

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 28

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
775-786-9716 fax
rle@lge.net

ATTORNEYS FOR APPELLANTS

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1 problems; she was leaning towards having surgery to get it done. If a
2 hernia is not symptomatic, and there's not a bowel in it, it could be
3 conceivable that a patient would not want surgery and wait and see how
4 it goes. But if you have bowels stuck inside there you increase the
5 chance or risk of something very serious happening to that bowel, which
6 can cause, you know, dramatic problems to the patient.

7 Q Was there a discussion about any risks of the surgery?

8 A All the risk benefits and alternatives were discussed in my
9 customary fashion with her, yes.

10 Q What were the risks?

11 A The risks, especially with the prior surgery was conversion to
12 an open. The risk with the colon there was injury to the bowel, which
13 would cause her to go from an out-patient basis, to an in-patient basis.
14 The other two major ones are always infection bleeding, and injury to
15 any adjacent organs.

16 Q And the benefits were what, that you discussed with her?

17 A The benefits were that the hernia would be repaired, the
18 colon would be reduced. It would cut down on her risk of having a
19 higher complication. Laparoscopic versus open, laparoscopic there
20 tends to be a lower recurrence rate, open there tends to be a higher
21 recurrence rate.

22 Q But why is there a higher recurrence rate with an open hernia
23 repair?

24 A It's a larger incision, it creates more tension on the repair.

25 Q Did Mrs. Farris decide whether she wanted to go forward?

1 A Yes.

2 Q What did she decide?

3 A She wanted to have the surgery.

4 Q What was the date of the surgery?

5 A July 3rd, I believe, 2015.

6 MR. DOYLE: I'd like to put up, we're going to be looking at
7 Exhibit 1, pages 37, 38 and 39.

8 [Counsel confer]

9 MR. DOYLE: Okay. Let's put up -- so, for the record, Exhibit
10 1, pages 37, 38 and 39 is Dr. Rives' operative report for July 3, 2015. If
11 you call up the first page, please.

12 BY MR. DOYLE:

13 Q And, Doctor, just for point of reference, what are we looking
14 at?

15 A My operative note for Titina Farris, on the 3rd of July 2015.

16 Q If you go for a moment to page 39, Actually, I'm sorry, page
17 38, at the bottom there. What does the "D" and "T" mean?

18 A Dictated, July 3rd, 2015, 12:43:44 seconds. Transcribed,
19 same dated, 22:41:51.

20 Q How soon after the surgery did you dictate this operative
21 report?

22 A I walked out of the operating room, and I walked to the
23 recovery room and dictated the note.

24 Q Let's go back to page 37, please. Under "preoperative
25 diagnosis" what do we have?

1 A "Incarcerated incisional hernia."

2 Q Why did you characterize this as an incisional hernia?

3 A Because the prior lipoma removal, that was a large incision,
4 it wasn't laparoscopic.

5 Q Then under the heading "Procedure" what do you have there,
6 for number 1?

7 A Laparoscopic reduction and repair of incarcerated incisional
8 hernia with mesh.

9 Q And then interpret for us what the number 2 procedure is?

10 A Colonography [sic] times 2, means repair of the colon, times
11 2.

12 Q EBL, what does that mean?

13 A Estimated blood loss.

14 Q All right. How would you characterize the 30?

15 A It's 30 ccs or 30 milliliters.

16 Q Then under "findings" below that -- oh, I'm sorry, what does
17 EBL stand for?

18 A Estimated blood loss.

19 Q for this type of surgery 30 ml would be -- how would you
20 characterize that?

21 A Normal.

22 Q And findings, what do you have?

23 A Incarcerated incisional hernia with the transverse colon.

24 Q And the findings section of your operative report represents
25 what?

1 A What I found when I got in laparoscopically.

2 Q What is the next heading under "findings"?

3 A "Technique."

4 Q Now, Doctor, would you explain to the ladies and gentlemen
5 of the jury, what your custom and practice, or habit, if you will, was for
6 dictating an operative report of what you would or would not put in it?

7 A So when dictating an operative report obviously we can't put
8 in everything that we do, every second, every minute of the time. So
9 surgeons have their own way of figuring out what they deem to be an
10 important part of the surgical procedure --

11 MR. JONES: Objection --

12 THE WITNESS: -- and what they figure out is part of their
13 custom and fashion.

14 THE COURT: I have an objection.

15 THE WITNESS: Yes, Your Honor.

16 MR. JONES: Objection on a narrative response.

17 THE COURT: Sustained.

18 BY MR. DOYLE:

19 Q Doctor, explain to the ladies and gentlemen of the jury,
20 based on your custom, and practice or habit, what you would typically
21 put in an operative report, and then we'll come to what you typically
22 don't?

23 A I put in what I think would be important for another surgeon
24 to know, what I deem are the major moves of the surgery, basically.

25 Q And what would you typically not put in an operative report?

1 A There's a lot that I don't put in an operative note, as far as --
2 you know, you're observing everything all the time, you're irrigating,
3 draining, all the time. You don't dictate all these little things that you're
4 doing, as part of your habits.

5 Q Now under "technique, that first sentence says: "After
6 getting informed consent the patient was brought to OR place in supine
7 position." What does that mean, "supine" position?

8 A That means, laying flat on your back.

9 Q And then according to your operative report what happened
10 next?

11 A She had general anesthesia.

12 Q Who was the -- do we have the name of the anesthesiologist?

13 A Yes. It's Georgeanne Raftopoulos, Doctor.

14 Q So after the general anesthesia, what happened next?

15 A At that point the nurse preps and drapes the abdomen, so
16 that it's sterile.

17 Q Explain what you mean by the "abdomen being sterile"?

18 A So for surgery, when the -- when the patient is laying flat, if
19 there's hair, the nurse will use a clipper to take the hair off, and then
20 they'll use a solution, it could be betadine, chlorodyne, whatever, to
21 sterilize the surface of the skin.

22 Q And after the abdomen was prepped and draped, what
23 happens next?

24 A As her hernia was a little bit up, up top here and off to the
25 left, I started with a small incision on the right, middle quadrant, off to

1 the side. So that way I wouldn't be getting into the area that I had to
2 work on. I made a little skin incision, inserted what we call a veress
3 needle, which is a way that we insufflate the abdomen with CO2, to get
4 our pneumoperitoneum, so we could perform the surgery.

5 MR. DOYLE: May I approach the witness, Your Honor?

6 THE COURT: For what purpose?

7 MR. DOYLE: To show him a proposed demonstrative exhibit
8 to lay --

9 THE COURT: Show it to --

10 MR. DOYLE: -- the foundation.

11 THE COURT: Show it Plaintiff counsel first, please.

12 [Counsel confer]

13 THE COURT: Pardon, I didn't hear?

14 MR. JONES: We object to it, Your Honor.

15 THE COURT: So if there's an objection, then it would not be
16 appropriate to approach the witness with it.

17 MR. DOYLE: I'm sorry?

18 THE COURT: Since there is an objection, it would not be
19 appropriate to approach.

20 MR. DOYLE: But I would need to lay the foundation.

21 THE COURT: The Court said, since there's an objection, it's
22 not appropriate to approach. Please move on with your next question.

23 BY MR. DOYLE:

24 Q Dr. Rives, did you work with an illustrator in this case to
25 create any illustrations that would be helpful in explaining your

1 testimony?

2 A Yes.

3 Q Can you tell us about when you worked with an illustrator, to
4 help prepare illustrations to illustrate your testimony.

5 MR. JONES: Your Honor, I'd like to object, it goes outside
6 the scope of what is permitted in this testimony.

7 THE COURT: Unless this is --

8 MR. JONES: And prior court orders.

9 THE COURT: The Court is going to sustain it, based on what
10 the Court's heard, thus far, based on prior Court orders, the Court's not --
11 Counsel can you both approach. Madam Court Recorder, turn on the
12 white noise, please.

13 [Sidebar at 4:53 p.m., ending at 4:55 p.m., not transcribed]

14 THE COURT: Okay. The Court's going to sustain the
15 objection based on what was prior represented to the Court.

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

17 BY MR. DOYLE:

18 Q Doctor, describe for the ladies and gentlemen of the jury the
19 appearance from the outside looking in her abdomen of the hernia
20 before you did the surgery on July 3rd. What did it look like to the naked
21 eye, in other words?

22 A You're talking about before the surgery?

23 Q Correct.

24 A So, if you saw her abdomen, she had a large lump sort of in
25 the same area where the lipoma had been before, but it wasn't the same

1 consistency and it wasn't the same size, it was a little bit smaller.

2 Q Okay. Going back to your operative report, Page 37, do you
3 see where it says a small incision was made in the right middle
4 quadrant?

5 A Correct.

6 Q Explain to the ladies and gentlemen of the jury how the
7 abdomen is divided.

8 A So, we can do it into four or six parts. Basically, left and
9 right. When we're doing surgery, obviously we're look at the patient, but
10 we always use left and right as it if was the patient's left and right, upper,
11 middle and lower quadrants is what I usually use is six quadrants.

12 Q So, what is the first device that you placed through Mrs.
13 Farris's skin for this surgery?

14 A After the skin incision, I used a veress needle to do the
15 insufflation part.

16 Q And where did you make the incision for the veress needle?

17 A It was in what I called the right middle quadrant, which is
18 over here on the right side. You want to stay obviously where you're
19 going to be in the abdomen and avoid any injury to the colon on the
20 right side.

21 Q What is the purpose of the veress needle?

22 A It's to allow Co2 into the abdomen, so that we can get a
23 pneumoperitoneum, or an amphitheater, so that way when we put a
24 camera in, we can see the abdomen and its contents.

25 Q Does the operative report indicate the amount of insufflation

1 that you used to create this amphitheater?

2 A We don't do it by volume, we do it by pressure, so 15
3 millimeters of mercury is the accepted pressure. You don't want to go
4 too high, because if the pressure's high it could actually crush or put
5 pressure on the veins that lead out of the abdomen and can cause heart
6 problems.

7 Q So, what happened next, after you placed this needle and
8 insufflated the abdomen?

9 A I removed the needle and put a five millimeter trocar
10 (phonetic throughout), which is our smallest s, which is those sleeves I
11 was talking about, into the same hole where the veress needle was.

12 Q What did you do next?

13 A Well, once you get in for the first time, you want to make
14 sure there is no injury to anything around because of the veress needle,
15 and then with the camera, you look around at the abdomen and figure
16 out where's the anatomy, what's in the way, what do I need to do, where
17 do I need to put my next trocars so that I can accomplish the surgery.

18 Q What did you find when you looked inside her abdomen on
19 this occasion for the first time?

20 A That she had her transverse colon up in this hernia sack, and
21 she had some of her omentum, which is a fatty veil that's attached to the
22 transverse colon also up in the hernia sack.

23 Q At this point in time, were you able to tell whether there were
24 adhesions?

25 A No, not yet.

1 Q Did you change that trocar to a different size?

2 A That particular trocar? No.

3 Q Where did you place the next trocar?

4 A I ended up placing three more five millimeter trocars. One in
5 the right upper quadrant.

6 Q And let me interrupt you, what was the purpose of that one?

7 A Well, all of them are so that I can put the camera in, look
8 around, figure out the anatomy, and use tools to start to reduce the
9 hernia.

10 Q Okay. So, the next one was where, again? I'm sorry.

11 A Five millimeter in the right upper quadrant, and then a five
12 millimeter in the right lower quadrant, and then another five millimeter
13 on the left middle quadrant, so that way I can see both sides of what I
14 was working on.

15 Q Did you change the size of any of those?

16 A The two in the right upper quadrants and the right lower
17 quadrant, I went from a five millimeter up to a 12 millimeter, so that way
18 I could use a larger size scope so I could see even better, plus some of
19 the instrumentation I needed required a larger sleeve to work with.

20 Q Now looking towards the bottom of this Page 37 --

21 MR. DOYLE: Your Honor, it's 5:00, would you like me to stop
22 here?

23 THE COURT: Feel free to continue for a moment or two.

24 MR. DOYLE: Okay.

25 BY MR. DOYLE:

1 Q Do you see where the operative report says we began by
2 reducing the hernia?

3 A Yes.

4 Q But would you explain what that meant, or what you mean
5 by that, rather.

6 A So, now that there's nothing else around that I need to work
7 with, like scar tissue from her C-section, anything like that, I'm looking
8 just at the hernia defect. I'm trying to figure out how is that going to get
9 reduced in the easiest way possible with the least amount of damage to
10 the tissues.

11 So, you start taking some graspers, again, through the sleeves, and
12 you start dissecting out what's pretty loose and pretty easy. In this case,
13 her omentum. As I started to manipulate it, it came down fairly easy
14 without me having to do much dissection at all.

15 Q And why is it necessary to reduce the hernia?

16 A Well, you have to reduce everything out of the hole to
17 eventually repair the hole.

18 Q In your operative report, you indicate that transverse colon
19 was severely stuck and adhered to the prior mesh repair. Would you
20 explain what that means, please, or what you saw?

21 A So, the transverse colon was stuck to the mesh by some scar
22 tissue, such that if you manipulated the colon, it wasn't come free from
23 the mesh like the omentum did. So, that meant that I was going to have
24 to take down that colon from the mesh, free up those scar bands and
25 take them off and get the colon off the mesh to repair the hernia again.

1 Q But what did you do first to accomplish that?

2 A You use -- you use blunt dissection, which basically means
3 you use your instruments to try to sweep the bowel, see if it will come
4 off the mesh fairly easy on its own. If there's little scar tissues that are
5 close to the colon and they're light, you can use scissors to cut them, and
6 you basically piecemeal this. You go where it's easy, easy, easy,
7 because sometimes that will free up other parts just by the weight of the
8 colon pulling down on itself.

9 Q And in Mrs. Farris's case, were you able to completely
10 separate the transverse colon from the mesh with just blunt dissection?

11 A No.

12 Q Why not?

13 A Because the scar bands weren't cobweb'ish, they were very
14 tight, they were very thick.

15 Q Were you able to separate the transverse colon from the
16 mesh using scissors, I think you mentioned?

17 A Some smaller scar bands that I didn't think would bleed
18 would come down with scissors, yes.

19 Q Did you use a ligature for her surgery?

20 A Yes.

21 Q At what point in this process of removing the transverse
22 colon from mesh did you use the ligature for the first time?

23 A So, I had pretty much gotten everything off the mesh at that
24 point, except for about two areas that I had been sweeping down bluntly,
25 and those scar bands were very thick, and I was worried about them

1 bleeding. So, I used the ligature device on the scar bands to ligate them,
2 basically cut off the blood supply and cut them at the same time so I can
3 get the colon removed from the mesh.

4 Q Using the ligature in the fashion that you just described, was
5 it successful?

6 A Yes.

7 Q Did the ligature device come into contact with the transverse
8 colon?

9 A No.

10 MR. LEAVITT: Objection, Your Honor. Speculation.

11 THE COURT: I'll sustain on speculation.

12 BY MR. DOYLE:

13 Q Do you know or recall whether the ligature device came into
14 direct contact with the transverse colon?

15 MR. LEAVITT: Objection, Your Honor. Speculation.

16 THE COURT: I'll sustain with the way that's phrased.

17 BY MR. DOYLE:

18 Q Doctor, what did you do with the ligature device visa the
19 transverse colon?

20 A So, the adhesions are scar bands that were between the
21 colon and the mesh. I took those down with the ligature device.

22 Q Did you look to see if you had caused any injury to the
23 transverse colon using the ligature device before you exited the
24 abdomen?

25 A I looked to see if there was any injury to the colon from any

1 source.

2 Q Before you began the repairs that we'll come to in a moment,
3 did you look and check for any injury?

4 A Yes.

5 Q What did you find?

6 A I found two holes in the colon. We call them colotomies, that
7 just means hole in the colon. And based upon the instruments, I would
8 say they were maybe about one centimeter, about half-an-inch long.

9 Q And at that time, did you have an opinion about why these
10 holes occurred?

11 A I think it was caused from the blunt dissection as I was
12 sweeping the colon off the mesh.

13 Q Now how is it that blunt dissections sweeping the adhesions
14 off the mesh can cause a hole in the colon? What's the mechanics of
15 that?

16 A Well, the adhesion scar bands are from the outer layer of the
17 colon, itself. So, if there's too much tension or it's too high, or it's
18 attached very strongly to the colon, if you sweep that hard enough, you
19 could possible cause a tear in the colon wall.

20 Q Now, if we go to the top of Exhibit 1, Page 38, the first full
21 sentence. It says in doing so, this created a small tear in the colon. What
22 is the doing so that you're referring to?

23 A The dissection of the colon off the mesh.

24 Q Do you indicate next how you repaired that small tear?

25 A Yes.

1 Q What did you use?

2 A I used the staple device that we talked about earlier.

3 Q Your operative report mentioned something about a blue
4 load, what does that mean?

5 A So, we talked earlier that there's a cartridge that has the
6 staples. So, there's different types of staple lines. We can do blue loads
7 on normal tissue, green loads on thick tissue, brown or white loads are
8 for vascular tissue.

9 Q And why did the you choose the blue load?

10 A Because the tissue was healthy and of normal thickness.

11 Q What did you indicate next, after mentioning the -- using the
12 stapler with the blue load?

13 A That I was able to staple across the colotomy. There was
14 also a second one and repaired it the same way.

15 Q Now, if you had had any concern about the nature of the
16 tissue that you were going to be stapled, what would you have done?

17 A It depends upon the degree that the tissue is injured. If you
18 don't think you can do it or close it with a staple device, then you have
19 the option of suturing it closed. If, because the colon's been up against
20 the mesh and the tissue is thinned out, and it may not even hold sutures,
21 then you would have to do an open incision, bring that colon out, inspect
22 it, see if you can repair it, and if not repair it, then you have to remove it.

23 Q So, explain to us what you did to ensure that the tissue was
24 okay before using staples to close that first hole.

25 A So, I evaluate the tissue, look at its vascularity, is it nice and

1 pink and healthy, or is it white and ischemic and not have a good blood
2 supply? Is the colon large enough that if I put a staple device across it,
3 am I going to kink that off or is it going to be normal flow through the
4 colon?

5 Q You described then the second small colotomy or hole, and
6 you indicated you repaired it with a -- again, the stapler, but with a tissue
7 load. Is that different than the blue load?

8 A That is the blue load

9 Q What do you say next in the operative report?

10 A After success of firings, the staple lines appeared to be intact.

11 Q Let me stop you there. What did you do to ensure the staple
12 lines were intact?

13 A So, any time you use the stapler, even for just resection, you
14 have to look at the staple line to make sure that it's not bleeding,
15 because sometimes you will come across small vessels and they will
16 start bleeding across the staple line, you have to take care of that.

17 Then, depending upon what you're using the stapler for, you have
18 to make sure that those staple lines took, because even with these
19 devices, they have certain failure rates. So, you could fire across, if you
20 look good, but if you pull on it a little bit and manipulate it, sometimes
21 the whole line will just unzip, meaning the staples didn't take.

22 Q Did you do that in Mrs. Farris's case?

23 A Yes.

24 Q And how do you know that even though it's not in the
25 operative report?

1 A Because I do that every time I use the stapler.

2 MR. DOYLE: This is --

3 THE COURT: Is this a good time?

4 MR. DOYLE: Yes.

5 THE COURT: Okay.

6 So, ladies and gentlemen of the jury, here's what we're going
7 to do. Counsel's going to be here at 8:00 tomorrow morning. Ladies and
8 gentlemen of the jury, able to do it, so 10:15. Is that going to work out?

9 Okay. We may be taking a shorter lunch tomorrow. We're
10 figuring that out to try and get people out so that everyone can be
11 celebrating Halloween.

12 Marshal, you got -- beautiful, there we go. Taking care of the
13 letters for seven jurors that needed it. So, it's extended until Friday, so
14 that will be taken care of for you all.

15 So, ladies and gentlemen of the jury, at this juncture -- oh,
16 Friday we're anticipating starting -- well, depending on what happens
17 tomorrow, anticipate Friday, maybe 9:00, or if it's deliberations, it will be
18 at the convenience of the jury. Okay? So, we'll decide -- it depends on
19 what's happening tomorrow, okay?

20 So, ladies and gentlemen of the jury, during this overnight
21 recess, of course you're admonished not to talk or converse among
22 yourselves or with anyone else on any subject connected with the trial.

23 You may not read, watch or listen to any report or
24 commentary of the trial, any person connected with the trial by any
25 means of information, clearly, without limitation, social media, texts,

1 tweets, newspapers, television, internet, radio, anything the Court's not
2 stated specifically, is, of course included -- I see some affirmative nods,
3 missing a few, there we go. We got them all taken care of. There we go
4 in the back. Thank you so very much.

5 Do not visit the scene or the events mentioned during the
6 trial. Do not undertake any research, bless you, experimentation or
7 investigation. Do not do any posting or communication on any social
8 networking cites, or anyone else. No independent research, **5:12:59,
9 but not limited to internet searches. Do not form or express any opinion
10 on any subject connected with the trial until this case is fully and finally
11 submitted to you at the time of jury deliberations.

12 With that, we wish you a very nice and relaxing evening.
13 Thank you so very much.

14 THE MARSHAL: All rise for the jurors.

15 [Jury out at 5:13 p.m.]

16 [Outside the presence of the jury]

17 THE COURT: If anyone wants those last couple doughnuts,
18 feel free to take the box with you. They were for you.

19 Okay, just us one second before we go off the record a
20 second.

21 As I mentioned to the jury, we may be taking a little shorter
22 lunch tomorrow so that we can get this done so that -- I'm saying sort of
23 lunch, I mean everyone, we have to take at least 40 minutes, but we may
24 be doing something to try and take 40 minutes instead of an hour,
25 etcetera, depending where the testimony's going so that we can get

1 closings and everything done so we can get this jury out because,
2 presumably, what time do you want this jury out to go for Halloween,
3 knowing that many people are --

4 MR. LEAVITT: As early as possible, Your Honor.

5 MR. DOYLE: And would it be --

6 THE COURT: You know, as early as possible, love is gold. I
7 have to work in timeframes because given where you are with the
8 testimony, what needs to be done to get your closings done, right? And
9 so --

10 MR. LEAVITT: I would say by 4:00 at the latest, Your Honor.

11 THE COURT: Remember what time it gets dark, so that --

12 Okay, we've just going to need to let them know. I'm
13 not -- I'm not putting a date -- a time on it. You, of course, know you
14 can't get discs today, because it's already 5:14.

15 MR. DOYLE: Right. To speed up lunch, can we -- and you
16 can you answer it in the morning, can we just buy it for them so it's
17 there?

18 THE COURT: I can offer the jury tomorrow's special, if they
19 want to . We'll have to see to make sure that other departments are
20 not --

21 MR. DOYLE: That way you're not putting --

22 THE COURT: Department's not --

23 MR. LEAVITT: Right.

24 THE COURT: Judge Eric John's Department is not using the
25 jury room for a trial tomorrow during lunch, but if they're willing to do

1 so, we can put them back there for that --

2 MR. LEAVITT: We'll do that.

3 THE COURT: -- one day. I have to doublecheck with my
4 Marshall, I'm not going to put him on the spot --

5 MR. LEAVITT: No, no, no, no.

6 THE COURT: -- but I need to check when my regular
7 Marshall's back to go do a shorter lunch, but it still has to be at least a
8 half-hour, 35 minutes. So that's why I say 40 minutes, because it has to
9 be 40 minutes by the time you all get out of here, you know what I mean,
10 get -- leave the courtroom, excuse me, better phrasing. Once you leave
11 the courtroom --

12 MR. LEAVITT: Right.

13 THE COURT: -- in order to have the full 30 minutes. So, we
14 need to get that taken care of.

15 So, we will you 8:00 a.m. prompt. You need to have your
16 jury instructions and you need to have your respective, if you're signing,
17 you know, certain pattern instructions, without a pattern instruction for a
18 particular year, have those with you because I will be asking about those,
19 because you all modified ones, okay?

20 And you need to talk among yourselves because you really
21 have objected to some certain things like simple things like, you know,
22 the standard of the law. If you have a difference between legal cause
23 and proximate cause, work it out among yourselves tonight. There's
24 really, there's certain things like that.

25 Okay. The standard on the elements of medical malpractice,

1 okay? Preponderance of the evidence. These are things that they're
2 really can be worked out among counsel, folks. There -- okay?

3 MR. LEAVITT: Absolutely, Your Honor.

4 THE COURT: And as you know, since Defense counsel did
5 not follow the Court's rules and number things, the Court just put in the
6 lower -- I just did a -- looked like there was 18 on Defense side, so I just
7 numbered them in the order that was given to me. So, for cross-
8 reference, if you should have cross-references in your own minds before
9 you come in tomorrow morning, you should have already done this,
10 right, cross-reference is a D, whatever, is a P, whatever, so that we're not
11 spending a lot of time me asking you what parallels from a P, Plaintiff's
12 proposed instruction to this D instruction. So, we're looking at the two
13 instructions side by side and going at them immediately.

14 MR. JONES: Okay. Your Honor. Sorry, two quick, super,
15 super things. One, the instruction that we had that we put together as a
16 sanction, I don't remember it word for word, and I didn't take it down. Is
17 it possible for us to get a copy of --

18 THE COURT: The pre-instruction?

19 MR. JONES: Yes, Your Honor.

20 THE COURT: A pre-instruction, is that a Court's exhibit?
21 We'll have to double-check.

22 MR. JONES: I believe it is, yes.

23 And then, in addition, I just wanted to mention, this is just
24 possibly for Dr. Rives's testimony tomorrow. I mentioned it at the bench
25 a couple of days ago, but we have the videos from his trial in the Center

1 case, and depending on --

2 THE COURT: This is not appropriate to be doing this this --

3 MR. JONES: Okay. Got it.

4 THE COURT: -- at 5:15. It's not appropriate to -- if there's
5 something you want to discuss with Defense counsel, feel free with
6 Defense counsel. You cannot be bringing up an issue. You can
7 appreciate it, 5:15, to the Court that we require some response by
8 Defense counsel, right? That would not be fair after the 5:00 hour, as far
9 as --

10 MR. JONES: All I was doing is making people aware, Your
11 Honor.

12 THE COURT: As far as the pre-instruction, well, it's not
13 something the Court can do. The pre-instruction is, that's the ultimate
14 one that was proposed. The one that was read was --

15 UNIDENTIFIED SPEAKER: Here's the jury instructions.

16 THE COURT: Well, you all got the disk, you're going to have
17 to look at it at your disk and have to type it out from your disk, because
18 you have the disk from day that it was read.

19 UNIDENTIFIED SPEAKER: That's jury instructions, yes.

20 MR. JONES: Oh, okay, okay.

21 THE COURT: You're going to have to have it from that disk
22 because if you want that to be done in the --

23 MR. JONES: Okay. So, it was never attached as an exhibit?

24 THE CLERK: No.

25 MR. JONES: Okay. So, we'll find it on the day. We, for sure,

1 have it somewhere and we'll get it typed out.

2 THE COURT: You should have it from the disk that you
3 ordered, right, and you should be able to type it out, so if you want it
4 included, correct?

5 MR. JONES: Yes.

6 MR. LEAVITT: Yes, Your Honor.

7 THE COURT: I do appreciate it.

8 MR. LEAVITT: We have it.

9 THE COURT: And I'm sure Defense should have it as well
10 because you ordered a disk and you've got things typed out from your
11 own set. So, with that, we wish you all a very nice evening.

12 I'm telling Madam Court Reporter to go off the record. See
13 you at 8:00. Appreciate it. Thank you so very much.

14 [Proceedings adjourned at 5:18 p.m.]

15

16

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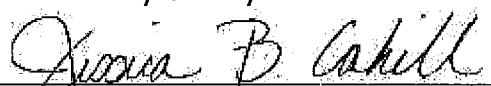
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22 ATTEST: I do hereby certify that I have truly and correctly transcribed the
23 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

24 

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

CLERK OF THE COURT
Alvin B. Hanson

DISTRICT COURT
CLARK COUNTY, NEVADA

CASE#: A-16-739464-C
DEPT. XXXI

BARRY RIVES, M.D.,
Defendant.

BEFORE THE HONORABLE JOANNA S. KISHNER
DISTRICT COURT JUDGE
THURSDAY, OCTOBER 31, 2019

APPEARANCES:

For the Plaintiff:

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

For the Defendant:

THOMAS J. DOYLE, ESQ.

RECORDED BY: SANDRA HARRELL, COURT RECORDER

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FOR THE PLAINTIFF

MARKED

RECEIVED

None

FOR THE DEFENDANT

MARKED

RECEIVED

None

1 Las Vegas, Nevada, Thursday, October 31, 2019

2

3 [Case called at 8:00 a.m.]

4 [Outside the presence of the Jury.]

5 THE COURT RECORDER: On the record.

6 THE COURT: Good morning. It's eight o'clock. We're ready
7 for everyone. Everyone should be here to start. Are you the only ones
8 doing jury instructions?

9 UNIDENTIFIED SPEAKER: Your Honor, Mr. Doyle and
10 Mr. Leavitt are outside. I'll have them come in.

11 THE COURT: Right. It's 8:00 a.m. We said we're starting
12 right at 8:00 a.m., so it is 8:00 a.m. I need to have everyone here, please.

13 Okay. We're on the record. It's 8:01. And I have one
14 counsel.

15 Ms. Newberry, are you taking care of this? You seem to be
16 the only counsel.

17 MS. CLARK NEWBERRY: Good morning, Your Honor.
18 Mr. Doyle is coming through the door. I'm here to print.

19 THE COURT: Okay. Fine.

20 Counsel, it's after the eight o'clock hour. Remember, we said
21 8:00 a.m., sharp, be ready to do it. So, let's go.

22 I need your appearances -- are you ready to go?

23 MR. LEAVITT: Yes, Your Honor. Jacob Leavitt on behalf of
24 Plaintiffs.

25 MR. DOYLE: Tom Doyle for the defendants.

1 THE COURT: Okay. I told you the first question I would be
2 asking you is how much time you all spent. You were directed
3 specifically last night to ensure that you all had spent time so that you
4 could have a cross-reference for each of your jury instructions and to
5 resolve as many of the jury instructions that you could between the two
6 of yourselves.

7 So, how much time did you spend last night, as specifically
8 directed by the Court?

9 Counsel for the plaintiff, how much time did you spend with
10 defense counsel last night?

11 MR. LEAVITT: I don't know. How much would you say? At
12 least 45 minutes.

13 THE COURT: Last night? Last night? I'm breaking it down.
14 Last night would be October 30th.

15 MR. LEAVITT: Yes, we --

16 THE COURT: How much time on October 30th?

17 MR. LEAVITT: Yes, we sent emails back and forth on the jury
18 instructions. We have most of them resolved and then today we -- this
19 morning we clarified a few words and many of them -- most of -- we
20 resolved quite a few, Your Honor.

21 THE COURT: Okay. So.

22 MR. DOYLE: We still have a couple, but --

23 THE COURT: Defense counsel, did you ever provide the
24 Court with a compliant provision of the jury instructions, consistent with
25 the Court's goldenrod, the Court has been telling you since about

1 October 8th.

2 MR. DOYLE: You mean that says D-1, D-2, et cetera?

3 THE COURT: Compliant with the Court's rules, as you've
4 been told and reminded numerous times. The Court still has never
5 received something compliant.

6 MR. DOYLE: Then the answer to your question is no.

7 THE COURT: Okay. Well, okay. So, here's what we're going
8 to -- I'm not sure why, but it's just -- okay. So, counsel --

9 MS. CLARK NEWBERRY: Your Honor, we did --

10 THE COURT: Counsel?

11 MS. CLARK NEWBERRY: I'm sorry.

12 We did prepare them if -- I wasn't aware that they hadn't
13 been provided to the Court. If we have a jump drive, I can make them
14 appear for the Court or I can print them.

15 THE COURT: No. No. I appreciate it, Ms. Clark Newberry,
16 but I've been telling Mr. Doyle the same since October 8th that those
17 were needed in the compliant form. It's been multiple times -- still don't
18 have it.

19 I even said as of yesterday, I was going to have to start
20 remembering, myself, to try and do some kind of cross-reference, which
21 is completely unfair for this Court to take all that additional extra time in
22 another non-compliance issue when there's already so many different
23 sanction issues and it's been reminded over and over and over again to
24 Mr. Doyle.

25 Whether he communicates it to you, I can appreciate that

1 may or may not have happened, but this Court has said it multiple times,
2 including yesterday; again, and there was no jury instructions even so
3 the Court could not go over jury instructions yesterday at all because
4 Defense counsel did not have any jury instructions.

5 So, we are where we're at. It's after the eight o'clock hour.
6 What the Court said it's going to do, so, hopefully, you all have a
7 cross-reference.

8 I'm just going straight to plaintiff's 1 and what we're going to
9 go is I'm going -- because Plaintiff's 1's were numbered, I'm going to say
10 Plaintiff's 1, whether it's resolved -- if it's not resolved, you're going to
11 tell me what the cross-reference -- defense counsel is going to tell me if
12 you have a cross-reference of it. If you don't have a cross-reference of it,
13 then we're going to hear the argument on it.

14 So, Plaintiff's 1 -- is Plaintiff's 1 agreed to, withdrawn, or --

15 MR. DOYLE: May I clarify something first, because there are
16 two sets -- I have two sets.

17 THE COURT: You can't have two sets. The Court only has
18 the set which was provided at the calendar call. That's the only set that
19 this Court has had. That's that the Court said it would be working off of.
20 As you know, the Court has spent a numerable number of hours on the
21 set.

22 The Court has never been provided any other set. There are
23 no two sets. The Court even clarified yesterday that it had Plaintiff's 1
24 through 15. It did not have defendant's with any numbers, so the Court,
25 then, had to number, itself, and did it number itself D-1 through 18 and

1 since I never even got a confirmation whether that was correct, the Court
2 just had to assume that it did its numbering, because I'm basing it on
3 defendant's proposed special jury instructions objected to by Plaintiff's
4 side that was provided on the 8th.

5 The Court said it then had to number itself and so that's what
6 the Court has. That's what the Court is working on. That's the only
7 copies this Court has and I'm sure no one is going to now, for the first
8 time, when there's 33 different jury instructions, somehow provide the
9 Court something different. So, the Court said what it was doing because
10 that's what we had at 5:00 about fourteen yesterday evening.

11 So, we're going to P-1 on the set that was provided on the
12 8th, which is the only set this Court has ever been provided, and I told
13 you what I was doing. I told you to make sure that you had a
14 cross-reference. I explained specifically so it was not duplicative. I
15 explained specifically. I even went over the ones about recording versus
16 because we have a court recorder, not a court reporter. So, that was in
17 your joint and I'm sure you fixed that one as well.

18 And I know I also went over the idea of legal versus
19 proximate cause. Went over that -- you had to ensure that you had the
20 correct citations because there was incorrect citations in different things
21 and there was jumbled different stuff.

22 So, I said we'd be going straight with the Plaintiff's because
23 that's the only one that was in any way compliant that I would have
24 some reference to do and that you all had to have a cross-reference
25 between the two of you all so that you could tell to the Court specifically.

1 This was all discussed yesterday after the five o'clock hour
2 while my poor team had to stay overtime because of the noncompliance
3 that had been provided. So, P-1 --

4 MR. LEAVITT: You're --

5 THE COURT: P-1, is that agreed upon? Withdrawn?

6 MR. LEAVITT: It is not agreed upon.

7 THE COURT: And is it withdrawn?

8 MR. LEAVITT: No.

9 THE COURT: Okay. So, defense counsel, what's your
10 cross-reference to P-1? Do you have a cross-reference?

11 MR. DOYLE: The instruction was --

12 THE COURT: No, not instruction. I need -- I told you to
13 number them because I told you I labeled them D --

14 MR. DOYLE: I have P-1, which is the purpose of the trial was
15 to ascertain the truth. The cite is to --

16 THE COURT: Counsel, please listen to what the Court is
17 reminding you what the Court said yesterday.

18 I said the Court numbered yours, defendant's, D-1 through 18
19 and that I needed the cross-reference, okay, because you all didn't
20 provide me a cross-reference. Most --

21 MR. DOYLE: I'm not sure what you mean by cross-reference.

22 THE COURT: I explained it again yesterday what I meant by
23 a cross-reference; for example, you all have the elements of what is a
24 negligence claim. You have different ones cited thereon.

25 Most people provide me -- and the reason why we do -- and I

1 don't want to take the time. The poor jury has waited hours and hours
2 and hours on a whole bunch of different things and you know that I have
3 a nine o'clock calendar this morning, and I'm squishing you in before my
4 nine o'clock hour calendar because you promised that this would get
5 done within an hour, printed, ready to go, and we're bringing
6 appropriate people.

7 Those were your representations to the officers of the Court,
8 RPC3.3(a). So, candor to the Court, I'm not going back there again.

9 So, I told you I numbered defendant's D-1 through 18 in the
10 order that you provided them. I told you all specifically that when we
11 went through plaintiff's, we needed to know which D-1 -- which number
12 in your Ds, because I had to number them myself because you did not
13 comply with the Rules. That what was your cross-reference, if you had a
14 cross-reference, so that we did not have to waste time trying to fumble
15 through on which page number it is, which language it was so that we
16 could get through these very quickly and very easily.

17 I also told the parties to make your own cross-reference so
18 this Court wasn't having to guess, back and forth, which one defendant
19 meant as a counterproposal to one of plaintiff's and we didn't waste time
20 doing that, given that there is 33 jury instructions, an hour, and given
21 what is taken with all the other issues.

22 So, P-1, is there a response by defendants as a proposed
23 alternative, yes or no; if not -- if there is, please give me the number on
24 D.

25 MR. DOYLE: There is no proposed alternative, but there is an

1 objection.

2 THE COURT: I did not see any objection anywhere cited in
3 anyplace.

4 Where was your objection cited?

5 MR. DOYLE: It's --

6 THE COURT: In any -- did you file any objections to the jury
7 instructions?

8 MR. DOYLE: No, I didn't.

9 THE COURT: Okay. So, the answer is no.

10 Okay. So, the purpose of the trial is to ascertain the truth;
11 that's straight out of the Nevada Jury Instructions.

12 What's your objection, real quickly? Let's walk through it.

13 MR. DOYLE: The -- looking at the 50.115, which is where this
14 come from, which is the mode and order of interrogation and protection.
15 Subsection 1(a) says to make the interrogation and presentation effective
16 for the ascertainment of the truth.

17 So, it's an incomplete statement. It's really an argument.

18 THE COURT: So, did you propose an alternative?

19 MR. DOYLE: No, I --

20 THE COURT: Counsel, this is a pattern jury instruction and
21 you did not propose an alternative.

22 What is your objection to it?

23 MR. DOYLE: It exists in the --

24 THE COURT: Counsel, I just need to know what's your
25 evidentiary objection. You didn't file anything, and the Court has no

1 basis.

2 MR. DOYLE: It's not a correct statement to the law. It's a
3 partial statement of the law and it's not --

4 THE COURT: So, do you have an alternative?

5 MR. DOYLE: -- and it's not in the 2018 set of jury
6 instructions which supersede the NEV. J.I. --1 -- J.I. 1. [sic].

7 THE COURT: Okay. And what is your legal basis for saying
8 that the 2018 supersede?

9 MR. DOYLE: Because it is -- it was published after the
10 Nevada Jury Instructions in the binder.

11 THE COURT: I asked you what's your legal basis for saying
12 that. Jury instructions -- there's no legal -- counsel, are you saying that
13 you can't use the 1986 and you can't use the 2011 and if so, please cite
14 me anything that says you can't.

15 MR. DOYLE: I can't cite you to anything.

16 THE COURT: Because people use all of them all the time;
17 they're different alternatives.

18 MR. DOYLE: Well, the statement is a misstatement of 50.115.

19 THE COURT: So, did you have any alternative?

20 MR. DOYLE: I don't have an alternative, no.

21 THE COURT: So, you don't want anything; is that your
22 response? I just need to know your response so I can move on. We're
23 wasting nine minutes on one instruction. I've got 33 -- 32 more to go.

24 MR. DOYLE: I object to it as for the reasons stated and I'm
25 not offering an alternative to it.

1 THE COURT: Okay. Counsel for the plaintiff, your response,
2 please.

3 MR. LEAVITT: Your Honor, it's a pattern instruction.

4 THE COURT: Anything better than it's a pattern instruction
5 from 2011?

6 MR. LEAVITT: Your Honor, it's an accurate statement of the
7 law. The purpose of trial is to ascertain the truth.

8 THE COURT: Why is it necessary in this case that we need
9 this instruction? What does it add to the case?

10 MR. LEAVITT: The goes to the fact-finder to let them know
11 that's the purpose here, is to weigh the evidence and find the truth of the
12 evidence. It goes -- it's intertwined throughout all the jury instructions,
13 what their purpose is.

14 THE COURT: Okay. Well, if that's what you have, there's
15 other instructions that tell what the purpose of the jury is and so the
16 Court doesn't see, based on the reasons presented -- the Court doesn't
17 see that in this particular case, based on what's been presented to this
18 Court, that there's really a basis to have this one and so, in that regard,
19 since it is objected to and it's not being fully and complete, the Court is
20 not going to give it.

21 Okay. Moving to Plaintiff's 2. Plaintiff's 2, is this agreed
22 upon? Is it withdrawn, modified, or need to be argued?

23 MR. LEAVITT: Withdrawn.

24 THE COURT: Pardon? Withdrawn?

25 MR. LEAVITT: Withdrawn.

1 THE COURT: Plaintiff's 2 is withdrawn.

2 Okay. Moving to Plaintiff's 3.

3 Plaintiff's 3?

4 MR. LEAVITT: Withdrawn.

5 THE COURT: Okay. Plaintiff's 4?

6 MR. LEAVITT: We have agreed upon a modification of this.

7 THE COURT: Okay. Is that in Defendant's packet or is it
8 printed so the Court has the modified one?

9 MR. LEAVITT: The Court does not have the modified one.

10 THE COURT: So, how would the Court have it when you
11 have to read jury instructions today?

12 MS. CLARK NEWBERRY: I have a copy of it in front of me,
13 Your Honor. I can make the modification and print them.

14 MR. LEAVITT: Correct.

15 THE COURT: If you were doing modifications, they were
16 supposed to be provided to the Court, right?

17 I appreciate, Ms. Clark Newberry, you're probably just going
18 to deal with this, but I wanted specific instructions, so we didn't have this
19 issue. That's why we were trying to go over instructions yesterday so
20 people could do this overnight and not have this issue because you can
21 appreciate we can't keep the jury waiting.

22 Okay. So, is P-4 is withdrawn; is that correct? Or is it
23 modified? What's the --

24 MR. LEAVITT: It's modified. We're taking out loss of
25 earnings.

1 MR. DOYLE: And I'm objecting to the second paragraph.

2 THE COURT: Wait. Wait.

3 MR. LEAVITT: All right.

4 THE COURT: Excuse me.

5 Is it modified? Is it agreed upon? Or was there an objection,
6 counsel?

7 MR. DOYLE: There was an agreed-upon modification to
8 Paragraph 1.

9 I object to Paragraph 2 and --

10 THE COURT: Okay. That's not modified; that's objected to.

11 MR. LEAVITT: No, apparently it's not, Your Honor. So, he --

12 THE COURT: Okay. Well, wait a second. I thought there was
13 a printout ready to give to the Court.

14 MR. DOYLE: My understanding is the Court was going to
15 take up any objections that either side had to the --

16 THE COURT: The Court said clearly: Agreed upon,
17 withdrawn, modified, or I have to deal with objections, all right --

18 MR. DOYLE: You have to deal with the objection.

19 THE COURT: -- and if there's an alternative proposal.
20 So, is there -- what's the defense version of this P-4?

21 MR. DOYLE: The defense version would be to delete the
22 second paragraph.

23 THE COURT: No, no, no.

24 Do you have anything in your grouping that is in the
25 alternative proposal?

1 MR. DOYLE: I did not offer this instruction at all.

2 THE COURT: Did not offer the insurance instruction, okay.

3 MR. DOYLE: At all.

4 THE COURT: Okay. So, here's what the Court is going do.

5 The Court is, based on the modification agreed upon by the parties, the
6 Court is going to allow that.

7 There was no alternative instruction or proposed by
8 defendants. Defendants were fully aware that this issue was what this
9 issue is.

10 *Proctor v Castelletto* -- clear case law. The Court is not going
11 to reiterate its two decisions on that. So, whatever the agreed-upon
12 modification is -- and the challenge here is what was the agreed-upon
13 modification?

14 MR. LEAVITT: To remove loss of earnings.

15 THE COURT: Medical bills -- so it would be the medical bills
16 or other damages?

17 MR. LEAVITT: Correct.

18 THE COURT: Okay. So, then, that is -- the rest of it is an
19 appropriate statement of the law -- *Proctor-Castelletto, McCrosky* -- the
20 rest of the instruction will be given because the Court was told it was
21 agreed upon, as modified. And it was stated that it was going to be
22 printed for the Court, so the Court has to take that representation and the
23 Court would find independently it is a correct statement of the
24 law -- *McCrosky, Proctor v Castelletto* -- see Court's rulings of several
25 different days. You all did your 7.27 briefs; you know this is a correct

1 statement of the law.

2 So, it's going to be given --

3 MR. DOYLE: As long as my objection to Paragraph 2 --

4 THE COURT: -- as modified --

5 Counsel, please do not, when I'm in the middle of talking,
6 interrupt me again, because we need to have a clear record. I really
7 would appreciate it. Thank you so very much.

8 Okay. So, it's going to be given, as modified, by the
9 agreement of the parties. We're moving on --

10 MR. DOYLE: No, Your Honor. It was not modified. I
11 objected to the --

12 THE COURT: That's how it's going to be given.

13 MR. DOYLE: I objected to the second paragraph, but I
14 understand the Court --

15 THE COURT: When did you object to the second paragraph?
16 Is it anywhere in writing?

17 MR. DOYLE: No. I stated my objection this morning.

18 THE COURT: To whom?

19 MR. DOYLE: To you and in an email to plaintiff's counsel
20 before trial started, going through all of their instructions.

21 THE COURT: What is the objection? Because the Court is
22 not aware of any objection that's ever been presented to this Court until
23 about what you're about to say right now.

24 MR. DOYLE: My objection is the second paragraph is
25 prejudicial because it simply highlights the fact that my client has

1 insurance and it's not necessary to tell the jury that.

2 THE COURT: Okay. And did you propose any modification
3 to that?

4 MR. DOYLE: No, I didn't propose the instruction at all, as I
5 said.

6 THE COURT: Okay. Do you propose today any modification
7 that would take care of any issues that you have?

8 MR. DOYLE: Yes, deleting the second paragraph.

9 THE COURT: Okay. Counsel for plaintiff, do you agree to
10 deleting the second paragraph?

11 MR. LEAVITT: No, Your Honor.

12 This was decided before regarding the word insurance
13 coming out anyway, and it was briefed -- I don't want to get into it. This
14 Court was here, present.

15 THE COURT: Since there's been absolutely no objection
16 raised in any manner that's been presented to this Court in any filing
17 whatsoever, anything in any way since October 8th, 2000, either before
18 the calendar call, at the time of the calendar call, any filings whatsoever
19 with regards to this jury instruction, there is no alternative proposed
20 previously, the Court has asked if there's any additional modification or
21 proposal and there's nothing provided by the defendants.

22 The defendants did not propose any alternative, either in
23 writing or other jury instructions or given additional time to propose
24 something today or in the discussions last night and that there was one
25 modification that plaintiff did agree to, the Court is going -- and this is

1 also a jury instruction that is set forth in the pattern jury instruction.

2 It is consistent with *Proctor v Castelletto*. It's consistent with
3 *McCrosky*, and there's no other requested modification, other than the
4 deletion of the second paragraph. The deletion of the second paragraph,
5 the Court would find would be inappropriate because a deletion of the
6 second paragraph is not something that would make it clear to the jury
7 in light of in this case we already have defendant specifically stating
8 insurance and we also had a co-pay issue; although, the co-pay issue
9 from plaintiff was pre-2015, but we already had this issue.

10 So, in this case, it would be very appropriate to ensure that
11 this comes in because of that pure inappropriate conduct by
12 defense -- defendant and defense counsel in eliciting that testimony and
13 defendant in stating that testimony. So -- as well as what's happened in
14 this case.

15 P-4, as the agreed-upon modification, will be given,
16 understanding the defendant has, today, raised an objection to the Court
17 about the second paragraph, but has not offered any alternative.

18 P-5?

19 MR. LEAVITT: Withdrawn. We're using D-2.

20 I believe we've numbered them the same, the D-2. I just took
21 what they gave us.

22 THE COURT: Okay. D-2 -- what the Court numbered is I just
23 did them in order.

24 Plaintiffs are seeking damages upon a claim of medical
25 malpractice. Plaintiffs had the burden of proving by a preponderance of

1 the evidence, all the facts necessary to establish colon. That's the D-2 I
2 have. Is that the D-2 you --

3 MR. LEAVITT: That's the D-2 I have, as well, Your Honor.

4 THE COURT: Okay.

5 MR. LEAVITT: So, P-5 is withdrawn and D-2 is in.

6 THE COURT: Is that an agreement by defense counsel --

7 MR. DOYLE: Yes.

8 THE COURT: -- you're using D-2 instead of P-5; is that
9 correct?

10 MR. DOYLE: I'm sorry, but I --

11 THE COURT: Yes or no? We have to move these forward.

12 MR. DOYLE: I understand.

13 THE COURT: It's your own instruction -- D-2 -- your own
14 instruction, the one I just read.

15 MR. DOYLE: Right. Yes.

16 THE COURT: Okay. So, P-5 is withdrawn, using D-2 instead.
17 Okay. And somebody is taking note of this so we're using,
18 instead of P-5.

19 Okay. Moving to --

20 MR. DOYLE: And I'm sorry, Your Honor, but would you read
21 the D instruction one more time.

22 THE COURT: Your D instruction is the D instruction you
23 submitted to this Court on October 8th at the calendar call.

24 MR. DOYLE: I understand.

25 Would the Court mind --

1 THE COURT: It starts with the words; Plaintiffs are seeking
2 damages based on a claim of medical malpractice.

3 Is that the same one you have? It's your D instruction; it's
4 the one you presented to the Court.

5 MR. DOYLE: Yes.

6 THE COURT: Okay. Can we move on?

7 P-6, is it agreed upon? Withdrawn? Or is there an
8 alternative?

9 MR. LEAVITT: We both agreed upon.

10 THE COURT: P-6 is agreed upon; is that correct, defense
11 counsel?

12 MR. DOYLE: Yes.

13 THE COURT: Okay. So, P-6 is agreed upon.

14 Okay. P-7? Are you using P-7 or are you using an
15 alternative?

16 MR. LEAVITT: We're withdrawing; we're using D-3.

17 THE COURT: Are you using D-3, as-is, because you have a
18 standard of preponderance of the evidence in D-3, which is duplicative in
19 other places in other instructions.

20 MR. LEAVITT: You know what? I must have numbered D-3
21 different, then.

22 MR. DOYLE: No, it's --

23 THE COURT: D-3, what was provided to this Court -- please
24 use the ones actually provided to this Court, because that's the only ones
25 that this Court has the benefit of having, correct?

1 MR. DOYLE: I will withdraw the part of D-3 that begins with,
2 A preponderance of the evidence -- that paragraph, and the next
3 paragraph, leaving the elements only and changing --

4 MR. LEAVITT: That's not the D-3 that she has.

5 THE COURT: Okay. So, it's the one that you all provided at
6 the calendar call. You would know what you provided at the calendar
7 call, right?

8 MR. DOYLE: What does your D-3 say?

9 THE COURT: The one you provided at the calendar call, it's
10 got five elements and then it has a preponderance of the evidence.

11 MR. LEAVITT: Oh, she's got it.

12 MR. DOYLE: This is D-3.

13 THE COURT: I numbered them exactly as you provided them
14 the day of the calendar call because you did not comply with the Court's
15 instructions, which is why I told you I then waited all the way until
16 yesterday for you all to provide me a compliant set.

17 Finally, when you didn't do it -- it was after the five o'clock
18 hour -- the Court could not wait any longer because, obviously, you can't
19 keep [indiscernible] of a jury. So, the Court then said it has to number
20 these in the order that they were provided at the calendar call, 1 through
21 18, which is how they were provided in that order.

22 I didn't do anything special. It was a stapled copy. I put 1
23 through 18 in the exact order.

24 MR. LEAVITT: Okay. So, we're using D-3, which is -- if I may,
25 Your Honor -- starts at 1, 2, 3, 4, 5.

1 Is that the one that you have? Because I --

2 THE COURT: Please find -- do you not have what you
3 submitted to the Court?

4 MR. DOYLE: I have it.

5 THE COURT: Okay.

6 MR. LEAVITT: Okay. And the modification on D-3 that we
7 both agree to is to take out the preponderance paragraph and to change
8 actual cause to proximate.

9 MR. DOYLE: No, no, no. We have proximate in 3 and then 4
10 has actual.

11 THE COURT: Okay. Let's go back.

12 There's -- are lines 11 through 15 being deleted?

13 MR. DOYLE: Yes.

14 MR. LEAVITT: Okay. Those are out.

15 THE COURT: Okay. By agreement of the parties, D-3, lines
16 11 through 15, the first paragraph. So, that is the preponderance of the
17 evidence paragraph and the paragraph that starts with, In determining
18 whether parties met this burden ...

19 Those paragraphs are being are deleted; is that correct?

20 MR. LEAVITT: Correct, Your Honor.

21 MR. DOYLE: Correct, because we have it elsewhere.

22 THE COURT: The five -- that's what the Court was asking,
23 because I saw it elsewhere multiple times.

24 Okay. The five elements are staying in, is that correct, from
25 D-3?

1 MR. LEAVITT: Correct.

2 THE COURT: And that's being used instead of P-7; is that
3 correct?

4 MR. LEAVITT: Correct.

5 THE COURT: Okay. Did you say that there was a
6 modification in subparagraph 4 of the four elements that the word actual
7 is going to be paralleling the word proximate, which is in subpart 3?

8 MR. DOYLE: No, the case says that number four should say
9 actual cause of injury.

10 THE COURT: So, you're using proximate in three and you're
11 using actual in four; you're using two different terms --

12 MR. LEAVITT: That's --

13 THE COURT: -- in two different subprongs of the same
14 instruction?

15 MR. DOYLE: That's what the --

16 THE COURT: Is that the intention of the parties? I'm just
17 asking --

18 MR. DOYLE: Yes.

19 THE COURT: -- is that the intention of the parties?

20 MR. DOYLE: Yes.

21 THE COURT: I heard two different things.

22 MR. LEAVITT: No, Your Honor.

23 It's --

24 THE COURT: Okay. I hear a yes and I hear a no; that's why
25 I'm asking.

1 MR. LEAVITT: It's my objection.

2 Do you --

3 THE COURT: I don't know if there's an objection.

4 MR. LEAVITT: Yes.

5 THE COURT: I'm trying to -- I asked about P-7. You told me
6 P-7 was withdrawn and you're going to use D-3 instead.

7 And then the Court asked the question: Was it the intention
8 to also include the preponderance?

9 And then you all went frolic or elsewhere and you started
10 going back to not even knowing which pages because these weren't
11 numbered.

12 MR. DOYLE: The five elements in D-3 come from the pattern
13 instruction 9.2, which comes from *Prabhu* and *Perez*.

14 THE COURT: The simple question is: Is there an agreement
15 or does this Court need to make a ruling?

16 Plaintiff's counsel, since I said I was starting with you and
17 going through yours because you're were properly numbered --

18 MR. LEAVITT: Right.

19 THE COURT: -- did you agree with the five elements as
20 currently stated in D-3 or was there some part of that that the Court
21 needs to rule on?

22 MR. LEAVITT: Line 4, actual -- it is in the pattern jury
23 instruction, but it's confusing. It should be -- from plaintiff's point of
24 view, it should be proximate.

25 You're giving two -- it's confusing -- you're giving two

1 standards. Proximate is the standard. That's my objection because it's --

2 THE COURT: Show me the 2018.

3 MR. LEAVITT: I have it, Your Honor. 9.2 -- may I approach?

4 THE COURT: Of course.

5 MR. LEAVITT: 9.2 starts at the bottom.

6 MR. DOYLE: I have the book if it's easier to look at.

7 THE COURT: She's fine. I don't care about the book.

8 MR. LEAVITT: It goes that way -- sorry -- this is just the cover
9 sheet.

10 THE COURT: The Court is going to have a different question.

11 And you all have modified 5 from 9.2; was that intended?

12 Because you all said you're using straight from 9.2.

13 MR. DOYLE: Well, we deleted the affirmative defenses
14 because --

15 THE COURT: No, your subprong 5 is different. That's why
16 the Court is asking the question.

17 Subpart 5 in 9.2 reads, The Plaintiffs suffered as a result of
18 the provider of health care's conduct.

19 You all have put, The plaintiffs -- which is another question
20 the Court was going to ask -- because is the medical malpractice cause of
21 action Patrick Farris' cause of action in this case?

22 So, you have a plural. You have a singular in certain places
23 as to the medical malpractice cause of action and you have a plural in
24 Subpart 5, Is Patrick Farris' claim medical malpractice?

25 That's why the Court is asking the question if it was the

1 parties' intention in subparagraph 5 because you told me you used 9.2
2 straight out of *Prabhu*, which this is not straight out of *Prabhu* 5 and it's
3 not 9.2 and you've used the plural on plaintiffs, which is not consistent
4 with your complaint.

5 If this is the parties' intention to give this instruction, I need it
6 specifically stated on the record that this is the parties' joint,
7 agreed-upon agreement.

8 MR. LEAVITT: No, Your Honor.

9 Again, Line 4 -- and as the Court pointed out -- is you're
10 going to get to Line 5 -- I thought it was a typo -- that needs to be taken
11 off, that S.

12 THE COURT: I don't know what the "that" is.

13 MR. LEAVITT: Sorry, Your Honor -- the S; it should be
14 singular because Patrick obviously wasn't in the surgery.

15 THE COURT: Okay. So, let's go to number four, subprong 4.
16 Subprong 4, since you all have told me it's your agreed-upon statement
17 was used or not, I'm listening to the objection.

18 When you have -- are you, otherwise, defining the terms
19 proximate and actual elsewhere in your instructions?

20 MR. LEAVITT: Proximate is defined; actual is not.

21 THE COURT: Are you using that the words are used
22 interchangeably or how are you defining actual elsewhere?

23 MR. LEAVITT: Actual isn't -- that's why I don't want it used.

24 THE COURT: Okay. Counsel for defense, why, if you're not
25 defining actual elsewhere, right, and you're treating those terms

1 normally when you use *Prabh*, and you use these is because actual and
2 proximate usually are used with a slash or something to indicate that
3 they can be used interchangeably.

4 And if your case, you are not defining actual or using it in the
5 defined term, similar to being proximate as an interchangeable term,
6 don't you think that would cause confusion to the jury to have one prong
7 saying actual and one prong saying proximate?

8 MR. DOYLE: Then we can delete Line 4.

9 THE COURT: I would delete it, the whole line?

10 I'm just saying the objection raised by plaintiff was to using
11 the term actual in Line 4 and using the term proximate in Line 3 --

12 MR. DOYLE: Right.

13 THE COURT: -- because it would be confusing using two
14 different terms.

15 MR. DOYLE: Right.

16 THE COURT: The Court was asking, in order to get a better
17 understanding if that could potentially be confusing to the jury, is if you
18 had defined each of those terms. Because if you've defined each of
19 those terms, then it may not be confusing, because sometimes parties
20 use a term -- use a definition that say proximate/actual or proximate or
21 actual or some definition that indicates that the terms proximate and
22 actual can be used interchangeably to mean same or substantially
23 similar thing.

24 MR. DOYLE: And with what --

25 THE COURT: And I'm asking in this case whether you have

1 done so. Plaintiff's counsel has told me that you have not; that you only
2 defined proximate; you have not defined actual.

3 MR. DOYLE: That is true.

4 THE COURT: So, I'm asking you, defense counsel, whether
5 that was, A, accurate?

6 MR. DOYLE: That is accurate --

7 THE COURT: Okay.

8 MR. DOYLE: -- because there is no pattern instruction
9 defining actual when putting this together.

10 THE COURT: Okay. So, in light of the fact that you're not
11 defining actual, the Court's second question was the Court could see
12 plaintiff's position that that could be confusing to a jury if you defined
13 one term, had not defined the other term, but, yet, had used two distinct
14 terms to give a similar-type concept and have not put a slash an or, or
15 something to indicate that those terms are similar, the same, or
16 something to that indication.

17 I'm asking if the defense would like to respond to the concern
18 raised by plaintiff?

19 MR. DOYLE: Then why don't we cross out number four and
20 change number three to read, The defendant, Dr. Barry Rives, was the
21 proximate/actual cause of injury, based upon what I'm hearing.

22 THE COURT: The Court -- this is just a question, okay.

23 MR. DOYLE: Are you okay with that?

24 MR. LEAVITT: No, because I don't want a jury instruction
25 that says proximate/actual.

1 MR. DOYLE: Well then, we'll just -- why don't we just take
2 out the fourth line?

3 MR. LEAVITT: Because that's a separate element.

4 MR. DOYLE: I'm not sure what the objection is anymore.

5 THE COURT: Is the objection that you want to define the
6 term actual or because --

7 MR. LEAVITT: No, I just want to replace it with proximate.
8 We have a joint, agreed-upon with proximate --

9 THE COURT: But, counsel, you do realize, then, your Prong 3
10 and your Prong 4 will say exactly the same thing.

11 MR. LEAVITT: That's fair enough, Your Honor.

12 Yeah. Hold on --

13 THE COURT: So, that's why the Court was trying to have an
14 understanding of what your objection is, what your intention is, et
15 cetera.

16 MR. LEAVITT: Yeah.

17 THE COURT: Sometimes those --

18 MR. LEAVITT: I'll agree to --

19 THE COURT: Sometimes proximates or legal are used
20 interchangeably. Sometimes people want to define actual, sometimes
21 people want different things.

22 These are separate prongs, right? They're separate prongs
23 because it's both proximate and actual, right? Okay. But sometimes
24 people want it differently.

25 The Court has no position on what you all want. The Court is

1 just trying to understand what you all want and that is --

2 MR. DOYLE: If plaintiff is okay with it, I'm fine with striking
3 Line 4, renumbering Line 5 as 4.

4 MR. LEAVITT: That's fine, Your Honor, as long as -- and take
5 out the S --

6 MR. DOYLE: Okay.

7 MR. LEAVITT: -- on Plaintiffs.

8 THE COURT: Sir, please set forth what your stipulated
9 agreement is --

10 MR. DOYLE: Okay.

11 THE COURT: -- one of the two of you. And then other one, if
12 you're agreeing to it, say yes or say no if you're not agreeing to it, so it's
13 clear, please.

14 MR. DOYLE: How about if I do it?

15 MR. LEAVITT: You're going to -- all right.

16 MR. DOYLE: We've agreed to strike the number 4 and the
17 words after that on that same line. We have agreed to change number 5
18 to number 4 and in that line make Plaintiff singular.

19 MR. LEAVITT: Agreed by Plaintiffs.

20 THE COURT: Okay. So the Court has no position. I'm just
21 asking. Okay. Okay. And is it also still you all's agreement that lines 10
22 through 15, preponderance of the evidence, two paragraphs, was also
23 still deleted?

24 MR. DOYLE: Correct, because that's covered elsewhere.

25 MR. LEAVITT: Correct, Your Honor.

1 THE COURT: Okay. Is that clear with everyone who's taking
2 care of whatever you may be taking care of?

3 Okay. Moving on. So I understood P7 was withdrawn in
4 light of the stipulated agreed upon D3. Is that correct then?

5 MR. LEAVITT: That is correct, Your Honor.

6 THE COURT: And if it's not correct, you need to let me know.
7 I'm asking questions.

8 MR. LEAVITT: No, that's correct.

9 THE COURT: Okay. The court is only asking questions.
10 Okay. Now we get to P8. P8.

11 MR. LEAVITT: Withdrawn. We're using D4. I want to make
12 sure that we all have the -- counsel has the same D4. I have D4 as
13 approximate cause of injury, damage, loss.

14 MR. DOYLE: Correct.

15 THE COURT: Okay. So he's using D4. Okay. Is that the
16 agreement of Defense counsel as well?

17 MR. DOYLE: Yes.

18 THE COURT: Okay. So we're moving to P9. P9. This is in
19 this case, you've heard medical experts.

20 MR. LEAVITT: Yes, Your Honor. There is an objection to this
21 one by Defense.

22 THE COURT: Okay. Defense --

23 MR. LEAVITT: It's not agreed upon. I'm sorry.

24 THE COURT: Defense, do you have an alternative instruction
25 to P9 or just an objection?

1 MR. DOYLE: I have an alternative, which is D1.

2 THE COURT: D1. Go to D1, please. Okay. D1 does not take
3 into account the fact that, generally -- okay. On what basis is the first
4 paragraph of D1 from any source, only from the doctors? Is that a
5 modification?

6 MR. DOYLE: It's a modification, because, according to the
7 statute, the standard of care can come from doctors. It can come from
8 learned treatises that have been admitted into evidence. Or it can come
9 from rules and regulations of hospitals. So we only have human being
10 experts in this case. So the references to -- find it here. References to --
11 well, actually, I'm looking at the pattern instruction 3.4, and I don't see
12 any modification other than adding -- putting Dr. Rives' name in there.

13 The pattern instruction reads: You must determine the
14 standard professional learning skill and care required of the Defendant
15 only from the opinions of the -- and then in brackets it says accountants,
16 attorneys, doctors, et cetera, end bracket, including that of the
17 Defendant, who have testified as expert witnesses to such standard.

18 So the only modification to that is just by putting in Dr. Rives'
19 name after the word Defendant on the first line of the pattern.

20 THE COURT: Counsel for Plaintiff, do you agree with that
21 straight out of the pattern instruction for Dr Rives? Are you saying --
22 counsel, are you saying all three paragraphs are straight out of pattern?
23 I don't --

24 MR. DOYLE: That's my reading of it.

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

1 MR. LEAVITT: I do not agree with it. The portion that
2 Plaintiff disagrees with is because Dr. Rives was objected to at his
3 deposition by Mr. Couchot, that Dr. Rives could not testify to the
4 standard of care. So my objection is including that of Defendant,
5 opinions of the doctors, including that of Defendant, who testified as an
6 expert witness. The Defendant did not testify as an expert witness. And
7 he was -- if he was intending to provide those, he would have had to give
8 a report and everything else just like any other expert.

9 THE COURT: So is your objection only to the words
10 including that of the Defendant?

11 MR. LEAVITT: That's it. If we can remove that, I would be
12 fine with their instruction.

13 THE COURT: Defense counsel, would you agree to the
14 modification requested by Plaintiff?

15 MR. DOYLE: No.

16 THE COURT: You -- do you concur that the objection was
17 raised by your partner, Mr. Couchot, at Dr. Rives' deposition?

18 MR. DOYLE: The more accurate picture would be if we're
19 referring to the trial brief that was submitted a day or two ago, where
20 there were quotations taken from Dr. Rives' deposition, where there was
21 a question and then an objection by Mr. Couchot, and then four ellipses
22 for each of his answers for that series of questions, the Court would find
23 by looking at the deposition transcript itself that despite the objections
24 and comments by Mr. Couchot, that Dr. Rives, in fact, didn't answer each
25 and every one of those questions at his deposition. In addition, he

1 answered the question and stated in his deposition that his care was
2 within the standard of care. And here at trial, on cross-examination, he
3 was asked, and he stated his care within the standard of care. So based
4 upon all of those circumstances, D1, as presently phrased, would be the
5 appropriate instruction.

6 THE COURT: Okay. The Court doesn't find, particularly
7 based on the case, that this --

8 Bless you.

9 THE COURT: -- this specific case and what has happened
10 thus far, that it would be appropriate to give the modification. The Court
11 finds more appropriate is to give a standard instruction, because that
12 would not be confusing to the jury. It does not put undue weight on any
13 particular witness versus any other witness. None of the other medical
14 providers are -- they're all doctors. It puts undo on one doctor versus
15 any other doctor. And it, in no way, by deleting the words "including
16 that of the Defendant", it doesn't, in any way, give any prejudice or harm
17 to Defendant. It puts him in the same category as any other doctor.

18 The Court takes no -- and so, therefore, it is appropriate
19 within the pattern instruction, which takes everyone into account. It does
20 not put any heightened credibility on the Defendant versus any of the
21 other medical professionals. And so, it would be more appropriate to
22 give it as the pattern instruction.

23 So in light of the fact the Plaintiff is fine withdrawing their P9
24 and using D1 and the modified form, deleting "including that of
25 Defendant", the Court would find that that is the appropriate for all the

1 reasons stated. So using D1, as modified, deleting the words "including
2 that of the Defendant", will be deleted. Okay.

3 MR. LEAVITT: Okay.

4 THE COURT: And that will be used instead of P9. Okay.

5 Moving on to P10.

6 [Pause]

7 THE COURT: Okay. We are going to P10. P10 is definition of
8 medical malpractice.

9 MR. DOYLE: The Court skipped P5. Oh, I'm sorry. I'm --

10 THE COURT: No, the Court didn't skip P5.

11 MR. DOYLE: -- looking at something --

12 THE COURT: The Court did not skip P5. The Court is on P10.

13 MR. DOYLE: Okay.

14 THE COURT: P5 was withdrawn --

15 MR. DOYLE: I'm --

16 THE COURT: -- and you were using D2. The Court is on P10.

17 MR. DOYLE: Okay.

18 [Court and clerk confer]

19 THE COURT: Okay. P10.

20 MR. DOYLE: We have P10 and D2, and we agreed to go with

21 D2.

22 MR. LEAVITT: D2.

23 MR. DOYLE: This one, just because it has the [indiscernible].

24 THE COURT: P10 is the definition of medical malpractice.

25 MR. DOYLE: Right.

1 THE COURT: capsule counsel for Plaintiff. P10 is medical
2 malpractice means the failure of physician. That's the one -- are you
3 using D2 instead of P2.

4 MR. DOYLE: No, no. Well, Your Honor, I have -- the P10 that
5 I have from before trial says the Plaintiffs seek to establish --

6 THE COURT: No. The Court -- no. The Court is using
7 October 8th, what was provided to the Court. What's provided to the
8 Court, page 12 of 17, P10. I just said medical malpractice means the
9 failure of a physician rendering services. That's with this court has.
10 That's what this court is utilizing. That's what was provided on the -- at
11 the calendar calls. Only documents ever provided to this court.

12 MR. LEAVITT: Yeah.

13 [Counsel confer]

14 MR. LEAVITT: So okay.

15 MR. DOYLE: Go ahead.

16 MR. LEAVITT: So I will state it, and he'll say -- Mr. Doyle
17 can --

18 THE COURT: Sure.

19 MR. LEAVITT: -- say if he agrees. What we have done is
20 we've taken P10 and D6 --

21 THE COURT: D6. Okay. Give me one second. Go ahead.

22 MR. LEAVITT: P10 will -- what we've removed is on line 4, is
23 reasonable, just the word. And then we're going to use D6. We're
24 putting P10 as the first paragraph. D6 will be the second.

25 THE COURT: So please read what you understand to be

1 the --

2 MR. LEAVITT: Yes.

3 THE COURT: -- agreed-upon one, and then we'll have to see
4 if he agrees or disagrees, please.

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

13 MR. DOYLE: Correct.

14 MR. LEAVITT: Okay.

15 THE COURT: Okay. So you're combining D6 to the end of
16 P10, but you're deleting the word reasonable, which was originally in
17 P10, correct?

18 MR. LEAVITT: Correct.

19 MR. DOYLE: Correct.

20 MR. LEAVITT: Correct.

21 THE COURT: Okay.

22 THE CLERK: Got it.

23 THE COURT: Moving on. P11.

24 MR. LEAVITT: It's objected to.

25 THE COURT: Okay. Is there an alternative to P11?

1 MR. DOYLE: No. It's a res ipsa instruction, which I --

2 THE COURT: Okay.

3 MR. DOYLE: -- don't believe is applicable in this case. So I
4 did not offer an alternative.

5 THE COURT: Okay. Counsel for Plaintiff, what would be
6 your basis of -- this is the res ipsa instruction.

7 MR. LEAVITT: Well, based on the testimony that's been
8 given in this case, the use of a ligature, I find that the subsection B, an
9 untended burn caused by heat radiation was suffered medical care.
10 Plaintiffs are willing to remove A and C. I gave it in its unadulterated
11 form, because I wasn't sure how the Court would play out -- or the trial
12 would play out.

13 THE COURT: Okay. Let me hear the quick response by
14 Defense counsel.

15 MR. DOYLE: N.R.S. 41A.100(3) says (1) does not apply if
16 Plaintiff submits an affidavit per 48A.071, which they did, or otherwise
17 designates an expert to establish the provider deviated from the
18 standard of care, which they did, Dr. Horowitz. So, therefore, per the
19 law, the instruction is not applicable.

20 THE COURT: Counsel for Plaintiff, you've heard Defense
21 response. Do you still feel it should be given? Want the Court to rule?

22 MR. LEAVITT: I ask the Court to rule. I think it's still
23 applicable. Because there's a burn, he's saying that there's conflicting
24 testimony.

25 THE COURT: The Court is not going to give the --

1 MR. LEAVITT: Okay.

2 THE COURT: -- P11, because it would not be consistent with
3 applicable law as applied to the facts in this case based on all the
4 testimony that's been provided. Plaintiff has rested his case in chief.
5 Defense has only got part of their own defendant and what you all
6 presented. Is there any offer of proof that, somehow, they're going to
7 open the door that's going to change, that you're going to be able to do
8 on -- since you've already called Dr. Rives in your case in chief, that,
9 somehow, they're going to open the door and there'd be something for
10 cross-examination that's going to allow this instruction in?

11 MR. LEAVITT: I have no offer of proof at this time, Your
12 Honor. Thank you.

13 THE COURT: And in the absence of any offer of proof, you
14 can appreciate that the Court is going to have to deny giving P11,
15 because that would mean there's only the anticipated testimony. So P11
16 will not be given, because it's objected to. As a matter of law, it would
17 be appropriate not to give P11. P12.

18 MR. LEAVITT: Not agreed to.

19 THE COURT: Is there an alternative to P12?

20 MR. DOYLE: Yes. It's in the agreed-upon set of instructions,
21 which I have as page 24. But it begins at --

22 THE COURT: That would be the unnumbered agreed-upon
23 instructions, which --

24 MR. DOYLE: Yes, which --

25 THE COURT: Contrary to the Court's specific --

1 MR. DOYLE: Yes.

2 THE COURT: -- instructions they were supposed to be
3 numbered? So where would I find page 24. How many pages from the
4 front or the back?

5 MR. DOYLE: It would be -- for my numbering, I -- it would be
6 24 pages back, including the cover page, joint agreed upon.

7 THE COURT: Okay. Just tell me how many pages from the
8 end or something, I mean without having to go back and trying to
9 renumber these too.

10 MR. DOYLE: It's number 20. It's the 24th page. It begins
11 with --

12 THE COURT: So you want me to flip through and find 24
13 pages?

14 MR. DOYLE: A person --

15 THE COURT: So everyone on my 9:00 calendar, please wait,
16 because I'm now going to have to flip through 24 pages. So from the --
17 including the first page or not including the first page?

18 MR. DOYLE: Including the first page.

19 THE COURT: Including the first page.

20 MR. DOYLE: And the instruction begins a person who has --

21 THE COURT: Counsel, I -- give me a second.

22 MR. DOYLE: Okay.

23 THE COURT: I've got to go through 24 pages. This is why
24 the Court specifically requires simple things like pagination and
25 numbering. Four, five, six. It's not just the Court. Feel free to read the

1 EDCR.

2 [Pause]

3 THE COURT: Okay. Why does your -- why does the joint
4 instruction take care of Plaintiff's P12?

5 MR. DOYLE: Because it's the same topic. P12 comes from
6 BAJI, which is California's --

7 THE COURT: I'm familiar with that.

8 MR. DOYLE: Okay. And --

9 THE COURT: I'm licensed there too.

10 MR. DOYLE: And 24 comes from the Nevada pattern
11 instruction.

12 THE COURT: Counsel for the Plaintiff, in light of Defendant's
13 objection, what's your position, please?

14 MR. LEAVITT: We'll withdraw it.

15 THE COURT: Okay. The Court need not rule. P12 is
16 withdrawn. Thank you so very much.

17 Moving on to P13. P13. Okay. Is P13 agreed upon,
18 withdrawn, modified, or an alternative, and if some objection, what?

19 MR. LEAVITT: Not agreed upon. I didn't get an --

20 THE COURT: Okay.

21 MR. LEAVITT: Did you have an alternative?

22 MR. DOYLE: Yes. The -- he's using KC 3920.

23 THE COURT: Counsel, do you have an alternative instruction
24 that takes care of Patrick Farris' claim?

25 MR. DOYLE: I was about to say that the instruction that they

1 have given does not include the complete 3920. And I'm indicating what
2 is missing and should be added, which then I would have no objection.

3 THE COURT: So you don't have an alternative? There's
4 nothing in the D packet that I should be looking at? I didn't see anything
5 in the D packet. That's why I was asking.

6 MR. DOYLE: Correct. I did not offer an alternative to this
7 one.

8 THE COURT: So, counsel for Plaintiff, have you looked at
9 the -- requested of Defense -- was this not discussed beforehand? Didn't
10 you all discuss this at a 2.67?

11 MR. LEAVITT: He doesn't have an alternative, as he said.
12 And I did have -- as the Court requested, I have the KCs here if the Court
13 would like to review them.

14 THE COURT: You may not have just heard what Defense
15 counsel is saying. He said he wanted to add language. And that's why
16 the Court was asking didn't you all discuss this in the 2.67? I mean --

17 MR. LEAVITT: We did --

18 THE COURT: -- Patrick Farris needs to have an instruction
19 that addresses his cause of action, right?

20 MR. LEAVITT: No, I don't agree to the added language. I'm
21 sorry, Your Honor. I misheard counsel.

22 THE COURT: Okay. So the added language -- okay. And you
23 don't agree to the added language because?

24 MR. LEAVITT: I don't think it's necessary. It gets confusing.
25 I have a copy for the Court if the Court would like to see it.

1 THE COURT: It's a straight -- also -- I don't -- why aren't you
2 all just using the Nevada one? Okay.

3 MR. DOYLE: I offered D7 as an alternative, which I think puts
4 them all together.

5 THE COURT: No, but D7 is not. D7 is a combination --

6 [Pause]

7 THE COURT: I mean are you suggesting that D7, 4 and 5,
8 goes on a different page or something? I mean I'm not --

9 MR. DOYLE: Our D7 comes from the pattern instruction 5.1,
10 2018 edition, as modified.

11 THE COURT: Okay. Counsel, I'll tell you the problem with --
12 Plaintiff, some of your issues are --

13 MR. LEAVITT: Yeah.

14 THE COURT: -- is part of your language in there is
15 inconsistent with your expert document --

16 MR. LEAVITT: We'll withdraw it and --

17 THE COURT: -- already, as you know.

18 MR. LEAVITT: -- use D7.

19 THE COURT: Well, D7, as is, combined, because you all have
20 broken down her claims versus Patrick Farris' claims. Now this is where
21 the Court does find and state for -- I at least have to say something here,
22 so you don't have confusion of a jury, because you're --

23 MR. LEAVITT: Right.

24 THE COURT: -- singular with her medical malpractice, and he
25 has a different cause of action. It is, of course, contingent on hers, but --

1 MR. LEAVITT: It is, Your Honor. I would like it on a separate
2 page. That was the point of mine, because -- the KC -- if we could put 4
3 and 5 on Patrick's own separate page, I'd be fine with that.

4 THE COURT: Counsel for the Defendant, you want to do
5 that?

6 MR. DOYLE: That's --

7 THE COURT: He has his own cause of action.

8 MR. DOYLE: That's acceptable.

9 MR. LEAVITT: Okay.

10 THE COURT: Okay. Are you putting some introduction or
11 something, so it says --

12 MR. LEAVITT: Yes. It'll have the same paragraph above, in
13 determining the amount of losses suffered by, and then it will say
14 Plaintiff.

15 THE COURT: Why don't you read what you're proposing or
16 show it to Defense what you're proposing? Circle it or something --

17 MR. LEAVITT: Okay.

18 THE COURT: -- or what you're suggesting on a separate
19 page, so that we're clear on what each of the parties are thinking. And
20 that might be helpful. Thank you so much.

21 [Counsel confer]

22 MR. LEAVITT: Your Honor, do you want me to read it?

23 THE COURT: Well, why don't you give an explanation of
24 what you're doing and --

25 MR. LEAVITT: Sure.

1 THE COURT: -- we'll see how long it is for reading purposes
2 to see where we get to, okay?

3 MR. LEAVITT: Okay. Very good. So what we're going to do
4 is we're going to split the two.

5 THE COURT: Split -- I need to know if you're talking Ps or Ds
6 here. Okay. Thank you.

7 MR. LEAVITT: D7.

8 THE COURT: Okay.

9 MR. LEAVITT: Determine -- so the first one will be to Titina
10 Farris, 1 through 3. It'll explain in determining the amount of losses,
11 evidence, Plaintiff, to Titina Farris. And then the next page will be
12 Plaintiff, Patrick Farris.

13 THE COURT: Okay.

14 MR. LEAVITT: We'll use the same paragraph on both pages.

15 THE COURT: The only concern you understand is,
16 remember, Patrick Farris' is a derivative claim.

17 MR. LEAVITT: Correct.

18 THE COURT: The Court doesn't tell parties how to do that,
19 but the Court -- if you all are stipulating/agreeing you want it exactly the
20 same, of course, not going to say anything. But --

21 MR. DOYLE: I hear what the Court is saying. And I think we
22 could probably come to an understanding that the separate page for Mr.
23 Farris would need to read something to the effect that if you have -- you
24 have it on P13. Don't you have it on the introductory paragraph of P13,
25 something of what you're talking about? The Court is not telling the

1 parties what to do. I'm just referencing the --

2 MR. LEAVITT: You know what? That'd be --

3 MR. DOYLE: There you go. Thank you.

4 THE COURT: Huh?

5 MR. LEAVITT: Yeah.

6 MR. DOYLE: Yes. That's -- thank you, Your Honor. Yes, we'll
7 do that. We'll use the P13 for Patrick and then we'll use 4 and 5.

8 THE COURT: So we have clarity, for the record, since there
9 was a lot of partial sentences just stated there --

10 MR. LEAVITT: May I --

11 THE COURT: -- why don't you start with P13 and say what
12 parts you're using for P13 for Patrick Farris and which part you're using
13 from D7 from Patrick Farris, and then explain how you're modifying D7
14 for Titina Farris. That might be helpful, so that we have a clear record,
15 right, to differentiate your two plaintiffs.

16 MR. DOYLE: Do you want me to do it?

17 MR. LEAVITT: Sure, go ahead.

18 MR. LEAVITT: So for Patrick Farris, the instruction will be
19 P13, paragraph 1.

20 THE COURT: Is that lines 2 through 6?

21 MR. DOYLE: 2 through -- well --

22 THE COURT: 2 through what?

23 MR. DOYLE: 2 through 5, technically, up through the word
24 including.

25 THE COURT: Okay.

1 MR. DOYLE: And then after that, then we will take D7,
2 paragraphs 4 and 5, and we will renumber those 1 and 2, which are on
3 D7, lines 15 through 18.

4 THE COURT: Okay. Is that agreeable to Plaintiff?

5 MR. LEAVITT: That is agreeable, Your Honor. Thank you.

6 THE COURT: Okay. And how would you like to set forth --
7 and so, would that mean the remainder of P13, starting with the
8 subparagraph numbered 1, the loss of love to the end, would that then
9 be withdrawn?

10 MR. LEAVITT: Yes, Your Honor. It'd be --

11 THE COURT: That's a question. I'm not saying it. I'm just
12 asking.

13 MR. LEAVITT: No, no. Yes, Your Honor. It would be -- lines
14 7 through 16 would be withdrawn.

15 THE COURT: Okay. Does that meet both parties' agreement
16 with regard to the Patrick Farris instruction?

17 MR. DOYLE: Yes.

18 THE COURT: Plaintiff's counsel?

19 MR. LEAVITT: Yes, Your Honor.

20 THE COURT: Okay. So now, although I wasn't really at D7,
21 but let's clean up D7, so we make that one correct. Okay. So for D7, are
22 you leaving D7 then D7, lines 3 through 14, and then just adding the
23 word Titina Farris and making that Plaintiff singular? Is that what you're
24 doing on that one? Or what are you doing on D7 just to clean it up for
25 Titina Farris?

1 MR. DOYLE: So to clean up D7, the first line of the
2 instruction, which is on line 3 of the pleading, in determining the amount
3 of losses, if any, suffered by the Plaintiff to Titina Farris as a proximate
4 result, et cetera, et cetera, we will go -- then we will go through line 14,
5 which then covers Plaintiff's P14.

6 THE COURT: Thank you. That's what I was about to get to.
7 Now would Titina Farris and that first line be consistent with the rest of
8 the Titina Farris in all caps or is it indicating something different? I'm
9 only saying that just for clarity in case anybody happens to be taking
10 notes for purposes of how things are going to be printed out and typed.

11 MR. DOYLE: Titina Farris should be in all caps, consistent
12 with the remainder of the instructions.

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

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

15 THE COURT: Okay. So counsel for Defense just -- now we're
16 moving to P14. Is P14, in light of what you all stated, is that correct that
17 that one is withdrawn in light of the modification to D7?

18 MR. LEAVITT: Yes, Your Honor.

19 THE COURT: Okay. So then P14 is withdrawn, because you
20 all are using D7, as modified, with the singular Plaintiff, Titina Farris in all
21 caps. Okay. D7, lines 3 through 14 being used. Okay. So I understand,
22 P14 is withdrawn because you're using D7, lines 3 through 14, modified
23 to be singular Plaintiff, Titina Farris, in all caps in line 3; is that correct?

24 MR. LEAVITT: Yes.

25 MR. DOYLE: Yes, Your Honor.

1 THE COURT: Okay. So now we're at P15.

2 MR. DOYLE: We just need to double check her current --

3 [Counsel confer]

4 THE COURT: Okay. So now we're on P15. And I think --

5 MR. LEAVITT: Yes.

6 THE COURT: -- you were about to tell me that her age is --
7 needs to be modified.

8 MR. LEAVITT: I --

9 THE COURT: Go ahead. So P15.

10 MR. LEAVITT: It's fine other than the modification of age,
11 counsel?

12 MR. DOYLE: Yes. I mean what I would suggest, P15 is okay
13 if we change 56 on line 4 of the pleading to 57 and then change 27 to 26
14 later in that line. And then on line 7, want to just do 27?

15 MR. LEAVITT: That's fine.

16 MR. DOYLE: Okay. Then --

17 THE COURT: Patrick Farris is not 50 -- he's -- I don't think
18 he's also a female, right?

19 MR. LEAVITT: Oh.

20 MR. DOYLE: Right.

21 THE COURT: I didn't know if you all noticed that one.

22 MR. LEAVITT: I figured, yeah, it was just a typo.

23 [Counsel confer]

24 [Pause]

25 MR. DOYLE: So we're going to -- P15, we're going to change

1 line 7 on the pleading to read a 53-year-old male is expected to live
2 another 27 years.

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

4 THE COURT: Okay. Then -- so then is P15 agreed to by the
5 parties?

6 MR. LEAVITT: It's agreed to.

7 MR. DOYLE: With those changes, yes.

8 THE COURT: Okay. Agreed to with the age changes.

9 Okay. So that then would have completed all of Plaintiff's; is
10 that correct?

11 MR. LEAVITT: Yes, Your Honor, aside from I did type up
12 the --

13 THE COURT: The pre-instruction.

14 MR. LEAVITT: -- pre-instruction.

15 THE COURT: Can I deal with that at the very end, so I can
16 just finish these, because I'm going to ask you to make sure Defense
17 looks at that one, and we'll circle back to that one, okay?

18 MR. LEAVITT: You got it.

19 THE COURT: So now for Defense's. What I understand is
20 Defense, the Court is already -- in light of what's already been ruled
21 upon, D1 has already been ruled upon, because that's --

22 MR. DOYLE: Yes.

23 THE COURT: -- coming in, in its modified form.

24 MR. LEAVITT: That is correct.

25 MR. DOYLE: Yeah. Yeah.

1 THE COURT: Okay. D2 has already been ruled upon,
2 because of the prior agreement of the parties.

3 MR. DOYLE: Right.

4 THE COURT: D3 has already been ruled upon, because
5 you're doing that as agreed upon modified.

6 MR. DOYLE: Yes.

7 MR. LEAVITT: Yes.

8 THE COURT: D4 has already been ruled upon, because
9 you're using that instead of P8.

10 MR. DOYLE: Yes.

11 THE COURT: D5, the Court does not see that there's been a
12 determination on. Is that correct from the parties?

13 MR. DOYLE: Correct. You're okay with that?

14 MR. LEAVITT: We agreed to it, yeah.

15 THE COURT: Okay. D5 is now agreed to by the parties. So
16 that is stipulated. So that will come in. And that's the one that's liability
17 for personal injury or death is not imposed upon a physician based on
18 negligence?

19 MR. DOYLE: Yes.

20 MR. LEAVITT: Yes.

21 THE COURT: Okay. D6 is already ruled upon, because that's
22 going at the end of P10. Is that one the Court shows, correct?

23 MR. DOYLE: Yes.

24 THE COURT: It's already ruled upon.

25 MR. LEAVITT: Yes.

1 THE COURT: D7 is already ruled upon, because that's the
2 one that gets broken up to Titina Farris and Patrick Farris, part of being --

3 MR. DOYLE: Right.

4 THE COURT: -- at the bottom -- Patrick Farris being at the
5 bottom of P13, correct?

6 MR. DOYLE: Yes.

7 MR. LEAVITT: Yes.

8 THE COURT: Okay. Next I show is D8. D8 the Court has not
9 yet ruled upon, because it's now being presented. So D8.

10 MR. LEAVITT: It's agreed upon, Your Honor.

11 THE COURT: D8 is agreed upon. Okay. So D8 will be agreed
12 upon. Now we go to D9.

13 MR. DOYLE: Withdrawn.

14 THE COURT: D9 is withdrawn. Now we go to D10.

15 MR. DOYLE: D10 is a modification of pattern instruction 6.03
16 to delete the references to error in judgment.

17 THE COURT: Counsel for Plaintiff, is this agreed --

18 MR. LEAVITT: I'm sorry, Your Honor. I'm just making sure I
19 have the same one he does, because --

20 MR. DOYLE: Yeah, that's the one.

21 THE COURT: Okay. This is the last one I'm going to do right
22 now, then I'm going to go over to my --

23 MR. LEAVITT: Sure.

24 THE COURT: -- 9:00 calendar. And then I will circle back to
25 you all as soon as I get done the 9:00 calendar, because I think that's

1 giving you enough -- a little bit of time to maybe work on and see the
2 rest of these.

3 But D10. Is D10 agreed upon, withdrawn, or objected to?

4 MR. LEAVITT: It's fine, Your Honor.

5 THE COURT: D10 is agreed upon by Plaintiff. Okay. That
6 means I can do one more.

7 MR. DOYLE: Withdrawn, D11.

8 THE COURT: D11 is withdrawn. I guess that means I can do
9 one -- D12.

10 MR. DOYLE: Well, I'm offering D12 or D13 as alternatives but
11 not both.

12 THE COURT: Counsel for Plaintiff, are you agreeing or
13 objecting. If you're objecting, what I'm going to do is I will stop and go
14 to my 9:00 calendar --

15 MR. LEAVITT: Yes, I'm objecting.

16 THE COURT: -- and let you all talk about, okay?

17 MR. LEAVITT: Yes, I'm objecting to that.

18 THE COURT: Okay. So we're stopping at D12. You all will
19 talk about D12 through the end, and then you've got the other ones to
20 work on. I'm going to do my 9:00 and then we'll circle back to you all
21 once I get 9:00. Remember also to look at the joint instruction which I
22 mentioned yesterday that we have a court recorder not a court reporter.
23 And what I explained to the parties yesterday about with a recording and
24 how you have to be here, the questions, and how that's what you want
25 and how that would need to be modified if that is what you intend to do.

1 Okay.

2 MR. LEAVITT: Very good.

3 THE COURT: I do appreciate it. At this juncture, Madam
4 Court Reporter and Madam Clerk, we are going -- okay. Wait, we have
5 Defense counsel, we don't have Defense counsel. Get jury instructions.

6 [Defense counsel enters courtroom]

7 THE COURT: Okay. Madam Court Reporter, did you have a
8 chance to get back to --

9 COURT RECORDER: Uh-huh.

10 THE COURT: Let's make sure everyone's had a chance to sit
11 down and get organized, and then we'll circle back. I do appreciate it.
12 Thank you.

13 MR. LEAVITT: Your Honor, there's a --

14 THE COURT: Give us one second.

15 MR. LEAVITT: Oh.

16 THE COURT: Because remember, Madam Court Reporter's
17 got to switch back from our motion calendar, back to the trial. I can
18 appreciate that whole pile of things. I have my motion calendar, give me
19 one second to switch my papers on my desk, and one moment, please.

20 Are we back on the record in this case now?

21 COURT RECORDER: Yes, Judge.

22 THE COURT: Okay. So, we're back now on the record. Case
23 739464. When you all left, you were on Defense Number 12. Give me
24 one moment to just grab that. I have Defense 12 in front of me.

25 MR. LEAVITT: Your Honor?

1 THE COURT: Okay. Defense had two alternatives. Defense
2 12 and 13. Go ahead, counsel.

3 MR. LEAVITT: Yes, Your Honor. There's a numerical error
4 here on 9 and 10 because --

5 THE COURT: On which one?

6 MR. LEAVITT: -- these weren't numbered.

7 THE COURT: Hold on a second.

8 MR. LEAVITT: I thought he was --

9 THE COURT: Hold on a second. On Defense 9 and 10?

10 MR. LEAVITT: Yes. My --

11 THE COURT: I don't know what you mean by clerical error.

12 MR. LEAVITT: Because his weren't numbered when we were
13 going through them. His numbers didn't match mine. Number 10, a
14 physician is not necessary. I had that as Number 9. A physician is --

15 THE COURT: Whoa, whoa, whoa, okay. Hold on a second.
16 Now we have to see how big of an issue we have. So --

17 MR. LEAVITT: Yeah.

18 THE COURT: -- let's stop for a quick second. Okay. You all
19 need to have right in front of you --

20 MR. LEAVITT: Right.

21 THE COURT: -- what was submitted, and this is a huge
22 example of why it is so very important to follow the Court rule and have
23 it. This could all be avoided if you put on what the Court specifically
24 ordered Defendants to do. Okay? Do you understand that, Defense
25 counsel? Do you understand this is causing yet another issue because

1 you failed to comply with yet another rule?

2 MR. DOYLE: Yes, Your Honor.

3 THE COURT: Okay. So, let's go back.

4 The Court's Defense 9 is if you decide Titina Farris has
5 suffered damages that will continue for the rest of her life, etcetera, three
6 paragraphs going through Line 15. Is that not -- do you not have the
7 same grouping?

8 MR. LEAVITT: His weren't numbered and they came in a
9 different numbering. That's why when we went back, I say hey, what are
10 your numbers because you're not matching mine.

11 THE COURT: I need to know how far back --

12 MR. LEAVITT: I have Number 9.

13 THE COURT: -- I need to go back is really the simple
14 question here.

15 MR. LEAVITT: Yes, yes. I had Number 9; a physician is not
16 necessarily. I thought that was being withdrawn. He's saying Number
17 10, that I -- I do not agree to, a physician is not necessarily negligent. I
18 had -- so I went back with him and renumbered. I disagree with that
19 one.

20 THE COURT: Okay. So, is that the only one that the Court
21 has to go back and revisit, or is there any other ones that the Court has
22 to go back and revisit?

23 MR. LEAVITT: That's the only one, Your Honor.

24 THE COURT: Okay. The Court's going to find obviously
25 that's fair, because the noncompliance, the Defendant caused the

1 problem by not numbering these. I can't -- okay. So --

2 MR. DOYLE: I did identify on the record and counsel was --

3 THE COURT: Counsel, you didn't number them, it's your
4 non-compliance, okay. So, I'm not going to hold somebody agreeing to
5 something they didn't agree to it because you didn't number them, as
6 you were required to do. So -- and you've had since October 8th to get
7 me a numbered set, and still refused to give this Court that numbered
8 set.

9 MR. DOYLE: You think, Your Honor, could --

10 THE COURT: So, Counsel, we're leaving it at that.

11 MR. DOYLE: -- I respond to that comment?

12 THE COURT: No. Counsel, you can't respond because we
13 need to get through these jury instructions, we have a jury coming in.
14 Okay? You didn't get me a set, it's as simple as that. You didn't do it.

15 MR. DOYLE: I offered to do so after the Court brought it up
16 for the first time. The Court indicated that you had already handwritten
17 in the numbers and it wasn't necessary.

18 THE COURT: Counsel, that is such an inaccurate statement.
19 It was not the first time, it was -- after the 5:00 hour yesterday, when the
20 Court said finally, because of -- still not providing me, okay, that the
21 Court had to number it. It would do no good after that time because by
22 that time, the Court had already been making notes, had already been
23 doing all the research and had to be dealing with this because you had
24 not provided me, as you're required to, on October 8th. Okay?

25 The Court is not the first time the Court has mentioned it.

1 The Court has even mentioned it other times because of the challenges
2 that happened. The Court even expressed its concern why you did not
3 even bring your jury instructions to court, as every trial attorney should
4 every day, because by definition, we had to do jury instructions. You
5 knew that today was going to be the day that you're all planning doing
6 closing and everything, so we had to do jury instructions, but by
7 definition, we should have been doing these jury instructions after I let
8 the jury go last night, which is what this Court was planning on doing,
9 and the only reason why we didn't do it is because you didn't even have
10 the jury instructions. So, counsel, please do not misrepresent, let's
11 move forward.

12 Let's just go to Defendant's 10, physician is not necessarily
13 negligent because his efforts would prove unsuccessful, is the first
14 sentence. So, counsel or Plaintiff, do you agree or do you object to that
15 proposal?

16 MR. LEAVITT: I object to it.

17 THE COURT: Okay. Since you object, the Court's going to
18 find it's appropriate. The Court does not find that you waived it in light
19 of the non-compliance of Defendant, of the Court's rules. And plus, it
20 just was a few moments ago. There's no prejudice or harm to
21 Defendant's when it was just a few moments ago. Okay?

22 So, you object, so the Court is now going to look at this.
23 What's your objection, Plaintiff's counsel and then Defense is going to
24 respond.

25 MR. LEAVITT: Sure. Your Honor, this is medical judgment.

1 It's -- and the case he cites to, it states on appeal, the Appellates contend
2 that the foregoing instructions imposed are judicial and premature upon
3 the Defense theories and tend to confuse the jury concerning the
4 minimum standards of professional negligence in a case, which is
5 medical judgment. It states, and I'm reading directly from the case,

6 Upon careful reflection, we agree with the growing number
7 of courts that have rejected the error in judgment instruction. And that's
8 what this is, Your Honor.

9 Our primary concern is that such instructions may confuse
10 jurors into focusing on the healthcare provider's subjective intentions in
11 the judgments, rather than -- rather than on the real issue whether the
12 healthcare provider's conduct conformed to an objective standard of
13 care.

14 What this is doing is circumventing what the whole case is
15 about, which is they are -- the jury is to decide the standard of care. This
16 is an improper --

17 THE COURT: Okay.

18 MR. LEAVITT: -- jury instruction according to Nevada of --

19 THE COURT: Okay.

20 MR. LEAVITT: Let me get this, sorry, Your Honor.

21 THE COURT: Sure.

22 MR. LEAVITT: I want to -- *Parodi vs. Washoe Medical Center*
23 892 P.2d 588 1985. And that, what I read from was from the decision
24 from the Supreme Court of Nevada.

25 THE COURT: Okay.

1 Counsel for Defense, would you like to respond?

2 MR. DOYLE: Yes. The language referring to judgment, error
3 in judgment, etcetera was removed from this instruction because of
4 *Parodi*, and the *Parodi* case did not disprove the language concerning
5 efforts are unsuccessful. So, it, as modified, it conforms to the *Parodi*
6 case.

7 THE COURT: Okay. You have a citation for jury instruction
8 6.3 on this?

9 MR. DOYLE: I don't know where that is.

10 THE COURT: 6.3 in the 2018 is killing in self-defense. So, I'm
11 not really sure where this comes from.

12 MR. DOYLE: That may be a typo and it should have said
13 Badge I 6.03. Oh, no, it's the -- it comes from Nevada Pattern Instruction
14 6.03 from the --

15 THE COURT: 1986 version?

16 MR. DOYLE: Right.

17 THE COURT: But didn't you just tell me that I should be only
18 relying on the 2018's?

19 MR. DOYLE: No.

20 THE COURT: Okay.

21 MR. DOYLE: But if there's a newer instruction compared to
22 an older one.

23 THE COURT: There's not, because this is a misstatement of
24 the law. The Court will not be giving D10. That is not a correct
25 statement of the law.

1 Okay. Now let's go to D11. And the Court just needs to
2 make sure that that's clarified on the record that there was an objection
3 to D10. The Court will not be giving the D10.

4 So, now we have D11. D11, the Court had previously shown
5 was withdrawn, is that correct or incorrect?

6 MR. DOYLE: Correct.

7 THE COURT: Okay. So, now the Court understood that D12
8 and D13 were two alternatives proposed by Defendant. Are either of
9 those alternatives -- first off, is that correct, Defense?

10 MR. DOYLE: Correct.

11 THE COURT: Are either of those alternatives acceptable to
12 Plaintiffs, either D12 or D13?

13 MR. LEAVITT: No, Your Honor.

14 THE COURT: Okay.

15 MR. LEAVITT: If you want to hear my objection?

16 THE COURT: Sure, that's fine. I'm just --

17 MR. LEAVITT: Okay. My objection is this, is -- they're -- other
18 than self-serving testimony by Dr. Rives, there is no other way to prove
19 habit. He hasn't brought anybody in to say yes, this is what you do, this
20 is routine. The standard of care is one thing, habit is another. He hasn't
21 testified this is what I do every day and I can recite it to memory, or
22 every surgery.

23 What they're trying to do is circumvent the standard of care.
24 Habit does not go to the standard of care.

25 THE COURT: Okay.

1 Then counsel for Defense, would you like to respond?

2 MR. DOYLE: Well, based upon Plaintiff's counsel's
3 comments, then D13 would be the more appropriate instruction, and it is
4 an accurate characterization of 48.059 in the *Thomas vs. Hardwick* case.

5 There is testimony in this case about Dr. Rives and his
6 custom and practice, or habits concerning how he does certain things
7 interoperatively, how he creates medical records, etcetera.

8 THE COURT: But counsel, doesn't the Court have a very
9 concern that you all expressed yesterday? You just mentioned medical
10 records. You have testimony, right, regarding medical records, and you
11 have a dispute that the very medical records don't show consistent with
12 the testimony. So, the Court -- how would the Court be able to do that?

13 MR. DOYLE: I'm not sure what the Court's referring to in
14 terms of the testimony being inconsistent with the records, but I don't
15 have anything else to add.

16 THE COURT: And how is it consistent with *Hardwick*? How
17 does *Hardwick* apply?

18 MR. DOYLE: I haven't read *Hardwick* in the last few days, but
19 from the last time I offered this instruction, I recall that it did conform to
20 *Hardwick*.

21 THE COURT: Right, but I'm trying to get an understanding.
22 You say since you modified, and this is not the pattern, this is one that
23 you all did, so how is the case that your citing supports?

24 MR. DOYLE: Well, neither D12 or D13 are pattern
25 instructions from any source.

1 THE COURT: Right, which is why the Court's asking you,
2 you've given a Nevada Supreme Court citation to support why this Court
3 should give it. So, the Court is asking you what's the basis of that
4 Nevada Supreme Court case that would allow you to give that
5 instruction so that the Court would have some idea of what you were
6 thinking why you think that this Nevada Supreme Court case supports
7 your request for this instruction.

8 MR. DOYLE: I can't articulate a specific thought.

9 THE COURT: Okay. Because *Hardwick* says,
10 Like many courts, we are cautious in permitting the
11 admission of habit or pattern conduct evidence under NRS 48.059, or
12 Federal Analog Rule 406, because it necessarily engenders the very real
13 possibility that such evidence will be used to establish triers propensity
14 to act in conformity with its general character in violation of NRS 48.045
15 and may involve collateral inquiries threatened to the ordinary
16 conduct -- orderly conduct of a trial by potentially coloring essential
17 inquiry and unfairly prejudicing a party against whom their direct party
18 they think.

19 So, that's why I'm trying to have an understanding. That's
20 one excerpt, there's, of course, several other excerpts, but I don't know
21 which part you might be relying on, because when the Court was
22 reading that, we talked about recall bias is another section on it. The
23 Court is looking to see how that case supported what you're asking for. I
24 was trying to give the --

25 MR. DOYLE: As I indicate, I don't have any additional

1 comments. I'm willing to submit it on --

2 THE COURT: Well, the Court can't find it either. Given the
3 arguable -- in light of what's been stated, the Court can't find that there's
4 any support for 12 or 13 articulated by Defense. There's objection to by
5 Plaintiff. The Court has independently looked at this, listening to the
6 testimony thus far, and particularly the issue's been raised with the
7 exhibits and the potential inconsistencies between the exhibits and
8 recording records and the testimony. The Court can't find that either 12
9 or 13 would be appropriate. So, the Court is not going to give 12, or its
10 alternative 13, because no one's provided any basis why it would be
11 appropriate in this case.

12 So, now let's go to D14.

13 MR. DOYLE: That was withdrawn.

14 THE COURT: Okay.

15 MR. DOYLE: Mere fact.

16 MR. LEAVITT: My form has D14.

17 THE COURT: Sorry?

18 MR. DOYLE: Mere fact.

19 MR. LEAVITT: With the what?

20 MR. DOYLE: Mere fact.

21 THE COURT: Mere fact.

22 So, now D15 is physician cannot be found negligence on the
23 basis of an assessment of a patient's condition, which only later in
24 hindsight, proves to be incorrect.

25 MR. DOYLE: Withdrawn.

1 THE COURT: Okay. Now, we're on D16, approximate cause
2 must be proven to a reasonable degree of medical probability.

3 MR. LEAVITT: Plaintiffs would agree to that.

4 THE COURT: Is that now stipulated?

5 MR. LEAVITT: Yeah, that's stipulated, Your Honor.

6 THE COURT: Okay.

7 MR. LEAVITT: Or yes.

8 THE COURT: So, now D16 is stipulated.

9 Now, we're going to D17, in considering an expert's
10 testimony, a verdict cannot be found on speculation or possibilities.
11 Now, this is different than the jury instruction, but is this agreed upon,
12 withdrawn, objected to? What's you all -- Defense counsel, is this agreed
13 upon, withdrawn, objected to? What's your position on this one? I know
14 it's your instruction, so I guess you would say agreed upon or
15 withdrawn, and then I'll go to Plaintiffs' counsel to see if it's objected. If
16 you say it's --

17 MR. DOYLE: My understanding it's objected to.

18 THE COURT: Okay. So Plaintiffs' counsel, what's the basis
19 for the objection?

20 MR. LEAVITT: Yes, it's -- there's a pattern instruction, and it's
21 redundant. We have these in the agreed upon jury instructions that go
22 over who experts are. It's redundant. I don't see a purpose of it. And,
23 again, it's pulled out of case law. I don't really see support for it within
24 the cases, unless counsel can enlighten me on it.

25 MR. DOYLE: I'll withdraw it.

1 THE COURT: Okay. So it's withdrawn. Okay. That's D17.
2 Now while the Court did number the last pages D18, the Court didn't
3 really see an instruction, I just saw a signature line on it, but I just
4 numbered the page anyway just in -- somebody was saying that
5 somehow there was something on that page that the Court should be
6 addressing. I was counting every single page. Does anyone see if
7 there's anything on that 18th page that the Court should be addressing?

8 MR. LEAVITT: There is nothing.

9 MR. DOYLE: Nothing, Your Honor.

10 THE COURT: Okay. So has the Court now resolved all jury
11 instructions subject to the pre-instructions the Court took out to get to,
12 but all instructions that were provided to the Court in both Plaintiffs and
13 Defendants, other than the pre-instruction?

14 MR. LEAVITT: Yes, Your Honor, on behalf of Plaintiffs.

15 MR. DOYLE: Yes.

16 THE COURT: Okay. So now let's get to the pre-instruction,
17 and then we have to circle back to that joint instruction on recording
18 versus recording, remember.

19 MR. DOYL: Right. I've noticed -- we fixed part of it, but
20 there' still typos that Ms. Clark Newberry is going to --

21 THE COURT: So, actually let's do the quick easy one on the
22 recording versus recording. First off, do you all want the recording
23 versus recording -- do you want that instruction realizing, as I explained
24 to you all yesterday that remember if a juror asks [indiscernible], but
25 remember if a juror asks a question, you all have to physically be here.

1 You then have to listen to the whole portion of the testimony. Like if
2 they just say Dr. Rives in the afternoon between 1:00 and 3:00,
3 hypothetically, you're going to have to listen to the whole -- watch the
4 whole 1:00 to 3:00 p.m., right.

5 MR. LEAVITT: Understood.

6 THE COURT: Find the agreed upon time period that you
7 think is appropriate, and then have that exerted out, and then be here
8 when it's played back to the jury, and then if you leave ten minutes later,
9 hypothetically if they have another question, I'm not saying they will or
10 won't, I have no idea, right, you would need to be here and do that
11 again, which means basically, you need to be here during the entire
12 deliberations, or within a few minutes.

13 You can't be off, I think I used the word steak dinner, or
14 whatever, the other day, whatever I said. You can't be off away and
15 have to be called back, so that it's waiting 20, 30 minutes each time, you
16 have to be within a few minutes proximity so that these can be done,
17 okay? So, that's -- it's completely up to you, but that is the parameters.
18 And you know how many questions you've already gotten throughout
19 this trial, so whether or not you think there might be some juror
20 questions.

21 MR. DOYLE: Defendants would like the instruction.

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

23 THE COURT: Okay. So, then it needs to accurately reflect
24 that it's a recorder, not a reporter, and it needs to talk about playbacks
25 being cumbersome, and not redacts. So, it has to accurately reflect that,

1 okay?

2 MR. LEAVITT: Very good.

3 THE COURT: Okay. So, you need to make those changes so
4 that it is appropriate.

5 Okay. So, now let's get to the pre-instruction, because that's
6 the last one to be taken care of, correct?

7 MR. DOYLE: Yes, Your Honor.

8 THE COURT: Okay. So, with the pre-instruction, did you all
9 have the benefit of -- you both have the DVDs and whatever
10 transcriptions you personally got on your own, I guess?

11 MR. LEAVITT: Yes, Your Honor, and I listened to it and typed
12 it up last night. I emailed it to him.

13 THE COURT: Okay.

14 MR. LEAVITT: Oh, did it already have a typo?

15 MR. DOYLE: Yeah.

16 MR. LEAVITT: Sorry, it was --

17 THE COURT: No worries.

18 MR. LEAVITT: I was 3:00, I --

19 THE COURT: No worries.

20 MR. LEAVITT: The first typo is was.

21 MR. DOYLE: And there's a second other one in the third line.

22 MR. LEAVITT: And there's another one on the third line?

23 THE COURT: Okay.

24 MR. LEAVITT: Yeah, case in. I --

25 THE COURT: Okay. So, the question just becomes, does

1 anyone dispute that this was the pre-instruction previously given to the
2 jury?

3 [Judge and Marshal confer]

4 MR. DOYLE: I'm sorry, is there a question?

5 THE COURT: Yeah. The question as do you disagree that
6 this was the pre-instruction that was given to the jury?

7 MR. DOYLE: I have to trust the Plaintiff is accurately put on
8 paper what the Court gave orally.

9 THE COURT: Right. Remember the Court told you both
10 specifically to listen to your DVDs, and we understood from Defense
11 counsel, from your prior statements, that you've had the DVDs
12 personally transcribed, I'll use the word transcribed. I don't know how
13 you, which is perfectly fine, but that you would have the benefit of both
14 the written and could listen to it so that the -- so that when you came in
15 today, there wouldn't be any disagreement on what was on there, and
16 that Plaintiff would have to take the [indiscernible] of typing it up and
17 that you all both needed to listen to it so we weren't spending time
18 having to replay that pre-instruction. So, does anyone disagree or --

19 MR. DOYLE: No.

20 THE COURT: Okay. So then, you've all fixed whatever typo's
21 needed to be fixed?

22 MR. LEAVITT: Yes.

23 THE COURT: Okay.

24 MS. CLARK NEWBERRY: Oh, wait. You fixed them and then
25 you handed them to me and asked --

1 MR. LEAVITT: Well, I can -- I've given them --

2 THE COURT: Well, can you email?

3 MR. LEAVITT: I can send you the email.

4 THE COURT: Okay.

5 MS. CLARK NEWBERRY: Well, if we need them now, I'm just
6 going to transfer it -- type it real quick because we need -- so that we
7 don't --

8 THE COURT: Well, doesn't Mr. Doyle -- oh, don't you just
9 forward an email? Isn't it typed up?

10 MR. LEAVITT: Yeah, I can do that. I sent it to Mr. Doyle, I
11 don't know if I put Amy on it.

12 MS. CLARK NEWBERRY: If you can send it to me, that would
13 be fine.

14 MR. LEAVITT: There you go.

15 THE COURT: Yeah, because that -- can it be cut and pasted?

16 MR. LEAVITT: I will get it right to you.

17 MS. CLARK NEWBERRY: Great. Thank you, Your Honor.

18 THE COURT: Okay. So, now you all need to decide the order
19 in which these instructions -- or did you take care of that, we hope?

20 MR. LEAVITT: No, I sent over, because they weren't
21 numbered, I sent over the --

22 THE COURT: Okay.

23 MR. LEAVITT: -- the joint proposed, the ones that we agreed
24 upon. I scanned them in and emailed them to counsel. We just need to
25 add these ones in order.

1 THE COURT: Okay.

2 MR. LEAVITT: The order that I proposed.

3 THE COURT: Okay. So, let's -- so, now has the Court settled
4 all instructions? I'll ask Plaintiff first and then Defense. Has the Court
5 settled all instructions or is there any other instructions that need to be
6 settled?

7 MR. LEAVITT: My apologies. No, there's no other
8 instructions that need to be settled, Your Honor.

9 THE COURT: And so, all instructions have been settled; is
10 that correct?

11 MR. LEAVITT: That is correct, Your Honor.

12 THE COURT: Defense counsel, have all instructions been
13 settled or is there any other instructions that need to be settled?

14 MR. DOYLE: All have been settled.

15 THE COURT: Okay. Because now we need to move to the
16 verdict forms, right? The Court has three verdict forms, although I think
17 two of them are identical, but okay. The Court was handed three verdict
18 forms. Two verdict forms say special verdict form on them and have a
19 Part 1 liability, Part 2 damages on them, and the third one has the
20 captioning of the Doyle firm and says Defendant's Proposed Special
21 Verdict Form. Okay?

22 So, like I said, I think the first two, I think inadvertently
23 Plaintiff's counsel might have just given me two copies of the same
24 thing, but I just clipped together what I got the day of the calendar call,
25 so.

1 To me, unless there's something that I'm missing, they
2 looked identical, because even there's a little dash between the -- before
3 the word Foreperson on the signature line, even that was the same. So,
4 they looked identical to me. Once again, you would have to let the Court
5 know if there's something I'm missing. Okay? Did you all submit one or
6 two? That's the easiest way to phrase it.

7 MR. LEAVITT: We submitted -- he has it. What I did is I
8 doubled up. If I may approach, Your Honor. We -- I think, if I can look at
9 it, what I -- we gave you two of the same?

10 THE COURT: I think you gave the Court two of the same
11 because -- and counsel for the Defense feel free to approach if you wish
12 to. The reason I why I think you gave me two of the same is because a)
13 these look the same.

14 MR. LEAVITT: Yes.

15 THE COURT: And b), even on the second page, see this little
16 dash between the word foreperson?

17 MR. LEAVITT: Yes.

18 THE COURT: There's even the same little dash, and I looked
19 at it from -- even the -- see the as falls flush to here?

20 MR. DOYLE: Right. Mine are different. The one I have is
21 different.

22 MR. LEAVITT: Yeah, that's the formatting.

23 THE COURT: Okay. So, this is what I got from Plaintiff --

24 MR. LEAVITT: Yeah.

25 THE COURT: -- and what I got from Defendant, feel free to

1 look, is on Doyle, Mandlebon (phonetic) letterhead, and it says, it starts
2 with We, the Jury, in the above-entitled special verdict form. That's the
3 only one I got --

4 MR. DOYLE: Correct.

5 THE COURT: -- from Defendant. Okay. So, is Defendant's
6 the correct one?

7 MR. DOYLE: You have my correct submitted.

8 THE COURT: Okay.

9 Plaintiffs, are these just duplicates and --

10 MR. LEAVITT: Those are just duplicates.

11 THE COURT: Okay. So, the Court doesn't have to look at --

12 MR. DOYLE: But that doesn't match what I was given, so
13 could I see what that --

14 THE COURT: Sure.

15 MR. LEAVITT: Could we just --

16 THE COURT: Okay. And I am, once again, these are what
17 were provided. These are the only things that have been provided to the
18 Court.

19 MR. LEAVITT: The one in my left hand --

20 THE COURT: Is different from the one in your right hand?

21 MR. DOYLE: Correct.

22 MR. LEAVITT: Yeah.

23 THE COURT: Okay.

24 MR. DOYLE: The one in the left hand, that you just handed
25 me, doesn't have the question for proximate cause.

1 THE COURT: Okay. Well, then, let's get back to the table,
2 because you have to realize --

3 MR. DOYLE: Can I --

4 THE COURT: You can still -- that's an extra copy.

5 MR. DOYLE: Okay.

6 THE COURT: Okay. So, I guess we also have an issue
7 of -- the Court's only been provided --

8 MR. LEAVITT: Yes.

9 THE COURT: -- since we've now established that Defendant's
10 gave the Court two duplicates on the eighth, right?

11 MR. DOYLE: Yes.

12 THE COURT: The Court only has one from Plaintiff and one
13 from Defendant, but Defendant just stated at bench that the one
14 Defendant has is different than the one the Court has on Plaintiff's
15 verdict form. So, you both agree that Defense verdict form is the same
16 that everybody has?

17 MR. DOYLE: Yes, Your Honor.

18 THE COURT: Okay. So, I have -- that's from Defendant.

19 So, I'm not sure the Court only has ever been given the
20 special verdict form that I just showed you both at bench, which Part 1
21 says liability and has a Question Number 1, Part 2 says damages,
22 underlined, and has a Question Number 2, with blanks, and then
23 Question Number 3 is we assess the total amount, it has Patrick Farris on
24 the second page, and that's the only question 3. So, is somebody telling
25 me that there's a different verdict form floating out there that the Court

1 has not been provided?

2 MR. DOYLE: I have been provided something different.

3 THE COURT: When?

4 MR. DOYLE: I don't recall when it was first provided, but I
5 got another copy of it this morning.

6 MR. LEAVITT: Yeah, that's not the --

7 THE COURT: Okay. Well, the Court has nothing other than
8 what the Court just said from Plaintiffs, so I'm not sure what you all are
9 asking this Court to settle than what you all provided to the Court.

10 MR. LEAVITT: That's it. That's it, Your Honor, other than the
11 formatting on that one that was provided to the Court, that's --

12 MR. JONES: Your Honor, we lost our soft copy of what we
13 provided to the Court. We tried to duplicate it this morning, that's what
14 happened.

15 MR. LEAVITT: Yeah.

16 THE COURT: Anyways, okay. So --

17 MR. DOYLE: Well, what was provided to the Court is missing
18 Question Number 2, what was provided to me, which reads, after
19 Question 1, of course, was Barry Rives, M.D.'s negligence the proximate
20 cause of injury to Titina Farris, because what was provided to the Court
21 has only one question, has Question Number 1, which is the negligence
22 question. There is no causation question, and then we go into damages.

23 THE COURT: Mr. Jones, you weren't here, Mr. Leavitt came
24 to the bench. If you want to see what was provided to the Court --

25 MR. JONES: Yeah.

1 THE COURT: -- so that everyone's -- and since I had two
2 identical copies of this, Defense counsel asked for my other copy
3 because he said it was different from what he had, so that's the only
4 thing that this Court's been provided.

5 MR. JONES: For the very reason there was mistreatment of
6 Titina Farris and was this negligence legal cause for the injury to Titina
7 Farris.

8 THE COURT: Does it say that out there?

9 MR. JONES: That's what it said, so. I mean it says, it asks if
10 he was negligent.

11 THE COURT: Yeah, it's all in one question. It's all Question
12 Number 1. I think that's okay.

13 MR. DOYLE: The question needs to be split up.

14 THE COURT: Okay.

15 MR. DOYLE: They are two very different issues in this case,
16 negligence and causation.

17 THE COURT: Whether Defense says it should be split up,
18 where this Court's back on step. The Court's back to the step of -- is
19 somebody saying that this Court should be looking at a different verdict
20 form than the one its hands that I've now shown both to Mr. Leavitt and
21 Mr. Jones, and to Mr. Doyle, which is the two-page document I had at
22 bench, which I had two identical copies of which I gave one to Defense
23 counsel. This is the only one I've been given.

24 MR. DOYLE: Can I show you the one that I was given?

25 THE COURT: Just work it out with Plaintiff's counsel on

1 which one was the one that the Court is supposed to be resolving. I can
2 only deal with what was given to this Court.

3 [Counsel confer]

4 THE COURT: The short of it is the Court can't address a
5 verdict form that it doesn't have, that's -- you can probably appreciate,
6 right, but --

7 MR. DOYLE: Well, Your Honor, speaking to Defendant's
8 special verdict form, it's essentially the same, I believe, as what Plaintiff's
9 and I have agreed to, that Plaintiff's objection to this special verdict form
10 that we submitted are the instructions that appear after each question,
11 which, for example, after Question Number 1, the jury is told that if your
12 answer to question Number 1 is yes, you go to Question Number 2. If
13 you answer Question Number 1 no, you stop and have the presiding
14 jurors sign and date the form.

15 What those instructions are not contained in the special
16 verdict form I was given, nor the one that you were given. So, what this
17 potentially can do is, even though the jury would answer Question
18 Number 1 no, without those instructions, they could go on to Number 2,
19 proximate cause, and go on to Number 3. I think the instructions are
20 essential.

21 THE COURT: Okay, okay. Let's walk down two things. Well,
22 you also, actually, there's another distinction, how you phrase the
23 damages, but that's a different point. Okay.

24 So, let's walk through. I'm back at my first question. Is the
25 verdict form provided to the Court, the verdict form I should be looking

1 for for purposes of settling the verdict form right now?

2 MR. LEAVITT: Yes, Your Honor.

3 THE COURT: Plaintiff for the master of the verdict form,
4 that's the one they gave me on the 8th, that's the one I'm looking at,
5 that's the one I'm addressing. Okay.

6 So, I have Plaintiff's verdict form and I have Defense verdict
7 form. The Court had seen a couple distinctions between the verdict
8 forms. One of the distinctions is just noted by Defense counsel was the
9 intervening instructions as phrased by Defense of what to do between
10 each of the questions. Another distinction was that -- well, Plaintiff has
11 broken it down between liability and damages, with underlying sections.
12 Defense has not, he's done it in a question and answer format. The third
13 distinction is that under the Part 1 Liability, Plaintiff has done it as a
14 combined question, Defense has broken it down as to two questions,
15 and in the damages section, the damages section is, I'll phrase these a
16 little bit different, but the Plaintiff has called it past medical and related
17 expenses, Defense has called it passed medical expenses, same thing
18 with future.

19 Plaintiff has called it future medical related expenses,
20 Defense has called it future medical expenses, and then Defense --
21 Plaintiff has called it past pain and suffering and future pain and
22 suffering, Defense has called it what Titina Farris's non -- he's broken it
23 down between economic and non-economic damages, and then said
24 past non-economic and future non-economic, and not described it as
25 pain and suffering. And then for Patrick Farris, Defense has called it non-

1 economic damages, and Plaintiff has called past loss of consortium and
2 future loss of consortium.

3 So, I will tell you the Court's general inclination is, match
4 your jury instructions, right? So, you might want to take a moment and
5 look at your jury instruction, right? Because your jury instruction is your
6 guides on telling the jury what to do on how to fill out your special
7 verdict form. So, you can appreciate the Court's inclination on which
8 way it's going to go is to be consistent with your jury instructions and
9 not confuse your jury. If you've called it pain and suffering in your jury
10 instructions, you're calling it pain and suffering in your verdict forms.

11 If you called in non-economic, then you would call it non-
12 economic, whichever way you've called it in your jury instructions is the
13 way you're going to call it in your verdict form so it's consistent and
14 appropriate to the jury and does not have confusion to the jury.

15 So, that part, I think you can, a) see jury instructions, right,
16 you've just dealt with it, you've just had that language. As far as the idea
17 of questions versus not having questions, I will tell you the Court's
18 inclination there and then you an each have an argument. I'm giving
19 you inclinations, then you can each have your viewpoint, okay?

20 The Court's inclination is that generally juries find it helpful
21 to have the questions, because then you don't have a lack of clarity of
22 what the jury should or should not be doing and whether they should or
23 should not have filled out a particular section of a verdict form.

24 So, generally, when there is the -- if you answer question
25 blank, do this or that, as long as it's accurate and as long as it's done in a

1 neutral matter that is not advantageous to either side, the Court
2 generally has those questions because jurors have historically said after
3 the fact, they find that helpful, something has been helpful to explain to
4 go from Point 1 to Point 2. The Court's going to -- inclination is going to
5 be utilize that in the future to avoid confusion. Okay?

6 So, with regards to related expenses, the Court was going to
7 ask a question of Plaintiff's, if they were wanting to utilize that term,
8 related expenses, and that's where the Court's -- as far as the Court's
9 inclination at this juncture goes.

10 So, if you all want a moment and look at your jury
11 instructions to see if maybe you can work out to an agreement during
12 the Court's inclination, or would you like to be heard right now?

13 MR. JONES: Yeah, we'll just go in the anteroom and talk for
14 a couple minutes?

15 THE COURT: Okay. So, I think it would be a perfect time
16 since the jury's supposed to be getting here about now. It's for the
17 Marshall to check, I think we already have all the jurors accounted for, is
18 that correct?

19 THE MARSHAL: No.

20 THE COURT: Oh, we have a few missing? Okay, perfect.

21 MR. DOYLE: Before we go off?

22 THE COURT: Sure, counsel for the Defense.

23 MR. DOYLE: I'm sorry. Did the Court -- I didn't hear an
24 inclination concerning a separate question for negligence and a
25 separate --

1 THE COURT: Because I didn't -- I didn't have one. I figured
2 you all were going to back to the anteroom and --

3 MR. DOYLE: Okay.

4 THE COURT: -- discuss that among yourselves anyway,
5 because you told me that they presented it to you in two different forms
6 anyway, so I thought you would probably resolve that before you came
7 back.

8 MR. DOYLE: Thank you.

9 THE COURT: So, okay. So, we're going to go off the record
10 and it's 10:13. I'm going to say 10:25, does that give you -- or 10:30,
11 which I say to give everyone enough time before people are walking out.

12 Can we go get Mr. Doyle back, because when I'm still in the
13 middle of a sentence -- Mr. Doyle, Mr. Jones.

14 Counsel, I need to know how much time you think you would
15 need so that the Marshal can accurately tell the jury, right, which would
16 be courteous to the jury, and also so that I make sure -- because I
17 appreciate you have somebody here assisting to get your jury
18 instructions in order so that you have those in the order that you need it.
19 So, I'm giving everyone appropriate that they need to do what they need
20 to do, realizing you've still got some witness testimony, or that you may
21 be balancing a couple of different things among all your respective
22 different attorneys, and so how much time? If I say 10:30, does that meet
23 everybody's needs do you think?

24 MR. DOYLE: Yes. It meets our needs, Your Honor.

25 THE COURT: Okay. If you're back earlier, let the Marshal

1 know, because we'll be ready to go earlier. I appreciate it. Thank you, so
2 much.

3 MR. DOYLE: Thank you, Your Honor.

4 THE COURT: Madam Court Report --

5 [Recess taken from 9:57 a.m. to 10:28 a.m.]

6 [Outside the presence of the jury]

7 THE COURT: Okay. We're on the record outside the
8 presence of the jury still in the Farris case, 739-464; did you all have an
9 opportunity to resolve your issues on the verdict forms or are there still
10 some matters that the Court needs to resolve?

11 MR. JONES: One matter only; everything else is resolved,
12 Your Honor.

13 THE COURT: Okay. Sure. What's the matter that you'd like
14 the Court to resolve?

15 MR. JONES: The only matter is one that you already
16 indicated an inclination to have the explanations in between; each one of
17 the questions.

18 THE COURT: Sure, go ahead.

19 MR. JONES: The concern the Plaintiffs have and, I think, this
20 is actually a real problem. I think that the jury, when they -- any time that
21 you give someone an out and say, hey, it's over sooner if you do it this
22 way --

23 THE COURT: Uh-huh.

24 MR. JONES: -- I think it presents a prejudice to the party that
25 benefits from it being over sooner and so, I believe, that although I can

1 see that in some instances having language of that type could be helpful
2 I think that it's prejudicial to the Plaintiffs because I think the jury, under
3 all circumstances, should go through the same effort regardless of which
4 side they ultimately choose. And so if they ultimately decide that there is
5 no negligence or there is no proximate cause it still is fine for them to
6 take a few minutes to identify what the damages would have been and
7 it's not saying those damages are awarded.

8 THE COURT: But see, how would the Court know whether
9 the jury was doing that or if they were confused? Therein lies the
10 challenge is because in the absence of an instruction, if those two forms
11 were completed, right? Then, per se, on its face it would look like an
12 inconsistency and so that, on its face, would present a challenge right up
13 front.

14 MR. JONES: No or perhaps, Your Honor, having an
15 instruction on the top that says read, you know, -- I don't mean --

16 THE COURT: Is your concern the second question of the two
17 questions that are in between the language?

18 MR. JONES: Yes.

19 THE COURT: The Court's statement about having some
20 instruction was a very generic statement because it is having some
21 instruction. Exactly how those are awarded is usually agreed upon by
22 the parties. So the Court's trying to get an understanding. Is it the idea
23 of having some instruction or is it a particular sentence; is it the way it's
24 phrased, et cetera?

25 MR. JONES: The phrasing of it, frankly, if it was going to be

1 there wasn't super troubling to me. I --

2 THE COURT: Because sometimes it's phrased, like, the
3 answer to question number 1 is yes, proceed to question number 2,
4 right? If the answer to question 2 --

5 MR. JONES: And then that's the end of it?

6 THE COURT: -- is proceed to number 3; doesn't have 3, 4,
7 and -- you know what I mean?

8 MR. JONES: Right.

9 THE COURT: If that's it -- I'm trying to have an
10 understanding if that's it or if you're concern is, if your answer to
11 question, no; we stop here; no further questions. Sign and date the
12 form. Is that the -- is that sentence the concern? I'm trying to get the
13 concept versus having any language whatsoever or it's the language
14 that's posed because --

15 [Counsel confer]

16 MR. JONES: Yeah I guess, Your Honor, I would feel more
17 comfortable if it says if your answer to question number whatever is yes,
18 proceed to the next question. Right? Or proceed to question number 3,
19 4, and 5. I think that that -- I guess part of it is the part of stop. If it's no
20 then stop here; answer no further questions.

21 I feel that that's -- I think we'd be agreeable to it if, I guess, if
22 we got rid of all the language after just the yes. If you answer the
23 question number 2 is yes, proceed to question number 3, 4, 5.

24 THE COURT: So it's the second sentence?

25 MR. JONES: Yes, Your Honor.

1 THE COURT: Okay. The Court's not trying to say one way or
2 another. I'm just trying to have an understanding of what your concern
3 is balancing with ensuring that the jury understands what they need to
4 do so there's no confusion; that you get a verdict form back that, on its
5 face, is, maybe, consistent and raises issues of either -- that could
6 present huge challenges as you can appreciate.

7 MR. JONES: Yes, Your Honor. That would be a significant
8 amount of wasted time.

9 THE COURT: I'll just use the huge challenges, yeah.

10 MR. JONES: Yes. I guess I'm comfortable with that, Your
11 Honor. If -- and, I guess, that would be sufficient for me and we'd be
12 willing --

13 THE COURT: Okay.

14 MR. JONES: -- to agree on that.

15 THE COURT: Defense counsel, would you agree to the
16 modification proposed by Plaintiff's counsel which was deleting the
17 second sentence? Is that the modification, deleting the second
18 sentence? Counsel for Plaintiff, was the modification deleting the second
19 sentence?

20 MR. JONES: Yes, Your Honor.

21 THE COURT: Counsel for Defense, would you be amenable
22 kept first sentence and deleting the second sentence?

23 MR. DOYLE: I think we have to have something in the
24 second sentence because, otherwise, we run the risk of the jury not
25 understanding the instruction completely and going on and possibly

1 creating an inconsistent verdict. What about if it says if your answer to
2 question one -- number one is no stop here and have the presiding juror
3 sign and date this form?

4 MR. JONES: Is it not what it says?

5 MR. DOYLE: No. Says answer no further questions. I mean,
6 just makes it more neutral, I guess, from Plaintiff's perspective? I mean,
7 they're being told what to do if the answer is yes; they need to be told
8 something if -- what to do if they answer no.

9 MR. JONES: Okay. Your Honor, we'll go with that. We'll go
10 with the proposed language that Mr. Doyle just said.

11 THE COURT: Okay. Do you want to read what the proposed
12 language is for both of you arguing to now?

13 MR. DOYLE: So it would be -- the second sentence would
14 read if your answer to question number 1 is no, stop here and have the
15 presiding juror sign and date this form. Similarly, after question number
16 2 it would say if your answer to question number 2 is yes -- well, I'm
17 sorry -- second sentence after -- if your question -- if your answer to
18 question number 2 is no, stop here and have the presiding juror sign and
19 date this form.

20 THE COURT: And do you all wish to use the term presiding
21 juror versus foreperson?

22 MR. JONES: Foreperson.

23 THE COURT: Jury instructions usually have the term
24 foreperson.

25 MR. DOYLE: Okay.

1 THE COURT: I saw you put presiding juror on this which is
2 not a term generally used in the 8th Judicial District, but if you're
3 stipulating to it then that's your decision --

4 MR. JONES: No, foreperson.

5 THE COURT: -- but usually it's foreperson.

6 MR. DOYLE: We can change that.

7 THE COURT: The signature line would also, similarly, have
8 to say that.

9 MR. DOYLE: Yes.

10 THE COURT: So does that meet the parties' needs or is there
11 something that you need the Court to rule on?

12 MR. JONES: That's fine, Your Honor.

13 THE COURT: That meet Defense counsel's needs?

14 MR. DOYLE: Sure, yes.

15 THE COURT: Okay. So then there's nothing that the Court
16 needs to rule on the verdict form? Okay. So we ready to bring the jury
17 back in or is there any other matters -- now we've settled the jury
18 instructions in totality; settled the verdict form in its totality. Is there
19 anything else or bring the jury in?

20 MR. JONES: I think bring the jury in, Your Honor.

21 MR. DOYLE: And our plan is we're getting paper copies
22 printed and sent over here so that we're hoping at the lunchtime just to
23 sit down and get them in an agreed upon order.

24 THE COURT: Whoa, whoa, whoa, whoa, whoa. Lunchtime.
25 Okay. Hold on.

1 MR. DOYLE: Because we don't have --

2 THE COURT: Okay. Just a second. Is the answer that they
3 are currently all done?

4 MS. CLARK NEWBERRY: Yes, I have made all the edits and
5 changes to the jury instructions and the verdict form. They're being
6 printed at Plaintiffs' counsel's office; a runner will be bringing them.

7 UNIDENTIFIED SPEAKER: It's just right over here.

8 THE COURT: Okay. No worries. So while one person's
9 doing testimony can someone on the Plaintiff's side put it in the order
10 that you all think you want it --

11 MR. JONES: Yes.

12 THE COURT: -- so it's just a matter of Defendant moving it
13 around is what I was --

14 MR. DOYLE: Absolutely.

15 THE COURT: The Court's not requiring -- if all three of you
16 need to do the testimony that's fine. I'm just --

17 MR. JONES: No, we got it, Your Honor. We'll have someone
18 handle that.

19 THE COURT: -- trying to think of the efficient way because
20 we talked about possibly having the -- Marshal, you can go get the jury;
21 just peek your head in, please, before.

22 MR. JONES: I'll put it in order for the Plaintiffs.

23 THE COURT: I'm not saying -- I'm not requiring it. I'm just --
24 was trying from your own efficiency --

25 MR. JONES: It makes sense. We understand, Your Honor

1 and we're very comfortable with having someone to handle that.

2 MR. DOYLE: Ms. Clark-Newberry's going to have to leave so
3 we'll figure out the logistics.

4 THE COURT: Just for your own time standard --

5 MR. JONES: Yeah.

6 THE COURT: -- right?

7 MR. DOYLE: Yeah.

8 THE COURT: To try and meet your needs for your time point;
9 willing to take shorter lunch today if the jury's willing to do so. That's
10 the next last thing. Are you all -- you'd -- counsel, Mr. Leavitt, you made
11 a suggestion yesterday; is that an agreeable suggestion or what do you
12 all want to do?

13 MR. DOYLE: I'm sorry.

14 MR. LEAVITT: The lunch for the jury. As long as somebody
15 from the Court --

16 MR. DOYLE: I'm fine with that.

17 MR. LEAVITT: We asked it last night and we didn't want to
18 put anybody on blast or anything so.

19 THE COURT: So how would that be -- you all would be
20 paying for that?

21 MR. JONES: Yes.

22 THE COURT: Okay. I have to check with my Marshal to see if
23 the jury's okay. I'm -- come in for a moment, okay.

24 MR. LEAVITT: And then I have the credit card. If whoever's
25 ordering need -- however it's done; it needs to happen.

1 THE COURT: I'll get that one figured out in just a moment.

2 MR. LEAVITT: Okay.

3 THE COURT: Let's see where we are.

4 Okay. Let's get -- bring the jury in. I'll probably call you to
5 bench in about 45 minutes to an hour just -- take to, kind of, see if we can
6 make things work; see if that will work for the parties; see what peoples'
7 plans are, et cetera. Okay?

8 MR. DOYLE: Can we get Dr. Rives take the stand?

9 THE COURT: Oh, sure. Of course. One second. Let me --
10 Marshal, two things. One, give Dr. Rives a second to take the stand. Can
11 you come here for a moment, please? Okay. So at counsels' request do
12 you want me to ask the Marshal to see if the jury is okay with if --

13 [Court and Marshal confer]

14 THE COURT: So is that something that you want to just, like,
15 Capriotti's Sandwiches or something that will be paid for by parties or
16 something if the jury is going to sit --

17 MR. JONES: Yes, Your Honor.

18 MR. DOYLE: Yes.

19 THE COURT: And then do just a half hour lunch? Actually,
20 have to be a 40-minute lunch to make sure my team gets their full time.
21 Does that work for the parties?

22 MR. JONES: Sure.

23 MR. DOYLE: Sure, Your Honor.

24 THE COURT: That's not coming from the Court. That's --

25 MR. LEAVITT: It's coming from me.

1 THE COURT: -- what I understood that Plaintiff's request was
2 yesterday.

3 MR. JONES: Yes.

4 THE COURT: And I don't know -- and I'm not putting you in
5 on the spot. If the answer's no that's fine. They jury's never going to
6 know so.

7 MR. JONES: No.

8 THE COURT: Is that what you both want to do or not?

9 MR. DOYLE: That's fine.

10 MR. LEAVITT: Yes, Your Honor.

11 MR. JONES: Yes, Your Honor.

12 [Court and Marshal confer]

13 THE COURT: See -- if they have plans we're not going to do
14 because we're not going to interfere with anyone's plans. Okay?

15 THE MARSHAL: Okay.

16 THE COURT: And then just -- then you can bring them in. So
17 you'll just walk them in and know that answer afterwards after he --
18 okay? Appreciate it. Thanks.

19 [Pause]

20 THE COURT: Okay. Everybody ready if the jury's brought in?

21 MR. JONES: Yes, Your Honor.

22 MR. DOYLE: Yes.

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

24 THE MARSHAL: All rise for the jury.

25 [Jury in at 10:40 a.m.]

1 [Within the presence of the jury]

2 THE MARSHAL: All jurors are accounted for; please be
3 seated.

4 THE COURT: Appreciate it. Thank you so much. Welcome
5 back, ladies and gentlemen. Hope everyone had a very nice relaxing
6 evening. Happy Nevada Day; Happy Halloween; enjoy.

7 As you recall same witness is on the stand; witness
8 understands still under oath, correct?

9 THE WITNESS: Yes.

10 THE COURT: Appreciate it.

11 Counsel, feel free to continue with your questioning.

12 MR. DOYLE: Thank you. If we could put back up where we
13 left off yesterday with Exhibit 1, page 38?

14 THE COURT: Okay. There you go. Everybody's set.

15 MR. DOYLE: Okay.

16 THE COURT: Okay. Perfect. Thank you so much. Feel free
17 to proceed.

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

19 DIRECT EXAMINATION CONTINUED

20 BY MR. DOYLE:

21 Q I want to go down 1, 2, 3, 4, 5, lines towards the end where it
22 says there were no further serosal or full thickness injuries to the colon.

23 Doctor, first of all would you explain to the ladies and gentlemen of
24 the jury at what point were you able to see the two holes in the colon?

25 A Once the entire segment of transverse colon was completely

1 free of the mesh that's when I was able to see the holes in the colon.

2 Q And, approximately, where were they in terms of the
3 circumference or some other reference point?

4 A So, like I discussed, there's the mesentery that comes up to
5 the bottom on the colon and feeds it with blood vessels and lymphatics
6 and then it circles around. So I would say it's on the opposite border of
7 that; what we call the antimesenteric border; so on top.

8 Q And then the sentence that we've highlighted there were no
9 further serosal, et cetera. What does that sentence mean?

10 A It means when I examined the colon at that point, looking at
11 all sides of it that I can, I see no further injury to the colon.

12 Q And how did you go about doing that; what were the
13 mechanics?

14 A You use the grasping instruments you can rotate and flip the
15 colon upside down, basically, back and forth; move it left and right as
16 you need to to make sure that there's no evidence of anything leaking
17 out. You're actually visualizing it to make sure it looks nice, pink, and
18 healthy.

19 Q Did you see anything abnormal at this point?

20 A No.

21 Q Okay. Then it goes on to say we then turned our attention
22 towards repair the incisional hernia. Would you describe the first step
23 that you took to repair the incisional hernia then?

24 A So at that point I have to look at the size of the defect, or the
25 hole, or the hernia; figure out why the prior mesh had failed and cover

1 that area. So I make an estimate of what size mesh I need to cover that
2 area. The mesh was a Ventralight ST, we call it, with echo. It's a piece of
3 mesh with a little insufflation device; you roll it up and you insert it
4 through one of the 12-millimeter trocar sites.

5 Q Were you able to determine, or come to a conclusion, why
6 the earlier one had not worked?

7 A All I can see is that on the upper part of her abdomen where
8 we had -- or where I had secured before had come loose and was pushed
9 up into the hernia sac. The remaining mesh below it was intact.

10 Q Why didn't you review -- I'm sorry. Why didn't you remove
11 the entire old mesh, if you will?

12 A Well, A. That would have been a much larger defect to close
13 which would have been much more difficult and have a higher rate of
14 recurrence. Second, taking out old mesh, necessarily, you have to
15 remove some of the soft tissue of the muscle; the connective tissue and
16 that would make the entire abdominal wall even weaker.

17 Q And then just if you could complete the steps that you took
18 to place that mesh and secure it?

19 A So, like I said, that mesh is a piece of mesh and has a little
20 green device which has an insufflation tube. So where the hernia is on
21 the skin I make an incision. There's a little grasping needle that we poke
22 through there to grab the insufflation tube. You pull that up through the
23 muscle layer, through the skin, and you hook it up to a syringe and you
24 inject air.

25 When you inject air into that green device it lays flat or it pushes

1 the mesh flat so that when you pull up on it you could put a clamp on it
2 near the skin and then when you're looking up at it the mesh is laid flat
3 against the abdominal wall. If you don't have that echo device to hold it
4 flat the mesh is just floppy screen everywhere and it makes it very
5 difficult to tack into appropriate position.

6 Q And then if we could scroll down about two-thirds down this
7 large paragraph there's a line that says defect by at least three to five
8 centimeters then there's a sentence at the end of that line that says there
9 was no further evidence of bleeding. What does that mean?

10 A So this is after the mesh has been approximated to the
11 abdominal wall so that part of the operation's complete. So now I'm
12 reviewing the omentum that had stuck in there before; I'm looking at it to
13 make sure -- it's been a while; is there any bleeding from it? And I'm, in
14 general, looking at the overall abdominal wall for any other signs of
15 bleeding or injury.

16 Q Then the next sentence says the colon appeared to be
17 healthy, viable, no further injuries or tears. Could you explain that
18 sentence?

19 A It sounds pretty self-explanatory. Again, I'm looking at the
20 colon where we did -- where I did the repair; made sure the staple lines
21 were intact; that there was no further injuries and that it looked healthy
22 and viable.

23 Q And, Doctor, I'm sorry. Going back for a moment to what
24 you did to test the two repairs of the holes you had mentioned the first
25 step, just inspecting, but what else did you do to make sure those repairs

1 were secure?

2 A Well, like I said, you need to make sure that the staple line
3 didn't constrict the colon, so you tend to squeeze the colon a little bit
4 with the clamps to make sure that things look like they're moving
5 through; that the staple line is intact and not pulling away from the
6 colon.

7 Q And then on Exhibit 1, page 38, this last sentence that says
8 she tolerated the procedure well without complications. What did you
9 mean by that?

10 A It means that when taking down the colon from the mesh it
11 was necessary to make those holes to get it away from the mesh. So it
12 wasn't an unexpected complication as opposed to you're working on the
13 mesh and you puncture the liver, for instance, that would be a
14 complication that would be unexpected. That would be a complication
15 we would dictate.

16 Q Did Mrs. Farris receive prophylactic antibiotics?

17 A Yes.

18 Q Which ones?

19 A I believe she got Ancef before the surgery and then after the
20 surgery I ordered Suboxitine.

21 Q Then for the remainder of -- well for the remainder of July
22 3rd how did she do?

23 A She went to recovery; she was extubated. There were no
24 anesthesia issues during the -- during the surgery and after and then she
25 went to the floor with no problems.

1 Q And then how did Dr. Tanveer Akbar become involved in her
2 care that day?

3 A He is the hospitalist and the hospitalist is the doctor that
4 admits and manages the patient while they're in the hospital. So they
5 help coordinate care; they help coordinate things with social workers,
6 case managers and help with the discharge of the patient so that they
7 get their discharge medications and have their follow-up appointments.

8 Q Now I wanted to digress for a moment concerning some
9 testimony from a little bit back. Do you recall the questions to you about
10 Mrs. Farris's white blood cell count after Dr. Hamilton's operation?

11 A Yes.

12 Q And what do you recall about that?

13 A That I was asked if it was normal on August 11th.

14 Q Was it normal on August 11th?

15 A Yes.

16 Q How many days was that after Dr. Hamilton's surgery?

17 A I believe that was 25 days.

18 Q Was that surprising to you?

19 A At first no, but on reflection that she had successful surgery
20 and was doing well, yes. That's surprising to be there; that elevated; that
21 long.

22 Q Doctor, I want you to -- if you could find the binder, please,
23 that is -- I forget what the sheet says, but its's -- it says Plaintiffs or Joint
24 on it? We're looking for Exhibit 1, the hospital records.

25 A Would that be in the Plaintiffs' Exhibits?

1 Q Yes, I think so.

2 THE COURT: Would that be, Counsel, I believe if I'm -- just as
3 Exhibit 1 in it. Plaintiffs' binder that has just Exhibit 1; is that which one
4 you're looking for?

5 MR. DOYLE: Yes.

6 THE WITNESS: Plaintiffs' Exhibit, Binder 1, Exhibit 1?

7 MR. DOYLE: Yes.,

8 BY MR. DOYLE:

9 Q Now I want to go July 4th. Did you see Mrs. Farris that day?

10 A Do you want to do it to this now or wait?

11 Q Just based on your memory.

12 A Yes.

13 Q Okay. Did Dr. Akbar see her?

14 A Yes.

15 Q Dr. Syed Zaidi?

16 A Cardiologist. Yes.

17 Q Dr. Kenneth Mooney?

18 A The intensivist. Yes.

19 Q Dr. Farooq Shaikh?

20 A Infectious disease doctor. Yes.

21 Q And Dr. Yann Bor Lin?

22 A Yes, another intensivist.

23 Q I want to go to your note for October -- I'm sorry. Your note
24 for July 4th. I don't want to put it up, but I just want you to take a look at
25 it and it is --

1 Q I jotted down the wrong number; give me one second. So
2 Doctor, take a look at Exhibit 1, pages 575, 576, 77, and 78 and if you
3 could just tell us what these pages are.

4 MR. JONES: Well, hold on, just a second.

5 BY MR. DOYLE:

6 Q Doctor, what are those pages?

7 A These are my --

8 MR. JONES: Actually, Your Honor, I think we'd need to
9 approach.

10 THE COURT: Thank you; you may do so.

11 Madame Court Recorder, can you please turn on the white
12 noise? Appreciate it; thank you so much.

13 [Sidebar at 10:53 a.m., ending at 10:54 a.m., not transcribed]

14 THE COURT: Okay. There was not an objection pending. It
15 was just a point of clarification; is that correct?

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

17 MR. DOYLE: Yes.

18 THE COURT: Okay. Feel free to proceed; thank you so much.

19 BY MR. DOYLE:

20 Q Dr. Rives, about what time of day did you see Mrs. Farris on
21 July 4th?

22 A About 12:20.

23 Q How was she doing when you saw her now on July 4th at
24 about noon?

25 A She was complaining of abdominal pain, bloating and

1 distention. She had been drinking some fluids and was feeling
2 nauseous.

3 Q The -- your post-operative orders for July 3rd what did they
4 include in terms of intake?

5 A Patient is to be NPO, nothing to eat or drink; can have a little
6 bit of ice chips and sips of water; basically keep your mouth moist.

7 Q And why -- is that a typical post-operative order?

8 A If you've done some repairs on the bowel or if you're unsure
9 whether the bowel's going to be working well the next day, yes.

10 Q Was that the reason for the order for Mrs. Farris?

11 A Yes.

12 Q Okay. Now how was she doing otherwise in terms of her
13 condition?

14 A She was starting to have a very high heart rate; an abnormal
15 heartrate called atrial flutter. I believe they were calling a cardiologist to
16 address that, and her glucose was over 500. She was not having any
17 fevers at that time and my abdominal exam was that it was firm,
18 distended and tympanic and that means the patient's so distended that
19 when you tap on it it sounds like a hollow drum.

20 Q Now if you look at page 578, the last page of your note,
21 there's a section there under impression and plan where you describe
22 her course?

23 A I described it as worsening.

24 Q And what was it that was worsening?

25 A Her abnormal heartrate; her abnormal abdominal exam.

1 Q What steps did you take or order to respond to what was
2 going on from your perspective?

3 A So one of the causes of high heartrate and patient distress
4 after abdominal surgery is if the gut's not working right you can get
5 bloated, distended; it could lead to nausea and vomiting. So to avoid
6 that we'll sometimes put a nasal gastric tube into the patient's nose,
7 down into the stomach, hook it up to a little machine that provides
8 intermittent suction to pull that air and fluid out of there. Hopefully to
9 depress their stomach and, hopefully, get them to feel better.

10 Q Was a nasal gastric tube placed?

11 A They attempted multiple times to place it, but they hadn't --
12 lot of difficulty. I don't think they got a tube in until she was intubated.

13 Q And who made those attempts?

14 A The nursing staff.

15 Q Is that typical for a nursing staff function?

16 A Yes.

17 Q You indicated in this note on page 578 that it was okay from
18 your standpoint to heparinize her if necessary. What was the reasoning
19 for that?

20 A The patient wasn't showing any signs of bleeding from my
21 standpoint; there wasn't any bleeding during the surgery. Cardiology
22 wanted to heparinize her because when you're in an abnormal heart
23 rhythm you can develop clots in your arterial system. Those can go to
24 your head and cause a stroke; then go to your lungs and cause
25 pulmonary emboli. They can sit in your heart and get on the leafs

1 [phonetic] or the valves of your heart. So, commonly, they'll want to
2 heparinize or thin the blood, so it doesn't make those types of clots.

3 Q If we look at Exhibit 1, pages 579 to 586, can you tell us what
4 that is?

5 A To 86?

6 Q Yes.

7 A It's a progress note, post-operative day one, July 4th from
8 Dr. Akbar, the hospitalist.

9 Q If you look at the 586 what was the plan for Mrs. Farris now
10 at about noon on July 4th?

11 A He discussed it with the patient's or -- you know, with
12 patient's son at length. All the questions were answered. They're going
13 to continue a Cardizem drip which is a heart medication to control the
14 heartrate; Heparin for protocol like we discussed about thinning out the
15 blood to avoid clots; Q2 or Accuchecks, that's to check her glucose and
16 get her glucose back under tight control; repeat basic metabolic profile in
17 the morning; broad spectrum antibiotics; called infectious disease;
18 nephro, meaning the renal doctors, to evaluate; low threshold to transfer
19 to ICU.

20 Q Now look at where Exhibit 1 and I want you to go to page 20.
21 And, actually, if you would look at pages 19, 20, and 21 and tell us first of
22 all, what is on these pages?

23 A It's a consultation note from Dr. Farook, the infectious
24 disease doctor, post-operative, day one, July 4th.

25 Q If you look at page 20 of Exhibit 1 under assessment and

1 plan, the item number 1 if I could address your attention to there.

2 MR. DOYLE: And if we could put up page 20, please? Under
3 assessment and plan, number 1.

4 BY MR. DOYLE:

5 Q And do you see the sentence under number 1 that says this
6 could represent fecal peritonitis?

7 A Yes.

8 Q Did you review this note at some point in time?

9 A Yes.

10 Q What did you understand -- is it Dr. Farook or Dr. Shaikh? I'm
11 sorry.

12 A Beg your pardon?

13 Q The infectious disease doctors last name is it Farook or
14 Shaikh?

15 A I'm sorry. I referred -- we know each other so I, kind of, go by
16 first names. It's Dr. Shaikh.

17 Q Okay. When you read Dr. Shaikh's note and saw his
18 comment that this could represent fecal peritonitis what thought did you
19 have about that?

20 A That his impression was that the bacteria from the
21 colotomies was causing an infection.

22 Q Agree or disagree with that thought?

23 A As a possibility? Agree.

24 Q Why?

25 A Because there's two holes in the colon. Bacteria -- even

1 though there's feces that doesn't come out -- bacteria could theoretically
2 get out. Bacteria could somehow find its way into the bloodstream and
3 cause a systemic infection.

4 Q Can that happen despite irrigation and drainage?

5 A Yes.

6 Q Can that happen despite prophylactic antibiotics?

7 A Yes.

8 Q On July 4th were you considering the possibility of some
9 bacterial contamination inside the abdomen as a cause of her problems?

10 A I think that came later after she was finally in the ICU. I think
11 my initial concern when I heard that she was transferred was I was
12 concerned that she may have aspirated because her stomach was so
13 distended and we had to put an NG tube down to try to decompress her,
14 but at some point, yes.

15 Q On July 4th were there a number of different physicians that
16 saw Mrs. Farris?

17 A Yes.

18 Q At some point between July 3rd and July 9th did you -- can
19 you tell the jury whether you considered the possibility of a failure of the
20 staple line?

21 A So no matter how the patient's doing even if we think that
22 we don't have an issue with the staple line it's always in the back of our
23 heads as surgeons that any complication after surgery is primarily
24 related to what we do. So we're always thinking about what signs or
25 symptoms, what clinical factors are going into our decision-making

1 about surgery first and that would be involving her injuries to her colon.

2 Q Can you tell us whether that was your thought process each
3 day going forward from July 4th?

4 A Yes.

5 Q All right. Let's go to July 5th and your note is beginning --
6 we go to 558 of Exhibit 1. Actually, let's go to 559 first. Tell us what we
7 are looking at on Exhibit 1, pages 559 to page 563?

8 A This is my progress note from July 5th, 2015.

9 Q And based upon your progress note how was she doing at
10 this point in -- well, let me ask you first, about what time of day did you
11 see her on July 5th?

12 A 11:00 in the morning.

13 Q And looking at this note how was Mrs. Farris doing on the
14 morning of July 5th now?

15 A Well from the day before she's worse. She's intubated; she's
16 now sedated. They continue to have the diltiazem drip and the heparin
17 drip. Her urine output is increased which is a good sign, but she's
18 sedated, intubated which is a drastic change from the day before.

19 Q Do you comment on anything about a pending CT scan?

20 A Yes.

21 Q What did you indicate?

22 A Will await results of CT scan of chest, abdomen, and pelvis.
23 Will consider exploratory laparotomy depending upon results of CT and
24 patient's clinical progression.

25 Q Okay. So we're putting up on the screen page 563 of Exhibit

1 1 and this sentence, again, will await results of CT scan, et cetera. Would
2 you explain to the ladies and gentlemen of the jury what your thinking
3 was at this point?

4 A So, like I mentioned prior, I was concerned that she may
5 have aspirated from being distended and having an NG tube placed and
6 she went into respiratory failure. I was also concerned about sepsis from
7 an intraabdominal course, so we were getting the CAT scan to look at all
8 aspects of her body: the chest, abdomen, and pelvis. Depending upon
9 what those results would show they would either support her clinical
10 diagnosis or clinical outcome so far or, maybe, be against it. So in terms
11 of the CT of the abdomen and pelvis which is what I would be concerned
12 with and looking at as the surgeon I was looking for abnormal free air,
13 abnormal free fluid, or anything abnormal about the bowel itself.

14 MR. DOYLE: And if we could go to Exhibit 1, page 558? We
15 could call that up?

16 BY MR. DOYLE:

17 Q What are we looking at on 558?

18 A An addendum to my note saying that the CT results were
19 reviewed.

20 Q What did those results tell you?

21 A That there was trace free fluid around the liver as expected.
22 There was an air fluid level in the hernia sac; there was no other free air.
23 There was no obstruction of the bowel; there was no pulmonary emboli
24 or clots in her lungs that would cause her to have respiratory distress.

25 Q And what do you mean by an air fluid level in the hernia sac?

1 A So when we remove that bowel from that hernia sac it leaves
2 a cavity or a little cave because it's been pushing the soft tissue away
3 while it's been developing. When you take that out that space still exists
4 and now you've put a piece of mesh covering the entrance to the cave so
5 to speak. And you would expect air to be in there from the surgery and
6 you'd expect fluid to be in there because as your body doesn't like an
7 empty space it tends to fill it with fluid we call seroma. So you'd tend to
8 see an air fluid level after that type of surgery.

9 Q Would that be normal or abnormal finding?

10 A Normal.

11 Q Okay. Then the next sentence in your note that begins we'll
12 see. If we could highlight that. And would you explain what this aspect
13 of your note represents? Or read it for us first.

14 A We'll see how patient develops clinically over the next 24
15 hours. If improves significantly then no surgical intervention. If patient
16 worsens clinically, or even does not improve, will consider surgical
17 intervention.

18 Q So what were your thoughts at this point?

19 A My thoughts were that if she doesn't improve clinically; if she
20 worsens clinically -- even though the CT scan doesn't show an abscess
21 or a leak then I'm going to assume that there's a leak and consider
22 re-exploration; take her back to surgery.

23 Q And on July 5th did Dr. Akbar see her?

24 A Yes.

25 Q Zaidi?

1 A Yes.

2 Q Mooney?

3 A I believe so.

4 Q And Shaikh?

5 A Yes.

6 Q And Dr. Arvin Gupta, a nephrologist?

7 A Correct.

8 Q What was the reason she was intubated?

9 A She couldn't maintain her oxygen saturations on room air.

10 And then as they increased the oxygen saturation by putting forced air if
11 you can't maintain your oxygen saturation you're going to knock off your
12 brain; knock off your kidneys and die. So it becomes necessary to put a
13 patient on a ventilator to give them enough oxygen to support their
14 tissues.

15 Q Now, Dr. Rives, is your July 6th note in Exhibit 1?

16 A I don't believe so.

17 Q From your memory can you tell us what was going on with
18 Mrs. Farris on July 6th from your perspective?

19 A Well at that point she was stabilizing. From the ventilatory
20 standpoint instead of being on a hundred percent oxygen she was
21 already down to 40 percent oxygen which is usually as low as we do on
22 the ventilator. From a cardiac standpoint her heartrate was now under
23 control; her blood pressure was normal without using medications to
24 support it. Her kidney function, in terms of the creatinine which we
25 measure in the blood was normal. She was making more urine as well,

1 so she was improving.

2 Q On July 6th was there evidence now of anasarca?

3 A Yes.

4 Q What's anasarca?

5 A So when you have sepsis the small blood vessels in your
6 body dilate and they become leaky because they can't maintain their
7 tight junctions anymore. So fluid, necessarily, leaks out into the -- what
8 we call the third space -- which is all the space basically outside of the
9 blood vessels themselves. So the first thing in a protocol is give the
10 patient two liters of fluid which supports the heart, but eventually with
11 those leaky capillaries that goes out in the subcutaneous tissue or the
12 tissue below the skin and the patient gets edematous and swollen not
13 just in the abdomen, but also in the legs and extremities.

14 Q Now, Dr. Rives, on July 6 was the bandemia better?

15 A Yes.

16 Q What was the significance of that for you?

17 A The significance was that whatever infectious process was
18 going on was getting controlled.

19 Q And do you recall how her lactic acid or acidosis was doing
20 on July 6th?

21 A It had resolved.

22 Q What was the significance of the lactic acidosis having
23 resolved?

24 A Well that means she's now burning oxygen for her
25 metabolism; the tissues are getting enough oxygen to survive and do

1 well; that she's not in anaerobic metabolism without oxygen and the
2 tissues are dying off.

3 Q And then on July 6th, besides yourself, Dr. Zaidi saw her?

4 A Yes.

5 Q Shaikh?

6 A I believe so, yes.

7 Q Gupta?

8 A Yes.

9 Q McPherson?

10 A Correct.

11 Q And Dr. Ali?

12 A Oh, the hospitalist, yes.

13 MR. JONES: Your Honor, I'm just going to object. Leading
14 questions.

15 THE COURT: Sustained.

16 BY MR. DOYLE:

17 Q Who is Dr. McPherson?

18 A He's a intensivist.

19 Q And --

20 A And ICU specialist.

21 Q -- and Dr. Ali?

22 A She's a hospitalist.

23 Q So on July 6th now with the improvements that you've seen
24 what was going through your mind in terms of what might be going on
25 inside the abdomen and the possibility of surgery?

1 A Well with those improvements I was less concerned that she
2 had an active leak going on or an active infection that needed to be
3 addressed surgically, but it was always in the back of my mind.

4 Q But why not just take her back to surgery?

5 A Taking people back to surgery requires a new anesthesia
6 which is a risk; taking somebody back just to look has a unnecessary risk
7 especially from a complication standpoint. It has higher morbidity and it
8 has a higher mortality which means she can die from it as well.

9 Q Let's go to July 7th and if you would look at -- we're, again,
10 Exhibit 1, page 437. Tell us what page 437 looks like or what is this?

11 A It's a progress note by me on the 7th of July at 1:00.

12 MR. DOYLE: So let's call that up, page 437.

13 BY MR. DOYLE:

14 Q And, Doctor, if you'd walk us through the first sentence and
15 explain what you have in the note?

16 A Patient continues to improve; bandemia is 7 percent which
17 was continuing to go down; lactic acid 1.11 which is normal; vital signs,
18 meaning her temperature, heartrate, blood pressure, oxygen saturation
19 are stable. She has increased urine output; she's been given Lasix to
20 help increase her urine output and get rid of that anasarca or edema in
21 her tissues. There was no bowel activity yet. The incision was clean,
22 dry, and intact. Hernia sac with seroma; unchanged bowel sounds, BS,
23 bowel sounds hypoactive meaning you don't hear much bowel sounds
24 going on. Overall, patient with resolution of sepsis and SIRS.

25 Q Let me stop you there. How or why did you come to that

1 particular conclusion?

2 A Because she has no further evidence of end organ
3 dysfunction.

4 Q Then what do you have next in the note?

5 A May repeat CT scan in 24 to 48 hours to evaluate for any
6 changes in new free air or possible abscess. It's a typographical error,
7 but or fluid collections otherwise weaned to extubate and continue nasal
8 gastric tube.

9 Q And why were you thinking about a repeat CT scan?

10 A Because if you have a possible source of infection even if it
11 doesn't show up on the initial CAT scan people will develop delayed
12 abscesses so that bacteria has time to grow; time to form an abscess;
13 form a fluid collection. That will usually happen anywhere from three to
14 eight days after the time of surgery. So she may not be showing signs of
15 an abscess now, but it could be because of the possible bacterial
16 contamination so I want to get a CAT scan. If it's developing get it
17 drained ahead of time, so it doesn't become an issue.

18 Q Did multiple other physicians see her on July 7th?

19 A Correct.

20 Q Was she seen by an intensivist -- slash -- critical care
21 specialist each day she was in the ICU?

22 A Yeah, she has to be.

23 Q Hospitalist?

24 A Yes.

25 Q Now let's go to Exhibit 1, page 363, 364. Actually, let's start

1 with page 364 and looking at 363 and 364 can you tell us whether it
2 appears part of your note is not in this exhibit?

3 A Yes.

4 Q So --

5 A The subjective part; the objective part; laboratory findings;
6 radiology findings are not on this note.

7 MR. DOYLE: All right. Well let's call up page 364.

8 BY MR. DOYLE:

9 Q Is this the last page of your progress note for July 8th?

10 A Yes, it's the impression and plan.

11 MR. DOYLE: All right. So let's call that up.

12 BY MR. DOYLE:

13 Q And under course what do you have?

14 A Improving.

15 Q And then under plan if you could just walk us through what
16 you've indicated?

17 A Patient slowly improving; trying to wean to extubate. She
18 was having difficulty when they would take off the sedation maintaining
19 her saturation because of agitation. So they'd have to sedate her
20 because they don't want her heartrate to go up and cause stress to the
21 patient.

22 White blood cell count trending down; no bandemia. Again
23 those early bands that we look for that indicate an active infection are
24 gone. The lactic lactate remains normal, no other signs or symptoms of
25 SIRS or sepsis or SIRS. The NG tube had minimal output meaning the

1 canister that it's hooked up to was showing that there was a normal
2 amount of fluid in there; there wasn't really signs of obstruction. She
3 remains afebrile meaning she did not have a temperature.

4 My plan was to repeat an X-ray tomorrow to evaluate for possible
5 bowel obstruction or free air; will consider repeat CT scan with PO
6 contrast if no bowel obstruction on the plain film X-ray. So normally I'd
7 get a plain film X-ray to make sure that there's no bowel obstruction
8 because if you give a patient oral contrast and there's an obstruction you
9 risk them being obstructed, filling the stomach, and having them aspirate
10 on that as well

11 Q Was that plain film of the abdomen obtained?

12 A No.

13 Q Was it obtained the next day?

14 A I don't know. I think they went ahead and ordered CT scan
15 anyways.

16 Q Okay. CT scan of what part of the body now?

17 A That would be the abdomen and pelvis with IV, oral and
18 rectal contrast.

19 Q Now on July 8th why did you want to or why were you
20 considering a repeat CT scan with oral contrast?

21 A Because while everything was improving the only thing that
22 really wasn't improving was her bowel function. She wasn't having
23 flatus or gas; she wasn't having any sort of normal stooling. The NG
24 tube output was what I'd expected, but I would expect some bowel
25 activity by now having the patient recovered.

1 Q Let's go to Exhibit 1, page 363. If we could call it up and tell
2 us what this is, please?

3 A This is an addendum to my note about three minutes after
4 the last note.

5 Q What's the date of the note?

6 A July 8th, 2015, 13:56.

7 Q Could you walk us through this note, please?

8 A Addendum. Discussed the patient progress of events with
9 husband again with nurse present. I'd been talking to family members
10 every day that I rounded. I wanted the nurse to be in the room to
11 document that this had been going on because there was some
12 confusion between myself and the family.

13 Explained the prognostic signs and symptoms we are looking for
14 and goals trying to achieve and indications that she might need re-
15 exploration. In other words I'm trying to explain to the family members
16 why would we go back in; why would we have to go back in; what were
17 the clinical signs we're looking for to re-operate. I was also explaining to
18 them what are the clinical signs we were looking at to not re-operate.

19 Q Okay. Continue, please?

20 A Have discussed this with the husband over the last four days
21 and numerous times. Overall explained patient's situation continues to
22 improve and now trying to get fluid off the patient and get her extubated.

23 Q And getting the fluid off means what?

24 A Getting rid of that edematous fluid that's in her
25 subcutaneous tissue. That -- that fluid is also in the lungs and keeping

1 her from getting extubated. So getting fluid off the lungs and off the
2 tissues helps the patient breathe better and easier and gets them off the
3 ventilator easier.

4 Q Did multiple physicians see her on July 8th?

5 A Yes.

6 Q Let's -- so at around 1:00 or 2:00 p.m. on July 8th, what was
7 going through your mind in terms of need for surgery, not need surgery;
8 what was going through your head?

9 A Well at that point she did not need surgery. There were no
10 indications to do a repeat surgery or look back as they say, but I was still
11 considering the possibility that there was something going on with the
12 bowel because it wasn't moving properly; that she wasn't having return
13 of bowel function like I would have expected at that time.

14 Q Let's go to July 9th and look at Exhibit 1, page 318. If you
15 could look at 318 through 322 and tell us what this is please?

16 A This is my progress note on July 9th, 2015, 15:00/15:42.

17 Q The 15:42 represents what?

18 A The time.

19 Q Time of what?

20 A That the note was done.

21 Q Can you tell us your --

22 A 3:42 in the afternoon.

23 Q -- normal practice for preparing these notes when seeing
24 someone like her? I mean, do you do them same day; next day, what?

25 A Oh, no. They're done right after I see the patient.

1 Q Okay. How does that work? Poor question. If -- let's look at
2 this July note or July 9th note for a minute. When you open her record
3 what is already there for you to see?

4 A When I open the record, or I start to make a note?

5 Q When you start to make a note. I'm sorry.

6 A So every physician has certain preferences in their progress
7 notes that are prepopulated meaning the computer puts it into your note
8 automatically. So, for me, for my progress notes I have the computer
9 put in the highs, lows, and averages for the vital signs; any pertinent
10 laboratory that's been done; a list of the medications that the patient's
11 on. The intakes and outtakes, the fluid that's gone into the patient; the
12 fluid that's come out of the patient and that's pretty much it. Everything
13 else is filled out by myself.

14 MR. DOYLE: Okay. Let's put up, or call up, Exhibit 1, page
15 322, please?

16 BY MR. DOYLE:

17 Q And under plan, can you walk us through what you have
18 under plan now for July 9th?

19 A Patient's stable; no signs or symptoms of sepsis or SIRS
20 currently; vent minimum support; X-ray no free air; no dilated loops of
21 small bowel or large bowel with air in the colon, meaning, air appears to
22 be getting through from the small bowel to the end of the colon.

23 CT pending with oral and rectal contrast; will compare to prior.

24 Q So what thoughts were going through your mind now in the
25 afternoon of July 9th about her condition?

1 A That she was still improved. There were no signs or
2 symptoms of SIRS or sepsis, but I was still concerned about the bowel
3 loops. The X-ray shows that they're not dilated; that there's distal air,
4 but she's still not -- still not functioning; still not having any output from
5 her rectum and there was a recommendation made for a CT scan with
6 oral and rectal contrast.

7 Q And how were her laboratory data at this point?

8 A Her white cell count was in the same range; it was 22.9. Her
9 hemoglobin and hematocrit -- in other words the look at the red cells --
10 was stable. Her platelets were stable; her creatinine was 0.65 which is
11 well within normal range.

12 Q What about bandemia or left shift on July 8th?

13 A No bandemia; no left shift.

14 Q I'm sorry. I misspoke. July 9th?

15 A Same answer.

16 Q Now Dr. Ripplinger did a consultation on July 9th. When did
17 you look at his full consultation note?

18 A That would be sometime on the 9th.

19 Q And what was your thinking compared to his thinking when
20 you looked at his full consultation note?

21 A That we were in the same clinical thought process.

22 Q Did the CT scan on July 9th show any changes in the hernia
23 sac?

24 A Yeah, actually, the air had gone away which was a sign that
25 there wasn't a hollow viscus perforation because the air would get into

1 that hernia sac because it's sitting right on top. It was being replaced
2 with fluid which we'd expect as the -- as I said before the body tissues fill
3 that area. The rest of the abdomen had less free air, or actually even no
4 free air, I believe and less free fluid. The bowel itself looks normal; there
5 were no pockets of fluid or abscess between the small and large bowel
6 indicating an active leak and, also, that there was no extravasation of any
7 of the contrast or leak of the contrast outside of the bowel.

8 Q Did you continue to see Mrs. Farris after July 9th?

9 A Yes.

10 Q Did multiple other specialties see her as well?

11 A Yes.

12 Q Intensivist?

13 A Yes.

14 Q Cardiology?

15 A Yes.

16 Q Nephrology?

17 A Correct.

18 Q Infectious disease?

19 A Correct.

20 Q Hospitalists?

21 A Yes.

22 Q Cardiology?

23 A Yes.

24 Q Let's look at your note for July 9th which is in Exhibit 1 and
25 we're going to look at page 264. Actually, take a look at page 260

1 through 264 of Exhibit 1 and tell us what this is?

2 A This is a progress note from July 10th, 2015.

3 Q About what time did you see her?

4 A 2:00 in the afternoon.

5 MR. DOYLE: So let's call up page 264 of Exhibit 1.

6 BY MR. DOYLE:

7 Q Under course what did you indicate?

8 A Improving.

9 Q And then under plan if you could walk us through that,
10 please?

11 A CT scan shows no signs of an abscess or leak meaning
12 there's no abnormal fluid collection inside of the abdomen; there's no
13 abnormal fluid collection between the loops of small and large bowel; no
14 leak. There's no increased free air suggesting a leak. The contrast that's
15 oral and in through the rectum is not leaking out of any holes in the
16 colon or even at the small bowel.

17 It looks improved with less pericolic fluid. So your colon lies on
18 the left and right side of your abdomen. Between the colon and the
19 abdominal wall we call that a pericolic gutter and it lays such that fluid
20 would collect there if it was developing anywhere in the abdomen by
21 gravity.

22 Q And then what do you have next?

23 A Nothing amenable to drain. In other words if there was an
24 abscess pocket that we're concerned about we could have interventional
25 radiology drain the abscess fluid if we thought it was infected and

1 needed to be dealt with.

2 Q And, Doctor, explain what an abscess is in the context of a
3 patient like this?

4 A So bacteria cause inflammation and all that fluid goes to the
5 side of inflammation; kind of think of it as the redness on your face
6 before as a pimple is developing and then your white cells try to attack
7 and fight off the infection it causes debris and some of those bacteria
8 create gas and it necessarily gets bigger and bigger; like a pimple it will
9 eventually pop. In other words the abscess is under pressure and it
10 wants to get out of a closed system.

11 Q Looking again at your plan on page 264 of Exhibit 1; if you
12 could continue walking us through that, please?

13 A Had long discussion with husband and brother regarding
14 findings; patient's condition. Indications to return to OR and indications
15 not to re-operate and what re-operation would entail.

16 Q Let me stop you there. What was -- what would have been
17 the indications to return to OR?

18 A Well if her clinical condition was deteriorating. So if instead
19 of trying to wean to extubate her all of a sudden she wasn't breathing
20 well; they had to increase her oxygenation or from a cardiac standpoint if
21 her heartrate all of a sudden went sky high; she went back into atrial
22 flutter she couldn't maintain her pressures.

23 If there were other signs that the kidneys were starting to fail -- in
24 other words anything that suggested she was back in sepsis or having
25 end organ dysfunction those would be indications to go back to the OR.

1 Q And then if you could finish that plan, please?

2 A Indications not to re-operate and what re-operation would
3 entail. They both understand and their questions answered to their
4 satisfaction.

5 Q All right. Let's look at your progress note for July 11th and if
6 you could look at Exhibit 1, pages 217 through 221 and confirm for us
7 what this is?

8 A Progress note by me on the 11th of July at 1:05 p.m.

9 Q I'm sorry. What time?

10 A 13:05, 1:05 p.m.

11 Q We don't need to call it up, but just take a look at page 217
12 for a moment. Under nurse report is there any information there about
13 fever?

14 A Yes.

15 Q What was the information?

16 A That she had a fever for the first time this morning.

17 Q What significance did that have for you?

18 A That there was some -- something going on that would
19 possibly give her a fever.

20 Q And then let's look at -- what were the possibilities that were
21 going through your mind at that point?

22 A They were doing the sedation vacation trying to get her to
23 get off the ventilator and a lot of times that causes agitation and stress
24 and people will have a fever from that. Fever could also be an indication
25 that something's going on in the abdomen.

1 MR. DOYLE: Let's look at page 221 of Exhibit 1 which is the
2 last page of this progress note. If we could call that up.

3 BY MR. DOYLE:

4 Q If you could explain to the ladies and gentlemen of the jury,
5 please, your plan for July 11th?

6 A Will get plain film X-ray tomorrow. If patient does -- if
7 patient does start passing the contrast -- which should mean does not
8 pass the contrast -- will need to get Fleets, which are enemas up the
9 rectum to loosen the contrast, so it does not become inspitated which
10 means dried out and hard; continue current management.

11 Q And why did you want to continue current management?

12 A Because she was doing well.

13 Q Let's look at your progress note for July 12th, which is
14 Exhibit 1, pages 170 through 74 and if you could confirm for us what
15 we're looking at?

16 A My progress note from July 12th at 11:00 a.m..

17 MR. DOYLE: Right. Let's call up page 170.

18 BY MR. DOYLE:

19 Q And under subjective and patient complaint what is indicated
20 in your note?

21 A The sedation is off while she's still intubated. She's starting
22 to move her eyes spontaneously.

23 Q Positive or negative findings?

24 A It's a good sign, yes. Neurologically she's intact.

25 Q And then under nurse report what is the significant

1 information there for you?

2 A The NG tube output is 450 which was elevated for her. The
3 urine output was greater than six liters; patient has been tolerating so far
4 with the sedation off; no high heartrate; no high blood pressure to
5 indicate stress from trying to wean her to extubate.

6 MR. DOYLE: Then let's call up page 172 and in the middle
7 there's a section called radiology results.

8 BY MR. DOYLE:

9 Q Explain what we have here, please?

10 A So when you pull up radiology results on your progress note
11 there's a section that you can click that says pull up the radiologist's
12 interpretation and that's why it's in the parentheses marks. Ileus pattern;
13 no obstruction; no pneumoperitoneum; contrast in colon unchanged,
14 meaning the bowel gas pattern of her small bowel looks like an ileus
15 versus an obstruction.

16 No pneumoperitoneum means there's no free --

17 Q I'm sorry. Let me stop you there. What's an ileus versus an
18 obstruction?

19 A So an ileus is when your bowel's just not moving right; it's
20 not dilated; it's not under stress. The bowel has its own natural rhythm;
21 it has its own neurological function basically and surgery will sometimes
22 disrupt those neurological find -- or firings; it'll become paralytic
23 meaning it just doesn't want to move as opposed to obstruction where
24 something's actually causing the bowel to stop moving. In those cases
25 everything backs up; the bowel is dilated; you see air fluid levels in the

1 bowel in different loops. It has a completely different look to it.

2 Q Now this X-ray that we're talking about it's an X-ray of what
3 part of the body?

4 A Of the abdomen.

5 Q Then no pneumoperitoneum; what does that mean?

6 A It means no free air.

7 Q All right. Let's go to page 174 then which is the plan section
8 for this note.

9 THE COURT: Counsel, can you both approach for a brief
10 moment?

11 MR. DOYLE: I'm sorry?

12 THE COURT: Thank you so much. Can you both approach
13 for a brief moment?

14 MR. DOYLE: Yes.

15 THE COURT: Madame Court Recorder, could you just --
16 white noise. Thank you so much.

17 [Sidebar at 11:41 a.m., ending at 11:43 a.m., not transcribed]

18 THE COURT: We're just going to pause for a brief moment.
19 We're not going to go off the record or anything, but I'll let you all have a
20 moment to hopefully enjoy, enjoy some water. Sorry, I couldn't bring
21 milk in, but just one quick second.

22 Pause it for quick second. I'm just taking care of just one
23 little administrative detail, if you all don't mind, for just one quick
24 second, then we'll go right back.

25 [Pause]

1 THE COURT: Everything -- all administrative issues, can you
2 tell us, taken care of?

3 MR. JONES: Yes, yes.

4 THE COURT: My apologies. Feel free, counsel, to continue.
5 My Marshal's just going to go back and erase.

6 MR. DOYLE: If we could call up Exhibit 1, Page 174, please.

7 THE COURT: Thank you.

8 BY MR. DOYLE:

9 Q Doctor, can you walk us through your plan for July 12th
10 now?

11 A Patient tolerated sedation protocol better today.

12 Q What does that mean?

13 A They had changed some of her medications regarding her
14 sedation. Sometimes if a patient is on, say Pravachol, it may keep them
15 too sedated, so they may change the medications to try to keep them
16 less sedated. It makes it easier for them to ventilate, breathe on their
17 own, and hopefully get off the ventilating machine.

18 Q Continue, please.

19 A White cell count -- white cell count basically unchanged.
20 Patient now afebrile, meaning no fever, normal lactic acid, again --

21 Q Let me stop you there. So, what was the significant of now
22 afebrile?

23 A That she wasn't having a fever.

24 Q And what was the significance of the normal lactic acid?

25 A In combination, it makes me less concerned that there's

1 something catastrophic going on in her abdomen.

2 Q And then continue, please.

3 A No acute issues on x-ray, will give suppository to stimulate
4 activity to get contrast clear of the colon to avoid incipitation [phonetic] or
5 drawing -- or drawing out of the contrast. No other acute surgical issues
6 or recommendations at this point.

7 Q So, what was going through your mind on July 12th,
8 concerning what might or might not be going on inside her abdomen or
9 belly?

10 A Well, the day before she had a fever, so I was a little
11 concerned about that, but by this point, the fever had gotten better.
12 There was no change in her white count, but there was no other
13 indications, like a bandemia of an ongoing infection. Her lactic acid was
14 normal again. The importance of metabolism and oxygen usage by the
15 tissues, meaning they're healthy and working properly, but I was still
16 concerned that even though the x-ray showed no free air or obstruction,
17 that there was still a lot of contrast in the colon and that it wasn't
18 moving, and I wanted to get that contrast moving through her colon so
19 that her bowel function could return to normal.

20 Q Let's go to your progress note of July 13, and if you could
21 look at, first of all, Exhibit 1, Page 145 through 149, and confirm what
22 we're looking at.

23 A My progress note from July 13th, 2015 at 1:15 p.m.

24 Q And let's call up Page 145, a particular one, and I want to just
25 direct your attention to the nurse report. And if you could explain what

1 this information means, please?

2 A CPAP for only four minutes before the patient became --

3 Q Okay, hold on. What's CPAP?

4 A Oh, I was going to read the whole thing, but -- so as you get
5 somebody from the ventilator, they stay intubated, the tube stays in their
6 throat, but you can basically turn the ventilator off, but give them a little
7 bit of positive pressure, so that when they breathe they get a good
8 volume. You're basically checking the patient's ability to expand their
9 lungs, generate negative pressure and oxygenate on their own without
10 the vent.

11 Q So, continue, please.

12 A So, when they did that, she only lasted for about four
13 minutes because she became tachypneic, which means she started
14 breathing too hard, usually shallow breaths, and that's worrisome that if
15 you breathe fast like that, your chest moving up and down, you're going
16 to get weak, tired out, and fail. She also became agitated.

17 Q Continue.

18 A No bowel activity, ng tube 300 the last 12 hours. No other
19 acute issues.

20 Q The 300, what does that refer to?

21 A That's the amount of fluid that's coming into that canister
22 from the tube that's in her nose and into her stomach. That's what the
23 nurse reported to me, that had been out just in the last 12 hours, not 24
24 hours.

25 Q What did you make of that?

1 A That that was increasing.

2 Q And then no bowel activity, what did you make of that?

3 A In other words, the nurses are in charge, of course, taking
4 care of the patients hygiene and care. So, they're the first ones to let us
5 know whether the patient's having any bowel activity or not.

6 Q Let's go to Page 149 of Exhibit 1, and let's look at the plan
7 section. If you could walk us through the plan, Doctor, 149.

8 A I'm here.

9 Q Okay.

10 A Patient with white cell count trending down. Improved
11 abdominal exam. And according to my abdominal exam, it was softer,
12 there was less anasarca or less edema in the tissues.

13 Q Let me interrupt you there. What was the significance of
14 those findings?

15 A That we were getting the fluids out of her tissues.

16 Q What was the significance of the abdomen being softer?

17 A If a abdomen has something catastrophic going on, it has
18 what we call peritoneal signs and it remains firm, it's hard, it's rigid, it
19 won't give. When an abdomen is soft, it means there's nothing going on
20 inside, or possibly nothing going on inside to cause inflammation or
21 irritation of the inner lining of the abdomen.

22 Q And let's skip over the suppository and let's pick up with
23 agree with ICU Team. Explain that, please.

24 A Agree with ICU team after patient only lasted four minutes
25 on CPAP, that she will likely need tracheostomy. They will consult

1 cardiothoracic surgery.

2 Q What's a tracheostomy?

3 A So, sometimes patients, for whatever reason, can't be
4 weaned off the ventilator, and to make it easier, instead of having this
5 long tube in their throat, that they're trying to breathe through, especially
6 when you put them on CPAP, it's like breathing through a straw, it's very
7 hard to do. So, instead, we'll make an incision below their vocal cords,
8 right into their windpipe, right above the little notch in your chest here,
9 and insert a tube to breathe or to cause ventilation directly into the
10 lungs. We can then take out that endotracheal tube and it helps the
11 patient breathe easier, breathe better. It also increases their hygiene of
12 their mouth as well. It's also less agitating to a patient to be breathing
13 here than have this contraption in their mouth, which they necessarily, if
14 you're not sedated, the first thing you want to do is, you know, kind of
15 rip it out of your mouth.

16 Q If you could tell us about the last sentence in your plan?

17 A Discussed all of the above with husband, who seems
18 encouraged.

19 Q So, overall, how is she doing now, early afternoon of July
20 13th?

21 A She continues to be improving in some ways. They're going
22 to plan to do the tracheostomy to get her off the ventilator, which would
23 be a big step for her.

24 Q Let's go to your progress note now for July 14th. And
25 Doctor, by the way, as we've been going through Exhibit 1, we've been

1 just dealing with your progress notes, but what else -- what else is in
2 between your progress notes, that we've been going through if
3 somebody wanted to look at?

4 A If somebody wanted to look at?

5 Q If somebody wanted to look at all of Exhibit 1, what would
6 we find in between your different progress notes that we've been talking
7 about?

8 A Well, there's notes by -- there's multiple notes in the chart.
9 There's notes by all the physician's involved in the care. There's notes
10 by the nurses involved with her care. There's notes by the physical
11 therapist, the occupational therapist, by pharmacy, if there's a pharmacy
12 issue regarding antibiotics. If there's a wound care team, there's notes
13 by them as well.

14 Q Now, let's look at your progress notes for July 14th, and take
15 a look at Exhibit 1, Page 127 to 131, confirm what we're looking at.

16 A This is a progress note by myself, July 14th, 8:43 in the
17 morning.

18 Q Let's call up Page 127 and look at the nurse report section.
19 I'm sorry, let's look at the subjective section. What do we have here?

20 A The sedation is mostly off. Usually means that they're just
21 getting little doses instead of a large run of it through the I.V. Patient
22 responding nodding her head.

23 Q Then let's go to -- and what do we have under provider
24 communication nurse report?

25 A The nurse told me there were no acute issues with the

1 patient, that the tracheostomy was planned for today. The patient had
2 no response from the Fleets enemas. In other words, they put the Fleets
3 up inside the rectum and there was no bowel activity that came out.

4 Q All right. Let's go to the last page of your note, which is
5 Exhibit 1, Page 131, and we'll look at the plan. Walk us through this,
6 please.

7 A Patient with new run of fevers and white cell count has
8 trended back up.

9 Q Okay. Let me stop you there. What do you mean by new run
10 of fevers?

11 A Well, her high temperature for that period started in the
12 morning of the 14th, 38.6, which is around 103, which is very high, and I
13 think it's higher than she had prior by a good step. Even though she was
14 looking good in terms of she was nodding, she was starting to have
15 increased white cell count that was starting to go up. I believe she had
16 an increased bandemia as well. So, even though looking at her you
17 would say she looks a little better, there's some concern that something
18 else is going on in her abdomen possibly.

19 Q All right. Then continue with your plan, please.

20 A The abdominal exam has gotten a bit worse in terms of
21 being firm. In other words, what I was talking about before is the
22 abdomen being soft, now it's starting to feel rigid or firm, like something
23 was irritating the inner lining of the abdomen. No response from the
24 Fleets and no bowel activity. Again, the concern that the bowel is just
25 not functioning properly.

1 Q Continue.

2 A We'll await the tracheostomy today and likely get repeat CT
3 scan of the abdomen tomorrow.

4 Q Let me stop you there. Why tomorrow rather than that day?

5 A Because she has a planned procedure for the tracheostomy.

6 Q Explain why you couldn't do the CT scan.

7 A Well, first of all, airway takes precedence over everything
8 else. Obviously, we don't breathe, we don't live. So, whenever Dr.
9 Osman wanted to do his tracheostomy, he has, obviously, the higher
10 priority of that.

11 After a patient is under general anesthesia, you don't want to do a
12 CT scan while they're possibly unstable after surgery. You want them
13 stable to know that there's no complications from the surgery first, and it
14 doesn't interfere with anything possibly from the surgery.

15 Q And then why did you indicate likely a repeat CT scan of the
16 abdomen tomorrow, looking for any increases in free fluid/abscesses or
17 development of bowel obstruction or free air. What was your thinking
18 there?

19 A So, there was a change in her abdominal exam, it was now
20 worse. It had been getting better every day. It was feeling more rigid,
21 like what we call peritoneal signs, like something's going on inside of the
22 abdomen. In addition, she's having a new run of very high fevers, her
23 white count's trending back up, and to me, that's a clinically significant
24 change in her status.

25 Q Let's go to Exhibit 1, Page 68, if we could call that up. And,

1 Doctor, what is -- what are we looking at for Exhibit 1, Page 68?

2 A This is an addendum to my earlier progress note regarding
3 the findings on the CT scan.

4 Q I would be looking for the earlier progress note.

5 A I think that's one of the ones that's not included in the
6 exhibit.

7 Q Tell us what you recall about earlier in the day on July 15th.

8 A So, earlier in the day on July 15th, she had the tracheostomy
9 done the day prior. She was doing well with it. She was actually
10 breathing a lot better; she was tolerating those CPAP trials a lot better.
11 So, the tracheostomy was already showing signs of success. However,
12 she was continuing to have high fevers, her abdomen was looking
13 worse. So, I was going to get a CT scan now that it was safe after the
14 tracheostomy to look for whether there was an abscess developing or
15 other issue in her abdomen.

16 Q Okay. Then let's look at Exhibit 1, Page 68.

17 MR. DOYLE: And it's noon, shall I continue, Your Honor?

18 THE COURT: Would you like to both approach, please?

19 Madam Court Reporter, would you turn on the white noise
20 for a brief moment, please.

21 [Sidebar at 12:00 p.m., ending at 12:01 p.m., not transcribed]

22 Appreciate it, just one moment, please.

23 THE COURT: Counsel approach. White noise, please.

24 Marshall, can you approach as well, please?

25 [Sidebar at 12:01 p.m., ending at 12:02 p.m., not transcribed]

1 THE COURT: Do appreciate it. Good to go? Okay.
2 Appreciate it. Sorry for the -- gave everyone a quick moment to stretch.
3 Counsel feel free to continue.

4 DIRECT EXAMINATION CONTINUED

5 BY MR. DOYLE:

6 Q Do you remember where we left off? We were, I think in the
7 morning of 15th.

8 A I think I already discussed that.

9 Q Okay. Anything else to add to it? I lost track.

10 A Not that I can recall.

11 Q Okay. Let's call up, please, Exhibit 1, page 68. And tell us
12 what we're looking at, first of all.

13 A An addendum to my prior note. It's a progress note,
14 7/15/2015 at 9:20 p.m.

15 Q Why were you in the hospital on July 15th in the evening,
16 whereas all your prior visits seemed to be late morning or early
17 afternoon?

18 A Because I had been notified about the findings on the CT
19 scan. I thought that they were very significant, and I wanted to go back
20 to the hospital to assess the patient and talk to the family.

21 Q All right. So walk us through this note, please, beginning
22 with the first sentence.

23 A "Reviewed patient's CT scan concerning for new
24 developments of abscess fluid and free air, where there was none prior."

25 Q Okay. Let me stop you there. Abscess fluid, meaning what?

1 A Infected fluid in the abdomen.

2 Q Free air?

3 A "Free air coming from a hollow viscous or the intestines."

4 Q All right. Continue, please.

5 A "Still no extravasation of contrast, but very concerning for
6 possible leak and/or abscess, either of which requires surgical
7 intervention, given patient's increasing fevers over the last 40 hours and
8 increased leukocytosis over the last 40 hours."

9 Q Let me stop you there. What does leukocytosis mean?

10 A Leukocytosis means increasing white cell count.

11 Q Total or some other component?

12 A Or bandemia.

13 Q Okay. Continue, please.

14 A "No improvement in the abdominal exam," meaning when I
15 reassessed the patient, her abdominal exam was not improved from that
16 morning.

17 "Patient just given Dilaudid and asleep. Spoke with husband
18 regarding these new findings and the patient's overall condition. Patient
19 spiking fevers of 103 now. Recommend exploratory laparotomy with
20 explantation of mesh."

21 Q Let me stop you there. What does that mean, exploratory
22 laparotomy?

23 A That means as opposed to going in with small little trocars
24 and instruments, that she would need to have a large incision all the way
25 up and down her abdomen.

1 Q And explantation of mesh means what?

2 A That any mesh that's been in there is now going to have to
3 be removed.

4 Q All right. And then continue, please, with the plan.

5 A Abdominal washout, which means any infected fluid, we put
6 copious or lots of normal saline in there here, irrigate the abdomen out,
7 basically wash it out and drain it. Thorough inspection of entire small
8 and large bowel. In other words, look at not just the large bowel but all
9 the bowel for any possible sources of perforation or abscess. Possible
10 colonic lavage to remove inspissated contrast. So since --

11 Q Just continue on.

12 A Okay.

13 Q What was the plan --

14 A Po --

15 Q What was the --

16 A "Possible bowel resection. Explained further the risk,
17 benefits and alternatives and the husband does not want to proceed with
18 surgery at this time."

19 Q Let me stop you there. What do you recall about the
20 conversation with Mr. Farris this evening of July 15 above and beyond
21 what's in the note?

22 A I explained to him everything that was going on, explained to
23 him why it was important that she get re-operated on. He explained to
24 me that he had concerns about me doing the procedure or that the
25 family had concerns about me doing the procedure and if she was stable

1 enough, he would prefer to wait 'til tomorrow morning to talk to the
2 family further about possible surgery.

3 Q Okay. Then -- picking up in the plan. Reemphasize my
4 concerns?

5 A "Reemphasize my concerns for further complications or
6 sepsis and he indicated he wanted to think about it further and decide
7 tomorrow, based upon how she does. I notified the ICU team of
8 husband's decision."

9 Q Why did you notify the ICU team?

10 A Because the ICU team was the one who notified me about
11 the CT scan results. I was going to talk to them about possible surgery. I
12 wanted them to be aware that she was not going to have surgery that
13 night and that need to be sort of on guard that she may go into sepsis
14 and have further complications.

15 Q Now, when did you first learn -- well, let me start over. Was
16 there a family meeting the next day?

17 A Yes.

18 Q When did you first learn about it?

19 A Re-reviewing all the notes, including the chaplain's notes, the
20 social worker notes, the case management notes, it appears I was
21 notified the morning of the 16th.

22 Q Okay. Let's look at your progress note for the 16th. And let's
23 call up Exhibit 1, page 67. And before we go to this note, tell us, based
24 on your memory, the events as they began on the morning of the 16th
25 concerning Mrs. Farris and the family.

1 A So, when I went in early to see the patient, see how she was
2 doing and meet with the family, we had an open discussion about
3 everything that was going on, all the changes from the time of her initial
4 surgery all the way to that morning. The family had questions. I
5 answered them as best as I can. At some point during that conversation,
6 Dr. Mono walked into the room.

7 Q Let me interrupt you. Who's Dr. Mono?

8 A Dr. Mono is -- well, he was a surgeon at one time, but he was
9 that time either chief medical officer or vice-chief medical officer,
10 meaning he represented the hospital and the administration.

11 Q Okay. And continue with your memory then, please.

12 A So we finished talking. Dr. Mono asked me to step out and I
13 believe the chaplain stepped out as well or whoever else was in the
14 room. They had a discussion with -- or he had a discussion with the
15 family, and it was clear that the family wanted me removed from the
16 case. Dr. Mono later talked to me about that, explained what the family's
17 desires and wishes were and more importantly, that somebody else was
18 going to be able to take over the case at that point and take her to the
19 operating room.

20 Q And how did you feel about that?

21 A I was happy that she was going to get the surgery she
22 needed. I was a little upset that I wasn't going to be, you know, the one
23 doing it, but my priority and my concern is obviously the patient's health
24 and safety.

25 Q All right. So let's look at this note now on page 67. Just kind

1 of walk us through it, please.

2 A "After discussion with Dr. Mono and fam -- or Dr. Mono,
3 family -- after discussion with Dr. Mono, family would be more
4 comfortable with having Dr. Ripplinger taking over as surgical consultant
5 going forward. I will continue to be available, if Dr. Ripplinger or family
6 has any further questions, or I can assist in any way. Otherwise, I will
7 effectively sign off for now."

8 Q Was this your last progress note?

9 A I believe so, yes.

10 Q Who did the surgery on July 16th?

11 A Dr. Hamilton and Dr. Ripplinger assisted, I believe.

12 Q Did you talk to Dr. Hamilton beforehand?

13 A Yes.

14 Q Why?

15 A Well, I was effectively going off the case. She was effectively
16 coming on the case. So that would be sort of a sign-off between
17 surgeons. So I wanted to let her know what was the course of the
18 patient during that time, what was the surgery that I did, what
19 complications I thought could be a problem. I was concerned, obviously,
20 about the injuries to the colon, but I was also concerned about all the
21 stool that was stuck with contrast that hadn't moved for 10 or 11 days.

22 Q When did you first learn that -- about Dr. Hamilton's
23 operative findings?

24 A I believe that's during my deposition.

25 Q Okay. All right. That's all I have then. Thank you very much,

1 Dr. Rives.

2 THE COURT: Is that the end of direct examination? Okay,
3 counsel, we're going to start on cross-examination and then we'll pause
4 and -- in a short bit, okay? Appreciate it.

5 MR. JONES: Thank you, Your Honor.

6 THE COURT: Excuse -- yes. Feel free to do so. Thank you so
7 much. Do you need a pocket microphone or are you set as is?

8 MR. JONES: Have one right there, Your Honor.

9 THE COURT: I thought you might. Thank you.

10 CROSS-EXAMINATION

11 BY MR. JONES:

12 Q Okay, Doctor --

13 MR. JONES: Can everybody hear okay? All right. Okay.

14 BY MR. JONES:

15 Q We just went through a whole bunch of notes. You'll agree
16 with me that the vast majority of everything that was covered with you
17 were your own notes, correct?

18 A The vast majority, yes.

19 Q There were a couple of other notes, right? But otherwise, it
20 was almost all your own notes?

21 A Correct.

22 Q Okay. And Doctor, no one controls what you write in your
23 notes, except for you, correct?

24 A Correct.

25 Q Okay. Now Doctor, you'd agree with me that the jury would

1 have gotten a completely different picture of how Titina Farris was doing
2 day by day between the 4th and the 14th, if they had instead reviewed
3 Dr. Shaikh's notes, rather than your notes, correct?

4 A Possibly.

5 Q Right. Because he says she had sepsis every day, right?

6 A His diagnosis each day was sepsis, yes.

7 Q Right. And he said almost every day course worsening or
8 certainly he didn't mention course improving, correct?

9 A I'd have to review his notes to confirm that.

10 Q Okay. And you'd agree that Dr. McPherson, also, if they had
11 reviewed Dr. McPherson's notes, they also wouldn't have gotten this
12 sunny picture of her getting better every day, would they have?

13 A I'd have to review his notes to confirm that.

14 Q In fact, if they had reviewed -- if you had reviewed Dr.
15 McPherson's notes, you would have seen that she was critical about
16 every other day, saying critical and course worsening several times
17 during that same timeframe, right?

18 A It depends what he means by critical.

19 Q And he also says she had sepsis during that timeframe when
20 you say that she had recovered and was no longer septic. Isn't that true?

21 A Again, depends upon his definition of sepsis.

22 Q Doesn't he call it sepsis, though?

23 A I'd have to review his notes.

24 Q Okay. So in all of these three or four years of litigation, you
25 haven't reviewed those notes to know if what I'm saying is the truth?

1 A To memorize it off the top of my head, no.

2 Q Well, simply to identify that everyone else, all these other
3 doctors, entirely disagreed with your perspective that she was doing
4 better from the 4th to the 14th?

5 MR. DOYLE: I'll object. It mischaracterizes the evidence.

6 MR. JONES: Your Honor, I'll just withdraw that one --

7 THE COURT: Okay.

8 MR. JONES: -- and move on to something else.

9 THE COURT: Since it's withdrawn, the Court need not rule.

10 BY MR. JONES:

11 Q Doctor, do you remember at the -- when I was questioning
12 you before, that we went through a day by day analysis of what
13 happened in this case, beginning on the 4th. Do you remember that?

14 A I remember going over some facts, yes.

15 Q Excellent. Do you remember how you didn't remember a
16 single day what the white blood cell count was, correct?

17 A The exact number, no.

18 Q In fact, you couldn't even give me an estimate when I was
19 asking you before, day by day, could you?

20 A I don't know about estimate.

21 Q Okay. But I ultimately had to give every single number,
22 correct?

23 A Correct.

24 Q Okay. Including the day when you said that she had resolved
25 sepsis, correct?

1 A That's what you told me, yes.

2 Q All right. Now, Doctor, the -- but somehow today, when your
3 attorney is questioning you. You have specific memory of bandemia, a
4 little subcomponent of white blood cell count day by day, correct?

5 MR. DOYLE: Objection. Argumentative.

6 THE COURT: The Court's going to sustain with the way that
7 that question was phrased.

8 MR. JONES: Absolutely.

9 BY MR. JONES:

10 Q Doctor, you agree that when I was asking you the white
11 blood cell count day by day, you couldn't even remember the general
12 white blood cell count, correct?

13 A The exact white cell count, no.

14 Q But today, when your attorney was asking you questions,
15 you remembered the subcomponents of white blood cell count. For
16 example, bandemia, from one day to the next, didn't you?

17 A The trend of the bandemia, yes.

18 Q Okay. Now Doctor, you'll agree with me that many studies
19 have been done on bandemia, correct?

20 A Sure.

21 Q You'll agree with me that the National Institute of Health has
22 found bandemia to have a weak relationship in predicting infection
23 compared to the white blood cell count overall?

24 MR. DOYLE: Objection. Hearsay.

25 THE COURT: The Court's going to overrule the way that

1 question was phrased.

2 THE WITNESS: I haven't read the study, but I would disagree
3 with that.

4 BY MR. JONES:

5 Q Certainly. We talked briefly about Dr. Shaikh's diagnosis of
6 fecal peritonitis. Do you recall that?

7 A Yes.

8 Q And you made it very clear that that was just one diagnosis
9 within his differential diagnosis, correct?

10 A I believe we just read that it said it could represent fecal
11 peritonitis.

12 Q Okay. You agree that that is the only diagnosis he listed,
13 correct?

14 A Again, I'd have to review all of his notes to confirm that.

15 Q So you saw it just a moment ago. Are you saying I'd have to
16 pull it up again right now for you to confirm that?

17 MR. DOYLE: Objection. Argumentative.

18 THE COURT: The Court is going to sustain the way that was
19 specifically phrased. Thank you.

20 BY MR. JONES:

21 Q Doctor, are you saying you don't recall from an hour ago,
22 when your attorney showed that to you?

23 A My attorney showed me one note of many of his.

24 Q Okay. Now doctor, you've made a point several times during
25 this case to mention the attorney, whether it be Dr. McPherson, Dr.

1 Shaikh by name and identify, for example, that they have your cellphone
2 number. Do you remember doing that?

3 A Correct.

4 Q Okay. Do you consider them to be good friends of yours?
5 You have a good relationship?

6 A We're colleagues. I wouldn't -- we don't hang out socially.

7 Q All right. And -- but none of them have come to say what
8 you did was okay, have they?

9 MR. DOYLE: Objection, Your Honor.

10 THE COURT: Basis?

11 MR. DOYLE: It assumes facts not in evidence and it's
12 irrelevant.

13 THE COURT: Overruled on assumes facts not in evidence.
14 Overruled on relevance.

15 BY MR. JONES:

16 Q Correct, Doctor?

17 A Can you repeat the question?

18 Q Yes.

19 A I'm sorry.

20 Q Yes. These people who have your cellphone number that
21 you talk to all the time, they're good colleagues, none of them have
22 come to say what you did in this case was okay, have they?

23 A We never asked them to.

24 Q Okay. Doctor, you talked about the risks of going back to
25 surgery on a septic patient, right? Or a patient who everyone else says is

1 septic, but you say is not septic, correct? You were talking about that?

2 A Correct.

3 Q Okay. So the risks that you identified as doing under
4 anesthesia, which she was already on, right? She was basically sedated
5 already, correct?

6 A Sedation is very different than general anesthesia.

7 Q Right. It's a heavier amount of anesthesia, correct?

8 A It's a much heavier stress on the lungs and the heart, yes.

9 Q Okay, doctor. The concern that -- you expressed those
10 concerns, but Doctor, would you not agree with me that you were fully
11 aware that leaving a patient day after day in this condition had a very
12 real risk of destroying her nerves and muscle function in her extremities?

13 A Related to the nerves in her muscles and extremities, I'd say
14 no.

15 Q Okay. You didn't learn that lesson at all in your treatment of
16 Vicky Center?

17 MR. DOYLE: Objection. Argumentative and relevance.

18 THE COURT: Court's going to sustain it on argumentative.

19 BY MR. JONES:

20 Q Doctor --

21 THE COURT: And relevance.

22 MR. JONES: Okay.

23 BY MR. JONES:

24 Q Doctor, a note was just shown to the jury just a couple of
25 minutes ago that was about a conversation between you and Patrick,

1 correct? On the 15th, when you recommended surgery for the first time?

2 A Yes.

3 Q Okay. So in that note -- well, when explaining to the jury
4 what had happened, you explained to them that Patrick indicated that he
5 and the family didn't really want you on the case, right?

6 A No. He indicated that the family may not want to, and he
7 wanted to speak to them further about it.

8 Q Okay. But you didn't put that in your note, did you?

9 A I think I put that he wanted to talk to the family, yes.

10 Q Did you put down that the family or that the husband had a
11 specific reluctance to allow the surgery to go forward, because you were
12 the surgeon?

13 A That's what I would interpret by him saying he wanted to talk
14 to the family further, yes.

15 Q Okay. You read into that that the issue that he had was he
16 was worried about you performing the surgery personally?

17 A I think it was more the family than him.

18 Q Okay. Doctor, another thing that was said is you said after
19 reviewing all of the notes and everything in the file, that you had
20 identified or realized that you found out about that meeting on the
21 morning of the meeting itself. Is that right?

22 A Correct.

23 Q Okay. Now Doctor, you would agree with me that there was
24 no you reviewed that specifically said when the meeting was, correct?

25 A Actually, it's in the chaplain's note, the social worker's note

1 and the case manager's note.

2 Q Those notes say that the moment that -- the moment that
3 you were told about the meeting?

4 A The chaplain's note does, yeah.

5 Q The chaplain's note says the moment in which you were
6 informed about the meeting?

7 A Yeah. It says that everybody was notified of the meeting that
8 morning.

9 Q Okay. All right. Does -- and the Chaplain wasn't the one that
10 notified you, correct?

11 A No.

12 Q Considering your prior testimony.

13 A No. Dr. Mono did.

14 Q Okay. So the Chaplain happened to know that Dr. Mono had
15 informed you about it previously and so he put that in his note?

16 A I guess he assumed that that Dr. Mono had done so, yes,
17 because he knew I was going to be there.

18 Q Okay. So do you have a recollection now, because -- well, let
19 me rephrase. I asked you before if you had any recollection about
20 actually receiving that call. Do you recall that?

21 A Correct.

22 Q Okay. At that time, you did not. You remembered a little bit
23 about the call itself, but no recollection about when you received it,
24 correct?

25 A I couldn't be positive.

1 Q But that call was with Dr. Mono, correct?

2 A Correct.

3 Q Not the Chaplain, correct?

4 A No.

5 Q Okay. Do you now recall when it happened? Do you have a
6 recollection of receiving the call?

7 A Based upon everything I reviewed, it did happen that
8 morning.

9 Q That's not what I asked you. Do you have a recollection of
10 receiving that call?

11 A My recollection is that it happened that morning now.

12 Q Okay. All right. So you now remember that?

13 A With the additional information that I see in the notes, yes.

14 Q Okay. All right. All right, Doctor. There were some
15 questions asked about the mesh, correct?

16 A Correct.

17 Q And you'd agree with me that at the time of your deposition,
18 you could not remember what had been taken out in terms of mesh
19 when you were answering questions during your deposition, correct?

20 A Correct. I didn't know whether little pieces came off with the
21 colon or not.

22 Q Got it. But today you had a really nice description of what
23 happened with the mesh, correct, when your attorney was asking you
24 questions?

25 MR. DOYLE: Objection. Argumentative.

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

2 THE WITNESS: I don't know what you referring to regarding
3 the mesh.

4 BY MR. JONES:

5 Q Okay. Doctor, is an NPO order after a surgery of this type
6 important for patient safety?

7 A It could be, yes.

8 Q Okay. In this -- and when would an NPO order be put in
9 place and by whom?

10 A So after the surgery's over, I go and dictate the operative
11 notes.

12 Q So go ahead and -- oh, okay. Sorry. Go ahead. My
13 apologies --

14 A So --

15 Q My interruption.

16 A -- I go to the recovery room. I dictate the operative not and
17 then I put in the postoperative orders.

18 Q Okay. Thank you, Doctor. And I apologize for the
19 interruption.

20 A No worries.

21 Q All right. Doctor, in this case, can we agree that the records
22 indicate you put in the NPO order at 12:12, postop day one?

23 A That would be a different NPO order.

24 Q Okay. All right. Do you know when the nurse implemented
25 the NPO order?

1 A Which one?

2 Q The day after surgery?

3 A Well, there was an NPO order from the postoperative order,
4 so that takes precedence. When she's looking bloated and distended,
5 she goes to strict NPO. No ice chips. No sips of water. So then the
6 nurse would do it as soon as I entered it.

7 Q So you're saying that was a different NPO order --

8 A Strict N --

9 Q -- on postop day two?

10 A Strict NPO is strict NPO with ice chips and sips of water, yes.

11 Q Okay. All right. Doctor, I want to talk about Dr. Ripplinger.

12 You agreed, when I was asking you questions last time, that Dr.

13 Ripplinger, he had a concern about that there might be an aggressive
14 infection of the mesh, correct?

15 A Correct.

16 Q Okay. And you agreed that could be the case, correct?

17 A Correct.

18 Q Okay. And that was never ruled out, correct?

19 A Correct.

20 Q All the way up until the time of, including the surgery of Dr.
21 Hamilton, correct?

22 A Well, no. At the time of Dr. Hamilton's operation, she would
23 see that, yes.

24 Q Right. But there was feces on it, so that couldn't have ruled it
25 out, correct?

1 A Well, if there's feces on the mesh, you'd assume that it's
2 infected, yes.

3 Q Absolutely. Okay. Fecal peritonitis never ruled out, correct?

4 A Well, we always keep it in the back of our minds --

5 Q Doctor, was --

6 A -- but I wouldn't say --

7 Q -- fecal peritonitis ever ruled out?

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

9 Q Okay. Doctor, the day that you said she was no longer
10 septic, I think you mentioned something along those lines perhaps on
11 the 7th, I think, but on the 9th, you had a note that you went over today
12 about her no longer being septic, meaning Titina no longer being septic.
13 Do you remember that?

14 A Correct.

15 Q Okay. Now Doctor, you would agree with me that at 9:11
16 a.m., Dr. McPherson said she was septic on that same day, correct?

17 A I would have to see his note.

18 Q Okay. And at 4:35 p.m., Dr. Shaikh again said she was septic,
19 had leukocytosis, correct? And fever, correct?

20 A Again, I'd have to see his note and discuss with him what he
21 meant by sepsis.

22 Q Okay. At the time, you didn't do that, as we discussed,
23 correct?

24 A No.

25 Q Okay. Now Doctor, I want to talk a little bit about the

1 LigaSure that you discussed yesterday. Or maybe it was the day before.
2 No. I think yesterday. You pointed out that Dr. Hurwitz had mentioned
3 that the LigaSure, the radius of the burn from the LigaSure is typically 1
4 mm. Is that correct?

5 A Yes.

6 Q Okay. Now, would it surprise you if I said that the video of
7 Dr. Hurwitz when he testified, said 1 to 2 mm? Would that surprise you?

8 A 1 to 2, I would accept that.

9 Q Okay, 1 to 2 millimeters. And doctor, that radius is around
10 the LigaSure, correct? 1 to 2 millimeters, correct? So we're not talking
11 about just this much space. We're talk about around the LigaSure,
12 correct?

13 MR. DOYLE: Objection. Compound.

14 THE COURT: Overruled the way the question was phrased.

15 THE WITNESS: No, that's not true.

16 BY MR. JONES:

17 Q Okay. Doctor, you agree that that can destroy tissue, correct?

18 A It seals and coagulates tissue, yes.

19 Q Doctor, do you agree that that can destroy tissue, that it can
20 burn it and necrotize it, causing it to die?

21 A It's designed to seal the --

22 Q Doctor, I asked a question --

23 A Sorry.

24 Q Can it burn tissue?

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

1 Q When your expert, Dr. Juell was here, and he said that it
2 could melt tissue, was he telling the truth? Yes or no, doctor?

3 A Melt would be closer, yes.

4 Q When he said it would char tissue, was he telling the truth?

5 A I don't use the term char, so I didn't ask him what he meant
6 by char --

7 Q Okay.

8 A -- so I wouldn't know.

9 Q Okay. So you don't know if Doctor -- if Dr. Juell, the expert
10 hired on your behalf, was telling the truth about it being able to char
11 tissue?

12 A Objection, Your Honor. It's argumentative and improper
13 character evidence.

14 THE COURT: Overruled on character evidence. Sustained on
15 argumentative, the way that last one was phrased.

16 MR. JONES: Okay. I'll go ahead and just rephrase or move
17 on to the next thing, Your Honor. Thank you.

18 BY MR. JONES:

19 Q Now, do you recall that at the beginning of this case, I
20 mentioned that my client -- that my clients, although they would often
21 times be there, that I wouldn't have them the courtroom. They'd usually
22 be on other floors and things like that, so they wouldn't be hearing the
23 testimony. Do you recall that?

24 A I do, yes.

25 Q Okay. All right. Now, you've been here the whole time, so

1 you've been able to hear what everybody else has said, correct?

2 A Correct.

3 Q Okay. Now Doctor, you agree that in the past, you provide
4 false and inaccurate testimony on several occasions, correct?

5 A It depends what you mean.

6 Q Okay. Doctor, you have heard the testimony of the Plaintiffs,
7 correct?

8 A The testimony of the Plaintiffs, you mean Titina and Patrick?

9 Q Yes.

10 A Yes.

11 Q Now Doctor, you would agree that in their testimony, they
12 don't seem to remember any mention about the colon ever, prior to her
13 July 3rd, 2015 surgery, correct?

14 A What do you mean by mention of colon?

15 Q Neither of them remembered you discussing that the colon
16 had any involvement whatsoever in this hernia repair surgery that she
17 was about to undergo. Do you recall that?

18 A You mean in the office? Yes.

19 Q Do you recall them saying that?

20 A I think they're referring to the office visit, yes.

21 Q Okay. Doctor, you mentioned when you were describing the
22 surgery, that you used scissors for part of the surgery, correct?

23 A Correct.

24 Q Okay. Now, that's nowhere in your operative report, correct?

25 A Correct.

1 Q But we -- but if true, regardless, we know that scissors were
2 available to you for the surgery, correct?

3 A It is true and yes.

4 Q Okay.

5 MR. JONES: Time for a break, Your Honor?

6 THE COURT: Whenever it's a good time.

7 MR. JONES: Absolutely. Your Honor, I'm happy to take a
8 break right there. Hopefully I won't be too much longer after.

9 THE COURT: Okay. If you need a few more minutes, it's fine
10 as well. It's what -- is this a good stopping point or no?

11 MR. JONES: This is a good stopping point, Your Honor.

12 THE COURT: Okay. Okay. So ladies and gentlemen of the
13 jury, here's what I understand that we're going to do today. I understand
14 that we're going to take a shorter lunch today and what we're going to
15 do -- now, let me be clear. Although we're going to -- we understand we
16 have an agreement that taking a shorter lunch and we're going to place
17 you back in what normal would be called the jury room. However, it is
18 not deliberations.

19 You may not, you must not, you cannot, you will not. And I
20 will read the admonition as well -- in any way discuss this case, just for
21 convenience, realizing that today is -- to try and do it, there's going to be
22 some food back there provided for you for lunch alternatives, okay, and
23 that you can be back in those restrooms back there as well, so that you
24 can have a shorter lunch and then we can come back to trial testimony.
25 Is that what we understood everyone wanted to do? I'm seeing all

1 affirmative nods, versus -- okay.

2 So that's what we're going to do. So I'm going to read you
3 the admonition. Then the Marshal's going to escort you back. But
4 everyone does understand, and I do need to see all affirmative nods that
5 everyone understands that this is not in any way jury deliberations and
6 this admonition fully applies. You can discuss the weather. You can
7 discuss the Golden Knights. You can discuss Halloween, Nevada Day,
8 okay? How much you enjoyed the Nevada-shaped cookies with the
9 appropriate color of the State of Nevada or things like that, but you may
10 not discuss this case in any manner, as I -- and everything else that I am
11 going to mention in the admonition.

12 Okay. So ladies and gentlemen of the jury, while you take
13 your lunch recess, you are admonished not to talk or converse among
14 yourselves or with anyone else on any subject connected with this trial.
15 You may not read, watch or listen to any report or commentary on the
16 trial or any person connected with the trial by any medium of
17 information, including without limitation social media, text, tweets,
18 newspapers, television, internet, radio.

19 Anything I've not stated is also included. You may not visit
20 the scene of any of the events mentioned during the trial. You may not
21 undertake an research, experimentation or investigation. You may not
22 do any posting or communications on any social networking sites or
23 anywhere else. You may not do any independent research, including,
24 but not limited to internet searches. You may not form or express any
25 opinion on any subject connected with the trial until the case is fully and

1 finally submitted to you at the time of jury deliberations.

2 It's 12:35. We are going to come back at 1:15, so that gives
3 you 35 -- 25 -- 35 -- I guess 40 minutes is what we said, so that we can
4 then move forward with the rest of the case. That works for everything.
5 And I think, if there's any issues, Marshal can just address. Just general,
6 remember, you can't discuss any matter. And he's going to be staying,
7 overseeing that room as well, because -- to ensure that everything goes.
8 Thank you so much. Please --

9 THE MARSHAL: All rise for the jury.

10 THE COURT: -- leave your juror books on the chair. Thank
11 you so much. If you all want to take cookies or take the pitcher of water,
12 feel free to take those with you as well. And if not, it's fine as well.
13 Okay. Just one second. Oh. Never mind. He told you that there's other
14 things in there. Okay. The Marshal's one step ahead of me. Perfect.
15 Okay.

16 [Jury out at 12:34 p.m.]

17 [Outside the presence of the jury]

18 THE COURT: Okay. At this juncture, the door is clicked shut.
19 I am going to wish you all a nice lunch. You heard -- so are we ready -- is
20 everything taken care, as far as the jury instructions and the verdict
21 forms and the only thing you need to is Defense counsel just needs to
22 look at it to confirm the order of the jury instructions. Is that -- the only
23 thing I understood needed to be done. Is that correct?

24 MR. DOYLE: That's what I hope.

25 MR. JONES: Your Honor, we may have a small problem. Let

1 me grab Jacob.

2 THE COURT: Let's find out real quickly if there's a small
3 problem. Okay. If you don't mind just staying on the record for just one
4 moment, so we can figure this -- sorry. Mr. Leavitt, the Court just had
5 asked -- what we'd understood is that they had been edited by Mr.
6 Doyle's office with them being emailed to your office for printing. You
7 were going to put them in the order that Plaintiff wanted and then were
8 going to hand it to Defense counsel, so over the lunchtime, Defense
9 counsel could --

10 MR. LEAVITT: Yes.

11 THE COURT: You call could coordinate to confirm. You're
12 more than welcome to stay in the anteroom, if you want to. Can't be
13 here in the main courtroom.

14 MR. LEAVITT: That's fine.

15 THE COURT: But -- so there is a problem?

16 MR. LEAVITT: One of them had to be corrected. One of the
17 email was inadvertently put in there. I think she just didn't hear that it
18 was out. That was specifically Number 10 with the judgment --

19 THE COURT: The Number 10, that was the one that was
20 discussed. Okay. So --

21 MR. LEAVITT: Yeah.

22 THE COURT: -- has that been withdrawn and then Defense
23 will have an opportunity to review, right?

24 MR. LEAVITT: Yes. And I put -- I have five sets and I have
25 them organized.

1 THE COURT: Okay.

2 MR. LEAVITT: I had to have one corrected and brought back
3 down.

4 THE COURT: No worries. Okay. So that should be all right.
5 So feel free to use the anteroom.

6 MR. LEAVITT: Yes.

7 THE COURT: And you can bring the jury instructions, if you
8 need to to get that taken care of. Does that meet everybody's needs?

9 MR. LEAVITT: Yes, it does, Your Honor. Thank you.

10 THE COURT: Okay. And you've got the proposed verdict
11 form that -- with your agreed upon changes as well?

12 MR. LEAVITT: Yes. I have it as well.

13 THE COURT: Okay. No worries. Just want to make sure
14 you're all taken care of. Is there anything you need the Court to do? If
15 not, I'm going to tell Madam Court Recorder to go off the record. Is there
16 anything Plaintiffs need?

17 MR. JONES: No, Your Honor.

18 THE COURT: Anything Defense needs?

19 MR. DOYLE: No.

20 THE COURT: Thank you so very much.

21 MR. DOYLE: Thank you, Your Honor.

22 THE COURT: Okay.

23 [Recess taken from 12:37 p.m. to 1:19 p.m.]

24 [Outside the presence of the jury]

25 THE COURT: Okay. We're on the record outside the

1 presence of the jury in Case 739464. Were you all able to get everything
2 figured out, so that we have a clean set of a jury instructions and a
3 verdict form that is acceptable to both parties?

4 MR. JONES: That's my understanding.

5 MR. DOYLE: It -- yes. The --

6 THE COURT: And it's in the order that you all want it, right?

7 MR. DOYLE: Yes, but there were a couple of typos on the
8 verdict form, so I think we're still waiting for that to come back.

9 MR. JONES: I -- Your Honor, I apologize. I wasn't handling
10 that part, so I'm --

11 MR. DOYLE: Well, they had Mr. Farris with past and past,
12 rather past and future, so --

13 MR. JONES: Okay.

14 THE COURT: No worries. Okay. But the jury -- is there a
15 clean set for the Court, so that I can have the clean set of the jury
16 instructions?

17 MR. JONES: Let me verify, Your Honor.

18 THE COURT: Thank you.

19 [Pause]

20 THE COURT: Is Madam Court --

21 MR. JONES: Your Honor, they do have them. They're being
22 put together right now. Mr. Leavitt asked if he could be given two or
23 three more minutes --

24 THE COURT: Yeah. Sure.

25 MR. JONES: -- and he'll come in and bring it to you.

1 THE COURT: Did you all number it in the order that you
2 wanted, so it's got the numbers in the upper right-hand corner? Right?
3 And all citations have been taken off the front --

4 MR. JONES: Yes, I believe --

5 THE COURT: -- the front page --

6 MR. JONES: Yes.

7 THE COURT: -- doesn't have anybody's law firms on it, right?
8 The front page just says --

9 MR. DOYLE: Correct.

10 THE COURT: -- jury instructions. The last page --

11 MR. DOYLE: Yeah, there was --

12 THE COURT: -- of course has to have today's date and has to
13 have -- you know, it is given with the signature line for the Judge, right?

14 [Pause]

15 MR. JONES: Your Honor, I apologize. We do not have that
16 page. And I apologize for my lack of familiarity. Does it just need to say
17 it is given? Is that?

18 THE COURT: Right. Right. It's the standard signature line
19 that's always on, you know, jury instructions, because it has to say it is
20 given and it's got a signature line. It says District Court Judge. I sign my
21 name right above that. I don't even --

22 MR. JONES: Okay.

23 THE COURT: -- care if it says Judge Joanna Kishner, as long
24 as it says District Court Judge.

25 MR. JONES: Okay.

1 THE COURT: You don't have it and you don't have a way to
2 get it. Is that where you're at?

3 MR. JONES: No, no. We can have it down here in --

4 THE COURT: Okay.

5 MR. JONES: -- 30 minutes, Your Honor.

6 THE COURT: If the answer is that that's the only thing
7 missing, do you have the last page in which that needs to be included
8 on?

9 MR. JONES: Yes. I --

10 THE COURT: Do you have it on a computer, that it could be
11 sent to email with a cc to Mr. Doyle's office, to my JEA, so that she can
12 take care of that, so that we can multitask here, so that you're not
13 worrying about --

14 MR. JONES: Yeah.

15 THE COURT: -- that and you all can focus on other things? Is
16 that --

17 MR. JONES: Yes, Your Honor.

18 THE COURT: -- does that help the parties.

19 MR. JONES: What's the email address to your JEA?

20 THE COURT: Same where you all sent everything else.

21 CordT -- C-o-r-d, first initial T @ --

22 MR. JONES: T --

23 THE COURT: C as in Charlie, O as in Oscar, R as in Richard, D
24 as in David, first -- then the letter T as in Tom at clarkcountycourt.us.

25 Would that meet both party's needs, if my JE -- my wonderful JEA

1 willing to do such?

2 MR. JONES: That would be wonderful, Your Honor.

3 THE COURT: Does that work for you, Defense Counsel?

4 MR. DOYLE: It does.

5 THE COURT: Okay. Cc -- make sure Mr. Doyle is cc'd on that,
6 because she won't open up anything --

7 MR. JONES: Of course. And --

8 THE COURT: -- right, unless you have --

9 MR. JONES: Sorry. It is so given, period, and then District
10 Court Judge?

11 THE COURT: Just put -- if you even just tell her it needs the
12 signature block on the end of jury instruction, she knows.

13 THE CLERK: And a date line, Judge.

14 THE COURT: Yeah. A date line. That's what I said, she
15 knows.

16 THE CLERK: Oh.

17 THE COURT: I know how to do these.

18 [Pause]

19 THE COURT: We're not ready for the jury yet. Just a second,
20 Marshal. I do appreciate it. Give us just a second, if you don't mind.

21 [Pause]

22 MR. JONES: So Your Honor, we apologize.

23 THE COURT: No worries. Okay. So --

24 MR. JONES: We're getting it handled. It'll take a couple
25 more minutes.

1 THE COURT: Okay. So do you all want to get started with
2 the jury coming back and doing the testimony while that's being taken
3 care of and multitask, or do you want to wait? What do you all want to
4 do?

5 MR. JONES: Your Honor, I'm happy either way. I -- if I could
6 present to the Judge, I -- present to Your Honor. I spoke to Mr. Doyle in
7 the break and we talked yesterday about trying to get the jury out by 3:00
8 and I don't -- what I -- what we both thought would be appropriate, if the
9 Court was okay with it is we will finish up everything with Dr. Rives, do
10 the jury instructions and let them go at that time. And then first thing in
11 the morning, we do opening both. And then --

12 THE COURT: I think you mean closing, but --

13 MR. JONES: Or closing, yes.

14 THE COURT: -- unless you're planning on starting the trial
15 over.

16 MR. JONES: Your Honor, It's been a long week.

17 THE COURT: No worries.

18 MR. JONES: A long few weeks.

19 THE COURT: Okay. You're going to have a challenge.
20 You're going to lose a juror. You're losing a juror, anyway. Most likely.
21 You have a juror. Do you remember the juror that told you at the time of
22 voir dire that she specifically had training for a promotional opportunity
23 all day Friday, November 1st and do you all remember promising the
24 jury that there was no way this case was going through November 1st?
25 Because this Court was actually supposed to be starting another trial

1 after yours.

2 Do you remember that promise and representation to that
3 juror? Well, that juror is one of your jurors going back for deliberations.
4 So unless you all are going -- what -- are all going to ask this Court to tell
5 that juror that she cannot go to all day training for a promotional
6 opportunity?

7 MR. DOYLE: Can the Court remind us what juror that was?

8 THE COURT: Does it -- okay. Here's the question. Do you
9 think it's appropriate for the Court to tell you which juror it is? It's a
10 seated juror. It's not one of the two alternates, so does it -- if you both
11 want me to, I'll tell you, but what I don't want -- if you both want me to,
12 like I said, I will tell you. If -- would it make a difference, because it's a
13 seated juror versus an alternate juror, right? So that's really the issue.
14 But like I said, if you both want me to say which juror it is, I will tell you
15 which juror has told the Marshal that situation. And so, it is one of your
16 seated jurors.

17 MR. DOYLE: It's okay to keep the mystery, I guess.

18 THE COURT: Well, the Court's not taking a position. Some
19 people have the viewpoint that it shouldn't matter to one side or the
20 other on your opinion as to whether you're going to excuse the juror,
21 because of who that particular juror is. Should it just be is it a seated
22 juror or is it an alternate? If you both wish the Court to tell you which
23 juror it is, I'm more than glad to tell you which one it is.

24 MR. DOYLE: No, Your Honor.

25 THE COURT: If one of you would prefer me just to leave it as

1 it's a seated juror, then I will -- then -- or you both wish it to remain it that
2 way, then I will do it that way. This Court doesn't have a preference. I
3 standardly say in the -- I generally just say it's a seated juror or it's an
4 alternate. And then if both parties specifically request that they want to
5 know who it is, I'm more than glad to say who it is. But sometimes
6 people say that they don't want to have an issue of their position being
7 who the person is versus it being a seated juror versus an alternate. Like
8 I said --

9 MR. JONES: Your Honor, that's how I --

10 THE COURT: -- this Court doesn't have this opinion one way
11 or another.

12 MR. JONES: That's how I feel about it. I think the decision
13 shouldn't be based on that. I --

14 THE COURT: Should be based -- so wait -- so --

15 MR. JONES: Shouldn't be based on who the juror is
16 individually.

17 THE COURT: Like I said.

18 MR. JONES: It should be based on whether or not we think
19 that it's appropriate to release the juror.

20 THE COURT: For the Court's position, I'm fine either way.
21 What I understand from the Marshal is that she reminded the Marshal
22 yesterday that she has all day training tomorrow. So yes, you know it's
23 a she, okay, has all day training tomorrow for the promotional
24 opportunity that she had mentioned before, I guess, and that's what the
25 Court's knowledge is.

1 MR. JONES: Your Honor, may I go talk to co-counsel really
2 quick?

3 THE COURT: Sure.

4 MR. JONES: Okay. Thanks.

5 [Pause]

6 THE COURT: Oh, counsel -- oh -- my JEA so far has not
7 received an email, so if you want -- multitasking.

8 UNIDENTIFIED SPEAKER: I know about that, but I will let him
9 know.

10 THE COURT: Yeah. At least as of a minute and a half ago. If
11 it came over the last minute and a half ago while I was talking, I don't
12 know.

13 MR. DOYLE: Can I step away from table?

14 THE COURT: Of course you may. Feel free. Just remember
15 we are still on the record, so if you're speaking loudly, remember the
16 good acoustics here in the courtroom. You just reminded him, because
17 she just resent me another saying still nothing at 1:29.

18 [Pause]

19 UNIDENTIFIED SPEAKER: In process that --

20 THE COURT: Appreciate it. Thank you. Multitasking at our
21 finest.

22 [Pause]

23 THE COURT: Okay. And just do remember, the acoustics are
24 very good, so if there's anything that people don't wish the Court to be
25 hearing from gallery, just --

1 UNIDENTIFIED SPEAKER: No, actually -- the only thing I did
2 -- I --

3 THE COURT: Oh, no. You're more than welcome. I just
4 remind people that sometimes people -- that's why just remember that
5 the acoustics are very good, so -- okay.

6 UNIDENTIFIED SPEAKER: Apparently there is a new style of
7 listening device that is being released to the courtrooms.

8 THE COURT: I don't yet --

9 UNIDENTIFIED SPEAKER: Who knows?

10 THE COURT: We have not yet --

11 UNIDENTIFIED SPEAKER: I know. This is what the IT people
12 are telling me.

13 THE COURT: Wonderful. We'll be glad to get it as soon as
14 they'll let us have it. Well, we're off -- let's go off the record for a brief
15 moment.

16 [Recess taken from 1:30 p.m. to 1:34 p.m.]

17 [Outside the presence of the jury]

18 THE COURT: Okay. Back on the record. Couple of different
19 things. One, I think -- well, 1:35, still says she doesn't have it, the last
20 page on the jury instructions, my JEA. And I appreciate colleague just
21 went and double-checked, so I don't know why, but she just sent me
22 another email at 1:35. She still doesn't have that last page on that issue.
23 On the issue with the juror, my Marshal did check again, while you both
24 were speaking. I had him follow up and understanding he received
25 again by checking with that same juror is this is the last opportunity to

1 go. Training is 8:00 to 5:00 tomorrow.

2 MR. DOYLE: So here's my thought. I'm not a big fan of
3 having jurors deliberate late, late into the night, especially after a long
4 day, because I don't think that's fair for either side and the jurors maybe
5 feel --

6 THE COURT: I need to know about tomorrow and this juror.

7 MR. DOYLE: I think we're going to have -- I think we need to
8 release the juror.

9 THE COURT: Counsel for Plaintiff?

10 MR. JONES: Your Honor, I think that's probably right. I don't
11 know how we can do that to her, so --

12 THE COURT: I kind of got probably and I got a --

13 MR. JONES: Yes, I -- Your Honor --

14 THE COURT: -- I think and I got a --

15 MR. JONES: -- we agree.

16 THE COURT: -- probably, so I kind of need final answers
17 affirmatively one way or another --

18 MR. DOYLE: Yes.

19 THE COURT: -- from counsel. And then I'm going to need to
20 know how you want to do it, meaning, do you want to wait 'til end of
21 day, so that -- or how you want to do that as well. Do you want to wait
22 until the end of all the testimony after the jury instructions have been
23 read? And I know that may tie into your question in a second about
24 closing arguments, but we have to find out if that's going to impact
25 anybody else. That's the one we know about right now, because

1 remember, based on what all counsel told to me to tell the jury
2 yesterday, remember what I told the jury --

3 MR. DOYLE: Yes.

4 THE COURT: That they were only going to be deliberating
5 tomorrow, remember? And that was going to be at their time schedule.
6 So you're asking me now to tell the jury something different. I do not
7 know, because obviously, that non-existing crystal ball again, right? I
8 wouldn't know whether that is going to pose a problem for anybody
9 else. The one we know about is the one that's 8:00 to 5:00, as we told
10 the Marshal that, you know, it's the last chance for this promotional
11 opportunity training.

12 MR. JONES: So Your Honor, I think what I would propose is
13 that we reach out to the jury and we see if there are any other issues
14 with that and let them know that what we think is probably the best thing
15 to do is to try to finish early, early today, so they can get out of here.
16 Once we finish with this witness and we do jury instructions, we let them
17 go and then tomorrow we do openings, see if that impacts anyone else's
18 schedule and if it does, I guess deal with that. But I -- we probably
19 should deal with that before we make a final decision on this juror, just
20 because we don't know how many alternates we have.

21 THE COURT: Right. There's always the plan B. Plan B is you
22 all decide what you want to do if you have less than a total of 8. You
23 know, how may do go back for a jury. But okay, if that's the thing you
24 want to do. So, do you want to leave it open in that way or do you want
25 to presume that if they have not brought it to the Marshal's attention that

1 they're all fine and that no one else has said it, when they have heard
2 that they're going for tomorrow at least for some day in part? How do
3 you all want to do it? It's up to you all. It's your case.

4 MR. JONES: They all understand that they're coming back
5 tomorrow for deliberations anyway, correct?

6 THE COURT: You heard what the Court said at the end of the
7 day, based on what you all's request was. You heard what I said.

8 MR. JONES: Perfect.

9 THE COURT: So the Court, of course, never said anything to
10 the jury without you being present, so that's the last this Court
11 understands, other than the specific request to the Marshal just to ask
12 that one juror updated outside the presence of everybody else, just so
13 that you would have the most up to date information. And that was just
14 an open-ended question to that juror is was there any update from
15 yesterday and then I related to you what he related to me was her
16 response.

17 And he asked her to go out of the room and did that in the
18 hallway, so it was not in front of anybody else. Okay. And so no one
19 else, to my knowledge, has come to him and presented any issues with
20 relating to tomorrow. That's the only one that has been brought to this
21 Court's attention as of right now.

22 MR. JONES: Okay. So I think, Your Honor, I think we should
23 do it that way and not mention it, release that juror at the end of the day.

24 THE COURT: It's completely up to you. The Court has no
25 preference. The Court is not giving any suggestions, any anything. I'm

1 just asking you all what -- how do you want to do your trial? To both of
2 you. Counsel for Defense, what's your position?

3 MR. DOYLE: I will agree with Mr. Jones for a change, so I
4 think we should finish with the evidence, the jury instructions and come
5 back in the morning and if we can get an early start -- I have no idea
6 what the Court's calendar looks like tomorrow, but happy to be hear
7 whatever time is convenient for you and your staff.

8 THE COURT: I think you know what the Court's calendar
9 looked like tomorrow. We had people flying in from all over the country,
10 because this Court had agreed to do the second round of a settlement
11 conference, that I had to tell everyone to cancel their flight plans and
12 everything, because of your case running late, late last night. So -- but
13 the Court does have a commitment from 1:00 to 1:30 involving my law
14 clerk and being sworn in, which -- would you like me to ask her and her
15 20 family members if they can't be sworn in tomorrow at 1:00?

16 MR. DOYLE: Absolutely not.

17 MR. JONES: No, Your Honor. Of course not.

18 THE COURT: Okay. And then the Court's not going to able
19 to go to the investiture of Judge Trevor Atkin, because I'll be with you.
20 So the Court has cleared everything else and all the other attorneys and
21 people who incurred whatever expenses they have for their case, so I
22 don't know what people's schedule is, but we take care of our trial.

23 MR. DOYLE: What time is the vestiture?

24 THE COURT: It's not really of your concern. I've already.

25 MR. DOYLE: Well, I was just wondering if we could work

1 around it. That's all.

2 THE COURT: The jury is going to be deliberating and this
3 Court's going to be here to ensure that I'm here --

4 MR. DOYLE: Okay.

5 THE COURT: -- for every single question and my duty first is
6 to ensure you have your trial fully and fairly on behalf of all your clients.
7 I will be here to ensure everything gets done for as long as the jury is
8 deliberating and for everything that needs to happen in this case, until
9 you all are walked out the door and everything's concluded, so this is
10 where I need to be. This is where I will be.

11 MR. DOYLE: Thank you.

12 THE COURT: And everyone understands --

13 MR. JONES: Thanks, Your Honor.

14 THE COURT: -- that that's the way it is. So in any event, I
15 already cancelled my RSVP on that, so that's already taken care of as
16 well. So that being said, do you want the jury to remain until the end of
17 the day and then just told at the end of the day that she may not come
18 back tomorrow? Do you want that for a less disruption or do you want
19 to excuse her now? In general, people suggest usually end of day. I'm
20 not only suggesting that for you all's sake one way or another. The
21 Court doesn't have any position. It's just what do you all want?

22 MR. JONES: I think that's what we should do, Your Honor.

23 THE COURT: What?

24 MR. JONES: Wait 'til the end of the day.

25 MR. DOYLE: That's fine.

1 THE COURT: That meets your needs. Okay. So then you
2 need to look at -- moving on to that. So let me tell which juror it is. So
3 my understanding, it is Juror Number 6, Ms. Keondra Crenshaw. Wait.
4 Let me make sure I'm correct. That's my understanding.

5 [Court and Clerk confer]

6 THE COURT: Thank you. I'm just going to have her confirm.
7 That's my understanding it was right there, Juror Number 6, Ms.
8 Crenshaw, but we're going to confirm that. Okay. Hearing the name,
9 does anyone wish to change their position in any manner whatsoever or
10 since you all already agreed, you're sticking with your agreement?

11 MR. DOYLE: No, that --

12 MR. JONES: No, Your Honor. We're not going to change.

13 MR. DOYLE: Not change. No.

14 THE COURT: Okay.

15 THE CLERK: That's correct.

16 THE COURT: Okay. Yes, so it's Ms. Keondra Crenshaw. So
17 she's not going to be told anything yet, though, okay? So then that
18 would mean, based on your prior agreement, that means Ms. Cindy
19 Peacock will go back for deliberations, because she was your alternate
20 number 1. Is that Plaintiff's intention?

21 MR. JONES: Yes, Your Honor.

22 THE COURT: Is that Defense intention?

23 MR. DOYLE: Yes.

24 THE COURT: Okay. Of course, no one will know until the
25 time of deliberations, okay? But -- so then at this juncture does some --

1 you all want to approach and see this last page and see? What I just
2 asked my JEA to do is put the -- it is given with the date and the
3 signature block, so it can be signed. The Court -- it doesn't change in any
4 way your language, but you need to take that to add that to your pile.

5 MR. JONES: Thank you, Your Honor.

6 MR. DOYLE: Okay.

7 THE COURT: All right. And then has somebody numbered
8 those in the order or is Mr. Leavitt or somebody in the -- numbering
9 those in the upper right-hand corner in the order that you all have agreed
10 upon?

11 MR. JONES: They have not been numbered. I mean, they
12 have a space, but --

13 THE COURT: Okay. So --

14 MR. JONES: -- the numbers have not been written in, Your
15 Honor.

16 THE COURT: -- in the set that gets given to the Court, can
17 you please have them --

18 MR. JONES: Number them first?

19 THE COURT: -- numbered in the order that you all have both
20 agreed upon, because that's the order in which this Court will read it.
21 And then madam -- of course Madam Clerk will first put the blueback on
22 it, okay?

23 MR. JONES: Okay.

24 MR. DOYLE: Would it be possible to get another copy of that
25 for my package?

1 THE COURT: That last page?

2 MR. DOYLE: Yeah, the last page.

3 THE COURT: Sure.

4 MR. JONES: Your Honor, I'm just going -- is a black pen
5 okay, or do you prefer a blue pen?

6 THE COURT: The Court has no preference unless you all do.

7 MR. DOYLE: Okay.

8 MR. JONES: None. I'm just going to go ahead and write in
9 the numbers.

10 THE COURT: Okay. And the verdict form is coming still. Do
11 you want to wait on the verdict form, or do you want the Marshal to
12 bring the jury in and finish up Dr. Rives' testimony? And then I'm going
13 to circle back to -- what I understand you all are asking to do is you want
14 to finish Dr. Rives' testimony today. You're going to get this jury out --
15 remember, you had me tell them yesterday 3:30 or 4:00. Now --

16 MR. JONES: Right.

17 THE COURT: -- if the change is based on what you all are
18 agreeing to, then that's whatever you all are agreeing to. It's completely
19 your trial. Don't forget we do have juror questions --

20 MR. DOYLE: Right.

21 THE COURT: -- from the prior testimony, right? So is it your
22 request that you finish Dr. Rives and then is Defense resting?

23 MR. DOYLE: Yes.

24 THE COURT: Is Plaintiff going to have a rebuttal case?

25 MR. JONES: No, Your Honor.

1 THE COURT: So then are you then wanting the Court then to
2 immediately go into the jury instructions and then excuse the jury for the
3 day and you do your closing arguments tomorrow or what are you
4 requesting?

5 MR. JONES: Yes, Your Honor.

6 THE COURT: And my wonderful JEA is coming and giving
7 you each a copy of that last page, if you want it for your respective
8 packets.

9 MR. DOYLE: Thank you.

10 THE COURT: One for counsel for Defense and one for
11 counsel for Plaintiff, if you need it separate for your own little packets.
12 Okay.

13 MR. DOYLE: So I'm wondering if we can just get started and
14 finish Dr. Rives, so that --

15 THE COURT: This Court has to have some general
16 understanding, so that we can tell the jury and so that the Court can just
17 do for breaks, so is that what you all --

18 MR. DOYLE: Kimball, can we just get going with Rives?

19 MR. JONES: Yes.

20 MR. DOYLE: Okay.

21 THE COURT: So did you want everything done today, other
22 than closing arguments and closing arguments will start immediately
23 tomorrow morning and we'll just check with the jury to see if it's better
24 to start at 8:30 or 9:00. Is that right?

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

1 THE COURT: And based on your estimates, you both will be
2 done by the noon hour, regardless if we start at 8:30 or 9:00, correct?
3 Because you both gave estimates between one hour and one hour and
4 15 minutes on one side, one hour and one hour and a half on the other
5 side. Even one and a half and one and a half equals three. Nine plus
6 three equals 12, which puts you at noon, even if we started at 9:00,
7 correct?

8 MR. JONES: Yes, Your Honor. I anticipate taking an hour
9 and a half, hour and 45 minutes between my close and rebuttal close.

10 THE COURT: Okay. I wasn't aware of the extra 15, but okay.
11 So okay. Because we have to decide breaks and everything, so tell the
12 jury -- so that means the jury's going out when it's going. That means
13 the jury will be going out around the lunchtime, correct? Is that
14 everybody's --

15 MR. JONES: Yes.

16 THE COURT: -- anticipation. Is there anything else?

17 MR. DOYLE: No.

18 THE COURT: Because remember, you still have two
19 outstanding issues that people have not brought back to this Court's
20 attention, okay? Do you remember there was the Sobe word is still in
21 Exhibit 1 and you still have the Doctor Hurwitz that no one brought back
22 to the Court's attention. I shouldn't say no one. Counsel for Defense
23 mentioned it yesterday and I reminding everyone that if somebody
24 wanted the Court to deal with it, somebody actually had to bring it to me
25 to address it on how you wanted -- if that ruling was needed and no one

1 has done anything since yesterday, so that's where we're at. And you all
2 are where you're at for closing. You've told me what you wanted to do,
3 so --

4 MR. JONES: Your Honor, I can tell you that with respect to
5 Dr. Hurwitz, we did go through and clip it and we just removed that
6 portion of his answer on our end in terms of what his answer is, but
7 yeah, I don't -- and in terms of the Sobe, as long as it doesn't get brought
8 up any further directly or anything like that, I think we can just leave it as
9 is, within the record, I mean.

10 THE COURT: Okay. Because your Exhibit 1 was a stipulated
11 admitted exhibit --

12 MR. DOYLE: Yeah.

13 THE COURT: -- but yet you've raised the issue of Sobe, and
14 you asked the Court that you were going to circle back and address it, so
15 I have it on my to do list, but okay. So Sobe's taken care of.

16 MR. JONES: Yeah.

17 THE COURT: Doesn't need to be addressed. It's in the
18 exhibits. You both know it.

19 MR. JONES: Yeah. As long as there's an understanding
20 between is and --

21 THE COURT: And nobody's asking --

22 MR. JONES: -- it won't be pointed to --

23 THE COURT: Pardon?

24 MR. JONES: -- then I don't think it needs to be addressed.

25 THE COURT: Is the answer from -- that the Court need not do

1 anything on Sobe, even though you both acknowledge it's in Exhibit 1.
2 Is that correct?

3 MR. DOYLE: Correct.

4 THE COURT: Correct from Plaintiff?

5 MR. JONES: Yes, Your Honor. Stipulated to that it will not
6 be directly identified or highlighted by the Defense.

7 MR. DOYLE: I have no such plans.

8 THE COURT: Okay. And Dr. Hurwitz. Nobody's asking the
9 Court to do anything with regard to Dr. Hurwitz. Is that correct?

10 MR. DOYLE: I would like the testimony to be stricken. I was
11 looking at it last night and I --

12 THE COURT: How --

13 MR. DOYLE: -- just -- I ran out of time.

14 THE COURT: Okay. But remember, the Court can't do
15 anything, if you all don't tell me what needed to be done, present it to
16 the Court. That's what the Court has said that day. Remember, when he
17 testified, which has now been a couple weeks, right? Was the Court
18 can't just guess on the exact language. There was something about, you
19 know, more than negligent, extremely, whatever, that you all needed to
20 provide the exact words that you wanted to be addressed. If no one
21 brought it to the Court's attention, it got left as is.

22 The Court shouldn't keep reminding you all why you have a
23 jury out there that you said one fi -- you do realize you asked this poor
24 jury to take a shortened lunch, my whole team to take shortened lunch
25 for 1:15. It's now 1:48. Again, another half hour they've been sitting

1 back there. My whole team did not get their whole lunch, because you
2 all still weren't prepared and that's really not fair to them yet again with
3 all the overtime and everything.

4 It's not that the Court wants to be saying this, but come on.
5 If you all weren't going to be prepared -- you could have done this last
6 night. You could have spent more time on the jury instructions, couldn't
7 have gotten these fixed, could have got them put in the order, okay?
8 Most everything -- you know that.

9 MR. JONES: Certainly, Your Honor.

10 THE COURT: And this is just --

11 MR. JONES: I do have a final now number.

12 THE COURT: Okay. Check it with Defense counsel. Make
13 sure he's okay.

14 [Counsel confer]

15 THE COURT: And the number of blank through what? One
16 through what?

17 MR. JONES: One through 45, Your Honor.

18 [Pause]

19 MR. DOYLE: May I approach?

20 THE COURT: Of course you may. Are they in the order, 1
21 through 45, agreed to by both the parties? Yes or no?

22 MR. DOYLE: Yes.

23 MR. JONES: Yes, Your Honor.

24 THE COURT: Okay. Madam Clerk, can you please put a
25 blueback on 1 through 45? Don't staple it, because I won't be able to

1 read it, but so could clip it so that I just have it?

2 THE CLERK: Sure.

3 THE COURT: Thank you.

4 THE CLERK: Of course.

5 THE COURT: So that identifies it in the middle of the other
6 things. Okay. So the Marshal's been instructed that at the end of the
7 day, when the Court tells him, he will then let Ms. Crenshaw know that
8 she is excused, and she won't know until that time at the end of the day
9 that she's excused. Based on the agreement of the parties and based on
10 your agreement, then Ms. Peacock will be the eighth juror to go back for
11 deliberations.

12 I just confirmed with him whether -- he a -- I asked whether
13 anybody -- any other juror has specifically told him that tomorrow is a
14 specific conflict. The answer to that specific question is no. Whether
15 people have expressed their concerns about the extended time, that's
16 not the issue.

17 So at this juncture, are you ready to bring the jury in?

18 MR. JONES: We are, Your Honor.

19 MR. DOYLE: Yes.

20 THE COURT: Okay. Will you peek your head out, please and
21 let Jimmy know, please, to bring the jury in. Thank you so much.

22 [Pause]

23 THE COURT: And counsel, you're going to continue your
24 cross. Is that correct?

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

1 THE COURT: Okay. Thank you so much.

2 THE MARSHAL: All rise for the jury.

3 [Jury in at 1:53 p.m.]

4 [Within the presence of the jury]

5 THE MARSHAL: Jurors are accounted for. Please be seated.

6 THE COURT: Welcome back, ladies and gentlemen. I hope
7 you had a nice, relaxing lunch with a gorgeous view of our valley. So at
8 this juncture, we were in cross-examination right before the lunch break.
9 The witness understands he's still under oath, correct?

10 THE WITNESS: I do.

11 THE COURT: Thank you so very much. Do appreciate it.
12 And counsel, since you're in cross-examination, feel free to continue
13 with your questions.

14 MR. JONES: Thank you, Your Honor.

15 CROSS-EXAMINATION CONTINUED

16 BY MR. JONES:

17 Q All right. Doctor, is your memory of what happened in the
18 July 3rd, 2015 surgery better right now or was it better when you typed
19 up your note?

20 A You mean when I dictated my note?

21 Q Yes. When you dictated your note.

22 A My memory would be better when I dictated my note.

23 Q Okay. Now Doctor, you'd agree that you stated in your note,
24 "We used the LigaSure to extract it," meaning the colon, "from the
25 mesh," correct?

1 A That is correct.

2 Q Okay. And then it goes on to say, "as the mesh would not
3 come free from the colon, in doing so, this created a small tear in the
4 colon?"

5 A Words to that effect, yes.

6 Q Okay. Now, when you were just testifying earlier, you were
7 talking about how the LigaSure really didn't have any involvement in the
8 tearing of the holes of the colon, correct?

9 A Correct.

10 Q Okay. But in your note immediately after the surgery, you
11 said, in doing so, specifically in using the LigaSure to extract the colon
12 from the mesh, in doing so, this created a small tear in the colon, right?

13 A No.

14 Q That's what you said?

15 A No. It means once the colon was free from the mesh, I could
16 see that there were two holes.

17 Q No. That's your testimony, but that's not what your
18 operative report says, right?

19 A That's my operative means --

20 Q Okay.

21 A -- my operative note means.

22 Q So when you say, in using the LigaSure to cut the colon
23 away from the mesh, what you actually meant is that after doing that
24 and a number of other things, like pulling and pushing and jerking, you
25 then saw holes?

1 A No. I used the term extract. That means to remove. It does
2 not mean that I used to actually cut the colon away from the mesh.

3 Q Okay.

4 A It means I took down the adhesive bands with the LigaSure
5 device.

6 Q That's what your -- that's what you've been testifying to
7 today, right? And yesterday, correct?

8 A That's my operative report --

9 Q Okay.

10 A -- operative report means, yes.

11 Q Your operative report doesn't say anything about adhesive
12 bands, right?

13 A No.

14 Q No. Okay. Doctor, you -- do you agree with Dr. Juell when
15 he testified that unlike the wording of your report, this was a significant
16 complication?

17 A I don't remember the terms he used.

18 Q Okay. Do you agree with him that by cutting a hole in the
19 colon, you multiplied the risk of infection to Ms. Farris by ten times?

20 A I would say that it increased the risk of infection. I wouldn't
21 agree with ten times.

22 Q Okay. But you agree that's what he said, right?

23 A I believe that's what he said, yes.

24 Q Okay. All right. And he was the expert paid by your
25 attorney, correct?

1 A Yes.

2 Q Okay. Doctor, you also agree that when I asked you earlier
3 last week, I said is there any contraindication in using the LigaSure in
4 this way and you said there's no contraindication in using the LigaSure.
5 Do you remember that?

6 A No contraindication in using it in which way?

7 Q You mentioned that it wasn't contraindicated at all to use the
8 LigaSure in approximation to the colon.

9 A Depends what you mean by approximation, but no.

10 Q Okay. But Dr. Juell said it was, right?

11 MR. DOYLE: Objection. Mischaracterizes the evidence and
12 testimony.

13 THE COURT: The Court's going to overrule the objection to
14 the way the question was phrased.

15 THE WITNESS: I believe he said relative contraindication.

16 BY MR. JONES:

17 Q Right. And do you recall what explained when he said what
18 relative contraindication meant? Do you remember that?

19 A I don't recall that, no.

20 Q Do you remember that he said that means that yes, you must
21 use the safest tool available, but if you have nothing else, then maybe
22 you can go use it. Do you remember him saying something along those
23 lines?

24 MR. DOYLE: Calls for speculation.

25 THE COURT: Overruled.

1 THE WITNESS: I don't recall his exact testimony to that at
2 all.

3 BY MR. JONES:

4 Q Okay. But you were here during his testimony, right?

5 A Yes.

6 Q Okay. All right. Now Doctor, you'll recall when I did this the
7 last time I was questioning you, near the end of my questioning, I
8 pointed out that if you go all the way out here to August 11th, that her
9 white blood cell count drops down to 9.3, right?

10 A Yes, you did.

11 Q And today, when your attorney was questioning you, you
12 mentioned how, that took a long time for it to get down to 9.3.
13 Remember that?

14 A In retrospect, yes.

15 Q Okay. And Doctor, the way that you phrased that to the jury,
16 it gave me the impression -- you tell me if this was the impression you
17 were trying to give. It gave me the impression that you were trying to
18 tell the jury that her white blood cell count didn't get better for three
19 weeks.

20 MR. DOYLE: Objection.

21 BY MR. JONES:

22 Q Is that what you were trying to tell the jury?

23 MR. DOYLE: Objection. It's irrelevant and compound.

24 THE COURT: Overruled on both grounds.

25 THE WITNESS: Could you rephrase the question, please?

1 BY MR. JONES:

2 Q Absolutely. So when I was listening to you say that, the way
3 that it was framed, it gave me the impression that you were trying to tell
4 the jury that it took three weeks for her white blood cell count to get
5 better after Dr. Hamilton's surgery. Is that what you were trying to tell
6 the jury?

7 A Based upon what you presented to me, yes.

8 Q Okay. But you spent all that time going over the notes, right?
9 That allowed you to remember that the phone call you received from Dr.
10 Mono was on the morning of. Did you also take the time to identify the
11 white blood cell count and what it looked like right after Dr. Hamilton's
12 surgery?

13 A I did review the white blood cell counts after Dr. Hamilton's
14 surgery since that testimony, yes.

15 Q Excellent. And so Doctor, what happened to her white blood
16 cell count following Dr. Hamilton's surgery?

17 A It rollercoastered at --

18 Q Did it rollercoaster?

19 A At times it went down and at times, it went as high as 39,000.

20 Q Interesting. So let's go ahead and let's talk about that. First
21 of all, are you telling this jury it went as high as 39,000 or did you mean
22 to say 34.6 thousand?

23 A Around 39,000 is what I remember.

24 Q And that was immediately after surgery, 34.6 thousand,
25 correct?

1 A Could be, yes.

2 Q Yes. And then the day after that, what was it at? Do you
3 recall?

4 A I don't recall the exact numbers. There were 25 of them to
5 try to remember.

6 Q Okay. Well, would you agree that the day after the one time
7 that it went up following a four-hour surgery, it dropped down to 22?
8 Does that sound right?

9 A That would be consistent, yeah.

10 Q And then the day after that, it dropped down to 16.9, right?

11 A Could be, yes.

12 Q And Doctor, would you agree that it never again went back
13 up to 20?

14 A I'd have to review them all again to know that.

15 Q Okay. All right. So then, it stayed there and maybe didn't
16 get totally normalized. And the reason why I picked this one, 9.3, is
17 because you'd agree that is a healthy white blood cell count, right?

18 A That's in the mid-range of normal, yes.

19 Q Okay. So by then, her white blood cell count was totally
20 normal, right?

21 A The total white cell count was, yes.

22 Q And --

23 A I didn't look at the shifts.

24 Q Okay. Right. Because you want to make sure you talk about
25 bandemia, right?

1 MR. DOYLE: Objection, Your Honor. Argumentative.

2 THE COURT: Sustained the way the question was phrased.

3 MR. JONES: Thank you, Your Honor.

4 BY MR. JONES:

5 Q On -- but you'd agree even the day before I -- before it went
6 down to single digits -- and I pointed it out, because it went down to
7 single digits, because I thought that was meaningful, you'd agree that it
8 was normal, at least on the edge of normal, 10.5, even before that,
9 wasn't it?

10 A It was trending down to that, yes.

11 Q Okay. And so what was really happening after Dr. Hamilton
12 fixed the problem and gained source control, you'd agree was that her
13 white blood cell count spiked immediately following the surgery and
14 then it declined all the way down into normal over a period of a few
15 weeks correct?

16 A I would say it went up after the surgery, plateaued and
17 slowly came down to normal after 25 days, yes.

18 Q Okay. But you'd agree that it was lower than the lowest
19 white blood cell count that you saw during that 12-day stretch when you
20 weren't recommending to go back to surgery, correct?

21 A Which white cell count?

22 Q Any of them. It was consistently below your -- below the
23 white blood cell counts that you had, correct?

24 A I'd have to look at the lowest one. During the times I saw
25 her, I think it was around 17. I think the majority of them during that 25-

1 day period were hovering between 12 to 18.

2 Q Okay. I think that's probably fair. Let's see. Doctor, do you
3 recall -- so do you recall giving the jury an explanation of what this case
4 was like for you getting that hernia out, because it was -- or getting the
5 contents out of the hernia, it was like a kid with his hand in a candy jar.
6 Do you recall that?

7 A I wasn't specifically referring to this case. I said hernias in
8 general, when the bowel goes up is like a kid putting their hand in a
9 cookie jar, in that it swells up and gets stuck and hard to come out.

10 Q Oh, okay. So -- but you've given that analogy other times
11 under oath, correct?

12 A Under oath?

13 Q Yeah.

14 A I guess.

15 Q Okay. That wouldn't surprise you?

16 A No.

17 Q Would it surprise you if you gave it under oath a couple of
18 months ago?

19 A No. I give it to patients, even when I talk to them in preop.

20 Q Now, just like in this case, Doctor, you'd agree that in the
21 Center case, day to day, day after day, you claimed that her course was
22 improving, correct?

23 MR. DOYLE: Objection. Assumes facts not in evidence.
24 Irrelevant and 48.035.

25 THE COURT: Court's going to have to sustain it, based on

1 testimony thus far.

2 MR. JONES: Okay.

3 BY MR. JONES:

4 Q Doctor, do you recall -- I'm not sure if it was yesterday or the
5 day before, but you were explaining to the jury your decision to live in
6 Las Vegas and you talked about how you came to live in Las Vegas,
7 because you couldn't afford to live in California. Do you remember that?

8 A I started that answer, yes.

9 Q Okay. And Doctor, you were saying that so that the jury
10 would feel sympathy for you, right, because -- to make it appear that you
11 didn't have money. That's the reason why you were trying to tell the
12 jury that, right?

13 A No, it's more a reflection of taxes and everything else in
14 California than anything else.

15 Q Oh, okay. Got it. Because you actually are a pretty wealthy
16 guy, right?

17 A I --

18 MR. DOYLE: Objection. Relevance.

19 THE COURT: The Court's going to overrule the objection in
20 light of the prior testimony on this topic the other day.

21 THE WITNESS: I don't know what you refer to as wealthy.

22 BY MR. JONES:

23 Q Okay. You grew up with money, right?

24 A We were upper middle class.

25 Q Okay. Doctor, what kind of car do you drive?

1 MR. DOYLE: Objection. Relevance.

2 THE COURT: Sustained.

3 BY MR. JONES:

4 Q Well -- Doctor, you claim you did several things during your
5 surgery that you failed to list in your report, correct?

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

7 Q One example and is that you claimed that you actually
8 washed up afterwards. You cleaned the wound. You irrigated it out,
9 made sure everything was good. You said that you did all of those
10 things right? But those aren't in your report, right?

11 A Those are typically what I do during every laparoscopic case,
12 yes.

13 Q That's not what I asked, Doctor. I said -- you said that's what
14 you did, but you didn't put that in your report, right?

15 A Correct.

16 Q Okay. And Doctor, do you remember how when I was
17 questioning you before, I was saying how you were the only person that
18 could really tell us what happened in that surgery. And then you
19 responded and said well, there was a scrub tech. And then over the last
20 couple of days, when you were explaining things to the jury, you
21 explained how there is a scrub tech and there's also large, what do you
22 call them, TVs or monitors, right? You said they're about 36 inches. Do
23 you recall all of that?

24 A Correct.

25 Q Okay. And doctor, the purpose of that was to kind of

1 demonstrate to the jury that other people might have been able to see
2 what happened. Is that right?

3 A No. It's just the way that the surgery's performed.

4 Q Okay. Now, Doctor, did any of those people that also saw
5 this surgery agree to come and testify and confirm your story of how
6 things happened?

7 A I don't believe they were asked to.

8 Q Okay. Now Doctor, you agree another way that you could
9 have confirmed your story might have been to just take pictures during
10 this laparoscopic procedure, correct?

11 MR. DOYLE: Objection. Argumentative.

12 THE COURT: Overruled.

13 THE WITNESS: Phrase that again?

14 BY MR. JONES:

15 Q Doctor, another way you could have confirmed your story of
16 what happened during this surgery would have been to take pictures
17 before and after, to demonstrate the condition of the colon, of Ms. Farris'
18 insides before and after your procedure, right?

19 A You take pictures during surgery to confirm the pathology,
20 not to --

21 Q Doctor --

22 A -- confirm your story.

23 Q Certainly. Certainly. That's certainly what everyone would
24 hope their surgeon is doing, right?

25 MR. DOYLE: Objection. Argumentative and speculation.

1 THE COURT: Well, the Court is going to sustain it on both
2 grounds.

3 BY MR. JONES:

4 Q Doctor, do you -- well, so I'm going to ask you about that
5 again. Now, you agree, first of all, as Dr. Juell said, it's very, very easy to
6 take pictures during a laparoscopic procedure?

7 A Yes.

8 Q You just click the button, right?

9 A Yes.

10 Q And it's the same picture you're taking that's going to be on
11 the monitor, right?

12 A Correct.

13 Q Okay. And in fact, in April of this year, you testified under
14 oath that you take pictures in literally all of your laparoscopic surgery
15 cases didn't you?

16 A Correct.

17 Q Okay. So in April of this year, you were fully aware of this
18 case, correct?

19 A Correct.

20 Q Which is a laparoscopic case, correct?

21 A Correct.

22 Q And at the time that you testified under oath that you literally
23 took pictures of all, each and every one of your cases, you, in fact, knew
24 at that time that that wasn't true, didn't you?

25 A No.

1 Q Did you take pictures in this case, Doctor?

2 A I think I did, actually.

3 Q You do?

4 A I do.

5 Q Okay. Where are those pictures, Doctor?

6 A Don't know.

7 Q Who had access to those pictures, Doctor?

8 A The circulating nurse.

9 Q Did you have access to those pictures, Doctor?

10 A No.

11 Q Do you remember in the Vicky Center case, Doctor, when you
12 explained how easy it was for you to make sure the pictures got into the
13 medical record?

14 A The photographs go --

15 Q Do you remember, Doctor? I'll repeat it for you. Do you
16 remember in the Vicky Center case, when you testified in April, that you
17 explained then how easy it was for you to make sure pictures got moved
18 to the medical chart?

19 A I don't believe it's by me. It's done by the circulating nurse.

20 Q Okay.

21 A But yes, they are easy to get into the medical records, yes.

22 Q Okay. So you're saying that pictures were taken in this case,
23 but that for some -- and you had control of those pictures at one point,
24 correct?

25 A No.

1 Q You never had control of those pictures?

2 A No. You take a picture with a camera head. It goes to the
3 laparoscopic equipment. The nurse is in charge of the printout of those
4 photos.

5 Q Doctor, did you --

6 MR. DOYLE: Your Honor, I object to the interruption.

7 THE COURT: Overruled. Redirect.

8 BY MR. JONES:

9 Q So Doctor, the photographs -- you're saying you did take
10 photographs?

11 A Correct.

12 Q Doctor, is there any reason why you never mentioned in any
13 of your records that you took photographs?

14 A I don't think I ever mentioned that.

15 Q Literally you never mentioned it until this moment. Isn't that
16 true?

17 A I don't think I ever mention it in any of my records for any
18 cases.

19 Q Well, you certainly talked about it in the Vicky Center case,
20 about the photographs you did take, didn't you?

21 A No. I meant in my operative case.

22 Q Okay.

23 A In the operative note, I don't dictate that I took pictures or
24 not.

25 Q But you didn't put it anywhere in your personal notes, in

1 your operative note. You don't have that anywhere, do you?

2 A It doesn't go in any of my notes.

3 Q Okay. And in your deposition, when you were asked
4 questions about what happened in this case, you never mentioned taking
5 pictures, did you?

6 MR. DOYLE: Objection. Lacks foundation.

7 THE COURT: Counsel, can you please both approach?
8 Madam Court Recorder, can you turn on the white noise.

9 [Sidebar at 2:11 p.m., ending at 2:12 p.m., not transcribed]

10 THE COURT: Court overrules that objection as to foundation.
11 That was the only objection that was stated. Counsel, feel free to -- the
12 witness can answer the question.

13 BY MR. JONES:

14 Q Do you remember the question, Doctor?

15 A No, I don't.

16 Q Okay. During your deposition, you -- your deposition was
17 taken for several hours, right?

18 A Correct.

19 Q You were asked a lot of questions about this case, right?

20 A Correct.

21 Q And during that deposition, you never told anybody that you
22 had taken pictures, right?

23 A I was never asked about pictures, no.

24 Q Okay. But Doctor, you've known for some time that your
25 report says that you cut two holes into Tina Farris' colon, haven't you?

1 A Correct.

2 Q And you've known for some time that there's a pathology
3 report, where the pathologist took the area of colon that you had been
4 operating on and they found three holes, right?

5 A That is correct.

6 Q Okay. But in this case, you're blaming it on the charge nurse.
7 She must have lost the photos?

8 MR. DOYLE: Objection. Argumentative.

9 THE COURT: Sustained the way it's phrased. There wasn't a
10 question, actually.

11 BY MR. JONES:

12 Q Doctor, is it your position that the charge nurse -- well, let me
13 restate it. It is true that you have taken the position in front of this jury
14 now that the charge nurse must have lost the photographs, correct?

15 A It's one of the possibilities, yes.

16 Q But you didn't do it, right?

17 A I'm not in charge of the photos, no.

18 Q Okay. In any case you don't dispute that you said just in
19 April,

20 "I take photographs of all my laparoscopic procedures. It's one of
21 the nice benefits of doing laparoscopic surgery is because using the
22 camera, I can take pictures of exactly what is going on inside the
23 patient's abdomen, what I do to fix it and then afterwards, I can show the
24 patient this is what was going on, this is what we did and this what I did
25 to fix it."

1 Did you say that, Doctor?

2 A Yes.

3 Q And doctor, you agree that there are significant benefits to
4 being able to see the before and after in a situation like this, right?

5 A Absolutely.

6 Q And you agree that you've known for some time that there's
7 a lawsuit and for some time that your patient, Ms. Farris, had a really,
8 really horrible outcome, right?

9 A Yes.

10 Q And Doctor, have you gone to the hospital administration
11 and said hey guys, where are these photographs, and tried to go get
12 those?

13 A It's been four and a half years, I believe, since that surgery,
14 so no.

15 Q So in all of this time, knowing there's a pathology report that
16 says no, ma'am, there was an extra hole there, you never went to try to
17 get the photographs you say you took. Is that right?

18 A The photographs aren't saved on the computer system for
19 the laparoscopy for four and a half years.

20 Q Doctor, did you -- well, you've been involved in it for four and
21 a half years, but certainly, couldn't you have gone and done this like one
22 year in?

23 A The photographs aren't --

24 Q Yes or no, Doctor?

25 A I beg your pardon. I can't answer that as a yes or no answer

1 then.

2 Q You couldn't have gone and checked one year in?

3 A No.

4 Q You don't know? Okay. You couldn't have gone and
5 checked two years in?

6 A No.

7 Q Three years in?

8 A No.

9 Q Four years in?

10 A No.

11 Q How about yesterday?

12 A No.

13 Q Okay. Yesterday, you remember me bringing it up, that I was
14 going to talk about your testimony in the Vicky Center case, right?

15 A I believe so, yeah.

16 Q Yeah. And so are you sure that you didn't just kind of invent
17 this particular narrative in response to that, to be prepared for that?

18 MR. DOYLE: Objection. Argumentative.

19 THE COURT: Sustained with the way the question was
20 phrased.

21 MR. JONES: Okay.

22 BY MR. JONES:

23 Q Doctor, are you sure you actually took photographs?

24 A Yes.

25 Q Okay. Doctor, did you destroy those photographs --

1 A No.

2 Q -- so they wouldn't be available?

3 A No. I would never do that.

4 Q Doctor, would you ever say something that was not true
5 under oath?

6 A I don't believe so, no.

7 Q Doctor, isn't it true, though, that you actually were, during
8 the Vicky Center case, untruthful under oath regarding your safety record
9 when it comes to laparoscopic surgeries?

10 A I don't believe so, no.

11 Q Doctor, isn't it true that you were untruthful under oath about
12 the complications that your patients have had following your
13 laparoscopic surgeries?

14 A I don't believe so, no.

15 Q Okay. Doctor, when you were under oath in April of this year
16 in the Vicky Center case, isn't it true that you were asked if you had ever
17 in any other case besides Vicky Center, caused one of your patients to
18 become disabled?

19 A To become disabled?

20 Q Yeah.

21 A I don't recall that question, no.

22 Q Okay. Let's go ahead and let's play that.

23 MR. DOYLE: Your Honor, I have an objection to this.

24 THE COURT: Counsel, what's the "this"?

25 MR. DOYLE: It hasn't been previously produced or disclosed.

1 THE COURT: I don't know what this is. Counsel --

2 MR. DOYLE: I don't know what we're going to be looking at.

3 THE COURT: -- why don't you both approach? Why don't
4 you turn on some white noise.

5 [Sidebar at 2:18 p.m., ending at 2:31 p.m., not transcribed]

6 THE COURT: Okay. Thank you. So what I understand is the
7 Court is going to defer your -- go to a different section. The Court's
8 going to defer that right now; is that correct?

9 MR. DOYLE: Yes.

10 THE COURT: Does that meet both party's needs?

11 MR. DOYLE: Yes, that's fine, thank you.

12 THE COURT: Okay.

13 BY MR. JONES:

14 Q Now, doctor, you agree that when you talk about doing a
15 laparoscopic surgery, that's the same as a minimally invasive surgery;
16 that's what you testified to with your counsel, right?

17 A Correct.

18 Q Okay. So if somebody says minimally invasive, it's the same
19 as if they say laparoscopic, correct?

20 A There's minimally invasive techniques that don't involve
21 laparoscopy, but in general yes.

22 Q But when you say it, that's what you've been referring to,
23 correct?

24 A Correct.

25 Q Okay. Let's see. Doctor, you mentioned to the jury that you

1 previously, I guess voluntarily, gave up privileges at many hospitals in
2 town, correct?

3 A Yes.

4 Q Okay. And when those hospitals -- have you ever seen a
5 circumstance where a hospital takes away privileges for cause?

6 A Yes.

7 Q Okay. And, doctor, do they make that information public?

8 A Yes.

9 Q They do?

10 A Yeah. It has to be reported to the national databank or
11 whatever it's called.

12 Q Okay. Doctor, if -- you were asked a question if not being
13 board certified had ever impacted you in your profession; do you recall
14 that?

15 A Correct.

16 Q Doctor, have you done an assessment to see if you told your
17 patients the truth or informed them that you were not board certified,
18 have you had an assessment to see if that would impact your business?

19 MR. DOYLE: Objection. It's compound and argumentative.

20 THE COURT: The Court's going to sustain it for compound.

21 BY MR. JONES:

22 Q Doctor, have you done any studies to identify what the
23 impact would be on your profession if you informed your clients, your
24 patients, that you were recommending surgery to up front that you
25 actually were not board certified?

1 MR. DOYLE: Irrelevant.

2 THE COURT: Overruled.

3 THE WITNESS: I have not performed any studies, no.

4 BY MR. JONES:

5 Q Okay. Doctor, in the Vickie Center case -- well, let's actually --
6 leukocytosis, you agree just as a general term, is the word they use for
7 increased white blood cell count, right?

8 A Correct.

9 Q Okay. And you agree that you previously testified quote, she
10 had an increased leukocytosis, and then explained, then you explained,
11 quote, leukocytosis is her white count. It's a sign that there's a new
12 infection developing and getting worse. Do you recall saying that?

13 A Who's she?

14 Q Well, it was when you were testifying in the Vickie Center
15 case.

16 A Okay.

17 Q Okay. But do you agree with that, that increased
18 leukocytosis is a sign there's a new infection developing or getting
19 worse?

20 A It could be, yes.

21 Q Now, can you say that competently without looking at the
22 bandemia effects of that or do you need to check the bandemia first?

23 A It depends upon the situation.

24 Q Okay.

25 MR. JONES: Your Honor, I have no more questions beyond

1 the issues we discussed.

2 THE COURT: Ladies and gentlemen, we're going to take a
3 break. At this recess be back at 2:45.

4 Ladies and gentlemen, during this recess you are
5 admonished not to talk or converse among yourselves or with anyone
6 else on any subject connected to this trial. You may not read, watch, or
7 listen to any report or commentary on the trial or any person connected
8 with the trial by any medium of information, including without limitation,
9 social media, texts, tweets, newspapers, television, internet, radio.
10 Anything else the Court has not specifically stated is, of course, also
11 included.

12 Do not visit the scene of the events mentioned during the
13 trial, do not undertake any research, experimentation, or investigation.
14 Do not do any posting or communications on any social networking
15 sites. Do not do any independent research, including -- thank you so
16 very much -- but not limited to interest searches. Do not form or express
17 any opinion on any subject connected to the case until it's fully and
18 finally submitted to you at the time of jury deliberations.

19 Thank you so much.

20 THE MARSHAL: All rise for the jurors.

21 [Jury out at 2:36 p.m.]

22 [Outside the presence of the jury]

23 THE COURT: Okay. We're outside the presence of the jury.
24 We're going to stay on the record for a brief moment.

25 Okay. There was an issue that was discussed at bench with

1 regards to playing a video clip. Now, the Court fully appreciates that,
2 you know, the Defendant has a right to be here during all proceedings.
3 This does impact his testimony. So is everyone fine with the witness
4 being here, because it's regarding witness testimony and potential
5 impeachment. But Defendants have a right to be here during the case,
6 just like Plaintiffs have a right to be here during their case, so.

7 MR. DOYLE: Your Honor --

8 THE COURT: The Court's not taking any position, it's just
9 asking a question.

10 MR. JONES: Yeah, we're fine, Your Honor, he can stay.

11 THE COURT: Okay. So the issue is with regards to a clip. As
12 you know, because you all told me that that case was on appeal, so there
13 was transcripts. The Court went to the transcript which you both -- what
14 was identified as the April 17th date. And the question that was at issue
15 and why you both came around over where the Clerk was is so that you
16 could both see on the screen the question that was on the video clip.

17 Is that correct, Plaintiff's counsel, that was the video clip
18 question that you were intending to play, wanting to play, is that correct?

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

20 THE COURT: Okay. And so you all had an opportunity to see
21 what it was in its written form. And you all saw that -- well, Mr. Doyle,
22 you were trial counsel, and you saw that the Court in that case had --
23 there was an objection, but the Court had overruled the objection, which
24 is the other thing the Court had pointed and showed you all.

25 So I guess the question becomes, counsel, you stated it's

1 impeachment, Plaintiff's counsel.

2 MR. JONES: That's right, Your Honor.

3 THE COURT: Defense counsel, you object as it being
4 impeachment. And so the Court needs to make a determination whether
5 it's impeachment and whether it would come out in a video format or
6 whether it could come out in a written format or some other format.

7 As I stated at bench, this is not a standard case where other
8 cases would be treated differently. Here we have a specific because of
9 conduct of Defendants and Defense counsel. There was a specific as a
10 lesser sanction within striking. There was the pre-instruction.

11 And, actually, both of the proposed pre-instructions offered
12 by both of the parties included information relating to the inference on
13 the Vickie Center case. In fact, the pre-instruction given was pretty close
14 to what was proposed by Defendants, but a little bit modified. And it's
15 based off of conceptual concept of *Bass-Davis* by analogy. I'm only
16 saying by analogy because it allows the jury to make a determination
17 whether they should or should not -- there's been inference.

18 Okay. So here, in order for the jury to be able to make the
19 determination whether there should or should not be an inference, the
20 failure of Defendant to mention the Vickie Center case, which then
21 precluded the experts and everything in this case for all the reasons that
22 the Court's not going to reiterate. See prior ruling, see prior arguments,
23 analysis, and pleadings, okay, on the topic. But the jury has to have
24 some information in order to make a determination whether they should
25 or should not make that inference.

1 And so here the Court sees Plaintiff's position where the jury
2 needs some information on that inference and why that information was
3 not presented. But the Court also has heard Defendant's position that
4 this was not timely provided to them, but then Plaintiff says that
5 Defendant was the trial attorney in that case, so he knew about it. So
6 herein lies the challenge. I'll give you each two minutes because I'm not
7 going to have the jury out there for too long, so.

8 MR. JONES: Your Honor, that's -- it's well said. I mean it's
9 very -- we've hashed it out. There's already been a determination that
10 this was intentional, so I will not go into that too much, but it's very clear
11 based on the records that we have that there was definitely not an
12 understanding from our side of the case about this Vickie Center case or
13 the impact it has with respect to this case.

14 But, in any event, I obtained the video for the Vickie Center
15 case. I don't remember which day, Your Honor, it might have been a
16 week ago, I had staff combing through it. It's only been a few days since
17 we were able to identify Doctor Rives' specific testimony. And since I
18 have been able to go through myself and verify and then to have it
19 clipped in such a way that there's no risk of playing anything beyond
20 that.

21 Anyway, bottom line, Your Honor, it's only been a few days
22 that we've even been aware of it or that we've been aware of this
23 specific testimony by Doctor Rives in that case. And so -- and I can say
24 definitively, when I questioned Doctor Rives initially, I did not have this
25 information, I did not know this information. This was not available to

1 me at that time. I received it after that and combed through it since then.

2 The jury needs some way to infer and the video is a minimal
3 way for the jury to do that.

4 THE COURT: Okay.

5 MR. JONES: And at the end of the day Doctor Rives was
6 asked a question and he denied that he had said it. And the question is
7 essentially exactly what he was asked in the *Vickie Center* case. And so
8 it demonstrates that he just is not being truthful, Your Honor. It goes to
9 his credibility, which is everything in this case, in a case where he now,
10 as Your Honor has heard just now claimed, that he took a bunch of
11 photographs, but that somehow they were destroyed by the hospital,
12 even though he didn't explain that in his request for production of
13 answers when we asked for photographs. A separate issue, but a
14 significant one.

15 THE COURT: Okay. Counsel for Defense, I was looking up,
16 just making sure, okay. You get the same two minutes.

17 MR. DOYLE: Go?

18 THE COURT: Go.

19 MR. DOYLE: So I can't say when the transcripts were first
20 available, but I suspect the Court can tell us or I suspect they've been
21 available for some time.

22 THE COURT: 10/28/19.

23 MR. DOYLE: So not that long ago. Well, but that doesn't --

24 THE COURT: Show it on the screen --

25 MR. DOYLE: That doesn't -- that doesn't make it --

1 THE COURT: -- that's what it shows, 10/28/19 is when they
2 show. That's 10/28/19. See what it says on the Odyssey, it says 10/28/19.

3 MR. DOYLE: Well, but counsel said he obtained it about a
4 week ago, so perhaps --

5 MR. JONES: That's true.

6 THE COURT: He said video. These are transcripts.

7 MR. DOYLE: Okay.

8 MR. JONES: I got disks.

9 MR. DOYLE: Okay. Well, so he has known since well before
10 this trial started that there was the trial in the *Vickie Center* case. He
11 knew that you could get the disks, regardless of whether there's an
12 appeal or not or a transcript. You can order the disks from a case.

13 And so, you know, the rules require disclosure in advance of
14 all materials, written materials, whether they be video or in writing, of
15 things going to be used for impeachment. And these materials were
16 available. I don't know what the circumstances are about their
17 acquisition and review, but it was only yesterday that I learned for the
18 first time that they even had a disk. There was no indication of what was
19 on the disk or how it was going to be used or what was going to be used.
20 And so I still don't know what the disk looks like.

21 I can read the transcript about, you know, MIS surgery and
22 whether, you know, other patients have become disabled as a
23 complication of MIS surgery, but I still haven't seen the video clip that
24 Plaintiff intends to --

25 THE COURT: Okay. Plaintiff, do you want to show the video

1 clip right now outside the presence of the jury?

2 MR. JONES: Yeah, we can play it.

3 THE COURT: Let's take care of that one right now.

4 Is the system on, Madam Court Recorder? Is it switched so
5 they can do it off their computer, please. Thank you so much.

6 [Whereupon, an audio/video clip was played in open court at 2:44
7 p.m., outside the presence of the jury, and not transcribed]

8 MR. DOYLE: So my position is, Your Honor, first of all, this
9 information is not relevant. And if it had any relevance for creating an
10 inference, it would be overwhelmed by 48.035. This jury has not yet
11 been told, and I think it would be inappropriate to tell them, that in fact
12 there was a trial in the Vickie Center case where there is currently an
13 appeal on that issue.

14 There has never before this moment been any inclination
15 that there was actually a trial. And so the questions before today have
16 always been phrased as, well, in your -- you know, did you give sworn
17 testimony in April, you know, did you testify this in April. And I think
18 certainly by showing the video clip, it's going to become obvious to the
19 ladies and gentlemen of the jury that in fact there was a trial in the Vickie
20 Center case. Now they're going to start wondering about what
21 happened, what was the result.

22 The matter's on appeal. So at a minimum it would be
23 overwhelmingly prejudicial in light of the slim relevance it would have
24 for the inference instruction to show the video rather than just reading
25 from the testimony and staying within the confines that we have stayed

1 within before that there -- we haven't gone to the fact that there's a trial.

2 THE COURT: Okay. Counsel for Plaintiff?

3 MR. JONES: Yes, Your Honor. This information we did not
4 have because they hid this information. They hid it over and over and
5 over and over again.

6 The information we got, we got it in the only format that we
7 could get it or that was available to us or the easiest one to get. And so
8 we got the disks. And we scoured them ourselves and we identified the
9 portion. And immediately, and I will say, Your Honor, the very first day I
10 got it, which might have been two days ago or something, I did mention
11 it when we went up at one point, but in any event, the very next day I
12 tried to offer the disks.

13 In any case --

14 THE COURT: Offer the disks to?

15 MR. JONES: Yesterday I tried to bring it up on the record
16 and I thought that I offered the disks to Mr. Doyle and he disputes that.
17 And so I thought I did, but he says I didn't.

18 MR. DOYLE: Your Honor --

19 MR. JONES: The same trial counsel. He knew exactly what
20 his client had said, knew exactly what his client had said.

21 THE COURT: Okay.

22 MR. DOYLE: Your Honor --

23 THE COURT: No. I said two minutes each and I give a
24 response because Defense, you brought up a new issue that you had not
25 brought up at bench and so in fairness Plaintiff got to respond to the trial

1 aspect. So the Court needs to rule. Okay.

2 MR. DOYLE: If I could just --

3 THE COURT: I think no.

4 MR. DOYLE: -- the disks are not -- can't be used to create an
5 official transcript. So to show the jury something from a disk --

6 THE COURT: Counsel, when I say that there's nothing else
7 you can say because in fairness the other thing is you really do have to
8 listen to at least one thing I say, please. Can we get through one day
9 where you listen to one directive from the Court?

10 MR. DOYLE: If I had been given some notice of this --

11 THE COURT: Counsel?

12 MR. DOYLE: -- I could have planned.

13 THE COURT: Counsel.

14 MR. DOYLE: I understand.

15 THE COURT: No, you don't understand. You keep doing
16 that. It's completely inappropriate. Where did you get that disk from?
17 You said they didn't give it to you.

18 MR. DOYLE: No. It's a disk from this --

19 THE COURT: Counsel --

20 MR. DOYLE: -- from this case.

21 THE COURT: So why are you using a disk from this case and
22 acting as if it was the disk from the Center case?

23 MR. DOYLE: Because the disk says on it that it cannot be
24 used for an official transcript. So how can you --

25 THE COURT: So how do you know that that's the same --

1 counsel, counsel. You did not say that this was a disk from this case,
2 okay? Then you interrupt the Court when the Court gave you each
3 deadlines and I gave Plaintiff, because you brought up a new issue, I
4 said, and then the Court said it was going to rule and you tried to talk
5 over me and then interrupted and bring up something you didn't say it
6 was a disk from this case. And you don't know what disk they're talking
7 about. The Court's talked about the transcript.

8 Here needs to be the Court's ruling and please, this Court has
9 been so accommodating with your constant not following any Court
10 directives on a daily basis. Not been doing it in front of the jury, but you
11 need to follow the Court's directives. When the Court says you don't
12 have an opportunity, again, because you each had your opportunities,
13 please listen as the Court can make its ruling and not have the jury
14 outside anymore, because you made representations to these poor
15 jurors, okay, with regards to today. So let's --

16 MR. DOYLE: I apologize for vigorously representing my
17 client.

18 THE COURT: Counsel, it has nothing to do with vigorously
19 representing your client. It has to do with, as you know, your oath of
20 office, right, is to show respect to the Court and officers of the Court as
21 part of the oath of office you took as an attorney. The Rules of
22 Professional Conduct require that you do so, okay? You need to comply
23 with those. That is the issue here. It has nothing to do with vigorously
24 representing your client because it has nothing to do with that.

25 The Court was going to make a ruling. Because you want to

1 say something else has nothing to do with vigorously representing your
2 client. So, please, do not try and say that. And you know that. And
3 please don't interrupt me when I'm asking you not to interrupt me or
4 interrupt me again to try and say that, okay? Thank you so very much. I
5 would appreciate it. Please actually do follow the Court's directives.
6 Thank you.

7 Now, with regards to the underlying ruling, counsel, the
8 issue about whether there was or was not a trial is a concern for this
9 Court. And because that video does show on the witness stand and does
10 show in the midst of a courtroom like setting, the Court is concerned that
11 that video depiction goes over the balance of what would be necessary
12 for the Court -- for the jury to evaluate for purposes of an inference the
13 pre-instruction, which does -- they need to evaluate.

14 But the fact of showing that video in the courtroom like
15 setting can confuse the jury either (a) whether it was the trial previously
16 in another case, what happened in that trial. It's an area that really you
17 don't want to go down, okay? And so a minimal issue like this to have
18 that come up. It's not something that really should take center stage.

19 So the Court is going to be perfectly fine with the same way
20 that it's been done in the past, previously sworn testimony under oath to
21 show it is a pure impeachment. The issues of it being surprised the
22 Court doesn't find to be valid on behalf of Defense because for several
23 reasons, including the fact that Defense was Defense counsel in that
24 case. The fact that you all even discussed this yesterday, something
25 could have happened, it could have been brought up earlier by Defense

1 counsel. You knew about the videos. It could have been brought earlier
2 today and all the other different breaks we've made the poor jury wait,
3 right? You were here at 8:00 in the morning, you could have brought it
4 up earlier.

5 Plus, this is the type of information that goes to the issue for
6 the jury to need to decide the pre-instruction and whether there should
7 or should not be an inference in fairness to all parties, all the Defense
8 parties and all the Plaintiff parties. And the only way they can evaluate
9 whether there should or should not be is to get some information in
10 evidence.

11 And what you did is, even after you asked the question, after
12 you came to bench, you then followed up with Doctor Rives and you got
13 additional testimony to confirm that he uses the terms minimally
14 invasive and he's using laparoscopic. I was writing down each and
15 every one of your follow-up questions so that would be appropriate in
16 the context of where the question is for impeachment in this case due to
17 the conduct of Defendant's and Defense counsel, which precipitated the
18 need for the pre-instruction in order for the jury to have some basis
19 where they can make a well-reasoned decision and consistent with what
20 has previously happened, right, then it would be appropriate to do it for
21 impeachment in this unique circumstance and also taking into account
22 the extensive questions that Defense counsel asked of Doctor Rives
23 during Plaintiff's case in chief all about the Vickie Center case, which the
24 Court's fully familiar with. And so those questions.

25 And those are all the factors in addition why the Court is

1 going to allow it. But the video itself, because it's in a courtroom setting,
2 the Court would find that that part would be more prejudicial and have
3 the jury then question what may have happened. And you wouldn't in
4 no way want that in any way to impact their decision in this case, that
5 they may think there was or was not some type of verdict either negative
6 or positive could impact either for Plaintiff or for Defendants, for or
7 against either side. And you wouldn't want that to happen, either side
8 would not want that to happen with regards to any of your clients, so the
9 Court can't let video in, but can let the question, the impeachment in, in a
10 format.

11 And if you need a printout of the page from the transcript,
12 then since you both have been shown it, the Court is fine giving you both
13 a copy of that page if you both would like that as an alternative.

14 Counsel for Plaintiff?

15 MR. JONES: That will serve our purposes, Your Honor.
16 We'll agree to that.

17 THE COURT: Okay. Counsel, would both of you like a
18 printout of that page?

19 MR. DOYLE: Please.

20 THE COURT: I'm not sure how I'm going to be able to get
21 that page, but we'll figure out. I mean you all can look it up just as easy
22 as I can in your respective computers. I don't know why I need to do it.
23 You each have tech people here. Can't your tech people go to the same
24 filed document that's publicly available on Odyssey?

25 MR. JONES: Your Honor, I think we've made it very clear

1 we're very incapable. Sorry, that was a joke. All of them are very
2 capable. I was talking about myself personally.

3 THE COURT: I'm just saying for this Court to try and figure
4 out how, I would have to cut and paste this and waste your time doing
5 that, couldn't I tell you it's day 13 and --

6 MR. JONES: I don't think we have the ability to print.

7 MR. DOYLE: How about taking a screen shot of the screen?

8 MR. JONES: Should we just play the audio, Your Honor?

9 THE COURT: Without showing the picture? That would be
10 fine.

11 MR. JONES: Or we can do a screen shot. I'm fine with either
12 one.

13 MR. DOYLE: Could we do a screen shot of your screen?

14 THE COURT: You know, both of your people that you have
15 here that you're paying one of your sums of money, can pop it up on
16 Odyssey the exact same transcript, pull it up to the say day 17 and do it,
17 and do the same screen shot, right?

18 [Parties confer]

19 THE COURT: I'm not sure if I could actually make a copy of
20 something that's currently on Odyssey in another case.

21 MR. JONES: Would you like us to just do the audio, Your
22 Honor? They might be able to give a demonstration that it would just be
23 audio.

24 THE COURT: See the audio. Could you see how the audio
25 [indiscernible]? The audio's no picture. You already know it's under

1 oath, you know who's testifying, so what's the difference between the
2 audio versus the actual reading it to.

3 MR. JONES: I think it needs to be switched over.

4 THE COURT: Can you switch over so that they can play the
5 audio, please? Thank you so much.

6 [Pause]

7 UNIDENTIFIED SPEAKER: We can convert it to an audio file.
8 I just need about three or four minutes to convert it, but it will just play
9 the audio.

10 [Whereupon, an audio/video clip was played in open court at 2:56
11 p.m., outside the presence of the jury, and not transcribed]

12 THE COURT: Okay. I mean the Court would see that as fine.
13 It's not in any way identifying, it's just the voice. Doesn't know who the
14 voice is from any type of proceeding. It doesn't have any judicial, it
15 doesn't have any other voices on that. As long as it's in that clip, it's
16 carved out. You've got a blank screen showing a window screen, which
17 there's nothing -- I can't see all the little itty-bitty windows, but you don't
18 have anything on any of those window screens.

19 UNIDENTIFIED SPEAKER: I can disappear them if you want.

20 THE COURT: Make them all disappear, right.

21 MR. JONES: Yeah, it's a good idea.

22 UNIDENTIFIED SPEAKER: If you can give me a few seconds,
23 I can do that. We're just grabbing another computer.

24 THE COURT: No worries, no worries, but the Court would
25 see that that is going to be equally the same --

1 UNIDENTIFIED SPEAKER: Yep.

2 THE COURT: -- because it would be utilizing the same verses
3 having the words. It's consistent with having the jury hear it. In fact, it
4 avoids the confusion of any intonation that somehow an attorney would
5 put a different intonation of what the witness' testimony is, okay?

6 And your client does understand the difference as you're
7 talking to your client here in the middle of court that he's still in the
8 middle of testifying. The Court takes no position, but just remember also
9 acoustically when you all talk, remember it can be heard around the
10 courtroom, so just remember that when you're -- one thing the Court's
11 saying is that remember when you talk, we're on the record, and so
12 when you're saying things, some of those things can be heard
13 acoustically by people throughout the courtroom. So if you don't wish it
14 to be intended, be careful what you're saying, okay?

15 So then the Court's going to find that that is an appropriate
16 substitute because in fact that actually protects Defendant even more so
17 because it allows the Defendant to give the answer in the way that
18 Defendant said it without any intonation or anything coming from
19 Plaintiff's counsel, no pausing, no commas, no way that you're phrasing
20 a particular question is actually being question and the answer. And as
21 long as there's no identification of who that first voice is, it's just a voice.
22 And since it's already been identified that there's different voices in
23 depositions and different things in sworn testimony, you couldn't even
24 necessarily tell that it wasn't somebody here in the courtroom's
25 particular voice, but. Of course you've had three different attorneys and

1 different things going on.

2 So that's going to be the Court's ruling that that is an
3 appropriate substitute. Then you don't have somebody holding a
4 transcript page and is looking even potentially -- okay. So that's the
5 Court's ruling. As soon as you can get that fixed, we can bring the jury
6 back in and we have some juror questions. Thank you so very much.

7 [Judge and Clerk confer]

8 THE COURT: Also, even if there's a typo in the transcript,
9 this Court doesn't know if there was or wasn't, you're hearing it straight
10 from the way he said it and everything, so it gives a full and fair basis for
11 with regards to Defense counsel.

12 How much longer, just so I can tell the Marshal to tell the
13 jury?

14 MR. JONES: I'm finished, Your Honor, personally. This is --
15 I'm going to ask probably --

16 THE COURT: No, no, how much longer for the transfer with
17 the audio file, just so -- should the Marshal start to go get the jury in?

18 UNIDENTIFIED SPEAKER: Can I get access to the screen?

19 THE COURT: Sure, of course.

20 UNIDENTIFIED SPEAKER: I just want to confirm what we did.

21 THE COURT: Okay. Counsel for the Defense, you want to
22 listen to this to make sure you're comfortable that it's the full question
23 and answer?

24 MR. DOYLE: I'm sorry?

25 THE COURT: They're going to play -- I know you were talking

1 when we were trying to listen, trying to have the full question and
2 answer, they're going to play it so you can hear the full question and
3 answer.

4 MR. DOYLE: Okay.

5 THE COURT: Yes, you're on the record. Of course, you're on
6 the record. Yes, always remain on the record, please.

7 [Whereupon, an audio/video clip was played in open court at 3:01
8 p.m., outside the presence of the jury, and not transcribed]

9 THE COURT: Okay. So everyone can hear that there's
10 nothing that -- it's the voices, right? Does anyone disagree that that's
11 Doctor Rives' voice?

12 MR. DOYLE: No.

13 THE COURT: [Indiscernible] shown that. Okay. I just want to
14 make sure; I mean. Okay. There's no editing or audio changing at all,
15 right? That's purely --

16 MR. JONES: Correct, Your Honor.

17 THE COURT: Okay. So it seems to be the most fair and
18 appropriate way because it's the way he said it, his voice, his intonation,
19 everything. We don't have to worry about any typos with any potential
20 transcript or anything, any pausing or anything. You've got it completely
21 as is.

22 So then at this juncture with that Court's ruling would you
23 like to bring the jury in?

24 MR. JONES: Yes, Your Honor.

25 THE COURT: Okay. Thank you so much.

1 Marshal, I'd appreciate it. So, counsel, are you going to go
2 back then and ask -- oh, yes, appreciate it. Thanks so much if the witness
3 wouldn't mind going back to the stand. Thank you so much.

4 MR. JONES: I'm going to ask a couple of follow-ups just to
5 make sure that everyone knows what's going on.

6 THE COURT: Before you do that? Okay, that's fine. The
7 Court's just going to say, counsel is finishing the cross-examination,
8 please continue, as soon as the jury comes back in then. Okay, thank
9 you.

10 [Pause]

11 THE MARSHAL: All rise for the jury.

12 [Jury in at 3:03 p.m.]

13 [Within the presence of the jury]

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

16 THE COURT: I appreciate it.

17 Welcome back, ladies and gentlemen. Hope you all had a
18 very nice break. If you recall before the break, Plaintiff was in cross-
19 examination, so counsel feel free to continue.

20 MR. JONES: Thank you, Your Honor.

21 CROSS-EXAMINATION CONTINUED

22 BY MR. JONES:

23 Q Doctor, we -- while the jury was gone, you had an
24 opportunity to hear something that you said before, right?

25	A	Correct.
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