

1 (October 7th, 2013, Judge Karalunas, continuation of Small
2 Smiles trial)

3
4 THE COURT: You guys should know I don't have
5 any guilt about not having my jury charges done. I keep
6 getting all these changes and new stuff. I do have the
7 verdict sheet done, and so I'm going to hand that out
8 right now.

9 This does not include the changes that are --
10 Mr. Leyendecker, I think it was you, that submitted the
11 change to the G.B.L. This was based on the G.B.L. as I
12 had drafted it.

13 Mr. LEYENDECKER: Okay.

14 THE COURT: If everybody would just take a
15 minute to look through that...

16 * * *

17 THE COURT: Some of the instructions are a
18 little confusing.

19 Mr. Hackerman, while they're looking at those,
20 why don't you come on up here? Does anybody mind? I'm
21 not going to talk about the case.

22 * * *

23 Mr. LEYENDECKER: On the first run-through, it
24 looks pretty solid. I haven't had a chance to tie back on
25 your damage questions, your Honor, limit to 2(a), 7(a), et

1 cetera; I have not had a chance to check that detail, and
2 then --

3 THE COURT: I did have time to check that, and
4 my guess is it's right, so... obviously if anybody catches
5 anything like that, let me know by e-mail, copies to
6 everybody.

7 Mr. LEYENDECKER: And the other thing on this,
8 your Honor, on the definition of the Syracuse clinic, we
9 have the three dentists listed and there was an issue
10 about the vicarious liability -- I think we're going to
11 perhaps bring it to a head.

12 THE COURT: Right. We're going to talk about
13 that, so that definition might change is what you're
14 saying?

15 Mr. LEYENDECKER: Yes.

16 Mr. HIGGINS: Just while people are looking
17 through that, I just wanted to try to save some time and
18 there was -- I went back and looked through the openings
19 and there were very discrete issues that might cause us to
20 object on the closings tomorrow so I prepared a
21 page-and-a-half submission on that, which is
22 double-spaced, and I served that on all counsel by
23 LexisNexis and gave them another hard copy when they came
24 in today.

25 So I can put those on the record in about a

1 minute-and-a-half or I have a written submission I can
2 give to the Court.

3 THE COURT: So these are issues that you're
4 concerned the defendants might raise during closing
5 argument that you want a ruling on --

6 Mr. HIGGINS: Yes.

7 THE COURT: -- in advance of?

8 Mr. HIGGINS: Yes.

9 THE COURT: Why don't you just hand it up to me
10 and I'll take a look at it.

11 Mr. HIGGINS: Okay.

12 And just another housekeeping matter is in terms
13 of after the closings, usually the attorneys go through
14 the exhibits and they make sure that all the exhibits
15 going back are appropriate and things of that nature.
16 There's a lot of exhibits here and I was trying to think
17 how that was going to work and I just wasn't sure how, you
18 know, if there's any redactions or anything like that.
19 That's just something that sometimes takes time.

20 THE COURT: Right. The Exhibits are here and I
21 do not send exhibits back to the jury unless they request
22 them.

23 Mr. HIGGINS: Okay.

24 THE COURT: But, you know, if they request the
25 exhibits, I'm going to send them back, and so if there are

1 redactions that need to be made, my suggestion is that if
2 all counsel agree, the exhibits can be removed from court
3 to have -- because I'm not going to be able to let people
4 stay here after 4:30 to do any necessary redactions, but
5 that's your call.

6 Mr. HIGGINS: I don't have any specific, but I'm
7 just saying it can take some time. If they're not all
8 going back at once, that's helpful.

9 THE COURT: But for example, if they ask for an
10 exhibit, I'm not going to wait, you know, while you're
11 going through a stack of the exhibit to redact.

12 Mr. FRANKEL: Is there an official exhibit list
13 that says "here's what's in evidence"? We have our own,
14 but --

15 THE COURT: Well, for some reason, I don't have
16 a court clerk or court security here today. I'm guessing
17 that word didn't get out. But there should be a list,
18 yes. The court clerk normally has that.

19 Mr. STEVENS: I appreciate the fact that my
20 colleague, Mr. Higgins, who used to be with my firm, by
21 the way, wants to save time by bringing up the issue of
22 what can and can't be said at summations and we of course
23 have the same concern, hoping to save time, but we just --
24 the kind of phrases here, I think this debate is one we
25 should try to work out among ourselves and if there's any

1 issues left standing, we'll bring them up to the Court
2 briefly tomorrow.

3 THE COURT: Okay. Let me just say, though,
4 again, I mean I don't mean to beat a dead horse, but I am
5 just one person and I don't know when I'm going to -- if
6 you bring them up tomorrow morning and the jury is here at
7 8:45, ready to go, when am I supposed to -- when are you
8 going to bring those up to me?

9 Mr. STEVENS: We're a little blind-sided by this
10 right now, but also, to object to charges, will we see
11 them before the summations?

12 THE COURT: I'm not sure. I would hope so
13 because I'm going to have to be able to read them right
14 after your summations. Whether I'm going to get them done
15 tonight or whether I'm going to get them done in the
16 morning, I really can't tell you.

17 And again, I'm not feeling that sympathetic
18 because we spent a long time yesterday working on this,
19 you know, and I'm still getting new stuff as we go. I'm
20 doing my best.

21 Mr. STEVENS: All you can do is your best, but
22 before summations are given, we do make that request.

23 THE COURT: I hear what you're saying. As I
24 said to you yesterday, objections are probably going to be
25 reserved, until the jury goes back, to anything that I

1 charge, simply because -- I'm going to go over with you
2 generally what I'm charging right now, but I won't have a
3 form of my written charge so you'll know generally what
4 I'm charging tomorrow.

5 Mr. FIRST: Judge, on the jury verdict form,
6 when do you want objections on the record to be made? Do
7 you want them now or do you want --

8 THE COURT: We dealt with all these issues
9 yesterday, so if there's something specific you want, tell
10 me right now.

11 Mr. FIRST: It's a lot of things, but all the
12 things we talked about last night. That's what I'm
13 talking about. I need to make a record of it --

14 THE COURT: We'll do that. When we send it back
15 to the jury, then we'll put those objections on the
16 record.

17 Mr. LEYENDECKER: One question on Question 13,
18 your Honor, the battery.

19 THE COURT: Yes.

20 Mr. LEYENDECKER: We had -- I'm not trying to...
21 but all three dates --

22 THE COURT: October 26th. I thought I had a
23 note to take out the 26th.

24 Mr. LEYENDECKER: There's not a restraint on the
25 26th but it does fall in line with our allegation that

1 they concealed the existence of the scheme to treat for
2 purposes of revenue rather than dental needs, that that
3 was concealed, but for this concealment of information, he
4 would not be sent for treatment, so there was an
5 allegation as to all three Bonds' treatments. I don't
6 know whether your Honor has concluded it relates only to
7 the two restraint episodes and if so, I accept that
8 because --

9 THE COURT: No, I took that out because I had a
10 "no" next to my notes and I thought it was because there
11 wasn't a restraint issue, but I also agree that it is not
12 an appropriate --

13 Mr. LEYENDECKER: Okay.

14 THE COURT: -- charge with respect to the
15 October 26th on the basis that you have just alleged, so
16 I'm not going to add that in there.

17 Mr. STEVENS: We're talking about --

18 THE COURT: The battery.

19 Mr. STEVENS: Could we talk about the Syracuse
20 clinic because my individual defendants are double-named
21 throughout the verdict sheet when it lists their names
22 individually and then under their names, Syracuse clinic.
23 So the jury could find in favor of one of my dentists and
24 then mistakenly find against them just by naming the
25 Syracuse clinic. That would be confusing, and I'm sure

1 it's not what the Court intends.

2 THE COURT: Okay.

3 Mr. HIGGINS: For the record, the Court did meet
4 with all counsel yesterday for I think four-and-a-half
5 hours on Sunday at the Crown Plaza Hotel, and I know all
6 counsel want to express our appreciation to the Court for
7 that.

8 This was discussed during that time and we're
9 now moving for a directed verdict on the issue of
10 vicarious liability as to the three dentists, Bonds, Aman
11 and Khan as to the Syracuse clinic, and I think that would
12 resolve, I think, the issue that Mr. Stevens is concerned
13 about.

14 THE COURT: So when you say you're moving for a
15 directed verdict on the issue of vicarious liability, is
16 there any -- just so I'm clear, you're not asking the
17 Court to find liability but merely to, in essence, obtain
18 from defendants a stipulation that if there is a verdict
19 against the individual defendants that the clinic is
20 liable -- I'm not sure I understand what you're saying.

21 Mr. HIGGINS: Well, I think on the proof there
22 is -- I think we're -- we talked about getting a
23 stipulation from New FORBA, so we should probably start
24 with that. If we have a stipulation, there's no reason
25 for a directed verdict. But if Drs. Bonds, Aman and Khan

1 are found legally liable in malpractice or some claim --

2 THE COURT: So malpractice or other claims?

3 Mr. HIGGINS: Yes, and then we're looking for a
4 stipulation from New counsel that the Syracuse clinic is
5 vicariously liable for that exposure.

6 Mr. CAHALAN: Your Honor, we would stipulate
7 that the clinic would be vicariously liable for the acts
8 of its employees within the scope of their employment. We
9 do not obviously admit liability, but we admit the legal
10 concept and that they were employees.

11 Mr. LEYENDECKER: Can I just ask, are you
12 acknowledging to the Court that you're not going to take a
13 position that something they did in treating Jeremy was
14 beyond the scope of their employment?

15 THE COURT: By the caveat you put on at the end
16 of the sentence?

17 Mr. CAHALAN: Yes, that's the definition. I
18 don't think there is any allegation that anything occurred
19 outside of the scope of their employment.

20 Mr. LEYENDECKER: Do you want to take off your
21 qualification then because you need to do one or the
22 other?

23 Mr. CAHALAN: We will withdraw the
24 qualification. I think it goes to what we may be looking
25 at is if they exceeded the scope of their employment. I

1 don't think they're making an allegation in that regard,
2 and so we would withdraw the qualification.

3 THE COURT: Okay. That was one of the issues I
4 was going to have to deal with, so in terms of the verdict
5 sheet then, we're going to take out --

6 Mr. LEYENDECKER: The end of the Syracuse
7 definition, just take out the --

8 THE COURT: And also.

9 Mr. LEYENDECKER: Yes, and also through, "as
10 includes dentists" through the names ending in Khan,
11 D.D.S., period.

12 Mr. STEVENS: Your Honor --

13 Mr. LEYENDECKER: I just need to clarify on this
14 stipulation. I just want to make sure it's the Syracuse
15 clinic that's stipulating to vicarious liability as
16 related to the dentists as opposed to New FORBA.

17 Mr. CAHALAN: It's not New FORBA, but I need
18 clarification because there's a cause, intentional tort
19 alleged as respects the battery and that would be
20 exceeding the scope of employment, so I think --

21 THE COURT: No, I think under P.J.I. 2:237, an
22 employer can be liable for even the reckless or
23 intentional acts of an employee. That's the jury charge
24 that you guys asked for, too.

25 Mr. CAHALAN: Well, okay --

1 THE COURT: I guess I was going to ask the
2 question whether I'm even going to charge that in light of
3 the stipulation here. Do we even charge vicarious
4 liability at all, either 2:235 or 2:237?

5 Mr. LEYENDECKER: I think it doesn't need to be
6 charged if the clinic is stipulating to whatever liability
7 may attach to the dentists in this verdict for whatever
8 cause of action they might be liable for.

9 THE COURT: Does anybody have any --

10 Mr. CAHALAN: You know what, your Honor? We'll
11 stipulate as originally requested, even with respect to
12 the battery, and so -- but the stipulation would not
13 extend to New FORBA. It would be limited to the clinic,
14 the dentists as employees and even with respect to
15 intentional tort cause of action, I don't know if the
16 Court needs to make that charge.

17 THE COURT: So is everybody in agreement I don't
18 need to charge either 2:235 or 2:237?

19 Mr. CAHALAN: Yes.

20 THE COURT: Okay. Then normally what I would do
21 when there was an issue of vicarious liability, I might
22 put in my charge that the parties have stipulated that a
23 verdict against the -- or that the -- here it would be
24 Syracuse clinic is vicariously liable for the acts of the
25 three defendants if they find that there's liability.

1 Mr. STEVENS: Does that mean we can take the
2 Syracuse clinic off the jury verdict form?

3 Mr. HIGGINS: No. No, we have direct claims
4 against the Syracuse clinic.

5 Mr. STEVENS: On Question Number 20, I think the
6 word "Jeremy" slipped in there alone.

7 THE COURT: Question Number 20?

8 Mr. LEYENDECKER: I think he's pointing out we
9 need a "Bohn" after Jeremy, Question 20.

10 THE COURT: Okay.

11 Mr. LEYENDECKER: And then, your Honor, on the
12 participation questions, we were batting around the idea
13 of whether we thought it was -- it's probably Number 3 as
14 an example, did any of the defendants personally
15 participate, whether to identify as personally
16 participating would make a difference in that question,
17 whether participate was alone.

18 Mr. HIGGINS: Just trying to cure some of the
19 defendants' objections. Personally, it's the same thing.
20 It doesn't make a difference to us, but whatever.

21 Mr. FIRST: We disagree with that whole concept.
22 We think that's being incorrectly charged. They either
23 committed a tort or statutory violation or they didn't.
24 That's the issue. We're going to object to it at the
25 time.

1 Mr. HIGGINS: We made that offer, but if they're
2 objecting to the whole charge --

3 THE COURT: Then we'll just leave it the way it
4 is.

5 Mr. HIGGINS: Exactly.

6 THE COURT: Okay. Anything else on the verdict
7 sheet? All right.

8 So there were a couple of other things that --
9 there were some requests to charge: There was a request
10 to charge habit, 1:71, with respect to the acts, acts of
11 the defendant dentists. The Court is not going to charge
12 that section. I know there was testimony by Dr. Bonds,
13 and I think probably all of them a little bit, about what
14 they would normally do. However, none of that testimony
15 was specific to what their pattern or practice or habit
16 was in '06 or '07, and so I don't think that it would be
17 proper to charge habit.

18 With respect to custom -- defendants request to
19 charge customary practice, at 2:16 -- I think I told
20 everybody yesterday that I was not going to charge that,
21 but I wanted to be clear that I had decided that.

22 There is a request by defendants to charge error
23 in judgment and do -- I want to hear a minute from the
24 plaintiffs and a minute from the defendants on why I
25 should or shouldn't do that.

1 Mr. HIGGINS: Yes, Judge. In terms of the error
2 in judgment, it requires a reasoned decision between
3 Medicaid acceptable alternatives and, you know, and in
4 this case, restraining the child after giving him an
5 improper consent form and, basically, not using the last
6 alternative, there is no -- not giving the parents another
7 choice and not giving them a choice to go to the hospital
8 -- in other words, there's not a choice between acceptable
9 alternatives here, so everything is medical judgment.
10 Everything a doctor or dentist does is medical judgment.
11 It doesn't mean they get the medical judgment charge.

12 The same thing with local and no anesthesia,
13 doing the treatment plans without getting consent with Dr.
14 Aman doing four pulps without talking to Mrs. Varano.
15 These are not things that reasonable doctors would say,
16 "Oh, well, you can either do a knee this way with three
17 screws or two screws or one screw;" this is just -- you
18 know, they're doing things wrong and they're not choosing
19 between medically acceptable standard of care.

20 THE COURT: Mr. Stevens?

21 Mr. STEVENS: The suggestion four pulps and four
22 crowns without even talking to her about it, the evidence
23 was that Mrs. Varano testified that she was told in
24 advance there would be four upper crowns needed, but
25 that's a different question. My colleague here is only

1 going from the point of view of the plaintiff's testimony.
2 The doctors testified that they considered alternatives
3 and offered the parents and guardians alternatives and the
4 alternatives were not going forward on this day,
5 permitting us to use, for instance, protective
6 immobilization if you want us to go forward on this day,
7 referring them out if you don't want it done here. The
8 doctors have testified that they do these things and make
9 these choices and it's only plaintiff who wants to say,
10 "Well, we don't believe them and there are no choices and
11 no avenues," but the doctors testified very clearly they
12 do make these choices and that is their habit.

13 Let me also say, when the Court said they
14 wouldn't charge on habit because it wasn't specifically
15 stated to the very years, all the doctors were talking
16 about these very years, the time that they were practicing
17 with Jeremy Bohn. That's what they were talking about,
18 what they said to parents at that point in time. This is
19 not an earlier or later point of time; it's exactly what
20 they were talking about.

21 THE COURT: How does Dr. Bonds have a habit two
22 weeks after he started? I mean that doesn't even make
23 sense. You developed a habit in two weeks?

24 Mr. STEVENS: No, no, he'd been trained for a
25 year in terms of how he uses the device and offers the

1 patient --

2 THE COURT: That might be what his training was
3 but not his habit.

4 Mr. STEVENS: He had already learned that by the
5 time he started. He had been working as a dentist under
6 supervision and chair-side for a year. He already learned
7 his method of practice. He treated people independently
8 for two years under what they call supervision as a
9 resident, going out and actually doing the work. He had
10 fully learned to be a dentist and was continuing that
11 through, and the idea that this is not part of his habit
12 when his testimony is that that was his habit is actually
13 putting yourself in the point of view of the finder of
14 fact instead of the Court.

15 THE COURT: Thank you. With respect to the
16 issue of the adverse inference, I have not yet decided
17 what I'm going to do with that. While I think that new
18 FORBA brought an order to show cause seeking reargument of
19 their prior motion for sanctions and upon reargument to
20 vacate the prior order, because 22:21D(2) doesn't allow
21 the Court to consider matters of fact that could have been
22 included previously and weren't, and for the most part it
23 appears that there's new evidence in the affidavit of
24 Michele Sobotka, so I don't think the argument is
25 appropriate.

1 However, I have read and am considering the
2 papers of the co-defendants and with respect to whether or
3 not I can give an adverse inference charge, that will not
4 unduly prejudice those parties.

5 So I haven't ruled on that yet.

6 Mr. HIGGINS: We have no objection to the Court
7 issuing a limiting instruction advising that the adverse
8 inference only applies to New FORBA and not to any of the
9 other parties.

10 THE COURT: That's how I have been thinking, but
11 I'm not sure I can adequately give a limiting instruction
12 given the nature of the claims in this lawsuit, and so
13 that's really the dilemma. If you have a specific
14 suggestion of language that you think would address my
15 concern, I'm glad to hear it.

16 Mr. HIGGINS: Okay.

17 Mr. STEVENS: On the adverse inference and the
18 failure to find performance reviews --

19 THE COURT: On the failure to produce the
20 performance reviews, right.

21 Mr. STEVENS: My only comment is on behalf of
22 the three dentists who didn't have control of those and
23 who couldn't produce them one way or the other because
24 they were not in possession but would be adversely
25 affected by the inference that this Court is going to

1 charge, so I would just ask the Court, first, do no harm,
2 because the harm to our defendants is prejudicial.

3 Mr. HIGGINS: I can take a stab at that
4 potential adverse inference since the Court raised it.
5 Perhaps something like "you are -- you may but are not
6 required to find that New FORBA was requested to but did
7 not produce production reviews of certain defendant
8 dentists and that you may find or take an adverse
9 inference that those production reviews would have been
10 unfavorable to New FORBA, and taking this adverse
11 inference, I instruct you as a matter of law that the
12 defendant dentists in this case had no control over any
13 performance reviews and the performance reviews at issue,
14 other than what's been produced in this case, do not
15 pertain to those defendant dentists."

16 THE COURT: I lost you on the last part.

17 Mr. HIGGINS: I think I lost myself.

18 Mr. LEYENDECKER: You said "production reviews"
19 and I think you meant to say "performance reviews."

20 THE COURT: I understand.

21 Mr. HIGGINS: I think Mr. Stevens is saying "I
22 don't want my dentists getting blamed for not coughing up
23 these performance reviews" and I think we could stipulate
24 that or the Court could instruct the jury that these
25 defendant dentists were not in control of these

1 performance reviews and this adverse inference is not
2 directed toward them.

3 Mr. FIRST: Judge, really that would do nothing
4 to alleviate our concern. These performance reviews that
5 were allegedly not produced were both Old FORBA and New
6 FORBA performance reviews. New FORBA had them because
7 they bought the company, and I would submit there's no way
8 from this inference, especially where there's a claim that
9 new FORBA utilized Old FORBA's so-called scheme, that you
10 could tailor a charge or an inference that is limited to
11 New FORBA. It will inherently hurt us in a way that's
12 unfair because we're not the ones that didn't produce the
13 performance reviews.

14 It's unfortunate but it's true that we are kind
15 of bound together on this issue because they bought the
16 company and came into possession of our records.

17 THE COURT: I understand that, and that's why I
18 rethought the issue in terms of the adverse inference.
19 What do you suggest I do as a penalty?

20 Mr. FIRST: If your Honor is inclined to issue a
21 penalty, there are a lot of other options available to the
22 court, including monetary.

23 THE COURT: How much would you suggest I impose?

24 Mr. FIRST: Do I have to answer that?

25 THE COURT: Yes, you do.

1 Mr. FIRST: I really don't know.

2 Mr. LEYENDECKER: I recognize it's the
3 plaintiffs that got us down this path but I tend to come
4 at this issue with a more practical approach and let me
5 just make a suggestion and that suggestion would be if
6 none of the defendants got up in closing and said, "Well,
7 where are all the other documents that say..." you know,
8 performance reviews, to do more procedures or where are
9 all the other documents to say pressure... "We didn't get
10 any of that. Why didn't you bring us 10,000 of these as
11 opposed to..." then I would say we don't need the
12 instruction. But if they get up and say it, then we go
13 with something like Mr. Higgins is suggesting. So if they
14 violate it, after they agree not to do that, then if they
15 did, they have what they've got coming to them.

16 THE COURT: Not a bad suggestion. What does
17 everybody say?

18 Mr. FIRST: I'm not going to agree to that.
19 We're not subject to the inference by definition. Why
20 would we agree?

21 Mr. HIGGINS: The reason is that that would cure
22 the prejudice that Mr. First is now complaining about to
23 the Court.

24 Mr. LEYENDECKER: And my suggestion would also
25 cure this business of making us look like "Oh, well, you

1 found a needle in a haystack" when we've got a gazillion
2 of these and they say, "Hey, quality of care is great and
3 that's all we care about" and that's what I want to avoid
4 and what I'm sensing is that's what he wants to do, but he
5 doesn't want to live with the other, and I'm not
6 comfortable.

7 THE COURT: I totally understand, and frankly,
8 Mr. First, I'm surprised that you would point the finger
9 to that because I think that exactly is -- that's the
10 point, the reason why you get the adverse inference,
11 because they're not able to produce additional performance
12 reviews because of conduct outside of their control. So
13 now you're saying "I want to be able to make it look like
14 these guys don't have any more proof" when it's nothing
15 within their control.

16 I understand that you take the position that
17 your client didn't do that or doesn't have them or
18 whatever, but the Court has to try to balance the needs of
19 all the parties in this case. I think that's a great
20 suggestion and I guess I'll take it under advisement and
21 we'll see what happens tomorrow with what I charge.

22 Mr. STEVENS: Quickly, I would like to say that
23 our arguments are before the Court in the order to show
24 cause --

25 THE COURT: That's what we're arguing right now.

1 Mr. CAHALAN: Could I be heard for a moment on
2 the Court's comments? I realize that this Sobotka
3 affidavit was new. We would have made a motion to renew
4 but it wasn't our motion in the first place. We can't
5 renew the plaintiff's motion. That's why we submitted the
6 affidavit. In reality it doesn't say a whole lot more
7 than what Linda Zoeller said during the hearing and in her
8 own affidavit.

9 THE COURT: What Linda Zoeller said was totally
10 speculative about where and what and why, and clearly Miss
11 Zoeller and New FORBA did not take seriously my order with
12 respect to production. You know, her testimony was she
13 basically, from what I understand, as a paralegal was
14 calling the shots on what to do, when to do it. And, you
15 know, New FORBA has got to live and die with that. They
16 give her control and she doesn't do it right, they've got
17 to live and die with the fact that they entrusted her to
18 take care of this job and she didn't take it seriously.

19 And the hearing was specifically held -- I mean,
20 this was an issue that from the Court's perspective, Miss
21 Sobotka could have come and testified. While I said that
22 Linda Zoeller had to testify, I didn't say that you were
23 excluded from bringing anybody else here, and I mean Miss
24 Zoeller, her testimony was very speculative about what
25 could have happened, should have happened, et cetera.

1 So I hear what you're saying, Mr. Cahalan, but I
2 think I'm going to be prepared to charge the adverse
3 inference charge in some form or another tomorrow.
4 However, I will not charge it if -- I think it's only
5 appropriate, if one of the defendants is suggesting that
6 the plaintiffs pulled out one when they should have had
7 more, that I'm going to charge adverse inference.

8 Mr. CAHALAN: Your Honor, could I just ask a
9 question for clarification on the likely charge that will
10 be made? For the purposes of Mr. Hulslander, and I think
11 the others, understanding what the boundaries are, my
12 understanding is there is a performance review that was
13 disclosed for Dr. Aman a few months before treatment of
14 Jeremy Bohn and that has whatever content it has, says
15 whatever it says and to the extent that it's in evidence,
16 we should be able to discuss it, maybe not in terms of
17 that's the only one and why aren't there more, why they
18 didn't come out with more, but discussing what that says.

19 Mr. LEYENDECKER: No question 46 is fair game.
20 The point is you can't come in and say "Aha! Where are
21 all the others?" Or something along these lines.

22 Mr. CAHALAN: But talking about performance
23 reviews, but there's all kinds of evidence that they
24 presented -- reports, e-mails and such -- that aren't
25 performance reviews and I think part of the defense's

1 argument might be, "Where are all the e-mails?" It's not
2 limited to just performance reviews.

3 THE COURT: You kind of already did argue that.
4 In one of the witnesses, you brought that subject up, you
5 know, "Where are all these..." But frankly, plaintiff
6 asked, "Yeah, where are the other ones that show you were
7 looking at the merits of the work of the dentists" or
8 something like that. It's your call, what you're going to
9 do, but obviously you can --

10 Mr. CAHALAN: I don't want to --

11 THE COURT: He's just talking about performance
12 reviews. That's the only subject that the adverse
13 inference goes to.

14 Mr. LEYENDECKER: Correct.

15 THE COURT: Okay. Defendants were requesting
16 1:64 with respect to clear and convincing, the clear and
17 convincing standard. What was that for?

18 Mr. STEVENS: For the allegations of G.B.L. 349;
19 is that correct? Yes -- 349. Since the tenor of 349, the
20 way it's being used in this case, is for fraud, the way
21 fraud is defined in terms of burden of proof is clear and
22 convincing.

23 THE COURT: I hear what you're saying. Then
24 2:275, comparative fault. You guys are asking for that.
25 Is there any dispute on that? Both sides were asking for

1 that charge, or put it in their proposed charges.

2 Mr. HIGGINS: Judge, that's the general
3 allocation charge, comparative fault.

4 THE COURT: Right.

5 Mr. HIGGINS: We don't have any objection to the
6 comparative fault.

7 THE COURT: Okay. Plaintiffs were requesting
8 2:10A, gross negligence charge.

9 Mr. LEYENDECKER: I think it's the end of the
10 day and that fell out of our details and that can come
11 off, your Honor.

12 THE COURT: 2:235 we talked about that already,
13 and 2:237.

14 Okay. I think those were the only disputed
15 charges between the parties, so...

16 Mr. FRANKEL: May I be heard on one point?

17 THE COURT: Yes.

18 Mr. FRANKEL: They had offered under 3.20.1 an
19 instruction on opinion versus fact. This is fraud
20 response to the consent defense of battery claim, and so
21 they -- I think that's on their list. I know we talked
22 about it last night.

23 THE COURT: 3.20.1, intentional torts, fact
24 versus opinion, right.

25 Mr. FRANKEL: And initially I thought that the

1 instruction needed additional language because it was
2 legally too narrow. I looked at it last night, and this
3 morning, my conclusion is that it doesn't apply to this
4 case. And if you look at the instruction itself in the
5 Pattern, it uses the term "under these circumstances."

6 THE COURT: I've got the Pattern right here.

7 Mr. FRANKEL: Okay. It's a general statement,
8 the law under normal circumstances, opinion can't be the
9 basis for a fraud claim. But the circumstances that we
10 have and that are described in the comments in the Pattern
11 are circumstances where the law does permit opinion to be
12 the basis for a fraud claim, and there are two specific
13 reasons.

14 One is a circumstance where the defendant has
15 special knowledge or skill and knows that the plaintiff
16 does not and is relying on defendant's opinion as an
17 expert. That's a circumstance where the law does allow
18 opinion to be the basis for a fraud claim.

19 The other is where the defendant stands in the
20 position of trust with the plaintiff. That's another
21 exception that's specifically discussed right there in the
22 Pattern comments on Page 170 and 171.

23 Those are the circumstances that are really
24 undisputed in this case. No question Ms. Varano was
25 relying upon an expert, a professional's opinion as to

1 what the risks were of restraints and that Dr. Bonds knew
2 he was dealing with somebody who would be relying on his
3 opinion. Likewise, he was in a position of trust.

4 Those circumstances under New York law are
5 circumstances in which opinion can be the basis for a
6 fraud claim, and so the standard instruction, which is the
7 one they're asking for, would be in this statement of law
8 under these circumstances. To say that under these
9 circumstances, opinion -- that you find if it's an opinion
10 then stop; it can't be fraud, which is the instruction
11 they have asked for, just ignores the actual circumstances
12 we're dealing with and would be a misstatement of New York
13 law.

14 THE COURT: Okay.

15 Mr. STEVENS: This is like an Alice in
16 Wonderland argument from someone who is not asking for
17 charge 28:05 because if the issue is whether informed
18 consent was properly given, then 28:05 is what that's all
19 about. They have this crazy conflict, "Oh you can have
20 informed consent," but "if it's by fraud, then it's not
21 informed consent." Of course it's not. Informed consent
22 means proper informed consent, telling someone the
23 benefits and risks and that's what fits in this case and
24 what they're trying to keep out of this case and that's
25 what should be a predicate to any claim of battery and

1 that's what is missing and that's what should be question
2 number one, it should be malpractice and then lack of
3 informed consent and those should be the predicate
4 questions. In turning this around the way it is in these
5 jury questions, gives -- in my view -- a confusing view to
6 the jury of what's happening here. I disagree with my
7 colleague about what he said with respect to that charge,
8 and it all makes even less sense in the absence of 28:05.

9 THE COURT: Okay. Thank you. Were there any
10 limiting instructions? During the course of the trial,
11 during the course of the motions in limine, the Court had
12 talked about giving various limiting instructions. We
13 revisited that subject yesterday, and the only limiting
14 instruction that I understood from our meeting yesterday
15 that the parties are asking me to give relates to the
16 guidelines and that the -- that essentially that the
17 guidelines aren't standard of care.

18 Was there another -- anything else with respect
19 to limiting instructions?

20 Mr. HIGGINS: Judge, I'm not sure it was a
21 limiting instruction. We did discuss this yesterday, but
22 the modified charge as to Jeremy's parents' condition,
23 which is Exhibit A, Page 3, of our charges. If you find
24 Jeremy is entitled to recover under the rules of law given
25 you, the sum you award as damages cannot be reduced by

1 anything that Jeremy's parents either did or did not do as
2 to Jeremy or his care. I further instruct you that there
3 is no claim in this case that either Jeremy or his parents
4 were negligent. I don't know if that's a limiting
5 instruction or a charge, but --

6 THE COURT: I was looking at it as a charge.
7 That was in -- that's in your proposed charges.

8 Mr. HIGGINS: Yes, it is.

9 Mr. STEVENS: In terms of simplifying, your
10 Honor, on the reckless disregard for the safety of others,
11 first, we believe that Drs. Aman, Bond and Khan shouldn't
12 be named in the punitive damage section and we object to
13 them being there, but if the Court disagrees and they are
14 named, then we don't need the Article 16 reckless
15 disregard section because if there's a finding that
16 they've acted under the punitive damage charge section,
17 then that more than applies, but assumes the reckless
18 disregard. So that would be two ways of finding out the
19 same thing.

20 THE COURT: So you're suggesting that the
21 Article 16 limitation is synonymous with the standard, is
22 the same as the punitive damages?

23 Mr. STEVENS: Maybe even more so. In other
24 words, if there's a finding that any party is liable for
25 punitive damages, I think the Court as a matter of law can

1 say they used reckless disregard for the safety of others.

2 I think that's a very easy thing --

3 THE COURT: But is the reverse true?

4 Mr. STEVENS: I don't think the reverse needs to
5 be true.

6 THE COURT: I think some people were arguing
7 that we need to have a determination as to the damages
8 with respect to each of the individual defendants so that
9 we can look at whether Article 16 applies for non-economic
10 loss.

11 Mr. STEVENS: I would be happy enough if the
12 Article 16 language were left in and the three individual
13 dentists were not named in the punitive damage section and
14 I urge that they shouldn't be and we object to them being
15 named in that section. But if all the parties are going
16 to be named in that section, then I think the reckless
17 disregard question under Article 16 becomes a surplus
18 issue.

19 Mr. HIGGINS: And I respectfully disagree,
20 Judge, with Mr. Stevens. I understand the argument, but
21 under 16.02(5), I believe, it's a different -- it can be a
22 different standard so, you know, the punitive damages can
23 be held for something more than negligence and something
24 less than intentional conduct, gross negligence, things of
25 that nature. That's all in the P.J.I.

1 So the fact that they get punitive damages is
2 not going to answer the question under 16.02(5), I
3 believe, or 7. So that's why it's in there. We think it
4 should respectfully stand.

5 THE COURT: Okay.

6 Mr. LEYENDECKER: One little typo, I think, on
7 Page 20, your Honor, in your instruction there at the
8 bottom, you've got 13-C. Thirteen is the battery question
9 and you've just got an A and B on the battery, so I think
10 there's no 13-C.

11 THE COURT: Okay. That's because there was a C
12 until I took it out.

13 Mr. CAHALAN: Your Honor, you mentioned earlier
14 if there were any other questions regarding the
15 modification charges. Are we doing that now or are we
16 doing that tomorrow after closings because I do have some
17 submissions with some of the modified charges that they
18 proposed.

19 THE COURT: I got something from Danielle, I
20 think. Do you have something that's different from what
21 she sent me?

22 Mr. CAHALAN: Two items in the --

23 THE COURT: You --

24 Mr. CAHALAN: -- per se charge. They had a
25 definition of what an owner is, a short, one-sentence

1 item, and I don't think it correctly states the law of
2 what an owner would be. The owners of the clinics were
3 licensed dentists and owners pursuant to a contract. They
4 were owners of the clinic.

5 THE COURT: Do you have something you're
6 submitting in writing?

7 Mr. CAHALAN: I can.

8 Mr. FIRST: We agree with that and we did cover
9 that.

10 THE COURT: Why don't you look at what Danielle
11 sent me already, and if you need to send me something
12 else, the sooner you send it, the better. More chance
13 I'll read it.

14 Anything else?

15 Okay. See everybody tomorrow.

16 Mr. FIRST: One more thing. We've reserved
17 motions both after the plaintiffs case and obviously after
18 the defendant's case. When do you want to hear those?

19 THE COURT: When do I want to hear them?

20 Mr. FIRST: That's the wrong question. When
21 will you hear them?

22 THE COURT: How long are you going to be?

23 Mr. FIRST: Not long. I'm personally not going
24 to be long.

25 THE COURT: If you guys want to come at 8:30 and

1 we'll do it. The jury is coming at quarter of.

2 Mr. FIRST: It's just something we need to do.

3 Mr. STEVENS: They asked for a directed verdict.

4 The defendants don't get a chance --

5 Mr. LEYENDECKER: Nobody is saying you waive
6 your right if it doesn't happen by 4:30 today or 8:30....

7 THE COURT: I have said all along everybody's
8 rights are reserved with respect to any motions because I
9 have always taken the view that the jurors are more
10 important than anybody else. Your rights are reserved.
11 We can put those on tomorrow morning if everyone is here
12 to put them on at 8:30, but I'm only giving you until
13 quarter of nine to do it, so be succinct.

14 Mr. FIRST: Thank you.

15 THE COURT: Thank you.

16 (Conclusion of proceedings).

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CERTIFICATE

I, VALERIE WAITE, an Official Court Reporter
in and for the State of New York, Fifth Judicial District,
do hereby certify that I recorded stenographically the
foregoing proceedings, at the time and place noted in the
heading hereof, and that it is a true and correct
transcript of the proceedings therein to the best of my
ability.

Valerie Waite,
Senior Court Reporter

Dated: October 7, 2013

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