

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants/Cross-Respondents,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents/Cross-Appellants.

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

Appellants,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents.

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APPELLANTS' APPENDIX
VOLUME 27

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CLERK OF THE COURT



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DISTRICT COURT

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CLARK COUNTY, NEVADA

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TITINA FARRIS, ET AL.,

CASE#: A-16-739464-C

8

Plaintiffs,

DEPT. XXXI

9

vs.

10

BARRY RIVES, M.D.,

11

Defendant.

12

13

BEFORE THE HONORABLE JOANNA S. KISHNER

14

DISTRICT COURT JUDGE

WEDNESDAY, OCTOBER 30, 2019

15

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 12

16

APPEARANCES:

17

For the Plaintiff:

KIMBALL JONES, ESQ.

18

JACOB G. LEAVITT, ESQ.

19

GEORGE F. HAND, ESQ.

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For the Defendant:

THOMAS J. DOYLE, ESQ.

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RECORDED BY: SANDRA HARRELL, COURT RECORDER

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None

FOR THE DEFENDANTMARKEDRECEIVED

None

1 Las Vegas, Nevada, Wednesday, October 30, 2019

2

3 [Case called at 8:28 a.m.]

4 THE COURT: On the record.

5 Are we waiting for any other counsel or anybody? Are you

6 all--

7 MR. LEAVITT: Not on behalf of the Plaintiffs, Your Honor.

8 THE COURT: Okay.

9 MR. DOYLE: No, Your Honor.

10 THE COURT: Okay. So it being 8:30 okay. The Court was
11 going to address, I guess, it was outstanding issue with the next witness
12 after -- is Dr. Rives still going to be the witness that's going to be on this
13 morning; is that correct?

14 MR. DOYLE: No, Erik Volk.

15 THE COURT: Is that Dr. Rives' -- oh, he's being interrupted?

16 MR. DOYLE: Correct. Yes, we spoke about this yesterday, as
17 I recall.

18 THE COURT: The Court was not aware that there was going
19 to be an interruption of Dr. Rives' testimony with Dr. Volk. The order that
20 Defense Counsel told the Court is the order the Court told the Court . I
21 don't know if you all had any conversation about interrupting Dr. Rives'
22 testimony, the Court wasn't aware of it, that's why the Court asked the
23 question.

24 So Defense wishes to call who, please?

25 MR. DOYLE: Erik Volk. He's an economist as a rebuttal

1 expert to Dr. Clauretie.

2 THE COURT: There was objections raised by Plaintiff in one
3 of the various briefs. Does Plaintiff still have objections or does not?
4 Just answer me yes or no. If I've got something that the Court needs to
5 resolve or not.

6 MR. JONES: I think it would be just helpful to throw it on
7 the record, there's been a clarification. Mr. Volk will not be testifying in
8 any respect as to Defendant's lifecare plan, where he did a present value
9 analysis, but he will have some criticisms of Plaintiff's economist's
10 method of calculating the present value, which I think we agreed was an
11 appropriate rebuttal limited to that.

12 And my understanding is that's the limitations of his
13 testimony.

14 MR. DOYLE: Yes.

15 MR. JONES: So with that understanding, that's we're good.

16 THE COURT: So there is no issues with Dr. Volk?

17 MR. JONES: No. Well, subject to what we just said, that was
18 our understanding with each other yesterday and so as long as Dr. Volk
19 stays within that lane, then we have agreed.

20 THE COURT: And everyone's fine since an expert's being
21 paid to interrupt Defense's own witness and have him come in first?
22 That's good with everyone?

23 MR. JONES: No objection, Your Honor.

24 MR. LEAVITT: No objection.

25 THE COURT: Beautiful. Okay. Moving on.

1 So does that just leave Dr. Chaney as an issue or is that
2 Defendant's only other witness other than Dr. Rives?

3 MR. DOYLE: Correct.

4 THE COURT: Okay. So with process of elimination that
5 could be potentially the only other one that is there any objections Dr.
6 Chaney that get all worked out? Simple yes or no, your objections or
7 worked out, please. First?

8 MR. LEAVITT: Objections are not worked out, no.

9 Sorry, we still have objections.

10 THE COURT: Okay. First step. Okay.

11 So let's get -- I'm going to do this in a little bit of a reverse
12 now.

13 Did the parties speak like the Court has directed the parties
14 so that you're clear on what the issues are and what the anticipated
15 testimony is to be dealt -- spend a lot of time where you all are
16 disagreeing and you're not on the same page. Hopefully, before you say
17 anything to the Court you have worked out what Dr. Chaney's
18 anticipated testimony is from Defense's standpoint so that Plaintiff
19 would know what objections Plaintiff would have to what Dr. Chaney's
20 anticipated to actually testify to.

21 Because remember, this is not the first round. The Court --
22 well, first off as a matter of law, Dr. Chaney -- this is nothing the Court
23 ruling, this is just straight NRCP 16 --

24 MR. LEAVITT: Correct.

25 THE COURT: -- and the disclosures thereto, Dr. Chaney can

1 only testify as disclosed and consistent with the disclosures and
2 consistent with NRCP 16. NRCP 16 you would both agree, 2019, March
3 version, is fully applicable because the Nevada Supreme Court has said
4 those rules are in effect. Would you both agree, correct? Because that
5 would be for a trial witness. Correct?

6 MR. LEAVITT: Yes, Your Honor.

7 MR. DOYLE: Yes.

8 THE COURT: Okay. So that means exactly what it says is
9 exactly what applies. So the Court's not even clear why there would
10 even be an issue before the Court because the specific read designation
11 in Defendant's disclosures, it was read last week, is what Dr. Chaney can
12 only testify to.

13 Nothing has been done under the specific provisions in
14 NRCP -- Right? -- 16, it specifically sets forth exactly what needs to be
15 done. There's a whole other nice new provisions specifically on treating
16 physicians and what needs to be done. There's nothing that's been
17 presented to this Court that gives the additional modification section, so
18 it is what it is as specifically disclosed in that designation.

19 So the Court's not even sure why there would even be an
20 issue before the Court. So going back to my first question. Did you all
21 talk to see even if there is an issue?

22 MR. LEAVITT: We did, Your Honor, and it's 'my
23 understanding that she is going to stay in that lane. However, we have a
24 *Leavitt v. Siems* issue that came up last night.

25 THE COURT: Excuse me? And I'm sure you all, even after --

1 the Court's not sure how that would even be possible. I have 7.27 briefs:
2 we've gone over this week in advance. We've gone over it weeks in
3 advance, we've gone over, so without further ado now the Court --
4 remember, because the Court's still addressing these issues in no way --
5 remember the Court still has its pending decision, which the Court said it
6 was waiting until the end of the trial from October 10th on the
7 misconduct of counsel which is still pending so you know the Court's
8 hearing all these in no way means that the Court is finding that these are
9 appropriately brought up at the last moment. The Court is hearing them
10 to ensure the course all parties are receiving a full and fair trial on the
11 merits.

12 What is the *Leavitt v. Siemens* issue?

13 MR. LEAVITT: Your Honor, in short, last night -- and I have
14 an affidavit declaration, I have a copy for Your Honor, if I may approach.
15 I have a copy for counsel as well. It sets forth -- I'll be brief.

16 THE COURT: Well, tell me what it says and --

17 MR. LEAVITT: Sure.

18 THE COURT: -- then we'll see it. I'm not sure what you're
19 saying, affidavit, I don't know what we're talking about.

20 MR. LEAVITT: It's --

21 MR. JONES: Based on what her counsel said in Court it's
22 very clear that they did not want Chaney to be subpoenaed again, didn't
23 want her to come in and testify. So I called her attorney yesterday
24 immediately after we --

25 THE COURT: State it again now. September 16th no one has

1 shown this Court that that was a proper subpoena.

2 MR. LEAVITT: Absolutely.

3 THE COURT: Now that issue's not come before the Court.
4 The Court still has asked and still never received a proper subpoena.
5 Now Court's been asking for weeks for that.

6 MR. LEAVITT: Correct, agreed, Your Honor.

7 THE COURT: But not ever seen a proper subpoena, so the
8 Court's not taking a position because the Court's not been asked to rule.

9 MR. LEAVITT: Of course.

10 THE COURT: The Court has asked to see it, the Court still
11 doesn't have anything, so --

12 MR. JONES: And what I'm --

13 THE COURT: -- NRCP 45 subpoena.

14 MR. JONES: I'm just referring to Your Honor when Todd
15 Weiss, the counsel for -- what he said in court two days ago indicated he
16 didn't want his client to be bothered anymore because she had already
17 suffered some hardship.

18 Mr. Doyle then yesterday said that he had spoken with them
19 and that everything was fine, and she was happy to come and testify
20 today in the afternoon. That seemed a little strange to me -

21 THE COURT: That's not exact quote.

22 MR. JONES: No, it's not.

23 THE COURT: It's your own representation.

24 MR. JONES: Absolutely it is my paraphrasing of my
25 understanding of what I thought Mr. Doyle said.

1 After hours, immediately after leaving the court at 4:48
2 yesterday afternoon, I gave Mr. Weiss a call and I said what -- I said, hey,
3 what's the story here? And I said is it true that your client is comfortable
4 coming in tomorrow afternoon to testify? And he said, well, what
5 happened basically is Defense Counsel has offered to pay her three
6 times the normal rate for the two days that she has not been paid for
7 where she had to come here, and for another day for her expert fee to
8 make sure she gets here. And under those conditions she is willing to
9 come and testify.

10 And I thought about that and I thought that sounds like a
11 pretty serious problem, given that apparently this is supposed to be the
12 Plaintiff's treating provider and there has been some side deal, not
13 disclosed to the Court or to Plaintiffs that this witness is apparently being
14 paid, who is a non-retained person is apparently being offered three
15 times the rate and that is the only basis for which she is willing to come.

16 We don't know what that rate is. I didn't ask, Your Honor, I
17 didn't inquire further in terms of what the daily rate was or what the
18 promised amount was, but that just happened yesterday, and I am
19 extraordinarily troubled by it. There has not been an agreement that
20 Defense Counsel's permitted to call and have ex parte conversations
21 with Plaintiff's treating providers, either through counsel or through -- or
22 directly anyway.

23 So the whole situation is a real problem. I've very troubled
24 by it. I don't even know what you do. I've never heard of something like
25 this happening, Your Honor.

1 THE COURT: So let's find out.

2 Defense Counsel, you heard what Plaintiff's Counsel stated --

3 MR. DOYLE: Yes. By way of --

4 THE COURT: -- what's your position in regards to that?

5 MR. DOYLE: By way of factual background, Your Honor, on
6 September 16, 2019, we did electronically file a trial subpoena for Dr.
7 Chaney, and she agreed to accept service of it. She did not have counsel
8 at that time.

9 We had scheduled her for the first day of trial at the
10 beginning of trial just because we didn't know when she would testify
11 with the understanding that we would coordinate a date that was
12 convenient for her.

13 Plaintiff objected and the only objection to the subpoena was
14 that we were asking her to appear at the first day of trial which would
15 still be her case -- their case in chief.

16 So with Dr. Chaney's agreement we -- she agreed to appear
17 at 1:30 p.m. on October 22. I did find, and I'm waiting for copies -- I do
18 have copies. I did find and I don't know why, but we e-served, but did
19 not e-file a subpoena on October 15th at 1:34 p.m., for her to appear on
20 October 22, at 1:30 p.m. She was here on --

21 THE COURT: Hold on a second. The Court's going to ask
22 some follow-up questions.

23 MR. DOYLE: Sure. Of course.

24 THE COURT: Okay. Remember NRCP 45. I need to know,
25 going back to your September 16th, was there full compliance with the

1 NRCP 45?

2 MR. DOYLE: I believe so, yes.

3 THE COURT: Wait just one second. Pause.

4 [Pause]

5 THE COURT: Pause for a second because somebody's
6 making a request and need to ensure that all accommodation requests
7 are taken care of. So --

8 MR. DOYLE: No worries.

9 THE COURT: Now, that we have that, we need to get that
10 taken care of. Thank you so much.

11 Can you hear us well? Yes? Are you good to go? Can you
12 hear? Yes?

13 UNIDENTIFIED SPEAKER: I'm sorry, Your Honor, I can't hear
14 you.

15 THE COURT: With those on you can't hear?

16 UNIDENTIFIED SPEAKER: I'm going to try to make them
17 work. So give me a second.

18 THE COURT: That's fine. No worries.

19 UNIDENTIFIED SPEAKER: I apologize, the elevators were
20 crazy this morning.

21 THE COURT: Just want to make sure you're good to go.
22 Okay. So since you came in when you --

23 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

24 THE COURT: -- came in, we were glad to accommodate as
25 soon as you came in and as soon as you made the request we were glad

1 to pause because remember we're also placing part of the public
2 accommodation --

3 UNIDENTIFIED SPEAKER: I'm all set.

4 THE COURT: Are you all set?

5 UNIDENTIFIED SPEAKER: I'm all good. Thank you, Your
6 Honor, I do appreciate that. I was trying to be unobtrusive, apparently
7 that's not in my bailiwick.

8 THE COURT: No worries because we're also a place of public
9 accommodation, we need to ensure that everybody has everything so
10 they --

11 UNIDENTIFIED SPEAKER: I do appreciate, Your Honor.

12 THE COURT: -- have full accommodation.

13 UNIDENTIFIED SPEAKER: You're very kind.

14 THE COURT: No worries. Okay.

15 Sorry, Counsel for Defense, but now we can continue. You
16 can appreciate the need to take care of --

17 MR. DOYLE: I'm not sure of where I left off, but --

18 THE COURT: The Court was asking you a question about
19 whether you complied with NRCP 45 with the September 16th document.
20 That was the question the Court had pending. And the Court noticed
21 that there was an accommodation request we needed to pause to ensure
22 that everybody's accommodation request was taken care of as well.

23 Thank you.

24 MR. DOYLE: Yes, we did.

25 THE COURT: Okay. Court never -- you did. So --

1 MR. DOYLE: And I have an electronically filed copy.

2 THE COURT: That's part of in our CP 45, the Court -- you
3 have an electronically filed copy of what?

4 MR. DOYLE: Of the trial subpoena for Dr. Chaney to appear
5 on the first day of trial, with the understanding with Dr. Chaney that we
6 would coordinate a date and time that would, in fact, be convenient for
7 her.

8 THE COURT: Maybe I'll phrase it a little bit differently.

9 Are you aware of all the provisions of NRCP 45? The Court's
10 asking you if you fully complied with NRCP 45.

11 MR. DOYLE: I do not have the rule memorized and if the
12 Court has a specific concern about a specific area, I can answer the
13 question. But I believe, to my knowledge we did. But if the Court has
14 some concern that I could address, I'd be happy to.

15 We did prepare the subpoena --

16 THE COURT: Do you need a second to check on your iPad or
17 something for NRCP45 so that --

18 MR. DOYLE: Well, no it's attached to the subpoena that we
19 sent to Dr. Chaney. We attached as Exhibit A copy of Rule 45.

20 THE COURT: Subpart B service.

21 MR. DOYLE: She agreed to accept service. And so we sent it
22 directly to her. At that time she did not have counsel.

23 THE COURT: The Court did not see any proof of service in
24 any way filed or served for opposing counsel. That's why the Court was
25 asking the question. That's why the Court's been asking for a copy of the

1 entirety of the subpoena so the Court could evaluate whether or not all
2 the primers of NRCP 45 were met.

3 MR. DOYLE: There is no proof of service. It was done
4 informally, she agreed to accept service and we sent it to her.

5 THE COURT: How would that obviate the responsibility to
6 show some proof of service still being filed, even if it's an acceptance of
7 service under NRCP 45?

8 MR. DOYLE: I guess, I'm looking at NRCP 45 --

9 THE COURT: The Court's not taking a position one way or
10 another, I'm just trying to have an understanding of your position.

11 MR. DOYLE: My position is a proof of service filed and
12 served was not required, given the circumstances. And Plaintiff was
13 served with it because they did their objection. So we know they
14 received it.

15 THE COURT: Okay. So that's 16th. Thank you so much.
16 Okay. So then?

17 MR. DOYLE: So then, so pursuant to that subpoena we made
18 arrangements for her to be present on October 22, at 1:30 p.m. in the
19 afternoon and having made those arrangements we e-served, but did not
20 file, another subpoena for her to -- on October 15th the second day of
21 trial, at 1:34 p.m. once we had coordinated a date and time that was
22 convenient for Dr. Chaney, we e-served another subpoena for her to be
23 present on October 22 at 1:30 p.m. which she agreed to accept. That
24 was --

25 THE COURT: Now, you understand her attorney stated in

1 open court the other day she never received said subpoena. And Ricky
2 went out into the hallway, the Court asked that question because you,
3 while the Court was asking the question talked to him and I politely said
4 we can't have multiple people talking and please not when the Court's
5 asking a question and then he said -- the Court said he didn't have to
6 answer the question, but that those was just a difference of opinion and
7 so he came back in and the Court's recollection -- the Court would be
8 glad to listen to it again, but the Court's recollection is Mr. Weiss said
9 that his client stated no second subpoena was received by her.

10 MR. DOYLE: I can't respond to that.

11 THE COURT: So how was it provided to her?

12 MR. DOYLE: I don't have that detail. I would have to check
13 with my office. But from a practical point of view she was prepared and
14 ready to appear at that date and time to testify.

15 THE COURT: But the Court has to look at -- okay. If you said
16 she was served with the subpoena, right? She wouldn't have gotten it
17 by e-service because she's not a registered user. Correct?

18 MR. DOYLE: Right.

19 THE COURT: So that's why the Court's asking if you said the
20 first one was acceptance of service, that's why you did not file the proof
21 of service, the Court has to evaluate -- Right? -- the propriety of any
22 subpoenas, obviously a non-filed subpoena's got its own issues, but if
23 you're -- I have her personal counsel saying in open court she didn't
24 receive one. I'm having you say that you served her with one.

25 So the Court's trying to have an understanding of those

1 differences of statements made in open court. So I'm trying to ask you
2 how she was served so that I have a better understanding of that.

3 MR. DOYLE: I don't know what my office did with that
4 subpoena after having served it. But --

5 THE COURT: After having served it you mean --

6 MR. DOYLE: Filed it. I'm sorry.

7 THE COURT: But they didn't file it.

8 MR. DOYLE: Yes, we e --

9 THE COURT: No. You just said that they did not file it.

10 MR. DOYLE: We e-filed it on October 15th, 2019 at 1:34 p.m.

11 THE COURT: You filed it or e-served it?

12 MR. DOYLE: I said e-filed it.

13 THE COURT: Counsel, can I see an e-file stamp because
14 there's no filing on October 15th.

15 MR. DOYLE: May I approach?

16 THE COURT: Of course you may.

17 No, Counsel, you did not e-file. There's no filing stamp.
18 Filing stamp is in the right-hand corner. There's no filing.

19 MR. DOYLE: I meant e-serve, I'm sorry. I misspoke.

20 THE COURT: Okay.

21 MR. DOYLE: I had said previously that it was e-served, but
22 not e-filed. I misspoke.

23 THE COURT: If it was e-service you'd have an envelope that
24 showed it was e-served.

25 MR. DOYLE: This one was just e- -- well, I don't know. I'm

1 not intimately familiar with the electronic system, but Your Honor, from
2 a practical point of view, if a witness is willing to appear voluntarily, I
3 don't understand the subpoena issue.

4 But be that as it may --

5 THE COURT: You don't understand there's two differences
6 of opinion about whether or not this witness is going to voluntarily
7 appear. That's why this Court has to ask these questions because I'm
8 hearing two different perspectives. If you all are in agreement then --

9 MR. DOYLE: Okay.

10 THE COURT: -- I would say we move on and the Court
11 doesn't have to address the issue.

12 MR. DOYLE: Well, she was voluntarily willing to appear on
13 the afternoon of October 22. I had inquired of Plaintiff's counsel if we
14 could accommodate her, take her out of order, because they -- and they
15 said no because that afternoon they put on Don Cook and Dr. Clauretie.
16 And because of that then -- and I don't remember when Todd Weiss
17 became involved, but because she was not able to testify out of order on
18 October 22, we moved her to the afternoon of October 28. And she, in
19 fact, that day was sitting out in the hall.

20 And again, Plaintiffs would not agree to take her out of order.
21 And because of that then now I know for sure Mr. Weiss is involved and
22 through her counsel we made arrangements to have Dr. Chaney testify
23 this afternoon.

24 And what happened, Your Honor, on each of the days that
25 she agreed to appear as a witness, she had to cancel her appointments

1 and reschedule her patients. And she did so on October 22, and she had
2 to do so on October 28. And I thought the right thing to do under the
3 circumstances was to compensate Dr. Chaney for the inconvenience that
4 she suffered and that her patients have suffered by virtue of her having
5 to cancel appointments and not be able to see patients and not earn any
6 income, if you will, on those two days.

7 And so --

8 THE COURT: When was that agreement made?

9 MR. DOYLE: Pardon me?

10 THE COURT: When was that agreement made? Was it made
11 prior to October 22nd, prior to October 28th, or some other date?

12 MR. DOYLE: When we had to cancel and reschedule her on
13 her October 22 date, I indicated that I would be happy to reimburse her
14 for any time, inconvenience or expenses.

15 THE COURT: You personally spoke to Dr. Chaney?

16 MR. DOYLE: This is now through counsel, I believe. No, I've
17 never spoken to Dr. Chaney. The only conversations my office has had
18 with Dr. Chaney were through my staff before she was represented by
19 counsel to make arrangements for her deposition and then initially to
20 make arrangements for her trial testimony. I've never spoken to her
21 other than to say hello the other morning.

22 THE COURT: I'm trying to have an understanding. Okay?

23 MR. DOYLE: And Dr. Chaney indicated in her deposition that
24 her hourly rate is \$500 an hour. And frankly, I don't know what she's
25 going to bill me for, you know, having to reschedule her office on

1 October 22 and what, you know, what the expense is going to be for
2 having to reschedule her office on Monday or today, but I indicated to
3 her counsel that I would, you know, I would take care of that.

4 THE COURT: When did you indicate that to her counsel?

5 MR. DOYLE: I believe last week sometime when we were
6 talking about getting her rescheduled for Monday.

7 THE COURT: I need to have a little -- I need to see the
8 affidavit, please.

9 MR. LEAVITT: Yes, Your Honor.

10 THE COURT: Because you all are doing very different dates
11 here. Your chronology dates is very --

12 MR. LEAVITT: If I may approach, Your Honor?

13 THE COURT: Yes, of course, you may. The chronology dates
14 is very different.

15 MR. LEAVITT: I turned the page.

16 MR. DOYLE: Are you giving her what was filed at midnight?

17 THE COURT: The Court just was handed --

18 MR. DOYLE: Is that what was filed at midnight?

19 MR. LEAVITT: Yeah.

20 THE COURT: Hold on a second.

21 MR. DOYLE: Do you have a paper copy?

22 MR. LEAVITT: Sure.

23 THE COURT: The Court was handed it says it's electronically
24 filed, so it's a filed document, filed motion to quash subpoena of Dr.
25 Naomi Chaney, order shortening time, 10/29, 11:59 p.m.

1 So filed document. So it was filed, and you served that,
2 correct? Defense Counsel said --

3 MR. DOYLE: Yes, I saw it at about 3:00 this morning.

4 THE COURT: Okay. So the Court just got handed this in
5 open court. So here's the question: Since it just got handed to the Court
6 in open court and it has the word motion, motions one judicial day. So
7 here's what the question for the Court is, the question the Court's going
8 to ask.

9 Counsel for Defense, do you wish the one judicial day that
10 you would have on an OST?

11 MR. DOYLE: No, because I'm hoping we can argue this case
12 tomorrow and have Dr. Chaney testify this afternoon.

13 THE COURT: Right. EDCR says one judicial day so that's
14 why the Court's asking. If you're waiving that specifically, then I will
15 address it now.

16 Are you specifically asking the Court to address it now,
17 you're waiving the one judicial day?

18 MR. DOYLE: I'm waiving the one judicial day so that we can
19 keep this trial moving forward.

20 THE COURT: Counsel for the Plaintiff, since you filed it I will
21 ask you the same question: Are you --

22 MR. LEAVITT: No objection, Your Honor.

23 THE COURT: All right. I want to make sure procedurally.
24 You know, procedurally, chronologically, then substance. Okay.

25 So the Court needs a clarification point here. The declaration

1 of Kimball Jones says that Paragraph 5, on October 29 Defense Counsel,
2 Thomas Doyle represented to the Court and Counsel Dr. Chaney was
3 agreeable to testify on October 30th.

4 After leaving it says he called Mr. Weiss and asked him Dr.
5 Chaney had agreed to testify on October 30th. Mr. Weiss informed me
6 Dr. Chaney so agreed but only after a promise from Mr. Doyle to pay her
7 an expert fee for each of the days previously summoned, as well as her
8 testimony on October 30th, meaning that Dr. Chaney only agreed after
9 being promised payment by Defendants for three times her normal
10 expert fee for the trial testimony.

11 So in reading this and hearing Mr. Jones' statement and then
12 hearing what Mr. Doyle said, this Court's understanding is I'm hearing
13 two different things and I need a point of clarification. I need to have an
14 understanding about whether or not from each -- Plaintiff's Counsel and
15 Defense Counsel -- and maybe I need to ask Mr. Weiss, maybe I'll be
16 asking him, but -- if he wishes to answer, the Court's not requiring him to
17 do so. I'm just trying to find out the truth here, is was the representation
18 to pay for the dates of October 22nd and October 28th on what day or
19 days was that representation made?

20 MR. DOYLE: All I can say is it was sometime last week when
21 we were having discussions about -- after we had cancelled her
22 appearance on October 22, and when we were trying to schedule her for
23 October 28th, that's when I indicated that I would be happy to, you know,
24 cover her time and inconvenience and lost patients. I can't tell you a
25 date and time.

1 THE COURT: I'm just trying to get an understanding. Okay?
2 Is -- you realize the Court heard what Mr. Weiss said in open court.
3 Right?

4 MR. DOYLE: Right.

5 THE COURT: His concerns the Court's hearing what I'm
6 hearing Mr. Jones saying today -- Mr. Leavitt, but Mr. Jones based on
7 the conversation, so I'm hearing what you're saying Mr. Doyle. Okay?
8 I'm also remembering what people said the other day about certain
9 documents which -- and I'm also looking at what's been filed. There are
10 differences, phrase it that way. Okay?

11 So is it Defense Counsel's statement that sometime between
12 October 22nd and October 28th it was stated to Dr. Chaney either directly
13 to Dr. Chaney or via her counsel that she would be fully compensated for
14 the time that she was not in the office for a full day the 22nd as well as
15 the full day the 28th, or did that conversation occur sometime after Mr.
16 Weiss left the courtroom on the 28th?

17 MR. DOYLE: Your Honor, no. It was between the 22nd and
18 the 28th. Whenever -- again, whenever the arrangements were made --
19 Dr. Chaney was here Monday afternoon, so she had to cancel patients --

20 THE COURT: The twenty -- I need dates.

21 MR. DOYLE: All I can tell you was last week, but it was
22 before Monday the 28th and it was after the 22nd.

23 THE COURT: Are you telling me she was physically here on
24 the 22nd?

25 MR. DOYLE: No, she was not physically -- she was prepared

1 to be here, and I think in the morning, in the morning of the 22nd, as I
2 recall, when Plaintiff's counsel indicated they were unwilling to take her
3 out of order because they had Dawn Cook and Dr. Clauretie. Then she
4 was notified -- and I can't tell you how or in what manner -- she was
5 notified not to show up that afternoon. . But she had already cancelled
6 her patients for that day.

7 THE COURT: It seems to me that I think secondhand
8 information the Court's not going to be able to get a full understanding
9 from what I'm hearing because I'm hearing two very is it different
10 perspectives.

11 So Defense Counsel, you're saying you had already told Dr.
12 Chaney she'd be fully paid for all day the 22nd, all day the 28th at some
13 point between the 22nd and 28th; is that correct?

14 MR. DOYLE: I don't know if it's all day, but I indicated I
15 would compensate her for the time and inconvenience and for having to
16 appear.

17 THE COURT: I'm trying to be specific here. Okay? Because
18 I'm trying to get clarity. Because let me switch over to Plaintiffs and let
19 you think about it for a second.

20 Plaintiff's Counsel, from your declaration , was I interpreting
21 what you said in your declaration, in your conversation with Mr. Weiss,
22 I'll phrase it a little bit differently, was it your understanding that the
23 agreement had happened prior to her showing up on the 28th or at some
24 point after she left the courthouse on the 28th?

25 MR. JONES: So my understanding was that for sure there

1 had been a subsequent conversation at least. Whether or not there had
2 been some other, what I believe to be improper communications before
3 then, I don't know, but with respect to what Mr. Weiss told me yesterday
4 there had very clearly been a subsequent conversation after he left
5 between Mr. Doyle and probably not Mr. Weiss or between someone
6 from his office, but with Mr. Weiss' boss. And I don't remember his
7 name. And there was a promise that absolutely --

8 THE COURT: You're talking about John Cotton?

9 MR. JONES: No, someone else, I think. I don't know.

10 THE COURT: The law firm of John Cotton's law firm. Okay.

11 MR. JONES: There yeah. Frankly, I'm not sure, Your Honor.
12 He said the first name of someone and I -- in our conversation, and I do
13 not recall --

14 THE COURT: No worries.

15 MR. JONES: -- what name he used.

16 In any case, he gave -- he said that whoever that person was
17 said, you know what, we're going to go ahead and let it go, because Mr.
18 Doyle has absolutely guaranteed that he's going to pay her for three
19 days. And so we're going to -- and so to me, I don't know how that
20 conversation happens before the Weiss -- what Mr. Weiss said.

21 THE COURT: Okay. Is that the only issue with regard to Dr.
22 Chaney? Is there any other issues with regard to Dr. Chaney?

23 MR. JONES: So Your Honor, no. I mean we have a problem
24 with Dr. Chaney, she was not properly disclosed at all, but we think that
25 this is a very serious --

1 THE COURT: Okay, I need to parse --

2 MR. JONES: Okay.

3 THE COURT: -- once again we're at 9:00. Remember you
4 got a jury.

5 MR. JONES: Absolutely.

6 THE COURT: So I'm just trying to parse out is is one issue
7 that you all have very difference of opinion, right? And I have

8 MR. JONES: Right.

9 THE COURT: -- secondhand knowledge from everyone
10 because you were party to the conversations on Plaintiff's side; Defense
11 Counsel's saying his office, and he's not party to direct conversations,
12 correct?

13 MR. DOYLE: No. I did have a conversation with Mr. Weiss
14 when we were rescheduling her from the 22nd to Monday the 28th and I
15 told him that I would compensate her for the time, inconvenience, and
16 expenses that she had lost because she could not testify on the 22nd;
17 and that I would, of course, be taking care of the 28th.

18 THE COURT: Okay. So partial, you were not party to a
19 conversation after the 28th? You were party to the conversation the
20 28th? How did this newest appearance agreement come about from
21 Defense Counsel's standpoint?

22 MR. DOYLE: I had a conversation with John Cotton about
23 her --

24 THE COURT: That's what I was trying to the heart of.

25 MR. DOYLE: Oh, I didn't --

1 MR. JONES: How about a little candor?

2 MR. DOYLE: -- appreciate --

3 THE COURT: Okay. So --

4 MR. DOYLE: So no, I had a conversation with John Cotton
5 yesterday about Dr. Chaney, you know, rescheduling and cancelling yet
6 again to be able to appear today.

7 THE COURT: And that conversation --

8 MR. DOYLE: The gist of the conversation was he would
9 check with her and he'd get back to me, and he got back to me, and he
10 let me know that she would be able to testify this afternoon.

11 THE COURT: Okay. Was there any additional compensation
12 other than the day's compensation for today that she was offered to
13 testify for today?

14 MR. DOYLE: She was offered compensation for the 22nd and
15 not being able to testify, Monday the 28th and not being able to testify,
16 because she had cancelled her office and patients and the plan is to
17 compensate her for appearing this afternoon at her hourly rate.

18 But I don't -- frankly, I don't know what she's going to charge
19 me for the 22nd or 28th.

20 THE COURT: The Court's trying to get an understanding of
21 she's not an expert, she's not a designated expert, right?

22 MR. DOYLE: But she's a treating physician, and she's
23 entitled to an hourly rate.

24 THE COURT: Counsel, once again, please let the Court finish
25 so the Court can ask the question before you make a statement. Okay?

1 So I can ask the question.

2 She is not designated as an expert, correct?

3 MR. LEAVITT: Correct, Your Honor.

4 THE COURT: Correct? Is that correct?

5 MR. DOYLE: She is designated as a --

6 THE COURT: Is she designated as an expert?

7 MR. DOYLE: Not as a retained expert, no.

8 THE COURT: Okay. So she's not designated as an expert.

9 She was not an initial or rebuttal expert, correct?

10 MR. DOYLE: Correct.

11 THE COURT: So her only designation was the 16.1
12 designation that you read last week and that was attached to 727 briefs,
13 correct?

14 MR. DOYLE: Yes, she was --

15 THE COURT: So just a straight 16.1, right?

16 MR. DOYLE: Right.

17 THE COURT: Okay. So that's all she is. She's not a -- she's
18 nothing more than just she's a treating physician, correct?

19 MR. DOYLE: Correct. She's going to testify about her care
20 and treatment --

21 THE COURT: No, Counsel, please don't tell me what she can
22 testify for.

23 The Court's specific question was I'm asking about her
24 designation. Please don't state what she can and cannot. That's a Court
25 determination and consistent with the applicable rules and case law.

1 Right? If there's any question about first off you designate her she can
2 only testify as she has been specifically designated. You very limited
3 how you are allowing her to testify by your specific designation in your
4 16.1 disclosure. That is the sole way that she can testify. Because that is
5 how you have specifically designated her.

6 How Defendants have designated her is the only way that
7 she can testify in accordance with NRCP. Okay? And it's fact you look at
8 FCH, right? Which specifically says that. So the applicable case law, and
9 you could go to your brief, which incorrectly cites federal law into District
10 of Nevada opinions, which would have no precedential affect, have no
11 basis, and don't have the correct law in this situation.

12 There is case law directly on point and there is a rule directly
13 on point, and there is the specific drafter's notes to the 209 amendments
14 directly on point. And even more so, and I know -- I'll just switch it this
15 way.

16 Since the Court for the several months after the June 2019
17 Nevada Lawyer articles came out has been consistently on a daily basis
18 citing this -- these articles on pretty much every single day, every single
19 motion calendar multiple times a day would gather -- and I've been
20 saying it off the record before when people were here in the court.
21 Earlier I've been saying it at all sorts of different hearings.

22 Without looking at the specific transcripts of every single day
23 that you all appeared would likely say it multiple occasions, but even
24 articles in the Nevada Lawyer June 2019 edition, clearly written by now
25 Court of Appeals Judge, Bonnie Bulla, and Wesley Ayres, Discovery

1 Commissioner, and another great article by our Supreme Court justices.

2 But the one in particular I was referencing is one I keep
3 reminding people of, that goes over brief overviews, selective changes
4 to Nevada discovery rules, which actually has a specific section expert
5 disclosures, which highlights -- not saying that this article is in any
6 precedential -- but clearly by the Court of Appeals judge prior to
7 discovery to commissioner for the 8th Judicial District who was on the
8 committee who specifically changed these rules, very informational for
9 most people clearly highlights that.

10 But you don't even need to go to that article, you have clearly
11 the NRCP. You have the highlighted, redlined versions that are available
12 online, et cetera. The drafters notes clearly articulate that this is a clear
13 change and a distinction of what needs to be done. That's all straight
14 NRCP. You even have the citation *FCH1, LLC v. Rodriguez*, 130 Nev. 425
15 case law directly on the point in this area.

16 That's what governs what Dr. Chaney can testify to. And in
17 this case, since it is the description specifically stated by the party who's
18 wishing the witness to testify, you have limited as such that's all she can
19 testify to. You have limited. You have chosen not to supplement it. You
20 have chosen not to take advantage of the specific provisions that have
21 been available to defendants since March 2019.

22 Since you've chosen not to do any of those things, you have
23 the designation that you provided for her is the only designation that she
24 can testify to consistent with NRCP and consistent with FCH1, all
25 precedential Nevada authority.

1 So that's what the law is. That's not anything coming from
2 this Court, that's just per se -- NRCP all the drafter's notes and FCH1. So
3 that's what she can testify to. That's nothing from this Court, that's just
4 the way it is.

5 So that being said, the issue of the compensation, the Court's
6 going to have to wait to see when her counsel comes personally and see
7 if he wishes to address that issue to clarify any outstanding issue so that
8 the Court could be fully informed, because the Court needs to be fully
9 informed on what his counsel's understanding is of the chronology is to
10 see if there is or is not an issue.

11 Because at this juncture I have two very different opinions of
12 what happened and I don't have full firsthand knowledge of everything,
13 so the Court can't say that something did or did not happen, which was
14 or was not permissible or impermissible. I need to be fully informed.

15 That take care of the issue for current present so that I be
16 fully informed so that I have full understanding I think that's the
17 appropriate thing to do and that's what this Court is going to do.

18 Is there other issues with regards to Dr. Chaney that don't
19 arise directly from NRCP and FCH1?

20 MR. LEAVITT: No, Your Honor, just that we have a hallmark
21 issue which I don't know how we're going to qualify her.

22 THE COURT: She's not an expert so you don't have a
23 hallmark issue. She is a treating physician --

24 MR. LEAVITT: No --

25 THE COURT: -- falls specifically within --

1 MR. LEAVITT: Correct.

2 THE COURT: -- NRCP. You all have both stated she was
3 never designated as an expert, initial or rebuttal. You've all told me that
4 multiple times. You've all shown me that she never was shown this
5 specific designation, it was read in open court by Mr. Doyle. Never been
6 supplemented. Everyone's told me that.

7 So NRCP is very clear. There has never been the provision
8 taking advantage of the provision about if somebody wishes to change
9 that, that's never been done. That provision has never been taken
10 advantage of that NRCP 2019 allows to be done. It was never done. So
11 there is no change. Unless somebody's going to say it was done and
12 this Court's missing something.

13 Counsel for Defense are you going to say that you took
14 advantage of the changes?

15 MR. DOYLE: The description of Dr. Chaney's testimony is, as
16 I stated, she's expected to testify regarding her examination, treatment,
17 diagnosis, and overall health conditions of Plaintiff. Which encompasses
18 her care and treatment.

19 THE COURT: Counsel, the designation is what the
20 designation says. NRCP is very, very clear. You must not run afoul if
21 you did not care to do what would have been required to have done
22 anything else to change the treater. You did not do it. You cannot do it
23 for the first time on the stand.

24 Are you abundantly understanding that? And please do not
25 say that you did not read the changes to the NRCP, and that you're going

1 to inadvertently do something because you don't understand those
2 changes. I'm just being very clear. You must fully -- have yourself fully
3 aware of that so that you don't inadvertently do that.

4 I'm sure that you already have read them over and over and
5 so I'm sure my caution is not necessary. But just in case I'm making it
6 abundantly clear because in the past you said you weren't aware of
7 certain EDCRs and different things and so the Court's making it clear.

8 And of course, as you know as a lawyer, a very experienced
9 lawyer, have to be aware and are required to be so. So --

10 MR. DOYLE: My questions will --

11 THE COURT: -- it's very clear that it has what is required,
12 FCH1 says what you can and cannot do. And you can't do it, it is not a
13 situation where you have a very detailed paragraph which explains
14 different things. You can't go into all those things; it says what you can
15 do. It's very clear. The drafter's note says what needs to happen. It
16 didn't happen in this case, can't pretend it didn't happen, no one's telling
17 me it happened.

18 MR. JONES: Your Honor, the only thing that continues to
19 trouble me on this is that it took an awful lot to pull from Mr. Doyle a
20 little bit of candor about his conversation with John Cotton, and I'm
21 concerned about other ex parte communications that have occurred
22 here. I'm confident we haven't heard all of them.

23 THE COURT: With whom?

24 MR. JONES: With either the attorneys for her, or with her
25 directly. But even consulting with her attorneys and making side deals

1 without us being involved is not appropriate. That is still an ex parte
2 communication through her representatives.

3 And so I'm concerned that perhaps this morning, after they
4 saw this motion, they called Mr. Cotton or Mr. Weiss and they had
5 additional conversations. And when Mr. Weiss comes in here to talk, I
6 don't want to have a situation where we've had additional
7 backchanneling.

8 And I'd like there to be an instruction that Defense is not to
9 communicate any further, other than through appropriate legal means
10 for -- with respect to Dr. Chaney.

11 They can submit subpoenas, they can reach out to us, but
12 they can't go do it on their own in an ex parte fashion, but they can't do
13 it on their own in an ex parte fashion.

14 THE COURT: Using the term ex parte --

15 MR. JONES: Yes, Your Honor.

16 THE COURT: -- by its own terms, right -- says something
17 would be both impermissible other than the specific exceptions where ex
18 parte is allowed, in which the ex parte usually misuse --

19 MR. JONES: Right.

20 THE COURT: -- the term ex parte, usually implies the Court.
21 That's why the Court was being so clear. There has been nothing that
22 this Court in any manner -- and I didn't think you were implying -- you
23 weren't implying that there was any ex parte communications with the
24 Court --

25 MR. JONES: No --

1 THE COURT: -- that's why I was --

2 MR. JONES: -- no, no, no. I meant --

3 THE COURT: --Okay. Usually the term ex parte refers --

4 MR. JONES: -- I meant between Defense Counsel and our
5 client's treating provider, which is the subject of *Leavitt v. Siems*, that
6 it's --

7 THE COURT: Yeah, I --

8 MR. JONES: -- that's -- yes. No, no, no. Not with respect to
9 the Court, Your Honor.

10 THE COURT: Okay. Just --

11 MR. JONES: And so the problem is, you know, if they have
12 any such communications those have to be disclosed. How is it that I
13 find out yesterday for the first time that there's all this money being
14 thrown around, being offered, money not yet paid, a bill not yet sent for
15 testimony not yet given. That is a problem. That is a real problem, Your
16 Honor, on its face. Have any testimony given when there is an unknown
17 bill that has not yet been paid. There's a bias element that gets built into
18 that and that is totally inappropriate. Especially when it's one of
19 Plaintiff's treating physicians. And the Defense failed to disclose that
20 information.

21 And so that on that --

22 THE COURT: And what remedy would you like, Counsel, just
23 using --

24 MR. JONES: She can't testify, Your Honor.

25 THE COURT: You understand at this juncture you're telling

1 me a conversation which you had with somebody who's not present in
2 the court, right?

3 MR. JONES: Yes.

4 THE COURT: And the person presumably or someone at that
5 office would presumably be here this afternoon and wouldn't it be more
6 appropriate from the Court to have an understanding from the
7 representative of Dr. Chaney's own personal counsel, if they wish to
8 inform the Court without requiring them to inform the Court, if they wish
9 to state what their view is so that the Court can be directly informed of
10 what Dr. Chaney's position is before the Court makes a determination?
11 Because they would know directly about what communications and what
12 was represented to their client, if they chose to disclose to the Court.

13 I'm not saying it would require it, because the Court has to
14 evaluate whether it would require it or not because more likely I will tell
15 you the Court's inclination is I would say that there is a difference of
16 opinion, would they like to explain what happened, and not require that
17 they do so. But at least give that opportunity, so that the Court could be
18 well informed from a firsthand knowledge, rather than a secondhand
19 knowledge, particularly since now, based on subsequent statements by
20 Defense Counsel, the conversation was with, not the individual that you,
21 Mr. Jones had the conversation with, wouldn't that be the more well-
22 reasoned approach?

23 MR. JONES: Certainly, Your Honor. I --

24 THE COURT: I am hearing what you're saying, but don't you
25 think the Court should have some firsthand knowledge before making a

1 determination? This Court thinks it should.

2 MR. JONES: I think that's reasonable, Your Honor. And I
3 think -- I would request that there be an instruction given that no one is
4 to communicate with Mr. Cotton's office, whether it be directly or
5 indirectly through any agents until that happens.

6 THE COURT: The short answer is this Court's going to ask
7 everyone this afternoon about any communications so that the Court has
8 the most up-to-date information, and you all know, as officers of the
9 court, you have your obligations and the rules of professional conduct.
10 The Court doesn't find that instruction --

11 MR. JONES: Okay.

12 THE COURT: -- would be appropriate because, remember,
13 you also have a joint jury instruction -- I have to doublecheck, but I
14 thought I saw it in your pack the other day, it's kind of a few different
15 matters maybe between a standard trial from start to finish that --
16 Okay? -- maybe intervening time -- but I have a recollection that there's
17 a joint jury instruction about speaking with a witness.

18 So would that be correct, that that jury instruction's --

19 MR. JONES: Yes, Your Honor.

20 THE COURT: -- in that packet?

21 MR. JONES: There is, Your Honor.

22 THE COURT: Yes? Okay. So I'm hearing what you're saying,
23 but I think the Court's more well-reasoned approach is to confirm this
24 afternoon with everyone to see what the most up-to-date information is,
25 and ask everyone, as officers of the court, the most up-to-date

1 information and everybody knows that they choose not to be forthright
2 to the Court, everybody's very aware, because not only is the Court put it
3 in writing, but I think we've all told you *Valley Health Systems*, and you
4 all know Rule of Professional Conduct 3.3A *Valley Health Systems* and
5 I'm sure everybody's here to put the best interests of their clients and not
6 continue conduct which there's still a pending motion. Sanctions
7 separate for the Court's pending motion. And I would hope that
8 everyone would be following the rules of professional conduct, following
9 the other rules without the Court going into a litany, because once again,
10 I have the poor jury waiting again.

11 So that's what the Court's going to do is get everyone's most
12 up-to-date information that's happening, In the intervening time, if there
13 was something else that the Court could address for either of the parties,
14 the Court would be glad to do so, but I think the best way to handle that
15 one is to have the most up-to-date information this afternoon.

16 So does that work for counsel for Plaintiffs? You raised the
17 objection for an interim addressing it?

18 MR. JONES: Yes, Your Honor

19 MR. LEAVITT: Yes.

20 THE COURT: Does that work for Defense Counsel?

21 MR. DOYLE: That's fine.

22 THE COURT: Okay. So then, at this juncture, is there
23 anything else that the Court can do to address either party's concerns, or
24 would you like the witness to come in that was agreed to by the parties
25 that would be called next, and then have the jury come in?

1 Counsel for Defense, it's your case in chief at this juncture, so
2 I ask you first.

3 MR. DOYLE: We can have him come in, yes.

4 THE COURT: And hat would be is it Dr. or Mr. Volk?

5 MR. DOYLE: Mr. Volk.

6 THE COURT: Okay.

7 Does that work for you, Plaintiff's Counsel? Addressed all
8 your issues?

9 MR. LEAVITT: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. DOYLE: May I just flip this over?

12 THE COURT: Of course.

13 Okay. And the witness does know that he will not be
14 bringing any documents to the witness stand and looking at them?

15 MR. DOYLE: I didn't specifically mention that.

16 THE COURT: I'm sure hope you did. After yesterday, I sure
17 hope you did.

18 MR. DOYLE: But his --

19 THE COURT: So please ensure that he does not.

20 MR. DOYLE: His testimony --

21 THE COURT: Please ensure that does not, Counsel.

22 MR. DOYLE: May I speak?

23 THE COURT: Of course, you may.

24 MR. DOYLE: His testimony requires him to --

25 THE COURT: Just a sec. Excuse me.

1 I have Defense Counsel speaking. I can't have cross-
2 conversations over there on Plaintiff's side, if you don't mind.

3 MR. LEAVITT: I apologize, Your Honor.

4 THE COURT: No worries. Thank you.

5 MR. DOYLE: He has specific numbers that he will be sharing
6 with the jury and he doesn't have those numbers committed to memory.
7 So he will have to look at some documents so that he can communicate
8 to the jury his --

9 THE COURT: Excuse me. Wouldn't these be numbers that
10 would already have been set forth in his reports?

11 MR. DOYLE: He has his report, yes. And he has made
12 calculations based upon his analysis of Dr. Clauretie's report, and he has
13 made calculations and has determined specific numbers under certain
14 scenarios based upon his criticisms of Dr. Clauretie's methodology, so
15 he has to be able to see those numbers.

16 THE COURT: Aren't those in his reports, though?

17 MR. DOYLE: They're not specifically in his report, he's made
18 handwritten notes.

19 THE COURT: So -- Sorry. Is there an agreement by Plaintiff's
20 Counsel for some handwritten calculations to come in?

21 MR. LEAVITT: Absolutely not.

22 MR. HAND: No, Your Honor.

23 THE COURT: Have these handwritten calculations been
24 provided to Plaintiff's Counsel timely during discovery?

25 MR. DOYLE: No, they're illustrative of the opinions he put in

1 his report and expressed at his deposition.

2 THE COURT: Counsel for Plaintiff, just once again, I do
3 appreciate that you all may have viewpoints, but remember we have
4 sound activated JAVS devices --

5 MR. LEAVITT: Sorry, Your Honor.

6 THE COURT: -- and so we -- couple of different things.

7 Marshal, since we have a moment, would you mind bringing
8 the donuts out to the jury?

9 THE MARSHAL: Sure.

10 THE COURT: Thank you so much. I was going to try and get
11 your attention in a few moments before. Feel free to bring the napkins
12 out with you so that they have a chance to do that. Okay.

13 Well, let's circle back. First off, is there -- let's walk it through
14 step by step. Is there any agreement by Plaintiffs with regards to
15 experts -- so far there's not been anyone's told me any agreement for
16 experts of anyone to be bringing their own notes or documentations to
17 the witness stand.

18 MR. JONES: No, Your Honor.

19 THE COURT: I think we may have a double negative. Is there
20 an agreement. Is there been --

21 MR. JONES: There's no agreement that experts can have
22 items at the stand. Or the witness --

23 MR. DOYLE: Dr. Clauretie and Don Cook used their reports
24 and --

25 THE COURT: Counsel. Can I please -- I'm asking questions

1 of both sides. Please give the Court a chance to ask questions. Okay?

2 So Plaintiff's, there's no agreement, is that correct?

3 MR. JONES: That's correct, Your Honor.

4 THE COURT: From Defense Counsel, are you stating that
5 there was any agreements?

6 MR. DOYLE: Well, yes. Don Cook and --

7 THE COURT: Counsel, my question is, was there any
8 agreement? Express agreement between the parties.

9 MR. DOYLE: No, it was implied that a witness such as Don
10 Cook or Dr. Clauretje can use their report and their written documents in
11 order to accurately convey their testimony.

12 THE COURT: Counsel, my question was very specific.
13 Plaintiff has told me that there was no agreement. I asked you all each
14 just to see if you have a difference of opinion whether there was an
15 agreement on a topic, because I want to get each party's position.

16 Plaintiff's Counsel's told me that there's been no specific
17 agreement.

18 Defense Counsel, are you saying there's been any specific
19 agreement?

20 MR. DOYLE: I said there's no specific --

21 THE COURT: Okay.

22 MR. DOYLE: -- agreement about that, no.

23 THE COURT: So then there's been no specific agreement.

24 Now, distinction when parties are referencing their experts to
25 reports, the Court is asking something different. Plaintiff's Counsel, you

1 heard Defense Counsel that the current witness needs some things up on
2 the Bench. Are you okay with that or are you not okay with it? The Court
3 doesn't have a position. I just need to hear what the parties' viewpoints
4 are.

5 If you have a difference of opinion, the Court needs to rule on
6 something, I'll be glad to do so. If you're in agreement, feel free to call
7 the witness in and get the jury in and we'll get moving.

8 MR. LEAVITT: No, Your Honor, I have no clue what those
9 are. He said he didn't serve them in discovery, I don't know what he's
10 talking about. So no.

11 THE COURT: Who's taking this witness?

12 MR. HAND: I am, Judge.

13 THE COURT: Okay. Then you can appreciate, I would need --

14 MR. LEAVITT: Fair enough, Your Honor.

15 THE COURT: -- let's have one voice, one writer in these to
16 write, that's the way you all have been doing it as per witness for the
17 attorney. So --

18 MR. HAND: Your Honor, there's been no calculations
19 disclosed specifically on Dr. Clauretje's present value or the Don Cook
20 lifecare plan.

21 THE COURT: Do you have any --

22 MR. DOYLE: But --

23 THE COURT: Do you have any objection to him having
24 calculations? If you don't, then we'll just move forward.

25 MR. HAND: I have an objection to him putting in new

1 calculations that weren't disclosed.

2 THE COURT: Okay. So let me hear from Defense Counsel.

3 MR. DOYLE: I'll limit him to the -- I'll limit him to his -- well,
4 we have his report and his response to Dr. Clauretie's report, and we
5 have his deposition where he provided an estimate, using his
6 methodology how the Clauretie number would change. So we have that
7 information.

8 THE COURT: Okay. Plaintiff's Counsel, are you all on the
9 same page, you agree so far?

10 MR. HAND: I'm not sure what the inquiry is at this point after
11 the he was designated strictly as a rebuttal to Dr. Clauretie, and most of
12 his report has to deal with interpreting the Sarah Larson report, who is
13 not testifying, based on the Lance Stone report. There's very little about,
14 in the report, about Dr. Clauretie, other than he says he uses some basis
15 of the consumer price index that I don't use, but there's no calculation in
16 that report as to what his present value is of the Cook lifecare plan,
17 which he's supposed to be rebutting.

18 THE COURT: Is that in the deposition? I understood Defense
19 Counsel saying that the calculation was in the deposition --

20 MR. HAND: All he said --

21 THE COURT: Is that correct, Defense Counsel --

22 MR. HAND: in the deposition --

23 THE COURT: -- you said it was in the depo?

24 MR. HAND: -- Judge, is I think if I do my calculations it
25 would be 20 to 30 percent lower. But there are no specific numbers. He

1 didn't have anything with him to give me a number. He just said I could
2 tell you I think it would be 20 to 30 percent lower, but that's all I can say
3 right now. I wasn't -- he says specifically in his deposition, I was not
4 asked to do a present value calculation on the Cook lifecare plan.

5 THE COURT: Okay.

6 MR. HAND: He wasn't asked to do that. So I don't think he
7 even has a basis to opine.

8 THE COURT: And can I have somebody reference me,
9 because you have very difference --

10 MR. HAND: Yes.

11 THE COURT: I'm going to ask Counsel for Defense, please go
12 to what you're referencing in the deposition you think supports your
13 position; Plaintiff's Counsel --

14 MR. HAND: Yes.

15 THE COURT: -- please go to what you think supports your
16 position so that the Court can have a better understanding, and then I'm
17 going to ask you to show it to me so that the Court can make a
18 determination.

19 Thank you so much.

20 MR. DOYLE: The testimony that we're both referring to
21 begins on page 20 of the deposition.

22 THE COURT: Does either party have a script or something
23 for the Court to follow along so I can look at something? If you --

24 MR. HAND: Yes.

25 THE COURT: Do either of you have an extra copy or a script

1 or something the Court can look at?

2 MR. HAND: Yes.

3 THE COURT: If you don't --

4 MR. HAND: I have.

5 THE COURT: You have an extra copy? I don't want to take
6 the copy you're looking at, just if somebody has an extra copy.

7 MR. HAND: I can pull it up on a computer.

8 THE COURT: Because wait a second. I'm just trying to think,
9 it was attached in your 7.2. Okay.

10 You're looking -- that's fine.

11 MR. JONES: He's going to pull it up on the computer.

12 THE COURT: Is there anything that -- is there any markings
13 or anything? Show it to Defense Counsel, make sure that he's okay that I
14 can see that first, please.

15 MR. JONES: There's some checkmarks on it.

16 MR. DOYLE: That's fine.

17 THE COURT: Okay. Thank you so much. Appreciate it. Page
18 20, is that correct, Defense Counsel --

19 MR. DOYLE: Yes.

20 THE COURT: -- you want me to look at?

21 Hold on a sec. You mean -- okay. Just give me a second,
22 please. Thank you. Let Plaintiff's Counsel get to that page as well, and
23 then we'll see what you're talking about. Thank you.

24 MR. DOYLE: It begins at line 2.

25 THE COURT: I do appreciate it. One second, please.

1 Plaintiff's Counsel, have you had a chance to get there or you
2 need another sec?

3 MR. HAND: One second.

4 THE COURT: Sure, of course.

5 MR. HAND: I can just probably pull it up so I can refer to it
6 directly.

7 THE COURT: If this is the only page, I can ask someone on
8 my team to make a quick copy of this page, if that would be quicker.

9 MR. DOYLE: It goes over, I mean the discussion goes over a
10 couple of pages.

11 THE COURT: Jimmy, do me a favor?

12 MR. HAND: I have it, Your Honor.

13 THE COURT: Oh, all right, you have it. Never mind.

14 MR. HAND: Judge, I found it.

15 THE COURT: No worries. Thank you so much. Appreciate it.
16 No worries, thank you so much.

17 MR. HAND: Your Honor, it's page 8, line 14 to 18.

18 THE COURT: So shall we start numerically on page 8 and
19 then go to page 20, so that so that --

20 MR. HAND: And then go down to page 8, line 19 to 21.

21 THE COURT: Okay. Hold on. So let's start then numerically,
22 then we'll go to Defense's so we're doing this in page numerical order.
23 One second. Okay.

24 So reference you'd like the Court to draw to the Court's
25 attention, Counsel for Plaintiff --

1 MR. HAND: Yes.

2 THE COURT: -- can you please state what you're saying?

3 MR. HAND: Page 8, line 19 to 21, the witness states he was
4 not asked to do any analysis or calculation based on the lifecare plan of
5 Dawn Cook.

6 THE COURT: Okay. Do you want to read the --

7 MR. HAND: Yeah, I'll read it.

8 THE COURT: -- lines and page just so we've got what you're
9 each reading --

10 MR. HAND: Okay.

11 THE COURT: -- because then Defense Counsel, if he wishes
12 to read what he's saying supports his we'll just go with what it all says
13 and --

14 MR. HAND: I'm reading -- I'll read above it, Judge in its
15 entirety.. We're at page 8, line 14:

16 Question: In this case what were you asked to do?

17 Answer: I was asked to evaluate future cost of care of
18 plaintiff based on the opinion of Dr. Stone, Dr. Kush, and Sarah Larson.
19 And also to respond to the work product and testimony of Dr. Clauretie.
20 Page 8, line 19:

21 Question: Were you asked to do any analysis or calculation
22 based on the lifecare plan of Dawn Cook?

23 Line 21:

24 Answer: I was not.

25 So he did not do --

1 THE COURT: Okay.

2 MR. HAND: -- any calculations based on that.

3 THE COURT: Okay.

4 So now, Defense Counsel, you have different citations, go
5 ahead.

6 MR. DOYLE: Do you want me to read them into the record or
7 just give you the pages and lines?

8 THE COURT: Feel free to do the same way that Plaintiff did
9 it, or --

10 MR. DOYLE: Fine.

11 THE COURT: -- if you choose to do it differently, you can do
12 it differently. Whatever you choose.

13 MR. DOYLE: Well, picking up on page 8, line 22:

14 Did you do any calculations based on the lifecare plan of
15 Dawn Cook?

16 Answer: Indirectly I did. Just for my own knowledge and
17 edification I started with Dr. Claurette's conclusions over the life
18 expectance and estimated how much different my figures would be if I
19 were to apply my net discount rates.

20 Question: So if you applied your method of analysis to the
21 Cook report, could you tell me what figure you came to in that regard?

22 Answer: So this would incorporate any other assumptions of
23 Dr. Claurette, such as life expectancy, so it's just working off of his
24 figures. So working off of his life expectancy and his methodology as
25 applied to the Cook plan, I would estimate my figures would be 20 to 30

1 percent lower.

2 Question: Thank Dr. Clauretie's figures?

3 Answer: Yes.

4 And then he's asked if he has his report in front of him. And
5 then if you go to page 20, beginning at line 2, it says:

6 So if we look at the Cook lifecare plan, you don't have any
7 calculations under your methodology as to what the present value of
8 that plan would be; is that right?

9 Answer: That's incorrect. I think we talked about that earlier.
10 I did do a calculation for that.

11 Question: What was it? I'm sorry, I missed it.

12 Answer: I said that my number would be, all else equal, life
13 expectancy in the Cook plan, the way Clauretie analyzed it, my figure
14 would be 20 to 30 percent lower.

15 Question: And that's using the Cook proposed cost as well
16 as the Cook life expectancy?

17 Answer: Correct.

18 Question: And on what basis would your present value
19 calculation be 25 to 30 percent lower ? Can you explain that to me?

20 And then it goes on for another -- I mean I don't think I need
21 to read the long answer.

22 THE COURT: At least give the reference so I know what
23 you're referencing is.

24 MR. DOYLE: Okay. So the answer goes over to page 21, line
25 15.

1 THE COURT: Hold on one a second. Give me a moment to
2 read it, please.

3 [Pause]

4 THE COURT: Okay. So I read what the additional aspects in
5 the answer. So Counsel for Plaintiff, we'll give you one minute to give
6 your summation; then Defense Counsel, your summation, see what we'll
7 have.

8 MR. HAND: This is the problem, Judge. Under 16.1 he
9 should have supplemented these calculations specifically if he wanted to
10 use them. Otherwise, he's confined to this report which hasn't
11 calculations. He had time to supplement this is what I think the Clauretie
12 plan -- I mean the Cook plan is valued at present value, using his
13 method. He didn't do that. I don't know what his calculations are, how
14 he got to them, what he did. I have no idea what his figures are. That
15 he's specifically going to say that's what it is.

16 It's an ambush trying to have somebody give new opinions
17 that aren't in his report that he had time to supplement if he's taking
18 issue with Clauretie's present value calculation, which wasn't done. And
19 I think it's --

20 THE COURT: Let the Court have a distinction of what
21 you're - actually, I'm going to ask Defense Counsel to give his brief
22 response, because I need to have an understanding of what he means by
23 calculation. If he's talking about the 2.7 percent positive, or if he's
24 actually having a number come out.

25 So let me have an understanding of what Defense Counsel is

1 going to try and elicit from this witness. I think --

2 MR. DOYLE: Well, I would ask this witness questions
3 contained in his report as well as in his deposition. I would ask this
4 witness, as he explained in his report, how he determines present cash
5 value. I would ask him for the estimate that he provided at his
6 deposition, how applying his methodology to the Dawn Cook
7 information, how that percentage would be less, and I would ask him for
8 what that number would be. Which is a --

9 THE COURT: How do you get from -- Okay. That last one is
10 where you can appreciate the distinction. All right?

11 MR. DOYLE: Okay.

12 THE COURT: So I -- how do you get from him saying for his
13 own -- indirectly I did for my own knowledge and edification, as he states
14 on page 8, line 24-25; and then even disregarding the own knowledge
15 and edification concept, even if the Court would disregard that, he said
16 would be, my figures would be 20 to 30 percent lower.

17 How does that get to an actual dollar number?

18 MR. DOYLE: Well, then I'll limit him to -- well, he says 20 to
19 30, 25 to 30. So I mean --

20 THE COURT: He says 20 to 30 on page 9, you're correct; and
21 then he says -- where does he say --

22 MR. DOYLE: 25 to 30 on page 20.

23 THE COURT: Okay. So that's still within the same range.

24 MR. DOYLE: Right.

25 THE COURT: 30 being an upper limit, 20 being the lower

1 limit. So how does that get to a calculation of a specific number?

2 MR. DOYLE: It doesn't.

3 THE COURT: Okay. So he'd be limited to percentages lower.

4 MR. DOYLE: Yeah, I thought Plaintiff would be interested in
5 what the number is, but if we want to limit to percentages --

6 THE COURT: Would Plaintiff be interested in what the
7 number is?

8 MR. HAND: I guess I would be. I have no idea what it is at
9 this point.

10 THE COURT: No, no. Excuse me.

11 MR. HAND: Yes?

12 THE COURT: Sorry. Counsel are you interested in having
13 the witness be able to say what the number is versus saying -- being
14 limited to what's stated in his deposition, 20 to 30 percent; 25 to 30
15 percent?

16 I understand your first position is he shouldn't be able to say
17 any of that.

18 MR. HAND: No, I would --

19 THE COURT: I will tell you the Court's inclination is that it
20 was explored in his deposition and, based on custom and practice, it's
21 explored in his deposition, put generally on notice that this is -- would be
22 within rebuttal and since this one was not subject to any timely objection
23 on this issue, the Court's inclination is that Mr. Volk would be able to
24 give analysis 20 to 30 percent, 25 to 30 percent because that was
25 explored in his deposition back during the discovery period June 2019 in

1 this specific case because there hasn't been an objection. There's been
2 so many objections to other things and that would be consistent with all
3 the other Court's rulings on both sides.

4 That's what the Court's inclination is on this. However,
5 Counsel for Defense said that Plaintiff may be interested in hearing what
6 that quote number is, versus just saying it's 20 to 30 percent less or 25 to
7 30 percent less.

8 So I wasn't sure if you heard that because it seemed like you
9 all might have been talking, so the Court was asking whether you wanted
10 to hear that number or you want the witness limited to, as stated in his
11 deposition, 20 to 30 percent less, 25 to 30 percent less, that's all fair
12 game because it was in his deposition.

13 MR. HAND: I would just like the witness limited to the
14 deposition testimony.

15 THE COURT: Okay. So --

16 MR. DOYLE: That's fine.

17 THE COURT: -- that's what would --

18 MR. DOYLE: I understand.

19 THE COURT: -- be appropriate because that would be fair
20 game. If you want to give calculations, the Court's giving you more
21 generous view on the rebuttal, so it would be appropriate for
22 calculations. To be more than that, because they would not have been
23 put on notice of any of this calculations, and given this was what it was,
24 if you wanted to do a supplemental report, but you didn't, then he would
25 have been able to have done that. There's no reason, you still had until

1 July 24th.

2 No one's provided any reason you couldn't have done that,
3 so I think the Court with generous view is allowing the percentages,
4 because that was explored during the deposition. So --

5 MR. DOYLE: Can I have a moment with him just to clue him
6 in?

7 THE COURT: I'm just going to make sure there's no
8 outstanding other issues before I was going to grant that request in two
9 seconds, but just make sure there's no other outstanding issues.

10 Is there any other outstanding issues?

11 MR. HAND: Not on behalf of Plaintiff, your Honor.

12 THE COURT: Is there anything else on behalf of Defendant?

13 MR. DOYLE: No.

14 THE COURT: Okay. Feel free. And then do you want the
15 witness on the stand when the jury comes in?

16 MR. DOYLE: Yes.

17 THE COURT: After you've had a chance, once you're
18 finished, please let the Court know.

19 MR. DOYLE: If we could use the anteroom for a moment?

20 THE COURT: Marshal, is the anteroom open this morning?

21 THE MARSHAL: it is open.

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

23 [Pause]

24 MR. DOYLE: Oh, one other thing. I'm sorry.

25 [Pause]

1 THE COURT: Are the parties ready to have the jury be
2 brought in since the witness is walking to the stand?

3 MR. DOYLE: Yes, Judge.

4 MR. HAND: Yes, Your Honor.

5 THE COURT: Counsel for Defense did I hear you say yes?

6 MR. DOYLE: Yes.

7 THE COURT: Okay. Thank you so much.

8 So I just give a quick caveat to the witness. Same conditions.
9 Have the witness head to the stand, the jury comes in and just to give
10 you a heads up, that is a voice-activated microphone right in front of
11 you. And just a friendly reminder, we need to ensure that only two
12 people are talking at the same time, we just tell all the witnesses so that
13 we can just ensure that we have a clear record and that all the responses
14 need to be audio. Meaning uh-huh, huh-uh, shrugs, of course can't be
15 picked up by our JAVS system, so just any responses need to be of a
16 verbal nature. Okay?

17 MR. VOLK: Thank you.

18 THE COURT: Do appreciate it. Thanks.

19 Once the jury comes in, then I will ask Defense Counsel to
20 call his next witness, even though you're there on the stand, and then
21 the clerk will swear you in. Appreciate it. Thanks so much.

22 THE MARSHAL: Ready, Judge.

23 THE COURT: Okay, we're ready. Thank you so much,
24 Marshal. Appreciate it.

25 THE MARSHAL: All rise for the jury.

1 [Jury in at 9:46 a.m.]

2 [Within the presence of the jury]

3 THE MARSHAL: Jurors are accounted for, please be seated.

4 THE COURT: Do appreciate it.

5 Welcome back, ladies and gentlemen. Hope everyone had a
6 very nice and relaxing evening. And at this juncture, as you recall, we're
7 in the Defense case in chief.

8 Counsel for Defense, would you like to call your next witness,
9 please?

10 MR. DOYLE: Yes, we're going to call Erik Volk and interrupt
11 Dr. Rives.

12 THE COURT: Okay.

13 So ladies and gentlemen of the jury, as you heard, and what
14 we've done in the past is sometimes, you know, for convenience of
15 different witnesses, we've interrupted one witness' testimony and gone
16 to a different witness and that's what's happening this morning.

17 So at this juncture, you heard counsel call for the next
18 witness, Madam Clerk, would you mind swearing in the witness? Thank
19 you so much.

20 THE CLERK: Thank you, Your Honor.

21 ERIK VOLK, DEFENDANT'S WITNESS, SWORN

22 THE CLERK: Thank you. Please be seated.

23 And could you please state and spell your name for the
24 record?

25 THE WITNESS: My name is Erik Volk, E-R-I-K V -- as in

1 Victor -- O-L-K.

2 THE CLERK: Thank you, sir.

3 DIRECT EXAMINATION

4 BY MR. DOYLE:

5 Q Mr. Volk, what's your occupation?

6 A I am an economist.

7 Q And what does that mean to be an economist?

8 A That means that I evaluate economic losses in primarily
9 cases of civil litigation, such as this case.

10 Q By whom are you employed?

11 A I'm employed by Cohen Volk Economic Consulting Group, in
12 Walnut Creek, California.

13 Q How long have you been doing this type of work?

14 A Since 1987, so about 32 years.

15 Q And what kind of cases are you typically consulted on?

16 A Typically I'd say half to two-thirds are personal injury or
17 wrongful death claims; about 20 to 25 percent are employment claims,
18 such a wrongful termination; and the rest are business disputes, such a
19 fire losses, water damage, things like that.

20 Q Would you please explain to the ladies and gentlemen of the
21 jury your educational background?

22 A Yes. I have a bachelor's degree in business administration
23 from UC Berkley, with an emphasis in finance and accounting; and I have
24 a master's degree in economics from the University of San Francisco,
25 with an emphasis in financial economics.

1 Q Do you have any teaching experience?

2 A Yes.

3 Q What's your teaching experience?

4 A From 2009 to 2011, I taught in the evenings as a lecturer
5 through Cal State University East Bay. I taught money and banking, as
6 well as managerial economics. And I also taught a basic class in
7 economics through the master's and Management Program at St. Mary's
8 College in 2016.

9 Q What organizations are you a member of?

10 A The American Economic Association, the Western Economics
11 Association, and the National Association of Forensic Economics.

12 Q Am I compensating you for the time that you have spent on
13 this case and for coming here today?

14 A Yes.

15 Q What is the -- what are your rates, please?

16 A For work and consulting, it's \$420, for testimony it's \$630 per
17 hour.

18 Q Now, Mr. Volk --

19 MR. DOYLE: Actually, may this witness offer his opinions as
20 an accountant, Your Honor?

21 THE COURT: Hearing no objection, the witness may offer his
22 opinions. Question?

23 MR. HAND: No objection, Your Honor.

24 BY MR. DOYLE:

25 Q Mr. Volk, do you know Dr. Clauretie?

1 A I don't know him personally; I've seen his work in many
2 occasions.

3 Q Under what circumstances have you seen his work on many
4 occasions?

5 A In litigation cases like this.

6 Q Do you and Dr. Clauretie have a different method for
7 calculating present value?

8 A Yes.

9 Q Explain to the ladies and gentlemen of the jury first, what is a
10 present value calculation? Or present cash valuation?

11 A Present cash value is based on the idea that you would
12 compensate the Plaintiff today, or at the time of trial for all of her future
13 losses. You give her an amount of money today that would pay for her
14 future losses, acknowledging that her future losses consists of various
15 care costs which are going to increase in cost over time, so the increase
16 in cost has to be accounted for.

17 But also taking into account that the money that you provide the
18 Plaintiff today, can be invested over time, earn interest or investment
19 returns that will help to pay for that care.

20 So those are all the things that go into present cash value.

21 Q Explain to the ladies and gentlemen of the jury your
22 understanding of Dr. Clauretie's method of calculating present value.

23 A For growth rates he increases various categories of care from
24 the Cook lifecare plan by 3-1/2 percent for things like doctors' visits,
25 home care, therapies, et cetera. For durable medical equipment, he

1 increases them by 2.8 percent in the future. And then for the interest
2 returns he looks at recent published offered rates from the U.S. Treasury.
3 So recent bond interest rates on U. S. Treasury bonds.

4 Q As an economist do you disagree with the growth rates that
5 he has used in this case?

6 A I have not formulated any opinions as to the expected
7 growth rates for the future in this case, but I have noted that the
8 Medicare -- Center for Medicare and Medicaid Services, their projections
9 for 2018 to 2026 are lower growth rates than those used by Dr. Clauretie.

10 A And then the interest rates that he uses, I think he spoke
11 about U.S. Treasury bonds maturing in one year, two years, three years,
12 et cetera, which I think he called a laddered approach. Is that a
13 methodology you use, or would you disagree with that?

14 A I don't use the laddered approach methodology. In my
15 opinion it's not reasonable nor prudent to do it that way.

16 Q Why do you disagree with the laddered approach?

17 A Well, I don't disagree with the idea that you're going to need
18 money out in the future, and we can try to figure out when we're going
19 to need it. The difference I have with Dr. Clauretie's approach is he's
20 using only currently available or recently available interest rates to
21 estimate the types of interest returns that are going to be available in the
22 future.

23 We've been at a very low interest rate period in our economy
24 over the past several years, and past decades, which is an anomalous
25 period looking at the historical record going back 60-plus years.

1 Projections from the government for future interest returns
2 are significantly higher than the current interest rates. So based on the
3 long run history of interest rates, as well as government projections for
4 interest rates, I don't consider reasonable nor prudent to lock in today's
5 currently low interest rates over the next 20 to 30 years.

6 Q Now, would you explain to the ladies and gentlemen of the
7 jury your method of determining present value and how that's different
8 than Dr. Clauretie?

9 A So in my methodology what I do is I look at historical time
10 series of interest rate data, inflation data, care cost growth rate data, and
11 I examine how they interrelate over time, what's the long run
12 relationship between home care costs versus general price inflation?
13 What's the long run relationship between interest returns and general
14 price inflation?

15 So I look at those net differences between interest returns
16 and general price inflation and care cost inflation over long run historical
17 periods to see how they have interrelated historically, and then I assume
18 that those historical interrelationships between interest and growth will
19 continue in the future.

20 Q And so how is that different than Dr. Clauretie in what he's
21 doing?

22 A So I'm looking at, like I said, historical relationships to
23 estimate how factors are going to interrelate in the future. Dr. Clauretie
24 is looking at interest returns today, on the one hand, and projections of
25 future growth rates, on the other hand. So he's not necessarily looking

1 at how projections of the future for interest rates compare to projections
2 of the future for growth rates. He's looking at projections for growth
3 rates versus current interest rates.

4 In my view, that's kind of an apples to oranges approach.

5 Q Now, there's a term net discount rate. What does that mean?

6 A Net discount rate just means if you take the difference
7 between interest and growth, the amount by which interest is estimated
8 to exceed growth.

9 So for example, if interest returns were estimated to be 4
10 percent a year on average in the future; and inflation was estimated to
11 be 2 percent per year on average in the future; the net discount rate
12 would be 4 percent interest minus 2 percent inflation, equals 2 percent
13 net.

14 Q Now, if you're dealing with positive net discount rates and
15 the number's getting larger, for example, if not 2 percent net discount
16 rate you have a 3 or perhaps 4 percent net discount rate, how does that
17 affect the present value?

18 A The larger then net discount rate, the lower the present cash
19 value. Because the amount by which interest exceeds growth is larger.

20 Q Now, in Dr. Clauretje's calculations did he have a positive or
21 a negative net discount rate?

22 A For the majority of his analysis it was a negative net discount
23 rate. I think for the durable medical equipment, where the growth rate
24 was 2.8 percent, I believe there were periods of time where he had the
25 interest rate slightly higher than 2.9.

1 So for some short periods of time he had a positive net discount
2 rate for the durable medical equipment.

3 Q And so when you have a methodology that yields a negative
4 net discount rate, how does that affect the present value?

5 A Well, as compared to a positive net discount rate, a negative
6 net discount rate is going to lead to higher present cash value.

7 Q The larger the negative number the larger the present value?

8 A That's true.

9 Q Now, Doctor, did you , as part of your work in this case,
10 apply your methodology to Dawn Cook's lifecare plan and the costs in
11 those plan and the life expectancy in that plan?

12 A Yes.

13 Q And applying your methodology to that same data that Dr.
14 Claurette used, in terms of percentages, your methodology yields what
15 difference?

16 A Between 20 and 30 percent less.

17 Q Why does your methodology yield 20 to 30 percent less, if
18 you could explain that?

19 A So based on the historical relationships that I analyzed
20 between interest and growth; the interest returns on average have been
21 higher than the growth rates. So my net discount rates are positive by
22 anywhere from 1-1/2 percent to 2.75 percent.

23 So because my net discount rates are positive and higher than
24 those of Dr. Claurette, the result is I come up with a lower present cash
25 value, all else equal.

1 MR. DOYLE: That's all I have, then. Thank you, Mr. Volk.

2 THE COURT: Cross-examination by Plaintiff's Counsel?

3 MR. HAND: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. HAND:

6 Q Good morning, Mr. Volk.

7 A Good morning.

8 Q I don't know if you remember me, my name is George Hand,
9 one of the attorneys for Titina Farris and Patrick Farris. I took your
10 deposition; do you remember that?

11 A I do remember that.

12 Q Okay. So what is your compensation for coming here today?

13 A So I charge \$420 per hour for preparation and travel and then
14 \$630 per hour for testimony.

15 Q So what do you think it would work out to be for today?

16 A Just for today?

17 Q Yeah, just for your appearance right now.

18 A So probably around \$2,000.

19 Q Okay. So when I took your deposition in June, specifically
20 June 20th, 2019, at that time you had past charges of \$6,416, an invoice
21 you were paid, correct?

22 A I don't recall the exact numbers, but I don't dispute that
23 figure.

24 Q And then you had another --

25 MR. DOYLE: Your Honor, relevance.

1 THE COURT: Overruled.

2 MR. DOYLE: If we could approach.

3 THE COURT: Madam Court Recorder, time to turn the white
4 noise.

5 [Sidebar at 9:59 a.m., ending at 10:01 a.m., not transcribed]

6 THE COURT: Okay. The objection is overruled. The witness
7 may answer the question. Thank you so much.

8 BY MR. HAND:

9 Q Do you need me to repeat the question, Mr. Volk?

10 A I only heard your first one about the 6,400.

11 Q All right.

12 A Sorry.

13 Q And then at your deposition, you indicated you had done
14 another eight-and-a-quarter hours of work and you charged I think you
15 said 450 an hour for that kind of work?

16 A 420, correct.

17 Q 420. So it was roughly \$3500, another \$3500, on top of the
18 6400. And then you also indicated at your deposition another three to
19 five hours for deposition prep. And that would be how much an hour?

20 A 420.

21 Q So that's another \$1,000 maybe, something like that. All
22 right. So prior to coming here today you billed about \$10,000 for your
23 work on the case. Is that a fair statement?

24 A I think that's about right, yes.

25 Q And you've had your deposition taken about 250 to 300

1 times, true?

2 A True.

3 Q And in 2009, you testified according to your testimony list,
4 about 20 times. Does that sound right?

5 A It sounds a little bit high to me, but I don't have it in front of
6 me.

7 Q All right. And I'll go to let's say the last four years, five years.
8 In 2014, you testified 37 times in arbitration, a deposition or trial. Does
9 that sound about right?

10 A Yeah, in the ballpark. Sure.

11 Q Okay. 2015 you testified 45 times. Does that sound about
12 right?

13 A Yes.

14 Q 2016, 39 times you testified. Does that sound right?

15 A In the ballpark. Sure.

16 Q 2017, 53 times. Does that sound about right?

17 A Yes.

18 Q And 2018, about 46 times. Does that sound right?

19 A Yes.

20 Q All right. And you've testified in Clark County in cases about
21 three to four times, true?

22 A Before today, correct.

23 Q And were those defendant cases?

24 A Yes.

25 Q And for Mr. Doyle's firm, how long have you had a

1 relationship with them?

2 A I've worked on cases for Mr. Doyle's firm at least the past ten
3 years. It could go back as much as 15 years.

4 Q And is it fair to state that you work on three to five cases for
5 his firm per year?

6 A Yes.

7 Q And those have been defense cases, true?

8 A To the best of my recollection, yes.

9 Q So the methodology that Dr. Clauretie used in this present
10 value calculation that's a method commonly used in the field of
11 economics, true?

12 A Having separate growth rates and discount rates is common,
13 yes.

14 Q And what he does, Dr. Clauretie, is commonly relied upon by
15 other economists or used by other economists. Fair statement?

16 A There are other economists who separate out the growth and
17 discount rates, yes.

18 Q So if I understand, you're not -- you have no -- you're not
19 able to give opinions on value of medical services, true?

20 A I don't understand the question. I'm sorry.

21 Q You don't know what the costs are for different medical
22 services? Like, you're not a lifecare planner, right?

23 A Oh, right. Sure.

24 Q Okay. So you can't say what a wheelchair costs or anything
25 like that, true?

1 A Without researching it, I couldn't. But I haven't been asked to
2 do that in this case.

3 Q All right. So you're aware that Dr. Clauretie had a present
4 value of the life care plan of 4,663,473? You're aware of that, true?

5 A I don't -- I'm not looking at it, but that sounds about right.

6 Q And you reduce it between 20 and 30 percent under your
7 calculation?

8 A I had reduced 20 to 30 percent the prior analysis that he had
9 done that was available at the time of my deposition.

10 Q Okay. So this ladder approach that he described is that a
11 term you've heard before?

12 A Sure.

13 Q You've heard that in economics?

14 A Yes.

15 Q And you've heard -- and you've seen other economists do it?

16 A Yes.

17 MR. HAND: No further questions. Thank you.

18 THE COURT: Redirect, counsel?

19 REDIRECT EXAMINATION

20 BY MR. DOYLE:

21 Q The number that Mr. Hand indicated did you apply your
22 methodology to that number as well?

23 A Yes.

24 Q And came up with what range --

25 MR. HAND: Object --

1 BY MR. DOYLE:

2 Q -- of reduction?

3 THE COURT: Just a sec. Counsel, I didn't hear -- was that
4 the end of your question?

5 MR. DOYLE: Yes.

6 THE COURT: Okay. What was the objection?

7 MR. HAND: I'm objecting based on our prior bench
8 conference and that it's a new opinion disclosed.

9 THE COURT: The Court is going to sustain the objection the
10 way that question was phrased, please. Thank you so much.

11 BY MR. DOYLE:

12 Q Mr. Volk, at the time of your deposition, did you have a
13 report from Dr. Clauretie?

14 A Yes.

15 Q Did he subsequently prepare a separate report?

16 A Yes.

17 Q And did you -- were you provided with that report?

18 A Yes.

19 Q And did you apply your methodology to that report?

20 A Yes.

21 Q And what difference did you come up with in terms of that
22 report?

23 MR. HAND: Objection. New opinion.

24 THE COURT: Can you both approach?

25 Madam Court Reporter, could you please turn on the white

1 noise?

2 THE MONITOR: Yes, ma'am.

3 THE COURT: Thank you so much.

4 [Sidebar at 10:07 a.m., ending at 10:08 a.m., not transcribed]

5 THE COURT: Thanks much. The Court sustains the objection
6 based on the prior Court ruling. Thank you so much.

7 BY MR. DOYLE:

8 Q Mr. Volk, when do you use separate growth and interest
9 rates like Mr. -- or Dr. Clauretje rather?

10 A I typically do not. I typically only use net discount rates.

11 Q Do you use -- and that's for determining present value?

12 A Well, I look at -- when I'm doing -- developing my net
13 discount rates, I look at the historical growth data and I look at the
14 separate net discount rate -- the interest rate data separately. I look at
15 the historical data separately and use that historical data to develop my
16 net discount rates.

17 Q Now, Dr. Clauretje's methodology for calculating present
18 value in your opinion would that be a majority or minority position?

19 A In my experience, the majority of the economists use a net
20 discount rate approach.

21 Q Is that your approach?

22 A Correct.

23 Q All right. Would it be a minority of the economists that use
24 Dr. Clauretje's approach?

25 A From the work I've seen, yes. I can't speak to the entire

1 universe of economists.

2 MR. DOYLE: Okay. Thank you.

3 THE COURT: Recross, counsel?

4 MR. HAND: No. No further questions, Your Honor.

5 THE COURT: Okay. There's a juror question. Counsel,
6 would you like to approach, please? We have a juror question. Thank
7 you so much.

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

9 THE COURT: Okay. So what we do with the juror question is
10 read it as is. Okay. Is your estimated interest rate on investment
11 guaranteed, question mark?

12 THE WITNESS: There is no guarantee as to the exact interest
13 returns that will be earned in the future given the fact that money is
14 going to have to be reinvested in the future, and we don't know what
15 those interest rates are going to be in the future.

16 THE COURT: Okay. Next one. Can the money be taken out
17 as needed for expenses without penalty, question mark?

18 THE WITNESS: Yeah. In a recommended portfolio, for
19 example, of a Vanguard mutual bond fund that holds U.S. Treasury
20 Securities, the money could be taken out without penalty at any time.

21 THE COURT: Okay. Answered to the satisfaction of the juror
22 that asked it? Okay. So since it's a Defense witness, ask Defense first. Is
23 there follow-up questions --

24 MR. DOYLE: Yes.

25 THE COURT: -- to those specific juror questions?

1 MR. DOYLE: Right.

2 FURTHER REDIRECT EXAMINATION

3 BY MR. DOYLE:

4 Q Explain your comment about interest rates in the future.
5 What did you mean by that?

6 A What I meant is that the process of paying for the future care
7 is going to involve these care costs being incurred in certain amounts, in
8 certain time periods in the future which are not exactly unknown as we
9 sit here today. We have the care plan that projects certain amounts per
10 year. But we don't know exactly what the growth rate is going to be on
11 those care costs in the future. All we can do is estimate them.

12 So when we're trying to figure out exactly how much interest we
13 need to earn or exactly what investments we need to invest in, we may
14 not -- we might buy investments today and then there's leftover money
15 because the growth rates didn't end up being what we predicted. So
16 that leftover money would need to be invested in the future, and we
17 don't know what those interest rates are going to be.

18 So there's -- all -- the best we can do is to estimate. We cannot
19 guarantee an exact result for this -- for the future cost of care.

20 MR. DOYLE: Okay. Thank you.

21 THE COURT: Okay.

22 Counsel for Plaintiff, follow-up questions to the juror
23 questions?

24 MR. HAND: Yes.

25 FURTHER RECROSS-EXAMINATION

1 BY MR. HAND:

2 Q Mr. Volk, Dr. Claurette's ladder approach uses purchase of
3 U.S. Government bonds at various yearly intervals; is that true?

4 A The ladder approach contemplates that the bonds purchased
5 will be for different maturities, ladder maturities.

6 Q And those are U.S. Government bonds under his analysis,
7 true?

8 A True.

9 Q And those U.S. Government bonds is -- are guaranteed
10 unless the government defaults, true?

11 A The returns are guaranteed. Whether the amount is exactly
12 correct that's needed for those care costs depends on whether the
13 growth rate estimate is exactly accurate.

14 Q Your method, you don't guarantee? You have no guarantee
15 on your method, true?

16 A Well, I -- mine are guaranteed in the same respect that my
17 interest returns are based on U.S. Government Treasury. So my net
18 discount rates are based on U.S. Government Treasury. So they're
19 based on those guaranteed securities.

20 MR. HAND: Thank you.

21 THE COURT: Okay. There being no further juror questions,
22 each counsel exhausting their questions, is this witness excused for all
23 purposes, Defense, or subject to recall?

24 MR. DOYLE: Excused for all purposes. Thank you.

25 THE COURT: Counsel for Plaintiff, do you agree?

1 MR. HAND: Excuse for all purposes.

2 THE COURT: Do appreciate it. Thank you so very much for
3 your time. Just be careful on your step down. Thank you so very much.

4 At this juncture, Counsel for Defense, please feel free to call
5 your next witness.

6 MR. DOYLE: We'll call Dr. Rives back to the stand.

7 THE COURT: Okay. Dr. Rives is called back to the stand.
8 Since he just testified yesterday, he doesn't need to be resworn in. Just
9 we'll -- be reminded when he gets to the stand that he's still under oath.
10 No worries. Just one second. Okay. And just since you're returning to
11 the stand, you understand you're still under oath, correct?

12 THE WITNESS: Yes.

13 THE COURT: Do appreciate --

14 MR. DOYLE: I just need to reorganize here.

15 THE COURT: No worries.

16 BARRY RIVES, M.D., DEFENDANT, PREVIOUSLY SWORN

17 DIRECT EXAMINATION CONTINUED

18 BY MR. DOYLE:

19 Q Dr. Rives, after how many years practicing with another
20 general surgeon in Las Vegas did you start your own practice?

21 A Three years.

22 Q What year would that have been?

23 A 2007.

24 Q What type of practice have you had since then in terms of
25 having partners or employees?

1 A Solo practice.

2 Q And what is the name of your practice?

3 A Laparoscopic Surgery of Nevada, LLC.

4 Q And what has been the focus of your solo practice here since
5 2007, if you could explain that?

6 A When I was working with another surgeon, the two of us
7 were covering up to eight or nine hospitals at a time which I found
8 ridiculous to put it nicely. So I decided to go into solo practice so I could
9 control my workload. I wanted to focus in the southwest near where I
10 lived. And I wanted to focus mostly on laparoscopic surgery.

11 Q Now, over the years, what have you done to maintain your
12 knowledge and expertise in laparoscopic surgery?

13 A There's many ways we do that. We have continued medical
14 educations that we have to do for the State of Nevada, go to conferences
15 for minimally invasive surgery symposiums, different organizations I
16 belong to. Society of Laparoendoscopic Surgeons, Society of American
17 Gastrointestinal and Endoscopic Surgeons have courses online.
18 Occasionally, there's some hands on. Like with the advent of robotics,
19 we'd go to intuitive in California, learn to do the robot, be proctored. So
20 there's some hands-on stuff as well.

21 Q In a typical year, how many hours will you spend on this sort
22 of education and maintaining current knowledge?

23 A I don't think there's a way to enumerate that. But for actual
24 CME credits, I try to do at least 40 a year.

25 Q Dr. Rives, it came up earlier but are you board certified?

1 A No.

2 Q Did you pass the written exam?

3 A Yes.

4 Q Did you pass it the first time?

5 A Yes.

6 Q Did you take the oral examination?

7 A I did.

8 Q Did you pass the oral examination?

9 A No.

10 Q Did you sign up to retake the oral examination?

11 A I did.

12 Q Were you able to sit for it a second time?

13 A No. I had to withdraw from it.

14 Q But why is that?

15 MR. JONES: Your Honor, relevance.

16 THE COURT: Will you both approach?

17 Madam Court Reporter, can you please turn on some lovely white
18 noise? Thank you so very much.

19 [Sidebar at 10:19 a.m., ending at 10:20 a.m., not transcribed]

20 THE COURT: Madam Court Reporter. Okay.

21 BY MR. DOYLE:

22 Q Doctor --

23 THE COURT: Sorry. Was there an objection pending,
24 counsel, or just a clarification?

25 MR. JONES: Clarification, Your Honor.

1 THE COURT: Okay. So being no objection pending, the
2 Court need not rule. Thanks much.

3 BY MR. DOYLE:

4 Q Okay. Doctor, just briefly, why did you not sit for the oral
5 examination a second time?

6 A During those few years, my mom who lives in --

7 THE COURT: Counsel, can you both -- the witness needs to
8 stop. Counsel, can you both approach, please?

9 Madam Court Reporter --

10 [Sidebar at 10:20 a.m., ending at 10:21 a.m., not transcribed]

11 THE COURT: Appreciate it. The jury will disregard the
12 beginning of that answer based on a prior court ruling.

13 Counsel, are you going to re-ask the question?

14 MR. DOYLE: Yes. Thank you.

15 THE COURT: Thank you so very much.

16 BY MR. DOYLE:

17 Q Dr. Rives, is the reason you did not sit for the oral
18 examination a second time did that have to do with personal family
19 reasons?

20 A Yes.

21 Q Okay. The fact that you're not board certified has that had
22 any adverse effect on your privileges?

23 A No.

24 Q Explain to the ladies and gentlemen of the jury what that
25 means, privileges, first of all.

1 A To work at a hospital, to admit patients or to do surgery
2 there, the hospital has to grant you privileges. So when you do an initial
3 application, they review your entire medical background going back to
4 your undergraduate work even to give you initial privileges. Then every
5 two years they review your casework at that hospital, whether you've
6 had any issues from a surgery standpoint at those hospitals. They look
7 at from the Nevada State Board whether there's been anything reported
8 on you. They look at the National Data Providers Bank to see if there's
9 been anything reported on you across the entire country. They review
10 any other issues that may have come up and decide whether to
11 recredential you every two years.

12 Q In applying for privileges at the different hospitals in Las
13 Vegas, have your privileges ever been -- your initial application ever
14 been rejected?

15 A No.

16 Q Has your re-application for privileges at any hospital in Las
17 Vegas been rejected?

18 A No.

19 Q Over the years, have you had privileges at Spring Valley?

20 A Yes, still do.

21 Q Sunrise?

22 A Yes.

23 Q Summerlin?

24 A Yes.

25 Q Mountain View?

1 A Yes.

2 Q Desert Springs?

3 A Yes.

4 Q UMC?

5 A Yes.

6 Q St. Rose Dominican Hospital, the Lima Campus?

7 A Yes.

8 Q And which hospitals -- you mentioned that you currently
9 focus yourself geographically. Which hospitals are those?

10 A My three main hospitals are St. Rose, Siena, St. Rose, San
11 Martin, and Southern Hills Hospital. I have privileges at Spring Valley,
12 but I maintain my privileges there only for special occasions or certain
13 requests by patients or certain consultants.

14 Q From your perspective, the fact that you're not board
15 certified has that had any adverse effect on your practice?

16 A None whatsoever.

17 Q Were you chief of surgery at St. Rose, San Martin for some
18 period of time?

19 A Yes, from 2011 to 2018.

20 Q And what did that position entail?

21 A As chief of surgery, you're responsible for the credentialing
22 of other surgeons. So I was responsible for reviewing everybody's
23 credentials, reviewing their cases. In parallel to that, I was also in charge
24 of reviewing any errors that have happened in the OR, any complaints by
25 people about other surgeons whether it be professional conduct or

1 technical issues. I would have to report to a quality care committee and
2 make recommendations about what to do and how to deal with those
3 surgeons.

4 In addition, I was the go-to surgeon if there were any issues.
5 Another surgeon was having an issue with a family or a medical doctor,
6 I'd get called in by the administration to help try to settle those issues as
7 well. There were other meetings that I was mandatory to -- that I had to
8 go to.

9 In addition, implementing additional protocols. We belonged to
10 the American College of Surgery. And they do data mining analysis of
11 all hospitals across the country. And they make recommendations
12 regarding antibiotic use pre-operatively, colorectal surgery, enhanced
13 recovery after surgery. So I would help coordinate those protocols --

14 MR. HAND: Your Honor, narrative response.

15 THE COURT: Sustained on narrative.

16 BY MR. HAND:

17 Q Doctor, at St. Rose, San Martin in 2015, was there a process
18 in place if a patient or a patient's family member had a complaint about a
19 particular doctor?

20 A Yes.

21 Q What was that process?

22 A If a patient had a problem with any physician or a nurse or
23 physical therapist or whatever, there was an administrator on call 24
24 hours a day, seven days a week.

25 Q And what would the administrator who was available 24/7

1 what would their role be?

2 A Their role would be to figure out who needs to get involved
3 to help figure out how to resolve the situation and how best to resolve
4 the situation.

5 Q And back in 2015 at St. Rose, San Martin with an
6 administrator available 24/7, if a patient or a patient's family member
7 had a complaint, how quickly would that be acted upon?

8 A Immediately.

9 Q Are you currently the head of general surgery at Southern
10 Hills?

11 A I am.

12 Q And briefly what does that entail?

13 A I'm head of the general surgery department at Southern Hills,
14 Again, monitoring all the general surgeons at that hospital, reviewing
15 their credentials, reviewing their quality work as well.

16 Q Now, as of July of 2015, what is your best estimate of the
17 number of laparoscopic surgeries you had performed over the years?

18 A All laparoscopic including residency or just in private
19 practice?

20 Q Residency and all kinds.

21 A It would have to have been at least 3 or 4,000 by that time.

22 Q And as of July of 2015, how many laparoscopic surgeries of
23 all kind were you performing per year on average?

24 A In private practice at that time, I was performing about 250 to
25 350 cases a year, laparoscopically.

1 Q And when you say a case, what does that word mean?

2 A An operation.

3 Q Now, for laparoscopic surgery back in July of 2015, would
4 there be other people present in the operating room?

5 A Yes.

6 Q Would one of these people be the anesthesiologist?

7 A Of course.

8 Q What's the role of the anesthesiologist?

9 A The anesthesiologist is the one who provides sedation and
10 relaxation to the patient so that they're asleep, make sure that they're
11 deep enough in sedation that they don't feel any pain, that there's no
12 stress to the patient. But obviously not so deep that they're in a coma
13 and you can't reverse them back. They monitor the surgery as it goes
14 along for blood loss, urine output and try to stay on top of that so they
15 can take care of the patient the best they can.

16 Q In terms of the nursing staff in the operating room, what
17 would be the titles of those people?

18 A The nurse is called a circulating nurse. She maintains the
19 medical record while we're in the operating room. So in addition to the
20 anesthesiologist, he or she will make notes regarding vital signs, is the
21 patient properly padded, what is the equipment being used, if we used
22 mesh, what type of mesh was it, what was the size, make sure that the
23 expiration dates haven't expired and overall keep sure that the patient
24 remains safe.

25 Q And then who is -- or what is a scrub tech? There was

1 mention of that I think last week.

2 A A scrub tech is somebody who helps you with the surgery.
3 So they're in charge of the instrumentation. They make sure that the
4 instrumentation is sterile. They make sure that the equipment is in good
5 use. They assist you with the surgery. So in laparoscopic surgery, they
6 will typically be holding the camera so that I have two hands available to
7 do whatever I need to do.

8 Q And back at St. Rose, San Martin in 2015, if the scrub tech
9 saw you do something wrong, what was the scrub tech supposed to do?

10 A The scrub techs would notice if there's something going on
11 and usually point it out to us.

12 Q Now, as of July of 2015, could you give me an estimate of
13 the total number of abdominal wall hernia repairs you had done both
14 open and laparoscopic?

15 A For just that year or for --

16 Q As of that year.

17 A Including residency or not?

18 Q Correct.

19 A So total ventral hernias laparoscopic and open, residency
20 and private practice, I would guesstimate over 1,000.

21 Q What percentage of those were laparoscopic versus open?

22 A Including residency which I -- it was 50/50, but private
23 practice more 80/20. So I'd say 70 percent.

24 Q And what percentage of the hernia repairs involved
25 incarcerated hernias?

1 A At least 50 percent.

2 Q Now, is an abdominal wall hernia repair or ventral hernia
3 repair tell us whether that is typically inpatient or outpatient.

4 A It's typically outpatient.

5 Q And what does that mean to be in outpatient surgery? When
6 does the patient get to go home?

7 A That means we operate on them in the morning and they go
8 home the same day.

9 Q In Mrs. Ferris's case, was she able to go home the same day?

10 A No.

11 Q Why not?

12 A Because during the surgery, there were two holes in the
13 colon which I had to repair. So I was going to admit her overnight at
14 least to make sure that her bowel function was working and that she
15 wasn't suffering any repercussions from possible infection from those
16 two holes.

17 Q As of July of 2015, were you familiar with sepsis and SIRS?

18 A Yes.

19 Q What was your understanding of sepsis back then?

20 A Well, sepsis -- sepsis has a wide variety of definitions, and
21 people use the term fairly loosely.

22 MR. JONES: Your Honor, objection. Testifying as an expert.

23 THE COURT: The Court is going to sustain in part. The last
24 sentence about to get into, the Court is going to preclude. But the Court
25 is not precluding anything that was stated prior to people use sepsis in

1 different --

2 MR. DOYLE: Okay.

3 THE COURT: -- ways. So the jury can listen to everything
4 else but when started with the sepsis can -- refer to it in different ways.
5 The Court is going to sustain it from there on. So feel free to ask --

6 MR. DOYLE: Okay.

7 THE COURT: -- a new portion of question.

8 BY MR. DOYLE:

9 Q What was your -- not what other people would be thinking
10 and whatnot, but what was your understanding of sepsis back in July of
11 2015?

12 A So sepsis even when I was in medical school was defined as
13 gram negative bacteria --

14 MR. JONES: Your Honor, once again, same objection. They
15 wouldn't let him testify as an expert. He can't do it now.

16 MR. DOYLE: Your Honor, may we approach?

17 THE COURT: Counsel, the jury will disregard the
18 commentary between counsel.

19 Counsel, please approach.

20 [Sidebar at 10:33 a.m., ending at 10:37 a.m., not transcribed]

21 THE COURT: Thank you so very much. Okay. The objection
22 is sustained as that question is phrased. Thank you -- excuse me,
23 objection -- yes. Objection is sustained to that question. The jury will
24 disregard that the answer was started. Thank you so very much.

25 Counsel, feel free to proceed with your next question.

1 BY MR. DOYLE:

2 Q Doctor, what was your understanding of sepsis in July of
3 2015? What did that term mean to you?

4 A At that time, sepsis meant that the body was using anaerobic
5 as opposed to aerobic metabolism.

6 MR. JONES: Objection, Your Honor. He's giving something
7 that is not his own opinion. Once again --

8 THE COURT: Counsel --

9 MR. JONES: -- unqualified expert opinion.

10 THE COURT: -- Court is going to overrule the objection.

11 BY MR. DOYLE:

12 Q May I ask so doctor, what was your understanding of sepsis
13 in July of 2015?

14 A Again, it's a systemic inflammatory cascade that results in
15 anaerobic metabolism as opposed to aerobic metabolism that results in
16 lactic acid build up in the structures that we call end organs such as the
17 brain, the heart, the lung and the kidneys.

18 Q And anaerobic and aerobic, you used those terms. Would
19 you explain what those mean?

20 A Aerobic means that your tissues are working normally.
21 They're saturated with oxygen and they use that oxygen in the
22 metabolism and cell function so that your cells function normally. When
23 they don't have oxygen, they go into anaerobic such as when athletes
24 get cramps and they get lactic acid build up it's because they're not
25 getting enough blood to those muscles and the cells can actually start to

1 die off.

2 Q And the role of lactic acid in sepsis is what? Again, based
3 upon your understanding in July of 2015.

4 A You can measure lactic acid in the blood, and you can
5 actually see the levels rise and the levels go down.

6 Q And when you see the level of lactic acid going up, what
7 does that indicate to you in terms of patient and sepsis?

8 A It means that the tissues are basically starving for oxygen
9 and they can lead to failure. And if it gets bad enough, it could lead to
10 multi-organ failure and death.

11 Q And again, based on your knowledge back in July of 2015,
12 what would be the typical or common causes for this anaerobic
13 metabolism leading to increasing lactic acid?

14 A Again, it all comes down to starvation of your tissues by lack
15 of oxygen. So usually patients would have really high heart rates but
16 really low blood pressure trying to profuse those tissues because they're
17 wanting more and more oxygen and your body is trying to supply it. But
18 because of the systemic inflammatory cascade which dilates all your
19 vessels, causes swelling of the tissues, all of that fuel basically is
20 diverted elsewhere, and the tissues end up starving from it.

21 Q And how does sepsis tie into this anaerobic metabolism?

22 A The sepsis part is that the inflammatory cascade keeps the
23 oxygen from getting to those tissues, keeps it from profusing those
24 tissues.

25 Q And the inflammatory cascade what is that?

1 A So either an infection source or a non-infectious source can
2 start your body to -- we call it an inflammatory cascade. In other words,
3 mobilize your white cell count or use your -- mobilize your white cells,
4 your platelets, a lot of hormones in a body we call cytokines basically to
5 get the body's immune system geared up, ramped up to fight off
6 infection.

7 MR. JONES: Your Honor, once again, objection to narrative
8 also but also to unfounded expert testimony.

9 THE COURT: The Court sustains on narrative.
10 BY MR. DOYLE:

11 Q Doctor, the definition of sepsis as you understood it back in
12 July of 2015 was that simply and only a white blood cell count above a
13 certain number?

14 A Not at all.

15 Q What went into a determination of whether a patient had
16 sepsis besides the white blood cell count?

17 A Well, you look more towards the function of the body itself.
18 You look to see are the kidneys functioning properly, are the lungs
19 functioning properly, how is the heart functioning, how is the brain
20 functioning, how is the overall whole person functioning.

21 Q And those different organs that you just mentioned is that
22 the end organ dysfunction you were speaking about that you want to
23 look at?

24 A Correct.

25 Q Then you -- SIRS. What is SIRS? Again, looking back at

1 2015.

2 A SIRS is systemic inflammatory response syndrome. So it
3 was the side of sepsis that was from a non-infectious attack on the body.

4 Q What would be examples of non-infectious attacks on the
5 body triggering SIRS?

6 MR. JONES: Your Honor, improper lay opinion.

7 THE COURT: The Court is going to overrule the objection.

8 THE WITNESS: So a non-infectious source causing SIRS
9 would be such as cancer patients who have metastatic disease and the
10 tumor antigens from the cancer itself can trigger these types of
11 responses. People with autoimmune disorders, rheumatoid arthritis,
12 lupus, that can trigger sepsis or SIRS in people without an infectious
13 cause.

14 BY MR. DOYLE:

15 Q Now, as a general matter, again thinking back to the time
16 period summer of 2015, what was the role of source control in terms of
17 treating sepsis?

18 A So source control refers, depending upon how it's used, to
19 actually controlling the actual source of the infection. So someone with
20 a perforated appendicitis, for instance, you could say the source control
21 would be to remove the appendix. Some people would use it saying
22 well, just give them antibiotics for the infection is source control. But
23 from a surgeon's standpoint, it usually means removing the leak or the
24 source of the leak in the abdomen.

25 Q Are there surgical conditions causing infection where you

1 don't have to remove something?

2 A Correct.

3 Q What would those be?

4 A Similar to the example I just gave you, if somebody presents
5 with acute appendicitis, inflammation of their appendix and it's been in
6 the first 24 or 48 hours, it's fairly easy to go in, surgically remove that
7 laparoscopically. Infection is controlled, patient does well. Some
8 patients may for whatever reason be in a lot of pain, they may not get to
9 the hospital for seven or ten days. By that time, there's a huge abscess.
10 And if you actually went in surgically, you'd probably do the patient
11 more damage than good. So what we do is we put them on antibiotics --

12 MR. JONES: Objection, Your Honor. Narrative.

13 THE COURT: Sustained.

14 MR. JONES: Improper lay opinion.

15 THE COURT: Sustained on narrative and parts of that also
16 will be sustained on the improper lay opinion.

17 BY MR. DOYLE:

18 Q Doctor, what would be some examples of surgical conditions
19 that would not require surgery for source control necessarily?

20 MR. JONES: Objection, Your Honor. Foundation,
21 speculation.

22 THE COURT: Sustained.

23 BY MR. DOYLE:

24 Q Doctor --

25 THE COURT: On foundation. The Court sustains.

1 BY MR. DOYLE:

2 Q Doctor, back in July of 2015, were you aware of certain
3 general surgery problems that -- where you have a source of infection
4 inside the abdomen, but the source control did not require surgery?

5 MR. JONES: Objection, Your Honor. Leading, over broad,
6 speculation.

7 THE COURT: Sustained on leading.

8 BY MR. DOYLE:

9 Q Doctor, what were the general surgery conditions in 2015
10 that did not necessitate surgery for source control?

11 MR. JONES: Seeking improper lay opinion, Your Honor.
12 Hearsay.

13 THE COURT: Overruled as applied to this case.

14 THE WITNESS: So in cases of delayed appendicitis --

15 THE COURT: Just wait. Since I sustained them. Since the
16 witness is testifying outside of this case, sustained. The question was
17 properly answered. The jury will disregard. The Court needs to sustain
18 it because it said -- it was overruled as to this case. The witness started a
19 different answer, so the Court has to sustain it and ask the jury disregard
20 the witness's answer.

21 Counsel, feel free to rephrase, proceed however you wish to
22 do.

23 BY MR. DOYLE:

24 Q Doctor, have you heard the term source control used in this
25 case?

1 A Yes.

2 Q What is your understanding of how source control has been
3 used in this case?

4 A Source control used in this case has been two different
5 definitions. One is to control the active source of infection. The second
6 way would be with antibiotics or interventional radiology drainage.

7 Q Explain that second one, antibiotics or interventional
8 radiology drainage in terms of source control here.

9 A So if a patient has a delayed diagnosis of infection and
10 you're concerned that the risk of surgery is high, the patient will be put
11 on antibiotics to control the infection. If there's an abscess or fluid
12 collection that can be drained off by radiology, they'll put a drain in there
13 to take the fluid off and in that way do a source control.

14 Q In Mrs. Farris's case, prior to July 9th, was there any
15 evidence of an abscess?

16 MR. JONES: Objection, Your Honor. Leading.

17 THE COURT: Sustained.

18 BY MR. DOYLE:

19 Q Doctor, in Mrs. Farris's case, did she have an abscess?

20 MR. JONES: Objection, Your Honor. Leading again.

21 THE COURT: Sustained.

22 BY MR. DOYLE:

23 Q Doctor, tell us whether Mrs. Farris had an abscess prior to
24 July 9th?

25 MR. JONES: Your Honor, objection. Third time leading on

1 the same exact thing.

2 THE COURT: Sorry, counsel, what was the evidentiary basis?

3 MR. JONES: Yes. Your Honor, I apologize for the additional
4 commentary. Leading.

5 THE COURT: Sustained.

6 BY MR. DOYLE:

7 Q Did Mrs. Farris have an abscess --

8 A No.

9 Q -- while in --

10 MR. JONES: Objection, Your Honor. Leading.

11 THE COURT: Sustained.

12 BY MR. DOYLE:

13 Q Was there any evidence of an abscess while you were caring
14 for her?

15 MR. JONES: Objection, Your Honor. Leading.

16 MR. DOYLE: Well, then --

17 THE COURT: Counsel, can you both approach?

18 Madam Court Reporter, would you like to turn on some
19 lovely white noise?

20 [Sidebar at 10:49 a.m., ending at 10:50 a.m., not transcribed]

21 THE COURT: Just one second. Okay, I appreciate it. That
22 objection's sustained. Counsel, feel free to proceed.

23 BY MR. DOYLE:

24 Q Was there an abscess while you were seeing Mrs. Farris?

25 A No.

1 MR. JONES: Your Honor, it's leading again.

2 THE COURT: Sustained. The jury will disregard the answer.

3 Counsel, feel free to proceed with your next question.

4 BY MR. DOYLE:

5 Q Did an intervention -- tell us whether an interventional
6 radiologist saw Mrs. Farris while she was still under your care and
7 treatment.

8 MR. JONES: Objection, Your Honor. Leading.

9 THE COURT: Overruled.

10 THE WITNESS: No.

11 BY MR. DOYLE:

12 Q Tell us whether Mrs. Farris had an abscess at any time while
13 under your care and treatment.

14 MR. JONES: Objection, Your Honor, leading.

15 THE COURT: Overruled.

16 THE WITNESS: No.

17 BY MR. DOYLE:

18 Q While you were caring for Mrs. Farris between the time
19 period July 4th up to and including July 9th, what was the source control
20 being used?

21 A IV antibiotics.

22 Q What were the IV antibiotics being used for then?

23 A According to the infectious disease notes, it'd be to whatever
24 cultures came back positive. They were in charge of managing the
25 antibiotics at that time. When you don't have a known source they try to

1 put as broad spectrum as possible to cover all possible bacteria.

2 Q Did the hospital have a sepsis protocol in July of 2015?

3 A Yes.

4 Q What was the sepsis -- or what is generally a sepsis protocol?

5 MR. JONES: Objection, Your Honor. Assumes facts not in
6 evidence, foundation.

7 THE COURT: Sustained on foundation.

8 BY MR. DOYLE:

9 Q Doctor, did the hospital have a sepsis protocol in July of
10 2015?

11 A Yes.

12 Q Were you familiar with the sepsis protocol?

13 A Yes.

14 Q Was the sepsis protocol initiated for Mrs. Farris?

15 A Yes.

16 Q The sepsis protocol that was utilized for Mrs. Farris, did it
17 apply to just you or to others?

18 MR. JONES: Your Honor, objection, leading.

19 THE COURT: Sustained.

20 BY MR. DOYLE:

21 Q Doctor, what is a CBC?

22 A Complete blood count.

23 Q What are the components of a CBC?

24 A Complete blood count includes the white cells, hemoglobin,
25 hematocrit, the types of red cells, the types of white cells as well as the

1 platelets.

2 Q What are platelets?

3 A Platelets are the fibrin like parts of our blood system that
4 help form clots, help form scabs when you have wounds.

5 Q Doctor, when looking at a CBC, what is the term left shift
6 mean?

7 A So we breakdown the white cells by their types. There's
8 neutrophils. And if those are elevated like a possible source of infection,
9 they increase, and we call that a left shift.

10 Q What is bandemia?

11 A Bands are the young types of white cells. So when your
12 body faces an insult or infection, the recruit the new white cells so they
13 tend to be very high early on in an infection.

14 MR. JONES: Objection, Your Honor. Narrative response.

15 THE COURT: Sustained.

16 BY MR. DOYLE:

17 Q Doctor, in Mrs. Farris's case, between July 4th and July 9th,
18 what was happening with the left shift, if any?

19 A It was coming back to normal.

20 Q And what did the left shift indicate to you?

21 A That whatever the white cell count process was, that it was
22 getting resolved.

23 Q And then after July 9th and before Mrs. Farris took a turn for
24 the worse on July 14th, what was happening with this left shift?

25 A Can you restate that?

1 Q Sure. The CBCs that were performed on July 10th, 11th,
2 12th, 13th, were they looking for left shift?

3 MR. JONES: Objection, Your Honor. Leading.

4 THE COURT: Sustained.

5 BY MR. DOYLE:

6 Q The CBCs that were performed those days, what were they
7 looking for?

8 A We were looking for the total white count, the types of white
9 cell counts, whether they were going up or down, going to the left or
10 normalizing.

11 Q And what were the results of those various components
12 telling you in terms of what was going on with Mrs. Farris between July
13 10th and 14th?

14 A That they were trending worse.

15 Q Now at what point did they start trending worse?

16 A I'd have to review the daily progress notes to know exactly,
17 but in that general timeframe.

18 Q And what did you do in response to them trending worse?

19 A On the 12th I ordered an x-ray to look at whether the contrast
20 was moving through her colon or not and whether there was any
21 increased free air or dilation of small bowel. Waiting on that first and
22 then eventually I was concerned to get a CT scan with oral and IV
23 contrast.

24 Q That abdominal x-ray that you ordered, what did it show?

25 A It showed that all the contrast was dried and in her colon.

1 There was no leak of this contrast. There was no free air. There was no
2 dilated small bowel. The bowel was normal size.

3 Q Did Mrs. Farris have a bandemia between July 4 and July
4 9th?

5 MR. JONES: Objection, Your Honor. Leading.

6 THE COURT: Sustained.

7 BY MR. DOYLE:

8 Q Was there a bandemia?

9 MR. JONES: Objection, Your Honor. Leading.

10 THE COURT: Sustained.

11 BY MR. DOYLE:

12 Q Doctor, in looking at the complete blood counts between July
13 4th and July 9th, can you tell us whether there was a bandemia?

14 MR. JONES: Objection, Your Honor. Leading.

15 THE COURT: Sustained.

16 BY MR. DOYLE:

17 Q Did Mrs. Farris have any abnormal findings on her CBC
18 between July 4th and July 9th?

19 MR. JONES: Leading, Your Honor.

20 THE COURT: Sustained.

21 BY MR. DOYLE:

22 Q What were the results of her CBCs trending in that period of
23 time?

24 A In the early stages her total white count was up and she a
25 bandemia and a, what we call left shift.

1 Q Between July 4th and July 9th, what happened to her
2 bandemia?

3 A Her bandemia normalized and went to zero and her shift
4 tended towards normal as well.

5 Q What did those findings tell you?

6 A That there was no active infection going on at that time.

7 Q And what did those -- what did that information tell you in
8 terms of the total white blood cell count?

9 MR. JONES: Leading -- or foundation, Your Honor.

10 THE COURT: Overruled.

11 THE WITNESS: The total white cell count is in and of itself
12 not the only determinant of what's going on with the patient. You have
13 to actually break down the components of it to get a better idea of what's
14 going on clinically.

15 MR. JONES: Objection, Your Honor. Improper lay opinion.

16 THE COURT: Sustained.

17 BY MR. DOYLE:

18 Q Doctor, are you a physician?

19 A Yes.

20 Q Have you looked at CBCs over the years?

21 A Yes.

22 Q How often do you look at a CBC?

23 A Daily.

24 Q Do you have a general understanding as a general surgeon
25 about what CBCs tell a general surgeon?

1 A Yes.

2 Q And do you have a general understanding of what's normal
3 and abnormal on a CBC?

4 A Yes.

5 Q Is this something that's part and parcel of your practice day
6 in and day out?

7 A Yes.

8 Q And in Mrs. Farris's case, what did the CBCs tell you as her
9 treating general surgeon between July 4th and July 9th?

10 MR. JONES: Objection, Your Honor. Improper lay opinion.

11 THE COURT: Overruled.

12 THE WITNESS: So while her white cell count remained in a
13 certain range, the types of white cell counts were improving.

14 BY MR. DOYLE:

15 Q Now was -- can you tell us -- well, strike that. Is -- was Mrs.
16 Farris's lactic acid being monitored?

17 A Yes, it was.

18 Q How often was it being checked between July 4th and July
19 9th?

20 A Sometimes multiple times, especially on the early onset of
21 being going to the ICU, it's checked every couple hours. Once it starts to
22 get normal then it's about every other day.

23 Q What was the -- what was her lactic acid generally the first
24 couple of days in the ICU?

25 A It was high and trended down.

1 Q What was it by July 9th?

2 A It was normal.

3 Q By July 9th, Dr. Rives, did you have an impression whether
4 Mrs. Farris was still septic?

5 A Yes.

6 Q What was your impression?

7 A She was no longer septic.

8 Q Can you tell us why you believe that as of July 9th?

9 A First regarding her cardiac standpoint. Her heartrate when
10 she wasn't agitated was normal. Her blood pressure was normal. She
11 had normal profusion to her extremities. She was on a ventilator, but
12 she was on minimal oxygenation and her blood gasses looked normal.
13 Her kidneys were functioning normal in terms of their urine output. And
14 we look at something called creatinine in the blood. When your kidneys
15 aren't working the creatinine goes up. Her creatinine was normal at that
16 time.

17 Q What's -- why do you look at urine output?

18 A Well, urine output gives you a lot of information about the
19 patient in terms of their fluid status. So if a patient is fluid overloaded it
20 could put stress on their extremities, in their abdomen on this part and it
21 can put stress on somebody's heart as well.

22 Q When you were following Mrs. Farris, what vital signs were
23 you looking at?

24 A Looking at her temperature, looking at her blood pressure,
25 her heartrate, her oxygen saturation, her urinary output, her NG tube

1 output and how much fluid she was going in.

2 Q How was her oxygen saturations between July 4th and July
3 9th?

4 A They were normal.

5 Q How did her heartrate do between July 4th and July 9th?

6 A Her heartrate initially went very high. After she was
7 intubated, put in the ICU, the cardiologist came on, gave some
8 medications. Her heartrate improved. They eventually had to heparinize
9 her so that she doesn't get clots from that and eventually her heartrate
10 normalized as well.

11 Q Before July 9?

12 A Yes.

13 Q How did her blood pressure do between July 4th and July
14 9th?

15 A Her blood pressure to the best of my recollection didn't
16 change too much. She had some periods where it was very low, but it
17 responded very quickly. I don't recall her being on medications to
18 support her blood pressure past the 5th or 6th.

19 Q How was her temperature in that time period, July 4th to
20 July 9th?

21 A Initially she had some temperature spikes, but then they
22 settled down and went towards normal.

23 Q Now the intensive care --

24 MR. DOYLE: Do we take a morning break? I was going to
25 switch gears.

1 THE COURT: If you'd like to this would be a good time.

2 MR. DOYLE: Sure.

3 THE COURT: I'd be glad to do so. Okay. Ladies and
4 gentlemen, we're going to come back at 11:20.

5 So ladies and gentlemen, during this recess you are
6 admonished not to talk or converse among yourselves or with anyone
7 else on any subject connected with the trial. You may not read, watch,
8 or listen to any report or commentary of the trial, or any person
9 connected with the trial by any medium of information, including
10 without limitation, social media, text, tweets, newspapers, television,
11 internet, radio. Anything the Court's not specifically is, of course, also
12 included.

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

20 With that, have a nice relaxing break while you stretch your
21 legs.

22 THE MARSHAL: All rise for the jury.

23 [Jury out at 11:04 a.m.]

24 [Outside the presence of the jury]

25 THE COURT: Hearing the click, wish you all a nice break.

1 And witness, please come off the stand. Thank you so very much.
2 Appreciate it. See you back.

3 [Recess taken from 11:05 a.m. to 11:23 a.m.]

4 [Outside the presence of the jury]

5 THE COURT: Okay. Back on the record. Counsel for
6 Defense, would you like the witness back on the stand?

7 MR. DOYLE: Please.

8 THE COURT: Okay. Thank you so much. You all ready for
9 the jury to come back in?

10 MR. LEAVITT: Yes, Your Honor.

11 MR. JONES: Yes, Your Honor.

12 MR. DOYLE: Yeah. But there's a --

13 THE COURT: Marshal, can you get the jury? Pardon?

14 MR. JONES: -- there's a loud humming.

15 THE COURT: No worries. It'll be turned off in just a quick
16 sec. Probably just -- I think we may just have a feedback so it should be
17 taken care of in a quick sec. Can you hear okay? Did you maybe leave
18 the feedback on, and you're hearing -- we're hearing a little bit of
19 humming. Are you getting feedback possibly?

20 COURT RECORDER: I'm sorry, Your Honor?

21 THE COURT: We seem to be getting a little bit of feedback.
22 Are you getting feedback through something maybe? No worries.

23 COURT RECORDER: My apologies.

24 THE COURT: No worries. We're all good to go.

25 COURT RECORDER: They talk to each other. If they're too

1 close when I forget to turn them off.

2 THE COURT: No worries whatsoever, okay. Marshal went to
3 go get the jury. We're all good to go. Witness is back on the stand,
4 okay.

5 COURT RECORDER: And of course I can't hear it so.

6 THE COURT: No worries, no worries. That's why I just
7 mentioned it.

8 COURT RECORDER: My husband's constantly, turn your ears
9 off.

10 THE COURT: It's all good. More than glad to accommodate.

11 THE MARSHAL: All rise for the jury.

12 [Jury in at 11:24 a.m.]

13 [Within the presence of the jury]

14 THE MARSHAL: All jurors are accounted for, please be
15 seated.

16 THE COURT: Do appreciate it. Welcome back, ladies and
17 gentlemen. Hope everyone had a very nice break at this juncture. We're
18 still in the examination of the witness. Counsel, feel free to continue.
19 Thank you so much.

20 MR. DOYLE: Thank you.

21 DIRECT EXAMINATION CONTINUED

22 BY MR. DOYLE:

23 Q Dr. Rives, in July of 2015, what type ICU did San Martin
24 have?

25 A They had a closed system.

1 Q Please explain what that means.

2 A Closed versus open ICU means that the intensivist doctors
3 basically were in control of the ICU.

4 Q Explain what that means.

5 A It means that they were there 24/7 overseeing patient care,
6 taking care of the orders, coordinating care amongst all the consultants,
7 physical therapists, occupational therapists, respiratory techs, nurses, et
8 cetera.

9 Q In the San Martin ICU in July of 2015, if someone wanted say
10 a CT scan of some sort, who would typically order it?

11 A The intensivist or the ICU doctor.

12 Q Why would that be?

13 A Again, it's to coordinate care. So in critical care patients
14 where things change rapidly, you don't want multiple doctors ordering
15 different things at the same time causing confusion. You want it to go
16 through one person so that there's coordination, so things aren't ordered
17 multiple times for instance.

18 Q In Mrs. Farris's case when she was in the ICU between July 4
19 and July 9, was there an intensivist involved?

20 A Yes.

21 Q Who else was involved by way of specialty?

22 A There was a hospitalist. There was a kidney doctor. There
23 was a cardiologist. There was an infectious disease doctor. And I think
24 that's it.

25 Q In Mrs. Farris's case, why was a cardiologist necessary?

1 A On her post-operative day her heartrate went up
2 dramatically. She went into something called atrial flutter, which is an
3 abnormal heartrate. Usually requires special drugs and medications and
4 a cardiologist evaluation to control it.

5 Q What happened to the atrial flutter between July 4 and July
6 9?

7 A It resolved.

8 Q Between July 4 and July 9, did she have any other cardiac
9 problems or heart problems?

10 A No.

11 Q The kidney doctor, what's the formal name for that specialty?

12 A Renal.

13 Q Why was it necessary for a kidney doctor to see Mrs. Farris?

14 A Initially when she went into sepsis her kidneys, they went to
15 acute kidney injury because of low blood flow, or low blood volume. So
16 they come on board to help correct all the electrolytes, like sodium,
17 potassium, magnesium, phosphorous. And eventually when we decided
18 that she needed to have IV nutrition, something called total parenteral
19 nutrition, the renal doctor's in charge of ordering that so that all the
20 electrolytes stay balanced, protein, amino acids, lipids stay balanced.

21 Q And how were her kidneys doing by July 9th?

22 A They were normal.

23 Q What is a LigaSure?

24 A LigaSure is a device that we use in the operating room and it
25 seals blood vessels and tissue.

1 Q Explain how it seals first of all blood vessels.

2 A The LigaSure looks like a long clamp attached to a handle. It
3 has an electrical cord that is hooked up to an electrical source and some
4 computer software. You apply the LigaSure like a clamp across tissue.
5 You press the button on the handle, and it has bipolar electricity that
6 causes the collagen and the other tissues to heat and seal.

7 Q And how does the LigaSure cut something?

8 A So the pads on the clamp send information back to the
9 software on the device. Let's you know when there's a good seal, that
10 there's no more need for any electricity. It gives you a sound and then
11 you pull a little trigger on the handle and a little blade cuts the tissue.

12 Q Why did you start using a LigaSure?

13 A I started using a LigaSure because the instrument I used
14 before was more prone to causing thermal injuries. It also looked more
15 like a sharp scissor. So if you were dissecting near bowel you could
16 more easily perforate it. The LigaSure's thicker, it's blunt and it's much
17 harder to injure a bowel with. Plus the LigaSure when you grasp tissue,
18 if there's too much tissue in the jaws, the software doesn't allow it to
19 function. So it tells you what you're grasping is too thick to seal.

20 Q How does it know that?

21 A To the best of my ability as, you know, knowing the
22 electronics of it --

23 MR. JONES: Objection, Your Honor. Speculation. Improper
24 lay opinion.

25 THE COURT: Sustained on speculation.

1 BY MR. DOYLE:

2 Q Okay. Based on your -- did you -- how did you come to learn
3 how to use the LigaSure?

4 A Other surgeons were using it and having good success with
5 it. So I got in serviced on how it's used and how it functions.

6 Q And what does that mean to be in serviced on how it's used
7 and how it functions?

8 A So representatives of the company will sit down with you, go
9 over the instrument, what its indications are, how it's used and how it's
10 functioned.

11 Q And based on the in-service that you had and your
12 experience with the LigaSure, what was your understanding why it
13 would not fire so to speak if there was too much tissue in the jaws?

14 A It's because for the electrical current to go as a bipolar one
15 side to the other side and join together, as opposed to monopolar where
16 you just zap something, there's voltage, impedance and amplitude. And
17 those exact measurements I don't know off the top of my head, but they
18 alter and change depending upon the thickness of the tissue.

19 Q Doctor, if you were performing surgery in July of 2015 and
20 you wanted to in fact put a through and through hole in the wall of the
21 transverse colon using the LigaSure, what would be the first step in
22 doing so?

23 A You'd have to get the entire wall of the transverse colon
24 across the entire clamps to do that.

25 Q Explain what you mean by that.

1 A So the LigaSure device, while it's a clamp, on the outside of
2 the clamp it's covered. So the actual elements that work are sort of
3 deeper inside the clamp. So the heating elements or the electrical
4 components aren't exposed. So you can't like touch a little bit of the
5 clamp to the bowel and cause a thermal injury. You'd have to get it
6 inside that heating element, those electrical components, clamp down on
7 it. And then of course the device would have to say yeah, that's --

8 MR. JONES: Objection, Your Honor --

9 THE WITNESS: -- thin enough to burn.

10 MR. JONES: -- narrative response, improper lay opinion.

11 THE COURT: Sustained. Sustained on narrative.

12 BY MR. DOYLE:

13 Q After you have the clamps completely across the transverse
14 colon, what would be the next step if you wanted to create a through and
15 through hole?

16 A You'd try to fire the device. And it would tell you whether
17 the tissue was too thick to coagulate or not.

18 Q In your experience using the LigaSure, is that possible when
19 dealing with the transverse colon?

20 MR. JONES: Objection, Your Honor. Speculation.
21 Incomplete hypothetical.

22 THE COURT: I'm going to sustain the way the question was
23 phrased.

24 BY MR. DOYLE:

25 Q Doctor, in your -- based on your in-service training with the

1 LigaSure and your use of the LigaSure, can you use it on the transverse
2 colon and cause a through and through hole?

3 A During surgery sometimes we make an anastomosis
4 between two pieces of bowel. And to do so we have to make a little
5 hole --

6 MR. JONES: Objection, Your Honor --

7 THE WITNESS: -- in either side of the bowel --

8 MR. JONES: -- nonresponsive to the question asked.

9 THE COURT: Court has to hear the end of the response
10 before Court can rule on that.

11 THE WITNESS: To fire a staple line across there to create the
12 anastomosis. And trying to use the LigaSure to make that initial hole it
13 won't work.

14 BY MR. DOYLE:

15 Q Why won't it work?

16 THE COURT: Okay. So in light of that, the Court's going to
17 sustain the objection to nonresponsive because of the question that was
18 asked. Jury will disregard that last answer.

19 BY MR. DOYLE:

20 Q Why wouldn't a LigaSure work to create a through and
21 through hole in the transverse colon?

22 A If you clamp both sides of the bowel, the tissue's too thick for
23 it to fire.

24 Q When using a LigaSure with adhesions, how does that work?

25 A So when there's -- adhesions are scar bands between the

1 bowel and any other object. And you create a distance between
2 whatever the object is and the bowel. And they're sort of stretchy.
3 Sometimes they're thin like cobwebs and you can just sweep them away,
4 or you can cut them even. But sometimes they're thick. So you put the
5 LigaSure across the adhesions, or the scar bands so that they'll
6 coagulate and stop any bleeding from the scar bands themselves, but
7 you make sure it's far enough from the bowel to use it.

8 Q Why is it necessary to use coagulation on scar bands?

9 A If they're thick, they'll bleed.

10 Q Now going back for a moment to the LigaSure and
11 hypothetically speaking you are able to burn a hole in the transverse
12 colon, what would the colon look like?

13 A The edges would be charred. You'd see evidence of a
14 thermal burn. They wouldn't be healthy, and they'd be not bleeding.

15 Q Can a LigaSure cause a delayed thermal injury to bowel?

16 A Yes.

17 Q How does that happen?

18 A So any thermal or heating device can cause delayed injuries.
19 No matter what instrument used there's always going to be some
20 amount of heat that's generated beyond the instrument itself. That
21 causes changes in the collagen, the blood supply and the muscle layers
22 of the bowel. So as those change over time, the wall weakens and with
23 pressure it can perforate. That process can take anywhere from four,
24 five days to two or three weeks.

25 Q And why would it take four to five days to two to three

1 weeks?

2 MR. JONES: Objection, Your Honor. Leading.

3 THE COURT: Sustained.

4 BY MR. DOYLE:

5 Q Could you explain your comment about the timing?

6 A It takes time for the structures of the bowel to become
7 weakened. So it's not like you're directly cutting it causing the hole.
8 You've undermined the structure of the bowel. So as the bowel builds
9 up pressure and starts to work, it'll push through there and cause a
10 perforation.

11 Q And assume hypothetically there's some sort of thermal
12 injury to a transverse colon during surgery, is that visible to the
13 surgeon --

14 A Yeah.

15 Q -- such as yourself?

16 MR. JONES: Objection, Your Honor. Leading.

17 THE COURT: Sustained.

18 BY MR. DOYLE:

19 Q If there's a thermal injury to the transverse colon, tell us what
20 that might look like to a surgeon.

21 A If there's a direct thermal injury to any small bowel, large
22 bowel, the tissue will look red, it'll look charred, it'll look ratty, it'll look
23 unhealthy. And then away from the actual burn the tissue will look white
24 and blanched. In other words, there's no blood supply coming in there
25 as opposed to pink and healthy.

1 Q At the end of Mrs. Farris's surgery on July 3rd, did you see
2 any redness that you just described?

3 A No.

4 Q Did you see any rattiness you just described?

5 A No.

6 MR. JONES: Leading, Your Honor.

7 THE COURT: Sustained.

8 BY MR. DOYLE:

9 Q What did you see, if anything, that might have said to you
10 that there was a thermal injury to the bowel?

11 A Nothing.

12 Q Tell us whether the tissue appeared blanched?

13 A No.

14 MR. JONES: Objection, Your Honor. Leading.

15 THE COURT: Overruled.

16 BY MR. DOYLE:

17 Q Tell us whether the tissue appeared blanched?

18 A No.

19 Q And how would you see blanched?

20 A Well, your bowel tissue is normally pink. It's a nice healthy
21 pink, almost like your skin. Like you can almost see the blood supply
22 inside the walls itself. When there's a heating device it turns white. Sort
23 of if you cut off the blood supply to the end of your finger and you look
24 at the tip, it changes color and whitens out.

25 Q By the end of the surgery on July 3rd can you tell us whether

1 you saw any charred tissue?

2 A No, I did not.

3 Q By the end of that surgery can you tell us whether you saw
4 any unhealthy tissue?

5 A No.

6 Q Do you by chance recall the testimony of Dr. Hurwitz and Dr.
7 Juell that it's okay to use a LigaSure within one millimeter of large
8 bowel?

9 MR. JONES: Objection, Your Honor, misstates testimony.

10 THE COURT: Sustained.

11 BY MR. DOYLE:

12 Q Doctor, what do you recall Dr. Hurwitz and Dr. Juell saying
13 about the distance and use of a LigaSure?

14 A One of them made the comment that it's okay to use within
15 one millimeter of bowel.

16 Q And how -- or what's -- what is one millimeter? Can you put
17 that in perhaps terms of a coin or something?

18 A One millimeter would be thickness of a quarter, maybe a
19 dime.

20 Q When you are using a LigaSure device, what do you do at the
21 end of the surgery to ensure there has been no inadvertent injury due to
22 the device?

23 A Well, regardless of what we do, whatever devices we use, we
24 always inspect the area that we've been operating on to make sure
25 there's no bleeding, there's no damage. Plus that there's no damage to

1 any associated organs near the area.

2 Q Tell us whether you did that in Mrs. Farris's surgery?

3 A Yes.

4 Q What did you find?

5 A All the bleeding had stopped. There was no evidence of
6 damage to any of the associated organs.

7 Q Doctor, what is an Endo GI stapler?

8 A Again, it's a laparoscopic device that goes through those
9 sleeves we were talking about. It too looks like a clamp. It has a
10 cartridge that you put in there with staples. You clamp across
11 something. It fires four rows of staples and then there's a little blade that
12 cuts between two rows. So as it separates the tissue you have a double
13 staple line on both ends and the tissue's divided safely.

14 Q What are -- what can a stapler be used for or to do?

15 A You can use the stapler to come across blood vessels like the
16 mesentery I was talking about before. You can use it to divide the bowel,
17 such as if you're doing a colon resection. You come across both ends of
18 the colon to remove it. And then to put the bowel back together again,
19 you can put two ends of bowel together, put the stapler between the two
20 bowels and it'll staple and cut such that it will join them and fuse them
21 with staples. And the bowel will now be in continuity.

22 Q What about for repairing holes?

23 A You can repair them for holes too.

24 Q As of July of 2015, what's your best estimate of how many
25 times you had used an Endo GI stapler?

1 A Since residency and private practice --

2 Q Sure.

3 A -- for any case?

4 Q Yes.

5 A Thousands.

6 Q When you have encountered an inadvertent hole in the large
7 bowel over the years, do you have a preference for the stapler versus
8 sutures?

9 A No.

10 Q Why did you use a stapler in Mrs. Farris's case?

11 A In Mrs. Farris's case when I assessed the hole and what was
12 going on with the colon, the wall itself looked nice and healthy. There
13 was no evidence of any burn or damage to it. The colon was of sufficient
14 size that when you put the stapler across it to close it that it would stay
15 open and not cause a stricture of the colon. And any stool that I saw was
16 inside the colon. Nothing was leaking out and contaminating the field.

17 Q Under what circumstances would you not repair an
18 inadvertent hole in the colon with a stapler?

19 A If the colon is, say, smaller such that if you repaired it that
20 way it would cause a stricture of the colon. You wouldn't want to do that
21 because you'd be causing an obstruction of the colon. If the tissue itself
22 doesn't look healthy and you put a staple line across there, those staples
23 may not hold, and you'd risk reperforation.

24 Q Now you mentioned something a moment ago about Mrs.
25 Farris's surgery and seeing, I forgot the word you used, when the holes,

1 before they were prepared, what did you see inside the bowel?

2 A You could see some stool deep into the colon.

3 Q Can you tell us whether that was surprising?

4 A No. It's her colon. There should be stool in there.

5 Q And when you say deep in the colon, what do you mean by
6 that?

7 A Well, it's inside the lumen of the colon. It's not like it's
8 pushing out through the hole that I saw.

9 Q Was there any spillage of this -- of any of this visible material
10 inside the stool -- I'm sorry, inside the bowel?

11 A No.

12 Q If there had been spillage what would you have done?

13 A It depends upon the amount of spillage. If the spillage was
14 significant then would have converted to an open procedure to assess
15 the bowel better. Figure out whether I could repair it primarily with
16 sutures or more likely than not have to resect that area.

17 Q Now in Mrs. Farris's case, was there any spillage of the
18 visible content?

19 A No.

20 Q And if there was spillage, what would you see? I mean,
21 would it be something subtle, obvious?

22 A No. It's very obvious when brown or green stool is leaking
23 out of the bowel.

24 Q When you are repairing an inadvertent hole in the colon with
25 a stapler, how many times does one have to pull the trigger so to speak?

1 A It depends upon the size of the hole, but in general a
2 minimum of two.

3 Q What does the term prophylactic antibiotics mean?

4 A So to reduce the risk of surgical site infections we give
5 prophylactic antibiotics to reduce that risk to the patient during the
6 procedure and after the procedure. The patient does not have an active
7 infection, but you want the antibiotics onboard in the blood system at
8 the tissue level so that way if they do develop a bacterial infection, you
9 already have the antibiotics ahead of the game so to speak.

10 Q I want to ask you some questions now about Mrs. Farris and
11 your care of her in 2014. And there should be a binder behind you.
12 We're looking for Exhibit A. It may say defense exhibits or something.

13 A Plaintiff's Exhibits 1, 2, Defendant's Trial Exhibits.

14 Q Defendant's Trial Exhibits. It's in two binders.

15 A Right. 1 or 2?

16 Q It should be in number 1.

17 THE COURT: And what proposed tab number please?

18 MR. DOYLE: I'm sorry?

19 THE COURT: What proposed number please?

20 MR. DOYLE: It's A for identification.

21 THE COURT: Okay, thank you.

22 BY MR. DOYLE:

23 Q And if you would turn to pages 3 and 4.

24 MR. JONES: Your Honor, we object to the use of this record
25 in any way; it's not authenticated.

1 THE COURT: Counsel, would you like to approach? And
2 madam court recorder, would you like to turn on some lovely white
3 noise?

4 [Sidebar at 11:49 a.m., ending at 11:56 a.m., not transcribed]

5 THE COURT: Appreciate it, thanks so much. Okay. So last
6 question that was pending, the Court would sustain the objection raised
7 by counsel because the question was starting out to refer to pages in
8 isolation. So Counsel, feel free to move to your next question.

9 BY MR. DOYLE:

10 Q Doctor, please take a moment and page through Exhibit A --

11 THE COURT: Proposed --

12 BY MR. DOYLE:

13 Q -- before I ask you my next question.

14 THE COURT: And this is proposed Exhibit A, correct?

15 MR. DOYLE: Correct, proposed.

16 BY MR. DOYLE:

17 Q Just go through proposed Exhibit A please.

18 [Pause]

19 A Okay.

20 Q What is Exhibit A?

21 A My office records.

22 Q How do you know that?

23 A Because I recognize my own office records.

24 Q How do you know that this copy which we've marked as A
25 for identification is a copy of your office records?

1 A Because I signed it as custodian of records.

2 Q Did you produce these records to the attorneys for Mrs.
3 Farris at their request?

4 A I believe it was to them, yes.

5 Q Did you provide them with a true and exact copy of your
6 records?

7 A Yes.

8 Q And the records that you have, are these -- is this a paper
9 chart or is it an electronic chart?

10 A I have an electronic medical record.

11 Q And so how do you create a paper copy of the electronic
12 medical record?

13 A You have to pull up each individual page, progress note,
14 report and print it out.

15 Q Did you do that for -- or in response to the request by Mrs.
16 Farris's attorneys for a copy of your records?

17 A Yes.

18 Q Does Exhibit A for identification contain your office notes?

19 A Yes.

20 Q Does it contain records concerning Mrs. Farris that were sent
21 to your office as well?

22 A Yes.

23 Q The office notes that are in Exhibit A, did you create those
24 notes yourself?

25 A Yes.

1 Q Did you create them at or near the time of each visit?

2 A Correct.

3 Q Did you create those notes to record what occurred at each
4 visit?

5 A Yes.

6 Q Did you create those notes as part of your routine and
7 regular office practice?

8 A Correct.

9 MR. DOYLE: I'd offer Exhibit A into evidence, Your Honor.

10 MR. JONES: Objection, Your Honor, hearsay, foundation.

11 THE COURT: Pardon?

12 MR. JONES: Hearsay, foundation, authenticity.

13 THE COURT: Okay. It is about two minutes to 12:00. The
14 Court's going to find it more appropriate instead of having this
15 discussion having the jury waiting given it's the lunch hour, that we have
16 everyone go and have a nice relaxing lunch break. A determination
17 outside the presence and then make a ruling when we return from the
18 lunch break.

19 So ladies and gentlemen, it is noon. I am going to ask the
20 jury to come back at 1:25. And I'm going to have counsel come back at
21 1:15. So ladies and gentlemen of the jury, while you enjoy a nice
22 relaxing lunch break of course you must not, and during this recess you
23 are admonished not to talk or converse among yourselves or with
24 anyone else on any subject connected with the trial. You may not read,
25 watch, or listen to any report or commentary of the trial, any person

1 connected with the trial by any medium of information, including
2 without limitation, social media, text, tweets, newspapers, television,
3 internet, radio. Anything I've not stated specifically is, of course, also
4 included.

5 Do not visit the scene or any of the events mentioned during
6 the trial. Do not undertake any research, experimentation or
7 investigation. Do not do any posting or communications on any social
8 networking sites or anywhere else. Do not do any independent research,
9 including, but not limited to internet searches. Do not form or express
10 any opinion on any subject connected with the case until the case is fully
11 and finally submitted to you at the time of jury deliberations.

12 And don't worry, also when counsel's back we're also going
13 to be discussing timeframes and also if there's any need for any
14 additional jury letters, feel free to let the marshal know. We'll be taking
15 care of that as well either end of day or first thing tomorrow for you all.
16 Thank you so very much. Have a great and relaxing lunch.

17 THE MARSHAL: All rise for the jury.

18 [Jury out at 12:01 p.m.]

19 [Outside the presence of the jury]

20 THE COURT: Just one sec until we hear the click. Okay. So
21 with that counsel, you heard when I'll be seeing you back and when the
22 jury's coming back. So you all have a nice and relaxing lunch. Witness
23 is more than welcome to get off the stand, as you're getting off.
24 Perfectly fine.

25 THE WITNESS: Thank you.

1 THE COURT: And then at this juncture, madam court
2 recorder's going to go off the record as everyone exits the courtroom so
3 that everyone gets their state and federally mandated . . .

4 [Recess taken from 12:02 p.m. to 1:16 p.m.]

5 [Outside the presence of the jury]

6 THE COURT: On the record outside the presence of the jury.
7 Is there -- okay. Any matters that need to be addressed, or did you all
8 resolve the issue with regards to proposed Exhibit A?

9 MR. JONES: No, Your Honor. It's not resolved.

10 THE COURT: Okay. Well, since you raised the objection,
11 counsel for Plaintiff, feel free to briefly give me a moment or two to set
12 forth your position. Then I'll give Defense a moment or two to set forth
13 its position. Then the Court will need to make a ruling. And you can
14 appreciate the Court has no basis or understanding because the only
15 thing I've been provided is what was stated by the witness on the stand
16 and the copy of proposed Exhibit A that was provided to the clerk at the
17 time of the calendar call. So that's what the Court has.

18 MR. JONES: Absolutely, Your Honor. Understood. So Your
19 Honor, what we have is we have a certification for custodian of records
20 that is not notarized. We have documents that were created in
21 anticipation of litigation and not in any way verifiably in connection with
22 the treatment of this patient.

23 THE COURT: Okay. Can I stop you for one quick second
24 because --

25 MR. JONES: Yes, Your Honor.

1 THE COURT: -- I'm not sure -- that statement is based on
2 what?

3 MR. JONES: It is, Your Honor. So these are records that Dr.
4 Barry Rives produced himself and created himself. And he can put in
5 whatever dates he likes. But there is an electronic signing requirement
6 on them, which comes out to June 9th, 2016 --

7 THE COURT: Ah, okay.

8 MR. JONES: -- around the time that he was sued in this case.
9 And there's no evidence that he finalized these at any time before then.
10 And so we're talking about a year separated from his last care and
11 treatment of the patient, at which time it was signed off as being true
12 and accurate. And so Your Honor, that's something that absolutely
13 there's a serious question.

14 He's going to represent to this jury -- after having multiple
15 times that he's acknowledged he's been untruthful under oath, he's
16 going to represent to this jury that these were during the time of his
17 treatment of Titina Farris, when in fact that's not what the documents --
18 well, it's unclear if the documents reflect that at all. And so that's the
19 issue, Your Honor. There's --

20 THE COURT: The Court -- sorry. Go ahead.

21 MR. JONES: There's no verification except for from the
22 Defendant's self-serving verification, Your Honor, and that's insufficient.

23 THE COURT: Okay. The Court's got three questions if you
24 don't mind. One, on these documents on the left-hand side there's an
25 indication that says PLTF and it's got some numbers starting it looks like

1 8649 on the very first page.

2 MR. JONES: Yes, Your Honor.

3 THE COURT: What is that?

4 MR. JONES: These documents were provided from Dr. Rives
5 to the Plaintiffs.

6 THE COURT: Okay, because on the right-side it's got A
7 numbers. On the left-hand side it has PLTF. So is there a distinction
8 between the two?

9 MR. JONES: No. Upon receiving them the PLTF was placed
10 there by Mr. Hand's office. And then thereafter Defense counsel placed
11 the A with the numbers immediately prior to the calendar call I believe.

12 THE COURT: So were they provided to Plaintiffs without any
13 Bates stamp numbering whatsoever on them?

14 MR. JONES: Yes. That's our understanding, Your Honor.

15 THE COURT: Oh okay. And do you -- when were they
16 provided, because --

17 MR. JONES: Early on in litigation, Your Honor.

18 THE COURT: Do we have any understanding? Because if
19 you recall, the Court was asking the other day because the JCCR said
20 that the 16.1 disclosures had not been provided as of the time the JCCR,
21 and the Court never got a follow-up date when any documents were
22 provided by Defendants.

23 MR. JONES: Your Honor, I can say that I talked with Mr.
24 Hand prior to this, and that he does not have an exact date when these
25 were received, in terms of he doesn't have a recollection of exactly when

1 he would've received these.

2 THE COURT: Were they attached to a supplemental
3 disclosure or something, or --

4 MR. HAND: Your Honor, they were received before the
5 complaint was filed in response to an authorization. And that was
6 sometime prior to July of '16.

7 THE COURT: Before the complaint was filed. Oh, you had a
8 HIPAA authorization or something from your client to get her --

9 MR. HAND: Yes.

10 THE COURT: -- file, is that what happened?

11 MR. HAND: Yes.

12 THE COURT: Okay. So --

13 MR. JONES: So they were provided directly from Dr. Rives'
14 office apparently.

15 THE COURT: To --

16 MR. JONES: Prior to litigation to Mr. Hand's office.

17 MR. HAND: No. I don't think they were ever produced in a
18 16.1 disclosure by Defendant.

19 THE COURT: Well, that's what I'm trying to get. I'm trying --
20 really, the Court's trying to get an understanding and ask Defense
21 counsel the same thing is was there not a Defendant's file medical
22 records provided as would be required under NRCP 16.1? The Court was
23 asking the question the other day because a joint CCR said it was going
24 to be provided, and then there wasn't an answer.

25 MR. HAND: I don't believe so.

1 THE COURT: And I appreciate Mr. Doyle may be looking for
2 the answer, but I was --

3 MR. HAND: But I'm going to check right now and see if they
4 ever provided it. Let me just check briefly.

5 THE COURT: Okay. Or attached to a supplement or
6 something.

7 MR. HAND: Yes.

8 THE COURT: I mean, that's what I'm trying to get an
9 understanding of.

10 Okay. Defense counsel, your position, please?

11 MR. DOYLE: Well, I can't tell you during which one it was,
12 but in -- we did produce pursuant to 16.1 medical and billing records
13 from Laparoscopic Surgery of Nevada.

14 THE COURT: But I do need to know when. I do need to know
15 that answer. That's why I asked it the other day.

16 MR. DOYLE: Okay.

17 THE COURT: I do need to know that answer.

18 MR. DOYLE: Which are BR1 through BR49. And I -- I'll have
19 to send an email to my office to inquire about that.

20 THE COURT: But BR1 through BR49, those indication is
21 nowhere on this document.

22 MR. DOYLE: Correct because we're using -- because the
23 exhibit we started with was the one that Plaintiffs produced.

24 THE COURT: Plaintiff produced. But --

25 MR. DOYLE: Yeah. We --

1 THE COURT: -- Plaintiffs --

2 MR. DOYLE: -- used the records that Plaintiff obtained from
3 Dr. Rives prior to litigation and produced. And that's the set that we
4 used for creating Exhibit A.

5 THE COURT: Okay. This Court needs to see BR1 through 49,
6 and needs to know when it was produced.

7 MR. DOYLE: Okay.

8 THE COURT: Where is that, and what is that? And you can
9 appreciate why the Court might be asking that question because what
10 you all have provided me is a 42-page document, right, including
11 custodian of records. And yet you're telling me that Defendant's records
12 is BR1 through 49. So that's why the Court would want to see, right, is --

13 MR. DOYLE: Well, remember --

14 THE COURT: -- is this the same or not because Court's
15 Exhibit 13, which Madam Clerk is about to hand to the Court -- because
16 presumably Court's Exhibit 13 had to come from somewhere on a
17 proposed exhibit which was stated to be from Defendant's exhibit. So I
18 must admit to you all this is now a bit confusing. Okay. So -- okay.
19 Even including Exhibit -- Court's Exhibit 13, which has the Bates stamp
20 numbers A20 through 26, is the missing pagination designation that is in
21 proposed A, because you can see it goes A19 and then it goes to A27.

22 That still does not get to 49 pages, which is what this Court
23 thought. And that's what I was confirming by getting proposed --
24 because I remember the pages -- I remember the range. But just double
25 checking. So I got 13. So Defendant produced 1 through 49. And this is

1 1 through 42 including the custodian of records. That's why the Court's
2 asking the question if two different things are being reported to be the
3 full and accurate files of Dr. Rives, which is what the objection is that you
4 all are asking me to rule on.

5 MR. DOYLE: Well, I did -- and I believe counsel is aware of
6 this. I did not include a later telephone message note in the records in
7 which Mrs. Farris called one of Dr. Rives' -- and I'm paraphrasing -- Dr.
8 Rives' malpractice insurance information. She wanted a settlement and
9 all of that. And so I mean, I did not include that page in --

10 THE COURT: In what?

11 MR. DOYLE: That is part of Dr. Rives' office records as a
12 telephone message. But I did not include that in the exhibit for the
13 obvious reasons.

14 THE COURT: Right. You understand you now have
15 testimony that this was a true and accurate of his complete file. The
16 Court could understand that you weren't going to address 20 through 27
17 because that was subject to -- sorry, 20 through 26 because that's subject
18 to the calendar call. The Court's completely unaware of this other
19 message. But now I have certain testimony. I have --

20 MR. DOYLE: Well, it --

21 THE COURT: -- a statement that he's the custodian of
22 records and this was his entire file, paraphrasing, right. And this was his
23 file. There's nothing that's indicating that this is not his complete file,
24 that this is a partial file, et cetera, so far in the testimony that this has
25 been saying it's a partial file. The word partial file, incomplete file, part

1 of a file, any words that in any way so far as indicated that it is
2 incomplete has not been stated in front of the jury. So the Court is
3 asking -- let's circle back to I need to see BR1 through 49.

4 MR. DOYLE: And I'm -- I've sent a message.

5 THE COURT: Okay.

6 MR. DOYLE: But --

7 THE COURT: So this Court needs that information in order to
8 rule on this pending objection because I need to see what was provided
9 from Defendants, and see how it was provided, and to see how it was
10 designated how it was provided. Okay. Because remember, I asked the
11 other day because the joint case conference report, mandatory 16.1
12 disclosures require certain things without going through 16.1 mandatory
13 disclosures. JCCR says it didn't exist. That's why the Court asked the
14 question the other day in relationship to this and other pending issues.

15 Remember, the Court's rulings on these are not isolated on
16 just what you tell me in these snippets in the middle of trial in five
17 minutes. Remember, my rulings are taking into account totality of
18 what's happening in trial. So even though I'm mentioning certain
19 details in a particular ruling, remember I'm taking everything into
20 account. I'm taking into account the things you told me previously on
21 the procedural timeliness. I'm taking into account the things you told me
22 procedurally chronology, substantively, et cetera, in all these rulings.

23 So if anyone's planning on sound biting out a few pages here
24 and there down the road, please don't because you know that would be
25 completely inaccurate because I've told you and you've asked me to take

1 into account the whole totality of things in my rulings. Remember, we're
2 in the middle of trial so I'm not repeating each and every thing at you
3 all's request. I'm incorporating the totality of everything that's
4 happened, right, in the hearings. I mean, pretty much since September's
5 hearings through today, what you all are presenting me when I am
6 making these rulings because you all as officers of the court have made
7 these statements and documentations and presented me this
8 information.

9 The way you've done it by doing these objections in the
10 middle of trial, providing witnesses on the stand when the jury is
11 outside, and not doing it in the format timely with motions means I have
12 told you I'm incorporating everything. I'm not restating all the
13 procedural aspects. I am not restating all -- each and every citation and
14 each and every 727 brief. Okay. You understand. I've told you. You all
15 have asked that I give you a quick snapshot to not have juries. So
16 remember, I'm including everything in the totality of my ruling, so please
17 don't sound bite this.

18 That being said, once again, that's why I was asking
19 previously for the disclosures because we knew this objection was
20 coming up because the Court -- you already told me you were having
21 objections to some of these documents. The Court knowing that it was
22 coming up wanted to have this information available to it so it could
23 make these well-reasoned decisions and not have the jury outside for an
24 extended period of time.

25 So is B1 through 49 coming?

1 MR. DOYLE: I haven't seen it come through yet. But could I
2 make a couple --

3 THE COURT: Okay. So then it makes sense then since you
4 now have Mr. Weiss here, which means presumably -- is Dr. Chaney
5 here outside?

6 UNIDENTIFIED SPEAKER: Yes, Your Honor. She's outside.

7 THE COURT: Do you all want me to continue with this
8 objection, or do you want me to switch over to the Dr. Chaney issues?
9 It's going to be up to a joint agreement of the parties which way you
10 want to go because I will do either. I am prepped for either in a totality
11 concept.

12 MR. DOYLE: I wasn't able to finish my thoughts about --

13 THE COURT: Sure.

14 MR. DOYLE: -- the exhibit.

15 THE COURT: Sure, go ahead.

16 MR. DOYLE: If I could.

17 THE COURT: Please do so.

18 MR. DOYLE: So what I wanted to indicate, Your Honor, is if I
19 said complete, that would've been a mistake or slip of the tongue on my
20 part because we all know the Exhibit A is not a complete set of the
21 records because if you recall, certain records were pulled from his chart
22 at the time of the calendar call. And there's also the telephone message.
23 So my intent was to say are these copies of your records. That's one
24 thought.

25 The second thought is in Mrs. Farris' --

1 THE COURT: But the telephone record, did you tell Plaintiffs'
2 counsel that the telephone record was pulled, because I -- you all never
3 said that A --

4 MR. DOYLE: Yeah.

5 THE COURT: -- to this Court at the calendar call, and B,
6 because you know I've reread that one over and over and over again
7 because we've already gone through that. That -- the Court -- it was
8 never brought to this Court's attention until you just said it a couple of
9 seconds ago about that being pulled in proposed A. So is that news to
10 Plaintiffs' counsel?

11 MR. DOYLE: That was discussed at the -- at our -- on
12 September 11th at our 2.67 conference that I was not going to be
13 including that in his records.

14 MR. JONES: It's possible, Your Honor. I don't --

15 THE COURT: Okay.

16 MR. JONES: -- remember clearly. But that does not --

17 THE COURT: So that's not part of your objection?

18 MR. JONES: No.

19 THE COURT: Okay.

20 MR. JONES: No, it's not, Your Honor.

21 THE COURT: That's what I just needed to know.

22 MR. DOYLE: But the other thing I wanted to bring to the
23 Court's attention is in Mrs. Farris' answers to interrogatories served
24 December 29, 2016, interrogatory number 2 she was asked if you
25 contend Defendant, Barry Rives, MD, or Laparoscopic Surgery of

1 Nevada, LLC's records are false, forged, altered, or modified, describe
2 why. The answer was, "At the present time I have no knowledge as to
3 this subject. Discovery is continuing. And this interrogatory will be
4 supplemented as additional information becomes available." This was
5 never supplemented or updated.

6 So I would have an objection to any questions, suggestions,
7 or innuendo that there's something nefarious about Dr. Rives' office
8 records as contained in Exhibit A. And concerning the date of June 9th,
9 2016, the explanation for that is all of these office medical record
10 systems, EMR systems, when you go to print a chart -- for example, in
11 this case when you print the chart in response to a HIPAA authorization
12 to produce the records, the EMR system automatically prints the date
13 that we see, June 9th, 2016.

14 So it's simply a function of the system. It has nothing to do
15 with some mechanical effort on Dr. Rives' part, and he can certainly
16 explain this in response to questions.

17 MR. JONES: Your Honor, first of all, the electronic signing
18 has nothing to do with that. The little timestamp down at the bottom
19 does that.

20 THE COURT: Right.

21 MR. JONES: But the electronic signing has nothing to do
22 with that.

23 THE COURT: Counsel, let me let Defense --

24 MR. JONES: Okay.

25 THE COURT: -- finish because the Court understands the

1 difference between the Drive App EClinicalWeb.com mobile doc, that
2 designation at the bottom of the document versus the electronically
3 signed in how some of these documents are by Dr. Rives and other
4 documents are not by Dr. Rives. We'll get there in a second. But let
5 Defense counsel please finish. Thank you so much.

6 Defense counsel?

7 MR. DOYLE: And the information that says electronically
8 signed by Barry Rives, MD on June 9, which I believe appears on every
9 office note, and you can see sequence of times. You know, 2:50 p.m.,
10 2:52 p.m., et cetera, et cetera. That is a function of the system printing
11 on the paper page that information as it's being copied. It's not
12 something that he is or is not including. It's just -- it's a proforma part of
13 the system.

14 So I would strenuously object to any question or suggestion
15 by Plaintiffs' counsel in light of that information as well as their
16 discovery response to the answer to the interrogatory that there's some
17 problem or issue with Dr. Rives and his office chart, and the accuracy or
18 voracity of those records.

19 THE COURT: Well, that's -- okay. So I've heard each of
20 those. So the question remains, do you wish the Court -- this Court has
21 asked for records and that date of when the supplement happens
22 because of course that supplement also, right, would make into account
23 whether it was before or after the interrogatories. Once again, why the
24 Court was keep reminding Defense counsel why I need the documents I
25 keep asking for so that I can have a correct chronological understanding

1 of the timeframe when different things are happening so that the Court
2 can make its rulings.

3 So in the absence of having BR1 through 49 and knowing
4 when Dr. Rives' medical records were provided as asserted that they
5 were provided in accordance with 16.1, this Court can't make a ruling
6 right now because I'm being precluded from making that ruling by not
7 being told the date that I've asked for for a number of days. Okay. So in
8 the absence of that I can't make a ruling because I need to fit this into the
9 chronology because you both are arguing chronological aspects.

10 And the Court needs to have the correct chronology and
11 needs to not only know the chronology, but also needs to know if what
12 was produced is different than what is proposed Exhibit A. And to the
13 extent that those two are different, in order to make a determination on
14 what is being asked of this Court.

15 So that's where this Court is at. And until you want to give it
16 to me, then this Court's going to have to deny the request to introduce
17 proposed Exhibit A because it is Defense counsel and Defendant who is
18 precluding the Court from having the information to allow you to
19 introduce the exhibits. You understand that I'm going to have to deny
20 your request to --

21 MR. DOYLE: I have --

22 THE COURT: -- introduce Exhibit A because as due to the
23 conduct of Defense counsel and Defendant for not providing the Court
24 the information that could've allowed the Court --

25 MR. DOYLE: I have -- I have the date.

1 THE COURT: Counsel, can I finish, please? I was right in the
2 middle of a word, so you couldn't have thought I was done. So please
3 let me finish. Because it was Defense counsel and Defendant's conduct
4 in precluding this Court from having the very information the Court had
5 asked even before the witness was on the stand in this issue, and it was
6 not provided with it, the information necessary to make the ruling to
7 show to address the objections that you knew were going to be raised
8 because this objection's already been previous raised, and appropriate
9 documentation.

10 And so therefore the ruling is proposed Exhibit A is denied
11 without prejudice at this juncture. That's the Court's ruling right now
12 because based on -- you all had a chance -- you even had the whole
13 lunch hour to get the information. No one chose -- Defense counsel, you
14 chose not to provide it in an appropriate format for the Court to read.
15 You had all the time. I gave you a heads up the other day. You chose
16 not to provide it to the Court. Proposed Exhibit A is denied without
17 prejudice for the reasons stated. It is without prejudice. The Court's
18 provided its reasoning. So --

19 MR. DOYLE: I have --

20 THE COURT: -- that one is done. So now we're going to
21 move to Dr. Chaney.

22 Now, there were some issues raised --

23 MR. DOYLE: Your Honor, I --

24 THE COURT: Counsel, I have now moved to Dr. Chaney. The
25 Court's made its ruling. Okay. It is now 1:35. The jury was already

1 supposed to be back in and already supposed to have a witness on the
2 standby this time. I've given you several days. For you not do it, that's
3 really your choice, counsel.

4 So moving to Dr. Chaney and the Dr. Chaney issues. Now,
5 the Court had previously -- now, would you all like the Court to provide,
6 or would you like counsel each to set forth their position of what was
7 stated this morning in this morning's most recent objections and motion
8 to quash the subpoena with Dr. Chaney that came before the Court this
9 morning and declarations thereto and different positions as to the
10 status? Do you all want counsel to set forth because you can appreciate
11 you now have in the gallery personal counsel for Dr. Chaney; is that
12 correct?

13 UNIDENTIFIED SPEAKER: That's correct, Your Honor.

14 THE COURT: Okay. Now, I'm not sure if you'd like him in the
15 gallery, or not have him in the gallery. Do you wish to state that?
16 Because the Court did say this morning when you all raised your
17 arguments, and I'm not going to say anything more, that there was some
18 information that the Court didn't have firsthand knowledge on.

19 And so I'm going to hear each party's position whether they
20 wish to set forth anything in the presence of Dr. Chaney's counsel, do
21 not wish to set forth anything in the presence of Dr. Chaney's counsel,
22 and wish the Court to rule on what the Court previously had, or do you
23 wish to state something to Dr. Chaney's counsel whether you wish the
24 Court to see -- the Court was asking questions.

25 Since Plaintiffs' counsel, you raised the objection, I'm going

1 to ask you first, and then Defense.

2 MR. JONES: Yeah.

3 THE COURT: Unless you have come to an agreement. I
4 should ask you first --

5 MR. JONES: No. We --

6 THE COURT: -- have you all come to an agreement?

7 MR. JONES: Your Honor, no, unfortunately.

8 THE COURT: I was hopeful. Okay.

9 MR. JONES: So I'll just --

10 THE COURT: I have to find out if you're both okay with --

11 MR. JONES: Okay.

12 THE COURT: -- Dr. Chaney's counsel being present. That
13 was my first question.

14 MR. JONES: I am.

15 THE COURT: Counsel for Defense, are you okay?

16 MR. DOYLE: That's fine.

17 THE COURT: Okay. Are you both okay with each of you
18 giving your two-minute explanation of your position to Dr. Chaney's
19 counsel?

20 MR. JONES: Your Honor, I'd rather -- perhaps you could just
21 ask questions that you think might be relevant to your decision of Dr.
22 Chaney's counsel.

23 THE COURT: Does that meet your needs, Defense counsel,
24 or would you prefer something different?

25 MR. DOYLE: Well, I'd like to hear Plaintiffs' position so that

1 counsel can understand what we're talking about. And I'll state my
2 position.

3 MR. JONES: I think it would be better if there was -- I think it
4 would be better if there was -- I think it would be better if we do that for
5 counsel to probably leave the room just so we can get -- to make sure
6 that he is not in any way contaminated by what we've talked about.

7 THE COURT: Well, the Court knows what you both have
8 talked about it.

9 MR. JONES: Right. So I think it would be best if the Court
10 just asks.

11 THE COURT: The Court knows what the situation is.

12 MR. JONES: Yeah.

13 THE COURT: The Court had already explained where it was.
14 And I'm intentionally not saying anything because of a difference of
15 opinion. So the only question then becomes --

16 MR. JONES: And Your Honor, I've provided all the
17 information that I have with respect to this issue. And so I think it's best
18 if just any questions you have just -- I think that's the -- that makes the
19 most sense.

20 THE COURT: Counsel for Defense?

21 MR. DOYLE: That's fine.

22 THE COURT: Okay. So the Court in no way is requiring
23 someone who is neither a party in this case, counsel to this case, or
24 anything else to answer any questions. But the Court in a short
25 paraphrasing fashion will explain. The Court's understanding is that

1 there was an issue that was raised regarding what may or may not have
2 been compensation that may or may not be provided to Dr. Chaney for
3 testimony, the timing of when compensation may have been mentioned,
4 discussed, however you'd like to phrase it with regards to Dr. Chaney's
5 testimony, and by who, as well as the Court -- questions to clarify as to
6 whether Dr. Chaney did or did not receive actual service of subpoenas
7 versus indication versus agreement potentially on appearing to testify.

8 Those were some issues that were discussed this morning in
9 a motion to quash quote filed, waived the one-day notice by Defense,
10 and waived the one-day notice by Plaintiff so the Court could initially
11 address it this morning since some of the involved purportedly a
12 conversation with you. Another part involved purportedly a
13 conversation with Mr. Cotton.

14 The Court indicated that it would prefer to have some
15 firsthand knowledge rather than just some secondhand knowledge in
16 order to have clarity, but in no way was going to require counsel for a
17 nonparty to answer questions. But potentially if you wish to, we could
18 offer that opportunity if both counsel for the parties were in agreement.

19 Is that a correct summation from Plaintiffs' standpoint?

20 MR. JONES: Yes, Your Honor.

21 THE COURT: And --

22 MR. DOYLE: Yes.

23 THE COURT: Okay.

24 MR. WEISS: I might not be able to answer any of the
25 questions you have, Your Honor.

1 THE COURT: Okay. So the issue has come up -- and would
2 you mind coming to the podium or something --

3 MR. WEISS: Yes.

4 THE COURT: -- just so we can make sure -- near some
5 microphone just so we can make sure Madam Court Reporter -- and can
6 you just -- would you mind stating even though you stated -- yeah,
7 wherever you -- pick your microphone of choice.

8 MR. WEISS: Okay.

9 THE COURT: And we can give you a pocket mic, or a
10 handheld, whatever you want.

11 MR. WEISS: This is fine, Your Honor.

12 THE COURT: Would you mind stating your name and who
13 you're here on behalf of?

14 MR. WEISS: Yes. Todd Weiss, Bar number 14130 with John
15 H. Cotton Associates. We are retained personal counsel for Dr. Chaney.

16 THE COURT: Okay. So I guess the first question would be
17 do you have an understanding about when you were retained as
18 personal counsel for Dr. Chaney? The firm -- when I saw you, I'm
19 referring to the John Cotton firm.

20 MR. WEISS: You know, I could find out very quickly, Your
21 Honor. It was -- I believe it was two weeks ago on the dot. But I can give
22 you an exact date --

23 THE COURT: Sure.

24 MR. WEISS: -- in one second. We were retained on October
25 16th, Your Honor.

1 THE COURT: Okay. I appreciate it. Okay. So I guess the
2 question -- the issue became about whether or not if you have any
3 understanding -- and I'm in no way trying to go into any confidential
4 communications that may be attorney client privilege or anything in any
5 way. And you're not required to answer any of these questions. That's
6 abundantly clear. Okay. Just -- an issue was raised with regards
7 potentially to the compensation that may be being provided to Dr.
8 Chaney for testimony, okay, and the timing of when compensation
9 happened.

10 So the Court can ask it one of two ways. Either one, to ask
11 you to explain what your understanding is of the compensation and the
12 timing of the compensation. Or if you prefer, the Court could ask some
13 more specific date timeframes. Which would meet your needs better?

14 MR. WEISS: I can discuss both. The discussion of
15 compensation first came up yesterday. I did not -- I was not part of the
16 conversation. I was relayed information between a -- of a conversation
17 between my partner, Mr. Cotton, and whom I believe was Mr. Rives'
18 counsel, Mr. Doyle. The same issue that we expressed when I was here
19 two days ago. We were concerned about just the I mean, lack of respect
20 received in Dr. Chaney's time, having taken two entire days off of seeing
21 patients to be here to testify previously, and then being told right
22 beforehand that that testimony would not take place. Dr. Chaney has
23 never expressed any concern about being compensated.

24 But my understanding was that in the conversations with Mr.
25 Cotton and Mr. Doyle that there was -- Mr. Cotton expressed that if Dr.

1 Chaney was going to come testify, one, there had to be some kind of
2 confirmation that she would actually be testifying on the date and time
3 given. We don't want her to show up again and be told that she
4 wouldn't actually be testifying on this day. This was after the subpoena -
5 - we received the subpoena indicating today in the afternoon that she
6 would be testifying again. And then Mr. Cotton expressed that, you
7 know, she's already missed significant time from her practice, and this
8 would be the third day she would have to take off from seeing patients.
9 And that if she was going to testify, there should be some kind of
10 reasonable compensation for her lost time and patients that she hasn't
11 been able to see over those now three days.

12 THE COURT: Okay. And where the Court was -- there
13 seemed to be a difference of opinion on whether or not there had been
14 any previous conversations about Dr. Chaney being compensated for -- I
15 believe the dates were October 22nd and October 28. And I may be off
16 on those particular dates. But whether there'd been any conversations
17 between the timeframe of October 22nd and October 28th, which the
18 John Cotton firm had already been retained counsel at that time --

19 MR. WEISS: Correct.

20 THE COURT: -- correct? So it was --

21 MR. WEISS: Correct.

22 THE COURT: -- to your knowledge, was there any
23 conversations prior to yesterday about Dr. Chaney receiving
24 compensation other than a standard 40-dollar witness testimony for her
25 appearance in court?

1 MR. WEISS: Not to my knowledge, Your Honor.

2 THE COURT: I'm sorry, not --

3 MR. WEISS: Not to my knowledge.

4 THE COURT: Would you -- and I hate to ask you this. Would
5 you be in a position to know whether that would or would not have
6 happened?

7 MR. WEISS: I can testify about conversations I've had
8 personally. But I'm not -- I can't -- again, I wasn't part of the
9 conversation with Mr. Cotton and Mr. Doyle. That was just information
10 that was relayed to me secondhand. But I have not had any personal
11 conversations with Dr. Chaney about compensation prior to that point.
12 She's mostly concerned with just getting her testimony over with. If
13 she's going to be required to testify, she wants to do it as quickly as
14 possible because she doesn't like being -- feel like she's being included
15 in the middle of a conflict, and that's her biggest concern.

16 THE COURT: Okay.

17 MR. WEISS: Mr. Cotton believed that as much time as she's
18 had to miss from seeing her patients at this point it would be impacting
19 her financially, and therefore there should be some kind of agreeable
20 compensation for her time.

21 THE COURT: We're -- this Court's just trying to get an
22 understanding as to whether or not the compensation component -- and
23 we're talking other than just a straight, you know, witness fee. You
24 know, something -- I'm going to ask how much in just a second. Okay.
25 Or actually, I'll ask that -- to your understanding, was there any amount

1 discussed on what the compensation would be?

2 MR. WEISS: I believe -- I don't know.

3 THE COURT: No worries. I'm just -- okay. And I'm just
4 trying to get an understanding if all of a sudden after she appeared on
5 the 28th, and then you appeared in court and then was told she wasn't
6 going to be testifying that day. And just to let you know, the Court never
7 authorized her to be testifying that day. So --

8 MR. WEISS: Understood.

9 THE COURT: Okay. Or on the 22nd. So it is what it is. The
10 Court takes no position one way or another. But, you know, with regards
11 to your understanding prior to the 28th -- prior to you leaving the
12 courthouse on the 28th, was it your understanding that Dr. Chaney was
13 anticipating, expecting any compensation for her testimony other than a
14 standard 40ish -- and I don't remember exactly what the witness fee is,
15 so that's why I'm saying 40ish witness fee for testifying?

16 MR. WEISS: No. There was -- we never had a discussion
17 about her being compensated. Not even for the subpoena witness fee.
18 The idea -- the idea of compensation was advocated by my partner, Mr.
19 Cotton, on her behalf. She has never asked to be compensated for
20 anything frankly.

21 THE COURT: And to your understanding, when was that
22 advocated first on her behalf to your understanding?

23 MR. WEISS: Yesterday, after receipt of the new subpoena.

24 THE COURT: After the receipt. And it was a receipt to your
25 office, do you know?

1 MR. WEISS: It was sent to my email. Yes, Your Honor.

2 THE COURT: Sent to your email?

3 MR. WEISS: Yes.

4 THE COURT: Did you all accept service, or was it just sent
5 there without your knowledge?

6 MR. WEISS: I mean, it was --

7 THE COURT: I'm trying to get an understanding; did you all
8 agree that she would testify today and then you received a subpoena?
9 Did you receive a subpoena first? Could you maybe explain to your
10 understanding? When I say you, I need to take the whole Cotton firm
11 because I'm not sure --

12 MR. WEISS: Right.

13 THE COURT: -- who may have been involved in what if you
14 don't mind.

15 MR. WEISS: Yeah. We received the subpoena to my email --
16 I received the subpoena to my email. There was no conversations about
17 what day or time she would be asked to testify after I left this courtroom
18 two days ago. We received a subpoena early yesterday morning in my
19 email. Mr. Cotton received it as well. We have never expressly said we
20 are accepting service on her behalf. But obviously both parties are away
21 that we are representing her as her counsel, so it didn't seem off to me
22 that we received the subpoena. And, you know, Dr. Chaney was made
23 aware immediately after as well.

24 THE COURT: Okay. What I was trying to get an
25 understanding is since the subpoena came the day before trial testimony

1 via email, I'm just trying to understand was that by agreement of the Law
2 Offices of John Cotton and the attorneys thereon to your understanding,
3 or at the direction -- without going to attorney client conversations --
4 with Dr. Chaney, or you received it and then you addressed the fact you
5 received it? You understand the distinction that I'm trying --

6 MR. WEISS: Absolutely, Your Honor. We received it first.
7 There was no prior discussion about today being the date and time for
8 the next subpoena, I suppose. We just received the subpoena and then
9 we notified the parties at that point.

10 THE COURT: Okay. I appreciate it. Sorry for asking you
11 those questions. But you can understand the Court's trying to get clarity
12 and understanding when --

13 MR. WEISS: That's okay, Your Honor.

14 THE COURT: -- there's a difference of opinion so the Court
15 can make a reading -- ruling. Okay. Those were the questions that the
16 Court had just so the Court could have firsthand context information. So
17 at this juncture do you wish counsel to remain her or go outside because
18 the Court at this juncture needs to make I guess a ruling. So --

19 MR. DOYLE: He can stay.

20 THE COURT: Are you all fine with him staying as well?

21 MR. JONES: Yes, Your Honor.

22 THE COURT: Okay. No worries. It's perfectly fine. I just
23 wanted to see what each party said.

24 Okay. Well, counsel for Plaintiff, I just have to have a 30-
25 second version of what -- do you still -- you've heard the additional

1 questions answered. Do you have any objection, or what's your position
2 so the Court just has -- I said I was going to ask you both, right, your up
3 to date position after the questions were asked. And I was also going to
4 ask you both, both counsel, whether you've had any conversations at all
5 with the Law Offices of John Cotton or Dr. Chaney between this morning
6 and this afternoon. I told you both I was going to ask you that. So those
7 are the two questions I'm asking to counsel.

8 MR. JONES: Yeah. The second question first, no, we have
9 not. I actually told Mr. Weiss that I was going to send him a text
10 yesterday after the Court's decision, and I intentionally did not. So no.
11 The answer's no.

12 With respect to the short version, none of the subpoenas that
13 have happened are compliant under NRCP 45. The ongoing conduct of
14 Defense counsel is shocking and appalling. The statements that he
15 made today to the Court this morning are clearly untrue. And the -- I
16 think there's a major problem with testimony on that end. Also, I think
17 there's a major problem with testimony under 16.1(a)(2)(b). I think we
18 have a serious problem with the way that things were disclosed.

19 And I even -- in the context -- very short context of a treating
20 -- of someone who is known to be a doctor always comes off as an
21 expert to a jury. I don't think that's something that can truly be protected
22 against, and especially when you know that it's the treater of the people
23 involved in a case. And so I think that necessarily in the context of this, if
24 she -- Dr. Chaney was going to testify, I think she would have to have
25 been disclosed properly, at least as a treating provider. And so I think

1 that the idea of her going up and being able to go through the records
2 and diagnoses and deposition or anything like that without having to
3 properly disclose their 16.1 wouldn't be appropriate.

4 THE COURT: Okay. The basis of your 16.1(A)(2)(b), why are
5 you saying she's not properly disclosed?

6 MR. JONES: It requires that fee schedule, testimony history.
7 It requires her CV. Those things are all required to be produced as a part
8 of that. And the designation has to be sufficient so that the other party
9 can anticipate what is going to be asked. In this case the term's very
10 vague, very broad in terms of her disclosure and it could conceivably
11 allow for a great variety of questions to be asked although it's an
12 identical disclosure as a couple of dozen other people that are listed in
13 Defendant's disclosure. And so from that there's no way the Plaintiffs'
14 could anticipate exactly what it is the Defense is going to try to get from
15 this testimony from the disclosure there.

16 And my understanding, Your Honor, I think we went through
17 it yesterday is that it says must, right. That it must -- they must provide
18 that information. And as we went on through this process as they
19 continued to do apparently subpoenas in violation of NRCP 45, they
20 continued to not supplement in a way that would permit the testimony.
21 So I don't think there's ever been a cure to the defects in the disclosures,
22 Your Honor.

23 THE COURT: Okay. Thank you. Defense counsel?

24 MR. DOYLE: Sure. Addressing the first issue of a subpoena,
25 if a witness wants to testify and appear in court voluntarily, a subpoena

1 is not necessary.

2 THE COURT: Are you saying that Dr. Chaney wants to testify
3 and appear in court voluntarily?

4 MR. DOYLE: Before counsel was involved and my staff was
5 talking to her the impression I had is that Dr. Chaney was okay coming to
6 court and testifying.

7 THE COURT: Your staff talked to her, and you're familiar
8 with the *Siems* case, right?

9 MR. DOYLE: Yes.

10 THE COURT: The source of *Siems*?

11 MR. DOYLE: Simply the same conversations about
12 scheduling her deposition. Simply scheduling her for trial. There was
13 no discussion about --

14 THE COURT: But she received a subpoena, and you said you
15 sent her a subpoena on September 16th. So --

16 MR. DOYLE: Right. After she voluntarily agreed to testify at
17 trial.

18 THE COURT: So you spoke to her prior to September 16th,
19 and she voluntarily agreed to testify at trial?

20 MR. DOYLE: Yes. And then we sent her the subpoena.

21 THE COURT: Okay. So you understand I'm going to have to
22 ask that question to have an understanding, right? Okay.

23 MR. JONES: Right.

24 THE COURT: So -- sorry. Please continue. Thank you.

25 MR. DOYLE: In terms on the ongoing conduct of counsel, I'm

1 not going to address that. In terms of the 16.1 issue, I mean, as we've
2 discussed, we -- in our disclosure we indicated Dr. Chaney is expected to
3 testify regarding her examination, treatment, diagnosis, and overall
4 health conditions of Plaintiff. She was deposed on May 9th, 2019.

5 THE COURT: How does that comply with 16.1 though? Walk
6 through sub D, treating physicians, and it's relevant. Okay. Right. How
7 does that go? How does that meet the criteria?

8 MR. DOYLE: Because at the deposition she provided her
9 hourly rate. Well, I will rely on FCH for the proposition that a treating
10 physician does not have to provide a report and can testify about any
11 opinions formed during the course of treatment of the patient so long as
12 all documents supporting those opinions have been disclosed in that
13 case to the defendant.

14 THE COURT: But that's --

15 MR. DOYLE: But in our case, all of her -- Plaintiff produced
16 all of her records, and those are the records that we're using and relying
17 on.

18 THE COURT: Counsel, do you remember the Court asking
19 and making sure that you were fully familiar with NRCP 16.1 in March
20 2019. And even mentioned again this morning, right. Said well, I knew
21 that the Court didn't have to remind the parties of the changes, but that it
22 had the specific provision. And I not only went through that, but then I
23 even referenced the June article, which anyone who's been in this
24 courtroom between June has seen me pretty much -- I walk the thing
25 across and mention it multiple times during the day. And one -- and

1 there's two articles. One written by the supreme. One written by then
2 Commissioner now Court of Appeals Judge Bulla.

3 Okay. So let's walk through treating physicians, right. I
4 asked you to make sure you're familiar. How does that meet (d)(i),
5 treating physicians section?

6 MR. DOYLE: May I pull it up.

7 THE COURT: All right. Did you look it up between this
8 morning and today?

9 MR. DOYLE: I looked at it about 3:30 this morning. And I did
10 not commit it to memory.

11 THE COURT: Okay. While you're looking it up I'm going to
12 tell Mr. Weiss that it's likely I'm going to ask -- and your client is no way
13 going to be compelled to do so, but as you could understand I have a
14 difference of opinion on -- since I have an objection and I have a
15 statement by counsel that Dr. Chaney voluntarily wanted to testify at
16 trial. So the Court's going to have to find out if that's Dr. Chaney's
17 position before she received something on or about September 16, that
18 she was voluntary appearing and waiving the concepts of subpoena and
19 et cetera because we can appreciate the very different positions that's
20 being presented here.

21 The Court's going to have to -- the Court would like to have
22 that information. I am in no way requiring it. I am in no way forcing
23 anyone to state something or get involved in this in any manner
24 whatsoever. You're her counsel, you can advise her, and the Court's not
25 going to ask you to advise her. But that's a question that the Court

1 would like answered. If you have the knowledge of that, that'll be fine. If
2 you don't have the knowledge of that, it would be helpful to this Court to
3 be able to address the current issue pending before this Court, fully
4 appreciating that you are welcome to say that you prefer not to answer
5 that, or something regarding would not in any way be viewed in any
6 negative light whatsoever because the idea is not to ever get any witness
7 or witness' personal counsel involved in a situation.

8 It's just the Court's presented with a situation that the Court
9 would like to address for the parties. And that would be a point of
10 information that would be helpful to know that neither of the parties can
11 present to the Court because there's different perceptions on that.

12 MR. WEISS: Understood, Your Honor. My knowledge is that
13 her first communication was after receipt of the subpoena. She is not --
14 her legal knowledge is very limited. I don't believe she understands the
15 difference between appearing voluntarily and appearing under
16 subpoena. But I will -- she will have no problem coming here and telling
17 you herself when she was -- when she first contacted Defense counsel.

18 THE COURT: Okay. It's up to you. So counsel for Plaintiff
19 and counsel for Defense, are you okay with having Dr. Chaney confirm
20 whether or not she had an understanding that she voluntarily agreed to
21 appear prior to receiving a subpoena on or about September 16th, 2019?

22 MR. DOYLE: No objection to that if that's important to the
23 Court.

24 THE COURT: Counsel for Plaintiff, do you have any objection
25 to the --

1 MR. JONES: No.

2 THE COURT: -- doctor giving that point of clarification?

3 MR. JONES: No, that's fine.

4 THE COURT: Okay. And I don't -- it's fine if you want to relay
5 it from her, if you want her to relay it. However you deem appropriate.
6 The Court doesn't want anyone --

7 MR. WEISS: I will get her preference, Your Honor.

8 THE COURT: -- in any way to feel compelled any which way.
9 Okay. Thank you so much.

10 While he's left the courtroom to find that answer, counsel for
11 Defense, have you had an opportunity to rereview the treating physician,
12 because that's a separate different issue as you know. That would be the
13 propriety of the disclosure. So have you had a chance --

14 MR. DOYLE: I'm trying to --

15 THE COURT: -- to review like the Court asked the treating
16 physician provision under NRCP 16.1, March 2019, which you both agree
17 and acknowledge is the relevant provisions that would be applicable
18 with regards to this case and this witness?

19 MR. DOYLE: I'm having difficulty putting my finger on it.

20 THE COURT: Okay.

21 MR. DOYLE: I keep getting --

22 THE COURT: Well, if you all -- the Court has it printed out if
23 you want the Court's.

24 MR. DOYLE: That would be faster.

25 THE COURT: Any objection from --

1 MR. JONES: No, Your Honor.

2 THE COURT: Okay. Actually, why don't I have both counsel
3 approach so you're both seeing it at the same time, right?

4 MR. JONES: Yes.

5 THE COURT: Okay.

6 MR. JONES: And Your Honor, I've -- it is within our brief.

7 THE COURT: Pardon? It's just --

8 MR. JONES: I think it's within our brief. So I'm --

9 THE COURT: Yeah, it is. It's just right there. (d)(i) status. It
10 just walks through.

11 MR. DOYLE: Would you like me to comment from here or
12 step back?

13 THE COURT: You can step back. That's fine. I just wanted to
14 make sure --

15 MR. DOYLE: Can I hold on to this?

16 THE COURT: Give me a second to pop up another version of
17 it so that yeah, sure.

18 MR. DOYLE: That would be great. Thank you.

19 THE COURT: Okay. Go ahead. Counsel, that's fine.

20 MR. DOYLE: So looking at (d)(i), Your Honor, it says a
21 treating physician who is retained or specially employed provide expert
22 testimony. I have not retained or specially employed Dr. Chaney to
23 testify. I've simply asked her to come here as a treating physician to
24 discuss her care and treatment.

25 THE COURT: Right. Go to the second sentence of that same

1 provision. That's the whole. Right. You see the other line?

2 MR. DOYLE: Right. And it refers to (a)(ii)(c), which I don't
3 have on this page. But --

4 THE COURT: Sure.

5 MR. DOYLE: May I approach?

6 THE COURT: Of course you may. I will give you -- there are
7 pages on either side.

8 MR. DOYLE: Thank you.

9 THE COURT: And it's in the brief from Plaintiffs, as well.

10 MR. DOYLE: I know I read it this morning somewhere.

11 THE COURT: No worries. The Court specifically was going
12 to -- it says --

13 MR. DOYLE: Right, right. No, I see. So --

14 THE COURT: It's got to have the specific disclosures. I do
15 not see as Plaintiff pointed out, not only the 7.27 brief. But it does not
16 have all the specific disclosures that are required under 16.1(a)(ii)(2)(i-v)
17 disclosures. None of those are in anywhere to that this Court -- in which
18 you read to the Court with regards to Dr. Chaney. That was the concern
19 raised by Plaintiffs' counsel.

20 Is that correct, Plaintiffs' counsel?

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

22 THE COURT: Okay. So --

23 MR. DOYLE: And my position is between our 16.1 disclosure,
24 the totality of her deposition, and the FCH case --

25 THE COURT: But counsel --

1 MR. DOYLE: -- we --

2 THE COURT: -- counsel --

3 MR. DOYLE: -- that she can testify.

4 THE COURT: Counsel, FCH 1 predates NRCP March 2019 by
5 the very date of the case, correct?

6 MR. DOYLE: It is.

7 THE COURT: FCH is not after March 2019. So obviously the
8 brand new provision -- the provision in NRCP 16.1 2019 -- March 2019,
9 specifically the rule post-dating FCH 1 takes precedence. That's why this
10 Court's been reminding the parties over and over and over to read the
11 rules. It's even if you look at -- remember, you can go back to this
12 Court's orders to you of September 18 and 19, right. Referenced again
13 September 26th, October 7th, October 10th, likely in the evidentiary
14 hearing again all before trial. And again, multiple times during trial.

15 But so we don't -- Mr. Weiss, I'll give you another second to
16 look at that. Let me hear Mr. Weiss' response. I'm switching back now
17 from that portion --

18 MR. WEISS: Okay.

19 THE COURT: -- to the voluntary, nonvoluntary difference of
20 opinion questions. Sorry, counsel, if you don't mind. If you wish to
21 answer, fine. If you don't wish to answer, fine. It's completely up to you.

22 MR. WEISS: Dr. Chaney actually preferred to do the -- to
23 communicate this herself if --

24 THE COURT: Okay.

25 MR. WEISS: -- that's okay with the Court.

1 THE COURT: Sure.

2 MR. WEISS: She has all the -- all of the messages that she
3 received from counsel. She knows exact days. She can tell you the
4 substance of it. What her feelings were when she received the
5 communication.

6 THE COURT: Okay.

7 MR. WEISS: Whatever the Court needs, she's comfortable
8 giving that information herself.

9 THE COURT: Does that meet the needs of Defense counsel?

10 MR. DOYLE: Sure.

11 THE COURT: Does that meet the need of Plaintiff counsel?

12 MR. JONES: Sure.

13 THE COURT: Okay. But once again, realizing also that your
14 client's -- I mean, this is not medical information, right, this is
15 scheduling?

16 MR. WEISS: Yeah. No, it's not medical. And she's not going
17 to talk about anything me and her have talked about. Just
18 communications with the parties in the case.

19 THE COURT: Okay. Does that meet both parties' needs?

20 MR. JONES: Your Honor, I -- we're fine with it. I don't think
21 we need it. But we're fine with it. If the Court -- if it would be helpful to
22 the Court, that's fine.

23 THE COURT: Counsel for the Plaintiff I understand has stated
24 that there was not a voluntary appearance by Dr. Chaney. That she was
25 coming pursuant to a subpoena. And I understood that Defense counsel

1 is saying that the September 16th, 2019 subpoena was provided to Dr.
2 Chaney after she voluntarily agreed to testify. Is that correct from
3 Defense?

4 MR. DOYLE: That's my understanding.

5 THE COURT: Okay. Is that correct from Plaintiffs?

6 MR. JONES: That she -- I don't know. I just don't -- the
7 question -- Your Honor, I think the question you're asking is whether or
8 not she had agreed to voluntarily come or not --

9 THE COURT: Yes.

10 MR. JONES: -- prior to getting the subpoena?

11 THE COURT: Because that would trigger the issues, right,
12 relating to whether or not the subpoenas would be necessary, correct?
13 Which would trigger to the objection that you're raising with regards to
14 the issues of the compensation because of the time -- because of the
15 subpoenas. That's why the Court was asking this question because it
16 was triggering back to the first subpoena.

17 And counsel for Defense was saying that the first subpoena
18 wasn't even necessary because I had understood counsel just said a few
19 moments ago Dr. Chaney voluntarily agreed to testify at trial, no
20 subpoena was necessary, that she voluntarily testified beforehand, and
21 then she received the subpoena. Is that correct chronology, counsel?

22 MR. DOYLE: Yes, to confirm that she would appear. Of
23 course.

24 MR. JONES: So it seems to me that that would still be
25 improper, right. We have an ex parte communication with Defense

1 counsel to her to secure her agreement to come even if that did happen.
2 But if it's --

3 THE COURT: The *Siems v. Leavitt* nature of the ex parte
4 communication, another distinct issue, right?

5 MR. JONES: Sure.

6 THE COURT: But you also raised the issue of the subpoena
7 and the payment. And the timing of the payment seems to have been
8 cleared up. The payment issue first arose -- at least from counsel from
9 Dr. Chaney is the payment issue first arose after Dr. Chaney and Mr.
10 Weiss left the courtroom on October 28th, 2019.

11 Is that correct, Mr. Weiss?

12 MR. WEISS: That's correct, Your Honor.

13 THE COURT: Okay. That part's been cleared up. Then came
14 the issue about whether or not she was -- the subpoenas were even
15 necessary, if she was receiving more than she would have gotten
16 pursuant to a subpoena, versus some voluntary agreement for her to
17 appear or not. If you don't wish that issue, if that's not a part of your
18 concern then the Court need not address it. If it's part of your concern,
19 then the Court will address it. If it's part of Defense's concern, the Court
20 will address it. If there's not an issue the Court need not address it. Only
21 if the parties have an issue about it.

22 MR. JONES: Yeah. I think -- Your Honor, it's been a long
23 night and long day, so I'm moving slowly. But I'm fine. If that's --
24 essentially if not bringing her in kind of absolved -- if the concept is that
25 that might absolve the Defense of their NRCP 45 requirement, then I

1 think she should be brought in and asked about it.

2 THE COURT: So it seems like you're both in agreement to
3 ask her; is that correct?

4 MR. DOYLE: It seems to be important, so sure.

5 THE COURT: Okay. Then fine, we'll take care of that. Would
6 you just bring her in real briefly --

7 MR. WEISS: Absolutely, Your Honor.

8 THE COURT: -- get that part taken care of? Then we'll circle
9 back to the disclosure. Okay.

10 And remember, we're also going to have to let the jury know
11 timing because you do have jurors that have already communicated to
12 you back -- way back at voir dire. Okay. Now, I appreciate it. So at this
13 juncture, is -- I should've asked, does anybody request that she be sworn
14 in, or just ask the questions just informally at this point for these
15 questions?

16 MR. DOYLE: Informally is fine.

17 THE COURT: Informally fine?

18 MR. JONES: Informally is fine, Your Honor.

19 THE COURT: Okay. So informally. So it's going to be
20 completely up to you if you want to be at the podium, if you're more
21 comfortable sitting down. Whatever you and your counsel feel is more
22 appropriate is perfectly fine. Okay.

23 DR. CHANEY: Okay. Hi.

24 THE COURT: Hi. Okay. So welcome. Just so we know
25 who's talking, even though you -- would you mind just stating your

1 name?

2 DR. CHANEY: Yes. My name is Dr. Noemi Chaney.

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

4 DR. CHANEY: Thank you.

5 THE COURT: Okay. There's just been some differences of
6 opinion, and I was told that you would be the best person. So you're in
7 no way required to answer any of the questions. Just -- okay. I'll try to
8 ask in the most general sense. If you don't feel comfortable, it's perfectly
9 fine not to. But there's just been a difference of opinion about whether
10 or not you -- prior to September 16, 2019 -- I understand you received a
11 subpoena on or about September 16, 2019 to testify in this case?

12 DR. CHANEY: I received an email on September 13th that I
13 will be receiving a subpoena to testify.

14 THE COURT: The question is you coming to testify in this
15 trial voluntarily or because you thought you were being subpoenaed and
16 therefore you --

17 DR. CHANEY: I was compelled to by the Court. I felt I was
18 being called to testify because I was compelled to by the Court.

19 THE COURT: Okay. That's really simple.

20 Does either Plaintiff or Defense wish the Court to ask any
21 further questions? That was the only question the Court had.

22 MR. JONES: No, Your Honor.

23 MR. DOYLE: No, Your Honor.

24 MR. WEISS: No, Your Honor.

25 THE COURT: Okay. Thank you. I appreciate it. Sorry.

1 DR. CHANEY: Thank you. So if you don't mind for a
2 moment, let's -- okay. So that part's cleared up about the time period.
3 With regards to the compensation cleared up. So then the other issue
4 becomes the -- do you all want me since we have counsel here for Dr.
5 Chaney, do you want the Court to continue on the disclosure aspect to
6 let Defense -- does Defense counsel want to finish that on how the
7 disclosure -- that goes to the content of the testifying versus the other
8 issue goes to the testifying overall, right?

9 MR. DOYLE: Yeah. So I just want to back up though for a
10 moment just to preserve for the record --

11 THE COURT: Of course you may.

12 MR. DOYLE: -- the fact that this is being -- that these
13 objections, these arguments are being raised by Plaintiff essentially for
14 the first time now well into this trial. If they had some issue with Dr.
15 Chaney testifying, they knew that she was going to be a witness for us
16 since the 2.67 conference on September 11th. There has been -- there's
17 been no motion, no formal objections, no effort on their part to exclude
18 Dr. Chaney until just the last -- well, Monday they were not willing to take
19 her out of order. And then today at midnight, a lengthy brief raising all
20 sorts of new objections for the first time.

21 So I do object to the -- I believe Plaintiffs have waived
22 whatever objections they may have had to her testifying. So -- but then
23 going on to the objections themselves, I stand by my position that
24 reading the 16.1 requirements, that we have satisfied those requirements
25 by virtue of the contents of our 16.1 disclosure, what was discussed at

1 her deposition, and under the FCH 1 case that she has been properly
2 disclosed as a treating physician, and that she can testify at trial.

3 THE COURT: And what are you saying the scope of what you
4 are stating that you are asserting that she can testify as to trial? Other --

5 MR. DOYLE: Yes. So --

6 THE COURT: I know what her 16.1 disclosure says. I know
7 what it says in quotes. Are you going to ask her anything else other
8 than --

9 MR. DOYLE: What I was going --

10 THE COURT: -- what her notes and her progress notes say.

11 MR. DOYLE: What I was going to ask Dr. Chaney was more
12 questions about her background, training, and experience, her patient
13 population, what percentage are diabetes, what percentage are diabetic
14 peripheral neuropathies, how often does she make a new diagnosis of
15 diabetes, a new diagnosis of diabetic peripheral neuropathy.

16 THE COURT: I'm going to stop you right there. How would
17 you get any of those in on her designation?

18 MR. DOYLE: Because it's --

19 THE COURT: Excuse me. When I say any of those, back --

20 MR. DOYLE: It's regarding her --

21 THE COURT: -- not background, training. Not her
22 background, where she went to college. Any of the diabetic type
23 generalized questions not to Ms. Farris.

24 MR. DOYLE: Because it's foundation to her examination,
25 treatment, diagnosis, and overall health conditions of Mrs. Farris. And

1 then I was --

2 THE COURT: So Plaintiff, do you have a position one way or
3 another on that?

4 MR. JONES: Your Honor, it's clearly the standard process for
5 qualifying an expert. That's all he's trying to do. And then he's trying to
6 get in the same stuff he's -- anyway.

7 THE COURT: Do you have an objection or not an objection?

8 MR. JONES: Yes, Your Honor, we absolutely object.

9 MR. DOYLE: And then I was going to ask her about diabetes
10 mellitus type 2, how is that treated, diet or medications, insulin, degrees
11 of severity, necessary labs to monitor it, blood sugars, A1C. I was going
12 to ask her about uncontrolled versus controlled diabetes type 2, the risks
13 of that, including peripheral neuropathy, the risks developing in terms of
14 controlled and uncontrolled, the risks of worsening with controlled and
15 uncontrolled, it being a progressive disease, her treatment of peripheral
16 neuropathy with medications such as Cymbalta, Gabapentin, pain
17 medications. I was going to ask her when she uses the term
18 noncompliance in her records what she means by that.

19 And then in terms of her treatment of Mrs. Farris, I was going
20 to find out if she's still a patient. We were going to talk about the first
21 office visit and the information in that visit indicating the diabetes, the
22 hypertension, the peripheral neuropathy, asking her to explain those
23 notes, comments in the notes about why she's referring her to an
24 ophthalmologist. I was going to go through the 15 medications. And I
25 was going to cover her assessment and plan, diabetes type 2 on insulin,

1 hypertension, the back pain. Then we were going to look at the referral
2 to Dr. Randall Yee, his note about bilateral feet pain, feet daily pain --

3 THE COURT: His note?

4 MR. DOYLE: -- sometimes --

5 THE COURT: His note?

6 MR. DOYLE: Yes. That formed her -- in part her thinking.

7 THE COURT: And how would that fall --

8 MR. DOYLE: Sometimes --

9 THE COURT: How would that -- that is a specific provision in
10 NRCP 16.1 that says if you want to do that that needs to be done in a
11 specific manner. How is that done?

12 MR. DOYLE: It's --

13 THE COURT: NRCP 16.1 2019 version.

14 MR. DOYLE: It's foundation for her examination, treatment --

15 THE COURT: It's not foundation.

16 MR. DOYLE: -- and diagnosis.

17 THE COURT: Okay. The Court -- okay. Give --

18 MR. DOYLE: I was going to focus on the July 23, 2014 visit
19 where her diagnoses include the diabetes and polyneuropathy. I was
20 going to go through other visits in 2014, specifically November 3rd. I
21 was going to go through the visits of February 6th, April 3rd. All of these
22 preceding surgery. And the multiple notes about the diabetes, it being
23 uncontrolled, noncompliance. Her notes about diagnosing and treating
24 the peripheral neuropathy, the symptoms that were evident that she was
25 treating. And then I was going to ask her questions about after surgery

1 in July of 2015 as she continued to follow her that the diabetes remained
2 uncontrolled according to her notes.

3 I was going to ask her about the visits on November 29, 2016,
4 May 25, 2017, August 2, 2017, March 22, 2018. And again ask her
5 questions about the diabetes remaining uncontrolled, the effect on the
6 peripheral neuropathy, the medications being used to treat that, the
7 diabetic foot ulcer that she diagnosed. And then I was going to ask her
8 about the last -- you know, our last note is March of 2018. I was going to
9 ask her, you know, has the diabetes remained uncontrolled, has the
10 peripheral neuropathy that's ongoing has it improved. And these
11 questions are all based on -- much of these questions are based on what
12 she told us in her deposition.

13 I was going to ask her about her deposition testimony that
14 there's foot drop in just one foot, that anxiety is not a major issue for
15 Mrs. Farris, and that -- I mean, that's an overall summary of what I was
16 going to ask her. And I offer it as an offer of proof.

17 THE COURT: Okay. And can you please reread the
18 designation on your 16.1 that was attached? So -- just because I have so
19 many doc -- I mean, I can find it if you want. But it would just be easier
20 because you probably have it handy. The 16.1 designation that you had
21 of her.

22 MR. DOYLE: Dr. Chaney is expected to testify regarding her
23 examination, treatment, diagnosis, and overall health conditions of
24 Plaintiff.

25 THE COURT: Okay. That's the only designation ever made,

1 correct?

2 MR. DOYLE: That's correct. And I believe everything that I
3 outlined comes within that designation.

4 THE COURT: The Court asked if that was -- is that the only
5 designation ever made, correct?

6 MR. DOYLE: Yes.

7 THE COURT: Okay. So --

8 MR. DOYLE: May I return this to you?

9 THE COURT: Yes, of course.

10 MR. DOYLE: So it doesn't get mixed into my papers.

11 THE COURT: No worries. Thank you so very much. That's
12 just straight printouts of part of NRCP 16.1 relating to experts. Okay. So
13 let's deal with the first issue and then the second issue. The first issue
14 with relationship Plaintiff, in light of hearing all the statements, do you
15 still have you resolved your issues? There's still something pending with
16 regards to the testimony and the compensation issue separate -- I'm
17 going to divide these down. One is issue testifying at all. Second issue
18 is the scope of the testimony. If you don't mind.

19 MR. JONES: Your Honor, no testimony at all. And if we're
20 talking about the two things separately, if we're talking about the money
21 issue and the *Siem*s issue, it's -- that's a major problem. As Your Honor
22 is aware, it specifically identifies when there's a treating -- a treating
23 physician has a designation either as a retained or an unretained. And in
24 this case what Defense counsel did is he tried to set up a dynamic
25 whereby he paid for the retention of the doctor, and then didn't tell us

1 about it. And it says that that has to be disclosed of course. And so
2 within the rule itself it says that. And so if there's going to be a
3 conversion from an unretained to a retained, you have to disclose that.
4 And to do it on the day before testimony at trial is remarkable.

5 In any case, I think that it's a very serious problem. I --
6 there's a case that we cited where I mean, I think there was a suspension
7 for similar conduct.

8 THE COURT: The case you cited in what?

9 MR. JONES: Just in what we filed this morning, Your Honor.

10 THE COURT: That I still don't have.

11 MR. LEAVITT: Your Honor, you have it. It was in that book.
12 It's the In Re of Callister.

13 THE COURT: Which book are we talking about?

14 MR. LEAVITT: The one --

15 THE COURT: If you filed it --

16 MR. LEAVITT: -- I gave you this morning. I believe it's --

17 THE COURT: The 10/29 7:06 a.m. one?

18 MR. LEAVITT: 10/29, 11:57 p.m. I have another copy if Your
19 Honor would like it.

20 THE COURT: Okay. That's what I was asking. This --

21 MR. JONES: That's it, Your Honor.

22 THE COURT: One second. I see -- the other one as you know
23 gave a midst of different arguments. Okay. So counsel, what are you
24 referencing, please?

25 MR. JONES: We have a -- I mean, one of the cases we cite

1 to, Your Honor, is the Matter of the Discipline of Callister, page 9 of 23,
2 Your Honor. And in that case it's a situation where the attorney sent a
3 letter and said hey, for your honest testimony that says basically A, B, C,
4 I'm going to give you money to come and testify, or something along
5 those lines.

6 And here what we have is we have something for -- we will
7 pay you an undisclosed amount in the future that you represent to me
8 will be in your bill for these three days after you testify in court. And I
9 know it's not identical, but it's troubling regardless.

10 THE COURT: Counsel, don't we have a different issue here
11 where we have from the statements of the personal counsel of Dr.
12 Chaney that -- two separate issues, right. We have voracity issues as to
13 whether or not she voluntarily appeared. That's separate and distinct.

14 MR. JONES: Sure.

15 THE COURT: Okay. The Court has strong concerns about
16 representations made in court about that, and how a witness was or was
17 not told about voluntary, et cetera, and representations made to the
18 Court somebody, quote, volunteered when their office sent an email
19 saying they're going to get a subpoena. And somehow that gets told to
20 this Court that that means the person volunteered to appear and then
21 gets a subpoena afterward. That is a huge, very, very all caps strong
22 concern is my politically correct way of saying it. But don't
23 underestimate how strong of concern it is because I'm using the very
24 nice word concern. Okay. That's one issue.

25 But the payment issue is different. The payment issue has

1 been specifically presented that Dr. Chaney because of the way things
2 were done, unfortunately it was not communicated to her that in no way
3 it hadn't been communicated to this Court or anything that she was
4 going to potentially testify on the 22nd because that was news and
5 surprise to this Court until it was somehow presented because you all
6 said that there was never an agreement to that effect. Same thing with
7 the 28th. Never an agreement. So unfortunately it seems the witness
8 got caught in the middle of that --

9 MR. JONES: Oh I agree, Your Honor.

10 THE COURT: -- because that is an unfortunate circumstance
11 for a witness. And hopefully afterwards, after it's fully testified,
12 understands and appreciates that that is not anything coming from
13 Court. Okay. That that is what happened. So in light of that, having her
14 personal counsel state that if she's going to appear, that she would need
15 to be compensated is not an unusual circumstance when a person has
16 already lost out financially for it being to protect their own client's
17 financial concern.

18 That's not a situation where -- the Callister situation where it
19 was generated, at least from what this Court has been told, that the idea
20 of compensation came from Defense counsel saying I will pay you X
21 amount of money and I want you to testify Y way. So that's where this
22 Court sees a distinction in your reference to Callister case, which the
23 Court had read previously anyway.

24 MR. JONES: Your Honor -- oh I'm sorry.

25 THE COURT: So that's why the Court sees that aspect

1 differently. Now, whether you can flesh that out in cross-examination or
2 not, a different issue. The Court takes no position. I'm not even going to
3 say you want to. But I don't have any position there. But that I can't see
4 is Defense -- is that being something that would preclude her from
5 testifying on that basis because that wasn't something that was stated it
6 was conduct initiated.

7 Now, I appreciate that that may never have had to have
8 happened if there was a proper subpoena under NRCP 45 done in a
9 manner, and then that proper subpoena done service of process, actually
10 filed as required under 45, and all the appropriate structures what 45 is
11 intended to require. Okay. Including all the requirements that are in the
12 new version of 45. Right.

13 Okay. All those needed to be done. They were done. That
14 presents independent challenges. That presents additional rule
15 violations. But that is separate issues from precluding her to testify on
16 purely the monetary issues.

17 MR. JONES: Absolutely. And Your Honor, I think you're
18 more than fair in the way that you laid that out. I absolutely -- I don't
19 view this as being something where -- I understand exactly why Dr.
20 Chaney would request it, and I understand exactly why Mr. Cotton would
21 request it. That all sounds very reasonable to me. And I -- and so I didn't
22 -- I don't want it to sound as though it's that.

23 The big issue I see with it is that we have this nondisclosure.
24 Now, I don't think it has necessarily all been fleshed out. We have a
25 nondisclosure of it. And this is a big deal. We have a witness that's

1 going to be paid thousands of dollars, and her check has not been cut
2 yet. And her check is going to be cut after her testimony for three days
3 lost. And the issue --

4 THE COURT: But isn't her check going to be cut regardless if
5 she testifies or not realistically?

6 MR. JONES: I don't think so.

7 THE COURT: Well, I would -- okay.

8 MR. JONES: That's not my understanding.

9 THE COURT: Is she going to be compensated regardless if
10 she testifies or not, Defense counsel?

11 MR. JONES: If she asks. Yes.

12 THE COURT: If she -- I am not going there. Okay. I would --

13 MR. JONES: So you see the concern, Your Honor.

14 THE COURT: Counsel, I'm sorry. I took a standard
15 community aspect.

16 MR. JONES: Right.

17 THE COURT: But that's not a ruling. There's no ruling. I'm
18 not anywhere involved in that.

19 MR. JONES: That --

20 THE COURT: But --

21 MR. JONES: That's why I say there's still a major issue with
22 the money. And it's not because of Mr. Cotton's office. And it's -- but
23 there is an issue of a potential witness not having money secured or
24 guaranteed who's going to testify, and then the payer the know is the
25 Defendant afterwards. Now, that creates a problem by itself. And I know

1 it's a unique problem. It's not the McAllister problem -- or the Callister
2 problem. It's different. But it's a problem. And with what counsel just
3 said --

4 THE COURT: Well --

5 MR. JONES: And so I do think that that continues to be a
6 problem, Your Honor.

7 THE COURT: Mr. Weiss, is Dr. Chaney going to ask
8 regardless if she testifies or not?

9 DR. CHANEY: She was supposed to have brought invoices
10 with her today. And she -- we were going to ask for three days whether
11 she ends up testifying today or not because she still had to move
12 another entire day of patients again.

13 THE COURT: The Court takes no -- okay. But Dr. Chaney
14 isn't aware of that nuance that just came up in the last few moments,
15 correct?

16 MR. WEISS: And neither was I, Your Honor. That's the first
17 I've heard of it. My understanding was there was already agreement
18 that regardless of whether she actually testified, whether -- what her
19 actual testimony was, she was going to be compensated for today and
20 for the previous two days that she's already missed from work.

21 THE COURT: So that's what this Court -- and you have to
22 appreciate that's what this Court would view in ordinary course because
23 that's -- the Court takes no position. Okay.

24 That being said, the witness is not going to know before she
25 takes the stand -- well, I guess that's a question. Is there going to be an

1 issue that if she doesn't take the -- that she's going to be told that if she
2 doesn't testify she's not going to get the money, and that's going to be
3 an issue of potential bias that this Court's going to have to address one
4 way or another?

5 MR. JONES: Your Honor, I don't think it can be cured
6 without payment in advance on the money issue. I don't think there's
7 any cure for that.

8 THE COURT: Okay. You understand the Court's presented
9 with a dilemma in light of your just last statement, Mr. Doyle?

10 MR. DOYLE: I assume she's going to ask and that she will be
11 compensated for the time that she has lost.

12 THE COURT: Maybe the Court misunderstood what you said.
13 But I thought you had previously stated that there was an agreement,
14 that she was going to be compensated for her three days for the time
15 she lost. And the only thing you just didn't know was the exact amount.

16 MR. DOYLE: Yeah. No, that -- perhaps we're
17 miscommunicating.

18 THE COURT: I'm just listening.

19 MR. DOYLE: Okay. Then whether she testifies or not today,
20 she -- we will take care of the time that she has lost.

21 THE COURT: Okay. The Court wasn't requiring an answer. I
22 just wanted -- in any event, so hearing that clarification as stated by
23 Defense counsel, it appears whether she testifies or not, based on what
24 was just stated, that that would not impact her payment issue, which is --
25 so that would be not on that issue. As far as the -- I will tell you what the

1 Court's inclination at this juncture is. And you do appreciate where the
2 time is. I do appreciate everybody's time. We do appreciate this jury
3 who you have promised is -- okay. They've got commitments, and
4 you've got all sorts of issues there. But okay. Is that at this juncture the
5 payment issue would not preclude Dr. Chaney from testifying.

6 The impropriety of the representations of her coming here
7 voluntarily or not would not preclude her from testifying unless that was
8 asserted by her counsel that somehow she is here under some different
9 purpose. But I do not have a motion to quash by her counsel on that
10 basis. I think in fairness since I don't have that, I have to take what I
11 currently have. Okay.

12 So at this juncture the motion to quash I have is by Plaintiffs'
13 counsel on other bases. So since I don't have Dr. Chaney saying through
14 her counsel -- maybe if her counsel's requesting time. I'm not
15 suggesting anything one way or another. But I just don't have anything
16 from Dr. Chaney's counsel saying that learning things that may or may
17 not be new news to him here today in court, I have not heard that there's
18 any different position as far as Dr. Chaney's willingness to testify. And I
19 use the term willingness under basically that she's here and would
20 attend the stand under the idea that she's already had her patients
21 canceled for the day, and as long as her testimony's finished today that
22 she would be testifying.

23 Okay. I'm not asking for -- so in that scenario that would
24 mean that her testimony would not be precluded under either of those
25 bases because I have not heard some bases to preclude her testimony in

1 that regard.

2 So then I look to the scope of her testimony, okay. The scope
3 of her testimony issue is distinct. She was designated, albeit in a very,
4 very narrow respect, okay. So then I have to take her designation under
5 the former NRCP, right, 16.1 and then say she gets that initial benefit of
6 that former NRCP 16.1 however, if she were to testify today, right, for
7 today's purposes, if she wants to do anything more than what was
8 specifically in her designation, she would have had to have done
9 everything that's required under some new provisions in NRCP 16.1
10 2019.

11 She did not do any of that, okay. She did not do any of the
12 additional requirements which would have allowed her, right. If she had
13 wanted to add anything regarding diagnosis prognosis, right, or she
14 wanted to do something else regarding her medical chart, right, or had
15 wanted to do all the new provisions, she would have had to have
16 reopened discovery. She would have done -- these are all set forth,
17 right.

18 None of those were done. Those are all precluded. Defense
19 counsel had a full opportunity between March 2019 and the close of
20 discovery July 24th, right. So none of the additional aspects can be
21 taken care of. And I'm going to quickly -- I'm just going to go to my nice
22 little redline version, so I have a redline version.

23 Okay. So the ability to try and do any of the supplementing
24 the disclosure did not happen, right. So the F, none of the F subpart
25 aspects, right, which were added by 2019 did not happen. So none of

1 the F aspects for the supplementation can occur.

2 So Defendant is precluded from a large part of what he
3 stated is the anticipated testimony of Dr. Chaney, i.e. all the opinions
4 regarding general concepts of diabetics, et cetera, okay. Her general
5 education, where she went to college and when -- where she went to
6 med school is appropriate for any witness to get general background. I
7 don't think Plaintiff you're going to disagree with it, do you?

8 MR. JONES: I do not.

9 THE COURT: Okay. So then after he went to general
10 background when he was talking about all the, will you object with
11 regards to general diabetes population she treats and all of that, that is
12 expert type information that needed to be disclosed appropriately and
13 was not in this case in accordance with the NRCP. So it cannot be done
14 in this case, okay.

15 So it will not be done. And Defense counsel is hearing me
16 say it will not be done, okay. That would be improper. However, to go
17 over the diagnostic notes of her care and treatment consistent with the
18 designation, i.e. saw her on X, Y, Z date, what did she discuss on X, Y, Z,
19 date, what's in the notes on X, Y, Z dates, right. And what did she
20 recommend, not recommend on X, Y, Z dates, that, the Court's
21 inclination, is it would be proper because that would be a straight
22 treating physician. And you can designate a treating physician from a
23 defendant standpoint, FCH1 and the NRCP to go over that specifically
24 what she advised her and did not advise Ms. Farris, okay.

25 Now she can't offer opinions as to what would be the likely

1 prognosis of all these unless that's in her notes, right. If she says in her
2 notes that, you know, she talked with Ms. Farris that if she does not do X,
3 like you know what I mean, if I eat 100 -- if she eats 100 candy bars a day
4 something's going to happen to her, that would be fair game. If however
5 that 100 candy bars a day is not in her notes, she can't say that -- offer an
6 opinion, people with Ms. Farris's condition are likely to have a shortened
7 life expectancy, are likely to have drop foot, are likely to have X, Y, Z.
8 That would be violative because it does not fall anywhere within D or the
9 sub provisions of specifically stated 16, right. Because it doesn't meet
10 the 16A1(2)(b), the 16A2(c) I through V aspects (phonetic). So none of
11 those would be allowed.

12 Going the notes of her treatment, right, from her care and
13 treatment would be appropriate. Now the Dr. Yee note wouldn't be
14 because that would be going -- unless the Dr. Yee note goes into that
15 area that would have had to have had the 16A -- would had to have the
16 (c) I through V under NRCP 2019 aspect because it would have had to
17 explain the subject matter the witness is to testify, present evidence,
18 summary of the facts and opinions which the witness would testify, the
19 qualifications, et cetera. None of that was done so none of that can
20 happen.

21 So it would be as if she's going through the conversations
22 that she had with the witness with regards to the dates that she saw her
23 prior to and after surgery. That's the Court's inclination. I'm going to
24 hear from Plaintiff for a moment. Then I'm going to hear from Defense
25 for a moment.

1 MR. JONES: Can I ask a clarifying question, Your Honor?

2 THE COURT: Of course.

3 MR. JONES: There was a deposition taken where the
4 Defense asked her not just opinions, but went through and had -- are
5 they going to be able to go through the stuff within the deposition?

6 THE COURT: Well, the Court just laid out the parameters
7 so --

8 MR. JONES: Okay.

9 THE COURT: -- if you went through the deposition
10 hypothetically, now remember there's no advisory opinions. If in the
11 deposition there was a broader scope than that, that doesn't make it
12 appropriate because remember at the time of the deposition you still had
13 the potential to have done the compliance with NRCP 16.1 or even filed
14 something even after the time, right. And even try excusable neglect,
15 good cause, file some motion to try and get an extension. None of that
16 was done.

17 So what may have been in the eyes at the time of the
18 deposition is not where we are now in the middle of trial when none of
19 those requests have been made. None of those excusable neglects had
20 happened. None of the supplementation as a word that's been used
21 throughout this trial has occurred. So those would be different.

22 To the extent in the deposition she asked about a note and
23 she says something different on the stand. Meaning if her note said, I
24 discussed with her the 100 candy bars a day, you know what I mean and
25 then in her deposition she says yes, I did discuss it with her. And then

1 she says on the stand today no, I never discussed with her 100 candy
2 bars a day. A standard impeachment question would be appropriate,
3 yes. But if you're asking if there was a question in the deposition, what's
4 your opinion for a patient such as Ms. Farris, her likely life expectancy,
5 that would be an improper opinion as to the deposition. Does it all of a
6 sudden mean it can be appropriate here for time of trial, no. Because we
7 don't have the disclosure. Does that answer your question?

8 MR. JONES: It does, Your Honor. So I'll state --

9 THE COURT: That's the Court's inclination.

10 MR. JONES: -- Plaintiff's position.

11 THE COURT: Okay.

12 MR. JONES: I absolutely don't think she should be permitted
13 to testify at all in any respect. I believe that there is very -- although we
14 all understand here as attorneys what the different is between an expert
15 and a lay witness, the jury does not, especially when it's a physician that
16 provided treatment in a case. And if the Defense wanted to go through
17 and identify her diagnosis that she states, and her notes that she states,
18 and her impressions that she had on certain days, that would have been
19 something, they would have needed to disclose that as an expert
20 disclosure because those are expert opinions laid out in consult notes.
21 That's exactly what they are.

22 And the problem is, Your Honor, on numerous -- on many of
23 those notes there are opinions that are not necessarily backed up by
24 clear science. And so we would then be put in a position where we have
25 to go in and request that the Court allow us to treat her as hostile so that

1 we can try to demonstrate why it is that she did -- you know, in what way
2 she did things wrong. And it -- there's no way to cross her on that
3 without attacking her ability as an expert.

4 THE COURT: Right.

5 MR. JONES: Because she's going to say, these are my
6 impressions, these are the diagnoses that I had, but there's a lot of
7 things that are improper there.

8 THE COURT: But Counsel --

9 MR. JONES: And they weren't disclosed.

10 THE COURT: -- if Plaintiff had designated her as a treating
11 physician, right.

12 MR. JONES: Sure.

13 THE COURT: And has done the same designation as has
14 happened gosh, golly, how many times, right? Even before and after
15 FCH1, before --

16 MR. JONES: Not by me, but yes, Your Honor.

17 THE COURT: Okay. I'm just saying, okay. That language has
18 been utilized numerous times, okay. Even including *Pizarro-Ortega*,
19 which I'm going to have to doublecheck to see exactly the underlying
20 language on the disclosures in *Pizarro-Ortega* where they allowed the
21 future damages remember with Dr. --

22 MR. JONES: Yes.

23 THE COURT: Okay. Even in that regard and --

24 MR. JONES: But, Your Honor --

25 THE COURT: -- there's not going to be a case since March

1 2019. I'm appreciative of that, but --

2 MR. JONES: Here --

3 THE COURT: -- in the specific aspect, as long as it's focusing
4 on just her own treatment, no opinions, no prognosis, no causation.
5 There hasn't been a distinction, okay, that if the designation has been
6 from a plaintiff or a defendant on a treating physician. Because if you
7 note, the language specifically says in NRCP, it doesn't say only a
8 plaintiff can designate, right. It's treating physician who is retained to
9 specially provide, okay. The parties employ -- okay. Otherwise a
10 treating physician is properly disclosed. It doesn't say one way or
11 another. And interest -- you know what I mean? So --

12 MR. JONES: Certainly.

13 THE COURT: -- there's not a determination that has to be by
14 the plaintiff.

15 MR. JONES: No. But whether it's plaintiff or defense, we
16 have to disclose a CV, a fee schedule, a testimony history if there is one.
17 We have to disclose basic information about the person that we're
18 calling to testify.

19 THE COURT: Not if they're a straight treater has been --

20 MR. JONES: As a straight treater.

21 THE COURT: That's why the Court is saying straight treater.
22 Straight treater, the Court's being very specific, straight treater. I said
23 dates of service, right. X, Y, Z dates and what discussed during X, Y, Z
24 appointments.

25 MR. JONES: Then --

1 THE COURT: Not going to causation, not going to prognosis,
2 not going to opinions. That's why this Court is trying to be very, very
3 clear on it, okay. So --

4 MR. JONES: Her notes though are nothing but opinions that
5 she had in the past. And so -- and if you listened, and I know you did, to
6 what Mr. Doyle said he was going to ask, the only thing that he has in his
7 entire plan of questions that is not for an expert is where did you go to
8 college. After that it was literally expert questions across the board. And
9 so, Your Honor, you already know what the Defense wants this for.
10 There's no question. It was just stated on the record, a list of five pages
11 of expert questions with no desire for any questions that were not of an
12 expert nature.

13 So there's no purpose, no appropriate purpose to put her on
14 the stand, Your Honor, understanding that.

15 THE COURT: So what would be your citation or provision
16 that would preclude her from going over her own notes for purposes of
17 that you provide, okay? Let's go to any objection that you timely raised,
18 okay. So let's go back to the objection because there's a waiver
19 argument, right. So when did you raise a timely objection? And sorry
20 Counsel, you're still hearing this.

21 MR. JONES: I believe it --

22 THE COURT: If you need to talk to your client that's fine.

23 MR. JONES: I believe it's September 13th, Your Honor.

24 THE COURT: Pardon?

25 MR. JONES: I think it's September 13th. I know I attached it

1 to a brief from yesterday that we did object to Dr. Chaney. I know there
2 was -- she was I believe formally within our objection that I attached as
3 an exhibit yesterday.

4 THE COURT: Wait, wait. You can't say yesterday. You all
5 have --

6 MR. JONES: Yes.

7 THE COURT: -- keep providing a whole series. You have to
8 give me a

9 MR. JONES: On my motion to strike Dr. Stone I know I
10 attached as Exhibit 1.

11 THE COURT: Okay. Your motion, give me the date of the
12 particular 727 brief that you're referencing. Because you're not
13 referencing the Dr. Chaney 10/29, 11:57 p.m., you're referencing
14 something else?

15 MR. JONES: Right now I am, Your Honor.

16 THE COURT: Okay.

17 MR. JONES: So it would have been October 29th.

18 THE COURT: October 29th, 7:06 a.m., not the 11:57 p.m.
19 one?

20 MR. JONES: Yes. That is correct, Your Honor.

21 THE COURT: Okay. So --

22 MR. JONES: And I believe it's Exhibit 1 I think that that's --

23 THE COURT: So let's look at Exhibit 1.

24 MR. JONES: -- our objection.

25 THE COURT: No worries. I'm going to what that is. Okay.

1 So your objections were filed on 9/20/2019 at 10:21 a.m. That's what the
2 Court's looking at, no worries.

3 MR. JONES: Okay.

4 THE COURT: Okay. Can you point me to Dr. Chaney,
5 anywhere in here?

6 MR. JONES: Maybe, Your Honor. May I approach?

7 THE COURT: Of course you may. You can --

8 MR. JONES: I don't --

9 THE COURT: You can have the same benefit of looking at
10 things --

11 MR. JONES: I don't have it handy --

12 THE COURT: No worries.

13 MR. JONES: -- so.

14 THE COURT: If this is what you're referencing, this is your
15 Exhibit 1. And counsel for defense, you're more than welcome to
16 approach as well, same thing.

17 MR. DOYLE: I'm fine. Your Honor, may my client step out
18 and use the restroom?

19 THE COURT: Of course.

20 MR. DOYLE: Okay.

21 MR. JONES: Your Honor, I apologize, I misstated. I do not
22 see Dr. Chaney in here at all.

23 THE COURT: Hence why the Court's inclination is based on --
24 remember, the Court's inclination has to be based on what you all
25 present to this Court. And in the absence of presenting --

1 MR. JONES: I --

2 THE COURT: -- different info -- you understand, right?

3 MR. JONES: Yes, Your Honor. I'm checking one other
4 source. I do think we objected --

5 THE COURT: Okay.

6 MR. JONES: -- but it might be in a separate objection.

7 THE COURT: No worries. That's what I've been --

8 MR. DOYLE: May I make a comment?

9 THE COURT: Of course you may, Counsel for Defense, while
10 they're looking. Feel free to do so.

11 MR. DOYLE: So in our pretrial disclosure we listed Dr. --

12 THE COURT: Date please.

13 MR. JONES: We did, Your Honor. So we --

14 THE COURT: Wait, wait.

15 MR. DOYLE: September --

16 THE COURT: Hold on a second. I've got two people talking
17 at the same time.

18 MR. DOYLE: September 13, 2019 at 2:28 p.m. we listed Dr.
19 Chaney as witnesses/party Defendant expects to present at trial. Dr.
20 Chaney was number 11. I'm looking at --

21 THE COURT: Right.

22 MR. DOYLE: -- Plaintiff's --

23 THE COURT: But you did not do any supplement on any
24 designation that would have otherwise fell within any supplement under
25 NRC 16.1. You just listed her name.

1 MR. DOYLE: Right, right.

2 THE COURT: Okay.

3 MR. DOYLE: But I was -- what I was going to point out is
4 then Plaintiff did an objection to our pretrial disclosure and there was no
5 mention of Dr. Chaney.

6 THE COURT: Well, he just pointed out the 9/20 did not have
7 an objection. Plaintiff objection, there's also Plaintiff's objection on 9/20,
8 which is what --

9 MR. JONES: Your Honor --

10 THE COURT: -- that's what Exhibit 1 was that Plaintiff's
11 counsel just looked at, that I just asked him about. That was Exhibit 1 to
12 the 727-brief filed at 7:06 a.m. on 10/29. That's what --

13 MR. DOYLE: Right. And they --

14 THE COURT: -- Exhibit 1 was. That's what I asked counsel
15 and he looked at that. But I think counsel for Plaintiff's about to tell me
16 it's in a different location so.

17 MR. JONES: Well, it's within our pretrial memo and our
18 pretrial disclosure where we have an objection, but --

19 MR. LEAVITT: October 1st.

20 MR. JONES: -- it may be -- what day?

21 MR. LEAVITT: October 1st.

22 MR. JONES: October 1st.

23 THE COURT: And October 1st, how would that be -- wait,
24 October 1st.

25 MR. JONES: Yeah. We object in our pretrial memo, our

1 pretrial disclosure --

2 MR. LEAVITT: 9/30, sorry.

3 THE COURT: October 1st can't be correct.

4 MR. JONES: No, sorry. September 30th, Your Honor.

5 THE COURT: Hold on a moment. Okay. Page what of that

6 16-page document please? Which page is your objection on please?

7 Because the only thing I see is your incorporation on page 8 and that's to
8 the subpoena, the trial subpoena.

9 MR. JONES: Your Honor, I think that's all it is.

10 THE COURT: Okay.

11 MR. JONES: I think that we have an objection --

12 THE COURT: So you can appreciate --

13 MR. JONES: -- to the subpoena.

14 THE COURT: -- that's the realm of why the Court has been
15 addressing -- how this Court has been addressing it in the context, right,
16 of the subpoena and looking at the per se rules under Rule 16. Because
17 you, unlike other situations, have not pointed this Court that you have
18 raised a timely objection to the totality of Dr. Chaney's testimony.

19 That's why this Court, you can appreciate, has looked at this
20 one in the context of what you all have presented to this Court, distinct
21 from the other ones when you have shown the Court that you have
22 raised a timely objection in either your individual pretrial memoranda,
23 objections to prior supplemental disclosures, et cetera.

24 That's the context is different here, which is why the Court, if
25 you notice, my analysis keeps on going based on the subpoena and

1 straight with the rules because you haven't shown me that you've raised
2 a timely objection in some other basis. Do you now understand why the
3 Court's making --

4 MR. JONES: I do, Your Honor.

5 THE COURT: -- the analysis that I'm making? So feel free to
6 say that there's something else I should be considering, but I --

7 MR. JONES: No, Your Honor. I'm not going to say that. We
8 -- I'm -- we're looking at a Word version here and I can't see a file stamp.
9 So I --

10 THE COURT: Okay.

11 MR. JONES: -- may just simply be mistaken, Your Honor.

12 THE COURT: Okay. Because on page 8 of your pretrial
13 memoranda you have an incorporation by the subpoena, but once again,
14 you would have needed to brought that to the Court's attention. But
15 even giving that benefit of the doubt, that's why the Court's analysis here
16 has been distinct from the other ones.

17 MR. JONES: Your Honor, we -- I guess in our objection to
18 Defendant's pretrial disclosure dated 9/20 --

19 THE COURT: Is that the page 8 of 16 that I just referenced?

20 MR. JONES: Yes, it is, Your Honor. And there's actually --
21 there is a further objection that I missed when we were both looking at it
22 together. We have an objection to -- Plaintiff's object to Defendant's
23 listed witnesses numbered three through nineteen as Defendant's failed
24 to disclose these -- this -- or these witnesses prior to the close of
25 discovery in this matter. Oh, but I think we're already --

1 MR. LEAVITT: She's number 11.

2 MR. JONES: Yeah. She's number 11.

3 MR. LEAVITT: Yeah. She's number 11.

4 THE COURT: Right. But you have her -- once again it's a trial
5 subpoena, do you see that on page 12? You also reference it as trial
6 subpoena. Feel free to look between line 17 and 18. Is that what you're
7 referencing?

8 MR. JONES: No. No, Your Honor. This is on page 2 of 4 and
9 it's --

10 THE COURT: Page 2 of 4 --

11 MR. JONES: -- lines 13 through 16.

12 THE COURT: Okay. Hold on. Page 2 of 4, which document
13 then --

14 MR. JONES: This is Plaintiff's objection to Defendant's
15 pretrial disclosure filed on 9/20.

16 THE COURT: Is that not Exhibit 1 that we just -- you just
17 referenced?

18 MR. JONES: Yeah. I think it may be, Your Honor, and it's in
19 subsection 2. So it is the subsection 2.

20 THE COURT: But they were -- but remember, that witness
21 was disclosed prior to discovery and she was deposed so she would not
22 fall within that sub 2 category. And the Court reviewed her when I did
23 my nice little chart.

24 MR. JONES: That's fair, Your Honor.

25 THE COURT: Isn't that correct?

1 MR. JONES: Yeah. I think you're right, Your Honor.

2 THE COURT: She doesn't fall within that category; I already
3 looked at that one.

4 MR. JONES: Okay.

5 THE COURT: So am I missing anything on the analysis?

6 MR. JONES: No, Your Honor. I don't believe so.

7 THE COURT: Okay. That's why the Court did the analysis
8 that the Court did. In light of that and for the Court's inclination, counsel
9 for Defense, being a few moments before the 3:00 o'clock hour. You've
10 heard the Court's inclination. Is there anything you wish to be heard or --

11 MR. DOYLE: No. Nothing further.

12 THE COURT: Okay. So we're clear, no opinions, no
13 prognosis, nothing about drop foot one way or another on life
14 expectancy, any of those opinion type things. Can go through notes for
15 her specifically. Not general population notes. Not -- it's a straight, just
16 like your quoted languages because you haven't met any of the other
17 rules. That's why this analysis is the way this one is.

18 Okay. Is there anything else that any of the parties would like
19 the Court to address, or does that take care of the issues counsel?

20 MR. JONES: The very last thing is I don't think that her
21 records will be able to come in or can come in. There's no
22 authentication.

23 MR. LEAVITT: There's no --

24 MR. JONES: There's no custodian of records at all
25 associated with the documents produced.

1 THE COURT: I don't think that's even come yet before me,
2 but I don't -- is she a proposed exhibit blank?

3 MR. LEAVITT: C.

4 MR. JONES: Proposed Exhibit C, I believe, Your Honor.

5 MR. LEAVITT: Of Defendants.

6 MR. JONES: Of Defendants.

7 THE COURT: C as Charlie?

8 MR. LEAVITT: Yeah. There's no COR.

9 THE COURT: I have to -- well, madam clerk, as you can
10 appreciate, had to excuse herself for a quick moment. So I have to look
11 at Exhibit C. Are you planning on trying to admit her file?

12 MR. DOYLE: Portions of it consistent with the Court's ruling.
13 I'm not -- Dr. Yee's notes for example are in there. There's laboratory
14 reports in there which I assume the Court is -- it would -- and be the
15 same rationale as Dr. Yee, but I believe everything else are just her own
16 office notes and I assume I'll be able to lay the foundation --

17 THE COURT: I'm going to have to hear it.

18 MR. DOYLE: -- for hearsay exception.

19 THE COURT: I don't know.

20 MR. DOYLE: Yeah.

21 THE COURT: I don't know. I have to hear it, okay.

22 MR. JONES: And they're not fully redacted also, Your Honor,
23 so there's some --

24 THE COURT: Well, I would hope they're fully redacted by
25 now because --

1 MR. JONES: They're not. There's some insurance
2 information.

3 THE COURT: -- you can appreciate that not only was this a
4 full discussion on October -- well, I won't have to go back how many
5 different discussions it is. I think Mr. Weiss would like his poor client to
6 be able to take the stand and not having to reiterate, how many times
7 I've had to reiterate this issue and the Court's ruling on preemption. And
8 everybody would know in anticipation of any witness, particularly after
9 the Court's ruling that there should not be, must not be, cannot be any
10 insurance information. But that would not be okay. So at this juncture
11 are you all ready to have the marshal bring in the witness?

12 MR. DOYLE: Is it possible to use the restroom for one
13 moment?

14 THE COURT: Of course it is.

15 MR. DOYLE: Thank you.

16 THE COURT: Go ahead.

17 MR. DOYLE: Okay.

18 THE COURT: Does -- I'll have to wait a second, okay. Thank
19 you so much. Marshal, tell the jury it'll just be a moment. They'll be
20 lining up in the next three to four minutes.

21 [Pause]

22 MR. WEISS: Your Honor, would it be okay if we take a seat
23 up front while --

24 THE COURT: Of course you can. Of course you can. My
25 apologies. I didn't mean to have you standing.

1 MR. WEISS: No, that's okay.

2 THE COURT: As soon as -- yes. And if you want -- the
3 witnesses traditionally have been coming and sitting on the stand in
4 advance and you're more than welcome to do so. I'm just going to
5 confirm with defense counsel when he comes back, but that's okay to
6 feel free to sit in the interim. Stand, whatever's comfortable people. It'll
7 just be a moment. We're just waiting for defense counsel to come back.

8 [Pause]

9 THE COURT: Okay. We now have everybody back. Would
10 you like the witness to be on the stand? Does that meet everybody's
11 needs?

12 MR. DOYLE: Yes.

13 MR. LEAVITT: Sure, Your Honor.

14 MR. JONES: Yes, Your Honor. That's fine.

15 MR. LEAVITT: No objection.

16 THE COURT: If it's okay counsel, we've had historically the
17 witness come on the stand and the jury gets brought in if that works
18 okay for your client?

19 MR. WEISS: Yeah.

20 THE COURT: And from your standpoint, you're welcome to
21 be in -- where are you going to want to be?

22 MR. WEISS: I can just take a seat right here if that's okay.

23 THE COURT: Does anyone care if he's in front of the jury,
24 sitting in front of the jury versus being in the gallery?

25 MR. LEAVITT: It don't bother me.

1 MR. JONES: No, Your Honor.

2 MR. DOYLE: Doesn't matter.

3 THE COURT: Okay. So you're welcome to be there,
4 wherever you like, okay.

5 MR. WEISS: Okay, Your Honor.

6 THE COURT: So if you can -- Marshal, would you go get Dr.
7 Chaney and then go get our jury? That would be wonderful. Thank you
8 so very much. And if you need to move that anywhere else that's more
9 comfortable that's fine too. The only thing you have to remember,
10 you're going to have a juror immediately --

11 MR. WEISS: Yeah.

12 THE COURT: Okay, no worries. The only thing I was going
13 to say, if you're going to do that, just a --

14 MR. WEISS: Yeah.

15 THE COURT: -- smidge more because you'll have a juror
16 immediately behind you. Like I said, if you want to be there, in the
17 gallery, either the tables you're fine, any chair except you can't have
18 mine or either of the counsel tables, either of the counsels' chairs.

19 [Pause]

20 THE COURT: Okay. Just what we've done in the ordinary
21 course is we've just had the witness come to the stand and the jury will
22 come in. So feel free to come to the stand and the jury's going to come
23 in in just a moment. And when they come in, the marshal will then ask
24 everyone to stand up just to give you a heads up. A couple just heads up
25 we've told everyone is one thing if you're soft spoken, feel free that that

1 microphone will get a little closer to you.

2 DR. CHANEY: Okay.

3 THE COURT: The other thing is, you need to make sure
4 there's always going to be verbal responses. So not uh-huhs, uh-uhs,
5 nods and shrugs --

6 DR. CHANEY: Okay.

7 THE COURT: -- you need to have just some kind of verbal
8 response. And the other thing is, our JAVS system picks up people
9 verbally. So even though sometimes people get conversational, just
10 need to make sure only one person's talking at a time so that we get
11 clear record, okay.

12 DR. CHANEY: Okay.

13 THE COURT: And the marshal will be here in just a second
14 because appreciate that everyone's been waiting a long time, apologies.
15 And the jury should be in shortly. Thank you so much.

16 [Pause]

17 THE COURT: Since it's been so long it may be that the jurors
18 may have had to go take care of something. It may be a moment or two.
19 So I'm sure everyone -- I'm sure we're all fine waiting for the jurors for a
20 few moments after the time that they've waited so our apologies to the
21 witness and counsel for the witness.

22 THE MARSHAL: Ready Judge?

23 THE COURT: Of course we are.

24 THE MARSHAL: All rise for the jury.

25 [Jury in at 3:04 p.m.]

1 [Within the presence of the jury]

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

4 THE COURT: Do appreciate it. Welcome back, ladies and
5 gentlemen, from your short lunch break at this juncture. We have a new
6 witness. So as we've done with the prior witnesses, witness is already
7 on the stand, but I'm going to ask counsel for Defense, would you like to
8 call your next witness please?

9 MR. DOYLE: Yes. We'd call Dr. Naomi Chaney.

10 THE COURT: Okay. Thank you very much. Madam clerk,
11 would you swear in the witness please?

12 THE CLERK: Yes, Your Honor.

13 THE COURT: Thank you so much.

14 THE CLERK: Ms. Chaney, please raise your right hand.

15 NAOMI CHANEY, M.D., DEFENDANT'S WITNESS, SWORN

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

18 THE WITNESS: My name's Naomi Chaney, N-A-O-M-I
19 Chaney, C-H-A-N-E-Y.

20 THE CLERK: Thank you.

21 DIRECT EXAMINATION

22 BY MR. DOYLE:

23 Q Good afternoon.

24 A Good afternoon.

25 Q Are you a medical doctor?

1 A I am.

2 Q Where did you go to medical school?

3 A University of Nevada School of Medicine.

4 Q What year did you finish?

5 A 2000.

6 Q What training did you do after -- do you want to --

7 A No, 2000.

8 Q Okay. Could you describe the training that you did after
9 medical school please?

10 A Yes. I went to Scripps Clinic for three years, internal
11 medicine.

12 Q What is internal medicine?

13 A Internal medicine I would say is a broad spectrum of adult
14 medicine.

15 Q And how long have you been practicing in Las Vegas?

16 A Sixteen years.

17 Q Now we have seen something called Internal Medicine of
18 Spring Valley; what is that?

19 A That is the name of my business.

20 Q Do you practice with others or by your --

21 A No.

22 Q That's okay. It's not a natural process. Do you practice with
23 others or by yourself?

24 A I practice -- I'm a solo practitioner.

25 Q How long have you been a solo practitioner?

1 A Sixteen years.

2 Q All right. Was Titina Farris a patient of yours prior to July of
3 2015?

4 A Would you please repeat that?

5 Q Sure. Prior to July of 2015 when Dr. Rives did the surgery on
6 the abdomen, was she a patient of yours?

7 A Yes, she was.

8 Q Has she continued to be a patient of yours?

9 A Yes.

10 Q Is she a current patient?

11 A Yes.

12 Q Okay. Doctor, I'd like you to take a look at, there's a binder
13 there and there's a tab that says C. And if you would just take a moment
14 and look at C, pages 1 and 2.

15 THE COURT: Okay. And Counsel, this is proposed, correct?

16 MR. DOYLE: Yes. Proposed, Your Honor.

17 MR. LEAVITT: Your Honor, I have an objection as to
18 foundation, authenticity, collateral source.

19 THE COURT: Okay. Court is going to sustain the objections
20 at this juncture given the way the question was phrased. So in other
21 words, that means the Court's sustaining the objection. If you wouldn't
22 mind, you don't need to look at that at this juncture because when the
23 Court sustains the objection the witness can't look at something right
24 now. So Counsel, feel free to ask your next question.

25 BY MR. DOYLE:

1 Q Yes. I was going to ask, what is C for identification pages 1
2 and 2? Is it an office note by you?

3 MR. LEAVITT: Same objection, Your Honor. She had the
4 benefit.

5 THE COURT: I need to know the evidentiary basis, sorry,
6 counsel. Thank you so much.

7 MR. LEAVITT: Authentication, foundation and hearsay at this
8 point as well as there's some collateral source.

9 MR. DOYLE: Well, Your Honor, they're --

10 THE COURT: Well, the Court's going to just allow for
11 identification purposes the way that question was phrased. Feel free to -
12 - you can open it back up and to pages 1 and 2.

13 MR. DOYLE: Pages 1 --

14 THE COURT: He's just asking what it is.

15 BY MR. DOYLE:

16 Q What is or are pages 1 and 2 of Exhibit C for identification?

17 A Would it be C dash and then multiple zeros and a one?

18 Q Correct.

19 A That would be an office note.

20 Q What's the date of that office note?

21 A 6/19/2014. 6/19 -- June 19, 2014.

22 Q Did you make this office note?

23 A Yes.

24 Q Did you make this office note at or near the time of the visit
25 on June 19, 2014?

1 A Yes.

2 Q Is this note a record of what occurred at the visit?

3 A Yes.

4 Q Is -- did you make this note as part of your routine and
5 regular office practice?

6 A Yes.

7 MR. LEAVITT: Your Honor, leading.

8 THE COURT: Sustained.

9 BY MR. DOYLE:

10 Q Doctor, could you explain to us the circumstances under
11 which you created this note?

12 MR. LEAVITT: Your Honor, again, foundation, authenticity
13 and hearsay.

14 THE COURT: Overruled on hearsay in light of the prior
15 answers. Overruled on foundation and authenticity in light of the prior
16 answer.

17 BY MR. DOYLE:

18 Q Doctor, would you explain your routine and practice for
19 creating office notes?

20 A A patient comes in for a reason. They state their reason, if
21 they have concerns. If I had ordered labs or studies, we would review
22 them at that time. I would do a physical exam. We would generate a
23 plan and we would implement them.

24 Q And then in terms of creation of the note, when would that
25 take place?

1 A Around that time.

2 Q In looking at C for identification pages 1 or 2, does it appear
3 to be an accurate copy of your note for June 19, 2014?

4 A Yes.

5 Q Okay.

6 MR. DOYLE: I'd offer into evidence C-1 and 2, Your Honor.

7 MR. LEAVITT: Authenticity, foundation and again, collateral
8 source.

9 THE COURT: The Court's going to --

10 MR. LEAVITT: Hearsay.

11 THE COURT: -- ask that counsel please both approach. And
12 madam court recorder, can you turn on some lovely white noise? So
13 when we're at bench just everybody knows, nobody can talk. Oh, we
14 don't have our observers anymore. No worries, okay. Thank you so --

15 [Sidebar at 3:10 p.m., ending at 3:13 p.m., not transcribed]

16 THE COURT: Okay. In accordance with EDCR 2.67 through
17 2.69, the Court's prior orders, as well as the objections are sustained.

18 MR. LEAVITT: Thank you, Your Honor.

19 BY MR. DOYLE:

20 Q Dr. Chaney, when did you start treating Mrs. Farris?

21 A In --

22 THE COURT: And, excuse me. The objection is sustained, so
23 denied with prejudice, in one of those -- sorry, my apologies. Thank you
24 so much. Sorry.

25 THE WITNESS: It would be early 2014, I believe.

1 BY MR. DOYLE:

2 Q Okay. What problems did she come to you with, initially?

3 A She had diabetes, high blood pressure, and neuropathy.

4 Q And when you say she had a "neuropathy" when she came to
5 you for the first time, what do you mean by "she had neuropathy"?

6 A She had complaints of feet, and her feet were painful and
7 burning, and she had back pain.

8 MR. LEAVITT: Your Honor, I object. Evidentiary ruling is --
9 assumes facts not in evidence and offering testimony outside of a
10 treating physician opinion.

11 THE COURT: Overruled.

12 BY MR. DOYLE:

13 Q What type of diabetes did Mrs. Farris have?

14 A Type 2 diabetes.

15 Q Prior to, and I'm going to -- if I keep referencing July of 2015,
16 I'm referencing that date, because that's when Dr. Rives did the second
17 abdominal surgery, okay?

18 A Yes.

19 Q Prior to July of 2015, what type -- I'm sorry, what type of --

20 A Type 2 diabetes.

21 Q Now what treatment was required prior to July of 2015 for
22 her Type 2 diabetes?

23 A Could you please explain the question?

24 Q Sure. Did you treat Mrs. Farris for her Type 2 diabetes?

25 A Yes.

1 Q What sort of -- what was the treatment regimen for her
2 diabetes?

3 A Originally, she was on oral medications, and then she started
4 on insulin.

5 Q Can you recall when she required insulin?

6 A Around the time that she started in my practice, a couple of
7 months later.

8 Q Now what oral medications was she taking before she
9 required insulin?

10 A She was on Metformin, she had taken Onglyza, different
11 classes of diabetic medication.

12 Q What was the reason for putting her on insulin, then?

13 A Because she was not controlled.

14 Q Between your first visit with Mrs. Farris in July of 2015, how
15 would you characterize her diabetes in terms of controlled or
16 uncontrolled?

17 A Uncontrolled.

18 MR. LEAVITT: Leading.

19 THE COURT: Just --

20 MR. LEAVITT: Leading.

21 THE COURT: Sustained in leading. So jury will disregard
22 that answer, because the Court sustained the objection. Thank you so
23 much.

24 BY MR. DOYLE:

25 Q How was her diabetes prior to July of 2015?

1 A Her diabetes --

2 MR. LEAVITT: Objection, vague.

3 THE COURT: Overruled. Overruled, you can answer. Sorry.
4 It's overruled.

5 THE WITNESS: Her diabetes was not controlled.

6 BY MR. LEAVITT:

7 Q And what do you mean by "her diabetes was "not
8 controlled"?

9 A The definition of diabetes being controlled, would be
10 hemoglobin E1C less than 7.

11 Q Does controlled versus uncontrolled look at any other lab
12 values?

13 A In terms of diabetes?

14 Q Right.

15 A Could you please ask the question again?

16 Q Sure. Let me ask you a different question.

17 Prior to July of 2015 what steps or efforts did you take to try
18 and bring the diabetes under control?

19 A May I look at the chart?

20 Q To refresh your recollection?

21 A Well, I can tell you generally what I did, what I do with lots of
22 patients.

23 Q Well, tell me, generally, what you did with Mrs. Farris, in
24 terms of her uncontrolled diabetes?

25 A Well, I typically will give people access --

1 MR. LEAVITT: Your Honor, I'm going to object to the word
2 "uncontrolled" it hasn't been used.

3 THE COURT: The Court's going to sustain the objection in
4 the context of this question, based on the context of the question and the
5 witness' prior answer. Go ahead.

6 BY MR. DOYLE:

7 Q Prior to July of 2015 was Mrs. Farris' diabetes ever under
8 control?

9 MR. LEAVITT: Leading.

10 THE COURT: Sustained.

11 BY MR. DOYLE:

12 Q Doctor, characterize for us her diabetes prior to July of 2015,
13 in terms of controlled versus uncontrolled?

14 MR. LEAVITT: The same objection, leading.

15 THE COURT: Overruled.

16 THE WITNESS: Mrs. Farris' diabetes was not controlled.

17 BY MR. DOYLE:

18 Q Describe for the ladies and gentlemen of the jury, generally
19 what steps you took with her to bring it under control?

20 A We would add additional medications, initially that are oral. I
21 would add insulin to increase the efficacy of the insulin. Once I start it, I
22 give patients access to me via the phone. They can call me or text me
23 with their number so we can increase the insulin dosage, so we can get
24 them rapidly controlled, instead of waiting between visits.

25 Q Did you offer Mrs. Farris, prior to July of 2015, the texting

1 and other services that you just mentioned --

2 A I don't --

3 MR. LEAVITT: Leading.

4 THE WITNESS: -- know.

5 THE COURT: Just a second.

6 MR. JONES: Leading, sorry.

7 THE COURT: Sustained on leading.

8 BY MR. DOYLE:

9 Q Doctor, you mentioned that Mrs. Farris had a neuropathy;
10 what kind of neuropathy were you treating her for?

11 MR. LEAVITT: Objection. Misstates trial testimony.

12 THE COURT: Sustained, the way it was phrased.

13 MR. DOYLE: I'm sorry, I didn't --

14 THE COURT: Sustained to the way that was phrased, the
15 questions was phrased.

16 BY MR. DOYLE:

17 Q Prior to July of 2015, can you tell us whether Mrs. Farris had
18 a neuropathy?

19 A Mrs. Farris had complaints of pain and burning in her feet,
20 and pain in her back and uncontrolled diabetes, which is consistent with
21 the diagnosis of neuropathy.

22 Q Did you diagnose her with a neuropathy, and prescribe
23 medications for the neuropathy?

24 A She came to me on Gabapentin, and I started her Duloxetine,
25 which is a medication that you also use for neuropathy.

1 Q And is there a brand name for that?

2 A Cymbalta.

3 Q And way, and I'm sorry, why did you prescribe Cymbalta for
4 Mrs. Farris, prior to July of 2015?

5 A For complaints of pain and burning in her feet.

6 Q Did you prescribe Cymbalta for her because you thought the
7 complaints in her feet were due to an neuropathy, or some other cause?

8 MR. LEAVITT: Leading.

9 THE COURT: Sustained.

10 BY MR. DOYLE:

11 Q Why did you prescribe Cymbalta for her?

12 A Because I believe she had neuropathy.

13 Q And did you believe that she had a diabetic neuropathy?

14 A She had --

15 MR. LEAVITT: Leading.

16 THE COURT: Sustained.

17 BY MR. DOYLE:

18 Q What type of neuropathy did she had?

19 A I believe she had diabetic neuropathy.

20 Q Why did you believe she had a diabetic neuropathy, prior to
21 July of 2015?

22 A Because she had pain, complaints of pain in her feet, and
23 burning in her feet, and she had uncontrolled diabetes.

24 Q Now the Cymbalta, can you tell us for how long she
25 remained on Cymbalta, once you prescribed that for her?

1 A My recollection she's on it right now.

2 Q Has she been on Cymbalta since the first time you prescribed
3 it?

4 A Yes.

5 Q The current prescription of Cymbalta for Mrs. Farris, is for the
6 same reason?

7 A Yes.

8 Q You mentioned Gabapentin, what is Gabapentin?

9 A It is a medication that has several uses, but it is commonly
10 used for pain syndromes that have a nerve in origin.

11 Q And did you continue the Gabapentin?

12 A Yes.

13 Q Why did you continue the Gabapentin?

14 A To treat her symptoms.

15 Q Which symptoms?

16 A Pain and burning in her feet.

17 Q The diabetic neuropathy symptom?

18 A Yes.

19 Q So besides the Cymbalta and the Gabapentin, were there any
20 other medications, for example, pain medications that you prescribed for
21 that?

22 MR. LEAVITT: Leading.

23 THE COURT: Sustained.

24 BY MR. DOYLE:

25 Q Doctor, what other medications, if any, did you prescribe for

1 Mr. Farris, because of the diabetic neuropathy?

2 A She was on opioids.

3 Q Which opioids?

4 A She started out on I think Tylenol 3. She came to my
5 practice, on medications, treating her for that, and then it increased over
6 time, and she currently sees a pain management physician.

7 Q For her diabetic neuropathy?

8 MR. LEAVITT: Objection. Foundation, and Your Honor at
9 this point can we --

10 THE COURT: Sustained. And, counsel, can you both please
11 approach?

12 [Sidebar at 3:23 p.m., ending at 3:24 p.m., not transcribed]

13 THE COURT: Okay. The jury is going to disregard that last
14 statement/question by Defense counsel. The Court is going to admonish
15 counsel, in front of the jury, based on the Court's prior order been stated.
16 Counsel, move forward with your next question. Thank you.

17 BY MR. DOYLE:

18 Q Doctor, prior to July of 2015 did you refer Mrs. Farris to any
19 specialist, because of her diabetes?

20 A Yes.

21 Q Who or what kind of specialist?

22 A Endocrinologist.

23 Q Did she see an Endocrinologist?

24 A No.

25 MR. LEAVITT: Foundation.

1 THE COURT: Overruled on untimely.

2 BY MR. DOYLE:

3 Q Did you refer her to any other specialists, besides an
4 endocrinologist, because of her diabetes?

5 A I referred her to cardiology.

6 Q So besides cardiology and endocrinology, did you refer her
7 to anybody else, because of her diabetes?

8 MR. LEAVITT: Your Honor, asked and answered.

9 THE COURT: Overruled.

10 THE WITNESS: Because of her diabetes?

11 BY MR. DOYLE:

12 Q Right.

13 A No.

14 Q Did she the cardiologist?

15 A I don't think she saw a cardiologist.

16 Q Prior to July of 2015 can you tell us how many times you
17 referred her, or asked her to see an endocrinologist?

18 A How many times, no.

19 Q What is the specialty of endocrinology?

20 A It is a specialty of hormones, such as diabetes, or thyroid, the
21 endocrine glands.

22 Q Did you refer Mrs. Farris to any specialists, prior to July of
23 2015, because of her diabetic peripheral neuropathy?

24 A No.

25 MR. LEAVITT: Objection, Your Honor. Foundation, and

1 again leading, asked and answered.

2 THE COURT: Sustained on all three grounds. Counsel, feel
3 free to move on.

4 MR. DOYLE: Thank you.

5 THE COURT: Your next question. Thank you so much.

6 BY MR. DOYLE:

7 Q The Gabapentin that you told us you prescribed -- well, why
8 did you describe the -- why did you continue the prescription for
9 Gabapentin, up to and including July of 2015?

10 A Because she had complaints of pain and burning in her feet.

11 Q Has she continued to take Gabapentin since then?

12 A Yes.

13 Q For the same reasons?

14 A Could you please ask the question again?

15 Q What are the reasons she is taking Gabapentin, after July of
16 2015?

17 A Well, she had an injury.

18 Q Okay. So prior to July of 2015 did -- what other medical
19 problems did Mrs. Farris have, besides the diabetes, and the diabetic
20 neuropathy; what else were you treating her for?

21 A High blood pressure.

22 Q And how was her blood pressure controlled prior to July of
23 2015?

24 MR. LEAVITT: Objection, Your Honor. Relevance.

25 THE COURT: I'm going to overrule that specific question.

1 THE WITNESS: My recollection was that her blood pressure
2 was not a major problem.

3 BY MR. DOYLE:

4 Q You mentioned something about back pain. Did she
5 complain to you of back pain, prior to July of 2015?

6 A Yes.

7 Q Did you come to any conclusion why she was having back
8 pain?

9 MR. LEAVITT: Objection, Your Honor. Outside the scope of
10 16.1 disclosure.

11 THE COURT: The Court's going to overrule to the specific
12 question, to the small area.

13 BY MR. DOYLE:

14 Q Go ahead.

15 A Please ask the question again.

16 Q Sure. Did you come to any conclusions prior to July of 2015,
17 why she was having the back pain?

18 A I drew the same conclusion why I giving her medications. I
19 ordered an MRI, and it did not show any pathology, is my recollection.
20 So I continued to treat her for diabetic neuropathy.

21 Q Did you believe she had diabetic neuropathy, in not only her
22 feet, but also her back?

23 MR. LEAVITT: Objection, leading --

24 THE COURT: Sustained.

25 MR. LEAVITT: -- and misstates testimony.

1 BY MR. DOYLE:

2 Q Doctor --

3 THE COURT: Just a sec. The Court sustains it on both
4 grounds. Counsel, please move forward.

5 BY MR. DOYLE:

6 Q Prior to July of 2015, where did you believe Mrs. Farris was
7 having symptoms of her diabetic neuropathy?

8 A Largely in her feet and legs.

9 Q And where in her legs, if you recall?

10 A Lower legs.

11 Q What symptoms did she complain to you about, that you
12 attributed to the diabetic neuropathy, other than the pain; were there any
13 others?

14 A Burning.

15 Q How as burning different than pain, if you could explain that?

16 A I think everyone knows what burning feels like, a burning
17 pain. She has pain and burning.

18 Q Did she complain to you prior to July of 2015, of any changes
19 in sensation in her feet or legs?

20 MR. LEAVITT: Objection. Leading.

21 THE COURT: Sustained.

22 BY MR. DOYLE:

23 Q Did she have any complaints to you prior to July of 2015, in
24 her feet or legs, other than the pain and the burning that you've
25 described?

1 MR. LEAVITT: The same objection. Leading.

2 THE COURT: Sustained.

3 BY MR. DOYLE:

4 Q What was going on in her legs prior to July 2015, symptom-
5 wise?

6 A Pain and burning.

7 Q Any others?

8 A No.

9 Q Prior to July of 2015 did you prescribe Lortab for Mrs. Farris?

10 A Yes.

11 MR. LEAVITT: Objection. Leading.

12 THE COURT: Sustained. The jury will disregard the answer,
13 because the Court hadn't had a chance yet to rule. Thank you so much.

14 BY MR. DOYLE:

15 Q What narcotics or opioids did you prescribe for Mrs. Farris,
16 prior to July of 2015?

17 A Norco, Lortab.

18 Q Now what is Norco?

19 A It's Lortab.

20 Q Why did you prescribe the Norco?

21 A She was on pain medication when she established care, and
22 she had complaints of pain and burning, in her lower extremities.

23 Q Did you continue the prescription for Norco?

24 A Yes.

25 Q What is, I'm not sure I'm going to pronounce it correctly, it's

1 O-N-G-L-Y-Z-A.

2 A Onglyza is a diabetic medication.

3 Q And Pravastatin?

4 A It's a cholesterol lowering medication.

5 Q Did Mrs. Farris have any issues with cholesterol, prior to July
6 of 2015?

7 MR. LEAVITT: Objection. Leading and relevance.

8 THE COURT: Sustained on leading.

9 BY MR. DOYLE:

10 Q What is "cholesterol"?

11 A It is fat in your blood, that's synthesized by your liver, largely.

12 Q Can you tell us whether that was an issue for Mrs. Farris,
13 prior to July of 2015?

14 A Yeah.

15 MR. LEAVITT: Leading.

16 THE COURT: Sustained on leading. Jury will disregard the
17 answer.

18 BY MR. DOYLE:

19 Q Besides the hypertension, besides the diabetes, and besides
20 the diabetic peripheral neuropathy, and besides the low back pain, what
21 other problems were you treating Mrs. Harris for, prior to July of 2015?

22 A Those would be it.

23 Q What is the term polyneuropathy and diabetes mean?

24 MR. LEAVITT: Objection, Your Honor, exceeds the scope of
25 the testimony.

1 THE COURT: Sustained, based on, none has been presented
2 to the Court. Sustained. Please move on.

3 BY MR. DOYLE:

4 Q Did you diagnose Mrs. Farris with a polyneuropathy and
5 diabetes?

6 A Is that what it says?

7 MR. LEAVITT: Your Honor --

8 BY MR. DOYLE:

9 Q From your memory?

10 MR. LEAVITT: Again, leading.

11 THE COURT: The Court would overrule on leading.

12 BY MR. DOYLE:

13 Q Doctor, tell us whether you recall diagnosing Mrs. Farris with
14 a polyneuropathy and diabetes?

15 A I remember diagnosing her with diabetic neuropathy.

16 Q Is polyneuropathy and diabetes a synonym for that?

17 A I would say, yes.

18 Q The terms "compliant" or "non-compliant" when used in the
19 medical field mean what?

20 A That they adherent or not adherent to the plan.

21 Q What was your general impression of Mrs. Farris, in terms of
22 your medical treatment and advice prior to July 2015?

23 MR. LEAVITT: Objection. Exceeds scope of testimony of
24 designation. Also, lacks foundation, and is an expert opinion, and
25 relevance.

1 THE COURT: The Court sustains on exceeding the scope,
2 and it is exceeding the skills of its expert, and so therefore that's actually
3 redundant, because it exceeds the scope --

4 MR. LEAVITT: Fair enough.

5 THE COURT: -- because this witness is not designated as an
6 expert witness.

7 MR. LEAVITT: Fair enough, Your Honor.

8 THE COURT: Move on to your next question.

9 MR. DOYLE: Right.

10 BY MR. DOYLE:

11 Q In your notes for Mrs. Farris, prior to July of 2015, did you
12 ever document whether she was compliant or non-compliant?

13 A Yes.

14 Q What did you document?

15 A That she was not compliant.

16 Q What was she not compliant with?

17 A Referrals.

18 Q Anything else?

19 A Her numbers were not falling in line.

20 Q Anything else?

21 A No.

22 Q When you say "referrals" is that the endocrinologist?

23 A Leading.

24 Q Okay. What did you mean when you said "referrals" what
25 were you referring to?

1 A Almost any referral.

2 Q What referrals, besides cardiology and endocrinology did
3 you give Mrs. Farris, prior to July of 2015?

4 MR. LEAVITT: Objection. Asked and answered.

5 THE COURT: Sustained.

6 BY MR. DOYLE:

7 Q Doctor, did you refer Mrs. Farris to any specialty, other than
8 endocrinology, and cardiology, before July of 2015?

9 MR. LEAVITT: Objection. Asked and answered.

10 THE COURT: Sustained. Counsel, please move on.

11 BY MR. DOYLE:

12 Q Did you at any time refer Mrs. Farris to an ophthalmologist?

13 A Yes.

14 MR. LEAVITT: Objection, Your Honor. If I could get it in.
15 Relevance and -- just relevance.

16 THE COURT: Overruled on relevance.

17 BY MR. DOYLE:

18 Q Did you refer her to an ophthalmologist prior to July of 2015?

19 A Yes.

20 Q Why?

21 A The sequela related to uncontrolled diabetes would be
22 problems with her eye, so it's a standard of care.

23 Q Did she see an ophthalmologist?

24 MR. LEAVITT: Foundation.

25 THE COURT: Overruled.

1 THE WITNESS: Not -- not to my knowledge.

2 BY MR. DOYLE:

3 Q Did you refer her to a neurologist, prior to July of 2015?

4 MR. LEAVITT: Leading.

5 THE COURT: Sustained.

6 BY MR. DOYLE:

7 Q What if any specialties -- well, strike that. What other
8 specialist did you refer Mrs. Farris to, other than ones we've already
9 talked about?

10 MR. LEAVITT: Your Honor, objection. Asked and answered,
11 leading.

12 THE COURT: Sustained, and the Court's already sustained
13 that several times. Please move on, counsel.

14 BY MR. DOYLE:

15 Q What does the term "chronic pain" mean?

16 A Pain that's ongoing.

17 Q Did Mrs. Farris have chronic pain before July of 2015?

18 MR. LEAVITT: Objection. Leading.

19 THE COURT: Sustained.

20 BY MR. DOYLE:

21 Q Can you tell us whether she had chronic pain prior to July of
22 2015?

23 MR. LEAVITT: Same objection. Leading.

24 THE COURT: Sustained.

25 BY MR. DOYLE:

1 Q Was chronic pain an issue for Mrs. Farris?

2 MR. LEAVITT: Objection. Leading.

3 THE COURT: Sustained.

4 BY MR. DOYLE:

5 Q Did she have chronic pain?

6 MR. LEAVITT: Objection. Leading.

7 THE COURT: Sustained.

8 BY MR. DOYLE:

9 Q Did you prescribe any medications -- were there any
10 medications that you prescribed for Mrs. Farris, to treat chronic pain?

11 MR. LEAVITT: Objection. Asked and answered, and leading,
12 foundation.

13 THE COURT: Overruled as phrased. Sorry, foundation,
14 overruled as well.

15 BY MR. DOYLE:

16 Q Were there any medications that you prescribed for Mrs.
17 Farris, to treat chronic pain, prior to July of 2015?

18 A Yes.

19 Q Which medications were those?

20 A That would be the Duloxetine, the Gabapentin, and an
21 opioid.

22 Q What does the diagnosis of "paresthesias of skin" mean?

23 MR. LEAVITT: Your Honor, objection. Outside the scope,
24 and designation. It calls for expert opinion.

25 THE COURT: Sustained.

1 BY MR. DOYLE:

2 Q Can you tell us whether one of your diagnoses for Mrs.
3 Farris, prior to July of 2015 was paresthesias of skin?

4 MR. LEAVITT: Leading, and the same objections.

5 THE COURT: Sustained, as leading.

6 Counsel, can you both approach, please. The jury will
7 disregard any facial expressions between -- okay.

8 [Sidebar at 3:40 p.m., ending at 3:41 p.m., not transcribed]

9 THE COURT: We appreciate it. Thank you so very much.

10 Okay. So there's not an objection, pending. Counsel, feel free to
11 continue. Thank you so much.

12 BY MR. DOYLE:

13 Q While you were treating Mrs. Farris did you come to a
14 conclusion about why she had the peripheral neuropathy?

15 MR. LEAVITT: Objection. Outside of the scope of
16 designation. Calls for expert opinion.

17 THE COURT: Overruled as phrased.

18 BY MR. DOYLE:

19 Q You can go ahead.

20 A Would you please repeat the question?

21 Q Sure. While you were taking care of Mrs. Farris, did you
22 come to a conclusion why she developed, or had the diabetic peripheral
23 neuropathy?

24 A Because her diabetes was not controlled.

25 Q Since July of 2015, after Mrs. Farris returned to start seeing

1 you again, how often -- well, let me ask it a different way. In the last year
2 or two how often are you seeing Mrs. Farris? If nobody says anything,
3 you're okay.

4 A Okay.

5 THE COURT: The jury will disregard that comment from
6 counsel. Counsel, you'll be admonished in front of the jury. Please do
7 not make these comments, please ask questions the witness can answer.
8 I do appreciate it. Thank you so very much.

9 The witness may answer the question. Thank you so much.

10 BY MR. DOYLE:

11 Q In the last year or two how often are you seeing Mrs. Farris?

12 A I'm seeing her less frequently. I would say I've seen her four
13 -- six -- four to six times.

14 Q When was the last visit, if you recall?

15 A April.

16 Q April of this year?

17 A Yes, sir.

18 Q Are you still treating her diabetes?

19 A Yes.

20 Q Are you still treating her diabetic peripheral neuropathy?

21 A I am no longer writing opioids.

22 Q Have you referred her to someone else, for that reason?

23 A Yes.

24 MR. DOYLE: Objection. Asked and answered.

25 THE COURT: Overruled.

1 BY MR. DOYLE:

2 Q Have you referred her to someone else, for that reason?

3 A Yes.

4 Q Is someone else now prescribing the Gabapentin?

5 MR. LEAVITT: Foundation.

6 THE COURT: Sustained.

7 BY MR. DOYLE:

8 Q Do you know whether -- are you continuing to prescribe
9 Gabapentin for her?

10 A I can't recall, she's on Gabapentin.

11 Q She is still on?

12 A Yes.

13 Q Do you know who is prescribing it currently?

14 A I referred her to Dr. Erkulvrawatr, a pain practice, and I think
15 she's under the care of a PA, or a nurse practitioner.

16 Q Are you continuing to prescribe Cymbalta, or somebody
17 else?

18 A I believe I am.

19 Q As of the last couple of visits with Mrs. Farris, what has been
20 the state of her diabetic neuropathy and the symptoms she's having?

21 A Please ask the question again.

22 Q Sure. The last couple of times that you have seen Mrs.
23 Farris, she still has the diabetic peripheral neuropathy?

24 MR. LEAVITT: Objection. Leading.

25 THE COURT: Sustained.

1 BY MR. DOYLE:

2 Q Does she still have diabetic peripheral neuropathy?

3 MR. LEAVITT: Leading.

4 THE COURT: Overruled.

5 THE WITNESS: She has diabetes that is not controlled. She
6 had an injury from the surgery --

7 BY MR. DOYLE:

8 Q Right.

9 Q -- so in my opinion it would be a blended pain syndrome
10 now.

11 MR. LEAVITT: Your Honor, I object. We're outside the scope
12 of this opinion, as a treating physician. It calls for expert opinion,
13 foundation.

14 THE COURT: On the Court's prior order, the Court is going to
15 strike that answer. Counsel, can you please re-ask the question. Thank
16 you so very much.

17 MR. DOYLE: Sure.

18 BY MR. DOYLE:

19 Q Based on your last several visits with Mrs. Farris, can you tell
20 us whether she is still having pain?

21 A Yes.

22 Q Pain caused by what, please?

23 MR. LEAVITT: Objection. Calls for expert opinion, outside
24 the scope of the designation of a treating physicians.

25 THE COURT: The Court's going to sustain that, based on the

1 prior order of the Court.

2 BY MR. DOYLE:

3 Q Based upon your own diagnoses and treatment of her, why
4 is she having the pain still?

5 MR. LEAVITT: The same objection, Your Honor. Outside the
6 scope and outside the designation.

7 THE COURT: The Court's going to sustain the objection, the
8 way the question is phrased.

9 BY MR. DOYLE:

10 Q How does Mrs. Farris diabetes been since July of 2015?

11 A Not controlled.

12 Q How has her diabetic peripheral neuropathy been since July
13 of 2015?

14 MR. LEAVITT: Objection. Calls for an expert opinion outside
15 the scope of this witness.

16 THE COURT: The Court's going to sustain the objection, in
17 light of this witness' prior testimony.

18 BY MR. DOYLE:

19 Q As her treating internist, can you tell us whether Mrs. Farris
20 still has the diabetic peripheral neuropathy?

21 MR. LEAVITT: Objection, asked and answered.

22 THE COURT: Overruled.

23 BY MR. DOYLE:

24 Q Go ahead.

25 A Please ask the question again.

1 Q Sure. As Mrs. Farris' treating internist, does she still have the
2 diabetic peripheral neuropathy?

3 A She has diabetes that's not controlled, and she had an injury
4 after surgery, so her presentation is different.

5 Q Does her current presentation include pain due to the
6 diabetic neuropathy?

7 MR. LEAVITT: Objection. Outside of the scope of this
8 witness?

9 THE COURT: Sustained, based on this witness' prior
10 testimony.

11 BY MR. DOYLE:

12 Q As Mrs. Farris' treating physician, her treating internist, and
13 based upon your last several visits with her, to what do you attribute her
14 current complaints of pain?

15 MR. LEAVITT: Your Honor, at this time may we approach?

16 THE COURT: You may --

17 MR. LEAVITT: -- I have a scope issue --

18 THE COURT: Okay. Okay.

19 MR. LEAVITT: -- and this is --

20 THE COURT: Counsel, is there an evidentiary basis of your
21 scope?

22 MR. LEAVITT: Yes. I have scope, foundation, and it calls for
23 an expert opinion.

24 THE COURT: Counsel, you both may approach, feel free.
25 Madam Court Recorder, can you please turn on some white noise?

1 [Sidebar at 3:49 p.m., ending at 3:51 p.m., not transcribed]

2 THE COURT: Okay. So those objections further discussed at
3 bench, on the basis -- based on the Court's prior order, and for all the
4 other basis are sustained. Counsel, feel free to move on to your next
5 question. Thank you so much.

6 BY MR. DOYLE:

7 Q Doctor, as Mrs. Farris' internist, and based upon your last
8 several visits with her over the past year, what is your own diagnosis for
9 why she is still having the pain in her legs and feet?

10 MR. LEAVITT: Objection. Outside the scope, foundation.

11 THE COURT: Sustained on both grounds.

12 MR. DOYLE: All right. Thank you, Doctor.

13 THE COURT: Are you passing the witness, or do you have
14 further questions, Counsel?

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

16 THE COURT: Okay. Cross-examination, counsel for Plaintiff?
17 Plaintiff, cross-examination?

18 MR. LEAVITT: Yes. Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. LEAVITT:

21 Q Good afternoon, Dr. Chaney.

22 THE COURT: Are you doing a pocket microphone, or are you
23 staying there?

24 MR. LEAVITT: A pocket microphone or the regular. I don't
25 have too many, I don't mind holding onto one of those.

1 [Pause]

2 BY MR. LEAVITT:

3 Q All right, Dr. Chaney. Dr. Chaney, before July 3rd, 2015 --

4 THE COURT: Counsel, do you want to double check to make
5 sure it's working?

6 MR. LEAVITT: Oh, is it --

7 COURT RECORDER: It's good, Judge.

8 THE COURT: It's good, okay thank you.

9 MR. LEAVITT: And I just yelled, I'm sorry.

10 BY MR. LEAVITT:

11 Q Dr. Chaney, before July 3rd, 2015, did Titina Farris have any
12 mobility issues?

13 A She had no mobility issues.

14 Q Prior to July 3rd, 2015, did Titina need a walker, when she
15 came to see you in the office?

16 A No.

17 Q Prior to July 3rd, 2015, did Titina have colostomy bag?

18 A No.

19 Q Prior to July 3rd, 2015, did Titina use a wheelchair to get
20 around?

21 A No.

22 Q Have you seen Titina use a walker since the surgery of July
23 3rd, 2015?

24 A Yes.

25 Q Okay. Thank you, Doctor. I have no further questions.

1 A Thank you.

2 THE COURT: Redirect, counsel?

3 MR. DOYLE: No questions, but there's something I'd like to
4 approach about.

5 THE COURT: Do we have some juror questions? Why don't
6 both counsel approach. We have a couple of juror questions. Thank you
7 so very much.

8 [Sidebar at 3:54 p.m., ending at 3:57 p.m., not transcribed]

9 THE COURT: Okay. What we've done with juror questions, I
10 would just read the question as is. Remember ladies and gentlemen of
11 the jury, sometimes there's certain questions that can't be asked, so I can
12 ask one and not the other. So I just read it as is, and if you can answer it,
13 to the best that you can't, you can't you just you can't. Okay.

14 So the question is: "Although Mrs. Farris had symptoms of
15 diabetic neuropathy, but never went to a specialist, why would you
16 continue the meds and diagnosis"?

17 Do you need me to re-read, I can re-read it?

18 THE WITNESS: Yeah.

19 THE COURT: Okay, sure. "Although Mrs. Farris had
20 symptoms of diabetic neuropathy, but never went to a specialist, why
21 would you continue the meds and diagnosis"?

22 THE WITNESS: May I restate it?

23 THE COURT: That's the question as is. So I read the
24 question as is, and then if you could answer it, and if you can't, then you
25 can state that you can't answer it, it's however you deem appropriate.

1 The Court just reads the question exactly as it is written.

2 THE WITNESS: Why would I continue medications on a
3 patient for treatment of diabetic neuropathy?

4 THE COURT: Okay. I can read it one more time --

5 THE WITNESS: Yes.

6 THE COURT: -- if you'd like? Okay. "Although Mrs. Farris
7 had symptoms of diabetic neuropathy, but never went to a specialist,
8 why would you continue the meds and diagnosis"?

9 THE WITNESS: The diagnosis was never in question, in my
10 mind. The treatment for diabetic neuropathy is to modulate the risk
11 factors, which would be the diabetes. So the goal is to fix the diabetes to
12 improve the neuropathy. If the diabetes was improved and her
13 symptoms hadn't improved over time, then you would question the
14 diagnosis.

15 THE COURT: Okay. Since this is the witness called by
16 Defense case in chief, I ask Defense counsel first, do you have a follow-
17 up to the question asked by the juror?

18 MR. DOYLE: Yes.

19 REDIRECT EXAMINATION

20 BY MR. DOYLE:

21 Q Since July of 2015, has the diabetes been controlled, or
22 uncontrolled?

23 A Uncontrolled.

24 MR. DOYLE: Thank you.

25 THE COURT: Plaintiff's counsel, do you have a follow-up

1 question to the jury question?

2 MR. LEAVITT: No, Your Honor, I don't. Thank you.

3 THE COURT: Okay. So is this witness excused for all
4 purposes then?

5 MR. DOYLE: Yes, Your Honor.

6 MR. LEAVITT: On behalf of Plaintiffs, yes.

7 THE COURT: Okay. Thank you so very much. For your time
8 and --

9 THE WITNESS: Thank you.

10 THE COURT: -- just please watch your stop on the way out.
11 Thank you so much., appreciate it.

12 Okay. At this juncture, counsel, I'm going to need you to
13 approach real briefly, because we had a scheduling question I just
14 needed to address real briefly, before we go to the next witness.

15 Thank you so very much.

16 [Sidebar at 4:00 p.m., ending at 4:08 p.m., not transcribed]

17 THE COURT: Okay. Ladies and gentlemen of the jury, here's
18 where we're at, timing-wise, what we're trying to figure out. We've got
19 to be realistic, because to try and evaluate with Halloween, tomorrow, to
20 try and get you all out for Halloween at a decent time, with what is left.

21 The realistic aspect is, I can send you out on break right now
22 to see if rescheduling can be done. I've got to balance here, that can't
23 accommodate everything to do the two different aspects, in order to try
24 and get those done. It looks like under one scenario we might be able to
25 get almost everything done, and then give you all the options, that if

1 everything got done, could get out to go to deliberations, or decide to
2 come back on Friday for deliberations, under the current scenario.

3 If we were to start even later tomorrow in the afternoon, that
4 pushes it, potentially, later tomorrow afternoon, and pushes it potentially
5 later maybe on Friday. So I'm going to send you all out on a break so
6 you can talk among yourselves, decide what meets everybody's needs
7 best, we try to accommodate everyone as soon as we know about
8 things, but that's kind of where we're at. So Ladies and gentlemen, I'm
9 going to give you a brief 15-minute recess, to make everyone's needs,
10 okay, 4:25.

11 Ladies and gentlemen, during this recess you are
12 admonished not to talk -- and don't worry, we can do letters, that's not
13 an issue, we can get that part taken care of. It's the other issue, I'm
14 trying to accommodate everyone's needs as much as we can.

15 During this recess you are admonished not to talk or
16 converse among yourselves, or with anyone else on any subject
17 connected with the trial. You may not read, watch or listen to any
18 commentary of the trial, or any person connected with the trial, by any
19 medium of information. including without limitation, social media, text,
20 tweets, newspapers, television, internet, radio. Anything the Court's not
21 stated specifically, is of course also included.

22 Do not visit the scene or the events mentioned during the
23 trial. Do not undertake any research, experimentation, or investigation.
24 Do not do any posting or communications on any social networking
25 sites, or anywhere else. Do not do any independent research, including,

1 but limited to internet searches.

2 Do not form or express any opinion, on any subject
3 connected with the trial, until the case is fully and finally submitted to at
4 the time of jury deliberations. Just one second.

5 [Court and Marshal confer]

6 THE COURT: Okay. So thank you so very much, ladies and
7 gentlemen.

8 THE MARSHAL: All rise for the jurors.

9 [Jury out at 4:11 p.m.]

10 [Outside the presence of the jury]

11 THE COURT: Okay. I wish you all a nice break, and Madam
12 Court Recorder is going to go off the record, we'll see you back in a few
13 moments, and we're going to need to figure this out, because the hope
14 was, that even if we had the jury that we could have stayed today to do
15 jury instructions, but I've just been informed Defense counsel did not
16 bring the jury instructions, so we can't do jury instructions today. And a
17 friendly reminder that, you know, we've to have everyone prepared to do
18 everything, so any available time we can make use of it, when we don't
19 have a jury here.

20 So appreciate it, please go on your break.

21 [Recess taken from 4:11 p.m. to 4:25 p.m.]

22 [Outside the presence of the Jury]

23 THE COURT: Okay. On the record, outside the presence of
24 the jury. The juror is trying to change his medical appointments,
25 because, obviously, as you all know, this trial was supposed to be done

1 yesterday, the latest today, and so he scheduled medical appointments
2 consistent, therewith. He's trying to change his medical appointments,
3 and so he's doing that and should be done in just a moment, hopefully,
4 and then as soon as they're ready the Marshal is going to let us know, so
5 the jury can come back in.

6 You all need to be here at 8:00 tomorrow morning, jury
7 instructions in hand. Please don't have anyone tell me that they don't
8 have everything. And when I say jury instructions, I mean jury
9 instructions. Obviously, I mean verdict forms, and obviously, I mean
10 tonight, you will be talking to each other and resolve all outstanding
11 issues. Please do not come to Court tomorrow and say that you haven't
12 talked, okay.

13 MR. LEAVITT: Okay.

14 THE COURT: Because there's no reason why you can't get
15 through most every one of those jury instructions and have succinctly
16 what you truly have a disagreement about.

17 MR. LEAVITT: Okay.

18 THE COURT: And have checked everything, and know the
19 order that you want everything, because those all can be done so that we
20 can efficiently and effectively get through those jury instructions and
21 ensure that everyone can get those done, because there's not really a lot
22 of huge issues.

23 The Court's made a lot of rulings between the time you
24 submitted these and now, and these are really -- they should be very,
25 very quick to go through. But the other thing is, you need to make sure,

1 a couple of other things. There was a disc, right? If that disc is any way,
2 somebody's thinking the jury is having that disc, remember, we have to
3 have something it can be played one, i.e., the video from the son, the
4 outdoor playground. So remember, you have to have something single
5 and containable, with nothing else on it. That's got to be able to go back
6 to the jury, single, identifiable.

7 The other thing you need to have is, you have to each have
8 people here, that if you're making changes to jury instructions, whether
9 you're agreeing that there is one person or the other, please do not come
10 here and then say, Oops, we have no way to make these changes, we
11 have to go back across town, or whatever, right?

12 So whether you have a designated person, A or B, agree
13 tonight, among yourselves who is going to be that one person, or two
14 people, so that they can be redone, and reprinted out in a format with
15 the verdict forms, right.

16 MR. LEAVITT: Okay.

17 THE COURT: So we're not waiting for people to, quote:
18 "Have to go outside," wait for people to be running back and forth
19 between the courthouse, okay. Because you're all reasonable, right, for
20 getting all those changes and nuances. And so do make sure tonight,
21 also, that there's not typos. Make sure you've got entity names, correct,
22 et cetera.

23 Remember we have a court recorder, not a court reporter, so
24 make sure, if you're doing that one, remember there is no readbacks of
25 testimony. Remember if it's a playback of testimony, with playbacks, all

1 attorneys have to be present, anytime there is a question, and then you
2 all have to watch the entirety of whatever the area of testimony is. You
3 have to then agree to the section. You have to be here when that entire
4 section is played back, it's not one of those call in, right?

5 So people have to be there, so you have to take that into
6 account, if that's one that you do want. I'm not saying you do or don't,
7 but if that's one that you do want, you have to take that into account,
8 which a lot of times people don't want to have that one anymore,
9 because they don't want to have to be physically be here.

10 So if a juror asks a question, then you're gone 20 minutes
11 later, they ask another one, you have to be back here present. So you
12 can't be across town, you can't be eating meals. You can't be saying,
13 hey, we're in the middle of our steak dinner and you will be here in an
14 hour, okay; it does not work. It cannot work, will not work, okay, or out
15 having brunch or whatever, okay. You physically have to be here the
16 entire time, because we can't be holding up things for extended periods
17 while people are dining or doing other things, right. So you've got to
18 make sure you have that issue taken care of.

19 And also, probably during jury deliberations, might be
20 addressing the outstanding sanctions issues, which you all still have not
21 had the Court to give some to. No one's asked me to schedule that, yet.
22 So remember, right now you have things going to a jury, so I'm not sure
23 what you're planning on doing that. That's another thing that the parties
24 have to discuss tonight among yourselves, not in front of the Court.

25 As soon as the Marshal -- well, he stepped back out.

1 MS. FARRIS: He just popped back out.

2 THE COURT: I know, I saw him, no worries.

3 MS. FARRIS: Oh, okay.

4 THE COURT: I saw him, when he walks back in we'll take
5 care of it.

6 [Court and Clerk confer]

7 THE COURT: So I'm just telling you this, while we're making
8 sure that the marshal is checking with the jury, to make sure they're all
9 ready to come back in. So when they're ready to come back in, I
10 presume Dr. Rives is back on the stand; is that correct?

11 MR. DOYLE: Yes.

12 THE COURT: Okay. Ready to go. And there should be no
13 more outstanding issues, because you have no more witnesses or
14 anything else, correct?

15 MR. JONES: Correct, Your Honor.

16 MR. DOYLE: Well, there is the pending motion to strike the
17 portion of Dr. Hurwitz's testimony that we never got back to. That's one
18 thing I got noted here.

19 MR. JONES: I think it was sustained, and I think there was a
20 portion of it stricken.

21 MR. LEAVITT: Yeah. The back part, where he said, "more
22 negligence was taken off," right. That's what I recall.

23 THE COURT: The Court ruled what the Court ruled.

24 MR. JONES: Yeah.

25 THE COURT: I mean, the Court has no understanding of

1 anything pending from this Court's notice, other than the re-hearing, the
2 outstanding Rule 37. So this Court, if you all didn't bring it up by now,
3 somebody is going to have to point out that it's something that is way
4 past the time, the Court made a ruling.

5 Marshal, is our jury ready?

6 THE MARSHAL: Yes.

7 THE COURT: Everybody else is ready. Let's bring in them
8 and get this taken care of. Thank you so very much.

9 MR. DOYLE: The Court ruled, but the Court didn't actually
10 strike the testimony on the record.

11 THE COURT: The Court ruled what the Court ruled. I'm not
12 sure what you're saying, the Court didn't strike on the record. What do
13 you mean "the Court didn't strike it on the record"?

14 MR. DOYLE: Did the Court, outside the presence of the jury
15 identify the aspect of the testimony that would be stricken, but the Court
16 never told the jury to strike the testimony.

17 THE COURT: Well, that would be the province of the party
18 that requesting it be stricken, to make sure that got taken care of now, it
19 had been.

20 MR. DOYLE: I don't know. That's why I'm mentioning it
21 now.

22 THE COURT: So if there's something, then you all have to
23 articulate and ask me to do it, right? Wasn't that kind of either to come
24 up in either jury instructions, or something, if you don't bring it up it
25 can't get done. You all were going to listen to your discs --

1 MR. LEAVITT: Oh, yeah.

2 THE COURT: If that was what it was going to be, right?

3 MR. LEAVITT: It would have been.

4 THE COURT: So if you haven't done it, you haven't asked me

5 to do it, I can't do what people have not presented to the Court.

6 Remember it's you all's obligation. Okay. The jury is outside, we're

7 ready to bring them in. Thank you so very much. Thanks Marshal.

8 THE MARSHAL: All rise for the jury.

9 [Jury out at 4:33 p.m.]

10 [Within the presence of the jury]

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

12 seated.

13 THE COURT: Okay. Thank you so much. Welcome back,

14 ladies and gentlemen, everything taken care of. And at this juncture, if

15 you recall Dr. Rives is back on the stand, because the other witness out

16 of order. This witness understand you're still under oath, correct?

17 THE WITNESS: Yes, I do.

18 THE COURT: Okay. Thank you very much. No one's

19 requesting a re-swearing, correct, it's just the next day, correct?

20 MR. LEAVITT: That's fine over here.

21 THE COURT: Okay. Counsel, feel free to continue with your

22 examination, then.

23 BARRY RIVES, M.D., DEFENDANT, PREVIOUSLY SWORN

24 DIRECT EXAMINATION CONTINUED

25 BY MR. DOYLE:

1 Q Doctor, when did you first see Mrs. Farris as a patient?

2 A In 2014.

3 Q Why was she referred to you?

4 A She was referred to me by Dr. Naomi Chaney, for swelling in
5 her upper abdomen.

6 Q And could you describe what this swelling was?

7 A She had, about the size of a small Nerf football, lumpy mass
8 above her bellybutton, but below her breastbone.

9 Q Did you examine, or did you do an examination?

10 A Yes.

11 Q Tell us what your examination showed?

12 A The examination was consistent with what we call "lipoma"
13 which is a fatty tumor. And even though we use the tumor, we use it for
14 mass, not meaning cancer.

15 Q Was there any discussion about what to do with it?

16 A Yes. My recommendation was that it was getting larger, it
17 was causing her problems, and that it should be removed.

18 Q Well, the procedure for removing it, what was being
19 contemplated?

20 A Excision of the entire lipomatous mass.

21 Q Did you do that surgery?

22 A Yes, I did.

23 Q Where did you do it?

24 A St. Rose, San Martin.

25 Q Do you recall when you did it?

1 A August 7th, 2014.

2 Q Was it an open procedure, or laparoscopic procedure?

3 A That's an open procedure.

4 Q Describe for the ladies and gentlemen of the jury, what you
5 did in that surgery; what happened first?

6 A So once the patient -- once Mrs. Farris is completely asleep I
7 was able to examine it more thoroughly. Again, it felt like a hard,
8 lipomatous or fatty tumor. So I made an excisional, or elliptical incision,
9 because it was so large that you'd have to take some of the skin just to
10 get it out.

11 So I went through the skin, went through the subcutaneous tissue,
12 shelled out his lipomatous mass, and as I removed it, I noticed that
13 below that she was having also a ventral hernia.

14 Q What did the hernia look like, when you first encountered it?

15 A The hernia was a little distorted, I think because of the lipoma
16 on top of it, and between our bellybutton and the top of our liver we
17 have something called the "falciform ligament" which is the remnants of
18 the umbilical artery and vein when we're babies. There's a lot of fat to
19 that, and it was pushing up through hernia defect, as well.

20 Q Did you repair the hernia then?

21 A Yes.

22 Q What did you do to repair it?

23 A Well, first I had to remove that falciform ligament, and then I
24 had to clean away all the soft tissue from the muscle, and the muscle
25 would not come together without tension. You have to close it without

1 tension, because if it doesn't it'll just pull apart on you. So I had to put a
2 mesh underneath the muscle layer, to bridge the muscle layer together.
3 I sewed that mesh to the muscle, using Prolene, which is non-absorbable
4 sutures.

5 Q Now the hernia repair that you just described, was that being
6 done open or laparoscopy?

7 A No, that's open.

8 Q Do recall the size of the hernia that you encountered?

9 A It was at least -- well, in inches, I'd say 5 by 3 inches.

10 Q What was the -- at the time Mrs. Farris went home, what was
11 the plan; and this again is in August of 2014?

12 A The plan was for her to come back and see me in the office,
13 so that I could evaluate the incision, make sure that it was healing good,
14 and review the pathology reports with her.

15 Q Did she come back and see you?

16 A No.

17 Q When did you next see Mrs. Farris, then?

18 A In the spring of 2015.

19 Q What was your understanding why she came to see you?

20 A She was complaining that she thought it was coming back.

21 Dr. Naomi Chaney referred her, because she was concerned that it may
22 be a large blood -- a blood clot.

23 Q What was coming back?

24 A The lipoma.

25 Q When you saw Mrs. Farris, then -- so are we now in 2015?

1 A Correct.

2 Q When you saw her in the spring of 2015, did she provide you
3 with an explanation why she did not come back to see you in 2014?

4 A She said she was feeling good and didn't see any reason to
5 come back.

6 Q Did you do an examination?

7 A Yes.

8 Q What did the examination show?

9 A The examination showed that she actually had a recurrent
10 hernia. As I started to manipulate the hernia down, because if the hole is
11 large enough you can reduce it, but if it can't be reduced that's the
12 suggestion that something's incarcerated, and I couldn't reduce the
13 entire hernia. I was concerned that something else might be inside the
14 hernia, so my recommendation was to get a CT scan to evaluate it.

15 Q Would you explain what you mean by "reducing" or being
16 able to reduce it?

17 A So a hernia, like we talked about before, is a hole in your
18 abdominal wall. And if something's pushing up through that hole you
19 can feel it on the outside. So as you examine the patient with you hand,
20 you can sometimes be able to push that all the way through, and actually
21 feel the edges of the muscle, so that way you have an idea of how big
22 the hole is, and how you need to go about repairing it. If you can't push
23 everything back down into the abdomen, that suggests that's something
24 is stuck inside the hernia sac.

25 Q Why did you want to get a CT scan?

1 A So that I can figure out what part of the anatomy was
2 actually stuck inside of there, because it would have affected my
3 operation approach.

4 Q What was the plan at the end of this visit, then, besides the
5 CT scan, if anything?

6 A It was to get the CT scan, come back after the CT scan and
7 discuss further surgical options.

8 Q Was the CT scan performed?

9 A Yes.

10 Q What did it show?

11 A It showed that her transverse colon was herniated and stuck,
12 or incarcerated in the hernia sac, but there was no evidence
13 strangulation, there was no evidence of obstruction.

14 Q Did Mrs. Farris come back to see you after the CT scan?

15 A Yes.

16 Q Do you recall when the visit was? The surgery was July 3rd?

17 A I think it was sometime in June maybe.

18 Q And tell us about that visit, what happened?

19 A So I reviewed with her the findings on the CT scan. We
20 talked again about what her symptoms were. She said that her
21 symptoms were getting worse, and she was especially concerned,
22 because it was affecting her activity level. So I made the
23 recommendation to repair this laparoscopically

24 Q Why did you make that recommendation?

25 A For a ventral hernia patients recover a lot easier, a lot

1 quicker, and especially if they're concerned about increasing their
2 activity, then a laparoscopic approach is better than an open, exploratory
3 approach. It's also less painful, the patients recover quicker, and with
4 the laparoscope inside the abdomen, you're actually being able to look at
5 the entire inside of the abdomen.

6 When you open up a hernia, and it's poking up at you, you
7 have to be very careful, because you can't see what's below you. It's
8 kind of looking at the tip of an iceberg, and you can get into other sorts
9 of the bowel without even knowing it.

10 Q Did you have a discussion whether you would be using mesh
11 again?

12 A Yes.

13 Q Why?

14 A Well, mesh is a necessary part of doing a recurrent hernia,
15 especially.

16 Q Why is it a necessary part?

17 A Because when I already did her open surgery, I knew that the
18 muscle was not coming together on its own, and that she was going to
19 need a bridge or a skeleton mesh to accomplish that.

20 Q Now was there a discussion with her, about the surgical
21 plan?

22 A In terms of?

23 Q Your recommendations, options, et cetera?

24 A Well, I always talk about your options, whether you should
25 have surgery, or not have surgery. She was having more pain and