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.	No.: 80271 Appeal from the Eighth Judicial District Court, the Honorable Joanna S. Kishner Presiding
BARRY JAMES RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants, vs. TITINA FARRIS and PATRICK FARRIS, Respondents.	No.: 81052 Appeal from the Eighth Judicial District Court, the Honorable Joanna S. Kishner Presiding

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RESPONDENTS/CROSS-APPELLANTS' APPENDIX, VOLUME 8

(Nos. 1000–1153)

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DISTRICT COURT

CLARK COUNTY, NEVADA

PATRICK FARRIS, TITINA FARRIS, Plaintiffs, vs. BARRY RIVES, M.D., ET AL., Defendants.	CASE#: A-16-739464-C DEPT. XXXI

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

RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL - DAY 5
TESTIMONY OF MICHAEL HURWITZ, 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

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None		

FOR THE DEFENDANT	MARKED	RECEIVED
None		

Las Vegas, Nevada, Friday, October 18, 2019

[Requested designation of record begins at 1:30 p.m.]

COURT RECORDER: On the record.

THE COURT: Okay. We're on the record outside the presence of the jury. Sorry, Madam Court Clerk, did you say something?

THE CLERK: No.

THE COURT: Oh, I'm sorry, I thought you said something. My apologies. 739464.

Okay. So the jury's all present outside ready to come in whenever you all are, but I understand -- so by agreement of the parties are you continuing with Dr. Rives or were you going to stop Dr. Rives and go to one of Plaintiff's other witnesses?

MR. JONES: That is correct, Your Honor. We are going to go with Dr. Hurwitz is going to be testifying next.

THE COURT: Okay. And so he's the next witness to be called. Okay. And then you were about to say something else.

MR. JONES: Yes.

THE COURT: So Dr. Hurwitz and then who? God bless you.

MR. JONES: I think it's Christina Garcia, Your Honor, I believe is the next -- Christina Garcia is going to be the next witness. She is leaving town and won't otherwise be available again during the course of trial.

THE COURT: Okay. And since we're -- okay.

Counsel for Defense, I see you standing up. Is that to stretch

your legs or is that because you wish to be heard?

MR. DOYLE: Stretching my legs and my back.

THE COURT: Okay no worries. I just wanted to make sure if there's an issue you had, I could take care of it for you. Okay.

Well, then, Marshal, you want to get our jury and we can get started.

THE MARSHAL: Yes.

THE COURT: Okay. Do you wish Doctor Hurwitz to be on the stand when the jury comes in or do you wish to call him?

MR. JONES: Sure, he can go ahead.

THE COURT: Okay. That's fine, if you wish to do so.

So there seems to be another binder that magically appeared on the witness desk. And so the Court wants to make sure. So there now is three --

MR. JONES: Your Honor, we --

THE COURT: -- so I'm sure nobody moved anything on the witness binder when the Court was out. Okay.

MR. JONES: No. It was what we did before, Your Honor. We took the one we had up there, and we replaced it with two binders for ease of use.

THE COURT: Okay. So it's behind him, as well.

So, Madam Clerk, so let's find out what's -- how do we now have --

MR. JONES: Your Honor, Plaintiffs' exhibits were divided into two binders.

THE COURT: Right. And then you have the one, so could we just identify what that says?

MR. LEAVITT: Plaintiffs' Exhibit -- this is the first exhibit.

THE COURT: Okay. And then the other two are which and which?

MR. LEAVITT: Let me pull it off --

MR. JONES: The two that are behind is -- are Plaintiffs.

MR. LEAVITT: This is the demonstrative with Doctor Rives.

THE COURT: So you do not need that one anymore. Okay, that's why I was asking. I was noting that there seemed to be one extra binder up there. That's why I was asking.

MR. JONES: We can bring that one.

THE COURT: Do you need it behind the witness, or do you need it for any reason?

MR. JONES: Oh, that's fine.

THE COURT: Okay.

MR. LEAVITT: And then Defendants on the desk.

THE COURT: Defendants on the desk. And then you have your demonstrative. And that last one is?

MR. LEAVITT: Plaintiff's Exhibit Binder 2.

THE COURT: Which is the 2 through the rest, right? Okay.

MR. LEAVITT: Yes.

THE COURT: Right.

MR. LEAVITT: And then this one --

THE COURT: You just had one extra, that's why I was asking.

That's because it was the Court Exhibit 6 and 7 previously discussed today, correct?

MR. JONES: Correct, Your Honor.

THE COURT: Okay. So that means everybody needs to have what you need at the witness stand for everybody for examination and cross-examination; is that correct?

UNIDENTIFIED SPEAKER: Yes.

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay, perfect. Thank you.

Do we have the jury ready? Ready to bring them in? Okay.

THE MARSHAL: All rise for the jury.

[Jury in at 1:33 p.m.]

[Inside the presence of the jury]

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

THE COURT: I appreciate it.

Welcome back, Ladies and Gentlemen. Hope everyone had a nice relaxing lunch break. As we did with the prior witness, just to save a moment or two he's already sitting on the stand.

So, counsel -- by agreement of the parties, what's happening is -- I mention it sometimes because of timing with different individuals, they may go in the middle of somebody else's testimony. So by agreement of the parties, they were stopping the testimony of Doctor Rives and a new witness is going to commence with his testimony, okay. And so I'm going to say to Plaintiffs' counsel, Plaintiffs' counsel, by

agreement of the parties, would you like to call the witness that you agreed was going to be called?

MR. LEAVITT: Yes, Your Honor. Plaintiffs call Dr. Michael Hurwitz.

THE COURT: Okay. He's already on the stand, so Madam Clerk can you please swear in this witness? We're swearing or affirming.

MICHAEL HURWITZ, PLAINTIFFS' WITNESS, SWORN

THE CLERK: Please state your name and spell it for the record, please.

THE WITNESS: Michael Bruce Hurwitz, H-U-R-W-I-T-Z.

THE CLERK: And Michael, M-I-C-H --

THE WITNESS: A-E-L.

THE COURT: Okay. I do appreciate it. So then at this juncture, counsel, you can commence with your examination.

MR. LEAVITT: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. LEAVITT:

Q Good afternoon, Dr. Hurwitz. Okay. Dr. Hurwitz, I would like to walk through your educational history.

A Okay.

Q Where did you go to college?

A So I went to Tulane University in New Orleans and majored in biology and environmental sciences. Graduated in 1982. I went to Louisiana State University Medical School in New Orleans from '84 to

1988. And upon graduation started surgical internship and residency. I did my training at Harbor UCLA Medical Center in Torrance, California. I started in '88 as an intern, finished in '94 as a chief resident. '94 to '95 I was a fellow in surgical oncology and essentially a junior attending surgical instructor at the same institution, Harbor UCLA.

I moved to New York for a few years after that to go into practice. And then came back and did an additional year of fellowship training in advanced minimally invasive surgery, laparoscopic surgery, in other words, at Los Angeles County USC Medical Center from '97 to '98. And that was the end of it.

Q That was the end of it. Doctor, are you board certified?

A I am.

Q What is the process to become board certified?

A So board certification is a process to determine if you have the requisite knowledge to practice as a board certified surgeon. And basically you have to prepare for the board, so you have to study fairly extensively and then you go through a written board examination. And then if you pass the written board examination you're invited to take an oral examination where you're grilled by a number of experts over the course of a day. And then if you pass that, then you're granted board certification. Once you're board certified, you have to recertify it for ten years, so I have since recertified twice.

Q Okay. Why is it important -- or what is the importance of being board certified?

A Well, I think it demonstrates that you have the knowledge

and, you know, the background and understanding of all of the facets of our specialty of general surgery in order to practice safely and effectively. Many hospitals use it as criteria to allow you to be on staff, some don't.

Q Okay. Along those same lines, do you have privileges at hospitals?

A So I have privileges at the hospital where I practice, Hoag Hospital, in Newport Beach, California. I've been in practice there at Hoag Hospital for 21 years, so 31 years since I -- hard to believe, but 31 years since I started internship in 1988. But I've been at Hoag for 21.

Q Thank you. And you mentioned several States when you were going through your educational history. What States are you licensed to practice medicine in?

A Just California.

Q Okay. How long have you been licensed to practice in California?

A I believe I got my license to practice in my second year of residency. You apply, I think, during your first year as I recall, so I think I got my license in 1990, if I'm not mistaken.

Q And do you recall what year you became board certified the first time, not the renewal?

A 1995.

Q Okay. And, Doctor, in your practice what do you do? What's your focus of practice?

A So I'm a general surgeon. General surgery encompasses

abdominal surgery, primarily; some endocrine surgeries, so in my case I do quite a few thyroid operations; a lot of hernia operations. And a lot of what I do is laparoscopic. So laparoscopic hernia repair, as well as open hernia repair, colon surgery, gall bladder surgery. So there's a lot of things that are basic general surgery things. And, in addition to that, I take a lot of emergency surgery call. We don't do trauma at my hospital, so we don't have gunshot wounds, stabbings, and so forth, but we have a lot of acute surgical emergencies that we take care of, as well, so perforated organs, appendectomies, and so forth.

Q Okay. Are you familiar with the standard of care in hernia repair?

A I am.

Q Are you familiar with care -- the standard of care in recognizing and treating infections, including sepsis?

A Yes, I am.

Q Okay.

MR. LEAVITT: Your Honor, I ask this Court to allow this witness to testify as a medical doctor in general surgery.

THE COURT: He can offer his opinion consistently therein. Feel free to proceed.

MR. LEAVITT: Thank you, Your Honor.

BY MR. LEAVITT:

Q Doctor, what is the standard of care; what does that mean?

A So the standard of care is what a reasonable physician would do, a reasonable and prudent surgeon would do under similar

circumstances.

Q Okay. And you've been hired as an expert in this -- or as a doctor in this case to review medical records; is that correct?

A That's correct.

Q Okay. And, in fact, you did review records. Doctor, there's a binder in front of you as it's the Defendants' exhibits; do you see it?

A Yes.

Q Can you open it to Exhibit K -- double K?

A Easier said than done.

MR. LEAVITT: Your Honor, may I approach to remove the other binder --

THE COURT: Of course you may.

MR. LEAVITT: -- and assist?

BY MR. LEAVITT:

Q Okay, Doctor, could you take a few moments and leaf through that?

A Okay.

Q Okay. Doctor, do you recognize that?

A I do.

Q Okay. Can you just give an overview what that is?

A So this was the expert report that I was asked to draft in the review of this -- in this case.

Q Okay. And there --

A So --

Q Oh, I'm sorry.

A Go ahead.
Q And you have a list of documents that you reviewed; is that correct?
A Yes, I do.
Q Okay. And in those documents you reviewed St. Rose Dominican Hospital records and billing?
A That's correct. I've got Rose Dominican, the records from Dr. Rives, the records of Dr. Chang, Desert Valley Therapy, Dr. Hamilton's records, and so on.
Q Okay. Now, you also reviewed, if you flip to the page 2 there in the same exhibit, Dr. Rives' interrogatories and answers to interrogatories?
A Yes, I do.
Q Okay. And you reviewed the deposition of Dr. Rives in this case?
A Yes, I did.
Q Did you also review the deposition of Dr. Rives in the Vicky Center [phonetic] case?
A Yes, I did.
Q Okay. And when you were deposed by Mr. Doyle, did he ask you about that deposition of Vicky -- in the Vicky Center case of Dr. Rives?
A Yes.
Q Okay. I'd like to go to your report, Doctor. You gave me a definition of the standard of care. After you reviewed all these records,

did you come to a conclusion of whether Dr. Rives breached or failed to meet the standard of care in this case?

A Yes, I did. I -- would you like me to --

Q Yes. Would you please explain to the jury what you found?

A So I had a number of concerns in this case, and I did feel that he fell below the standard of care. And I can, you know, expand upon that. Basically, you know, he had a patient to whom he did this laparoscopic hernia repair on. This is a clean case. One would typically expect a case like this to -- you know, the patient to recover fairly quickly and go home if not that day, but maybe the day after surgery.

And during that operation I have a number of concerns about the way this operation was conducted. And in particular, when he went in laparoscopically to do this operation, he found that the colon -- the transverse colon, which is the part of the colon that goes across the abdomen here, the mid portion essentially of the colon, was stuck, was adherent to the mesh that had been placed at the previous hernia repair that failed. So she had had this hernia operation in 2014, the repair failed, he took her back to surgery and found that the colon was stuck, was adherent to the mesh.

Q Now, Doctor, when you say adherent or stuck to the mesh, the colon, is the colon -- what type of tissue is that?

A So the colon is a tube, and it's part of the gastrointestinal tract that holds waste. So the colon stores fecal material, and it's essentially a fleshy tube and the outer -- and it's, you know, about so thick. And the outer layer of the tube is called the serosa. And that

serosa is what had become plastered to the mesh that had been placed previously. And that's not uncommon to find, intestine stuck to mesh. It happens.

Q Okay.

A So in order to repair this hernia, it was necessary to peel the colon away from the mesh to which it had become stuck. And so according to the operative report Dr. Rives used a device called a ligature device, which is a thermal energy source. It's a tool that uses heat to seal blood vessels and to cut tissue.

Q Now, Doctor, are you familiar with this tool, the ligature?

A I am.

Q Okay. And so if you would proceed -- so what else did the operative report say?

A So he used this thermal device to cut through these adhesions to separate the colon from the mesh.

During the course of this operation and using heat on the intestine, he created two holes in the colon that he became aware of. And discovering these holes, he proceeded to attempt to close the hole using a stapling device.

Q Okay. Now, Doctor, can you explain to the jury, when you close a hole, a colotomy, what's that process? You've done this before, correct, Doctor?

A I have.

Q Okay. So what's the process? If you could show the jury the best you can with your hands?

A So if you're going to close a hole in the colon, and keeping in mind the colon is flexible, right, you can -- it's a little difficult to describe, but you can pinch up the part of the colon that has the hole in it, bringing the edges together. And then the stapling device clamps across the intestine below the hole. So you have to catch good colon in order to do that, right?

Q Okay.

A And then you fire this stapler. The stapler has within it a cartridge that's inserted in the stapler. And that cartridge has two -- it has four rows of staples. So it fires -- it lays down two rows of little tiny staples that are sort of offset from one another, so you don't have leakage, and then it cuts between them. So you leave two rows on one side and two rows on the other.

Q Okay.

A And so in doing that you zip across the colon, and it staples it together, essentially.

Q Now, you mentioned good tissue. What do you mean by that? When you're using a ligature can that cause unexpected risk or increased risk?

A So first there's a number of concerns in using a stapler to close a hole. One of the concerns could be that you could narrow the colon. If you take too much of the colon, this little tube and pinch it off too much, you can -- you have to be careful you don't narrow the colon.

But the bigger concern here was the fact that this thermal energy source that I mentioned, the ligature, was used to free the colon from the

mesh. And the problem with using the ligature against the bowel is that thermal energy can be transmitted from the device to the underlying serosa. And if the thermal device is in contact for too long with the bowel, you can get a full thickness thermal injury to the intestine, so. And that might not become apparent right away. It can sometimes take time for that thermal energy to fully kill the full thickness layers of the intestine. So you might not recognize in that case if you damage the tissue surrounding the area that it's touched.

Now, the manufacturer claims that the thermal spread is minimal, but it's still there and it can spread a millimeter or two. So it can spread some distance. And if you're using that over this whole surface of the colon as you're freeing it, you can cook a lot of that colon. And then if you're stapling that area that you just seared with the ligature, you staple across that, you may be stapling tissue that really doesn't have good structural integrity because you just injured it with the thermal device, essentially.

Q Thank you, Doctor. Do you have an opinion as to whether or not using the ligature fell -- in this case fell below the standard of care?

A So I feel that using the ligature was below the standard of care because again you know that you've got a thermal energy source that has the potential to damage bowel, so I think it's contraindicated in that setting.

And the preferred method if you were going to try to do this laparoscopically is to use cold scissors. To use a device that doesn't sear the tissue. The downside to that is you can have some bleeding from the

tissue, but you would rather have a little bit of bleeding than have tissue that you've damaged, you know, without being able to fix that.

So using a thermal energy source against the bowel in that way is below the standard of care and it's contraindicated. It's not indicated. You're not supposed to use it in that way.

The other option would be if you have a colon that's stuck to the mesh in that way and that you can't safely free, is to say okay, well, we've tried to do this laparoscopically, this is too risky, we're going to open. And in that case you would have to make an incision, take out the mesh if you have to, and then carefully an open technique where you have -- you know, you can use your hands better than you can laparoscopically, you can cut the intestine away from the mesh. That's a decision that has to be made intraoperatively. Dr. Rives' view is that he could complete the operation laparoscopically, but it was clearly below the standard of care to use this thermal energy source in that way.

Q Okay. So, Doctor, let me see if I understand. When you use a ligature, the thermal heating device, can that cause the tissue that it spreads to, to fail over time?

A Yes.

Q Am I using the right word fail or how would you describe it?

A Well, the tissue, it loses its integrity, it loses its strength, it loses the ability to hold suture or to hold staples. The tissue slowly dies. And as the tissue dies, it falls apart. So if you staple together tissue, it dies because of the thermal energy and now you've got staples holding tissue that won't hold.

Q So in this case did Dr. Rives fall below the standard of care as a reasonable surgeon to use the stapler after he's used a ligature?

A I think the standard -- I think he fell below the standard of care in using the ligature against the bowel. I think that it further compounded that problem in stapling it. But even had he sewn it, he still would have been sewing tissue that didn't have structural integrity. So once he committed to using this, you have to be concerned about the potential for injury to the colon that you've just freed up.

And if you're concerned about that, then you have to make sure that you've got good tissue to reconnect, whether it's using the stapler, or whether it's using a suture, or whether if you feel that you've damaged a significant amount of tissue, you may have to just remove that whole section of colon.

Q Okay. Now, when you say suture, that's where you thread it?

A Correct. When you sew it.

Q When you sew it. Now, colotomies can happen without negligence; is that --

A That's correct. And I would say that if you're going to operate on somebody, you're going to dissect the colon away from mesh. You can -- it's certainly possible to get a colotomy. And I would not say that getting a colotomy -- putting a hole in the colon under difficult circumstances where it's plastered to the tissue, is below the standard of care. I think that's a complication that can be expected.

Q Okay. So in this scenario where the mesh was plastered to the colon, where was the failure of standard -- to meet the standard of

care?

A In my view the failure to meet the standard of care was in using a thermal energy source in the first place to take the colon off of the mesh because there's such a high risk of thermal energy -- injury.

Q Okay. Now, Doctor, you reviewed these medical records. Do you recall how many holes Dr. Rives could see during the surgery that he made?

A Dr. Rives found two holes -- saw two holes in the colon and repaired the two holes with the stapling device.

Q Okay. Do you recall how many holes there ended up being?

A So in the final analysis once the patient went back to surgery on the 16th, there were three holes. So there were the two holes and then there was a third hole that he was not aware of.

Q Okay. Now, in Dr. Rives' operative report did he say the number of staples he used?

A It was not clear how many staples he used, how many staples was used.

Q Okay. Could you tell in his operative report whether he did a thorough examination and cleaned everything up?

A Well, there are other concerns here. So one of the concerns is first and foremost making sure that you don't have any other injuries in the bowel that you're overlooking. Another concern is making sure that if there's any spillage from the colon, and he doesn't describe any spillage of fecal matter or stool from the colon, you have to make sure all of it is very well cleaned out.

Another concern was his decision during surgery to put a new mesh in, despite knowing that he had just made two colotomies. He's now taken a clean case, and it's become a contaminated case. He now has two holes in an unprepped colon. Frankly, even had the colon been -- had the patient had a bowel prep to wash out the colon ahead of time, it would still be -- it would still contaminate that case.

And so you have to worry about the potential that this new mesh that you're going to put in, this new synthetic material, is going to become infected. Mesh has this tendency to become infected once it's exposed to bowel contents.

It's a little bit controversial because there are some people that think you can, in some cases, get away with using a lightweight mesh in the presence of infection and that you can sometimes treat with antibiotics and get over it. But it's a very dicey proposition. And so I have concerns about that, as well, placing that synthetic mesh in the presence of two known holes in the colon.

Q Okay. You used a term that I'd like you, if you wouldn't mind explaining, unprepped bowel; what does that mean?

A So when you're going to have colon surgery or when you're going to have a colonoscopy, you have to drink this awful stuff and wash out your colon. So anybody who's had a colonoscopy knows you have to drink a jug of bowel prep to wash everything out so that you don't have stool in the colon. So that's called a mechanical bowel prep.

Q Okay. And in this case there was no bowel prep?

A And in this case there was no bowel prep. Now, I'm not

saying you have to prep every bowel in a hernia operation, but he did not have a bowel -- she did not have a bowel prep.

Q Now, you've just explained to the jury, and you've reviewed the operative report. I had some questions about that that you just addressed. If the operative report says no complications; is that true?

A No. There was further complications. There were two holes in the colon that he was aware of. So there were clearly complications. And documenting that there's complications is okay.

Q Right.

A You know, I mean we have complications. Anybody that operates is going to have complications. Nothing's -- you know, these things arise, but you have to document them.

Q Why would you have to document complications? What does that do?

A Well, first of all, it allows you to be fully truthful about the operation that you performed, right? So you have to -- it's part of the medical record that we are expected to record and that we're expected to document. If there's complications, you have to document them. It's important because if things go awry and other people are taking care of this patient, they have to know what took place during surgery.

So it's in the best interest of the patient that you be as forthcoming and truthful as possible in your documentation of the operation to guide the further care of that patient.

Q Okay. Whose best interest did you say it was?

A It's in the best interest of the patient.

Q Right. Why is that?

A Well, ultimately other people may be taking care of that patient, whether it's on this admission or somewhere down the line, you have to have a full -- it's very important that not only do you document the complications, but you document it timely. You know, people are going to be taking care of this patient and the record has to be complete in order for others to provide the appropriate care.

Q Okay.

A And it's a legal requirement, as well. I mean it's -- you have to document everything.

Q Very good. Doctor, thank you for that explanation. I'm going to back up a bit here to when you received this case. You were looking -- what type of approach did you take when you got these documents? What did you do?

A So -- well, it's a lot of work. I reviewed everything that was given to me. This was, you know, a while ago. I reviewed the records from the office, I reviewed the records from the hospital, I reviewed the depositions of people that were involved, I reviewed x-rays and CAT scans. So it's a matter of reviewing the whole thing and -- you know, and evaluating that in the context of what I know to be appropriate and the standard of care for surgery to determine whether the care that was provided was appropriate, basically.

Q Okay. Now, have you done this type of work before, looking back and --

A I have. I've done some expert witness work in the past.

Q How many times -- how many cases would you say you've been involved in?

A So over the past five years or so there's probably been about ten cases in all, give or take, that I've been asked to review and end up being -- had to give a deposition in.

Q Okay.

A Mostly in the past these were on behalf of defendants, the doctors that were involved in the case, but there's been several also that have been on the side of the plaintiff, on the side of the patient. So, you know, roughly ten. I think there are some other cases that I've been asked to review that I didn't feel rose to -- I didn't feel were malpractice or that I could, you know, assist in. There have been cases that have been presented to me by plaintiff's attorneys and I felt that, you know, the doctor had done the right thing, so I couldn't take that case. And there were some cases on behalf of defendants that I felt I couldn't take on.

Q Thank you, Doctor. How many times have you testified in trial on behalf of plaintiffs?

A I think this is the first one. The trial testimony that I've done has been on behalf of defendants.

Q Okay. Thank you. Now, doctor, you're also compensated for being here today; is that correct?

A Yes.

Q How much are you paid?

A Have I been paid?

Q How much are you being paid for being here today?
A For today's testimony I think $6,000.
Q Okay. And does that include preparation time?
A That includes all the preparation time, all the time reviewed, the two days that I've had to take off from work over, you know, yesterday and today, and so forth.
Q Okay. So your practice doesn't stop when you testify?
A It just keeps going.
Q It just keeps going.
A I had to give away my calls. I'm supposed to be on call today, so a number of things I've had to --
Q Okay. You had to give them away?
A Yes.
Q Okay. So somebody else is doing that?
A Somebody's doing that for me.
Q Okay. I just want to make sure. All right. So in reviewing these records -- and I appreciate your testimony today regarding the surgery itself -- what I'd like to do is now discuss a bit with you, and I'm -- now, in this case do you believe Dr. Rives fell beneath the accepted standard of care for his intraoperative technique?
A Well, I do, and I feel that he fell beneath the standard of care in using this ligature thermal energy device against the bowel, as I said. I think that he also made some decisions that while they may not have fallen beneath the standard of care, may not have been in the best interest of the patient, such as his decision to try and complete this

laparoscopically, rather than opening or taking out the old mesh and making sure that he was able to dissect this away.

I think that the idea of putting a new patch in over the old patch, which had failed, was not a good idea, but different people do things differently. So I can't say that that falls below the standard of care, but clearly using the thermal energy source was below the standard of care in the way in which it was used.

Q Now you stated that he continued to go laparoscopically. What other option did he have?

A Well, his other option, faced with intestine plastered to the mesh, as I said, would have been to make an old fashioned incision, open up, take out the mesh by hand, carefully free the bowel from the mesh. In doing so he's accomplished getting -- he can, in that way, make sure that the bowel is healthy, that he hasn't damaged it. He removes the old mesh and now he's not laying a new mesh against the old mesh.

It might also allow him to -- and it may or may not have allowed him to bring the edges of the tissue together, rather than just once again bridging across that hole, that defect that was the hernia, with this new mesh. So that would have been an option for him.

Q Okay. Now, are you aware that -- and you reviewed Dr. Rives' deposition in this case. Are you aware that Dr. Rives testified he doesn't know if he took out all, or some, or any of the mesh from 2014?

A I don't think he took out the mesh from 2014.

Q Okay. Doctor, what does it mean to repair -- or do you feel that he adequately repaired the bowel perforations on July 3rd, 2015?

A Well, clearly he didn't --

Q Okay.

A -- because we know the outcome of this, right? So ultimately, you know, following surgery the patient clearly became septic. And that became evident as early as the first post-operative day. And by the second post-operative day she had respiratory failure and was intubated, she had a breathing tube, and she was in the intensive care unit.

And the concern that I have is that here you have a patient going in for a clean operation, who had this operation and comes out, and she becomes septic. She becomes -- she develops this evidence of overwhelming infection to the point where she has respiratory failure. Dr. Rives had just been in there doing this operation and knew full well that he had two holes in the colon and now you've got a septic patient.

So one's first concern as a surgeon is, you know, oh, my gosh, is this patient septic, because I've got a hole -- I've got holes in the colon that I fixed. Are the holes leaking, did my repairs fail? I mean that's the first logical thought you would have to have.

And I don't know if this is answering your question, but -- so you have to assess where this infection is coming from. So the patient had a very elevated white blood cell count. The white blood cell count is a measure in the blood of the number of white blood cells. And that goes up in the presence of infection.

Now, we also know that white blood cell counts rise in patients who are stressed. So having just had an operation this patient is

stressed. So in the first post-operative day when the white blood cell count goes up, you have to think, okay, is this because of infection, is this because of the stress of the operation, what's going on here. And you have to look at all the variables and figure out, you know, where you think this is coming from.

Q Okay. What's aspiration?

A So there are times when patients can inhale liquids or vomitus into the lungs. They can vomit, and they can inhale that vomit and it essentially can go down the airways into the lungs. And that's called aspiration.

And if you have aspiration like that, that can blossom into aspiration pneumonia or aspiration pneumonitis, which is inflammation of the lungs. And that, too, can cause a white count and fever after surgery.

In this case, however, there was no evidence that the patient had aspiration pneumonia. So that was a consideration. That was in what was called the differential diagnosis. When you're trying to come up with a diagnosis, you have a list of potential diagnoses. And that would be in the differential diagnosis. But it's pretty straightforward to rule out. You've got a chest x-ray. You --

MR. DOYLE: Objection. Narrative.

MR. LEAVITT: Okay. Very good. Sure.

BY MR. LEAVITT:

Q Doctor, how would you rule that out?

A Well, you can rule that out with a chest x-ray, you can rule

that out with a chest CT. You can rule that out over the course of a series of films to see if there's any significant change and so forth.

Q Okay. Now, Doctor, you've seen CT scans in the past?

A Yes.

Q Okay. In this case can you solely rely on a CT scan?

A So CT scans are imaging tools that give you cross-sectional imaging of the body. And they're useful diagnostic tools, but they're just one part of an evaluation. You can't always rely upon them. And, in fact, there is a significant rate at which they can be misinterpreted, or they can show nothing when actually there's something. And that's called a false negative, right?

Q Okay.

A So they can miss things.

So CT scans can be useful, they can help you identify infection, but if they don't show infection in the presence of somebody who clearly has an infection, then you have to look at them with a little bit of skepticism. You have to use your -- a surgeon has to use one's clinical experience and the knowledge that they've developed over the course of their medical school surgery training and practice to evaluate the CAT scan in the context of what's going on with the patient.

Q Okay.

A So I have a concern since you asked. In this case --

MR. DOYLE: Objection, narrative.

THE COURT: Overruled.

THE WITNESS: So in this case -- I'm sorry.

THE COURT: Let the Court finish before you continue. Thank you. It's getting close, but so far not yet.

BY MR. LEAVITT:

Q Okay. Doctor, let me ask you, what is your concern about the CT scans in this case?

A So my concern about the CT scan is that while the CT scan interpretation did not conclusively point out a source of intraabdominal infection on the interpretation of the radiologist, that doesn't rule out intraabdominal infection as the source of the sepsis. And the clinician, the surgeon, taking care of this patient has to, in approaching this patient who is clearly becoming septic, take into consideration that he knows, for instance, that just yesterday he put two holes in the colon and now suddenly the patient's becoming septic, you have to put -- you have to connect the dots. And so it's incumbent upon the surgeon to make that connection, to use that experience to figure out what's going on.

Q Okay. Now, Doctor, there was a slide in the opening statements used by Defense counsel. I'd like you to look at that.

MR. LEAVITT: Any objection? It's your slide. I'm going to go ahead and put this up on the screen.

BY MR. LEAVITT:

Q Doctor, there's a --

MR. LEAVITT: If we could get the microphone. I thought it was -- is it up there?

THE COURT: Would you like the hand-held microphone?

MR. LEAVITT: Hand-held -- I apologize.

THE COURT: Sure.

MR. LEAVITT: The hand-held microphone.

THE COURT: The Marshal will provide it to you.

BY MR. LEAVITT:

Q And, Doctor, if you wouldn't mind once it's on, take a step down, I'd like to go through -- I'd like you to go through this first CT scan on the 5th. Do you see that says no leak?

A Yes.

Q Okay. And the arrow. Can you explain to the jury what we're looking at?

A Well, so -- can you hear me?

UNIDENTIFIED SPEAKER: Uh-huh.

THE WITNESS: So we're looking at a cross-section of the abdomen at the level of the hernia repair. And you can see where the arrow's pointing. You can't really see it in this projection very well, but it's pointing to a little -- a white area and that's the -- presumably the staple line on the colon that was repaired. And you see here there's this circle here, and it's got a line across the middle of it. So this is called an air fluid level. And this is -- the black up here is air and the gray underneath it is fluid. So there's fluid in this space.

Now, this is just on -- this was on the 5th? So this is on the second postoperative day. Now, when a hernia repair is done, the hernia is reduced. In other words, the intestine in this case, the transverse colon was freed up from the mesh. The mesh is presumably lining this hernia sac. This is called the hernia sac. There's mesh up

here. The colon has been returned to the abdominal cavity leaving a space. And then mesh is placed here. So here's your staple line and the new mesh is under here. Mesh doesn't really show up well on a CAT scan, so you really can't see it, but we presume that it's there. And there's air and fluid here.

Now, it is not unexpected in a newly created space where the bowel has been removed for fluid and air to collect just two days after surgery. So while you have to worry, you know, is something going on, one can also say well, this is -- this can be attributed to -- expected what it should look like post-operatively, right. You can expect to have some air and fluid here. But I've got a septic patient here. So this is a concern. This is something I'm worried about.

But this -- so that's basically what we're seeing here. We're seeing air and fluid in the space vacated by the bowel that was there previously.

BY MR. LEAVITT:

Q Now, Doctor, at this point she's post-operatively day two. Is she septic?

A On post-op day two she's septic, and she's -- and that's the day that she was intubated and brought to the intensive care unit.

Q Okay. But she was also septic on the 4th, correct? So on the 4th she was septic, okay?

A Correct.

Q Now, why -- her white -- is her white blood cell count elevated at this time?

A The white blood cell count is -- I don't have the number off the top of my head, but 23,000, somewhere in that -- it's high.

Q Okay.

A The upper limited normal is say 12,000 and she's at 22 or 23,000. So she's septic here. And you see this having -- knowing that you had these two holes in the colon that you closed together, you got to start -- you have to start thinking about is this something that's been done surgically.

Q Okay. And like you said, connect the dots. If you could look to the 9th, the staple line -- the arrow's pointing to the staple line, is this common for the staple line to move?

A So it's hard to know how to interpret that part of it exactly.

Q Sure.

A Because these aren't at exactly the same part of the abdomen. This is the liver here, for example, and you can see this is a little bigger and over here you're -- we're probably seeing a little farther down. It's not exactly the same cut. So it's hard to say exactly what's going on with this staple line.

Q Okay.

A Is the staple line pulled away, is it just -- are you just getting it on a different angle, did the intestine move a little bit and so the staple line moved. It's hard to interpret. But what you do see is now that this space that was half air and half fluid now is all filled with fluid and there's what appear to be bubbles of air within it. So there's still some air in the abdominal cavity and this is now five days post-op.

Q Okay.

A And the patient is clearly still septic.

Q Okay. Thank you, Doctor. So, again, is it reasonable to rely solely on a CT scan?

A No. And I think the problem we have here is that the CT scan may be completely useless to you, right? A CT scan might be beneficial if it clearly shows you a problem, like over here on the 15th where -- I'm sure we'll get to that, but there's air and the whole thing is blown out, and it's a big problem. But if you don't see that, and you see a CT scan that doesn't look horrible, and you've got a patient who's still septic, who still has a high white blood cell count, is still in the intensive care unit with a breathing tube, you have to make a clinical determination of what's going on with the full knowledge of having made two holes in the colon. Again, we're coming back to connecting the dots and saying this is what we found in surgery, I've got a patient who should have been home days ago and now she's lying in an intensive care unit on massive antibiotics and still with a breathing tube, what's going on here?

So you have to make that -- you have to -- again, it's up to the surgeon to take their full knowledge, experience and so forth and connect the dots. And I have to say, since you brought up the *Center* case before --

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

THE COURT: The objection is narrative?

MR. DOYLE: Yes. And 48.035.

THE COURT: A narrative. Counsel, can you ask a question?

MR. LEAVITT: I'll ask another question.

THE COURT: Okay.

BY MR. LEAVITT:

Q Now, you mentioned before you've read Dr. Rives' deposition in the *Center* case; is that correct?

A Yes.

Q And Mr. Doyle here, he asked you about the deposition of Dr. Rives in the *Center* case during your deposition in this case?

A Correct.

Q Do you follow me? A lot of depositions there. Now, in reading Dr. Rives' deposition in the *Center* case and after doing your -- and doing your expert or your opinions in this case, did that -- did the *Center* case shed any light on what's going on here?

A Well, so the *Center* case didn't change my opinion.

Q Okay.

A Okay. And what I had in the *Center* case was the deposition.

Q Okay.

A But what it clearly showed me was that, you know, as I said, the surgeon has to rely upon his experience and what has come before to -- you know, that's how surgeons learn.

MR. DOYLE: Objection, Your Honor.

THE COURT: Hold on a second.

MR. LEAVITT: Hold on, Doctor.

THE COURT: Now.

MR. DOYLE: The answer's becoming irrelevant in 48.035.

THE COURT: You both need to approach. Madam Court Recorder, can you turn the lights on, please?

[Sidebar at 2:25 p.m., ending at 2:40 p.m., not transcribed]

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

It will just give you time to ask more questions.

Okay. Counsel, going back, the question that was -- that had been pending and the witness had just started to answer with the first sentence, the Court had overruled the two objections raised for narrative in 48035. So on that specific question, that was the Court's ruling based on where you were on that mid-answer of just -- the witness. Okay?

MR. LEAVITT: Very good, Your Honor. Thank you.

BY MR. LEAVITT:

Q Doctor --

THE COURT: But I think we forgot to -- your pocket mic.

MR. LEAVITT: Oh.

THE COURT: Sorry. She's putting batteries in for you. Sorry. I forgot to tell you about that. My apologies. No worries. Feel free. Thank you.

MR. LEAVITT: The light's on. All right.

THE COURT: We took away your mic, and then we don't tell you that we put new batteries in for you. Sorry. Go ahead.

MR. LEAVITT: All right. Very good.

BY MR. LEAVITT:

Q All right. Doctor, back to the CT scans in this case. Why are CT scans -- why can they be what you call a -- first --

MR. LEAVITT: -- strike that.

BY MR. LEAVITT:

Q What is a false negative?

A So a false negative is essentially just that. It's saying something isn't there when it is. A negative -- you know, a negative means that it's not there, right?

Q Right.

A It's not seeing it essentially that it's false. So it's -- it -- there's something there that you're not seeing.

Q Okay. How can CT scans be a false negative when they're a diagnostic tool?

A Well, surprisingly, you know the diagnostic tools don't always show you what is truly there. There there's a lot of reasons for that. One is that they're subject to interpretation --

Q Okay.

A -- they're subject to the resolution of the scan. In other words, can the scan clearly distinguish between two points adjacent to one another? There's a certain inherent inability to see certain things. And in the case of intra-abdominal infection, they can overlook things. They're useful if you have something clearly obvious. So if you have -- as in on that -- on that fourth picture on the right there, you have free air. You have -- all of black area is air. And so it's obvious.

But there are times when findings are more subtle, and they can't be easily picked up. And so in those cases, you can get a false negative. And there's a significant risk of false negatives in CAT scans.

Q Okay. What would cause a false negative --

A Well --

Q -- in this scenario?

A So this in scenario, for instance, when you have a patient who's been given oral and rectal contrast to outline the colon, and you're looking for evidence that that contrast -- that radiocontrast material is leaking out of the colon, if it shows you that it's leaking out, then it gives you an answer. But if it doesn't show you that it's leaking out, it doesn't mean you don't have a colon -- a hole in the colon. There are a lot of reasons that you might have a hole in the colon that doesn't leak contrast.

Q Okay. And -- for -- can you give me a few examples of this?

A So an example would be the fact that we have this fatty apron, this veil of fat, that hangs down from the colon called the omentum. And the omentum can temporarily seal a hole, an area; a perforation can be very sticky, for lack of a better term, that things can stick to it or it can stick to other things. Right? So the omentum can seal over a hole and can -- and can make it seem like nothing -- and it can prevent things from leaking out. It doesn't mean the hole's not there. And the hole could be there and the tissue damage that was -- that is there can be causing the white blood cell to come up. The white cell -- excuse me -- white blood cell count to come up, but nothing's spilling out.

So you can have an infection, but you're not seeing what you're looking for in the CT scan, which is contrast spilling out. You can't let

that take you down the primrose path of not doing anything about it just because you don't see it though in there. And for that reason, getting a CAT scan may or may not even be a benefit to you. If there's something obvious -- if you need to go in surgically and find a perforation, you know, or see what's going on, and there's this -- there's a presumed intra-abdominal infection, just because it's not showing up on the CAT scan doesn't mean you don't operate.

So they can leading astray. And that's -- again, when I was talking about experience, you have to have the experience to be aware of that. And a surgeon in practice has that experience -- should have that experience.

Q Should have that experience. Well, in this case, on day -- on the 3rd of July, was Titina septic?

A On the day of surgery?

Q The day after the --

A The day after surgery?

Q Sorry. The 4th. I apologize.

A On the 4th, it --

Q The first day of surgery.

A -- Titina was becoming septic --

Q Okay.

A -- yes. She had an elevated white blood cell count and she was becoming sick.

Now, that -- you know, was it clear? I mean, there were seen that you could attribute that high white blood cell count to, like I said,

stress and so forth. But it was -- it's clear that she's --

Q Okay.

A -- becoming septic.

Q Now, in your record review, was there ever pneumonia?

A No.

Q Was there ever pneumonitis?

A No, there was not.

Q So those were ruled out?

A So those were -- so a pulmonary source of this sepsis was ruled out. So once you've ruled out a pulmonary source, what do you got? You've got a patient who has holes in her -- you know, who had holes in her colon on the 3rd and now has sepsis, abdominal distension, elevated white blood cell count. You know, you were there, there is intra-abdominal sepsis.

Q Okay. So what is distension? Can you explain that to the --

A So --

Q -- jury?

A I'm sorry. Distension is sort of the medical term for swelling. So when we talk about abdominal distension, we're talking about the abdominal -- essentially bloating of the abdomen, swelling and bloating of the abdomen.

Q Okay.

A That's how we typically --

Q Okay.

A -- phrase it.

Q And what causes that?

A So often distension can be used -- there's a number of things that can cause distension.

Q Sure.

A Distension can be caused by an ileus, for example, where you -- where when you have an intra-abdominal process or sometimes just after surgery, even when there's not infection, the intestines don't move things through as they ordinarily would. They're sort of asleep after surgery. And that's called an ileus. And so air can collect inside the intestine and swell the intestine. That would be one source of distension.

You can get abdominal distension with peritonitis. So if you have an infection in the abdomen, such as with fecal peritonitis, you can get a profound infection of the abdomen, the lining of the abdomen, called the peritoneum, becomes inflamed, and when the peritoneum becomes inflamed, you develop what's called peritonitis. So those are a couple of things that can cause the abdomen to be distended.

Q Okay. And in this case, in your review, what caused Titina this sepsis and distension?

A So until proven otherwise, again, until proven otherwise, a sepsis, this infectious process that's ongoing, was caused by something that occurred during surgery. She didn't have this before surgery. She comes in, she has an operation, she's clearly got an infection. One has to presume that's it's related to the surgery, especially when you've ruled out a lung process. And there's no other infection anywhere else

that you've discovered.

So what's left to you is an intraabdominal process, something going on inside the abdominal cavity.

Q And, Doctor, to a reasonable degree of medical probability, what caused -- what was the cause of Titina's sepsis here?

A So Titina's sepsis was caused by peritonitis. And the concern is for fecal peritonitis. The concern when you have somebody a day or two after an operation in which there are holes in the colon and now you've got somebody who's clearly developing of sepsis, you have to be worried about the potential for spillage of colono contents or of bacteria into the abdominal cavity.

So -- and it doesn't have to be liquid or solid stool. Meaning, if you have an injury to the colon wall, you can get what's called bacterial translocation. So bacteria are what are the -- what's in stool that makes it cause infections, right? So it is bacteria in there. And if you destroy the structural integrity of the colon wall, if you destroy that waterproof barrier, then that bacteria can get across that -- that colon wall and cause infection even in the absence of frank stool spillage. Right? So o you can become septic from that. That bacteria can get in the bloodstream and you can get a -- you can get what's called bacteremia, bacteria in the bloodstream. There are a lot of way that you can get septic from a perforation of the colon.

But, again, when the colon has lost it's -- you know, under normal circumstances, right now the colon is watertight. Nothing's leaking out of it, right? But once it's been damaged, then things can get

across that barrier.

Q Okay. So it was reasonable to look at the area where surgery took place?

A That's correct.

Q Okay. Now, Doctor, you reviewed the records in this case. There was a -- a hole mentioned around -- and Dr. Hamilton's note says it was about the size of a quarter, 3.7 by 3.5 centimeters?

A Right.

Q Okay. I'm a standards guy. Meaning I -- inches are my thing.

A Um-hum.

Q How big is that?

A Well, so an inch, just, you know, to think of it in nonmetric terms, an inch is 2.54 centimeters.

Q Okay.

A So there's two-and-a-half centimeters roughly in an inch. So that's about, you know, close to an inch and a half -- between an inch and a quarter and an inch and a half.

Q Okay. Now, I have something that I'd like you to look at to see if it's -- as a demonstrative?

MR. LEAVITT: Would you like to see it, Counsel, I'm about to give it to the --

MR. DOYLE: That's fine. Thank you.

MR. LEAVITT: Okay.

BY MR. LEAVITT:

Q Doctor, what I've given you, is that about the size of an inch

and a half or what --

A That's --

Q -- what you said?

A That's maybe an inch to an inch and a half-ish.

Q Okay. And that -- that would be the size that Dr. Hamilton noted in her record?

A Yes.

Q Okay. And does that demonstrate about the size of the hole -- or the term's defect, right, or hole that was found in Titina's colon when they did surgery on the --

A That --

Q -- 16th?

A That was how they -- that was what they measured it at.

Q Okay. And can you hold that up and show that to the jury?

A So this key ring is roughly that size.

Q Okay. And what happens when you have a hole that size in your transverse colon?

A So if you have a hole this size -- and it doesn't have to be a hole this size, it can be a hole a lot --

Q Okay.

A -- smaller than this. You don't need a hole this size. But fecal material can get outside of the colon and into the abdominal cavity where it doesn't belong. And that's what causes infection.

Q Okay. Very good.

A And causes sepsis as a consequence.

Q Okay. Now, Doctor, in this case, in your report -- I was looking at page 5 -- if you need it to refresh recollection -- I'd like you to list off for the jury the -- to a reasonable degree of medical probability that the care and lack of care, that Dr. Rives fell beneath the acceptable standard of care. K -- double K zero 5, are you. Did you move the --

A I'm hear.

MR. DOYLE: Asked and answered, Your Honor.

THE COURT: Overruled.

THE WITNESS: Okay.

BY MR. LEAVITT:

Q Do you feel that Dr. -- or is it your testimony, to a reasonable degree of medical probability, that Dr. Rives fell below the standard care for intraoperative technique?

A Yes, I do.

Q Is it your testimony, to a reasonable degree of medical probability, that Dr. Rives fell believe -- fell below the standard of care for failure to adequately repair iatrogenic bowel perforations during the July 3rd, 2015 operation?

A Yes.

Q Doctor, to a reasonable degree of medical probability, did Dr. Rives fall below the standard of care in his failure to timely diagnose and treat a colon perforation with feculent?

A Yes, he did.

Q Okay. Oh, sorry. Feculent peritonitis during the postoperative period? Sorry.

A Yeah. So I think this was -- for me, this was -- this is a real shortcoming because one can -- as I said before, one can have a colotomy, you know, that can happen to anyone, I mean, that's a complication that one can get during surgery. The surgeon needs to be able to have the experience to know when things have gone awry and to fix them timely. So there are times when one has to go back to surgery to address a problem before the problem gets out of hand.

And clearly there was a failure to do that in a timely fashion. This should have been diagnosed days and days earlier. The patient should have gone back to surgery when there was an opportunity to do so before she continued to become profoundly septic.

Q Okay. Thank you, Doctor.

And then the last one, Doctor, to a reasonable degree of medical probability, did Dr. Rives fall below the accepted standard of care for poor postoperative management of patient's perforated bowel and result in sepsis?

A Yes.

Q Doctor, did you review the medical expenses and the past medical bills in this case?

A I did.

Q And you reviewed the past medical records and treatment?

A I did.

Q The past medical treatment -- or the medical treatment that she received during that time in the hospital and the records you reviewed -- and I'll go over some of those -- go over those in a minute --

were those reasonably -- reasonable and necessary due to the failure of the standard of care of Dr. Rives?

A In my view, they were. The care that was provided was necessary, yes.

Q Okay.

A And the billing, therefore, was as well.

MR. DOYLE: Your Honor, I move to strike the last part as nonresponsive and there being no foundation.

THE COURT: What was the -- what was the second one? You said foundation?

MR. DOYLE: Right. For his -- for the end of his answer.

THE COURT: Overruled.

MR. LEAVITT: Okay.

BY MR. LEAVITT:

Q Doctor, I'd like to go over the -- just the billing amounts that you -- that you reviewed. And I'd like to -- I'm going to go ahead and write them out. The total past medical bills are as follows: St. Rose Dominican Hospital was $908,033.12. Do you --

A Yes.

Q -- recall that?

A Yes.

Q Then she had another St. Rose Dominican bill, Siena campus, $104,120.04. Does that sound --

MR. DOYLE: Objection. Hearsay and lack of foundation.

MR. LEAVITT: He testified that he reviewed these.

THE COURT: Counsel, can you please approach?

Madam Court Recorder, can you turn on some white noise, please?

[Sidebar at 2:58 p.m., ending at 3:05 p.m., not transcribed]

THE COURT: All right. As soon as the jury comes back, we're sending you out for a break. That's really what we are trying to do. So we'll do that.

But, Counsel, we can't continue until I have my jury back, and then I'll send you out for a break. Okay? Did you all get your juror letters?

Marshal, did you get the jury letters from Tracy yet?

THE MARSHAL: Yes.

THE COURT: Oh, okay. So everyone's -- or you've gone through it.

Okay. We're going out for a break. That's what I was trying to -- I was trying to do the holdup. Sorry. No, but I'm sending everybody out for a break that's -- no worries. We're all good to go.

So Ladies and Gentlemen, it's 3:00. I told you about 3:00 we would get a break. We just were trying to have everyone here so we could send you out for a break.

So Ladies and Gentlemen, we're going to come back at 3:25-ish.

UNIDENTIFIED SPEAKER: Ish.

THE COURT: Thank you. Hey, it's in my name.

Okay. So 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 this trial. You may not read, watch, or listen to any report or commentary of the trial, or any person connected with the trial by any medium of information, including, without limitations social media, text, tweets, newspapers, television, internet, radio. Everything I'm not saying specifically is, of course, also included.

Do not visit the scene 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, of course, anywhere else. Do not do any independent research, including, but not limited to, internet searches, do 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 your deliberations.

With that, go relax, stretch your legs, enjoy the beautiful --

THE MARSHAL: All rise for the jury.

[Jury out at 3:07 p.m.]

[Outside the presence of the Jury]

THE COURT: Okay. And, Counsel, we'll also have you go enjoy your break, as --

MR. LEAVITT: Thank you, Your Honor.

THE COURT: -- my team gets to enjoy their afternoon break.

And the witness understands about the rules with witnesses who are currently in the middle of testifying and not to talk to any of our jurors? They all they can't talk to you. And you can't even offer them a

piece of gum or comment on the weather. So --

THE WITNESS: Yes, Your Honor.

THE COURT: So enjoy. Thank you so very much. It's just a friendly reminder. I'm sure you already knew that, but we play it safe.

Thank you so much.

THE WITNESS: Thank you.

[Recess taken from 3:07 p.m. to 3:27 p.m.]

[Outside the presence of the jury]

THE COURT: Okay. Let's go back on the record. Now, do you wish the witness to be here for this discussion?

MR. LEAVITT: Doesn't matter to me.

MR. DOYLE: No.

THE COURT: Okay. And your basis for -- so counsel, since Defense is saying no, do you have an objection to him not being here?

MR. DOYLE: No. Go ahead. He can leave. I want to make this --

THE COURT: Is our anteroom --

THE CLERK: On the record.

THE COURT: Sure. Is our anteroom open?

THE MARSHAL: I believe it is unlocked. Let me make sure.

THE COURT: Okay. So -- Marshall, where's our jury. Is our jury near the --

THE MARSHAL: No, they're --

THE COURT: They're all the way down.

THE MARSHAL: -- by the [indiscernible].

THE COURT: Okay. So sure. Okay. Outside the presence of the jury in Case 739464. So counsel, right before the break, counsel asked a question, said -- and bill, you said St. Rose. You didn't specify which St. Rose. You said St. Rose, $104,120.04. Does that sound about right? And I'm paraphrasing. It was pretty close to that. The was starting to answer and there was a hearsay objection raised by Defense counsel. The Court asked the parties to come to the bench. The Court then asked you all whether or not that bill was the Exhibit 1, which you all had told the Court previously was a stipulated exhibit.

The parties had told me that it is not in the Exhibit 1, because I guess it is a different St. Rose than what the Exhibit 1 is. So then the Court asked Plaintiff's counsel what would be his response on why it would not be hearsay and then decided it would be a good opportunity to give the jury a break, so that each of the parties could prepare any response that they wanted for the hearsay objection, so Plaintiff's counsel, the question was pending to you --

MR. LEAVITT: Sure.

THE COURT: -- in response to Defense counsel's hearsay objection, why would this document not be hearsay? Actually, I should say you did say the word business records and the Court said what would be your basis --

MR. LEAVITT: Right.

THE COURT: -- of business records, since there's -- so --

MR. LEAVITT: Yes, Your Honor. For one, there's a COR. I'll refer to -- it's Plaintiff's Exhibit 2.

THE COURT: Proposed 2?

MR. LEAVITT: Proposed 2.

THE COURT: And is it proposed? That's why -- that's --

MR. LEAVITT: Yes.

THE COURT: -- a question mark.

MR. LEAVITT: It's proposed.

THE COURT: Okay. It's proposed, so it's not an admitted Exhibit. Okay. Thank you.

MR. LEAVITT: Right.

THE COURT: So it's proposed Number 2. Okay. So there's --

MR. LEAVITT: Proposed Number 2. There's a COR for -- that's signed.

THE COURT: Okay.

MR. LEAVITT: Okay. And the --

THE COURT: So that gives it -- and then you all agreed to authenticity only. Is that correct?

MR. LEAVITT: Yes.

THE COURT: Or was there even an agreement as to authenticity? Counsel for Defense, was there an agreement as to authenticity of the documents or not?

MR. DOYLE: There was no objection to this for authenticity.

THE COURT: Okay. So -- okay, so go ahead.

MR. LEAVITT: Yes, Your Honor. This is a -- the business exception is this. This is a document that was made by St. Rose. I want

to be clear. St. Rose Dominican Siena Campus. Doctor -- excuse me. Dr. Hurwitz has reviewed these. He's been an expert in other cases here in the State of Nevada. He knows what billing is. He's worked in New York, New Orleans, you name it. So to lay foundation for it, he understands these. He sees medical billing, especially with hospitals on a regular basis and he's qualified to talk about.

THE COURT: But does that address the hearsay exception?

MR. LEAVITT: Yes. He's -- I mean --

THE COURT: And is that -- are you having that -- I mean, there is a hearsay objection.

MR. LEAVITT: Right.

THE COURT: So is that -- are you trying to say that that is a hearsay exception to the hearsay objection? I mean, business records is a hearsay --

MR. LEAVITT: Right.

THE COURT: -- exception, but I'm trying to understand how his knowledge of the -- his knowledge of the billing standards in the community is -- goes to reasonable and necessary, right? It doesn't address the hearsay issue raised by the objection or are you saying it does? I'm just trying to keep the distinctions different of what you're trying to say.

MR. LEAVITT: Yes, I believe it does, because it's done in the normal course. This is a COR. There's nothing to say it isn't. And there it is.

THE COURT: Okay. I will let Defense respond, because you

didn't have a chance yet to explain the basis of your hearsay objection. Since you've heard the response, go ahead.

MR. DOYLE: So, if you look at Exhibit 2, page 1, it's entitled a certification of records. It's not a custodian of records certification. And whoever signed this, all I they say is I certify the enclosed photographic copy of the requested billing records has been compared to the original billing records and is an accurate duplicate of such billing records. That would take care of authenticity, but it says nothing about any of the requirements to satisfy the business records exception to the hearsay rule.

THE COURT: Okay. Was there an objection lodged in the individual pretrial memoranda anywhere else to have preserved any objection to Plaintiff's proposed Exhibit 2 that the Court should be considering one way or another?

MR. DOYLE: I believe so.

THE COURT: Did you all look at that during the break, by chance, either of you, so that the Court could address that? Because remember, folks, it is 3:32. Remember you've got this witness and possibly another witness and I'm not sure what your out of town issues are, but it is the time. The Court's more than glad to address your issues, but for your sake, you might want to be cognizant of the time. I was hoping you would all be addressing this during the break.

MR. DOYLE: And we did do an objection that was filed September 26, 2019, 4:45 p.m.

THE COURT: September 26. Hold on. Objection to what?

You filed a couple things on the 26th.

MR. DOYLE: To Exhibit 2. Well, we did an objection to not only the hospital records, but also the billing records, as they, at that point in time, were Bate stamped with a different set of numbers, but --

THE COURT: Okay. So you're saying your objection was preserved, because you --

MR. DOYLE: Yes.

THE COURT: -- appropriately and timely objected? Okay. Is that -- do you disagree with that?

MR. LEAVITT: No, Your Honor.

THE COURT: Okay. I'm just wanting to make sure, so you have -- because I go procedure first and then I go substance. So -- okay, so objection not waived. Now I gotta go to substance. So how do you get over the other aspects, other than authenticity through -- I mean, a certification versus a custodian, the Court doesn't see really a distinction in the State of Nevada that the Courts have really made a distinction with regards to those, because that really goes to authenticity anyway. But how does that get to the -- right. How does is it get to the other aspects, right? Let's walk you through -- walk me through the business records exception, how that falls within it, right?

MR. LEAVITT: Right. Your Honor. I have a solution. I have another expert that's testifying as to whether the bills are reasonable and customary within the Las Vegas community, so --

THE COURT: So you're going to take care --

MR. LEAVITT: So I would like --

THE COURT: -- of all your issues for you.

MR. LEAVITT: What's that?

THE COURT: So you have another expert that's going to --

MR. LEAVITT: I do. I do. So I have --

THE COURT: So whatever you want to do -- I'm just -- the Court's --

MR. LEAVITT: So exhibit --

THE COURT: -- here at your services. What would you like?

MR. LEAVITT: So the Exhibit 1 is in with St. Rose Dominican Hospital of 908,000.

THE COURT: Sorry. Nine -- that --

MR. LEAVITT: Right.

THE COURT: -- amount again please.

MR. LEAVITT: But here's -- again --

THE COURT: Okay.

MR. LEAVITT: -- going to this -- these records are -- unless - because they are authenticated. These are kept within the normal course and scope --

[Counsel confer]

THE COURT: The Court can address whatever you'd like to have addressed.

MR. LEAVITT: There's nothing to say that this wasn't kept, I guess. What we'll do is we'll have Ms. Cook testify to those and we'll move on with this witness.

THE COURT: Okay. So then would you like the jury to be

called back in? What would you like?

MR. LEAVITT: Are you ready for the jury?

MR. DOYLE: We are ready for the jury.

THE COURT: Okay. Then since you're not wishing the Court then to make any ruling on that. Is that correct? At this juncture, you're not asking the Court to make a ruling. Is that correct?

MR. LEAVITT: That's correct.

THE COURT: Okay. I just wanted -- if there's anything you need me to make a ruling on, let me know.

Marshall, let's bring the jury back in. Thank you so very much.

MR. DOYLE: Can the doctor come back in?

THE COURT: You want the doctor back on the stand first?

MR. LEAVITT: Yes.

THE COURT: Thank you so much. Yes. Appreciate it.

MR. DOYLE: May I ?

THE COURT: We have the jury coming back in. What are you doing?

MR. DOYLE: Well, we had agreed to take down that piece of paper from Dr. Willard [phonetic] the other day.

THE COURT: Oh. Yeah. Sure. Just flip it over. Why don't you just flip it over? He might need it again. So, yeah, just flip it over, so it's down. Does that work for everybody?

MR. LEAVITT: Yeah.

THE COURT: Okay.

THE MARSHAL: All rise for the jury.

[Jury in at 3:38 p.m.]

[Inside the presence of the jury]

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

THE COURT: Appreciate it. Welcome back, ladies and gentlemen. Hope everyone had a very nice break. As you recall, on the examination of the same witness. Witness understands he's still under oath, even though we had a break, so counsel, feel free to continue with your questioning. And I believe the last question, were you withdrawing that last question? So the Court may not rule on the pending objection. Is that correct?

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay. No worries. Thank you so very much.

MR. LEAVITT: Thank you.

DIRECT EXAMINATION CONTINUED

BY MR. LEAVITT:

Q Okay, Doctor, I just have a few more questions for you, a few clarifications hopefully here. Doctor, on this type of surgery, how often does sepsis occur?

A It really should be a very rare event. I mean, it -- particularly a hernia operation, you really shouldn't become septic after.

Q Okay. How often does it occur, sepsis, postop day one?

A Well, I mean, that would be -- it's extremely unlikely, so when it does occur postop day one, obviously you have to be very worried.

Q And after pneumonia is ruled out or pneumonitis --

A Well --

Q -- where do you look next?

A -- well, that's the issue, so again, you know -- and I've said this before, but if you have a patient with -- that just had a surgery complicated by a colotomy or two, then you have to look to the abdomen as the source. You really don't have -- you know, you can check the urine, right?

So you can look at the urine to make sure there's not a urinary infection. That would be reasonable. That could be a concern postop, you know, in the first few postop days, particularly if a catheter was placed in the bladder, so that would be a concern.

Once you've ruled out a urinary infection, you've ruled out a pulmonary lung infection, typically we also check blood cultures, so we draw blood and we see if there's any bacteria in the blood. That's not often very fruitful, because patients get antibiotics and so we don't often see positive blood cultures, but once you've done those things, you know, you have to suspect the abdominal cavity.

Q Very good. Doctor, earlier I asked you when you reviewed the deposition in Dr. Rives and the Vicky Center [phonetic] case, you said it didn't change your opinion. What do you mean by that?

A Well, the case didn't change --

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

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

THE WITNESS: The case didn't --

THE COURT: On both basis.

THE WITNESS: Sorry.

THE COURT: Sorry. I should say both cases, so we're clear.

THE WITNESS: The case didn't change my opinion about the conduct of this operation, but what it showed me was -- what it illustrated --

MR. DOYLE: Your Honor, I'm sorry to interrupt, but it's now become a narrative and I have the same objections.

THE COURT: The Court's going to --

MR. DOYLE: And it's a new opinion not expressed at the time.

THE COURT: Okay, well, let's break it down.

MR. LEAVITT: Okay.

BY MR. LEAVITT:

Q Let me ask you --

THE COURT: Since it's being rephrased and withdrawn, then the Court's not going to rule on the pending objection, so counsel can you break that down into two questions, I guess, or however you're going to break -- are you withdrawing it or is the Court ruling? What do you wish the Court to do?

MR. LEAVITT: I'm withdrawing, and I'll rephrase it. Thanks, Your Honor.

THE COURT: Okay. Then the Court need not rule. Go ahead.

MR. LEAVITT: Thank you, Your Honor.

BY MR. LEAVITT:

Q Doctor, you stated it didn't change your opinion when you reviewed Dr. Reeve's deposition in the Vicky Center case. Is that fair?

A Yes.

Q Okay. What did you mean, it didn't change your opinion?

A I had already come to the conclusion that the way in which the operation was performed, and the postoperative care was below the standard of care, but was it also enforced for me is that --

MR. DOYLE: Your Honor, and I'm sorry. Objection. It's become a narrative, and relevance, and 48.035, and it's a new opinion.

THE COURT: The Court will overrule on narrative. Overrule, based on what the Court's heard so far, 48.035 and the Court's not -- I have to overrule. It's not heard under NRCP 16 issues at present, so --

BY MR. LEAVITT:

Q Will you please continue, Doctor?

A The fact that a very similar circumstance occurred just five months --

MR. DOYLE: Your Honor, I'm sorry. It's clearly violative -- well, it's become narrative. It's nonresponsive. It's a new opinion not expressed at the time -- in any report or deposition. It's irrelevant and it's 48.035 and there's no foundation.

THE COURT: Okay. Three additional words have been stated since the Court's last ruling. The Court would have to overrule the narrative, because those three words are not going to make it narrative. The three additional words would not make it 48.035. Three additional words would not make it lacking foundation. The Court would have to

overrule that, and the Court would also have to overrule the additional objection with regard to -- 805 and with regards to it being a new opinion, since at this juncture, those additional three words since the Court's last ruling, the Court can't say that it is a new opinion or violative of NRCP 16. No one's presented this Court with the opinion so that the Court could determine that.

BY MR. LEAVITT:

Q Doctor, are you offering a new opinion at this point?

A I don't think so, no.

Q Okay. So same question. What did you mean by your statement?

A In the Center case, there was a perforation. There was sepsis that was initially attributed to aspiration and it took 11 or 12 days to ultimately discover that there was an intraabdominal process that was causing the infection. And that was just five months earlier.

So the lessons of that case clearly weren't applied here and so the similarities are striking and -- in both cases. For instance, there significant harm ultimately to the lower extremities. It's -- there's a clear correlation. There's clearly a lesson that was not learned from the Center case that would -- that had so many similarities.

Yes, there were some differences to be applied here. And for me, that -- having had that recent experience even increases the negligence, because you didn't learn anything. So I just don't -- it's surprising to me that something like that with such similarities can repeat itself in such short order, where there's an intrabdominal process that's -- it's

attributed to a pulmonary process, even though there's no evidence of a pulmonary process and then ultimately it turns out there's an intrabdominal process as the source.

There's this long delay in identifying this, so it leads to sepsis and a bad outcome. So that's -- so it didn't change my opinion about the case. I already made an opinion, but it certainly increases the negligence in my view.

MR. DOYLE: Your Honor --

BY MR. LEAVITT:

Q Your --

MR. DOYLE: -- move to strike as irrelevant, 48.035 and opinion not -- a new opinion not expressed at the time of the deposition or in any of the reports.

THE COURT: Counsel can you please approach, and can someone bring your report?

[Sidebar at 3:46 p.m., ending at 3:59, not transcribed]

THE COURT: Instead of having you sit there, we're going to send you out for a brief few moments. I hope it's only going to be a few moments. Marshall will let you know, but it's going to be about ten minutes.

So 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 this trial. You may not read, watch or listen to any report or commentary of the trial, any person connected with the trial by any medium of information, including without limitation

social media, text, tweets, newspapers, television, internet, radio.

Anything I've not stated specifically is of course also included. Do not visit the scene of the events mentioned during the trial. Do not undertake any research, experimentation or investigation. Do not do any posting or any communications on any social networking sites. Do not do any independent research, including but not limited to internet sites. Do 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, we wish you a very nice break. We'll get you back in as quickly as possible.

THE MARSHAL: All rise for the jury.

THE COURT: Thank you so very much. Okay.

[Jury out at 4:00 p.m.]

[Outside the presence of the jury]

THE COURT: Counsel, I need that report back.

MR. LEAVITT: Oh, I'm sorry, Your Honor.

THE COURT: Thank you so much. Okay. And I need to know. Do you wish the witness to be present during this discussion or not to be present? The Court's fine either way.

MR. DOYLE: Not present.

THE COURT: Thank you. Please do let me finish my sentence before being interrupted. I would definitely appreciate it, so we just have a clear record, because it's very hard for a transcriber when two people are talking at the same time. I would appreciate it.

Since the attorney requested of the witness not to be

present, would you mind either enjoying the anteroom or the hallway? Whatever your leisure is. Thank you so very much.

Okay. So here's what the Court is going to remind the parties of. This Court specifically told the parties prior to the commencement of trial and multiple times and reminded you also at the calendar call, like I tell all counsel, that if you all want anything to be outside the presence of the jury, i.e., not at bench -- and I reminded you that bench is not part of the official transcript, you need to let me know at the beginning, that you can't do it part way through, can't do it at the end, can't do it as the Court is giving you the ruling.

Has to be at the beginning. The Court would be glad to accommodate you and if you want it done right then and there, the Court's glad to accommodate you. Or if you need it a different time, depending on that it is, at the Court's discretion. Sometimes the Court may feel it needs to do it immediately. Sometimes may do it at a later time. But at -- despite the Court saying that multiple times, I am going to have to remind and sorry, Defendant, I normally try and just say counsel in general to make it very neutral, but since it has been you each time -- and the Court -- and I am using -- only reason why I'm using a little bit louder voice right now is because in the past, you've told me you can't hear me, despite the fact we have offered you hearing assisted devices.

So I'm making sure it is clear and that you can hear me. That's the only reason why my voice is being a little bit louder, so that we don't have that confusion. Okay. So despite that, while the Court was in the midst of starting to give it -- was giving its ruling, then

Defense counsel said it wanted it to be done outside the presence of the jury. So the Court is accommodating that request, but -- and this is at least the second time today that has happened. And the Court cautioned the other time, but I'm doing it once again.

But this is not appropriate. It is not fair to do to our jury. It's not fair to Plaintiff's counsel. The Court made it very clear. Same ground rules for both sides. Court would be very glad to do anything. I told you this over and over, reminded you again before voir dire. The Court used the same things it says, told you I don't have a crystal ball. I don't know if you want something outside the presence. I merely used the same examples over and over, that you to let me know, but you can't do it midway through, because that's not really fair, because we've already gone through the analysis and that is multiplying the proceedings. I didn't go through the whole analysis of why those examples, because as experienced litigators, I presumed you all knew the reasonings, but I did give the same fair and equal rules to everyone.

So despite that, it's perfectly find and fair that there was a request, so I am accommodating that request. So as I started to give my ruling, here's what I understood. There was a question stated. The question -- the witness then went through his entire answers and then pause, then there was an objection for a motion to strike the answer. Okay. Motion to strike the answer. Then the Court, since that was a motion to strike the answer, the Court had you both approach and I asked that you bring me -- because it was saying it was a new opinion, a new opinion of Dr. Hurwitz. Okay.

Here's what the Court has to take into account, was what the Court said. The Court asked the parties specifically to bring up the expert report or reports. I didn't know if there was one or two, of Dr. Hurwitz. The Court's intention with that regard was of course multifold, because this Court is specifically aware and all parties are fully aware, because you all were here, and you all did the motions and you all were here, and everyone testified who wanted to testify in a multi-day proceedings regarding the sanction issue. But part of that sanction issue was the failure to disclose the *Vicky Center* case.

And the reason why the Court needed to have not only the expert report -- because this is not a usual circumstance under NRCP 16, expert disclosure rules. *Fiesta Palms* informally as the case is known with regards to experts and expert deadlines. And remember, this Court is giving benefit of the doubt, both old and new under NRCP 16, okay? But this is unique in the situation that the Court needed to see the date in which there was the expert reports, reports of Dr. Hurwitz vis a vis when those were in relationship to when Vicky Center's name was disclosed to Plaintiffs consistent with the Court's rulings from the motions, which discussed September 26th, October 7th, October 10th.

I may be off a date. It was 26 -- it was Monday the 7th. Oh, the 10th. Yes, I'm correct. Okay. So -- and then the pre-instruction that was given after, once again, extensive oral argument, consistent all there with -- once again, no one has told me that Dr. Hurwitz had some crystal ball, would somehow be omniscient and know about a case that was intentionally not disclosed. And as the Court's ruling that that was not

disclosed, due to the conduct of Defendant and Defendant's counsel.

So you can't hold -- in this unique circumstance in this case only, you can't hold Dr. Hurwitz responsible for not addressing a case and how that may impact his opinions, when that case was not provided to him, not due to the conduct of Plaintiff, but as it was found after an evidentiary hearing, extensive briefing, extensive oral argument, everyone having a full opportunity to call whoever they wished do to it, multiday proceeding. It was found to be due to the conduct of Defendant and Defendant's counsel.

So his report of November 13, 2018, obviously predates the date in which the information on the Center case -- now, the Court is cognizant that Dr. Reeve's deposition was that, but that's when you had the word Sinner [phonetic], not Center. And so then you had the follow up. The follow up was December 19th, the other report, 2018. Once again, prior to the appropriate follow up disclosures, right, which you all have heard significant testimony today, occurred in September 2019. So unlike a standard expert disclosure, you have a unique circumstance here and the Court has to deal with this circumstances in this case, not in a hypothetical general case with initial disclosures.

Taking that into account, the Court then asked the parties to also provide the deposition of Dr. Hurwitz. Dr. Hurwitz' deposition, this Court had understood by agreement of the parties, presumably whether it was EDCR 7.50 or you even just didn't even know it was EDCR 7.50, but you took the deposition outside of discovery, so outside of July 24th, but presumably, at least you all represented previously at a hearing that you

all had agreed to take Dr. Hurwitz' deposition outside of standard discovery, so it was an agreed upon deposition outside of discovery, was taken on 9/18/2019.

So then the Court asked to look at the deposition to see if Vicky Center was discussed in any manner, because it has been previously represented the Vicky Center case at least had been discussed in some regard. The Court hadn't seen it, so it didn't know the extent of the regard, but it had been mentioned or discussed the Court -- don't take any verbiage from the fact that I use the word discuss versus mentioned. At least so I -- whichever way you would like to phrase it, but at least had -- that name had come up in Dr. Hurwitz' deposition. I wanted to see how it had come up, how many times it had come up, in what context it come up, so I had a full understanding how that was mentioned in order to make a well-reasoned ruling in this motion to strike.

I was provided with the deposition of Dr. Hurwitz and I gave both parties the opportunity to provide me any citations to Vicky Center or Sinter [phonetic]. You all said there was -- showed me the index, said pages 5 and page 7. Pretty much appeared that the parties agreed that the pages 5 and 7 was two pages that the Court needed to look at and that it was nowhere else in Dr. Hurwitz' deposition. In looking at particularly page 7, there is a -- let's see. Let's go to the discussion about depositions. Okay.

It says -- so it starts on the bottom page 6.

"These various depositions that you told me about," line 23,

"did you take any notes when you read them?"

Answer, "No." That's line 25.

Top of page 7.

"Did you mark or highlight in any form or fashion the transcripts when you read them?"

Answer, "No."

Question, "What was your understanding why you were given Dr. Rives' deposition in this other case?"

Answer, "The reason was to demonstrate his interpretation of the events leading up to the discovery of the gastric perforation as a pulmonary process."

Line 9.

Question, "Well, did you find any striking or important similarity," -- and then it has a dash-dash, "similarities or dissimilarities in that Center deposition question?"

Answer, "To be fair, I didn't," -- there's a dash-dash, "I didn't," there's a dash-dash -- "I had already reviewed everything else and it didn't really change my opinion."

Question, "Okay. We marked as Exhibit A," -- dash-dash -- there's a paren -- Exhibit A identified, end of paren. "17, Mr. Doyle question. Just tell me generally what is in Exhibit A."

Answer, "So you asked for all of my correspondence with Mr. Hand and so I provided that. A series of email's mostly," dash-dash -- "almost entirely around, you know, reviewing the records and getting in contact with them, so there's nothing of significance in there."

And then it goes into, "I also provided by CV, as you requested. A list of questions in which I've testified as a," dash-dash, "as an expert in my depositions. And I've also provided," -- this is now on page 8 -- "And I've also provided, I believe in here somewhere" -- dash-dash -- "was my bill to," -- dash-dash -- "was my," -- dash-dash, "bill for services," -- dash-dash and then question.

So it appears that that was the end of the discussion with regards to Vicky Center, because I've now gone to line four page 8. Would both counsel agree that that was the end of discussion with regards to Center? Counsel for Plaintiff?

MR. LEAVITT: Yes, Your Honor.

MR. DOYLE: Yes.

THE COURT: Counsel for Defense? Okay. So that was the realm of what the Court had with -- of course, the Court knowledge of the various hearings that have gone on regarding this, the testimony that's all gone around this.

Okay. So here was the Court's inclination after hearing the motion to strike argument by Defense, after hearing Plaintiff's response and the question and the prior testimony of Dr. Hurwitz and fully in this case having to take into account the unique circumstances in this case, because of the failure to disclose the Center matter, which per se should have been disclosed timely and appropriately -- well, let's just say way before experts disclosures. Whether you want to say it should have been in -- back in 2016.

The Court's not going to say necessarily there, but clearly

there's already been a finding. Dr. Hurwitz could not have added something that he did not have to the benefit of, due to the failure of Defendant and his counsel to comply with the rules, which they were required affirmatively to comply with not only initially but also because there had already been interrogatories, an affirmative duty to supplement for over a year, affirmative deposition testimony, affirmative responsibilities to do those interrogatories, because they already knew the issue had come up at the deposition.

So we're not going back to everything that the Court said previously, but there is a unique circumstance here. So the Court's inclination, based on these unique set of facts -- regards to the motion to strike, which the Court was starting to state was as follows. It was to grant in part and deny in part. The Court was inclined to deny the analysis and basis consistent with what had already been asked, so fully open and fully discussed in the deposition what Dr. Hurwitz said consistent here with in his testimony in trial, his explanation, his interpretation of the events leading up to the discovery of the gastric perforation as a pulmonary process, which really gets through most all of his answer today on the stand.

The part that the Court was inclined to grant of the motion to strike was he made a comment it's more negligence, okay? It's -- you know, he said words to the effect of it was more negligence. It was -- so that, quote, summation-type language, rather than his explaining the analysis of the similarities, where he said both there were similarities and dissimilarities between the present case and the Center case, was

another way to phrase it. The Court was going to allow that, because that would be factual. That was specifically brought up.

It appears it was brought up by Mr. Doyle, because when the Court looked -- is that correct it was brought up -- was that question on page 7 by you, Mr. Doyle?

MR. DOYLE: Yes.

THE COURT: Okay. So appeared it was brought up by Mr. Doyle at the deposition. That's what I had understood at bench, so I was just confirming that. And so it was explored to the extent that the parties wished to explore it at the deposition. Can't say that it was brought up by Plaintiffs. It was brought up by Defendant. He then said what the reason was to demonstrate his interpretation of the events leading to the discovery of the gastric perforation as a pulmonary process. Because that's what he explained it was. It could have been further examined at his deposition, if anyone chose to do so.

It couldn't have been disclosed earlier prior during the discovery process, because Defendant and his counsel's failure to comply with their specific obligations Rule 11 NRCP 16, 26, 37, EDCR 7.60 for the sanction component. I could keep going. So all of those affirmative obligations to have done so. And also, the failure to supplement, which is also inherent in what the Court already said.

So to give an explanation, similar to which he gave in summary fashion on -- during his deposition, saying the same thing here, his testimony here in court, although it seems -- okay -- that the Court would find appropriate the summation concept is saying, so

therefore he's saying it's more negligent or words to that effect.

That's what the Court would strike, because the Court would see that more as a summation, as I really don't see it as a quote, new opinion, but I think it's close enough that in fairness, the Court should strike that, because I think that is the fair balance between this unique circumstance in this case that does not occur in a standard case with disclosure timing for experts. I said at bench that the Court was going to say what its opinion was going to be and then give each side a minute to give a response, because you had a change to both fully argue it at bench.

So just consistent with what the Court said, I'll give you each a minute. Counsel for Defendant, you raised the objection. You get to go first.

MR. DOYLE: Thank you, Your Honor. In the deposition, the witness was asked if there were any striking or important similarities or dissimilarities in the Center case versus the Farris case and the witness said he didn't see any striking or important similarities or dissimilarities.

THE COURT: Can you point that out where he said that?

MR. DOYLE: "Well, did you find any striking or important similarities? Similarities or dissimilarities in that Center deposition?"

He said, "To be fair, I didn't. I didn't."

In other words, he didn't find any similarities or dissimilarities in the Center deposition. And so there was no reason to explore further with him those opinions. And now today, he went through a litany of similarities, a litany of similarities that apparently to

him are now significant and he went through that litany of similarities and came to the conclusion that he did that the Court is inclined to strike. But perhaps we're reading this answer differently.

But the witness said -- which there's no doubt he had the Center deposition at the time of his deposition in the Farris case. He had read, he had reviewed it and he had considered it. And he did not find any similarities or dissimilarities and now today, we have a whole long list of similarities leading to his conclusion. This is new opinion that was not expressed at the time of his deposition, so I object to it on the basis that it was not disclosed at the time of his deposition, in addition to the other objections, the foundation, the relevance, the 48.035. But I think the most important one is this is a brand new opinion.

THE COURT: Okay. The Court -- just to be clear. This Court in reading it, he said -- the question phrased by Mr. Doyle, as this Court saw in the deposition was striking or important similarities was the first prong. So this Court, in looking at it and how the question was phrased today, does see that that falls within -- and then says similarities and dissimilarities, so it's vague enough that this Court sees that these are explanations of -- that doesn't see it the way that you just read it. I saw that you read part of that question, not the entirety of the question, so this Court doesn't know what this witness said. It wasn't asked in the exact same way today as it was asked at that deposition, and so the Court had him explain about reasons.

Now, the Court didn't have him explain. Plaintiff's counsel asked the question, so there is a reasonable understanding with regards

to this. And so the Court, in reading this, I wasn't at the deposition, but when I see the words striking similarities and --

MR. DOYLE: Striking or important.

THE COURT: Can I please finish? I was going to read the next word. Please give me a second to finish without interrupting, so I can read it in its entirety, please. Okay? And we have a clear record. Striking or important -- dash-dash, similarities or dissimilarities in that Center deposition is broad enough that it's confuse -- potentially confusing to a witness of whether you meant important or striking or just similarities or dissimilarities. So the Court has to take it in that broad sense. The Court doesn't know how the witness took it.

The Court can only read it the way it is typed up and that seems to give four different options and that's why the Court's reading it the way I have to read it, because I wasn't there. I wasn't the witness. I have to read it the way an average, normal person would read this, in the most neutral sense and that's what the Court is doing. Appears to be four different options, okay? And then I have to -- so that's why the Court's analysis is the way the Court's analysis is. How would a reasonable person in reviewing this potentially review the answer and his answer thereto. So just so that you have an understanding. I was reading the entirety of the question in.

So that's why I read everything starting at the bottom of page 6 all the way through part of page 8, so that I wasn't reading just selected excerpts or soundbites. I was reading prior to the page you all stated, plus going all the way to page 8. So now you've raised some

new objections that you didn't mention at bench and so now I'm going to have to address those new objections.

Okay. So you've now raised -- let's go -- let me go through. You've added some new ones. You added again -- walk through your list of the ones you're now stating, so I can make sure I take care of all of them, because some of those are not ones that you've raised before, so let me make sure I have the totality of every one that you're raising, please.

MR. DOYLE: Relevance.

THE COURT: Okay.

MR. DOYLE: 48.035, in particular, the time that we're now going to spend in this trial defending his care in the Center case and explaining to the jury in fact how the Center case was quite dissimilar to the Farris case, contrary to what this witness has concluded. So it will be necessary to go through the Center case and the evidence in that case and different expert witnesses and their opinions to show the dissimilarities between these two cases, contrary to what Dr. Hurwitz says are the similarities.

THE COURT: Okay.

MR. DOYLE: So that's going to take a lot of time.

THE COURT: Did you ever present that to the Court until just this minute?

MR. DOYLE: No, because the evidence was not in until just this minute.

THE COURT: Okay. And you had the benefit of the

deposition, because you took it. There was no motions before this Court at all on OST or anything like that, correct?

MR. DOYLE: Motion to what?

THE COURT: Okay. I just -- I wasn't receiving anything and I just wanted to make sure that you didn't maybe file something again in front of the discovery commissioner that I'm not aware of. That's why I'm just asking.

MR. DOYLE: I was there. I took the deposition.

THE COURT: Okay.

MR. DOYLE: I understood his answer in a plain sense that he said in Center there were no important or striking similarities or dissimilarities. There was no reason for me to think that I needed to file a motion on shortening time or any other reason. For what?

THE COURT: Okay. So there's no -- I'm just -- I'm trying to make sure that there's nothing something that you say that was outstanding that wasn't ruled upon, counsel. That's all I'm trying to get at. This Court tries very hard to rule on things immediately, efficiently and effectively on every single thing you present, as you notice as soon as you raise things, okay? So I just wanted to make sure there wasn't something. So okay, 48.035 --

MR. DOYLE: So it's the undue consumption of time. We're going to have -- the probative value is substantially outweighed by the prejudice to Dr. Rives, by introducing this evidence. It's likely to lead to confusion of the jury, now that they're going to have to sort through and discern two different cases, where the medicine is in fact, quite different.

THE COURT: Okay.

MR. DOYLE: Perhaps the only similarity is the outcome of two patients who had developed a problem in their lower extremities.

THE COURT: Okay. And relevance was your other objection. Was there any others that you added?

MR. DOYLE: There was no foundation laid as to the similarities, before the witness was allowed to testify. And I think -- well, that's --

THE COURT: Okay.

MR. DOYLE: -- that's what I have.

THE COURT: Okay. So with regards to the objections and the analysis that was raised after the Court ruled, those would be untimely, and they would be waived. Nevertheless, the Court's going to address -- the Court doesn't see how this would be a foundational argument, because based on the fact that parties agree he read it. It was a question asked by Defense counsel in his deposition that was the predecessor of the question that was raised and there was no objection or any striking or any request at the deposition for him to go into this. And it was consistent with what was asked at his deposition. And then with regard to what the Court said previously of the unique aspects of this case, I incorporate without restating it all here.

Relevance. I -- here, it has a relevance aspect, because here you have this issue is remember, there's a pre-instruction here, right? That -- have the pre-instruction concept that it would have been disclosed, other than you have potentially the jury has to evaluate, right,

whether or not it may have been harmful, the failure to disclose. That's in this unique case has a relevance component that normally wouldn't be in other cases. Plus, you both have used Center in various aspects up and to this moment, so you have brought it into the case in a variety of different ways, so you have made it relevant, okay? So independently of that.

Next, as far as time consumption, time consumption that you all -- that counsel has brought forth, although this has come and I do think it's untimely, as I've stated. The additional arguments is the Court doesn't see why that necessarily would raise any time consumption issues is because this has already been brought that the issue here can easily -- this is just general cross-examination questions that you'd ask in any event, cross-examination. And it's the type of examination you would have been fully on notice, because you raised the issue at the time of the deposition and could have easily prepared for this for purposes of this testimony, particularly since you also knew that Ms. Center was noticed as a witness.

Now, you objected and the Court's there on an objection. The Court's not going to give any advisory ruling, but the fact that this was coming up, you knew, because at this time, even the time of the deposition, you already had the sanction motion in front of you for dispositive striking answered motion on the very *Center* case. So to think that it somehow wasn't relevant to this case, or that this issue wasn't coming up, in this unique circumstance from a pure chronological standpoint, the Court doesn't see how that argument has merit in this

case, okay?

And given the opportunities that everyone's had and the number of things that you all -- counsel has provided without any notice, I don't see how this is going to take any more time, rather than all the other things that you all have taken time of this jury, because of your failure to comply with all of the various rules. And that's really what's taken time from this jury and taken away from this trial. This can be handled in very, very short order, okay?

So Plaintiffs' counsel, your response to the Court's inclination?

MR. LEAVITT: Your Honor in res --

THE COURT: Or the Court's -- go ahead.

MR. LEAVITT: Oh, sorry. In response to the Court's inclination, the Plaintiff's fine with that. We can remove -- even if the Court would like to instruct, the more negligence part is -- instruct the jury to disregard that part of it.

THE COURT: Okay. So there's a couple ways that that could be handled. That could be handled right now, that I could ask Madam Court Recorder to try to find that language at the end of -- because it was the very end of his statement before the motion to strike was made and you all can agree what that language was, because I was paraphrasing the more negligence. It wasn't exactly what he said, but I was paraphrasing. You can agree. Then the Court can make its ruling. Or B, if you would like to -- are you ordering a disc or is somebody ordering an expedited transcript?

MR. DOYLE: I've ordered a disc.

THE COURT: Okay. So if it's a disc, then the other alternative is, what you can do -- and there's a third alternative. Third alternative is you all choose something different that you agree upon. So -- but second alternative is you can wait closer to the time of jury instructions and you can have something typed out from just that section, right, of what it is that -- what the jury can consider of his testimony and what needs to be excluded, pursuant to a Court order, if you prefer something like that.

Like I said, there's a lot of different options. Option three is something else that the parties wish that you agree upon. And there may be a fourth as well. Third is the catchall of something else you all agree upon. The second option is just kind of a creative way that if you all prefer not to address it right now and you want something different -- sometimes parties like things specifically in writing to juries. Sometimes parties don't. It doesn't have to be a jury -- you know, it can be sooner. Doesn't have to be at the time of jury instructions. I'm just trying to think of some creative ways that might meet the party's needs, so --

MR. DOYLE: I would like the motion granted in part and denied in part while the witness is still here in court testifying.

THE COURT: Okay. Does that meet your needs as well, Plaintiff's counsel? That would be the standard way, unless you all really wanted something different and creative.

MR. LEAVITT: Yeah. That's fine, Your Honor.

THE COURT: Okay.

MR. LEAVITT: We just want to move on.

[Court to Court Recorder]

THE COURT: Okay. Do you all want to take a moment now? Moment being a euphemistic term, because it'll take more than a moment. Would you like Madam Court Recorder to go off the record for what it takes to try and find the very end of his testimony to see what his last words were? You all agree it was kind of like his last couple words, right?

MR. LEAVITT: Can --

MR. DOYLE: I'd like to hear the whole answer, if that's possible, because I think it's woven through the answer, just not at the end. That's what I recall. I could be wrong.

THE COURT: Well, it's -- from a time period standpoint. What, counsel for plaintiff your viewpoint -- let's -- be heard. And I'm going to allow two people here, because realistically, this is -- you know, this an issue. This is not -- this is an issue if you both were at bench, you both would be able to discuss it. We've had multiple people in the past. When they had three attorneys at other hearings, they all got to talk, so in fairness, you get to talk on this, because you don't have a jury here, so I don't have a one-horse-one-rider issue.

MR. JONES: I'm just trying to see if we can just resolve it right now, so that we can just move on and quickly get him off.

THE COURT: The Court's open to whatever you all what to do.

MR. DOYLE: Well, I'm not going to finish my cross-

examination anytime soon and we probably have 45 minutes of questions.

THE COURT: Oh. These are the juror questions, just to let you know. So what would you all like to do?

[Counsel confer]

MR. LEAVITT: We're probably going to have to dismiss the jury, but I need to ask my witness when he can come back.

THE COURT: Okay.

MR. LEAVITT: It may be in the time the Defense has their --

THE COURT: All right. It doesn't have -- if you all don't wish to do it today and you wish to do it while he's still on the stand a different day, that might be another solution. Like I said, the Court's open to various solutions that meet the party's needs. I'm just asking you what meets your needs to get it taken care of. The Court's going to -- let's put it this way. The Court turns its inclination, obviously, into the ruling. That's the Court's --

MR. LEAVITT: Right.

THE COURT: -- granted in part and denied in part, consistent with what I said. The only point of pure clarification is to get the exact wording of what I have phrased the term more negligent -- you know -- so issue more negligence, et cetera to -- applied here. So that's the only point of clarification I need to get for the denied part, because -- I mean, excuse me, the granted part, because -- I mean, excuse me, the granted part, because that way I have to instruct the jury to disregard in some manner agreeable to the parties. If not agreeable to the parties,

then the Court's going to pick a way to do it.

MR. LEAVITT: Okay.

THE COURT: So at this juncture, do you want to go off the record and see if she can find the excerpt or what do you want to do? Because right now we're on the record just -- and you don't have a jury here and so what do you want to do? Because sitting here just not doing anything is probably not the best use of your time --

MR. LEAVITT: Right.

THE COURT: -- unless that's what you want to do. It's your trial.

MR. LEAVITT: That's fine, Your Honor. We can go off the record and --

MR. DOYLE: See if we can find it.

MR. LEAVITT: -- and see if she can find it.

THE COURT: Okay. Madam Court Recorder, would you mind going off the record and see if we can do that? Appreciate it. Thank you so much.

[Recess taken from 4:32 p.m. to 4:36 p.m.]

[Outside the presence of the jury]

THE COURT: Okay. We're back on the record outside the presence of the jury. The Marshal went to go get the jury. So counsel, here's what I understand. I'm going to let Plaintiff say what you're planning on doing. The Court made a ruling outside the presence of the jury. The Court's ruling was with regards to the motion to strike the Court is granting in part and denying part. The Court is granting it all to

the procedural analysis. The Court is granting it to -- I'm going to phrase it this way.

To the extent that there was a summary statement that referenced something regarding negligence, like more negligence, additional negligence or words somewhat to that effect, that is the only part that the Court is granting on the motion to strike. The Court is going to find that language through the Court Recorder and then we'll address that when this witness is on the stand at some appropriate point to notify the jury with regards to that ruling. I'm -- if you all wish, just one second. If you wish, I can tell the jury at this juncture, it's granted in part and denied in part and they're going to get a clarification later or I can address it later in totality.

What would the parties like the Court to do?

MR. DOYLE: The former.

THE COURT: Does that work okay?

MR. LEAVITT: That's fine, Your Honor.

THE COURT: Okay. Then that's what the Court's going to do. Thank you so very much.

MR. DOYLE: Thank you.

THE MARSHAL: All rise for the jury.

[Jury in at 4:37 p.m.]

[Inside the presence of the jury]

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

THE COURT: Do appreciate it. Welcome back, ladies and

gentlemen. Okay. Right before the break, if you recall, there was an objection raised by Defense with regards to the last answer of this particular witness. Outside the presence of the jury, the Court made a ruling. The Court made a ruling that it was granting in part and denying in part. However, instead of keeping you out in the hallway, by the agreement of the parties, the Court's going to give you a little bit further clarification on that probably on Monday, I hope. If not, at a point when this witness is still on the stand, you'll get a further clarification on that.

But we're just going to move forward with the next questioning of this witness, okay? So I'll give you further guidance. Okay? Thank you so very much. So make a little mark, if you put that last answer in your notebook, so that you can go back to it, if I need for that clarification, okay? Thank you so very much. And at this juncture, counsel for Plaintiff, would you like to continue with your next question or what would you like to do, counsel?

MR. LEAVITT: Your Honor, Plaintiff passes the witness.

THE COURT: Okay. Defense counsel, feel free to start -- commence your cross-examination.

MR. DOYLE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. DOYLE:

Q Dr. Hurwitz, in the Center case, are you aware that there was a professor from Stanford, who offered the opinion that all of Dr. Rives' care in that case was appropriate and within the standard of care?

A No.

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

THE COURT: Okay. The Court's going to sustain the objection, because it's not presented to this Court.

MR. DOYLE: I simply asked him if he was aware.

THE COURT: The Court's ruling stands. Feel free to ask your next question.

MR. DOYLE: Okay.

THE COURT: Thank you so much.

BY MR. DOYLE:

Q Have you been made aware of any of the expert witnesses, who were retained and offered opinions on behalf of Dr. Rives?

A No, I haven't.

Q Were you aware of any of the treating physicians, who gave opinions in the Center case about their care and whether there was or was not aspiration?

A No.

Q Dr. Lynne [phonetic]. Does that name ring any bells, from reading Dr. Rives' deposition?

A No.

Q When you read Dr. Rives' deposition in the Center case, you became aware that aspiration was in the differential diagnosis for the cause of Mrs. Center's sepsis, correct?

A Yes.

Q And you're aware from reading his deposition that the aspiration remained in the differential diagnosis for quite some period of

time?

A Yes.

Q Now, in the Center case, the surgery that Dr. Rives performed is called a paraoesophageal hernia repair, correct?

A Yes.

Q A paraoesophageal hernia is where a portion of the stomach comes up above the diaphragm, correct?

A Yes.

Q And while a paraoesophageal hernia has the word hernia in it, it is a different kind of hernia than an abdominal wall or ventral hernia, correct?

A True.

Q A more complicated surgery?

A In some cases, yes.

Q Do you perform paraoesophageal hernia repairs?

A I have. I don't presently.

Q When did you last perform a paraoesophageal hernia repair?

A Probably five years ago.

Q And so --

THE COURT: Either we're going to ask you there to lean forward, or if you can bring the microphone a little closer to you, you're getting a little -- just make sure we here. The microphone moves closer to you. That's fine as well. Just need to make sure everything can be heard. Appreciate it. Thank you so much, counsel. Feel free to commence with your next question.

BY MR. DOYLE:

Q And I assume you became aware from reading Dr. Rives' deposition in the Center case that some days after he repaired the paraoesophageal hernia, that a hole was found in the stomach, correct?

A Yes.

Q Different than the transverse colon, correct?

A Correct.

Q And I assume you came to learn that there -- one of the explanations or the leading explanation for the hole found in the stomach was slippage of the repair with a volvulus and obstruction of the stomach causing that hole to form some days later?

A As I recall.

Q All right. Very different mechanism of injury than the mechanism of injury that you have opined occurred in the Farris case, correct?

A Potentially, yes.

Q Well, in the Center case, Dr. Rives repaired the paraoesophageal hernia by bringing the portion of the stomach above the diaphragm, he brought it back below the diaphragm, to where it was supposed to be located, correct?

A Yes.

Q And then what happed subsequently, the repair slipped and the -- a portion of the stomach again came up. True?

A In a manner of speaking, yes.

Q All right. And you also understand from reading Dr. Rives'

deposition that the reason the -- and nissen fundoplication, that is part of the technique for repairing a paraoesophageal hernia?

A Yes.

Q That's -- and so I assume you became aware from reading Dr. Rives' deposition that the -- it was the nissen fundoplication that slipped and that that then caused an obstruction, correct?

A I recall that from the deposition, yes.

Q Right. And you also recall from the deposition that the reason the nissen fundoplication slipped was not because of some surgical issue with Dr. Rives' care, but rather the need to resuscitate Mrs. Center. You became aware of that, didn't you?

A I don't know why it slipped.

Q All right. So you don't know why in the Center case, the hole developed, other than it was in part because of the fact that the repair slipped. True statement?

A Yes.

Q And it's also fair to say that the reason for the hole in the stomach in the Center case, as you learned from Dr. Rives' deposition had nothing to do with electrocautery or a thermal injury. True?

A My understanding of the -- or my recollection of that deposition was that he did not attribute it to the electrocautery or to the --

Q Nor did --

A -- harmonic scalpel.

Q -- anyone else. True?

A I didn't read everybody else's deposition. I just saw Dr. Rives' deposition.

Q Now, Doctor, do you remember when I took your deposition in the Farris case?

A Yes.

Q Do you remember me asking you this question? "What was your understanding why you were given Dr. Rives' deposition in this other case?"

Do you recall that question?

A Yes, I do.

MR. LEAVITT: Your Honor, I object. There's no -- if he's impeaching, we need the deposition from the back, and I don't believe there is one.

MR. DOYLE: Well, I can lodge the original deposition, or I have copies available. Plus the witness -- well, sorry --

THE COURT: Counsel, you both need to approach, please. Can you please turn on the white noise, Madam Court Recorder? We would much appreciate it.

[Sidebar at 4:46 p.m., ending at 4:52 p.m., not transcribed]

THE COURT: The jury will disregard that last statement by Defense counsel, based on a prior Court ruling. The statement should not have been made in front of the jury. Okay, then at this juncture, counsel feel free to move forward with your next question.

MR. DOYLE: Thank you.

BY MR. DOYLE:

Q Dr. Hurwitz, do you recall me taking your deposition one month ago, September 18th?

MR. LEAVITT: Your Honor, same objection. He's referring to something -- if you want me to continue or I can approach, but it's something that doesn't exist.

THE COURT: Please give the evidentiary objection with no speaking objections, please.

MR. LEAVITT: Yes, Your Honor. I object. There is no foundation for his deposition. It doesn't exist.

THE COURT: There was no deposition of Dr. Hurwitz lodged timely. The objection by Plaintiff has to be sustained.

BY MR. DOYLE:

Q Doctor, did you give a deposition in this case?

MR. LEAVITT: Your Honor, same objection. Same line of questioning. Same --

THE COURT: The Court's going to overrule that objection. That's -- whether his deposition was taken, that's an appropriate question.

THE WITNESS: Yes.

BY MR. DOYLE:

Q Doctor, what date was your deposition taken?

A September 18th.

Q Of this year?

A Yes.

Q When you and I were together for your deposition, was there

a discussion or a couple of questions about the Center deposition you had been provided?

MR. LEAVITT: Again, Your Honor, we're going to -- if he's going to try to impeach him or discuss it, where's the transcript? It doesn't exist.

MR. DOYLE: I'm not trying to impeach him. I'm just trying to get some information. It's not impeachment.

THE COURT: Please. The jury will disregard the colloquy between counsel. Question as phrased, the Court's going to overrule the objection that was stated.

THE WITNESS: I'm sorry. Would you repeat the question?

BY MR. DOYLE:

Q Sure. At your -- excuse me. At your deposition about a month ago, did you and I talk about the Center deposition that had been provided to you?

A Yes.

Q At your deposition about a month ago, did I ask you if you found any striking or important similarities or dissimilarities between the Center deposition and the facts of the Farris case?

MR. LEAVITT: Your Honor, again, we're quoting out of a -- the same objection. And if you want us to approach --

THE COURT: Counsel, I need an evidentiary statement, plea -- the evidentiary basis of the objection, counsel, please.

MR. LEAVITT: Yes. Hearsay. There's -- where's the document?

THE COURT: Sustained.

BY MR. DOYLE:

Q Doctor, at your deposition about a month ago in the Farris case, did you tell me that you didn't find any striking or important --

THE COURT: Counsel, please approach. The jury will disregard. Counsel, please approach. Madam Court Recorder, can you please turn on some white noise?

[Sidebar at 4:55 p.m., ending at 4:56 p.m., not transcribed]

[Court admonished jury]

[Witness excused]

[Designated proceedings concluded at 4:56 p.m.]

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

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

Electronically Filed
10/21/2019 8:10 AM
Steven D. Grierson
CLERK OF THE COURT

[OPPM]
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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.'S AND LAPAROSCOPIC SURGERY OF NEVADA, LLC'S OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' TRIAL BRIEFS ON ORDER SHORTENING TIME** **HEARING REQUESTED**

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Case Number: A-16-739464-C

Defendants BARRY J. RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC ("Defendants") hereby oppose plaintiffs TITINA FARRIS and PATRICK FARRIS' ("Plaintiffs") Motion to Strike Defendants' Trial Briefs on an Order Shortening Time ("Motion to Strike") as follows:

I.

BACKGROUND

Trial of this medical malpractice action commenced on October 14, 2019. The issues before this Court include liability, causation and damages.

On October 16, 2019, Defendants submitted to this Court three trial briefs pertaining to legal aspects of the issues in this case. As to the issue of damages, Defendants submitted a trial brief regarding the impropriety of advising the jury that this case is subject to a cap on non-economic damages under NRS 41A.035, and a trial brief regarding the types of evidence of medical expenses which should properly be received by the jury in light of the unique law applicable to health insurance plans under ERISA and the abrogation of the collateral source rule in actions for medical malpractice. Defendants also submitted a trial brief regarding their anticipated objection to Plaintiffs' counsel's questioning of their expert witnesses regarding their history as a defendant in a medical malpractice action.

II.

ARGUMENT

Defendants' trial briefs are appropriate under EDCR 7.27. Plaintiffs misstate the scope of EDCR 7.27 in their argument Defendants' trial briefs are improper under EDCR 7.27 because the trial briefs request relief. There is no disqualification for trial briefs requesting relief found in EDCR 7.27 and there is no cited case law creating such a limitation for trial briefs. In fact EDCR 7.27 reads:

> Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memoranda of points and authorities at

> any time prior to the close of trial. The original trial memoranda of points and authorities must be filed and a copy of the memoranda must be served upon opposing counsel at the time of or before submission of the memoranda to the court.

Here, Defendants' trial briefs, in this civil case, were submitted to the Court prior to the close of trial, on October 16, 2019. The original trial briefs were filed with the Court and a copy of the trial briefs were served upon Plaintiffs' counsel. Defendants therefore complied with EDCR 7.27 in their submission of trial briefs.

The mere fact Defendants' trial briefs request relief does not render the trial briefs improper. Often, in the course of trial, trial briefs under EDCR 7.27 which provide points and authorities to support an objection are submitted to the Court. The trial briefs in those situations, provide the Court and counsel with the points and authorities to support the objection. Defendants anticipate during various parts of trial, that Plaintiffs will attempt to put before the jury evidence of the cap on non-economic damages under NRS 41A.035, of expert witnesses' histories of being defendants in unrelated actions for medical malpractice and medical bills which were not ultimately paid by Plaintiffs or another source. Defendants anticipate making objections to Plaintiffs' efforts to put those categories of evidence before the jury. The trial briefs were submitted to provide the Court and counsel with Defendants' legal basis for their anticipated objections as trial progresses.

Defendants' trial briefs comply with EDCR 7.27. Accordingly, Plaintiffs' Motion to Strike should be denied.

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III.

CONCLUSION

For the reasons stated in more detail above, Defendants' trial briefs are proper under EDCR 7.27. Accordingly, Plaintiffs' Motion to Strike should be denied.

Dated: October 21, 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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on the 21st day of October, 2019, service of a true and correct copy of the foregoing:

DEFENDANTS BARRY RIVES, M.D.'S AND LAPAROSCOPIC SURGERY OF NEVADA, LLC'S OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' TRIAL BRIEFS 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
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

/s/ Jodie Chalmers
an employee of Schuering Zimmerman & Doyle, LLP
1737-10881

A-16-739464-C Titina Farris, Plaintiff(s)
vs.
Barry Rives, M.D., Defendant(s)

October 21, 2019 09:00 AM Jury Trial - Med Mal #1

HEARD BY: Kishner, Joanna S. COURTROOM: RJC Courtroom 12B

COURT CLERK: Botzenhart, Susan

RECORDER: Harrell, Sandra

REPORTER:

PARTIES PRESENT:

Barry Rives, M.D.	**Defendant**
George F. Hand	**Attorney for Plaintiff**
Jacob G Leavitt	**Attorney for Plaintiff**
Kimball Jones	**Attorney for Plaintiff**
Thomas J. Doyle	**Attorney for Defendant**

JOURNAL ENTRIES

OUTSIDE PRESENCE OF JURY: Counsel provided courtesy copy of responsive pleadings to Court in regards to Plaintiffs' pending Motion to Strike. Colloquy as to witness line up. Court reminded both sides to follow the rules as to witnesses and witness binders for the witness stand.

JURY PRESENT: Testimony and Exhibits presented (See Worksheets.). Deposition of Alex Barchuk, M.D., was FILED AND PUBLISHED IN OPEN COURT.

OUTSIDE PRESENCE OF JURY: Objections placed on record by Plaintiffs' counsel as to alleged misconduct from opposing counsel during cross examination earlier. Mr. Jones requested a curative instruction be given to the Jury by Court. Arguments by counsel. Discussions as to earlier bench conference and the witness testimony. Court stated findings. Colloquy as to witness line up. Court noted it had received another OST request from counsel this morning, addressing Plaintiffs' renewed Motion to strike. Court inquired whether a date for the Motion was agreed upon by the parties. Statements by counsel as to proposed briefing schedule having been discussed. Court stated this will be revisited.

JURY PRESENT: Further testimony and Exhibits presented (See Worksheets.).

Lunch recess.

OUTSIDE PRESENCE OF JURY: Court stated it will keep the extra copy of the pleadings that were provided by counsel on Plaintiffs' renewed Motion to strike Defendants' Answer. COURT ORDERED, hearing SET on the Motion for October 23, 2019 at 1:00 P.M. Statements by Mr. Doyle as to status of written opposition to be filed. Order Shortening Time SIGNED IN OPEN COURT.

JURY PRESENT: Further testimony and Exhibits presented (See Worksheets.). Deposition

of Barry Rives, M.D. SIGNED AND PUBLISHED IN OPEN COURT.

OUTSIDE PRESENCE OF JURY: Defendant Barry Rives, M.D., present on witness stand. Objections placed on record by Plaintiffs' counsel regarding testimony from the witness and insurance information having been allegedly elicited during testimony by Defendant.

JURY PRESENT: Further testimony and Exhibits presented (See Worksheets.).

OUTSIDE PRESENCE OF JURY: Plaintiffs' counsel moved for mistrial, and alternatively requested Court to strike Defendants' Answer. Following arguments by counsel, and discussions as to what was previously discussed before the Court earlier, the matter was deferred to a later date, for both sides to have an opportunity to submit additional briefing on the Motion to strike, including additional briefing on the witness and insurance information issue, and Plaintiffs' renewed Motion to strike Defendants' Answer. Mr. Jones requested Defendant not to discuss insurance information in front of the Jury.

JURY PRESENT: Further testimony and Exhibits presented (See Worksheets.). Court admonished and excused the Jury for the evening, to return tomorrow at the time given by Court.

OUTSIDE PRESENCE OF JURY: Court reminded both sides the deadline dates to file pleadings on pending Motions.

Evening recess. TRIAL CONTINUES.

10/22/19 10:30 A.M. TRIAL BY JURY

A-16-739464-C Titina Farris, Plaintiff(s)
vs.
Barry Rives, M.D., Defendant(s)

October 22, 2019 10:30 AM Jury Trial - Med Mal #1

HEARD BY: Kishner, Joanna S. COURTROOM: RJC Courtroom 12B

COURT CLERK: Botzenhart, Susan

RECORDER: Harrell, Sandra

REPORTER:

PARTIES PRESENT:

Barry Rives, M.D.	**Defendant**
George F. Hand	**Attorney for Plaintiff**
Jacob G Leavitt	**Attorney for Plaintiff**
Kimball Jones	**Attorney for Plaintiff**
Thomas J. Doyle	**Attorney for Defendant**

JOURNAL ENTRIES

OUTSIDE PRESENCE OF JURY: Mr. Leavitt not present. Juror questions were addressed. Mr. Jones requested juror questions be asked to Defendant Dr. Rives, when he testifies again during Defendant's case in chief. Arguments by Mr. Doyle in support of the questions being asked during current testimony in Plaintiffs' case in chief. Court stated findings; and noted this presents a challenge to have the questions read to the witness at this juncture. Court also stated if there is an agreement by the parties, or a joint request, the Court will consider it. Colloquy as to witness line up.

JURY PRESENT: Mr. Leavitt present in Court. Testimony and Exhibits presented (See Worksheets.).

OUTSIDE PRESENCE OF JURY: Counsel addressed the examination of Plaintiff Titina Farris; and objections were placed on the record. Plaintiffs' Exhibit No. 1 and the Calendar Call proceedings were addressed. Mr. Jones provided the proposed Order on Plaintiffs' Motion to Strike Defendants' Fourth and Fifth Supplements to NRCP 16.1 Disclosures, to the Court. Colloquy as to witness line up for the afternoon.

JURY PRESENT: Further testimony and Exhibits presented (See Worksheets.).

OUTSIDE PRESENCE OF JURY: Courtesy copy of pleadings and trial brief were provided to the Court by counsel.

JURY PRESENT: Further testimony and Exhibits presented (See Worksheets.). Jury admonished and excused by Court to return tomorrow by 9:45 A.M.

OUTSIDE PRESENCE OF JURY: Upon Court's inquiry, both sides confirmed on the admission to Plaintiffs' Exhibit No. 1 having been done by stipulation. Objections were placed on the record. Following discussions as to specific pages from Exhibit No. 1, earlier bench

conference, ERISA plan, discovery, and witness testimony, Court reminded both sides any objections regarding a witness need to be addressed, before the witness takes the Stand. Further discussions as to case law from McCrosky vs. Carson Tahoe Regional Medical Center.

Evening recess. TRIAL CONTINUES.

10/23/19 9:45 A.M. TRIAL BY JURY

A-16-739464-C Titina Farris, Plaintiff(s)
vs.
Barry Rives, M.D., Defendant(s)

October 22, 2019 01:00 PM Plaintiffs' Motion to Strike Defendants' Trial Briefs on Order Shortening Time

HEARD BY: Kishner, Joanna S. COURTROOM: RJC Courtroom 12B

COURT CLERK: Botzenhart, Susan

RECORDER: Harrell, Sandra

REPORTER:

PARTIES PRESENT:

Barry Rives, M.D.	**Defendant**
George F. Hand	**Attorney for Plaintiff**
Jacob G Leavitt	**Attorney for Plaintiff**
Kimball Jones	**Attorney for Plaintiff**
Thomas J. Doyle	**Attorney for Defendant**

JOURNAL ENTRIES

Court addressed EDCR 7.27, and stated its findings. Statements by counsel. COURT ORDERED, Motion DENIED WITHOUT PREJUDICE; the Court will review briefs under EDCR 7.27, and the Court will look at the trial briefs and treat them as Rule 7.27 briefs.

A-16-739464-C Titina Farris, Plaintiff(s)
vs.
Barry Rives, M.D., Defendant(s)

October 23, 2019 **09:45 AM** **Jury Trial - Med Mal #1**

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Botzenhart, Susan

RECORDER: Harrell, Sandra

REPORTER:

PARTIES PRESENT:

Barry Rives, M.D.	**Defendant**
George F. Hand	**Attorney for Plaintiff**
Jacob G Leavitt	**Attorney for Plaintiff**
Kimball Jones	**Attorney for Plaintiff**
Thomas J. Doyle	**Attorney for Defendant**

JOURNAL ENTRIES

OUTSIDE PRESENCE OF JURY: Colloquy regarding witness line up for today, and status of witness scheduled to appear by video conference at 2:00 P.M.

JURY PRESENT: Testimony and Exhibits presented (See Worksheets.).

OUTSIDE PRESENCE OF JURY: Objections were placed on record as to there having been no agreement between the parties as to specific documents, for Dr. Juell's testimony. Discussions as to demonstrative exhibits, films, and deposition testimony. Arguments by counsel. Further discussions as to Exhibit No. 8. Court stated the witness cannot make a reference to the document at issue, until verification is made by the parties about whether the document was previously disclosed. Discussions as to trial schedule for the afternoon and witness line up.

JURY PRESENT: Further testimony and Exhibits presented (See Worksheets.).

OUTSIDE PRESENCE OF JURY: Statements by counsel as to Plaintiffs' Exhibit No. 8. Objections placed on the record. Discussions as to demonstrative exhibits for Dr. Juell's examination. At request of counsel, COURT ORDERED, Plaintiffs' renewed Motion to Strike Defendants' Answer CONTINUED to be addressed outside the presence of the Jury, at a later date.

JURY PRESENT: Further testimony and Exhibits presented (See Worksheets.).

OUTSIDE PRESENCE OF JURY: Objections placed on the record by Plaintiffs' counsel as to defense counsel addressing specific language in regards to a deposition during testimony. Mr. Doyle requested to have a deposition lodged; and argued in support of relief requested. Discussion regarding what was said to the Court by counsel earlier. Counsel was cautioned by Court not to make inadvertently improper or inaccurate statements in front of the Jury.

JURY PRESENT: Further testimony and Exhibits presented (See Worksheets.).

Evening recess. TRIAL CONTINUES.

10/24/19 10:15 A.M. TRIAL BY JURY

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11/14/2019 12:46 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

PATRICK FARRIS, TITINA FARRIS, Plaintiffs, vs. BARRY RIVES, M.D., ET AL., Defendants.	CASE#: A-16-739464-C DEPT. XXXI

BEFORE THE HONORABLE JOANNA S. KISHNER
DISTRICT COURT JUDGE
WEDNESDAY, OCTOBER 23, 2019

RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL - DAY 8
TESTIMONY OF MICHAEL HURWITZ, 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

Case Number: A-16-739464-C

INDEX

INDEX OF EXHIBITS

FOR THE PLAINTIFF	MARKED	RECEIVED
None		

FOR THE DEFENDANT	MARKED	RECEIVED
None		

Las Vegas, Nevada, Wednesday, October 23, 2019

[Requested designation of record begins at 2:03 p.m.]

[Inside the presence of the jury]

THE COURT: Okay. Thanks very much. Since the next witness is going to be on the screens in just a second, this witness is more than welcome -- you're excused to either go to the anteroom or the hallway, whatever is comfortable for you, okay? Just one second. Before the new witness states anything, we need to have -- this witness is more than welcome to -- as he's walking out and so let's give him one second.

Okay. So ladies and gentlemen of the jury, can you see there's the two screens? Okay. So we're just going to. So counsel for Plaintiff, I'm just going to -- as I stated, even though we're on the cross-examination, just so we have clarity. This is now going back to Plaintiff's case in chief and we are going to be -- Plaintiff's counsel, I just want to confirm. You had passed the witness and it was Defense cross-examination. Is that correct?

MR. LEAVITT: That is correct, Your Honor.

THE COURT: Okay. And this is Dr. Hurwitz, correct?

MR. LEAVITT: That is correct, Your Honor.

THE COURT: Okay. Dr. Hurwitz, just consistent with what we've done with other witnesses when it's been a few days between their testimony, realizing that you're in the midst of your testimony, Madam Clerk is just going to re-swear you in, okay? Just -- we've done

that consistent with the other witnesses.

MR. HURWITZ: So -- Madam Clerk, if you don't mind. Please. Thank you so much.

THE CLERK: Yes, Your Honor. Please raise your right hand, sir.

MICHAEL HURWITZ, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN

[APPEARING VIA VIDEOCONFERENCE]

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

THE WITNESS: Michael Bruce Hurwitz, H-U-R-W-I-T-Z.

THE COURT: Okay.

THE CLERK: Thank you.

THE COURT: So for just purposes of everyone -- is the volume at an acceptable level or does it need -- everyone can hear okay and it's not too loud. Okay. So then at this juncture, counsel, you can -- it's your cross-examination. And it's up to you where you want to be and if you need a pocket microphone, we're glad to give you a pocket microphone, okay?

MR. DOYLE: I'm happy to stay right here, if that works for the video.

THE COURT: That's perfectly fine, because you've also got them on your screen in front of you, if you have your screen turned on.

MR. DOYLE: Yes.

THE COURT: Okay. So you have them on all the screens as well as the two big screens. Okay. Go ahead.

CROSS-EXAMINATION CONTINUED

BY MR. DOYLE:

Q Good afternoon, Doctor.

A Good afternoon.

Q Do you recall that when we were together on September 18, 2019, I asked you if you had ever participated in meetings, such as peer review meetings or M & M meetings, where there were frank discussions about a particular physician's care of a patient? Do you recall?

A Yes, I do.

Q And you attend --

A Yes.

Q -- you've attended such meetings, correct?

A I have.

Q And in those meetings, there have been frank discussions by well-qualified and reasonable physicians, who sometimes disagree about the care provided to a particular patient and the quality of that care. Fair statement?

A Yes.

Q In other words, it's quite common in medicine in general and general surgery, in particular, that one physician might be critical of how another physician went about taking care of a patient, but that other physician still can be within the standard of care. Fair statement?

A Yes.

Q And do you recall telling me on September 18, 2019 that I may take issue with something, but I would say that, as you said, that

there are areas to disagree that do not fall below the standard of care. Do you recall that statement by you?

A I believe so, yes.

Q Now, when you testified last week, Friday under oath, you said several times that you had concerns about Dr. Rives' care. Fair statement?

A Yes.

Q And when you said that you had concerns about Dr. Rives' care, what you were indicating were there were certain aspects of his care that you disagreed with, correct?

A Yes.

Q And when you were raising these concerns about Dr. Rives' care, not only were these areas where you disagreed with him, but they were also areas, nonetheless, where his care was within the standard of care?

A Yes. I would say that's fair.

Q Now, can you -- well, would you agree that Dr. Rives' care of Mrs. Farris in 2014 was appropriate and within the standard of care?

A I mean, we could differ on the -- his operative findings or the technique that he used to fix the hernia the first time around, but I would say that it was within the standard of care, yes.

Q Okay. And can we also agree that Dr. Rives' care of Mrs. Farris in the office in 2015 prior to July was within the standard of care?

A Yes.

Q Can we also agree that Dr. Rives' care on July 3, 2015 in the

hospital before surgery, that care was within the standard of care. True?

A True. Again, I -- there are areas that I might disagree with his approach, but I would say that the care is within the standard of care.

Q All right. And I appreciate that. Thank you. Now, do you recall telling me on September 18, 2019, "I think that the standard of care -- the interoperative technique," --

MR. LEAVITT: Your Honor, I object based on last Friday's objection. If you want me to get into it, I will.

THE COURT: Counsel, I need you to approach, but I'm going to have an issue on how we can do this with audiovisual to address. So let me tell you what's going to have to happen. We're going to need to turn you off for a second. The witness is going to need to be turned off, so the screen's going to go blank for a second. That should not disconnect the connection, okay? It should just go blank. And then we'll reconnect you after the Court has finished with the bench conference. If for any reason, it disconnects, which it should not -- it has not in the past when we've done this -- then we'll reconnect. But it'll be -- you'll be on blank for a little bit and you should not be able to hear or see us, okay? And so --

THE WITNESS: Yes, ma'am.

THE COURT: -- so just a moment. So at this juncture, I'm going to have to let Madam Recorder take a second to put the witness on blank. There you go.

[Sidebar at 2:10 p.m., ending at 2:14 p.m., not transcribed]

THE COURT: Okay. What we're go to do is -- this is going to

take a -- sorry. Are we back on the record?

COURT RECORDER: Should we --

THE COURT: Not yet. I'm going to explain something first, but then I will.

COURT RECORDER: Okay.

THE COURT: Thank you so very much, Madam Court Recorder. Ladies and gentlemen of the jury, just to kind of give you a heads up of what we're going to do. This is going to take a few more moments, so what we're going to do is we're going to put the witness just back up briefly, okay? Because then the Court is going to tell him that we're going to take him off again. I'm going to put you out for a break, rather than having you sit here where you've both got white noise and black screens. And then we're going to resolve it.

We'll have you come back in, then we'll put the witness back up on the screens, okay? But we have to put him back on to tell him, so he just doesn't think that he's been disconnected, okay? So just give us one minute. So, Madam Court Recorder, if you'll put the witness back up just on the screen, so we can let him know.

Dr. Hurwitz, just to give you a heads up, we're going to have to take -- we're going to be excusing the jury for a few moments. We're going to be needing to take a break, so we're going to put you back on a black screen. It's probably going to take about ten minutes, okay?

THE WITNESS: Okay.

THE COURT: And so the disconnection should not be lost during that timeframe, because the way that this is set up is that the

connection should stay on all the way until 5:00 p.m.-ish, okay?

THE WITNESS: Uh-huh.

THE COURT: But if for any reason it does, we will connect back. But -- so just so you know, it'll probably be about ten minutes-ish, okay?

THE WITNESS: Sure.

THE COURT: Ish being conceptual time frame, okay? So your screen is going to go black. I'm going to give the jury their admonishment and we're going to send them out for a break. Do appreciate it. Thank you so much, okay?

So Madam Court Recorder, if you could make the screens black. Thank you so very much. Ladies and gentlemen of the jury, what we're going to do is -- I'm going to say ten minutes and the Marshall will let you know if it needs to be a little bit longer. It shouldn't. Hope it will be. So 2:15 to 2:25.

Ladies and gentlemen of the jury, you are admonished not to talk or converse among yourselves with anyone else on any subject connected with this trial. You may not read, watch or listen to any report or commentary of the trial, any person connected with the trial by any medium of information, including without limitation social media, texts, tweets, newspapers, television, internet or radio. Anything I've not stated specifically is of course also included. Do not visit the scene of any of the events mentioned during the trial or undertake any research, experimentation or investigation.

Do not do any posting or communications on any social

networking sites or anywhere else. Do not do any independent research, including but not limited to internet searches. Do not form or express any opinion on any subject connected with the case until this case is fully and finally submitted to you at the time of jury deliberations. With that, we'll see you back shortly. Thank you so very much.

THE MARSHAL: All rise for the jury.

[Jury out at 2:16 p.m.]

[Outside the presence of the jury]

THE COURT: Okay. So we now have the jury out and the witness is off the screen. This is our understanding. Is that correct, Madam Court Recorder?

COURT RECORDER: Yeah.

THE COURT: Okay. So now I just have counsel present and your witness is going outside, but he understands the jury is just about to walk out that door, right? He understands the jury is --

MR. DOYLE: Yes, he --

THE COURT: -- about to walk out the door, what he's a few feet away from, right?

MR. DOYLE: Yes. He knows his obligations.

THE COURT: Okay. So feel free to sit down, stand or whatever is comfortable for you. You all asked to go to bench, so I'm going to let counsel for Plaintiff articulate what your objection was and then I'll let Defense counsel respond. Go ahead.

MR. LEAVITT: Sure. Yes, Your Honor. We're getting into hearsay again. There is no deposition. He asked about his deposition

when we were together back on -- in September. Again --

THE COURT: Instead of using pronouns, can we make sure who the he is --

MR. LEAVITT: Oh.

THE COURT: -- because I'm dealing with two different he's. Thank you so very much.

MR. LEAVITT: There are a number in here. Sorry. Mr. Doyle indicated he was getting into the deposition here. At least that's the way I took it when he -- when Mr. Doyle said to Dr. Hurwitz, remember when we were together. Dr. Hurwitz said yes. Last week this came up before. I stood up. We objected. There is no deposition, sealed transcript or other for reasons that we discussed last week that I do not want to get into. This Court made a ruling last Friday and order on that. It was violated last Friday and then it gets violated again today.

THE COURT: Now, let's --

MR. LEAVITT: That's --

THE COURT: The Court does need one point of clarification.

MR. LEAVITT: Sure.

THE COURT: There's a distinction between there being no deposition --

MR. LEAVITT: Right.

THE COURT: -- and there being no deposition properly lodged for an --

MR. LEAVITT: Very --

THE COURT: -- expert witness and so therefore, by not

having that deposition properly lodged, that deposition transcript cannot be utilized as if it were properly lodged. That was the Court's ruling. It wasn't that the deposition --

MR. LEAVITT: Very --

THE COURT: -- itself did not exist. It's just when there's a per se violation under the rules and it's a multiple violation and there was a clear deadline and parties chose to violate EDCR 2.69, which is, in addition, reiterated in the Court's rules, the Court made that ruling, gave a full opportunity for anyone to provide it, if they thought they had asked for an exception. Nobody asked for an exception. No one provide any additional requests, and so in light of the objection raised by Plaintiff's counsel and because it was then for the time brought to the Court's attention again by blurting out to the jury. So there are specific facts here that had the Court's ruling.

MR. LEAVITT: Right.

THE COURT: It was -- it would not be appropriate in those circumstances, as articulated and explained further by the Court last week for Defense counsel to be able to use said deposition as if he had timely lodged it with the Court --

MR. LEAVITT: Correct.

THE COURT: -- because he had not and instead had -- everything that happened and then blurted it out in front of the jury, specifically contrary to the Court's directive with a lot of the other explanations that the Court had given. That was the Court's ruling. It wasn't that the deposition did not exist. Just for a point of clarification.

Feel free to continue, counsel.

MR. LEAVITT: No, I appreciate the point of clarification. I was just trying to be quick.

THE COURT: Right.

MR. LEAVITT: My apologies.

THE COURT: But that distinction does make a difference. Go ahead, counsel.

MR. LEAVITT: It does. It's very on point. Yet today, his line of questioning comes down to are you -- he's -- I don't know his thoughts. I'm not going to anticipate, but the line of questioning that I hear, that I personally would go down when I'm doing a cross-examination is impeachment. How do you impeach and then go back after you blurted out we took the deposition last week that is not properly lodged? Mr. Doyle blurted that out to the jury. There is no way in this [indiscernible] without a properly lodged deposition to impeach an expert witness.

That's why they are sealed, and they come in and there's the opening. The Clerk opens them in front of the jury. They can see. It's for sanitation purposes of the testimony and of a deposition. Here we have -- again, I don't want to get into how he needs to do it. That is -- sorry -- how Mr. Doyle needs to do it. That is up to him. He states that we had an agreement outside. Mr. Jones was next to me the entire time. We went through the other issue that we had with him and he asked -- the exhibits.

THE COURT: Who's the he?

MR. LEAVITT: I'm sorry, Mr. Doyle. We went through those. How he plans to get into Dr. Hurwitz' deposition or try and impeach him is not my concern. My concern is this line of questioning, he can't impeach him with an improperly lodged or unlodged, lack thereof lodged deposition. So this line of questioning that he's going down and then referring to the jury after saying, hey, look, I took your deposition. Do you recall being there? And now he's referring back to the date.

And this Court afterwards -- I won't rehearse Friday. Why would I go back on what was stated Friday? That's not my challenge to know how to cross-examine a witness without a deposition. I -- there is no agreement to go outside of Friday's ruling. If there was, I wouldn't have stood up and objected, if there was some miscommunication that Mr. Doyle understood that I didn't. There is no stipulation. As this Court addressed, when there is a stipulation, bring it in. For example, when a case settles.

Even though it settles, for example, outside, I typically come in, put it on the record. That way there's clarity. That did not happen here. Again, this line of questioning -- if you're trying to impeach somebody, the question becomes for Mr. Doyle, how do you do so without a properly lodged deposition? That is not my challenge. That is his, but to keep inferring to the jury, referring back to this time, there's a question. And at this point, we're borderline RPC 3.3(a)(1). You're representing facts that aren't there. They cannot be proven.

THE COURT: Okay. So what remedy, if any, are you requesting or where are we? I'm hearing you say that there was not an

agreement, which is a question I asked you both at bench --

MR. LEAVITT: Correct.

THE COURT: -- because you had -- you and Defense counsel, who I'm going to have speak in just a second, had different views. So are you requesting any remedy or just what? I just need to know what the Court is being asked to do, if anything.

MR. LEAVITT: Sure. Sustain the objection. Let the jury know they're -- and have a -- counsel cannot -- Mr. Doyle cannot keep referring back to this deposition time that there is no lodged deposition for. That's what's going on. Continuing to do this is going to confuse the jury. Well, how come -- you know, he said deposition. Now the Court's saying not. I don't think we need anything curative at this point, other than to say the objection's sustained and move on from that line of questioning. Trying to impeach him on a document that is not properly lodged.

THE COURT: Okay. Counsel for Defense, your position, please.

MR. DOYLE: Yes. I understood the Court's ruling consistent with what you said a few moments ago that I can't use the transcript. I can't refer to the transcript. I can't indicate that there was a transcript. If he were -- I can't use it to refresh his recollection. I can't use it to impeach him. I did not understand the Court's ruling to say I couldn't refer to the fact that there was a deposition or refer to a particular date. But be that --

THE COURT: Counsel --

MR. DOYLE: -- as it may, I'm not ref -- I have not used the word deposition yet. I was being, I thought, cautious, by saying words like when we were together on. Was it your opinion on September 18, 2019. And I'll just state it for the record. I -- you know, out of an abundance of caution, indicated to Plaintiff's counsel in the hallway what my plan was and how I plan to frame these questions. And I was given the okay. So I intend to ask questions like when we were together on September 18, 2019, was it your opinion on September 18, 2019.

I believe it's appropriate and necessary to frame the questions that way, because importantly, if the witness gives testimony today that is materially different than the testimony that he gave at his deposition, then I would ask -- I would renew my request to lodge the deposition to demonstrate to the jury that the witness is -- has changed his testimony, has perhaps committed perjury or whatnot. I don't think that's going to happen. I hope it doesn't happen. But that would be my intent.

So again, when we --

THE COURT: Okay. Yours is too narrow --

MR. DOYLE: -- when were together, what --

THE COURT: Yours is too narrow. Okay. Just like counsel for Plaintiff's was too broad, yours is too narrow, because if you recall, what I did at the end of the day Friday, when you then had the deposition in hand and wasn't using the word deposition and then you continued with that path, I then brought you both to bench and I told you I was going to admonish you outside the presence of the jury, because you

could not do indirectly what you could not do directly.

So the Court didn't say specifically how you phrased it, because that's why it was important I had to call you to the bench, because I had made it clear that you -- you can't, just because say well, I lodged the deposition and then do the very things, hold the document in your hand and then read from it or read -- paraphrase from it and just not say the word deposition and do the same thing as if you had properly lodged a deposition.

The Court was very clear that you couldn't do that, told you in advance you couldn't do that, then you did it, which is why the Court had to call you to bench and then say that I was going to admonish you outside the presence of the jury, which is what I did at the end of the day outside the presence of the jury, admonished that inappropriate behavior, as you'd already cautioned about not doing and you did it anyway. So your interpretation of what I said, you know is too narrow, because I cautioned you about it at bench and then admonished you on Friday, so both sides -- okay -- the Court said what it said on Friday.

MR. LEAVITT: Yes.

THE COURT: One side's ordered a disc and knows fully what's said. The other side, I don't know if you did or did not order a disc, but I know at least one side did. So that being said, as far as -- I -- as far as a prong about what someone may or may not say and the request that may or may not come before the Court, the Court will address requests, any requests regarding a deposition. And let me be abundantly clear in all caps, will not be said in front of the jury.

MR. DOYLE: Of course not.

THE COURT: Okay. Just want to make sure, so everyone's hearing me okay on that, right?

MR. DOYLE: Yes.

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay.

MR. DOYLE: But the record, I'd like to --

THE COURT: I --

MR. DOYLE: -- reflect. I don't even -- I don't have the transcript in front of me. I don't have the transcript on the table. I'm not holding it. I'm simply asking questions based on handwritten notes.

THE COURT: The was specifically -- that's why the Court kept on saying Friday. The Court's not saying today. If it was today, I'd be saying today Friday, but what I'm saying is if you have a request about potentially you think that there is an inconsistency or something, the Court's not at that second step, but that will not be done in front of the jury. That will be a request to either come to bench, and then you can ask if you want it at counsel table for -- there's a full discussion, et cetera, but it will not be done in front of the jury.

MR. DOYLE: Of course.

THE COURT: That's what I'm making abundantly clear. Thank you. Okay. Now, the first prong. If there are proper questions that get asked about testimony, that's fine, but you can't do improper impeachment or proper use of a, quote, deposition that you did not properly lodge. Where that area lies between in the absence of an

agreement between the other side, you have to evaluate and ensure that you do it correctly and as an experienced litigator, you need to make sure you do it correctly.

This Court can't tell you how to ask your questions. I don't know what your questions are going to be. You're the litigator. You're the attorneys on both sides. You all need to decide how to ask your questions, but you know the parameters. You both stated that -- one says there was an agreement. One says there wasn't. This is not the first, second or third time that you all on different viewpoints, on different sides have said there is or is not. So the Court was not present. That's why I have told you all over and over that if you have something and you want to say it, feel free to say it in court.

Say it on the record. Then it's clear to every and everyone's on the same page. In the absence of that, the Court wasn't out in the hallway with you. Obviously I wasn't. You all know that. I didn't hear anything -- I can't, when I have two different viewpoints, take you both as officers of the Court and I just will view it as a misunderstanding between the two.

And so at this juncture, I do not see that there is an objection that I can sustain, because there isn't -- the last question asked when counsel for Plaintiff stood up and objected A, was -- I appreciate in this case, it was contrary to a prior Court's ruling and you phrased it in a nice, very neutral way that was not negative in front of the jury.

So the Court's not saying you had to give an evidentiary basis, because I think the way he did it was actually very -- in a very

appropriate manner, because it didn't in any way imply that you were doing -- that Defense counsel was doing something inappropriately, so it's not that, but the very last question, the way it was phrased, I can't see how that one specifically would have violated with the Court said on Friday. But I think it's very clear to you both the parameters of just because there's not a physical deposition, doesn't mean that you can treat it as if there is a physical deposition sitting in front of you or not. You can ask the appropriate areas of inquiry, but you can't do things indirectly as if you had timely and properly lodged a deposition at this juncture.

I'm not at a situation right now where I have to deal with the issue of impeachment, because so far all the issues and answers and questions have been consistent. It's answered pretty much yes to everything. Wouldn't you agree, Defense counsel? He's agreed with everything that you've said.

MR. DOYLE: So far. I was just raising --

THE COURT: Right.

MR. DOYLE: -- the possibility of something different.

THE COURT: The Court can't address something that is a contingent possibility. It has to be raised at the time it actually occurs and the Court would be glad to address it at that time, but in this case, outside the presence of the jury at bench.

MR. DOYLE: Of course. I understand. I was just giving you --

THE COURT: Okay.

MR. DOYLE: -- a heads up.

THE COURT: Right. No. I appreciate it, but since there's been some confusion in the past, the Court is being abundantly clear, so that there's no third, fourth or fifth inadvertent statements in front of the jury. Okay. Does that address each party, so we can go back to having people here or does that not? Is there any questions, clarification, anything the Court needs to do for either party?

MR. LEAVITT: No. Not on behalf of Plaintiff, Your Honor. Thank you.

THE COURT: On behalf of Defense counsel?

MR. DOYLE: I'm good. Thank you.

THE COURT: Okay. So, Marshal, let's get the jury back in. Now would you like the witness back on the screen first? Is there anything that either party thinks that the witness needs for a point of clarification before the jury comes in or are you comfortable that the witness can just be on the screen and the jury can come back in?

MR. LEAVITT: I'm comfortable with him being on the screen, Your Honor. Thank you.

MR. DOYLE: That's fine.

THE COURT: Okay. So no one thinks the witness needs anything. Okay. Then in that regard, I will make sure -- we'll get the jury and we'll give Madam Court Recorder a moment to get the witness back on. And just remember, as a friendly reminder, when you are done with all the questions with Dr. Hurwitz, we do have some questions, some juror questions, remember?

MR. LEAVITT: Oh, that's right.

MR. DOYLE: Right.

MR. LEAVITT: That's right.

THE COURT: I told you on Friday that we would have it at the end, so just remember that, because even though he's on video, we are going to have those at the end. So there's your friendly reminder in that regard. Thank you so much.

So Dr. Hurwitz, it's going to be a moment. The jury's going to be coming back in in just a moment and even though you're on video, it still would be a courtesy when they come in to stand, okay? Appreciate it. Thank you so very much. They'll be in in just a second. You'll hear the Marshal say it in just a moment.

[Pause]

THE MARSHAL: All rise for the jury.

[Jury in at 2:34 p.m.]

[Inside the presence of the jury]

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

THE COURT: Appreciate it. Thank you so very much. Okay. Okay, so right before the break, there was an objection pending. Based on discussion, the objection/clarification, the Court clarified, so in light of the Court's clarification, the objection would be overruled. Thank you so very much. Counsel, feel free to proceed with your next question.

MR. DOYLE: Thank you.

CROSS-EXAMINATION CONTINUED

BY MR. DOYLE:

Q Dr. Hurwitz, what I want to ask and explore are your standard of care criticisms of Dr. Rives, not your personal criticisms of him, okay?

A Yes.

Q So --

THE COURT: Wait. I think our volume -- just a second. I think we lost part of our volume. Can you speak again, sir?

THE WITNESS: Hi. Can you hear me?

THE COURT: Can the jury hear okay? Can we get it a little louder, please, Madam Court Recorder. We're having some difficulty hearing.

THE WITNESS: Testing, testing.

THE COURT: Can you hear okay now? Okay. Let's try --

MR. DOYLE: I'll re-ask it when we get it.

THE COURT: Let's turn the volumes up on the TVs. Give us one second. Let's see if that helps it out. Okay. Let's re-ask the question and see if we're good to go.

MR. DOYLE: Okay.

BY MR. DOYLE:

Q Dr. Hurwitz, I want to ask you a couple of questions about your standard of care opinions or criticisms of Dr. Rives, not your personal concerns or how you might have done something differently. Do you understand that?

A Yes, I do.

Q And you understand the distinction, based upon what you

and I went over probably about 10 or 15 minutes ago. You understand the distinction?

A Yes, I do.

Q All right. So in chronological order, on July 3rd, 2015, the first thing that Dr. Rives did or didn't do that was below the standard of care was his use of the ligature during surgery, correct?

A Yes.

Q Okay. And then in terms of chronological order and just the standard of care and your standard of care criticisms, the next standard of care criticism of Dr. Rives is his failure, in your opinion, to return Mrs. Farris to the operating room on July 9th, 2015. True?

A Yes. And as I said before that, while it didn't rise to the level of standard of care issue, there were, you know, ample opportunities to return her. But where I felt that he finally dropped below the standard of care was on the 9th.

Q All right. And then in terms of Dr. Rives and what he did that was or was not below the standard of care, again moving forward in a chronological order after July 9th, same comment, that he did not take her back to surgery on July 10th, correct?

A Correct.

Q Or the 11th, correct?

A Correct.

Q The 15th -- I'm sorry. The -- I forgot where I was. The 11th, 12th, 13th, 14th. On those days, same standard of care criticism of Dr. Rives as you had of him on July 9th that he did not take Mrs. Farris back

to an operating room. Fair statement?

A Yes.

Q Okay. Now, I guess the corollary is if Dr. Rives had taken Mrs. Farris back to the operating room on July 9th, in your opinion, that would be appropriate and within the standard of care, correct?

A I believe that's what I said in my deposition.

Q Okay. Now, if Dr. Rives had performed surgery on July 9th, 2015, can you and I agree that it probably would have been necessary to remove a segment of Mrs. Farris' transverse colon at that point in time?

A Yes.

Q And if Dr. Rives had gone back to surgery with Mrs. Farris on July 9th, 2015, in all probability, having removed a segment of her transverse colon, she was going to need the colostomy, correct?

A Yes, I think that's fair.

Q And she still would have been on a ventilator and in the intensive care unit in the hospital for some period of time after surgery on July 9th. Fair statement?

A Yes.

Q All right. She -- if Dr. Rives had performed surgery on July 9, 2015, she probably would have been in the hospital for another two or three weeks to recover before she could go home. Fair statement?

A I would say that's somewhat speculative. I don't know the answer to that.

Q Well, would you give me one --

A Perhaps.

Q -- would you give me one week?
A Yes.
Q Two weeks?
A Possibly. It depends on how she recovered. I can't answer that with certainty, but one week or more.
Q Now, you were asked some questions last Friday about the comment at the end of Dr. Rives' report, operative report on July 3rd that Mrs. Farris tolerated the procedure well without complications. Do you recall that comment in his operative report?
A Yes, I do.
Q When you prepare your operative reports, do you dictate? Type them? How do you go about doing that?
A I dictate them, or we have a template that we use.
Q And if you're using a template, what that means is certainly language is already existing in the operative note and you just have to put in certain blanks, correct?
A Well, in our case, we click on whether there were or were not complications, so you have to choose one from the menu.
Q All right. But if you have to dictate the report, can you and I agree that if you're dictating an operative report, it's common to see at the end of every operative report she tolerated the procedure well without complications or words to that effect?
A That's a common phrase, yes.
Q All right. And you and I could also agree that up above that comment in the operative report itself, Dr. Rives talked about and

documented the two holes he created, correct?

A Correct.

Q He documented in his operative note his repair of those holes, correct?

A Yes.

Q All right. So if someone later read the operative report for some reason, even though the saw the phrase at the end she tolerated the procedure well without complications, having read the report, they would have seen that there were two colotomies that he repaired?

A Yes, that's true.

Q When you dictate an operative report for a procedure that you've performed hundreds and hundreds of times, can we agree that you develop a certain habit or pattern in how you dictate that operative report?

A Yes.

Q And if you're dictating an operative report for a procedure or surgery that you've performed hundreds and hundreds of times, can we agree that you're not going to include in the operative report absolutely each and every step taken along the way, correct?

A That's correct, yes.

Q And can you and I agree that when dictating an operative report for a surgery that you have performed hundreds and hundreds of times that there are certain routine steps that you take in that surgery that often do not end up in the operative report, because they're routine and happen with every operation. Would you agree with me on that?

A Yes, I would.
Q Now, colotomies can occur during dissection of adhesions, correct?
A Yes.
Q And do you recall talking about dissecting adhesions and using the words tugging or pulling on the bowel?
A Yes.
Q All right. So if you're talking to a patient or a patient's family after a surgery where you have inadvertently created one or two or more colotomies, in lay language, you would explain to the patient or the family that they occurred because of tugging or pulling, correct?
A If that's --
Q You would --
A -- how I felt that it happened, yes.
Q Okay. So not unusual to use the words tugging and pulling when describing how a colotomy occurs. Fair statement?
A If you're describe it in lay terms to someone, that is -- those are terms that you would use.
Q And you have inadvertently caused colotomies over the years yourself. True?
A Probably. Yes. I can't think of a specific instance, but there have been times I'm sure that I have.
Q Right. And when -- on those times where you're sure you've created a colotomy, you've repaired it before you close, correct?
A Correct.

Q And you've used a stapler to close colotomies in the past, correct?

A We talked about this in the deposition. I probably more frequently have sewn them closed, but I think it's acceptable to use a stapler. I don't recall whether I have specifically done that.

Q Okay. And it's your impression from reading Dr. Rives' operative note that he thought he got a good closure of those two colostomies. True?

A True.

Q And in fact, you would agree with me that those two closures held for some period of time. True?

A I assume so. I don't know how long they held for.

Q Okay. But can you and I agree that when you repair a colotomy using a stapler and you do everything right, that there is still a certain failure rate of those repairs?

A Yes, that's correct.

Q That failure rate could be as much as 10 percent, true?

A I think that's probably reasonable.

Q And so having repaired a colotomy using a stapling device, up to 10 percent of the time, you can have a failure of that repair and even though the care was appropriate and within the standard of care, you would agree?

A I think that's reasonable. That's a rough estimate. That may be -- it may be a little high or a little low, but I think that's a reasonable statement.

Q Okay. And if you have an appropriate closure of a colotomy using a stapling device and it later fails, often the reason it fails is because of reasons intrinsic and extrinsic to the patient. Fair statement?

A Yes.

Q It can fail, due to tissue ischemia, correct?

A Correct.

Q It can fail because of the presence of an infection, correct?

A Correct.

Q You and I would agree, I think, that if you have a hole in the transverse colon during a surgery like the one performed by Dr. Rives, that before it is repaired, some bacteria can escape into the abdominal cavity, true?

A True.

Q And you also spoke about bacterial translocation last Friday. Do you recall that?

A Yes, I do.

Q And bacterial translocation, that's a microscopic process not visible to the naked eye. True?

A Yes.

Q And if during a surgery, there's an inadvertent colotomy before the hole is repaired, there is some bacteria that is able to escape into the abdomen, that's something that's microscopic. You can't see those bacteria. True?

A If it's something that you -- it can be macroscopic. It's something you can see, if there's gross spillage, but there are times

when bacteria can get out through tissue that's lost its impermeability and --

Q Okay.

A -- that you would not see. That is correct.

Q Okay. So you and I would agree that during a surgery, if there's an inadvertent colotomy, bacteria can escape from inside the colon into the abdomen before the colotomy is closed and that bacteria is going to be microscopic, correct?

A Yes.

Q You and I can agree that in some patients, not much bacteria can cause a lot of problems. True?

A True.

Q And you and I can agree that in other patients, that same amount of bacteria might not cause any problems at all. True?

A True.

Q You would agree with me that between July 4 and July 15, Mrs. Farris' renal function improved. True?

A It did, yes.

Q You and I could agree that between July 4 and July 15, the left shift or bandemia, that also improved, correct?

A Yes, it did.

Q You and I can agree that between July 4 and July 15, there were times when she was afebrile. True?

A True.

Q Afebrile means no temperature, no fever, correct?

A Correct.
Q Can you and I agree that between July 4 and July 15, that Mrs. Farris' encephalopathy improved?
A That was my impression in reviewing the chart, yes.
Q And encephalopathy, that's the medical word for mental status, correct?
A Correct.
Q Between July 4 and July 15, her heart problems, in particular the AFib or a-flutter, that resolved and went away. True?
A I don't recall that specifically.
Q Between July 4 and July fi --
A I'll take your word for it.
Q I'm sorry. I didn't mean to interrupt you.
A Oh. I'm sorry. I'll take your word for that. I don't recall that specific --
Q Well, you and I can agree that between July 4 and July 15, her blood glucose came under control, true?
A Yes, it did.
Q And her abdominal pain improved at times, correct?
A I think that fluctuated, as I recall.
Q Okay. Now, how did Plaintiff's counsel find you in this case?
A So, I was retained through a company called, I believe, National Medical Consultants. There was a -- there's a gentleman that runs a service, a doctor that runs a service that finds experts for attorneys.

Q And I don't remember frankly, but were you asked about your fees last week?

A I think you asked how much I was being paid for my trial testimony.

Q Okay. And for reviewing records, what is your charge? If you now.

A So, I'm paid by this company $375 an hour to review records.

Q Now, you have had patients of your own, where the patient or the patient's family has requested a second opinion from another general surgeon. True?

A True.

Q And --

A Yes.

Q -- in those instances, you have said that's fine. I mean you don't quarrel or quibble with a patient or family request along those lines, do you?

A No, I do not.

Q And in fact, you've had at least one instance where the family asked you to step aside and be replaced by another general surgeon. True?

A Yes.

Q And you didn't quibble or argue in that situation, did you?

A No.

Q I mean, the idea --

A I didn't --

Q -- is if the patient or the patient's family wants a second opinion, you're going to say yes, because that's in the patient's best interests, correct?

A Correct.

Q And if a patient or a patient family has lost confidence in you and wants a different general surgeon, you of course are going to step aside, because that's in the patient's best interests. True?

A Yes, that's true.

Q Now, I assume you're familiar with anasarca, correct?

A Yes, I am.

Q And anasarca is an explanation for Mrs. Farris abdomen and why it became distended. True?

A Well, it may have been. Anasarca describes the soft tissue edema that one gets when critically ill. Distention can also -- can be caused by other things as well, but anasarca would be one explanation.

Q But you saw in the medical records, you reviewed notes by multiple physicians that documented that she had this anasarca?

A Yes.

Q Thank you for your time, Dr. Hurwitz. I don't have any more questions.

THE COURT: Redirect, counsel?

MR. LEAVITT: Yes, Your Honor. Thank you.

REDIRECT EXAMINATION

BY MR. LEAVITT:

Q Doctor, can you see me if I stand up here?

A I see you.
Q Can you see me?
A I saw you a moment ago. Now I do, yes.
Q So how about I stand back here. Can you see?
A Yeah, either is fine.
Q Right there is good? All right.
MR. DOYLE: I'm sorry. I'm not going to be able to see the screen.
THE COURT: Well, you can see -- you have a screen right in front of you.
MR. DOYLE: Oh. Sorry, Your Honor.
MR. LEAVITT: It's the big one right there.
MR. DOYLE: I apologize.
THE COURT: All right.
BY MR. LEAVITT:
Q All right. I gotta get my microphone on here, Doctor. Bear with me.
MR. LEAVITT: Court's indulgence.
THE COURT: You don't need to, if you're at the podium, counsel.
MR. LEAVITT: Oh, yeah, you're right.
THE COURT: You only need it, if you're walking around.
MR. LEAVITT: If I stand there, I do not. Thank you, Your Honor.
THE COURT: No worries.

MR. LEAVITT: That works so cool. All right. Very good.

BY MR. LEAVITT:

Q Doctor, so you were just asked a lot of questions about some of the good things that were happening to her. Did Titina's white blood cell count go down from 17,000?

A No, it did not.

Q Wow. When did Titina's distension -- the distention word -- swollen, when did that go down? Was it --

A I don't believe that it --

Q Go ahead. Sorry.

A I'm sorry. I don't believe that it did.

Q Oh, all right. Okay. So let me ask you this. You were asked about this bacteria that you can't see. If you know bacteria is in there, shouldn't that be one of the first places you look where you cut, when there's an -- when somebody has a white blood cell count and they're septic?

A Well, as I think I said before, you know, if somebody is persistently showing evidence of sepsis in the presence of a hole in the colon, you know, whether it's microscopic or something larger, I mean, I think you have to first and foremost worry that there is ongoing contamination from the colon.

Q Okay. And that would be a good place to look, wouldn't it, after somebody's septic, after you cut two holes in it?

A Yes. I think it's up to -- it would be up to the surgeon to rule out the hole in the colon as the source of the sepsis.

Q Doctor, do you recall when the lung were ruled out in this case?

A Yes, I do.

Q How quickly was that?

A Well, I think it was pretty quickly apparent that there was no pneumonia as a source of the ongoing sepsis. The chest x-ray did not show evidence of pneumonia.

Q Okay. Now, if Dr. Rives, on his operative report -- and well, back up. Would you agree with me there was a complication, at least two complications in this surgery of Titina's Farris --

A Yes, I do.

Q So would it be untruthful to say that there was no complications in Titina's Farris' surgery on July 3rd, 2015.

MR. DOYLE: Objection. Character evidence.

THE COURT: Just sorry. Did not hear the objection. You said char --

MR. DOYLE: Inappropriate character evidence.

THE COURT: Overruled.

BY MR. LEAVITT:

Q Go ahead, Doctor.

A Well, it would certainly be a misstatement.

Q Okay. Misstatement. Let me ask you this. If Dr. Rives testified, even in retrospect, that he would do everything in this case the same, would that be reckless?

MR. DOYLE: Objection, Your Honor. Relevance --

THE COURT: Overruled.

MR. DOYLE: -- and scope.

THE COURT: Overruled in light of the -- overruled on both counts.

THE WITNESS: Well, I think having -- if you're talking about in retrospect and having the knowledge that in fact, it was the injury to the colon that was causing the sepsis and then yes, and then you would do the same thing over again, then yes, that would be reckless.

BY MR. LEAVITT:

Q Okay. Okay. Now, you were asked about if you've ever used a stapler to close a colotomy. In this case, a ligature was used. Correct, doctor?

A That's correct.

Q Okay. And should you staple tissue that has been potentially compromised or burned?

A Well, I think that if you're going to staple tissue, as I believe I said last week, then you have to be sure that the tissue that you're stapling together is healthy. And if you know that a thermal energy source has been used on the bowel at that point, then you're potentially involving tissue in the stapler that is not healthy. And so you're potential -- you're creating a potential for that staple line to later become disrupted.

Q So that would increase the risk of stapling dead -- excuse me. Let me rephrase that question. Stapling tissue that's been burned, would that increase the risk of reopening?

A Yes, it would, because the staples would not have good tissue to hold onto.

Q Okay. Now, one last question, Doctor. Again, how big was the hole ultimately that was found in the tissue after it was taken and looked at by the pathologist?

A Well, as I recall, that was about 2 and a half to 3 centimeters --

Q Okay.

A -- as I recall the testimony.

Q Okay. And you recall seeing the keyring that I gave you?

A Yes.

Q It was about that size?

A About a little more than an inch.

Q Very good. Thank you, Doctor. I appreciate it.

THE COURT: Recross, counsel?

MR. DOYLE: No questions. Thank you.

THE COURT: Okay. We have some juror questions, so counsel, would you mind approaching? Thank you so very much.

[Sidebar at 3:01 p.m., ending at 3:12 p.m., not transcribed]

THE COURT: Okay. So the witness -- just so that you understand, we have some jury questions. And what I do is I read the questions as is, okay? And I'm just going to read through them ,the various questions and at the completion of the questions, since you're Plaintiffs' witness, Plaintiff then would have an opportunity to ask to ask follow up questions to these witness questions and then Defense would

have an opportunity, okay? Do you understand?

THE WITNESS: Yes.

THE COURT: Okay. So -- okay. In your expert opinion, was the third hole overlooked or could it have opened up after the surgery?/time?

THE WITNESS: I think it -- this is going to be challenging, because there's an echo. I think it -- it's hard for me to say that with certainty. I have to think that since Dr. Rives didn't describe seeing any fecal contamination, he most likely would have seen a hole, a third hole, if he had created one and he would have addressed it, as he did the other two. So I have to think, therefore, that it may have opened up afterward.

THE COURT: Okay. And then the second part -- slash/question/time.

THE WITNESS: I -- it would be purely speculation on my part to determine at what time it opened up --

THE COURT: Okay. Second que --

THE WITNESS: -- within the first --

THE COURT: Sorry.

THE WITNESS: -- 48 hours perhaps, 72 hours. I can't say that with certainty.

THE COURT: Was the third hole near the initial two holes?

THE WITNESS: It was in the same section of intestine that was removed. I don't have the pathology report in front of me. I think the report can probably answer that question.

THE COURT: Okay. Next. After the holes were created and identified, did Dr. Rives take the appropriate action to repair them?

THE WITNESS: Yes, I think that he made an effort to close the holes with the stapler. I think it's incumbent upon the surgeon at that time to assess whether he's getting good tissue to close the holes. So I think using the stapler is an appropriate method, if you know that you've got healthy tissue that you're closing, as I said before.

THE COURT: Okay. Would you say that Dr. Rives' postop actions were against the standard of care?

THE WITNESS: So I think that the concern that I have is that when a surgeon is faced with evidence of sepsis, somebody who's sick and isn't recovering, after an operation in which they know that there were two holes that were placed in the colon, then I think every effort must be made by that surgeon to determine whether the source of the sepsis is coming from the colon. And so I think that failing to address that in a timely fashion is below the standard of care.

Now, I've already said that -- and it's been brought up that you know, this can be viewed differently. Ideally, one might be taking the patient back to surgery by the second postoperative day, but you know, I appreciate that there is some concern, but certainly by the 9th of July, it's evident and by the time he's been seen by a -- in second opinion by another surgeon, I think it's pretty clear -- she's been seen, I should say. I think it's pretty clear that he's falling below the standard of care by not taking the patient back to surgery.

THE COURT: Okay. Next question. What is the temperature

of the ligature?

THE WITNESS: Well, I don't know that offhand. I'd be guessing. It's very hot. It's hot enough within the portion of the device that clamps on the tissue to seal tissue together. So it's very hot within the clamps and then within about a millimeter or so away from the clamp, it's still very hot. So if the device is clamped on these adhesions and is resting against the bowel as it was in this case, it's in direct contact with the intestine, so it's causing a thermal injury.

THE COURT: Okay. How thick is the colon lining? Inches/centimeters.

THE WITNESS: It's more in millimeters. The colon is a thin-walled, tubular organ that -- it's a matter of you know, a few millimeters in thickness.

THE COURT: Okay.

THE WITNESS: So millimeters. There's two and a -- there's -- you know, there's 10 millimeters in a centimeters and 2 and a half centimeters in an inch, so that's a very -- it's thin.

THE COURT: Okay. Next. In your medical opinion, how many days after surgery could Dr. Rives have waited to operate and most likely avoided her ongoing complications or damage? And there's an e.g.

THE WITNESS: So --

THE COURT: I'm going to give you an e.g. I'm going to -- it's got an e.g. portion. E.G. If he had operated on the 5th, would she likely have had a fully recovery as anticipated? And then there's a third part,

so give me a sec for the third part, okay? Third part.

THE WITNESS: Yes.

THE COURT: Without the advantage of hindsight, what date would you have likely operated, based the --

MR. DOYLE: Your Honor --

THE COURT: Counsel, sorry. Can you please both approach?

[Sidebar at 3:19 p.m., ending at 3:20 p.m., not transcribed]

THE COURT: Just one second, sir.

Okay. So I'm going to finish that last one, okay? Without the advantage of hindsight, what date would you have likely operated based on the sepsis and increased white blood cell count?

THE WITNESS: Well, I think --

THE COURT: So, did you understand there was --

THE WITNESS: -- that --

THE COURT: -- there was three, there was three parts to that? You --

THE WITNESS: But I've forgotten the first two questions.

THE COURT: Okay. So -- so let me -- because we took a break, because of the bench conference, let me go back to it. So I'll just pause on three.

In your medical opinion, how many days after surgery could Dr. Rives have waited to operate, and mostly avoided her ongoing complications or damage, question mark. And then there's the, e.g., portion. E.G., if he had operated on the 5th, would she likely have had a

full recovery as anticipated?

Break that down first, and then I'll do the last one.

THE WITNESS: Okay. So given what transpired and what -- what was in real time, I would think that on the 4th it would be too soon to have expected him to operate. It's the first postoperative day. The white blood cell count with elevate in response to stress, stress of surgery, and so forth. And you wouldn't necessarily expect -- you would -- you might expect it to be a pulmonary source, as Dr. Rives suggested.

So I would grant you that it wouldn't be on the -- on the 4th. And on the 5th, you know, she clearly is declining and requires intubation and transfer to the unit and has to be stabilized.

So I would say that by the 6th, if she's still show signs of sepsis, if I were -- if I didn't feel there was enough evidence to get me back to the operating room on the 5th or she was in the middle of being resuscitated and worked up, then I would say no later than the 6th would have been my personal preference.

So, you know, I think that he could have waited until the 6th. But, again, as I said before, it -- by the 9th clearly, with several days of seeing that she'd been decline or not improving, one shouldn't wait any longer than that.

THE COURT: Okay.

THE WITNESS: Had he operated on the 5th, I don't know that the operation -- it would depend upon what he found intraoperatively. You know, you can't say because we don't know what it looked like in

there on the 5th.

You know, there's different approaches to perforations on the colon. There are sometimes -- sometimes, for example, where you can remove more of the colon all the way down to the ileum, and occasionally get away with an anastomosis, a connection between the ileum, last part of the small intestine and the transverse colon, downstream of the perforation. It depends on where in the colon the perforation was, specifically, and how much contamination there is.

I think, chances are, had he operated on the 5th, he may have done the same operation that Dr. Hamilton did. It just depends upon what you find at the time of surgery. So it's really -- it would be speculation. He would have done, you know, perhaps the same operation that ultimately was done.

Whether -- you know, as far as the neuropathy that developed, the -- the foot drop and so forth, I can't answer that. I'm not a neurologist, and I -- that would be beyond my scope to say -- to, you know, comment.

THE COURT: Counsel, were you saying something? Sorry.

MR. DOYLE: No.

THE COURT: Okay. Sorry.

Okay. Did you need the Court to read the third part or --

THE WITNESS: Well, the question was when would I have operated?

THE COURT: Without the advantage of hindsight, what date would you have likely operated based on the sepsis and increased white

blood cell count?

THE WITNESS: I think I would have operated on the 5th, but I -- it would depend upon on how stable the patient -- how stable I felt the patient was at that time. I might conceivably have pushed it to the 6th.

THE COURT: Okay. Next question. Where would a ligature be appropriate to be used on the body? In other words, what kind of tissue would a surgeon use a ligature on?

THE WITNESS: So the ligature device is -- it's a very useful device in the right place because it clamps on blood vessels and seals them. So it's a great time saver and it's useful for surgeons. I would use it on areas where the device is not in contact with the intestine specifically or anything else that it could damage. It can be used, for example, to free the gallbladder from the liver in some cases, or to divide small blood vessels in intestinal -- in the mesentery, the tissue that carries the blood supply to the intestine, if you're trying to deliberately seal those vessels. And you can use it a adhesions if those adhesions are -- are loose enough that -- that you can clamp the device on them without being in contact with intestine.

THE COURT: Okay. Next question. If Dr. Rives had operated on 7/9, would that have reduced the level of injury to Ms. Farris question mark? Would she likely still have foot drop?

THE WITNESS: You know, again, I'm not a neurologist, and, you know, that would be -- I -- that would be speculation on my part. I don't know the answer.

THE COURT: Okay. Are those questions to the satisfaction of the jurors that asked them? Okay.

Whoever's -- okay. Just one pause, because we hear a phone vibrating that is subtlety being turned off. Give us one second.

So consistent with the procedure, since it's Plaintiff's witness, the Plaintiff would be asked first in Plaintiff has any follow-up questions to those juror questions.

Plaintiff's counsel, do you know follow-up questions to any of those questions?

MR. LEAVITT: I do not, Your Honor.

THE COURT: Okay. Defense counsel --

MR. DOYLE: Yes, we --

THE COURT: -- do you have follow-up questions to those specific questions -- those questions of jurors.

RECROSS-EXAMINATION

BY MR. DOYLE:

Q Doctor, while you personally would have operated on the 5th or perhaps 6th of July, in terms of standard of care and what the standards of care required of Dr. Rives, the standard of care first required him to take her back to an operating room on July 9th, given all the information and without the benefit of hindsight, true?

A I think that's what I stated before, and I would standby that.

Q Okay. Great. Thank you.

THE COURT: Okay. There being -- so counsel had an opportunity to ask questions. I'm not seeing any further juror questions

-- just one second -- at this juncture. Is this witness excused for all purposes subject to recall at some other point in the trial or what?

Counsel for Plaintiff first, and then I'll ask counsel for Defense.

MR. LEAVITT: Yes, Your Honor. He's subject to recall for rebuttal.

THE COURT: Okay. So counsel for Defense, do you have a position on this?

MR. DOYLE: I mean, I'm fine if he's excused, but I have no position on --

THE COURT: Okay. You have no position.

So you can appreciate your excused subject to re-call for rebuttal.

So at this juncture, Madam Court Recorder is going to disconnect you and wish you a nice rest of the day. Okay?

THE WITNESS: Thank you, Your Honor. You, too.

THE COURT: Thank you so much.

[Matters continue]

[Designated proceedings concluded at 3:29 p.m.]

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

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708