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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2018-UP-221 (S.C. Ct. App. filed May 30, 2018)
Appellate Case No. 2015-002466
Case No. 2012-CP-07-03782

Rebecca Delaney, as Personal
Representative of the Estate of
Justin Nicholas Miller,

Petitioner,

v.

CasePro, Inc.,

Respondent.

Appendix: Volume 8

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Table of Contents

Record on Appeal	1
Final Brief of Appellant	2462
Final Brief of Respondent	2494
Opinion of the Court of Appeals	2521
Petition for Rehearing	2525
Return to Petition for Rehearing	2537
Order Denying Rehearing	2544

1 testimony.

2 THE COURT: Okay. So, you want to use this
3 document; you want to have her authenticated it; and
4 then, you want to impeach her with it.

5 MR. MACKELCAN: I mean, that's what I was marking
6 them for.

7 THE COURT: Okay.

8 MR. MACKELCAN: I was going to ask her about the
9 documents and --

10 THE COURT: Okay. All right.

11 MR. MACKELCAN: Your Honor, two of the three that I
12 initially marked, she has signed. The order from the
13 Court, she did not sign, but.

14 THE COURT: Okay. Well, you all come up here, and
15 let me see them.

16 MR. HOYLE: I think that's a good idea, Judge.

17 OFF-THE-RECORD BENCH CONFERENCE, OUT
18 OF PRESENCE OF JURORS. PRESENT: THE
19 COURT, MR. HOYLE, MS. CASTLEBERRY,
20 MR. MACKELCAN, MR. LOVELL.

21 END BENCH CONFERENCE.

22 OFF THE RECORD 4:45 P.M.

23 BACK ON THE RECORD 4:55 P.M.

24 BY THE COURT:

25 THE COURT: Okay. Let's have the jury. Quick, go

1 get them.

2 JURORS ENTER COURTROOM 4:56 P.M.

3 THE COURT: Thank you. Mr. Mackelcan, you may
4 continue.

5 REBECCA ANN DELANEY

6 CONTINUE CROSS-EXAMINATION, BY MR. MACKELCAN:

7 Q Ms. Delaney, I think you testified that your first
8 time visiting South Carolina was a few days after your
9 son's death. Is that right?

10 A I drove through.

11 COURT REPORTER: I drove through?

12 A I drove through.

13 Q Okay. And you filed your petition to be the P.R.
14 of Justin's estate prior to the funeral. Is that right?

15 A The day before. I believe it was the day before.

16 THE COURT: We're having trouble understanding you.
17 You just back a little bit up from the microphone.

18 A Okay. It was either day before -- is this even on?
19 Can you hear me?

20 THE COURT: It is.

21 A It was soon as I got here. Ms. Castleberry helped
22 me out with that.

23 Q Okay. So, as soon as you got to South Carolina,
24 you came to the courthouse to file your petition to be
25 P.R., with the help of your lawyer.

1 A Yes, sir.

2 Q How long had Justin been living in South Carolina
3 before his death?

4 A Since 2004.

5 Q So, about seven-and-a-half years?

6 A Um-hmm.

7 COURT REPORTER: Is that yes?

8 THE COURT: You have to say yes.

9 A Yes. Yes, ma'am.

10 Q And you hadn't been out here to visit him?

11 A No.

12 Q I think you said that you didn't actually know he
13 was living in Beaufort. Is that right?

14 A No, I didn't. My last -- I heard it was Port
15 Royal, but I didn't know the difference between the two.
16 And then, there was Conway and Pinetop -- Pinetops
17 Drive. And I had been really sick, and I couldn't
18 travel down here.

19 Q Do you know when Justin and Chris and all of them
20 moved from Conway to Beaufort?

21 A No, I don't.

22 Q Please correct me, but it's my understanding that
23 Justin and Chris spent some time in West Virginia in
24 2011, up in Parkersburg. You're aware of that, right?
25 When their father was sick?

1 A Yes.

2 Q And you didn't see Justin during that time, either,
3 did you?

4 A I called Cheryl Stonacker's house, and they never
5 would answer their phone. We wanted to take them to a
6 Cinderella concert in Columbus, and we tried -- my
7 sister tried several times, and I tried several times to
8 get a hold of them, to take them to this concert. And I
9 also went to the hospital a couple of times to see Doug.
10 But he was really sick, and he wasn't even allowed to
11 have the germs around him, you know? And he was doing
12 the chemo, stuff like that.

13 Q But Justin wasn't ever there when you went there?

14 A No.

15 Q How big a place is Parkersburg, West Virginia?

16 A 30,000 people.

17 Q And you've described a lot of your growing up, and
18 as it sounds like everybody lived close by. Is that
19 right?

20 A Yeah. When -- yeah. To the house, yes. But his
21 sisters all live far away. Cheryl lives in Ohio, and
22 Kelly lives in Lubeck, and Susan lives in Ravenswood.
23 And I don't know where Mitch was living. Michael lives
24 in Mineral Wells.

25 Q How far a drive is it from Parkersburg, West

1 Virginia, to Huntington, West Virginia where the Burn
2 Unit was?

3 A Two hours.

4 Q Two hours?

5 A Yeah, in traffic, yeah.

6 Q Since Justin's death, how many times have you been
7 to South Carolina to visit?

8 A Four since then.

9 Q So, five times?

10 A I've been here five times altogether.

11 Q We saw a picture, and you'd talked about moving to
12 Florida for a period in the mid-nineties. Do you
13 remember that?

14 A Yeah, I did move to Florida, twice.

15 Q You've moved to Florida twice.

16 A Um-hmm.

17 Q When were those two times?

18 A When Donovan was in kindergarten, me and him lived
19 down in Fort Myers on Fifth Avenue. And for about,
20 gosh, I don't know how long we were there. Maybe a
21 year. And then, me and Chris and Donovan moved to Fort
22 Myers. See, my family lived down there, and he was in
23 high school. He went to Cypress Lake High School. He
24 had a little bit of trouble there, and decided to go
25 back to South. Plus, we missed Justin.

1 Q Why didn't Justin go to Florida with you?

2 A He didn't want to.

3 Q Why didn't he want to?

4 A I don't know.

5 Q If I understood you correctly, Doug told you that
6 he was picking up the boys to take them for a vacation,
7 and then, you never saw them again? Is that what you
8 said?

9 A Well, he had called that evening and said that the
10 boys wanted to go with him. And I said, well, I guess.
11 I said, you just come up here, and we'll take the stuff,
12 the clothes from Justin's room, whatever he needs, that
13 were upstairs, and take them downstairs in Chris's room,
14 and you can pull up in the driveway, and get it that
15 way. It would be a lot easier, instead of, you know,
16 the boys running around getting their stuff. But yeah,
17 they went.

18 Q So, they cleared out their closets, and left with
19 him?

20 A Actually, I did it. Yeah. I mean, they were old
21 enough to go. It was their decision.

22 Q Did I hear you say that you tried to get Justin's
23 Social Security check after their father died?

24 A No.

25 Q You said you went to the Social Security office.

1 A Yeah. After their father died, I wanted to know
2 where they were living, that's all.

3 Q Do you recall your deposition in this case?

4 A That was a long time ago. I mean, this has been a
5 long, drawn-out process. It was three-and-a-half years
6 ago this happened. But you know, I might not get
7 something right, you know. I'm all over the place. You
8 know?

9 Q Do you think it's possible that you could have
10 asked to be their payee at that time?

11 A I might have threw that in there, but I basically
12 wanted to know where they were. And I told them that I
13 was their mother, and that I didn't know if they had a
14 payee or not, because no one will tell me. And it's
15 usually better if the mother or the father takes care of
16 the money for a child on the autism spectrum, and you
17 know, as I do for Donovan.

18 Q During those seven-and-a-half years, where you were
19 not around Justin, --

20 A Um-hmm.

21 Q -- was he supporting you financially in any way?

22 A Was he supporting my financially?

23 Q Yes.

24 A I think -- I don't -- I'm confused. No.

25 Q Okay.

1 A I don't understand.

2 Q So, he was not supporting you financially?

3 A No.

4 Q Okay. And then, you weren't supporting --

5 A He was supporting himself.

6 Q Okay. And you weren't supporting him financially?

7 A I sent him money. I have where I sent him \$100.00
8 one time. And then, sometimes, it would come back.

9 Q I heard you mention that -- you talked a lot about
10 your own health issues, physical and emotional. Is that
11 correct?

12 A Yes.

13 Q When you were talking about your anxiety and
14 depression, how long had you been dealing with that?

15 A I've had anxiety, well, it started when I was a
16 teenager. I didn't have it too bad when I had kids,
17 but.

18 Q But you had been seeing a mental health
19 professional prior to Justin's death?

20 A Yes, you know, yes.

21 Q With some regularity, for prescribing medications
22 and that sort of thing.

23 A Yes.

24 Q Okay. And I think you had mentioned that you had
25 had, again, prior to Justin's death, you had panic

1 attacks?

2 A Yes.

3 Q Anxiety attacks?

4 A Yes.

5 Q Difficulty sleeping?

6 A Yes.

7 Q Nightmares?

8 A Yes.

9 Q Poor concentration?

10 A At times, yes.

11 MR. MACKELCAN: I don't have any further questions.

12 Thank you.

13 A Okay.

14 THE COURT: All right. Re-direct. All right.

15 REBECCA ANN DELANEY

16 RE-DIRECT EXAMINATION, BY MR. HOYLE:

17 A Hi.

18 Q Hi, Becky. Good afternoon again.

19 A Good afternoon.

20 Q We looked at some photographs earlier that have
21 been moved into evidence. The past couple of days,
22 we've also been going through a few videos, as well. Is
23 that fair?

24 A Yes.

25 Q Now, did you ever actually own a video camera?

1 A Well, yeah. When my husband's father died, he had
2 a video camera, and that was the first time I really had
3 a camera. I mean, I had -- other than portable ones
4 that you buy at the store.

5 Q Disposable-type cameras?

6 A Yeah.

7 Q That's where a lot of the pictures we looked at
8 came from.

9 A Yeah. And there, and my brothers and sisters.

10 Q So, this will be Plaintiff's Exhibit 27, which Mr.
11 Mackelcan's indicated he has no objection to.

12 THE COURT: Okay.

13 ITEM IDENTIFIED AS DVD OF HOME VIDEO

14 MARKED PLAINTIFF'S EXHIBIT NUMBER 27

15 ADMITTED AS EVIDENCE.

16 PLAYING HOME VIDEO VIDEOTAPE,

17 PLAINTIFF'S EXHIBIT NUMBER 27.

18 END PLAYING VIDEOTAPE MARKED PLAINTIFF'S

19 EXHIBIT 27.

20 BY MR. HOYLE:

21 Q What were we just seeing in the video that's going
22 to be marked Plaintiff's Exhibit 27?

23 A I was putting a new roof on the house, and I had
24 been outside recording it. And I had walked inside, and
25 Donovan had gotten new eye teeth. I mean, he was late

1 getting everything. But he had a fever, and the way he
2 said it to me was sick. I'm -- that's just the way
3 they did things. And so, I was going to send this video
4 to Peg, and show her that we got a new roof, and the
5 boys were okay, doing great. And we were teasing him
6 about their teeth. I always made them brush their
7 teeth. I was always telling them, brush your teeth;
8 they're turning green.

9 Q And that was Justin?

10 A That was Justin. The tall one. He was very tall.

11 Q Becky, were you a good mother?

12 A Yes.

13 Q Do you love your children?

14 A Very much.

15 Q Do you miss Justin?

16 A Very much.

17 Q Did your heart break on that fateful day?

18 A Yes, it did.

19 MR. HOYLE: Those are all the questions I have.

20 THE COURT: All right. Re-cross.

21 MR. MACKELCAN: Nothing for the Defense, your
22 Honor.

23 THE COURT: Very well. You may come down. Call
24 your next witness, please.

25 A Thank you, your Honor.

1 THE COURT: Yes.

2 ITEM IDENTIFIED AS AGREEMENT

3 DATED MAY 15, 1989

4 MARKED DEFENDANT'S EXHIBIT NUMBER 5

5 FOR IDENTIFICATION.

6 ITEM IDENTIFIED AS FAMILY LAW

7 MASTER'S REPORT

8 MARKED DEFENDANT'S EXHIBIT NUMBER 6

9 FOR IDENTIFICATION.

10 ITEM IDENTIFIED AS JUDGMENT

11 MARKED DEFENDANT'S EXHIBIT NUMBER 7

12 FOR IDENTIFICATION.

13 ITEM IDENTIFIED AS PETITION FOR

14 APPOINTMENT OF PERSONAL REPRESENTATIVE

15 MARKED DEFENDANT'S EXHIBIT NUMBER 8

16 FOR IDENTIFICATION.

17 THE COURT: Call your next witness, please.

18 MOTIONS AND RULINGS:

19 MR. HOYLE: Your Honor, at this time, Plaintiff
20 moves to amend her complaint to conform to the evidence
21 that's been offered at trial. And subject to your
22 ruling on that motion, we'll subsequently rest.

23 THE COURT: Okay. All right. Come here.

24 OFF-THE-RECORD BENCH CONFERENCE, OUT

25 OF HEARING OF JURORS. PRESENT: THE

1 COURT, MR. HOYLE, MS. CASTLEBERRY,
2 MR. LOVELL, MR. MACKELCAN, MS. SABER.
3 END BENCH CONFERENCE.
4 ON-THE-RECORD BENCH CONFERENCE, OUT
5 OF HEARING OF JURORS. PRESENT: THE
6 COURT, MR. HOYLE, MS. CASTLEBERRY,
7 MR. LOVELL, MR. MACKELCAN.

8 THE COURT: We have motions that I want to hear,
9 and it's my understanding that, at this juncture, the
10 Defense does not believe that the Defense will have any
11 additional witnesses.

12 MR. LOVELL: That is correct.

13 THE COURT: Just given the procedurally where we
14 are, may I -- and I won't, if you don't want me to, by
15 the way. Do you object to me telling the jury that I
16 believe, that, because of the manner in which this trial
17 has proceeded, the witnesses, some witnesses being
18 called out of turn, that I believe, it's my belief we
19 have received all the evidence; there's work that I must
20 do; but I believe that, again, I believe -- it is my
21 belief, and if it's error, it's my fault, that we will
22 have argument and charge in the morning. Any concern
23 about that? I'd love to be able to tell them that.

24 MR. HOYLE: None from the Plaintiff.

25 MR. LOVELL: None at all. None at all.

1 THE COURT: But I don't want anybody resting at
2 this point.

3 MR. LOVELL: No, that's fine.

4 THE COURT: Is that cool? Is that cool?

5 MR. HOYLE: That's fine.

6 THE COURT: Okay. Great. Good.

7 END BENCH CONFERENCE.

8 THE COURT: Ladies and gentlemen, it's ten minutes
9 after 5:00, and Counsel has worked out what we have to
10 do at this juncture. And so, if this was tomorrow
11 morning, I would be sending you to your jury room while
12 we do that work. It's not. It's ten minutes after
13 5:00.

14 I do want to share with you that it does appear
15 that what I told you a little bit ago is correct.
16 Counsel is allowing me -- and let me just tell you, now,
17 if I'm not being correct, I don't want you upset with my
18 lawyers. I want you upset with me, because it would be
19 my jump of the gun, certainly not them. But I believe
20 that we have now reached the stage of these proceedings
21 where you have heard all of the witnesses that you will
22 hear, and that you have received the evidence, which you
23 will. Some of it has to do with, as you will remember,
24 there were some witnesses called out of -- that would be
25 called in the Defense case that were, in fact, called

1 during the Plaintiff's case; some by cooperation, and
2 some were called in the Plaintiff's case. So that, I
3 believe that, that is correct. So, I believe that, when
4 you return in the morning, that you will hear the
5 arguments of Counsel, and then, my charge on the law.
6 And then, you will receive this case for your
7 deliberations. I wanted to share that with you. That's
8 where I believe we are.

9 There is work that remains for us to be done this
10 evening. We'll be here for a little while. I don't
11 know how long we will be staying, because I don't like
12 to keep, quite frankly, I don't like to keep court
13 personnel late and keep the courthouse open late. So,
14 we will probably come in the morning. I am, therefore,
15 going to ask that you all arrive in the morning at
16 10:00, a little bit later, because I don't want you -- I
17 don't want you cooling your heels, and I want to be sure
18 that we are prepared for you when you come in the
19 morning. So, I'm going to ask you to arrive at 10:00.

20 It is my believe that, when you arrive at 10:00,
21 that you will hear the arguments of Counsel, and then,
22 my charge or instruction on the law. Now, and then, you
23 will receive this case for deliberations.

24 However, even though you have received the
25 testimony and the evidence in this case, you are not

1 prepared to deliberate. You are not prepared to
2 deliberate, because you have not heard the arguments of
3 Counsel. You have not heard my charge on the law. You
4 are not in a position to deliberate. So, every single
5 admonition that has existed remains. Do not discuss
6 this matter. Do not allow anyone to discuss it with
7 you. Don't listen to anything. Don't read anything
8 about this matter. That's the radio, the television,
9 the Internet. Do not do any Columbo. Do not do any
10 research. You still must receive all of the information
11 from which you will make up your minds, here in court,
12 while court is in session.

13 Cell phones still remain away from the courthouse.
14 If you forget, give it to our bailiffs, who will, in
15 turn, will give that to us. All of the same admonitions
16 remain in effect as they have every evening, because you
17 are not prepared to deliberate. Leave your notebooks in
18 your seats. We'll secure them for the evening, and
19 then, replace them to you in the morning. And I'll see
20 you at 10:00 o'clock a.m. Thank you so much.

21 JURORS LEAVE COURTROOM 5:17 P.M.

22 CONTINUE MOTIONS AND RULINGS:

23 BAILIFF: The jury's clear, your Honor.

24 THE COURT: Thank's so much. All right. All
25 right. Let me hear about the motion to amend that's

1 been made.

2 MS. CASTLEBERRY: It's his.

3 THE COURT: You've already done it. From you guys.

4 MR. LOVELL: Your Honor, I wasn't a hundred percent
5 sure what I heard was included within the motion to
6 amend. I thought he said negligent hiring, training,
7 supervision, and something else.

8 THE COURT: Retention.

9 MR. HOYLE: Retention.

10 MR. LOVELL: Retention. I'm not sure there's been
11 any evidence that even could conform on the issue of
12 supervision and training. I think the evidence was that
13 somebody other than CasePro did all the training and
14 supervised all the day-to-day stuff. So, I don't know
15 that there's any evidence from which the pleadings could
16 be amended in that regard. I think he already -- you
17 already pled negligent hiring, did you not? in the
18 complaint?

19 MS. CASTLEBERRY: Yeah.

20 MR. HOYLE: Correct. In paragraphs 44 and 54
21 (iii), we pled that the Defendant failed to ensure the
22 employees or agents had or received adequate experience,
23 training, and supervision.

24 THE COURT: Whoa, whoa, whoa.

25 MR. HOYLE: I'm sorry. I'll start over.

1 COURT REPORTER: Slower. Thank you.

2 MR. HOYLE: In Paragraph 44 (iii), which was the
3 survival count, and Paragraph 54, (iii), which was the
4 wrongful death count, Plaintiff's pled, as one of the
5 particulars of the Defendant was negligent by failing to
6 ensure employees or agents had or received adequate
7 experience, training, or supervision.

8 There was a concern raised pretrial that we had not
9 properly pled a negligent retention count. That's
10 really our concern at this point, by that particular
11 allegation of negligence. To the extent that the Court
12 views that we have not properly pled a negligent
13 retention, specifically, with respect to Dr. Chris
14 Jansen, we would move, under Rule 15(b) to amend the
15 complaint to conform to the evidence with respect to
16 that negligent retention cause of action.

17 MR. LOVELL: We heard a ton of evidence on that.
18 We would agree that it is a disputed issue. We do not
19 concede that it was anything other than disputed, but
20 they got in a bunch of stuff on that, and I think it's
21 an issue.

22 THE COURT: Okay. Yeah. Thank you. Yeah. It's
23 amended. I think it probably is needed to be amended,
24 and it is amended on retention. Not the others.

25 MR. HOYLE: Thank you, your Honor.

1 THE COURT: All right. Now, okay, motions. Could
2 we stop just a second. This is a lawyer, I'm pretty
3 sure. Now, your client is -- I don't see her. I don't
4 see that she's present. Does she understand you're
5 going to follow up with a motion?

6 MR. HOYLE: Yes, your Honor.

7 THE COURT: Very well. Okay.

8 MR. HOYLE: We actually thought, given the
9 examination that took place here, we thought it was
10 appropriate for her to go gather her thoughts.

11 THE COURT: Okay. No problem. All right. Yes,
12 sir, motions. Mr. Mackelcan, yeah.

13 MR. MACKELCAN: Your Honor, at this time, the
14 Defendant would move for a directed verdict.

15 THE COURT: Or an involuntary non-suit with
16 prejudice. If you had known a judge by the name of
17 Walter Bristow, who passed away last year, you would
18 know exactly from whence I come. He called it an
19 involuntary non-suit with prejudice. Yes, sir, he did.

20 MR. MACKELCAN: You know, I know we're all anxious
21 to talk about duty, and I hate to keep us on the edge of
22 our seats, but I want to start with the survival cause
23 of action.

24 THE COURT: Me, too. Thank you. I get it. I get
25 it. Milliseconds. Very, very, very, very short period

1 of time. Yes?

2 MR. MACKELCAN: Correct.

3 THE COURT: Talk to me about that.

4 MR. MACKELCAN: Your Honor, the standard is whether
5 or not there's any evidence in the record --

6 THE COURT: Taking the evidence in the light --
7 taking the evidence --

8 MR. HOYLE: In the light most favorable.

9 THE COURT: And all inferences --

10 MR. HOYLE: That are reasonable therefrom.

11 THE COURT: -- in the light most favorable to the
12 non-moving party, is it reasonable that a jury could
13 make a determination? It's the reasonable. This is not
14 scintilla.

15 MR. HOYLE: I agree with that, your Honor. But I
16 still believe that there is evidence in this record from
17 which a reasonable jury could find that there is
18 conscious pain and suffering, with respect to the
19 decedent, such that damages should be awarded to the
20 estate for those damages.

21 We had Dr. Michael Caplan on the stand, as you
22 recall. Dr. Caplan offered testimony about a number of
23 injuries that took place while blood was still flowing.
24 We know that he gave unequivocal testimony that he was
25 conscious for some period of time. He later quantified

1 that in terms of milliseconds. I think there were three
2 verys.

3 THE COURT: There were three verys.

4 MR. HOYLE: There were three verys.

5 THE COURT: One millisecond.

6 MR. HOYLE: That, in light of the totality of Dr.
7 Caplan's testimony, with respect to the injuries that
8 were sustained, prior to Justin Miller's death, coupled
9 with the testimony as to his expert opinion as to the
10 conscious pain and suffering, as well as the entirety of
11 the --

12 THE COURT: Now, I don't think he testified he
13 thought he was conscious.

14 MR. HOYLE: Actually, he did. If we can --

15 THE COURT: That he was conscious to the pain. I
16 don't -- I remember listening for that, and --

17 MR. HOYLE: Your Honor, if I can beg your
18 indulgence for one moment, --

19 THE COURT: Sure.

20 MR. HOYLE: -- we actually have a transcript of
21 that testimony. I know we have one.

22 MR. LOVELL: Your Honor, we have a transcript. Do
23 you need one?

24 MR. HOYLE: Yes, that would be helpful.

25 THE COURT: This is testimony at trial?

1 MR. LOVELL: Yeah.

2 MR. HOYLE: We record -- we requested a -- I don't
3 know if it's a certified copy or not, but we requested a
4 dirty copy. There is a provision under the rule that
5 allows for the ASCII disc print out.

6 THE COURT: Oh, good.

7 MR. HOYLE: We can't seem to find our copy, but.

8 COURT REPORTER: It'll be in a red folder.

9 MS. CASTLEBERRY: I know. I'm looking for the red
10 --

11 COURT REPORTER: And yes, it is a certified copy.

12 MR. LOVELL: It says copy, copy.

13 COURT REPORTER: You've got copy. He's got the
14 original. But it has my signature on it. It's good to
15 go.

16 THE COURT: I got one.

17 MR. HOYLE: Okay. Good.

18 THE COURT: You want to look with me?

19 MR. HOYLE: I, apparently, paid for it, but my
20 people can't seem to find it.

21 THE COURT: Very well. Here you go.

22 MR. HOYLE: Okay. Hot dog.

23 THE COURT: Okay. All right.

24 MR. HOYLE: You have the transcript, your Honor?

25 THE COURT: I do.

1 MR. HOYLE: All right. There is testimony that
2 Justin Miller remained conscious for some period of time
3 following the initial impact. That testimony is
4 contained on page 30. That's where the doctor used the
5 very, very, very short period of time. I asked him the
6 basis for that opinion. He said that there is -- he
7 goes on to say:

8 *Consciousness means awareness of one's*
9 *self, one's environment, but there's no*
10 *specification as to a time of that awareness.*

11 I asked him if that was qualitative versus
12 quantitative assessment.

13 He said: Yes, it is.

14 I then, later, I think, confused everyone in this
15 courtroom, perhaps, even myself, when I was asking about
16 whether or not he could sequence these injuries.

17 THE COURT: Yep.

18 MR. HOYLE: And he said he was unable. So, the
19 question actually is asked.

20 THE COURT: Because we're talking about such
21 infinitely small time period, there is no
22 reasonable way, scientifically, to ever
23 verify that. We're talking about a much
24 too narrow window of time to ever be able
25 to make a conclusion of sequence of events

1 there.

2 MR. HOYLE: That is correct. That is the
3 testimony.

4 THE COURT: That's correct.

5 MR. HOYLE: And I think that is with respect to the
6 sequencing of events, whether or not the heart was
7 avulsed first or last, or whether the kidney was avulsed
8 before the spleen came out, or whether --

9 THE COURT: Whether the brain stem was ripped away.

10 MR. HOYLE: The brain stem was ripped away. That
11 was the cause of death listed in the autopsy report, and
12 the cause of death reflected on the death certificate.
13 But we certainly know, from his prior testimony, that,
14 while certain injuries were taking place, blood was
15 still circulating in the body, meaning that the heart
16 was still pumping.

17 THE COURT: But that isn't the standard. And of
18 course, I cite for you the case against DOT out of
19 Orangeburg County, that is, the Rutland, R/u/t/l/a/n/d.
20 It's the Rutland versus South Carolina DOT case. And in
21 that case, the Supreme Court talks about it's
22 insufficient even that life continues. It must be
23 conscious pain and suffering. Conscious. Conscious.
24 It must be evidence of conscious pain and suffering.
25 And this is --

1 And in the Rutland case, the testimony is that the
2 passenger died instantaneously. And I think that
3 instantaneously, if it doesn't mean an infinitely small
4 time period, or a millisecond, or a very, very, very
5 short period of time, which would be a millisecond --
6 here's -- I think that it would be unreasonable for a
7 jury to return a verdict in a survival action in this
8 case. I simply do. And I thought about it. I thought
9 long and hard about it, but genuinely believe, given the
10 nature of these overwhelming injuries, this young man
11 was struck head-on, straight up, by a fire engine
12 traveling at approximately 56 miles an hour. I simply
13 believe that, that millisecond, and in that millisecond,
14 there was no conscious pain and suffering. And I note
15 your exception to it, too.

16 MR. HOYLE: If I can just take exception, and just
17 note a few additional piece of evidence for that record.

18 THE COURT: Go right ahead.

19 MR. HOYLE: Plaintiff certainly respects that
20 ruling, but does take exception to it.

21 THE COURT: I know.

22 MR. HOYLE: We'd also mention that the fire truck
23 video, in it's entirety, not the one that was played
24 here in open court, but the video in it's entirety was
25 received as a Court's exhibit. I believe it was Court's

1 Exhibit --

2 COURT REPORTER: 12 is the unredacted version.

3 MR. HOYLE: I'll just say it this way, so that we
4 don't waste time. It was received as a Court's exhibit.
5 It is a part of the Court's exhibit.

6 THE COURT: It is.

7 MR. HOYLE: And in addition, Plaintiff marked for
8 identification purposes, Plaintiff's 4, which were
9 autopsy photos, as well as two additional photographs,
10 Plaintiff's 5 and 6 for identification. We would ask
11 that those three exhibits be received at this time,
12 those Court's [sic] exhibits, since they were --

13 THE COURT: Does that include Number 12? Number
14 12? Or not?

15 MR. HOYLE: It includes 5 and 7.

16 THE COURT: Okay.

17 MR. HOYLE: And then, all of the photographs that
18 Dr. Caplan took, we would ask that those be received as
19 an additional Court's exhibit.

20 THE COURT: Sure, sure.

21 COURT REPORTER: That's Exhibit 12, Court's Exhibit
22 12. Sorry.

23 MR. HOYLE: Court's Exhibit 12.

24 COURT REPORTER: Yes.

25 THE COURT: Yes. I'm sorry, Mr. Mackelcan. I just

1 presumed that we would have -- I've thought a lot about
2 that. I really have, as this trial has progressed, and
3 I apologize for taking your scintillating argument away
4 from you, but.

5 MR. MACKELCAN: I apologize for sitting down while
6 you --

7 THE COURT: No, sir. I just -- I just -- it's one
8 of those matters that I've just been thinking about
9 quite a bit. Okay. Next.

10 MR. MACKELCAN: Your Honor, the next grounds would
11 be a request to dismiss the punitive damages claim. The
12 Defense submits to the Court that there has not been
13 clear and convincing evidence of willful, wanton,
14 reckless, gross negligence as to the actions of the
15 CasePro employees in the emergency department on
16 February 24, 2012.

17 See, this is a bit of a difficult one to argue,
18 because I put it in front of the duty, and but. But
19 specifically, --

20 THE COURT: That's okay.

21 MR. MACKELCAN: -- what we're talking about is a
22 failure of a duty --

23 THE COURT: That's another one that I've given a
24 lot of thought to.

25 MR. MACKELCAN: Okay.

1 THE COURT: If you don't mind, I'm going to
2 respectfully deny your motion, noting your exception,
3 too.

4 MR. MACKELCAN: Okay.

5 THE COURT: The doctors testified that it was
6 reckless, and I do believe that there's evidence in this
7 record from which a jury could make a determination of
8 recklessness and gross negligence.

9 Now, and I know it. I know it's before duty, too.
10 Yeah. I'm kind of ready there, too.

11 MR. MACKELCAN: I know. This is the moment we've
12 all been waiting for.

13 THE COURT: Yeah. Let me just tell you where we
14 are with duty, and then, you tell me where I'm wrong.

15 MR. MACKELCAN: Okay.

16 THE COURT: Okay. This is not a malpractice case,
17 but it is a negligence case that arises out of medical
18 context. I believe that, if you meld -- I hope that's a
19 word -- together the *Hardee* case and the *Bishop* case --
20 I keep wanting it to be *Bailey* or something -- the
21 *Bishop* case, this is what I believe, after having heard
22 all of the evidence. I believe, taking the evidence in
23 the light most favorable to the non-moving party, which
24 would be the Plaintiff, I believe that a jury could
25 reasonably render a decision, and I do believe that the

1 Plaintiff has made out that a duty existed to Mr. Hunt.
2 And under the language of *Hardee*, and under the language
3 -- coupled with the language from *Bishop*, there was a
4 duty to warn Mr. Hunt not to leave the emergency room,
5 under -- taking the evidence in the light most
6 favorable.

7 And put whatever you additionally need to put on
8 the record, but that's where it is for me. And
9 therefore, I believe that the duty that existed for Mr.
10 Hunt to warn is the duty -- is the duty that also
11 existed, and I think the language is the zone of danger
12 toward the people of the public, the pedestrians
13 crossing, and the motorists.

14 MR. MACKELCAN: Your Honor, just --

15 THE COURT: Yeah. Or the general field of danger,
16 is what the case law says. The general field of danger.
17 I believe that Plaintiff's decedent was in the general
18 range of danger, and I think that the issue of
19 foreseeability is for the jury. I think if somebody
20 with this, particularly with this gentleman's history,
21 what was, not only should have been known, but was, in
22 actuality known to this company, because this company's
23 got employees; he's got a lot; he's probably got a bunch
24 of knowledge; that it was foreseeable that, when
25 somebody says, I'm going to go kill people -- I mean,

1 not kill -- I'm going to go harm people, that it is
2 foreseeable that they will, in fact, harm people. And
3 given all of the information, given the -- taking the
4 evidence in the light most favorable to the Plaintiff, I
5 believe, just as I have set forth.

6 Now, you may put whatever you need to put on the
7 record. That's where this case is for me.

8 MR. MACKELCAN: Well, your Honor, I'll start with,
9 I think there are some factual distinctions. And not to
10 correct your Honor at this late hour, but there's no
11 testimony that Calvin Hunt said that he intended to hurt
12 others or was going to hurt others. He said he had
13 thoughts of hurting others. I think that's different.

14 THE COURT: Not for me.

15 MR. MACKELCAN: Okay.

16 THE COURT: I will give you and grant you that it's
17 worse to have a plan. Without question. But when you
18 ask somebody in an emergency room, do you have thoughts
19 of hurting yourself, and they say, apparently,
20 repeatedly, uh, yes; and you ask them, you take it to
21 the next level, do you have thoughts of hurting others?
22 oh, yes, or yes.

23 MR. MACKELCAN: In the Hardee case, --

24 THE COURT: Yeah.

25 MR. MACKELCAN: -- and we've been talking about

1 this, it's just a duty to warn.

2 THE COURT: Sure, sure.

3 MR. MACKELCAN: And I think it's important to read
4 the full duty to warn.

5 THE COURT: Yes.

6 MR. MACKELCAN: Because it says that the duty that
7 they found, the Court found, was a duty to warn of the
8 dangers associated with medical treatment.

9 THE COURT: Yep.

10 MR. MACKELCAN: And in that case in particular,
11 this was medical treatment that those providers,
12 presumably, that's all they do. It's a dialysis center.
13 They do that all day, every day. They give treatment,
14 dialysis, to patients that need it. They know what
15 they're doing to their patients when they do it, and
16 they talk about actually warning the patient before they
17 get the treatment yet. So, here, we're really talking
18 about a duty to warn, not to do something that they
19 apparently think there may be a propensity to do that,
20 which I think is different from treatment in this case
21 that is given to the patient, meaning, they are giving
22 you a chemical or blood or whatever it is that is going
23 to -- they know is going to impact your ability to
24 function in certain ways.

25 In the *Bishop* case, this case doesn't fall within

1 *Bishop* of a duty to warn. *Bishop* is very clear that
2 South Carolina doesn't recognize a general duty to warn
3 of the dangerous propensity of others. The exceptions
4 require that a specific threat to a specific person must
5 be made. That clearly was not made in this case. So,
6 that's not there.

7 I also think it's interesting, in *Bishop*, that the
8 Court found that there was no duty in terms of an
9 improper diagnosis allegation. And but I don't think --
10 I guess I would like some clarification from the Court
11 is how this *Bishop* fit into *Hardee*, when you say that
12 they're melding together.

13 THE COURT: That's wonderful. Well, this is what's
14 interesting. If your reading of *Bishop* is correct, and
15 a person walked into an emergency room, and they're not
16 specific, but they say I'm walking out of here, I'm
17 going to kill people, you hear me; do you hear me; I'm
18 going to go kill people; I'm leaving right now, and I'm
19 going to kill me some people; and they say, have a nice
20 day, that can't possibly, can't possibly be the law. In
21 my judgment, that cannot possibly be the law. It just
22 can't.

23 I don't think we're there, because you -- and he,
24 this gentleman, Mr. Hunt, did exactly what he said he
25 was going to do; or he did exactly what he said he had

1 contemplated doing, was hurting people. He just hurt
2 people, in general. He went, oh. And all you need to
3 do is look at that video. He guns that fire engine
4 some, probably, six, seven, eight minutes later, down
5 Ribaut Road, right at the juncture of the Lady's Island
6 Bridge. And he -- there are -- there are a number of
7 cars at the light, and he just guns right through them.

8 Taking the evidence in the light most favorable to
9 the Plaintiff, I believe -- and if you will remember,
10 here's a problem, I think, also, for the Defendant. If
11 you will recall, your employee said, if I had known it,
12 I wouldn't have let him leave. I wouldn't have let him
13 leave. If I had known it, I would not have let him
14 leave. They're all your employees. So, if I take the
15 evidence in the light most favorable to the non-moving
16 party, then, in fact, what we have is, we have a
17 gentleman with all of this history that is -- it's not
18 should have known -- it's known. I mean, it's known.
19 And you've got your employee that says I would never
20 have let him leave. I wouldn't have let him leave.
21 Wouldn't have let him leave.

22 And then, you've got another employee says, I was
23 scared of him; I moved; I was very frightened of him.
24 And taking the evidence in the light most favorable to
25 the non-moving party, she told her husband that she was

1 afraid of him. That was communicated to him. So, you
2 have, you know, despite -- and this is disputed
3 testimony -- I think you've got Mr. McDonald says, I
4 would have loved to have him come home to dinner. Even
5 though he says that, somehow, I don't think Ms. McDonald
6 would let him do that, based on her testimony. But he
7 wanted him to come home for supper.

8 But taking the evidence in the light most
9 favorable, I believe that -- I believe that our law is
10 such that there was a duty to warn. And your doctor
11 says there's a duty to not let him leave, but.

12 MR. MACKELCAN: But is that the same thing? I
13 mean, here, they didn't think he was leaving.

14 THE COURT: Well, I think that's a bigger -- I
15 actually think that's a greater duty. I think that's a
16 -- that's a duty to take a greater act, and I think --
17 let me tell you what I -- I'm a real stare decisis kind
18 of girl, and I got to tell you, I'm uncomfortable with
19 the duty to warn. But I think, yes, there may have been
20 a duty to hold onto him. But, and I may be in error by
21 not making that determination that there was duty to
22 more than warn. That may be my error, but our law
23 speaks in terms of a duty to warn, and quite frankly,
24 I'm quite comfortable going there. I'm not comfortable
25 to say they got a duty to hold onto him, though.

1 Yes, sir.

2 MR. HOYLE: It's always dangerous at this point for
3 me to stand up.

4 MR. LOVELL: I'm putting one thing -- I just want
5 to make sure we perfect that record, because we're at
6 that directed verdict stage.

7 THE COURT: You are.

8 MR. LOVELL: We had moved early on that this case
9 truly should have been a case for professional
10 negligence and malpractice, and you obviously had denied
11 that motion. We just want to renew it for purposes of
12 the record at this point, because I think many of the
13 issues you've touched on about should they have known
14 that he had propensities to do this, that, or the other,
15 do rise to the level of exercising professional
16 judgment. And we elicited a lot of testimony both from
17 Dr. Baker, their expert witness, and others. And I
18 understand and respect the Court's earlier ruling, but I
19 want to make sure our record's clear and we don't waive
20 that.

21 THE COURT: Does that -- well, okay. Well, that's
22 just where he happened to go. I mean, he just happened
23 to go there. I mean, he happened to go to an E.R. I
24 mean, if he'd gone somewhere else, maybe I'd think we
25 got a duty, too. But these people had a duty. They got

1 a common --

2 Interestingly enough, in the Delaware -- there's a
3 Delaware case, and the Delaware case, says -- there
4 were two people dead. There was a -- the patient was
5 dead and somebody else was dead. And so, with regards
6 to the patient, it was malpractice; but with regards to
7 the other dead person, it was ordinary negligence. And
8 so, I'm certainly mindful of that, too.

9 I believe that there -- given the knowledge that
10 the Defendant had, and interestingly enough, the
11 Defendant is not a doctor, not a hospital. I don't even
12 know if it's a medical provider. I don't know what they
13 are. All I know is they are a corporation, that they
14 don't train, don't run by doctors, not owned by doctors.
15 They just -- they're a staffing company. They staff
16 places. That's what they do. So, I believe that this
17 company, taking the evidence in the light most -- taking
18 the evidence in the light most favorable to the non-
19 moving party, I believe that there was a duty and an
20 ordinary negligence to warn.

21 MR. HOYLE: Your Honor, I'll stand up again, and
22 I'll reiterate. It's probably dangerous for me to do
23 so. I certainly respect the reasoning of the Court with
24 respect to this being an ordinary negligence cause of
25 action, and an ordinary negligent duty to warn. For our

1 purposes, you referenced a case from Delaware. I
2 believe that's the *Naidu v. Laird* case, --

3 THE COURT: Yes.

4 MR. HOYLE: -- reported at 539 Atlantic 2nd 1064, a
5 1988 case from the Delaware Supreme Court, which found
6 not only a duty to warn, but also, a duty to control the
7 actions of the mentally ill.

8 Also, I respectfully draw the Court's attention to
9 a case from the Supreme Court of Alabama, decided in
10 2004. It is *Taylor v. Smith*, the case reported at 892
11 Southern 2nd, 887. I certainly understand that the
12 safest reading of *Hardee* is solely as a duty to warn.
13 But the case, the *Hardee* case, states that the duty owed
14 to third parties is identical to the duty owed to the
15 patient. I personally believe that, as other states
16 have held that, that, if a foreseeable, non-patient,
17 third-party plaintiff can show to a jury, by a
18 preponderance of the evidence, what a duty owed to the
19 patient was, that, under my view, an expansive view,
20 perhaps, of *Hardee*, that, that duty would extend to that
21 foreseeable non-patient third party.

22 THE COURT: And you very may well have an
23 opportunity to argue that.

24 OFF THE RECORD.

25 BACK ON THE RECORD.

1 THE COURT: And let me tell you, I have certainly
2 -- I have -- I considered that, and I'm comfortable
3 being exactly where I am with the warning. Yes. Okay.

4 MR. HOYLE: Thank you. Thank you, your Honor.

5 THE COURT: And I note -- and I want both sides to
6 understand that we are as far out there as I have ever
7 been in a case. We really are. But as odd as it is, I
8 am as comfortable as I've ever been, as far out there as
9 I feel that I am. I really -- and the exceptions that
10 you all raised on behalf of the Defense, you absolutely
11 do that. I think -- I one hundred percent understand
12 it. It is -- it is a place, I believe, that our law is
13 developing, and I think that this very much my -- and I
14 wish I could tell you who it was, and I have watched so
15 much baseball in the last two weeks, I cannot tell you
16 the game -- but I can tell you that -- I want to say it
17 was Toronto, and it was a kid that got a run, and hit
18 the foul pole on the right side on the -- so that it was
19 in, instead of out. If it had hit on the other side of
20 the pole, it would have been a foul ball, but because it
21 hit on the inside of the pole, it was a home run.

22 Let me just tell you, I think the case, in my mind,
23 is that close, but I'm comfortable and confident, and
24 believe that it hits the inside of the pole, not the
25 outside. That's where -- and that's where it is for me.

1 Now, you want to do, like, negligent hiring stuff?
2 We're almost at 6:00 o'clock. You want to save that for
3 in the morning?

4 MR. HOYLE: Sure. Be fine.

5 MR. MACKELCAN: Save that 'til morning, yeah.

6 THE COURT: Because that way, I can --

7 MR. HOYLE: And your Honor, --

8 THE COURT: I've been so -- I've been so focused at
9 this, I've got to look at it.

10 MR. HOYLE: And your Honor, we also have a directed
11 verdict motion with respect to the respondeat superior
12 issues, as well, at the close of their case.

13 THE COURT: We'll just wait.

14 MR. HOYLE: Okay.

15 THE COURT: 'Til they close their case.

16 Now, here's what I need to do on the charge,
17 because I am -- that's what I'm working on this evening.
18 And what I'd like to do, with your permission, is, I'd
19 like to do a draft and email it to you, if that's okay.
20 I know that's not -- probably that's kind of gruesome to
21 do that to you and make you look at it this evening.
22 Can I just give you a little bit of a hint? If there's
23 an obvious typo or problem in the first part of the
24 charge, please, please let me know that. Whoever's
25 going to be -- I'm looking at everybody. I don't know

1 who's going to be in charged of that responsibility. I
2 figured that, you know. There you go. Yes. All right,
3 madam genius. The first part of it, I've been doing it
4 for a very long time, and those are -- it's pretty
5 stuck. So, kind of look at -- I almost -- don't look at
6 that when you're a little bit tired tonight. Begin
7 looking where it says, *wrongful death*.

8 MS. LEYIMU: Okay.

9 THE COURT: That's where I want you to start
10 looking. Okay?

11 MS. LEYIMU: Okay.

12 THE COURT: All right. You, too, because I know
13 you're going to look at it. I know you'll look at it.

14 MR. LOVELL: It probably will be me that'll be
15 looking at it. He's doing closing tomorrow.

16 THE COURT: Okay. We had a wrongful death. You
17 know.

18 MR. LOVELL: Unless I change my mind.

19 THE COURT: Begin looking from wrongful death,
20 forward. That's where I'm really looking for your all's
21 help in the informal charge conference we will start at
22 8:30 in the morning. Everybody get a Starbuck's, come
23 on over.

24 MR. LOVELL: 8:30?

25 THE COURT: Yeah. We're going to be back here,

1 because we're going to have an informal charge
2 conference, and I'm looking for wrongful death, and
3 let's just make -- we'll bring it back to you, because
4 it's an obvious problem. And the first part, I've been
5 doing it for, I mean, the witnesses and all that,
6 preponderance of the evidence. I'm not going to -- I've
7 just been doing it for so long, I'm not going to change
8 that. Oh, yes, you've got other things to do. So, but
9 look from wrongful death, forward.

10 MR. HOYLE: Your Honor, do you wish for us to
11 prepare a proposed form of verdict, or do you have
12 something already in mind with respect to that?

13 THE COURT: Do you want interrogatories?

14 MS. CASTLEBERRY: No.

15 MR. HOYLE: No, no, no. We want it as simple as
16 possible, Judge.

17 THE COURT: How about you guys? You all think you
18 need interrogatories?

19 MR. LOVELL: No.

20 THE COURT: Yeah, go ahead and do what you can. Do
21 a proposed, you know. Why not? Just simple.

22 MR. HOYLE: I want it as simple as possible.

23 MR. LOVELL: Will you be instructing them on the
24 punitive damages aspect?

25 THE COURT: No.

1 MR. HOYLE: Not yet.

2 MR. LOVELL: This will just be the negligence, yes
3 or no, and that's all?

4 THE COURT: I'm not playing -- I'm not -- none of
5 it. No, I'm not doing that for you to do that. I'm
6 telling you, here's what I'm not going to charge. I'm
7 not charging recklessness, willfulness, wantonness. I'm
8 not charging gross. I'm not charging -- I'm not
9 charging clear and convincing evidence. I'm charging
10 nothing to do with punitive damages, because it doesn't
11 matter, unless they find actual damages. I'm not doing
12 that.

13 MR. LOVELL: Perfect.

14 THE COURT: I'm just not going to do it. And then,
15 my -- and I've had -- and my thought is to do this. Is,
16 if we get a verdict, then, we will come back, and I will
17 charge them on willfulness, recklessness, --

18 MR. HOYLE: Gross negligence.

19 THE COURT: Yeah. Right. And clear and convincing
20 evidence. I'll do that. And then, I'll give them the,
21 you know, the elements that they must look at, if they
22 are considering punitive damages.

23 Oh, let me ask you this question. Are there any
24 specific statutes? Yeah, I think so. Have you pulled
25 the statutes?

1 MR. LOVELL: I don't think there are any specific
2 to our case.

3 THE COURT: I don't think there are any. None of
4 that's going to matter, is it?

5 MS. CASTLEBERRY: Not violation of statute.

6 THE COURT: No, it's not. I mean, there's no
7 statutory violation in this anywhere.

8 MR. HOYLE: No. No.

9 THE COURT: Okay. Good.

10 MR. HOYLE: Your Honor, could we talk about
11 additional witnesses in that phase?

12 THE COURT: What? Yes.

13 MR. HOYLE: We've retained Perry Woodside, your
14 good friend, my good friend, Mr. Mackelcan's new friend.
15 He has prepared a report in this case with respect to
16 ability to pay. I produced the revised report to
17 Defendant's Counsel this morning.

18 THE COURT: Okay. So, you would propose to call
19 him?

20 MR. HOYLE: I would propose to call him with this
21 problem that I'm going to state.

22 THE COURT: Okay.

23 MR. HOYLE: And we can maybe figure out or not
24 figure out. I don't know. Dr. Woodside is not
25 available to testify live tomorrow. He is out of the

1 state at the moment. He asked me if I would raise, in
2 open court, the possibility of him appearing by Skype or
3 telephone, or something of the sort, or whether or not
4 any -- or any potential testimony could be heard on
5 Monday.

6 THE COURT: Oh. We'll deal -- this -- we'll wait
7 'til verdict.

8 MR. HOYLE: It's premature, Judge, and I'm
9 certainly not counting any chickens before they hatch.

10 THE COURT: Don't, yeah.

11 MR. HOYLE: I'm just putting that out there, cause
12 that's what he told us.

13 THE COURT: Right. We're done with this. We're
14 off the record, Wanda.

15 OFF THE RECORD 5:57 P.M.

16 END DAY EIGHT, THURSDAY

17 OCTOBER 15, 2015, 5:57 P.M.

18 BEGIN DAY NINE, FRIDAY,

19 OCTOBER 16, 2016, A.M.

20 MOTIONS AND RULINGS:

21 BAILIFF: All rise. Please come to order.

22 THE COURT: Thank you very much, and please be
23 seated. Jury ready? Bring us the jury.

24 MR. HOYLE: Your Honor, we need to make a directed
25 verdict motion.

1 THE COURT: Oh, I'm sorry. I forgot about the
2 motions, yeah. I'm listening. Yes.

3 MR. MACKELCAN: Not to interrupt, but I think we
4 were also going to discuss the negligent hiring,
5 retention, and supervision on our side of the directed
6 verdict.

7 THE COURT: Right. Oh, yeah. Go ahead.

8 MR. MACKELCAN: Before I do that, your Honor, we
9 had prepared a memo in support. I don't know if you
10 want that.

11 THE COURT: Yeah, of course.

12 MR. MACKELCAN: I had forgotten to give it to you
13 yesterday.

14 THE COURT: Great.

15 MR. MACKELCAN: Your Honor, on the negligent hiring
16 claim, we would submit to the Court that the Plaintiff
17 has not submitted any evidence as to negligent hiring,
18 in that, you know, in this case, the only evidence is
19 that the Navy provided CasePro a list of people to hire.

20 THE COURT: Stop. What about negligent hiring?
21 And training, while you're up.

22 MR. HOYLE: Judge, we'll withdraw everything except
23 negligent retention. They should have told Dr. Jansen
24 to get gone, and they didn't. There's evidence of that.
25 That, I'm sure of.

1 THE COURT: Okay. Okay.

2 MR. MACKELCAN: Okay. So, --

3 THE COURT: Unfurl your brow.

4 MR. MACKELCAN: So, hiring and supervision are out?
5 Is that -- and training?

6 THE COURT: And training, hiring, supervision.

7 MR. MACKELCAN: Okay. As to retention, this is
8 limited to Craig Martin's testimony in an email. I
9 think, if you read Craig Martin's email, he was actually
10 an advocate for Dr. Jansen in that email. Now, he's a
11 former employee working for a competitor, and he's
12 changed his mind a little bit that he wanted Dr. Jansen
13 fired. But that email says we need more information;
14 how about due process for E.R. doctors. And that's it.
15 That is the only piece of information CasePro had
16 regarding Dr. Jansen. There's been no evidence in this
17 case as to whether an employer's supposed to fire
18 somebody if they hear of a negative peer review.

19 Your Honor, we know that there are doctors working
20 in every hospital in this state that have had a negative
21 peer review, and they haven't gotten fired. So, you
22 know, is the jury supposed to believe that a negative
23 peer review automatically means you get fired? There's
24 been no testimony as to what the standard is.

25 CasePro has no ability to review actual medical

1 records. So, it's just a small piece of information
2 that, you know, is -- we just don't believe that a
3 reasonable inference can be made by the jury that they
4 were negligent in retaining Dr. Jansen.

5 THE COURT: Thank you so much. That was
6 appropriate for possibly wonderful closing argument, but
7 I do think there's -- taking the evidence in the light
8 most favorable to the Plaintiff, I think there is
9 evidence on negligent retention, and would respectfully
10 deny that motion.

11 Any other motions?

12 MR. MACKELCAN: No, your Honor. Okay. Yes, sir.

13 MR. HOYLE: Your Honor, I believe I have three
14 directed verdict motions to make on behalf of the
15 Plaintiff, --

16 THE COURT: Okay.

17 MR. HOYLE: -- since the Defendant has now closed
18 its case without calling any additional witnesses.

19 First, with respect to respondeat superior, we
20 would move that, in light of all the evidence in this
21 record, in light of all the testimony that has been
22 heard, the only reasonable inference that can be drawn
23 with respect to Dr. Christian Jansen, Nurse Janice
24 McDonald, and Nurse Joe McDonald is that all three
25 persons were, in fact, employees of CasePro,

1 Incorporated; and that on February 24, 2012, they were
2 acting within the scope of that employment; and that the
3 master in this situation, CasePro, is responsible for
4 the actions of their servants; because it is without
5 question that CasePro unequivocally paid these persons
6 cash money; determined their benefits; determined what
7 their salary was going to be; scheduled them to go to
8 work; and had the absolute, unequivocal ability to fire
9 these persons at any time.

10 We submit that, in light of all of the evidence in
11 this record, the only reasonable inference that can be
12 drawn from that evidence is that the jury must find that
13 there is respondeat superior liability with respect to
14 those three employees, Nurse Joe McDonald, Nurse Janice
15 McDonald, and Dr. Chris Jansen.

16 I'm going to make the other two motions and let the
17 Defendant respond, or we do it piece --

18 THE COURT: No. No. Tell me about that.

19 MR. MACKELCAN: Your Honor, we have certainly heard
20 testimony, we have exhibits in the form of the contract
21 and the task order, which clearly state that the
22 government has the sole authority to supervise and
23 control these workers, Janice, Joe, and Dr. Jansen while
24 they are at the Naval Hospital.

25 What we're talking about in this case is 2:15 to

1 about 4:00 p.m. There is no question, in that time
2 period, that a jury could reasonably decide that it was
3 the government, and not CasePro, that had the ability to
4 control the activity of those workers. Their supervisor
5 was a lieutenant.

6 THE COURT: Let me ask this question. Do you
7 maintain, then, that despite -- do you maintain that
8 these individuals were not employees of CasePro, meaning
9 Dr. Jansen and the two nurses, that they were not
10 employees of CasePro?

11 MR. MACKELCAN: We don't maintain that. Okay? But
12 the contract specifically, in a number of different
13 places, says it's part of what is negotiated in the
14 contract is that the government has assumed the sole
15 right to supervise and control --

16 THE COURT: Well, let me ask you this question,
17 because the issues of control, based on my review of the
18 law and how -- based on my review of the law, when you
19 begin to look at the issues of control, you look at the
20 issues of control to ascertain whether, in fact, not in
21 may, but in fact, the relationship of employer/employee
22 exists between the individuals. And once it is
23 ascertained that the relationship of employer and
24 employee, irrespective of what they call each other,
25 once that's established, then, respondeat superior, the

1 relationship of master and servant, attaches, and
2 respondeat superior applies.

3 I am not aware of case law, that, once it is
4 established to that, in fact, not in name, but once it
5 is established that, in fact, the employer/employee
6 relationship exists, then, respondeat superior attaches.
7 That's why I'm having difficulty. I'm having difficulty
8 with this idea that, while CasePro and these individuals
9 are employer/employee, that respondeat superior doesn't
10 attach.

11 Now, let me just finish my thought processes. I
12 don't pretend to get into the issue of whether or not
13 there is some sort of indemnification, either equitable
14 or otherwise, because that's not before me. But I'm
15 having difficulty dividing respondeat superior away from
16 the in fact, the in fact, employer/employee
17 relationship, master/servant. Help me with that.

18 MR. MACKELCAN: Your Honor, I know you don't want
19 to hear about federal law in a state courthouse, but in
20 that contract it states if, in this case, Dr. Jansen and
21 Joe McDonald and Janice McDonald were sued in their
22 individual capacities, as often is the case of medical
23 malpractice cases, they were named individually, the
24 contract directs everyone to a process by which the
25 government assumes their defense. And it refers you to

1 C.F.R.s that say that; that there is an
2 employer/employee relationship created between the
3 government and those employees, which allows the
4 government to defend those cases under the federal tort
5 claims act.

6 Now, that has been circumvented in this case by
7 only suing CasePro. And but, if you read that contract,
8 and you recognize that what they're talking about is
9 these healthcare workers, it's there. It's in the law
10 that the government has that employee/employer
11 relationship with those workers, and if they're sued in
12 their individual capacities, the government has -- it
13 says explicitly that it's the law that they have
14 respondeat superior for them.

15 THE COURT: Okay. But that's if they're sued in
16 federal court under the tort claims act individually.

17 MR. MACKELCAN: If they're sued individually
18 anywhere. But that's what we're talking about here.
19 We're talking about the acts and omissions of these
20 healthcare workers. And so, I think that, that is
21 indication of the fact that there could be a reasonable
22 inference that it's the government. It's in the
23 contract that it's the government that is the
24 appropriate party, to the extent that there is one, to
25 have that vicarious liability.

1 THE COURT: So, is it -- but here's my problem. My
2 problem is, at the point in time that you say to me that
3 the relationship of employee/employer exists between
4 CasePro and these employees, you don't have to tell me
5 that. I mean, you can tell me that they're just a pass-
6 through, and my charge, as it exists, can address that.
7 But it's a different circumstance when you tell me that,
8 no, no, no, that we do not contest that these
9 individuals are employees of CasePro.

10 MR. MACKELCAN: Maybe I should be more specific
11 that not employees for the purposes of respondeat
12 superior and, you know, tort acts while they're at work.
13 I mean, at least that is what was contracted for. I
14 mean, I can pull out the federal court suit that Ms.
15 Delaney has filed against the federal government where
16 they made claims of negligent hiring, negligent
17 retention, negligent supervision for the government and
18 the acts of Dr. Jansen -- I mean, not the acts, I'm
19 sorry -- but Dr. Jansen in this federal court suit. So,
20 clearly, the Plaintiff also believes that the federal
21 government has that respondeat superior, as well.

22 MR. HOYLE: Judge, I want to be heard on that,
23 because that is a gross misstatement of what was filed
24 by the estate in federal court.

25 THE COURT: Time out. Plaintiffs are allowed to do

1 that. It's okay. Sit down.

2 MR. HOYLE: Okay. Thank you, Judge.

3 MR. MACKELCAN: And we're not a defendant in that
4 case, so I do not, obviously, have that complaint
5 memorized, so I apologize if I made a misrepresentation.

6 THE COURT: Just practicing law. I don't care
7 about that. Now, so, so, is it -- tell me, just kind of
8 tell me, what's the position now of CasePro. Just tell
9 me what that position is with regard to these folks vis-
10 a-vis the employer/employee relationship.

11 MR. MACKELCAN: Under the contract, when these
12 workers are at the Naval Hospital performing services,
13 it clearly states the government is the party
14 responsible for supervising and control, controlling
15 these employees; that there's employer/employee
16 relationship created by the government in that instance;
17 and they have taken on responsibility for acts or
18 omissions of these employees while they're working at
19 the Naval Hospital.

20 It's a unique situation, your Honor. Clearly, the
21 contract is a -- it's a government contract. It's a
22 unique situation in the way that, that is negotiated.
23 But certainly, because of that, we believe that the jury
24 can reasonably infer that this is a case that should
25 have been brought against the federal government, not

1 against CasePro.

2 THE COURT: If I take the evidence in the light
3 most favorable to the Defendant, --

4 MR. HOYLE: It would still be an employee/employer
5 relationship. With respect to case law in this state,
6 *Armstrong v. Food Lion, Incorporated*, the cite is at 371
7 S.C. 271, pinpoint cite 276 at 2006, South Carolina
8 Supreme Court case, our Supreme Court said a Plaintiff
9 seeking recovery from the master for injuries must
10 establish that the relationship existed at the time of
11 the injuries, and also, that the servant was then about
12 his master's business and acting within the scope of his
13 employment.

14 There was testimony from Nurse Janice McDonald,
15 Nurse Joe McDonald, Dr. Jansen, and even Mr. McCabe, the
16 chief executive officer of CasePro, Incorporated, that
17 all of the three persons present in the emergency room
18 that day were employees of CasePro, and that they were
19 all acting within the scope of their employment.

20 I think the inquiry at this juncture ends. There
21 may be some ability in federal court somewhere to also
22 have liability against someone else for these persons.
23 I don't know. But what I do know is that, under South
24 Carolina law, respondeat superior is premised upon the
25 relationship.

1 We've been going around and around and around in
2 circles about this whole issue of control. Control is
3 typically an issue in cases where it's not crystal clear
4 that somebody is an employee. Here, we have an employee
5 handbook that these people signed and said, yeah, I'm
6 going to follow your policies and procedures. We have
7 paychecks. We actually got a paycheck stub into
8 evidence through Dr. Jansen's personnel file showing
9 that he was getting paid.

10 THE COURT: Let me stop you for a minute, Mr.
11 Hoyle, because I think that the record needs to reflect
12 that it was my understanding, when we began this case,
13 that there was an issue regarding respondeat superior,
14 and I think that our record needs to reflect that,
15 because I -- and I think that continues to this moment.

16 And the reason that I allowed the testimony in on
17 the issue of control was because that was in context.
18 But I think that the record also needs to reflect that,
19 in that, and in allowing that, that I believe that,
20 because respondeat superior was in contest, that, that
21 meant that whether or not the relationship was also in
22 contest between Plaintiff and Defendant regarding
23 whether these individuals were employees of CasePro.
24 Because I believe that, once you establish that you have
25 an employer and employee relationship and folks are

1 acting within the course and scope of their employment,
2 that respondeat superior attaches as a matter of law.

3 And I am simply not aware of, for purposes of
4 negligent responsibility, I'm not aware of the ability
5 by contract of an employer's ability in contracting with
6 third parties and those third parties are not the
7 plaintiffs, of being able to contract away respondeat
8 superior.

9 Now, having said that, I didn't mean
10 indemnifications rights, that somebody can't step into
11 somebody's shoes, or that other relationships'
12 contractual rights may exist on behalf of CasePro vis a
13 vis other individuals. But in terms of the Plaintiff
14 and these individuals, I believe that respondeat
15 superior applies, because I believe that they are
16 employees of Defendant. They being the two Nurse
17 McDonalds and Dr. Jansen. Because I don't believe,
18 under state law, we have divided respondeat superior as
19 it relates to the employer and the employee
20 relationship.

21 Once the employer/employee relationship is
22 established, and the courts discover it's established, I
23 believe respondeat superior follows. All right. And
24 that's just a ruling of the Court. So, I will grant
25 your motion for that.

1 MR. HOYLE: Thank you, your Honor. Two additional
2 motions for directed verdict. In its answer, and
3 through the testimony, Defendant has asserted the
4 negligence of third parties. I believe that the third
5 parties that the Defendant is seeking to identify -- I
6 don't know where their trial brief went -- is Edward
7 Ray, who was a family friend, but also an employee of
8 some state or county agency, doing veterans' affairs
9 work; Calvin Hunt, who was adjudicated not guilty by
10 reason of insanity in the Court of General Sessions in
11 this County; and the Beaufort/Port Royal Fire
12 Department.

13 With respect to all three of those potential third
14 parties, I do not believe that those claims can survive.

15 With respect to the -- I'll work backwards. With
16 respect to the Fire Department, the fire chief, Sammy
17 Negron, came into this courthouse and testified that
18 they complied with all applicable standards, both here
19 locally, here within the state, and here nationally.
20 There has been no contrary evidence offered by the
21 Defendant that the Beaufort/Port Royal Fire Department
22 violated any such standard. There's been no duty
23 established with respect to the reasonable manner in
24 which a fire truck responding to a non-fire emergency
25 call should be left operating.

1 With respect to Calvin Hunt, I believe his
2 adjudication of not guilty by reason of insanity
3 precludes him from being a potential -- a potential
4 criminal intervening cause, because he did not lack --
5 he lacked the capacity to distinguish from moral -- a
6 legal right from moral and legal wrong.

7 And with respect to Edward Ray, we've heard no
8 testimony whatsoever about the duty of care owed by
9 either a friend to someone who's in the emergency room
10 for psychiatric issues or the duty of care owed by some
11 employee of a governmental agency doing Veterans Affairs
12 work.

13 I believe those same arguments that I've just made
14 will also support my additional motion for directed
15 verdict with respect to intervening cause, as I do not
16 believe the Defendant has come forward with any evidence
17 that any of those three persons and/or entities, Edward
18 Ray, Calvin Hunt, and the Fire Department, were, in
19 fact, a superceding, intervening cause.

20 THE COURT: Gotcha. Well, let me ask -- let me
21 tell you -- hold on. Now, they don't have the burden of
22 proof, negligence of third parties, okay? acts of third
23 parties. They do have the burden to prove intervening
24 cause.

25 You're talking about criminal acts of the third

1 party. Acts of the third party. It's out there. It's
2 just out there. It's in this case, and I'm not going to
3 restrict these people from being able to argue
4 intervening acts of third parties. Nor am I going to
5 keep them from being able to argue sole acts of third
6 parties. I'm just not going to do that. And I note
7 your exception for the record.

8 MR. HOYLE: Thank you, your Honor. We certainly
9 respect your ruling.

10 THE COURT: Thank you so much. All right. Any
11 other motion for the Plaintiff? Any other motion for
12 the Defendant?

13 MR. LOVELL: Nope. Just our exception to the
14 Court's ruling on respondeat superior, for the record.

15 Judge, I did a have one question about a charge
16 thing that I forgot about.

17 THE COURT: Yeah, now I've got to go back and
18 change the charge with respondeat, the
19 employer/employee, I got to take all that out.

20 MR. LOVELL: We had asked for a hindsight charge.

21 THE COURT: Huh?

22 MR. LOVELL: A hindsight charge.

23 THE COURT: Oh, gosh. Oh, yes, yes.

24 MR. LOVELL: I have two of those we submitted, and
25 neither were in there.

1 THE COURT: Oh, I'm sorry. Daggone. And that's my
2 fault, because Ryan talked about that. And we're going
3 to put -- thank you so much for -- oh, yeah, it goes in.

4 MR. LOVELL: That's the one.

5 THE COURT: Oh, yeah. Any other ones like that;
6 because, absolutely, hindsight's going in there. And we
7 mentioned -- yeah, it goes after the defenses. It goes
8 after the defenses.

9 MR. LOVELL: I think you had the sympathy charge
10 that Doug was asking about. I seem to recall seeing
11 that.

12 THE COURT: ' No sympathy, passion, or prejudice for
13 or against any party in weighing the evidence?

14 MR. LOVELL: Yes.

15 THE COURT: If it's not in there, it's going to be
16 in there.

17 MR. LOVELL: Okay.

18 THE COURT: You know, this is not a total script.
19 You know, you going to think, oh, my, why did we go back
20 there; she's not deviating from it.

21 MR. LOVELL: Okay.

22 THE COURT: I'm not an Episcopal lay leader.

23 MR. HOYLE: With respect to the hindsight charge
24 that my friend Mr. Lovell just raised, I noticed that he
25 submitted two. One was just a general hindsight charge.

1 The other was a malpractice hindsight charge. I don't
2 think the malpractice one's appropriate, your Honor.

3 THE COURT: I changed -- yeah, I changed -- I
4 changed those. I actually played with it. Is that the
5 one I changed? All right, you all listen, because I
6 changed:

7 *In considering whether the Defendant*
8 *has exercised reasonable care in a given*
9 *case, you must consider Defendant's actions*
10 *and omissions, and/or omissions, as they*
11 *relate to the facts existing at the time*
12 *these events occurred, and not in light of*
13 *what hindsight may later reveal.*

14 That's the charge.

15 MR. HOYLE: That's fine from the Plaintiffs.

16 THE COURT: Okay.

17 MR. HOYLE: And your Honor, just since we're all in
18 here on the record, we did have an informal conference
19 this morning, as you know. There is going to be a
20 charge, unless you change your mind, there is going to
21 be a charge given to the jury today with respect to duty
22 specifically relating to the Court's view of the Bishop
23 and Hardee cases. I'm just going to go ahead and put it
24 out there. I know I have to say it again later, but I
25 at least want to have a record today here, so that, when

1 someone else more brilliant than myself argues this,
2 there's a good record.

3 While I acknowledge that there is a duty to warn a
4 patient, and that, that duty extends to a reasonably
5 foreseeable, non-patient third party within the general
6 zone of danger, it is Plaintiff's position that, based
7 upon the evidence in this case, including the testimony
8 of Dr. Terrence Baker, who was qualified as an expert
9 witness here in this courthouse, that the duty owed to
10 non-patient, third parties is, in fact, broader than
11 merely a duty to warn; and that, under the case law in
12 this state, specifically the *Hardee* case, which states
13 the duty owed to third parties is identical to the duty
14 owed to the patient, that any obligation that a
15 plaintiff brings forth evidence of with respect to a --

16 THE COURT: Yep.

17 MR. HOYLE: -- medical provider and a patient,
18 flows to a non-patient, third party who's reasonably
19 foreseeably in the zone of danger.

20 And so, we would respectfully and understandably,
21 but respectfully, take exception to any charge that you
22 give that merely limits the law of this state with
23 respect to non-patient, third parties as solely as a
24 duty to warn.

25 THE COURT: Thank you so much. I'm not going to

1 change the charge as it is. I'm just not going to do
2 it.

3 MR. LOVELL: We'll just make our exceptions at the
4 end, after the charge. Thank you, your Honor.

5 MR. HOYLE: Judge, a point of clarification for my
6 closing.

7 THE COURT: Yeah.

8 MR. HOYLE: In light of the directed verdict motion
9 on respondeat superior, and the fact that you will not
10 be charging the jury on that, will the Court address the
11 jury at any point in time to advise them that, that is
12 no longer an issue in this case, or how?

13 THE COURT: We will.

14 MR. HOYLE: Okay. I will undertake that.

15 THE COURT: And you got to be really careful, now,
16 that the evidence that came in under limited
17 instructions that you don't jump out and use it for
18 something else. You've got to be very careful. While
19 some of it's delicious and you're going to want to talk
20 about it, the negligent retention, you're going to have
21 to be really careful.

22 MR. HOYLE: Negligent retention, that's right,
23 Judge.

24 THE COURT: So be very careful. Okay. Because
25 they're not going to be sleeping over here. They're

1 going to be paying attention.

2 MR. HOYLE: You think they'll be paying attention,
3 Judge?

4 THE COURT: I know they will. Okay.
5 You can bring them in.

6 What we're going to do, -- let me just make this
7 announcement. We're going to lock the doors, and the
8 only person that's going to be allowed to come and go is
9 going to be the Plaintiff. If she needs to leave, she
10 gets to leave. She gets to come back. Okay.

11 MR. HOYLE: Thank you, your Honor.

12 MS. DELANEY: Thank you.

13 THE COURT: And if there are other family members
14 who are present -- I'm sorry. I'm so sorry. I just
15 know that she has been here, but certainly, certainly,
16 if you're comfortable, most assuredly. Okay?

17 MR. HOYLE: Judge, also, for clarification, --
18 good.

19 THE COURT: I just did that.

20 THE COURT: What it's going to say is:

21 *Ladies and gentlemen, --*

22 MR. HOYLE: I love it.

23 THE COURT: -- the evidence that you should
24 give the most weight to is in the preponderance
25 charge. The evidence that you should give

1 the most weight to is that which convinces
2 you of its source, regardless of from whom
3 or what source it comes. However, you should
4 not consider sympathy, passion, or prejudice
5 for or against either of these parties in
6 weighing the evidence.
7 MR. LOVELL: Very good. Thank you, your Honor.
8 THE COURT: Okay. Yep. All right. We're up.
9 MR. HOYLE: Point of clarification --
10 THE COURT: Hold on.
11 MR. HOYLE: One clarification, your Honor.
12 Yesterday, informally, we discussed times. I just want
13 to make sure I have the times correct in my head.
14 THE COURT: No.
15 MR. HOYLE: Okay.
16 THE COURT: You argue. You do your thing.
17 MR. HOYLE: Okay. Do what I need to do. Thank
18 you, Judge.
19 BAILIFF: Jury is entering the courtroom, your
20 Honor.
21 THE COURT: Wonderful.
22 JURORS ENTER COURTROOM 11:10 A.M.
23 THE COURT: Ladies and gentlemen, good morning.
24 RESPONSES FROM JURORS.
25 THE COURT: I want to tell you how we are going to

1 be proceeding. The first thing that's going to occur is
2 that you're going to hear closing argument on behalf of
3 the Plaintiff in this case, by Mr. Hoyle. The Plaintiff
4 is Ms. Rebecca Delaney. You'll hear his principle
5 closing argument. You're then going to hear from Mr.
6 Mackelcan on behalf of CasePro, Inc., the Defendant in
7 this case. You are then going to hear a -- it's called
8 a reply or rebuttal argument from Mr. Hoyle. And that
9 will be the concluding closing argument.

10 So, first from Mr. Hoyle, then from Mr. Mackelcan.
11 And then, rebuttal or reply argument from Mr. Hoyle on
12 behalf of the Plaintiff. Ladies and gentlemen, that
13 will then conclude the closing arguments.

14 We're then going to have a recess, a break at that
15 point, for a little comfort break. You're going to
16 control the comfort break. And when you have finished
17 your comfort break, at that point, you won't be -- you
18 can't deliberate then. You just take your comfort
19 break. And then, you're going to come back, and I'm
20 going to deliver the charge or the instruction on the
21 law to you. I believe that, that will take me about 30
22 minutes max to do that. And then, there will be another
23 very short break. And I'll explain that to you, the
24 purpose of it when we come to that point.

25 And then, ladies and gentlemen, you are going to

1 receive this case for your deliberation. You have
2 ordered your goodies from Alvin Ord. So, I contemplate
3 that you will be deliberating and eating at the same
4 time. So, that is our plan as we go forward this
5 morning, ladies and gentlemen, and some approximate
6 times that I think we'll be dealing with.

7 Ladies and gentlemen, you are free to take notes if
8 you choose to. Again, don't let the taking notes keep
9 you from being able to listen to the closing arguments
10 of the attorneys. All right?

11 But at this time, I ask that you please draw close
12 as we listen to the closing arguments of our attorneys.

13 MR. HOYLE: May it please the Court?

14 THE COURT: Yes, sir.

15 CLOSING ARGUMENT ON BEHALF OF

16 PLAINTIFF, BY MR. HOYLE:

17 MR. HOYLE: Semper fidelis declares the Marine
18 Corp, meaning always fair. Words that, in this
19 community, have meaning. Words that, in this community,
20 have a meaning regardless of the good, the bad, the
21 ugly. Words that have meaning regardless of one's
22 station in life. Words that sometimes are signified and
23 represented by an oath, a solemn vow, a promise.

24 Calvin Hunt took an oath as part of the oath of an
25 enlisted man to defend this country and to serve under

1 the officers appointed. A solemn vow. Dr. Chris Jansen
2 took an oath, an oath to do no harm; to put patient
3 safety first.

4 Nine days ago, when we first began this process,
5 each of you took an oath, an oath as a juror to consider
6 all the evidence in a search for the truth. And that is
7 what we have done over the past nine days.

8 You will recall that, when I first spoke to you, I
9 tried to give you a sense of a tragedy that had taken
10 place, and I told you in my opening remarks that this
11 was a tragedy that could have been prevented. In the
12 days that followed, you saw first-hand evidence of that
13 tragedy.

14 Corporal Jamie Perry, from the Highway Patrol, came
15 and sat on the witness stand. He was the first witness.
16 And he showed you photographs and walked you through
17 that horrific scene that he found on a Friday afternoon
18 on Ribalt Road.

19 You later, with your ears, heard from Ms. Melanie
20 Smith, an employee of the Sheriff's Office, who came
21 into this courtroom with the original 911 recordings of
22 that fateful Friday, and you heard a sequence of events,
23 a sequence of events that began with somebody in his
24 underwear, then he was suddenly naked, then he was
25 driving a fire truck.

1 And you heard call after call after call, a sense
2 of panic, a sense of fear, a sense of terror of what was
3 transpiring on Ribalt Road. And those calls ended less
4 than 20 minutes after the first one began, with a call
5 from a man reporting that someone had come into a
6 bowling alley reporting that his brother had been run
7 over by a fire truck.

8 On that first day of trial, you heard from a
9 pathologist who talked to you about some things. And
10 then, we began the testimony of almost 20 witnesses,
11 many of whom were there at the Naval Hospital, Beaufort
12 on that fateful Friday. And testimony from others who
13 were far away, all in an effort to help piece together
14 the puzzle of why this tragedy happened.

15 You, each of you, by becoming jurors in this case,
16 became participants in a search for the truth. You are
17 here on behalf of this entire community, on behalf of
18 all of Beaufort County, to try and ascertain what
19 happened on that tragic, fateful Friday.

20 This community, for more than three years, has had
21 questions. Questions about how such a tragedy could
22 have happened, and whether or not it could have been
23 prevented. And each of you, each of you now know more
24 than virtually anyone else in this community what
25 happened, why it happened, and will be called upon later

1 today, as far as your deliberations, to answer some
2 questions.

3 Our first witness was a lady by the name of Koren
4 Pope. First witness from the Naval Hospital. And Ms.
5 Pope really didn't know all that much. Ms. Pope really
6 didn't spend all that much time with Kalvin Hunt. I
7 think we played some 20 minutes of testimony for maybe a
8 three- or four-minute interaction. But a few salient
9 points came forward for Ms. Pope. She wasn't able to
10 find this man in the computer. If you go type my name
11 into the system at the Naval Hospital and don't have the
12 matching Social Security Number, nothing's going to come
13 up. Doesn't matter what kind of identification I have
14 or who I am or who I'm not, if you don't have that
15 combination, you're not going to be able to find any
16 records. That's what Ms. Pope told us.

17 But more importantly, Ms. Pope interacted with this
18 man for just a very few minutes, and she knew that he
19 needed some help. And so, she went and got Registered
20 Nurse Saundra Smith from the back, and had Ms. Smith
21 come out to see Mr. Hunt. Mr. Hunt went back, along
22 with Edward Ray, his friend, somebody Grandma had
23 thought of, and they go back to Ms. Smith's office. And
24 you'll have back with you in the jury room as an
25 exhibit, the note that Ms. Smith typed up that day.

1 Ms. Smith told you on the videotape that she had an
2 inner sense that something just wasn't right, something
3 wasn't right with this man, Calvin Hunt. She'd been a
4 nurse for a good, long while. She'd gone up at A&T in
5 Greensboro for school. She'd come back here to her home
6 county of Beaufort. Been nursing for a good, long
7 while.

8 And she was able to count the times she had to ask
9 this question on one hand. It was either two or three
10 times. But she felt the urge to ask Calvin Hunt,
11 because of the way he was behaving in her presence, do
12 you have thoughts of hurting yourself. And she got a
13 simple answer back -- yes. And rather than do nothing,
14 rather than ignore it, rather than just assume that it's
15 just one of those Fridays, Sandra Smith acted
16 immediately. She got Mr. Hunt up, told Edward Ray to
17 come along, and they walked downstairs to the emergency
18 room.

19 And Ms. Smith told you on the videotape that she
20 knew this man needed to be seen by a doctor. In her own
21 note, which she typed up that afternoon and put into the
22 computer system, she noted that the patient, in her
23 presence that day, began to moan and rock back and
24 forth. That is not normal behavior, folks. You don't
25 need to be an astronaut to know that. You don't need to

1 go to medical school to know that. If you've got
2 somebody moaning and rocking back and forth, they might
3 need some help.

4 And that's what Ms. Smith did. She escorted this
5 man, a member of our armed forces, who had gotten into
6 some trouble, downstairs to the emergency room, and
7 provided the nurse, who she handed care off to, a report
8 of what it was she had observed and what it was that had
9 happened.

10 At about 17 minutes past the hour of 2:00 on that
11 fateful Friday, Nurse Smith makes the handoff. Calvin
12 Hunt's now in the emergency room. He's now the
13 emergency room's responsibility. Nurse Smith, she works
14 for the federal government, and the folks downstairs in
15 the emergency room, they work for somebody else. And I
16 know you all heard a lot about that, and we'll talk
17 about that in a little bit.

18 But at 2:17 in the afternoon, a lady by the name of
19 Janice McDonald, who came up here and sat on that
20 witness stand, made an assessment of the man who was in
21 front of her. And the chief, primary assessment that
22 this nurse made was suicidal ideation. In other words,
23 that this man, at that point in time, had thoughts of
24 hurting himself. Thoughts of hurting himself.

25 Now, there was some testimony about some paper

1 records that came on into the emergency room that day
2 with Mr. Hunt. And Nurse Janice said, oh, they were
3 about an inch thick; maybe they were an inch-and-three-
4 quarters thick. You didn't get to see any of those
5 records, because Nurse Janice, she really didn't look
6 through whatever it is that was brought in that day.
7 She spent about 60 seconds looking through an inch-to-
8 an-inch-and-three-quarter stack of medical records.

9 Now, Calvin Hunt wasn't some eighty-year-old who
10 had been spending ten years in the nursing home. This
11 was a young, fit, United States Marine. Somebody in the
12 prime of his life. And he had an inch-and-three-
13 quarter-inch stack of medical records. Makes you wonder
14 what was in it.

15 But Nurse Janice, she looks through them records
16 enough to find some medications, because she knows that
17 Mr. Hunt wants some pills. So, she looks through those
18 records just enough to find some list of medication that
19 she can write on this form she's got filled out. And
20 she realizes -- she knows that two of those medications
21 that Mr. Hunt has been previously prescribed and needs a
22 refill of are anti-psychotic, mental health medications.
23 She doesn't know how long he's been out of the pills,
24 but she knows he needs them. And she knows that he
25 suffers from depression and PTSD.

1 She knows he's a Marine, but she doesn't bother to
2 ask whether or not that PTSD is service-related. We
3 don't really know why. And the only time this man's
4 vital signs are ever taken on that fateful Friday in the
5 emergency room are done shortly after he gets there.
6 And he's got a slightly elevated heart rate of 103.

7 There's been some testimony, it's up to you to
8 decide whether or not you believe it, that 103 might be
9 slightly elevated on somebody like me who's a little out
10 of shape; but testimony that a fit, young, United States
11 Marine had a heart rate of 103 might be a red flag.

12 Regardless, Nurse Janice doesn't spend all that
13 much time with Mr. Hunt. She takes him into a little
14 room, and she sees him doing some odd things. She sees
15 him put his hands over his ears. She knows that's not
16 normal. Anybody with good, old-fashioned common sense
17 knows that's not normal. Not right.

18 She knows from the information she has that the
19 grandma, Calvin Hunt's people, have sent him over to the
20 emergency room -- or, excuse me -- sent him over to the
21 Naval Hospital where the emergency room's located,
22 because he needs some help. But she doesn't want to
23 spend all that much time with him in that itty-bitty
24 emergency room, specifically in the itty-bitty triage
25 room, because he's between her and the door. And

1 there's testimony from Nurse Janice herself that she got
2 a little afraid of him, got a little scared.

3 So, Nurse Janice keeps filling out her forms,
4 making sure she documents this encounter the way she's
5 supposed to. And she notes that he has, among other
6 things, a flat affect or affect. She sat up there on
7 the witness stand and compared that -- I want to get
8 these words right -- she compared that to a sense of
9 almost death. That's the way he looked to her.

10 She described his demeanor and his actions as a
11 slow simmer. She knew he was angry, but she thought,
12 rather than being a frying pan with some bacon, he was
13 more like a pot boiling some eggs.

14 But nevertheless, she fills out her paperwork,
15 checks her boxes. And in that short, brief period of
16 time that Calvin Hunt's her responsibility, she does
17 what she needs to, to make sure the records are clear
18 that this man is depressed, withdrawn, and suicidal.
19 And then, she walks him down the hall and passes him off
20 to her husband, Joe McDonald.

21 Now, she tells her husband some of what she knows,
22 even though she's got Mr. Hunt to answer some questions
23 about how he's been doing in the past two weeks, whether
24 he was down, depressed, or hopeless; whether he had a
25 little interest or pleasure in doing things; she says,

1 you know, I don't think -- I don't think he's suicidal;
2 I think he's angry. Angry.

3 There's been a lot of testimony in this case from a
4 couple of witnesses that angry does not mean the same
5 thing as calm. I think we can all agree on that. I
6 think we all know that. This was an angry man, off his
7 medications, reporting to an emergency room with
8 thoughts of hurting himself.

9 Now, even though Nurse Janice is afraid of the man,
10 really doesn't want to spend all that much time with
11 him, we heard testimony from Nurse Janice's husband, Joe
12 McDonald, who was treatment nurse, and there was some
13 sort of nonsense said in here about how he would have
14 Calvin Hunt over for dinner. I don't know if his wife
15 would like that too much or not.

16 But he fills out his paperwork, too, although, he
17 admits that, even though he's the only patient there in
18 the emergency room, Calvin Hunt, the only patient there
19 in the emergency room, the only patient that Nurse Joe
20 McDonald has to tend to, that, well, you know, some of
21 the times might be a little off. Wasn't real detailed
22 in my record keeping that day. All right, we said.

23 What did Nurse Joe McDonald say. He received the
24 report from triage, so he at least acknowledges in the
25 record that his wife told him some things about this

1 man, about Calvin Hunt. He noted that a medical doctor,
2 Dr. Jansen, went in and started talking the man. And he
3 notes, importantly, somewhere around 3:10 or 3:20, that
4 Dr. Jansen makes a telephone call over to Beaufort
5 Memorial to the psyche ward to see if they've got a bed
6 available.

7 Subsequent entries down here, Nurse Joe says, well,
8 the times might be a little off; even this time, it's
9 1510, 1520; not really sure. But he told you that he
10 was writing these as a sequence. So, at least according
11 to the sequence, that telephone call that Dr. Jansen
12 made, according to the record, was made before Psyche
13 Tech Manning ever showed up.

14 Let's talk a little bit about Psyche Tech Manning.
15 This is an enlisted man in the Marine Corps. He's not a
16 doctor, not a nurse. He's a corpsman. That's what he
17 went to A School to learn to do. And when his
18 deposition was taken, his deposition was actually taken
19 out in Hawaii. I didn't get to go. None of us actually
20 got to go. We did that by telephone.

21 But Mr. Manning testified that he didn't spend all
22 that much time with Calvin Hunt, but when he interacted
23 with him, he thought he was agitated. And he went
24 upstairs to share with others his report of what it was
25 he had observed how his own two eyes about Calvin Hunt.

1 He made clear he wanted to come back downstairs with
2 somebody else, because he didn't want to be alone with
3 Calvin Hunt.

4 Now, Nurse McDonald, Nurse Joe McDonald, though,
5 keeps writing things up as if everything's hunky dory.
6 Notes that Psyche Tech Manning's evaluation's in
7 progress. Notes that Calvin Hunt goes by himself fully
8 clothed to the bathroom.

9 Nurse Joe McDonald had access to his wife's medical
10 records. Had access, presumably, to everything it was
11 his wife knew. There's some evidence in this record
12 that he could have pulled up the records from Sandra
13 Smith. But inexplicably, some 50 minutes after a phone
14 call is made to see if there was a bed on the psyche
15 ward that Calvin Hunt can rest his head on later that
16 day, Nurse Joe McDonald gets asked a question, and you
17 all know that question is: can we go outside for a
18 breath of fresh air.

19 And Nurse McDonald didn't channel Nancy Reagan; he
20 didn't use good, old-fashioned common sense. He didn't
21 say no. He said yes.

22 You heard testimony from Joe McDonald himself that,
23 if he had known certain things, his answer would have
24 been different. It wouldn't have been a simple yes;
25 that he would have told him no.

1 We'll come back to Dr. Jansen in a minute. He was
2 our next witness. I'm sure you all have forgotten about
3 Dr. Jansen.

4 Nurse Joe McDonald had the opportunity,
5 unequivocally, to give direction to Calvin Hunt a few
6 minutes before the hour of 4:00 on February 24, 2012, as
7 to whether or not he could leave the emergency room.

8 You heard testimony from a man who's been
9 practicing medicine for 40 years. He's got a whole
10 bunch of credentials after his name. He's the current
11 president of one of the largest societies that emergency
12 doctors belong to. He practiced here in South Carolina.
13 He practiced up in Maryland. Still treating patients in
14 the emergency room. Actually treated patients in the
15 E.R. this week. And he also makes a little bit of money
16 testifying in cases like this.

17 Dr. Baker took the witness stand and was pretty
18 clear that Nurse Joe McDonald simply needed to say no,
19 and that he needed to warn Calvin Hunt of why he was
20 answering the question in the no. That he needed to
21 tell Calvin Hunt that you are here in the emergency
22 room; off your anti-psychotic medications; and you have
23 thoughts of harm; and if you leave the safety and
24 security of the emergency room, you might do those
25 things; so, let's just stay here.

1 That's what Dr. Baker said Nurse Joe McDonald
2 needed to do. Said that it was careless and reckless
3 for this nurse to say yes, when he should have said no.

4 Now, shortly after Dr. Baker testified, the
5 defendant brought in a nice, young fellow, a Dr. Oberg
6 from North Charleston. You heard testimony from Dr.
7 Baker that he had previously done some work for Mr.
8 Mackelcan and Mr. Lovell's firm, but I guess he wasn't
9 available for this case. So, the Defendant brought in
10 Dr. Oberg.

11 And Dr. Oberg's been a board-certified, emergency
12 room doctor for five years. And as a good, young
13 professional ought to do, he still consults the books
14 from time to time. He told you about how he takes his
15 iPad to work, and he looks on his iPad when he needs
16 certain information. And even though Dr. Oberg sat up
17 there on that witness stand, and for a good long while,
18 defended what Nurse Joe McDonald said, you saw on this
19 screen right here yesterday the plain text of a textbook
20 that Dr. Oberg first read in medical school, a textbook
21 he keeps on his iPad to this day, consults a couple of
22 times a week. And the text of that book was clear,
23 that, until the patient is admitted or discharged,
24 somebody with suicidal ideations cannot leave the
25 emergency room. Suicidal ideations is a baseline

1 matter. If that's what the patient is in for, until
2 they are admitted or discharged, you don't let them
3 leave.

4 Now, that's not all that was known in the emergency
5 room on that fateful Friday. Many of you all remember
6 Dr. Jansen. I don't know if Dr. Jansen likes me or not.
7 I don't think he does. But regardless, Dr. Jansen came
8 here and testified about what it was he did that day,
9 what it is he knew.

10 He knew that this man, at 2:50 in the afternoon,
11 had suicidal thoughts; had depression; and was in need
12 of some medication. Dr. Jansen didn't consult any past
13 medical records to find out why it was this man had been
14 prescribed Seroquil. He just relied on what Nurse
15 Janice had written in the previous record. But he did
16 note that these thoughts continued in the emergency
17 room; that they had charted several weeks ago with a
18 gradual onset; and that they were severe. He noted that
19 this young man was appealing a dishonorable discharge
20 from the service; and that he was depressed and angry.

21 I believe this is now the third person in the
22 emergency room to describe Calvin Hunt as angry. And
23 Dr. Jansen notes that, in addition to having thoughts of
24 hurting himself, this man, Calvin Hunt, also has
25 thoughts of hurting others.

1 Now, a lot of questioning and a lot of time has
2 been spent on whether or not Calvin Hunt had a specific
3 plan. My friends who represent the Defendant in this
4 case have asked a lot of questions about a plan. But
5 just looking at our time line, we know that the thoughts
6 of harming others was entered at 2:50 in the afternoon,
7 and that the permission granted by Joe McDonald for
8 Calvin Hunt to leave was almost an hour later.

9 There's nothing that says you can't develop a plan
10 in an hour. More importantly, there is nothing,
11 nothing, that suggests that Calvin Hunt didn't have a
12 plan and just didn't tell anybody about it. Because the
13 records also show in this case that Calvin Hunt didn't
14 recall his Social Security Number; that he was
15 disoriented with respect to that; and according to Dr.
16 Jansen, was poorly communicative. In Dr. Jansen's mind,
17 this was somebody that he could not get a sufficient
18 history from. Calvin Hunt didn't tell him.

19 Apparently, according to this record typed up at
20 4:40, after the horrific events out on Ribalt Road, all
21 Mr. Hunt could say was that he wanted his medications
22 refilled, medications that, at least according to the
23 testimony in this courthouse, Mr. Hunt wasn't able to
24 fully identify.

25 Dr. Jansen was unable to get that sufficient

1 medical history, even though he wrote, *see prior medical*
2 *notes from Mr. Ray.* Were those the inch-to-an-inch-and-
3 three-quarter stack of records that Nurse McDonald
4 recalled? We don't know. Dr. Jansen tried very hard
5 from that witness stand to distinguish medical records
6 from the medical notes. At the end of the day, I don't
7 think it matters, because whatever they were, Dr. Jansen
8 didn't look at them. He kept filling out his paperwork.

9 He noted that Mr. Hunt appeared anxious. He noted
10 that elevated heart rate. He noticed the depressed
11 affect. And he noted that this man, a then active duty
12 Marine, suffered from depression and PTSD.

13 Now, you subsequently heard testimony, after Dr.
14 Jansen finally left the witness stand, from Dr.
15 Hendelman, the staff psychiatrist. Dr. Hendelman never
16 actually laid eyes on Calvin Hunt. According to her,
17 she didn't need to. And the reason was, it was obvious
18 that this patient needed to be admitted. That was her
19 testimony. Her unequivocal testimony that you heard was
20 that the second that Nurse Janice McDonald noted
21 suicidal ideations, that, that, in and of itself, was a
22 requirement for admission.

23 According to Dr. Handelmann, this man needed to go
24 to an inpatient psychiatric bed, based on that
25 information alone.

1 The fact that Dr. Jansen also noted that he had
2 thoughts of hurting others, that also was a requirement
3 for admission. Dr. Hendelman identified three states of
4 mind that require admission of a person to a psychiatric
5 bed in a hospital: suicidal ideations, homicidal
6 ideation, or gravely disabled. Don't need all three.
7 Don't need two of the three. You just need one. And
8 this man had two to them.

9 Dr. Hendelman thinks it's obvious that this man
10 needed to be admitted. She also offered some testimony,
11 which you heard, about whether or not this man needed to
12 be kept under close watch until such time as he could be
13 admitted. There was testimony from Dr. Hendelman as to
14 whether or not he should have been allowed to leave the
15 emergency room. And she concurred with that textbook
16 that Dr. Oberg keeps on his iPad. She concurred with
17 Dr. Baker. And she concurred with what I submit is
18 good, old fashioned common sense; that the answer as to
19 whether or not this man needed to be turned loose was a
20 simple no. He needed to be kept safe. He needed to be
21 told no. He needed to be warned.

22 Now, we talked earlier about some times perhaps
23 being off on Nurse Joe McDonald's time line. And we
24 know that two of those times don't always match up with
25 Dr. Jansen's notes. Nurse Joe McDonald says there was a

1 telephone call to the hospital over at Beaufort Memorial
2 to see about a bed at 10 or 20 minutes after the hour of
3 3:00. Dr. Jansen, in his record, reflects that, that
4 was an hour later. But yet, when Dr. Jansen realizes
5 that something horrific, horrible, and traumatic has
6 happened out on Ribalt Road, and he decides to type up a
7 memorandum at 4:40 in the afternoon, about 23 minutes
8 after Justin Miller was pronounced dead, he puts his
9 thoughts in order and he notes that, even before Mr. Ray
10 came back to say that Calvin Hunt had run away,
11 presumably in his underwear, out the front gate of the
12 Naval Hospital, he had figured out that Calvin Hunt
13 wasn't in that itty-bitty emergency room. And he asked
14 his nurses, Joe and Janice, and the psyche tech to look
15 for the patient, and to notify security and the front
16 desk.

17 Why would Dr. Jansen do that? Edward Ray hadn't
18 come back. All Dr. Jansen would have known at that
19 point in time is that Nurse Joe McDonald had said that
20 the patient could leave. But Dr. Jansen wanted him
21 tracked down and brought back.

22 You'll be charged, ladies and gentlemen of this
23 jury, later, hopefully this morning, more likely this
24 afternoon, about certain matters of law, and I'm not
25 going to presume to do what the Judge has the solemn

1 obligation according to her oath that she needs to do.
2 But one or more of the charges that you will hear will
3 deal with the issue of foreseeability, the question of
4 whether or not the events that transpired on Ribalt Road
5 involving Calvin Hunt could have been reasonably
6 foreseen.

7 Now, I will tell you that, in the charge you will
8 hear from the Judge, there is not going to be any
9 requirement that the specific harm, in other words,
10 Justin Miller being hit and killed by a fire truck, had
11 to be reasonably foreseen. Rather, the harm that had
12 to be foreseen was the general harm, the harm of hurting
13 others. The harm that Calvin Hunt, at 2:50 in the
14 afternoon, informed Dr. Jansen he was having thoughts
15 of.

16 Quite frankly, ladies and gentlemen, it doesn't
17 matter for purposes of the law whether or not Calvin
18 Hunt, after he expressed those thoughts, left the
19 hospital and hurt somebody with a gun, a knife, or the
20 strap of a lady's pocketbook. The central question with
21 respect to foreseeability is whether or not, in light of
22 all of the information that the three people in that
23 emergency room knew or should have known, whether or not
24 they could have reasonably foreseen that a United States
25 Marine, trained to be resourceful when needed, trained

1 to improvise when needed, who was off his anti-psychotic
2 medication, who was agitated, angry, and just not acting
3 right, would actually follow through with what it was he
4 said he had thoughts of doing, and that's hurting
5 others.

6 The others, of course, weren't identified by name.
7 Calvin Hunt didn't show up to the emergency room at the
8 Naval Hospital in Beaufort with a Beaufort phone book.
9 He didn't have names highlighted. But ladies and
10 gentlemen, other than perhaps members of the grand jury
11 and law enforcement in this community, you are the only
12 people who have seen the video that was shown the other
13 day here in court of the carnage and rampage that Calvin
14 Hunt brought about on Ribalt Road.

15 Do you recall that horrific video that starts off
16 with the fire engine traveling at a normal rate of
17 speed, because it's being driven by firemen, people who
18 serve this community by fighting fire and tending to
19 people in need. It's driven at a normal speed.

20 And then, after the firemen leave to go do their
21 medical call, the truck just sits there for some period
22 of time, and then, something changes. It's no longer
23 being driven by a fireman. It's, apparently, being
24 driven by Calvin Hunt, someone who, minutes earlier, had
25 been in an emergency room looking for help, looking for

1 care. He was in a safe place, or a place that should
2 have been safe.

3 Calvin Hunt is in a fire truck, making a three-
4 point turn in a tight apartment complex parking lot
5 before he goes out on Ribalt Road. And he's driving,
6 initially, at a high rate of speed before, if you'll
7 think back to the video, making a sudden u-turn.

8 He then drives down Ribalt Road, past the Laurel
9 Hill Apartments, which he obtained the fire truck. And
10 then, you see him approach the intersection of Lady's
11 Island. And you saw him not one, not two, not three,
12 but some five vehicles that he struck with that fire
13 truck. This was a man off his medication, with severe
14 mental illness, who was doing exactly what he had told
15 medical providers less than two hours earlier he was
16 having thoughts of doing, and that's hurting other
17 people.

18 Our video that we played here in court stopped a
19 few minutes before impact. I shouldn't say a few
20 minutes. I apologize. A few seconds before impact.
21 But the video that you all saw, and this is the last
22 screen shown here in court, clearly showed the fire
23 truck crossing the centerline to strike a pedestrian.
24 Somebody literally walking across the street. An
25 innocent person.

1 This wasn't an accident. This was intentional.
2 And you heard yesterday the Court take judicial notice
3 of an order, an order that was entered right here in
4 this very courtroom by one of the resident judges here
5 in this circuit, an order that stated that, at the time
6 Kalvin Hunt did this, he did not know the legal
7 difference, did not know the difference between legal
8 right from legal wrong or moral right from moral wrong.
9 And therefore, as a matter of law, was not guilty by
10 reason of insanity.

11 The coroner, on the death certificate, which Dr.
12 Caplan had with him here, said that death occurred at 17
13 minutes past the hour of 4:00. If you believe Nurse
14 Jansen's [sic] notes about when Dr. Jansen called over
15 to Beaufort Memorial to inquire about a psyche bed,
16 that's almost exactly an hour later.

17 Now, the claims in this case are pretty simple.
18 You've heard from others, both in opening statement and
19 through some of the testimony, that Plaintiff did not
20 plead this as some sort of standard-of-care case,
21 whatever that is, but rather pled this case as what's
22 known as an ordinary negligence. And the Judge, in her
23 charge to you, will talk to you about what negligence
24 is.

25 In addition, one of the claims that Plaintiffs have

1 pled in this case, is that the Defendant not only was
2 negligent by and through its three employees, but that
3 the Defendant was negligent in continuing to retain, or
4 hire, keep on the payroll, keep getting paid, Dr.
5 Jansen.

6 There has been a lot, a lot, of testimony in this
7 case, and I apologize for it, about this whole issue of
8 employment. That's actually going to be one of the
9 questions that you all aren't going to have to decide,
10 because of some legal matters that were addressed here
11 in this courtroom earlier this morning, before you all
12 came out to the jury box.

13 Nurse Joe, Nurse Janice, and Dr. Jansen are all
14 employees of CasePro. I think that's been shown to you
15 all repeatedly through the personnel records and through
16 their testimony. But the bigger issue, I think, with
17 that is that, up until this morning, CasePro,
18 Incorporated, the Defendant that's involved in this
19 case, didn't want to take responsibility for the three
20 people that they were giving a paycheck to, to be in
21 that E.R. that fateful Friday.

22 I would submit to you that a reasonable person
23 could wonder if those three people did nothing wrong,
24 Nurse Janice, Nurse Joe, and Dr. Jansen, then, why does
25 it matter who's responsible for what they did or didn't

1 do? But that was one of the big fights that took place
2 in this courtroom. That was the reason some of these
3 witnesses that you all heard from the witness stand and
4 on the televisions had to testify. That's the reason
5 certain documents had to come into evidence. Because
6 there was a dispute as to whether or not this company
7 that had a contract that had its employees present in
8 the emergency room, could wash their hands of these
9 three people and say we have no responsibility for them.
10 In other words, we just want to keep the economic
11 benefit and have no responsibility.

12 I'm reminded of a story. It's actually a story
13 about a good friend of mine who was a trial lawyer in
14 the state. He did what I did. He did it a lot better,
15 I'll be honest with you. And he had a case where a
16 child had gotten bit by a dog. And the defendant came
17 into court, said, well, my dog don't bite. And when
18 that got proved up through the testimony and the
19 documents and the evidence that just wasn't true, there
20 was just no way to defend that.

21 The defendant then decided, well, maybe, maybe the
22 child didn't get bit by a dog; that it also got bit by
23 somebody else's dog.

24 And then, after testimony and evidence and
25 witnesses, when that turned out not to be true either,

1 the third thing the defendant said, well, my dog may
2 have bit you, but you didn't get hurt all that bad.

3 I think that's some of what's been going on here.
4 There has been a dispute about whether or not these
5 three people belonged to CasePro. And ladies and
6 gentlemen, based on the ruling here today, that dog's
7 not going to hunt, because, it's without question that
8 all three of these people are CasePro's employees, and
9 that CasePro is responsible for what they did or didn't
10 do.

11 Now, let's talk a little bit more about Dr. Jansen.
12 Dr. Jansen talked a little bit about the oath he took to
13 be a good doctor. But he, apparently, also took an oath
14 at some point in time to be a citizen. He just doesn't
15 remember when, and wouldn't put it past me to,
16 apparently, doctor up his citizenship papers.

17 But Dr. Jansen wasn't one of these incumbent
18 employees who just carried over from the prior
19 contractor with CasePro at the Naval Hospital. He had a
20 break in service. He had to work somewhere else. He
21 had to go over to Varnville in Hampton County and be an
22 E.R. doctor there for some period of time.

23 And Dr. Jansen, after he completed the citizenship
24 course he tells which he couldn't remember or didn't
25 recall or something like that, gets hired on by CasePro.

1 And he works for them for a year and a half, almost two
2 years, getting his paycheck from them, sending them
3 emails about his 401(k) match, and how much time off
4 he's going to get, and how much money they're going to
5 reimburse, so that he can keep his license up to date
6 with his continuing medical education criteria, all
7 sorts of stuff. That is in his personnel file as
8 Exhibit 22.

9 And then, something happens. Something happens
10 long before our story and our case begins. There's
11 information that you all heard about from Craig Martin
12 on the videotape and from documents and that exhibit I
13 just held up, that Dr. Jansen was involved in the
14 unfortunate death of a United States Marine. This
15 Marine came into the emergency room in 2009, and he
16 didn't come on with some sort of invariably fatal
17 disease, like mesothelioma, which you see advertised on
18 the television. He didn't come in with some rare form
19 of cancer that was going to require him to be sent to MD
20 Anderson or Harvard or some sort of world-renowned
21 treatment center. He came in with an infection. It's
22 called sepsis, an overwhelming infection of the body.
23 And Dr. Jansen actually laid hands on that young Marine,
24 but he didn't diagnose the infection; he didn't
25 prescribe any antibiotics. And that young man, that

1 United States Marine, passed away.

2 A chart review is done, kind of like what you all
3 are doing. A chart review is done right here in
4 Beaufort by another one of CasePro's employees. Gets
5 his paycheck just like Dr. Jansen does. By a fellow by
6 the name of Scott Moore. And Scott Moore is so bothered
7 and concerned and worried about what it is he sees in
8 those charts that belong to this United States Marine
9 that he just doesn't fill out paperwork, he doesn't just
10 check boxes, he calls somebody on his cell phone. Calls
11 Craig Martin, who testified that he was traveling back
12 from somewhere back to the corporate office in Texas.
13 And he tells Craig Martin that he has grave concerns
14 about Dr. Jansen. He believes that Dr. Jansen, in this
15 particular instance, all the way back in 2009, wasn't
16 able to meet the standard of care.

17 Now, if you remember Craig Martin's testimony, he
18 told you all on the videotape that, prior to Scott Moore
19 calling him up about this dead United States Marine,
20 there had been some complaints from a nurse about how
21 Dr. Jansen was sleeping too much. And then, he said,
22 well, there are beds, you know, for the physicians. You
23 all were paying attention to the testimony. Just about
24 everybody who came up here said that this was a four-bed
25 E.R. Dr. Jansen referred to it as a five-bed E.R. I

1 guess one of those beds was for him.

2 But having previously gotten complaints about Dr.
3 Jansen doing more sleeping than being a doctor, Mr.
4 Martin takes these concerns seriously. A dead United
5 States Marine is not a good thing. And he goes right to
6 the president of the company, his boss, down the hall,
7 Mr. McCabe, and talks to him.

8 And you heard testimony both from Mr. McCabe and
9 from Craig Martin. Now, there was no impeachment of Mr.
10 Martin on the videotape. Everybody accused him in his
11 deposition of having an ax to grind or of making things
12 up. You didn't hear any of that. Instead, what came
13 out from Mr. Martin was cold, hard truth.

14 Mr. Martin told you all that he didn't want his
15 wife to be treated by Dr. Jansen. He didn't want to be
16 treated by Dr. Jansen. He wouldn't want Mr. McCabe to
17 be treated by Dr. Jansen. He wouldn't even want a
18 uniformed member of our service treated by Dr. Jansen;
19 and that, if the decision had been up to him, as the
20 program manager, instead of the chief executive officer
21 of the company, in 2010, he would have told Dr. Jansen
22 to get gone.

23 But as we know, that didn't happen. No good
24 explanation has been brought forth in this courtroom
25 from any witness, including the president of the

1 company, as to why they didn't get rid of him, of this
2 bad doctor.

3 I respectfully submit to you, ladies and gentlemen,
4 that, because Dr. Jansen didn't get gone in 2010, that's
5 why Justin Miller is no longer with us today.

6 Dr. Jansen told you from this witness stand up here
7 that he and he alone was the person in charge of that
8 emergency room on that fateful Friday. He told you that
9 he was analogous to the captain of the ship. Didn't
10 quite know what a quarterback was, but he was the
11 captain of the ship. Any decisions that were going to
12 be made in that emergency room about the care and
13 treatment of the patients, they weren't coming from some
14 other doctor elsewhere in the emergency -- elsewhere in
15 the Naval Hospital. There was nobody there holding his
16 hand, telling him what diagnosis to make or what
17 treatment to give or what medications to prescribe. He
18 was clear. It was his decision. And that would be true
19 with respect to whether or not to admit a patient.

20 There's lots of E.R. doctors out there, but you saw
21 through his personnel file how much Dr. Jansen was
22 getting paid. And you also saw in the task order how
23 much CasePro was getting paid by the government to have
24 him there. I respectfully submit that you all are smart
25 enough to reach your own conclusions as to why CasePro

1 kept Dr. Jansen on the payroll, instead of telling him
2 to get gone.

3 Mr. McCabe, though, wanted more proof. Just wasn't
4 enough proof.

5 We're talking about that three-dog story. Dog
6 doesn't bite; bit by someone else's dog; didn't get hurt
7 all that bad. Let's talk a little bit more about this
8 somebody else's dog. We know that these folks were
9 CasePro employees. They're getting their paycheck from
10 them. They're really not, somehow, the Navy's
11 responsibility. But there's been testimony elicited in
12 this courtroom that, either explicitly or implicitly,
13 tries to blame other people.

14 Let's start with the 911 dispatchers. Did you all
15 hear some funny questions asked of her? How quickly was
16 help dispatched? Where was help sent to? It's not the
17 Sheriff's Office fault that they couldn't set up some
18 sort of massive roadblock to keep a fire truck from
19 going down Ribalt Road. Nobody there had knowledge
20 about Calvin Hunt and about all of his mental health
21 issues, and that he had thoughts that day, that
22 afternoon, within mere hours, if not minutes of this
23 horrific tragedy occurring, that he had thoughts of
24 hurting others. Those three did, but nobody answering
25 911 calls at the Dispatch Center.

1 There were some questions asked of the fire chief
2 of this community, perhaps either to implicitly or
3 explicitly blame the fire department. And our fire
4 chief told us that, if the fire truck had been cut off,
5 the battery had been powered down, the Dispatch units of
6 the two firemen attending to a medical call in the
7 senior housing wouldn't have worked. Not a good thing
8 to have firefighters who can't communicate.

9 So, I guess the only other person left for the
10 Defendant to blame would be Calvin Hunt, somebody that
11 was brought to their facility, to the emergency room
12 they were staffing, for help.

13 You heard the Court take judicial notice of certain
14 matters. I've already talked to you about those.

15 But who was in a better position that day? Those
16 three? Or Calvin Hunt? Somebody who got committed to
17 the Department of Mental Health subsequent to a
18 proceeding here in this courthouse? Or persons who took
19 an oath to keep people safe? People who had knowledge
20 that this was a man looking for a refill of something
21 known as Seroquil. Hadn't been on it for quite some
22 time. Somebody who had PTSD and alcohol and drug
23 dependent issues.

24 Now, we've been looking at these records, gosh,
25 almost for nine days, it seems like. Dr. Jansen didn't

1 order any type of tests to figure out what drugs or
2 alcohol Calvin Hunt might have been on that day, so we
3 don't know. But they knew he suffered from depression;
4 there'd been a prior suicide attempt; that he had an
5 altercation with his superior; and that, as a result of
6 that, he was appealing a dishonorable discharge from the
7 service.

8 They knew he was angry, anxious, and partially
9 disoriented, at least with respect to his Social
10 Security. We've seen before this record that he was
11 poorly communicative.

12 Who was in a better position? A mentally ill man?
13 Or the people who should have helped him? The people
14 whose obligation was to keep him safe and to warn him
15 that he needed to stay exactly where he was.

16 In a few moments you will hear from the Defendant's
17 counsel, and then, I will get the opportunity to speak
18 to you again. The Judge will charge you on the law.
19 Then, you will go back to that jury room and begin your
20 deliberations.

21 I've never been on a jury. I really would like to
22 be on a jury some day, but I don't know that I could
23 make it through the process that you all went through
24 last Tuesday. They'd probably have me out of here by
25 11:00 o'clock or so.

1 But back there in that jury room, you're going to
2 have all of the evidence, the paper evidence that has
3 been put forward at this trial. You're going to have
4 all these records. You're going to have all the
5 personnel files. You're going to have a lot of things
6 that you're looking at in front of you here. And each
7 of you are going to have the ability to talk to each
8 other, and to form the consensus to speak as one voice
9 as the conscience of this community.

10 When you're back there in that jury room, and
11 someone tries to tell you that the CasePro personnel
12 were somehow justified or right to not warn Calvin Hunt
13 he needed to stay there, I want to remind you of the red
14 flags.

15 He was poorly communicative. He was going through
16 a rough patch as a result of a dishonorable discharge.
17 he was depressed and angry. He had severe suicidal
18 thoughts, depression that had been going on for several
19 weeks. The last two weeks he felt down, depressed,
20 hopeless, had little interest or pleasure in things, and
21 he was out of his depressed, moody meds. All the
22 information was there.

23 And then, at some point in your deliberations, I
24 imagine that some people might start discussing the
25 concept of money. And I apologize for that. I really

1 wish that, instead of awarding some sort of money
2 damages, that juries in a wrongful death case could
3 bring a loved one back to life. I wish that was
4 possible. I wish that there was something more that
5 twelve jurors could do than merely indicate on a line
6 that someone or some entity is responsible for a
7 specific harm and reflects that responsibility by
8 putting a specific number on a line.

9 But that's the task that you all are going to be
10 given to do, subject to your oath, sitting here on
11 behalf of the community.

12 And you will hear later from the Judge about the
13 elements of the damages in a case like this, a case
14 involving the wrongful death of an innocent person.
15 You're going to hear about elements such as shock,
16 suffering, wounded feelings, grief, and sorrow.

17 Those are emotional damages, emotions that take
18 place regardless of your educational level, regardless
19 of where you grew up, regardless of how sophisticated
20 you are, regardless of who you might be, those are
21 emotions that are as natural and as human as anything
22 that we know.

23 You heard testimony about the shock of finding out
24 that this terrible tragedy had taken place, the
25 disbelief, the horror, the inability to comprehend that

1 someone's life could come to an end by making contact
2 with a fire truck.

3 You have heard about a broken heart. You've heard
4 about love that continues. You've heard about the
5 inability to say goodbye.

6 I wish we weren't talking about money. And I'm not
7 going to stand up here and look you in the eye and tell
8 you any kind of number or anything like that, but I'm
9 going to remind you of this. That this whole discussion
10 of money began when a decision was made, gosh, some five
11 years ago, when a decision was made that it was better
12 for a corporation to keep a doctor on its payroll than
13 to tell him to get gone.

14 And I respectfully submit to each of you ladies and
15 gentlemen that the verdict that you all return in this
16 case, the form that you fill out and that you walk back
17 through that door later today, will send a message. It
18 will send a message on behalf of this community with
19 respect to how you --

20 MR. MACKELCAN: Objection, your Honor. Improper.

21 THE COURT: Sustained.

22 BY MR. HOYLE:

23 MR. HOYLE: When you return that verdict later
24 today, it will be published here in open court, and it
25 will be heard by all of those present. It will be heard

1 by the Plaintiff --

2 MR. MACKELCAN: Objection, your Honor. Same
3 objection.

4 THE COURT: Overruled, but be careful. Just people
5 will hear it in the courtroom. I mean, it will be
6 announced, but beyond that.

7 BY MR. HOYLE:

8 MR. HOYLE: It'll be heard by everyone here in the
9 courtroom. I even believe it'll be heard, maybe
10 directly or indirectly, by the three people on February
11 24, 2012, who had all of the information that they knew,
12 all of the information that they should have known, to
13 prevent this terrible tragedy from taking place.

14 Thank you.

15 THE COURT: Ladies and gentlemen, it's a stand-and-
16 stretch. Oh. Is that enough? Do you all need to take
17 a -- does anybody need to take -- some of you all? Who
18 needs a break? Morning break? Need a comfort break?

19 You are not prepared to deliberate. We're in
20 closing arguments. Do not discuss this matter or allow
21 anyone to discuss it with you. When you have finished
22 your comfort break, ladies and gentlemen, I wait on your
23 return. Leave your notebooks in your seat.

24 JURORS LEAVE COURTROOM 12:20 P.M.

25 THE COURT: All right. We'll take our comfort

1 break. But don't go far, because we'll be able to start
2 right up when our jury let's us know we are ready --
3 they are ready.

4 OFF THE RECORD 12:21 P.M.

5 BACK ON THE RECORD 12:36 P.M.

6 BAILIFF: All rise. Court is now back in session.

7 THE COURT: Okay.

8 BAILIFF: Are you ready, your Honor?

9 THE COURT: Yes.

10 BAILIFF: Jury's entering the courtroom now.

11 THE COURT: Great.

12 JURORS ENTER COURTROOM 12:38 P.M.

13 THE COURT: All right. Ladies and gentlemen, Mr.
14 Mackelcan.

15 CLOSING ARGUMENT ON BEHALF

16 OF DEFENDANT, BY MR. MACKELCAN:

17 MR. MACKELCAN: Ladies and gentlemen of the jury,
18 the issue in this case is not whether Calvin Hunt had
19 mental health issues. He did. All of the medical
20 witnesses testified to that. The issue in this case is
21 also not whether Calvin Hunt had his wits about him when
22 he stole that fire truck and caused all the harm that he
23 caused. It's fairly clear that, at that time, he
24 didn't.

25 The issue in this case is whether, upon

1 presentation to the emergency department at the Naval
2 Hospital at 2:15 in the afternoon, during that time and
3 4:00 o'clock, whether the signs and symptoms were
4 present for the average, ordinary person off the street
5 to reasonably foresee that Calvin Hunt would walk out of
6 that emergency room to get a fresh air with his escort
7 and not come back for the remainder of his treatment.
8 That's the issue in this case.

9 There's a lot out here to confuse you about what
10 this case is about. That's what this case is about.

11 When we started, Gary talked about some of our
12 themes. Medical judgment versus ordinary care. This
13 has been pled as an ordinary care case. You've heard
14 Mr. Hoyle talk about that. What that means is the
15 standard by which you hold the conduct of Joe McDonald
16 and Janice McDonald and Dr. Jansen is to that of the
17 ordinary person in the same or similar circumstances.
18 It's not a standard -- you do not hold the McDonald's to
19 the standard of an R.N. with 20 years of experience.
20 You're not holding Dr. Jansen to the standard of a
21 board-certified medical doctor with 35 years of
22 experience. It's a standard of the average person.

23 Next, we're going to talk about the signs and
24 symptoms present versus not present. And we've heard
25 witness after witness. Plaintiffs have had their boards

1 with their things highlighted. Defendant has had their
2 board highlighted.

3 But again, the issue is not whether or not Calvin
4 Hunt had mental illness. He had depression. He had had
5 medication. That's why he was there. The issue is
6 whether he presented on that day, February 24, 2012, as
7 someone who was a flight risk; as someone who didn't
8 want treatment; as someone who was such a threat of harm
9 to others, that this duty to warn may have been created
10 or this duty to keep him under close watch.

11 Plaintiff's expert got up here and said that -- I
12 think he used the term *careless disregard*. I think one
13 of the things you have to think about was Janice
14 McDonald carelessly disregarding Calvin Hunt? Was Joe
15 McDonald carelessly disregarding Calvin Hunt? Was Dr.
16 Jansen carelessly disregarding?

17 Patients' rights. Mr. Hunt was a Marine. He was
18 there to get help. He was there voluntarily. He was
19 there with a family friend. He had met that family
20 friend at 10:30 that morning, and they had gone their
21 separate ways, and gotten back together at about 1:30 at
22 the Naval Hospital for treatment.

23 Mr. Ray was the Veterans Affairs Officer for
24 Beaufort County. He had dealt with veterans. That was
25 his job. He knew what to look for, and he was there to

1 help Calvin Hunt. He was with Calvin Hunt every step of
2 the way. The only time he was not physically able to
3 see Calvin Hunt was when Dr. Jansen was evaluating. I
4 believe they said that the curtain was pulled. When
5 Manning was evaluating Hunt, I believe the curtain was
6 pulled. But Mr. Ray was standing right outside of the
7 curtain.

8 They calmly walked outside together after Mr. Ray
9 asked Joe McDonald if they could step outside for a
10 breath of fresh air.

11 Foreseeability, I've already talked about that. I
12 won't repeat myself. The key is being able to
13 reasonably foresee that Calvin Hunt was not going to
14 come back in and continue his treatment.

15 You heard at the beginning about the burden of
16 proof. Plaintiff has the burden of proof. We talked
17 about tipping the scales, the preponderance of the
18 evidence. The Plaintiff must prove the case to a
19 preponderance of the evidence. And keep that in mind on
20 every issue.

21 When you go back and you start deliberating, you're
22 going to have a series of decisions to make. And if, at
23 every step of the way, you say no, you have to find for
24 the Defense. We can all go home.

25 And that first question that you have, we talked

1 about already. Is this a medical negligence case, or is
2 this an ordinary negligence case? If you decide that
3 this is a medical negligence case, we go home.

4 If you decide that it was not reasonably
5 foreseeable under the circumstances, that Calvin Hunt
6 would run away from Mr. Ray at some point after they
7 stepped outside of the E.R., race through the gate of
8 the -- the security gate at the Naval Hospital, and
9 cause harm, there's no duty. We go home. We're going
10 to come back to that.

11 We talked a little bit about -- and you've heard
12 this over and over, over the last couple of weeks.
13 Calvin Hunt and Mr. Ray walk in; they go up to the
14 second floor to see if Calvin Hunt can speak with the
15 doctor about getting some medication. They come in.
16 They speak with Koren Pope. Her words that she used to
17 describe him, he was neat, he was calm, he was normal,
18 he was quiet, he followed direction, and he had normal
19 voice volume and tone. None of this behavior concerned
20 her about her safety.

21 Sandra Smith testified that Mr. Hunt stood up when
22 she entered the room, and they went back. He indicated
23 that he needed medication refills for sleep and anxiety.
24 She asked him, do you want to have an appointment for
25 Monday, or do you want to go to the E.R. right now. He

1 said I'll take the appointment Monday.

2 She didn't think there was anything abnormal about
3 that until he -- and using her words -- one slight
4 rocking motion and sigh of exasperation.

5 She followed up and asked if he had thoughts of
6 hurting himself. He said that he did. And she said,
7 well, let's go down to the E.R. There was no
8 resistance. There was no disagreement. Calvin Hunt
9 simply got up with Edward Ray. They walked from the
10 Medical Homeport on the second floor, down to the
11 emergency room, where they stood outside of the
12 emergency room in the hallway.

13 Sandra Smith makes the hand-off to Janice
14 McDonald. Importantly, you've seen, and you saw early
15 this morning, the note that Sandra Smith created.
16 There's been a lot of talk about that and a lot of talk
17 about the problem list on the first page.

18 That note was generated at 3:56 p.m. on February
19 24, 2012. The emergency room did not have that note.
20 Sandra Smith only told Janice McDonald that Calvin Hunt
21 needed medication refills and had thoughts of hurting
22 himself. She didn't say anything about the rocking and
23 the moaning.

24 Janice McDonald brings Calvin Hunt back into
25 triage. Plaintiff counsel seemed to indicate that she

1 didn't spend enough time with him. But the triage is
2 not supposed to be an extended evaluation. The purpose
3 of a triage, as you have heard, is to take some vital
4 signs, see what's happening with the patient, and get
5 them back into the bed. And that's what Janice McDonald
6 did.

7 We go back and talk about the medical versus
8 ordinary negligence. Janice McDonald identified what
9 his ESI scale was. Took his vital signs. She actually
10 asked him if he was currently having thoughts of hurting
11 himself, and he said no, at that time.

12 Janice, who has 30 or 40 years experience as a
13 registered nurse, said Mr. Hunt was calm; he was well-
14 kept; he was polite. Strictly military, I think, is
15 what she said. He made eye contact with her. He was
16 flat. He was withdrawn. As you heard Dr. Oberg say, he
17 was depressed. Depressed people are often flat and
18 withdrawn.

19 After Calvin Hunt put his hands over his ears,
20 Janice McDonald did what a good nurse would do and asked
21 him are you hearing voices. He responded no. She takes
22 him back to the bed in Bay 4, and that's about 2:30 in
23 the afternoon. From 2:30 to 4:00, Joe McDonald has eyes
24 on Calvin Hunt and Edward Ray, except for when the
25 screen is pulled when Dr. Jansen is evaluating him, and

1 Psyche Tech Manning is evaluating him. He can hear him.
2 It's from me to the wall. There's never any indication
3 that Calvin Hunt raised his voice or that there was any
4 sort of combative behavior.

5 As Joe McDonald said, Calvin Hunt was calm, he was
6 quiet, he communicated appropriately. For Joe, there
7 was significance in the communication that he had with
8 Calvin Hunt at 10 'til 4:00, or whatever time that was
9 when Calvin Hunt got up to go to the bathroom. He got
10 up and he looked at Mr. McDonald and said, can I have a
11 head call, or whatever the military term was.

12 He gets out. Joe McDonald offers him something to
13 drink or something to eat. He politely declines. Goes
14 back. And a few minutes later, Edward Ray asked if they
15 could step outside for a breath of fresh air. They
16 don't run out the door after Joe McDonald says can we
17 step out -- or says that you can go. They don't run
18 out. They don't go out the side where the ambulances
19 come in. They go out into the door that goes into the
20 hallway. That goes out here, as opposed to out here.
21 So, from that, we know that Calvin Hunt, at some point,
22 ran away from Mr. Ray. We don't really know -- and
23 there's the gate.

24 Joe McDonald's note indicates a call to the
25 hospital about bed availability. That seems like good

1 nursing to me. There's some thought that Friday
2 afternoon there's no inpatient mental health at the
3 Naval Hospital. If this patient is going to get help
4 today, it's not going to be there. We know Dr.
5 Hendelman wasn't going to leave her office. She
6 testified, well, we see patients 'til about 3:00, and
7 then, call starts; but when we've got a call, we don't
8 really come in. They knew that. Dr. Jansen had been
9 working at the Naval Hospital since 1989. Joe McDonald
10 had been there since 2006. That's long before CasePro.
11 Janice McDonald, 2005.

12 They'd been working for other companies at the
13 Naval Hospital doing the same job. They understood that
14 they may need to find somewhere for Calvin Hunt to go.
15 No decision had been made. Doesn't sound like careless
16 disregard, does it? Sounds proactive.

17 So, Dr. Jansen goes in to see Calvin Hunt at about
18 2:50. Does this look like a careless medical note?
19 It's filled out in just about every section you could
20 fill out. He's asked questions regarding why he's
21 there, when it started. Asked him about a situational
22 problem, saying, what's going on with you. Clearly asks
23 a follow-up question about his suicidal thoughts to get
24 that information out of Calvin Hunt that he did have
25 thoughts of hurting others, but no specific plan,

1 specifically/suicide attempt/wanted to escape/confused/
2 hallucinating.

3 But Dr. Jansen's not a psychiatrist. He recognized
4 that, at the Naval Hospital, if you need a specialist,
5 or any hospital, in the emergency room, you request that
6 help, and he did that. So, after about a 20-minute
7 visit with Mr. Hunt, Dr. Jansen requests a specialist,
8 not because he thought Calvin Hunt was going to run out
9 of the emergency room and hurt somebody, but because he
10 needed help diagnosing Calvin Hunt, deciding what to do
11 with him. Was he going to give him medication and send
12 him on his way; was he going to send him to the
13 emergency room; was he going to send him to a psyche
14 ward? He didn't know. He needed help, and he did that.
15 And he asked for a psychiatry consultation.

16 Psyche Tech Manning comes down. Records indicate
17 that he's there between 3:25 and 3:40 in the afternoon.

18 Psyche Tech Manning testified that he has done
19 mental health evaluations, exactly the same as the one
20 he did on Calvin Hunt, over 1,500 times. He's not
21 really the ordinary person in this case either. And
22 although he's not a registered nurse or a doctor, it's
23 impossible to ignore the level of experience and
24 training that he had for the specific patient that he
25 was talking to.

1 He said that he had experience with patients with
2 suicidal ideation, with suicidal plans, with suicidal
3 attempts, with homicidal ideations, homicidal plans,
4 homicidal attempts. And Psyche Tech Manning was very
5 clear that, if Hunt presented any indication to him that
6 he was a threat or in some way combative, I think his
7 words were, it would have been a different situation.
8 And he said that twice that you heard earlier this week.

9 It would have been a different situation. He would
10 have called security. He didn't do that. Psyche Tech
11 Manning left and said I'm going upstairs. And that was
12 it.

13 Nothing changed. Nothing abnormal at that point
14 when Psyche Tech Manning goes up to report his findings
15 to Dr. Hendelman.

16 Dr. Hendelman testified that, what she recalls of
17 her conversation with Psyche Tech Manning were no
18 unpredictable demeanor and no safety concern. And we
19 heard Dr. Hendelman say many, many times that he needed
20 to be admitted. But she did say no unpredictable
21 behavior and no safety concern.

22 And there's been a lot made about the use of the
23 word obvious in Dr. Jansen's note. Obvious. We've got
24 a psychiatrist with 40 years experience, talking to a
25 board-certified emergency room doctor with 40 years

1 experience. What may be obvious to them, certainly not
2 obvious to the ordinary person.

3 But more importantly, she wasn't talking about
4 involuntary commitment. She made that distinction. You
5 heard her say that. She was talking about admission.
6 What she was saying there was, hey, it's 4:00 o'clock on
7 Friday; it's obvious he can't stay here; he's going to
8 have to go somewhere else to get help. It's obvious I'm
9 not coming down to see him; and it's obvious that he
10 can't stay in the emergency room; he's got to go
11 somewhere else.

12 I want to talk a little bit about this judicial
13 notice that the Plaintiff's requested that the Judge
14 read to you. Calvin Hunt was charged with some crimes
15 following this incident, and those crimes began with the
16 grand larceny of the fire truck at approximately 10
17 after 4:00 on that day. Those crimes that he was
18 charged with went from then, until the intentional
19 directing of the fire truck into Justin Miller.

20 This is not the issue in this case. We've talked
21 about that. This is a criminal finding. There's no
22 jury trial.

23 Frankly, I don't know a whole lot about it. It was
24 the State v. Calvin Hunt. Didn't involve CasePro.
25 Didn't involve Rebecca Delaney. Don't be confused by

1 what this means.

2 Going back to this board, if you do find that this
3 is an ordinary negligence case, and you find that it was
4 reasonably foreseeable, based on Mr. Hunt's presentation
5 to the emergency room to an ordinary person that he
6 would do those things that he did on that day, you've
7 got to decide that Joe and Janice and Dr. Jansen
8 breached that duty to him. If there was no breach, you
9 go home.

10 Next, you look at causation. When Mr. Ray and
11 Calvin Hunt walked out of that Naval Hospital, a lot of
12 things happened after that. We know that Mr. Ray
13 followed him for some period of time, because he didn't
14 come back into the E.R. immediately and say Hunt took
15 off. He didn't go to the quarterdeck and say, hey, Hunt
16 took off on me. He came back about 25 minutes later
17 saying that he had run through the gate, which is over
18 here. Again, this is Mr. Ray. Mr. Ray was with Calvin
19 Hunt all day long. He was experienced with veterans.
20 He was experienced with the issues that they face.
21 Never did Mr. Ray ever indicate to Joe McDonald, Janice
22 McDonald, or Dr. Jansen that Calvin Hunt's condition was
23 changing in the emergency room; that he was concerned
24 that he might elope; that he was concerned for Calvin
25 Hunt's safety; that he was concerned for his own safety.

1 There were four guards at that gate. You heard the
2 911 call from Merced. Calvin Hunt ran right through the
3 gate, partially clothed. He gets into a fire truck
4 that's running and unattended.

5 But most importantly, this was Calvin Hunt doing
6 these things. You've got to find, if you get to this
7 point, that it's CasePro that caused it, not all of
8 those other people. And if you can't do that, you go
9 home.

10 Before we talk about damages, let's talk about the
11 experts. You're going to get a jury charge talking
12 about credibility. We really put forth two experts that
13 couldn't be more different. It's not always like that
14 in cases. It is in this case. It's stark. Our expert,
15 he'd never ever given a deposition until a few months
16 ago. He'd never testified in court. He's a graduate of
17 the Air Force Academy. He's a twelve-year veteran. He
18 was the emergency room director at a base in
19 Afghanistan.

20 Plaintiff's expert has got a lot on his resume.
21 He's an expert in a whole lot, according to him. Never
22 worked at a Naval facility. Primarily worked in
23 civilian hospitals.

24 He didn't really know the facts very well either.
25 I think that's important when you're determining

1 credibility. The facts are important. Every little
2 fact makes a difference, and if you're going to get up
3 in court and give your opinion based on facts, you
4 better know what those facts are.

5 Stood up there a couple of times and said Calvin
6 Hunt told Sandra Smith he wanted to hurt himself.
7 That's just not true. Never has been true. Not in any
8 documentation. That's a big deal. That's the first
9 medical professional Calvin Hunt saw on that day. How
10 can that not influence the way that you look at a case,
11 if you don't even know what the patient said to the very
12 first medical professional that Calvin Hunt saw? Yet,
13 he's willing to say careless disregard, reckless,
14 everything's a red flag. That's for you to decide.

15 What he did do, though, he conceded a few things
16 that are very important in this case. When we talked
17 about what is the issue and what's not the issue, Dr.
18 Baker conceded that there was no evidence Calvin Hunt
19 was ever uncooperative.

20 Now, again, if the issue is whether or not a
21 reasonable person would expect that Calvin Hunt would go
22 outside with Mr. Ray and not come back, there's no
23 evidence that he was uncooperative. He was following
24 instruction every step of the way. And Dr. Baker also
25 conceded that Psyche Tech Manning, to the extent he had

1 concerns about Calvin Hunt, he should have conveyed
2 those to the emergency department. He didn't do it.

3 Dr. Oberg, on the other hand, has seen hundreds of
4 patients like Calvin Hunt. His lack of experience as an
5 expert witness shouldn't impact his credibility.

6 He said there's no indication that Hunt wasn't
7 going to cooperate. He said Calvin Hunt needed care,
8 and that's what he was getting. He was getting care.
9 They were in the process of doing what they needed to do
10 to get him admitted to the hospital. He had never heard
11 of a duty to warn a patient not to leave. Never heard
12 of it. Langley Air Force Base. Other, San Antonio,
13 Virginia. Multiple places that he's worked, he's never
14 heard of that duty. No duty to confine Calvin Hunt or
15 to instruct the staff to do so.

16 Dr. Oberg found it important that Mr. Ray was with
17 him at all times. He had an escort. Again, not to keep
18 him from leaving; but just to tell the staff. It's an
19 extra set of eyes on the patient.

20 We've already talked about Mr. Ray never said
21 anything to anyone that would indicate he felt Calvin
22 Hunt was not going to continue to cooperate with the
23 process that had been going on now in the emergency room
24 for nearly two hours.

25 You heard two different employees of the federal

1 government by video deposition say that the Navy
2 evaluated this incident. And we know from the email
3 that they evaluate the treatment provided in the
4 emergency department.

5 Ms. Mayo and Lieutenant Brannon both testified that
6 they were not aware of anything that was done wrong by
7 Dr. Jansen, Joe McDonald, or Janice McDonald on February
8 24, 2012. We know the Navy, pursuant to the contract,
9 was the entity that reviewed the medicine. The medical
10 records were their property. CasePro didn't get medical
11 records. CasePro didn't get peer reviews. This was
12 done by the Navy. The Navy decided who performed
13 medical services at the Beaufort Naval Hospital. Dr.
14 Jansen had his privileges, and he remained. Those
15 privileges remained.

16 And that's a good segue into this negligent
17 retention claim. We really don't know much about this
18 situation in 2009-2010. We know that Scott Moore called
19 Craig Martin at that time, expressed some concerns about
20 a conflict of interest. We know that Craig Martin's
21 email, if you read it -- and I think you probably all
22 will when you go back into the deliberation room.
23 Although Craig Martin, in his deposition, after he had
24 already left CasePro and was working for a competitor,
25 was critical of Dr. Jansen, you read that email? He was

1 advocating for Dr. Jansen. He was saying, hey, we need
2 more information; what's the deal with this; all we know
3 is that there was a standard of care wasn't met; we
4 don't know anything else; we know nothing; please give
5 us some more information. That certainly is a
6 reasonable thing to do for an employer to want to know
7 more information, not just go fire somebody.

8 The last, I believe it was Number 7 of that email,
9 talks about due process. Now, if this is somebody that
10 wants Dr. Jansen fired, why is he writing an email to
11 the Navy Logistics Command and telling them about due
12 process? Due process indicates that they wanted the
13 Navy to look at this again; not that they want to fire
14 him; they want the Navy to look at it.

15 So, this idea that CasePro should have fired Dr.
16 Jansen at that point, based on that tiny bit of
17 information, it's just unsupported by the evidence. The
18 Plaintiff has not met its burden as to that allegation.

19 Let's talk about the damages here. You've seen a
20 lot of pictures, you've seen a lot of videos. Those are
21 out there so you feel sympathy, which is inappropriate.
22 You don't award damages based on sympathy. And you're
23 going to get a jury charge about that.

24 It's impossible not to have sympathy. It's a
25 terrible, terrible thing that happened. There is no

1 question, any one of us in this room would bring back
2 Justin Miller if we could. That's not what we have
3 here. This is a lawsuit for the wrongful death, and
4 you, if you get to the point where you've decided that
5 you want to allocated damages, it's for Rebecca
6 Delaney's emotional loss.

7 This is not Chris Miller. This is not Donavan
8 Delaney. This is not Aunt Jennifer, who had been taking
9 care of Justin Miller before he died. This is Rebecca
10 Delaney. It's her damages. It's her loss. And you
11 have to decide what's that worth.

12 You may see more pictures. You may see more
13 videos. Keep that in mind when you're looking at those
14 videos and those pictures. They're intended to evoke
15 sympathy. That is not the way you measure damages in a
16 wrongful death case.

17 Going back to where we started, what's the issue in
18 this case? The issue is whether the ordinary person,
19 with the knowledge that Joe McDonald, Janice McDonald,
20 and Dr. Jansen had, could have reasonably foreseen that
21 Calvin Hunt and Edward Ray would not come back into the
22 emergency room and continue their treatment. That's
23 what you have to decide.

24 Thank you.

25 THE COURT: Thank you. Mr. Hoyle.

1 CLOSING ARGUMENT IN REBUTTAL

2 ON BEHALF OF PLAINTIFF, BY MR. HOYLE:

3 MR. HOYLE: It's been about two hours since I first
4 stood in front of you today. Remember -- you might
5 remember some of the things I had to say. I talked to
6 you a little bit about the difference between frying up
7 bacon and boiling up eggs. A few hours ago I made
8 reference to the idea of putting some eggs in a pot on
9 the stove and putting it on a low simmer.

10 It's two hours later. Has our pot boiled over? I
11 want you to think about that as you go back to that jury
12 room. Janice McDonald described this man as an angry,
13 low-simmering individual. And he sat in this itty-bitty
14 emergency room for two hours. Two hours. He was the
15 only patient there. The only patient. They've got an
16 inch-to-an-inch-and-three-quarter stack of medical
17 records and that nobody reads. They can't even keep
18 their couple of pages of records straight with respect
19 to what happens when. Not only do they disagree with
20 each other about when certain events occurred, one of
21 the witnesses, Joe McDonald, sat right up there and told
22 us, yeah, those times aren't all that right.

23 How good of attention were these folks really
24 paying, ladies and gentlemen? What else were they doing
25 in that itty-bitty emergency room? given the fact that

1 they just had one patient. Were they on their phones
2 looking at Facebook? Were they twittering? Was Dr.
3 Jansen catching some shade in Bed Number 5? I don't
4 think we'll ever know. I really don't.

5 But Mr. Mackelcan is correct, the credibility of
6 the persons that came into this courtroom and placed
7 their hand on the Bible and swore an oath is absolutely
8 for you to determine. The same is true of those persons
9 who were sworn by a notary public to tell the truth in a
10 deposition that was recorded on videotape. Credibility
11 is absolutely something for each of you to determine as
12 we go forward in this case.

13 And my friend, Mr. Mackelcan, references this idea
14 of foreseeability. Could a reasonably prudent person
15 have foreseen that Kalvin Hunt would do what it was he
16 was talking about doing? I think the best evidence of
17 that actually came from the man who turned him loose.
18 Joe McDonald sat right up there, and not in response to
19 my questions, but in response to Mr. Lovell's question,
20 said that he was sitting there at the nurses' station.
21 Obviously, had the scanner on behind him. It was right
22 up against his head. And when he heard these reports
23 out there on Ribalt Road involving a fire truck, the
24 thought passed his mind that it was Kalvin Hunt. It
25 doesn't get any clearer than that, ladies and gentlemen.

1 If it wasn't foreseeable that Calvin Hunt could have
2 gone and harmed people like he was talking about doing,
3 that thought wouldn't have entered Joe McDonald's mind.

4 If you actually get to quit being a juror in this
5 case at some point, and you were to run into me at
6 Walmart on a Sunday afternoon, would you actually think
7 that I might go out and steal a fire truck and start
8 driving it down Ribalt Road? How many people in your
9 life have you ever heard such a crazy story about and
10 associated somebody in your mind as, oh, that must have
11 been so and so, or Calvin Hunt doing it. But within
12 minutes of turning him loose, within minutes, when Joe
13 McDonald heard that from the consolidated dispatch on
14 the scanner, he associated it with Calvin Hunt.

15 I think it's important, with respect to this idea
16 of warning, to think about all the witnesses that sat up
17 there that testified by videotape that told us that, if
18 they knew all the facts, that they would have warned Mr.
19 Hunt to stay right where he was.

20 Dr. Hendelman said that. Dr. Jansen said that.
21 Dr. Baker said that. The book that Dr. Oberg keeps on
22 his iPad says that. And most importantly, Joe McDonald
23 himself says that.

24 The Defendant did not bring but one witness to tell
25 you that they didn't do anything wrong. They brought

1 Dr. Oberg. And if you heard Dr. Oberg's testimony, he
2 got contacted because he knows somebody who works for
3 the Defendant's law firm, a nurse.

4 And there's all this talk about how Dr. Baker makes
5 a little money testifying. If you recall, Dr. Baker
6 told you all that he was going to send me a bill for
7 \$500.00 an hour. That's the same amount that he's sent
8 Mr. Lovell's firm in the past for testifying. \$500.00
9 an hour. It's a lot of money, folks. I have to pay it.
10 I'll admit it's a lot of money.

11 But did you hear Dr. Oberg, who's been a board-
12 certified physician for five years, tell you how much he
13 was charging the Defendant to come down here to
14 Beaufort? He's charging \$500.00 an hour, as well. Just
15 something for you to think about, now, that this
16 question of credibility has been raised.

17 Dr. Oberg, when he testified yesterday, didn't even
18 know that Dr. Hendelman had testified that she wouldn't
19 let Calvin Hunt out. And I seem to recall standing up
20 here at this podium, turned facing that way, using my
21 iPad, going through the book that Dr. Oberg uses on his
22 iPad, looks at it virtually every single day he goes to
23 work, and seeing a lot of inconsistencies with what Dr.
24 Oberg had sat right up here and told Mr. Lovell.

25 I think Dr. Oberg said, oh, no, you don't need to

1 put people in a gown. Don't need to search them for
2 weapons. Oh, but the book Dr. Oberg keeps on his iPad
3 says you do those things.

4 Dr. Oberg told Mr. Lovell, oh, no, you don't need
5 to tell somebody with Calvin Hunt's presentment and
6 history that they can't leave. But yet, the book that
7 he keeps on his iPad says you don't let them leave.
8 That's another thought, since this issue of credibility
9 has been raised.

10 Now, if you think back to the Defendant's opening
11 statement, they drag the flip chart over here when Mr.
12 Lovell talked to you all nine days ago. And there was a
13 list of things on that flip chart that you didn't see
14 today. In opening statement, the Defendant told you
15 that these folks weren't their employees. I'm not
16 talking about that anymore. On the flip chart, they had
17 some reference to the fact that they were going to
18 destroy, annihilate, throw stones at something, I don't
19 really remember, with respect to Dr. Baker. But today,
20 in their closing argument, they drag the flip chart over
21 here, and they want to talk about professional medical
22 judgment versus ordinary care. That's something they
23 tried to talk about in opening, as well. And it's
24 interesting that, that's on the board, because I think
25 Mr. Mackelcan's statement that medical provider services

1 are not an issue in this case is simply wrong.

2 Later, the Judge is going to charge you on the law
3 in this case, and I want you to listen carefully to that
4 charge. She'll tell you to listen carefully, too. She
5 is the sole judge of the law, and she will tell you what
6 the law in this state is, and she will charge you that,
7 under the law, that there is a duty to warn that certain
8 medical providers have in certain situations.

9 I'm not going to be so presumptuous as to tell you
10 what I think that charge that she is going to tell you
11 is going to say word for word, but I want you to listen
12 to it, because that is the law in this state, and a law
13 that all of us as citizens here must follow.

14 You'll recall that the Judge qualified two experts
15 at my request in this case. Dr. Caplan, who was here on
16 the first day. And then, later, she qualified Dr.
17 Baker. And she will instruct you, as well, in those
18 jury charges that you may consider the evidence that an
19 expert brings forth.

20 And with respect to Dr. Baker, Dr. Baker has been a
21 practicing doctor for 40 some years. He used the word
22 *careless*. He used the word *reckless*. But he was very
23 clear in his testimony that the persons working for
24 CasePro in the emergency room didn't do what they should
25 have done, and that they should have warned Calvin Hunt,

1 and they should have said no, instead of yes.

2 Whether that's a careless, reckless, a violation of
3 the standard of care or merely violative of negligence,
4 you will see a simple verdict form back in your jury
5 room as part of your deliberations. If you decide that
6 Nurse Joe McDonald, Nurse Janice McDonald, and Dr.
7 Jansen breached a duty, and that, that breach caused an
8 injury, which proximally caused the death of Justin
9 Miller, as part of your oath, you will have to find for
10 the Plaintiff.

11 Now, there's another claim that the Plaintiff has
12 set forth, and that's the claim involving Dr. Jansen.
13 And we still, still, have not heard any good explanation
14 for why they didn't tell Dr. Jansen to get gone. Maybe
15 one dead United States Marine wasn't enough. But what
16 we know is that doesn't take any specialized knowledge
17 or advanced degree or some sort of state license to have
18 good, old fashioned common sense, and know that, if you
19 have medical doctors that aren't up to par treating our
20 men and women in uniform, and the men and women who
21 served this country are dropping dead because of a bad
22 doctor in an emergency room, that the bad doctor needs
23 to get gone. That is a simple concept, ladies and
24 gentlemen.

25 I'm going to ask you, in my final thoughts, my

1 final opportunity to talk to you, to listen closely to
2 the Judge's charge, not only with respect to liability,
3 but also with respect to damages, because, if -- and I
4 underscore the word if -- if you believe that wrong was
5 done, and the Plaintiff has met her burden, and if you
6 consider damages, listen carefully to what the Judge
7 tells you about those items.

8 The Defendant has suggested that we are merely
9 here, that I am merely here and my co-counsel, my
10 colleague, and my wonderful paralegal, and my wonderful
11 trial technology specialist, are here trying to evoke
12 sympathy. We're not asking for sympathy, ladies and
13 gentlemen. Rebecca Delaney didn't come from West
14 Virginia, she and her family didn't hire a team of
15 lawyers to ask for sympathy. She's gotten plenty of
16 sympathy. What she's come here is to find that search
17 for truth. To find out why this tragedy happened. to
18 answer the question as to whether or not this tragedy
19 could have been avoided, and to seek justice. Not
20 partial justice, not half justice, but complete and
21 total justice for the loss of her son.

22 I thank you very much for paying attention these
23 past nine days. I can tell you, I've looked jurors in
24 the eyes in the past who have nowhere near the attention
25 span and dedication that each of you have brought here

1 to the courthouse. I know that nine days is a long
2 time. I've been away from my family, as well. Many of
3 you have been away from your places of employment, from
4 your businesses, from your avocations, from your
5 friends, from your family, and you've been here for nine
6 days. And I want to say, from the bottom of my heart,
7 thank you for doing that. Thank you for coming here and
8 being the voice of this community.

9 I suspect that, when this trial ends, you all are
10 going to go back to your normal lives, and people are
11 going to ask you, they're going to take you aside,
12 whether it be at the supermarket or the drugstore, or
13 when you're dropping your kids off at school, they're
14 going to ask you what you've been doing. And I hope and
15 I pray that the answer for each of you is that we
16 listened to the evidence, we considered the testimony,
17 and we answered the question of why this event happen,
18 and did our reasonable best to bring full and complete
19 justice with respect to our verdict.

20 Thank you all for your time and attention. We look
21 forward directly to hearing from you.

22 THE COURT: Thank you, Mr. Hoyle. Just stand up.
23 Is that going to be enough? My charge is 15 pages and a
24 verdict form. Is it sufficient? Do you all need a
25 comfort break? Okay? We can go? Just move around,

1 wiggle around, stretch. And when you're ready to be
2 seated, be seated. And oh, by the way, if you need to
3 wiggle around, stand during the course of the charges to
4 stay awake and listen at us, absolutely okay.

5 JURY CHARGE:

6 THE COURT: Mr. Presiding Juror, ladies and
7 gentlemen of our jury, you have now heard the evidence.
8 You have received the evidence. You have listened to
9 the arguments of counsel. It is now my duty to explain
10 to you the law applicable to this case.

11 I remind you, that during this trial, you and I
12 have had certain duties to perform. As the trial judge,
13 it is my responsibility to preside over the trial of
14 this case. And I also have the duty to rule on the
15 admissibility of the evidence offered during this trial.

16 Ladies and gentlemen, you are, of course, to
17 consider only the sworn testimony which has been
18 presented and any exhibits that have been made a part of
19 the record in this case, matters of judicial notice, and
20 the inferences which you can reasonably draw from the
21 evidence which has been presented in this case.

22 I have the additional duty to charge you regarding
23 the law applicable to this case. It is your duty, as
24 jurors, to accept and apply the law exactly as I state
25 it to you. If you think you have any idea as to what

1 the law is or what it ought to be, and it should differ
2 from what I should tell you what the law is, you are
3 now, by your oath, sworn to accept and to apply the law
4 exactly as I state it to you.

5 Now, if your preconceived ideas should differ from
6 what I tell you the law is, feel free one day to have a
7 conversation with your legislature. But for our system
8 to work correctly, you must accept and you must apply
9 the law exactly as I state it to you.

10 Ladies and gentlemen, in every case tried in this
11 Court before a jury, the jury becomes the sole, the
12 only, the exclusive finders, the exclusive judges of the
13 facts. A trial judge cannot comment on or make any
14 statement about the facts in the case. Since you are
15 the sole, the only, the exclusive judge of the facts in
16 this case, please do not think by anything I may have
17 said or done during the course of this trial that I have
18 any opinion regarding the facts in this case. The law
19 doesn't allow me to have an opinion about the facts. I
20 don't have an opinion regarding the facts in this case.

21 Ladies and gentlemen, the way that our duties will
22 work together is that you will make the findings of fact
23 from the evidence in this case, and you will make those
24 findings as you find them to be. You will then take the
25 law as I give it to you, and you will apply the law to

1 those facts, and that is how you will reach your
2 verdict, which will then be a true and just verdict.

3 Ladies and gentlemen, in our courts, I remind you
4 that there's no distinction made between corporations
5 and natural persons or individuals. A corporation is a
6 person in the eyes of the law. A corporation is
7 entitled to the same fair and impartial consideration
8 and to justice by the same legal standards as a natural
9 person or individual.

10 Ladies and gentlemen, you're going to hear me use a
11 term throughout this charge *person*. When I use the term
12 *person*, I am not only referring to a natural individual;
13 I am anyone referring to corporations. So, persons, be
14 mindful. Corporations are persons in the eyes of the
15 law, as of course, are natural individuals.

16 Ladies and gentlemen, we're now going to talk about
17 the burden of proof that is applicable, that is
18 applicable, in this matter to these claims and to the
19 affirmative defense.

20 Ladies and gentlemen, the burden of proof, burden
21 of proof, in this case is by what we call the greater
22 weight or the preponderance of the evidence. The
23 greater weight or the preponderance of the evidence. A
24 preponderance of the evidence simply means that, simply
25 means the greater weight of the evidence. It is

1 evidence, which, as a whole, shows that a fact sought to
2 be proved is more likely true than not true.

3 This can be illustrated by imagining a set of
4 scales. When the case begins, the scales were even.
5 And after all the evidence has been presented, if the
6 scales should remain even, or if they should tip in
7 favor of the Defendant, Plaintiff will simple have
8 failed to meet their burden of proof, and your verdict
9 will be for the Defendant.

10 If, however, when you have considered the
11 Plaintiff's claim and the Defendant's defenses, those
12 scales should tip ever so slightly in favor of the
13 Plaintiff, then, she will have met her burden of proof,
14 and your verdict will be for the Plaintiff.

15 Ladies and gentlemen, there is one defense, there
16 is a defense, which has been presented by the Defendant,
17 and it is an affirmative defense. And we're going to
18 talk about that. With regards to that affirmative
19 defense, the Defendant has the burden of proof of
20 proving that defense. But again, by the greater weight
21 or the preponderance of the evidence.

22 Now, ladies and gentlemen, the preponderance of the
23 evidence is not determined by counting the number of the
24 witnesses presented by each side. Instead, the
25 preponderance of the evidence is determined by the

1 greater weight of all the evidence.

2 Ladies and gentlemen, you should weigh all the
3 evidence in this case. The evidence that you should
4 give the most weight to is that which convinced you of
5 its truth, regardless of from whom or what source it
6 comes. However, ladies and gentlemen, you must not
7 consider sympathy, passion, prejudice, for or against
8 either of these parties when weighing the evidence.

9 Now, ladies and gentlemen, there are typically two
10 types of evidence generally presented during a trial.
11 One type is called direct evidence, and the other is
12 called circumstantial evidence. And I'm going to define
13 those for you and give you an example of each.

14 Direct evidence is the testimony of a person who
15 claims to have actual knowledge of a fact, such as an
16 eye witness. It is evidence which immediately
17 establishes the main fact to be proved.

18 Circumstantial evidence is proof of a chain of
19 facts and circumstances indicating the existence of a
20 fact. It is evidence which immediately establishes
21 collateral facts from which the main fact may be
22 inferred. Circumstantial evidence is based on
23 inference, and not on personal knowledge or observation.
24 It is proof that does not actually establish the fact in
25 question, but that asserts or describes something else

1 from which you may either reasonable infer the truth of
2 the fact or at least reasonably infer an increase in the
3 probability that the fact is true.

4 For circumstantial evidence to be sufficient to
5 warrant the finding of fact, circumstances must lead to
6 that act with reasonable certainty. The facts and
7 circumstances should be considered in light of ordinary
8 experience and common sense. The existence of a fact
9 cannot be based on speculation, surmise, or conjecture.

10 Examples: February, cold outside, snow is
11 forecast, walk outside and you get smacked in the eye
12 with some snow. You literally are an eyewitness when
13 you go inside and say it's snowing outside. You know
14 that directly from your observation. That knowledge is
15 direct. That is direct evidence.

16 Let me give you an example of circumstantial
17 evidence. February, cold outside, snow is forecast.
18 You go outside before you go to bed and all you see is
19 your poor, old, pitiful brown, crunchy grass. Well,
20 that's what you know. You know that directly. You know
21 those collateral facts. It's February, it's cold. Snow
22 is forecast. Pitiful, poor, brown, crunchy grass. You
23 know all that. Those are collateral facts that you know
24 of your observation.

25 The next morning, you wake up and snow covers

1 everything as far as the eye can see. I don't know
2 who's the T.V. personality, but they on the television
3 telling you everything's been canceled, we have a snow
4 day.

5 Here's what you know. You have the collateral
6 facts the evening before, and you know there's snow
7 covering everything the next morning. You can, by
8 inference, then say and testify, it snowed over night.
9 You didn't see it snow. You didn't observe it snow, but
10 you know that it snowed over night because all of the
11 collateral facts that you do know point to, and by
12 inference, you know it snowed over night. That's
13 circumstantial evidence.

14 The law makes absolutely no distinction between the
15 weight or the value to be given to either direct or
16 circumstantial evidence. Nor is a greater degree of
17 certainty required of circumstantial evidence than of
18 direct evidence.

19 Ladies and gentlemen, you should consider all of
20 the evidence in this case. And again, the evidence you
21 should give the most weight to is that which convinces
22 you of its truth, regardless from or what source it
23 comes. And remember, you did not drop your common sense
24 off at the courthouse door. It came right on in here
25 with you. It is right there with you in your jury box,

1 and will be with you, of course, in your jury room.

2 And you must not consider sympathy, passion,
3 prejudice for or against either of these parties when
4 weighing the evidence.

5 Now, ladies and gentlemen, necessarily, in order to
6 make the findings of fact that you must make, you must
7 determine the credibility of the witnesses who have
8 testified in this case. What does that mean,
9 *credibility*? It simply means believability. It becomes
10 your duty as jurors to evaluate the evidence and to
11 determine which evidence convinces you that it's true.

12 In determining the believability of witnesses who
13 have testified in this case, you may believe one witness
14 over several witnesses, or several witnesses over one
15 witness. You may believe a part of the testimony of a
16 witness, and reject the remaining part of the testimony
17 of the same witness. You may believe the testimony of a
18 witness in its entirety, or you may reject the testimony
19 of a witness in its entirety.

20 You may consider whether the witness has any
21 interest in the result of the trial; whether the witness
22 is prejudice towards the Plaintiff or the Defendant; the
23 opportunity for the witness to have seen the matters and
24 things about which the witness may testify; and of
25 course, you may consider the way in which the witness

1 acts, not only during the witness stand, but acts on the
2 video as they are being questioned under oath.

3 Ladies and gentlemen, in this case, you have heard
4 a witness that was deemed to be an expert witness. The
5 Rules of Evidence ordinarily do not permit witnesses to
6 testify regarding their opinions or conclusions, and
7 there is an exception for this rule, which exists for
8 those witnesses determined to be expert witnesses, and
9 those witnesses are witnesses who, by education and
10 experience, have become an expert in some art, science,
11 or profession, and they may give an opinion regarding
12 the subject in which the witness claims to be an expert.
13 And they may give the reasons for the opinion or
14 opinions.

15 You should consider any expert opinion given by a
16 witness, and like any evidence, give it the weight you
17 think it deserves. If you decide that an expert
18 witness's opinion is not based on sufficient education
19 and experience, or if you decide that the reasons given
20 in support of the opinion are not sound, or that the
21 opinion is outweighed by other evidence, you may
22 disregard the opinion entirely.

23 Ladies and gentlemen, an expert witness's testimony
24 is to be given no greater weight than that of other
25 witnesses simply because the witness is an expert. And

1 you do not have to accept an expert's opinion, even
2 though it is uncontradicted.

3 Expert witness testimony is given for the purpose
4 of helping you consider the evidence, and not for the
5 purpose of controlling your judgment.

6 Now, ladies and gentlemen, I charge you, I instruct
7 you, that a corporation can only act through its agents
8 or employees. Therefore, a corporation is responsible
9 for any negligent acts or omissions of its agents or
10 employees while they are acting within the scope of
11 their employment which proximately causes injury to
12 another person. I am going to define for you negligence
13 and proximate cause.

14 Ladies and gentlemen, this is a wrongful death
15 action. In this wrongful death action, the Plaintiff,
16 as the personal representative of the deceased estate
17 claims that the deceased wrongfully died as a result of
18 the negligent acts or omissions of the Defendant.

19 In a negligence cause of action, the issues are
20 raised in papers which are called pleadings. The filing
21 of a complaint is the beginning of an action. The
22 filing is by what we call a plaintiff, meaning a person
23 has brought an action against a defendant who has, in
24 turn, filed an answer.

25 Ladies and gentlemen, here are the elements which

1 the Plaintiff must prove by the greater weight or the
2 preponderance of the evidence.

3 The first element is negligence. Ladies and
4 gentlemen, negligence means that a person has done
5 something that a reasonable person would not have done,
6 or has failed to do something that a reasonable person
7 would have done under the same situation, under the same
8 circumstances, or both.

9 Carelessness means the same thing.

10 Next, the Plaintiff must prove by the greater
11 weight or the preponderance of the evidence that the
12 injuries or damages were proximately caused by the
13 Defendant's negligence. What do we mean by proximate
14 cause? To prove proximate cause, I will begin -- I'm
15 going to withdraw that, because I want to start in a
16 little bit different place. I want to define it for
17 you, and then, talk about how one proves it. I'm going
18 to define it for you.

19 Proximate cause is something that produces a
20 natural chain of events, which, in the end, brings about
21 the injury and/or death. It is a direct cause.

22 Ladies and gentlemen, to prove that the Defendant's
23 negligence proximately or directly caused a decedent's
24 death, a plaintiff must prove causation in fact. And
25 this is proven by showing that the death would not have

1 occurred but for, but for, the Defendant's negligence.
2 this is a concept that you learn in law school that I
3 thought I would never learn, until I heard the but for
4 test. I thought this one was going to float right past
5 me. But for the negligence of the Defendant,
6 Plaintiff's decedent would not have died. But for test
7 is what that's called.

8 A plaintiff must also show legal cause. He must
9 show causation in fact and legal cause. Legal cause is
10 proven by showing that the death was reasonably
11 foreseeable. This means that the death occurred as a
12 natural and probable consequence of the defendant's
13 negligence or carelessness.

14 A plaintiff must prove that some injury from the
15 defendant's negligence was reasonably foreseeable, but
16 does not have to prove the particularity, the
17 particulars, but that, as a result of the defendant's
18 negligence, some injury, some death, was reasonably
19 foreseeable.

20 Ladies and gentlemen, a defendant, however, cannot
21 be held responsible for things which could not be
22 expected to happen. Proximate cause does not mean the
23 only cause. A defendant's act or omission can be a
24 proximate cause of the decedent's death if it was at
25 least one of the direct concurring causes of the death.

1 There may be more than one cause of an injury
2 and/or death. More than one person may be responsible
3 for the injury and/or death. If the negligence of two
4 or more persons combines to cause an injury or death,
5 each person involved may be held responsible, as if that
6 person alone caused the injury and/or death.

7 Causes are concurrent if the individual acts of
8 negligence combine to cause the injury and/or death. If
9 an injury and/or death occurs through the concurrent
10 negligence of two or more persons and would not have
11 happened without the negligence of either person, the
12 negligence is the proximate cause of the injury and both
13 persons are responsible.

14 Now, ladies and gentlemen, I'm going to -- when I
15 talk to you about the defenses, I'm going to talk to you
16 about what's called an intervening cause, an intervening
17 cause. But because the Defendant has pled that as a
18 defense, and it is an affirmative defense, I will talk
19 to you about that in just a few moments when I talk to
20 you about the Defendant's defenses.

21 Now, I'm going to talk about the acts that the
22 Plaintiff claims were negligent. The Plaintiff
23 maintains that there are several acts of negligence for
24 you to consider. These include the duty to warn, what
25 I'm going to talk about in just a moment; and negligent

1 retention. I think I said several. I should have said
2 two. One act that the Plaintiff alleges is duty to
3 warn, and the other is negligent retention.

4 Ladies and gentlemen, Plaintiff does not have to
5 prove both acts of negligence, but if the Plaintiff
6 fails to prove one act of negligence, at least one act
7 of negligence, then your verdict must be for the
8 Defendant.

9 And again, burden of proof is by the greater weight
10 or the preponderance of the evidence.

11 First, I'm going to talk to you about the duty to
12 warn. And then, I'm going to talk to you about
13 negligent retention.

14 Ladies and gentlemen, when a person provides
15 medical services to another person, a duty to warn may
16 arise. This duty to warn arises when a reasonably
17 prudent person, under the same or similar circumstances
18 would have provided a warning. The duty to warn a
19 patient flows to foreseeable persons in the general
20 field of danger.

21 Negligent retention. The basis for an employer's
22 liability for negligent retention is direct liability.
23 To invoke the theory of liability based upon negligent
24 retention, the Plaintiff must show that the employer
25 knew or should have known that its employee behaved in a

1 dangerous or otherwise incompetent or unfit manner; and
2 that the employer knew or should have known of the
3 behavior; and that the employer failed by retaining the
4 employee.

5 And in order to prove negligent retention, you
6 should compare the evidence which you have seen and
7 heard, and you should compare that with the way in which
8 a reasonably prudent employer, armed with what you deem
9 this employer knew or should have known, because the
10 Defendant is charged to use the same degree of care that
11 an ordinarily prudent employer would have used under the
12 same or similar circumstances in the retention of an
13 employee.

14 Now, ladies and gentlemen, the negligent retention
15 cases, generally, they turn on two fundamental elements:
16 knowledge of the employer and foreseeability of harm to
17 third parties. These elements, from a factual
18 perspective are not necessarily mutual exclusive, as a
19 fact bearing on one element may also impact the
20 resolution of another element, or the other element.
21 From a practical standpoint, the elements analyzed
22 should be analyzed in terms of the number and nature of
23 prior acts of wrongdoing by the employee, and the nexus
24 or similarity between the prior acts and the ultimate
25 harm caused.

1 Ladies and gentlemen, of course, I remind you that
2 these are the allegations of negligence. And I remind
3 you that is the first element. Second element, of
4 course, is proximate cause. Negligence, proximate
5 cause. Plaintiff must sustain her burden to prove both
6 negligence and proximate cause by the greater weight or
7 the preponderance of the evidence.

8 Now, ladies and gentlemen, I'm going to turn and
9 talk to you about the Defendant's defenses.

10 Ladies and gentlemen, the Defendant has answered
11 the Plaintiff's complaint and has pled defenses. The
12 first defense is called a general denial. And by that,
13 the Defendant may admit certain facts such as where the
14 Defendant may do business or the fact that something may
15 have happened on a particular occasion, but the
16 Defendant denies each and every allegation that would
17 cause the Defendant to be responsible to the plaintiff,
18 to be liable to the plaintiff. The Defendant denies
19 those allegations.

20 Because of the general denial -- when, I should
21 say, a defendant enters a general denial, that places
22 upon the plaintiff the burden of proving each element of
23 her claim.

24 Now, ladies and gentlemen, the defendant also has
25 pled and claims that the decedent's death was not

1 proximately caused by the alleged or any alleged
2 negligence on behalf of the Defendant, but was caused
3 solely by the negligence of another person. The
4 Defendant does not have the burden of proving that the
5 negligence of the other person caused the Plaintiff's
6 injury. Instead the burden remains on the Plaintiff to
7 prove that the Defendant's negligence was a proximate
8 cause of the injury and/or death. And wrongful death is
9 obviously a death.

10 Now, ladies and gentlemen, the Defendant has also
11 pled the defense of intervening negligence of a third
12 party. The Defendant has the burden of proving this
13 defense by the greater weight or the preponderance of
14 the evidence. In pleading this defense, the Defendant
15 alleges that the chain of causation -- remember that we
16 talked about causation when we talked about proximate
17 cause -- that the chain of causation between the alleged
18 Defendant's negligence and the decedent's death was
19 broken.

20 The chain of causation between the alleged
21 Defendant's negligence in the death may be broken by the
22 independent intervening acts, or act or omission, or
23 omissions by another person over whom the Defendant has
24 no control.

25 In order to decide whether an intervening act

1 breaks the chain of causation, you must determine
2 whether the intervening act or omission, or acts or
3 omissions, was or were reasonably foreseeable. If the
4 intervening act or omission was a probable consequence
5 of the Defendant's negligence, the Defendant is
6 responsible for the decedent's death. If however, you
7 find that the intervening act or acts or omission or
8 omissions was not foreseeable, the Defendant is not
9 liable, unless the Defendant's acts alone would have
10 caused the decedent's death, even with the intervening
11 act or omission.

12 Ladies and gentlemen, when you consider whether the
13 Defendant has exercised reasonable care, you must
14 consider the Defendant's actions and/or omissions as
15 they relate to the facts then and there existing,
16 meaning those facts, the facts existing at the time that
17 the events occurred, and not in light of what hindsight
18 may later reveal.

19 Ladies and gentlemen, when you have considered the
20 Plaintiff's claims and the Defendant's defenses, if you
21 determine that the Plaintiff has met her burden of
22 proof, and you determine that the Plaintiff is entitled
23 to a verdict, then your next consideration would be that
24 of damages, would be that of damages, how much money,
25 which is the form that you have to award for damages,

1 ought be received by the Plaintiff in this case.

2 Ladies and gentlemen, whenever the death of a
3 person is proximately caused by the wrongful act or
4 neglect of another, and the act or neglect is one which
5 would have entitled the deceased to have recovered
6 damages if the deceased had not died, the personal
7 representative of the estate of the deceased may bring
8 an action for wrongful death. The personal
9 representative has a right to recover compensatory
10 damages for the wrongful death.

11 The following are damages in an action for wrongful
12 death upon which a recovery may be based. Even though
13 these damages may be deemed to be emotional in nature, a
14 recovery for them is allowable if proven by the
15 Plaintiff by the greater weight or the preponderance of
16 the evidence.

17 These would be the elements of damages recoverable
18 by the Plaintiff if met by the greater weight or the
19 preponderance of the evidence: wounded, shock, and
20 suffering. Excuse me. It's wounded feelings, mental
21 shock, and suffering.

22 So, let me begin again. Mental shock and
23 suffering, wounded feelings, grief and sorrow, loss of
24 companionship. Those are the elements.

25 Ladies and gentlemen, it is not necessary for the

1 Plaintiff to show the exact amount of damages suffered
2 by the beneficiary, or that the beneficiary suffered a
3 monetary loss. As I say, these elements are emotional
4 in nature.

5 It is not necessary to show the monetary value of a
6 deceased's life, since direct proof of the value of
7 human life is not possible.

8 What is reasonable compensation, ladies and
9 gentlemen, is left to your sound discretion and
10 judgment. The Plaintiff has the burden of proving the
11 damages by the greater weight or the preponderance of
12 the evidence. But as I say, that does not mean you must
13 deduce the precise amount of those damages.

14 Now, I'm going to go over the verdict form, ladies
15 and gentlemen. And before I go over the verdict form
16 with you, I want to tell you that there are two possible
17 verdicts. I have written them on this paper. They are
18 in an order. One is first and one is second. There is
19 no hidden meaning, now, in the order in which these
20 things have been put on paper. It's just that we have
21 two things to put on paper; one has to be first and one
22 has to be second. I could have just as easily put the
23 second one first, and the first one second. Please
24 don't take any intended hidden meaning, because there is
25 no intended hidden meaning. It's just that I've got to

1 put this on paper, and there's two of them, and one's
2 got to be first.

3 The other thing that I want to talk to you about
4 before going over it with you is to tell you your
5 verdict must be unanimous. And that means, this verdict
6 must be the verdict of each and every one of you. The
7 majority doesn't rule, and nobody is the queen or king
8 of the jury. This verdict must be the verdict of each
9 and every one of you. It must be unanimous. It must be
10 the verdict of each and every one of you.

11 Now, ladies and gentlemen, -- and that should be a
12 hint for my alternates to stay with me when my jury
13 leaves me on this next occasion, please.

14 Ladies and gentlemen, there are two possible
15 verdicts, irrespective of what your verdict is, I want
16 to instruct you, so there isn't any question what is the
17 unanimous verdict of this verdict.

18 The first possible verdict states as follows:

19 *We, the jury, unanimously find for the*
20 *Plaintiff in the amount of blank dollars*
21 *actual damages.*

22 If this verdict is found to be the unanimous
23 verdict of this jury, first of all, I want you to circle
24 it. And then, I want you to determine unanimously what
25 are the actual damages, and then, write in those actual

1 damages. And I'd ask that you use numbers and words,
2 like you do a check, so you can double check the amount.
3 So, use numbers and words as you would on a check, in
4 the event that this is the unanimous verdict of the
5 jury.

6 The second possible verdict is:

7 *We, the jury, unanimously find for the*
8 *Defendant.*

9 Now, irrespective of what is the unanimous verdict
10 of this jury, again, I want you to circle it, so there's
11 no question what is the unanimous verdict, which of
12 these two verdicts is the unanimous verdict of this
13 jury.

14 Now, when you have completed your deliberations,
15 and you have filled out your verdict form, you will sign
16 here, as the presiding juror, and you know who you are.
17 And I'm going to ask you, also, to date the verdict
18 form. Just for your informational purposes, today is
19 the 16th.

20 Now, when you have completed your deliberations,
21 and you have filled out your verdict form, then you
22 knock on the door, and you will return to the courtroom,
23 and you will hand the verdict form to either our bailiff
24 or our clerk, who will, in turn, hand it to me. You do
25 not publish the verdict. You hand it off.

1 Now, ladies and gentlemen, when you step back to
2 your jury room on this next occasion, I'm going to tell
3 you exactly what's going to happen, because I'm going to
4 give you this instruction: do not discuss this matter
5 or allow anyone to discuss it with you. And you ought
6 to be saying what; come on; this is when you told us,
7 now, in nine days we would get our deliberation.

8 I'm going to tell you exactly what's going to
9 happen when you go back to your jury room on this next
10 occasion. Ladies and gentlemen, I'm going to turn to
11 these lawyers and I'm going to ask them two questions:
12 have I given this jury all of the law that they need for
13 their deliberations, and have I stated it for them
14 correctly.

15 Now, sometimes, and it's my fault, sometimes I fail
16 to give a jury all of the law that they may need for
17 their deliberations, and sometimes I need to invite a
18 jury to come back out so that I may give them an
19 additional part of the law, because I failed to give
20 them all of the law that they may need.

21 In the event that I need to bring you back out for
22 that reason, I ask you in advance, please do not
23 consider that piece of the law, that instruction, with
24 any emphasis. In the event that I need to bring you
25 back out, because I have stated something incorrectly,

1 sometimes it'll pop out wrong unintendedly. Goodness
2 knows it's unintended, but sometimes it does happen. In
3 the event that I need to bring you back out to correct
4 an error that I have made, I'm going to ask you in
5 advance to please allow me to correct my error in your
6 mind, because, you see, this is my one chance to get
7 this right, to give you all of the law that you may need
8 for your deliberations, and state it for you correctly.

9 Now, in the event that I do not need to bring you
10 back out, you will be brought the exhibits and the
11 verdict form and a specific instruction to begin your
12 deliberations.

13 Now, ladies and gentlemen, you will not have these
14 exhibits and this verdict form unless it is time for you
15 to begin your deliberations.

16 Now, when you begin your deliberations, I need you
17 to be mindful that all twelve of you must be present to
18 deliberate. So, if somebody needs to take a comfort
19 break, stop the deliberations, take your comfort break.
20 And then, just reconvene your deliberations when all
21 twelve of you are together again.

22 Your lunch is going to be brought back to you.
23 It's okay to eat and deliberate. In fact, I'm going to
24 ask you just as to not -- I think your lunch might be
25 back there. If it is, just hold up a minute, because,

1 if I need you to come back out, I'd like you to come on
2 back out, let me do what I might need to do, and then,
3 when you begin your deliberations, go ahead and begin
4 your lunch, as well. If you choose. Now, if you don't
5 want to do it, don't do it that way, but you certainly
6 can, if you wish. You can eat and deliberate, if you
7 choose, so long as all twelve of you are together.

8 Now, ladies and gentlemen, I want to leave you with
9 this last thought. And it is this. The word *verdict*
10 comes from the Latin phrase *verum dictum*, which means to
11 speak truth. To speak truth.

12 Ladies and gentlemen, that is now your task.
13 Please step to your jury room, except the alternates.
14 Do not discuss this matter or allow anyone to discuss it
15 with you. And we will be with you shortly.

16 JUROR: Can we take our books?

17 THE COURT: Nope. Leave them right there. We'll
18 bring them to you. I just said that. We'll bring your
19 verdict form, the exhibits, and your books.

20 JURORS LEAVE COURTROOM 2:21 P.M.

21 BY THE COURT:

22 BAILIFF: Jury's clear, your Honor.

23 THE COURT TO ALTERNATE JURORS:

24 THE COURT: Thank you so much. Here's what I'm
25 going to ask you all to do for me. First of all, I want

1 you to eat, so you can get your lunch. I'm going to ask
2 you all to give me about 30 minutes after the jury
3 begins its deliberations. And the reason for that is,
4 that, in the event somebody should fall out quick, I
5 think I can stop those deliberations and seek an
6 alternate and begin them anew. So, hold up. But you
7 got to eat anyway.

8 So, what's going to happen, we're going to put you
9 in a whole different -- you all go together, but you got
10 to go now separate from the jury. And but once the jury
11 begins their deliberations, we'll keep up with it. And
12 I'm going to ask you for 30 more minutes, because we've
13 come a long way, and I'd hate to lose the opportunity to
14 save the case. So, if you'll give me that amount of
15 time. Once the 30 minutes is up, you know, if you're
16 not seated, then we'll chat very quickly. I'll give you
17 some instruction before you leave. So, bye. Leave your
18 little notebooks right there.

19 ALTERNATE JURORS LEAVE COURTROOM 2:23 P.M.

20 THE COURT: Any exceptions or additions from the
21 Plaintiff?

22 MR. HOYLE: One addition, your Honor.

23 THE COURT: All right.

24 MR. HOYLE: We believe that the *Hardee* case sets
25 forth the duty owed to third parties is identical to the

1 duty due to the patient. We, therefore, we would
2 request that your Honor add to the medical providers
3 duty to warn charge to include it's not merely a duty to
4 warn, but it is any duty owed to the patient is also
5 owed to the reasonably foreseeable non-patient in the
6 general zone of danger.

7 THE COURT: Thank you so much. I'm satisfied with
8 it as it exists, but thank you so much. Noting your
9 exception for the record.

10 MR. HOYLE: Thank you, your Honor.

11 THE COURT: Anything further?

12 MR. HOYLE: Not at this time, your Honor.

13 THE COURT: From the Defense.

14 MR. LOVELL: Your Honor, our only exceptions would
15 be one. We had submitted a foreseeability charge, which
16 you didn't give, and that's fine. That was our Number
17 9. And then, as we discussed in our conference, the
18 giving of the duty of warn charge -- duty to warn, we
19 just contend that wasn't applicable law to this case or
20 adjusted to the evidence.

21 THE COURT: Thank you so much. And again, I thank
22 you all so much for the charge conference, but I'm
23 satisfied with the charges given. I note your exception
24 for the record.

25 Would you guys do me a favor, please -- guys and

1 ladies, do me a favor. Take a look at what is going,
2 please, back to this jury, and be sure that what's going
3 back is supposed to be going back.

4 I have a bit of a sensitivity, because I tried a
5 case a number of years ago, and a piece of evidence -- a
6 criminal case -- a piece of evidence was a pair of
7 pants, and the confession of the defendant was in that
8 pocket. So, would you all do me a favor. And since
9 then, I ask my lawyers to please look at what's going
10 back is supposed to be going back, And we will then be
11 in recess until we hear from our jurors.

12 JURORS RECEIVE EXHIBITS AND VERDICT

13 FORM FOR DELIBERATION 2:39 P.M.

14 OFF THE RECORD 2:39 P.M.

15 BACK ON THE RECORD 4:06 P.M.

16 VERDICT:

17 THE COURT: Thank you so much, and please be
18 seated.

19 BAILIFF: All rise.

20 THE COURT: All right. It's my understanding that
21 the jury as reached its verdict. Anything from the
22 Plaintiff before we bring the jury out?

23 MR. HOYLE: Nothing from the Plaintiff, your Honor.

24 THE COURT: From the Defense?

25 MR. LOVELL: Nothing from the Defendant, your

1 Honor.

2 THE COURT: Very well. Thank you.

3 BAILIFF: Ready, your Honor?

4 THE COURT: I am.

5 BAILIFF: Jury's entering the courtroom.

6 JURORS ENTER COURTROOM 4:07 P.M.

7 THE COURT: All right. It is my understanding the
8 jury's reached its verdict. Is that correct?

9 PRESIDING JUROR: Yes, ma'am. Yes, your Honor.

10 THE COURT: Pass it, please. Thank you, sir. The
11 verdict is in due form. Will you please publish it.

12 MADAM CLERK: *In the case of Rebecca Delaney*
13 *versus CasePro, Incorporated, we, the jury,*
14 *unanimously find for the Defendant.*

15 And it's signed by the foreman.

16 THE COURT: Presiding juror, Mr. Lawrence?

17 MADAM CLERK: Mr. Lawrence.

18 THE COURT: Very well. If this was your verdict in
19 your jury room and it continues to be your verdict here
20 in the courtroom, please indicate by raising your right
21 hand. Let me observe for the record, all of our jurors
22 have their hands raised. Thank you. You may put your
23 hands down.

24 Anything from the Plaintiff before we dismiss the
25 jury?

1 MR. HOYLE: Nothing from the Plaintiff, your Honor.

2 THE COURT: Anything from the Defense?

3 MR. LOVELL: Nothing, your Honor.

4 THE COURT: Very well. Ladies and gentlemen, I
5 want to thank you for your service on this jury. I
6 certainly hope that you have found it interesting and
7 informative. I can assure you, it has been critical to
8 our system of justice, to our way of life.

9 Ladies and gentlemen, there are a couple of things
10 that I promised you we would talk about, and so, I want
11 to do that.

12 First thing I want to tell you is that you are now
13 at liberty to talk about this case, if you wish. You
14 can go home and talk about it. You can talk about it
15 with your family, your friends, and anybody that you
16 choose to talk about it with.

17 Let me share with you that, occasionally, and maybe
18 once in 18 years, maybe, arguably, once in 18 years,
19 there has been somebody that wanted to talk to a juror
20 about a case, and they said, I don't want to talk about
21 it. I'm not absolutely certain that did it really
22 happen quite in those terms, but I have always told
23 jurors that, in the event that somebody wants to talk
24 about this case with you, and you tell them I don't want
25 to talk about it, and they persist, what you should do

1 is contact the clerk's office, and they will contact me,
2 and I will intercede on your behalf. Again, I really
3 don't -- I'm quite confident that's not going to happen.

4 And, you know, the practice of law is an art, and
5 not a science. And you may be contacted to say, okay,
6 what worked, what didn't work, what was helpful, what
7 wasn't helpful. And again, if you're comfortable
8 talking about it, that's fine. If not, just tell them
9 you don't want to talk about it. They will absolutely
10 honor your request, I'm quite confident.

11 Ladies and gentlemen, do let me remind you that you
12 have an exemption for your jury service in a court
13 record for the calendar 2016 and 2017, 2017, 2016,
14 should you choose to exercise that exemption. You are
15 not eligible now to serve on a jury in a court of record
16 during the rest of 2015. I feel your pain. I get it.
17 But please keep that in mind.

18 I used to tell jurors that the check was in the
19 mail. It's not quite in the mail, but it will be in the
20 mail to you next week, I'm quite confident. This
21 clerk's office is most efficient. But as you will learn
22 when you receive it, it is a very small token of all
23 that you've given to us, which is your dear and precious
24 time. I'm afraid to tell that you your check will get
25 you to Garden's Corner on a trip to Tahiti for your

1 service in the last nine days.

2 I would tell you that any of you that you need
3 something for your employer so they will know where you
4 have been and what you have been up to, we will be happy
5 to get that for you.

6 BAILIFF: They already have it, your Honor.

7 THE COURT: You already have it. Wonderful. I'm
8 trilled about that. And thank you all so much. So, I'm
9 delighted that you have that.

10 And I will just conclude by saying it's been an
11 honor and a privilege. And again, and finally, thank
12 you so very much for every tick of the clock that you
13 have given to us. And have a lovely weekend. And you
14 are free to go. Thank you so much for being here.

15 JURORS LEAVE COURTROOM 4:12 P.M.

16 BAILIFF: Jury is clear, your Honor.

17 THE COURT: Thank you so much. All right.
18 Anything further at this time from the Plaintiff?

19 MR. HOYLE: Not at this time, your Honor.

20 THE COURT: From the Defense?

21 MR. LOVELL: None, your Honor.

22 THE COURT: Very well. Thank you all kindly.
23 Thank you for hard work. Thank you for all of your
24 time, all of your energy and efforts. And we will be
25 adjourned. Sine die. Thank you kindly.

1 MR. LOVELL: Your Honor, will you prepare a Form 4,
2 or do you want us to -- oh.

3 THE COURT: I'm doing it as we speak.

4 MR. LOVELL: Excellent. Thank you, Judge.

5 END DAY NINE, FRIDAY, OCTOBER

6 16, 2015, END TRIAL 4:12 P.M.

CERTIFICATE OF REPORTER

OCTOBER 7 THROUGH 16, 2015

PRETRIAL MOTIONS AND TRANSCRIPT OF TRIAL

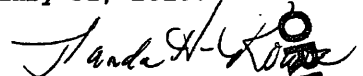
STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, Wanda H. Rowe, CVR-M, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing October 7 Through 16, 2015 Pretrial Motions and Transcript of Trial is a true, accurate, and complete record of the proceedings had and exhibits admitted on said dates, in the case of Rebecca Delaney, as Personal Representative of the Estate of Justin Nicholas Miller versus CasePro, Incorporated, Beaufort County, South Carolina, Court of Common Pleas, Case Number 2012-CP-07-03782; that I am of neither kin, counsel, nor interest to any party hereto.

THIS CERTIFICATE OF REPORTER CONTAINS MY ORIGINAL SIGNATURE AND IS ATTACHED TO THE ORIGINAL OF THIS TRANSCRIPT. PURSUANT TO SCACR 607, REQUESTS FOR COPIES OF THIS TRANSCRIPT MUST BE MADE TO THE COURT REPORTER. UNAUTHORIZED COPYING OF THIS TRANSCRIPT IS PROHIBITED.

Witness my signature January 31, 2016.


Wanda H. Rowe, CVR-M
Official Court Reporter

Page 1575

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OCTOBER 2015 DELANEY V. CASEPRO

\$	447:1 642:11	1483:25 1484:2,5	404:12 444:5
\$1,295.00- 1160:9	650:24 659:15	1064- 1446:23	683:12 720:7
\$10,000.00-	766:19 917:17	1089- 54:21	777:23 888:19
1354:11	1010:13,14	55:5,9,14	998:5
\$100.00- 1418:1	1267:6,7 1349:23	109- 781:22	1018:20,23,25
\$104.50- 619:4,12	1448:24 1449:9	782:1,5	1346:15 1435:21
\$118.35- 876:5	1454:1 1521:2,25	10:00- 659:21	1436:7,8,15,16,17
\$160.00- 758:8		660:1,3 661:24	120- 357:15 358:2
\$165.29- 601:11	0	683:2,6,8 1138:25	1354:3 1356:7
602:8 619:9	00579- 1353:23	1202:24	120DAY- 266:19
\$17.00- 606:5	0103- 634:12,22	1425:10,13,14	121814- 1358:9
\$19.00- 605:1	02588- 1353:24	1426:14	122- 779:12,17,20
\$2,000.00-	03/2013- 1358:17	10:25- 720:25	123- 780:1 1344:9
622:14,22 870:14	0700- 289:9 555:8	10:30- 683:12	124- 1344:16
873:11	1	962:7 968:2	125- 1344:11
\$2.57- 604:21	1- 19:18 26:6	1105:3 1167:17	128- 152:6
\$31.00- 604:20	191:7 205:19	1168:7,17	12:01- 1340:25
\$33.57- 604:25	209:9,11,13,14,19	1169:14,21	12:07- 253:25
\$35.00- 606:2,4	,20	1200:18 1516:14	12:20- 534:9,14
\$38.00- 605:19	208:5,6	10:34- 1033:22	1513:18
\$500,000.00-	212:14,17,18,19,2	10:36- 686:16	12:21- 1348:4
1055:2	0,21	10:41- 64:25	1350:13 1513:23
\$500.00-	210:4,8,12	10:47- 1033:23	12:24- 1082:11
1207:11,16	213:5,9	10:49- 1035:24	12:25- 1350:14
1314:12	219:17,24,25	10:50- 65:1	12:30- 127:3
1536:1,2,8	220:3 245:20	10TH- 622:7	270:16
\$52.51- 601:25	246:5 317:11	735:10 870:8	12:32- 1084:6
602:2,12	331:23 347:24	11- 28:10 1003:10	12:35- 127:21
&	348:1,2,3 354:21	1034:9,12 1035:4	12:36- 1513:24
&- 3:16 1267:14	371:21 507:6	1039:13 1109:9	12:38- 1514:6
	579:5 591:10	1343:18 1383:7	12:44- 733:10,19
	599:13,22	115- 996:8	12:47- 1084:7
'04- 568:6	1,000- 874:4	11:00- 970:4,8	12:54- 991:8,15
'07- 443:7,8	1,500- 51:24	1509:19	12:57- 562:1
'11- 998:23,24	1523:14	11:09- 72:6	12HOURL- 444:21
'60- 1367:20	1,700- 150:15	11:10- 1035:25	624:3
'61- 1367:21	10- 28:3 54:21	1475:16	12TH- 521:13
'7- 605:18	269:25 289:2	11:15- 1036:9	625:6 871:14
'76- 324:24	1000:12,20	11:27- 253:15	13- 11:38 20:23
'78- 1061:13	1003:10	11:28- 253:24	28:24 40:19
'79- 736:18	1034:6,12,24	729:22	272:24 273:3
'83- 1383:5	1368:11 1494:21	11:35- 970:9	586:21 587:4
'84- 1061:20	1521:2 1525:10	11:36- 1340:16	604:5 888:21
'88- 1068:7,14	10/16/09- 443:6	11:37- 1340:24	1009:15 1251:2
'89- 1371:19	100- 357:12	11:39- 971:4	1384:2
'91- 1383:6	1066:1 1136:11	11:41- 729:23	130- 668:16
'92- 1068:19	1151:6,22 1289:1	11:43- 730:5	130PAGE- 649:13
'EMPLOYEE- 279:6	100.4- 1288:3	11:50- 533:17	663:17 668:15
'ER- 1228:22	103- 357:11	11:51- 534:8	1308- 1290:3
'THERE- 380:7	1181:12,17	12- 10:17 22:8	131PAGE- 54:17
'TIL- 125:4,8	1286:25	28:18 40:16	699:16
163:21 164:5	1287:22,24	144:12	132- 1345:25
305:22 356:20	1288:25	214:15,17,22	1346:5,7
385:24 445:25	1289:4,20,25	244:7 269:22,23	132PAGE- 704:15
	1290:3,10 1327:16	270:6 337:25	133- 996:5 1346:5
		338:11 379:19	134- 996:6

OCTOBER 2015 DELANEY V. CASEPRO

1350- 754:8 136- 1346:15 14- 13:31 20:30 29:2 264:11,25 413:11,14 414:11 433:24 468:7 685:8,10 690:20 1009:17 1232:17 1333:6 1354:17 1359:10 1383:24 1384:1,2 1408- 1290:3 685:12,14,15,18,1 9,20 1415- 291:13 1417- 344:9,10 376:13,19 1430- 368:8 468:8,9 469:21 480:19 481:1 492:7 513:2 516:23 526:23 534:25 860:12 1450- 368:11 397:15 517:1 790:14 791:24 821:9 901:23 902:1,6,20,24,25 903:6 148- 777:11,13 149- 775:13,16,17 776:11 14TH- 1:3 626:16 924:21 1375:24 15- 16:6 21:3 24:23 59:20,22 61:15 127:6 253:14 255:16 279:22,25 533:13 534:4 574:25 575:6 576:23 580:25 618:18 716:23 818:13 969:15 970:2 1066:16 1157:7 1232:19 1333:7 1340:15 1409:17 1421:22 1454:11 154 150- 142:15 1500- 469:22,23 527:8 535:3 827:5 860:14 1510- 471:24 472:1,14 535:6 857:17 860:21,25	861:2,3,9 905:2 955:18 1487:3 1515- 472:1 1520- 471:23,24 472:14 858:2 862:1 955:17 956:10 1487:3 1525- 471:22 472:22,24 528:13 536:5 956:13 1530- 471:3 860:18 154- 1000:11,12 1540- 858:15 956:15 958:23 155120- 33:18 155140- 33:19 34:19 1556- 513:2 15B- 1428:8 15HOUR- 1071:21 15TH- 586:9,11,14 16- 1:20 18:5 21:8 213:21 401:8 414:20,22 463:15,20 1384:17 1385:11 1454:13 1573:25 1575:2,8 1605- 536:22 537:2,12 904:12 958:24 959:12 986:22 1246:7 1609- 213:21 1610- 858:19 861:13 1612- 376:13,19 533:3 537:24 538:13 1245:24 1246:4,17 1617- 213:24 1620- 976:14 987:11 1625- 540:23 1635- 468:10 487:24 504:3 527:1 1640- 826:11,14 1670- 105:21 16:03:27- 1027:11 1030:9 1032:12,13 16A- 463:10 16TH- 1563:13 17- 21:15 150:12,16 340:16 669:8 670:1 751:24 752:5,11	753:10 1136:17 1239:3 1243:24 1244:6 1245:8 1344:9 1482:4 1499:6 172410- 1355:2 172440- 1356:4 173- 235:1,5 174- 235:6 175- 235:2 245:2 246:4 175176- 245:20 176- 129:24 245:2 246:5 18- 21:24 131:12 256:17 275:2 322:23 323:2,11,15 325:6 357:17 642:17 670:24,25 671:5,15,19 721:13 895:3 1249:12 1368:18 1379:7 1388:12 1391:21,23,24 1571:12 180- 1147:1 18TH- 768:24 770:22 972:11 1235:22 1354:5 19- 21:32 235:6 252:22 253:1,5 403:22 492:1 570:20 831:3 915:18 1186:20,24 1187:3 1321:18 1322:10 1900- 292:16 1912- 1368:21 1927- 1374:14 19508TYPE- 1387:16 1955- 735:10 1960- 906:18 1976- 1355:3 1979- 736:16 1368:11 1980- 736:19 737:7 755:19 19808- 912:8,17 1982- 735:22 737:8,12 755:19 1983- 167:25 1369:7 1985- 738:4,6,10,14	753:24 754:12,22 756:2 1987- 168:7,11 740:20,21,23 741:8,9 1988- 1372:21 1446:24 1989- 24:23 740:18,19 915:20 1371:20 1409:17 1421:22 1522:3 1991- 1378:21 1992- 168:11 432:3 1996- 567:8,13 912:24 1998- 150:7 1116:10 1256:9 19A- 663:21,24 19TH- 378:16,25 1:00- 561:7 563:15 933:7 990:15 1:17- 144:23 1:20- 1232:1,2 1:21- 313:9 1:23- 314:11 1:29- 1112:22 1:30- 1251:23 1252:1,3 1516:15 1:45- 127:19 1349:23 1A- 19:24 208:25 210:15 212:5,8 219:21 220:4 233:16,18 1246:20 1247:21 1AA- 601:3 619:6 1F- 213:20 1ST- 584:2 586:9,11,14 599:16 741:22 756:15 757:12,15,16 894:17 1256:11 1262:6,7,8 1T05- 317:9,11 2 2- 23:32 26:12 191:7 227:19 245:3,21 246:5 315:19,22 316:9 332:9 348:10 353:24 371:24 439:16 507:11
---	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

523:1,11,16,19 567:2 603:5 635:13,25 666:7,8 671:17 685:20 703:25 759:7 760:1 773:16 780:1 802:4 894:25 2,000- 173:10,11 176:4 2,300- 173:8 2,500- 173:8 2.0- 600:23 2.1- 601:18 2.3- 694:14 2/24/12- 316:19 791:25 2/24/2012- 1167:17 20- 22:4 49:20 101:21 116:10 117:2 221:24 235:2,5 268:21 270:7 315:12,20 316:9 368:23 452:8 467:3 472:9 486:25 503:22 536:13 567:13 588:14 606:13 619:7 637:23 652:16 719:11 788:3 853:24 1038:11 1052:16 10 200- 122:2 2000- 703:22 706:12 20008- 572:9 2001- 567:21 652:6 2002- 568:9 569:12,17 652:5 2003- 129:24 168:21 568:6 2004- 168:21 169:7 570:1 1366:1 1389:22,23 1392:21 1393:4 1394:24 1412:23 1447:4 20042005- 1393:23 2005- 275:19,20,24,25 570:14 1393:4 1522:5 2006- 58:24	570:14 914:8 1257:11 1464:1 1522:4 2007- 278:10,13,21 279:12 280:21 281:9 282:12,23 283:23 284:10,23 286:23 434:7 435:2 438:5,22 439:16 440:22 441:15 591:10 604:16,18 618:6 642:9,10 663:1 741:22 2008- 169:8 259:4 617:24 618:22 619:3,15,19 742:3,9 745:23 2009- 259:4 622:7 633:17 742:3 757:16 759:12,14 870:8 917:8 1038:8 1039:6 1260:22 1261:13 1503:9 1504:9 20092010- 1530:12 201- 1235:8 1238:4 2010- 104:18 259:4 307:14 624:14 625:7 626:16 631:24 632:1,10 634:19 639:22 640:8,25 641:4,5 703:23 706:2,16 709:7 710:2 713:12 715:1 871:4,14 919:23 997:14 998:8 1219:20 1220:20 1260:23 1505:15,23 2011- 169:8 175:16 259:4 305:23,24 329:25 356:20 599:13,22 615:4,8,20 652:10 700:20 709:8 756:15 757:12,16 758:10 874:18 876:5 880:4 891:16 894:17 895:1,6,14 896:5 973:23 999:6 1396:3,4 1413:18	2012- 47:18 94:8,17 97:4 98:8 105:6 108:19 150:25 176:10 203:5,8 205:9,25 206:3 259:3 268:22 272:16 288:16,17,23 289:1,12,14,18 291:6 292:5 294:5 309:17,19,22 310:1,5,15 318:19 324:5 331:7 337:25 339:1 342: 2012CP0703782- 1:6 1575:15 2012G80700573- 1353:23 2014- 169:8 175:13,14,16 378:16,25 573:5,20 665:1 667:5,8 768:24 770:23 776:1 895:4 914:9 971:24 972:11 1107:23 1119:11 1235:22 1261:7 1354:5 2015- 1:20 4:7,16 6:29 8:5 10:17 11:38 13:31 16:6 18:5 30:2,4 234:2,4 427:20,22 683:10,12 752:19,25 888:19,21 1009:15,17 1079:12 1158:9 1163:7,20 1232:17,19 1262:9 1454:11 1572:10 1573:25 1575:2,8 2016- 1454:13 1572:7 1575:22 2017- 1572:7 201B- 1238:11 20A- 664:1,7 20MINUTE- 1213:4,6 1522:25 20SOMETHING- 1110:1 20SOMEYEAROLD- 545:9 21- 22:12 54:19 598:3,8,19,25	599:1,5 600:3,22 694:13 697:5 996:8 1346:16 1391:22 1406:8 211- 401:7,8 213- 1249:21 21738- 566:24,25 218T- 617:24 618:2,7 22- 22:17 579:2 607:11,16 608:8 611:25 612:6,20 613:4,10 743:12 744:2,14 869:24 928:1 947:8 1176:4 1345:25 1346:5,11 1503:2 220A- 1358:17 22412- 22:5 270:5 22ND- 752:25 22PAGE- 578:25 23- 22:25 25:10 105:24 231:16 589:1,3,6 664:13 921:3,11,17,23 971:16,18 972:1,10 973:18 974:2 996:6 1050:7,17,23 1051:3,7 1054:11 1233:1,8 1341:10 1495:1 23.1051- 14:12 232- 1249:22 23RD- 431:21 24- 23:4 47:18 94:8,17 98:8 108:19 150:25 176:10 203:5,8 205:9,25 206:3 245:2,20 246:4 259:3 268:22 288:23 289:1,12,14,18 291:6 292:4 294:5 309:16,19,22 310:1,5,15 318:19 324:5 337:25 339:1 342:14 343:8 3 24/48- 1039:14 24/7- 104:12 1039:20 24/7/52- 444:25 603:15 2408- 1365:22
---	---	---	--

OCTOBER 2015 DELANEY V. CASEPRO

24HOUR- 365:23 24TH- 176:22 258:1 303:19 456:5 533:4 537:23 545:13 645:14 794:14 802:22 810:8 811:21 821:12 837:13 840:18 846:16 985:13 998:13 1040:25 1041:5 1119:7,11,12 1132:17 1205:3,19 1266:14 1267:24 1268:4 1354:25 25- 23:10 151:21 176:10 245:2,20 246:4 386:14 414:11 416:12 486:25 606:13 652:16 779:20 782:1,5 906:6 996:6 1248:23 1251:13 1343:9 1346:7,11 1350:20 1391:22 1526:10 253- 614:18 877:5,8,12 257- 616:21 617:18 25MINUTE- 52:13 25TH- 176:22,24 26- 23:17 396:25 409:16 411:25 566:20 664:18 754:12 906:6 1363:21,22,24 1370:7,12 1380:4 1382:23 260- 621:2 263- 621:23 870:3 26508- 2:29 266- 622:18 267- 871:5 877:9 27- 23:22 25:15 410:11 411:21 615:4,7 906:6 1032:3,5,6,7 1154:12 1155:11 1210:8 1420:4,8,11,13,16 271- 1464:1 276- 1464:1 27TH- 164:2 615:6 877:6 1032:11	28- 2:19 25:21 130:21 417:22 632:10 663:1 893:7,9,12 923:4 972:21 974:19 1157:22 1158:4 1210:13 282- 626:20 28TH- 257:16 703:22 29- 25:27 441:15 1078:25 1110:4 1162:24 1163:8,14,21 1344:9 292033220- 1358:4 294013531- 3:19 29464- 2:20 29TH- 257:15 278:21 2:00- 95:11 104:13,14 291:14 292:4 458:13 561:23,24 603:21 732:22,23 821:19 990:18 991:6,14 1081:24 1082:9 1096:4 1136:17 1285:19 1349:23 1482:4 2:03- 563:16 2:04- 733:20 734:8 2:05- 144:24 2:07- 564:14 2:09- 991:16 992:16 2:10- 1350:15 2:13- 1352:8 2:15- 148:19 291:12 294:6 1458:19 1514:21 2:17- 114:15 316:17,24 1482:12 2:21- 1566:14 2:23- 1567:13 2:25- 1112:23 2:26- 1113:5 2:30- 312:21 313:7,23 344:14 468:9 469:2,3 481:1 492:11 510:6 534:25 551:14 560:2 1520:16,17 2:30ISH- 510:25	2:39- 1569:7,8 2:41- 314:12 2:43- 314:25 2:50- 397:15 790:14 821:11 837:13 995:2 1491:4,25 1496:7 1522:12 2E- 471:10,11 478:24 2ND- 283:23 284:10,23 438:5,22 1398:25 1446:23 1447:5 3 3- 19:29 24:4 26:18 146:2,9 147:16 154:16 227:15 245:21 246:5 290:14,16,18,20 291:3 315:19,25 317:23 328:22 332:9 343:17 344:2 348:10 353:24 372:1 507:11 511:11 543:6 599:12 636:15 693:18 694:1,9 699:17 3/28/10- 625:21 872:6 3/28/2010- 872:14 3/31/10- 624:9 30- 97:25 290:18 305:2 395:3 428:20 583:17 687:19 853:25 1052:16 1083:16 1157:10 1170:15 1239:6 1345:24 1432:23 1476:15 1520:6 1566:21 1567:6,9 30,000- 1414:10 30,000FOOT- 236:10 300- 627:10 301- 627:21 3045942828- 2:30 30B6- 658:7 665:2,12 30HOUR- 583:17 30TH- 286:23 434:7 752:19	31- 1575:22 32- 225:19 33- 1039:13 333- 631:5,12 334- 639:10 341- 874:16 875:24 35- 1515:15 353- 129:23 36- 605:18 360- 157:11 37- 1039:13 371- 1463:25 3712- 2:28 3:00- 369:2,3,4 470:3 471:1 472:8,9 535:3 1215:1,11,12,13,1 9,23 857:19 1214:21,22 1251:20 1494:22 1521:25 3:00ISH- 1285:19 3:09- 608:2 3:10- 863:6 864:2 905:2,14 1486:22 3:14- 611:14 3:20- 1486:22 3:25- 536:5 862:2 1523:11 3:27- 1360:12 3:28- 611:15,21 3:30- 471:3,6,18,22 3:35- 197:18 3:37- 198:2 3:39- 1365:7 3:40- 1523:11 3:43- 818:14 3:44- 819:7 3:47- 1003:16 3:55- 372:22 373:8 3:56- 1519:12 3A- 26:24 147:24 252:7,11,14 3E- 527:19 3Z- 147:24 4 4- 19:34 24:13 26:32 115:22 116:1,3 120:19 331:3,10,13,16,20 ,22 184:8,11 239:22
---	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

332:8 333:24 334:2,5 348:12,17 353:13,16,24 362:25 368:8,9,10 371:19 384:5,8 430:2 447:22 448:1 450:1,8,12 451:12 453:4 454 418- 317:22 4,000- 1072:18 40- 3:17 55:6 294:18 650:24 853:25 976:3 978:1 1015:2 1061:4,7 1069:1 1072:1 1095:11 1129:11 1489:3 1520:6 1524:18,19 1538:15 400- 3:18 401K- 103:14 616:1,19 623:6 624:24,25 625:25 765:9,19 873:22 874:1 876:16 878:7 1502:22 403- 33:12,15 129:21 230:7 1020:12 40SOMETHINGBED- 1115:12 40YEAR- 1085:6 41- 1003:10 417- 344:8 42- 1003:10 433- 744:17 44- 413:17,18 414:11 1066:15,16 1427:14,21 4417580- 1356:15 443- 743:14 744:17,22 45- 412:23 418:12,21 687:19 1348:16 46- 419:8 47- 396:2 48- 214:12,14,15 1067:10 1107:22 49- 652:14 4:00- 94:19 99:9 476:23 477:7 479:20 487:3,5 821:20 976:3 978:2 1003:18 1014:9 1202:23	1244:13 1246:14 1247:18 1458:20 1488:25 1499:7 1514:22 1520:17 1521:2 1524:25 1525:11 4:02- 1005:11 1246:14 4:03- 819:8 4:04- 819:19 4:05- 1246:7 4:06- 1569:9 4:07- 1569:25 4:09- 213:22 217:3 4:10- 1244:14 4:11- 644:12,18 4:12- 1246:17 1573:9,25 4:16- 218:24 4:17- 213:24 219:14 373:9 1245:7 4:19- 373:13 4:20- 976:15 4:23- 151:7 644:19 4:24- 645:3 4:25- 540:23 4:30- 151:7 344:13 4:35- 219:15 224:17 488:2 527:2 4:39- 389:5 4:40- 826:16 975:18 1213:1 1408:11 1492:14 1495:1 4:45- 1411:16 4:50- 662:1 4:55- 1411:17 4:56- 1411:21 4AA- 601:19 4E- 529:23 4TH- 1395:22	656:6 667:8 704:8 705:3 782:12 996:8 1010:10 1015:11 1045:2,9,16,23 1046:3,21 1048:18 1 518- 317:22 50- 55:6 101:12 108:16 417:23 665:5,16 1181:16 1344:11 1488:7 50PLUS- 129:6 50YARD- 85:14,16 51- 413:11 515120- 33:18 515140- 33:21 52- 104:12 415:24 539- 1446:23 54- 1365:19 1427:14,22 55- 1244:20 553- 240:1 56- 165:11 1435:6 568- 324:23 569- 324:23 57- 1015:7 570- 324:23 571- 324:23 572- 324:23 573- 324:24 574- 324:24 576- 324:25 580- 325:10 582- 325:10 594- 240:2 59YEAROLD- 95:13 5:00- 386:15 387:14 659:15 1399:23 1424:3,7 5:02- 1223:9 5:07- 229:14 5:12- 234:2 5:13- 1230:6 5:15- 1232:17 5:16- 683:10 5:17- 1426:15 5:28- 887:6 888:19 5:30- 1007:23 1213:3 1214:14 1216:3 5:32- 1009:15 5:40- 427:20 5:57- 1454:9,11 5TH- 278:13 281:9	282:12 646:24 665:1 667:5 1396:3,4 6 6- 4:7 20:3 24:27 27:9 30:4 139:7,16 140:8 141:22 142:9 143:1,3 430:10 600:1 639:2 652:16 656:6 1107:23 1409:11,22 1422:2 1436:4 60- 258:19 260:7 321:18 324:2 357:12 416:5,12 861:15 1000:8,9 1068:24 1157:9 1483:1 607- 1575:19 60PLUS- 1262:24 60SOMETHING- 51:13 53:8 61- 399:10 63- 997:4 64- 357:15 682- 282:9 685- 278:17 280:10 604:10 697- 282:18 6:00- 1202:23 1448:21 6:50- 289:2 6:59- 338:12 6TH- 282:23 435:2 440:21 1109:24 7 7- 1:20 4:16 20:8 24:33 27:16 30:1 139:7,20 141:16,17 143:10,15 184:4,16 185:22 234:2 252:21 399:10 639:10,11 889:10,15 890:6 1341:23 1409:11 1410:1 1422:5 1436:9 1531:2 1575:2,8 70- 1066:1 1068:24 1151:6,22 1157:9 1181:17
---	---	--	---

OCTOBER 2015 DELANEY V. CASEPRO

700FOOT- 348:8 701- 1073:6 1097:2 702- 1097:2 703- 1056:25 1097:2 708- 283:15 709- 282:3 711- 284:4 712- 284:13 713- 277:5 716- 278:4 74- 566:10 745- 285:1 75- 53:10 758- 286:5 759- 286:21 77- 400:20 78- 404:12 406:9 78258- 567:1,5 7901- 1358:3 7:00- 163:4,21 289:2,3 292:16 338:8,9 369:4 445:25 446:1,3 605:21 606:1 766:16,17,19 768:10 7:01- 338:12 7:55- 1026:8 1027:3 1244:21,22 7:56- 1026:8,25 7:57- 1015:3 7TH- 573:20 1366:18	1358:5 8039355544- 1358:6 81- 973:9 834- 434:11 8432169136- 2:21 8432555893- 1358:12 8437270307- 3:20 8439866379- 1358:15 846- 435:15 855- 441:4,6 858- 436:1,5 87- 1341:23 876- 436:19,20 879- 437:5,18 880- 438:13 881- 438:24 884- 439:18 887- 440:16 1447:5 89- 1341:23 892- 1447:4 8:00- 733:23 1215:6 8:30- 1450:16,18 8A- 728:23 8TH- 742:9 753:24	204:2,7,14 205:1,11,24 210:7,11 211:6,22 212:13 2 92415- 25:30 94- 379:14 771:4,9 94TH- 771:1 95- 771:16 1259:24 9814- 26:13 227:18 99.5- 357:9 1286:25 1288:1,4 9:00- 176:23 233:12,23 387:16 389:3 391:10 660:2 886:15,16,18 887:5,25 888:15 1007:22 1009:11 1223:18 9:15- 1232:19 9:24- 888:22 9:26- 888:21 890:25 9:30- 228:25 229:13 233:12 427:22 9:31- 429:5 9:32- 234:4 9:33- 896:17 9:35- 429:6,8 9:37- 632:10 9:45- 1009:17 9:49- 1252:9 9:52- 30:2 9:57- 249:5	922:16,17,22 923:2,5,25 972:16 973:11 974:1,15 975:6 ABEYANCES- 972:21 974:18 ABIDE- 519:22 ABILITIES- 907:17 ABILITY- 30:16 35:20 78:14 79:17 90:4,10 104:5 114:16 120:4 126:4 133:16 243:23 281:10,17 423:16 491:3 865:14 878:22 999:14 1025:23 1196:17 1200:15 1243:18 1357:17 1381:8 1441:17 1453:10 1456:19 1458:2,22 1464 ABLE- 74:1 89:12 95:25 96:1 100:15 141:19 146:21 148:9 155:15 156:2 182:14,25 183:4 185:7 191:10,23 248:20 255:15 260:16 285:20 299:9 303:18 306:2 329:20 332:22 333:6 335:8 345:6 423:12 447:16 450:23 476:7 ABNORMAL- 532:21 949:23 952:20,23 953:4 1287:21,25 1288:4,7,24 1289:1 1327:18,19 1518:21 1524:7 ABNORMALITIES- 1184:20 ABNORMALLY- 1193:3 ABOVE- 359:6,9 493:23,24 583:18 630:5 671:24 815:20 860:8 862:22 952:18 1136:11 1264:11 1288:25 1289:1 1323:25 ABRADED- 943:11 ABRASIVE- 367:7
8- 6:29 20:13 25:3 27:22 139:7,23 141:16,17 143:10 234:4 400:20 403:22 427:20 604:3 777:13 889:18 890:2,9 1344:16 1409:12 1410:5 1422:9 80- 872:21 1399:22 800- 105:12 106:7 287:16 331:7 853:17 8008SQUAREFOOT- 980:11 1204:9 802- 152:5 8039355540-	9 9- 8:5 20:18 27:29 139:8 140:1,23,24 141:14 144:3,13,14,18 328:21,23 427:22 585:17 600:1 683:10 989:6,8 1034:4,12,19 1369:7 1378:21 1568:11 90- 492:19 1259:24 900- 642:13 911- 19:20 26:8 32:15 38:19 62:14 100:13 128:1,2,14 129:2,13,25 130:19 131:3,17,19,21,24 132:1,4,10 133:15,19 134:18 135:12,16 147:8 202:14 203:11,14,15,18	A AET- 1480:23 ABANDON- 87:23 ABBEVILLE- 917:4,6 ABBREVIATION- 359:11 ABDICATE- 1234:8 ABDOMEN- 174:8 192:12 ABDOMINAL- 141:1 192:17 ABEYANCE- 25:11 881:1,5 892:10,13 893:6,12,19,22 894:3,6,18 897:5 921:1,7,15,22	

OCTOBER 2015 DELANEY V. CASEPRO

ABSCONDED- 1010:14 ABSENCE- 37:7 943:3 1223:14 ABSENT- 180:10,12,15 945:11 ABSOLUTE- 1029:21 1458:2 ABSOLUTES- 1329:11 ABSTAINED- 946:2 ABSTAINING- 946:10 ABUSE- 284:5 439:2,7,11 585:9 627:23 800:22 944:20 1142:24 1322:13 ACADEMY- 639:12 1064:6,7,23 1102:24 1118:14 1256:9,10 1257:22 1258:1,2,7 1527:11 ACCENT- 175:18 ACCEPT- 87:10,14,24 672:23 1297:1 1542:18,22 1543:2 1550:20 ACCEPTABLE- 963:6 ACCEPTANCE- 621:25 675:17 870:7 871:7 ACCEPTED- 59:2 105:8 176:15 671:24 677:14 1061:18,21 ACCEPTING- 77:12 279:4 441:22 442:1 653:15 870:10 941:5 1296:19 ACCEPTS- 687:4 ACCESS- 303:8,12 336:13 495:16,18 512:15 681:17 696:6,9,10,12,13 703:1 712:21 835:15 846:24 847:1,10,17,22 863:19,23 868:24 869:1,3 1047:19 1048:10,13 1134:22 1182:24	1332:1 1488:3,4 ACCESSED- 30:24 ACCESSING- 1333:7 ACCIDENT- 133:24 134:23,24 145:17 150:9,13,14 157:17 163:24 215:15,16,17 257:14 292:23 1044:24 1047:12 1354:10 1498:20 ACCIDENTALLY- 101:7 ACCIDENTS- 486:18 ACCOMMODATE- 733:24,25 908:17 1214:14,16 ACCOMMODATION- 497:20 ACCOMPANIED- 531:21 962:7 1087:21 1173:9 1305:24 1308:1,4 1313:1 ACCOMPANY- 477:18 ACCOMPANYING- 516:6 840:10 ACCOMPLISH- 174:23 387:12 ACCOMPLISHED- 1030:15 ACCORD- 355:11 ACCORDANCE- 190:25 ACCORDING- 74:17 278:9 344:6,11 469:23 537:14 540:21 546:4 578:24 637:9,11,14 666:12,20 667:1 693:3 743:16 810:9 820:18 857:25 858:13,17 861:3 863:8 904:8 959:12 965:18 1105:3,5 1184:11 1187:2 1327:13,22 1487:4, ACCORDINGLY- 1270:3 ACCOUNT- 435:22 601:14 616:8 852:16,19 875:1 876:13 1055:5 ACCOUNTANT-	1319:10 ACCRUE- 59:13 ACCRUED- 872:19 ACCUMULATE- 1262:4 ACCURACY- 487:11,14 1192:21 1238:15 ACCURATE- 53:23 134:13 154:25 187:17 206:7 219:6 220:5 317:2 334:25 379:1,9 487:2 506:25 523:6 540:23 570:4 608:14 657:13 658:21 707:1 748:9 1075:23 1153:11 1164:9,19 1181:6 1233:15 1238:14 1575:9 ACCURATELY- 185:3 695:17 811:16 814:22,24 1131:22 1134:12 ACCUSED- 678:21 1505:4 ACGME- 170:2 ACKNOWLEDGE- 421:13 438:7 439:6 1254:17 1471:22 ACKNOWLEDGED- 105:7 1165:15 ACKNOWLEDGES- 1486:18 ACKNOWLEDGING- 439:1 627:22 ACKNOWLEDGMENT- 283:17 284:4,14 437:24 438:15 627:14 711:9 ACKNOWLEDGMENTS- 576:17 ACKWARDS- 655:12 ACLS- 285:21 286:14 ACQUAINTANCE- 1313:5 ACQUAINTANCES- 1228:10 ACQUAINTING- 323:20 ACROSS- 153:1 157:25 164:25	165:3 183:10 217:1 331:19,20 332:9 347:23 349:7 383:23 454:15 457:9 497:14 507:17 645:24 1014:11 1020:10 1377:22 1396:18 1402:8 1498:18 ACT- 35:2,24 36:13 111:21 236:6 326:18,21 351:20 352:17 382:6 775:5 791:18 909:24 913:16 983:24 1060:2 1076:25 1102:6 1140:4,5,6,15 1144:17 1198:13 1204:5 1212:16 1275:19 1280:15 1285:2 1317:11 1392:10 144 ACTED- 371:8 542:23 546:9 1313:10 1481:9 ACTING- 95:9 308:20 385:4 488:24 933:6 962:10 1059:21 1074:1 1105:1 1139:6 1191:18,24 1192:15 1193:1,2 1457:21 1464:6,13 1465:20 1496:21 1551:4 ACTION- 33:23,24,25 34:7,10,11,14,15 41:2,9 59:1,4,5,13 63:17,20 64:9 71:1 75:3 76:8 93:11 136:19 494:22 640:24 641:2 675:10,11,20 702:25 753:9 758:24 759:19 764:17 881:19 892:1 893:19 894:7 923:1,5,22 1020:1 ACTIONS- 35:5
---	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

50:13,24 55:4 59:10,14 204:6 211:15 405:10 422:8,20 494:23 496:5 509:20 514:7 550:1 580:14 701:15 841:19,23 901:16 924:4 927:21 1057:17,21 1059:9 1100:22 1123:11 1131:3,5 1148:14 1166:25 1284:12 ACTIVATED- 151:17 ACTIVE- 114:8 118:22 356:19 357:1 365:13 446:11 474:11 503:1 515:21 535:10 697:23 778:15,18 833:6,18 955:3 1072:6,10,16 1138:18 1146:25 1147:3 1152:15 1197:9 1256:14 1261:5 1305:15 1493:5 ACTIVEDUTY- 51:21 57:12 570:21 807:3 997:16 1139:2 1156:18 1205:9 ACTIVELY- 1063:4 1065:3,16 1196:19 ACTIVITIES- 91:8 94:12 124:19 502:17 698:1 717:15 1154:15 ACTIVITY- 88:8,10 486:20 572:23 881:6 1017:6 1257:8 1458:23 ACTS- 54:23 55:8 101:9 236:14 310:22 724:7 842:1 1102:5 1279:15 1355:6,10 1461:13 1462:6,12 1468:16,19,20,23, 24 1463:11 1549:20 1551:3,12 1554:1,15,17,24 1556:17,18 1558:16,21	1559:1,3 ACTUAL- 43:21 70:2,4,6 76:5 179:19 214:14 281:1 423:14 506:24 586:3 589:15 605:4 609:7 658:12 692:2 807:23 937:22 985:12 1022:6,18 1031:15 1040:10 1048:2 1055:19 1206:2 1342:5,10 1343:1 1452:5 1456:19 1546:9 ACTUALITY- 1439:16 ACUITY- 1261:16 ACUTE- 916:14 ADD- 48:10 132:20 469:12 604:24 674:19 780:7 796:18 870:13 1166:6 1202:10 1240:14 1351:12 1567:21 ADDED- 673:1 804:8 824:23 829:22 955:13 1062:17 ADDENDUM- 580:19,23 582:4,5 826:8 ADDICTION- 803:4 ADDITION- 68:8 103:21 104:1 132:6 328:15 353:9 360:9 436:22 572:21 577:15 625:18 1016:1 1022:18 1040:9 1157:23 1362:20 1436:1 1491:17 1499:19 1567:16 ADDITIONS- 226:24 393:9 622:10 671:22,23 1230:8 1254:5 1360:20 1567:14 ADDRESS- 53:25 54:16 129:22 172:21 248:23 253:18 277:15 437:23 440:4	441:10 565:16 566:24 646:11 664:10 719:3 754:8 758:13 874:22 970:16 994:19 1014:23 1357:16 1392:12 1397:5,8,21 1461:25 1473:4 ADDRESSED- 575:18 608:17 625:7 752:21 871:11 1016:24 1041:25 1500:4 ADDRESSES- 33:22 624:17 1239:20 1243:10 ADDRESSING- 168:14 ADDS- 624:18 ADEQUATE- 1291:22 1292:7 1427:16,25 ADEQUATELY- 827:20,21 ADHERE- 384:11 ADHERENCE- 576:5 711:2 ADJOURNED- 1114:22 1573:19 ADJUDICATED- 1022:14 1058:5 1234:22 1239:10 1467:3 ADJUDICATION- 30:19 1467:21 ADJUNCT- 804:6 805:6 ADJUST- 343:24 ADJUSTED- 1568:14 ADJUSTING- 1323:19 ADJUSTMENT- 310:2 321:9,13 493:2,14,24 832:1,19,24 834:11 1187:20,24,25 1188:1 1322:17,24,25 1323:1,3,15,16,22 1324:1,4 1326:1,3 ADMINISTER- 556:2 ADMINISTERED- 60:11 769:3 776:3 ADMINISTRATION- 569:6 626:11	873:3 1072:15 1138:13 1146:22 1152:19 1169:5 1187:20 ADMINISTRATIVE- 498:10 579:23 696:4 698:1 1217:14 1234:23 1356:17,21 ADMINISTRATOR- 286:8 593:7 ADMINISTRATORS- 503:10 567:18 ADMISSIBILITY- 88:24 89:2 90:2,6 128:1 138:21 257:6,7 259:6 677:18 1542:9 ADMISSIBLE- 89:4 133:4 147:9 407:25 411:24 413:1 610:6,10,21 722:24 999:25 ADMISSION- 47:12 48:5,7 102:7 120:2 147:16 266:3 381:24 385:11 409:10 410:2 412:5,8 918:3 939:6,10,15 940:13,15 960:23 961:14 987:8 1128:21 1129:4 1165:4 1196:15 1272:2 1291:8 1297:14 1320:21 1339:9 1493:16,22,2 ADMISSIONS- 59:14 98:5 879:15 1204:15 ADMIT- 119:25 185:21 207:10 246:20 385:22 396:19 400:1 402:5 550:19 552:5 596:11 657:18 677:8 694:1 841:23 844:5 863:1 864:23 865:7,15 921:17 978:21 984:20 1195:23 1234:1 1294:4,20,25 1295:11 1506:13
--	--	--	--

OCTOBER 2015 DELANEY V. CASEPRO

1536:4 ADMITTS- 1320:7,8 1486:11 ADMITTANCE- 399:15 ADMITTED- 19:21,26,31 20:27,33 21:5,12,21,35 22:9,14,22,28 23:19,24,36 24:10 25:12,31 44:20 46:24 47:2,3,10,24 48:2 49:12 66:21 83:13 89:5 99:6 102:4 115:19 119:20,25 120:10 145:22 147:18,24 210:9,16 212:15 236 ADMITTING- 61:3 940:3 955:24 1195:18 1296:15 ADMONISH- 1212:14,18 1250:8 ADMONITION- 388:24 644:4 886:19 991:5 1425:24 ADMONITIONS- 1349:25 1426:9 ADO- 1036:24 ADRENAL- 192:13,14,15,18 ADULT- 372:9,10 875:21 1256:4 1388:16 ADULTS- 107:20 1331:16 1385:25 1392:2 ADVANCE- 955:14 1564:16,24 ADVANCED- 1061:22 1539:11 ADVERSE- 893:19 894:6 923:1,5 ADVERTISE- 1155:1,15 ADVERTISED- 1155:14 1503:11 ADVERTISEMENT- 1157:18 ADVERTISEMENTS- 1159:15 1206:17 ADVICE- 377:4	488:10,16,20,25 489:10 696:21 ADVISE- 1085:9,15,19 1087:17 1240:5 1357:21 1473:5 ADVISED- 920:5 ADVOCACY- 1029:15 ADVOCATE- 1456:4 ADVOCATES- 76:24 77:4 250:18,19,20 ADVOCATING- 1530:20 AERIAL- 63:3 99:20 AFFAIRS- 56:10 95:14 337:5 469:25 470:10 527:10,11 529:16 538:10,16 1057:19 1058:1 1059:22 1102:20 1103:11 1108:4,15 1109:6 1111:15 1120:5 1146:22 1167:18 1168:1 1205:4 1246:1 1467:2 1468:5 1516:17 AFFECT- 126:4 172:24 299:15 327:17 366:7 458:17 459:2,22 822:25 823:1,2,3,6 868:12 950:9,14 1136:3 1275:14,21 1277:19 1302:5 1330:4 1339:7 1484:25 1493:5 AFFECTED- 134:2 AFFIDAVIT- 45:20 54:3 55:13 256:23 258:24 259:7 262:12,24 1103:15 1105:5 1109:25 AFFIDAVITS- 1097:11 AFFILIATED- 350:5 894:14 896:3 AFFIRM- 74:16 149:7 166:11 201:24 271:2 430:14 564:23 734:20 1037:7 1060:7 1255:8 1359:21	AFFIRMS- 59:8 AFFIXED- 1050:20 AFFORD- 1044:21 1374:25 AFGHANISTAN- 1256:22,25 1527:13 AFOREMENTIONED- 857:22 AFORETHOUGHT- 1236:24 AFRAID- 297:16 301:20,24,25 330:6,8,13 337:21 383:7,17 451:23 461:7 547:3,14 548:2 661:8 784:9 811:2 947:2 1022:1 1326:16 1375:4 1381:18 1443:20 1484:21 1486:3 1572:18 AFRICA- 60:25 AFRICANAMERICAN- 295:15 AFTERNOON- 94:19 95:12 96:2 99:10 104:14 127:16 128:14 136:15 149:18 164:15 166:21,22 202:9 214:8 271:15,16 291:12,14 372:17 397:15 458:14 468:9 469:3 475:12 481:1 492:11 510:11 527:2 551:15 561:19 562:4,7 563:2 AGAINST- 35:5,25 42:21 55:21 59:4 71:2 75:3 88:20 125:13 158:13 349:17 384:24 484:25 488:10,16,24 758:25 844:24 941:21 945:12 1087:14 1108:14 1121:20 1122:5 1126:1,2 1140:4,5,7,12 1157:9 1196:6 1218:13 1272:17 AGE- 470:23,24	680:11,12 712:9 839:10 952:14,17 1367:18,22,24 1379:7 1388:12 1391:20 AGENCIES- 897:20 AGENCY- 1357:16,20,22,24 1467:2 1468:5 AGENCY'S- 1357:17 AGENT- 751:8 1146:21 AGENTS- 1087:14 1427:16,25 1551:1,3 AGES- 1331:16 AGGRESSION- 1281:4 AGGRESSIVE- 938:8 1139:13,14 1194:14 1281:4,9 1282:2,21,23 1283:7 1308:9 1309:3 AGGRESSIVENESS- 1136:14 AGITATED- 115:9 118:14 357:21,25 363:16 367:2,6 517:13 518:12 521:23 828:8 932:1 934:25 944:8 952:24 953:22 960:21 1013:25 1138:15 1139:13,14 1180:24 1181:8 1182:9 1183:15 1194:14 1281:19 1284:20 1288:15 1290:2 AGITATION- 121:1 517:18 944:14 1136:13 1275:6,8 1285:10 1286:13 AGREE- 46:4 83:8 132:22,23 133:1 220:5,10 221:18 237:7 245:7,15 258:25 263:3 281:16 304:16 308:9 309:2,5 322:7,12 325:21 335:11 336:2 380:19 384:22 405:23 406:4
---	---	---	--

OCTOBER 2015 DELANEY V. CASEPRO

417:24 423:21 501:20 548:16 549:17 553:18 557: AGREED- 42:6 105:14 106:1 167:9 225:18 247:1 251:2 395:8 600:20 601:6 652:11 812:5 842:24 878:1,17,18 1211:5,14,22 1254:16 1272:1 1298:9 AGREEING- 602:13 604:19 AGREEMENT- 24:22 145:7,11 265:1 272:25 433:25 573:10 575:5 669:12 670:10,16 719:16,20,21 1194:21 1195:17 1347:6 1409:10 1410:10 1421:21 AGREEMENTS- 234:12 AGREES- 939:16 1141:20 AH- 34:21 1091:1 AHEAD- 66:9,10 107:3 121:6 129:22 145:19 146:9 155:22 196:1 208:19,21 223:10 248:16 274:14 302:3 314:6 609:3 644:14 659:9 662:3 684:23 708:13 808:20 880:6 955:25 970:14 974:12 986:13 990:3 1033:20 1060:6 107 AHTLA- 257:10,20 258:3 261:7 491:4,7 512:3 513:4 868:24 869:1 AID- 79:2 790:22 1040:18 AIDED- 204:11 211:4	AIDS- 78:23 AILMENT- 343:22 832:21 AIN'T- 59:11 414:18 667:23 AIR- 99:16 120:22,23 121:8 357:17 387:20 480:6 481:17 486:20 489:15 491:11 492:17 495:4 512:11 520:13,18,24 521:6 538:17,18,20,23 549:5 557:18 559:25 577:5 776:23 777:19 963:5 964:11 985:14 987:4,19 1010:3 AIRLINE- 1160:12 AIRPLANE- 591:12 AIRWAY- 359:19 AJ- 21:8 AJAR- 332:17 333:5 ALABAMA- 1447:3 ALAN- 681:23 ALARMS- 1052:22 ALAS- 72:10 ALASKA- 1067:13 ALCA- 1249:23 ALCOHOL- 103:6 114:9 117:15 283:18 307:13 320:5 356:9 363:17 437:24 438:8 454:20 455:4,13 515:8 517:14 944:19 945:20,25 946:5,10 1088:25 1091:6 1128:4 1134:9 1138:4 1142:24 1182:11 1187:15 1250:1 1322:13 1508: ALCOHOL/DRUG- 800:22 ALCOHOLADDICTED- 340:9 ALCOHOLISM- 324:12 325:10 945:22 946:1 1187:23 1322:22	ALCOHOLRELATED- 163:1 ALE- 478:13 ALERT- 114:20 115:6 361:4,8 363:12 516:12 517:5 648:21 696:23,25 1008:6 1181:25 1305:8,13,14 ALERTED- 322:2 646:14 ALERTING- 696:22 ALEXANDER- 1378:19 ALEXANDRA- 3:13 ALIGN- 647:21 ALIVE- 423:23 1052:21 1395:8 ALK- 1249:23 ALL'S- 514:24 1450:14 ALLEGATION- 974:17 1428:5 1442:3 1531:12 1557:10 ALLEGATIONS- 922:20,24 972:19 1556:21 1557:13 ALLEGE- 35:21 43:17 55:8 1105:2 ALLEGED- 44:3 236:7 243:12,14 1068:13 1102:5,6 1104:12 1108:2 1235:14 1355:1,20 1557:20 1558:11,14 ALLEGEDLY- 238:11 919:24 ALLEGES- 1554:21 1558:9 ALLEGIANCE- 746:1,8,15,19 ALLEN- 176:14 564:19 1245:6 ALLEY- 101:16 1245:19 1478:25 ALLOCATED- 1531:24 ALLOW- 35:13 78:5,6 79:10,17 82:10 86:16 90:1,4 91:5 127:8 133:23,24 174:11 195:12 198:11	199:11 218:21 241:17 244:24 253:12 312:23 372:19 388:15 533:12 561:9 607:24 618:16,19 660:5 720:21 732:25 818:11 886: ALLOWABLE- 1560:8 ALLOWANCE- 280:25 604:21 605:24 625:25 765:10 ALLOWED- 56:8 64:17 76:25 118:4 124:17 134:12 171:18,24 391:20 401:9,13 496:6 773:15 775:6 850:23 855:7 907:18 917:23 919:11 925:9 975:1 1011:14 1087:22 1099:18 1109:21 1113:14,19 1122:18 1128:22 1212:11,12,17 ALLOWING- 126:13 945:12 949:12 1121:24 1122:14 1312:10 1424:10 1465:13 ALLOWS- 225:24 1098:11 1131:6 1376:11 1431:24 1460:22 ALLUDING- 591:16 ALLY- 969:13 ALONE- 47:23 108:17 300:2,5,6 302:4 328:9 330:5 334:2 382:11 397:1 409:15,17 411:25 547:3 789:18 839:3 855:19 999:14 1088:25 1122:1 1130:2 1158:2 1160:22 1487:21 1493:19 1506:1 1553:25 1559:3 ALPS- 1317:15 ALTER- 660:15 762:6 1234:10,18,19
--	---	---	---

OCTOBER 2015 DELANEY V. CASEPRO

ALTERCATION- 307:19,21,23,25 1134:6 1145:4 1508:24 ALTERED- 34:16,17 204:21 1048:6 ALTERNATE- 685:15,18,19,20 1566:17,25 1567:13 ALTERNATES- 1562:6 1566:7 ALTERNATIVE- 532:1,5 ALTERS- 1234:25 ALTOGETHER- 1157:6 1388:4 1415:4 ALVIN- 1476:21 ALZHEIMER'S- 1156:11 AMA- 488:9,15 489:3 AMANDA- 632:7,13 633:13 999:12 1220:20 AMBIVALENCE- 824:14 AMBULANCE- 100:17 216:18 292:12 346:16,23 347:14 373:24 383:22 484:12,16 485:14 508:6,14 519:11 1040:10 1055:14 AMBULANCES- 1040:16 1521:12 AMBULATE- 537:25 538:15 AMBULATED- 538:14 1245:25 AMBULATORY- 355:7 519:10 AMEND- 1253:11 1422:14 1426:19,25 1428:8 AMENDED- 750:23 1427:10 1428:17,18 AMENDS- 106:14 AMERICA- 70:25 273:12,16,19,22 276:5,6,9,15,23 341:17,18,21 342:6 343:5 433:15 500:18,21	501:1,4,13,19 658:5 736:2 742:1 745:3 746:2,14 906:21 1067:6 1314:7 AMERICAN- 169:12,21,23,24 170:2,8 618:15 639:12 1064:5,6,7,8,17,1 8 747:14,17,25 1102:24 1107:9 1118:13 1255:23 1260:18 1264:5 1316:8,10 1317:20 AMMUNITION- 800:7 AMONG- 35:2 105:15 106:13 176:3 216:21 619:20 808:21 1484:24 AMONGST- 444:18 AMOUNT- 78:13 423:7,13 597:8,9 619:7 758:5 864:20,21 913:4 1030:19 1342:11 1536:1 1560:20 1561:7 1562:14,21 1567:8 AMOUNTS- 280:25 AMPLIFIES- 1141:21 AMPLIFY- 1204:24 1205:3 ANACHRONISMS- 1064:10 1316:12 ANALOGIES- 1091:4 ANALOGOUS- 846:9,13 1088:2,14 1090:6 1097:18 1506:3 ANALOGY- 43:2 60:16 108:15 798:9 1088:1 ANALYSIS- 1002:9 1020:12 ANALYZED- 1556:15,16 ANATOMIC- 169:13 180:1 AND/OR- 439:7 579:11 806:15 933:22 1075:2 1168:15,16 1193:6	1468:11 1471:4 1552:15 1553:21,22,25 1554:2,3 1558:2 1559:8 ANDERSON- 340:15 1503:14 ANDTHREEQUARTERIN C CH- 321:19 A ANEW- 1566:25 ANGELINA- 12:44 13:11,16,20 28:13 419:2 555:13 995:6,9 1006:11,14,17,21, 24 1005:17,20,23 1034:9 1035:3 ANGER- 302:16,18 334:16,24 1299:4 1301:23 1302:10 ANGLE- 156:21 160:16 534:23 ANGRIER- 1181:4 ANGRY- 302:13,24 334:12,13 335:10 336:20 451:17 454:10,17 461:6 557:11 798:1,2,3,5 814:1 816:14 817:3,23 868:11 934:15,22 937:21 942:21 1013:15,25 1022:3 1138:3 1139:24,25 1140:2,8,14 1142:14,19 1180:10 1181 ANGST- 391:4 ANIMATED- 1275:22 1277:20 1280:22 ANINCHAND- 236:24 ANINCHANDTHREEQUA	1359:24 1360:3,24 1361:1,5,20,22 1362:3,8,11,14,19 1363:1,11,21 1364:3,7,10,21,24 1365:2,4,11,15 1407:10 1409:4 1411:24 1419:9 ANNIHILATE- 1537:12 ANNIVERSARY- 584:17 ANNOTATED- 28:4 1034:6,21 1355:2 1356:3,14 ANNOTATES- 1293:21 ANNOUNCED- 1512:25 ANNOUNCEMENT- 1474:1 ANNUAL- 502:2 ANNUALLY- 502:3 622:22 ANONYMITY- 81:11 ANTE- 1231:6 ANTEROOM- 222:18 ANTI- 95:8 98:21 868:10 1315:12 1339:7 ANTIBIOTIC- 883:8 ANTIBIOTICS- 882:18,24 1503:19 ANTICIPATE- 66:20 107:14 112:9 233:9 729:19 1216:25 1349:4,15 ANTICIPATED- 62:17 732:19 1234:24 1352:17 ANTICIPATING- 571:22 ANTIDEPRESSANT- 306:7,19 310:19 370:15 ANTIDEPRESSANTTYP E E- 1189:24 A ANTIDPRESSION- 370:16 ANTI-PSYCHOTIC- 306:16 311:3
---	---	---	---

OCTOBER 2015 DELANEY V. CASEPRO

326:7 804:2 821:6 836:22 982:2 1084:21 1483:16 1489:16 1496:20 ANTISOCIAL- 402:11 ANTONIO- 437:23 565:16 566:24,25 574:3 577:7 593:17 594:9 608:11 613:13 626:15 628:7 664:25 665:11 701:8 743:2,3 1263:4,5,15,19,20 21 1259:17 1262:22 1529:6 ANXIETY- 310:6 320:14 493:16,20,21 832:7 833:2 1134:4 1187:23 1188:1 1257:16 1322:22,24 1323:3 1329:18,20 1404:6 1405:16 1418:7,9,22 1518:17 ANXIOUS- 358:5 360:23 364:7 367:10 493:25 817:1,5,7,8,9,11, 14,17,18,20,23 815:20 816:24 832:9,25 834:12 868:11 949:2 1013:15 1071:2,7 1136:22 1183:25 1187:25 1190:24 1277:5 1322:25 1323:15,23,24 1329:20 1330:2 ANYBODY'S- 1108:23 ANYMORE- 232:21 301:3 541:14 785:6 1537:10 ANYTIME- 178:24 319:17 332:4 352:16 372:3 1376:22 ANYWAY- 222:24 358:18 675:2 714:14 1027:15 1381:19 1407:20	1567:1 ANYWHERE- 200:18 321:15 590:22 700:10,12 810:13 855:12 1041:24 1044:9 1115:25 1144:8 1176:10 1225:18 1314:6 1453:1 1461:12 AORTA- 192:11,17 APARTMENT- 94:15 100:1 122:10 128:20 133:11 1014:12 1019:2,8,13 1025:13,19 1055:12 1374:10,14,16 1377:21 1383:10 1396:17 1497:23 100:2,9,10,11,12, 20 APARTMENTS- 94:6 101:1 216:17,18 1010:14 1049:5 1055:10 1498:3 APOLOGIES- 1036:11 APOLOGIZE- 70:8 72:13 73:1,13,22 195:21 218:3 222:8 231:13 282:6,9 345:11 347:9 395:23 413:18 436:17 441:3 443:8 495:10 536:14 567:2 584:3 744:17 750:7 785:21 860:23 877:8,10 907:24 908:25 909:11 922:7 928:20 94 APOLOGIZING- 356:12 1032:17 APOLOGY- 72:10 APP- 758:21 1333:12 APPARATUS- 1039:3 1041:9 1042:10 1044:2,5,18,23 1045:16 1046:2,8,10,11 1052:1,5,15,16,22 24 1049:7 1051:8	1054:19 1055:1,5 APPARENT- 1188:18 APPARENTLY- 73:20 105:24 295:24 303:10 473:9 712:2 829:13 1157:23 1432:13 1440:13 1441:13 1492:13 1497:17 1502:7,10 APPEALING- 797:5 933:21 1301:7 1491:13 1508:25 APPEAR- 132:25 286:7 754:21 755:5 788:22,24 824:18 828:8 943:15 946:2,24 1009:5 1015:19 1424:8 APPEARANCE- 513:20 518:3 548:16 815:19 816:3 823:3,5 839:10 953:23 1119:3 APPEARANCES- 2:3 APPEARANCES2- 4:21 APPEARED- 157:19,20 832:9 954:9 987:3 1169:2 1190:3 1493:3 APPEARING- 76:23 521:24 943:14 1453:21 APPEARS- 37:5 98:3 278:20 355:7 359:7 434:14 439:20 464:22 575:17 615:4 632:7 676:19 753:2,17 793:15 826:13 873:6 875:2,13 876:17 1000:8 1172:10 1409:16,20 APPELLATE- 220:1 APPEND- 267:24 APPENDED- 580:25 APPENDIX- 180:15 APPLIES- 798:8 APPLICABLE- 83:15 84:4,6,9,11 87:3 241:4 366:17	574:22 584:14 585:14 590:21 1080:15 1085:22 1234:9 1235:1,3 1467:12 1542:4,17 1544:11,12 1568:13 APPLICANT'S- 755:22 APPLICATION- 277:9,13 278:4 436:7 439:21 628:5,15,17,18 630:10,18 745:15 754:2,22 756:1,14 759:5,7 760:1 880:4 894:17,20,25 895:6,14 896:5,11 899:21,22 923:10 973:23 1073:25 1074:1 1410:6 APPLICATIONS- 103:2 APPLIED- 168:2 278:12 440:5 745:13 923:24 APPLIES- 939:19 1459:21 1466:9 APPLY- 83:18 87:10,14,19 92:22 256:5 421:10 579:15 724:24 817:18 916:25 917:23 923:11 1076:23 1077:9,10 1542:18,22 1543:2,19 APPLYING- 285:13 628:9 745:18 1186:4 APPOINT- 593:5 APPOINTED- 1102:21 1477:20 APPOINTMENT- 25:5 96:9,14 113:15 351:2 365:20 547:10 733:22 1191:22 1192:11 1193:4,18 1215:5 1285:5,20 1409:11 1410:6 1422:8 1518:18,20 APPOINTMENTS- 1349:9 APPRECIATE-
--	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

36:5,8 65:11 137:6 180:8 301:5 386:20 608:24 681:11 703:7 756:17 885:6 988:22 1008:23 1009:10 1016:8 1254:17 1352:16 APPRECIATED- 780:15 1083:22 APPRECIATION- 1009:8 APPRECIATIVE- 31:23 246:8 1009:4 APPRISED- 763:4 APPROACH- 67:3 89:11,22 90:8 126:19 139:1 152:2 154:11 183:24 201:12 205:13 206:22 209:3 210:20 217:8,16 224:14 272:19 279:17 309:12 315:7 322:19 433:20 452:3 463:6 491:21 522:21 572:2 575:1 597:22 604:6 613:6 APPROACHED- 152:17 201:11 217:24 296:17 571:18 756:23 1089:9 APPROACHING- 184:2 322:21 463:18 598:5 716:21 APPROPRIATE- 37:20 50:14,15,25 133:18 188:19 204:13 211:12 229:19 263:23 290:23 291:2 299:18 355:2 366:13 367:10 389:12 392:17 396:19 406:13 408:3,15 610:20 620:24 656:1 684:21 715:23 763:11 764:8 767:19 809:22 89	APPROPRIATELY- 1208:9 1227:23 1520:25 APPROPRIATENESS- 1314:8 APPROVAL- 690:18 691:14,22,23 695:7 884:20 APPROVED- 170:1,6 171:6 624:13 692:6 APPROXIMATE- 537:16 904:12 941:23 1243:16 1476:24 APPROXIMATELY- 151:21 162:18 170:12 173:4 259:24 272:6 289:2 291:12 331:8 566:10 739:20 906:19 1068:24 1231:17 1435:6 1525:10 APRIL- 275:19,20,24 615:3,6,7,20 625:6 626:16 631:24 632:1,10 634:19 639:22 640:8,25 703:22 706:2 710:2 715:1 871:4,14 877:6 1112:8,11 1368:11 AREA- 56:17 152:2,14 170:16,18 179:4 180:1 183:12 186:23,25 187:14 200:18 214:25 216:10,13 298:10 333:7 340:3 343:19 346:3,4 348:21 351:14,24 352:7,10 353:13 370:25 383:11 447:8 450:14 464:23 465:1 467:23 4 AREAS- 160:10 183:2,4 187:1,24 231:19 406:14 521:14 775:22 854:9 943:11,20 944:7 1066:1 1150:23 1151:7,23	1155:3,7,9 1156:9,14,15 1258:14 1265:2 1343:14 AREN'T- 115:8 257:12,16 300:23 308:9,12,13,17,18 405:15 428:15 475:8 515:3 550:1 557:13 814:17 830:21 918:24 950:4 1178:25 1301:12 1327:7 1500:3 1533:16 1539:13 ARGUABLY- 1571:12 ARGUE- 35:21 36:10 45:18 897:22 1312:24 1437:11 1447:17 1468:22,24 1475:10 ARGUED- 133:4 1109:15 1218:13,15 ARGUES- 1471:20 ARGUING- 49:17 242:4 411:14 414:21 1104:24 ARGUMENT- 18:14,16,24,28 34:22 60:5 112:19 129:22 132:6 242:22 259:17 596:4 674:12,19 675:8 724:15 754:10 1023:20,24 1024:4 1096:7,9 1097:1 1106:11 1423:16 1436:22 1456:25 1475:21,24 1476:2,3,5 1477:9 1514:9 15 ARGUMENT/- 15:12 ARGUMENT674- 10:8 ARGUMENTATIVE- 674:7 708:9 ARGUMENTS- 36:11 82:7,8 83:3,5,14 92:20 1424:24 1425:15,21 1468:7 1476:7 1477:3,6 1513:14 1542:3 ARISE- 1098:18 1555:10	ARISES- 1098:13 1099:5 1438:11 1555:10 ARISING- 1154:21 ARIZONA- 1252:24 ARKANSAS- 1162:20 ARM- 423:20 ARM'S- 481:3 670:11 ARM'SLENGTH- 873:5 ARMED- 570:17,22 1481:24 1556:2 ARMS- 128:18 360:11 ARMSTRONG- 1463:25 ARMY- 557:9 577:6 647:15 1117:7 AROSE- 502:5 ARR- 1227:3,5 ARRANGEMENT- 501:18 ARRANGEMENTS- 65:25 95:10 489:22 490:5 ARREST- 162:14 1022:11 1237:4 1354:8 ARRESTED- 162:9,11 1237:4 ARRIVAL- 316:17 355:6 ARRIVE- 95:15 445:23 792:19 810:14,17 1055:12 1267:24 1425:9,13,14 ARRIVED- 161:5 162:3 292:18 843:2 862:12 933:6 1068:7 1121:7 1166:7 ARRIVES- 95:11 1293:5 ARRIVING- 1240:20 ART- 171:22 1550:4 1571:23 ARTHUR- 12:36,38 28:5 52:18 58:17 394:8 840:25 844:13 851:14,18,20 852:6,21 993:20,21 994:6,9,12
--	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

1034:7,23 1165:14 1266:22 ARTICLES- 170:9,12 1066:22 1117:10,11 1197:18 ARTICULATE- 46:6 236:8 ARTICULATED- 1031:8 1085:12 1089:13,21 1090:5 1103:4,5 1125:15 1132:20 ARTICULATING- 1033:4 ARTIFACT- 186:21,22 ARTIST- 344:22 347:10 ASABER@CARLOCKCOP	ASSESS- 117:4 236:5 363:18,19 448:16 506:9 1075:1 1091:8 ASSESSED- 111:8 112:4 361:7 505:14 558:22 559:2 827:6 1188:23 ASSESSING- 110:17 111:18 117:10 359:24 360:8 449:16 504:23 927:13 968:13 1074:18 1075:22 1076:3,12 1184:22 1185:6 1268:22 1269:4,18 1279:23 ASSESSMENT- 116:23 190:23 289:25 302:22 318:18,20 319:22 320:17 321:8 354:23 355:14 359:20 362:1 448:6,24 453:19,22 455:24 459:15 460:18 466:17,19 474:20 509:2 513:13,15,19 514:14 515:7 529:12 535:1 801:11 802:7 ASSESSMENTS- 110:18 243:6 458:11 462:23 466:11 812:2 ASSET- 780:14 ASSIGN- 343:18 ASSIGNED- 150:19 152:8 343:17 697:24 1045:4 1122:10 1305:2 ASSIGNMENT- 1077:13 ASSIGNS- 290:2 ASSIST- 79:2,7 152:10 175:2 185:18 250:19 373:20 579:9 1102:21 1130:5 1132:1 1174:6 1198:13 ASSISTANCE- 79:18 891:19 1095:15,19	ASSISTANT- 178:8 767:4 1217:12 ASSISTANTS- 642:3 1065:19 1146:5 ASSISTED- 1030:18 1115:8 1156:5 ASSISTING- 1085:16 ASSISTS- 79:7 ASSOCIATE- 175:20 1316:15 ASSOCIATED- 333:17 797:16,21 934:14,24 943:9 953:14 1046:2 1049:17 1179:13 1312:23 1393:14 1441:2 1535:4,8 ASSOCIATES- 274:18 343:7 ASSOCIATION- 1064:6,8,19 1107:9 1118:13 1353:1 ASSOCIATIONS- 1064:1 1207:2 ASSORTMENT- 1042:14 ASSUMED- 794:18 1104:19 1459:8 ASSUMPTION- 454:8 785:13 829:23 858:11 860:10 925:7 940:7 948:16 1170:16,17 1173:19 1298:5,6 1326:25 1337:8 ASSUMPTIONS- 123:1 1153:16 ASSURE- 72:19 86:21 88:23 144:16 578:15 1036:17 1571:1 ASSURED- 91:17 ASSUREDLY- 1031:6 1474:10 ASTRONAUT- 1481:19 ASTUTE- 1268:11 1279:1,10 1287:24 ASTUTELY- 1287:20 1327:17 ASTUTENESS- 1277:9 1278:22 ATLANTA- 387:22,23,24	651:24 ATLANTIC- 1391:11 1446:23 ATROCITY- 1279:21 ATROPHIED- 1381:14 ATTACH- 187:7 1460:4 ATTACHED- 675:1 1235:19 1240:9,15 1355:14 1575:18 ATTACHES- 1459:20,25 1465:21 ATTACHMENT- 179:23,24 ATTACHMENTS- 19:3 ATTACK- 1185:1 1198:25 1208:4 1329:16,17,20 1396:2 ATTACKED- 1180:15 ATTACKS- 1404:7 1418:20,22 ATTEMPT- 117:16 260:18 303:13 307:14 319:17,24 336:24 367:13,15 522:5 810:10 825:14 928:16 929:11 932:2 944:21,23 945:2,3 1183:18 1335:23 1508:23 ATTEMPT/WANTED- 1522:20 ATTEMPTED- 630:12,16 658:11 1241:21 ATTEMPTING- 136:15 262:20 307:18 ATTEMPTS- 825:14 943:10,15 1134:5 1142:25 1145:3 1205:1 1308:17 1335:6 1523:22,23 ATTEND- 76:4 386:25 387:8 1111:3 ATTENDANCE- 1048:16 ATTENDED- 629:24 ATTENDING- 175:23 634:14 635:11 637:1 789:19
--	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

1037:21 1507:25 ATTENTION- 78:2 82:18,22 88:18 92:17 106:18 108:6,24 123:7 150:25 291:5 318:6 463:21 509:7 618:2 642:20 691:12 716:25 717:3 760:9 771:8 775:16 779:12,19 780:24 781:25 789:14 796:5 803:5 859:14,25 870:1 871:4 975 ATTENTIVE- 1009:3 ATTENTIVELY- 1227:14 ATTESTATION- 1410:3 ATTITUDE- 582:19 1009:4 1277:16 1283:17 ATTORNEY- 81:21 403:13 1068:19 1069:23 1070:8 1154:24 1173:9 1174:11 1217:13 1354:15 1356:19 ATTORNEY'S- 88:20 ATTORNEYS- 53:20 76:23 79:16 83:10,11 89:9 90:1 93:21 1069:12 1119:17 1154:16 1254:1 1477:4,6 ATTRIBUTE- 1188:5 ATTRIBUTED- 1276:1 ATWILL- 584:18 AUDIBLES- 514:15 AUDIO- 19:19 26:7 131:18,20,24 132:1,15 203:10 210:7,11 211:21 212:13 213:6,9 1003:17 1014:17,18 AUGUST- 278:21 305:24 329:25 378:15,25 441:15 573:5,19 622:7 646:13,16,18 665:1 667:4,7	753:24 768:24 770:22 776:1 870:8 871:3 895:3 896:1 971:24 972:11 1369:7 AUNT- 1396:20 1532:2 AUTHENTICATE- 129:19 132:16 263:20 AUTHENTICATED- 207:11 263:8 658:24 1410:22 AUTHENTICITY- 256:19 257:7 259:6 608:18 658:10 662:5 677:10 684:18 AUTHOR- 1337:4 AUTHORED- 512:25 1102:10 1110:1 1162:3 1163:8 1164:4 AUTHORING- 1174:3 AUTHORITATIVE- 1332:8,10 1335:10 AUTHORITIES- 620:24 897:4 922:23 924:4 AUTHORITY- 553:21 708:23,25 712:25 724:5 726:24 1344:22 1458:16 AUTHORIZATION- 772:13 AUTHORIZED- 666:9 1357:2 AUTISM- 107:22,24 1374:21 1380:13,16 1385:3 1417:10 AUTOMATIC- 205:11 215:6,11 1051:22,24,25 AUTOMATICALLY- 203:21 204:4,19 215:20 276:10 605:13 1179:20 1456:17 AUTOMOBILE- 237:4 AUTOPSIES- 173:2,4,8 176:4 AUTOPSY- 19:36,41 20:9 63:1 136:16,25 137:13 138:10,14,21	139:11,18 140:7 173:13,14,20,22 174:13,21,25 176:1,3,8,9,18,20 24 175:1,24 177:1 181:5,18 183:20 184:10,21 185:2,5 193:2 198:16 199:3 200:11 1266:18 14 AUTRY- 678:8 AVAILABILITY- 239:7 471:12 479:1 527:20 861:5 863:7 904:17 905:1,4,13 940:5 955:23 1521:19 AVAILABLE- 37:11 39:24 57:21 88:14 181:12 235:25 237:10 238:6,7,10,14 257:10 259:3 261:7 320:23 375:11,13 440:6 443:19 473:7 502:20 513:3 550:20 573:17 596:1 689:19 806:19 829:14 830:8,9,13,22 956:1 1085:18 1103 AVENUE- 713:21 1415:13 AVENUES- 713:24 AVERAGE- 53:12 244:19 294:19 506:8 1044:19 1053:1 1075:13 1514:23 1515:16 AVIS- 1463:4 AVOCATIONS- 1540:23 AVOID- 1405:2 AVOIDED- 1149:9 1540:13 AVULSED- 141:1 179:18 180:20 181:24 192:1,5,6,7 200:9,17 1434:1 AVULSION- 141:13 179:19,21,25	181:1 186:24 191:11 AVULSIONS- 182:4 187:18 AWAKE- 93:11 361:8 363:12 418:8 919:8 1541:23 AWARD- 591:15 671:1 687:9 1531:16 1559:19 AWARDED- 687:19 736:12 1402:13 1430:13 AWARDING- 1510:20 AWARDS- 581:9 AWARE- 30:14 33:19 34:19,20 72:14 73:4,5,8 266:19 267:4 306:6 309:19,22 310:1,5 311:19 325:23 376:7 381:23 409:8 473:25 503:18 505:19 519:6 558:16 559:1,6 581:14,18 640:10,15 641:5 666:5 852:22 856:2 999:10 AWARENESS- 190:17,19,21 1433:2,4 AWESOME- 249:9 AWHILE- 53:19 463:23 497:1 933:4 1108:20 1367:3 1373:25 1374:3,4 1375:6 1391:2 1393:7 AWKWARD- 389:13 392:2 AX- 1505:5 AXIS- 1187:19,22 1322:16,19 1325:12,13,14 AZ- 19:29 B BABIES- 168:19 BABITSKY- 1154:25 1159:4,10,14,17,2 4 1157:19 1222:4 BABITSKY'S-
--	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

1217:16 BABY- 415:17 1227:1,6 1370:14 1379:2 BABYSITTER- 1377:3 BACHELOR- 274:23 BACHELOR'S- 275:1 431:24 432:1 736:12 755:10 1061:11 BACK- 4:31 5:10,35 6:10,16,44 7:13,26 8:13,30,46 9:10 10:44 11:20,30 12:7,29 13:5,42,48 14:42 15:17 16:32,43 18:22 42:10 44:10 46:1,2 49:16 56:2,3,8 58:23 59:12 60:12,19,25 62:8,12 63:17 65:1,3 67:16,19 75: BACKED- 547:6 BACKGROUND- 64:20 167:16 274:6 277:24 568:14 569:11 571:11 649:17 690:8 796:20 1190:1 1269:25 1279:23 1296:21 1313:8 1366:5 BACKING- 1161:10 BACKS- 1116:17 BACKSLASH- 794:6 931:7,14 943:11,23 944:13 1294:1 BACKSLASHED- 935:6,7 943:10 1303:4,8 BACKSLASHES- 1293:22 BACKSLASHING- 935:16 BACKUP- 998:15 BACKWARD- 182:24 BACKWARDS- 40:25 376:24 520:15 572:12 877:10 976:13 1187:12	1467:9 BACON- 1485:6 1533:1 BACTERIAL- 882:23 BAGRAM- 1256:22 BAGS- 1121:22 BAILEY- 1438:14 BAILIFF- 30:7 65:3 67:9 71:25 72:1 75:8,11,15 127:20,22 145:1 148:15,17,20 149:3 166:7 195:25 197:25 198:3 224:18 229:15 234:6 249:3 253:16 254:2 268:18 270:11,13,23,25 314:14,23 373:5 389:6 427:24 533:21 534: BAILIFFS- 72:3 80:20,23 90:23 229:2 418:3 419:22 561:18 661:18 733:6 1007:18 1082:7 1350:9 1426:8 BAKER- 14:23,32 15:3,24 25:17,30 122:21 1056:14 1057:23 1060:10,13,15 1073:1,14,16 1084:10,12 1091:2 1105:6 1109:25 1110:22 1114:12 1143:9 1149:15,17 1160:10 1163:20 1172:10 1176:23 1186:13 1201:21,23 1209:2 BAKER'S- 1105:4 BAKERISM- 1186:13 BALANCE- 55:24 BALANCED- 85:1 BALL- 968:12,18 1448:14 BALTIMORE- 1060:23,24 1061:10 1066:10,16 1071:20 1111:3 1114:18 1115:13 1116:1,3 1117:5,6	1135:12 1209:18 BANGOR- 1257:23 BANK- 435:21 601:13 874:25 1389:10,13 BAR- 913:8 1379:11 BAREFOOT- 1381:17 BARELY- 1181:12 1289:1 1403:14 BARKING- 70:7 73:23 BARRED- 237:24 BARRIERS- 354:24 BARTENDED- 1367:3 BASE- 95:15 104:23 183:7,8,11 280:25 577:5 604:20,24 605:5,23 855:7 968:8 977:19 979:19 1152:11 1153:10 1173:18 1174:1 1256:22 1257:1 1259:2 1261:14 1263:14,16 1270:14 1293:19 1294:9 1527:12 1529:6 BASEBALL- 407:3 1448:9 BASED- 32:11 33:2 39:5 42:13 44:18 47:12,22,25 54:2,13,23 55:4 62:16 126:12 179:5 304:16 318:20 322:12 331:14 384:10 397:1 404:14 405:16 406:12,19 409:3,15,17,21 411:25 412:1 421:12 449:1 460:17 483:11 493:1 BASELINE- 1490:19 BASEMENT- 1376:2 BASES- 42:19 813:6 BASIC- 203:13 345:25 653:12 675:13 677:13 907:14 1040:3,5 1137:10,15,16	1296:21 BASICS- 751:13,14 1040:4 BASIS- 58:2 89:13 128:2 185:9 190:10,12 194:6 242:4,5,9,15,20 259:6,12 317:21 502:5,13 676:19 694:2 918:17 1103:7 1108:13 1111:21,22 1118:19 1241:10 1342:2 1432:25 1555:15 BASKINROBBINS- 572:25 573:2,8 574:12 577:3,7 620:10 BASS- 655:12 BATE- 265:14 277:3,5 278:4,16 280:10 282:3 283:15 284:3,12,25 286:5,20 743:14 BATES- 268:25 278:17 434:10 435:25 438:12 440:16 600:22 601:17 604:10 614:18 616:21 619:6 621:1 626:20 743:9 744:16,21 870:2 875:24 877:5 BATH- 347:21 1089:3 1091:6 1092:19 1093:2 BATHROOM- 43:1 120:18 347:6,21 477:1,2,8,17,20,2 5 464:14 478:17,18 480:1,10,12,23 507:23 531:1,8,12,19,21 537:16 538:2,14,15 542:10 980:14 1087:21 1122:1,4,18 1130:2,8 1200:7 1245:25 1246:2 1282:13 1299:18,19,2
--	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

BATHROOM'S- 532:13 BATHROOMS- 1376:2 BATMAN- 1317:18 BATTERY- 1041:11,20 1052:12,13,14,19 1237:1 1354:6 1507:24 BATTLE- 393:25 563:2 BATTLEFIELD- 1257:13 BATTLEFIELDS- 290:6 BATTLES- 1256:18 BAY- 115:22 116:1,3 120:19 331:3,9,13,16,17 332:8 333:23 334:2,5 346:16,23 347:14 348:10,12,17 353:13,16 362:24 368:9,10 371:19 373:24 384:5,8 447:22 448:1 450:1,2,8,12 451:12 453:4 454:15 455:12 456:6 457 BAYS- 331:14,19 332:21 507:11 BEACH- 1388:24 1390:23 1391:7,8 BEAR- 32:22 399:6 658:3 669:7 670:21 1058:12 BEARING- 552:23 1556:13 BEARS- 282:11,22 439:14 441:10 664:16 757:3 BEAT- 387:14 659:16 1354:7 BEATING- 1237:3 BEAUFORT- 1:4,24 23:35 61:20 94:7 95:5,11,20 97:4 98:10,12 100:16 104:8,12 120:5 132:5 150:20 151:9,12,25 153:16,19 162:17,21 164:6 176:15 197:14	202:12,14,17 203:19 204:24 216:5,6 268:23 271:23 272:4 275:6,17, BEAUFORT/PORT- 1467:5,15 BEAUFORTPORT- 1009:23 1010:11 BEAUTIFUL- 391:3 BECAME- 95:7 256:25 433:17 480:20 570:1,7 618:17 628:24 738:14 742:8 1038:20,22 1062:21 1162:21 1259:12 1260:22 1281:9 1299:12 1479:10 BECKY- 1363:19 1365:13 1370:10 1372:20 1374:6 1387:15 1405:21 1407:5 1419:12 1421:5 BECOME- 131:9 134:2 150:4 171:22 175:11 273:9 341:1 462:18 595:25 610:13 741:25 745:7 910:20 912:5,20 998:21 1038:18 1039:1 1063:2,5,7 1068:10 1113:17 1118:16 1121:19 1122:4 1260:20 1281:4 1283:6 1284:19 1308 BECOMES- 36:9 70:21 410:17 1029:23 1140:13,18 1166:12 1196:10 1345:2,14 1543:5 1549:3 BECOMING- 150:5 1212:7,8 1228:10 1231:1 1479:9 BED- 56:22 100:14,22 308:25 312:3 332:3 352:18 353:20,21 384:7 385:12,23	471:12 473:7 479:1,6 529:23 861:5 863:7 904:17 905:1,4,13 940:5 955:23 967:5 1042:14 1156:13 1194:10 1195:14 1282:16 1290:14 1291:1 BEDROOM- 1379:18 BEDROOMS- 1376:2 BEDS- 97:13 120:9 288:10,14,16,20 466:1 763:22,24 853:22,25 919:2 956:1 1066:12,15 1195:22 1262:24 1374:12 1504:16,20 BEDSIDE- 334:3 368:11 517:1 1077:1,21 1200:2 BEEPING- 222:18,20 BEEPS- 1052:22 BEFOREHAND- 730:10 BEGAN- 58:16 72:16 100:6 122:8 176:11,25 177:18 185:5 238:23 247:1 286:23 302:6 378:23 390:10 548:4 567:21,24 571:8 790:11 869:13 879:24 910:8 971:15 1465:6 1477:23 1478:17,23 1479:4 1481:17 1512:4 1525:9 BEGINNINGS- 912:18 916:13 BEGINS- 56:18 81:18 94:8 101:18 240:1 397:23 441:22 466:21 633:13 779:20 1015:10 1191:23 1192:14 1224:17 1503:4 1544:23 1566:22 1567:5 BEHAVED- 1555:19 BEHAVING- 132:12 840:1 1481:5	BEHAVIOR- 310:12 311:1 312:2 326:19 362:23 366:25 383:18 459:10 517:19 521:22 549:18 811:12 833:25 1136:14 1138:11 1139:17 1193:17 1194:14 1481:18 1518:13 1520:23 1524:15 1555:22 BEHAVIORS- 402:11 1191:15 BEHIND- 349:1 427:1 484:2,22 485:2,24 486:15 712:11 904:2 1379:22 1534:15 BEHOLD- 32:2 BEINGS- 948:13 1224:9,10 BELABOR- 974:8 BELABORING- 160:24 BELIEF- 319:17 773:12 1168:12 1169:18,20,24 1170:17 1324:23 1423:12,15 BELIEFS- 1324:20 BELIEVABILITY- 1549:3,6 BELIEVED- 50:24 60:1 159:4 332:4 749:7 792:13 843:7 1164:15 1169:7 1170:1,4 1173:22 BELIEVER- 550:5 BELIEVES- 550:5,7 658:21 1242:16 1462:14 1504:8 BELIEVING- 1091:13 BELLIGERENT- 385:4 BELLS- 1007:15 1230:5 BELLY- 1291:25 BELONG- 627:8 1221:13 1489:6 1504:2 BELONGED- 1501:24 BELONGS- 70:16 804:2
--	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

BELOW- 187:21 200:18 536:24 538:13 715:23 717:11 951:16 999:24 1357:17 BELT- 478:3 532:11 BENCH- 126:20,24 188:21 189:17 194:11 195:7 197:1 201:14 206:23 207:1 209:6 217:17,24 218:18,25 219:13 266:11 267:11 595:12 597:21,24 607:4,18 608:3 611:13 655:5 656:16 657:22 659:10 720:14 721:1 729:21 730: BENE- 225:14 BENEATH- 1296:1 BENEFICIAL- 1356:12 BENEFICIARIES- 33:17,18 34:2,3,4,6,8,15 BENEFICIARY- 63:12 1560:21 BENEFIT- 36:21 167:23 274:9 282:19 345:5 431:22 433:8 437:2 524:7 623:2 627:3 669:20 801:21 870:19 872:13 873:10 968:11 992:20 1115:1 1125:2,3,4 1139:1 1161:13 1276:6 1312:7 1501:5 BENEFITS- 104:3 280:25 282:25 283:11 436:22 501:5,9 503:4 555:2 587:5,7 606:13 624:19,20,23 625:11,19,24 765:8 870:13 872:3 876:25 878:3,4,16 1089:14 1100:12 1139:1 1147:2,5	1267:15 1457:25 BENIGN- 505:1 BERLINSKY- 403:12,16 BESIDE- 376:18 1379:17 BESSINGER- 53:15 BEVERLY- 12:18,22 27:32 99:2 395:20,21 840:25 842:3,6 989:2,5,9 990:6,9,11 1034:18 BI- 311:8 BIBLE- 149:5 166:10 201:23 430:13 564:22 1255:7 1359:20 1396:24 1534:1 BID- 648:10 649:7,20,21,23,25 652:25 653:1,2,4 672:19,21 676:21,22 687:4 BIDS- 674:25 675:1,4 BIFURCATE- 33:1,3,10,14 68:7 BIFURCATING- 69:2 BIFURCATION- 49:17 BIG- 49:15 72:20 99:20 156:7 184:6 230:23 240:19 273:5 287:14 316:10 322:10 325:4 347:14,15,18 349:1 414:23 418:25 441:5 447:10 465:11 596:14 626:24 630:9 631:8 669:24 699:20 704:15 719:12 812:6 853:11 854 BIGGEST- 498:4 BILATERALLY- 360:11 BILL- 257:4 1207:10 1311:9 1535:25 BILLED- 1235:23 BING- 67:12 BINGE- 945:21 946:10	BIPOLAR- 306:11 311:8 321:17,20,21 333:18 370:12 456:18 805:13,17 BIRTH- 735:13,16 748:13 1378:15 1406:8,21 BIRTHDAY- 1383:13,14 BISCUIT- 855:6 BISHOP- 41:10 58:25 59:8 1097:25 1438:13,15,22 1441:19,20 1442:1,5,8 1471:16 BIT- 30:11,13 32:20 40:20,21,25 41:3 59:15 67:12 73:6 77:16 85:24 88:2 89:16,18 90:4,13 97:1 111:20 117:11 123:22 132:20 150:3,10,21 158:10,24 159:13 161:15 175:17 181:22 218:23 219:9 242:1 274:6 275:11 27 BITE- 1501:11 1506:25 BITS- 53:22 BITY- 331:6 BIZARRE- 1191:24 BL- 729:2 BLACK- 294:19 833:13 1324:25 BLACKJACK- 598:25 BLACKWATER- 1395:21 BLAH- 750:16 1343:22 BLAME- 389:13 418:18 728:19 1101:20 1229:14 1507:7,22 1508:4 BLANDING- 754:8 BLANK- 663:24,25 664:3 814:25 931:7 1562:14 BLANKET- 136:24 BLANKETS- 1399:4 BLEEDING- 61:1,2	178:21,25 179:10 182:10 183:5 186:15,25 187:12,15,23,24 188:2 349:4 BLENDED- 605:4 BLESS- 97:22 287:22 BLOCK- 155:14 156:4 330:22 524:2 1313:21 1377:19 BLOCKING- 1276:16 BLOCKS- 356:14 1377:22 1388:19 BLOOD- 140:13,16 141:11,20 142:11 162:24 178:21,22,23,24 182:3,12,19 183:13,15 185:8,10 186:9 187:1 188:11 191:6,15 192:11 193:17 196:13 291:25 345:25 357:15 358:3,4 360:23 361:19 385:18 448:18 941:6 948:3 9 BLOW- 417:4 579:7 616:25 BLOWUP- 690:25 BLOWUPS- 57:3 BLS- 285:19,21 BLUE- 151:22 390:10 436:7,8 474:10 754:2 1372:5 1401:2 BLUESTEIN- 1267:14 BLUISEBLACK- 448:3 BLUNT- 179:3 BLUNTED- 366:8 BLUSH- 1013:1 1285:9 BME- 471:10 860:19 861:4,18 987:6 BNETER- 827:4 BOARD- 26:34 27:5,12 53:8 76:3 169:9,12,16,18,20 ,21,22,23,24 120:10 140:5
---	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

170:2,8 286:22 316:3 429:18 430:1,5,9 469:1 558:22 713:19 749:9,10 753:11,18 754:6,21 758:7,25 759:2 760:11 834:3 881:12 882:1 891:16 BOARDCERTIFIED- 51:14 189:25 194:4 198:15 199:2 844:10,15 1085:6 1114:20 1206:25 1316:4 1333:22 1490:5 1515:15 1524:19 BOARDS- 66:11,12,14 169:21 1150:9 1156:1 1260:24 1515:19 BODIES- 193:14 140:9,13,15,16,19 20 BODY- 137:16 141:2,3,7 144:6 145:12 155:14 160:25 168:10 173:19,20,23 174:6 177:3,5,6,12,14,1 9,23 176:11,16,20 178:5 179:4,8,20,24 180:2,5,13,20,22 181:23 182:4,19 184:20,23,25 185:1,4 BODY'S- 172:14 BOILED- 1533:4 BOILING- 1485:7 1533:1 BOISTEROUS- 1308:9 1384:6 1406:7 BOMB- 892:22 BONE- 183:13 193:8 1116:17 BONES- 193:6,7 196:6 BOO- 390:10 BOOGEYMAN- 1109:7 BOOING- 392:10	BOOK- 40:7 379:6 580:25 585:12 586:19 590:2 661:8 686:11 1333:4,10,15,16,1 8,25 1332:21 1335:20 1336:3 1380:3 1490:16 1497:2 1535:15 1536:15,21,25 BOOKING- 1193:4,17 BOOKLET- 769:12 776:9 BOOKS- 76:7,17 1331:19 1490:7 1566:10,13 BOOMING- 1276:8 BOOTIES- 1144:6 BORDERLINE- 311:8 322:5 370:13 BORN- 411:7 735:10,24 906:15 1257:23 1365:25 1366:6 1367:20 1368:10,12,20 1369:6,8,9,12,22 1370:2,18,21 1378:20,21 1383:5 BOBS- 1504:25 BOTH- 40:22 57:11 62:6 65:11 88:10 94:3,4,15 107:18,20,21 156:1 170:5 183:10 207:18 225:24 237:10 247:13,23 251:5,10 256:5 273:22 310:18 360:11 368:19 376:4 413:9 418:11 433:8 444:10 515:15 545:13 550:16 61 BOTHER- 30:18 780:25 1483:20 BOTHERED- 329:14 1503:25 BOTHERING- 681:25 BOTHERS- 53:5 BOTTLE- 532:2 BOTTOM- 265:10 334:19 440:16 443:1 504:2	553:22 579:5 585:18 614:24 615:2,5 617:10 627:6,17 630:5 663:21 720:7 729:1 755:21 860:3 944:19 945:4 1028:9 1187:8,15 1322:12 1338:17 1383:19 1540:25 BOTTOM'S- 1028:10 1187:9 BOTTOMRIGHT- 536:18 BOULEVARD- 2:19 122:7 526:13 566:25 628:6 BOUND- 422:5 425:24 BOUNDS- 1093:17 BOWLING- 101:16 1245:19 1478:25 BOX- 65:22 67:20 97:16 126:11 328:5 329:11 346:8 458:20 459:8,16 460:15 467:19 494:14 599:12,25 600:1 603:13 617:10 663:21 664:7,13 669:8,11,13 670:1,23,24,25 671:5 676:21 801:13,16,21 811:12 820:20 823:14 BOXES- 394:5 458:1 459:13 460:13 522:6 1485:9 1504:4 BOY- 1370:16,24 1382:11 1405:5 BOYS- 101:19 105:17 1372:11,22 1373:22 1374:8,18,19 1375:6,21 1376:14,15,18 1377:14 1379:23 1384:15 1385:1 1387:12 1391:4,18 1392:12 1400:4 1407:19 1415:25 1416:4,10 1420:24	BRACE- 1381:17,23 BRACES- 1380:9 1381:2,5 BRACKETS- 806:9 BRAIN- 174:11 186:17,20,22 200:13,15,18 726:13,15 950:6 1434:3,4 BRAINSTEM- 186:15,16,19 200:9,14 BRANCH- 491:11 498:1 512:5,8 570:17 581:7 737:22 BRAND- 573:6 BRANNON- 13:16,20 28:14 374:12,19 375:1,4,7,15,23 376:8,14,20 377:3 419:3 502:19 504:11 555:13,22,25 698:3,6 995:6,10 998:20 1001:14 1006:12,15,18,21, 25 1005:17,21,24 1035:3 1529:24 BRANNON'S- 374:16 1034:10 BRANNON1003- 13:11 BRANNON995- 12:45 BRASWELL- 594:12,13 1003:21,23 BRAVE- 100:21 1039:17 BRCPI- 573:18 BREACH- 675:9,19 1526:2 1539:1 BREACHED- 60:7 1132:12 1526:2 1539:1 BREACHES- 1132:10 BREACHING- 1086:1 BREAD- 969:21,24 BREAK- 62:8 63:7 73:19 127:2,7,16 197:9,12,15 218:20 253:11 311:10 312:20,22 372:16,17 373:3,7 390:16 418:25
--	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

419:21 428:25 429:3 533:11,19 534:20 541:9 561:8,17,19,21 562:23 563:7 607:20 608:1 629:3 637:21 6 BREAKDOWN- 1278:19 1280:1,6,17 1281:5,12,22 1284:14 1286:5 1287:5 1288:11 1289:23,24 1299:9 1300:22 1301:15 1302:13 1303:16 1307:2 BREAKFAST- 832:12 BREAKING- 533:23 649:19 770:12 BREAKS- 80:17 108:16 1212:1 1558:20 BREATH- 480:5 489:15 495:3 538:19 549:4 559:24 776:23 777:19 985:14 1085:4 1122:20 1124:1 1139:18 1161:15 1181:5 1185:11 1328:3 1337:7 1488:12 1517:4 1521:9 BREATHE- 418:18 BREATHING- 359:21,23 360:2 532:21 548:17,21 952:9,12 953:7 1181:1 1182:5 1288:23 BREATHOFFRESHAIR- 1306:16 BRICK- 302:1 BRIDE- 391:1 393:2 BRIDGE- 133:1 134:23 135:4 152:4 1116:3 1384:14,23,24 1442:25 BRIDGESIDE- 2:19 BRIEF- 146:16 187:4 191:8 193:22 196:18,24 306:1 307:7	311:16 312:1 362:21 415:23 511:6 1056:16 1107:7 1466:25 1485:9 BRIEFS- 1111:19 BRILLIANCE- 59:6 75:13 404:1 BRILLIANT- 45:4,5,6,13,16,21 415:8 1252:19 1364:12,17 1471:20 BRINGS- 49:12 104:20 123:2 238:9 259:12 288:18 289:24 445:22 772:7 840:8 849:25 1045:13 1394:24 1472:9 1519:18 1538:13 1552:14 BRISTOW- 1429:11 BRITCHES- 980:23 BROAD- 152:4 188:9 366:8 370:18 1011:22 BROADEN- 376:23 BROADER- 1294:17 1472:4 BROADLY- 606:14 BROADWAY- 1377:20 1388:19 BROCHURE- 1159:2 BROKE- 56:4 652:16 1381:19 BROKEN- 605:22 719:13 721:20 775:14 779:14 781:23 889:19 1122:6,7 1221:6 1344:12 1511:22 1558:13,15 BROTHER- 101:24 107:19,23 154:5 1020:9,25 1021:2 1026:17,23 1027:5,12 1029:12 1375:19 1395:15 1401:6 1478:25 BROTHER'S- 64:17 1026:18 1030:7 BROTHERINLAW- 1400:12 BROTHERS- 63:14 64:3,15 94:2,15	1366:13 1375:9 1383:15 1420:3 BROUGHT- 33:20 34:1,11,18 35:5,8,9 37:25 41:2,9 55:25 75:3 81:7 97:25 99:13 105:24,25 116:19 164:6 176:20,21 208:16,19,21 221:21 238:11 258:14 261:3 294:7 304:1 305:7 307:9 319:3 350:8,22 351:4 384:20 419:12 4 BROW- 1455:22 BROWN- 1547:13,16 BRUISE- 179:3 BRUISES- 182:22 183:1 187:6 BRUISING- 360:11 364:22 BRUSH- 1420:25 1421:1 BSN- 274:20 BUCKS- 1158:24 BUDGETARY- 1044:20 BUDWEISER- 1387:2 BUGGING- 1215:21 BUILD- 294:19 614:11 839:10 1043:5 1157:24 1158:12 BUILDING- 387:21 388:3 523:7 525:11 979:6,9 982:16,17 1043:1 1055:15 1065:16 1166:8 1192:14 BUILT- 1376:7 BULK- 721:7 1152:7 1259:23 BULLET- 494:3 BULLETS- 493:7,18,23 BUMED- 893:18 1217:24 BUMED'S- 893:21 BUMMED- 1217:25 1218:1 BUMP- 521:9 BUNCH- 103:6 114:2 240:21 504:5 515:19	536:14 617:9 642:1 913:8 921:4 1079:15 1108:12,15 1111:22 1174:9 1221:22 1302:23 1428:14 1439:17 1489:4 BUNGEE- 1384:25 BUNK- 1374:12 BURDEN- 70:12,16 71:9,13 83:22,23,25 84:4,6,9,11 85:3,9,21 110:21 121:23 125:11,15,19 130:11,12 236:14 606:12 1015:23 1234:2 1239:17 1468:15,17 1517:9,10 1531:12 1539:24 1544:11,14 1545:2,7,13 1555:3 1556:24 BUREAUCRACY- 1285:13 BURLINGTON- 431:16 443:10 498:11 BURN- 335:12 1399:5,20,21 1414:20 BURNT- 1399:22 BURSA- 325:8 BURTON- 1040:16 BUS- 389:13 BUSINESS- 88:9 102:17 129:20 205:3,6,8 257:2 408:24 412:16 420:5 490:1 532:17 569:4,5 571:19,22,24 572:7,8,23 579:17 580:7 584:17 596:20 650:5,16 651:25 692:11 701:11 709:7,12 766:6 1037:21 1300:11 1357:14 1366 BUSINESSES- 572:13 1540:23 BUSINESSMAN-
--	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

569:1 BUSY- 446:24,25 486:3 551:14 919:4 1116:25 1147:7 1371:11 BUTTER- 569:22 BUTTERFLY- 1372:6 BUTTON- 419:18 437:9,10,14,17 524:20 542:18 BUTTONS- 1041:14,21 BUY- 614:11 1419:23 BUYING- 426:7 BYE- 1567:11	170:2 180:4 181:17 182:25 183:9,12 197:14,15 201:9,20 203:19,21,24 206:15,16,17,18,19 204:1,9,15 207:6 2 CALLED- 44:17 69:14 76:21 83:3,24 97:6 102:15 129:2,13 146:20 151:7 155:19,20 208:19 210:24 225:3,21,24 254:5,14 264:17 272:17 273:15 276:4 290:2 295:24 335:17 336:25 337:2 341:16 375:18 376:8 394:1 407:12,21 CALLER- 211:10 CALLER'S- 211:9 CALLING- 129:12 134:24 216:5,16 543:6 670:25 688:24 995:14 1195:11,21 1211:17 1254:18 1400:17 1457:12 1504:13 CALLS- 26:8 38:19 53:3 95:19 98:25 110:12 128:17 131:17,19,21,24 132:1,4,24 133:16 134:8,21 135:3 148:25 166:5 193:24 196:20 203:11,16,18 204:7,14 205:11,24 210:7,11 251:25 270:20 429:15 486:14 543:7 564:19 CALM- 118:2,18 121:5 122:11 132:8,11 235:20 298:14 310:14 449:25 510:18	557:11 798:6 817:2,3,4,7,15,19 21,23 799:22 965:4 978:13 979:23 980:3 1013:14,23 1124:4,5 1139:5,11 1145:16 1199:4 1284:25 1286:11 130 CALMED- 1400:16 CALMER- 1199:7 CALMLY- 113:20 929:23 1138:14 1517:2 CAMERA- 1046:1,5,7,25 1419:19,21,22 CAMERAS- 1046:8 1047:5 1048:11 1243:18 1419:24 CAMMIES- 474:10 CAMPUS- 1061:11 1066:11,12 CAN- 31:18,25 32:6,7 35:15 36:10,16,18 39:13,15,18 40:3 41:9 42:23 45:22 48:16 50:6,7,16 51:1 61:4 62:10,22 63:13 67:4 68:2 71:19 72:19 77:18,25 78:2,12,24 79:25 80:23 85:13 86:21 88:23 89:16,23 96:9,11 99 CAN'T- 32:16,21 37:19 45:6 56:3 60:15 92:13 111:23 112:2,5 138:19 155:23 156:4,6 186:21 192:13 193:17 195:3 196:13 220:22 230:21 235:22,23 255:15 263:20 264:2,9 305:24 313:15 325:22 326:20 330:8 337:8 343:23 CANADA- 618:15 629:21 736:2,16 737:10,13 738:3	906:16,18,19,23 910:16 CANADIAN- 618:16 CANAL- 183:6,8,11 CANCELED- 1547:22 CANCER- 172:16 340:14,18 359:13 497:14 942:12 1396:3 1503:13 CANDID- 1111:5 CANDIDATE- 1063:17,22,23 CANDIDATE'S- 690:2 CANDIDATES- 1039:6 CANDLELIGHT- 388:1 CANE- 1394:21,22 CANNABIS- 1188:2 1323:4 CANNONS- 105:24 CAPABILITY- 1297:11 CAPABLE- 221:22 965:10 996:21 1238:14 1243:6 CAPACITIES- 1460:16 1461:6 CAPACITY- 40:10,11 56:11 337:9 1076:2,25 1100:22 1102:22 1199:21 1209:12 1235:16 1236:2,4 1242:7 1261:9,19,23 1301:16 1354:24 1355:8,22 1467:24 CAPITAL- 271:10 CAPITOL- 754:8 1205:5 CAPLAN- 5:28 140:5,11 141:5,19 143:5 166:5,14,17,18,19 171:10 197:13 198:7 199:23 1011:2 1430:15,16 1436:12 1499:6 1538:9 CAPLAN'S- 142:22 1431:1 CAPTAIN- 94:14 845:21 846:9,11,15
--	---	--	---

OCTOBER 2015 DELANEY V. CASEPRO

1204:12 1506:3,5 CAPTION- 1353:18 CAPTION1- 4:19 CAPTIVE- 1362:16 CAR- 59:20,22 61:14,17 129:14,15 162:7 661:20 799:19 1052:2 1387:2 1400:16,22,23 CARBON- 633:4,6 CARD- 337:7,8 CARDBOARD- 79:21,22 80:11 CARDIAC- 432:8 1294:18 CARDIOLOGIST- 1295:11,15 CARDIOLOGY- 651:2 1062:5 1295:6,7 CARDS- 1406:14 CARE- 21:34 32:19 37:24 41:1,25 44:22 50:21 51:2 58:6,8 59:3 109:7 110:16,23 111:21 120:4 121:22 127:15 189:16 230:8 237:21 238:15 240:13 241:10,22 244:3,16,21 253:4 262:8 263:6 266:23 276:1 290:21 317:12 3 CAREER- 173:5 176:4 340:7,12 930:3 1038:12,14 1047:11 1071:13 1172:1 1204:19 1256:4 1262:2 1301:24 CAREERS- 1301:21 CAREFUL- 264:18 1020:24 1055:22 1212:5,9 1224:23 1304:8 1473:9,12,15,18 1512:23 CAREFULLY- 111:11,17 113:12 115:12 122:22 771:20 1537:22,23 1539:25 CARELESS- 43:18 1083:14 1086:2	1099:13 1100:2 1121:6,11,13,24 1122:2,13 1123:5,22 1125:17 1126:5 1209:8 1268:11 1277:16 1296:1 1319:16,19 1320:1 1489:21 1516:6 1522:9,12 1528:7 1538:16,21 CARELESSLY- 1516:8,9,10 CARELESSNESS- 236:6,7 1083:6,10 1085:21 1090:11,12 1099:19,25 1105:11 1126:11 1128:8 1552:3 1553:7 CARES- 245:5,8 258:10 414:19 CARING- 1303:5 1304:3 1319:21,22 1398:5,8 CARLELTON- 738:3 CARLETON- 737:13 CARLOCK- 3:16 CARMEN- 1022:14 1233:10 1358:9 CARNAGE- 129:7 1497:7 CAROLINA- 1:2,24 2:20 3:19 21:17 33:25 35:2 55:12 95:3 105:21,23 106:4 129:24 149:24 169:4 171:1,5 175:16 197:16 225:19 257:3 381:8 443:14 557:15 588:2,23 591:9,13 602:22 603:2 629:8 640:19 642:15 657:8 701:22 CARPETED- 214:24 CARRIED- 356:11 1287:21 1288:13 1394:13,18 1502:12 CARRY- 355:24 358:15,18,19 799:16 1042:14,21 1403:15	1406:11,12 CARRYING- 192:11 655:18 1292:18,19,20 CARS- 134:10,11,12 1443:1 CARTA- 106:5 CASE- 1:6 32:2,21 34:9 35:3,4 36:17 41:4,8,10,11,15,2 0 42:1,2,8,9,17,18, 21,22,23 38:1,3 43:5,7,10 50:5 51:1,3,4 53:15,18 55:11,14,19,20,21 22,23 54:1,5,10,13,14 56:9 57:9,23 58:2,23 59:12,16 60:2,4,5,14,15 CASEINCHIEF- 1352:2 CASEPRO- 1:29 3:4 20:26,32 21:4 22:20 24:9,17 44:15,16 46:12 50:13 54:18 56:19 57:11 58:4,9 71:2 75:1,5 82:1 97:7 102:15 103:1,3,4,9,15,21 104:1,4,9,17 105:2,5,7 106:20 109:23 123:18,22 124:7,8 272:17,23 273:7 CASEPRO'S- 102:20 124:17 423:13 425:12 577:18,22 578:18 579:8 589:17 601:13 636:10 657:15 871:11 1263:4 1502:2 1503:23 CASES- 37:12 41:11 42:24 53:19 62:5 126:6 240:10 420:6 621:16 739:7 913:15,18 953:4 1057:9,10 1069:8,9,14,24 1070:4 1097:25 1098:1,10 1157:2	1230:24 1240:13 1267:11 1311:25 1460:17,23 1464:22 1471:17 1489:10 CASH- 1457:25 CASTLEBERRY- 2:27 66:19 67:1,6,8 126:22 145:10,21,25 146:6,11 147:15,25 148:3,25 149:17 154:11,14 155:3 156:9,11 158:7,8 163:15,20 164:8 165:19,22 188:23 194:13 266:13 415:21 595:14 607:6 608:5 655:7 657:24 749:18 CASTLEBERRY149- 5:20 CASTLEBERRYLAW@AO L LOCOM- 2:31 C CASUALTIES- 290:6 CASUALTY- 317:14 CAT- 155:20,21,22 224:15 288:13 464:21 483:25 484:1 833:13 1324:25 CATATONIC- 366:20 CATCH- 783:21 CATCHING- 855:20 1533:22 CATECHOLAMINES- 953:7 CATEGORIES- 317:20 822:16 CATEGORY- 188:10 343:15,18 CATHETERIZATION- 432:8 CATNAP- 390:24 CATS- 105:25 557:9 798:8 CAUGHT- 1404:21 CAUSAL- 130:13 CAUSATION- 188:25 1526:4 1552:18
--	---	--	---

OCTOBER 2015 DELANEY V. CASEPRO

1558:9,10,11,14,2 0 CAUSE- 33:7 59:4 108:20 129:9 136:19 160:5 280:17 285:20 297:4 302:7 348:6 350:14 353:19 360:25 442:17,21 463:22 466:15 527:25 536:1 537:16 584:25 649:21 717:6,12 932:25 968:9 969:4 1012:4 1015:22 1059:8 109 CAUSED- 117:1 391:4 510:22 547:21 1514:16,17 1527:1 1539:1,2 1552:6,17 1553:25 1556:19 1557:20,21,24 1559:4,22 CAUSES- 59:13 676:22 1089:4 1551:5 1553:19 1554:1 CAUSING- 129:6 389:15 1128:5 CAUTION- 263:23 CAUTIOUS- 1047:21 CAVEAT- 394:2 CAVERNOUS- 854:1 CAVITIES- 187:23 CAVITY- 141:1 187:21 192:7 CBBS- 1358:3 CC- 633:4 CC'D- 633:5 CD- 19:19 26:7 131:18,20,23,25 147:4 210:6,10 212:12 213:6,9 1233:18 CEASED- 608:15 CEILING- 1276:19 CELEBRATE- 1383:11 CELEBRATION- 1119:4 CELEKA- 306:7,19 322:14 370:1,2,15 1315:10 CELL- 127:14	228:25 561:15 679:8,9,10,12,14, 16,20 639:18 661:15 680:21 681:22 733:4 991:3 1007:16 1082:5 1230:1 1350:8 1426:7 1504:4 CELLS- 127:9 187:1 313:2 CEMETERY- 1371:5,13 CENTER- 131:5 147:1 152:25 158:3 164:7 165:1 168:21 187:20 202:15,18,19 203:11,22,25 204:1,15,18 214:11,18 216:20,24 497:14 629:7 917:4 1065:12 1066:8,9 1102:19 1256:1,23 1262:23 1263:1,18,20,25 1264:1 1306:4 CENTERLINE- 1498:17 CENTRAL- 669:1 672:17,22 1496:14 CEO- 105:2 CEREBRAL- 1380:20 CERTAIN- 31:2,7 60:22 72:21 83:7 88:10 114:18 116:14 133:14,15 140:14 142:11 163:17 182:4 185:9 226:13 232:19 247:8 258:16 260:14 263:5 266:17 304:12 305:25 370:7 396:12 427:6 435:10 468:17 519:21 549:25 550:6 CERTAINLY- 32:8 36:10 39:21 51:4 53:11 73:4,5,8 86:25 130:12 135:8,24 144:11 179:13 190:8 235:19 237:7	239:10 255:25 256:6 259:1,7 264:5 290:22 295:8 301:16 302:15 307:24 311:2,7,10 315:1 316:7 322:17 324:6 327: CERTAINTY- 142:8 182:15 190:1 191:14 198:18 199:4 837:21 840:20 1126:19 1132:21 1148:4 1268:16 1546:25 1548:11 CERTIFICATE- 19:6 621:17 744:24 745:1,11 746:12,17,18,23 748:4,9 1062:17 1245:5 1434:6 1499:5 1575:1,17 CERTIFICATES- 285:19 CERTIFICATION- 169:18 912:15 914:1 1061:25 1062:3,4,13 1066:2 1150:3 1151:10,11,12 1409:25 CERTIFICATIONS- 169:9 620:19 690:7 1062:14 1115:14 1151:8 1155:10 CERTIFIED- 53:9 140:6 169:12,16,24 170:7 558:23 834:4 912:20 914:5 1038:22 1039:1 1062:21 1063:3,7,10,16 1115:4,5 1118:17 1146:5 1149:23 1150:1 1240:8 1255:22 1260:8,18,20,23 1357:12,15 1431:22 1432:5 1536:6 CERTIFY- 286:22 1128:24 1575:7 CERVICAL-	187:9,10 CETERA- 230:9 523:8 606:11 631:4 642:4 649:16 687:9 693:8 1103:20,21 1270:20,21 1342:11 CFRS- 1460:20 CHAIN- 502:18 503:14 553:9,15,19 705:18 997:12 1546:12 1552:14 1558:9,11,14,20 CHAIR- 34:22 35:21 345:24 349:8,15,17 367:6 1058:4,5,6 1111:16 1127:18 1138:14 1289:13,14 1372:6 CHAIRMAN- 1117:18 CHAIRS- 419:17 CHALLENGE- 1074:19 1230:23 1382:18 CHALLENGES- 94:5 107:25 340:5 357:20 370:3,17 498:15,16,19,23 499:8 500:3 505:4 519:20 532:4 535:11 915:12 926:16 930:1 944:1 946:9 947:18 1075:1 1184:23 1187:5 1188:23 1257:15 1262:14 1264:21 1265:4 1268:24 1269 CHALLENGING- 1403:23 CHAMBERLAIN- 274:21 CHAMBERS- 81:8 CHANCE- 76:4 112:3 218:11 227:24 562:21 821:7 832:3 1040:17 1080:10 1347:3 1409:1 1564:25 CHANGE- 32:2 104:3 119:24
--	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

296:2 330:2,3 427:10 443:23,25 449:3 477:14 510:12,17 529:14,15 543:2 546:13 559:14,21 624:9 650:18 669:3 672:22 673:1,5 843:12 962:10,20 975:1 986:25 1131:21 1162:18 1166:9 1192:25 CHANGED- 276:11 411:17 495:6 510:22 511:23 543:10,13 545:24 546:7 548:9 573:24 735:20,21 741:15 782:19 899:12 916:1 1185:13 1215:7 1305:18 1407:22 1456:6 1470:22,23,24,25 1524:7 CHANGES- 513:19,20 671:22,23 989:20 1138:20 1348:13 1497:16 CHANGING- 528:23 571:14,16,19,20 748:13 1347:16 1526:17 CHANNEL- 1488:13 CHANNELS- 718:17 CHAOS- 563:21 CHAOTIC- 486:3 CHAPERONE- 1306:6 CHAPTER- 1333:15,17,19 1335:20 CHARACTERIZATION- 424:11 1191:25 1193:10,15 CHARACTERIZED- 334:23 CHARGE- 4:38 18:33 69:20,21 70:5,11 74:22 92:20 172:4 246:23,24 705:16 767:8,14,20 768:6,12 771:14 772:2,3 773:4	845:18 847:16 848:3 852:5 879:4 1042:22 1204:9,13 1207:12 1423:16 1424:24 1425:16,22 1449:10,18 CHARGED- 246:21 495:15 1235:18 1354:6 1355:6,10 1449:20 1495:16 1525:8,12 1556:4 CHARGES- 1236:22 1250:20 1356:1 1495:21 1538:12 1541:22 1568:17 CHARGING- 167:5 1158:24 1314:12 1452:1,2,3 1473:4 1536:7,8 CHARLATANS- 1108:15 CHARLESTON- 3:19 42:4 50:12 60:21 123:9 728:16 854:2 1110:21 1255:25 1258:9 1263:13 1332:14 1489:25 CHARLESTOWN- 105:18 CHART- 110:6 257:9 305:22 319:23 321:15 356:11 358:8,9,16 359:18 402:20 466:25 526:24 826:9 837:6 925:6 926:12,13,14 936:3 943:6 957:8,10 982:24 1067:17 1161:3 1162:15,16,17 1176:4 1274:4 1283:14 1287:20 150 CHARTED- 955:22 1491:11 CHARTING- 790:12 CHARTS- 110:8 855:20 1068:11,18 1154:19 1504:2 CHASE- 963:17 CHASING- 545:9 CHASTISE- 318:17 CHASTISED- 919:14	CHAT- 1360:18 1567:10 CHATTED- 353:17 CHATTER- 544:1 547:20 CHATTING- 1220:7 CHAUFFEUR- 1044:17 CHEAT- 415:2 534:20 1104:4,6 CHECK- 120:8 153:20 233:18 269:13 315:3 359:14 360:4 366:4,8,16 367:1 374:20,25 430:25 489:20 501:17 512:20 615:24 710:17 772:8 811:12 875:14 905:4 918:7 955:23,25 956:3 982:15,17 1150:17 1176:13 1177:3 1179 CHECKED- 355:6 356:14 359:19 360:15 361:4,24 363:12,15,23 364:2,10,12 366:9,25 367:4,12,15 458:20 459:8,13,16 460:15 515:3 517:4,12 522:8,9 669:11,13 670:25 671:5,6 676:20,21 801:16,17,20 811:14 838:16 895:8 9 CHECKING- 71:11 360:9,10 457:25 876:13 941:1 1195:13 CHECKLIST- 363:9 CHECKMARKED- 328:5 CHECKMARKS- 359:6 CHECKS- 341:19 690:8 1052:24 1485:9 CHEMICAL- 353:1,4 385:8 1078:19 1441:16 CHEMICALLY-	964:17 CHEMO- 1414:6 CHERYL- 1413:23 1414:15 CHEST- 174:7 187:20 1396:2 CHEWING- 1186:2 CHICHI'S- 1386:4 1387:10 CHICK- 1096:21 CHICKENS- 1454:3 CHIEF- 14:3 58:24 116:16 125:5 168:16 175:11 247:9 266:2 297:8 318:11,19 355:13 398:17 420:2,7 792:3 794:5,8 809:20 918:21 931:16 1009:22 1037:3,10,13,16,2 5 1015:24 1038:6,15,19 1039:7,8,9 1040:20 1041:1 104 CHIEFS- 705:10 CHILD- 94:11 783:12 928:11 945:22 1368:8 1369:2 1417:10 1501:10,16 CHILDCARE- 340:20 CHILDHOOD- 63:2 1366:10 CHILDISH- 1392:9 CHILDREN- 168:19 170:21 274:12 348:1,7 712:11 1368:4,6 1372:3 1396:24 1402:20 1407:16,20 1410:15 1421:7 CHILL- 429:1 CHIPS- 1036:23 CHITCHATTING- 511:6 CHOICE- 331:14 382:9 838:13 CHOICES- 386:15 816:8,18 1142:9 1320:19 CHOOSE- 78:19 80:13 392:22,25 520:2 612:17
---	--	--	--

OCTOBER 2015 DELANEY V. CASEPRO

661:22 1171:8 1477:2 1565:23 1566:1 1571:10 1572:8 CHOOSES- 1155:7 CHOP- 1347:13,22 CHOSE- 331:13,22 929:21 CHOSEN- 238:17 CHRIS- 94:23 98:9 101:20 421:2 578:20 581:19 615:15 627:18 633:2 708:3 997:10,14 998:8 1086:18 1143:12 1147:14 1368:10,12 1370:2 1372:12 1373:23 1374:23 1375:4 1376:13 1377:14 1379:6,24 1380:12 1385:10 1386: CHRIS'- 1379:18 CHRIS'S- 1416:7 CHRISTIAN- 11:13,47 21:20 27:11,25 289:18 430:9 556:9 607:14 608:9 613:2 625:7 645:10 701:16 734:13,16,19,23 735:1,4,8,13 751:23 819:23 889:19 890:1,12,14,16,18 891:8 905:22 971:12 986:7 1278:24 1457:17 CHRISTMAS- 1372:21 1378:2 1390:12,14 CHRISTOPHER- 22:19 94:13 101:24 107:19 154:4 1368:9,19 1370:13 1372:5,12 1375:14 1378:25 1382:25 1383:20,22 1384:16 1385:25 1386:8 1387:8 1388:10,13 1389:23 1390:17 1395:20 1396:7	1400:19 1406:21,23,24 1407:1 CHRISTOPHER'S- 1387:24 CHRONIC- 832:10 1187:3 CHRONOLOGICAL- 21:33 253:3 957:20 1172:11 1263:12 1277:2 CHRONOLOGICALLY- 1283:20 CHUCKLE- 1231:11 CHURCH- 94:12 1396:23 1397:1,23 CIGARETTE- 560:20 832:16 953:15 963:23 CIGARETTES- 359:1 CINDERELLA- 1413:25 CIRCLE- 317:20 329:10,16 796:14 797:25 798:11 812:18,23 815:19 822:23 826:4 836:6 931:11,13 932:15 945:21 1562:17 1563:4 CIRCLED- 624:7,10 792:10 794:24 795:19 797:20,23 798:11,12 812:24,25 815:20 816:21 820:8 823:22 826:1,3,5 838:16 928:15 931:6,25 932:2,10 933:12,14,15,18 934:15 949:8 950:14 1179:17 CIRCLES- 974:21 1464:21 CIRCLING- 798:14 931:8 CIRCUIT- 1:3 75:8 265:13 1234:12,13 1353:6,15,16,20,2 1 1243:5 1356:18 1358:10 1409:23,24 1410:1 1498:24 CIRCULAR- 346:14 CIRCULATE- 182:20	188:11 CIRCULATED- 683:19 CIRCULATING- 140:14 141:12 142:11 182:3 191:15 193:17 196:13 1434:9 CIRCULATION- 179:8,11 180:25 182:10,13 187:3 188:5 CIRCUMSPECT- 1229:3,4 CIRCUMSTANCE- 240:15 317:13 544:17 618:13 1462:1 CIRCUMSTANCES- 76:8 120:15 240:25 241:20 294:4 545:5 610:5 716:1 773:19,21 774:16 775:4 780:13 965:1 1081:3 1098:4 1180:6,12 1313:13 1371:17 1410:14 1515:11 1517:24 1546:13,24 1547:1 1552:2 1555:11 1556:6 CIRCUMSTANTIAL- 1546:6,12,16,23 1547:10 1548:7,10,11 CIRCUMVENT- 55:7 CIRCUMVENTED- 1460:25 CITALOPRAM- 803:15 CITE- 1097:25 1434:12 1463:25 1464:1 CITED- 58:25 238:3 CITES- 1196:25 CITIES- 1044:17 CITIZEN- 618:15,16,17 741:16,25 742:8 745:8,23 747:25 1502:8 CITIZENS- 100:12 129:2 747:14 916:2 1055:18	1538:7 CITIZENS'- 76:20 CITIZENSHIP- 618:20 741:12 745:18 900:1 916:3 917:10 1502:10,17 CITY- 153:16 168:15 739:18 754:8 1037:25 1038:2,7,13,19,25 1040:15 1046:18 1047:1,4,6,16 1048:2 1053:5 1054:4,17 1205:5 CITY'S- 1039:7 CIVIL- 84:10,11 170:23 225:19 939:11 CIVILIAN- 44:15 58:22 96:23 238:21 338:20 471:3 473:21,23 474:9 535:15,18 553:21 593:24 594:2 707:12 761:2 821:10 826:15 862:2 941:11,15 1072:8,12,13 1261:16 1262:17,20,25 1527:17 CIVILLY- 223:5 CLAIM- 71:2 85:2,6,7,11,12 225:25 239:12 243:3 1016:25 1017:7 1322:21 1437:5 1455:10 1530:11 1539:5,6 1545:5 1557:17 CLAIMED- 1236:24 CLAIMS- 35:24 36:13 37:3 83:23 84:24 125:13 1060:2 1460:24 1461:10 1462:10 1467:8 1499:11,19 1544:12 1546:9 1550:6 1551:11 1554:16 1557:19 1559:14 CLAIRVOYANT- 1226:21 CLARIFICA- 1475:3
---	---	--	---

OCTOBER 2015 DELANEY V. CASEPRO

CLARIFICATION- 64:12 70:23 428:14 454:5 787:10 1100:19 1442:4 1472:24 1474:11 1475:5 CLARIFIED- 69:12 1169:6,19 CLARIFIES- 630:6 CLARIFY- 73:10 215:23 595:3 893:16,25 1028:17 1031:3 1174:4 1322:24 CLARIFYING- 577:15 CLARK- 238:4 239:14 CLASS- 59:9 804:2 1045:7 CLASSES- 274:15 CLASSIFICATION- 1332:24 CLASSIFICATIONS- 583:3,16 CLASSIFIED- 583:11 830:21 CLASSIFY- 1325:6 CLAUS- 1372:22 CLAUSE- 589:18 836:16 CLEAN- 448:3 589:14 659:7 898:13 CLEANSHAVEN- 505:2 CLEARCUT- 879:22 CLEARED- 102:23 1416:12 CLEARER- 159:13 1534:19 CLEARING- 725:2 CLEMON- 557:15 CLERK- 30:13,16 68:2,4 69:13 74:14,15 149:4,11 166:9,15 201:22 202:3 271:1,6,9,12 295:23,25 303:10 316:10 345:22 350:1 430:12,18 437:8 443:21 527:24 554:16 564:22 565:3 703:10	734:17,20,24 770:13 824:10 859: CLERK'S- 30:18 67:24 68:1 267:24 1242:10 1571:20 1572:15 CLERKS- 296:2 300:6 303:15 349:2 CLICK- 200:6 CLICKED- 113:16 CLIENT'S- 49:19 1102:6 1237:23 CLIENTS- 77:5 CLIENTS'- 77:8 CLIMATE- 906:25 CLIMBS- 100:25 CLINIC- 113:3 114:7 239:1 272:3 916:14,15,19,21 1116:4 1191:23 1257:13 1263:14 CLINICAL- 169:13 170:17 698:11,18 825:25 894:5 922:19 972:18 974:16 1065:23 1070:16,25 1074:9 1150:20 1157:15 1158:23 1286:16 CLINICS- 102:18 CLIP- 26:13 227:17 232:8 233:2 417:21 420:17 995:10,15 1341:11 CLIPS- 1002:23,24 1347:10 CLOCK- 72:15 99:9 762:19,20 892:21 1573:6 CLOCKED- 762:18 1108:5 CLOSE- 41:19 43:6,25 46:8 48:15 61:9 82:18,22 92:17 93:20 102:5 214:22 266:2 332:25 344:13 354:13 370:22,23 400:5,9 401:3 410:7 444:23 508:24 528:8 530:10 647:24	669:25 862:15 906:6 1055:5 1125:22 1201:12 13 CLOSED- 92:25 93:2,9 294:15 331:25 332:16 370:24 419:24 450:20 480:21 482:19 483:16 511:14 529:1,9 904:2 1457:11 CLOSELY- 1539:20 CLOSENESS- 1243:13 CLOSER- 65:21 161:2,3 300:12 660:1 1029:12,22 1040:21 1239:6 CLOSERUP- 158:25 CLOSES- 348:3,5 CLOSEST- 116:3 331:17 332:3 450:1 816:18 838:17 CLOSETS- 1416:12 CLOSING- 18:14,16,24,28 36:10 83:3 112:18 126:16 507:9 1450:9 1456:25 1472:25 1475:21,24 1476:3,7 1477:3,6,9 1513:14 1514:9 1532:20 1537:14 CLOTHED- 177:19 1122:2 1127:22 1307:19 1488:2 1526:22 CLOTHES- 100:7 122:7 330:3 477:11,13,22,24 530:1 556:20 557:2,4 1140:11 1197:22 1198:15 1290:16 1291:9,16,23 1292:20 1328:6,18,21,24 1329:1 1400:11 1416:6 177:4,6,7,8,9,10, 13 CLOTHING- 174:2	184:22 1087:12 1100:23 1144:4 1197:18,23 1198:16,21 1328:25 1335:22 CLUE- 297:4 CMA- 870:14 CME- 622:14,22 625:25 CMES- 873:18 CO- 638:7,14,20 702:4 705:6 CO'S- 638:2,6 639:4 COACH- 167:12 COAST- 358:22 642:16,17 645:24 COASTAL- 917:8,9 COAUTHORED- 170:14 COCKTAIL- 592:22 COCOUNSEL- 135:6 136:6 1001:4 1246:19 1540:3 CODE- 54:25 55:12 567:1,4 589:2,15 648:23 1039:3 1355:2 1356:3,14 CODES- 567:2 CODY- 1387:12 COERCE- 519:4 COFFEE- 832:15 855:3,6 888:5 890:15 919:8 COGNITION- 1092:21 COGNITIVE- 362:2 COGNITIVELY- 1089:5 1392:1 COHERENT- 363:24 COINCIDENTAL- 34:5 COLD- 90:21 574:1 928:24 1203:23 1362:9 1505:7 1547:4,11,15 COLE- 1120:2 COLLAR- 1291:24 COLLATERAL- 36:21,22 1546:15 1547:15,17,24 1548:5 COLLEAGUE- 42:11 135:17 752:21 1111:2 1353:14 1540:4
---	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

COLLEAGUES- 95:19 885:23 1064:21 COLLECT- 80:21 174:15 228:13 886:22 COLLECTED- 118:19 122:11 132:8,12 174:14 235:21 978:13 979:23 980:4 1178:21 COLLECTIVE- 146:5,6,7 1143:16,18 COLLECTIVELY- 108:21 1143:15 1144:9,10 COLLECTS- 847:5 1141:19 COLLEGE- 274:13,15,21 629:24 630:18,22 736:9 907:7 1061:21 1064:7,17 1065:3 1255:23 1264:5,10 1316:10 COLLEGIATE- 630:4 755:7 COLLISION- 61:19 152:12 154:7 158:23 162:12 COLLISIONS- 150:16,24 165:14 COLON- 192:20 COLONEL- 1258:5 COLOR- 360:19 364:11 518:6 953:16 COLORADO- 571:19 577:4 1317:18 COLORING- 360:15 COLUMBIA- 621:21 755:22 895:11 1065:9 1072:15 1074:7 1116:12 1205:5 1267:14 1358:4 COLUMBO- 388:19 887:2 1007:7 1229:8 1350:5 1426:3 COLUMBUS- 1413:25 COLUMN- 367:11 COM- 1105:24 COMBAT- 810:5 COMBATIVE- 115:9 363:16 517:13	938:8 954:7 960:20 1182:10 1520:23 1523:25 COMBATIVENESS- 517:18 COMBED- 518:14 COMBINATION- 175:9 726:25 792:21 884:19 931:21 1067:25 1089:1 1480:9 COMBINE- 1288:8 1554:2 COMBINED- 53:10 230:2 916:14 COMBINES- 1553:23 COME- 61:8 62:8,22 81:12,15 82:8 91:19,20,22 95:22 96:9 107:4,6 111:9 112:5 113:9 115:24 119:22 120:18 121:9 123:9 133:23 153:17 159:10 165:5 166:7 172:18 189:12 198:9 204:15 206:12,13 238:12 241:10 266:9 2 COMES- 46:5,20 47:7 48:11,23 57:6 65:24 78:3 82:21 83:12 101:12 112:14 114:6 117:6 119:2 173:14 195:1 203:22,24 204:1 206:17,18,19 211:7 236:15 302:16 334:16 348:21 349:6 355:22 375:9 401:14 408:16,25 410:4 COMFORT- 62:7 197:9,12,15 390:16 419:13 428:25 429:3 644:2,7,14 720:18 818:7 1033:20 1059:1 1083:18,19,24 1084:4 1172:2,3,5,7	1211:25 1212:1,2,24 1223:11,12 1476:9,10,11,12 1513:12,16,19 1541:19 1565:12,13 COMFORTABLE- 298:23 300:3,4,15 301:13,18 389:10 504:23,25 1361:25 1444:18 1447:21 1448:2,17 1474:10 1572:1 COMFY- 224:2 COMING- 78:1,6 113:9 116:10 117:21 136:25 146:19 157:24 183:5,13 189:15 195:5 203:22 233:12 253:7 286:16 296:6 297:5 318:11 339:17 340:25 387:17 391:22 407:22 417:4 500:12 504:20 522:15 525:23 539:25 540:13 5 COMMAND- 24:8,17 426:12 502:18 503:14 512:10 553:9,15,19,21 593:19 600:5,17 633:24 634:3 656:22 657:10 658:13 662:21,22 663:6 667:11 668:19 670:12 694:8 700:18 764:20 997:12 1004:9 1039:10,18 1173:13 1531:5 COMMANDER- 502:23 714:1 COMMANDING- 104:21 105:3 638:8,20,23 639:22 640:11 698:22,25 699:4 702:4 704:11 705:6,10,21 706:3,8,23 707:2,10,12 708:25 712:17	713:16,18 885:16 997:12 998:9,16 1344:17,22 COMMANDS- 1283:18 1284:3 COMMENCED- 599:22 COMMENCING- 769:5 COMMEND- 248:4 COMMENT- 72:18 90:7 249:13 406:25 613:25 733:24 775:22 808:13 897:3 1102:16 1109:23 1148:20 1225:6 1231:9 1252:16 1318:13,23 1543:7 COMMENTS- 31:8 115:5 251:19 519:15 539:19 543:18 962:14 1148:16 1230:9 1254:5 1337:19 COMMERCIAL- 650:4 COMMISSION- 1235:13 1355:19 COMMISSIONED- 308:6 813:15 COMMISSIONS- 1355:6 COMMIT- 365:13 844:23 941:11 1272:16 1279:20 1309:4 1311:19 COMMITMENT- 520:4 866:3,6 939:12,23 941:10,17 1272:14 1308:24 1354:2 1524:23 COMMITMENTS- 578:19 COMMITTS- 439:10 COMMITTED- 47:2,3 385:15 578:14 941:24 1196:4,5,11 1241:11 1247:15 1356:4 1508:10 COMMITTEE- 38:23 39:6,19 40:2 717:17 913:14 1117:18,19,22 COMMITTEES- 40:3 1220:12 COMMITTING- 310:22 1307:8
--	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

COMMON- 1:5 46:15 50:5 54:6 60:3 61:22 84:7 94:22 102:9 108:23 109:4 110:1,12 317:20 361:20 405:12,13,15 449:9,11 500:2 571:1 781:18,21 783:3,25 784:3 785:6 937:7 956:6 968:20 980:6 1044:4 1063:24 1108:17 115 COMMONLY- 803:19 804:6 805:15 807:9,10 941:4 1280:4 1315:23 COMMONSENSE- 59:16 COMMUNICABLE- 1091:17 COMMUNICATE- 52:10 90:20 114:16 369:17 824:15 867:3 937:14 948:14 1145:9 1182:2 1241:21 1249:11 1253:5 1293:16 1395:14 1396:5 1508:2 COMMUNICATED- 582:24 636:2 827:11,15 1195:1 1219:12 1281:19 1293:20,25 1443:20 1520:25 COMMUNICATES- 723:4 COMMUNICATING- 216:24 354:25 748:18 1052:21 1145:19 1178:12 1212:11 1224:12,17 1300:3 1374:20,22 1392:8 COMMUNICATION- 127:10,14 216:21 229:1 313:2 354:24 528:3 539:9 561:15 661:16 733:5 895:15 991:2,3 1007:16 1082:6 1152:12 1224:15	1225:5 1230:1 1306:20 1350:8 1396:9 1521:1 COMMUNICATIONS- 721:21 897:20 COMMUNICATIVE- 114:17 827:19 828:7 836:20 950:11 980:25 981:2,16,24 982:5 1144:24 1145:5 1147:8 1178:16 1330:9 1492:10 1509:5 1510:9 COMMUNISM- 736:1 COMMUNITIES- 84:8 484:8 COMMUNITY- 104:8 106:12,21 109:14 129:2 172:24 275:4 443:12,13 484:6 778:24 1039:20,25 1040:8 1043:6,19 1049:13,16,24 1051:13 1066:17 1085:10 1087:15,24 1088:21 1089:16 1090:17 1091:24 1094:17 1098:8 1100:12 112 COMP- 588:20 606:11 COMPANIES- 124:6 567:17 571:18 1068:17 1522:6 COMPANION- 1199:22 COMPANIONSHIP- 1560:18 COMPANY- 97:6 98:16 99:3,12 102:15 103:6 123:24 124:8 272:17 273:15 276:4 341:16 432:25 435:20 543:24 565:20,23 566:1,15 567:14,21,24 568:4,8 569:12,13,18,25 570:7 571:8,13,15 572:16,22 573:4 574:10,20 576:13,	COMPANY'S- 102:16 279:6 442:3 583:23,24 585:12 626:25 674:3 709:7 711:2 1439:16 COMPARATIVE- 37:17,18 70:15 1015:14 1016:2,3,5 COMPARE- 123:5 1555:25 1556:1 COMPARED- 458:7 522:10 1485:1,2 COMPARISON- 141:17 1026:5 COMPARTMENTS- 1042:16 COMPASSION- 938:15 COMPASSIONATE- 947:24 COMPELLING- 1021:5 COMPENSATE- 285:22 COMPENSATION- 103:19 280:12,23 285:19 441:18 584:22 588:10,11,17 591:4 595:19,21 602:6 604:24 605:4,16 606:18 619:15 624:8 717:4 876:10 1561:2 COMPENSATORY- 1560:3 COMPETE- 647:19 COMPETENCE- 650:11 COMPETENT- 77:7 240:15 385:3 407:5 856:23 1103:24 COMPETENTLY- 967:19,21 COMPETITOR- 1456:5 1530:18 COMPILATION- 824:19 928:1 931:24 COMPLAIN- 996:18 COMPLAINING- 1047:13 1070:21	COMPLAINS- 94:13 COMPLAINT- 55:6 204:10 225:23 242:25 290:1 297:8 318:12,19 355:13 792:3 794:5,8 796:19 809:20 928:11 931:16 934:25 1017:1 1070:3 1104:13 1110:22 1240:2 1271:5 1422:14 1427:12 1428:9 1462:23 1551:15 1557:5 COMPLAINT'S- 610:23 COMPLAINTS- 116:17 343:10,20 610:25 792:7 793:22 794:10,22 795:1 797:16,21 928:17 934:14 938:16 943:9 1016:24 1068:13 1070:22 1142:20 1504:14,21 COMPLEMENTARY- 177:1 COMPLETE- 19:35 170:1 179:24 180:3 184:9 186:24 193:13 249:20 251:9,16 329:20 387:3 539:8 540:21 609:12 829:4,5 830:14 869:6 958:5 1052:24 1200:17 1236:14 1292:7 1540:14 1541:12 1575:10 COMPLETED- 81:1,2 168:17 331:2 516:12 529:17 537:9 636:16 637:7 711:12 712:2 715:4,22 755:19,25 774:10 789:23 831:14 837:22 846:23 909:15 954:2 956:19 963:10,13 984:10 1061:13,17,20 1115:9 1212:24
---	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

1260:9 1276:25 COMPLETELY- 100:25 132:23 133:1 179:25 186:19 187:19 192:5,6,7,19 193:12 200:9 218:4 245:7,15 332:19 423:21 660:12 723:15 725:4 772:5 814:15 961:1 997:23 1111:5 1199:5 COMPLETING- 821:25 903:21 957:17 958:17 1147:2 1259:11 COMPLETION- 170:6 1065:6 COMPLEX- 99:21 100:1,2 122:10 128:21 133:11 1014:12 1019:2,8,13 1025:4,14,19 1055:13 1166:13 1184:22,25 1207:21,23 1208:1 1374:14,16 1497:23 COMPLICATED- 1083:11 1333:17 COMPLIED- 1268:2 1467:12 COMPLIMENT- 1364:18 COMPLY- 42:14 54:3 588:4 663:2,7 1313:16 COMPONENTS- 1052:18 COMPORT- 665:22 COMPORTS- 1035:9 COMPREHEND- 1511:19 COMPROMISES- 1030:21 COMPUTER- 95:19,24 204:11 211:4,5 215:1,3,7,12 237:10 303:5,8,23 316:25 387:22,23 614:23 620:13 834:21 869:9	1052:17 1382:9,12 1406:8 1480:4 1481:16 COMPUTERAIDED- 215:18 COMPUTERS- 585:10 CONCEALED- 49:14 CONCEDE- 428:18 1428:13 CONCEDED- 500:14 1345:9 1528:9,12,19 CONCEDING- 1028:21 CONCENTRATE- 78:24 93:6 419:23 944:3 CONCENTRATES- 92:25 CONCENTRATING- 93:2,9 CONCENTRATION- 78:23 79:2 660:9 1419:3 CONCEPT- 112:10 614:25 708:24 876:1 1054:3 1292:9 1510:19 1539:17 1552:21 CONCEPTS- 557:13 814:17 CONCERN- 37:18,25 38:5,6 63:5 77:24 78:10 96:16,19 102:9 105:3 117:1 228:20 233:15 297:14 307:5 308:22,23 310:9,13,24 333:12 381:6,16 399:21 423:18 425:7,11 494:20 502:16 531:25 676:23 696:18 701:19,21 708:2,1 CONCERNED- 40:20 95:7 219:3 233:16 248:15 297:10 308:24 311:2 319:12 350:24 357:12 407:23 531:22 543:19 553:19 616:12 660:8 676:14,17,18,23 702:15 751:7	797:7,13 809:14 834:17,19,23 856:11 933:4 934:2 962:9 963: CONCERNING- 48:13 140:8 205:25 286:13 310:25 530:16 749:9 883:22 896:5,10 1119:10,13 1120:4 1137:2 1139:7 CONCERNS- 31:8 39:19 66:4,7 102:7 256:18 261:1 321:4 369:21 381:14 420:24 421:2 637:25 640:11 641:3,22 642:19 658:10 703:25 722:11 723:3,6 727:14 741:11,19 742:15 748:12 750:10 794:20 834:3 836:25 837:23 838:1, CONCERT- 1413:25 1414:2 CONCLUDE- 88:21 228:10 386:21 886:13 1476:7 1573:4 CONCLUDES- 200:21 252:18 732:15,16 994:14 1007:1 CONCLUDING- 84:2 85:19 171:16 172:4 612:13 1113:25 1114:6 1476:3 CONCLUSION- 82:8 92:19 115:16 117:19 135:11 185:9 191:23 252:16 367:24 543:19 561:19 654:8 701:25 714:21 715:23 716:3,4 1012:9 1032:20 1162:10 1173:19 1433:19 CONCLUSIONS- 1004:4 1058:16 1506:19 1549:25 CONCLUSIVE- 425:17	CONCRETE- 302:1 CONCUR- 995:20 1002:9 1026:2 1028:5 1131:17 CONCURRED- 1494:9,10,11 CONCURRENT- 1554:1,3 CONCURRING- 1553:19 CONDITION- 110:19 185:4 543:12,21 832:10,21 833:23 941:7 961:1 1088:10 1092:4 1187:18,22 1197:9 1208:5 1237:10,22 1238:19 1241:4,15 1284:1 1312:12 1322:16,19 1526:16 CONDITIONALLY- 1234:1 CONDITIONED- 1181:18,19 CONDITIONING- 387:20 CONDITIONS- 310:8 360:25 458:1,2,3 505:5 803:3,4,7,10 844:17 933:1 964:25 1063:19 1091:19 1092:7 1116:21 1188:2,3 1208:6 1323:9 CONDUCTIVE- 547:6,16 CONDUCT- 51:18 173:2 310:3 321:10,14 442:5 493:3 550:6,13 634:13 636:2 731:4,5,24,25 832:2 1013:13 1019:20,21 1188:2 1229:3 1314:8 1323:4 1324:2,5,6,7 1354:24 1356:22 1515:9 CONDUCTED- 140:6 173:4,6 175:24 176:4 199:2 636:12 922:21 972:21 974:18
--	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

977:9 CONDUCTING- 635:16 CONDUIT- 596:9 597:13 CONFER- 135:6 416:18 763:9 1001:4 1003:24 1059:4 1223:14 CONFERENCE- 126:20,24 188:21 189:17 194:11 195:7 197:1 201:14 207:1 209:6 217:17 218:18,25 219:13 266:11 267:11 595:12 597:21,24 607:4,18 608:3 611:13 655:5 656:16 657:22 659:10 665:12,14,15 720:14 721:1 729:21 7 CONFERRED- 234:12 872:13 CONFESSION- 1569:1 CONFIDENCE- 182:22 CONFIDENT- 392:3,6,12 724:10 1448:17 1571:22 1572:4,14 CONFIDENTIAL- 830:22 895:16 1219:11 1241:23 CONFINED- 1529:8 CONFINED- 50:23 1304:17 CONFINES- 979:5 980:8 982:15 985:9 CONFIRM- 249:8 687:14 825:17,18 873:10 951:18 1233:22 CONFIRMATION- 743:25 1357:5 CONFIRMED- 319:5 899:12 CONFIRMS- 58:24 1148:1 CONFLICT- 585:10 636:7 1530:14	CONFORM- 40:10 1236:4 1242:8 1354:24 1422:14 1427:5 1428:9 CONFRONT- 939:17 CONFRONTED- 1313:13 CONFUSE- 108:7 1027:23 1058:2 1316:13 1515:3 CONFUSED- 785:21 836:7 935:6 1131:7 1385:8 1417:18 1433:8 1525:19 CONFUSING- 43:5 69:24 437:13 509:3 726:2 1000:12,14 CONFUSION- 57:14 CONGESTED- 151:23 152:1 CONGESTION- 158:19 CONGESTIVE- 1295:8 CONGRESS- 747:15 CONJECTURE- 1547:3 CONNECT- 1154:16 CONNECTED- 894:18 1042:21 CONNECTICUT- 168:6 CONNECTING- 140:15 CONNECTION- 130:13 181:22 786:12 1042:19 1119:6 1127:8 1145:5,7 1235:24 1242:25 CONNECTIVE- 187:13 CONNECTS- 186:17 200:14 CONSCIENCE- 1510:3 CONSCIENTIOUS- 244:14,20 CONSCIOUS- 141:24,25 142:2 188:13 190:5,18 191:9,16 193:19 194:16 196:15 198:21 199:6,17	1011:3,10 1016:19 1017:6 1020:18 1022:20 1430:12,19 1431:4,7,9 1432:21 1434:17,18 1435:8 CONSCIOUSLY- 953:9 CONSCIOUSNESS- 141:12 142:4,5 188:16 189:20 190:15,19 193:22 194:7,17,21 196:18 1433:2 CONSENSUS- 1510:2 CONSENT- 259:9 463:19 491:25 1346:18 CONSEQUENCE- 128:12 1013:19 1553:6 1558:23 CONSEQUENCES- 69:9 799:17 1111:23 1309:13 1310:10 CONSIDER- 33:15 84:25 107:11 112:7 170:16 612:8,17,22 634:4 736:25 896:14 930:19 940:13 1020:12 1471:3 1474:23 1477:24 1538:12 1539:25 1542:11 1546:1 1548:13,21 1549:14,19 1550:9,23 1554:18 1559:6,8 1564:17 CONSIDERABLE- 57:10 CONSIDERATION- 90:17 111:20 612:12 633:21 1236:7,14 1544:1 1559:17 CONSIDERED- 33:8 125:14 583:21 731:8 732:3 944:22 1242:18 1288:4 1289:1 1447:21 1541:10 1545:4 1547:1 1559:13 CONSIDERING-	84:17,23 85:5,11 788:12 1237:21 1319:19 1452:16 1471:1 CONSIDERS- 639:13 CONSIST- 914:23 CONSISTENT- 141:6 334:20 518:4 606:21 967:7 1196:1 1285:23 1286:17 1303:14 1338:21 CONSISTING- 22:7 270:6 CONSOLIDATED- 1535:7 CONSTANT- 44:8 932:15 CONSTANTLY- 948:11 1043:4 CONSTITUTION- 106:3 257:4 656:10 746:2 943:21 CONSTRUCTED- 90:7 CONSULT- 67:2 303:18 491:18 555:22 696:24 840:21 843:19 865:4 866:14 918:8,11 954:4 982:9 1195:24 1295:4 1332:13 1491:6 CONSULTANT- 407:14,15 841:5,9 842:3 843:22 845:14 865:3 958:7 CONSULTANTS- 841:4 845:12 CONSULTATION- 52:9 57:5 377:4 842:25 845:6 865:8 960:9 1523:9 CONSULTED- 49:10 397:19 407:11 408:6 494:9 1326:7 1333:21 CONSULTING- 866:14 958:8 CONSULTS- 840:23 1490:7,15 CONSUMER- 569:13,18
---	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

CONTACT- 286:7 328:14 365:12 593:11 595:5 639:19 696:18,25 749:8 859:9 897:3 899:9,14 904:21 974:22 975:2 1088:10 1270:17 1275:25 1342:11 1357:20 1511:20 1520:9 1571:20 CONTACTED- 504:14 649:2 896:2 897:12 899:7 987:6 1535:21 1571:24 CONTACTING- 904:23 CONTACTS- 57:4 571:23 593:10 647:12 CONTAIN- 257:13 288:10 491:7 590:18 CONTAINED- 177:9 183:12 259:2 277:12 325:5,16 467:22 487:15 589:4 630:13,17 753:15 830:17 831:20 895:6,14 972:9 973:17,23 1051:2 1083:7 1205:22 1370:12 1432:23 CONTAINING- 1048:17 CONTAINS- 323:15 1410:12 1575:17 CONTEMPLATE- 1476:21 CONTEMPLATED- 1442:20 CONTEMPLATING- 1349:19 CONTEMPORANEOUS- 468:21 CONTEMPORANEOUSLY - 454:25 1017:3 C CONTEMPT- 45:19 CONTEND- 125:16	1568:13 CONTENDED- 1110:3 CONTENDING- 1094:9 CONTENT- 1109:17 1249:16 CONTENTION- 421:8 CONTENTS- 257:19,21,23 258:2 261:6 578:24,25 CONTEST- 597:4 1462:2 1465:14,16 CONTESTED- 144:9 421:5 1111:19 CONTEXT- 39:9 40:1 57:22 59:13 71:13 130:17 133:5 175:6 180:11 243:18,19 247:6 308:21 371:11 445:18 796:11,20 986:10 995:18 1002:25 1019:4,6,11 1023:18 1098:7,14,19 1099:6 1100:1 1103:10 1147:10 1438:12 1465:1 CONTINGENT- 691:14,21,23 CONTINUALLY- 449:15 916:6 CONTINUE- 5:12,37 7:17 8:32 9:14 10:28 11:24,49 15:27 45:11 121:9,13 124:4 127:4 144:25 148:23 181:2 183:17 198:8 218:25 225:1,5,6 270:18 297:6 312:21 315:5,10 347:20 373:15,16 429:13 534:18 535:21 541:18 542:2 CONTINUED- 116:21 267:5 640:1 666:14 782:21 794:22 943:7 1009:8 1064:20 1065:5 1303:10 1356:11 1491:10	CONTINUES- 106:24 399:24 412:6 639:9 990:7 1071:14 1116:2 1179:13 1301:5 1345:12 1434:16 1465:9 1511:23 1570:13 CONTINUING- 182:20 188:11 285:18,23 513:18 535:12 622:16 723:24 765:9 824:6 873:11 943:9 1074:9 1499:22 1502:25 CONTINUITY- 687:21 774:5 CONTINUOUS- 977:13 CONTINUOUSLY- 429:22 1046:14 1260:12,13 CONTRACT- 22:13 24:6,14 38:5 54:17 55:8,15 104:9 124:1,7 273:12,18 276:11,14,24 279:8 342:6 343:7 350:6 365:4,15,22 421:12 422:5,23 425:21,25 426:1,9,11,21 568:2 580:15 581:12,16 586:4,6 587:3 589:16,18 590:6,1 CONTRACTED- 1236:6 1462:7 CONTRACTING- 571:11,25 572:2,15,22 591:21 593:3,9,11,24 596:3 601:22 632:15,24 638:17 647:7,8,9 664:2 702:13,16,24 703:3 704:13,14,19,20 705:4 708:22 712:24 713:22,23 714:11 1004:10 1342:16 1345:17 1465:24	CONTRACTOR- 433:6,10,14 591:18 597:10 602:24 647:11,14 658:4,6 670:5 671:2 692:18 693:2 697:10,23 713:21 741:1,2 765:17 997:22 1345:14,15,16,18 1502:13 CONTRACTOR'S- 593:5 669:12 CONTRACTORS- 272:14 276:11 632:23 645:22 CONTRACTORS'- 688:8 CONTRACTS- 123:24 570:11 580:10,20 581:3,4,7,9 589:20 618:14 620:9 645:15,16,19 647:24 648:17 650:5 668:25 675:2 709:8,23 712:25 1001:25 CONTRACTUAL- 421:23 656:4 1466:6 CONTRARY- 1052:16 1467:14 CONTRAST- 141:21 488:15 670:23 CONTRIBUTE- 103:13 CONTRIBUTED- 1102:11 CONTRIBUTING- 616:7 CONTRIBUTION- 35:2 616:1 622:11 870:22 877:22 CONTRIBUTIONS- 77:14 616:9 CONTROL- 38:12 90:16 91:8 124:12,19 132:14 267:3 326:16,18 327:5 410:8 412:21 416:23 419:18 422:22 423:3 566:3,6 610:11,14 611:2 612:7,8,18,19,21
---	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

641:13 654:3 661:18 692:22,25 695:4,5 722:12,14,24 723:2,10,12, CONTROLLED- 283:18 310:11 341:22 342:16 387:20 437:25 438:9 CONTROLLING- 172:7 422:19 424:15 1114:3 1463:8 1550:24 CONTROLS- 34:12 186:18 979:8 CONTUSION- 179:1,2,7,11 180:21 CONTUSIONS- 181:23 183:1 CONVER- 520:20 1159:21 CONVERSATION- 44:18 54:4 87:8 117:16 156:2 242:18 295:10 297:13,22 299:14,24 313:15 317:7 327:22 332:25 390:9 450:16,24 451:5,8 472:3 486:9 510:14 511:16 516:3 520:23 540:19 560:15 702:10 706:6 855:23 908:7,10,15 9 CONVERSATIONS- 413:13 543:4,10 702:19 707:25 721:16 722:6 883:18,19,21 1050:6 1082:20 1103:16 1118:22 1159:22 CONVERSELY- 417:11 CONVERSING- 904:3,9 CONVEY- 787:7,8 CONVEYED- 885:19 1528:20 CONVINCE- 83:7 CONVINCED- 1030:5	1545:23 CONVINCES- 1474:20 1548:15 1549:5 CONVINCING- 69:25 70:21 1437:7 1452:3,13 CONWAY- 1065:6,9 1392:13 1413:10,14 COOK- 101:22 1371:9 COOKIES- 59:19 1036:23 COOKING- 1367:1 COOL- 132:8,11 235:20 248:21 264:18 680:20 734:1 978:13 979:23 1006:9 1423:23 COOLING- 72:17 1425:11 COOPERATE- 121:14 535:22 541:18 542:2 543:20 582:17 940:8 954:10 966:16,23 1191:11 1194:8 1273:4,11 1306:22 1309:14 1310:13,20 1311:12,14 1312:22 1529:1,16 COOPERATED- 248:2 968:2,3,4,5 993:5 1191:14 1254:10 1273:12 COOPERATING- 1254:16 1280:8 1309:1,2 1311:6 1312:18 COOPERATION- 967:7 1130:13 1424:20 COOPERATIVE- 118:13,19 120:25 122:12 367:2,4,5,9 470:1 490:1 521:22 527:12,13 535:4,13 542:14 543:11 827:10 938:4 945:13 952:1 980:24 1144:24 1271:14	1272:13 1279:18 1284:25 1298:9 1299:17 1300:8 1310:1 1330:25 13 COORDINATOR- 202:24 COPELAND- 3:16 COPIED- 633:6 COPIER- 221:21 COPIES- 220:13 223:9,12,14 684:1 1575:19 COPY- 65:7 206:7 218:5 237:11 239:16,18 258:14 279:14 303:25 304:17 326:22 379:4 438:8 468:25 596:1 608:14 633:4 657:13 662:24 665:6 666:6,17 667:10 670:6 672:13,15 673:12,15,25 674:3 700:11 807:5 809:17 83 COPYING- 1575:21 COR- 593:8 594:4 636:10 638:12,17,24 688:7 702:3 704:11 705:3,23,24 707:13 714:2,11 CORCRAIN- 178:8 CORD- 186:17 340:23 CORNER- 132:25 277:3 278:16 284:13 285:1 298:6 324:17 365:2 368:8 434:10,12 436:1 438:13 526:9 547:6 600:23 601:17 614:19 621:2 626:21 639:11 664:19 743:9 744:16 802:6 1135:21 1572:19 CORNERS- 1108:1 CORONER- 176:14 1245:6 1499:5 CORONER'S-	1402:14 CORP- 779:24 780:10 809:25 933:21 1038:21,24 1039:16 1477:12 149:1,4,10,13,16, 18 CORPORAL- 5:17 150:18,23 151:2 154:15 156:3 157:1 161:5 162:3 164:13,15 165:23 1022:9 1142:19 1181:10,15,18,19 1193:1,2 1478:8 CORPORATE- 286:12 566:22 573:4 586:5,24 592:10 593:16 594:8 617:3,6 620:15 631:1 665:2 666:4,16 701:7 707:22 711:21 715:3 743:1,5 871:11,24 883:21 884:14 1263:4 1504:6 CORPORATION- 75:5,18,19 123:18 667:17 1446:7 1512:6 1543:24,25 1551:1,2 CORPORATIONS- 123:19 652:4 1207:14 1543:23 1544:7,8 CORPS- 95:3 97:9 1487:9 CORPSMAN- 767:4 841:7 844:1,2,12 851:14,21,24 852:20 853:3 856:16,20 1487:10 CORRECTED- 728:3 CORRECTING- 947:4 CORRECTLY- 87:9 183:21 189:21 192:24 279:9 308:3 344:4 374:13 406:23 439:12 442:6,17 471:13 472:22 512:2,6 514:22 576:6 577:20 578:16 579:13,25 582:14,20 584:1
---	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

585:4 616:2 633:18,22 634:16 635:18 636:8,13,20 638 CORRELATE- 211:20 1136:20 CORRELATED- 496:5 CORRESPOND- 468:13 CORRESPONDING- 486:7 CORROBORATE- 136:20 138:5 142:10,22 144:15 CORROBORATED- 53:19 CORROBORATIVE- 143:14,20 144:8 CORY- 1354:15 1358:14 CORY@MOSSANDKUHN C OM- 1358:16 C COST- 436:14 579:11 COSTS- 567:18 1055:1 COSTUMES- 1406:15 COT- 349:5,7 COTS- 854:9 919:5 COUCHING- 1083:4 COUGH- 609:1 1028:20 COULDN'T- 194:23 200:6 235:18 287:15 303:1,11 304:12 305:1 351:2 377:7 378:8 380:3,11,21 381:17,18 411:11 415:20 502:20 532:10 635:8 651:15 672:15 678:3,5 727:10 786:23 824:9 838:10 869:6 887:23 946:4 966:3 100 COUNCIL- 170:3 COUNSEL- 31:18 92:20 126:19 127:25 148:8	156:1 194:10 201:11 247:25 252:2 266:18 373:21 376:4 377:20 392:22 429:2,17,20 546:21,22 548:14 549:13 596:6 699:16 704:11 769:24 770:12 888:8 897:6 921:5 922:5 936:23 COUNSEL'S- 1071:11 1159:2 1206:10 COUNSELING- 1271:9 1278:24 1321:5 1404:4 COUNSELOR- 1195:14 1405:6 COUNT- 269:12,22 343:11 364:25 642:13 645:17 800:17 1000:16 1427:22,23 1428:3 1481:2 COUNTERMAN- 1234:8 COUNTERPART- 632:20,22 1342:18 COUNTERS- 231:9 COUNTING- 1213:3 1454:3 1545:17 COUNTRY- 60:18 97:10 290:8 358:17 555:17 569:22 594:1 645:25 742:9 745:8,24 746:9,15,20 747:9 748:14 762:10 779:5 965:10 1159:7 1252:23 1256:3,11 1263:23 1477:19 1539:15 COUNTY- 1:4 40:17 42:12 61:20 94:7 95:5,14,21 98:10,12 100:16 104:8 132:5 149:22 151:9,12 164:7 166:25 175:12 176:15 197:15 202:14,17 203:17,19 204:25 267:4 275:6,18	431:10,12,15 432:22 435:22 443:11 484:6,7 COUPLE- 110:4,9 121:11,15 130:13 134:11,21 231:20 341:12 345:9 391:14 404:11 424:25 428:9 468:19 488:1 497:2 521:12 540:15 572:14 574:8 575:13 585:7 652:8 681:1 697:4 731:18 851:22 856:15 907:3 986:14 1033:17 COUPLED- 1431:2 1438:22 COURSE- 38:13 70:16 88:1 91:11 172:6 205:3,5,8 206:16 240:9 249:21 252:2 255:13 257:2 286:16 359:12 386:21 388:12 390:17 402:2 413:10 470:17 505:14 561:11,17 608:10 644:16 652:10 660:25 661:17 676:5 680:24 72 COURSES- 274:13,15 285:18,23 COURT- 1:5,50 4:8 26:3 30:4,7,9 31:11,14 33:20,22 34:17,19 36:7 37:2,10 41:7,10 43:13,16,23 45:2,7,8,9,10,14, 20,25 44:2,12 49:22 51:7 53:14 56:5 58:11,13 59:6 60:1 62:2,11,15,20,22 63:6,16,21,24 64:6,8,23 65 COURT'S- 207:13 208:4,5 209:9,11,13,14	210:12 219:25 227:15,19 252:3,7,11,14 267:20 268:14 430:2,6,10 889:10,15,17 890:2 989:5,8 1018:15,19,23 1034:4,6,9,12,19, 24 1022:17 1035:4 1078:24 1084:14 1097:16 1236:7 COURT1007- 13:23 COURT1019- 28:21 COURT1028- 13:44 COURT1034- 27:34 COURT1035- 28:7,15 COURT1081- 14:38 COURT1113- 15:19 COURT1210- 15:40 COURT1251- 28:27 COURT126- 5:3 COURT1340- 16:28 COURT1348- 16:39 COURT1352- 17:6 COURT1359- 17:18 29:6 COURT1411- 17:31 COURT1542- 18:34 COURT1566- 18:36 COURT210- 26:9 COURT217- 6:6 COURT219- 6:12,18 COURT227- 26:15,21 COURT249- 6:35 COURT252- 26:29 COURT254- 6:46 COURT312- 7:9 COURT314- 7:15 COURT373- 7:28 COURT386- 7:33 COURT428- 8:9 COURT429- 8:15 COURT430- 26:35 27:6,13 COURT561- 8:42 COURT563- 8:48 COURT611- 9:12 COURT65- 4:34 COURT659- 9:21 COURT683- 10:21 COURT730- 10:46 COURT74- 4:39
--	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

COURT810- 11:22 COURT889- 11:42 27:19 COURT890- 27:26 COURT969- 12:3 COURT990- 12:25 COURT991- 12:31 COURTHOUSE- 42:4,10 76:19 92:14 127:11 129:18 135:25 229:2 313:3 548:25 561:16 572:20 643:14 661:16 769:8 807:13 848:12 850:1 884:7 893:12 991:4 1007:17,21 1021:25 1045:14 1082:6,9 1107:25 1108:6 1230:1,2,4 1287: COURTHOUSES- 105:11 COURTROOM- 50:20 72:4,6 76:18 89:23 97:15 122:24 123:3,6 127:21 148:17,19 195:14 198:2,10 218:24 224:17 226:23 229:14 249:3,5 253:15 254:9,17,19,24 259:16 270:13,16 275:10 289:21 313:9 314:24,25 342:24 372:22 37 COURTROOMS- 1067:21 COURTS- 36:14 171:4 1067:3,4 1098:2 1100:6 1253:3 1320:2 1466:16 1543:22 COURTYARD- 526:15 540:6 COVER- 88:15 280:4 363:23 370:16 614:15 699:1 COVERAGE- 588:11,20 760:23 1039:20 COVERED- 693:24	747:12 1050:11 1054:18 1095:20 1111:9 COVERING- 1548:1 COVERINGS- 174:12 COVERS- 1547:19 COWBOYS- 1406:15 CPA- 652:22 CPI- 574:1 CPR- 1040:4 CRAFT- 610:8,16 CRAIG- 10:39 11:3,7 27:18 421:2 562:6,9,13,23 563:7 594:16 615:15,18,19,22 617:11 631:15,17 632:7 640:12,14 700:25 701:3,4 702:3,5 709:24 711:23 718:11,17,25 719:6,23 721:20 723:4 730:12,15,17 731:20 732:11, CRANE- 691:8 CRANKING- 1041:17 CRASHED- 137:15 1161:17 CRASHING- 1317:14 CRAZY- 369:5 497:16 1535:3 CREAM- 572:23 CREATE- 128:6 1166:1 CREATED- 76:22 94:3 179:2 651:16,20 692:24 957:10 1116:13 1123:8 1322:4 1460:21 1463:10 1516:3 1519:9 CREATES- 1107:13 CREATING- 957:1 CREATURE- 97:2 CREDENTIALLED- 1263:20 1264:1 CREDENTIALING- 631:2 687:18 690:3,16 717:16 884:4 CREDENTIALS- 103:3 286:14,17 620:20 755:18	1117:17,19,22 1118:18 1155:9 1489:4 CREDIBILITY- 898:6 1059:12 1103:23 1225:4,8 1527:6,20 1528:24 1533:24 1534:4 1536:10 1537:2 1549:1,3 CREDIT- 806:5 CREDITS- 275:2 CREEPY- 391:14 CREMATED- 1403:1,3,16 CREMATION- 1403:6 CREW- 1015:11 1046:12 CRIED- 60:2 CRIME- 257:3 1247:15 CRIMES- 1525:8,9,11 CRIMINAL- 40:10,14 84:6 150:8 170:23 223:5 1234:22 1235:24 1236:3,23 1237:15 1241:25 1242:3,7 1354:18,23 1467:23 1468:19 1525:15 1568:25 CRITERIA- 169:19 1274:16,20 1275:7,11 1277:23,24 1279:3 1323:19,20,21 1502:25 CRITICAL- 92:7 147:7 702:17 1102:10 1106:15,17 1209:24 1530:19 1571:1 CRITICISM- 37:6 78:10 CRITICISMS- 1148:16 CROCK- 569:22 CROOKS- 1108:12 CROSS- 8:32 301:14 436:8 542:20 544:1,3,15 676:9 825:10 898:13 1123:18	1213:14 CROSSED- 158:3 300:17 301:12 362:18 544:5,6 547:19 551:23 552:2 825:13 988:8 1024:16 1053:11,14 CROSSES- 544:13 551:21 CROSSEXAMINATION- 5:22,41 6:3 7:21 8:25 9:18,33 10:29 11:52 14:14 15:9,31 16:25 17:28 123:7 164:10,14 199:22,24 214:5,7 339:22 340:1 496:11,15 534:19 550:17 646:4,6 663:14 674:19 677:9 686:21,23 708:10 905:21,23 1051:1 CROSSEXAMINE- 122:21 198:11 659:6 662:4 684:10 1101:16,18 CROSSING- 152:25 158:11 1024:8 1051:9 1100:9 1439:7 1498:17 CROSSWALK- 525:9 526:1,8 542:21 CRUCIAL- 54:15 639:14 CRUNCH- 94:14 CRUNCHY- 1547:13,16 CRUSH- 136:21 141:6 144:5 CRY- 945:1 CRYSTAL- 2:27 489:3 968:11,18 1402:16 1464:22 CT- 465:2 CUFF- 345:25 CULL- 1380:3 CUMULATIVE- 132:20,23,24 147:3 1341:25 1342:6,14 CUMULATIVELY- 287:3 CUP- 855:6 888:5
---	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

CUPS- 969:17 CURB- 158:14 CURBING- 165:3,4 CURE- 1116:20 CURIOSITY- 228:16 388:12 1046:23 CURIOUS- 1007:5 CURRENT- 356:22,24 458:5,11 459:1 493:10 565:16 619:2,21 735:22 791:22 797:16,20 934:14,24 943:8 1135:9 1136:18 1142:20 1323:13 1325:12 1489:4 CURRENTLY- 166:23,24 169:1 271:22,23 274:23 275:3 419:8 432:4 459:20 473:20 475:22 565:15 789:3 1039:13 1066:7,14,15,18,2 0 1064:17 1068:21 1118:10 1255:24 1520:4 CURRENTS- 419:15 CURRICULUM- 1114:25 CURSORY- 321:22 1134:24 CURTAIN- 97:13 332:1 354:3,4 464:23 480:21 507:12 511:5,8,11,13 529:9 1516:23,24 1517:1 CURTAINS- 52:17 354:2 CUSHION- 80:5 CUSTODIAN- 129:18 133:19 135:12,18 146:16 203:4 1246:21 CUSTODY- 164:6 268:10 1341:14 1356:23,25 1373:22,24 1410:16,18 CUSTOM- 255:10 CUSTOMER- 579:24 CUSTOMERS- 651:14	CUT- 75:8 81:16 288:12 336:4 417:7,24 428:18 770:1,2 942:19 1043:14 1054:19 1232:3 1328:23 1329:2 1507:23 CUTANDPASTE- 415:12 CUTE- 415:2 CUTS- 360:12 799:19 CUTTING- 157:25 299:7 335:6,19 CV- 1117:2 CVA- 359:11 CVRM- 1:49 1575:6,25 CVS- 135:4 CYCLE- 586:4,7,25 587:2 CYCLES- 586:17 CYPRESS- 1386:9 1415:17 CYST- 809:16,20 D D/E/L/A/N/E/Y- 1360:4 1365:15 DAB- 816:7 DAD- 1366:24 1371:7 1375:18 1385:17 1386:14,18 1405:14 1406:9,10,12 DADDY- 655:12 1376:6 DAGGONE- 72:22 1469:20 DAILY- 99:24 1049:3 DAMAGE- 70:2 153:4 157:18,20 159:2 160:5 1054:15,16 DAMAGED- 1054:22 DAMAGES- 33:4,8 63:13,19,20,22,23 64:3,8,22 68:7 69:1,21,22 70:4,5,6 134:3 423:11 595:25 1430:13,14 1437:5 1451:18 1452:4,5,16	1510:21 1511:7,11 1527:4 1531:13,16,24 1532:4,9 1539:22,25 1552:6 1559:18,19,25 15 DANGER- 47:1,13 48:1,4,5 60:9 61:11,23 130:6 384:24 409:6,7,8,9,21,22 410:1,2 412:2,4,5 416:10 482:10 868:14 879:10 967:13,23 969:4 978:14 982:11 1089:6,8,18 1094:13,14,15,16 1107:17 1125:22 1132:14 1439:5,9, DANGEROUS- 852:18 936:21 939:20 1043:23 1105:8 1106:7 1124:16 1145:13,15 1441:22 1444:21 1446:16 1555:20 DANGERS- 1441:2 DANTE- 492:4 786:12 787:9 DARK- 32:4 295:16 707:18 DASHCAM- 13:38 14:10 22:27 28:20 1009:19 1010:10 1018:9,10,22 1050:16,22,25 1235:2 DATA- 621:3 1048:11,13 1353:2 DATABASE- 620:14 869:9 DATE- 151:1,5 259:8 261:3 282:12,22 284:10,23 286:17 376:23 439:16 441:15 443:6 445:22 446:22 508:21 584:17 599:12 613:21,22 615:7 618:24 619:22 624:9 639:6 646:24 664:16 706:13,14 741:23 748:13	754:12 790: DATED- 24:22 25:30 278:9 283:23 438:5,22 580:7 622:7 625:6 752:18,25 756:14 871:14 877:6 1163:20 1409:17 1421:22 DATES- 106:7 440:5 574:5 747:4 1575:11 DATING- 1367:13 DAUGHTER- 55:25 56:8 933:16 1400:2 DAVID- 2:12 42:5 890:10 1110:6 1158:3 1159:21 DAWKINS- 55:19,20,23 56:6 61:12 DAWSON- 65:8 DAY- 4:7,14 6:27 8:3 10:15 11:36 13:29 16:4 18:3 30:1,3 42:1 43:22 44:17 45:8 49:11 50:14 51:16 56:14 80:18 94:17,18,24 95:1 96:7,11 97:5,23 100:12,19,23 102:22 104:11 107:16 110:19 113:24 121:3 123:13 151 DAYS- 49:18 73:18 95:2 103:11 121:15 164:2 250:11,15 259:11 368:25 369:10 375:3,6 378:4 380:13,16 381:3 515:12 573:3 659:19 687:19 893:7,9,12 923:4 972:21 974:19 1039:15 1118:23 1130:18 1147:1 1159:23 1160: DAYTODAY- 124:19 317:21 342:16 502:5,13,17 503:2 695:3 761:3,5 918:17,19 1427:8
--	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

DC- 1061:19 DE- 225:14 1145:16 DEAD- 49:20 101:23 137:16 327:24 640:18 641:10 703:24 706:19 708:7,16 712:15 713:3 717:10 723:5 882:5,7 883:10 884:13 892:5 894:18 999:8,9 1217:2 1220:21 1381:14 1445:23,24 1446:1 1495:2 1504:13,23 1539:9,1 DEAL- 39:10 57:21 92:15 131:1 256:11 268:6 498:22 519:7 546:13 597:1,2 609:22 649:1 719:10 728:1 846:17 1002:1 1100:22 1341:19 1453:25 1495:22 1528:2 1530:21 DEALING- 30:21 38:25 39:20 70:3 123:16 168:18 340:18 419:1 594:10 615:10 755:13 786:10 829:20 898:6 947:17 997:21 1004:3 1016:1 1070:11 1072:1 1105:13 1221:10 1259:24 1393:19 1399:15 1403:12 1404:1 1405:9 1409 DEALINGS- 384:10 599:15 DEALS- 54:20 135:15 172:14 521:12 DEALT- 52:5 63:12 124:8 134:18 414:7 509:25 546:8 721:14 1072:2 1516:18 DEAR- 575:23 1249:7 1572:17	DEATH- 33:23 34:2,7,14,15 64:4,17 105:4 108:20 109:10 175:3,10 176:7,16 181:8 190:12 198:21 633:17 635:10 636:5,23 637:2 712:1,5 883:14,23 885:7 893:7 1069:19 1102:8 1120:22 1123:8 1217:20 1245:5,7 1247:19 1 DEB- 594:5 704:21 1004:2 1342:16 1351:23 DEBATABLE- 572:10 DEBATE- 77:20,23 724:19 1252:23 DEBORAH- 16:36 17:11,15 29:5 1003:20 1119:24 1341:2 1358:24 1359:5,7,9,13 DEBRIS- 153:6 154:10 161:21 DECADES- 1252:20 DECEASED- 153:8 154:5 157:3 173:18 1185:19 1216:14 1402:21 1551:10,11 1559:24,25 1560:1 DECEASED'S- 1560:25 DECEDENT- 64:9,18 179:14 1010:22 1011:12,24 1012:16 1015:15 1030:13 1082:25 1245:3 1430:13 1439:11 1552:25 DECEDENT'S- 140:9,25 173:20 1247:19 1552:17 1553:18 1557:19 1558:12,25 1559:4 DECEMBER- 914:9 1235:22 1354:5 1367:20 DECENT- 224:13 DECIDE- 108:22 117:3 121:20 126:1,9,11 145:4	175:9 241:24 486:4 571:13 647:19 727:16 740:12 800:11 809:9 855:2,5 963:15 1025:9 1047:4 1092:4 1103:24 1105:10 1189:9 1212:7 1271:5 1320:2,3 1394:7 1458:21 1484:2 DECIDED- 102:18 396:16 443:14 497:17 498:5,8 571:25 572:1,16 643:12 651:10 653:1 738:6 907:5 1046:24 1386:5 1415:18 1447:3 1501:15 1530:6 1531:23 DECIDES- 246:11 649:7 1217:7 1376:9 1494:25 DECIDING- 106:13 865:5 1523:4 DECISION- 32:9 86:3 103:24 105:2 130:18 236:11 375:7 414:3 572:9 597:17 638:2,6 738:10,24 739:22 759:22 775:4,5 797:5 810:14 843:2,3 845:15 863:1 864:23 865:4,7 866:15 918:10 923:9 933:21 941:22 954:3,13 963:14 DECISIONS- 761:16 881:21 1076:13 1077:24 1129:1 1131:24 1132:2 1273:6 1506:5 1517:16 DECISIS- 1444:11 DECLARED- 747:15 1175:16 DECLARES- 1174:25 1477:11 DECLINED- 480:3 1282:15,17 1300:15 DECLINES- 1521:7	DECUBITUS- 1156:6 DEDICATED- 76:19 DEDICATION- 1540:19 DEDUCE- 1561:7 DEDUCTION- 588:7 DEDUCTIONS- 103:17 435:10 554:22 587:19 876:12 DEDUCTIVE- 851:6 DEEM- 1556:2 DEEMED- 86:6 171:23 238:3 490:9 520:3 1293:14 1549:23 1560:7 DEEP- 183:1 465:13 DEESCALATE- 1145:16 DEFECT- 1235:15 1355:7,21 DEFEND- 965:10 1148:14 1460:23 1477:19 1501:14 DEFENDANT- 1:29 3:3 4:46 18:25 23:29 31:11 35:22 38:7,8 40:23 43:11,17 65:16 70:17 71:9 75:2,3,4,18 82:1,25 83:23,25 85:15 102:13,14,15 109:20 136:25 167:6 242:6 247:4,13 252:23 268:24 394:15 421:6,21,25 424:6 4 DEFENDANT'S- 37:23 40:23 50:2,10 70:23 84:24 85:6 231:8 248:7 264:9 393:18,19 413:11 415:23 522:25 523:16 656:23,25 657:3 662:9,20 663:18 668:22 670:20 693:18 694:1,9 699:17 727:24 764:16 770:12
--	--	--	--

OCTOBER 2015 DELANEY V. CASEPRO

921:3,11,23 971:16 DEFENDANTS- 35:10,20 43:11 394:18 416:7 1068:3,23 1069:4 1104:24 1108:2 1154:20 1242:16 DEFENDED- 1070:9 1490:12 DEFENDING- 1067:24 1068:23 DEFENSE- 85:3,6,8,9,15 137:18 255:1 272:13 314:3 338:21 342:3,4,21 393:12,13 648:14 682:21 888:12,13 997:4 1030:20 1068:16 1069:24 1119:19 1148:14 1230:11 1231:15 1233:24,25 1234:3 1240:12 1241:19 1262:21 1285 DEFENSE'S- 1030:16 DEFENSES- 71:8 83:24,25 84:1,24 102:20 125:14 225:25 1240:3 1470:1,2 1545:5 1554:9,14 1557:3,5 1559:14 DEFER- 766:5 785:24 DEFERRED- 1187:18 1322:16 DEFICIENCIES- 1217:4 DEFINE- 936:6 1093:4,13,18 1094:2 1129:23 1546:6 1551:6 1552:10,12 DEFINED- 606:14 631:2 1275:8 DEFINES- 653:8 972:16 1176:23 DEFINING- 178:17 704:10 DEFINITE- 1294:4 DEFINITELY- 46:10 67:1 157:21 343:3 352:6 368:2 668:3	816:20 1271:2 1285:25 1286:20 1299:14 1301:20 1378:5 DEFINITION- 46:25 178:25 449:11 653:7 785:9,18,23 786:1,9,24,25 817:9 849:2 851:23 881:8,9 893:18,21,24 894:11,21 895:8 897:4,5 899:13 921:7,15 922:16 972:9 973:16 974:1,5,9,14 1083:9 DEFINITIONS- 25:11 179:17 921:22 1176:14 DEGREE- 142:7 167:24 168:4,7 182:15,21 190:1 191:13 198:18 274:17,24 423:3 431:24 432:1 436:16 454:18 460:21 486:21 491:6 568:17 569:6 650:24 736:12 755:10 771:21 798:3 840:20 884:18 907:15 938:24 962:21 1061 DEGREED- 244:12 DEGREES- 631:3 799:15 800:10 942:5,15 DEHYDRATED- 364:24 DELANEY- 1:11 2:8 17:22 74:24 81:23 107:23 108:2 125:12 130:24 590:22 1056:6 1231:20 1266:25 1351:24 1359:18,24 1360:3,24 1361:1,5,20,22 1362:3,8,11,14,19 1364:1,3,7,10,21, 24 1363:1,11,21 1365:2,4,11,15,16	137 DELANEY'S- 37:6 600:11 700:10,12 1531:25 DELAWARE- 1445:21,22 1446:20,24 DELAY- 417:25 858:6 883:8 963:23 1037:20 1352:13 DELAYED- 836:5,17,19 981:21,23 982:4 DELEGATION- 1102:21 DELIBERATE- 76:15 92:21 114:3 126:11 1212:13 1228:21 1425:20,21,23 1426:11 1476:12 1513:13 1565:12,17,25 DELIBERATING- 1212:12 1476:22 1517:15 DELIBERATION- 78:11 87:16 90:17 91:9 1212:18 1223:25 1224:5 1476:20 1530:16 1564:1 1569:7 DELIBERATION1569- 18:40 DELIBERATIONS- 78:16 79:12 81:2 90:25 91:16,20 126:2 1229:1 1237:14 1349:5,16 1425:1,17 1479:20 1509:14 1510:17 1538:24 1563:8,14 1565:2,6,9,10,13, 14,22 1564:7,11 1566:22,24 1567:5 DELICIOUS- 1473:13 DELIGHTED- 1231:10 1573:3 DELIVER- 390:1 391:21 1476:14 DELIVERY- 634:24,25 669:2,4 673:6	DELOACH- 53:15 DELUKE- 343:7 DELUS- 833:15 DELUSIONAL- 309:20 320:16 494:3 833:5,9 834:10 954:25 1187:23 1322:20 1324:17,18,19 DELUSIONS- 833:10,15 DELVE- 795:5 810:16 DEMANDED- 767:19 DEMEANOR- 382:4 449:23 509:20 510:12 513:19 816:14 1013:21 1019:19 1485:4 1524:12 DEMENTIA- 1156:6 DEMOCRACY- 76:12 DEMONSTRATE- 1063:8 1192:24 1264:10 DEMONSTRATED- 1128:13 1173:25 DEMONSTRATING- 867:16 939:2 1128:14 DEMONSTRATIVE- 66:8 1141:11 DENIAL- 1557:6,14,15 DENIED- 42:19 367:16 371:7,16 759:1,16 881:17 923:19 1445:4 DENIES- 1557:10,12 DENTAL- 283:3 587:11 784:7 DENY- 825:17,18 951:17 1437:21 1457:4 DEPARTED- 510:7 1237:19,24 DEPARTMENT- 21:17 96:24 175:21 215:20 268:23 272:13 292:1 338:21 341:24 342:1,3,4,21 432:9,11 471:8 501:22 502:6,25 503:8 525:12
---	---	---	--

OCTOBER 2015 DELANEY V. CASEPRO

539:20 552:8,9,13,23 553:2 588:2 648:14 697:14,19 698:4 717:23 751:21 752:6 753:3 7 DEPARTMENTS- 124:2 910:13 1044:4,16 DEPARTURE- 1241:13 DEPENDENCE- 114:10 307:13 356:9 454:21 455:4,14 515:8 1188:2 1323:5 DEPENDENCY- 320:5 1138:4 DEPENDENT- 774:5 852:12 1187:21 1192:20 1193:10 1508:17 DEPENDENTS- 446:12 778:19 DEPICT- 185:3 DEPICTED- 145:11 523:2 DEPICTS- 156:13 DEPLOYED- 1256:17 DEPO- 230:19 413:17 684:15 1172:22 1173:7 1341:17 DEPOS- 562:5 1003:23 DEPOSE- 226:4 DEPOSED- 44:21 993:22 1079:10 1166:20 DEPOSING- 642:6 1172:24 DEPOSIT- 876:13 DEPOSITED- 435:17 DEPOSITION- 6:21,38 7:35 12:44 13:9 16:35 17:14 26:14,20,26 27:18,24,31 28:6,12 29:4 44:25 46:12,13 52:2 53:21 107:8 167:16 221:3 222:4 225:15,16 226:16,19 227:5,9,12,14,18	231:20 232:13 234:15,17,19 246:16,17,21 DEPOSITION'S- 1348:15 DEPOSITION719- 10:40 DEPOSITIONS- 53:17 226:14,15 229:16 231:2,14 232:8 247:11,24 249:14,19,21 250:24 314:6 393:15 395:4 426:17 562:4 563:3,5,10 592:13 658:18 749:22 992:20 1003:20 1008:19 1058:14 1110:24 1111:8 1119:22 1134:19 1154:5 DEPRESSED- 116:18 327:25 329:2 340:8,20 366:15 459:9,22 494:22,24 798:1 804:9 805:18 811:14 814:1 816:14 822:25 823:1 934:15 937:6 942:12 950:9,14 1121:17 1122:24 1135:25 1136:3,22,24 1137:4 1139:11 1142:14,19 1 DEPRESSION- 46:22 49:1 102:3 114:10,19 117:10 306:13 307:13 319:24 320:5,13 321:3 322:6 356:9 358:25 359:9 370:14 401:17 410:22 455:7,14 456:10,16,18 457:5 459:3 515:8 792:9,11 793:2,18 794:9,15 796:8 797:8,11,13 DEPRESSIVE- 804:5 805:13 DERSHOWITZ'S- 681:23 DESCRIBE- 97:12	177:8 287:13 294:17 295:13 298:12 299:15 327:24 367:8 447:11 511:19 695:17 839:9 853:12 1382:2 1491:16 1518:11 DESCRIBED- 177:22 191:11 192:2 204:15 299:22 302:17 521:15 748:23 779:6 811:13,16 1145:18 1178:11 1284:12 1330:8 1414:11 1485:4 1533:6 DESCRIBES- 518:6 695:14 1546:19 DESCRIBING- 215:1 447:10 558:4 DESCRIPTION- 92:12 1193:11 1306:18 DESCRIPTIONS- 603:8 853:10 DESCRIPTIVE- 817:17 DESERVES- 1550:11 DESIGN- 1043:5 DESIGNATE- 632:23 688:10 DESIGNATED- 90:22 231:16 416:7 704:18 995:16 1048:10 1087:20 1356:5 1357:3 DESIGNATION- 648:22 1004:17 DESIGNATIONS- 230:3 231:8 393:16 394:15,17 428:6 562:19 727:24 DESIGNED- 55:7 1174:5 DESIGNER- 573:4 666:5,16 DESIRABILITY- 239:7 DESK- 296:9 345:23 349:8,14 374:2 680:17 847:4,8,23 957:18 977:2,11,22 978:18 979:17	982:13 984:17 987:10 1133:19 1495:10 DESPITE- 53:6 94:4 98:14 99:9 105:3 488:23 762:4 1443:21 1459:1 DESPOSITION- 1338:14 DESTROY- 1537:12 DETAILED- 1178:25 1486:15 DETAIN- 839:14,20 840:12 DETECT- 219:9 DETECTED- 175:17 DETENTION- 164:7 DETERMINATION- 31:3 32:24 34:24 39:3 54:8 69:22 70:1,2 86:9 87:17 423:2 612:7,21 702:25 703:5 924:12 1015:17 1030:1 1238:15 1241:10 1271:14 1309:17 1430:7 1438:1 1444:15 DETERMINATIONS- 33:13 DETERMINE- 86:18 87:3 89:2,8 108:11,17 425:12 506:9 595:22 675:15 772:14 795:6 804:17 807:24 872:18 884:16 918:3 923:23 967:21 1019:20 1021:9 1077:10 1094:20 1106:4 1138:25 1271:16 1356:10,22 1534:2,5 1549:1,5 1 DETERMINED- 86:6 103:9,11 104:2 586:4 873:1 877:1 924:1 1238:16 1292:16 1321:14 1338:7 1457:25 1545:17,19 1550:2 DETERMINES- 215:14
---	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

DETERMINING- 965:23 1074:19 1075:8 1078:5,13,17 1269:2,18 1291:6 1527:19 1549:6 DETRICK- 593:12,18 999:12 DETRIMENTAL- 1043:23 DETROIT- 1158:3 1384:4 DEVELOP- 301:18 741:19 1492:3 DEVELOPED- 194:5 1325:8 1326:15 DEVELOPING- 1448:7 DEVELOPMENT- 1259:9 DEVELOPMENTAL- 1061:16 DEVELOPS- 228:20 DEVIATE- 394:3 DEVIATES- 749:24 DEVIATING- 1470:14 DEVIATION- 59:2 1209:7,9 DEVICE- 127:14 561:16 661:16 733:5 991:3,4 1007:17 1350:8 DEVICES- 127:10 229:1 313:2 1082:6 1230:1 DEVOTING- 1157:16 DEWITT'S- 1366:18 DHEC- 60:20 895:16,21 DHOYLE@MOTLEYRICE C COM- 2:13 D DIABETES- 359:11,15 1156:13 1325:20 DIABETIC- 1393:21 DIAGNOSE- 762:6 878:23 1208:6 1274:17 1278:2 1289:12,16 1503:18	DIAGNOSED- 309:3 310:22 882:8,15 1138:21 1274:18,22 1321:12 1380:13 DIAGNOSES- 174:15 834:12 945:8 1188:20 1206:3 1263:3 1325:12 DIAGNOSING- 844:16 920:1 1074:2 1262:13 1275:11 1523:4 DIAGNOSIS- 761:11,13 832:19 834:3 840:19 882:25 883:3,5 1074:14 1091:10 1136:21,23 1187:18,21 1274:12 1279:16,17 1321:15 1322:16,17,18,19 1323:3 1324:9 1325:10 1334:20 1442:3 1506:10 DIAGNOSTIC- 940:8 1200:16 1273:5 1274:16 1275:7 1276:2 1277:23,24 1306:22 1310:20 1325:7 DIAGRAM- 177:24 373:21 506:19,21 525:1 DIAGRAMS- 82:16 DIAL- 859:11 DIALOGUE- 820:17 DIALYSIS- 59:17 1103:9 1441:6,8 DIANE- 1:42 30:8 234:7 390:25 427:25 888:25 DIAPHORESIS- 1184:19 DIAPHORETIC- 364:21 548:22 1183:7 DICTAPHONE- 975:24 DICTATE- 975:24 1203:2 DICTATED- 124:15 656:7 DICTATES- 655:13	676:16 DICTATION- 827:2 DICTIONARY- 180:7 785:24 786:5,17 791:16 881:3,4 DICTUM- 1566:4 DIDN'T- 44:22 49:18,19 50:1 51:17 54:16 59:21 68:9 94:20 104:24,25 113:9 117:9 129:21 153:14 162:25 179:15 180:6 258:20 274:12 276:16 294:8 298:25 299:12 302:2,4 304:24 307:23 309:24 320:11,16,24 321:7,8,15,2 DIE- 100:23 1573:19 DIED- 137:20,22 175:5 198:17 634:15 641:10 882:5 886:3 892:5 1220:21 1283:10 1393:15 1407:21 1416:17,20 1419:20 1434:21 1532:3 1551:11 1552:25 1559:25 DIEGO- 307:12 324:15 DIES- 717:11 DIET- 1187:18 DIFFER- 87:6 1542:20,24 DIFFERENCE- 33:23 52:3 57:13 143:1,3,6,10 291:20 355:17 358:22 380:18 410:18 427:13 501:17 513:23 514:1 557:10 606:5 654:18 692:14 795:21 807:13 848:19,22 862:17 939:14 1023:14 1137:20 1144:19 1196:14 1367:18 141 DIFFERENCES- 57:8 580:14,15,16	605:15 997:25 DIFFERENT- 35:6 76:2 84:15 85:24 97:2,21 121:22 131:13 143:16 218:1 257:21 260:11,12 261:10 265:12 287:22 306:10 311:9 335:18 344:24 350:6 357:24 363:10 364:8,9 368:22 370:9 404:8 412:23 433:6,10,13 446:7 447:16 DIFFERENTIAL- 604:23 605:7,9,25 606:2 761:10 834:2 DIFFERENTIALS- 605:6 606:22 DIFFERENTLY- 399:13,16,19 514:14 959:5 960:12 962:11,18 968:18 1320:18 DIFFICULT- 32:9 33:4 244:22 274:14 296:22 299:24 303:11 358:20 388:10 390:2 459:17 768:14 908:11 961:1 1021:4 1212:19 1228:5,11 1230:25 1279:6 1332:2 1399:9 1437:11 DIFFICULTIES- 107:20 DIFFICULTTO- 1116:8 DIFFICULTY- 73:23 296:18 361:12 1278:7 1418:24 1460:1,9 DIGGING- 955:11 1371:5 DIGITAL- 204:3 DIGITS- 859:11,13 DILLON- 73:25 1172:6 DINNER- 94:11 510:10 1013:16 1244:16 1443:23
---	---	--	---

OCTOBER 2015 DELANEY V. CASEPRO

1486:8 DIRE- 14:32 1073:3,10,12,14 1080:5,19 1081:13 1265:24 DIRECTED- 50:7 152:13,14 481:20 717:3 977:9 983:20 1016:24 1429:8 1444:25 1449:4 1454:18,24 1457:8 1466:21 1468:8 1473:2 DIRECTING- 761:2,5 979:16 1525:13 DIRECTION- 101:3 122:6 183:20 349:15 445:5 526:12 556:15 638:13 639:4 695:7 705:6 719:19 1282:5 1488:24 1518:12 DIRECTIONS- 383:24 1281:10 1282:22 1284:21 1286:12 DIRECTLY- 132:10,16 136:18 173:7 179:16 258:24 328:13 331:19,20 347:23 398:21 426:5 454:15 464:15 581:14 602:3,9,14 618:17 654:10 709:23 711:21 714:20 740:24 767:20 768:2 772:10 795:3 852:12 865:15 876:13 899:2 DIRECTOR- 60:20 502:18,23 504:7 626:11 698:12,16,19 873:3 911:9,14,18 914:11 1115:4,5,7 1152:11,13 1256:22 1257:3 1261:14 1264:14,15 1265:14 1527:12 DIRECTORIES- 1154:18	DIRECTORS- 715:2 1152:10 DIRECTORY- 1155:6,7,8 1157:3 DIRECTS- 1460:18 DIRT- 177:13,15,20 184:22 DIRTY- 1431:23 DIS- 215:13 DISABILITIES- 1061:16 1380:19 1391:21 DISABILITY- 283:7,9 361:4 436:24 553:5 567:15 587:13,15 624:24 878:8 1072:7 1392:3 DISABLED- 47:14 108:4 409:10 1493:25 DISADVANTAGE- 256:1 DISAGREE- 62:3 87:13 765:12 771:21,22,23 781:17 812:4,7,12 837:8 939:22 1091:19 1092:7 1095:11 1155:6 1165:25 1178:11 1179:22 1182:24 1196:8,13 1533:13 DISAGREED- 656:15 DISAGREEING- 812:1 DISAGREEMENT- 1519:2 DISAPPEARS- 833:13 DISBELIEF- 1511:19 DISC- 146:24 205:24 1017:22 1048:17 1233:6 1431:24 DISCERN- 1020:2 DISCHARGE- 448:17 841:19 842:1 903:9,14 935:22 1180:8,12,20 1301:7 1491:13 1508:25 1510:10 DISCHARGED- 292:11 773:16	797:4 847:6 903:11 933:19 934:9,19 1142:15,18 1179:15 1229:17 1256:12 1302:1,4 1337:6 1490:17,21 DISCIPLINARY- 758:24 DISCIPLINE- 716:24 DISCLOSE- 30:14,23 DISCLOSED- 43:12 1167:19 DISCLOSING- 1283:23 DISCLOSURE- 31:4,6 DISCONCERTING- 677:4,6 DISCONJUGATE- 949:21 DISCONJUGATIVE- 950:3,4 DISCOURAGE- 1198:3,5 1249:17 1253:4,9 DISCOURAGED- 919:11 1249:10,17 1250:12 1253:15 DISCOURAGING- 1250:13 DISCOVER- 225:25 1466:16 DISCOVERABLE- 40:1 DISCOVERED- 487:6 1154:4 1193:22 1328:24 DISCOVERY- 53:18,20 225:15,22,24 608:10 1110:25 1164:6,10,16,21 1165:2 1169:6 1202:12 1203:1 DISCOVERY'S- 1154:2 1161:22 DISCREPANCY- 861:18,20 864:16 DISCRETION- 33:2 281:14 392:1 869:2 1561:3 DISCUSSING- 54:17 186:7 242:11	420:9 868:22 1510:18 DISCUSSIONS- 112:4 126:3 542:12 555:4 556:19 625:17 643:10 872:1 940:3 982:23 DISEASE- 168:10 172:15,17 173:18 174:8,12 181:14 1091:17 1156:11 1235:15 1294:18 1295:8 1325:20 1355:7,21 1380:24 1503:11 DISEASES- 168:19 175:8,10 1116:17 1186:5 DISHEVELED- 518:19 DISHONORABLE- 935:22 1180:7 1301:7 1491:13 1508:25 1510:10 DISHONORABLY- 797:4 933:19 934:8,19 1142:15,18 1179:14 1301:19 1302:1,4 DISHWASHING- 1367:2 DISINGENUOUS- 1109:2,8 DISMISS- 42:12,13 54:1,2 241:14 242:15,19 1437:5 1570:18 DISMISSED- 71:1 1059:23 1101:25 DISORDER- 114:11 306:11 309:20,23 310:2 320:3,16 321:9,13 333:18 336:8 370:13 493:2,15,20,21,24 494:3,4 805:12 833:2,5,9,17,21,2 2 832:1,24 834:10,11 928:16 929:11 954:25 1187:21,22,23,24, 25 955:3 1138:4,9
--	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

1188: DISORDERS- 333:18 399:18 833:24,25 1325:14 DISORIENTED- 98:3 117:11 812:25 818:2,4 868:12 951:20 1184:13 1278:4 1330:12 1339:6 1492:9 1509:3 DISPATCH- 131:5 151:7 152:9 202:15,18,19 204:12,13 205:11 211:4 215:18,22 216:17 484:7 486:6,10,14 1055:10 1507:19,24 1535:7 DISPATCHED- 100:20 151:6 215:7,25 216:1,6,10 1040:23 1507:10 DISPATCHER- 204:4 211:7,12,24 212:2 215:21 DISPATCHERS- 202:24 204:6 214:14,18 1507:8 DISPATCHES- 205:1 211:14 DISPENSE- 775:19 DISPOSABLETYPE- 1419:24 DISPOSITION- 31:8 1290:22 1293:6 1297:22 1318:12 DISPUTE- 221:2 573:20 622:4 667:3 707:16,17 716:11 742:12 755:11 768:23 773:7 776:20 821:18,21 876:19 972:15 973:12 974:13 997:2 1166:3,5 1238:12 1240:7 1243:7 1322:3 1332:10 1352:24 1500:25 1501:23 DISPUTED- 1428:12,13 1443:21	DISPUTES- 106:13 DISPUTING- 1315:16 DISREGARD- 86:14,20,25 1121:6,12,14 1122:3,13 1123:22 1516:6 1522:10 1528:7 1550:16 DISREGARDING- 1516:8,9,10 DISRESPECTFUL- 747:3 DISROBE- 122:8 1087:11 1101:1,5 1121:14 DISROBED- 1087:20 1121:20 1127:20 1140:10 1198:1 DISROBES- 1014:10 DISROBING- 100:7 DISRUPT- 1089:5 DISRUPTION- 774:5 DISSECTION- 176:11,13,25 178:2,6 185:5 DISTANCE- 165:4 484:25 1049:8 1393:25 DISTIN- 807:12 DISTINCT- 69:16 DISTINCTION- 777:7 1023:7,16 1271:21 1524:23 1543:23 1548:8 DISTINCTIONS- 55:17 1023:13 1440:3 DISTINGUISH- 75:21 783:17 807:12 1235:16 1355:8,22 1467:24 1492:24 DISTRACTED- 108:5 529:5 DISTRESS- 364:7 815:21 816:3,4,11 944:9 949:2 1183:23,24 1184:1,20 1277:5,6,8 DISTRESSED- 949:4 DISTRICT- 1040:16 1074:7 DISTURB- 1234:12 DISTURBANCE-	310:3 321:9,13 493:3 832:1 943:24 1188:1 1323:4 1324:1 DISTURBANCES- 944:10 DISTURBED- 1070:21 1134:12 DISTURBING- 1139:7 DIVERSIFIED- 102:16 DIVERSIFY- 567:21 572:2,16 DIVERSIFYING- 571:8 DIVERTED- 78:2 DIVIDED- 1466:12 DIVIDING- 165:1 1460:9 DIVISION- 203:1 651:10,12 697:13,16 698:2 1258:1 DIVORCE- 1371:23 1372:17 1373:14 1374:7 1398:16 1409:20 1410:15 DIVORCED- 307:10 362:7 945:22 1371:19 1373:16 1398:20 1399:7 1407:12,15 DIZZINESS- 55:25 DM- 359:7,10 DMACKELCAN@CARLOC	104:10,16,23,24 105:8 108:8 114:14 115:17 117:16 123:9 124:18 166:9,14,17,21,23 167:2,15 168:22 169:15 170:9,16, DOCTOR'S- 116:7 331:17 348:13 372:7 374:2 423:25 450:2 507:20 535:1 775:5 918:10 941:22 1289:11 1291:19 DOCTOR/NURSE- 445:19 DOCTOR/PATIENT- 41:23 DOCTORATE- 1278:24 DOCTORATE'S- 1061:20 DOCTORED- 742:13,15 748:5,7 788:25 DOCTORING- 748:12 857:9 DOCTORS- 38:8 53:10,11 114:25 121:19 123:10 124:14 240:24 424:6 443:19 542:15 547:9 568:4 570:8,13 574:16 582:1 603:4 642:1,2 763:3 773:2 775:3 784:7 864:10 884:19 910:9,17 911:17 913:21 914:23 964:22 1078:9 1 DOCTORS'- 1349:9 DOCUMENT- 25:16,22 30:24 47:15,17,22 177:1,24 217:23 228:1 261:20 263:9,11,24 264:10 277:1 278:9,18 279:2,12 280:1,15,21,24 281:5,7,8,16,21 282:18 283:21
--	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

284:1 285:1,4 309:15 315:13 321:7 322:22 323:10 365:2 39 DOCUMENT'S- 743:16 1409:6 DOCUMENTATION- 238:11 367:24,25 467:12 609:19 637:24 639:3,6 702:18,21 1182:19 1200:10 1528:2 DOCUMENTED- 178:1 813:22 935:13 949:19 951:24 1128:16 1166:14 1191:7,15 1192:5 1194:5 1288:2 1307:15 DOCUMENTING- 173:24 767:22 1277:13 DOCUMENTS- 21:16 30:17,20 40:15 107:9 110:8 224:21,22,24 225:6 256:11,17,19,25 258:6,7,20 259:8,9,24 260:6,9,13,14 262:1,21 265:11 273:5 284:15 323:21 324:2,3 325:5 326:15 358:12 435:25 438:16 441:2 452:8,10,12, DOD- 761:2 762:17 DOESN'T- 33:11,14 40:1 44:15 48:19 50:18 52:20 55:2,3 57:24 64:13 75:9 78:12 86:23 95:23 99:2 112:16 117:10,12 119:10 123:21 128:7 144:14 212:1 219:4 238:12 240:18 245:16 267:15 275:20 313:14,15 343:21 385:20, DOG- 266:22 1501:10,11,16,17, 20	1432:16 1506:24,25 1507:2 DOG'S- 1501:25 DOGGONE- 1231:2 DOGS- 557:9 798:8 DOLLAR- 101:15 758:4 DOLLARS- 605:18 1157:1 1343:20 1562:14 DOLORES- 12:45 13:11,16,20 28:14 995:6 1005:20,24 1006:11,14,17,21 1035:3 DOW'T- 30:17,24,25 31:16,19,21 35:18 36:1,2,3,14 38:1,2,9 39:14,20 40:6,11 42:2 45:7 46:15 53:23 61:1,2 64:21 68:23 69:6 71:15 73:14 74:6 78:17 79:6,13,21 80:18 81:6,14 86:17,22,23 89:15 90:15 92:13 93:1,5 9 DON'THIRE- 688:19 DONALD- 16:19 1255:10,13,15 1313:25 DONAVAN- 1532:1 DONOVAN- 37:6 107:23 1378:19,20,24 1380:16 1383:2,5,19,22 1384:17 1385:4 1386:6,11,16 1387:7 1388:14 1390:3,4,17 1398:5 1415:12,15 1417:11 1420:19 DONOVAN'S- 1383:12,14 1385:2,6 DOOR- 300:12,16 301:9 331:25 332:15,25 333:2,5 339:10 343:19 345:20 346:13 347:1,2,16 348:3,5,13,16,17	370:22,23,24 381:25 383:1,7,22 464:9,12,13,17,20 ,22 426:24 450:19,21 465:2 482:15,19,22 483:1,12 485:13 DOORS- 333:1 541:8 854:6 904:2 1043:21 1379:21 1474:1 DOORWAY- 485:12 525:20,23,25 526:7 DORCHESTER- 42:12 267:4 DORN- 1072:15,20 1102:19 1138:13 1152:18 1205:4 DORY- 1487:24 DOSES- 361:18 DOT- 524:20 1434:12,14 DOTS- 140:15 DOUBLE- 269:12 485:13 1157:15 1158:23 1385:4 1562:21 DOUBLESIDED- 323:22 324:8 DOUBT- 71:16 80:20 83:6 84:8 88:4 91:18 371:21 487:14 665:25 706:1 845:9 984:22,23 1098:23 1337:17 1348:24 DOUBTS- 487:11 DOUG- 1011:19 1164:6 1219:13 1233:13 1368:15 1369:22 1371:1,12,17 1373:23 1374:7 1375:1,7,11,15,19 1376:11,16 1377:14 1378:8 1379:14 1385:11,13 1387:17 1388:23 1390:25 1392:11 1393:23 1394:24 1395:19 1396:1 DOUG'S- 1389:5 1390:22 1400:3,13	DOUGLAS- 3:7 1367:17 1368:9 DOWNS- 572:11 DOWNSTAIRS- 53:5 96:11,25 294:11 295:19,25 558:13 560:2 1273:14 1286:1 1379:14 1416:7 1481:11,25 1482:8 1487:20 DOZEN- 64:14 DOZENS- 658:18 DR- 5:28 11:13,47 12:18,21 14:23,32 15:3,24 16:19 21:20 22:19 25:29 27:10,24,32 38:21 44:13,14,16,17,18 ,21 41:12 46:1,2,12,17 49:10 51:9,11,19 52:8,21,23,24 53:4,5,6,8,17 57:2 98:15,16,25 99:2,4,5,6,7 102 DRAFT- 1449:13 DRAG- 372:6 519:4 1108:16 1537:5,14 DRAGGING- 141:7 521:5 DRAMA- 76:7 DRAMATICALLY- 101:4 DRAW- 89:7 93:20 344:20 345:17,18 346:7 347:6,7,13 348:21 412:12 448:17 468:25 691:12 701:24 948:3 1447:2 1477:5 1542:14 DRAWEDOUT- 1416:24 DRAWER- 345:11 DRAWING- 345:16 346:8 373:21 DRAWN- 353:23 1457:16 1458:6 DRAWS- 291:25 DREAMA- 296:1 527:25 DRESS- 589:2,15 1406:15 DRESSED- 330:4 333:24 980:24
--	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

1122:19 1127:23 DREW- 506:21,23 507:21 508:4 DRIED- 183:15 DRINK- 478:12 480:2 560:13 919:8 967:4 969:19 1124:10 1282:15 1300:14 1521:7 DRINKER- 945:21 DRINKING- 946:10 1373:15 1407:13,16 DRIVE- 2:28 660:11 667:9 1025:21 1053:2 1392:13 1393:25 1404:13 1413:11 1414:19 DRIVEN- 384:17 572:6 583:17 1025:24,25 1497:11,13,17,18 DRIVER- 1046:9 1047:13 1052:23 1354:9 DRIVERS- 1047:18,20 1055:20 DRIVES- 1044:15 1498:2 DRIVEWAY- 497:14 1416:8 DRIVING- 59:20 101:11 129:5 152:19 153:12,18,21 799:19 1014:5 1015:18 1039:3 1043:18 1047:13 1478:19 1497:24 1535:2 DROP- 609:1 1381:20,21 1548:17 DROPPING- 1539:15 1541:7 DROPS- 1028:20 DROVE- 384:19 1010:15 1014:16 1384:25 1385:1 1399:11,23 1401:9,13,21 1412:4,5,6 DROWN- 788:12	1122:8 DROWNING- 788:7 DRUG- 103:6 114:10 307:13 320:5 356:9 370:8,9 454:21 455:4,14 456:20 515:8 585:9 944:20 946:1 1134:8 1138:4 1142:24 1508:16 DRUGADDICTED- 340:9 DRUGS- 117:15 353:5 456:19 1088:25 1089:1 1091:6 1128:4 1250:1 1339:8 1508:20 DRUGSTORE- 1541:6 DSMS- 1325:7,18 DSB- 790:22 827:7 DUE- 35:9 49:22 179:3 307:19 639:13 1083:10 1099:12 1456:8 1531:3,5,6 1567:20 1570:5 DUFFIE- 256:24 1022:8 1354:14 1358:11 DUPLICATES- 143:11 161:24 DUPLICATION- 133:24 DUPLICATIVE- 134:8 143:16 DURATION- 144:11 544:21 727:14 1036:20 DUST- 490:3 DUTIES- 58:7 85:24 90:14 150:7,22 163:23 202:21 203:7 243:5,6,7 582:13 767:17 853:7 855:20 897:11 922:19 972:18 974:16 1039:10 1048:2 1049:10 1059:22 1072:21 1073:7 1077:16,17 1081:10 1132:10,12,16 1195:4 122	DUTY- 41:16,20,21 44:2,3,4,9 60:2,7 87:2,4 88:19,24 243:12,14 293:15 304:21 307:11 356:20 357:1 398:18,20 446:11 474:11 535:10 697:24 778:15,18 793:19 807:8 897:7 983:4 1057:8 1072:6,10 1080:15 1081:1 1082: DVD- 6:20,37 14:8 22:26 23:23 26:19,25 27:17,30 28:11,19 29:3 227:9,11,13 252:4,9,12 730:14,16 889:10,13 890:6 989:4,7 990:5,8 1005:19,22 1018:21 1034:4,9,16 1035:1 1050:15,22,24 1359:4,6,8 1420:7 DWELL- 1373:9 DYING- 882:8 DYSFUNCTION- 306:8 E E91- 202:23 E911- 202:23 203:4 EACH- 73:6 74:12 75:22 80:14 81:21 82:4,10,12,19,23 83:2,6 84:25 94:17 102:24 103:4 104:10 106:8 108:21 111:15 143:11 155:21 181:19 214:22 216:22 217:1 250:2,6,8 251:4 269:13 324:19 329:22 332:1,10 369:1,5, EAGLE- 1118:20 EAR- 183:6,8,11 EARL- 1400:2 1402:2	EARLIER- 56:14 104:19 106:2 107:18 181:16 183:18 185:7,25 192:23 201:11 280:9 317:6 322:1 327:16 331:5 335:7 341:13 350:7 354:20 358:7 364:5 368:19 374:11 376:4 384:16 391:25 396:6 397:24 406:22 419:3 425:10 4 EARLIEST- 1194:2 EARLY- 54:1,12 176:22 274:13 387:7,10,14 572:9 604:13 964:15 1011:2 1079:9 1172:1 1202:22 1206:9 1445:2 1519:8 EARN- 623:16,17 1146:12 1152:21,22 EARNED- 281:1 623:11 709:10 EARNING- 377:1 EARS- 185:8 300:19 311:22 330:18 333:14 334:20 350:10 362:15,16,19 461:21 462:10 509:10 510:2 817:12 949:14 1281:17 1286:9 1331:1 1478:13 1484:9 1520:13 EARSNOT- 1201:2 EARTHY- 267:1 EASE- 373:6,7 926:21 970:3,6 EASEL- 344:21 496:13 EASELS- 65:22 EASIER- 78:23 232:3 256:16 420:19 970:19 1031:22 1416:9 EASIEST- 231:12 344:25 394:25 EASILY- 39:25 774:11 830:8,9
--	--	--	--

OCTOBER 2015 DELANEY V. CASEPRO

1561:16 EAST- 358:22 526:3,9 527:24 528:2,3 542:21 642:17 645:24 EASTER- 1373:3 EASY- 126:4 557:17 771:25 909:12 1006:3 1407:5 EAT- 1124:10 1160:14 1386:6 1521:7 1565:17,25 1566:20 1567:1 EATING- 1476:22 EBOLA- 60:18,20 61:6,25 1088:8,9 1091:5,7,10,22 1092:12 ECONOMIC- 1054:24 1501:4 ECONOMICS- 424:4 ED- 914:11 933:11 1245:6 1336:22 1337:2 EDGE- 1144:16 1429:15 EDITED- 247:18 1035:7 1233:2 EDITING- 1031:17 1244:17 EDITS- 246:7 EDUCATION- 167:23 170:3 179:5 191:1 274:10 285:18,23 406:20 431:23 568:11 569:8 622:16 755:3,6,14 765:10 844:11 852:2 856:21 873:11 906:20 907:6 1061:8,9,16 1063:9 1073:21,22,23 1074:10 1085:5 1094:25 1113:17 11 EDUCATIONAL- 277:24 440:13 629:20 630:17 1511:12 EDWARD- 95:13 99:13 122:15 176:14 296:16 298:1 304:1 481:15 485:20	538:17 549:6 806:15 827:5 840:15 979:10 1057:18,22 1059:19,23 1101:14,22 1103:1 1109:5 1111:5,12 1146:8,12 1167:18,20 1168:7 1174:20 1206:6 1 EDWARD'S- 216:15 EDWARDS- 217:15,25 EFFECT- 85:18 119:15 120:21 144:19 327:17 529:21 530:11 812:8 856:13 929:5 949:19 960:3 962:14,18 969:5 1020:15 1029:25 1185:14 1200:13 1298:15 1308:19 1426:10 EFFECTIVE- 625:21 872:5 EFFECTIVELY- 143:12 EFFECTS- 370:7 1121:22 EFFICIENCY- 1374:11 EFFICIENT- 129:12 251:7,16 1572:15 EFFORT- 76:12 359:23 666:24 1479:7 EFFORTS- 1573:18 EGGS- 1378:9,11,12 1485:7 1533:1,2 EIGHT- 16:4 170:15 261:12 272:10,11 274:2 287:6,7,12 465:13,14 493:7,18 499:1 914:3 1015:5,8,22 1040:15 1111:7 1117:5 1158:16,17 1232:18 1247:18 1323:25 1370:22 1379:25 1391:3 1442:23 1454:10 EIGHTED- 1294:9 EIGHTEENANDAHALF-	1226:6 EIGHTHOUR- 1062:9 EIGHTIES- 274:13 912:10,11 917:5 1153:2 EIGHTY- 1262:24 EIGHTYYEAROLD- 1483:3 ELAINE- 12:18,22 27:32 989:5,9 990:6,9 1034:18 ELAPSED- 486:23 ELDER- 1374:10 ELDERLY- 336:5 1378:13 ELDERS- 1396:25 ELECT- 1064:22 ELECTED- 283:12 1064:19 1107:8 ELECTIONS- 69:9 ELECTRICAL- 419:15 ELECTROLYTES- 360:25 ELECTRONIC- 512:3 ELECTRONICALLY- 238:11 435:21 1120:16 1396:5 ELECTRONICS- 1048:8 ELEMENT- 1551:22 1556:13,14,22 1557:16 ELEMENTS- 1452:15 1511:7,9 1551:19 1556:9,11,15 1560:11,18,22 ELEVATE- 1280:21 ELEVATED- 357:11 953:6,13 1000:15 1136:10 1181:20,22 1287:18 1288:17,18,22 1289:19 1330:6 1483:25 1484:3 1493:4 ELEVATION- 952:20 1136:10 ELEVEN- 431:15 1079:13 1240:7 ELEVENTH- 431:13 ELICIT- 130:9 143:19 241:3 426:20 1058:3 1130:13 1137:11	ELICITED- 113:8 140:3 238:8 596:6 918:24 996:25 999:3 1057:10,15 1207:7,8 1216:15 1217:1 1445:10 1507:5 ELICITING- 1222:7 ELIGIBILITY- 807:20 874:3 925:12 1139:1 ELIGIBLE- 358:13 925:14 1147:5 1572:9 ELIMINATED- 444:1 ELIZABETH- 995:1 1111:2 1195:15 ELMO- 986:5 ELOPE- 489:6 541:7 1140:7 1526:18 ELOPED- 122:15 837:7 866:8 1237:8 1267:7 1298:7 1311:1,23 1312:2 ELOPEMENT- 488:10,12,13 489:8 1120:20 1130:7 1139:18 1186:6 ELSE'S- 312:8 682:2 1219:19 1501:17 1506:25 1507:2 ELSEWHERE- 513:9 642:15 1067:6 1506:8 EMAIL- 286:7,12 609:10 610:1 614:23 615:2,3,4,14,22 631:14,21 632:6,7 633:2,6,13 634:7 636:23 637:9,11,13,14 639:9 664:10 683:20 700:23,24 701:3,12,15,18 702:2,12 703:9 704:6 706:24 716:7 718:11,18 721:10 87 EMAILED- 1220:20 EMAILING- 1220:25 EMAILS- 609:24
---	---	---	--

OCTOBER 2015 DELANEY V. CASEPRO

614:22 998:17 1502:22 EMBARKED- 106:7 EMBARRASSED- 415:5 EMBARRASMENT- 1301:23 EMERGENCY- 23:35 43:22 49:21 52:14,21 53:3,4,9 55:24 56:13,20 60:24 61:3 96:12,25 97:1,12,18,23 98:1,11,20 99:21 100:5,11,13,18 104:11,13 107:16 203:16 211:7 239:1 268:23 287:1,4,8,13,21,2 4 273:24 288:10,19 289: EMERGENT- 485:7 844:17 926:7 EMOTION- 128:7 321:13 327:21 1324:4 EMOTIONAL- 1029:25 1289:23 1404:3 1418:4 1511:11 1531:25 1560:7,22 EMOTIONALLY- 1404:1 EMOTIONS- 310:3 321:9 493:3 832:2 1188:2 1323:4 1324:1,6,7 1361:18 1511:11,15 EMPHASIS- 1564:18 EMPHASIZE- 83:6 EMPLOYEE- 583:24 EMPLOY- 698:15 EMPLOYED- 51:16 166:23,24 242:6 271:22 272:4,16 273:9 276:7 342:1 433:2 443:15 559:3 634:19 761:1 1146:8 1147:15 1173:16 1336:15 EMPLOYEE- 21:4 44:15,16 46:13	50:14 51:13 96:24 103:5 104:17 238:21 276:9 279:15,21 283:17 338:20 433:18 437:24 439:10 442:4,8 445:8 554:25 555:10 574:21 575:11,18,23 576:3,4,17 577:8,12,14,16 580:9,13,23 583:2 EMPLOYEE/EMPLOYER - - 595:23 653:25 654:1 875:17 1461:4,22 1463:23 - E EMPLOYEES- 43:21 57:12 102:22 124:20 282:20 342:21 350:4 421:13 424:15 502:25 574:8,19 577:2,24 579:16 581:5 582:18 583:6,7,9,10 584:14 585:14 586:5 587:7 588:20 590:15 592:1 595:19 596:10,12 614:4 617:5 621:5 6 EMPLOYEES'- 50:2 1327:3 EMPLOYER- 228:20 285:15 436:23 581:25 616:13,15 875:23 998:7 1101:25 1459:17 1465:19 1466:13 1530:25 1555:18,21,22 1556:2,3,5,10 1572:22 EMPLOYER'S- 1456:11 1465:24 1555:15 EMPLOYER/EMPLOYEE - -	653:9 1459:15,24 1460:3,10,21 1463:4,9 1466:15 1469:13 - E EMPLOYERS- 567:18 588:5 690:9 EMPLOYING- 571:10 EMPLOYMENT- 242:5 277:9,19 278:21,24 279:4 280:16 281:17,25 285:11 286:22 340:2 341:13 342:11 424:17 425:1 427:11 439:21 440:9 441:23 442:1,15,21,23 500:11 580:19 584:12,13,18,22,2 4 583:3 604:14 606:10 608:15 612 EMPLOYE- 592:16 EMPTY- 34:22 35:21 292:13 331:14,15,23 860:15 919:6 1189:7 EMS- 484:3 EMT- 100:21 484:11 1040:4 1074:6,7 1237:2 EMTIS- 822:16 EMTS- 153:10 1074:11 ENABLED- 282:14 ENCLOSED- 854:9 ENCLOSING- 752:24 ENCOMPASS- 367:22 1031:15 ENCOMPASSED- 58:7 ENCOMPASSES- 230:25 ENCOUNTER- 291:11 1270:2,16 1313:6 1338:25 1484:23 ENCOURAGE- 221:20 677:12 ENCOURAGED- 1249:13 ENCOURAGING- 220:21 1032:25 1033:2	ENDANGER- 398:24 ENDANGERED- 109:8 ENDANGERING- 49:8 401:24 ENDANGERMENT- 398:13 402:19 ENDING- 245:2 546:21 601:17 744:22 ENDORSEMENT- 754:4 ENDS- 97:16 227:21 272:2 978:6 990:11 1006:24 1015:12 1032:20 1188:4 1359:12 1464:14 1541:3 ENERGIZES- 1052:19 ENERGY- 31:22 1573:18 ENFORCEMENT- 150:9 162:4 1039:3 1497:5 ENGAGED- 598:14 995:12 1038:9 1055:19 1108:22,25 1117:12 1200:16 ENGINE- 1010:10 1015:11 1041:11,15 1042:10,11,12,13 1045:2,9,16,23 1046:2,15,21 1048:18 1049:18 1052:20 1233:2 1235:2 1243:17 1244:23 1247:16 1435:5 1442:22 1497:10 ENGINEER- 569:3 1046:9,10 1052:23 ENGLAND- 105:13,14 106:2 ENGLISH- 105:20 786:2 ENJOY- 79:5 329:6 533:19 733:8 906:24 1212:22 1340:18 ENLIST- 712:24 ENLISTED- 58:17 95:3 97:9 779:23 809:24 813:14,20
---	---	---	--

OCTOBER 2015 DELANEY V. CASEPRO

844:12 851:21 856:14 1477:19 1487:9 ENLISTMENT- 1038:24 ENROLLED- 274:20 ENROLLMENT- 436:7 ENSUES- 1301:23 ENSURE- 88:12 1427:15,25 ENTER- 136:9 148:19 198:2 212:2 215:7 224:17 249:5 270:16 314:25 429:8 513:7 534:14 654:9 669:2 686:16 730:5 734:8 809:11 819:19 890:25 907:18 971:4 992:16 1005:11 1036:9 1113:5 1223:9 1252:9 1348:4 1352:8 1 ENTERED- 211:17,24 219:21 452:1 533:2 676:17 697:5 1057:19 1058:15 1109:24 1235:21 1238:7 1355:13 1491:25 1498:22 1518:16 1534:22 ENTERING- 72:3 148:17 207:7 215:3 249:3 270:13 314:24 534:12 564:12 611:19 644:25 686:14 691:21 730:3 734:5 819:17 890:22 898:21 971:2 992:12 1036:7 1113:3 1223:6 1252:8 1348:2 1352:6 1365:5 1475:13 1514:4 1569 ENTERS- 72:6 373:13 564:14 581:5 611:21 645:3 1557:15 ENTERTAINMENT-	76:11 1379:16 ENTIRE- 56:12,14 192:10,19 232:15 304:24 361:21 379:13 387:5 417:22 475:15 597:7 775:21 837:12 875:21 986:10 995:16 1038:14 1041:25 1049:24 1051:3 1245:4 1479:11 ENTIRELY- 724:15 813:10 1550:16 ENTIRETY- 131:22 132:4 206:5 305:5 608:13 957:8 1015:13 1022:16 1431:4 1435:17,18 1549:12,13 ENTITIES- 35:6 75:22 566:14 1468:11 ENTITLED- 75:7,19,23 597:14 726:5 868:1 1100:9,10 1147:2 1154:22 1207:9 1249:19 1544:1 1559:16,24 ENTITY- 38:8 75:5,6 422:8 433:11 573:6,9,18,22 616:17 875:19 1059:22 1510:25 1530:3 ENTRANCE- 346:23 525:11,13,15,17 1076:4 ENTREPRENEURIAL- 579:22 652:5 ENTRIES- 468:22 472:19 473:16 527:7 860:1 1487:1 ENTRY- 215:1 345:20 346:13 469:21 471:20 472:15 487:10,24 493:15 504:3 513:5 526:23 528:11 536:23 537:21,23 538:13 539:6 857:15 861:24,25 1107:21	1245:22 ENVELOPE- 752:6,13 ENVIRONMENT- 116:4 190:20 547:5,15 856:22 868:15 979:8 1087:8 1099:20 1100:24 1125:11 1199:6,7 1433:3 ENVIRONMENTAL- 895:17 EOWYN- 178:7 EPISCOPAL- 274:19 1470:16 EPISODE- 330:18 444:2 1187:16 1284:11 1286:11 1322:15 EQUAL- 632:24 EQUALLY- 37:11 950:5 1103:24 EQUATION- 809:12 1168:25 EQUIPMENT- 1042:21 1044:2 1048:8 EQUITABLE- 1460:7 EQUUS- 898:10,11,15 ER- 46:21 47:8 51:17,18 97:3,20,21 98:15 99:10 102:25 103:2 111:7,9 113:17,20,21 114:13,14 115:17,21 116:7 117:21 118:1,11,15,21 119:5 122:5,12 123:9 124:2,6,13,14 238:15 241:19 274:1,2 287:17 288:13 293: ER'S- 774:15 ERECTILE- 306:8 ERIK- 16:19 1120:1 1148:9 1214:7,9,18,21 1215:14,16,20 1254:22 1255:10,13,15 1313:25 ERRATIC- 583:15	ERRONEOUS- 86:9 897:11 1173:19 ERROR- 35:13 93:5 744:4,9 903:3 1079:21 1423:15 1444:14,16 1564:23,24 ERS- 500:1 853:24 ESCALATE- 1145:17 ESCALATED- 1300:21 ESCALATES- 1284:18 ESCALATING- 1280:9,20 1299:22 1302:10 ESCALATION- 1283:16 1299:10 ESCAPE- 736:1 906:23 942:11 943:10 1014:10 ESCAPE/CONFUSED/- 1522:20 ESCAPED- 903:22 ESCORT- 365:3,7 774:19 775:6 1106:22 1144:7 1304:20,24 1305:4,8 1306:6 1337:7 1514:25 1529:11 ESCORTED- 294:10 365:7 382:11 959:4 1144:8 1273:17 1281:22 1304:20 1307:19,21 1308:12 1313:1 1318:16 1481:23 ESI- 290:2,4,5,20 317:6,20 343:15 344:2 1520:3 ESSE- 225:15 ESSENCE- 174:20 193:9 242:12 956:22 1237:13,21 1241:6,18 ESSENTIAL- 82:22 589:10 ESSENTIALLY- 96:3 97:15 128:24,25 131:16 423:16 486:8 880:11 1047:25 1108:13 1123:6 1130:4 1164:13 1221:11
--	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

1258:16 1282:13 1287:13 1292:22 1306:11 1342:18 ESTABLISH- 263:13 926:23 1011:3 1083:11 1464:4 1465:18 1546:18 ESTABLISHED- 38:23 411:2,15 766:22 820:11,25 1171:21 1189:3 1243:3 1459:19,23,24 1466:16 1467:17 ESTABLISHES- 425:14 653:24 655:17 1026:14 1546:11,14 ESTABLISHING- 926:20 ESTATE- 1:12 2:9 33:22 34:1,12,13 63:16,21,24,25 74:25 81:24 1402:12,18 1412:8 1430:14 1462:18 1551:10 1560:1 1575:12 ESTIMATE- 101:11 157:18 173:6 178:13 1380:1 ESTIMATED- 587:23 588:1 ESTIMATING- 468:16 ESTOPPED- 1109:4,21 ESTOPPEL- 35:17 ET- 230:9 523:8 606:11 631:4 642:3 649:16 687:9 693:8 1103:20,21 1270:20 1342:11 ETHICAL- 77:7,11 ETOH- 363:17 517:14,20 ETRAM- 415:11,12 EVAL- 365:18 469:4,18 470:1 527:12 860:14,15 862:5 EVALUATE- 57:15 448:25 696:6 717:14 852:9 853:4 954:14	1143:21 1189:9,18 1225:4 1291:3 1529:22 1549:4 EVALUATED- 113:17 541:19 550:12 773:25 778:3 918:2 929:25 952:22 985:10 1188:22 1279:19 1290:21 1312:6 1354:22 1529:21 EVALUATES- 696:14 858:15 1189:15 1194:24 EVALUATING- 57:4 470:4 505:18 536:6 932:17 938:7 956:14 961:3 969:1 1070:14 1166:25 1237:23 1262:12 1268:22 1279:23 1280:7 1516:22,24 1520:19,20 EVALUATION- 40:11 117:2,20 119:1 120:8 121:10 466:16 469:19 473:1,5 474:16 479:12 528:12 529:12,17 530:4,9 537:9 542:2,15 543:7 560:8,10 864:4 918:4 940:8 943:7 950:8 954:19 957:19 958:18 959:19 961:13,18 962:22 EVALUATION'S- 466:17 1487:25 EVALUATIONS- 466:19 576:4 1188:10 1242:5 1308:7 1310:3 1358:1 1523:13 EVASIVE- 814:3 EVENING- 228:13,14,19 229:12 233:19 292:17 389:1,2,21 391:6 392:12 393:4 429:12 633:13 733:7 886:14,22 887:5 888:7,15 993:1 1004:21 1007:21	1008:1 1209:18 1230:4 1416:3 1425:4 1426:10,12 1449:11,15 1547:25 EVENINGS- 767:5 EVENLY- 84:25 EVENTS- 133:10 175:2 191:24 404:3 409:3 504:8 539:16 632:2 640:9 847:7 883:16 924:9 976:18 987:25 999:21 1000:3,4,24,25 1001:25 1002:2,6,14 1010:12 1014:14 1019:16 1020:10 1029:21,22 1049:1 1102:8,11 1117:7 1 EVENTUALLY- 177:12 651:5 847:9 EVERYBODY- 52:15 71:19 72:12 79:20 90:25 91:2 116:7 197:5,23 232:11 267:6 373:11 418:22 525:19 531:13 545:15 552:1 563:19 612:24 683:2,16 819:11 843:21 907:11 908:16 931:2 936:5 939:4 1025:6 1031:23 1083:18,23 1 EVERYBODY'S- 197:3 414:21 644:3 1092:16 1366:13 1390:18,20 EVERYONE- 30:10,14 137:9 221:15 234:8 246:8 267:6 302:7 312:7 332:6 333:6 340:23 373:4 418:17 428:1 679:23 683:23 725:6 846:5 889:2 1044:23 1433:8 1460:18 1513:2	EVERYONE'S- 93:13 649:22 EVERYTHING- 42:24 66:2 71:17 120:24 124:14 129:1 191:12 204:12 211:6 230:25 231:4,15,25 296:10 299:20 300:1 333:3 378:21 404:17 406:9 469:8 477:2 487:10 504:16 511:13 516:16 620:9 684:11 696:12 768:7,16 769:11 77 EVERYTHING'S- 204:17 211:16 1487:24 1528:8 1547:22 EVERYWHERE- 94:16 EVIDENCE- 35:11 40:16 50:6 63:13 64:2 66:21 69:25 82:13,14,18,20,23 ,24 70:19,21 74:18 83:1,2,7,11,13 84:13,14,22 85:12,17,22 86:2 88:11,15,17,25 89:2,3,4,16,18 90:2,6 92:19 94:21 97:3 99:14 100:3 101:25 102:5,2 EVIDENCE1050- 22:28 EVIDENCE1163- 25:31 EVIDENCE1364- 23:19 EVIDENCE1420- 23:24 EVIDENCE147- 19:31 EVIDENCE210- 19:26 EVIDENCE212- 19:21 EVIDENCE253- 21:35 EVIDENCE265- 20:33 EVIDENCE270- 22:9
---	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

EVIDENCE273-20:27 EVIDENCE279- 21:5 EVIDENCE463-21:12 EVIDENCE523-23:36 EVIDENCE599-22:14 EVIDENCE613-22:22 EVIDENCE694-24:10 EVIDENCE752-21:21 EVIDENCE922-25:12 EVIDENT- 944:11 EVIDENTIARILY-1021:11 EVIDENTIARY-36:17 1018:25 1019:9,15 1020:13 1026:5 EVOKE- 1532:8 1540:5 EVOLVING- 1170:19 1203:10 EX- 1397:7 EXAM- 364:12 374:1 690:22 821:25 825:19,20 837:22 854:7,16 898:14 913:8,24 947:1,13,17,19 949:1,5,15 950:13 952:4 1062:9 1184:3 1189:16 1270:10,15,20 1276:25 1291:16,19,22 1292:2,4,5,8 1300:19 1302:8 1303:1 EXAMINATION-5:19,30,38,49 7:6,18,30 8:22,33,36 9:5,15,30 10:2,32 11:15,25,49 12:9 14:5,17,26,35 15:6,28,34 16:22 17:25,33 149:17 166:20 170:4,7 173:16,22 174:4,5,11,16	177:18,21 178:3 181:2 198:8 202:8 271:14 315 EXAMINATIONS-576:9 EXAMINE- 181:12 411:22 944:6 1127:13,22,23 1292:3 1356:9 EXAMINED-174:2,8,9 365:14 1128:1,11 1183:6 EXAMINER- 140:4 166:25 168:16 175:12 1063:13 EXAMINERS- 753:11 754:7 1063:23 1068:9 1118:9 1338:18 1355:5 EXAMINES- 1090:23 1197:6 1199:20 EXAMINING- 944:11 947:25 1357:16,20 EXAMPLE- 32:15 60:16 90:20 134:13 169:21 216:3 424:21 425:16 501:25 555:8 612:15 653:16 676:13 761:7,10,13,17,20 799:17 800:1 830:2 833:12 942:18 944:24 1042:22 1088:8 1089:1,3 1091:20 1092:11 1095:12 1116:7 1 EXAMPLES- 84:20 215:15 502:1 828:6 942:17 1088:7 1091:21 1317:14 1547:4 EXAMS- 348:6 1183:21 EXASPERATION-1518:23 EXCEED- 972:21 974:19 1354:2 1356:7 EXCEEDED- 144:18 1093:16 EXCEEDING- 579:23 1080:5 EXCELLENT- 818:6 851:2 1573:23	EXCEPT- 245:23 383:21 480:21 585:2 717:8 828:18 835:4 1098:4 1106:17 1287:24 1455:16 1520:18 1566:7 EXCEPTION- 54:6 94:18 171:20 246:23,24 466:25 480:18,23 511:1 580:12 597:17 1030:16 1100:14 1113:15 1200:6 1233:12 1248:3 1435:9,10,14 1437:21 1469:1,7 1472:15 1550:1 1568:3,17 EXCEPTIONAL-467:1 579:22 EXCEPTIONS- 393:9 1360:20 1362:20 1441:22 1448:3 1472:22 1567:14 1568:8 EXCERPT- 244:6 EXCERPTS- 424:12 EXCESS- 101:11 222:3 1224:7 EXCESSIVE- 1134:9 EXCHANGE- 38:4 44:25 482:20,23 483:4 486:23 591:4 878:15 EXCHANGED- 482:13 959:13 EXCITED- 129:4 155:18 391:10 734:1 1223:11 EXCITING- 390:1 EXCLUDE- 38:15 64:5 245:15 1243:8 1343:2 EXCLUDED- 38:22 39:5 64:6 722:23 1030:7 1097:22 1098:13 EXCLUDING-36:16,19 637:21 EXCLUSION- 35:24 816:23 EXCLUSIVE- 86:5 1543:6,9 1556:12 EXCLUSIVELY-912:7 1146:2	EXCRUCIATINGLY-33:4 EXCUSED- 135:18 201:4 390:15 685:16,24 1018:2 1056:5 1082:17 1084:14 1112:13 1210:17 1408:20 EXECU- 1402:12 EXECUTED- 668:21 676:14 EXECUTIVE-1402:12 1464:10 1505:14 EXEMPTION-1572:6,8 EXERCISE- 33:2 61:21 1074:17 1075:21 1076:11,22 1077:7 1091:15 1094:18 1097:8 1106:8 1185:5 1269:4 1572:8 EXERCISED- 1075:7 1471:2 1559:7 EXERCISING-1075:21 1445:9 EXHAUSTING-106:16 EXHIBIT- 14:11 139:13,16,20,23 140:1,23 144:3 146:1,2,7,9 147:16,23 154:16 184:8,11 205:19 207:13 210:8,12,15 212:8,14 213:5,8,19 218:9,10,11,12,14 219:5,17,24,25 220:3,4,22 227:15,19,23 252:3,7,11,14,21 253:1 EXHIBITING-781:8,13 782:10 954:24 955:8 1274:24 1323:17 EXHIBITS- 18:38 19:12 83:13 139:7 246:20 248:23,25 253:7 770:14 1034:12 1165:5 1242:12 1251:15
---	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

1363:18 1436:5,6 1458:14 1542:12 1565:4,8 1566:13 1569:6 1575:10 EXHUSBAND- 1376:20 1377:10 EXHUSBAND'S- 1399:1,16 EXISTED- 1099:20 1132:16 1165:18 1328:10 1425:24 1438:20 1439:3,5 1464:4 EXISTENCE- 505:12 943:4 1312:23 1546:13 1547:2 EXISTS- 287:9 666:17 668:13 758:2 1049:19 1092:4 1243:13 1459:16,25 1461:22,25 1550:1 1568:2 EXIT- 89:23 122:6 347:14,15 508:9,14 525:22 EXITED- 478:10 1324:6 EXITING- 1030:12 EXITS- 119:5 352:18 EXMILITARY- 557:6 EXPAND- 701:25 EXPANDED- 569:4 1066:14 EXPANSIVE- 1107:11,12 1447:13 EXPECT- 76:2 77:6 78:17 112:13 245:7 255:19 357:24 807:16 840:14 843:20 844:9 854:15 934:21 948:23 952:14,16 953:1 994:3 1053:1 1057:15 1063:20 1151:5 1181:21 1280:5 1284:17,19,25 1286:15 1288:14 1289:24 1290 EXPECTANCY- 181:8 EXPECTATION- 50:19,22 407:1,6	577:1 608:12 775:7 776:14 839:13,18 840:9 983:9,11 EXPECTATIONS- 406:25 407:20 578:19 579:24 582:23 839:16 EXPECTED- 77:10 245:4,8 416:25 417:1 582:17 850:6 1280:5 1302:12 1553:16 EXPECTING- 121:7 839:22 867:25 EXPECTS- 582:10 EXPEDITE- 628:13 956:7 1112:14 1296:10 1297:6 1357:17 EXPEDITIOUS- 441:4 1304:10 EXPENSE- 622:14 870:14 EXPENSES- 167:10 EXPERIENCE- 32:5 53:11 122:16,23 171:21 179:6 191:1 304:16 351:24 357:19 404:15 406:20 443:8 497:3,7 498:13,14,18 499:7,15 504:19 513:4 545:12 568:22 578:15 647:9 650:17 748:16,17 750:10 813:5 844:11 907:4 934:7 EXPERIENCED- 198:20 849:18 1053:10 1320:14 1381:25 1526:13,14 EXPERIENCING- 868:5 1017:5 1071:2 1116:16 1188:9 EXPERT- 43:12 50:9,10,11,20 54:3 122:20 170:23 171:4,7,22,23 172:3,5 241:9 244:4,5 245:11,14	255:21 256:2 403:1,4,10 405:20,21 406:18,21 408:4,5 410:17 413:4 414:17,18 416:15,16 417:10 630:23 1057:1,10,12 105 EXPERT'S- 53:17 1154:7 1550:20 EXPERTISE- 170:17 171:25 407:13 714:8,14,16 715:11 1097:4 1113:22 1126:20 1132:22 1148:5 1269:8 1314:21 EXPERTS- 43:10 122:20 411:3 1099:22 1157:17 1159:7 1527:5,6 1538:8 EXPERTS'- 1110:18 EXPIRATION- 286:13 EXPLAIN- 83:15 84:3,14 88:6 123:10 155:4 169:16 172:10 211:2 224:8 225:12 247:20 294:4 389:14 412:15 540:4 777:9 783:20,22 795:21 861:21 906:2 908:1 925:17 928:7 939:5,10 948:23 950:2 961:12,13 1069:22 1070:7 EXPLAINED- 82:10 439:8 796:2 EXPLAINING- 185:18 256:24 580:13 948:17 1254:23 EXPLAINS- 247:11 EXPLANATION- 128:25 226:25 581:10 790:17 844:8 861:24 862:19 864:8 1124:6 1253:17 1505:18 1539:7 EXPLANATORY-	782:16 EXPLICITLY- 1020:25 1461:7 1507:6,22 EXPLODE- 1142:12 1204:4 1284:16 1285:2 1286:14 1288:16 1308:2 EXPLODED- 1144:12 EXPLODING- 1307:7 EXPLORE- 906:21 EXPPOSE- 739:6 EXPPOSED- 1091:13 1092:12 EXPPOSES- 182:24 EXPOSURE- 498:24 1091:22,23 EXPRESS- 559:15 626:14 727:8 962:9 1009:8 1022:4 1153:25 1310:1 EXPRESSED- 351:6 365:25 495:4 640:11 701:21 836:23 848:14 849:9 867:23 879:15 917:25 937:22 999:11 1178:2 1283:16 1302:16 1496:12 1530:13 EXPRESSES- 781:19 EXPRESSING- 798:3 983:12 1185:16,18 1302:21 1336:13,20 EXTENDED- 1519:21 EXTENDS- 1085:13 1471:23 EXTENSION- 180:3 1377:20 EXTENSIVE- 178:14 218:16 1197:3 1213:14 1224:5 EXTENT- 31:4 147:5 192:2 296:4 297:11 309:24 322:17 392:9 422:11 426:19 724:6 749:12,13 1267:16 1361:10 1428:5 1461:18 1528:19 EXTERNAL- 173:23 174:4 177:18,21
---	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

178:1 1150:11 EXTERNALIZED- 140:13 EXTRA- 689:18 1296:3 1529:13 EXTRAORDINARILY- 388:10 908:12 EXTRAORDINARY- 1098:4 EXTREME- 57:8 364:7 EXUBERANCE- 459:3 EYE- 44:8 97:14 328:13 363:2 530:10 1270:17 1275:25 1420:19 1512:1 1520:9 1546:10 1547:5,20 EYEBALLING- 518:1 888:11 EYES- 92:25 93:2,6,7,9 173:15,18 419:23 449:18,20 479:21 481:9 509:9 510:2 792:5,24 835:11 919:3 943:22,23 946:25 949:14,17 950:4 1233:22 1272:25 1487:19 1493:10 1520:17 1529:13 1540:18 1543:25 1544:8 EYESIGHT- 528:24 EYEWITNESS- 1547:6	686:7 693:1 696:7,9 939:25 1065:21 1069:1 1072:18 1115:9 1262:12 FACILITY- 48:11 60:6 61:16 111:21 120:2,16 236:13 399:3 400:24 401:10 413:2 503:11 510:7 591:21 692:22 693:5 849:15 854:1 859:2 868:10 910:18 911:8 916:11 917:11 920:3 925:9 938:3 939:11,13 940:4 941:12 966:4 1 FACING- 302:1 349:20 524:17 639:14 1020:7,8 1536:14 FACTLY- 478:14 FACTORS- 1191:7 FACTUALLY- 1167:9 FAIL- 1564:9 FAILED- 85:3 109:7 1053:20 1127:14 1145:8 1427:15 1545:2 1551:25 1555:22 1564:13 FAILING- 43:24,25 1427:24 FAILS- 1554:25 FAILURE- 37:10 42:14 54:3 237:25 1087:6,11,16 1097:7 1100:21 1101:1,3,4,5 1106:4,8 1125:13 1126:5,12,17 1127:5,12 1128:2,8 1209:4 1294:19,23 1295:9 1437:16 FAILURES- 1100:20 FAIR- 77:9 154:25 164:18 167:10,20 179:15 193:19,20 196:15,16 244:1 290:20 293:5 302:5 304:14 306:14 307:2,5	308:7,8 316:15,16 366:5 375:9,10 380:11 414:20 433:12 436:15 445:2,20 448:8,9 457:23 469:16 473:1 FAIRLY- 185:3 469:15 853:23 856:22 865:1,2 995:11 1172:12 1514:17 FAIRNESS- 77:2 399:25 1019:10 FALL- 477:5 531:16 549:25 553:25 599:20 1381:23 1441:19 1566:23 FALLEN- 100:14 FALLING- 43:1 FALLS- 57:25 230:19 717:11 1156:6 1395:22 FALMOUTH- 1154:23 FALSE- 1324:19,23 FAMILIES- 95:6 1068:25 1069:8,16 1095:12 1152:16 FAMILY- 23:18 24:28 64:18 91:23 95:7,12 96:4 106:20 107:17,24 113:2 294:10 296:3,6 324:14 340:19 359:15 379:22 594:25 735:25 736:1 906:14 1062:6,16,23 1064:6 1065:17 1068:20 1069:23 1085:1,18 1105:2 1115:15,1 FAMILY'S- 1390:1 FAN- 1384:4,7 FANCIFUL- 1024:3 FANCY- 178:20 665:12,14 FANNIE- 614:8 FANS- 390:10 392:9 FANTASTIC- 1171:24 FAR- 94:25 133:8 144:18 147:3	153:3 192:2 255:17 319:21 323:22 324:7 333:15 334:23 341:21,23 342:13 352:13 362:10 465:6,16 470:9 481:12 484:22 502:17 508:21 523:7 525:17 527:7 528:11,19 538:12 548:25 553:1 FARGO- 285:4,8 FARTHER- 158:11,24 FASHION- 89:19 134:17 171:21 748:6,7 756:2 834:22 856:8 1030:19 1313:11 FASHIONED- 1494:12 1539:12 FAST- 45:6,13 165:7 200:7 659:17 736:9 878:11 897:17 909:14 911:1 952:9 FASTER- 221:22 360:2 907:16 952:16 953:8 1181:2 1288:23 FASTTRACKED- 907:8,12 FATAL- 1503:10 FATALLY- 1010:15 FATEFUL- 104:21 105:4 108:8 258:19 326:5 376:8,19,25 377:10 378:7 381:14 453:24 490:15 547:3 581:23 713:14 718:2 772:6 863:14 867:9 868:21 869:4,16 902:15 975:13 976:19 978:2 1045:10 1147:16 1149:8 1203:25 120 FATHER- 1368:15 1413:19 1416:17,20 1417:9
---	---	---	---

OCTOBER 2015 DELANEY V. CASEPRO

1419:20 FATHER'S- 1402:21 FAULT- 35:22 37:17,18 1015:14 1016:2 1291:15 1423:15 1469:21 1507:11 1564:9 FAULTY- 1153:15 1162:11,22 FAVOR- 85:1,7 88:22 1545:1,6 1568:19,20 1569:2 FAVORABLE- 1430:2,5 1438:17,25 1439:23 1443:2,9,18 1444:3 1446:12 1457:2 1463:22 FAVORITE- 750:19 FAVORITES- 750:20 1406:3,4 FAX- 614:15 1358:6 FAXED- 871:7 FC- 359:13 FEAR- 60:18 362:14 1011:6,7 1017:15 1326:16 1478:21 FEARFUL- 117:12 362:14 FEATURES- 173:24 1191:14 FEBRUARY- 47:18 94:8,17 98:8 108:19 150:25 176:9,10,24 203:5,7 205:9,25 206:3 259:3 261:3 268:22 272:16 288:16,23 289:1,12,14,18 291:6 292:4 294:5 303:19 309:16,19,22 310:1,5,15 318:19 324:5 337:25 339:1 342:14 FEDBIZOPPS- 648:3,12 FEDERAL- 35:24 36:6,13 42:4 51:13 554:23,25 555:2 559:3 567:25 571:24	572:21 580:15 581:8 589:21 590:7 596:9 599:16,17,21 600:17 601:5,22 602:3,13 605:1 606:5 619:8 621:15 626:14 645:19 650:5,6 653:6,10 654:3 FEDEX- 626:15 FEDEX'D- 646:15 FEE- 758:4 FEED- 75:9 FEEL- 31:25 40:9 55:17 79:13 126:7 147:6 247:21 266:9 298:22 302:6 366:4 461:18 608:20 682:4 729:6 747:14 769:18 782:8 796:25 811:24 846:17 868:16 906:1 939:20 940:11 944:15 1155:23 1361:25 1381:15 1406:13 FEELING- 329:2 542:13 547:14 729:5 1124:7 1169:23 1182:22 1228:18 1270:9 1393:10 FEELINGS- 74:4 838:17 1137:8,9,19 1140:9 1178:23 1511:10 1560:14,17 FEELS- 781:6 FEET- 52:17 287:16 331:7 466:7 476:9 480:14 509:21 529:3 853:17 919:9,16 1144:6 1380:8 FELL- 56:4 100:22 715:23 FELLOW- 91:13,24 92:11 473:4 582:18 710:13 996:19 1224:24 1264:4	1316:8,10,16 1489:24 1503:24 FELLOW'S- 59:17 FELLOWS- 1264:7 FELLOWSHIP- 168:12,17 FELT- 242:13 330:10 350:24 383:15 427:6 636:3 640:4 796:6 800:18 808:5 815:5 816:21 827:16 866:21 869:6 919:19 929:6 1167:11 1227:16 1377:8 1481:4 1510:13 1529:15 FESPARALEGAL@SCDM H HORG- 1358:7 F FEVER- 61:1 928:11 1288:2,5,6 1420:20 FICA- 103:17 435:11 587:21 FIDELIS- 1477:11 FIDGETING- 367:9 FIELD- 60:8 61:10 85:12,16 169:20 171:3,11,22 179:13 244:18 475:8 486:12 648:1 906:22 1011:21 1012:1 1029:13 1073:21 1075:4 1085:22 1093:20 1113:9,18 1124:25 1125:21 1126:19 1132:21 1148:4 1150:5 1260:7,11 1 FIELDS- 1261:10 FIFTEEN- 487:7 970:6 FIFTH- 293:19,21 475:21,23 1415:13 FIFTYFOUR- 1368:1 FIGHT- 266:22 307:24 FIGHTERS- 1152:12 FIGHTING- 934:19	935:23 1038:10 1039:25 1497:12 FIGHTS- 1374:24 1500:20 FIGURE- 219:1,10,11 232:5 306:3 444:18 619:17 799:7 888:6 900:24 1008:17 1022:25 1133:5 1321:3 1328:20 1342:5 1352:16 1400:18 1453:17,18 1508:20 FIGURED- 330:22 433:7 534:1 544:5 832:5 1449:21 1495:6 FIGURING- 857:4 FILA- 1096:22 FILE- 20:25,32 22:18 54:2 67:24,25 257:1 264:24 268:5 269:21 272:23 273:6 278:15 280:10 283:15 286:3 304:8,10,24,25 305:6,16,17 434:2 596:17 606:16,24 607:9,14 608:9,14 609:5,17 610:25 611:1 613:1,16 614:6 FILED- 42:7 241:14 267:24 268:2,4,5,10 642:6 646:14 900:7 1070:2,3 1108:4 1109:9 1111:17 1272:16 1357:11 1412:7 1462:9,17 1551:18 FILES- 303:12 576:13,15 666:18 667:8 696:10 1118:16 1509:24 FILING- 225:22 1240:1,3 1356:19 1357:6 1551:14,16 FILL- 282:1 329:7 342:10 368:4 498:8 621:5 687:5 689:8 814:22
--	---	---	---

OCTOBER 2015 DELANEY V. CASEPRO

865:23,25 928:13 939:24 1014:7 1504:3 1512:10 1522:14 FILLED- 47:17 328:15 335:5 376:5 435:20 437:1 439:23 440:1 453:9 454:20 455:24 456:24 457:22 459:21 460:22 479:17,22 494:10 621:7 628:19 663:24 664:2,4 754:22 789:23 794:13 800:14 802:14 809:5 820:19 846:21,2 FILLING- 113:14 342:8 466:20 495:15 617:7 797:15 811:25 814:21 820:1 863:24 866:6 1484:22 1493:2 FILLS- 687:24 901:13 1485:8 1486:10 FINAL- 135:10 757:11 1016:1 1035:7 1309:17 1539:19,20 FINALLY- 92:16 174:18 500:13 997:8 1118:13 1122:13 1169:11 1309:9 1391:5 1493:8 1573:5 FINANCES- 1061:14 FINANCIAL- 340:19 652:22 FINANCIALLY- 1417:15,16,21,25 FIND- 31:20 72:11 73:7 92:22 117:9 125:18 135:2 143:7 151:23 153:17,21 163:16 204:9 230:12 305:22 320:25 329:20,24 359:8 395:9 490:23 580:20 628:12 646:7 648:17 672:15 678:25	687:5 702:5 752:12,14 756:15 76 FINDERS- 85:25 1543:6 FINDING- 70:6 95:18,24 144:2 266:3 358:21 609:11 636:18 637:8 687:8 711:14 712:16 715:5 716:8 725:25 886:1 920:22 1182:3 1235:9,20 1237:15,20 1240:6 1241:1 1243:10 1247:13 1291:15 1351:5 1353:8,25 1356:17 1511 FINDINGS- 16:11 17:3 23:11 52:13 83:17 87:17 177:16,23,24 185:8 364:8 1216:15 1232:20 1237:14 1248:21 1274:3 1278:16 1352:9 1524:8 1543:16,18 1548:25 FINDS- 147:5,8 412:19 611:1 1139:8 FINE- 81:5,14 197:13 247:14 256:6 262:10 263:20 269:5 356:20 390:21 413:9 419:18 429:23 437:11 662:15 788:14 820:3 844:4 890:16 897:13 898:9 939:17 940:20 1004:6 1202:18 1248:6 1364:22,23 1365:1 1385:22 142 FINGER- 296:22 533:8 1364:15 FINISHES- 52:19 1286:19 FINISHING- 1201:12 FIRE- 13:37	14:3,10 22:27 28:20 49:25 61:18 62:25 100:19,25 101:5,12,16 104:5 105:2 109:3 122:2 128:17,23 129:5,14 130:13 135:1 137:14,15,23 144:10 145:12,18 151:8 153:3,5,7,12,18,2 5 152:14,15,20 154:10 156 FIRE- 104:23 281:11 705:22 727:10 800:5 885:13,17 1000:24 1456:7,15,17 1531:4,9 FIREFIGHTER- 1038:14,18,20 1039:24 1044:1 FIREFIGHTERS- 100:18,21 1039:13,14 1040:1 1045:2,4 1047:11,15 1048:1,25 1049:13,17 1051:25 1508:2 FIREHOUSE- 1015:11 1019:2 FIREMAN- 1025:21 1497:17 FIREMEN- 1019:5,12 1497:11,14 1507:25 FIRES- 1038:10 FIRING- 767:22 884:5 996:21 FIRM- 167:9 1069:24 1207:17,19 1266:9 1267:13 1315:6 1490:2 1535:22 1536:2 FIRST- 32:20,25 33:16 42:4,11 52:7 72:13 73:20 76:25 79:19,23 81:20,22 82:25 84:15 99:21 105:20 111:24	124:7,25 125:3 128:18 137:7 148:25 150:23 154:2 164:18 167:19 200:1 206:19,20 213:14 216:3 217:2,14,23 2 FIRSTHAND- 1478:6 FIRSTTIME- 857:15 FISCAL- 599:17,21 618:3 FITNESS- 1410:17 FIVE- 10:15 53:18,20 105:24 111:13 134:10,12 136:16 259:11 417:19 459:11,13 487:3,5 493:6,17 499:12,14 539:16 561:7,24 578:13 641:7 647:13 683:11 763:23,24 797:19 853:22 856:2 885:3 888:18 911:19,21 944:24 FIVEBED- 1504:19 FIVEPOINT- 290:11,14 FIX- 269:10 1381:1 FIXED- 728:7 1324:20,23 FIXING- 1020:9 FLAG- 1136:9 1139:25 1142:8 1147:8,11 1484:5 1528:8 FLAGS- 1128:14,15,19 1129:2,3 1132:24 1133:11,16 1134:14,16 1135:1,7 1136:4,6,18 1138:1,3 1141:7,10,25 1142:3 1145:2 1146:3 1147:9 1191:7,9,10 1204:3 1273:24 1308:11,19,22 1510:8 FLAILING- 816:15 FLAMBOYANT-
--	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

1217:16 FLASHLIGHT- 388:1 FLASHLIGHTS- 1042:24 FLAT- 299:16,17 327:17,24 366:7 458:21,23,24 459:2,3,4,22 811:14 1136:3 1182:13,20 1183:17 1275:14,20 1330:4 1484:25 1520:10,11 FLAW- 1014:3 FLAWED- 898:10,17 FLEE- 1186:10 FLEET- 486:6 FLEMING- 1354:15 1358:14 FLEW- 167:12 1401:20,21 FLIGHT- 122:1 773:25 778:3 1186:6 1257:12 1259:12 1263:12 1287:11,12 1301:20 1516:1 FLIP- 110:5 345:9 503:20 514:18 516:18 526:22 575:13 933:5 982:24 1041:13,21 1165:12 1537:5,7,10,14 FLIPPED- 260:6 305:21 FLIPPING- 395:10 437:15 1378:9,11,12 FLOAT- 1552:23 FLOOD- 419:7 FLOODING- 1107:20 FLOODS- 105:19 FLOOR- 51:12 53:6 99:21 293:19,21,22 340:7 475:21,23 853:19 866:5 898:17 987:7 1075:19 1195:22 1518:8 1519:4 FLORENCE- 739:15,18,22 740:8 911:3,4,18 912:2 914:10	FLORIDA- 892:16 1375:18 1376:9 1383:22 1386:7,10,17 1401:13 1415:6,8,9,20 FLOW- 774:11 1132:12 FLOWED- 1082:22 FLOWING- 140:16 141:20 182:12 185:10 186:10 191:6 1430:17 FLOWS- 1098:8 1472:12 1555:13 FLU- 356:15,21,24 685:20,21 928:24 978:25 FLUID- 508:18,19 556:2 1282:17 FLUIDS- 174:13 291:25 512:21 1295:17 FLUSHED- 360:21 518:11 953:18,23 1183:7 FLY- 42:18 273:12,15,19,22 276:4,6,9,15,23 341:17,18,21 342:6 343:4 433:15 500:18,21 501:1,4,13,19 FLYERS- 1159:5 FLYING- 1128:15 FOCUS- 110:5 111:2 250:12 286:25 298:9 300:8 322:8 567:14 737:21 760:13,16 803:5 929:12 1014:1 1093:9 1177:11 1226:1 1228:11 1238:25 FOCUSED- 725:7 950:5 1449:2 FOCUSES- 1155:25 FOCUSING- 1086:10 1259:20 FOLDER- 304:8,10 323:11,14,17 325:5 329:24 1432:2 FOLK'S- 1378:10,12	FOLKS- 50:13 78:21 104:2 105:9 216:20 254:17 275:10 343:1 350:8 384:12 423:2 500:2 505:9 528:20 578:5 580:3 587:18 591:25 593:15 620:10 645:20 750:24 755:22 840:24 872:17 878:10 919:20 966:7 970:7 993:2 1040 FOLLOW- 54:25 233:10 244:13,15 285:10 319:18 366:12 502:8 669:13 798:14,18 815:18 965:18 988:9 991:4 1126:5 1231:3 1297:25 1428:24 1464:25 1496:22 1538:7 FOLLOWED- 122:17 490:13 778:7 784:18 849:20 850:7 851:3 973:10 1062:10 1090:9 1170:7 1273:13,14 1282:6 1284:7 1286:11 1478:6 1518:12,24 1526:7 FOLLOWING- 95:3 96:14 105:4 168:8,12 188:14,17 190:6 191:9 194:8 199:7 240:21 297:22 329:15 365:20 383:24 633:20 1047:22 1065:6 1107:21 1130:25 1280:22 1281:10 1282:5,22 1283:17 1284:3,21 1295:23,25 1357:4 1432: FOLLOWS- 230:22 277:22 379:19 455:6 467:18 613:25 771:10 782:6,13 985:13	1076:22 1098:5 1249:22 1336:21 1466:17 1562:12 FOLLOWUP- 46:18 512:13 898:7 966:12 1522:17 FOOD- 705:18 855:8 1463:25 FOOT- 292:24 367:7 465:12,13,20 554:4 1370:20 1381:9,12,20,21 FOOTAGE- 1010:10 1047:19 1048:17 FOOTBALL- 85:12,13,16 108:15,16 846:14 FORBID- 220:20 FORCE- 179:3 557:18 577:5 1256:5,6,9,22 1257:1,21 1258:1,2,7 1259:2,13 1261:14 1263:13,16 1294:8 1327:9 1527:11 1529:6 FORCES- 570:22 1481:24 FORD- 1041:17 FORECAST- 1547:5,11,16 FOREGOING- 1575:8 FOREGROUND- 464:9 1390:14 FOREIGN- 876:1 FOREMAN- 1249:21 1570:9 FOREMOST- 259:19 FORENSIC- 167:25 168:1,4,13 169:13 172:10,12,18,19,2 5 170:19 171:7,11 173:1,5 174:1 175:23 176:5 180:11,23 181:4 182:2 189:25 191:1 194:4 198:14,15 199:2 1062:17 1068:6 1151:12 1358:1,3 FORENSICS- 140:6 172:18 1266:19 FORESEE- 1339:10
--	--	--	--

OCTOBER 2015 DELANEY V. CASEPRO

1514:24 1517:7 FORESEEABILITY- 60:12 112:11 121:18 132:9 236:16 237:8 1161:12 1239:17,20 1439:13 1495:22 1496:15 1517:5 1534:8 1556:10 1568:9 FORESEEABILITY'S- 237:6 FORESEEABLE- 41:14,16,21 46:7 61:8 112:11,17,24 115:1 122:11 123:14 235:21 236:14 398:19 399:4 559:25 560:16 1107:16 1132:14 1147:17,19 1161:13 1439:18,21 1447:10,15 1471:24 1517:24 1525:23 1534:20 1553:5,9,13 155 FORESEEABLY- 1472:13 FORESEEN- 60:10 1495:25 1496:5,6,18 1532:14 1534:9 FORESHADOW- 1067:14 FOREVER- 105:15 721:6 1171:22 1401:8 FORGET- 127:13 155:10 229:2 512:22 522:18 561:17 661:17 909:5 961:6 1007:17 1082:7 1230:2 1278:10 1350:9 1426:8 FORGETFUL- 1278:9 FORGOT- 246:23 809:14 1007:3 1454:20 1469:10 FORGOTTEN- 641:18 1455:6 1488:21 FORM- 18:39 89:19 134:16 175:3	204:21 307:4 342:10 521:12 617:1,2 619:20 621:13,14 664:18 728:1,6 772:13 834:21,22 856:8 933:9 957:2,17 958:13,19 1164:12 1224:2,16,17 1235:20 1451:5 1458:14 1483:13 1503:12 FORMAL- 364:12 509:14 593:2 1061:9 FORMALITIES- 775:19 FORMALLY- 406:16 FORMAT- 1170:13 FORMATION- 668:18 FORMED- 189:19,25 569:25 573:19 712:3 1084:16 1120:19 1161:20 1162:2 FORMER- 60:19 566:17 748:14 1205:8 1456:5 FORMING- 1175:19 FORMS- 82:15 376:3 457:22 928:10 931:5 1484:22 FORMULATE- 1153:13 FORMULATED- 937:16 1202:13 FORMULATING- 1168:21 FORT- 535:25 536:4 593:12,18 999:12 1386:10 1415:13,15 FORTH- 80:19 117:5 142:18 238:24 240:13 257:20 258:23 259:4 262:13 280:12,24 311:25 321:3 325:18 333:19 407:2 508:20 509:22 602:7 619:20 671:23 680:25 917:19 921:15 974:1 1076:21	1110:2 1111:1 1192:1,2 1275: FORTHCOMING- 327:21 366:23 546:23 558:4 810:23 865:6 1357:22 FORTHWITH- 459:18 FORTIES- 294:19 FORTUNATE- 1202:14 FORUM- 172:19 FORWARD- 68:16 69:1 127:19 149:3 166:7 182:24 270:25 278:17 389:3 434:9 435:14,24 437:4 439:18 571:23 572:7,8,12 578:23 602:19 621:1 622:18 628:4,14 661:23 751:4 756:6 871:3 887:4,24 897:17 909:13 911:1 917:14 FORWARDTHINKING- 1252:24 FOUL- 1448:12,14 FOUND- 45:19 69:1 117:8 122:7 180:13 192:6 258:16 354:22 384:19 515:4 547:2 579:5 631:8 640:20 678:9 684:15 712:2 744:13,20 830:2 895:8 910:4 921:14 925:22 958:19 978:15 1070:24 1135:6 1185:22 1197:19,24,25 FOUNDATION- 131:6 188:19 189:14 257:6 406:14 655:19 662:13,14 1103:12 1154:14 FOUNDATIONAL- 181:3 428:16 453:12 656:2 675:14 857:5 902:10 FOUNDED- 123:23	567:8 568:9 FOUNDER- 650:21 FOUR- 8:3 43:21 97:13 110:10 111:13 121:16 125:17 130:15 136:16,18 140:17 288:14,16,17,20 343:12 374:9,16 375:22 377:9 427:21 459:11 460:13 462:7 468:18 472:19 475:13 479:18 493:6,17,23 507:1 556:7 683:9 76 FOURANDAHALF- 105:17 FOURBED- 763:19 1294:10 1504:18 FOURHOUR- 1063:21 FOURMINUTE- 1480:2 FOURS- 744:17 FOURTEENTH- 265:13 1353:16,20,21 1358:10 FOURTH- 51:12 53:6 456:14,17,20 468:23 487:10 FOURYEAR- 736:23 1258:12 FRACTURE- 183:7,9,10 186:7 187:9,11,12 193:13 FRACTURES- 182:4 191:12 193:5,9 196:5 FRAGMENTED- 329:21 FRAME- 60:19 129:9 146:21 182:19 206:12 285:3 342:14 379:18 479:19 484:19 573:15 631:24 636:17 640:8 642:7 672:7 701:4 711:14 713:14 715:5 760:17 821:13,20 838:24 841:16 852:25 854:24 903:3 904:19
--	---	--	---

OCTOBER 2015 DELANEY V. CASEPRO

912:4 959: FRAMES- 113:5 FRAN- 276:18,19,22 FRANCHISE- 572:23 573:9,13 FRANCHISES- 573:5 FRANK- 1360:17 FRANKLY- 71:16 410:25 1231:6 1293:9 1425:6 1444:17 1496:10 1525:17 FRAUD- 1108:22 1109:1 FRAUDS- 676:13 677:15 FRAUDULENTLY- 1108:3,7,23 FREAK- 1404:19 FREAKING- 1401:8 FREE- 113:1 165:21,22 166:1 201:3,7 228:3,8 352:14 386:7,13 519:17,20 561:4 682:4 729:6 769:18 906:2 988:13,18 1056:4,11 1087:9 1100:24 1210:19 1319:11 1340:5,10 1360:21 1361:14 1477:1 1542:25 1573:8 FREEDOMS- 105:14 106:1 FREELY- 362:24 FREEZE- 984:14 FRENCH- 736:7 1317:15 FREQUENCY- 484:4 FREQUENTLY- 547:8 780:15 813:10 1140:3 1332:16 1333:1,3 FRESH- 99:16 121:8 390:22 391:3 480:6 481:17 486:20 489:15 492:17 495:4 538:19 549:5 559:25 776:23 777:19 818:20 873:14,15 963:5 964:11	985:14 987:4,19 1085:5 1122:20 1124:1 1139:19 1161:16 1185:11 1273:2 13 FRIDAY- 8:3 18:3 94:8 95:12 96:2 104:21 105:5 108:9 258:19 302:21 303:19 326:5 365:18 376:5,8,19,25 377:10 378:7 381:15 397:16,19 427:21 453:24 458:14 475:11 490:15 497:18 547:3 581:23 605:20,25 683:9 684:18 FRIDAYS- 1481:9 FRIEND- 95:13 113:2 115:25 1090:23 1105:2 1107:13 1111:2 1149:6 1199:16,22 1200:2 1206:7 1209:10,13 1302:24 1307:19 1375:13 1453:8 1467:1 1468:3 1470:18 1480:16 1501:7 1516:13,14 1534:7 FRIENDS- 91:23 1212:7,9 1228:10 1376:21 1491:22 1540:24 1571:9 FRIENDSHIP- 1206:15,19 1207:3 FRIGHT- 1011:6,7 FRIGHTENED- 330:7 337:12 1443:17 79:21,22 94:9 FRONT- 42:5 56:1 111:4,5 153:4 157:6,19 159:1,8 161:3,4,16 183:2 241:2,11 269:18,20,24 277:2,6 296:9 310:13 312:6 326:23 330:9,10 332:10 337:6,10 344:3,12,15 350:2 354:4 362:12,13	385:5 386:19 FRONTS- 999:20 FRUSTRATED- 302:14,24 330:21 334:15 335:15,22 542:6 934:25 1193:25 1194:3 1285:24 FRUSTRATION- 301:1 302:15 334:16,21 383:18 FRYING- 1485:6 1532:25 FUDGE- 1006:4 FULFILL- 169:25 170:5 689:6 1077:16 FULL- 76:7 177:5 314:17 583:5 584:5 671:23 719:25 737:1 757:8 758:1 784:11 840:17 863:13 973:25 1091:21 1255:12 1309:23 1360:1 1376:2 1440:23 1541:12 FULLTIME- 379:11,12 583:9,12,21,23,25 584:7 625:11,14,19 728:14 870:10 872:3 1152:9 FULLY- 107:14 112:4 330:4 333:24 668:20 701:10 763:4 773:24 778:3 1122:2,19 1127:22 1292:3 1307:19 1488:1 1492:18 FULLYEXECUTED- 667:10,16 674:4 FUN- 1253:1 FUNCTION- 405:1,3 1079:8 1392:7 1441:18 FUNCTIONING- 1382:3 1392:2 FUNCTIONS- 404:24 405:1 1378:1 FUNDAMENTAL- 76:11 557:10 1556:9	FUNDAMENTALS- 747:9 FUNDING- 1061:18 FUNDS- 874:24 1160:12 1402:1,2,8,22,23, 25 FUNERAL- 1412:8 FUNNY- 1231:11 1384:6 1507:9 FURTHER- 120:7 137:4 142:22 164:8 178:15 214:3 221:7 228:2 300:20 350:15 360:6 361:3 362:22 386:2 465:19 494:2 557:22 572:16 663:10 673:7 696:6 697:21 699:8 718:4,20 719:13 721:20 777:10 807:25 918:4 959:19 96 FURTHERANCE- 596:20 FUSS- 536:1 FUTURE- 87:9 286:13 413:6 968:14,15 G G/A/L/E/A- 182:25 GAINED- 1073:23 GAIT- 1380:25 GALEA- 182:25 GALLERY- 97:15 316:11 GAME- 390:7 411:6 1448:10 GAMES- 1117:7 1378:5 GANDER- 256:4 GAP- 423:8 689:17 1014:6 GAPS- 689:12 GARDEN- 42:8 1119:3 GARDEN'S- 1572:19 GARDENVARIETY- 42:18,23 49:13 GARY- 3:10 164:15 235:4 256:15 1233:13 1515:5 GAS- 129:15
---	--	--	--

OCTOBER 2015 DELANEY V. CASEPRO

GATE- 133:11 337:6,10 385:5 487:20 516:8 540:25 976:17 977:8,20 987:13 1139:20 1197:22 1495:5 1518:1,2 1521:17 1526:11,20,22 GATEWAY- 152:6 GATHERED- 1274:1 1309:16 GATHERING- 958:15 1373:5 GATORADE- 478:13 GAVE- 61:24 99:12 100:4 103:5 217:3 218:6 305:3 321:1 359:5 361:18 362:5 378:4,19 394:15 396:2 405:25 406:12 414:2 435:1 495:25 549:1 652:14,15 667:4 731:16 748:25 863:18 920:14 942:18 973:16 997:5 1057:23 GAVEL- 909:7 GAZE- 949:21 950:3,4 GENE- 786:7 GENERAL- 4:38 44:14 49:22 56:17 59:9 60:8 61:10 74:22 101:15 117:1 173:12 181:17 237:22 244:9,11 257:5 346:4 396:18 484:7 486:6 589:17 674:14,15 737:3,7,24 739:15 773:9,23 774:3,8,10,23 777:4,8 778:1 815:19 81 GENERALITIES- 785:11,13 1329:3 GENERALIZATION- 518:19 779:10 GENERALLY- 275:3 298:22 303:17 326:20 346:2,10 358:1 366:1 368:6	370:22 444:13 580:11 586:4,7,17 587:1 679:4 762:3 772:24 773:14 786:23 814:18 853:23 915:24 926:4 980:24 1078:16,22 1315:12 1546:4 1556:9 GENERATED- 492:7 1165:23 1321:25 1519:12 GENEROUS- 1349:14 GENITAL- 1292:4 GENIUS- 1364:12 1449:22 GENTLEMAN- 95:13 99:10 100:14 113:3 114:25 117:17 118:1,7,8,11,18 119:4 120:7 121:8 122:1,8,14 257:14 266:19 350:8 352:5 354:16 359:25 360:8 361:7 362:9 366:5,18 465:18 470:19 481:6 506:5 511:2 515:20 517:17 519 GENTLEMAN'S- 362:1 594:14 1165:4 1237:22 1241:3 1439:14 GENTLEMEN- 51:20 72:7,10 73:22 74:7,23 75:4,17,25 76:9,18,23 77:20 81:18 82:17,20,24 83:9,21 84:5 85:10,23 86:1,15 87:2 88:4 89:5,21 90:12 92:7,16,24 93:12,19 100:4 101:8 102:1 105:9 106:17,24 107:13 108:21 114: GENTS- 934:5 GENUINE- 1109:12 GENUINELY- 1435:3 GEORGE- 1061:19 1065:14 1070:14,17,20	GEORGIA- 629:11 635:5 GERARD- 12:36,39 993:20,21 994:9,13 1034:23 GERIATRICES- 1062:17 1064:7 1151:10 GERMS- 1414:5 GESTURE- 86:11 362:20 801:1 944:20,21,22 945:1 1212:16 GESTURES- 117:18 543:23 1142:25 1205:1 GESTURING- 1224:11 1275:10 GET- 31:4 32:1 33:6 35:14 38:1,22 39:15 45:8 52:9 56:16 57:24 61:6 62:7 66:17 71:7 74:10 75:8 79:24,25 92:12,13 96:10 99:3,16 100:15,18 108:5 110:2,5 113:25 114:13 117:3,6 119:14 120:17,22 121:8 123:19 125 GETS- 38:22 59:22 98:16 99:3,12 100:24 101:13 114:9 160:12 204:4 246:15 290:2 420:6 423:9 454:14 472:10 520:6 563:21 582:5 597:9 614:23 647:16 650:11 653:7 682:9 800:7 876:9 909:14 942:2 997:7 1013:12 1014: GINGER- 478:13 GIRL- 73:25 1375:3 1444:12 GIRLFRIEND- 1375:8 GIST- 834:2 GIVE- 45:20 70:11 74:17 79:24 84:2,20 85:18,19	87:18,24 89:6 90:10,16,23,24 91:7 92:21 121:12 123:3 140:10 146:21 149:8 166:12 167:16,22 171:15 172:2,4 175:7 182:14 201:24 209:15 218:5 221:10 232:7,8 245:3 GIVEN- 59:18,19 114:6 134:25 144:16 172:5 181:14 214:17 217:22 226:3,10 236:13 261:3 322:5 355:23 365:8 379:4 488:20 514:23 563:1 636:5 714:23 772:19,23 773:5 851:2,9 898:4 904:15 915:15 920:14,17 962:22 974 GIVES- 73:19 127:5 130:17 235:24 327:10 422:1 552:11 577:17 929:10 1002:24 1075:17 1137:17 1154:3 1349:17 1405:19 GLAD- 45:17 69:11 411:17 750:25 899:8 1073:10 1391:5 GLADLY- 611:11 770:2 GLADSTONE- 1374:14 GLANCE- 514:24 GLANCED- 808:11 GLAND- 192:13,14,16,18 GLASS- 296:8,19 349:1,2 GLOVELL@CARLOCKCO P PELANDCOM- 3:11 G GO- 30:16
--	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

32:22,23 37:23 44:10 46:15 49:4,18 52:12 53:5 55:5 56:2,8,17 58:23 61:1 66:9,22 67:16,19 69:1 78:25 82:25 95:10,15,16 96:11 105:12,19 107:2 110:9,13 111:11,14 112:8 114:3 115:2,16 118:4 119:8,13 GOAL- 344:3 814:22 1334:17 GOD'S- 73:16 GOGETABREATHOFFRE	904:18 963: GOOD- 30:10 38:11 41:5,7 59:16 60:3,16 61:21 65:10 72:7,9 73:20 74:15 95:1 108:22,24 109:21 127:1 128:14 149:18 164:15 166:21,22 192:20 198:14 202:3 208:10 214:8 220:15,18 222:5,6 229:22 235:13,14,18 244:15 GOODBYE- 1386:24 1511:24 GOODFAITH- 1111:21,22 GOODIES- 1476:21 GOODNESS- 32:10 255:23 313:18 388:4 632:1 742:7 799:20,23 877:15 887:14 1324:16 1564:20 GOODSTEIN- 1:42 30:8 234:7 390:25 413:8 427:25 888:25 1227:18,19 GOODSTEIN'S- 1228:13 GOOGLE- 972:6 GOOSE- 256:4 GOOSE/GANDER- 1218:6 GOOSING- 1251:17 GORGE- 1384:14 GOT- 31:23 35:25 37:2 44:7 50:11 54:25 55:17 56:13,21 57:3 58:11 60:25 62:2,4 64:23 65:7,10 66:4 68:7 69:7 70:12 71:19 78:18 79:25 91:3 97:12 103:19 104:2 105:1 114:9,10 117:14 118:3 119:13 121:23 128:4 13 GOTCHA- 230:12 395:22 398:15 399:5 422:16,25	724:17,21 725:1 1343:15 1352:3 1468:14 GOVERNED- 580:14 586:7 590:15 917:20 1220:13 GOVERNING- 657:14 GOVERNMENT- 35:25 51:16 57:12 68:24 71:3 102:18 124:2,15 272:12 338:21 423:10 425:5 426:21 554:23 555:10 559:3 567:25 572:2,15 574:17 580:5,10 581:6,8 587:1 589:21 590:7 591:4 595:21 596:9,16 599:16 600:18 601:5, GOVERNMENT'S- 586:7 599:17,21 601:10 602:3,13 672:10 690:15 GOVERNMENTAL- 772:13 1468:5 GOVERNS- 657:8 GOWN- 330:2 477:12,15 530:4 1121:21 1127:25 1140:11 1144:5 1197:12 1198:2,10,17 1199:5 1290:15 1291:17,20 1292:7,10,11,22 1328:6,10,14 1536:20 GOWNED- 1122:9 GOWNS- 1198:21 1290:12 GRAB- 344:20 503:20 613:10 1363:2 GRACIOUS- 386:18 799:20 GRADE- 913:9 1405:25 1406:2 GRADES- 907:17 GRADUAL- 932:9 1179:12,16,17 1184:9 1301:4 1491:12 GRADUALLY- 932:20	GRADUATE- 170:3 1388:7,10 1527:10 GRADUATED- 168:6 736:15 1256:8 1258:6,21 1260:22 GRADUATING- 1259:1 GRADUATION- 95:4 1387:21,24 GRAFTS- 1399:13 GRAND- 887:5 888:14 1008:21 1022:12 1235:14,23 1237:5 1239:1 1247:15 1350:11 1354:11 1497:4 1525:10 GRANDCHILDREN- 1398:17 GRANDFATHER- 833:16 GRANDFATHERED- 276:10 342:12 GRANDMA- 1480:16 1484:13 GRANDMOM- 343:24 GRANDMOTHER- 237:4 297:9,15,17 336:25 337:2,12,21 378:3,6 379:23 380:2 381:1 451:22 551:10 797:6,12 934:1 1095:14 1209:13 1301:8 GRANDMOTHER'S- 115:25 GRANDSON- 1209:16 GRANDSON'S- 797:13 GRANDSONS- 1398:17 GRANT- 1440:10 1466:18 GRANTED- 35:7 124:22 242:7 696:13 914:14,18,22 1057:18 1492:1 GRANTING- 550:21 1057:20 GRASS- 1547:13,16 GRATEFUL- 31:18 1030:18 1253:20 GRAVE- 1504:7 GRAVELY- 409:10
---	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

1493:25 GRAVES- 1371:5 GREATER- 70:18 84:12,13,21 85:21 106:11 108:12 837:18 1204:25 1444:9,10 1544:15,17,19 1545:14,20 1548:10 1550:18 1551:20 1552:4 1555:3 1556:25 1558:7 1560:9,12 1561:5 GREATEST- 76:21 182:21 GREATLY- 47:13 1019:18 1020:22 GREEK- 173:14 GREEN- 6:40 26:28 252:6,10,13 1421:2 GREENSBORO- 1480:24 GREETING- 298:23 GREETINGS- 1217:15 GREW- 274:8 1366:8 1376:6 1377:17 1389:16 1511:13 GRIEF- 64:2 1404:4 1405:6 1511:10 1560:17 GRIER- 892:16 GRIEVED- 64:16 GRILLING- 750:4,8 GRIN- 246:14 GRIND- 1505:5 GRINNED- 246:14 GRITS- 101:22 GROANING- 551:15 GROGGY- 418:7 GROOMED- 589:10 GROSS- 876:9 1437:8 1438:2 1452:2,12 1462:17 GROSSLY- 1090:13,16 GROUND- 632:21 1043:24 GROUNDS- 554:5 560:1 684:18,19 1437:4 GROUP- 498:3,4 500:25 591:19	954:4 GROW- 274:7 906:11 1384:19 GROWING- 813:5 1066:16 1414:11 GROWN- 1116:5 1397:21 GRUESOME- 678:24 1449:14 GRUESOMENESS- 138:22 GS- 51:12 593:24 GUARD- 80:17,18 127:18 128:18 228:13 930:15 GUARDS- 385:6 1526:20 GUESS- 128:11 156:15 159:20 162:11 163:10 224:3 263:12 353:18 381:2 416:11 443:11 465:12 474:17 486:25 487:1 505:25 557:16 583:16,18,19 595:8 628:14 645:16 646:12,22 652:23 659:14 841:7 886:7 1012:3 1031:1 1 GUESSING- 606:4 645:17 787:1 968:23 GUESSTIMATING- 468:17 GUIDANCE- 693:4 695:7 894:13 1058:21 1217:14 1240:16 GUIDED- 928:17 GUILTY- 16:12 17:4 23:12 30:21 49:24 266:3 1022:15 1227:2 1232:21 1235:17,20 1236:9 1237:20 1247:13 1248:22 1352:10 1354:1 1355:25 1467:3,21 1499:3 GUN- 514:5 1197:15 1302:24 1424:13 1496:13 GUNS- 1121:15	1442:22 1443:1 GURU- 387:22 GUY'S- 544:3 1191:11 1297:16 1299:9 GUY'S- 31:5,7 45:3,12 266:25 267:18 420:12 677:12 720:23 970:6 1044:19 1212:5 1292:20 1346:21 1426:22 1451:11 1568:19 GYN- 347:25 GYNECOLOGY- 1258:23 H HADN'T- 32:16,17 37:25 38:17 54:8 62:20 68:21 120:25 121:1,3 189:13 477:14 551:12 640:21 676:15 794:20 852:15 882:8 979:10 1161:25 1165:23 1290:21,24 1391:2 1413:4 1495:11 1508:15 HAHNEMANN- 498:2,3 HAIR- 518:14 589:12 1228:13 1370:13 HAIRS- 1304:7 HALF- 56:24 64:14 119:2 193:12 272:6 288:13 299:8 335:6,19 336:4,10,11,14 341:9 344:4,15 411:14 432:17,19 443:11 497:4,13 498:19 499:5 605:14 742:2 1348:16 1372:13 1383:2 1502:20 1540:14 HALFAUNT- 1396:16 HALFINCH- 21:26 HALFSISTER- 1400:3 HALFSISTERS- 1397:9,10,12	HALFWAY- 224:12 493:5 HALL- 297:11 345:19 346:23 347:16 348:25 383:22 594:9 617:6 643:19 1240:10 1485:13 1504:25 HALLUCINATE- 308:10 HALLUCINATING- 308:20 333:13 371:8,9 932:1 935:6 1522:21 HALLUCINATING'S- 309:8 HALLWAY- 296:10,11,25 297:1,13 298:4,5,6,18 345:19 347:5,17,20 348:25 350:15 374:4 382:13 384:2 428:13 464:5,16,18 485:12,16 508:7,9,12,13,17 525:25 539:18,23 540:3,6,12 1519:6 1521:14 HAMPTON- 40:17 629:4,7 899:24 900:4,8 1502:15 HAND- 74:5,12 149:5 156:5 166:10 201:22 217:5 239:19 243:24 271:1 273:5 323:4,8 391:9 430:12,13 437:9 438:13 467:6,7 564:22 726:9 734:18 746:14 752:7 789:3 879:2 957:9 958:6,7,12 1154:12 1161:10 1235:5 1255 HANDBOOK- 103:5 279:15 574:21 576:18 577:8 711:10 716:15,21,24 1464:24
--	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

HANDCUFFS- 111:24 HANDED- 260:6 262:2 323:13 831:11 1005:1 1233:6 1251:4 1399:25 1482:1 HANDELMAN- 1493:17 HANDFUL- 609:4 HANDLE- 415:9 684:6 1008:13 1063:24 1223:13 1249:14 HANDLED- 421:20 HANDLIN- 1400:2 HANDLING- 1296:10 1304:10 HANDOFF- 763:3,11 1482:5 1519:7 HANDS- 74:11 260:15 300:19 305:17 311:22 327:1 330:18 333:14 334:20 350:9 362:16,19 461:21 462:10 613:11 822:3 882:13 886:17 926:19 929:2,4 946:25 1275:10,22 1281:17 1286:9 1330:25 1397:4 1484:9 1501:2 1503: HANDWRITING- 277:12,20 278:1 315:23 439:24 452:20,23 467:18,22 754:11,13 790:5,7,19,20,23 798:13 805:23 806:1,2 823:8,12 861:9 870:17 901:18,22,23,24 903:5,13,14,15 947:14 955:14 HANDWRITTEN- 536:24 537:2 790:3 HANDY- 869:17 971:16 HANG- 532:10 1215:25 1216:1 1276:18 1292:24 HANGING- 942:25	HAPPENING- 51:11 88:3 129:7 308:18 407:20 528:19 641:25 703:6 833:11 861:2 908:19 931:15 1053:9,16 1090:1,2 1130:11 1195:25 1519:23 HAPPY- 32:12 45:7,10 51:4 228:21,22 608:18 610:7,17 661:11 726:6 934:9 942:11 1008:25 1096:9 1192:12 1251:8 1351:13 1382:10 1390:20 1406:7 1572:23 HARASSMENT- 103:7 585:8 HARD- 237:11 258:14 303:25 304:17 326:22 368:24 650:23 684:1 739:2 780:17 790:20 807:4 834:21 869:9 887:14 960:22 1112:5 1120:16 1163:25 1203:23 1231:3 1362:9 1364:5 1382:4,7 1384:18 1435:3 1492:23 1505:7 1 HARDCOPY- 27:23 28:4 743:10 806:14 889:25 994:8 1034:6,22 HARDEE- 41:15,24 51:3 58:23 59:15 60:1,4,14 61:14 65:7 398:17 1082:15,23 1098:1,5,9 1100:4,11 1103:3,5,8,9 1107:11,13,17 1438:13,21 1440:17 1442:5 1447:6,7,14 1471:17 1472:6 1567:18 HARDEE'S- 135:4 855:5	HARDEES- 129:14 HARDER- 1231:7 HARDEST- 221:16 1407:2 HARDWORKING- 780:14 HARDY- 566:24 628:6 667:9 HARM- 46:7 61:10 102:1 118:20 337:14,22 362:11 384:25 416:14 477:25 494:20 549:18,19,25 939:2 968:9 979:24 1087:10,15 1094:4 1107:14,16 1121:17 1128:6 1140:20 1147:18 1168:3,15 1169:23 1175:12 1193:6 1196:1 HARM'S- 1090:18 HARMED- 1534:21 HARMING- 46:5,14 47:8 337:23 400:25 404:19 414:16 551:2,6 1093:7,8 1125:8 1131:22 1140:1,2 1168:10 1180:3 1191:21 1203:21 1339:9 1491:25 HARRUMPH- 221:8,9 222:7,13,17 HARSH- 906:23 HARVARD- 1503:14 HASH- 825:8,10 HASH'T- 40:4 117:15 189:2 391:8 413:4 676:3 982:3 984:10 1104:25 1154:6 1177:4 1218:19 1241:8,19 HAT- 1373:7,8 1405:5 HATCH- 1454:3 HATE- 50:4 72:9 128:24 344:18 353:22 583:18 678:19 800:3 1101:10 1109:11 1135:11 1381:2,25 1382:2 1429:15 1567:7	HATED- 1381:2 1406:11 HATEFUL- 682:13 HATS- 1373:6 1406:14 HAVEN- 1225:23 HAVEN'T- 32:20 34:16,17 42:17 220:12 272:1 391:3 429:22 470:9 536:11 641:14 1067:11 1117:10 1151:4 1154:5 1183:5 1224:20 1361:5 1456:15 HAWAII- 1067:13 1487:13 HAZARDS- 1087:9 1100:25 HCW- 694:17 695:6 HCWB- 694:25 HE'D- 52:5 260:17 377:25 381:7 487:9 490:22 658:7,8 828:1 977:19,20 1178:9,10 1406:17 1445:18 1527:9,10 HE'LL- 115:19 123:15 HE'S- 56:25 59:23 73:17,20 101:2,4,6,7 111:21 114:9,10 115:6,9 117:9,11,13,14,22 119:3,13 120:16 123:4 130:20 148:4 185:1 188:25 195:3,4 225:11 262:13 264:1 275:13 295:15 302:23 305:4 318:22 336:20 356:19 3 HEAD- 138:3,19 170:20 186:14 213:16 281:12 300:20 301:25 311:24 328:10,12,13 341:25 476:24 477:6 478:16 480:18,24 481:5 484:20 485:2,25
---	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

487:3 520:6 538:7 698:4 739:25 740:1,2,3,5,10,13 914:17 915:5 998:22 1 HEADACHE- 943:23 HEADACHES- 944:10 HEADED- 498:3 1268:14 HEADING- 485:12 582:9 587:5 589:1 HEADON- 1435:5 HEADPHONES- 216:22 HEADQUARTERS- 566:22 592:11 593:17 620:15 631:1 707:22 715:3 743:1,5 871:24 884:14,20 HEAL- 1116:9 HEALING- 1116:8 HEALTH- 51:22,25 57:22 108:3 168:14 172:16,23 236:12 282:25 297:14 307:5 311:4 321:4 322:15,16 333:18 340:4,5 341:2 357:20 359:25 360:20 370:2,4,16 381:22 399:2 436:8,10,22 456:11,19 471:7,11 472:11 498:15,16 HEALTHCARE- 54:24 58:18 60:6 61:16 112:20 122:14 123:10 226:7 238:2,7,8 240:9,22,24 541:19 570:9 691:16 694:18,19,20 696:19 698:18 699:5 922:18 967:8 1083:12 1088:2 1098:16 1119:14 1122:16 1131:2,25 1160:18 1166: HEALTHCHALLENGED- 355:10 927:16 HEALTHILY- 820:4	HEALTHY- 1289:20,22 HEAR- 32:1 36:3 40:21 52:15 74:2,5 81:21,22,25 88:5,25 89:23,25 90:4 95:17 96:17 97:11,19 99:15 106:25 108:1 111:15 112:6,19,20 113:7,11,21,23 114:21 116:11,16 117:25 118:6,17,23 119:16 120:14 122:19,20 126 HEARD- 32:16,20 33:3 42:12 113:13 125:2 132:7,9 146:20,24 194:15,17 221:8 275:10 289:21 300:14 311:20 333:4 341:13 371:6 406:22 409:9 419:3 426:15 447:6 462:12,13 463:3 475:9 485:24 512:2,24 532:14,19,22,24 HEARING- 32:11 38:3 42:5 55:16 58:9 73:24 90:22 126:21 128:10 188:22 194:12 201:15 207:2 217:18 242:12 250:15,16 296:18 300:21 309:6 333:9 344:18 362:22 363:1 371:15 472:5 486:14 595:13 607:5 623:24 655:6 657: HEARSAY- 163:13,19 609:13 721:19,20,24 722:7 1001:22 1170:25 1171:2 HEART- 187:19 192:5 237:9 357:10 358:1	360:10 611:3 653:8 822:6,10 953:13 1062:5 1136:9,11 1166:16 1181:6,12,16,20 1185:1 1191:4 1198:25 1208:3 1287:17 1288:8,16,22,25 1289:8,19,24 1290:2,8,10 1291:24 1295:8 HEARTBREAKING- 390:12 HEARTWRENCHING- 390:12 HEAT- 335:11 387:19 512:19 HEATING- 296:21 HEAVEN- 220:20 HEAVIER- 1181:2 HEAVIEST- 516:1 HEAVY- 532:21 548:18,22 613:11 HECK- 1109:7 1110:16 HECK'S- 1400:18 HEELS- 72:17 1164:24 1425:11 HEIGHTENED- 228:17 HELD- 129:24 305:17 327:1 1064:12,16,24 1107:5 1209:10 1235:12 1242:2 1447:10 1503:7 1553:15,24 HELLO- 76:3 214:9 295:9 415:6 730:6 843:23 993:16 1084:13 HELP- 45:6 74:18 77:3 116:21 121:5 123:15 149:9 166:13 175:3,6,9 178:16 202:1 247:16 250:21 271:3 370:6 371:22 372:2 399:8 407:24 420:11 430:16 449:20 484:11 497:17 518:25 527:9 531:25 538:24 542:25	565:1 6 HELPED- 115:24 328:16 418:3 1072:17 1320:10,21 1402:12 1412:15 1509:7 HELPPFUL- 39:15 58:13 79:1,2,3,12 133:8,9 251:12 808:12 829:21 830:18,19 845:5 866:25 867:5 1112:9 1269:23,24 1284:20 1294:19 1326:12,13 1431:18 1571:25 1572:1 HELPING- 172:6 567:17 1038:10 1114:2 1366:24 1399:9 1550:23 HELPS- 78:22 1147:9 1405:20 HEMISECTION- 193:10 HEMORRHAGE- 178:19,20,25 179:2,6,10 180:21 HEMORRHAGES- 181:23 183:4 186:15 HEMORRHAGING- 140:12 182:9 192:23 HENDELMAN- 12:18,23 27:33 44:14,18,21 46:1,2,18 49:10 51:10,11 52:22,23 53:5 99:2,4,8 102:10 111:8 112:23 119:14,16,21,23 120:9 395:13,17,20,21 396:18 397:18,21 398:23 403:23 414:7,8 417:22 505:24 530:20 536:21 HENDELMAN'S- 44:14 51:19 1034:5 1297:22 1318:11 HERE'S- 38:5,22
---	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

45:2 63:6 79:19 133:23 142:24 155:25 158:12 222:23 224:21 243:11 257:8 258:5 407:17 421:4 423:20 424:7,8 489:22 525:5 580:13 644:3 659:4 675:25 676:5,8 682:9 687:10 793:21 920:19,20,21 925:6 9 HEREBY- 671:24 1356:4 1357:1 1575:7 HEREIN- 259:2 831:21 1357:10 HEREINAFTER- 1354:22 HERETO- 1355:14 1575:16 HERMELYNDA- 286:9,11,12,21 HERO- 65:9 HESITATE- 73:24 74:6 HEY- 61:4 119:21 120:21 529:21 650:6 651:13 652:2 920:19 927:1 934:18 958:19 959:3,4,5 961:20 963:2 988:2 1104:24 1105:4 1159:10 1189:6 1297:15 1524:25 1526:9 1530:20 HI- 199:25 298:24 431:7 1214:6 1347:11 1395:24 1419:11,12 HICCUP- 220:23 HIDDEN- 49:14 785:10,18,20,23 842:19 1561:13,18,19 HIDE- 39:18 427:1 1404:25 1406:17 HIDING- 980:11 1406:17 HIGH- 76:7 95:4 358:1 360:23	381:21 388:12 512:19 606:12 629:25 630:1,4,19,20 705:18 892:20 944:9,14 1144:11 1181:17 1288:21 1367:12,14 1368:3 1386:10 1388:7 1415:17 1497:25 HIGHER- 358:4 502:22 952:13 953:5,6 1261:16,17 1288:3 1289:5,25 1290:3,5 HIGHEST- 569:8 1144:11 1258:4 HIGHLAND- 1365:22,24 1375:25 1389:1 HIGHLANDS- 1372:9 1386:21 1389:7,16 HIGHLIGHT- 584:19 587:5 670:23 HIGHLIGHTED- 354:24 694:15 1167:15 1497:3 1515:20,21 HIGHLY- 241:7 1010:25 1011:13 1012:18 1237:17 1269:10 1320:13 HIGHRANKING- 104:22 HIGHTECH- 110:7 437:12 HIGHWAY- 101:10 136:7 137:12 138:8 145:3,5,6 149:24,25 150:4,5,6,11 152:4 1404:13 1478:8 HILL- 100:2,8,10,11,20 101:1 128:20 216:16,18 567:11 571:21 572:1 650:15,19,21 652:20 672:8 679:23 1010:14 1049:5 1055:9 1498:3 HILL'S- 647:10 HILLCREST-	1369:16 HILTON- 739:25 740:1,2,3,5,10,13 914:16 915:5 HINDMAN- 498:2,4 HINDSIGHT- 968:11,18 1160:19 1237:13 1312:3,7 1469:14,16 1470:17,19,20 1471:7 1559:11 HINDSIGHT'S- 1469:25 HINGE- 183:9 HINT- 1449:16 1562:6 HIP- 193:7 1381:19 HIPAA- 284:14 298:4 351:17,18 438:16 502:1 627:15 HIPS- 1116:17 HIRE- 124:10 617:1 618:17,19,24 688:11,12,14,15,1 6,18,22,23 687:21 689:3,10 692:6 1153:14 1154:17 1219:8 1345:14 1455:13 1499:23 1540:8 HIRED- 103:4 618:9,20 629:13 714:17 1038:25 1076:15,19,25 1077:15 1079:8 1110:22 1502:19 HIRES- 689:4 1345:14 HIRING- 43:20 44:6 568:4 570:8,13 767:22 1426:25 1427:11 1455:9,11,14,23,2 5 1448:20 1454:23 1462:10 HISTORIAN- 791:1,3,5 HISTORICAL- 1167:12 HISTORY- 46:21 48:25 49:1 102:3 105:12	114:6,9,15,18 116:15 181:13 235:18 277:19 307:12 309:25 310:21 319:24 320:4 321:3 327:8 340:2 356:7,8 358:24 359:15 399:16,17 401:16,17 410:22 414:3,15 416:13 440:9,13 45 HIT- 128:16 129:14,15 130:2 144:9 347:22 437:9,14 477:6 513:7 562:17 653:19 909:7 970:22 1024:16 1237:5,6 1354:9 1400:24 1448:11,13,15 1496:4 HITS- 204:2 1448:18 HITTING- 101:7 437:17 HIVPOSITIVE- 340:11 HMMUM- 290:22 342:25 479:15 HMO- 1156:10 HO- 356:6 HOCKEY- 1257:25 HOLD- 78:17 88:20 155:19 169:9 250:23 274:23 297:9 328:22 407:4 506:15 569:5 571:5 641:15 669:24 690:17 702:21 786:3 839:23 877:11 1062:13 1066:3,5 1104:1,4,6,7 1107:8 1108:19 1155:4,22 1156:14 1157:14 1171 HOLDING- 479:24 557:16 788:2 789:3 879:2 881:4 894:9 965:6 1155:20 1206:17 1281:17 1383:1 1506:9 1515:14
---	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

HOLE- 508:2,3 HOLIDAY- 604:23 605:12,13 HOME- 23:23 81:13 497:17,18,19,21,2 2 167:2 228:14 498:6,8 510:10 660:14 686:7 758:13 763:7 793:25 844:6 845:7 895:8 966:7 1007:5 1013:16,24 1071:22 1115:8 1151:24 1156:5 1229:14 1271:8 1272:9 1290:23 1337:3 HOME LAND- 745:6 HOMELESS- 1115:24 HOMEPORT- 96:5 831:18 1519:4 HOMEWOOD- 1061:10 HOMEWORK- 893:17 HOMICIDAL- 52:5 98:7 367:12,17,21 401:5 522:4,9 546:24 559:13 800:9 942:14 943:3 960:19 983:12,25 1021:23 1023:5,8,10,14,17 ,22 1022:3,22 1024:20,23 1026:1 1028:22 1071:6 1093:4,6,9 1094:7 1095:4,16 1131:7 1176:1 HOMICIDE- 1092:9 HON- 1:42 2:12,15,27 3:7,10,13 HONED- 446:25 HONES- 727:5 HONEST- 388:4 389:16 666:13 806:17 1109:14 1501:9 HONESTLY- 133:17 280:2 312:5 324:4 379:10 450:4 668:15 HONESTY- 43:2 HONEY- 389:21 391:18 609:1	HONOR- 31:10,12,13 36:24 37:8 41:6 44:11 45:17,24 46:12 51:5,8 53:18 55:17 58:15 62:23 64:12 65:14,17,20 68:6 70:22 71:14,23,25 72:1,4 75:9 76:19 89:10,11 93:17,23 109:17 127:22 128:14 130:21,23 131:1,22 132 HONOR'S- 1035:9 1236:13 HONORABLE- 30:8 234:7 427:25 1233:10 HONORABLY- 1256:12 HONORARYTYPE- 1118:19 HOOK- 414:22 HOPE- 64:13 106:17 123:14 148:22 222:19 315:1 408:22 429:12 564:16 577:16 683:15 686:18 699:15 800:3 852:3 886:14 1242:4 1352:12 1438:12 1541:8 1570:25 HOPEFULLY- 73:6,10 224:12 235:17 248:19 419:8 588:25 650:8 1495:17 HOPELESS- 329:3 1485:18 1510:14 HOPING- 407:23 810:15 HOPKINS- 1061:9,12,13,15 1065:14 HORRIBLE- 340:21 348:19 1279:21 1399:13,14 1494:24 HORRIFIC- 1312:2 1317:21 1478:11 1492:14 1494:24 1497:9 1507:17 HORROR- 101:24	1511:19 HOSE- 153:5 161:21 1042:14,15 HOSES- 159:10 HOSPICE- 1156:11 HOSPITAL- 21:11 22:6 23:34 41:12 47:3 50:12 51:12 52:9 54:25 56:16 57:11 60:21 61:3 95:11,16 96:3,4 97:2,3 99:19,20 100:1,6,8 104:12 112:25 113:16 115:24 116:6,20 117:4 120:1,2,5,7 122:5 124:5,21 128:16 130:14, HOSPITAL'S- 526:8 697:14 HOSPITALIST- 1295:2 HOSPITALIZATION- 48:9 102:12 410:3 412:10,19 1356:7,11 HOSPITALIZED- 48:14,16 HOSPITALS- 473:22 528:9 630:14 772:25 843:18 1065:13 1066:5 1072:8,13 1157:9 1261:16 1262:20 1263:9,21 1292:15 1527:17 HOST- 1117:6 HOSTILE- 935:1 938:8 950:10 HOSTILITY- 117:12 798:4 HOT- 90:20 415:17 1006:4 1432:16 HOTEL- 1401:22 HOOR- 56:23 101:12 104:10 119:3 127:5 129:6 135:24 222:3 231:16 344:4,16 377:2 417:22 419:8 423:13 472:8,9 552:17 561:23,24 601:11,25 602:2,8,12,14 604:18,20,22,24	605:1,3,18 606:2,4 619:13 620:7 720:10,11, HOURLY- 280:12,23 281:1 601:25 876:4,25 HOURS- 49:19 53:22 97:8 98:24 121:3,11 131:12 281:1 337:25 338:11 382:8,15 390:9 444:5 489:23 539:2,7 583:18 584:17 601:10,24 603:10 605:20 623:10,15,18 658:18 764:6 766:12,13,16 869:13 872:20,21 874:4 876:9 HOUSE- 614:11 1244:24 1366:16,17,18 1372:6,7 1376:6,12,15,19,2 0 1375:21,23,24,25 1377:17,20 1388:23 1389:1,6,8,16,19 1390:11,15 1398:21 1399:2,3 1413:23 1414:14 1420:17 HOUSEKEEPING- 248:22 889:9 992:2 1034:3 1149:21 1232:24 1253:12 HOUSING- 1508:1 HOUSTON- 424:24 HOVER- 853:6 HOVERING- 855:22 HOYLE- 2:12 25:28 31:10 36:24 41:5,8 43:15,19,24 44:10,13 45:17,23 46:1 53:25 54:16 58:15 59:7 62:23 63:10 64:12 65:10,14,20 66:7,12 67:16,19,22 69:6,9 70:22
---	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

71:6,11,14,17,21 81:22 93:16,22,23 94:1,2 109:11, HOYLE'S- 54:4 1023:20 1244:4 HOYLE1037- 14:6 HOYLE1054- 14:18 HOYLE1060- 14:27 HOYLE1084- 15:7 HOYLE1114- 15:29 HOYLE1202- 15:35 HOYLE1314- 16:26 HOYLE1365- 17:26 HOYLE1419- 17:34 HOYLE1477- 18:18 HOYLE1533- 18:31 HOYLE166- 5:31 HOYLE198- 5:39 HOYLE271- 7:7 HOYLE315- 7:19 HOYLE373- 7:31 HOYLE431- 8:23 HOYLE546- 8:37 HOYLE565- 9:6 HOYLE645- 9:16 HOYLE663- 9:34 HOYLE673- 10:6 HOYLE699- 10:33 HOYLE735- 11:16 HOYLE820- 11:26 HOYLE891- 11:50 HOYLE94- 4:43 HOYLE971- 12:10 EPI- 791:11,14 931:18 ETN- 359:6,12 HUFFING- 532:20 548:21 HUBB- 68:2 HUMAN- 49:25 168:10 927:7 947:24 948:13 1022:7 1224:9,10 1228:8 1511:15 1561:1 HUMANLY- 1226:20 HUNDRED- 61:6 106:2 122:2 161:8 178:14 183:19 357:16 359:22 503:22 626:6 651:21 672:14 820:16 865:1 874:2 1095:2 1158:24 1253:7 1262:25 1426:23	1448:5 HUNDREDS- 658:18 930:5 1095:9 1528:22 HUNG- 121:2 323:1 HUNKY- 1487:24 HUNT- 21:28 30:19 38:16 43:2,24 47:19,24 49:17,20 52:11,14 56:9,11 57:2,10 95:2,18,22,24 96:8,14,24 97:8 100:5,6,24 102:14 108:18 111:3,22 113:8,19 114:16 115:21 117:19,21 118:8 119:3,7 120:15 121:10,12 128 HUNT'S- 22:5 236:16,19 258:22 260:1,3 270:4 297:17 302:17 306:1,6 326:15 337:14 449:23 451:21 462:7 466:10 494:7 551:9 659:1 797:12 810:4 815:3,18 816:2 826:23 831:25 832:7 833:6,18 834:20 835:12 836:4 902:15 HUNTING- 94:6 HUNTINGTON- 1399:5,11,21 1414:20 HURRY- 1347:18,22 HURT- 48:19 74:4 102:11 103:19 111:13,14 297:16 319:7 337:12 343:25 365:23 398:25 400:11 531:16,23 532:1 544:18 546:6 558:8,14,20,25 559:4,9,16 936:17,18 937:12,16,23,25 943:17 945:12 1023:15 1071:6 1094:21 HURTING- 46:23	47:19 48:12,25 98:12,22 102:3,8 111:25 112:1 113:9,10 116:25 238:25 243:16 339:15 355:21 356:1 367:18,22,23 397:10 400:13 401:16 406:11 410:5,21 495:5 505:16 532:6 545:22,23 546:4 781:8,13,15,19 HUSBAND- 73:16 116:5 275:9,11,13 285:7 289:6,8,14 291:17 293:10 334:8 336:19 337:13,17 368:19 369:18 376:7,18 377:10 389:11 566:17 647:10 651:22 700:3 1135:3 1331:3 1410:11 1443:19 1485:14,15 1486:5 HUSBAND'S- 606:18 1397:8 1419:20 HUT- 526:15,16 HYPER- 366:16,21 521:15 1183:11 1230:17,18 HYPERSENSITIVE- 1230:20 HYPERTENSION- 359:10,12,16 1156:11 1289:12,17 HYPERTENSIVE- 1325:20 HYPOTHETICAL- 241:20 396:12 410:12,23 411:1,11 834:15 1078:15,22 1084:18 1085:3 1307:22 1319:23 HYPOTHETICALLY- 1319:23 HYPOTHETICALS- 411:3 HYSTERICAL- 1403:8	I I'D- 32:4 110:4,10 119:22 132:19 145:22 150:15 151:21 218:10 223:24 248:12 250:3,5 295:7 302:22 389:20 405:9 447:13 470:23 488:1 497:21 506:22 514:18 520:10 526:21 527:23 532:1 537:22 550:15 643:17 645:17 I'LL- 32:23 37:4 38:18 40:23 42:18 44:10,23,24 45:4,20 61:13 62:23 68:4 69:10 77:16 78:25 89:13 90:8 123:7 128:11 129:22 130:8,21 132:3 138:7 161:25 176:17 194:3 199:11 213:17 221:12 224:12 229:12 232:5 253 I'M- 30:25 31:5,17,22 32:11,24 33:1,9,14,15 35:13 36:11,20 37:12,14 39:2,21 40:9,20 44:6 45:3,11,17 51:4,13 58:13 61:1 62:20,24,25 63:1,4 64:1,15 70:7,19 71:7,8 72:2 73:14 74:2,3 75:8 76:2 78:5,13,21 84:14 I'VE- 30:12,15 59:7 60:25 62:23 65:7 72:24 73:21 75:17 86:20,24 111:24,25 136:16 142:17 145:21 146:20 147:2 150:12,14 173:6 184:7,13,15 185:13 223:2
---	---	---	--

OCTOBER 2015 DELANEY V. CASEPRO

231:22 274:20 294:14 295:5 299:5 344:18 411:1 413:23 463: ICE- 572:23 1257:24,25 ID- 322:22 337:7 656:25 875:4 IDEAL- 197:10,11 370:8 510:4 844:3 1214:24 IDEAS- 937:15 942:17 951:7 1093:7,8 1094:4,21 1542:24 IDEATION- 52:3,4,5 318:22 355:14,15,18 453:23 460:6 494:25 513:22,23 514:2,4 515:7 800:9 808:22 809:20 823:15 936:7 942:6 962:25 1023:14 1178:1 1303:13 1335:6,14 1336:13 1482:16 1493:25 1523:21 IDEATIONS- 46:21 114:8 117:6 351:6 367:11 410:4 454:1,6,11 460:4,12,19 478:7,8,9 494:14,16,19 505:16 522:4 532:4 546:3 559:13 783:17 824:11,12 825:16,17 846:19 848:17 918:1 930:6,13 932:25 933:2,12 938:10 942:9, IDENTICAL- 41:21 1054:19 1125:20 1447:8 1472:7 1567:19 IDENTIFICATION- 66:14,16,18 139:8,14,17,21,24 140:2 184:3,7,12,15 185:14 205:18 207:17 252:22	256:14 264:12 323:3,10 325:6 429:19 598:4,6 607:12,17 608:8 656:18,24 657:3 668:22 670:20 684:5,7 693:18 1018:13 1078:25 1 IDENTIFICATION121 0 0- 25:18,24 IDENTIFICATION124 8 8- 23:7 IDENTIFICATION124 9 9- 23:14 IDENTIFICATION139 - 19:42 20:5,10,15 IDENTIFICATION140 - 20:20 IDENTIFICATION142 2 2- 24:24,30,35 25:7 IDENTIFICATION184 - 19:37 IDENTIFICATION323 - 21:29 IDENTIFICATION657 - 24:18 I IDENTIFIED- 20:3,8,13,18,23,3 0 19:18,24,29,34,40 21:3,9,15,24,32 22:4,12,17,25 23:4,10,17,22,32	24:4,13,21,27,33 25:3,10,15,21,27 26:6,12,18,24,32 27:3,9,16,22,29 28:3,10,18,24 139:11,15,18,22,2 5 29:2 147:22 184: IDENTIFIES- 289:25 426:1,6 1198:8 IDENTIFYING- 173:24 268:25 IDENTITY- 254:23 IDIOPATHIC- 1385:5 IGNITION- 1041:13 II- 1263:18 1325:14 III- 1427:15,21,22 ILL- 109:5 774:1 778:4 1447:1 1509:6 ILL/INJURED- 579:9 ILLNESS- 306:11 791:15,22,23 792:20 825:4,5 931:18 941:2 960:25 1186:5 1292:17 1338:7 1498:8 1515:23 ILLNESSES- 792:13 ILLUSTRATE- 141:20 148:1 ILLUSTRATED- 1544:22 ILLUSTRATIVE- 141:10 IMAGE- 94:3 148:1 IMAGER- 1042:25 IMAGINE- 60:24 84:23 85:11,15 97:14 108:13 308:5 544:12 1510:18 IMAGINING- 1544:22 IMBALANCE- 360:24 IMMEDIATE- 180:18 296:11 333:7 647:13 1013:11,13 1296:23 IMMEDIATELY- 96:22 151:16	188:17 194:8 253:20 297:24 318:8 355:22 362:23 618:20 638:13 643:16 651:17 705:5 792:5 795:9 919:20 926:8 1013:10,20 1019:17 1049:1 1194:1 1287:17 1289:15,16 1291:3 1293:5 1356:25 1357:11 IMMIGRATED- 736:1 906:16,18 IMMUNITY- 35:4,8 1102:1 IMPACT- 132:25 179:4 188:14,17 190:6 191:9 194:8 199:7 1010:20 1011:17 1012:21 1015:12 1017:12,13,14 1020:6,16,18,20,2 1 1019:23,24 1022:6,18 1031:16 1051:8 1242:11 1244:24 1245:2 1432:22 1441:17 1498:13,14 15 IMPACTS- 474:19 IMPAIRED- 1089:5 IMPAIRMENT- 922:21 972:20 974:18 IMPAIRS- 1092:21 IMPARTIAL- 1544:1 IMPEACH- 749:13 750:11,15 1410:23 IMPEACHMENT- 1410:19 1505:3 IMPENDING- 1180:7 IMPERMISSIBLE- 236:2 IMPLEMENT- 80:1,6 1357:18 IMPLICITLY- 1020:23 1507:6,21 IMPLIED- 513:12 1194:10 IMPLY- 747:24 918:24 IMPLYING- 747:21
---	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

IMPORTANT- 74:1 77:13 78:9 79:14 82:17 83:10 91:10 104:4 106:19 111:17 129:11 134:9,16 226:20 239:4 249:19 251:17 269:8 320:10 358:19 403:2 515:2,14 521:16 524:24 528:18 529:13 585:18 729:10 829:21 835:22 836:11 IMPORTANTLY- 56:16 98:4 116:23 117:9 135:25 404:7 1047:22 1107:18 1480:11 1486:22 1492:4 1519:8 1524:22 1526:24 1535:16 IMPOSED- 501:22 IMPOSSIBLE- 32:17,18 33:9 35:19 37:4 38:2,12,16 388:10 524:1 719:10 1226:9,16,18,20 1227:10,11 1361:11,16,19 1523:17 1531:18 IMPOSSIBLETO- 1207:21 IMPRECISE- 381:15,18 IMPRESSED- 518:13,16 IMPRESSION- 484:15 541:12,16,25 543:9 825:25 IMPRESSIONS- 129:3 976:3 IMPROPER- 749:14 1442:3 1512:14 IMPROPERLY- 728:11 IMPROVISE- 1496:20 IMPULSE- 326:16,18 327:5 IMPULSIVE- 780:3,5 IMPULSIVENESS-	399:11,17 414:15 416:14 INABILITY- 236:11 302:25 1511:19,24 INACCURACIES- 749:9 INACCURATE- 379:9 790:16 895:5,13 897:7 973:22 INACCURATELY- 814:23 IN ACTIONS- 50:13,24 701:16 1057:17,22 1123:11 INADMISSIBLE- 142:19 1001:3 1345:10 INADVERTENT- 221:9 INAPPROPRIATE- 490:9 660:11,13 1030:2 1225:15 1531:15 INARTFUL- 847:11 INARTICULATE- 723:18,19 INARTICULATING- 723:18 INC- 75:2,5 82:2 600:6,7 617:1 1343:21 1475:25 INCAPABLE- 1128:25 INCEPTION- 570:20 INCK- 304:11,23 307:8 320:6 321:18 323:16 1482:22 INCHAND- 262:6 INCHANDTHREE- 304:23 322:24 1482:22 1483:6 INCHANDTHREEQUART	I INCHES- 258:15 1370:19 INCHTO- 1483:1 INCHTOANINCHAND- 1492:21 INCHTOANINCHANDTH R REEQUARTER- 1533:10 I INCHTOONEANDONE- 21:25 INCISION- 174:6 INCLINATION- 70:9 985:3 1002:11 INCLINED- 1013:1 INCLUSIVE- 491:9,14 INCOHERENT- 1182:15 INCOME- 25:23 282:15 579:11 587:23 588:1 709:10,15 711:6 874:3 1156:24 1157:7,15 1158:23 1210:11 1374:17 INCOMING- 204:18 1030:12 INCOMPETENCY- 30:22 31:3 INCOMPETENT- 385:3 1555:20 INCOMPLETE- 609:17 INCOMPLETENESS- 1178:20,21 INCONSISTENCIES- 1536:17 INCONVENIENCE- 137:4 INCORPORATED- 1:29 3:4 22:21 71:2 102:16 273:7 277:10 279:5 281:10 282:14,19 283:19 284:5 285:15 286:8 289:15 427:3 433:3,18 434:2,7 436:12 437:20 439:3 440:25	441:8 442:2,9 565:18 566:4,8,23 567:8,14 569:17 570:8, INCORPORATED'S- 438:8 INCORPORATES- 1247:1 INCORRECT- 489:4 809:10 880:23 1153:24 1154:1 1173:15 INCORRECTLY- 346:7 1564:19 INCREASE- 1546:21 INCREASINGLY- 1166:13 INCREDIBLE- 1301:24 INCUMBENT- 688:9 691:16 1502:11 INCUMBENTS- 687:17,25 688:2,25 689:13 INDEXED- 429:4 597:23 598:22 1022:22 INDEMNIFICATION- 1460:7 INDEMNIFICATIONS- 1466:4 INDEPENDENCE- 747:15 INDEPENDENTLY- 107:21 762:5 878:23 INDEX- 4:3 19:8 290:5,17,24 291:3 INDEX4- 4:23 INDIANA- 1261:3 INDIANS- 1406:15,16 INDICATED- 181:13 238:24 400:25 539:22 545:21 711:23 956:14 965:3 1080:13 1169:21 1420:5 1518:16 INDICATING- 152:24 474:8 1306:25 1336:15 1381:22 1546:13 INDICATION- 86:12 187:2 321:2 478:6 542:4,9 545:19
---	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

577:17 610:12 715:25 867:16 930:17 938:1 963:4 984:2 1137:6 1176:10 1210:1 1273:3 1282:1 1283:5 1306:17 1330:11 1461:15 1520:21 1523:24 1528:25 INDICATIONS- 982:10 INDICATIVE- 522:15 731:5,25 INDICATOR- 38:11 INDICIA- 424:17 552:23 676:20 INDICT- 1022:13 INDICTMENT- 1353:23 INDICTMENTS- 1235:23 1247:11 INDIRECTLY- 1513:4 INDIVIDUALLY- 78:15 396:10 1059:20,24 1060:5 1104:19 1143:15 1144:2,9 1460:17 1461:10,11 INDULGENCE- 197:7 268:14 1431:12 INDUSTRY- 1044:3 INEVITABLY- 72:22 155:14 INEXPLICABLY- 1488:7 INFANTS- 168:19 170:20 INFECT- 1088:13 INFECTED- 1088:11 1364:17 INFECTION- 172:16 174:18 1393:16 1503:15,16,18 INFER- 1463:18 1546:20,21 INFERENCE- 1456:22 1457:16 1458:5 1461:16 1546:17 1548:2,6 INFERENCES- 89:7 1430:3 1542:14 INFERENTIALLY- 1010:23 INFERRED- 1546:16	INFINITELY- 191:19 1433:15 1434:22 INFINITESIMAL- 200:3 INFLAMMATORY- 1159:18 1343:25 INFLECTION- 1275:21 INFLUENCE- 78:13 117:15 1088:24 1089:3 1091:6 1092:20 1093:2 1528:4 INFLUENCING- 1188:3 INFO- 356:18 359:17 678:18 INFORMAL- 1450:15,20 1471:12 INFORMALLY- 1475:6 INFORMATIONAL- 661:4 1349:10 1563:12 INFORMATIVE- 251:13 1571:1 INFORMED- 154:6,7 176:14 540:24 637:23 989:19 1131:2 1283:6 1402:5,7 1496:8 INFORMING- 849:6 INFRINGING- 41:22 INGROWN- 944:5 INHOUSE- 1218:22 INITIAL- 188:14 190:6 191:9 194:8 199:7 297:22 298:23 469:9 568:2 570:11 1147:3 1354:1 1432:22 INITIALLY- 54:2 288:12 351:16 443:20 475:19 505:23 541:13 907:2 929:19 942:2 1244:7 1325:9 1411:6 1497:25 INITIALS- 617:17,20 624:12 INITIATE- 327:22 689:11,14,17	INJECT- 69:25 1020:25 1021:3 1170:25 INJECTING- 1237:13 INJECTION- 1097:14 INJECTS- 1020:23 INJUNCTION- 1233:9 1234:6,17,19,20 1235:1 INJURED- 162:13 1207:13 INJURIES- 136:20 141:6,7,13 142:11 162:12 170:20 173:18,25 175:8,10 177:16 178:1 182:8,11,18 183:17 185:9 186:6,8,13 188:6,7 191:5,10,14 193:1,15,16 194:24 196:10,12 1430:17 1431:1 1433:10 1434:8 1435:4 1464:3, INJURING- 1099:16 INJURY- 54:23 55:4 136:21 140:14 144:5 174:9,12 179:9 180:3,14,17,18 190:14,15,18 215:16,17 567:19 928:11 929:6 1354:10 1539:2 1553:8,12,20,22,2 3,25 1551:5 1552:15 1554:2,3,6 1557:25 1558:2 INK- 661:13 INNER- 1480:21 INNOCENT- 109:10 1498:19 1511:8 INPATIENT- 381:24 866:10 1129:5 1271:10,12,16 1295:3 1297:12 1321:4 1493:18 1521:21 INPUT- 512:4 687:23 918:16	919:19 INPUTED- 513:8 INQUIRE- 471:12 520:12 527:20 861:5 863:6 904:17 905:1,13 1499:9 INQUIRED- 900:11 INQUIRING- 891:25 INQUIRY- 708:18,21 710:3,4,5 922:20 972:19 974:17 1464:14 INSANITY- 17:5 23:13 30:22 49:24 266:4 1022:15 1232:22 1235:18,21 1236:10 1237:16,20 1241:10 1247:13 1248:22 1352:11 1354:1 1356:1 1467:4,21 1499:4 INSANITY1233- 16:13 INSEPARABLE- 94:3 INSIDE- 155:10 178:23 506:24 943:10 979:18 982:17 1041:5 1043:20 1046:9 1146:13 1224:3 1239:6,7 1381:17 1420:18 1448:15,18 1547:7 INSOFAR- 134:6 INSOMNIA- 832:19 1187:23,25 1322:21,25 1323:1 INSTABILITY- 1136:14 INSTALL- 419:17 1046:24 INSTALLATION- 577:6 1261:18 INSTALLED- 1046:7 INSTANTANEOUS- 190:13 INSTANTANEOUSLY- 1434:21,22 INSTINCT- 547:25 INSTITUTE- 340:14 498:25 INSTITUTED- 59:1
--	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

INSTITUTION- 292:12 375:11 844:24 1166:15 INSTRUCT- 36:11 110:3 612:9,23 868:8 992:4 1127:24 1199:10 1304:15 1529:9 1538:11 1550:25 1562:10 INSTRUCTED- 1159:16 1357:19 INSTRUCTING- 1451:17 INSTRUCTION- 84:3 85:19 125:21 171:15,16 248:8 338:24 418:16,21 489:8 490:13 556:9 610:7,17 611:7 612:3,13,14 682:19 718:15 721:9 725:18 726:6 727:17 729:6 731:16,18 850:5,8,11 851:2 965:19 983:14 1001:3 1032:19 1 INSTRUCTIONS- 172:3 384:11 659:16 903:9,14 988:9 1127:8 1251:5 1473:11 INSUFFICIENT- 1434:16 INSURANCE- 103:19 283:1,3,5 426:8,16,22,24,25 436:8,10,22,24 553:2,5 567:17 571:18 587:9,11 588:17 606:11 624:23,24 627:4 651:8 765:9,15 878:7 1054:16 1055:4 1068:16,17 INSURANCES- 606:14 INSURE- 793:19 867:11,19 1087:12 1147:1 INSURED- 567:18 INSURING- 922:24 INTAKE- 1168:13 1173:14,15 1174:23	INTEGRAL- 597:3 INTEGRITY- 77:2 INTELLIGENT- 783:19 INTEND- 63:8 90:15 233:5 266:1 596:3 690:1 1247:8 INTENDED- 54:10,14 128:6 895:4 973:21 1440:5 1532:8 1561:18,19 INTENDS- 1098:15 INTENSE- 76:8 INTENSIVE- 275:25 340:13 341:7 497:12 1271:11 1321:6 1399:21 INTENT- 42:15 52:4 55:13 577:22 1176:17,21 1197:1 1293:22 1302:14 1303:4 INTENTION- 69:21 142:19 INTENTIONAL- 101:8 1498:20 1525:12 INTENTIONALLY- 1015:19 1024:16 INTENTIONS- 355:20 414:6 INTENTLY- 1253:19 INTERACT- 910:17 911:21 INTERACTED- 350:21 371:18 554:17 560:6,7 709:14,19 1103:16 1165:22 1273:1 1480:11 1487:16 INTERACTING- 300:9 369:19 511:20 821:8 910:9 935:2 948:7 1075:21 1077:5 1078:4 1185:3 1264:21 1303:11 INTERACTION- 56:25 297:11 352:13 371:21 375:4 475:25 499:7 545:14 962:24 1078:13 1106:13 1166:14	1192:22 1283:22 1286:4 1300:16 1480:2 INTERACTIONS- 479:11 519:14 541:25 946:18 966:21 1273:21 INTERACTS- 1177:15,16,17 INTERCEDE- 1571:21 INTEREST- 168:3,14 172:22 329:5 565:22 577:18,23 585:10 636:7 910:23 1116:7,13 1314:19 1485:19 1510:14 1530:14 1549:15 1575:16 INTERESTING- 105:19 245:6,9 387:25 655:21 677:10 739:7 1111:11 1242:21 1253:1 1442:1,8 1537:18 1570:25 INTERESTINGLY- 403:1 750:17 1445:21 1446:4 INTERESTS- 77:8 INTERFERE- 1234:7 INTERJECT- 1241:5,8 INTERJECTION- 1241:19 INTERMITTENT- 932:15 INTERN- 738:18 1259:4,11 1260:3 INTERNAL- 169:22 174:5 178:3 587:24 739:5 1065:15 1150:11,22 1258:17 INTERNET- 92:2,5 127:13 229:8 313:1 388:18,19 561:12 660:25 733:3 887:1,3 972:5 990:22 1007:9,14 1082:4 1155:2,21 1206:18 1229:8,25 1230:22,24 1350:4	1395:20 1396:5 1426:3 INTERNIST- 1295:13 INTERNS- 1065:4,21 INTERNSHIP- 736:18 737:20 1150:25 INTERPRET- 527:9 1004:14 INTERPRETATION- 68:17 1107:11 1192:21 INTERRELATED- 722:18 INTERROGATION- 748:20,23 750:6,8 768:20,21 INTERROGATORIES- 1119:16,18,21 1451:7,12 INTERRUPT- 1086:14 1135:11 1454:22 INTERRUPTING- 922:7 INTERSECTION- 1498:4 INTERSECTIONS- 1047:21 INTERSTATES- 1404:14 INTERVENE- 709:22,23 1302:25 1305:5,6 INTERVENES- 1198:19 INTERVENING- 71:5 1059:8 1102:2,7 1103:13 1105:14 1106:10 1239:22 1467:23 1468:9,13,17,23 1558:5,16,19,21,2 3 1554:10 1559:1,4 INTERVENTION- 474:20 1197:10 1198:23 1282:22 1305:15 INTERVENTIONAL- 432:9,12,13 INTERVENTIONS- 448:15 462:23 466:11 1281:9
---	--	--	--

OCTOBER 2015 DELANEY V. CASEPRO

INTERVIEW- 51:21 52:14,19 53:2 937:20 1105:21 INTERVIEWED- 51:24 558:6,12,17 1105:6 1180:2 1286:2 1298:23 INTERVIEWING- 1105:18 1280:18 INTERVIEWS- 1095:9 1174:18 1240:22 INTERMOVE- 1101:4 INTESTACY- 34:5 INTESTINE- 192:10,20,21,22 INTIMATION- 121:12 INTOXICATION- 174:16 INTOXICATIONS- 175:9 INTRODUCE- 35:11 64:18 82:10 131:3 136:15 227:4 523:10 926:18 948:8 1010:8 INTRODUCED- 36:9 75:17 216:4 271:17 565:14 741:3 752:11 1060:20 1350:21 INTRODUCING- 926:25 INTRODUCTION- 807:20 INTRODUCTORY- 578:12 INVARIABLY- 1503:10 INVESTIGATED- 150:15 300:20 INVESTIGATION- 92:1,3 127:9 136:10 150:9,14 163:16 229:4 388:18,21 660:16 717:18 759:19 881:19 882:2,4 883:15 884:13 885:8 892:1,7 894:18 923:21,23 990:23 1007:8 1082:4 1350:5 INVESTIGATIONS- 157:17 920:9	1039:4 INVESTIGATOR- 1398:3 INVESTIGATORY- 257:1 INVITATIONS- 648:16 INVITE- 390:13 510:10 591:16,19 678:7 1564:11 INVITED- 911:7 1065:10 INVITING- 1068:9 INVOKE- 254:8,12 1555:17 INVOKED- 255:3 INVOKING- 1217:11 INVOLUNTARILY- 941:11,24 1195:18 1196:5,20 INVOLUNTARY- 186:18 520:4 535:16 939:12,19,23 940:13 941:10,16 959:22 1128:21 1129:4 1196:10 1271:20 1272:14 1297:25 1298:4,8 1308:23 1311:17,21 1429:9,13 1524:23 INVOLVE- 42:24 172:22 609:5 1257:14 1525:18,19 INVOLVEMENT- 510:6 521:14 697:15,18 698:23 924:16 999:2 1266:6 INVOLVES- 168:9 173:23 242:23 1067:17 1117:23 IPAD- 1331:22 1332:12,17 1333:4,8,13 1335:11,21 1336:4 1490:9,15 1494:10 1535:16 1536:15,16,21 1537:1 IPHONE- 1331:25 1332:1 IRA- 622:11 870:22	IRONED- 298:15 IRRATIONALLY- 1140:16 IRRELEVANT- 238:3 241:5 243:9 245:8 897:10 1002:14 1011:13 1012:12 1027:16,18,19 1059:7 1073:6 1097:12 1102:13 IRRESPECTIVE- 34:9 250:3 1217:19 1334:15 1459:18 1562:9 1563:3 IRRITATED- 542:6 IRS- 765:23 ISLAND- 94:6 101:3 152:6 166:25 275:5 277:16 365:21 431:10 491:12 512:5,12 807:8 1040:14 1442:24 1498:5 ISN'T- 35:14 36:4 41:3 55:11 58:1 91:6,7 133:3 144:9 244:10 255:7 264:7 276:13 318:3 332:6 333:15 421:19,24 425:22 619:13 624:22 675:19 676:21 677:15 679:20 725:14,16 728:18 848:25 1098:12 1164:23 1209:10 12 ISOLATE- 1021:5 ISOLATED- 1091:23,24 1092:1,13 ISOLATION- 1091:25 ISSUANCE- 1240:17 1357:21 ISSUE- 30:20 34:20,21 35:18 37:19 55:18 70:5,21 84:17 111:17 112:7,10,19 128:12 129:25 130:5 134:3	137:19,21,24 138:2,6 141:23 144:8,10,12 147:7 224:8 235:19 237:6 238:5 239:5,8 240:10 241:5 242:8,24 258:6 2 ISSUED- 103:15,17 391:25 753:23 918:13 1209:25 1233:9 1234:16 1241:17 ISSUES- 32:14 35:3 42:13 43:5 55:24 57:18,22 73:11 74:16 82:5 108:3 119:13 121:17 123:15 125:1 126:1,8 132:17 136:2,17 137:5 221:7 241:11,15 242:13 256:10 261:13 322:15,16 324:13 326:16,18 327:6 340:20 341:2 ISSUING- 670:6 IT'D- 465:13 806:4 1391:13 IT'LL- 524:14 1171:5 1341:20 1405:7 1432:2 1513:2,3 1564:20 IT'S- 31:21,23 32:9,12 33:1 35:25 36:9 37:3 38:2,12,16 39:10 40:7,12,13 42:1,17 43:7 49:14,15,23 52:24 54:21 55:3 57:23 58:4,6 59:24 60:13 61:17,18 64:6 67:11 68:17,24 69:5,7 71:15 72:11,23,25 75:15 78:1,6 20:3,8,13,18,23,3 0 ITEM- 19:18,24,40 21:3,24,32 22:12,17,25 23:4,10,22,32 24:4,13,21,27,33 25:3,10,15,21,27
---	---	---	--

OCTOBER 2015 DELANEY V. CASEPRO

26:6,12,18,24,32 27:3,9,16,22,29 28:3,10,18,24 139:11,15,18,22,2 5 29:2 210:6,10,14 212:12 227:13,1 ITEMS- 19:29,34 21:9,15 22:4 23:17 66:8 147:22 177:8 184:9 463:14 579:2 649:16 650:2 893:20 931:15 1121:16 1274:7 1335:22 1343:24 1540:1 ITTY- 331:5 ITTYBITTY- 97:12 98:15 287:18 298:7 316:21 447:11 482:22 483:18 853:15 980:11 1204:9 1484:17,18 1495:7 1533:7,19 IV- 291:25 353:7 512:21 J J/A/M/I/E- 149:14 J/A/N/S/E/W- 735:1 J/O/S/E/P/E- 430:22 JAB- 1364:15 JACKET- 1242:10 JAMIE- 5:17 149:10,13,16 164:13 1478:8 JANICE- 7:4 20:24 26:33 56:20 103:1 104:6 111:4 112:21 113:22 115:15,22 116:5 254:6 256:20 270:20 271:5,8,10,13,17 272:22 313:11 315:9 339:25 372:25 373:2,18 386:17 389:8,16,23 390:5 393:8 422:12 425:10 426:3 JANICE'S- 811:4	957:12 1486:5 JANSEN- 11:13,47 21:20 22:20 27:11,25 38:21 41:13 44:16,17 46:12 49:11 52:8,24 53:8,17 57:2 98:15,17,25 99:5,6 102:10,21,25 103:10,16 104:5,24 111:5 112:22 116:10,12,22 117:2 118:24 119:20,25 120:6 124:10 235 JANSEN'S- 53:4,6 111:10 117:8,19 332:15 425:9 475:3 482:19 483:8 490:16 543:8 600:14 606:25 607:8 608:9,14 613:16 614:6,21 619:20 621:20,24 622:5 628:9,15 631:6 637:15 641:10 700:23 713:13 718:10 731:3,10,23 73 JANSENS'S- 1106:13 JANUARY- 103:18 150:7 552:12 1262:6,8 1407:21 1575:22 JANUARY/FEBRUARY- 636:17 711:13 715:5 JASPER- 149:22 150:20 151:20 JAW- 187:7 JAZZ- 729:3 JEANS- 448:4 518:14 JEFF- 1058:16 1107:22 JEFFERSON- 431:24 JEFFERY- 166:18 JEFFREY- 5:28 166:14,17,19 198:7 199:23 JENNIFER- 1400:3 1401:24 1532:2	JENNIFER'S- 1400:2 JENNY- 1397:10 1400:17 1401:4 JERSEY- 431:16,17 497:15,24 JJ- 897:24 JL- 149:1 JOB- 72:24 103:2,8,20 150:7,21 175:18 202:22,23 203:3,4,5 271:24 284:21 342:9 369:1 404:7 440:24 496:1 528:17 592:17 593:24 594:15 621:25 628:9 689:9 691:23 723:6 728:14 780:16,17 870:7 873:2 933:17 1039:2 JOBS- 647:23 JOE- 20:31 27:4 52:17 56:23 99:11,15 100:4 101:22 102:25 104:5 111:4 112:22 116:5 119:6 120:14 264:23 302:20 330:9 332:11 334:3,8,10 336:19,23 337:17 368:14,15 376:18 377:11 390:21,24 391:12 392:20 393:5 4 JOHN- 105:13 106:1 224:7 563:21 679:23 1377:18 JOHNS- 1061:9,15 1065:14 JOHNSON- 342:20 JOIN- 1316:15 JOINED- 74:17 568:8 1108:3,7,23 JOINING- 569:11 JOINS- 420:5 JOINT- 53:17,19 705:9 1373:24 JOKE- 309:1 1224:3	JOKES- 72:20 JOSEPH- 8:20 275:13 430:17,21,22 431:1,4 496:14 534:18 546:18 558:1 JOURDANTON- 1263:24 JOURNALS- 170:10,13 JOY- 299:17 JR- 3:10 8:20 430:17,21,22 431:1,2,4 496:14 534:18 558:1 JUDGE- 1:42 30:15 32:12 41:17 42:5,6,11,16 50:4 66:19 67:17 69:9 71:18 77:22 87:4 107:1 108:10 110:2 112:9 123:18 124:23 125:10,25 130:2 147:13 148:13 189:15 194:21 195:18 197:6,22 219:2 221:11,15 228:17 230 JUDGE'S- 108:15 743:21 1028:18 1109:24 1248:5 1539:21 JUDGED- 110:18 241:12 JUDGES- 77:25 86:1,5 1352:22 1353:3,16 1498:23 1543:6 JUDGING- 111:1 JUDGMENT- 24:34 35:6,7 44:11 50:8 56:18 121:18,20 172:7 241:14 242:1,7,9 841:11 1057:18,20 1074:18 1075:7,11,22,25 1076:6,22 1077:7,11,25 1078:12,19,21 1091:15 1094:19 1097:9,10 1101:14 1104:8 1114:3 1120:4 116
---	---	---	--

OCTOBER 2015 DELANEY V. CASEPRO

JUDGMENTED- 1058:1 JUDICIAL- 1:3 23:6 35:17 45:23 77:3 266:2 419:25 1097:16 1109:21 1235:8,19 1236:15,16 1238:3,6,21 1239:19,24 1240:5 1242:17,23 1243:6 1246:25 1247:9 1248:14,18 1251:12,16 1350:19 1353:3,4,5,7,11,17 JUDICIALLY- 1058:5 1238:11 1241:5,17 JUICE- 59:19 JULY- 175:13,14 273:11 617:24 618:2,7,22 619:3 737:7 1395:22 JUMP- 909:12 1375:5 1384:24 1424:13 1473:11 JUMPED- 813:18 JUMPING- 517:22 808:20 858:19 1384:25 JUNCTION- 200:10 JUNCTURE- 36:12,15,19 171:17 610:12 1030:15 1423:3 1424:4 1442:24 1464:14 JUNE- 736:18,19 737:8 754:12 756:14 757:11,15,16 891:16 894:17,25 1378:21 1390:13 JURIES- 106:12 250:13,21 1036:15 1230:19 1252:25 1510:21 JURISDICTION- 58:19 176:15 702:13 1108:17 1238:14 JUROR- 28:26 78:11,12 79:23 80:8,11,22 90:13	685:8,10,12,13,18,19 91:7 156:8,10 733:21 1214:13 1215:5 1225:11 1226:1 1227:11,12,17 1230:16,17 1249:5,9,16,22 1251:1 1252:22 1253:4,9 1477:24 1534:23 1541:25 15 JUROR'S- 1231:9 JURORS- 4:36 18:38 67:14 72:8 74:14,19 77:25 91:13,24 92:11 109:22 126:21 127:21 130:18 148:19 188:22 194:12 195:14 198:2 201:15 207:2 217:18 218:24 224:17 229:14 234:9 247:7,20 248:15 249:5,11 251:14,17 253: JURY- 1:44 18:33 33:8 42:3 44:3 57:14 58:9 63:8 64:20 65:19,22,24 67:10,19 70:2 71:24 72:6,14,15,16 73:2,5 74:8,13 77:13 81:2 83:16 86:6,7,10 88:16 90:9,16,19 91:8 97:16 105:10,16 106:5 109:11 126:10 127:22 JURY'S- 72:3 90:17 91:8,9 195:25 197:9 207:6 214:25 233:12 253:16 373:5 533:21 534:12 686:14 898:21 970:5 1015:17 1203:13 1237:14 1252:8 1426:17 1514:4 1566:16 1569:24 1570:2	JUSTICE- 58:24 75:20,23 76:13,15,22 77:14 86:8 398:17 420:3,7 1107:9,10 1540:13,14,15 1541:13 1544:2 1571:2 JUSTIFIED- 1364:19 1510:6 JUSTIFY- 963:2 JUSTIN- 1:13 2:10 41:11 55:10 63:20,23 64:15 74:25 81:24 94:10,23 98:9 101:19,23 107:17,19 129:10 175:24 176:16,19 177:6 178:5 181:4,7 182:1,18 184:20 185:4 186:9 188:13,16 190:4 191:5,8,16 192:1 193:18,22 19 JUSTIN'S- 105:4 106:20 108:20 176:7,11 1371:1 1383:1 1385:11 1388:16 1395:24 1412:8 1414:25 1416:6,16 1418:13,19 K KALVIN- 21:28 22:5 43:2,24 47:19,24 49:17,20 57:2,10 95:2,10,18,24 98:3,5,10,14,18,24 96:14,21 97:8 99:6,13 100:4,6,24 102:14 108:18 111:3 128:15 129:10 132:8,11 153:23 206:1 216:8 235:20 236:15,19 238:22,23 KALVIN'S- 95:7 97:25 KEEN- 626:3,9,10,13,15	633:8 871:8,10 873:2 KEENES- 497:11 KEEPS- 424:10 721:6 1353:1 1484:22 1487:24 1490:15 1494:10 1535:15 1536:21 1537:1 KELLY- 1400:13 1414:16 KEVIN- 205:25 KEY- 513:7 653:3 1041:10,17 1517:6 KEYHOLE- 296:20 349:1 KEYWORD- 19:8 KID- 510:10 544:10 1041:6 1448:11 KIDNEY- 192:13,14,15,18 1294:19,22,24 1384:19 1434:1 KIDS- 274:16 372:5 906:7,9 1371:14 1374:23 1375:3,5 1377:9,13 1378:4 1379:6 1382:7,8 1418:10 1541:7 KILL- 319:13 780:4 783:13 799:20 800:6 882:23 942:13,20 944:25 945:3 1024:1 1131:8 1236:25 1439:19,20 1442:11,12,13 KILLED- 49:25 61:20 144:10 1207:14 1317:20 1496:4 KILLING- 96:22 319:1,10 779:6 780:3 KILLS- 59:23 KIN- 1575:15 KINDERGARTEN- 1415:12 KINDLY- 313:25 1573:16,19 KINDS- 306:10 915:10 1122:24 1367:2
---	---	---	---

OCTOBER 2015 DELANEY V. CASEPRO

KING- 105:13 106:1 497:12 1562:1 KNEE- 325:8 1292:5 KNEES- 1026:7 KNEWORSHOULDHAVEK N NOWN- 236:17 K KNIFE- 1197:15 1496:13 KNIVES- 1121:15 KNOCK- 644:8 720:23 1212:2 1563:16 KNOCKED- 153:5 161:19 288:14 KNOCKS- 650:23 KNOWING- 120:24 504:16 551:18 747:4 778:1,12 849:17,21 850:25 968:12,17 1105:22 1160:19 1161:14 1226:7 1312:7 KNOWLEDGE- 84:7 119:10 162:15 171:21 376:20,22 385:17 404:14 462:1 494:18 519:2 530:18 545:13 558:7 559:5 645:9,13 647:1,3 663:2,5 666:15 667:15 702:8 703:23 714:21 718:9 747:8 861:22 913:2 937:9,15 959:2 962:13 KNOWLES- 130:20 132:2 147:2 221:20,25 225:9 245:17 246:11 417:24 428:18 492:2 493:14 563:21 584:19 613:20 614:6 616:22 624:6 629:19 631:10,11 669:6,19 670:23 703:10 704:8	706:14 728:10,11 754:16 760:14 859:22 KNOWN- 236:20 282:1 289:22 327:4 382:24 434:14 445:13,16 473:24 483:16,23 548:4,7 598:10 621:3 633:6 774:17 803:23 832:23 868:24 875:11 1004:9 1066:22 1069:10 1088:17 1092:15,19,23,24 1122:22 1133:18 1141:15 KNOWORSHOULDHAVEK N NOWN- 239:9 K KNOWS- 98:19 114:12 119:5 221:16 260:4 398:6 516:16 679:23 709:1 984:8 1000:19 1069:11 1106:6 1190:9 1195:16,17 1200:21 1201:4 1220:24 1246:10 1483:10,14,18,20 1484:9,11,12 1485:15 1535:21 1564:21 KO- 714:11 718:16 KOREN- 6:22 26:14,20 95:18 227:7,8,10,12,14, 18 221:2 222:4 1119:23 1479:22 1518:10 L LAB- 291:25 385:19 512:20 642:3 941:1 1270:20 LABEL- 901:15 1040:4 LABELED- 435:14	463:19 600:22 1121:22 1123:1 LABELS- 268:25 434:10 LABILE- 366:16,19 521:16 1183:12 LABOR- 21:18 751:22 752:6 753:3 754:20 757:4 894:15 896:4 LABORATORY- 174:20 175:21 LABS- 512:16 LACERATION- 180:4 LACK- 35:9 1083:10 1099:3,12 1145:10 1467:23 1528:23 LACKED- 1355:7 1467:24 LADDERS- 1042:15 LADIES- 72:7,10 73:22 74:7,23 75:4,17,25 76:9,18,23 77:20 81:18 82:17,20,24 83:9,21 84:5 85:10,23 86:1,15 87:2 88:4 89:5,21 90:12 92:7,16,24 93:12,19 100:3 101:8,25 105:9 106:16,24 107:13 108:21 114:23 121:16 LADY- 95:17 221:1 276:18 555:12 704:21 831:13 1000:15,19 1220:20 1367:24 1479:22 1482:12 LADY'S- 275:5 277:16 431:10 1442:24 1496:14 1498:4 LAIID- 188:19 189:13 259:5 792:5 882:13 1272:25 1493:10 1503:17 LAIID- 1446:21 LAKE- 1386:9 1415:17 LANDING- 105:18 LANDMARKS- 346:12	LANE- 101:17 152:25 158:17 164:25 165:1 1021:13 1024:15 1030:10,11 LANES- 164:19 165:3 LANG- 1263:11 LANGLEY- 1261:14 1263:16 1294:8 1529:6 LANGUAGE- 55:5,20 58:25 280:15 281:8 301:2 334:19,20 335:23 422:23 467:13 599:8 1100:11 1159:19 1270:17 1438:21,22 1439:5 LAPSE- 487:6 LAPSES- 516:17 LAPTOP- 1028:19 LAPTOPS- 415:19 LARCENY- 1235:14 1237:5 1239:1 1247:15 1354:11 1525:10 LARGE- 192:20,21 296:8 304:14 348:8 569:13,18 652:3 1072:8 1082:25 1095:13 1098:8 1100:8 1106:10 1124:19 1126:3 1132:18 1139:25 1193:10 LARGELY- 1166:3,9 LARGER- 853:24 LARGEST- 642:11 1262:21 1263:23 1489:5 LASER- 155:20 523:24 1151:19,21 1156:13 LASERS- 1116:20 1152:3 LASTED- 53:21 1213:15 LASTLY- 92:24 LASTS- 839:1 1394:4 LATE- 274:11 294:18 295:12 395:23 418:14 566:17 567:7 590:25 819:2
---	---	--	---

OCTOBER 2015 DELANEY V. CASEPRO

966:6 1112:8 1420:19 1425:7 1440:4 LATELY- 1366:1 LATER- 30:11 49:18,19 52:20 59:22 96:17 100:23 101:11 131:9 136:14 137:4 153:17 163:2 164:1,2 235:16,17 266:1 443:22 461:14 480:8,10 487:24 520:12 536:20 563:5 570:1 594:6,17 618:7 630:6 631:20 659:21 672:25 LATIN- 1566:4 LATER- 924:8 1010:18 LAUGHS- 942:23 LAUGHTER- 608:24 LAUNDRY- 1101:22 1379:22 LAUREL- 100:2,8,10,11,20 101:1 128:20 216:16,18 1010:13 1049:5 1055:9 1498:2 LAVIGNE- 664:14 LAVIGNE/CONTRACTI	680:12 681:24 723:20 906:1 1107:10 1126:7 1170:9 1202:18 1227:1 1319:10 1362:1 1412:19 1428:21 1501:7 LAWYERS- 32:1,6 45:4 88:5,16,25 89:21,25 90:5 107:14 226:1,3,5,10 248:2 249:16 250:17 251:2,15 255:11 264:15 392:25 571:2 646:12 656:14 784:12 818:22,23 821:17 887:23 888:11 993:4 1069:16 1144:19 1153:14 1157: LAYING- 792:24 822:3 LAYOUT- 23:33 344:19 506:24 523:7,15 LAYPERSON- 800:12 1075:15 1077:17,20 1078:3 1092:10,14 1093:1 1095:15 LAYPERSONS- 1095:2,5 LDELAHUNTY@BCGOVN	1400:7 1487:11 1552:21,22 1572:15 LEARNED- 60:13 105:22 296:5 404:18 406:11 479:11 675:1 701:18 856:9 892:6 1077:8 1203:1 1265:1 1316:14 LEARNING- 1161:24 1162:1 1170:21 LEAVE- 44:1 61:4,24 80:14,15 99:14 101:1 125:20 127:9,17,21 130:24 165:21,22 195:14 201:3 218:24 228:12,25 229:14 253:15 254:13 259:19 292:14 301:16 313:2,6,9 334:5 339:4,14 354:8 364:1 372:18,22 385:12,13 3 LEAVES- 128:16 480:10,11 483:1 533:17 970:4 1096:8 1409:5 1562:7 LEAVING- 98:19 120:15 384:24 400:23 520:1 540:13 659:19 774:6 911:2 963:9,12 1013:13,21 1015:11 1019:17 1088:12 1094:11 1125:11 1198:4,5 1309:13 1442:12 1444:7 1529:12 LEAVY- 135:17 LED- 175:2,10 543:19 568:11 792:1 923:9 1102:8 LEDEAUX- 1375:12 LEFT- 43:3 49:20 56:4,12 57:24 59:20 61:16 97:14 129:10 149:5 151:16 152:21	156:16 159:7,15 160:1 164:18 165:8 166:10 183:6,14 184:23,24 187:21 192:6,9 201:22 292:19 334:1,3 338:12 345:21 346:25 351:9 352:1 LEFTHAND- 820:5 1322:7 LEG- 1380:9 1394:3 LEGAL- 112:10 181:5 421:17 646:11 653:7 654:8 655:24 675:15 757:8 758:2 783:10 784:3 933:17 941:18 1004:3 1157:16 1160:5 1235:16,17 1272:15 1311:18 1355:8,9,23 1357:18 1467:25 1498:25 1499:1,2 1500:4 1544:2 LEGALITIES- 942:3 LEGALLY- 632:24 735:21 939:24 942:1 1355:11 LEGISLATIVE- 1102:21 LEGISLATOR- 87:8 LEGISLATURE- 1543:1 LEGS- 1393:10 1408:25 LEISURE- 888:9 1017:23 LEMIYU- 719:8 LEND- 1314:21 1315:1 LENDER- 285:14 LENGTH- 119:4 257:22 481:3 670:11 LENGTHIER- 732:20 LESIONS- 950:6 LET'S- 62:7 77:18 96:15 153:24 188:9 190:9 222:23 244:24 246:17 255:16
N NG- 664:8	E ET- 1358:13		
L LAWFULLY- 61:19 LAWRENCE- 1570:10,11 LAWSON- 1158:3 1159:21 1160:11 LAWSUIT- 40:17 42:21 55:1 105:5 109:2,3,4,5,6,7 259:12 900:7 1067:23,25 1531:22 LAWSUITS- 54:20 931:1 1068:23 1314:20 LAWYER- 32:4 54:13 110:7	L LEAD- 50:6 108:7 549:19 1546:24 LEADER- 1470:16 LEADERSHIP- 1107:8 LEADING- 158:1 796:18 LEADS- 158:14 LEAN- 1057:14 LEARN- 307:7 447:4 577:11 603:8 632:5 633:12 869:10 1157:15 1160:4,6 1393:8,9,10		

OCTOBER 2015 DELANEY V. CASEPRO

274:6 283:14 286:2,25 298:9 300:8 306:2 315:22 316:9,13 327:15 328:19 347:7 349:22 372:16 393:18,24,25 410:20 420:19,22 428:24 435:24,25 LETHARGIC- 949:4 1184:2 LETTER- 286:21 575:17,25 580:12 625:6,16 691:9 752:18,21 807:20 871:10,14 895:11 1068:9 1164:12 1170:8,13 1201:25 1202:20 1203:2,18 1217:10 LETTER/REPORT- 25:28 1163:18 LETTERHEAD- 437:20 441:8 552:22 626:4 627:1 753:2 754:6 757:3 LETTERS- 504:5 812:6 1334:4 1335:3 1396:14 LETTING- 633:15 728:24 1110:16 1145:21 1290:15 LEVEL- 190:9 193:12 230:18 236:10 311:5 335:21 340:10 381:20 516:7 569:8 579:11 715:10 1074:6,19 1078:13 1185:2 1256:23 1263:18 1440:15 1445:9 1511:12 1523:17 LEVELS- 795:11,17 796:1 LEVIN- 1315:6 LEVITRA- 306:8 1315:10 LEYIMU- 2:15 138:17 201:18,20 202:8 205:13,16 207:3,5,9,12,15,2 1,25 206:22,25	209:1,7,8,12,14,1 7,20,24 208:2,16,23 212:5,16,19,21,23 ,25 210:3,17,20,23 213:11,12 214:3 217:19 220:7 228:5 992:5 993:25 994:5,10, LEYIMU202- 5:50 LIABILITY- 33:4 42:22 58:2 68:25 69:23 70:1,3,6 102:23 134:7 1057:21 1104:11 1206:19 1458:7 1461:19 1464:16 1539:21 1555:16,17 LIABLE- 1557:12 1559:3 LIATSON- 295:7 593:18,23 1342:19 1345:19 LIBERTY- 1571:7 LIBRARY- 94:7,24 1373:19 LICENSE- 568:20 620:23 622:17 753:21,23 754:3,23 756:1 757:23,24 758:10 1128:24 1261:5 1502:24 1539:11 LICENSED- 58:18 168:22 169:1,3,6,7 239:2 244:12 341:1 377:5 404:15 556:12 568:12 603:14 738:14 762:8 763:3 767:6,12,18 768:4,11 771:12 772:18 775:9 1066:18,20 1075:3 1261:1,3 LICENSEE- 758:1 LICENSES- 620:18 631:4 756:8 757:14 LICENSING- 21:18 690:6 751:22 752:7 753:3 754:20 757:4	894:15 896:4 897:20 1075:4 LICENSEUR- 568:23 759:1 LIES- 35:22 LIEUTENANT- 13:10,16,19 28:12 341:25 342:1,18,19,20 374:12,14,16,19 375:1,4,7,15,23 376:8,14,20 377:3 419:3 502:19 504:11 555:16,22,25 698:3,6 995:5 998:20 1001:14 1005:17,20,23 1006:11,14,17,20 1035:2 1258:5 145 LIFEENDING- 1088:9 LIFEGUARD- 788:16 LIFESTYLE- 579:10 660:15 LIFETHREATENING- 1088:9 LIFT- 328:13 1291:25 LIGHT- 59:23 61:15 416:17 1097:4 1284:10 1337:18 1429:25 1430:2,5,25 1438:17,24 1439:23 1443:1,2,9,18 1444:2 1446:11,12 1457:1,14,15 1458:4 1463:21 1471:6 1473:2 1496:15 1547:1 1559:11 LIGHTLY- 838:19,22 1272:17 1277:15 1301:22 1304:3 LIGHTS- 151:17,22 387:19 1042:20 1055:16 LIGHTSKINNED- 294:19 LIKED- 327:7 548:3 1373:8 LIKELYTHANNOT- 199:5	LIMINE- 31:15,17,20 35:23 37:22,23 57:18 264:9 265:9 LIMIT- 73:11 952:19 LIMITATIONS- 237:24 983:1 1381:7 LIMITED- 56:24 90:15,18 595:20 609:6 612:12,13 712:23 717:24 721:9 727:17 773:10 997:10 1001:3 1182:19 1456:2 1473:10 LIMITING- 610:7,17 611:7 612:3 725:17 726:6 729:5 731:16,17 1220:23 LIMITS- 360:17 1472:16 LIN- 626:3,9,10,15 633:8 871:8,10 873:2 LINE- 41:19 44:1 46:17 50:2 85:14,16 98:18 108:17 150:23 152:25 158:3 204:2 221:7 230:2 235:2,5,6 244:7 245:3 315:19 379:19 393:16 396:8,13,17 397:23 398:20 399:9,10 401:7,8 403:22 404:12 406:8 412:12 413:1 LINEMAN- 1026:7 LINES- 59:25 221:3 234:13 245:2 247:3,5 249:24 250:2,4,6,9 251:3,10 353:23 414:11 415:7 534:21 537:15 538:8,9,12 574:1 782:12 815:9 840:1 861:19 862:14 1003:10
---	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

1032:21 1130:18 1323:25 1341:23 LION- 1463:25 LIONS- 1384:4,7 LIP- 334:19 LIPS- 1186:1 LIBGAR- 630:4 755:6 LIST- 105:14 183:17 186:6 191:25 277:23 306:15 329:20 455:23 456:6,9 620:20 648:20,24 688:1,3,6,9,10,15 18,19,22,23 650:2,10 689:3,8 802:17,21 803:14 831:22 880:10 934:14 995:7 1101:23 1156:17 1187:3 1274:2 LISTED- 114:5 358:24 579:2 630:14 658:4 671:17 674:22 690:5 802:25 803:9 923:10 1100:20 1154:18 1155:7,19 1182:12 1322:7 1325:21 1357:17 1434:5 LISTENED- 771:19 1541:10 1542:2 LISTENING- 31:19 78:7 128:11 510:9 513:14 528:23 529:2,8,10 531:6,12 728:18 771:24 994:2 1147:7 1226:3,14 1227:2,23 1229:4 1253:19 1270:8,18 1431:10 1454:21 LISTING- 440:12 755:2 1197:18 LISTS- 106:1 648:12 LITERALLY- 415:25 416:2,3 573:11 580:24 653:7 1089:7 1121:19 1138:16 1240:9 1247:25 1498:18 1547:6 LITERATURE-	1066:23 1159:2 1186:11 1288:6 1300:7 LITIGATION- 39:16 41:17 130:5 995:23 LIVED- 94:5 340:10 362:4 431:11 1365:18,23 1374:10 1375:19 1376:3,14 1379:14 1385:6 1386:16 1388:18 1390:4 1391:9 1414:12 1415:12,16 LIVER- 192:8,17 LIVES- 95:20 99:24 390:3 625:8 704:24 821:9 1385:19 1392:18,19 1414:15,16,17 1541:4 LIVINGTYPE- 1115:9 LLC- 2:18 573:18 LLP- 3:16 LLR- 757:6 895:22,23 923:10 LO- 32:2 76:18 LOADING- 1197:20 LOBBY- 129:17 136:8 LOCAL- 593:6 710:7 1195:11 1263:18,21 LOCALLY- 1044:8 1467:13 LOCATE- 544:24 LOCATED- 154:1 160:25 447:23 524:25 593:4 1040:14 1484:15 LOCATION- 101:13 157:2 159:24 204:10 211:8,13 215:17,19 216:1,11 1040:12 LOCATIONS- 660:12 LOCK- 1474:1 LOCKED- 659:25 661:6 LOCKHART- 1025:3 1026:22 1027:11 1028:8 1032:2,5 LOCKING- 1044:1	LOCKS- 1043:20,23 LOG- 1197:22,23 LOGICAL- 133:10 222:2,10 247:6 312:15 316:14 394:7 830:6 LOGICALLY- 420:16 LOGISTICAL- 65:25 224:8 680:23 LOGISTICS- 24:8,16 96:13 221:16 426:12 593:19 600:4,17 633:24 634:3 656:21 657:10 658:13 662:21,22 663:6 667:11 668:19 670:12 694:8 700:17 764:20 1004:9 1173:13 1531:5 LOGO- 285:4 895:21,22 LONG- 40:4 77:22 149:25 151:19 162:18 166:25 167:2 198:13,14 202:16,25 218:23 223:2 230:22,23 269:7 272:4 274:1 299:7 305:25 310:10 326:6 335:24 336:17 362:19 364:25 368:3,21 377:25 378:8 380:3,12,17 381:7, LONGER- 72:22,23 129:11 155:8 266:20 287:9 418:4,6 659:23 689:15 982:13 997:15 1016:10 1058:5 1081:21 1114:5 1196:22 1286:19 1352:17 1473:6 1497:16 1505:24 LONGEST- 419:2 995:10 LONGEVITY- 1137:17 LONGTERM- 283:7 436:24 587:13 1115:7 1270:25 LONGWAYS- 507:18	LOOK- 31:1 38:18 41:15 62:19 78:25 80:23,24 106:3 111:11 114:5 123:1,4,11 127:18 141:18 146:14 174:14 213:15 215:18 217:2 218:11 223:14 227:24 233:20 234:24 239:20 263:10 277:1 279:2 286:2 293:18 311:11,13 LOOKED- 57:20 114:20 116:14 160:2 186:23,24 221:12 236:18 237:13,15 269:3 296:8 328:10 329:19,22,24 364:19 411:1 457:8 490:24 491:2 515:6 518:3 521:12 523:6 542:23 552:15 602:8 604:9 606:16,24 613:12 614:3 63 LOOKING- 31:1,19 68:22 69:8 114:1 137:8 156:17 158:16 160:17,22 164:17 184:24 196:2 216:11 217:6,11 221:10 235:24 242:2 258:20 305:20 321:8,18 328:20,21 358:9 360:18 363:20 376:24 388:19,20 396:1 415:1,23 418: LOOKOUT- 229:6 LOOP- 1129:12,25 LOOSE- 1494:13 1534:11 1535:6 LOOSELY- 606:4 LORRAINE- 6:39 26:27 252:5,10,13 LOSE- 67:9 73:16,18 1116:14 1152:1 1567:7 LOSING- 73:14 1142:18 1301:24
--	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

LOSS- 64:2 1116:10,11,12 1151:19 1156:12 1531:25 1532:4 1540:15 1560:17,22 LOST- 73:21 125:24 160:12 190:16 299:16 933:17 1104:16 1385:8 1393:17 LOT- 35:1 43:8 57:17 58:16 62:17 107:3 128:8 134:18 147:13 157:16 160:22 177:13 242:1 265:12 294:15 317:15 328:10 340:7,9,10 343:14 353:10 355:3 357:13 365:17 368:25 377:8 390:4 396:18 463:3 496:25 512:18, LOTS- 37:15 302:10 641:24 1036:11 1145:11 1228:9,16 1301:17 1316:21 1406:13 1506:14 LOUD- 485:3,5 1276:12 1281:1,10 1282:22 1283:6 1308:9 1382:11 1384:6 1404:12 1406:7 LOUDER- 333:4 LOUDLY- 367:7 LOVE- 40:7 45:11 245:24 246:1 264:15 408:17 609:8 890:20 907:5 1013:15,24 1029:14 1171:25 1172:5 1343:18 1391:7 1421:7 1423:17 1474:16 1511:23 LOVED- 1207:14 1406:14,15 1443:23 1510:22 LOVELL- 3:10 31:12 43:9 65:17 109:16,17,20,21,2	3 71:23 82:1 107:1 126:23 132:7 143:22 148:4,7,11 163:12 164:11,14,15 165:17,25 171:12 185:24 188:18,24,25 189:13 193:24 194:9,14,22 195:3 196:22 197:4 198:11,22 LOVELL'S- 1090:7 1207:19 1315:5 1363:13 1490:2 1534:13 1536:2 LOVELL1073- 14:36 LOVELL109- 4:47 LOVELL1091- 15:10 LOVELL1149- 15:32 LOVELL1210- 15:38 LOVELL1255- 16:23 LOVELL164- 5:23 LOVELL199- 5:42 LOVELL340- 7:22 LOVELL496- 8:26 LOVELL534- 8:34 LOVELL558- 8:40 LOVELL906- 11:53 LOVELL986- 12:13 LOVELY- 68:3 389:2 391:1,4 393:6 661:25 675:25 1007:21 1096:15 1230:4 1573:7 LOVES- 45:11 LOVING- 1387:15 LOW- 485:3 1374:17 1533:3 LOWER- 186:16 187:7 193:8,11,14 277:2 278:16 284:13 324:17 434:10,11 436:1 438:12 600:23 601:17 614:19 626:21 639:10 664:19 743:9 744:16 1135:21 LOWGRADE- 357:9 1288:5 LOWSIMMERING- 1533:7 LOYAL- 392:9	LPN- 293:15 443:20 444:1 475:10,11,12 511:5 554:16 603:14 LUBECK- 1414:16 LUCKY- 586:21 587:4 LUMBAR- 193:14 LUMPY- 719:12 LUNCH- 80:17 127:3,7,18 135:23,25 148:23 312:19,22 313:7,8,14,20 315:2 561:8,17,21,23 562:22 563:7,12 564:16 585:6 661:21 732:20,24 733:17 990:16 991:5,14 1007:19 1081:19,22 1082:9 1096:2,13 1100:13 1101:9 1 LUNCHTIME- 1213:8 LUNG- 187:21,22 192:6 1396:3 LUNGS- 822:11 943:21 1292:1 LUXURY- 179:14 LYING- 185:1 847:23	43:9 51:8 53:16 58:12,16 61:12 62:10,12,16,21 63:3,7,11,19,22 64:1,7,10,13,21 65:7,10 66:3,5 68:6,14,17,20 69:3,14 70:14 93:17 126:23 128:3,5 129:4 132:19 137:11,20,24 145:14,17 14 MACKELCAN'S- 42:16 596:5 1420:5 1453:8 1537:19 MACKELCAN1051- 14:15 MACKELCAN1407- 17:29 MACKELCAN1514- 18:26 MACKELCAN214- 6:4 MACKELCAN646- 9:19 MACKELCAN662- 9:31 MACKELCAN671- 10:3 MACKELCAN687- 10:30 MACKELCAN718- 10:36 MAD- 1397:6 MADAM- 68:2,4 74:14,15 149:4,11 166:9,15 201:22 202:3 271:1,6,9,12 316:10 364:18 406:7 430:12,18 437:8 564:22 565:3 574:25 703:10 734:17,20,24 770:13 976:5 1037:7,11 1060:7,11 1255:6,11 1359:20 1360:1 1449:2 MADISON- 1119:3 MAE- 614:8 MAGICAL- 1099:23 MAGICALLY- 794:20 824:18
--	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

MAGNA- 106:5 MAGNIFICENT- 726:15 1252:23 MAIL- 626:5 1572:13,14 MAILING- 758:13 MAIN- 204:9 231:1 290:1 345:19 347:2 348:24 498:25 508:12 590:14 593:10,11 648:3,11 688:1 713:18 906:22,24 1197:21 1213:20 1546:11,15 MAINE- 1257:23 MAINLY- 297:7 302:24 348:6 MAINTAIN- 138:1 188:16 582:19 620:14 863:14 1023:20 1024:2 1115:17 1459:1,5 MAINTAINED- 257:1 262:13 766:6 MAINTAINING- 666:6 MAINTAINS- 692:25 1554:17 MAIT- 165:11 MAJOR- 306:12 370:14 727:7,8 786:2 1187:15 1263:1 1274:17,22 1322:15 1325:13 1329:19 1388:1 MAJORITY- 203:9 511:8 565:22 826:14 1260:6 1313:5 1562:1 MAKE- 32:9 36:3,16,22 38:18 39:3 40:1 50:16 62:5,6,10 64:10 65:13,15,24 68:9 71:3 74:9 76:12 80:2 83:17 86:11 87:17 89:14 92:9 93:5,7 94:11 96:8 101:4 103:11 112:12 117:13 123:14 125:1,8 126:6 128:13 130:5, MAKER- 94:4 MAKEUP- 990:25	MAKING- 34:23 76:14 96:13 107:2 167:15 375:8 423:8,13 454:7 466:23 478:24 480:18 489:21 501:2 513:20 527:7 606:19 709:8 779:10 785:12 884:15,19 962:13 1055:3 1076:13 1077:24 1097:1 1109:5 1132:1,25 1139:5 134 MAL- 405:8 MALE- 153:8 295:15 1292:4 MALICE- 1236:23 MALINGERING- 1323:2 MALPRACTICE- 38:1 41:2,3,8 55:2,11,22 59:1,8,10 60:15 240:10 426:8,16 1069:20,21 1098:3 1099:24 1123:13 1438:10 1445:4,25 1460:17 1470:20,21 MAN- 51:23 58:17 73:20 94:25 95:2 96:15 97:8 98:10 99:13 100:22 109:3 115:23 121:5 125:24 128:21,23 181:6,19 302:5 372:12 468:6 504:21 545:25 550:18 559:25 779:23 792:6 809:24 813:14,23 844:12 848:9 851:21 MAN'S- 144:6 557:4 712:9 830:2 869:10 883:14 1483:22 MANAGE- 709:23 1052:17 1055:21 1116:6 MANAGED- 1138:11 1168:13 1169:15,17,25	1173:14,15 1174:23 1177:10 1191:16 1197:5 MANAGEMENT- 497:23 498:8 567:15 571:9,15,18 572:3,21 574:10 579:12,22 580:8 582:18 620:11 647:22 651:5,7,9,13 692:20 697:15,18 1116:15,18 1118:3 1151:20 MANAGEMENTTYPE- 579:17 MANAGER- 488:7 497:23 498:1,7 569:12,17 592:17,21,23 593:1,8 594:10 615:21 631:18 651:9 697:25 1505:14 MANAGING- 569:20 632:15 717:22 751:8 MANDATORY- 1129:5 1258:24 MANGER- 128:20 MANIC- 804:5 805:12,13 MANICS- 366:10 MANIFESTATION- 937:23 MANILA- 323:11 MANLEY- 4:9 30:5 MANN- 1120:2 1128:18 1130:11 1139:12,14 1148:1 MANNERISM- 522:1 MANNERISMS- 335:23 461:18 462:3 511:15,19 530:13 MANNING- 12:36,39 28:6 52:10,13,18,19 58:17 111:6 112:23 119:2,5,7,19 394:8,9,10,15,16 395:3 413:22,25 421:1 472:25 473:4 474:5,7,24	475:25 476:2,8,11,14 480:22 487:4 505:23 511:3,22 528:12,13 529:2,17 530:8,1 MANNING'S- 394:18 414:6 1165:14,17 1169:4 1173:3,8 1487:25 MANUAL- 21:4 279:21 442:4,8 575:11 576:3 577:14,17 580:9,13,20,24 582:9 1051:22 1325:8 MANUAL'- 279:7 MANUALLY- 211:24 MANY- 32:13,14 76:4,21 82:14 95:1 99:18,23 103:11,12 109:9 122:16 132:24 170:12 173:4 177:15 178:11,13 214:10 269:7,11 272:9 287:3 288:10 292:5 310:10 332:7 335:3,4 341:8 361:16 390:9 392:4,13 443:18 475:8 MAP- 63:4 754:16 MARATHON- 1361:24 MARCH- 1112:10,11 1256:11 1262:7 1367:21 1389:12 MARILYN- 471:14,16 527:21 858:21,22,24 859:6 861:6,21 905:9,12 987:7 1297:18 MARINE- 95:3 97:9 98:20 633:17 636:24 640:18 641:10 703:24 706:19 708:7,16,19 712:15 713:3 715:15 717:10 723:5 779:1,24 780:6,10 809:25 837:24 848:9
---	---	--	---

OCTOBER 2015 DELANEY V. CASEPRO

882:5,8 883:3 884:13 885:8 886:3 892:5 893:8 894:19 919:24 MARINE'S- 883:23 MARINES- 779:2,4,6 780:2 934:7 1142:16,18 1181:10,15,18,19 MARK- 66:14,17 145:19 146:9 207:16,18,19 208:4,5 209:25 210:1,3 212:5 252:22 269:13 359:1 429:19 656:17 684:2,5,7 771:5 791:3 825:8 1250:23 1407:24 MARKED- 66:16 139:7,13,16,20,23 140:1,23 145:21,25 146:1 147:23 154:16 184:3,7,11,15 185:13,22 205:18 207:23 208:22 209:11 210:1,8,12,15 212:14 227:15,19 252:7 253:5 256:14 258:17 264:11,25 270:7 272:24 273:2 MARKET- 1368:21 MARKING- 1347:17 1410:24 MARKS- 152:23,24 154:10 MARRIAGE- 1371:16 1398:15 MARRIED- 307:10 362:6 748:14 850:19 906:7 1369:23,25 1371:2 1375:12,23 1398:12 1402:20 MARSHALED- 1134:5 1180:15 MARSHALL- 1039:4 MARTIN- 10:39 11:3,7 27:18 420:20,21,23,25 421:2 562:6,9,13,23 563:7 594:16,17	615:15,18,19 617:12 625:17 631:15,17,20,21 632:7 634:6 639:3,18 640:13,14 700:25 701:3,4,10 702:3 709:24 711:23 718:11,17,25 719: MARTIN'S- 420:19 721:20 731:20 1219:15 1220:19 1456:2,3 1504:11 1530:14 MARVELOUS- 1364:17 MARYLAND- 593:4,12,18 632:18,19 999:13 1060:23,24 1061:10 1065:14,20 1066:21 1114:19 1118:10 1489:7 MASS- 290:6 317:14 MASSACHUSETTS- 1154:24 MASSIVE- 306:12 1507:12 MASTER- 274:24 645:16 1409:11 1457:22 1459:20 1464:3 MASTER'S- 24:28 569:5 596:20 907:15 1061:15,17 1409:23 1410:12 1422:1 1464:6 MASTER/SERVANT- 596:13 1460:11 MASTERS- 128:18 MATCH- 103:13 515:18 616:13,15,16 765:9,19 862:8 874:8,12 876:17,20 877:24 878:6 902:1 1494:18 1502:22 MATCHES- 862:10,11 874:1 MATCHING- 615:25 616:9 622:11 624:24 870:22 877:21 1480:6	MATERIAL- 1087:13 MATERIALS- 802:2 1087:9 MATH- 1316:3 1383:3 MATO- 657:8 MATTERS- 34:11 91:6 168:14 172:21 253:19 386:25 407:25 660:9 1157:16 1223:13 1228:8 1253:13,24 1348:11 1437:2 1493:1 1495:18 1500:4 1508:8 1542:13 1549:17 MAX- 1476:16 MAYHEM- 547:20,21 MAYO- 594:5 704:21,24 705:2 1003:20,23 1004:2 1529:24 MAYO'S- 1004:9 MCBEAL- 969:13 MCCABE- 3:24 9:3,27 10:25 123:22 342:23 564:19 565:2,5,10 575:4 598:5 608:11 613:9 641:21 644:16 645:5,7 646:5,7 650:15 657:2,4 662:17,19 663:13,15 671:13,15 673:9 679:17 680:10 681:10 686:22,24 688:5 690:19 MCCABE'S- 658:6 674:20 MCDONALD- 7:4 8:20 20:24,31 26:34 27:5 52:17 56:20,23 99:11,15 100:4 101:23 103:1 104:5,6 111:4,5 112:22 113:22 114:4 115:15,22 116:5 117:25 118:5,7 119:6 120:14,24 254:6 256:20 259:15 264:23 270:20	271:5,8,10, MCDONALD'S- 116:5 604:14 606:7 691:9,24 803:1,14 810:9 820:12 957:17,24 1141:17 1176:7 1177:2 1268:21 1287:22 1387:2 1494:17 1515:12 1521:18 1534:22 MCDONALDS- 124:10 125:5 962:15 1092:3 1094:20 1106:18 1312:6 1466:11 MCDONALDS'- 1167:6 MD- 168:7 340:15 348:11 469:18 470:1 527:12,20 615:15 861:5 905:8 1060:14 1503:13 MEAL- 1160:13 MEANS- 46:16 52:24 89:15,18 102:12 141:2 172:19 173:15,20 179:19 180:12,24 190:19 268:5 318:25 353:4 355:15,22 360:2 489:8 506:15 537:25 553:15 561:11 584:23 602:24 633:4 741:3 781:15,19 782:24 784:21,25 785 MEANT- 317:25 328:2 409:15 784:17 786:21,23 787:6 816:11 1224:3 1465:15 MEANTIME- 987:6 MEASURE- 75:19,20,23 1335:18 1532:9 MEASURED- 262:6 MEASURES- 1089:25 1335:7,15 MEAT- 589:3 MEAUT- 16:36 17:11,15 29:5 1119:24,25 1232:3
--	--	--	--

OCTOBER 2015 DELANEY V. CASEPRO

1341:2 1342:16 1351:23 1358:25 1359:5,7,9,13 MECHANISM- 714:2 MED- 405:8 MED/MAL- 42:17 405:11 MEDIA- 1091:21 MEDIAN- 153:1 158:11 1030:12 MEDIANS- 1030:11 MEDIATION- 62:17 MEDICAL- 21:27,34 22:6 24:7,16 40:6 42:22 46:15 47:16 48:11 51:14 52:7,11 53:10 55:2,9,11,14,22 56:5,18 57:9,10,19,22,24 58:7,8,25 59:4,7,10,14 60:7,14 96:5 97:24 98:2,4 100:10,13,18 104:10 110:16,17 111:21 11 MEDICALLY- 964:19 1301:19 1334:13 MEDICALLYTRAINED- 1094:19 MEDICARE- 1156:8 MEDICATE- 878:23 930:24 MEDICATED- 931:2 MEDICATING- 930:19 MEDICATION- 95:9 98:22 113:2 116:18 132:14 235:22 299:6 304:5 306:15 308:10,17 310:11 311:7 318:4,23 321:25 325:19,24 335:8,19,21 336:12,18 350:17 361:15 365:19 504:21 518:21 792:8 793:3,16,21 794:9 797:11 803:12 MEDICATIONINDUCED - -	1185:25 M MEDICATIONS- 96:1 113:14 114:19 116:20 260:17 299:2,10 302:25 303:1 305:23 306:5,6,16 311:3 320:25 325:18 329:20 333:17 335:5 350:13 351:3 358:6 369:25 370:4 451:19 455:23 456:2,7,9 457:1 560:21 761:20 793:6,8,10 MEDICATIONWISE- 803:10 MEDICINE- 168:6,9,22 169:3,22 172:14 175:22 308:12 309:4 310:16,18,24 322:1 695:22 724:6 737:4,22 738:15 739:5 754:3,23 756:1 757:24 778:24 803:19 910:23 912:5,13,16,21 913:2,22 914:24 915:11 967:20 1061:2,19,2 MEDICINES- 335:25 804:11 1190:9 MEDICS- 484:3 MEDS- 361:17 820:24 1510:15 MEDSURG- 340:7 MEET- 85:3 130:11 135:18 199:25 294:24 591:21,25 592:7 884:25 920:18,23 1066:16 1096:12 1118:24 1127:2 1133:20 1150:15 1195:3 1199:5 1323:19,20,21 1504:10 1545:2 MEETING- 140:11 563:7 591:15 675:3,13 1138:25	1167:19 MEETS- 57:2 1160:5 MELANIE- 5:47 201:21 202:2,5,7 214:6 222:25 223:2,6 224:1,4 1245:14 1478:13 MELD- 1438:12 MELDING- 1442:6 MELLITUS- 359:11 MEMBER- 288:8 705:9 1063:25 1064:5 1072:16 1194:24 1264:2,4,6 1481:24 1505:12 MEMBERS- 109:5,8 570:15 1039:23 1085:18 1195:1 1205:9 1326:24 1330:17,21 1474:7 1497:4 MEMO- 1455:3 MEMORANDUM- 1495:1 MEMORIAL- 120:5 153:19 162:17,21 271:23 272:5 341:6,10,14 401:11 432:5,6,16,19 443:11,13,15 471:8,11 472:12 473:7,21,22 478:22 479:2 499:3,6 500:1 527:19 535:7 858:20,25 859:9 862:18 863:5 864:2,24 865:10,12,15 MEMORIAL'S- 275:25 1195:22 MEMORIES- 237:3 MEMORIZED- 1462:24 MEMORY- 516:17 665:22 668:16 688:3 742:4 745:21 886:4,6 1166:2 1218:17,18 MEN- 51:25 94:3 95:15 98:9 101:19 107:22 570:10 780:9 1039:10,17	1054:6 1146:25 1397:21 1539:14 MENINGITIS- 999:9 1378:7 MENTAL- 51:22,25 57:21 132:10 236:12 297:14 306:11 307:4 311:4 321:4 322:14,16 333:17 340:4,5 341:2 357:20 359:25 360:20,25 363:11 370:2,3,16 381:22 399:2 456:11,19 498:14,16,18,23,2 4 471:7,11 472:11 499:8 50 MENTALLY- 109:5 355:9 949:25 1184:10 1392:1 1447:1 1509:6 MENTIONING- 37:3 MERCED- 216:4 217:7,24 1526:21 MERE- 1083:4 1507:16 MERELY- 130:10 141:17,21 143:4 710:4 721:25 1240:5 1472:5,16 1510:24 1538:22 1540:2,3 1567:22 MERGE- 247:5 MESOTHELIOMA- 1503:11 MESS- 430:23 1394:12 MESSAGE- 73:16 1512:11,12 MESSED- 105:8 160:12 222:24 1390:10 MESSY- 680:17 MET- 56:13 84:19 85:9,14,17 105:13 110:21 125:15,19 200:1 234:12 238:23 239:3 294:13,20,22 342:23 446:19 470:12,17 578:5,7 636:19 637:8 640:21 643:18 704:1 711:15
--	---	---	--

OCTOBER 2015 DELANEY V. CASEPRO

712:3,16 715:6 716:9 787:19 791:6,10 852:2 METEOROLOGICAL- 1353:1 METHOD- 168:1 190:25 532:2 749:14,25 METHODIST- 1263:22 METHODS- 172:20 532:5 1053:18 MEXICAN- 1386:4 MICHAEL- 5:28 9:3,27 10:25 140:5 166:5,14,17,19 198:7 199:23 564:19 565:2,5,10 645:5 646:5 662:17 663:13 671:13 673:9 679:17 686:22 699:11 718:7 1120:2 1414:17 1430:15 MICHIGAN- 167:25 168:11 MICROBIOLOGY- 174:19 MICROPHONE- 75:9 155:7,8 345:5 430:24 437:16 524:7 1276:7 1412:11 MICROSCOPE- 174:14 186:14,25 MIDBRAIN- 200:10 MIDDLEAGED- 294:18 MIDDLEMAN- 741:4,6 MIDNIGHT- 338:5 MIDNINETIES- 1415:6 MIDPOINT- 441:21 MIDSTREAM- 32:10 MIDTWENTIES- 51:23 MIDWAY- 255:4 279:2 756:13 MIKE- 3:24 123:22,25 617:14,18 650:15 1400:12 795:13,16,22,24,2	5 MILD- 796:6 816:3,12,15,20,22 838:13 1142:9 MILD/MODERATE/SEV E ERE- 815:21 M MILE- 99:25 MILES- 94:17 101:12 129:6 130:13 1435:6 MILITARY- 40:14 51:21,25 57:13 58:21 102:18 104:16,22 123:24 124:8 281:12 291:13 299:20 304:17,18 307:17 338:16 357:1 365:9 446:13 488:6 500:2 501:6 503:1,14,16 505:11 535:9,10,18 536:4 553:12,18 555:17 557:4 5 MILITARY'S- 281:13 MILK- 59:18 MILLER- 1:13 2:10 41:11 55:10 63:20 64:15 75:1 81:24 101:23 129:10 154:4 175:24 181:4,7 182:2 184:20 186:9 188:13,16 190:5 191:6,8,16 193:18,22 194:6 196:15,19 198:17,20 199:3,6 590:25 700:14 1010:16 1016:19 MILLER'S- 63:23 137:16 176:16,19 177:6 178:5 182:19 185:4 192:1 600:8 1026:10 1120:22 1431:2 MILLISECOND- 1016:22 1430:24	1434:23,24 1435:7 MILLISECONDS- 200:4 1429:19 1430:20 MIND'S- 97:14 MINDFUL- 82:20 156:3 228:14 312:22 313:13 345:5 391:13 524:6 644:17 660:4 732:24 818:19 887:10 990:19 991:2 1029:20 1036:12 1082:1 1096:3 1212:21 1223:18 1229:4 1362:15 1446:2 1544:8 1565:11 MINDING- 490:1 MINDS- 92:9 229:10 313:5 388:22 661:2 675:3,13 990:25 1007:10 1229:9 1250:10,15 1254:4 1350:7 1426:5 MINE- 230:25 439:25 440:20 443:5 467:24 468:4 524:16 754:14 806:4 971:21 988:19 1333:13 1353:14 1381:2 1501:7 MINERAL- 1414:18 MINIMAL- 724:25 MINIMUM- 165:12 1036:17 1045:8 1063:9 1196:21 MINOR- 1183:24 1354:10 MINUS- 499:15,17 1079:13 1246:8 MINUTES'- 487:6 864:16 MINUTIA- 745:20 746:25 747:3,18 748:1 864:19 MIRAMAR- 324:15 MIRROR- 148:1 1122:6 MIS- 1332:23 MISCONDUCT- 922:21 972:20 974:17	MISCONSTRUE- 93:9 MISERABLE- 392:7 MISMATCH- 619:14 MISREAD- 1156:8 MISREPRESENTATION - 133:20 1462:24 M MISS- 77:25 78:3,6 194:18 1156:19 1421:9 MISSED- 441:3 1041:6 1415:19 MISSING- 487:7 519:9 979:2 1165:13 1225:20 MISSION- 579:4,6,8,20 580:3 MISSTATEMENT- 707:5 902:6 1462:17 MISSTATING- 860:21 MISTAKE- 54:11 93:8 105:7 218:4 437:9 942:22 MISTAKES- 893:23 1319:8 MISUNDERSTANDING- 1069:19 MISUNDERSTOOD- 746:16 974:23 1043:15 MITCH- 1414:17 MITRAL- 1393:22 MIX- 485:8 MIXED- 531:11 MMD12569- 757:24 MM- 890:19 1212:16 1224:4 1227:17 MOAN- 1481:17 MOANED- 350:10 MOANING- 238:23 551:15 1193:12 1284:11 1481:21 1519:17 MOBILIZE- 1393:11 MODEL- 94:13 118:12 MODERATE- 795:13,16,22,24
---	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

815:20 816:4,11,12,21 838:14 949:2 1142:9 1277:6 MODERN- 1387:16 MODEST- 1183:22 MODIFICATIONS- 668:17,23 672:25 673:1 MODIFIED- 672:18 MODIFIER- 1142:11 MOLASSES- 1229:16 MOLES- 173:25 MOM- 568:8 1028:3 1371:7 1395:21,24 1398:20 1399:20 1407:21 MOMENTARILY- 1243:22 1244:2 MOMENTS- 234:11 974:13 1016:1 1509:10 1554:13 MONA- 4:9 30:5 MONDAY- 10:15 96:9,14 113:15 248:20 351:3 388:7 497:18 603:17 614:3 659:20,22,23 660:3,8 661:7,13,14,16,24 676:7,11 681:3 683:2,3,5,11 884:17 888:18 968:21 1191:22 1193:18 1194:2 1215:7,9 1285:6 1453:24 1518: MONDAYTHROUGHSUND A AY- 586:25 M MONETARY- 1560:22,24 MONEY- 38:4,11 103:10 122:24 423:13 424:1 435:21 572:4 597:8,9 601:13 602:2,8,14,17 619:7,12 621:19 709:8,11 874:13,15	875:10,14 876:21 878:16 1055:4 1152:21,23 1156:23 1398:3 1401:6 1417:10 1418:1 1457:25 1 MONICA'S- 755:6 MONIES- 554:22 MONIQUE- 217:14,25 MONITOR- 65:21 66:12,15 147:25 155:15,23 156:3 419:12,15 448:16 449:20 496:2 MONITORED- 548:8 MONITORING- 448:21 462:23 466:11 474:20 495:14 548:5 MONITORS- 1050:20 1359:1 MONOTONE- 1275:24 1277:21 MONTH- 272:2 586:8 738:20 1065:22 1110:2 1164:23,24 1184:12 1333:6 1388:21 1405:7 MONTHS- 60:17 105:18 326:11 378:17 574:4 609:22 618:7 687:18 689:23 738:19,20,21,22,2 3 702:6 757:15 759:11 844:2 851:22 856:15 880:9,22,24 881:24 1079:13 1174:2 1203:16 1240:7 1372:13 1390:13 1391:3 1394:6 15 MONTREAL- 736:4 755:6 MOOD- 366:15 459:6 493:25 521:15 804:5 832:25 834:12 1136:3 1187:25 1274:20 1275:17,18,20 1277:19 1322:25	1323:15,23 MOODS- 459:8 MOODY- 1136:22,24 1137:4 1510:15 MOORE- 424:10,12,22 610:22 634:11,18,19,25 635:15 636:1,12,16 637:4 702:10 710:14,16 711:12,18,22,24 715:4,8,10,13,14, 18,22 712:2 714:16,17 721:17,21 722:7 723:4,8 885:23 886:1 920:18 1216:11,13 1219:8 1221: MOORE'S- 609:24 610:1 714:22 716:8 MOOT- 848:17 MORAL- 1235:16,17 1355:8,9,22,23 1467:24,25 1499:2 MORALLY- 1355:10 MORELIKELYTHAN- 194:5 MORELIKELYTHANNOT - 190:2 198:19 M MORGANTOWN- 2:29 MORNING- 30:10 41:5,7 72:7,9,12 73:14 74:15 104:14 109:21 176:22,23 228:25 229:13 231:15 233:22 234:16,18 235:13,14 249:10 253:10 365:20 387:6 389:2,3 391:7,10 392:15 393:7 418:5,6 419:4 420:10 428:1 429:10 43 MORPHED- 408:3 MORRISTOWN- 497:24 498:6 MORTGAGE-	285:7,14 614:10 1376:12 MOS- 58:20 MOTEL- 1160:14 MOTHER- 95:6 108:2 123:23,25 237:3 567:7,11 568:11 569:25 571:21 650:22 651:20 1377:9 1399:1,16 1402:19 1404:1 1417:7,9 1421:5 MOTHER'S- 94:10 566:17 MOTION- 31:20 33:20 34:17,18 37:23 38:18 40:23 42:12,13,16,19 49:17 54:1,2 63:12 68:7,8 69:15 241:14,25 242:9,15,19 264:9 509:21 1016:25 1059:15 1111:19 1120:3 1186:1,2 1422:16 1426:19,24 1428:24 1437:21 1445 MOTIONED- 296:22 MOTIONS- 1:22 4:25 31:15,17 37:16,22 57:18 265:8 1226:24 1275:9 1422:12 1423:2 1426:16 1428:20 1429:6 1454:14,21 1457:5,8 1458:10 1466:21 1575:3,9 MOTIONS/RULINGS- 30:6 MOTIONS/RULINGS14 2 22- 17:36 MOTIONS/RULINGS14 5 54- 18:9 M MOTIVATED- 738:25
---	---	--	--

OCTOBER 2015 DELANEY V. CASEPRO

MOTIVES- 873:16 MOTLEY- 2:18 167:9 MOTOR- 61:18 952:4 1014:20 MOTORING- 60:9 1100:8 1106:10 MOTORISTS- 1098:8 1439:7 MOUNT- 2:20 752:22 MOUNTAINS- 1400:25 1401:2 MOUNTED- 1046:2,5 MOUTH- 314:17 520:21 549:6 1186:1 MOUTHS- 1327:3 MOVE- 65:21 67:11 131:6 145:20,22 147:9,17 148:9 185:21 209:8 249:18 252:20 253:1 268:21 275:17 330:12 345:8 406:17 418:23 431:14 443:14 504:15,17 523:10 657:17 694:1 733:25 738:6,11,24 917:14,15 921:17 924 MOVED- 64:4 123:25 275:19,20 315:11 330:11 420:10 431:14 433:25 452:7 463:19 491:25 497:15 498:20 572:12 575:5 598:19 600:2 613:9,15 658:11 716:22 733:22 743:18 752:4 753:8 764:16 788:2 831:2 869:24 1163:4,1 MOVEMENTS- 186:18 1275:9 MOVES- 171:10 1073:1 1130:5 1381:13 1422:14 MOVIE- 94:9 1317:17,18 MOVIES- 76:6,17	813:6 MOVING- 65:20 147:13 165:7 187:5,14 248:23 628:13 719:18 726:17 1011:25 1028:8 1290:11 1415:5 1446:13 MPS- 1198:11,13 MSN- 274:21 MUCH- 30:9 40:3 65:3,5,11 69:6 75:14 79:14 103:10,13 106:25 122:1 126:18 127:25 137:7 150:17 161:20 191:22 198:5 226:8 228:9 233:23 234:8 251:7,8 267:19 270:17 287:24 290:7 296:4 297:10 305:19 314:15 324:7 MULLEN- 41:17 1022:14 1233:10 1234:6,14,18,21 1240:8 1242:3,8,14,18 1251:13 1353:14 1358:9,18 MULLEN'S- 30:15 1234:8 1247:8,24 1353:17 1358:20 MULTIFACTORIAL- 804:3 MULTIPLE- 182:22 183:2 187:15,18 193:5 322:14 399:18 581:9 1119:13 1209:6 1211:3 1321:11 1529:7 MULTIPLEAWARD- 591:17 MULTIPLICATION- 876:8 MULTISTEP- 1041:16 MUMBLING- 308:21 371:13 509:22 MUNICIPALITY- 1038:3 MURDER- 1022:11,14	1235:14 1236:23 1354:6 MURPHY- 42:11 MUSC- 138:14 140:7 164:3 175:16 176:12,17,18 185:2 1241:22 1247:2 1258:21 1266:20 MUSCLE- 1116:17 1381:13 MUSCLES- 187:6,13 MUSIC- 996:9 MUTUAL- 1556:12 MUTUALLY- 417:24 MYERS- 1386:10 1415:13,16 MYRTLE- 1388:24 1390:23 MYTHICAL- 412:16 413:5,6 417:4 N N/E/G/E/O/- 1037:14 N6264506R10100005 - 671:21 N NAG- 156:6 NAICS- 648:23 NAIDU- 1446:21 NAIL- 1024:1 NAILS- 589:14 NAKED- 100:25 109:2 128:21,23 1123:7 1139:19 1291:20 1478:18 NAME'S- 149:13 600:8 NAMED- 95:13 98:9,10 100:2 573:18 1060:4 1070:1 1297:17 1460:17 NAMES- 294:16 299:12 303:1 1497:3 NANCY- 664:8,14 1488:13 NARROW- 142:17 191:22 1011:22	1015:21 1244:25 1433:18 NARROWED- 136:16 NARROWS- 648:24 NATION- 1044:16 1053:9 NATIONAL- 1081:7,8,10 1353:1 NATIONALITY- 748:15 NATIONALLY- 1467:13 NATURAL- 75:21,22,24 112:13 533:25 565:25 566:2 739:3 753:14 1032:20 1061:11 1511:15 1543:24 1544:2,6,9 1552:14 1553:6 NATURALIZATION- 744:25 745:2,12 746:13 748:5,10 NAUSEA- 944:13 NAUSEATED- 944:15 NAVAL- 21:10 22:6 23:34 24:7,16 51:12 54:24 56:16 57:5,11 95:10,15 96:3 97:2,3 99:18,20,25 100:6,8 104:11 113:16 116:20 117:4 120:1,2 122:5 124:5 128:16 130:14,15 216:5,6,12 237:11 238:22 257:14 259:11 268:2 NAVY- 54:19 58:18 96:24 102:14 104:22,25 117:5 124:1,15,21 150:6 238:21 258:24 271:24 317:22 338:21 341:11 342:2,21 343:1 369:6 421:7,10,21,23,25 422:8 424:2 425:15,16,19 426:3,4 432:20,21 433:4 445:14 474: NAVY'S- 689:3
---	--	---	--

OCTOBER 2015 DELANEY V. CASEPRO

1327:9 1507:4 NAVYPARTICULAR- 648:4 NAW- 1332:23 NCO- 308:6 NEAR- 101:13 116:7 1124:21 1540:18 NEARBY- 563:22 1040:18 NEARDEATHTYPE- 317:17 NEAREST- 1195:19 NEARS- 99:9 NEAT- 298:14 557:2 589:12 1518:11 NECESSARY- 93:10 366:4 406:22 490:6 504:19 545:16 763:4 930:15,18 964:19 1036:18 1063:9 1078:18 1127:17 1128:3 1356:12 1560:19,24 NECESSITATE- 1292:6 NECK- 174:9 187:6,7,10 691:8 1304:8 NECKS- 1116:17 NECROPSY- 173:19,20 NEEDED- 44:19 48:2 73:2 200:24 223:11,15 236:12 266:24 286:16 318:1,5,23 325:24 326:2,3 335:9,21 339:8 350:17 365:18 385:18,19 397:21 409:5,6,22 412:3,22,24 490:11 496:1 509:19 556:15 583:14 614:11 640:5 772: NEEDING- 224:20 455:17 457:1 661:9 832:16 835:13 1044:2 1197:12 NEEDLESS- 398:13 NEEDLESSLY- 49:7 109:8 398:24	401:24 NEGLECT- 1559:23 NEGLIGENCE- 42:2,8,9,18,23 43:5,7,21 49:13 51:4 52:25 54:5 55:9,14 57:23 70:13,15 71:4,5 108:20 110:13 236:6,7 237:19,23 239:10,11 240:11 241:1,6 242:23,24 243:2,3,14 396:7 422:11 721:16 725:25 1016:3,5 1056:24 1 NEGLIGENCE/PROFES S SYONAL- 243:8 N NEGLIGENCECTYPE- 58:5 NEGLIGENT- 43:18,20 44:6 108:19 243:13 1090:13,16 1099:15 1100:2 1101:22 1319:16 1320:1 1426:25 1427:11,24 1428:3,6,10 1446:19 1448:20 1454:23 1455:9,11,14,17 1456:23 1457:3 1462:10,11 1465:23 1473:14,16 1499:21 NEGOTIATE- 873:16 NEGOTIATED- 423:24,25 669:12 670:10,11,16 676:19 870:20,25 1459:7 1463:16 NEGOTIATING- 424:18 NEGOTIATION- 873:5 NEGOTIATIONS- 668:17 873:21 877:1 878:13 NEGROW- 14:3	1009:22 1037:3,10,13,16 1051:17 1054:1 1467:11 NEIGHBORHOOD- 128:22 340:8 472:2,10 1374:9,25 1406:18 NEIGHBORS- 1399:4 NEITHER- 405:14 609:20 779:11 865:14 882:15 1127:21 1160:11 1469:19 1575:15 NEPHROLOGIST- 1294:24 NERVES- 952:4 NERVOUS- 853:6 1278:8 1288:20 NET- 876:13 NEURO- 363:10 822:19 NEURO/- 943:22 NEUROLOGIC- 363:11 950:8 1182:9 NEUROLOGICAL- 943:22 1017:5 1186:5 1405:18 NEUROPSYCHE- 950:13 NEVERTHELESS- 138:18 307:25 1296:17 1485:8 NEW- 45:8 166:24 167:1 168:15 169:2 175:12 223:7 343:6 431:16,17 497:15,24 573:6 577:12 617:1,2,24 684:2 691:17 872:13 1119:2 1189:10,20 1190:18,23,24 1202:12,13 1203:11,12 1223:11 1376:11,20 1379:2 1384:1 NEWBORNS- 1331:16 NEWIRE- 619:19 NEWS- 92:5 220:15,18 390:1 892:15 1091:21 1209:18 1347:9,10	NEWSPAPER- 92:6 127:13 313:1 388:17 660:25 733:3 990:22 1007:14 1138:14 1170:22 1229:25 1350:4 NEWSPAPERS- 561:12 NEXUS- 1556:17 NGRI- 31:2,8 1234:23 1235:5 1236:9 1242:2 1247:13 NE- 625:20 637:22 872:4 NEB- 1173:14 1174:19 NICE- 379:5 510:11,18 656:13 676:1 699:15 755:22 872:17 891:13 970:21 1378:14 1442:13 1489:24 NICER- 1150:18 NICHOLAS- 1:13 2:10 75:1 81:24 185:4 194:6 198:16,20 199:3,6 1017:3 1120:22 1369:5 1575:13 NICHOLS- 1267:14 NICOLE- 500:16,20,21 501:8 NICOTINE- 306:9 1187:21 NIGHT- 94:9 163:4 176:21 313:17 338:4 365:18 393:8 605:21,25 681:1 766:17,19 892:15,17 919:3,7 968:21 1110:20 1160:15 1244:16 1377:2 1548:2,4,6 NIGHTMARES- 237:3 1405:11,12 1419:1 NIGHTS- 390:8 392:8 497:19 1376:19 NINE- 18:3 53:22 493:7,18 1007:15 1174:2 1230:5 1247:17
--	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

1274:21,23 1454:12 1477:23 1478:1 1508:19 1537:6 1540:17,20,24 1564:1 1572:20 1573:24 NINEHOUR- 748:20 750:4 NITPICKING- 862:11 NITROGLYCERIN- 1199:1 NITROGLYCERINE- 1295:17 NMLC- 633:24 NMLC'S- 633:20 NOBODY- 96:6 160:11 483:8 761:5 762:15 788:12 800:4 900:11 1143:6 1246:10 1396:20 1506:9 1507:13,18 1533:11 1562:1 NOISE- 348:8 483:22 NOISES- 510:21 513:20 1139:5 1404:12 NON- 211:6 698:19 950:10 1446:12 NONCHALANTLY- 521:7 NONCOMMUNICATIVE- 1178:13 NONCOMMUTATIVE- 923:6 NONEMERGENCY- 203:16 NONEMERGENT- 290:16 926:7 NONFIRE- 1467:18 NONMOVING- 1430:6 1438:17 1443:9,19 NONPATIENT- 1447:10,15 1471:24 1472:4,12,17 1567:24 692:11,12,17,18,2 1 NONPERSONAL- 693:7 NONSENSE- 1486:7 NONSERIOUS-	799:25 944:22 NONSPECIFIC- 493:20 NONSUIT- 1429:9,13 NONVERBALLY- 542:4 NONWORDS- 510:21 NOR- 88:21 600:11,13 825:17 865:14 882:18 951:17 1127:21 1355:16 1468:23 1548:10 1575:16 NORESTRAINT- 352:20 NORESTRAINTS- 352:17 NORMAL- 30:11 112:12 172:16 181:7,15 357:11,15,18 360:17 364:13,16 365:1 383:9 485:4 517:24 518:6 829:19 883:17 908:6,10,15,19 909:2 927:7,8 932:24 949:15 952:7,15,19 953:16 1020:3 1184:16,17 1254:13 1289:2,2 NORMALLY- 171:17 212:3 329:6 528:7 530:3 829:25 843:17,19 847:20 866:1 905:6 926:17 933:2 952:12 961:16 1211:11,20 1255:1 1281:11 NORTH- 50:12 152:7,19 158:16 497:4 498:19 500:1 526:3,6,8 542:21 1066:20 1110:21 1255:25 1332:14 1489:25 NORTHBOUND- 152:24 157:24 164:20,22,25 1024:15 NORTON- 42:5,6 1108:19 1109:18 1112:2	NOS- 493:20,21 1187:24 1322:23 NOSE- 108:16 949:14 NOTARY- 1534:3 NOTATION- 954:22 1180:10 1245:11 NOTATIONS- 357:5 NOTE- 4:7 28:25 78:2,3,6,9,10,11, 12,13,18,19,20 79:1,3,4,5,14,17, 18 30:3 77:17,24 115:4 120:17 163:15 265:25 344:6 354:19 362:9 397:13,15 416:6 468:20 469:24 487:15,18,20 490:16 491:4 503:21,25 504:12,14 51 NOTEBOOK- 249:8,9 661:12 NOTEBOOKS- 127:17 228:12 372:18 388:25 561:20 607:25 644:6 661:4 720:22 733:9 818:12 969:14 1350:12 1408:9 1426:11 1513:17 1567:12 NOTED- 117:16 186:16,19 187:14 327:25 355:6 521:17,19 536:6 802:23 809:2 813:17 858:2 944:19 945:20 950:9 1031:5 1183:11,18 1246:6 1274:4 1282:21 1287:20 1300:20 1327:17 1481:16 1486:20 1491:12 1493:3,5,14,2 NOTEPAD- 80:15,23 315:3,4 NOTEPADS- 80:19,21 81:7 253:13 533:14 886:21 NOTES- 77:18,21	78:14,15,17,18,25 79:4,9,10 80:12,24,25 81:3,6,9,12,17 117:8 313:6,8 354:18 466:23 467:14,19 468:12 469:2,23 471:6 472:19 473:10 491:7 536:19 786:13 787:17 792:21 801:19 802:1 806:9,23,24 807 NOTHING'S- 865:1 1480:6 NOTICE- 17:3 23:6 42:15 45:9,23 55:13 363:15 429:17 442:25 584:25 610:13 646:17 717:7 722:2,6,8,9,10,11, 15,21 721:25 725:23 1001:21 1055:11,16 1108:5 1111:18 1212:4 1221:7 1235:8,19 1236:15,16 1238:3,6,21 123 NOTICES- 1301:10 NOTIFIED- 488:7 924:3 982:12 NOTIFIES- 926:1 NOTIFY- 503:13 895:4 973:21 977:1,10 978:18 979:17 984:16 987:9 1495:9 NOTIFYING- 977:22 978:24 NOTING- 471:8 488:5 528:15,16 1030:15 1437:21 1568:2 NOTORIOUS- 383:13 NOVEMBER- 105:6 633:17 646:16 702:8 1107:23 1109:24 NOWADAYS- 336:6 NUGGET- 1249:13 NUMBERED- 579:5 NUMBERS- 147:16,23 257:22
---	--	--	---

OCTOBER 2015 DELANEY V. CASEPRO

324:17,18 434:11 443:22 463:15 472:22 528:1 595:18 634:6 642:5 890:5 1342:1 1562:20,22 NURSE- 13:10,16,19 28:13 56:18 57:15 95:20,23 96:8,15,16,23 101:22 102:25 103:1 104:5,6,16 109:14 111:4 112:21,22 113:22 114:4,7 116:6 237:20 238:20 240:17 271:21 274:1,2 276:20,22 281:12 289:22,23,24 291:15 NURSE'S- 115:5 305:8 374:1 793:7,14 809:18 820:8 821:1 824:20,23 847:23 848:16 861:3,25 862:1,6,22 863:8 864:3 904:15,24 905:8 930:11 947:2 957:18,19,20 1133:21 1181:24 1265:2 NURSES- 38:9 41:13 51:19 94:20,22 97:5,24 98:17 99:10 102:21 103:10,16 104:10 108:8 114:24 115:13 116:1 121:19 124:14,18 240:24 241:18 289:4,11 293:12 339:13 355:19 405:15 407:4 443:18 444:16 568:5 570:9,12 5 NURSES'- 347:22 349:8,14 447:24 451:6 454:16 465:17 466:7,15 482:15 485:11 511:12 532:12	792:21 809:2 1534:14 NURSING- 116:4 237:21,22 274:15,17,19,22,2 4,25 244:9,16,17 286:22 318:18 319:21 321:8 340:22 341:23 346:1 355:14 368:21,23 431:24 432:2 448:18,23 453:22 455:23 459:15 467:14,18 472:19 483:24 497:7 498:9 506:7 O O/B/E/R/G- 1255:14 O/M/A/L/D- 271:11 OAK- 566:25 628:6 667:9 OB/GYN- 331:23 348:6 1258:17 1259:2,3,11 OBAMA- 705:9 OBORG- 16:19 123:8 1008:4 1120:1 1148:10,12,13 1153:19 1214:7,9,18,21 1215:14,16,20 1232:6 1248:9 1255:10,13,14,15, 17 1254:22 1265:19 1313:25 1489:24 1490:4,10,14 1494:10 1520:10 1528:22 1529:10 1535:15,20 1 OBORG'S- 1148:17 1149:1 1490:5 1535:20 OBRY- 88:11 OBJECT- 188:18 229:20 230:17 263:23 266:5 402:13 595:17 694:2 743:15 749:12 1056:25 1080:4 1093:15 1163:10 1170:24	1236:20 1363:9,16 1423:9 OBJECTED- 196:4 405:18 562:20 728:5 OBJECTING- 137:14,16 405:9 728:11 OBJECTION- 63:9 89:1,9,12,13,14,1 5,17 88:6,20,22 128:1 136:24 139:9 147:20,21 163:12 165:24 171:12 185:24 186:2 189:10 193:24 194:9 196:20 197:3,21 198:22 199:8 201:5 212:9,10 213:1 228:6 230:7,20,24 235:9 244:2 OBJECTIONABLE- 145:16 OBJECTIONS- 5:5,12 6:32,48 7:35 10:38 12:42 13:7 16:34 66:22 93:14 127:23 136:11 137:8,9,12,13 144:25 219:19 226:24 227:1 229:17 230:1,2,3,13 231:8 232:13 234:5,20 248:24 256:9 393:14,19 394:17 395:13,16 413:11 4 OBJECTIONS/RULING - 16:10 1232:20 OBJECTIONS/RULING S S- 13:36 O OBJECTIVE- 174:23 175:1 OBJECTOINS-	231:19 OBJECTS- 1025:6 1121:16 OBLIGATED- 87:23 88:17 OBLIGATION- 1089:22,24 1343:23 1472:8 1495:20 1509:8 OBLIGATIONS- 58:8 377:5 OBLITERATE- 81:9 OBNOXIOUS- 1230:21 1281:1,10 1282:23 1283:7 1308:10 OBSCURE- 177:15 OBSERVABLE- 1121:9 OBSERVATION- 469:24 510:25 545:17 960:14 983:13 985:2 1183:10 1270:8,14 1546:17 1547:8,18 OBSERVATIONS- 118:1 318:20 459:25 517:24 541:12,16,25 1141:17 1181:24 1193:16 1194:19 OBSERVE- 79:15 92:18 153:2 447:25 506:10 509:9 521:3 528:17 1253:25 1548:3 1570:15 OBSERVED- 113:23 116:9 152:20 186:13 193:2 448:2 449:2 517:17 521:19 528:13 529:22 535:3 545:25 560:9,10 1192:7 1193:16 1305:25 1482:2 1487:19 OBSERVES- 128:22 OBSERVING- 56:24 78:8 115:14 116:6 509:18 511:13 513:14 1076:12 1306:14 OBSTETRIC- 507:7 OBSTETRICS- 1258:23
---	--	---	---

OCTOBER 2015 DELANEY V. CASEPRO

OBTAIN- 135:20 295:22 296:15 432:1 490:18 591:8 754:23 772:12 824:3 971:24 1057:12 1267:15 OBTAINED- 167:24 168:4 746:12 971:19 1061:11,15 1261:6 1272:16 1293:18 1498:3 OBTAINING- 687:2 OBUNDLED- 949:5 1184:2 OBVI- 1323:22 OCCASION- 118:3 262:2 263:6,11 294:21,24 377:1,3 383:13 490:15 731:5,6,25 732:1 773:20 885:3 919:12 1557:9 1562:7 1563:21 1564:4 OCCASIONALLY- 90:9 295:5 318:16 744:9 807:10 845:7,8 1178:8 1205:11 1571:11 OCCASIONS- 49:2 294:22,23 401:18 404:8 885:3 924:20 947:21 1067:22 1291:8 OCCUPATION- 149:23 431:18 767:19 OCCUPATIONAL- 1116:19 OCCUR- 31:15 81:20 112:13 123:13 510:9 945:13 954:16 965:25 966:3 1191:9 1259:18 1311:19 1475:20 OCCURRED- 125:24 135:3 142:12 171:14 177:19 179:9 181:1 182:5,11,18 193:17 194:24 196:12 205:24 243:19 369:21 454:2,4 503:13,15	528:4 537:8 546:5 573:14 582:2 702:7 712:5,6,7 714:9 716:2 717:21 792:4 986:18 999 OCCURRING- 88:7 454:2 494:16,18 792:4 825:1 1246:10 1323:17 1507:17 OCCURS- 190:14,15 225:21 923:4 1032:8 1296:25 1554:3 OCEAN- 1391:11 OCTOBER- 1:20 4:7,16 6:29 8:5 10:17 11:38 13:31 16:6 18:5 30:1,3 234:2,4 283:23 284:10,23 388:2 427:20,22 438:5,22 439:16 584:2 591:10 599:13,16,22 618:6 683:10,12 741:22 888:19,21 1009:15,17 1232:17,19 1392:2 ODD- 1448:1 1484:8 ODOR- 363:17 517:14,20 946:5 OFFCAMPUS- 1072:20 OFFENSE- 1355:20 OFFENSES- 1235:14,18 1355:1 OFFENSIVE- 1026:7 OFFER- 51:17 140:7 141:25 142:2 209:8 212:8 278:20,24 390:6 392:11 407:6 441:15 480:3 596:3 611:22 621:25 625:18 633:20 671:20 675:16 677:14 691:14,24 692:1 870:7,10 871:7 872:2 878:3 1025:21 1044:3 1069:3 1 OFFERED- 40:13	89:20 146:4 170:9 219:18 282:25 285:19 392:7 482:5 612:6,20 714:25 731:1,7,21 732:2 740:14 967:4 1058:8 1079:14 1110:8 1422:15 1430:16 1467:14 1494:4 1542:9 OFFERING- 130:9,11 145:5 441:18 654:7 1094:12 1123:10 1148:3 OFFERS- 96:8 611:25 689:10 691:20,23 1521:6 OFFICE- 30:18 40:15 48:17,24 49:4 53:4 67:25 68:1 95:22 129:19 131:4 132:5 146:17 151:10,15,17,20 166:25 168:15 202:14 204:25 226:6,7 265:13 267:24 286:13 331:17,21 332:15,19 334:4 348:11,13 370:20 372:7 374: OFFICER- 56:10 95:14 104:21,22 130:8 153:16 156:12 217:7 254:23 307:22 308:2,6 488:5 502:21 504:6 591:21 593:3,12 632:15 638:8,20,23 639:22 640:11 664:2,9 698:22,25 699:4 702:4,13,16,24 703:3 705:6,10,21 706:3 OFFICER'S- 105:3 632:24 OFFICERS- 77:1 131:5 162:13,15 307:20 593:9,25 632:23 638:17	647:8 704:13,14,20 705:4 715:2 918:22 1004:10 1039:15 1156:19 1342:16 1345:17 1477:20 OFFICERS'- 211:15 593:5 688:8 704:11 OFFICES- 667:9 1064:12,16 OFFICIAL- 1:50 56:11 104:22 705:11 1049:10 1120:14 1199:21 1209:12 1247:4 1575:6,26 OFFICIALLY- 1199:16 OFFTHERECORD- 126:20 201:14 314:8 403:8,9 681:8 922:8 970:23 1003:11 1028:1 1032:14 1035:12 1171:14 1201:13 1223:1 1347:25 1411:11 1422:18 OFFTEN- 31:14 76:15 103:22 304:17 512:13 518:17 582:1 656:14 804:8 941:5 1053:19 1133:20 1140:15 1157:13 1164:8,10 1166:22 1460:16 1520:11 OFFTIMES- 100:18 908:4 OFFTIMES- 78:24 OHIO- 1414:15 OKEYDOKEY- 1100:13 OLD- 237:5 295:11 322:10 618:14 994:25 1061:4 1367:25 1368:17 1371:22 1372:11 1378:10,12 1379:23,24 1383:3,4,23 1384:15 1416:14 1494:12 1539:12
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