

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF NEVADA,
LLC,

Appellants/Cross-Respondents,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents/Cross-Appellants.

BARRY JAMES RIVES, M.D.; and
LAPAROSCOPIC SURGERY OF NEVADA,
LLC,

Appellants,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents.

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APPELLANTS' APPENDIX
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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

TITINA FARRIS, ET AL.,

Plaintiffs,

vs.

BARRY RIVES, M.D.,

Defendant.

CASE#: A-16-739464-C

DEPT. XXXI

BEFORE THE HONORABLE JOANNA S. KISHNER
DISTRICT COURT JUDGE
THURSDAY, OCTOBER 17, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 4

APPEARANCES:

For the Plaintiffs:

KIMBALL JONES, ESQ.
JACOB G. LEAVITT, ESQ.
GEORGE F. HAND, ESQ.

For the Defendants:

THOMAS J. DOYLE, ESQ.

RECORDED BY: SANDRA HARRELL, COURT RECORDER

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None		

<u>FOR THE DEFENDANT</u>	<u>MARKED</u>	<u>RECEIVED</u>
None		

Las Vegas, Nevada, Tuesday, December 17, 2019

[Case called at 12:40 p.m.]

THE COURT: On the record.

MR. LEAVITT: Apologies, Your Honor, we didn't check our email this morning or at least for the last few hours.

THE COURT: We just tried to give you the courtesy that our pre-trial conferences this morning, we had one attorney an hour and forty minutes late, was it Madam Court Recorder? And we had other attorneys that were incredibly late this morning, so that unfortunately we ran late, so we try to give you all the courtesy, that my team of course, still needed lunch so that we'll be starting a few minutes late. So I asked my JEA to email both sides and so, I guess, you got it at least?

MR. LEAVITT: Yes, I did, Your Honor, thank you.

THE COURT: So we're just trying to give you the courtesy so that you all didn't wind up [indiscernible].

MR. DOYLE: Your Honor, can I return the juror list?

THE COURT: Oh, yes. If you don't want your juror list, you don't mind bringing this back. Actually, it stays where it is because if they're talking to counsel. Remember they may want to -- thank you so much, yes -- so they may want to put a witness list in, counsel. You could just hand them to the marshal that would be great. Thank you. Appreciate it.

MR. DOYLE: And I have an extra copy of the slides that I used --

THE COURT: We don't keep them for any reason, unless you needed them.

THE CLERK: Is anybody using the on-line today?

MR. LEAVITT: Yes, I will be, Your Honor. I will be.

THE CLERK: Okay.

THE COURT: She works -- she's in charge, that's good. So do you need the TV screens on? We generally don't put the TV screens -- are you going to need them for the witness? We'll be glad to put them on if you think you're going to need it for the witness.

MR. JONES: I suspect that -- the first witness we will not.

THE COURT: Okay. Then do you want the Elmo up for the first witness? Yes or no?

MR. JONES: No.

THE COURT: Okay. Then Cindy maybe you should put that down. The only reason why we're asking, normally you're more than welcome, fine to do whatever you want, just let us know. Some people don't like the Elmo up, particularly from where your table is because you see that visual. It's up to you all. If you want it up --

MR. LEAVITT: Oh, no, no. Let's --

THE COURT: -- she'll put it up for you. If you want it up only when you're going to be needing it or when Defense Counsel needs it, obviously, then we'll put it up for them. But if you don't need it for your first witness some people like it down because of the line of sight; and if you want it up, we'll put it up for you.

MR. JONES: No, thank you, Your Honor.

THE COURT: So which do you want it, up or down?

MR. JONES: Down, down.

THE COURT: Okay. And then the same thing with the TV screen. We're more than glad to put the TV screens fully on for you, but when you put them on there's a little bit of a brightness and some people don't like -- Defense Counsel, you're hearing what I'm saying it's all right?

MR. DOYLE: Yes, I'm listening.

THE COURT: Because some people don't like the brightness and some people find it a little bit distracting, so some counsel prefer that we only turn them on when you actually want them on, versus just leaving them on because of -- some people don't like that brightness. Do you want them on? We'll leave them on the entire time.

From our standpoint we're glad to accommodate any which way, but -- so we're glad to do it anyway. But like I said, some people don't like it because you get either the blue screen that some people find a little distracting and some people are fine with it, so just let us know whichever way you want it, and we're glad to accommodate. Okay.

MR. LEAVITT: Your Honor, do you mind if I move that back --

THE COURT: You're also more than welcome to move the clip chart wherever you want, just be careful of your head so you don't --

MR. LEAVITT: There's a marker back here.

THE COURT: Okay. Do you have all jurors?

THE MARSHAL: We do, Judge.

THE COURT: Okay. So we have all of our jurors so

everyone's ready. Should I presume that the gentleman in the first row is a witness?

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay. What's your preference with regard to witnesses, because the Court's fine with whatever you all want. Some people like to have the witness already on the stand when the jury comes in, and just have the witness sworn in; some people like the formality of Counsel, would you like to call your first witness, the witness comes through the door, and comes walking into the stand. Once again, the Court's fine any which way you all want it; and if different sides want it different ways as long as you are in agreement, we don't -- it's your trial, it's your choice.

MR. LEAVITT: No, Your Honor, I'll just call him when -- this is Justin Willer, M.D., I'll just call -- I'll call him when the jury's seated, it's fine.

THE COURT: Do you want him to be seated there from when you're going to call him? Because some people don't --

MR. LEAVITT: No, actually, why don't -- do you mind if he just sits at the stand?

MR. DOYLE: That's fine.

THE COURT: Then that's perfectly fine.

Exhibit notebooks is what I'm about to ask you about because Madam Clerk is about to get the proposed exhibit notebooks that we have.

THE CLERK: Yes. And I do not have Plaintiff's exhibit binder

for the witness, unless counsel has it.

THE COURT: You only gave us one binder?

THE CLERK: Yes.

THE COURT: Remember you only gave us one binder.

You're supposed to get us that second binder before your witnesses. At the time of the calendar call you only gave us one.

MR. JONES: No, I gave two binders to the marshal that was there that day. There was -- so we had one binder of exhibits and we had another binder.

THE COURT: The demonstrative?

MR. JONES: Demonstrative, yeah. What were we missing?

THE COURT: You were to -- remember, we have to have one for the witness, and we have to have one the official set, because we don't --

MR. JONES: Oh, we didn't bring two binders.

THE COURT: Right. Because if you don't do that, remember the official set always has to stay with Madam Clerk because -- see, sub two, two sets exhibits which must be three-hole punched, unless we submit it in a three-ring binders because remember you need to have the witness needs to look at one and the clerk needs to maintain the official court copy because that avoids the issue of people sometimes inadvertently taking things out and different things. And the clerk has to maintain custody and control. That's a clerk rule, that's not a conditional rule, that's a clerk's office rule. So --

MR. LEAVITT: I'm not using Plaintiff's exhibit binder for this

witness.

THE COURT: If it's the same and there's no objection, the Court has no -- it's fine as long as you all are on the -- it's numbered the same and if there's no objection from Defense, the Court's fine with it.

All right. We went down from a three -- I know a lot of departments require three, we only require two. We used to have three, we've tried to save some paper, so I share with the clerk, but she needs to maintain custody of it, which is why you always have to have two.

We have two Defense?

THE CLERK: Yes.

THE COURT: There were two Defense. That's why remember on the calendar call she said we need the other one. So what is the witness going to look at? Are you going to have him refer to any exhibits during his testimony?

MR. LEAVITT: Your Honor, just Defendant's exhibit.

THE COURT: Defendant's exhibit binder.

So Madam Clerk, can we have the two exhibit binders for Defendant so we can put those on the stand.

THE CLERK: I think there's just one binder for --

THE COURT: There's just one binder?

THE CLERK: Yes.

THE COURT: Marshal, would you mind giving that to the witness. So that is exhibits, was that A through Z?

THE CLERK: A to GGG.

THE COURT: I'm sorry. A through GGG. Okay.

And we ask that you keep it closed until you're referenced to something because --

DR. WILLER: Yes, Your Honor.

THE COURT: -- that way we don't have any issue of anyone raising an issue someone's looking at something.

Anything else?

DR. WILLER: Yes, Your Honor.

THE COURT: No worries.

Okay. So the witness has A through GGG. Are you going to reference anything in the Plaintiff's binder?

MR. LEAVITT: Not for this witness, Your Honor.

THE COURT: Not for this witness. Okay.

Now, Plaintiff we do have your demonstrative binder, did you need the witness to have the demonstrative binder?

MR. LEAVITT: No, Your Honor.

THE COURT: Not this witness. Okay.

Do you wish the demonstrative binder to be on the witness stand for your next witness? Are you going to utilize it then? Up to you. Or you can wait until the next one. Usually we have a set up there ready for you if you want.

MR. JONES: I will be using the demonstrative binder, I believe, Your Honor --

THE COURT: For the next witness?

MR. JONES: -- but I will have another one brought in immediately.

THE COURT: Okay. The demonstrative binder we have -- okay. Demonstrative does not go back to the jury, so the clerk doesn't need to maintain custody and control. That can be utilized for the witness. It's the --

MR. JONES: Oh, okay.

THE COURT: -- official exhibits. Remember --

MR. JONES: Perfect.

THE COURT: -- the exhibits -- the clerk has to maintain custody and control because that's what officially goes back to the jury so she has to maintain custody and control to ensure at all time, because remember, she has to mark it if it gets admitted and everything, and she can't admit it -- she's got long arms, but they're not that long.

MR. JONES: Okay. So that --

THE COURT: So it's the official exhibit binder.

MR. JONES: Perfect. So I will not be using the official exhibits today. So we will --

THE COURT: Feel free to also refer to the golden rod, the DCR 2.67 through 2.69 which sets forth. Okay.

So you already submitted the one, so you have the one for the official, which is why this Court is making distinction. I mean if you choose to share it with your witness, that's your issue for your convenience. The Court has the official one you did submit at the time of the calendar call so that's why this Court's making a distinction in how this Court is phrasing that. Okay? We had the A through GGG from Defendant, and we had the 1 through -- I think it was 18, but I'm doing

this from memory --

THE CLERK: Yes.

THE COURT: -- from --

MR. LEAVITT: That sounds right.

THE COURT: -- from October 8th from memory. So I had a few hearings since then. And remember you never got back to us on the Plaintiff's Exhibit 8, which was part of Defendant's -- I'm doing this one from memory. It's part of Defendant's J through Z, but was also some of other Defendant's other letters, i.e. on 8 for Plaintiff's it was the -- what was on your jump drive images? Now, I don't want to say anything more because you have a witness on the stand yet, but remember --

MR. DOYLE: We'll figure it out.

THE COURT: -- you were supposed to have gotten that back to the Court by first day of trial. On that you never got back to the Court.

MR. JONES: Okay. So any --

MR. DOYLE: We'll talk at the end of the day.

THE COURT: Do you need it for this witness, or should we get the jury in and why don't you all start?

MR. LEAVITT: No, not at all. We don't need it for this witness.

THE COURT: Okay. Now, just to let you know, we will be taking a break where we told you we take our break around 3:00, 3:15. I'm not sure exact time, but that conference call with the other case that the attorneys were on hold waiting, waiting, waiting yesterday on is going to have to actually happen today. I can't do that to the other

attorneys.

So did we get an exact time, did they give us a time?

MR. LEAVITT: What time so I know?

THE COURT: It's around 3:00 or 3:15. My JEA is trying to coordinate with them now. So just to let you know we will be taking that -- it's the time we're taking the break normally anyway, but we'll be taking a little bit longer afternoon break because we have to do that today since they were nice enough to reschedule after waiting, waiting, but we can't do that because, remember they also need various things taken care of. Okay?

So anything else you all need? Or are you ready to go?

MR. LEAVITT: Plaintiffs are ready, Your Honor.

THE COURT: Okay.

So Marshal, would you mind getting our jury in? Thank you so much.

So we've got the notebooks ready for the jury. I did not have it today, so it's just a real quick little -- and Marshal, can you check for tomorrow's purposes, no allergies.

THE MARSHAL: Yes.

THE COURT: Thank you. Okay.

And since the Court did not have a chance to check with you all -- on the purely somewhat inconsequential, but goes over well with the jury issue -- is A) do any of you have any airborne nut allergies?

MR. DOYLE: No.

THE DEFENDANT: No.

MR. LEAVITT: No.

MR. JONES: No.

THE COURT: No, no, no, no, no. Okay. Is that a no in the back row, too? Okay.

Do you have any idea -- none of your witnesses do, do they?

What the Court normally does, just for a nice courtesy standpoint, I buy candy for the jury and I usually have a little bowl of candy for the jury, but it maybe may contain nuts, may have been made in a place that has nuts, is neither diabetic, diabetic, nor relying in any way suggest, may or may not cause a choking hazard. I give the jury equal disclaimer, but I usually provide them a nice little bowl of candy if nobody has any allergies and give them the appropriate disclaimer so that if they wish to enjoy it I always ask counsel beforehand to see if anyone has an objection to said accommodation that I do for the jury in general, depending on if I had a chance to go to the appropriate candy stores to buy the appropriate candy.

Does anyone have an objection?

MR. DOYLE: I missed the peanuts on Southwest, so I have no objection.

MR. LEAVITT: No objection.

MR. JONES: No, Your Honor.

THE COURT: Sometimes it's hard candies, sometimes it's chocolate, and it's not there right now because I haven't had a chance to ask anyone, but it might show up tomorrow if everyone's okay with it.

THE MARSHAL: All rise for the jury.

[Jury in at 12:53 p.m.]

[Within the presence of the jury]

THE MARSHAL: All rise for the jurors. All jurors are accounted for. Please be seated.

[TESTIMONY OF JUSTIN AARON WILLER, M.D., PREVIOUSLY
TRANSCRIBED FROM 12:53 p.m.to 4:01 p.m.]

So then at this juncture, Plaintiff's counsel, would you like to call your next witness?

MR. LEAVITT: Yes, Your Honor. May we approach?

THE COURT: Of course you may.

[Sidebar at 4:01 p.m., ending at 4:01 p.m., not transcribed]

THE COURT: Okay. Thank you so much.

Go ahead, counsel for Defense -- I'm sorry, counsel for Plaintiff, would you like to call your next witness?

MR. LEAVITT: Yes, Your Honor. Dr. Rives.

THE COURT: Okay. Thanks very much.

Just watch your step on the stairs.

THE CLERK: Please raise your right hand.

BARRY RIVES, DEFENDANT, SWORN

THE CLERK: Thank you. Please be seated. And could you please state and spell your name for the record?

THE WITNESS: Barry, with an A, J. Rives, R-I-V-E-S.

THE CLERK: Thank you.

THE COURT: Okay, counsel, you may proceed. Oh, you got the pocket microphone, I was about to ask you that.

So, go ahead at your leisure.

MR. JONES: All right, Your Honor, thank you.

DIRECT EXAMINATION

BY MR. JONES:

Q Doctor, over the last few days, you've been sitting next to a woman, she's a consultant on your case, correct?

MR. DOYLE: Objection, Your Honor, relevance and 48.035.

THE COURT: Counsel, please approach.

[Sidebar at 4:02 p.m., ending at 4:08 p.m., not transcribed]

THE COURT: Okay. Sorry about that. Okay. Court is going to overrule the objection in light of the stipulated jury instruction. Go ahead, counsel.

MR. JONES: Thank you, Your Honor.

BY MR. JONES:

Q Doctor, over the last few days, you've been sitting next to a woman, she's a consultant for your case, correct?

A Correct.

Q Doctor, was she here to assist you in your preparation for your testimony today?

A No.

Q Okay. Did she assist you in your preparation for your testimony today?

A No.

Q Doctor, do you have a clear recollection of the July 3rd, 2015 surgery, or would you be relying on your notes to recall what you did or

did not do?

A I would say it's a combination of both.

Q Okay. Doctor, on a scale of one to ten, how important is patient safety to you?

A Ten.

Q I'm going to ask you some questions about patient safety. I don't want to confuse anyone and say that I'm specifically asking about standard of care, okay. I'm asking about patient safety. All right?

A Correct.

Q Doctor, do you agree it's important for patient safety that you sanitize your hands, whether that be with sanitizer, protective gloves, or both before touching an admitted patient?

MR. DOYLE: Objection. Relevance and 48.035.

THE COURT: Overruled on those grounds.

THE WITNESS: Can you repeat --

BY MR. JONES:

Q Sure.

A There's a lot in there. Can you repeat it all?

Q Yeah. Doctor, do you agree it's important for patient safety that you sanitize your hands, whether that be with sanitizer, protective gloves, or both, before touching an admitted patient?

A I disagree with that.

Q Okay, all right. Why do you disagree with that, Doctor?

A Because when we wash our hands, we can examine patients with our bare hands, and that's totally acceptable.

Q Okay. Doctor, do you agree that it's important for patient safety, that you keep accurate and complete records regarding patient care and patient condition?

A Like on a scale of zero to ten, or yes or no?

Q Yes or no, Doctor.

A I don't think I can answer that as a yes or no question.

Q Okay, go ahead and -- and explain it on a scale of one to ten.

How important are complete and accurate records?

A So a lot of our records --

Q On a scale of one to ten, Doctor?

A About a seven and eight.

Q Okay. Keeping accurate and complete records is important for patient safety for many reasons. Do you agree with that?

A Again, on a scale, I'd say seven to eight.

Q Do you agree that it is important for patient safety? Yes or no?

A I'd have to answer that, the way I answered the one before it.

Q So you cannot say that keeping accurate and complete records is important for patient safety?

A There's a scale to that, yes.

Q No scale to that.

A Okay.

Q So I just want to be very clear. I'm going to ask you again. Is keeping accurate and complete records important for patient safety?

A I can't answer that as a yes or no question.

Q Okay. Doctor, if you do not keep accurate and complete records, is it possible that you, or is it more than likely that you would forget what was done, or what condition the patient has?

MR. DOYLE: Calls for speculation. Objection.

THE COURT: Sustained. The way the question's asked.

BY MR. JONES:

Q Doctor, from your own personal experience, have you found it to be the case that if you failed to keep accurate and complete records, you are more likely to forget what was done, or what condition the patient was in?

A I would disagree with that.

Q Okay. Doctor, do you agree that other medical providers rely on your notes and records?

A To some extent, yes.

Q Okay. And their ability to treat the patient, you would agree is affected by the accuracy and completeness of the records you keep, right?

MR. DOYLE: Objection. Speculation.

THE COURT: Overruled, in light of his answer to the last question.

THE WITNESS: It could be, yes.

BY MR. JONES:

Q Okay. And Doctor, you also agree that you could be replaced as a surgeon on the case, and that the next surgeon would have to rely on your notes and records, if they didn't speak to you directly, correct?

A That would be one way, yes.

Q Okay. And if your notes are not accurate or complete, that surgeon could be left guessing about the information that you had, right?

A Could be, if they decide not to talk to me about it, yes.

Q Okay. And you agree that could be dangerous for the patient, right?

A Well, that's speculative, but possible, yes.

Q Doctor, you agree that patient safety relies on doctors and surgeons being careful and skillful in their differential diagnosis, correct?

MR. DOYLE: Objection, Your Honor. Relevance. And it's an incomplete hypothetical.

THE COURT: Sustained on relevance, the way that was phrased, because it's an incomplete hypothetical, is why the Court is saying.

BY MR. JONES:

Q Doctor, you agree that patients are at risk when their doctor or surgeon provides the -- an incorrect diagnosis?

A Again, that's hard to answer yes or no.

Q Go ahead and explain that, Doctor.

A Well, a lot of times in medicine surgery, we make a differential diagnoses. And there's not just one diagnosis. So one diagnosis may be correct, while another diagnosis may be incorrect. So it would be hard to assess whether that incorrect one would necessarily cause harm or damage to the patient.

Q Would the patient be at risk, if their doctor gives an incorrect or wrong diagnosis?

A Again, it depends upon what the diagnosis is.

Q Okay, so in some circumstances yes, in some circumstances, no.

A Correct.

Q Are you aware of patients being harmed in a serious way, after their doctor gave an incorrect diagnosis?

A Yes.

Q Okay. That's something that does happen, right?

A That does happen, yes.

Q Okay. And in some cases, that's because they're getting treatment they don't need, right?

A That could be, yes.

Q And in some cases, that's because they don't get treatment that they do need, correct?

A That would be the converse, yes.

Q Okay. And in some cases, it can be horrible. It can result in permanent injury or death, correct?

A I assume, yes.

Q Are you aware that that happens? You've heard of that?

A Probably, yes.

Q Okay. Doctor, you also agree -- well, I'm going to go back to that. Are you saying -- when you say probably yes, are you saying you're not certain if you're aware of an incorrect diagnosis resulting in

serious injury, or permanent injury, or death?

A What I'm saying is I can't think of one off the top of my head. But I'm sure in 16 years of private practice, just it's -- I've encountered somewhere.

Q Okay. Would you like more time to think about it, so that you can be totally sure?

MR. DOYLE: Objection. Argumentative.

MR. JONES: Not argumentative, Your Honor. I'm just checking if --

THE COURT: The Court's going to overrule the argumentative objection.

THE WITNESS: Off the top of my head, I'd have to say no.
BY MR. JONES:

Q Okay. Doctor, you agree that using the wrong tool can create unnecessary danger for a patient, correct?

A I don't know what you mean by tool.

Q In the process of performing a surgery, if you use the wrong tool, the wrong device, that can put the patient in unnecessary danger; is that fair?

A It's possible, yes.

Q Okay. For example, during your deposition, you mentioned the har- -- in this case, you mentioned the harmonic scalpel and noted that you had seen it burn patients in unintended areas in the past, correct?

A I'd have to see the -- the reference to that, but --

Q Does that sound right?

A It sounds right, yes.

Q You -- do you recall seeing the harmonic scalpel in at least some instance burning the -- the small bowel?

A Yes.

Q Okay. In an unintended way, correct?

A Oh, of course.

Q Okay. And that's because of the heat that radiated off of it?

A Two -- two ways technically. The harmonic scalpel is shaped like a -- like a scissor. So it's rather pointed. So it can do both. It can actually poke into the small bowel. Or while you're using it, if you're too close to the bowel, it could burn the bowel. So it could do it in two ways.

Q And you -- you specifically mentioned that you had seen it cause blanching of the bowel, correct?

A That is correct.

Q And blanching of the bowel is -- is when it turns the bowel right, or -- or it turns -- it -- it whitens, so --

A Correct.

Q -- indicting that it's burned, right?

A Correct.

Q Okay, all right. And as a result, you noted that you don't use that tool anymore, correct?

A For many reasons, yes.

Q Okay. So even though the harmonic scalpel cuts really well, it puts the patient in unnecessary danger. So you don't use that tool

anymore, correct?

A I don't know if I'd say it's because of unnecessary danger to the patient, because there's plenty of surgeons that still use the harmonic scalpel, use it safely and have no issues, I assume. It's just my personal preference.

Q Okay. Doctor, you agree that all things being equal, limiting the time a patient has an infection is important for patient safety, right?

A I don't know if it's important for patient safety. But you want to try to limit the exposure of patients to infectious processes, in general, yes.

Q Limiting the time that a patient has an infection is not important to patient safety. Is that correct?

A That's not what I said.

Q Well, I asked you a question, and -- and you said you didn't know if it was important to patient safety. So I want to make sure I understand your answer here.

A So sometimes patients will have prolonged infections, and it won't affect their safety whatsoever. In general, we try to keep people from having an infectious process for as -- you know, as short of time period as possible.

Q And Doctor, you agree, that includes limiting the time a patient is septic, correct?

A Septic doesn't always --

Q Please answer yes or no, Doctor.

A Oh, I'm sorry.

Q You agree that includes limiting the time a patient is septic, correct?

A Correct.

Q Okay. And you agree that the longer a patient is septic, the more likely it is, that a patient will die or suffer permanent injury, correct?

A That's possible, yes.

Q In fact, the literature says that's the case, correct?

A Statistically.

MR. DOYLE: Objection. Hearsay.

THE COURT: We had three people talking at once. So you need to break down where the question was ending, the objection and a new question, so --

MR. JONES: I'll withdraw it, and I'll establish foundation, Your Honor.

THE COURT: Do you want to -- since the question has been withdrawn, the Court need not rule on the objection. I just need not rule on the objection. I just need clarity if the witness was asking the last question or the question before the last, because I need to -- since it was withdrawn, whether or not I need to instruct the jury to disregard it, so --

MR. JONES: I don't think he answered that question.

THE COURT: Okay. In light of that, then there's nothing for the jury to disregard anything for. Please go.

BY MR. JONES:

Q Doctor, have you reviewed literature on sepsis?

A Yes.

Q Doctor, have you reviewed literature on sepsis that indicates the likelihood of severe injury and death, based on chronology?

Meaning the time that a person has the sepsis for?

A Yes.

Q Okay, and Doctor, you agree that that literature on infection and sepsis indicates that the patient is much more likely to die, or suffer permanent injury, the longer they are septic, correct?

A Correct.

Q Okay, and Doctor, you agree, the literature on infection and sepsis indicates source control is critical, correct?

A Disagree.

Q You disagree that the literature says source control is critical for sepsis?

A Correct.

Q Okay. Excuse me. Doctor, you agree -- let's see. Any points that we just discussed on patient's safety, the opinions that you -- that you've offered today, or the -- the information that you've offered today, you knew all that information on July 3rd, 2015, correct?

A Correct.

Q Okay. Doctor, I'm going to ask you a few questions about your attorney's opening statement yesterday. Do you remember that?

A More or less, yes.

Q Okay. It sounded to me like your side, the Defense agrees generally that Titina became septic, and was transferred to the ICU post-

op day one; is that fair?

A That is correct.

Q Okay. Second, it sounded like you agree that Titina's development of foot drop, not necessarily all of the conditions we -- that have been talked about, but foot drop, resulted at least primarily from the complications and extended time in critical care, following the July 3rd, 2015 surgery. Is that fair?

MR. DOYLE: Objection. I'll withdraw the objection.

THE COURT: Okay. Go ahead.

THE WITNESS: Can you rephrase that? I'm sorry.

BY MR. JONES:

Q Absolutely. You agree Titina's development of foot drop, resulted at least primarily from the complication and extended time in critical care following the July 3rd, 2015 surgery. Is that fair?

A I can't answer that as a yes or no question.

Q You can't answer whether it was primarily as a result of the complications and extended time in critical care following the July 3rd, 2015 surgery?

A I might -- I may be misunderstanding, but if I have a chance to explain.

Q Go ahead.

A Because my care with Mrs. Farris ended around July 15th-16th. So what happened beyond that, I have no review of. I only rely on what's been going on between the courts.

Q Absolutely, absolutely. Now Doctor, you are aware that you

-- no that -- I understand exactly what you're saying. So what I'm saying is you appreciate -- initially the expectation was Titina Farris would come in, have the surgery, go home the same day or the next day, right?

A That is correct.

Q Okay. But ultimately she ended up being in the hospital a long time, right?

A That is correct.

Q And it's fair to say that the entire prolonged hospital stay related to a complication from the surgery, correct?

A In some terms, yes.

Q Okay. But for complications in the surgery, she wouldn't have been there, she would have gone home that day or the next day, right?

A Yes.

Q Okay. And so what I'm saying is, it sounds like Titina's developmental foot drop, whether it was completely developed by the 15th or 16th or developed in the -- in the month after or something like that, while she was still hospitalized in part, all of that would have been a complication. It would have been resultant at least primarily from a complication of surgery, right?

MR. DOYLE: Objection. It lacks foundation.

THE COURT: Overruled. In light of this witness.

THE WITNESS: Again, having not followed her since the 15th, I can't address that.

BY MR. JONES:

Q It also agreed -- it also appeared that you agree that Titina's need for a colostomy resulted from complications of the July 3rd, 2015 surgery, correct?

A It resulted from her having a perforation of her transverse colon after surgery sometime, yes.

Q A perforation of her transverse colon after surgery at some point?

A Correct.

Q Okay. The transverse colon was perforated during your surgery; is that right?

A That is correct.

Q Okay. And the same perforation, literally the same hole, although it may have expanded or not, it's the same hole that occurred in your surgery; right?

A Reviewing the pathology report, it's hard to determine that.

Q Okay. Doctor, does -- did diabetes in this case cause fecal peritonitis or sepsis?

A Diabetes wouldn't cause either of those.

Q Okay. Doctor, regarding foot drop, you agree that as far as you know, Titina had no mobility problems prior to July 3rd, 2015, correct?

A I never assessed her mobility.

Q Okay. Titina walked -- Titina walked into and out of every appointment without assistance, correct? That she had with you?

A I believe so, yes.

Q That began in 2014, correct?

A Correct.

Q And that includes Titina's appointments in 2015, leading right up to the surgery, correct?

A To the best of my knowledge, yes.

Q And you never noted that she seemed to have any impairment walking in your medical records, correct?

A Correct.

Q You never noted that she had a history of anything, where she had difficulty with any mobility at all, did you?

A I don't recall that, no.

Q Okay. Now you do not dispute that Titina left in a wheelchair, do you?

A I didn't see her leave. I have no reason to dispute it, I guess.

Q Okay, and you've certainly heard about it in this case, right?

A I don't know if I've directly heard that, actually.

Q Okay. Are you aware that they did an EMG test to identify if she had nerve -- nerve function?

A I just heard about it after the last witness.

Q That's the first time you've heard about that?

A Correct.

Q In these four years since the surgery, you never knew about that?

A Correct.

Q Okay. And so you don't know anything about Titina and the

extensive physical therapy that she had to go through to be able to do simple things like socks, shoes, things like that?

A I do not.

Q Okay. Do you have any reason to dispute that what the expert said essentially today, that Titina will never walk again, without assistance?

MR. DOYLE: Objection, Your Honor, lacks foundation and calls for speculation.

THE COURT: Court -- can you -- Madam Court Reporter, would you mind turning on the white noise?

[Sidebar at 4:27 p.m., ending at 4:34 p.m., not transcribed]

THE COURT: So with regards to the objections raised to the Court, you're going to just make the clarification that, of course, nothing that he is asking would be sought to seek any attorney-client communication?

MR. JONES: Absolutely.

THE COURT: No worries.

BY MR. JONES:

Q So you understand that caveat?

A No.

Q That I'm not seeking you to tell the jury conversations you had with your attorney privately.

A Oh, sure.

Q Okay. Okay.

A Yeah.

Q And that will always be the case. I'll never ask you something seeking that information, okay?

A Of course.

Q All right. So Doctor, with that being understood, do you have any reason to dispute that Titina will never walk again without assistance?

A I'm not a neurologist, I'm the general surgeon. I'm not capable of making that type of assessment and evaluation.

Q Okay. Doctor, do you recall during voir dire that when your attorney was talking to the jury about pulling wallpaper off the wall? Do you recall that?

A I do.

Q Do you recall during voir dire, or during opening, when your attorney described you pulling and tugging on the mesh to get it off the colon?

A I don't know if he said mesh off colon or colon off mesh, but I'd say that's agreeable.

Q You agree that you heard him say that, where he talked about pulling and tugging --

A Something to that --

Q -- to get it off the colon --

A -- effect, yes.

Q -- right? Okay. Now, Doctor, did you notice that your attorney avoided mentioning the ligatures roll in removing the mesh from the colon?

MR. DOYLE: Your Honor, objection. Objection, Your Honor.

THE COURT: Basis? Basis of the objection?

MR. DOYLE: There's no factual -- it assumes facts not in evidence. There are no --

THE COURT: Sustained.

BY MR. JONES:

Q Okay. Doctor, do you recall your attorney explaining to the jury the ligatures role in removing the mesh from the colon?

MR. DOYLE: Objection. Assumes facts not in evidence.

THE COURT: The way that one was phrased, overruled.

THE WITNESS: I'm sorry, I get lost with all the objections.

Can you repeat it again? I don't mean to make it --

BY MR. JONES:

Q Absolutely.

A -- I get lost.

Q Did -- do you recall your attorney explaining to the jury the ligatures role in removing the mesh from the colon?

A I don't recall that.

Q Okay. Doctor, does pulling and tugging on mesh that you put in sound like a careful and skillful surgical practice?

A The phrases tugging and pulling may be a little harsh, but it is part of the process, yes.

Q That was the phrase that was used, right?

MR. DOYLE: Objection, Your Honor. Could we approach?

THE COURT: Of course, you may. Madam Court Reporter,

please put on some white noise.

[Sidebar at 4:36 p.m., ending at 4:42 p.m., not transcribed]

THE COURT: Okay, at this juncture, the question had not been finished, so the Court can't rule until I hear the entire question. So please finish the entire question, so the Court can't hear until I hear the entire question. So please finish the question, so the Court can hear the question and make its ruling.

BY MR. JONES:

Q I think I've halfway forgotten my question. We were talking about tugging and pulling of the -- of the mesh on the colon. One way or the other, right? You said something to the effect that you thought that was kind of a harsh way to describe it?

A It could be, yes.

Q Okay. Is that how you would describe how you did?

A It would be one way of describing it, but it's what we do during surgery. It's -- usually what we do is called blunt dissection. And blunt dissection --

Q And I'm just --

A -- involved tugging and pulling.

Q No, and I appreciate that. I'm just asking you if it's a way you described it. Yes or no is fine. If that's the way you would describe it.

Tugging and pulling, yeah.

A At what point?

Q Well, you heard the opening statement. As described there.

A But that's the way my counsel described it, not me.

Q Right.

A Am I missing something? I'm sorry. I thought you were asking about me.

Q Right. Wasn't he representing what you did?

A Well, but you're asking about the words he used. Those are his choice of words, not mine.

Q Okay. So you're -- you're not signing off on those words. You yourself are not signing off on those words, you yourself are not.

A Signing off?

Q As to what you did. Do you agree that those words appropriately describe what you did in this case?

A They could be used to describe it, yes.

Q Okay. Doctor, does the operative notes say anything about tugging and pulling on the mesh? Or even pulling at all?

A I don't recall that, no.

Q Okay. And Doctor, does your operative notes say that you created tears in the colon by tugging and pulling on the mesh, at all?

A I don't think it says that at all.

Q Doctor, you'd agree that the operative report actually says, "We had used a ligature device to extract it from the mesh, as the mesh would not come free. In doing so, this created a small tear in the colon." Right?

A That is correct.

Q That sounds like what you wrote down, right?

A That sounds correct.

Q So it was the ligature, the use of the ligature created the tear in the colon, right?

A No, it's that after the ligature was used, we saw the -- I saw the holes in the colon. So --

Q Okay.

A -- the way this works is --

Q Thank you, Doctor.

A -- as you tug and pull on the colon, it can cause tears that you can't see. You can see adhesions. You take the ligature to take down the adhesions, and then you see the holes.

Q Got it.

A So you have to assume, was that from tugging and pulling, was that from the ligature? I don't know. I've got holes in the colon. I need to fix them.

Q Okay, got it. But it would be fair to say you never saw the holes in the colon until after you had used the ligature, right?

A That's fair.

Q Okay. Dr. Rives, you've testified under oath many times, correct?

A Yes.

Q You've testified under oath in courtrooms like this many times, correct?

A Yes.

Q You've testified under oath in conference rooms for depositions, as well, correct?

A Yes.

Q And just like testifying under oath orally, as you're doing now, and as you've done before many times, you've also testified under oath through written answers called interrogatory responses, correct?

A Correct.

Q Okay. Doctor, I want to go through what an interrogatory is, so it's very clear to everyone. Is that okay?

A Yes.

Q All right. Doctor, in each case, the parties will exchange written questions to each other that the other side is legally obligated to answer under oath, correct?

A Correct.

Q Okay. So in this case, you sent interrogatories, or questions, to Titina Farris and Patrick Farris, and they sent interrogatories to you and your company, correct?

A Correct.

Q Okay. And when you receive these interrogatories, you have a 30-day window to answer them, to make sure that your answers are truthful and accurate. Is that correct?

A I'll take your word on that, yes.

Q Okay. And Doctor, you are very familiar with this process, correct?

A Somewhat familiar, yes.

Q Okay. And Doctor, how many times have you answered interrogatories?

MR. DOYLE: Objection, Your Honor. Relevance and 48.035.

MR. JONES: Your Honor, it goes to his knowledge about exactly what we're talking about.

MR. DOYLE: Your Honor, could we approach? Counsel keeps arguing in front of the jury and --

THE COURT: You both are doing it impermissibly and I asked you not to do it. So yes, you may approach. Please turn on the --

[Sidebar at 4:46 p.m., ending at 4:49 p.m., not transcribed]

THE COURT: The Court overrules the objection in light of prior Court ruling. Counsel you can re-ask your question.

BY MR. JONES:

Q Yes, Doctor, I was asking you how many times you've answered interrogatories?

A Assuming that that process happens every time I've been named in a suit, I would say that's happened seven times.

Q Okay. Now Doctor, you stated a few times when I asked you questions earlier, about not knowing what had essentially become of Titina Farris, as a -- as a basis for not being able to answer some questions, correct? Because --

A And the fact --

Q -- because your treatment ended around the 15th.

A 15th-16th, correct.

Q Okay. Doctor, how is it then that you are aware of the specific findings of the pathology report?

A Because I was asked to review them.

Q Okay. You agree that that took place after your care had stopped, right?

A That did.

Q Okay. And Doctor, you agree that your surgery, you identified two holes that you had cut or burned, or somehow caused in the colon, correct?

A Correct.

Q And you agree that the pathology report found three holes, correct?

A Correct.

Q So Doctor, I want to get back to that. So the interrogatories, you've answered those seven or eight times, and -- and you agree that just as if -- that just as if you were standing in a court of law with a judge and jury, as we are today, those interrogatory responses are also sworn under penalty of perjury, correct?

MR. DOYLE: Objection. It mischaracterizes the testimony.

THE COURT: The Court is going to ask you to rephrase the question please.

MR. JONES: Yes.

THE COURT: That was a little bit long, kind of combined a couple of concepts, if you don't mind, so --

BY MR. JONES:

Q Doctor, you agree that right now you're testifying under penalty of perjury, correct?

A Correct.

Q You agree during your depositions you testify under penalty of perjury, correct?

A That is correct.

Q And Doctor, you agree that when you answer interrogatory responses, those are under penalty of perjury, correct?

A I believe so.

Q Why do you believe so?

THE COURT: Without asking any contents of any communication with counsel, yes.

THE WITNESS: I can't answer that question then.

BY MR. JONES:

Q Okay. Doctor, do you remember last week I handed you a document that you had signed?

A Correct.

Q And that document said you were signing it under penalty of perjury, do you recall that?

A I don't recall that exact terminology.

Q Okay. So we're going to go through and I'm going to show you some documents. We're not going to do it today, because we're basically out of time, but I'm going to show you some documents and do you have any reason to dispute that every time you signed your name on interrogatories, that you were signing directly below a paragraph that says I am signing under penalty of perjury?

A I believe that to be correct, yes.

Q Okay, all right.

MR. JONES: Would you like me to stop there, Your Honor?

THE COURT: If this is a good stopping point. We can stop for the evening today, if you want. If you need a question or two to finish up your section, then feel free to do so. Whichever is best.

MR. JONES: I'll go ahead and stop there, Your Honor and let the jury go.

THE COURT: Okay. And ladies and gentlemen, being about ten minutes -- well eight to ten minutes before the 5:00 hour, we're going to wish you a very nice evening. And remember tomorrow -- I think it's Friday right. Friday we're starting at 9:00 a.m. And the Court said, so we'll be starting at 9:00 a.m.

And so ladies and gentlemen, while you have a nice relaxing evening, where you think of anything other than this case. During this overnight recess, you're admonished not to talk or converse among yourselves, or with anyone else on any subject connected with this trial.

You may not to read, watch or listen to any report, or commentary of the trial, any person connected with the trial, by any medium of information, including without limitation, social media, texts, tweets, newspapers, television, internet, and radio. Everything I've not stated specifically, is of course also included.

Do not visit the scene or the events mentioned during the trial, or undertake any research, experimentation, or investigation. Do not do any posting or communications on any social networking sites. Do not do any independent -- or any other -- or any other place, of course. Do not do any independent research, including, but limited to

internet searches.

And do not form or express any opinion, on any subject connected with the trial of the case, until the case is fully and finally submitted to you at the time jury deliberations, With that we wish you a very good evening. Thank you so very much.

THE MARSHAL: All rise for the jurors.

[Jury out at 4:54 p.m.]

[Outside the presence of the jury]

THE COURT: Counsel is now outside; we wish you all a very nice evening. So since tomorrow is Friday --

MR. JONES: Your Honor --

THE COURT: -- we do not have --

MR. JONES: -- we -- we have an issue that I think has to be addressed, and I think it has to be addressed right now before it leaves our minds, if I may.

THE COURT: Well, counsel, what should I do about it being five minutes of 5:00 and you all wanting to address it right now --

MR. JONES: Your Honor --

THE COURT: -- with my wonderful team. It's five minutes of 5:00. You realize there's no way you are going to get a disc today, because we told you, you had to end at 4:30. And told everyone --

MR. JONES: If I --

THE COURT: -- if you wanted a disc today for -- anyone had to make sure --

MR. JONES: I don't -- I don't need a disc. I'd just like to

establish it on the record that -- and we can -- we can argue it tomorrow or whenever the Court thinks is appropriate. But we would renew our motion to strike their answer on a couple of basis today.

First of all, when we were up there talking with Your Honor, it was very clear that this consultant, based on what we were told by Mr. Doyle, when the three of us were there, helped prepare the Defendant for his testimony. And the Defendant, on the stand, stated under oath that that did not happen. That is a clear -- that is clear perjury, Your Honor. I don't know how more simple it can be.

Secondarily, he was here one week ago -- one week and three days ago, at which time he knew very clearly interrogatories were sworn under penalty of perjury, and he's not complying with the truth -- with the process of simply telling the truth when being asked a question. Your Honor, I just don't want it to be forgotten, those issues just happened, and they need to be brought up now, or else --

THE COURT: As you know we told the jury that they're coming in at 9:00 tomorrow morning. It wouldn't be fair to the jury to have them wait. You have experts that are coming tomorrow.

MR. JONES: Right.

THE COURT: So would you like the Court to allocate -- would you like to come in at 8:20 tomorrow --

MR. JONES: Yes.

THE COURT: -- and we'll take this argument before -- I mean what do you all want to do?

MR. JONES: That's -- that's perfect for us, Your Honor.

THE COURT: I mean to ask both sides. I mean the point here is --

MR. JONES: If you're --

THE COURT: -- you cannot do what you did to the jury. And I say you, that's not saying Plaintiff's counsel, you let me be clear. But with regards to the pre-instruction. Right?

MR. DOYLE: Right.

THE COURT: Can't continue even a simple thing of asking you all to write the words yes, and no, and question mark. You can't continue. For the simple thing is we ask you, we put in writing, no more than a four-inch binder. Do you realize the witnesses are having to -- the reason we say four-inch binders is because you saw the difficulty the witnesses have in trying to do these huge six inch plus binders. They can't get into the binders. It causes huge issues.

They split apart. Usually have documents flying all over. That's why we clearly say in writing, right. Underlined and bold, no more than four inches. We release, Defense counsel, you don't want to follow a single one of our rules, okay. Bolded, underlined, even the simple ones of yes, no, and question mark after. If you didn't hear it, this one is written down, bold and underlined, okay. I guess we better --

THE CLERK: [Indiscernible] both sides.

THE COURT: Yeah, I mean, but I'm going to both, and, you know, Madam Clerk can actually spindle it. Okay. So Plaintiff you didn't -- you didn't give us a second binder, so you all are causing challenges to your case. Okay. And your clients.

So this Court will set aside some time, but realize you've got experts tomorrow. So if you want to set aside some time, just realize we have something else going on first thing in the morning, so we can't do it before the trial starts at 9:00. So if you want to find some time, you got to give me some notice so I can be prepared between when you want it for your experts and the Court will address this tomorrow.

If you wish to address it tomorrow, it's fine, as you realize Court was deferring ruling. So Court will address things, but parties have to have full due process, an opportunity to respond and the Court will be glad to address things. But you got to give the Court sufficient notice, right.

And all parties on any matters have to have sufficient notice from the other side, so full due process, no matter who who's bringing it. So other party has full due process, an opportunity to respond, and the Court has to be fully advised of the issues and given some information, instead of just what you did to me yesterday with the pre-instructions, which, of course, considered short -- and we had to have the jury sit out there what for about an hour-ish. And then the other case that was specifically supposed to have their matter taken care of, had to at the last minute be cancelled. So the Court's more than glad to do it, I appreciate people have frustrations, but what would you like to do?

MR. JONES: Your Honor, we're happy to do it either on Monday or during a break at some point on Friday.

THE COURT: Well, we can't -- remember breaks are --

MR. JONES: Oh.

THE COURT: -- remember people get their State mandated lunch breaks, and their morning and afternoon State and federally mandated breaks. So if you say a time you want to do -- what time are your experts going to be here?

MR. JONES: I think we have one at 9:00, right?

UNIDENTIFIED SPEAKER: We have one at 9:00, and then one in the afternoon.

THE COURT: Okay, so if you want to block out some time. So if you want to do it right after lunch before your second expert, let me know today, so this Court can be fully prepared and let Defense counsel know so he can be fully prepared. Right. Got to ensure everybody has a full opportunity to be fully prepared.

MR. JONES: Let's do it immediately after lunch, if that's okay.

THE COURT: If Defense brings up something for you all, I've done the same thing. Fair and impartial everyone, right. They want to bring something up you get an opportunity to be fully prepared. You bring something up they get an opportunity to be fully prepared. I want to make sure everyone knows what's going on, so everyone can be fully prepared.

So are you going to want to address this tomorrow, because everyone's going to need to know, or do you want to address this on Monday. We need to allocate some time and tell the jury to come in later. What do you want to do?

MR. JONES: I think perhaps do a longer lunch with the jury

and do it tomorrow. Allocate 30 minutes, or whatever the Court thinks is appropriate? I mean it be -- the issues don't go beyond what I just said, but I do think they're pretty serious.

THE COURT: Tomorrow, because this other conflict, we're going to have -- break -- we can break at 11:40 to 1:20. Tomorrow we're going to have to have an hour and a half, because there's some other members trying to do some other --

MR. JONES: Of course.

THE COURT: -- court business issues and things going on tomorrow. So -- so tomorrow --

MR. JONES: If it's more convenient, we are okay doing it Monday, Your Honor.

THE COURT: Remember -- remember with a jury when you give them extra long lunches on Friday, that's what's going to take them into account so --

MR. JONES: Monday is fine.

THE COURT: -- want to do it end of the day Friday?

MR. JONES: Yeah, if that works.

THE COURT: You're doing that, but remember if you're doing that, make sure from your experts' standpoints that gets taken care of. And that way counsel has the maximum amount of time at end of day Friday. Will it work for you Friday at the end of day, instead of doing it in the middle of the day?

MR. DOYLE: Assuming I have the information that I need.

THE COURT: What?

MR. JONES: I just gave all the information that I have.

THE COURT: So --

MR. DOYLE: Well, the Court indicated that she expected something perhaps -- why don't -- in order to have an opportunity to respond, I guess I need to know what their arguments are, and the basis for the argument. Not a -- not a simple synopsis.

THE COURT: I'm going to ask you to speak among yourselves this evening, okay. And let the Court know first thing at 9:00 tomorrow morning if you want to do it at the earliest, end of day. Okay.

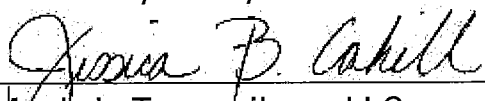
MR. JONES: Okay.

THE COURT: So that gives you all a chance to talk among yourselves, right. And that way neither side feels like they're somehow providing the Court any information with the other side not having an opportunity to evaluate it. Talk among yourselves and see if you want the end of day Friday or if you want some time Monday or Tuesday, then we can work on a schedule for you. Okay. I do appreciate it. Wish everyone a very nice and relaxing evening and we'll see you back tomorrow at 9:00 a.m. Thank you, so much.

THE MARSHAL: Court is now adjourned.

[Proceedings concluded at 5:02 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



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Steven D. Grierson
CLERK OF THE COURT



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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 TITINA FARRIS, ET AL.,

8 Plaintiffs,

9 vs.

10 BARRY RIVES, M.D.,

11 Defendant.

CASE#: A-16-739464-C

DEPT. XXXI

12
13 BEFORE THE HONORABLE JOANNA S. KISHNER
14 DISTRICT COURT JUDGE
FRIDAY, OCTOBER 18, 2019

15 **RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 5**

16 APPEARANCES:

17 For the Plaintiff:

KIMBALL JONES, ESQ.
JACOB G. LEAVITT, ESQ.
GEORGE F. HAND, ESQ.

19 For the Defendant:

THOMAS J. DOYLE, ESQ.

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25 RECORDED BY: SANDRA HARRELL, COURT RECORDER

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<u>FOR THE PLAINTIFF</u>	<u>MARKED</u>	<u>RECEIVED</u>
None		

<u>FOR THE DEFENDANT</u>	<u>MARKED</u>	<u>RECEIVED</u>
None		

1 Las Vegas, Nevada, Friday, October 18, 2019

2

3 [Case called at 8:56 a.m.]

4 THE COURT: Okay, we're on the record outside the presence
5 of the jury in Case number 739464. Counsel, since I have a wonderful
6 clerk helping us out today, can you make your appearances, so we make
7 sure we know who's going to be here today, and if there's somebody
8 who's not yet here, just give a head's up who's still going to be coming.

9 MR. LEAVITT: Yes, Your Honor, Jacob Leavitt, on behalf of
10 Plaintiffs.

11 MR. JONES: Kimball Jones on behalf of Plaintiffs.

12 MR. LEAVITT: George Hand will be here.

13 MR. JONES: We will be able to begin without George Hand.
14 He's collecting an expert.

15 THE COURT: Okay, go ahead and on behalf of --

16 MR. DOYLE: Tom Doyle for Dr. Rives and Laparoscopic
17 Surgery of Nevada. And Dr. Rives is running a little behind but he'll be
18 here.

19 THE COURT: Well, are we waiting?

20 MR. DOYLE: No, we're not waiting.

21 THE COURT: Okay, Marshal how are we doing on jurors?

22 THE MARSHAL: Seven.

23 THE COURT: Okay, so we just missed --

24 MR. LEAVITT: Hey, Tom, we are waiting for Dr. Rives. We
25 were going to continuing with Rives.

1 MR. DOYLE: Oh, you're going to continue with Rives?

2 THE COURT: Oh, that was the next -- sorry, that was the next
3 question the Court was about to ask you all, because I -- you all were
4 talking about the order of witnesses. And so just so that everyone is
5 prepared and knows, what are you all doing? I know you had a couple of
6 expert today's and then you also said that you were going to be doing
7 some Dr. Rives. So what -- can you just give a head's up, so that Madam
8 Clerk can get what she needs organized.

9 MR. JONES: Yes.

10 THE COURT: And everybody knows what we're doing and so
11 if you want me to let the jury know something different as well.

12 MR. JONES: We do need to continue with Dr. Rives, but I do
13 understand misunderstandings. I think that on our end there was a lack
14 of clarity at the moment our experts were going to get in. And so we
15 wanted to go with our experts the moment they were available, but they
16 won't be here until I think 9:30-ish or something like that.

17 MR. LEAVITT: Yeah, he was 10 minutes away 20 minutes
18 ago, so --

19 MR. DOYLE: So if the plan is to go with Dr. Rives until
20 someone arrives and then interrupt him, that's fine.

21 THE COURT: Okay.

22 MR. DOYLE: I just -- I'm --

23 MR. JONES: Sure.

24 MR. DOYLE: -- if I could have a minute with Dr. Rives,
25 because we hadn't planned on this. Just to give him a head's up.

1 THE COURT: Okay, but he understands the role of -- the
2 difference between his role as a client and what he can discuss with
3 counsel versus his role as a witness who's in the middle of his
4 testimony.

5 MR. DOYLE: Of course.

6 THE COURT: And what he can discuss with counsel --

7 MR. DOYLE: Of course.

8 THE COURT: -- right?

9 MR. DOYLE: Yes.

10 THE COURT: Okay. Because Coyotes Springs and its
11 analogies are alive and well.

12 MR. JONES: Right.

13 THE COURT: Okay. So -- okay, so then we need to -- so we
14 do need to wait for him, which is fine, I just --

15 MR. DOYLE: Okay.

16 THE COURT: -- took from ballpark. Okay, and so --

17 MR. DOYLE: I've got a couple housekeeping things, Your
18 Honor.

19 THE COURT: Well, that's why we're asking, so let's -- first we
20 have order of witnesses. So are you going to need the screens for Dr.
21 Rives? The computer screens. Somebody want to answer the question?

22 MR. LEAVITT: Yes, Your Honor.

23 MR. JONES: I'm only going to need the --

24 THE COURT: Elmo?

25 MR. JONES: -- Elmo. Yes, Your Honor.

1 THE COURT: For Dr. Rives. Okay, so then Madam Court
2 Recorder will get that up for you. Okay. Do you need the pocket
3 microphone?

4 MR. LEAVITT: Yes.

5 MR. JONES: Yes, Your Honor, please.

6 THE COURT: Okay, we'll get that taken care of for you.

7 COURT RECORDER: I have it there.

8 MR. JONES: There's one already right there. It's been --

9 THE COURT: I was going to say, Madam Court -- I was going
10 to say Madam Court Reporter, see what she did for you. Look at that.
11 Now, remember, if either of you are going to need a handheld mic in
12 addition to the pocket microphone, we need to coordinate with Madam
13 Court Reporter, because one of our pocket microphones does work with
14 our handheld microphone, unless we've gotten that fixed. --

15 COURT RECORDER: I think they're all --

16 THE COURT: Unless we've got that fixed.

17 COURT RECORDER: I think so.

18 THE COURT: Okay. There was an issue before that we only
19 had one of our pocket mics work with the handheld mic and one didn't.
20 And so --

21 MR. LEAVITT: Okay. We may use the microphone for Dr.
22 Hurwitz.

23 THE COURT: In addition to the pocket microphone? Madam
24 Court Reporter, do we know if that issue got fixed or not?

25 COURT RECORDER: It's -- I think it's --

1 THE COURT: Well, we'll test it, and if we can't -- if we hear a
2 little feedback noise --

3 MR. LEAVITT: Okay.

4 THE COURT: -- we'll switch.

5 COURT RECORDER: Well, I gave him number two, anyway.

6 THE COURT: Oh, you got number two anyway. So you 're
7 set. Don't worry, you 're set.

8 MR. LEAVITT: Oh this one, this is the non-feedback? Okay.

9 THE COURT: If we hear feedback, we'll realize it's the oops
10 one, but, yeah, it's supposed to -- number two is supposed to be the
11 correct one, anyway.

12 MR. LEAVITT: All right.

13 THE COURT: Okay. So that takes care of the immediate
14 needs. Now friendly reminder. If you all are utilizing -- or if you move
15 what you're just moving, which is the mouse, just remember, the mice
16 were set up so that they would wirelessly meet the needs to go to the
17 router. So that if anybody is using them for that purposes. If you don't
18 think you're going to need the mouse from counsel's desk, then Madam
19 Court Reporter is very glad to take it away from you.

20 MR. LEAVITT: I turned it off. That's what --

21 THE COURT: Now, Madam Court Reporter can take that right
22 now from you, if you don't think you're need it from counsel table.
23 Counsel for Defense, are you going to use your mouse?

24 MR. DOYLE: Doubt it.

25 THE COURT: Okay, then she can take it back. Because

1 remember these monitors now are mice-activated. But the mouse has to
2 be in line with the router. But if you're using -- are you taking care of all
3 IT?

4 MALE SPEAKER: Yeah.

5 THE COURT: Okay, so Defense counsel, you don't need your
6 mouse?

7 MR. DOYLE: Correct.

8 THE COURT: Okay. Then Madam Court Reporter will take it
9 back.

10 MR. JONES: Your Honor, I brought a -- I brought a duplicate
11 binder for -

12 THE COURT: That is for the witness?

13 MR. JONES: It is for the witness.

14 THE COURT: So that's --

15 MR. JONES: Should I place it on the stand?

16 THE COURT: Does Defense counsel want to see it before it
17 goes on the stand?

18 MR. DOYLE: And --

19 THE COURT: Okay.

20 MR. JONES: And also Exhibit 8, Defense counsel provided it,
21 I guess. And we have --

22 MR. LEAVITT: It's just the CT scans.

23 MR. JONES: Okay.

24 THE COURT: Sorry. So --

25 MR. JONES: Oh, and this is for us.

1 MR. LEAVITT: And he -- this is --

2 THE COURT: Wait, wait, you're going too fast.

3 MR. JONES: Oh, sorry.

4 THE COURT: Let's walk through one at a time, okay.

5 Because we've got to make sure there's nothing new. And if there's
6 anything new that everyone's -- where we are.

7 So what -- the duplicate Plaintiffs' binder is what was already
8 provided at the time of calendar call. It's what the Court understood you
9 were providing. So it's nothing new. It's exactly what you provided at
10 calendar call. It's just you were supposed to have provided the two
11 copies, and instead of you sharing your copy with the witness, you just
12 provided that duplicate copy; is that correct, or incorrect?

13 MR. JONES: That is correct, Your Honor.

14 THE COURT: Okay. Defense counsel, does that meet your
15 needs?

16 MR. DOYLE: I will accept the representations, yes.

17 THE COURT: Okay.

18 MR. DOYLE: I don't want to spend the Court's time --

19 THE COURT: Okay.

20 MR. DOYLE: -- going through it to --

21 THE COURT: Okay. And since you're -- remember, there's a
22 good reason, since you're -- since you happen to be highlighting the
23 inches, remember --

24 MR. JONES: I know.

25 THE COURT: -- all these Court rules are for a good reason.

1 They are not in any way just because they're rules.

2 MR. JONES: No.

3 THE COURT: What you don't fully appreciate is what
4 happened, okay. We weren't going to highlight it, but since you're
5 mentioning about binders, the four inches has two very -- well, multiple
6 good reasons, but two of them which actually got highlighted in this
7 case. One, you saw the first witness having incredible difficulty in front
8 of your jury because the Defense binder did not comply with the rules,
9 and the witness was having difficulty trying to find the very exhibits that
10 were being referenced. If you all want to have your trial held up, have
11 your witnesses not be able to get to their exhibits, or proposed exhibits,
12 whatever the case may be, because you don't follow the rules, and that
13 makes your trial longer, how it appears in front of the jury, that presents
14 a challenge.

15 MR. JONES: Absolutely.

16 THE COURT: The other challenge that you aren't aware of,
17 because we have wonderful team members here in Department 31, is
18 the binder -- the other binder provided by Defense broke. Which meant
19 the Court Clerk had to go and find another binder and replace it. Okay,
20 which Madam Court Clerk isn't supposed to be doing on her own time to
21 do that. And that's the reason why we ask for four-inch binders, because
22 the bigger binders have those historic issues. It's not like this Court
23 didn't practice for two decades before I took the bench, and I've been on
24 the bench for about a decade. This is not new news, folks. These issues
25 happen all the time.

1 So we try and do things to really help the attorneys. We
2 know these things happen, so we create things from experience, to help
3 you have a smooth and effective trial. If you choose to disregard these
4 rules, it really makes how you all look in front of the jury, and takes time
5 out of your trial, and impacts your clients' rights. So feel free to bring
6 the binder.

7 MR. JONES: Thank you, Your Honor.

8 THE COURT: Okay, now that you went -- you said Exhibit 8,
9 correct?

10 MR. DOYLE: Your Honor, on the binders, could I provide
11 replacement binders on Monday for the Defense exhibits?

12 THE COURT: If --

13 MR. DOYLE: I'd be happy to do that?

14 THE COURT: Yeah, that's not four inches, but it's okay.

15 MR. JONES: I know it's not --

16 THE COURT: It's not close, but what was --

17 MR. LEAVITT: Yeah, Your Honor --

18 THE COURT: I mean we're not -- I mean if you all would like
19 us to stop your trial and send the jury home and make you comply with
20 four inches. Or if you had wanted this Court to have -- sent your binders
21 back with you at the time of the calendar call and make you all do four
22 inches, instead of preparing for your trial, we could have done that. We
23 really were trying to let you all prepare yourselves for your trial, spend
24 your time, so that you could prepare your witnesses, prepare your clients
25 and do those things. But if you all choose to disregard your rules, it's

1 costing your clients money, right. It's costing your clients how you get
2 perceived in front of the jury. It doesn't do anything -- I still make my
3 fair rulings, but it's really how you all come across, you know --

4 MR. JONES: It's absolutely --

5 THE COURT: -- so as to your question, the only concern this
6 Court has is if you're going to take trial time away from the trial, to re-put
7 them into binders. Are you going to bring somebody to re-put them into
8 your orange binders?

9 MR. LEAVITT: Those are four inches.

10 MR. DOYLE: I will have somebody on Monday who will
11 break, and take and move them --

12 THE COURT: Not a break where my team needs their state
13 and federally mandated break --

14 MR. DOYLE: I understand.

15 THE COURT: -- they're going to come here earlier, before the
16 trial commences and do it, then fine. You can bring a couple binders and
17 do it, so it's more user-friendly. That's perfectly fine, of course.

18 MR. LEAVITT: We have replacement binders for that.

19 THE COURT: Right, but you understand we're not going to
20 take --

21 MR. LEAVITT: Absolutely.

22 THE COURT: -- trial time and have a jury wait out in the
23 hallway where you all -- I mean if you tell me some other way other than
24 bold and underlining it on bright colored paper and also having it
25 available online, also having it available every single day here in Court,

1 also reminding you multiple times, including pretrial conference, okay.

2 MR. JONES: Yes.

3 THE COURT: And multiple other times. Really, there is a
4 certain point where, you know, if you need it in multiple languages, I will
5 put it in multiple languages. But no one's indicated that that's necessary.
6 So not really sure what else we should be doing. Because there is that
7 point of, come on, you all have post-graduate degrees. You know how
8 to read, particularly when it's bold and underlined.

9 MR. JONES: Your Honor, may I swap out the one that I have
10 up there, that I now have in two binders? One large exhibit for Exhibit 1,
11 and 2 through 18 in the next binder. And it references --

12 THE COURT: That's perfectly fine from the Court.

13 MR. DOYLE: That's fine.

14 THE COURT: To make it more user friendly. That's fine for
15 Defense.

16 MR. DOYLE: I trust you that it's the same.

17 THE COURT: Okay, so now you're moving on -- just a
18 second, Madam Court Reporter has a question.

19 Okay, so now you said Exhibit 8. Was there an Exhibit 8
20 issue?

21 MR. DOYLE: You remember we discussed it --

22 THE COURT: Exhibit 8 was a jump drive, right?

23 MR. DOYLE: Well, I checked -- I checked the jump drive and
24 Exhibit 8 wasn't on there, so this is the CD that Plaintiffs produced that
25 has -- this is Exhibit 8.

1 THE COURT: Okay.

2 MR. DOYLE: And we've agreed to just present this as Exhibit
3 8.

4 THE COURT: Wait a second. Remember your Exhibit 8,
5 which was the imaging studies paralleled Defendant's Exhibits. I'm
6 going to do this partially from memory. I remember it was J through Z
7 and it was also Ms. Clark Newberry gave a variety of different exhibits
8 from Defense binder. It was some exhibits prior to Exhibit J and then it
9 was Exhibit J through Z that you said was parallel to the imaging
10 studies. And that was going to be, I thought a stipulated admitted
11 exhibit which you all were going to say which version was going to
12 come in -- stipulated admitted.

13 And if it was anything other than paper copies, then you all
14 needed to provide the appropriate device for the jury to view both in the
15 Court setting, and then also for the jury deliberation setting. So are you
16 going to use a DVD version both for the Court setting and for jury
17 deliberation setting, in lieu of pieces of paper, or are you doing
18 something different?

19 MR. DOYLE: I think the consensus is that we are not going to
20 send back to the jury for deliberations, the actual x-ray images, because
21 that can prove problematic.

22 THE COURT: Okay.

23 MR. DOYLE: But we have Exhibit 8, which are the images
24 that were used --

25 THE COURT: Demonstrative only then?

1 MR. DOYLE: I --

2 THE COURT: That's what I'm asking.

3 MR. DOYLE: Do you think we can do it demonstrative only?

4 MR. LEAVITT: Yeah, I don't think we need the CT scans for --

5 MR. DOYLE: We don't -- yeah, we don't need them admitted
6 and go to the jury.

7 THE COURT: So proposed 8 is going to be demonstrative
8 only; is that correct?

9 MR. DOYLE: Yes.

10 MR. LEAVITT: Correct.

11 THE COURT: Okay, so the DVD is how you're going to use it
12 for the jury during the trial, but not going back for deliberations; is that
13 correct?

14 MR. DOYLE: Correct.

15 THE COURT: Okay.

16 MR. LEAVITT: That's correct, Your Honor.

17 THE COURT: So do you have some medium in which you
18 can put that DVD in?

19 MR. DOYLE: Well, I'm --

20 THE COURT: Or does your tech -- your wonderful tech
21 person has it taken care of?

22 MR. DOYLE: Yes.

23 THE COURT: Okay.

24 MR. DOYLE: The ones that we will be using are -- will come
25 from my tech person.

1 THE COURT: Okay.

2 MR. DOYLE: But they -- everything -- what we use,
3 everything will come from Exhibit 8.

4 THE COURT: Demonstrative exhibit -- is that --

5 MR. DOYLE: Demonstrative Exhibit --

6 THE COURT: Your understanding?

7 MR. LEAVITT: Yes, Your Honor.

8 THE COURT: Okay. So sure, feel free. So thank you, Madam
9 Clerk will take that. Okay. So then do you need your jump drive back, or
10 does it have other things on it? Or are you going to deal with that at the
11 end of the case?

12 MR. LEAVITT: The jump drive we need -- there's -- there are
13 two videos on the jump drive.

14 THE COURT: So remember, if either of those videos are
15 sought to be introduced --

16 MR. LEAVITT: Right.

17 THE COURT: -- two things. One you're going to need to
18 have some medium by which they're going to need to be able to be
19 played if you are -- (a) if they do get introduced, and (b) if they're getting
20 introduced, okay, then the medium by which they need to be played for
21 the jury back in deliberations, which you need to provide.

22 MR. LEAVITT: Correct.

23 THE COURT: And the third thing is, if that jump drive
24 contains anything else other than just discreetly those two videos, it
25 cannot, because if you are getting the two videos admitted, right, they

1 both get admitted, then they can be on the jump drive, right. Individually
2 identified as exhibits. If only one gets admitted, it has to be the only
3 thing on the jump drive, right. Because remember you can't have any
4 medium go back that has anything else other than what has been
5 specifically admitted.

6 MR. LEAVITT: Yes, Your Honor, I understand that because it
7 is a jump drive, they could --

8 THE COURT: It could have ten different things on it,
9 hypothetically, right.

10 MR. LEAVITT: Watch anything, right.

11 THE COURT: Exactly right. If it's got an index of ten things,
12 and one of those ten has been admitted, there's no way to ensure that
13 the jury wouldn't go to the other nine.

14 MR. LEAVITT: Right.

15 THE COURT: So the way we ensure that is it only has one
16 thing on it when it goes back. Or if there's two things admitted, it has
17 two things on it. So on and so forth, right?

18 MR. LEAVITT: Absolutely.

19 THE COURT: Then it also has a means by which it needs to
20 be played, because I think I already give you the example, that there may
21 be a VHS back there--

22 MR. LEAVITT: Right.

23 THE COURT: -- but there definitely is not something that
24 plays that type of --

25 MR. LEAVITT: I was hoping there was a beta, but --

1 THE COURT: I don't think so. I think they actually got -- they
2 heard me enough times making jokes about the VHS, that I think they
3 actually even eliminated the VHS, since I made so many jokes about it.
4 But --

5 MR. LEAVITT: Okay.

6 THE COURT: -- the point being taken that you need to
7 provide the appropriate player-type method in order for whatever non-
8 piece of paper medium that you are intending to have the jury view of
9 any admitted exhibit in any other form, other than a piece of paper, okay.

10 MR. LEAVITT: Absolutely, Your Honor.

11 THE COURT: No worries. Okay, Marshal, have we found all
12 our jurors?

13 THE MARSHAL: Yes, Judge.

14 THE COURT: Okay. So counsel, we are up on all of our
15 jurors, so witness-wise, if you're doing Dr. Rives first, we still need to
16 wait a few moments, so then I'm going to handle some administrative
17 matters that Defense has, because we still need a witness, right?

18 MR. LEAVITT: Correct, Your Honor.

19 THE COURT: Okay. So let's go to -- because we handled
20 your witness issues for today, right. So, now let's go to Defense, if
21 there's quick matters. We're not going to go into new issues that you're
22 going to bring to the Court's attention for the first time. But before we
23 go there, actually, you all were supposed to let me know something,
24 right? First thing in the morning when you came in.

25 MR. JONES: Yes.

1 THE COURT: Is there going to be, because you're not going
2 to surprise the Court again with something new, without giving me any
3 notice. Is there an agreement among the parties, that you all are going
4 to have some type of motion at the end of day today? If so, what is the
5 agreement? And if there's not an agreement, I need like a one-minute
6 version. First off, simple question, did you all talk last night?

7 MR. JONES: Yes.

8 MR. LEAVITT: Yes, Your Honor, we did.

9 THE COURT: Okay, so what are you all intending to do? The
10 one-minute version, please --

11 MR. JONES: Yes.

12 THE COURT: -- not the 15-minute trying to educate to the
13 Judge version, please.

14 MR. JONES: Your Honor, we will be preparing a motion by
15 Monday morning. Mr. Doyle will respond on Monday, and the Court can
16 make a decision Tuesday is what Mr. Doyle and I request -- or talked
17 about that was his preference. And so --

18 THE COURT: So when are we anticipating the Court's going
19 to get things? So what is your anticipated game plan times?

20 MR. JONES: So for --

21 MR. LEAVITT: Saturday we're submitting the motion to --

22 MR. JONES: To Mr. Doyle. And then we'll provide the
23 Court --

24 THE COURT: The Court's asking when the Court's going to
25 get it.

1 MR. LEAVITT: Oh.

2 THE COURT: The Court needs to see it, right?

3 MR. LEAVITT: Correct.

4 THE COURT: The Court needs to read it. The Court wants to
5 be prepared.

6 MR. LEAVITT: Monday, Your Honor.

7 THE COURT: What time Monday will the Court get this?

8 MR. JONES: We'll deliver it at 8:00 a.m. or 9:00 a.m. on
9 Monday morning. Our initial motion. But Mr. Doyle, I don't know when
10 his opposition to it will be done.

11 THE COURT: That's what I'm asking. So Plaintiff is intending
12 for 9:00 a.m., while the Court's in the midst of trial. And when's
13 Defendant going to give -- is this written, right?

14 MR. JONES: Yes.

15 MR. LEAVITT: Correct, Your Honor.

16 THE COURT: Okay, so when is Defendant planning on giving
17 the Court your written response?

18 MR. DOYLE: Tuesday at 9:00 a.m.

19 THE COURT: Tuesday at 9:00 a.m. And when were you
20 anticipating the Court was going to be hearing this?

21 MR. JONES: At the Court's convenience, Wednesday,
22 Thursday. Not that any time is convenient.

23 MR. LEAVITT: Tuesday.

24 MR. JONES: Or Tuesday in the afternoon.

25 MR. LEAVITT: Before we --

1 THE COURT: When I'm still in the midst of trial dealing with
2 all of your motions at the same time. So when was I going to be reading
3 these?

4 MR. JONES: Yeah, I don't know.

5 THE COURT: Just trying to -- trying to anticipate, right?

6 MR. JONES: I was -- I was thinking probably you'd need at
7 least Tuesday, Your Honor. So I was thinking Wednesday morning was
8 probably the most logical time. If that's enough time for Your Honor.

9 THE COURT: And I'm sure these will comply with all the
10 rules, as far as length, discreet whatever you're planning on doing. And
11 I'm sure no one's bringing in things that deal with issues that are not
12 within this case, right.

13 MR. LEAVITT: Correct, Your Honor. It will be more of a
14 supplemental to the --

15 THE COURT: I'm sure no one is going to be telling this Court,
16 please see other motions, right? There is no way that I think either of
17 you are going to be saying, referring to other documents, like please see
18 motion X, right?

19 MR. JONES: No, we will not, Your Honor.

20 THE COURT: They are going to be discreet self-contained
21 motions. Is everyone hearing me?

22 MR. DOYLE: Yes.

23 THE COURT: And --

24 MR. DOYLE: And I'm writing it down.

25 THE COURT: Okay. Because I am sure no one is going to

1 say, please receive prior motion X or Y and then tell Judge to go fishing
2 to try and find the other motions, what you may be talking about. Or no
3 one is going to tell the Court please see deposition X or Y, right. It's
4 going to be discreet self-contained, right?

5 MR. JONES: That would be correct, Your Honor.

6 MR. LEAVITT: Yes.

7 THE COURT: Because we would want the Court to be able to
8 fully read everything in the midst of trial, or it's going to be with you all
9 day, plus doing all of its other preparation for all of its other cases, right.
10 At the same time. And so you all know it would be impermissible to
11 have done that anyway, and the Court never had to say what it just said.
12 So I'm sure you would have never done it anyway, but just making sure.

13 MR. LEAVITT: Absolutely.

14 THE COURT: So everyone does understand that, right. And
15 everyone can hear me? By the way we do have hearing assisted
16 devices, and several attorneys use them, if anyone can't hear. Okay.
17 And like I said, the jury was hearing me fine and they were in the last
18 row. And yesterday when we talked about Post-it's. The observer could
19 hear me perfectly in the second row in the gallery, on the right-hand
20 side.

21 So if anyone's not hearing me, we have hearing assisted
22 devices, and lots of other devices to help anyone in any manner
23 whatsoever. And if there's not something we have; I'll be glad to talk to
24 administration. So feel free to let me know. Okay. Any other matters?

25 MR. DOYLE: Yes, Your Honor.

1 THE COURT: Go ahead.

2 MR. DOYLE: Just we don't need to discuss it at the moment,
3 but I learned yesterday that Vickie Center's been subpoenaed as a
4 witness for trial.

5 THE COURT: She's listed as a witness on their --

6 MR. DOYLE: She was disclosed at the same time, and under
7 the same circumstances, on the same dates, et cetera, as Mary Langan.

8 THE COURT: Right.

9 MR. DOYLE: So she was disclosed -- I don't have my notes
10 with me, but --

11 THE COURT: In September, yes.

12 MR. DOYLE: Right. And then we objected to the -- to the
13 16.1 disclosures being untimely, and we raised other objections. And
14 then she was listed in a pretrial disclosure. We raised objections -- same
15 objections to that. So I'm just giving the Court a head's up that we'll
16 have to take the issue up at some convenient time.

17 MR. JONES: So this is right before I'm -- however Your
18 Honor would like to handle it, we're happy to deal with it now or later.

19 MR. DOYLE: We'll deal with it later.

20 THE COURT: Would you all like to have -- we have the jury
21 outside. When would you all like to have it addressed?

22 MR. DOYLE: I'd suggest we do it later, because I don't know
23 for a fact that they're calling her or not, but if they are, then we should
24 take it up.

25 MR. JONES: Yeah, we are -- we are calling her.

1 THE COURT: When would you all like to have it addressed?

2 MR. DOYLE: Monday morning.

3 MR. JONES: If we finish early, Your Honor, that's the hope
4 for today. Hope. Or Monday morning is fine.

5 MR. LEAVITT: Yeah, that's --

6 THE COURT: Is there anything anyone's going to provide me
7 in anticipation of the Court addressing this. Or are you just planning on
8 just arguing it and I'm doing it from memory with a whole bunch of
9 reference documents? Or what are you all anticipating?

10 MR. DOYLE: It's the same -- it's the same documents, the
11 same dates. All the same data as Mary Langan, which the Court ruled on
12 a couple of days ago.

13 THE COURT: Oh, are there -- there's medical records with
14 regard to Ms. Center?

15 MR. DOYLE: I'm sorry, what?

16 THE COURT: You said it was all the same data and
17 documents. I didn't think there was any medical records are there? With
18 regard to Ms. Center?

19 MR. DOYLE: No, but Mrs. Center's been known for quite
20 some time as a witness.

21 THE COURT: I'm sorry, I thought you said you learned
22 yesterday.

23 MR. DOYLE: I learned yesterday that she was in fact
24 subpoenaed to testify at trial. She was listed as a witness. I had no
25 knowledge that in fact there was a plan to call her as a witness.

1 THE COURT: Okay, I'm --

2 MR. LEAVITT: That's fine. Your Honor, we will submit
3 some --

4 THE COURT: The Court's just asking is anyone planning on
5 providing anything or not. It's really a simple --

6 MR. JONES: No.

7 THE COURT: -- yes or no. I just, if you are --

8 MR. JONES: Okay.

9 THE COURT: -- I'd like to have it so I could review it. If
10 you're not, I'm just trying to have an understanding, so that I just need to
11 know if there's something I should be reviewing in the midst of trial. It's
12 a simple yes or no.

13 MR. DOYLE: If necessary, can we file something over the
14 weekend, and with a courtesy copy delivered first thing in the morning. I
15 can't have something in writing put together by the end of the day.

16 THE COURT: The Court's not requiring anything one way or
17 another. The Court's just inquiring. I don't know if you all have
18 something prepared or not. I know I've not received anything. But I
19 don't know what you all are intending. The only way to find out the
20 answer to that, is to ask you all.

21 MR. JONES: No.

22 THE COURT: I don't know. Okay, that's why I have to ask
23 you. I can't get into people's minds. When you say you want an issue
24 down the road, I don't know what people are asking. I give you all the
25 courtesy of asking if you're planning on providing something or not. So

1 that somebody doesn't think that they've communicated that they're
2 providing something, and I should be waiting for something. And then,
3 you know, you all schedule something differently. So if you're not --

4 MR. DOYLE: My plan is --

5 THE COURT: -- you're not. If you are, you are. I'll be glad to
6 review something if you are. If you're not, then I'll address it, if you're
7 not. But to say it's just there in the record is -- it is what it is. I will
8 address it how you all want it addressed. I'm just trying to ask you all if
9 you're planning on providing something or not. It's simply a yes or no.

10 MR. DOYLE: Okay. Unknown. My plan at this moment --

11 THE COURT: Okay.

12 MR. DOYLE: -- is to present it orally Monday morning. But if
13 I feel there's something that needs to be filed, I would file it on Sunday
14 and provide courtesy copies Monday morning. But I don't think I need to
15 file something. It's -- I think it can all be -- I can do it orally.

16 THE COURT: Do you think maybe in fairness to the Court,
17 and the fact that there's requirements in the Eighth Judicial District about
18 one judicial day that maybe you might want to comply with that rule?
19 Even though this Court is politely asking you today, don't you think
20 maybe, Defense, Plaintiffs' counsel might want to know if you're possibly
21 doing something, so it's not all surprise.

22 Do you think the fact that you all have already told me that
23 I'm getting documents on Monday morning, maybe this Court might
24 want to try and figure out if it needs to be here at 5:00 in the morning on
25 Monday, 6:00 in the morning? Because remember, I've got about 800,

1 67, some other 800 other cases on my docket, and I've got full -- all my
2 other cases. So maybe I want to make sure I'm prepared for everything.
3 So out of maybe a courtesy, if you think you're going to do it, you might
4 want to just give a head's up. It was a simple yes or no question. It's
5 not --

6 MR. DOYLE: I'm not going to submit anything in writing.

7 THE COURT: Okay, you're more than welcome to or not. I
8 just was asking what people's intentions were, so I can try and plan and
9 prepare, so I can be fully prepared. Which is what I do on each and
10 every case. So --

11 MR. JONES: Your Honor, we're not submitting anything.

12 THE COURT: Counsel for Plaintiff, are you planning on
13 submitting something? Yes or no?

14 MR. JONES: No, Your Honor.

15 MR. LEAVITT: No.

16 THE COURT: Okay. The wonderful tech person is trying to
17 assist us to make sure that the Elmo is working, because you indicated
18 you might use the Elmo.

19 MR. JONES: All right.

20 MR. LEAVITT: Okay.

21 THE COURT: So that's why he's trying to assist you.

22 MR. LEAVITT: No, there's just a paper on the --

23 THE COURT: Right. That's a test to see if the Elmo is
24 working.

25 MR. LEAVITT: Oh, okay.

1 THE COURT: The way we see if the Elmo is working is, we
2 put a piece of paper or something there, because if we don't see it on the
3 screen, then it's not working.

4 MR. JONES: Oh, okay.

5 THE COURT: If you see it, see it's working.

6 MR. JONES: Okay, now I see the paper.

7 THE COURT: Now you know that the Elmo is working.

8 MR. LEAVITT: Your Honor.

9 THE COURT: He's doing his job to make sure that everything
10 is working for you. And we appreciate it. Thanks for jumping here so
11 quickly.

12 IT TECHNICIAN: You're welcome.

13 THE COURT: Thank you. Okay, so the Elmo is working for
14 you all.

15 MR. JONES: Your Honor, we have --

16 THE COURT: Okay, next.

17 MR. JONES: -- two more potential demonstrative exhibits,
18 that I don't intend to use.

19 THE COURT: Have they been disclosed to Defendant in
20 accordance with you all's agreement?

21 MR. JONES: Well, one of them I just got this week, Your
22 Honor. And the other is the verification that -- that was used for the first
23 time in the -- in the hearing with Dr. Rives.

24 THE COURT: Is it --

25 MR. JONES: On the 7th.

1 THE COURT: Is that impeachment?

2 MR. JONES: It is impeachment only.

3 MR. LEAVITT: Yes.

4 THE COURT: There's rules for impeachment. You know the
5 rules for impeachment.

6 MR. JONES: Okay.

7 THE COURT: With a party witness. I mean it is what it is. If
8 it's demonstrative versus impeachment, there's different rules. Follow
9 your rules. They are what they are. If you have an agreement with
10 Defense counsel that's different, that you all need to comply with, then
11 feel free to show it to Defense counsel.

12 MR. JONES: Okay.

13 THE COURT: If Defense counsel has a viewpoint, the Court
14 will be glad to address it. Defense counsel, do you have a viewpoint on
15 the two demonstratives that they handed you in the binder?

16 MR. DOYLE: Yes, I do have an objection to both, having just
17 received them this morning.

18 THE COURT: Okay.

19 MR. DOYLE: I mean I'm certainly aware of them, but I was
20 not aware that they were going to be used for impeachment purposes.

21 THE COURT: Because you know they don't have to disclose
22 things for impeachment purposes, if they're documents. But, okay.

23 MR. DOYLE: My understanding of the rule is all documents
24 have to be disclosed in advance of trial, even those being used for
25 impeachment.

1 THE COURT: Depending -- okay. Both of the statements are
2 generalities. Let me hear the objection. Let me address what the
3 objection is. So let's identify. Can someone actually show me the Court
4 what we're talking about so I can --

5 MR. JONES: May I approach, Your Honor?

6 THE COURT: -- have some idea of what we're talking about?
7 That would be wonderful. Thank you so very much. Marshal, could you
8 please let our poor jury know that there's going to be a few more
9 minutes. Thank you so very much.

10 Okay, so counsel for Plaintiff, can you please describe what
11 these are, to the extent that you wish to do so?

12 MR. JONES: Yes, Your Honor, the first --

13 THE COURT: If you feel --

14 MR. JONES: -- is a verification signed by Dr. Rives on April
15 27th, 2017. I received it maybe, I don't know three weeks or a month
16 ago.

17 THE COURT: Uh-huh.

18 MR. JONES: The -- and it was disclosed and used for
19 impeachment purposes at the hearing on October 7. In addition I have
20 the transcript of the hearing on October 7th, which is number 19 -- so
21 number 18 was what I just described. The verification. Number 19 is the
22 recorder's transcript of pending motions. The portion that I would be
23 looking at would be the testimony of Dr. Rives, which begins on --
24 somewhere in the ballpark, page -- let's see. Around page 20 -- no, 29,
25 Your Honor.

1 THE COURT: Okay.

2 MR. JONES: And continues through the questions, I think up
3 until -- okay, up until page 17 -- 72. I won't be using anything after page
4 73, which is -- the Court has some questions at that point, but I won't be
5 using any of that.

6 THE COURT: Okay. So can you --

7 MR. JONES: And it's for impeachment purposes only, Your
8 Honor.

9 THE COURT: -- to the extent you -- yeah, can you just -- to
10 the extent -- to the extent without in any way trying to ask you about trial
11 strategy --

12 MR. JONES: Absolutely.

13 THE COURT: -- so just so the Court has a better
14 understanding of what you're asking the Court potentially to rule on.

15 MR. JONES: The only reason I would use it is in the event
16 that I feel that there has been a misstatement made on the standby Dr.
17 Rives during his testimony. And then I would refer back to what he said
18 on October 7th. So it's for impeachment purposes only, and I won't be
19 using it otherwise.

20 THE COURT: Okay. So are you -- just so I have a better
21 understanding, counsel. And if you feel it's trial strategy and don't wish
22 to answer it's perfectly fine. Just I'm trying to get an understanding,
23 because you used the term demonstrative. Demonstrative sometimes
24 means you're showing it to the jury. You may be asking it to go up on
25 ELMO and things like that. So I'm not sure if that's what you're

1 intending to do with a transcript and the verification, or you're using
2 them more as reference documents to ask questions based on them, or
3 something different. Just because you used the term demonstrative, if I
4 could just have a little bit more clarification as to how you're trying to do
5 it, without in any way giving away your trial strategy or anything like
6 that. Just did you mean demonstrative in its traditional sense, or
7 something different? I'm just --

8 MR. JONES: No, not in its traditional sense, Your Honor. My
9 inclination would be to give it to the -- give it to the Defendant and let
10 him refresh his recollection potentially and -- yeah, I guess -- I guess 18
11 would be something that we would show ultimately if he -- yeah, I think
12 that will be shown to the jury. And then 19 I don't expect it to be,
13 because I'll have him just address it himself when he re-reads it, as
14 impeachment only.

15 THE COURT: Okay. So --

16 MR. JONES: So, Your Honor, I guess the request would be
17 that -- that 18 would be for impeachment, but also, I would like to
18 demonstrate it to the jury if allowable. And 19 would be for
19 impeachment only, and I would not be putting it on the Elmo or anything
20 else.

21 THE COURT: Okay. Just one moment, give me a second.
22 Okay, and so counsel for Defense. After hearing what Plaintiff's
23 intended, what is your response, if any? Or what would you like the
24 Court to hear?

25 MR. DOYLE: In terms of Exhibit 19, which is the transcript, I

1 would not have an objection to using that, if it was referred to perhaps as
2 earlier testimony, or something like that. But not specific reference to a
3 hearing last week on such and such a date. Or anything about the
4 reasons or background about that hearing. In addition it is a document
5 that is being disclosed late for purposes of impeachment.

6 For Exhibit 18, I do object to showing that to the jury. It has
7 not been offered previously as an exhibit. It's not part of anyone's
8 exhibit binders or lists. This document has been known for quite some
9 time. And it's not in evidence. I don't believe it will come into evidence.
10 And so I would object to showing something to the jury that really is not
11 demonstrative. And really is a factual piece of information.

12 THE COURT: Can you give me your legal base -- folks on
13 Exhibit 18. I'm hearing your objection, but what's any legal basis on why
14 they couldn't show it to the jury. Now --

15 MR. DOYLE: It would --

16 THE COURT: And you said quite some time. And once
17 again, I'm trying to be very careful here, because remember the Court
18 still hasn't made a final determination, right? On some of the -- on the
19 counsel sanction issue. It's still pending, right. Because I needed to see
20 all of counsel's conduct throughout this trial. Remember I deferred to
21 give people all of the benefit of the doubt, right, from Defense counsel,
22 right, on that.

23 So -- and then Plaintiff's counsel as well. So that's still
24 pending. So I'm -- remember I'm trying to still give everyone the benefit
25 of the doubt here. So quite some time. If I were to look through the

1 transcript of when the verification was provided to Plaintiff's counsel,
2 what does quite some time mean if you just used that term?

3 MR. DOYLE: I don't know that date. But at some point, they
4 asked for it, and we provided it. Because they couldn't find it apparently.

5 THE COURT: Couldn't find it, counsel?

6 MR. DOYLE: Or didn't have it. I don't know. That -- you'd
7 have to ask George Hand that question.

8 MR. JONES: Your Honor --

9 THE COURT: Counsel for Plaintiff, go ahead.

10 MR. JONES: Your Honor, this was an emailing between
11 secretaries. There was a complete failure to disclose this document by
12 the Defense, and so we obtained this because we reached out and said,
13 really, is there no verification? And so a paralegal from Mr. Hand's office
14 apparently sent an email to a paralegal from Mr. Doyle's office, and she
15 said, oh, here is a verification and sent it over. That's the first time we
16 got it and, like I said, I don't have the exact date, but as I mentioned I just
17 did my best to estimate the last three weeks to -- three weeks or
18 something like that. I mean, it was recent. Anyway, and so, yeah.

19 THE COURT: What this Court is trying not to do -- and you all
20 have the transcript of the October 7th hearing so no one has to rely on
21 this Court's recollection -- the transcript says what the transcript says; if
22 anyone has any questions about the transcript you could usually order
23 the DVD, but you may recall the timing of when that verification came
24 over was an issue as part of the terminating sanctions hearing.

25 The difference between the date of 2017 when it was signed

1 and when it was actually provided was part of the issues that came up in
2 that hearing which is why this Court was very carefully trying to say to
3 you -- before you answer the Court's question on what you meant by
4 quite some time. That's why I wasn't sure if you recalled that it was an
5 issue from the October 7th hearing when you used the phrase quite
6 some time because I wasn't -- needed to have a better understanding of
7 what you meant by the term, quite some time, because in plain English
8 quite some time generally does not mean last month.

9 MR. DOYLE: Based on my memory, without checking, I
10 believe it was provided before the 2.67 conference because at the 2.67
11 conference I was informed, for the first time, that the motion would be
12 coming, and it came a few days later as I recall.

13 THE COURT: These dates were in pleadings provided to this
14 Court. Okay. So we're not going to get caught up on that date issue,
15 but --

16 MR. DOYLE: My objection to showing it to the jury is it's not
17 a timely disclosed document to be used for impeachment purposes --

18 THE COURT: But is the reason it's not timely disclosed is
19 because your office failed to timely disclose it which was part of the
20 reason why there was a sanction hearing for terminating sanctions?
21 Counsel, that's what the Court really was politely trying not to have to
22 ask you. It's not disclosed because your office didn't do it.

23 MR. DOYLE: Okay. My --

24 THE COURT: Isn't that acknowledged by both parties? So
25 are you asserting that they can't use it because your office failed to do it

1 when it needed to do it back in 2017; is that what you're representing to
2 this Court?

3 MR. DOYLE: The Court asked for my objections. I'm simply
4 stating my objections, and my other objection is showing the jury
5 something that is not in evidence and, also, based upon 48.035.

6 THE COURT: How is it 48.035 more prejudicial than
7 probative?

8 MR. DOYLE: Because it's -- I anticipate it is going to be more
9 prejudicial than probative. The Court has not given us any guidance as
10 to how far, if at all, Plaintiffs or Defendants, for that matter can go into
11 the *Vickie Center* case. In terms of, you know, who were the defendants;
12 what's the medicine issue? What the jury's finding was which, by the
13 way, is on appeal. I mean, so what Plaintiffs are doing is they're -- you
14 know, I assume they want to bring -- well they want to bring Vickie
15 Center in as a witness for what possible purpose.

16 So, yes, this is 48.035 to the extent it's one further step along
17 the path of getting, in front of this jury, as much information as possible
18 about the *Vickie Center* case which will be very prejudicial and will
19 consume time.

20 THE COURT: Counsel, I'm hearing everything you're saying,
21 but I'm going to have to overrule it for several reasons.

22 MR. DOYLE: That's fine.

23 THE COURT: Okay. One of which is please read Exhibit 18,
24 Laparoscopic Surgery of Nevada's response to Plaintiff -- to Tina Farris's;
25 first set in interrogatories. It has nothing to do with Vickie Center. It says

1 right on the document to Tina Farris. So your objection on 48.035 the
2 Court can't even find has any potential merit.

3 Your whole analysis on *Vickie Center*, the Court can't find has
4 any potential merit because if you look at the very document that they
5 handed you, and you have a copy -- you've got the binder now closed in
6 front of you, but they gave it to you specifically says to Tina Farris's first
7 set of interrogatories. So it has nothing to do with Vickie Center.

8 So that whole analysis, the Court can't find, has any
9 relevance to what Plaintiff has requested. The Court also can't find your
10 objection for it not being timely disclosed has any merit in this case
11 because by acknowledgment of the parties -- not only in October 7th, but
12 the Court confirmed today -- is even, under your best scenario though
13 you don't know the date -- is the verification wasn't provided until, at the
14 earliest, September 2019 by your office, Mr. Doyle, or someone related
15 to your office.

16 I'm not sure if it was your office or related office here
17 someone related to your firm in 2019 a verification by its date was
18 signed on or about April 27th, 2017 with a notary stamp April 27, 2017.
19 So the failure for it to be disclosed timely was your law office's fault
20 because your law office -- at least the only information has been
21 presented to this Court by Mr. Chad Couchot, by yourself, by everyone
22 was -- and by your own client, Dr. Rives is that Dr. Rives, under oath, said
23 he signed it on or about April 27, 2017, and then had Teresa Duke
24 assigned to other documents, I'm paraphrasing, had her notarize that
25 and then he sent it to counsel timely. He didn't say you waited two years

1 to send it to counsel. Okay?

2 He said he sent it to -- okay. Got the email then sent it --
3 maybe he didn't send it that day; I don't believe that follow-up question
4 was asked specifically, but there was nothing to say that he waited two
5 years. And even if he did it still would be Defendant's issue. It's not
6 Plaintiff's issue to fail to disclose it. It would have been either Defendant,
7 himself, on behalf of Laparoscopic Surgery, or even Dr. Rives on behalf
8 of Laparoscopic Surgery, or it's the Doyle Law Firm or people associated
9 with the Doyle Law Firm, counsel for Dr. Rives and Laparoscopic Surgery
10 that didn't give it to Plaintiffs. So Plaintiffs and Plaintiffs' counsel can't
11 be held responsible for not disclosing something because the Doyle Law
12 Firm and/or -- Doyle Law Firm is what you all have told me it was so I'm
13 not holding Dr. Rives or Laparoscopic responsible, but even a second
14 alternative it would have been Laparoscopic and Dr. Rives, but based on
15 Dr. Rives' sworn testimony and based on what everyone's told me it was
16 the Doyle Law Firm or employee of the Doyle Law Firm for the first time
17 provided it to Plaintiffs' counsel, slash, on behalf of Plaintiff in 2019 and
18 around, you all said, probably September giving you the benefit of the
19 doubt, but August, slash, September.

20 September is what you all told me, but okay -- because you
21 said around the 2.67. Your 2.67 you've identified as being
22 September 11th, I recall, I may be off a day or so, but I thought you told
23 me September 11th so, best case scenario, that's over two years
24 afterwards. So the late disclosure I can't hold Plaintiff responsible for
25 something they didn't know existed; they didn't have until -- therefore,

1 that objection has no merit. The whole *Vickie Center* argument, through
2 that objection, has no merit.

3 And then I need to go to the very thing that we already
4 discussed. You all have jointly agreed upon jury instructions. You all
5 have told me that these are your joint agreed upon jury instructions and,
6 in fact, they're on the letterhead of Thomas Doyle and Kim Mandelbaum
7 for Defendants Barry Rives and Laparoscopic Surgery -- that's the face
8 page that was presented to the Court -- hard copies provided to the Court
9 so I have to presume that it's on your pleading; that it came from your
10 law office. Okay. And since it's the ones that don't comply with the
11 Court rules and don't have the Ds on them that would be consistent with
12 the rest of the ones that were provided from Defense Counsel because
13 the Plaintiff's ones had the Ps on them.

14 So that joint agreed upon jury instruction includes one that
15 says before trial each party has the right to ask the other parties to
16 answer written questions. These questions are interrogatories; the
17 answers to the interrogatories are also in writing and they're sworn
18 under oath. Okay? Sworn under oath which implies verification.

19 You must consider the questions and answers that -- it says
20 rad, but I assume that was a typo -- I was going to address it at the time
21 of jury instructions that the E was missing so that the word should have
22 been read -- okay, that were, like I said it says R-A-D, but I assume that
23 was a typo, but whether it says rad or read -- to you the same as if
24 questions and answers had been given in court.

25 Generally, when there is this joint agreed upon jury

1 instruction that addresses interrogatories and directly talks about it being
2 sworn under oath, sworn under oath, references generally of verification
3 and the interrogatories themselves, if they had been properly done and
4 provided in a proper format, would have had the verification attached to
5 them because that's what the rules require; would have been a complete
6 document and that complete document, if read, could have easily
7 referenced -- because sworn under oath includes the verification -- that
8 also would allow the verification to be mentioned and to be shown to a
9 jury because it talks about by very reference of your stipulated jury
10 instruction the verification under oath.

11 And since this joint jury instruction doesn't specifically only
12 say Dr. Rives and exclude Laparoscopic the Court has to take it that you
13 all meant it generally as to both Defendants because these were supplied
14 as joint; it doesn't say only as to one Defendant. And so, therefore, if I
15 look at it from your own joint exhibit that you really have stipulated to
16 allow this in and so that would be an independent reason that would
17 allow it to come in. In addition, if I need to go further, as another
18 independent reason from a verification standpoint part of the sworn
19 testimony that comes up in other testimony by a Defendant on the stand,
20 okay, that can be utilized, right, for other purposes which you didn't
21 object to in Number 19 conceptually, would allow the same argument for
22 the sworn testimony -- as long as it's not saying that it's an evidentiary
23 hearing that was related to sanctions or something -- it's just prior sworn
24 testimony is appropriate lingo, right? Or something similar to that.
25 Okay? Is appropriate impeachment.

1 So the Court would allow Exhibit 19 to utilize as prior
2 impeachable testimony, under oath, as long as it is done -- I think the
3 clarification of saying earlier testimony or prior sworn testimony is fine --
4 not using the dates --

5 MR. DOYLE: Is it okay if I mention the date?

6 THE COURT: -- not using -- there was an evidentiary hearing;
7 not the reason why I had the evidentiary hearing -- none of those need to
8 be said -- prior testimony, prior sworn testimony, is appropriate because
9 those are both accurate. Okay? And those would be appropriate
10 because the rules allow, but just like a prior deposition can be used for
11 any purposes against a party -- it doesn't have the timeliness aspect --
12 and it's not untimely done because the hearing just happened on the 7th
13 so it couldn't have happened before the close of discovery on July 24th
14 by definition.

15 These issues couldn't have arisen before July 24th, by
16 definition, because the very verification that was -- good large part of the
17 issue for which the motion was filed on OST didn't come to light until
18 after the close of discovery because the very verification wasn't even
19 provided. At least as presented in the pleadings and not contested by
20 one of the counsel from Doyle Firm, by all the pleadings that were
21 presented to this Court, and by all the testimony that the very verification
22 wasn't even presented to Plaintiffs' counsel until after the close of
23 discovery; after July 24th. Okay?

24 So in light of all of those, Exhibit 19, proper impeachment --
25 Defense doesn't even disagree with that as long as you're not using

1 improper terms. Okay? And I've clarified improper terms. Okay?
2 Exhibit 18, depending on the answers you get, could potentially be used;
3 could be just shown. Okay? In an appropriate manner depending on
4 answers you get, and I have to get a little bit more clarification to have
5 an understanding of what you're intending to do before the Court makes
6 a final ruling, but that's the Court's inclination.

7 Plaintiffs' counsel, feel free to respond.

8 MR. JONES: The only thing I would ask, Your Honor, is that
9 depending on the circumstance I think it would be appropriate to
10 mention that this was just a week or so ago because I think it goes to
11 credibility of, you know, closeness in time if he is -- depending on what
12 his answers are, but other than that -- and, certainly --

13 THE COURT: That is going to be -- if you think that question
14 needs to come up I'm going to ask that you say, Your Honor, may we
15 approach. We're going to come to bench and then you and opposing
16 counsel have an opportunity for you to explain why you think it's
17 necessary and counsel for Defense is going to have an opportunity to
18 explain if he thinks it's not necessary so that the Court, then, can have a
19 temporal understanding of whether is, or is not -- the Court can base its
20 rulings now on what the law is. I'm going to have to hear answers to see
21 whether or not a temporal understanding needs to be taken into account.

22 MR. JONES: Perfect.

23 THE COURT: Okay. I think that is the appropriate way to
24 handle that situation. Does that meet your needs?

25 MR. JONES: It does, Your Honor.

1 THE COURT: Does that meet your needs, Counsel for
2 Defense?

3 MR. DOYLE: Yes. Thank you.

4 THE COURT: Okay. Does that address that one issue, but so
5 right now you know you can't say the date, and you can't say what type
6 of hearing it is, right?

7 MR. JONES: Absolutely, Your Honor.

8 THE COURT: Now in clarity -- and this is kind of interesting
9 that I'm saying this, but once again since the client has the right to be
10 here for these type of hearings. If something gets blurted out by witness
11 on the stand things may change and if people think things change and
12 need to come to bench then counsel can easily come to bench. Okay.
13 I'm giving you the parameters based on the information that you all have
14 provided me and based on what was said as of yesterday which is,
15 obviously, the only information I currently have. I don't have a crystal
16 ball to foreshadow what people may say on the stand. Okay?

17 Anybody have any further questions?

18 MR. JONES: No, Your Honor.

19 MR. DOYLE: No, Your Honor.

20 THE COURT: Okay. Before you want to show Exhibit 18 you
21 need to touch base with me, right? Because we're going to have to hear
22 what the answers are. Okay?

23 MR. JONES: Yes, Your Honor.

24 THE COURT: Does that work? Okay.

25 MR. JONES: It does.

1 THE COURT: So is there any other matters that the parties
2 need, or should we bring the jury in?

3 MR. JONES: Bring the jury in, Your Honor.

4 THE COURT: Okay.

5 [Court and clerk confer]

6 THE COURT: I need to give a point of clarification. Our
7 wonderful clerk is helping us out today. You all have used these terms,
8 Exhibit 18 and 19, so they're truly not exhibits. These were -- I'm going
9 to phrase them as proposed demonstratives, right? And what we're
10 going to actually do is we're going to call them Court exhibits just so that
11 since there was discussion about them today, I think we're going to call
12 them Court exhibits next in order for today's purposes. Does that meet
13 your needs better? Probably? That way --

14 MR. JONES: That's perfect, Your Honor.

15 THE COURT: -- if there was some issues --

16 MR. DOYLE: That's helpful.

17 THE COURT: -- that anyone has with regards to today's
18 discussion -- does that meet both of your needs better?

19 MR. DOYLE: Yes, thank you.

20 MR. JONES: Yes, Your Honor. Thank you.

21 THE COURT: That way? Okay.

22 [Court and clerk confer]

23 THE COURT: I'm only using the term Court's exhibits just
24 because they were the subject of some extensive oral argument. I'm in
25 no way saying that the Court wants them as an exhibit or any manner it

1 just that we're really, using it for a clear distinction so that they are not
2 viewed as things otherwise were provided at the calendar call. Okay?
3 So you understand that's why I'm using that generic term, okay?

4 MR. DOYLE: Yes.

5 MR. JONES: We're fine with your vernacular, Judge. Thank
6 you, Your Honor.

7 THE COURT: Okay. Just so that you all have a clear
8 understanding what you were talking about. Thank you so much. Go
9 ahead.

10 THE MARSHAL: All rise for the jury.

11 [Jury in at 9:51 a.m.]

12 [Within the presence of the jury]

13 THE MARSHAL: All jurors are accounted for. Please be
14 seated.

15 THE COURT: Do appreciate -- welcome back, ladies and
16 gentlemen. If I hadn't already used my ish example I would have used it
17 today, you know. Welcome back. Hope everyone had a nice, relaxing
18 evening. We're going to continue to -- as you know we're in Plaintiffs'
19 case-in-chief. So, Plaintiff, are you going to call your next witness or we
20 recalling the same witness that was on the stand at the end of the day
21 yesterday?

22 MR. JONES: Your Honor, we are going to continue with
23 Dr. Rives.

24 THE COURT: Okay. So Dr. Rives will be coming back to the
25 stand.

1 So, ladies and gentlemen, what we generally do when a
2 witness comes back to the stand, they don't get re-sworn in again. The
3 Court just reminds them that they understand that understand that
4 they're still under oath and they just confirm that. Okay?

5 So, give a chance just to get up to the stand, the Court will
6 just take care of that.

7 Witness, you understand you're still under oath, correct?

8 THE WITNESS: Absolutely.

9 THE COURT: Okay. Appreciate it. Thank you so very much
10 and so counsel's going to do the questioning. And, Marsha, would you
11 mind coming here real quick?

12 Counsel, you can feel free to commence with your
13 questioning.

14 MR. JONES: Thank you, Your Honor.

15 THE COURT: And as he's getting ready, juror letters are
16 almost finished we just had one little quick little thing that my JA had to
17 do on another matter. So just took a few extra minutes and they should
18 be out by the time you have your lunchbreak. Okay?

19 BARRY RIVES, M.D., PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

20 DIRECT EXAMINATION CONTINUED

21 BY MR. JONES:

22 Q Dr. Rives, this litigation has been going on for years, correct?

23 A That is correct.

24 Q And Doctor, at any time at any of the meetings that you've
25 had with someone from our side whether it be your deposition or

1 something like that, has anyone on our side ever blamed you for causing
2 Titana's diabetes?

3 A Diabetes? No.

4 Q Has anyone blamed you for causing her back pain?

5 A No.

6 Q For causing her impinged shoulder?

7 A No.

8 Q Okay. How about high cholesterol?

9 A No.

10 Q Okay. So all of those things no one's ever even accused you
11 of having any role in that?

12 A No.

13 Q Okay. All right. Are you under the impression that Tina is
14 asking for compensation from you for that; for any of those things?

15 A No.

16 Q Okay. All right. Doctor, we left off yesterday talking about
17 interrogatory responses and, Doctor, these are the answers you write
18 down in response to questions asked and you understand that you're
19 under oath and that they're sworn under penalty of perjury when you
20 sign, correct?

21 A I reviewed them last night and, yes, that is correct.

22 Q Okay. Thank you, Doctor. And that's the same -- just like
23 you're under penalty of perjury now if you're untruthful, correct?

24 A That is correct.

25 Q Okay. Now, in this case, on September 24th of this year, let's

1 see, you made some changes to some interrogatory responses and you
2 swore that the new responses are now true under oath, under penalty of
3 perjury, correct?

4 A There were multiple changes in September, and we
5 eventually put a supplemental responses in; that is correct.

6 Q Okay. Got it. Now -- and Doctor, you know that every time
7 that you sign a verification, as we've just been explaining, that it is again
8 under oath, under penalty of perjury?

9 A That is correct.

10 Q All right. Now, Doctor, you'd agree that in this case you're
11 the only person that can really tell us what happened in Titina's July 3rd
12 surgery, correct, because you were the only one watching the camera at
13 the time, right?

14 A I was the only surgeon in the room. There's, obviously, a
15 scrub tech in the room, there's nurses in the room, and there's an
16 anesthesiologist in the room.

17 Q Okay. But you're the one watching the camera, right, as the
18 surgeon?

19 A I'm the one performing the surgery, correct.

20 Q Okay. All right. And that surgery wasn't recorded; was it?

21 A No.

22 Q Okay. And the anesthesiologist he's not looking at the
23 camera; is he?

24 A I -- that's asking for speculation; I don't know whether he
25 looked at it or not.

1 Q Okay. That's not part of his role; is it?

2 A Usually not.

3 Q Okay. All right. And if you did something wrong and chose
4 not to report it conceivably the only person that would know would be
5 you; is that fair?

6 A No, I think the scrub tech would know that as well.

7 Q Doctor, in your mind, is either of these two things worse or is
8 one worse than the other? Dishonesty under oath or dishonesty in a
9 medical record.

10 A Is one worse than the other?

11 Q Yes, or are they equally?

12 A I would say they're equally.

13 Q Okay. Now Doctor, again, what is the penalty for providing
14 false information when you're under oath?

15 A Possible perjury.

16 Q Okay. And you understand that perjury is a serious crime?

17 A I do.

18 Q Okay. Doctor, in prior testimony you swore, quote, to tell the
19 truth, the whole truth, and nothing but the truth so help you God. Do
20 you remember that?

21 A That is correct.

22 Q Okay. You recall making that oath?

23 A Yes, I do.

24 Q Okay. When you swore to tell the truth what you're
25 promising there is to answer questions precisely and accurately, correct?

1 A And completely, yes.

2 Q And completely. When you're saying to tell the whole truth
3 that indicates absolutely completeness, right?

4 A Hopefully yes.

5 Q Means you're not going to leave anything out, right?

6 A Not intentionally, no.

7 Q Okay. And nothing but the truth that means you're not going
8 not exaggerate or add other information that isn't the truth; is that fair?

9 A That is correct.

10 Q Okay. But Doctor, during that prior testimony, your answers
11 were not always the truth, the whole truth and nothing but the truth;
12 were they?

13 A Which answers are you referring to?

14 Q Do you recall that I showed you the six sets of interrogatory
15 responses in this case at that -- during that testimony?

16 A Yes.

17 Q Right, and specifically those included, back in April of 2017,
18 there was a set of questions that you had answered or a set of questions
19 from the -- that had your name on them with answers in response to
20 interrogatories from the Plaintiff, correct?

21 A There were interrogatories with answers to both myself, and
22 to Laparoscopic Surgery Nevada.

23 Q Thank you.

24 A Correct.

25 Q And so there was a set for your company and a set for you,

1 correct?

2 A If you're referring to the ones in April of 2017 that is correct.

3 Q Okay. And then, subsequently, there were supplemental
4 responses from September of 2019, correct? So two and a half years
5 later there were some changes to those answers, right?

6 A Correct.

7 Q And then about a week or so after that there were more
8 changes to those answers, correct? Or --

9 A Well I received them in email as proposed supplemental
10 responses and, without divulging communications between me and my
11 attorney and waiving my rights thereof, I made suggestions for changes
12 because there were some wrong answers and there were some
13 incomplete answers. My attorneys eventually corrected those and
14 eventually filed, I hope, a supplemental where all the correct answers
15 were done, and I signed a verification for that as well.

16 Q Got it.

17 A In doing so there were multiple verifications in September.

18 Q Perfect. Now, Doctor, you testified under oath during that
19 testimony -- you testified under oath that the first time you had seen any
20 of those documents was in September of this year, correct?

21 A To be complete --

22 Q I asked you to answer whether or not you testified, under
23 oath at that time, that the first time you saw those documents was in
24 September of this year?

25 A I believe what I testified to during the testimony we're

1 referring to is that I pulled up an email in April --

2 Q Doctor, I asked you a yes or no question. Did you testify,
3 under oath, that the first time you saw those documents was in
4 September of this year or not?

5 A I'll have to -- you'll have to refresh my memory to that.

6 Q Okay. Please go to page 49, line 11. Doctor, I'm going to
7 read --

8 A Wait, wait, wait, wait.

9 Q Okay.

10 THE COURT: Counsel, can you give that page reference
11 again, please?

12 MR. JONES: Yes, it's page 49, beginning at line 11.

13 THE WITNESS: Okay.

14 BY MR. JONES:

15 Q Okay. So beginning at line 11 we're going to go through
16 page 50, line 9 and I'm going to read this, Doctor and I'm going to go
17 question and answer. You agree that these questions are from me and
18 these answers are from you, correct?

19 A Correct.

20 Q Okay. So 49, line 11.

21 "Q Okay. Now, Doctor, are you sure you have not seen these
22 before, any of these six that we just went through, prior to September of
23 2019?

24 "A Yes.

25 "Q Okay. Why are you so sure of that, Doctor?

1 "A Because when I had a chance to review them there were
2 errors on there that I needed to have them corrected.

3 "Q And that's true both for the ones for your corporation as well
4 as your answers to interrogatories for yourself personally?

5 "A I'd have to go through them again to verify that.

6 "Q Please do so?

7 And then it says witness reviews documents. Then the witness,
8 that is yourself, answers:

9 "A Yeah, I reviewed them in September of this year because I
10 needed to correct the address on my corporation's responses as well.

11 "Q So because of that you can say with certainty, for the Court,
12 that this is the first time you saw that -- saw them was September 2019,
13 correct?

14 "A Or sometime in September, yes.

15 "Q Right, sometime in September 2019?

16 "A Oh, 2019? Yes.

17 "Q Okay. And that you've never seen either one before, correct?

18 "A That is correct.

19 Okay. So, Doctor, you testified that you had never seen those
20 documents prior to September of 2019, correct?

21 A And what I would say is I need to clarify what I mean by seen
22 as opposed to review.

23 Q Okay. So we'll get to that in a minute. Now at one point,
24 after you swore that you had never seen these documents before, I
25 confronted you with a verification for some of these documents that you

1 had signed all the way back in 2017, right?

2 A Correct.

3 Q And you didn't know I had that document before I showed it
4 to you then, right?

5 A I have no way of knowing that.

6 Q Okay. Do you recall what that verification said?

7 A I'd like to look at it to make sure.

8 Q Okay. So go ahead and flip to 18.

9 THE COURT: And, Counsel, you just mean to flip back a page
10 or two, right?

11 MR. JONES: Yes, that's it. Yes.

12 THE COURT: And jury will disregard that numbering. We
13 just use a tab divider and so 18 has no reference in this case just to let
14 you know. We just threw in a tab divider. Okay?

15 Sorry, go ahead. Thank you.

16 BY MR. JONES:

17 Q Doctor, can you go ahead and read that verification?

18 A This is regarding Laparoscopic Surgery Nevada's response
19 to Plaintiff, Titina Farris's first set of interrogatories. I, the undersigned,
20 declare I have read the foregoing document and know the contents
21 thereof. I am informed and believe that the matter stated therein are
22 true and on that ground I allege that the matter stated therein are true.

23 I declare, under the penalty of perjury, that the foregoing is true
24 and correct; executed April 27th, 2017, Henderson, Nevada; signed by
25 myself, notarized by Teresa Duke, head of our credentialing department.

1 Q All right. So you signed that document under penalty of
2 perjury on April 27th, 2017?

3 A Correct.

4 Q Okay. And that document -- well it says that you read the
5 foregoing documents, document, and know the contents thereof,
6 correct?

7 A Correct.

8 Q All right. And in normal English that just means that you
9 read it and you know what it's talking about, right?

10 A Yes.

11 Q Okay. It then says I declare, under penalty of perjury, the
12 foregoing is true and correct; doesn't it?

13 A Well there's a middle sentence in there as well, but yes.

14 Q Okay. All right. And so you agree that the verification itself
15 requires you to read the documents and make sure that they are truthful
16 and complete before signing, right?

17 A Correct.

18 Q The truth, the whole truth, and nothing but the truth, correct?

19 A Correct.

20 Q Okay. Because if you leave out information that wouldn't be
21 the whole truth; would it?

22 A Correct.

23 Q All right. Now you agree that you signed that verification
24 without making sure the information you were sending to my clients was
25 true, correct?

1 A Correct.

2 Q All right. And based on the plain language of the verification
3 you signed while I was questioning did you start to worry that you had
4 been --

5 THE COURT: Counsel, can you all approach?

6 Madame Court Clerk, can you turn on some white noise?

7 THE CLERK: Yes.

8 [Sidebar at 10:06 a.m., ending at 10:08 a.m., not transcribed]

9 THE COURT: Sorry. Appreciate it.

10 Counsel, feel free to continue. Sorry for the interruption.

11 MR. JONES: Thank you, Your Honor.

12 BY MR. JONES:

13 Q Based on the plain language of the verification you signed
14 while I was questioning you did you start to worry that you might have
15 some negative consequences?

16 A Negative consequences. You'd have to define that for me.

17 Q What are negative consequences mean to you?

18 A In legal terms? I don't know.

19 Q In any terms?

20 A Well negative is not good for me.

21 Q Okay. Did you think that something bad might happen
22 because of what you had sworn under oath there?

23 A I was concerned, yeah.

24 Q Okay. Now, Doctor, you agree that when you signed the
25 verification your understanding that it was to sign off on all of the

1 interrogatory responses, both for yourself personally as well as for your
2 corporation, correct, when you signed that document?

3 A In April 27th -- yes.

4 Q So in April 27th, 2017 your understanding was by signing
5 that you were verifying the authenticity, the truthfulness, of all of your
6 answers, right?

7 A Yes.

8 Q Okay. Doctor, you agree that once you realized the potential
9 consequences there that you started to change your answers a little bit?

10 A Change the answers to the interrogatories?

11 Q No. You started to change your answers while under oath?

12 A I don't know what you're referring to.

13 Q Okay. So I want to go back to -- turn -- this is -- right, to page
14 49; go read lines, please for the jury, 11 to 14. And 11 starts with a
15 question and then an answer from yourself.

16 "Q Okay. Now, Doctor, are you sure that you have not seen
17 these before, any of these six, that we just went through prior to
18 September of 2019?

19 "A Yes."

20 All right.

21 A How far do you want me to go?

22 Q You can stop right there.

23 A Okay.

24 Q And then, Doctor, let's go ahead and go to 15 -- let's go to 54.
25 So this is after I presented you with the verification.

1 A Okay.

2 Q Okay. And let's go ahead and -- I'll read it out loud. If I make
3 any mistakes, please, please, let me know. Okay? So 54, beginning at
4 line 10 and going to 14.

5 "Q Okay. So -- and you didn't go back and read what you were
6 swearing under penalty of perjury was true?

7 "A You mean the other documents?

8 "Q Right.

9 "A No."

10 But then go to 55, the next page, 4 through 6.

11 "Q Okay. All right. But you certainly did not verify that any of
12 the statements therein were true, correct?

13 And this is where we have the deviation. Your answer, I did not
14 review them sentence by sentence, no.

15 MR. DOYLE: Your Honor, I object to Counsel's commenting
16 on the evidence.

17 MR. JONES: I'll read it --

18 THE COURT: Okay. So can you -- jury will disregard --

19 MR. JONES: Happy to withdraw it, Your Honor.

20 THE COURT: -- that last -- Court's going to sustain the
21 objection. The jury will disregard that last one. Counsel, if you wish to
22 re-read it, please, re-read it as stated in there.

23 MR. JONES: I'll re-read it exactly as stated.

24 BY MR. JONES:

25 Q "Q Okay. All right. But you certainly did not verify that

1 any of the statements therein were true, correct?

2 "A I did not review them sentence by sentence, no."

3 Did I read that correctly?

4 A Correct.

5 Q Okay. So initially, before you knew that I had evidence that
6 you had signed this verification, you clearly stated you had not ever seen
7 those documents before, correct?

8 A Correct.

9 Q And then after I showed you the verification and made you
10 read it, on the record under oath, you changed your response to, quote, I
11 did not review them sentence by sentence, no. Is that true?

12 A The incorrect part about that is that it was based upon seeing
13 the verification.

14 Q Okay. So you do agree that prior to me showing you the
15 verification you said you had never seen it until September 2019,
16 correct?

17 A Correct.

18 Q And after seeing the verification you said I did not review
19 them sentence by sentence, no. Correct?

20 A Correct.

21 Q Okay. And you're just saying the verification had nothing to
22 do with your changed language there?

23 A No, I was trying to be accurate about when I saw them, when
24 I reviewed them. There were multiple sets. There were the initial set;
25 there's a supplemental set. There's multiple verifications. You showed

1 me multiple --

2 Q Doctor, there's not a --

3 A -- exhibits at the same time --

4 Q -- question pending. So your counsel --

5 A Okay.

6 Q -- can ask you questions about this if he would like.

7 MR. DOYLE: Your Honor, I object. The witness should be allowed
8 to finish his answer.

9 MR. JONES: The witness just went rambling on without a
10 question pending.

11 THE COURT: Okay. The jury will disregard the colloquy
12 between counsel. The response -- the objection, the evidentiary
13 objection was what, counsel?

14 MR. DOYLE: Interrupting the witness.

15 THE COURT: And the evidentiary response would be?

16 MR. JONES: He was giving a narrative explanation without a
17 pending question.

18 THE COURT: So the Court's ruling is going to be that the jury
19 will disregard -- everything's -- the answer. I'm going to ask counsel for
20 Plaintiff can you, please re-ask the question? Jury is supposed to
21 disregard everything after the question.

22 The question and -- including the question and counsel for
23 Plaintiff -- just ask you to re-ask the question and that way everything got
24 disregarded and we're starting from scratch.

25 MR. JONES: Perfect.

1 THE COURT: Thank you.

2 MR. JONES: Your Honor, I'm just going to move on to the
3 next question.

4 THE COURT: Okay. That's fine; that's your choice. Thank
5 you so much. Please --

6 BY MR. JONES:

7 Q Do you agree that by saying, quote, I did not review them
8 sentence by sentence, you are indicating that you did review them?

9 A No.

10 Q But just not sentence by sentence?

11 A No.

12 Q Okay. Do you agree that when discussing a document from
13 2017 there is a significant difference between saying I never saw them
14 until 2019 -- September 2019, and I did not review them sentence by
15 sentence back in 2017?

16 A Repeat that again?

17 Q Do you agree that when discussing a document from 2017
18 that there is a significant difference between I never saw them until
19 September 2019, and I did not review them sentence by sentence back in
20 2017?

21 A Well if you said you never saw them then you also never
22 reviewed them. So I would say those are equivocal.

23 Q Okay.

24 A Or the same.

25 Q Doctor, do you agree that it was legally and ethically wrong

1 for you to sign the April 27th, 2017 verification?

2 MR. DOYLE: Objection, Your Honor. Calls for legal
3 conclusion.

4 THE COURT: Sustained.

5 BY MR. JONES:

6 Q Doctor, do you believe that it was ethically wrong for you to
7 sign the April 27th, 2017, verification?

8 MR. DOYLE: Objection. Calls for a legal conclusion and it's
9 irrelevant.

10 MR. JONES: Do you want me to respond or approach?

11 THE COURT: Counsel, could you please approach and
12 Madame Court Clerk, can you please turn on some white noise?

13 [Sidebar at 10:15 a.m., ending at 10:21 a.m., not transcribed]

14 THE COURT: Ladies and gentlemen, instead of having you
15 sit there, it's going to take a few more minutes, so we're going to send
16 you out for a break.

17 So ladies and gentlemen, during this recess you're
18 admonished not to talk or converse among yourselves or with anyone
19 else on any subject attached to this trial.

20 You may not read, watch, listen to any report or commentary
21 of the trial. Any person connected with the trial or any means of
22 information, including without limitation, social media, texts, tweets,
23 newspapers, television, and internet, radio, anything the Court's not said
24 specifically is, of course, also included.

25 Do not visit the scene of the events mentioned during the

1 trial. Do not undertake any research, experimentation or investigation or
2 anything else, of course. Do not do any posting or communications on
3 any social network, websites or anything else. Do not do any
4 independent research, included but not limited to, internet searches.

5 Do not form or express any opinion on any subject
6 connected with the trial until the case is fully and finally submitted to
7 those going to jury deliberations.

8 You're going to come back at twenty to eleven. Thank you
9 so much.

10 THE MARSHAL: All rise for the jury.

11 [Jury out at 10:22 a.m.]

12 [Outside the presence of the jury]

13 THE COURT: Twenty to eleven. We'll stay on the record
14 briefly. Any second until I hear the door click. Okay.

15 Outside the presence of the jury. There was a request, based
16 on the objection raised to do this outside the presence of the jury, and so
17 we are now outside the presence of the jury.

18 So what we're going to do is give you brief argument.
19 You've still got the witness on the stand; do you wish him to remain on
20 the stand during the argument or do you want him to go back and sit at
21 counsel table? What do you all wish?

22 MR. JONES: No preference, Your Honor.

23 MR. DOYLE: He can stay or leave, whatever he prefers.

24 THE COURT: Since there is no preference, the witness is
25 welcome to do what the witness wishes to do. And since he is a client,

1 it's up to you all whether you wish him to stay during argument or not.

2 What do you all want?

3 MR. DOYLE: He can stay.

4 MR. JONES: I don't mind, Your Honor.

5 THE COURT: Okay. So the question was stated, the two
6 objections raised by Defense Counsel was calls for a legal conclusion
7 and relevance. Those were the two timely objections. The Court, so that
8 there was no speaking objections in front of the jury, asked the two
9 counsel to come to Bench. At Bench it was raised -- well, the question
10 was whether -- counsel for the Plaintiff, will you please re-read the
11 question. It was the ethics question.

12 MR. JONES: Absolutely, Your Honor.

13 Doctor, you agreed that it was ethically wrong for you to sign
14 the April 27th, 2017 verification.

15 THE COURT: Okay. So it calls for a legal conclusion, the
16 Court said that since it was asking is this ethically wrong, the objection
17 with regards to calls for a legal conclusion the Court was going to
18 overrule it because ethics is not legal, and it wasn't saying it was a
19 legally ethical standard or anything like that. So the Court was inclined
20 to overrule that.

21 With regards to the relevance objection, the Court was asking
22 each of the counsel to provide a further explanation as to, from Plaintiff's
23 side, why it was relevant; and from Defense side, how it was not relevant
24 and so then we all both, I'll let you repeat what you said as far as
25 relevance and if you want to go back to why it would be legal, it's fine;

1 but legal's ethical.

2 So Counsel, you raised the objection for Defense, so
3 Defense go to your --

4 MR. DOYLE: And Your Honor, there was also discussion at
5 sidebar about foundation and 48.035 which I --

6 THE COURT: No, Counsel, you never mentioned foundation
7 at all. You then added 48.035 and what the Court said to you specifically
8 was you raised two timely objections at the time to the jury, and that you
9 can't -- that would not be proper that after the Court -- instead of the
10 Court making a ruling right there in front of the jury to give you all an
11 opportunity to present in furtherance of the two timely objections. To
12 then start raising additional objections after the Court was starting to
13 hear your arguments on those two, to raise additional objections would
14 not be proper because they would be untimely, and the Court did say
15 that.

16 You never said foundation. You said 48.035. The Court in its
17 discussion with regards to relevance was asking Plaintiffs' counsel,
18 because, as far as the ethical issue, whether or not -- because counsel is
19 asserting that the ethics issues that he could raise it as far as whether
20 there was the foundation the Court was saying that this was a
21 challenging -- actually, I needed to hear more from you all because
22 questions about whether it would be for Plaintiff's counsel to raise the
23 foundational aspect of what he meant for ethics, or whether it would be
24 the witness' responsibility.

25 So the Court was not raising a foundational objection, and

1 counsel for Defense did not raise a foundational objection, and those
2 would not be timely objections to raise after the Court had already called
3 you to Bench to allow you to get further arguments on those two
4 objections that were raised. The Court does not view any additional
5 objections after the Court already asked you to come to Bench on the
6 two timely raised objections. For either side to raise additional issues,
7 because you all know those would be waived because those would be
8 viewed as untimely.

9 So the Court views that there's two timely objections to be
10 discussed --

11 MR. DOYLE: So the Court will not permit discussion about
12 foundation and 48.035?

13 THE COURT: Since they were not -- Counsel, you did not
14 raise timely objections, you never raised foundation until you actually
15 came back outside the presence on foundation. Because the Court
16 mentioned a foundational issue with regards to a relevance issue does
17 not turn it into a foundational objection.

18 You raised two timely objections in front of the jury. You
19 have an opportunity to fully discuss those two timely objections. Of
20 course you do.

21 MR. DOYLE: Okay. So the question, first of all, calls for a
22 legal conclusion because we don't know what ethical standard is being
23 applied. As the Court pointed out at sidebar, are we talking about
24 medical ethics? Are we talking about some other type of ethics? Or
25 what?

1 And so there is no -- it does call for a legal conclusion based
2 upon some unknown understanding of what the ethics are to be applied,
3 as the Court pointed out.

4 THE COURT: The Court did not point anything out. Please
5 do not -- you're using selected out of context statements, please do not
6 quote the Court, because you're quoting it out of context and only
7 selected excerpts. The Court's statement was relating to the relevance
8 objection was only selected partial excerpts. Please do not quote the
9 Court. The Court was not pointing out anything, the Court was asking
10 each side questions and saying what -- asking -- explaining to you the
11 reasoning why the Court was asking you questions so that you both
12 would fully understand why the Court was asking you questions, rather
13 than just asking you questions.

14 It's something this Court really does so that each of the
15 counsel in all my cases have an understanding why I ask questions,
16 rather than ask questions out of the blue. Every counsel really has told
17 me that they find it helpful, it gives them explanation of why I'm asking
18 the question. If you'd rather me not give an explanation of why I ask a
19 question, I'll just ask you a question.

20 But please don't misquote me. Thank you.

21 MR. DOYLE: So the relevance objection is, not knowing what
22 ethics means, or what ethics standards are to be applied, it becomes an
23 irrelevant question, because it can't have any bearing on an issue in this
24 case, the facts in this case, the medicine, or the credibility of my client.

25 THE COURT: Thank you so much.

1 Counsel for Plaintiff, why should the Court -- what's your
2 position please?

3 MR. JONES: Your Honor, in common vernacular people use
4 the word ethics all the time. If you look at almost any word in the
5 English language you could find some group of treatises that run off and
6 have special things about them from plumbing to anything else.

7 But ethics is one of a handful of words that are used by
8 everyday people every day to talk about good morals, it's something
9 they do, and very few people, other than people like us as lawyers or in
10 specialized practices, look at this and say, well my ethics are, you know,
11 separate and they're this distinct tome of things that I must follow.

12 And so it's common vernacular, it's something that the jury
13 understands -- not to indicate anything to do special with medicine or
14 anything else or law -- it's just a common word. And it has a meaning to
15 most people, including myself, frankly, that is synonymous, essentially,
16 with whether a person has morals, whether they have the fortitude to do
17 things that they should do versus if they don't. If they don't really have a
18 foundational base upon which they make decisions as to good and bad.

19 THE COURT: Okay. Was your question limited -- limiting
20 witness to a yes or no answer?

21 MR. JONES: Potentially, Your Honor. But, you know, a
22 witness, even in such a circumstance, has every opportunity to say I
23 can't answer that with a yes or no response.

24 THE COURT: Say --

25 MR. DOYLE: May I be heard?

1 THE COURT: You each had an opportunity to give your
2 position, which is what I said we'd do -- right? -- with objections. Each
3 side gets one opportunity and the Court needs to make a ruling.

4 Okay. Court is going to overrule, as I said at Bench, the Court
5 doesn't see how objection for legal conclusion would apply in this case.
6 There is no legal standard being sought, there is nothing that in the
7 question that would imply a legal standard.

8 With regard to the relevance objection, the Court doesn't see
9 how that would be a relevance objection. Particularly where the Court
10 wanted the clarification is that the question would allow that the witness
11 could be able to assert that either, A, he didn't understand the question;
12 or B, that they can't answer the question with a yes or no type answer.

13 So as long as those options are available to the witness, then
14 that is very clearly that a witness can answer in those manners. And so,
15 therefore, if those options are available, the Court doesn't see how it
16 would be irrelevant, because this type of question can get to part of a
17 juror's -- once again, going to all the introductory remarks the Court
18 made without the witness, but referring again to your joint jury
19 instructions. Right? Referring to your joint jury instructions.

20 Let's go to a joint jury instruction. Okay, two of them.

21 One, although you are to consider the evidence in the case in
22 reaching a verdict, you must bring into your consideration your everyday
23 common sense and judgment as reasonable men and women. That's
24 not limited solely to what you see and hear in the court. Witnesses
25 testify. You may draw reasonable inferences from the evidence which

1 you feel justified by a common experience, keeping in mind that such
2 inferences should not be based on speculation or guess.

3 A verdict may never be influenced by sympathy, prejudice, or
4 public opinion. Your decision should be a product of sincere judgment,
5 sound discretion in accordance with these rules of law.

6 So that's one of the ones that would apply to it, and the
7 Court was also looking at the other joint jury instruction why the Court
8 would find that this is relevant. The other jury instruction that you all
9 submitted to the Court is:

10 The credibility or believability of a witness should be
11 determined by his or her manner on the stand, his or her relationship to
12 the parties, his or her fears, motives, interests, or feelings. His or her
13 opportunity to observe the matter to which he or she testifies, the
14 reasonableness of his or her statements, and the strength or weakness of
15 his or her recollections.

16 If you believe a witness has lied about any material fact in
17 the case, you may disregard the entire testimony of that witness, or any
18 portion of this testimony which is not proved by other evidence.

19 In light of those joint jury instructions, as well as the various
20 options that the witness can have, the Court would find that that
21 question is relevant and would overrule the relevance objections.

22 Even though the Court would have stated that it does find
23 that the other objections would have been timely, even the Court would
24 consider the 48.035, the Court would find it more prejudicial than
25 probative because the very joint jury instructions that the Court just read,

1 very much allows the jury to do the very thing that is being sought by
2 Plaintiff's assertions with regard to that question and the foundational
3 issue is addressed by the fact that the witness can easily provide the
4 answers of saying all the various options that the witness can answer
5 with response to that question.

6 That is the Court's ruling, and it's so ordered.

7 At this juncture my team must take their morning break, so
8 we'll see you back at twenty to -- actually, it's going to be more like a
9 quarter to, so my team gets their break.

10 Thank you so much.

11 THE MARSHAL: The Court is in recess.

12 [Recess taken from 10:34 a.m. to 10:48 a.m.]

13 [Outside the presence of the jury]

14 THE COURT: Counsel, as I stated yesterday, remember, we
15 were breaking at 11:45.

16 THE COURT RECORDER: On the record.

17 THE COURT: Sorry. Find a good spot.

18 MR. JONES: Absolutely. Will do, Your Honor.

19 THE COURT: And then we're coming back at 1:20, because
20 the Court's got a meeting I have to attend.

21 Your experts aren't here? And you're doing this and your
22 experts --

23 MR. JONES: Our expert did arrive, but we'll just go with him
24 right after lunch.

25 THE COURT: Okay. So 1:20.

1 MR. JONES: Okay. Perfect.

2 THE COURT: Jury's ready? You all ready, everything's
3 ready?

4 MR. JONES: Ready.

5 THE COURT: Okay.

6 THE MARSHAL: All rise for the jury.

7 [Jury in at 10:50 a.m.]

8 [Within the presence of the jury]

9 THE MARSHAL: All jurors are accounted for, please be
10 seated.

11 THE COURT: Appreciate it. Welcome back, ladies and
12 gentlemen.

13 Same witness is on the stand. Same witness understands
14 he's under oath and Counsel you can continue with your examination.

15 The pocket mic's back on, and you can go when you're
16 ready. Thank you so much.

17 MR. JONES: Thank you, Your Honor.

18 DIRECT EXAMINATION CONTINUED

19 BY MR. JONES:

20 Q Dr. Rives, you understand that when you're testifying on the
21 stand and you're on break that there is no attorney-client privilege for
22 those conversations, correct?

23 MR. DOYLE: Objection. Misstates the law.

24 THE COURT: Counsel would you both like to approach?

25 You know what, I need the white noise on because counsel

1 needs to talk to me for a second. I'm telling the jury something.

2 [Sidebar at 10:51 a.m., ending at 10:52 a.m., not transcribed]

3 THE COURT: Okay. So the Court's going to overrule that
4 objection as stated.

5 Counsel, you may proceed with the next question.

6 BY MR. JONES:

7 Q All right, Doctor, did you hear my question?

8 A Would you please repeat it?

9 Q Yes. The question was something to the effect of you
10 understand that when you have already taken the stand and are giving
11 testimony, and there's a break, the conversations with your attorney
12 during that break during that time are not attorney-client privileged.

13 Does that make sense?

14 A I understand that I'm not supposed to talk about my
15 testimony with my lawyer, yes.

16 Q Okay. All right. And during that break, did you talk with your
17 lawyer about your testimony today?

18 A No.

19 Q Okay. Now, Doctor, previously before the break that
20 everyone went on, I had asked you a question, and I'm just going to say
21 it like this:

22 Doctor, do you agree that it is wrong or was wrong for you to sign
23 the April 27th, 2017 verification?

24 A I'd have to answer that not as a yes or no question.

25 Q Okay. So you can't answer that as a yes or no question that

1 it was wrong to sign the April 27th, 2017 verification?

2 A Not completely, no.

3 Q Okay. Doctor, is it your practice to swear under oath without
4 knowing or reviewing the information you're swearing to?

5 A My practice? You'd have to define that for me. My legal
6 practice? My medical practice?

7 Q You don't have a legal practice, do you?

8 A Well, I'm in a legal court of law here.

9 Q Okay. So is that something that you -- here, Doctor, why
10 don't -- do you remember I asked you this question before, during prior
11 testimony?

12 A No, I don't.

13 Q Okay. Doctor, do you think it's okay to swear under oath that
14 you have reviewed something that you know you didn't actually review?

15 A Do I think it's okay? I'd say that -- I'd phrase it as I did not do
16 my proper due diligence in the matter.

17 Q Okay. And in this case, you swore under oath leading my
18 clients to believe that your information was true and correct, right?

19 A I have no way of knowing what your clients believed or did
20 not believe.

21 Q Okay. But you know that the answers that were given
22 omitted information, correct, that should have been in your answers?

23 A Not at the time I signed that first verification, no.

24 Q At the time you signed that first verification, the answers
25 were complete and accurate?

1 A No, I did not know, because I did not review them, whether
2 they were complete and accurate.

3 Q Okay. But you signed under oath, under penalty of perjury,
4 that the answers were complete and accurate?

5 A That is correct.

6 Q Okay. But they weren't?

7 A Later when I was notified by --

8 Q Doctor, they weren't, were they?

9 A No.

10 Q Okay. All right.

11 Doctor, let's go through what you did not disclose in April 2017.

12 Let's see. This is the demonstrative exhibit binder.

13 MR. JONES: Your Honor, may we borrow the demonstrative
14 exhibit binder that's up there?

15 THE COURT: Sure. It's a marked demonstrative. Counsel, I
16 believe it's behind the witness stand.

17 MR. JONES: Oh, right behind you. There you go, perfect.

18 THE COURT: That's the one you're referencing; is that
19 correct?

20 MR. JONES: Yes, it is, Your Honor, thank you.

21 THE COURT: No worries. Thank you so much.

22 BY MR. JONES:

23 Q All right, Doctor. Let's take a look. Let's look at Defendant,
24 Barry Rives', answers to interrogatories, which is Demonstrative Exhibit
25 No. 8. Now, you reviewed these in, you said, in September of this year,

1 correct?

2 A I'm not sure whether I reviewed this or the supplemental
3 version of this.

4 Q Okay. So you don't know if you ever reviewed this?

5 A Well, it was sent to me as a draft, I made corrections to it,
6 advised my legal attorneys of that, and that became the final
7 supplement. So I'm not sure whether -- what -- you know what I'm
8 trying to say? Whether this is strictly the one from April or from
9 September.

10 Q Okay. Well, why don't we look at the -- go to the first page of
11 it.

12 A Okay.

13 Q And what is the service date on that say? It's up at the top
14 right-hand corner.

15 A Service date is April 17th, 2017.

16 Q Okay. So this is April of 2017.

17 Now, do you recall me showing this to you at the last time that you
18 were giving testimony?

19 A I believe so, yes.

20 Q Okay. And do you recall at that time saying that you had
21 seen this for the first time in September of 2019?

22 A I believe so, yes.

23 Q Okay. And so you are familiar with this document at this
24 point?

25 A Familiar with, yes.

1 Q Okay. Let's go ahead and let's turn to interrogatory No. 3.
2 Now, there is a typo here --

3 MR. JONES: Your Honor, I'd like to put this on the Elmo, if
4 that's okay, so the jury may see it?

5 THE COURT: Show it to Defense Counsel first, please.

6 MR. JONES: Yes. And I think you do have a copy of our
7 demonstratives. Those two pages.

8 MR. DOYLE: So I object to any reference to this based on
9 relevance and 48.035. And certainly showing it to the jury.

10 THE COURT: Counsel, can you please approach the Bench?

11 [Sidebar at 10:51 a.m., ending at 11:07 a.m., not transcribed]

12 THE COURT: Okay. Appreciate it.

13 So at this juncture what I understand is that deferring, is
14 that -- based on the agreement of counsel deferring the issue to later, is
15 that right? So the Court may not rule at this moment, is that the
16 agreement of counsel?

17 MR. JONES: Yes, Your Honor.

18 MR. DOYLE: Yes.

19 MR. JONES: I'm going to read it in a slightly different way
20 and do something else now.

21 THE COURT: So that prior question, was that withdrawn so
22 that the Court need not rule at this juncture?

23 MR. JONES: Yes.

24 THE COURT: Okay. So that's fine. Go ahead.

25 MR. JONES: All right.

1 BY MR. JONES:

2 Q So the interrogatory, right? I'm going to read you the
3 question and I'm not going to read you the answer. Okay? But the
4 question, there's an interrogatory that was sent to you and it says, this is
5 interrogatory No. 3, and the question is:

6 Have you -- and there is a misspelled word, but it means every, it
7 looks like E-E-R-Y --

8 A Correct.

9 Q -- have you ever been named as a defendant in a lawsuit
10 arising from alleged malpractice or professional negligence? If so, state
11 the court, jurisdiction, the caption, and the case number for each lawsuit.
12 Right? Is that what it says?

13 A That is correct.

14 THE COURT: Is your pocket microphone on by chance?

15 MR. JONES: Now it is, thank you, Your Honor.

16 THE COURT: No, it's taken care of. I appreciate. Thank you
17 so much.

18 BY MR. JONES:

19 Q Did I read that correctly?

20 A You did.

21 Q And in simple terms, what does it look like it's asking you to
22 do there?

23 A To list any lawsuit arising from alleged malpractice or
24 professional negligence with all the associated date with those cases.

25 Q Okay. So to tell the Plaintiff about other malpractice suits

1 you 've had, right?

2 A Correct.

3 Q Okay. Now, I'm not going to ask you to read the response,
4 but we can agree that the response specifically does not include a case
5 of Vickie Center against you, correct?

6 A That is correct.

7 Q Okay. And you agree, Doctor, that eventually you corrected
8 this answer on September 25th of 2019 to include that case, right?

9 A Sometime in September, yes.

10 Q So about two and a half years of litigation going on before
11 you corrected that answer, correct?

12 A Correct.

13 Q Okay. Doctor, do you find it strange that Vickie Center, of all
14 patients, would be the one that was left off of your answer here?

15 A No.

16 Q Okay. Do you agree that there are some coincidences
17 between this case and that case that could cause someone to think that
18 there might be a motive for you or your attorneys to not provide that
19 information?

20 MR. DOYLE: Objection. Speculation.

21 THE COURT: Sustained.

22 BY MR. JONES:

23 Q Doctor, you agree that you and your attorneys were very
24 familiar with the *Center* case when this question was answered, because
25 you were in the middle of a lawsuit with the *Center* case, correct?

1 A Yes.

2 Q Okay. And Doctor, you're aware that after we found out
3 about the *Center* case, even though there's a lot of information still
4 missing, we were able to gather some information, including your
5 deposition in the *Vickie Center* case?

6 MR. DOYLE: Objection, Your Honor. To comments by
7 counsel on the evidence. And it mischaracterizes the evidence.

8 MR. JONES: I'll rephrase, Your Honor, just to make it simple.

9 THE COURT: So the Court need not rule.

10 BY MR. JONES:

11 Q You understand that we now have your deposition in the
12 *Vickie Center* case, correct?

13 A I believe so, yes.

14 Q Okay. And you have gone over that deposition recently,
15 correct?

16 A The entire *Vickie Center versus Rives* deposition that I gave?

17 Q Uh-huh.

18 A I don't know if I'd say I went over the entire thing.

19 Q Do you recall what I asked you when you were last under
20 oath, if you had recently reviewed the *Vickie Center* case or the Vickie
21 Center deposition, and you stated that you had within the last couple of
22 weeks.

23 A Correct.

24 Q Okay. So you have reviewed the deposition somewhat
25 recently?

1 A In general terms, yes.

2 Q Okay. When do you estimate that you reviewed the
3 deposition, Doctor?

4 A Sometime within the last month.

5 Q Okay. Doctor, do you recall you attorney during voir dire,
6 during opening, talking about hindsight being 20/20?

7 A Yes.

8 Q The idea was for the jury to judge you based on what you
9 knew in July of 2015, the day of Titina Farris' surgery, rather than based
10 on what you might have learned since, correct?

11 MR. DOYLE: Objection. Assumes facts not in evidence and
12 calls for speculation.

13 THE COURT: Sustained on speculation. Overruled on
14 assumes facts not in evidence.

15 BY MR. JONES:

16 Q Doctor, what was your understanding of this conversation of
17 you shouldn't judge based on what he knows now, but based on what he
18 knew then?

19 A I think that the point of that discussion is that when you make
20 decisions medically taking care of patients, you have to understand what
21 that person's doing at the time they made it. And the fact that you know
22 something that happened downstream of that, you shouldn't take that
23 into consideration they should have known that, or foreseen that, or
24 something along those lines; and, therefore, misjudge their actions.

25 You should judge them based upon the data, the information they

1 had when they made it.

2 Q Doctor, is there some big piece of data, some new
3 information you received that would cause you to do things differently?

4 A I don't know what you're referring to.

5 Q Differently in the Farris case, in Titina Farris' case. Is there
6 some new information you've come by that would cause you to change
7 your behavior?

8 A My behavior?

9 Q With respect to your treatment of Titina Farris.

10 A Oh, my treatment. No.

11 Q Okay. So Doctor, let's go ahead and let's discuss what you
12 knew prior to July 3rd, 2015.

13 You agree that you performed surgery on Vickie Center on
14 February 6th of 2015 about five months before you performed surgery
15 on Titina, correct?

16 MR. DOYLE: Objection. Relevance and 48.035.

17 THE COURT: The Court's going to sustain it on relevance.

18 MR. JONES: Your Honor, may we approach?

19 THE COURT: Of course, you may. And Court recorder,
20 would you like to turn on some lovely white noise.

21 [Sidebar at 11:14 a.m., ending at 11:23 a.m., not transcribed]

22 THE COURT: So the Court made its rulings. So, Counsel,
23 feel free to go on to your next question. Thank you so much.

24 BY MR. JONES:

25 Q Doctor, do you recall my partner, Jacob Leavitt's, opening

1 that he gave?

2 A More or less.

3 Q Okay. Do you remember when he indicated that during this
4 case the Defense would use CT scans to kind of misinform what had
5 occurred in this case?

6 A I'll take your word for it, yes.

7 Q Do you recall that? Okay.

8 Doctor, you saw the CT scans that were used during your
9 attorney's opening, correct?

10 A Correct.

11 Q Okay. Doctor, have you seen the show Brain Games on
12 Netflix?

13 A No.

14 Q Doctor, there's a video that's on that show, but it's also
15 online here and there, and I'm going to describe it for you very briefly.
16 And you tell me if you've seen it. It has these six kids with basketballs
17 and they're passing it between them. Right? And they're moving
18 around passing the ball and it asks you to count the number of times
19 they pass the ball.

20 A Okay.

21 Q Okay. But the real trick in the movie is that right there in the
22 middle of them passing the ball, a guy in a gorilla suit walks through the
23 set, stands in the middle, pumps his chest, and then walks out, right?

24 MR. DOYLE: Objection, Your Honor. Assumes facts not in
25 evidence.

1 BY MR. JONES:

2 Q Have you seen that video, Doctor?

3 THE COURT: The objection assumes facts not in evidence,
4 overruled.

5 MR. DOYLE: Again, it's irrelevant.

6 THE COURT: Have you seen that video?

7 MR. DOYLE: And there's no foundation and calls for
8 speculation.

9 THE COURT: Okay. Well, overruled on speculation. You
10 know whether he saw the video or not. Assumes facts not in evidence,
11 would be irrelevant as to this particular one. Relevance, sustained.

12 BY MR. JONES:

13 Q Doctor, have you -- did you order any of the CT scans in this
14 case, in the Titina Farris case?

15 A I don't think I'm listed as the ordering physician, no.

16 Q Okay. Not on any of them, right?

17 A I don't believe so, no.

18 Q Okay. Second, you yourself, you didn't actually look at the
19 CT scans during your care and treatment of Titina Farris, did you?

20 A I believe that I did look at the second one and third one.

21 Q During the time that she was your patient, not just the report,
22 the actual film?

23 A I believe I pulled it up on the PAC system, yes.

24 Q Okay. Now, Doctor, do you recall when those images were
25 up there on the screen your attorney had written below them no leak, no

1 leak, no leak, leak?

2 A Correct.

3 Q Okay. Now, Doctor, when I saw that, I thought to myself, if I
4 didn't know better, he's trying to say that those showed that there was
5 no leak.

6 MR. DOYLE: Objection. Irrelevant and calls for speculation.

7 MR. JONES: I wasn't finished with my question.

8 THE COURT: Ask the end of the question.

9 BY MR. JONES:

10 Q Was that your understanding of what you saw up there?

11 MR. DOYLE: Objection. Irrelevant.

12 THE COURT: The Court overrules.

13 MR. DOYLE: And assumes facts not in evidence.

14 THE COURT: The Court's already made its ruling.

15 BY MR. JONES:

16 Q Go ahead, Doctor.

17 A Of course I'm seeing that in, with my knowledge of the case,
18 so I know all of the situations that were going on around those CT scans.
19 So to me, it was a correct representation, yes.

20 Q Now, Doctor, deep down you know CT scans miss things all
21 the time, right?

22 A I wouldn't say all the time.

23 Q Okay. Doctor, in the setting of sepsis and possible
24 perforation of the colon, you agree that the medical literature says you
25 can rely on a positive CT scan if it shows a leak, but you cannot rely on a

1 negative CT scan to avoid going back to surgery, because of the fact that
2 CT scans often miss leaks.

3 MR. DOYLE: Objection. Hearsay.

4 MR. JONES: I'll go ahead, and I'll give some kind of
5 foundation if needed.

6 THE COURT: Okay.

7 MR. JONES: But it's not hearsay at all.

8 THE COURT: So it's --

9 MR. JONES: I'm asking if --

10 THE COURT: Overruled as to hearsay objection. Since
11 counsel's withdrawing, the Court need not even rule on it.

12 BY MR. JONES:

13 Q Doctor, have you seen medical literature on the reliability of
14 CT scans in the condition of patients who are septic with possible
15 perforations of their bowel?

16 A Specific to that, no.

17 Q Okay. Do you think that would be important information for
18 you to have?

19 A The medical literature regarding that?

20 Q Yeah, and the reliability of CT scans in that setting.

21 MR. DOYLE: Objection. Lacks foundation.

22 THE COURT: Overruled.

23 THE WITNESS: I don't think I need to have the medical
24 literature to make that decision.

25 BY MR. JONES:

1 Q Okay. Doctor, you agree that a negative CT scan, even with
2 contrast, cannot rule out a leak, right?

3 A That is correct.

4 Q Okay. So you can have a leak there and even though it
5 doesn't show anything, there could still be a leak there?

6 A That is correct.

7 Q Okay. And in fact you, yourself, have cancelled CT scans
8 when you had septic patients because you didn't think that it was
9 indicated, because you didn't think the CT scan would show anything.

10 A I think -- is that a yes or no?

11 Q Yeah.

12 A I need to explain.

13 Q Go ahead, explain.

14 A Post-operatively CT scans will show postoperative changes.

15 Q I'm not asking you for that.

16 A Sorry.

17 Q I'm asking you to answer the question in a way that explains
18 it. The question is that you have cancelled CT scans, right? This is a
19 question about you. That you have cancelled CT scans that other
20 physicians have ordered for septic patients, because you didn't think the
21 CT scan would show anything useful.

22 A Correct.

23 Q You've done that?

24 A Yes.

25 Q Okay. And that includes cases where there was a concern

1 about perforation.

2 A I don't know what the concern was at that time.

3 Q Okay. So Doctor, when the slide up there shows -- now,
4 you'd agree the slides, the slides themselves, actually did show some air
5 and showed some fluid, correct?

6 A Correct.

7 Q Right. And you couldn't know if that was from a perforation
8 or not, could you?

9 A Based just on the CT film itself?

10 Q Right.

11 A No.

12 Q Right. And so, very possibly from the films themselves you
13 were looking at, there could have been a leak there, right?

14 A There could have been, yes.

15 Q Okay. So to say no leak, no leak, no leak, that's not exactly
16 the whole truth of the matter, is it?

17 A It is the truth because in addition to all the other evidence it
18 says -- and there was no leak at that time.

19 Q Doctor, what was causing the sepsis?

20 A I think it was a number of factors.

21 Q Now, ultimately, Doctor, we know that there was a leak at
22 some point, correct?

23 A At some point, yes.

24 Q On February 16th, when Dr. Hamilton went back in there was
25 feces all over, correct?

1 A On my limited review of her operative note, yes.

2 Q Okay. And there is an indication that your staples had failed,
3 correct?

4 A I believe so, yes.

5 Q And there is an indication that your mesh had failed, correct?

6 A I believe so.

7 Q Doctor, you'll agree with me that when there's a perforation
8 of the bowel that even if you staple it closed that bacteria and feces can
9 get out, at least in small quantities, correct? Or in big quantities, frankly.

10 MR. DOYLE: Well, it's compound.

11 THE COURT: Sustained.

12 BY MR. JONES:

13 Q Doctor, you agree with me that when there's a perforation of
14 the bowel that bacteria and feces can get out, correct?

15 A Bacteria, yes; and you would observe whether feces came
16 out, yes.

17 Q Okay. You would observe if you were paying close attention,
18 right?

19 A Absolutely.

20 Q Okay. And Doctor, when it's healing up, it creates kind of a
21 sticky, gooey substance, right? Kind of like snot?

22 A What does?

23 Q In the area where it's been repaired you would expect to find
24 sticky, gooey substance near where you had created a colotomy,
25 correct?

1 A Possibly, yes.

2 Q Okay. And if you had a portion of bowel where you had
3 created a colotomy, and it was pressed right up against the peritoneal
4 wall, as it had been previously, it wouldn't surprise you if it did so again,
5 right?

6 A If it did so what?

7 Q If it was pressed against the peritoneal wall again after.

8 MR. DOYLE: Object. It's an incomplete hypothetical.

9 THE COURT: Overruled.

10 THE WITNESS: Can you rephrase that or repeat it? How
11 about that?

12 BY MR. JONES:

13 Q Sure. It wouldn't surprise you if -- let's be more specific.

14 In this case the colon was pressed up against the inside of
15 the belly, right?

16 A The transverse colon was inside a herniation.

17 Q It was partially inside a herniation, correct?

18 A Correct.

19 Q Okay. It wasn't completely inside a herniation, correct?

20 A Correct.`

21 Q Okay. So it was just -- there was a little portion of it pushed
22 inside the herniation, and there was also some omentum or fatty tissue
23 in there, too, right?

24 A I'd say there was a significant portion of transverse colon in
25 there.

1 Q Okay.

2 A Yes.

3 Q In any event, when you reduce down the herniation, right,
4 the transverse colon, the natural position for it to go, right where you
5 had created the holes, would be right up against the inside of the belly,
6 correct?

7 A If you mean belly anywhere on the anterior abdominal wall,
8 yes.

9 Q Okay. And I'm saying it's likely to be in about the same spot
10 that it had been before, correct?

11 A Not necessarily.

12 Q Okay. Was it or was it not in this case? You were the one
13 looking at the camera.

14 A Well, no, you're asking me what happened at Dr. Hamilton's
15 when she went in, opened it up. I have no idea --

16 Q No, no.

17 A -- whether it was against that part of the belly or not.

18 Q Let me rephrase. And I apologize if that was unclear.

19 On July 3rd when you did your surgery, you burned, cut, or tore at
20 least two holes in the colon, correct?

21 A I made two holes in the colon, yes.

22 Q Okay. And those -- and we can agree that you either cut,
23 tore, or burned those holes in the colon, correct?

24 A I would not use the term burn, no.

25 Q Okay. If you had -- if the thermal device had created a hole in

1 the colon through heat, what would you like to call that?

2 A Thermal injuries are delayed injuries, they're not immediate
3 injuries.

4 Q They can be immediate injuries, can't they?

5 A Only if you -- I guess if you put the instrument across the
6 bowel and burned it and cut it at the same time, I guess that's possible.

7 Q Okay. Thermal injuries, can they be immediate injuries?

8 A Usually, no.

9 Q Okay. So they're always prolonged, always?

10 A You don't ever use the term always in medicine. Because
11 anything's possible. But the more likely and the more often situation is
12 that they're delayed injuries, usually by four to eleven days.

13 Q So then you would say that you cut or tore holes in the colon
14 is the position you'd have?

15 A More likely, yes.

16 Q And you don't think that those two colotomies were caused
17 by burning?

18 A I do not, no.

19 Q Okay. Now you do agree that the LigaSure does have a
20 thermal radiation component, correct?

21 A Yes.

22 Q Right. So it's possible to burn things you don't even intend
23 to burn, correct?

24 A It's possible, yes.

25 Q Okay. And that's why it's contraindicated in proximity of the

1 colon, correct?

2 A It's not contraindicated at all.

3 Q Doctor, CT scan takes pictures of the human body -- well,
4 let's talk about this first.

5 Doctor, have you zoomed in and out of a camera to get really
6 close and then really far away?

7 A Zoomed in? So I'm sorry, that's a yes or no question. Can I
8 explain?

9 Q I mean have you ever zoomed in on a camera and gotten
10 really, really close to something?

11 A The camera has multiple options, you could slide it in or out
12 to get closer, it also has a button where you can actually zoom it like you
13 would a camera.

14 Q What are we talking about?

15 A Whether you zoom in or not and the motion you're making.

16 Q With a camera. Have you ever zoomed in with a camera?

17 A The laparoscope.

18 Q No, I'm just talking about a camera.

19 A Oh, I'm sorry. I thought you were talking about a
20 laparoscope.

21 Q Okay. No. I'm talking about just a camera. Have you ever
22 zoomed in with a camera so that you got really close to something and
23 zoomed back out?

24 A Yes.

25 Q Okay. And you agree that when you get close to something

1 very small shifts can make pretty drastic changes in the way it -- in the
2 appearance of something, right?

3 A It's possible, yes.

4 Q Okay. Now, on a CT scan how many slices does that do of an
5 abdominal CT?

6 A It depends upon how it's ordered. They usually do it as
7 slices between. So in other words, they may do one-centimeter slices, in
8 other words, do a cut, go down a centimeter, do another cut, go down,
9 do another cut,. Or they may do it in five millimeters. A lot of CTs now
10 also have software where they do three-dimensional reconstruction, use
11 software to make it into 3D image as well, if you wanted to.

12 Q And so a CT, typically it's a very -- when you take a slice,
13 you're looking at something that's just right there, right? You're looking
14 at that slice of the body essentially, correct?

15 A You're looking at -- yeah, the software and the x-ray making
16 that equivocal one slice, yes.

17 Q Okay. And so if you have different slices on a CT scan from
18 one to the next and you go to different slices, you're going to see
19 different things, right?

20 A That would be the point, yes.

21 Q Right. Okay. All right, Doctor, I'm going to -- let's see.
22 Doctor, you met Titina in 2014, correct?

23 A That is correct.

24 Q To keep it -- you did a surgery in October 2014, correct?

25 A I don't remember the exact date, but in 2014 I did do an

1 operation, yes.

2 Q Okay. And you removed a lipoma is what you said, and then
3 you reduced down a hernia that you found during that surgery, correct?

4 A We excised -- I excised a lipoma. After doing so, her
5 falciform ligament was pushing up through the hernia, it was
6 incarcerated to omentum, yes.

7 Q And the hernia pushed back out sometime thereafter, and
8 she came back to see you in April of 2015, right?

9 A That sounds correct, yes.

10 Q All right. And you recommended that she go back in for
11 surgery on July 3rd, 2015, correct? That was the date that you set for her
12 surgery, correct?

13 A That's the date, correct, yes.

14 Q Okay. And during that time, until your physician-patient
15 relationship ended, July 16, 2015, there were a number of office visits,
16 correct?

17 A I believe there was a preop visit for the first surgery, and at
18 least two preop visits for the second surgery.

19 Q Okay. And so you met with Titina before the surgeries, right?
20 Before both of them.

21 A Correct.

22 Q And Doctor, you agree in your medical record, it states,
23 quote, after getting informed consent, end quote and it says nothing else
24 about any consent that you obtained, correct?

25 A I'd have to review that.

1 Q Okay. Go ahead. Open Exhibit 1. I think it's on page 37.

2 Sorry, it's in the big binder.

3 A Exhibit 108, binder 1 or 2.

4 Q It's going to be in Exhibit 1, so it's going to be in this one.

5 MR. DOYLE: I'm sorry, what page?

6 MR. JONES: I think it's 37, if I remember the record right. It
7 could be 37 or 39.

8 BY MR. JONES:

9 Q You see your operative report there?

10 A Yes.

11 Q Now your operative report, if you look at it, the only thing it
12 says about consent it says, after getting informed consent. And then it
13 goes on to explain what you did, correct?

14 A In my operative note, yes.

15 Q Yeah. Do you have anywhere else where you describe
16 informed consent in any more detail?

17 A Yes, in my office notes.

18 Q Okay. Now, during the process of getting informed consent,
19 did you ever tell Titina or Patrick, her husband Patrick, that you were not
20 board certified?

21 A No.

22 Q Did you ever tell Titina or her husband, Patrick, that you had
23 never completed a fellowship?

24 A No.

25 Q Did you ever tell Titina or her husband, Patrick, that you

1 intended to use a thermal cutting device on or around the colon?

2 A Specific to a thermal cutting device, no.

3 Q Yeah. You agree a LigaSure is a thermal cutting device,
4 correct?

5 A Correct.

6 Q Okay. Did you ever tell Titina or her husband, Patrick, that
7 you might burn, cut, or tear holes in her colon?

8 A Except for the burn part, yes.

9 Q Did you ever tell Titina or her husband, Patrick, that if she
10 became septic you would take a wait and see approach?

11 A That specifically did not come up.

12 Q Did you ever tell Titina or her husband, Patrick, that she
13 might develop bilateral foot drop?

14 A That would not come up.

15 Q Did you ever tell Titina or her husband, Patrick, that prior --
16 that your prior patient, Vickie Center, became septic?

17 MR. DOYLE: Objection, Your Honor. Relevance and 48.035.

18 THE COURT: Sustained on both grounds.

19 BY MR. JONES:

20 Q Instead, as we discussed yesterday, you indicated to Titina
21 that she would likely go home that day or the next day, correct?

22 A Correct.

23 Q Now, is it true that Titina's surgery was your fifth or sixth
24 surgery of that day, the 3rd of July 2015?

25 A I don't recall.

1 Q You don't recall?

2 A No.

3 Q Do you recall how many additional surgeries you did after
4 Titina's surgery that day?

5 A I do not.

6 Q Okay. Any idea at all, any estimate?

7 A None.

8 Q Okay. Doctor, as we discussed yesterday, once upon a time
9 you used to use the harmonic scalpel, correct?

10 A Correct.

11 Q And for the benefit of the jury, a harmonic scalpel is a
12 thermal cutting instrument, correct?

13 A Technically it's an ultrasonic, but thermal would cover it, yes.

14 Q Right. There's a difference between monopolar and bipolar,
15 right? That's a difference, right?

16 A No, it's actually -- there's -- ultrasonic is actually different
17 than monopolar and bipolar.

18 Q Oh, okay. And so --

19 THE COURT: Counsel, remember, you're just going to do a
20 quick stop at this [indiscernible] --

21 MR. JONES: Absolutely.

22 THE COURT: -- in the next moment or two. Thank you so
23 much.

24 BY MR. JONES:

25 Q Doctor, and you agree that your use of the harmonic scalpel

1 you identified that it would sometimes burn tissue that you didn't intend
2 to burn, correct?

3 A Correct.

4 Q Particularly in the small intestines, correct?

5 A Correct.

6 Q Okay. And for that and other reasons you stopped using it,
7 correct?

8 MR. DOYLE: Objection. Asked and answered.

9 THE COURT: Overruled.

10 BY MR. JONES:

11 Q Now, Doctor, you agree that during your deposition in this
12 case you were asked why you chose a thermal cutting instrument during
13 your deposition, correct? That question was asked to you in this case?

14 A I believe so, yes.

15 Q And you agree that you stated that you did not recall, at least
16 visibly, seeing thermal spread using the LigaSure device and that's --
17 and then you went on to explain that that's why you had stopped using
18 the harmonic scalpel.

19 A Particular to this case or any case?

20 Q The question posed to you was why you used a LigaSure
21 given that it can have some thermal spread. And your response was
22 well, I haven't actually had that problem with the LigaSure in my
23 personal experience, but I did have it with the harmonic scalpel, so I
24 stopped using it.

25 MR. DOYLE: Objection. It may mischaracterize the evidence.

1 BY MR. JONES:

2 Q Does that sound approximately right, Doctor?

3 THE COURT: Just a second. The Court's going to overrule
4 the objection because may mischaracterize the evidence, as the question
5 was clarified, the witness may answer.

6 And then, Counsel, I need to --

7 THE WITNESS: That sounds about right.

8 BY MR. JONES:

9 Q And I'm not trying to say I'm quoting you word for word
10 there. That's approximately the conversation.

11 A That sounds correct.

12 Q Okay. Now, in fact, do you recall that you further distanced
13 yourself from the harmonic scalpel by testifying that you had not used it
14 in five to seven years before the Farris surgery?

15 A Sounds about right.

16 Q Okay. Now, that's not true, is it?

17 A I don't know.

18 Q You used the harmonic scalpel before -- in a short duration of
19 time before the Farris surgery.

20 A Well, from my deposition or from the time of the surgery?

21 Q Well, I just asked you from the time of the surgery, which
22 was my understanding of your deposition, and you said yes, correct?

23 A Well -- the time of the deposition was in 2018 --

24 Q It was.

25 A -- I believe. And her surgery was in 2015.

1 Q Uh-huh.

2 A So if I had not used the harmonic scalpel, it would be from
3 around 2015 going forward, not prior to that.

4 Q So we'll come back to this and this will be our stopping
5 point. I'm just going to make just a couple of final questions.

6 First of all, whether it was in 2018 or 2015, even giving you the
7 benefit of the doubt of 2018, your deposition was October 2018, correct?

8 A I believe so, yes.

9 Q If you go five years before that, giving you the benefit of the
10 doubt of five years instead of seven, you're looking at October of 2013,
11 correct?

12 A That would be true, yes.

13 Q Okay. Nevertheless, you used the harmonic scalpel in the
14 *Vickie Center* case, just five months before this, correct?

15 MR. DOYLE: Objection. Relevance and --

16 THE COURT: The Court's going to --

17 MR. DOYLE: -- 48.035.

18 THE COURT: Overruled on both grounds in light of the prior
19 testimony.

20 THE WITNESS: I believe so, yes.

21 BY MR. JONES:

22 Q Okay. So when you said you hadn't used that device in five
23 to seven years, that would not have been true?

24 A It was an estimate, no.

25 MR. JONES: Okay. Well, what we'll do is we'll stop there,

1 we'll go over your specific testimony when come back.

2 THE COURT: Ladies and gentlemen, we're going to break for
3 lunch and we're going to give you a nice recess, so you have a nice
4 relaxing lunch. About ten minutes to twelve, so we're going to come
5 back at 1:30.

6 We're going to see you back at 1:30. During this lunch
7 recess, you're admonished not to talk or converse among yourselves
8 with anyone else on any subject connected to the trial.

9 You may not read, watch, listen to any report or commentary
10 or any person connected with the trial by any medium of information,
11 including, without limitation, social media, texts, tweets, newspaper,
12 cells, internet, radio, and anything I have not stated specifically is, of
13 course, also included.

14 Do not visit the scene or the events mentioned during the
15 trial. Do not undertake any research, experimentation, or investigation.
16 Do not do any posting or communications on any social network sites or
17 anywhere else. Do not do any independent research, including, but not
18 limited to, internet searches.

19 Do not form or express any opinion on any subject
20 connected with the trial until the case is fully and finally submitted to you
21 at the time of jury deliberations.

22 And with that, we wish you a very nice relaxed lunch. We'll
23 see you back, like I said, at 1:30. Thank you so much.

24 THE MARSHAL: All rise for the jury.

25 [Jury out at 11:49 a.m.]

1 [Outside the presence of the jury]

2 THE COURT: Okay. And Madam Court Recorder is going to
3 go off the record. Wish you all a very nice lunch. See you back

4 [Recess taken from 11:49 a.m. to 1:29 p.m.]

5 COURT RECORDER: On the record.

6 THE COURT: Okay. We're on the record outside the
7 presence of the jury. Sorry, Madam Court Clerk, did you say something?

8 THE CLERK: No.

9 THE COURT: Oh, I'm sorry, I thought you said something.
10 My apologies. 739464.

11 Okay. So the jury's all present outside ready to come in
12 whenever you all are, but I understand -- so by agreement of the parties
13 are you continuing with Dr. Rives or were you going to stop Dr. Rives
14 and go to one of Plaintiff's other witnesses?

15 MR. JONES: That is correct, Your Honor. We are going to go
16 with Dr. Hurwitz is going to be testifying next.

17 THE COURT: Okay. And so he's the next witness to be
18 called. Okay. And then you were about to say something else.

19 MR. JONES: Yes.

20 THE COURT: So Dr. Hurwitz and then who? God bless you.

21 MR. JONES: I think it's Christina Garcia, Your Honor, I
22 believe is the next -- Christina Garcia is going to be the next witness.
23 She is leaving town and won't otherwise be available again during the
24 course of trial.

25 THE COURT: Okay. And since we're -- okay.

1 Counsel for Defense, I see you standing up. Is that to stretch
2 your legs or is that because you wish to be heard?

3 MR. DOYLE: Stretching my legs and my back.

4 THE COURT: Okay no worries. I just wanted to make sure if
5 there's an issue you had; I could take care of it for you. Okay.

6 Well, then, Marshal, you want to get our jury and we can get
7 started.

8 THE MARSHAL: Yes.

9 THE COURT: Okay. Do you wish Doctor Hurwitz to be on the
10 stand when the jury comes in or do you wish to call him?

11 MR. JONES: Sure, he can go ahead.

12 THE COURT: Okay. That's fine, if you wish to do so.

13 So there seems to be another binder that magically appeared
14 on the witness desk. And so the Court wants to make sure. So there
15 now is three --

16 MR. JONES: Your Honor, we --

17 THE COURT: -- so I'm sure nobody moved anything on the
18 witness binder when the Court was out. Okay.

19 MR. JONES: No. It was what we did before, Your Honor.
20 We took the one we had up there, and we replaced it with two binders
21 for ease of use.

22 THE COURT: Okay. So it's behind him, as well.

23 So, Madam Clerk, so let's find out what's -- how do we now
24 have --

25 MR. JONES: Your Honor, Plaintiffs' exhibits were divided

1 into two binders.

2 THE COURT: Right. And then you have the one, so could we
3 just identify what that says?

4 MR. LEAVITT: Plaintiffs' Exhibit -- this is the first exhibit.

5 THE COURT: Okay. And then the other two are which and
6 which?

7 MR. LEAVITT: Let me pull it off --

8 MR. JONES: The two that are behind is -- are Plaintiffs.

9 MR. LEAVITT: This is the demonstrative with Doctor Rives.

10 THE COURT: So you do not need that one anymore. Okay,
11 that's why I was asking. I was noting that there seemed to be one extra
12 binder up there. That's why I was asking.

13 MR. JONES: We can bring that one.

14 THE COURT: Do you need it behind the witness, or do you
15 need it for any reason?

16 MR. JONES: Oh, that's fine.

17 THE COURT: Okay.

18 MR. LEAVITT: And then Defendants on the desk.

19 THE COURT: Defendants on the desk. And then you have
20 your demonstrative. And that last one is?

21 MR. LEAVITT: Plaintiff's Exhibit Binder 2.

22 THE COURT: Which is the 2 through the rest, right? Okay.

23 MR. LEAVITT: Yes.

24 THE COURT: Right.

25 MR. LEAVITT: And then this one --

1 THE COURT: You just had one extra, that's why I was asking.
2 That's because it was the Court Exhibit 6 and 7 previously discussed
3 today, correct?

4 MR. JONES: Correct, Your Honor.

5 THE COURT: Okay. So that means everybody needs to have
6 what you need at the witness stand for everybody for examination and
7 cross-examination; is that correct?

8 UNIDENTIFIED SPEAKER: Yes.

9 MR. LEAVITT: Yes, Your Honor.

10 THE COURT: Okay, perfect. Thank you.

11 Do we have the jury ready? Ready to bring them in? Okay.

12 THE MARSHAL: All rise for the jury.

13 [Jury in at 1:33 p.m.]

14 [Inside the presence of the jury]

15 THE MARSHAL: All jurors are accounted for. Please be
16 seated.

17 THE COURT: I appreciate it.

18 Welcome back, Ladies and Gentlemen. Hope everyone had a
19 nice relaxing lunch break. As we did with the prior witness, just to save
20 a moment or two he's already sitting on the stand.

21 So, counsel -- by agreement of the parties, what's happening
22 is -- I mention it sometimes because of timing with different individuals,
23 they may go in the middle of somebody else's testimony. So by
24 agreement of the parties, they were stopping the testimony of Doctor
25 Rives and a new witness is going to commence with his testimony, okay.

1 And so I'm going to say to Plaintiffs' counsel, Plaintiffs' counsel, by
2 agreement of the parties, would you like to call the witness that you
3 agreed was going to be called?

4 MR. LEAVITT: Yes, Your Honor. Plaintiffs call Dr. Michael
5 Hurwitz.

6 THE COURT: Okay. He's already on the stand, so Madam
7 Clerk can you please swear in this witness. We're swearing or affirming.

8 MICHAEL HURWITZ, PLAINTIFFS' WITNESS, SWORN

9 THE CLERK: Please state your name and spell it for the
10 record, please.

11 THE WITNESS: Michael Bruce Hurwitz, H-U-R-W-I-T-Z.

12 THE CLERK: And Michael, M-I-C-H --

13 THE WITNESS: A-E-L.

14 THE COURT: Okay. I do appreciate it. So then at this
15 juncture, counsel, you can commence with your examination.

16 MR. LEAVITT: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. LEAVITT:

19 Q Good afternoon, Dr. Hurwitz. Okay. Dr. Hurwitz, I would like
20 to walk through your educational history.

21 A Okay.

22 Q Where did you go to college?

23 A So I went to Tulane University in New Orleans and majored
24 in biology and environmental sciences. Graduated in 1982. I went to
25 Louisiana State University Medical School in New Orleans from '84 to

1 1988. And upon graduation started surgical internship and residency. I
2 did my training at Harbor UCLA Medical Center in Torrance, California. I
3 started in '88 as an intern, finished in '94 as a chief resident. '94 to '95 I
4 was a fellow in surgical oncology and essentially a junior attending
5 surgical instructor at the same institution, Harbor UCLA.

6 I moved to New York for a few years after that to go into
7 practice. And then came back and did an additional year of fellowship
8 training in advanced minimally invasive surgery, laparoscopic surgery,
9 in other words, at Los Angeles County USC Medical Center from '97 to
10 '98. And that was the end of it.

11 Q That was the end of it. Doctor, are you board certified?

12 A I am.

13 Q What is the process to become board certified?

14 A So board certification is a process to determine if you have
15 the requisite knowledge to practice as a board certified surgeon. And
16 basically you have to prepare for the board, so you have to study fairly
17 extensively and then you go through a written board examination. And
18 then if you pass the written board examination you're invited to take an
19 oral examination where you're grilled by a number of experts over the
20 course of a day. And then if you pass that, then you're granted board
21 certification. Once you're board certified, you have to recertify it for ten
22 years, so I have since recertified twice.

23 Q Okay. Why is it important -- or what is the importance of
24 being board certified?

25 A Well, I think it demonstrates that you have the knowledge

1 and, you know, the background and understanding of all of the facets of
2 our specialty of general surgery in order to practice safely and
3 effectively. Many hospitals use it as criteria to allow you to be on staff,
4 some don't.

5 Q Okay. Along those same lines, do you have privileges at
6 hospitals?

7 A So I have privileges at the hospital where I practice, Hoag
8 Hospital, in Newport Beach, California. I've been in practice there at
9 Hoag Hospital for 21 years, so 31 years since I -- hard to believe, but 31
10 years since I started internship in 1988. But I've been at Hoag for 21.

11 Q Thank you. And you mentioned several States when you
12 were going through your educational history. What States are you
13 licensed to practice medicine in?

14 A Just California.

15 Q Okay. How long have you been licensed to practice in
16 California?

17 A I believe I got my license to practice in my second year of
18 residency. You apply, I think, during your first year as I recall, so I think I
19 got my license in 1990, if I'm not mistaken.

20 Q And do you recall what year you became board certified the
21 first time, not the renewal?

22 A 1995.

23 Q Okay. And, Doctor, in your practice what do you do? What's
24 your focus of practice?

25 A So I'm a general surgeon. General surgery encompasses

1 abdominal surgery, primarily; some endocrine surgeries, so in my case I
2 do quite a few thyroid operations; a lot of hernia operations. And a lot of
3 what I do is laparoscopic. So laparoscopic hernia repair, as well as open
4 hernia repair, colon surgery, gall bladder surgery. So there's a lot of
5 things that are basic general surgery things. And, in addition to that, I
6 take a lot of emergency surgery call. We don't do trauma at my hospital,
7 so we don't have gunshot wounds, stabbings, and so forth, but we have
8 a lot of acute surgical emergencies that we take care of, as well, so
9 perforated organs, appendectomies, and so forth.

10 Q Okay. Are you familiar with the standard of care in hernia
11 repair?

12 A I am.

13 Q Are you familiar with care -- the standard of care in
14 recognizing and treating infections, including sepsis?

15 A Yes, I am.

16 Q Okay.

17 MR. LEAVITT: Your Honor, I ask this Court to allow this
18 witness to testify as a medical doctor in general surgery.

19 THE COURT: He can offer his opinion consistently therein.
20 Feel free to proceed.

21 MR. LEAVITT: Thank you, Your Honor.

22 BY MR. LEAVITT:

23 Q Doctor, what is the standard of care; what does that mean?

24 A So the standard of care is what a reasonable physician would
25 do, a reasonable and prudent surgeon would do under similar

1 circumstances.

2 Q Okay. And you've been hired as an expert in this -- or as a
3 doctor in this case to review medical records; is that correct?

4 A That's correct.

5 Q Okay. And, in fact, you did review records. Doctor, there's a
6 binder in front of you as it's the Defendants' exhibits; do you see it?

7 A Yes.

8 Q Can you open it to Exhibit K -- double K?

9 A Easier said than done.

10 MR. LEAVITT: Your Honor, may I approach to remove the
11 other binder --

12 THE COURT: Of course you may.

13 MR. LEAVITT: -- and assist?

14 BY MR. LEAVITT:

15 Q Okay, Doctor, could you take a few moments and leaf
16 through that?

17 A Okay.

18 Q Okay. Doctor, do you recognize that?

19 A I do.

20 Q Okay. Can you just give an overview what that is?

21 A So this was the expert report that I was asked to draft in the
22 review of this -- in this case.

23 Q Okay. And there --

24 A So --

25 Q Oh, I'm sorry.

1 A Go ahead.

2 Q And you have a list of documents that you reviewed; is that
3 correct?

4 A Yes, I do.

5 Q Okay. And in those documents you reviewed St. Rose
6 Dominican Hospital records and billing?

7 A That's correct. I've got Rose Dominican, the records from
8 Dr. Rives, the records of Dr. Chang, Desert Valley Therapy, Dr.
9 Hamilton's records, and so on.

10 Q Okay. Now, you also reviewed, if you flip to the page 2 there
11 in the same exhibit, Dr. Rives' interrogatories and answers to
12 interrogatories?

13 A Yes, I do.

14 Q Okay. And you reviewed the deposition of Dr. Rives in this
15 case?

16 A Yes, I did.

17 Q Did you also review the deposition of Dr. Rives in the Vicky
18 Center [phonetic] case?

19 A Yes, I did.

20 Q Okay. And when you were deposed by Mr. Doyle, did he ask
21 you about that deposition of Vicky -- in the Vicky Center case of Dr.
22 Rives?

23 A Yes.

24 Q Okay. I'd like to go to your report, Doctor. You gave me a
25 definition of the standard of care. After you reviewed all these records,

1 did you come to a conclusion of whether Dr. Rives breached or failed to
2 meet the standard of care in this case?

3 A Yes, I did. I -- would you like me to --

4 Q Yes. Would you please explain to the jury what you found?

5 A So I had a number of concerns in this case, and I did feel that
6 he fell below the standard of care. And I can, you know, expand upon
7 that. Basically, you know, he had a patient to whom he did this
8 laparoscopic hernia repair on. This is a clean case. One would typically
9 expect a case like this to -- you know, the patient to recover fairly quickly
10 and go home if not that day, but maybe the day after surgery.

11 And during that operation I have a number of concerns about the
12 way this operation was conducted. And in particular, when he went in
13 laparoscopically to do this operation, he found that the colon -- the
14 transverse colon, which is the part of the colon that goes across the
15 abdomen here, the mid portion essentially of the colon, was stuck, was
16 adherent to the mesh that had been placed at the previous hernia repair
17 that failed. So she had had this hernia operation in 2014, the repair
18 failed, he took her back to surgery and found that the colon was stuck,
19 was adherent to the mesh.

20 Q Now, Doctor, when you say adherent or stuck to the mesh,
21 the colon, is the colon -- what type of tissue is that?

22 A So the colon is a tube, and it's part of the gastrointestinal
23 tract that holds waste. So the colon stores fecal material, and it's
24 essentially a fleshy tube and the outer -- and it's, you know, about so
25 thick. And the outer layer of the tube is called the serosa. And that

1 serosa is what had become plastered to the mesh that had been placed
2 previously. And that's not uncommon to find, intestine stuck to mesh. It
3 happens.

4 Q Okay.

5 A So in order to repair this hernia, it was necessary to peel the
6 colon away from the mesh to which it had become stuck. And so
7 according to the operative report Dr. Rives used a device called a ligature
8 device, which is a thermal energy source. It's a tool that uses heat to
9 seal blood vessels and to cut tissue.

10 Q Now, Doctor, are you familiar with this tool, the ligature?

11 A I am.

12 Q Okay. And so if you would proceed -- so what else did the
13 operative report say?

14 A So he used this thermal device to cut through these
15 adhesions to separate the colon from the mesh.

16 During the course of this operation and using heat on the intestine,
17 he created two holes in the colon that he became aware of. And
18 discovering these holes, he proceeded to attempt to close the hole using
19 a stapling device.

20 Q Okay. Now, Doctor, can you explain to the jury, when you
21 close a hole, a colotomy, what's that process? You've done this before,
22 correct, Doctor?

23 A I have.

24 Q Okay. So what's the process? If you could show the jury the
25 best you can with your hands?

1 A So if you're going to close a hole in the colon, and keeping in
2 mind the colon is flexible, right, you can -- it's a little difficult to describe,
3 but you can pinch up the part of the colon that has the hole in it, bringing
4 the edges together. And then the stapling device clamps across the
5 intestine below the hole. So you have to catch good colon in order to do
6 that, right?

7 Q Okay.

8 A And then you fire this stapler. The stapler has within it a
9 cartridge that's inserted in the stapler. And that cartridge has two -- it
10 has four rows of staples. So it fires -- it lays down two rows of little tiny
11 staples that are sort of offset from one another, so you don't have
12 leakage, and then it cuts between them. So you leave two rows on one
13 side and two rows on the other.

14 Q Okay.

15 A And so in doing that you zip across the colon, and it staples it
16 together, essentially.

17 Q Now, you mentioned good tissue. What do you mean by
18 that? When you're using a ligature can that cause unexpected risk or
19 increased risk?

20 A So first there's a number of concerns in using a stapler to
21 close a hole. One of the concerns could be that you could narrow the
22 colon. If you take too much of the colon, this little tube and pinch it off
23 too much, you can -- you have to be careful you don't narrow the colon.

24 But the bigger concern here was the fact that this thermal energy
25 source that I mentioned, the ligature, was used to free the colon from the

1 mesh. And the problem with using the ligature against the bowel is that
2 thermal energy can be transmitted from the device to the underlying
3 serosa. And if the thermal device is in contact for too long with the
4 bowel, you can get a full thickness thermal injury to the intestine, so.
5 And that might not become apparent right away. It can sometimes take
6 time for that thermal energy to fully kill the full thickness layers of the
7 intestine. So you might not recognize in that case if you damage the
8 tissue surrounding the area that it's touched.

9 Now, the manufacturer claims that the thermal spread is
10 minimal, but it's still there and it can spread a millimeter or two. So it
11 can spread some distance. And if you're using that over this whole
12 surface of the colon as you're freeing it, you can cook a lot of that colon.
13 And then if you're stapling that area that you just seared with the
14 ligature, you staple across that, you may be stapling tissue that really
15 doesn't have good structural integrity because you just injured it with the
16 thermal device, essentially.

17 Q Thank you, Doctor. Do you have an opinion as to whether or
18 not using the ligature fell -- in this case fell below the standard of care?

19 A So I feel that using the ligature was below the standard of
20 care because again you know that you've got a thermal energy source
21 that has the potential to damage bowel, so I think it's contraindicated in
22 that setting.

23 And the preferred method if you were going to try to do this
24 laparoscopically is to use cold scissors. To use a device that doesn't sear
25 the tissue. The downside to that is you can have some bleeding from the

1 tissue, but you would rather have a little bit of bleeding than have tissue
2 that you've damaged, you know, without being able to fix that.

3 So using a thermal energy source against the bowel in that way is
4 below the standard of care and it's contraindicated. It's not indicated.
5 You're not supposed to use it in that way.

6 The other option would be if you have a colon that's stuck to the
7 mesh in that way and that you can't safely free, is to say okay, well,
8 we've tried to do this laparoscopically, this is too risky, we're going to
9 open. And in that case you would have to make an incision, take out the
10 mesh if you have to, and then carefully an open technique where you
11 have -- you know, you can use your hands better than you can
12 laparoscopically, you can cut the intestine away from the mesh. That's a
13 decision that has to be made intraoperatively. Dr. Rives' view is that he
14 could complete the operation laparoscopically, but it was clearly below
15 the standard of care to use this thermal energy source in that way.

16 Q Okay. So, Doctor, let me see if I understand. When you use
17 a ligature, the thermal heating device, can that cause the tissue that it
18 spreads to, to fail over time?

19 A Yes.

20 Q Am I using the right word fail or how would you describe it?

21 A Well, the tissue, it loses its integrity, it loses its strength, it
22 loses the ability to hold suture or to hold staples. The tissue slowly dies.
23 And as the tissue dies, it falls apart. So if you staple together tissue, it
24 dies because of the thermal energy and now you've got staples holding
25 tissue that won't hold.

1 Q So in this case did Dr. Rives fall below the standard of care as
2 a reasonable surgeon to use the stapler after he's used a ligature?

3 A I think the standard -- I think he fell below the standard of
4 care in using the ligature against the bowel. I think that it further
5 compounded that problem in stapling it. But even had he sewn it; he still
6 would have been sewing tissue that didn't have structural integrity. So
7 once he committed to using this, you have to be concerned about the
8 potential for injury to the colon that you've just freed up.

9 And if you're concerned about that, then you have to make sure
10 that you've got good tissue to reconnect, whether it's using the stapler,
11 or whether it's using a suture, or whether if you feel that you've
12 damaged a significant amount of tissue, you may have to just remove
13 that whole section of colon.

14 Q Okay. Now, when you say suture, that's where you thread it?

15 A Correct. When you sew it.

16 Q When you sew it. Now, colotomies can happen without
17 negligence; is that --

18 A That's correct. And I would say that if you're going to
19 operate on somebody, you're going to dissect the colon away from
20 mesh. You can -- it's certainly possible to get a colotomy. And I would
21 not say that getting a colotomy -- putting a hole in the colon under
22 difficult circumstances where it's plastered to the tissue, is below the
23 standard of care. I think that's a complication that can be expected.

24 Q Okay. So in this scenario where the mesh was plastered to
25 the colon, where was the failure of standard -- to meet the standard of

1 care?

2 A In my view the failure to meet the standard of care was in
3 using a thermal energy source in the first place to take the colon off of
4 the mesh because there's such a high risk of thermal energy -- injury.

5 Q Okay. Now, Doctor, you reviewed these medical records. Do
6 you recall how many holes Dr. Rives could see during the surgery that
7 he made?

8 A Dr. Rives found two holes -- saw two holes in the colon and
9 repaired the two holes with the stapling device.

10 Q Okay. Do you recall how many holes there ended up being?

11 A So in the final analysis once the patient went back to surgery
12 on the 16th, there were three holes. So there were the two holes and
13 then there was a third hole that he was not aware of.

14 Q Okay. Now, in Dr. Rives' operative report did he say the
15 number of staples he used?

16 A It was not clear how many staples he used; how many
17 staples was used.

18 Q Okay. Could you tell in his operative report whether he did a
19 thorough examination and cleaned everything up?

20 A Well, there are other concerns here. So one of the concerns
21 is first and foremost making sure that you don't have any other injuries
22 in the bowel that you're overlooking. Another concern is making sure
23 that if there's any spillage from the colon, and he doesn't describe any
24 spillage of fecal matter or stool from the colon, you have to make sure all
25 of it is very well cleaned out.

1 Another concern was his decision during surgery to put a new
2 mesh in, despite knowing that he had just made two colotomies. He's
3 now taken a clean case, and it's become a contaminated case. He now
4 has two holes in an unprepped colon. Frankly, even had the colon been
5 -- had the patient had a bowel prep to wash out the colon ahead of time,
6 it would still be -- it would still contaminate that case.

7 And so you have to worry about the potential that this new mesh
8 that you're going to put in, this new synthetic material, is going to
9 become infected. Mesh has this tendency to become infected once it's
10 exposed to bowel contents.

11 It's a little bit controversial because there are some people that
12 think you can, in some cases, get away with using a lightweight mesh in
13 the presence of infection and that you can sometimes treat with
14 antibiotics and get over it. But it's a very dicey proposition. And so I
15 have concerns about that, as well, placing that synthetic mesh in the
16 presence of two known holes in the colon.

17 Q Okay. You used a term that I'd like you, if you wouldn't mind
18 explaining, unprepped bowel; what does that mean?

19 A So when you're going to have colon surgery or when you're
20 going to have a colonoscopy, you have to drink this awful stuff and wash
21 out your colon. So anybody who's had a colonoscopy knows you have
22 to drink a jug of bowel prep to wash everything out so that you don't
23 have stool in the colon. So that's called a mechanical bowel prep.

24 Q Okay. And in this case there was no bowel prep?

25 A And in this case there was no bowel prep. Now, I'm not

1 saying you have to prep every bowel in a hernia operation, but he did
2 not have a bowel -- she did not have a bowel prep.

3 Q Now, you've just explained to the jury, and you've reviewed
4 the operative report. I had some questions about that that you just
5 addressed. If the operative report says no complications; is that true?

6 A No. There was further complications. There were two holes
7 in the colon that he was aware of. So there were clearly complications.
8 And documenting that there's complications is okay.

9 Q Right.

10 A You know, I mean we have complications. Anybody that
11 operates is going to have complications. Nothing's -- you know, these
12 things arise, but you have to document them.

13 Q Why would you have to document complications? What
14 does that do?

15 A Well, first of all, it allows you to be fully truthful about the
16 operation that you performed, right? So you have to -- it's part of the
17 medical record that we are expected to record and that we're expected to
18 document. If there's complications, you have to document them. It's
19 important because if things go awry and other people are taking care of
20 this patient, they have to know what took place during surgery.

21 So it's in the best interest of the patient that you be as forthcoming
22 and truthful as possible in your documentation of the operation to guide
23 the further care of that patient.

24 Q Okay. Whose best interest did you say it was?

25 A It's in the best interest of the patient.

1 Q Right. Why is that?

2 A Well, ultimately other people may be taking care of that
3 patient, whether it's on this admission or somewhere down the line, you
4 have to have a full -- it's very important that not only do you document
5 the complications, but you document it timely. You know, people are
6 going to be taking care of this patient and the record has to be complete
7 in order for others to provide the appropriate care.

8 Q Okay.

9 A And it's a legal requirement, as well. I mean it's -- you have
10 to document everything.

11 Q Very good. Doctor, thank you for that explanation. I'm going
12 to back up a bit here to when you received this case. You were looking --
13 what type of approach did you take when you got these documents?
14 What did you do?

15 A So -- well, it's a lot of work. I reviewed everything that was
16 given to me. This was, you know, a while ago. I reviewed the records
17 from the office, I reviewed the records from the hospital, I reviewed the
18 depositions of people that were involved, I reviewed x-rays and CAT
19 scans. So it's a matter of reviewing the whole thing and -- you know,
20 and evaluating that in the context of what I know to be appropriate and
21 the standard of care for surgery to determine whether the care that was
22 provided was appropriate, basically.

23 Q Okay. Now, have you done this type of work before, looking
24 back and --

25 A I have. I've done some expert witness work in the past.

1 Q How many times -- how many cases would you say you've
2 been involved in?

3 A So over the past five years or so there's probably been about
4 ten cases in all, give or take, that I've been asked to review and end up
5 being -- had to give a deposition in.

6 Q Okay.

7 A Mostly in the past these were on behalf of defendants, the
8 doctors that were involved in the case, but there's been several also that
9 have been on the side of the plaintiff, on the side of the patient. So, you
10 know, roughly ten. I think there are some other cases that I've been
11 asked to review that I didn't feel rose to -- I didn't feel were malpractice
12 or that I could, you know, assist in. There have been cases that have
13 been presented to me by plaintiff's attorneys and I felt that, you know,
14 the doctor had done the right thing, so I couldn't take that case. And
15 there were some cases on behalf of defendants that I felt I couldn't take
16 on.

17 Q Thank you, Doctor. How many times have you testified in
18 trial on behalf of plaintiffs?

19 A I think this is the first one. The trial testimony that I've done
20 has been on behalf of defendants.

21 Q Okay. Thank you. Now, doctor, you're also compensated for
22 being here today; is that correct?

23 A Yes.

24 Q How much are you paid?

25 A Have I been paid?

1 Q How much are you being paid for being here today?

2 A For today's testimony I think \$6,000.

3 Q Okay. And does that include preparation time?

4 A That includes all the preparation time, all the time reviewed,
5 the two days that I've had to take off from work over, you know,
6 yesterday and today, and so forth.

7 Q Okay. So your practice doesn't stop when you testify?

8 A It just keeps going.

9 Q It just keeps going.

10 A I had to give away my calls. I'm supposed to be on call
11 today, so a number of things I've had to --

12 Q Okay. You had to give them away?

13 A Yes.

14 Q Okay. So somebody else is doing that?

15 A Somebody's doing that for me.

16 Q Okay. I just want to make sure. All right. So in reviewing
17 these records -- and I appreciate your testimony today regarding the
18 surgery itself -- what I'd like to do is now discuss a bit with you, and I'm
19 -- now, in this case do you believe Dr. Rives fell beneath the accepted
20 standard of care for his intraoperative technique?

21 A Well, I do, and I feel that he fell beneath the standard of care
22 in using this ligature thermal energy device against the bowel, as I said.
23 I think that he also made some decisions that while they may not have
24 fallen beneath the standard of care, may not have been in the best
25 interest of the patient, such as his decision to try and complete this

1 laparoscopically, rather than opening or taking out the old mesh and
2 making sure that he was able to dissect this away.

3 I think that the idea of putting a new patch in over the old
4 patch, which had failed, was not a good idea, but different people do
5 things differently. So I can't say that that falls below the standard of
6 care, but clearly using the thermal energy source was below the
7 standard of care in the way in which it was used.

8 Q Now you stated that he continued to go laparoscopically.
9 What other option did he have?

10 A Well, his other option, faced with intestine plastered to the
11 mesh, as I said, would have been to make an old fashioned incision,
12 open up, take out the mesh by hand, carefully free the bowel from the
13 mesh. In doing so he's accomplished getting -- he can, in that way, make
14 sure that the bowel is healthy, that he hasn't damaged it. He removes
15 the old mesh and now he's not laying a new mesh against the old mesh.

16 It might also allow him to -- and it may or may not have allowed
17 him to bring the edges of the tissue together, rather than just once again
18 bridging across that hole, that defect that was the hernia, with this new
19 mesh. So that would have been an option for him.

20 Q Okay. Now, are you aware that -- and you reviewed Dr.
21 Rives' deposition in this case. Are you aware that Dr. Rives testified he
22 doesn't know if he took out all, or some, or any of the mesh from 2014?

23 A I don't think he took out the mesh from 2014.

24 Q Okay. Doctor, what does it mean to repair -- or do you feel
25 that he adequately repaired the bowel perforations on July 3rd, 2015?

1 A Well, clearly he didn't --

2 Q Okay.

3 A -- because we know the outcome of this, right? So
4 ultimately, you know, following surgery the patient clearly became
5 septic. And that became evident as early as the first post-operative day.
6 And by the second post-operative day she had respiratory failure and
7 was intubated, she had a breathing tube, and she was in the intensive
8 care unit.

9 And the concern that I have is that here you have a patient going in
10 for a clean operation, who had this operation and comes out, and she
11 becomes septic. She becomes -- she develops this evidence of
12 overwhelming infection to the point where she has respiratory failure.
13 Dr. Rives had just been in there doing this operation and knew full well
14 that he had two holes in the colon and now you've got a septic patient.

15 So one's first concern as a surgeon is, you know, oh, my gosh, is
16 this patient septic, because I've got a hole -- I've got holes in the colon
17 that I fixed. Are the holes leaking, did my repairs fail? I mean that's the
18 first logical thought you would have to have.

19 And I don't know if this is answering your question, but -- so you
20 have to assess where this infection is coming from. So the patient had a
21 very elevated white blood cell count. The white blood cell count is a
22 measure in the blood of the number of white blood cells. And that goes
23 up in the presence of infection.

24 Now, we also know that white blood cell counts rise in patients
25 who are stressed. So having just had an operation this patient is

1 stressed. So in the first post-operative day when the white blood cell
2 count goes up, you have to think, okay, is this because of infection, is
3 this because of the stress of the operation, what's going on here. And
4 you have to look at all the variables and figure out, you know, where you
5 think this is coming from.

6 Q Okay. What's aspiration?

7 A So there are times when patients can inhale liquids or
8 vomitus into the lungs. They can vomit, and they can inhale that vomit
9 and it essentially can go down the airways into the lungs. And that's
10 called aspiration.

11 And if you have aspiration like that, that can blossom into
12 aspiration pneumonia or aspiration pneumonitis, which is inflammation
13 of the lungs. And that, too, can cause a white count and fever after
14 surgery.

15 In this case, however, there was no evidence that the patient had
16 aspiration pneumonia. So that was a consideration. That was in what
17 was called the differential diagnosis. When you're trying to come up
18 with a diagnosis, you have a list of potential diagnoses. And that would
19 be in the differential diagnosis. But it's pretty straightforward to rule out.
20 You've got a chest x-ray. You --

21 MR. DOYLE: Objection. Narrative.

22 MR. LEAVITT: Okay. Very good. Sure.

23 BY MR. LEAVITT:

24 Q Doctor, how would you rule that out?

25 A Well, you can rule that out with a chest x-ray, you can rule

1 that out with a chest CT. You can rule that out over the course of a series
2 of films to see if there's any significant change and so forth.

3 Q Okay. Now, Doctor, you've seen CT scans in the past?

4 A Yes.

5 Q Okay. In this case can you solely rely on a CT scan?

6 A So CT scans are imaging tools that give you cross-sectional
7 imaging of the body. And they're useful diagnostic tools, but they're just
8 one part of an evaluation. You can't always rely upon them. And, in
9 fact, there is a significant rate at which they can be misinterpreted, or
10 they can show nothing when actually there's something. And that's
11 called a false negative, right?

12 Q Okay.

13 A So they can miss things.

14 So CT scans can be useful, they can help you identify infection, but
15 if they don't show infection in the presence of somebody who clearly has
16 an infection, then you have to look at them with a little bit of skepticism.
17 You have to use your -- a surgeon has to use one's clinical experience
18 and the knowledge that they've developed over the course of their
19 medical school surgery training and practice to evaluate the CAT scan in
20 the context of what's going on with the patient.

21 Q Okay.

22 A So I have a concern since you asked. In this case --

23 MR. DOYLE: Objection, narrative.

24 THE COURT: Overruled.

25 THE WITNESS: So in this case -- I'm sorry.

1 THE COURT: Let the Court finish before you continue. Thank
2 you. It's getting close, but so far not yet.

3 BY MR. LEAVITT:

4 Q Okay. Doctor, let me ask you, what is your concern about the
5 CT scans in this case?

6 A So my concern about the CT scan is that while the CT scan
7 interpretation did not conclusively point out a source of intraabdominal
8 infection on the interpretation of the radiologist, that doesn't rule out
9 intraabdominal infection as the source of the sepsis. And the clinician,
10 the surgeon, taking care of this patient has to, in approaching this patient
11 who is clearly becoming septic, take into consideration that he knows,
12 for instance, that just yesterday he put two holes in the colon and now
13 suddenly the patient's becoming septic, you have to put -- you have to
14 connect the dots. And so it's incumbent upon the surgeon to make that
15 connection, to use that experience to figure out what's going on.

16 Q Okay. Now, Doctor, there was a slide in the opening
17 statements used by Defense counsel. I'd like you to look at that.

18 MR. LEAVITT: Any objection? It's your slide. I'm going to go
19 ahead and put this up on the screen.

20 BY MR. LEAVITT:

21 Q Doctor, there's a --

22 MR. LEAVITT: If we could get the microphone. I thought it
23 was -- is it up there?

24 THE COURT: Would you like the hand-held microphone?

25 MR. LEAVITT: Hand-held -- I apologize.

1 THE COURT: Sure.

2 MR. LEAVITT: The hand-held microphone.

3 THE COURT: The Marshal will provide it to you.

4 BY MR. LEAVITT:

5 Q And, Doctor, if you wouldn't mind once it's on, take a step
6 down, I'd like to go through -- I'd like you to go through this first CT scan
7 on the 5th. Do you see that says no leak?

8 A Yes.

9 Q Okay. And the arrow. Can you explain to the jury what we're
10 looking at?

11 A Well, so -- can you hear me?

12 UNIDENTIFIED SPEAKER: Uh-huh.

13 THE WITNESS: So we're looking at a cross-section of the
14 abdomen at the level of the hernia repair. And you can see where the
15 arrow's pointing. You can't really see it in this projection very well, but
16 it's pointing to a little -- a white area and that's the -- presumably the
17 staple line on the colon that was repaired. And you see here there's this
18 circle here, and it's got a line across the middle of it. So this is called an
19 air fluid level. And this is -- the black up here is air and the gray
20 underneath it is fluid. So there's fluid in this space.

21 Now, this is just on -- this was on the 5th? So this is on the
22 second postoperative day. Now, when a hernia repair is done, the
23 hernia is reduced. In other words, the intestine in this case, the
24 transverse colon was freed up from the mesh. The mesh is presumably
25 lining this hernia sac. This is called the hernia sac. There's mesh up

1 here. The colon has been returned to the abdominal cavity leaving a
2 space. And then mesh is placed here. So here's your staple line and the
3 new mesh is under here. Mesh doesn't really show up well on a CAT
4 scan, so you really can't see it, but we presume that it's there. And
5 there's air and fluid here.

6 Now, it is not unexpected in a newly created space where the
7 bowel has been removed for fluid and air to collect just two days after
8 surgery. So while you have to worry, you know, is something going on,
9 one can also say well, this is -- this can be attributed to -- expected what
10 it should look like post-operatively, right. You can expect to have some
11 air and fluid here. But I've got a septic patient here. So this is a concern.
12 This is something I'm worried about.

13 But this -- so that's basically what we're seeing here. We're
14 seeing air and fluid in the space vacated by the bowel that was there
15 previously.

16 BY MR. LEAVITT:

17 Q Now, Doctor, at this point she's post-operatively day two. Is
18 she septic?

19 A On post-op day two she's septic, and she's -- and that's the
20 day that she was intubated and brought to the intensive care unit.

21 Q Okay. But she was also septic on the 4th, correct? So on the
22 4th she was septic, okay?

23 A Correct.

24 Q Now, why -- her white -- is her white blood cell count
25 elevated at this time?

1 A The white blood cell count is -- I don't have the number off
2 the top of my head, but 23,000, somewhere in that -- it's high.

3 Q Okay.

4 A The upper limited normal is say 12,000 and she's at 22 or
5 23,000. So she's septic here. And you see this having -- knowing that
6 you had these two holes in the colon that you closed together, you got to
7 start -- you have to start thinking about is this something that's been
8 done surgically.

9 Q Okay. And like you said, connect the dots. If you could look
10 to the 9th, the staple line -- the arrow's pointing to the staple line, is this
11 common for the staple line to move?

12 A So it's hard to know how to interpret that part of it exactly.

13 Q Sure.

14 A Because these aren't at exactly the same part of the
15 abdomen. This is the liver here, for example, and you can see this is a
16 little bigger and over here you're -- we're probably seeing a little farther
17 down. It's not exactly the same cut. So it's hard to say exactly what's
18 going on with this staple line.

19 Q Okay.

20 A Is the staple line pulled away, is it just -- are you just getting
21 it on a different angle, did the intestine move a little bit and so the staple
22 line moved. It's hard to interpret. But what you do see is now that this
23 space that was half air and half fluid now is all filled with fluid and
24 there's what appear to be bubbles of air within it. So there's still some
25 air in the abdominal cavity and this is now five days post-op.

1 Q Okay.

2 A And the patient is clearly still septic.

3 Q Okay. Thank you, Doctor. So, again, is it reasonable to rely
4 solely on a CT scan?

5 A No. And I think the problem we have here is that the CT scan
6 may be completely useless to you, right? A CT scan might be beneficial
7 if it clearly shows you a problem, like over here on the 15th where -- I'm
8 sure we'll get to that, but there's air and the whole thing is blown out,
9 and it's a big problem. But if you don't see that, and you see a CT scan
10 that doesn't look horrible, and you've got a patient who's still septic, who
11 still has a high white blood cell count, is still in the intensive care unit
12 with a breathing tube, you have to make a clinical determination of
13 what's going on with the full knowledge of having made two holes in the
14 colon. Again, we're coming back to connecting the dots and saying this
15 is what we found in surgery, I've got a patient who should have been
16 home days ago and now she's lying in an intensive care unit on massive
17 antibiotics and still with a breathing tube, what's going on here?

18 So you have to make that -- you have to -- again, it's up to the
19 surgeon to take their full knowledge, experience and so forth and
20 connect the dots. And I have to say, since you brought up the *Center*
21 case before --

22 MR. DOYLE: Your Honor, it's become a narrative.

23 THE COURT: The objection is narrative?

24 MR. DOYLE: Yes. And 48.035.

25 THE COURT: A narrative. Counsel, can you ask a question?

1 MR. LEAVITT: I'll ask another question.

2 THE COURT: Okay.

3 BY MR. LEAVITT:

4 Q Now, you mentioned before you've read Dr. Rives'
5 deposition in the *Center* case; is that correct?

6 A Yes.

7 Q And Mr. Doyle here, he asked you about the deposition of Dr.
8 Rives in the *Center* case during your deposition in this case?

9 A Correct.

10 Q Do you follow me? A lot of depositions there. Now, in
11 reading Dr. Rives' deposition in the *Center* case and after doing your --
12 and doing your expert or your opinions in this case, did that -- did the
13 *Center* case shed any light on what's going on here?

14 A Well, so the *Center* case didn't change my opinion.

15 Q Okay.

16 A Okay. And what I had in the *Center* case was the deposition.

17 Q Okay.

18 A But what it clearly showed me was that, you know, as I said,
19 the surgeon has to rely upon his experience and what has come before
20 to -- you know, that's how surgeons learn.

21 MR. DOYLE: Objection, Your Honor.

22 THE COURT: Hold on a second.

23 MR. LEAVITT: Hold on, Doctor.

24 THE COURT: Now.

25 MR. DOYLE: The answer's becoming irrelevant in 48.035.

1 THE COURT: You both need to approach. Madam Court
2 Recorder, can you turn the lights on, please?

3 [Sidebar at 2:25 p.m., ending at 2:40 p.m., not transcribed]

4 THE COURT: I appreciate it. Thank you so much.
5 It will just give you time to ask more questions.

6 Okay. Counsel, going back, the question that was -- that had
7 been pending and the witness had just started to answer with the first
8 sentence, the Court had overruled the two objections raised for narrative
9 in 48035. So on that specific question, that was the Court's ruling based
10 on where you were on that mid-answer of just -- the witness. Okay?

11 MR. LEAVITT: Very good, Your Honor. Thank you.

12 BY MR. LEAVITT:

13 Q Doctor --

14 THE COURT: But I think we forgot to -- your pocket mic.

15 MR. LEAVITT: Oh.

16 THE COURT: Sorry. She's putting batteries in for you.
17 Sorry. I forgot to tell you about that. My apologies. No worries. Feel
18 free. Thank you.

19 MR. LEAVITT: The light's on. All right.

20 THE COURT: We took away your mic, and then we don't tell
21 you that we put new batteries in for you. Sorry. Go ahead.

22 MR. LEAVITT: All right. Very good.

23 BY MR. LEAVITT:

24 Q All right. Doctor, back to the CT scans in this case. Why are
25 CT scans -- why can they be what you call a -- first --

1 MR. LEAVITT: -- strike that.

2 BY MR. LEAVITT:

3 Q What is a false negative?

4 A So a false negative is essentially just that. It's saying
5 something isn't there when it is. A negative -- you know, a negative
6 means that it's not there, right?

7 Q Right.

8 A It's not seeing it essentially that it's false. So it's -- it --
9 there's something there that you're not seeing.

10 Q Okay. How can CT scans be a false negative when they're a
11 diagnostic tool?

12 A Well, surprisingly, you know the diagnostic tools don't
13 always show you what is truly there. There there's a lot of reasons for
14 that. One is that they're subject to interpretation --

15 Q Okay.

16 A -- they're subject to the resolution of the scan. In other
17 words, can the scan clearly distinguish between two points adjacent to
18 one another? There's a certain inherent inability to see certain things.
19 And in the case of intra-abdominal infection, they can overlook things.
20 They're useful if you have something clearly obvious. So if you have --
21 as in on that -- on that fourth picture on the right there, you have free air.
22 You have -- all of black area is air. And so it's obvious.

23 But there are times when findings are more subtle, and they
24 can't be easily picked up. And so in those cases, you can get a false
25 negative. And there's a significant risk of false negatives in CAT scans.

1 Q Okay. What would cause a false negative --

2 A Well --

3 Q -- in this scenario?

4 A So this in scenario, for instance, when you have a patient
5 who's been given oral and rectal contrast to outline the colon, and you're
6 looking for evidence that that contrast -- that radiocontrast material is
7 leaking out of the colon, if it shows you that it's leaking out, then it gives
8 you an answer. But if it doesn't show you that it's leaking out, it doesn't
9 mean you don't have a colon -- a hole in the colon. There are a lot of
10 reasons that you might have a hole in the colon that doesn't leak
11 contrast.

12 Q Okay. And -- for -- can you give me a few examples of this?

13 A So an example would be the fact that we have this fatty
14 apron, this veil of fat, that hangs down from the colon called the
15 omentum. And the omentum can temporarily seal a hole, an area; a
16 perforation can be very sticky, for lack of a better term, that things can
17 stick to it or it can stick to other things. Right? So the omentum can seal
18 over a hole and can -- and can make it seem like nothing -- and it can
19 prevent things from leaking out. It doesn't mean the hole's not there.
20 And the hole could be there and the tissue damage that was -- that is
21 there can be causing the white blood cell to come up. The white cell --
22 excuse me -- white blood cell count to come up, but nothing's spilling
23 out.

24 So you can have an infection, but you're not seeing what you're
25 looking for in the CT scan, which is contrast spilling out. You can't let

1 that take you down the primrose path of not doing anything about it just
2 because you don't see it though in there. And for that reason, getting a
3 CAT scan may or may not even be a benefit to you. If there's something
4 obvious -- if you need to go in surgically and find a perforation, you
5 know, or see what's going on, and there's this -- there's a presumed
6 intra-abdominal infection, just because it's not showing up on the CAT
7 scan doesn't mean you don't operate.

8 So they can lead astray. And that's -- again, when I was talking
9 about experience, you have to have the experience to be aware of that.
10 And a surgeon in practice has that experience -- should have that
11 experience.

12 Q Should have that experience. Well, in this case, on day -- on
13 the 3rd of July, was Titina septic?

14 A On the day of surgery?

15 Q The day after the --

16 A The day after surgery?

17 Q Sorry. The 4th. I apologize.

18 A On the 4th, it --

19 Q The first day of surgery.

20 A -- Titina was becoming septic --

21 Q Okay.

22 A -- yes. She had an elevated white blood cell count and she
23 was becoming sick.

24 Now, that -- you know, was it clear? I mean, there were seen
25 that you could attribute that high white blood cell count to, like I said,

1 stress and so forth. But it was -- it's clear that she's --

2 Q Okay.

3 A -- becoming septic.

4 Q Now, in your record review, was there ever pneumonia?

5 A No.

6 Q Was there ever pneumonitis?

7 A No, there was not.

8 Q So those were ruled out?

9 A So those were -- so a pulmonary source of this sepsis was
10 ruled out. So once you've ruled out a pulmonary source, what do you
11 got? You've got a patient who has holes in her -- you know, who had
12 holes in her colon on the 3rd and now has sepsis, abdominal distension,
13 elevated white blood cell count. You know, you were there, there is
14 intra-abdominal sepsis.

15 Q Okay. So what is distension? Can you explain that to the --

16 A So --

17 Q -- jury?

18 A I'm sorry. Distension is sort of the medical term for swelling.
19 So when we talk about abdominal distension, we're talking about the
20 abdominal -- essentially bloating of the abdomen, swelling and bloating
21 of the abdomen.

22 Q Okay.

23 A That's how we typically --

24 Q Okay.

25 A -- phrase it.

1 Q And what causes that?

2 A So often distension can be used -- there's a number of things
3 that can cause distension.

4 Q Sure.

5 A Distension can be caused by an ileus, for example, where
6 you -- where when you have an intra-abdominal process or sometimes
7 just after surgery, even when there's not infection, the intestines don't
8 move things through as they ordinarily would. They're sort of asleep
9 after surgery. And that's called an ileus. And so air can collect inside the
10 intestine and swell the intestine. That would be one source of
11 distension.

12 You can get abdominal distension with peritonitis. So if you have
13 an infection in the abdomen, such as with fecal peritonitis, you can get a
14 profound infection of the abdomen, the lining of the abdomen, called the
15 peritoneum, becomes inflamed, and when the peritoneum becomes
16 inflamed, you develop what's called peritonitis. So those are a couple of
17 things that can cause the abdomen to be distended.

18 Q Okay. And in this case, in your review, what caused Titina
19 this sepsis and distension?

20 A So until proven otherwise, again, until proven otherwise, a
21 sepsis, this infectious process that's ongoing, was caused by something
22 that occurred during surgery. She didn't have this before surgery. She
23 comes in, she has an operation, she's clearly got an infection. One has
24 to presume that's it's related to the surgery, especially when you've
25 ruled out a lung process. And there's no other infection anywhere else

1 that you've discovered.

2 So what's left to you is an intraabdominal process, something
3 going on inside the abdominal cavity.

4 Q And, Doctor, to a reasonable degree of medical probability,
5 what caused -- what was the cause of Titina's sepsis here?

6 A So Titina's sepsis was caused by peritonitis. And the
7 concern is for fecal peritonitis. The concern when you have somebody a
8 day or two after an operation in which there are holes in the colon and
9 now you've got somebody who's clearly developing of sepsis, you have
10 to be worried about the potential for spillage of colono contents or of
11 bacteria into the abdominal cavity.

12 So -- and it doesn't have to be liquid or solid stool. Meaning,
13 if you have an injury to the colon wall, you can get what's called
14 bacterial translocation. So bacteria are what are the -- what's in stool
15 that makes it cause infections, right? So it is bacteria in there. And if
16 you destroy the structural integrity of the colon wall, if you destroy that
17 waterproof barrier, then that bacteria can get across that -- that colon
18 wall and cause infection even in the absence of frank stool spillage.
19 Right? So o you can become septic from that. That bacteria can get in
20 the bloodstream and you can get a -- you can get what's called
21 bacteremia, bacteria in the bloodstream. There are a lot of way that you
22 can get septic from a perforation of the colon.

23 But, again, when the colon has lost it's -- you know, under
24 normal circumstances, right now the colon is watertight. Nothing's
25 leaking out of it, right? But once it's been damaged, then things can get

1 across that barrier.

2 Q Okay. So it was reasonable to look at the area where surgery
3 took place?

4 A That's correct.

5 Q Okay. Now, Doctor, you reviewed the records in this case.
6 There was a -- a hole mentioned around -- and Dr. Hamilton's note says it
7 was about the size of a quarter, 3.7 by 3.5 centimeters?

8 A Right.

9 Q Okay. I'm a standards guy. Meaning I -- inches are my thing.

10 A Um-hum.

11 Q How big is that?

12 A Well, so an inch, just, you know, to think of it in nonmetric
13 terms, an inch is 2.54 centimeters.

14 Q Okay.

15 A So there's two-and-a-half centimeters roughly in an inch. So
16 that's about, you know, close to an inch and a half -- between an inch
17 and a quarter and an inch and a half.

18 Q Okay. Now, I have something that I'd like you to look at to
19 see if it's -- as a demonstrative?

20 MR. LEAVITT: Would you like to see it, Counsel, I'm about to
21 give it to the --

22 MR. DOYLE: That's fine. Thank you.

23 MR. LEAVITT: Okay.

24 BY MR. LEAVITT:

25 Q Doctor, what I've given you, is that about the size of an inch

1 and a half or what --

2 A That's --

3 Q -- what you said?

4 A That's maybe an inch to an inch and a half-ish.

5 Q Okay. And that -- that would be the size that Dr. Hamilton
6 noted in her record?

7 A Yes.

8 Q Okay. And does that demonstrate about the size of the hole -
9 - or the term's defect, right, or hole that was found in Titina's colon when
10 they did surgery on the --

11 A That --

12 Q -- 16th?

13 A That was how they -- that was what they measured it at.

14 Q Okay. And can you hold that up and show that to the jury?

15 A So this key ring is roughly that size.

16 Q Okay. And what happens when you have a hole that size in
17 your transverse colon?

18 A So if you have a hole this size -- and it doesn't have to be a
19 hole this size, it can be a hole a lot --

20 Q Okay.

21 A -- smaller than this. You don't need a hole this size. But fecal
22 material can get outside of the colon and into the abdominal cavity
23 where it doesn't belong. And that's what causes infection.

24 Q Okay. Very good.

25 A And causes sepsis as a consequence.

1 Q Okay. Now, Doctor, in this case, in your report -- I was
2 looking at page 5 -- if you need it to refresh recollection -- I'd like you to
3 list off for the jury the -- to a reasonable degree of medical probability
4 that the care and lack of care, that Dr. Rives fell beneath the acceptable
5 standard of care. K -- double K zero 5, are you. Did you move the --

6 A I'm hear.

7 MR. DOYLE: Asked and answered, Your Honor.

8 THE COURT: Overruled.

9 THE WITNESS: Okay.

10 BY MR. LEAVITT:

11 Q Do you feel that Dr. -- or is it your testimony, to a reasonable
12 degree of medical probability, that Dr. Rives fell below the standard care
13 for intraoperative technique?

14 A Yes, I do.

15 Q Is it your testimony, to a reasonable degree of medical
16 probability, that Dr. Rives fell believe -- fell below the standard of care for
17 failure to adequately repair iatrogenic bowel perforations during the
18 July 3rd, 2015 operation?

19 A Yes.

20 Q Doctor, to a reasonable degree of medical probability, did
21 Dr. Rives fall below the standard of care in his failure to timely diagnose
22 and treat a colon perforation with feculent?

23 A Yes, he did.

24 Q Okay. Oh, sorry. Feculent peritonitis during the
25 postoperative period? Sorry.

1 A Yeah. So I think this was -- for me, this was -- this is a real
2 shortcoming because one can -- as I said before, one can have a
3 colotomy, you know, that can happen to anyone, I mean, that's a
4 complication that one can get during surgery. The surgeon needs to be
5 able to have the experience to know when things have gone awry and to
6 fix them timely. So there are times when one has to go back to surgery
7 to address a problem before the problem gets out of hand.

8 And clearly there was a failure to do that in a timely fashion.
9 This should have been diagnosed days and days earlier. The patient
10 should have gone back to surgery when there was an opportunity to do
11 so before she continued to become profoundly septic.

12 Q Okay. Thank you, Doctor.

13 And then the last one, Doctor, to a reasonable degree of
14 medical probability, did Dr. Rives fall below the accepted standard of
15 care for poor postoperative management of patient's perforated bowel
16 and result in sepsis?

17 A Yes.

18 Q Doctor, did you review the medical expenses and the past
19 medical bills in this case?

20 A I did.

21 Q And you reviewed the past medical records and treatment?

22 A I did.

23 Q The past medical treatment -- or the medical treatment that
24 she received during that time in the hospital and the records you
25 reviewed -- and I'll go over some of those -- go over those in a minute --

1 were those reasonably -- reasonable and necessary due to the failure of
2 the standard of care of Dr. Rives?

3 A In my view, they were. The care that was provided was
4 necessary, yes.

5 Q Okay.

6 A And the billing, therefore, was as well.

7 MR. DOYLE: Your Honor, I move to strike the last part as
8 nonresponsive and there being no foundation.

9 THE COURT: What was the -- what was the second one?
10 You said foundation?

11 MR. DOYLE: Right. For his -- for the end of his answer.

12 THE COURT: Overruled.

13 MR. LEAVITT: Okay.

14 BY MR. LEAVITT:

15 Q Doctor, I'd like to go over the -- just the billing amounts that
16 you -- that you reviewed. And I'd like to -- I'm going to go ahead and
17 write them out. The total past medical bills are as follows: St. Rose
18 Dominican Hospital was \$908,033.12. Do you --

19 A Yes.

20 Q -- recall that?

21 A Yes.

22 Q Then she had another St. Rose Dominican bill, Siena
23 campus, \$104,120.04. Does that sound --

24 MR. DOYLE: Objection. Hearsay and lack of foundation.

25 MR. LEAVITT: He testified that he reviewed these.

1 THE COURT: Counsel, can you please approach?

2 Madam Court Recorder, can you turn on some white noise,
3 please?

4 [Sidebar at 2:58 p.m., ending at 3:05 p.m., not transcribed]

5 THE COURT: All right. As soon as the jury comes back,
6 we're sending you out for a break. That's really what we are trying to
7 do. So we'll do that.

8 But, Counsel, we can't continue until I have my jury back, and
9 then I'll send you out for a break. Okay? Did you all get your juror
10 letters?

11 Marshal, did you get the jury letters from Tracy yet?

12 THE MARSHAL: Yes.

13 THE COURT: Oh, okay. So everyone's -- or you've gone
14 through it.

15 Okay. We're going out for a break. That's what I was trying
16 to -- I was trying to do the holdup. Sorry. No, but I'm sending
17 everybody out for a break that's -- no worries. We're all good to go.

18 So Ladies and Gentlemen, it's 3:00. I told you about 3:00 we
19 would get a break. We just were trying to have everyone here so we
20 could send you out for a break.

21 So Ladies and Gentlemen, we're going to come back at 3:25-
22 ish.

23 UNIDENTIFIED SPEAKER: Ish.

24 THE COURT: Thank you. Hey, it's in my name.

25 Okay. So Ladies and Gentlemen, during this recess, you are

1 admonished not to talk or converse among yourselves or with anyone
2 else on any subject connected with this trial. You may not read, watch,
3 or listen to any report or commentary of the trial, or any person
4 connected with the trial by any medium of information, including,
5 without limitations social media, text, tweets, newspapers, television,
6 internet, radio. Everything I'm not saying specifically is, of course, also
7 included.

8 Do not visit the scene of the events mentioned during the
9 trial. Do not undertake any research, experimentation or investigation.
10 Do not do any posting or communications on any social networking
11 sites, or, of course, anywhere else. Do not do any independent research,
12 including, but not limited to, internet searches, do not form or express
13 any opinion on any subject connected with the trial until the case is fully
14 and finally submitted to you at the time of your deliberations.

15 With that, go relax, stretch your legs, enjoy the beautiful --

16 THE MARSHAL: All rise for the jury.

17 [Jury out at 3:07 p.m.]

18 [Outside the presence of the Jury]

19 THE COURT: Okay. And, Counsel, we'll also have you go
20 enjoy your break, as --

21 MR. LEAVITT: Thank you, Your Honor.

22 THE COURT: -- my team gets to enjoy their afternoon break.

23 And the witness understands about the rules with witnesses
24 who are currently in the middle of testifying and not to talk to any of our
25 jurors? They all they can't talk to you. And you can't even offer them a

1 piece of gum or comment on the weather. So --

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: So enjoy. Thank you so very much. It's just a
4 friendly reminder. I'm sure you already knew that, but we play it safe.

5 Thank you so much.

6 THE WITNESS: Thank you.

7 [Recess taken from 3:07 p.m. to 3:27 p.m.]

8 [Outside the presence of the jury]

9 THE COURT: Okay. Let's go back on the record. Now, do
10 you wish the witness to be here for this discussion?

11 MR. LEAVITT: Doesn't matter to me.

12 MR. DOYLE: No.

13 THE COURT: Okay. And your basis for -- so counsel, since
14 Defense is saying no, do you have an objection to him not being here?

15 MR. DOYLE: No. Go ahead. He can leave. I want to make
16 this --

17 THE COURT: Is our anteroom --

18 THE CLERK: On the record.

19 THE COURT: Sure. Is our anteroom open?

20 THE MARSHAL: I believe it is unlocked. Let me make sure.

21 THE COURT: Okay. So -- Marshall, where's our jury. Is our
22 jury near the --

23 THE MARSHAL: No, they're --

24 THE COURT: They're all the way down.

25 THE MARSHAL: -- by the [indiscernible].

1 THE COURT: Okay. So sure. Okay. Outside the presence of
2 the jury in Case 739464. So counsel, right before the break, counsel
3 asked a question, said -- and bill, you said St. Rose. You didn't specify
4 which St. Rose. You said St. Rose, \$104,120.04. Does that sound about
5 right? And I'm paraphrasing. It was pretty close to that. The was
6 starting to answer and there was a hearsay objection raised by Defense
7 counsel. The Court asked the parties to come to the bench. The Court
8 then asked you all whether or not that bill was the Exhibit 1, which you
9 all had told the Court previously was a stipulated exhibit.

10 The parties had told me that it is not in the Exhibit 1, because
11 I guess it is a different St. Rose than what the Exhibit 1 is. So then the
12 Court asked Plaintiff's counsel what would be his response on why it
13 would not be hearsay and then decided it would be a good opportunity
14 to give the jury a break, so that each of the parties could prepare any
15 response that they wanted for the hearsay objection, so Plaintiff's
16 counsel, the question was pending to you --

17 MR. LEAVITT: Sure.

18 THE COURT: -- in response to Defense counsel's hearsay
19 objection, why would this document not be hearsay? Actually, I should
20 say you did say the word business records and the Court said what
21 would be your basis --

22 MR. LEAVITT: Right.

23 THE COURT: -- of business records, since there's -- so --

24 MR. LEAVITT: Yes, Your Honor. For one, there's a COR. I'll
25 refer to -- it's Plaintiff's Exhibit 2.

1 THE COURT: Proposed 2?

2 MR. LEAVITT: Proposed 2.

3 THE COURT: And is it proposed? That's why -- that's --

4 MR. LEAVITT: Yes.

5 THE COURT: -- a question mark.

6 MR. LEAVITT: It's proposed.

7 THE COURT: Okay. It's proposed, so it's not an admitted
8 Exhibit. Okay. Thank you.

9 MR. LEAVITT: Right.

10 THE COURT: So it's proposed Number 2. Okay. So
11 there's --

12 MR. LEAVITT: Proposed Number 2. There's a COR for --
13 that's signed.

14 THE COURT: Okay.

15 MR. LEAVITT: Okay. And the --

16 THE COURT: So that gives it -- and then you all agreed to
17 authenticity only. Is that correct?

18 MR. LEAVITT: Yes.

19 THE COURT: Or was there even an agreement as to
20 authenticity? Counsel for Defense, was there an agreement as to
21 authenticity of the documents or not?

22 MR. DOYLE: There was no objection to this for authenticity.

23 THE COURT: Okay. So -- okay, so go ahead.

24 MR. LEAVITT: Yes, Your Honor. This is a -- the business
25 exception is this. This is a document that was made by St. Rose. I want

1 to be clear. St. Rose Dominican Siena Campus. Doctor -- excuse me.
2 Dr. Hurwitz has reviewed these. He's been an expert in other cases here
3 in the State of Nevada. He knows what billing is. He's worked in New
4 York, New Orleans, you name it. So to lay foundation for it, he
5 understands these. He sees medical billing, especially with hospitals on
6 a regular basis and he's qualified to talk about.

7 THE COURT: But does that address the hearsay exception?

8 MR. LEAVITT: Yes. He's -- I mean --

9 THE COURT: And is that -- are you having that -- I mean,
10 there is a hearsay objection.

11 MR. LEAVITT: Right.

12 THE COURT: So is that -- are you trying to say that that is a
13 hearsay exception to the hearsay objection? I mean, business records is
14 a hearsay --

15 MR. LEAVITT: Right.

16 THE COURT: -- exception, but I'm trying to understand how
17 his knowledge of the -- his knowledge of the billing standards in the
18 community is -- goes to reasonable and necessary, right? It doesn't
19 address the hearsay issue raised by the objection or are you saying it
20 does? I'm just trying to keep the distinctions different of what you're
21 trying to say.

22 MR. LEAVITT: Yes, I believe it does, because it's done in the
23 normal course. This is a COR. There's nothing to say it isn't. And there
24 it is.

25 THE COURT: Okay. I will let Defense respond, because you

1 didn't have a chance yet to explain the basis of your hearsay objection.
2 Since you've heard the response, go ahead.

3 MR. DOYLE: So, if you look at Exhibit 2, page 1, it's entitled a
4 certification of records. It's not a custodian of records certification. And
5 whoever signed this, all I they say is I certify the enclosed photographic
6 copy of the requested billing records has been compared to the original
7 billing records and is an accurate duplicate of such billing records. That
8 would take care of authenticity, but it says nothing about any of the
9 requirements to satisfy the business records exception to the hearsay
10 rule.

11 THE COURT: Okay. Was there an objection lodged in the
12 individual pretrial memoranda anywhere else to have preserved any
13 objection to Plaintiff's proposed Exhibit 2 that the Court should be
14 considering one way or another?

15 MR. DOYLE: I believe so.

16 THE COURT: Did you all look at that during the break, by
17 chance, either of you, so that the Court could address that? Because
18 remember, folks, it is 3:32. Remember you've got this witness and
19 possibly another witness and I'm not sure what your out of town issues
20 are, but it is the time. The Court's more than glad to address your
21 issues, but for your sake, you might want to be cognizant of the time. I
22 was hoping you would all be addressing this during the break.

23 MR. DOYLE: And we did do an objection that was filed
24 September 26, 2019, 4:45 p.m.

25 THE COURT: September 26. Hold on. Objection to what?

1 You filed a couple things on the 26th.

2 MR. DOYLE: To Exhibit 2. Well, we did an objection to not
3 only the hospital records, but also the billing records, as they, at that
4 point in time, were Bate stamped with a different set of numbers, but --

5 THE COURT: Okay. So you're saying your objection was
6 preserved, because you --

7 MR. DOYLE: Yes.

8 THE COURT: -- appropriately and timely objected? Okay. Is
9 that -- do you disagree with that?

10 MR. LEAVITT: No, Your Honor.

11 THE COURT: Okay. I'm just wanting to make sure, so you
12 have -- because I go procedure first and then I go substance. So -- okay,
13 so objection not waived. Now I got to go to substance. So how do you
14 get over the other aspects, other than authenticity through -- I mean, a
15 certification versus a custodian, the Court doesn't see really a distinction
16 in the State of Nevada that the Courts have really made a distinction with
17 regards to those, because that really goes to authenticity anyway. But
18 how does that get to the -- right. How does it get to the other aspects,
19 right? Let's walk you through -- walk me through the business records
20 exception, how that falls within it, right?

21 MR. LEAVITT: Right. Your Honor. I have a solution. I have
22 another expert that's testifying as to whether the bills are reasonable and
23 customary within the Las Vegas community, so --

24 THE COURT: So you're going to take care --

25 MR. LEAVITT: So I would like --

1 THE COURT: -- of all your issues for you.

2 MR. LEAVITT: What's that?

3 THE COURT: So you have another expert that's going to --

4 MR. LEAVITT: I do. I do. So I have --

5 THE COURT: So whatever you want to do -- I'm just -- the

6 Court's --

7 MR. LEAVITT: So exhibit --

8 THE COURT: -- here at your services. What would you like?

9 MR. LEAVITT: So the Exhibit 1 is in with St. Rose Dominican
10 Hospital of 908,000.

11 THE COURT: Sorry. Nine -- that --

12 MR. LEAVITT: Right.

13 THE COURT: -- amount again please.

14 MR. LEAVITT: But here's -- again --

15 THE COURT: Okay.

16 MR. LEAVITT: -- going to this -- these records are -- unless -
17 because they are authenticated. These are kept within the normal course
18 and scope --

19 [Counsel confer]

20 THE COURT: The Court can address whatever you'd like to
21 have addressed.

22 MR. LEAVITT: There's nothing to say that this wasn't kept, I
23 guess. What we'll do is we'll have Ms. Cook testify to those and we'll
24 move on with this witness.

25 THE COURT: Okay. So then would you like the jury to be

1 called back in? What would you like?

2 MR. LEAVITT: Are you ready for the jury?

3 MR. DOYLE: We are ready for the jury.

4 THE COURT: Okay. Then since you're not wishing the Court
5 then to make any ruling on that. Is that correct? At this juncture, you're
6 not asking the Court to make a ruling. Is that correct?

7 MR. LEAVITT: That's correct.

8 THE COURT: Okay. I just wanted -- if there's anything you
9 need me to make a ruling on, let me know.

10 Marshall, let's bring the jury back in. Thank you so very
11 much.

12 MR. DOYLE: Can the doctor come back in?

13 THE COURT: You want the doctor back on the stand first?

14 MR. LEAVITT: Yes.

15 THE COURT: Thank you so much. Yes. Appreciate it.

16 MR. DOYLE: May I ?

17 THE COURT: We have the jury coming back in. What are
18 you doing?

19 MR. DOYLE: Well, we had agreed to take down that piece of
20 paper from Dr. Willard [phonetic] the other day.

21 THE COURT: Oh. Yeah. Sure. Just flip it over. Why don't
22 you just flip it over? He might need it again. So, yeah, just flip it over, so
23 it's down. Does that work for everybody?

24 MR. LEAVITT: Yeah.

25 THE COURT: Okay.

1 THE MARSHAL: All rise for the jury.

2 [Jury in at 3:38 p.m.]

3 [Inside the presence of the jury]

4 THE MARSHAL: All jurors are accounted for. Please be
5 seated.

6 THE COURT: Appreciate it. Welcome back, ladies and
7 gentlemen. Hope everyone had a very nice break. As you recall, on the
8 examination of the same witness. Witness understands he's still under
9 oath, even though we had a break, so counsel, feel free to continue with
10 your questioning. And I believe the last question, were you withdrawing
11 that last question? So the Court may not rule on the pending objection.
12 Is that correct?

13 MR. LEAVITT: Yes, Your Honor.

14 THE COURT: Okay. No worries. Thank you so very much.

15 MR. LEAVITT: Thank you.

16 DIRECT EXAMINATION CONTINUED

17 BY MR. LEAVITT:

18 Q Okay, Doctor, I just have a few more questions for you, a few
19 clarifications hopefully here. Doctor, on this type of surgery, how often
20 does sepsis occur?

21 A It really should be a very rare event. I mean, it -- particularly
22 a hernia operation, you really shouldn't become septic after.

23 Q Okay. How often does it occur, sepsis, postop day one?

24 A Well, I mean, that would be -- it's extremely unlikely, so when
25 it does occur postop day one, obviously you have to be very worried.

1 Q And after pneumonia is ruled out or pneumonitis --

2 A Well --

3 Q -- where do you look next?

4 A -- well, that's the issue, so again, you know -- and I've said
5 this before, but if you have a patient with -- that just had a surgery
6 complicated by a colotomy or two, then you have to look to the
7 abdomen as the source. You really don't have -- you know, you can
8 check the urine, right?

9 So you can look at the urine to make sure there's not a urinary
10 infection. That would be reasonable. That could be a concern postop,
11 you know, in the first few postop days, particularly if a catheter was
12 placed in the bladder, so that would be a concern.

13 Once you've ruled out a urinary infection, you've ruled out a
14 pulmonary lung infection, typically we also check blood cultures, so we
15 draw blood and we see if there's any bacteria in the blood. That's not
16 often very fruitful, because patients get antibiotics and so we don't often
17 see positive blood cultures, but once you've done those things, you
18 know, you have to suspect the abdominal cavity.

19 Q Very good. Doctor, earlier I asked you when you reviewed
20 the deposition in Dr. Rives and the Vicky Center [phonetic] case, you said
21 it didn't change your opinion. What do you mean by that?

22 A Well, the case didn't change --

23 MR. DOYLE: Objection, Your Honor. Relevance and 48.035.

24 THE COURT: The Court's going to overrule that objection.

25 THE WITNESS: The case didn't --

1 THE COURT: On both basis.

2 THE WITNESS: Sorry.

3 THE COURT: Sorry. I should say both cases, so we're clear.

4 THE WITNESS: The case didn't change my opinion about the
5 conduct of this operation, but what it showed me was -- what it
6 illustrated --

7 MR. DOYLE: Your Honor, I'm sorry to interrupt, but it's now
8 become a narrative and I have the same objections.

9 THE COURT: The Court's going to --

10 MR. DOYLE: And it's a new opinion not expressed at the
11 time.

12 THE COURT: Okay, well, let's break it down.

13 MR. LEAVITT: Okay.

14 BY MR. LEAVITT:

15 Q Let me ask you --

16 THE COURT: Since it's being rephrased and withdrawn, then
17 the Court's not going to rule on the pending objection, so counsel can
18 you break that down into two questions, I guess, or however you're
19 going to break -- are you withdrawing it or is the Court ruling? What do
20 you wish the Court to do?

21 MR. LEAVITT: I'm withdrawing, and I'll rephrase it. Thanks,
22 Your Honor.

23 THE COURT: Okay. Then the Court need not rule. Go ahead.

24 MR. LEAVITT: Thank you, Your Honor.

25 BY MR. LEAVITT:

1 Q Doctor, you stated it didn't change your opinion when you
2 reviewed Dr. Reeve's deposition in the Vicky Center case. Is that fair?

3 A Yes.

4 Q Okay. What did you mean, it didn't change your opinion?

5 A I had already come to the conclusion that the way in which
6 the operation was performed, and the postoperative care was below the
7 standard of care, but was it also enforced for me is that --

8 MR. DOYLE: Your Honor, and I'm sorry. Objection. It's
9 become a narrative, and relevance, and 48.035, and it's a new opinion.

10 THE COURT: The Court will overrule on narrative. Overrule,
11 based on what the Court's heard so far, 48.035 and the Court's not -- I
12 have to overrule. It's not heard under NRCP 16 issues at present, so --

13 BY MR. LEAVITT:

14 Q Will you please continue, Doctor?

15 A The fact that a very similar circumstance occurred just five
16 months --

17 MR. DOYLE: Your Honor, I'm sorry. It's clearly violative --
18 well, it's become narrative. It's nonresponsive. It's a new opinion not
19 expressed at the time -- in any report or deposition. It's irrelevant and
20 it's 48.035 and there's no foundation.

21 THE COURT: Okay. Three additional words have been stated
22 since the Court's last ruling. The Court would have to overrule the
23 narrative, because those three words are not going to make it narrative.
24 The three additional words would not make it 48.035. Three additional
25 words would not make it lacking foundation. The Court would have to

1 overrule that, and the Court would also have to overrule the additional
2 objection with regard to -- 805 and with regards to it being a new
3 opinion, since at this juncture, those additional three words since the
4 Court's last ruling, the Court can't say that it is a new opinion or violative
5 of NRCP 16. No one's presented this Court with the opinion so that the
6 Court could determine that.

7 BY MR. LEAVITT:

8 Q Doctor, are you offering a new opinion at this point?

9 A I don't think so, no.

10 Q Okay. So same question. What did you mean by your
11 statement?

12 A In the Center case, there was a perforation. There was sepsis
13 that was initially attributed to aspiration and it took 11 or 12 days to
14 ultimately discover that there was an intraabdominal process that was
15 causing the infection. And that was just five months earlier.

16 So the lessons of that case clearly weren't applied here and so the
17 similarities are striking and -- in both cases. For instance, there
18 significant harm ultimately to the lower extremities. It's -- there's a clear
19 correlation. There's clearly a lesson that was not learned from the
20 Center case that would -- that had so many similarities.

21 Yes, there were some differences to be applied here. And for me,
22 that -- having had that recent experience even increases the negligence,
23 because you didn't learn anything. So I just don't -- it's surprising to me
24 that something like that with such similarities can repeat itself in such
25 short order, where there's an intrabdominal process that's -- it's

1 attributed to a pulmonary process, even though there's no evidence of a
2 pulmonary process and then ultimately it turns out there's an
3 intrabdominal process as the source.

4 There's this long delay in identifying this, so it leads to sepsis and
5 a bad outcome. So that's -- so it didn't change my opinion about the
6 case. I already made an opinion, but it certainly increases the negligence
7 in my view.

8 MR. DOYLE: Your Honor --

9 BY MR. LEAVITT:

10 Q Your --

11 MR. DOYLE: -- move to strike as irrelevant, 48.035 and
12 opinion not -- a new opinion not expressed at the time of the deposition
13 or in any of the reports.

14 THE COURT: Counsel can you please approach, and can
15 someone bring your report?

16 [Sidebar at 3:46 p.m., ending at 3:59, not transcribed]

17 THE COURT: Instead of having you sit there; we're going to
18 send you out for a brief few moments. I hope it's only going to be a few
19 moments. Marshall will let you know, but it's going to be about ten
20 minutes.

21 So ladies and gentlemen, during this recess, you are
22 admonished not to talk or converse among yourselves or with anyone
23 else on any subject connected with this trial. You may not read, watch or
24 listen to any report or commentary of the trial, any person connected
25 with the trial by any medium of information, including without limitation

1 social media, text, tweets, newspapers, television, internet, radio.

2 Anything I've not stated specifically is of course also
3 included. Do not visit the scene of the events mentioned during the trial.
4 Do not undertake any research, experimentation or investigation. Do not
5 do any posting or any communications on any social networking sites.
6 Do not do any independent research, including but not limited to internet
7 sites. Do not form or express any opinion on any subject connected with
8 the trial until the case is fully and finally submitted to you at the time of
9 jury deliberations. With that, we wish you a very nice break. We'll get
10 you back in as quickly as possible.

11 THE MARSHAL: All rise for the jury.

12 THE COURT: Thank you so very much. Okay.

13 [Jury out at 4:00 p.m.]

14 [Outside the presence of the jury]

15 THE COURT: Counsel, I need that report back.

16 MR. LEAVITT: Oh, I'm sorry, Your Honor.

17 THE COURT: Thank you so much. Okay. And I need to
18 know. Do you wish the witness to be present during this discussion or
19 not to be present? The Court's fine either way.

20 MR. DOYLE: Not present.

21 THE COURT: Thank you. Please do let me finish my
22 sentence before being interrupted. I would definitely appreciate it, so we
23 just have a clear record, because it's very hard for a transcriber when
24 two people are talking at the same time. I would appreciate it.

25 Since the attorney requested of the witness not to be

1 present, would you mind either enjoying the anteroom or the hallway?
2 Whatever your leisure is. Thank you so very much.

3 Okay. So here's what the Court is going to remind the
4 parties of. This Court specifically told the parties prior to the
5 commencement of trial and multiple times and reminded you also at the
6 calendar call, like I tell all counsel, that if you all want anything to be
7 outside the presence of the jury, i.e., not at bench -- and I reminded you
8 that bench is not part of the official transcript, you need to let me know
9 at the beginning, that you can't do it part way through, can't do it at the
10 end, can't do it as the Court is giving you the ruling.

11 Has to be at the beginning. The Court would be glad to
12 accommodate you and if you want it done right then and there, the
13 Court's glad to accommodate you. Or if you need it a different time,
14 depending on that it is, at the Court's discretion. Sometimes the Court
15 may feel it needs to do it immediately. Sometimes may do it at a later
16 time. But at -- despite the Court saying that multiple times, I am going to
17 have to remind and sorry, Defendant, I normally try and just say counsel
18 in general to make it very neutral, but since it has been you each time --
19 and the Court -- and I am using -- only reason why I'm using a little bit
20 louder voice right now is because in the past, you've told me you can't
21 hear me, despite the fact we have offered you hearing assisted devices.

22 So I'm making sure it is clear and that you can hear me.
23 That's the only reason why my voice is being a little bit louder, so that
24 we don't have that confusion. Okay. So despite that, while the Court
25 was in the midst of starting to give it -- was giving its ruling, then

1 Defense counsel said it wanted it to be done outside the presence of the
2 jury. So the Court is accommodating that request, but -- and this is at
3 least the second time today that has happened. And the Court cautioned
4 the other time, but I'm doing it once again.

5 But this is not appropriate. It is not fair to do to our jury. It's
6 not fair to Plaintiff's counsel. The Court made it very clear. Same ground
7 rules for both sides. Court would be very glad to do anything. I told you
8 this over and over, reminded you again before voir dire. The Court used
9 the same things it says, told you I don't have a crystal ball. I don't know
10 if you want something outside the presence. I merely used the same
11 examples over and over, that you to let me know, but you can't do it
12 midway through, because that's not really fair, because we've already
13 gone through the analysis and that is multiplying the proceedings. I
14 didn't go through the whole analysis of why those examples, because as
15 experienced litigators, I presumed you all knew the reasonings, but I did
16 give the same fair and equal rules to everyone.

17 So despite that, it's perfectly fine and fair that there was a
18 request, so I am accommodating that request. So as I started to give my
19 ruling, here's what I understood. There was a question stated. The
20 question -- the witness then went through his entire answers and then
21 pause, then there was an objection for a motion to strike the answer.
22 Okay. Motion to strike the answer. Then the Court, since that was a
23 motion to strike the answer, the Court had you both approach and I
24 asked that you bring me -- because it was saying it was a new opinion, a
25 new opinion of Dr. Hurwitz. Okay.

1 Here's what the Court has to take into account, was what the
2 Court said. The Court asked the parties specifically to bring up the
3 expert report or reports. I didn't know if there was one or two, of Dr.
4 Hurwitz. The Court's intention with that regard was of course multifold,
5 because this Court is specifically aware and all parties are fully aware,
6 because you all were here, and you all did the motions and you all were
7 here, and everyone testified who wanted to testify in a multi-day
8 proceedings regarding the sanction issue. But part of that sanction issue
9 was the failure to disclose the *Vicky Center* case.

10 And the reason why the Court needed to have not only the
11 expert report -- because this is not a usual circumstance under NRCP 16,
12 expert disclosure rules. *Fiesta Palms* informally as the case is known
13 with regards to experts and expert deadlines. And remember, this Court
14 is giving benefit of the doubt, both old and new under NRCP 16, okay?
15 But this is unique in the situation that the Court needed to see the date in
16 which there was the expert reports, reports of Dr. Hurwitz vis a vis when
17 those were in relationship to when Vicky Center's name was disclosed to
18 Plaintiffs consistent with the Court's rulings from the motions, which
19 discussed September 26th, October 7th, October 10th.

20 I may be off a date. It was 26 -- it was Monday the 7th. Oh,
21 the 10th. Yes, I'm correct. Okay. So -- and then the pre-instruction that
22 was given after, once again, extensive oral argument, consistent all there
23 with -- once again, no one has told me that Dr. Hurwitz had some crystal
24 ball, would somehow be omniscient and know about a case that was
25 intentionally not disclosed. And as the Court's ruling that that was not

1 disclosed, due to the conduct of Defendant and Defendant's counsel.

2 So you can't hold -- in this unique circumstance in this case
3 only, you can't hold Dr. Hurwitz responsible for not addressing a case
4 and how that may impact his opinions, when that case was not provided
5 to him, not due to the conduct of Plaintiff, but as it was found after an
6 evidentiary hearing, extensive briefing, extensive oral argument,
7 everyone having a full opportunity to call whoever they wished do to it,
8 multiday proceeding. It was found to be due to the conduct of Defendant
9 and Defendant's counsel.

10 So his report of November 13, 2018, obviously predates the
11 date in which the information on the Center case -- now, the Court is
12 cognizant that Dr. Reeve's deposition was that, but that's when you had
13 the word Sinner [phonetic], not Center. And so then you had the follow
14 up. The follow up was December 19th, the other report, 2018. Once
15 again, prior to the appropriate follow up disclosures, right, which you all
16 have heard significant testimony today, occurred in September 2019. So
17 unlike a standard expert disclosure, you have a unique circumstance
18 here and the Court has to deal with this circumstances in this case, not in
19 a hypothetical general case with initial disclosures.

20 Taking that into account, the Court then asked the parties to
21 also provide the deposition of Dr. Hurwitz. Dr. Hurwitz' deposition, this
22 Court had understood by agreement of the parties, presumably whether
23 it was EDCR 7.50 or you even just didn't even know it was EDCR 7.50, but
24 you took the deposition outside of discovery, so outside of July 24th, but
25 presumably, at least you all represented previously at a hearing that you

1 all had agreed to take Dr. Hurwitz' deposition outside of standard
2 discovery, so it was an agreed upon deposition outside of discovery, was
3 taken on 9/18/2019.

4 So then the Court asked to look at the deposition to see if
5 Vicky Center was discussed in any manner, because it has been
6 previously represented the Vicky Center case at least had been discussed
7 in some regard. The Court hadn't seen it, so it didn't know the extent of
8 the regard, but it had been mentioned or discussed the Court -- don't
9 take any verbiage from the fact that I use the word discuss versus
10 mentioned. At least so I -- whichever way you would like to phrase it,
11 but at least had -- that name had come up in Dr. Hurwitz' deposition. I
12 wanted to see how it had come up, how many times it had come up, in
13 what context it come up, so I had a full understanding how that was
14 mentioned in order to make a well-reasoned ruling in this motion to
15 strike.

16 I was provided with the deposition of Dr. Hurwitz and I gave
17 both parties the opportunity to provide me any citations to Vicky Center
18 or Sinter [phonetic]. You all said there was -- showed me the index, said
19 pages 5 and page 7. Pretty much appeared that the parties agreed that
20 the pages 5 and 7 was two pages that the Court needed to look at and
21 that it was nowhere else in Dr. Hurwitz' deposition. In looking at
22 particularly page 7, there is a -- let's see. Let's go to the discussion about
23 depositions. Okay.

24 It says -- so it starts on the bottom page 6.

25 "These various depositions that you told me about," line 23,

1 "did you take any notes when you read them?"

2 Answer, "No." That's line 25.

3 Top of page 7.

4 "Did you mark or highlight in any form or fashion the
5 transcripts when you read them?"

6 Answer, "No."

7 Question, "What was your understanding why you were
8 given Dr. Rives' deposition in this other case?"

9 Answer, "The reason was to demonstrate his interpretation
10 of the events leading up to the discovery of the gastric perforation as a
11 pulmonary process."

12 Line 9.

13 Question, "Well, did you find any striking or important
14 similarity," -- and then it has a dash-dash, "similarities or dissimilarities
15 in that Center deposition question?"

16 Answer, "To be fair, I didn't," -- there's a dash-dash, "I didn't,"
17 there's a dash-dash -- "I had already reviewed everything else and it
18 didn't really change my opinion."

19 Question, "Okay. We marked as Exhibit A," -- dash-dash --
20 there's a paren -- Exhibit A identified, end of paren. "17, Mr. Doyle
21 question. Just tell me generally what is in Exhibit A."

22 Answer, "So you asked for all of my correspondence with Mr.
23 Hand and so I provided that. A series of email's mostly," dash-dash --
24 "almost entirely around, you know, reviewing the records and getting in
25 contact with them, so there's nothing of significance in there."

1 And then it goes into, "I also provided by CV, as you
2 requested. A list of questions in which I've testified as a," dash-dash, "as
3 an expert in my depositions. And I've also provided," -- this is now on
4 page 8 -- "And I've also provided, I believe in here somewhere" -- dash-
5 dash -- "was my bill to," -- dash-dash -- "was my," -- dash-dash, "bill for
6 services," -- dash-dash and then question.

7 So it appears that that was the end of the discussion with
8 regards to Vicky Center, because I've now gone to line four page 8.
9 Would both counsel agree that that was the end of discussion with
10 regards to Center? Counsel for Plaintiff?

11 MR. LEAVITT: Yes, Your Honor.

12 MR. DOYLE: Yes.

13 THE COURT: Counsel for Defense? Okay. So that was the
14 realm of what the Court had with -- of course, the Court knowledge of the
15 various hearings that have gone on regarding this, the testimony that's
16 all gone around this.

17 Okay. So here was the Court's inclination after hearing the
18 motion to strike argument by Defense, after hearing Plaintiff's response
19 and the question and the prior testimony of Dr. Hurwitz and fully in this
20 case having to take into account the unique circumstances in this case,
21 because of the failure to disclose the Center matter, which per se should
22 have been disclosed timely and appropriately -- well, let's just say way
23 before experts disclosures. Whether you want to say it should have
24 been in -- back in 2016.

25 The Court's not going to say necessarily there, but clearly

1 there's already been a finding. Dr. Hurwitz could not have added
2 something that he did not have to the benefit of, due to the failure of
3 Defendant and his counsel to comply with the rules, which they were
4 required affirmatively to comply with not only initially but also because
5 there had already been interrogatories, an affirmative duty to
6 supplement for over a year, affirmative deposition testimony, affirmative
7 responsibilities to do those interrogatories, because they already knew
8 the issue had come up at the deposition.

9 So we're not going back to everything that the Court said
10 previously, but there is a unique circumstance here. So the Court's
11 inclination, based on these unique set of facts -- regards to the motion to
12 strike, which the Court was starting to state was as follows. It was to
13 grant in part and deny in part. The Court was inclined to deny the
14 analysis and basis consistent with what had already been asked, so fully
15 open and fully discussed in the deposition what Dr. Hurwitz said
16 consistent here with in his testimony in trial, his explanation, his
17 interpretation of the events leading up to the discovery of the gastric
18 perforation as a pulmonary process, which really gets through most all
19 of his answer today on the stand.

20 The part that the Court was inclined to grant of the motion to
21 strike was he made a comment it's more negligence, okay? It's -- you
22 know, he said words to the effect of it was more negligence. It was -- so
23 that, quote, summation-type language, rather than his explaining the
24 analysis of the similarities, where he said both there were similarities
25 and dissimilarities between the present case and the Center case, was

1 another way to phrase it. The Court was going to allow that, because
2 that would be factual. That was specifically brought up.

3 It appears it was brought up by Mr. Doyle, because when the
4 Court looked -- is that correct it was brought up -- was that question on
5 page 7 by you, Mr. Doyle?

6 MR. DOYLE: Yes.

7 THE COURT: Okay. So appeared it was brought up by Mr.
8 Doyle at the deposition. That's what I had understood at bench, so I was
9 just confirming that. And so it was explored to the extent that the parties
10 wished to explore it at the deposition. Can't say that it was brought up
11 by Plaintiffs. It was brought up by Defendant. He then said what the
12 reason was to demonstrate his interpretation of the events leading to the
13 discovery of the gastric perforation as a pulmonary process. Because
14 that's what he explained it was. It could have been further examined at
15 his deposition, if anyone chose to do so.

16 It couldn't have been disclosed earlier prior during the
17 discovery process, because Defendant and his counsel's failure to
18 comply with their specific obligations Rule 11 NRCP 16, 26, 37, EDCR
19 7.60 for the sanction component. I could keep going. So all of those
20 affirmative obligations to have done so. And also, the failure to
21 supplement, which is also inherent in what the Court already said.

22 So to give an explanation, similar to which he gave in
23 summary fashion on -- during his deposition, saying the same thing
24 here, his testimony here in court, although it seems -- okay -- that the
25 Court would find appropriate the summation concept is saying, so

1 therefore he's saying it's more negligent or words to that effect.

2 That's what the Court would strike, because the Court would
3 see that more as a summation, as I really don't see it as a quote, new
4 opinion, but I think it's close enough that in fairness, the Court should
5 strike that, because I think that is the fair balance between this unique
6 circumstance in this case that does not occur in a standard case with
7 disclosure timing for experts. I said at bench that the Court was going to
8 say what its opinion was going to be and then give each side a minute to
9 give a response, because you had a change to both fully argue it at
10 bench.

11 So just consistent with what the Court said, I'll give you each
12 a minute. Counsel for Defendant, you raised the objection. You get to
13 go first.

14 MR. DOYLE: Thank you, Your Honor. In the deposition, the
15 witness was asked if there were any striking or important similarities or
16 dissimilarities in the Center case versus the Farris case and the witness
17 said he didn't see any striking or important similarities or dissimilarities.

18 THE COURT: Can you point that out where he said that?

19 MR. DOYLE: "Well, did you find any striking or important
20 similarities? Similarities or dissimilarities in that Center deposition?"

21 He said, "To be fair, I didn't. I didn't."

22 In other words, he didn't find any similarities or
23 dissimilarities in the Center deposition. And so there was no reason to
24 explore further with him those opinions. And now today, he went
25 through a litany of similarities, a litany of similarities that apparently to

1 him are now significant and he went through that litany of similarities
2 and came to the conclusion that he did that the Court is inclined to strike.
3 But perhaps we're reading this answer differently.

4 But the witness said -- which there's no doubt he had the
5 Center deposition at the time of his deposition in the Farris case. He had
6 read, he had reviewed it and he had considered it. And he did not find
7 any similarities or dissimilarities and now today, we have a whole long
8 list of similarities leading to his conclusion. This is new opinion that was
9 not expressed at the time of his deposition, so I object to it on the basis
10 that it was not disclosed at the time of his deposition, in addition to the
11 other objections, the foundation, the relevance, the 48.035. But I think
12 the most important one is this is a brand new opinion.

13 THE COURT: Okay. The Court -- just to be clear. This Court
14 in reading it, he said -- the question phrased by Mr. Doyle, as this Court
15 saw in the deposition was striking or important similarities was the first
16 prong. So this Court, in looking at it and how the question was phrased
17 today, does see that that falls within -- and then says similarities and
18 dissimilarities, so it's vague enough that this Court sees that these are
19 explanations of -- that doesn't see it the way that you just read it. I saw
20 that you read part of that question, not the entirety of the question, so
21 this Court doesn't know what this witness said. It wasn't asked in the
22 exact same way today as it was asked at that deposition, and so the
23 Court had him explain about reasons.

24 Now, the Court didn't have him explain. Plaintiff's counsel
25 asked the question, so there is a reasonable understanding with regards

1 to this. And so the Court, in reading this, I wasn't at the deposition, but
2 when I see the words striking similarities and --

3 MR. DOYLE: Striking or important.

4 THE COURT: Can I please finish? I was going to read the
5 next word. Please give me a second to finish without interrupting, so I
6 can read it in its entirety, please. Okay? And we have a clear record.
7 Striking or important -- dash-dash, similarities or dissimilarities in that
8 Center deposition is broad enough that it's confuse -- potentially
9 confusing to a witness of whether you meant important or striking or just
10 similarities or dissimilarities. So the Court has to take it in that broad
11 sense. The Court doesn't know how the witness took it.

12 The Court can only read it the way it is typed up and that
13 seems to give four different options and that's why the Court's reading it
14 the way I have to read it, because I wasn't there. I wasn't the witness. I
15 have to read it the way an average, normal person would read this, in
16 the most neutral sense and that's what the Court is doing. Appears to be
17 four different options, okay? And then I have to -- so that's why the
18 Court's analysis is the way the Court's analysis is. How would a
19 reasonable person in reviewing this potentially review the answer and
20 his answer thereto. So just so that you have an understanding. I was
21 reading the entirety of the question in.

22 So that's why I read everything starting at the bottom of
23 page 6 all the way through part of page 8, so that I wasn't reading just
24 selected excerpts or soundbites. I was reading prior to the page you all
25 stated, plus going all the way to page 8. So now you've raised some

1 new objections that you didn't mention at bench and so now I'm going
2 to have to address those new objections.

3 Okay. So you've now raised -- let's go -- let me go through.
4 You've added some new ones. You added again -- walk through your list
5 of the ones you're now stating, so I can make sure I take care of all of
6 them, because some of those are not ones that you've raised before, so
7 let me make sure I have the totality of every one that you're raising,
8 please.

9 MR. DOYLE: Relevance.

10 THE COURT: Okay.

11 MR. DOYLE: 48.035, in particular, the time that we're now
12 going to spend in this trial defending his care in the Center case and
13 explaining to the jury in fact how the Center case was quite dissimilar to
14 the Farris case, contrary to what this witness has concluded. So it will be
15 necessary to go through the Center case and the evidence in that case
16 and different expert witnesses and their opinions to show the
17 dissimilarities between these two cases, contrary to what Dr. Hurwitz
18 says are the similarities.

19 THE COURT: Okay.

20 MR. DOYLE: So that's going to take a lot of time.

21 THE COURT: Did you ever present that to the Court until just
22 this minute?

23 MR. DOYLE: No, because the evidence was not in until just
24 this minute.

25 THE COURT: Okay. And you had the benefit of the

1 deposition, because you took it. There was no motions before this Court
2 at all on OST or anything like that, correct?

3 MR. DOYLE: Motion to what?

4 THE COURT: Okay. I just -- I wasn't receiving anything and I
5 just wanted to make sure that you didn't maybe file something again in
6 front of the discovery commissioner that I'm not aware of. That's why
7 I'm just asking.

8 MR. DOYLE: I was there. I took the deposition.

9 THE COURT: Okay.

10 MR. DOYLE: I understood his answer in a plain sense that he
11 said in Center there were no important or striking similarities or
12 dissimilarities. There was no reason for me to think that I needed to file
13 a motion on shortening time or any other reason. For what?

14 THE COURT: Okay. So there's no -- I'm just -- I'm trying to
15 make sure that there's nothing something that you say that was
16 outstanding that wasn't ruled upon, counsel. That's all I'm trying to get
17 at. This Court tries very hard to rule on things immediately, efficiently
18 and effectively on every single thing you present, as you notice as soon
19 as you raise things, okay? So I just wanted to make sure there wasn't
20 something. So okay, 48.035 --

21 MR. DOYLE: So it's the undue consumption of time. We're
22 going to have -- the probative value is substantially outweighed by the
23 prejudice to Dr. Rives, by introducing this evidence. It's likely to lead to
24 confusion of the jury, now that they're going to have to sort through and
25 discern two different cases, where the medicine is in fact, quite different.

1 THE COURT: Okay.

2 MR. DOYLE: Perhaps the only similarity is the outcome of
3 two patients who had developed a problem in their lower extremities.

4 THE COURT: Okay. And relevance was your other objection.
5 Was there any others that you added?

6 MR. DOYLE: There was no foundation laid as to the
7 similarities, before the witness was allowed to testify. And I think -- well,
8 that's --

9 THE COURT: Okay.

10 MR. DOYLE: -- that's what I have.

11 THE COURT: Okay. So with regards to the objections and
12 the analysis that was raised after the Court ruled, those would be
13 untimely, and they would be waived. Nevertheless, the Court's going to
14 address -- the Court doesn't see how this would be a foundational
15 argument, because based on the fact that parties agree he read it. It was
16 a question asked by Defense counsel in his deposition that was the
17 predecessor of the question that was raised and there was no objection
18 or any striking or any request at the deposition for him to go into this.
19 And it was consistent with what was asked at his deposition. And then
20 with regard to what the Court said previously of the unique aspects of
21 this case, I incorporate without restating it all here.

22 Relevance. I -- here, it has a relevance aspect, because here
23 you have this issue is remember, there's a pre-instruction here, right?
24 That -- have the pre-instruction concept that it would have been
25 disclosed, other than you have potentially the jury has to evaluate, right,

1 whether or not it may have been harmful, the failure to disclose. That's
2 in this unique case has a relevance component that normally wouldn't be
3 in other cases. Plus, you both have used Center in various aspects up
4 and to this moment, so you have brought it into the case in a variety of
5 different ways, so you have made it relevant, okay? So independently of
6 that.

7 Next, as far as time consumption, time consumption that you
8 all -- that counsel has brought forth, although this has come and I do
9 think it's untimely, as I've stated. The additional arguments is the Court
10 doesn't see why that necessarily would raise any time consumption
11 issues is because this has already been brought that the issue here can
12 easily -- this is just general cross-examination questions that you'd ask in
13 any event, cross-examination. And it's the type of examination you
14 would have been fully on notice, because you raised the issue at the time
15 of the deposition and could have easily prepared for this for purposes of
16 this testimony, particularly since you also knew that Ms. Center was
17 noticed as a witness.

18 Now, you objected and the Court's there on an objection.
19 The Court's not going to give any advisory ruling, but the fact that this
20 was coming up, you knew, because at this time, even the time of the
21 deposition, you already had the sanction motion in front of you for
22 dispositive striking answered motion on the very *Center* case. So to
23 think that it somehow wasn't relevant to this case, or that this issue
24 wasn't coming up, in this unique circumstance from a pure chronological
25 standpoint, the Court doesn't see how that argument has merit in this

1 case, okay?

2 And given the opportunities that everyone's had and the
3 number of things that you all -- counsel has provided without any notice,
4 I don't see how this is going to take any more time, rather than all the
5 other things that you all have taken time of this jury, because of your
6 failure to comply with all of the various rules. And that's really what's
7 taken time from this jury and taken away from this trial. This can be
8 handled in very, very short order, okay?

9 So Plaintiffs' counsel, your response to the Court's
10 inclination?

11 MR. LEAVITT: Your Honor in res --

12 THE COURT: Or the Court's -- go ahead.

13 MR. LEAVITT: Oh, sorry. In response to the Court's
14 inclination, the Plaintiff's fine with that. We can remove -- even if the
15 Court would like to instruct, the more negligence part is -- instruct the
16 jury to disregard that part of it.

17 THE COURT: Okay. So there's a couple ways that that could
18 be handled. That could be handled right now, that I could ask Madam
19 Court Recorder to try to find that language at the end of -- because it was
20 the very end of his statement before the motion to strike was made and
21 you all can agree what that language was, because I was paraphrasing
22 the more negligence. It wasn't exactly what he said, but I was
23 paraphrasing. You can agree. Then the Court can make its ruling. Or B,
24 if you would like to -- are you ordering a disc or is somebody ordering an
25 expedited transcript?

1 MR. DOYLE: I've ordered a disc.

2 THE COURT: Okay. So if it's a disc, then the other
3 alternative is, what you can do -- and there's a third alternative. Third
4 alternative is you all choose something different that you agree upon.
5 So -- but second alternative is you can wait closer to the time of jury
6 instructions and you can have something typed out from just that
7 section, right, of what it is that -- what the jury can consider of his
8 testimony and what needs to be excluded, pursuant to a Court order, if
9 you prefer something like that.

10 Like I said, there's a lot of different options. Option three is
11 something else that the parties wish that you agree upon. And there
12 may be a fourth as well. Third is the catchall of something else you all
13 agree upon. The second option is just kind of a creative way that if you
14 all prefer not to address it right now and you want something different --
15 sometimes parties like things specifically in writing to juries. Sometimes
16 parties don't. It doesn't have to be a jury -- you know, it can be sooner.
17 Doesn't have to be at the time of jury instructions. I'm just trying to think
18 of some creative ways that might meet the party's needs, so --

19 MR. DOYLE: I would like the motion granted in part and
20 denied in part while the witness is still here in court testifying.

21 THE COURT: Okay. Does that meet your needs as well,
22 Plaintiff's counsel? That would be the standard way, unless you all really
23 wanted something different and creative.

24 MR. LEAVITT: Yeah. That's fine, Your Honor.

25 THE COURT: Okay.

1 MR. LEAVITT: We just want to move on.

2 [Court to Court Recorder]

3 THE COURT: Okay. Do you all want to take a moment now?
4 Moment being a euphemistic term, because it'll take more than a
5 moment. Would you like Madam Court Recorder to go off the record for
6 what it takes to try and find the very end of his testimony to see what his
7 last words were? You all agree it was kind of like his last couple words,
8 right?

9 MR. LEAVITT: Can --

10 MR. DOYLE: I'd like to hear the whole answer, if that's
11 possible, because I think it's woven through the answer, just not at the
12 end. That's what I recall. I could be wrong.

13 THE COURT: Well, it's -- from a time period standpoint.
14 What, counsel for plaintiff your viewpoint -- let's -- be heard. And I'm
15 going to allow two people here, because realistically, this is -- you know,
16 this an issue. This is not -- this is an issue if you both were at bench; you
17 both would be able to discuss it. We've had multiple people in the past.
18 When they had three attorneys at other hearings, they all got to talk, so
19 in fairness, you get to talk on this, because you don't have a jury here, so
20 I don't have a one-horse-one-rider issue.

21 MR. JONES: I'm just trying to see if we can just resolve it
22 right now, so that we can just move on and quickly get him off.

23 THE COURT: The Court's open to whatever you all what to
24 do.

25 MR. DOYLE: Well, I'm not going to finish my cross-

1 examination anytime soon and we probably have 45 minutes of
2 questions.

3 THE COURT: Oh. These are the juror questions, just to let
4 you know. So what would you all like to do?

5 [Counsel confer]

6 MR. LEAVITT: We're probably going to have to dismiss the
7 jury, but I need to ask my witness when he can come back.

8 THE COURT: Okay.

9 MR. LEAVITT: It may be in the time the Defense has their --

10 THE COURT: All right. It doesn't have -- if you all don't wish
11 to do it today and you wish to do it while he's still on the stand a
12 different day, that might be another solution. Like I said, the Court's
13 open to various solutions that meet the party's needs. I'm just asking
14 you what meets your needs to get it taken care of. The Court's going
15 to -- let's put it this way. The Court turns its inclination, obviously, into
16 the ruling. That's the Court's --

17 MR. LEAVITT: Right.

18 THE COURT: -- granted in part and denied in part, consistent
19 with what I said. The only point of pure clarification is to get the exact
20 wording of what I have phrased the term more negligent -- you
21 know -- so issue more negligence, et cetera to -- applied here. So that's
22 the only point of clarification I need to get for the denied part, because --
23 I mean, excuse me, the granted part, because -- I mean, excuse me, the
24 granted part, because that way I have to instruct the jury to disregard in
25 some manner agreeable to the parties. If not agreeable to the parties,

1 then the Court's going to pick a way to do it.

2 MR. LEAVITT: Okay.

3 THE COURT: So at this juncture, do you want to go off the
4 record and see if she can find the excerpt or what do you want to do?
5 Because right now we're on the record just -- and you don't have a jury
6 here and so what do you want to do? Because sitting here just not doing
7 anything is probably not the best use of your time --

8 MR. LEAVITT: Right.

9 THE COURT: -- unless that's what you want to do. It's your
10 trial.

11 MR. LEAVITT: That's fine, Your Honor. We can go off the
12 record and --

13 MR. DOYLE: See if we can find it.

14 MR. LEAVITT: -- and see if she can find it.

15 THE COURT: Okay. Madam Court Recorder, would you
16 mind going off the record and see if we can do that? Appreciate it.
17 Thank you so much.

18 [Recess taken from 4:32 p.m. to 4:36 p.m.]

19 [Outside the presence of the jury]

20 THE COURT: Okay. We're back on the record outside the
21 presence of the jury. The Marshal went to go get the jury. So counsel,
22 here's what I understand. I'm going to let Plaintiff say what you're
23 planning on doing. The Court made a ruling outside the presence of the
24 jury. The Court's ruling was with regards to the motion to strike the
25 Court is granting in part and denying part. The Court is granting it all to

1 the procedural analysis. The Court is granting it to -- I'm going to phrase
2 it this way.

3 To the extent that there was a summary statement that
4 referenced something regarding negligence, like more negligence,
5 additional negligence or words somewhat to that effect, that is the only
6 part that the Court is granting on the motion to strike. The Court is going
7 to find that language through the Court Recorder and then we'll address
8 that when this witness is on the stand at some appropriate point to notify
9 the jury with regards to that ruling. I'm -- if you all wish, just one second.
10 If you wish, I can tell the jury at this juncture, it's granted in part and
11 denied in part and they're going to get a clarification later or I can
12 address it later in totality.

13 What would the parties like the Court to do?

14 MR. DOYLE: The former.

15 THE COURT: Does that work okay?

16 MR. LEAVITT: That's fine, Your Honor.

17 THE COURT: Okay. Then that's what the Court's going to
18 do. Thank you so very much.

19 MR. DOYLE: Thank you.

20 THE MARSHAL: All rise for the jury.

21 [Jury in at 4:37 p.m.]

22 [Inside the presence of the jury]

23 THE MARSHAL: All jurors are accounted for. Please be
24 seated.

25 THE COURT: Do appreciate it. Welcome back, ladies and

1 gentlemen. Okay. Right before the break, if you recall, there was an
2 objection raised by Defense with regards to the last answer of this
3 particular witness. Outside the presence of the jury, the Court made a
4 ruling. The Court made a ruling that it was granting in part and denying
5 in part. However, instead of keeping you out in the hallway, by the
6 agreement of the parties, the Court's going to give you a little bit further
7 clarification on that probably on Monday, I hope. If not, at a point when
8 this witness is still on the stand, you'll get a further clarification on that.

9 But we're just going to move forward with the next
10 questioning of this witness, okay? So I'll give you further guidance.
11 Okay? Thank you so very much. So make a little mark, if you put that
12 last answer in your notebook, so that you can go back to it, if I need for
13 that clarification, okay? Thank you so very much. And at this juncture,
14 counsel for Plaintiff, would you like to continue with your next question
15 or what would you like to do, counsel?

16 MR. LEAVITT: Your Honor, Plaintiff passes the witness.

17 THE COURT: Okay. Defense counsel, feel free to start --
18 commence your cross-examination.

19 MR. DOYLE: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. DOYLE:

22 Q Dr. Hurwitz, in the Center case, are you aware that there was
23 a professor from Stanford, who offered the opinion that all of Dr. Rives'
24 care in that case was appropriate and within the standard of care?

25 A No.

1 MR. LEAVITT: Objection. Assumes facts not in evidence.

2 THE COURT: Okay. The Court's going to sustain the
3 objection, because it's not presented to this Court.

4 MR. DOYLE: I simply asked him if he was aware.

5 THE COURT: The Court's ruling stands. Feel free to ask your
6 next question.

7 MR. DOYLE: Okay.

8 THE COURT: Thank you so much.

9 BY MR. DOYLE:

10 Q Have you been made aware of any of the expert witnesses,
11 who were retained and offered opinions on behalf of Dr. Rives?

12 A No, I haven't.

13 Q Were you aware of any of the treating physicians, who gave
14 opinions in the Center case about their care and whether there was or
15 was not aspiration?

16 A No.

17 Q Dr. Lynne [phonetic]. Does that name ring any bells, from
18 reading Dr. Rives' deposition?

19 A No.

20 Q When you read Dr. Rives' deposition in the Center case, you
21 became aware that aspiration was in the differential diagnosis for the
22 cause of Mrs. Center's sepsis, correct?

23 A Yes.

24 Q And you're aware from reading his deposition that the
25 aspiration remained in the differential diagnosis for quite some period of

1 time?

2 A Yes.

3 Q Now, in the Center case, the surgery that Dr. Rives performed
4 is called a paraoesophageal hernia repair, correct?

5 A Yes.

6 Q A paraoesophageal hernia is where a portion of the stomach
7 comes up above the diaphragm, correct?

8 A Yes.

9 Q And while a paraoesophageal hernia has the word hernia in
10 it, it is a different kind of hernia than an abdominal wall or ventral hernia,
11 correct?

12 A True.

13 Q A more complicated surgery?

14 A In some cases, yes.

15 Q Do you perform paraoesophageal hernia repairs?

16 A I have. I don't presently.

17 Q When did you last perform a paraoesophageal hernia repair?

18 A Probably five years ago.

19 Q And so --

20 THE COURT: Either we're going to ask you there to lean
21 forward, or if you can bring the microphone a little closer to you, you're
22 getting a little -- just make sure we here. The microphone moves closer
23 to you. That's fine as well. Just need to make sure everything can be
24 heard. Appreciate it. Thank you so much, counsel. Feel free to
25 commence with your next question.

1 BY MR. DOYLE:

2 Q And I assume you became aware from reading Dr. Rives'
3 deposition in the Center case that some days after he repaired the
4 paraoesophageal hernia, that a hole was found in the stomach, correct?

5 A Yes.

6 Q Different than the transverse colon, correct?

7 A Correct.

8 Q And I assume you came to learn that there -- one of the
9 explanations or the leading explanation for the hole found in the
10 stomach was slippage of the repair with a volvulus and obstruction of
11 the stomach causing that hole to form some days later?

12 A As I recall.

13 Q All right. Very different mechanism of injury than the
14 mechanism of injury that you have opined occurred in the Farris case,
15 correct?

16 A Potentially, yes.

17 Q Well, in the Center case, Dr. Rives repaired the
18 paraoesophageal hernia by bringing the portion of the stomach above
19 the diaphragm, he brought it back below the diaphragm, to where it was
20 supposed to be located, correct?

21 A Yes.

22 Q And then what happened subsequently, the repair slipped and
23 the -- a portion of the stomach again came up. True?

24 A In a manner of speaking, yes.

25 Q All right. And you also understand from reading Dr. Rives'

1 deposition that the reason the -- and nissen fundoplication, that is part of
2 the technique for repairing a paraesophageal hernia?

3 A Yes.

4 Q That's -- and so I assume you became aware from reading
5 Dr. Rives' deposition that the -- it was the nissen fundoplication that
6 slipped and that that then caused an obstruction, correct?

7 A I recall that from the deposition, yes.

8 Q Right. And you also recall from the deposition that the
9 reason the nissen fundoplication slipped was not because of some
10 surgical issue with Dr. Rives' care, but rather the need to resuscitate Mrs.
11 Center. You became aware of that, didn't you?

12 A I don't know why it slipped.

13 Q All right. So you don't know why in the Center case, the hole
14 developed, other than it was in part because of the fact that the repair
15 slipped. True statement?

16 A Yes.

17 Q And it's also fair to say that the reason for the hole in the
18 stomach in the Center case, as you learned from Dr. Rives' deposition
19 had nothing to do with electrocautery or a thermal injury. True?

20 A My understanding of the -- or my recollection of that
21 deposition was that he did not attribute it to the electrocautery or to
22 the --

23 Q Nor did --

24 A -- harmonic scalpel.

25 Q -- anyone else. True?

1 A I didn't read everybody else's deposition. I just saw Dr.
2 Rives' deposition.

3 Q Now, Doctor, do you remember when I took your deposition
4 in the Farris case?

5 A Yes.

6 Q Do you remember me asking you this question? "What was
7 your understanding why you were given Dr. Rives' deposition in this
8 other case?"

9 Do you recall that question?

10 A Yes, I do.

11 MR. LEAVITT: Your Honor, I object. There's no -- if he's
12 impeaching, we need the deposition from the back, and I don't believe
13 there is one.

14 MR. DOYLE: Well, I can lodge the original deposition, or I
15 have copies available. Plus the witness -- well, sorry --

16 THE COURT: Counsel, you both need to approach, please.
17 Can you please turn on the white noise, Madam Court Recorder? We
18 would much appreciate it.

19 [Sidebar at 4:46 p.m., ending at 4:52 p.m., not transcribed]

20 THE COURT: The jury will disregard that last statement by
21 Defense counsel, based on a prior Court ruling. The statement should
22 not have been made in front of the jury. Okay, then at this juncture,
23 counsel feel free to move forward with your next question.

24 MR. DOYLE: Thank you.

25 BY MR. DOYLE:

1 Q Dr. Hurwitz, do you recall me taking your deposition one
2 month ago, September 18th?

3 MR. LEAVITT: Your Honor, same objection. He's referring to
4 something -- if you want me to continue or I can approach, but it's
5 something that doesn't exist.

6 THE COURT: Please give the evidentiary objection with no
7 speaking objections, please.

8 MR. LEAVITT: Yes, Your Honor. I object. There is no
9 foundation for his deposition. It doesn't exist.

10 THE COURT: There was no deposition of Dr. Hurwitz lodged
11 timely. The objection by Plaintiff has to be sustained.

12 BY MR. DOYLE:

13 Q Doctor, did you give a deposition in this case?

14 MR. LEAVITT: Your Honor, same objection. Same line of
15 questioning. Same --

16 THE COURT: The Court's going to overrule that objection.
17 That's -- whether his deposition was taken, that's an appropriate
18 question.

19 THE WITNESS: Yes.

20 BY MR. DOYLE:

21 Q Doctor, what date was your deposition taken?

22 A September 18th.

23 Q Of this year?

24 A Yes.

25 Q When you and I were together for your deposition, was there

1 a discussion or a couple of questions about the Center deposition you
2 had been provided?

3 MR. LEAVITT: Again, Your Honor, we're going to -- if he's
4 going to try to impeach him or discuss it, where's the transcript? It
5 doesn't exist.

6 MR. DOYLE: I'm not trying to impeach him. I'm just trying to
7 get some information. It's not impeachment.

8 THE COURT: Please. The jury will disregard the colloquy
9 between counsel. Question as phrased, the Court's going to overrule the
10 objection that was stated.

11 THE WITNESS: I'm sorry. Would you repeat the question?

12 BY MR. DOYLE:

13 Q Sure. At your -- excuse me. At your deposition about a
14 month ago, did you and I talk about the Center deposition that had been
15 provided to you?

16 A Yes.

17 Q At your deposition about a month ago, did I ask you if you
18 found any striking or important similarities or dissimilarities between the
19 Center deposition and the facts of the Farris case?

20 MR. LEAVITT: Your Honor, again, we're quoting out of a --
21 the same objection. And if you want us to approach --

22 THE COURT: Counsel, I need an evidentiary statement,
23 plea -- the evidentiary basis of the objection, counsel, please.

24 MR. LEAVITT: Yes. Hearsay. There's -- where's the
25 document?

1 THE COURT: Sustained.

2 BY MR. DOYLE:

3 Q Doctor, at your deposition about a month ago in the Farris
4 case, did you tell me that you didn't find any striking or important --

5 THE COURT: Counsel, please approach. The jury will
6 disregard. Counsel, please approach. Madam Court Recorder, can you
7 please turn on some white noise?

8 [Sidebar at 4:55 p.m., ending at 4:56 p.m., not transcribed]

9 THE COURT: Thank you so much.

10 Counsel, it's five minutes to five. Is this a good time to break
11 for the weekend?

12 MR. LEAVITT: Yes.

13 THE COURT: I thought so. This jury probably needs to go
14 enjoy a nice relaxing weekend and not think about this case because
15 they know they can't, they know they won't, and they know have lots of
16 other things they would like to be thinking about.

17 And just as a friendly reminder, which is so very serious that
18 I'm sure they are listening a hundred percent attentively, right? Yes, I
19 see all those affirmative nods. Thank you so very much.

20 So -- and don't take the fact that you all know that it is very
21 serious, right? I mean that. Right? Okay? I'm saying it in a friendly
22 tone, you understand the full seriousness of the admonition I'm giving
23 you, correct?

24 GROUP RESPONSE: Yes.

25 THE COURT: Thank you so very much.

1 Ladies and gentlemen, we're going to take the weekend
2 recess. Okay? During this weekend recess you are admonished not to
3 talk or converse among yourselves, or with anyone else on any subject
4 connected with this trial.

5 You may not read, watch, or listen to any report or
6 commentary of the trial, or any person connected with the trial by any
7 medium of information, including without limitation social media, texts,
8 tweets, newspapers, television, internet, radio, or anything that I have
9 not named is, of course, included.

10 Do not visit the scene or the events mentioned during the
11 trial. Do not undertake any research, experimentation or investigation.
12 Do not do any posting or communications on any social network and
13 sites, and do not do any independent research, including, but not limited
14 to, internet searches.

15 Do not form or express any opinion on any subject
16 connected with the trial until the case is fully and finally submitted to you
17 at the time of jury deliberation.

18 With that, I do hope you have a very nice and relaxing
19 weekend where you can rest, and we look forward to seeing you on
20 Monday.

21 JUROR NO. 7: Monday morning what time?

22 THE COURT: Monday morning, my wonderful team -- we are
23 starting at 9:00, thank you. There we go.

24 THE MARSHAL: All rise for the jury.

25 THE COURT: Thank you. Experienced juror, No. 7, I

1 appreciate it. There we go. Have a great weekend.

2 And yes, too, please do leave your jury notebooks on the
3 chairs, they'll be sitting there nicely for you on Monday morning.

4 Thank you so much.

5 [Jury out at 4:58 p.m.]

6 [Outside the presence of the jury]

7 THE COURT: Okay. One second till the door clicks closed.
8 Thank you.

9 Okay. We're not outside the presence of the jury. Is this
10 witness excused and understands that he is subject to recall, whatever
11 the terms may be; is that correct?

12 MR. LEAVITT: That is correct, Your Honor.

13 THE COURT: Okay. I just wanted to make sure that everyone
14 was on the same page. He's not first thing up Monday morning; is that
15 correct?

16 MR. LEAVITT: That is correct, Your Honor, he is not.

17 THE COURT: So then this witness is subject to recall, and he
18 understands the rules with regards to being subject to recall, what can
19 and cannot be discussed, right?

20 MR. LEAVITT: Yes, Your Honor. I will --

21 THE COURT: Sounds perfect.

22 Okay. Thank you so very much, just give it a moment or two
23 so that you're not in the same elevator with our jurors. Okay? If you
24 don't mind. Appreciate it.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: Thank you so very much.

2 Okay. At this juncture the Court does, unfortunately, need to
3 as -- one thing, I'm sorry. Madam Court Recorder, I'm going to these, if
4 you could just keep those. Take care of those. You just put them in
5 envelopes so I can take care of those on Monday morning.

6 We do have some juror questions that we will hold
7 appropriate for when Dr. Hurwitz and how we need to deal with that. So
8 we'll take care of that at that juncture. Okay.

9 The Court did state something at Bench that the Court does
10 need to state outside the presence of the jury and so that last question
11 that the Court did call the Counsel to Bench. That was a direct statement
12 from page 7 in Dr. Hurwitz' deposition -- would both parties agree that
13 that was directly from Dr. Hurwitz' deposition?

14 MR. DOYLE: I'm not sure. I don't recall, frankly. I thought I
15 had maybe had paraphrased it. And I don't think it was the exact
16 question.

17 THE COURT: Okay. Was the language that you used,
18 including the terms on page 7, where using the terms similarities and
19 dissimilarities from page 7 of Dr. Hurwitz' deposition?

20 MR. DOYLE: I asked a different question, I believe. I asked
21 him, well --

22 THE COURT: Okay. What question do you believe you
23 asked, Counsel?

24 MR. DOYLE: I believe I --

25 THE COURT: Do you have it written down, by chance?

1 MR. DOYLE: No.

2 THE COURT: Okay.

3 MR. DOYLE: I believe I asked him whether he came to the
4 conclusion that there were or were not similarities or dissimilarities
5 between the *Center* case and the Farris case, after having read the Center
6 deposition or words to that effect, as I recall.

7 THE COURT: Okay. In Court's understanding from the way
8 that the question was phrased by Defense Counsel, using words straight
9 out of the deposition of similarities and dissimilarities, after the Court
10 had already admonished Counsel and let's go back historically.

11 As you all know, and as specifically -- and this is going back
12 to -- I hate to do this, sorry team, because I realize it's a 5:00 hour -- this
13 Court, as you know, specifically went through a variety of different times,
14 without this Court naming each and every other time, reminded the
15 parties on several different occasions -- it's available on line, it's been
16 available at every single hearing in this department on counsel bench,
17 the handout procedure for civil jury trials, District Court, Department 31,
18 and it's also referenced in various different things, including your trial
19 orders, and the Court noted at different times, I even reminded you on
20 October 7th, the day before your calendar call, that even though that you
21 had to have everything appropriately done for the calendar call to give
22 you yet another reminder -- golden rods, I know, and Mr. Doyle you even
23 came in here beforehand and got another one of these because it was
24 during other hearings.

25 But regardless. Depositions says specifically any -- okay.

1 Then all original depositions anticipated to be used in any manner -- in
2 any manner -- during the trial (other than in lieu of live testimony) must
3 be delivered to the clerk at the date and time exhibits are delivered at or
4 prior to the calendar call. Okay?

5 It was abundantly clear, the Court even at the calendar call
6 had the counsels specifically read each and every deposition, in fact,
7 nicely you even offered to leave the box which had the deposition
8 transcripts in them. We had each of the counsel specifically read each
9 and every deposition transcript so we knew exactly which deposition
10 transcripts were going to be lodged at that juncture and at no time prior
11 was there any request that there was any deposition transcript that the
12 Court should be expecting afterwards, any request to lodge a deposition
13 transcript late, nor was there at any time provided to the Court any
14 request or any need or anything with regards to any late transcript.

15 Thereafter, I believe it was the first day of trial, the Court may
16 be incorrect, but I believe it was on the 14th, that -- I'm pretty sure it was
17 the 14th -- that -- but just in case I'm wrong, I'll say on or about the 14th,
18 the first day of trial, counsel for Defense then said that he had the
19 deposition of Dr. Hurwitz.

20 At that juncture, the Court reminded him of the specific
21 handout procedure for rules, reminded him of all the different violations
22 that have happened with regards to the court rules, NRCP, all -- I'm not
23 going to go through the whole litany -- and that this was yet another
24 violation concern. However, at that juncture, Counsel for Defense had
25 indicated to the Court that, I believe he said, paraphrasing, that he

1 thought that there was an exception or request with regards to the Dr.
2 Hurwitz deposition made at the time of the calendar call.

3 So the Court in order to give that accommodation, in case his
4 request had been made, even though the Court did not recall such a
5 request being made, said that if you did wish to -- if he thought that it
6 had been made, that it would need to be presented to the Court, the
7 excerpt from the transcript, and then and then it was clear that he had
8 just gotten the transcript that morning, because he had just ordered it
9 the Friday before, and then the Court even asked whether the Hurwitz
10 deposition transcript had been ordered on an expedited basis, because
11 the Court wanted to make sure it wasn't something that had been
12 ordered on an expedited basis and maybe it was an error due to the
13 court reporter service, and found out it wasn't.

14 It had not been ordered on an expedited basis, so therefore,
15 it had just been ordered on a regular basis, but then did provide the
16 opportunity that if a request had been made at the calendar call or some
17 other time that he could provide the Court with anything from any of the
18 transcripts to show the Court that such a request had been made, then
19 the Court would be glad to consider it.

20 As of today, there was no transcript, or any portion provided
21 to the Court. However, instead, in front of the jury, Counsel then said, I
22 have the -- paraphrasing -- indicated to the jury that he had the
23 deposition to lodge and that he had copies of Dr. Hurwitz's deposition
24 which is completely inappropriate in light of the specific discussion that
25 had already been held with the Court, that if he wished in any manner to

1 request the late lodging of Dr. Hurwitz's deposition he needed to provide
2 the Court that he had made that request timely and needed to provide
3 the Court something that showed that he had made that request for the
4 Court's consideration and had never brought that issue up again after
5 the Court had provided him that opportunity to do so.

6 And so it was completely improper to mention it in front of
7 the jury after having that specific discussion with the Court. The Court
8 did say that the Court would admonish him outside the presence of the
9 jury, because the Court does find that that was a violation of a specific
10 Court directive, and because -- while the Court tries and has been
11 bending over backwards in this case because there's been so many of
12 them, this really is not one that cannot continue to go unnoticed because
13 it was said in front of the jury after there was the specific discussion with
14 the Court, even though nothing was provided to the Court and then
15 Counsel did acknowledge at Bench that there was no request made at
16 the calendar call after.

17 So Court is -- there is still sanctions pending. Unless you
18 wish -- you're really getting to the point, Counsel would you like me to
19 call a mistrial because of counsel conduct on behalf of your -- because
20 that's really where you've, with your continued non-compliance, this
21 Court is so close to calling a mistrial due to counsel conduct in creating
22 the issues with regards to your client.

23 So I am really -- this is -- I am trying to give you every
24 possible benefit of the doubt, but it's very, very difficult when you
25 continue to say that you're not hearing specific directives, saying things

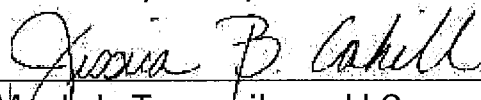
1 again in front of the jury impermissibly after you know it's
2 impermissible. Because an experienced litigator such as yourself, and
3 you've done so many trials, to keep on saying that these are oopses is
4 very challenging for this Court with my very, very, very, very, very, very,
5 very, rosy colored glasses that I put on in this case with respect to this
6 conduct.

7 So I hope this weekend you will re-evaluate it and that
8 Monday morning will be a wonderful fresh start, so this does not
9 happen.

10 With that, I'm going to ask Madam Court Recorder to go off
11 the record. It's 5:06. Have a nice weekend. I'm leaving.

12 [Proceedings adjourned at 5:06 p.m.]
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
23 best of my ability.

24 

25 Maukele Transcribers, LLC

Jessica B. Cahill, Transcriber, CER/CET-708