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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2017-CP-10-02758
Appellate Case No. 2019-001716

Jeane Whitfield,

Appellant,

v.

Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery,
LLC,

Respondents.

RECORD ON APPEAL – VOLUME II

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1 Q. All right. So you are making an
2 assumption based on the testimony of Ms. Whitfield?

3 A. Correct.

4 Q. All right. And did you read the
5 testimony of Dr. Schimpf where he said he did, in
6 fact, discuss the risks associated with this
7 procedure and that Ms. Whitfield consented to the
8 surgery?

9 A. I recall reviewing the testimony of
10 Dr. Schimpf, and, if you don't mind, let me review
11 my notes.

12 Q. Do you -- you don't recall that?

13 A. I don't recall that, but -- but if --
14 if that statement appeared in the deposition, then
15 I will -- I will concede that. I just don't recall
16 it.

17 MR. SLOTCHIVER: I believe he asked for
18 an opportunity to read his notes. I think he
19 should be afforded that opportunity.

20 BY MR. SMYTH:

21 Q. You are not allowed to look at notes
22 during a trial that's not in evidence. So, I'm
23 sorry, you are not going to be able to do that,
24 Doctor.

25 MR. SLOTCHIVER: I'm not aware of a

1 rule that precludes him from bringing notes with
2 him to testify during a trial. I believe he is
3 allowed to look at his notes during the trial, and
4 if you preclude him from it, it will be an issue to
5 take up with the trial judge.

6 MR. SMYTH: They are not in evidence,
7 so that is not --

8 MR. SLOTCHIVER: They don't need to be
9 in evidence. In fact, you asked him to send you a
10 copy of it during the discovery deposition. I
11 believe he is allowed to look at his notes. There
12 is nothing wrong with the witness looking at notes.
13 And this is -- you are going to taint the whole
14 deposition from your perspective, and we will move
15 to strike all of your cross-examination if you do
16 not allow him to look at the notes.

17 MR. SMYTH: Well, you can file whatever
18 motions you want.

19 BY MR. SMYTH:

20 Q. Doctor, do you know whether or not
21 Dr. Schimpf discussed this procedure with
22 Ms. Whitfield prior to the start of that surgery?

23 A. I do not know that.

24 Q. And what we're talking about is the
25 liposuction on the chin, correct?

1 A. That is correct. That is correct.

2 Q. And you did see the signed informed
3 consent forms that Ms. Whitfield signed to undergo
4 liposuction that day, correct?

5 A. I didn't see the consent forms
6 personally, so I've not reviewed them, but my
7 understanding was that it was liposuction on other
8 parts of the body and that the submental
9 specifically on the chin was not included. That
10 was what my understanding was.

11 Q. Is this an understanding that you got
12 from Ms. Whitfield's attorneys?

13 A. It was from her testimony, her
14 deposition, as well as from her attorneys, yes.

15 Q. All right. But you haven't bothered to
16 read the actual forms themselves?

17 MR. SLOCHIVER: Objection.

18 THE WITNESS: I don't think I saw them.

19 BY MR. SMYTH:

20 Q. Okay. Have you been provided a copy of
21 Ms. Whitfield's personal diary?

22 A. I have not.

23 Q. Have you reviewed the anesthesia
24 documentation from the surgery?

25 A. No.

1 Q. Has Ms. Whitfield complained to you on
2 any occasion about her chin?

3 A. No, not that I recall.

4 Q. Have you offered her any treatment
5 whatsoever for anything related to her chin?

6 A. No, not that I recall.

7 Q. So as you sit here today, you are not
8 aware of her suffering any damage related to any
9 liposuction done on her chin, are you?

10 A. No.

11 Q. Okay. We can agree that any lack of
12 conformed -- consent form did not cause
13 Ms. Whitfield any injury.

14 MR. SLOTCHIVER: Objection.
15 Mischaracterizes the testimony.

16 BY MR. SMYTH:

17 Q. Doctor, you can answer the question.

18 A. Unless I interview the patient and
19 examine her specifically, I don't think that I can
20 comment on that. But thus far my evaluation of
21 her, my examination of her, does not bring to my
22 memory any issues related to her chin or her
23 previous submental liposuction.

24 Q. Right. Your notes don't reflect that
25 she's brought it up a single time in four years, do

1 they?

2 A. No.

3 MR. SLOTCHIVER: Objection. Asked and
4 answered.

5 BY MR. SMYTH:

6 Q. Is it your position that the patient's
7 version of what happened with regard to informed
8 consent is to be believed over the physician's?

9 MR. SLOTCHIVER: Objection. Pitting
10 witnesses.

11 THE WITNESS: No.

12 BY MR. SMYTH:

13 Q. Okay.

14 A. That's not my position at all.

15 Q. And you understand that Ms. Whitfield
16 would have received anesthetic agents on the day of
17 her surgery, correct?

18 A. I presume so. If her surgery was under
19 general anesthesia, certainly.

20 Q. Right. And many of those anesthetic
21 agents are well known to cause memory lapses and
22 memory deficits, aren't they?

23 A. Yes.

24 Q. Have you ever had an occasion where you
25 discussed multiple cosmetic procedures with the

1 patient, went over the risks with them, they agreed
2 to have the procedure done, but either you or your
3 staff failed to go back and list that on the
4 informed consent form?

5 A. No.

6 Q. You've never had that happen?

7 MR. SLOTCHIVER: Asked and answered.

8 THE WITNESS: Never.

9 BY MR. SMYTH:

10 Q. Okay. Do you believe that can happen?

11 A. No.

12 Q. Okay. Have you ever had a patient ask
13 you to perform a procedure just before the start of
14 anesthesia and maybe forgotten to add that back to
15 your record?

16 A. The -- the answer is no. We are very
17 careful. If a patient has asked us to perform an
18 additional procedure which was not initially
19 included in the informed consent, we will modify
20 the informed consent. We will initial it, we will
21 have the patient initial it, and we will change the
22 operative plan.

23 Q. Okay. But what I would like you to do
24 now, please, is look at some of the exhibits that
25 we have e-mailed you prior to your deposition.

1 The first one is your office visit
2 note, dated October 23rd, 2015, and it has a
3 Bates-stamp number on the bottom right corner of
4 Kalus 24. Let me know when you have that, please.

5 A. Is this in the trial deposition
6 exhibits again?

7 Q. Yes, sir.

8 A. Okay. And how did you tell me I was
9 going to find it?

10 Q. The date is 10/23/15.

11 A. I found it.

12 Q. Is this your note from the visit that
13 you had with Ms. Whitfield on October 23rd, 2015?

14 A. It is.

15 Q. Was it made contemporaneously with the
16 visit that you had with her?

17 A. Yes.

18 Q. Was it part of your medical chart?

19 A. Yes.

20 MR. SMYTH: All right. I move this
21 document into evidence. Any objections?

22 MR. SLOTCHIVER: None.

23 (DFT. EXH. 1, OFFICE VISIT NOTE, DATED
24 10/23/15, BATES STAMPED KALUS 24, was marked for
25 identification.)

1 BY MR. SMYTH:

2 Q. In this note, Doctor, you talk about
3 fat deposits, or what's referred to as
4 lipodystrophy, in her arms, flanks, and upper
5 buttocks and that that's where you planned to
6 remove fat for the fat grafting procedure; is that
7 correct?

8 A. That's correct.

9 Q. Okay. And let's look at the next
10 document, please, which is the 10/26/2015 consent
11 form, and that bears a Bates stamp of CSC 39.

12 Let me know when you have that, please.

13 A. 10/26/15, you said, correct?

14 Q. Yes, sir.

15 A. Yes, I found it.

16 Q. Okay. And is this the consent form
17 that Jeane Whitfield signed on October 26th of 2015
18 in order to undergo surgery with you?

19 A. Yes.

20 Q. All right. And does it list the
21 procedures that you plan to perform at the top of
22 the form?

23 A. Yes.

24 Q. All right. And those procedures would
25 include liposuction of the upper arms; is that

1 correct?

2 A. Yes.

3 Q. Abdomen?

4 A. Yes.

5 Q. Lateral breasts?

6 A. Yes.

7 Q. Trunk?

8 A. Yes.

9 Q. Is that upper lateral buttocks?

10 A. Upper lateral buttocks, correct,
11 thighs, flanks, back fat, fat grafting, bilateral
12 breasts. And the rest is hard to see in this --
13 it's a miniaturized -- let me just see. I can't
14 magnify the view so I'm not being able to read it
15 well. If you read it to me, I can verify whether
16 that sounds right or not.

17 Q. Okay. Umbilicoplasty?

18 A. That sounds possible, sure.

19 Q. Excision of basal cell carcinoma?

20 A. Yep.

21 Q. And I'm trying to read this myself: Of
22 the neck, shoulder, and right underarm?

23 A. That looks right.

24 Q. Okay. Those would have been the
25 procedures that she signed consent for?

1 MR. SLOTCHIVER: I think just for
2 clarity, I think it says of the left neck and
3 shoulder area --

4 THE WITNESS: Yes.

5 MR. SLOTCHIVER: -- and right underarm.

6 MR. SMYTH: Okay.

7 THE WITNESS: Yeah, that looks right.

8 BY MR. SMYTH:

9 Q. All right. And this is your signature
10 on this page as well?

11 A. It is.

12 Q. As part of the medical record you would
13 have created in connection with this surgery?

14 A. Yes.

15 MR. SMYTH: All right. I move this
16 document into evidence. Any objections?

17 MR. SLOTCHIVER: None.

18 (DFT. EXH. 2, CONSENT FORM, DATED
19 10/26/15, BATES-STAMPED CSC 39, was marked for
20 identification.)

21 BY MR. SMYTH:

22 Q. Okay. All right. The next document
23 that I would like you to look at, please, Doctor,
24 is your operative report of October 26, 2015. That
25 begins with Kalus 31, and it is a three-page

1 document going to Kalus 33. Please let me know
2 when you have that.

3 A. Got it.

4 Q. Okay. And you want a chance to review
5 that note?

6 A. Sure.

7 Okay.

8 Q. All right. And is this the operative
9 note that you created as a result of the surgery
10 that you performed on Ms. Whitfield on October
11 26th, 2015?

12 A. It is.

13 Q. All right. And does it list the areas
14 where you performed liposuction on her?

15 A. Yes.

16 Q. Okay. And is that under the -- on the
17 first page there under the heading fluids? Is that
18 where we would find that?

19 A. No. It's just above that. It says
20 procedure performed.

21 Q. Okay. And the number 1 procedure
22 performed is suction, assisted lipectomy with fat
23 harvest from the back, flanks, buttocks, knees,
24 arms, and abdomen. Did I read that correctly?

25 A. You did.

1 Q. And when you look back at the prior
2 exhibit that we've just put into evidence, which is
3 the consent form, you would agree that you did not
4 mention knees on that form, did you?

5 A. If knees wasn't listed, then you are
6 correct.

7 Q. All right. Is that a breach of the
8 standard of care by you in that sense?

9 A. No, I don't think so. Because I think
10 that when we got into the operating room, I saw
11 that she had some lipodystrophy in her knees, and
12 she said that that was fine to correct that, to
13 harvest some fat from there as well.

14 Q. So when you told me earlier you never
15 had that situation occur, that wasn't true, was it?

16 A. I need to be reminded of what you said
17 would have never occurred.

18 Q. Well, your testimony --

19 A. Go ahead.

20 Q. Your testimony, as I understood it, was
21 that you said you've never had a situation where a
22 patient's asked you for an additional procedure and
23 you had not gone back and put it on the consent
24 form. That's exactly what happened here, isn't it?

25 A. Yes.

1 I need to -- well, let me just -- let
2 me just rephrase that. The medial knees is a
3 specific area that we describe where we borrow fat
4 from. I think one can argue that the medial knee
5 is part of the thigh. So I would like to take
6 issue with your characterization that this was the
7 same thing as performing liposuction on an area for
8 which we did not get consent. I would disagree
9 with that. The medial knee is part of the thigh,
10 and we had consent obtained for liposuction on the
11 thigh. So I would like to change my response to
12 say that I disagree. This is not a comparable
13 situation.

14 Q. It's your testimony that the knee is
15 the same as the thigh, then?

16 A. I would say that the medial knees are
17 part of the thigh. That is correct.

18 Q. But it doesn't change the fact that you
19 don't mention knee anywhere in the informed consent
20 form, does it?

21 MR. SLOTCHIVER: Objection.

22 THE WITNESS: No, it does not. You are
23 correct about that.

24 MR. SLOTCHIVER: Objection.

25 Argumentative.

1 BY MR. SMYTH:

2 Q. And the operative note that we just
3 discussed that's Kalus 31 through 33, is that the
4 operative note that you generated from the surgery?

5 A. Yes.

6 Q. And that's part of your medical record?

7 A. Yes.

8 Q. Kept in the regular course of business?

9 A. I beg your pardon?

10 Q. And it's kept in the regular course of
11 your business?

12 A. The operative record?

13 Q. Right.

14 A. Yes.

15 MR. SMYTH: All right. I move that
16 into evidence as well.

17 Any objection?

18 MR. SLOCHIVER: None.

19 (DFT. EXH. 3, OPERATIVE NOTE FOR
20 SURGERY, DATED 10/26/15, BATES-STAMPED 31-33, was
21 marked for identification.)

22 BY MR. SMYTH:

23 Q. You also on that consent form listed
24 that you were going to remove basal cell cancers of
25 the left neck and shoulder area and right underarm;

1 is that correct?

2 A. Right upper arm, correct.

3 Q. Oh. Right upper arm. Okay.

4 A. Uh-huh.

5 Q. And if you look at the operative note
6 that we have just been discussing, isn't it true
7 that you also removed what you thought was a basal
8 cell carcinoma from her chest?

9 A. Yes.

10 Q. And nowhere on the consent form does it
11 list the chest as an area where you were going to
12 remove basal cell carcinoma, does it?

13 A. I'm going to have to reflect back on
14 that. But the last thing the patient told me was
15 that if there is any other area of suspicion that
16 I'm concerned about that I ought to excise it as a
17 biopsy.

18 Q. Right. And you didn't document that,
19 though, did you?

20 A. Actually, as we look at the consent
21 form, basal cell carcinoma, again, I can't read it
22 because it's too small, but if you're -- if you're
23 suggesting that the chest wasn't listed on the
24 consent form as you are reading it in full view --
25 I'm seeing it very, very small. So if the chest is

1 not indicated, then that's an oversight.

2 MR. SLOTCHIVER: I would ask that you
3 read the form or I can read it to him so he can
4 have a full --

5 MR. SMYTH: You can do it on re-direct.

6 MR. SLOTCHIVER: Well, he can't -- he
7 can't testify without looking at the document. The
8 document he has is too small to read. So he should
9 have an opportunity to know what he is reading.

10 MR. SMYTH: And you can do that on
11 redirect.

12 MR. SLOTCHIVER: Then I object to this
13 line of questioning as it's mischaracterizing the
14 testimony because he is not providing an
15 opportunity to see the area where it references the
16 documents that we're talking about.

17 BY MR. SMYTH:

18 Q. Doctor, do you see the word chest on
19 the informed consent form anywhere related to basal
20 cell carcinoma?

21 A. It's too small for me to see. I see
22 basal cell carcinoma of, and then I just can't tell
23 anymore what I'm seeing.

24 Q. And you have no --

25 A. I think I see left neck. And then

1 after that it could be chest. I just can't see.

2 It's kind of scrunched together, so I can't tell.

3 Q. It says left neck and shoulder area and
4 right underarm.

5 A. Okay.

6 Q. You don't take issue with that?

7 A. No. If that's what it says, I will
8 take your word for it.

9 Q. All right. And Ms. Whitfield has not
10 sued you for not including the knees or the chest
11 on this consent form, has she?

12 MR. SLOTCHIVER: Objection.

13 THE WITNESS: No, she has not.

14 BY MR. SMYTH:

15 Q. She hasn't hired an expert to testify
16 that this was somehow an assault or a reckless
17 behavior on your behalf, was it?

18 MR. SLOTCHIVER: Objection to
19 relevancy.

20 THE WITNESS: No, she has not.

21 BY MR. SMYTH:

22 Q. Do you believe this was a simple
23 clerical mistake that didn't cause any damage to
24 Ms. Whitfield?

25 A. I do.

1 Q. Okay. You were asked some questions
2 about recordkeeping. Isn't it true that the first
3 time you saw Ms. Whitfield was July the 10th, 2014?

4 A. I believe that's correct.

5 Q. All right. And you were able to
6 formulate your opinion and make treatment
7 recommendations without reviewing any prior records
8 at that time, were you not?

9 A. I was.

10 Q. And you were actually able to speak to
11 Dr. Schimpf and could have asked him any questions
12 that you had about what procedures had been done or
13 what treatment had been given, correct?

14 A. Correct.

15 Q. And the same is true when you operated
16 on her three days later: You did not request any
17 notes from Dr. Schimpf or call him beforehand to
18 ask any questions about what needed to be done,
19 correct?

20 A. Correct.

21 Q. All right. So the lack of any records
22 in this case didn't prohibit you in any way from
23 taking proper care of Ms. Whitfield, did it?

24 A. No, I don't believe it did.

25 Q. All right. I want to turn my attention

1 now to some questions about the topic of tension.

2 MR. SLOTCHIVER: Before you go there,
3 why don't we talk about timing. Because we have
4 reserved -- we can go off the record. We reserved
5 the room until now, and I don't know if we can
6 continue or not. I don't know how long you have to
7 go. I know it's 11:00 in Israel, the Doctor's
8 time. And so let's talk about the elephant in the
9 room and decide what we are going to do.

10 MR. SMYTH: I'm ready to continue to
11 proceed. I'm going to continue my examination
12 until I cannot.

13 MR. SLOTCHIVER: You know what?
14 Todd --

15 MR. SMYTH: If you are going to disrupt
16 my deposition anymore, Dan, we'll take this to the
17 judge.

18 MR. SLOTCHIVER: We can take it to the
19 judge. I want this on the record. The room is
20 reserved until now. We have three hours
21 reservation of the room. That's what we have.
22 We've talked about it. We knew that.

23 MR. SMYTH: We have not been asked to
24 leave the room, and we are ready to proceed.

25 MR. SLOTCHIVER: Are you going -- are

1 you going to continue to fund the cost of the room
2 from this point forward, assuming the videographer
3 is available to stay and assuming the company is
4 available to stay? It's 11:00 in Israel. And
5 assuming that the Doctor is willing to stay and
6 testify after a day's work. It's 11:00 in Israel.

7 MR. SMYTH: This is highly improper.
8 I'm in the middle of a trial cross-examination.
9 This is improper on the record. We have properly
10 noticed this --

11 MR. SLOTCHIVER: For three hours.

12 MR. SMYTH: -- deposition, and I am
13 allowed to conduct my trial cross-examination, and
14 that's what I intend to do.

15 MR. SLOTCHIVER: You've conducted it
16 for three hours. Three hours is over. I'm
17 addressing we discuss how we are going to proceed.

18 MR. SMYTH: No, Dan. You gave me the
19 witness after 3:30. You are not going to hold me
20 to a 30-minute cross-examination because you want
21 to do that and you want to be a jerk. And we are
22 not going to do that.

23 MR. SLOTCHIVER: This is -- let's go --
24 let's keep on the record. Let's be very clear. We
25 have written you over and over and over again and

1 addressed the fact that we are concerned about the
2 ability to do it. We have scheduled the Doctor's
3 deposition for the 3rd, assuming we cannot finish
4 today.

5 MR. SMYTH: No. We have no deposition
6 scheduled for the 3rd at all.

7 MR. SLOTCHIVER: There was a deposition
8 scheduled and noticed and subpoenaed for the 3rd.
9 And the question now is how do we proceed? I don't
10 know if in Israel they are willing to continue.

11 BY MR. SMYTH:

12 Q. Dr. Kalus, are you ready to continue to
13 complete your deposition today?

14 A. I can continue.

15 Q. Thank you.

16 A. I must admit I'm getting pretty tired,
17 but...

18 Q. Thank you. Well, you -- you tell us if
19 you are no longer able to truthfully answer my
20 questions, okay, but I would like to finish today.

21 MR. SLOTCHIVER: Todd, are you going to
22 pay for the facility fee at \$500 an hour?

23 BY MR. SMYTH:

24 Q. Doctor, going back to the issue of
25 tension, you were not in the operating room --

1 MR. SLOTCHIVER: Before we move
2 forward --

3 BY MR. SMYTH:

4 Q. -- when Dr. Schimpf was performing this
5 surgery, were you?

6 MR. SLOTCHIVER: Before we move
7 forward, who is going to cover the additional cost
8 of the facility room?

9 MR. SMYTH: Dan, quit taking up my time
10 for trial cross-examination.

11 MR. SLOTCHIVER: I'm not taking up your
12 time. I've asked you a question. It's expensive.
13 We paid for it. Who is going to pay for this
14 part --

15 MR. SMYTH: We'll sort that out after
16 we finish the deposition.

17 MR. SLOTCHIVER: I want to sort it out
18 right now.

19 MR. SMYTH: We're not going to. And
20 you don't get to do that. I didn't interrupt your
21 examination of the witness. This is highly
22 unprofessional and improper.

23 BY MR. SMYTH:

24 Q. Doctor, you were not in the operating
25 room when Dr. Schimpf performed the surgery on June

1 6th, 2014, were you?

2 A. I was not.

3 Q. Okay. And so you are not able to say
4 with any degree of certainty whatsoever how much
5 tension Dr. Schimpf utilized when he was closing
6 Ms. Whitfield's wounds?

7 A. That is correct.

8 Q. And you are not able to point to any
9 specific area within the sutures that he placed
10 that you can say was closed with too much tension,
11 can you?

12 A. No.

13 Q. All right. And you agree that a
14 surgery like this requires lots of surgical
15 judgment in terms of things like how much skin can
16 be removed and the amount of tension to be placed
17 on wounds?

18 A. Correct.

19 Q. All right. And because you were not
20 there, you can in no any second-guess the surgical
21 judgment that might have taken place in this case,
22 correct?

23 A. No, I cannot second-guess. I can only
24 speak to the results that I encountered when I
25 evaluated the patient.

1 Q. Right. And you have no way to comment
2 on how the surgery was actually performed, do you?

3 A. I have no way of commenting on how the
4 actual surgery was performed.

5 Q. Okay. And we've talked about the fact
6 that wound separation is a recognized complication
7 of an augmentation/mastopexy, correct?

8 A. Yes.

9 Q. And that's something that you would
10 tell your patients about and put in your informed
11 consent forms, correct?

12 A. Yes.

13 Q. And you are aware that it's also in the
14 formed -- consent forms that Ms. Whitfield signed
15 in this case, correct?

16 A. Yes.

17 Q. All right. And even though you believe
18 that there was tension on the wound, you agree that
19 it would be just pure conjecture to try to say what
20 the cause or the etiology of that tension was,
21 don't you?

22 A. No, I would not say that.

23 Q. All right.

24 A. It's not pure conjecture to determine
25 the etiology of tension in a wound. It's very

1 specifically related to the amount of skin removed
2 and the amount of breast volume retained. That's
3 exactly what it's related to. There is no
4 conjecture whatsoever.

5 Q. But you are not able to say which one
6 of those it was in this case, correct?

7 A. It was actually both. Because you have
8 to have both factors. You have to have a shortage
9 of skin and an excess of volume, and that
10 relationship together results in too much tension.

11 Q. Well, Doctor, you agree that those
12 aren't the only things that can cause tension in a
13 wound, correct?

14 A. Correct.

15 Q. There are things like trauma. The
16 patient can take a fall in the shower and --

17 A. True.

18 Q. -- cause an injury which would result
19 in swelling which would create tension?

20 A. Yes.

21 Q. And you didn't do anything to rule that
22 possibility out, did you?

23 A. I did. I took a history, and she
24 reported to me that there was no such event.

25 Q. Right. So she told you there was no

1 event?

2 A. Well, you know, we have a
3 doctor/patient relationship with all of our
4 patients, and we take them at their word. Is it
5 possible that patients are not truthful? It's
6 possible. But I had no reason to believe that she
7 was not being truthful.

8 Q. Right. And you weren't with her for
9 the four weeks during the postoperative period
10 before she saw you, were you?

11 A. Of course not.

12 Q. All right. Other things that can cause
13 tension would be swelling?

14 A. Yes.

15 Q. Hematomas?

16 A. Yes.

17 Q. Seromas?

18 A. Yes.

19 Q. Circulatory problems?

20 A. Yes.

21 Q. Noncompliance?

22 A. No, circulatory problems wouldn't cause
23 tension. Tension would cause circulatory problems.

24 Q. Okay. Noncompliance with postoperative
25 instructions?

1 A. Certainly.

2 Q. As a matter of fact, you give your
3 patients very specific instructions to avoid
4 strenuous activities, lifting, any kinds of
5 activities after surgery so that they won't have
6 undue tension or swelling as a result of that,
7 correct?

8 A. Correct.

9 Q. And the wearing of under-wire bras or
10 overly compressive garments?

11 A. Are to be avoided, correct.

12 Q. Right. Those can all cause tension and
13 swelling?

14 A. Yes.

15 Q. All right. Taking certain medications
16 can also cause that, correct?

17 A. Theoretically.

18 Q. Clogged surgical drains?

19 A. Yes. Theoretically, sure.

20 Q. Right. And you never saw Ms. Whitfield
21 in that four-week postoperative period to determine
22 whether she had any of those things, did you?

23 A. Correct.

24 Q. And you agree that it would be very
25 unusual for tension to appear for the first time

1 three to four weeks after surgery, don't you, as a
2 cause for wound separation?

3 A. I would say that that's true. I would
4 say that what would be unusual is for wound
5 breakdown to present at three to four weeks out of
6 surgery. I would expect that some signs of
7 compromised wound healing would be evident before
8 that time.

9 Q. If there was too much tension?

10 A. If there was too much tension or any
11 other reason for circulatory problems with healing.

12 Q. All right. Now, when Ms. Whitfield
13 first came to you on July the 10th, she had an
14 opening on the scar line on her right breast that
15 she was worried about, correct?

16 A. Correct.

17 Q. All right. Did you take a history and
18 physical from her then?

19 A. Yes.

20 Q. All right. Did she disclose to you
21 that she had any psychiatric diagnosis or was
22 taking any psychiatric medications at that time?

23 A. I don't have her record in front of me,
24 but I do recall that she had reported to me that
25 she was under the care of a psychiatrist.

1 Q. When did that happen?

2 A. When did she report that to me?

3 Q. Right. Wasn't that later in your
4 relationship with her?

5 A. That's very possible.

6 Q. All right. So in the initial intake
7 form, you don't quarrel with the fact that she did
8 not report any psychiatric conditions or
9 medications at that time?

10 A. Again, I would have to refer back to my
11 record on the original history and physical because
12 we always take a history of what medications she is
13 taking. So if she specifically failed to report to
14 me any medications that she is taking, that is
15 certainly possible, but I don't have my record in
16 front of me to know exactly all of her medication.

17 Q. All right. When you examined her, you
18 agreed that the implant on the right side was not
19 exposed?

20 A. Based on what I was able to evaluate in
21 the office, that's correct.

22 Q. Okay. And you didn't panic or rush her
23 immediately to surgery based on your examination
24 that day, did you?

25 A. No.

1 Q. All right.

2 A. I referred her back to Dr. Schimpf.

3 Q. All right. And you didn't diagnose her
4 with an infection on that visit, did you?

5 A. I wasn't definitively able to say that
6 it was or wasn't infected because I was referring
7 her back to Dr. Schimpf for proper treatment. The
8 wound was open and draining. I did not obtain any
9 cultures or Gram stains, if that's what you are
10 asking.

11 Q. Did you make a specific diagnosis that
12 she had an infection on this first visit?

13 A. No. She had a wound separation.

14 Q. Right. And you never told
15 Ms. Whitfield that she had MRSA or gangrene either,
16 did you?

17 A. No, I did not.

18 Q. All right. You didn't administer any
19 antibiotics or take any wound cultures?

20 A. Correct.

21 Q. And you described some drainage, but
22 you admit that fat necrosis is impossible to
23 distinguish from purulent drainage by the human
24 eye?

25 A. Clinically just by looking at the

1 patient, that's pretty hard to distinguish, that's
2 true.

3 Q. Right. And it was your impression that
4 this was more of a dehiscence as opposed to an
5 infection process?

6 A. Yes.

7 Q. All right. And you agree that the
8 complication that she had at that point is a
9 recognized complication of the procedure?

10 A. Yes.

11 Q. And you didn't tell her at that time
12 that Dr. Schimpf had done anything wrong, did you?

13 A. No.

14 Q. In fact, you sent her back and strongly
15 encouraged her to go see Dr. Schimpf, correct?

16 A. Correct.

17 Q. And he agreed to do that?

18 A. I believe so, yes.

19 Q. All right. I believe you said earlier
20 that had she been your patient, you would have
21 taken her to the operating room that day or within
22 the next day or so and removed the right implant;
23 is that correct?

24 A. No. That's not exactly correct. I
25 would have taken her back to the operating room to

1 assess the wound in the operating room setting and
2 make a determination of how we can best get that
3 wound closed, which may or may not include removing
4 the implant or downsizing the implant, depending on
5 what my discussions with the patient were to lead
6 to.

7 Q. All right.

8 A. And it was the discussion with my
9 patient, with her, that led us to the conclusion
10 that she wanted the implant removed.

11 Q. All right. And if the implant is
12 removed, one of the simplest, most efficient
13 treatments is to let that wound heal and then put
14 the implant back in after, correct?

15 A. Well, it depends on the timeframe you
16 are talking about. We wouldn't let the wound heal.
17 We would actually close the wound surgically. And
18 then once it's fully healed, if the patient chose
19 to get re-augmented at some future date, most
20 plastic surgeons would wait at least three months.

21 Q. All right. And so after three months,
22 you would put an implant back in to match the left
23 side, correct?

24 A. Potentially.

25 Q. All right. And that was your plan at

1 the time that you removed the implant in this case?

2 A. Right.

3 Q. All right. But you didn't take her to
4 surgery on July the 10th, did you?

5 A. No, I didn't.

6 Q. Okay. But you agree that even if you
7 had taken her to surgery on July the 10th, that
8 would not have changed the outcome in this case?

9 A. I think we took her four days later,
10 didn't we, on the 14th?

11 Q. Three days later.

12 A. Is that -- three days later? So no,
13 probably wouldn't have changed the outcome.

14 Q. Okay. All right. When Ms. Whitfield
15 presented to the emergency room on July the 13th,
16 2014, she had what you described as an extensive
17 dehiscence at that point, correct?

18 A. I believe that's right.

19 Q. All right. And that was a definite
20 change from when you had seen her three days
21 before?

22 A. Again, I don't have my records, but I
23 believe that she had dehisced further, which is
24 what brought her to the emergency room in the first
25 place. She said she felt the wound was separating

1 even further.

2 Q. All right. And she didn't tell you
3 what had happened to cause that change in her
4 condition that resulted in the more extensive
5 dehiscence, did she?

6 A. She did not.

7 Q. And you would have drawn labs on
8 Ms. Whitfield in the hospital?

9 A. I believe the emergency room staff did.

10 Q. Okay. And that would include blood
11 work?

12 A. Yes.

13 Q. All right. And if her white blood
14 count was 6.4, was that a normal reading for a
15 white blood count?

16 A. It is.

17 Q. All right. And is that a sign that she
18 did not have a systemic infection?

19 A. More than likely that's correct.

20 Q. Right. They also swabbed her for MRSA
21 and that was negative?

22 A. If the records reflect that, sure. I
23 don't remember treating her for MRSA.

24 Q. All right. And you didn't have to
25 consult an infectious disease specialist or anyone

1 else to treat an infection during this
2 hospitalization, did you?

3 A. No.

4 Q. Okay. And I believe your preoperative
5 and postoperative diagnosis was delayed healing; is
6 that correct?

7 A. Yeah. I believe that's correct.

8 Q. All right. And your -- you did not
9 encounter any pockets of pus or purulence during
10 this surgery on July the 14th, did you?

11 A. Not that I recall.

12 Q. All right. And so you never diagnosed
13 her with an infection while she was at Roper
14 Hospital either, did you?

15 A. Well, the -- the lab results did show
16 bacteria in the wound, Gram-positive cocci, and
17 light growth of pseudomonas came from the culture.
18 But that diagnosis would have been contingent upon
19 that lab report, which was not immediate.

20 Q. All right. And the wound cultures
21 actually showed normal skin flora, correct?

22 A. No. Well, the wound culture showed
23 light growth of pseudomonas aeruginosa, which is
24 not normal skin flora.

25 Q. What are you looking at there, Doctor?

1 A. I'm looking at the -- let's see. What
2 document is it? RH00072.

3 Q. Okay. And under the culture report,
4 final, of that same document, it says: Usual skin
5 flora present. Correct?

6 A. Culture report, final, usual skin flora
7 present, yes.

8 Q. All right.

9 A. Isolate, final, light growth
10 pseudomonas aeruginosa.

11 Q. Right. That's not an alarming finding,
12 is it?

13 A. It's not a what?

14 Q. It's not an alarming finding?

15 A. Well, it is concerning. You know, you
16 make a judgment at the time of the postoperative
17 evaluation whether or not that needs to be
18 specifically treated post facto.

19 Q. Right.

20 A. But if the wound was looking good,
21 which I think it was, then that can probably be
22 discounted, yes.

23 Q. All right. So you didn't do anything
24 different or special to treat an infection on this
25 hospitalization?

1 A. No, I don't believe I did. I think we
2 covered her with antibiotics. That would have made
3 sense. But I don't have that information directly
4 in front of me. The medical record would -- would
5 support that. I'm almost certain I would have
6 covered her with antibiotics until the final
7 cultures came through.

8 Q. All right. And during this
9 hospitalization, you would not have to told
10 Ms. Whitfield that she was dying or that there was
11 a chance of her dying from any condition that she
12 presented to you with that day, would you?

13 A. No, I would not have said that.

14 Q. You wouldn't have told her that she
15 needed to have last rights administered by a priest
16 prior to your surgery?

17 A. I would have not -- I would not have
18 said that.

19 Q. All right. And during the course of
20 the procedure, as you were probing the wound with
21 your finger, the implant became exposed; is that
22 correct?

23 A. I believe that's correct.

24 Q. All right. At that point, you had to
25 remove the implant because it had become exposed,

1 correct?

2 A. I believe that's right.

3 Q. All right. And then you would have
4 closed that wound. With sutures, I presume?

5 A. Yes.

6 Q. All right. And you don't document how
7 much tension you used when closing those sutures,
8 do you?

9 A. No.

10 Q. And there is actually -- there is no
11 way to quantify or measure how much tension is
12 being applied to a suture is there?

13 A. No, there really isn't.

14 Q. And there is no published standard that
15 would tell you what the right amount of tension is
16 on a suture?

17 A. That is correct. That is part of
18 surgical judgment.

19 Q. All right. As you continued to see
20 Ms. Whitfield in your office, did you discuss with
21 her that it was critical that she continue to
22 receive ongoing psychiatric care?

23 A. Yes. I recommended to her that if she
24 is under the care of her psychiatrist that she
25 continue to see her or him.

1 Q. All right. Did she ever tell you that
2 she had been diagnosed with longstanding panic
3 disorder, anxiety, major depression, posttraumatic
4 stress disorder, or bipolar type II disorder?

5 A. I don't recall all of those diagnoses.
6 I believe that I do recall that she was treated for
7 anxiety disorder. I don't remember that she
8 specifically pointed out that she had bipolar
9 disease, no.

10 Q. Do you know whether Ms. Whitfield was
11 compliant with taking her psychiatric medications?

12 A. I have no knowledge of that.

13 Q. All right. If you have a patient that
14 would present to you with those diagnoses that I
15 just list, that would be concerning for you as a
16 surgeon, wouldn't it?

17 A. Yes, it would.

18 Q. All right. Because you need to know
19 that your patient is in a good place
20 psychologically to make well-reasoned decisions,
21 correct?

22 A. That is true.

23 Q. All right. And you also believe that a
24 good emotional wellbeing is -- is conducive to
25 proper healing, correct?

1 A. I do believe that.

2 Q. All right. At some point prior to the
3 surgery you conducted on her on March 11th of
4 2015 -- well, let me back up.

5 The plan all up to this point had been
6 as far as you knew to replace the implant on the
7 right once she was healed; is that correct?

8 A. Right.

9 Q. And then in March of 2015 when you
10 operated, that plan changed because Ms. Whitfield
11 asked to take the implant on the left out, correct?

12 A. That's correct.

13 Q. There wasn't any medical reason that
14 the implant on the left side needed to come out,
15 was there; that was just her preference?

16 A. Well, specifically removing the
17 implant, no. But she did have delayed healing over
18 there initially as well and some areas of fat
19 necrosis that was diagnosed clinically. But the
20 specific removal of the implant was her request,
21 that is correct.

22 Q. Right. It was not a medical reason to
23 take it out like it was infected or out of
24 position, or anything like that?

25 A. That is correct.

1 Q. And it had healed appropriately by this
2 time when you were doing your operation in March of
3 2015?

4 A. True.

5 Q. And part of the reason that you chose
6 to operate on her in March of 2015 was because she
7 reported pain that you thought was due to fat
8 necrosis; is that correct?

9 A. I believe that's correct.

10 Q. All right. Did Ms. Whitfield ever tell
11 you that she had a long history of complaining of
12 pain in her breasts even prior to Dr. Schimpf's
13 surgery?

14 A. I don't believe that history was shared
15 with me.

16 Q. All right. So you weren't aware that
17 she had gone to a pain management doctor after
18 Dr. Kline did the initial breast augmentation on
19 her?

20 A. No. Not until I reviewed these
21 records.

22 Q. Will every breast surgery you do on a
23 patient leave scar tissue?

24 A. By definition, yes. Anytime you have
25 surgery, there will be scar tissue.

1 Q. All right. And scar tissue can cause
2 pain as well, can't it?

3 A. Scar tissue can sometimes entrap nerve
4 fibers and that can result in pain, yes.

5 Q. All right. And you also agree that fat
6 necrosis can happen from any breast surgery as
7 well?

8 A. I wouldn't say that it can happen from
9 any breast surgery, but it can happen from breast
10 reduction, mastopexy, fat grafting. All of those
11 can lead to fat necrosis. I have never seen fat
12 necrosis in a pure breast augmentation.

13 Q. All right. And just because a patient
14 has fat necrosis, though, doesn't mean that the
15 doctor did something negligent to cause that, does
16 it?

17 A. Correct.

18 Q. And you are not saying that anybody in
19 this case did anything negligent to cause
20 Ms. Whitfield to have fat necrosis, are you?

21 A. No, I'm not saying that. I'm stating
22 again that the outcome of the surgery and the
23 complications therein were, in my opinion, a result
24 of poor judgment during surgery that resulted in
25 tight sutures or undue tension that ultimately

1 resulted in both skin and fat necrosis. Does that
2 constitute negligence? I can't make that
3 statement.

4 Q. Okay. And, again, because that's
5 judgment that you didn't see exercised, correct?

6 A. That's correct. I wasn't in surgery.

7 Q. And when you performed this procedure
8 to remove the fat necrosis and the implant on the
9 left side, you had explained to Ms. Whitfield that
10 there were risks associated with that surgery as
11 well, correct?

12 A. Yes.

13 Q. And those would include wound
14 separation like she experienced before?

15 A. Any surgery can have a risk of wound
16 separation.

17 Q. It would also include things like
18 infection; bleeding; unfavorable scarring; nipple
19 loss; physical distortion; the patient being --
20 appearance being worse than it was prior to the
21 original surgery; severe psychological disturbance,
22 including depression; and the possible need for
23 more surgery. Those were all risks associated with
24 this procedure on your consent forms, correct?

25 A. Yes.

1 Q. All right. And in addition to removing
2 the 250 cc implant in this case, you also removed a
3 fair amount of tissue from the left breast,
4 correct?

5 A. Correct.

6 Q. And the pathology report indicates that
7 that was 490 grams of breast tissue in addition to
8 the implant, correct?

9 A. Correct.

10 Q. All right. And so I did the math --
11 And you can check me on this if I'm
12 wrong because I may not be great on the conversion,
13 but I used one of those calculators.

14 -- and the total volume removed during
15 this procedure with a 250 cc implant and 490 grams
16 of tissue is about 716 grams, which equates to
17 about a pound and a half. Is that consistent with
18 your understanding as well?

19 A. Sure.

20 Q. All right. And you agree that removing
21 that extra tissue from the left side is what has
22 left her with the current asymmetry that she has
23 now?

24 A. That certainly contributed to it, yes.

25 Q. All right. And I think when you looked

1 at the results of your surgery, you agreed that
2 that was not a great result as far as you were
3 concerned?

4 A. I agree.

5 Q. All right. Were you aware that
6 Ms. Whitfield went to her psychiatrist seven days
7 after surgery and expressed that she had suicidal
8 thoughts because of her appearance after your
9 surgery?

10 MR. SLOTCHIVER: Objection to the
11 relevancy as to this witness.

12 THE WITNESS: No, I was not aware of
13 that.

14 BY MR. SMYTH:

15 Q. All right. And then to address the
16 undersized breast on the left side, you operated
17 again on her in October of 2015, correct?

18 A. I believe that's correct.

19 Q. All right. And at that point, you
20 performed fat grafting, correct?

21 A. I believe that's right.

22 Q. And you agree that when you put fat in
23 that you go in with the expectation that close to
24 50 percent of that fat will not survive, correct?

25 A. It's variable, but that's sort of the

1 number that the literature quotes, yes.

2 Q. And so the plan that you had at that
3 time was to do multiple fat grafting sessions over
4 the course of time, correct?

5 A. Correct.

6 Q. All right. And there is no way to
7 predict any -- how any fat that you inject is going
8 to be absorbed or rejected by the body, is there?

9 A. No. But there are various techniques,
10 specific related interventions. In my own clinical
11 practice, we probably have significantly more than
12 50-percent survival. I would say probably
13 quantitative more like 70 percent. And it just has
14 to do with a lot of specific technical nuances
15 relating to how much fat is injected, the planes
16 that's injected in, the size of the cannulas,
17 things like that.

18 MR. SLOTCHIVER: I need a restroom
19 break when you are at a point.

20 MR. SMYTH: All right.

21 MR. SLOTCHIVER: Maybe now is a good
22 point.

23 MR. SMYTH: That's fine. We'll go off
24 the record for a minute.

25 THE VIDEOGRAPHER: We'll go off the

1 record at 11:30.

2 (A recess transpired.)

3 THE VIDEOGRAPHER: Back on the record
4 at 11:34.

5 BY MR. SMYTH:

6 Q. All right. Doctor, when we left off, I
7 was asking you about the surgery that you performed
8 on Ms. Whitfield in October of 2015. One of the
9 things you also did was you removed what you
10 thought were basal cell cancers from several parts
11 of her body, correct?

12 A. Okay. Yes.

13 Q. All right. And were you aware that she
14 had been under the care of a dermatologist for --
15 or since the late 1990s?

16 A. I believe I was.

17 Q. Okay. Did you contact her
18 dermatologist or ask for the dermatologist's
19 records before you operated on Ms. Whitfield?

20 MR. SLOTCHIVER: Object to the
21 relevancy.

22 THE WITNESS: No. I most likely did
23 not. Plastic surgeons routinely perform skin
24 excisions and frequently are shared by -- their
25 treatment is shared both by dermatologists and

1 plastic surgeons.

2 BY MR. SMYTH:

3 Q. All right. I want to get you to look
4 at the next exhibit. This is the 10/26/2015
5 surgical path report from that procedure. Let me
6 know when you have that, please.

7 A. Found it. Yep.

8 Q. Okay. And that is -- bears the Bates
9 numbers Kalus 28 and 29. Is that the pathology
10 report from the lesions that you removed from
11 Ms. Whitfield on October 26th of 2015?

12 A. It looks that way, yes.

13 Q. Okay. And what we're really talking
14 about, according this path report, are 0.3
15 centimeter freckle-type appearing bumps; is that
16 correct?

17 A. No. A basal cell carcinoma wouldn't
18 typically look like a freckle.

19 Q. Is it the same size, roughly?

20 A. Well, you know, I think the size is
21 described, so it --

22 Q. Right.

23 A. Yeah. You can't really compare sizes
24 of any skin lesions until you are actually looking
25 at the specific lesion.

1 Q. You can look at the pathology findings
2 there. These were all less than a half a
3 centimeter in size, correct?

4 A. One was -- yep.

5 Well, no. Maximum depth, .5
6 centimeters, 2.6 by 1.3 centimeter ellipse, 3 by 1
7 centimeter ellipse. So the skin excisions there
8 was an area of ulceration on the left neck that was
9 .5 by .3, and then -- they didn't actually describe
10 -- no discrete lesions or abnormalities are
11 identified in the first -- specimen number 3.

12 Q. All right. Well, I believe the
13 operative report indicates that you made excisions
14 that were about three and a half centimeters on all
15 four of these lesions. Is that consistent --

16 A. Right.

17 Q. -- with your recollection?

18 A. Correct.

19 Q. All right. Why did you make such a
20 large incision for such a small lesion?

21 A. Well, clinically the area of redness
22 can sometimes have some associated inflammation,
23 and with the naked eye you cannot tell what the
24 actual lesion size would be. So you design the
25 shortest possible excision that would allow for a

1 straight-line closure after an elliptical incision.

2 Q. And the pathology results for all four
3 of these specimens that were submitted was that
4 they were not, in fact, cancer, correct?

5 A. Correct.

6 Q. They were benign?

7 A. Right.

8 Q. Okay. And then the last visit that you
9 would have had in 2015 was in December, and her
10 breasts at that point were still asymmetrical, I
11 gather, even after the fat grafting surgery?

12 A. Correct.

13 Q. All right. And you talked to her about
14 possibly turning towards a more simpler and
15 predictable solution, which would be just the
16 replacement of implants, correct?

17 A. Correct.

18 Q. All right. And Ms. Whitfield at this
19 point tried on sizers, and she wanted implants that
20 were as -- I think the sizers that she listed in
21 your notes are 350 ccs on the right and 450 ccs on
22 the left; is that correct?

23 A. That -- I'm going to take your word for
24 it. I don't see that actual documentation, but
25 that sounds correct.

1 Q. All right. And that's significantly
2 larger than the implant Dr. Schimpf used, which was
3 250 ccs, correct?

4 A. Correct.

5 Q. Okay. And then at that point,
6 Ms. Whitfield stopped coming to see you for a
7 period of three and a half, almost four years,
8 correct?

9 A. I think that's right.

10 Q. And she has chosen to remain
11 asymmetrical for that entire period of time?

12 A. That's true.

13 Q. All right. And then all of a sudden
14 she comes to see you again this year with a trial
15 date on the horizon and she wants to have a
16 conversation with you about having more surgery; is
17 that correct?

18 A. I believe that's correct.

19 Q. All right. And we can look at your
20 note if you need to. I believe that's also one of
21 the exhibits. That's March the 1st of 2019. Let
22 me know when you have that in front of you.

23 A. Where am I going to find that?

24 Oh, here we go. March 1st, 2019, you
25 said?

1 Q. Yes, sir.

2 A. Where -- where am I going to find that,
3 please?

4 Q. That's in the trial exhibits that we
5 have been looking at the entire time. It says
6 3/1/19 office note.

7 A. Got it.

8 Q. Okay. And the Bates stamp on that page
9 is Kalus 45.

10 So at this point, she returns to you
11 and she tells you that she is doing -- emotionally
12 and psychologically doing much better; is that
13 correct?

14 A. That's right.

15 Q. All right. Did you take a new history
16 and physical from her at this point?

17 A. A cursory one, yes.

18 Q. All right. Did you do anything to
19 confirm her psychological status, like call her
20 psychiatrist or ask any further about any of her
21 psychiatric issues?

22 A. No, I did not. I simply interviewed
23 the patient.

24 Q. All right. If she told her
25 psychiatrist and therapist in the months leading up

1 to this visit that she was experiencing intense
2 anger, rage, not taking her medications, bouts of
3 hypomania, insomnia, extremely high stress levels,
4 had spent three years in her room with blackout
5 curtains crying and not wanting to leave, those
6 would not be consistent with somebody that's doing
7 emotionally and psychologically well, wouldn't you
8 agree?

9 MR. SLOTCHIVER: Let me just put an
10 objection to evidence not before -- not on the
11 record.

12 But you can go ahead and answer.

13 THE WITNESS: No. With that
14 description, I would certainly be concerned. And
15 with her psychiatric history, before I undertake
16 any surgery, I would be -- more than likely confirm
17 with her psychiatrist to see whether or not the
18 timing and the plan of action was advisable.

19 BY MR. SMYTH:

20 Q. All right. So she didn't report any of
21 that to you at that point?

22 A. No, she did not.

23 Q. Okay. And you examined her and found
24 that the left breast was still smaller than the
25 right, correct?

1 A. Correct.

2 Q. And that was a result of removing all
3 the tissue that we talked about earlier, the seven
4 hundred-plus grams, correct?

5 A. The total cumulative weight, including
6 the implant, correct.

7 Q. All right. And you also talked to her
8 about performing a -- some more basal cell
9 carcinoma removals, correct?

10 A. Yes.

11 Q. All right. And did you also prepare --
12 oh, sorry.

13 Did you also prepare or have your
14 office prepare cost estimates for surgeries at the
15 request of Ms. Whitfield's attorneys as a result of
16 this visit?

17 A. I believe that's true. I don't have
18 specific recollection of that. And I don't know
19 that it would have been -- I'm not sure I would say
20 it was because of the request of the attorneys.
21 Any patient who is contemplating surgery is going
22 to get a cost estimate from us.

23 Q. All right. I believe those exhibits
24 are -- excuse me -- those cost estimates are
25 contained in the exhibits in the e-mail. If you

1 would look for those and let me know when you have
2 them. I believe they are called Dr. Kalus cost
3 estimates.

4 A. I see quotes.

5 Q. Okay.

6 A. I see document -- let's see. Kalus
7 00034 starts there. Is that what we're talking
8 about?

9 MR. ORTON: Estimate 1 and estimate 2.

10 BY MR. SMYTH:

11 Q. These are separate pdfs in that list of
12 exhibits. The first one is called Dr. Kalus
13 estimate 1 and Dr. Kalus estimate 2. It should be
14 in the list of pdf files there.

15 A. So this would be in the e-mail, you are
16 saying?

17 Q. Correct. The trial exhibit one.

18 A. Okay. And it would be further down?

19 Q. Yes.

20 MR. HORTON: Almost to the bottom.

21 THE WITNESS: Nope. I'm at the bottom.
22 I see June/July '14 unopened. I see quotes.

23 BY MR. SMYTH:

24 Q. The next -- the next two above the
25 June/July '14 is Dr. Kalus estimate 1 and Dr. Kalus

1 estimate 2.

2 A. Okay. I don't see that title,
3 Dr. Kalus estimate 1 and Dr. Kalus estimate 2. I
4 just don't see that in this e-mail. So I'm seeing
5 the big letters "quote." Is that what we're
6 talking about, bilateral breast augmentation?

7 Q. On the -- on the page itself it says
8 quote. I was just talking to you about the title
9 of the pdf. I was trying to help you search for
10 it.

11 A. Okay.

12 Q. If you want to look --

13 A. Okay.

14 Q. -- at the screen, maybe we can put the
15 document up next to the camera --

16 A. Yeah. I see it.

17 Q. -- so you can see what I'm looking at.

18 A. Yeah. Yeah. I see it.

19 Q. Okay.

20 A. I just didn't see that title of the
21 document. For some reason the title is not showing
22 up here.

23 Q. Okay. Those are two separate quotes
24 that you provided to Ms. Whitfield as a result of
25 this March 1st visit, correct?

1 A. Sure.

2 Q. Right. And one is for lateral -- or
3 lipo-lateral breast fat grafting to the left
4 breast, and the total for that proposed procedure
5 is \$6,179, correct?

6 A. Yes.

7 Q. All right. And so that would just be
8 lipo -- excuse me -- fat injection into the left
9 breast, is what that procedure is, correct?

10 A. Correct.

11 Q. All right. And then you've got a
12 separate quote for a separate surgery for bilateral
13 breast augmentation, and that quote totals \$10,499.
14 So that would be implants placed both on the left
15 side and the right side, correct?

16 A. Yes.

17 Q. All right. And I didn't see in your
18 notes where there was any mention of the specific
19 size implants that you were planning to use. Did
20 you make that determination yet?

21 A. No. I didn't make it yet. We almost
22 always have a followup discussion because she was
23 -- I think she was still far away from being able
24 to make the decision so we didn't get into the
25 nitty-gritty of which implant size would be

1 selected for her. We weren't quite ready to
2 schedule.

3 Q. And you agree with me that you could
4 restore Ms. Whitfield's breast volume simply by
5 placing implants and not doing any fat grafting
6 alone, correct?

7 A. More than likely, yes.

8 Q. But the total of these two procedures
9 that you proposed would be over \$16,000, correct?

10 A. Yeah. But it probably would be one or
11 the other instead of both.

12 Q. All right. You agree that the use of
13 implants is simpler and more predictable than the
14 fat grafting solution would be?

15 A. It is. Definitely. But some patients
16 after having as much trouble as Ms. Whitfield has
17 had sometimes they just get sort of jinxed by the
18 idea of having more implants.

19 Q. Right.

20 A. So they just choose not to.

21 Q. Right. But that's something that she
22 is considering, though, correct?

23 A. As of that consultation, I would say
24 the answer is yes.

25 Q. Yes. And even larger implants than

1 what she originally had?

2 A. Correct.

3 Q. All right. And the idea of just
4 replacing an implant and not doing the fat
5 grafting, that could have been done four years ago
6 after she healed from your July 2014 surgery,
7 couldn't it?

8 A. Yes, it could have been.

9 Q. Did Ms. Whitfield sign an informed
10 consent form for either of these procedures?

11 A. No. We don't get informed consent in
12 the office setting. We describe the procedure. We
13 document everything we have talked about, and we
14 actually obtain the informed consent the morning of
15 surgery when the surgery is being performed. So it
16 would not be in any way unusual to see our medical
17 records not reflect informed consent because
18 ultimately that is secured in the operating room
19 setting.

20 Q. And your note from the March 1st, 2019
21 visit does not list or identify any specific risk
22 associate with either of the surgeries that you are
23 proposing to her, correct?

24 A. That is correct. Because it wasn't a
25 detailed discussion of the actual surgery. It was

1 more like a general discussion of surgical options,
2 and it was -- I was very aware of the fact that she
3 wasn't close to ready to make a decision so we
4 didn't get into all that detail at that time, but
5 we would have as we got closer to surgery with
6 another preoperative visit.

7 Q. Right. And if you had discussed the
8 risks associated with these procedures, those would
9 include things like fat necrosis, correct?

10 A. Yes.

11 Q. Asymmetry?

12 A. Yes.

13 Q. Infection?

14 A. Yes.

15 Q. Wound healing issues?

16 A. Yes.

17 Q. Poor surgical result?

18 A. Yes.

19 Q. Need for revision surgery?

20 A. Yes.

21 Q. And potential psychiatric
22 ramifications?

23 A. You know, I don't know that I would
24 specifically highlight that, but if the informed
25 consent includes that statement, I certainly

1 wouldn't object to it.

2 Q. Okay. Because those are all recognized
3 complications of any breast surgery, aren't they?

4 A. Yes.

5 I would answer that question,
6 Mr. Smyth, that those are all potential
7 complications, recognized potential complications.

8 Q. Right. The note that we have been
9 talking about from your March 1st visit, that's a
10 business record kept as part of the normal course
11 of business at your practice?

12 A. March 1st?

13 Q. Yes.

14 A. Let me find that note.

15 Okay. What's the question again,
16 please?

17 Q. Is that a record that you generated
18 when you saw Ms. Whitfield on March 1st, 2019?

19 A. Yes.

20 Q. And is it kept as a part of your
21 regular medical practice?

22 A. Yes.

23 MR. SMYTH: I'll move that document
24 into evidence as well. Any objections?

25 MR. SLOTCHIVER: None.

(DFT. EXH. 4, OFFICE NOTE, DATED
3/1/19, BATES-STAMPED KALUS 45, was marked for
identification.)

BY MR. SMYTH:

Q. Okay. And, Doctor, you were talking a
little bit about complications, and complications
are referred to as recognized because they do occur
even when you do the procedure a hundred percent
correctly sometimes, correct?

A. Certainly.

Q. All right. And just because a patient
experiences a complication or poor outcome doesn't
mean the doctor was medically negligent, does it?

A. No, it does not.

MR. SMYTH: All right. Those are all
my questions. Thank you, Dr. Kalus.

EXAMINATION

BY MR. SLOTCHIVER:

Q. Doctor, I know it's almost midnight
your time, and I know you have got to be exhausted.
Are you okay to answer just a few more questions?

A. Sure.

Q. I've just got a few followup, and then
hopefully we can -- we can end the deposition and
the testimony.

1 A. Okay.

2 Q. You were asked previously in your
3 cross-examination by Mr. Smyth about your testimony
4 that Dr. Schimpf did not breach the standard of
5 care in your original deposition. My recollection
6 is that you never opined if he did or did not
7 breach the standard of care because you hadn't
8 reviewed everything at the time of your first
9 deposition.

10 MR. SMYTH: Objection. Move to strike
11 testimony of counsel. And leading question.

12 BY MR. SLOTCHIVER:

13 Q. Is that more -- would it be more
14 accurate?

15 A. I would have to read my testimony once
16 again. But I'm pretty sure that I opined that
17 there was no breach of -- there was not -- there
18 was no negligence based on the information that I
19 had available to me at that time.

20 Q. Fair enough.

21 Doctor, since the time that you gave
22 the initial deposition, have you had the
23 opportunity to review more testimony?

24 A. Yes.

25 Q. And I believe you stated that you've

1 reviewed the testimony and the deposition of
2 Dr. Schimpf; of Jeane Whitfield; and of
3 Dr. Rosenberg; and of Dr. Perez, who is the hired
4 expert for Dr. Schimpf, correct?

5 A. Correct.

6 Q. Okay. And after having reviewed those
7 depositions, and not until having reviewed those
8 depositions, you did not have an opinion, correct?

9 MR. SMYTH: Objection. Leading.

10 BY MR. SLOTCHIVER:

11 Q. I'll -- I'll rephrase it.

12 When was it that you were in a position
13 to form -- or when was it that you did, in fact,
14 form an opinion that Dr. Schimpf had deviated from
15 the standard of care?

16 A. When I learned about the absence of
17 medical records, postoperative care, and when I
18 learned about the portion of the procedure that
19 wasn't elucidated specifically with informed
20 consent.

21 Q. And my understanding is that you
22 reviewed those recollections in preparation for
23 attending an IME, a medical examination; is that
24 correct?

25 A. Yes.

1 Q. You were asked earlier about the
2 removal of a carcinoma, and -- and you weren't able
3 to read your notes on the computer screen that you
4 have with you. And I want to ask you -- the
5 question was whether or not you had consent in the
6 area of the chest, and in reading the small
7 language that was not -- that you were not able to
8 see, it says basal cell carcinoma of left neck and
9 shoulder and right shoulder area and right under
10 the arm.

11 A. Yes.

12 Q. Is the chest considered to be the
13 shoulder area?

14 MR. SMYTH: Objection. Leading.

15 THE WITNESS: You know, without
16 reviewing her medical records, it's certainly
17 possible. If I point to my own shoulder, you can
18 see that it's sort of the upper chest. So this may
19 have been a nomenclature issue. I would have to go
20 back to the record specifically and examine the
21 patient and see if what I referred to as the chest
22 was, in fact, the shoulder. The upper chest was
23 the shoulder. I'm just not sure.

24 BY MR. SLOTCHIVER:

25 Q. Sure.

1 And, Doctor, you're a -- you've been
2 qualified as a expert in plastic surgery and not in
3 psychiatric medicine, correct?

4 A. That is true.

5 Q. So when you were asked about
6 psychological opinions and evaluations, would you
7 be able to opine about those areas?

8 A. Not by any means as an expert, but by
9 virtue of being a medical doctor with some basic
10 psychological and psychiatric knowledge as any
11 physician should have, but not in any detail.
12 Certainly not at the level of a psychiatrist.

13 Q. If you had an opportunity to see, meet,
14 examine Jeane Whitfield a week or two before you
15 actually did, do you believe that it would have
16 been -- that it would have made a difference with
17 regard to the extensive dehiscence that we have
18 talked about?

19 MR. SMYTH: Objection. Calls for
20 speculation. Is outside the scope of cross.

21 BY MR. SLOTCHIVER:

22 Q. You can answer the question.

23 A. Sure. As I mentioned earlier at some
24 point in this testimony, the tissue necrosis
25 process is a continuum. And so theoretically the

1 earlier you can intervene in a treatment plan for a
2 problem wound the better.

3 Q. Thank you, sir.

4 And I just wanted to get clarity. You
5 were asked a little while ago about the time when
6 you were probing with your finger and the implant
7 became exposed. And the question was: Did you
8 then remove it? And I wanted clarity. Would you
9 have removed it whether or not it had become
10 exposed when you were probing it with your finger?

11 A. If I felt that the presence of the
12 implant was impeding my ability to close the wound
13 with an acceptable amount of tension, or more
14 likely lack thereof, then I would have removed the
15 implant.

16 Q. And in the case --

17 A. My judgment -- my judgment in surgery
18 was that the removal of the implant was necessary
19 in order to be able to get this wound closed
20 properly.

21 Q. You were asked a few questions about
22 Jeane Whitfield's psychological state. Would you
23 have taken her on as a patient if you questioned
24 her being psychologically stable?

25 A. Many patients who come to the plastic

1 surgeon may have psychological issues, almost by
2 definition, because what we do as plastic surgeons
3 is we try to help patients improve their sense of
4 self-confidence and self-esteem. That said, a
5 patient with active psychiatric problems would give
6 me pause before indulging or -- or embarking, is
7 the proper word, on a big surgical plan. I want to
8 make sure that this patient is stable. I probably
9 would consult with her psychiatrist. In this
10 particular case, this was obviously an emergency,
11 what I would describe as somewhere between an
12 emergency and surgically urgent. And I didn't
13 think that a psychiatric input would have any
14 relevance whatsoever because the medical indication
15 -- the surgical indication for intervening
16 surgically was paramount.

17 Q. Yes, sir.

18 I believe you stated that you can't
19 talk about what happened in the surgical room. You
20 weren't there when Dr. Schimpf did the surgery.

21 A. Correct.

22 Q. Is it -- is it that your opinions today
23 are based on what you were able to observe from
24 Mrs. Whitfield when she came to see you?

25 A. Yes. I mean, when one looks at a

1 wound --

2 MR. SMYTH: Objection. Outside the
3 scope of cross.

4 THE WITNESS: -- for the first time --
5 when one looks at a wound for the first time and
6 understands the operation that was performed, one
7 can theorize how we got to this point.

8 MR. SMYTH: Objection. Move to strike.
9 Speculative testimony.

10 BY MR. SLOTCHIVER:

11 Q. And I believe you talked earlier about
12 the fact that what you saw was indicative of a
13 deviation of the standard of care as it applies to
14 the tension placed on the wound.

15 MR. SMYTH: Objection. Leading.
16 Improper characterization of the testimony.

17 THE WITNESS: I wouldn't -- I wouldn't
18 characterize my statement as the way you described
19 it. What I would characterize it as, that the
20 operation was performed, in my opinion, with
21 potentially poor judgment as to the tension on the
22 wound, which then resulted in dehiscence and fat
23 necrosis. I -- I can't make a statement that the
24 surgery was performed in any method that would
25 constitute a deviation from the standard of care.

1 I can't make that statement. I wasn't there.

2 BY MR. SLOTCHIVER:

3 Q. As to not the surgery itself but the
4 tension on the wound, I believe you stated earlier
5 that there is no other way that this injury would
6 have happened but for the fact there was too much
7 tension placed at the time of the surgery; is that
8 correct?

9 MR. SMYTH: Objection. Leading.
10 Improper characterization of the testimony again.

11 THE WITNESS: That would be my best
12 guess as to the explanation for the wound
13 dehiscence and wound separation, that there was an
14 excessive amount of tension in the wound.

15 BY MR. SLOTCHIVER:

16 Q. Do you stand by the opinions you gave
17 previously during your direct examination?

18 MR. SMYTH: Objection.

19 THE WITNESS: Yes.

20 MR. SMYTH: Outside the scope of cross.
21 Cumulative.

22 BY MR. SLOTCHIVER:

23 Q. You were asked about the reasons -- or
24 you were asked if Jeane Whitfield had returned to
25 you for the procedure and if she could have

1 returned to you for the procedure up until this
2 time, and you said she was not ready, what did you
3 mean by she was not ready?

4 A. The patient clearly disclosed to me
5 that she was not ready to have more surgery. She
6 was not psychologically ready to undergo additional
7 surgery with the inherent risks of additional
8 surgery, and she was reporting to me that she was
9 traumatized by this entire experience and was
10 simply not ready to proceed. She wasn't -- the
11 timing wasn't right.

12 Q. I beg your indulgence one moment.

13 MR. SLOTCHIVER: Doctor, thank you very
14 much. I've got nothing further.

15 MR. SMYTH: No further questions.

16 THE VIDEOGRAPHER: This concludes the
17 videotaped deposition of Ram Kalus. Going off the
18 record at 12:01.

19 (The witness, after having been advised
20 of his right to read and sign this transcript, does
21 not waive that right.)

22 (The deposition was concluded at 5:01
23 p.m.)
24
25

SIGNATURE OF DEPONENT

DEPONENT: RAM KALUS, M.D.
DEPOSITION DATE: JULY 24, 2019
REPORTER: KAREN NELLIUS
CASE CAPTION: JEANE WHITFIELD vs. DENNIS K.
SCHIMPF, M.D., AND SWEETGRASS PLASTIC SURGERY, LLC

(Please return both Signature of Deponent pages)

I, the undersigned, RAM KALUS, M.D., do
hereby certify that I have read the foregoing
deposition and find it to be a true and accurate
transcription of my testimony, with the following
corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)

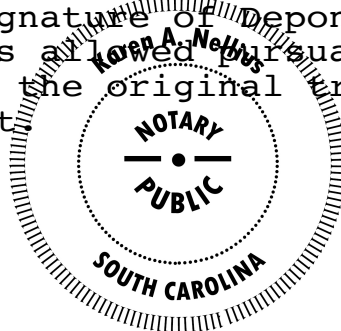
DEPOSITION DATE: JULY 24, 2019
REPORTER: KAREN NELLIUS
CASE CAPTION: JEANE WHITFIELD vs. DENNIS K.
SCHIMPF, M.D., AND SWEETGRASS PLASTIC SURGERY, LLC

PAGE	LINE	CHANGE	REASON

RAM KALUS, M.D.

Date

I, Karen Nellius, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.



Karen Nellius

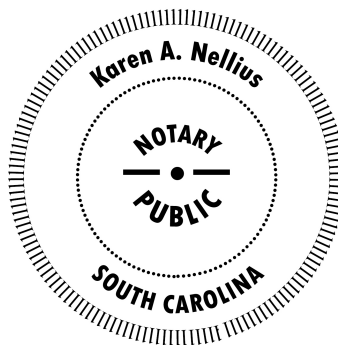
Karen Nellius, RPR
My Commission expires
November 14, 2024

CERTIFICATE OF REPORTER

I, Karen Nellius, Court Reporter and
Notary Public for the State of South Carolina at
Large, do hereby certify that the foregoing
transcript is a true, accurate, and complete
record.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 28th day of July,
2019 at Charleston, Berkeley County, South
Carolina.



Karen Nellius

Karen Nellius, RPR
My Commission Expires
November 14, 2024

I N D E X

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Jeane Whitfield,	)	CASE NO. 2017-CP-10-02758
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	ORIGINAL
	)	
Dennis K. Schimpf, MD, et al.,	)	
	)	
DEFENDANTS.	)	
	)	

August 26, 2019 to August 30, 2019

Charleston, South Carolina

B E F O R E:

The Honorable Bentley D. Price

A P P E A R A N C E S:

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Record on Appeal - 0577

I N D E X

(PW) - DENOTES STATE'S WITNESS

(DW) - DENOTES DEFENSE WITNESS

(IC) - DENOTES IN CAMERA

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1 (WHEREUPON, pre-trial begins, 8/26/19, 1:47 p.m.)

2 MOTIONS

3 THE COURT: All right. So I know that we have several
4 pre-trial briefs that -- I mean motions that we need to take
5 up. So what I would like to do is while we have the jury not
6 sitting there waiting on us take up some of the ones that are
7 either "A", be dispositive of potentially the case itself; or
8 "B", would have to deal with the witnesses for today and we
9 can take up whatever motions we need to take up later on this
10 afternoon for the continued portion of the trial.

11 So what motions need to be taken up now?

12 MR. SLOTCHIVER: Judge, I don't believe there are any
13 motions that are dispositive of the case itself.

14 THE COURT: Okay.

15 MR. SLOTCHIVER: But at the very least we would like to
16 take up the motion to strike the answer.

17 THE COURT: Okay. All righty.

18 MR. SMYTH: Your Honor, we have a few that need to be
19 heard. We have filed several motions in limine. The first
20 one would be to exclude the deposition transcripts that were
21 improperly filed in the case with witness's personal
22 information.

23 The reason that one I think needs to be heard is because
24 they have now placed people's private information in the
25 public domain and we have got a jury seated that kind find

1 that kind of information in violation of the court ruling.

2 THE COURT: Okay.

3 MR. SMYTH: That is in violation of South Carolina
4 Supreme Court Supreme Court rule.

5 MR. SLOTCHIVER: That was already heard by Judge
6 Jefferson.

7 MR. SMYTH: No, it was not.

8 MR. HALVERSEN: We just filed it last ---

9 THE COURT: Hold on now. Hold on. Hold on. Let me
10 start off with this. Number one, we are not going to have
11 that. All right. Y'all want to talk, ya'll talk to me. All
12 right.

13 This is y'all's courtroom. You don't have to ask me to
14 approach the witnesses. They are your witnesses, not mine.
15 You do with them what you want. You can move freely. You can
16 go in and out. You can come in and out.

17 You know, my issues are please don't argue amongst
18 yourself, address everything with me, and be on time. As
19 obviously as you can see I don't like to see the jury waiting.

20 So let's go back. You have an issue as to the
21 depositions that were filed in this case. You alleged in your
22 pre-trial brief that I read apparently that they were filed on
23 the 19th of August, which was like two Fridays ago; something
24 like that.

25 MR. SMYTH: I am not sure of the exact date off of the

1 top of my head. I can get that for you. But ---

2 THE COURT: It's okay.

3 MR. SMYTH: --- they were filed with no legal
4 justification and in violation of the South Carolina Supreme
5 Court rules on filing that information.

6 They contained Social Security numbers, children's names
7 and ages, and all of that information. We believe it is
8 improper because it could possibly taint the jury pool in
9 addition to violating the South Carolina Supreme Court rules
10 on that.

11 THE COURT: All righty. What is your response as to
12 that?

13 MR. SLOTCHIVER: Your Honor, I know they don't want the
14 information in there because it talks about the threesome
15 relationships that took place.

16 We filed it because we had -- before we filed it we
17 contacted defense counsel and asked if they were going to
18 consent to the issue about the relationship between the
19 office manager, Dr. Schimpf, and his wife. Depositions have
20 already -- have addressed that fact.

21 When we brought that up in front of Judge Jefferson
22 initially they refused to answer, both Ms. Tolbert refused to
23 answer the questions about the relationship and Dr. Schimpf
24 refused to answer the questions based on the advice of
25 counsel.

1 We brought it in front of Judge Jefferson, and Judge
2 Jefferson ordered that I believe that it goes to bias and
3 credibility and it has to come in. And then at that point
4 they asked her if she would seal it; and she said, no, she
5 would not seal it.

6 As we proceeded further when they told us they would not
7 consent to it then at that point we knew it was going to be a
8 subject of this case and of the motions to be heard; and,
9 therefore, we filed it with the court so that it is of record
10 with the Court.

11 I understand why they don't want it. It doesn't mean
12 that it is not admissible. And that is why we filed the
13 matter. It is no different, Your Honor, than when they filed
14 the deposition transcript of my client they talked about her
15 psychological issues that she has had and the treatments she
16 has had.

17 But it is -- and we can't object to it. It is a matter
18 for the Court's consideration. So we wanted it in the Court's
19 record.

20 THE COURT: All right.

21 MR. SLOTCHIVER: And that is why we filed it in
22 anticipation of the motion. It is only after they refused to
23 consent to the relationship coming in and therefore we wanted
24 to have the documents in the record.

25 THE COURT: All right. Thank you very much.

1 Yes, sir?

2 MR. SMYTH: Yes, sir, Your Honor. Obviously, Your Honor,
3 this is a matter of black and white law in our opinion. Rule
4 41.2 of our rules talks about what can be filed in the public
5 domain. There is no legal justification whatsoever for filing
6 these deposition transcripts. They contain the witnesses
7 Social Security numbers, they contain the identities of the
8 children.

9 If they want to make that a part of the Court record the
10 proper way to do that is to bring it to the Court and hand it
11 up, not filed it for everybody with an iPhone in the world to
12 see. That is not what this Court is all about. That is ---

13 THE COURT: Why did Judge Jefferson deny the motion to
14 seal it then?

15 MR. SMYTH: Beg your pardon? This is different.

16 THE COURT: Oh.

17 MR. SMYTH: They just filed these deposition transcripts
18 a week ago.

19 THE COURT: That is what I was indicating.

20 MR. SMYTH: Right.

21 THE COURT: In your pretrial you said it was last Friday
22 or something along those lines.

23 MR. SMYTH: Right. Right. And the only reason to do
24 that is to try to smear our client and to taint the jury pool.

25 THE COURT: Well, what depositions are they talking about

1 that have already -- that Judge Jefferson took up?

2 MR. SMYTH: She is talking -- he was talking about
3 whether they could get into the discovery of those.

4 THE COURT: Correct.

5 MR. SMYTH: And the judge ruled that they could go back
6 and ask that. So we presented both witnesses. They have
7 testified about it in their depositions. But that doesn't
8 justify filing depositions with the court in the public
9 record. And it clearly violates 41.2.

10 THE COURT: All right. Why can't I simply just seal them
11 until the trial -- until he testifies and you can unseal it
12 and talk to him about his deposition.

13 MR. SLOTCHIVER: If that is what Your Honor is inclined
14 to do. But just for the record, this is the same motion that
15 Judge Jefferson heard. The difference is at the time she
16 heard it it was if we are going to have the depositions taken
17 and we want to have the information, could you seal it. No.

18 Then the depositions were taken and they are saying,
19 okay, it is a whole new motion now because the depositions
20 have been taken so now we can seal it.

21 But if Your Honor is inclined to do it. We just wanted
22 to make sure that it is a matter of the Court's record.

23 THE COURT: All right.

24 MR. SLOTCHIVER: That is why we filed it.

25 THE COURT: All right. It will be sealed and made a part

1 of the Court's record.

2 MR. SMYTH: Thank you, Your Honor.

3 THE COURT: All right. Next.

4 MR. SMYTH: Just for the record, those would be of Dr.
5 Schimpf and Vicky Tolbert, so that we have got names attached
6 to them.

7 THE COURT: All right.

8 MR. SLOTCHIVER: And that is not a permanent seal, Your
9 Honor; that is just pending the case, is that correct?

10 THE COURT: That is correct.

11 MR. SLOTCHIVER: Thank you, sir.

12 MR. SMYTH: Your Honor, if I may, if those become
13 unsealed we have Social Security numbers, home addresses, and
14 minor's names, all of which are prohibited under 41.2. Will
15 we have a ruling that those have to be redacted if they become
16 unsealed?

17 THE COURT: Sure.

18 MR. SMYTH: I mean first. Thank you.

19 THE COURT: Next.

20 MR. SMYTH: All right. Your Honor, we had filed multiple
21 motions in limine. I don't know if you wanted to go through
22 these one by one. Several of them I think we need rulings on
23 just in order to set the boundaries as to what could be
24 discussed during opening statement.

25 THE COURT: All right. Those are the ones I would like

1 to address. Sure.

2 MR. SMYTH: Okay. The first one, Your Honor, under the
3 defendant's omnibus motion. In that one, Your Honor, we have
4 moved in limine to exclude any evidence or assertion that
5 medical records have been destroyed in this case. And the
6 basis for that is that there is no proof whatsoever that
7 anything has been altered, deleted or destroyed in this case.

8 There are some records missing. That is a very different
9 thing than to be able to tell this jury that somebody has
10 intentionally, willfully, purposefully destroyed, altered or
11 deleted a record.

12 And we know we have proof of this, Your Honor, because a
13 forensic expert hired by the plaintiff has gone through these
14 medical records and said and confirmed -- we have an audit
15 trial log where any time somebody opens it and reviews a
16 record it records an entry on that. And there is nothing in
17 any of that audit log that would suggest anything has been
18 altered and deleted or destroyed.

19 The records custodian of the practice where Dr. Schimpf
20 shared space at the time this occurred has given his
21 deposition at nauseum. He has produced that entire audit
22 trial log, and there is absolutely no evidence whatsoever. So
23 it would violate obviously 401, 402, and 403 in our opinion.

24 THE COURT: All righty.

25 MR. SLOTCHIVER: Thank you, sir. The issue, Judge, is --

1 the argument has been taken out of context. So if I could
2 give you some context about what has happened.

3 There are two issues that are missing. One -- two areas
4 that are missing. One is photographs and one is actual
5 medical records.

6 On the photographs the practice has admitted in its
7 answer that photographs are missing. They have also admitted
8 that records are missing. The question is where are they.

9 Dr. Schimpf testified that all of the photographs would
10 have been put into an Apple program maintained with the --
11 with Dr. O'Neill who is another plastic surgeon.

12 We had a -- we moved before the court. We had Mr. Abrams
13 appointed to go to Dr. O'Neill's practice to review that Apple
14 program, to review all of these documents. It is part of an
15 affidavit that we have agreed to put into evidence. And what
16 Dr. O'Neill says is I don't see any evidence of the existence
17 of it. Abrams will testify there is no evidence of the
18 existence or the deletion of it. But we know the pictures
19 were taken.

20 So if the pictures were taken where are they? And what
21 is significant, Judge, is that this surgery took place in
22 2014. About a year ago Mr. Tolbert found in her office, which
23 is not where files are supposed to be kept, that she has
24 testified to, in a stack of papers, somewhere in that stack of
25 paper a medical record, an H&P -- an H&P form. Why was it

1 there? We don't know.

2 Last Friday she found -- or Thursday -- last Thursday or
3 Friday she found a photograph. So just because it is not --
4 just because we haven't found it in an Apple computer doesn't
5 mean it doesn't exist. And she is a critical witness to it.
6 And the fact that these documents were taken and are no longer
7 there is something that we should be able to go into.

8 It gets even murkier because her testimony is that she
9 would take the tapes -- she was the keeper of the tapes, and
10 she would take them to the transcriptionist. And the
11 transcriptionist has told us that there was evidence that
12 information was on the tapes but it is no longer there.

13 So we believe that we should have the right to question
14 them about these missing records, about the missing
15 photographs. It is their duty -- in fact there is a rule that
16 we will present to the court. It is going to be in the
17 charges. And if it is not it will come up in testimony. It
18 is a South Carolina rule on medical records that you have a
19 duty to maintain the records and to maintain the photographs.
20 Which they have not done. And I don't believe that is
21 disputed.

22 They agree they haven't done it. In fact, Dr. Schimpf
23 has testified in deposition that he wasn't really aware of the
24 HIPPA rules, they really didn't teach him that at Ross Medical
25 School and he really wasn't aware of that when he worked at

1 the Medical University.

2 So we believe it is relevant for the jury because we have
3 two lawsuits here. One is against Dr. Schimpf. One is
4 against the practice.

5 And everybody admits the reason you keep medical records
6 is not for yourself. It is a medical requirement. It is for
7 the patients. It is for future doctors to get involved. So
8 we believe it is very relevant to go into that information.
9 And that is our position.

10 THE COURT: All right. I am going to allow you to talk
11 about missing medical records. Because we all agree that they
12 are missing medical records. We will let the testimony play
13 out and we will have to figure out at closing arguments what
14 you are able to get into as to Ms. Tolbert whether she
15 testifies and y'all have a basis of being able to prove a
16 prima facie case that they were destroyed.

17 But for right now we all agree they are missing, so I
18 will let you get into the fact that they are missing.

19 MR. SLOTCHIVER: Thank you, sir.

20 THE COURT: All right. What is next?

21 MR. SMYTH: Your Honor, the other aspects of that motion
22 that I think is appropriate for the Court to understand is
23 that we have taken the depositions of the plaintiff's two
24 plastic surgery experts and asked questions about those issues
25 in terms of what damage did the plaintiff's lack of medical

1 records cause. And so far there is none.

2 THE COURT: I don't disagree with that. I mean I said
3 earlier when I was discussing it in the back, I was like I
4 don't know what dollar value you can ascertain to put on that.
5 And I think that is your argument is that -- is that you have
6 to have causation, proxi- -- you know, and damages; and we
7 just don't have damages. So at a directed verdict hearing I
8 may be able just to say, all right, we are not going to get
9 into that.

10 But -- but that is to play out throughout the testimony
11 of the witnesses. So for right now I -- because of that fact
12 that we are all going to agree that they are missing and they
13 are going to bring that up as to the case against Sweetgrass
14 Plastic Surgery, the actual business itself, I am going to
15 allow them to, you know, discuss the fact that they are
16 missing.

17 MR. SMYTH: Okay. Your Honor, two others that I think
18 probably need to be taken up ahead of time. Obviously one
19 that we have spoken about briefly in chambers, and that would
20 be the information that we would move to exclude in terms of
21 relationships outside of the medical care involved in this
22 case. And our position is that the information about that has
23 absolutely nothing to do with this case.

24 This is a medical malpractice case. The only question at
25 issue in a medical malpractice case is whether the doctor met

1 the standard of care. The plaintiffs have happened upon this
2 information and they are trying to use this Court as a bully
3 pulpit to smear our client with that type of information when
4 it has absolutely nothing to do with the care of Ms.
5 Whitfield.

6 We believe is it improper. We believe it violates 401,
7 403, and 608. Plaintiffs have alleged that this goes to some
8 kind of bias and I mean that they can use it for impeachment
9 purposes. Well, number one, under 401 it is not relevant
10 evidence. It doesn't make any fact at issue in the case more
11 or less probable. Number two, it violates 403 because it is
12 unfairly prejudicial. And, you know, it is liable to sway a
13 jury on the basis of emotion rather than fact.

14 And under 608 the cases that deal with this all talk
15 about the confrontation clause. And the way the rule is used
16 is if there is animus between the witnesses, not a
17 relationship. And so it is completely inapplicable, and we
18 believe it needs to be excluded because it is just too
19 prejudicial and will enflame this jury and it has got nothing
20 to do with the facts of the issue of the case.

21 THE COURT: All righty. Thank you, sir.

22 MR. SLOTCHIVER: Judge, this goes to bias and
23 credibility. There are several areas in which it comes up.
24 One is that Ms. Tolbert and Jeane Whitfield have different
25 recollections as to what happened as to different complaints

1 that have taken place.

2 Keep in mind Ms. Tolbert was the office manager at the
3 time and she is the person who knew Ms. Whitfield, who kind of
4 lured her into the practice to begin with.

5 So it goes to credibility about what took place about
6 complaints that were made. Her primary conversations were
7 actually with Ms. Tolbert, not other staff members or the
8 doctor himself.

9 It also goes to the issue beyond that of the credibility
10 when it comes to testimony. For example -- and I don't want
11 to give the whole case away. But there are tapes. There is
12 dictating equipment that was used. And we know there was
13 dictating equipment that was available at Dr. O'Neill's office
14 that was not used because it was too complicated or cumbersome
15 so they used hand-held machines.

16 Ms. Tolbert testified that there was one hand-held
17 machine that she realized later on in time was defective. And
18 when she realized it was defective later on in time all of the
19 tapes that were taken from that machine apparently the records
20 were lost from those tapes. One machine.

21 Dr. Schimpf testified differently. He testified about a
22 variety of hypothesis about what happened to it: I forgot to
23 dictate; it was broken; we put it in the wrong file.

24 And then when we talked to him about the machine, that
25 one machine, and it wasn't one machine, it was a series of

1 machines over years and years where he kept on replacing it.
2 Every time it would go in and out of service he would replace
3 it and buy another one just like it. It would go in and out
4 of service. He would replace it and buy another one.

5 And what finally caused him to stop buying more of these
6 same machines from Amazon, as he testified, was they stopped
7 selling them. And I am assuming they stopped selling it
8 because they kept on breaking.

9 So we have differences of opinion, and that goes to
10 credibility. I understand they don't want the relationship.
11 But we have all dealt with bias and credibility situations in
12 all courts, in all -- in all areas.

13 But the fact that they have been -- not only have they
14 been together having a relationship for the last seven years
15 at -- or more at the practice on a monthly or weekly basis,
16 but they have also had it before he even went over and opened
17 O'Neill Practice when he was at the Medical University. And
18 there was a rule that he violated at the Medical University.
19 So the credibility is important. I believe it is relevant
20 exactly to the issue. It talks about the practice.

21 As discussed, one of the issues -- one of the defendants
22 in the case is the practice. It is kind of in following
23 policies and following rules. And you are familiar with all
24 of the cases about following policies and rules. Because that
25 is a large part of the case in general is who do we believe,

1 whose testimony do we believe.

2 And when she testifies on behalf of the practice or on
3 behalf of the doctor, as she has done, we should be able to
4 talk about the fact that she is not just an employee. You
5 know, she has got a romantic interest with him.

6 And it wasn't a one-time deal. When we deposed her and
7 we asked -- we deposed him and asked when was the last most
8 recent time. I think he said a week ago.

9 Now I do know that more recently he told us that he is --
10 in the last deposition he said he is no longer having
11 relations with her and his wife, it is either with his wife or
12 with her but the three of them not together. But it goes to
13 credibility.

14 THE COURT: All right. Well, under 403 I find it to be
15 more prejudicial than probative. However, I would probably
16 reverse that decision if in fact we later find out through
17 testimony that in fact the only medical records that are
18 missing are those of Ms. Whitfield in some miraculous scenario
19 whereby she is trying to cover up for him because of their
20 relationship as opposed to just being an employee or something
21 along those lines.

22 I don't know if that is what is going to be an
23 allegation. I don't know what is going -- what they are going
24 to bring up or what has actually transpired.

25 But for right now I am going to hold that motion until

1 she is actually going to testify and we will make the decision
2 at that point in time. But for purposes of opening statements
3 please just don't reference the relationship apart from she
4 being the manager of the obvious Sweetgrass Surgery, but
5 certainly not any personal relationship. But I will retake
6 that motion up and rule on it right before she testifies. All
7 right.

8 MR. SLOTCHIVER: Thank you, sir.

9 THE COURT: All right.

10 MR. SMYTH: Yes, sir, Your Honor.

11 The next one that I think we need to take up is the
12 plaintiffs in this case have served both a deposition notice
13 and a trial notice on Mrs. Schimpf, and so it is a related
14 issue.

15 Ms. Schimpf is not a healthcare worker. She has never
16 worked at the practice. She has absolutely zero involvement
17 in Ms. Whitfield's care or her case. She has no relationship
18 to this case whatsoever. And she's never been listed as a
19 witness by a single party in this case until last week when
20 the plaintiffs served a blind notice on her at her house in
21 front of her children.

22 She has seven children of whom she is the sole caregiver
23 during the day, because Dr. Schimpf is running his medical
24 practice and will be here.

25 There's absolutely no reason whatsoever for her to be

1 dragged into this court and embarrassed on this witness stand,
2 especially when we have already got the testimony about what
3 has happened from the other two witnesses.

4 And so, Your Honor, we would move to quash that trial
5 subpoena. They've already withdrawn the deposition subpoena,
6 so that part of the motion is moot. But we believe it's
7 highly improper to try to drag Ms. Schimpf in here solely for
8 those purposes.

9 THE COURT: All right.

10 MR. SMYTH: And we would make the same arguments that we
11 made under 401, 403, and 608 earlier.

12 THE COURT: All righty. Are you planning on calling
13 them -- calling her?

14 MR. SLOTCHIVER: Your Honor, it goes a little bit back to
15 the same issue we just discussed. What happened was we had
16 noticed the deposition of Lori Schimpf. They objected to it,
17 said it wasn't timely; so then we offered, we said why don't
18 we take her deposition because we want to examine the -- her
19 knowledge of the relationship between her husband
20 independently.

21 We said we can take her discovery deposition if you want,
22 so we can learn what she has to say; we can learn her opinion
23 about the relationship between them and then they could file a
24 motion to block the testimony from the Court.

25 They've objected to that. And now they tell -- they're

1 telling you, Your Honor, that it's unfair to bring her in
2 court. But we offered to take her deposition outside of
3 court.

4 THE COURT: Well, what is her -- what testimony of her
5 relationship with Ms. Tolbert, how is that relevant to a
6 medical malpractice case?

7 MR. SLOTCHIVER: It goes back to the same argument that
8 you had decided to hold in abeyance, which was the
9 relationship between Dr. Schimpf and Vicky Tolbert. So we
10 believe that their relationship is -- goes to bias and
11 credibility, and we wanted an outside source to tell us about
12 that relationship and about -- to tell us how close they are,
13 how friendly they are, to learn more about it.

14 And it's a discovery tool. We wanted to use it for
15 discovery to learn about it because we believe it's
16 discoverable. It may not be admissible, but it's
17 discoverable.

18 When they refused to allow us to do it we said, fine,
19 we're not required to take a discovery deposition of anybody.
20 I mean, that's not what the rules require. We said, fine,
21 we'll bring her to court.

22 And that's when -- so now they're arguing that we
23 shouldn't bring her to court without doing a discovery
24 deposition, but they're also telling us we can't do a
25 discovery deposition.

1 And I would ask Your Honor to hold it in abeyance
2 dependent. But once we put Ms. Tolbert on the stand, we won't
3 have an opportunity to go back and take her deposition and
4 cross-examine Ms. Tolbert on that information. That's why we
5 wanted to see what she had to say. We don't know what she's
6 going to say. But we are concerned ---

7 THE COURT: You are talking about -- you're talking about
8 Mrs. Schimpf?

9 MR. SLOTCHIVER: We are talking Mrs. Schimpf. She is the
10 one having the relationship with the two of them, and she has
11 independent knowledge.

12 And one thing that is concerning for us, Your Honor, and
13 one of the reasons we want to understand, is we asked Dr.
14 Schimpf was there an independent relationship with Mrs.
15 Schimpf and Ms. Tolbert.

16 THE COURT: What relevance does that have to this case?

17 MR. SLOTCHIVER: It goes to the credibility and bias.

18 THE COURT: Well, you keep going to this credibility. I
19 mean I haven't even decided whether I am going to let them get
20 into that.

21 MR. SLOTCHIVER: Understood.

22 THE COURT: So for right now she is released from her
23 trial subpoena. If we need her, I'll go get her and I'll send
24 somebody for her.

25 MR. SLOTCHIVER: Thank you, sir.

1 THE COURT: Not a problem.

2 MR. SMYTH: Your Honor, the last issue that we brought to
3 the Court's attention that I think needs to be taken up today
4 is that the plaintiffs, just last week, named several new
5 witnesses that we would move to exclude.

6 I don't know what the order is. They won't share that
7 with me as to who they are calling or when they are calling
8 these folks.

9 Depending on the Court's ruling on that issue, we may
10 want to take their depositions; and so we obviously need to
11 know that in advance so that we can plan accordingly during
12 the evening. And we may also have a rebuttal response to that
13 information. So that may be one that you want to decide now.
14 But I will certainly leave that to the Court's discretion.

15 THE COURT: All right. Are any of the people that you
16 just recently named going to be testifying today?

17 MR. SLOTCHIVER: Not today, Your Honor.

18 THE COURT: All right. At the end of every single day we
19 will take up who -- what witnesses are going to be called
20 next, and you will get an order so we can move this
21 efficiently and everybody is on the same page. There's no
22 reason to keep the order from somebody. That just does
23 nothing but stall and delay. And so we need to keep this
24 thing moving along.

25 So at the end we will go through a witness list for

1 tomorrow as to exactly who you are going to call each day. It
2 doesn't have to be the exact order. As close as possible.
3 Obviously, there are some delays in witnesses sometimes. But
4 we'll definitely be getting that every evening.

5 What else?

6 MR. SMYTH: I think that's it from the defense, Your
7 Honor.

8 THE COURT: All right.

9 MR. SLOTCHIVER: Your Honor, with reference to their --
10 the last motion and your ruling, it does affect the theory of
11 the case. Only two of -- two of the witnesses, not the third
12 one.

13 THE COURT: Okay. And what two witnesses are those?

14 MR. SLOTCHIVER: And that would be the financial expert
15 who we listed.

16 THE COURT: All right.

17 MR. SLOTCHIVER: And that's Mr. Roberts. And that would
18 also be --

19 [WHEREUPON, Plaintiff's counselors confer.]

20 MR. SLOTCHIVER: And maybe if we heard the motion to
21 strike it would all make more sense, Your Honor, if we could
22 do that.

23 THE COURT: I'm sorry. What was your question?

24 MR. SLOTCHIVER: Maybe if you would hear our motion to
25 strike we can kind of tie it all together.

1 THE COURT: Are we going to hear that as well ---

2 MR. SLOTCHIVER: We'd like to, Your Honor.

3 THE COURT: --- before we ---

4 MR. SLOTCHIVER: Because if you strike their answer
5 obviously it is going to change the impact on the case and how
6 we proceed.

7 THE COURT: And you are moving to strike their answer
8 based on the fact that you didn't get to take the doctor's
9 deposition once you received the financial records?

10 MR. SLOTCHIVER: We've moved to strike based on the fact
11 that we had scheduled the deposition and they refused to
12 present him. And we've also got motions to -- with regard
13 to ---

14 [WHEREUPON, plaintiff's counselors confer]

15 MR. SLOTCHIVER: We also have motions regarding the IMEs
16 that were taken that we probably need to present to the Court,
17 because it could affect the testimony of their witnesses.

18 THE COURT: All right.

19 MR. SLOTCHIVER: There are two -- and I'll be happy to
20 address it, if you would like. There are two witnesses that
21 did IMEs. One is Dr. Ballenger and one is a Dr. Perez.

22 THE COURT: Well ---

23 MR. SLOTCHIVER: And that will affect ---

24 THE COURT: Does that affect -- by me indicating that we
25 don't need to bring up these two financial experts until

1 tomorrow, or a later date when they are going to testify, is
2 that going to affect your, again, theory of the case whereby
3 you can't present it to the jury in your opening?

4 MR. SLOTCHIVER: Yes.

5 THE COURT: All right. What's your -- so we will need to
6 take up those two. So one is a financial expert, Roberts.
7 And who's the second one?

8 MR. HALVERSEN: It's the defendant's CPA, George Ja- --
9 however you pronounce it.

10 THE COURT: George -- it's J-A-C-Y ---

11 MR. HORTON: Jacynycz.

12 THE COURT: Jacynycz.

13 MR. HORTON: I've been having to work on it, Your Honor.

14 THE COURT: All right. And -- well, they are saying that
15 you -- that they -- that you have two that they are objecting
16 to. Thus far, the only two -- the only one you've told me
17 that you have added is Roberts, the financial expert. Who's
18 the second one that you added that they're objecting to?

19 MR. SMYTH: I think the other two, Your Honor, are the
20 plaintiff's sister and then the IC expert, Mr. Abrams.

21 And just for the Court's reference, the scheduling order
22 discovery deadline concluded March 1st, and these witnesses
23 were just named last week.

24 MR. HALVERSEN: Your Honor, I think if we could hear the
25 motion to strike ---

1 THE COURT: All right. Let's do -- go ahead ---

2 MR. HALVERSEN: I think ---

3 THE COURT: We keep talking about it. Let's go ahead and
4 hear it.

5 MR. HALVERSEN: It will kind of make -- all of this will
6 make sense.

7 So, Your Honor, the motion to strike the answer was
8 based, as Your Honor was just indicating, on their failure to
9 appear at a deposition.

10 So just going back in time, just until last month in
11 July, Judge Goodstein, just last month, entered this order
12 that we're allowed to get this financial information.

13 So we had a lot to do and a lot to boogey on to get this
14 financial information. It wasn't until July 26 that their
15 CPA, the George Jacynycz guy, started produce -- started
16 producing information. Kept going back to him saying, hey,
17 this isn't everything, this isn't everything. I get dribbles
18 of information from him July 29th, August 2nd, August 5th,
19 August 12th, August 15th.

20 And I tell them, I tell the defendant's lawyers, hey,
21 we've got some questions just based on what I've seen already
22 and we want to set your client for a deposition on these
23 financials. That's Exhibit A to the motion.

24 Exhibit B they said, as to availability, Todd is
25 available August 14th and 19th and Dr. Schimpf is available

1 any time on August 19th. That was from the defendant's
2 paralegal. Mr. Smyth was copied, Mr. Horton, these gentlemen,
3 were copied on that email. So we noticed it the same day,
4 July 31st, for August 19th, a week ago from today.

5 And what's happened since -- I also said I wanted to take
6 the CPA's depo. That was last week. CPA comes on August
7 14th, Wednesday. He comes and testifies their books are
8 unreliable and not accurate. Okay? Whoa.

9 And then Friday, before the depo - which was on Monday of
10 last week - Friday before the depo, we get -- we are served
11 with a motion to quash the depo and for a protective order.

12 First of all, he's a party, so you can't quash him.
13 Protective order, fine. Move for a protective order. They
14 don't get an order. And we go. On last Monday Dan and I show
15 up. Where is he? He's not coming. We sit there. We take a
16 certificate that he didn't appear.

17 So, Your Honor, we think it was a flagrant disregard of
18 the rules. If you don't want to strike the answer, that's --
19 we understand that's a drastic remedy, but there has to be a
20 consequence. There has to be a consequence for being --
21 producing that party for information that we never had, that
22 we got dump-trucked in the last couple of weeks, and the only
23 reason he didn't show up is because something bad, testimony,
24 came out from that CPA.

25 So all of this goes to net worth of the defendant, which

1 is an element of the punitive damages we're seeking in this
2 case. And we would like an adverse inference. We would like
3 an adverse interest -- inference that the anomalies we see --
4 we saw in the books, and for him not showing up at his
5 deposition, and a 30(B)(6) for the defendant not showing up,
6 would have been detrimental to his defense and advantageous
7 for our portion of that claim.

8 THE COURT: Okay. All righty.

9 MR. SMYTH: Thank you, Your Honor.

10 The only thing that is really a flagrant disregard of the
11 rules in this instance is the plaintiff's behavior in this
12 setting.

13 We have had a scheduling order in place in this case
14 throughout the entire time. As a matter of fact, we actually
15 took the experts out of order last year, around Christmastime,
16 because they wouldn't agree. They said discovery is over in
17 December. But Judge Young gave us a new scheduling order,
18 which extended the scheduling order -- excuse, me, the
19 discovery deadline to March -- March 1st of this year. So
20 roughly six months ago.

21 The plaintiffs have deposed Dr. Schimpf not once, not
22 twice, but three times in this case, Your Honor; and they have
23 had ample opportunity to ask him any questions they wanted
24 about his finances.

25 Understanding they didn't have some of the detail that

1 they have now. There was nothing that prohibited them,
2 though, from asking him what are your assets, what are you --
3 who they actually did ask him where he banked, where his
4 accountants were. And they didn't do anything with that until
5 six months after the scheduling order expires. That's a
6 violation of the Court's order, trying to conduct discovery
7 after the Court's scheduling order has expired. So it's
8 officially an invalid notice.

9 The second aspect of this is I never once agreed to
10 present Dr. Schimpf for a deposition in this case. My
11 paralegal responded. I had some availability on that day; but
12 that's a very different thing from me saying, yes, I am going
13 to bring this witness. And I've actually conveyed that to the
14 plaintiffs' lawyers. They showed up at my office unannounced,
15 with a court reporter, after being told there was going to be
16 no deposition.

17 And we have moved to quash. We have moved for a
18 protective order. Rule 30(A), Your Honor, says the deposition
19 of a party or a witness may only be taken one time. One time.
20 We have given three. We have given them thousands of pages of
21 financial records. Everything that -- this is more -- in
22 twenty-six years practicing law, I've never turned over this
23 much financial information for net-worth statements. And this
24 is beyond the pale.

25 And the other thing, Your Honor, is when you read Judge

1 Goodstein's order about -- that required us to produce that
2 information, we have produced it. There are some vagaries in
3 there because it says backup information. Well, backup
4 information was never really defined. But we've given them
5 access to everything.

6 It's not just tax returns. It's banking records, it's
7 loan applications, it's everything. Every aspect of this
8 doctor's financial life has been turned over to these folks.

9 And the order from Judge Goodstein never once says and
10 you can get to depose him about it or you can take as many
11 depositions as you like about it. It doesn't say anything
12 about taking depositions. It says provide the information.
13 We've done that tenfold.

14 So for them to move to strike our answer at this late
15 stage, based on their own conduct, Your Honor, is just highly
16 offensive and improper

17 THE COURT: All right. Would you like to respond
18 briefly?

19 MR. HALVERSEN: Briefly, Your Honor.

20 They agreed to the depo. It was -- it was -- they
21 gave -- we said why we wanted to take it, and we were given
22 dates. It wasn't -- we didn't blind-notice them. They gave
23 us dates and we noticed it. It was noticed and we didn't hear
24 blank about it for two weeks, until the bad testimony started
25 coming out from their CPA. All of a sudden he doesn't show up

1 at -- or we get the motion on Friday to quash it. He doesn't
2 show up at the depo on Monday.

3 As far as the discovery being cut off, we're continuing
4 to do discovery. We're doing the CPA. They've produced the
5 CPA, Your Honor. It's not as if they said, oh, well, time
6 out, you can't do discovery on the CPA.

7 [WHEREUPON, plaintiff counselors confer.]

8 Yeah, and we are still getting records. We got medical
9 records last Friday. They want to come in here and say, oh,
10 hey, discovery's cut off; well not for -- for you guys, but
11 not for us. That's -- that -- that doesn't wash.

12 That's it, Your Honor.

13 THE COURT: All right. So as to the mention or potential
14 mentioning of the two witnesses which are financial experts,
15 Roberts and George Jacynycz, I am going to deny the motion.

16 If they want to bring it up, they can bring it up. This
17 is their opportunity to tell the jury what they believe the
18 evidence is going to show. If it doesn't show it, you can
19 bring it up later and say they told you they were going to
20 show you this and they didn't get -- they didn't show you
21 this.

22 So, also, I agree with both parties in the sense that if
23 y'all were to come to me and ask me to do anything one day
24 past that scheduling order I would have said absolutely not,
25 discovery is over, that's it.

1 I follow the orders. If a judge makes an order, that's
2 it. So both of y'all can't use this as a sword and a shield
3 as well. You are -- like you say, you're still both violating
4 the order by producing documents and being involved in the
5 discovery, and obviously the same with trying to attempt to
6 depose people and bring them to court.

7 And the fact that he didn't show, I don't know whether
8 that was at the direction of his attorney or whether he
9 just -- the doctor -- or the defendant just didn't want to
10 show. But I don't really think that we need to get into that.

11 I think you're both guilty of violating the order, so I'm
12 not going to let you use it against each other.

13 Anything else?

14 MR. SLOTCHIVER: One more thing, Your Honor.

15 The defendants have named two experts on the case. One
16 is a doctor named Jorge Perez from North Fort Lauderdale,
17 Florida; and the other one is a Dr. James Ballenger. You
18 would have seen the name because you read them to the jury
19 earlier.

20 And it's an interesting scenario that we're in, if I can
21 walk you through it briefly. They note -- they named both
22 expert witnesses, and we deposed both expert witnesses; and
23 both of them gave their opinions. Okay?

24 Subsequent to that, they moved for an IME. And this was
25 heard in front of Judge Kinlaw from Greenville. We argued

1 that they should not be able to use these witnesses in the
2 IME, they can use other witnesses in the IME.

3 And there is a South Carolina -- we quoted this in the
4 pleadings and the briefs that you have. There's a case
5 directly on point. And, most interestingly, the case -- the
6 Fairchild case, the most interesting thing is that the
7 Fairchild case deals with Dr. Ballenger, the same Dr.
8 Ballenger that we are here with for today, the exact same
9 doctor.

10 And what the Court said is that we're not questioning the
11 credibility of Dr. Ballenger but once you've been named as an
12 expert and provided an opinion as an expert that you cannot
13 be -- you cannot be independent, you are no longer
14 independent. That's a Supreme Court case. You are not
15 independent.

16 Despite that, Judge Kinlaw decided to allow them to use
17 these doctors as the IME doctors and to examine my client. We
18 wrote them. And not only did we write them, even my client
19 handed a letter directly - and it's part of the attachment to
20 Ballenger's deposition - and said, look, we understand you get
21 the right to do an IME but we don't believe that the IME
22 should be done by a doctor who's already given an opinion
23 because it's not independent as per the pending -- the South
24 Carolina case on point. We said, we think you should
25 substitute him.

1 In fact, we went so far, Judge, not only did we write
2 them but we filed -- a long time ago, as soon as this
3 happened, we filed a motion in limine to exclude the
4 testimony.

5 And we said, guys, here, if you're going to go forward
6 with it, we want you to know we're going to move to exclude
7 any testimony from these guys because they are going to
8 examine her in violation; Judge Kinlaw has the right to say
9 you can do it but the trial judge is the keeper of the gate,
10 the trial judge will determine who does and who doesn't
11 testify, and we want you to know in advance before you go to
12 trial if you use Dr. Perez and if you use Dr. Ballenger as
13 your IME doctors we want you to know before you go forward
14 that we're going to move to exclude the testimony and the
15 reason is because it violates the law, regardless of the fact
16 that he was appointed, so please substitute somebody else.

17 And we've offered it over and over again. They have
18 refused to do it, and they went forward. And, as you know,
19 Judge, it is interlocutory so we don't have the appellate
20 right to -- at that point to argue that it was improper for
21 Judge Kinlaw to order it.

22 And I'm not passing -- I am not trying to suggest
23 anything other -- we just disagree. We think the law is
24 directly on point. We don't know why it was ordered. But it
25 was, and we've lived with that order for now.

1 But the fact that it's the same judge, it's the same
2 topic, it's absolutely violative of it, we believe it's proper
3 for you to keep the evidence out because if it goes forward,
4 we -- what we don't want to do is have an appeal on the fact
5 that we're not putting testimony in which the Supreme Court
6 has already said can't come in.

7 So we offered them an out. We didn't want a surprise.
8 We wrote them and said we don't want a surprise, we want you
9 to know in advance this is going to happen, this is going to
10 come up, so you have an opportunity to correct it.

11 I think it's -- you know, Gedney Howe used to say it's
12 the -- you are the author of your own dilemma if you go
13 forward under these circumstances.

14 But they refused to back off of it; so we filed a motion
15 to exclude their testimony based on the fact that they did
16 IMEs and they had an opportunity to examine my client, which
17 normally they would not have the right to examine her at all.

18 Thank you, sir.

19 THE COURT: Who allowed that?

20 MR. SLOTCHIVER: Judge Kinlaw out of Greenville.

21 THE COURT: All right.

22 MR. SLOTCHIVER: Thank you, sir.

23 MR. HORTON: Briefly, Your Honor.

24 As Mr. Slotchiver said, the Court ordered this
25 examination. They have fought that. They opposed our request

1 for that. Judge Kinlaw found that it was proper. He found
2 that Fairchild did not apply. And then they filed a motion to
3 reconsider.

4 So they've argued it two times. This is the third bite
5 at the apple, and they're essentially trying to get you to
6 overturn Judge Kinlaw's ruling.

7 It would be highly improper to say that a medical doctor
8 is somehow biased by being able to examine the patient. Under
9 that logic, Your Honor, Dr. Kalus who is now serving as both
10 Ms. Whitfield's treating doctor and her expert witness,
11 couldn't take the stand.

12 THE COURT: Are they planning on testifying today?

13 MR. SMYTH: No. These are my defense experts so they ---

14 THE COURT: Oh, so we're looking probably ---

15 MR. SMYTH: It will be at the end of the week, Your
16 Honor.

17 THE COURT: Right. All right. Let me read the -- I just
18 want to see why Judge Kinlaw didn't think that Fairchild
19 applied. I haven't read it, so let me read it.

20 I will take that under consideration and we'll deal with
21 it and address it at the time of your case in chief.

22 MR. SLOTCHIVER: And until that happens can the testimony
23 about what they're going to elicit from their examination in
24 the IME be limited at this point?

25 THE COURT: What is your position? Are you planning on

1 discussing the two doctor's opinions in your opening?

2 MR. SMYTH: I was going to say that they had -- they had
3 examined her. And they're going to talk about their findings.
4 So just foreshadowing that.

5 So, you know, I think, you know, the problem with this is
6 that they're asking for an appeal when they're not entitled to
7 an appeal.

8 This is the law of the case. It's been established by
9 Judge Kinlaw in the case. It was proper. The doctors were
10 acting under a court order to do so. This allegation that the
11 examination has to be independent is not in the rule. If you
12 read Rule 35 it's -- there's nowhere in that rule does it use
13 the word independent. The Court has discretion as to who they
14 can appoint to that. And they made all the allowances that
15 the rule requires, which is allowing Ms. Whitfield's
16 physicians to be there with her while those examinations
17 happened.

18 And so everything was done by the book. And for them to
19 try to get an appeal of the order at this stage, Your Honor,
20 would be highly prejudicial and improper.

21 THE COURT: All righty.

22 MR. SLOTCHIVER: And, Judge, we're not appealing the
23 order of Judge Kinlaw at this point. We're -- we are
24 asserting that it doesn't make it admissible. And that is
25 what the case says, it's not admissible.

1 The Fairchild case is copied in the brief, if you'd like
2 to see it.

3 [Pause for the Court]

4 THE COURT: I mean the rule indicates that if not by
5 agreement a court can order the examination. Obviously, it is
6 based on the actual damages threshold.

7 MR. SLOTCHIVER: We agree, Your Honor. But the case law
8 interpreted the statute, and that's where we came in.

9 THE COURT: It's not in here. She can't find it, and I
10 couldn't find it either.

11 MR. SLOTCHIVER: We'll pull it up, Your Honor, if you
12 will give us just a moment.

13 THE COURT: What are you -- but your position, Mr.
14 Slotchiver, is that because these doctors have done their own
15 independent medical examination upon the plaintiff, that they
16 are now precluded from coming in and testifying as to what
17 their findings are because they're going to give their opinion
18 of their findings?

19 MR. SLOTCHIVER: No, sir. No, sir. I'm -- and I know it
20 is a know little convoluted, and I apologize.

21 My position is that the Court has already ruled that --
22 we will back it up. The basis with which they did their IME
23 was the appointment as being independent medical examiners
24 under the rule. The Court has already ruled that you cannot
25 be an independent medical examiner if you've already given an

1 opinion.

2 In fact, it was directly Ballenger who was quoted in that
3 case. They said we're not questioning his credibility. By
4 the very nature he was hired as an expert and that he's
5 already given an opinion, he cannot be independent. And he
6 had -- and so our position is not that -- that he can't be
7 appointed. If the court wants to appoint him, they can
8 appoint him. But he can't testify because it's violative of
9 the rule. The rules are -- of the case law interpretation of
10 the rule, which already says you can't do this.

11 So by allowing him now to come in and say, I examined her
12 and this is what I found, it's kind of the fruit of the
13 poisonous tree. How did you examine her? I was appointed as
14 an IME. Which he could be appointed as an IME, if he were;
15 but that evidence isn't supposed to be brought to the jury.
16 The jury should not hear testimony from you as to your
17 findings as an independent medical examiner if you're not
18 independent.

19 Dr. Kalus is different, by the way. They quote -- they
20 reference Dr. Kalus. Dr. Kalus was a treating physician that
21 took over the treatment of my client after she left Dr.
22 Schimpf. First, he sent her back to Dr. Schimpf; and then she
23 ended up coming to him afterwards.

24 He's not our expert. He's a treating physician who
25 happens to be an expert. But he's not our expert. Our expert

1 is Dr. Rosenberg.

2 Were you able to find that case?

3 MR. HORTON: Do you need copies of Fairchild?

4 MR. SLOTCHIVER: It was in the motion filed July 17th.

5 THE COURT: Oh, I don't have it. That's all right. What
6 section are you referencing in the Fairchild case?

7 MR. HORTON: Your Honor, would y'all like copies of the
8 case?

9 THE COURT: Sure.

10 MR. HORTON: I brought some with me.

11 THE COURT: Sure.

12 MR. SLOTCHIVER: And the main quote, Your Honor, is under
13 the plain language of Rule 35(A): The defendant clearly does
14 not have the right to unilaterally select the examining
15 physician -- physician, rather, the Court alone has the
16 right to make the appointment. This rule contemplates that
17 the parties will confer on this point to make suggestions.

18 This isn't the right quote.

19 [WHEREUPON, counselors confer]

20 MR. SLOTCHIVER: The quote is: The court could not
21 compel a plaintiff to submit to a physical examination by the
22 witnesses of the other sides.

23 And this was in the Ballenger case. But if you will look
24 at the case that will -- you will see a directive on it.

25 THE COURT: I see what it's saying. Because she

1 wasn't -- she didn't pick the ER doctor in Fairchild, because
2 obviously that was just the one that was on call.

3 All right. I am going to deny the motion. And you're --
4 you can bring it up in your opening.

5 Anything further?

6 MR. SMYTH: I think that's it for the time being from the
7 defense, Your Honor.

8 MR. HALVERSEN: We had some miscellaneous motions in
9 limine.

10 THE COURT: Is it going to be in reference to opening
11 statements or the witnesses that we're going to call this
12 afternoon?

13 [WHEREUPON, counselors confer]

14 MR. SLOTCHIVER: Judge, I think we're good. And for
15 clarity, my understanding is that your rulings are based on
16 the information you have now and these matters that have been
17 addressed are subject to being raised again during the course
18 of the trial based on information that comes up?

19 THE COURT: Sure. I have no problem with that
20 whatsoever.

21 All righty. You can go get the jury for us.

22 [Whereupon, recess 8/26/19, 2:37 p.m.]

23 [Whereupon, resume and the jury enters the courtroom
24 8/26/19, 2:45 p.m.]

25 THE BAILIFF: Your Honor, the jury is complete.

1 THE COURT: All right. Thank you so very much. Please
2 be seated.

3 All right. Ladies and gentlemen of the jury, I am going
4 to take -- I am going to take that one on the chin. So I
5 shouldn't have brought y'all back so quickly at two o'clock.
6 I should have given you a little bit more time.

7 There were some matters of law that you will see that we
8 will take up periodically. Matters of law have to be taken up
9 in front of me and me alone. Y'all are the sole triers of the
10 facts of this case. The law will be told to you at the close
11 of the trial by myself. And my job is to rule on those
12 matters of law, and I just wasn't aware that it was going to
13 take that long. So I apologize.

14 But I wanted to let you know we began working at 1:45 and
15 it took us that long to resolve them. So with that being
16 said, we are now going to begin the trial of the case.

17 But before we do, just real quickly, have y'all selected
18 a foreperson? All right. And what juror number is that?

19 JUROR NUMBER 176: 176.

20 THE COURT: All righty. Obviously you know that your
21 duties will be explained to you at a later date. But for the
22 purposes of the trial, you simply just sit there. That's the
23 only assigned seating that we have. All righty?

24 So now is the opportunity for the attorneys to give you
25 their opening statements. Opening statements are not to be

1 considered as fact in this case. Anything that the attorneys
2 tell you in their opening statements are only to be considered
3 as to what they believe that the evidence is going to show you
4 throughout this trial. And they will present their opening
5 statements at this time.

6 Yes, sir?

7 MR. HALVERSEN: Thank you, Your Honor.

8 **OPENING STATEMENT**

9 **MR. HALVERSEN:** Thank you all for your service and
10 serving as jurors today. My name is Brent Halversen. And
11 this is Dan Slotchiver. And we have the privilege of
12 representing Mrs. Jeane Whitfield who is sitting right there
13 (pointing).

14 So I don't know how many of you all have been on juries
15 before. But this is a civil case. It's not a criminal case.
16 So no one is going to jail today or this week or any time. I

17 This is a dispute amongst individuals. And when
18 individuals can't come to an agreement about a claim they
19 have, then they have to have the jury decide. Somebody has to
20 decide what is going to happen.

21 Now, unfortunately, we can't undo the past; so that means
22 that the only thing we can do is ask you for an award of
23 money. And that's what you're here to decide, is for the
24 plaintiff or for the defendant, and if for the plaintiff how
25 much.

1 And we're going to be asking you, again, this week for a
2 large amount of money to compensate Mrs. Whitfield for what
3 she's been through and what she's still going through and what
4 she still has to face in the future in terms of future
5 surgery.

6 We're also going to be asking you for a sum of money to
7 punish the defendants for the behavior; because we'll submit
8 to you what happened to her is unacceptable, and we want you
9 to take it into consideration and send a message that this
10 won't be tolerated again.

11 So, ladies and gentlemen, this is Jeane's day. She's
12 waited years to get to this point. You know a little bit
13 about it. It's about a medical malpractice case. You know
14 it's about plastic surgery. But it's actually about her
15 intimate body part, her breast.

16 And it's not something that's easy to talk about. It's
17 not something that's easy for me to talk about. But she's
18 here to tell her story and live -- relive the nightmare she
19 lived through.

20 She's willing to do that here with people, you, strangers
21 she's never met. And it's up for you to decide, you know,
22 what -- what you make of her and her credibility and the
23 defense credibility.

24 But as you sit here this week, each day when you come in
25 and right now, I want you to continually ask yourself what did

1 Jeane do wrong. Every day when you come in and sit down and
2 see my client, Mrs. Whitfield, sitting there, ask yourself
3 what did she do wrong.

4 So what did Dr. Schimpf do wrong? And you are going to
5 hear a lot of things about the things he did wrong. You are
6 going to hear he stitched her up too tight, he ignored her
7 when she was reaching out for help; and finally when he saw
8 her, put some stitches on her, kicked her out the door.

9 And you're going to see and you're going to hear evidence
10 that somehow there's -- there were photographs taken of Mrs.
11 Whitfield before her surgery. And somehow those photographs
12 are gone. They're missing.

13 You're going to hear evidence about missing medical
14 records, about when she came to the practice and there's no
15 missing -- there's no medical records. And then you're going
16 to hear that after the procedure there's no medical records.

17 You're going to hear testimony about rules and
18 regulations, actual real federal and state regulations that
19 govern medical practices.

20 And you're going to hear that those rules were in place,
21 they are there to be followed, and they are there for the
22 patient's protection.

23 We believe at the end of the day you will understand and
24 concur that these rules are in place for a reason. They're
25 meant to be followed. When rules aren't followed, bad things

1 happen. When you cut corners, bad things happen.

2 There was rules to get signed consent forms so there's no
3 ambiguity about what's being done. Jeane said she had a --
4 she never consented to having a procedure done on her neck.
5 The doctor says he got it but not in writing, despite the rule
6 requiring it.

7 There's rules to keep and maintain accurate medical
8 records. You will hear that the doctor lost the medical
9 records or may not have even had them. He himself will admit
10 he used tape recorders, despite the fact that they were
11 repeatedly breaking.

12 There's rules to keep photographs. These are medical
13 records too. There's no dispute that photographs were taken
14 of Jeane. The defendants will tell you that they mysteriously
15 disappeared. You will hear evidence that they weren't placed
16 in the machine they were supposed to be. This rule wasn't
17 followed. There's a Dr. O'Neill that shares office space with
18 Dr. Schimpf, and he scoured the computer and he couldn't find
19 them.

20 So what happened to Jeane? Why is Jeane here? So Jeane
21 had her breasts augmented in 2009 with a doctor, a local
22 plastic surgeon, named Dr. Kline. She had just gotten
23 remarried. She was very happy with her appearance. And
24 you'll -- if you ask her, she will tell you how she loved her
25 appearance. You will see pictures of her the way she used to

1 look.

2 But she started having pain below her right breast. She
3 asked her doctors what was going on, and they didn't know the
4 answer.

5 She asked her doctor at Palmetto Primary Care about it.
6 They didn't know what was going on. They sent her to a
7 gastroenterologist named Dr. Aaron Domm. Dr. Domm didn't know
8 what was going on. He thought it might have been related to
9 some scar tissue that she had related to her augmentation.

10 So you will hear as she's leaving the building from that
11 appointment, she hears a name call out. And it's a lady named
12 Ms. Vicky Tolbert who is the defendant's office manager. And
13 she sings Dr. Schimpf's praises. And she's known Ms. Tolbert
14 from back when she used to work at Outback in the '90s.

15 So it made sense to give it a shot. He's right there.
16 She had known Vicky. And Dr. Schimpf walks in the lobby while
17 she's there and pitches his services.

18 But what's important for you all to understand is that
19 Jeane didn't go to Sweetgrass or Dr. Schimpf for cosmetic
20 reasons. She went there for pain relief and he was told --
21 she was told that reducing the size of her breasts would cure
22 her problem.

23 She wouldn't have changed anything. Like I said, she was
24 happy with the way she looked. And while she was there, Dr.
25 Schimpf upsold her on getting a couple of other things. He

1 said, we can do something for your stomach, we can do
2 something for your legs, and do something for your eyelids.

3 And she's, well, all right, I am already here; okay. So
4 she had the surgery. That was June 6, 2014, now five years
5 ago. And then when she comes back for her follow up, which is
6 June 10th, a few days later, she has bandages around her head.
7 She thought that was for her eyes.

8 And the bandages are removed; and he comes up to her and
9 says, hey, I did a little something-something here for your
10 neck. Shocked. Okay.

11 Didn't discuss anything about doing something to my neck.
12 She did discuss having something done to her stomach and her
13 legs, but she never gave permission for Dr. Schimpf to take a
14 scalpel to her neck.

15 She was fine with the way her neck looked. So imagine
16 how she felt in that situation, how anyone would feel, that a
17 procedure was done on them without any permission. She felt
18 violated.

19 And we're going to show you documents, the defendant's
20 documents, the defendant's consent forms, defendant's billing
21 records, discharge papers. And nothing, nothing, has any
22 whiff of having something to do with the neck.

23 We can't -- it was definitely done. There is an
24 operative record that says it was done, so we know it was
25 done. She knows it was done. But she was happy with the say

1 she looked.

2 But, unfortunately, the testimony is going to show things
3 only went downhill from there. She begins to notice oozing,
4 smell, pain; and her right breast is starting to come apart.
5 Would that upset anybody? I mean, I don't have breasts. Half
6 of you don't. But the other half, if it happened to you in a
7 private area, I imagine you would be upset.

8 So she's calling and calling and calling for weeks for
9 help in that situation. And the only thing I can make it an
10 analogy to is if you have ever gone to a salesman and that
11 guy's your best friend, tells you, hey, yeah, we can do
12 everything, it's going to be great, it's going to be
13 fantastic, and you say, okay, great, you buy it, and then
14 you've got a problem and that guy is long gone. You can't
15 find them. That's kind of like what happened here.

16 So what does she do? She is having pain in her chest.
17 What would anybody do? She's not getting any response. She
18 goes to the hospital. Goes there. And they say, well, you're
19 not having a heart attack but you might want to follow up with
20 the plastic surgeon.

21 She's been trying. Finally, after that, she gets an
22 appointment with Dr. Schimpf. Dr. Schimpf puts a couple of
23 stitches in, sends her out the door.

24 But then it keeps getting worse. It's not getting any
25 better. She keeps calling, calling, calling. No response.

1 So what does she do? She does what anybody would do in that
2 situation. She tries to find somebody for help. She gets on
3 Google and finds a plastic surgeon in town in Mt. Pleasant
4 where she lives, and that doctor is named Dr. Ram Kalus.

5 You might have heard the name this morning. And he's a
6 very successful plastic surgeon. He has an office in Mt.
7 Pleasant. He's got an office in Israel.

8 And she goes to him on July 10th and shows him her
9 breasts. And he's shocked. He thought it was very serious.
10 It's a small community. He knows Dr. Schimpf. He calls Dr.
11 Schimpf while Jeane's still there: Dennis, I want to make
12 sure you're listening; we have a serious issue here.

13 He tells Jeane: I talked to Dr. Schimpf. Go back to
14 him. You are not my patient. Go back to him.

15 So she does. The next day she goes to Dr. Schimpf; and
16 miraculously she immediately gets an appointment. I wonder
17 why. She goes back to him, and he is angry. He is not happy.
18 He is embarrassed that his work is on display for his
19 colleagues. I

20 He puts some more stitches in her, with no anesthetic.
21 And she's crying and upset. And he says, what, it's just fat,
22 you can't feel anything. And then when she keeps crying, he
23 says get out of here.

24 A couple of days later, her breast doesn't improve. It
25 keeps separating. It's getting worse. She's in the shower.

1 You're going to hear about this. It starts to open. Blood is
2 coming down.

3 Fortunately, her daughter is there at the house, her
4 daughter who is also an EMT and a paramedic. She gets her to
5 the hospital. She has surgery. Her right implant is removed.
6 That was in 2014, in July.

7 Since that time she has had two subsequent surgeries.
8 One was to remove the left breast to bring her back to flat,
9 and then she had fat-grafting surgery to build herself back
10 up. You're going to hear she's going to need another future
11 surgery to get her back to as close as possible to where she
12 was before.

13 So what did Jeane want and expect in a physician? And I
14 think when you listen to the testimony, put things through
15 this prism: She wanted somebody that was responsive. She
16 wanted somebody that was competent and focused. She wanted
17 somebody that had compassion. And I think she wanted somebody
18 that was going to be honest.

19 Seems pretty reasonable, right? I don't think she's
20 asking a whole lot. Something anybody would think that that's
21 what they want from their doctor.

22 So was Dr. Schimpf responsive? You're going to hear
23 about her begging, crying for help, getting no response or
24 being dismissed.

25 Was Dr. Schimpf competent and focused? He doesn't have

1 our client's medical records. He doesn't have her
2 photographs. There's laws in place that govern medical
3 facilities and doctors. It's not an option.

4 Was Dr. Schimpf compassionate? Again, begging to see
5 her. I told you about the welcome that she received.

6 Was Dr. Schimpf professional? Doing a procedure on
7 someone's neck without permission, is that professional? Not
8 keeping medical records, is that professional?

9 Is Dr. Schimpf honest? You're going to hear evidence
10 what Dr. Schimpf represents to his financial institutions and
11 the federal government. You can be the judge of that.

12 You're going to hear from Jeane's daughter, Samantha, who
13 is an EMT and a paramedic who I mentioned, who is going to
14 tell you what she observed when she saw it. Listen closely to
15 what Samantha says.

16 Now, Dr. Kalus is in Israel; so you're not going to hear
17 live testimony from him. But his testimony was recorded on a
18 video link. And it's recorded. And it's about two hours.
19 But we're going to play it back so you can hear what Dr. Kalus
20 had to say.

21 And he -- you need to listen to what he says about how
22 serious he thought it was when she first came to him, that it
23 was a critical situation. You're going to hear, that if it
24 had been his patient he would have taken her to surgery that
25 night, and how he pressured Dr. Schimpf to see her right away.

1 You're going to hear from our expert, a plastic surgeon
2 named Dr. Michael Rosenberg. He's a highly-educated, highly-
3 credentialled, highly-experienced plastic surgeon. And he's
4 going to testify that Dr. Schimpf fell below the standard of
5 care in how he actually did the procedure. He put too much
6 tension on her wounds during the procedure. That's the
7 testimony of Dr. Rosenberg. And that what he said was
8 observed in fact by Dr. Kalus who was at the hospital and took
9 out her implant and he observed too much tension on the
10 wounds.

11 You're going to hear from Jeane's sister, Mary. And
12 Jeane [sic] is going to testify as to what she saw and how
13 this has affected Jeane.

14 You're going to hear from Dr. Marcino, who is Jeane's
15 treating psychiatrist. And Jeane had problems. She had
16 issues with anxiety and depression before any of this
17 happened. But this didn't make it any better. It made it
18 worse. And Dr. Marcino can testify to that. And Dr. Marcino
19 has known Jeane for twelve years, a long time; so you can take
20 what Dr. Marcino says to the bank.

21 But in the face of all of this, ladies and gentlemen, the
22 defendants are going to attempt to convince you this week that
23 Dr. Schimpf and Sweetgrass did nothing wrong, nothing wrong,
24 perfect procedure. And I expect they're going to tell you it
25 is a recognized complication of what happened. A recognized

1 complication.

2 Now, I don't take any joy in showing you this picture.
3 But as painful as this picture is to look at, I want you to
4 remember that Jeane had to live with this (displaying). She
5 had to live with this (displaying).

6 And if that -- is that a recognized complication? Is
7 that something that Jeane bargained for when she wanted to get
8 pain reduced, pain eliminate? I suggest not.

9 So why are you here? It goes back to what I started
10 with. When people have disagreements and they can't figure it
11 out amongst themselves, it's up to the jury to decide. That's
12 our system. Unfortunately, today we live in a world that no
13 one wants to accept responsibility for anything that happens.

14 Now, at the end of this case the judge is going to
15 instruct you on what the law is. And because this is a
16 medical malpractice case, the law is negligence. And
17 negligence is a fancy word for screw-up. That's it. I'm
18 going to boil it all down.

19 So when you're deliberating and you hear this evidence
20 and you look at that picture, I want you to ask yourself was
21 there a screw-up here? And I think you're going to answer at
22 the end of the day, yes, and find for our client.

23 Thank you.

24 THE COURT: All right. Thank you very much.

25 Mr. Smyth?

26

1 MR. SMYTH: May it please the Court, Your Honor?

2 THE COURT: Absolutely.

3 **OPENING STATEMENT**

4 MR. SMYTH: Good afternoon, ladies and gentlemen. My
5 name is Todd Smyth. We did the introductions earlier this
6 morning. With me this week is Kevin Horton who is an
7 associate in my firm. My paralegal is Katy Rhoades. And
8 seated to Kevin's right is Dr. Dennis Schimpf. It's our
9 privilege to represent him this week.

10 And I want to talk to you a little bit about how this
11 process works. A lawsuit is a little bit like a coin. There
12 are two sides to it. So far you've heard one side of it. And
13 I imagine that during the course of the week Judge Price is
14 going to give you a reminder and some instructions. When you
15 go home at night or when you take a break for lunch, don't
16 start your deliberations.

17 And that's an important reminder, from our perspective.
18 Because in our system the plaintiff gets to go first. They
19 get to tell you their story first. You won't hear our story
20 until the end of the week.

21 So when you get -- hear that reminder, just remember you
22 haven't heard everything. It's not time to decide the case
23 until all the evidence is in.

24 As I mentioned, we represent Dr. Schimpf. He's got an
25 interesting story. He grew up in upstate New York and earned

1 a college basketball scholarship to put himself through
2 college. Towards the end of his career he decided, you know,
3 maybe I have an interest in medicine.

4 And there were two things that really happened in his
5 life that sparked that interest. The first one was he worked
6 in an emergency room, so he got to see how hospitals work and
7 kind of the craziness that happens in an emergency room. And
8 he enjoyed that aspect of it.

9 The second aspect was that his mother got sick. She had
10 cancer, and that really prompted him to go into medicine
11 because he wanted to be able to help people.

12 And so he -- not being a traditional student, he was -- I
13 think he was a philosophies and humanities major. He hadn't
14 taken all the sciences that you need to go to medical school,
15 so he went back and did that. He went back and put in the
16 work to take those classes to become admitted to medical
17 school.

18 He completed his medical school training. And then not
19 only did he graduate from his medical school class, but he got
20 into one of the most difficult specialty fellowships or
21 residencies that's out there, plastic surgery. And he did
22 that in New York. And he was with a group of fifty-four other
23 residents in plastic surgery, and he was voted the chief
24 resident out of that entire class.

25 After completing his training he came back and he passed

1 his boards. There's a certification examination to become
2 board certified in plastic surgery. That involves a written
3 examination. It involves an oral examination. And it also
4 involves presenting cases, show us your work, show us that
5 you're competent at what you do. He passed all those
6 examinations and became board certified.

7 Then he came to the Charleston area. He's had a wide
8 variety of experiences since he's been here. He's been into
9 academics. Matter of fact, he actually founded the center at
10 MUSC for reconstructive breast surgery. He's literally done
11 thousands and thousands of breast surgeries.

12 He's also -- in 2014, he opened his own practice called
13 Sweetgrass Plastic Surgery. And since then he's had more
14 emphasis on cosmetic procedures like the one that Ms.
15 Whitfield came to him for.

16 Now you've heard testimony -- or excuse me, the argument
17 from plaintiff's counsel that that wasn't the reason she came.
18 But we plan to show you evidence that that's not true. We
19 plan to show you evidence that she asked for these surgeries,
20 that there was a period of six months that transpired before
21 she decided to have the surgery and that during that six
22 months the procedures were added that she wanted. She was
23 requesting more procedures. Not the doctor.

24 But Dr. Schimpf is going to talk to you about the surgery
25 at issue in this case. And we believe there are really only

1 two questions that you have to decide this week.

2 Number one, did Dr. Schimpf do the breast surgery the
3 proper way? Did he do it according to the standard of care?
4 Now, that's a word that you'll hear a lot this week because
5 it's a medical malpractice case and that's one of the ways
6 that we, as lawyers, communicate about what's required of a
7 doctor.

8 Simply defined, standard of care is what a reasonable
9 surgeon with similar training would do under similar
10 circumstances. It's a reasonableness standard. It's not the
11 best care, it's not the highest level of care, it's not
12 perfect care; it's actually the minimum level of care that's
13 acceptable. That's a part of it.

14 And so you're going to be asked to evaluate whether a
15 plastic surgeon did a mastopexy with implant exchange
16 according to the standard of care.

17 My guess is that none of you sitting here have ever done
18 that surgery and so you're asking how are we going to evaluate
19 that. And we're going to help you with that.

20 First of all, we're going to bring you Dr. Schimpf; and
21 he's going to testify about his involvement with Ms.
22 Whitfield. He's going to talk to you about the care that he
23 gave her throughout the course of their one-month
24 relationship.

25 He's going to tell you that he did the surgery according

1 to the accepted standard, that he did the surgery using the
2 same technique that he used over and over and over again,
3 hundreds and hundreds and hundreds of times. He did it that
4 way because that's the right way to do it.

5 He's also going to tell you that he had a conversation
6 with Ms. Whitfield. And the documents -- we're going to bring
7 you those evidence -- the evidence of those conversations.
8 It's called an informed consent form.

9 If you -- if any of you have undergone surgery or been to
10 a doctor's office you've probably signed one. And what that
11 is, is it's a chance for the doctor to be able to communicate
12 to his patients that there are risks associated with what
13 we're about to do.

14 And my associate kind of laughs at me sometimes. My
15 little colloquialism about that is there's no free lunch.
16 Every single surgery that's done on the human body comes with
17 risks. Anybody that's ever had a family member go into
18 surgery, you know that; because you are worried about them,
19 what could happen.

20 And so Dr. Schimpf had this conversation. Ms. Whitfield
21 signed multiple forms talking about what these risks are.
22 These are not hypothetical risks. These are risks that are
23 real. These are risks that are -- that happen, and that's why
24 the doctor has to talk to his patient about them.

25 They can include serious things: muscle and nerve

1 injury, blood vessel damage, blot clots, wound separation like
2 the photo he just showed you. Those are things that are known
3 to happen with the procedure that she had. She went into this
4 procedure with her eyes open. She knew that was a risk, and
5 she chose to proceed.

6 Now, there's been some reference already to something
7 called a recognized complication. I prefer to call it a known
8 complication. And as the name implies, that's something that
9 goes with the procedure. It comes with the territory.
10 There's no free lunch.

11 We know that with a mastopexy, wound separation is one of
12 the biggest risks associated with that procedure. Because
13 it's always been under some tension. It's not done under too
14 much tension. Dr. Schimpf is going to tell you that the
15 reason Ms. Whitfield's wound was separating was not because he
16 used too much tension during surgery. And we believe we can
17 show you that that's the case.

18 You're going to have to decide are there other reasons
19 why her wound separated. Does it just happen with the
20 procedure? Did she have a trauma? What else could have
21 happened to cause that wound to separate?

22 We are also going to bring you some expert witness
23 testimony to help you understand that. So we have hired an
24 internationally-recognized plastic surgeon from Fort
25 Lauderdale. His name is Dr. Perez. He's literally spoken in

1 over twenty different countries on surgery procedures. He's
2 been in practice more than thirty years. He does this surgery
3 on a regular basis.

4 He's going to come to this courtroom and he's going to
5 tell you that he's looked at the medical records in this case,
6 he's looked at the photographs in this case, he's examined all
7 the evidence, he's read the deposition testimony of all the
8 witnesses. And he's going to offer you his opinion. And I
9 suspect that his opinion is going to support the care that Dr.
10 Schimpf provided to Ms. Whitfield.

11 Dr. Perez is also going to look at the causes. And he's
12 going to evaluate the evidence and tell us what else could
13 have caused this wound to separate besides the tension. And
14 you're going to get to hear that information from him, as
15 well.

16 You know, as Dr. Schimpf performed the surgery on June
17 6th, there were no complications during the surgery itself.
18 Everything went according to plan. The medical records and
19 the operative note confirm that. Ms. Whitfield's
20 postoperative visits confirm that.

21 It wasn't until three to four weeks after the surgery
22 that she developed a problem. And that's a key timeframe.
23 Because typically most of the experts in this case are going
24 to agree with me, that if you have a wound that was closed
25 under too much tension, that's going to occur much sooner,

1 twenty-four or forty-eight hours, not three or four weeks
2 later. So you're going to get to hear evidence of that from
3 our expert witnesses.

4 Dr. Schimpf didn't abandon his patient. He didn't kick
5 her out of the office. So where did that come from? Well, as
6 already heard, Ms. Whitfield has some psychiatric issues. And
7 that's not something I bring up to embarrass her or to
8 humiliate her, but it's the truth. The problem is, she never
9 told Dr. Schimpf she had those. She filed out two medical
10 histories and never mentioned that she had any of those
11 diagnoses or that she was supposed to be taking medication to
12 help control those diagnoses. Dr. Schimpf was blindsided by
13 this. He had no idea.

14 So we're going to bring you another expert who's one of
15 the world's leading experts in psychiatry, Dr. James
16 Ballenger. Dr. Ballenger founded the Institute of Psychiatry
17 at MUSC. He lives here in Charleston and he has incredible
18 expertise in the field of psychiatry. He's written the
19 textbook that psychiatrists turn to when they're going to make
20 a diagnosis.

21 He's going to come and tell you that he's read the
22 psychiatric records of Ms. Whitfield and he's looked at all of
23 the records and the testimony and the evidence in the case and
24 he's going to give you his opinion as to why that matters.

25 How does it help us understand what happened here? How

1 does a patient go from having a successful procedure, three or
2 four weeks later develops a complication she was told could
3 happen, into thinking this man (pointing) kicked her out of
4 her [sic] office?

5 Which I guarantee you he's going to come on this stand
6 and tell you he's never done in his life. How do you explain
7 that? Dr. Ballenger is going to tie those pieces together for
8 us.

9 Our case is going to be fairly simple. Like I told you
10 at the outset, really two questions you have to answer: Did
11 he do the surgery according to the standard of care, and is
12 Dr. Schimpf to blame for the condition she finds herself in.

13 One other wrinkle that kind of happened when Ms.
14 Whitfield changed doctors, or changed courses, when this
15 complication came up, Dr. Perez has looked at those records of
16 Dr. Kalus and he has some opinions on the care and treatment
17 that Dr. Kalus offered her. And he's going to tell you that
18 the care that Dr. Kalus provided to Ms. Whitfield left her
19 more scarred, more deformed, and more upset than she should
20 have ever been.

21 He is going to tell you that this problem could have been
22 fixed within three months and we wouldn't be sitting here this
23 week.

24 So I want to thank you in advance. I am going to get one
25 more opportunity to talk to you directly. That is at the end

1 of the case. I am going to ask you to return a verdict that
2 says Dr. Schimpf met the standard of care, he provided the
3 care that he was supposed to provide, and unfortunately Ms.
4 Whitfield had one of those complications that's mentioned in
5 those forms that she knew about. That doesn't mean he did
6 anything wrong. That doesn't mean he was negligent.

7 And so I'm going to ask you to render a verdict that
8 supports his care. And I appreciate your time. Thank you.

9 THE COURT: All right. Thank you so very much. Call
10 your first witness.

11 MR. SLOTCHIVER: The plaintiffs will call Jeane Whitfield
12 to the stand.

13 THE COURT: All right.

14 [Whereupon, Ms. Whitfield is duly sworn by the clerk of
15 court]

16 THE CLERK: You may be seated. And for the record please
17 state your full name, spelling your last. You may be seated.

18 MR. HALVERSEN: May I approach briefly, Your Honor?

19 THE COURT: All right.

20 If you will go ahead and just give your name for the
21 record and spell your last name, and then you can be seated.

22 THE WITNESS: It is Edith Jean Crow Van Buren Whitfield
23 W-H-I-T-F-I-E-L-D.

24 THE COURT: Thank you very much. Just please be seated
25 and make yourself comfortable.

1 [Bench conference]

2 [Whereupon, witness notes removed from witness
3 possession, by Mr. Slotchiver, as directed by the Court in
4 bench conference]

5 MR. SLOTCHIVER: May it please the Court?

6 THE COURT: Absolutely.

7 JEANE WHITFIELD, Having Been First Duly Sworn, was Examined
8 and Testified as Follows:

9 **DIRECT EXAMINATION BY MR. SLOTCHIVER OF JEANE WHITFIELD:**

10 Q. Jeane, I know you've waited a long time for this. I am
11 going to ask you some questions, and I am going to ask you to
12 speak to me and to the jury and just to give your recollection
13 to the best of your ability. Okay?

14 First, I want to discuss some background with you. Can
15 you tell the ladies and gentlemen a little bit about yourself;
16 how old are you?

17 A. I'm fifty-eight years old.

18 THE COURT: Ms. Whitfield, if you don't mind, if you will
19 pull that microphone closer to you.

20 THE WITNESS: Sorry.

21 THE COURT: You have to speak up. The court reporter has
22 to hear every single thing that you're saying so we can take
23 it down. And so if you'll just speak up, that'd be wonderful.
24 Thank you.

25 A. I'm fifty-eight years old.

1 MR. SLOTCHIVER: I know you're nervous. Take your time.
2 If you need a break, let the Court know.

3 THE WITNESS: Okay.

4 MR. SLOTCHIVER: But I think you'll be fine.

5 Q. Jeane, are you married?

6 A. Yes, I am.

7 Q. And who is your husband?

8 A. Anthony Whitfield.

9 Q. Okay. Is he here with you today?

10 A. He's not.

11 Q. How come?

12 A. He needed to stay home. He can't handle the stress. He
13 has a cardiac issue.

14 Q. Do you have any children?

15 A. Yes, I do.

16 Q. How many children do you have?

17 A. I have one. Samantha Van Buren.

18 Q. Okay. And tell me - there was reference from the opening
19 statement - who is Samantha Van Buren?

20 A. She's my daughter from my first marriage.

21 Q. Okay. And what does Samantha do for a living?

22 A. She's a paramedic.

23 Q. Where does she work?

24 A. Dorchester County EMS.

25 Q. Jeane, where did you grow up?

1 A. Charleston, mostly.

2 Q. Did you go to high school here?

3 A. Yes, I did. Middleton High School.

4 Q. And where do you live now; what part of the community do
5 you live in?

6 A. Mt. Pleasant.

7 Q. After high school did you -- did you get any extra
8 education?

9 A. Yes. I went to Trident Technical College.

10 Q. Did you -- what kind of courses were you studying when
11 you were at Trident?

12 A. Chemical engineering.

13 Q. And how long did you stay at Trident?

14 A. A very short while.

15 Q. And why was that?

16 A. Um ---

17 Q. I know it's a sensitive subject. I just want ---

18 A. That's okay.

19 Q. I wanted to go through the background with you and ---

20 A. That's fine.

21 Q. --- let the jury hear your testimony.

22 A. I was out in that area in a darkened parking lot, and I
23 was attacked by three men; and it made me feel not to trust
24 darkened areas anymore.

25 Q. Did you ever return to school?

1 A. No.

2 Q. Did you go to work?

3 A. Yes, I did.

4 Q. Tell me about your general work history.

5 A. Food and beverage. I was in hospitality. I worked for
6 Steak and Ale, I worked for years. And then I worked for -- I
7 left town and worked in hospitality in Virginia and in
8 Charlotte, where I got in with Outback Steakhouse. And I
9 stayed with them for ten years. And then I went to work for
10 Sal Parco's restaurants here in Mt. Pleasant.

11 Q. Like the Mustard Seed, ---

12 A. Yes.

13 Q. --- that group?

14 A. Mustard Seed, Boulevard Diners, Sette.

15 Q. Are you working now?

16 A. I run my husband's --- the administrative part, his
17 business.

18 Q. And your husband does real estate?

19 A. Yes. He's a real estate investor. And I go around and
20 make sure that the properties are well-maintained. If they
21 need anything, I make sure and coordinate that. Take care of
22 the taxes, the insurance, the utilities, general maintenance,
23 and then -- and then the books.

24 Q. Jeane, did you -- or have you -- have you been involved
25 in any churches?

1 A. Yes, I have. Seacoast.

2 Q. You're a member of Seacoast?

3 A. Yes, I am.

4 Q. Have you been involved in any civic organizations?

5 A. Yes, I have.

6 Q. Tell the ladies and gentlemen of the jury what type of
7 stuff you've been involved in.

8 A. Charleston Animal Society. I was on the board setting up
9 the fire fighter calendar to benefit all of the intakes for --
10 what it would take in one day for -- when we do benefits would
11 pay for like all the deworming for a whole year. And we would
12 bring in a lot of money for the animal shelter while promoting
13 fire fighters, our first responders.

14 Q. Okay.

15 A. Meals on Wheels. The Dream Center. And the dental
16 clinic for Seacoast. The Hope House downtown. I would cook
17 for cancer patients on Calhoun Street and Ronald McDonald
18 House for the -- for the people that would have to come from
19 miles and miles away, and that's where they'd stay for their
20 children or -- and themselves, actually, sometimes to have
21 surgeries. And I do cook there. Things like that. I'm
22 sorry. I'm nervous.

23 Q. That's okay. Do you remember being asked the same thing
24 in your deposition?

25 A. Yes, I did.

1 Q. Did you give us as exhaustive of an answer at your
2 deposition?

3 A. Actually, no, because I was sick at the deposition
4 because the very next day I had to go into surgery and have
5 thirteen inches of colon and my appendix removed the very next
6 day.

7 Q. But these are the types of things that you ---

8 A. Yes.

9 Q. --- that you were involved in?

10 A. Yes. My mind -- I'm sorry. My mind was just -- wasn't
11 there to retain and speak about. Sorry.

12 Q. That's okay. That's fine. It's hard. I understand
13 that. As they say in the deposition, it's not a memory test;
14 it's just to the best of your ability.

15 Jeane, you were married to Tony about ten years ago;
16 correct?

17 A. We married in 2009. September 12th.

18 Q. I'd like to show you some pictures and ask you if they
19 accurately reflect how you looked in 2009, more or less, until
20 the time that you had the surgery.

21 A. Okay.

22 Q. Okay. I'm going to show these to you, in this order; and
23 if you can identify them then I'll put them up on this machine
24 so the jury can see them. Okay?

25 Take a look at the first one.

1 [Whereupon, the witness reviews document]

2 Q. Is that a picture of you?

3 A. That is me and my mother. My wedding day, September
4 12th, 2009.

5 Q. Okay. Is that one -- one picture from you after 2009 ---

6 A. Yes.

7 Q. --- prior to your surgery?

8 A. Yes.

9 Q. Okay. How about this one?

10 A. That's in 2010. My daughter had just graduated from high
11 school and we just had this -- friends and I got together and
12 had a group photo done.

13 Q. Who is in this picture?

14 A. One of my best friends and my daughter.

15 Q. When was that picture taken?

16 A. 2010, spring.

17 Q. This one?

18 A. That's my daughter at my wedding.

19 Q. And one more. This one?

20 A. That's my husband and I getting married, 2009.

21 MR. SLOTCHIVER: I'd like to mark these photographs
22 together, as a packet, as Plaintiff's 1.

23 THE COURT: All righty. Any objection?

24 MR. SMYTH: No objection, Your Honor.

25 [Whereupon, Plaintiff's Exhibit Number 1, photos, is

1 marked for identification by the court reporter]

2 THE COURT: All right. Are you submitting them into
3 evidence now?

4 MR. SLOTCHIVER: Yes.

5 THE COURT: All right. Plaintiff's 1, without objection.

6 [Whereupon, Plaintiff's Exhibit Number 1 is admitted into
7 evidence by the Court]

8 Q. Jeane, you had a breast augmentation done in 2009 by Dr.
9 Kline?

10 A. Correct.

11 Q. Okay. Were these photographs all taken after that
12 augmentation?

13 A. Yes.

14 Q. Okay. Were you pleased with the appearance of your
15 breasts after that augmentation?

16 A. Over the moon. Yes.

17 Q. Let's talk about why we're here, about the lawsuit.
18 Could you please tell the ladies and gentlemen of the jury how
19 it is that you became a patient of Dr. Schimpf?

20 A. May of 2013, April or May, I started having discomfort in
21 the area underneath the right side of that breast and around
22 my ribs. And I was going to Palmetto Primary Care Physicians,
23 and they did a CT scan on me and they said they found a
24 peristaltic artifact in my mid descending colon.

25 Q. What does that mean, if you can explain?

1 A. Something is stuck.

2 Q. Okay.

3 A. There's something there. And they sent me immediately to
4 Dr. Aaron Domm who performed a lower GI on me, a scoping.

5 Q. What kind -- and let's -- I a going to show you down a
6 little bit just to make sure that ---

7 A. Colonoscopy.

8 Q. Because you understand it, but nobody else necessarily
9 understands who the players are involved. Palmetto Primary,
10 that's your regular physician?

11 A. Correct. And Dr. ---

12 Q. That's who you go to for everything?

13 A. Correct. And Dr. Aaron Domm was their gastroenterologist
14 they sent me to.

15 Q. Okay. And his office is located where?

16 A. His office is located in Summerville. And he shared a
17 rectanguled building. When you walk in there is a universal
18 waiting area. If you walked straight through you'd be into
19 his offices. But if you talk -- if you stopped and looked to
20 the right was a window for Sweetgrass Plastic Surgery.

21 But I went into Dr. Domm's office, and he told me he
22 couldn't find anything. And I -- he told me to come back,
23 just monitor it. And so I did.

24 And then I came back again, and he did -- he checked me
25 out. And he goes, you know, by not finding anything there

1 that he tended -- he was leaning towards maybe there's some
2 scar tissue there, maybe -- he was, but I don't handle that,
3 you'd have to go to a plastic surgeon to see that.

4 Q. How painful was this discomfort?

5 A. It was -- it was very achy. It's -- it was -- it was
6 like a hot, searing ache. It was just aching all the time.
7 And then whenever he said that I turned around and I said,
8 okay.

9 I was going -- I was leaving the building, and that
10 window was on this side of me (motioning). I was walking out
11 and I hear, hi, Jeane, how are you. And I looked over, and it
12 was Victoria Hunter Tolbert.

13 She worked with me before over at Outback Steakhouse. As
14 a matter of fact, I trained her there. And we struck up a
15 conversation and talking about, you know, how our lives were.
16 And then she asked me what I was doing. And I told her, well,
17 I am going to find a plastic surgeon to look at this. I told
18 her about it. And she goes -- and that's about the time Dr.
19 Schimpf came in the room. And she's, well, Dr. Schimpf can --
20 he's so good, he's great at what he does, you know. And he's
21 like, yeah, I can take a look at it for you. And I -- like,
22 okay.

23 So we set up an appointment and ---

24 Q. Did you tell him what your problem was?

25 A. Yes, I did. I explained it in detail. Plus, Dr. Aaron

1 Domm was right there in his building, and that is the HIPPA
2 form I signed so they could have a free-flow of information.
3 It was right there. I said, well, okay.

4 And later on I came in to see -- well, let me go back
5 just a second. My mother got progressively sicker. She had
6 Alzheimer's dementia; and so that meant I had to take more
7 time away and to keep an eye on her, to take care of her
8 needs.

9 And then I came back to Dr. Domm -- I mean, Dr. Schimpf,
10 in December, where he did a manual manipulation of my body up
11 there after he had -- he had - I decided, you know, it's time
12 to do the -- he got more in-depth with it. Let me put it that
13 way. Because he had already said that he believes it to be
14 scar tissue.

15 And then he felt around. And he said, it's heavy
16 encapsulation, heavy scar tissue, and the best thing, the best
17 course of action, would be to remove the larger implants and
18 then he would get in there and clean out the encapsulation and
19 all the scar tissue and by reducing the implants it would take
20 the area -- the weight off the area, giving me more -- giving
21 me relief. And --

22 Q. So your understanding was by giving you relief, that
23 would remove the pain that you were having?

24 A. Correct. From that pain. And so we -- I dubbed it the
25 scar-tissue issue every time we spoke of it or anytime after I

1 spoke -- how I dubbed it. And because he -- that's what he
2 told me it was.

3 And so I went in. I said, I'm going to do this. This
4 was the end of December. And I signed some papers. Made sure
5 that HIPPA was in place so they could talk, him -- he and Dr.
6 Domm, to make sure everything was all good.

7 And then my mother got progressively ill, more ill; and I
8 had to put that on hold because of that, and I did not go back
9 to Dr. Schimpf until my mother was placed into a care facility
10 called Sommerby out here in Mt. Pleasant to where I could have
11 help taking care of her. My other sisters and -- we all took
12 care of her.

13 Q. Do you have a large family?

14 A. Yes, I do. I have -- I had five sisters. I have one
15 sister that died of gastric cancer in the beginning of June,
16 2010. As a matter of fact, she was at my wedding in 2009; and
17 that was the last bite of food she ever ate because they took
18 her to Roper St. Francis, they scoped her, and found out she
19 had a tumor, a gastric tumor, from one side to the other and
20 there was no fixing it.

21 Q. Okay.

22 A. So I took care of her, too. And, again, there's the
23 urgency of me going to Dr. Aaron Domm to find out, oh, my God,
24 let me check this out. Anybody would. And so I now have four
25 sisters. I did have five.

1 Q. Jeane, when you had gone to Dr. Kline many years ago.
2 That was cosmetic; correct?

3 A. Correct. That was totally cosmetic.

4 Q. When you went to Dr. Schimpf, was that cosmetic?

5 A. No. That was to remove the scar-tissue issue and to
6 relieve the aching pain that was here (pointing) on my ---

7 Q. I'm going to jump way ahead, and then we'll come back.

8 A. Okay.

9 Q. After the procedure done on you by Dr. Schimpf, did it
10 remove the pain?

11 A. No.

12 Q. Were you given a proposal when you went to Sweetgrass
13 with Dr. Schimpf?

14 A. I was given a proposal in December, 2013, and then when I
15 went back in April of 2014. My mother had gotten settled in;
16 and I said, well, okay, now I guess I have the time to do it.

17 MR. SLOTCHIVER: May I approach?

18 THE COURT: Absolutely.

19 Q. Let me show you a proposal. I've got one -- you
20 referenced you have a proposal in December of '13.

21 A. Yes.

22 Q. Is this a copy of that proposal?

23 A. Yes, it is.

24 Q. Okay. And at the time you had that proposal, you had
25 contemplated getting what procedure?

1 A. The liposuction of this area of the abdomen to -- and
2 mastopexy. That's to take out all of the scar tissue. And
3 the encapsulation was why the mastopexy was done -- the
4 mastopexy. And he was going to take the larger implants out
5 and put in the smaller ones.

6 MR. SLOTCHIVER: Okay. If I can mark that as an
7 exhibit ---

8 THE COURT: All right.

9 MR. SLOTCHIVER: --- and move it into evidence.

10 THE COURT: All right. Any objection?

11 MR. SMYTH: Let me double-check one thing.

12 [Whereupon, Plaintiff's Exhibit Number 2, proposal, is
13 marked for identification by the court reporter]

14 THE COURT REPORTER: Plaintiff's Number 2 marked for
15 identification.

16 MR. SMYTH: No objection, Your Honor.

17 THE COURT: All righty. Number 2, without objection.

18 MR. SLOTCHIVER: Thank you, sir.

19 [Whereupon, Plaintiff's Exhibit Number 2 is admitted into
20 evidence by the Court]

21 Q. And then you said you went back. I am going to show you
22 a copy of a second proposal that you received.

23 A. Uh-huh.

24 Q. And this one is dated April 11th of 2014?

25 A. Correct.

1 Q. What was that proposal for?

2 A. Well, this had the exact same things on there where he
3 was going to exchange the implants and do the mastopexy, and
4 the liposuction here (motioning).

5 But while I was in there with him he goes, oh, you know,
6 I could do a little something with your eyebrows. And I'm
7 like -- or I mean, your eyelids. Sorry. He goes, I can
8 tighten that up for you while you're -- you know, while you're
9 here.

10 I'm like, you can do that and it'll be okay? And he
11 said, yes, it'll be great.

12 And he's very charismatic. And he said, oh, you know,
13 summer is coming; we can, you know, touch up that bikini area
14 for you, you know, make you look really sharp for summer.

15 Because I had had a C-section scar.

16 And I'm like, okay. It was just bikini -- lady bikini
17 area.

18 I said, well, you can do that too? He goes, not a
19 problem.

20 So I said, well, okay. And so I did it. I agreed to it.

21 MR. SLOTCHIVER: We would move this into evidence, also,
22 Your Honor.

23 THE COURT: All righty. Is there any objection?

24 MR. SMYTH: No, Your Honor.

25 THE COURT: All right. That will be Plaintiff's

1 Number 3.

2 [Whereupon, Plaintiff's Exhibit Number 3, medical bill,
3 is marked for identification]

4 [Whereupon, Plaintiff's Exhibit Number 3, admitted into
5 evidence by the Court]

6 Q. Jeane, on Exhibit Number 2 it references a bill of
7 \$7,830; correct?

8 A. Correct.

9 Q. And on Exhibit Number 3 it references a bill of \$11,400.
10 That was the extra amount of money ---

11 A. Correct.

12 Q. --- for the extra things you were going to have done?

13 A. Correct.

14 Q. Anywhere on Exhibit Number 2 or Exhibit Number 3 is there
15 any reference to a proposal to do a procedure on your neck or
16 on your chin?

17 A. Absolutely not.

18 Q. Did you or Dr. Schimpf or anybody in his office ever
19 discuss doing a proposal to your neck or to your chin?

20 A. Absolutely not.

21 Q. Were you ever billed for doing a procedure to your neck
22 or to your chin?

23 A. No.

24 Q. Were you happy with your neck and your chin?

25 A. I was happy with the neck and the chin I had. I never

1 spoke to him about my neck and my chin. He never spoke to me
2 about my neck and my chin either.

3 Q. Other than a facial to your neck or to your chin, had you
4 ever had any work done to your neck or to your chin?

5 A. No. I have -- I have facials. I like to go for them.
6 They have the ones that are done with the -- with firming
7 creams and very nice creams they put on your face. And they
8 have some that are sanded facials that are called micro-derm
9 abrasion, which they do a little vacuum cleaner on your face
10 and up here (motioning) on your neck and then down here on
11 your décolleté (motioning) to remove older skin and just, you
12 know, dead -- get off the dead skin and clean out your pores.

13 And then there's a facial called the IPL facial. I have
14 rosacea, and so it's a -- it's a light. It's about one inch
15 by one inch is the paddle. And they just go across your face,
16 beep-beep, beep-beep-beep-beep-beep-beep, like this
17 [indicates]. And maybe a couple of little places on your
18 chest.

19 It just closes the capillaries and brings down the
20 appearance of the rosacea. And then they put wonderful cream
21 on your face and send you home very happy.

22 Q. Where would you have that work done?

23 A. Well, since I was -- Palmetto Primary Care is all-
24 inclusive. They have their own med spas, they have their own
25 gastroenterologists, all of that.

1 That is where I go. Because I went to the Iron Horse
2 Road facility over in Ladson and it sat in front of the
3 doctor's office. So whenever you go into the doctor's office,
4 you know, they'd have their little flyers out about, hey,
5 we've got this special, this special facial, or this special
6 facial. And I went and got a facial, a couple of them.

7 Q. Let me show you a document and ask what this document
8 represents.

9 A. Oh. That's how -- these are facial lines on the face.
10 Any time they did Botox or any type of filler, any type of
11 where the rosacea was, where they were going to plan to hit it
12 with a light, where they're going to use -- what kind of mask
13 they were going to use.

14 Like this one here says a pumpkin mask. It's a clay mask
15 with pumpkin that they put on your face to draw out
16 impurities, to take off that -- slough off the dead skin.

17 As you get older your face gets more ruddy. As opposed
18 to a man who shaves can always exfoliate, women tend to go and
19 have the exfoliating done. It's call the Whole Shebang, is
20 what that one is. They -- then they put a nice sunscreen on
21 your and send you on your way.

22 Then they tell you, you know, maybe next time when you
23 come in we'll discuss, you know, any other facials you might
24 want to do.

25 Q. Jeane, I want to go through some of this with you.

1 A. Sure.

2 Q. So this is where you would go to get your facial work
3 done?

4 A. Correct.

5 Q. Okay. So if we would look at, for example, on the first
6 page of the document ---

7 MR. SMYTH: Is this in evidence yet?

8 MR. SLOTCHIVER: Oh. I'm sorry. I would move to
9 introduce this document into evidence.

10 MR. SMYTH: No objection, Your Honor.

11 THE COURT: All righty.

12 THE COURT REPORTER: If we can mark it first?

13 MR. SLOTCHIVER: I believe we agreed beforehand that all
14 the documents coming in, but why don't we mark it as -- mark
15 it, please.

16 THE COURT REPORTER: It will be Plaintiff's Exhibit
17 Number 4.

18 [Whereupon, Plaintiff's Exhibit Number 4, medical, is
19 marked for identification by the court reporter]

20 THE COURT REPORTER: Be Plaintiff's Exhibit Number 4.

21 MR. SLOTCHIVER: Thank you.

22 [Whereupon, Plaintiff's Exhibit Number 4 is admitted into
23 evidence by the Court]

24 Q. Okay. So, Jeane, if you'll follow along with me. And
25 I'll put it on the screen so the jury can see what we're

1 talking about.

2 A. Okay.

3 Q. Okay. So, Jeane, is this a form that you would have --
4 that would have been filled out at the -- at the med spa?

5 A. Yes.

6 Q. Okay. And in particular, on the first page, right ---
7 I'll point -- right here (pointing) it references to patient
8 wants to tighten the neck, remove broken cap, pores from the
9 skin. Is that -- is that referring -- is this the type of
10 facial you were talking about?

11 A. To tighten the neck is where they -- it's a skin-
12 tightening cream that you can buy. You -- it -- you can get
13 it from Wal-Mart. It's just a skin rejuvenating tightening
14 cream. The remove the broken capillaries, there are no broken
15 capillaries on my neck.

16 Q. Okay.

17 A. It's across the face. It's just the adding the cream,
18 because they have to charge for the things they do and the --
19 and the stuff they use.

20 Q. Okay. You've seen this document before; correct?

21 A. I've not -- I've not looked at it. It's just -- it's
22 filled in at the office by the ---

23 Q. Let's move -- let's move through a few pages until we
24 get to what's marked as -- on the bottom as 00200 on the
25 bottom-right corner.

1 A. 00200?

2 Q. If you see the numbers.

3 A. Okay.

4 Q. You see that one?

5 A. Yes, I do.

6 Q. Okay.

7 A. Okay.

8 Q. This one it says, in the right corner, two weeks --
9 excuse me -- three weeks, neck resurface. What is that
10 referring to?

11 A. Oh. That's from the sanding facial, the micro-derm
12 abrasion, where she was going to do it to my neck. Because I
13 had gotten -- I believe -- let me look at this. I had gotten
14 Botox that day. When you -- you cannot do certain facials
15 whenever you have gotten Botox. They just -- they prefer you
16 wait a few weeks.

17 Q. Is getting facials, this type of treatment, is that part
18 of your regular routine that you've done ---

19 A. Yes.

20 Q. --- over the years?

21 A. I got a facial on Thursday.

22 Q. Okay. Thank you.

23 Let me get this back.

24 (Whereupon, exhibit returned to counsel]

25 Q. Is it an invasive procedure?

1 A. No. As a matter of fact, while I was there getting my
2 facial on Thursday I picked up their new flyer for the micro-
3 derm abrasion and the micro-blading, which is actually the
4 lady shaving your face for you so she gets it even better.
5 The -- and then doing the facial. And it's only -- I think
6 it's \$125. They do not puncture, cut, or anything to your
7 skin.

8 Q. Okay. Let's move along. So you came back in 2014?

9 A. Correct.

10 Q. You testified that it was because of some family health
11 problems?

12 A. Correct.

13 Q. Okay. And what was your understanding of what procedure
14 would take place, the same ones that are on that proposal?

15 A. On?

16 Q. On the proposal that we discussed earlier?

17 A. With Sweetgrass?

18 Q. Yes.

19 A. Yes. He -- we -- I was in there presenting myself for
20 the very -- for the original proposal. And he told me he
21 could do my eyelids, not a problem. He told me he could do my
22 bikini area because, again, summer was coming, look real
23 fresh. And then, you can do this? Not a problem.

24 Q. What was -- were those things all authorized by you?

25 A. Those were authorized. And I do believe it was May. And

1 then I took the check over there, filled out my paperwork, and
2 I paid \$11,400 for it.

3 Q. Jeane, what was done in preparation for the surgery?
4 Were there measurements, photographs; what types of things
5 were done?

6 A. Oh, yes, definitely. He had this little thing that
7 looked like the size of an iPhone. He had me stand like --
8 first it was front. He had me stand like this [indicates] and
9 rotate in increments so he could get the perfect shot of my
10 chest and my bikini area.

11 Q. Have you ever seen those photographs since they were
12 taken?

13 A. No. When I asked him what those would be used for, he
14 said they would be used for promoting the business, that they
15 would be on -- for other people to come and view so they could
16 also purchase -- the before and afters. So ---

17 Q. But they would be in your -- they would be in your file?

18 A. They were supposed to be in my file.

19 Q. Did you get larger or smaller implants?

20 A. Smaller.

21 Q. Did you ultimately decide to go in for the procedure and
22 did you go in for the procedure?

23 A. Yes, I did. I went in June 6th, 2014.

24 Q. What time did you go in?

25 A. 8:00 a.m.

1 Q. And tell me about what happened that day.

2 A. Well, I went in. My sister and my husband were with me.
3 And Dr. Schimpf came in the room; and he drew the little dot,
4 dot, dots on me to prepare me for surgery. My -- again, my
5 husband and my sister were there. And then he walked out.

6 And then Dawn came in to get me, and she walked -- she's
7 the surgical nurse. And she walked me back into the room.
8 And I got on the table. That's where I met Dr. Bradham, the
9 anesthesiologist. And ---

10 Q. What time did the procedure start?

11 A. About 8:30. It was real quick to get in there.

12 Q. Before I begin, did you discuss with anybody changing the
13 procedures that was going to be done?

14 A. No. We were ---

15 MR. SMYTH: Objection, Your Honor. It calls for hearsay.

16 MR. SLOTCHIVER: It's a party defendant, Judge. Any
17 discussion she would have had would have been with the
18 defendant.

19 MR. SMYTH: And non-parties. We haven't identified the
20 other people she just mentioned she talked to.

21 THE COURT: Rephrase the question as to who she was --
22 just rephrase the question.

23 MR. SLOTCHIVER: Happy to.

24 Q. Before the procedure began did you speak to anybody --
25 well, let's back up.

1 I'm assuming that when you went for the procedure the
2 only people around you and in the room would have been people
3 that worked at Sweetgrass?

4 A. Correct.

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

6 THE COURT: Ask her what her and the doctor discussed.

7 Q. Did you and the doctor ---

8 A. Nothing.

9 Q. --- or any of the staff have any discussion?

10 A. No. When he left from doing the dot, dot, dots, I did
11 not see him until I was going under. I saw her pushing the
12 medication, and I hear him walk from -- in through the door
13 going what's the hold up? And I was out.

14 Q. Were consent forms signed?

15 A. Consent forms for my surgery ---

16 Q. To do -- to do procedures.

17 A. Of course. I had to -- they gave me a stack of papers to
18 sign and turn in. When I -- when I -- matter of fact, it was
19 when I paid them, I believe.

20 Q. Did you sign any consent forms for your neck?

21 A. No, I did not.

22 Q. Did you want any other procedures?

23 A. No, I didn't. I had my father's chin and neck. I didn't
24 see changing something that I already thought was amazing.

25 Q. After the procedure were you able to go home?

1 A. Yes. My husband and my sister took me home.

2 Q. As far as you knew, when you left the facility had he
3 done what he had -- what you had agreed upon with him to have
4 done?

5 A. I believed so.

6 Q. When did you first return?

7 A. Well, I was supposed to go back in four days. This
8 happened Friday morning. I went back on Tuesday. My daughter
9 drove me to their Summerville store. I had this bandage, this
10 Velcro-enclosed bandage, on my head and everything else. And
11 I went in and saw him.

12 He took the bandage off my head; and he removed my eye
13 sutures, just like this [indicates]. And then he reached --
14 he goes, oh, by the way, I took a little something-something
15 for you; you're going to like it. And I [indicates].

16 Then he looked at my breasts. And I was like, okay,
17 something's not right there. And so he went and checked my
18 breasts. He said, oh, you're going to be just fine; you're
19 going to be just fine, you know. And he sent me home.

20 Well, when I got home, I have this dry-erase board in my
21 bathroom, and I wrote chin on it. The word chin, the word
22 neck, they were on that dry-erase board.

23 My husband and I use that dry-erase board so -- because
24 of our business we can coordinate any type of appointments,
25 any points of interest, or any points of memory we would put

1 it to that and then address it later. And so I put those on
2 there.

3 Q. You hadn't known he was going to do your chin; correct?

4 A. No.

5 Q. Have you -- you had received from his office
6 postoperative instructions; correct?

7 A. Yes.

8 Q. Let me show you a copy of what you received. I am going
9 to ask you if this is what you received. Is this a copy of
10 what was presented to you, or I guess your husband, when you
11 left the hospital?

12 A. Yes.

13 Q. Okay. This is the postoperative instructions for care
14 for different things that took place; correct?

15 A. Correct.

16 Q. The first one says postoperative instructions for
17 liposuction, abdomen; correct?

18 A. That's -- yes. That was the C-section scar.

19 Q. The next one's for liposuction legs?

20 A. That was the bikini area. Yes.

21 Q. The next one says - and I'm going to butcher the word -
22 the blepharoplasty, upper. That's the eyelids; correct?

23 A. Yes.

24 Q. And the next one says postoperative instructions for
25 silicone implant exchange, bilateral?

1 A. Correct.

2 Q. And the last one says for mastopexy, bilateral; correct?

3 A. Correct.

4 Q. Where is the postoperative instructions for your neck?

5 A. Not there.

6 Q. You weren't given them?

7 A. No, because it didn't -- I didn't sign anything. I
8 didn't get anything for that.

9 MR. SLOTCHIVER: I'd like to mark this as -- and place
10 this into evidence, Your Honor, as Exhibit Number 5.

11 THE COURT: All right. Any objection?

12 MR. SMYTH: I'm sorry, Your Honor. Is that -- is that
13 the postoperative instructions?

14 MR. SLOTCHIVER: It is.

15 MR. SMYTH: No objection.

16 THE COURT: All right. Without objection.

17 MR. SLOTCHIVER: Thank you, sir.

18 [Whereupon, Plaintiff's Exhibit Number 5, postoperative
19 instructions, is marked for identification by the court
20 reporter]

21 [Whereupon, Plaintiff's Exhibit Number 5 is admitted into
22 evidence by the Court]

23 Q. Jeane, you talked about your visit or you talked about
24 the procedure. And you went back on the -- on the 10th, you
25 said; correct?

1 A. Correct.

2 Q. And that's when he took the bandages off?

3 A. Correct.

4 Q. And that was the first time you knew about this, correct?

5 A. Yes, when he said I did a little extra something-
6 something.

7 Q. To the best of your abilities, walk us through what
8 happened next. What was the next day you would have seen Dr.
9 Schimpf or had any interaction with him or his practice?

10 A. Well, the next morning I called them. It was on the
11 11th, because the suture right here (motioning) on my eyelid
12 came open. And when I looked down -- because when I was in
13 there, he removed a piece -- one of the pieces of tape up top
14 and I could see the nipple and the areola. And I noticed the
15 skin wasn't seamed. It wasn't touching and there were no
16 stitches and it looked gooey.

17 And so I immediately called. And I spoke with Vicky; and
18 she said, don't worry, natural progression of healing, we can
19 tweak it later.

20 Q. Vicky is Vicky Tolbert?

21 A. I'm sorry. Yes.

22 Q. The office ---

23 A. The office manager, yes.

24 Q. The one that you knew before?

25 A. Correct.

1 Q. Okay. So tell us what happened.

2 A. I said ---

3 Q. She said -- she said natural progression?

4 A. Natural progression of healing, we can tweak it later.

5 Q. What's the next thing that happened?

6 A. That was on the 11th. And I'm doing exactly what they
7 tell me to do. And I -- on the 16th, over the weekend, I
8 noticed it was starting to smell funny and it wasn't healing.
9 As a matter of fact, it was pulling away more. It was -- the
10 seam was opening more.

11 And I called them on the 16th and I left a message. I
12 said I really think I need to come in because this isn't
13 looking the way it's supposed to.

14 I've already had a breast surgery. I already knew to
15 keep an eye on things. And this was not -- it was going the
16 other way. It was just not seaming. I did not get a call
17 back on the 16th.

18 I waited the 17th. Still heard nothing. So on the 18th
19 I called and I -- and I got a hold of the office manager
20 again.

21 Q. Vicky?

22 A. Vicky Tolbert. And I'm like, something's happening, my
23 chest is hurting now, it smells really bad. And when she
24 asked me to explain it, it smells like the meat pad underneath
25 the hamburger that's been in your refrigerator. That's what

1 it smelt like. It was -- and I'm like, something's going on
2 here. I

3 The skin was angry red. It was starting to turn, and the
4 tape was black. Actually, I shouldn't say angry. It was
5 redder. She gave me two cell phone numbers to send -- to text
6 pictures to, and I did. And that went on a couple of times, I
7 believe, that day. Well, the very next day ---

8 Q. Well, let's stop for a moment.

9 MR. SLOTCHIVER: There's no perfect time with chronology
10 to do this, Your Honor; but I'd like to go ahead and let her
11 identify some pictures.

12 THE COURT: Okay.

13 MR. SLOTCHIVER: Because otherwise it will be so
14 piecemeal. And she can -- if I could have her explain, to
15 the best of her ability, the chronology of the different
16 pictures ---

17 THE COURT: Okay.

18 MR. SLOTCHIVER: --- even though we are moving a little
19 bit ahead. And then we will back it back up ---

20 THE COURT: That'll be fine.

21 MR. SLOTCHIVER: --- if that's okay. Okay.

22 I'm going to start with the blowups I have, and then I am
23 going to move to the Elmo it that will be acceptable.

24 MR. SMYTH: May I see what we are going to introduce?

25 MR. SLOTCHIVER: Sure.

1 [Whereupon, Mr. Slotchiver proffers documents to Mr.
2 Smyth]

3 THE COURT: All right. Ladies and gentlemen, we're going
4 to take about a five-minute break. Now may be a good time to
5 stretch your legs real quickly and let them go through these
6 exhibits together.

7 So at this point in time I just want to remind you that
8 you don't really know a whole lot about the case. Not that
9 you would do this, but out of an abundance of caution,
10 whenever I excuse you for just a quick break or sometimes we
11 take up a matter of law, just don't discuss the case. At the
12 appropriate time, I will give you the opportunity to do that.
13 Especially, obviously when we go home, no researching or
14 Googling or anything like that.

15 But please just return to the jury room and take a quick
16 break and we'll get you right back out. All right. Thank you
17 so very much.

18 [Whereupon, the jury exits the courtroom 8/26/19, 4:04
19 p.m.]

20 THE COURT: All right. Ms. Whitfield, you can take a
21 break; but I'll remind you you are under oath and so you're
22 not to discuss anything with anybody. Just use the restroom
23 and just come on back.

24 THE WITNESS: Thank you.

25 THE COURT: Yes, ma'am.

1 [Whereupon, the witness exits the witness stand]

2 [Whereupon, a recess is taken 8/26/19, 4:05 p.m.]

3 [Whereupon, resume before jury enters, 8/26/19, 4:11
4 p.m.]

5 THE COURT: All right. Are y'all ready to roll?

6 MR. SLOTCHIVER: Yes, Judge.

7 THE COURT: All right.

8 THE COURT REPORTER: We have not marked any exhibits yet.

9 THE COURT: All right, did y'all not marked any exhibits?

10 THE COURT REPORTER: They have not decided yet.

11 MR. SMYTH: Your Honor, I do have one objection to one of
12 the pictures.

13 THE COURT: All righty.

14 MR. SMYTH: I don't know if you want to take that up now.

15 THE COURT: Absolutely.

16 MR. SMYTH: Okay. Let me see. I will use this one as an
17 example. The plaintiff's have a sticky on here with a date on
18 it. We actually have the digital file. This was sent from
19 plaintiff's husband's cell phone to our office manager's cell
20 phone. So that's where it originated. The date is embedded
21 in the file name with a different date than what they proposed
22 on here.

23 THE COURT: Okay.

24 MR. SLOTCHIVER: That is correct.

25 MR. SMYTH: And from my understanding from Mr.

1 Slotchiver, he says that the plaintiff is going to try to
2 offer some explanation about how that happened. But I don't
3 know that there's any way to manipulate the date. Once the
4 photo is taken on a particular date, the file name stays the
5 same.

6 MR. HORTON: We have the phone record, too, Todd.

7 THE COURT: All right.

8 MR. SLOTCHIVER: Judge, the metadata works different.
9 The date on the phone is the day that it was received, but not
10 the day that it was taken.

11 THE COURT: Okay.

12 MR. SLOTCHIVER: So if I take a picture and I send it to
13 you, it will mark a date you received it, but it doesn't mean
14 it is the date it was taken.

15 THE COURT: Okay.

16 MR. SLOTCHIVER: And that's why -- she can still testify
17 to it.

18 You know, one of the problems is that because the
19 defendants maintain the photographs and records, we've got to
20 go back and show them.

21 THE COURT: I'm confused on what the objection is.
22 You're objecting just to the sticky note being on it?

23 MR. SMYTH: Right. The date is wrong. So we know when
24 the picture was taken and sent from her husband's phone by
25 virtue of the file name and the day that is contained in it.

1 THE COURT: Okay.

2 MR. SMYTH: So they're offering a different proposed
3 date. It would makes it better for their case to take it back
4 in time if it was sent several days earlier than what the file
5 name suggests.

6 MR. SLOTCHIVER: For clarity, Judge, when he and -- may
7 we approach? Well, I guess it doesn't ---

8 THE COURT: It's on the record.

9 MR. SLOTCHIVER: It doesn't really matter.

10 When he is -- the issue is going to be that when the
11 picture was sent it was -- it was sent -- the fact that it was
12 sent on a day creates the receipt on the day it was sent. It
13 doesn't mean that's the day it was taken. So I think the ---

14 THE COURT: I've got that.

15 MR. SLOTCHIVER: --- the testimony is going to be that we
16 were told to send over the pictures you have. We sent the
17 pictures we had. There's also missing pictures because the
18 phone's broken. And we can't see those. But the fact that we
19 sent them over on a particular day doesn't mean it was taken
20 on that day. And she'll testify to it. They can cross-
21 examine her.

22 But they don't get to rely on the fact that just because
23 it was received on that day, that's the day it was taken.

24 THE COURT: Right. But I'm saying your objection is only
25 to the sticky note?

1 MR. SMYTH: Well, my objection is to her ability to
2 testify to that. She doesn't have the ability to talk --
3 she's not been sworn in as an expert on digital files, and
4 those kinds of things; so she can't talk about how that
5 happens.

6 MR. SLOTCHIVER: She can testify ---

7 MR. SMYTH: That's beyond the purview of a lay witness.

8 THE COURT: How is she going to testify as to what
9 she -- well, who ---

10 MR. SLOTCHIVER: Because she knows. She was there.

11 THE COURT: Okay.

12 MR. SLOTCHIVER: When it was sent.

13 THE COURT: All right.

14 MR. SMYTH: She doesn't ---

15 THE COURT: How -- well, I mean, hold on. I mean, how
16 does she -- who sent the picture?

17 MR. SMYTH: It came from her husband's phone to our ---

18 MR. SLOTCHIVER: She and her husband are in the office.
19 They say send me the pictures. They send the pictures over.
20 She's standing right there when the pictures are sent.

21 THE COURT: She can testify to that.

22 MR. SLOTCHIVER: That's it. That's why she's going to
23 explain it. They want to rely on the date it was sent as if
24 that is the date it was created. That's not the date it was
25 created.

1 THE COURT: Well, she can testify to that.

2 MR. SLOTCHIVER: And we wouldn't have this problem if we
3 had records.

4 THE COURT: No, I mean she can testify to that.

5 MR. SLOTCHIVER: Okay.

6 THE COURT: Yeah.

7 MR. SLOTCHIVER: Thank you, sir.

8 THE COURT: All right. We can bring in the jury.

9 MR. SLOTCHIVER: No objection besides that, on the
10 pictures? Can we mark these as exhibits, ---

11 THE COURT: Sure.

12 MR. SLOTCHIVER: --- Your Honor?

13 THE COURT REPORTER: Do you have smaller ones that are
14 exact copies ---

15 MR. SLOTCHIVER: How about if we substitute smaller ones
16 for these; can we do that?

17 THE COURT REPORTER: Well, when they go back to the
18 Clerk's Office ---

19 MR. SLOTCHIVER: Before the jury goes out we will
20 substitute them. I don't have -- I don't have smaller ones
21 for all of them.

22 THE COURT: Okay. Then we will mark these.

23 MR. SMYTH: I think the boards are demonstrative,
24 right?

25 THE COURT REPORTER: Okay.

1 MR. SLOTCHIVER: Well, I have got ---

2 THE COURT: Are you just going to make those as the
3 exhibits?

4 MR. SLOTCHIVER: I would actually like to -- some are
5 here that aren't here. I would to substitute them before the
6 jury gets them. But for this purpose we will mark them and
7 then we will substitute them for a smaller picture ---

8 THE COURT: Okay.

9 MR. SLOTCHIVER: --- before it goes to the jury.

10 THE COURT: You can bring them in.

11 THE BAILIFF: Your Honor, we're waiting on one juror that
12 went back to get her glasses.

13 THE COURT: Not a problem whatsoever. Y'all feel free to
14 be seated. We're just standing up because y'all are coming
15 in.

16 [Whereupon, the jury enters the courtroom 8/26/19, 4:14
17 p.m.]

18 THE BAILIFF: Your Honor, the jury is complete.

19 THE COURT: All right. Thank you so very much. Resume
20 with your examination.

21 MR. SLOTCHIVER: Yes, sir, Judge. We're just marking
22 these documents real quickly and then we'll jump into it.

23 [Whereupon, Plaintiff's Exhibit Numbers 6 through 13,
24 photos, are marked for identification by the court reporter]

25 MR. SLOTCHIVER: Yes. Mark these, also, and then we'll

1 substitute them for the small ones.

2 [Whereupon, Plaintiff's Exhibit Numbers 14 through 21,
3 photos on photo board, are marked for identification by the
4 court reporter]

5 MR. SLOTCHIVER: Thank you. May it please the Court?

6 THE COURT: Yes, sir. Absolutely.

7 Q. Jeane, before we took a break I addressed with the Court
8 that we were going to show some photographs so you can help
9 show the jury the time sequence of what happened.

10 The order they've been marked as exhibits don't
11 necessarily reflect the dates in which they were taken. I'm
12 sorry, I am going to need you to do this. Some are blow-up
13 and some I will put on the Elmo.

14 I want you to take your time because time is -- without
15 the notes and photos timing is critical. I

16 These are photographs taken by you; correct?

17 A. Yes.

18 Q. Or by someone on your behalf ---

19 A. My husband ---

20 Q. --- out by the doctor's office?

21 A. --- or myself.

22 MR. SLOTCHIVER: What I'm going to ask you to do is I'm
23 going to ask you to, if I can, Judge, is to come down and then
24 go through the photographs with me or actually and to --
25 because I don't want to suggest to you the dates and have

1 you -- I can line them up here and you can point to which ones
2 came first and then we can show them to the jury if that is
3 okay with you, Judge.

4 THE COURT: Not a problem. Yes, ma'am. Yes, ma'am.

5 THE COURT REPORTER: I just need you to hold your voice
6 up while you're there.

7 THE WITNESS: I will.

8 THE COURT REPORTER: Thank you.

9 [Whereupon, the witness moves in front of witness stand]

10 MR. SLOTCHIVER: And I want to make sure that we put on
11 the record which exhibit is which.

12 MR. SMYTH: Your Honor, is it okay if I move over and ---

13 THE COURT: Absolutely.

14 MR. SMYTH: Thank you.

15 [Whereupon, Mr. Smyth positions to be able to see display
16 being shown to the jury]

17 Q. And, Jeane, to the extent -- these are the other
18 exhibits. These are on paper. And I will show these to the
19 jury. But if you can try to go through them and from a date
20 chronology point out which is first.

21 I'll put it on the Elmo and we'll talk about it -- or
22 we'll talk about it here. And then we'll go to the second
23 one. So take your time. Okay?

24 A. So this picture right had to be taken -- this is -- I
25 believe that's when a piece of tape was removed by Dr. Schimpf

1 when I went in there for my very first ---

2 Q. Let me put it on the stand. This is the first
3 picture ---

4 A. Yes.

5 Q. --- of the chronology?

6 A. That's actually -- that's with the black tape. There was
7 a piece ---

8 Q. Look at all these, because they're -- and this is the
9 first -- which is the first out of these two?

10 A. This is the first [indicating].

11 Q. All right. Let me show this to the jury.

12 A. Okay. That is the first.

13 Q. And when you talk -- when you say this is the first, why
14 don't you show them where it is.

15 A. You have it -- you have it the wrong way.

16 Q. I'm sorry.

17 A. So the length of my body, like ---

18 Q. Yes.

19 A. --- on this side.

20 Q. Okay.

21 A. Where it was black and it looked gooey where it wasn't
22 being seamed ---

23 Q. What was the date of that?

24 A. Actually -- hang on. There's -- like this, this is how
25 it [adjusting display]. It's gooey because it wasn't seamed.

1 I believe this is on the 11th. This was taken on the 11th
2 because I was looking at it when my eyelid came open. I
3 believe it --- that one I may be off a day or two.

4 Q. All right. So this, for the record, is Exhibit 21.
5 Okay. Which is the next one?

6 A. I believe this is the ---

7 Q. Would it help to spread these on the table ---

8 A. Right.

9 Q. --- so you can look at them?

10 A. Yes, I believe that would be better.

11 Q. All right.

12 A. That is the very -- the first one happened within the
13 first four days, three or four days.

14 Okay. This is the second one.

15 Q. This is the second one?

16 A. This is the ---

17 Q. The head of these?

18 A. This is the second one, yes.

19 Q. All right. Let me put this on the -- hold on. I want
20 you ---

21 A. That is the ---

22 Q. I want you to tell the ladies and gentlemen about this
23 one.

24 A. That's the way it goes. This is the seam going down the
25 breast.

1 Q. Hold on, Jeane.

2 A. Okay.

3 Q. I want to put the exhibit in. All right. So, Jeane,
4 what is this picture?

5 A. That is the picture where that -- that is the second
6 picture. It's where the seam is not meeting. The skin is
7 already separating. That had to be the one on the 16th that I
8 called Vicky about.

9 I called and I -- she had me text two pictures to her on
10 the 18th. Dr. Schimpf was in surgery and she would get back
11 to me. I told her I was not seaming correctly, please bring
12 me in, I believe I need to be seen. Because the tape was --
13 the tape, again, was black and it stank.

14 Q. And this one is -- for the record, this is Plaintiff's
15 Exhibit 6?

16 A. Yes.

17 Q. Okay. What's the next one in chronology?

18 A. There's -- that's the second one. Actually that's the
19 first one. That is the second one.

20 Then I had -- then on -- let's see, that was on the 18th
21 when I texted two pictures to two different cell phone
22 numbers. He was in surgery. And she -- they got back to me
23 on the 19th and said there's -- that my chest hurt, it smelt
24 bad. And, oh, my God, my chest was hurting. It felt like it
25 was ripping open.

1 I begged to please come in. And I was told it was a
2 natural progression of healing, there was nothing that was
3 done by their -- by Sweetgrass that was causing my discomfort.

4 And so on the 20th when my chest was -- it was hot. It
5 was like the chest area was hot and it was almost like
6 something was stabbing me.

7 I went to Roper St. Francis Hospital and they kept me in
8 the cardiac-care wing for three days. And then while I was
9 being dismissed, discharged, the discharging doctor said, I
10 would really recommend calling your plastic surgeon ---

11 MR. SMYTH: Objection, Your Honor. Hearsay.

12 THE COURT: All right. You can't say -- you can't say
13 what anybody else told you ---

14 THE WITNESS: Oh.

15 THE COURT: --- other than what Dr. Schimpf told you.

16 THE WITNESS: Oh.

17 THE COURT: All right.

18 MR. SLOTCHIVER: How about if I ask differently.

19 THE COURT: All right.

20 Q. I am going to come back through and I am going to let you
21 tell the rest of the story.

22 A. Okay.

23 Q. Okay. I promise you. Okay?

24 A. Okay.

25 Q. What I would like you to do is to the best of your

1 ability, while we're here right now in front of the jury, walk
2 through the chronology. It would help me -- for me to show
3 you the pictures and tell about when you think happened or
4 when it happened, ---

5 A. Correct.

6 Q. --- we can do that. But I just want to show the
7 chronology of it ---

8 A. Okay.

9 Q. --- more so than the history of how everything happened.

10 A. Okay.

11 Q. Then we'll come back to that.

12 A. All right.

13 Q. Okay.

14 A. Do you want me to continue?

15 Q. Yes, please. So just from a chronology what happened;
16 which pictures were taken sooner, and which were the last
17 pictures?

18 A. Okay. The next morning I called Sweetgrass O'Neill
19 Plastic Surgery and I spoke to Dawn. And they had me come in
20 because I was crying. I told them my chest hurt and it was
21 feeling like it was splitting open, I really needed to be
22 seen. And they said, come on in.

23 And so I came in, and Dr. Schimpf came in. My husband
24 was with me. When Dr. Schimpf came in the room, he was made
25 to stay in Charleston because he was flying out to Washington,

1 D.C. to meet associates, business associates or investors.

2 Q. Your husband? Or Dr. Schimpf?

3 A. Dr. Schimpf told ---

4 Q. Okay.

5 A. --- told me that. And so he stayed. And he looked at
6 the area. He cleaned up the area.

7 Q. What picture shows that area?

8 A. He said it is a natural progression of healing, we can
9 tweak it later.

10 Q. This one?

11 A. And this was the two stitches he put in. This was a
12 natural progression of healing, we can tweak it later, not to
13 worry about it. My chest was still burning and hurting. He
14 gave me antibiotics and he gave me pain killers and sent me
15 home.

16 Q. This is -- for the record, this is Plaintiff's Exhibit
17 14. Okay.

18 A. Okay. Okay, that is -- that was -- I called again. It
19 wasn't getting any better. I called again on the 30th of June
20 where I -- they was a message saying they were going to be
21 closed for the 2nd, 3rd and 4th of July. So I called them.
22 And it was like evening, like five o'clock. I called and
23 said, this isn't getting any better, somebody please see me,
24 please see me. And no call back.

25 So I called back in on the 2nd of July, somebody's really

1 got to see me. And nobody called. They were closed. Over
2 that timeframe I was getting worse, the chest was -- by the --
3 by the 6th of July, the stitches, those two little stitches,
4 were just like really, really done holding me together. Oh,
5 God.

6 And so the morning of the 7th I called and I spoke to
7 Sweetgrass Plastic Surgery on Daniel Island. I spoke to them
8 for like six minutes. And I said I -- this is -- this hurts,
9 I feel like I'm ripping open, please, God, somebody just see
10 me, see me.

11 I got two phone calls back from Dr. Schimpf leaving me a
12 message -- one was for one minute, the other was for two
13 minutes leaving me a message to come by the office. That was
14 Monday the 7th.

15 I went by the office thinking, thank God, somebody's
16 going to see me. I get in there and there was a lady behind
17 the counter with brown hair, and she handed me two
18 prescriptions. And I'm like, well, is somebody going to see
19 me, please somebody see me. There was nobody there to see me.
20 So I was given two prescriptions.

21 And I went home, cried my eyes out. I laid in the bed.
22 And I was just getting so sick. The smell was putrid, is the
23 word. And something said inside of me, you have got to get
24 help.

25 And so I went onto the computer and I Googled plastic

1 surgeons that deal with radical and mastectomies. I don't
2 know why I put that there, 29464. And Dr. Ram Kalus' name
3 came up. It was the very first query. And he was literally
4 less than a mile away. That was on the 9th. And I called
5 them and I begged. And he said, I am not -- I am not your
6 physician, I am not your physician. And we ---

7 MR. SMYTH: Objection, Your Honor. Hearsay.

8 A. All right. I begged to the point of them saying okay.

9 Q. Wait a minute. Were you able to see Dr. Kalus?

10 A. Yes, I was.

11 Q. Are there any pictures here that reflect your condition
12 at the time you went to see Dr. Kalus?

13 A. Ten o'clock on the 10th. No, these are 12 and ---

14 Q. And over here also.

15 A. Oh. Sorry. Ten o'clock on the 10th. Yes, here it is.

16 Q. Hold on. This is ---

17 A. This is ---

18 Q. --- Plaintiff's Exhibit Number 8.

19 A. This is how I presented myself to Dr. Kalus. The two
20 stitches had popped.

21 Q. Hold on, Jeane. I want to bring it in.

22 A. Sorry.

23 Q. Okay. That's how you presented to Dr. Kalus?

24 A. Correct. That was taken in Dr. Kalus' office after he
25 wiped the -- wiped me clean and looked at it. And he

1 immediately opened the door, hollered down the hall ---

2 MR. SMYTH: Objection.

3 THE WITNESS: I'm sorry.

4 THE COURT: Hold on.

5 MR. SMYTH: Hearsay.

6 THE COURT: I'll sustain the objection.

7 Q. You can't say what Dr. Kalus told you.

8 A. Okay.

9 Q. We will hear his testimony later this week.

10 A. Okay.

11 Q. Okay?

12 A. Okay.

13 Q. But as a result -- after seeing Dr. Kalus, what happened
14 next?

15 A. He facilitated a -- Dr. Schimpf's office. Vicky called
16 me. His office manager called me back that same day and
17 facilitated me seeing him the very next day. Because all I
18 could do was lay in bed and cry in pain. It was like, oh, my
19 God. But they gave me a -- this was on the 10th. So on the
20 11th I went over to Sweetgrass Plastic Surgery.

21 Oh, and I have to say when he put in these two stitches
22 he used anesthetic, a little cat needle to put in those two
23 stitches. He numbed the area.

24 When I went on to Sweetgrass Plastic Surgery on the 11th
25 I was placed in a room at the end of the hall and Vicky came

1 in in her little white jacket, and then he -- Dr. Schimpf
2 comes through the door.

3 And he was very angry. Why did you go to someone else?
4 Why did you go there? Why did -- why did you let someone else
5 see this? Why didn't you come to me?

6 And my answer to him was you wouldn't call me back, you
7 wouldn't bring me in, this is four weeks, just a four-week
8 timeframe, and one of them being the week of the Fourth of
9 July where nobody works, it is like I wanted to be seen, I
10 wanted you to see me.

11 And he was just so angry. And he was sucking this little
12 mint. And he was just so angry. He took -- he put out his
13 instruments. He put silvadene on some kind of pad. He opened
14 up my wound, the area. And I was on that reclining chair; and
15 he proceeds to stitch me up with no anesthetic, no little cat
16 needle, no cream or anything, no spray.

17 And I start screaming, stop, it hurts, stop, it hurts,
18 please stop, it hurts. And I looked at Vicky, whose eyes were
19 big and brown - you are probably going to see her - and he
20 said these stitches. And he is tugging and putting in these
21 three stitches.

22 And he wasn't happy with me. And he kept muttering about
23 the fact I can't believe you went somewhere else and you
24 wouldn't see me, I can't believe that you went somewhere else,
25 you didn't -- you didn't come here.

1 No one would call me back. They had all of these cell
2 phones numbers. Nobody would call me back. That's why I went
3 to Dr. Kalus.

4 And when he got done he was so incensed with me he threw
5 the tray into the sink. He took the pad with the silvadene on
6 it, stuck it to my breast, taped it down, took off his gloves,
7 threw them in the sink, and he goes get out of here. And out
8 the door he went. I saw his back. The door was still open.

9 Vicky left the room and left me -- just left me there.
10 So I got myself dressed, and I walked out. And she handed --
11 still not saying anything. And she handed me two pieces of
12 paper, which were prescriptions. Not a word. And she turned
13 around and walked off. That was it. That was it.

14 I went home, got in the bed, and cried my eyes out. I
15 could not believe that just happened to me.

16 Do you want to go over those pictures?

17 Q. Okay. What happened next?

18 A. Um ---

19 Q. The next day was not a good day, was it?

20 A. The next day my mother died. She died a little after
21 noon. And my sisters, we all raced over to where she died.
22 She died of pulmonary embolism.

23 Q. Let's go to the day after that.

24 A. The day after that was the 13th. And I was in the
25 shower. And I remember the water hitting my back, and I'm in

1 the ---

2 Q. Was anybody with you?

3 A. My daughter, Samantha, was in the bathroom with me. She
4 was upstairs putting on -- touching up her makeup.

5 And my shower is a big glass enclosure, and there is a
6 window the light comes through. And I remember standing there
7 and the water's hitting my -- hitting me on my back. And all
8 of a sudden there -- I would -- it was like fading out to gray
9 and black. And something -- I got really, really woozy and
10 dizzy. I was -- I was still sick all over, just -- I just --
11 I was so sick and dizzy that I looked down like this and there
12 was blood pouring down my leg, swirling around my feet.

13 And I was, oh, my God. And I turn -- I was able to turn
14 around like this [motioning] and push open the door. And I
15 said, Sam, to my daughter. She helped me out of the shower,
16 and I guess -- are you ready me to pick that picture up?

17 Q. I'm going to show you a picture, Jeane, and ask if this
18 picture accurately represents the condition you were in at the
19 time that you were in the shower on that day.

20 A. Yes.

21 Q. This was taken by your daughter?

22 A. Yes.

23 Q. Let me put it on the screen.

24 A. I didn't know she carried that with her.

25 Q. So that's the day that it broke open?

1 A. That is right after she got me out of the shower. She --
2 what I hear is, mom, who can I call, who can I call.

3 Q. I want to come back to that in a second. Let's talk --
4 let's take a look at some of these other photographs ---

5 A. Okay.

6 Q. --- and show the jury which other ones represent how you
7 were ---

8 A. Okay.

9 Q. --- at that timeframe.

10 A. This is the picture outside of the shower. This is
11 three -- three stitches have popped.

12 Q. Where were the three stitches?

13 A. The three stitches were here [indicates]. This is some
14 stitches. And the breast blew open all the way through. And
15 this was the areola that kept being eaten away.

16 Q. This is two days after you left Dr. Schimpf's office?

17 A. This is -- this is his silvadene on my -- on my chest.
18 Correct. And ---

19 Q. This is two days after your visit?

20 A. Correct. There's his three stiches. I can always -- you
21 know, because of his stitches. There's his two, there's his
22 three.

23 Q. Any other pictures here represent the condition you were
24 on that day?

25 A. Yes. This is -- this was taken by my husband, who

1 obviously heard screaming. And he took this picture again.
2 There are the three stitches.

3 And this is -- this is -- gosh. I went -- I went -- I
4 was in and out of consciousness. My daughter got Dr. Kalus on
5 the phone, who said bring me to Roper St. Francis immediately.

6 Q. You know what, I -- hold on. I'm sorry.

7 MR. SLOTCHIVER: I have not told you which pictures we're
8 looking at, have I (addressing court reporter)?

9 Let me -- let me do that, because I want to make sure we
10 have a clean record.

11 Q. You said this is one of the pictures that was taken?

12 A. Correct. That is the two stitches.

13 Q. The one on the screen is not marked. We can mark that
14 for an exhibit in a moment. We can mark that the next number.
15 Why don't we do that just to keep everything straight. I
16 apologize. It is my fault. I apologize, Judge.

17 THE COURT: That's okay.

18 MR. SLOTCHIVER: There's a lot of documents, so it gets
19 confusing sometimes.

20 THE COURT REPORTER: Marked for identification, Number
21 22.

22 [Whereupon, Plaintiff's Exhibit Number 22, photo, is
23 marked for identification by the court reporter]

24 Q. All right. So the one we just referred to that your
25 daughter had taken is Number 22. And then the three that we

1 referred to that were taken on that day? Were Number 14 ---

2 A. That was the two stitches. No, that was done after --
3 that was done on the -- on about the 25th. That's the first
4 time he saw me and he put in stitches.

5 Q. On the 25th. I'm sorry. And then Exhibit Number 16?

6 A. That's out of the shower. My daughter -- I guess got the
7 blood off my -- off my belly.

8 Q. Okay.

9 A. But she never touched the wound.

10 MR. SLOTCHIVER: Okay. Let me just put this over here.

11 A. Left it in tact.

12 Q. And then the next one we referred to a moment ago, just
13 for clarity, was Number 15?

14 A. Yeah. You can see the three stitches right here where he
15 tried to stitch that back together there [indicates].

16 Q. Okay.

17 A. Okay.

18 Q. I'm going to -- are any of the other pictures here
19 representative of your condition on that day?

20 A. I kept going in and out. But these -- this is
21 actually -- my husband took this picture of Dr. Kalus' hands.
22 This is the -- what it was in the -- you can't see him right
23 there. But that's what it was inside of the ER where they
24 took me.

25 Q. This is after it had broken loose?

1 A. Yes. Blew open.

2 Q. We haven't gotten to Dr. Kalus. We'll come back to that
3 in a moment.

4 A. Okay.

5 Q. But this is Picture Number 18, Exhibit 18. How about
6 these pictures here?

7 A. I believe these are when they were taking me ---

8 Q. Let's look at this one, Number 20. When is this one?

9 A. I believe that is when they were taking me into surgery.
10 It could have been a few hours' difference. I ---

11 Q. Okay. This is Number 20.

12 A. I -- this is actually the same one. This is -- right
13 here, because, yeah, the areola and nipple are way back here
14 now [pointing].

15 Q. This is where it's coming off; this is Number 19?

16 A. Like that.

17 Q. Calm down. I'm just trying to get through this part of
18 it so we can sit back and tell the rest of ---

19 A. And this is where they put them on the same board, some
20 of them on the same board, the ---

21 Q. So this is a collage of pictures, Number 17?

22 A. Yeah.

23 Q. Okay. These photographs are going to come up later
24 on ---

25 A. Okay.

1 Q. --- in testimony. And is this a photograph, Number 9 ---

2 A. That's one of the ones that are here.

3 Q. These are the ones that we've already seen, ---

4 A. Yes, ---

5 Q. --- Number 9 ---

6 A. --- the two ---

7 Q. --- and Number 7?

8 A. The two stitches and the three stitches.

9 Q. Okay. So we don't -- okay. So Number 9 is the two
10 stitches?

11 A. Yes.

12 Q. And seven is the three stitches?

13 A. Correct.

14 MR. SLOTCHIVER: All right. Why don't you come back and
15 have a seat.

16 THE WITNESS: Okay.

17 MR. SLOTCHIVER: I will put these away.

18 [Whereupon, the witness retakes the witness stand]

19 MR. SLOTCHIVER: Judge, we would move to introduce all of
20 these photographs into evidence at this time.

21 THE COURT: All right. Any objection?

22 MR. SMYTH: No. As long as we've got a list. I wasn't
23 able to keep track of all the different numbers. But as long
24 as we have got them, no objections.

25 THE COURT: All right. Without objection.

1 THE COURT REPORTER: The photos we have are Plaintiff's
2 Number 6 through Number 22.

3 MR. SMYTH: Thank you, Madam Court Reporter.

4 [Whereupon, Plaintiff's Exhibit Number 6 through 22 are
5 admitted into evidence by the Court]

6 Q. Jeane, walk us through when the stitches came open your
7 sister was there -- or your daughter was there. Excuse me.

8 A. Correct.

9 Q. And you testified that at that point, you said you needed
10 help and you asked your daughter to get help?

11 A. I was losing consciousness because I -- with this hand I
12 opened the glass door and I said, Sam. And she got me out of
13 the shower. And I hear her voice saying, mom, who do I call,
14 who do I call. And the only number I knew that would call me
15 back was Dr. Kalus, and I said Dr. Kalus. She found him on my
16 phone and called him. They said bring me in.

17 And I woke up later. I heard my husband's voice rousing
18 me in the -- in the emergency room. And there were medical
19 personnel on this side of me, where the busted breast was, and
20 doing all the stuff they were doing.

21 My husband was here [indicates], my daughter was here
22 [indicates], and there was a gray curtain here [indicates]
23 that was open. And Dr. Kalus was standing there. And he
24 goes, Jeane, I cannot ---

25 MR. SMYTH: Objection, Your Honor. Hearsay.

1 THE WITNESS: Oh. I'm sorry.

2 THE COURT: That's okay.

3 THE WITNESS: Sorry.

4 THE COURT: Just move on. You just can't say what Dr.
5 Kalus said.

6 THE WITNESS: Okay.

7 Q. What did you say to Dr. Kalus when he appeared?

8 A. I told Dr. Kalus, Schimpf is fired, you are hired. And
9 then he stepped over the threshold. He would not come in the
10 room until that was made abundantly clear to medical personnel
11 that Schimpf was fired and he was hired. And then he
12 approached me. And in one of the pictures there are his hands
13 exposing the breast.

14 Q. Would you walk the ladies and gentlemen of the jury
15 through the procedures that you've had since then? Who was
16 your doctor from that point forward?

17 A. Dr. Ram Kalus only.

18 Q. Are you happy with Dr. Ram Kalus?

19 A. He is fantastic. That man saved my life. He saved my
20 life.

21 Q. Tell me about the procedures he's done for you.

22 A. Well, that day he had to wait until the next morning to
23 remove the implant because he said my body wasn't stable
24 enough and they wanted to put in antibiotics.

25 MR. SMYTH: Objection, Your Honor.

1 THE COURT: I'll sustain the objection. You can't say
2 what someone else said.

3 THE WITNESS: Okay.

4 Q. Would you tell me your understanding of what transpired
5 and why, without telling us what anybody told you?

6 A. They had to wait to do surgery the next morning because
7 my body was weak and I needed antibiotics.

8 Q. So what happened next?

9 A. The very -- I went to sleep. The next morning I remember
10 an orderly pushing me into the holding room. It was early,
11 early in the morning. Pushed me into the holding room at
12 Roper St. Francis, getting ready to go down to the operating
13 room.

14 The orderly said, we'll be back for you in just a few
15 minutes. And I'm like, okay. And I was laying there. And
16 the walls were the pale yellow and big like oak-wood trim on
17 the door. And all of a sudden, this priest came in and he
18 goes ---

19 MR. SMYTH: Objection, Your Honor.

20 MR. SLOTCHIVER: May we approach?

21 THE COURT: Sure.

22 [Whereupon, an off-the-record bench conference is held]

23 THE COURT: Ladies and gentlemen, we're going to take a
24 five-minute break, if that's all right. I am going to take up
25 a matter of law that will just need my -- need to be able to

1 discuss this with the attorneys outside of your presence.

2 So if you'll just return to the jury room. And remember,
3 please don't discuss anything. Just enjoy your quick break.

4 [Whereupon, the jury exits the courtroom at 8/26/19, 4:50
5 p.m.]

6 THE COURT: All right. For the record, would you just
7 state -- your objection was objection to hearsay.

8 And, Mr. Slotchiver, what is your response to that? She
9 was about to testify as to what the priest said.

10 MR. SLOTCHIVER: Your Honor, what the priest said to her
11 is not being offered for the truth of the matter asserted.
12 It's being asserted for her present sense impression, her
13 understanding, and her psychological damages as a result of.

14 It's not a violation of the hearsay. It's not being
15 offered to say it didn't happen. They can dispute it
16 happened. But an exception to the hearsay rule is -- if you
17 offer not for the truth of the matter asserted but for her
18 damages, how she's damaged.

19 She believes it happened. They can cross-examine her all
20 they want and say it didn't happen. They can try to convince
21 the jury it didn't happen. But she believes it happened.

22 And, Judge, this has been -- this case has been
23 exhaustively litigated with lots and lots of depositions. Her
24 experts will testify this is part of the basis of her
25 psychological damages as a result of this case. She

1 absolutely believes it.

2 This is no surprise. It's been addressed all along. I
3 believe the rules are clear that it's allowed for this
4 purpose. Not to allow her to do it would be -- you can't do
5 it because they can't prove it did or didn't happen, it is the
6 same scenario we are in with the medical records and all the
7 pictures. But this is a direct exception to the hearsay rule.

8 THE COURT: What do you think -- what is she going to say
9 that the priest said?

10 MR. SLOTCHIVER: She's going to say that he offered --
11 that he -- I am happy to proffer, if you would like.

12 THE COURT: Sure.

13 MR. SLOTCHIVER: Okay. And maybe that will help clarify
14 it. Because one of their objections is that the doctor said
15 it didn't happen. She'll testify what -- I'm happy to proffer
16 and then you can decide?

17 THE COURT: Okay.

18 MR. SLOTCHIVER: Okay. So that means I'm going to ask
19 you questions as if the jury is here. Okay?

20 THE WITNESS: Okay.

21 MR. SLOTCHIVER: So answer them and let the judge hear
22 your responses. Okay?

23 THE WITNESS: All right.

24 PROFFER

25 BY MR. SLOTCHIVER:

1 Q. So, Jeane, what -- at the time that the priest came into
2 the room, who was present besides you?

3 A. The orderly had just walked out. And he came around the
4 corner. And it was me and him.

5 Q. You and who?

6 A. The priest.

7 Q. Okay. And what happened when the priest came into the
8 room?

9 A. He told me that he really needed to pray over me, he
10 really needed to. And he was adamant about it.

11 And I'm like, I'm okay. And he goes, no, I really,
12 really need to pray with you. And I'm like, but I'm not
13 catholic. And he goes, it's okay, please let me pray over
14 you.

15 And I'm like, okay. And he put his Bible on my belly,
16 took my left hand, put it on his Bible; and he said the 23rd
17 Psalm. He said The Lord's Prayer. And then he said, Dear
18 Lord, we consecrate Jeane to you. And at that point in time,
19 I realized he gave me last rites.

20 Q. Okay. How did that make you feel?

21 A. Me?

22 Q. Yes. How has that affected you?

23 A. Really? It's not a confidence booster, believe me.

24 Getting rolled into the lights -- they came and got me right
25 away and they rolled me into those lights, and all I could do

1 is scream in my head it but I've got a daughter; I've got --
2 I've got -- is this it?

3 MR. SLOTCHIVER: So, Judge ---

4 A. I thought I was going to not wake up. And I was
5 screaming in my head, please, God, don't put me to sleep,
6 don't put me to sleep. So, yeah, that's what happened.

7 Q. All right. Thank you.

8 MR. SLOTCHIVER: So, Judge, under one of the hearsay
9 exceptions is a statement under belief of impending death.

10 THE COURT: What exception is that?

11 MR. HALVERSEN: 804(b)(2).

12 THE COURT: That's if the declarant is unavailable.
13 She's here.

14 MR. SLOTCHIVER: We don't know who the priest was.

15 THE COURT: You're talking about the priest?

16 MR. SLOTCHIVER: So the declarant -- the hearsay would be
17 what the ---

18 THE COURT: Oh, what the priest said because he feared as
19 though her death was imminent? Concerning the cause or
20 circumstances of what the declarant believed to be impending
21 death.

22 So you want to go under the exception that the priest's
23 is an unavailable witness and it falls outside the hearsay
24 rule because he believed that the declarant's death was
25 imminent?

1 MR. SLOTCHIVER: That's one of the bases. The primary
2 basis, Your Honor, is that it's not being offered for the
3 truth of the matter asserted, which is what hearsay is. It's
4 being offered to prove her damages on the psychological issue
5 and ---

6 THE COURT: I fall more into that. I mean, that's what I
7 indicated at the bench, is that it's not really the truth of
8 the matter -- the statement, that I really need to pray over
9 you, isn't being offered for that. It's -- the statement is
10 being offered for the fact that she felt as though she was --
11 I mean, that this was much more dire than what it truly was.
12 And he could have simply just come in there and said, hey, I
13 just wanted to stop by; and she thinks to herself, oh,
14 goodness, there's a priest in the room, I'm going to die.

15 And the fact that whatever he says isn't being proved --
16 offered to prove the truth of the matter asserted, it's just
17 that she perceived it to be something that it may or may not
18 have been, i.e., you know, a potential death based on a
19 surgery.

20 So I don't think it's what he said is offered to prove
21 the truth of the matter that's being asserted. I think it's
22 just for other purposes.

23 What's your remark as to that, Mr. Smyth?

24 MR. SMYTH: Your Honor, I think we may be missing the
25 boat here. If she wants to say she thought she was going to

1 die, that's fine.

2 THE COURT: Okay.

3 MR. SMYTH: If we're going to rely on something a priest,
4 who we haven't identified, we haven't established is
5 unavailable, who may or may not have said this, that's where
6 all of this becomes unreliable evidence; and that's why it's
7 excluded from the hearsay, because we can't verify it.

8 She can -- she can testify any time she wants about what
9 she thought. She can't testify about what some person we
10 can't identify might have thought or might have said.

11 To add to that, there's no indication whatsoever in any
12 of her medical records that she was in any grave danger of
13 death. Okay? And so taking a medical opinion from a priest
14 we can't identify and transposing that into a feeling of
15 death, is a big leap. It's hearsay upon hearsay. And so
16 there's multiple reasons to keep this out of evidence.

17 But I agree she can say that she thought she was going to
18 die. But I don't think we get to get into anything that the
19 priest might have surmised.

20 MR. SLOTCHIVER: There's a significant psychological
21 difference in believing you're going to die and having
22 somebody read you your last rites. That's where it becomes an
23 exception to the hearsay, it's not for the truth of the matter
24 asserted.

25 His position is hearsay doesn't matter, let's just say

1 you thought you were going to die. This is what she said all
2 along, this is what she believed, because of what he said to
3 her. So I don't believe it's being offered for the hearsay.
4 It's truth of the matter asserted, it's being offered because
5 she believed that she was going to die based on what he said
6 to her.

7 MR. SMYTH: Your Honor, one other thought to maybe
8 complicate the analysis. I'm not Catholic, so I might be
9 speaking a little bit out of school. I'm close.
10 Episcopalian. But the use of consecrate, to me, does not
11 connote that you're going to die. That just means we dedicate
12 you. And, you know, that's a very different interpretation
13 that's being laid over this entire conversation that we don't
14 have evidence of.

15 THE COURT: Well, I'm going to let it in. I'll just let
16 the whole statement in. Whether what she perceived the words
17 consecrate to mean I mean doesn't really matter.

18 MR. SLOTCHIVER: She's not Catholic, either. That's what
19 she understood, though.

20 THE COURT: Right.

21 MR. SLOTCHIVER: And it's pivotal to the case, and it's
22 pivotal to psychological.

23 THE COURT: Well, just because it's pivotal doesn't mean
24 that I still don't have a duty and responsibility to determine
25 what evidence is admissible. So I've got to make sure I am

1 doing the right thing.

2 Why can she not say that -- or you can ask her in the
3 line of questioning is, well: What did you think was
4 happening and why do you think he was in the room and what did
5 he do next?

6 MR. SLOTCHIVER: I can do that.

7 THE COURT: And you don't have to say what did he say.
8 You can -- you can just simply say did -- she said that -- she
9 could -- she could say that he -- I was going to say pray over
10 me, but what did you take away from the fact that he had come
11 into the room? And ---

12 MR. SLOTCHIVER: A priest walking in the room isn't going
13 to make her think she's going to die ---

14 THE COURT: No, but I'm saying that you can somehow get
15 around it by asking what did he do next. And you could say,
16 he prayed over me. And what did you take away from that? I
17 took away that that was my -- whatever they call it.

18 MR. SLOTCHIVER: With all -- here's the problem. They're
19 going to attack her on whatever she says.

20 THE COURT: Right.

21 MR. SLOTCHIVER: She believed this because she thought
22 she was going die. She thought she was going to die because
23 he read the last rites to her. That's why.

24 And if I ask her what did he do next, she's going to say,
25 well, he prayed over me; and they're going to say to her

1 something like, well, praying over you doesn't mean you're
2 going to die, it's just what you perceived. And then they're
3 going to talk about the psychological damage she has, what's
4 made her think things that weren't true.

5 The reality is what happened to her and what's she's
6 testified to it all along - and they know this - is that she
7 was read her last rites. Whether she was or wasn't, that's
8 what she perceived and that's what she understood and that's
9 what she can testify to. It's what she's always testified to.
10 It's not for the truth of the matter asserted. It's, instead,
11 for what she believed.

12 And because the psychological component is significant,
13 you will see that, Judge, in the next couple of days, it is
14 significant in this case. They're going to try to attack it
15 in every way they can. And she has the right to put forth the
16 evidence in every way she can.

17 And I don't think it is violative of the rule, and I
18 would ask you to rule with us on this one.

19 MR. SMYTH: Your Honor, if it helps, I am happy with the
20 suggestion you offered. I think that solves the hearsay
21 problem in terms of asking her, you know, what she took out of
22 that situation.

23 MR. SLOTCHIVER: We just don't think it's a hearsay
24 problem. And I think it doesn't give rise to her concern that
25 she's going to die. It makes her -- frankly, they'll argue

1 that it makes her seem unreasonable and unsensible to assert
2 she's going to die merely because a priest walks in the room.

3 Under the present sense impression exception to hearsay,
4 a statement describing or explaining an event or condition
5 made while the declarant where the declarant was perceiving
6 the event or condition or immediately thereafter.

7 And for multiple reasons, I believe it falls into that --
8 under the hearsay exceptions.

9 THE COURT: Which one?

10 MR. SLOTCHIVER: This is under -- under number one.

11 THE COURT: No. What rule?

12 MR. SLOTCHIVER: Oh. I'm sorry. 803.

13 THE COURT: Which one?

14 MR. SLOTCHIVER: One. I apologize. 803(1). And also
15 number three. Actually, ---

16 THE COURT: Number 803(1) is -- present sense impression
17 it says statement describing or explaining an event or
18 condition made while the declarant was perceiving the event or
19 condition or immediately thereafter.

20 I don't think it falls under that one. He just came in.
21 I don't -- I mean, unless you are alleging that he was
22 perceiving the event of her going to die and he therefore
23 thought he should give her her last rites.

24 MR. SLOTCHIVER: That's certainly what we believe
25 happened. And I don't -- I mean, I think that's -- when they

1 do the last rites -- I think that's what she perceived.

2 Also, under number three, the then existing mental,
3 emotional or physical condition.

4 Hearsay itself is the out-of-court statement offered for
5 the truth of the matter asserted. And this isn't being
6 offered for the truth of the matter asserted. It's being
7 offered for her state of what she believed was done.

8 MR. SMYTH: Your Honor ---

9 THE COURT: Yeah, it's just there's just so many ways
10 around it. I just don't get why we need -- because here's
11 what I am thinking the whole time, this may be the one thing
12 that this thing gets appealed on and then we've got a thousand
13 ways around it so I don't know why we are not going around it.

14 But y'all want to keep going down the middle of it. And
15 you have got to understand that if I say to you rephrase your
16 question, that's not appealable. If I rule on the
17 admissibility of this and it's not -- or and I'm wrong, then
18 it's appealed.

19 MR. SLOTCHIVER: I don't know how -- because it ties --
20 and I hear you. And I promise, I don't want an appeal. But
21 because it ties directly to a significant part of her mental
22 condition and to the testimony that will be elicited from her
23 damages, experts in the future, I don't know how we don't have
24 this addressed with the jury. And I don't know how saying
25 what did -- if we -- their doctor is going to say that she has

1 all of these psychological issues that make her perceive
2 things different than they are, is what I am guessing he's
3 going to say based on his reports. So how do we not go
4 forward with the basis for why she said what she did?

5 He still gives that same opinion. Her expert still gave
6 them two reports. He did his deposition and then he did his
7 IME. He's still saying the same thing. This knowledge of
8 what she's testified to, he's already opined on this. It's
9 not new.

10 THE COURT: All right. Again, that has nothing to do
11 with what I have to make a decision on. It's just whether I
12 determine that it's admissible evidence.

13 And as you saw from the beginning, Mr. Smyth, I was very
14 affixed on the fact that I didn't think it was for the truth
15 of the matter asserted, meaning what the statement was; but
16 for the purpose of what the -- or it's the fact that the
17 priest came in and gave her her last rites -- but if he would
18 have just came in and said, well, do you want to diet Coke,
19 that's different. Because the fact that he did give her her
20 last rites, that is an out-of-court statement.

21 MR. SMYTH: And, Your Honor, one other thing. I found
22 Dr. Kalus' testimony on this issue. And remember, to place
23 this in context, she had already talked to Dr. Kalus about the
24 surgery that she was going to have.

25 So she talks to Dr. Kalus first, and then before she goes

1 in and gets wheeled into this area -- I asked Dr. Kalus the
2 question. I said -- I said, did you ever tell Ms. Whitfield
3 that -- and I'm reading from Page 47 of this original
4 discovery deposition, Line 11: Did you ever tell Ms.
5 Whitfield that you thought she was dying or that there was a
6 chance of her dying from the condition that she presented to
7 the hospital with? No. That would be a very unlikely thing
8 that I would say. She's testified that somebody came in and
9 performed last rites on her. Do you know anything about that?
10 No. I have no knowledge of that. No knowledge of that. Is
11 it your opinion that this was a life-threatening situation?
12 And he says in his answer, he said -- he said, life
13 threatening, no.

14 MR. SLOTCHIVER: He wasn't there, Your Honor. That's why
15 I had a proffer.

16 MR. SMYTH: But what that does is it puts a priest's
17 interpretation over the doctor's, who's already said this
18 wasn't life threatening.

19 MR. SLOTCHIVER: And, once again, it's not about Dr.
20 Kalus; it's about her impression, an out-of-court statement.
21 Her impression is she was dying because he came in and read
22 the last rites.

23 THE COURT: Well, then it is offered to prove the truth
24 of the matter asserted.

25 MR. SMYTH: Exactly.

1 MR. SLOTCHIVER: No, sir. It's not being offered for the
2 truth of the matter asserted that she was read her rites.
3 It's being mattered [sic] for the -- for the fact that she
4 believed that she was read her last rites, that she believed
5 that she was going to die.

6 They can argue that it didn't take place. They can talk
7 about Dr. Kalus. He wasn't there. And that's what she's
8 testified to today in her proffer was that he wasn't there;
9 she was the only one in the room, the orderly had left, and
10 that's when -- that's when the priest came in. And that's
11 what she heard him say, and that's what affected her.

12 And that's -- that is -- I think that's part of her
13 psychological damages. If she was wrong, they can attack her
14 on it. They can say there's no way it happened. They can say
15 it couldn't have happened. They could talk about Dr. Kalus.
16 It doesn't mean it didn't happen, and it doesn't mean that she
17 doesn't believe it happened.

18 THE COURT: Why are we doing this now? The first day of
19 trial and y'all -- this thing has been pending for years.

20 Is the fact that the priest read her her last rites, is
21 that out-of-court statement offered to prove that she thought
22 that she was going to die? We would have to take the
23 testimony of the priest, and you could cross-examine him as to
24 what he thought or perceived as to why he did that. But we
25 didn't do that in this case. So is that an out-of-court

1 statement offered to prove that he thought that she was going
2 to die and therefore she had the sense that she was going to
3 die and this was much dire than what it really was.

4 MR. SLOTCHIVER: We're not suggesting that he thought she
5 was going to die. We're suggesting that he read her her last
6 rites and therefore she thought she was going to die.

7 THE COURT: Well, he wouldn't have read her her last
8 rites if he didn't think she was going to die.

9 MR. SLOTCHIVER: Correct.

10 THE COURT: All right. It's hearsay. You have so many
11 ways of getting around it. You're going to need to figure out
12 ways to get around it.

13 You can ask her all of those requisite questions I talked
14 about. The only thing you cannot ask her is what did he say.
15 You can do, what did you perceive as -- because he came in.
16 You can ask what he did, which is to pray. And what did you
17 perceive that as? I mean, you have so many ways around it as
18 to -- than saying what he said. All right?

19 MR. SLOTCHIVER: We've got testimony in the depositions
20 from Dr. Kalus in the depositions that were taken and the
21 reports done by the defense's experts, that they talked about
22 the fact that she said that she was given her last rites. He
23 just read part of the deposition just now, Your Honor. So if
24 it's ---

25 THE COURT: Why didn't you go get the priest and depose

1 him?

2 MR. SLOTCHIVER: We don't know who the priest is. And
3 we're not saying that he said it. We're saying that she
4 believed he said it.

5 But if that's your ruling -- I'm not arguing with you on
6 the ruling. I take exception to it. But -- but we would ask
7 that you restrict the testimony and the examination from their
8 witnesses so that they cannot talk about the fact that she
9 said she was read her -- she was read her last rites.

10 THE COURT: I thought you were going to get into it, that
11 that's what she perceived as what he said to her. Or
12 perceived as to why he was in the room.

13 MR. SLOTCHIVER: Well, I do want to go into it; but I
14 wanted her -- my plans were for her to testify that she was
15 read her last rites. My concern is that they say to Dr.
16 Ballenger, do you understand that she says that she was read
17 her last rites? Yes. And what is your opinion? It never
18 took place and she's made it up.

19 So they're using that same information against her that
20 we're not allowed to present to the jury. That's my -- I know
21 it is circular, but that's my concern.

22 THE COURT: We'll address it at the time.

23 All right. We've kept them too long, so we're just going
24 to have to let them go.

25 Will you bring the jury out.

1 [Whereupon, the jury enters the courtroom 8/26/19, 5:11
2 p.m.]

3 THE BAILIFF: Your Honor, the jury is complete.

4 THE COURT: All right. Ladies and gentlemen of the jury,
5 I'm still reviewing these matters of law and I don't want to
6 keep you here. You've got families and people to get to, and
7 so I'm not going to punish you for taking up some more matters
8 that I probably need to take up with the attorneys so I'm
9 going to go ahead and let you go for the night.

10 They threw me off my game this morning by selecting the
11 jury downstairs. I usually have a little bit of a rapport
12 that I do with everybody, and I failed to realize that I did
13 that with y'all this morning.

14 Just to kind of let you know a lot of the moving parts
15 here as to what's going on -- not everybody's always been on a
16 jury. This is my law clerk. You'll see her get up and go in
17 and out. She's typing notes, she's doing research. I'm
18 writing her notes telling her to go get me certain things,
19 books, those type things. So don't be concerned with her
20 getting up and down.

21 This wonderful lady is our clerk. She handles all the
22 things that are pretty much just the day-to-day operations of
23 the court. And the deputy is here to keep us all protected.
24 And this is our wonderful court reporter, and she's taking
25 down every single thing that is being said in the courtroom.

1 So just to kind of give you an overlay of what's going on
2 and who all is doing things. And of course the most important
3 people are the bailiffs, who get your lunch usually for you
4 during the day. So, yay. So they -- these guys are great.
5 They run the courtroom, and they -- they're going to make sure
6 you get out, make sure your parking gets paid for, make sure
7 everything gets handled for you. So if you need something,
8 you just let them know and they'll get it for you.

9 All right. So we start back at 9:30 every morning.
10 We're usually going to try to conclude at 5:00. Today,
11 because it was the first day and we just had a lot of
12 ancillary things to begin within the morning it pushed us over
13 a little bit. So, I apologize for that. But I will just see
14 everybody -- if you will just be in the jury room by 9:30,
15 we'll get started then. Okay? I hope y'all have a wonderful
16 evening.

17 And I do remind you please don't research, talk about --
18 like I tell everybody, if your family says how is the trial
19 going, you can say it's fine. If they say what it's about,
20 you can say the judge is mean and he said he's going to throw
21 me in jail if I talked about it so I'm not going to tell you
22 anything until it's all over. All right? Throw it on me.

23 All right. I hope y'all have a wonderful evening. I
24 look forward to seeing you in the morning.

25 [Whereupon, the jury exits the courtroom 8/26/19, 5:14

1 p.m.]

2 THE COURT: All right, guys. Here's what I'm going to
3 do. I'm going to take it under advisement and sleep on it
4 tonight, take a look at the rules, and let you know tomorrow.

5 I understand it's an intricate part of the case and so I
6 want to make sure that I'm doing and making the right call.
7 So I'll let you know what my ruling is in the morning.

8 Mrs. Whitfield, you're still under oath. All that means
9 is you can talk to anybody, you just can't talk to your
10 attorneys about the substance of your testimony. Okay?

11 And so we'll just bring you back in the morning and we'll
12 begin again. Sorry about doing that. Tried to get through
13 it, ---

14 THE WITNESS: That's fine.

15 THE COURT: --- but it is what it is. So I hope you have
16 a wonderful evening. And you feel free to step down, and we
17 will see you back here in the morning.

18 THE WITNESS: What time?

19 THE COURT: Your attorneys will tell you, but y'all
20 probably need to be here about 9:15.

21 THE WITNESS: Thank you.

22 THE COURT: And we'll bring the jury out about 9:30.

23 All right. Anything else before we adjourn for the
24 evening? Y'all can leave your stuff in here if you want, by
25 the way.

1 MR. SMYTH: Thank you, Your Honor. We talked about
2 lineup for witnesses. And, also, I don't know if you want to
3 take up the issue about the witnesses that they've named so
4 new. If they're going to be able to testify, we'd like to
5 depose them and might name somebody in response.

6 So we're just trying to kind of stay ahead of the game
7 and keep things moving if we can.

8 THE COURT: All right. That leads me to my first sticky
9 of the day. All right. I want the order of the witnesses, or
10 just a list of the witnesses. It doesn't have to be the exact
11 order, for tomorrow given over. You can write it on a sticky
12 pad. I don't care. Just so they'll know who it is tomorrow.

13 What y'all were doing in here was what I asked y'all to
14 do in my email on Sunday, which was to go through every single
15 one of the exhibits, mark it, stipulate to what you can. That
16 didn't happen.

17 And, yes, the witness -- are the witnesses that they have
18 objected to, are they slated to testify tomorrow?

19 MR. SLOTCHIVER: Your Honor, we had agreed that all the
20 evidence came in; so I thought we had already done that.

21 THE COURT: Huh-uh.

22 MR. SLOTCHIVER: We agreed ---

23 THE COURT: I want them marked, already into evidence and
24 all we have got to do is just say, well, I'm going to show you
25 what's been previously marked as State's Number 1, obviously

1 there was no objection, because they're all in, and you just
2 get to glide right through them. But marking each one of them
3 and slowing down and then showing it to them and which number
4 you are, that's what I'm trying to ---

5 MR. SLOTCHIVER: Yes, sir.

6 THE COURT: --- to avoid.

7 MR. SLOTCHIVER: One of the witnesses that we plan to
8 call is one of the witnesses that they filed a motion to
9 block.

10 THE COURT: All right. Who was that?

11 MR. SLOTCHIVER: That is Mary Crowe who is Ms.
12 Whitfield's sister. We had listed her, and we offered to
13 depose -- we offered them the right to depose her. They did
14 not want to depose her. They just said no. So in the
15 process ---

16 THE COURT: And she is whose sister?

17 MR. SLOTCHIVER: This is her [indicates] sister.

18 THE COURT: Okay. And what is Ms. Whitfield's sister
19 going to testify to?

20 MR. SLOTCHIVER: She's going to testify as to the
21 observations she made. And, really what's she's going to
22 testify to is how it's affected her, how she's seen it affect
23 her sister.

24 THE COURT: Okay. And what is ---

25 MR. SLOTCHIVER: Nothing surprising.

1 THE COURT: All right. What is y'all's objection, Mr.
2 Smyth?

3 MR. SMYTH: Well, again, Your Honor, this is a witness
4 that was just named a week or so ago. I don't remember the
5 exact date. But we're, you know, three-and-a-half months
6 past the -- or, actually, we're six months past the
7 scheduling-order deadline now and we're getting, you know,
8 lists of new witnesses.

9 And so we object to it because that wasn't -- that wasn't
10 timely provided. But if the Court is going to rule that they
11 are allowed to testify, then we'd like to take their
12 deposition.

13 MR. SLOTCHIVER: And just if I can respond, Judge?

14 THE COURT: When are you going to take her deposition if
15 she's going to testify tomorrow?

16 MR. SMYTH: We can do it tonight, Your Honor.

17 MR. SLOTCHIVER: We're still getting discovery responses
18 from them ---

19 THE COURT: I've already made it clear that I wasn't
20 overly excited about everybody violating the order. But, I
21 mean, we're in a trial now ---

22 MR. SLOTCHIVER: We --- and ---

23 THE COURT: --- so we've got to make decisions, real-time
24 decisions.

25 MR. SLOTCHIVER: Yes, sir. That's all -- she can testify

1 right now. If you want, I can proffer her. But there's no
2 surprise. She's going to talk about how it's affected her
3 sister.

4 THE COURT: All right.

5 MR. SLOTCHIVER: And it's a ten-minute questioning. I
6 could literally do it now if you would like.

7 THE COURT: We'll do it -- we will do it at lunch
8 tomorrow, so don't let her be here before lunch. We won't
9 call her before lunch. If we need to do that, I'll give them
10 the same opportunity and we will just have her proffered at
11 lunchtime.

12 MR. SLOTCHIVER: Sure.

13 THE COURT: Simple enough?

14 MR. SMYTH: Yes, sir.

15 THE COURT: All right. What's next? All right. I --

16 MR. SMYTH: Is that -- is that the only witness?

17 THE COURT: That's the only one that they said they were
18 going to call tomorrow that you objected to.

19 I don't want to keep Madam Court Reporter here for y'all
20 to --- yeah?

21 MR. SLOTCHIVER: I'm sorry. There is one more. Ray
22 Roberts.

23 MR. HALVERSEN: Your Honor, if I may, because it's my
24 responsibility, that's the expert they named last Friday.
25 They're going to have him testify to a bunch of financial

1 stuff about how, you know, certain boxes on the tax return
2 don't add up with boxes in the profit and loss statements and
3 financial statements of Sweetgrass.

4 If an expert is going to give complicated opinion
5 testimony about Dr. Schimpf's financial side of the house I
6 would like the opportunity to take his deposition tonight.

7 THE COURT: Sure.

8 MR. HALVERSEN: Thank you.

9 THE COURT: It's an expert.

10 MR. HALVERSEN: Yeah, I mean ---

11 THE COURT: This isn't her sister.

12 MR. HALVERSEN: Right. But they just dump-trucked these
13 documents on us. We offered to give him the deposition last
14 week, on Monday or Tuesday of last week. They said -- they
15 didn't say squat about it. And now I've got -- I actually
16 cleared those dates with him, and we got no response. Now
17 they say, we want him tonight. I don't even know if he's
18 available tonight. That's not fair.

19 THE COURT: If he's not available, he's not available.
20 Why didn't you do it sooner?

21 MR. HALVERSEN: Because, Your Honor, the judge entered
22 her order, the revised order, on July 8th. I got working on
23 the financial production; and as he said earlier, we began
24 producing information from Dr. Schimpf's CPAs. We collected
25 all of his bank accounts. We have collected -- you know, we

1 had them printing off things out of Quick Books. We went and
2 ran down information about his net worth, his assets, his
3 liabilities; which, quite frankly, we're still running down
4 because there are things you would need to prove net worth
5 that they have never even asked for. So, you know, if we're
6 going to have to present that in the course of this trial,
7 it's going to, you know, involve some more work.

8 We moved to exclude him because he was a brand new
9 expert. They could have told us that they were going to
10 identify a financial expert at some earlier date in the case.
11 They didn't. They disclosed him last Friday. So we moved to
12 exclude him, reasonably thinking he would be, you know,
13 precluded under the scheduling order. But when we provided
14 our witness list, we said, you know, in the event that he's
15 allowed to testify, we intend to name a rebuttal individual
16 ourselves.

17 THE COURT: Well, I didn't say that I was going to let
18 him testify.

19 MR. HALVERSEN: I see, Your Honor.

20 MR. SLOTCHIVER: For clarity, Your Honor ---

21 THE COURT: Did I?

22 MR. HALVERSEN: No, sir, you did not, Your Honor.

23 MR. SLOTCHIVER: What's unfair, Judge, is that they
24 waited and waited and waited before they gave us documents.
25 They gave us documents and we -- they gave us documents. And

1 we had to tell them we need more or they are not correct.
2 They gave us more. We said they're not correct. They gave us
3 more. We said they're not correct.

4 Last week is the first time we took the deposition of
5 their CPA and learned from their CPA that Dr. Schimpf's own
6 financial records are not reliable. That's the first time we
7 could have known about getting an expert.

8 They keep saying we could have asked about it before.
9 Judge Goodstein said we couldn't. Judge Goodstein said we
10 were not entitled to the information until after the
11 mediation. Then we had an order but they didn't give us what
12 she had said in court. They held back. We had to go back to
13 Judge Goodstein, clarify the order; which she did it.

14 So what they're saying to you is, hey, because of all of
15 the circumstances we don't really have to give this
16 information. And then we said, all right, now that we've got
17 it why don't you take a -- take the deposition. They said,
18 no, they're not going to take it. They just filed a motion to
19 exclude it. Meanwhile, there's nothing we could have done.

20 THE COURT: Well, I'm not going to put this guy through a
21 deposition. He was just asking if he could take it. I mean,
22 you can do whatever you want. But, no, I'm not going to put
23 this man through it.

24 So what we're going to do is we'll wait until we get to
25 that witness and if we have to have the -- I'll rule on it at

1 that point in time. And maybe we'll have to do the exact
2 thing, just proffer the testimony and give them an opportunity
3 to cross-examine him before we put it in front of the jury.

4 MR. SLOTCHIVER: Thank you, sir.

5 MR. HALVERSEN: Thank you, Your Honor.

6 THE COURT: All right.

7 I don't want Madame Clerk or court reporter or anybody to
8 have to stay to mark these exhibits.

9 Can you give them the stickers and just say put them on
10 there?

11 THE COURT REPORTER: Sure. Sure.

12 THE COURT: Come get your stickers. Don't leave until
13 it's all marked. All right? And I want to see y'all in the
14 back real quick, please.

15 [Whereupon, jury trial adjourns 8/26/19, 5:22 p.m.]

16 [Whereupon, resume 8/27/19, 9:26 a.m.]

17 MR. SLOTCHIVER: Good morning.

18 THE COURT: Good morning.

19 MR. SLOTCHIVER: The only issue, if you want to take it
20 up now instead of later, is we plan to play the deposition of
21 Dr. Kalus later on. It was a de bene esse deposition that he
22 gave.

23 THE COURT: Okay.

24 MR. SLOTCHIVER: Our inclination is to put everything in.
25 The defendant's have given us some objections. We do not

1 agree with their objections. We agree with one, to redact it.
2 And we will go ahead -- we have a computer program, so we can
3 take out the part on the video that we need to. If you want
4 to take it up now, we can. If you want to take it up at a
5 break. However you want to do it.

6 THE COURT: When do you think you're going to try to play
7 it?

8 MR. SLOTCHIVER: It'll be the fourth witness today. My
9 guess is cross-examination will probably go into lunch.

10 MR. SMYTH: I don't know. I am probably -- forty-five
11 minutes, thirty minutes ---

12 MR. SLOTCHIVER: Okay. So my guess is it will be -- it
13 will be right before lunch or right after lunch.

14 THE COURT: All right. We'll just take it up at a break,
15 then.

16 MR. SLOTCHIVER: Okay. Okay. Thank you, sir.

17 THE COURT: All right.

18 MR. SLOTCHIVER: We can move things around a little bit
19 if we need to.

20 THE COURT REPORTER: And I have not been given a list of
21 any exhibits that they're agreeing to, other than the ones
22 that were admitted yesterday.

23 THE COURT: All right. So we have got Plaintiff's 1
24 through 21 already?

25 THE COURT REPORTER: 1 through 22.

1 THE COURT: Twenty-two.

2 THE COURT REPORTER: Twenty-two.

3 THE COURT: And did y'all mark all the exhibits?

4 MR. SLOTCHIVER: We were -- we have -- the ones I plan to
5 put in this morning have been agreed to, 23 through 25.

6 THE COURT: All right. Let's go ahead and give it to the
7 court reporter so she can put it all down, so when we go
8 through you can just simply just ---

9 [Whereupon Plaintiff's Exhibit Number 23, medical bills,
10 marked for identification and admitted]

11 [Whereupon Plaintiff's Exhibit Number 24, notes, was
12 marked for identification and admitted]

13 [Whereupon, Plaintiff's Exhibit Number 25, calendar, was
14 marked for identification and admitted]

15 MR. SMYTH: Would you like me to do that with what I am
16 going to use as well?

17 THE COURT: Sure.

18 MR. SLOTCHIVER: And I haven't seen -- let me see what
19 you have. You are not going to mark the same exhibit I have
20 already marked?

21 MR. SMYTH: Yeah, just because it is only portions of it.
22 So I have already got it pulled out so I can use it. But it
23 is the same document.

24 MR. SLOTCHIVER: I just worry that is confusing, if we
25 hand them two of the same document.

1 THE COURT: What he is saying is that -- I thought y'all
2 were going to mark one in bulk and then whatever you are going
3 to extract from there you would mark as your actual exhibit.

4 MR. SLOTCHIVER: I am scratching the entire document I am
5 going to hand in. I want to talk about it all.

6 THE COURT: Okay. Then you need to mark -- that is fine.
7 But we were talking about for some of the bigger medical
8 records what he is indicating is that I would mark the big
9 boys as a court exhibit and he has got just the exhibits that
10 he wants to utilize already extracted out.

11 MR. SLOTCHIVER: Right, and I am fine with that. My only
12 concern was if we hand the jury, for example, this packet
13 [indicating] and he hands the jury half of this packet and it
14 looks the same, they are going to get confused down the road.
15 I would rather him work off of the one that I give that has
16 everything. Because otherwise when they go back into the jury
17 room they are not going to -- if they see this cover page and
18 that cover page, they think they are the same but they are
19 not.

20 MR. SMYTH: I am going to highlight on my versions. So,
21 you know, they may be a little bit different; but it is the
22 same document.

23 THE COURT: Well, why don't we just use the same
24 document?

25 MR. SMYTH: Well, I can; I just don't want to highlight

1 on his version of it if that is objectionable. So that's ---

2 MR. SLOTCHIVER: He can highlight on my version.

3 THE COURT: Okay. You can highlight on it then. So
4 let's just go through it and make sure which ones that you are
5 going to put in and which ones are redundant.

6 MR. SMYTH: So this top one I think is the only one that
7 is redundant, so that's ---

8 MR. SLOTCHIVER: Okay.

9 MR. SMYTH: That is like three pages out of there. So
10 that is her history form. She did it for Sweetgrass.

11 MR. SLOTCHIVER: Okay.

12 MR. SMYTH: And these are the informed consent forms.

13 MR. SLOTCHIVER: We have already put those in.

14 MR. SMYTH: Those are all in?

15 MR. SLOTCHIVER: The informed consents, yes.

16 MR. SMYTH: Also -- I mean all five of them or whatever?

17 MR. SLOTCHIVER: Yeah.

18 MR. SMYTH: That makes that easy. Then this one is a
19 summary that we did of the services that she got in the year
20 leading up to surgery, so 2013, 2015.

21 MR. SLOTCHIVER: We are not going to agree to that one.

22 MR. SMYTH: Okay.

23 [Off the record momentarily for attorneys to confer
24 regarding exhibits]

25 MR. SMYTH: So do you want to put on the record that we

1 have stipulated to the defense ---

2 THE COURT: Yes, please, so in that way you don't have to
3 go through the qualification of it; it is already in evidence.

4 MR. SMYTH: Do you want me to identify each document or
5 do you just want me to give you numbers?

6 THE COURT REPORTER: Just the numbers.

7 MR. SMYTH: We have stipulated by agreement of counsel
8 that defendant's exhibits one through twenty-five are admitted
9 without objection.

10 MR. SLOTCHIVER: Well, which one -- hold on. One is not
11 admitted. We have ours in and you were going to write on
12 ours, remember? In other words, the ones that you ---

13 MR. SMYTH: It is the same thing.

14 MR. SLOTCHIVER: The ones that we already have in we are
15 not going to put in twice.

16 MR. SMYTH: Right, well, this is the format I want to
17 have it in to be able to use it. So it is the same
18 information. I won't send the duplicate back. How about
19 that?

20 MR. SLOTCHIVER: As long as we don't send the duplicate
21 back, I'm fine.

22 THE COURT: All right. Mr. ---

23 MR. SLOTCHIVER: Are they in evidence now?

24 THE COURT: Yes.

25 [Whereupon, Defendant's Exhibit Number 1, notes, marked

1 for identification]

2 [Whereupon, Defendant's Exhibit Number 2, online patient

3 history, marked for identification]

4 [Whereupon, Defendant's Exhibit Number 3, consent for

5 eye, marked for identification]

6 [Whereupon, Defendant's Exhibit Number 4, consent for

7 breast, marked for identification]

8 [Whereupon, Defendant's Exhibit Number 5, notes, marked

9 for identification]

10 [Whereupon, Defendant's Exhibit Number 6, consent for

11 lipo, marked for identification]

12 [Whereupon, Defendant's Exhibit Number 7, consent form,

13 marked for identification]

14 [Whereupon, Defendant's Exhibit Number 8, \$6,830.91

15 facials, marked for identification]

16 [Whereupon, Defendant's Exhibit Number 9, operative

17 record, marked for identification]

18 [Whereupon, Defendant's Exhibit Number 11, medical 0328,

19 marked for identification]

20 [Whereupon, Defendant's Exhibit Number 12, medical 0330,

21 marked for identification]

22 [Whereupon, Defendant's Exhibit Number 13, notes, marked

23 for identification]

24 [Whereupon, Defendant's Exhibit Number 14, notes, marked

25 for identification]

1 [Whereupon, Defendant's Exhibit Number 15, head-wrap,
2 marked for identification]
3 [Whereupon, Defendant's Exhibit Number 16, consent form,
4 marked for identification]
5 [Whereupon, Defendant's Exhibit Number 17, medical note,
6 marked for identification]
7 [Whereupon, Defendant's Exhibit Number 18, medical note,
8 marked for identification]
9 [Whereupon, Defendant's Exhibit Number 19, Medical
10 RH00221, marked for identification]
11 [Whereupon, Defendant's Exhibit Number 20, Medical
12 RH00237, marked for identification]
13 [Whereupon, Defendant's Exhibit Number 21, Medical
14 RH000091, marked for identification.)
15 [Whereupon, Defendant's Exhibit Number 22, Medical
16 RH00190, marked for identification]
17 [Whereupon, Defendant's Exhibit Number 23, Medical
18 RH00071, marked for identification]marked for identification]
19 [Whereupon, Defendant's Exhibit Number 24, photo, marked
20 for identification]
21 [Whereupon, Defendant's Exhibit Number 25, photo, marked
22 for identification]
23 [Whereupon, Defendant's Exhibit Numbers 1 through 25,
24 were admitted into evidence]
25 MR. SLOTCHIVER: Well, why don't we leave them up here in

1 case I want to use them.

2 THE COURT: Ms. Whitfield, if you will take the stand,
3 please?

4 MS. WHITFIELD: Excuse me?

5 THE COURT: Will you take the stand, please?

6 MS. WHITFIELD: Oh, certainly.

7 THE COURT: All righty.

8 MS. WHITFIELD: I'm sorry.

9 MR. SLOTCHIVER: Judge, if these documents are in
10 evidence am I free to use them during my examination?

11 THE COURT: He ---

12 MR. SLOTCHIVER: They are in evidence at this point.

13 MR. SMYTH: I am trying to work ahead of him, but
14 obviously some of that stuff is stuff that I want to use for
15 cross; so we were trying to be efficient, so I don't know that
16 it is fair to necessarily grab my documents that I am going to
17 use ahead of time.

18 THE COURT: I don't understand what does he have that you
19 don't have?

20 MR. SLOTCHIVER: Well, he is putting in some documents,
21 and the only -- he is putting in some document that we have
22 not put in. He is putting in some different pictures than we
23 have put in. So in my case in chief I would like the
24 opportunity to go ahead and ask my clients -- my client about
25 them.

1 THE COURT: No. If he wants to put them in, he is going
2 to put them in.

3 MR. SLOTCHIVER: Okay.

4 THE COURT: All right. Ms. Whitfield you are still under
5 oath, okay?

6 THE WITNESS: Yes, sir.

7 THE COURT: All right. As to the objection that we took
8 up yesterday concerning the statement by the priest, it is not
9 considered hearsay in my opinion. It's an out-of-court
10 statement but it's not being offered to prove the truth of the
11 matter asserted, so I am going to let her testify to it.

12 Your objection is noted for the record.

13 Bring me the jury, please, Mr. Robinson.

14 MR. SMYTH: So I'm clear, when that comes out I don't
15 need to object again?

16 THE COURT: You're all -- we hashed it as much yesterday,
17 but that's just my final ruling.

18 MR. SMYTH: Yes, sir.

19 THE COURT: So you're good to go. You don't need to
20 object to it again.

21 MR. SMYTH: Thank you, Your Honor.

22 [Whereupon, the jury enters the courtroom 8/27/19, 9:35
23 a.m.]

24 THE BAILIFF: Your Honor, the jury is complete.

25 THE COURT: All right. Well, I hope y'all had a

1 wonderful evening. I want to thank you so very much for being
2 here on time. As I indicated, we will try to start right on
3 9:30 as we can, so I appreciate you being here.

4 Mr. Slotchiver, you can continue with your examination.

5 MR. SLOTCHIVER: Thank you, Your Honor. May it please
6 the Court.

7 JEANE WHITFIELD, Having Been Previously Sworn, was Examined
8 and Testified as Follows:

9 RESUME

10 **DIRECT EXAMINATION BY MR. SLOTCHIVER OF JEANE WHITFIELD:**

11 Q. Jeane, when we took a break yesterday, you were starting
12 to testify as to what happened once you got to Roper Hospital.
13 And you had talked about being in a hallway. Can you walk us
14 through that?

15 A. Okay. When I -- after they took me out of the emergency
16 room I -- they put me in a room. And the next morning, very
17 early, they -- an orderly came and took me to the holding room
18 before the operating room, and he told me we'd back -- he'd be
19 back in few minutes. I'm like, okay.

20 And so this room had light yellow walls and had a big
21 wooden border on the door. And I'm just -- I'm laying there
22 waiting, and all of a sudden a priest walks in the room. And
23 when he came in he goes, Ms. Whitfield, can I -- can I please
24 pray over you.

25 And I'm like, no, I'm okay. Then he goes, no, I really

1 need to pray over you. And I'm like, okay, but I'm not
2 Catholic. And he goes -- he goes, it's okay, just please let
3 me pray over you. And I'm like, okay.

4 And so he takes my hand, he takes his Bible, puts his
5 Bible on my stomach, puts my hand on the Bible, puts his hand
6 on mine. He says the 23rd Psalm. He said the Lord's Prayer.
7 And he says, Lord I consecrate her to you.

8 And then I -- then the orderly started to show back up
9 and I could realize was, oh, my God, I've been given last
10 rites. And then all of a sudden I was -- all I could do in my
11 head was scream, oh, my -- I've got a kid, I've got -- I've
12 got a daughter, I can't be given last rites.

13 And as they took me down the hallway and the lights kept
14 going overhead, all I could think of is please don't put me to
15 sleep, please don't put me to sleep, I don't want to -- I
16 don't want this to be it, please.

17 And I got in the operating room, where Dr. Kalus was in
18 there -- well, everyone was in there -- to put me to sleep to
19 do the surgery; and all I could think of was I don't want to
20 die, please, God, not -- this can't be it, I have a daughter,
21 I have a family. And that was where my mind was at that time.

22 Q. Has this had a significant effect on you? Or let me ask
23 it differently. What effect has that experience had on you
24 into the future?

25 A. I never knew what it would be like to have that done.

1 And when you think in your mind this is it, and you honestly
2 think, oh, my God, this is it, you're going to -- what, after
3 all I've been through, that that -- and that weekend. I was
4 like, no.

5 And it really -- it really did mess with me. It -- I was
6 like, oh, my God, oh, my God, oh, my God. That's all I could
7 do, please, God, I don't want to go to sleep, I don't --
8 please don't put me to sleep.

9 Q. Have you gotten completely over it?

10 A. This is five years later and I still see it with such
11 clarity that it still -- it's still bothersome. I know I'm
12 not dying, I know I didn't die; but at that moment I still
13 feel it just as I felt ripping open. I knew it was there. It
14 was real. It was palpable. I still -- that's why I choose
15 not to remember it or think about it.

16 Q. We're going to talk in a little while about your
17 experiences with therapy and Dr. Marcino. But is this part of
18 the issues that you have when you deal with Dr. Marcino?

19 A. Yes.

20 Q. Jeane, Dr. Kalus did a procedure on you; correct?

21 A. Correct.

22 Q. And what was the procedure?

23 A. He was removing that implant. It had to come out. The
24 breast was busted up. It had infection and necrosis, had --
25 it had to come out. I

1 But he said my body was too weak to take the other one.
2 And whenever he took it out, it was -- it was just a -- I
3 can't say another word except for a mashed biscuit is what it
4 ended up looking like.

5 Q. We are going to walk through the timeframe of this
6 surgery and through the other surgeries you've had.

7 A. Correct.

8 Q. Do any of these photographs represent the condition you
9 were in after that first surgery?

10 A. Let's see. This is the second one right here. This is
11 after -- right after the first surgery, because it still has
12 the stitches on both breasts. Because there was openings on
13 the other breast also.

14 Q. Let me put this on the screen, and let's talk about this
15 for a moment. So this is a photograph of your condition ---

16 [Plaintiff's counselors confer]

17 Q. --- after the first surgery?

18 A. Correct. That is where he had to take out that implant.
19 It was still all swollen. And he had to reattach the areola
20 and the nipple because it had receded so far up in my chest
21 with that -- with the fact it was not tended to. And then he
22 had to come back down and close it up all tight.

23 But on the other sides he has -- he had stitches here
24 [indicating] and stitches around the other areola, because
25 that too had openings.

1 Q. This was Exhibit Number 10.

2 A. That was on -- that's what it looked like probably the
3 two or three days after the July 14th surgery.

4 Q. Walk me through the other procedures that you've had.
5 And if any of the photographs that you have reflect them, if
6 you will let me know.

7 A. If you had that one still up there, I had to live with
8 that extremely large breast on one side and the divot -- well,
9 the mashed biscuit, sorry, on the other, for eight months. I
10 had to wait until October -- let's see. It was March, until
11 March, to have that one taken out so my body could heal.

12 Q. Jeane ---

13 A. I --

14 Q. Go ahead.

15 A. I had to go to that Fredrick's of Hollywood to buy those
16 really enforced bras so I could stuff this side with those
17 silicone things you find at the Wal-Mart that -- you know,
18 enhancers or socks, whatever I could do, just to walk outside
19 and pretend to be normal.

20 Q. You said divot. Was it that he removed the implant, or
21 did he have to go into the tissue?

22 A. He removed the implant. And obviously he went in and had
23 to clean it out. It was full of infection and necrosis.

24 Q. Tell me what happened next.

25 A. Well, that -- we got to February of 2015. The last three

1 days of February I recall definitely where I had -- I was
2 preparing for my next surgery to remove the larger breast,
3 because (A), there was not enough skin to put another breast
4 in; and this one, since it already had all those -- it was
5 square-like on the bottom. It was -- no, it wasn't --
6 wasn't -- wouldn't match.

7 But I called over to Sweetgrass Plastic Surgery to
8 request my records, because Dr. Kalus needed them in order to
9 do -- to find out what implant size, what was in that other
10 breast. Because I never got a mentor card to say what my
11 implants were, the size, the implants' serial number.

12 It's just like a serial number you would find on a
13 pacemaker and a knee replacement. They have to give you
14 those. I was never given those.

15 I did not know what size was put in me. I did not have
16 the serial numbers to them. My first plastic surgeon did
17 that. This plastic surgeon did not.

18 So Dr. Kalus said call over there, get your records, I
19 need to see what's in there. Whenever I called over there I
20 spoke to someone and -- I spoke to someone and said I needed
21 to get my medical records. And that was about -- probably
22 about noon.

23 And the person at Sweetgrass said, okay, not a problem,
24 they'll be ready tomorrow. Called back the next day. I was
25 getting ready to go over, and just to make sure they were

1 there, so I didn't make that drive for no reason. The person
2 was more hesitant saying I needed to speak with the office
3 manager about those records. But she assured me I would be
4 getting them.

5 Well, the very next day, that's the third day in the end
6 of February, the office manager related to me that I would not
7 be receiving those records, as they were sent over to their
8 attorneys; all of my records were sent to their attorneys, for
9 review. And ---

10 Q. Is this Vicky -- is this Vicky Tolbert?

11 A. Vicky Tolbert. They were sent to -- may I use the name
12 of the person that she said she sent them to, or is that a
13 hearsay?

14 Q. If she told you this, you can tell.

15 A. She told me they've been sent to our attorneys, Josh
16 Whitley of Smith Whitley, my entire record was, for them to
17 review them before I could have them for my surgery that I
18 needed to have. And I told her I need these, they are mine,
19 I've got to have them, my doctor has to have them. Nope,
20 you're not getting them.

21 And so I called over to Dr. Kalus' office, in semi-
22 hysterics, saying they are not giving them to me, they are not
23 giving them to me. And he assured me that by the -- by the --
24 before the surgery happened, I would be getting -- he would be
25 getting those records, to assuage my fears and calm me down.

1 And then in -- farther into March, I went in to
2 Charleston Surgical Center, where Dr. Kalus removed the other
3 breast. The other breast had issues with it -- with it, also.
4 But that was March.

5 And then he wanted my body to rest again. Because it was
6 even more of a divot. And so I waited. I changed my clothing
7 style where I wore baggy things, just didn't go out or
8 anything. I kind of shrunk against the wall. And I just
9 waited, waited for the next surgery, which was in October
10 where he and I discussed the next best thing to build up the
11 chest wall was to do fat-grafting to at least get me to an
12 even stage to where we could discuss the next stage. I had to
13 be evened out first.

14 Q. What is your understanding of fat-grafting?

15 A. Fat-grafting is where he does -- he lipos all the extra
16 fat off, revolves it. It's call fat revolve. And they take
17 your own body's fat that your body won't reject and they take
18 it from areas and they put it in there. Because it's safer.
19 It's really beautiful fat that actually your body loves, your
20 body made. And so that's where I am now. And then I will be
21 with Dr. Kalus again to finish the next stage.

22 Q. Well, before we move forward, what is your plan with Dr.
23 Kalus for the future?

24 A. He and I are going to discuss it. I have -- I have
25 options. We have discussed options. We have not settled on

1 anything. It's not in stone. He wanted me to take a break
2 and get back to being happy again, think about it, get my body
3 back to being stronger again.

4 And with the help of Dr. Marcino talking me through
5 things, and about all of my insecurities and my body-conscious
6 way I was thinking, I was more -- I totally lost all my
7 confidence. And he wanted me to get back. And he was in --
8 he was in touch with her. And he wanted me to get back into a
9 place where I'd be ready to have that discussion again. And
10 that's where we're at.

11 Q. Have you been pleased with the treatment of Dr. Kalus?

12 A. He saved my life. He is still -- every time I see him,
13 he -- I get hope. And he gives me a lot of hope. And he --
14 we're walking through the things out there that can be done to
15 give me back my woman's form.

16 Q. Let me show you some of the other pictures that we --
17 that I have handed you. I am going to put them on the screen.

18 A. Yes. This is -- this is the one where he had to go in
19 and take out the left breast because -- you'll have to see his
20 reports in here from him, what he saw. But the -- that is
21 actually what -- yeah. That's what it looked like.

22 Q. What's the next one, Jeane?

23 A. The next one is -- this is with the fat-grafting to
24 bring -- to bring them up to normal. And this is ---

25 Q. When you say up to normal, do you mean to make them

1 consistent size?

2 A. Correct. That's from the procedure. There [indicates]
3 is where the thing is pumping the fat was in. And this
4 [indicates] is where I am now.

5 It has now settled, so it has gained a form. But if you
6 were to remove my shirt, you would see that the nipples face
7 different ways, and so I layer my clothing if I don't have to
8 wear something -- I have to wear something over it, these
9 little -- they're called -- they're called Low Beam. They're
10 these little like -- it's like -- it's almost like plastic.
11 And you stick it -- stick them to you so nobody can see one's
12 looking that way and one's looking that way [indicating].

13 Because it has been remarked upon in outings that did you
14 see those. And I heard it. The whole family heard it. On
15 the day I had on a black shirt, that I thought I was in a
16 group of friendly people, did you see -- did you see the
17 nipples on that chick? Exactly.

18 MR. SMYTH: Objection, Your Honor. Hearsay.

19 THE WITNESS: Okay. I'm sorry.

20 THE COURT: That's okay. Just don't say what someone
21 else said, please.

22 THE WITNESS: Okay. I'm sorry, sir. I'll try not to.

23 THE COURT: That's okay.

24 MR. SLOTCHIVER: So, Jeane, when he objects, give the
25 judge an opportunity to answer. Okay?

1 THE WITNESS: I'm sorry. I just ---

2 MR. SLOTCHIVER: That's okay. I know it's not -- but let
3 me ---

4 THE CLERK: I don't ---

5 MR. SLOTCHIVER: Before the court reporter kills me for
6 not putting in records, let me clarify for her which ones
7 we've talked about so far.

8 The first picture we talked about a moment ago where they
9 had taken out the left implant, was Plaintiff's Exhibit Number
10 11.

11 The second picture that we talked about, which was after
12 the fat grafting, was Plaintiff's Exhibit Number 12.

13 THE WITNESS: In October.

14 MR. SLOTCHIVER: And the third one that we talked about
15 that we haven't put in yet, I'm going to show right now, is
16 Plaintiff's Exhibit Number 13.

17 Q. Jeane, is this more or less today?

18 A. Yes. It has settled more. Because that was right after
19 the surgery. You can see that. It has settled more. But
20 it's pretty accurate. It's -- yeah.

21 Q. And so far coming from ten years ago?

22 A. Dr. Kline put those in. They were beautiful. I would
23 never have touched those ---

24 Q. And right now we're referring to Exhibit Number 1?

25 A. Correct. Over a scar-tissue issue.

1 Q. Jeane, you asked for the miss -- for the records to be
2 given; and you said they weren't given to you, they were sent
3 to counsel. Have you ever seen those records?

4 A. I have never seen those records.

5 Q. We'll have testimony later on about that.

6 Tell me about -- before we move on to Dr. Marcino tell me
7 about the -- tell me about the physical aspects of the
8 surgeries. Were they -- were they painful, were they ---

9 A. Yes.

10 Q. --- minimal? How did they affect you? How -- tell us
11 that.

12 A. How they affected me?

13 Q. Well, tell me about the pain associated with those
14 surgeries, if any.

15 A. It's more anguish because of the adjustments I've had to
16 make in my life and step back from my life. Because what, in
17 my mind, if you saw my first set of breasts, I was -- in my
18 mind, I was perfect. This was debilitating to my mind and my
19 psyche, to where I didn't want to go out. I wish I could have
20 worn a burka. I wish they were in style because I wanted to
21 hide and shrink back against the wall.

22 I was involved with so many things, going to help like
23 the Animal Society. I had to put on this -- these big, grand
24 shows for the Animal Society. And the first one I went to, I
25 was all bandaged up and I had to wear socks stuffed into one

1 of those -- what is it -- the -- oh, gosh. I'm sorry.
2 Fredrick's of Hollywood steel bras in order to make me hold
3 out so people wouldn't see -- they wouldn't -- they wouldn't
4 see, they wouldn't know, how destroyed I was. I wanted to
5 look normal. And I got through the first one.

6 The next one, for the second year -- people think it's
7 just one night. It starts in March and doesn't -- and all the
8 promotions, nothing ends until the middle of October. So I
9 had to be there. And so the next year I didn't go to the
10 dinners, I would slink back or I would -- I worked in the
11 kitchen instead of being out in the front where I should have
12 been.

13 I just -- I receded from life. I just -- I -- my life
14 wasn't mine anymore. And it really bothers you when a
15 defining body part -- I haven't worn a bathing suit since that
16 day, since June 6th. I swim fully clothed, if I swim at all,
17 being in shorts and baggy shirts.

18 Q. You've got a pool at your house, don't you?

19 A. I have a pool at my house. I haven't been in my pool. I
20 don't go into. Because I don't want to go to it, because
21 someone might see. We're right on the water. The boaters go
22 out. I can't be seen. I can't be seen. And I know that
23 people say when they look at me, you look normal, you look
24 great; but it's not ---

25 MR. SMYTH: Objection, Your Honor.

1 A. It's ---

2 MR. SMYTH: Hearsay.

3 A. It's what I see.

4 THE COURT: All right. I'll sustain the objection.

5 A. I -- it bothered me more and more. I had to pull back
6 from life more and more. The last time I was intimate with my
7 husband was June 5th, 2014, because ---

8 Q. Why is that?

9 A. Huh?

10 Q. Why?

11 A. I looked like Frankenstein. It really bothered me to go
12 from being -- I didn't want him to see me. I didn't want him
13 to see it. I would take a shower.

14 Again, I've got a big glass-enclosure shower. I would
15 change in my closet. I'd wait until he went to work to take
16 my shower. I'd wait until he went to sleep to take my shower.
17 I'd change in the closet. I would change -- and then I
18 started layering things. He was like, honey, you're -- what's
19 going on. And it just messed with me. I have not been
20 intimate with my husband since -- for five years.

21 Q. Jeane, let me show you a few more documents. We're
22 almost done.

23 A. Okay. I'm sorry.

24 Q. I'm going to show you what's been marked as Plaintiff's
25 Exhibit Number 23. It's already into evidence, I believe.

1 And I am going to ask if this is an accurate calculation of
2 the medical bills that you have incurred since you took on the
3 venture to have the pain go away from your -- what we
4 discussed.

5 A. It took -- for the pain to leave the side of my abdomen
6 and the scar-tissue issue, I have spent \$188,382.80.

7 Q. Is that an accurate amount?

8 A. That's accurate.

9 Q. I'm going to show you ---

10 A. Can I say something about that?

11 Q. You may.

12 A. I had a surgery right after my last deposition with Mr.
13 Smyth, in October of 2018; and I -- when I was in that
14 deposition I really could not focus on that deposition. I was
15 in excruciating pain. The very next day, I went to Roper St.
16 Francis Mt. Pleasant and had thirteen inches of colon and my
17 appendix removed because I had been suffering from
18 diverticulitis and diverticulosis ever since I walked into Dr.
19 Domm's office. And once that was done, I didn't have the -- I
20 didn't have that pain anymore.

21 Q. Jeane, I'm going to show you what's been marked as
22 Plaintiff's Exhibit Number 24 and ask you to tell the ladies
23 and gentlemen of the jury what this document is.

24 A. Oh, this. Yesterday I told y'all whenever I got home
25 that I -- well, I have a dry-erase board in my bathroom. I --

1 when I got home on the 10th, after be told -- being told a
2 little something-something was done to my chin, neck, I wrote
3 the word chin and neck on my board.

4 I handwrote June 6th, June 10th, and I just wrote -- I
5 wrote dates on there, trying to remember -- I wanted to
6 memorialize the things I'd heard and the things I'd seen. And
7 I put notes all over that board. And the beginning of -- and
8 I pretty much walked away from that board. It was all
9 scattered all over.

10 I wanted to memorialize, I wanted to remember things,
11 because I was going through so much with these -- what I was
12 going through with physically and mentally and emotionally.
13 And so in early 2015 my husband was going to erase the board.
14 And I went, no, oh, my gosh, no. And so I got in there and I
15 wrote down everything that was on the board, every note; and
16 then I tried to put it into a sequence to what I could keep
17 memorialized in my mind, is this how it happened, is this what
18 happened, and how do I go forward with what has happened.

19 But this is so incomplete. It -- I did not -- I just did
20 not put phone records, I did not put pictures in this.

21 Q. Would it ---

22 A. These were just words.

23 Q. Would it be -- I'm not trying to interrupt. But would it
24 be fair to say that these are random thoughts that ---

25 A. These are random.

1 Q. --- you placed on there?

2 A. This is all random musing. This even has in here, you
3 know, Dr. Schimpf told me when he said, oh, yes, he could do
4 these things, I was going to be bright and shiny for my high-
5 school reunion, I never got to go to.

6 And I missed my mother, because during all that time --
7 my mother dying because -- and during all that time I couldn't
8 wear the seatbelt to get to her. Those things are in here. I
9 wrote down the words. I tried to put as much in here. And
10 even some of the dates are wrong. They're a few days off.
11 And just trying to remember.

12 Q. Did you -- did you do this for litigation, or did you do
13 this for your own memory?

14 A. No. No. There was not even -- when I called to get my
15 records from Dr. Schimpf's office, I still had no lawsuit
16 filed or planned. And as you can see with the money that I've
17 already spent in it, I could have just gone and gotten
18 something done.

19 Q. By the way, on this, I didn't speak -- and I wanted to
20 make sure it's clear for the jury. And I don't think you
21 misspoke. I think --- this bill here [indicating] includes --
22 on the bottom line it says Ram Kalus, M.D. And it says here,
23 just to be -- it says, on the future surgery quotes.

24 A. Correct.

25 Q. Okay. So the 188 does include the future surgery?

1 A. Yes. It -- that's whatever it takes to get me there. I
2 could have gotten this done, but I -- this has been such a
3 long process. I didn't even have -- didn't have any -- I just
4 wanted to walk away from it.

5 Q. Jeane, are you happy with the way your chin looks now?

6 A. No. It was my father's chin. No.

7 Q. Is it now?

8 A. No.

9 Q. I'm going to show you another document which we've
10 introduced into evidence, which is Plaintiff's Exhibit 25. I
11 think there's two copies of it. It is the same document,
12 Exhibit 25. What is this exhibit? And I will put it on the
13 screen.

14 A. Oh. These are my call logs.

15 Q. I'm going to put ---

16 A. These are ---

17 Q. I'm going to put it on the screen so that you can see it
18 while we're talking.

19 A. Okay. Yeah. These are my call logs, as many times as I
20 called begging to be seen. And in this diary I do write neck
21 and I do write chin. Actually, it's not a diary; it's a
22 journal, because a diary is an every ---

23 MR. SMYTH: Objection, Your Honor. Nonresponsive.

24 THE COURT: I'm sorry?

25 MR. SLOTCHIVER: I think she is ---

1 THE COURT: Just restate ---

2 MR. SLOTCHIVER: --- answering my question.

3 THE COURT: Restate the question.

4 MR. SMYTH: Again ---

5 THE COURT: Restate the question.

6 MR. SLOTCHIVER: I asked her what this was, and she's
7 explaining what it is.

8 THE COURT: Okay.

9 A. Oh, that -- I can explain this; right?

10 Q. Yes.

11 A. This is my call log. I called -- starting on the 11th
12 of -- when the first stitch came open and the gooey part is
13 showing, I called all the way through and I got -- if someone
14 got on the phone or called me back, oh, that's a natural
15 progression of healing, we can tweak it later. Tweak is a
16 famous word here. And, um -- no.

17 Q. You'll see on the side it says Exhibit 7. That's not
18 from this. That's from the deposition that was taken;
19 correct? This is a copy of the document that was used for the
20 deposition?

21 A. Yes, I suppose so.

22 Q. Just so you understand. What are the numbers there?

23 A. Those phone numbers there are phone numbers -- the very
24 top one is Sweetgrass Plas- -- it is O'Neill Sweetgrass
25 Plastic Surgery. The two others in the center are some

1 obscure cell phone numbers they wanted me to use, which I
2 found very sketchy.

3 And then there's another cell phone number, the 367; I
4 believe that might be Dr. Schimpf's personal phone number.
5 That's the one he called me on the 7th of July and told me to
6 come down to Sweetgrass Plastic Surgery, O'Neill, after the
7 Fourth of July week. And I thought, oh, my God, I'm going to
8 be seen, yah, I'm going to be seen. And I had two
9 prescriptions left for me. And that was it. Nobody saw me.

10 Q. Jeane, let's talk ---

11 A. Those are their numbers.

12 Q. Let's talk -- we're wrapping up. Let's talk for a moment
13 about how you feel now and what you are doing psychologically
14 to maintain yourself.

15 A. I -- psychologically, I have a -- I have a physician.
16 Her name is Dr. Sara Marcino. She has been my psychologist
17 for a long time. I had to -- she's helped me put my life in a
18 box and -- the things that I'm dealing with. And we call it
19 putting it in a box and putting that box away, ever since --
20 every since my rape, from forty years ago; and now I'm having
21 to deal with having to tell my whole family about it, because
22 it was in that box until it was brought out by the other side.

23 Q. Your family had not known about the rape until then?

24 A. No. I did not -- I don't -- I don't put anything on my
25 family. I'm supposed to be the strong one. So I hired

1 somebody, just like a dentist if you have a broken tooth, or
2 an ophthalmologist if you have a busted eye, you go to -- you
3 go to the person that fixes it.

4 I've been with Dr. Marcino for years and she's helped me
5 deal with things in my life. And that -- putting them in a
6 box so I can move on. She has helped me with my suicidal
7 thoughts from this, because I just didn't fit in life when --
8 what I thought my value was. And you -- a lot of women think
9 this is what their worth is, and all of a sudden I was
10 worthless and not worth being looked at to fix. So, yes. And
11 then I had to -- I just had to deal with things, how to get
12 through things; and she's helped me.

13 Do you need this [exhibit]?

14 Q. Put it here. Yes.

15 [Off the record momentarily]

16 A. And I wrote that. Yes, I did.

17 Q. The journal? Okay.

18 A. It's journaling. It's different from diary.

19 Q. Right.

20 MR. SLOTCHIVER: Jeane, I'm going to stop asking you
21 questions now.

22 I believe -- let me take one quick moment, if I may,
23 Judge. I believe I'm done.

24 THE COURT: All righty.

25 MR. SLOTCHIVER: I am. If you'll answer any questions

1 that Mr. Smyth has for you.

2 THE WITNESS: I couldn't hear you.

3 MR. SLOTCHIVER: If you'll answer any questions that Mr.
4 Smyth has for you.

5 THE WITNESS: Okay.

6 THE COURT: All right. Mr. Smyth?

7 MR. SLOTCHIVER: Thank you, Your Honor. May it please
8 the Court?

9 THE COURT: Absolutely.

10 MR. SLOTCHIVER: Rearranging furniture here, Your Honor.
11 Good morning, Ms. Whitfield. How are you?

12 THE WITNESS: I'm fine.

13 **CROSS-EXAMINATION BY MR. SMYTH OF JEANE WHITFIELD:**

14 Q. Prior to seeing Dr. Schimpf, you had already undergone
15 several cosmetic surgeries, had you not?

16 A. Correct.

17 Q. You'd had breast implants WITH Dr. Kline?

18 A. Correct.

19 Q. You'd gone for liposuction with another physician in
20 town?

21 A. Dr. Widenhouse, yes. Correct.

22 Q. And you have regular facials and laser treatments and
23 Botox injections?

24 A. Yes.

25 Q. All right. And ---

1 A. Topical laser treatments for rosacea.

2 Q. All right. But Botox is an injection with a needle?

3 A. Correct. Right around here [indicates].

4 Q. Right. And so the surgery that you had with Dr. Schimpf

5 was not your first exposure to plastic surgery, was it?

6 A. Correct.

7 Q. You testified yesterday that you did not go to Dr.

8 Schimpf, initially, for any cosmetic reasons; is that correct?

9 A. Correct.

10 Q. But isn't it -- isn't it true that you actually did go to

11 Dr. Schimpf for some cosmetic reasons?

12 A. Not in the beginning of the -- I went in around December.

13 Well, in that area around December. This was not -- this was

14 not -- the scar-tissue issue was not cosmetic.

15 Q. All right. So let's look at what's been pre-marked as

16 Defendant's Exhibit 1 and admitted into evidence.

17 A. May I have a copy of that so I can read along with you?

18 Q. Yes, ma'am.

19 A. Thank you. I know that page. I don't need it. I don't

20 need it. I know that page, sir.

21 Q. Well, I want to make sure you've got it so we're all ---

22 A. Okay.

23 Q. --- reading it right. There you go.

24 [Whereupon document provided to witness]

25 Q. So this is from the journal notes that you talked about,

1 right?

2 A. This is from the notes that I got off of my dry-erase
3 board, yes, and tried to put them into a reason to where -- a
4 way you could understand it, that I could understand it.

5 That says I got this surgery, I was going to reduce my
6 large implants and look refreshed for my thirty-fifth high-
7 school reunion. Because he told me by reducing and by the
8 time that high-school reunion came I would be all looking
9 refreshed. That's why that's there.

10 Q. So you wrote down in your notes that you got this surgery
11 to reduce your large implants and to look refreshed for your
12 high-school reunion; ---

13 A. No.

14 Q. --- those are your notes, right?

15 A. That's my note. That is not why. He told me I would be
16 refreshed. We weren't doing this -- because I had questions
17 about him taking out my Dr. Kline implants. He goes, don't
18 worry, you will be refreshed.

19 Q. And you would agree being refreshed and taking out large
20 implants are both cosmetic surgery, right?

21 A. This was -- this cosmetic surgery was not done -- this
22 was not a cosmetic surgery. This was done to reduce the
23 implants, the scar tissue, and the encapsulation. And he said
24 don't worry, you will look refreshed. He tried to assuage my
25 fears that, is this going to -- is this going to work, can you

1 do it.

2 Q. And these are your notes made right after this happened?

3 A. Actually, these are notes done; and I put them -- I tried
4 to put them together on a dry-erase board.

5 Q. You said you made them right after June 10th.

6 A. I did not write this after June 10th.

7 Q. Isn't that what you testified to earlier, that you ---

8 A. I did not write this -- I did ---

9 Q. Is that note ---

10 A. No. I went home and wrote the words chin and neck on
11 June 10th.

12 Q. We'll get to those in just a second.

13 A. Okay.

14 Q. But this is your description of what you understood that
15 surgery was going to be like, wasn't it?

16 A. No. That's what my high-school reunion was going to be
17 like.

18 Q. Do you recall, when you first begin contacting Dr.
19 Schimpf's office, filling out an online history?

20 A. An online history?

21 Q. Yes, ma'am.

22 A. An online history?

23 Q. I will show you a copy of what's been marked as
24 Defendant's Exhibit 2 and admitted into evidence. Is that an
25 online ---

1 A. This -- yeah. This was 2013.

2 Q. Right. And that's a document you filled out, correct?

3 A. I would suppose I did. But I remember sitting in their
4 office and doing this.

5 Q. Okay. And it asked you for your past medical history?

6 A. Okay.

7 Q. And if you look about four lines down -- or excuse me, a
8 little further down. There are some questions at the bottom
9 of the page that ask you about some of your psychiatric
10 issues. It asked you, first of all, whether you had any
11 anxiety. And you answered?

12 A. At that point in time, no.

13 Q. Okay. You -- it also asked you if you had bipolar
14 disorder. And your answered?

15 A. I had no idea that I do. Do I?

16 Q. You don't know whether you have bipolar disorder?

17 A. No, I don't.

18 Q. Okay.

19 A. I've never looked at any -- I've never looked at Dr.
20 Marcino's stuff. I have no idea.

21 Q. All right. And then on the second page at the top there,
22 it asks you if you had any emotional problems.

23 A. Not at the time, no.

24 Q. And you said no. It also asked you whether you had
25 depression, ---

1 A. Not at the time, ---

2 Q. --- and you said no.

3 A. --- no.

4 Q. And then further down under the neuro-psych area, again
5 it asked you if you have any neuro or psychological problems;
6 and you said, no?

7 A. Not at the time, no.

8 Q. But you were seeing Dr. Marcino at the time?

9 A. Yes.

10 Q. And you had been seeing her for years?

11 A. Yes.

12 Q. And she was treating you for anxiety?

13 A. She was -- no. She was helping me talk things out. Do
14 you have the amount of times I did see her?

15 Q. Yes, ma'am. We've got those records and we'll ---

16 A. Okay.

17 Q. --- we'll talk to her about that.

18 But you deny that you were being treated for anxiety at
19 this time?

20 A. I wasn't having any anxiety at that time. You have to
21 give me a definitive time and place. Actually, I was in a
22 happy time and place.

23 Q. Well, the date is on the document, ma'am. It's December
24 31st, 2013. Is that helpful?

25 A. Yes. It was -- Christmas was coming. I was decorating.

1 Q. Okay. And so it's your testimony that you didn't have
2 any anxiety or any emotional problems whatsoever at this time?

3 A. I wasn't having any when I went to this appointment, when
4 I did this.

5 Q. Were you being treated for depression?

6 A. I had medication, but I wasn't depressed.

7 Q. Were you being treated for depression?

8 A. I suppose you would put it that way.

9 Q. And you didn't note that on the document that we just
10 looked at, did you?

11 A. I suppose I didn't.

12 Q. Okay. And, as a matter of fact, you were being treated
13 with several medications at the time by Dr. Marcino; correct?

14 A. Correct.

15 Q. She had prescribed Klonopin, Risperdal, Ativan, Zyprexa.
16 Those are all antipsychotics, antidepressants, anti-anxiety
17 medications, aren't they?

18 A. Yes.

19 Q. And on this form that we just looked at, did they ask you
20 whether you were taking any medications? This is on the
21 second page under allergies and medications.

22 A. I put down that I was -- what I was allergic to.

23 Q. Right. And then under current medications?

24 A. I have my Ambien down there.

25 Q. Right. That's for sleep, right?

1 A. Yes.

2 Q. All right. Did you put Klonopin in there?

3 A. No.

4 Q. Did you put Zyprexa?

5 A. No.

6 Q. Did you put Risperdal?

7 A. No.

8 Q. Did you put Ativan?

9 A. No.

10 Q. So you withheld some on that information on your history
11 form from Dr. Schimpf from the very first time you interacted
12 with him, didn't you?

13 A. On this piece of paper, obviously.

14 Q. And isn't it also true that during this same period of
15 time, you told your psychiatrist that you were under a
16 tremendous amount of stress?

17 A. Not dealing with this. What are you -- give me the
18 example what you're saying I was dealing with.

19 Q. I'm just asking you whether you reported between December
20 and June, when you had the surgery, did you tell your
21 psychiatrist that you were under a tremendous amount of
22 stress?

23 A. I was dealing with my mother.

24 Q. And did you tell your psychiatrist that you were
25 extremely anxious?

1 A. About my mother? Was I ---

2 Q. About anything.

3 A. What was I anxious about? You need to give me the
4 examples so I can tell you where I was.

5 Q. I'm asking you if you reported any anxiety to your
6 psychiatrist during that period of time.

7 A. You can't put a blanket on that.

8 Q. So you don't know?

9 A. I don't know what I spoke to her about, but you -- if you
10 give me the example, I will tell you when.

11 Q. Did you tell your psychiatrist that you were having
12 marital problems with your spouse and that his ex-wife wanted
13 to sue you?

14 A. She does not want to -- that's not true.

15 Q. She didn't want to sue you for alimony?

16 A. I don't owe her alimony.

17 Q. Not you personally; you and your family, your husband.

18 A. That's his business with her. He deals with her, not me.

19 Q. Was she threatening to sue him for alimony during this
20 same time period?

21 A. She was getting her alimony every day. She was -- she
22 threatens everything. But she doesn't -- it wasn't anything
23 towards me.

24 Q. And she was -- she was threatening to sue him because he
25 hadn't paid the \$80,000 a year that he owes her in alimony,

1 correct?

2 A. He has paid her every year.

3 Q. But she was ---

4 A. But ---

5 Q. --- threatening to sue him for that?

6 A. She does that all the time.

7 Q. And as a matter of fact, that wasn't all she did; she was
8 stalking you; and her son -- they were both stalking you,
9 weren't they?

10 A. I'd see them -- they'd turn up a lot of places.

11 Q. Did you complain to your psychiatrist that they were
12 stalking you all the time in your own home and in your
13 neighborhood?

14 A. I -- it was bothersome, ---

15 Q. Right.

16 A. --- and I told her that.

17 Q. And you were actually afraid they were going to shoot
18 you?

19 A. There was a moment whenever her daughter, who was a
20 friend of mine, the -- that mother, that -- his ex-wife, her
21 daughter is a friend of mine. She told me that he said that.

22 Q. And during this time period between December and June,
23 when you had surgery with Dr. Schimpf, were there multiple
24 times when you stopped taking the psychiatric medications that
25 we just talked about?

1 A. When I was sick, when I'd get a cold, or whenever I'd be
2 having the issue, the gastro issue, the scar-tissue issue that
3 turned out to be a gastro issue, whenever I -- one -- when my
4 family doctor would give me medications that might interact,
5 then I came off of those. Or when -- because you can't take
6 cold medicine with these medicines because it's -- medicine --
7 the interaction of the medicines you can't do, and so I have
8 to come off of something in order to do something else. But
9 those medicines, I'm happy, I'm fine.

10 Q. Did you -- did you tell your doctor that you were trying
11 to stop taking your psychiatric medicines during that time
12 period?

13 A. Scaling it back. You have -- in order to come off of
14 things, because you're feeling a lot better, you have to do --
15 you can't just stop cold turkey. She would have to.

16 Q. And every time you told her that, she would put you back
17 on the medication, didn't she?

18 A. No, she changed one. Like -- I -- the Risperdal, I think
19 I only took one of those. Because some medications affect you
20 a different way. And with the Zyprexa was way too heavy.
21 That -- to sleep. That's why I have the Ambien.

22 Q. And another thing that you reported to your psychiatrist
23 during that time period is that you'd been drinking too
24 heavily, just months before this surgery; didn't you?

25 A. I went to a Christmas party.

1 Q. No, she said you had been drinking heavily and must quit
2 drinking. Didn't she tell you that?

3 A. She told me not to do that because of the medications.
4 But whenever I was out with all -- at all of these little
5 parties and all of these gatherings and I'd have three glasses
6 of wine, that's heavily to me.

7 Q. And did you also report to your psychiatrist just prior
8 to this surgery, the last visit that you had actually with her
9 prior to surgery with Dr. Schimpf, that you were having
10 nightmares about the prior assault that you mentioned, about
11 loss of a child, about people breaking into your home, and
12 about physical abuse from an ex-boyfriend, did you report all
13 those things to your psychiatrist?

14 A. She -- we talked about those over -- over years of time.

15 Q. Right. And that was in the visits ---

16 A. And I do have ---

17 Q. That was in the visit right before you went to see Dr.
18 Schimpf, isn't it?

19 A. I have -- I -- we had had a sixteen-year relationship.

20 Q. And you never -- you never let Dr. Schimpf know any of
21 that stuff was going on, did you?

22 A. Because nothing was wrong when I went to see him. Then
23 my mother got sick. And then when everything settled down, I
24 could do this. I wanted to get rid of the scar-tissue issue.

25 Q. And I think we looked at some of the informed consent

1 forms maybe yesterday. But when you went to Dr. Schimpf's
2 office -- I'm going to show you what we will mark as -- has
3 been pre-marked and admitted as Defendant's Exhibit 3. Is
4 that the informed consent form that you signed for the surgery
5 on your eyes?

6 A. Yes.

7 Q. Okay. And that's a seven-page document, and you've
8 initialed every page?

9 A. I'm sure I did.

10 Q. And then I'll show you what's been pre-marked and
11 admitted as Defendant's Exhibit 4. And is that the informed
12 consent form that you signed for the encapsulotomy and the
13 breast implant exchange?

14 A. I'm sure it is.

15 Q. I'll show you what's been marked and admitted as
16 Defendant's Exhibit 5. Is this the informed consent form for
17 the scar revision that we talked about?

18 A. This is for -- or the bikini area that he said he could
19 tweak if this -- if this is the scar revision down here.

20 Q. It says scar revision surgery, right?

21 A. Okay.

22 Q. Is that the right one? You signed that form, correct ---

23 A. Yes, because this is on 6/6. This is on -- in -- on
24 6/14. Yes. Whenever he changed things ---

25 Q. That's the date of the surgery.

1 And I'll show you what's been marked as Defendant's
2 Exhibit 6. Is that the informed consent form that you signed
3 for liposuction?

4 A. Yes, around the bikini area. So the revision scar --
5 these are the bikini area [indicating]. And this is the
6 breast [indicating]. And this is the eyelids [indicating].
7 Yes.

8 Q. So let's look at the informed consent form that you have
9 in front of you with the liposuction.

10 A. Okay.

11 Q. All right. So at the top it says informed consent,
12 liposuction surgery; correct? Is that the title of the
13 document?

14 A. Uh-huh.

15 Q. Is that a yes?

16 A. Yes.

17 Q. Okay. And does it say anywhere in this document that
18 this liposuction is for a specific body part?

19 A. I believe it says -- I believe it says it in the bill
20 where it ---

21 Q. I am asking you about this informed consent form that you
22 signed. Does it specify you getting liposuction in a specific
23 body part?

24 A. No.

25 Q. Okay. But it does -- in that first paragraph under

1 general information, it does say the liposuction areas and it
2 lists several where it can be done: the face, neck, the upper
3 arms, trunk, abdomen, buttocks, hips, thighs, knees, calves,
4 and ankles.

5 A. It could be done anywhere if that's what you're saying
6 this document says. He can -- he can -- so he could have
7 unilaterally gone in there and vacuum-cleaned me anywhere he
8 wanted to because I signed this paper when we -- he and I
9 decided to do my bikini area where my scar was?

10 Q. The informed consent form that you signed, ma'am, doesn't
11 that say it's limited to a specific body part; does it?

12 A. Like a menu at a -- at a restaurant where if it says
13 steak here and it says chicken there, you get it all?

14 Q. Does it say it's limited to a body part, ma'am?

15 A. No, it doesn't.

16 Q. Thank you.

17 A. So that's what I signed here is where he could turn it
18 into a vanity project as if -- is that it? What you're
19 saying?

20 Q. I'm going to show you what's been marked as Defendant's
21 Exhibit 7, admitted into evidence. Is that another informed
22 consent form that you signed for liposuction?

23 A. It looks to be the same thing.

24 Q. And that's the same form that we just looked at?

25 A. Looks to be the same thing.

1 Q. So you signed two of those?

2 A. I have no idea. That looks to be the same thing. And I
3 scribble. I should be a lot more careful when I initial.

4 Q. And so those are the informed consent forms that you
5 signed for the liposuction procedures in this case; correct?

6 A. I suppose so.

7 Q. And so you never signed an informed consent form that
8 listed a specific body part, did you?

9 A. No. And I notice the word cellulite here. And I didn't
10 have that on my neck. So if that's where you think you're
11 going with this -- is that the word in here, too?

12 Q. It's your testimony that you never asked Dr. Schimpf to
13 do liposuctions on your chin; is that correct?

14 A. Never.

15 Q. So you didn't have any cosmetic concerns about your neck
16 or chin?

17 A. No, I did not.

18 Q. But isn't it true that for an entire year leading up to
19 this surgery that you had been getting regular treatment to
20 your face and neck, cosmetic treatment?

21 A. Facial.

22 Q. Right. That's what you said yesterday, facials; right?

23 A. Facials.

24 Q. And Botox injections, correct?

25 A. Facials. Botox here [indicating]. Facials. The

1 décolleté area to slough off dead skin. Nothing invasive.
2 Micro-derm abrasion is probably the harshest thing because
3 they take a sand and -- sand-and-clay facial and then they
4 take a little vacuum cleaner and suck it off. And they can do
5 that from your décolleté to your neck because you want to
6 remove the ---

7 [Whereupon, plaintiff and defense counsel confer.]

8 MR. SMYTH: Beg the Court's indulgence for a second, Your
9 Honor.

10 Q. So I am going to show you what was marked as Exhibit 4
11 yesterday.

12 A. Yes, sir ---

13 Q. And your attorney ---

14 A. From 2013 ---

15 Q. Right.

16 A. --- to May. Correct.

17 Q. All right. And that -- those are records that you --
18 were generated from your treatment at the Palmetto Medical
19 Spa, correct?

20 A. Yes. If you would like me to go over there, sir, I can
21 get the rest of them for -- since I've had facials ---

22 Q. Okay.

23 A. --- all the way until here.

24 Q. Sure. We're going to go through them.

25 A. Okay.

1 Q. And this is -- this first record that I'm showing you is
2 from March 30th, 2013.

3 A. Okay.

4 Q. Do you see that? And those are the areas where you're
5 going to be injected with Botox, correct?

6 A. Correct. Actually, it might have been -- yeah, it's --
7 it looks like the Botox. Right here [indicating], to lift my
8 smile line.

9 Q. All right. And then the next record that we'll look at?

10 A. That's a pumpkin facial.

11 Q. Right. This is from May of 2013, correct?

12 A. Correct.

13 Q. And down here at the bottom, ---

14 A. Uh-huh.

15 Q. --- notes: Patient wants to tighten neck, correct?

16 A. With a tightening cream. They sell the creams that
17 tighten all skin areas.

18 Q. Right. But you wanted to tighten your neck on this
19 visit?

20 A. It says -- no, it's a note. She wants -- patient wants
21 to tighten the neck and remove broken capillaries from the
22 face. And the uneven skin tone. And I had a consultation
23 with Tiffany for the IPL resurfacing of my face to get rid of
24 my rosacea. Noninvasive.

25 Q. All right. Let's keep looking at these then. This is a

1 visit from August the 1st, 2013. And, again, they've
2 highlighted the areas where you requested treatment; correct?
3 A. You mean the hound-dog look?
4 Q. Right on the ---
5 A. Okay.
6 Q. --- screen, ma'am.
7 A. Let me try to get the page with you. Oh, yes, the hound-
8 dog look to make this [indicates] look pretty.
9 Q. Right. And those are Botox injections to your chin and
10 jaw?
11 A. Botox, Juvederm, and Radiesse, right here [indicates].
12 Q. Those are all injectables?
13 A. Yes.
14 Q. Okay. The next document is September 12th, 2013. You
15 see the date there?
16 A. Uh-huh.
17 Q. And the drawing. And that's ---
18 A. Tinted eyebrows.
19 Q. And the area that has a box around it, that's your neck
20 and chin; isn't it?
21 A. Oh, yes, she passed the -- the -- when she did the sanded
22 facial she went up and down on my neck.
23 Q. With a laser, correct?
24 A. No. She used the sanded facial.
25 Q. The procedure ---

- 1 A. Ultra firming ---
- 2 Q. --- at the bottom ---
- 3 A. It was an ultra firming mask with a gentle cleanser.
- 4 Q. The procedure at the bottom, ma'am, says neck
- 5 resurfacing; doesn't it?
- 6 A. That's what you do with the vacuum cleaner ---
- 7 Q. Right.
- 8 A. --- and the sanded facial. It resurfaces it because it
- 9 takes off all the dead tissue.
- 10 Q. And you also got Botox on that visit?
- 11 A. Yes.
- 12 Q. The next visit that we will look at is October 30th,
- 13 2013.
- 14 A. Uh-huh.
- 15 Q. Do you see the date there?
- 16 A. Yes.
- 17 Q. Once again they are drawing a box around the area that
- 18 you are going to be treated with, correct?
- 19 A. Correct.
- 20 Q. Okay. The next visit, November 19th, 2013.
- 21 A. Uh-huh.
- 22 Q. And under the drawing here it looks like you got Botox on
- 23 your eyebrows; and it says, next time lips and chin; correct?
- 24 A. Here [indicates] and here [indicates] ---
- 25 Q. Right.

1 A. --- was going to be discussed for next time. That was --
2 that's why it says notes.

3 Q. And it says Botox treatment, correct?

4 A. Correct.

5 Q. Next visit. This is April the 11th, so about two months
6 before you had surgery with Dr. Schimpf. And you got more
7 treatment done to your face on this visit, correct?

8 A. Yes. A double-enzyme cleanser to rejuvenate the
9 moisture. And then the same little vacuum cleaner to slough
10 off stuff.

11 Q. And I'll show you -- this will be Defendant's Exhibit 8.
12 I'll represent to you this is into evidence and it's been
13 agreed to by counsel.

14 If I can get you that. I'm sorry.

15 A. Okay.

16 Q. This is a summary for all the charges from Palmetto
17 Medical Spa that you got in 2013 and 2014 for cosmetic
18 treatment.

19 A. Okay.

20 Q. And what's the total there at the bottom?

21 A. \$6,830.91. I like facials.

22 Q. And that's just in the year leading up to the surgery you
23 had with Dr. Schimpf, isn't it?

24 A. Actually, that's a year and a half. It's -- yeah. It --
25 no, it -- actually, I go -- I still go. I like facials. They

1 make me feel good.

2 And spa special here is when you get your hands done.
3 Photo-facial is when they use light to make your face feel
4 better.

5 Q. \$6,800 worth?

6 A. Yes.

7 Q. Okay. I'm going to show you what's been marked -- what's
8 the exhibit number on that one?

9 A. I don't know -- a 9.

10 Q. Exhibit 9 and admitted into evidence. And this is a copy
11 of the operative record from your surgery with Dr. Schimpf?

12 A. Uh-huh. I've never seen this.

13 Q. And in the middle of this document, under the procedures,
14 it's got the procedure names, it has got the blepharoplasty,
15 ---

16 A. Uh-huh.

17 Q. --- exchange of implants, ---

18 A. Uh-huh.

19 Q. --- mastopexy which is the breast reduction; and then
20 it's got liposuction: abdomen, medial thigh, axilla, and the
21 neck?

22 A. So he chose to do my neck as a vanity part because I
23 obviously gave him permission ad hoc by signing that piece of
24 paper saying, oh, let me shop and find a place to do that?

25 Q. This was done before ---

1 A. He never had -- he had never had permission to do my neck
2 at any given point in time.

3 Q. Okay.

4 A. Ever. Never came out of my mouth, ever. And when -- it
5 really shocked me. Because when I went in and he took that
6 headdress off that I thought was pressure for my eyelids, he
7 goes, I did a little extra something-something, you're really
8 going to like it. That's why I went home and wrote the word
9 chin.

10 Q. Okay. Let me show you what's been marked as Defendant's
11 Exhibit 11. And I'll represent to you that that's the --
12 sorry, I gave you the wrong one.

13 [Counselor exchanges Defendant's Exhibit Number 11 for
14 Defendant's Exhibit Number 12, to witness]

15 A. Okay. Well, I am sure you are going to give me this one,
16 too.

17 Q. I am, just in a different order.

18 A. Okay.

19 Q. We'll look at Defendant's Exhibit 12. And this is the
20 pre-anesthesia history that was given to the anesthesiologist
21 before the procedure started.

22 A. Yes. Doctor -- when -- I confirmed with Dr. Marcino and
23 I came off all of my medications for this procedure.

24 Q. Okay. And so the anesthesiologist takes your history,
25 and at the top of ---

1 MR. SLOTCHIVER: Objection, Your Honor. There's no
2 evidence this was given to the anesthesiologist by my client.
3 That's not in the record, and that's not in the evidence.

4 A. And I never spoke to her ---

5 THE COURT: Hold on. When he -- when he objects I have
6 to make a ruling.

7 THE WITNESS: I'm sorry.

8 THE COURT: Come up here.

9 [Whereupon, an off-the-record bench conference is held
10 8/27/19, 10:37 a.m.]

11 THE COURT: All right. I am going to sustain the
12 objection and strike the last answer from the record.

13 MR. SLOTCHIVER: May I, Your Honor?

14 [Whereupon, an off-the-record bench conference is held]

15 THE COURT: All right. Ladies and gentlemen of the jury,
16 I struck the last answer which was given, which was in
17 reference to a communication that the witness had with the
18 anesthesiologist; and that's not to be taken into
19 consideration. And I'll explain to you later during the jury
20 charge what that means whenever I strike something from the
21 answer.

22 It's my understanding that we want to take a quick
23 morning break. Is that true? All right. We will go ahead
24 and take our morning break, and I'll see you back in here in
25 about five or ten minutes.

1 [Whereupon, the jury exits the courtroom 8/27/19, 10:40
2 a.m.]

3 THE WITNESS: Do I still -- can I go ---

4 THE COURT: You're still under oath, but you can take a
5 break, yes, ma'am.

6 THE WITNESS: That's what I wanted to do. Thank you.

7 [Whereupon, a recess is taken 8/27/19, 10:41 a.m.]

8 [Whereupon, resume 8/27/19, 10:52 a.m., without jury]

9 THE COURT: Mr. Robinson, have they all had a chance to
10 take a break?

11 THE BAILIFF: They are all here and ready.

12 THE COURT: Let's roll.

13 MR. SLOTCHIVER: Your Honor, the only -- the only concern
14 I have is to deal with what -- what is essentially -- and I
15 don't want to call it a representation; but I am concerned
16 about the representation that was made to the jury a few
17 moments ago, the representation being that the liposuction
18 form that she signed would have also potentially included her
19 neck surgery; do you recall that testimony?

20 And the reason I'm concerned about it is because -- I
21 will represent to you, and it's undisputed, the deposition
22 testimony of even Dr. Schimpf, is that there was -- is that,
23 at best, the discussion of the neck would have taken place
24 right before the surgery took place, because he has no records
25 to support ever doing the neck otherwise.

1 So now the jury is being led to believe that maybe this
2 form justified the liposuction of the neck, when even Dr.
3 Schimpf says, no, he had never anticipated it, never
4 contemplated it, it must have been done right before the
5 surgery and it's routine that sometimes a patient will ask for
6 things right before the surgery and then we'll do it and
7 that's why we never get a consent form or put it in writing.
8 So the jury is being led to believe something that's
9 inconsistent with what their own doctor will testify to.

10 And nobody -- this was the first time, with all the
11 experts and all of the depositions that have been taken with
12 this case - and there's a lot - this is the first time it's
13 ever even been inferred that maybe he was authorized a long
14 time ago to do it by the liposuction form.

15 And I don't know how to handle it with the Court, but I'm
16 concerned about it because it doesn't seem proper. And it
17 doesn't -- it certainly doesn't correlate with the facts that
18 have been presented in the case or the testimony that goes
19 forward.

20 THE COURT: What ---

21 MR. SLOTCHIVER: He was suggesting -- and we can clarify
22 it later on with the jury, but I just wanted to bring it to
23 the Court's ---

24 THE COURT: What was the form that he showed her?

25 MR. SLOTCHIVER: The form was a form for liposuction.

1 And she had agreed to liposuction but had never agreed to her
2 neck or chin. And he asked her: Isn't it true this doesn't
3 say that it's not neck or chin? And she goes, well, it
4 doesn't. And then she said, it's not that I signed a vanity
5 project for you to do whatever you want.

6 The inference that was made was when you signed this you
7 authorized the neck and chin, which is inconsistent with the
8 doctor's own testimony in his -- in his multiple depositions.
9 It is inconsistent with the expert's testimony. It's
10 inconsistent ---

11 THE COURT: And so the doctor is going to testify as to
12 that, I assume?

13 MR. SLOTCHIVER: Yes, I am just concerned about the
14 representation to the jury that's being made that's just
15 false.

16 THE COURT: Well, I mean, I struck that from the record.
17 I guess my concern is is that what more do you want?

18 MR. SLOTCHIVER: Well, what you struck from the record
19 was the representation that she had a conversation with the
20 anesthesiologist wherein she gave the anesthesiologist
21 information that was on the anesthesiologist's form.

22 What I'm referring to is the reference that she agreed to
23 liposuction and by signing that form she agreed to liposuction
24 on her neck. That was what they -- when -- that was a five-
25 or ten-minute conversation with her. And she goes: Are you

1 saying that I just signed a form and that he could do my neck?
2 And that was the inference that he drew from it, but that
3 that's inconsistent with the facts or the reality of the case.
4 So it's giving the jury a view that's not proper because it's
5 not consistent with any of the evidence or the testimony that
6 even the doctor has testified to.

7 THE COURT: Well, you keep saying what the doctor
8 testified to. This is the trial. The doctor is going to
9 testify. Cross-examine him about it.

10 MR. SLOCHIVER: I will. Thank you, sir.

11 [Whereupon, pause awaiting jury]

12 [Whereupon, the jury enters the courtroom 8/27/19, 10:56
13 a.m.]

14 THE BAILIFF: Your Honor, the jury is complete.

15 THE COURT: Thank you so very much, Mr. Robinson.

16 All right. Mr. Smyth?

17 MR. SMYTH: May it please the Court, Your Honor?

18 THE COURT: Yes, sir.

19 [Whereupon, resume cross-examination of Jeane Whitfield
20 by Mr. Smyth]

21 Q. All right. Ms. Whitfield, I think when we left off we
22 were still talking about the procedure on your chin. And then
23 we looked at this document a little bit. But this is
24 Defendant's Exhibit 13. It is part of the notes and the
25 journal that we've already seen.

1 A. Yes. The notes of the -- that I got off of my dry-erase
2 board and tried to put into place.

3 Q. Okay. And at the very bottom of this page you have
4 written here that you went for a consult; with Dr. Schimpf,
5 presumably, right?

6 A. Uh-huh. Yes. It says I went for a consult. He said,
7 scar tissue, implants, refine abdomen; and I set up the
8 surgeries.

9 Q. Right. And ---

10 A. I got abs, breasts -- from what he said, because I had to
11 take the word neck off of this dry-erase board. I put that
12 there. And eyes at the same time. How do I move on with this
13 in life, is how it reads, how I wrote it.

14 Q. All right. And what it says is you set up surgeries for
15 your abs, breast, neck, eyes at the same time.

16 A. If you look at that page, it has no punctuation. That's
17 how you read it. And this is how I wrote it.

18 Q. All right. I'm just asking you what's on the page. It
19 says you set them up at the same time, doesn't it?

20 A. It says -- it says that there were -- I set up surgeries.

21 Q. Right.

22 A. This -- but this is what happened, the abs, the breast,
23 the neck, the eyes, at the same -- were done at the same time.
24 I didn't know I had to -- trying to get it off the dry-erase
25 board. I wasn't planning on suing. I did not need to know

1 that I had to write it in an articulate way. This was just to
2 keep in my head how this nightmare evolved and went.

3 Q. Right.

4 A. It even says something about my mother dying. It also
5 says about the chin. How do I go from here when I've been
6 changed here, here, here and here [indicates] ---

7 Q. And what ---

8 A. --- is the nightmare I'm in.

9 Q. And what you wrote is that you set up surgeries for the
10 abs, the breast, the neck, the eyes, at the same time;
11 correct?

12 MR. SLOTCHIVER: Objection, Your Honor. This is asked
13 and answered. She's already answered it and she's already
14 explained it.

15 A. You can ask me again --

16 THE WITNESS: Oh. I'm sorry.

17 THE COURT: I'll give her another chance to answer, if
18 she's going to change her answer.

19 A. I'm not going to change my answer. It's going to be
20 the same way ---

21 THE COURT: All right. Then ---

22 A. --- every time you ask it, sir.

23 THE COURT: -- asked and answered. Move on.

24 MR. SMYTH: Okay.

25 Q. And the next one I'll show you has been marked and

1 admitted as Defendant's Exhibit 14.

2 A. Yes.

3 Q. That's another page from your notes, correct?

4 A. Yes.

5 Q. All right. And this is June 6th. That was the day you
6 had the surgery, correct?

7 A. Correct.

8 Q. And the things that you've listed there are implants
9 redux, which is a reduction of the implants itself; correct?

10 A. Yes.

11 Q. Scar removal?

12 A. Yes.

13 Q. Eyelids?

14 A. Yes.

15 Q. Chin?

16 A. Yes. It's written there. It came -- there were words on
17 my dry-erase board, when I was trying to put together, piece
18 together, what had happened to me. I went home the day, on
19 the 10th, and I wrote the word chin. I wrote it there under
20 June 6th because it happened on June 6th. I wrote it down on
21 June 10th. But it's not under June 10th.

22 Q. Okay.

23 A. I wrote it down, yes. This is -- this is -- these are my
24 notes off of a dry-erase board to make sense of what nightmare
25 happened and how it all came to pass.

1 This does not have June 16th, the phone call. This does
2 not have the phone calls. This does not have the phone
3 records, the phone numbers. This does not have the pictures.
4 June 16th, June 18th, June 19th. This does not have on it
5 June 30th. I don't even believe it says June 7th when he
6 called me back personally and told me to go to the office; I
7 was finally going to -- just go to the office. Went over
8 there and nobody to see me.

9 These are words I snatched off of that dry-erase board at
10 the beginning of 2015 so my husband wouldn't erase it, because
11 it was in my -- it was in my bathroom closet so I wouldn't
12 have to see it. He got it out and was going to erase it; and
13 I said, well, let me try to put together my nightmare. That's
14 how this came to pass. Even some of the dates are wrong.

15 Q. Sure. But you did put chin on there?

16 A. Of course, because I wrote it on my dry-erase board.

17 Q. Okay. Well, you said earlier in testimony yesterday that
18 you didn't realize anything had been done to your chin until
19 you went back for the follow-up visit four days later; is that
20 correct?

21 A. Correct. On the 11th.

22 Q. All right. And you also ---

23 A. That's the date I wrote ---

24 Q. You also said that you were sent home with your husband,
25 and I believe your daughter picked you up from the surgery;

1 correct?

2 A. No. My sister and my husband.

3 Q. Your sister. I'm sorry. And you were wearing a ---

4 A. A wrap.

5 Q. --- a head wrap?

6 A. Yes. I didn't -- I didn't realize I had that -- what the
7 head wrap was for. I thought it was pressure here on my
8 eyelids.

9 Q. All right. And that's the head wrap that you were
10 wearing, isn't it?

11 A. It -- I guess that's it. It looks like it's a pressure
12 bandage for anything done to your face.

13 Q. Right.

14 MR. SMYTH: And so we'll move that into evidence as
15 Defendant's Exhibit 15. Any objections?

16 MR. SLOTCHIVER: I don't believe she testified this is
17 necessarily the head wrap. But we're not opposed to putting
18 in something that it looked like.

19 MR. SMYTH: Right.

20 MR. SLOTCHIVER: Sure. I will just -- that is what she
21 said.

22 MR. SLOTCHIVER: Okay.

23 Q. This is the type of device that you were wearing?

24 A. I would assume that's the one he used, but I'm not sure.
25 But I know I had the wrap here [indicates], and I believed it

1 was for pressure here [indicates] because of my eyelids.

2 MR. SLOTCHIVER: Then we would object to it if she can't
3 testify that that's something that she's aware of.

4 THE COURT: All right.

5 MR. SLOTCHIVER: For demonstrative purposes, no problem.

6 THE COURT: Do you want to submit it in as evidence, or
7 do you want to utilize it for just demonstrative purposes?

8 MR. SMYTH: We want to submit it in evidence, Your Honor.

9 THE COURT: All right. You're going to need to proffer
10 her just a little bit more about it.

11 MR. SMYTH: Sure.

12 THE COURT REPORTER: And if I could get some
13 clarification first. I thought Defendant's 1 through 25 we
14 had already agreed, stipulated would go in.

15 MR. SMYTH: We haven't talked about this one yet, though.
16 So 15 was not on the list.

17 THE COURT REPORTER: But you listed 1 through 25.

18 MR. SMYTH: Okay, that's my mistake then.

19 THE COURT REPORTER: Okay. So 1 through 25 previously,
20 excluding 15?

21 MR. SMYTH: Correct.

22 THE COURT REPORTER: Okay. Any other excluding, or just
23 15?

24 MR. SMYTH: Just 15.

25 THE COURT REPORTER: Okay. I have got it. Thank you.

1 [Whereupon, remove Defendant Exhibit Number 15 from those
2 that previously admitted]

3 Q. Ms. Whitfield, is -- the picture that we've got here, is
4 this similar to the bandage ---

5 A. Correct.

6 Q. --- that you were wearing when you left the facility?

7 A. Correct.

8 MR. SMYTH: All right.

9 THE COURT: All right. Then over the objection I'll
10 allow it in.

11 MR. SMYTH: Thank you, Your Honor.

12 [Whereupon, Defendant's Exhibit Number 15 is now admitted
13 into evidence by the Court]

14 Q. And it's your testimony that you didn't realize you had
15 had anything done to your chin ---

16 A. Until he ---

17 Q. --- until the 10th?

18 A. --- told me he did a little extra something-something, I
19 would like it.

20 Q. Right. And you were wearing this garment underneath your
21 jaw and chin for four days?

22 A. Actually, I was out of it those four days because I had
23 just gotten over a surgery.

24 Q. When ---

25 A. When I went into his office on the 10th and he took it

1 off and he removed the two sutures and he did my -- he said, I
2 did a little extra something-something. And he did my head
3 back; and he went snip, snip [indicating].

4 Q. And you wore this same garment for four days?

5 A. That's -- yes. I had just gotten out of surgery. And I
6 had stayed in bed for four days.

7 Q. And it's your testimony that you didn't know anything had
8 been done to your jaw?

9 A. Not at all.

10 MR. SLOTCHIVER: Ask and answered, Your Honor. Three
11 times, I believe.

12 THE COURT: I'll sustain the objection.

13 Q. All right. I want to go over I know that one of the
14 informed consent forms that we haven't talked about yet. And
15 this is Defendant's Exhibit 16 that's been previously admitted
16 and agreed upon without objection. Is that the informed
17 consent form that you would have signed for the mastopexy part
18 of the procedure?

19 A. The breast?

20 Q. Yes, ma'am.

21 A. Mastopexy. I'm sure it is.

22 Q. Okay.

23 A. Dated 6/6.

24 Q. Okay. And looking at the first page of this document ---

25 A. Yes. The standard document.

1 Q. Right. It says that the best candidates for mastopexy
2 are healthy, emotionally stable women without realistic
3 expectations about what type of surgery -- what type of --
4 surgery can accomplish, correct?

5 A. Yes. And I've had successful surgeries, including
6 beautiful breast implants, before with the same mindset and
7 the same life I've lived.

8 Q. Let's look at the second page. At the top of the page it
9 talks about breast augmentation and simultaneous mastopexy,
10 right?

11 A. Okay.

12 Q. It says the risk associated with the potential use of
13 breast implants are covered in a separate informed consent
14 form - which we've seen - and according to the type of
15 implant; however, patients who choose to undergo breast
16 implant augmentation and elect to have it at the same time as
17 the breast lift may be at an increased risk for necrosis,
18 skin, nipple, breast tissue, due to decreased blood supply to
19 those tissues.

20 A. Well, I'm sure that it does say that. But I'm sure the
21 doctor would be there to answer the phone to fix it when it
22 did appear.

23 Q. So this is something that you knew about before you had
24 the surgery; ---

25 A. Actually, no.

1 Q. --- those are your initials?

2 A. Actually, I did not read through all these, obviously, to
3 see that it was a chop-chop.

4 Q. Sure. You signed off on the bottom as having read it,
5 though; right?

6 A. Uh-huh. Yes, I did.

7 Q. Okay. And then under delayed healing, there's another
8 section that you were warned about. It says wound disruption
9 or delayed healing -- wound healing is possible; some areas of
10 the breasts, skin, or nipple region may not heal normally and
11 may take a long time to heal?

12 A. That's why I was calling him, to please answer the phone,
13 something was going on. It was not in my head.

14 Q. Right. And the next sentence says areas of skin or
15 nipple tissue may die. Correct?

16 A. That's why I called him sixteen times, to please see me
17 because this was going on.

18 Q. All right. And it also says this may require frequent
19 dressing changes and further surgery to remove non-healed
20 tissue. Correct?

21 A. I wish he would have -- I wish he would have adhered to
22 this.

23 Q. And you signed this page, correct?

24 A. Yes. I should have made him sign it too.

25 Q. Let's look at the next page on this. It also tells you

1 that there's a risk of infection with implants. It tells you
2 there's a risk of scarring associated with implants. Correct?

3 A. Correct.

4 Q. All right. And then at the bottom it also tells you that
5 there is a risk of major wound separation. Correct?

6 A. If it's written here, that's what it says.

7 Q. Right. Wounds may separate after surgery?

8 A. If that's what's written here, it says so.

9 Q. And should this occur, additional treatment, including
10 surgery, may be necessary?

11 A. It starts with answering the phone, something's
12 happening, it's coming open, I'm ripping open. Yes. Ad I had
13 already been through a successful breast augmentation where
14 none of that happened.

15 Q. And those are your initials at the bottom of the page,
16 correct?

17 A. I guess they are.

18 Q. Look at the next page. At the very top of that page it
19 talks about fat necrosis, correct?

20 A. I'm sure it does. I ---

21 Q. Do you want to follow along?

22 A. I don't need to. You're -- it's obviously what it is.

23 Q. Okay. And fat necrosis is one of the risks that you were
24 warned about?

25 A. Yes.

1 Q. It says fatty tissue found deep in the skin might die.
2 This might produce areas of firmness within the skin.
3 Additional surgery to remove areas of fat necrosis may be
4 necessary. Correct?

5 A. If treated properly and punctually and on time, get to
6 the doctor, show the doctor, if the doctor will see you and
7 return your phone calls; not tell you that's a natural
8 progression of healing, we can tweak it later, ten times.

9 Q. Did I -- did I read the section about fat necrosis
10 correctly?

11 A. I'm sure you did.

12 Q. Okay. And it says there's a possibility of contour
13 irregularities in the skin that may result from the fat
14 necrosis, correct?

15 A. I'm sure it is. I'm sure it does.

16 Q. It also tells you that you're going to experience pain
17 and varying levels of pain and maybe even chronic pain as a
18 result of the surgery, correct?

19 A. All right.

20 Q. Do you agree with that?

21 A. I agree it's on that paper.

22 Q. All right.

23 A. And, again, it should have been signed by both he and
24 myself.

25 Q. And one of the other risks that you were also warned

1 about is asymmetry, meaning the breasts might be different
2 shapes and sizes; correct?

3 A. If it's there, I can't argue with it.

4 Q. And those are your initials at the bottom of the page
5 again?

6 A. I can't argue with that.

7 Q. Okay. Let's look at the next page. At the top of this
8 page it says Page 70. At the bottom there it says
9 unsatisfactory results. So you were told that you could
10 potentially get unsatisfactory results from the surgery,
11 correct?

12 A. If it's on the page, yes.

13 Q. All right. It says although good results are expected,
14 there's no guarantee or warranty, express or implied, on the
15 results that may be obtained. You may be disappointed with
16 the results of surgery. Asymmetry, unanticipated shape and
17 size, loss of function, wound disruption, poor healing, loss
18 of sensation, may occur after the surgery. Correct?

19 A. Correct. If that's what ---

20 Q. Size may be incorrect. Unsatisfactory surgical scar
21 location or appearance may occur. It may be necessary to
22 perform additional surgery to improve your results.

23 A. You have to answer the phone first to see the -- to see
24 the patient when she calls and says I'm ripping open.

25 Q. Did I read that correctly, though?

1 A. I'm sure you did.

2 And after he bought -- after he bought the car for
3 \$11,400, he wouldn't return the call when I said I'm ripping
4 open. He wouldn't. So I don't think ---

5 Q. And those are your initials at the bottom of the page?

6 A. Yes, they are.

7 Q. Okay. Let's look at the next page of this document.

8 Down here at the bottom, the very last category says mental
9 health disorders and elective surgery. It says it's important
10 that all patients seeking to undergo elective surgery have
11 realistic expectations to focus on improvement rather than
12 perfection. Complications or less than satisfactory results
13 are sometimes unavoidable and may require additional surgery
14 and are often stressful. Did I read that correctly?

15 A. Correct.

16 Q. All right. And those are your initials there at the
17 bottom?

18 A. Yes.

19 Q. All right. And then it also says, in this next sentence,
20 please openly discuss with your surgeon prior to surgery any
21 history that you may have of significant emotional depression
22 or mental health disorders. Correct?

23 A. I wasn't having any at the time. And I've had successful
24 surgeries. Successful.

25 Q. Okay. Let's look at the next page of the document. At

1 the top of this one it says additional surgery may be
2 necessary, re-operations. It says there are many variable
3 conditions that may influence the long-term result of a
4 mastopexy. It's unknown how your breast tissue may respond or
5 how wound healing will occur after surgery. Correct?
6 A. [No response]
7 Q. Is that correct?
8 A. If that's what it says.
9 Q. Do you want to follow along to verify it? You are
10 welcome to.
11 A. No.
12 Q. Okay.
13 A. I don't need to.
14 Q. Secondary surgery may be necessary to perform additional
15 tightening or repositioning of the breast. Should
16 complications occur, additional surgery or other treatments
17 may be necessary.
18 A. Does it say immediately contact your physician?
19 Q. So let's keep reading and see.
20 A. Okay.
21 Q. Even though the risks and complications occur
22 infrequently, the risks cited are particularly associated with
23 this surgery, the mastopexy. And it says the practice of
24 medicine is not an exact science. Although good results are
25 expected, there's no guarantee or warranty, express or

1 implied, on the results. In some situations it may not be
2 possible to achieve optimal results with a single surgical
3 procedure.

4 Did I read that correctly?

5 A. I'm sure you did.

6 Q. All right. And those are your initials, again, at the
7 bottom?

8 A. Yes. Does it says there consult your physician
9 immediately?

10 Q. And so after we've been through the risks that you signed
11 in that document, you still agreed to go forward with the
12 surgery; correct?

13 A. Yes.

14 Q. All right. Let's talk a little bit about some of your
15 other testimony. I believe you testified earlier that on June
16 the 20th of 2014, roughly fourteen days, two weeks, after your
17 surgery ---

18 A. Yes.

19 Q. --- you went to the hospital?

20 A. Correct.

21 Q. All right. And you told this jury the reason you went to
22 the hospital is because your breast was pulling apart; is that
23 correct?

24 A. No. Actually, I went to the hospital because I was told
25 by Sweetgrass Plastic Surgery on the 19th that nothing was

1 done -- nothing that was done by them could possibly be
2 causing my discomfort and pain. They left me no choice but to
3 seek medical health, because my chest was hurting. It felt
4 like it was ripping. It was a dull, hot, aching pain. And
5 they put me in the cardiac ward of Roper St. Francis,
6 believing it may be a cardiac issue.

7 But I did call Sweetgrass Plastic Surgery on the 16th
8 about this pain. They never called back on the 17th. They
9 called back on the 18th. That's when I sent over pictures.

10 Dr. Schimpf was in surgery, and I spoke with Vicky
11 Tolbert. I sent two -- I texted two pictures. And I was told
12 it was the natural progression of healing, it could be tweaked
13 later, and nothing that was done to me at Sweetgrass was
14 causing this discomfort.

15 So he's the doctor. And I'm like, well, if he's saying
16 this then he's the doctor. I went to seek help because it
17 obviously had to be something else.

18 Q. Okay. But the reason that you went to the hospital is
19 because you thought you were having a heart attack; isn't that
20 true?

21 A. Yes.

22 Q. And I will show you what's been marked as Defendant's
23 Exhibit 18, which is the EMS report from the day that you
24 went. And I've highlighted a sentence there.

25 A. Yes. The pain was -- the pain was right here [indicates]

1 to right here, directly below -- I told them directly below
2 both -- below the left breast. But right here [indicates] ---
3 Q. Right.
4 A. Is ---
5 Q. The pain -- it says the patient was able to place a
6 finger on where the pain, was and it was directly below her
7 left breast.
8 A. Mid clavicle.
9 Q. Right.
10 A. This is -- right here [indicating].
11 Q. Below your left breast, though; correct?
12 A. Right here [indicating]. My chest was in pain.
13 Q. Does it say left breast, ma'am?
14 A. It says left breast.
15 Q. Okay. Thank you.
16 A. My whole chest felt like it was going -- was going to
17 blow up.
18 Q. All right. And then when you got to the hospital, you
19 said they took you to the coronary unit; correct?
20 A. Correct.
21 Q. All right. And I'll show you what has been marked and
22 admitted as Defendant's Exhibit 17. This is some nursing
23 notes from the hospitalization stay there. And I'll direct
24 your attention to the middle of this ---
25 A. It says left breast chest, ---

1 Q. Right.

2 A. --- like something is grabbing my chest in a spasm. It
3 was all here [indicates].

4 Q. Okay. And there in the note it says pain location, left
5 breast.

6 A. All here [indicates].

7 Q. Okay. And then underneath that it says like something is
8 grabbing your chest; correct?

9 A. Spasm.

10 Q. A spasm. All right.

11 A. Uh-huh. And it's like it was ripping open. I kept
12 saying it felt like I was ripping open. I just -- I guess I
13 didn't correlate it, my verbiage, correctly.

14 Q. You said it was a spasm?

15 A. It was grabbing. It was hurting. Felt ripping. It's
16 something you never felt before.

17 Q. All right. And it's your testimony, I believe, that
18 during this you were in the hospital for three days?

19 A. I believe so.

20 Q. Okay. And during this hospitalization for three days,
21 when you told them you felt like your chest was ripping or
22 pulling, that nobody ever once looked at the wounds on your
23 breast?

24 A. No. I had clean dressings on my -- on my chest.

25 Q. So you were in the hospital getting a full cardiac workup

1 for three days, ---

2 A. Correct.

3 Q. --- complaining of chest pain, and nobody ever once
4 looked at your breast?

5 A. Correct.

6 Q. And they didn't give you any treatment for your breast?

7 A. No.

8 Q. Okay. And there's not a single complaint in the medical
9 record about anything pertaining to your right breast from
10 that visit, is there?

11 A. The very next morning when I was being released, the
12 physician releasing me said that I should contact my plastic
13 surgeon. That put the ball back in his court.

14 Q. Right. And there's no documented treatment of any kind
15 from this hospitalization for your breast, is there?

16 A. No, because I wasn't there for that. I was assured it
17 was my -- it was my heart. I was assured it was my chest.

18 Q. All right.

19 A. And they kept me for observation.

20 Q. And then you were shown a copy of the medical bills that
21 I think you talked about earlier, correct?

22 A. Yes.

23 Q. And that's Defendant's Exhibit 23?

24 A. Yes.

25 Q. All right. And on Defendant's Exhibit 23 have you

1 included a bill for this hospitalization that had nothing to
2 do with your breast treatment ---

3 MR. SLOTCHIVER: I think it is plaintiff's exhibit, just
4 to be clear for the record.

5 MR. SMYTH: Oh, I'm sorry.

6 Q. Plaintiff's 23. Have you included a bill for the
7 treatment from this visit for \$21,000?

8 A. Yes.

9 Q. And no treatment was given to the breast?

10 A. The reason, because the breast was ripping open from the
11 inside out.

12 Q. And nobody looked at that?

13 A. You can't see from the inside out.

14 Q. Nobody at the hospital ---

15 MR. SLOTCHIVER: Your Honor, this has been asked and
16 answered at least three times. Again I will object.

17 MR. SMYTH: I believe she has answered the question.

18 THE COURT: I will sustain the objection. She's answered
19 it.

20 MR. SMYTH: All right. I will move on.

21 Q. They also didn't diagnose you with an infection during
22 that hospitalization, did they?

23 A. It was inside the breast.

24 Q. Did they diagnose you with an infections, ma'am?

25 A. No.

1 Q. Okay. And they didn't diagnose you with a wound
2 dehiscence, did they?

3 A. They didn't bother with the breasts.

4 Q. All right. And then, moving forward in time, I am going
5 to show you what's been pre-marked and admitted as Exhibit 21.
6 You went to see Dr. Kalus ---

7 A. Correct.

8 Q. --- on July the 10th; correct?

9 A. Correct.

10 Q. All right.

11 A. At 10:00 in the morning.

12 Q. And you filled out a history form when you went there, as
13 well; didn't you?

14 A. Correct.

15 Q. All right.

16 A. It says Ambien. Because I had been taken off my other
17 medications so I could have had that surgery.

18 Q. Okay. I wasn't going to ask you about that, but thank
19 you. But I'll ---

20 A. You've very welcome.

21 Q. Let's look at 7/10 here. That's the date, right?

22 A. Yes.

23 Q. And then the question is: Symptoms and for how long?
24 And what did you write?

25 A. Symptoms of? Where?

1 Q. The third line down, ma'am.

2 A. Symptoms of what?

3 Q. Symptoms and for how long, is the question. What was
4 your response?

5 A. Consult for repair -- it says one week. I told you back
6 then I was really upset. I had just gotten out of the
7 hospital, and this person would not see me.

8 Q. All right.

9 A. So I may have been -- may have wrote the wrong number
10 down.

11 Q. You did remember that you had had surgery with Dr.
12 Schimpf and the date of the surgery and that was all accurate,
13 correct?

14 A. The date of my surgery -- when I -- whenever I went to
15 Dr. Kalus, I was sick. I was upset. I was crying. I was
16 coming apart. So if this was the little mini form I filled in
17 his office, I was a sloppy mess when I got there.

18 Q. Okay. Well, let's look at it. Is there anything else on
19 this form, ma'am, that is wrong?

20 A. Let's see. I've had an ectopic pregnancy, a gallbladder,
21 and then augmentation. My family history: My mother has
22 dementia, my sister had cancer, and my father had cancer,
23 also. Yeah, I didn't write down all my father had, and I
24 didn't write down all my sister had.

25 Q. Okay. But the information that you wrote on this form is

1 all accurate, isn't it?

2 A. Codeine, Gabapentin, alcohol, socially smoke. No -- I
3 guess that's my age and my height. I saw Dr. Schimpf on June
4 6th. I had had -- it says consult for repair. It was consult
5 for help, actually. He sent me back to Dr. Schimpf because,
6 as I said, he was not my doctor.

7 Q. And my question just was is everything else on this form
8 correct.

9 A. It doesn't seem to be. I don't even list everything
10 about my family's medical history.

11 Q. Is anything you wrote on this form inaccurate?

12 A. I should have written on -- this -- the reason for this
13 visit today, help me. And it said, symptoms for how long, a
14 week. It should have probably been four weeks. I don't know.
15 I was a -- I was a horrible mess when I went into his office
16 that day.

17 Q. But you got everything else on the form right?

18 A. Yeah -- no, I don't have my mother and father and my
19 sister's medical issues all labeled there.

20 Q. Okay. And did you tell Dr. Kalus about your psychiatric
21 diagnoses at this point?

22 A. I lived life. I wouldn't call them psychiatric
23 diagnoses. And I've never seen my psychiatric record. I --
24 when I go into her and I talk to her, that's it. I don't
25 really have a record. I have just lived life, and I had

1 gotten a professional person to consult with so I don't take
2 it out on my family and friends.

3 Q. And when you saw Dr. Kalus, he didn't take you to surgery
4 immediately; did he?

5 A. I was not his patient. He called -- he informed Dr.
6 Schimpf that he needed to see me ASAP, and that's when Dr.
7 Schimpf decided to see me. It got me an appointment, with Dr.
8 Schimpf finally appearing.

9 Q. So is it your testimony that had Dr. Kalus said you need
10 surgery right now, come with me, let's go, you would have said
11 no?

12 A. I probably would have gone to surgery.

13 Q. All right.

14 A. But I didn't ---

15 Q. And Dr. Kalus didn't ask you to go to surgery ---

16 A. He ---

17 Q. --- on that visit, did he?

18 A. His -- I can't attest to his exact words, because you
19 keep saying it's hearsay. But ---

20 Q. I'm asking you what you remember, ma'am.

21 A. Doctor -- what I remember? I remember Dr. Kalus getting
22 on the phone with Dr. Schimpf and saying necrosis ---

23 MR. SMYTH: Objection, Your Honor.

24 A. --- and gangre- ---

25 MR. SLOTCHIVER: If she could please ---

1 MR. SMYTH: This is hearsay.

2 THE WITNESS: You keep saying you want to hear what I
3 have to say.

4 Q. No. I'm asking you whether he took you to surgery.

5 MR. SLOTCHIVER: Your Honor, I object. I believe they're
6 arguing right now. This is a -- it's her opportunity to
7 answer the question he asked her, and I would ask that she be
8 given the opportunity to finish her answer.

9 THE COURT: She can't testify to hearsay ---

10 MR. SLOTCHIVER: If he ---

11 THE COURT: --- information.

12 MR. SLOTCHIVER: If he opens the door and asked her a
13 question and it requires that response then I believe it is an
14 appropriate response.

15 MR. SMYTH: Your Honor, can we approach, please?

16 THE COURT: Sure.

17 [Whereupon, an off-the-record bench conference is held]

18 THE COURT: All right. I overruled the objection. You
19 can re-ask the question if you would like.

20 MR. SMYTH: Thank you, Your Honor.

21 Q. Dr. Kalus did not take you to surgery on July the 10th,
22 did he?

23 A. No, he did not.

24 Q. Okay. In fact, he sent you back to Dr. Schimpf that day;
25 correct?

1 A. Correct.

2 Q. All right. And it's your testimony that you went back --
3 Dr. Schimpf offered you an appointment that same day, correct?

4 A. Doc- -- no. Vicky called. They had it the next day. I
5 was too ill to go. I went -- I was -- had been through the
6 ringer. I was crying. I was a hot mess. I went home and got
7 in the bed. I went the very next day.

8 Q. Okay. And you told us about that interaction that you
9 had with Dr. Schimpf the next day on the 11th, correct?

10 A. Yes. Very traumatic.

11 Q. And it's your testimony that Dr. Schimpf was so angry
12 that he was throwing his instruments in the sink and told you
13 to get out of his office?

14 A. His words were get out of here.

15 Q. Okay.

16 A. And he did toss his instruments.

17 Q. And after that you actually went to the nursing home with
18 your sister to visit your mother, correct?

19 A. I went home and went to bed. She came and got me and
20 took me over there.

21 Q. All right. That same day?

22 A. Correct.

23 Q. And then the next day your mother, unfortunately, passed?

24 A. Correct.

25 Q. Okay. And then on Sunday, the 13th, you were in the

1 shower and your daughter was with you; correct?

2 A. Correct.

3 Q. You got lightheaded, the room got dark, and your breast
4 blew open?

5 A. Correct. From the inside out.

6 Q. You got dizzy and you blacked out?

7 A. I got -- I got dizzy and I was blacking out.

8 Q. You said yesterday you were in and out of consciousness?

9 A. Correct.

10 Q. And your ---

11 A. The whole day.

12 Q. Your breast started bleeding, totally opened up while you
13 were in the shower; correct?

14 A. Correct. I looked down and it was pouring down my leg
15 and swirling around my feet.

16 Q. And it's your testimony that nothing happened to cause
17 your breast to blow open while you were in the shower?

18 A. It blew open.

19 Q. Right.

20 A. The three stitches he put in the day before blew apart.

21 Q. Did you fall?

22 A. No.

23 Q. Did you bump it on anything?

24 A. No.

25 Q. Did you scrape it on anything?

1 A. No. And his silvadene is still on the picture.

2 Q. You said that your daughter had to drag you and pull you
3 out of the shower; is that correct?

4 A. I said she helped me out of the shower.

5 Q. We could look at your deposition testimony. Do you
6 dispute that you said she dragged you out of the shower?

7 A. She helped me out of the shower. If I said the drag
8 or something, she helped me out of the shower. You
9 can -- you can read it. I'd like you to read it. I'd like to
10 explain it.

11 Q. Sure.

12 MR. SMYTH: Your Honor, I don't think we've used a
13 deposition yet. Do you want to go through that process with
14 the jury?

15 THE COURT: Sure.

16 Ladies and gentlemen of the jury, they're going to unseal
17 a previously-taken deposition. Depositions are sworn
18 testimony, as if they are given in court; and they are
19 previously done prior to court and they can be utilized to
20 refresh a defendant's recollection. So that's why they'll
21 unseal it now.

22 [Sealed deposition was unsealed]

23 THE COURT REPORTER: And, Your Honor, I'll mark this as a
24 Court's Exhibit.

25 THE COURT: Ma'am?

1 THE COURT REPORTER: I'll mark this as a Court's Exhibit.

2 THE COURT: Yes, ma'am.

3 [Whereupon, Court's Exhibit Number 1, Whitfield
4 deposition, Part 1, was marked for identification.)

5 MR. SMYTH: Your Honor, we may need to take something up
6 with you very quickly. It's just an administrative thing.

7 THE COURT: What time is it? It is only 11:30.

8 All right. Ladies and gentlemen of the jury, they need
9 to take up a matter of law. It's going to take about five
10 minutes. So if you'll just retire to the jury room, I'll get
11 you right back out here in just a couple of minutes.

12 [Whereupon, the jury exits the courtroom 8/27/19, 11:27
13 a.m.]

14 MR. SMYTH: Judge, what happened is they sent us that
15 large -- her deposition was done in two different settings.
16 We thought that contained the original of both. The court
17 reporter never sent us the original of the first version of
18 it. Everybody's got copies of it. Everybody's agreed that we
19 can use the copies. I just didn't want to bog us down into a
20 procedural thing.

21 THE COURT: Okay.

22 MR. SMYTH: So ---

23 THE COURT: And so obviously when you opened that up, you
24 realized that the original ---

25 MR. SMYTH: Right.

1 THE COURT: --- of number one is not in there?

2 MR. SMYTH: We couldn't open it before we got here. So
3 that was my ---

4 THE COURT: Okay.

5 MR. SMYTH: We kind of knew that, but we weren't sure
6 exactly what happened. But if we've got copies and
7 plaintiff's counsel is ---

8 THE COURT: All right. Any objection to utilizing one of
9 the copies since the court reporter never submitted the
10 originals of the first deposition of Ms. Whitfield?

11 MR. SLOTCHIVER: No objection. It doesn't come into
12 evidence, I don't believe. But no objection.

13 THE COURT: It's being marked as a Court's Exhibit.

14 MR. SLOTCHIVER: Yes, sir.

15 [Whereupon, Court's Exhibit Number 2, Whitfield
16 deposition, Part 2, is marked for identification by the court
17 reporter]

18 THE COURT: All right. Anything further?

19 MR. SMYTH: No, sir, Your Honor. I just wanted to get to
20 the pages before the jury got back so that I didn't waste
21 anymore time.

22 [Whereupon, a recess is taken 8/27/19, 11:30 a.m. to
23 11:33 a.m.]

24 THE COURT: Bring the jury for us.

25 [Whereupon, the jury enters the courtroom at 11:36 a.m.]

1 THE BAILIFF: Your Honor, the jury is complete.

2 THE COURT: Thank you so very much. All right. Yes,
3 sir?

4 MR. SMYTH: Thank you, Your Honor.

5 Q. Ms. Whitfield, when we took a break I think you wanted to
6 see your deposition; so I pulled that page that I was talking
7 about.

8 A. Thank you.

9 Q. And I'll ask you to please turn your attention to Page
10 101.

11 A. Yes.

12 Q. At Lines 8 through 11.

13 A. Yes.

14 Q. Where you were describing what happened on the 13th.

15 A. Yes.

16 Q. And you said in that very next day on the 13th: I was in
17 the shower and my breast blew open, and I got dizzy. My
18 daughter dragged me out of the shower where blood was pooling
19 around my feet.

20 Was that your response?

21 A. That is what is written here. That is what I said here.

22 When I'm standing in the shower and I was getting dizzy
23 and et me stand up for a visual.

24 [Whereupon, witness stands]

25 And I started getting dizzy. And I looked down, and

1 there was blood going all down my leg and pooling around my
2 feet. And I opened the door like this [indicating]; and I
3 said, Sam. She helped me out of the shower.

4 I guess dragging would have been something that I
5 would -- I don't know why I used a dramatic word like that.
6 She helped me out of that shower. I kept going in and out.

7 Q. And you were under oath when I took your deposition,
8 told -- swore to tell the truth; correct?

9 A. Yes, I did. She got me out of the shower.

10 Q. And you had never had any problems with this wound
11 bleeding before, had you?

12 A. With the wound bleeding before?

13 Q. Right.

14 A. It was nasty until that day whenever the blood poured out
15 of it when the ---

16 Q. Right.

17 A. --- when the wound blew open.

18 Q. It wasn't bleeding before you got in the shower, was it?

19 A. No.

20 Q. Okay.

21 A. It had puss and green stuff and black stuff and really,
22 really red angry skin.

23 Q. Okay. Well, let's talk about that. Because the next --
24 you went to the hospital that same day, didn't you?

25 A. Correct.

1 Q. All right. And they ran labs on you?

2 A. I would assume so. I was in and out of it.

3 Q. Right. And your labs were perfectly normal; there was no
4 elevated white count, was there?

5 A. I have no idea. I've never seen those reports. I know
6 my breast was blown open.

7 Q. So to your knowledge you were never diagnosed with an
8 infection when you were at Roper, were you?

9 A. I have no idea. I've never seen those notes.

10 Q. Okay. And ---

11 A. A putrid ---

12 Q. --- your implant was not exposed at the time you were at
13 the hospital, was it?

14 A. Whatever the -- what I saw, whenever I -- whenever I did
15 see it -- because that day was so hazy to me, going in and
16 out. The black, the yellow, the green, angry red, and then of
17 course all the blood and the yellow fat. The whole thing was
18 open.

19 Q. Right.

20 A. You saw the pictures.

21 Q. And Dr. Kalus told you he was going to try to salvage
22 that implant because it wasn't exposed, didn't he?

23 A. No, he didn't.

24 Q. Okay.

25 A. I don't know what he said, what his exact words were.

1 And, again, I can't have hearsay or anything like that; so you
2 get to tell your truth, but I only get to tell half of mine.

3 Q. Well, do you recall talking with Dr. Kalus about trying
4 to salvage the implant?

5 A. No. He said remove.

6 Q. Okay. And you've not read his testimony then?

7 A. I have not.

8 Q. Okay. And the surgery that day, they removed the right
9 implant only; correct?

10 A. Correct.

11 Q. And you were already talking to Dr. Kalus just a few
12 months later about having an implant put back in on that right
13 side, correct?

14 A. No. We were talking about -- we have, every time we met,
15 talked about our next steps as what we were going to be doing.
16 But we hadn't gotten there yet with the exactly what we were
17 going to do.

18 We looked at -- we discussed the -- I think the concept
19 of spacers, implants, of fat-grafting. But we've had
20 conversations.

21 Q. And one of those conversations was about putting an
22 implant back in on the right side, correct?

23 A. It's -- actually, our conversations -- what is the date
24 of the -- a conversation you're asking about? Because when I
25 only had one breast, we did have those conversations.

1 Q. Right.

2 A. When I had had no breasts, we had another conversation.
3 When he did the fat-grafting, we had another conversation. So
4 what exactly was his conversation he had with me? Because I
5 can't -- I can't put words in his mouth.

6 Q. I'm not asking you to.

7 A. Okay.

8 Q. I'm just asking you whether you ever talked to him about
9 putting an implant back in on the right side after this one
10 was removed.

11 A. We were going to visit that in March. That's why in
12 February it was important for him to get the information to
13 get my records from Sweetgrass that y'all had, you, as his
14 legal counsel had, but would not give to me.

15 Q. So we talked about this picture a little bit earlier.
16 This is a picture of your breasts in February of 2015,
17 correct?

18 A. Correct.

19 Q. All right. So this is after Dr. Kalus has removed the
20 implant on the right?

21 A. Correct.

22 Q. And you still had the implant on the left?

23 A. Correct.

24 Q. All the wounds are healed?

25 A. From the -- they appear to be.

1 Q. Okay. And that was your appearance in February of 2015?
2 A. Okay.
3 Q. And then you had surgery with Dr. Kalus the next month in
4 March, correct?
5 A. Correct. To remove that other implant.
6 Q. And this is the result of that surgery, correct?
7 A. Yes.
8 Q. And so ---
9 A. He will explain it to you in his deposition.
10 Q. Right. So this was your condition before you saw Dr.
11 Kalus [displaying], and this was your condition after you saw
12 Dr. Kalus [displaying]?
13 A. Correct. Because he had to remove that other implant.
14 He will explain that since -- hearsay.
15 Q. And he also removed a lot of breast tissue, too; didn't
16 he?
17 A. Correct. You have to look ---
18 Q. And he left you with a deformity on the left side that
19 you didn't have before?
20 A. You're going to have to consult his notes; because,
21 again, you keep saying hearsay.
22 Q. I'm just asking you if this was the condition that he
23 left you in after his surgery.
24 A. Correct. But ---
25 Q. Okay.

1 A. --- I don't have the medical notes to see what he found
2 in there.

3 Q. And Dr. Kalus, I believe, according to the bills that
4 you've given us, has billed you over \$60,000 since he's taken
5 over your care; correct?

6 A. If that's what the bills say.

7 Q. And you understand, don't you, ma'am, that if you had
8 have stayed with Dr. Schimpf you wouldn't have incurred any of
9 those costs?

10 A. If he would have called me back, and if he wouldn't have
11 been so traumatically violent on the last time in telling me
12 to get out of his office, I assume maybe I could have stayed
13 with Dr. Schimpf. But his careless, callous, no compassion,
14 not caring, don't even pick up the phone, I -- no, I don't
15 think I am going to go back to him.

16 MR. SMYTH: Those are all my questions. Thank you,
17 ma'am.

18 THE WITNESS: You're very welcome.

19 THE COURT: All right. Any redirect?

20 MR. SLOTCHIVER: A few, Your Honor.

21 **REDIRECT EXAMINATION BY MR. SLOTCHIVER OF JEANE WHITFIELD:**

22 Q. You were asked during cross-examination about the
23 informed consent that you signed ---

24 A. Correct.

25 Q. --- dealing with liposuction.

1 A. Correct.

2 Q. And you talked about it wasn't a vanity option ---

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

4 THE COURT: Just ask her a question. If you'll just
5 rephrase the question for me, please.

6 MR. SLOTCHIVER: Sure.

7 THE COURT: Thank you.

8 Q. This is a copy of the informed consent liposuction that
9 was referenced earlier, correct?

10 A. Correct.

11 Q. And anywhere on that form where it references neck?

12 A. No. And I didn't get a plan to -- a care for the neck
13 when I was -- whenever I was released ---

14 Q. Okay.

15 A. --- from his surgeries. I got a -- I got a plan of care
16 for my -- everything but ---

17 Q. I am going to ask you about that, I promise.

18 A. I'm sorry. I'm sorry. I'm jumping ahead.

19 Q. This is Defendant's Number 7.

20 A. I'm just upset. Sorry.

21 Q. This is the -- you testified I believe you had two
22 proposals, correct?

23 A. Correct. One in December and one in I believe it was
24 April when I went back.

25 Q. Do you see on this form where it references liposuction?

1 A. Correct.

2 MR. SMYTH: Your Honor, objection. May we approach?

3 THE COURT: Sure.

4 [Whereupon, an off-the-record bench conference is held
5 8/27/19, 11:45 a.m.]

6 THE COURT: All right. For the record, the objection is
7 overruled. You may ask the question.

8 Q. On the proposal you were given, what did the proposal say
9 regarding liposuction?

10 A. The liposuction pertains to the abdomen, inner thighs.
11 This is what a lady would call the bikini area. And I have a
12 C-section scar. So this area only [indicating].

13 Q. Okay.

14 A. Tightening up the thighs and around here [indicates].

15 Q. Okay.

16 A. I have to make it on point.

17 Q. I'm going to show you what's been marked as Plaintiff's
18 Exhibit 5. You've seen this before. And you testified --
19 this is already in evidence. This is the postoperative
20 instruction you were given for the liposuction, correct?

21 A. Correct.

22 Q. What area does that refer to?

23 A. The abdomen.

24 Q. Thank you.

25 What discussions did you have with Dr. Schimpf or

1 Sweetgrass Chiropractic -- Sweetgrass -- excuse me --
2 Sweetgrass Plastic Surgeon -- Surgery, ever, about surgery or
3 a procedure on your chin or neck?
4 A. Never. He did it as a -- and his words were something-
5 something, you'll like it later. It was shocking.
6 Q. You were shown the different forms that you signed, and
7 they talked about different things that could potentially
8 happen?
9 A. Correct.
10 Q. You understand that things could potentially happen?
11 A. Yes. I've had -- I've had surgeries before. I healed
12 perfectly.
13 Q. Did you file a lawsuit because of a bad result or because
14 of medical malpractice?
15 A. I filed for ---
16 MR. SMYTH: Objection, Your Honor.
17 A. --- a medical malpractice.
18 THE COURT: What's the basis?
19 MR. SMYTH: May we approach?
20 THE COURT: Sure.
21 [Whereupon, an off-the-record bench conference is held]
22 THE COURT: All right. Rephrase the question.
23 Q. Did you file a lawsuit because you believed it was bad --
24 a bad result, or did you file a lawsuit because you believed
25 that there was medical malpractice?

1 A. Medical malpractice. He had no right, and he did not
2 care for me. He took no care of me. He abandoned me once he
3 got my money.

4 Q. I'm going to show you a picture again of Plaintiff's
5 Exhibit Number 22. I believe you testified that this is a
6 picture that your daughter took; correct?

7 A. Correct.

8 Q. Is this the condition you were in at the time that you
9 got out of the shower?

10 A. Yes. But she snapped the picture when I got out of
11 the -- when she got me out of the shower, helped me out of the
12 shower; and it still has his -- Dr. Schimpf's silvadene on it.
13 It still has the three stitches hanging to the side and the
14 nipple way back here [indicating] from -- after he put in
15 three stitches and saw this and sent me home. Yes, that's
16 when the breast blew up from the inside out.

17 Q. The other photographs -- I'm not going to put them up.
18 But the other photographs that we've shown the jury, these are
19 the ones that kind of show the timeline of how things started
20 to fall apart until the time -- the time you came out of the
21 shower?

22 MR. SMYTH: Objection, Your Honor. Leading.

23 MR. SLOTCHIVER: I'll be happy to show them.

24 A. Are you talking about July 11th all the way to -- I mean,
25 June 11th to July 11th, the timeframe where everything turned

1 into a nightmare?

2 Q. This is the earliest picture you have?

3 A. I believe there's ---

4 Q. That was ---

5 A. I believe there's one where you see my fingers. Are my
6 fingers on one of those where I think I pointed to? That is
7 the earliest I believe on -- that's where it was gooey with
8 the -- it was taken on the 11th, because it -- the seams -- it
9 wasn't seaming and it was gooey.

10 But those are the very first sets of pictures. I may be
11 a day or two off; but, yes, if you see where there's gooey
12 seaming and black tape.

13 MR. SLOTCHIVER: Beg the Court's indulgence.

14 I've got nothing further. Thank you.

15 THE COURT: All right. Ms. Whitfield, you may be
16 excused. Thank you so very much. Have a seat back at the
17 plaintiff's table.

18 THE WITNESS: Thank you.

19 THE COURT: Yes, ma'am.

20 THE WITNESS: You want me to leave these pictures --
21 these papers here?

22 THE COURT: Yes, ma'am.

23 [Whereupon, the witness exits the witness stand]

24 THE COURT: All right. Come up real quick.

25 [Whereupon, an off-the-record bench conference is held]

1 THE COURT: Thank you very much. Call your next witness.

2 MR. SLOTCHIVER: Call Samantha Van Buren.

3 [Whereupon, Ms. Van Buren comes forward]

4 [Whereupon, Ms. Van Buren is duly sworn by the clerk of
5 court]

6 THE CLERK OF COURT: You may be seated.

7 [Whereupon, the witness takes the witness stand]

8 THE CLERK OF COURT: And for the record, please state
9 your full name, spelling your last.

10 THE WITNESS: Full name is Samantha Jessie Van Buren.

11 V-A-N B-U-R-E-N.

12 MR. SLOTCHIVER: Thank you, Your Honor.

13 MR. SMYTH: Can we take up a matter briefly before this
14 witness testifies?

15 THE COURT: Sure.

16 [Whereupon, an off-the-record bench conference is held]

17 MR. SLOTCHIVER: I promise this will be shorter than your
18 mother's testimony.

19 THE WITNESS: Go ahead.

20 SAMANTHA J. VAN BUREN, Having Been First Duly Sworn, was
21 examined and testified as Follows:

22 **DIRECT EXAMINATION BY MR. SLOTCHIVER OF SAMANTHA VAN BUREN:**

23 Q. Samantha, tell us -- tell us, who -- you are Jeanne's
24 daughter, correct?

25 A. Yes.

1 Q. Give us a little bit about your background. Where do you
2 live?

3 A. I currently live in Summerville, South Carolina.

4 Q. Do you work?

5 A. I do.

6 Q. And what do you do for a living?

7 A. I'm a nationally registered paramedic for Dorchester
8 County EMS.

9 Q. And before you got your degree as a paramedic, did you
10 work?

11 A. No.

12 Q. Were you certified before then as something else?

13 A. I was certified as an EMT basic.

14 Q. In layman terms, what is a paramedic? What
15 responsibilities do you have? What is your training?

16 A. My responsibilities are taking care of patients. I am
17 currently a crew chief at Dorchester County EMS. I have a
18 crew member beneath me. I make sure that they are taking care
19 of patients properly. Every single patient that steps into my
20 ambulance is ultimately my responsibility.

21 It ranges from just checking off the truck in the
22 mornings, making sure all my equipment is ready and ready to
23 go, to just answering 911 calls. And it ranges from traumas,
24 medical. You name it, we have got it.

25 Q. What's the difference in an EMT and a paramedic?

1 A. EMT is just your basic life support. A paramedic, it's
2 different, as in a paramedic starts IVs, gives you the
3 medications, is really the brains behind treating you.
4 Basics, it's not a not-too basics; but being a paramedic
5 involves so much more.

6 Q. How long have you worked as an EMT or as a paramedic?

7 A. I've been an EMT ---

8 MR. SMYTH: Objection, Your Honor. May I approach?

9 THE COURT: Sure.

10 [Whereupon, an off-the-record bench conference is held]

11 THE BAILIFF: Your Honor, may I?

12 THE COURT: Absolutely. Yes, sir.

13 [Whereupon, bailiff has bench conference with the Court]

14 THE COURT: All it was was they couldn't hear you.

15 THE WITNESS: Oh.

16 THE COURT: So just pull the microphone ---

17 THE WITNESS: Sorry.

18 THE COURT: --- up close. And he [bailiff] has to do
19 that, because he doesn't know what you can and can't say in
20 front of the jury. But that's all it was. So nothing crazy.

21 [Off the record momentarily to adjust microphone and
22 chair]

23 MR. SLOTCHIVER: Do I need to go back through the
24 testimony that we have done?

25 [Whereupon no affirmative responses from jury]

1 MR. SLOTCHIVER: Okay.

2 Q. Testimony has come out that you took a picture of your
3 mother on the day that she got out of the shower.

4 A. That is correct.

5 Q. Okay. Putting it up very briefly.

6 A. Okay.

7 Q. It is -- this is Plaintiff's Exhibit Number 22. Is this
8 the picture that you took?

9 A. That is.

10 Q. Okay. Is that the picture you took?

11 A. Yes, sir.

12 Q. Can you tell us what was going on that day and why you
13 were at the house?

14 A. My grandmother just died and was buried. I had family
15 down downstairs. Mom needed to take a shower and she wanted
16 me to just be there and be with her.

17 She has a very large, spacious shower. There's actually
18 a chair in there. I was sitting in there, and she was just
19 crying. I assumed she was just crying -- obviously, my
20 grandmother had just passed.

21 She wanted me to help her get out of the shower, and she
22 said she was in so much pain. I was just kind of confused. I
23 opened up the door, and that's when I saw that looking back at
24 me.

25 And I just asked her like who -- who do I call. I had

1 already known she had gotten a second opinion. I was like,
2 who is that, what's his number.

3 We -- I called his -- I called the office. They said
4 they can get in touch with him. They called, within a few
5 minutes, back. I said ---

6 Q. Was this Dr. Kalus?

7 A. This was Dr. Kalus. I asked him -- I told him what I was
8 seeing; exactly, everything. I was like what hospital is
9 going to let you in to take care of my mother. He said take
10 her to Roper downtown, and that's where I took her.

11 Q. Perhaps it speaks for itself. But did you consider that
12 condition that she was in to be serious and require immediate
13 attention ---

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

15 THE COURT: Just ask her what her perception was.

16 Q. What was your perception of the condition that your
17 mother was in at that point?

18 A. I believed my mother needed to be seen by a physician;
19 someone to take care of that, to fix it.

20 MR. SLOTCHIVER: Beg the Court's indulgence.

21 THE COURT: Absolutely.

22 Q. Samantha, from your personal observations how has this
23 affected your mother?

24 A. It's affected her greatly. Prior to this, I wouldn't
25 know that she had anxiety, depression; any other problems that

1 normal people normally have.

2 After this, she felt like a monster. She stayed in her
3 room. She wouldn't come out to events. She wouldn't -- we
4 didn't go shopping as much. She definitely didn't look at
5 clothes.

6 She -- I know she had suicidal thoughts. She had written
7 out papers, just in case she had gone through with it, that I
8 would eventually find having to, you know, work through her
9 estate.

10 And -- sorry. That's not my mother.

11 Q. The conditions that you're talking about, the changes,
12 the suicidal thoughts, this was all after the surgery took
13 place?

14 A. This was a few years after. Yes.

15 MR. SLOTCHIVER: Thank you very much.

16 THE WITNESS: Uh-huh.

17 THE COURT: All righty. Mr. Smyth?

18 **CROSS-EXAMINATION BY MR. SMYTH OF SAMANTHA VAN BUREN:**

19 Q. Samantha, to our knowledge ---

20 A. Uh-huh.

21 Q. --- your mother's breast wasn't bleeding before the
22 shower, right?

23 A. I didn't look at it. I wouldn't be able to tell you.

24 Q. But when she got out of the shower it appeared like it
25 did in Exhibit 22; ---

1 A. Yes.

2 Q. --- is that correct?

3 A. That is correct.

4 MR. SMYTH: Thank you very much.

5 THE COURT: All right. Nothing further?

6 MR. SMYTH: No, sir.

7 THE COURT: You may step down. Thank you so very much.

8 [Whereupon, the witness exits the witness stand]

9 THE COURT: All right. Ladies and gentlemen of the jury,
10 I think it's probably a pretty good stopping point. It's
11 12:05. Was the amount of time I gave you the other day ample,
12 about an hour and fifteen minutes, enough time to get out of
13 the building and get something and get back? I

14 Okay. Well, let's just try to do that again. Just be
15 back in the jury room. When I say we're going to start at
16 1:15 sometimes the bailiffs will tell you to come a little bit
17 earlier. But we are going to start right around 1:20, so just
18 be back in the jury room about 1:15. All right? He's just
19 playing the safe odds. All right. Enjoy your lunch.

20 [Whereupon, the jury exits the courtroom 8/27/19, 12:03
21 p.m.]

22 THE COURT: All right. Do y'all want to take up the
23 issue real quickly about the deposition testimony that you
24 want to object to so when we get to that point we can just
25 kind of keep rocking and rolling? All right. Let's do that.

1 MR. SLOTCHIVER: We also had a very brief testimony,
2 Judge, about Mary Crowe, the witness we wanted to produce.

3 THE COURT: Okay.

4 MR. SLOTCHIVER: But that's -- it's similar to what you
5 just heard. It's not a lot different. I'll be very brief.

6 THE COURT: Meaning what, now?

7 MR. SLOTCHIVER: We wanted to present Mary Crowe to
8 testify today. They had complained that she was lately
9 provided. We had said what we would do is today before she
10 testified we could have proffer testimony and then that could
11 be their opportunity essentially to depose her and then we
12 could put her on the stand.

13 I represent it to the Court that her testimony is going
14 to be not the same, but it's going to be the same nature as
15 what her daughter testified to.

16 THE COURT: All right. And what is her role, this
17 witness?

18 MR. SLOTCHIVER: She -- she is the sister. She was the
19 one that was with her at the doctor's office at different
20 times.

21 THE COURT: Okay.

22 MR. SLOTCHIVER: She's been a caregiver.

23 THE COURT: All righty. And, Mr. Smyth, what's your
24 objection to her testifying?

25 MR. SMYTH: She was named six months after the scheduling

1 order expired, Your Honor. And, presumably, if she knew about
2 all this since 2014 there would be no reason not to have named
3 her other than just before the week of trial as an ambush.
4 And so, you know ---

5 THE COURT: I think we're all in agreement that this
6 little order that y'all had wasn't overly abided by. I'm not
7 overly excited by the fact that we're still going through
8 discovery the day before the trial; but if her testimony is
9 going to be similar in nature, I don't find it to be -- I
10 mean, I don't see how it's prejudicial at all in allowing her
11 to simply reiterate or I guess bolster what the daughter has
12 testified to.

13 What's your position as to that?

14 MR. SMYTH: Well, it's cumulative. So, you know, if it's
15 the same testimony about the same things that we've already
16 heard from the plaintiff and her daughter about, then it
17 becomes cumulative.

18 THE COURT: Well, that's true. I mean, under Rule 611
19 I've got to keep this trial moving. So what ---

20 MR. SLOTCHIVER: It's a five-minute -- five, ten minutes
21 at most. It's not cumulative. She wasn't with her -- she
22 wasn't with her sister at the time this broke apart. She went
23 to her with appointments. She's known her sister her whole
24 life, as opposed to her daughter.

25 THE COURT: All right. Bring her up.

1 MR. SLOTCHIVER: Very brief. Sure.

2 [Whereupon, Ms. Crowe comes forward]

3 [Whereupon, Ms. Crowe is duly sworn by the clerk of
4 court]

5 THE CLERK OF COURT: You may be seated.

6 [Whereupon, the witness takes the witness stand]

7 THE CLERK OF COURT: And for the record, please state
8 your full name, spelling your last.

9 THE WITNESS: Mary Carolina Crowe. C-R-O-W-E.

10 THE COURT: All righty.

11 MR. SLOTCHIVER: Judge, can I skip the background
12 information?

13 THE COURT: Absolutely. Let's just go into the
14 substantive.

15 MR. SLOTCHIVER: Okay. Thank you, sir.

16 MARY C. CROWE, Having Been First Duly Sworn, was Examined and
17 Testified as Follows:

18 PROFFER

19 **DIRECT EXAMINATION BY MR. SLOTCHIVER OF MARY CROWE (IC) :**

20 Q. Ms. Crowe, you've been called as a witness regarding the
21 claim by your sister, Jeane Whitfield. Can you tell us -- can
22 you tell us your observations and what you have participated
23 in and what you know about it?

24 A. I knew that Jeane, after she had her first augmentation,
25 later on started experiencing pain below her breast. I knew

1 she had dealt with that for a while. And then there came a
2 time that she told me that she was going to go to the doctor,
3 that a doctor was going to take care of that pain.

4 So I told her I would give her a ride to the doctor. And
5 I thought we were at the doctor's office - that was Dr.
6 Schimpf - to do what needed to be done to alleviate the pain.

7 So I told her I would take off work and take her and her
8 husband on the day of the surgery to the -- to the surgical
9 suite. And I did.

10 And when she came out, she had her -- she was bandaged.
11 She had that thing around her head. I'm like, what is that
12 for. And she said she had her eyes done. There was no
13 mention of anything else.

14 I took her home, and I went and got her prescriptions.
15 And then I stayed with her through the weekend making sure
16 that she had water and she was warm enough and helped her go
17 to the bathroom and took care of her until her husband came
18 upstairs to sleep.

19 Q. Let's move past that part.

20 A. Past that part?

21 Q. What do you know about the complications that she had?

22 A. I returned to work. And then I came -- I worked in
23 Columbia. But I would stay with Jeane and Tony on the
24 weekends. And so the next time I saw her, she showed me.
25 This was -- I believe this was before the blowing up. And it

1 -- she showed me her breast. And I looked at it. And I'm --
2 a seamstress is my hobby. And I looked at it; and I said, the
3 stitch is too tight, he took out too much skin and you need to
4 get that fixed.

5 And she said that she had been calling and stuff, so I
6 didn't think anything else about it. I knew she said she was
7 going to get it taken care of. So I went back to work in
8 Columbia; and the next thing I know I'm getting a phone call,
9 Jeane's having emergency surgery, and I had to rush back here.

10 And the sister that was before this surgery was a bright-
11 shining person, happy, helping people, outgoing. And now she
12 has folded in on herself. She's sad. And this whole process
13 of the humiliation and beating down by the other side has
14 caused her even more damage.

15 Jeane is not insane. There is no mental issues.

16 Q. Okay. One more question for you. You were with her on
17 the date of the surgery; you drove her down there; did you
18 stay with her preoperatively?

19 A. Yes.

20 Q. Okay. Did you hear any mention of anybody about -- or
21 any discussion ever about the surgery to her neck or to her
22 chin?

23 A. No.

24 MR. SLOTCHIVER: Okay. Nothing further.

25 THE COURT: All right. Mr. Smyth, I'll give you more

1 than ample opportunity to cross-examine her.

2 **CROSS-EXAMINATION BY MS. SMYTH OF MARY CROWE (IC) :**

3 Q. Ms. Crowe, you're not a physician, are you?

4 A. No.

5 Q. You've never operated on a human body, have you?

6 A. No.

7 Q. And you agree you're not qualified to testify about the
8 things that doctors do when they do surgery, correct?

9 A. That is correct.

10 Q. But you did see Ms. Whitfield after she had the surgery,
11 correct?

12 A. Yes.

13 Q. And she had a bandage, that we looked at earlier, around
14 her head?

15 A. Yes.

16 Q. And you asked her about that?

17 A. No.

18 Q. You didn't ask her about it?

19 A. Oh, I said what is that for; and she said for her eyes.

20 Q. And it's your testimony that your sister has no mental
21 issues whatsoever?

22 A. No, my sister is a normal person who has a normal life.
23 There's no craziness in her.

24 Q. Were you aware that she's been seeing a psychiatrist for
25 over a decade?

- 1 A. I know that she has been talk- -- I've taken her there.
2 She likes to go to Dr. Marcino to have somebody to talk to
3 that's non-judgmental. And so she opened up her whole past to
4 this person so that she would have her as a resource.
- 5 Q. And she's also prescribed her some pretty heavy
6 medications?
- 7 A. She has prescribed her different medications over this
8 course of the time. It's not like she gave her a bowl of
9 pills to eat by the handful.
- 10 Q. And you're aware of those medications?
- 11 A. I'm aware that there are medications. I am not aware of
12 what they are, specifically, or what they do.
- 13 Q. And you told us earlier your occupation is what?
- 14 A. I'm retired now.
- 15 Q. What were you before?
- 16 A. I was a project manager.
- 17 Q. Were you an accountant?
- 18 A. I did accounting for the Department of Social Services.
- 19 Q. Okay. Do you know Mr. Ray Roberts?
- 20 A. The name is not familiar. Could you remind me why I
21 would know him?
- 22 Q. I think he's one of the experts. I was curious if you
23 knew him or not.
- 24 A. No.
- 25 Q. The expert that they have hired on this case -- okay.

1 And you testified that you were with your sister at the time
2 she went to see -- or -- on the day of surgery; correct?

3 A. Uh-huh.

4 Q. Is that right?

5 A. Yes.

6 Q. Okay. But you didn't go back behind the office; you
7 stayed in the waiting room, right?

8 A. That's correct.

9 Q. And you've known about this testimony. You could have
10 offered it at any point in the last five years, couldn't you?

11 A. I knew you were offered to depose me and you turned it
12 down.

13 Q. Right. Did you ever come forward as a witness before
14 this month?

15 A. Everybody you see sitting over there is a witness to
16 this.

17 Q. Were you ever identified as a witness in this case before
18 August of 2019?

19 A. No.

20 Q. Okay.

21 MR. SMYTH: Thank you.

22 THE COURT: All right. Thank you very much, ma'am. You
23 may step down.

24 [Whereupon, the witness exits the witness stand]

25 THE COURT: I am going to allow the testimony. It's not

1 as cumulative as I expected. It's more probative than
2 prejudicial. And I believe we've all agreed that we've blown
3 through the scheduling order for this -- for this trial. So
4 I'm going to allow it.

5 All right. We're going to be in recess until 1:15.

6 [Whereupon, a recess is taken 8/27/19, 12:15 p.m., to
7 handle unrelated court matters]

8 [Whereupon, resume trial, 8/27/2019, 1:30 p.m.]

9 THE COURT: Juror -- not question. There is a juror
10 statement. It says, Your Honor, I would like to bring this to
11 your attention. When the plaintiff mentioned the burka to
12 cover her appearance, the burka in my religion is to cover
13 beauty. I have family members that wear the burka. I found
14 that to be offensive. Wanted to point this out in respect to
15 the burka. Thanks. Juror Number 3.

16 What do y'all want to do?

17 MR. SLOTCHIVER: Judge, we have two alternate jurors.
18 The juror obviously found it significant to enough to bring it
19 to the Court's attention. Certainly there was no intent to
20 offend her or him. I don't know who Juror 3 is. But I would
21 ask that ---

22 THE COURT: The first one on the left.

23 MR. SLOTCHIVER: I would ask that this juror be excused.

24 MR. SMYTH: I would think, Your Honor, before we excuse a
25 juror we need to find out whether it will affect his ability

1 to render a fair and impartial verdict in the case.

2 THE COURT: It's going to be tricky for him to get over
3 that bar, but I'm happy to do it.

4 Just for the record -- well, the record will show it and
5 indicate it. He tried to get out of jury duty a couple of
6 times. So, I mean, he does not want to be here. I just
7 wanted to let you know that.

8 He made -- the first one, I can't remember what it was.
9 I can't remember what the exemption was. But then he came up
10 on a personal matter and said that he and his wife own a
11 business, just those two, and that they alternate between
12 picking up their daughter at two o'clock and that -- when I
13 said, well, I wasn't sure it that is an exemption because your
14 daughter is ten, not seven, he got upset and angry and huffed
15 off.

16 So also I can just let you know this, as well.
17 Throughout this process he has not -- I've watched him. Just
18 because he -- and he just basically just stares at me the
19 entire time.

20 So I don't think he's an overly good juror. He's already
21 pointed out that he's offended by the plaintiff. So -- for
22 his -- and this is a religious issue. This isn't because, you
23 know, something's that probably not very close to him. So
24 I'll be happy to bring him out and talk to him, but it's going
25 to be a close one.

1 MR. SMYTH: Okay.

2 THE COURT: Bring me Juror Number 3, please.

3 [Whereupon, Juror Number 3 enters the courtroom]

4 [Whereupon, Court's Exhibit Number 3, jury note, marked
5 for identification]

6 THE COURT: I have received your letter, and I have
7 published it just to the parties. And I wanted to ask you, as
8 I have in qualifying the jury, and I've asked you a couple of
9 times, the fact that this reference to the burka has been
10 brought up, you indicated that you found that to be offensive.
11 Is that something that would preclude you from being fair and
12 impartial in this situation?

13 JUROR NUMBER 3: I mean, it might.

14 THE COURT: It's a religious issue, and I understand
15 that; and so I'm not going to get in depth with you concerning
16 that, and so I am going to excuse you and replace you with
17 Alternate Number 1.

18 [Whereupon, Jury Number 3 is excused and replaced by
19 Alternate 1 who is Juror 287]

20 JUROR NUMBER 3: Thank you.

21 THE COURT: You're free to go.

22 [Whereupon, Juror Number 3 exits the courtroom]

23 THE COURT: Hold on. Bring him back real fast.

24 [Whereupon, Juror Number 3 enters the courtroom]

25 THE COURT: Sir, one last question I would ask you. Have

1 you shared this information or discussed this with any of the
2 jurors?

3 JUROR NUMBER 3: No.

4 THE COURT: All right. Just wanted to make sure that
5 nobody else you had spoken to concerning it. All right. You
6 can be excused. Thank you so very much.

7 JUROR NUMBER 3: Thank you.

8 [Whereupon, Juror Number 3 exits the courtroom]

9 THE COURT: All right. Any other issues that we need to
10 address before we bring the jury back in?

11 MR. SLOTCHIVER: Thank you, Judge. Thank you for the
12 follow-up question. That helped resolve any concern that we
13 would have had.

14 THE COURT: All righty. And from the defense?

15 MR. SLOTCHIVER: The only other thing would be -- would
16 be if we could, either now or later on, but we still have got
17 to talk about the deposition. We've got a program that we
18 believe will allow us to immediately redact that information.
19 We can do it later if you would like.

20 We are going to have two -- we are going to have one very
21 short witness, then a longer witness, and then a short
22 witness; and then we're -- and then we're going to play the
23 audio.

24 THE COURT: All right. So let's do the three witnesses,
25 and we'll take that up during our little mid-afternoon break.

1 MR. SLOTCHIVER: Okay.

2 THE COURT: Okay?

3 MR. SLOTCHIVER: Thank you, sir.

4 MR. SMYTH: Your Honor, I understand the ruling on the
5 dismissing the juror, so nothing further on that.

6 But with regard to this witness that we took the proffer
7 on prior to lunch, she attempted to express some opinions that
8 I think border on the line of expert opinion in terms of how
9 the surgery is done and the fact that she was a seamstress.
10 And so I would like her to be instructed not to offer those
11 opinions because she's not been qualified as an expert, and I
12 think that was pretty clear from her testimony.

13 THE COURT: That was a close one. I don't think we need
14 to get into that.

15 MR. SLOTCHIVER: Okay, so ---

16 THE COURT: I mean, because what she's essentially saying
17 is is that based on her knowledge of being a seamstress, she's
18 giving her opinion that it was done incorrectly. But, again,
19 I mean, let just stay away from that question.

20 MR. SLOTCHIVER: Sure.

21 THE COURT: All right.

22 MR. SLOTCHIVER: Thank you, sir.

23 THE COURT: If you will bring out the jury, Mr. Robinson.
24 I appreciate it.

25 [Whereupon, the jury enters the courtroom 8/27/19, 1:35

1 p.m.]

2 THE BAILIFF: Your Honor, the jury is complete.

3 THE COURT: All right. Thank you very much.

4 All right. If you'll just call your next witness.

5 MR. SLOTCHIVER: Thank you, Your Honor. We would call

6 Mary Crowe.

7 [Whereupon, Ms. Crowe comes forward]

8 [Whereupon, Ms. Crowe is sworn by the clerk of court]

9 THE CLERK OF COURT: You may be seated.

10 [Whereupon, the witness takes the witness stand]

11 THE CLERK OF COURT: And for the record, please state
12 your full name, spelling your last.

13 THE WITNESS: Mary Caroline Crowe. C-R-O-W-E.

14 MARY C. CROWE, Having Been First Duly Sworn, was Examined and
15 Testified as Follows:

16 **DIRECT EXAMINATION BY MR. SLOTCHIVER OF MARY CROWE:**

17 Q. Ms. Crowe, can you tell the ladies and gentlemen a little
18 bit about yourself and your background?

19 A. I graduated from Trident Tech in 1971. I was an IT
20 professional for forty-two years. I retired in 2016. And my
21 last job was at the Department of Social Services.

22 Q. What is your relationship to Jeane Whitfield, the
23 plaintiff in this case?

24 A. I'm her older sister, one of her older sisters.

25 Q. Okay. And what knowledge do you have about -- what

1 personal knowledge do you have about the procedures that she
2 underwent?

3 A. She had her breast augmentation right before she got
4 married. She was very happy with it. Sometime later she told
5 me that she was having pain under one of her breasts and that
6 she thought it might be scar tissue and she was trying to get
7 it treated. Then there came a time when she told me that ---

8 MR. SMYTH: Objection, Your Honor. Hearsay.

9 MR. SLOTCHIVER: It's a party --

10 THE COURT: Yes, it is a statement of a party.

11 A. Then she told me that she had found a doctor that could
12 treat the scar tissue, and I told her that I would accompany
13 her to the appointment. And so I took off work and I took her
14 to the doctor to get her scar-tissue issue addressed.

15 Q. Was -- who was that doctor?

16 A. Dr. Schimpf.

17 Q. Did you take her for a -- for one of the pre-surgical
18 visits, or was it the surgical visit?

19 A. I took her for the pre-surgical visit and I took her for
20 the surgical visit.

21 Q. What discussion did you overhear, if any, pertaining to
22 her neck or chin?

23 A. None.

24 Q. Did you take her home from the surgical procedure?

25 A. Yes, I did. I took her. Her husband was with us. I

1 took them both home. We got Jeane upstairs into her bedroom.
2 I went and got her prescriptions. And then I stayed with her
3 for three days to get her water, make sure she was warm and
4 comfortable and was taking her medication on schedule; and
5 then I went back to work in Columbia.

6 Q. Okay. What's the next thing that you know about -- from
7 your own personal observations, about Jeane, with reference to
8 after the surgery took place?

9 A. When I came back the next time to Charleston, which
10 was -- I'd come home every weekend and I would -- at the time,
11 I'd usually stay with my sister because she would host family
12 events and things. So I spent a lot of time over there.

13 At this time, she showed me her breast. And it did
14 not -- the skin wasn't meeting, and I told her that she needed
15 to get that taken care of.

16 She had told me she was trying to contact the doctor.
17 And I said, well, you have to get that taken care of, it
18 doesn't look like it's going to heal.

19 Q. Okay.

20 A. And she assured me that she was trying to do that. So
21 then I went back to Columbia. And then I got a phone call
22 that they had rushed her into surgery, so I immediately came
23 home to take care of her.

24 Q. Was that rushing into surgery, would that have been with
25 Dr. Kalus?

1 A. I believe so.

2 Q. Let me ask you, can you describe to the jury what Jeane
3 was like, personality-wise, before the surgery with Dr.
4 Schimpf and what she is like now; have there been any changes
5 and if you can just discuss that with the jury.

6 A. It is night and day. Jeane was like the sunshine in our
7 family, and she was always helping everybody, and she was
8 always signing us up to do charity events. And we -- every
9 time we were all together as a family, it was -- everything
10 was enjoyable and wonderful.

11 After this event, Jeane has folded in on herself. She
12 feels like she's a monster. She is so sad all the time. And
13 none of the things that she used to do and enjoy in life, she
14 doesn't do them anymore because she's so upset about this.

15 And the stress and -- of preparing for this trial, and
16 the humiliation and badgering of the people for her
17 depositions, and her medical records and the -- just the whole
18 thing has just been such a bad effect on her.

19 She is not the person that she was before this happened.
20 It went from night -- it went from day to night. And she's
21 still not back to where she needs to be.

22 MR. SLOTCHIVER: Thank you very much. If you'll answer
23 any questions Mr. Smyth has for you.

24 MR. SMYTH: Good afternoon, Ms. Crowe. How are you?

25 **CROSS-EXAMINATION BY MR. SMYTH OF MARY CROWE:**

1 Q. It's my understanding that your sister has been going to
2 a psychiatrist for over a decade. Were you aware of that?

3 A. Yes.

4 Q. Okay. And you knew that she had been diagnosed with
5 bipolar disorder?

6 A. No.

7 Q. Anxiety?

8 A. I knew that she was anxious at times, but not any more
9 than a normal person would be.

10 Q. And how about depression?

11 A. Everybody gets depressed and anxious in time. It's part
12 of life.

13 Q. Had she had a lot of difficult and traumatic events in
14 her life before the surgery?

15 A. She has managed, with working with her therapist, to get
16 past them until y'all brought them all back and started poking
17 at them.

18 Q. Excuse me? I'm sorry, I didn't hear what you just said.

19 A. I said she had managed to deal with those. And I'm sure
20 her psychiatrist will tell you about it when she gets up here,
21 but y'all dragging them out and making her go through them all
22 again has added to her stress and anxiety.

23 Q. My point was she had them all before this surgery, didn't
24 she?

25 A. They were not something that was on display every day.

1 She had worked through them.

2 Q. And you said that you accompanied your sister on the day
3 of the procedure with Dr. Schimpf, correct?

4 A. That is correct.

5 Q. But you waited in the waiting room, correct?

6 A. That is correct.

7 Q. So you wouldn't have had any knowledge of what she told
8 the doctors while you were in the waiting room?

9 A. That is correct.

10 Q. All right. And then I'll show you what's been previously
11 marked as Defendant's Exhibit 15. And do you recognize that?

12 A. She was wearing something similar to that when I took her
13 home.

14 Q. Okay. And that's the -- that's the Velcro, what's it
15 called, full-neck support?

16 A. Face mask, full-neck support.

17 Q. She was wearing that out of the surgery?

18 A. Yes.

19 MR. SMYTH: Thank you. I don't have any further
20 questions.

21 THE COURT: All righty. Thank you very much, Ms. Crow.
22 You may be -- you may step down.

23 [Whereupon, the witness exits the witness stand]

24 THE COURT: All right. Call your next witness.

25 MR. HALVERSEN: Your Honor, the plaintiff would like to

1 call Ms. Vicky Tolbert to the stand.

2 THE COURT: Okay.

3 MR. SMYTH: May we approach briefly?

4 THE COURT: Sure.

5 [Whereupon, an off-the-record bench conference is held]

6 [Whereupon, Ms. Tolbert comes forward]

7 [Whereupon, Ms. Tolbert is sworn by the clerk of court]

8 THE CLERK OF COURT: You may be seated.

9 [Whereupon, the witness takes the witness stand]

10 THE CLERK OF COURT: And for the record, please state
11 your full name, spelling your last.

12 THE WITNESS: Victoria Hunter Tolbert. T-O-L-B-E-R-T.

13 MR. HALVERSEN: Good afternoon, Ms. Tolbert.

14 THE WITNESS: Good afternoon.

15 VICKTORIA H. TOLBERT, Having Been First Duly Sworn, was
16 Examined and Testified as Follows:

17 **DIRECT EXAMINATION BY MR. HALVERSEN OF VICKY TOLBERT:**

18 Q. Where do you presently work?

19 A. Sweetgrass Plastic Surgery.

20 Q. And how long have you worked there?

21 THE COURT: Ms. Tolbert, if you'll get closer to the
22 microphone just so it'll pick you up.

23 [Witness complies]

24 THE COURT: I appreciate it. Thank you very much.

25 THE WITNESS: Sure.

1 A. Since 2013.

2 Q. And before that, where did you work?

3 A. The Medical University of South Carolina.

4 Q. And what was your position at MUSC?

5 A. I was the Division of Plastic Surgery office manager.

6 Q. Were you working with Dr. Schimpf at the time?

7 A. I was.

8 Q. Why did you leave MUSC?

9 A. Because Dr. Schimpf was going into private practice and
10 had asked me to be his office manager.

11 Q. You said you are the office manager for Sweetgrass. Do
12 you have a good working relationship with Dr. Schimpf?

13 A. Yes.

14 Q. What are some of your duties as the office manager?

15 A. I have to deal with patient complaints. I deal with the
16 bills, the financials, those kinds of things. You know, I
17 oversee the employees there, as well. And pretty much any,
18 you know, day-to-day activities that happens in the office.

19 THE COURT: Ms. Tolbert, they can't hear anything you've
20 said. So let's just stop there.

21 THE WITNESS: Okay.

22 THE COURT: You are going to have to scream into that
23 microphone. I apologize, but they have to be able to hear
24 everything you said. So if you'll start back over as to your
25 duties at Sweetgrass, please.

1 THE WITNESS: Okay.

2 A. You know, daily activities. You know, the daily
3 functions of the business, overseeing employees, dealing with
4 patients. You know, helping with physicians with whatever
5 they need. Pretty much anything, you know, to help run the
6 office.

7 Q. Okay. What about with regard to medical records?

8 A. I'm in charge with keeping up with the medical records
9 requests.

10 Q. Okay. And that's present today as it was back in 2014?

11 A. Yes.

12 Q. Before we get started into a lot of more detailed
13 questions, I just want to see if there's some basic things
14 that we can agree on. Okay?

15 A. Okay.

16 Q. The first thing, would you agree with me that Sweetgrass
17 is missing Ms. Whitfield's medical records?

18 A. No.

19 Q. You don't agree with that?

20 A. No.

21 Q. Okay. We'll come back to that.

22 A. Okay.

23 Q. Well, let me rephrase it. Is Sweetgrass missing some of
24 Ms. Whitfield's medical records?

25 A. Yes.

1 Q. They're not all of the medical records, correct?

2 A. They're incomplete, yes.

3 Q. Okay. Would you agree with me that there is photographs
4 of her that are missing?

5 A. Yes.

6 Q. Would you agree with me that Sweetgrass had a
7 malfunctioning dictation equipment that Dr. Schimpf used to
8 record his patient encounters?

9 A. Yes.

10 Q. Would you agree with me that there's a history and
11 physical form that's on a Sweetgrass letterhead that you found
12 a couple of months ago in your cabinet, that was signed by Dr.
13 Schimpf that said that no liposuction to Ms. Whitfield's neck
14 was intended?

15 A. I would have to go back and look at the document itself.
16 But I believe so.

17 Q. Okay. We'll -- I will show you that later.

18 A. Okay.

19 Q. Back in 2014 -- well, let's just go back a little bit.
20 When did Sweetgrass open?

21 A. 2013.

22 Q. 2013. And then at the time, Dr. Schimpf was sharing
23 office space with a doctor named Dr. O'Neill; correct?

24 A. Yes.

25 Q. And Dr. O'Neill had his own practice, correct?

1 A. Correct.

2 Q. But did they share patients?

3 A. No.

4 Q. Okay. So Dr. Schimpf had his patients, Dr. O'Neill had
5 his patients; and but they -- Dr. Schimpf was using his
6 facility to operate out of, is that correct?

7 A. Correct.

8 Q. Is that fair? Okay.

9 And he was using Dr. O'Neill's medical record equipment,
10 correct?

11 A. Yes. Uh-huh.

12 Q. Okay. And what was the name of that medical record
13 equipment that Sweetgrass used?

14 A. Nextech.

15 Q. How did -- how did Dr. Schimpf at the time -- and when I
16 say that, I mean 2014. How did Dr. Schimpf record his patient
17 encounters?

18 A. Using the dictation device.

19 Q. Okay. And for the benefit of the jury, could you explain
20 to them what that is?

21 A. It's just a little handheld recorder that you can, you
22 know, dictate into and talk into and then you can play it back
23 and listen to what you say.

24 Q. And were those dictations supposed to be transcribed and
25 put into the patient's chart?

1 A. Yes.

2 Q. And chart means their medical record?

3 A. Yes. The electronic medical record.

4 Q. And how did -- back at that time in 2014, how did the
5 tapes themselves get transcribed?

6 A. The transcriptionist would pick them up, take them home,
7 transcribe them, and then send back the dictation.

8 Q. And then send them where?

9 A. Send back the transcription.

10 Q. Okay. And so would you send the -- would you get the
11 tapes to Ms. Long ---

12 A. She would come and pick them up ---

13 Q. And that's ---

14 A. --- from our office.

15 Q. I'm sorry. That's the name of the transcriptionist, Ms.
16 Long?

17 A. Yes.

18 Q. Okay. And then would she send the transcriptions
19 directly back to you?

20 A. Yes.

21 Q. Where did Dr. Schimpf keep his dictation recorders?

22 A. He had one in the offices and in his car and at home, so
23 he could dictate anytime he had free time.

24 Q. Okay. So he had multiple recorders?

25 A. Yes.

1 Q. And then how did -- how did it come to be that -- did he
2 tell you that the tapes were full and then you knew to collect
3 them?

4 A. She would come by about every other week or so; and I
5 would say, she's coming, do you have any tapes for me. Or he
6 would say, this tape is full, you know, keep it for her for
7 when she comes, and he would replace it.

8 Q. Then you would collect the tapes and give them to Ms.
9 Long?

10 A. Yes.

11 Q. Did Dr. O'Neill use Ms. Long for transcription?

12 A. No.

13 Q. Why not?

14 A. He used -- he had his own dictating device.

15 Q. What was that?

16 A. Dragon.

17 Q. Do you know why Dr. Schimpf used his computer system for
18 keeping medical records but didn't use the Dragon dictation
19 that Dr. O'Neill used?

20 A. Dragon was something specific that he liked, and Dr.
21 Schimpf wasn't a big fan of it.

22 Q. And why wasn't he a big fan of it?

23 A. You'd have to ask him.

24 Q. Okay. You don't know?

25 A. No, I don't.

1 Q. Okay. So let's talk about these tapes. In any given
2 tape, there could be multiple patients' dictations on that
3 tape; is that accurate?

4 A. That is.

5 Q. Does Sweetgrass still have these recorders?

6 A. No.

7 Q. Do you recall when your deposition was taken in this
8 case?

9 A. I don't. About a year ago, maybe.

10 MR. HALVERSEN: I'd like to put the deposition into the
11 record.

12 MR. SMYTH: Approach?

13 [Whereupon, an off-the-record bench conference is held]

14 [Whereupon, Tolbert transcript dated 9/24/18, marked as
15 Court's Exhibit Number 4]

16 MR. SLOTCHIVER: May we approach briefly?

17 THE COURT: Sure.

18 [Whereupon, an off-the-record bench conference is held]

19 MR. HALVERSEN: So, Ms. Tolbert, I have the same problem
20 that you have is I don't speak loud enough; and apparently the
21 people in the back of the court can't hear us. So I will try
22 to do a better job, and hopefully you can too.

23 THE WITNESS: Okay.

24 Q. I was -- you -- I believe my last question I asked you
25 was if you still had the dictation devices. And your answer

1 was?

2 A. No, I don't think we do. I -- we don't have them in the
3 office. I don't know if Dr. Schimpf has them at home or
4 anything.

5 Q. Okay.

6 A. But we do not have them in the office.

7 Q. Okay. I'll submit to you when your deposition was taken,
8 Page 44, Line 20, I asked you do you still have -- I said, and
9 are they just handheld devices. You said, yes. You said -- I
10 asked you do you still have them. And you said, I don't
11 believe they're in the office; Dr. Schimpf may have them at
12 home, but I don't think they're still in the office.

13 A. They're -- I have not ---

14 MR. HORTON: Objection, Your Honor.

15 A. --- seen them in the office.

16 MR. HORTON: If he's going to impeach on the testimony,
17 he needs to show it to her.

18 [Whereupon, Mr. Halversen proffers documents to the
19 witness]

20 Q. Page 44, Line 20, is where it starts.

21 [Pause for witness review of document]

22 A. There -- I mean, I -- obviously, it is a year ago that
23 this took place; and so, you know, since then I have cleaned
24 the office and we've not come across them.

25 Q. Okay. When I took your deposition, though, I think --

1 believe you said he may have them at home; correct?

2 A. He may have them at home.

3 Q. Okay.

4 A. But I haven't gone and searched his house. I'm sorry.

5 Q. I understand.

6 MR. HALVERSEN: I'm going to mark into -- into the --
7 your affidavit. Any objections?

8 MR. HORTON: Can I see it?

9 [Plaintiff and defense counselors conferred]

10 MR. HALVERSEN: There's no objection, so we'll mark into
11 the record the affidavit of Vicky Tolbert as Plaintiff's
12 Exhibit 26.

13 [Off the record momentarily]

14 [Whereupon, Plaintiff's Exhibit Number 26, affidavit of
15 Tolbert, is marked for identification by the court reporter]

16 [Whereupon, Plaintiff's Exhibit Number 26 was admitted
17 into evidence.]

18 Q. And I'd like to have you read into the record Paragraph
19 Number 8.

20 A. You'd like me to read that? I'm sorry ---

21 Q. If you could, ma'am.

22 A. Sure. Around the time of Ms. Whitfield's postsurgical
23 care in the summer of 2014 Ms. Long discovered that some of
24 the tapes we sent -- we sent her for transcription were blank.

25 Q. And this document, this affidavit, is this a document

1 that you prepared; or did your lawyers prepare it for you?

2 A. Our attorney prepared it.

3 Q. Okay. That is the same lawyers that are sitting here
4 today?

5 A. Yes.

6 Q. And you state in the affidavit: Around the time of the
7 postsurgical care in the summer, Ms. Long discovered that some
8 of the tapes were blank.

9 Do you have any recollection whether it was before the
10 surgery or after the surgery, or did you just think it was
11 sometime around then?

12 A. I believe it sometime around then.

13 Q. And what specifically do you recall that Ms. Long told
14 you?

15 A. She said that some of the tapes that we had sent her
16 appeared that they had been dictated on but there was nothing
17 on there that could be transcribed.

18 Q. Did she feel that something had originally been recorded
19 on it but the tapes were now blank?

20 MR. HORTON: Objection, Your Honor. Hearsay.

21 THE COURT: I'll sustain the objection.

22 MR. HALVERSEN: I asked the exact same question at the
23 deposition though.

24 MR. HORTON: Your Honor, it's still hearsay if he hasn't
25 brought Ms. Long here to this courtroom.

1 THE COURT: It's an out-of-court statement offered to
2 prove the truth of the matter asserted. I'll sustain the
3 objection.

4 Q. Okay. But what you have told us is that the tapes that
5 were sent had something on and now there was nothing on it,
6 correct? You just told us that, right?

7 A. Well, she said they appeared to have been dictated on but
8 there was nothing there for her to transcribe.

9 Q. Did you erase the tapes?

10 A. No. We had no ability to erase the tapes.

11 Q. Why not?

12 A. That was something that she did.

13 Q. She erased the tapes?

14 A. Uh-huh.

15 Q. Okay.

16 A. Before she brought them back to us so they could be
17 reused.

18 Q. Okay. But I understand that was the process.

19 A. Yes.

20 Q. But based on what your understanding was, you're of the
21 understanding that the tapes were blank? They originally had
22 something on them and then they were blank, correct?

23 MR. HORTON: Objection, Your Honor. Mischaracterizing
24 prior testimony.

25 THE COURT: He can ask her, and she can say whether she

1 said it or not. I'll overrule it.

2 A. I'm sorry. Say it again.

3 Q. The tapes that went to her ---

4 A. Uh-huh.

5 Q. --- were blank. She felt there was something originally
6 had been on it and now they were blank.

7 A. They weren't blank. They -- she wasn't able to
8 transcribe. Like whenever they tried to record it, it didn't
9 record. There was a problem with the recorder, so it didn't
10 actually record what he was saying.

11 Q. Okay. And I'm just getting back to what Ms. Long had
12 imparted to you.

13 A. Yeah. I mean, I don't know if she heard static or if she
14 heard noise; but she said it appeared that they had tried to
15 dictate on them but she wasn't able to transcribe it.

16 Q. Because nothing was on it?

17 A. Yes. Well, yeah, I mean, I guess.

18 Q. Were there more than one tape -- was there more than one
19 tape that this happened to?

20 A. Yes. It did happen several times.

21 Q. What actions did the practice take when this happened;
22 did you test the recorders to see if they were working?

23 A. Yes, I believe Dr. Schimpf did.

24 Q. Did Dr. -- did Sweetgrass or Dr. Schimpf replace any of
25 the recorders or the tapes?

1 A. We did order some new tapes because we weren't sure if it
2 was the tape or the recorder.

3 Q. So you just told me you weren't sure if it was the tape
4 or the recorder, correct?

5 A. Originally, yes. Initially, we didn't know which one it
6 was.

7 Q. Whether it was a tape that was malfunctioning or a
8 recorder?

9 A. Yes.

10 Q. And then what happened?

11 A. And then after, you know, testing the tapes and testing
12 the recorders, they were able to determine that it was the
13 recorder that was the problem.

14 Q. And how many recorders had a problem?

15 A. Only the one, that I believe.

16 Q. Just one?

17 A. Uh-huh.

18 Q. Is that a yes?

19 A. Yes.

20 Q. For the record, yes?

21 A. Sorry.

22 Q. Okay. Are you aware Dr. Schimpf testified there were
23 problems with multiple recorders?

24 A. I'm not.

25 Q. Did you throw the recorder away?

1 A. Yes.

2 Q. Who threw it away?

3 A. I'm not sure if it was me or Dr. Schimpf.

4 Q. I'm sorry. I couldn't hear you.

5 A. I'm not sure if it as myself or if it was Dr. Schimpf. I
6 just know it got thrown away.

7 Q. And did you purchase new tapes as well?

8 A. We did purchase new tapes when we were trying to figure
9 out if it was the tape or the recorder.

10 Q. Did you still use old tapes?

11 A. Yes, because the tape wasn't the issue; it was the
12 recorder.

13 Q. And that was your understanding from Dr. Schimpf?

14 A. And Debbie.

15 Q. The transcriptionist?

16 A. Yes.

17 Q. Are you aware Dr. Schimpf testified in his deposition
18 that he may not have even dictated medical records?

19 MR. HORTON: Objection, Your Honor. Pitting witnesses.

20 MR. HALVERSEN: He's not a witness; he's a party.

21 MR. HORTON: Pitting prior sworn testimony. That's
22 definitionally pitting witnesses.

23 THE COURT: All right. Ladies and gentlemen of the jury,
24 I am going to take up a matter of law. If you could just be
25 excused for about five minutes, I'll get you right back in.

1 Okay?

2 [Whereupon, the jury exits the courtroom 8/27/19, 2:05
3 p.m.]

4 THE COURT: All right. State your objection.

5 MR. HORTON: Your Honor, my objection is that that
6 question pitted sworn deposition testimony against what he was
7 about to elicit from Ms. Tolbert.

8 THE COURT: All righty. What's the rule on that one?
9 I'm looking it up here.

10 MR. HORTON: To my mind pitting is the common-law rule.

11 THE COURT: It's not in the -- it's not in the rules of
12 evidence?

13 MR. HORTON: Give me a moment. I've got my little guide
14 book. Brown one.

15 [Off the record momentarily]

16 MR. HORTON: Your Honor, I do have Ralph King Anderson's
17 bench book.

18 THE COURT: All right.

19 MR. HORTON: And he cites a bunch of different cases for
20 pitting. I'm afraid it is a common-law, derived -- subject,
21 unfortunately.

22 MR. HALVERSEN: I think a deposition can be used for any
23 purpose.

24 THE COURT: So what's y'all's -- what's y'all's argument?

25 [Whereupon document presented to the Court by Mr. Horton]

1 MR. HALVERSEN: I apologize for the speaking objection
2 too, Your Honor.

3 THE COURT: That's okay.

4 MR. SLOTCHIVER: Your Honor, this in part goes to the
5 issue of credibility. She's testifying different than Dr.
6 Schimpf testified to in his deposition. My understanding is
7 that depositions can be used for any purposes whatsoever. But
8 this further is part of the basis for our discussions earlier
9 today regarding credibility issues. And this is basically
10 cross-examination. So generally it is wide open with a lot of
11 latitude.

12 MR. HORTON: I think the general rule is they're allowed
13 to cross-examine the witness on what the witness knows but
14 they're not allowed to use somebody's testimony against that
15 witness that's not their own.

16 THE COURT: All right. Well, let's do this. Ask the
17 question. What were you going to ask her? Because they
18 stopped you.

19 MR. HALVERSEN: And I said: Are you aware that Dr.
20 Schimpf testified in his deposition that he may not have
21 dictated the medical records?

22 THE COURT: All right.

23 MR. HORTON: There's a way you can ask that question
24 without pitting.

25 MR. SLOTCHIVER: I don't know how that is pitting.

1 THE COURT: Well, why don't you -- instead of indicating
2 that he testified to that in his deposition, why don't you
3 just ask him if she's aware that -- I guess you could just ask
4 her is she aware that the records may not have been taken -- I
5 mean, the reports had not been made or taken.

6 I mean I am with you. I mean, my understanding was a
7 deposition can be utilized -- I mean, if (pause).

8 MR. HORTON: That's the whole reason they have the
9 pitting objection is you can't take somebody else's testimony
10 and try to beat the other on the side of the head with it.

11 You can ask this witness what they know, what they
12 remember, what their knowledge is. When you start getting
13 into what somebody else testified, that's the whole purpose
14 for the objection.

15 MR. SLOTCHIVER: Except in this case she's working for
16 the party, and this is cross-examination. And she's
17 testifying, and it is her credibility ---

18 THE COURT: Well, this isn't cross-examination; this is
19 your direct ---

20 MR. SLOTCHIVER: But ---

21 MR. HALVERSEN: She's an adverse witness.

22 MR. SLOTCHIVER: Adverse witness. So it's the equivalent
23 of I guess of cross.

24 THE COURT: Ah.

25 MR. SLOTCHIVER: But she isn't -- she is -- this is why

1 we brought up the issue of credibility because she is
2 testifying differently than her boss has testified to.

3 MR. HORTON: That's something they can argue in closing.
4 That doesn't ---

5 MR. SLOTCHIVER: But that's not ---

6 MR. HALVERSEN: --- allow them ---

7 MR. SLOTCHIVER: We should ---

8 MR. HALVERSEN: --- to have an entry ---

9 MR. SLOTCHIVER: We should be able to ---

10 THE COURT: If you are deeming her as a -- if you are
11 deeming her as a ---

12 MR. SLOTCHIVER: Hostile witness.

13 THE COURT: --- hostile witness, you can just lead her
14 into it, isn't it true.

15 MR. HALVERSEN: Okay.

16 THE COURT: I mean, I ---

17 MR. HORTON: The problem is the reference to the
18 deposition. So, you know, he can ask is it -- is it possible.
19 He didn't do that. But using his testimony against her's is
20 the whole reason for the objection.

21 THE COURT: All right. I'll sustain the objection.
22 There's several ways we can get around it, so I don't want to
23 cloud up a legal issue with it.

24 So you can lead her and ask her any other questions
25 concerning it; but, yeah, just don't reference what he's

1 testified to. He's going to testify. You will have all the
2 chance in the world to ask him about it, okay?

3 All right. If you'll bring me the jury back up, Mr.
4 Robinson, I appreciate it.

5 Ms. Tolbert, I know that we're beating you over the head
6 with this. But I do not have the problem of being loud. I
7 actually have the opposite problem. So -- but if you could,
8 just lean as close as you could. Because you have a soft
9 voice, and it's just kind of hard. I just notice the jurors
10 are straining just a little bit to try to hear you.

11 THE WITNESS: Okay.

12 THE COURT: It's okay to be soft-spoken. I just don't
13 have that same issue.

14 THE WITNESS: Normally I'm not, bit it's so quiet.

15 [Whereupon, the jury enters the courtroom 8/27/19, 2:13
16 p.m.]

17 THE BAILIFF: Your Honor, the jury is complete.

18 THE COURT: All right. Thank you very much for that,
19 ladies and gentlemen of the jury.

20 Mr. Halversen, you may continue.

21 Q. Ms. Tolbert, is it possible that the medical records were
22 never dictated by Dr. Schimpf?

23 A. Yes.

24 Q. Is it possible that the medical records might not have
25 found themselves into the patient's chart?

1 A. Sure. It's happened before.

2 Q. Okay. If those are possibilities, why did you tell us in
3 your affidavit in Paragraph 11, I quote: Ultimately we
4 determined one of the dictation recorders was malfunctioning.
5 We took it out of service and threw it away.

6 A. Because we determined that that recorder wasn't working.

7 Q. Okay. But you just told me it's possible it could have
8 been other reasons why the medical records weren't put in the
9 chart; for instance, he didn't dictate it or it didn't make it
10 into the chart; correct?

11 A. Correct.

12 Q. But you told us in your affidavit the reason why it
13 didn't happen was because of one malfunctioning recorder,
14 correct?

15 A. I said that the recorder was malfunctioning. I never
16 said -- I never confirmed or denied whether or not her
17 dictation was on one of those tapes. But it was around that
18 time that the recorder was -- that we found the recorder
19 wasn't working, that her dictation was missing.

20 Q. Okay.

21 A. It's very likely that her dictation was on one of the
22 tapes that wasn't working.

23 Q. Okay. And just to be clear, I'm talking about the one
24 recorder. In your affidavit you said, Paragraph 7: Each tape
25 would hold dictations related to numerous patients. Each tape

1 contains roughly one week's worth of dictation. Because we
2 employed multiple tape recorders, however, it would take
3 several weeks for Dr. Schimpf to fill a single tape. Around
4 the time of Ms. Whitfield's postsurgical care in summer of
5 2014, Ms. Long discovered that some of the tapes that were
6 sent -- it says we sent her for transcription were blank.

7 Paragraph 9: She notified me that she had received blank
8 tapes.

9 10: We therefore tested tapes and recorders seeking to
10 find the cause of the blank tapes.

11 Paragraph 11: Ultimately, we determined one of the
12 dictation recorders was malfunctioning. We took it out of
13 service and threw it away.

14 Paragraph 14: We discovered that the tape-recorder
15 malfunction affected Ms. Whitfield's chart when she requested
16 a copy of her medical records.

17 So isn't it true that you represented in this affidavit
18 that the reason why Ms. Whitfield's medical records were not
19 produced is because of one malfunctioning recorder?

20 A. That was an assumption on my part, yes.

21 Q. But now you have different explanations; correct?

22 A. You asked if it was possible; and I said, yes, it's
23 possible.

24 Q. Why is it possible that now you say it could be other
25 reasons?

1 A. Because you asked if it's possible that he didn't dictate
2 it; and, yes, that's possible.

3 Q. Did Doctor ---

4 A. I -- we did not keep a log of everything that he dictated
5 on those recorders.

6 Q. Should you have?

7 A. No, not necessarily.

8 Q. When did you discover that the taping malfunction
9 affected Ms. Whitfield's medical records?

10 A. When we received a request for her medical records.

11 Q. Do you know when that was?

12 A. I believe it was in 2015.

13 Q. When you were at O'Neill's office how would the
14 transcribe notes be uploaded; where would they go?

15 A. We would put them into (cough in audience) Nextech.

16 Q. Could you say that again?

17 A. We would put them into Nextech.

18 Q. And that was Dr. O'Neill's medical records recording
19 system?

20 A. Yes. His EMR.

21 Q. Let me show you what we'll mark as Plaintiff's
22 Exhibit 27.

23 [Whereupon, Plaintiff's Exhibit Number 27, operative
24 report, is marked for identification by the court reporter]

25 Q. Have you had a chance to review that?

1 A. Not recently. I've seen it previously.

2 Q. What does this document appear to be?

3 A. The operative report.

4 Q. For Ms. Whitfield?

5 A. Yes.

6 Q. All right. Does this appear to be a document that was
7 transcribed by Ms. Long?

8 A. Yes.

9 Q. And what leads you to that conclusion?

10 A. On the second page at the bottom, it says DKS/DEL.

11 THE COURT REPORTER: I'm sorry. Say that again.

12 THE WITNESS: On the bottom of the second page it says
13 DKS/DEL.

14 THE COURT REPORTER: Thank you.

15 Q. And I'd like to refer you to the top of that page where
16 it says surgeon, Dr. Dennis K. Schimpf, assistant none. And
17 then it says preoperative diagnoses. Do you see that section
18 there?

19 A. Yes.

20 Q. And then there's 1, 2, 3, and 4?

21 A. Uh-huh.

22 Q. Is there any mention in the preoperative diagnosis of a
23 liposuction to the neck?

24 A. No.

25 Q. Is there any mention in the preoperative diagnosis of a

1 liposuction or anything to do with a liposuction for the
2 abdomen, flanks and legs?

3 A. Yes.

4 Q. And where is that?

5 A. Number 2.

6 Q. And I want you to go down to the postoperative diagnosis.
7 What does it say there?

8 A. You want me to read the whole thing?

9 Q. No. Just where it says postoperative diagnosis and
10 there's a colon what does it say?

11 A. The same.

12 Q. And then it says procedure. And then in that section is
13 there any reference to a liposuction of the neck?

14 A. No.

15 Q. In Paragraph 2, what does it state?

16 A. In Paragraph 2?

17 Q. Of the postoperative diagnosis.

18 A. Oh. You mean Number 2?

19 Q. Yes.

20 A. Bilateral liposuction of the abdomen and legs.

21 Q. Does it -- does it say neck?

22 A. No.

23 Q. Would this document have been dictated by Dr. Schimpf?

24 A. Yes.

25 Q. Can you explain to us why we have a dictation of the

1 operative record, which is reflected here in Plaintiff's
2 Exhibit 27, but we don't have any transcriptions for Mrs.
3 Whitfield's other office visits?

4 A. You're asking why we have an operative report and no
5 other follow-ups? Is that what you said?

6 Q. Maybe -- close. What I'm asking is why is it that we
7 have something that was dictated for Mrs. Whitfield that was
8 on the date of the surgery, June 6th ---

9 A. Uh-huh.

10 Q. --- 2014, but we don't have other transcriptions for Mrs.
11 Whitfield?

12 A. Because it must have been on one of the functioning
13 recorders.

14 Q. Okay. That's an assumption on your part?

15 A. Yes.

16 Q. Okay. But I guess my question is a little bit different.
17 I'm trying to find out why we have one for June 6 -- and I'll
18 submit to you that Ms. Whitfield came to a post-op visit on
19 June 10th.

20 A. Okay.

21 Q. Do you know why we have a dictation from June 6th but no
22 dictation from June 10th?

23 A. No.

24 MR. HALVERSEN: I'd like to mark next and offer into
25 evidence, Plaintiff's Exhibit 28.

1 [Whereupon, Plaintiff's Exhibit Number 28, appointment,
2 is marked for identification by the court reporter]

3 [Whereupon, admittance of Plaintiff's Exhibit Number 28
4 was not yet ruled upon]

5 Q. And before I talk to you about Exhibit 28, I just do want
6 to go back to Exhibit 27 for one quick follow up. Although
7 there's no mention in the -- in the -- of the neck in the top
8 of Exhibit 27, the operative record, in the body of the
9 operative record there is reference to a procedure to the
10 neck; correct?

11 A. I haven't read it. I can if you give me just a minute.

12 Q. Sure. Take your time.

13 [Whereupon, the witness reviews documents]

14 A. It says he turned his attention to the neck region.

15 Q. Okay. Do you have any explanation as to why it's
16 referenced in the detail section but it's not indicated on the
17 pre-op diagnosis?

18 A. You would have to ask Dr. Schimpf that question.

19 Q. Okay. Let's look at Exhibit 28. And what does this
20 document appear to be?

21 A. A list of appointments.

22 Q. Okay. And was this generated on Dr. O'Neill's Nextech
23 EMR system?

24 A. Yes.

25 Q. Is there any indication on this form that Ms. Whitfield

1 underwent a liposuction to her neck?

2 A. Not that I see.

3 Q. Pardon?

4 A. Not that I see.

5 Q. According to this ledger, Ms. Whitfield was seen on which
6 dates?

7 A. It looks like 12/19/13, 6/10/14, 6/19/14, 4/10/14, and
8 6/6/14.

9 Q. And 6/6/14 was the date of the surgery; correct?

10 A. Yes.

11 Q. And tell the ladies and gentlemen on the jury how it is
12 that you're able to make that conclusion based on your
13 understanding of how this software works.

14 A. There's a status of the appointment and it says whether
15 it was pending, cancelled, or out. And the ones that are
16 marked as out were the ones that we can confirm that she was
17 seen at those appointments.

18 Q. Okay. Would it be a better way to say that if it was
19 marked as out, then that was the program -- or Sweetgrass'
20 routine if the patient had come and ---

21 A. The appointment had been completed.

22 Q. The appointment had been completed. Okay.

23 Does Sweetgrass have a medical record that documents what
24 happened at Ms. Whitfield's December 19th, 2013, office visit?

25 A. I don't believe there is.

1 Q. Is a medical office supposed to keep records of when a
2 patient comes to see them and make a record of what care is
3 provided?

4 A. We do our best to keep good medical records.

5 Q. Okay. But I'm asking you -- I know you make an effort;
6 but I'm just simply asking are they supposed to keep a record
7 of when a patient comes to see them and make a record of what
8 care is provided?

9 A. Sure. We certainly do our best.

10 Q. I know you're effort is there. I'm saying do you have a
11 duty to do it.

12 MR. SMYTH: Objection, Your Honor. Asked and answered.

13 MR. HALVERSEN: I'm not getting an answer.

14 THE COURT: He's not getting an answer. Keep going ---

15 A. I said ---

16 THE COURT: I'll overrule it.

17 A. I said sure.

18 Q. Yes?

19 A. Yes.

20 Q. You agree with me?

21 A. Yes.

22 Q. Okay. Are you aware of what South Carolina law is on the
23 obligations of a medical facility to keep and maintain medical
24 records?

25 A. I'm not aware of what South Carolina's law is, no.

1 MR. HALVERSEN: May we approach, Your Honor?

2 THE COURT: Sure.

3 [Whereupon, an off-the-record bench conference is held]

4 THE COURT: All right. Ladies and gentlemen, we're going
5 to take up a matter of law for about five minutes. If you'll
6 just give us one quick second, we'll get you right back in.

7 [Whereupon, the jury exits the courtroom 8/27/19, 2:28
8 p.m.]

9 THE COURT: All right. Go ahead and state your objection
10 for the record.

11 [Whereupon, Plaintiff's Exhibit Number 29, DHEC
12 Regulations, had been pre-marked by counsel]

13 MR. HORTON: Your Honor, this 6191 is the DHEC regulation
14 section that applies to ambulatory surgery facilities.
15 Plaintiff's counsel has proposed to cross-examine Ms. Tolbert
16 on it.

17 Ms. Tolbert is not the administrator of an ambulatory
18 surgery facility. That's a very specific, defined point of
19 law, if you get into this regulatory scheme. She's not a
20 lawyer. She's not their general counsel.

21 You know, I don't understand how we have laid any
22 foundation to examine her on her knowledge of the law. And
23 she's responsible for managing employees. And she's testified
24 about her duties. She did not say legal compliance is one of
25 her jobs. In fact, that's Josh Whitley's job.

1 THE COURT: All right.

2 MR. HALVERSEN: They have an ambulatory facility,
3 ambulatory surgical facility. She's the office manager.
4 She's already stated she's in charge of medical records, then
5 and now.

6 THE COURT: Is that true that this -- that this code
7 section would apply to their facility?

8 MR. HORTON: It would apply to the administrator's
9 duties, Your Honor. We had this come up in another plastic
10 surgery case where it's been in the circumstance of an
11 after-action review. And that applies entirely to the actions
12 of the administrator of the ambulatory surgery facility who's
13 the person that DHEC licenses. And I believe that nowadays,
14 in their office-based surgery suites, that's Dennis. That's
15 who is the appropriate person to question about this.

16 THE COURT: Who's Dennis?

17 MR. HORTON: Oh, sorry. Dr. Schimpf. I'm sorry, Your
18 Honor. I'm using first names.

19 THE COURT: All right.

20 MR. HALVERSEN: He said it is the administrator of the
21 facility. She is the office manager of the facility. I am
22 not aware of a distinction between administrator and office
23 manager.

24 If you've got some case law on point, please show the
25 Court now.

1 MR. HORTON: Your Honor, the administrator is a defined
2 term. Section 101, definition, administrator, the individual
3 designated by the facility licensee to have the authority and
4 responsibility to manage the facility. That's the person on
5 the license.

6 THE COURT: Right. That's the --- that's the head
7 honcho.

8 MR. HORTON: Who is Dennis K. Schimpf.

9 THE COURT: All right.

10 MR. HORTON: On their current system. Now if we're
11 talking about back then, that's Dr. O'Neill. They were
12 operating in Dr. O'Neill's ambulatory surgery facility.

13 The duty is incumbent upon the licensee.

14 MR. HALVERSEN: They said this is not Dr. O'Neill's
15 patient a million times; this is Sweetgrass' patient ---

16 THE COURT: Oh, I'm not worried about that. That's --
17 I'm not worried about that at all.

18 What is the -- y'all cited something in one of your
19 briefs that it was negligent per se not to maintain and keep
20 the records, and then y'all cited and quoted a statute. What
21 was that one?

22 MR. HALVERSEN: These.

23 THE COURT: Got it.

24 MR. HORTON: Your Honor, I do believe that was the
25 medical disciplinary board ---

1 MR. HALVERSEN: Oh, I'm sorry.

2 MR. HORTON: --- that they cited. It was not this one.

3 MR. HALVERSEN: You're ---

4 MR. HORTON: This is brand new. That's one of the
5 reasons that I'm ---

6 MR. HALVERSEN: No, let me clarify.

7 MR. HORTON: Yeah.

8 MR. HALVERSEN: You are partially correct. I have both
9 of those charges ---

10 MR. HORTON: Okay.

11 MR. HALVERSEN: --- in there. The second charge as to
12 misconduct is something that we'll take up with Dr. Schimpf
13 when he's -- as to this, they're both in the jury charges.
14 This one, too.

15 THE COURT: Okay.

16 MR. HORTON: The other one is 4047-110.

17 MR. HALVERSEN: I'll take your word on that.

18 THE COURT: She has testified that she is the office
19 manager, and she has said that part of her duties is to
20 maintain the records for the patients. And so I don't have a
21 problem with you discussing with her what she knows to be her
22 job duties and descriptions. And I think you have gone into
23 the fact that she understand that there is a legal obligation
24 to do that. Is that what you were trying to ascertain from
25 the witness now?

1 MR. HALVERSEN: Yes, sir.

2 THE COURT: All right. And in doing so, could you ask
3 her if Dr. Schimpf would be the one that would have to
4 maintain the license of the building and in doing so would he
5 be the one that would be responsible for training you on your
6 day-to-day duties and protecting and keeping those records.
7 You see what I'm saying? I mean, you could -- you can kind of
8 build it up that way instead of -- because I just --

9 I agree with you in the sense that I think it's extremely
10 relevant, that you should know what your job duties and
11 descriptions are, especially when you are saying that your job
12 is to keep medical records that are now missing.

13 But I don't know -- my only concern is that if there is a
14 DHEC regulation that the licensee is Dr. Schimpf and he is
15 responsible and the one that is solely responsible for all of
16 these requirements, which there are a lot. I think, again, he
17 would be the one that you would want to talk to concerning
18 that.

19 Go ahead.

20 MR. HALVERSEN: I would just say, Your Honor, I would --
21 I don't disagree with what the statute says; he's the
22 administrator, he's the one that is ultimately responsible.

23 Why I can't question her as the office administrator and
24 in charge of the records if she's familiar with the rule, if
25 she's looked at the rule, if she knows the rule, I don't see

1 why that's not improper.

2 THE COURT: Well, how is that improper? She can keep
3 saying no, no, no, and no. He's stuck with the answer.

4 But you're saying that she's not a lawyer and that she's
5 not -- you know, not -- neither be required to know what the
6 statue and number and law is, but she needs to know what her
7 job description is. She's held to a different standard
8 because she's the office administrator of a -- of a medical
9 complex; and in her job description duties this is laid out
10 statutorily as to what her job description duties are. I
11 think they can ask her if she knows what they are.

12 MR. HORTON: Your Honor, it says the facility shall.
13 And, you know, my contention, again, is that's the licensee,
14 you know.

15 THE COURT: Right. But he can ask her if the licensee
16 has discussed with her what her job descriptions and duties
17 are. And they are. That you have to have sufficient
18 documented information to identify the patient, that the
19 person responsible for each patient, the description, the
20 diagnosis and the care, the treatment, procedure, surgery,
21 services provided, to include the course of action taken and
22 results.

23 I mean, I certainly think this is relevant for her to be
24 able to testify to. She's the office manager.

25 MR. HORTON: Thank you, Your Honor. We could note our

1 exception and just move on with it.

2 THE COURT: Yeah. Because I -- I mean, if she -- but
3 you -- I mean, obviously understanding that you're stuck with
4 her answer. But I think you certainly have every right to
5 discuss and ask her about it.

6 MR. HORTON: Thank you, Your Honor.

7 THE COURT: It's two -- let's just bring them back.
8 Let's try to work until about 3:15 and then give them a longer
9 break.

10 So just bring the jury back in, please.

11 [Off the record awaiting jury]

12 [Whereupon, the jury enters the courtroom 8/27/19, 2:38
13 p.m.]

14 THE BAILIFF: Your Honor, the jury is complete.

15 THE COURT: All right. Thank you so very much.

16 We'll resume the testimony.

17 Q. Ms. Tolbert, I've handed you a South Carolina Code of
18 Regulations from DHEC. It's Section 61-91, Section 700; and
19 it's entitled patient records. Have you ever seen this
20 regulation before I have just handed it to you?

21 A. No, I have not.

22 Q. Are you in charge with -- of -- I think you -- I believe
23 you already said you were in charge of the medical records,
24 presently and in the past, for Sweetgrass; correct?

25 A. Yes.

1 Q. And has -- your boss is Dr. Schimpf; correct?

2 A. Correct.

3 Q. Has he ever gone over with you any of these regulations?

4 A. We've not discussed these specifically.

5 Q. Okay. Would you agree with me that this document states,
6 in Paragraph A, that the facility is supposed -- it shall
7 initiate and maintain an organized record for the patient? Is
8 that what it says?

9 A. Yes, that's what it says.

10 Q. It says that: The records shall contain sufficient
11 document information to identify the patient, the person
12 responsible for each patient, a description of the diagnosis
13 and the care, treatment, procedures, surgery and/or services
14 provided, to include the course of action taken and results
15 and the response and reaction to the care, treatment,
16 procedures, surgery and/or services provided. All entries
17 shall be indelibly written, authenticated by the author, and
18 dated.

19 Did I read that accurately?

20 A. Yes.

21 Q. Would you agree with me that Sweetgrass did not follow
22 that section with regards to Mrs. Whitfield?

23 A. As I said before, we do our best.

24 Q. And I understand that you've done -- you try. But what
25 I'm specifically trying to get an answer to is did Sweetgrass

1 comply with Section A as it pertains to Mrs. Whitfield's
2 medical records?

3 A. No.

4 Q. Let's look at Section B. It says specific
5 entries/documentation shall include, at a minimum:

6 Paragraph 1: Consultations by physicians or other
7 legally authorized health-care providers.

8 3: Orders and recommendations for all care, treatment,
9 procedures, surgery and/or services from physicians or other
10 legally authorized health-care providers completed prior to or
11 at the time of patient arrival at the facility and
12 subsequently as warranted.

13 Paragraph 4: Care, treatment, procedures, surgery and/or
14 services provided.

15 5: Recommenda- -- record of administration of each dose
16 of medication.

17 And 11: Signed informed consent.

18 Did Sweetgrass comply with Paragraph 5 -- or Paragraph B
19 that I just read, as it pertains to Mrs. Whitfield?

20 A. Record of administration of each dose of medication?

21 Q. Yeah.

22 A. As far as I'm aware, yes.

23 Q. Okay. And you have records of each dosage of medication?

24 A. It should be in her anesthesia record.

25 Q. Okay. What about her pre -- her pre-surgical visits and

1 her post-op visits?

2 A. We wouldn't have been -- we wouldn't have been giving her
3 any medication at those.

4 Q. Okay. All right. I think we have said at the beginning
5 we can agree there were no preoperative and postoperative
6 records of Mrs. Whitfield's care by Sweetgrass; correct?

7 A. Correct.

8 Q. Okay. So what I'm asking you is did Sweetgrass comply
9 with Paragraph B because of not keeping those records?

10 A. The records were incomplete.

11 Q. Okay. Did they comply with Paragraph B?

12 A. No.

13 Q. Would you agree with me that Sweetgrass failed to
14 maintain an organized record for Mrs. Whitfield?

15 A. Yes. But we -- we treat patients, not medical records.

16 Q. Are medical records important?

17 A. Yeah.

18 Q. I'd like you to go back to Exhibit 28. And I apologize
19 if I've already asked you this, but I just want to make sure
20 so the record is clear. As to your indication as to the fact
21 that it says out on the appointment ledger, that gives you the
22 conclusion that Mrs. Whitfield was actually seen on that day;
23 correct?

24 A. Correct.

25 Q. And those were -- those dates I believe were -- you

1 verbalized were December 19th, 2013, just taking it down in
2 order on the sheet, June 10th, 2014; June 19th, 2014; April
3 10th, 2014; and June 6th, 2014?

4 A. Yes.

5 Q. Are you aware if there's any medical records for any of
6 those office visits?

7 A. I know we have the operative report for June 6th, but I
8 don't believe there's any others.

9 Q. Okay. Let me ask you. Look at the first page, still, on
10 Exhibit 28 of the appointment ledger.

11 A. Uh-huh.

12 Q. On July 1st, 2004 [sic], it states continued drainage
13 from nipple. Do you have -- is that a physical finding, or is
14 that something that Mrs. Whitfield called up and maybe perhaps
15 complained about?

16 A. Specifically, if it's -- if it's something a patient
17 tells us when they call, then we would put it in the
18 appointment so that it could be seen.

19 Q. So just to clarify for the record. That means it's not a
20 physical finding?

21 A. Correct.

22 Q. But somebody put that down in this appointment ledger?

23 A. Yes. So it must have been told by the patient.

24 Q. Now, back in 2014 was there any kind of record-keeping
25 where patients' complaints were written down and put into

1 their medical records?

2 A. When a patient would call and if they had a concern about
3 their procedure then we would let the nurse or the doctor know
4 and then the nurse or the doctor would address that.

5 Q. Okay. So aside from maybe a manual system of that
6 going -- happening, is that how you're describing it?

7 A. I mean a manual system, I don't know what you mean by
8 that.

9 Q. Okay. So what you're telling me is back at the time,
10 that if a patient complained, how would that -- how would that
11 complaint get into a patient's medical record?

12 A. We would let the doctor or the nurse know, and then if
13 they chose to put a message -- I mean, a note in the chart,
14 then they would be the ones to do that. The front desk asks
15 them to do that.

16 Q. Okay. Was there an automated way to make sure that that
17 patient's complaint went into that patient's medical record?

18 A. No.

19 Q. That wasn't at that point in time?

20 A. No.

21 Q. Do you have that in place now?

22 A. An automated way now.

23 Q. But somebody answering a phone, would they have noted
24 that, a patient complaint, in the chart back in 2014?

25 A. No. The front desk staff didn't put things into the

1 chart like that.

2 Q. Was there ever a time before the summer of 2014 where
3 there was an issue with the keeping of medical records that
4 Ms. Long was doing?

5 A. Not that I'm aware of.

6 Q. Did Dr. Schimpf keep using Debbie Long to transcribe
7 tapes even after he left Dr. O'Neill's office?

8 A. Yes.

9 Q. Why did he keep using this transcription service if it
10 was having problems?

11 A. Because it wasn't a problem with the transcription
12 service; it was a problem with the one recorder.

13 Q. And we've discussed that.

14 A. Yes.

15 MR. HALVERSEN: Let me mark next what we'll mark as
16 Plaintiff's Exhibit 31.

17 [Whereupon, Plaintiff's Exhibit Number 31, 7/21/1 memo,
18 is marked for identification by the court reporter]

19 [Whereupon, document provided to witness]

20 Q. Have you had a chance to look at that document?

21 A. I mean, I've seen it previously.

22 Q. What is that document?

23 A. It's a summary of Ms. Whitfield's care by Dr. Schimpf.

24 Q. And what is the date that's on the top of that document?

25 A. July 21st, 2015.

1 Q. And does this appear to be a document that was dictated
2 by Dr. Schimpf?

3 A. Yes.

4 Q. And what leads you to that conclusion?

5 A. Well, it's signed by him on the last page. Or it has his
6 name on the last page.

7 Q. And it has Ms. Long's initials, too; correct?

8 A. Yes.

9 Q. Is there any indication in this letter from Dr. Schimpf
10 that Ms. Whitfield underwent a liposuction to her neck?

11 [Whereupon, the witness reviews documents]

12 A. I don't believe so.

13 Q. Okay. Now I'll refer you to the first page and the
14 first -- or the third paragraph, the first sentence. Could
15 you read what that states on the July 21st, 2015, letter?

16 A. She was seen again on the 11th, 14th, and 16th of July.

17 Q. Now, could you go back to the appointment ledger, what
18 we've marked as Exhibit 28?

19 A. Uh-huh.

20 Q. Is there anything on the appointment ledger that states
21 that -- that tells you that Ms. Whitfield was seen by Dr.
22 Schimpf on those days?

23 A. There's no appointment scheduled for the 16th, but it's
24 still listed as pending.

25 Q. Okay. Well, I think you earlier testified that if it

1 says "out", that means she was seen; correct?

2 A. Correct. So on the pending appointments, it could just
3 be human error, that someone never checked her in, checked her
4 out, no-showed the appointment, because nothing was ever done
5 with those.

6 Q. Right. But we -- you drew the conclusion that when it
7 says out, she was seen.

8 A. But that's definitely a completed appointment. But if it
9 says pending, there's no way for us to know, to be a hundred
10 percent accurate, if she was there on those days or not.

11 Q. I understand what you're saying. But where -- is there
12 any -- Dr. Schimpf states in his note that Ms. Whitfield was
13 seen July 11th, July 14th, and July 16th. Are those dates ---

14 A. The 11th and the 14th are not on here.

15 Q. The 11th and the 14th are not on the appointment ledger?

16 A. Correct.

17 Q. Do you know why?

18 A. No, sir. I don't know if that was a weekend or if that
19 was after hours or -- I'm not sure.

20 Q. Okay. Shouldn't all patient visits be put in the
21 appointment ledger?

22 A. Not if they were to occur after hours or on the weekend.

23 Q. That's something that would not be recorded?

24 A. No. I mean, if a patient needed to be seen and taken
25 care of, then we would see the patient and take care of them.

1 Q. Well, the practice at the time wouldn't document that she
2 actually -- that person came in and was seen on a particular
3 day?

4 A. If it was after hours or on the weekend, there's
5 typically not anybody there to document it.

6 Q. Wouldn't you agree with me, though, that the rule we just
7 saw in Exhibit 29 is there's supposed to be a record of all
8 care and treatment provided to the patient?

9 A. Correct.

10 Q. That wouldn't be providing a record of the care and
11 treatment, then, would it?

12 A. That's providing care to the patient.

13 Q. Right. But there has to be a record of that care
14 pursuant to the law I showed you; correct?

15 A. We do our best. Yes.

16 Q. When I asked you before about when Mrs. Whitfield
17 requested her medical records, I believe you said sometime in
18 2015. Was that accurate?

19 A. Yes. I don't know the exact date.

20 Q. Okay. Do you believe that that was sometime around when
21 Exhibit 31 was created?

22 A. That would be my best guess, yes.

23 Q. In fact, on the third page -- or the bottom of the second
24 page, on or about the fifth line from the bottom, it says: We
25 will go ahead and provide her with medical records, including

1 the operative dictation as well as notes from Dr. Kalus and
2 our clinical notes.

3 Did I read that correctly?

4 A. Uh-huh.

5 Q. So ---

6 THE COURT REPORTER: I'm sorry, I didn't hear your
7 answer.

8 THE WITNESS: Oh, yes.

9 THE COURT REPORTER: Thank you.

10 A. Yes.

11 THE COURT REPORTER: Thank you.

12 Q. Do you recall any conversation that you had with Mrs.
13 Whitfield on the phone after her surgery around this period of
14 time when she was requesting her medical records?

15 A. I don't recall speaking to her about her medical records.

16 Q. Did you ever tell Mrs. Whitfield that you had sent her
17 medical records to your attorneys to review before providing
18 them to her?

19 A. No.

20 Q. You don't -- you didn't?

21 A. I mean I would have -- I wouldn't have said that to a
22 patient. And so I -- and I don't recall her calling and
23 asking me specifically for medical records. Because I would
24 have said she needed to complete the forms in order for us to
25 release them.

1 Q. Is it possible that you sent Mrs. Whitfield's medical
2 records to Dr. Schimpf's lawyers when she requested a copy of
3 her medical records?

4 A. We routinely send requests through our attorneys, yes.

5 Q. You do?

6 A. We do.

7 Q. Why do you do that?

8 A. It's our policy.

9 Q. It was your policy back then?

10 A. Uh-huh.

11 Q. Is that your policy now?

12 A. It's our policy now, and it started -- I don't know at
13 what point it did start.

14 Q. So do you get a patient's authorization for them to share
15 the medical records with somebody else before sending it to
16 the lawyer?

17 A. We -- we have a business-associate agreement with Josh
18 Whitley so that he is able to -- he has access to medical
19 records and things like that.

20 Q. Did you have a business-associate agreement in place with
21 Josh Whitley at the time of this event in 2014 and 2015?

22 A. I believe that we did, but I don't -- I don't -- I'd have
23 to go back and look.

24 Q. So I believe you said it's possible that Mrs. Whitfield's
25 records could have been sent to her attorneys -- or, I'm sorry

1 -- to Dr. Schimpf's attorneys?

2 A. Yes.

3 Q. Who would have done that?

4 A. Me.

5 Q. What would you have sent them?

6 A. I would have sent them her -- the records that we had.

7 Q. Okay. Which -- which are? What are the records that you
8 had?

9 A. The consent, the -- the consent, the -- I don't know if
10 this letter was around at that time. The operative report.
11 If we had any prescriptions or path reports or anything like
12 that that were in her chart we would have sent them to him.

13 Q. Can you tell -- can you tell the ladies and the gentlemen
14 of the jury what you might have sent, specifically, as it
15 pertains to Mrs. Whitfield's chart?

16 A. We would have sent anything that pertained to Ms.
17 Whitfield. I don't know specifically. I'm sorry.

18 Q. Okay. And that was just my question.

19 A. Yeah.

20 Q. Okay. Would you have sent them the H&P form that
21 pertains to Mrs. Whitfield?

22 A. No, because I don't believe that was found until after
23 the fact.

24 Q. I'm sorry?

25 A. I don't believe that was found until after the fact, ---

1 Q. After ---

2 A. --- that the records had been requested.

3 Q. Okay. So that's a document that wouldn't have gone to
4 the lawyers?

5 A. Correct.

6 Q. Do you know why Dr. Schimpf created the summary of care
7 in July 21st -- that's dated July 21st, 2015?

8 A. My assumption was because it was a -- it was in relation
9 to a medical record request.

10 Q. Was that after Dr. Schimpf knew there was a problem with
11 Mrs. Whitfield's care?

12 A. I believe we brought it to, you know, his attention that
13 there were some records missing; and so he went ahead and
14 dictated the summary so that, you know, we could send it out
15 to show the course of her care.

16 Q. Right. But my question was was it after there was a --
17 that Sweetgrass became aware that Mrs. Whitfield had a problem
18 with her course of treatment at Sweetgrass?

19 A. It would have been in around the time that the medical
20 records request came in. And I don't know the date of that.

21 Q. So you're saying Sweetgrass wasn't aware that Mrs.
22 Whitfield had any issues after her surgery with Dr. Schimpf
23 until 2015?

24 A. She was seen in the office multiple times, so of course
25 he was aware that she had issues.

1 Q. Right. Postoperative problems?

2 A. Yes.

3 Q. Do you know why Dr. Schimpf didn't create this summary of
4 care back at the time we're talking about, in the summer of
5 2014, back when this transcription issue came to the attention
6 of the practice?

7 A. I don't believe he was aware of it at that time.

8 Q. Dr. Schimpf wasn't aware of the transcription problem in
9 the summer of 2014?

10 A. Dr. Schimpf wasn't aware that Ms. Whitfield was affected
11 by that.

12 Q. Until 2015 when the medical records request came in?

13 A. Yes.

14 Q. Were there other patients' medical records that were on
15 those tapes other than Ms. Whitfield's?

16 A. Yes.

17 Q. Do you have any way of determining whose medical records
18 were on those tapes?

19 A. No.

20 Q. Why not?

21 A. Because there was multiple recorders and he would
22 record -- or do dictations at different times. So there, you
23 know, might have been one clinic on three different recorders,
24 depending on where he was at the time when he dictated it.

25 Q. And there was no way that the practice didn't keep a log

1 of what patients' charts were on any given tape?

2 A. At that time we did not. We've learned a lot since then.

3 Q. And there's no way to determine whose medical records,
4 what patients' medical records, were on the tapes?

5 A. No.

6 MR. HALVERSEN: I would next like to introduce
7 Plaintiff's Exhibit 32.

8 [Whereupon, Plaintiff's Exhibit Number 32, 7/16/14
9 letter, had been pre-marked by counsel]

10 [Whereupon, admittance of Plaintiff's Exhibit Number 32
11 was not yet ruled upon]

12 Q. And for the record, this is a -- what purports to be a
13 letter to Mrs. Whitfield from Dr. Schimpf. Have you seen this
14 document before?

15 A. I have.

16 Q. And what's -- what's it say on the first two lines at the
17 top?

18 A. Dear Ms. Whitfield, I'm sorry to hear ---

19 Q. I'm sorry. I meant the first top two lines.

20 A. Oh. Jeane Whitfield, 7/16/14.

21 Q. And does this appear to be a document that was dictated
22 by Dr. Schimpf?

23 A. Yes.

24 Q. And what leads you to that conclusion?

25 A. It has Dr. Schimpf's and Debbie Long's initials at the

1 bottom.

2 Q. Do you know how this letter got transcribed, dated July
3 16th, but we don't have a record of Dr. Schimpf's other
4 medical treatments of Mrs. Whitfield in that same time period?

5 A. Because the transcriptionist was able to transcribe this
6 one.

7 Q. So this one -- this one got transcribed, but we don't
8 have any explanation of why some of the other postoperative
9 notes weren't transcribed?

10 A. We do have an explanation. The recorder wasn't working
11 properly and we didn't realize it.

12 Q. Okay. Let's move on to Plaintiff's Exhibit 33.

13 [Whereupon, Plaintiff's Exhibit Number 33 is marked for
14 identification by the court reporter]

15 Q. What does this document appear to be?

16 A. Some type of I guess a list -- a list of financial
17 transactions.

18 Q. From?

19 A. From Nextech.

20 Q. And it has Dr. O'Neill's name on the top, O'Neill Plastic
21 Surgery?

22 A. Correct.

23 Q. And then it says patient financial history, Whitfield,
24 Jeane?

25 A. Yes.

1 Q. Is there any indication on this billing ledger that Mrs.
2 Whitfield was billed for a liposuction for her neck?

3 A. No.

4 Q. Is there any indication of a patient visit on July 11th,
5 2014, according to this document?

6 A. Not that I see, no.

7 Q. Is there any indication of a visit on July 14th, 2014,
8 according to this document?

9 A. No.

10 Q. Is there any indication of a visit on July 16, 2014,
11 according to this document?

12 A. No.

13 Q. I'm going to refer you back again to the Exhibit 31 of
14 July 21st, 2015, Dr. Schimpf's summary letter where it states
15 she was seen again on July 11th, July 14th, and July 16th. Do
16 you know why that's indicated and it's not billed for?

17 A. Well, there's no charge for any postoperative or
18 preoperative visit.

19 Q. There's no charge for a preoperative visit?

20 A. No, sir, not for a cosmetic procedure.

21 Q. Why does it say on the second page of Exhibit 33,
22 December 19th, 2013, charge, cosmetic consult \$50?

23 A. I apologize. Dr. O'Neill did have a rule where he would
24 charge \$50 for a cosmetic consult.

25 Q. But this was not Dr. O'Neill's patient; correct?

1 A. Correct.

2 Q. It was Dr. Schimpf's patient?

3 A. Correct.

4 Q. And when Sweetgrass opened in 2013, did Dr. Schimpf take
5 preoperative photographs of his patients?

6 A. Preoperative, yes. Actually, can I -- Dr. Schimpf would
7 not take them. Whoever was working the patient up for surgery
8 would take them.

9 Q. Okay.

10 A. And if you notice on this bill, that \$50 is adjusted off;
11 so she was not charged for that visit since it was a Dr.
12 Schimpf patient.

13 Q. Let me just refer you to your previous deposition taken
14 September 24th, 2018, Page 75, Line 11. And I -- did you see
15 it? Have you found it?

16 A. Yes.

17 Q. I asked you the question, I said does -- did -- at the
18 time when Sweetgrass opened in 2013 or 2014 did Dr. Schimpf
19 take preoperative photographs of his patient. And you said --
20 patients. And you said, yes.

21 A. But then the next line said who would take the
22 photographs. And I said whoever was working the patient up
23 for surgery.

24 Q. Okay. Fair enough.

25 Do you know -- have any explanation as to why no

1 preoperative photographs were produced of Mrs. Whitfield?

2 A. I don't.

3 Q. When would pre-op photos be taken of the patient?

4 A. The morning of surgery.

5 Q. Did Dr. O'Neill have a special photo room for pictures?

6 A. He did.

7 Q. Was the computer for storing the pictures in the same
8 photo room that was used to take the pictures?

9 A. Yes.

10 Q. Do you recall being present for any of Mrs. Whitfield's
11 postoperative visits?

12 A. I remember being in the room for one.

13 Q. Do you recall which one?

14 A. I don't.

15 Q. What do you remember?

16 A. Ms. Whitfield had come in because she was having
17 a -- she had an opening in her breast. And so I went into the
18 room to talk to her while Dr. Schimpf attended to her breast.
19 And, you know, I do that to try and distract the patient so
20 they're not really, you know, paying attention and they're not
21 really focusing on what he's doing and, you know, talk to them
22 about my kids and, you know, what's going on and, you know,
23 just trying to do anything I can to make them not think about
24 it so that, you know, they're not focused on what he's doing
25 and he can get it done without them getting upset or anything

1 like that.

2 Q. Do you recall Dr. Schimpf putting stitches into Mrs.
3 Whitfield without anesthesia?

4 A. No. Typically, I have my back to where I'm not watching
5 the procedure. I'm looking at the patient eye-to-eye.

6 Q. So you were looking -- you would have been looking eye-
7 to-eye with Mrs. Whitfield?

8 A. Yes.

9 Q. Okay. And you were doing that while Dr. Schimpf was
10 putting stitches into Mrs. Whitfield?

11 A. Correct.

12 Q. Was she crying?

13 A. I don't recall her crying.

14 Q. But you remember her in the office room while Dr. Schimpf
15 was stitching her, but you don't remember her crying?

16 A. I remember that she was upset. But I don't specifically
17 remember if she was crying or not.

18 Q. And why was she upset? Was she visibly upset?

19 A. She was upset because she was in pain; and she was upset
20 because, you know, she was having some problems with her wound
21 healing.

22 Q. Okay. Was Dr. Schimpf upset?

23 A. I'm not sure if he was upset or not.

24 Q. Was he angry?

25 A. No. He would never be angry.

1 Q. Did he slam his utensils, his surgical utensils, in the
2 sink and tell Mrs. Whitfield to leave?

3 A. No. Dr. Schimpf would never do that.

4 Q. Did you ever ask Mrs. Whitfield to text a picture of her
5 breast to you?

6 A. Yes.

7 Q. Okay. I'd like to refer you to your deposition again,
8 Page 84, Line 8.

9 A. I'm aware that I did not recall that she had, but just
10 recently they asked me if -- my attorneys asked me if she had
11 ever sent me a picture, and I said not that I'm aware of. And
12 they said, well, can you go look; do you have, you know,
13 access to your phone; you know, how long have you had this
14 phone. And I said, I do have an old phone in my drawer. And
15 they said, well, can you look at it and see if there's, you
16 know, anything on there. And so when I went and looked, I did
17 find a picture of Ms. Whitfield.

18 Q. Okay. And where was this phone?

19 A. It was in a drawer in my bedroom.

20 Q. And why did you think to go look in your bedroom drawer
21 for the iPhone?

22 A. Because the attorneys asked me if I still had the phone
23 that that photo might be on.

24 Q. And you had it in your -- you kept that in your drawer?

25 A. Yes.

1 Q. At home?

2 A. Yes.

3 Q. Would you -- do you usually -- is that where -- would you
4 agree with me that a patient's photo should be in the
5 Sweetgrass office for where the medical records are supposed
6 to be?

7 A. Yes.

8 Q. Would you agree with me that that photo should have been
9 put into her chart?

10 A. Yes. Like I said, we've learned a lot over the years,
11 and now any patient that texts a picture or sends anything
12 through email or anything like that always gets saved into the
13 patient's chart.

14 Q. But that didn't happen for Mrs. Whitfield?

15 A. That picture did not get saved.

16 Q. I'd like to show you what was previously marked as
17 Plaintiff's Exhibit 21. Does that appear to be the picture
18 that was on your phone?

19 A. I believe so.

20 Q. And was there a date on that photograph?

21 A. Yes.

22 Q. And what was the date?

23 A. I don't remember.

24 Q. Okay. Do you know if that -- the date on that was the
25 date that the picture was forwarded to you?

1 A. Yes. I mean, that was the date that they send it to me.

2 Q. Who sent it to you?

3 A. I believe it was Mr. Whitfield.

4 Q. Okay. And that's because of the phone number?

5 A. Yes.

6 Q. Do you know why this picture wasn't given to us until
7 last week?

8 A. Because I did not recall ever receiving a picture.

9 Q. Until last week?

10 A. Until my attorneys asked -- said -- they -- she said she
11 sent you a picture, would you -- do you still have that
12 picture.

13 Q. And that's what prompted you to look?

14 A. Yes.

15 Q. Even though we've been looking for medical records in
16 this case for a long time; correct?

17 A. Correct.

18 Q. And they've been requested multiple times?

19 A. But I didn't think to go look at my cell phone for a
20 picture.

21 Q. Until last week?

22 A. Yes.

23 Q. Let me next introduce Plaintiff's Exhibit 34.

24 [Whereupon, Plaintiff's Exhibit Number 34 had been
25 pre-marked by counsel]

1 [Whereupon, admittance of Plaintiff's Exhibit Number 34
2 was not yet ruled upon]

3 Q. And what is this document?

4 A. It's a history and physical.

5 Q. And could you explain to the ladies and gentlemen of the
6 jury what a history and physical form is?

7 A. It just states past medical history, any current
8 problems, if you have hypertension or diabetes or something
9 like that.

10 Q. And there's also on the page -- it's -- what is the --
11 what is the date of this document?

12 A. The date of her surgery, 6/6/14.

13 Q. And it says intended procedure. And could you please
14 read to the jury what procedures are in the blank for intended
15 procedures?

16 A. Sure. Bilateral upper bleph, lipo to abdomen and legs,
17 silicone implant exchange.

18 Q. Would you agree with me that there's nothing in there
19 about a liposuction to the neck?

20 A. Correct.

21 Q. And whose signature appears to be on the bottom, to the
22 best of your ability?

23 A. Dr. Schimpf.

24 Q. And what is the date on that?

25 A. June 6, 2014.

1 Q. And where did you find this document?

2 A. In a cabinet in my office.

3 Q. Is that where it was supposed to be?

4 A. No.

5 Q. What -- did you find other patients' medical records in
6 there as well?

7 A. Yes.

8 Q. Do you have any idea how these records got into your
9 cabinet?

10 A. I believe because they were incomplete and they needed --
11 they were waiting to be completed and they got mixed into some
12 card stock and some other stuff and got put up in the cabinet.

13 Q. Waiting to be completed by what?

14 A. Well, the history and stuff isn't filled out; so I guess
15 they weren't complete yet, and so they hadn't been put into
16 the chart because they hadn't been completed.

17 Q. Well, when was it going to get completed if the date of
18 the surgery was June 6, 2014? I mean, that's all that was
19 ever going to be completed on the form; right?

20 A. I -- obviously it wasn't complete, so we hadn't scanned
21 it into the chart.

22 Q. Did you anticipate finding this record in your cabinet?

23 A. No.

24 Q. Would you agree with me that your patient records
25 shouldn't have been in your office?

1 A. I have patient records in my office all the time.

2 Q. Would you agree with me patient records shouldn't be
3 stored in your office?

4 A. Yes. We try to be -- we try to be paperless, but -- so,
5 yes, it should have been scanned into her chart.

6 Q. And this form you didn't find until when?

7 A. I don't know the date. But as soon as I found it I sent
8 it over to our attorneys and let them know.

9 Q. If I represented to you that this was produced in
10 February, before a deposition, do you have any reason to
11 dispute that? Of this year.

12 A. No.

13 Q. You have no reason to dispute that; correct?

14 A. No. I mean, if that's the date that I sent it to them.
15 But I don't know the date.

16 Q. And I'm not holding you ---

17 A. Yeah.

18 Q. --- to the exact date. But would that be fair to tell --
19 say that?

20 A. Yes, that's fair.

21 Q. And this -- these records were stored along with other
22 random office supplies?

23 A. Correct.

24 Q. Do you believe a member of your staff confused the
25 medical records with being office supplies?

1 A. No.

2 Q. I am going to show you the transcript of your deposition.

3 MR. HALVERSEN: And for the record, defense counsel has
4 stipulated that the copy of the February 11th, 2019 transcript
5 can be used as -- in lieu of the originals.

6 Let's make that Court's -- exhibit?

7 THE COURT REPORTER: Number 5.

8 MR. HALVERSEN: Five.

9 [Whereupon, Court's Exhibit Number 5, Tolbert transcript
10 dated 2/11/19, is marked for identification by the court
11 reporter]

12 MR. HALVERSEN: I'll withdraw the question.

13 Q. What is the purpose of an H&P form?

14 A. I'm not a clinical person. That's -- I mean, that's all
15 part of the OR stuff.

16 THE COURT: Mr. Halversen, ---

17 MR. HALVERSEN: Yeah.

18 THE COURT: --- why don't we take this chance for you to
19 get reorganized just for a second and we'll go ahead and take
20 our mid-afternoon break.

21 I can see everybody's getting kind of fidgety, and so we
22 maybe just need to take a little -- our mid-afternoon break
23 and get something to drink, stretch our legs, and use the
24 restroom, and we'll just come back in a little bit. All
25 right?

1 [Whereupon, the jury exits the courtroom 8/27/19, 3:13
2 p.m.]

3 THE COURT: All right. I'll remind you that you're under
4 oath. You're not to discuss your testimony with anyone, but
5 you're certainly free to go use the restroom and take a break.

6 THE WITNESS: Okay.

7 THE COURT: All right. We'll take a recess.

8 [Whereupon, a recess is taken 8/27/19, 3:13 p.m. to 3:34
9 p.m.]

10 THE COURT: All right. Anything before I bring the jury
11 out? From the plaintiff?

12 MR. HALVERSEN: Your Honor, just after my exam I would --
13 like to approach. And I'm near the end.

14 THE COURT: Okay. Anything from the defense?

15 [No response]

16 THE COURT: All right. They have brought it to my
17 attention that the jury is complaining that they're still
18 having a hard time hearing you.

19 THE WITNESS: Okay.

20 THE COURT: So if you don't mind, just stay leaning
21 forward at all times ---

22 THE WITNESS: Okay.

23 THE COURT: --- and make sure that you're speaking up for
24 us, please.

25 [Off the record discussions regarding temperature in the

1 courtroom]

2 THE COURT: All right. Bring out the jury.

3 [Whereupon, the jury enters the courtroom 8/27/19, 3:35
4 p.m.]

5 THE BAILIFF: Your Honor, the jury is complete.

6 THE COURT: All right. Thank you, sir.

7 You can proceed.

8 MR. HALVERSEN: Thank you, Your Honor.

9 Q. One follow-up question I have on Plaintiff's Exhibit 21.
10 It's a photo of the picture you found on your iPhone last
11 week.

12 A. Yes.

13 Q. I believe you previously testified that the photo on
14 there was forwarded to you; correct?

15 A. The patient's husband texted it to me.

16 Q. Right. Okay. And there was a date on that photograph.
17 Do you have any personal knowledge of when that photograph was
18 taken?

19 A. I don't. I mean, it said it on the top of when that text
20 message was received. But I don't remember the exact date.

21 Q. I know there was a date of when it was -- and it's above
22 the photograph on your iPhone ---

23 A. Yes.

24 Q. But as to specifically, do you have any personal
25 knowledge as to when that photograph was taken, besides

1 from ---

2 A. I would assume that it's the same day that it was sent.

3 Q. I know that's your assumption.

4 A. Yes.

5 Q. But do you have any personal knowledge as to ---

6 A. No.

7 Q. --- when it was taken, aside from the date that's on
8 there?

9 A. No.

10 Q. Before, I had asked you if you believed if a member of
11 your staff confused the medical records with being office
12 supplies. Do you recall that question?

13 A. Yes.

14 Q. And what was your response?

15 A. That they would not think the medical records were office
16 supplies.

17 Q. So I want to refer you to your February 11th, 2019
18 deposition, Page 10, Line 18. The question was posed to you
19 is it your testimony --

20 Let me just wait until you get there. I'm sorry.
21 Page 10.

22 A. You said Page 10?

23 Q. Yeah. Is that the ---

24 A. I don't think that's the right ---

25 Q. That's your first deposition. February 11th, 2019

1 deposition, I'm sorry, which is marked as Court's 5.

2 The question was posed to you on Page 10, Line 18: Is it
3 your testimony that a member of your staff or Sweetgrass'
4 staff may have confused a stack of H&P documents as office
5 supplies?

6 And you answered: Yes, they were in a stack like card
7 stock and other things.

8 A. They were in a stack of office supplies.

9 Q. Okay. But somebody ---

10 A. Somebody wouldn't think that an H&P was an office supply.

11 Q. Okay. Well, that's your testimony.

12 A. I wasn't saying that they thought H&Ps were office
13 supplies. I was saying that they were in a stack of office
14 supplies, that they would have just put the office supplies
15 away not realizing that they were in the stack.

16 Q. Okay. What's the purpose of an H&P form?

17 A. That's a clinical question, and I am not a clinical
18 provider.

19 Q. Okay. I'll refer you to Page 18 on that same deposition,
20 Line 19. And you said to that question: So the physician
21 knows the history and physical of the patient.

22 Is that true?

23 A. I mean, that's -- I mean, an H&P is a history and
24 physical. I'm kind of repeating the question. But, yes.

25 Q. Okay. How often are these forms filled out with

1 patients, starting from when they first come into the office
2 all the way through surgery; is it a one-time form, or is it a
3 routine form filled out numerous times?

4 A. They just do it before surgery.

5 Q. Whose job would it be to fill out the form?

6 A. Usually the nurse and Dr. Schimpf.

7 Q. Is it Sweetgrass' practice to fill these forms in
8 accurately?

9 A. Yes.

10 Q. And the procedure is that any procedure that was intended
11 to be done should have been listed on that form; correct?

12 A. Correct.

13 Q. And if that form was signed when it was purported to be
14 signed, at 3:40 p.m. after the procedures were done, certainly
15 the doctor should have accurately or the staff should have
16 accurately reflected what procedures were done in filling out
17 that form. Do you agree?

18 A. Agree.

19 MR. HALVERSEN: We're marking into evidence Plaintiff's
20 Exhibit 35.

21 Q. Do you remember that?

22 [Whereupon, Plaintiff's Exhibit Number 35, form, is
23 marked for identification by the court reporter]

24 THE COURT: Is there any objection as to Plaintiff's
25 Exhibit 35?

1 MR. HORTON: No, sir, Your Honor.

2 THE COURT: All right. Without objection.

3 [Whereupon, Plaintiff's Exhibit Number 35 is admitted
4 into evidence by the Court]

5 Q. Which is the -- which is the original affidavit of the
6 record's custodian for O'Neill Plastic Surgery. And are you
7 familiar with the -- you're familiar with the Nextech EMR
8 system?

9 A. Yes.

10 Q. And attached to Dr. O'Neill's affidavit is what I'll
11 represent to you is what's called an audit trail where Dr.
12 O'Neill presented that this -- these were a readout of every
13 time somebody went into the Nextech EMR system. Do you have
14 any reason to dispute that?

15 A. No.

16 Q. And your name is on these -- in this system. Do you see
17 your first name on that?

18 A. I do.

19 Q. Okay. But I just wanted you to identify that for the
20 record.

21 Ms. Tolbert, how much does Sweetgrass or Dr. Schimpf pay
22 you? What's your compensation for the year?

23 MR. HORTON: Objection, Your Honor.

24 THE COURT: What's the objection?

25 MR. HORTON: Relevancy grounds. 401, 402 and 403.

1 THE COURT: All right.

2 MR. HALVERSEN: Why don't we -- Your Honor, it's probably
3 a good time to take up our ---

4 THE COURT: All right. Ladies and gentlemen, I'm going
5 to take up a matter of law. If you'll please excuse us for
6 about five minutes. We'll bring you right back out.

7 [Whereupon, the jury exits the courtroom 8/27/19, 3:43
8 p.m.]

9 THE COURT: All right. They objected under 401, 402,
10 403. So what is -- what is the relevance of this line of
11 questioning?

12 MR. HALVERSEN: Your Honor, I think the amount the
13 practice compensates her, as well as we believe also evidence
14 that has been discussed with the Court previously as to the
15 relationship that Ms. Tolbert has with Dr. Schimpf, we believe
16 is relevant to her bias and credibility with respect to two
17 different aspects of her testimony.

18 The first is the testimony that you've heard about -- her
19 testimony about her observations of what she claims did and
20 didn't happen when Mrs. Whitfield was there postoperatively.
21 They are squarely at odds with what Ms. Whitfield has
22 testified to.

23 We believe the evidence of their relationship, how much
24 Dr. Schimpf is compensating her financially, and also the
25 plastic surgery services that he's bestowed upon her, which is

1 evidence that we adduced from the depositions, is directly
2 relevant to her credibility and her bias as a witness.

3 We also believe that the fact that the -- she has
4 proffered innocent explanations as to why there is no medical
5 records, specifically being that there was one dictation
6 recorder that malfunctioned, whereas she's also given
7 testimony that there was other alternative explanations
8 proffered by Dr. Schimpf.

9 So we believe all those factors go to her credibility and
10 bias. It's just a fact of life. I mean, I don't know why it
11 can't come in. It's just the nature of their relationship.
12 It's a true fact. She was ordered to answer the question by
13 Judge Jefferson. They blocked it at the deposition. Judge
14 Jefferson said it's relevant. I think it goes to the
15 credibility and bias. I think we've stated it.

16 THE COURT: And what are you -- what do you believe to be
17 her bias? Like what is she testifying to that you think that
18 she is not being truthful about?

19 MR. HALVERSEN: Specifically as to the patient
20 interactions with Mrs. Whitfield, claims she had with Dr.
21 Schimpf. And those are things that are important aspects of
22 the case, which I mentioned in the opening, which was that he
23 was angry, she felt abandoned, and the dismissive nature of
24 his complaint -- of her complaints to Sweetgrass.

25 She's offered her testimony about how she went to

1 Sweetgrass and was dismissed and he was angry. Ms. Tolbert
2 has just disputed that.

3 [Whereupon, plaintiff counselors confer]

4 MR. HALVERSEN: Yeah, I mean the testimony about the
5 recorders was inconsistent as well.

6 But specifically as to testimony as to Mrs. Whitfield, we
7 believe it has a direct bearing onto the credibility of what
8 Ms. Whitfield has testified to.

9 THE COURT: And so you feel like the amount of money
10 she's being paid, surgical procedures performed that she does
11 not have to pay for, and the fact that she has some
12 relationship with the doctor -- I'm reading as I'm talking,
13 sorry -- with the defendant is -- I mean, it says evidence of
14 bias is bias, prejudice, or any motive to misrepresent may be
15 shown to impeach the witness either by examination of the
16 witness or by evidence otherwise adduced.

17 And you're alleging that she is not testifying truthfully
18 because she is some -- in somewhat way biased towards the
19 defendant?

20 MR. HALVERSEN: She's sleeping with the defendant, Your
21 Honor. Yes.

22 THE COURT: I got that.

23 It says, in Subsection B, in the discretion of the Court,
24 if probative of truthfulness or untruthfulness be inquired
25 into on cross-examination of the witness concerning the

1 witness' character or truthfulness or untruthfulness or
2 concerning the character for truthfulness or untruthfulness of
3 another witness as to which character the witness being cross-
4 examined has testified. The giving of testimony, whether by
5 an accused or by other witnesses, does not operate as a waiver
6 of the accused or witnesses' privilege against self-
7 incrimination; that doesn't apply.

8 All right. What is y'all's argument as to bias?

9 MR. SMYTH: Well, Your Honor, I don't think he's done
10 anything to establish any bias. And I don't think that it
11 warrants going into the witness' personal life.

12 You know, this case is a medical malpractice case. It's
13 about whether there was a breach in the standard of care.
14 That's the sole issue before this Court.

15 This Court should not lower itself to allow this kind of
16 conduct in here in order to embarrass the witnesses. And
17 that's the sole purpose of all this, Your Honor.

18 They're trying to paint the defendants and their staff in
19 a bad light. It doesn't -- she's allowed to testify what she
20 remembered. That doesn't mean she's biased. That doesn't
21 mean you get to go into her personal medical history or her
22 personal life. You know, those kind of things should be off
23 limits.

24 And she's here to testify to what she knows. She's
25 answered all the questions honestly in her deposition and here

1 at the courtroom. There's been no indication otherwise.

2 She may have a different account than the plaintiff does,
3 but that doesn't warrant this type of intrusion into people's
4 personal lives.

5 MR. HALVERSEN: May I ---

6 THE COURT: All right. Subsection A says the credibility
7 of a witness may be attacked or supported by evidence in the
8 form of reputation, but subject to the limitations of evidence
9 may refer only to the character for truthfulness or
10 untruthfulness and the evidence of truthful character is
11 admissible only after the character of the witness for
12 truthfulness has been attacked by opinion or reputation,
13 evidence or otherwise.

14 I just don't think we have that here. I mean, you know,
15 in making these decisions, I get the luxury of taking into
16 account the witness' testimony. I'm here. I don't think that
17 she's testified to anything contrary than she has in her
18 deposition. Every question that you've asked her you've
19 either moved on from or she's been able to say that's what I
20 said or that's how I said it and let me clarify as to what I
21 meant.

22 I understand that it -- I just don't see the probative
23 value outweighing the prejudicial effect of it, of her
24 testifying as to the relationship that she may have with the
25 defendant.

1 I agree this is a medical malpractice claim. You can
2 certainly point out the fact that she had a job to do and she
3 has admittedly said she didn't do it.

4 I don't think anybody is going to have a problem with you
5 getting up there and saying she had a job to do in 2014, she
6 didn't do it, she's admitted that there was mistakes.

7 I think you get to run with the fact that she has several
8 occasions said we just did our best.

9 So I think she's -- I don't think she's biased, in my
10 opinion at this point in time. And I don't think anything has
11 been elicited as to fact that she's been untruthful in any
12 way, so ---

13 MR. HALVERSEN: And, Your Honor, ---

14 THE COURT: Sure.

15 MR. HALVERSEN: --- I understand your ruling as you are
16 talking about the medical records. But what about the
17 testimony about the inconsistencies she's saying about what
18 Mrs. Whitfield testified to? She's offered these explanations
19 that, no, he never said that. She's got a motive to say
20 something, to cover for him. It's her boss and they're
21 sleeping with each other; and she's paid a certain amount of
22 money, and I can't ask her about that? Isn't that relevant?

23 THE COURT: What do you want to ask --- not about that.
24 But I'm saying what are you indicating that she has testified
25 contrary to what Ms. Whitfield has testified to? Just about

1 the phone conversations and ---

2 MR. HALVERSEN: No. When she came back -- Mrs. Whitfield
3 testified this morning when she came for help to Dr. Schimpf,
4 she was there postoperatively and said he was angry and
5 dismissive and threw his -- threw his tools in the sink and he
6 was stitching her up while she was crying.

7 And this witness just said, no, that didn't happen, ---

8 THE COURT: Okay.

9 MR. HALVERSEN: He would never -- she said Dr. Schimpf
10 would never do that. Right there.

11 THE COURT: I'm going to instruct the jury at the end
12 they get to take the credibility of witnesses into account.
13 They can believe whole parts of testimony, parts of testimony,
14 all of one testimony, or none of the other. And I think
15 that's the exact charge they need to hear.

16 I mean, this is a trial. There's going to be differences
17 of testimony and there's going to be conflicting evidence in
18 the case. But I don't think that we need to get into her
19 personal life as to the bias of anything. So I'm not going to
20 let you get into it.

21 Now whether -- do you consider the fact that he asks her
22 how much that she's paid -- I mean, I don't know really what
23 the relevance of that is.

24 MR. SMYTH: That's -- that was our objection. That was
25 simple. We didn't know we were getting into all of this. But

1 that was ---

2 THE COURT: Well, he was going to start heading that
3 direction; and so that's fine.

4 I'm going to find that what she pays isn't -- or what
5 she's paid isn't relevant either.

6 MR. SLOTCHIVER: Judge, can we have an equal ruling when
7 it comes to Kalus? For example, earlier they referenced isn't
8 it true that Dr. Kalus was paid \$60,000 to do these
9 procedures. Under the same line of thought it would be
10 irrelevant, because the suggestion is that he is doing
11 something outside of his norm because he's being paid money.

12 The same inference they brought up earlier when it came
13 to one of our doctors, our treating physician. But now when
14 it's their person on the stand, they ---

15 THE COURT: Well, do you care if we exclude that he got
16 paid \$60,000?

17 MR. HORTON: They put it in in their medical bills.

18 THE COURT: Okay.

19 MR. HALVERSEN: I mean they asked me to ---

20 MR. SLOTCHIVER: But the inference that he got paid
21 \$60,000 and therefore he must be lying is what I am asking to
22 exclude.

23 MR. HALVERSEN: I didn't make an inference. I just asked
24 the question.

25 MR. SLOTCHIVER: Well, I heard the inference. But maybe

1 I misheard it. As long as we don't argue it later on.

2 [WHEREUPON, plaintiff and defense counselors confer]

3 THE COURT: All right. All right. Do you have any other
4 questions for the witness?

5 MR. HALVERSEN: I do not, Your Honor.

6 THE COURT: All right. I will allow him to rest in front
7 of the jury.

8 Will you bring the jury out, please?

9 [Whereupon, the jury enters the courtroom 8/27/19, 3:54
10 p.m.]

11 THE BAILIFF: Your Honor, the jury is complete.

12 THE COURT: All right. Thank you so very much.

13 Do you have any further questions for this witness, Mr.
14 Halversen?

15 MR. HALVERSEN: I do not. Mr. Smyth may have some
16 follow-up questions for you.

17 THE COURT: All righty. Thank you so very much. Mr.
18 Smyth?

19 MR. SMYTH: No questions, Your Honor.

20 THE COURT: All righty. Ma'am, you are free to step down
21 and you are excused. I hope you have a wonderful day.

22 THE WITNESS: Thank you.

23 [Whereupon, the witness exits the witness stand]

24 THE COURT: All right. Call your next witness.

25 MR. SLOTCHIVER: We would call Steve Abrams to the stand,

Examination of Steven Abrams - Direct by Mr. Slotchiver

1 Your Honor.

2 THE COURT: All righty. Mr. Abrams, if you'll come up,
3 please.

4 [Whereupon, Mr. Abrams comes forward]

5 [Whereupon, Mr. Abrams is duly sworn by the clerk of
6 court]

7 THE CLERK OF COURT: You may be seated.

8 [Whereupon, the witness takes the witness stand]

9 THE CLERK OF COURT: And for the record, please state
10 your full name, spelling your last.

11 THE WITNESS: My full name is Steven Marc, M-A-R-C,
12 Abrams, A-B-R-A-M-S.

13 THE COURT: All right. Mr. Slotchiver?

14 MR. SLOTCHIVER: Thank you, sir.

15 STEVEN M. ABRAMS, Having Been First Duly Sworn, was Examined
16 and Testified as Follows:

17 **DIRECT EXAMINATION BY MR. SLOTCHIVER OF STEVEN ABRAMS:**

18 Q. Mr. Abrams, please tell the ladies and gentlemen of the
19 jury a little bit about your interesting background.

20 A. Sure. So I'm a digital forensic examiner. I work both
21 for military and for law enforcement. I just retired from law
22 enforcement. So I retired on June 30th of this year. But
23 prior to that, for the last -- not just for SLED, but for the
24 last thirty years I've worked as a digital forensics examiner
25 for military and law enforcement and also in private cases

1 such as this one.

2 And what I do is I collect evidence from digital devices,
3 like phones and computer and tablets and thumb-drives and
4 anything that has digital memory on it, and I analyze that and
5 produce what evidence would be helpful to the Court to
6 understand certain facts about how that digital information
7 has been used.

8 MR. SLOTCHIVER: I'm going to approach, because I'm
9 looking at a document that I believe is up here.

10 I was looking for the last document that was introduced
11 into evidence. I just didn't see it -- it was the affidavit
12 of Dr. O'Neill.

13 THE WITNESS: It's right here.

14 MR. SLOTCHIVER: You have it. Okay. Great. Thank you.
15 All right. We've got a lot going on.

16 THE WITNESS: It's 35.

17 Q. All right. Mr. Abrams, how did you get involved in this
18 case?

19 A. I received a call from Brent Halversen asking me to be
20 involved in the case.

21 Q. And what were you asked to do in this case?

22 A. So a couple of things. The first thing I was involved
23 in, in this case was trying to find some photographs of Ms.
24 Whitfield that may have been on a MAC computer and an external
25 hard drive that was in the possession of O'Neill Plastic

1 Surgery.

2 Q. Okay. So with reference to O'Neill Plastic Surgery, you
3 were asked to go to their computers to look for photographs?

4 A. Yeah. It was a little more complicated than that.

5 Q. Could you walk through it a little bit with us?

6 A. Sure. So what I didn't talk about in my background is I
7 also have a medical background and I also have a legal
8 background, licensed attorney in three states.

9 But in this particular case for the privacy of all Dr.
10 O'Neill's patients and to maintain the requirements for HIPPA,
11 I devised a method where I could actually search the
12 photographs without ever looking at them. And I did that with
13 Dr. O'Neill's help.

14 So essentially I extracted the data from his computer,
15 his MAC computer, and his external hard-drive; and then I
16 processed them to remove the photos from the other data that
17 was on the hard-drive. I then scored them, using software
18 that scored the skin-tone percentage of each of the
19 photographs so I could then tell which of the photographs were
20 more likely to be of patients and which would be -- likely to
21 be extraneous things.

22 And then once the data was sorted I also did keyword
23 searches for Whitfield and a number of other dates and times
24 that were relevant to this case. Once it had the data all
25 sorted into the relevant pieces I then went back to Dr.

1 O'Neill and we sat for several hours as he went through the
2 photos, with his laptop turned so that no one but he could see
3 the actual images, and he went and was able then to look to
4 see if he could find any images of Ms. Whitfield.

5 Q. Was this a collabor- -- I know you were retained by the
6 plaintiff. But was this a collaborative effort with you
7 working with both Dr. O'Neill's counsel and us, and counsel
8 for the defendant, to make sure that you had an accurate
9 finding?

10 A. Yeah, I coordinated with all parties in this case.

11 I don't know if I -- in some cases I am actually
12 appointed by the Court as their expert. I'm not sure if Judge
13 Kinlaw actually appointed me as the Court's expert or if I'm
14 your expert.

15 But the thing about digital forensics is it's a science.
16 And the data is whatever it is. It doesn't matter who I'm
17 paid for, the results -- or who paid by. The results are
18 going to be whatever they are.

19 And, you know, I've been through training, both military
20 training and two law enforcement academy trainings, and lots
21 of other private trainings, on digital forensics. And the
22 thing about the digital forensics community is we all agree
23 the data is whatever it is. You may disagree on what the date
24 means; but what it is, it is.

25 And so even though people hire me as their expert in

1 cases, I have to say the data is going to be what -- I can't
2 make the data be something that it's not.

3 Q. So there's no -- there's no gray areas; it's either black
4 or white?

5 A. Yeah, that's exactly. It's either black or white. The
6 data is either there or it's not there. And then in this
7 particular case it's a photograph; so it's either there, or
8 it's not there.

9 Q. In working with Dr. O'Neill and creating the mechanism
10 that you used and going through -- you went through a lot
11 of -- a lot of images; correct? Thousands; is that right?

12 A. He went through thousands of images, yes.

13 Q. Okay. At the end of the day were you able to identify
14 any pictures that were -- in the collaborative effort, were
15 any pictures of Jeane Whitfield found in the computer storage
16 facility that Dr. O'Neill had in his office?

17 A. Not as far as I'm aware of.

18 Q. Okay.

19 MR. SLOTCHIVER: Beg the Court's indulgence.

20 Q. And just for clarity, Mr. Abrams, your job was limited to
21 the photographs. You didn't look in the medical records ---

22 A. No.

23 Q. --- parts of the computer; correct?

24 A. Well, so the -- I looked on the entire hard-drive. So
25 whether there were medical records on other parts of the hard-

1 drive or not, the parameters that I set into my software was
2 only going to isolate photographs.

3 Q. Okay. So whether or not there were medical records or
4 not, you're not aware of that; you can't opine to that one?

5 A. No, because ---

6 Q. You are only going to find as to photographs; that's the
7 limited role you had?

8 A. Right, I had a very limited protocol that the court order
9 allowed me to do, and it was simply to look for photographs --
10 or simply to sort out photographs so Dr. O'Neill could look at
11 them.

12 MR. SLOTCHIVER: Can I see that document?

13 THE WITNESS: Uh-huh.

14 MR. SLOTCHIVER: Okay. I've got nothing further. Thank
15 you, sir.

16 THE WITNESS: Thank you.

17 THE COURT: Any questions?

18 MR. SMYTH: No. Thank you for being here, Mr. Abrams.

19 THE WITNESS: Thank you very much.

20 THE COURT: Thank you very much, Mr. Abrams. You are
21 free to go, and I hope you have a wonderful afternoon.

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: Yes, sir.

24 [Whereupon, the witness exits the witness stand]

25 THE COURT: All right. Call your next witness.

1 MR. HALVERSEN: Your Honor, the plaintiff would like to
2 call Mr. Ray Roberts.

3 THE COURT: All righty.

4 MR. SMYTH: If I may, Your Honor?

5 THE COURT: Sure.

6 [Whereupon, an off-the-record bench conference is held]

7 THE COURT: Ladies and gentlemen, there's a matter of law
8 that we need to take up. If you'll excuse us for about five
9 minutes, and we'll bring you right back in.

10 [Whereupon, the jury exits the courtroom 8/27/19, 4:05
11 p.m.]

12 THE COURT: All righty. Would you swear the witness
13 please.

14 [Whereupon, Mr. Roberts is duly sworn by the clerk of
15 court]

16 THE CLERK OF COURT: You may be seated.

17 [Whereupon, the witness takes the witness stand]

18 THE CLERK OF COURT: And for the record, please state
19 your full name, spelling your last.

20 THE WITNESS: Ray Leonard Roberts. R-O-B-E-R-T-S.

21 THE COURT: All right.

22 RAY L. ROBERTS, Having Been First Duly Sworn, was Examined and
23 Testified as Follows:

24 PROFFER

25 **DIRECT EXAMINATION BY MR. HALVERSEN OF RAY ROBERTS (IC):**

1 Q. Mr. Roberts, just give us a brief description of your
2 educational background.

3 A. Well, I went to school in North Carolina, from Boone.
4 Had a good time going through my college career there learning
5 accounting and tax. Got my first job in Winston, Salem, in
6 1983. Certified as a CPA in 1985. And been working in public
7 accounting since that date among five other firms.

8 Q. You are a certified public accountant?

9 A. Yes, I am.

10 Q. And you are in private practice?

11 A. Yes, I am.

12 Q. And how long have you been -- since 1985. My math is a
13 little fuzzy. But about thirty-five years?

14 A. Well, technically, I started in '83.

15 Q. What documents have you reviewed in order to form the
16 opinions that you're about to provide in this case?

17 A. I was provided copies of the internal accounting reports
18 generated by I guess their internal accounting system using
19 Quick Books. And also had a chance to review or look at the
20 2017 business tax return.

21 Q. And did you also review any deposition testimony in this
22 case?

23 A. I did review the -- their CPA or tax preparer that
24 prepared the return.

25 Q. And as it pertains to the Quick Books ledger sheet, you

1 had an opportunity to review the distributions of Dennis
2 Schimpf for 2007; is that correct??

3 A. That's correct.

4 Q. And I could show you the document. This is a proffer, so
5 it's not quite as formal. But if I -- if I represented that
6 the distributions for -- on that sheet were 360,000-and-
7 change, does that ---

8 A. Uh-huh.

9 Q. --- sound about accurate?

10 A. That is correct.

11 Q. And you've evaluated that in comparison to the 2017
12 corporate tax return for Sweetgrass Plastic Surgery; correct?

13 A. Correct. Corporate tax return, 750,000.

14 Q. And so what has been represented as a distribution for
15 2017 and compared to the Sweetgrass tax return don't match;
16 correct?

17 A. That is correct.

18 Q. And that's because I think you just indicated for
19 distributions for 2017 it indicated there were 150,000 versus
20 360 which was reported in the Quick Book ledger; correct?

21 A. Correct.

22 Q. And did -- do you agree with the defendant CPA's
23 statement in his deposition that Dr. Schimpf took it in excess
24 of distributions that were allowable?

25 A. Based upon the accounting -- accounting ledger, yes.

1 Q. Is there a tax consequence for that?

2 A. There is several different ways of looking at it. With
3 excess earnings in profits or excess to play, which is
4 basically income that has already been taxed, if you pull out
5 more than your earnings and more than your stock basis it
6 typically should be treated as a capital gain ---

7 Q. And based ---

8 A. --- to get the distribution.

9 Q. And based on your review of the return did it appear that
10 distributions were taken in excess of the capital stock of the
11 shareholder?

12 A. The capital stock and retained earnings that were
13 reported on the return were significantly less than would have
14 allowed to -- to take the full amount as a distribution and
15 show it on the -- on the return.

16 Q. Okay. Did you see any other accounts that were not
17 present -- well, let's just stick to this issue. Was there
18 any other -- do you have any other opinions as to specifically
19 this issue that we just haven't already discussed?

20 A. Regarding the distributions?

21 Q. Right.

22 A. The only other part -- odd part relating to the
23 distributions was the fact that somehow if it's not on -- as a
24 distribution on the tax return, it's got to be deducted
25 somewhere or reported somewhere; and I could not find where it

1 was.

2 Q. Okay.

3 A. It wasn't obvious.

4 Q. Is it fair to say that either -- okay. Were there any
5 other -- and you have also reviewed and been supplied the 2018
6 Sweetgrass balance sheet; correct?

7 A. That is correct.

8 Q. And you've also been supplied the balance sheet for -- as
9 of April 30th, 2019; correct?

10 A. Correct.

11 Q. And is it fair to say that those documents are near
12 identical?

13 A. The difference between the 2018 year-end accounting and
14 the two thousand -- I mean, April 30th, 2019 accounting is
15 only \$200 difference in cash.

16 Q. And based upon your review, would you agree with the
17 defendant CPA's testimony that the 2019 -- as of April 30th,
18 2019 balance sheet, was not correct and not reliable?

19 A. It's extremely unusual to have only a \$200 change. The
20 debt did not change; nothing else changed, on the balance
21 sheet.

22 Q. Was there any other opinions that you could adduce from
23 looking at the -- those balance sheets and as it pertains to
24 accounts such as accumulated distribution or any kind of
25 accounts that produced any irregularities?

1 A. I did not find any difference in the numbers being rolled
2 forward to go back and be like it was reported on the 2017
3 return. So if there were errors coming forward, they remained
4 errors or inconsistencies that weren't corrected at a
5 subsequent date. So they were still rolling forward with
6 improper numbers.

7 Q. So to sum up, then, what's been provided as a balance
8 sheet as of April 30th, 2019, it's also your opinion, as well
9 as the defendant's CPA's opinion, that that is not accurate or
10 reliable; correct?

11 A. Correct.

12 Q. All right. And then we talked about the issue that there
13 was a -- what's been represented on the 2017 return, is that
14 also inaccurate -- or unreliable based upon the distribution
15 sheet that was provided to you?

16 A. That was one of the factors that were significantly
17 different.

18 Q. And do you -- have you given those opinions within a
19 reasonable degree of accounting certainty?

20 A. Yes.

21 MR. HALVERSEN: So Mr. Smyth or Mr. Horton might follow
22 up some -- with some questions for you.

23 THE COURT: Mr. Halversen, do you plan on qualifying him
24 as an expert in front of the jury?

25 MR. HALVERSEN: I do. I just didn't because ---

1 THE COURT: Yeah, I know. But I just wanted to make sure
2 they're not going to object to it so we don't have to send
3 them right back out.

4 Are y'all going to object to the fact that he's an expert
5 in I guess CPA?

6 MR. HORTON: No, Your Honor, not on the -- I mean he
7 sounds qualified as a CPA. I'll hear it as he proves him up.
8 But, you know, our issue is to the relevancy of it more ---

9 THE COURT: Sure, but I just was -- just for the purposes
10 of continuing to go forward I wanted to address that briefly.
11 So that's fine.

12 Would you like to proffer any testimony from him?

13 MR. HORTON: As to his qualifications or ---

14 THE COURT: Or as to anything he's just testified to.

15 MR. HORTON: Not at the moment, no.

16 THE COURT: All right. His objection is going to be as
17 soon as you call him again is relevance. So let's get that
18 knocked out.

19 What is the relevant testimony of this witness?

20 MR. HALVERSEN: The relevant testimony, Your Honor, is
21 that we are seeking punitive damages in this case. Part of
22 the prong for punitive damages is the net worth of the
23 defendant as information, the evidence that we're entitled to
24 know. That's the why we requested the information. That's
25 why Judge Goodstein ordered the information. That's why we

1 attempted to depose Dr. Schimpf about these financials.

2 But what was given to us, Your Honor, was unreliable
3 according to his CPA, according to our expert.

4 So we want to -- that's the thing, Your Honor. He --
5 they gave us a 2018 balance sheet, which is net worth, which
6 is assets and earning, stockholders' equity, liabilities and
7 equity. That's net worth.

8 So we've been given unreliable and inaccurate
9 representations as to his current net worth.

10 THE COURT: Okay.

11 MR. HALVERSEN: That's a problem.

12 THE COURT: Well, to prove the prong of punitive damages
13 you're going to have to be able to prove net worth. All
14 you're proving through this witness is that you don't know
15 what his net worth is because he's given inaccurate
16 information.

17 MR. HALVERSEN: That's right, Your Honor. And we want an
18 inference. Because we haven't -- been given inaccurate and
19 unreliable information, as this testimony has shown.

20 THE COURT: And who are you going to get that balance
21 sheet in through?

22 MR. HALVERSEN: I can get it in through them. They
23 produced it.

24 THE COURT: Okay.

25 MR. HALVERSEN: They've admitted to it. It's not -- it's

1 authentic. There's no reliability issues. It came from them.
2 I don't know what -- how it's not -- there's any issue with
3 that.

4 THE COURT: All right. And when you say it came from
5 them, who provided you that information? I mean, did CPAs
6 provide ---

7 MR. HALVERSEN: The CPA provided that to us.

8 THE COURT: Okay. That's what I'm asking.

9 MR. HORTON: If I may?

10 THE COURT: Sure.

11 MR. HORTON: We provided the balance sheet because a
12 balance sheet in Quick Books is somebody who mashes a button
13 and it creates a balance sheet.

14 In order to actually make the balance sheet -- and I
15 think Mr. Roberts will probably agree with me on this. I
16 mean, big corporations audit balance sheets with CPAs.
17 Sweetgrass doesn't do that. So that's why we're off into this
18 netherworld of comparing tax returns to balance sheets. And
19 it's a dangerous territory to get into because there's all
20 kinds of, you know, relevancy issues with using these
21 documents for what they're intending to use it for. I mean,
22 there's other ways to prove net worth, and not through Mr.
23 Roberts necessarily.

24 THE COURT: All right. What are other ways to prove net
25 worth?

1 MR. HORTON: Well, one of the ways in which they can do
2 that is use the records that they subpoenaed from Dr.
3 Schimpf's bank on which he states his net worth.

4 THE COURT: All right. What about that?

5 MR. HALVERSEN: It's inconsistent with what he's
6 providing here, Your Honor. Mr. Horton just told us a day or
7 two ago that he's still working on trying to give us net worth
8 information. But as of now, this is what we have been
9 provided. We have to rely on what they've been giving --
10 given us. And what they've given us, according to our expert
11 and their CPA, is inaccurate and unreliable.

12 What am I supposed to do? This is what we've been given.

13 THE COURT: I'm not arguing with that. I'm just saying
14 how does it move you forward, because you've got to prove to
15 the jury that, in fact, he's worth "A". Because, of course,
16 that's one of the prongs of punitive damages. But all we're
17 really getting in through these witnesses is is that we don't
18 know what he is worth at all.

19 MR. HALVERSEN: You're right, Your Honor.

20 And I've asked Mr. Horton as of recently, hey, if you're
21 saying this isn't accurate, get me something that's accurate,
22 but what you've given me is not accurate.

23 And I think that's what he's just saying, somebody pushes
24 a button it might not be accurate. But, hey, if you're
25 represented -- we have been told -- we were given this by them

1 probably, I don't know, sometime in the last couple of weeks.
2 We had to scramble to make sense of it. And it makes no
3 sense, Your Honor. And that's why we had -- retained a CPA
4 for that opinion that ---

5 THE COURT: And what argument are you going to make to
6 the jury as to his net worth? We don't know what his net
7 worth is.

8 MR. HALVERSEN: We're going to argue that he has provided
9 inaccurate and unreliable information, Your Honor. That's
10 right.

11 THE COURT: Okay.

12 MR. HORTON: And, Your Honor, in Dr. Schimpf's tax CPA's
13 deposition, he did testify that these balance sheets aren't --
14 you know, they're not updated, they're not -- they're just --
15 to my mind, I mean, that's not all we provided. We have
16 provided the entire Quick Books file. We have provided all
17 the data that Sweetgrass has. We provided everything that we
18 were supposed to provide under the order. And that's one of
19 the reasons we were looking for direction on Monday as to, you
20 know, what we want to do about net worth.

21 If we're going to get there, we recognize that it's
22 something that needs to be proven. You know, one of the
23 avenues, of course, these Synovus records. You know,
24 defendant has not testified yet. I mean it is not a closed
25 issue yet.

1 It's questionable to me though what relevant testimony he
2 has as to a 2017 tax return. I mean, that doesn't have a lot
3 to do with Dr. Schimpf's net worth today. I mean, it's
4 something that Judge Goodstein ordered that we provide, so we
5 provided what she ordered we provide.

6 MR. HALVERSEN: I've got testimony. It's inaccurate,
7 Your Honor. They can -- they can -- they can cross-examine
8 him, do whatever they want; but ---

9 THE COURT: All right. I don't find it's overly
10 prejudicial. I mean, if it's inaccurate information and a
11 professional is going to testify that it's inaccurate and
12 that -- and then we're still not going to move the ball
13 forward as to what his net worth is.

14 But, I mean, it's -- I mean, it's certainly not -- I
15 don't think it's overly prejudicial. So if y'all want to call
16 him as a witness, I have no problem.

17 Do y'all have any questions to proffer him on?

18 [No response]

19 THE COURT: Okay. All right. Bring out the jury, Mr.
20 Robinson.

21 THE BAILIFF: Your Honor, may I?

22 THE COURT: Yes, sir.

23 MR. HORTON: Your Honor, hold on one second. Can we
24 confer about whether we want to proffer?

25 THE COURT: Absolutely.

1 Bring it up, Mr. Robinson (bailiff). I'll take a look at
2 it.

3 [Whereupon, the Court reviews document from bailiff]

4 THE COURT: You can just make it a Court's Exhibit.

5 THE COURT REPORTER: Court's Exhibit Number 6.

6 [Whereupon, Court's Exhibit Number 6 is marked for
7 identification by the court reporter]

8 [Off the record while counselors confer]

9 THE COURT: All right. The jury just asked is it okay if
10 we have pens and pads. I never care. Do y'all care?

11 Here's the issue. Some judges don't let them have it
12 because they say they need to be focused on the testimony on
13 the witness stand, not on writing notes. And then they get
14 there in the back and they start saying, well, I didn't know
15 they said that or I didn't write that down, are you sure they
16 said that. They say it creates issues.

17 Other times people say it's wonderful because they get
18 back there and say, yeah, I wrote it right down right here,
19 it's a non-issue, let's move on.

20 So I really don't care. Do y'all have any objection to
21 letting them use pens and pads? We leave them in the
22 courtroom. We don't let them take in the room back there with
23 them until the end.

24 MR. SLOCHIVER: I'm usually fine with it. I'm just
25 hesitant in light of the fact that part of the trial is over

1 or that has been done and not over.

2 [Whereupon, counselors confer]

3 THE COURT: I don't have a problem having pens and pads
4 if they want them. I'll ask them if they want them. If they
5 want them we will give them to them.

6 Do we have enough?

7 THE CLERK: Yes, sir.

8 THE COURT: All right. All right. Bring them out.

9 MR. HORTON: I'm sorry, Your Honor, what did you decide
10 about the pads?

11 THE COURT: Yeah, I don't have a problem with them having
12 it. I mean, certainly if the jury asks for them and they
13 think they're going to be beneficial I don't want to tell them
14 no.

15 MR. HORTON: Okay.

16 Your Honor?

17 THE COURT: Yes.

18 [Whereupon, an off-the-record bench conference is held]

19 [Whereupon, the jury enters the courtroom 8/27/19, 4:26
20 p.m.]

21 THE COURT: All right. Thank you very much.

22 Ladies and gentlemen of the jury, as you've seen, you've
23 asked for pens and pads. And I certainly don't have a problem
24 giving them to you. The reason we don't offer them in the
25 beginning is there's just kind of a general rule that some

1 judges get concerned about jurors having them. The only issue
2 as to that is is that all the evidence that you need and all
3 of the facts that you will get will be from the witness stand
4 and all the exhibits that are admitted into evidence. And
5 there's some concern sometimes that people are writing or
6 taking notes and not paying attention to actually what's being
7 said on the witness stand and missing some very key portions
8 of the testimony or sometimes they're just writing grocery
9 lists.

10 But I would just say you want them, you're entitled to
11 them, I'm going let you have them; but just, please, you know,
12 remember to give all the attention to the witness stand as
13 well. All right. Thank you very much.

14 Mr. Halversen?

15 MR. HALVERSEN: Your Honor, we have called Ray Roberts to
16 the stand.

17 Mr. Roberts, could you give your full name for the
18 record?

19 THE WITNESS: My name is Ray Leonard Roberts.

20 RAY L. ROBERTS, Having Been First Duly Sworn, was Examined and
21 Testified as Follows:

22 **DIRECT EXAMINATION BY MR. HALVERSEN OF RAY ROBERTS:**

23 Q. And what is your profession?

24 A. I have been a public accountant and CPA preparing mainly
25 tax returns since 1983.

1 Q. And could you give the ladies and gentlemen of the jury a
2 quick synopsis of your education?

3 A. I have a four-year degree from Appalachian State
4 University. Got out of college. Took about a year to get a
5 job. So I started in '83. And I've worked with approximately
6 six different CPA firms in North Carolina, Ohio, and South
7 Carolina. And I now currently have my own firm here. Been
8 here since 1996.

9 Q. And have you been in continuous practice as a licensed
10 professional CPA since 1985?

11 A. Correct. I was licensed in 1985.

12 MR. HALVERSEN: Your Honor, at this time we would like to
13 move to qualify Mr. Roberts as an expert in certified public
14 accounting.

15 THE COURT: All righty. Any objection?

16 MR. HORTON: No objection, Your Honor.

17 THE COURT: All right. Ladies and gentlemen, they have
18 qualified Mr. Abrams [sic] as an expert witness in this case.
19 The only difference between him being qualified as an expert
20 as a certified public accountant is that he can give you an
21 opinion. All right. And so that's unique from a lay witness.
22 Okay. That's all you need to know about an expert.

23 MR. HALVERSEN: And we'd like to mark as exhibit,
24 Plaintiff's Exhibit Number 36, present that to the witness.

25 [Whereupon, Plaintiff's Exhibit Number 36, Sweetgrass

1 transactions distribution sheet, is marked for identification
2 by the court reporter]

3 MR. HALVERSEN: And we also would like to move into
4 evidence Plaintiff's Exhibit 37 which, for the record, is
5 Sweetgrass Plastic Surgery 2017 tax return.

6 [Whereupon, Plaintiff's Exhibit Number 37, tax return, is
7 marked for identification.)

8 [Admittance of Plaintiff 37 was not yet ruled upon]

9 Q. And, Mr. Roberts, I would like to ask you what opinions
10 you have formed in reviewing the Sweetgrass distributions
11 sheet which we marked as Exhibit Number 35, I believe. Is
12 that 35, the distribution sheet?

13 A. Thirty-six.

14 Q. Thirty-six. Sorry. Thirty-six. As well as the
15 corporate tax return for Sweetgrass, which is 37. So I would
16 like to ask you some questions about those documents. But
17 first, for the ladies and gentlemen of the jury, what is
18 Exhibit 36; could you explain that to them?

19 A. Exhibit 36 is an accounting of -- off of their accounting
20 program of the distributions paid out to the owner in 2017.

21 Q. And it says in the -- for the name column, does that --
22 does this appear to be the distributions for Dr. Dennis K.
23 Schimpf?

24 A. It is intermingled with some other names regarding his
25 other entity and another person's name there.

1 Q. But on the far-left column, what does it say for
2 distributions?

3 A. Oh, DKS Distributions.

4 Q. And I will represent to you this was provided to us by
5 the defendants. And can you see what the number is for the
6 amount of distributions that DKS took in 2017?

7 A. Okay. This report shows he took out three hundred and
8 sixty thousand seven hundred and I guess it's eighteen bucks.

9 Q. The fine print is kind of small, ---

10 A. It is.

11 Q. --- even for you.

12 But if you compare that to Exhibit 17 -- or 37, the 2017
13 tax return, I would like you to tell the jury what opinions
14 you've formed in comparing the books for Sweetgrass Plastic
15 Surgery versus the corporate income tax return.

16 A. Are you speaking directly to the distributions?

17 Q. Yes, sir.

18 A. Okay. Well, the accounting system says that he pulled
19 out -- the distribution is over 360,000. The tax return --
20 tax return shows 150,000. So there's about \$268,000
21 different.

22 Q. And is that ---

23 A. No. I'm sorry, 210,000.

24 Q. Is that an underreporting on that 2017 tax return?

25 A. The tax return is much less than his accounting system,

1 his report.

2 Q. And for the benefit of the jury, where in the tax return
3 is the distributions box in the -- in their tax -- corporate
4 tax return?

5 A. The distributions show up on two different lines as part
6 of the main part of tax return. Usually it's on Schedule K,
7 which is on Page 3. Got a line down here that says
8 distributions, Line 16d; and that line says 150,000.

9 Q. And does that number match what's the distributions on
10 the Sweetgrass books, Exhibit 36?

11 A. It does not.

12 Q. And is there a tax ramification for underreporting your
13 distributions on the corporate tax return?

14 A. If the distributions are greater than his investment in
15 the company, his capital stock plus all the accumulated
16 earnings, then it could be treated -- should be treated as a
17 capital gain distribution because it's greater than he has
18 invested in the company. It's taking out more money than he's
19 ever put in.

20 Q. Is his distribution for 2017 larger than his tax basis in
21 the company?

22 A. According to the tax return, yes.

23 Q. Based upon your review of Exhibit 37 and 36, assuming
24 that Exhibit 36 is accurate, that that was the amount of the
25 distributions for that year for DKS, the 360,000, does it

1 appear that the corporate income tax return -- corporate
2 income tax for Sweetgrass for 2017 (cough in audience) is
3 accurate?

4 A. I did miss part of that question.

5 Q. Sorry.

6 A. The very end.

7 Q. Assuming the distributions for Sweetgrass for 2017,
8 Exhibit 36, of \$360,000 is accurate, when comparing that to
9 what was represented on Exhibit 37 in the corporate income tax
10 return, does that appear that what was represented in Exhibit
11 37 for the distributions was accurate?

12 A. One or the other is accurate -- inaccurate. The amounts
13 on the tax return were much less than he reported
14 concurrently.

15 Q. Right. And assuming that the number in 36 is
16 accurate ---

17 A. Uh-huh.

18 Q. --- do you believe that what's reported on 37 for the
19 distributions is inaccurate?

20 A. Yes, I do believe it's inaccurate.

21 Q. And do you hold that opinion to a reasonable degree of
22 accounting certainty?

23 A. Well, I could compare 360,000 to 150,000 and say that
24 it's significantly different.

25 Q. Okay. And you had a chance to review the defendant's

1 CPA's deposition?

2 A. Yes.

3 Q. Did he also agree that the defendants had taken -- or Dr.
4 Schimpf had taken distributions in excess of what was allowed?

5 A. He did agree that this 360,000 was what was reported, and
6 he did agree that the 150,000 was on the tax return. He said,
7 yes, that there would be situations where it could be taxable
8 income to the defendant -- to the owner, I'm sorry, because
9 it's greater than his basis. He did allude to that.

10 Q. Okay. All right. Next I'd like to show you what we've
11 marked as Plaintiff's Exhibit 38, which is the Sweetgrass
12 balance sheet as of -- of two thousand -- December 31st, 2018.

13 [Whereupon, Plaintiff Exhibit 38, balance sheet, marked
14 for identification.

15 Q. And what does this document appear to be?

16 A. It is intended to be the balance sheet of the Sweetgrass
17 Plastic Surgery as of December 31st, 2018.

18 Q. Okay. And for -- what does this show is the net worth of
19 Sweetgrass Plastic Surgery as of December 31st, 2018?

20 A. The net equity for the shareholder would be \$481,214.

21 Q. I meant the total liabilities and equity for all of
22 Sweetgrass, what is that amount?

23 A. Do you mean total liabilities?

24 Q. The last line on Page 2.

25 A. Oh, I'm sorry. I misunderstood. That'd be one million

1 six hundred and twelve thousand five hundred and sixty-nine
2 thousand -- five hundred and sixty-nine dollars and thirty-
3 eight cents.

4 Q. And that's the net worth of Sweetgrass; correct?

5 A. That is the total of the liabilities and equity.

6 Q. And would that be a -- accurate to say that that is net
7 worth?

8 A. That would not.

9 Q. Okay. Why not?

10 A. Net worth is the difference between assets owned and
11 liabilities owed by the company, ---

12 Q. Okay.

13 A. --- which would be the sum of the first page which are
14 all of the assets, minus all of the debt, would give you the
15 net worth.

16 Q. Okay. And what would that be, according to that
17 definition?

18 A. It would be \$481,214.

19 Q. Okay. Now, next I'd like to mark what has been provided
20 to us as the Sweetgrass Plastic Surgery balance sheet as of
21 April 30th, 2019. That is Plaintiff's Exhibit 39.

22 [Whereupon, Plaintiff's Exhibit Number 39, balance sheet,
23 is marked for identification by the court reporter]

24 Q. And you have had a chance to review both of these
25 documents, the balance sheet for 2018, which we just

1 discussed, and the balance sheet of April 30th, 2019; correct?

2 A. Correct.

3 Q. What opinions have you been able to form when you have
4 compared the Sweetgrass balance sheet as of 2018 versus the
5 balance sheet as of April 30th, 2019?

6 A. There's basically no change. There was a \$200 difference
7 in the checking account.

8 Q. Would you agree with the defendant's CPA, the deposition
9 you read of the defendant's CPA, who testified that -- in a
10 deposition that the April 30th, 2019, balance sheet is
11 inaccurate and unreliable?

12 A. I wouldn't believe what was on here; so, no, I would not
13 rely upon this, the April 30th statement.

14 Q. And why is that?

15 A. The balance is, except for cash, for four months there's
16 only a \$200 decrease in cash. That means the P&L should have
17 a \$200 loss. And there was no change in debt. No principal
18 payments against any of the debt. Accounts payable was
19 exactly the same from December 31st to April 30th. So I would
20 not be relying upon the April 30th statement.

21 Q. Okay. And is it accurate to say you would not rely upon
22 the value of the net worth represented in the April 30th,
23 2019, balance sheet as being accurate?

24 A. I would not rely upon that because it's only a \$200
25 difference for in being a month -- in business for four months

Examination of Ray Roberts - Cross by Mr. Horton

1 does not seem logical.

2 Q. Mr. Roberts, are all of the opinions you've given to the
3 jury this afternoon within a reasonable degree of accounting
4 certainty?

5 A. As well as I could compare these numbers, yes.

6 MR. HALVERSEN: Thank you. Mr. Smyth or Mr. Horton may
7 ask some follow-up questions.

8 THE WITNESS: Okay.

9 MR. HORTON: Thank you for being here, Mr. Roberts.

10 THE WITNESS: Hey.

11 MR. HORTON: Be very brief.

12 **CROSS-EXAMINATION BY MR. HORTON OF RAY ROBERTS:**

13 Q. So Exhibit 38 is the balance sheet for the year of 2018;
14 correct?

15 A. Yes, sir.

16 Q. Do you have any idea whether this balance sheet was
17 intended to be an audited balance sheet?

18 A. It doesn't say it was audited, no.

19 Q. And taking a look at Exhibit 39, you commented earlier
20 there's a \$200 difference in one area and it doesn't appear to
21 be reliable; right?

22 A. That would be my analysis, yes.

23 Q. Would you agree with me that more likely than not this
24 first quarter of 2019 balance sheet has not been updated?

25 A. I would definitely agree with that, yes.

1 MR. HORTON: Thank you, sir.

2 THE COURT: All right. You are free to go. You are
3 excused, and I hope you have a wonderful rest of your evening.

4 THE WITNESS: Thank you.

5 [Whereupon, the witness exits the witness stand]

6 THE COURT: Do y'all have any further jury for today -- I
7 mean, witnesses for today?

8 MR. SLOTCHIVER: We have the tape that we need to take
9 up, I believe, Your Honor.

10 THE COURT: Okay.

11 Ladies and gentlemen of the jury, the next two witnesses
12 are going to be lengthy in nature, and so I'm going to strike
13 a deal with you. I am going to let you go a little early
14 today if you will promise to be here at 9:00 tomorrow. We are
15 just going to start a couple of minutes early.

16 We have determined that the two witnesses should take up
17 most of the morning. But we probably need to get started a
18 little early so we don't go to lunch too late.

19 One other thing I wanted to bring up is obviously y'all
20 have noticed that Juror Number 3 is no longer with you. Don't
21 worry about that. That's not for your consideration. But
22 Juror Number 287, you have been empanelled on the jury. All
23 righty.

24 Look forward to seeing y'all tomorrow. I hope y'all have
25 a wonderful evening, and enjoy the rest of your night.

1 [Whereupon, the jury exits the courtroom 8/27/19, 4:43
2 p.m.]

3 THE COURT: All righty. So what do we have first thing
4 in the morning?

5 MR. SLOTCHIVER: Our plan, Your Honor, is to play the
6 video depositions of Dr. Kalus in the morning. And then we
7 plan to call Dr. Rosenberg live. He's flying in tonight from
8 New York. And then in the afternoon we plan to call Dr.
9 Marcino. And I believe that ends our case.

10 THE COURT: All righty.

11 MR. SLOTCHIVER: The deposition is about two hours. We
12 plan -- what we've submitted to defense counsel is we plan to
13 play the entire thing, the video deposition. They have some
14 areas they want to redact. We don't agree. So maybe we can
15 take that up with you now and we can edit it before tomorrow
16 so we can -- if that would work.

17 THE COURT: All righty. Let's do that so they can edit
18 it tonight so it will be a smooth flowing video.

19 MR. SLOTCHIVER: Is our client free to leave at this
20 point?

21 THE COURT: Absolutely.

22 [Whereupon, defendant excused]

23 THE COURT: All righty. Yes sir?

24 MR. SMYTH: Your Honor, it may be simpler to hand this
25 up, if it's okay. These are our counter designations and

1 objections with the transcript. That way you can follow along
2 with the context. We're trying to pull up a second copy of
3 the transcript. So I have got one here as well.

4 [Whereupon, document provided to the Court by Mr. Smyth]

5 THE COURT: All righty. So we have got -- which ones
6 have y'all agreed -- or which ones, I guess, are still in
7 controversy?

8 MR. SMYTH: Well, it's my understanding from Mr.
9 Slotchiver's representation is that they are not agreeing to
10 any of our objections. So I think we have to go through them
11 all unless they ---

12 MR. SLOTCHIVER: Actually, that's not correct.

13 THE COURT: All right.

14 MR. SLOTCHIVER: That is almost correct. We can agree to
15 one of them, which is 36-3-12.

16 [Pause for counselors to confer]

17 THE COURT: All righty. And so there's no objection to
18 36-3-12; is that correct?

19 MR. SLOTCHIVER: On that -- correct, one, yes, sir.

20 THE COURT: Let's start with the first one.

21 [Whereupon, pause for the Court]

22 THE COURT: All right. Let's start with 17, 18-11.

23 MR. SMYTH: Your Honor, just for background, this is
24 their plastic surgery expert. The treating physician, Dr.
25 Kalus' deposition, it's his video trial deposition. And the

1 question was asked by plaintiff's counsel on Page 17, Line 18
2 through 11: And if it was untreated what was the likelihood
3 she would develop an infection she didn't -- if she didn't
4 already have one?

5 Dr. Kalus has testified repeatedly that he did not
6 diagnose her with an infection in the case. And the objection
7 is that this calls for speculation. And it's basically asking
8 the witness, well, if you -- if you have an infection and you
9 don't treat it, what's going to happen. But he's already
10 testified she didn't have an infection.

11 THE COURT: All right. What's your position?

12 MR. SLOTCHIVER: I think, Judge, this is going to be a
13 recurring theme about the next half an hour or so. He's a
14 treating physician. He's an expert in the field. This is
15 what he does. And he's testified this is what happens when
16 you don't do certain things. He's testifying as an expert.
17 It's not speculation. He's qualified. I believe -- there --
18 no -- there was no objection to the de benne esse deposition
19 where he was named and qualified as an expert.

20 I know you haven't heard that, Your Honor; but the
21 parties consented to it. And he's giving an expert opinion
22 about what happens when you don't do certain things.

23 It's no different than when they bring experts to talk
24 about what happens when you do other things and don't do
25 others.

1 THE COURT: Well, I'm tending to agree with him, Mr.
2 Smyth. He's an expert and this is in the -- and this is in
3 the field of plastic surgery. And the question is what, if
4 untreated, was the likelihood that she would develop an
5 infection if she didn't already have one.

6 I mean, he saw her. I mean, he's treating her. He took
7 over the responsibilities as her doctor. So I certainly think
8 he'd be able to testify as to his opinion as to what would
9 happen if an infection wasn't treated.

10 MR. SMYTH: Well, it starts off with an assumption that
11 he didn't make, though; so it's a false basis for the opinion.
12 He's testified several times in this case he has never once
13 diagnosed this lady with having an infection. To assume that
14 she might develop one, or one might get worse, when she never
15 had one, is misleading and it's speculative because she never
16 did develop one.

17 MR. SLOTCHIVER: That doesn't change the fact of what
18 happens when you do certain things or don't do certain things.
19 That's why he's giving an opinion as an expert. It's no
20 different. It's the same position that we've taken. If he's
21 an expert, he's qualified to answer that. He's qualified to
22 give an opinion.

23 You're not limited to only opining about things that
24 happened. If that were the case then I don't think they would
25 have -- they'd be in the same boat that we're in, that they're

1 trying to place us in right now with our experts.

2 The experts are allowed to testify to things within the
3 purview and within their field if they are experts in the
4 field. That's all we've asked him to do.

5 THE COURT: I agree. It's coming in. All right.
6 Page 22, 6 through 11.

7 So you're going to object to everything -- every time
8 they use the word infections; is that what I'm getting down
9 to?

10 MR. SMYTH: That and could.

11 THE COURT: Say -- and the other?

12 MR. SMYTH: Could is highly speculative. The question is
13 did it. Because their job is to -- is to bring evidence of
14 damages, not speculative damages.

15 And we've got jury charges on that, that we've already
16 submitted, that you are not allowed to infer it. And I think
17 that's -- it's something that could be very confusing to the
18 jury to ask the -- you know, a witness could they do this,
19 could they do that.

20 We're talking about what happened here. And he clearly
21 did not diagnose this lady with infections. She went to the
22 hospital. She had her blood count checked. She had a
23 completely normal white blood cell count. He performed an
24 operation on her and he discharged her and he never once said
25 she had an infection.

1 And, you know, she's testifying that she thought she did;
2 but the evidence is clear that she did not. So this only
3 further murkies the waters, makes the water a little murkier,
4 for a jury to try to sort through what's reliable.

5 This doesn't get them past the reliability standard for
6 an expert witness. Then he has to be able to say to a
7 reasonable degree of medical certainty I think this happened.
8 He's not saying that. He's saying it could happen. That's a
9 speculative hypothetical.

10 And if you read the David vs. McCloud case, that says
11 that cannot serve as the basis for liability in a medical
12 malpractice case.

13 MR. SLOTCHIVER: Your Honor, he talks later on about the
14 certainty. But what he's testifying to is why you need to
15 have a certain standard of care. And we've got a lawsuit
16 against both Dr. Schimpf and the practice for not following
17 the standard of care and not doing what's supposed to be done.

18 In order to prove what's supposed to be done, we have to
19 testify about what's supposed to be done and why and what
20 happens when you don't.

21 And the fact that she didn't get the infection doesn't
22 mean it was followed correctly. It may go to the damage
23 element, but it doesn't surpass the fact that this -- and our
24 position -- our position throughout the case, and you'll hear
25 the opinions over the next day and you might have seen the

1 affidavit from Dr. Rosenberg, is a failure repeatedly to
2 follow the standard of care. And this is just yet another
3 example of failing to follow the standard of care.

4 The jury will know that she did not get an infection.
5 That's been gone over ad nauseam. But they also should have
6 the opportunity to know why it is that you're supposed to
7 follow it.

8 And that's all he's testifying to. And they can -- and
9 they've had an opportunity to cross-examine. This was a de
10 benne esse deposition. And they have cross-examined him in
11 their part. But we should be allowed to put this part in, we
12 believe.

13 Thank you, sir.

14 THE COURT: Well, he goes on to explain himself. It
15 says: If you have wound breakdown what can that lead to? It
16 can lead to infection, it can lead to exposure of vital
17 structures, and it can lead to exposure of a foreign body such
18 as a breast implant which, in fact, will almost certainly be
19 at risk for getting infected. It won't necessary become an
20 infection though. But standard of care of an exposed implant
21 is to remove it.

22 So he's giving his expert opinion as to the standard of
23 care.

24 MR. SMYTH: Right. Once he exposed the implant during
25 the surgery, he had to take it out; that's what he's talking

1 about. So he put -- he testified he put his finger in the
2 wound. It wasn't exposed before that, but when he put his
3 finger in the wound it became exposed and he had to take it
4 out because once the implant has been exposed to the
5 environmental factors in the OR, you can't keep it anymore.
6 The standard of care is to take it out. We agree to that.

7 THE COURT: I think the whole purpose of an expert being
8 qualified as an expert is to give his opinion. And, again, I
9 mean, I'm going to instruct the jury that they're to give no
10 greater weight to an expert and that they can take some in
11 part and some not in part, as a whole or none at all.

12 I think he gets to testify as to his opinion.

13 MR. HORTON: Very well. Do you want to move to the next
14 one?

15 THE COURT: Well, that is the next one. So that would be
16 26, 11, I think is -- okay. So now we're 11 all the way to
17 29-8, correct?

18 MR. SMYTH: Yes, sir. That may take me a second to
19 digest them.

20 THE COURT: Yeah.

21 MR. SMYTH: I am sure it might as you as well.

22 [Whereupon, the Court and counsel review documents]

23 THE COURT: All righty.

24 MR. SMYTH: So what we're dealing with here, Your Honor,
25 is kind of the crux of the problem with Dr. Kalus' opinion.

1 And we'll get to it at the very end of the deposition,
2 probably.

3 But the problem that he has is that he cannot say to a
4 reasonable degree of medical certainty that Dr. Schimpf used
5 too much tension during this procedure. Okay? That's his --
6 that's his testimony in in this deposition. It's on the next-
7 to-the-last page, I believe, somewhere towards the end.

8 And so plaintiff's counsel kind of repeatedly tried to
9 get him right up to the edge. But every time he would say, I
10 wasn't there, I can't say how much tissue was used, all I can
11 do is look at the wound and speculate.

12 And he's agreed it's all speculation. He's agreed that
13 he's taking the end results and using it to assume negligence.
14 And he says: I can't say to a reasonable degree of medical
15 certainty that too much tension was used in this case.

16 And so what you've got here is kind of the beginnings of
17 that opinion. It gets fleshed out a little bit further in the
18 deposition.

19 But obviously, *res ipsa*, you know, keeps somebody from
20 doing that. You can't stop -- start with the end, which you
21 know is a wound breakdown, and assume something was done
22 wrong. You have to be able to affirmatively prove it.

23 And he's saying, I can't do that, I cannot get to that
24 level of a reasonable degree of medical certainty. Which is
25 required for expert testimony to be admissible in this state.

1 And he admits that. And we -- and I can show you that page in
2 just a second if you want to see it.

3 THE COURT: All right.

4 MR. SLOTCHIVER: Your Honor, the opinions he's giving are
5 to a reasonable degree of medical certainly. He does not say,
6 I'm speculating. He is saying he gives -- you can see it on
7 the text on the very first page they quoted, on Page 26; he
8 gives his opinion. It is in retrospect, because he wasn't
9 there; but he says: This was caused by too much tension.

10 And he says: Whether it was right under the skin or in
11 the fold, either way it's caused by too much tension.

12 He's giving that opinion without any doubt whatsoever.
13 And he's given it repeatedly. And he's given it repeatedly
14 throughout the deposition. His opinions are all -- and
15 he's confirmed -- affirmed in the deposition that his
16 opinions are most probably to a reasonable degree of medical
17 certainty.

18 This is not speculation at all. These are his opinions
19 as an expert.

20 [Whereupon, plaintiff counselors confer]

21 And they are based on his observations. And he had an
22 opportunity to treat the patient. Unlike the experts that
23 they're going to call, who came in many years later, Dr. Kalus
24 had an opportunity to actually physically treat the patient.

25 Under their theory, it would be impossible for their

1 experts to talk or give any opinions because they never had an
2 opportunity to treat her at the time. And, therefore,
3 everything would be retrospective and everything would be
4 speculative. And that's not how it works.

5 THE COURT: I understand. He says, my opinion is
6 retrospective. But, in other words, there is wound breakdown
7 and it's my medical opinion that the wound breakdown was due
8 to tension in the wound, be it deep in the wound.

9 He gave his opinion. It's coming in.

10 All right. What's next?

11 MR. SMYTH: Your Honor, before we leave that one, just
12 because I think it's going to be relevant to some of the other
13 stuff, if I could turn the Court's attention to Page 140 of
14 the deposition.

15 THE COURT: Okay. All righty. Yes, sir.

16 MR. SMYTH: And this is the exchange that I was
17 referencing a moment ago. This is Mr. Slotchiver asking a
18 question of his expert.

19 He says: I believe I talked to you earlier about the
20 fact that what you saw was indicative of a deviation of the
21 standard of care as it applies to tension placed on the wound.

22 And the answer is: I wouldn't characterize my statement
23 as the way you just described it. What I would characterize
24 it as is the operation was performed, in my opinion, with
25 potentially poor judgment as to the tension on the wound,

1 which then resulted in a dehiscence of fat necrosis. I can't
2 make a statement that the surgery was performed in any method
3 that would constitute a deviation of a standard -- from the
4 standard of care.

5 THE COURT: Well, who's objecting to that one?

6 MR. SMYTH: I'm sorry?

7 THE COURT: I said who's objecting to that one?

8 MR. SMYTH: I'm not objecting to it. I'm pointing
9 out ---

10 THE COURT: Oh, no, I was about to say, yeah, because
11 you -- I would assume you want that one in.

12 MR. SMYTH: Exactly. Well, I am pointing out the fact
13 that he -- this is the problem with his entire opinion in the
14 case, though, is that he's saying I can't say that, I can't
15 say to a reasonable degree of medical certainty there was a
16 deviation related to tension. Which is the entire premise of
17 the reason they're offering him.

18 MR. SLOTCHIVER: I'll be happy to respond if you'd like,
19 Your Honor.

20 THE COURT: Are y'all -- because the one snippet that you
21 need to take out of that is that: In my opinion, with
22 potentially poor -- with potentially poor judgment as to the
23 tension on the wound -- I guess does that constitute the
24 deviation of the standard of care?

25 MR. SMYTH: No, it is potentially. That's David vs.

1 McCloud.

2 THE COURT: You see my point? I mean, I'm saying that's
3 the argument that you get to make.

4 MR. SMYTH: Right.

5 THE COURT: And so ---

6 MR. SMYTH: So the case law that I am referring
7 to ---

8 THE COURT: Oh, and it goes on. Sorry. It says, I can't
9 make that statement, the statement that Mr. Slotchiver made,
10 which was and do you -- believed ---

11 MR. SMYTH: There was a deviation.

12 THE COURT: Yeah, that you ---

13 MR. SMYTH: Right.

14 THE COURT: --- the fact that what you saw was indicative
15 of a deviation of the standard of care as it applies to the
16 tension placed on the wound; I can't make that statement; I
17 wasn't there.

18 Okay?

19 MR. SMYTH: Yeah, and that -- this goes to the
20 admissibility of expert opinion. Our law is well-developed on
21 this issue. It's one of the few areas of the law in our
22 state, and I think that's well developed on anything.

23 But the Courts have routinely said if you can't hold that
24 opinion to a reasonable degree of medical certainty, most
25 probably, in your profession, then that's not admissible,

1 that's not coming in. It's a mere speculative hypothetical
2 which -- and, again, that David vs. McCloud case said that
3 cannot under any circumstances serve as the basis of a medical
4 malpractice claim language.

5 What we've included in our jury charge from that case --
6 and if it would help your clerk, the cite to that case is 626
7 S.E.2d, Number 1. That's a 2006 Supreme Court case. And it
8 says that: Medical malpractice actions require a greater
9 showing than generic allegations and conjecture. A
10 speculative hypothetical may not serve as the standard of care
11 in an action for medical malpractice.

12 MR. SLOTCHIVER: Your Honor, it's not a speculative
13 hypothetical. He previously gave an opinion at 12:00 or so in
14 the morning in Israel. He got twisted around. And then if
15 you read further on Page 141, you'll see when he reaffirmed
16 the opinion that he had given us earlier.

17 They can certainly attack him on it in closing arguments.
18 But he reaffirmed that he stands by all of the opinions that
19 he's given before.

20 And he says -- I said to him: I believe you stated
21 earlier there's no other way that the injury would have
22 happened but for the fact there was too much tension placed at
23 the time of surgery; is that correct?

24 And he says, that is my best guess as the explanation for
25 the wound dehiscence and wound separation, that there was an

1 excessive amount of tension in the wound.

2 I said, do you stand by the opinions you gave previously
3 during your direct examination?

4 Answer, yes.

5 So he's reaffirmed his opinion. They can attack him on
6 it. They can say he was inconsistent within his deposition.
7 But certainly he said it twice, and he got it twisted around
8 once. And I don't really think he was twisted around. I
9 think what happened was with all the -- all the things being
10 thrown at him it was taken out of context. But that's not for
11 a fact-finder to determine.

12 THE COURT: Here's what's happened. This expert came in
13 because he treated the actual patient, which is rare. Most
14 times y'all [indicating] pay for an expert and they're going
15 to say what you're going to say, y'all [indicating] pay for an
16 expert and they're going to say what you want to say.

17 We just -- it's unique that we have an actual testifying
18 doctor that treated the patient and is now going to testify as
19 an expert. That's not always how it works.

20 But, I mean, Mr. Slotchiver, you do have a problem. I
21 mean, you asked him the question and he said -- and he said, I
22 wouldn't -- I wouldn't characterize my statement as the way
23 you described it.

24 I don't think he understands that that's what he has to
25 agree to under the law. But ---

1 MR. SLOTCHIVER: He re-clarified it afterwards, Your
2 Honor. I believe the testimony is clear.

3 MR. SMYTH: And to provide a little more historical
4 context, Dr. Kalus gave a discovery deposition in I believe in
5 December of 2018 and in that deposition I asked him the
6 question, do you plan to testify that Dr. Schimpf did anything
7 below the standard of care or deviated from his care -- the
8 standard of care or was negligent in any way. And he said,
9 no.

10 So this is yet another reversal of that position.

11 MR. SLOTCHIVER: Your Honor, that's not a reversal.
12 That's taken out of context. What he said in his earlier
13 deposition was he is not giving any opinion. Just like every
14 doctor that we generally see, he's not going to give any
15 opinions whatsoever at the time of the trial or in the case
16 about the deviation from the standard of care. By no means
17 did he say there wasn't one. He just wasn't going to give an
18 opinion on a standard of care.

19 Since that time -- and the testimony is as follows.
20 Since that time, Judge Kinlaw appointed him to be -- or
21 appointed Dr. Perez to do the IME. When that happened, part
22 of the order from Judge Kinlaw was that -- or is that we were
23 allowed to bring a personal physician. My client had asked
24 Dr. Kalus, who was now her personal physician, to attend that
25 IME.

1 Dr. Kalus, in preparation for the IME, wanted to review
2 the reports. Dr. Kalus then reviewed the medical reports,
3 reviewed the testimony, reviewed the depositions, and at that
4 point said, after I've seen this, I'm now going to give
5 opinions.

6 As soon as he said that, we immediately notified defense
7 counsel, hey, the treating physician -- not our expert, but an
8 expert, wants to give opinions and he will give opinions in
9 this case and these are the opinions. They then took his
10 deposition.

11 So the -- to articulate that he said something different
12 in his deposition, that's not exactly right. At the time of
13 his deposition he hadn't -- he hadn't reviewed everything.
14 He's testified to that. He had seen a limited amount of
15 information. He was not going to give an opinion. Since then
16 he's reviewed everything, he's seen a lot more, and he's given
17 an opinion.

18 And I believe the testimony in the deposition speaks for
19 itself. He gave an opinion. He then started to back off the
20 opinion, and then he clarified the opinion.

21 But I'll remind -- or I'll let the Judge know that this
22 was at 12:00 a.m. in the morning after he worked a long day.
23 We had it set for three hours. There's a time difference. He
24 was in Tel Aviv, Israel, where he -- where he keeps a practice
25 for half of the year. He goes back and forth with the family.

1 And I believe they could certainly have questioned him on
2 it, but I don't believe that -- I believe his standard he's
3 testified to is most probably to a reasonable degree of
4 medical certainty. He's testified to it once. He affirmed it
5 later on in the deposition. We believe it goes to the weight
6 of the evidence, Your Honor.

7 THE COURT: All right. I don't want to keep these people
8 here much longer, but we're not making any headway. So Option
9 A is I take this under advisement, I go home, I do it on my
10 own, which is what I had to do last night. Or Option B is
11 we're going to have to hash this out again later.

12 What is your abilities to skip over portions that if we
13 in fact -- I grant their motion to -- or I grant their
14 objections to like slide over it? Because if I don't give you
15 the chance tonight to sit there and do it so it's just one
16 smooth deposition, is that something that's easily done? If
17 we start the deposition and I say, already at 22:6:11, just
18 hit mute? I mean, can you do it that way?

19 MR. SMYTH: Rosen can do it pretty quickly. Last night
20 when I had them cut our cross, you know, they did it in about
21 thirty minutes. And that's -- you know, that's a hundred
22 pages of testimony, you know.

23 So are y'all putting Kalus up first, or Rosenberg up
24 first?

25 MR. SLOTCHIVER: Our plan is to put Kalus up first. And

1 our plan, Your Honor, is to -- is -- my normal thing with
2 these cases, I put the whole deposition in. I let the jury
3 hear it all. So they may want to cut the cross. That's okay
4 for them. But I'm going to put it all in. I want the jury to
5 hear everything that took place at the deposition, unless you
6 keep it out.

7 [Whereupon, plaintiff counselors confer]

8 Yeah, it is trial testimony. It's not a discovery
9 deposition. It was actually taken as a de benne esse
10 deposition for use and being played at trial.

11 THE COURT: All right. I'm going to take it under
12 advisement. I'll go through it line by line myself, and if I
13 have any questions then we're just going to have to go through
14 this in the morning. So just be prepared to get started
15 around 9:15. All righty?

16 [Whereupon, jury trial adjourns for the evening, 8/27/19,
17 5:09 p.m.]

18 [Whereupon, resume 8/28/19, 9:17 a.m.]

19 THE COURT: If y'all want to follow along with me with
20 the defendant's and plaintiff's objections to the deposition,
21 we'll kind of go through it quickly.

22 All right. The first one is -- I am just going to say
23 the numbers. It's Page 17, 18 through -- well, it says 18
24 through 11, but.

25 MR. SMYTH: I'm sorry.

1 THE COURT: I ruled on that one yesterday. And the
2 objection was, I assume, some type of speculation; because it
3 says expert admittedly guessing about the likelihood that
4 patient will develop infection. I will rule that as an
5 opinion.

6 On Page 22, 6 through 11, I overruled that one yesterday
7 as to his opinion.

8 On Page 26, continuing -- or excuse me. Page 26-11,
9 continuing to Page 29, we discussed that one yesterday; and I
10 overruled that one. He's giving his opinion.

11 Thirty-six, three through twelve, y'all agreed that there
12 was no objection to that one and have withdrawn it.

13 The same for 36, 24 through 37-11.

14 Page 38, the question was: Would stitching up the open
15 wound instead of operating on it -- and I'll represent to you
16 that the facts will bear that the testimony is that it was
17 stitched both before and after she came to see you, would that
18 in your opinion be a deviation from the standard of care?

19 The objection for that one is leading. You can lead in
20 certain instances. I agree it's somewhat leading. He's
21 asking for his opinion. But I simply find that he was just
22 developing the witness and giving information. So I'm
23 overruling that one.

24 Page 41, Line 9 through 16: Is the reason that the
25 doctor and the patient would sign that form to avoid any