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.	Case No. 80271
BARRY JAMES RIVES, M.D.; and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants, vs. TITINA FARRIS and PATRICK FARRIS, Respondents.	Case No. 81052

APPELLANTS' APPENDIX
VOLUME 30

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CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX

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

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Attorneys for Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS,

Plaintiffs,

vs.

BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA, LLC, et al.,

Defendants.

CASE NO. A-16-739464-C
DEPT. NO. 31

DEFENDANTS BARRY RIVES, M.D. AND LAPAROSCOPIC SURGERY OF NEVADA, 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

I. INTRODUCTION

Plaintiffs Titina Farris and Patrick Farris' Motion for Sanctions alleges Defendant

Case Number: A-16-739464-C

Barry Rives M.D.'s intentional concealment of a prior medical malpractice action, *Center v. Rives*. During the hearing on September 26, 2019, the Court graciously provided the opportunity for Dr. Rives to testify at a subsequent hearing, in accordance with *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 90, 787 P.2d 777, 778 (1990).

Following the hearing on September 26, 2019, Thomas Doyle, defense counsel, spoke to William Brenske, counsel for Vickie Center in *Center v. Rives*, by telephone. Mr. Brenske informed Mr. Doyle that he had spoken to George Hand, counsel for Plaintiffs in this matter, about Dr. Rives, in the "weeks to months" before trial in the *Center* matter, which began April 1, 2019.

This Supplemental Opposition provides a timeline of the key dates underlying Plaintiff's Motion for Sanctions. Further, it addresses the *Young* factors, which a district court may consider in determining whether terminating sanctions are warranted.

II. TIMELINE OF KEY DATES

- On January 18, 2017, Mrs. Center served discovery requests to Dr. Rives and Laparoscopic Surgery of Nevada.
- On February 27, 2017, Mrs. Farris served discovery requests to Dr. Rives and Laparoscopic Surgery of Nevada.
- On March 7, 2017, Dr. Rives and Laparoscopic Surgery of Nevada served responses to Mrs. Center's discovery requests.
- On April 17, 2017, Dr. Rives and Laparoscopic Surgery of Nevada served responses to Mrs. Farris' discovery requests.
- On October 25, 2017, the first session of the deposition of Dr. Rives was taken in the *Center* matter.
- On April 17, 2018, Dr. Rives' deposition was completed in the *Center* matter.
- On October 24, 2018, Dr. Rives' deposition was completed in the *Farris* matter.
- In the "weeks to months" before trial in the *Center* matter began, George Hand, Plaintiffs's counsel in the *Farris* matter, spoke to William Brenske, Plaintiffs' counsel in the *Center* matter, about Dr. Rives.
- On April 1, 2019, the *Center* trial began.
- On July 24, 2019, discovery closed in the *Farris* matter.

III. ARGUMENT

A. Counsel for Mrs. Farris Spoke to Counsel for Mrs. Center, More than Three Months Before Discovery Closed.

Plaintiffs' motion for sanctions suggests Plaintiffs were not aware of the *Center* matter until after discovery in this matter had closed. Mr. Jones declaration states:

> During the summer of 2019, I checked the Odyssey database. It became apparent that Dr. Rives had withheld information on *Center* case. Nevertheless, I did not know much about the case at that time and provided the name in the deposition was incorrect I had to do more research.

Plaintiffs argue their lack of knowledge regarding the *Center* matter cost Plaintiffs the opportunity to assess the "specific foreseeability of the probable consequences of his behavior." This is incorrect.

Mr. Hand spoke to Mr. Brenske, counsel for Mrs. Center, about Dr. Rives, in the "weeks to months" before April 1, 2019, when the trial in *Center v. Rives* commenced. Mr. Jones' argument the incorrect name in the deposition transcript of Dr. Rives prevented Plaintiffs from learning about the *Center* matter is incorrect. Similarly, the argument that Plaintiffs did not have sufficient information about the *Center* matter, is incorrect. At the time Mr. Hand spoke to Mr. Brenske, there was more than three months left to complete any discovery Plaintiffs deemed necessary. If Plaintiffs thought the *Center* matter was important, they could have investigated the matter during discovery. They could have asked defense counsel or Mr. Brenske for Dr. Rives' deposition in *Center*. Rather than investigating such issues in discovery, Plaintiffs chose to wait until September 18, 2019, to file the motion for sanctions. Under those circumstances, Plaintiffs cannot reasonably argue they were prejudiced.

B. The *Young V. Johnny Ribeiro* Factors Weigh Against Imposing Terminating Sanctions.

In *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 90, 787 P.2d 777, 778 (1990), the

Nevada Supreme Court addressed the issue of when terminating sanctions are appropriate. In *Young*, the trial court found the plaintiff had willfully fabricated evidence, and sanctioned him by dismissing the case. Citing *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 591 (9th Cir. 1983), the Court held fundamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated. *Young*, *supra*, at 92.

There are two sources of authority to support discovery sanctions: NRCP 37; and the court's inherent equitable powers to dismiss actions or enter a default judgment for abusive litigation practices. *Id.* "Generally, NRCP 37 authorizes discovery sanctions only if there has been willful noncompliance with a discovery order of the court." *Id.*, citing *Fire Insurance Exchange v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 913 (1987). In this case, there has been no willful noncompliance with a discovery order of the court.

The *Young* case described the various factors a court may properly consider when analyzing whether terminating sanctions are appropriate:

> The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.
>
> *Young*, *supra*, at 93.

i. Willfulness of the Offending Party.

There is no willful discovery violation by either Dr. Rives or defense counsel. As discussed in Defendants' Opposition, the *Center* matter was inadvertently omitted from

the list of prior medical malpractice actions in Dr. Rives' discovery responses in this matter. During his deposition in this matter, Dr. Rives was asked about prior depositions he had given. On page 12 of the deposition transcript, Plaintiffs' counsel referred to a list of prior depositions Dr. Rives had given. The testimony read:

> Q And looking at Response No. 5, there is notes of depositions you gave in some of these cases we just talked about. Are there any other depositions that you given, such as an expert for patient or for defendant doctor in any cases?
>
> A I've testified as a participant in care.
>
> Q What case was that?
>
> A There have been a few. One involved a patient who was misdiagnosed with perforated appendicitis, delay in treatment, presented to the OR in distress. I was the surgeon on the case. And the suit was against the internal medicine doctor. There was another suit involving delay in diagnosis of a patient that was treated by a rehab facility, transferred to a hospital. And basically, was not doing well on arrival and there was nothing we could do surgically for her.
>
> Q That's it, that you recall?
>
> A Those are the two that I can recall at this time.
>
> MR. COUCHOT: Sinner is not on there?
>
> THE WITNESS: Mm-hmm?
>
> MR. COUCHOT: Sinner is not on there? Just to be compete, when I prepared this he had not been deposed in the Sinner case so that is not listed there. So that would be responsive to that question.
>
> MR. HAND: What was the name of that case?
>
> THE WITNESS: Sinner versus Rives.
>
> BY MR. HAND:
>
> Q Is it on here? It's not listed here –
>
> MR. COUCHOT: It's subsequent.

///

BY MR. HAND:

Q Can you tell me what that case involved.

A Patient had a diaphragmatic hernia tear laparoscopically. She aspirated and became septic.

Q Is that still ongoing?

A That's pending.

Q And you gave a deposition in that case?

A Yes.

Q Is that a case in Las Vegas?

A Yes.

(Exhibit A, 12:20-14:11)

Dr. Rives' answer stating "Those are the two that I can recall at this time," was an answer to the followup question beginning on page 12 line 20, which pertained to depositions as a treating physician, and his subsequent testimony regarding his testimony "as participant in care." In the context of the prior questions and answers, a reasonable interpretation of Dr. Rives' testimony is that his answer pertaining to what he could recall at the time addressed depositions as a treating physician/participant in care.

Upon realizing the Center matter was not included in the list of prior depositions, defense counsel mentioned the case and it was discussed. Neither Dr. Rives, nor counsel, were trying to conceal the matter.

ii. The Extent to Which the Non-offending Party Would Be Prejudiced by a Lesser Sanction.

Plaintiffs would not be prejudiced by a lesser sanction. As discussed above, Plaintiffs' counsel discussed the *Center* matter with counsel for Mrs. Center months before the close of discovery. Plaintiffs had the opportunity to conduct any discovery they deemed necessary.

iii. The Severity of the Sanction of Dismissal Relative to the Severity of the Discovery Abuse.

Terminating sanctions would be incredibly severe in relation to the discovery violation. The discovery violation at issue is an incomplete response to an interrogatory, and a failure to correct and supplement the discovery response. That violation is in stark contrast to the fabrication of evidence which justified terminating sanctions in *Young*. Further, the fact that Plaintiffs knew about the *Center* matter months before discovery closed would make it fundamentally unfair to impose a terminating sanction, a very severe sanction.

iv. Whether Any Evidence Has Been Irreparably Lost.

No evidence has been irreparably lost. After speaking to counsel for Mrs. Center, Plaintiffs apparently chose not to pursue any discovery related to the *Center* matter. Plaintiffs could have requested an additional deposition of Dr. Rives. Plaintiffs could have taken the depositions of other healthcare providers involved in Mrs. Farris' care. Plaintiffs' could have propounded discovery requests for information pertaining to the *Center* matter. They chose to do no such things.

v. The Feasibility and Fairness of Alternative, less Severe Sanctions, Such as an Order Deeming Facts Relating to Improperly Withheld or Destroyed Evidence to Be Admitted by the Offending Party.

Should the Court deem sanctions warranted, there are feasible and less severe sanctions which would be far more fair than terminating sanctions. The discovery violation at issue was a mistake of counsel. If any sanction is warranted, it should be a monetary sanction imposed against counsel.

vi. The Policy Favoring Adjudication on the Merits.

The policy favoring adjudication on the merits weighs heavily against terminating sanctions. The discovery violations at issue were due to an oversight by counsel. It would be fundamentally unfair to Dr. Rives for terminating sanctions to be imposed.

vii. Whether Sanctions Unfairly Operate to Penalize a Party for the Misconduct of His or Her Attorney.

Terminating sanctions would be fundamentally unfair to Dr. Rives under the circumstances. The issue before the Court is defense counsel's inadvertent failure to include the *Center* matter in a discovery response which listed prior lawsuits where Dr. Rives have been named as a defendant, and to timely supplement that response. Dr. Rives should not be punished for defense counsel's oversight and failure to supplement the discovery responses.

viii. The Need to Deter Both the Parties and Future Litigants from Similar Abuses.

The discovery violation at issue is not an abuse of the discovery process which would require deterrence. Defense counsel did not intentionally conceal any information from Plaintiffs. Dr. Rives did not intentionally conceal information from Plaintiffs. Defense counsel inadvertently omitted the *Center* matter from a list of cases where Dr. Rives had been a defendant, and failed to supplement the discovery response. In the future, defense counsel will ensure discovery responses in all matters are complete, accurate, and timely verified.

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IV. CONCLUSION

There has been no intentional concealment, or other willful discovery abuse, which would warrant terminating sanctions. Plaintiffs' counsel were well aware of the *Center* matter at least three months before discovery closed. They cannot reasonably claim they were prejudiced by Defendants' incomplete discovery response. If the Court deems a sanctions necessary, it should be against counsel only, and it should be in proportion with the discovery violation at issue.

Dated: October 4, 2019

SCHUERING ZIMMERMAN & DOYLE, LLP

By _____

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(916) 567-0400
Attorneys for Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on the 4th day of October, 2019, service of a true and correct copy of the foregoing:

DEFENDANTS BARRY RIVES, M.D. AND LAPAROSCOPIC SURGERY OF NEVADA, 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

was served as indicated below:

☒ served on all parties electronically pursuant to mandatory NEFCR 4(b);

☐ served on all parties electronically pursuant to mandatory NEFCR 4(b), exhibits to follow by U.S. Mail;

☐ by depositing in the United States Mail, first-class postage prepaid, enclosed ;

☐ by facsimile transmission; or

☐ by personal service as indicated.

Attorney	Representing	Phone/Fax/E-Mail
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Kimball Jones, Esq. Jacob G. Leavitt, Esq. BIGHORN LAW 716 S. Jones Boulevard Las Vegas, NV 89107	Plaintiffs	702/333-1111 Kimball@BighornLaw.com Jacob@BighornLaw.com

An employee of Schuering Zimmerman & Doyle, LLP
1737-10881

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Attorneys for Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA, LLC, et al., Defendants.	CASE NO. A-16-739464-C DEPT. NO. 31 **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**

I, THOMAS J. DOYLE, declare:

1. I am an attorney at law licensed to practice in the State of Nevada. I am a partner of the law firm of Schuering Zimmerman & Doyle, LLP, attorneys of record for

Case Number: A-16-739464-C

Defendants BARRY J. RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA, LLC.

2. I spoke to William Brenske on October 1, 2019. Mr. Brenske represented Plaintiffs Vickie Center and Thomas Center in the matter of *Center v. Rives*. The trial in *Center v. Rives* began on April 1, 2019. According to Mr. Brenske, George Hand contacted him about Dr. Barry Rives "weeks to months" before the trial in *Center* began.

3. True and correct copies of the pertinent pages of the transcript of the deposition of Dr. Rives, taken October 24, 2018, are attached as Exhibit A.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct, and if called to testify, I could competently do so.

Executed this 4th day of October, 2019, at Sacramento, California.

/s/ Thomas J. Doyle
THOMAS J. DOYLE

EXHIBIT A

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS,	
Plaintiffs,	CASE NO A-16-739464-C
	DEPT NO 22
vs.	
BARRY RIVES, M.D., LAPAROSCOPIC SURGERY OF NEVADA, LLC, et al,	
Defendants.	

DEPOSITION OF BARRY RIVES, M.D.

Taken on October 24, 2018

At 10:07 a.m.

At Veritex Las Vegas

2250 South Rancho Drive, Suite 195

Las Vegas, Nevada 89102

Reported by: Yvette Rodriguez, CCR NO. 860

APPEARANCES:

For the Plaintiffs:

BY: GEORGE F. HAND, ESQ.
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3442 North Buffalo Drive
Las Vegas, NV 89129
702-656-5814
ghand@handsullivan.com

For the Defendants:

BY: CHAD C. COUCHOT, ESQ.
SCHUERING ZIMMERMAN & DOYLE, LLP
400 University Avenue
Sacramento, California 95825-6502
(916) 567-0400
ccc@szs.com

Also Present:

Leslie Smith, JD, MPH,
Senior Claims Specialist
PRO ASSURANCE
3800 Howard Hughes Parkway
Suite 550
Las Vegas, Nevada 89169
lesmithproassurance.com

And I guess the allegation was delay in diagnosis of the lymphoma.

Q And there is Schorle versus Southern Hills Hospital. Can you tell me what the allegations in that case were.

A The case was a patient who had spinal surgery, had a colon perforation. I ended up doing surgery to repair the colon, gave her an ostotomy, ended up reversing the patient's ostotomy, but because of the lawsuit, every doctor on chart was named. And I was quickly dropped thereafter.

Q And we have a case, Tucker v. Rives. Can you tell me the allegations in that case.

A Ms. Tucker had a duct of Luschka leak post-operatively after a laparoscopic colon discectomy. I guess it would be complications from surgery.

Q Is that case resolved or ongoing?

A It was dismissed.

Q And looking at Response No. 5, there is notes of depositions you gave in some of these cases we just talked about. Are there any other depositions that you given, such as an expert for patient or for defendant doctor in any cases?

A I've testified as a participant in care.

Q What case was that?

A There have been a few. One involved a patient who was misdiagnosed with perforated appendicitis, delay in treatment, presented to the OR in distress. I was the surgeon on the case. And the suit was against the internal medicine doctor.

There was another suit involving delay in diagnosis of a patient that was treated by a rehab facility, transferred to a hospital. And basically, was not doing well on arrival and there was nothing we could do surgically for her.

Q That's it, that you recall?

A Those are the two that I can recall at this time.

MR. COUCHOT: Sinner is not on there?

THE WITNESS: Mm-hmm?

MR. COUCHOT: Sinner is not on there?

Just to be compete, when I prepared this he had not been deposed in the Sinner case so that is not listed there. So that would be responsive to that question.

MR. HAND: What was the name of that case?

THE WITNESS: Sinner versus Rives.

BY MR. HAND:

Q Is it on here? It's not listed here --

MR. COUCHOT: It's subsequent.

BY MR. HAND:

Q Can you tell me what that case involved.

A Patient had a diaphragmatic hernia tear laparoscopically. She aspirated and became septic.

Q Is that still ongoing?

A That's pending.

Q And you gave a deposition in that case?

A Yes.

Q Is that a case in Las Vegas?

A Yes.

Q Have you given any lectures involving hernia repair?

A Other than to medical students or residents, no.

Q Prior to coming here today, what did you review, if anything?

A I reviewed my office notes, progress notes. My progress notes and my operative notes. I think I reviewed some of the radiology findings.

Q Did you review any other operative reports?

A No.

Q Is there anything that you would like to review that you haven't looked at in this case?

CERTIFICATE OF REPORTER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Yvette Rodriguez, a duly commissioned Notary Public, Clark County, State of Nevada do hereby certify:

That I reported the deposition of BARRY RIVES, M.D., commencing on October 24, 2018 at 10:17 a.m.

That prior to being deposed, the witness was duly sworn by me to testify to the truth; that I thereafter transcribed my said shorthand notes into typewriting; and that the typewritten transcript is a complete, true, and accurate transcription of my said shorthand notes.

I further certify that I am not a relative or employee of counsel or any of the parties nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 30th day of October, 2018.

YVETTE RODRIGUEZ, CCR NO. 860

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on the 4th day of October, 2019, service of a true and correct copy of the foregoing:

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

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☒ served on all parties electronically pursuant to mandatory NEFCR 4(b);

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☐ by depositing in the United States Mail, first-class postage prepaid, enclosed ;

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☐ by personal service as indicated.

Attorney	Representing	Phone/Fax/E-Mail
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Kimball Jones, Esq. Jacob G. Leavitt, Esq. BIGHORN LAW 716 S. Jones Boulevard Las Vegas, NV 89107	Plaintiffs	702/333-1111 Kimball@BighornLaw.com Jacob@BighornLaw.com

Cheyanne

an employee of Schuering Zimmerman & Doyle, LLP
1737-10881

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

TITINA FARRIS, PATRICK FARRIS,	)	CASE NO. A-16-739464
Plaintiffs,	)	DEPT. NO. XXXI
vs.	)	
BARRY RIVES, M.D., et al,	)	
Defendants.	)	

BEFORE THE HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 17, 2019

PARTIAL TRANSCRIPT RE:

TRIAL BY JURY - DAY 4
TESTIMONY OF JUSTIN WILLER, M.D.

APPEARANCES:

FOR THE PLAINTIFFS: KIMBALL JONES, ESQ.
JACOB G. LEAVITT, ESQ.
GEORGE F. HAND, ESQ.

FOR THE DEFENDANTS: THOMAS J DOYLE, ESQ.

RECORDED BY: SANDRA HARRELL, COURT RECORDER
TRANSCRIBED BY: LIZ GARCIA, LGM TRANSCRIPTION SERVICE

Case Number: A-16-739464-C

LAS VEGAS, NEVADA, THURSDAY, OCTOBER 17, 2019, 12:40 P.M.

* * * * *

(Proceedings outside the presence of the jury from 12:40 p.m. to 12:53 p.m. not transcribed)

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

(Inside the presence of the jury)

THE COURT: Do appreciate it. Welcome back, ladies and gentlemen. Hope everyone had a nice relaxing evening last night and a wonderful morning this morning. Rumor has it that the weather was decently nice today. I don't know, I haven't really been outside, but I did hear it.

So welcome back. If you recall yesterday as you left, the parties had completed their opening statements and we said when you came in today we would start with plaintiff's case-in-chief, so plaintiff is going to be able to call their first witness. To save just a couple of real quick minutes, we already have the witness on the stand. However, from a pro forma standpoint I'm still going to ask plaintiff's counsel to, quote, call their first witness. They're going to state the individual's name and then the individual is going to be sworn in by the clerk.

Counsel for plaintiff, would you like to call your first witness?

MR. LEAVITT: I would, Your Honor. Plaintiff calls

Justin Aaron Willer, M.D. to the stand.

THE COURT: Thank you so very much. The witness is already on the stand and the clerk is going to ask the witness to stand and be sworn or affirm.

MR. WILLER: Affirm.

THE COURT: Affirm. So the witness is going to be affirming, okay?

THE CLERK: Yes, Your Honor.

THE COURT: Thank you so very much.

JUSTIN WILLER, M.D., PLAINTIFF'S WITNESS, SWORN

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

THE WITNESS: Justin Aaron Willer.

THE CLERK: Can you spell that, please?

THE WITNESS: W-I-L-L-E-R.

THE CLERK: Thank you.

MR. LEAVITT: Your Honor, may I --

THE COURT: Counsel, feel free to proceed and you can feel free to use the big podium, the small podium if that's better for you. And thank you for putting the microphone there, we do appreciate it.

MR. LEAVITT: Very good.

THE COURT: And this is a wonderful time, just in case anyone inadvertently forgot to turn off their cell phones, it's a beautiful subtle way just to make sure everyone

does get that taken care of.

And counsel, feel free to proceed at your leisure.

MR. LEAVITT: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. LEAVITT:

Q Dr. Willer, there's a large binder in front of you.

A Yes.

Q Do you see it?

A Yes.

Q Okay. Can you please turn to -- it's a large binder. You're looking for double O in there. I find it easier, Doctor, if you just grab a section each time to turn.

MR. DOYLE: Your Honor, I'm sorry to interrupt, but if counsel could stay to one side then I can see the witness.

MR. LEAVITT: Oh, yeah. Is this all right?

MR. DOYLE: Yeah, that's fine.

MR. LEAVITT: This works for you?

MR. DOYLE: Thank you.

(Pause in the proceedings)

MR. LEAVITT: Your Honor, do you mind if I assist --

THE COURT: You can feel free to approach and assist. That's of course fine. Just if you're going to talk, we're going to have to pocket mike you.

THE WITNESS: The binder is --

MR. LEAVITT: Oh, the teeth, yeah.

THE WITNESS: Yeah, the teeth are broken. That's the problem.

MR. LEAVITT: There we go.

BY MR. LEAVITT:

Q Okay. Doctor, if you could look through double O just briefly.

A Uh-huh.

Q Very good. Okay. I have a few questions for you. I'd like to walk through your -- who you are. Doctor, where are you from?

A I'm from New York.

Q Do you still live in New York?

A Yes.

Q Where did you go to college?

A Columbia University.

Q Do you remember -- did you graduate from college?

A Yes, I did.

Q Okay. What year did you graduate?

A I believe 1979.

Q Okay.

A No, sorry, I think it was '83; '79 is when I entered college.

Q Okay. Did you go on to any other education after college?

A Yes. I completed medical school at the Chicago

Medical School.

Q Do you recall what year you completed that?

A 1987.

Q Okay. After medical school, did your education continue?

A Yes.

Q What did you do?

A I did a year internship in Internal Medicine.

Q Where did you do that at?

A At Brookdale.

Q Brookdale. Where is that?

A That's in east New York, Brooklyn.

Q Okay. When you were there, did you do anything else after that?

A Yes. I did four months in an Opthamology program at Temple and then decided to switch to Neurology.

Q When you switched to Neurology, what did you -- what do you mean by switched to Neurology?

A Well, I decided Opthamology wasn't for me, so I decided to apply for a Neurology residency.

Q Okay. What is a residency?

A A residency is a training program in a particular area, so you can have it to be a general internist, a specialist, a surgeon.

Q Okay. How long is a residency?

A It varies. It's generally anywhere from like three to six years, depending on the specialty.

Q And the specialty that you chose is what?

A It's three years.

Q Okay. And that specialty is Neurology?

A Yes.

Q Where did you do your residency at?

A I did the first year and a half of my residency at Long Island Jewish Medical Center and then I switched to Mt. Sinai and did another two years.

Q Where is Mt. Sinai at?

A That's in Manhattan on the east side, upper east side.

Q Now, Doctor, are you board certified?

A Yes.

Q Can you briefly explain to the jury what board certification means?

A Board certification means that there is a certifying board that examines candidates in that particular area. So my board is the American Board of Psychiatry and Neurology. You have to train separately in order, but there are more psychiatrists and neurologists so they get top billing. Basically Neurology boards consist of two parts. First you take a written test to assess your level of knowledge. If you pass, you then do orals, which are subdivided in a number of

areas and you have a live patient to examine. And basically what they're looking for is to assess your level of competency and make sure you're not dangerous.

Q Okay. And so you passed and you're not dangerous?

A I passed on my first try.

Q Okay. Doctor, do you have any honors or awards?

A I'm not sure what you're referring to. I was AOA, which is the Honors Medical Society. I have a few others listed on my C.V. from college.

Q Okay. Are you currently a member of any society or -- yeah, societies?

A Yes. I am a fellow of the American Academy of Neurology and I'm a fellow of the American Association of Neuromuscular and Electrodiagnostic Medicine.

Q Okay. Doctor, do you have any hospital appointments?

A Yes. Maimonides Medical Center in Borough Park, Brooklyn.

Q And when I say hospital appointments, do you have privileges at that hospital as well?

A Yes.

Q Okay. Do you have any academic appointments?

A Yes. I'm a Clinical Assistant Professor for Neurology at SUNY Health Science Center, Brooklyn.

Q What does that involve, briefly?

A Basically it involves performing responsibilities

to the department, which can include teaching of residents or students or basically whatever the department needs done, and practicing in Neurology and serving wherever they have you serve.

Q Approximately how many students do you --

A I don't really teach students anymore.

Q Okay. Do you have any research experience?

A Yes.

Q Can you give some examples of research that you've done?

A I participated when I was an Epilepsy fellow in a number of clinical trials of anticonvulsants. I did a study or two when I was an EMG fellow at SUNY Health Science Center in Brooklyn.

Q Do you have any post-graduate -- well, I went through your post-graduate training. Did you -- Where are you licensed to practice medicine?

A New York, New Jersey and Florida.

Q Very good. Do you have any publications?

A Yes. I have one or two.

Q Okay. Can you briefly tell us those were?

A The two -- I have a number of abstracts and it was one or two publications regarding the stimulation of the caudal equina, which is the collection of nerve roots in the back after the spinal cord ends, with a magnetic coil.

Q Okay. I would like to go through briefly your employment history. Actually, let me ask you this. Have you ever sat on any committees?

A Yes. I serve on the podcast committee. And I was appointed to a couple other committees, but I don't remember the names of them, recently.

Q Okay. Tell me about your current employment.

A I'm self-employed. I've been in my current practice since 1997.

Q Okay. Before 1997, where were you employed?

A I was employed by the Maimonides Medical Center.

Q Very good. Now, to practice in those three states that you mentioned, did you have to comply with the state regulations to practice medicine?

A Well, I can't answer that because I never really practiced outside of a fellowship in Florida. I have practiced in New York and New Jersey, but I've never really worked in Florida.

Q Okay. But you are licensed there?

A Yes, I am.

Q And have you complied with the licensure requirements in all these states?

A Yes. They have a number of courses you have to take on domestic violence, trafficking. Florida has an HIV course. New York requires an infectious disease course. New Jersey

requires a cultural competency course. So I do these every couple of years.

Q And those are continuing education courses?

A Yes.

Q Okay.

MR. LEAVITT: Your Honor, at this time I move to --

THE COURT: Counsel, would you approach?

Madame Court Recorder, would you like to turn on the white noise, please.

(Bench conference held; not transcribed)

MR. LEAVITT: Thank you, Your Honor.

THE COURT: Sorry for the interruption. Go ahead, counsel. Sorry, what were you about to say?

MR. LEAVITT: Yes, Your Honor. May this witness offer his opinions as a doctor?

THE COURT: Yes, he may offer his opinions.

MR. LEAVITT: Thank you, Your Honor.

BY MR. LEAVITT:

Q All right. Doctor, were you hired in this case to give opinions?

A I was hired to review the record and then give my opinion based on the review of the record submitted.

Q Okay. Now, Doctor, you were paid to come here and testify today, is that correct?

A Absolutely.

Q How much are you charging for today?
A Six thousand dollars per day, plus two hours preparation time at a rate of $375 an hour.
Q Very good. And why are you compensated for this?
A Because I have to close my office and fly halfway around the country.
Q Okay. Are you paid to review other cases?
A Yes.
Q How often do you review cases for legal purposes?
A For any purposes, any legal purposes at all, at least a few a week.
Q Do you agree to take on each case that you review?
A No. I agree to evaluate what's in there and then give my opinion whether I think there has been a significant deviation from the standard of care or not or if there is causality involved, because not every case involves liability, I'm only addressing causes.
Q Okay. Now, in this case you were asked to provide what type of opinion?
A A causality opinion only.
Q Okay. So when you say a causality opinion, can you explain that to the jury?
A Causality means A causes B. In other words, I fall down, I break my hip. My broken hip is caused by my fall.
Q Okay, very good. Before I go into your opinion,

Doctor, you reviewed records in this case, is that correct?

A That is correct.

Q And you listed those records that you reviewed in your report, is that correct?

A That is correct.

Q Okay. So I have some questions regarding your opinions. Very good. Doctor, you were asked to provide, as you said, a causation opinion in this case; correct?

A Yes.

Q Very good. And in reviewing the records in this case, did you look at just one causation or did you look at different ones?

A I looked at all the potential causations which likely would have contributed to this.

Q Okay. Now, did you look at those from a neurological standpoint? Is that correct?

A Well, a neurologic and a neurophysiologist because I've had two years of additional training in neurophysiology.

Q And can you explain the difference between the two?

A Well, a general neurologist is somebody who has completed a general neurology residency. A neurophysiologist is someone who's done advanced training, either in epilepsy, reading electroencephalograms, evoked potentials, or in the peripheral nervous system, such as doing EMGs and addressing neuromuscular disorders. It's a bit more specialized than

doing general neurology.

Q Very good. And in this case did you look at -- can you explain -- did you look at Guillain-Barre Syndrome?

A Yes.

Q And can you explain to the jury what that is?

A Guillain-Barre is a syndrome. There are a number of subtypes. Basically you have to imagine your nerve is like an electrical wire with insulation. The most classic type is called AIDP or Acute Inflammatory Demyelinating Neuropathy -- Polyradiculoneuropathy, which is basically the insulation is stripped off, so the nerve conducts not at all or conducts very slowly and everything is delayed. And it can present with either an ascending weakness or a descending weakness or a variety of other patterns.

There are axonal types, which is like breaking the wire. Those are fundamentally different and they respond a little bit different to treatment and can have a worse prognosis. Then you have something called Miller Fisher Syndrome. Miller Fisher Syndrome is a unique syndrome that presents with paralysis, you can't move your eye, you're basically unstable and your reflexes are absent, and it's due to a different antibody that has caused the Guillain-Barre Syndrome.

Q And what was your opinion about Guillain-Barre Syndrome in this case?

A It was not consistent with the presentation of this patient.

Q Okay. And ultimately Titina Farris has foot drop, is that correct?

A Absolutely.

Q Okay. So this Guillain-Barre Syndrome did not cause the foot drop, is that what you're saying?

A Yes.

Q Okay. And how did you come to that conclusion?

A Well, Guillain-Barre does not present in someone who has been septic and encephalopathic. Encephalopathic means an alteration in their level of consciousness, so they're like sleepy, easily arousable, hard to arose or even comatose. It presents -- you basically come in with the symptoms of Guillain-Barre. You have weakness, numbness. You know, basically your hands are weak and things are progressing. You're legs are weak and they're progressing. You can't walk. You have double vision. It doesn't present that you come in, get sepsis and then get Guillain-Barre.

Q Very good. Thank you, Doctor. So that was ruled out? Is that a proper term?

A Yes.

Q Okay. What did you conclude caused Titina Farris' foot drop?

A Well, there is an entity called critical illness

polyneuropathy. It's basically a spectrum when on one end you have more damage to the nerve and on the other end you have more damage to the muscle and the muscle may become to the point inexcitable. Hers is more consistent with what we call critical illness polyneuropathy. Basically clinically they will look about the same, with certain exceptions. It occurs in people who have had infections, steroids. Critical illness myopathy, which is the muscle end of it, tends to occur in people who have had high dose steroids, where as critical illness polyneuropathy tends to occur in people who haven't had steroids and just have been infected and septic.

You tell the difference by doing neurophysiologic studies. In critical illness polyneuropathy the sensory responses are very reduced or absent, whereas in critical illness myopathy it's just motor responses. The motor responses are also reduced in critical illness polyneuropathy, but in critical illness myopathy the sensory responses are normal or relatively normal.

Q Okay. Doctor, you said a mouthful. I'm going to see if I can't break that down a bit. When you say motor responses, what do you mean?

A Well, basically your nerve consists of sensory and motor nerves. The sensory nerves supply information coming from the periphery like pain, temperature, joint position sense. Motor is basically outgoing and telling -- it's

directing the muscle what to do.

Q Okay. Now, in this case or in the records you reviewed, how does this CIP turn into foot drop?

A Well, basically you get lysis. Basically in your muscle there are two chains, there's a thin chain and a heavy chain. You get a lysis of the heavy chain, it gets obliterated, then you subsequently get damage to the nerves. So basically the amplitudes start to fall or become, you know, basically gone.

Q Okay.

A The amplitude refers to the size of the response.

Q Doctor, can you explain what foot drop is to the jury?

A Well, in order to walk normally you have to pick your foot up so the front of the foot clears the ground. When you can't pick the foot up all the way, it's called a foot drop. It has to be full range of motion. When that happens, in order to walk you need to do one of two things. You can either drag your leg along the ground, but what happens is your leg will catch, the foot will catch on the ground, you'll fall and potentially injure yourself. The other way is to compensate for not being able to pick the front of the foot up you pick the whole leg up and that's called the steppage gait, but you're also very unstable because obviously when you pick the whole leg off the ground you're balancing on one leg and

they also have a tendency to fall when they walk like that.

Q And in this case does she have foot drop or bilateral foot drop?

A She has bilateral foot drop, which means it's on the right and the left sides.

Q Okay. Doctor, to a reasonable degree of medical probability, what caused this double foot drop?

A The critical illness polyneuropathy.

Q Okay. And that came from where?

A That came from the sepsis which she experienced, which was likely from peritonitis.

Q Okay. Doctor, are you familiar with diabetes?

A Yes.

Q Are you familiar with Titina's past medical history?

A Yes.

Q Have you reviewed records from Dr. Chaney?

A Yes.

Q Okay. Can you explain to the jury what you reviewed in Dr. Chaney's records?

A Well, Dr. Chaney makes note of numbness and gives a diagnosis of neuropathy.

Q Did Titina have neuropathy?

A There is nothing in the record to establish that she had neuropathy.

Q Okay. It says neuropathy, but why is there nothing

in the record to establish neuropathy?

A Well, the diagnosis of classic diabetic neuropathy, in your nerve you have big fibers and small fibers. Classic diabetic neuropathy is damage to the large fibers. So you have to have, number one, a history consistent with the presentation, like burning in the feet, numbness, particularly worse at night when lying in bed. Then you have to have characteristic changes on your neurologic exam of abnormal reflexes, a characteristic sensory loss pattern, weakness distally, like in the feet particularly because diabetic neuropathy always starts in the leg. The reason is it's an axonal breakage of the wire process and it's a dying back. So since your legs are longer than your arms, the distal muscles, you know, like in your feet, are much more prone to injury than the hands because it's very length dependent.

Q Okay. Now, why do you say there's no evidence in Dr. Chaney's records that Titina had diabetic neuropathy?

A Well, she just tells us numbness. Numbness is not necessarily pathologic. You have to tell me more than that. First of all, where was the numbness? Was it the hands? If it was the hands, that's more likely carpal tunnel syndrome. If it's the feet, was it primarily when she was sitting? When you sit, you compress the nerve and you get numbness. It's not anything abnormal; you wouldn't do anything about it. Secondly, she never performed a neurologic exam. Thirdly,

once you have the clinical history and the exam, you have to do a neurophysiologic study, which is an EMG. Basically what you do is you put recording electrodes in a variety over certain muscles and over the sensory nerves and you stimulate and you see what the responses are.

Diabetic neuropathy is most commonly a combination of the stripping of the insulation off the wire and breakage of the wire. And even when you get down to like very small size motor responses, you don't see profound truncal ataxia with it unless you have a really bad sensory ataxia, which she didn't have.

Q Okay. Thank you, Doctor. You used some terms that I'd like to break down. You said truncal?

A Truncal means your whole body.

Q So my trunk?

A Yes, your trunk.

Q Okay.

A So in other words, truncal ataxia would be you're kind of falling over.

Q Okay. Does -- So can you again explain what is steppage?

A Steppage is where you have to bring the whole leg up in order to walk to compensate for the fact that you can't bring the front of the foot up to clear the ground.

Q Okay. And truncal, where does that come into play?

Can you explain that?

A That's basically between your neck and your hips is your trunk.

Q Okay. And what did you find in the record review of Titina Farris?

A Well, prior to her admission for the surgery in July there was no evidence of a foot drop or any instability or falling.

Q Okay. Was there any evidence that she actually had neuropathy?

A No.

Q Was there an EMG prior to her going into the hospital that said she had neuropathy?

A Not that I'm aware of.

Q In Dr. Chaney's records did you see any neurological testing?

A No.

Q Okay. Now, neurological testing, Doctor, can you walk me through or walk this court through briefly what is neurological testing? What is it?

A Well, it's a basic neurologic exam, so usually what you would start with is mentation. In other words, are they alert, are they sleepy, do they know where they are, do they have cognitive impairments? You then test nerve supply in the muscles and the head called the cranial nerves. So you test

their extra-oc, the movements of the eyes, facial weakness, tongue movement, palate movement. And then you do a motor exam, so you assess the tone. Is the tone normal, increased, decreased? Then you assess strength. So first you test proximal and then you move out to distal muscles. Usually you start in the arms and then do the legs. After that you would then test the reflexes, basically at the, you know, biceps, the elbows, the forearm, the knees, the ankles.

And then you would do a sensory exam, which could be just you're testing pinprick, temperature, vibration, joint position sense. You don't have to test all of them, most people don't. And then you test coordination. In other words, your ability to touch finger to nose. Sometimes people do heel to shin or basically you do tandem gait where you have them walk one foot in front of the other like the drunk test that the police do.

Q Okay. So those are neurological tests?

A That's a neurologic exam.

Q I'm sorry, a neurological exam.

A Yes.

Q So is that what that pin -- that little wheel with all the little pins on it, is that what that's for?

A It's for sensory testing, but we kind of discourage it because of fear of transmitting infection with it, so we prefer disposal items to test pinprick these days.

Q Okay. So the pin wheel is no longer used?

A There might be somebody using it, but it's kind of discouraged.

Q Okay. So you're testing the sensory. Do you test both sides? How do you test a sensory? Say we were -- the pinprick or the pin wheel, how do you do that?

A Well, what you do is you have the patient close their eyes and you say when I touch you, tell me if it's sharp or dull. And generally start in the fingers and work your way up to the shoulder, and in the feet and work your way up the legs to the thigh.

Q Okay. So when you ask a patient in a neurological exam --

A Yes.

Q -- to walk one foot in front of the other, what are you testing?

A That's testing their coordination.

Q Okay. So to determine neuropathy, you need to do some of these tests. Do you test -- for example, neuropathy in the feet, how would you test sensory down there?

A Well, you could test pinprick, vibration, joint position sense or temperature. You don't necessarily have to do all of them. Pinprick and temperature tests small nerve fibers. Joint position sense and vibration test the biggies. At a minimum you would want to do a motor exam, a reflex exam

and a sensory exam because that's what should be abnormal in diabetic neuropathy.

Q I'm curious, Doctor. Are you okay? There's water there.

A It's my asthma, you know.

Q Okay. If you need it, the water is right in front of you. What is a vibration exam?

A Well, basically what you do is you take a tuning fork and you have them close their eyes and you tell them, tell me when you feel this vibrating or when it's not vibrating. And you test it and you work your way up, depending how far it's abnormal. So let's say it's abnormal in the toes, you go to the ankle. If it's normal at the ankle, you kind of stop there. If it's abnormal at the ankle, you go to the knees.

Q Okay. And that's how you would test for -- one of the exams for neuropathy?

A Yes.

Q Okay. Do you test -- do you hit them on the knee with -- reflexes, is that part of it?

A Yeah. Yeah, it's sort of like when, you know, they hit Herman Munster in the knee and the bucket goes flying. You tap the knee and basically it jerks. You tap the elbow so it comes up. You tap the forearm and the arm comes up. You tap above the elbow and the arm goes straight. And when

you tap the ankle the foot goes down.

Q Okay. So those -- let me see if I understand. In this neurological exam for, say, the feet, you're testing both motor skills and nerve? Is that correct?

A Well, you're testing muscle strength on clinical exam.

Q Okay. And in this -- in the records that you were provided by or provided of Dr. Chaney, were any of those in there?

A No.

Q And again, just to make it clear, no EMG prior to July of 2015 was in there, either?

A Not that I'm aware of.

Q Okay. So you would disagree that she had neuropathy at that time?

A Yes.

Q Verifiable?

A Yes.

Q So in this case in Ms. Farris, you reviewed the records. We've discussed diabetes. We've discussed sepsis. To a reasonable degree of medical probability, which one caused her foot drop?

A Sepsis.

Q Can you -- Doctor, can you walk the jury through the pathophysiology for sepsis causing CIP or critical illness --

A Well, basically in your normal muscle you have thin fibers and thick fibers, and the way your muscle contracts is that when an impulse comes in and tells the muscle, hey, I want you to make a muscle, basically it begins to slide on each other, the muscle shortens and you make a muscle. In critical illness polyneuropathy or myopathy the heavy chains get wiped out, so since they're wiped out the muscle can't slide, this sliding can't occur, so basically you can't move those muscle fibers. And what happens subsequently is you get degeneration of the sensory, the nerve fibers supplying sensation, and the motor nerve fibers.

Q Okay. Is that what you found in this case?

A Yes.

Q Okay. Did there come a time after reviewing these records that you formed an opinion on whether or not Titina has permanent foot drop?

A Yes.

Q And what's your opinion?

A My opinion is at this point it's permanent.

Q And is that to a reasonable degree of medical probability?

A Yes.

Q Now, you used the word permanent foot drop. It may sound odd, but I'm going to ask you what does permanent foot drop mean?

A It means it's never going to get better.
Q Okay.
A She's stuck with whatever range of motion she has and that's it.
Q And I'm not using the term feet drop, so is it bilateral, meaning both?
A Well, you could use feet drop but it's usually referred to as bilateral foot drop, but it wouldn't be incorrect to do so.
Q Okay. I guess it's more professional. Bilateral sounds better. And to a reasonable degree of medical probability, did the clinical illness -- did the CIP, I'm going to say it that way, cause bilateral foot drop?
A Yes.
Q We went through truncal instability.
A Yes.
Q That's the part you said between the shoulders and the hips?
A Yes.
Q Okay. To a reasonable degree of medical probability, did CIP cause the truncal instability?
A Yes.
Q And again, Doctor, for the record, can you define CIP?
A Basically it starts with infection and we're not

exactly sure how the damage occurs, whether it's from toxins, you know, by the bacteria or whether it's from the inflammatory response, but the final common pathway is the heavy chain in the muscle is wiped out. It's called myosin lysis because the heavy chain is referred to as myosin, the thin chain actin, and then you get degeneration of the sensory and motor nerves. We're not really quite sure exactly what causes it.

Q So in this case is the truncal instability, is that permanent?

A Yes.

Q And is that to a reasonable degree of medical probability?

A Yes.

Q To a reasonable degree of medical probability, did the critical illness polyneuropathy or CIP cause sensory loss in Titina's feet?

A Yes.

Q Now, sensory loss, I think you've explained it a little bit. Can you remind me what sensory loss is?

A Well, there are different modalities of sensation. So there's pinprick, temperature, light touch, vibration and joint position sense. So basically vibration is your ability to detect vibrational activity. Joint position sense allows you to know what you're doing with your limbs in space. So

if you have impaired joint position sense, you don't really know exactly what you're doing with your toes or your feet, depending on where it is. Pain and temperature are kind of warning signals for the body that something is wrong. So if you have impaired pain and temperature, you're more prone to injury because the warning signals aren't there, so you can get cuts, you can get damage to the joints if you keep banging them around without realizing it.

Q Okay. So in this case, what does Titina have in both her feet?

A She has profound sensory loss.

Q So, profound sensory loss, does that mean she can feel some things under her feet?

A Well, yes. I mean, severely. The report from Dr. Barchuk indicated it was severely impaired. If it was completely absent, it would say absent.

Q Okay. Now, have you had other patients with foot drop?

A Lots.

Q I didn't know. Have you had other patients with double foot drop?

A Yes.

Q Now, Doctor, you ruled out -- am I correct -- what's your -- actually, why don't I ask it this way. What's your opinion on whether she has clinical illness myopathy?

A My opinion would be no, primarily because she was never treated with steroids, which is usually characteristic for people with myopathy. And the nerve conduction studies showed abnormal sensory responses, which should be relatively preserved in a myopathy.

Q Okay. So is it two parts, treatment with steroids --

A Yes.

Q -- and EMGs?

A Yes.

Q Okay. Does foot drop change a patient's gait?

A Absolutely.

Q Now, when I use the term gait, can you explain to the jury what gait means?

A Gait means you look at the way the person walks. Normally when people walk they should have a normal degree of arm swing. They should -- their feet -- they pick their feet, the front of the foot up as before they move so the foot can clear the ground. And you look at their balance, you look at how narrow or wide the stance is. If you have damage to your coordination, you will compensate by the base of the gait. In other words, distance between the feet will get wider. You also look how they do on turns. Sometimes turns are more sensitive for detecting instability.

Q Now, that instability, is that due to a combination of things or just the foot drop?

A Well, in her case it's a combination because there's also joint position sense loss, which makes things worse because she's not -- doesn't really know exactly what she's doing with her toes and her foot exactly, so that would tend to make things worse. But the foot drop alone is enough to make you very unstable and fall periodically with injuries.

Q So does that increase the likely -- the likelihood that they fall?

A Yes.

Q How about carrying things in their hands, a person with double foot drop?

A Well, they would be more limited because obviously if you're carrying something on one side it tends to unbalance you, and if you're already unbalanced to begin with it would increase the probability of falling, so basically the amount they could lift would be very limited.

Q Now, I'd like to go back to steppage. Steppage, does it -- how far they have to lift their leg, does that depend on how far the foot falls?

A Well, I kind of have to show you that. If I could stand up, I could show that to you.

MR. LEAVITT: Your Honor?

THE COURT: Sure. The hand-held microphone. If you're going to have him get up, it's perfectly fine. We'll just get a hand-held microphone, please, for the witness.

And then counsel, if counsel needs to move to get a better angle, other counsel is always invited to do so, as long as it's not getting into the jury's area.

MR. DOYLE: Thank you, Your Honor.

THE COURT: Perfectly fine to move if you need to move anywhere. Feel free to do so.

THE WITNESS: Basically steppage would look like this (demonstrating). You have to pick the whole leg up in order to clear the ground because you can't do this. So ordinarily when you walk, you're walking like this. Somebody who can't pick their foot up has to either drag it along and it's going to catch and they're going to fall, or you have to pick it up all the way and you have to pick the whole leg up off the ground. And as you can see when I do that, I'm a bit unsteady and off balance.

BY MR. LEAVITT:

Q Okay. So with the steppage, is that where the trunkar -- or truncal, excuse me, the truncal instability comes from?

A Yes.

Q So because of the requirement to lift the foot up high to avoid what?

A To avoid dragging on the ground and it catches because, you see, if you can't pick the front of the foot up and you drag it on the ground, it catches, you go falling and

you can injure yourself. So to compensate a patient picks the whole leg up, so it's a bit better than dragging it on the ground, but they're still quite unstable.

Q Okay. Thank you, Doctor. You can just turn the mike off. All right, thank you.

THE COURT: You can keep it there if you think he's going to go off the stand again. It's up to you.

MR. LEAVITT: You can -- thank you, marshal.

BY MR. LEAVITT:

Q Now, clinical illness polyneuropathy, does that -- over time does that do anything to the nerves that it's already affected?

A Well, basically what happens is due to the effect of normal aging everything is going to get worse with time because each year you get older it's like the old phrase about athletes, a year older, a step slower. You have a certain number of motor nerves die off and sensory nerves die off as you age each year. The problem is she's had so many wiped out, when you lose -- when she loses one nerve it represents a much greater percentage of what's left than for a normal person her age. So when you lose -- if it has a greater affect, it results in more loss of function.

Q Okay. It loses more loss of function because she's already lost so much?

A Yes, because it's like -- let's say you have a

million nerves and you lose a thousand, you wouldn't really notice it. If you have a hundred thousand nerves and you lose a thousand, that's a much larger percentage, so each time you lose a nerve you have greater loss of function.

Q Okay. And does that affect the muscle mass at all?

A Well, you know, basically as you age there's going to be some atrophy as you get older, but whatever atrophy she's already had from the critical polyneuropathy would not get worse.

Q Okay. And what --

A Except --

Q Sorry.

A -- for due to disuse, because she obviously can't move, so when you don't use muscles they tend to atrophy as well. So there would be some element of disuse atrophy and the affect of normal aging causing some degree of atrophy.

Q Okay. And for those of us who don't know, what does the word atrophy mean?

A Atrophy means, like, for example, there's a big muscle mass here. Atrophy would be this would vanish. The muscle mass would get smaller to the point where in an extreme case it would be completely gone. So, for example, instead of a bowing out of my finger over here, which you have normally, it would go in the other way if there was really profound atrophy.

Q Okay. So it's a shrinking?

A Shrinkage. Yes.

Q Now, in patients that you've had that had singular foot drop, do they atrophy differently in one leg as opposed to the other?

A Well, it depends on the cause and whether it's reversible or not. So, for example, if you have somebody who had foot drop from an anesthetic like from an epidural due to the anesthetic, those are usually reversible, you don't get that. Basically if you have, like, you know, severe neuropathy like Guillain-Barre or CIDP, it depends on the results of treatment. If it doesn't respond, yeah, eventually it will get atrophic. The muscle mass will begin to shrink.

Q Did you offer any opinions in this case regarding Titina's muscle mass?

A Which page of my report are you referring to?

Q No, I was just asking. I was looking at page 8 of your report.

A I don't think so.

Q Okay. Now, you reviewed an MRI in this case. Do you recall that? It would be on page 3 at the top.

A I reviewed the report.

Q You reviewed the report. The MRI was taken of what body part?

A That was the lumbosacral area.

Q Which is where?
A Which is basically from just below your ribs all the way through the buttocks.
Q Okay. And was the MRI normal or abnormal?
A It was normal.
Q Okay. So, Titina's foot drop, did you rule out nerve damage in the low back?
A Not just on the MRI. The MRI indicates there's no structural lesion that would cause it. Generally a radiculopathy does not affect the sensory nerves, although there are certain exceptions which wouldn't apply here because it's a normal study.
Q Okay. So you looked at all of these other areas, is that fair, before you came to your opinion --
A Yes.
Q -- that it was CIP that caused her double foot drop?
A Yes.
Q Now I have a few questions -- well, actually, you know what, I just have one more -- a couple more questions is all. Again, Doctor, to a reasonable degree of medical probability, what caused Titina's double foot drop?
MR. DOYLE: Objection. Asked and answered.
THE COURT: The way that -- sustained the way that was phrased.
MR. LEAVITT: Fair enough, Your Honor.

pocket microphone.

MR. DOYLE: I think the microphone should work okay.

THE COURT: Perfect. Feel free to proceed.

CROSS-EXAMINATION

BY MR. DOYLE:

Q Good afternoon, Doctor.

A Good afternoon.

Q Now, you're familiar with a company called National Medical Consultants?

A Yes.

Q It's a corporation you do business with?

A Yes.

Q It's a corporation based in New York somewhere. True?

A Yes.

Q And what National Medical Consultants does is they basically recruit cases from attorneys and give them to people to review, such as yourself?

A Yes.

MR. LEAVITT: Your Honor, may we approach?

THE COURT: Yes, you may.

Madame Court Recorder, can you turn on the lovely white noise.

(Bench conference held; not transcribed)

(A few jurors are excused to use the restroom)

BY MR. LEAVITT:

Q To a reasonable degree of medical probability, what caused her foot drop?

MR. DOYLE: Objection. Asked and answered.

THE COURT: The Court is going to overrule.

MR. LEAVITT: Very good.

BY MR LEAVITT:

Q Doctor, was it the clinical illness polyneuropathy that caused her double foot drop?

A Yes.

Q Okay. And that's to a reasonable degree of medical probability?

A Yes.

Q Has your -- are all your opinions today to a reasonable degree of medical probability?

A Yes.

MR. LEAVITT: Thank you, Doctor. I have no further questions.

THE COURT: Okay. Then at this juncture, cross-examination. And, counsel, are you going to be staying at the podium or do we need to get you a pocket microphone?

MR. DOYLE: I thought I'd stand right here if that's okay.

THE COURT: You're more than welcome to stand there as well. We just needed to know if we need to get you a

THE COURT: We're going to wait a moment until the jurors get back, so if you don't mind just pausing for a quick moment.

MR. DOYLE: Oh, okay.

MR. LEAVITT: Oh, we're missing some jurors.

THE COURT: Yes. I didn't anticipate things would be as quick. We'll just wait for them a quick second. If anyone needs to stand up for a second. The water is fresh every day and then there's tissues and stuff. It will just be a moment until the people return.

(Pause in the proceedings)

THE COURT: Okay. Thank you very much. We are still on the record. So at this juncture, I think as that was occurring -- Counsel for plaintiff, was there something that you needed the Court to address?

MR. LEAVITT: No, Your Honor.

THE COURT: Okay. So then counsel for defense, feel free to continue with your cross-examination.

MR. DOYLE: Thank you.

BY MR. DOYLE:

Q Doctor, I was asking you about National Medical Consultants, and that's owned by Dr. Gene DeBlasio?

A Yes.

Q And apparently George Hand and Dr. DeBlasio have some relationship or business relationship because that's how

he came to find you?

MR. LEAVITT: Objection, Your Honor. Going outside of the --

THE COURT: The Court is going to sustain that objection. The jury will disregard the comment from counsel. Feel free to move on to your next question.

BY MR. DOYLE:

Q Doctor, which attorney did you have contact with at the beginning of this case?

A George Hand.

Q Is it George Hand who hired you and retained you in this case?

A Yes.

Q Now, National Medical Consultants, what it does is attorneys can go to National Medical Consultants and find expert witnesses for their cases; correct?

A Yes.

Q It's kind of a shop of sort for expert witnesses; correct?

A I'm not sure what you mean.

Q Like a shop or a store or an on-line source for finding expert witnesses.

A A source, but I wouldn't really think shop is apropos.

Q And you're affiliated with other such companies,

JD.MD and Mednick Associates; correct?

A Yes.

Q These are other companies or sources where attorneys can go to the company looking for an expert witness and then the company connects them with an expert witness?

A Yes.

Q And in this case the time that you spent on this case, the bills you submitted went to National Medical Consultants and then they presumably billed Mr. Hand; correct?

A Yes.

Q And when I took your deposition, you submitted a bill to National Medical Consultants and then they sent me a bill to pay for your deposition?

MR. LEAVITT: Objection. Foundation. Why would he know what's sent?

THE COURT: The Court is going to sustain the objection. There really wasn't even a question.

BY MR. LEAVITT:

Q Doctor, for the time you and I spent together in your deposition, how were you paid?

A I submitted an invoice to National Medical Consultants.

Q Did you receive a check from National Medical Consultants?

A Yes.

Q Now, what's your best estimate of the number of neurologists who are practicing in the United States?

A I believe it's roughly about 3,000.

Q I'm sorry, how many?

A I said roughly about 3,000, I believe.

Q Can you tell me how many neurologists there are on the east coast versus the west coast?

A No, I couldn't give you that figure without referencing the literature. I can tell you neurologists tend to concentrate in larger cities, but I couldn't give you exact numbers.

Q Do you know how many neurologists there are in Las Vegas?

A No.

Q Do you know whether Mrs. Farris has actually seen a neurologist here in Las Vegas to date?

A I don't believe so.

Q Do you know how many neurologists there are in California?

A No.

Q Based upon your conversations with Mr. Hand or perhaps others, do you know why it was that you came from New York rather than finding someone closer?

A I have no idea.

MR. LEAVITT: Your Honor, I object to this line of

questioning, the relevancy of it.

THE COURT: The Court is going to sustain the objection and ask counsel to please approach.

(Bench conference held; not transcribed)

THE COURT: So the Court sustains the objection and the jury will disregard. Since the witness started to answer, the jury will also disregard the witness' answer because the objection came about at the time that the answer was involved. Okay. Thank you so much.

Counsel, feel free to move on.

MR. DOYLE: Thank you.

BY MR. DOYLE:

Q The report that you prepared that counsel was discussing with you earlier that was marked for identification as OO, what's the date of that report?

A October 22nd, 2018.

Q In your report do you indicate that you were provided with some records from Advanced Orthopedics? If you look it up --

A Yes.

Q You reviewed those records?

A Yes.

Q When you reviewed the records from Advanced Orthopedics, did you become aware that Mrs. Farris was receiving steroid injections prior to July of 2015?

A I'm not really sure what you mean with your question.

A Well, you testified earlier that Mrs. Farris had never been treated with steroids, and what I'm wondering is when you looked at the records from Advanced Orthopedics, did you note that she had received steroid injections prior to July of 2015?

MR. LEAVITT: Objection, Your Honor. Misstates facts.

THE COURT: Feel free to bring the documentation. Counsel, feel free to come visit the bench. And Madame Court Recorder, turn on the white noise. And can we bring something with us?

(Bench conference held; not transcribed)

BY MR. DOYLE:

Q Doctor, do you recall --

THE COURT: So, counsel, are you withdrawing that last one so that the Court may not rule?

MR. DOYLE: Oh. Yes.

THE COURT: Okay.

MR. DOYLE: Yes. Thank you.

THE COURT: Since counsel is withdrawing, the Court may not rule. Go ahead.

BY MR. DOYLE:

Q Doctor, do you recall testifying earlier today that

Mrs. Farris was never treated with steroids?

A I don't recall. If that's what I said, then I said it, but what I meant was she was not treated with large doses of intravenous steroids.

Q And you're referring to perhaps what was happening in the hospital?

A Yes.

Q When you gave that answer, you weren't suggesting that she had never been treated with steroids prior to her hospitalization?

A I can't answer that as a yes or no question. If you'd like me to elaborate, I can.

Q Well, you saw in the records that were provided to you, that you had available to you at the time you prepared your report that she had received steroid injections for a left shoulder problem?

A I can't answer that as a yes or no question. If you'd like me to elaborate, I can.

Q You don't remember one way or the other?

A I can't answer it the way you've asked it.

Q Okay. Now, have you examined Mrs. Farris?

A No.

Q Have you seen her walk?

A Yes.

Q When did you see her walk?

A I was sent video of her walking and ambulating. The video was about six to eight minutes and there were a few other videos.

Q And when you watched the video and you observed her steppage gait, was her steppage gait like that where she brought her foot up perhaps even with her hip?

A No.

Q Did you form an impression based upon the videotape whether one foot was better than the other?

A I couldn't really tell. It looked like both feet were pretty affected.

Q But could you tell if one was better than the other?

A No.

Q And when you watched the video in terms of this steppage gait, did you note that Mrs. Farris had to bring her foot up perhaps one or two inches off the ground in order to move it forward?

A I can't answer that unless you let me look at the video.

Q You just don't recall?

A I don't recall.

Q And does she wear AFOs?

A She did wear AFOs, but I believe they broke and she wasn't able to replace them.

Q Well, does she have AFOs currently?

A I don't know.
Q AFO, that stands for an ankle-foot orthosis?
A Well, ankle-foot orthodic. Basically what an AFO is, you brace the patient in a more functional position so that it makes them a bit more stable. So instead of the foot being down, you put them in a brace so the foot is slightly up. It improves their stability.
Q Now, so if Mrs. Farris was using an AFO, that would improve her ability to walk?
A Yes.
Q And do you know whether she's currently using an AFO or not for walking?
A No, I do not.
Q Now, if you would look at that binder in front of you, if you would look at Exhibit D. And again, these are the records from Advanced Orthopedics and Sports Medicine, which you mention in your report.
A You mean double D?
Q No, no, single D. And take a look at your report for a moment. Well, I'll let you get to Exhibit D. Can you grab your report for a moment?
A Yes. Which page are you referencing?
A I'm referencing the second page, Item Number 7, where you indicate which notes you had from Advanced Orthopedics. Do you see that?

A Yes.

Q One of the notes that you had and that you looked at in this case was from July 2, 2014; correct?

A Yes.

Q And if you look at Exhibit D, pages 10 and 11, that's the note that you had available to you from July 2, 2014; correct?

A Let's see, 10 and 11 is July 2nd, 2014, so that would be what I reviewed.

Q And in this first paragraph there's a typo but it says, "He also states she has foot pain daily and sometimes numbness and sharp pain." Do you see that?

A Yes.

Q Then the next sentence in the Advanced Orthopedics records says, "She states that she has a history of diabetes, insulin dependent and diabetic neuropathy." Correct?

A That's what it says.

Q And she's being treated at this visit for what's called a left shoulder impingement syndrome?

A That was one of the diagnoses he was treating.

Q Okay. Excuse me for one second. Then another note that you looked at from Advanced Orthopedics, that was dated November 25th, 2014; correct?

A Yes.

Q And if you go to Exhibit D, pages 7 and 8, that is

-- 7, 8 and 9, that's the note you were referring to; correct?

A Yes.

Q If you look at page 7 of Exhibit 7 (sic), do you see the section that says, "Impression"?

A Yes.

Q Impression is a word that's commonly used to mean diagnosis or assessment?

A Yes.

Q And under "Impression" it has "history of diabetic neuropathy"?

A Yes. That's what it says.

Q It has "bilateral foot pain"?

A Yes.

Q It has "C-spine radiculopathy." Correct?

A That's what it says.

Q What's a cervical spine radiculopathy?

A Well, it wouldn't really be a cervical, it would be a cervical radiculopathy. There are eight nerve roots in the neck from C1 through C8, and a cervical radiculopathy would be damage to one of the nerve roots. On a numbers basis the 6th cervical nerve root is the most commonly injured one, with the 7th a bit less frequent as number two. Sometimes you can have multiple injuries.

Q Now, you also had available to you and looked at the visit note from Advanced Orthopedics dated May 5th, 2015,

correct, according to your report?

A Yes. That's what my report says.

Q So if you look at Exhibit D, pages 5 and 6, that is the note you were referring to in your report?

A Yes.

Q And do you see in the second -- or in that large paragraph on page 5 there's documented a physical examination?

A Yes.

Q Do you see towards the end of that paragraph where it says, "Regarding the bilateral feet, there is pain noted"?

A Yes.

Q And then if you look at the Impression section of this note from May of 2015, we again have "history of diabetic neuropathy"?

A That's what it says.

Q And it also says "bilateral foot pain"?

A Yes. That's what it says.

Q As well as several other items?

A Yes.

Q Then you also have a note that was provided to you that you looked at dated July 2, 2014 and that's in the exhibit -- that's in the D Exhibit -- I'm sorry. You were provided -- if you look at Exhibit D, pages 1, 2, 3 and 4, this is a patient history type form that Mrs. Farris filled out and signed on July 2, 2014. That was part of the records

that were provided to you; correct?

A Yes.

Q All right. And on July 2, 2014, Mrs. Farris indicated in response to, "What are we seeing you for today," she put, "Her feet, right and left." Correct? Page 1.

A Yes.

Q And then if you skip down a few lines it says, "What do you think caused what we are seeing you for today?" And she wrote, "Nerve pain." Correct?

A That's what she wrote.

Q And she was also complaining of problems with her left arm and shoulder?

A Yes.

Q And she also indicated that in her mind the nerve pain started in 2012?

A Yes.

MR. LEAVITT: Objection, Your Honor. Misstates facts.

THE COURT: Counsel, can you please approach?

Madame Court Recorder, I'll love to turn on some white noise. Would you mind, Madame Court Recorder? I do appreciate it. Thank you so much.

(Bench conference held; not transcribed)

THE COURT: Okay. The Court is going to need to sustain that objection. Since the witness answered before the

Court had an opportunity to address the objection, the jury will disregard the witness' last answer. If you wrote it down, scribble it out. Thank you so much.

Counsel, feel free to continue with the next question. Appreciate it. Thanks.

MR. DOYLE: Thank you.

BY MR. DOYLE:

Q Doctor, in addition to records from Advanced Orthopedics, you were provided with records from Dr. Chaney; correct?

A Yes.

Q And when you and I were together for your deposition you indicated to me that you had Dr. Chaney's note for Mrs. Farris on January 5th, 2015; correct?

A If I said that in the deposition, yes, that would be correct.

Q February 6th, 2015?

A If that's what I said in the deposition, yes.

Q March 5, 2015?

A If that's what I said in the deposition, yes.

Q Okay. Well, we could look at it, but will you take my word for it?

A I'm taking your word for it.

Q All right. You also had Dr. Chaney's note of April 3rd, 2015?

A Again, same answer.
Q May 5th, 2015?
A Same answer.
Q June 4th, 2015?
A Same answer.
Q June 30, 2015?
A Same answer, counselor.
Q And September 11, 2015?
A Same answer.
Q Were you provided with any of Dr. Chaney's records from 2014 or earlier?
A I was provided with records from Dr. Chaney prior to the admission to the hospital. I don't recall the exact dates. I would need to look at the --
Q Well, the dates that you and I just went through, those all precede the admission on July 3rd, 2015. True?
A Yes. They sound about right, but I don't remember them, recall them exactly. I would need to look at the records I reviewed.
Q Do you have the ability to do that if need be?
A Yes.
Q Did you bring your laptop and we could double check?
A Well, I brought my tablet.
Q Okay, your tablet. Did you bring your tablet and we could double check if need be?

A Yes, it is. It's sitting right here.

Q Okay. Well, why don't you take a moment and look in your tablet and see if you were provided with any of Dr. Chaney's records for 2014 or earlier?

THE COURT: Counsel, can you both approach, please?

Madame Court Recorder, can you turn on some white noise?

(Bench conference held; not transcribed)

THE COURT: Okay. So the Court is going to need to instruct the witness that you cannot do that. The Court is going to sustain the objection and the jury will disregard the request.

Counsel, please move on to your next question.

BY MR. DOYLE:

Q Doctor, let's look at Exhibit C, pages 26 and 27, which is Dr. Chaney's note for January 5th, 2015, which you did indicate you had provided to you. Can you find that, please?

A Which page is it?

Q 26 and 27 on Exhibit C.

A Yes.

Q And by the way, Doctor, just as a general matter, is a peripheral neuropathy a complication of diabetes?

A It can be.

Q And is a peripheral neuropathy -- can it be a

complication of uncontrolled diabetes?

A It can be.

Q If a patient has uncontrolled diabetes, can the risk of a diabetic neuropathy increase?

A Yes and no.

Q If we look at Exhibit C, page 26, which is Dr. Chaney's note of January 5th, 2015, which was provided to you and you reviewed, under HPI do you see where it says, "The patient is not monitoring her blood glucose on a regular basis"?

A Yes.

Q And do you see under PMH -- that stands for Past Medical History; correct?

A Yes.

Q It says, "Diabetes, Hypertension and Neuropathy."

A That's what it says.

Q And then do you see under the Medications that they include Cymbalta and Gabapentin?

A Yes.

Q Is Cymbalta used to treat a diabetic neuropathy?

A It can be.

Q Can Gabapentin be used to treat diabetic neuropathy?

A Yes.

Q Do you know one way or the other whether Dr. Chaney was prescribing Cymbalta to treat diabetic neuropathy?

A It doesn't say exactly, but I would assume that was why she was doing it.

Q Because you don't see any other reason in her note that would be an indication for prescribing Cymbalta. Fair statement?

A Well, I can't answer that the way it's asked.

Q All right. Do you assume as well that Dr. Chaney was prescribing Gabapentin for diabetic neuropathy?

MR. LEAVITT: Objection, Your Honor. Foundation.

THE COURT: Sustained, based on he used the word assume.

BY MR. DOYLE:

Q Doctor, what is your impression based upon all the materials that you have reviewed in this case why Dr. Chaney -- or do you know why Dr. Chaney was prescribing Gabapentin?

MR. LEAVITT: Same objection. Foundation.

THE COURT: Overruled on the foundation objection based on the way the question was rephrased.

MR. DOYLE: And I'll restate it.

BY MR. DOYLE:

Q Based upon all the information available to you in this case, do you know why Dr. Chaney was prescribing Gabapentin as of January 5th, 2015?

MR. LEAVITT: Same objection. He's asking why Dr. Chaney did something.

THE COURT: The Court is going to overrule the objection because he asked the witness do you know why. Based on the way the question was phrased.

THE WITNESS: The record suggests that she had made a presumptive diagnosis of diabetic neuropathy, but that is not necessarily correct.

BY MR. DOYLE:

Q So if we assume hypothetically that Dr. Chaney made a diagnosis of diabetic neuropathy, you would disagree with her?

A Yes.

Q And if you go over to page 27 of Exhibit C, under Assess -- A/P, that means Assessment/Plan?

A Yes.

Q And the second item, does it say, "Type 2 Diabetes Mellitus, uncontrolled"?

A Yes, it does.

Q Then let's look at C-28 and 29. Having reviewed this note, did you see in History of Present Illness where it says, "Historically she is reluctant to see physicians and developed diabetic neuropathy as a consequence"? Do you see that?

A Yes, I do.

Q And then also it says, "She has neuropathy which has been improved on Cymbalta."

A Well, that's what it says.
Q And again, as of February 6th, 2015, the current medications include Cymbalta and Gabapentin; do they?
A Yes.
Q And under Assessment and Plan on page 29, we have again "Type 2 Diabetes Mellitus, uncontrolled." Do we have that?
A Yes.
Q When you were provided Dr. Chaney's records, were you provided with the laboratory information showing her blood glucose levels?
A Yes.
Q Were you provided the laboratory information about her A1C?
A Could you tell me page reference to the A1C?
Q I'm just asking from memory, if you recall?
A No, I don't recall.
Q Let's look at page 37 and 38 of Exhibit C, another record that was provided to you from Dr. Chaney. And if you could go to page 37, specifically the History of Present Illness. Do you see that?
A Yes.
Q It says, "The patient was asked to come in today for further evaluation secondary to her blood work."
A Yes.

Q "The blood work demonstrates abnormal control of her blood glucose." Does it say that?

A Yes.

Q "Her cholesterol is elevated, as well as her triglycerides."

A Yes.

Q And if you look under Medications, again we still have Cymbalta and Gabapentin?

A Yes.

Q And if you go to page 38 under Assessment and Plan, we again have "Type 2 Diabetes Mellitus, poorly controlled"?

A Yes.

Q If you look at Exhibit C-39 and 40, that's the note of April 3rd, 2015 that you looked at; correct?

A Yes.

Q It says, "Patient states that her blood glucose has improved and is not regularly sending me her numbers." Do you see that?

A Yes.

Q Typically what internists do when they have a patient with uncontrolled diabetes is they want their patient to check the blood glucose or blood sugar levels at home regularly and send that information to the doctor so they can evaluate it.

MR. LEAVITT: Objection, Your Honor. Counsel is

testifying.

THE COURT: The Court is going to sustain the objection because there wasn't a question at the end of that.

BY MR. DOYLE:

Q Doctor, if you know, does an internist who has a patient who has uncontrolled diabetes -- what do they typically ask that patient to do in terms of checking their blood glucose at home?

A I can't answer that. I'm not an internist.

Q On April 3rd, 2015, she's still taking Cymbalta and Gabapentin? Page 39.

A Yes. That's what it says.

Q And if you go over to page 40 where we have Assessment and Plan, do you see now it says, "Polyneuropathy and Diabetes"? Do you see that?

A Yes, it does.

Q Is that the same thing as saying diabetic neuropathy?

A Yes.

Q And then right above that it says, "Type 2 Diabetes Mellitus, poorly controlled"?

A Yes.

Q And you disagree with Dr. Chaney's conclusion on April 3, 2015 that Mrs. Farris had a polyneuropathy and diabetes or diabetic neuropathy?

A Yes. I would disagree with that opinion.

Q If we look at pages 41 and 42 of Exhibit C, do you have that in front of you? Do you see under History of Present Illness, "I've explained to the patient that her diabetes has not been well controlled and she does require improved diabetic control"? Do you see that?

A Yes, it does.

Q And again, she's taking Cymbalta and Gabapentin still?

A Yes.

Q And if you go to Assessment and Plan on page 42 of Exhibit C, we have a backache; correct?

A Yes.

Q Chronic pain syndrome; correct?

A Yes.

Q Were you able to determine where the pain was that was a chronic pain syndrome?

A Not based on her records.

Q On C-42, Dr. Chaney indicated, "Patient non-compliance, general"?

A Yes.

Q And "Type 2 Diabetes Mellitus, uncontrolled"?

A Yes. That's what it says.

Q Then if you look at Exhibit C-50 to 51, that is the visit note that you were provided for June 4th, 2015; correct?

A Yes.

Q And under History of Present Illness, it says, "I"ve explained to the patient that although her hemoglobin A1C is improved and she continues to demonstrate poor control, I have advised the patient that she must see an endocrinologist." Correct?

A That's what it says.

Q In any of the records that were provided to you, did you -- were you able to determine whether Mrs. Farris did or did not see an endocrinologist?

A I did not review any records from an endocrinologist.

Q And hemoglobin A1C is used how when treating a patient with diabetes or uncontrolled diabetes?

A Well, basically there are several ways to test for prediabetes or diabetes. The first is to do a fasting blood sugar. That doesn't work in prediabetics because their sugar is up some of the time. In a diabetic where it's elevated pretty much every day, you can follow how they're doing. A hemoglobin A1C is normally in your body your red blood cell contains hemoglobin. When your sugar gets too high, the body will attach a sugar molecule to the hemoglobin, so by testing the hemoglobin A1C, you can get an idea what their average sugar has been for two or three months.

So it depends on the assay. Different labs have

different assays. Most labs, less than 5.7 percent is normal, between 5.7 and 6.4 percent is prediabetic and above 6.4 percent is full blown diabetes. Other labs have different cutoffs because the assays are slightly different, so you get different numbers. At some labs the cutoff is 7 percent, some it's 9 percent.

The last way you test for diabetes or prediabetes is a glucose tolerance test, which is basically you go to the lab, they put in a hep lock, they draw a fasting sugar. They then give you a sugar solution, about 50 cc's or so, to drink and then they check your blood sugar a half an hour, an hour, two hours later. You can go to four hours, but I generally don't do that anymore because at least in my experience going to four hours doesn't add anything to your yield. So basically you can have a normal fasting sugar and basically after the sugar solution if it's beyond the normal for that range that would either indicate prediabetes or diabetes.

Q In coming to your conclusion that Mrs. Farris did not have a diabetic neuropathy prior to July 3, 2015, did you go back and look at her lab data and plot her blood glucoses or blood sugars?

A No.

Q Did you go back and look at and plot her A1Cs?

A No. I'm not sure why I would need to do that. Just

because you have poorly controlled diabetes does not automatically give you diabetic neuropathy.

MR. DOYLE: Your Honor, I'd move to strike the last part of the answer as non-responsive.

THE COURT: Did you --

MR. DOYLE: Objection. Non-responsive.

THE COURT: Can you both approach, please.

(Bench conference held; not transcribed)

THE COURT: The Court is going to overrule the objection. Counsel didn't specifically ask if it was to say yes or no, so the Court can't find it unresponsive.

Go ahead.

BY MR. DOYLE:

Q So, Doctor, looking at C-50, on June 4, 2015, Mrs. Farris again is taking Cymbalta and Gabapentin?

A Yes.

Q And looking at page 51, Dr. Chaney's assessment is Type 2 Diabetes Mellitus, poorly controlled?

A Yes.

Q Now, the last one I want to ask you about, which you identified as the note of June 30, 2015, which is pages 52 and 53, do you see that, of Exhibit C?

A Yes.

Q And under Medications again we have Cymbalta and Gabapentin; correct?

A Yes.
Q Do we have Lortab?
A Yes.
Q What was she taking the Lortab for?
A I don't know.
MR. LEAVITT: Objection, Your Honor. Foundation.
THE COURT: Sustained.
BY MR. DOYLE:
Q Do you know why she was taking Lortab?
MR. LEAVITT: Same objection, Your Honor.
THE COURT: Overruled; the way it was phrased.
BY MR. DOYLE:
Q Do you know why she was taking Lortab?
A No. It doesn't indicate why.
Q Does the note indicate she was taking Norco?
A Yes.
Q Do you know why she was taking Norco?
A Same answer.
Q Does the note indicate she was taking Percacet?
MR. LEAVITT: Objection, Your Honor. Relevance and foundation.
THE COURT: The Court is going to overrule it as to relevance and overrule it on foundation since the reference -- the way the question was phrased with regards to a reference to a particular note.

MR. LEAVITT: Thank you, Your Honor.

BY MR. DOYLE:

Q Does the note indicate she's taking Percocet?

A Yes.

Q Do you know why she's taking Percocet?

A It does not indicate why it's being prescribed.

Q Now, it is your opinion -- well, let me start over again. Do you think Dr. Chaney was mistaken or ill-informed when she diagnosed a peripheral neuropathy?

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

Q Do you recall telling me at your deposition that "I would say Dr. Chaney has no idea how to diagnose a neuropathy?"

A Yes, I do.

Q Can you and I agree that the statistics associated with what percentage of patients with Type 2 Diabetes, poorly controlled, will go on to develop a peripheral neuropathy that it's between 20 to 23 percent, depending on what one looks at?

A Roughly for all diabetics, including the ones that are poorly controlled.

Q And you would expect that number to be higher for diabetics who have poorly controlled diabetes that has been poorly controlled for years or more?

A No.

Q The numbers would remain the same?

A I can't answer that as a yes or no. If you'd like me to elaborate, I'll be happy to.

Q Do you recall telling me at the time of your deposition that it was your impression that Mrs. Farris was taking Lortab and Norco in part for the pain in her feet?

A If that's what it says in the record, yes.

Q Well, do you recall me asking you, "Was she taking Lortab and Norco prior to July of 2015?" You told me yes. And I asked you, "What was she taking those for?" And you said again, "They were being given for neuropathy. I think there was also some mention of back pain somewhere." Does that sound correct?

A Yes.

Q Now, as part of your work in this case, you provided all of us with a case list. Do you recall that?

A Yes.

Q It was a case list where you had given a deposition as an expert witness?

A It listed the depositions and appearances in court.

Q And the list that you gave us, all the depositions were on behalf of a plaintiff; correct?

A Yes. Well, I'd have to look at the list. I can't recall off the top of my head. It might be correct, but I'd need to refresh my memory.

Q Why don't you look at Exhibit RR to refresh your

memory?

A That would be helpful. The depositions were for plaintiffs.

Q And the trial testimonies were all for plaintiffs?

A Yes.

Q Have you ever testified at trial in a medical malpractice case for a defendant?

A Not so far.

Q Have you ever testified as an expert witness in a medical malpractice case at deposition for a defendant?

A No.

Q About 50 percent of your expert witness work is working as an expert witness in a medical malpractice case -- cases?

A I don't keep those kind of records. I couldn't answer that.

Q Do you recall me asking you, "The expert witness work that you do, what percentage would you say is medical malpractice versus all others?" Answer: "I would say the med-mal probably represents about 50 percent of it." Does that refresh your recollection?

A Then the answer would be yes.

Q The treatment of CIP is physical therapy and mobilization?

A Yes.

Q And there is no other specific treatment for CIP other than physical therapy and mobilization; correct?

A Yes.

Q When you prepared your report, was it your impression that Mrs. Farris did not receive any physical therapy in the hospital?

A Do you mean before or after her transfer to rehab?

Q Before her transfer to rehab.

A It was my understanding she did not.

Q So it's your understanding that Mrs. Farris did not receive any physical therapy at St. Rose Dominican Hospital before she was transferred to the rehab hospital; correct?

A I did not see any records from therapists prior to transfer.

Q Can you and I agree that CIP is static?

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

Q Can you and I agree that if someone has CIP causing a foot drop, the CIP will not cause the foot drop to get any worse?

A Once the infection and sepsis has resolved and the CIP have reached their nadir, there is usually no further progression after that directly from the CIP. But as the patient ages, there will be progression due to the normal loss of nerve fibers with aging.

Q So as everyone ages you lose nerve fibers; correct?

A Yes. That's why athletes have to retire when they get to a certain age.

Q And you lose motor nerve fibers and you lose sensory nerve fibers; correct?

A That is correct.

Q That's just part of the normal aging process; correct?

A Yes.

Q And even if Mrs. Farris had not developed CIP and a foot drop, she still would have continued to age; correct?

A Yes.

Q And given her various other medical problems, you would expect her to have those problems for the remainder of her life?

A What problems are you referring to?

Q The diabetes, that's a life-long condition for her?

A Yes.

Q Did you see anything to indicate that her chronic pain syndrome was going to get better over time?

A I can't answer that because the ideology of the chronic pain syndrome was really never established very well outside of what she might have from the CIP.

Q Okay. So at the point in time when Mrs. Farris was diagnosed with a foot drop due to the CIP, the CIP itself is not going to make the foot drop worse over time, but rather

the natural aging process. Am I understanding you correctly?

A Well, no. I believe from the record the foot drop on the left was worse than the right and it's already pretty bad, so it can't really get worse. The right one might get a little worse, but it's pretty bad as well, though not as bad as the left, so it might get a little bit worse as she ages but this is mostly permanent.

Q So you do know which foot is better versus worse concerning the foot drop?

MR. LEAVITT: Objection. Misstates prior testimony.

THE COURT: The Court is going to sustain with the way that question was phrased.

BY MR. DOYLE:

Q In terms of her foot drop, the left foot is worse than the right foot; correct?

A You asked me different questions, but --

Q I'm asking --

A Well, the question you asked me about what was in the record, the record indicates. You asked me about looking at her gait. That's a separate question because I can't really remember without looking at the video which foot looked worse on the gait. I know in the record what it says, but the two are not the same question.

Q Okay. Is it your impression that one foot is worse than the other in terms of the foot drop?

A The record indicates the left foot is worse.

Q And have you seen any records to indicate whether there has been any improvement in the right foot or left foot in terms of strength and mobility?

A What record I've seen indicates there has been no improvement.

MR. DOYLE: All right. That's all I have, then. Thank you, Doctor.

THE COURT: I'm going to let you do redirect, realizing we're going to stop for our afternoon break at about between 3:00 and 3:05, okay?

MR. LEAVITT: Yes, Your Honor.

THE COURT: Appreciate it. Thank you.

MR. LEAVITT: Yes. I'll keep my eye on the clock. Thank you.

THE COURT: If we just need to break in your redirect, I'll just give you a heads up in case, okay. Thank you so much.

MR. LEAVITT: Very good. Thank you. All right.

THE COURT: It was by prior agreement we're stopping between 3:00 and 3:05 for our afternoon break.

REDIRECT EXAMINATION

BY MR. LEAVITT:

Q All right. Doctor, thank you. I don't have a lot of questions. You were asked some questions about mobility.

Did you see the EMG report in this case?

A Yes, I did.

Q Okay. And the EMG report was after the surgery; correct?

A Yes.

Q And that EMG report confirms what?

MR. DOYLE: Objection. Beyond the scope.

MR. LEAVITT: Do you want to approach or do you want me to respond?

THE COURT: Feel free. Thank you.

Madame Court Recorder, would you mind turning on some white noise.

(Bench conference held; not transcribed)

THE COURT: Thank you so much. Counsel, feel free to proceed.

MR. LEAVITT: Thank you. Let me -- all right. Is that good? Madame Court Recorder, can you hear me?

COURT RECORDER: Yes.

MR. LEAVITT: Okay, very good.

THE COURT: Okay. Go ahead. Feel free.

MR. LEAVITT: Oh, okay. Let me gather my thought for a moment.

BY MR. LEAVITT:

Q Okay. You reviewed the EMG report in this case?

A Yes.

Q And that EMG was done post the July 3rd, 2015 surgery; correct?

A I'd have to look at the report, but I believe it was done in September of 2015.

Q Okay. But you recall what that report said?

A Yes.

Q What did it report?

A It demonstrated that the sensory and motor responses were completely absent.

Q Okay. And you were asked about loss of mobility.

A Yes.

Q That loss of mobility, is that from the clinical illness polyneuropathy?

A Purely. She did not have trouble walking before she came into the hospital. There is no evidence that she had a foot drop, because if she had bilateral foot drop before she came in the hospital she would have noticed it because she would have been falling over, and there's no evidence of that.

Q Okay. Now, the CIP, clinical illness polyneuropathy -- I'm going to have that very well down soon -- that's from the sepsis?

MR. DOYLE: Objection. Asked and answered and it's beyond the scope.

THE COURT: The Court is going to have to wait until I hear the end of the question before I make a ruling, so let

me hear the end of the question first, please.
BY MR. LEAVITT:
Q Okay. Did that come from the sepsis?
MR. DOYLE: Objection. Asked and answered and beyond the scope.
THE COURT: Sustained of the asked and answered.
MR. LEAVITT: Okay.
BY MR. LEAVITT:
Q Doctor, you were asked about diabetes and you went through Dr. Chaney's records, uncontrolled diabetes and all. You were -- Specifically, what do you need to diagnose neuropathy? What are the three things? Could you list them on that white board? The microphone is there. There's a marker right on the bottom. What three things do you go through to confirm neuropathy?
A Firstly, an appropriate clinical history. Burning in the feet. Numbness in the feet, particularly when lying in bed at night. Weakness. Numbness and tingling, but not just any numbness and tingling, it's numbness and tingling when not sitting because sitting could be normal. There's also lancinating or burning pain, which you would look for in the history.
Second would be an abnormal neurologic examination. There are actually two types of neuropathies diabetics get. The classic diabetic neuropathy is called large fiber because

it affects the big fibers. Then there's the much more common cause of numbness in diabetics called small fiber neuropathy, and that usually drives doctors batty. Because it only affects the small nerve fibers, a physical exam is completely normal and standard neurophysicologic tests don't help you. You need to diagnose it by either doing specialized testing like heart rate interval testing where you're looking at their heart rate and seeing the ratio of the maximum inspiratory/ expiratory ratio when doing things like deep breathing or valsalva. Ordinarily in a normal person when you deep breathe your heart rate speeds up, when you exhale it slows down. For each age group there's a normal value. If that value is closer to one, the normal means the small nerve fibers are impaired.

The other thing you can do is a sympathetic skin response where you put a recording electrode on the palm and a reference electrode on the back of the hand or at the top and bottom of the foot and you use stimulation. By looking at the size -- usually what's abnormal in small fiber neuropathy is the size, not the -- it's not delayed, just smaller than normal. That will get you about 75 percent of people.

The third thing is the skin biopsy where basically what they do is you take a small punch biopsy and the pathologist counts the numbers of small fiber nerve endings

and if they're decreased then it shows small fiber neuropathy, which is a much more common cause of numbness in a diabetic than large fiber neuropathy.

Large fiber neuropathy frequency -- I don't know that it's affected by uncontrolled diabetes. What is affected is the severity of the damage. So, for example, in a patient who is drinking alcohol and high sugars and has amplitudes, a normal amplitude is 3,000 microvolts or more and their amplitudes are 60 to 200. If you get them stop drinking and do their blood sugar control, the amplitudes will improve by considerably, but not anywhere to normal. But I don't know that it affects the frequency. And, you know, it's hard to tell and it drives everyone crazy because you have patients with diabetes who are very, very meticulous about their sugar control that have fairly severe neuropathy, and then you've got people who never seem to do anything about their sugar and they never get neuropathy. You know, we don't know a lot.

The third thing would be an abnormal neuro-physiologic study. Now, in the case of a large fiber neuropathy that would be your standard nerve conduction studies, EMG, which would detect it, and typically what you would be looking for is a mixed picture. So the velocities would be slow, the latency, which is the time it takes from giving them an electric shock 'til their impulse reaches the recording electrode, would be delayed. Amplitudes would be

reduced. And some of these values would be very slow, others would be more borderline, and that's the typical picture you see most commonly in diabetes. You can have ones which are more -- you know, the axonal type which is cutting the nerve and some which are somewhat more demyelinating, which is stripping off the covering. But it's usually a mixed picture and generally that's with a slow, chronic process, not suddenly becoming completely unable to walk. In fact, in somebody with diabetes when you hear that you start thinking of other conditions like CIDP in diabetes, which is Chronic Inflammatory Demyelinating Polyradiculoneuropathy.

MR. DOYLE: Objection, Your Honor, it's become narrative.

THE COURT: You need a follow-up question. I have an objection, counsel. You need a follow-up question.

MR. LEAVITT: No, I'll stipulate.

BY MR. LEAVITT:

Q Doctor, I do have some follow-up questions for you on this.

A Can I take the stand again?

Q Yes, if you would, and go ahead and turn off the microphone. In any of the records that you reviewed prior with counsel today, did you have those? Did you see any of those? (pointing to what witness wrote on white board)

A No. There was nothing.

Q Okay. So in those records that you reviewed with counsel today, can you say that there was neuropathy prior to this?

A No.

Q Okay. Doctor, you were asked some other questions. Did shoulder impingement cause her CIP?

A No. Absolutely not.

Q Okay. Did her back pain cause CIP?

A No.

Q Did diabetes cause CIP?

A Not directly.

Q In this case?

A In this case, no.

Q The questions on -- now, the records you reviewed with counsel prior to the July 3rd, 2015 surgery, did any of Dr. Chaney's records indicate mobility problems?

A No, they didn't get anything.

Q The orthopedic doctor, did any of those record any mobility problems prior to this?

A I would have to look at the record, but my understanding is that she had pain and maybe some difficulty walking during the pain, but no instability.

Q Okay. How about foot drop?

A There was no foot drop.

Q Okay. Now, when you look -- you were asked about

cases that come through. You look at cases for both plaintiffs or defendants. Do you even know about your cases when they come in who they're for?

A Not usually until I speak to the attorney involved.

Q Okay. So do you -- who chooses whether you accept a case or not?

A I do.

Q Have you looked at medical malpractice cases for defendants?

A Not med-mal cases. I've done defense work.

Q Okay.

A But that also is not my choice. I would prefer to do 50 percent defense and 50 percent plaintiff if it was up to me.

Q Okay. Now, you were asked about this Advanced Ortho -- I call it an L bracket. What do you call it, Doctor, that goes on your foot? I call it an L bracket.

A Ankle/foot orthodic.

Q Ankle/foot orthodic. Can the boots that go up to the calf, can those help at all?

A Well, it really doesn't matter whether it goes up to the calf. The importance of the ankle/foot orthodic is when you have foot drop you can't pick the foot up. The ankle-foot orthodic is to splint them in a more functional position so that they can kind of clear the ground and not fall and, you

know, basically injure themselves.

Q Again, Doctor, are all your -- is your testimony today to a reasonable degree of medical probability?

A Yes.

MR. LEAVITT: Thank you, Doctor. I have no further questions.

THE COURT: Okay. We have jury questions. Are you going to have recross?

MR. DOYLE: I don't have any recross, no.

THE COURT: Okay. Well, then let's see if we can -- counsel, can you approach, because we've got a juror question.

MR. DOYLE: Yes.

THE COURT: Okay. Could we get the white noise, please?

(Bench conference held; not transcribed)

THE COURT: Thank you so much.

Ladies and gentlemen, it's a great time for a break instead of you sitting here. This witness will be back in after the break. So, ladies and gentlemen, recess admonition. So you're going to come back at -- it's 3:03, you're going to come back at 3:35.

Ladies and gentlemen, during this recess you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with the trial. You may not read, watch or listen to any report of or commentary on

the trial or any person connected with the trial by any medium of information, including without limitation social media, texts, Tweets, newspapers, television, the Internet or radio. Do not visit the scene or any of the events mentioned during the trial. Do not undertake any research, experimentation or investigation. Do not do any posting or communications on any social networking sites or any other type of sites.

Do not do any independent research, including but not limited to Internet searches. And you understood when I went through the social media, texts, Tweets, newspapers, television, the Internet and radio that that included everything, even though I did not specifically name it. Yes? Yes. Okay, perfect. Of course you may not form or express any opinion on any subject connected with the trial until the case is fully and finally submitted to you at the time of jury deliberations.

With that, have a nice break. We'll see you back at 3:35.

(Jury exits the courtroom)

THE COURT: We're now outside the presence of the jury. So, counsel, here's what we're going to do. My team of course needs their afternoon break as well. We have a Court call that we were supposed to do yesterday. It needs to be done today. So that's at 3:15, so my team is going to take their afternoon break and then we're going to do that call.

You can come back if you want into the court -- we're going to have to ask you to leave, obviously, the court for right now. And your witness knows that he cannot talk to any of the jurors or in any way communicate with the jurors. I'm sure that's been advised.

So feel free to have a break. You can come back in -- the Court will be back open when we get onto the call, which will be probably about 3:15 to 3:18-ish, so if you want to come back in and if you want to look at the questions at that time and talk among yourselves, you can do so. We just need to make sure my team gets their break before that. Okay? So at that juncture the questions will be available around 3:15 to 3:18 for you to take a look at them. Okay?

MR. DOYLE: Perfect. Thank you.

THE COURT: Appreciate it. Thank you so much.

(Court recessed from 3:07 p.m. until 3:30 p.m.)

(Outside the presence of the jury)

THE COURT: Okay, on the record outside the presence of the jury in Case 739464.

Okay. So, counsel, as you saw we have jury questions, a variety of them from particular jurors, so we handed you so that you all could talk among yourselves. And so what I'm going to -- the Court had started to try and number these. So do the A's mean that you both agree to them?

MR. DOYLE: Yes.

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay. Because I had asked you to do yes and nos and you decided to do A's and D's, but okay.

MR. LEAVITT: Your Honor, we agreed to all of them, so.

THE COURT: Okay. I just -- I know, but when I asked you before the break to please put either yes or no and I see A's and D's, I have to now ask you what the translation means, okay, because yeses and nos are easy for me to know yes means yes and no means no. Okay, so does A mean you both agree to it?

MR. DOYLE: Yes, Your Honor.

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay. And what does D mean?

MR. DOYLE: Disagree.

THE COURT: So does that mean -- what does that -- It means plaintiff agrees to ask it and defense does not want it asked? Is that the response?

MR. DOYLE: Correct.

THE COURT: Okay.

MR. LEAVITT: Correct, Your Honor.

THE COURT: I don't know if D meant both you disagree, because remember, yes meant you both agreed, no meant you both said it should not be asked and you're supposed to put a question mark if one wanted it asked and the other

did not want it asked because there's three options. There's three options, there's not just two. So since I don't see --

MR. DOYLE: Plaintiff's counsel indicated they agreed to all of them --

THE COURT: Okay.

MR. DOYLE: -- so we labeled them accordingly.

THE COURT: Right. But since you didn't use what I asked, which is our standard way of doing it, which is why we make it clear, that's why I need to ask. Okay. So I really don't know why a simple thing like asking you all to use yes and nos, you can't just do yes, nos and question marks, but I guess you don't want to do anything I ask, so we'll now have to do it. Is there any reason you couldn't put yes, nos and question marks like the Court specifically asked you all to do?

MR. DOYLE: I didn't hear that, Your Honor. And counsel, when we were all sitting in the back --

THE COURT: Okay.

MR. DOYLE: -- nobody said anything about yes or no. So --

THE COURT: I said yes, nos and question marks.

MR. DOYLE: I'm happy to change it if you'd like.

THE COURT: It's fine. You already -- no, I'm not going to have the jury sit out there, okay. So it looks like there's two ones that defense -- that there are only two

questions that both parties state -- sorry, let me rephrase this. All questions can be asked other than two questions in which one party would like to be asked and the other party would not like it to be asked. Is that correct?

MR. DOYLE: Yes.

MR. LEAVITT: That's correct.

THE COURT: Is there any questions in which both parties do not want asked?

MR. DOYLE: No.

MR. LEAVITT: No, Your Honor.

THE COURT: Okay. So then I only need to address two questions. The two questions I need to address are: "Why do you disagree with Dr. Chaney's assessment on April 13, 2015 that Ms. Farris has diabetic neuropathy?" Okay. So I will ask -- since the person does not want that asked, I ask the person who doesn't want it asked on what basis would that not be a proper question? But I need the witness outside. Thank you so much. If you don't mind, and just not near our jury. You can appreciate why I need you outside because I need you obviously not to hear it. Unless you both stipulate that he can be in here?

MR. DOYLE: No.

THE COURT: Okay. I didn't think so since you haven't really stipulated to almost anything.

Okay. So, "Why do you disagree with Dr. Chaney's

assessment on April 13, 2015 that Ms. Farris has diabetic neuropathy?" So why would that be an improper question to come out through this witness?

MR. DOYLE: Because he offered those opinions on direct and cross-examination. Or, I'm sorry, on direct and redirect.

THE COURT: Okay. So the basis of your objection to that juror question being asked would be?

MR. DOYLE: Cumulative.

THE COURT: Cumulative. Okay. And your response, plaintiff's counsel?

MR. LEAVITT: Yes, Your Honor. The question is being asked because there is some confusion, and if it had been asked and answered, what's the harm in it one more time?

THE COURT: The Court's ruling is that that question can be asked for the following reason. A) This question was not asked in this format. Both plaintiff's counsel and defense counsel, while from a legal concept may have asked within this general area, phrased in their particular ways that they would phrase it from a plaintiff's standpoint and a defense standpoint, but realistically this juror question is asked in a direct manner and obviously there seems to be some question to get clarity.

Since the triers of fact are the jurors and the jurors have a lack of clarity to try and have an understanding

of why people agree or disagree and they have to determine and evaluate the various testimony, it would be proper to have that understanding, to have it in a clear, direct answer versus the presentation of questions in manners phrased by plaintiff's counsel and defense counsel. And so since there's not any legal basis, the basis was just cumulative, the Court would find it's appropriate to ask that question, so the Court is going to allow that question to be asked.

The other one -- wait. Is there -- is the one right underneath that an A or a D?

MR. DOYLE: May I approach?

THE COURT: Yeah, sure. I'm not sure if that's an A or a D because it's got a little leg on the left-hand side. Is that an A or a D?

MR. DOYLE: That's an A.

THE COURT: That's an A. So was that the only D? Oh, no, I'm sorry, there's two D's. Sorry. On the next page. Okay. The next page is -- there's two D's. Okay. And since I started to number these but then these are not numbered and I went to that one first, I'm reading the questions rather than necessarily the numeric aspect of it, okay?

MR. DOYLE: Yes.

THE COURT: So that you're clear on which ones I'm ruling on, okay? "How quickly can diabetic neuropathy take to get to her past July 2015 state if she never had sepsis,

minimum time" -- is the way I'm reading that. Is that the way that counsel read that?

MR. DOYLE: Yes.

THE COURT: Is that the way you read it, plaintiff?

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay. And like I said, I'm reading it as is. I'm not adding grammatic words to it. I'm reading it as is. And even though that had a question -- I should have said sepsis question mark and then minimum time, period, to be accurate. So let me reread that. "How quickly can diabetic neuropathy take to get to her" -- oh, sorry -- "to her" and then there's a little caret "past July 2015" and then there's another little caret, and it says "state if she never had sepsis" -- question mark, "min. time." Period. Okay. So min., presumably minimum time, right? Is that the way you're reading it? Okay.

So the basis of your objection, defense counsel?

MR. DOYLE: It's unintelligible.

THE COURT: Are you saying grammatically or something else?

MR. DOYLE: Grammatically as well as substantively. The question -- I don't know what the question is, the way it's phrased.

THE COURT: Okay. Counsel for plaintiff, your response? Whoever is taking this one.

MR. LEAVITT: Yes. I think to me the question is clear. It's asking about timing when -- because the defense is claiming that she's being -- she would have had neuropathy anyway and she would have had these symptoms anyway. How long would she have had them had she not had sepsis? I agree that it's -- grammatically it's poorly worded.

THE COURT: I will tell you, if we did it on grammar and spelling on juror questions, you wouldn't have a lot of juror questions asked. Because remember, people, when they're writing them down, they don't -- I mean, min. stay -- sorry, min. time, everyone knows that's minimum time. I mean, people don't when they're writing down a question oftentimes write all the words. I mean, she in fact put in the little carets in there and putting some extra words is more grammatically correct than a lot of the juror questions we get.

And I'll tell you, that's why the Court says it reads the questions as is, and you've all heard that in prior trials that I read it to the witness and then allow the witness to answer the question if he or she feels that they can answer the question as phrased. And then if they can't, then they say they don't understand or that question isn't something within my scope and allow the witness to answer it that way. If there's a legal basis to preclude the question or there is a motion in limine -- there's so many different reasons why I wouldn't ask a question, but usually grammar

and potential clarity aren't because -- well, of course very attorney is always completely artful in every question they always ask, right, and always --

MR. LEAVITT: Overall.

THE COURT: So that's not -- grammar, you know what I mean, is -- So the Court -- if those are the objections, the Court is going to allow that question and allow the witness to answer it if he feels that he can answer it as phrased. The Court is not going to add any additional words. I'm going to read it as is. The only thing I'm going to ask you all is if you want me to say min. time or minimum time.

MR. DOYLE: I think you need to read it as is.

THE COURT: Okay. Then one party has asked me, then I'll say min. time. That's what --

MR. LEAVITT: That's fine.

THE COURT: If the other side asked me, then I read it as is. Sometimes people ask me to put in if there's an abbreviation, okay, because sometimes people -- you know, if they do, that's fine. If they don't, then I'll read it exactly as is. It's really up to the parties' counsel. Okay. So I'm going to read it. Based on those objections, I don't see that -- it doesn't violate, it's not any of the legal aspects, so that would be appropriate to ask.

The last one, I see a D on the very next one, so the next one is, "Why do you rule out diabetic neuropathy as

a cause for her foot drop?" Question mark. Counsel for defense, that was a D. That was your --

MR. DOYLE: Now that I've heard it again, you can change it to an A.

THE COURT: Okay, so that's an A. Okay. So those were the only -- in light of your changing that last one, I'm seeing A's everywhere else. Does anyone want -- counsel, do you want to double check to make sure I addressed any objection?

MR. DOYLE: No, I think you've got them.

THE COURT: Okay. So in light of that, then the Court would ask each of those. Here's what the Court does with regards to those, is the Court would ask these questions. Now, normally we don't have this many in a row, but I still would -- the Court's general practice would be to ask each of these questions.

Marshal, we can start getting the jury in. Just peek your head in, if you don't mind. This is just my last little two seconder. I would ask these questions of the witness and then would say, since it's plaintiff's witness, that you can only ask a follow-up question, possibly, maybe, you know, to these specific questions. This is not topic areas, it's to these questions, going first to plaintiff and then to defense in one round.

Does that meet your needs or are you all requesting

something different? If you're requesting something different, I need to know.

MR. LEAVITT: No, Your Honor. On behalf of plaintiffs, one follow-up question is fine.

THE COURT: Wait, let me say that. It's not one follow-up. Let me be clear. I wasn't saying one follow-up. I'm saying -- what I would say is, okay, I ask these questions as is. After he would finish I would say, okay, so now that the question was asked, plaintiff's counsel, do you have any follow-up questions to these specific questions asked by this juror of this witness? You can either say yes or no. You would have an opportunity for any of these questions to ask a follow-up question. Usually it's a question or two, it's not a half hour of questions that -- I know no counsel has ever oopsed and forgot to ask a question and tries to put it in at the end of a juror question. I know no one would ever do that. But that's not the intent to go outside the scope of the juror questions. And when I say scope, here scope is different. Scope is not body parts. Scope is these questions rather than these body parts.

That's generally the practice unless the parties both stipulate and agree to something different. Does that meet your needs or do you wish something different?

MR. LEAVITT: That meets plaintiff's needs.

THE COURT: Okay. Defense counsel, does that meet

your needs or do you wish something different?

MR. DOYLE: Meets our needs.

THE COURT: Okay. I was just saying, if you want something different you've got to let me know. Okay. In light of the fact that meets both parties' needs, we're ready for the jury to come back in. Thank you so much. Sorry, wait a quick second.

MR. LEAVITT: The witness.

THE COURT: Do you want the witness back on the stand first? Feel free to get him if you'd like. Give us just one second. We just need to get him back on the stand. Thank you so much. Thank you so much, marshal, do appreciate it.

THE MARSHAL: All rise for the jury.

(Inside the presence of the jury)

THE COURT: Appreciate it. Thank you so much.

Okay. So welcome back, ladies and gentlemen. Okay, so let me walk through, consistent with -- I mentioned, remember, with the introductory remarks --

(The marshal hands the Court another juror question)

THE COURT: Okay. Well, before I'm about to say what I'm about to say, I'm going to ask counsel, since we've got another one, I'm going to ask you if you don't mind approaching, please.

(Bench conference held; not transcribed)

THE COURT: Thank you so much.

Okay. So, ladies and gentlemen of the jury, as I mentioned during kind of the introductory remarks, I'm just going to go through this again, what we do -- questions, I mentioned some can get asked and some don't get asked. I read the question exactly as it's written to the witness, give the witness an opportunity to answer the question, okay. We do these one by one. And then at the end of the juror questions, since this is the plaintiff's witness, the plaintiff called this witness, the plaintiff first would have an opportunity to ask follow-up questions to these questions that are asked, not go back to everything else, but just to these questions. And then defense counsel has an opportunity to ask follow-up questions to these questions, okay. So with that in mind, we'll start.

Okay. "The difference between" -- and apologies in advance if I mispronounce something, okay. "The difference between diabetic neuropathy and CIP-caused neuropathy?"

THE WITNESS: Diabetic neuropathy is a slow onset, gradual process which is caused -- which occurs in people with diabetes. It's controversial whether it occurs in prediabetics. It primarily affects the large nerve fibers and usually has a mixed-type picture, and it usually presents with burning, lancinating pains, numbness, tingling, particularly worse at night, abnormal neurologic exam and

abnormal neurophysiologic studies.

CIP does not occur in people walking around and is not -- occurs in people with or without diabetes. When somebody gets sepsis with prolonged immobility, they get the spectrum from critical illness polyneuropathy to critical illness myopathy. There is no demyelinating element to CIP, so when you look at it what you see is small size responses, but the velocities and the latency, which is the time it takes from stimulating until the response reaches the recording electrode are relatively normal, whereas in a diabetic neuropathy it would tend to have prolonged latencies and much more reduced velocities.

The clinical picture is also vastly different. People walk around with diabetic neuropathy even if their amplitudes are really, really bad, like 60 to 200 microvolts. People with CIP are generally not walking around. They cannot walk. They're immobilized. And if you get them up and going, within the first year you can see improvement. Beyond that, whatever -- after one year whatever you have, that's pretty much what you're going to have for the rest of your life.

THE COURT: Okay. The next one. "How to tell between the two causes of neuropathy?"

THE WITNESS: Well, as I said, the clinical picture is completely different. People with diabetic neuropathy are basically walking around. They're in pain, they may have some

weakness, but generally they're not immobile and unable to walk. Somebody with CIP, they're basically pretty much bed-bound. When you see them initially, they may be completely paralyzed. You may not see any movement in their legs. And it's usually more in the legs than the arms. And then they may make gradual improvement or they may have some strength but they're weak, but these people are generally not mobile.

THE COURT: Okay. Next. "Is bilateral foot drop more common in CIP or diabetic neuropathy?"

THE WITNESS: I can't really answer that without looking up the statistics, but my inclination it would be probably CIP. But I don't know an exact answer because I'd have to research that.

THE COURT: Okay. Next. "What is, quote, 'a reasonable degree of" dot, dot, dot, end quote, question mark. And this is a two-parter. "How much can you give a minimum" -- and there's a percentage sign.

THE WITNESS: Of what?

THE COURT: Counsel, do you both wish to approach real quickly, if you don't mind? I want to turn on some white noise.

(Bench conference held; not transcribed)

THE COURT: As to the agreement of counsel, I read it as is and if you can't, that's fine, answer the question.

THE WITNESS: I can't answer. I'm not sure what

they're -- they're asking a percentage of what?

THE COURT: Okay. No worries. Then we'll move on. Next. Okay. "Can only a neurologist give neurological exams?"

THE WITNESS: No. Anybody can do a neurologic exam. It's just a matter of accuracy. In other words, like if you had a great neurologist like Lewis P. Rowland, he was accurate almost 100 percent of the time. I'm not in that category. If you have an intern who's doing it, it's more like in the zero to five percent chance of being right. Why? Because they don't do neurologic exams during their training and it's all about repetitions.

Medicine is not about brilliance. It's what we call a heuristic paradigm, which means it's all about experience, how many cases you see, how many exams you do. You need to do a certain number of normal exams to know this is not normal, and if you don't do that your exam is not going to be reliable. It's the same with a history. If you don't see enough cases of diabetic neuropathy in your training, if you don't see enough cases of CIP, then you don't know anything about it. And, you know, you can give any opinion you want, but the probability of that opinion being correct is pretty low.

THE COURT: Okay. Next. "How does steroids cause CIP"? Question mark. And I'm going to -- this is a multi-pronger. "How much, how long" Question mark. "How long does

it take to cause CIP?" Question mark.

THE WITNESS: Intra -- high dose intravenous. It's not just any old steroids because there are different ways to give steroids. There's oral inhalers like in asthmatics. There's oral Prednisone. There's localized injections. Those have nothing to do with CIP or CIM. It's high dose intravenous steroids. And it's not really CIP, it's really CIM, critical illness myopathy. Critical illness polyneuropathy is usually just people with sepsis. Why? Nobody knows.

Could you repeat the second part of the question?

THE COURT: Sure. I'll repeat the whole thing. "How does steroids cause CIP?" -- is the first part. Question mark. "How much, how long?" Question mark. And then, "How long does it take to cause CIP?" Question mark.

THE WITNESS: You can't answer the how long because you have to remember most of these patients are with life-threatening illnesses and the surgeons and critical care teams taking care of these patients are trying to preserve life and limb. So nobody is really paying attention as to whether they're moving their legs or not, and generally nobody realizes something wrong until they wake up and they're not moving. So you can't really answer it because you don't have anybody following along and, you know, basically CIP is not their primary concern. So, you know, if they had a neurologist

following along, you might be able to answer that question, but not really, not today.

THE COURT: Okay, moving on. "How quickly can diabetic neuropathy take to get to her past July 2015 state if she never had sepsis?" -- question mark -- "Min. time."

THE WITNESS: Well, basically diabetic neuropathy would never present like this. If you had a diabetic presenting like this, you'd start thinking of completely other illnesses like Chronic Inflammatory Demyelinating Polyradiculoneuropathy because this is not the natural -- [indiscernible] -- of diabetic neuropathy. They have pain, they can't sleep at night. They may have pain, you know, it hurts for them to walk. They may or may not get a foot drop, depending how bad it is. They generally have weakness of the toes which doesn't really affect their movement that much, but they're not like falling all over the place and they're not, you know, paraparetic to the point where they can't walk at any point. So you really never could get a picture like this from diabetic neuropathy.

THE COURT: Okay. "Why do you rule out diabetic neuropathy as a cause for her foot drop?"

THE WITNESS: Because there was no evidence of it before she was admitted. And basically somebody presenting with sepsis and then develops a foot drop, you don't think diabetic neuropathy, you think critical illness polyneuropathy

or critical illness myopathy because the foot drop from diabetes is a chronic process, it doesn't develop just like that. And if it was from the diabetes, it would have had to have been there before she was admitted and it wasn't. And, you know, there's an old medical principle, when you hear hoof beats, think horses, not zebras.

THE COURT: Okay, next. Okay. "How quickly can diabetic neuropathy occur if diabetes (Type 2) is untreated?"

THE WITNESS: Well, this is a difficult question to answer because control of blood sugar affects how bad the neuropathy is, but it doesn't necessarily affect the incidence of neuropathy. Diabetic neuropathy just isn't that common. I may see one or two cases a year. Other causes of numbness in diabetics I see one or two cases a week. So it just doesn't happen that often. So it's really kind of hard to say because you have patients who have very well-controlled sugars and they get severe neuropathy and nobody really knows why. I don't know why, either. My inclination is that there's obviously something else insulin does that we're not measuring and when that's out of whack that you get neuropathy, and it sometimes correlates with the blood sugar but very often not.

THE COURT: Okay. Next. "Based on Mrs. Farris' diabetes, how quickly can she get foot drop if she did not have sepsis?"

THE WITNESS: It would have taken a fairly long

time, on the order of years. I couldn't give you an exact number of years, but you're talking about a very long time.

THE COURT: Okay. Next. "Why do you disagree with Dr. Chaney's assessment on April 13, 2015 that Mrs. Farris has diabetic neuropathy?"

THE WITNESS: Well, the proper way to make a diagnosis is to take a full history. Like a headache, where do you get the headache, what kind of pain is it, does it get better when you move around? Same thing for numbness. You then do an exam and then based on the exam you order appropriate tests to either increase or decrease the probability that you're right.

Internists don't work that way. They have very little experience with most chronic illnesses because their training is almost exclusively hospital-based. We haven't admitted people for neck or back pain to the hospital in almost thirty years, so they have almost zero experience with it. So when they hear numbness, they say neuropathy. They don't go through this process because they don't even know what questions to ask. So when they're right about things, it's like the same way a broken clock is right twice a day. If you call everybody with diabetes with numbness, some of them will have diabetic neuropathy, but your percentage of being right is probably in single digits.

THE COURT: Okay. "Can you elaborate the likelihood

someone with Type 2 Diabetes getting neuropathy between treated versus untreated?"

THE WITNESS: I can't really tell you because at least in my experience treating lots of diabetics the degree of blood sugar control doesn't really affect how often they get neuropathy, it just kind of affects the severity. So if you have someone who's got like a hemoglobin A1C of ten percent and you bring it down to six and a half, you can see when you do nerve conduction the amplitudes go from like 60 or 200 microvolts up to like 1,500 or 2,100, which is still not normal but is a lot better than 60 or 200. So I don't really see, at least not in my experience, that the sugar control really affects whether they get the neuropathy or not. To me, mainly what I see is that it affects the severity.

THE COURT: Okay. Next. "If Mrs. Farris was not experiencing neuropathy before her July 2015 surgery, based on her condition" -- and I have a W slash, okay -- "with sepsis, can she get CIP"? Question mark.

THE WITNESS: Well, CIP only generally occurs in hospitalized patients with sepsis, people who have received high dose intravenous steroids, neuromuscular blocking agents and have been basically not moving. So generally if you weren't in the hospital with sepsis, you don't really see this.

THE COURT: Okay. So the questions were answered

satisfactorily as the jury asked them. Okay. One more. "Will the witness receive any additional payment if the verdict is in favor of the plaintiff?"

THE WITNESS: No, I do not.

THE COURT: Okay. Answered satisfactorily to the asked question.

Okay. So now at this juncture, as I stated, once the questions have been asked plaintiff first has an opportunity. If you have any follow-up questions to those specific juror questions, you may do so.

FOLLOW-UP EXAMINATION

BY MR. LEAVITT:

Q Just one follow-up, Doctor. When you were saying severity -- when the glucose levels are up, when you say severity, what do you mean by severity?

A Well, severity means the amount of nerve damage on a neurophysiologic study would be worse. So the size of the motor sensory responses would be smaller when the sugar is very elevated, and if you improve the blood sugar control the sizes can improve and come closer to normal, but in my experience usually don't become normal.

MR. LEAVITT: Okay. That's it, Your Honor.

THE COURT: Defense counsel, same, if you have -- Go ahead if you have follow-up questions. Go ahead.

MR. DOYLE: I don't have any questions.

THE COURT: Okay. Well, then at this juncture then is this witness excused for all purposes for the entire case, or is he subject to recall in some form in the case?

MR. LEAVITT: No, Your Honor, he's excused for all purposes.

MR. DOYLE: That's fine.

THE COURT: Okay. This witness is excused for all purposes. Thank you so very much for your time. Just watch your step on the way down. Feel free to leave the notebook on this. Okay, appreciate it. Thank you so much.

THE WITNESS: Thank you, Your Honor.

THE COURT: Appreciate it.

(Portion of proceedings concluded at 4:01:10 p.m.)

* * * * *

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

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS

Plaintiffs,

vs.

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

Defendants.

CASE NO. A-16-739464-C
DEPT. NO. 31

JURY INSTRUCTIONS

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

NOV 0 1 2019

BY, Denise Husted
DENISE HUSTED, DEPUTY

A-16-739464-C
JI
Jury Instructions
4873823

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

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

INSTRUCTION NO. 2

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

INSTRUCTION NO. 3

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

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

INSTRUCTION NO. 4

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

INSTRUCTION NO. 5

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

INSTRUCTION NO. 6

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

During the course of this trial, the attorneys for both sides and court personnel, other than the bailiff/marshal, are not permitted to converse with members of the jury. These individuals are not being anti-social; they are bound by ethics and the law not to talk to you. To do so might contaminate your verdict. You are admonished, additionally, that you are not to visit the scene of any of the acts or occurrences made mention of during this trial, unless specifically directed to do so by the court. Do not undertake any investigation of the case on your own, or endeavor to research legal or factual issues on your own.

INSTRUCTION NO. 7

Again, let me remind you that until this case is submitted to you:

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

2. "Anyone else" includes members of your family and your friends. You may tell them that you are a juror in a civil case, but don't tell them anything else about it until after you have been discharged as jurors by me.

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

4. Do not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with it. This includes anything about the case posted on the internet in any form.

5. Do not read or post anything about this case on social media.

INSTRUCTION NO. 8

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

INSTRUCTION NO. 9

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

There are two types of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is the proof of one or more facts from which you could find another fact. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

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

Questions are not evidence. Only the answer is evidence. You should consider a question only if it helps you understand the witness's answer. Do not assume that something is true just because a question suggests that it is.

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

If the court has instructed you that you must accept a fact as proven or draw a particular inference, you must do so.

If the court has instructed you regarding a Presumption regarding evidence, then you must consider that presumption as well.

INSTRUCTION NO. 10

Certain evidence was admitted for a limited purpose. At the time this evidence was admitted it was explained to you that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. You may only consider that evidence for the limited purpose that I described and not for any other purpose.

INSTRUCTION NO. 11

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

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 12

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

INSTRUCTION NO. 13

The credibility or believability of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

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

INSTRUCTION NO. 14

During the trial, you received deposition testimony that was read from the deposition transcript. A deposition is the testimony of a person taken before trial. At a deposition, the person took the same oath to tell the truth that would be taken in court and is questioned by the attorneys. You must consider the deposition testimony that was presented to you in the same way as you consider testimony given in court.

INSTRUCTION NO. 15

The lawyers and/or witnesses have shown you charts and summaries to help explain the facts. The charts or summaries themselves, however, are not evidence or proof of any facts. Charts and summaries are only as good as the underlying evidence that supports them. You should therefore give them only such weight as you think the underlying evidence deserves.

INSTRUCTION NO. 16

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

INSTRUCTION NO. 17

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

INSTRUCTION NO. 18

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

INSTRUCTION NO. 19

Witnesses who have special knowledge, skill, experience, training, or education in a particular subject have testified to certain opinions. This type of witness is referred to as an expert witness. In determining what weight to give any opinions expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reason for each opinion.

An opinion is only as good as the facts and reasons on which it is based. If you find that any such fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reason on which it is based.

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

INSTRUCTION NO. 20

A hypothetical question has been asked of an expert witness. In a hypothetical question, the expert witness is told to assume the truth of certain facts, and the expert witness is asked to give an opinion based upon those assumed facts. You must decide if all of the facts assumed in the hypothetical question have been established by the evidence. You can determine the effect of that assumption upon the value of the opinion.

INSTRUCTION NO. 21

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

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

INSTRUCTION NO. 22

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his testimony.

INSTRUCTION NO. 23

Plaintiffs are seeking damages based upon a claim of medical malpractice. Plaintiffs have the burden of proving by a preponderance of the evidence all of the facts necessary to establish:

INSTRUCTION NO. 24

1. The accepted standard of medical care;
2. That defendant Dr. Barry Rives' care departed from the standard;
3. That defendant Dr. Barry Rives' care was the proximate cause of injury;
4. That plaintiff sustained injury as a result of Dr. Barry Rives' care.

INSTRUCTION NO. 25

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

INSTRUCTION NO. 26

"Medical malpractice" means the failure of a physician, in rendering services, to use the care, skill or knowledge ordinarily used under similar circumstances.

It is the duty of a physician who holds himself out as a specialist in a particular field of medical, surgical, or other healing science to have the knowledge and skill ordinarily possessed, and to use the care and skill ordinarily used by reasonably competent specialists practicing in the same field.

A failure to perform such duty is negligence.

INSTRUCTION NO. 27

You must determine the standard of professional learning, skill and care required of the defendant Dr. Barry Rives only from the opinions of the doctors who have testified as expert witnesses as to such standard.

You should consider each such opinion and should weigh the qualifications of the witness and the reasons given for his opinion. Give each such opinion the weight to which you deem it entitled.

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

INSTRUCTION NO. 28

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

INSTRUCTION NO. 29

In this case you have heard medical experts express opinions as to the standard of professional learning, skill and care required of the Defendant.

To evaluate each such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion. Give each opinion the weight to which you deem it entitled.

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

INSTRUCTION NO. 30

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

INSTRUCTION NO. 31

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

INSTRUCTION NO. 32

Members of the jury, Dr. Barry Rives was sued for medical malpractice in case, Vickie Center v. Barry James Rives, M.D., et al. Dr. Barry Rives was asked about the Vickie Center case, under oath, and he did not disclose the case in his Interrogatories or his Deposition.

You may infer that the failure to timely disclose evidence of a prior medical malpractice lawsuit against Dr. Barry Rives is unfavorable to him. You may infer that the evidence of the other medical malpractice lawsuit would be adverse to him in this lawsuit had he disclosed it.

This instruction is given pursuant to a prior court ruling.

INSTRUCTION NO. 33

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

INSTRUCTION NO. 34

In determining the amount of losses, if any, suffered by the plaintiff TITINA FARRIS as a proximate result of the incident in question, you will take into consideration the nature, extent and duration of the damage you believe from the evidence plaintiff TITINA FARRIS have sustained, and you will decide upon a sum of money sufficient to reasonably and fairly compensate plaintiff TITINA FARRIS for the following items:

1. The reasonable medical expenses plaintiff TITINA FARRIS has necessarily incurred as a result of the incident and the medical expenses which you believe plaintiff TITINA FARRIS will be reasonably certain to incur in the future as a result of the incident;

2. The physical and mental pain, suffering, anguish, disability, and loss of enjoyment of life endured by plaintiff TITINA FARRIS from the date of the incident to the present; and

3. The physical and mental pain, suffering, anguish, disability, and loss of enjoyment of life which you believe plaintiff TITINA FARRIS will be reasonably certain to experience in the future as a result of the incident.

INSTRUCTION NO.: 35

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

1. The loss of companionship, society, comfort and consortium endured by Plaintiff PATRICK FARRIS from the date of the incident to the present; and
2. The loss of companionship, society, comfort and consortium you believe the Plaintiff PATRICK FARRIS is reasonably certain to experience in the future as a result of the incident.

INSTRUCTION NO. 36

You are not to discuss or even consider whether or not the Plaintiff was carrying insurance to cover medical bills, or any other damages she claims to have sustained.

You are not to discuss or even consider whether or not the Defendant was carrying insurance that would reimburse him for whatever sum of money he may be called upon to pay to the Plaintiff.

Whether or not either party was insured is immaterial, and should make no difference in any verdict you may render in this case.

INSTRUCTION NO. 37

A person who has a condition or disability at the time of an injury is not entitled to recover damages therefor. However, she is entitled to recover damages for any aggravation of such preexisting condition or disability proximately resulting from the injury.

This is true even if the person's condition or disability made her more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.

Where a preexisting condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation.

INSTRUCTION NO. 38

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

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

This fact should be considered by you in arriving at the amount of damages if you find that the plaintiff is entitled to a verdict. This is the average life expectancy. Some people live longer and others die sooner. This published information is evidence of how long a person is likely to live but is not conclusive. In deciding a person's life expectancy, you should also consider evidence in this case related to that person's health, habits, activities and lifestyle.

INSTRUCTION NO. 39

Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy nor speculation is a proper basis for determining damages. However, absolute certainty as to the damages is not required. It is only required that plaintiff prove each item of damage by a preponderance of the evidence.

INSTRUCTION NO. 40

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

INSTRUCTION NO. 41

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the Court.

INSTRUCTION NO. 42

When you retire to consider your verdict you must select one of your number to act as foreperson, who will preside over your deliberations and who will be your spokesman here in court.

During your deliberations, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict, which have been prepared for your convenience.

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

INSTRUCTION NO. 43

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

Playbacks of testimony are time consuming and are no encouraged unless you deem it a necessity. Should you require a playback, you must carefully describe the testimony to be played back so that the court recorder can arrange their notes. Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. 44

We also permit jurors to ask questions of witnesses. However, asking questions is the primary responsibility of the attorneys, not the jurors. The procedure for a juror to ask a question is somewhat complicated and has a tendency to prolong the trial. Any question that a juror asks must be factual in nature and designed to clarify information already presented. You will not be permitted to become "the third attorney" or advocate a position and I have discretion to preclude you from asking excessive numbers of questions. If you feel that you must ask a question of a witness, you must write out the question on a piece of paper and do so while the witness is still present. Raise your hand before that witness leaves the courtroom and give the question to the marshal/bailiff. I will then halt the trial, review the question with the attorneys and, if the question is appropriate, ask the question on your behalf. The attorneys will then be permitted to ask follow up questions on that subject.

Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.

I caution you not to place undue weight on the responses to your questions as opposed to other evidence in the case.

INSTRUCTION NO. 45

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as your understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

It is so given this 1st day of ~~October,~~ November, 2019.

DISTRICT COURT JUDGE

Electronically Filed
12/18/2019 11:29 AM
Steven D. Grierson
CLERK OF THE COURT

[NOAS]
THOMAS J. DOYLE
Nevada Bar No. 1120
AIMEE CLARK NEWBERRY
Nevada Bar No. 11084
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400 University Avenue
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2012 Hamilton Lane
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(702) 367-1234
Email: filing@memlaw.net

Attorneys for Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA, LLC, et al., Defendants.	CASE NO. A-16-739464-C DEPT. NO. 31 NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendants Barry J. Rives, M.D. and Laparoscopic Surgery of Nevada, LLC appeal to the Nevada Supreme Court from the Judgment on

///

Case Number: A-16-739464-C

Verdict entered on November 14, 2019 (Exhibit 1) and from all other orders made final and appealable by the foregoing.

Dated: December 17, 2019

SCHUERING ZIMMERMAN & DOYLE, LLP

By */s/ Thomas J. Doyle*
THOMAS J. DOYLE
Nevada Bar No. 1120
400 University Avenue
Sacramento, CA 95825-6502
(916) 567-0400
Attorneys for Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC

EXHIBIT 1

Electronically Filed
11/14/2019 6:17 PM
Steven D. Grierson
CLERK OF THE COURT

JGJV
KIMBALL JONES, ESQ.
Nevada Bar No.: 12982
JACOB G. LEAVITT, ESQ.
Nevada Bar No. 12608
BIGHORN LAW
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ghand@handsullivan.com

Attorneys for Plaintiffs
TITINA FARRIS and PATRICK FARRIS

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D., LAPAROSCOPIC SURGERY OF NEVADA LLC; DOES I-V, inclusive; and ROE CORPORATIONS I-V, inclusive, Defendants.	Case No.: A-16-739464-C Dept. No.: 31 **JUDGMENT ON VERDICT**

The above–entitled matter having come on for trial by jury on October 14, 2019, before the Honorable Joanna S. Kishner, District Court Judge, presiding. Plaintiffs TITINA FARRIS and PATRICK FARRIS ("Plaintiffs"), appeared in person with their counsel of record, KIMBALL JONES, ESQ. and JACOB LEAVITT, ESQ., of the law firm of Bighorn Law, and GEORGE HAND, ESQ., of the law firm of Hand & Sullivan, LLC. Defendants BARRY J. RIVES, M.D. and LAPARASCOPIC SURGERY OF NEVADA, LLC ("Defendants") appeared by and through their counsel of record, THOMAS DOYLE, ESQ., of the law firm of Schuering, Zimmerman & Doyle,

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Case Number: A-16-739464-C

LLP.

Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the merits of their cases. The jury rendered a verdict in favor of Plaintiffs and against the Defendants as to claims concerning medical malpractice in the following amounts:

1. $1,063,006.94 for TITINA FARRIS' past medical and related expenses;
2. $4,663,473.00 for TITINA FARRIS' future medical and related expenses;
3. $1,571,000.00 for TITINA FARRIS' past physical and mental pain, suffering, anguish, disability and loss of enjoyment of life;
4. $4,786,000.00 for TITINA FARRIS' future physical and mental pain, suffering, anguish, disability and loss of enjoyment of life;
5. $821,000.00 for PATRICK' past loss of companionship, society, comfort and consortium; and
6. $736,000.00 for PATRICK' future loss of companionship, society, comfort and consortium.

The Defendants requested that the jury be polled, and the Court found that seven (7) out of the eight (8) jurors were in agreement with the verdict.

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiffs and against the Defendants as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs shall have and recover against Defendants non-economic damages of $350,000.00 pursuant to NRS 41A.035, economic damages of $5,726,479.94, and the pre-judgment interest of $291,325.58, calculated as follows:

1. $1,063,006.94 for TITINA FARRIS' past medical and related expenses, plus prejudgment interest in the amount of $258,402.69 (interest calculated at 5.50% prime plus 2% for a total of 7.50% from date of service August 16, 2016 to November 12, 2019, for a total of 1,183 days = $218.43 per day) pursuant to NRS 17.130 for a total judgment of $1,321,409.63; with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

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2. $4,663,473.00 for TITINA FARRIS' future medical and related expenses, plus post-judgment interest accruing at $958.25 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%) pursuant to NRS 17.130 from the time of entry of the judgment with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

3. $43,225.00 for TITINA FARRIS' past physical and mental pain, suffering, anguish, disability and loss of enjoyment of life, plus prejudgment interest in the amount of $10,505.04 (interest calculated at 5.50% prime plus 2% for a total of 7.50% from date of service August 16, 2016 to November 12, 2019, for a total of 1,183 days = $8.88 per day) pursuant to NRS 17.130 for a total judgment of $53,730.04; with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

4. $131,775.00 for TITINA FARRIS' future physical and mental pain, suffering, anguish, disability and loss of enjoyment of life, plus post-judgment interest accruing at $27.07 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%) pursuant to NRS 17.130 from the time of entry of the judgment with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

5. $92,225.00 for PATRICK FARRIS' past loss of companionship, society, comfort and consortium, plus prejudgment interest in the amount of $22,417.85 (interest calculated at 5.50% prime plus 2% for a total of 7.50% from date of service August 16, 2016 to November 12, 2019, for a total of 1,183 days = $18.95 per day) pursuant to NRS 17.130 for a total judgment of $114,642.85; with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied; and

6. $82,775.00 for PATRICK FARRIS' future loss of companionship, society, comfort and consortium, plus post-judgment interest accruing at $17.00 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%) pursuant to NRS 17.130 from the time of entry of the judgment with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

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IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs TITINA FARRIS and PATRICK FARRIS has judgment against Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA LLC as follows:

Principal	$	6,076,479.94
Pre-Judgment Interest	$	291,325.58 (1,183 days @ 7.50%)
TOTAL JUDGMENT of:	$	**6,367,805.52**

Pursuant to NRS 17.130, the judgment shall continue to accrue daily post-judgment interest at $1,248.58 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%); daily post-judgment interest shall accrue at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

SO ORDERED this 12 day of November, 2019.

JOANNA S. KISHNER

HONORABLE JOANNA S. KISHNER
District Court Judge

Respectfully Submitted by:

Dated this 11th day of November, 2019.

BIGHORN LAW

By: George F. Hand (8483)
Kimball Jones, Esq.
Nevada Bar No. 12982
716 S. Jones Blvd
Las Vegas, NV 89107

George F. Hand, Esq.
Nevada Bar No. 8483
3442 N. Buffalo Drive
Las Vegas, NV 89129
Attorneys for Plaintiffs

Approved as to form and content:

Dated this 11th day of November, 2019.

SCHUERING ZIMMERMAN & DOYLE, LLP

By: */s/ Thomas J. Doyle, Esq.*
Thomas J. Doyle, Esq.
Nevada Bar No. 1120
Aimee Clark Newberry, Esq.
Nevada Bar No. 11084
400 University Avenue
Sacramento, CA 95825
Attorneys for Defendants
Barry J. Rives, M.D.;
Laparoscopic Surgery of Nevada, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on the 18th day of December , 2019, service of a true and correct copy of the foregoing:

NOTICE OF APPEAL

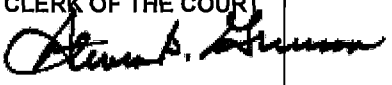
was served as indicated below:

☒ served on all parties electronically pursuant to mandatory NEFCR 4(b);

☐ served on all parties electronically pursuant to mandatory NEFCR 4(b) , exhibits to follow by U.S. Mail;

Attorney	Representing	Phone/Fax/E-Mail
George F. Hand, Esq. HAND & SULLIVAN, LLC 3442 North Buffalo Drive Las Vegas, NV 89129	Plaintiffs	702/656-5814 Fax: 702/656-9820 hsadmin@handsullivan.com
Kimball Jones, Esq. Jacob G. Leavitt, Esq. BIGHORN LAW 716 S. Jones Boulevard Las Vegas, NV 89107	Plaintiffs	702/333-1111 Kimball@BighornLaw.com Jacob@BighornLaw.com

An employee of Schuering Zimmerman & Doyle
1737-10881



NOAS
KIMBALL JONES, ESQ.
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JACOB G. LEAVITT, ESQ.
Nevada Bar No.: 12608
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Phone: (702) 656-5814
Email: GHand@HandSullivan.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA, LLC et al., Defendants.	CASE NO.: A-16-739464-C DEPT. NO.: XXXI

NOTICE OF CROSS-APPEAL

Notice is hereby given that Titina Farris and Patrick Farris, Plaintiffs above named, hereby appeal to the Supreme Court of Nevada from the Entry of Judgement filed on November 19, 2019. A copy of the Notice of Entry of Judgment and the Judgment on Verdict is attached hereto as **Exhibit "1."** Although Plaintiffs are the Prevailing Party in this matter, Plaintiffs are contesting the reduction

of the jury award. See *Ford v. Showboat Operating Co.*, 110 Nev. 752, 756, 877 P.2d 546, 548-49 (1994).

DATED this 30th day December, 2019.

BIGHORN LAW

By: */s/ Kimball Jones*

KIMBALL JONES, ESQ.
Nevada Bar No.: 12982
JACOB G. LEAVITT, ESQ.
Nevada Bar No.: 12608
716 S. Jones Blvd.
Las Vegas, Nevada 89107

GEORGE F. HAND, ESQ.
Nevada Bar No.: 8483
HAND & SULLIVAN, LLC
3442 N. Buffalo Drive
Las Vegas, Nevada 89129

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that on this 30th day of December, 2019, I served a copy of the foregoing ***NOTICE OF CROSS-APPEAL*** by serving a true copy thereof via the Court's Electronic System, and/or U.S. Mail, to the following:

Kim Mandelbaum, Esq.
MANDELBAUM ELLERTON & ASSOCIATES
2012 Hamilton Lane
Las Vegas, Nevada 89106
&
Thomas J. Doyle, Esq.
Chad C. Couchot, Esq.
SCHUERING ZIMMERMAN & DOYLE, LLP
400 University Avenue
Sacramento, California 95825
Attorneys for Defendants

Office of the Attorney General
Grant Sawyer Bldg.
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101

/s/ Erickson Finch
An employee/agent of **BIGHORN LAW**

EXHIBIT "1"

Electronically Filed
11/19/2019 3:54 PM
Steven D. Grierson
CLERK OF THE COURT

NEOJ
KIMBALL JONES, ESQ.
Nevada Bar No.: 12982
JACOB G. LEAVITT, ESQ.
Nevada Bar No.: 12608
BIGHORN LAW
716 S. Jones Blvd.
Las Vegas, Nevada 89107
Phone: (702) 333-1111
Email: Kimball@BighornLaw.com
Jacob@BighornLaw.com

GEORGE F. HAND, ESQ.
Nevada Bar No.: 8483
HAND & SULLIVAN, LLC
3442 N. Buffalo Drive
Las Vegas, Nevada 89129
Phone: (702) 656-5814
Email: GHand@HandSullivan.com

Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D.; LAPAROSCOPIC SURGERY OF NEVADA, LLC et al., Defendants.	CASE NO.: A-16-739464-C DEPT. NO.: XXXI **NOTICE OF ENTRY OF JUDGMENT**

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that a Judgment on Verdict was entered, in the above-entitled matter, on November 14, 2019, a copy of which is attached hereto.

DATED this 19th day of November, 2019.

BIGHORN LAW
By: */s/ Kimball Jones*
KIMBALL JONES, ESQ.
Nevada Bar.: 12982
JACOB G. LEAVITT, ESQ.
Nevada Bar No.: 12608
716 S. Jones Blvd.
Las Vegas, Nevada 89107

Case Number: A-16-739464-C

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of **BIGHORN LAW**, and on the 19th day of November, 2019, I served the foregoing ***NOTICE OF ENTRY OF JUDGMENT*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system; and/or

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below:

Kim Mandelbaum, Esq.
MANDELBAUM ELLERTON & ASSOCIATES
2012 Hamilton Lane
Las Vegas, Nevada 89106
&
Thomas J. Doyle, Esq.
Chad C. Couchot, Esq.
SCHUERING ZIMMERMAN & DOYLE, LLP
400 University Avenue
Sacramento, California 95825
Attorneys for Defendants

/s/ Erickson Finch
An employee of **BIGHORN LAW**

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11/14/2019 6:17 PM
Steven D. Grierson
CLERK OF THE COURT

JGJV
KIMBALL JONES, ESQ.
Nevada Bar No.: 12982
JACOB G. LEAVITT, ESQ.
Nevada Bar No. 12608
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716 S. Jones Blvd.
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Las Vegas, Nevada 89129
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ghand@handsullivan.com

Attorneys for Plaintiffs
TITINA FARRIS and PATRICK FARRIS

DISTRICT COURT

CLARK COUNTY, NEVADA

TITINA FARRIS and PATRICK FARRIS, Plaintiffs, vs. BARRY RIVES, M.D., LAPAROSCOPIC SURGERY OF NEVADA LLC; DOES I-V, inclusive; and ROE CORPORATIONS I-V, inclusive, Defendants.	Case No.: A-16-739464-C Dept. No.: 31 **JUDGMENT ON VERDICT**

The above–entitled matter having come on for trial by jury on October 14, 2019, before the Honorable Joanna S. Kishner, District Court Judge, presiding. Plaintiffs TITINA FARRIS and PATRICK FARRIS ("Plaintiffs"), appeared in person with their counsel of record, KIMBALL JONES, ESQ. and JACOB LEAVITT, ESQ., of the law firm of Bighorn Law, and GEORGE HAND, ESQ., of the law firm of Hand & Sullivan, LLC. Defendants BARRY J. RIVES, M.D. and LAPARASCOPIC SURGERY OF NEVADA, LLC ("Defendants") appeared by and through their counsel of record, THOMAS DOYLE, ESQ., of the law firm of Schuering, Zimmerman & Doyle,

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Case Number: A-16-739464-C

LLP.

Testimony was taken, evidence was offered, introduced and admitted. Counsel argued the merits of their cases. The jury rendered a verdict in favor of Plaintiffs and against the Defendants as to claims concerning medical malpractice in the following amounts:

1. $1,063,006.94 for TITINA FARRIS' past medical and related expenses;
2. $4,663,473.00 for TITINA FARRIS' future medical and related expenses;
3. $1,571,000.00 for TITINA FARRIS' past physical and mental pain, suffering, anguish, disability and loss of enjoyment of life;
4. $4,786,000.00 for TITINA FARRIS' future physical and mental pain, suffering, anguish, disability and loss of enjoyment of life;
5. $821,000.00 for PATRICK' past loss of companionship, society, comfort and consortium; and
6. $736,000.00 for PATRICK' future loss of companionship, society, comfort and consortium.

The Defendants requested that the jury be polled, and the Court found that seven (7) out of the eight (8) jurors were in agreement with the verdict.

NOW, THEREFORE, judgment upon the verdict is hereby entered in favor of the Plaintiffs and against the Defendants as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs shall have and recover against Defendants non-economic damages of $350,000.00 pursuant to NRS 41A.035, economic damages of $5,726,479.94, and the pre-judgment interest of $291,325.58, calculated as follows:

1. $1,063,006.94 for TITINA FARRIS' past medical and related expenses, plus prejudgment interest in the amount of $258,402.69 (interest calculated at 5.50% prime plus 2% for a total of 7.50% from date of service August 16, 2016 to November 12, 2019, for a total of 1,183 days = $218.43 per day) pursuant to NRS 17.130 for a total judgment of $1,321,409.63; with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

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2. $4,663,473.00 for TITINA FARRIS' future medical and related expenses, plus post-judgment interest accruing at $958.25 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%) pursuant to NRS 17.130 from the time of entry of the judgment with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

3. $43,225.00 for TITINA FARRIS' past physical and mental pain, suffering, anguish, disability and loss of enjoyment of life, plus prejudgment interest in the amount of $10,505.04 (interest calculated at 5.50% prime plus 2% for a total of 7.50% from date of service August 16, 2016 to November 12, 2019, for a total of 1,183 days = $8.88 per day) pursuant to NRS 17.130 for a total judgment of $53,730.04; with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

4. $131,775.00 for TITINA FARRIS' future physical and mental pain, suffering, anguish, disability and loss of enjoyment of life, plus post-judgment interest accruing at $27.07 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%) pursuant to NRS 17.130 from the time of entry of the judgment with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied;

5. $92,225.00 for PATRICK FARRIS' past loss of companionship, society, comfort and consortium, plus prejudgment interest in the amount of $22,417.85 (interest calculated at 5.50% prime plus 2% for a total of 7.50% from date of service August 16, 2016 to November 12, 2019, for a total of 1,183 days = $18.95 per day) pursuant to NRS 17.130 for a total judgment of $114,642.85; with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied; and

6. $82,775.00 for PATRICK FARRIS' future loss of companionship, society, comfort and consortium, plus post-judgment interest accruing at $17.00 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%) pursuant to NRS 17.130 from the time of entry of the judgment with daily post-judgment interest accruing at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

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IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs TITINA FARRIS and PATRICK FARRIS has judgment against Defendants BARRY RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA LLC as follows:

Principal	$	6,076,479.94
Pre-Judgment Interest	$	291,325.58 (1,183 days @ 7.50%)
TOTAL JUDGMENT of:	**$**	**6,367,805.52**

Pursuant to NRS 17.130, the judgment shall continue to accrue daily post-judgment interest at $1,248.58 per day (interest calculated at 5.50% prime plus 2% for a total of 7.50%); daily post-judgment interest shall accrue at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions, plus 2 percent. The rate is to be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

SO ORDERED this 12 day of November, 2019.

JOANNA S. KISHNER

HONORABLE JOANNA S. KISHNER
District Court Judge

Respectfully Submitted by:

Dated this 11th day of November, 2019.

BIGHORN LAW

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Approved as to form and content:

Dated this 11th day of November, 2019.

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