 MR. WINNER: Can we make it a short lunch? Like 30  
19 minutes, 40 minutes.

20 THE COURT: We're not going to get these jury instructions  
21 ready and numbered to me, are you? If you are, you are, but I'm not  
22 doing --

23 MR. WINNER: Could we get jury instructions done and  
24 numbered in 30 minutes, 40 minutes?

25 MR. HENRIOD: I hope so, so just on logistics, do you have

1 the pen or do we? We can -- are you guys making the final set, or are  
2 we?

3 MR. PRINCE: Whatever the ones -- we're going to make the  
4 changes we agreed upon -- the -- like what you wanted here, those  
5 couple changes and the other ones you were going to -- you said you  
6 said you guys were going to make a few on comparative negligence.

7 THE COURT: See, we're going to give them an hour guys.

8 MR. WINNER: Okay. So the question is just putting them  
9 together and --

10 THE COURT: Mr. Winner, if you're not bringing in lunch,  
11 they get an hour.

12 MR. PRINCE: You're emailing it to us. Okay.

13 [Counsel confer]

14 [Recess at 10:49 a.m., recommencing at 10:52 a.m.]

15 [Outside the presence of the jury.]

16 THE COURT: Saying she'll do it if you want.

17 Mr. Winner, I just said that Kelly will order the lunch if you guys want her  
18 to. Or if you would prefer them to go on their own, that's fine as well.  
19 But you have to pay for the lunch, and you have to give her a card.

20 MR. WINNER: I'm happy to share the cost if --

21 MR. PRINCE: Well, just give them your credit card then send  
22 me half the bill, and we'll pay it. My firm credit card, I had -- they had --  
23 we had to replace our cards. We'll pay it.

24 MR. WINNER: Mine is maxed out.

25 MR. PRINCE: Okay. If it's maxed out, it's maxed out.

1 THE COURT: What's your preference? Do you want them to  
2 go on their or do you want to have it ordered?

3 MR. WINNER: That's fine. We'll just order it.

4 THE COURT: Okay. At then however long it takes, at least it  
5 gives them something to do.

6 MR. PRINCE: Yes, that's fine.

7 MR. WINNER: Yeah. Maybe we can -- I think if we had lunch  
8 here by 12:30 probably would be a good time.

9 THE COURT: Well, if it's Capriotti's, they just bring it and it  
10 can wait.

11 Should we check and make sure the jury is okay with that,  
12 folks?

13 MR. PRINCE: Well, if it's cold sandwiches. And if we're done  
14 that soon, great.

15 THE COURT: I'm going to make sure they're okay with that.  
16 All right, guys?

17 MR. PRINCE: Okay.

18 THE COURT: The loose plan is we're going to go till noon,  
19 and we'll bring them in lunch --

20 MR. WINNER: Okay.

21 THE COURT: -- before closings. See if there's any allergies.  
22 We're looking at Capriotti's. See if that's okay with everyone, please.

23 MR. WINNER: They'll just do like a platter of things, right, or  
24 something to that --

25 [Pause]

1 MR. PRINCE: You remember you're going to look at the  
2 Posas instruction. That's the *Posas* case. That's the -- our proposed not  
3 agreed upon number 2, about what to anticipate, you know. I don't  
4 know. Did you decide that or to look closer at the case.

5 THE COURT: I thought we decided everything now.

6 MR. PRINCE: It's 126 Nev. 112. It's our supplemental --  
7 excuse me -- our proposed not agreed upon.

8 THE COURT: What page was it? I'm sorry.

9 MR. PRINCE: Our proposed not agreed upon number 2, a  
10 driver must anticipate.

11 THE MARSHAL: Everybody is good with Capriotti's.

12 THE CLERK: No weird allergies or anything?

13 THE MARSHAL: No.

14 THE CLERK: You're good. Okay. So we'll just get a platter.

15 THE COURT: Okay. I have that this was a -- that I came  
16 down to a no on this one.

17 MR. PRINCE: Okay. I thought you were going to review the  
18 case. No. Okay. So you're -- as of now, is it a no?

19 [Counsel confer]

20 THE COURT: Yeah. We'll -- I'll look at it, but --

21 [Counsel confer]

22 THE MARSHAL: Ready?

23 THE COURT: I don't have everybody, but I will be.

24 MR. PRINCE: Well, I think we just need Mr. Winner.

25 MR. DEGREE: Yeah. They're just --

1 MR. PRINCE: The other two are going to be working on jury  
2 instructions.

3 THE COURT: Okay. I'll be back in one minute.

4 [Pause]

5 THE COURT: So they're ordering it for noon. Do you think  
6 it's going to take that long?

7 MR. PRINCE: I don't know. I have about 30 minutes. So -- I  
8 offered to wave him off, but --

9 THE COURT: No, I know. Where's the -- just check with Mr.  
10 Winner and make sure, because Mr. Prince thinks he's only going to be a  
11 half-hour.

12 THE MARSHAL: All right.

13 THE COURT: Because, otherwise, we're going to be at a  
14 weird stage with the jury waiting a half-hour for their food.

15 MR. PRINCE: I think you can have it here by noon, 12, to  
16 your --

17 THE COURT: You think that's fine?

18 MR. PRINCE: I do.

19 THE COURT: Okay. They're ordering it for noon. I'm just  
20 making sure we're not going to be ready for it before then, because I  
21 don't want to be wasting jury time either. Mr. Prince thinks about a half-  
22 hour. Do you have a lot left?

23 MR. WINNER: No. And I've asked Dr. Schifini again to  
24 shorten his answers. And I will try to be brief.

25 THE COURT: All right. So everybody agrees that noon is

1 fine?

2 MR. WINNER: Yeah.

3 MR. PRINCE: Uh-huh.

4 THE COURT: All right. Well, if you're done early, filler.

5 Okay.

6 MR. PRINCE: Are we ready to work? Okay.

7 MR. WINNER: It's 11 now. You don't need all that time?

8 THE COURT: He said about a half-hour.

9 MR. PRINCE: I know my time. You worry about your time.

10 You have -- you say five minutes and it's an hour and 15.

11 MR. WINNER: So you don't need the full hour?

12 MR. PRINCE: I don't know.

13 MR. WINNER: Okay.

14 MR. PRINCE: I guess I don't know.

15 [Counsel confer]

16 THE MARSHAL: Getting the jury.

17 [Pause]

18 THE MARSHAL: All rise, please, for the jury.

19 [In the presence of the jury.]

20 THE COURT: Both sides stipulate to the presence of the jury.

21 MR. PRINCE: Yes.

22 MR. WINNER: Yes.

23 THE COURT: Welcome back, folks. Sorry to leave you

24 waiting, but believe it, we were doing stuff to try and move it faster. So

25 while you felt like it wasn't, we're trying to get it to you faster. Okay.



1 Mr. Prince.

2 MR. PRINCE: I'm ready, Judge. I just -- we're waiting on the  
3 witness, I guess.

4 JOSEPH SCHIFINI, DEFENDANT'S WITNESS, PREVIOUSLY  
5 SWORN

6 THE COURT: Good morning.

7 THE WITNESS: Good morning.

8 THE COURT: Remind you you're still under oath.

9 THE WITNESS: Okay. You don't need me to --

10 THE COURT: No. I'm good. Are you good?

11 THE WITNESS: I'm fine.

12 CROSS-EXAMINATION CONTINUED

13 BY MR. PRINCE:

14 Q Doctor, good morning.

15 A Good morning.

16 Q I have some additional questions for you today.

17 A Of course.

18 Q Doctor, I think you even used the term yesterday, but you do  
19 use the clinical correlation process to determine the nature of someone's  
20 injury, formulating a diagnosis as well as a treatment plan, correct?

21 A That's correct.

22 Q And in your practice, the date of the onset of symptoms is  
23 very important to the overall clinical correlation analysis, correct?

24 A It is.

25 Q Yeah. Because history by -- in any aspect of medicine but

1 including someone who's been involved in some type of trauma, that's  
2 important as well, correct?

3 A It is important, yes.

4 Q Okay. And also, you're looking at a patient's response to  
5 treatment following traumatic events to determine if it falls in a  
6 reasonable range of expectation of how patients respond to care and  
7 what might be needed in the future for that?

8 A Yes.

9 Q Okay. And you agree that diagnostic testing, which can  
10 include site specific injections, that's a piece of the clinical correlation  
11 process, correct?

12 A It is.

13 Q And there was no medical evidence that we talked -- that you  
14 found to support any ongoing symptoms to Desire's cervical spine  
15 before October 30, 2015, in the months or years before that, correct?

16 A That's correct.

17 Q Right. So just so we're clear though, you did review medical  
18 records between 2000 -- July 2010 and October 2015, correct?

19 A Yes.

20 Q In fact, you reviewed some of her primary care records,  
21 right?

22 A That's correct.

23 Q Meaning her primary, like her family doctor, hospital records,  
24 right?

25 A Yes.

1 Q You even looked at her OB/GYN records, her personal  
2 gynecological records, didn't you?

3 A They were given to me to review, yes.

4 Q Right. The defense gave you her gynecological records,  
5 correct?

6 A I believe so, yes.

7 Q And you -- and there's nothing in any of those records from  
8 2011 through 2013, that you had records of, that in any way documented  
9 any problems with her neck or her arm, correct?

10 A That's correct.

11 Q And you agree that following the October 30, 2015 collision,  
12 Desire did report neck and arm complaints, correct?

13 A She did.

14 Q And she reported those complaints continuously after her  
15 surgery, correct?

16 A Continuous after her surgery?

17 Q Before her surgery. Sorry.

18 A Before her surgery, yes.

19 Q Okay. Now you agree that there's nothing you saw in the  
20 record for Desire that would -- you characterize as any unreasonable  
21 patient behavior? She believed normally, as a reasonable patient would,  
22 right, for the recommendations she was given?

23 A I'm not sure exactly --

24 MR. WINNER: Object to the form of the question.

25 THE WITNESS: -- that means.

1 BY MR. PRINCE:

2 Q Okay. Do you agree she was reasonable in following the  
3 recommendations of her medical care providers?

4 A Yes.

5 Q You agree that she was a compliant patient with her  
6 physician's recommendations and plans for medical treatment?

7 A She appeared to be, yes.

8 Q Right. None of her treating physicians reported any  
9 compliance issues, missed appointments, not following through as  
10 indicated, correct?

11 A That's correct.

12 Q You saw no behavior related to abuse of narcotics or other  
13 analgesics as prescribed to her following the October 30, 2015 collision,  
14 correct?

15 A That's correct.

16 Q Do you agree that seeking medical treatment, including  
17 going to the chiropractor at Align Chiropractor that was reasonable and  
18 appropriate for Desire?

19 A It was reasonable, yes.

20 Q And it was reasonable for Guadalupe as well, correct?

21 A Yes.

22 Q Isn't it true, doctor, that people who've been -- strike that --  
23 isn't it true that a typical practice for a chiropractic physician, or a  
24 physical therapist, or any -- even a pain management doctor, is to start  
25 treating people for a soft tissue component to see how the patient

1 responds, and then determine if there's more symptoms that aren't  
2 resolving as you would expect, to then refer them for imaging or to see a  
3 specialist?

4 A That's a reasonable course of treatment.

5 Q And it's also reasonable for a medical doctor -- for a  
6 chiropractor to involve a medical doctor, like in this case -- he didn't  
7 come to court, because he didn't really need to -- Dr. -- to involve Dr.  
8 Ross to provide medication support while a patient is going through  
9 physical therapy, correct?

10 A That is reasonable, yes.

11 Q So is it reasonable for Dr. -- the chiropractor, Dr. McCauley to  
12 refer both Guadalupe and Dr. -- excuse me -- and Desire to Dr. Ross for  
13 medical management?

14 A Yes.

15 Q Because chiropractors can't prescribe medications or inject  
16 patients, correct?

17 A This is true.

18 Q Dr. Schifini, don't you agree that a disc protrusion is a type of  
19 herniation?

20 A Well, based on nomenclature from the North American Spine  
21 Society, all extensions from the disc are called herniations. There's of  
22 the bulge type, of the protrusion type, of the extrusion type, free  
23 fragment type. So there's specific nomenclature that's associated with  
24 that. But they're all kind of under the heading of herniation.

25 Q Well, I have a copy of their recent -- most recent article on

1 this point called lumbar disc nomenclature 2.0 from 2014.

2 A Yes.

3 Q Yeah. And I want to see if you agree with this statement.

4 MR. PRINCE: Excuse me one moment.

5 BY MR. PRINCE:

6 Q Herniated discs may be --

7 MR. WINNER: Excuse me.

8 BY MR. PRINCE:

9 Q -- classified --

10 MR. WINNER: Excuse me, Your Honor. Didn't the doctor just  
11 agree with him?

12 THE COURT: He did.

13 MR. PRINCE: I don't think he -- he said -- added something  
14 else. It wasn't -- the bulging was included. I just want to make sure.

15 MR. WINNER: He said it's all under the heading of herniation  
16 according to the current nomenclature.

17 MR. PRINCE: Okay. I just want to be clear for my own self.

18 BY MR. PRINCE:

19 Q Herniated disc may be classified as protrusions or extrusions  
20 based upon the shape of the displaced material. Do you agree with that  
21 statement?

22 A I agree with that statement. It's not the complete article, but I  
23 agree with that statement.

24 Q Okay. And they also talk about bulging, right, which is  
25 another type of disc abnormality, right?

1           A     It is.

2           Q     Okay. And in this case, the radiologist found a disc  
3 protrusion, a type of herniation, bilaterally at C6-7, correct?

4           A     That's correct. Right.

5           Q     And a radiologist is a -- someone who has sub -- medical  
6 specialty training in the field of radiology, correct?

7           A     That's correct.

8           Q     It's a separately recognized medical subspecialty, correct?

9           A     It is.

10          Q     Now Dr. Rosler, he performed a site specific injection at C6-7,  
11 correct, on the left side? Selective nerve root block.

12          A     He performed a left C7 selective nerve root block.

13          Q     Right.

14          A     Yes.

15          Q     Okay. And you agree that a disc protrusion can cause nerve  
16 root irritation and symptoms down the arm, correct?

17          A     Yes.

18          Q     Okay. Desire reported symptoms down her arm and into her  
19 hand, both pain, numbness, or -- three things, pain, numbness, and  
20 tingling, correct?

21          A     That's correct.

22          Q     And those are all significant complaints which deserve to be  
23 investigated to determine what the cause or the origin of those  
24 complaints are, correct?

25          A     I think that's reasonable, yes.

1 Q Now in this case, the left side selective nerve root block was  
2 performed on January 7, 2016, correct?

3 A I believe that was the first of two, yes.

4 Q But before that though, Desire actually went to see Dr. Rosler  
5 on December 16, 2015, correct?

6 A I don't know the exact date, but it was before that.

7 Q If I represent to you that just for time purposes?

8 A Yeah. It was before the injection, yes.

9 Q Fair enough. Okay. And Desire's reported complaints of  
10 neck pain and symptoms down into the arm is consistent -- just  
11 consistent with a disc protrusion at the C6-7 level?

12 A Are you asking? Is that a question?

13 Q Yeah. I'm saying it's consistent with that, right?

14 A Symptoms in the arm are consistent with that, yes.

15 Q A disc at C6-7?

16 A Well, you'd have to be more specific with your question and  
17 where the -- you know, which fingers were involved and what part of her  
18 arm was involved for me to agree with you.

19 Q Okay. Fair enough. You understand dermatome distribution,  
20 correct?

21 A I do.

22 Q And you agree that a interventional pain management  
23 specialist who's board certified and fellowship trained like Dr. Rosler,  
24 they would understand, or he would also understand dermatome  
25 distribution pattern, right?



1 A Well, Dr. Rosler is not fellowship trained, but --

2 Q He didn't have --

3 A -- besides that -- he did not do a fellowship.

4 Q Well, he said -- he told the jury he did.

5 A Well, then he was not accurate with his comments.

6 Q You didn't do a fellowship in pain, did you?

7 A That's correct. And that's how I know Dr. Rosler didn't do  
8 one either.

9 Q Okay. And Dr. Rosler, on examination, he found, on the left  
10 side, a decrease in sensation in the left C7 dermatome, correct?

11 A I believe that's what he documented, yes.

12 Q And that, a loss of sensation, is consistent with nerve root  
13 irritation coming from Desire's C6-7 disc?

14 A Or other sources. But the C6-7 disc would be included in the  
15 differential diagnosis.

16 Q Right. Now yesterday, you said that muscle spasms or  
17 muscle -- or soft tissue musculoskeletal injury, that can cause symptoms  
18 like this?

19 A Yes.

20 Q Isn't it true if you -- you don't do selective nerve root blocks if  
21 you feel someone has a soft tissue injury and a muscle spasm which  
22 may be causing some kind of extremity problem?

23 A I wouldn't, no.

24 Q That wouldn't be the standard of practice for any pain  
25 management physician, correct?

1           A     That's correct.

2           Q     All right. And you agree that following the left-sided C6-7  
3 selective nerve root block, Desire received -- reported that her symptoms  
4 had decreased, correct?

5           A     Yes.

6           Q     That's consistent with nerve root irritation coming from the  
7 C6-7 nerve root, correct?

8           A     Among other things, yes.

9           Q     And one of the things that you do, as well as other pain  
10 management physicians do, is perform selective nerve root blocks to  
11 assist surgeons in their surgical decision-making?

12          A     Well, I typically don't perform selective nerve root blocks. I  
13 don't find them helpful. I've performed transforaminal epidural steroid  
14 injections, which is a whole different procedure. Similar placement of  
15 needles but targeting the disc and the nerve not just the nerve.

16          Q     Okay. And -- all right. And so, you provide -- when you do  
17 perform selective nerve root blocks, you provide that data to the  
18 surgeons, right?

19          A     I do.

20          Q     And then they make decisions based upon that, correct?

21          A     Yes.

22          Q     It's up to them to determine how to use the data from  
23 selective nerve root blocks or transfer -- epidural steroid injections,  
24 correct?

25          A     It is information that is passed on from me as the -- I'll call

1 myself a diagnostician to the -- provide that information to the surgeon.  
2 Yes.

3 Q Right. And when you perform selective nerve root blocks,  
4 you often tell patients that you may have some -- you know, some  
5 immediate relief, and you may have some therapeutic benefit even after  
6 that for a period of weeks or months or so, right?

7 A Yes.

8 Q All right. And you also tell them, to set their expectations,  
9 that after the steroid wears off, the pain may come back, you'll need to  
10 come back and see me?

11 A Yes.

12 Q All right. So in this case, Desire reported within a few days  
13 or weeks after that, that her symptoms substantially went away  
14 following that selective nerve root block, correct?

15 A Yes.

16 Q Now, she went to see Dr. Rosler on February 18th, 2016, and  
17 she reported that at that point, she was feeling good and was pain free,  
18 right?

19 A Yes.

20 Q All right. After that, she came back -- called Dr. Rosler, set up  
21 another appointment, and came back because the symptoms had  
22 returned, correct?

23 A Yes.

24 Q You're not aware, between February 18th, 2016 and March  
25 29th, 2016, those two dates, of any intervening trauma or other event

1 causing her injury, correct?

2 A That's fair; yes.

3 Q And you also agree that when she went back to see Dr.

4 Rosler on March 29th, 2016, she had decrease in sensation, again, in the  
5 left C7 dermatome distribution, correct?

6 A I believe so.

7 Q That's what Dr. Rosler documented, correct?

8 A Yeah. I -- for the sake of time --

9 Q Do you want me --

10 A -- I'll believe that that's what it says.

11 Q All right. All right. And she also document -- reported to Dr.  
12 Rosler, and he documented, ongoing neck and cervical complaints, or  
13 neck complaints, and symptoms down into the arm, correct?

14 A Yes.

15 Q All right. So, essentially the same presentation she had back  
16 in December?

17 A Yes.

18 Q All right. Not uncommon for someone like Desire who  
19 undergoes a selective nerve root block for the symptoms to return,  
20 correct?

21 A Well, that's if you assume the selective nerve root block  
22 actually was the source of her improvement.

23 Q Okay. Well, fair enough. Dr. Rosler, when he saw her again,  
24 she had pain in her neck, symptoms down her left arm. He, again,  
25 recommended a selective nerve root block to help her, right?

1           A     Yes.

2           Q     All right. And isn't it common in your practice as a pain  
3 management doctor, that sometimes you'll do a confirmatory block to  
4 see -- just to confirm the results, right?

5           A     Yes.

6           Q     And that's something you do in your own practice, right?

7           A     It is.

8           Q     So Dr. Rosler wanting to do a confirmatory block to see if  
9 that provided her any additional benefits, he, in fact, did one of those,  
10 right?

11          A     He did.

12          Q     And it did, again, give her immediate benefit?

13          A     He documented that; yes.

14          Q     All right. And he not only injected her with like the  
15 anesthetic or for the lidocaine to like numb up the nerve like right then,  
16 he also injected a steroid, correct?

17          A     That's correct.

18          Q     And unlike the first injection, the symptoms came back,  
19 correct?

20          A     Yes.

21          Q     Sooner? Sonner, correct?

22          A     Yes.

23          Q     Okay. And you agree, just in general, that a patient who has  
24 a disc herniation causing nerve root irritation, that that is not going to  
25 typically improve with ongoing chiropractic care?

1           A     But it did.

2           Q     Oh. Well, that's only if you -- the injection was in there,  
3 right? In Desire's case, the injection was in the middle of the chiropractic  
4 care, right?

5           A     Yes. The injection was inserted as the pain was going down  
6 anyway.

7           Q     Right. Dr. Rosler is reasonable in recommended the injection  
8 to her in December of 2015, correct?

9           A     Based on the information provided to Dr. Rosler at that time,  
10 it was reasonable --

11          Q     Okay.

12          A     -- but that information was inaccurate.

13          Q     Okay. And I'm not asking about that. My question now is  
14 once you have a patient who has a -- just in general, if you have a disc  
15 protrusion, symptoms for more than six months, which is chronic pain,  
16 and nerve root irritation, chiropractic care typically is not going to go -- is  
17 not going to help that person, right?

18          A     It might help temporarily in that hypothetical situation that  
19 you just presented.

20          Q     Right. And so I want to set the stage. By the way, assuming  
21 what Desire is saying is true, okay? I'm going to --

22          A     Okay.

23          Q     I'm assuming what Desire is saying is true that I've got these  
24 ongoing symptoms, they all started October 30th. By May 30th, 2015,  
25 she would be characterized medically in chronic pain, correct?

1           A     Yes, based on the dates.

2           Q     Right. And chronic pain, and it seems to be when I was in  
3 my younger years doing this, it was six months, but I've seen more  
4 recent literature saying if you have chronic -- continuous pain complaints  
5 or symptoms more than three months, that would be considered chronic  
6 pain?

7           A     Yes.

8           Q     All right. So regardless of which standard we use, by May,  
9 she's in the chronic pain category, correct?

10          A     Yes, by any common definition, she'd be in chronic pain.

11          Q     Right. And people who are in chronic pain, they offer  
12 sometimes that they have -- their sleep is affected, correct?

13          A     Yes.

14          Q     They have an altered mood, correct?

15          A     Yes.

16          Q     They can develop depression because of chronic pain,  
17 correct?

18          A     Yes.

19          Q     And also when a patient's wake and sleep cycles are affected,  
20 they kind of become sleep deprived, and it causes them to become more  
21 fatigued, right?

22          A     I think that's fair.

23          Q     Right, and then, it actually, it kind of makes the pain worse at  
24 times, right?

25          A     It can; yes.

1 Q All right. And so sometimes -- and you obviously treat  
2 patients in chronic pain in your practice, right?

3 A Yes.

4 Q And sometimes when patients are having a -- and they have  
5 bad days and good days, right?

6 A Yes.

7 Q And sometimes on bad days, if they're a chronic pain patient,  
8 if they haven't slept well or done well, it feels like their whole body is on  
9 fire, right? It feels like there's pain everywhere to them, even though  
10 there are problems in the neck, it looks like it could be anywhere?

11 A I don't know if that's accurate, but I've seen it. It's not  
12 common, but yes, I understand what you're saying.

13 Q People that just have a bad day, do not feel well, even  
14 though in their chronic pain, it just feels like everything hurts, like my  
15 body right now feels like everything is on fire because I want to be -- I  
16 want to get this case to this jury, and I don't have any --

17 A Me, too.

18 Q All right. So my question -- so I want to show you then, you  
19 were shown this in Dr. Khavkin's office.

20 MR. PRINCE: It's Bates Number 278, Brandon. Just the  
21 diagram at the bottom.

22 BY MR. PRINCE:

23 Q So this is by May 17th. She draws this on one day at Dr.  
24 Khavkin's clinic, right?

25 A Yes.



1 Q All right. I mean, she might just have been having -- Desire  
2 said, I was just having a bad day, and it felt like everything hurt that day.  
3 I mean, you agree, her other drawings don't look like that, right?

4 A None of her other drawings.

5 Q Right. So that just could've been a really bad day for her,  
6 right?

7 A She should've just circled her whole body.

8 Q Okay. Well, she did, it looks like to me. Well then -- but that  
9 doesn't -- now, when she sees Dr. Khavkin, who you agree -- have you  
10 ever referred patients to Dr. Khavkin?

11 A On occasion; yes.

12 Q Has he ever referred patients to you?

13 A Yes.

14 Q I mean, he's world class trained. He trained at John Hopkins,  
15 right?

16 A I believe so; yes.

17 Q All right. And you would consider that a preeminent  
18 teaching hospital in the world, right?

19 A Yes.

20 Q All right. So when he sees her in the exam room, he  
21 recognizes part of the history. Your main problem is in your neck, and  
22 your left arm, and that's where he focuses his exam, right?

23 A Yes, he did.

24 Q Right. He wasn't worried about the back or the legs or any of  
25 that? He focused on the neck and the arm symptoms, right?

1           A     Yes, it was a very focused exam.

2           Q     Right. And by that time, she had already been discharged  
3 from chiropractic care, correct?

4           A     Yes.

5           Q     Right. She had already had two selective nerve root blocks,  
6 correct?

7           A     Yes.

8           Q     So Dr. Khavkin had known about the chiropractic care, he  
9 knew about the selective nerve root blocks, because he documented that  
10 in his chart, correct?

11          A     He did; yes.

12          Q     He also saw a disc protrusion, C6-7, correct?

13          A     He did.

14          Q     He also found an abnormality at C5-6, correct?

15          A     He did.

16          Q     And on his own direct review of the imaging, correct?

17          A     I believe so; yes.

18          Q     Right. And he recommended the two level surgery, right?

19          A     Yes.

20          Q     Okay. Now, with regard to Dr. Garber for a minute, I thought  
21 I'd covered this yesterday. I thought I resolved it all, but I want to do one  
22 more thing. There's some conflict as to how in the evidence -- I don't  
23 think it matters -- but I want to -- I'm going to ask you. You agree,  
24 number one, there was a reason for Desire to want a second opinion  
25 about surgery, given her age?

1           A     I think it's reasonable to get a second opinion regardless of  
2 your ages, but yes, I think it's reasonable.

3           Q     It was reasonable for her?

4           A     For her --

5           Q     Or anybody else for that matter?

6           A     Yes.

7           Q     Whether you had spine surgery, knee surgery, elbow, it  
8 doesn't matter, right?

9           A     Right.

10          Q     Okay. And you agree that Dr. Garber, he is a well-trained,  
11 well-respected neurosurgeon in our community?

12          A     He is.

13          Q     And someone you have trust and confident in, correct?

14          A     Yes.

15          Q     So let's say that Dr. Rosler referred her to Dr. Garber; would  
16 you be critical of that?

17          A     No.

18          Q     For a second opinion?

19          A     No.

20          Q     Let's say that her lawyer -- let's say it was even me, Dr.  
21 Schifini. And I said, you know what, I think he's a good choice, go see  
22 him. You wouldn't be critical of that; would you?

23          A     No.

24          Q     So if your lawyer, Paul Powell, said, hey, you want a second  
25 opinion, Dr. Garber is a good choice. You're not critical of that at all, are

1 you?

2 A No.

3 Q In fact, it's irrelevant to you, isn't it, how she got there?

4 A Yes, it's --

5 Q Okay.

6 A -- sort of irrelevant.

7 Q All right. Because all your focusing on is was the treatment  
8 appropriate, and what was going on at the time. That's your focus  
9 medically speaking, right?

10 A Yes.

11 Q How the patient gets there, that's a whole other issue, right?

12 A It is another issue.

13 Q It's really collateral to your medical causation or your  
14 medical opinions, right?

15 A It's another piece of information, it's a very minor portion of  
16 it.

17 Q Right. And Dr. Garber, on his direct review of the imaging,  
18 he also saw a C6-7 disc protrusion, correct?

19 A That's what he says.

20 Q Okay. And he's operated on your patients, yes?

21 A He has.

22 Q And he has relied upon injections that -- data that you  
23 provide him, injections on patients you've shared?

24 A Yes.

25 Q Whether it be selective nerve root blocks, epidural steroid

1 injections, at the same levels, right?

2 A That's correct.

3 Q All right. He also found on his exam a decrease in sensation,  
4 an earlier abnormality, consistent with a C6-7 nerve problem, right?

5 A Yes.

6 Q And you agree that a neurosurgeon -- I mean, they're  
7 focusing on issues of the spine, but they're keenly focused on any  
8 neurologic issues, right? I mean, that is really the emphasis of their  
9 practice.

10 A It is.

11 Q All right. And so there's been two neurosurgeons who felt  
12 that she had some sort of nerve root irritation causing symptoms down  
13 into the arm, correct, by the time she goes to see Dr. Garber?

14 A Yes. I think Dr. Khavkin's exam findings were not as specific  
15 as Dr. Rosler or Dr. Garber, however.

16 Q Right. Well, Dr. Khavkin, he testified in front of the jury that  
17 his findings were consistent with the C7 dermatome distribution; is that  
18 -- then if he testified that you would have no reason to disagree, right?

19 A No.

20 Q Okay. All right. Now, you agree that Desire underwent a --  
21 she underwent a single level neck surgery at C6-7, on September 1st,  
22 correct?

23 A Yes.

24 Q And you have two different neurosurgeons making two  
25 different recommendations, right?

1           A     Yes.

2           Q     This doesn't make them both -- one right or one wrong, it  
3 just means that's just my approach, that is my clinical judgment, only  
4 one level -- we should get started at one level, as opposing to doing two  
5 levels, right?

6           A     Yes.

7           Q     All right. Now, you've read Dr. Garber's reports in this case,  
8 correct?

9           A     Yes.

10          Q     Okay. And you treat patients in your practice who have  
11 undergone spinal reconstructive fusion surgery, correct?

12          A     Yes.

13          Q     And you treat patients who -- you're familiar with the  
14 adjacent segment disease process, correct?

15          A     I am.

16          Q     And you treat patients who become symptomatic due to  
17 adjacent segment disease in your practice, correct?

18          A     Yes.

19          Q     And often times, you'll prescribe medications or even  
20 additional injections and work them back up, correct?

21          A     Yes.

22          Q     And then with adjacent segment disease, once someone has  
23 a fusion surgery over a period of time, there's a likelihood that  
24 depending on the number of years, that a patient -- the disc above or  
25 below will start to break down and become symptomatic, correct?

1           A     That's in the literature; yes.

2           Q     Right. And that's something that you understand in your  
3 practice, right?

4           A     I do.

5           Q     And when that becomes symptomatic, the patient starts to  
6 go through this whole chronic pain cycle again, medication, you try to  
7 treat it conservatively with therapy, you start the injections, and maybe,  
8 at some point, you're even referred back to the surgeon, correct?

9           A     Well, that's if it happens; yes.

10          Q     Right. Assuming it comes to that, right. And you've read in  
11 your review of this case, Dr. Garber's reports, correct?

12          A     I have.

13          Q     And you've read Dr. Garber believes that Desire is going to  
14 require an adjacent segment surgery at C5-6, correct?

15          A     That's correct.

16          Q     And it's your opinion that Dr. Garber is likely accurate in  
17 terms of Desire's need for adjacent segment surgery at C5-6, correct?  
18 You've said that in your reports.

19          A     I believe what I was referring to was the percentage that you  
20 quoted in reference to being accurate in reference to the need for that.

21          Q     Okay. In your January 23rd, 2018 report, you summarize Dr.  
22 Garber's letter, outlining at C5-6, the necessity and the likelihood of C5-6  
23 adjacent segment surgery, right?

24          A     Yes.

25          Q     All right. And you say that you believe that Dr. Garber's

1 predictions, based upon the performance of a previous cervical fusion at  
2 C6-7, are likely accurate; that's what you said on page two, correct?

3 A Let me get to page two, and I will --

4 Q Go ahead.

5 A Yes, but there's more to that sentence.

6 Q Well, no. I understand you don't believe anything is related  
7 after February. I mean, even -- because you have to assume an injury,  
8 right? And then if you assume an injury, nothing past February; that  
9 would be your opinion if you assume an injury, right?

10 A Yeah.

11 Q Right. Well, setting that aside, let's just talk just about the  
12 medicine for a minute, okay?

13 A Okay.

14 Q Because the causation issue is one issue, but how medically  
15 Desire is doing, and how she's going to do in the future, that's a separate  
16 issue, right? Based upon a fusion surgery?

17 A Yeah. If we take causation out; yes.

18 Q Yeah. So I've got that over here.

19 A Okay.

20 Q You didn't -- did you ever form an opinion that she was hurt,  
21 you've not formed an opinion that she wasn't hurt, right?

22 A Correct.

23 Q That's what you said yesterday?

24 A Yes.

25 Q So assuming she was hurt, assuming that's a hypothetical,



1 then you're saying you shut it all down as of February 18th, 2016?

2 A Yes.

3 Q The day she says she's pain free with Dr. Rosler, you kind of  
4 draw that line in the sand right there?

5 A Yes.

6 Q So even though she's got no new advance, no new trauma,  
7 no new anything, and she goes back to Dr. Rosler after February 18th,  
8 and she goes back in March --

9 A Yes.

10 Q -- you're saying starting at that point, none of it's related to  
11 what happened in October?

12 A Yes.

13 Q Okay. All right. Putting all that aside, you agree -- talking  
14 about just because she's had a fusion at 25 years old, you reviewed Dr.  
15 Garber's report and his indication that it's likely that she's going to have  
16 -- require -- excuse me, require a fusion at C5-6, you read that in the  
17 report, correct?

18 A Yes.

19 Q And you said his prediction, based upon the previous fusion  
20 at C6-7, is likely accurate. That's what you said, correct, setting  
21 causation aside?

22 A Well, again, you're leaving out the word "although" in front  
23 of that, the rest of the sentence that you're quoting, so I mean, it's hard  
24 to -- I agree with you, yes, that's what it says, but it's not complete. I'll  
25 leave it at that.

1 Q Well, let's just read it together --

2 A Okay.

3 Q -- just for clarity. I don't want anybody to -- although Dr.  
4 Garber's predictions based on the performance of a previous cervical  
5 fusion at C6-7 are likely accurate, it's my opinion that the original  
6 performance of the surgery, the C6-7, was unrelated to the October 30th,  
7 2015, right?

8 A Yes.

9 Q Right. That's a causation issue, right? The other part was  
10 causation?

11 A Yes.

12 Q You told us about that?

13 A Yes.

14 Q That you have no opinion. But the other thing is, I'm just  
15 talking about the fusion and the performance of C5-6 becoming to the  
16 point of being a pain generator, right?

17 A Yes.

18 Q And you agree that even using -- I think you've used two  
19 percent in some cases, right? You've commented on this in other cases  
20 of mine?

21 A Yes.

22 Q That even at two percent, it's more likely than not that she's  
23 going to have adjacent segment disease and problems at C5-6 within 20  
24 years, right?

25 A Yes, based on her age.

1 Q Based on her age.

2 A Well --

3 Q And to the part requiring surgery?

4 A Well, I would say if we're talking about 20 years, two percent  
5 doesn't get you to more likely than not. You'd have to go out 25, but --

6 Q Okay. You agree that more likely than not, at some point in  
7 her future, she's going to require an adjacent segment surgery of C5-6,  
8 correct?

9 A Yes.

10 Q All right. So in that respect, you do agree with Dr. Garber?

11 A Yes.

12 Q Okay. And so even assuming it's at she thinks 50, okay?

13 A Yes.

14 Q She's now going to be fused, potentially, more likely than  
15 not, in two levels of her spine, right?

16 A If she ends up having the second surgery; yes.

17 Q Yeah, okay. And if she has a 55 -- I think it's about a 54, 55  
18 year life expectancy from now, so she'll be living to her mid-80s. I mean,  
19 once she's fused at two levels, this adjacent segment process at this, you  
20 know, two percent, three percent, the process starts over again, right?

21 MR. WINNER: Objection, Your Honor.

22 MR. PRINCE: To the next level? Right?

23 MR. WINNER: Objection, Your Honor. We --

24 MR. PRINCE: I'm just talking about the point of becoming  
25 symptomatic.

1 THE COURT: Counsel, approach.

2 [Sidebar begins at 11:31 a.m.]

3 MR. WINNER: You're trying to get in a third surgery in?

4 MR. PRINCE: No, I'm talking about the process. I can talk  
5 about what she's gonna go through -- she's going to go through.

6 MR. WINNER: Yeah.

7 MR. PRINCE: That she -- this whole process. She'll be -- that  
8 disc will become likely symptomatic after she has the second surgery.  
9 That's -- I'm gonna stop short of the surgery.

10 MR. WINNER: And you're giving hypotheticals about ages,  
11 and I'd object to that but, I --

12 MR. PRINCE: But, we have a stipulation on that.

13 MR. WINNER: -- I belatedly object.

14 MR. PRINCE: We have a stipulation on that.

15 MR. WINNER: No, no, 50 years old, you said.

16 MR. PRINCE: Well, he said 20, you have to go 25 years, okay,  
17 so I said, okay, 50. I'm saying that's where it's more likely than not to --

18 MR. WINNER: You're defeating your numbers, and I --

19 THE COURT: Okay.

20 MR. WINNER: -- I object to the age at 50 that --

21 THE COURT: I don't -- I don't think he's gotten there yet but,  
22 I'm not -- if -- control him.

23 MR. PRINCE: Okay.

24 THE COURT: You're in dangerous waters; so, if you --

25 MR. PRINCE: But, Judge, I'm gonna ask that -- that once you

1 full the second level, the adjacent segment disease process will start  
2 over, and likely will become symptomatic. I'm just gonna stop at  
3 symptomatic; she'll have to go through this whole process again.

4 THE COURT: All right.

5 MR. HENRIOD: And, just for the record, I have to say, we  
6 renewed the objection to the line of inquiry, because it makes it obvious  
7 where it's going. Whether we don't say specifically it's surgery at the  
8 end of the day, is certainly a good thing but, it's not enough. I mean, it's  
9 -- it's obvious why he wants it in.

10 MR. PRINCE: Judge, their expert just said, and gave me, that  
11 it's more likely than not she'll have an adjacent segment surgery at C5-6  
12 and hurt like that; he just said that. So now, I'm gonna follow up on that,  
13 that it's going to follow, and it's going to start to be --

14 MR. WINNER: He didn't quite say that but, if --

15 THE COURT: Like I said, you're only going to follow up to the  
16 extent of the initial ruling. You stop at process --

17 MR. PRINCE: Yeah, yeah, okay.

18 MR. WINNER: Fine.

19 THE COURT: -- and, like I said, if we start getting deep and  
20 he blurts, it's on you.

21 [Sidebar ends at 11:33 a.m.]

22 BY MR. PRINCE:

23 Q Okay. And, Doctor, once the two levels are fused, then the  
24 adjacent segment disease, or breakdown process would start over again  
25 at C4-5, correct?

1           A     Yes.

2           Q     And, given her age, where it'll more likely than not she would  
3 have the surgery, and given her life expectancy to her early 80s, it's  
4 more likely than not, that she would break down to the point of  
5 becoming --

6           MR. WINNER: No.

7           Q     -- symptomatic, and have to deal with --

8           MR. WINNER: No.

9           Q     -- product pain issues.

10          MR. WINNER: That's -- that's --

11          THE COURT: Okay, approach.

12          MR. WINNER: -- yeah.

13          Move to strike.

14          MR. PRINCE: What did he say?

15          THE COURT: Granted.

16          MR. PRINCE: What are we striking? What are we striking?

17                         [Sidebar begins at 11:34 a.m.]

18          MR. HENRIOD: The process, about her symptoms. You have  
19 to deal with --

20          THE COURT: You -- you did it. You did not leave it at  
21 process, you made it -- you said everything but the magic words --

22          MR. PRINCE: What? I don't understand what the issue is.  
23 But, yes, that is -- can happen --

24          THE COURT: You talked specifically about her lifetime --

25          MR. WINNER: You -- you --

1 THE COURT: -- you specifically disclosed the fact that you --

2 MR. WINNER: -- you just told us exactly what you were  
3 going to ask and then you asked something else.

4 MR. PRINCE: I don't understand what the violation is. If she  
5 has her second surgery, the adjacent segment --

6 THE COURT: You just said to me --

7 MR. PRINCE: -- disease process is going to --

8 THE COURT: -- you just threw out to them the process of it  
9 being done again --

10 MR. PRINCE: It will be done again.

11 THE COURT: -- and then she's going to become  
12 symptomatic --

13 MR. PRINCE: She will become symptomatic.

14 THE COURT: -- and because of her age, by the time she's 80  
15 -- you have effectively just argued a third surgery.

16 MR. PRINCE: No, I'm not.

17 THE COURT: I'm sustaining it.

18 MR. PRINCE: Judge, but that -- that's --

19 THE COURT: -- and it's being stricken.

20 MR. PRINCE: -- but that's part of the evidence, the process is  
21 that should be painful.

22 MR. WINNER: Moving to strike the questions and the  
23 answers. Thank you.

24 THE COURT: I'm going to strike that, you blew it. I let you  
25 go as far as you went --

1 MR. PRINCE: But, what?

2 THE COURT: -- and you went further.

3 MR. PRINCE: I don't understand -- but, you told me I could  
4 argue the process and her becoming symptomatic. I'm not arguing  
5 another surgery.

6 THE COURT: But then --

7 MR. PRINCE: I'm not going to say another surgery.

8 THE COURT: -- you went -- no, you went right over the issue.

9 MR. PRINCE: I'm not going to --

10 THE COURT: You basically did.

11 MR. PRINCE: No, I didn't.

12 THE COURT: You went -- surgery.

13 MR. PRINCE: No, I didn't.

14 THE COURT: Yes, you did. Well, that's what I heard.

15 MR. PRINCE: No, let's read it --

16 MR. WINNER: That's what I heard.

17 MR. PRINCE: -- let's read it back. Then, let's listen to it back.  
18 That's -- no, I did not do that.

19 THE COURT: Okay. Well, I'm going to sustain it and I'm  
20 going to just throw out the last question and answer. I gave you up to  
21 the symptoms, because of her age and whatnot but as soon as you hit to  
22 that 80 and stuff, I think you -- I think you did --

23 MR. PRINCE: But she -- I'm not arguing to cause a --

24 THE COURT: -- allude to that third surgery.

25 MR. PRINCE: -- she's going to become symptomatic again in



1 C4-5. I'm not going to say she's going to have another surgery but I'm  
2 going to say she's symptomatic. Because she has to live with that; she  
3 has to endure that.

4 THE COURT: Well, I don't know that she's necessarily going  
5 to become symptomatic but --

6 MR. PRINCE: But, that's what I'm asking.

7 MR. WINNER: I move to strike the last question and answer.

8 MR. PRINCE: But why can't I --

9 THE COURT: Okay. That's the ruling.

10 MR. WINNER: Thank you.

11 [Sidebar ends at 11:35 a.m.]

12 THE COURT: Ladies and gentlemen, you're instructed to  
13 disregard the last question and answer, thank you.

14 That's stricken.

15 MR. PRINCE: Okay.

16 BY MR. PRINCE:

17 Q When a patient is going -- just in general -- has adjacent  
18 segment disease, they come -- they often develop symptoms over a  
19 period of time, right?

20 A Yes.

21 Q And, then it kind of comes on slow, and then it kind of gets a  
22 little worse, and a little worse, and to the point it needs medications,  
23 physical therapy, and may go to the doctor, correct?

24 A Yes.

25 Q And so, just dealing with -- just say C5-6 for a minute -- when

1 a patient becomes symptomatic, at an -- in an adjacent level, okay? They  
2 have, like -- once they get to a certain point, they have two options,  
3 either to live with it, yeah?

4 A Yes.

5 Q Or have a surgery, right? That's one other option?

6 A Or, have injections but --

7 Q Oh, oh, correct. I'm assuming that once they become  
8 symptomatic, they kind of maybe start taking some over-the-counter; go  
9 back to the doctor, have some imaging, go for conservative physical  
10 therapy and see if that helps them for a while. Because, you're trying to  
11 avoid injections and surgery --

12 A Yeah.

13 Q -- all the while, right?

14 A Yes.

15 Q But, it's kind of this gradual build up again, right?

16 A It can be, yes.

17 Q Right. And, you try to manage them conservatively at first?

18 A Yes.

19 Q And then, you start with injections to find out where the pain  
20 is coming from; you start at the investigation of that again?

21 A Yes.

22 Q And, then, depending on how they respond to the injections,  
23 then you'd make another referral to the surgeon, right?

24 A Well, it depends on how they respond, I mean, the most  
25 common source of pain following an adjacent-segment breakdown is not

1       discogenic pain, it's facet-mediated pain; so --

2             Q     Oh --

3             A     -- they may never need to see a surgeon.

4             Q     Oh, okay, okay, I follow you here. Right. Because what we  
5       have -- so we're clear, the facets are these little joints at every level of the  
6       spine, right?

7             A     Yes.

8             Q     And, in addition to pain coming from the disc and the nerve,  
9       you can also have pain coming from this facet joint, right?

10            A     Yes.

11            Q     And so -- oh, excellent point -- so, once you fuse, now you --  
12       a motion segment, now, there's going to be additional stress and strain  
13       on the facets joints above or below, correct?

14            A     Yes.

15            Q     Because when you do a fusion, you fuse the facet of that  
16       level, right?

17            A     Yes.

18            Q     Oh, exactly. Right. So, then you could potentially become to  
19       have two pain generators, facet and the disc micro trauma problem,  
20       right?

21            A     Those are all possible, yes.

22            Q     Right, and that's -- in fact, that's common, right?

23            A     I --

24            Q     If you're saying the first step -- line is, you start having facet  
25       pain, right, that's the most usual -- one of the main causes, right? Of the

1 source of the pain?

2 A It's one of the sources, yes.

3 Q And, then what you do for facet pain is, you try to block the  
4 facet joint, right?

5 A Yes.

6 Q And, once you -- once you do that, then you start having  
7 these other procedures called radiofrequency ablations every 12 to 18  
8 months, or however long, which try to help control the pain. You burn  
9 the nerve endings in the facet joints, right?

10 MR. WINNER: Your Honor, I'm going to object to all of this.

11 MR. PRINCE: Well, I think that's part of the adjacent segment  
12 disease process, the --

13 MR. HENRIOD: Your Honor, may we approach?

14 THE COURT: You may.

15 [Sidebar begins at 11:39 a.m.]

16 MR. HENRIOD: If he's blurting, we'll need to let our own  
17 expert know that he's blurting.

18 MR. WINNER: Are we introducing the future damages now?  
19 You're going --

20 MR. PRINCE: Oh, no, that's not what's happening.

21 MR. WINNER: It is now, you're going -- there's an ablation?

22 MR. PRINCE: Yeah.

23 MR. HENRIOD: So, now we're getting into an entire new  
24 thing?

25 MR. PRINCE: Yes. He said that could also be a treatment

1 option. She has to have a -- she -- yeah, number one, she's had a --

2 MR. HENRIOD: Well, one -- one that you have --

3 MR. PRINCE: -- she's never going -- she's having --

4 MR. HENRIOD: -- one that you have not claimed; that has not  
5 been part of this case --

6 MR. PRINCE: He just threw it out there. He just -- he told us  
7 what it was.

8 MR. HENRIOD: All right, we are willing to control our  
9 witness and tell him not to blurt, or you to tell him not to blurt.

10 MR. PRINCE: No, not to do anything. He's into the cross-  
11 exam now. He said --

12 MR. HENRIOD: Not to open up an area --

13 MR. PRINCE: -- no, no, no --

14 MR. HENRIOD: -- where he's not allowed to go.

15 MR. PRINCE: -- I was talking --

16 THE COURT: Yeah --

17 MR. PRINCE: Judge, I was talking about a disc issue. He said  
18 the most common is a facet; now I'm talking about how do you treat a  
19 facet --

20 MR. HENRIOD: Now it's on to this --

21 MR. PRINCE: Now I'm talking about how do you treat a facet  
22 joint?

23 THE COURT: Yeah, but that's not in any of the original stuff;  
24 so --

25 MR. PRINCE: Judge, he just went through it right now during

1 trial.

2 MR. WINNER: No.

3 MR. PRINCE: He -- he threw it out there. He came up with  
4 that, I didn't bring it up, I wasn't even thinking that.

5 THE COURT: Okay, well, you got it and you're done.

6 MR. PRINCE: No, I'm not -- I wasn't done.

7 THE COURT: -- so we're not going to go --

8 MR. PRINCE: I'm going to talk to how you treat facet pain.

9 MR. WINNER: No, no, no.

10 THE COURT: No, we're not going there.

11 MR. HENRIOD: Yeah, now we get another hundred thousand  
12 dollars in deep.

13 THE COURT: Uh-huh. No, we're not going to -- because then  
14 we'll have another expert, nope.

15 MR. WINNER: No.

16 THE COURT: You got what you got, and you got lucky and  
17 he threw it out there and you can have that. But, that's it.

18 MR. HENRIOD: Yeah, we need to instruct --

19 MR. PRINCE: I got you.

20 MR. WINNER: Did you want to [indiscernible]?

21 THE COURT: Yeah, just go ahead and tell him --

22 MR. PRINCE: Tell him what -- tell him -- I'm objecting to him  
23 talking to the witness at all --

24 MR. HENRIOD: Telling you to listen.

25 MR. PRINCE: During my cross-examination.

1 MR. WINNER: Right, drop it, drop it.

2 THE COURT: We're going to just drop it.

3 Don't ask any more questions about it, okay?

4 MR. PRINCE: Okay.

5 [Sidebar ends at 11:40 a.m.]

6 THE COURT: Overruled and sustained.

7 MR. WINNER: Okay.

8 MR. PRINCE: Okay.

9 BY MR. PRINCE:

10 Q So, your point is, there could be multiple sources of pain as  
11 part of the adjacent segment process, correct?

12 A Those are all possibilities, yes.

13 Q With different treatment options that you just told us about?

14 A Yes.

15 Q Okay. Short of that, I mean, some has just to live with that  
16 pain, right? Whether -- I mean, unless you do something medically to  
17 treat it, they just have to live with that pain, right?

18 A Yeah, the option is to do something or do nothing.

19 Q So, if someone does nothing; then their suffering goes up,  
20 right?

21 A Potentially, yes.

22 Q Right, the quality of their life goes up if you do nothing,  
23 right?

24 A Not always but yes, I understand your point.

25 Q If you don't -- there's nothing -- if you don't intervene,

1 medically speaking, either with a surgery or some facet treatment you  
2 just described briefly, then the -- they're going to have to live with  
3 increased suffering. The surgery and the facet treatments hopefully  
4 decrease pain, right?

5 A Well, that's the hope, yes.

6 Q All right. And so, even though they're -- with regard to  
7 Guadalupe for a moment.

8 A Yes.

9 Q I think if I read your report correctly, now if you assume --  
10 you have no opinion whether she was injured or not injured, right?

11 A Correct.

12 Q That if you assume an injury, all her treatment through  
13 February of 2016 that was reasonable and appropriate, right?

14 A Reasonable, yes.

15 Q Right. You have no problem with the chiropractic care,  
16 referring to the MRI, etcetera, right? All through February you said it was  
17 reasonable, in your report?

18 A Well, I think it's reasonable. Was it necessary? That's a  
19 whole another story. The reasonable, yes. Necessary for -- to go for an  
20 MRI when you're improving, it was not necessary.

21 Q The cost of all that treatment was reasonable, right?

22 A Yes.

23 Q For what she had? Okay. And she was also following the  
24 recommendations of her doctors, right?

25 A She was.



1 Q and it was reasonable for her to follow those  
2 recommendations, right?

3 A It was.

4 Q And that was reasonable patient behavior and decision  
5 making, to follow the advice of her doctors?

6 A I agree.

7 Q Okay.

8 MR. PRINCE: I'm almost done, Tom.

9 MR. WINNER: Okay.

10 BY MR. PRINCE:

11 Q Oh, one thing was asked earlier yesterday, I wanted to ask  
12 you a question about. Dr. Khavkin?

13 A Yes.

14 Q He recommended a surgery in May of 2016, even before the  
15 July of 2016 collision, right?

16 A That's correct.

17 Q And he -- and he was going to operate on the same level that  
18 Dr. Garber did, correct?

19 A Yes.

20 Q All right. Now, he authored a letter, kind of outlining what  
21 the cost of that might be if she were to have the surgery in the future,  
22 right?

23 A That's correct.

24 Q You author cost letters in your practice, don't you?

25 A I do.

1 Q And, there's nothing in appropriate or wrong with that,  
2 correct?

3 A No.

4 Q Sometimes because, if someone has -- if somebody has the  
5 surgery or does a procedure, we know the cost because there's a bill for  
6 it, right?

7 A Yes.

8 Q On the other hand, if it's going to happen in the future, the  
9 only way the Court or the lawyers, or people can function is at what's the  
10 cost of that going to be in the future, right?

11 A I agree.

12 Q Right. So, there's nothing weird about that, unusual about  
13 that, right? Because, you do the same thing in your practice?

14 A That's correct.

15 Q Okay. And one last thing, you -- in your practice, you, at  
16 times, treat patients on a lien basis, right?

17 A That's correct.

18 Q Right. And, you expect to be paid, regardless of what  
19 happens, don't you?

20 A Correct.

21 Q Right. And, there's nothing wrong with, at times, treating  
22 patients on a lien basis, right?

23 A No.

24 Q All right. Nothing illegal about it?

25 A No.

1 Q Okay. And, you're not critical of my client if they treated in  
2 part, if some of it's on a lien; some of it's not on a lien, right?

3 A That's correct.

4 Q It makes no difference to you?

5 A No difference.

6 Q Okay. Good. Thank you.

7 A No problem.

8 MR. PRINCE: I have no questions -- or, no more questions,  
9 thank you.

10 THE COURT: Mr. Winner?

11 MR. WINNER: Thank you.

12 Dennis, are these yours?

13 MR. PRINCE: Yeah.

14 REDIRECT EXAMINATION

15 BY MR. WINNER:

16 Q Doctor, really quickly, I think I might have heard you miss --  
17 misspeak. Mr. Prince asked you about Desire Evans; she did not  
18 complain consistently about neck and arm pain, after the surgery, and  
19 there's some confusion, and then he changed the question and said, she  
20 did complain consistently about neck and arm pain, before the surgery,  
21 and you agreed with him. Which is different from what you said  
22 yesterday.

23 MR. WINNER: ELMO, please.

24 Q She did not complain about neck and arm pain consistently  
25 before that 2016 surgery, did she?

1           A     When -- when you say consistently, we're talking about  
2 different things. Consistently is, yes, she continued to complain. Was  
3 the -- were those complaints significantly improved to the point where  
4 they disappeared at some point? That's a different question, and clearly  
5 they disappeared at some point.

6           Q     Okay. So, she consistently complained, meaning that, when  
7 she did complain, months and months apart, those complaints were  
8 included in her complaints?

9           A     That was the intent of my answer, yes.

10          Q     Okay. Just so we're not confused. She did not continuously  
11 complain of any of those symptoms, up until she had surgery in  
12 September of 2016?

13          A     Continuously, no.

14          Q     Okay. You were asked about Rosler's testing, and you were  
15 talking yesterday, about the diagnostic value of that testing, was there  
16 any motor deficit found on any of Rosler's testing?

17          A     No.

18          Q     Does the MRI show any evidence of any nerve being pinched  
19 at any level, including C6-C7?

20          A     No.

21          Q     Would that MRI be seen in -- could that MRI be seen in a 25-  
22 year-old woman who is completely asymptomatic; pain free?

23          A     Absolutely.

24          Q     I'm sorry, absolutely you said?

25          A     Absolutely.

1 Q Okay. Is there any single pathology -- any single pathology  
2 to explain all these complaints that she had?

3 A No.

4 Q Khavkin did say -- in his records say, that he saw symptoms  
5 in her left deltoid, correct?

6 A Yes.

7 Q Show the jury where the deltoid is, please.

8 A The deltoid is the muscle over the shoulder.

9 Q The left internal tricep?

10 A So, it's inside of the arm on the bottom.

11 Q And, down to the forearm, and I think we all know what that  
12 is. That does not identify a C6-C7 specific dermatomal pattern, does it?

13 A That's not a specific dermatomal pattern at all.

14 Q Okay. Would it be consistent with shoulder impingement  
15 syndrome, or a shoulder bruise?

16 A Yes.

17 Q As a sports medicine doctor, do you treat impingement  
18 syndrome and shoulder -- shoulder bruise and bursitis?

19 A Yes. And, it's not uncommon, based on my familiarity with  
20 the worker's compensation process, and people -- what they do for an  
21 occupation, to have injuries to those areas and have symptoms from  
22 that.

23 Q And, you can have those symptoms from no trauma at all, or  
24 just from repetitive motion, correct?

25 A Yes. That's correct.

1 Q Okay. Many people have come to you with those symptoms,  
2 shoulder bruise, shoulder impingement, who have not been involved in  
3 any accident at all?

4 A Yes.

5 Q Okay. Even people in their 20s?

6 A Even people in their 20s.

7 Q Okay. Would an injection of the kind performed by Dr.  
8 Rosler, the anesthetic and a steroid being injected, would you expect that  
9 to improve symptoms in the deltoid, and symptoms down into the  
10 forearm and triceps, as described by Dr. Khavkin?

11 A With the administration of steroid, which is an anti-  
12 inflammatory medicine, all the symptoms can improve, even if it wasn't  
13 injected at the right target.

14 Q Okay. Even if it wasn't injected at that target, you would  
15 expect all of those symptoms from a shoulder impingement to go away  
16 or improve?

17 A They certainly can, yes.

18 Q So, did those Rosler injections actually diagnose anything?

19 A Rosler's injections didn't diagnose anything, based on  
20 multiple factors, including the fact that he didn't target the disc, he only  
21 targeted the nerve, and Ms. Evans, while you was asleep during the  
22 performance of these objections, and described yourself as being groggy  
23 afterwards, the nurses at the recovery room, at the surgery center,  
24 described her as being sedated. It's hard to talk to somebody sedated or  
25 groggy and get an answer that's reliable.

1 Q Okay. Really quickly. Yesterday, Mr. Prince asked you a  
2 well-worded; closed-ended question, he asked you if you use the word  
3 reasonable, with regard to Dr. Garber, and he asked the question in a  
4 very closed-ended way; so, I want to ask you about that. She reported to  
5 Dr. Garber that she had had continuous symptoms from the time of the  
6 accident, to up until she saw him on July 12th, 2016, correct?

7 A Yes, she did.

8 Q Was it unreasonable for Garber to accept what she was  
9 saying as true?

10 A No, it was not unreasonable for him to rely on her history to  
11 accept that that was true, although, based on the records, it was  
12 inaccurate.

13 Q Okay. As a pain doctor, do you have to report complaints of  
14 pain?

15 A Yes. So, you basically write down what the patients tell you  
16 but, oftentimes is, they're sitting there, and they tell you a 10 out of 10,  
17 and they're sitting there very comfortably in their seats, and they're not  
18 moving around, they're not, you know, acting in a particular way.  
19 Oftentimes, you kind of question whether or not that -- that number they  
20 gave you is accurate, but you still write it down.

21 Q Do you still write it down when a patient complains of pain?

22 A Yes.

23 Q You're required to do that?

24 A Yes.

25 Q Do you have to believe it?

1           A     Well, you have to believe it until you're presented with  
2 evidence that would --

3           Q     Okay. Is that --

4           A     -- go against that.

5           Q     -- is that different from having to assume that every patient  
6 you see is being accurate?

7           A     Yes.

8           Q     Okay. When Plaintiff said to Align Chiropractic, that she had  
9 never in her life had neck pain before, never mentioned to them having a  
10 prior neck MRI before, was she being an accurate historian and being  
11 truthful in that?

12                   MR. PRINCE: Objection. Misstates the record.

13                   THE COURT: Sir, it's your recollection of the testimony is  
14 what rules.

15 BY MR. WINNER:

16           A     No.

17           Q     When the patient said to Dr. Rosler that she had never had  
18 neck pain in her life before, was she being an accurate historian?

19           A     No.

20           Q     When she told Dr. Khavkin the same thing, that she had  
21 never in her life, before October 30 of 2015, had neck pain before, was  
22 she being an accurate historian?

23           A     No.

24           Q     Was she being thorough?

25           A     No.



1 Q Do you expect your patients to be accurate and thorough  
2 with you?

3 A Yes.

4 Q If a patient is inaccurate, or less than thorough with you, can  
5 you arrive at the wrong conclusions or the wrong diagnoses?

6 A Of course.

7 Q Can you arrive at unwise -- can you arrive at unwise  
8 treatment recommendations?

9 A Of course you can.

10 Q Okay. When she told Dr. Khavkin that she had experienced  
11 all of this pain down both of her arms, and both of her legs and back,  
12 and in her neck, and in her head, and she had experienced all of those  
13 symptoms continuously since October 30th of 2015, was she being  
14 accurate with her doctor?

15 A No.

16 Q When she told Dr. Garber, two days after the second  
17 accident, that she had all of these symptoms, including symptoms in  
18 both hands -- or, both legs, both arms, neck and her back, and she had  
19 those symptoms ever since October 2015, was she being an accurate  
20 historian to Dr. Garber?

21 A No.

22 Q Was she being thorough?

23 A No.

24 Q When she did not tell Dr. Garber that the morning of July  
25 10th, 2016 that she no longer had any symptoms in her left arm or her

1 left hand, when she did not tell him that, was she being a thorough or an  
2 accurate historian?

3 A No.

4 Q When you see a patient, how important is it, particularly, a  
5 personal injury patient who's making a personal injury claim, how  
6 important is the accuracy of what a patient tells you?

7 A Well, you rely upon the historical recollections or  
8 representations of the patient as being accurate, especially if that's the  
9 only information that you have to rely on.

10 Q Okay. After you -- after a while, do you ever have to review  
11 information or review data or review other records that causes you to  
12 question whether that patient is really being truthful with you?

13 A Yes.

14 Q Have you ever been fooled by a patient?

15 A Of course.

16 Q When you find out a patient has not been accurate with you,  
17 has not been thorough with you, has not been accurate or thorough with  
18 other doctors she has gone to see, does that make you doubt everything  
19 else they're telling you?

20 A Yes, if they've been inaccurate on one occasion, it makes you  
21 question everything else that you've heard or know about them.

22 Q If you're -- Dr. Khavkin told us he relies 100 percent on the  
23 history a patient gives him or what a patient chooses to tell him, is that --  
24 is it typically a surgeon's job, like Khavkin or Garber, to go out and  
25 independently investigate whether a patient is telling him the truth?

1           A     No, they're -- they're relying on the history that's being  
2 providing to him -- or to them. And in Dr. Khavkin's case, especially if  
3 that's the only information that he was provided, other than the imaging  
4 studies.

5           Q     Thank you. With regard to Desire Evans-Waiau, Mr. Prince  
6 talked to you about this yesterday, she reported a continuous and steady  
7 improvement with the chiropractor all the way through her treatment,  
8 the chiropractor recommended three months of treatment and, at the  
9 end of almost three months of treatment in January, that's when she  
10 was sent to get the steroid injection with Dr. Rosler, correct?

11          A     Yes.

12          Q     By which time, her pain was going down from a 3 to a 2 out  
13 of 10?

14          A     Yes.

15          Q     And you believe it was the steroid that was causing her to  
16 get better, given that she was a 2 out of 10 on the next visit, a 1 out of 10  
17 on the next visit, a 1 out of 10 the next visit, and a 1 out of 10 in  
18 February?

19          A     No, I kind of look at this trend that you've demonstrated on  
20 this as kind of throwing up a ball and watching it come down and it was  
21 going to come down regardless of the inserting of the injection at that  
22 point.

23          Q     And you've read the sworn testimony of her chiropractor  
24 saying she benefitted greatly from this treatment, it was very successful,  
25 correct?

1           A     Yes, he also said it was significantly improved, her pain  
2 score, so these scores, his recollections representations, and my  
3 interpretation are all consistent with chiropractor care helped.

4           Q     Incidentally, Dr. Rosler -- and I don't expect you're going to  
5 fault Dr. Rosler, Rosler testified that he did not have an opportunity, or  
6 he did not look at all the chiropractic records. He was just aware that she  
7 had been to a chiropractor. When she told Dr. Rosler at the end of all of  
8 this time that chiropractic treatment had failed and that's why she  
9 wanted that extensive injection, was she being truthful with him?

10          A     No.

11          Q     Incidentally, Dr. McCauley told both of these Plaintiffs, you  
12 did great, you're being discharged. You're welcome to come back any  
13 time. You responded very well to treatment and why don't you come  
14 back on a monthly basis to make sure you keep feeling better. You can  
15 come back once a month. Did you see that in the discharge?

16          A     I did see that in the discharge. I saw no evidence that they  
17 followed those recommendations, however.

18          Q     Okay. She did not follow that recommendation, correct?

19          A     That's correct.

20          Q     Instead, three months later, she went and got a surgical letter  
21 to be sent to a lawyer?

22                 MR. PRINCE: Objection. Move to strike. Argumentative,  
23 Judge. She went and got a surgical letter. She was referred for a  
24 neurosurgical consultation. She didn't go get a surgical letter.

25                 THE COURT: Overruled.

1 BY MR. WINNER:

2 Q Similarly, with Guadalupe Parra Mendez, you'd agree that  
3 her symptoms were down to 1 out of 10, according to Dr. Ross, and 4 out  
4 of 10 by November 6th of 2015, which would be, jeez, less than a week  
5 after her first visit?

6 A Yes.

7 Q Okay. Was it reasonable, necessary for her to be referred out  
8 to multiple MRIs after that date or sent to a pain management physician?  
9 Was it necessary?

10 A Not based on the demonstrated improvement of  
11 conservative care.

12 Q Okay. There was testimony yesterday that you saw that the  
13 chiropractor diagnosed both Plaintiffs with exactly the same thing. Both  
14 Plaintiffs, both adult Plaintiffs, went into Align Chiropractic three days  
15 after the accident and both of the Plaintiffs were found to have cervical  
16 disc disease with symptoms going down the left arm. I think he said that  
17 was not impossible, but it's very unusual?

18 A It was unusual.

19 Q Did you see the MRI reports for Keith Lewis?

20 A Yes.

21 Q Did it strike you as unusual that Dr. Keith Lewis diagnosed  
22 both Plaintiffs with having disc bulges or disc protrusions at exactly the  
23 same levels of both of their cervical spines?

24 A It was unusual, again, not impossible.

25 Q Is it nearly mathematically impossible for two people in their

1 20s involved in a relatively minor accident to be diagnosed with having  
2 exactly the same --

3 MR. PRINCE: Objection. Move to strike. Leading. His  
4 characterization --

5 THE COURT: Sustained.

6 MR. PRINCE: Yeah, and asked and answered, and beyond  
7 the scope of my direct -- or cross-examination.

8 BY MR. WINNER:

9 Q You said that you don't fault the lawyer referral, but you said  
10 it's a factor, it's a single factor?

11 A It is a factor. It's unusual to seek attorney advice before you  
12 seek medical advice.

13 Q You've read reports before where you've expressed -- well,  
14 let me put it this way. You've expressed before, in reports, and I'll  
15 phrase this carefully, some concern about litigation-driven --

16 MR. PRINCE: Objection. Move to strike, Your Honor. You've  
17 already excluded all of that.

18 THE COURT: Approach.

19 [Sidebar begins at 12:01 p.m.]

20 THE COURT: I believe the order was that you can't use that  
21 kind of language, unless you bring it me first and I make a factual basis.

22 MR. PRINCE: Right. And he's talking about reports. He's not  
23 talking about this case. He's talking about other cases, yes. So, no,  
24 that --

25 MR. WINNER: Well, it's in response to a question saying it's

1 meaningless and he sees nothing wrong.

2 MR. PRINCE: No. Judge, he can't say it's --

3 MR. WINNER: I'll withdraw the question. I'll agree to have  
4 you strike it. I shouldn't have asked it that way.

5 MR. PRINCE: At all.

6 THE COURT: Okay.

7 [Sidebar ends at 12:01 p.m.]

8 THE COURT: Sustained. That'll be stricken. You're -- the  
9 jury is instructed to disregard that last question/comment.

10 BY MR. WINNER:

11 Q You said that the lawyer referral is a single factor that you  
12 might consider in combination with other factors, correct?

13 A What other factors might you consider? Would you consider  
14 the factor of liens as being potentially relevant?

15 MR. PRINCE: No, objection. Move to strike. Misstates his  
16 testimony already, and lacks foundation, and speculation.

17 THE COURT: Your recollection, counsel.

18 THE WITNESS: They might be relevant.

19 BY MR. WINNER:

20 Q Lawyer referral in combination with liens might be relevant?

21 A They might be, yes.

22 Q Lawyer referral in combination with liens on a patient who  
23 gives an inaccurate medical history to her doctors, might that be  
24 relevant?

25 A It's more relevant.

1 Q Okay. A lawyer referral in combination with liens, in  
2 combination with litigation history about which she was not forthcoming  
3 with her doctors, is that relevant?

4 MR. PRINCE: Objection. Irrelevant.

5 THE COURT: Sustained.

6 BY MR. WINNER:

7 Q Would the fact that the patient did not return to see any of  
8 the doctors who treated her back in 2010, but allowed her referral -- her  
9 lawyer to refer her to someone who had never seen her before --

10 MR. PRINCE: Objection. Foundation, speculation.

11 BY MR. WINNER:

12 Q -- is that potentially relevant?

13 THE COURT: Sustained.

14 MR. PRINCE: Argumentative.

15 BY MR. WINNER:

16 Q Do you believe, doctor -- quick question. Do you believe that  
17 the selective nerve root block given at the time when it came in her  
18 treatment was the reason she had no claim -- no complaints to express  
19 for several months?

20 A No.

21 Q Okay. If you believe she was injured and you don't have an  
22 opinion that she was injured and if you believe she was injured, do you  
23 believe any injury that might be related to this accident must have  
24 reasonably concluded by that time you gave us?

25 A Yes.



1 Q Okay. And same with Guadalupe Parra?

2 A That's correct.

3 Q Have all the opinions you've given to a reasonable degree of  
4 medical probability?

5 A Yes.

6 Q Thank you.

7 MR. PRINCE: Okay. I do have some more questions, Judge.

8 MR. PRINCE: Can we have the monitor for a second?

9 RECROSS-EXAMINATION

10 BY MR. PRINCE:

11 Q I want to talk about something, okay?

12 A Okay.

13 Q I want to talk about -- first off, the 2010 motor vehicle  
14 collision. Let's assume she would have told the doctors that, okay? This  
15 is hypothetically assuming.

16 A Yes.

17 Q It doesn't change anything, does it? Because it's medically  
18 not significant to these complaints, correct?

19 A Well, it might change their opinions. They didn't have a  
20 chance to consider it. I did, they didn't, so that's the significance for me.

21 Q Okay. Well, you say that. Dr. Khavkin had talked about, Dr.  
22 Rosler talked about it, Dr. Garber talked about it. They did talk about it.  
23 They talked about it in court and, to them, it's medically irrelevant. And  
24 you even said today it's medically irrelevant to your analysis, correct?

25 A But I knew --

1 Q On causation. I'm not asking about that. I'm asking about its  
2 medical relevance.

3 MR. WINNER: Can he be allowed to finish his answer  
4 without being interrupted, please?

5 THE COURT: Yeah, try not to talk over each other, please.

6 MR. PRINCE: Okay.

7 BY MR. PRINCE:

8 Q Because -- well, maybe let me just make sure you have the  
9 question -- my question firmly in line, Doctor. The 2010, the records you  
10 saw --

11 A Yes.

12 Q -- they're not medically relevant; they're symptoms she had  
13 after October 30th, 2015, correct? They don't explain them?

14 A But I made that determination knowing that information --

15 Q Okay.

16 A -- not -- not just assuming there was nothing.

17 Q Yeah. Are you aware Dr. Wong felt that the 2010 motor  
18 vehicle collision was not medically significant to her symptoms after  
19 October 30th, 2015?

20 A But he's -- he was always aware of it and could --

21 Q Okay.

22 A -- make that determination.

23 Q Well, these other doctors, they reviewed records, they were  
24 in court, and they did -- ruled it out as being medically insignificant?

25 A Some of the doctors reviewed records, others did not.

1 Q Okay. I'm talking about in court. You weren't here for all  
2 that. So now, I want to talk about some consistency, okay?

3 A Okay.

4 Q All right. November the 2nd of 2015, isn't it true that the  
5 chiropractor reported that she was pain free before the accident? That's  
6 what the chiropractor noted.

7 A That's what he noted, yes.

8 Q He never talks about never having neck pain any time in your  
9 life, he doesn't even talk about any of that, does he?

10 A He talks about pain free.

11 Q Pain free before, right?

12 A Yes.

13 Q And the medical evidence you have is that she was pain free  
14 immediately before, correct?

15 A That's my understanding, correct.

16 Q So he -- the chiropractor never says that she never had any  
17 neck pain ever at any time in her life, right? So that -- that statement by  
18 Mr. Winner, that's just wrong, isn't it? I'll show you the record, if you  
19 need it.

20 A Well, I agree with you, on the record, that you're quoting.

21 Q All right. The first day of treatment, November 2nd, 2015,  
22 patient is reporting pain in her neck that radiates down to her left hand --  
23 arm and hand into the fingers and feels numbness and tingling. You  
24 agree she reported that, right?

25 A She did.

1 Q All right. Second visit, November 4th, 2015, the patient  
2 described symptoms radiating into her left arm to the hand?

3 A Yes.

4 Q November 6th, 2015, the patient describes symptoms  
5 radiating down the left arm to the hand?

6 A Yes.

7 Q November 9th, 2015, the patient describes symptoms  
8 radiating down the left arm to her hand; meaning Desire?

9 A Yes.

10 Q November 11th, 2015, the patient describes symptoms  
11 radiating down the left arm to the hand?

12 A Yes.

13 Q November 13th, the patient describes symptoms radiating  
14 down the left arm to the hand, yes?

15 A Yes.

16 MR. WINNER: I think we're wandering --

17 BY MR. PRINCE:

18 Q November 16, 2015 --

19 MR. WINNER: -- outside the scope, Your Honor.

20 BY MR. PRINCE:

21 Q -- the patient describes the symptoms radiating down the left  
22 arm to the hand, yes?

23 A Yes.

24 THE COURT: Overruled.

25 BY MR. PRINCE:

1 Q November 18, 2015, the patient describes symptoms  
2 radiating down the left arm to the hand?

3 A Yes.

4 Q November 20th, same complaint, right?

5 A Again, I'm assuming that you're reading --

6 Q I'm going through every note in order.

7 A And I assume you're accurately going through those.

8 THE COURT: Counsel, can you approach?

9 [Sidebar begins at 12:08 p.m.]

10 MR. PRINCE: He said it wasn't consistent, so I'm showing  
11 him the records now.

12 THE COURT: I'm obviously it's all running together for me,  
13 so I don't even know what the scope was and how --

14 MR. PRINCE: He said it wasn't consistent. My client --

15 THE COURT: We're not going to redo this whole thing, are  
16 we?

17 MR. PRINCE: No. He said -- he asked --

18 THE BAILIFF: The jury needs a restroom break.

19 MR. PRINCE: -- the question was that -- during Mr. Winner,  
20 was that she didn't consistently report left arm symptoms and I'm saying  
21 she did and I'm going through the actual record.

22 THE COURT: Did you ask her that in your --

23 MR. PRINCE: Yes, yes, he did.

24 THE COURT: Okay.

25 MR. WINNER: And he agreed, and he said they were

1 consistent. He said they just weren't continuous from after chiropractic  
2 until much later.

3 THE COURT: My only question was, was that outside the  
4 scope. I was hoping it was, but --

5 MR. PRINCE: No.

6 MR. WINNER: Well, no. He's --

7 THE COURT: -- you're good.

8 MR. WINNER: -- he's agreeing with you.

9 MR. PRINCE: Okay. Okay. Thanks.

10 THE COURT: Overruled.

11 [Sidebar ends at 12:08 p.m.]

12 MR. PRINCE: Judge, we need a -- we need to do a break?

13 THE BAILIFF: Yes, one of the jurors needs to use the  
14 restroom.

15 THE COURT: Okay. During this recess, you are admonished  
16 not to talk or converse among yourselves or with anyone else on any  
17 subject connected to this trial.

18 Or read, watch, or listen to any report or commentary on this  
19 trial of any person connected with the trial by any medium of  
20 information, including without limitation to newspapers, television, the  
21 internet, and radio.

22 Or form or express any opinion on any subject connected  
23 with the trial until the case is finally submitted to you.

24 We'll just take a -- whatever you need, two, five-minute,  
25 okay?

1 THE BAILIFF: All rise for the jury.

2 [Outside the presence of the jury.]

3 THE COURT: Outside the presence of the jury. We don't  
4 need nothing, right?

5 MR. WINNER: Well, yeah, I have something to say. When I  
6 asked Dr. Schifini about consistency, he said, yes, they were consistent;  
7 she had consistent symptoms in those areas, but they were not -- they  
8 were not continuous up until the time of the surgery. That's what I  
9 meant by consistent. But when she complained, the complaints were  
10 consistent. I don't know what we're impeaching.

11 MR. PRINCE: No, no. I felt --

12 THE COURT: I don't necessarily know that we're impeaching,  
13 but it's within the scope of your questions, so.

14 MR. WINNER: Okay. Well -- is lunch here?

15 THE COURT: Huh?

16 MR. WINNER: Is lunch here? Was it supposed to come at  
17 noon, did you just say?

18 THE COURT: It should be.

19 MR. WINNER: Okay.

20 MR. PRINCE: I just have a few minutes left.

21 [Recess at 12:10 p.m., recommencing at 12:18 p.m.]

22 [Outside the presence of the jury.]

23 THE COURT: Ready?

24 MR. PRINCE: Ready.

25 THE COURT: Where's my guy?

1 UNIDENTIFIED SPEAKER: I'll get him. Give me a second.  
2 THE COURT: Thank you.  
3 UNIDENTIFIED SPEAKER: Yes.  
4 THE COURT: Oh, I -- I left those instructions back there. But  
5 the one you asked me to look up, I looked it up, but I'm not going to give  
6 it, so.  
7 MR. PRINCE: *Posas*?  
8 THE COURT: Yeah. I think it's already --  
9 MR. HENRIOD: The *Posas* instruction.  
10 THE COURT: I think it's already in there. So now we are --  
11 we are final on the instructions.  
12 MR. HENRIOD: Except for the curative one. And I'm taking a  
13 crack at it. And we'll --  
14 MR. WINNER: Yeah. The --  
15 MR. HENRIOD: -- talk --  
16 THE COURT: Okay.  
17 MR. HENRIOD: But I think it's it.  
18 THE COURT: Okay. Didn't we give it -- didn't we give one in  
19 -- during the trial? Was it significantly --  
20 MR. PRINCE: Yes.  
21 THE COURT: -- different?  
22 MR. HENRIOD: No.  
23 THE COURT: No. We did it the first time. Remember?  
24 MR. HENRIOD: No. Not on this. Not on this.  
25 THE COURT: Yeah, we did.



1 MR. HENRIOD: And we were -- we were in a hurry, we  
2 moved forward, and we even talked about --

3 THE COURT: No. But the --

4 MR. HENRIOD: -- how it could wait.

5 THE COURT: -- the first time the other witness did it.  
6 Remember?

7 MR. PRINCE: Yeah, we did.

8 THE COURT: Like --

9 MR. HENRIOD: No, we did not.

10 THE COURT: -- last week.

11 MR. HENRIOD: No. After -- after that surgeon --

12 THE COURT: Do you have the curative instruction there?

13 MR. HENRIOD: -- or after the doctor blurted a third surgery,  
14 no, we didn't.

15 THE COURT: I give him the instruction --

16 MR. PRINCE: But that's the issue, it's like just -- well, we'll  
17 talk about it.

18 MR. HENRIOD: And I raise at the time whether or not we had  
19 to raise it then and deal with it then, and everyone agreed that we could  
20 move forward in the interest of time.

21 THE COURT: I -- distinctly -- well, I don't want to say,  
22 because then -- but I'm also certain that I read after -- who was the first  
23 witness that blurted it?

24 MR. HENRIOD: It was at the -- it was at the end --

25 MR. PRINCE: Dr. Garber.

1 MR. HENRIOD: -- of the day on Thursday, and I think it was  
2 Khavkin. Thursday would have been -- it was the bachelorette day  
3 where --

4 THE COURT: Right. Did you find it?

5 MR. WINNER: It was either Khavkin or Garber on Thursday.

6 MR. HENRIOD: And then we -- we brought it up the next  
7 morning -- or the next court day, and we decided in the interest of time,  
8 that we could move on and deal with it later.

9 MR. PRINCE: We will maybe we did the --

10 THE COURT: I -- I read -- oh, that was the health insurance  
11 one. No. There was a another one.

12 MR. PRINCE: Yeah, you did read a health insurance one.

13 THE COURT: I did read a health -- but I could have sworn I  
14 read a surgery one, too.

15 Please see if there's another one.

16 MR. WINNER: I think you sustained an objection.

17 MR. HENRIOD: Yeah.

18 MR. WINNER: And move to strike.

19 MR. PRINCE: And you moved to strike, which is -- which is  
20 enough.

21 MR. HENRIOD: Then it was blurted again.

22 MR. PRINCE: But --

23 [Court and Clerk confer]

24 THE COURT: All right. Well, we'll keep looking. I could have  
25 sworn there was another one. But let's --

1 MR. PRINCE: All right. Well, we're ready, Judge.

2 THE COURT: Let's -- we can fight about this while the jury's  
3 eating -- I mean talk about it.

4 [Pause]

5 THE MARSHAL: We're just waiting on one juror, Judge.

6 THE COURT: Okay. Okay.

7 So do you -- did you take a stab at it?

8 MR. HENRIOD: I did, and Jesse, I think, just asked for copies.

9 THE COURT: Okay. So that's what she's making copies of?

10 MR. HENRIOD: They're being made.

11 THE COURT: Okay.

12 MR. HENRIOD: Yeah. Actually, we can all look at it and we  
13 can --

14 MR. PRINCE: Because we're going to have to have a  
15 discussion about what I can claim and argue, right? The expense clearly  
16 not. But the process of her becoming symptomatic is a whole different  
17 issue.

18 THE COURT: It's not just expense though. It's also the fact  
19 of a surgery. Not just the cost of it, but the fact --

20 MR. PRINCE: Oh, no. I --

21 THE COURT: -- of another surgery.

22 MR. PRINCE: -- agree. I agree. I'm not talking about the --

23 THE COURT: And so that's fine.

24 Also, you all have your PowerPoints with you so that you can  
25 do the swap?

1 MR. PRINCE: I do.

2 MR. WINNER: Well, I don't swap mine until after his --

3 THE COURT: Correct.

4 MR. WINNER: -- but --

5 THE COURT: Correct. I just to make sure you have it ready.

6 Well, then we'll take -- you give them yours around 15 minutes before

7 you present it, and then we'll take and break and give you time to look at

8 his after yours, and then we're done. Right? You're not going to

9 PowerPoint in rebuttal?

10 MR. PRINCE: No.

11 THE COURT: Okay. And everybody has copies for us?

12 MR. HENRIOD: Yes.

13 [Pause]

14 THE MARSHAL: We're all present, Judge.

15 THE COURT: Did you look at this?

16 MR. PRINCE: Just right now. And I don't agree to it right

17 now. I'd love to have some --

18 THE COURT: Okay.

19 MR. PRINCE: -- language change, and I'll have input.

20 THE COURT: Okay.

21 MR. PRINCE: I just -- I'm -- I'm focused on this witness right

22 now.

23 THE MARSHAL: Ready for them?

24 THE COURT: Yes.

25 THE MARSHAL: All rise for the entrance of the jury.

1 [Inside the presence of the jury.]

2 THE MARSHAL: All present, Your Honor.

3 THE COURT: Do the parties stipulate to the presence of the  
4 jury?

5 MR. WINNER: Yes.

6 MR. PRINCE: Yes.

7 THE COURT: Okay. Mr. Prince?

8 MR. PRINCE: Yes.

9 BY MR. PRINCE:

10 Q Doctor, just for the sake of brevity, I could go through  
11 each and every record from the chiropractor through January of 2016,  
12 and they will all -- don't you agree, they all document symptoms into the  
13 left arm and hand?

14 A Right. I -- I don't disagree with that.

15 Q Okay. I'm just saying, you agree. That's -- that's -- you  
16 agree that's consistent --

17 A Consistent symptoms.

18 Q -- and it continuous through January?

19 A Continuous through --

20 MR. WINNER: He's not letting him finish his answers, Your  
21 Honor.

22 THE WITNESS: Consistent and continuous through January.

23 BY MR. PRINCE:

24 Q After -- after the selective nerve root block, then she  
25 didn't report any symptoms down her arm and hand, correct, in

1 February?

2 A I would have to look at the specific record --

3 Q Do you want me --

4 A -- in -- in February, but -- but assuming that's correct, I'll  
5 -- I'll agree with you.

6 Q February 1st, "The patient describes symptoms radiating  
7 down the left arm to the hand by the chiropractor."

8 A Okay.

9 Q February 3rd, "No longer has the symptoms in her hand."  
10 It says -- okay?

11 A Okay.

12 Q So then that's after the selective nerve root block, right?

13 A It is.

14 Q All right. And then when she goes back for care, after  
15 leaving the chiropractor, she goes back to Dr. Rosler in March. She has  
16 symptoms in the left arm and hand again, right?

17 A She did.

18 Q There's a recurrent -- they call that a recurrence of  
19 symptoms, right, or return of symptoms?

20 A Or -- or you could call it new symptoms. But you could  
21 call it whatever you'd like.

22 Q Well, it's the identical location? It's in the -- it's in the  
23 same arm, right? The same left arm?

24 A Well --

25 Q When she goes back to Dr. Rosler, the symptoms are

1 again in her left arm, correct?

2 A Yes.

3 Q She -- he again diagnoses her with the same C7  
4 sensation loss?

5 A He does.

6 Q Right. And you agree that the -- the examination finding  
7 from December 2015 and March 2016 are substantially similar with  
8 doctor -- by Dr. Rosler?

9 A Rosler's, yes.

10 Q Yeah. You agree that no doctor, including yourself, ever  
11 diagnosed any impingement syndrome in her left shoulder, correct?

12 A Well, it was mentioned in her MRI. So I'm not sure how  
13 to answer that.

14 Q Okay. Let's look then. Let's -- you're saying you believe  
15 -- it's your opinion that the impingement syndrome is mentioned in the  
16 MRI?

17 A I believe there's like a down-sloping acromion or  
18 something mentioned, if I remember correctly.

19 Q Okay.

20 MR. PRINCE: Yeah. Let's look at 157, Brandon, Exhibit 45.

21 Okay. Brandon just do the whole -- the whole -- just do the --  
22 just do the findings. Yeah. Right there.

23 BY MR. PRINCE:

24 Q Let's just be clear. There is no down-sloping acromion  
25 identified, correct? In fact, it's called normal. "Normal acromioclavicular

1 and glenohumeral joint relationships are maintained." Do you see that?

2 A Yes, I do. I --

3 Q So that's a -- that is -- there is no impingement syndrome  
4 in that shoulder, correct, according to this radiology read?

5 A Well, according to the picture, yeah, you're correct.

6 Q Right. And you never found any impingement syndrome  
7 in that shoulder, correct --

8 A I never --

9 Q -- on any direct review of imaging?

10 A No.

11 Q Okay. So when Mr. Winner's been talking about  
12 impingement syndrome, that's not present on the MRI imaging, correct?

13 A Well, it's also a clinical diagnosis, too. You can see it on  
14 imaging, but it's an examination finding. So it -- it doesn't have to show  
15 up on imaging.

16 Q Right. Because the MRI doesn't always tell you the  
17 whole story, does it?

18 A It doesn't.

19 Q Right. But no doctor, no physician ever diagnosed her  
20 with impingement syndrome in her care, correct?

21 A I don't know that that's true, but I will agree with you that  
22 it wasn't a big feature of -- of any diagnosis, and it may not be existent. I  
23 -- I'd have to look through all the records. That wasn't my --

24 Q Okay. One of things the pain manager, including you  
25 and Dr. Rosler and the -- and the surgeons, is you wanted to



1 differentiate the symptoms come from a shoulder problem or the -- the  
2 neck problem, right, so you can treat it appropriately, right?

3 A But oftentimes those two things are confusing, and you  
4 have to --

5 Q Yeah.

6 A -- do things to -- to --

7 Q Agreed.

8 A -- differentiate them.

9 Q Yeah. And one thing you can do is selective nerve root  
10 block or a transforaminal epidural injection, inject something in the  
11 spine, and if that resolves the symptoms, then it's likely not coming from  
12 the shoulder, right?

13 A I -- I would agree.

14 Q Okay. And you agree that a cervical fusion isn't going to  
15 resolve or heal symptoms coming from a shoulder problem, right?

16 A That's correct.

17 Q All right. You agree that before the 2016 collision and  
18 after, Desire's pain in her neck and then symptoms into her arm were the  
19 same as after?

20 A Yes.

21 Q All right. Mr. Winner said to you that Desire was  
22 referred to Dr. Khavkin for a surgical cost letter. That's not accurate, is  
23 it? He was referred -- she is referred to a neurosurgical consultation,  
24 correct?

25 A I -- I think that's more appropriate.

1 Q Right. And you -- you agree that in Clark County,  
2 Nevada, the majority of pain management physicians, like what Dr.  
3 Rosler did here, use propofol in connection with procedures? You've  
4 testified to that, correct?

5 A I have, yes.

6 Q In fact, the majority of them do? You may not -- you may  
7 disagree with that, but the majority of them do?

8 A So yes.

9 Q Okay. You agree that propofol does not have any  
10 analgesic or pain-relieving effect?

11 A That's correct.

12 Q Okay. So a patient in the surgical center, the -- part of  
13 the intake before the procedure, they meet with the nurse, she reports  
14 pain a score, right?

15 A Yes.

16 Q Once they get through the procedure, they go in the  
17 recovery unit, and they're recovered, and they're well enough to leave  
18 and go home; they record the next pain score, right?

19 A Well, usually in between, but yes.

20 Q So door to door?

21 A Not always, but yes.

22 Q All right. Thank you, Doctor. I have no additional  
23 questions.

24 A Okay.

25 THE COURT: Mr. Winner? You're done?

1 RECROSS-EXAMINATION

2 BY MR. PRINCE:

3 Q Doctor, after the commonly chiropractic records, there  
4 will be a cut and paste of what the original findings were on each  
5 successive visit, correct?

6 A That's very common.

7 Q Okay. After the selective nerve root block in Dr. Rosler,  
8 the pain management doctor's records, the Plaintiff tested positive for a  
9 Hawkins sign?

10 A Yes.

11 Q Please tell the jury what a Hawkins sign is.

12 A So a Hawkins sign is a physical examination finding  
13 consistent with a shoulder issue. Perhaps a -- an impingement  
14 syndrome.

15 Q Thank you.

16 MR. WINNER: Nothing further.

17 FURTHER REDIRECT EXAMINATION

18 BY MR. WINNER:

19 Q Did anybody ever diagnose her with any impingement  
20 syndrome?

21 A Not officially, no.

22 Q Did anybody -- there are orthopedists who specialize in  
23 issues relating to the shoulder as in the knees, correct?

24 A Yes.

25 Q Did anybody ever make a referral for her to an

1 orthopedist to evaluate any shoulder-related issue?

2 A No.

3 FURTHER RECROSS-EXAMINATION

4 BY MR. PRINCE:

5 Q She was referred for a shoulder MRI, correct?

6 A She was.

7 Q Which showed a bone bruise?

8 A Yes.

9 Q Okay. It showed other abnormalities?

10 A Yes.

11 Q And Dr. Rosler tested her and found a positive Hawkins  
12 sign?

13 A He did.

14 Q Okay. Those symptoms found on the shoulder -- or  
15 those conditions found on the shoulder, those go away on their own  
16 over time, right?

17 A They can.

18 Q Aren't they expected to?

19 A They are.

20 Q Over the course of a few months?

21 A They are.

22 Q Thank you.

23 THE COURT: Okay. Ladies and Gentlemen of the Jury, any  
24 questions?

25 THE MARSHAL: No questions.

1 THE COURT: No questions? Oh, okay.

2 All right. We're going to take our lunch recess. During the  
3 recess, you're admonished not to talk or converse among yourselves or  
4 with anyone else on any subject connected to this trial, or read, watch or  
5 listen to any report or commentary on the trial of any person connected  
6 with this trial by any medium of information, including, without  
7 limitation, to newspapers, television, the Internet, and radio; or form or  
8 express any opinion on any subject connected with the trial until the  
9 case is finally submitted to you.

10 I think we're going to try and go as close to a half hour, but  
11 they brought in lunch to kind of keep it faster. So I say a half hour, but  
12 you know, don't wolf your food.

13 THE MARSHAL: All rise for the exit of the jury.

14 [Outside the presence of the jury.]

15 THE COURT: Okay. We're outside the presence of the jury.

16 The witness is excused, correct?

17 MR. PRINCE: Yes.

18 THE COURT: Thank you for coming back.

19 THE WITNESS: Thank you. Okay.

20 THE COURT: Now, when they come back, do you officially  
21 rest? Is that how this -- everybody officially rests, and there's no rebuttal  
22 case or anything?

23 MR. PRINCE: Yeah. I'm -- I'm going to put or stipulation  
24 down, but first I want to lodge it with the Court.

25 THE COURT: Okay.

1 MR. PRINCE: So if we can do that.

2 MR. HENRIOD: Did you still want a chiropractic stipulation?

3 MR. PRINCE: No.

4 THE COURT: And do -- and let's make sure we have all those  
5 proposed instruction packets, that we were referring to when we were  
6 discussing them, lodged with the Court so that if the record needs to be  
7 recreated somewhere someone could figure it out.

8 MR. PRINCE: Okay.

9 THE COURT: And --

10 MR. WINNER: Yeah, I think --

11 THE COURT: -- PowerPoints and then this instruction. What  
12 -- how -- what -- I'm going to give something like this. What do you --

13 MR. PRINCE: Well, let's just talk about it. Let's just -- number  
14 one --

15 THE COURT: Okay.

16 MR. PRINCE: -- we need to talk about a couple things. One is  
17 the C4-5 disc level was always discussed as an adjacent segment issue  
18 from Dr. Khavkin forward, because he was recommending a two-level  
19 surgery. Dr. Garber said, well, I'm going to try it at this level first,  
20 meaning C6-7.

21 THE COURT: Okay. Let me -- let me -- I'm not going to have  
22 the argument about what came in. I'm arguing about the instruction.  
23 They're going to get an instruction that recognizes that at least two of  
24 your witnesses have referred to future surgeries that I ruled were not  
25 coming in.

1 MR. PRINCE: No, no.

2 THE COURT: I just want to talk about how that's going to be  
3 presented.

4 MR. PRINCE: It's -- it's a problem, and that's why -- that's  
5 what I'm trying describe. Because there are certain things I can't argue  
6 that after her second -- her next surgery, she's going to suffer this  
7 adjacent -- will become symptomatic. I -- I know I'm not claiming a third  
8 surgery. I know that. But her having to live through the process, I am  
9 claiming, because that's a fact. That's a physiological fact.

10 THE COURT: Okay. But that doesn't have anything to do  
11 with this instruction.

12 MR. PRINCE: Okay. But -- right. You heard testimony from  
13 Khavkin and questions from counsel suggesting that, "Evans, the  
14 Plaintiff, may pursue multiple surgeries in the future. This is testimony  
15 that's speculative, inappropriate." Not true. We've established -- and  
16 even through doctor -- their Defense witness, Dr. Schifini -- and I have a  
17 separate motion relating to him before we're done with all this -- that  
18 she's going to --

19 THE COURT: We're going to --

20 MR. PRINCE: -- need one --

21 THE COURT: We're going to get a lunch. My staff is going to  
22 get some time. So if you eat the whole half hour up, we're still going to -  
23 - and if it doesn't get to the jury until Monday, it doesn't get to the jury  
24 until Monday.

25 MR. PRINCE: Okay.

1 THE COURT: Just so we all know.

2 MR. PRINCE: It says -- Judge, we have to craft language that  
3 she may require more than one. And you can say more than one  
4 surgery.

5 THE COURT: No, I'm not.

6 MR. PRINCE: No, no. Judge, she's -- we have --

7 THE COURT: No.

8 MR. PRINCE: -- evidence saying that she's going to require  
9 one.

10 THE COURT: Correct.

11 MR. PRINCE: And you're saying multiple --

12 THE COURT: And that's in evidence.

13 MR. PRINCE: Yeah. So he can't say, well -- because this --  
14 the way they've got it worded, multiple surgeries, that like even the first  
15 one's inappropriate and speculative. That's not true. We satisfied our  
16 legal burden.

17 THE COURT: Okay.

18 MR. PRINCE: So therefore, when it says multiple surgeries --

19 THE COURT: Then -- then propose -- do --

20 MR. PRINCE: I haven't been given a chance yet. I just  
21 haven't. I mean, I just literally got it while we were getting ready to  
22 examine Dr. Schifini.

23 MR. WINNER: How about instead of multiple, and  
24 additional? Does that work.

25 MR. PRINCE: I want to think about --



1 THE COURT: Okay. Hang on --

2 MR. PRINCE: -- that language.

3 THE COURT: -- a second.

4 MR. HENRIOD: Well, the second paragraph --

5 THE COURT: The second paragraph clarifies that entirely.

6 Yeah. Look down there, Mr. Prince. That's exactly what it says.

7 "It's reasonably certain to require. You may decide whether

8 the Plaintiff has proven by a preponderance of the evidence

9 that she is reasonably certain to require one surgery in the

10 future to remove one disc. The Court expresses no opinion

11 on whether she met a" -- "you may not consider" --

12 MR. PRINCE: Um-hum.

13 THE COURT: Okay. I -- I think it's -- what I don't -- the part I

14 don't like is --

15 MR. PRINCE: I don't think the, "Multiple surgeries," and, "it's

16 speculative and inappropriate." You don't need to tell them what that is.

17 THE COURT: Yeah, I'm not going to -- because I didn't -- that

18 -- that goes back to me making a ruling, and I'm not doing that --

19 MR. HENRIOD: Well, I --

20 THE COURT: -- so --

21 MR. HENRIOD: But I think one of the readings that -- that this

22 is in important is that we've had to approach the bench about ten times

23 on this. So it -- it's not just that it happens to be outside their purview; I

24 think that it ought to include a -- a mention to why it doesn't come in,

25 that --

1 THE COURT: Well, I disagree, because --

2 MR. HENRIOD: -- that -- that it's inappropriate, and we can  
3 say it's because it wasn't disclosed before trial. But it is inappropriate.

4 MR. PRINCE: No. You don't tell --

5 MR. HENRIOD: And --

6 MR. PRINCE: You don't tell the jury the evidentiary basis of a  
7 ruling.

8 THE COURT: Yeah.

9 UNIDENTIFIED SPEAKER: Oops. Sorry. I'm sorry.

10 THE COURT: That's all right.

11 I'm -- I'm -- I think that's I'm commenting on the evidence,  
12 and I'm not going to do that.

13 MR. PRINCE: Why can't we say more than --

14 THE COURT: I -- I kept it out --

15 MR. PRINCE: -- one surgery?

16 THE COURT: I kept it out because of the notice issue, and  
17 that's just too convoluted and whatnot. I don't think they need to know.  
18 So I'm going to take out, "this testimony was speculative and  
19 inappropriate." I'm also going to --

20 MR. PRINCE: Can we say --

21 THE COURT: -- take out -- hang on. I'm also going to take  
22 out, "And questions from counsel." I don't believe that counsel in any  
23 way necessarily did that. So I'm going to --

24 MR. HENRIOD: We can come back to that later, but I agree, it  
25 doesn't have to be in the instruction.

1 THE COURT: Okay. So it's -- it's -- it will read,  
2 "You have heard testimony suggesting that Plaintiff may  
3 pursue multiple surgeries in the future. If you are to  
4 determine to award damages, you may decide whether  
5 Plaintiff has proven by a preponderance of the evidence that  
6 she is reasonably certain to require one surgery in the future  
7 to remove one disc. The Court expresses no" --  
8 I don't even know that we need to say, "remove one disc."  
9 MR. HENRIOD: Well -- well --  
10 MR. PRINCE: Yeah, right. That -- that -- exactly right.  
11 MR. HENRIOD: Yeah, because no -- the one surgery was  
12 described in -- in what was disclosed before trial. That is the cost issue.  
13 THE COURT: Okay. But --  
14 MR. HENRIOD: It was the cost of removing one disc.  
15 THE COURT: Is it even remove? I thought it was like fusing.  
16 Is that the same thing?  
17 MR. PRINCE: Yes.  
18 MR. HENRIOD: Yeah.  
19 MR. PRINCE: There's --  
20 MR. HENRIOD: You remove it to fuse it.  
21 MR. PRINCE: It's -- it's --  
22 THE COURT: You see, I'm sitting here, and I've been here all  
23 the way and I'm still not even 100 percent sure, but --  
24 MR. PRINCE: Why can't we just say, "to require one  
25 surgery"?

1 THE COURT: Yeah. I think that's -- that's more --  
2 MR. PRINCE: Yeah.  
3 THE COURT: I don't want -- I don't like it so fact sensitive.  
4 MR. HENRIOD: Well, I mean, as --  
5 MR. PRINCE: And then --  
6 MR. HENRIOD: -- as long as there isn't a -- an implication  
7 that that one surgery is going to be anything more than one disc.  
8 MR. PRINCE: Well, correct. I'm not -- I'm not --  
9 THE COURT: And if you go that way, then I'm going to have  
10 -- let them amend or whatever. So yes.  
11 MR. PRINCE: Well, Judge, that's all -- I'm -- I mean, I -- that's  
12 fine. But I'm going to argue that after that next surgery, the one I'm -- I  
13 put evidence on, because of her age, she will go through the adjacent  
14 segment process to the point she has symptoms and will have to live  
15 with those symptoms. I am going to argue that because that goes to her  
16 pain and suffering.  
17 THE COURT: Okay.  
18 MR. PRINCE: Okay. So we're going to put a period at, "in the  
19 future" -- after "future." Okay?  
20 MR. HENRIOD: Okay.  
21 THE COURT: We'll take out the, "remove one disc." And  
22 then I'll leave in, "The Court expresses no opinion. You may not  
23 consider" -- the rest of that.  
24 MR. PRINCE: Well, I don't know.  
25 THE COURT: Okay?

1 MR. PRINCE: Let's -- the language of,  
2 "You may not consider for any purpose that" -- "You may not  
3 consider whether or not the Plaintiff might choose to  
4 undertake any other medical procedures in the future."  
5 Why can't we just say that. And the cost of --

6 MR. HENRIOD: What -- what is it?

7 MR. PRINCE: I want to work on the language there. "You  
8 may not consider whether" -- "whether Plaintiff" -- "whether or not  
9 Plaintiff" -- don't say any purpose, because I am arguing in the future,  
10 she is going to have pain and suffering as a result of an adjacent  
11 segment at C4-5. I'm not -- I'm stopping short of, "She's going to need  
12 surgery there." I'm just going to say, "She's going to have to live with  
13 that pain for the rest of her life."

14 THE COURT: And that -- this doesn't stop you from doing  
15 that I don't think.

16 MR. PRINCE: I know. But I don't want there to be any  
17 confusion that this stops me from doing that, Judge. That -- this is  
18 critically important.

19 THE COURT: Okay. We're -- we're -- I don't think anybody's  
20 intending that unless --

21 MR. PRINCE: You --

22 THE COURT: -- you take it to the --

23 MR. HENRIOD: You know, I mean if --

24 THE COURT: -- degree where you --

25 MR. PRINCE: No. It says --

1 THE COURT: -- insinuate a surgery.

2 MR. PRINCE: -- any purpose would include that.

3 MR. HENRIOD: I mean, if Mr. Prince is -- is -- is saying he's  
4 going to argue that it may continue to hurt after another surgery --

5 MR. PRINCE: Yes.

6 MR. HENRIOD: -- I don't think this precludes that.

7 MR. PRINCE: I -- I know. But the language -- I think the  
8 language -- I'm worried about the laypeople -- we're lawyers and a judge  
9 and I don't think it's clear in my mind, and I want to make sure it's clear.  
10 "You may not consider whether the cost or whether or not the Plaintiff  
11 might choose to undergo another surgery" --

12 THE COURT: That's correct. You -- you're going to talk  
13 about the hurting but not the treatment.

14 MR. HENRIOD: Yeah.

15 THE COURT: Okay? So that's how it's going to read.  
16 Everybody --

17 MR. PRINCE: Well, let's --

18 MR. HENRIOD: Very good.

19 MR. PRINCE: How is it going to read? I don't know -- I'm still  
20 not -- the language of the last paragraph is concerning to me.

21 THE COURT: All right. Well, I -- I don't think it has a  
22 problem. I don't think -- your concern is that it limits you. We all agree  
23 that it doesn't. If that changes, we'll -- we'll work -- work on it. But I  
24 don't see -- I don't see any problem with it. So,

25 "You have heard testimony suggesting that" --

1 MR. PRINCE: "Whether or not the Plaintiff might" --  
2 THE COURT: -- "the Plaintiff" --  
3 MR. PRINCE: -- "choose to undertake any" --  
4 THE COURT: -- "Evans" --  
5 MR. PRINCE: -- "future surgical procedures" --  
6 Like -- I don't like the "any purpose." "You may not consider  
7 whether" -- I don't like the "any purpose."  
8 THE COURT: But they -- they can't. They cannot.  
9 MR. PRINCE: I don't like the "any purpose" language though.  
10 THE COURT: I know. They can't. That's the -- that's the --  
11 MR. HENRIOD: Yeah.  
12 THE COURT: -- reality of what it is.  
13 MR. PRINCE: "You're not" -- "you cannot consider" --  
14 THE COURT: And I -- and I -- and -- and in fairness, I think  
15 there is a reasonable balance in light of the fact that those two witnesses  
16 both in direct contravention of -- of my order did what I told them not to  
17 do. And the second one, even after I said, approach, you're in this scary  
18 area, that this happened last time, and I was assured not a problem. And  
19 again, I don't think counsel did it. Mr. Degree, I don't think in any way  
20 asked for that necessarily, but that was certainly volunteered and  
21 blurted, and that leads me to believe that either the witness did it on  
22 purpose or the witness wasn't advised about it.  
23 Having said all that, I think this is reasonably valid, seeing  
24 those errors.  
25 So other -- anything else?

1 MR. HENRIOD: No, I don't think so. We are --  
2 THE COURT: When will we have the jury --  
3 MR. PRINCE: Well -- well, the --  
4 THE COURT: -- instructions so that we --  
5 MR. PRINCE: -- let's --  
6 THE COURT: -- can make copy of them for the jury? Do you  
7 -- do you all -- let me ask you this: Do you all want them to have their  
8 own copies?  
9 MR. PRINCE: Oh, of course. They need them. Yes. You'll --  
10 MR. HENRIOD: So --  
11 MR. PRINCE: The Court needs -- even needs those.  
12 THE COURT: I know, but I can't make them until I have it.  
13 MR. HENRIOD: Okay. So I think we are very close to having  
14 a Word doc to send back, if we could send that back to you. Get two  
15 copies of it so that we can --  
16 THE COURT: Yep.  
17 MR. HENRIOD: -- order them.  
18 THE COURT: Yep.  
19 MR. HENRIOD: And then we can finalize. Will that work?  
20 THE CLERK: Yeah. Perfect.  
21 MR. HENRIOD: All right.  
22 THE CLERK: You have my email I think.  
23 MR. HENRIOD: Yes.  
24 THE CLERK: Okay.  
25 MR. PRINCE: Oh, you need to have the life expectancy table



1 in there. You guys --

2 MR. HENRIOD: Oh.

3 MR. PRINCE: -- agreed to that.

4 MR. HENRIOD: Oh, is that now? So life expectancy. Is that --

5 UNIDENTIFIED SPEAKER: Yeah. I'm going to put that in

6 the --

7 THE CLERK: It was in there? Okay.

8 THE COURT: Okay.

9 MR. HENRIOD: I mean, if it's not, let's --

10 MR. PRINCE: I guess --

11 MR. HENRIOD: You want to double-check?

12 UNIDENTIFIED SPEAKER: Yeah.

13 MR. HENRIOD: Go ahead.

14 UNIDENTIFIED SPEAKER: All right.

15 [Pause]

16 THE COURT: And don't forget, we still need PowerPoints

17 and other stuff.

18 [Recess at 12:43 p.m., recommencing at 1:36 p.m.]

19 [Outside the presence of the jury.]

20 THE COURT: I need to know -- guys are not going to finish,

21 obviously, openings or closings or what ---

22 MR. PRINCE: Well we can't exclude them, so -- I'm ready to

23 go now.

24 THE COURT: I'm ready, too.

25 MR. HENRIOD: What's that?

1 THE COURT: But the jury instructions are still not --- do we  
2 even have them yet?

3 MR. HENRIOD: No.

4 THE CLERK: Not yet.

5 THE COURT: So we don't have them. They have not been  
6 copied. That's a 15 to 20-minute process, I've been saying, that's which  
7 is I tried to do this on Wednesday, just saying it just so people know it's  
8 not on me. I was fine --

9 MR. WINNER: We're not saying it's your fault.

10 THE COURT: -- and I'm accommodating, but it's not my fault.  
11 You all did it to yourselves. And so we're just trying to make the best --

12 MR. PRINCE: I think we come back for arguments Monday.

13 MR. WINNER: Do we even know if the jury is going to stay?

14 MR. PRINCE: Because -- yeah, they can stay. Then the one  
15 juror, the alternate he can come back. I think we just come Monday. I  
16 think they know they're likely staying. I think they have to, because it  
17 happens. And so rather than -- they know that they're coming back  
18 Monday. I'd rather -- Judge, I'd rather give the arguments Monday.

19 Am I ready now? Yes. I am ready. I want my PowerPoint  
20 back, though if there is -- I'll given it to them, but I didn't want them to  
21 keep it over the weekend. I'm not going to change it. And if I change it,  
22 but if I change it, I'll give a copy early Monday morning, but I don't  
23 anticipate changing it, but I don't want them to have it over -- the whole  
24 thing over the weekend.

25 MR. WINNER: I don't care. That's fair.

1 MR. PRINCE: But I'm ready to give the Court mine, but --

2 THE COURT: Well there's no way you guys are going to  
3 finish by 5.

4 MR. PRINCE: No, no. Because by the time you copy and  
5 read, we're not --

6 THE COURT: Will you see if the jury is available Monday at --

7 THE BAILIFF: Yeah. Just a reminder to you, you have seat  
8 8 --

9 THE COURT: At 10?

10 THE BAILIFF: -- should show up, he needs to leave by 10.  
11 He's one of the alternates.

12 [Counsel confers]

13 THE CLERK: We can't do it at 10. We have the evidentiary  
14 hearing.

15 THE COURT: We're going to have to move the evidentiary  
16 hearing, because --

17 THE CLERK: So should we do the evidentiary hearing  
18 Tuesday?

19 [Counsel confers]

20 MR. PRINCE: Well then, you're not going to lose the first  
21 alternate. He's go to leave today anyway, too.

22 THE COURT: Correct, correct. That's why I'm trying to  
23 resolve this right now, so that we can --

24 MR. PRINCE: What time do we start on Monday?

25 THE COURT: -- release --

1 MR. PRINCE: What time do we start on Monday?

2 THE COURT: I'm trying to resolve this so we can release  
3 them. We reset the evidence hearing that you just placed to Monday.  
4 So now we're trying to figure out -- but if we do --

5 MR. PRINCE: Oh that's right. I have a Supreme Court at 1:30  
6 Monday.

7 THE COURT: They definitely trump me.

8 MR. WINNER: That is true, he does.

9 THE COURT: So what do you want to do, guys? I don't  
10 know.

11 MR. PRINCE: Either go right now or start at 9 on Monday.

12 THE COURT: Okay, but we've agreed that we can't go right  
13 now and finish. Are you -- do you care? Do you want to split?

14 MR. PRINCE: No.

15 MR. WINNER: No. No.

16 MR. PRINCE: How long will it --

17 MR. WINNER: How long would it -- I mean reading the jury  
18 instructions and --

19 THE COURT: You understand we don't have them yet.

20 MR. PRINCE: Yeah, no coming back, how long will closings  
21 be?

22 MR. WINNER: Mine will be about an hour and 15 minutes or  
23 so --

24 THE COURT: Yours and Mr. Degree's or --

25 MR. PRINCE: I'm just going to combine them all together. I

1 may need a little bit more, but so I've got an hour for both of us -- an  
2 hour 15-20 minutes.

3 THE COURT: If we --

4 MR. WINNER: They can't be split up.

5 THE COURT: If we start Monday at 9?

6 MR. PRINCE: Yes, that's fine.

7 MR. WINNER: Monday at 9 is fine, or now.

8 THE COURT: You told -- you want now, but you don't want  
9 to split.

10 MR. WINNER: I -- no, I don't think either of us wants to split.  
11 What --

12 THE COURT: So between those two choices, because do you  
13 agree with me that you can't do now and finish?

14 MR. PRINCE: Logically how long are we waiting for the  
15 instructions to be printed?

16 THE COURT: Well, first they have to get sent to us.

17 MR. WINNER: So you should have them here, really in about  
18 five minutes. We are on the last --

19 THE COURT: You're saying we don't have them yet.

20 MR. PRINCE: It's going to take --

21 THE COURT: So five minutes to get them --

22 MR. PRINCE: -- 15 minutes -- it'll take until 2 before you can  
23 get the jury in here and --

24 THE COURT: -- and then 15 to 20 --

25 MR. PRINCE: -- read them.

1 THE COURT: Correct.

2 MR. PRINCE: And then 2:30 at the earliest. It's just -- it's not  
3 going to happen.

4 THE COURT: Are we in agreement that I'm going to send  
5 Adam back to talk to the jury about this?

6 [Counsel confers]

7 MR. WINNER: If we're in a time crunch today, is there a  
8 benefit to instructing --

9 MR. PRINCE: No benefit -- I want the jury -- it's hard for me  
10 to be close to time.

11 [Counsel confers]

12 THE COURT: Do we have an agreement or not?

13 MR. WINNER: I want both given the same day, I don't want  
14 one given today and one given on Monday, if we're still waiting on the  
15 instructions to be printed, the instructions can be read to the jury in 10  
16 minutes, I would think, and we start

17 MR. PRINCE: Oh no.

18 MR. WINNER: -- 15? How many instructions are there? 40?

19 MR. PRINCE: I think it's going to take at least 20 minutes to  
20 30 -- I think it's going to take 20 or more minutes to do it, 30 minutes.  
21 And then, right, I mean, the time estimate is a bit off --

22 THE COURT: And I understand the one juror that has to  
23 leave at 5, has to leave at 5. So that means mid-argument or whatever  
24 I'm not going to --

25 MR. WINNER: But here, let's see, so --

1 MR. PRINCE: But then what about the rebuttal, Judge? I  
2 mean that's just --

3 MR. WINNER: Who needs to leave at 5? Is it one of the  
4 alternates?

5 THE BAILIFF: A master. Stephanie, she's seat 2, and then  
6 the alternate is seat 8. Ryan Shult (phonetic) --

7 THE COURT: Has to leave at 2.

8 THE BAILIFF: He needs to leave at 2. I'm sorry, seat 9.

9 THE COURT: Yeah.

10 MR. PRINCE: All right, but that one --

11 MR. WINNER: So could seat --

12 MR. PRINCE: Right? I mean that one we knew. On the  
13 alternate. That was a foregone conclusion that he might not hear it  
14 anyway.

15 MR. WINNER: Could we seat the other eight and argue  
16 today?

17 MR. PRINCE: I'm saying there's not enough time. I think,  
18 respectfully, you're --

19 MR. WINNER: That's because one of the jurors has to leave  
20 at 5. And if --

21 THE COURT: You know, in fairness, I think we've kind of  
22 jerked this jury around a little bit. They've been here since 9:30 this  
23 morning and then they sat around and waited for an hour for stuff that  
24 we should have, I think, taken care of the other day.

25 MR. PRINCE: We also told them they'd be done today.

1 MR. HENRIOD: I think you've been super nice.

2 THE COURT: We actually told them we'd be done by  
3 Wednesday. They're going to hold it against me, not you guys. That's  
4 what I'm not crazy about, you know? I'm the --

5 MR. WINNER: I'd like to inquire of the jury whether all of  
6 them can be here Monday morning at 9.

7 THE COURT: If you could advise them, please?

8 THE BAILIFF: Yep. Monday morning at 9.

9 MR. PRINCE: Where are they out here, or in the jury room?

10 THE BAILIFF: They're out here.

11 MR. PRINCE: Oh.

12 THE BAILIFF: Outside.

13 [Pause]

14 THE COURT: You guys could theoretically stipulate to egg  
15 time your arguments?

16 MR. PRINCE: Well if we start at 9, we're going to be done  
17 with closing by a quarter to 11, right? 11?

18 MR. WINNER: I think 11:30ish by the time we do everything  
19 we have to do. So is my --

20 THE COURT: We still have to instruct, when we do it then,  
21 Mr. Winner.

22 MR. WINNER: Right. Right.

23 THE COURT: I figure we'll be lucky if we get done in time for  
24 your Supreme Court argument, but that's just me. But that means we --

25 MR. WINNER: I'm happy to start at 8.



1 THE COURT: Huh?

2 MR. WINNER: I'm happy to start at 8 to 8:30.

3 THE COURT: Are you?

4 MR. WINNER: I mean, if that makes --

5 THE COURT: We can start at 9 and you guys can just finish  
6 by 1. However we figure that out.

7 MR. WINNER: Okay.

8 [Counsel confers]

9 MR. HENRIOD: Your Honor, I'm just sympathetic to having  
10 to stand at the podium on Monday like he's going to have to do --

11 MR. PRINCE: Well, I've done the Supreme Court arguments  
12 in one day. So I guess if I can do that, I can do this.

13 MR. HENRIOD: Okay. All right.

14 MR. PRINCE: I mean I arguably -- thank you for that, but I  
15 mean, I've done -- I did two en banc arguments last summer on the same  
16 day. So I guess this I'm ready for, and I the other one I'm ready for.

17 THE BAILIFF: They're all good with 9:00 Monday.

18 THE COURT: Okay. We'll pull the trigger.

19 MR. PRINCE: Tell them to be here -- maybe tell them to be  
20 here at 8:45? Just so -- see if they can be, and let's try to be rolling right  
21 at 9.

22 MR. WINNER: That's great by us, if it works for the Court and  
23 the staff.

24 THE COURT: I mean it does. We have to move things again  
25 for other people, so that -- it is what is though.

1 MR. HENRIOD: Well and we can -- right now we can close,  
2 we can argue whatever issues, right? We can finalize the jury instruction  
3 so that there is nothing remaining, right? We come in and --

4 MR. PRINCE: We can do that right now today.

5 MR. HENRIOD: Yeah.

6 MR. PRINCE: We can finish all that now.

7 MR. HENRIOD: Yeah.

8 MR. WINNER: So I assume you will want, and I will  
9 numbered jury instructions to go through here.

10 THE COURT: Did you want me to bring them back in to  
11 release them for the weekend or no?

12 MR. PRINCE: No, you can just release them.

13 THE COURT: All right.

14 MR. PRINCE: They're under the admonishment already.

15 THE COURT: There's no different admonishment. Okay.  
16 Just remind them of the admonishment and to the fact that we'll expect  
17 them back here Monday ready to be in their chairs and start listening at  
18 9:00.

19 THE BAILIFF: Okay --

20 THE COURT: So a few minutes before.

21 THE BAILIFF: 15 minutes early then? 8:45? Okay.

22 MR. HENRIOD: Okay. So Morgan, those are coming back to  
23 you now.

24 THE CLERK: Cool. I just got them.

25 [Pause]

1 THE COURT: We have 10 jurors -- how many sets of  
2 instructions you guys want? Copies?

3 MR. PRINCE: Ten -- and then two more for -- two for our  
4 side.

5 THE COURT: Two for your side?

6 MR. PRINCE: Yes, please.

7 [Court confers with Clerk]

8 [Counsel confers]

9 THE COURT: Do we feel like we need to make a further  
10 record on the instructions or --

11 MR. PRINCE: I think we just maybe review them one more --

12 THE COURT: Just so that you guys --

13 MR. PRINCE: -- time and number them, and we can --

14 THE COURT: -- agree on them?

15 MR. PRINCE: -- what the objection is finally for the record  
16 and then so we're just unmistakably clear.

17 THE COURT: Okay.

18 MR. HENRIOD: Yes, we do have to go through the do you  
19 object as given --

20 THE COURT: Okay.

21 MR. HENRIOD: -- blah blah but we can go through these.

22 THE COURT: Okay.

23 MR. PRINCE: Do you have any more? Then I'll say yes, and  
24 you say, I've already, you know, ruled.

25 THE COURT: Okay.

1 MR. WINNER: May I suggest we do that this afternoon  
2 either --

3 MR. PRINCE: We're doing it right now.

4 THE COURT: We're -- yeah.

5 THE CLERK: So for now I just need six --

6 THE COURT: For right now just get --

7 THE CLERK: -- for --

8 THE COURT: -- yeah, six copies. She can print them all out  
9 and as soon as she has six then we'll bring them.

10 THE CLERK: Okay.

11 THE BAILIFF: Judge, just to verify you said you want them  
12 released now, right?

13 THE COURT: Yes.

14 THE BAILIFF: Okay.

15 THE COURT: That's what we agreed to, right? And we  
16 agreed that there's an admonishment in effect that's good enough?  
17 Right everyone?

18 MR. PRINCE: Yes.

19 MR. WINNER: Yes.

20 MR. HENRIOD: Yes.

21 [Counsel confers]

22 THE COURT: I can set the evidentiary hearing for 1:00 -- the  
23 criminal one that I have for -- well, I guess probably 2:00 to be safe on  
24 Monday, because you can't possibly go over, because you're --

25 MR. PRINCE: No, I've got to be at the Supreme Court really

1 by 1:00. So I'm going to plan on being out of here and there by 1:15 at  
2 the latest.

3 THE COURT: Okay.

4 [Counsel confers]

5 MR. PRINCE: Judge, we're handing -- we're going to file with  
6 you our planned proposed jury instructions.

7 THE COURT: Okay.

8 MR. PRINCE: And I'm just going to hand those to you. And  
9 those are, just for the records numbers I think it's 1 through 48.

10 THE COURT: Okay. That's the original. Can you also give  
11 me --

12 MR. PRINCE: The cites?

13 THE COURT: Huh?

14 MR. PRINCE: These are with the cites.

15 THE COURT: No, you did two other packets. You did --

16 MR. PRINCE: We did an agreed upon and then a proposed  
17 document.

18 THE COURT: Correct, can I get those too, please, because  
19 those were the ones we were referencing when we were arguing on the  
20 record today.

21 MR. PRINCE: Right. Okay.

22 MR. HENRIOD: Can we still file a motion with the Court or --

23 THE COURT: Just --

24 MR. HENRIOD: No, no. I mean I'm not asking, technically,  
25 I'm asking logistically.

1 THE COURT: I have no idea. We'll just make them court  
2 exhibits.

3 MR. HENRIOD: Okay. That's fine.

4 THE COURT: Then I can -- we can take anything, right? Is  
5 that --

6 MR. HENRIOD: Yeah, no, I mean I can push then to have  
7 somebody back at the office --

8 MR. PRINCE: Okay. What we did earlier was --

9 MR. HENRIOD: -- file one promptly.

10 MR. PRINCE: -- we filed the Plaintiff's -- the agreed upon jury  
11 instructions. We already filed the served already today.

12 THE COURT: Okay.

13 MR. PRINCE: I'm going to say we already did that. Secondly,  
14 we filed and served the Plaintiff's proposed not agreed upon as we  
15 discussed earlier.

16 THE COURT: Okay.

17 MR. PRINCE: So I've done that today.

18 THE COURT: So you're all done.

19 MR. PRINCE: I'm done with it.

20 THE COURT: Then it's just you guys.

21 MR. HENRIOD: We can do -- yeah, if we haven't already,  
22 we'll push a few buttons and do that now.

23 THE COURT: All right. I'm remembering now, so now it's on  
24 you all.

25 [Counsel confers]

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[Pause]

THE COURT: Okay. Everybody got -- we're on right?  
Because we're in we're on?

THE CLERK: It's on.

THE COURT: All right. Okay. Everybody has their copies of  
instructions 1 through 50. Right?

MR. HENRIOD: Yes.

THE COURT: Okay. Is the Plaintiff familiar with the Court's  
proposed jury instructions?

MR. PRINCE: I'm sorry, Judge, say it again.

THE COURT: Is the Plaintiff familiar with the Court's  
proposed jury instructions?

MR. PRINCE: Yes.

THE COURT: Does the Plaintiff object to the giving of any of  
those instructions?

MR. PRINCE: Yes.

THE COURT: Do we want to make a record, or is the --

MR. PRINCE: I'm just going to tell you we --

THE COURT: -- did we decide the record early enough, was  
good enough?

MR. PRINCE: We can do that, and if any default argument is  
necessary. Let me, now that I have them numbered here, Judge -- hang  
on.

MR. HENRIOD: We can move, but I'm afraid we do have to  
do this part.

1 MR. PRINCE: I'm going to identify for you on the record,  
2 Your Honor --

3 THE COURT: Okay.

4 MR. PRINCE: -- which ones I object to, since you asked me  
5 first.

6 THE COURT: Okay.

7 MR. PRINCE: Number 25. The mere fact there was an  
8 accident, somebody was injured, doesn't add further to the instruction.  
9 While it's a statement of the law it does not add to the substantive  
10 instruction the jury is going to use to decide. There's no presumption of  
11 any kind.

12 You've already instructed that there's a burden to prove the  
13 elements of negligence, so it's redundant, and suggests -- and that -- the  
14 way it's suggesting is, that we have overcome so many additional  
15 burden.

16 THE COURT: Does Defense want to respond to these, each  
17 individually?

18 MR. HENRIOD: I don't mind incorporating the arguments  
19 that we made --

20 THE COURT: It's up to you.

21 MR. HENRIOD: -- earlier. So if he's --

22 MR. PRINCE: That's fine.

23 MR. HENRIOD: -- fine with that. Okay. Then I'll incorporate  
24 the argument that I made --

25 THE COURT: Okay.



1 MR. PRINCE: That's fine.

2 MR. HENRIOD: -- earlier, in support of this.

3 MR. PRINCE: The next objection is instruction 33, the  
4 comparative negligence instruction. I guess I can bootstrap, rely on the  
5 arguments we had earlier today on that.

6 THE COURT: Okay.

7 MR. PRINCE: I'm objecting to 34, which was relating to tail  
8 lamp reflectors, horns, there's no evidence --

9 THE COURT: Okay. Well, that was just -- as to 33, Defense,  
10 you're also incorporating arguments from before?

11 MR. HENRIOD: Correct.

12 THE COURT: Okay, and 34?

13 MR. PRINCE: 34. First, there is no one to support the  
14 instruction. They didn't identify what aspect. I'm assuming that they're  
15 relating to equipment, like lamps, reflectors, brakes, horns, whatever the  
16 -- not in proper working order. But it's obvious that they were not  
17 improper here. There is only evidence that there was some cosmetic  
18 feature over the taillight, but the only evidence you have in this record is,  
19 that it worked, functioned properly, it was well illuminated, both the turn  
20 signals, the running lights, and the brake lights.

21 So therefore there'd be no basis for that -- for some kind of  
22 equipment on the car. Nor did the Plaintiff suggest that that was reason  
23 for not being able to see anything. So there's no one to support the  
24 instruction.

25 MR. HENRIOD: I think that when you go to an audio store

1 and you get something to modify a safety device that comes out of the  
2 factory, that is tested to ensure that it can be seen from the appropriate  
3 range, that there is circumstantial evidence to support that any inability  
4 to see those lights, resulted from the modification, especially when this  
5 person happens to have been rear-ended twice in two years.

6 THE COURT: Okay.

7 MR. PRINCE: They didn't even ask if it was during day or  
8 night for the second accident, Judge. How would they know? How  
9 would these -- anybody know that? So the suggestion is -- I think you  
10 should even preclude that argument. They can't suggest that the tail  
11 lenses, I mean the cover over the lens, somehow contributed to the  
12 second collision. How could they -- they didn't even produce any  
13 evidence of that, so how can they argue that, they can't.

14 THE COURT: Well, they definitely --

15 MR. HENRIOD: Yeah. It came in.

16 THE COURT: They definitely asked questions on that, so --

17 MR. PRINCE: But, right. But no, Judge, the key is, they didn't  
18 ask if it was day or night.

19 THE COURT: Yeah. But brake lights you can see during the  
20 day.

21 MR. HENRIOD: Yeah. You have brake lights --

22 MR. PRINCE: You can see brakes --

23 MR. HENRIOD: -- and blinkers.

24 MR. PRINCE: Well, you can see that at night, too, it would be  
25 the same. The lens cover, you would still be able to see the illuminate --

1 and that's exactly our point, you'd still see the illumination day or night.

2 THE COURT: Okay.

3 MR. PRINCE: So --

4 MR. HENRIOD: You certainly should be able to see  
5 illumination --

6 MR. PRINCE: Well, they have notice that it could be. That's, I  
7 guess my point --

8 THE COURT: Okay. Well --

9 MR. PRINCE: -- they never inspected the car -- they did  
10 inspect the car actually, so, no, that's not true, they did inspect the car  
11 and pay for the damages.

12 THE COURT: Okay. Well, it's -- records are made. Any other  
13 objections or --

14 MR. PRINCE: Right. Number 35 --

15 THE COURT: Okay.

16 MR. PRINCE: -- about equipped with to tails, mounted on the  
17 rear, which there was, when lighted it made a red plainly visible from  
18 500 feet to the rear. They saw that. There's no evidence to support that  
19 they -- number 1 the car was equipped, well, the you saw the car have  
20 them. They're just saying it had because of this after-market, this more  
21 cosmetic feature that somehow it's a violation of the statute.  
22 They've got no evidence of an expert, automotive, or otherwise to  
23 support that --

24 THE COURT: Okay.

25 MR. PRINCE: -- theory or evidence, so --

1 THE COURT: Did you want to respond on that, are you just  
2 relying on your earlier argument?

3 MR. HENRIOD: I don't think --

4 THE COURT: It's kind of the same thing.

5 MR. HENRIOD: Yeah. I think the Court can look at *Rish v.*  
6 *Simao* for the general proposition that you don't need an expert for  
7 everything, but you can hire one to come and -- you don't need an expert  
8 for every proposition, and I don't think we need --

9 MR. PRINCE: Well, you need some evidence of it.

10 MR. HENRIOD: And I don't think we need one here.

11 THE COURT: Okay. Then --

12 MR. PRINCE: They'll need some evidence of it.

13 MR. HENRIOD: I think there is sufficient evidence --

14 MR. PRINCE: Yeah. But --

15 MR. HENRIOD: -- that --

16 MR. PRINCE: -- for example, the evidence would be this way,  
17 Judge; someone looked at the car, they determined that the lights  
18 weren't functioning correctly, couldn't illuminate correctly. You need to  
19 have some basis, not some theoretical possibility. They don't even --  
20 they don't even have that. They have none of that.

21 THE COURT: But the fact that she rear-ended her, is a  
22 potential partial evidence.

23 MR. PRINCE: That fact?

24 THE COURT: It can be.

25 MR. PRINCE: The mere fact --

1 MR. HENRIOD: That's the only evidence --

2 MR. PRINCE: Well, then --

3 MR. HENRIOD: -- where it says that it can be drawn.

4 MR. PRINCE: Then that would be an argument in every case,  
5 right? I mean --

6 MR. HENRIOD: On any case where I think you modify a  
7 factory safety device --

8 THE COURT: I'm not saying --

9 MR. HENRIOD: Yes. Actually, I think you could.

10 THE COURT: -- good fact, or bad fact, I'm simply saying it's  
11 in there. So what's the next one?

12 MR. PRINCE: 40, the curative instruction. And just --

13 THE COURT: The same arguments as earlier?

14 MR. PRINCE: The same arguments. And just allow -- even  
15 though we added one language, I'm still going to argue that even though  
16 she's not entitled to costs for an additional surgery, that she'll experience  
17 the pain, and you know, suffering of the adjacent breakdown at that  
18 level. I'm still going to argue that as one of the --

19 THE COURT: They're not going to say, even though she's  
20 not entitled to the cost of an additional surgery, like --

21 MR. PRINCE: I'm saying, I'm going to tell the jury she's not  
22 entitled to a cost of that. I'm going to say I'm going to tell the jury --

23 THE COURT: I don't think you can say that?

24 MR. PRINCE: Why? I'm going to tell the jury they're not --  
25 she's not -- because she's not --

1 THE COURT: That's the --

2 MR. PRINCE: -- entitled to that.

3 THE COURT: You're drawing your attention to something  
4 that's not allowed. You can --

5 MR. PRINCE: No, I'm telling them --

6 THE COURT: -- talk about -

7 MR. PRINCE: -- what's not allowed. Why can't I -- what do  
8 you need to draw attention to it?

9 THE COURT: Because I've --

10 MR. PRINCE: What do you mean, "draw attention to it"?  
11 You're telling them -- telling me -- you're instructing the jury that you're  
12 not -- they can't consider that for any purpose, but they can consider her  
13 pain and suffering that she goes through as a result of the adjacent  
14 segment disease, her symptoms and how it affects her.

15 THE COURT: Yes.

16 MR. PRINCE: I'm going to -- I am going to say that. I plan on  
17 saying that. Because they only can award the cost of one surgery, that's  
18 what's in evidence that they can do.

19 THE COURT: You can't argue anything about the second  
20 surgery, or a second surgery. I guess it's a third, actually.

21 MR. PRINCE: Yeah. I'm not going to argue, I'm saying --

22 THE COURT: Well, you're not going to say, even though I  
23 can't talk to you about a third surgery --

24 MR. PRINCE: Oh, no, no, no.

25 THE COURT: -- blah, blah, blah, which is what I'm hearing

1 you're telling me. I assume you're not going to do that, and if you do  
2 that we'll just deal with that, I'm telling you no. You can talk --

3 MR. PRINCE: Well, I'm trying to --

4 THE COURT: -- symptoms, you talk about process.

5 MR. PRINCE: But, Judge how do you --

6 THE COURT: -- progress --

7 MR. PRINCE: How do you deal with the fact that my client,  
8 medically speaking, is going to have these symptoms return, after her  
9 second surgery. I'm going to say, we are entitled to pain and suffering  
10 for that. We're not asking for the cost of -- we're only asking the cost of  
11 one surgery, that's what I'm going to tell them we're asking for. And  
12 that is true, we're asking for the cost of one surgery. Then after that  
13 she's going to experience the similar symptoms and have to live with  
14 that; she's had to live with those symptoms, I'm going to say that.

15 THE COURT: And you're fine with that --

16 MR. PRINCE: Okay.

17 THE COURT: -- like I said.

18 MR. PRINCE: That's how I do it. And I don't agree with 41  
19 on -- it's a mitigation instruction, I don't agree with that.

20 THE COURT: Okay. Rely on earlier arguments?

21 MR. PRINCE: Yes.

22 THE COURT: Did we --

23 MR. HENRIOD: The same, Your Honor.

24 THE COURT: Okay. All right.

25 MR. PRINCE: And then we have the *Posas v. Horton* case,

1 the instruction on what a driver should really anticipate --

2 THE COURT: Correct.

3 MR. PRINCE: -- which you didn't allow, so I would again --  
4 that was part of what we proposed previously.

5 THE COURT: Okay. Well, before you get to that. So are  
6 there any others, of the ones that we're giving, that you object to?

7 MR. PRINCE: No.

8 THE COURT: Okay. So now does the Plaintiff have any  
9 additional instructions to propose?

10 MR. PRINCE: Yes.

11 THE COURT: Okay. It's part of Plaintiff's proposed jury  
12 instruction, page 29. "The driver must anticipate and be prepared for the  
13 sudden appearance of obstacles, events or/and persons in the roadway,  
14 and must anticipate the sudden stop of other vehicles in the roadway or  
15 at intersections. " That's the *Posas v. Horton* case, 126 Nev. 112.

16 It further defines what a drive should reasonable anticipate,  
17 and I don't believe that the current instructions, which fully define what  
18 that might be, or necessarily needs to be. We did, under instruction  
19 number 27, talked about conditions be reasonably anticipated, but I  
20 believe this adds further description to what should be reasonably  
21 anticipated.

22 THE COURT: Okay. Defense, any additional arguments, or  
23 are we relying on previous?

24 [Counsel confer]

25 MR. PRINCE: Okay. Joel seems to believe that I need to



1 have you -- and I respect you for doing this really.

2 MR. HENRIOD: We can look at the rule if you want. I just --

3 MR. PRINCE: I guess I need to have you -- I guess hand it to

4 you and --

5 THE COURT: It's probably cleaner if we're -- on the

6 proposed?

7 MR. PRINCE: Yeah. Yeah, it's probably cleaner.

8 THE COURT: Okay.

9 MR. PRINCE: Separate copies.

10 THE COURT: Yeah. We have it on the --

11 MR. HENRIOD: Well, no, no, no. I mean, there's only one.

12 You need to write, "propose not given" and then you need to sign your

13 name.

14 THE COURT: Okay.

15 MR. PRINCE: Okay. So I'll hand a copy to you, then you can

16 just -- just sign it and you can make it a court exhibit.

17 THE COURT: Okay. Do I have like Plaintiff's proposed?

18 MR. PRINCE: Plaintiff's proposed --

19 MR. HENRIOD: Uh-huh.

20 MR. PRINCE: -- but not given.

21 THE COURT: Okay. Any other ones you want me to --

22 MR. PRINCE: No.

23 THE COURT: -- propose not given? Okay.

24 MR. PRINCE: No.

25 THE COURT: Does -- are we done, then?

1 MR. PRINCE: Yes.

2 THE COURT: Is the Defendant familiar with the Court's  
3 proposed jury instructions?

4 MR. HENRIOD: Yes, Your Honor.

5 THE COURT: Does the Defendant object to giving of any of  
6 those instructions?

7 MR. HENRIOD: Yes. Defense object -- Defendant objects to  
8 instruction number 29.

9 THE COURT: Okay.

10 MR. HENRIOD: Which begins, there was in force at the time  
11 of the occurrence in question, a law reads as follows: "The driver of a  
12 vehicle shall not follow."

13 THE COURT: Okay.

14 MR. HENRIOD: The end of the statute -- no, I'm sorry. Let  
15 me read the statute.

16 "The drive of the vehicle shall not follow another vehicle  
17 more closely than is reasonable and prudent, having due regard for the  
18 speed of such vehicles and the traffic upon, and the condition of the  
19 highway." I think that this unduly emphasizes a particular theory and  
20 argument, because the actual test is the same as the general negligent  
21 standard, what is ultimately reasonable and prudent.

22 THE COURT: Okay. And I think I earlier said that I think this  
23 addresses the negligence per se, aspect, so I'm giving it.

24 MR. PRINCE: Right.

25 THE COURT: Anything to add?

1 MR. PRINCE: And to incorporate my arguments from before.

2 THE COURT: Okay. Anything else from the Defense?

3 MR. HENRIOD: Yes, Your Honor. Same or similar objection  
4 to instruction number 31, which also is a negligence per se --

5 THE COURT: Okay.

6 MR. HENRIOD: -- statute.

7 THE COURT: The same?

8 MR. HENRIOD: And here again with this, I think that the  
9 language of the statute alludes to a general negligence principle, and so  
10 it is unnecessary.

11 THE COURT: Okay. The same ruling here. Anything to add?

12 MR. PRINCE: No.

13 MR. HENRIOD: The same thing with instruction number 32.

14 THE COURT: Okay. The same response?

15 MR. PRINCE: Yes.

16 THE COURT: The same ruling.

17 MR. HENRIOD: And no other objection to the sentence  
18 given.

19 THE COURT: Okay. And does the Defendant have any  
20 additional instructions to propose?

21 MR. HENRIOD: We do.

22 THE COURT: Okay.

23 MR. HENRIOD: The instruction is quote: "If weaker and less  
24 satisfactory evidence is offered by a party, when it was within such  
25 party's ability to produce stronger and more satisfactory evidence, the

1 evidence offered should be viewed with distrust."

2 And the source for that is, BAJI 2.02. It is referring to the --  
3 we would offer it in reference to the actual MRI film, that was taken in  
4 2010, and I'm happy to rely upon the arguments that I made earlier.

5 MR. PRINCE: The same arguments.

6 THE COURT: Do you want to bring that up here, please. And  
7 as I said, earlier, I don't disagree that that might not be appropriate, but I  
8 don't think that the burden has been met in terms of laying the facts for  
9 it. So this is Defendant's proposed --

10 THE COURT: Okay. Does the Defendant have any additional  
11 instructions to propose?

12 MR. HENRIOD: Yes. Where Plaintiff's injury or disability is  
13 clear and readily observable, no expert testimony is required for an  
14 award of future pain, suffering, anguish and disability. However, where  
15 an injury or disability is subjective and not demonstrable to others,  
16 expert testimony is necessary before a jury may award future damages.  
17 The source for that is the stock civil instructions from the 2011 Set 5  
18 PID4.

19 And just to briefly summarize. This is necessary, because  
20 future pain and suffering here we know is going to be predicated in large  
21 part in this adjacent segment breakdown theory and while they are not  
22 allowed to talk about future medical procedures past the one surgery  
23 that has been established, now we're going to be talking about driving  
24 up general damages based on the pain that will be -- that will allegedly  
25 be experienced during that timeframe. Because that type of pain is not

1 within the realm of knowledge to the average layperson, an expert does  
2 not need to establish it.

3 Now, I recognize that an expert has testified to do that here,  
4 but the issue is, is that the jury needs to understand that they are then  
5 looking back to the sufficiency of that expert testimony and for pain and  
6 suffering, looking back to see whether or not that expert testimony is  
7 credible. They look back to those instructions and consider that the  
8 conclusions are only as good as the reasons given. So that's why I think  
9 it is in the --

10 THE COURT: Okay.

11 MR. HENRIOD: -- stock set and should be in.

12 MR. PRINCE: Same arguments, Judge.

13 THE COURT: I believe it's generally covered by other  
14 instructions, kind of common sensical. So this will be Plaintiff -- or  
15 Defense 2 proposed, not given.

16 THE CLERK: Okay.

17 MR. HENRIOD: And the last one is from our proposed not  
18 given set on page 18, starting with, "A personal injury defendant has no  
19 legal ability to independently gather medical information without the  
20 Plaintiff's express consent." Certainly, we did do investigation, but we --  
21 it is not completely independent, in that it is curtailed by the disclosures  
22 that are given to us and then that puts on us the ability to go and chase  
23 down what has been disclosed, but we cannot go into what has not been  
24 disclosed in the first place.

25 And I think that the jury needs to understand that when

1 arguments are being made about all the facts being in and the fact that  
2 there are no records for particular time periods, that they should  
3 understand, the jury should understand that that universe of facts is not  
4 entirely -- they -- pardon me. They should not assume that if there were  
5 something else, that we would have and could have necessarily brought  
6 it to their attention. So that's why I think that the special instruction is  
7 necessary.

8 THE COURT: Okay. Mr. Prince, anything?

9 MR. PRINCE: Same arguments.

10 THE COURT: Okay. I think once there, again, is common  
11 sense that obviously you can't get what they don't have. I think this is --

12 MR. PRINCE: But they can't even argue. There's an order in  
13 place. They can't even argue the absence of records or anything like  
14 that. They can't do anything like that. You have an order specific to that  
15 point.

16 THE COURT: All right. Well then that -- even more so.

17 MR. PRINCE: Exactly.

18 THE COURT: But I think that the instruction as written is  
19 somewhat misleading as well. Defendant's --

20 MR. HENRIOD: Well, it --

21 THE COURT: -- proposed --

22 MR. HENRIOD: -- it -- Your Honor, may I find what the Court  
23 finds misleading? Because I'd be happy to propose an alternative, if  
24 there's some --

25 THE COURT: Well, that a defendant --

1 MR. HENRIOD: -- particular language --

2 THE COURT: -- can't --

3 MR. HENRIOD: -- the Court finds misleading.

4 THE COURT: I'm sorry. That you can't independently  
5 investigate. You can theoretically. There's things that you can do and --

6 MR. PRINCE: Of course.

7 THE COURT: -- and you can come into the courts and you  
8 can -- I mean, there's --

9 MR. WINNER: Well, Judge, as a -- and Mr. Prince did this for  
10 many years before he became a plaintiff lawyer. In theory, what we are  
11 allowed to do is send interrogatories to a plaintiff, take a plaintiff's  
12 deposition and ask what doctors have you seen in the past. We can  
13 compel them to give authorizations for those doctors or clinics that they  
14 have seen in the past. If they don't disclose a doctor or don't disclose a  
15 clinic, we have no ability really of finding that out.

16 MR. PRINCE: But we can never overcome that negative,  
17 right? We already have an order on that exact point --

18 THE COURT: Okay.

19 MR. PRINCE: -- that -- I mean, that's what discovery is for.  
20 That's what signing interrogatories are for, depositions, et cetera. That's  
21 how discovery under oath is conducted.

22 THE COURT: Okay. And regardless, none of that evidence is  
23 in is in --

24 MR. WINNER: And I understand your ruling.

25 THE COURT: -- this trial.

1 MR. WINNER: But I'll bet you \$100 Mr. Prince has been  
2 surprised to find out about prior medicals that were never disclosed and  
3 that had never been given to him --

4 MR. PRINCE: Yeah, but think about --

5 MR. WINNER: -- when he was doing defense work.

6 MR. WINNER: -- how he invites speculation. I'm not adding  
7 further argument on this.

8 THE COURT: No. It is what it is. Like you said, I don't think  
9 there's any evidence in it anyway.

10 MR. WINNER: And I understand your ruling, Judge. Just --

11 THE COURT: Okay.

12 MR. WINNER: -- that's the practicality of it.

13 MR. PRINCE: When they sleep, they see ghosts. I don't.

14 THE COURT: Pardon?

15 MR. PRINCE: When the defense lawyers sleep, they see  
16 ghosts everywhere. They're just every -- they're just flying above. I just  
17 sleep normally.

18 MR. HENRIOD: And beyond that, Your Honor, I don't have  
19 any others to propose.

20 THE COURT: Okay. So now, both sides are familiar with the  
21 instructions through -- 1 through 50. And other than everything that  
22 we've --

23 MR. PRINCE: Yes.

24 THE COURT: -- put on the record, we're going to start fresh  
25 Monday morning, 9:00.



1 MR. PRINCE: Yes.

2 THE COURT: I'm going to start reading them. I'm going to  
3 read them real fast.

4 MR. PRINCE: Oh, yeah. I have a couple things. Just a  
5 couple fast things.

6 THE COURT: Okay.

7 MR. WINNER: I have one fast thing, too.

8 MR. PRINCE: So we did that. I'm moving to -- I filed a trial  
9 brief last night moving to strike Dr. Schifini's testimony under the  
10 Hallmark standard as well as FGA and Williams. He says that he is not  
11 giving and cannot -- has not given an opinion to a reasonable degree of  
12 medical probability whether the Plaintiffs were injured or were not  
13 injured. And as a result of that, we believe that he can't satisfy the  
14 assistance part of it, because he can't assist the trier of fact to  
15 understand the evidence or determine a fact in issue.

16 The principal issue is causation in this case. He's simply  
17 assume -- if you assume an injury that only -- that we believe that under  
18 Hallmark, when you're talking about a reliable methodology, it wasn't  
19 specific. It wasn't based on particularized facts. He just made a critical,  
20 just an assumption for which he drew an arbitrary line about cutting off  
21 certain treatment, if you assumed an injury, then everybody was done  
22 after mid-February.

23 Moreover, using the *FGA v. Giglio and Williams* analysis, his  
24 testimony is incompetent, because it lacks a degree of probability of  
25 admissibility, because it does nothing but to controvert, since he's not

1 giving any specific opinion on causation, none of it is relevant to this jury  
2 to understanding those issues and so therefore, we believe it's not  
3 admissible and should be stricken.

4 THE COURT: Okay. I've looked it over. I believe that  
5 effectively under *Williams*, he is talking about causation. He's basically  
6 saying there is no injury, which is --

7 MR. PRINCE: He can't -- he said --

8 THE COURT: -- kind of the same thing.

9 MR. PRINCE: -- no, he didn't say that. He said no injuries,  
10 giving no opinion.

11 THE COURT: I -- what he said was -- he basically can't say  
12 whether your client's lying or not, so he's saying, I don't think there's any  
13 injury, but let's give her the benefit of the doubt and let's assume that  
14 she had an injury. It was resolved by this time. In any event, none of it  
15 was caused by --

16 MR. PRINCE: Okay.

17 THE COURT: -- that accident.

18 MR. PRINCE: That's not what he said. Okay.

19 THE COURT: So -- and beyond that, there was no  
20 contemporaneous objections, so I don't think that it can be raised at this  
21 point.

22 MR. PRINCE: Oh, yes, I did. I objected yesterday.

23 THE COURT: No, there was no objection.

24 MR. PRINCE: Well, I established -- I didn't need an objection.  
25 I established a record of him today even, yesterday and today. So right, I

1 have the ability to move to strike it after his testimony's completely  
2 concluded.

3 THE COURT: I --

4 MR. PRINCE: Which is what I did.

5 THE COURT: -- think there has to be a contemporaneously  
6 made --

7 MR. PRINCE: Well, I'm -- I --

8 THE COURT: -- to give the Court the opportunity to address  
9 it and fix it, if there's something wrong. There has not been. Unless it's  
10 clear error, I think you have to object at the time. In any event, the only  
11 objections I recall -- and the record will speak for itself -- was based upon  
12 cumulative and that's not the basis of this motion. So is there anything  
13 else to be added?

14 MR. WINNER: May I add that Mr. Degree when he was -- I  
15 think it was Mr. Degree and Mr. Prince, when he was questioning Dr.  
16 Schifini --

17 MR. PRINCE: He did question Dr. Schifini.

18 MR. WINNER: -- said, are you aware or -- no. When he was  
19 questioning his client, are you aware Dr. Schifini has already given the  
20 opinion you were injured and all of this was reasonable and necessary,  
21 which Dr. Schifini did not say in his report. He said, If I assume there is  
22 an injury, then I think this amount of treatment would be appropriate,  
23 based on what little pathology I see. But he did not say -- specifically did  
24 not say I think she was injured.

25 THE COURT: Correct.

1 MR. WINNER: He did not say that. I had to respond to that,  
2 because I objected. You said something about the evidence will speak  
3 for itself and Schifini said I don't have an opinion that -- I can't say that  
4 she was injured, based on what I see.

5 THE COURT: So --

6 MR. WINNER: Yeah.

7 MR. HENRIOD: And I do think that it's permissible under  
8 *Williams v. District Court* and under *Leavitt v. Seams* and even *FGA, Inc.*  
9 *v. Giglio* and the Court entertained argument on this line of cases for  
10 about two hours, I think, before trial.

11 THE COURT: Okay. So that's denied and --

12 MR. WINNER: I have a last point to make. I've never tried a  
13 case against Mr. Prince, believe it or not. I don't expect this to happen,  
14 but there is Instruction Number 42 and I think it's an appropriate  
15 instruction necessary in this particular case. As you know, a number of --  
16 as you may know, a number of judges don't give the instruction, because  
17 they think it draws extra attention to insurance. Given the fact that it was  
18 blurted out by two different witnesses here, I think it's necessary to give  
19 it. I have a real problem with focusing on or talking about that  
20 instruction at any length during closing argument.

21 MR. PRINCE: Well, the *Orth* case says you can comment on  
22 it. You're giving the instruction. I guess if he has an objection during the  
23 course of the argument, you'll rule on it.

24 THE COURT: And I would assume that in fairness, you aren't  
25 going to hammer that. I mean, I --

1 MR. PRINCE: They -- in Orth -- *Campanna v. Orth*, that  
2 instruction was approved, and I discussed it.

3 THE COURT: I understand. And you've agreed to it, quite  
4 frankly, that both sides have agreed to it.

5 MR. PRINCE: Correct. It's in. So -- right. And I -- and -- right.  
6 You need to read the *Campanna v. Orth* case. That --

7 THE COURT: But --

8 MR. PRINCE: Well, I'm not going to talk about it extensively,  
9 so --

10 THE COURT: Okay. I'm just saying I don't want to see you  
11 arguing it to the point where I think that you're now kind of -- don't look  
12 at the -- you know.

13 MR. PRINCE: Correct.

14 MR. WINNER: The elephant. It would be tantamount to my  
15 saying over and over and over again --

16 THE COURT: Okay.

17 MR. WINNER: -- you're not to consider that health insurance  
18 already --

19 THE COURT: Object if it happens and --

20 MR. WINNER: -- paid for the insurance.

21 THE COURT: -- I'll watch for it.

22 MR. WINNER: It's not fair to them and it wouldn't be fair to  
23 me to do the opposite.

24 THE COURT: Sounds good. See you at 9:00 Monday?

25 MR. HENRIOD: Oh, Your Honor, I also don't have any

1 problem with the verdict forms.

2 THE COURT: Oh.

3 MR. HENRIOD: Do you want to --

4 THE COURT: You're right. I didn't ask that.

5 MR. PRINCE: Yeah, we've agreed on those.

6 THE COURT: That's Number 7. I only got to 6.

7 MR. PRINCE: We've agreed on those.

8 THE COURT: Do we have them? We don't have yours.

9 MR. HENRIOD: Okay. So you should have --

10 THE CLERK: I have the two-pager from -- I believe, Mr.  
11 Prince's office sent it.

12 MR. HENRIOD: Okay. Let me --

13 THE CLERK: Unless it's attached to something and I just  
14 didn't see it.

15 MR. HENRIOD: We should have that momentarily.

16 THE CLERK: Okay.

17 [Pause]

18 THE COURT: The verdict form doesn't have your logos on it,  
19 right, guys?

20 MR. HENRIOD: No.

21 MR. PRINCE: Oh also, just for our record, Your Honor. As  
22 part of our evidence, we have a stipulation that we filed with the Court  
23 May 28th, 2019 regarding the present value costs of the single level  
24 cervical fusion of \$237,554 and a life expectancy of 54.8 years, that that  
25 would have been testified to by an economist, had he been called. And

1 we can -- we have the stipulation that can be shown to the jury in lieu of  
2 calling him to expedite, so --

3 THE COURT: Okay. How do you all do that?

4 MR. PRINCE: Just the way we did it.

5 MR. WINNER: I do it by reading to the jury. It's not an  
6 exhibit or --

7 THE COURT: Do you do it like --

8 MR. WINNER: -- shown to them.

9 THE COURT: -- before you rest your case?

10 MR. PRINCE: I'm inserting it now. I'm putting it on the  
11 record before we rest, so --

12 THE COURT: Okay. We still haven't done that. Don't --  
13 somebody remember to do that.

14 MR. PRINCE: We will.

15 THE COURT: All right. It doesn't go with the jury, though.  
16 You're just going to --

17 MR. PRINCE: No, I'm just saying -- right. I mean, I could tell  
18 the jury this in my closing that if the parties stipulated to a fact, you can  
19 consider that conclusively proven and this is what --

20 THE COURT: Okay.

21 MR. PRINCE: -- a fact that we stipulated to.

22 THE COURT: Got it.

23 MR. WINNER: Your -- the way it's typically done is Your  
24 Honor would read that stipulation to the jury --

25 THE COURT: Okay.

1 MR. WINNER: -- and I'd agree to it. That's all.

2 THE COURT: Okay. Just somebody remind me.

3 MR. PRINCE: All right.

4 THE COURT: And is that it?

5 THE CLERK: Not yet.

6 THE COURT: Oh, we're doing the verdict form things.

7 THE CLERK: Just waiting for it.

8 [Pause]

9 MR. PRINCE: Judge, are we good?

10 THE COURT: Do you all need to see the verdict form to agree  
11 to it?

12 MR. PRINCE: No, we already did.

13 THE COURT: Okay. Just -- let's just run over it on Monday,  
14 you know, before it goes back to them, okay?

15 MR. PRINCE: We're fine. Yeah, we agree on that.

16 MR. WINNER: All right.

17 THE COURT: Okay. All right. Thank you. You all have a  
18 great weekend.

19 MR. WINNER: Thanks, Judge.

20 THE COURT: Uh-huh.

21 [Proceedings concluded at 2:33 p.m.]

22 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
23 audio-visual recording of the proceeding in the above entitled case to the  
best of my ability.

24 

25 Maukele Transcribers, LLC  
Jessica B. Cahill, Transcriber, CER/CET-708



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JUN 03 2019

BY, Dara Yorke  
DARA YORKE, DEPUTY

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IN THE EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

DESIRE EVANS-WAIAU, and  
GUADALUPE PARRA-MENDEZ,

Plaintiffs,

vs.

BABYLYN TATE,

Defendant.

CASE NO.: A-16-736457-C

DEPT. NO.: XVIII

JURY INSTRUCTIONS

A-16-736457-C  
JI  
Jury Instructions  
4839972



LADIES AND GENTLEMEN OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person or a corporation.

The purpose of the trial is to ascertain the truth.

INSTRUCTION NO. 5

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 6

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness about what the witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, proof of one or more facts from which you could find another fact. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including circumstantial evidence, should be considered by you in arriving at your verdict.



INSTRUCTION NO. 7

You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works for additional information.

INSTRUCTION NO. 8

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 9

No statement, ruling, remark or comment which I may make during the course of the trial is intended to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts. At times, I may even ask questions of witnesses. If I do, it is for the purpose of bringing out matters which I feel should be brought out and not in any way to indicate my opinion about the facts or to indicate the weight I feel you should give to the testimony of the witness. I may, during the trial, take notes of the witness' testimony. You are not to make any inference from that action. I am required to prepare for legal arguments of counsel during this trial and, for that reason, I may take notes.

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INSTRUCTION NO. 10

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

INSTRUCTION NO. 11

During the course of the trial you have heard reference made to the word "interrogatory." An interrogatory is a written question asked by one party to another, who must answer it under oath in writing. You are to consider interrogatories and the answers thereto the same as if the questions had been asked and answered here in court.

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INSTRUCTION NO. 12

Certain charts and summaries have been received into evidence to illustrate facts brought out in the testimony of some witnesses. Charts and summaries are only as good as the underlying evidence that supports them. You should therefore give them only such weight as you think the underlying evidence deserves.

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INSTRUCTION NO. 13

The credibility or believability of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

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INSTRUCTION NO. 14

Discrepancies in a witness's testimony or between his testimony and that of others, if there were any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.



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INSTRUCTION NO. 15

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

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INSTRUCTION NO. 16

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his or her opinion as to any matter in which he or she is skilled. You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons for it are unsound.

INSTRUCTION NO. 17

An expert witness has testified about his reliance upon books, treatises, articles or statements that have not been admitted into evidence. Reference by an expert witness to this material is allowed so that the expert witness may tell you what he relied upon to form his opinion. You may not consider the material as evidence in this case. Rather, you may only consider the material to determine what weight, if any, you will give to the expert's opinions.

INSTRUCTION NO. 18

Hypothetical questions have been asked of expert witnesses. In a hypothetical question, the expert witness is told to assume the truth of certain facts, and the expert witness is asked to give an opinion based upon those assumed facts. You must decide if all of the facts assumed in the hypothetical question have been established by the evidence. You can determine the effect of that admission upon the value of the opinion.

INSTRUCTION NO. 19

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him or her, the meaning of such an instruction is this: that unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

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3 A "preponderance of the evidence" means such evidence as, when  
4 considered and compared with that opposed to it, has more convincing force and  
5 produces in your mind a belief that what is sought to be proved is more probably  
6 true than not true. In determining whether a party has met this burden, you will  
7 consider all the evidence, whether produced by the plaintiffs or defendant.  
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INSTRUCTION NO. 21

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses. The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his testimony.

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.



INSTRUCTION NO. 23

The plaintiffs seek to establish a claim of negligence. I will now instruct  
you on the law relating to this claim.

In order to establish a claim of negligence, the plaintiffs must prove the following elements by a preponderance of the evidence:

1. That the defendant was negligent; and
2. That the defendant's negligence was a proximate cause of damage to the plaintiffs.

INSTRUCTION NO. 25

The mere fact there was an accident and that someone was injured does not of itself prove that anyone acted negligently. Liability is never presumed but must be established by the preponderance of the evidence.

When I use the word "negligence" in these instructions, I mean the failure to do something, which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, to avoid injury to themselves or others, under circumstances similar to those shown by the evidence.

It is the failure to use ordinary or reasonable care.

Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.

The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

INSTRUCTION NO. 27

It is the duty of the driver of any vehicle to avoid placing himself or others in danger; and to use like care to avoid an accident; to keep a proper lookout for traffic and other conditions to be reasonably anticipated and to maintain proper control of his vehicle.

INSTRUCTION NO. 28

A person who, himself, is exercising ordinary care, has a right to assume that every other person will perform their duty under the law; and in the absence of reasonable cause for thinking otherwise, it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another.

INSTRUCTION NO. 29

There was in force at the time of the occurrence in question, a law which read as follows:

“The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.”

A violation of the law just read to you constitutes negligence as a matter of law. If you find that a party violated a law just read to you, it is your duty to find such violation to be negligence; and you should then consider the issue of whether that negligence was a legal cause of injury or damage to the plaintiffs.

There was in force at the time of the occurrence in question, a law which read as follows:

1. A driver of a motor vehicle shall:
  - a. Exercise due care to avoid a collision with a pedestrian;
  - b. Give an audible warning with the horn of the vehicle if appropriate and when necessary to avoid such a collision; and
  - c. exercise proper caution upon observing a pedestrian:
    1. On or near a highway, street or road;
    2. At or near a bus stop or bench, shelter or transit stop for passengers of public mass transportation or in the act of boarding a bus or other public transportation vehicle; or
    3. In or near a school zone or a school crossing zone marked in accordance with NRS 484B.363 or a marked or unmarked crosswalk.



There was in force at the time of the occurrence in question, a law which read as follows:

(a) When official traffic-control devices are not in place or not in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be so to yield, to a pedestrian crossing the highway within a crosswalk when the pedestrian is upon the half of the highway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the highway as to be in danger.

...

(c) Whenever a vehicle is stopped at a marked crosswalk or at an unmarked crosswalk at an intersection, the driver of any other vehicle approaching from the rear shall not overtake and pass the stopped vehicle until the driver has determined that the vehicle being overtaken was not stopped for the purpose of permitting a pedestrian to cross the highway.

A violation of the law just read to you constitutes negligence as a matter of law. If you find that a party violated a law just read to you, it is your duty to find such violation to be negligence; and you should then consider the issue of whether that negligence was a legal cause of injury or damage to the plaintiffs.

The fact that the speed of a vehicle is lower than the prescribed limits does not relieve a driver from the duty to decrease speed when special hazards exist or may exist with respect to other traffic and highway conditions. Speed must be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on a highway in compliance with legal requirements and the duty to all persons to use due care.

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3 The defendant claims that plaintiff Desire Evans-Waiau's own negligence  
4 contributed to her harm. To succeed on this claim, defendant must prove both of  
5 the following:

6 That plaintiff Evans-Waiau was negligent; and

7 That plaintiff Evans-Waiau's negligence was a proximate cause of her harm.

8 Plaintiff Evans-Waiau may not recover damages if her comparative  
9 negligence has contributed more to her injury than the negligence of the defendant.  
10 However, if the plaintiff is negligent, the plaintiff may still recover a reduced sum,  
11 so long as her comparative negligence was not greater than the negligence of the  
12 defendant.

13  
14 If you determine that plaintiff Evans-Waiau is entitled to recover upon the  
15 theory of negligence, you shall return by general verdict the total amount of  
16 damages sustained by the plaintiff and you shall return a special verdict indicating  
17 the percentage of negligence attributable to each party.

18 The percentage of negligence attributable to plaintiff Evans-Waiau shall  
19 reduce the amount of such recovery by the proportionate amount of such  
20 negligence and the reduction will be made by the court.

There were in force at the time of the occurrence in question a law which read as follows:

1. A person shall not drive, move, stop or park any vehicle, or cause or knowingly permit any vehicle to be driven, moved, stopped or parked, except for purposes of repair, on any highway if such vehicle:
  - (a) Is in such unsafe condition as to endanger any person or property.
  - (b) Is not equipped with lamps, reflectors, brakes, horn and other warning and signaling devices, windows, windshield, mirrors, safety glass, mufflers, fenders and tires, and other parts and equipment in the position, condition and adjustment required by the laws of this State as to such parts and equipment of a vehicle on the highways of the State at the time, under the conditions and for the purposes provided in such laws.
2. With respect to any vehicle being driven, moved, stopped or parked on any highway, it is unlawful for any person to do any act forbidden, or fail to perform any act required, by the laws of this State relating to the lamps, brakes, fenders and other parts and equipment, size, weight and load as to such vehicle on the highways.

An unexcused violation of the laws just read to you constitutes negligence as a matter of law. If you find that a party, without excuse or justification, violated a law just read to you, it is your duty to find such violation to be negligence, and you should then consider the issue of whether that negligence was the proximate cause of injury or damage to the plaintiff.

1       The burden of proof is upon the person who violated the law to show by a  
2 preponderance of evidence that such violation was excusable or justifiable. A  
3 violation of the law is excusable or justifiable only if you find that the person who  
4 violated the law did what might reasonably be expected of a person of ordinary  
5 prudence, acting under similar circumstances, who desired to comply with the law.  
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There were in force at the time of the occurrence in question a law which read as follows:

1. Every motor vehicle must be equipped with two tail lamps mounted on the rear, which, when lighted, emit a red light plainly visible from a distance of 500 feet to the rear.

An unexcused violation of the laws just read to you constitutes negligence as a matter of law. If you find that a party, without excuse or justification, violated a law just read to you, it is your duty to find such violation to be negligence, and you should then consider the issue of whether that negligence was the proximate cause of injury or damage to the plaintiff.

The burden of proof is upon the person who violated the law to show by a preponderance of evidence that such violation was excusable or justifiable. A violation of the law is excusable or justifiable only if you find that the person who violated the law did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

There were in force at the time of the occurrence in question a law which read as follows:

1. A driver shall not turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement and after giving the appropriate signal if any other vehicle may be affected by such movement.
2. A signal of intention to turn right or left, or otherwise turn a vehicle from a direct course, shall be given continuously during not less than 100 feet traveled in a business or residential district and not less than 300 feet traveled in any other area prior to changing the course of a vehicle. This rule shall be observed, regardless of the weather.
3. A driver shall not stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal to the driver of any vehicle immediately to the rear.

An unexcused violation of the laws just read to you constitutes negligence as a matter of law. If you find that a party, without excuse or justification, violated a law just read to you, it is your duty to find such violation to be negligence, and you should then consider the issue of whether that negligence was the proximate cause of injury or damage to the plaintiff.

The burden of proof is upon the person who violated the law to show by a preponderance of evidence that such violation was excusable or justifiable. A

1 violation of the law is excusable or justifiable only if you find that the person who  
2 violated the law did what might reasonably be expected of a person of ordinary  
3 prudence, acting under similar circumstances, who desired to comply with the law.  
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INSTRUCTION NO. 37

When I use the expression "proximate cause," I mean that a cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury.

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3 More than one person may be to blame for causing an injury. If you decide  
4 that the defendant was negligent and that her negligence was a proximate cause of  
5 injury to the plaintiff, it is not a defense that some third person who is not a party  
6 to the suit may also have been to blame.

7 However, if you decide that the sole proximate cause of injury to the  
8 plaintiff was the conduct of some person other than the defendant, then your  
9 verdict should be for the defendant.  
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In determining the amount of losses, if any, suffered by the plaintiff as a proximate result of the accident in question, you will take into consideration the nature, extent and duration of the injuries you believe from the evidence plaintiff has sustained, and you will decide upon a sum of money sufficient to reasonably and fairly compensate plaintiff for the following items:

1. The reasonable medical expenses plaintiff has necessarily incurred as a result of the collision and the medical expenses which you believe the plaintiff will be reasonably certain to incur in the future as a result of the collision;
2. The physical and mental pain, suffering, anguish, disability, and loss of enjoyment of life endured by the plaintiff from the date of the collision to the present; and
3. The physical and mental pain, suffering, anguish, disability, and loss of enjoyment of life which you believe plaintiff will be reasonably certain to experience in the future as a result of collision.

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3       You have heard testimony that plaintiff Evans-Waiau may pursue multiple  
4 surgeries in the future.

5       If you determine to award damages to plaintiff Evans-Waiau, you may  
6 decide whether plaintiff has proven by a preponderance of the evidence that she is  
7 reasonably certain to require one surgery in the future. The Court expresses no  
8 opinion as to whether or not plaintiff Evans-Waiau has met this burden of proof.

9       You may not consider for any purpose, however, whether or not plaintiff  
10 might choose to undertake any other significant medical procedures in the future,  
11 other than the surgery described above.  
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3       It is the duty of a person who has been injured to use reasonable diligence in  
4 caring for her injuries and reasonable means to prevent their aggravation to  
5 accomplish healing. When one does not use reasonable diligence to care for her  
6 injuries, and they are aggravated as a result of such failure, the liability, if any, of  
7 another whose act or omission was a legal cause of the original injury, must be  
8 limited to the amount of damage that would have been suffered if the injured  
9 person herself had exercised the diligence required of her.  
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11       The defendant has the burden of proving, whose act or omission was the  
12 cause of the original injury, and to present evidence that the plaintiff failed to use  
13 reasonable diligence in treating her injuries.  
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INSTRUCTION NO. 42

You are not to discuss or even consider whether or not the plaintiffs were carrying insurance to cover medical bills, or any other damages they claim to have sustained.

You are not to discuss or even consider whether or not the defendant was carrying insurance that would reimburse her for whatever sum of money she may be called upon to pay to the plaintiffs.

Whether or not a party was insured is immaterial, and should make no difference in any verdict you may render in this case.

INSTRUCTION NO. 43

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

INSTRUCTION NO. 44

According to a table of mortality the life expectancy of a female person aged 26 is expected to live 54.8 additional years. This figure is not conclusive. It is an average life expectancy of persons who have reached that age. These figures may be considered by you in connection with other evidence relating to the probable life expectancy of plaintiffs, including evidence of occupation, health, habits and other activities, bearing in mind that many persons live longer and many die sooner than the average.



INSTRUCTION NO. 45

Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy nor speculation is a proper basis for determining damages. However, absolute certainty as to the damages is not required. It is only required that plaintiffs prove each item of damage by a preponderance of the evidence.

INSTRUCTION NO. 46

The court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case, including that of damages, must not be taken as indicating an opinion of the court as to what you should find to be the facts or as to which party is entitled to your verdict.

INSTRUCTION NO. 47

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the court.

INSTRUCTION NO. 48

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to Court where the information sought will be given to you in the presence of the parties or their attorneys. Read backs of testimony are time consuming and are not encouraged unless you deem it a necessity. Should you require a read back, you must carefully describe the testimony to be read back so that the court reporter can arrange her notes. Remember, the Court is not at liberty to supplement the evidence.

INSTRUCTION NO. 49

When you retire to consider your verdict, you must select one of your number to act as foreperson, who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

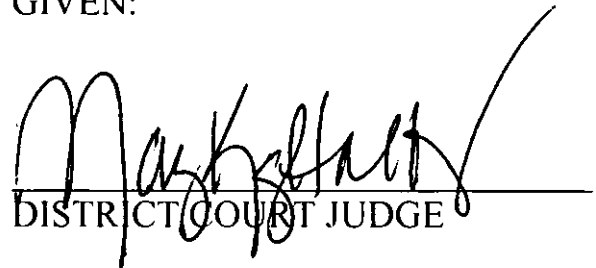
The percentage of negligence attributable to the plaintiff, if any, shall reduce the amount of his recovery by the proportionate amount of his negligence. If you determine that the plaintiff is entitled to recover, you shall return a general verdict indicating the total amount of damages the plaintiff would be entitled to recover without regard to his contributory negligence, if any; a special verdict indicating the percentage of negligence attributable to each party; and a general verdict indicating the net sum determined to be recoverable by the plaintiff.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. As soon as six or more of you have agreed upon the verdict, you must have the verdict signed and dated by your foreperson, and then return with them to this room.

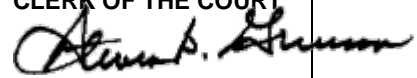
INSTRUCTION NO. 50

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

GIVEN:

  
DISTRICT COURT JUDGE

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1 RTRAN

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5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

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8 DESIRE EVANS-WAIAU,  
9 Plaintiff,

10 vs.

11 BABYLYN TATE,  
12 Defendant.

)  
) CASE#: A-16-736457-C  
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) DEPT. XVIII  
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13 BEFORE THE HONORABLE MARY KAY HOLTHUS  
14 DISTRICT COURT JUDGE  
MONDAY, JUNE 3, 2019

15 **RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 13**

16  
17 APPEARANCES:

18 For the Plaintiff:

DENNIS M. PRINCE, ESQ.

19 For the Defendant:

20 JOEL D. HENRIOD, ESQ.  
21 THOMAS E. WINNER, ESQ.

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25 RECORDED BY: YVETTE SISON, COURT RECORDER



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