

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
VOLUME 29

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CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
1.	Complaint (Arbitration Exemption Claimed: Medical Malpractice)	7/1/16	1	1-8
	<u>Exhibit 1</u> : Affidavit of Vincent E. Pesiri, M.D.	7/1/16	1	9-12
	<u>Exhibit 2</u> : CV of Vincent E. Pesiri, M.D.		1	13-15
	Initial Appearance Fee Disclosure (NRS Chapter 19)	7/1/16	1	16-17
2.	Defendants Barry Rives, M.D.; Laparoscopic Surgery of Nevada, LLC Answer to Complaint (<i>Arbitration Exempt – Medical Malpractice</i>)	9/14/16	1	18-25
3.	Notice of Association of Counsel	7/15/19	1	26-28
4.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada LLC's Motion to Compel The Deposition of Gregg Ripplinger, M.D. and Extend the Close of Discovery (9th Request) on an Order Shortening Time	9/13/19	1	29-32
	Declaration of Chad C. Couchot, Esq.	9/13/19	1	33-35
	Declaration of Thomas J. Doyle, Esq.	9/13/19	1	36-37
	Memorandum of Points and Authorities	9/13/19	1	38-44
	<u>Exhibit 1</u> : Notice of Taking Deposition of Dr. Michael Hurwitz	2/6/19	1	45-49
	<u>Exhibit 2</u> : Amended Notice of Taking Deposition of Dr. Michael Hurwitz	7/16/19	1	50-54

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 4)	Second Amended Notice of Taking Deposition of Dr. Michael Hurwitz (Location Change Only)	7/25/19	1	55-58
	<u>Exhibit 3</u> : Third Amended Notice of Taking Deposition of Dr. Michael Hurwitz	9/11/19	1	59-63
	<u>Exhibit 4</u> : Subpoena – Civil re Dr. Gregg Ripplinger	7/18/19	1	64-67
	Notice of Taking Deposition of Dr. Gregg Ripplinger	7/18/19	1	68-70
	<u>Exhibit 5</u> : Amended Notice of Taking Deposition of Dr. Gregg Ripplinger	9/11/19	1	71-74
5.	Defendants Barry Rives, M.D.; Laparoscopic Surgery of Nevada LLC's NRCP 16.1(A)(3) Pretrial Disclosure	9/13/19	1	75-81
6.	Trial Subpoena – Civil Regular re Dr. Naomi Chaney	9/16/19	1	82-86
7.	Plaintiffs' Motion for Sanctions Under Rule 37 for Defendants' Intentional Concealment of Defendant Rives' History of Negligence and Litigation and Motion for Leave to Amend Complaint to Add Claim for Punitive Damages on Order Shortening Time	9/18/19	1	87-89
	Affidavit of Kimball Jones, Esq. in Support of Plaintiff's Motion and in Compliance with EDCR 2.34 and NRCP 37	9/18/19	1	90-91
	Memorandum of Points and Authorities	9/16/19	1	92-104
	<u>Exhibit "1"</u> : Defendant Dr. Barry Rives' Response to Plaintiff Titina Farris' First Set of Interrogatories	4/17/17	1	105-122

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 7)	<u>Exhibit “2”</u> : Deposition Transcript of Dr. Barry Rives, M.D. in the Farris Case	10/24/18	1	123-149
	<u>Exhibit “3”</u> : Transcript of Video Deposition of Barry James Rives, M.D. in the Center Case	4/17/18	1	150-187
8.	Order Denying Stipulation Regarding Motions in Limine and Order Setting Hearing for September 26, 2019 at 10:00 AM, to Address Counsel Submitting Multiple Impermissible Documents that Are Not Complaint with the Rules/Order(s)	9/19/19	1	188-195
	Stipulation and Order Regarding Motions in Limine	9/18/19	1	196-198
9.	Plaintiffs’ Motion to Strike Defendants’ Rebuttal Witnesses Sarah Larsen, R.N., Bruce Adornato, M.D. and Scott Kush, M.D., and to Limit the Testimony of Lance Stone, D.O. and Kim Erlich, M.D., for Giving Improper “Rebuttal” Opinions, on Order Shortening Time	9/19/19	1	199-200
	Motion to Be Heard	9/18/19	1	201
	Affidavit of Kimball Jones, Esq. in Compliance with EDCR 2.34 and in Support of Plaintiff’s Motion on Order Shortening Time	9/16/19	1	202-203
	Memorandum of Points and Authorities	9/16/19	1	204-220
	<u>Exhibit “1”</u> : Defendants Barry J. Rives, M.D. and Laparoscopic Surgery of Nevada, LLC’s Rebuttal Disclosure of Expert Witnesses and Reports	12/19/18	1	221-225

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 9)	<u>Exhibit “2”</u> : Expert Report of Sarah Larsen, R.N., MSN, FNP, C.L.C.P. with Life Care Plan	12/19/18	2	226-257
	<u>Exhibit “3”</u> : Life Expectancy Report of Ms. Titina Farris by Scott Kush, MD JD MHP	12/19/18	2	258-290
	<u>Exhibit “4”</u> : Expert Report by Bruce T. Adornato, M.D.	12/18/18	2	291-309
	<u>Exhibit “5”</u> : Expert Report by Lance R. Stone, DO	12/19/18	2	310-323
	<u>Exhibit “6”</u> : Expert Report by Kim S. Erlich, M.D.	11/26/18	2	324-339
	<u>Exhibit “7”</u> : Expert Report by Brian E. Juell, MD FACS	12/16/18	2	340-343
	<u>Exhibit “8”</u> : Expert Report by Bart Carter, MD, FACS	12/19/18	2	344-346
10.	Court Minutes Vacating Plaintiffs’ Motion to Strike	9/20/19	2	347
11.	Plaintiffs’ Objection to Defendants’ Second Amended Notice of Taking Deposition of Dr. Gregg Ripplinger	9/20/19	2	348-350
12.	Plaintiffs’ Objections to Defendants’ Pre-Trial Disclosure Statement Pursuant to NRCP 6.1(a)(3)(C)	9/20/19	2	351-354
13.	Plaintiffs’ Objection to Defendants’ Trial Subpoena of Naomi Chaney, M.D.	9/20/19	2	355-357
14.	Defendants Barry Rives, M.D. and Laparoscopic Surgery of Nevada, LLC’s Opposition to Plaintiffs’ Motion for Sanctions Under Rule 37 for Defendants’ Intentional Concealment of Defendant Rives’ History of Negligence and Litigation and Motion for Leave to Amend Compliant to Add Claim for Punitive Damages on Order Shortening Time	9/24/19	2	358-380

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
15.	Declaration of Chad Couchot in Support of Opposition to Plaintiffs' Motion for Sanctions Under Rule 37 for Defendants' Intentional Concealment of Defendant Rives' History of Negligence and Litigation and Motion for Leave to Amend Complaint to Add Claim for Punitive Damages on Order Shortening Time	9/24/19	2	381-385
	<u>Exhibit A</u> : Defendant Dr. Barry Rives' Response to Plaintiff Vickie Center's First Set of Interrogatories	3/7/17	2	386-391
	<u>Exhibit B</u> : Defendant Dr. Barry Rives' Response to Plaintiff Titina Farris' First Set of Interrogatories	4/17/17	2	392-397
	<u>Exhibit C</u> : Partial Deposition Transcript of Barry Rives, M.D. in the Farris case	10/24/18	2	398-406
	<u>Exhibit D</u> : Partial Transcript of Video Deposition of Barry Rives, M.D. in the Center case	4/17/18	2	407-411
	<u>Exhibit E</u> : Defendant Dr. Barry Rives' Supplemental Response to Plaintiff Titina Farris' First Set of Interrogatories	9/13/19	2	412-418
	<u>Exhibit F</u> : Partial Transcript of Video Deposition of Yan-Borr Lin, M.D. in the Center case	5/9/18	2	419-425
	<u>Exhibit G</u> : Expert Report of Alex A. Balekian, MD MSHS in the <i>Rives v. Center</i> case	8/5/18	2	426-429
16.	Defendants Barry J. Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Objection to Plaintiffs' Ninth	9/25/19	2	430-433

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 16)	Supplement to Early Case Conference Disclosure of Witnesses and Documents			
17.	Court Minutes on Motion for Sanctions and Setting Matter for an Evidentiary Hearing	9/26/19	2	434
18.	Plaintiffs' Objection to Defendants' Fourth and Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents	9/26/19	2	435-438
19.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Objection to Plaintiffs' Initial Pre-Trial Disclosures	9/26/19	2	439-445
20.	Plaintiffs' Motion to Strike Defendants' Fourth and Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents on Order Shortening Time	9/27/19	2	446-447
	Notice of Hearing	9/26/19	2	448
	Affidavit of Kimball Jones, Esq. in Support of Plaintiff's Motion and in Compliance with EDCR 2.26	9/24/19	2	449
	Memorandum of Points and Authorities	9/25/19	2	450-455
	<u>Exhibit "1"</u> : Defendants Barry Rives, M.D. and Laparoscopic Surgery of Nevada, LLC's Fourth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents	9/12/19	2	456-470
	<u>Exhibit "2"</u> : Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents	9/23/19	3	471-495

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
21.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Pretrial Memorandum	9/30/19	3	496-514
22.	Plaintiffs' Pre-Trial Memorandum Pursuant to EDCR 2.67	9/30/19	3	515-530
23.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's First Supplemental NRCP 16.1(A)(3) Pretrial Disclosure	9/30/19	3	531-540
24.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Supplemental Objection to Plaintiffs' Initial Pre-Trial Disclosures	9/30/19	3	541-548
25.	Order Denying Defendants' Order Shortening Time Request on Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Motion to Extend the Close of Discovery (9th Request) and Order Setting Hearing at 8:30 AM to Address Counsel's Continued Submission of Impermissible Pleading/Proposed Orders Even After Receiving Notification and the Court Setting a Prior Hearing re Submitting Multiple Impermissible Documents that Are Not Compliant with the Rules/Order(s)	10/2/19	3	549-552
	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Motion to Extend the Close of Discovery (9th Request) on an Order Shortening Time	9/20/19	3	553-558
	Declaration of Aimee Clark Newberry, Esq. in Support of Defendants' Motion on Order Shortening Time	9/20/19	3	559-562
	Declaration of Thomas J. Doyle, Esq.	9/20/19	3	563-595

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 25)	Memorandum of Points and Authorities	9/20/19	3	566-571
	<u>Exhibit 1</u> : Notice of Taking Deposition of Dr. Michael Hurwitz	2/6/19	3	572-579
	<u>Exhibit 2</u> : Amended Notice of Taking Deposition of Dr. Michael Hurwitz	7/16/19	3	580-584
	Second Amended Notice of Taking Deposition of Dr. Michael Hurwitz (Location Change Only)	7/25/19	3	585-590
26.	Defendants Barry Rives, M.D. and Laparoscopic Surgery of Nevada, LLC's Opposition to Plaintiffs' Motion to Strike Defendants' Fourth and Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents on Order Shortening Time	10/2/19	3	591-601
27.	Declaration of Chad Couchot in Support of Opposition to Plaintiffs' Motion to Strike Defendants' Fourth and Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents on Order Shortening Time	10/2/19	3	602-605
	<u>Exhibit A</u> : Partial Transcript of Video Deposition of Brain Juell, M.D.	6/12/19	3	606-611
	<u>Exhibit B</u> : Partial Transcript of Examination Before Trial of the Non-Party Witness Justin A. Willer, M.D.	7/17/19	3	612-618
	<u>Exhibit C</u> : Partial Transcript of Video Deposition of Bruce Adornato, M.D.	7/23/19	3	619-626
	<u>Exhibit D</u> : Plaintiffs' Eighth Supplement to Early Case Conference Disclosure of Witnesses and Documents	7/24/19	3	627-640

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 27)	<u>Exhibit E</u> : Plaintiffs' Ninth Supplement to Early Case Conference Disclosure of Witnesses and Documents	9/11/19	3	641-655
	<u>Exhibit F</u> : Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Fourth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents	9/12/19	3	656-670
	<u>Exhibit G</u> : Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents	9/23/19	3	671-695
	<u>Exhibit H</u> : Expert Report of Michael B. Hurwitz, M.D.	11/13/18	3	696-702
	<u>Exhibit I</u> : Expert Report of Alan J. Stein, M.D.	11/2018	3	703-708
	<u>Exhibit J</u> : Expert Report of Bart J. Carter, M.D., F.A.C.S.		3	709-717
	<u>Exhibit K</u> : Expert Report of Alex Barchuk, M.D.	3/20/18	4	718-750
	<u>Exhibit L</u> : Expert Report of Brian E Juell, MD FACS	12/16/18	4	751-755
28.	Declaration of Thomas J. Doyle in Support of Opposition to Plaintiffs' Motion to Strike Defendants' Fourth and Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents on Order Shortening Time	10/2/19	4	756-758
29.	Reply in Support of Plaintiffs' Motion to Strike Defendants' Fourth and Fifth Supplement to NRCP 16.1 Disclosure Of Witnesses and Documents on Order Shortening Time	10/3/19	4	759-766
30.	Defendants' Proposed List of Exhibits	10/7/19	4	767-772

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
31.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Reply to Plaintiffs' Opposition to Motion to Compel the Deposition of Gregg Ripplinger, M.D. and Extend the Close of Discovery (9th Request) on an Order Shortening Time	10/10/19	4	773-776
32.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Trial Brief Regarding Their Request to Preclude Defendants' Expert Witnesses' Involvement as a Defendant in Medical Malpractice Actions	10/14/19	4	777-785
	<u>Exhibit 1</u> : Partial Transcript Video Deposition of Bart Carter, M.D.	6/13/19	4	786-790
	<u>Exhibit 2</u> : Partial Transcript of Video Deposition of Brian E. Juell, M.D.	6/12/19	4	791-796
33.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Trial Brief Regarding the Need to Limit Evidence of Past Medical Expenses to Actual Out-of-Pocket Expenses or the Amounts Reimbursed	10/14/19	4	797-804
	<u>Exhibit 1</u> : LexisNexis Articles		4	805-891
34.	Plaintiffs' Renewed Motion to Strike Defendants' Answer for Rule 37 Violations, Including Perjury and Discovery Violations on an Order Shortening Time	10/19/19	4	892-896
	Memorandum of Points and Authorities	10/19/19	4	897-909
	<u>Exhibit "1"</u> : Recorder's Transcript of Pending Motions	10/7/19	5	910-992
	<u>Exhibit "2"</u> : Verification of Barry Rives, M.D.	4/27/17	5	993-994

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
35.	Defendants' Trial Brief in Support of Their Position Regarding the Propriety of Dr. Rives' Responses to Plaintiffs' Counsel's Questions Eliciting Insurance Information	10/22/19	5	995-996
	Declaration of Thomas J. Doyle	10/22/19	5	997
	Memorandum of Points and Authorities	10/22/19	5	998-1004
	<u>Exhibit 1</u> : MGM Resorts Health and Welfare Benefit Plan (As Amended and Restated Effective January 1, 2012)		5	1005-1046
	<u>Exhibit 2</u> : LexisNexis Articles		5	1047-1080
36.	Defendants Barry Rives, M.D. and Laparoscopic Surgery of Nevada, LLC's Opposition to Plaintiffs' Renewed Motion to Strike	10/22/19	5	1081-1086
	<u>Exhibit A</u> : Declaration of Amy B. Hanegan	10/18/19	5	1087-1089
	<u>Exhibit B</u> : Deposition Transcript of Michael B. Hurwitz, M.D., FACS	9/18/119	6	1090-1253
	<u>Exhibit C</u> : Recorder's Transcript of Pending Motions (Heard 10/7/19)	10/14/19	6	1254-1337
37.	Reply in Support of, and Supplement to, Plaintiffs' Renewed Motion to Strike Defendants' Answer for Rule 37 Violations, Including Perjury and Discovery Violations on an Order Shortening Time	10/22/19	7	1338-1339
	Declaration of Kimball Jones, Esq. in Support of Plaintiff's Reply and Declaration for an Order Shortening Time		7	1340
	Memorandum of Points and Authorities	10/22/19	7	1341-1355

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 37)	<u>Exhibit “1”</u> : Plaintiffs’ Seventh Supplement to Early Case Conference Disclosure of Witnesses and Documents	7/5/19	7	1356-1409
38.	Order on Plaintiffs’ Motion to Strike Defendants’ Fourth and Fifth Supplements to NRCP 16.1 Disclosures	10/23/19	7	1410-1412
39.	Plaintiffs’ Trial Brief Regarding Improper Arguments Including “Medical Judgment,” “Risk of Procedure” and “Assumption of Risk”	10/23/19	7	1413-1414
	Memorandum of Points and Authorities	10/23/19	7	1415-1419
40.	Plaintiffs’ Trial Brief on Rebuttal Experts Must Only be Limited to Rebuttal Opinions Not Initial Opinions	10/24/19	7	1420
	Memorandum of Points and Authorities	10/24/19	7	1421-1428
	<u>Exhibit “1”</u> : Defendants Barry J. Rives, M.D. and Laparoscopic Surgery of Nevada, LLC’s Rebuttal Disclosure of Expert Witnesses and Reports	12/19/18	7	1429-1434
	<u>Exhibit “2”</u> : Expert Report of Bruce T. Adornato, M.D.	12/18/18	7	1435-1438
41.	Plaintiffs’ Trial Brief on Admissibility of Malpractice Lawsuits Against an Expert Witness	10/27/19	7	1439-1440
	Memorandum of Points and Authorities	10/26/19	7	1441-1448
	<u>Exhibit “1”</u> : Transcript of Video Deposition of Brian E. Juell, M.D.	6/12/19	7	1449-1475

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
42.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Trial Brief on Rebuttal Experts Being Limited to Rebuttal Opinions Not Initial Opinions	10/28/19	7	1476-1477
	Declaration of Thomas J. Doyle, Esq.	10/28/19	7	1478
	Memorandum of Points and Authorities	10/28/19	7	1479-1486
	<u>Exhibit 1</u> : Expert Report of Justin Aaron Willer, MD, FAAN	10/22/18	7	1487-1497
	<u>Exhibit 2</u> : LexisNexis Articles		7	1498-1507
	<u>Exhibit 3</u> : Partial Transcript of Examination Before Trial of the Non-Party Witness Justin A. Willer, M.D.	7/17/19	7	1508-1512
43.	Plaintiffs' Trial Brief Regarding Disclosure Requirements for Non-Retained Experts	10/28/19	7	1513-1514
	Memorandum of Points and Authorities	10/28/19	7	1515-1521
44.	Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Trial Brief Regarding Propriety of Disclosure of Naomi Chaney, M.D. as a Non-Retained Expert Witness	10/29/19	7	1522-1523
	Declaration of Thomas J. Doyle, Esq.	10/29/19	7	1524
	Memorandum of Points and Authorities	10/29/19	7	1525-1529
	<u>Exhibit 1</u> : Partial Deposition Transcript of Naomi L. Chaney Chaney, M.D.	8/9/19	7	1530-1545
	<u>Exhibit 2</u> : Plaintiffs' Expert Witness Disclosure	11/15/18	7	1546-1552

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 44)	<u>Exhibit 3</u> : Plaintiffs' Second Supplemental Expert Witness Disclosure	7/12/19	7	1553-1573
	<u>Exhibit 4</u> : Expert Report of Justin Aaron Willer, MD, FAAN	10/22/18	7	1574-1584
	<u>Exhibit 5</u> : LexisNexis Articles		8	1585-1595
	<u>Exhibit 6</u> : Defendant Barry Rives M.D.'s and Laparoscopic Surgery of Nevada, LLC's First Supplement to NRCP 16.1 Disclosure of Witnesses and Documents	12/4/18	8	1596-1603
45.	Plaintiffs' Motion to Quash Trial Subpoena of Dr. Naomi Chaney on Order Shortening Time	10/29/19	8	1604-1605
	Notice of Motion on Order Shortening Time		8	1606
	Declaration of Kimball Jones, Esq. in Support of Plaintiff's Motion on Order Shortening Time		8	1607-1608
	Memorandum of Points and Authorities	10/29/19	8	1609-1626
	<u>Exhibit "1"</u> : Trial Subpoena – Civil Regular re Dr. Naomi Chaney	10/24/19	8	1627-1632
	<u>Exhibit "2"</u> : Defendants Barry Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents	9/23/19	8	1633-1645
	<u>Exhibit "3"</u> : Defendants Barry J. Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Initial Disclosure of Expert Witnesses and Reports	11/15/18	8	1646-1650

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 45)	<u>Exhibit “4”</u> : Deposition Transcript of Naomi L. Chaney, M.D.	5/9/19	8	1651-1669
46.	Plaintiffs’ Trial Brief Regarding the Testimony of Dr. Barry Rives	10/29/19	8	1670-1671
	Memorandum of Points and Authorities	10/29/19	8	1672-1678
	<u>Exhibit “1”</u> : Defendants Barry Rives, M.D.’s and Laparoscopic Surgery of Nevada, LLC’s Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents	9/23/19	8	1679-1691
	<u>Exhibit “2”</u> : Deposition Transcript of Barry Rives, M.D.	10/24/18	8	1692-1718
47.	Plaintiffs’ Objection to Defendants’ Misleading Demonstratives (11-17)	10/29/19	8	1719-1720
	Memorandum of Points and Authorities	10/29/19	8	1721-1723
	<u>Exhibit “1”</u> Diagrams of Mrs. Farris’ Pre- and Post-Operative Condition		8	1724-1734
48.	Plaintiffs’ Trial Brief on Defendants Retained Rebuttal Experts’ Testimony	10/29/19	8	1735-1736
	Memorandum of Points and Authorities	10/28/19	8	1737-1747
	<u>Exhibit “1”</u> : Plaintiffs Objections to Defendants’ Pre-Trial Disclosure Statement Pursuant to NRCP 16.1(a)(3)(C)	9/20/19	8	1748-1752
	<u>Exhibit “2”</u> : Defendants Barry J. Rives, M.D. and Laparoscopic Surgery of Nevada, LLC’s Rebuttal Disclosure of Expert Witnesses and Reports	12/19/18	8	1753-1758

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 48)	<u>Exhibit “3”</u> : Deposition Transcript of Lance Stone, D.O.	7/29/19	8	1759-1772
	<u>Exhibit “4”</u> : Plaintiff Titina Farris’s Answers to Defendant’s First Set of Interrogatories	12/29/16	8	1773-1785
	<u>Exhibit “5”</u> : Expert Report of Lance R. Stone, DO	12/19/18	8	1786-1792
	<u>Exhibit “6”</u> : Expert Report of Sarah Larsen, R.N., MSN, FNP, C.L.C.P.	12/19/18	8	1793-1817
	<u>Exhibit “7”</u> : Expert Report of Erik Volk, M.A.	12/19/18	8	1818-1834
49.	Trial Subpoena – Civil Regular re Dr. Naomi Chaney	10/29/19	9	1835-1839
50.	Offer of Proof re Bruce Adornato, M.D.’s Testimony	11/1/19	9	1840-1842
	<u>Exhibit A</u> : Expert Report of Bruce T. Adornato, M.D.	12/18/18	9	1843-1846
	<u>Exhibit B</u> : Expert Report of Bruce T. Adornato, M.D.	9/20/19	9	1847-1849
	<u>Exhibit C</u> : Deposition Transcript of Bruce Adornato, M.D.	7/23/19	9	1850-1973
51.	Offer of Proof re Defendants’ Exhibit C	11/1/19	9	1974-1976
	<u>Exhibit C</u> : Medical Records (Dr. Chaney) re Titina Farris		10	1977-2088
52.	Offer of Proof re Michael Hurwitz, M.D.	11/1/19	10	2089-2091
	<u>Exhibit A</u> : Partial Transcript of Video Deposition of Michael Hurwitz, M.D.	10/18/19	10	2092-2097
	<u>Exhibit B</u> : Transcript of Video Deposition of Michael B. Hurwitz, M.D., FACS	9/18/19	10 11	2098-2221 2222-2261

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
53.	Offer of Proof re Brian Juell, M.D.	11/1/19	11	2262-2264
	<u>Exhibit A</u> : Expert Report of Brian E. Juell, MD FACS	12/16/18	11	2265-2268
	<u>Exhibit B</u> : Expert Report of Brian E. Juell, MD FACS	9/9/19	11	2269-2271
	<u>Exhibit C</u> : Transcript of Video Transcript of Brian E. Juell, M.D.	6/12/19	11	2272-2314
54.	Offer of Proof re Sarah Larsen	11/1/19	11	2315-2317
	<u>Exhibit A</u> : CV of Sarah Larsen, RN, MSN, FNP, LNC, CLCP		11	2318-2322
	<u>Exhibit B</u> : Expert Report of Sarah Larsen, R.N.. MSN, FNP, LNC, C.L.C.P.	12/19/18	11	2323-2325
	<u>Exhibit C</u> : Life Care Plan for Titina Farris by Sarah Larsen, R.N., M.S.N., F.N.P., L.N.C., C.L.C.P	12/19/18	11	2326-2346
55.	Offer of Proof re Erik Volk	11/1/19	11	2347-2349
	<u>Exhibit A</u> : Expert Report of Erik Volk	12/19/18	11	2350-2375
	<u>Exhibit B</u> : Transcript of Video Deposition of Erik Volk	6/20/19	11	2376-2436
56.	Offer of Proof re Lance Stone, D.O.	11/1/19	11	2437-2439
	<u>Exhibit A</u> : CV of Lance R. Stone, DO		11	2440-2446
	<u>Exhibit B</u> : Expert Report of Lance R. Stone, DO	12/19/18	11	2447-2453
	<u>Exhibit C</u> : Life Care Plan for Titina Farris by Sarah Larsen, R.N., M.S.N., F.N.P., L.N.C., C.L.C.P	12/19/18	12	2454-2474
57.	Special Verdict Form	11/1/19	12	2475-2476

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
58.	Order to Show Cause {To Thomas J. Doyle, Esq.}	11/5/19	12	2477-2478
59.	Judgment on Verdict	11/14/19	12	2479-2482
60.	Notice of Entry of Judgment	11/19/19	12	2483-2488
61.	Plaintiffs' Motion for Fees and Costs	11/22/19	12	2489-2490
	Declaration of Kimball Jones, Esq. in Support of Motion for Attorneys' Fees and Costs	11/22/19	12	2491-2493
	Declaration of Jacob G. Leavitt Esq. in Support of Motion for Attorneys' Fees and Costs	11/22/19	12	2494-2495
	Declaration of George F. Hand in Support of Motion for Attorneys' Fees and Costs	11/22/19	12	2496-2497
	Memorandum of Points and Authorities	11/22/19	12	2498-2511
	<u>Exhibit "1"</u> : Plaintiffs' Joint Unapportioned Offer of Judgment to Defendant Barry Rives, M.D. and Laparoscopic Surgery of Nevada, LLC	6/5/19	12	2512-2516
	<u>Exhibit "2"</u> : Judgment on Verdict	11/14/19	12	2517-2521
	<u>Exhibit "3"</u> : Notice of Entry of Order	4/3/19	12	2522-2536
	<u>Exhibit "4"</u> : Declarations of Patrick Farris and Titina Farris		12	2537-2541
	<u>Exhibit "5"</u> : Plaintiffs' Verified Memorandum of Costs and Disbursements	11/19/19	12	2542-2550
62.	Defendants Barry J. Rives, M.D.'s and Laparoscopic Surgery of Nevada, LLC's Opposition to Plaintiffs' Motion for Fees and Costs	12/2/19	12	2551-2552

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 62)	Declaration of Thomas J. Doyle, Esq.		12	2553-2557
	Declaration of Robert L. Eisenberg, Esq.		12	2558-2561
	Memorandum of Points and Authorities	12/2/19	12	2562-2577
	<u>Exhibit 1</u> : Defendants Barry J. Rives, M.D. and Laparoscopic Surgery of Nevada, LLC's Initial Disclosure of Expert Witnesses and Reports	11/15/18	12	2578-2611
	<u>Exhibit 2</u> : Defendants Barry J. Rives, M.D. and Laparoscopic Surgery of Nevada, LLC's Rebuttal Disclosure of Expert Witnesses and Reports	12/19/18	12 13	2612-2688 2689-2767
	<u>Exhibit 3</u> : Recorder's Transcript Transcript of Pending Motions (Heard 10/10/19)	10/14/19	13	2768-2776
	<u>Exhibit 4</u> : 2004 Statewide Ballot Questions		13	2777-2801
	<u>Exhibit 5</u> : Emails between Carri Perrault and Dr. Chaney re trial dates availability with Trial Subpoena and Plaintiffs' Objection to Defendants' Trial Subpoena on Naomi Chaney, M.D.	9/13/19 - 9/16/19	13	2802-2813
	<u>Exhibit 6</u> : Emails between Riesa Rice and Dr. Chaney re trial dates availability with Trial Subpoena	10/11/19 - 10/15/19	13	2814-2828
	<u>Exhibit 7</u> : Plaintiff Titina Farris's Answers to Defendant's First Set of Interrogatories	12/29/16	13	2829-2841
	<u>Exhibit 8</u> : Plaintiff's Medical Records		13	2842-2877

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
63.	Reply in Support of Plaintiffs' Motion for Fees and Costs	12/31/19	13	2878-2879
	Memorandum of Points and Authorities	12/31/19	13	2880-2893
	<u>Exhibit "1"</u> : Plaintiffs' Joint Unapportioned Offer of Judgment to Defendant Barry Rives, M.D. and Defendant Laparoscopic Surgery of Nevada LLC	6/5/19	13	2894-2898
	<u>Exhibit "2"</u> : Judgment on Verdict	11/14/19	13	2899-2903
	<u>Exhibit "3"</u> : Defendants' Offer Pursuant to NRCP 68	9/20/19	13	2904-2907
64.	Supplemental and/or Amended Notice of Appeal	4/13/20	13	2908-2909
	<u>Exhibit 1</u> : Judgment on Verdict	11/14/19	13	2910-2914
	<u>Exhibit 2</u> : Order on Plaintiffs' Motion for Fees and Costs and Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs	3/30/20	13	2915-2930
<u>TRANSCRIPTS</u>				
65.	<i>Transcript of Proceedings Re: Status Check</i>	7/16/19	14	2931-2938
66.	<i>Transcript of Proceedings Re: Mandatory In-Person Status Check per Court's Memo Dated August 30, 2019</i>	9/5/19	14	2939-2959
67.	<i>Transcript of Proceedings Re: Pretrial Conference</i>	9/12/19	14	2960-2970
68.	<i>Transcript of Proceedings Re: All Pending Motions</i>	9/26/19	14	2971-3042
69.	<i>Transcript of Proceedings Re: Pending Motions</i>	10/7/19	14	3043-3124

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
70.	<i>Transcript of Proceedings Re:</i> Calendar Call	10/8/19	14	3125-3162
71.	<i>Transcript of Proceedings Re:</i> Pending Motions	10/10/19	15	3163-3301
72.	<i>Transcript of Proceedings Re:</i> Status Check: Judgment — Show Cause Hearing	11/7/19	15	3302-3363
73.	<i>Transcript of Proceedings Re:</i> Pending Motions	11/13/19	16	3364-3432
74.	<i>Transcript of Proceedings Re:</i> Pending Motions	11/14/19	16	3433-3569
75.	<i>Transcript of Proceedings Re:</i> Pending Motions	11/20/19	17	3570-3660

TRIAL TRANSCRIPTS

76.	<i>Jury Trial Transcript — Day 1</i> (Monday)	10/14/19	17 18	3661-3819 3820-3909
77.	<i>Jury Trial Transcript — Day 2</i> (Tuesday)	10/15/19	18	3910-4068
78.	<i>Jury Trial Transcript — Day 3</i> (Wednesday)	10/16/19	19	4069-4284
79.	<i>Jury Trial Transcript — Day 4</i> (Thursday)	10/17/19	20	4285-4331
93.	<i>Partial Transcript re:</i> Trial by Jury – Day 4 Testimony of Justin Willer, M.D. [Included in “Additional Documents” at the end of this Index]	10/17/19	30	6514-6618
80.	<i>Jury Trial Transcript — Day 5</i> (Friday)	10/18/19	20	4332-4533
81.	<i>Jury Trial Transcript — Day 6</i> (Monday)	10/21/19	21	4534-4769
82.	<i>Jury Trial Transcript — Day 7</i> (Tuesday)	10/22/19	22	4770-4938

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
83.	<i>Jury Trial Transcript</i> — Day 8 (Wednesday)	10/23/19	23	4939-5121
84.	<i>Jury Trial Transcript</i> — Day 9 (Thursday)	10/24/19	24	5122-5293
85.	<i>Jury Trial Transcript</i> — Day 10 (Monday)	10/28/19	25 26	5294-5543 5544-5574
86.	<i>Jury Trial Transcript</i> — Day 11 (Tuesday)	10/29/19	26	5575-5794
87.	<i>Jury Trial Transcript</i> — Day 12 (Wednesday)	10/30/19	27 28	5795-6044 6045-6067
88.	<i>Jury Trial Transcript</i> — Day 13 (Thursday)	10/31/19	28 29	6068-6293 6294-6336
89.	<i>Jury Trial Transcript</i> — Day 14 (Friday)	11/1/19	29	6337-6493

ADDITIONAL DOCUMENTS¹

91.	Defendants Barry Rives, M.D. and Laparoscopic Surgery of, LLC's Supplemental Opposition to Plaintiffs' Motion for Sanctions Under Rule 37 for Defendants' Intentional Concealment of Defendant Rives' History of Negligence and Litigation And Motion for Leave to Amend Complaint to Add Claim for Punitive Damages on Order Shortening Time	10/4/19	30	6494-6503
92.	Declaration of Thomas J. Doyle in Support of Supplemental Opposition to Plaintiffs' Motion for Sanctions Under Rule 37 for Defendants' Intentional Concealment of Defendant Rives' History of Negligence and litigation and Motion for Leave to Amend Complaint to Add Claim for Punitive Damages on Order Shortening Time	10/4/19	30	6504-6505

¹ These additional documents were added after the first 29 volumes of the appendix were complete and already numbered (6,493 pages).

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 92)	<u>Exhibit A</u> : Partial Deposition Transcript of Barry Rives, M.D.	10/24/18	30	6506-6513
93.	<i>Partial Transcript re: Trial by Jury – Day 4 Testimony of Justin Willer, M.D. (Filed 11/20/19)</i>	10/17/19	30	6514-6618
94.	Jury Instructions	11/1/19	30	6619-6664
95.	Notice of Appeal	12/18/19	30	6665-6666
	<u>Exhibit 1</u> : Judgment on Verdict	11/14/19	30	6667-6672
96.	Notice of Cross-Appeal	12/30/19	30	6673-6675
	<u>Exhibit “1”</u> : Notice of Entry Judgment	11/19/19	30	6676-6682
97.	<i>Transcript of Proceedings Re: Pending Motions</i>	1/7/20	31	6683-6786
98.	<i>Transcript of Hearing Re: Defendants Barry J. Rives, M.D.’s and Laparoscopic Surgery of Nevada, LLC’s Motion to Re-Tax and Settle Plaintiffs’ Costs</i>	2/11/20	31	6787-6801
99.	Order on Plaintiffs’ Motion for Fees and Costs and Defendants’ Motion to Re-Tax and Settle Plaintiffs’ Costs	3/30/20	31	6802-6815
100.	Notice of Entry Order on Plaintiffs’ Motion for Fees and Costs and Defendants’ Motion to Re-Tax and Settle Plaintiffs’ Costs	3/31/20	31	6816-6819
	<u>Exhibit “A”</u> : Order on Plaintiffs’ Motion for Fees and Costs and Defendants’ Motion to Re-Tax and Settle Plaintiffs’ Costs	3/30/20	31	6820-6834
101.	Supplemental and/or Amended Notice of Appeal	4/13/20	31	6835-6836
	<u>Exhibit 1</u> : Judgment on Verdict	11/14/19	31	6837-6841

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>VOL.</u>	<u>PAGE NO.</u>
(Cont. 101)	<u>Exhibit 2</u> : Order on Plaintiffs' Motion for Fees and Costs and Defendants' Motion to Re-Tax and Settle Plaintiffs' Costs	3/30/20	31	6842-6857

1 Q Okay. And, doctor, you would agree that in the Vickie Center
2 case you were under oath and you were asked, have you ever disabled --
3 have you ever had another patient become disabled through one of your
4 minimally invasive surgeries. Do you recall that, doctor?

5 A I don't know if that's the exact question.

6 Q It's not the exact words. I paraphrased, right?

7 A You do, but the exact question's important.

8 Q Oh, okay, okay. So when I asked you that, you stated that
9 you had been truthful in the Vickie Center case, correct?

10 A Yes, I believe so.

11 Q Now, doctor, you agree that Titina Farris is disabled
12 following a minimally invasive surgery with you, right?

13 A To a certain extent, yes.

14 Q Okay. You agree she has drop foot, right?

15 A Based upon what I've heard here, yes.

16 Q You agree that she, as far as what any expert has said, she
17 will never walk again without assistance, right?

18 A I don't know if I'd go that far, but I could say yes, sure.

19 Q Okay, doctor. And during the Vickie Center case, while this
20 case was ongoing, you were asked, under oath, if you had disabled other
21 patients with -- through one of your minimally invasive surgeries, right?

22 MR. DOYLE: Objection. Mischaracterizes the evidence.

23 THE COURT: Sustained the way that question was phrased.

24 BY MR. JONES:

25 Q Doctor, you agree that you were asked in the Vickie Center

1 case, and this is paraphrased, okay, it's not word-for-word, if you had
2 disabled other patients in the performance of minimally invasive
3 surgery; do you recall that, doctor?

4 A To some effect, yes.

5 Q And your response was that you had not, right?

6 A Yes.

7 Q Okay.

8 MR. DOYLE: I'll object to this. It's not impeachment.

9 MR. JONES: It is impeachment, Your Honor, based on his
10 prior answer. He only changed his answer after just being shown this.

11 MR. DOYLE: Your Honor?

12 THE COURT: The jury will -- sorry. Sorry, counsel, go ahead.

13 MR. DOYLE: Move to strike counsel's comments

14 MR. JONES: Your Honor, I'll withdraw. I apologize.

15 THE COURT: Okay. Counsel withdrew the comments and
16 the jury knows to disregard colloquy between counsel's comments, so.
17 And the Court is going to view this appropriate because the Court by
18 agreement of the parties at 2:30 said it was deferring ruling. And so this
19 will be based on a prior question approximately from that prior time
20 period. Okay.

21 [Whereupon, an audio/video clip was played in open court at 3:06

22 p.m., outside the presence of the jury, not transcribed]

23 BY MR. JONES:

24 Q That was in April of this year, right, doctor?

25 A Correct.

1 Q Okay. And so you were aware of Titina Farris' condition,
2 correct?

3 A I was vaguely aware, yes.

4 Q Okay.

5 MR. JONES: No further questions, Your Honor.

6 THE COURT: Okay. Redirect, counsel for Plaintiff? Sorry,
7 counsel for Defense, my apologies, redirect?

8 REDIRECT EXAMINATION

9 BY MR. DOYLE:

10 Q Doctor Rives, tell us whether that little audio clip we listened
11 to, was that an accurate answer?

12 A Was my answer to the question accurate?

13 Q Yes.

14 A It depends upon the timeframe of when it was asked.

15 Q Okay. Now, doctor, explain briefly what's the process for
16 obtaining photographs of a laparoscopic surgery?

17 A So the camera head has the button where you can take
18 pictures. It goes through the camera head to the laparoscopic tower. I
19 have a preference sheet. And on the preference sheet it says to set it
20 specifically at four so that it will automatically print out. Sometimes that
21 doesn't happen, but either way it's managed by the circulating nurse. So
22 if I only take three pictures, it may not automatically print out. They have
23 to go back into the system, pull those three pictures out, and print it out
24 on themselves.

25 If they power down that tower, unless for some reason it's saved to

1 the permanent hard drive disk, which is limited and erased weekly, the
2 pictures can be lost.

3 Q Now, in a laparoscopic abdominal hernia repair, at what
4 point would you take pictures typically?

5 A So usually when I get into the abdomen, and I have a
6 pneumoperitoneum and I can see what's going on, I take a picture of
7 what the hernia, the incarceration, and everything looks like.

8 Q And would you take pictures subsequently?

9 A Yes. I would take pictures of what the next major parts of the
10 operation were. And, for instance, in a laparoscopic ventral hernia
11 repair, once the mesh is up there and it's in place, I would usually take a
12 picture to show that it's covered the hernia defect.

13 Q Now, you've been asked several times about the pathology
14 report, which indicates three holes. Have you seen that report?

15 A Yes, I have.

16 Q What's your takeaway from the pathology report?

17 MR. JONES: Your Honor, outside the scope of his testimony
18 in terms of any opinions he might have.

19 THE COURT: The Court is going to sustain the way the
20 question was phrased.

21 BY MR. DOYLE:

22 Q Doctor, were you asked about the pathology report earlier
23 today?

24 A Yes.

25 Q Would you please explain the answer that you gave?

1 MR. JONES: Your Honor, the question itself, I'm not sending
2 it -- I'm waiting to see if he attempts to delve into something. I'm not
3 objecting at this time.

4 THE COURT: [Indiscernible].

5 THE WITNESS: I believe I was asked whether the pathology
6 showed three holes or not and I said yes, it did.

7 BY MR. DOYLE:

8 Q And did you form an opinion about the cause of those holes?

9 MR. JONES: Your Honor, objection.

10 THE COURT: I'll sustain that. Outside the scope.

11 BY MR. DOYLE:

12 Q Can you tell us whether you formed an opinion whether
13 those holes were present as of July 9th?

14 MR. JONES: Your Honor, leading. Also, outside the scope.

15 THE COURT: Counsel, can I let Defense finish his question
16 first?

17 MR. JONES: Yes. I apologize, Your Honor.

18 THE COURT: I wasn't sure if you were finished or not. Were
19 you?

20 MR. DOYLE: I don't think I was, but.

21 BY MR. DOYLE:

22 Q Doctor, when you look at the pathology report, did you form
23 an opinion whether those three holes were present as of July 9th?

24 MR. JONES: Objection, Your Honor, leading. Also outside
25 the scope of his testimony.

1 THE COURT: Sustained on both grounds.

2 MR. DOYLE: Okay. Thank you. That's all I have, then.

3 MR. JONES: No questions, Your Honor.

4 THE COURT: Okay. We have some juror questions, if
5 counsel would like to approach, please, with juror questions.

6 [Sidebar at 3:11 p.m., ending at 3:22 p.m., not transcribed]

7 THE COURT: Thank you so very much, counsel.

8 Okay. So the same as we've done with other witnesses, just
9 ask the questions as is. Ladies and gentlemen of the jury, as you know
10 certain questions can't be asked, so it would have been more appropriate
11 for the witnesses, so this one is, okay.

12 When completing your operative report, are you supposed to
13 list everything in detail of what took place (i.e., how big the holes in the
14 colon were? How many staples used to repair damage?)

15 THE WITNESS: No.

16 THE COURT: Okay.

17 Next. If getting holes in the colon is a complication, why
18 wasn't the patient informed, if so? prior to the procedure? Or was she?

19 THE WITNESS: Prior to the procedure, both in my office and
20 preoperatively holding area before going back to the surgery, I discuss
21 with all patients that have incarcerated hernias, especially with bowel,
22 the risk that bowel can be injured during part of the procedure.

23 THE COURT: Okay.

24 Next question. Could you have removed the feces from the
25 colon before cleaning the patient's holes to help prevent further

1 complications?

2 THE WITNESS: Can you read that again?

3 THE COURT: Sure.

4 Could you have removed the feces from the colon before --
5 sorry -- closing the patient's holes to help prevent further complications?

6 THE WITNESS: If I understand that correctly, if you see -- if
7 you make a hole and you see feces in it, you wouldn't want to reach in
8 there with an instrument and pull the feces out because that would
9 automatically contaminate your entire operative field.

10 THE COURT: Okay.

11 Next. When did you first notify the medical team and Mrs.
12 Farris that you made two holes in her colon?

13 THE WITNESS: I'm not sure what's meant by the medical
14 team, but that would be apparent in my operative note. Mrs. Farris,
15 herself, would have been post-operative day one. On the day of surgery
16 she was in recovery, she was still asleep, and I spoke to family after the
17 procedure.

18 THE COURT: Okay.

19 Next. Is it normal for recovery if there was -- sorry -- is it
20 normal for recovery if there was no bowel movement between July 5th
21 to July 15th?

22 THE WITNESS: It's not normal to have no -- wait, there's a
23 lot of negatives. I would expect there to be bowel activity after the
24 operation.

25 THE COURT: Okay.

1 Next one. Can a bowel obstruction cause a hole in the colon
2 or contribute to creating a hole in the colon?

3 THE WITNESS: Yes.

4 THE COURT: Okay.

5 Next one. On 7-13 your notes say, quote, progressing as
6 expected, end quote. But she's on a ventilator and still no bowel
7 movement ten days post-op. Please explain how this is quote,
8 progressing as expected, end quote?

9 THE WITNESS: So progressing as expected means what my
10 evaluation was from the prior day to the next day. It does not refer to
11 this is how I expected her to be before we started doing surgery.

12 THE COURT: Okay. The questions asked to the satisfaction
13 of the jurors have asked them. Okay, thanks so much.

14 Since it's the Defense witness, Defense first, any follow-up
15 questions to those juror questions?

16 MR. DOYLE: I don't have any, thank you.

17 THE COURT: Plaintiff's counsel, any follow-ups to those
18 juror questions?

19 MR. JONES: None, Your Honor.

20 THE COURT: Okay. Counsel, then, at this juncture, there
21 being no further juror questions, there being no further counsel
22 questions, is this witness excused for all purposes or subject to recall?

23 MR. DOYLE: Excused.

24 MR. JONES: Excused, Your Honor.

25 THE COURT: Sorry, excused for?

1 MR. JONES: For all purposes, Your Honor.

2 MR. DOYLE: Yes, sorry.

3 THE COURT: Okay. You're excused for all purposes. Thank
4 you so very much.

5 Defense counsel, would you like to call your next witness?

6 MR. DOYLE: We rest, thank you.

7 DEFENDANT RESTS

8 THE COURT: Thank you so much. Thank you, sir. As the
9 witness is exiting the stand, since Defense rests, as you know the next
10 stage is to ask Plaintiff, Plaintiff for your rebuttal case would you like to
11 call witnesses for your rebuttal case?

12 MR. JONES: No, Your Honor. We do have a motion we'd like
13 to make probably outside the presence of the jury, though.

14 THE COURT: Okay. At this juncture then, counsel, can I have
15 you both approach for a brief moment if you don't mind. Thanks so very
16 much. And Madam Court Recorder, would you mind turning on the
17 lovely white noise.

18 [Sidebar at 3:27 p.m., ending at 3:28 p.m., not transcribed]

19 THE COURT: Just one moment please. Okay. Ladies and
20 gentlemen of the jury -- 3:29 -- I said by 3:30 you'd be out. Okay. Ladies
21 and gentlemen of the jury -- got a good 45 seconds to read your
22 admonition. Okay.

23 Ladies and gentlemen of the jury, you agreed to come back
24 at 8:30 tomorrow morning. So what we're going to do tomorrow
25 morning is the Court is going to read you the jury instructions, then

1 you'll have closing arguments, then you'll do deliberations. Okay? And
2 so that's what's going to happen since all the parties have rested on their
3 respective case -- subject to some motion practice to read outside your
4 presence. I presume you'd prefer to go home right now rather than wait
5 to have the court hear the motions and come back and have the jury
6 instructions read afterwards; is that correct? That's what I thought
7 because you all have kids and different things you need to get home for
8 Halloween. Okay. I just don't know how long those motions may take.
9 Okay.

10 So ladies and gentlemen, we're going to wish you a very nice
11 rest of your Nevada day evening and Halloween. You're going to come
12 back tomorrow. You are not to talk or converse among yourselves or
13 with anyone else on any subjects attached to this trial. You may not
14 read, watch, listen to any report or commentary of the trial. Any person
15 connected to the trial by any mean of information included without
16 limitation social media, text, tweets, newspapers, television, internet,
17 radio, anything I'm saying specifically is, of course, also included.

18 Do not visit the scene or the events mentioned during the
19 trial. Do not undertake any research experimentation or investigation.
20 Do not do any posting or communications on any social networking sites
21 or anywhere else. Do not do any independent research included but not
22 limited to internet searches. Do not form or express any opinion on any
23 subject connected with the case until the case is fully and finally
24 submitted to you at the time of jury deliberations.

25 I'll see you tomorrow at 8:30 where we'll finalize things.

1 Thank you so very much. I appreciate it.

2 THE MARSHAL: All rise for the jury.

3 [Jury out at 3:31 p.m.]

4 [Outside the presence of the jury]

5 THE COURT: Are we staying on the record? You have a
6 question?

7 So give one second for the jury to leave. Okay.

8 So we're going to stay on the record. You can just let it stay
9 on, right? Okay. So Counsel for Plaintiff are you going first?

10 MR. HAND: Yes, Your Honor, briefly. We have some --

11 THE COURT: I love those words. It's always nice when
12 they're actually true.

13 MR. HAND: I'm going to try. I'm going to try.

14 Briefly, we have Rule 50 motions and I pulled up the recent --
15 and I haven't seen much change for what we're talking about so far as
16 the standard. And I know, Your Honor, you're familiar with the standard
17 of if a party has been fully heard on an issue --

18 THE COURT: Uh-huh.

19 MR. HAND: -- jury trial the Court finds out a reason the jury
20 would not have a legally sufficient evidentiary basis to find for the party
21 in that issue the Court may --

22 THE COURT: I need to interrupt you one quick second
23 though. And the only reason why I'm interrupting you for one quick
24 second is, I just need a clarification because I wasn't sure if Mr. Jones
25 had said that you had no rebuttal case, or you had --

1 MR. HAND: We do not have a rebuttal case, Your Honor.

2 THE COURT: Okay. So all parties have rested --

3 MR. HAND: Have rested.

4 THE COURT: -- correct?

5 MR. HAND: Yes, Your Honor.

6 THE COURT: The only thing left to be done subject to the
7 ruling on these motions is jury instructions, closing arguments, and
8 deliberations depending on rulings in this case; is that correct?

9 MR. HAND: That is correct, Your Honor.

10 THE COURT: Is that correct from Defense as well?

11 MR. DOYLE: Correct.

12 THE COURT: Okay. Just making sure. Thank you so much.
13 Go ahead.

14 MR. HAND: Judge, based on the rule --

15 THE COURT: Uh-huh.

16 MR. HAND: -- 50(a)1 standard, I believe that it is undisputed
17 that the past medical bills have been completely resolved in Plaintiff's
18 favor. Testimony and evidence have been that they were reasonable,
19 customary, medically necessary, and there's been no opposition on that
20 point. So I believe that is -- should be a directed verdict on that specific
21 issue.

22 Second, the life care plan --

23 THE COURT: Can you give me the amount of what you're
24 saying. Is that --

25 MR. HAND: It was --

1 THE COURT: -- attested. I need to know if it's the fact that
2 they are medical bills. Are we talking a specific number is what you're
3 asking for in your Rule 50 motion?

4 MR. HAND: The number was --

5 THE COURT: Sure. No worries.

6 MR. HAND: The number as outlined by witness Dawn Cook
7 is \$1,063,006.94.

8 THE COURT: That's past meds?

9 MR. HAND: Yes.

10 THE COURT: Okay.

11 MR. HAND: The next issue, Judge is the issue of the life care
12 plan and I'm going to narrowly explain where I believe that there is no
13 issue of fact that would permit a directed verdict in that issue. There is --
14 it's been undisputed through the testimony of Dawn Cook, the pricing of
15 certain medical and associated items. It's been undisputed through the
16 testimony of Dr. Barchuk that these are medically necessary. Dawn Cook
17 priced them -- said they are reasonable, customary prices for what is
18 needed. And Dr. Barchuk specifically excluded her pre-existing issues
19 from the life care plan when he made his recommendations. Dawn Cook
20 took those recommendations, priced them out.

21 And then third, Dr. Clauretie took that calculation -- the life
22 care plan and reduced it to present value. I will concede that they did
23 produce an economist that took a shot at the present value calculation
24 and he said I would reduce it --

25 THE COURT: Uh-huh.

1 MR. HAND: -- 10 to 30 percent.

2 THE COURT: 20 is 30 percent but okay.

3 MR. HAND: That is a jury question if it should be reduced.

4 But the actual numbers, the costs in that life care plan, they're
5 reasonable necessity. The medical proof supporting those charges has
6 been undisputed by any opposition expert testimony. So I believe we're
7 entitled to a directed verdict on the life care plan subject to any reduction
8 due to their raising an issue with our economist and the way he
9 calculated it.

10 THE COURT: So how would you view the order -- I will
11 pause just one second. I want to make sure the one jury was taken care
12 of. Was Juror No. 6 taken care of?

13 THE MARSHAL: Yes, Judge.

14 THE COURT: I appreciate it. Thank you so very much,
15 Marshal. Juror No. 6 being the juror that you said could be excused and
16 need not return. The Marshal did notify her outside the presence of the
17 other jurors, correct, Marshal?

18 THE MARSHAL: Correct.

19 THE COURT: Appreciate it. Thank you. Taken care of in that
20 issue. Sorry, Counsel, just wanted to make sure that got tended to.

21 MR. HAND: Judge, I --

22 THE COURT: Okay. So what is the order that you would be
23 saying would occur for your directed verdict if it were so granted. How
24 would that be phrased so that the Court understands what you're really
25 asking for?

1 MR. HAND: I would say the directed verdict in Plaintiff's
2 favor on the issue of the future medical and associated costs as put forth
3 by Plaintiff's experts including Dr. Clauretie, Dr. Barchuk, Dawn Cook in
4 the amount of 4,663,473 subject to any reduction the jury feels
5 appropriate if they accept or consider the testimony of Mr. Volk, the
6 Defense economist.

7 THE COURT: Okay. So you would modify line item on the
8 verdict form. Is that what you're asking --

9 MR. HAND: Yes.

10 THE COURT: -- in that regard?

11 MR. HAND: Yes.

12 THE COURT: Okay. Sorry. Go ahead, please. Next?

13 MR. HAND: And the third one, Judge is -- Your Honor, is the
14 issue of proximate cause. The testimony has been overwhelming that
15 the -- and I'll work backwards from the foot drop. That the foot drop was
16 caused by critical illness polyneuropathy. Plaintiffs' experts, Dr. Willer,
17 Dr. Barchuk have said that. Dr. Adornato agreed to that and admitted
18 that that the foot drop was caused by the critical illness polyneuropathy.

19 THE COURT: Used a different term but yes, same concept.

20 MR. HAND: Yeah. He called it critical --

21 THE COURT: CCN v. CIP, right?

22 MR. HAND: Yes. Right. There's no dispute that Mrs. Farris
23 was septic. All sides agreed to that. Their expert said, yes, she's septic.
24 Dr. Adornato stated on cross -- stated yes, septic. Sepsis causes critical
25 illness polyneuropathy which then results in foot drop. Dr. Barchuk said

1 the same thing.

2 There's no dispute that the cause of the sepsis was the
3 perforation of the bowel. So the chain of reasoning starts with the
4 perforation of the bowel, undisputed sepsis, undisputed critical illness
5 polyneuropathy, undisputed foot drop, undisputed. And then Dr.
6 Adornato said I believe 90 percent of her foot drop was caused by the
7 critical illness polyneuropathy. Which as I just stated was caused by the
8 sepsis going back to the hole in the bowel. So if we want to take the
9 greater than preponderance standard, we certainly --

10 THE COURT: Are we maybe switching Dr. Adornato says 90
11 percent. Is that --

12 MR. HAND: He said 90 percent physical.

13 MR. JONES: He said 100 percent.

14 MR. HAND: He said 100. I take that back. When he was
15 trying to parse out the diabetic neuropathy versus the critical illness
16 preop. I thought he said 90 percent, my colleague said 100 percent but --

17 THE COURT: Okay.

18 MR. HAND: -- in any event, it's greater than 50 percent. I
19 think there's sufficient evidence for the Court to grant a directed verdict
20 on that particular issue given the testimony on that particular issue in the
21 approximate cause -- it's greater than 50 percent even by their own
22 expert.

23 THE COURT: Okay. Thank you. You had an opportunity to
24 fully be heard. Should I move on to Defense's response or is there
25 anything else?

1 MR. HAND: Nothing else, Your Honor.

2 THE COURT: I do appreciate it. Thank you so much.

3 Okay. Defense your brief response as you each promised,
4 right?

5 MR. DOYLE: May I remain seated?

6 THE COURT: It's usually customary to stand up in the Court
7 to show respect to the Court but if you want to remain seated --

8 MR. DOYLE: No. No. No. It's just --

9 THE COURT: -- like you've done other times, the Court's fine.

10 MR. DOYLE: -- easier to read.

11 THE COURT: The Court's glad to accommodate.

12 MR. DOYLE: No. No. No. It's fine.

13 So Your Honor, 50(a)1(b) says, in grant a motion for
14 judgment, there's a matter of law against the party on a claim or defense
15 that under controlling law can be maintained or defeated only with a
16 favorable finding on that issue. So in terms of the past medical bills and
17 the life care plan, neither of those are a claim or a defense. I believe the
18 thought behind 50(a) motion is we go to a claim or cause of action or
19 one of my defenses.

20 Having said that, in terms of the past medical bills, there is
21 evidence in this case from which the jury can infer and conclude that the
22 full amount, for example, of the St. Rose, San Martin bill is not a
23 reasonable amount given the expert testimony. In this case that -- the
24 bill first of all includes the care on July 3rd. And the bill also includes --
25 different experts have testified that with surgery on July 9th which, and

1 this is in part something I'm going to address in my motion.

2 But in terms of Dr. Hurwitz and his standard of care opinion
3 as to when surgery needed to be performed, that surgery needed to be
4 performed on July 9th. And on July 9th, and he actually also said and
5 agreed as did Dr. Juell, that even if surgery had been done on the 4th or
6 the 5th or the 9th she would have required an open procedure. She
7 would have required a resection of bowel. And she would have required
8 a colostomy.

9 So that if the jury were to find that Dr. Rives did not do
10 anything below the standard of care in the surgery but his only standard
11 of care violation was not taking her to surgery on the 9th, then a
12 substantial amount of those medical expenses would have been incurred
13 anyway. And in terms of the life care plan, we have Dr. Adornato
14 parsing out different percentages in addition to Erik Volk speaking about
15 his opinion concerning Dr. Clauretie's present cash value and calculation.

16 And in terms of the proximate cause argument, there is a
17 dispute about the cause of the sepsis. Was it a hole in the bowel? Was it
18 aspiration syndrome? Was it microscopic bacteria that spilled during the
19 surgery that could not be contained or controlled with the irrigation and
20 drainage and antibiotics. So, I mean, there is much to say about what
21 caused the sepsis. It's not cut and dry.

22 THE COURT: Okay. Court's got a couple questions if you
23 don't mind. First off, I'm going to go a little bit out of order. Number 2,
24 you said Dr. Adornato -- while he attributed percentages, Court doesn't
25 see that he testified in any manner whatsoever as to the life care plan as

1 to any of the amounts. He attributed the CCN/CCP versus Other and a
2 sensory other and the neuropathy other in rebutting Dr. Barchuk, right?
3 But he does not -- I'm sorry, Dr. Willer, I misspoke when I said Dr.
4 Barchuk. I meant to say Dr. Willer, my apologies. Dr. Willer because he
5 disagreed 100 percent Dr. Willer and he gave his 50/50 and his one third
6 two thirds, but I don't see that he gave any testimony whatsoever to the
7 life care plan. So how do you get that nexus for a rule 50 motion?

8 MR. DOYLE: Because both Dr. Willer and Dr. Barchuk did not
9 acknowledge the pre-existing diabetic neuropathy and the effect that had
10 on her mobility. And it's her mobility that's the issue in this case and Dr.
11 Adornato --

12 THE COURT: Okay.

13 MR. DOYLE: -- apportioned the mobility to 50/50.

14 THE COURT: But that doesn't really answer the Court's
15 question. The Court's question was really specifically asking you about
16 the life care plan. How do you have any evidence whatsoever that
17 mobility goes to dollars in the life care plan? Do you have any expert,
18 any testimony, anything that you can appoint to the court, any evidence
19 whatsoever that goes the opinions as to mobility links to dollars in a life
20 care plan? The only thing I've heard is the Volk 20 to 30 percent
21 reduction. Is there anything else in anyway anybody addressed the life
22 care plan?

23 MR. DOYLE: Yes. Because both Dr. Willer and Dr. Barchuk,
24 their opinions are that her mobility problems and hence, 100 percent of
25 the life care plan is due to the foot drop. Dr. Adornato testified that her

1 mobility problems are 50 percent due to the foot drop caused by the
2 critical illness polyneuropathy and 50 percent due to her pre-existing
3 diabetic neuropathy.

4 So based upon that testimony, it would be appropriate to
5 argue, and the jury could infer that not a 100 percent of the life care plan
6 is due to the critical illness polyneuropathy foot drop but rather a
7 combination of things.

8 THE COURT: Was there any designation, anywhere in the
9 expert designation that had anything to do with the future care plan --

10 MR. DOYLE: I'm not --

11 THE COURT: -- future life care plan?

12 MR. DOYLE: I'm relying simply on the trial testimony of Dr.
13 Adornato, Dr. Barchuk, and Dr. Willer.

14 THE COURT: Okay. Do Dr. Adornato, Dr. Willer or Dr.
15 Barchuk -- Dr. Barchuk agrees with the life care plan, so he's not going to
16 dispute the numbers, right?

17 MR. DOYLE: Correct. But his assumption is that the life care
18 plan is based on her lack of mobility --

19 THE COURT: Right --

20 MR. DOYLE: -- 100 percent --

21 THE COURT: But Counsel, the reason why I'm interrupting
22 you, is because you're really not answering my specific question. Okay?
23 Did Dr. Adornato ever mention life care plan in any of his testimony?

24 MR. DOYLE: He did not use those words. No.

25 THE COURT: Okay.

1 MR. DOYLE: But he spoke --

2 THE COURT: That's really that simple --

3 MR. DOYLE: -- about her mobility which is part of the life
4 care plan.

5 THE COURT: But he never tied it to the life care plan. He
6 never said her mobility would then reduce any dollars in the life care
7 plan in any way whatsoever. Is that correct or an incorrect statement?

8 MR. DOYLE: The inference from his -- it's in -- your
9 statement is incorrect because a reasonable inference can be drawn
10 from his testimony that half the life care plan is attributable to the pre-
11 existing diabetic neuropathy.

12 THE COURT: Mine was merely a question of testimony. Did
13 he ever state the words "life care plan" anywhere in his testimony?

14 MR. DOYLE: He did not use those words, but --

15 THE COURT: Okay. That's really where I was just trying to
16 go. I appreciate it. Thank you so much. Okay. We got the third one.

17 And then my other question was with regards to the first
18 one, you said that there was testimony with regards to the July 3rd --
19 testimony versus argument. Was there any testimony that that bill -- did
20 anybody testify that the July 3rd bill could be broken down and reduce
21 that amount? I remember there was questions. And I recall my notes
22 say question the witness said that that couldn't be broken out -- the bill
23 couldn't be broken out.

24 So is there any testimony that you're stating any witness
25 testified that the July 3rd could be broken out from the rest of the bill?

1 Testimony versus potential counsel argument?

2 MR. DOYLE: Yes. The testimony was that some percentage
3 of the medical bills incurred probably would have been incurred anyway
4 depending on how the jury decides the standard of care issue. And
5 Dawn Cook did not look at the medical bills, she looked at a diagnosis
6 and then made a calculation based upon a diagnostic code.

7 THE COURT: Right. My question was a little bit more
8 specific. Are you stating that any witness stated that you could -- any
9 witness' testimony said that they could parse out or that they did parse
10 out any portion of the St. Rose bill?

11 MR. DOYLE: No one said that explicitly but it's reasonable
12 inferences that can be drawn from the testimony of Dr. Hurwitz and Dr.
13 Juell.

14 THE COURT: Okay. Brief response to your motion folks and
15 just not brief by any speck of the imagination.

16 MR. HAND: Judge, Your Honor, I believe it has to be expert
17 testimony to refute this -- Plaintiff's -- on these issues, there has to be
18 expert testimony. There has been no expert testimony and specifically
19 when Mr. Volk was on the stand, I asked him, are you a life care planner?
20 No. Do you know any of these costs, like a wheelchair? No, I don't
21 know. So there hasn't been any evidence to rebut this undisputed
22 evidence of the costs in that plan by any competent testimony from an
23 expert that's been properly qualified or produced to give testimony in
24 the case.

25 THE COURT: Okay. About the past medical bill argument

1 with regards to the July 3rd and the things --

2 MR. HAND: Yeah.

3 THE COURT: -- can by reasonable inference that some of
4 these procedures would have been necessary regardless of whether or
5 not there was or was not an injury.

6 MR. HAND: I understand what he's saying but when Mrs.
7 Cook was asked about that, she said you can't break it out because of the
8 way it's coded. It's included when we do the pricing --when we do
9 medical coding it's included, all of that's included. And our position's
10 been that the -- it's their burden and our position's been the negligence
11 starter at the beginning of surgery with the LigaSure perforating the
12 bowel. So to try to, you know, cloud it with aspiration and everything, I
13 would submit isn't persuasive and it's their burden to come up with
14 triable issues of fact on this.

15 THE COURT: Okay. Before the Court makes a ruling, the
16 Court's going to have to ask a different question. The Rule 37 motion,
17 part of the release that was originally requested a renewed motion for
18 Rule 37, part of the relief requested was to make a determination as a
19 matter of law that the past medicals were presumed. One of your
20 alternatives was liability -- well, striking answer, liability, past meds. I'm
21 paraphrasing, but so are -- but yet no one's given me any time, told me
22 when they wanted that to be heard so I'm looking at this purely as a Rule
23 50. Am I not?

24 MR. HAND: At this point, I would say so.

25 THE COURT: Okay. Just making sure I got the perimeters of

1 what you all are asking me. Okay.

2 Here's the Court's ruling.

3 I'm going in reverse order. With regards to the proximate
4 cause which was the third issue. The Court denies that without prejudice
5 the Court doesn't find that the Court could rule under Rule 50 as a matter
6 of law. The Court finds that there's disputed evidence which the jury
7 could infer either which way based on the totality of the evidence
8 presented by each of the parties. So the Court needs to deny the -- I'm
9 just informally calling it to proximate to cause portion of your Rule 50
10 motion.

11 With regards to the second portion, I'm just going in reverse
12 order. With regards to the future care plan, the Court -- the issue here
13 would be, I guess a part of your claim or defense under controlling law
14 cannot be maintained or resolve an issue against a party. The motion
15 may be made at any time submitted to the jury, must specify the
16 judgments sought, the law in facts, entitled to movement to judgment.
17 Okay.

18 So the issue is whether or not a reasonable jury would have
19 a legally sufficient evidentiary basis to find for the party on that issue.
20 Okay. So if a party -- let's reread Sub 1 -- so I read the entirety of the
21 sentence.

22 50 sub. 1: If a party has been fully heard on an issue during a
23 jury trial and the Court finds that a reasonable jury will not have a legally
24 sufficient evidentiary basis to find for the party on that issue the Court
25 may --

1 Sub (a): resolve the issue against that party and (b) grant a
2 motion for judgment as a matter of law against the party on a claim or
3 defense that under the controlling law can be maintained or defended
4 only with a favorable finding on that issue.

5 So there's two different things the Court can do. 1) I can find
6 a finding on an issue. Okay? Because it would be defense, in Plaintiff's
7 case, right? Defense would have had a full opportunity to have been
8 heard and so the Court could resolve the issue against the parties. It can
9 resolve against the defendant because it's Plaintiff's motion.

10 In the present case, the issue would be whether or not the
11 future care amount should be resolved against Defendant or whether or
12 not there is anything that would preclude that future care amount being
13 ruled against with regards to Defendant. The Court is inclined to grant it
14 in part and deny it in part. The Court is inclined to grant it that the
15 amount at issue in the life care plan is the \$4,663,473. There's nothing
16 that's been provided is any alternative testimony that that amount is
17 incorrect as the amount of the life care plan in general.

18 The question then becomes, what is the present value
19 amount. The present value amount is the amount that's disputed
20 between Dr. Lauretie and Mr. Volk. That issue cannot be resolved by
21 this Court. That is a distinct issue because you have a priced-out number
22 which is Barchuk and the RN and you don't have anyone rebutting that
23 whatsoever. While the Court is appreciative of defenses argument, that
24 somehow the response rebuttal to Dr. Willer by having attributing part of
25 the conditions to CCN and things to other -- okay? That somehow that

1 would go to the number. There was no nexus created. And while there
2 maybe argument, there is not legal evidence.

3 And this is what the Court has to do. You can't reduce the
4 numbers without some expert or someone reducing those numbers or
5 attacking the underlying wheelchair, hydro-lift -- I'm just giving
6 examples. Okay? The amount of physical therapy et cetera. None of
7 that was presented and that's where the challenge here is. Since none of
8 that was presented, the parties have fully been able having heard, the
9 Court can resolve the issue against the party -- the party being
10 Defendant. And so therefore, the 4,663,473, that is the correct number
11 what this Court wrote down. Plaintiff's conferring that that's the number,
12 right?

13 MR. HAND: Yes. Yes, Your Honor.

14 THE COURT: That's the number proposed by Plaintiff,
15 correct? You don't show a different number proposed by Plaintiff. Do
16 you?

17 MR. DOYLE: I don't have that handy.

18 THE COURT: Okay. The number proposed by Plaintiff in
19 their future care life plan which has been represented to this Court was
20 4,663,473. If for some reason, somebody says that the number is
21 different in the life care plan, you need to tell me because I'm relying on
22 what you told me the actual number is because you just popped this
23 Rule 50 motion.

24 While the Court can analyze it fully legally, the specific
25 number without taking the time to go find it in your specific piece of

1 evidence. You went to the board. That's the number you put on the
2 board. That's the number you represented. No one objected to that
3 being an incorrect numeric. Objected to the fact that it should or should
4 not happen but that numeric was never objected to. So the Court has to
5 take that as the number that you presented and so that would be
6 appropriate.

7 However, the Court will deny it to the extent that the Rule 50
8 in any way is asking what would be the present value amount and
9 whether that should or should not be reduced by somewhere the 20 to
10 30 percent by Mr. Volk that fully would go before the jury to make that
11 determination. Okay. And according to their whether it should or
12 should not. Okay.

13 Now, we go to Number 1. Number 1 is the past. With regard
14 to the past medical damages, the Court

15 The Court -- there's one question -- the Court -- since you all
16 just brought this to me right now and listening to it -- Defense counsel,
17 who did you say disagrees with the million dollars, who are you saying?

18 MR. DOYLE: Both Dr. Hurwitz and Dr. Juell testified about,
19 you know, if surgery had been -- well, Dr. Hurwitz in particular -- that
20 certainly if surgery had been performed on July 9, it would have been
21 essentially the same surgery as Dr. Hamilton performed on the 16th --

22 THE COURT: Well, but that still would've been a surgery
23 necessitated by the alleged injury by your client -- alleged, I'm just
24 saying.

25 MR. DOYLE: Not -- there's two standard of care issues from

1 Dr. Hurwitz and if the jury were to find in favor of Dr. Rives on the first
2 issue, but against him on the second issue, then the medical bills are not
3 100% attributable to the malpractice.

4 THE COURT: And who would be the -- what would be the
5 testimonial evidence if somehow you could reduce that amount?

6 MR. DOYLE: The jury -- the jury would have to disregard the
7 amount because there is no evidence that would allow them to a portion.

8 THE COURT: So you're telling me they'd have to go to zero?
9 And you -- and you're presenting no evidence of a portion -- but you
10 presented no evidence of a portion. That's the challenge this court is
11 having. That's why I keep asking this question. I'm trying to see if
12 you're trying to say that any of your witnesses said that something
13 should be apportioned to reduce. I've looked through my notes. I can't
14 find any such thing. Are you saying that anybody said it should be
15 apportioned and reduced?

16 I understand there's a difference of opinion on the dates of
17 surgery, when different people would do it. I appreciate -- the plaintiff
18 went through each day by day by day, okay, and then at some point, you
19 got some asked and answers, accumulative objections at different times,
20 but are you saying that there's any testimony that any witness at all said
21 that it would be -- the bill could be apportioned? I know the plaintiff's
22 expert said it could not be.

23 I am looking through my notes. I am not seeing anybody
24 who's saying it could be apportioned from a testimonial standpoint. Not
25 a reasonable inference on somehow the jury would have to come up

1 with something if they go for one standard of care, but are you saying
2 that anybody said it could be apportioned out in any manner?

3 MR. DOYLE: There is testimony that some percentage of
4 these expenses may have been incurred anyway, so I think the jury can
5 reasonably infer and evaluate this issue based upon the evidence
6 presented to them and reduce the number if they think it's appropriate.

7 THE COURT: Are you telling me that a specific percentage
8 was said? You said some percentage by -- who's the person and what
9 percentage did they say?

10 MR. DOYLE: Dr. Hurwitz and Dr. Juell, but not by any
11 specific percentage .

12 THE COURT: Well, in the absence of that, and the Court -- in
13 reading all this, they didn't say that the bill itself could be reduced. They
14 had differences in opinion on the days of surgery and whether the
15 standard of care was or was not met, but I don't see -- are you saying as
16 an officer of the Court that they specifically said that the bill would be
17 reduced? That either of them said the bill would be reduced, not that the
18 surgeries would've happened anyway, that the actual bill would be
19 reduced, or some number would be reduced, like X would go down to Y
20 or some percentage, or any --

21 MR. DOYLE: Not X to Y, but the inference from their
22 testimony is the bill would be reduced.

23 THE COURT: So you're saying the arguing inference?

24 MR. DOYLE: Yes.

25 THE COURT: In the absence of any testimony, I can't go for

1 argument inferences when I've asked for any testimony or any evidence
2 any -- anything that would support anything that contradicts that bill
3 amount so that if the Court has to grant first one for one million -- sorry,
4 \$106,306.94, which is what I was told as pass. Is that the correct pass
5 number?

6 MR. JONES: Yes, Your Honor.

7 THE COURT: Okay, does the defense dispute that is the pass
8 number? Whether you agree or disagree what should be the pass
9 number, do you disagree that was the pass number that was presented?

10 MR. DOYLE: Without checking, I can't agree or disagree, but
11 it sounds about right.

12 THE COURT: Okay, so before these things go on a verdict --
13 a modified verdict form, you all will have to check your numbers, okay,
14 because I'm relying on your numbers. That's where we're at.

15 Okay, so that is the Court's ruling. Granted in part and
16 denied in part, as the Court has stated.

17 Defense counsel, what's your Rule 50 Motion?

18 MR. DOYLE: Dr. Hurwitz and the standard of care, while Dr.
19 Hurwitz expressed a number of concerns and personal criticisms about
20 how he would have done things differently; in terms of his standard of
21 care opinions, there were just two. First that Dr. Rives' intraoperative
22 technique was below the standard of care because he used the LigaSure
23 device.

24 Second, that Dr. Rives' postoperative management was
25 below the standard of care because he did not return Ms. Farris to the

1 operating room on July 9 or thereafter. *Banks v. Sunrise* and *Morsicato*
2 *v. Save-On*, and I can provide the cites if necessary, both say that a
3 standard of care opinion has to be expressed through a reasonable
4 degree of medical probability, and Dr. Hurwitz's standard of care
5 opinions -- he offered opinions that Dr. Rives violated the standard of
6 care, but he did not say that those opinions were held to a reasonable
7 degree of medical probability. That's my first point.

8 THE COURT: Okay. Go ahead, please. Next, go ahead.

9 MR. DOYLE: Next point, causation also must be expressed
10 to a reasonable degree of medical probability, and in review of Dr.
11 Hurwitz's testimony concerning Dr. Rives and the use of the LigaSure,
12 which according to Dr. Hurwitz was below the standard of care, there's
13 no testimony whatsoever from Dr. Hurwitz to a reasonable degree of
14 medical probability that the LigaSure caused or contributed to some or
15 any injury, or that if Dr. Rives had not used it with Mrs. Farris to a
16 reasonable degree of medical probability she would not have developed
17 the CIP and foot drop.

18 In other words, the standard of care opinion is using the
19 LigaSure, but there's no testimony whatsoever that the LigaSure caused
20 some injury in general and there's certainly no testimony that the
21 LigaSure caused an injury that then caused or led to the CIP, which then
22 caused or led to the foot drop.

23 The second standard of care opinion is returning Mrs. Farris
24 to the operating room on July 9 or thereafter. There is no testimony at
25 all by Dr. Hurwitz that if there had been surgery on July 9 or thereafter,

1 Mrs. Farris to a reasonable degree of medical probability would not have
2 developed the CIP and foot drop. I mean, as far as we know and based
3 on the stated evidence, she could've had the process already done
4 before July 9, but it's plaintiff's burden to show that surgery on July 9
5 would have obviated or prevented the CIP and the foot drop, and there's
6 none whatsoever.

7 THE COURT: Okay. Chance for the plaintiff?

8 MR. JONES: Yes, Your Honor, very briefly. The -- I think --
9 one of the matters in the Supreme Court say a couple years ago --
10 emblematic, or something like that -- they had some word they used with
11 respect to the wording of to a reasonable degree of medical probability,
12 right? If it is clear that is what the expert is saying, even if they didn't
13 say those exact words, it's still sufficient. Now, in this case, I actually
14 believe Dr. Hurwitz did say those exact words, or he answered in the
15 affirmative when Mr. Leavitt asked him to probability -- medical
16 probability.

17 Now, the restitution of Dr. Hurwitz's opinions are not
18 accurate. Dr. Hurwitz certainly identified the LigaSure as being below
19 the standard of care in approximation to the bowel. Obviously, he was
20 stating it can be very simply inferred that if he says that using the
21 LigaSure in approximation of the bowel is below the standard of care,
22 it's because he believed the LigaSure was used in approximation to the
23 bowel. There's no jump in logic there or in understanding. He clearly
24 had that opinion and expressed it. Dr. Hurwitz also expressed that a
25 third hole was created through the use of the LigaSure. He also talked

1 about the closing of the staples being below the standard of care
2 because the use of the LigaSure had compromised the tissue and made
3 it so that you could not actually have confidence that the tissue would
4 hold, and that was also below the standard of care.

5 Dr. Hurwitz also expressed more widely that the -- that Dr.
6 Rives was below the standard of care with respect to his failure to timely
7 diagnose in this case the fecal peritonitis and the sepsis, in addition to
8 saying that -- that he should have operated by the 9th at the very latest
9 or that was also below the standard of care.

10 Moreover, Your Honor, as the plaintiff is not restricted to
11 identifying standard of care or presenting standard of care from their
12 own expert. They're not so limited. In this case, Dr. Juell provided a
13 number of opinions that clearly indicate standard of care violations and
14 just like to a reasonable degree of medical probability, doesn't have to
15 be stated in those exact magical words, standard of care does not have
16 to be stated the standard of care.

17 In fact, if the doctor says something along the lines of a
18 surgeon must do a certain thing or it's negligent, that certainly means a
19 standard of care has been violated. In this case, Dr. Hurwitz said that
20 about a number of things, one of which -- I'm sorry, not Dr. Hurwitz, Dr.
21 Juell stated that a surgeon must use the safest tool available for the job
22 that he's doing.

23 He agreed with that proposition. He agreed with a number of
24 other standard of care propositions, Your Honor, which I've gone
25 through the video and looked at it, and so Dr. Juell gives us a number of

1 additional bases for which we can demonstrate the standard of care was
2 violated, Your Honor, and I -- I actually believe there are more bases
3 within the case, but certainly there's that.

4 That's all, Your Honor.

5 THE COURT: Okay. Well. Do you know the citation for the
6 recent case where it talked about -- that you referenced, do you?

7 MR. JONES: I'm sorry, I didn't hear.

8 THE COURT: The case with *Banks v. Sunrise* and *Morsicato*
9 *v. Save-On* where it talks about not using, quote, the magic words, you
10 can use -- that's the case I'm looking for. I'm trying to look at the
11 Supreme Court's analysis on that case is what I'm looking for, about
12 when you don't use the specific words or not.

13 MR. DOYLE: I think I know the case that you're speaking
14 about, but it still has to be to a reasonable degree of medical probability.
15 You can use some alternate phrase, but again, I-- I'm just -- that's a dim
16 memory.

17 THE COURT: Like I said, that's why the Court is trying to find
18 -- case off the top of his head.

19 MR. DOYLE: I mean, my issue that the reasonable degree of
20 medical probability standard.

21 THE COURT: Well, are you saying that -- didn't you use the
22 magic words? Are you saying it didn't establish what would be
23 necessary regardless if they used the correct words or not; that's what
24 the Court was trying to understand, because --

25 MR. DOYLE: He used the correct words, standard of care, but

1 he never offered his standard of care opinions to a reasonable degree of
2 medical probability.

3 MR. JONES: Your Honor, one thing I would say -- I mean,
4 obviously I've already stated that I didn't think the magic word was
5 required, but I can -- he said on -- let's see, on the 18th, various
6 testimony, I think it -- oh goodness, sorry, I don't know what time it is.
7 The timestamp is weird here, but he said, Dr. Rives is clearly below the
8 standard of care when he used the LigaSure in -- in a specific way, and
9 so -- I mean, he's not just saying it is below the standard of care, the
10 quote is, he is clearly --

11 THE COURT: But isn't that the word that the Court struck?

12 MR. JONES: No, actually it's not. That was separate.

13 THE COURT: That was the, more than negligent, or
14 something like that, that was later on?

15 MR. JONES: That's correct, Your Honor. Yes.

16 THE COURT: Okay. That's what I remember, you all never
17 brought back to the court. So you never asked for a ruling, that's you
18 all's issue, but we'd be more than glad to make a ruling. You left it out
19 there. The Court made its ruling, but you didn't ever want to finetune in
20 front of the jury, that was you all's issue, so. First you wanted it, never
21 brought it back to the Court's attention what you wanted, so if the Court
22 finds that gets waived, waived with all capital W-A-I-V-E-D. Okay, here it
23 is. Here's what it is. Is that the -- no, that's not what I'm looking for,
24 sorry.

25 Okay, well, since the issue is the defense is not using the

1 words, it's the fact that it's the substance. Of course, I'm going to have
2 to deny the motion because the Court's going to find that it really is up --
3 the standards and how it's been phrased by the experts for those
4 standard of care opinions. While you all dispute in kind of a nuance
5 fashion what truly is the opinion, okay, the aspect of the falling below the
6 standard of care has been presented by the expert enough that it would
7 go back to a jury, it does not meet the Rule 50 standard. So therefore,
8 the Court is going to have to deny the motion on the Rule 50 in that
9 regard.

10 Now, with regard to the second one, on July 9 v the CIP, I
11 didn't really hear plaintiff's counsel that you really addressed that one at
12 all, so are you waiving that one or --

13 MR. JONES: No, no, Your Honor, not at all. Your Honor, I
14 apologize, maybe I misheard. I -- I'm not -- I guess I'm not entirely sure
15 what the argument was.

16 THE COURT: Counsel for defense, do you want to, in 30 or
17 60 seconds articulate your argument for the July 9 issue?

18 MR. DOYLE: Concerning the July 9th issue, there is no
19 testimony at all that if Mrs. Farris had been returned to the operating
20 room on July 9, she would not have gone on to develop CIP and would
21 not have gone on to develop the foot drop.

22 THE COURT: The timing of when the surgery was -- correct
23 you to say -- I understand what you are saying basically is that you are
24 asking for directed verdict, old lingo, correct verdict Rule 50 lingo, is on
25 the issue about whether or not the standard of care was breached on the

1 timing of when the surgery occurred because the injury would've
2 happened regardless, before or after the 9th?

3 MR. DOYLE: We don't know.

4 THE COURT: But is that a standard of care?

5 MR. DOYLE: No, that's proximate cause.

6 THE COURT: So, are you saying, regardless of what your
7 client -- see, I wanted to hear it first out to kind of have an understanding
8 of what each party's position is. So, are you saying that your client --
9 regardless of what your client did, she was going to get a foot drop
10 anyway?

11 MR. DOYLE: In order to get to the issue of damages, the jury
12 has to find a particular aspect of care below the standard of care, and
13 that aspect of care was the proximate cause of the injury and damage.
14 That's the plaintiffs burden of proof, is to set forth in the instructions that
15 the jury would receive. There is testimony that Dr. Rives was below the
16 standard of care on July 9th because he did not take her back to surgery.
17 There is no testimony whatsoever from anyone that if he had taken her
18 back to surgery on July 9, she would not have developed the CIP and not
19 have developed the foot drop.

20 The testimony in this case has been that the CIP was caused
21 by sepsis. The testimony in this case is also that she had sepsis on July
22 4th. I mean, now I'm just speculating to say that -- I'm just speculating to
23 say that how do we know the CIP and the foot drop weren't inevitable
24 before July 9? We had Willie Nelson's daughter testify that she was
25 there at about this same timeframe and the feet were already gone, so

1 that certainly pushes it way early in the case rather than way late in the
2 case. I mean, I'm not saying that's --- that's --

3 THE COURT: She's a lay opinion.

4 MR. DOYLE: It's a lay opinion, but I think it's illustrative of
5 the complete girth of evidence linking the standard of care violation on
6 July 9th to some injury or damage being claimed, and that's the same
7 argument that I had with the LigaSure.

8 THE COURT: I denied it with the LigaSure because there was
9 enough for the jury to go back with regard to the LigaSure.

10 The thing is, you're framing -- the framing your standard of
11 care argument is different than how plaintiff is framing the standard of
12 care arguments, so that's why the Court has to look at it in the totality of
13 is -- does it meet the prompts for a medical malpractice case, not broken
14 down the way --

15 MR. JONES: Absolutely, and that's --

16 THE COURT: I'm saying you don't meet proximate cause.

17 MR. JONES: Absolutely, no I understand -- I understand now
18 what the defense is saying, and again, I mean, it's a strawman position,
19 right? They're saying -- Mr. Doyle is saying that we have the position
20 that July 9th is this critical huge day. No, it's critical and huge because
21 anytime beyond it falls below the standard of care, but Dr. Willer
22 specifically testified very clearly that it was a prolonged sepsis that
23 caused this condition.

24 Now, the prolonged sepsis, how long did it last? Perhaps
25 through like the 16th, right, something along those lines, and then at that

1 point, the sepsis started to go away, at least according to our experts,
2 and so that -- that would've caused it. So the delay, can we say that this
3 is the exact point in time? No, but there is certainly enough evidence
4 that the period of time that Dr. Rives was not providing the appropriate
5 care and gaining source control was the period of time during which the
6 destruction came, and it certainly was all related to the original surgery.

7 Dr. Hurwitz in particular, one of his opinions was that the --
8 that there was negligence in the failure to diagnose the patient with the
9 conditions she actually had, which were fecal peritonitis and sepsis, and
10 this is an ongoing failure by the defendant each and every day from July
11 4th, July 5th, July 6th, July 7th, through the 15th until finally on the 15th,
12 he finally made the correct diagnosis.

13 And so -- yes, Your Honor. It's not framed -- the plaintiff's
14 case is not at all the way the defense is attempting to frame it and so the
15 idea that -- well, I think -- I think the best way to take it is the way that Dr.
16 Hurwitz said it, right? Dr. Hurwitz said it fell below the standard of care --
17 defense fell below the standard -- the defendant fell below the standard
18 of care in his failure to diagnose in the postoperative period, right? And
19 so the failure to diagnose in the postoperative period -- the failure to take
20 her back to surgery in the reasonable postoperative period, is really what
21 his opinion was, and that is definitively, according to Dr. Willer, the
22 reason that we had the CIP.

23 And, when defense counsel said, well is there a certain day
24 by which all other things that -- that he could've taken her back and the
25 limited decision to go back to surgery would not have been below the

1 standard of care and he said yes, the 9th, so he gave him the 9th for that,
2 but that is not a -- as far as the plaintiff is concerned, that's not a
3 particularly critical day. He was below the standard of care each and
4 every day from the 4th through.

5 THE COURT: Truly brief, like 2 or 3 minutes, because you all
6 promised my team, too. You realize --

7 MR. JONES: Yes, Your Honor. I'm finished.

8 THE COURT: No, the defense is going to response, and then
9 the Court will make a ruling.

10 MR. DOYLE: I was very careful in my cross examination of
11 Dr. Hurwitz on Wednesday when he returned with this very issue in
12 mind, and if the Court will recall, I went chronologically.

13 I said, was all of Dr. Rives' care in 2014 within the standard of
14 care? Yes.

15 Was all of his care in the office in 2015 within the standard of
16 care? Yes.

17 Was his care on July 3rd prior to surgery within the standard
18 of care? Yes.

19 Was his care during surgery below the standard of care?
20 Yes.

21 The LigaSure? When chronologically was Dr. Rives next
22 below the standard of care, or words to that effect, and he -- we went to
23 July 9, so there is no standard of care criticism between the 3rd and the
24 9th.

25 THE COURT: Are you saying there's no criticism that

1 anything happened to Tina Farris between July 3rd and July 9th?

2 MR. JONES: I'm not saying nothing happened. I'm saying
3 Dr. Hurwitz had no standard of care criticisms of that time period until
4 you get to July 9th.

5 THE COURT: The Court, after listening to all the argument
6 and how you all have articulated, has to look at really what's the
7 standard under Rule 50 and under Rule 50, the Court has to deny the
8 Rule 50 motion. I mean, even defense's own witness, kind of going from
9 post talk, attributes whether he disagrees -- attributes some of the
10 damages injuries, whether it be 50/50 in one respect, one-thirds, two-
11 thirds, right? We're talking about two aspects of what happened based
12 on what Dr. Rives was involved in the injuries that resulted -- as a result
13 of things that happened -- I'm just going to phrase it in the generic
14 aspect -- of July 2015.

15 I appreciate how the quote standard -- how it's been parsed
16 out in one minute, that's not the way it was set forth by plaintiffs in their
17 argument of how the injuries had happened, and so while Court is
18 hearing what defendant is saying, that characterization of what plaintiff's
19 arguments are for this case is not consistent with the way the plaintiff
20 has phrased it, look at the totality of all the evidence. There is disputed
21 aspects about whether or not Dr. Rives conduct fell below the standard
22 of care and proximally caused the injury to Tina Farris and even your
23 own witnesses, expert witnesses, on how the ultimate actions of what
24 occurred to Tina Farris and that didn't happen beforehand, and doesn't
25 attribute it to her diabetic neuropathy, I'll use those words myself, or

1 how it was used in the testimony, that it was pre and post, and so
2 whether you agree with the defense experts of one-thirds, two-thirds,
3 50/50 or 90%/10%, that still shows that there was injury in July 2015, plus
4 the statements with Dr. Hurwitz does establish his opinions that he felt
5 fell below the standard of care and caused an injury to Ms. Farris, so the
6 Court has denied the Rule 50 Motion on the other basis.

7 I'm denying the Rule 50 Motion in its totality. The Court
8 appreciates how defense has parsed those out, but the Court doesn't
9 necessarily adopt how defense has parsed those out because that's not
10 how the plaintiff has stated their standard of care, and even if -- so it
11 needs to be denied because of the totality of the testimony set forth,
12 including defense's own expert witnesses as saying that the injury was
13 the net result -- that did not occur beforehand. No other explanation.
14 We don't have a Williams alternative causation here. We don't have any
15 of that. So, proximate cause aspect has been at least to a standard of
16 care to go back to a jury under Rule 50 based on the totality of all the
17 evidence. Therefore, they are denied.

18 It is so ordered. I wish you all a very nice relaxing evening.
19 We will see you at 8:20 because the jury is coming in at 8:30. You all
20 have to talk to client and get your verdict form modified consistent with
21 today's rulings. Do not come into this court tomorrow with an, oops, we
22 have to have changes, we have to send it back to people and do things,
23 and make the poor jury wait again. That would not be acceptable; is it
24 clear?

25 MR. DOYLE: Yes, Your Honor.

1 MR. JONES: Yes, Your Honor.

2 THE COURT: That is not appropriate for anyone.

3 With that, we wish you a nice evening as you quickly exit the
4 courtroom so that -- my team, which you all promised would also be out
5 of here at 3:30 because no one said anything about any Rule 50 motions
6 and that really was not fair to the Court or my team. You said everyone
7 would be out of here by 3:30. It's now 4:22. Goodbye, have a nice
8 evening. Thank you.

9 [Proceedings adjourned at 4:42 p.m.]

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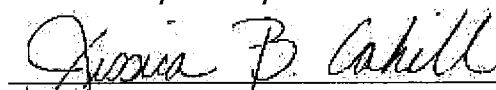
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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TITINA FARRIS, ET AL.,

CASE#: A-16-739464-C

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Plaintiffs,

DEPT. XXXI

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vs.

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BARRY RIVES, M.D.,

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Defendant.

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BEFORE THE HONORABLE JOANNA S. KISHNER

14

DISTRICT COURT JUDGE
FRIDAY, NOVEMBER 1, 2019

15

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 14

16

APPEARANCES:

17

For the Plaintiff:

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

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For the Defendant:

THOMAS J. DOYLE, ESQ.

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RECORDED BY: SANDRA HARRELL, COURT RECORDER

INDEX

Plaintiffs' Closing Argument	45
Defendant's Closing Argument	79
Plaintiffs' Rebuttal Closing Argument	108
Verdict	148

1 Las Vegas, Nevada, Friday, November 1, 2019

2

3 [Case called at 8:30 a.m.]

4 COURT RECORDER: On the record.

5 THE COURT: Okay. On the record outside the presence of
6 the jury. So, counsel, please provide me your agreed upon verdict form.
7 Is it agreed upon by the parties?

8 MR. LEAVITT: It is not agreed upon.

9 THE COURT: How can it not be agreed upon by the parties?
10 You all were supposed to work last night. Okay. So how much time --

11 UNIDENTIFIED SPEAKER: I know you were juggling a lot of
12 work, so.

13 THE COURT: Okay. How much time did the parties spend
14 last night? As officers of the court I'm going to ask each Plaintiff and
15 Defendant in person . This was supposed to be fully resolved before you
16 came into court today. So, counsel for Plaintiffs, how much time did
17 Plaintiffs and Defendants spend last night as specifically directed by this
18 Court before you left?

19 MR. DOYLE: Your Honor, probably 20, 30 minutes. I sent an
20 email of proposed. They said we won't agree to it and --

21 THE COURT: Did they send you a response proposed?

22 MR. LEAVITT: They did not give me a proposed. They gave
23 me -- they said what they wanted removed. And I have one.

24 THE COURT: And so then what was the response after that,
25 was there more communications?

1 MR. LEAVITT: No. We said we won't agree to it.

2 THE COURT: Excuse me. This Court, before you all left,
3 specifically directed you that you must get this resolved. Not go back
4 and send little emails, one little shot. And what time were those emails?

5 MR. LEAVITT: They were last night 6:00 or 6:44, then 9:13,
6 and then I have to look at what the time Tom responded.

7 THE COURT: Okay. So at this juncture, Defense counsel, do
8 you have a proposal in writing on a special verdict form? If you have no
9 alternative, then I'm going to have to take Plaintiff's. You can appreciate
10 that because the specific instruction was you all were supposed to have
11 this resolved so the Court can move forward. You had to have
12 something proposed. We can't just have a jury out there where we don't
13 have a document. Do you have an alternative written proposed special
14 verdict form with you to hand to the Court? Please hand it if you do.

15 MR. DOYLE: I don't have one to add to the Court. I have an
16 objection to the one that --

17 THE COURT: Counsel, counsel, you can't do an objection
18 because you know you have the jury outside. You know you all -- this
19 jury, you told them it was going to be yesterday. In fact, you
20 misrepresented to this Court, both counsel, about your motion practice.
21 This Court told you all that you needed to get it resolved so that we did
22 not have exactly what's happened.

23 There's no way that this Court has anything else to give to a
24 jury. It doesn't matter if you have an objection, you had to have your
25 own proposed alternative because the Court has nothing to look at. The

1 Court has nothing to look at, the Court only has Plaintiff's to look at.

2 If you wish to have something be considered by the Court, as
3 the Court has told you over and over and over again, you need to
4 provide it to the Court. The Court only has one special verdict form. The
5 Court doesn't have anything else. The parties know that the jury's
6 waiting outside. The jury specifically we said to give them the option
7 between 8:30 and 9 to come in. We said specifically that you were not
8 going to do to the jury again what you all have been doing to them for
9 the last three weeks that caused this trial to go way past its deadline.

10 So if you don't have a special verdict form for the Court to
11 consider, then the Court has no choice but to utilize the one that's done
12 by Plaintiffs because you failed to follow a directive of the Court, you
13 failed to provide the Court any alternative for the Court to consider.

14 You were provided the same opportunity as Plaintiff to
15 provide a written special verdict form that took into account yesterday's
16 hearing. You chose not to do so. The Court -- it's past the 8:30 hour.
17 You don't have anything. You acknowledge you don't have anything, so
18 the Court has nothing but Plaintiff's form to consider.

19 You have not provided anything that you have any printed or
20 anything that there's any way that possibly there would be anything
21 that's done. You knew last night that you had a difference of opinion. If
22 you have a difference of opinion, you do the standard protocol; you each
23 provide your alternatives just like you did at the time of the calendar call.
24 It's no different. You each had the same opportunity to provide a
25 proposed form.

1 So, unfortunately, since I have nothing from Defendants, this
2 Court has no choice but to only do the only special verdict form that was
3 provided to this Court because that's the only thing that any party chose
4 to provide to the Court for its consideration. That's going to have to be
5 the Court's ruling. Unfortunately, that's where we are, so.

6 MR. DOYLE: So my objection is to including the amount of
7 the life care plan and then the special question about Erik Volk and
8 assigning a percentage.

9 THE COURT: Okay.

10 MR. DOYLE: And I received it after I had gone to sleep.
11 When I woke up, I responded by email with my objection and I did not
12 hear anything in response from Plaintiff, so I don't believe there has
13 been full consideration and an opportunity to take care of it.

14 THE COURT: Yes, counsel, you had the same opportunity.
15 You both left the courtroom at the same time within a few minutes of
16 each other. You were all both specifically directed that you needed to
17 get those resolved so the Court just would be handed a special verdict
18 form or forms this morning. I was only handed one. You had the same
19 opportunity when you left this courtroom to prepare your own special
20 verdict form if you chose for any to be considered by the Court.

21 It was not Plaintiffs' obligation to submit a verdict form and
22 submit it to you. Each party had their own opportunity to provide a
23 form. Each party had their own opportunity to present said form to the
24 Court. You both were directed when you left here at 4:30 in the
25 afternoon-ish, within a few moments, because it was before the 5:00

1 hour, it was 4:30-ish. We have to go exactly what time because it took a
2 few moments for each of you all to clear up your stuff. That's why the
3 Court's saying 4:30-ish. At 4:30-ish in the afternoon with the specific
4 directive that you had to provide the Court either the agreed upon or
5 special verdict forms.

6 As an experienced litigator you know if you don't provide
7 something to the Court, the Court has nothing to consider. You chose
8 not to provide any form. You could have easily created a form. You
9 have three law firms. You have the Doyle law firm, you have the
10 Mandelbaum Law Firm, and you stated you have the Eisenberg Law
11 Firm, so you have more than enough resources, you have more than
12 enough people, you had a verdict form that you could have utilized off
13 of.

14 You had all those opportunities, given the exact same
15 opportunities as Plaintiff. If Plaintiffs' counsel had not provided this
16 Court a special verdict form, then Plaintiff's counsels would not have
17 something for the Court to look at. Each party was provided the exact
18 same opportunity. One side provided a special verdict form, one side
19 did not. So that is where the Court has to rule. Given the exact same
20 opportunity.

21 There was nothing of one side having an obligation to do it
22 or the other side having the obligation to do it. You both were given the
23 same directive. Even without that directive, if you wanted to submit
24 something on behalf of your clients, you have the affirmative obligation
25 as their attorney to do so. This Court doesn't have to even give you that

1 directive because if you think that there's something that in light of the
2 Court's ruling something should have been changed, you as an
3 experienced litigator know under your rules and your obligations to your
4 clients, rules of professional conduct, et cetera, that you have that
5 independent obligation separate and apart anything from this Court.

6 That if you wish something to be considered by a Court, no
7 matter what Court, a state court, federal court, it doesn't matter what
8 state or federal or any administrative body, you have the affirmative
9 obligation to provide it to said administrative body, court, et cetera. You
10 chose not to prepare such form. That's nothing to do with this Court. It
11 has nothing to do with when Plaintiff gave you something. They
12 prepared something, they provided it to you. If you chose to prepare
13 something and provide it to them, you had the exact same opportunity,
14 the exact same timeframe because you left here within a few moments
15 of each other.

16 You had the exact same resources that you presumably
17 would have with each parties. I mean you have laptops, you have
18 computers, you have computer assistance people, you have multiple law
19 firms at each person's disposal in this case that was the exact same
20 directive. The Court fully finds that everyone had a full opportunity
21 because this is not a situation where one side was directed to do
22 something and failed to provide it to the other. Each side was given the
23 exact same equal opportunity as you left here at the 4:30-ish, maybe it
24 was 4:40, maybe it was 4:45, that's why I'm saying 4:30-ish, okay.

25 When you both left here, if either side wanted this Court to

1 consider a different special verdict form in light of the rulings the Court
2 made, equal opportunity, both sides exact same deadline and the Court
3 even gave the caveat and told you all specifically do not come into court
4 with nothing. If you come into court with nothing, that that was not
5 going to be acceptable. So each side, the exact same, we're here. Each
6 side exact same opportunities.

7 No one's told me that there's been any electrical issues, any
8 other issues. And with the multiple firms that each side has at their
9 resources, the Court can't see how that would be an issue, but no one's
10 even raised that as an issue.

11 So if you went to sleep, I don't know if you went to sleep at
12 4:30 in the afternoon or 4:40 or when you got back to wherever you're at,
13 at the 5-ish hour, but you still had a full opportunity all day, that whole
14 afternoon, or early this morning to prepare something to provide to the
15 Court. That's what the Court's basing it on. There was nothing
16 specifically that Plaintiff was told to do that was any different than
17 Defendant. Each given the same equal opportunity to provide a special
18 verdict form.

19 Defense counsel, on behalf of his clients, chose not to
20 provide the Court with any verdict form, unfortunately, then his clients
21 are going to have to bear that issue. It was Defense counsel's choice
22 with the exact same opportunity given to Plaintiff's counsel. So that's
23 where we're at. I have one special proposed verdict form. A special
24 proposed verdict form on its face has the same questions that was
25 agreed upon by the parties in yesterday's ruling.

1 The Court sees that the distinction in this is that what you all
2 had said is that it has an additional question with regards to three --
3 question three appears to have been modified. Question three has been
4 modified to take into account the Court's ruling. Now, whether past
5 medical related expenses, I told you all to confirm that number that was
6 stated in open court yesterday. Both parties had the exact same
7 opportunity to confirm that past medical number. If somebody chose
8 not to confirm it, that's really Defense counsel -- Plaintiff's counsel has
9 the number and so both of you had the same opportunity to check that
10 number. The number is consistent with what you all stated in open
11 court, which was on the flip chart is what you all represented was on the
12 flip chart. I can't see it exactly from this angle right here.

13 MR. LEAVITT: It is the same, Your Honor.

14 THE COURT: Okay. The present value of the life care plan
15 was specifically stated in court. The Court asked everyone if anyone had
16 a different number or a different issue, they had until today to confirm it
17 was a different number. This is the number that was presented in court.
18 Nobody has stated that there's any different number, so that number
19 would be appropriate to put in that line because nobody's presented this
20 Court that the number is incorrect from a numeric standpoint.

21 So then the Court goes to the idea that the fact that the
22 numbers are there and the fact that this is added a 3C, proceed to
23 question 3D, and the percentage from zero to 30 percent. The zero to 30
24 percent is consistent with Mr. Volk's testimony. In some respects the
25 Court's going to ask a question right then and there because it's not only

1 consistent with his testimony, but the Court's going to have to ask a
2 follow-up question. The follow-up question is going to be his testimony
3 was well, 20 to 30 percent. I see you put zero to 30 percent. The Court
4 needs to have an understanding why you put zero to 30 percent. I have
5 an understanding why you might, but I need to hear it from Plaintiffs.
6 What's your viewpoint as to why you put zero to 30 percent.

7 MR. LEAVITT: Yes, Your Honor, because the jury should
8 have the opportunity to say look, I disagree with them, it's up to 30
9 percent and they can give less than 20, less.

10 THE COURT: And the Court's going to find that that's
11 appropriate because that is consistent with what you all argued and
12 stated the testimony between Doctor Clauretie -- Doctor Clauretie was
13 the initial expert. He would have been quote, for zero percent.

14 MR. LEAVITT: Correct.

15 THE COURT: Then you have Mr. Volk, which the Court gave
16 wide latitude that even though it was not in the reports, no one
17 presented it in the reports because it was discussed in the deposition,
18 and the Court appreciates it was over the objection of Plaintiff. The
19 Court's not going to reiterate its reason. The Court finds that it made an
20 appropriate analysis, gave the breadth and depth to Defendant's benefit
21 with regards to allowing the testimony 20 to 30 percent and it was
22 anywhere between there, so it goes all the way up to the maximum
23 number that Mr. Volk said. And so that number is accurate in
24 accordance with testimony.

25 So the Court doesn't see that there's anything inaccurate or

1 impermissible on the special verdict form, in addition to the fact that the
2 Court has no other special verdict form because Defense counsel, given
3 the exact same opportunity as Plaintiff's counsel, chose not to provide
4 anything to the Court.

5 So then we deal with the other aspect. The other aspect are
6 the potential objections the fact that these numbers are on here. Well,
7 the fact that these numbers are on here, if Defense counsel on behalf of
8 Defendants wanted something different, they had the exact same
9 timeframe. They already had a draft special verdict form because they
10 were required at the time of calendar call back on October 8th, so it was
11 really easy. Each party had it. You each had -- I don't know who
12 provided the edits. Who provided the edits to the special verdict form
13 that was agreed to yesterday in court?

14 MR. LEAVITT: Your Honor, it was Amy. She --

15 THE COURT: Ms. Clark Newberry?

16 MR. LEAVITT: She -- yeah. Thank you, Your Honor. Yeah,
17 Ms. Clark Newberry sent it over. When I put the modifications in, I kept it
18 in Word and that's what I sent over to him. Everything was in Word.

19 THE COURT: Okay. And why the Court just asked that point
20 of clarification is because that means that both sides not only had their
21 own versions that they submitted on October 8th, which would have
22 been very easily to change because remember, the Court, based on the
23 agreement of the parties, these questions and this format, really in
24 essence came from Defendant's proposed special verdict form in the first
25 place. But even absent that, Defendant would have had that full form on

1 their own computer systems since October 8th, but second, since the
2 edits and the changes were done on the computer by -- on Defense
3 counsel's counsel, one of Defendant's counsel, they would have had the
4 same benefit of the same document.

5 And now that Plaintiff's even clarified it was sent over in
6 Word, that if there was any changes to be made, it could have easily
7 have been done, printed out in a different version, and for some reason
8 anybody, wherever they are, there's either business centers, if it's hotels,
9 or there's offices. And with three different law firms on each side, you all
10 have access to multiple and no one's told me that that's an issue that
11 anything was even attempted or created.

12 And so then the Court has to look at all of that and the Court
13 looks at the fact that these numbers are on here. The Court has not been
14 provided with anything other than the fact that now, at 8:30-ish there
15 was an objection raised for the first time in this court and that objection
16 the Court's going to find (a) it has no -- is waived because these are all
17 independent rulings. (a), the objection is waived because of the pure
18 disregard by Defense counsel of the Court's specific directive when
19 Defense counsel was given the exact same timeframe and the exact
20 same opportunities as Plaintiff's counsel to provide a special verdict
21 form and you both had it on your respective computerized systems in a
22 Word format, so it was very, very easy to do edits or changes or do
23 alternative proposals.

24 (B), the Court made it specifically that it was either side could
25 do it if you didn't agree. There's no preclusion, there was no magic that

1 one side had to do it, or the other side had to do it. It was whoever, they
2 had the same exact opportunity.

3 So in light of the fact that Defense counsel chose not to
4 submit something to the Court, the Court would find any said objection
5 is waived because they chose not to provide anything to the Court as any
6 alternative when given the exact same timeframe as Plaintiff's counsel
7 and Plaintiff's counsel did choose to submit something.

8 Then looking at the merits, the Court just gave an analysis.
9 Nobody's saying that the math is wrong, that the numbers are wrong.
10 So A and B, the numbers being correct, they could potentially and
11 properly be on there because the numbers are correct mathematically.
12 No one is contesting that the zero to 30% doesn't accurately reflect the
13 dispute and the testimony between Mr. Volk and Doctor Lauretie. So
14 having a range of zero to 30 percent is accurate based upon the
15 testimony.

16 So then the only issue really comes down to it is the
17 objection potentially is, which the Court doesn't think it should even be
18 considering the objection, but the Court's making independent basis, one
19 it's waived, second independent basis, even taking into account the
20 objection on a separate independent basis, since the Court has got
21 nothing other than I object it shouldn't be in there, there's no basis for I
22 object. It hasn't been in there because it's information that's accurate.
23 There is no alternative form provided by Defense counsel.

24 It is now a quarter of 9. You told this jury 8:30. A pure no
25 excuse to the prejudice of Plaintiff, to the prejudice of the jury, to the

1 prejudice of this entire case by not moving forward when you already
2 know you have okay, the jurors, and you have the representations, okay,
3 to these jurors. There is no reason, there is no good cause to hold up
4 this case. There's [indiscernible] request of the case. There's no good
5 cause for not providing the written document that each party had. We're
6 talking a two pager with maybe five to ten minutes at most of editing
7 changes if anyone wished to provide it.

8 There is no good cause. I appreciate that Defense counsel
9 said he went to sleep. He didn't say he went to sleep from 4:30 in the
10 afternoon-ish when they left here to today at 8:30 in the morning. And
11 with all the other resources and counsel available, the Court can't find
12 that there would be any good cause or reasons presented that they
13 couldn't provide a special verdict form if they wanted the Court to
14 consider something different.

15 So equal obligation to provide special verdict forms one
16 does, one doesn't. The accurate information numerically, as well as
17 based on the testimony of the zero to 30 percent, the fact that it has
18 these numbers in here since the Court has not provided any alternative
19 by Defense counsel after giving the same exact timeframe, the same
20 exact opportunity as Plaintiff, the Court can't find that there's any good
21 cause or any reason not to do -- utilize the only one that has been
22 provided to the Court.

23 In light of that, the Court has to use the special verdict form.
24 It's the only one that's been provided, so unfortunately that's -- excuse
25 me -- delete the word unfortunately. That is going to need to be the

1 Court's ruling and the Court has stated its reasons why and so therefore
2 this is going to be the special verdict form. The Court's given two
3 independent basis. I have looked at the substance and once again. So
4 that's going to be the special verdict form.

5 Okay. So that being the special verdict form, you've already
6 agreed to all the jury instructions which were -- and you had a chance to
7 look at yesterday because you all numbered them yourselves and
8 reviewed them before you handed it to the Court. And so the Court has
9 all the jury instructions. You've already stated that they're all completely
10 settled. You had the special verdict form.

11 At this juncture we have the introduction to the jury
12 instructions that the Court would need to read, the jury instructions, and
13 then you would go straight into your closing arguments. And then the
14 jury would go into deliberations because you all have not presented
15 anything else that this Court -- the Court has confirmed that multiple,
16 multiple times with each of you all.

17 The Court did make its rulings yesterday on the Rule 50
18 motions. The Court understands that it has not signed an order yet on
19 the first Rule 37 motion and that has been because realistically you can
20 appreciate with everything that you all have been providing to the Court,
21 the Court hasn't had even a spare moment with the several hundred
22 other cases, several hundred other cases on its docket, which is really
23 not even that, it's the fact that you all provided such very different
24 proposed orders that you can appreciate the extensive amount of time
25 it's going to take to go back and to look because there are two proposed

1 orders which, by the way, that's even evidence [indiscernible]. Okay.

2 So that brings up a different point as another example of
3 how the parties knew that if they had a difference of opinion, to provide
4 different proposed orders/verdict forms because even in this case, the
5 Rule 37, there was competing orders the same thing, there could have
6 been competing forms, in addition to all the rules allowing it, all the rules
7 requiring it, the specific directive of the Court and the fact that everyone
8 had the full time and equal everything and so actually that's even
9 another reason.

10 So that being said, that's why you don't have it. The Court's
11 going to sign something before we get a final judgment. That's really all
12 you all need because that's what it needs to be taken care of. The Court
13 doesn't see that there's any prejudice for the Court not signing that initial
14 order at this juncture because you all didn't give it to me timely in the
15 first place and you gave me things that have -- I'll phrase it very different
16 views of what was done. And so unfortunately that means it's not going
17 to be able to be -- it needs to be looked at more.

18 So that's the only outstanding thing that this Court sees and
19 so this Court is going to bring in the jury. The question that this Court
20 has is since Ms. Krenshaw was excused by the joint agreement of the
21 parties, would you like the jurors to sit in their regular seats that they sat
22 in and just leave seat number six open, or did you wish the jurors in the
23 front row to move over one seat to the left? In general, it's whatever you
24 all want.

25 Most people, if it's happened in the past, people usually

1 leave the seat open, but that doesn't matter, that's context and the Court
2 has no position whatsoever on that. It's purely you all's case. It's purely
3 what the joint agreement of the parties would be with regards to that,
4 but I just need to know if you want that seat open so the Marshal would
5 know to either have the seat left open or whether or not that seat should
6 have the front row people moved over one to the left. Counsel for
7 Defense, I'm going to ask you first and then I'm going to ask counsel for
8 Plaintiff.

9 MR. DOYLE: The Court's -- or Plaintiff's preference is fine for
10 me.

11 MR. LEAVITT: You Honor, we just as soon leave it open. It's
12 just mentally we have them all in place.

13 THE COURT: Okay. So does that work for Defense counsel?

14 MR. DOYLE: Yes.

15 THE COURT: Okay. So then at this juncture are you ready to
16 bring in the jury?

17 MR. LEAVITT: One point of clarification. Yesterday, on
18 yesterday I went back and watched the video. Doctor Hurwitz --

19 THE COURT: I don't know what video you're referencing.
20 There's a lot of videos, there's been a few weeks of trial.

21 MR. LEAVITT: There are a lot of videos. Thank you, Your
22 Honor.

23 Doctor Hurwitz, and so upon counsel's representation that he
24 didn't testify to a reasonable degree of medical probability, he most
25 certainly did on each one. I went down each of his opinions.

1 THE COURT: Counsel, the Court had already made its ruling.
2 I'm appreciative but you can appreciate we're not going to reopen and
3 have anybody re-educate --

4 MR. LEAVITT: No.

5 THE COURT: -- or redo because the Court already made a
6 ruling. There's nothing pending before the Court in that regard. You all
7 have a difference of opinion. The Court had all of its notes.

8 MR. LEAVITT: Perfect.

9 THE COURT: The Court had the opportunity. The Court
10 made a full well-reasoned decision based on --

11 MR. LEAVITT: Very good.

12 THE COURT: You don't think this Court through the multiple
13 binders, post-it's, everything that you've seen, I don't think anyone is in
14 any way going to doubt that this Court has been able to address each
15 and every point, each and every issue, cite you times and dates and
16 different testimony of different individuals.

17 So you can appreciate I can't have Plaintiff raise additional
18 arguments because the Court already made its ruling, just like it wouldn't
19 be fair to have Defense raise additional arguments. So the Court's going
20 to --

21 MR. LEAVITT: I'm not raising any --

22 THE COURT: I heard what you said, but you understand --
23 bless you -- I cannot take that into consideration because the Court
24 already made a ruling --

25 MR. LEAVITT: It was just a point of clarification.

1 THE COURT: -- so you said what you said, but the Court's
2 ruling was what the Court's ruling was, okay?

3 MR. LEAVITT: Very good. I just wanted to clarify. I went
4 back and verified. Thank you, Your Honor. That's it.

5 THE COURT: For purposes of the Rule 50 motions, the Court
6 already made its ruling and I do appreciate it, so you can appreciate it
7 wouldn't be fair for either side to add additional information, right?

8 MR. LEAVITT: Yes. And it will be done. Thank you, Your
9 Honor.

10 THE COURT: So this Court's not taking that into
11 consideration. The Court had all the information available to it, had the
12 benefit of a lot of different things, articulated its reasonings for granting
13 and not granting consistent with Rule 50. And, as you know, the legal
14 standards you all presented with the rules and the points and authorities
15 and the Court went through the various provisions and gave each side a
16 full opportunity and gave additional time so that the parties could find
17 and ask questions specifically as to testimony of each of the respective
18 witnesses to see before granting a portion of any said motions to see if
19 there was anything that went on point and even asked additional follow-
20 ups, which was way in excess of the quote, brief argument each side
21 said they were going to do.

22 And as you know, the totality of those two motions took
23 approximately an hour yesterday and that was the amount of time that
24 you all wished. The Court did not limit anybody with regards to their
25 arguments or anything they wished to present. And the fact that you all

1 both chose not to do it in any written form, which really was you all's
2 choice. The Court in no way limited it because you even told the Court
3 that either side was planning on doing Rule 50 motions.

4 So to the extent that you chose to do it early was each
5 party's stand choice. No one told you when you could do it, no one said
6 any specific date and time or how it would be done, how each side chose
7 to do it. When they chose to do it was all you all's choice and that's how
8 the Court had the benefit of what it had the benefit of when it made its
9 rulings yesterday.

10 Mr. Jones, what may I assist you with?

11 MR. JONES: Very shortly, just to protect against waiver,
12 Your Honor. I need to just say that Doctor Barry Rives yesterday made
13 representations about photographs during his testimony. I had an
14 opportunity last night to review the interrogatory responses, both the
15 supplemented and the ones back in April, as well as the request for
16 production of document responses, both the supplemented and the ones
17 back in April.

18 THE COURT: Wait, are we talking April or are we talking the
19 12/18 ones?

20 MR. JONES: April from 2017, as well as the ones that were
21 just supplemented in September of this year.

22 THE COURT: Okay.

23 MR. JONES: And in both cases I believe there would be a
24 significant lack of candor with the Court and a lack of candor with
25 Plaintiff in terms of their responses in both.

1 I believed that almost certainly I would be able to bring it up
2 afterwards in a Rule 37 sanctions motion whenever that gets heard
3 afterwards, but.

4 THE COURT: When would you like that heard, counsel? The
5 Court, as you know, the Court specifically put on the OST after
6 consultation with counsel that the Court has been prepared since several
7 weeks ago on that Wednesday at 1 p.m. and keep asking you all because
8 you all, I appreciate you wanted to get your witnesses taken care of, the
9 Court was more than fine with that, but said that you need to give the
10 Court some head's up time when the parties wished to do it.

11 I've asked you at a variety of different intervals. People have
12 said that by agreement of both parties that they wanted witnesses to be
13 taken care of. I asked in Plaintiff's case in chief and Defense's case in
14 chief. So the Court it's fine to do it. The Court can do it while the jury's
15 deliberating if that's what you wish to be done --

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

17 THE COURT: -- or some other time, but the Court needs to
18 have some head's up when, since you're the movants, you need to tell
19 this Court. The same thing, right?

20 MR. JONES: That's fine for us. That's perfect for us.

21 THE COURT: That's not a suggestion, that's just a --

22 MR. JONES: In fact, we request that, Your Honor, if that
23 pleases the Court.

24 THE COURT: Perfectly fine. You're all planning on being
25 here anyway in light of your request with the playback, so okay.

1 MR. JONES: That's all I have.

2 THE COURT: So the Court is not taking that in any manner
3 substantively at this juncture because there's nothing -- counsel for
4 Plaintiff, I need to ask you a question. To this Court's understanding
5 there's nothing pending before the Court.

6 MR. JONES: No, Your Honor, no. In terms of have we filed
7 something new, no, we have not.

8 THE COURT: New or any issue or anything. What this Court
9 understands when you all left here yesterday was --

10 MR. JONES: All issues other than the Rule 37 motion
11 decided, Your Honor.

12 THE COURT: And the Court's own motion with regards to
13 inappropriate conduct, which the Court specifically stated on October 10,
14 i.e., you both had the ability to read the transcript of that day. The Court
15 was going to defer to the end of trial, i.e., to give everybody a full
16 opportunity to come into compliance with the hope, as the Court
17 expressed at that time, that all of the written documents, the Court had
18 already done all of the analysis, the Court had already done all the
19 requests, orders, okay? Orders, everything that the Court had done
20 verbally, all the printed rules that the Court had provided, et cetera,
21 would somehow have compliance by counsel and hopefully not have to
22 have -- but as the Court has what the Court has and so the Court will
23 having to address that, as well.

24 So those are the two outstanding, but those in no matter
25 would affect the closing arguments and the jury instructions and

1 allowing the jury to go back to deliberations. Is that correct from
2 Plaintiff's viewpoint?

3 MR. JONES: Yes, Your Honor.

4 THE COURT: Is that correct from Defense viewpoint?

5 MR. DOYLE: Yes, Your Honor.

6 THE COURT: Okay. That's why I'm asking. I'm doing the
7 timing here to see when you all want these. If you want me to stop right
8 now and have the jury wait and do those two motions now, the Court
9 will be glad to do that if that's what the parties are requesting. Is
10 Plaintiff's counsel requesting that?

11 MR. JONES: No, Your Honor.

12 THE COURT: Is Defense counsel requesting that?

13 MR. DOYLE: No.

14 THE COURT: Okay. Like I said, the Court's prepared and
15 ready to do it whenever you all want, so at this juncture does anyone
16 need any tech checks or anything or are we just bringing the jury in?

17 MR. JONES: Bringing the jury in, Your Honor.

18 THE COURT: Counsel for Defense, do you need anything for
19 tech checks or anything or just bring the jury in?

20 MR. DOYLE: Bring the jury in.

21 THE COURT: Okay. So as you can appreciate, does either of
22 you want the Court to explain in any manner why there's one missing
23 juror or do you just want the Court to start with the introductions with
24 regard to jury instructions?

25 MR. DOYLE: Start with introductions.

1 MR. JONES: That meets our needs, Your Honor.

2 THE COURT: Okay. So then, Marshal, can you please bring
3 our jury in? Thank you so very much.

4 And you each have your own copy presumably of the jury
5 instructions, which are jury instructions one through 45, which were
6 handed to the Court yesterday after being numbered by counsel and you
7 both reviewing them; is that correct?

8 MR. DOYLE: Yes.

9 MR. JONES: Yes, Your Honor.

10 THE COURT: Okay. Generally if there's like a little typo like a
11 redundant word like sometimes the word "is" is there twice or that's an
12 example, do you all preference that you want me to read the word if it's
13 like doubled or would you like the Court to read it in its proper way?

14 MR. JONES: Read it in the proper way, Your Honor, omitting
15 errors that we may have made in the creation of the jury instructions.

16 THE COURT: If that's the request, then bring it to you all's
17 attention afterwards. Is that the request of Defense counsel, as well?

18 MR. DOYLE: That's fine, yes.

19 THE COURT: Like hypothetically say if you all had left Patrick
20 Farris is a female, if you had wanted the Court to have changed it to
21 male, that's what I'm --

22 MR. JONES: Yes, Your Honor.

23 THE COURT: Sometimes those type of things --

24 MR. JONES: That would be our preference.

25 THE COURT: -- stay in. So if the Court does, the Court puts a

1 post-it by it and then tells you all or if there's something that's more
2 substantive, I would bring you to bench. Thank you so much.

3 Marshal, thank you so much.

4 THE MARSHAL: All rise for the jury.

5 [Jury in at 9:01 a.m.]

6 [Within the presence of the jury]

7 THE MARSHAL: All jurors are accounted for. Please be
8 seated.

9 THE COURT: Okay. Welcome back, Ladies and Gentlemen. I
10 hope everyone had a very nice and relaxing Nevada day, Halloween full
11 of nice -- lots of little trick or treaters and everything.

12 So at this juncture, Ladies and Gentlemen, welcome back.
13 We do appreciate it.

14 So as you know when you left yesterday, we had Defense
15 had rested their case in chief. The Court had then asked Plaintiff's
16 counsel. Plaintiff's counsel said that they did not have a rebuttal case in
17 chief. So as you know, the next stage in the process is that the Court will
18 be reading the jury instructions, okay?

19 So Ladies and Gentlemen of the jury, I'm about to instruct
20 you on the law as it applies to this case. I would like to instruct your
21 orally without reading to you, however these instructions are of such
22 importance it is necessary for me to read to you these carefully prepared
23 written instructions. A copy of the instructions will be provided to you in
24 the deliberation room. The instructions are long, and some are quite
25 complicated. If they are not especially clear when read, please keep in

1 mind that they will be with you back in the jury room. You will be able to
2 read these carefully prepared instructions that you can consider them
3 carefully.

4 Ladies and Gentlemen, what I do is I read the instruction
5 number and then each of these instructions. And appreciate I might
6 need to pause every once in a while for a sip of water, so just one
7 moment, please. I appreciate it.

8 Instruction 1. Members of the jury, it is my duty as Judge to
9 instruct you on the law that applies to this case. It is your duty as jurors
10 to follow these instructions and to apply the rules of law to the facts as
11 you find them from the evidence.

12 You must not be concerned of the wisdom of any rule of law
13 stated in these instructions. Regardless of any opinion you may have as
14 to what the law ought to be, it would be a violation of your oath to base
15 a verdict upon any other view of the law than that given in the
16 instructions of the Court.

17 2. The masculine form as used in these instructions, if
18 applicable, as shown by the text of the instruction and the evidence
19 applies to the female person or a corporation.

20 3. Excuse me. If, in these instructions any rule, direction, or
21 idea is repeated or stated in different ways, no emphasis thereon is
22 intended by me and none may be inferred by you. (Bless you.) For that
23 reason you are not to single out any certain sentence or any individual
24 point or instruction and ignore the others; but you are to consider all of
25 the instructions as a whole and regard each in light of all the others. The

1 order in which the instructions are given has no significance as to their
2 relative importance.

3 4. One of the parties in this case is a corporation. A
4 corporation's entitled to the same fair and unprejudiced treatment as an
5 individual would be under like circumstances. And you should decide
6 the case with the same impartiality you would use in deciding a case
7 between individuals.

8 5. If, during this trial I have said or done anything which has
9 suggested to you that I am inclined to favor the claims or position of any
10 party, you will not be influenced by any such suggestion. I have not
11 expressed nor intended to express, nor have I intended to intimate any
12 opinion as to which witnesses are or are not worthy of belief, what facts
13 are or are not established, or what inference should be drawn from the
14 evidence. If any expression of mine has seemed to indicate an opinion
15 relating to any of these matters, I instruct you to disregard it.

16 6. You are admonished that no juror shall declare to a fellow
17 juror any fact relating to this case as of his or her own knowledge and if
18 any juror discovers during the trial after the jury has retired that he, she,
19 or any other juror has personal knowledge of any fact and controversy in
20 this case, he or she shall disclose the situation to me in the absence of
21 the other jurors. This means that if you learn during the course of the
22 trial that you are acquainted with the facts of the case or the witnesses
23 and you have not previously told me of this relationship, you must then
24 declare that fact to me. You communicate to the Court through the
25 bailiff/marshal.

1 During the course of the trial the attorneys for both side and
2 court personnel, other than the bailiff/marshal are not permitted to
3 converse with members of the jury. These individuals are not being
4 antisocial. They are bound by ethics and the law not to talk to you. To
5 do so might contaminate your verdict.

6 You are admonished additionally that you are not to visit the
7 scene of any acts -- excuse me -- any of the acts or occurrences made
8 mention of during this trial unless specifically directed to do so by the
9 Court. Do not undertake any investigation of the case on your own or
10 endeavor to research legal or factual issues on your own.

11 7. Again, let me remind you that until this case is submitted
12 to you,

13 1) do not talk to each other or anyone else about it or anyone
14 who has anything to do with it until the end of the case when you go to
15 the jury room -- bless you -- to decide on your verdict.

16 2) quote, anyone else, end quote, includes members of your
17 family and your friends. You may tell them that you are a juror in a civil
18 case, but don't tell them anyone else about it until after you've been
19 discharged as jurors by me.

20 Do not let anyone talk to you about the case or anyone that
21 has anything to do with it. If someone should try to talk to you, please
22 report it to me immediately by contacting the bailiff/marshal.

23 4) do not read any news stories or articles or listen to any
24 radio or television reports about the case or about anyone who has
25 anything to do with it. This includes anything about the care -- case

1 posted on the internet in any form.

2 5) do not read or post anything about this case on social
3 media.

4 Instruction 8. In determining whether any proposition has
5 been proved, you should consider all of the evidence bearing on the
6 question without regard to which party produced it.

7 9. The evidence which you are to consider in this case
8 consists of the testimony of the witnesses, the exhibits, and any facts
9 admitted or agreed to by counsel.

10 There are two types of evidence, direct and circumstantial.
11 Direct evidence is direct proof of a fact, such as testimony by a witness
12 about what the witness personally saw or heard or did.

13 Circumstantial evidence is the proof of one or more facts
14 from which you could find another fact.

15 The law makes no distinction between the weight to be given
16 either direct or circumstantial evidence. Therefore, all of the evidence in
17 the case, including the circumstantial evidence, should be considered by
18 you in arriving at your verdict.

19 Statements, arguments, and opinions of counsel are not
20 evidence in the case; however, if the attorneys stipulate (meaning to
21 agree) as to the existence of a fact, you must accept the stipulation of
22 evidence and regard that fact as proved.

23 Questions are not evidence. Only the answers are evidence.
24 You should not consider -- excuse me -- you should consider a question
25 only if it helps you understand the witness' answer. Do not assume that

1 something is true just because a question suggests that it is.

2 You must also disregard any evidence to which an objection
3 was sustained by the Court and any evidence ordered stricken by the
4 Court. Anything you may have seen or heard outside the courtroom is
5 not evidence and must also be disregarded.

6 If the Court has instructed you that you must accept a fact as
7 proven or draw a particular inference, you must do so. If the Court has
8 instructed you regarding a presumption regarding evidence, then you
9 must consider that presumption, as well.

10 10. Certain evidence was admitted for a limited purpose. At
11 this time this evidence was admitted it was explained to you that it could
12 not be considered by you for any other -- excuse me -- for any purpose
13 other than the limited purpose for which it was admitted. You may only
14 consider that evidence for the limited purpose that I described and not
15 for any other purpose.

16 11. Although you are to consider only the evidence in the
17 case in reaching a verdict, you must bring to the consideration the
18 evidence, your everyday common sense and judgment as reasonable
19 men and women. Thus, you are not limited solely to what you see and
20 hear as witnesses testify. You may draw reasonable inferences from the
21 evidence which you feel are justified in the light of common experience,
22 keeping in mind that such inferences should not be based on speculation
23 or guess.

24 A verdict may never be influenced by sympathy, prejudice, or
25 public opinion. Your decision should be the product of sincere judgment

1 and sound discretion in accordance with these rules of law.

2 12. You must decide all questions of fact in this case from
3 the evidence received in the trial and not from any other source. You
4 must not make any independent investigation of the facts or law or
5 consider or discuss facts to which there is no evidence. This means, for
6 example, you must not on your own visit the scene, conduct
7 experiments, or consult reference works for additional information.

8 13. The credibility or believability of a witness should be
9 determined by his or her manner upon the stand, his or her relationship
10 to the parties, his or her fears, motives, interests, or feelings, his or her
11 opportunity to observe the matter to which he or she testified, the
12 reasonableness of his or her statements, and the strength or weakness of
13 his or her recollection.

14 If you believe the witness has lied about any material facts in
15 the case, you may disregard the entire testimony of that witness or any
16 portion of this testimony which is not proved by other evidence.

17 14. During the trial you received deposition testimony that
18 was read from the deposition transcript. A deposition is the testimony of
19 a person taken before trial. At a deposition the person took the same
20 oath to tell the truth that would have been taken in court and is
21 questioned by the attorneys. You must consider the deposition
22 testimony that was presented to you in the same way as you consider
23 testimony given in court.

24 15. The lawyers and/or witnesses have shown you charts
25 and summaries to help explain the facts. The charts or summaries

1 themselves, however, are not evidence or proof of any facts. Charts and
2 summaries are only as good as the underlying evidence that supports
3 them. You should therefore give them only such weight as you think the
4 underlying evidence deserves.

5 16. The Court has given you instructions embodying various
6 rules of law to help guide you to a just and lawful verdict. Whether some
7 of these instructions will apply will depend upon what you find to be the
8 facts. The fact that I've instructed you on various subjects in this case,
9 including that of damages, must not be taken as indicating an opinion of
10 the Court as to what you should find to be the facts or as to which parties
11 entitled to your verdict.

12 17. An attorney has a right to interview a witness for the
13 purpose of learning what testimony the witness will give. The fact that
14 the witness has talked to an attorney and told that attorney what he or
15 she would testify to does not reflect adversely on the truth of the
16 testimony of the witness.

17 18. Discrepancies in a witness' testimony between his
18 testimony and that of others, if there were any discrepancies, do not
19 necessarily mean that the witness should be discredited. Failure of
20 recollection is a common experience. An innocent misrecollection is not
21 uncommon. It is a fact, also, that two persons witnessing an incident or
22 transaction often will see or hear it differently. Whether a discrepancy
23 pertains to a fact of importance or only to a trivial detail should be
24 considered in weighing its significance.

25 19. Witnesses who have special knowledge, skill, experience,

1 training, or education in a particular subject have testified to certain
2 opinions. This type of witness is referred to as an expert witness.

3 In determining what weight to give any opinions expressed
4 by an expert witness, you should consider the qualifications and
5 believability of the witness, the facts and materials upon which each
6 opinion is based and the reason for each opinion. An opinion is only as
7 good as the facts and reasons on which it is based.

8 If you find that any such fact has not been proved or has
9 been disproved, you must consider that in determining the value of the
10 opinion. Likewise, you must consider the strengths and weaknesses of
11 the reason on which it is based.

12 You must resolve any conflict in the testimony of the
13 witnesses, weighing each of the opinions expressed against the others,
14 taking into consideration the reasons given for the opinion, the facts
15 relied upon by the witness, his or her relative credibility, and his or her
16 special knowledge, skill, experience, training, and education.

17 20. A hypothetical question has been asked of an expert
18 witness. In a hypothetical question the expert witness is told to assume
19 the truth of certain facts and the expert witness is asked to give an
20 opinion based upon those assumed facts.

21 You must decide if all of the facts assumed in a hypothetical
22 question have been established by the evidence. You can determine the
23 effect of that assumption upon the value of the opinion.

24 21. Whenever in these instructions I state that the burden or
25 the burden of proof rests upon a certain party to prove a certain

1 allegation made by him, the meaning of such an instruction is this: That
2 unless the truth of the allegation is proved by a preponderance of the
3 evidence, you shall find the same to be not true.

4 The term "preponderance of the evidence" means such
5 evidence as, when weighed with that opposed to it has more convincing
6 force and from which it appears the greater probability of truth lies
7 therein.

8 22. The preponderance or weight of evidence is not
9 necessary -- excuse me -- necessarily with the greater number of
10 witnesses. The testimony of one witness worth of belief is sufficient for
11 the proof of any fact and would justify a verdict in accordance with such
12 testimony even if a number of witnesses have testified to the contrary.

13 If, from the whole case, considering the credibility of
14 witnesses, and after weighing the various factors of evidence, you
15 believe that there is a balance of probability pointing to the accuracy and
16 honesty of the one witness, you should accept his testimony.

17 23. Plaintiffs are seeking damages based on a claim of
18 medical malpractice. Plaintiffs have the burden of proving by a
19 preponderance of the evidence all of the facts necessary to establish.

20 24. 1) the accepted standard of medical care.

21 2) that Defendant, Doctor Barry Rives' care departed from the
22 standard.

23 3) that Defendant, Doctor Barry Rives' care was the
24 proximate cause of the injury.

25 4) that Plaintiff sustained injury as a result of Doctor Barry

1 Rives' care.

2 25. A proximate cause of injury, damage, loss, or harm is a
3 cause which, in natural and continuous sequence, produces the injury,
4 damage, loss or harm and without which the injury, damage, loss, or
5 harm would not have occurred.

6 26. "Medical malpractice" means the failure of a physician in
7 rendering services to use the care, skill, or knowledge ordinarily used
8 under similar circumstances. It is the duty of a physician who holds
9 himself out as a specialist in a particular field of medical, surgical, or
10 other healing science, to have the knowledge and skill ordinarily
11 possessed and to use the care and skill ordinarily used by reasonably
12 competent specialists practicing in the same field. A failure to perform
13 such duty is negligence.

14 27. You must determine the standard of professional
15 learning, skill, and care required of the Defendant, Doctor Barry Rives,
16 only from the opinions of the doctors who have testified as expert
17 witnesses as to such standard. You should consider each such opinion
18 and should weigh the qualifications of the witness and the reasons given
19 for his opinion. Give each such opinion the weight to which you deem is
20 entitled.

21 You must resolve any conflict in the testimony of the
22 witnesses, weighing each of the opinions expressed against the others,
23 taking into consideration the reasons given for the opinion, the facts
24 relied upon by the witness, his relative credibility and his special
25 knowledge, skill, experience, training, and education.

1 28. Liability for personal injury or death is not imposed upon
2 any physician based on alleged negligence in the performance of that
3 care unless evidence consisting of expert medical testimony is presented
4 to demonstrate the alleged deviation from the accepted standard of care
5 in the specific circumstances of this case.

6 29. In this case you've heard medical experts express
7 opinion as to the standard of professional learning, skill, and care
8 required of the Defendant. To evaluate each such opinion, you should
9 consider the qualifications and credibility of the witness and the reasons
10 given for his opinion. Give each such opinion the weight to which you
11 deem it entitled.

12 You must resolve any conflict in the testimony of the witness
13 by weighing each of the opinions expressed against the others, taking
14 into consideration the reasons given for the opinion, the facts relied
15 upon by the witness, his relative credibility and his special knowledge,
16 skill, experience, training, and education.

17 30. The standard of skill and care required of a physician
18 should be determined not by reference to a specific geographical area,
19 but by reference to the practice within the field of practice nationally.

20 31. Proximate cause must be proven to a reasonable degree
21 of medical probability based upon competent expert testimony.

22 32. Members of the jury, Doctor Barry Rives was sued for
23 medical malpractice in this case. Sorry. Let me restate that. Let me
24 repeat number 32. My apologies.

25 Members of the jury, Doctor Barry Rives was sued for

1 medical malpractice in case Vickie Center v. Barry James Rives, M.D., et
2 al. Doctor Barry Rives was asked about the Vickie Center case under
3 oath and he did not disclose the case in his interrogatories or his
4 deposition.

5 You may infer that that failure to timely disclose evidence of
6 a prior medical malpractice lawsuit against Doctor Barry Rives is
7 unfavorable to him. You may infer that that evidence of the other
8 medical malpractice lawsuit would be averse to him in this lawsuit had
9 he disclosed it. This instruction is given pursuant to a prior Court ruling.

10 33. Before trial each party has the right to ask the other
11 parties to answer written questions. These questions are interrogatories.
12 The answers to the interrogatories are also in writing and are sworn
13 under oath. You must consider the question and answers that were read
14 to you the same as if the questions and answers had been given in court.

15 34. In determining the amount of losses, if any, suffered by
16 the Plaintiff, Titina Farris -- bless you -- as a proximate result of the
17 incident in question, you will take into consideration the nature, extent,
18 and duration of the damage you believe from the evidence Plaintiff,
19 Titina Farris, has sustained and you will decide upon a sum of money
20 sufficient to reasonably and fairly compensate Plaintiff, Titina Farris, for
21 the following items:

22 1) the reasonable medical expenses Plaintiff, Titina Farris,
23 has necessarily incurred as a result of the incident and the medical
24 expenses which you believe Plaintiff, Titina Farris, will reasonably certain
25 to incur in the future as a result of the incident.

1 2) the physical and mental pain, suffering, anguish, disability,
2 and loss of enjoyment of life endured by Plaintiff, Titina Farris, from the
3 date of the incident to the present, and

4 3) the physical and mental pain, suffering, anguish, disability,
5 and loss of enjoyment of life which you believe Plaintiff, Titina Farris, will
6 be reasonably certain to experience in the future as a result of the
7 incident.

8 35. Patrick Farris claims that he has been harmed by the
9 injury to his wife. If you decide that Titina Farris has proven her claims
10 against Barry Rives, M.D., you must also decide how much money, if
11 any, will reasonably compensate Patrick Farris for loss of his wife's
12 companionship and services, including

13 1) the loss of companionship, society, comfort, and
14 consortium endured by Plaintiff, Patrick Farris, from the date of the
15 incident to the present and

16 2) the loss of companionship, society, comfort, and
17 consortium you believe that Plaintiff, Patrick Sarraf -- sorry -- Patrick
18 Farris is reasonably certain to experience in the future as a result of the
19 incident.

20 36. You are not to discuss or even to consider whether or
21 not the Plaintiff was carrying insurance to cover medical bills or any
22 other damage she claims to have sustained. You are not to discuss or
23 even consider whether or not the Defendant was carrying insurance that
24 would reimburse him for whatever sum of money he may be called upon
25 to pay to the Plaintiff. Whether or not either party was insured is

1 immaterial and should make no difference in any verdict you may render
2 in this case.

3 37. A person who has a condition or disability at the time of
4 an injury is not entitled to recover damages; therefore, however, she's
5 entitled to recover damages for any aggravation of such pre-existing
6 condition or disability approximately resulting from the injury. This is
7 true even if a person's condition or disability made her more susceptible
8 to the possibility of ill effects than a normally healthy person would have
9 been and even if a normally healthy person probably would have not
10 suffered any substantial injury where a pre-existing condition or
11 disability is so aggravated that damages as to such condition or
12 disability are limited to the additional injury caused by the aggravation.

13 38. If you decide Titina Farris has suffered damages that will
14 continue for the rest of her life, you must determine how long she will
15 probably live. According to the U.S. Department of Health and Human
16 Services standard mortality tables, a 57-year-old female is expected to
17 live another 26 years.

18 If you decide Patrick Farris has suffered damages that will
19 continue for the rest of his life, you must determine how long he will
20 probably live. According to the U.S. Department of Health and Human
21 Services standard mortality tables for a 53-year-old male is expected to
22 live another 27 years.

23 This fact should be considered by you in arriving at the
24 amount of damages if you find that the Plaintiff is entitled to a verdict.
25 This is an average life expectancy. Some people live longer, and others

1 die sooner. This published information is evidence of how long a person
2 is likely to live, but is not conclusive.

3 In deciding a person's life expectancy, you should also
4 consider evidence in this case related to that person's health, habits,
5 activities, and lifestyle.

6 39. Whether any of these elements of damage have been
7 proven by the evidence is for you to determine. Neither sympathy nor
8 speculation is a proper basis for determining damages; however,
9 absolute certainty as to damages is not required. It is only required that
10 Plaintiff prove each item of damage by a preponderance of the evidence.

11 40. No definite standard or method of calculation is
12 prescribed by law by which to fix reasonable compensation for grief or
13 sorrow or pain and suffering. Nor is the opinion of any witness required
14 as to the amount of such reasonable compensation. Furthermore, the
15 argument of counsel as to the amount of damages is not evidence of
16 reasonable compensation. In making an award for grief or sorrow and
17 pain and suffering, you shall exercise your authority with calm and
18 reasonable judgment of the damages you affix shall be just and
19 reasonable in light of the evidence.

20 41. It is your duty as jurors to consult with one another and
21 to deliberate with a view towards reaching an agreement if you can do
22 so without violence to your own -- excuse me -- to your individual
23 judgment. Each of you must decide the case for yourself, but should do
24 so only after consideration of the case with your fellow jurors. And you
25 should not hesitate to change an opinion when convinced that it is

1 erroneous.

2 However, you should not be influenced to vote in any way on
3 any question submitted to you by the single fact that a majority of the
4 jurors or any of them gave such a decision. In other words, you should
5 not surrender your honest convictions concerning the effect or weight of
6 evidence for the mere purpose of returning a verdict or solely because of
7 the opinion of the other jurors. Whatever your verdict is, it must be the
8 careful and impartial consideration of all the evidence in the case under
9 the rules of law as given you by the Court.

10 42. When you retire to consider your verdict, you must select
11 one of your number to act as a foreperson, who will preside over your
12 deliberations and who will be your spokesman here in court. During
13 your deliberations you will have all the exhibits which were admitted
14 into evidence, these written instructions and forms of verdict, which
15 have been prepared for your convenience.

16 In civil actions three-fourths of the total number of jurors
17 may find and return a verdict. This is a civil action. As soon as six or
18 more of you have agreed upon a verdict, you shall have it signed and
19 dated by your foreperson and then return with it to this room.

20 43. If during your deliberation you should desire to be fully --
21 excuse me -- further informed on any point of law or hear again portions
22 of the testimony, you must reduce your request to writing signed by the
23 foreperson. The officer will then return you to court where the
24 information sought will be given to you in the presence of the parties or
25 their attorneys.

1 Playbacks of testimony are time consuming and not
2 encouraged unless you deem it a necessity. Should you require a
3 playback, you must carefully describe the testimony to be played back so
4 that the Court Recorder can arrange their notes. Remember, the Court is
5 not at liberty to supplement the evidence.

6 44. We also permit jurors to ask questions of witnesses.
7 However, asking questions is the primary responsibility of the attorneys,
8 not the jurors. The procedure for a juror to ask a question is somewhat
9 complicated, has a tendency to prolong the trial. Any question the juror
10 asks must be factual in nature and designed to clarify information
11 already presented. You will not be permitted to become "***9:26:25a
12 attorney" or advocate a position and I have discretion to preclude you
13 from asking an excessive number of questions.

14 If you feel that you must ask a question of a witness, you
15 must write out the question on a piece of paper and do so while the
16 witness is present. Raise your hand before the witness leaves the
17 courtroom and give the question to the marshal/bailiff. I will then halt
18 the trial, review the question with the attorneys and if the question is
19 appropriate, ask questions on your behalf. The attorneys will then be
20 permitted to ask all questions on that subject.

21 Do not feel disappointed if your question is not asked. Your
22 question may not be asked for a variety of reasons. For example, the
23 question may call for an answer that's not allowed for legal reasons.
24 Also, you should not try to guess the reason why a question is not asked
25 or speculate about what the answer might have been because the

1 decision whether to allow the question is mine alone. Do not hold it
2 against the -- any of the attorneys or the clients if your question is not
3 asked. I caution you not to place undue weight on the responses to your
4 questions as opposed to other evidence in this case.

5 45. Now you will listen to the arguments of counsel, who
6 will endeavor to aid you to reach a proper verdict by refreshing in your
7 minds the evidence and by showing the application thereof to the law.
8 But whatever counsel may say, you will bear in mind that it is your duty
9 to be governed in your deliberations by the evidence as you understand
10 it and remember it to be and by the law as given to you in these
11 instructions and return a verdict which, according to your reason and
12 candid judgment, is just and proper.

13 Dated this 1st day of November, given District Court Judge
14 Joanna S. Kishner.

15 Ladies and Gentlemen, the Court has now read the jury
16 instructions. Now it would be time to move into Plaintiff's closing
17 argument.

18 Plaintiff's counsel, do we have all the screens on, is
19 everything turned on so that it can be switched over and utilized for
20 Plaintiff's closing arguments? Just one second. It takes just a second to
21 kind of get the tech going, so just one second, please.

22 Okay, all set. So, counsel, if you're ready and the pocket
23 microphones all set, feel free to commence with your closing argument.
24 Thank you so much.

25 PLAINTIFF'S CLOSING ARGUMENT

1 MR. JONES: Can everyone hear me okay?

2 GROUP RESPONSE: Yes.

3 MR. JONES: All right. We, the people. The founders that
4 came up with the concept of the country that we live in now, they
5 weren't perfect by any means, but they wanted something better,
6 something better than had ever existed. And so they formed the
7 Constitution. And there were ten rights that they wanted added because
8 they were of such importance they were necessary for our country to
9 work the right way.

10 And the seventh among those rights, the Seventh
11 Amendment, is the right to a jury trial in case like this. Number seven on
12 their list of the things that they were concerned about. And as jurors,
13 you have a role that is sacred. You took an oath. We talked about it in
14 voir dire. And you have this incredible role, this oath that you have
15 taken. And because of the role that you fill, we stand for you. And think
16 about that. We stand for the President, right, when he comes? We stand
17 for the Judge, right? And we stand for the jury.

18 And the founders of our country when they started all of this,
19 they didn't want any more cases decided by some magistrate, by some
20 king, not even by a judge. It was to be decided by the people within the
21 community where you live, and they say what's right and what's wrong.

22 Lawyers and soldiers take an oath to defend the Constitution
23 of the United States. As lawyers we take that oath. As soldiers, some of
24 the people take that oath. As jurors you take an oath to judge fairly, to
25 weigh things and to do the right thing.

1 When we take an oath to tell the truth on the stand, that is
2 also a sacred oath. And our entire system of government functions with
3 an understanding that when we take oaths, we tell the truth. When we
4 take oaths, we tell the truth. And behavior that doesn't comport with
5 that cannot be tolerated.

6 Now, I know we've been through this process for a long time,
7 right? It's been a few weeks. And I want you to imagine for a moment
8 as if you didn't know everything that you know about this case. If we
9 bumped into each other on the street and I told you, I said to you, yeah, a
10 woman in her early 50's went into the hospital for a simple hernia
11 procedure and she walked in, everything was fine. And then when she
12 left, it was six weeks later and was in a wheelchair because her feet and
13 her lower legs and their function was totally destroyed. You'd probably
14 say something to me like what went wrong?

15 And if I told you, well, the surgeon, he used an instrument in
16 a way that was really dangerous, close to an area that he wasn't
17 supposed to use it, where they say it's contraindicated, and that in his
18 follow-up, in the post-surgical period, he on diagnosing the wrong thing,
19 kept on saying it was something else. You'd probably respond, and
20 you'd probably know immediately yeah, that's wrong, something bad
21 just happened. And your instinct would be exactly right.

22 Now, I know, of course, what I just said is a simplification,
23 right, of what happened? No question. But it's not far off. It's not far
24 off. In fact, as we dug into this case, it's probably much worse than that.
25 As you really get into it and start looking at what really happened here,

1 everything I just said was right, but it's probably much worse than that.

2 Now, this story of this case can be broken down into these
3 three simple points: Titina went in for a simple hernia repair surgery.
4 Doctor Rives botched both the surgery and the post-surgical care.
5 Doctor Rives denies all responsibility for what he did to Titina. In fact, as
6 you heard him here, four and a half years later what if, doctor, you had
7 someone else come in with all of the same symptoms, what would you
8 do? I'd do everything the same. I wouldn't do a bowel prep; I'd use the
9 ligature again the same way I did. I would do every single thing the
10 same, but I'd hope for a different result.

11 So this is a simple case, but the Judge has given me a little
12 bit of time and I want to use it the best way I can for my client, okay?
13 And I'm not going to belabor it, but I do want to go through some things
14 because it's been three weeks and I'm going to show you some video
15 clips not of the recent last few days. I'm sure that you guys, that's very
16 fresh in your memory, but to remind you about some of the things we
17 might have seen earlier on so that it's not forgotten.

18 Now, as attorneys, one thing that we are notoriously bad at
19 is focusing on the big picture like we were just talking about, right, the
20 simple reality of really what this case is about. And then we got into
21 these little fights about little small things that are much less important.

22 So, for example, you saw us fight over and over again on
23 white blood cells, right? White blood -- well, they're high all the time,
24 right, and they're -- it looks terrible. Oh, but is every little subcomponent
25 of the white blood cell that? It doesn't matter. It doesn't matter.

1 Another area that we fought about a lot is the two holes that
2 were created in the colon during the original surgery, right, the two holes
3 that Doctor Rives admitted were there when he finished the surgery. He
4 says I created two holes in the colon, then I sewed them up, right, or I
5 stapled them closed. And we fought quite a bit about were those created
6 by a through-and-through burn, right, during the cutting or was it
7 through tugging and pulling and jerking on the colon? Does it really
8 matter?

9 Is either of those two things careful or skillful? They're not.
10 But even going a step further, you know, the third hole. We know from
11 pathology there were three holes where Doctor Rives was working on.
12 And he only identified two holes where he was working.

13 And then you even go a step further. If everything was
14 beautiful and pristine and looked the way that Doctor Rives said it did
15 when the surgery was over, wouldn't he have gone and checked to try to
16 find those photographs that he says he took during that surgery? Don't
17 you think he might have checked when the family fired him, when the
18 family didn't trust him? That he might go back and say hey, I'd like to
19 get these records. Or how about when he was being sued over a three-
20 year period of time; do you think he'd ever check?

21 He came here on the stand yesterday and for the first time
22 ever said oh, I never looked for those ever, in four and a half years. Does
23 that really make sense?

24 Now, you heard about the standard of care in this case. The
25 Judge just went over it, right? And the standard of care is what another

1 careful, skillful surgeon would do under similar circumstances, right?

2 And so the question is, is did Doctor Barry Rives, did he act carefully and
3 skillfully during this process? And it also requires that surgeons have the
4 same knowledge of other surgeons within their specialty. And we're
5 going to talk about that a little bit, right? We're going to talk about what
6 his own expert said about the use of these devices and we'll go over
7 that.

8 Now, let's go ahead and talk about the safety rules that we
9 discussed. The first safety rule that we talked about in this case is
10 choose the safest tool and ensure that you cut only what should be cut,
11 right? A surgeon must carefully and skillfully choose the safest tool and
12 to ensure he cuts only what he should cut.

13 Let's go ahead to the second one. A surgeon must carefully
14 and skillfully fix any injury he causes. And, number three, a surgeon
15 must never let ego get in the way of proper patient care.

16 Now, we heard from Patrick a couple of days ago up here
17 and he talked about his experience with Doctor Rives. He talked about
18 how after the surgery, right, he expected his wife to come home. And
19 then when things were bad, he was told about that a day or so later and
20 he found out that there had been the holes and that his wife is now in the
21 ICU. And Patrick goes day after day to Doctor Rives and says Doctor
22 Rives, what's going on, what are we going to do? And it appears to
23 Patrick that Doctor Rives isn't doing anything. And he's saying hey, just
24 wait, the antibiotics will kick in.

25 Now, these aren't antibiotics that Doctor Rives is prescribing

1 by any means. These are antibiotics being prescribed by the infectious
2 disease doctor and the critical care doctor, who are doing everything
3 they can pumping her full of antibiotics to keep her alive, right?
4 Knowing that hour after hour when you have a patient who is septic,
5 every hour counts, every day counts. Every hour that goes by, every day
6 that goes by, the chances of permanent impairment or death go up. But
7 he just waited day after day.

8 And Patrick finally, after four or five days, asks for a second
9 opinion, as anyone would do. And he asked for a second opinion. And
10 the response to that from Doctor Rives is less than one hour later, for the
11 first time ever, Doctor Rives puts in his chart, I've been talking to this
12 family all the time. I've been talking to them every day, right?

13 And then Doctor Rives has a conversation with Patrick where
14 he says look, man, I'm the surgeon, I've been doing this for ten -- I went
15 to school for ten years for this, what do you know? And you saw Patrick.
16 You saw how he answered things. Patrick's a simple guy, he's a simple
17 good guy that just wants to protect his wife, that just wants to do the
18 right thing. He's not trying to start a fight with anybody. And so Patrick
19 is shocked by it. He's shocked by the behavior. He doesn't really know
20 how to respond to that.

21 But it goes beyond that with the ego that you see in this
22 situation. You have Doctor Rives, who is discounting the indicators from
23 his own team. He has an infectious disease doctor that's telling him,
24 septic, critical care, worsening, day after day after day, all caps, surgical
25 re-intervention, re-intervention, intervention. And what happens?

1 Nothing. Doctor Rives discounts it. Does Doctor Rives call Doctor
2 McPherson? No. Does Doctor Rives call Doctor Shaikh? No. Does
3 Doctor Rives call Doctor Ripplinger? No. In fact, what did Doctor Rives
4 say when he was asked about that? He said he didn't call any of those
5 people, but then he said you know, really it's their responsibility to call
6 me, right? You know, if the second opinion doctor, he has something to
7 tell me, he can call me. It is your patient, sir. Your patient is dying day
8 after day, she's getting worse.

9 Let's go ahead and let's talk about the truth. We're going to
10 go ahead and play some clips about some things that Doctor Rives has
11 said. Let's go here first.

12 So this is one of the instructions that was just read to you:
13 Members of the jury, Doctor Barry Rives was sued for medical
14 malpractice in the case of Vickie Center v. Barry Rives, M.D., et al.
15 Doctor Barry Rives was asked about the Vickie Center case under oath
16 and he did not disclose the case in his interrogatories or his deposition.
17 You may infer that the failure to timely disclose evidence of a prior
18 medical malpractice lawsuit against Doctor Barry Rives is unfavorable to
19 him. You may infer that the evidence of the other medical malpractice
20 lawsuit would be averse to him in this lawsuit had he disclosed it.

21 So you saw that come up. And I don't want to mix issues
22 because this case is about this case and what Doctor Rives did in this
23 case. But why was he hiding it? Why was he hiding what he did before?
24 Why didn't he learn from what happened before?

25 The credibility or believability of a witness should be

1 determined by his manner on the stand, his or her relationships to the
2 party, his or her fears, motives, interests. If you believe a witness has
3 lied about any material fact, any material fact, you may discard -- you
4 may disregard the entire testimony of that witness.

5 Let's go ahead.

6 Whereupon, an audio/video clip was played in open court at 9:43
7 a.m., within the presence of the jury, and not transcribed)]

8 MR. JONES: I'm just going to flip some pages so that this
9 doesn't get in the way of anything.

10 So consider that, consider that. At his deposition -- all right.
11 At his deposition, were there any signs or symptoms of a leak from the
12 colon repair prior to July 15, 2015? In the continuum or clinically
13 evaluation, no. Right? But then here on the stand, right, after some
14 evidence had been brought up and you knew a certain amount of
15 information by then, right, what does he say? He has to admit it, yes.
16 Cannot keep it straight.

17 Play the next one, please.

18 Whereupon, an audio/video clip was played in open court at 9:44
19 a.m., within the presence of the jury, and not transcribed]

20 MR. JONES: You heard yesterday that he swore in April of
21 this year under oath, swore under oath, that he had never had -- or that
22 he had no patients in minimally invasive surgery who had become
23 disabled. Now, this lawsuit is almost over. It's been going on three
24 years and we're going to trial right now in this case, right? We're on our
25 last day of trial, but in April he says it never happened before under oath.

1 And then obviously he was aware of this case when he said that. He
2 knew exactly what he had done.

3 Next.

4 [Whereupon, audio/video clips were played in open court at 9:45
5 a.m., within the presence of the jury, and not transcribed]

6 MR. JONES: I know you've seen a lot of this, and this is from
7 before, right? This isn't over the last several days. Why is he hiding the
8 Center case from us and our case from them? Why is he telling -- first of
9 all, not telling them at all about the Farris case, but then when he does
10 tell them about it, he misrepresents what actually happened in this case,
11 right? He didn't tell them that Titina Farris became septic immediately
12 after he had cut holes in her colon. He didn't tell them that Titina Farris,
13 that he did this wait and see approach for 12 days, that she developed
14 bilateral foot drop, right? And why? We know why. I know you know
15 why.

16 Talk about patient safety a little bit. You're going to watch a
17 couple of clips from some of the experts.

18 [Whereupon, audio/video clips were played in open court at 9:52
19 a.m., within the presence of the jury and not transcribed]

20 MR. JONES: So let's go ahead and play the next one, but
21 just recall, I mean this is Defendant's expert, right? This isn't information
22 from somebody that the Plaintiff -- that our side paid to bring here. This
23 is their expert admitting that you use this device close to the colon in
24 approximation next to, that doesn't mean cutting on the colon. That
25 means using it next to the colon in approximation of, in the vicinity of,

1 that this is what happens. And they know this. And their own expert
2 couldn't deny it.

3 [Whereupon, an audio/video clip was played in open court at 9:54
4 a.m., within the presence of the jury, and not transcribed]

5 MR. JONES: Okay. We're going to go through the standard
6 of care. We're going to talk about a few different issues, right? The
7 standard of care in this case, first of all, carefully and skillfully. Were
8 these things done carefully and skillfully. And then we're going to talk
9 about some different elements of the standard of care or different areas
10 where they were breached, right? And you're going to hear the experts
11 talk about a number of different things. And you have heard them talk
12 about a number of different things.

13 There was a failure to choose the right tool, okay, that was
14 safe for this operation, okay? That's where it all begins. Then, after that,
15 there was a failure to do a good job stapling, which was probably
16 impossible to do a good job stapling at that point because the tissue was
17 damaged. He had used a heated -- this thermal energy device in
18 approximation of the colon to remove the mesh. And so there's a risk of
19 damage and injury to the tissue, so you can't staple it because it will fall
20 apart afterwards, right?

21 Then thereafter there's a failure to identify a third hole, for
22 goodness sakes, that you created during the operation, right, even if it
23 was tiny, even if it wasn't even physically there at that moment, but it
24 was breaking through over time over the next couple of days. By using
25 that device all of these problems occurred.

1 Then you get into all of the other things with day after day
2 after day these missed diagnoses, these ridiculous notes in the file,
3 progressing as expected, progressing as expected, day after day. She's
4 intubated. She's almost dying. These other -- the other people treating
5 her, it almost looks like they are begging the surgeon to do something as
6 they put in caps of what he should do, and he doesn't.

7 Let's go ahead, standard of care.

8 [Whereupon, an audio/video clip was played in open court at 9:56
9 a.m., within the presence of the jury, and not transcribed]

10 MR. JONES: Play the next one.

11 [Whereupon, an audio/video clip was played in open court at 9:58
12 a.m., within the presence of the jury, and not transcribed]

13 MR. JONES: Okay. Now we're going to hear from Doctor
14 Juell, Defendant's expert, on standard of care.

15 [Whereupon, an audio/video clip was played in open court at 9:58
16 a.m., within the presence of the jury, and not transcribed]

17 MR. JONES: So he acknowledges that it's certainly well
18 known that if you use this, you can have unintended injuries without
19 question. And we're going to talk about this in detail. As you recall,
20 Doctor Juell did acknowledge that a surgeon must be careful and skillful
21 in everything he does. He said diagnosis, but he also said in everything
22 else.

23 And but I want to talk about something really quick before
24 we go onto the other clips because Doctor Juell does something, when
25 you logically put it together, it's definitive and obvious that what

1 happened here was below the standard of care by their own expert.

2 But I want to talk to you a little bit about the fallacy, the
3 fakeness of the Defense position in this case. And I think you probably
4 all saw it when I was questioning Doctor Juell on it because he came in
5 here and he wanted to say over the top that Doctor Rives didn't do
6 anything wrong. But then as you logically break down his position, right,
7 on most of these issues, right, and say okay, doctor, medical records.
8 Does the standard of care require that you keep good medical records?
9 Yes, it does. Are good medical records within the standard of care? Yes,
10 they are. Well, what if a doctor just leaves out a bunch of important stuff
11 in his medical records, is that below the standard of care? Well, no, not
12 necessarily. Well, when does it be -- you know, who knows.

13 So we also asked Doctor Juell about the staples. Doctor,
14 when does it -- when is it above the standard of care, when is it below
15 the standard of care? Well, if it achieves the outcome, if the staples stick
16 and it doesn't all fall apart, then it's within the standard of care. Great.
17 Doctor, what about if it fails? Well, you know, well that's also within the
18 standard of care, right? What? Right.

19 So why? Is this something that is actually a useful standard
20 to identify when a surgeon does something wrong or is this really just a
21 Defense shield to say that the surgeon, no matter how negligent, is
22 always okay and that the patient, no matter how badly harmed and no
23 matter what the negligence, can never have relief from the bad behavior
24 of a surgeon, right?

25 Let's go ahead and listen to a couple more and we're going

1 to talk about an area where Doctor Juell makes it very clear that the
2 standard of care was breached when it comes to the ligature.

3 Go ahead.

4 [Whereupon, an audio/video clip was played in open court at 10:01
5 a.m., within the presence of the jury, and not transcribed]

6 MR. JONES: Okay. Relative contra indicated, okay? That's
7 what Doctor Juell just said. And what did that mean to him, his
8 definition of that, what did he just say? It equals can use if only option.
9 Okay.

10 Continue on.

11 [Whereupon, an audio/video clip was played in open court at 10:02
12 a.m., within the presence of the jury, and not transcribed]

13 MR. JONES: If you recall, it actually hadn't come up in the
14 case at all. But yesterday, as Mr. Doyle was questioning Doctor Rives on
15 the stand and they were trying to do everything they could to say hey,
16 even though the operative report says in the use of the ligature I created
17 two holes in the colon, right, and trying to distance themselves from
18 what the operative report says.

19 MR. DOYLE: Objection, Your Honor, improper expression on
20 credibility of witnesses and counsel and I request --

21 MR. JONES: Your Honor, I'll --

22 THE COURT: Excuse --

23 MR. JONES: I'll rephrase and just continue on.

24 THE COURT: Okay. So the jury will disregard that last
25 sentence since it's being rephrased and withdrawn. Thank you so very

1 much. And the Court made that rule since it's being rephrased and
2 withdrawn. Thank you.

3 MR. JONES: When Mr. Doyle was questioning Doctor Rives
4 and they were saying well, the operative report says the ligature was
5 used and then these holes happened and they're trying to say well, no,
6 there were these bands and things that are not in the report that had to
7 be cut and obviously they're not in the photos because they were either
8 destroyed or they were never produced or something, what he said is for
9 the first time ever in this case, he said well, I used scissors for a little part
10 of the operation, right? Well, according to Doctor Juell, the ligature was
11 only, only within the standard of care if there was no other option.

12 Now, obviously, a surgeon can plan out his surgeries. And
13 so it's implied he could have chosen his tool in advance with the
14 scissors. But Doctor Rives acknowledged that he had scissors, they were
15 there. They were there to be used and he chose not to use them,
16 regardless of the fact that the ligature is dangerous in this setting. And
17 he put the patient at absolute unnecessary risk, and he should not have
18 done it.

19 Okay. Actually, can you go back to the last one. Sorry about
20 that. I didn't really cover that. Oh, no, sorry, go forward.

21 Okay. The preponderance of the evidence, right? So this is
22 the burden. So the greater probability of truth lies therein.

23 Let's go ahead and flip forward.

24 So it's pretty simple, right? You remember me doing this
25 goofy thing earlier in voir dire trying to make sure that you guys

1 understood, right, the process of the evidence. The preponderance of
2 the evidence is -- the standard is pretty easy to understand using the
3 scales of justice. Basically, if you put one piece of paper on the scale,
4 that's enough, right? If you put a second -- one piece of paper is
5 preponderance. A second piece of paper is more preponderance, right?
6 A third piece of paper is more, right? And so it's just one side has more
7 on than the other side.

8 So what I wanted to talk about here is an example to discuss
9 what is really going on here. So as you know in this case, Titina and
10 Patrick, the claims that we've talked about over and over again while
11 Defense is talking about all these other things, like diabetes and different
12 things like that, over and over again I brought up witness after witness
13 and I asked them, did Titina Farris have foot drop before this, did Titina
14 Farris have mobility problems before this, right?

15 And so just to give an example on this one issue, I'm just
16 going to go through some of these, right?

17 With a colostomy and the foot drop, right, the mobility
18 problems caused by the surgery, right? So there are no medical records
19 ever showing that there was any issue with mobility, ever. The Defense
20 has not showed you a single one. There's nothing that exists out there.

21 Doctor Rives, I put him on the stand, and he admitted she
22 never had mobility problems before this surgery.

23 Doctor Hurwitz said that from all the information he had, no
24 mobility problems.

25 Doctor Chaney, who was just on here yesterday, said no, she

1 didn't have mobility problems. She had burning in her feet; she didn't
2 have mobility problems ever. And we're not asking for burning of the
3 feet, by the way, okay.

4 Doctor Barchuk says no mobility problems.

5 Doctor Willer says no mobility problems. The EMG shows
6 very recent acute injury, right?

7 Doctor Barchuk explained that EMG. You can tell, based on
8 the EMG, relatively speaking, when the nerves were destroyed because
9 they kind of cry out, apparently, or they flash in some way that you can
10 tell on the EMG. And Doctor Barchuk was very, very clear the EMG says
11 this is from an acute, some incident that happened and recently, right?
12 This is not some old thing that happened over time.

13 The daughter, right, Titina's daughter Sky came. A sweet
14 girl. She came and she testified no issues with mobility.

15 Lowell, her son came, testified no issues with mobility.

16 Her brother came, no issues with mobility.

17 Patrick came, no issues with mobility.

18 Amy, a good friend of hers, came, no issues with mobility,
19 right? Talked about going and dancing and things before.

20 Her friend, Tina, came, again.

21 And the Defense produces this one guy, Doctor Adornato,
22 right? And Doctor Adornato, he admits that the entirety of the foot drop,
23 he admits the foot drop is all caused by this, right? He admits, yes, she
24 did have critical illness. He called it something else, which I don't think is
25 actually a medical term, but he called it something else, but it's critical

1 illness polyneuropathy. And he had his own term for it, but he said it's
2 the same thing. He said it's a synonym, okay?

3 And so when -- and he said that yes, she had that and yes, it
4 did cause foot drop and the foot drop was caused by this. And he says,
5 but her pre-existing condition caused 50% of her loss of mobility that she
6 now has, okay? So that is the only thing on the Defense side of the table.
7 Literally, there is not another person who can say that, including Doctor
8 Rives who testified under oath she never had a mobility problem as far
9 as he knew.

10 Now, while we're on that point, I want to talk just briefly
11 about Doctor Adornato, okay? And put aside the fake Stanford stuff,
12 right? He's some professor at Stanford, but he's never been paid or
13 taught. Put that aside. Put aside the lack of respect, right, or the lack of
14 following of rules. But it can't be put aside that he was not given a
15 complete record in this case, that he received cherry picked records of
16 two or 300 pages, had no idea what was in the other 8,000 plus pages of
17 records.

18 And that he somehow, somehow was able to come in here,
19 because he hadn't been shown the records, he hadn't been shown the
20 videos of before or what her condition was after. He hadn't been shown
21 any of those things. He didn't ever meet Titina, right? He didn't have
22 any of that knowledge.

23 He was given -- he was not given any of the deposition
24 testimony from her side of the case. He was given limited cherry-picked
25 records. And this is a fair picture of Defendant's case here.

1 They didn't give this expert, this doctor, the records that
2 anyone would need to make a fair decision in a case. And somehow he
3 had been given information which doesn't exist in any medical record,
4 which doesn't exist in anything in this case, but he had been given some
5 information somehow and you'll have to just speculate as to how
6 because he never told us, but he was given some information somehow
7 that he arrived at the opinions, if you recall, that before this surgery,
8 Titina could not walk in the dark well. That Titina, before the surgery,
9 could not walk on uneven surfaces. That Titina could not run or jog.

10 And then you heard a follow-up from Mr. Doyle. Well what
11 does running or jogging mean? And he goes well, it's running or
12 jogging. But somehow he had these bizarre clearly false opinions. And
13 the Defense was able to put him up on the stand to say things that are
14 clearly false. And the only reason he could say it is because he had not
15 been --

16 MR. DOYLE: Your Honor, I object. Improper attack on a
17 witness and an improper expression about the credibility of a witness. I
18 request an admonishment.

19 THE COURT: Overruled. Overruled the way that that was
20 phrased so far from what the Court's heard thus far.

21 MR. JONES: And the only reason he could say it is because
22 he had not been provided the evidence. And you have to decide if you
23 think that was intentional, if you think that was preplanned, or if you
24 think that it was a random occurrence and if you think that is the right
25 way that we should be doing things in a court of law.

1 The proximate cause of injury, this is about the most
2 complicated sentence ever for the most simple concept that you can
3 imagine. The proximate cause of injury, damage, loss, or harm is a
4 cause which, in the natural continuous sequence, produces the injury,
5 damage, loss, or harm, and without which the injury, damage, loss, or
6 harm would not have happened.

7 I mean I just read it. I have no idea what it means. But I do
8 know what proximate cause means. And what it means is that to tie -- to
9 tie the injuries that happened in this case to the events that happened in
10 this case, to the negligent actions that happened in this case, you have to
11 determine if it's part of the natural sequence of events or if it's part of -- if
12 it can be tied together, okay? So I'll give you an example. In this case
13 every expert acknowledges that the colostomy bag was a result of the
14 botched first surgery, okay? Whether they called it a botched first
15 surgery or not, it all came from that surgery. No one disputes that fact.

16 When it comes to foot drop, everyone acknowledges, all of
17 the experts say yes, that first surgery, whether we fully understand it or
18 not, that first surgery resulted in sepsis, it resulted in infection sepsis,
19 which caused the CIP, which caused foot drop, right? And so there's this
20 chain of events that all experts acknowledge, right? You can identify if
21 you kick something and you stub your toe, that your swollen toe the next
22 day came from you kicking it. Does that make sense? And so that is
23 what that's talking about.

24 So the damages that can be claimed are the damages that
25 came from the event, that you can identify reasonably came from an

1 event. More likely than not they came from that event, okay? And in this
2 case some of these damages we wouldn't know one way or another
3 probably as -- most of the things in this case are absolutely super simple
4 and but the nice thing is it's so simple in the medical world that all the
5 experts agree that foot drop came from this. But it leads from one thing
6 to the next. And so proximate cause just means that because of the
7 original surgery, she developed the colostomy bag or needed the
8 colostomy eventually and then that she also developed foot drop as a
9 result.

10 Okay. So as you go through in deliberations, insurance is
11 not to be discussed. You're not supposed to think of it, regardless.
12 You're not supposed to consider if the Plaintiff had insurance or will
13 have it in the future and you're not supposed to consider if a Defendant
14 has insurance to protect his interests, either, okay? So that's not to be
15 discussed, not to be considered, all right?

16 Next.

17 Okay. This is important because just understand a person
18 who has a condition or disability, right, doesn't recover for that. And I
19 sure hope that it was made clear during this process, right? I asked
20 Doctor Rives about it. I said doctor, has anyone ever said something that
21 makes you think that the Plaintiffs want something for pre-existing stuff,
22 right? And I asked him that on the stand and he said no. He said no, I'm
23 not aware of that ever happening. Well it didn't happen. So why all this
24 time on diabetes? Who knows, right? Well, maybe you do know.

25 But, anyway, she is entitled to recover damage for any

1 aggravation, okay? And then this is true even if a person's condition or
2 disability made her more susceptible, right? And so no one has said
3 that, right? No one has made that point that maybe she was more
4 susceptible to developing foot drop because she was diabetic. But if that
5 were true, she certainly receives 100% full coverage even if she was
6 more susceptible since that resulted from the surgery. Does that make
7 sense? And so it's not something that prevents that.

8 So that's the bottom line, right? If there was an aggravation
9 of something, then she's entitled to recover for that. If she was more
10 susceptible and wouldn't have -- and because of her susceptibility
11 became extra injured or more injured than maybe someone else might
12 have, it doesn't matter, right? You take a person as you find them, right?
13 We all have our own issues and you take a person as you find them.

14 And so whatever the result is that you change from where
15 they were to where they are now, if you caused it because of your
16 negligence, take them as you find them.

17 Next.

18 [Whereupon, an audio/video clip was played in open court at 10:17
19 a.m., within the presence of the jury, and not transcribed]

20 MR. JONES: This was Titina in April of 2015. That's how she
21 was. That was her with her grandson, okay. And you saw her how she
22 was now, right? And I didn't -- she's not sitting here so you can look at
23 her and feel sorry for her and feel sympathy, right? But you had to see
24 her at some point so that you could see with your own eyes the difficulty
25 that she has every day, right? And so we brought her here just enough

1 so you could identify that, right? And otherwise she stayed out of the
2 courtroom as we said and we've kept her upstairs, you know. She's
3 wanting to be here to see what's happening and, you know, troubled and
4 worried. But we don't have her here so that there can be some concern
5 about the sympathy. But that was her before this. And you saw what
6 happened to her because of this.

7 But I want to make something very, very clear. Sympathy
8 has no part in this process, okay? It has no part in this process. It's not
9 about the sympathy, it's about being fair and identifying was something
10 bad done here, did Doctor Rives do something bad? Did he? If Doctor
11 Rives did something bad, we know what happened, right? We know the
12 truth of what happened.

13 Now, I'm not going to ask you, and I think I said it in voir dire,
14 and I meant it then and I mean it now, this isn't about sympathy for my
15 client, absolutely in no way is it. And it's about sympathy for Doctor
16 Rives, either. And the Defense should tell you the same thing. They
17 should say the same thing.

18 What needs to happen is a careful consideration of the
19 evidence. Did the experts identify that ligature was the wrong thing to
20 use in this setting? Well, their expert did. He said it was the wrong thing
21 to use if you have something else. You're not allowed to use it unless
22 it's your only option. And he had scissors which he did use, according to
23 him, right? It's not in his operative report, so who knows. But he used it
24 in part according to him and he certainly had it available, which he
25 admitted yesterday.

1 Sometimes small things matter the most. The things that
2 Titina has lost and we're not talking about the things that she already
3 had. You could see there that whatever she had, she was living a life
4 that looked pretty full, looked pretty complete, looked pretty happy. And
5 she may have had an issue, right? Because in that video we know that it
6 was the same month that she went back because the hernia was there.
7 She had the hernia already, right? It was coming back. But that's how
8 her life was with the hernia before Doctor Rives' surgery. And so we
9 know where she is now.

10 Now, the damages in this case, I want to go through those.
11 And I think I want to pull it up on this screen so I can actually write them
12 out. When you go back into deliberation, you are going to -- well, you're
13 going to see what comes up in a minute here. You're going to receive
14 this exact form and you're going to go through and you're going to fill it
15 out. It's the verdict form.

16 Titina's past medical specials, there hasn't been rebuttal
17 evidence against those being related and so it's \$1,000,000 or so. And so
18 you're going to see those. Those are already written in, right? And I told
19 you from the beginning, the calculation of medical really isn't the big
20 thing for the jury, right? The big thing is for you to think about the pain
21 and suffering that has gone on. And I focused on that because the pain
22 and suffering is what you're going to really need to focus in on.

23 The future medical that she's going to need in her life care
24 plan also wasn't rebutted and the damages for that are identified, as
25 well, so you don't need to think about that in terms of the medical and

1 other related expenses, okay?

2 So I'm going to walk through this with you. This is the
3 verdict form, okay? And you're going to receive -- you're going to get
4 one that's just like this, okay? It says Special Verdict Form at the top.
5 Then, We, the Jury, in the above-entitled matter, answer the questions
6 submitted to us as follows: 1) Was Doctor Barry Rives negligent in his
7 care and treatment of Titina Farris? Yes.

8 Then it says if your answer is yes, proceed to question two.
9 2) Was Doctor Barry Rives' negligence a proximate cause, a proximate
10 cause. Just to be clear, it doesn't have to be the only cause, it has to be
11 a proximate cause of Titina's injuries and damages. Yes.

12 If your answer to two is yes, proceed to questions three and
13 four.

14 Here, this is the life care plan, okay? Well, first is past
15 medical expenses. They're already written in there, so you don't have to
16 do that calculation. Present value of life care plan. It's already written in
17 there, so you don't have to do that calculation. But, if you'll recall, the
18 Defense had an expert that came in, Erik Volk was his name, and he
19 testified that under Plaintiff's expert's calculations, he thought that it
20 caused it to be a little bit high. Plaintiff's expert used a laddered
21 approach as a way to do it to secure it so that there was essentially
22 almost no risk at all to the Plaintiff of having that money be lost in bad --
23 you know, depending on the condition of the economy, essentially,
24 right? And so he did this laddered approach that was very safe.

25 And the Defense expert said that he would use a different

1 rate, right? And I have my issues with the Defense expert. He's hired
2 only for the Defense, but that's not the only issue. He acknowledged that
3 his rate was not guaranteed. It has a higher degree of things could go
4 wrong and the money might not ultimately be there, so.

5 But do you believe that the present value of Titina's life care
6 plan should be reduced based on his testimony? And if you found
7 something that he said to be compelling that you think that his approach
8 should be used instead of the approach that was offered by Mr.
9 Clauretie, then you can check yes, but you shouldn't. You should check
10 no, okay? So you do not believe that the life care plan should be
11 reduced, okay?

12 So then you proceed on. And on page 2 right, you don't
13 need to answer D because that is the percentage that you want to reduce
14 it. If you did want to reduce it based on the testimony, if you found him
15 compelling, you could reduce it by some amount between zero and 30%,
16 okay?

17 When I was a kid my mom would -- my mom told a story and
18 she'd tell it with some frequency. I have an older brother, he's five years
19 older than me, he's one of my best friends in the world. His name is
20 Danny. And Danny, when I was very little, like seven years old, received
21 a pair of cowboy -- received cowboy boots for Christmas. And he
22 wanted to be a cowboy, right? He was a cowboy. And he wore them
23 everywhere, wore them everywhere, wore them out, right, as kids do
24 with their favorite shoes, right? And he'd wear them to church, he'd
25 wear them to school, he'd wear them every day no matter what. You

1 can imagine after a year or so they had some holes in them, they looked
2 real bad, right?

3 And my mom is very embarrassed having all the --
4 everybody else thinking that she can't put shoes on her kid, right? And
5 she really wanted to be done with these boots. And so she tried to trick
6 him with this or that to give up the boots. And then finally she took him,
7 and she got him some really cool Velcro shoes, right, that have the cool
8 Velcro straps. And convinced him to wear those one day to school.

9 So my brother puts on those shoes with the Velcro straps
10 and goes to school. And my mom, you know, doesn't waste a minute.
11 She grabs those boots, she runs them out and she throws them in the
12 garbage, right? Puts them out there on the curb.

13 And she goes back inside, and she starts thinking about the
14 memories and everything that those boots represented and how my
15 brother felt about them. And she ran back out to grab the boots, but
16 they were gone. The garbage people had already come, the boots were
17 gone.

18 And my brother came home later that day and he just cried,
19 right, he just could not be consoled. And my mom said that she would
20 have given a thousand bucks. And we didn't have it, but she would have
21 given a thousand bucks to have those boots back.

22 And that's probably the reason that, you know, she kept this,
23 you know, stupid little thing I made when I was like six of a mushroom
24 out of clay, you know, in this, you know, case for years because she felt
25 so bad about the boot situation.

1 Some things in life that you lose, now that's a silly small
2 story, right, but it's some things in life that you lose they seem small.
3 And sometimes the small things matter a great deal. And sometimes it's
4 hard to understand the big things without realizing all of the small things
5 that are really a part of that.

6 And how do you value Titina's pain and suffering? How do
7 you value -- it says non-economic damages, her physical -- in the past,
8 physical, mental, pain, suffering, anguish, disability, and loss of
9 enjoyment of life? How do you value that, where do you value that?
10 What is the cost of what she went through over the last four and a half
11 years? What is that, her future, physical, mental pain, suffering, anguish,
12 disability, loss of enjoyment of life?

13 And then Patrick Farris, his loss of companionship, society,
14 comfort. How has his life been changed by this, what did this do to him,
15 right? The small things, right. Not being able to take care of your yard,
16 even though you love to do it, because you need to take care of the
17 house because it has to be taken care of. To not have the same level of
18 physical contact with the person you love, right? All of these things.

19 Now, there's a few ways that people look at doing this and
20 I'm going to go through some of the common ways that people go
21 identifying the amount that they -- that you should put in to these
22 damages.

23 One way that is common is you take the amount of the
24 economic losses and you use some multiplier, right? The economic
25 losses times two, times one, times whatever. I try to think when I look at

1 this, what would this case be worth if this was someone important,
2 someone that everybody knew, someone famous, if they had this
3 happen to them? Would that change anything in the way that we felt
4 about it at all? And if you took somebody like that, you might say that's
5 not reasonable because, you know, if you take somebody that's known
6 for being very wealthy or very successful, it's not the same because
7 they're worth all this money or they have this degree of success.

8 But the Judge can confirm for you that we're all equals
9 before the law. And the Court may be the only place in the world where
10 that's true. I will tell you, well, the evidence has shown that Titina's loss
11 of her ability to walk, that Titina's loss of her ability to be independent as
12 a human being matters as much to her as it does to anybody else.

13 So Titina has lived with this injury for four and a half years.
14 And you saw the life expectancy tables or you heard it mentioned that
15 she's going to live for another 26 years, right? That's the estimated life
16 expectancy. So that means Titina lived or will live with the effects of this
17 for a total of 30 years. That's what it means to have a permanent injury.

18 So another way that people do it is they take the amount of
19 time the person is going to live, right? So if you take 30 years and you
20 multiply it by the number of days, by the number of hours, how does a
21 reasonable person value that? How does a reasonable person value the
22 losses in that context?

23 So if you took it in this case and you said that her damages
24 would be -- many reasonable people, conservative people, many people
25 who want to be fair, would not trade their mobility, they would not trade

1 their personal independence in this way for 10, 20, 30, \$40 an hour, \$50
2 an hour. Certainly, a lot less than what any of the experts were paid as
3 they came in here.

4 What I'd like you to do, I'd like you to think in your minds,
5 and you can close your eyes if it's helpful at all, but I want you to think
6 and I want you to consider someone you trust in your life for good
7 advice, someone that you believe is reasonable, and I want you to
8 consider what that reasonable person would say. Not in terms of bills,
9 what would that reasonable person say in terms of a number. Is the
10 reasonable value for 30 years with the loss of mobility, 30 years with the
11 loss of that freedom, and consider the impact on both Titina and on
12 Patrick. And you should write that number down. And if you would
13 have fairly gone through that and you have that in your mind, that will
14 be a fair number.

15 I can tell you, Titina and Patrick, their greatest concern here is
16 not having enough money to be able to handle the medical side of it.
17 But they've been through an awful lot. And think about that in your
18 minds what that number is, what that number is for each one of these
19 and write them down individually and separately.

20 Let's go ahead and let's pop it back over.

21 THE COURT: Counsel, you need to push the square right
22 behind you.

23 MR. JONES: Oh, yes.

24 THE COURT: Yeah, there you go.

25 MR. JONES: Now, the Defense is going to close now.

1 They're going to give their closing statement. And we're going to go
2 through some things that I would like you to keep in mind as the Defense
3 is giving their closing statement. And these are questions that are
4 critical that the Defense has not answered. I'd like you to keep it in mind
5 and see if they do answer them or if you're left with these questions still
6 when they're finished.

7 Go ahead.

8 Why doesn't Doctor Rives learn from past mistakes? Why?

9 Why didn't they give -- why is it that Doctor Rives says he
10 would do it all the same again after the harm he has caused?

11 Why didn't they give the whole file and videos to their
12 experts?

13 Why do none of the other doctors agree with Doctor Rives
14 about Titina's condition, right, primarily between June 5th and June -- or
15 July 5th and July 13th period of time; why is everyone else saying
16 something else and Doctor Rives appears to be in a totally different
17 world?

18 Why won't Doctor Rives tell the truth?

19 Why do we keep on getting other things?

20 Why, when I asked him if he has a history of saying things
21 that are untruthful under oath yesterday, did he say well, it depends on
22 what you mean or something along those lines? Why won't he just say
23 it, say what it is?

24 Why didn't Doctor Rives save the photographs?

25 You've been more than patient over these last three weeks.

1 Thank you.

2 THE COURT: Counsel for Defense, would you like to
3 commence with your closing argument?

4 MR. DOYLE: Yes.

5 THE COURT: You've got a pocket mic on your table if you
6 want it.

7 MR. DOYLE: Yes. I just need a moment to get organized.

8 THE COURT: Of course. Do you need to switch it over to --
9 are you all set for your tech? Okay. I appreciate it.

10 THE COURT: Counsel, can you approach? Madam Court
11 Recorder white noise, please? Thank you so very much.

12 [Sidebar at 10:38 a.m., ending at 10:38 a.m., not transcribed]

13 THE COURT: Ladies and gentlemen of the jury, what we're
14 going to do is we're going to take a morning recess for everyone to
15 stretch their legs, whatever, so everything gets set up as well. So it's --
16 we're going to come back at five to 11.

17 So ladies and gentlemen, during this recess you are
18 admonished not to converse among yourselves or with anyone else on
19 any subject connected with this trial. You may not read, watch, or listen
20 to any report or commentary of the trial or any person connected with
21 the trial by any medium of information including without limitation
22 social media, texts, tweets, newspapers, television, internet, radio.
23 Anything I've not stated you understand is also included. Yes. Thank
24 you so very much. I saw the affirmative nods.

25 Do not visit the scene of the visits mentioned during the trial

1 or undertake any research, experimentation, or investigation. Do not do
2 any posting or communications on any social networking sites or
3 anywhere else. Do not do any independent research including but not
4 limited to internet searches. Do not form or express any opinion on any
5 subject connected with the trial until the case is fully and finally
6 submitted to you at the time of jury deliberations. With that, have a nice
7 relaxing break this evening. Thank you.

8 THE MARSHAL: All rise for the jury.

9 [Jury out at 10:39 a.m.]

10 [Outside the presence of the jury]

11 THE COURT: So what we're going to do is -- we need at least
12 a 10-minute break. So we're going to ask you to just excuse yourselves
13 for 10 minutes. We'll let you back in after 10 minutes so that everyone
14 can get set up. That'll be another 10 minutes before the jury comes back.
15 Does that meet your needs?

16 MR. DOYLE: That's fine, Your Honor.

17 MR. JONES: Yes, Your Honor.

18 MR. DOYLE: Thank you.

19 THE COURT: Okay. Perfect. So then Madam Court Reporter,
20 feel free to go off the record. I do appreciate it.

21 [Recess taken from 10:40 a.m. to 10:52 a.m.]

22 [Outside the presence of the jury]

23 THE COURT: Okay. We're on the record outside the
24 presence of the jury. Defense counsel, you set with your microphone?
25 You're all set?

1 MR. DOYLE: Yes, I'm good. Thank you.

2 THE COURT: Okay. The check is set? Okay.

3 MR. DOYLE: Are we linked, synched, or whatever? Okay.

4 THE COURT: Okay. So then the marshal in a moment will
5 just go get the jury and bring them in if everyone is ready.

6 MR. DOYLE: Yes.

7 THE COURT: A moment or two. But yeah. I just wanted to
8 make sure everyone had time to get all organized and prepared, so.
9 Okay.

10 Marshal, if the jurors -- would you all like to see if the jury's
11 ready to come in?

12 MR. DOYLE: Yes. Yes.

13 THE COURT: Does that work for you Plaintiff's counsel?

14 MR. JONES: Yes, Your Honor.

15 MR. LEAVITT: Yes, it does, Your Honor.

16 THE COURT: Marshal, would you check and see if they're
17 ready? Thank you so much.

18 [Pause]

19 THE MARSHAL: Ready, Judge?

20 THE COURT: Counsel, yes?

21 MR. DOYLE: Yes.

22 MR. JONES: Yes, Your Honor.

23 THE COURT: Yes, please bring in the jury. Thank you so
24 much.

25 THE MARSHAL: All rise for the jury.

1 [Jury in at 10:55 a.m.]

2 [Within the presence of the jury]

3 THE MARSHAL: All jurors are accounted for. Please be
4 seated.

5 THE COURT: Okay. I do appreciate it. Welcome back, ladies
6 and gentlemen. As you recall, since Plaintiff finished their closing
7 argument, now it will be time for Defense counsel to do their closing
8 argument.

9 Counsel for Defense, feel free to commence at your leisure.

10 DEFENDANT'S CLOSING ARGUMENT

11 MR. DOYLE: Thank you. Good morning, everyone.
12 Obfuscation is the action of making something obscure, unclear, or
13 unintelligible. And I have trouble with that word to this day, and I'm
14 sorry. Obfuscation is trying to hide two trees in a large forest so you
15 cannot find them. It's sort of the legal version of Where's Waldo, if any
16 of you are familiar with that game of sorts. Obfuscation is trying to
17 confuse, misdirect, or refocus you by talking about everything but the
18 medicine in this case, the standard of care in this case, which is question
19 number one on the verdict form, and causation in this case, which is
20 question number two.

21 Why was there so much time spent on this case, ladies and
22 gentlemen, on what I called standard of Hurwitz rather than standard of
23 care, but standard of Hurwitz. This case is not about what Dr. Hurwitz
24 would do or not do. This case is not about his personal concerns or
25 criticisms. Remember my questions on Wednesday -- two Wednesdays

1 ago to Dr. Hurwitz where I asked him, can reasonable physicians
2 disagree? He said yes. Can one reasonable physician criticize the care
3 provided by another reasonable physician? He said yes. And I asked
4 him can that happen even though the other physician's care was within
5 the standard of care? And he said yes.

6 So why was so much time spent on his concerns? His
7 concerns that were carefully woven into his two standard of care
8 opinions in this case, ladies and gentlemen. Why hide those two trees in
9 a large forest? And what were his concerns, but not his standard of care
10 opinions? His concerns weren't many. That there was no bowel prep,
11 using a stapler, how Dr. Rives closed the two holes, his use of mesh, not
12 convert to an open procedure, Dr. Rives' care on July 5, 6, 7, 8. All of
13 those were carefully frame by Dr. Hurwitz to be concerns. Well, I would
14 be concerned. I would. I would not.

15 Those are not standard of care opinions, ladies and
16 gentlemen. Those are concerns. How he would have done something
17 differently.

18 Let me remind you of Dr. Hurwitz's two standard of care
19 opinions in this case. First opinion was Dr. Rives' intraoperative
20 technique in use of the ligature. That is the only standard of care opinion
21 that Dr. Hurwitz offered concerning Dr. Rives and what took place in the
22 surgery was simply the use of the ligature. His second standard of care
23 opinion was Dr. Rives' post-operative care; that he did not return to Mrs.
24 Farris to surgery on July 9th or thereafter. That is the sum total of his
25 standard of care testimony, ladies and gentlemen. And let's listen. First

1 audio clip.

2 [Whereupon, a video recording was played in open court from
3 11:00 to 11:04 a.m. and not transcribed]

4 MR. DOYLE: If we could go to the next segment.

5 [(Whereupon, a video recording was played in open court from
6 11:04 a.m. to 11:06 a.m. and not transcribed)]

7 MR. DOYLE: So again, ladies and gentlemen, what is
8 relevant in this case when evaluating Dr. Rives' care is the standard of
9 care. What is not relevant is Dr. Hurwitz and his concerns, or personal
10 preferences, or how he should or would do things differently. And his --
11 and those concerns of his should be disregarded as simply personal
12 criticisms. They're not standard of care opinions. I would've, I would
13 not have, I am concerned. The well, you know, maybe I would disagree
14 with his technique, but his technique was within the standard of care.

15 So what is relevant, ladies and gentlemen, in this case are
16 the two trees; the ligature and not returning Mrs. Farris to an operating
17 room on July 9 or thereafter. What is not relevant is the rest of the forest
18 around those two trees, the personal criticisms.

19 Then, ladies and gentlemen, now that we have the context of
20 Dr. Hurwitz and his two standard of care criticisms of Dr. Rives, why was
21 so much time spent on perhaps one could say the standard of counsel?
22 There were criticisms voiced by counsel in questions to Dr. Rives, to Dr.
23 Juell, and even Dr. Adornato that were not backed up by Dr. Hurwitz and
24 the standard of care, creating the forest around the trees. For example,
25 the contents of Dr. Rives' records, in particular the operative report, what

1 is in the operative report and what is not in the operative report. Dr.
2 Hurwitz did not offer a standard of care opinion that there was some
3 deficiency or problem with Dr. Rives' operative report. He did not even
4 criticize it from a person point of view, what was there or not there. And
5 in fact, Dr. Hurwitz said that you don't typically include what you
6 typically do. You don't typically include what you routinely do in your
7 operative report.

8 Other examples, ladies and gentlemen, of standard of
9 counsel perhaps, not reaching out to Dr. Ripplinger after his consultation
10 to call him and speak to him. Dr. Hurwitz had no criticisms standard of
11 care or otherwise about calling Dr. Ripplinger. Delay in doing surgery on
12 July 15th wasn't a standard of care criticism by Dr. Ripplinger. The focus
13 on the total white blood count -- the white blood cell count, ladies and
14 gentlemen. Focusing on just the total white blood cell count and not
15 looking at the other aspects of the white blood cell count when those
16 other aspects were discussed by Dr. Rives, Dr. Juell, and even Dr.
17 Hurwitz. Dr. Hurwitz -- in response to some of my questions we talked
18 about left shift.

19 We talked about bandemia, those immature and different
20 kinds of white blood cells and the significance and importance of those
21 white blood cells. And he agreed that those were improving after July
22 4th up to July 9th, and for a couple of days thereafter. Even though the
23 total white blood cell count remained elevated, these other components
24 were improving.

25 Another aspect of the forest, not returning the money for

1 surgery, ladies and gentlemen. What was that about and what was the
2 reason for that? Dr. Hurwitz said nothing about surgeons or anyone else
3 in the standard of care in returning money. Not disclosing to Mrs. Farris
4 that prior to surgery that Dr. Rives was not Board certified. Now, ladies
5 and gentlemen of the jury, why was Dr. Rives asked that question? Well,
6 Dr. Rives, did you disclose to Mrs. Farris the fact that you're not Board
7 certified? Well, no, I didn't. Well, do you disclose that to other patients?
8 No, I don't. Well, have you done some study or research to look into
9 what effect that would have or something to that effect?

10 What was all of that about other than to try and embarrass
11 Dr. Rives because Dr. Hurwitz did not say anything about Board
12 certification and having to share that or disclose that to a patient. There
13 was nothing from Dr. Hurwitz by way of a standard of care opinion, or
14 even a personal criticism of that information. So why bring it up? Why
15 take the time? Why do that with Dr. Rives?

16 And ladies and gentlemen, I would direct your attention to
17 jury instruction number 26. And you'll have copies of these jury
18 instructions. And I want to read a part about it because what you're --
19 what instruction 26 defines a physician or general surgeon in this case,
20 what their duty is. And if they breach that duty, then that's what is
21 negligence or care below the standard of care, or malpractice. It is the
22 duty of a physician who holds himself out as a specialist in a particular
23 field of medical, surgical, or other healing science to have the knowledge
24 and skill ordinarily possessed by reasonably competent specialists
25 practicing in the same field. He has a duty to have the knowledge and

1 skill ordinarily possessed by other general surgeons. And the evidence
2 has shown, ladies and gentlemen, clearly, that even though he's not
3 Board certified, he certainly has ordinary and more than ordinary
4 knowledge and skill as a general surgeon. So why bring it up? Why
5 throw mud on the wall to see if maybe something will stick?

6 Ob -- and I'm going to keep tumbling over that word. I'm
7 sorry. Obfuscation -- I'm tongue tied today. I should've written it out
8 phonetically. The other thing, ladies and gentlemen, safety rules. How
9 much time did we spend on safety rules in voir dire, in opening
10 statement, with Dr. Rives and virtually every doctor who testified in this
11 case? Why did we spend so much time on safety rules when if you want
12 to look at the package of instructions -- and I forget the exact number. I
13 think it's 45 is the total number of instructions. You can read each
14 instruction.

15 You can read each word in each instruction, and you are
16 never going to find in any of those instructions the words safety or safety
17 rules. They're not in the instructions. They're not part of the law. The
18 standard by which Dr. Rives is to be governed is called the standard of
19 care. And that is defined in the instructions. Nothing, nothing, nothing
20 in the safety rules -- I'm sorry, nothing in the jury instructions about
21 safety rules. So why was there so much time spent on safety rules with
22 so many different people, ladies and gentlemen? Building the forest
23 around the two trees to obfuscate -- I'm just not even going to say it
24 anymore -- to hide those two trees in the forest, ladies and gentlemen.

25 Why was so much time spent on records sent to experts?

1 You know, this came up, you know, all the time spent, and what was
2 received, and what was reviewed, and the number of pages, and what
3 wasn't received, and what was never pointed out. I do want to follow up
4 on that because remember, that was Dr. Adornato. He was being asked
5 questions in a general sense. Well, do you know if you have all the
6 records? Well, no, I don't know if I have all the records. Do you know if
7 you have all of the pages in a particular set of records? Well, no, I don't
8 know that with the exception of the hospital chart.

9 I mean, we went on, and on, and on, and consuming a fair
10 amount of time with him, and I think perhaps Dr. Juell as well, trying to
11 create the impression that there are records out there that were
12 important, or should be important, should've been sent to them that
13 weren't sent to them, and somehow things are being hidden, hide the
14 ball.

15 But I would remind you at the end of that sequence of
16 questions and answers, and questions and answers, was there anything
17 about okay, doctor, well, here's Dr. Y's records, do you have those? Oh,
18 you don't have those. Well, doctor, here are the records from such and
19 such place, do you have those? Oh, you don't have those. Well, doctor,
20 here's six more sets of records from six different places, so now we've
21 got eight or nine actual sets of records, doctor, that you have not been
22 given, that have been kept from you, that you have not seen, reviewed,
23 and evaluated in forming your opinions. Did that take place? No. Why
24 not? Because there weren't any other records to pull out, and to show,
25 and to use, and to say oh, well, you didn't have this, didn't have that.

1 Why was that done? Building the forest around the trees so you won't
2 see the trees.

3 And then ladies and gentlemen, with Dr. Juell, remember
4 this, when Dr. Juell was testifying on cross-examination, he was asked
5 about his report. And he was asked well, on cross-examination by
6 counsel, well now, doctor, in your report do you use the initials TF to
7 describe Mrs. Farris? And then there was some questions about
8 dehumanizing and how initials I guess are dehumanizing or
9 depersonalizing her.

10 What was the purpose of that other than to try and unfairly
11 cause you to wonder about Dr. Juell and his character and his
12 personality, or who knows whatever else. What was that about, ladies
13 and gentlemen, when Dr. Juell tried to explain to Plaintiffs' counsel, but
14 was interrupted and not allowed to answer. So that when I had the
15 opportunity to follow up with a question I pointed out, well, okay, Dr.
16 Juell, let's go to the beginning of your report where you have Titina
17 Farris, the full name, and then in parentheses, TF, just to shortcut things
18 a little bit in terms of preparing the report. Knowing that was there, why
19 start with the initials and try and suggest that he was dehumanizing her
20 by using her initials, saying she's not a real person.

21 Ladies and gentlemen, and then also why was there so much
22 effort to hide the two trees in the forest? Why didn't Dr. Hurwitz go
23 through with you, like Dr. Juell, the CT scan of July 5th and show you
24 images, the CT scan of July 9th, the CT scan of July 15th and show you
25 images, and show you how they're changing, and what are the

1 significance of those changes? Why wasn't Dr. Hurwitz -- why didn't he
2 share with you like Dr. Juell, the abdominal x-ray done on July 12th?

3 Ladies and gentlemen, pictures speak a thousand words.
4 And those pictures spoke a thousand words about what was going on
5 inside of Mrs. Farris on those days, July 5th, July 9, July 12, and July 15,
6 when coupled with all of the other information about her. Thousands of
7 words, thousands of words that Dr. Juell -- images Dr. Juell shared with
8 you and talked about in conjunction with Mrs. Farris and how she was
9 improving over this period of time. But nothing from Dr. Hurwitz.

10 Ladies and gentlemen, if you use your commonsense and
11 not nonsense, if you instead focus on the medicine in this case, the
12 standard of care in this case, and causation in this case, the evidence is
13 clearly shown that Dr. Rives' care was within the standard of care. The
14 answer to question number one is yes. Ladies and gentlemen, if you use
15 commonsense instead of nonsense -- I'm sorry ladies and gentlemen, I
16 misspoke. That the evidence has clearly shown that Dr. Rives' care was
17 within the standard of care, which is question number one.

18 But ladies and gentlemen, on the off chance that if you
19 instead commonsense and not nonsense and find against Dr. Rives and
20 answer question number one yes, because of the first tree, the second
21 tree, or perhaps both, you still have to answer question number two on
22 that verdict form that you looked at. It's not simply enough to answer
23 question number one yes, and then you get to jump to damages. No.
24 You have to answer question number one yes, and you have to answer
25 question number two yes before you get any farther on that verdict form.

1 And remember ladies and gentlemen, that on question
2 number one and question number two, it is the Farris' who have the
3 burden of proof. And the burden of proof is described in instruction
4 number 21. And the burden of proof is preponderance of the evidence.
5 The term preponderance of the evidence means such evidence as when
6 weighed with that opposed to it has more convincing force, and from
7 which it appears that the greater probability of truth lies therein. What
8 that means, ladies and gentlemen, is that the Farris' have to convince
9 you with their evidence on proximate cause. They have to prove by a
10 preponderance of the evidence a natural and continuous sequence
11 between tree one and the outcome, and/or tree two and the outcome.
12 They have to prove and convince you with the evidence that there is a
13 natural and continuous sequence. Said another way, but for X, Y would
14 not have occurred.

15 There's another instruction that you have been given that is
16 pertinent. It's instruction number 31, which says proximate cause must
17 be proven to a reasonable degree of medical probability based upon
18 competent expert testimony. So not only do you have to rely on the
19 expert witnesses for question number one, but you also have to rely on
20 them for question number two.

21 So ladies and gentlemen, let's assume for the sake of
22 argument -- just for the sake of argument, that Dr. Rives' use of the
23 ligature was below the standard of care and therefore you answer
24 question number one yes. In other words, he should not have used it.
25 Then I would ask you, is there any expert testimony in this case to a

1 reasonable degree of medical probability if Dr. Rives had not used the
2 ligature, Mrs. Farris would not have developed sepsis, the critical illness
3 polyneuropathy, and the foot drop? Ladies and gentlemen, there is no
4 evidence at all making that proximal causal connection between the
5 ligature, the sepsis, the CIP, and the foot drop. At best, giving the Farris'
6 every benefit of the doubt, at best what they have is Dr. Hurwitz who said
7 the ligature maybe caused a thermal injury. Well, maybe is not to a
8 reasonable degree of medical probability.

9 But there's a second part to that. When he said the ligature
10 may have caused a thermal injury, he then went on to say if there's a
11 thermal injury at the time of surgery on July 3rd, it would take 48 to 72
12 hours for that injury to change and evolve and open up into a hole in the
13 bowel. So think about this, ladies and gentlemen. Dr. Rives' surgery
14 was done on July 3rd, and the surgery was done by about 1 p.m. 48
15 hours later, using Dr. Hurwitz's testimony about how thermal injuries
16 take time to change, and evolve, and necrose, and all of that, and open
17 up into a hole in 48 to 72 hours. Well, with Dr. Rives doing surgery on
18 the morning of the 3rd, 48 hours takes us to the morning of the 5th, or
19 perhaps the early afternoon of the 5th.

20 But everyone in this case has agreed that Mrs. Farris became
21 ill, she became septic on July 4th. So it just doesn't make sense. There's
22 no proximate cause. There's no causal connection about what happened
23 in this case if Dr. Rives' use of the ligature -- just assuming hypothetically
24 for the sake of argument -- based on Dr. Hurwitz's maybe -- let's say
25 maybe there was a thermal injury. That injury is not going to open up

1 and start spilling bowel contents until the day after she became ill and
2 septic. So there's no causal connection there, ladies and gentlemen.
3 There's no proximate cause between the use of a ligature proximately
4 causing, in normal, natural, continuous sequence, however you want to
5 phrase it, it didn't cause the sepsis. I mean, that's kind of the simplest
6 way to look at it.

7 And then if you want to think about the second tree if you
8 will. And let's assume for the sake of argument that you answer
9 question number one yes because you have come to a collective
10 decision that Dr. Rives, the standard of care required him to return Mrs.
11 Farris to surgery on July 9th. Let's say that's the collective wisdom and
12 you check yes. Is there any expert testimony in this case, ladies and
13 gentlemen, any expert testimony to a reasonable degree of medical
14 probability that told you, said to you if Dr. Rives had operated on July
15 9th, Mrs. Farris would not have developed sepsis? Well, of course not
16 because she already the sepsis from July 4th. Is there any expert
17 testimony to a reasonable degree of medical probability that has said to
18 you that if Dr. Rives had operated on July 9th, Mrs. Farris would not only
19 have not developed the sepsis, but also the CIP and the foot drop? There
20 is no testimony whatsoever.

21 And it is the Farris' burden of proof to show you to a
22 reasonable degree of medical probability an expert who said that with
23 surgery on July 9th she would not have become septic, but she already
24 was, and she would not have developed the CIP and the foot drop, And
25 really, the only person who kind of touched on this topic was Dr. Willer.

1 And there was -- there were no questions to Dr. Willer. There was no
2 testimony from Dr. Willer. There wasn't even a suggestion from Dr.
3 Willer about when the CIP began, when it became irreversible, and all of
4 that. There was nothing from Dr. Hurwitz or any other expert.

5 And according to the Farris', and their interpretation of the
6 hospital records, Mrs. Farris was still septic on July 9th and thereafter,
7 perhaps. We don't know because their burden of proof, they didn't bring
8 someone to tell us. But perhaps it all began on July 10th, or July 11th, or
9 July 12th, after Dr. Rives should've taken her back to surgery. We just
10 don't know because the Farris' did not tell you or show you any of this to
11 a reasonable degree of medical probability.

12 And for all of these reasons, ladies and gentlemen, assuming
13 for the sake of argument you answer question number one yes, the
14 answer to question number two is no. There's no causal connection
15 between the ligature and the sepsis. And there's no causal connection
16 between not doing surgery on July 9th, on the sepsis which had already
17 started.

18 The issue of damages, ladies and gentlemen. The subject
19 has been raised. I'm a little bit uncomfortable talking about it because
20 based upon the evidence it's highly unlikely you will even get past
21 question number two. But -- and so I don't want you to think for a
22 moment that because I'm going to say a few things about the issue of
23 damages that I'm concerned or worried that you're going to get there.
24 But I owe a duty to Dr. Rives to properly represent him. And to do so I
25 need to address some of the things that came up on the topic of

1 damages.

2 And again, keep in mind if you answer question number one
3 no -- and it's not unanimous; it's six out of eight. As soon as six of eight
4 of you agree that the answer to question number one is no, then your
5 deliberations are over. In the unlikely event that you answer question
6 number one yes, but then you answer question number two no -- and
7 again, that takes six out of eight, not unanimous. If you answer question
8 number two no, then your deliberations are over.

9 So I want to give you some thoughts to keep in mind. Mrs.
10 Farris did have significant medical problems prior to July of 2015. And
11 we heard that from Dr. Chaney, and we heard that from Dr. Adornato.
12 What did Dr. Willer say? No, there weren't any. Remember Dr. Willer
13 was the -- he testified early. He was the doctor from New York who had
14 been hired through National Medical Consultants, a company I do
15 business with, were his words, which Dr. Hurwitz also came to Plaintiffs
16 by way of National Medical Consultants. Dr. Barchuk said well, no, there
17 were no preexisting problems, or concerns, or issues. Dr. Barchuk,
18 someone who's an expert witness 30 percent of his professional.
19 Hundreds if not thousands of cases over the last 20 years. One to two
20 new cases per week. Has done over a thousand life care plans. The cost
21 for this life care plan was about \$15,000. If you want to multiply 15,000
22 times 1,000, that's a lot of money. But be that as it may.

23 Despite what Dr. Willer said and Dr. Barchuk said about not
24 having any significant problems prior, based on the testimony of Dr.
25 Chaney, and then Dr. Adornato, we have the type 2 diabetes requiring

1 medications and insulin, which has been uncontrolled since the first visit
2 with Dr. Chaney and remains uncontrolled to the present time. We have
3 the chronic pain requiring opioids. The pain in the back and shoulder.
4 Pain in the feet. We have other shoulder problems on the left side. We
5 have the hypertension with medications. We have the cholesterol
6 medications. And then we have the diabetic peripheral neuropathy
7 which Dr. Willer said Dr. Chaney is just wrong, she doesn't know how to
8 make the diagnosis. She's just -- well, paraphrase probably what he was
9 thinking about her. But he said no, she's just wrong, there is no diabetic
10 peripheral neuropathy.

11 And Dr. Barchuk seemed to fall in line with that. Where Dr.
12 Chaney testified that she did diagnose it. She had to treat it with
13 medications. That Mrs. Farris' symptoms were pain, a loss of sensation.
14 And remember Dr. Adornato talked to you about a loss of position sense,
15 not knowing where your feet are in space? Where that came from -- and
16 I asked him about it. And this is one of the records I did provide to him.
17 You'll --

18 MR. JONES: Your Honor, I'd like to object about these
19 conversations. It didn't ever come up in evidence or before this jury.

20 THE COURT: The Court is going to sustain the objection.
21 And the jury heard the testimony. It's up to the jury to decide what you
22 heard and weigh it in accordance with the jury instructions.

23 Counsel, feel free to proceed. Thank you so much.

24 MR. DOYLE: Thank you. Do you recall when Dr. Adornato
25 testified about reviewing Dr. Duraballa's [phonetic] records, a podiatrist

1 who had seen Mrs. Farris prior to July of 2015? And remember him
2 talking about Dr. Duraballa's examination with that filament, and other
3 things, and how Dr. Duraballa diagnosed the loss of position sense.
4 That's where Dr. Adornato got it. He didn't make that up out of thin air.

5 So ladies and gentlemen, you can consider, you know, her
6 condition as of July 2015 and the problems she was having when
7 looking at aspects of her damages.

8 Now I want to look for a moment at the life care plan. Now,
9 remember, you heard from Dawn Cook. Dawn Cook did the pricing -- or
10 the costing for the life care plan. She figured out the cost of everything.
11 And then according to Dr. Clauretie, he's going to then reduce that
12 number to present value. And remember, Dr. Clauretie said present
13 value is always less than future loss. Is that true in this case, ladies and
14 gentlemen? No, that is not true.

15 If you add up the total cost in the -- that Ms. Cook figured out
16 -- and what she did is she simply figured out, you know, what is the cost
17 today, you know, say of a wheelchair, \$5,000, it needs to be replaced
18 every seven years. So what she did is she took 5,000 times 7 times, you
19 know, whatever the life expectancy is to come up with that gross
20 number. And her gross number was \$4,211,817. And then Dr. Clauretie
21 was going to reduce that number to present value and came up with
22 \$4,663,473. Some -- I didn't do the math, but it's some 4 or \$500,000
23 more than what Ms. Cook came up with. That's not a reduction to
24 present value. That's going the other way. So one might wonder is
25 there something wrong with his method or methodology, which is why

1 you heard from Eric Volk.

2 And as explained by Mr. Volk, Dr. Clauretie uses a method
3 that is used by a minority of economists, but he uses a method
4 comparing apples and oranges. The apples are the long-term growth
5 rates that give you a larger number. And the oranges are the short-term
6 interest rates that give you a smaller number. And if you'll remember
7 when I was asking questions of Dr. Clauretie, we talked about positive
8 net discount rate and negative net discount rate. And if it's a negative
9 net discount rate, the present value is going to be more than the total
10 cost. And if it's a positive net discount rate, the present value is going to
11 be less than the total cost. Well, he's got it all backgrounds and flipped
12 around apparently.

13 And so Mr. Volk was here in part to share with you his
14 methodology, which results in a positive net discount rate so that when
15 you do look at the total cost, you do reduce it, and you do reduce it to a
16 present value. And he looked at the total number that Dr. Clauretie came
17 up with. And Mr. Volk gave your range using his methodology. If you
18 used his methodology on Dr. Clauretie's number, you know, taking
19 everything at face value, you know, assuming everything is okay and
20 accurate, if you reduce Dr. Clauretie by 20 percent, \$932,695, leaving us
21 with \$3,730,778. If you reduce it by 30 percent that would be 1,399,042,
22 leaving us with \$3,264,431. Just something to think about if -- and in the
23 unlikely chance that you get to that issue.

24 Now, let me circle back to questions number one and
25 number two. Question number one, was Dr. Rives negligent, was his

1 care below the standard of care. Again, the Farris' burden of proof. As I
2 indicated to you, I read to you a portion of instruction number 26 which
3 defines his duties. The other aspect of instruction number 26 that I want
4 -- well, I'll -- it's short. It is the duty of a physician who holds himself out
5 as a specialist in a particular field of medical, surgical, or other healing
6 science, to have the knowledge and skill ordinarily possessed -- we
7 talked about that -- and to use the care and skill ordinarily used by
8 reasonably competent specialists practicing in the same field. A failure
9 to perform such duty is negligence.

10 So what the law requires, ladies and gentlemen, is that Dr.
11 Rives use ordinary care and skill. And you can look at instruction
12 number 26, and you can look at any other instruction. Remember I said
13 you're not going to find safety rules? We are not going to find carefully
14 and skillfully in instruction 26, or in any other instruction either. So
15 again, why spend all this time on carefully and skillfully, knowing that
16 that's not the standard by which Dr. Rives is to be judged and his care.
17 His duty is to use the care and skill ordinarily used by reasonably
18 competent specialists practicing in the same field.

19 Now, I've used an analogy in the past. Some people like it,
20 some people don't like it. But if you think of a grade in school, and if you
21 think of the standard of care as being a line, well, ordinary care and skill,
22 that would be a C. And the law recognizes and understands that you can
23 have varying qualities of care, all of which are within the standard of
24 care. That goes back to Dr. Hurwitz, and personal criticisms, and one
25 doctor critical of another doctor even though the other doctor is within

1 the standard of care. There is that variation and variability allowed by
2 the law. And the law does not require extraordinary or super ordinary
3 care and skill. It's ordinary care and skill.

4 Now, one might be wondering well, how do we as lay people
5 determine first what is the standard of care, and did Dr. Rives' care --
6 was it above that line or below that line. There's another instruction I
7 would refer you to, and that's instruction number 27, which says you
8 must determine the standard of professional learning, skill, and care
9 required of the Defendant -- that's what I just went over with you from
10 instruction number 26 -- only from the opinions of the doctors who have
11 testified as expert witnesses to such standard. Who are those doctors?
12 Dr. Hurwitz, Dr. Juell, and Dr. Rives. But then one might be wondering,
13 well, wait a minute --

14 MR. JONES: Your Honor, I'd just like to object. Dr. Rives
15 isn't on that list.

16 THE COURT: Can you both -- I'm going to have to have you
17 both approach.

18 Madam Court Reporter, please, white noise.

19 [Sidebar at 11:43 a.m., ending at 11:44 a.m., not transcribed]

20 THE COURT: Okay. Thank you so much.

21 MR. DOYLE: To clarify, ladies and gentlemen, Dr. Rives is
22 not an expert in this case like Dr. Hurwitz or Dr. Juell. But he did testify
23 in response to one of counsel's questions that his care was within the
24 standard of care. So ladies and gentlemen --

25 THE COURT: And along with that clarification by agreement

1 of the parties, the Court need not rule on the pending objection. Thank
2 you so much.

3 Go ahead, counsel.

4 MR. DOYLE: Thank you, Your Honor.

5 So now some might be wondering, well, we have different
6 opinions, or differing opinions. We have Dr. Hurwitz, we have Dr. Juell,
7 and we have Dr. Rives. How do we as lay people evaluate these differing
8 opinions? How do we decide is Dr. Rives above that line or below that
9 line? Well, going back to instruction 27 tells you how to do that very
10 thing.

11 So if you look at the second and third paragraphs of
12 instruction 27 it says you should consider each such opinion and should
13 weigh the qualifications of the witness and the reasons given for his
14 opinion, give each such opinion the weight to which you deem it
15 entitled. You must resolve any conflict in the testimony of the witnesses,
16 weighing each of the opinions expressed against the others, taking into
17 consideration the reasons given for the opinion, the facts relied upon by
18 the witness, his relative credibility, and his special knowledge, skill,
19 experience, training, and education.

20 So what you have to do, ladies and gentlemen, when you
21 look at the expert witness -- well, when you look at Dr. Hurwitz, and Dr.
22 Juell, and Dr. Rives, you have to look at the reasons given for the
23 opinion, the facts relied upon, relative credibility, knowledge, skill,
24 experience, et cetera. Weigh and balance whose opinions are more
25 weighty. And using that pan scale analogy if you will, as soon as six or

1 more of you say and agree -- okay, let's just take Dr. Hurwitz over here,
2 and let's take Dr. Juell over here. We won't even put Dr. Rives on one of
3 the pans. But as soon as six or more of you say no, we think Dr. Juell's
4 opinions are more weighty, are more reliable, we're going to go with Dr.
5 Juell and his opinions on the standard of care, as soon as six or more of
6 you come to that conclusion, then the answer to question number one is
7 no, and your deliberations are over.

8 So let's look at Dr. Hurwitz again. A general surgeon, yes. A
9 critical care general surgeon like Dr. Juell? Remember, Dr. Juell takes
10 care of surgical patients in an ICU as a regular part of his practice. He's
11 Board certified in surgical critical care. We didn't hear anything from Dr.
12 Hurwitz about his experiences taking care of patients in an ICU, or how
13 often he does that, or if whether he does that at all.

14 We heard from Dr. Hurwitz that he repairs holes in the bowel
15 with staples, just like Dr. Rives. We heard from Dr. Hurwitz the staple
16 lines fail. The failure rate's up to 10 percent with appropriate repairs for
17 various reasons why. We heard from Dr. Hurwitz despite comments
18 earlier today, we heard from Dr. Hurwitz that Dr. Rives was not the only
19 physician who thought Mrs. Farris was improving from July 4th to July
20 14th. If you'll recall that from this morning, Dr. Rives to the exclusion of
21 all others was the only doctor who thought she was improving.

22 Well, we could start going through all the records, and all the
23 different doctors, and analyzing all the data and what not, but perhaps
24 the best and easiest way to do this is I want to remind you of a series of
25 questions I asked Dr. Hurwitz when he was testifying about how Mrs.

1 Farris was doing between July 4th and July 14. And Dr. Hurwitz agreed
2 with me. When I was asking him the questions on what we call cross-
3 examination, Dr. Hurwitz agreed that between July 4 and July 14th, the
4 kidney function was improving. He agreed the heart rhythm problem
5 resolved. He agreed the blood glucose problem resolved. He agreed the
6 temperature improved. He agreed the blood pressure and heart rate
7 improved. He agreed the abdominal pain improved. He even agreed --
8 and I mentioned this a little bit ago -- he even agreed the bandemia
9 improved between July 4 and July 15 -- or 14.

10 So setting aside all the other physicians who were involved
11 in Mrs. Farris' care day by day in the intensive care unit, we have Dr.
12 Hurwitz agreeing that she was improving during that period of time.
13 And to digress for a moment, ladies and gentlemen, just -- I mean, you
14 heard lots of names about lots of different specialists who were caring
15 for Mrs. Farris between July 4 and July 14th, and some but not all of the
16 records are in the exhibit that will go back to you in your deliberation
17 room. But keep in mind, there's no evidence in this case, and there's no
18 evidence in the records of some other physician diagnosing a hole in the
19 bowel and telling Dr. Rives that he should be thinking about that.

20 There's nothing in evidence, or nothing in the records that
21 some other doctor who's involved in her care day by day by day is
22 thinking that she has to go back to surgery, I need to talk to Dr. Rives,
23 and I need to tell him to take her back to surgery. Nobody testified about
24 that of all the different doctors who were taking care of her. There's
25 nothing in the records that actually indicate some other doctor was so

1 worried that there was a hole in the bowel, and was so worried that she's
2 not getting better, and so worried that she needed to go back to surgery.
3 So worried that nobody said anything to Dr. Rives about that. Well, no,
4 that doesn't make any sense. There was no such worry. There was no
5 such concern by any of the other doctors who were taking care of her
6 prior to July 14th about whether there was some hole in the bowel or
7 some problem going on inside the abdomen.

8 Dr. Hurwitz apparently ignored Dr. Ripplinger's consultation.
9 Remember Dr. Ripplinger? Dr. Hurwitz did not try to explain it a way, like
10 he didn't try to explain the imaging. He just ignored Dr. Ripplinger
11 altogether. He ignored the imaging altogether. And what did Dr.
12 Ripplinger say on July 9? And his note is in the records. And I
13 apologize, I didn't write the page number, but it's kind of towards the
14 front of the exhibit. But what Dr. Ripplinger said on July 9th was he was
15 concerned about something going on inside the abdomen. Well, so was
16 Dr. Rives. And Dr. Rives had had that concern every day since she took a
17 turn for the worse on July 4th.

18 Dr. Ripplinger recommended a CT scan to look inside the
19 abdomen to see if there was something worrisome. And if there was
20 something worrisome, Dr. Ripplinger is recommending going back in
21 and operating. That's what he states. One can reasonably infer from
22 that comment that if the CT scan does not show anything worrisome,
23 then there is no reason to go back in and reoperate to perform surgery
24 again. The CT scan is performed on July 9th. There's nothing
25 worrisome. There's no reason to operate.

1 Dr. Rives agreed with Dr. Ripplinger's thoughts, plan, and
2 what he was thinking. The two of them were on the same page.

3 Dr. Juell, again, his two standard of care criticisms, the trees,
4 we've talked about that. Let's look at Dr. Juell. Mild mannered, maybe a
5 little bit quiet, not a professional expert witness. But did he hold up well
6 to cross-examination? And what happened during cross-examination,
7 ladies and gentlemen, to Dr. Juell? You have to decide for yourself.
8 Was there bullying? Were there insults?

9 THE COURT: No. Can you both approach?

10 Madam Court Reporter, can we please turn on the white
11 noise? Thank you so very much.

12 [Sidebar at 11:53 a.m., ending at 11:54 a.m., not transcribed]

13 THE COURT: Madam Court Reporter, thank you so much.

14 Okay. The jury is going to be told counsel is going to
15 withdraw statements with regards to Juell. The jury is going to
16 disregard any commentary that talked about anything that may or may
17 not have gone on on the stand.

18 Counsel, please continue with closing argument.

19 MR. DOYLE: Thank you.

20 THE COURT: Thank you.

21 MR. DOYLE: Looking at Dr. Juell, his years of experience.
22 Remember, I mentioned he -- you know, he's Board certified in critical
23 care general surgery. He also told you that a focus, or an area of his
24 expertise is the repair of abdominal wall hernias, unlike Dr. Hurwitz.
25 Who better to have evaluate this case, a case about an abdominal wall

1 hernia repair. Who better to have evaluate this case other than someone
2 who has a particular interest in the surgery and in the procedure.

3 And Dr. Juell told you to a reasonable degree of medical
4 probability that all of Dr. Rives' care was within the standard of care. He
5 explained to you why given the circumstances of this case it was okay to
6 use the ligature to dissect adhesions. You can use it near the bowel. He
7 told you about the protective ceramic cap. He told you to a reasonable
8 degree of medical probability that in his opinion the ligature did not
9 cause any injury to Mrs. Farris.

10 He told you why it was okay to not operate on July 9th. He
11 looked at all the data. He looked at the imaging studies, the laboratory
12 tests, the clinical exams, the physician progress notes. He looked at how
13 Mrs. Farris was doing day by day. Her sepsis had resolved by July 9th,
14 according to Dr. Juell.

15 And then Dr. Juell spoke about the cause of the sepsis on
16 July 4th, because again, we know from Dr. Juell's testimony that maybe
17 there was a thermal injury. But that's not going to open up and cause
18 problems until the day after on July 5th. But Dr. Juell testified based on
19 his background, training, and experience, how bacteria can escape from
20 those holes before they're repaired. That the bacteria sometimes cannot
21 be controlled or washed away with irrigation and drainage. They can't
22 be, you know, eliminated or killed by the prophylactic antibiotics. And
23 they can sometimes just continue to grow, and multiply, and cause an
24 infection.

25 He also shared with you his thought about aspiration, foreign

1 material inside the lungs triggering a pneumonia and triggering the
2 sepsis. He showed you the different imaging studies if you'll remember.
3 Not only did he show you the imaging studies of the abdomen, but he
4 showed you some x-rays and some CT scans of the lungs and shared
5 with you what he saw and what he thought was going on.

6 Dr. Juell had told you about the cause of the decline on July
7 14. In his opinion, one of the staple lines failed. There's now a hole, and
8 now there's bowel contents leaking. He considered Dr. Ripplinger's
9 consultation. He considered all the evidence. And even after cross-
10 examination, Dr. Juell still believed -- remember, I asked him that
11 question. I said after, you know -- I think it was my last question. Dr.
12 Juell, after the cross-examination, do you still believe all of Dr. Rives'
13 care was appropriate and within the standard of care? And he said yes.

14 So ladies and gentlemen, the evidence has clearly shown the
15 answer to question number one is no. The pathology report and the
16 three holes. Ladies and gentlemen, if there's some issue about this in
17 your mind, I would invite you to look at Exhibit 1, pages 31 to Exhibit 1,
18 pages 36 -- page 36 rather. This is a note prepared by Dr. Hamilton on
19 July 17th that document -- it's 31 to 36 -- that documents her visit with
20 Mrs. Farris on July 16th, the operation on July 16, and then her visit with
21 Mrs. Farris the next day on July 17th. And I want to pull up one page
22 from this. And this will be Exhibit 1, page 34.

23 So what Dr. Hamilton has here, "With great care I removed
24 the purple tackers that were holding the mesh in place on two times.
25 The purple tackers ripped the outer layer of my glove, and I had to

1 change gloves, but the mesh was removed without complication.
2 Underlying this was what appeared to be the transverse colon with
3 about a quarter size, or about a 2 and a half to 3-centimeter hole with
4 semi chronic appearing edges. Around it there was active leak of green
5 feculent material and free air." And you can read the remainder of her
6 note, and she does not describe a second hole or a third hole. You will
7 find this to be a long and detailed note of two visits and an operation.
8 And Dr. Hamilton, at the point in time she's first looking at the transverse
9 colon she's only seeing one hole, ladies and gentlemen. Just one hole.

10 Why were there three later by the pathologist? Well, no one
11 really knows to a reasonable degree of medical probability. The
12 pathologist didn't testify. A pathology expert didn't testify. No one
13 knows. I mean, were there one or two more holes created by Dr.
14 Hamilton after she found the first one? Did something happen in the
15 pathology lab? No one knows because it's just not known. But if it's
16 important to the Farris' that there were three holes, it's their burden of
17 proof to come forward with the evidence to a reasonable degree of
18 medical probability to show you how and why each of those holes
19 occurred. And there just isn't any. And you have Dr. Hamilton
20 describing seeing just one.

21 So as I said earlier, in the unlikely event you answer question
22 number one no, then you have to look at number two for whatever you
23 decided was below the standard of care. I've already talked to you in
24 detail earlier about why there's no proximate cause, why the answer to
25 question number two is no. And I just want to remind you, you know,

1 what did cause the sepsis on July 4th? What did cause the sepsis on
2 July 4th to a reasonable degree of medical probability? Was it a hole in
3 the transverse colon? No. There's no evidence of that.

4 And again, even giving Dr. Hurwitz the benefit of the doubt
5 about maybe, there just isn't any competent evidence, leaving us with
6 the escape of bacteria on July 3rd that was not washed away and
7 controlled by the prophylactic antibiotics, or the aspiration as described
8 by Dr. Juell. So for all the reasons that I discussed, the answer to
9 question number two is no.

10 Dr. Shaikh -- this might come up in a little bit by counsel. But
11 this whole thing, remember, fecal peritonitis, fecal peritonitis, there was
12 a diagnosis of fecal peritonitis, et cetera, et cetera. You can go back --
13 and I apologize, I didn't write down the page numbers for Dr. Shaikh's
14 initial note. But again, it's toward the front of the exhibit as I recall. But
15 when Dr. Shaikh saw Mrs. Farris on July 4th, what Dr. Shaikh put down
16 was this could represent fecal peritonitis. It doesn't say this is, or I'm
17 certain, or I'm sure. This could represent fecal peritonitis. And Dr.
18 Shaikh therefore initiated various antibiotics to treat that possibility, a
19 possibility that Dr. Rives was thinking about that day and each
20 subsequent day.

21 Ladies and gentlemen, I'm going to sit down in a moment
22 and you're not going to hear from me anymore. I've covered a number
23 of important points. I've tried to cover some points that I -- were
24 important to me, and I thought might be important to you. And I'm sure
25 I missed a lot. I mean, with a trial of this length it's not possible for me

1 to stand here and talk about each and every point, or to try and predict,
2 you know, what questions you may still have in your mind. It's just not
3 feasible or possible.

4 What I don't want you to do is assume because I didn't have
5 something to say about something it was because I didn't have
6 something to say. I have something to say about each and every point in
7 this case. Mr. Kimball will get back up. He'll have an opportunity to
8 address my comments and respond to what I had to say. I would love to
9 get back up after him and have another shot at it, but that's not how the
10 process works. His rebuttal argument as we call it will be the final
11 argument before you go back to deliberate. But while listening to him,
12 you know, perhaps you might want to say, well, what would Mr. Doyle
13 say about this or that.

14 I want to thank you for the time and energy that you've
15 devoted to this case. It has been a long trial. I know there's been a lot of
16 time spent in the hallway. I apologize for that on behalf of myself and
17 Dr. Rives for that time you did spend in the hallway. I also want to
18 apologize, you know, if there's anything I did during the course of this
19 trial. You know, I'm Irish, and sometimes my Irishness comes out. And
20 sometimes I -- maybe I object too much, or maybe I object to
21 vociferously or something. And so I would hope that I mean, if I've done
22 something or said something that has bothered you or annoyed you,
23 take it out on me sometime later, but please don't take it out on Dr.
24 Rives. I'm just trying to do the best I can.

25 On behalf of Dr. Rives, thank you. On behalf of myself, thank

1 you.

2 Your job now, the hard job, is you have to evaluate the facts
3 and do justice, ladies and gentlemen. And the evidence has clearly
4 shown that to do justice in this case you have to have a finding in favor
5 of Dr. Rives and a finding that he's not legally responsible for what
6 happened to Mrs. Farris. Thank you.

7 THE COURT: Thank you.

8 Rebuttal closing by Plaintiff?

9 MR. JONES: Yes, Your Honor.

10 THE COURT: Do you need a moment to switch things over?

11 MR. JONES: No.

12 THE COURT: Okay.

13 MR. JONES: No, I'm just going to --

14 THE COURT: That works.

15 MR. JONES: Nope. I'm not even going to use any tech.

16 PLAINTIFFS' REBUTTAL CLOSING ARGUMENT

17 MR. JONES: So I was going -- well, I think I still will, start out
18 by commenting on the reality that they ultimately found three trees,
19 right, after they did the pathology report, right. In reality though, this is
20 something very serious, and so let's go through it a little bit. I'm not
21 going to cover -- there's several things I'm not going to even mention
22 that counsel said. I didn't want to be objecting on every question. I
23 wanted this thing to end once and for all. And so I let a lot of things go
24 that I didn't object to.

25 And so I just wanted to be very, very clear that on comments

1 that counsel made about purported things that experts did or did not
2 say, I don't agree that those events occurred for the most part. I think
3 that it was not an accurate representation. And I think that it would've
4 been very easy to make clips of those and to show you, as we did, if that
5 actually happened that way. If you don't remember it, I think you should
6 ask yourself why.

7 MR. DOYLE: Your Honor, I object. That's improper personal
8 opinion.

9 THE COURT: Overruled in light of this -- in light of the
10 statements during Defense closing.

11 Go ahead, counsel.

12 MR. JONES: The other thing that I think is very important is
13 counsel mentioned that -- he said that there were all of these records
14 showing these other doctors who were actually -- or I don't know exactly
15 what he said. But he suggested some way or another that within the
16 records there were other doctors who were agreeing with Dr. Rives
17 about the condition of the -- about the condition of Titina Farris. That
18 also is something that I think would've been very easy to show right here
19 to all of you, but it wasn't shown. It was just stated. And you'll notice
20 that it was stated several times referring to Dr. Rives' records only, to his
21 own statements. But you'll see over, and over, and over again there's
22 been ample opportunity to demonstrate how all of these other doctors
23 were in line with Dr. Rives. But that wasn't done because the records
24 don't exist. They're not part of the file.

25 So as you go through -- and that could've been shown to you

1 if they existed. It wasn't. I haven't shown it to you. I'm unaware of it.

2 Now, there was the comment on Dr. Hamilton's report. I
3 endorsed that. Go ahead and go through it. It's, like, a seven page -- or
4 it's a significant operative report that outlines in detail what Dr. Hamilton
5 did in a lifesaving surgery that saved Titina Farris. She did a
6 phenomenal job. And you should -- you can read it, and you can see
7 exactly what she did. You can see what she found when she entered the
8 abdomen and all of the organs -- all these organs are all the same color.
9 She has a hard time even telling what is bowel versus other things
10 because it's so contaminated and horrible as she goes in. And she
11 identifies all of these -- this feces everywhere, cleans the whole thing up.
12 Expertly identifies the section of bowel that Dr. Rives has worked on, and
13 has to cut it, has to get rid of it, and has to do -- put the bag on after that.
14 And she does an expert job doing all of that. And I think she has to cut
15 off -- I believe it says nine inches, I could be mistaken. But I believe it's
16 nine inches of bowel that was the subject amount that Dr. Rives had
17 been working on. And she sends that to pathology, right.

18 And to try the blame game during closing and to say that Dr.
19 Hamilton on this piece of bowel that she thought was particularly critical
20 to send to pathology so they could identify what went on here, that Dr.
21 Hamilton somehow was uncareful and damaged it, right, or pathology
22 did. It's an absurdity. There were three injuries that pathology found,
23 and that was in the section of bowel that Dr. Hamilton cut because that
24 was where Dr. Rives was working on, and that's why it was sent to
25 pathology.

1 In addition to, you know, the two holes in the forest, this idea
2 that there were only two things that had ever been done in terms of the
3 standard of care, you heard the witnesses. You know that that is not
4 accurate at all. In fact, Dr. Horowitz said it was a violation of the
5 standard of care by the fact that he had failed to diagnose fecal
6 peritonitis, and he failed to diagnose the obvious conditions that Titina
7 had day after day after day. Right. We have an ongoing failure of the
8 standard of care. Every single time Dr. Rives steps in the room there's
9 another failure in the standard of care.

10 MR. DOYLE: Your Honor, I object. That's improper
11 argument.

12 THE COURT: The Court's going to sustain that based on that
13 very last sentence, every single --

14 MR. JONES: Okay.

15 THE COURT: -- day. Thank you.

16 MR. JONES: Every time that Dr. Rives had an opportunity to
17 diagnose the actual condition that Titina Farris had and he failed to do so
18 was a breach in the standard of care. And the idea that you pin it to --
19 anyway, you've heard it. I'm not going to cover that anymore.

20 And moreover, you heard it from Dr. Juell. And Dr. Juell
21 identified things that were below the standard of care. And I want to talk
22 for a minute, and you know what, maybe I was rough on Dr. Juell, right.
23 I don't have any particular malice for the guy other than the fact that he
24 did some stuff that I think is not right. And so I went after him a little bit
25 about some things that I didn't think was appropriate that he had done.

1 MR. DOYLE: Objection. Improper expression --

2 MR. JONES: I'll --

3 MR. DOYLE: -- on the personal opinion.

4 THE COURT: The Court is going to overrule the objection in
5 light of the statements made by Defense counsel during their closing.

6 Counsel, continue. But --

7 MR. JONES: Thank you. Sorry, Your Honor.

8 THE COURT: -- shortly move on. Thank you.

9 MR. JONES: Yes. And I'll tell you, so Dr. Juell, was I a little
10 rough on him? Yeah, I think I was. I think I was. And I wasn't trying to
11 be mean. But I was trying to make sure that the truth came out so that
12 you guys could all see it. That you could see exactly what the real --
13 what the truth of the matter was when it came to Dr. Juell. And, you
14 know, Dr. Juell, he's stated again that he's not a -- what, I'm not a paid
15 expert. He's been hired by Dr. -- by Mr. Doyle 10 prior times.

16 So I mean, I don't know what that means. He's been hired as
17 an expert for 20 years, and this is his at least 11th case with this attorney
18 where in each and every case he came in and said the doctor did nothing
19 wrong. And so the idea that he's -- I don't even know what that means to
20 say that he's not a professional expert. I'm not -- I don't fully understand
21 that.

22 I did want to talk about the dehumanizing that he did. And
23 that is a real thing, and it is really not okay. Dr. Juell I think for the most
24 part came in here, and he was caught up in the competition of an event
25 where people disagree. Right. I'm not going to take anything personal

1 about him or anything like that. I'm not going to say anything like that.
2 But Dr. Juell -- and I went through it with him. In his report he does -- he
3 certainly says -- he certainly puts in parentheses that he has reduced the
4 name Titina Farris down to TF. He says that. But with Dr. Rives he didn't
5 do that. And then he goes on to hammer her for things that are not her
6 fault, and it's unbelievable. It's completely unfair. And he knew it was
7 unfair. And you can tell when I had him up here, he did not -- he didn't
8 feel comfortable with what he had done in that report, and I think that
9 you were able to see that.

10 And when I then contrasted that with how he didn't do that
11 with Dr. Rives, and how he tried to make Dr. Rives out to be a hero in his
12 report, and I pointed out to him the heroic language he used for Dr.
13 Rives, when Dr. Rives came to the rescue on the 15th and wanted to do
14 the surgery, right. And what was his response to that? He didn't want to
15 be caught up in the language he had used in his report. Instead he
16 shortcut it and said, well, I guess Dr. Rives was the only guy that
17 could've done it, that could've recommended it because he was the only
18 surgeon on the case. He backtracked off that because what he did was
19 not okay. And I'm not saying he did it because he's a bad guy, but he
20 shouldn't have done it. What he did, he shouldn't have done it.

21 And when it came to the 15th itself, right, not that it even
22 matters, you were here when I asked him how long -- okay. So let's just
23 say everything else out the window, how long does Dr. Rives have to
24 make a reasonable recommendation for surgery on the 15th? What did
25 he say? He said a couple of hours after scrambling, right. He says

1 immediately first. Then he says a couple of hours. And then it becomes
2 more and more apparent that it's a longer and longer timeframe. He's
3 like, well, what's reasonable. Right. Here, I'll throw out something that
4 you can't possibly measure, right. What's reasonable. Right.

5 But you saw what happened. It was five and a half hours
6 later that Dr. Rives even suggested doing another surgery. And despite
7 what has been said, you've heard the testimony and you can decide
8 when it is that he knew what.

9 Dr. Adornato, we have no idea what -- well, Dr. Adornato, we
10 have no idea what he based anything on because he didn't give us his
11 file, right. And neither did Dr. Juell. Now, although Dr. Juell -- if you
12 recall, Dr. Juell made it very clear that he had read everything, right. He
13 said that over and over again, he had read everything. And he wanted to
14 make sure of that because he didn't want to be impeached on the idea
15 that he was missing information. And let's remind you, this was the day
16 before Dr. Adornato testified, right. I went through it with him, and I
17 wanted to see if he was going to be truthful about what happened in this
18 case.

19 And so he absolutely says with certainty, I've reviewed 8,000
20 pages. How long -- you know, and I walked him through it. I mean, I
21 don't know if he's called the Guinness Book of World Records to
22 demonstrate his speed reading abilities, right. I have no idea. But the
23 idea that he did this is absurd. And these are based on his numbers.
24 These were not coached numbers. These were numbers that I walked
25 him through, and I allowed him to give me all of his numbers. And then

1 I pointed out what that actually meant. Well, no surprise, Dr. Adornato
2 the next day comes in and he says what, no, I only received 200 pages.
3 Well, 200 pages of an 8,600 page chart? Which 200 pages, right? So in
4 terms of what the truth is of all this, who knows. What we do know is Dr.
5 Adornato was not given any of the films, or any of those things.

6 I do want to make one significant clarification. It's that Dr.
7 Barchuk came and testified to you that he didn't know about Titina Farris'
8 prior medical history of something. Something along those lines I think
9 was just said. And if I misheard it, I misheard it. But let's be very, very
10 clear. Dr. Barchuk reviewed all of the records. All of the records. We
11 didn't pay him \$32,000, but he was paid a lot of money. I don't
12 remember how much, but plenty. Okay.

13 Everyone -- I'm not taking shots at these doctors who are
14 good at what they do so they get paid a lot of money. It is what it is,
15 right. But you should be aware of what it is so that you can assess
16 whether or not they're biased, right. And if you notice, Dr. Barchuk, Dr.
17 Willer, all of our experts came up here and one of the first things they
18 said is how much money they've been paid on the case, right. They put
19 that out to you. Why is it that I had to go through it and pull it out and
20 go through the process that we aren't provided that information, even
21 though it's supposed to be provided. In any case, Dr. Barchuk spent
22 hours with Titina Farris, hours with Titina Farris and Patrick Farris testing
23 every little thing that they -- that Titina could do. Reviewed all of the
24 records. He knows all about her prior conditions.

25 When he prepared his life care plan it was with a full

1 knowledge of her conditions in the past and in the present, and it's a
2 projection into the future. And so it's not a situation that he doesn't
3 know. He knows it all. He knows everything there is to know. He knows
4 all the information that we have. And he put together the best plan he
5 could based, on actually having all of the information. And so what he
6 said is that he took -- he did not include in the life care plan things that
7 she will need in the future related to her past conditions. So he reduced
8 the life care plan to take out the past conditions. But he did not -- he was
9 not unaware. He understood all of them and made sure to properly take
10 out anything from her past that wasn't caused by the surgery.

11 I found it interesting that the theme of Defendant's close was
12 obfuscation. Of all things can you imagine. That there's some effort on
13 the Plaintiffs' part to hide anything. Our experts got all of the records.
14 They went through everything. Our -- we have tried to get the truth in
15 front of you everywhere we can so you can make a fair decision based
16 on what really happened. We didn't come up with some bizarre lung
17 cascade, you know, when it's very obvious that the injury is in the
18 stomach. It's very obvious the injury is in the bowel. And that's
19 definitively demonstrated when they do the second surgery and it fixes
20 everything.

21 Oh, this is significant. I just want to make sure. The Defense,
22 Mr. Doyle, mentioned that -- okay. This is Jury Instruction No. 26,
23 Defense counsel mentioned, and said something to the effect of carefully
24 and skillfully is like not significant, or something, within the standard of
25 care. It actually is. Does it say carefully and skillfully? No, it says care

1 and skill.

2 And I asked his expert, Dr. Juell, specifically on that and he
3 said yes, he needs to be careful and skillful in everything he does. So
4 this isn't some, you know, made up thing. That is standard of care.
5 Here's the standard of care chart right there, care and skill. And
6 Dr. Juell, their own expert, identified very clearly as carefully and
7 skillfully is also a perfectly appropriate way to describe that.

8 No comment was made by Defense counsel on any of these
9 things, on the Vickie Center case or on the Dr. Rives' history of not being
10 exactly up front on things.

11 When you are in deliberations in just a couple of minutes,
12 because I'm just about done, when you are deliberating in a few
13 minutes, in the process of voir dire, it seems like an eternity ago, I asked
14 a lot of questions because I wanted to make sure that my clients had a
15 fair jury.

16 There were people who made it very clear that they had a
17 hard time with the idea of judgment, and as they expressed the reasons
18 why, it occurred to me there could be no one better than someone who
19 cares about the decision that much that they will do the right thing, that
20 they don't want that on their conscience down the road; that they want
21 to go in and do the right thing based on the evidence.

22 So there are two things that I think are very significant with
23 this. Number one, Dr. Rives doesn't get it. It's clear he doesn't. Your
24 verdict should, based on the evidence, send a message to Dr. Rives that
25 what he did was not okay, that it's not okay.

1 MR. DOYLE: Object, Your Honor. Jury nullification.

2 THE COURT: The Court overrules it, the way that that was
3 specifically stated. Counsel for the Plaintiff, move on.

4 MR. JONES: Number two, you have heard Patrick and Titina
5 testify. These two guys, they love each other. I mean, you could see it,
6 right, and you could see how much they care for each other, how
7 committed they are, how dedicated they are to each other, and they have
8 had this upset in their life that is major.

9 They haven't fallen apart, they've come together. They've
10 made it as good as they can. But Dr. Rives made her a cripple, and
11 Patrick is filling a role to make her life as good as he can, and he's doing
12 a very good job with it. And you don't need to worry about the medical
13 expenses of that, right, but you have an opportunity, based on the
14 evidence, to give them a second chance, and you should.

15 THE CLERK: Oh, I'm sorry. You want that back up?

16 MR. JONES: Yes, please. Thank you.

17 Okay. So we went through this a moment ago. Dr. Rives
18 was negligent. Dr. Rives' negligence was the proximate cause of
19 Titina Farris' injuries. The answers to those are yes. I do not agree that
20 there's any justification to reduce the life care.

21 So comments were made about that, about the nature of
22 how it's done and some criticisms. The reality is both of these
23 economists used a standardized approach that is used commonly within
24 economics. One is more protective, one is less protective, and it is what
25 it is. We think that you should use the more protective version. Okay.

1 All right. Titina Farris, her past noneconomic damages. This
2 goes from the date of the incident until now. Any pain, any physical or
3 mental pain, any suffering, anguish, disability or loss of enjoyment of
4 life, from then until now. Her future physical and mental pain, suffering,
5 anguish, disability and loss of enjoyment of life.

6 Patrick Farris' noneconomic damages; past loss of
7 consortium, society, comfort, companionship, and future. And under
8 ordinary circumstances, I might put a higher number in the future, but in
9 this particular case, with the life care plan, a lot of the difficulties that
10 Patrick is dealing with in his life, and that he and Titina are, will be
11 partially resolved. They'll have somebody that is there to help a lot.

12 And so those are the numbers that I have put up there. I
13 described for you before a way that would be fair for you to come up
14 with numbers, and I think that that is exactly right. I think it's evident
15 what Dr. Rives did here and that it clearly is related and caused all of
16 these incidents. All of the experts said so. There's no one in
17 disagreement on this. All of the experts agree the colostomy and the
18 foot drop were caused by this surgery.

19 Now, if you guys are in disagreement when it comes to the
20 damages, come together and find something that you guys think works,
21 but think about what you believe a reasonable person would consider,
22 what would it cost that person to consider these things, and all of that.

23 So thank you again, and good luck in your deliberations.

24 THE COURT: Ladies and gentlemen of the jury, you know the
25 Court stated once the closings were completed, after each counsel had

1 an opportunity to do their closing, Plaintiff, Defense, and then Plaintiff
2 got to do rebuttal, the clerk at this juncture is going to swear in -- we
3 have two sets. As you heard from the jury instruction, the clerk is going
4 to swear in first the alternate, and at this juncture --

5 [Pause]

6 THE COURT: So somebody else is helping us out today.

7 So, ladies and gentlemen of the jury, as you can appreciate,
8 there is nine of you, and you've heard the jury instruction, eight of you
9 will go back to deliberations. So at this juncture, in just a moment,
10 Madam Clerk is going to state who our alternate is in this case.

11 And what's going to happen with the alternate is we need to
12 be very clear. The alternate is going to have two choices. The alternate,
13 if the alternate wishes to stay -- the jury's going to go back to the jury
14 deliberation room, which you actually ate lunch in the other day.

15 The alternate's going to have the choice to either go into the
16 other jury deliberation room and sit there, will not be speaking with any
17 of the jurors, or can go back to his or her life. But if they go back to his
18 or her life, what they're going to need to do is provide the phone number
19 so they can be contacted immediately, because here's what happens.

20 With the alternate, the jurors will go back for deliberations. If
21 for any reason one of the jurors who go back to deliberations is unable
22 to continue deliberating, we need to contact the marshal. The marshal
23 will then contact the Court. The Court will then contact counsel for the
24 parties and make that determination. And then the alternate would
25 potentially need to come back and deliberate with those individuals.

1 Okay.

2 The individuals, if the jury had already begun deliberating,
3 then the jury would need to start from scratch their deliberations
4 process. That's why it's so very, very important that -- like I said, the
5 alternate can either leave or stay, the choice is going to be up to the
6 alternate, but if the alternate does leave, cannot discuss any matter,
7 cannot post anything, the whole admonition that the Court gave would
8 fully apply.

9 In fact, it would fully apply until next week because we don't
10 know how long deliberations would take. Okay. You people have an
11 opportunity to deliberate all day today, as late as the jury's going to want
12 to deliberate, and then if they wish to come back on Monday, they can
13 continue to deliberate, you know, for as many days as the jury feels it's
14 appropriate to deliberate.

15 And so the alternate would need to ensure that he or she is
16 not in any way communicating with anyone, discussing the case, doing
17 any postings, everything that was set forth in the admonishment.
18 Because, like I said, if the alternate comes back, then the jury would start
19 again from scratch with deliberations from the very beginning, and the
20 alternate then would participate in that full deliberations.

21 If the jury, however, the individuals who go back, are able to
22 complete their deliberations, then the alternate just would be notified at
23 the time that there is a jury verdict rendered that they could call in and
24 determine the verdict has already been rendered and that they are
25 released from jury duty.

1 So whoever that alternate is, who Madam Clerk's going to
2 name in just a moment, has to understand that they're not released until
3 they would contact the Court, most likely on Monday, to see if the jury
4 deliberations are ongoing or if they have been completed.

5 Okay. Does everyone understand that before Madam Clerk
6 says who the alternate is? Do appreciate it. Thank you so very much.

7 So at this juncture Madam Clerk is going to swear in my JEA,
8 Ms. Tracy Cordova, who's going to take charge of the alternate and find
9 out if the alternate's going to stay or not stay and get the appropriate
10 phone numbers.

11 And then what's going to happen thereafter is Madam Clerk
12 is then going to swear in the marshal who's going to take the remaining
13 eight jurors back to the jury deliberation room, which there's food back
14 there, and to commence deliberations. I'll tell you in a moment or two
15 thereafter, then you'll get the jury instructions, the exhibits that have
16 been introduced, as well as the verdict forms that have been prepared
17 for your convenience back into the jury deliberation room.

18 So at this juncture I want to ensure that the jury understands
19 those instructions. I'm seeing affirmative nods from everyone.
20 Thank you so very much. Do appreciate it.

21 So, Madam Clerk, can you please state who the alternate --
22 first, if you would please swear in Ms. Cordova to take charge of the
23 alternate.

24 [The Clerk swore in the officer to take charge of the jury during
25 deliberations]

1 THE CLERK: Thank you.

2 THE COURT: So, Madam Clerk, can you please take who the
3 alternate is in this case, please?

4 THE CLERK: Mr. Roger Johnson is the --

5 THE COURT: So, Mr. Johnson, would you mind meeting
6 Ms. Cordova, you can go to the back door, okay, and you can -- the
7 marshal will take charge of your juror notebook and keep it secure.
8 Okay. Thank you so very much.

9 And so now at this juncture, Madam Clerk, I'm going to ask
10 you to please swear in the marshal to take control of the rest of the
11 jurors and bring them back to the jury deliberation room, please.

12 [The Clerk swore in the Marshal to take charge of the jury during
13 deliberations]

14 THE CLERK: Thank you.

15 THE COURT: Okay. So at this juncture, courtesy of all.
16 Marshal.

17 THE MARSHAL: Rise for the jurors.

18 THE COURT: Okay. And take your juror notebooks.

19 THE MARSHAL: Take your notebooks.

20 THE COURT: Yeah, please do. Please take the basket, if you
21 want. And like I said, there will be food in the jury deliberation room for
22 you. And thank you so very much.

23 [Jury retired to deliberate at 12:35 p.m.]

24 [Outside the presence of the jury]

25 THE COURT: Okay. Counsel, with respect to what was

1 stated before the Court read the jury instructions, stated that in case
2 there was -- and, in fact, I even had mentioned the same one I mentioned
3 to you the other day, you all did not fix the gender, you know.

4 So in Instruction 38, okay, under Patrick Farris, the one that
5 you were supposed to fix, you didn't change it from a she to a he, so the
6 Court read in line 8 the word he, instead of the word she, as you all had
7 requested, and that was in two different locations in that jury instruction.

8 Would you like the Court to make the physical change to the
9 document just by eliminating the S and then changing it to the
10 masculine form instead of the feminine form on Instruction 38?

11 MR. JONES: Yes, Your Honor

12 THE COURT: Pardon?

13 MR. DOYLE: Yes.

14 THE COURT: Okay. So the Court will do that. Then
15 afterwards, I'm just going to ask you, because these are the blue back
16 ones, so have you taken a look at them before they get stapled to go
17 back to the jury. Okay. So the Court will see that the -- counsel, you can
18 feel free to approach on 38. The Court just took out the f-e, female, at
19 line 5, and on line 8 deleted the S before the h-e, so that you turned
20 female into male and she into he.

21 Do either of you want to look -- these are the 45 pages that
22 you all provided with your handwriting in the upper right-hand corner,
23 showing those before Madam Clerk just does the power stapler on
24 those?

25 MR. DOYLE: No.

1 MR. JONES: No, I'm good, Your Honor.

2 THE COURT: Okay.

3 MR. JONES: Thank you.

4 THE COURT: And then this is the special verdict form that
5 was handed today. It's been blue backed by the clerk, as provided by --
6 well, it was the only that was provided, so it's only provided today.

7 MR. JONES: Okay.

8 THE COURT: Okay?

9 MR. DOYLE: Very good. Thank you, Your Honor.

10 THE COURT: And then, Madam Clerk, since these are blue
11 backed, just if you wouldn't mind -- why don't you take this little stapler,
12 or whatever, and that gets taken care of. And so by agreement, as you
13 all confirmed, I'm going to have Madam Clerk just confirm again the only
14 exhibits that were admitted and so then the rest of the exhibits are going
15 to be released to counsel.

16 And in turn, released to counsel -- I'm giving Madam Clerk a
17 moment so she can pull them out so that she can confirm which are the
18 ones that are going back to the jury and have you all both confirm that.
19 And then when I say the rest of the exhibits are released to counsel,
20 there is two choices on that. Okay.

21 One is you could take them today with you. Okay. The rest
22 of the binders that are behind the witness stand, et cetera, and the other
23 exhibits not there in the binder that will go back to the jury. Or two,
24 since today is Friday, basically by next Wednesday you can send
25 somebody with a box or whatever to pick up your respective exhibits for

1 the Plaintiff or Defendant. We can't really hold them past more than a
2 couple days because you can appreciate we're starting new trials. You
3 see how small our little storage area is.

4 MR. JONES: Absolutely.

5 THE COURT: And so either of those are going to be fine
6 options from the Court. So at this juncture though I'm going to ask
7 Madam Clerk what you show are the exhibits that have been admitted
8 and have both Plaintiff and Defense counsel confirm if that's your
9 understanding or not, please.

10 MR. JONES: Yes, Your Honor.

11 MR. DOYLE: Yes, Your Honor.

12 THE CLERK: Exhibit 1, 6 and 10.

13 THE COURT: Exhibit 1, 6 and 10 is what Madam Clerk shows.
14 Is that Plaintiff's understanding? Wait. Hold on a second.

15 [Pause]

16 THE COURT: Ten is the DVD. Ten is the DVD which is that
17 video from the --

18 MR. JONES: Yes, Your Honor, that's our understanding.

19 MR. DOYLE: What was 6?

20 MR. JONES: Six was the CareFusion records.

21 MR. DOYLE: Oh, right. Right, right, right.

22 MR. JONES: Meridian. CareMeridian.

23 THE COURT: Exhibit 1 was your hospital records. Exhibit 6,
24 Madam Clerk, could you -- she's going to need to --

25 THE CLERK: Custodian of records, and then --

1 THE COURT: Right. But of what entity? Does it say
2 CareMeridian on there? Just one moment, please.

3 [Pause]

4 THE COURT: Madam Clerk, [indiscernible]? What is it 1 and
5 6 in there?

6 THE CLERK: One, Meridian for 6, yeah. One, 6 and 10 are
7 together and can go back to the jury.

8 THE COURT: Right. But counsel is asking what No. 6 was.

9 MR. DOYLE: I've got it here. I've got the list here. We're
10 good.

11 THE COURT: Okay. So you confirmed 1, 6 and 10.

12 MR. JONES: Yes, Your Honor.

13 THE COURT: Now, with 10, since 10 is a DVD, 10 is that DVD
14 video, which --

15 MR. JONES: We brought a DVD player --

16 THE COURT: Okay.

17 MR. JONES: -- yesterday.

18 THE COURT: Right. So give me a quick second on the DVD
19 player. Is it a straight play and plug? And, Madam Clerk, do you know
20 where that DVD is that they brought yesterday?

21 THE CLERK: I wasn't here.

22 THE COURT: Right. I didn't know if there was a note left.
23 That's why I'm asking.

24 MR. JONES: Is it over here?

25 THE CLERK: I didn't get a note about the DVD player.

1 MR. JONES: Oh, I think that's it right there. I think it's just
2 over here on the side. Do you want me to -- I believe this might be it.

3 THE COURT: Sure. Okay. Okay. So that's the Sony DVD
4 player in the box. Okay. Is that just a straight plug in and play?

5 MR. JONES: It is, I believe. Yes, Your Honor.

6 THE COURT: Okay. Does Defense counsel want to see the
7 DVD player at all?

8 MR. DOYLE: No.

9 THE COURT: Okay. So the DVD player will go back because
10 that will be for Exhibit 10 to be played. And that's not in any way
11 protected in any manner, right, it's just straight pop the disk in and it
12 plays; is that correct?

13 MR. JONES: Yes. Yep, \$20 DVD player from Target.

14 THE COURT: Okay.

15 MR. JONES: Easy-peasy.

16 THE COURT: Okay. Just want to make sure. Okay. So that
17 would go back to the jury.

18 So what will go back to the jury, based on counsels'
19 understanding and agreement, Exhibit 1, which is the medical records,
20 right, from the hospital medical records; Exhibit 6, which you confirmed
21 is CareMeridian; Exhibit 10, which is a DVD. Is that correct from
22 Plaintiff's understanding?

23 MR. JONES: That's our understanding, Your Honor.

24 THE COURT: Counsel for Defense?

25 MR. DOYLE: Yes.

1 THE COURT: Okay. And included therewith would also be
2 the DVD player provided by Plaintiff to play the video, which is the
3 Exhibit 10 in the CD format, correct?

4 MR. JONES: Correct, Your Honor.

5 THE COURT: Correct from Defense?

6 MR. DOYLE: Yes.

7 THE COURT: Okay.

8 MR. DOYLE: Fine.

9 THE COURT: Then also the jury's instructions that were read
10 by the Court, 1 through 45, with the edited from the masculine to the --
11 from the feminine to the masculine, as appropriately agreed to by
12 counsel. Correct from Plaintiff?

13 MR. JONES: Correct, Your Honor.

14 THE COURT: Correct from Defense?

15 MR. DOYLE: Correct.

16 THE COURT: And then the verdict form that was presented
17 today after discussion, it was blue backed, you all had a chance to see it
18 at bench. That's the other thing that will go back to the jury. Plaintiff's
19 understanding; is that correct?

20 MR. JONES: Yes, Your Honor.

21 THE COURT: Defense understanding; is that correct?

22 MR. DOYLE: Yes.

23 THE COURT: Okay. That's the only things that this Court has
24 an understanding is to be going back to the jury. Is either Plaintiff or
25 Defendant asserting that anything else should be going back to the jury?

1 First, Plaintiff.

2 MR. JONES: No, Your Honor.

3 MR. DOYLE: No.

4 THE COURT: Okay. So those will be the only things,
5 Madam Clerk, confirming you heard what will be going back to the jury?

6 THE CLERK: Yes, Your Honor.

7 THE COURT: Okay. Do appreciate it. So at this juncture
8 here's what we're going to do. Have you all provided on a business card
9 your name and phone number? And not a voicemail, not something
10 where someone's not going to pick up, somewhere where you get a call,
11 because as soon as this stuff goes back to the jury, if they have a
12 question or something, you know, people can be immediately available.

13 All right. And so it's only one per side and then you're
14 responsible for contacting the other people. So whoever is the person,
15 just ensure that they have their phone, whatever, fully charged up,
16 wherever they will be, because it's a call, it's not a text or anything, you
17 know. It's a call at any time. Make sure you're fully available, please, for
18 each side.

19 MR. DOYLE: I don't have a card, but I can --

20 THE COURT: Do you have a piece of paper --

21 MR. DOYLE: Yes.

22 THE COURT: -- something you can write it on?

23 MR. DOYLE: Yes.

24 THE COURT: The phone number, that people will -- thank
25 you. Give it to Madam Clerk, please. And please do return the portable

1 hand-held. Okay.

2 COURT RECORDER: Should we go off the record?

3 THE COURT: No, we are not going off the record yet, please.
4 We're still on the record. What? Is that not a phone number? That's all
5 we need.

6 THE CLERK: I know.

7 THE COURT: Okay.

8 MR. JONES: It's your cell phone number, right, Jake?

9 MR. LEAVITT: Yes, it's my cell.

10 THE COURT: Yeah. It's got to be someplace that people are
11 completely available, will be picking it up, it's not turned off, it's not out
12 of batteries. It's something that, you know --

13 MR. JONES: Fully charged.

14 THE COURT: You can appreciate, I've done this a lot, that's
15 why the Court gives those friendly caveats when people say that they
16 haven't heard it. Okay. So you have to be fully available.

17 So at this juncture, being it's basically -- well, it's almost a
18 quarter to, here's what the Court's going to ask the parties, because you
19 know we still have the two sanction motions that have to happen that
20 you requested be done during jury deliberations.

21 Quarter of one, quarter of two. Let's see. 2:15 to have
22 counsel all back here, give you enough time for whatever you're doing,
23 assuming --

24 MR. JONES: Absolutely.

25 THE COURT: Now, 2:15 means if there's not a juror question

1 in the intervening time.

2 MR. JONES: Of course.

3 THE COURT: I'm just trying to give you a time to be back
4 here for the hearings.

5 MR. JONES: We will stay in the building.

6 THE COURT: Okay.

7 MR. JONES: Absolutely.

8 THE COURT: Now, remember the courtroom's going to be
9 closed. Of course, my team -- well, part of it gets to have lunch, part of it
10 has to observe the jury, but go ahead counsel for Plaintiff.

11 MR. JONES: Can we take our binders now?

12 THE COURT: You're more than welcome to come to the
13 witness stand and take the binder now if you wish to. Like I said, either
14 of those options because the Court's releasing the binders.

15 Counsel for Defense, do you wish to take yours now or just
16 pick them up by next Wednesday?

17 MR. DOYLE: I'll take them now.

18 THE COURT: Okay. Feel free.

19 [Pause]

20 There's some depositions that were lodged, but that were
21 not ever utilized, but I think Madam Clerk is going to need some time to
22 look through those, so those aren't going to be available right at this
23 particular moment. When you come back at 2:15, then we'll have which
24 ones those are available. Okay. Is that okay for both Plaintiff and
25 Defense?

1 MR. JONES: Absolutely, Your Honor.

2 MR. DOYLE: Yes.

3 THE COURT: Okay. Our Madam Court Reporter is saying
4 that your DVD player is not put together. Is it put together? So basically,
5 remember, it was supposed to be so the jury could just plug it in. It
6 looks like there's various pieces, or whatever, and then there's cords and
7 stuff. I don't know if there's an HDMI cord or something.

8 MR. JONES: There's two sets of cords, Your Honor. There's
9 the full --

10 THE COURT: It's supposed to be so they can plug it into a
11 socket and play it. That's all they're supposed to be able to do. So it
12 needs to be in basically -- like I said, the format that it gets handed to
13 them, all they have to do is plug it in, right. Not that they have to
14 connect anything, start things up, make sure things are running and
15 working, or any of those kind of good things. It's got to just be --

16 UNIDENTIFIED SPEAKER: I found it.

17 THE COURT: Yeah. Because they can't be opening the
18 boxes like you're opening up and adding in cords and things like that.

19 MR. JONES: No, Your Honor. Thank you. And you asked if
20 it was plug and play ready and I said yes. I didn't understand you, and I
21 apologize.

22 THE COURT: Okay.

23 MR. JONES: We're getting it ready though.

24 THE COURT: So you can appreciate they can't spend their
25 time opening up boxes, figuring it out and read instructions and do

1 things. They have to just be able to pop it in a socket so that only a
2 straight battery kind of issue, right. Okay.

3 So Plaintiff's counsel, you've taken your witness binders.

4 MR. JONES: Yes.

5 THE COURT: Defense counsel, you're going to take -- there's
6 still two back there. I'm not sure whose those are.

7 MR. DOYLE: Yeah, I'll get them.

8 THE COURT: Oh, they're yours, Defense counsel. Okay.

9 So is there any other questions that either party has at this
10 juncture? Otherwise, we will see you at 2:15, unless you get a call earlier
11 that there's a juror question or a verdict by the jury and then, of course,
12 you need to be back here sooner.

13 The Court does remind the parties, please do not be more
14 than like 15 minutes away from the courthouse because you can
15 appreciate the jury wouldn't want to wait extended periods of time. So
16 please, no drives to Mesquite, Bunkerville, et cetera, or going to your
17 favorite restaurant that happens to be in Laughlin, or something. So that
18 would be too long of a time period to get back here. Okay.

19 MR. JONES: Very good. Thank you, Your Honor.

20 THE COURT: Thank you, sir. I assume there's nothing --
21 okay. At this juncture the Court's going to give to the marshal the jury
22 instructions, the exhibits, et cetera.

23 Any other questions? If not, Madam Clerk and Madam Court
24 Reporter, they're going to go off the record. Does that work for
25 everyone?

1 MR. JONES: That's fine.

2 MR. DOYLE: Yes, Your Honor. Thank you.

3 THE COURT: Okay. Thank you so much. Thank you so
4 much, Madam Court Reporter --

5 [Recess from 12:52 p.m. to 1:38 p.m.]

6 [Outside the Presence of the Jury]

7 THE COURT: Give me just one moment. Okay. Are we
8 about -- as soon as she puts the call through? Okay. Do I need this any
9 closer to me?

10 COURT REPORTER: No.

11 THE COURT: Okay.

12 UNIDENTIFIED SPEAKER: It's just from trying to stretch it
13 out.

14 [Court and Clerk Confer]

15 THE COURT: Sorry, just one second. I've just got to do a
16 real quick telephone call, conference call on a jury trial. Give me one
17 second and then I'll get right back to you.

18 Okay. Do I have both counsel on the line in case 739464,
19 Farris v. Rives?

20 UNIDENTIFIED SPEAKER: Yes, Your Honor.

21 MR. DOYLE: This is Tom. Yes.

22 THE COURT: Okay. Can I have Plaintiff first make an
23 appearance and then Defense counsel?

24 MR. JONES: Kimball Jones and Jason Leavitt and George
25 Hand are all here on the Plaintiffs' side.

1 MR. DOYLE: And Tom Doyle.

2 THE COURT: Okay. So Counsel, the jury just spoke to -- the
3 foreperson or whoever just spoke with the marshal and stated -- and just
4 to let you know, you're here in open court on the record, Madam Court
5 Reporter is here, on the record. The juror brought to the attention of the
6 marshal that question five, What are Patrick Farris' non-economic
7 damages? Subpart A and subpart B both have the word past, P-A-S-T.
8 Neither of them -- was it intentional to be sub A and sub B to both be
9 past?

10 MR. JONES: No, Your Honor. Subpart B was supposed to
11 be --

12 THE COURT: I need you identify yourself Mr. Jones. As
13 much as I understand who you are, I need you to just state --

14 MR. JONES: Yes, Kimball Jones.

15 THE COURT: Okay.

16 MR. JONES: This is Kimball Jones, and I can say that no,
17 that was an error. It should have said future instead of past on subpart
18 B.

19 THE COURT: Okay. So in light of that, I'm going to need to
20 ask you what you would like to do and see what Defense's position is.
21 Do you want to all come in? Do you need to argue it? Do you have an
22 agreement that you want the Court to interlineate the sub B instead of
23 the word past put the word future? Or what do the parties wish to do?
24 I'm going to ask Plaintiffs' counsel first and Defense counsel your
25 position.

1 MR. JONES: Your Honor, to interlineate and just write in the
2 word future in subpart B, that would be Plaintiffs' position.

3 MR. DOYLE: And the Defense is fine with that.

4 THE COURT: Okay. So and you all have each your own
5 copy, so you can see that it has that right?

6 MR. JONES: Yes.

7 MR. DOYLE: Yes.

8 THE COURT: Okay. So you both looked at it, both proofed it,
9 neither of you all caught it. So in subpart 5(B), the very first word that
10 currently says capital P-A-S-T, you wish me to strike through that and
11 write the word future, F-U-T-U-R-E; is that correct?

12 MR. JONES: That is correct, Your Honor. This is Kimball
13 Jones from the Plaintiffs. Yes.

14 MR. DOYLE: Yes, Tom Doyle, for the Defendant.

15 THE COURT: Okay. Does anyone wish to come in and have
16 this or do you wish me to take care of this with having your approval
17 over the phone?

18 MR. DOYLE: [Indiscernible].

19 MR. JONES: I think over the phone is fine.

20 MR. DOYLE: Same for the --

21 THE COURT: And that was? Since you both talked at the
22 same time, I just need one at a time. First, Plaintiffs then Defense.

23 MR. JONES: You can go ahead, Tom.

24 MR. DOYLE: That's fine, Your Honor. We don't need -- I
25 don't need to come in.

1 MR. JONES: Kimball Jones for the Plaintiffs. We also are
2 agreeable to that, Your Honor. We don't need to come in.

3 THE COURT: Okay. So based on the joint request of the
4 parties, the Court has put a line through the word P-A-S-T and instead is
5 writing the word F-U-T-U-R-E, F-U-T-U-R-E and then the Court is putting
6 a little JSK right next to it, okay. So then at this juncture, is there
7 anything else either party wishes to address with the Court or should the
8 Court just tell the -- provide this back to the jury?

9 MR. JONES: Just provide that back to the jury, Your Honor,
10 Kimball Jones.

11 MR. DOYLE: Provide it back to the jury.

12 THE COURT: Okay. So the Court will hand the verdict form
13 back to the marshal to provide back to the jury. Thank you so very
14 much. At this juncture, if there's nothing else, then shall we disconnect?

15 MR. DOYLE: Thank you.

16 MR. JONES: Yes, Thank you.

17 THE COURT: Okay. Thank you so much. At this juncture,
18 we'll disconnect and go off the record. I appreciate it. Bye bye.

19 Okay. Done, done, done. Okay. Welcome. See we were
20 waiting for you.

21 COURT REPORTER: Should we go off?

22 [Off the record at 1:42 p.m.]

23 [On the record at 2:18 p.m.]

24 [Outside the Presence of the Jury]

25 THE COURT: Okay. We're on the record outside the

1 presence of the jury. The marshal just informed us that the jury has
2 indicated to him that they have a verdict and so would you like the jury
3 to be brought in, counsel?

4 MR. JONES: Yes, Your Honor.

5 MR. DOYLE: Yes, Your Honor.

6 THE COURT: Okay. Then at this juncture, Ms. Cordoba,
7 could you please let the marshal know to please bring in the jury. We'd
8 appreciate it. Thank you so very much.

9 And just -- Counsel, just so you know what I do, although
10 you've had trials before me in the past, but just what I will do is when
11 they come in, I will say the record will reflect, you know, that counsel's
12 here. Now, are you waiting for you client at all? Should we be waiting?

13 MR. DOYLE: No, no, no.

14 THE COURT: Okay. And have you all cleaned up your trash
15 that you left for us? That was your Target bag you left on the table and
16 stuff -- trash you left for us.

17 MR. HAND: Oh.

18 THE COURT: No, I'm not talking about that. I was talking
19 also --

20 MR. LEAVITT: We're taking it out.

21 THE COURT: You'll be taking your own trash? Thank you so
22 much.

23 MR. HAND: We'll try to do that, Your Honor. I apologize.

24 THE COURT: We would appreciate it not left on tables. We
25 do appreciate it. Thank you.

1 MR. HAND: It sounds like a reasonable request.

2 THE COURT: No worries. Okay. So when the jury comes
3 back in, the Court will just basically say the record will reflect the
4 presence of Counsel because -- is that correct, Plaintiff did you wish us to
5 wait for your clients?

6 MR. JONES: No, Your Honor.

7 THE COURT: Defense counsel, do you wish us to wait for
8 your client?

9 MR. DOYLE: No, Your Honor.

10 THE COURT: Okay. So I will just say Counsel, then I'll
11 basically ask you to stipulate to the presence of the jury. Then I'll just
12 ask if they elected foreperson, who is the foreperson, and ask the
13 foreperson whether they reached a verdict. The foreperson will then
14 hand the verdict form to the marshal. The marshal in turn will hand it to
15 me. I will just review it just to see if all the lines have been -- well, to see
16 that things have been filled out.

17 And in that regard, based on our telephone conference,
18 which was fully recorded on our JAVS systems, at the request of
19 Counsel, the Court in subsection 5(B) did change the word from past to
20 future and initialed it. And so we did that. Does anyone wish to address
21 that issue at all?

22 MR. JONES: No, Your Honor.

23 MR. DOYLE: No, Your Honor.

24 THE COURT: Okay. So the Court did do that, and it went
25 back to the jury.

1 So then after this, then I asked Madam Clerk -- and I ask
2 Madam Clerk to read the entire form, regardless if something is filled out
3 or not. So even if something is not filled out, I ask her to just say there is
4 blank. So that if there's a question it is or is not filled out or there is a
5 line that is blank, just to read it and then just say that it is blank. So it
6 goes through the entirety of the form, okay.

7 Then I'll ask you -- and I'll ask right now, but I'll re-ask you in
8 front of the jury, is are either of you going to want the jury polled?

9 MR. DOYLE: It depends on the verdict.

10 THE COURT: Okay. Fair enough. Sometimes people know
11 in advance if they're going to. So and I'll just ask you in front of the jury.

12 MR. JONES: Yeah, that's fine.

13 THE COURT: Okay? That's fine. And then -- or I then explain
14 to the jury when I say individually polled, what's going to happen is
15 Madam Clerk is just going to go Juror No. 1, is this your verdict as read,
16 all the way through the eighth juror. Okay? So it's going to be a yes or
17 no, just -- and I explain to them that the reason why they're being
18 individually polled is because just like the jury instructions require six of
19 the eight of them must have -- the verdict, we just need to ensure that
20 there are six of the eight of them that have had that verdict.

21 And so Madam Clerk, you're hearing what I was saying --

22 THE CLERK: Uh-huh.

23 THE COURT: -- about reading the entire thing? Thank you so
24 much.

25 Okay. And then so after -- if you are requesting that it be

1 polled, then the Court will be glad to ask Madam Clerk to do so. If you
2 both say no, then they wouldn't be. If one says yes, and one says no, the
3 Court's position is that one party's requested it and so then we'll do it.
4 And I will tell you just from the course -- this of course starts with
5 Plaintiffs because it's Plaintiffs' burden. I'm going to ask them that
6 question and then it goes to Defense. Okay? So that -- keeping that
7 standard order unless you all are requesting some different order. Are
8 you requesting to -- just one moment. Are you requesting any different
9 order when I ask you the question about polling?

10 MR. JONES: No, Your Honor.

11 MR. DOYLE: No, Your Honor.

12 THE COURT: Okay. So then after if they are or are not
13 polled, regardless of which way you went, is that the Court will then say
14 the clerk will then record the verdict in the court.

15 And then what I will tell them, ladies and gentlemen of the
16 jury is that generally I tell them that I like to take a few moments if they
17 have some time to go back into the jury room. Just to let you know. I
18 don't have counsel back in the jury room and there are some very good
19 reasons for that, and you can appreciate is that jurors sometimes feel
20 awkward when you actually have the counsel back in the jury room. We
21 actually had the experience way back when I was first on the bench. It's
22 been almost ten years.

23 So the Court's position is that if you want me to, and this is a
24 question I need to ask you, is that do either of you anticipate that you
25 may be out in the hallway, between the hallway and the elevators, to

1 potentially talk to the jurors?

2 MR. DOYLE: Yes.

3 MR. JONES: Yes, Your Honor.

4 MR. LEAVITT: Yes, Your Honor.

5 THE COURT: Okay. So then would you like me to tell the
6 jurors as part of the intro -- what I would tell them is that I explain that if
7 they have a few minutes to talk with me, I go back into the jury room,
8 and that afterwards out in the hallway, they are not compelled to do so,
9 but that counsel may be out there and they may wish to ask some
10 questions and that I tell them in private practice I used to find it helpful.
11 And that they can choose or choose not to. Does that -- would you all
12 like the Court to say something similar to that?

13 MR. JONES: Perfect, Your Honor.

14 MR. DOYLE: Please, yes.

15 THE COURT: Okay. So then that's what the Court would do.
16 And then afterwards -- now, in light of that, since the timing worked out
17 the way the timing worked, would you all prefer that the sanction
18 hearings not take place? Would you rather see if you can talk to jurors
19 and that might be more of a limited experience --

20 MR. DOYLE: Yes.

21 THE COURT: -- time wise than doing the hearing and then
22 I'm going to have to reschedule that to a different day. Is that -- this is a
23 question.

24 MR. LEAVITT: That would be ideal, Your Honor.

25 MR. JONES: No, that would -- please.

1 THE COURT: Okay. I've got an ideal and please from
2 Plaintiffs' side. What do I have from Defense side?

3 MR. DOYLE: Yes. We can do it another day.

4 THE COURT: Is that what you prefer? I want to make sure
5 that everyone feels fully -- I do not want to leave something not ruled on
6 today if anyone in any manner would prefer it to be ruled on today. But
7 since I don't know how long you may be addressing the jurors, and you
8 can appreciate there's other things going on that if you would prefer it to
9 be another day, the Court's going to be fine if you all want another day
10 so that you can potentially address the jurors.

11 MR. JONES: We'd request it be another day, Your Honor.

12 THE COURT: Okay. But what I'm saying is if either side
13 wants me to rule on it today, it's going to be today. But what it can't be,
14 just to let you know, it can't be well, we don't know how long we're
15 going to be with the jurors and we'll just come back at some hour, 3:00
16 or 4:00, some undetermined time and judge, you're going to need to do
17 that because that is not going to be an option because you can
18 appreciate from teams standpoint, et cetera, remember they pretty much
19 worked through lunch, et cetera, of other things that they need to work
20 on, other cases. They were fine to be dedicated to give you your time
21 right now, but we can't have an indefinite sometime before 5:00
22 timeframe.

23 So if you want it immediately after the jury does its verdict,
24 the Court will be glad to do that. If you would prefer to potentially see if
25 you can talk to jurors and you want this rescheduled to a different date,

1 which will not be Monday because Monday I've booked other things,
2 we'd have to find another days within the next couple of weeks,
3 that's -- the Court would be fine with either of those options. If you all
4 are specifically requesting one or the other, the Court's going to be fine
5 with either, or some third option potentially, but I don't know what the
6 third option might be.

7 So Plaintiffs, I've heard your position, right?

8 MR. JONES: Yes.

9 MR. LEAVITT: At the Court's convenience in the future.

10 THE COURT: That's for your -- okay. Defense counsel?

11 MR. DOYLE: Rescheduling is fine. Of course, it will be a day
12 that I can be here myself so.

13 THE COURT: Okay. Well, but I'm just saying --

14 MR. DOYLE: Yes, rescheduling is fine.

15 THE COURT: But is it fine or is it what you want the Court to
16 do? Because I in no way want since as you know there's some very
17 serious sanction hearings against yourself, your client, your firm, right?

18 MR. DOYLE: Right.

19 THE COURT: Both from the Court and for the Rule 37. I do
20 not in any way want you to feel -- if you want an answer today, you're
21 entitled to an answer today and I will do it right after the verdict. But if
22 you want the opportunity to potentially talk to jurors and you want to do
23 that, then we'll postpone it. So that's why the Court's asking. I want
24 everyone to have a full opportunity so that no one feels in any manner
25 that things are, you know. So that's why the Court keeps on asking you

1 each so many different times when you all want it, so.

2 MR. DOYLE: I am fine returning another day. I'm quite
3 exhausted anyway and I'm not sure how well I'd be able to argue
4 anything today anyway so.

5 THE COURT: So it would work to your benefit as well if I do
6 it a different day; is that correct?

7 MR. DOYLE: That is fine.

8 THE COURT: Okay. So in light of that joint request, then
9 that's what the Court will do.

10 Marshal, would you please bring the jury in? Thank you so
11 much.

12 THE MARSHAL: All rise for the jurors.

13 [Jury in at 2:26 p.m.]

14 [Within the presence of the jury]

15 THE MARSHAL: All jurors are accounted for. Please be
16 seated.

17 THE COURT: I do appreciate it. Thank you so very much.

18 Welcome back, ladies and gentlemen. At this juncture, the
19 record will reflect the presence of Plaintiffs' counsel and Defense
20 counsel. Do the parties stipulate to the presence of the jury?

21 MR. JONES: Yes, Your Honor.

22 MR. DOYLE: Yes.

23 THE COURT: Okay. Has the jury elected a foreperson?

24 MADAM FOREPERSON: Yes.

25 THE COURT: And who is that foreperson? I appreciate it.

1 Thank you so much. Madam foreperson, has the jury reached a verdict?

2 MADAM FOREPERSON: We have.

3 THE COURT: Can you please hand the verdict form to the
4 marshal? The Marshal in turn, just to let you know, will then hand it to
5 the Court. The Court's just going to review it, that everything has been
6 completed. And then what's going to happen next, just to explain the
7 next step, is I will then hand it to Madam Clerk. Madam Clerk will then
8 read the entirety of the verdict form. Okay? She'll read the entirety of
9 the verdict form, even if there is a blank in a verdict form, okay.

10 After she reads the entirety of the verdict form, what I will
11 then do is I will then ask each of the counsel whether or not they want
12 the jury to be individually polled, and what that means is, and you can
13 appreciate if you recall one of the jury instructions is since this is a civil
14 case, we need to ensure that there's six of the eight of you that come to
15 an agreement on the verdict. So if you are requested to be individually
16 polled what Madam Clerk would then do is go Juror No. 1, is this your
17 verdict as read. Okay?

18 Now, since we do not have Juror No. 6, Madam Clerk, we
19 would go from No. 5 to No. 7. Okay? So it would be -- because Juror
20 No. 6 was excused. So it would be Juror No. 5 to Juror No. 7, Juror No.
21 8 to Juror No. 9. It's just the jury number identification. It would just be
22 whether or not it's your verdict as read that gets polled. Does everyone
23 understand that? Okay. So give me one moment, please.

24 Okay. Madam Clerk?

25 THE CLERK: Yes, Judge.

1 THE COURT: Can you please read the entirety of the special
2 verdict form? Thank you so very much. From the beginning of the
3 caption.

4 THE CLERK: District Court, Clark County, Nevada, Titina
5 Farris and Patrick Farris, Plaintiffs, v. Barry Rives, M.D., case number
6 A739464, Department 31, Special Verdict Form.

7 We, the jury in the above-entitled matter, answer the
8 questions submitted to us as follows:

9 (1) Was Dr. Barry Rives negligent in his care and treatment of
10 Titina Farris? Answer, yes. If your --

11 (2) Was Dr. Barry Rives' negligence a proximate cause of
12 Tina Farris' injuries and damages? Answer, yes.

13 (3) What are Titina Farris' economic damages, past medical
14 and related expenses? \$1,063,000 --

15 THE COURT: Do you just want me to -- just read the digits.

16 THE CLERK: 1,063,006.94.

17 Present value of life care plan, \$4,663,473.00. Do you believe
18 that the present value of Titina Farris' life care plan should be reduced
19 based on the testimony of Defense economist Erik Volk? No.

20 What percentage between zero and 30 percent do you reduce
21 the present value of Titina Farris' life care plan? Blank.

22 What are Titina Farris' non-economic damages for past
23 physical and mental pain, suffering, anguish, disability, and loss of
24 enjoyment of life? \$1,571,000.

25 Her future physical and mental, pain, anguish, suffering,

1 disability, and loss of enjoyment of life? \$4,786,000.

2 What are Patrick Farris' non-economic damages, past loss of
3 companionship, society, comfort, and consortium? \$821,000.

4 Future loss of companionship, society, comfort, and
5 consortium? \$736,000.

6 Signed by Jury Foreperson, dated November 1st, 2019.

7 Ladies and gentlemen of the jury, is this your verdict as read?

8 JURY IN UNISON: Yes.

9 THE COURT: Okay. So now at this juncture, do either of the
10 parties desire that the jury be polled? I'll ask first Plaintiffs' counsel and
11 then Defense counsel. Plaintiffs' counsel, would you like the jury to be
12 polled?

13 MR. JONES: No, Your Honor.

14 THE COURT: Defense counsel, would you like the jury to be
15 polled?

16 MR. DOYLE: Yes, please.

17 THE COURT: Okay. Madam Clerk, will you now please poll
18 the jury individually, starting with Juror No. 1?

19 THE CLERK: Juror No. 1, is this your verdict?

20 JUROR NO. 1: Yes.

21 THE CLERK: No. 2, is this your verdict?

22 JUROR NO. 2: Yes.

23 THE CLERK: No. 3, is this your verdict?

24 JUROR NO. 3: Yes.

25 THE CLERK: No. 4, is this your verdict?

1 JUROR NO. 4: Yes.

2 THE CLERK: No. 5, is this your verdict?

3 JUROR NO. 5: Yes.

4 THE CLERK: No. 7, is this your verdict?

5 JUROR NO. 7: No.

6 THE CLERK: No. 8, is this your verdict?

7 JUROR NO. 8: Yes.

8 THE CLERK: No. 9, is this your verdict?

9 JUROR NO. 9: Yes.

10 THE CLERK: Thank you.

11 THE COURT: Okay. The jury has now been polled. The
12 Court has heard that there has been seven yeses and one no. Does
13 counsel agree that that's what the polling showed?

14 MR. JONES: On behalf of Plaintiffs, yes, Your Honor.

15 MR. DOYLE: Yes, Your Honor.

16 THE COURT: Okay. There being seven yeses, and one no,
17 that means that six or more have agreed upon the verdict and so
18 therefore the clerk will now record the verdict in the minutes of the court.

19 Ladies and gentlemen of the jury, I want to thank you so very
20 much for your willingness to do not only your civic duty but to do it a
21 few extra days that wasn't really anticipated. I do appreciate that you
22 spent so much time and effort. It's very clear by the number of
23 questions, the fact that you were so attentive, the fact that you were here
24 early for each and every one of the days, and willing to stay late. We
25 really do appreciate everything that you have done. You were definitely,

1 you know, a jury that took your civic duties so very, very seriously. We
2 thank you so very much for that.

3 At this juncture, let me explain a couple things. My JEA is
4 going to have your checks ready for you. I know you still have stuff back
5 in the jury room. I will find it helpful, and I fully appreciate that people
6 may be needing to get to where they need to get very quickly, but the
7 Court does find it very helpful if you have a few moments, just to talk
8 with the Court. I'll go back to the jury room in just a moment once you
9 all have gone back in there, and if you'd spend a few moments with me,
10 I'd just like to find out your experience, what we can do better about jury
11 service, you know, to make it better either for yourselves down the road
12 or for other individuals with regard to jury services. If you have a few
13 moments, it's always very helpful. I'd be glad to talk with you and thank
14 you again personally where I can actually shake your hand and say thank
15 you.

16 Also, I will tell you is that oftentimes out in the hallway
17 between the doors and when you go in the elevators counsel's likely to
18 be present and oftentimes counsel find it very helpful to speak with
19 ladies and gentlemen of the jury. Okay? Now, it's up to you whether
20 you wish to speak to them or not. It's completely up to you. I will tell
21 you when I was in private practice before I took the bench, I always tried
22 to talk with jurors because I found it helpful just to kind of get a general
23 idea of, you know, things that I could improve on as a lawyer, you know,
24 any suggestions and thoughts. I'm not saying that's the nature of the
25 questions they'll ask. I'm just kind of saying what I would do sometimes

1 previously. So you may see them out there and that's something else
2 that's up to you if you're willing to talk with them, and if you're not,
3 that's perfectly fine as well.

4 So at this juncture, I can tell you your jury service is
5 completed. Thank you so very much ladies and gentlemen. We do
6 appreciate it. At this juncture, we'll all stand to thank you so much.

7 THE MARSHAL: All rise for the jurors

8 THE CLERK: I have them.

9 THE COURT: Oh, and the checks, yeah, will be brought into
10 the jury room. Okay. Thank you so very much.

11 [Jury out at 2:33 p.m.]

12 [Outside the presence of the jury]

13 THE COURT: Okay. One second until we hear the door click,
14 and Madam Court Reporter, please do stay on the record. Thank you so
15 very much. Okay.

16 So counsel I'm sure you can appreciate. You heard what the
17 verdict was. The verdict Madam Clerk has, it does -- hold on a second.
18 Does either party wish to come forward and just see the verdict form
19 with the numbers in?

20 MR. DOYLE: Yes, Your Honor.

21 MR. JONES: The Plaintiffs will, Your Honor.

22 THE COURT: You can feel free to do so before I go back.
23 Sometimes people do want to do it. Sometimes people don't.

24 UNIDENTIFIED SPEAKER: Take a picture of it.

25 MR. JONES: Can I take a picture of it, Your Honor?

1 THE COURT: We prefer not to until it's officially filed.

2 MR. JONES: Okay.

3 THE COURT: Until it's officially filed please --

4 MR. JONES: Absolutely.

5 THE COURT: -- because we want to make sure that we just
6 have -- you know, Madam Clerk just gets it. That way it's the same
7 official filing.

8 MR. JONES: Perfect.

9 THE COURT: That way it's straight from the court records.
10 It's not anything that shows any aspect of any particular department.
11 That's just our general policy. I'm sure you can appreciate why. That
12 way we don't have it --

13 MR. LEAVITT: No, absolutely.

14 MR. JONES: We certainly can.

15 THE COURT: -- so that way -- because the clerk's office does
16 it. So there's the verdict form, if you want to take a look at it. You'll see
17 the November 1 date and you'll see at the 5(B) just the word future
18 instead of the word past based on the specific request of each of the
19 counsel. Did you all have an opportunity --

20 MR. JONES: Thank you, Your Honor.

21 MR. LEAVITT: We have.

22 THE COURT: -- on behalf of Plaintiffs to look at it?

23 MR. JONES: Yes.

24 THE COURT: Defense, you've had an opportunity to look at it
25 as well?

1 MR. DOYLE: Yes.

2 THE COURT: Okay.

3 MR. DOYLE: Thank you, Your Honor.

4 THE COURT: So Madam Clerk, you can get that filed. Thank
5 you so very much.

6 At this juncture, I'm going to ask the parties in light of the
7 verdict form, are you all going to wish to address anything today, or do
8 you wish to come back next week to address anything? I'm going to ask
9 first Plaintiffs and then Defense.

10 MR. JONES: Wait until next week, Your Honor.

11 MR. LEAVITT: Yes.

12 THE COURT: Counsel for Defense, what's your preference?

13 MR. DOYLE: Next week is fine and my request is that we
14 defer preparation and entry of any judgment based upon this verdict so
15 that the adjustments that -- can be made to the non-economic damages.

16 THE COURT: Okay. Just for two points of clarification. The
17 clerk will need to file the verdict.

18 MR. DOYLE: Right.

19 THE COURT: Okay? Before a judgment gets submitted. This
20 Court's custom and practice, as consistent with the Eighth Judicial
21 District, is a proposed judgment entry has to be circulated to the
22 opposing counsel before it is submitted to the Court. Okay?

23 MR. DOYLE: Okay.

24 THE COURT: So that would give you an opportunity to see
25 and review it before it was submitted to the Court. And so you've heard

1 the request, and so in light of that, this Court's not going to sign off on a
2 judgment, right?

3 So do you all want to schedule a time right now on Tuesday
4 or Thursday of next week or do you want -- since you may be tired and
5 have other things to do, do you want to just send the Court a letter
6 Monday by noon whether you want next Thursday or the following
7 Tuesday at 9:30 for a hearing? Does that work? Just get me a letter by
8 noon on Monday.

9 MR. JONES: That's fine.

10 THE COURT: Unless you know right now that you can be
11 here next Thursday.

12 MR. DOYLE: Well, I just want to make sure that those dates
13 are --

14 THE COURT: Okay. Well, you're going to need to send -- the
15 short answer is you're going to need to send the Court a letter by noon
16 tomorrow -- I mean noon on Monday anyway, so.

17 MR. DOYLE: But what if those two days don't work, can we
18 suggest --

19 THE COURT: Well, since you all requested, I can't hold a
20 judgment off pretty much any longer. I figured I could do it next
21 Tuesday as well, I mean.

22 MR. JONES: Next Thursday works well for us, Your Honor.

23 THE COURT: Let me make sure I didn't pick Veterans Day. I
24 mean I'm doing this top of the head without looking.

25 MR. DOYLE: Next Thursday, is that the 7th?

1 THE CLERK: Yes.

2 MR. DOYLE: I'm not available, but if all we're going to deal
3 with on the 7th is the verdict and the judgment, I can send somebody
4 else.

5 THE COURT: If that's all you wish, and you wish the other to
6 be put -- because I don't know if strategically you all are planning on
7 doing anything behind the scenes and you want me to continue a
8 hearing for a little bit of time. I don't know. So what I am going to need
9 is by Monday at noon, it gives you all the weekend, right, to talk among
10 yourselves.

11 So we're going to do Thursday at 9:30, okay? It's going to be
12 with regards to -- your request with regards to the judgment itself. And
13 so people can bring a proposed judgment that day because I presume
14 you all may have already agreed upon it beforehand, right? Maybe
15 you're doing a stipulated judgment and maybe we can even vacate
16 Thursday. Oftentimes, people do that. But I'm saying that date for next
17 Thursday. Okay?

18 If parties want something else to be done on that date
19 or -- by that date, I have to deal with the judgment. Okay? If the parties
20 want something else done either next Tuesday or that Thursday, then I
21 need a letter by Monday at noon on a joint agreement and that's cc'd to
22 all parties. That's not one side saying it or another. Okay?

23 So are we clear? 9:30 on Thursday we're going to address
24 the judgment issue and the amount of damages according to the
25 statutory provisions.

1 MR. JONES: Right.

2 THE COURT: Unless I get a stipulation from the parties
3 before next Thursday. When I say before next Thursday, that means of
4 course 24 hours in advance, right?

5 MR. JONES: Yes, Your Honor.

6 MR. DOYLE: Yes, Your Honor.

7 THE COURT: Okay. Does that meet everybody's needs?

8 MR. DOYLE: Yes.

9 MR. JONES: Yes, Your Honor.

10 MR. LEAVITT: It does, Your Honor.

11 THE COURT: And if you all want something else addressed
12 next Thursday, then the letter is going to have to say either you do or
13 don't. If you're not, you're still going to give me a letter and you're
14 going to give me four or five possible dates within the next couple of
15 weeks, that's -- okay?

16 MR. DOYLE: Let me write that down.

17 MR. JONES: Perfect.

18 THE COURT: For the Court to look at, but both parties are in
19 agreement and please don't give me two separate letters, one side says
20 they're not available at all because this is going to get addressed in the
21 month of November and it's not going to be the Tuesday before
22 Thanksgiving, okay? So now if you all need some time --

23 MR. LEAVITT: I've got a trial.

24 THE COURT: -- to work out whatever you may wish to work
25 out before behind the scenes and you need me to wait a week or two,

1 fine, but we do need to get this taken care of. Okay.

2 MR. DOYLE: Okay.

3 MR. LEAVITT: Very good. Thank you, Your Honor.

4 MR. JONES: Thank you, Your Honor.

5 THE COURT: Does that work for everyone? I do appreciate.

6 At this juncture, Madam Clerk, we were so busy, they didn't have a
7 chance to address the depositions. You're going to just get a
8 communication on to pick up your depositions, okay?

9 MR. DOYLE: Okay.

10 MR. JONES: Okay.

11 MR. LEAVITT: Perfect. Thank you, Your Honor.

12 MR. DOYLE: Thank you, Your Honor.

13 MR. DOYLE: Thanks.

14 THE COURT: I appreciate it. Thank you so very much. Have
15 a great rest of your day.

16 MR. JONES: Thank you, Your Honor.

17 MR. LEAVITT: Thank you.

18 [Proceedings concluded at 2:39 p.m.]

19

20

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
best of my ability.

23 

24 Maukele Transcribers, LLC

25 Jessica B. Cahill, Transcriber, CER/CET-708