

2010

# John A. Lyon v. Donald W. Bryan, M.D. : Brief of Appellee

Utah Court of Appeals

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David H. Epperson; J. Kevin Murphy; Epperson & Owens; Attorneys for Appellee.

Savage, Yeates & Waldron; E. Scott Savage; Kyle C. Thompson; Attorneys for Appellant.

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JOHN A. LYON,

*Plaintiff-Appellant,*

vs.

DONALD W. BRYAN, M.D.,

*Defendant-Appellee.*

Case No. 20100006-CA

PLAINTIFF'S APPEAL FROM AN ORDER DENYING A MOTION  
FOR NEW TRIAL, ENTERED BY THE SECOND JUDICIAL DISTRICT  
COURT, THE HONORABLE MICHAEL D. LYON, PRESIDING

David H. Epperson, No. 1000  
J. Kevin Murphy, No. 5768 (of counsel)  
EPPERSON & OWENS, P.C.  
10 West 100 South, Suite 500  
Salt Lake City, Utah 84101  
Telephone (801) 983-9800

E. Scott Savage  
Kyle C. Thompson  
SAVAGE, YEATES & WALDRON, P.C.  
170 South Main, Suite 500  
Salt Lake City, Utah 84111  
Telephone: (801) 363-4011

FILED  
UTAH APPELLATE COURTS

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vs.  
  
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Kyle C. Thompson  
SAVAGE, YEATES & WALDRON, P.C.  
170 South Main, Suite 500  
Salt Lake City, Utah 84111  
Telephone: (801) 363-4011

*Attorneys for Plaintiff-Appellant*

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JOHN A. LYON,

Case No. 20100006-CA

VS.

DONALD W. BRYAN, M.D.,

*Defendant-Appellee.*

\* \* \*

The parties to this appeal are John A. Lyon, plaintiff and appellant; and Donald W. Bryan, M.D., defendant and appellee.

This is an appeal from an order denying appellant Lyon's motion for a new trial, and, purportedly, an appeal from the jury's "no cause" verdict, entered by the Second Judicial District Court, Ogden Department, Hon. Michael D. Lyon. This appeal was originally filed in the Utah Supreme Court pursuant to Utah Code Ann. § 78A-3-102(3) (West 2010). It was transferred to this Court under the supreme court's "pourover" authority, Utah Code Ann. §§ 78A-3-102(4) and 78A-4-103(2)(j) (West 2010).

**ISSUES PRESENTED ON APPEAL,**  
**STANDARDS OF APPELLATE REVIEW,**  
**and**  
**ISSUE PRESERVATION**

For reasons that will be apparent in the Argument section of this brief, Appellee Dr. Bryan frames the issues on appeal in a different order, and in different form, than does appellant Lyon:

**I. Did the trial court properly deny appellant Lyon’s motion for a new trial?**

When a motion for a new trial is based upon a claim of “insufficient evidence,” a trial court’s denial of such motion is reviewed deferentially on appeal, for abuse of discretion, and will be reversed only if there is “no reasonable basis for the decision.” *E.g., Crookston v. Fire Insurance Exchange*, 860 P.2d 937, 938 (Utah 1993) (“*Crookston II*”). This issue was preserved by appellant Lyon’s post-verdict motion for a new trial.

**II. Should this Court decline to independently review the sufficiency of the evidence, either in deference to the trial court’s decision on appellant’s motion for a new trial, or because such review is procedurally barred?**

This issue is, in part, one of appellate policy that, by definition, could not be presented to the trial court, and must be decided *de novo* by this Court. A procedural default argument was raised in appellee Bryan’s opposition to Lyon’s new trial motion, but was not decided by the trial court. (R. 425-427).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,  
STATUTES, AND RULES**

A post-verdict motion for a new trial is governed by Utah R. Civ. P. 59 (copied in Appendix 1 of this brief). Rule 59(a)(6) permits a new trial based upon “[i]nsufficiency of the evidence to justify the verdict . . .” Utah R. Civ. P. 50 (also in Appendix 1) addresses motions for directed verdict, and motions for judgment notwithstanding the verdict.

**STATEMENT OF THE CASE**

This appeal arises from a medical malpractice lawsuit brought by appellant John Lyon against appellee Donald Bryan, M.D. The lawsuit proceeded to a jury trial in the Second Judicial District Court, Ogden Department, the Honorable Michael A. Lyon, presiding. The trial jury found, by a 6-2 vote, that appellee Dr. Bryan had been negligent. However, the jury unanimously found that such negligence had not caused harm to appellant Lyon. (R. 537, in Br. of Appellant Addendum C.)

Appellant Lyon moved for a new trial, arguing that the evidence was insufficient to support the jury’s unanimous finding of “no causation.” (R. 383-385.) After briefing and oral argument (R. 386-406, 414-479, 516-529, 627), the trial court entered its Ruling Denying Plaintiff’s Motion for a New Trial. (R. 537-542, in Br. of Appellant Addendum C.) This appeal followed.

## **STATEMENT OF FACTS**

### *Preface*

A jury found that Dr. Bryan had committed negligence, but also found that such negligence had not caused the harm suffered by Lyon. The trial court reviewed the case, and denied appellant Lyon's motion for a new trial. To properly assess whether the trial court's decision was reasonable, *Crookston II*, 860 P.2d at 938, this Court needs to not merely assess evidence supporting the trial court's decision, but also must acknowledge the evidentiary conflicts and ambiguities. *See State v. Dunn*, 850 P.2d 1201, 1206 (Utah 1993) (conflicting evidence recited "to the extent necessary to understand the issues on appeal"). This fact recitation is drafted accordingly.

### *Overview*

This case is based upon an allegation of failure to diagnose a post-surgical complication. On November 15, 2005, Dr. Bryan performed elective left shoulder (rotator cuff) surgery on appellant Lyon, to repair damage of several years' duration. (R. 106-108.) The parties agreed that the surgery was competently performed. (R. 625 p. 16, testimony of Lyon's orthopedist expert, Dr. Serfustini; R. 626 p. 88, closing argument of Lyon's counsel.)<sup>1</sup>

Post-surgery, appellant Lyon developed deep vein thrombosis (DVT) -- i.e., one or more blood clots -- in his left arm. (R. 625 p. 162.) The parties agreed that the DVT was

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<sup>1</sup>Dr. Bryan also performed carpal tunnel surgery on both of appellant Lyon's wrists. (R. 2.) Lyon made no malpractice claim related to those surgeries.

not caused by negligence. (R. 625 pp. 57, 59-60, testimony of Lyon's orthopedist expert, Dr. Serfustini; R. 626 p. 89-90, closing argument of Lyon's counsel.) Instead, Lyon alleged that Dr. Bryan negligently failed to *diagnose* and promptly *treat* the DVT, during a follow-up examination thirteen days post-surgery, on November 28, 2005. (R. 336.) As a result, alleged Lyon, one or more of the clots migrated from his arm into his lungs, causing a pulmonary embolism that was diagnosed four days later, and that required a three-day hospitalization. (R. 3; R. 624 p. 133.)

Trial of appellant Lyon's malpractice lawsuit took four days. Lyon, a retired railroad worker, did not seek recovery for medical expenses, lost wages, or other economic damages. He sought only general "pain and suffering" damages. (R. 369; R. 626 p. 89, closing argument of Lyon's counsel.)

#### *Evidence re: Negligence*

At trial, the evidence was in dispute about the signs and symptoms that were presented by appellant Lyon, to Dr. Bryan, during the November 28, 2005 follow-up examination. Lyon testified that he was showing signs and symptoms of DVT at that time -- including extreme pain and unusual swelling in the arm, and that he reported this to Dr. Bryan. (R. 624 p. 119-124.) Appellee Dr. Bryan testified to the contrary -- in effect, that Lyon's presentation on November 28 indicated an uneventful recovery, with no more pain and swelling than would normally be expected. (R. 625 pp. 137-140, 150-158, 165, 172-173, 180.) Lyon and Dr. Bryan each presented other evidence to support their respective

positions on this factual dispute; that evidence will be described, in more detail, in argument point I-C of this brief.

The foregoing factual dispute was central to the question whether Dr. Bryan had negligently failed to diagnose the DVT. If evidence supporting appellant Lyon was believed, it was more likely that Dr. Bryan had negligently overlooked the DVT. If evidence supporting Dr. Bryan was believed, no DVT warning signs and symptoms were present during the November 28 examination, and therefore, the DVT was not negligently overlooked. (R. 625 p. 47; R. 626 p. 40-41, testimony of defense orthopedist Vanderhooft; R. 626 p. 88-89, closing argument of Lyon's counsel.)

*Evidence re: Causation*

To establish causation – i.e., that failure to diagnose the DVT had caused the pulmonary embolism – appellant Lyon relied upon the testimony of his orthopedist expert, Dr. Serfustini. Regarding causation, Serfustini initially testified as follows:

[Appellant Lyon's counsel]: Do you have an opinion as to whether or not Mr. Lyon's subsequent pulmonary embolism was more likely than not caused by the lack of him getting attention on November 28?

...

[Dr. Serfustini]: Counsel that's really, not only is that the answer is a medical one, the answer is a common sense one. If you define the problem that is a blood clot you take timely action then you stand an excellent chance of preventing this blood clot from breaking loose and going to his lungs.

(R. 625 p. 39, in Br. of Appellant Addendum B.) Appellant Lyon's counsel attempted to clarify that response, as follows:

[Counsel]: Alright and just to make sure we're clear on this so would you, taking in account all your years of experience and training think that Mr. Lyon's blood clot, blood clot to his lungs, pulmonary embolism, was more likely than not a result of him not being treated on 11/28?

[Serfustini]: Correct.

(R. 625 p. 38-39.)

Dr. Serfustini briefly repeated the above-quoted opinion, upon cross and redirect examination. (R. 625 pp. 60-61, 89.) In its ruling denying appellant Lyon's new trial motion, the trial court found that opinion to be "uncontroverted." (R. 539, in Br. of Appellant Addendum C.)

#### *No Plaintiff Motion for Directed Verdict*

At the close of appellant Lyon's case in chief, appellee Dr. Bryan moved for a directed verdict. The trial court denied that motion, finding that appellant Lyon had introduced sufficient evidence for the jury to consider whether the "negligence" and "causation" elements of Lyon's claim were proven. (R. 625 p. 98-101.)

At the close of appellee Bryan's case in chief, appellant Lyon did not move for directed verdict, on any element of his case. Instead, jury instructions were read, and closing arguments presented. (R. 625 p. 84-87.)

#### *Closing Argument*

During closing argument, Lyon's counsel cited Serfustini's "causation" testimony briefly. He argued that there was no dispute on the "causation" element of his claim. (R. 626 pp. 91, 106, 109; closing arguments are fully copied in Appendix 2 of this brief.)

The bulk of both parties' closing argument was devoted to the central factual dispute about whether signs and symptoms of DVT had been present during the November 28, 2005 follow-up examination. Resolution of that dispute would determine whether Dr. Bryan had negligently failed to diagnose the DVT. Lyon, through counsel, naturally argued that Lyon's version of the follow-up examination was credible, and that Dr. Bryan's version was not. (R. 626, closing arguments, in Appendix 2.)

However, one prominent feature of appellant Lyon's closing argument really addressed *neither* "negligent failure to diagnose" *nor* "causation." During presentation of evidence, Lyon's counsel had elicited an admission, from Dr. Bryan, that he had put inaccurate "informed consent" notes in Lyon's care record. Specifically, those notes recited that certain risks, including risks of DVT, had been explained to Lyon. Dr. Bryan admitted he did not actually inform Lyon of the DVT risk. He further admitted that those "informed consent" notes consisted of "generic," computer-stored language that he placed in the records of all his surgical patients. (R. 625 pp. 127-128, 158-163, 177-178.)

During closing argument, appellant Lyon's counsel emphasized those inaccurate "informed consent" notes. He had them blown up into poster-sized, demonstrative argument exhibits. (R. 540; those demonstrative exhibits would later be described as "refrigerator-sized," R. 627 pp. 22, 31.) Counsel pronounced himself "shocked" and "stunned" that Dr. Bryan would create such "phony" clinical notes. (R. 626 pp. 94, 138-139, in Appendix 2.)

### *The Verdict*

After closing arguments, the jury deliberated, guided by the agreed-upon jury instructions. (R. 626 p. 86-87.) Following over four hours of deliberation (R. 314), the jury returned a Special Verdict Form that asked, first: “Considering all the evidence in this case, was Defendant Donald Bryan, M.D., negligent?” To that question, the jury answered, “Yes.” (Special Verdict Form, R. 334, Br. of Appellant Addendum tab A.) Post-verdict polling revealed that answer to be a 6-2 split decision. (R. 626 p. 150-151.)

The second Special Verdict question was, “If your answer to Question 1 is ‘yes,’ was such negligence the proximate cause of any injury or damage to the Plaintiff?” To this question, the jury answered, “No.” (Special Verdict Form, R. 334-335, in Br. of Appellant Addendum A.) This answer was unanimous. (R. 626 p. 151-154.)

### *Motion for New Trial*

Moving for a new trial, appellant Lyon argued that the only permissible answer to the Special Verdict “causation” question was “Yes.” (R. 483-489, 516-522.) The trial court denied the new trial motion, explaining two principal grounds:

First, the trial court found that Lyon’s “causation” testimony, from Dr. Serfustini, which “spanned approximately one minute of one witness’s lengthy testimony as part of a four-day trial,” “was not presented in an emphatic, or even a very clear, manner.” (R. 539, in Br. of Appellant Addendum C.) Noting the jury’s prerogative to reject expert testimony, the trial court found that “the jury was well within its bounds to disregard Dr. Serfustini’s opinion, if it saw fit to do so.” (R. 540, in Br. of Appellant Addendum C.)

Second, the trial court agreed “that, as a result of the emphasis placed on Defendant’s inaccurate [informed consent] notes, the jury may have found Defendant negligent in his note-taking, and not for his failure to diagnose the blood clots in Plaintiff’s arm.” “Such a scenario,” the court held, “would explain the jury’s unanimous finding of no cause of action, given that Defendant’s inaccurate note-taking may have been negligent, but could not have caused Plaintiff’s pulmonary embolism.” (R. 540-541, in Br. of Appellant Addendum C.)

The trial court then seemingly equivocated on the second ground, yet summed up as follows: “While the Court cannot state with certainty what led the jury to answer ‘yes’ as to negligence and ‘no’ as to causation, the Court is satisfied that there are multiple reasonable ways in which the jury could have come to such a conclusion.” Finding the verdict “not ‘so contrary to the manifest weight’ of the evidence,” the trial court denied Lyon’s motion for a new trial. (R. 541, in Br. of Appellant Addendum C.) On appeal, Lyon urges reversal.

## **SUMMARY OF ARGUMENT**

### **I**

This Court should affirm the trial court’s denial of appellant Lyon’s new trial motion under the highly deferential “reasonableness” review standard. That standard both permits and expects that in deciding a new trial motion, the trial court will, utilizing its advantaged perspective to view the entirety of the trial, consider the weight of the evidence, the presentation of evidence and argument, and the likely influences of

evidence and argument upon the jury deliberations. The trial court also must grant a *strong presumption of correctness to the jury's verdict.*

Under these standards, the trial court's denial of Lyon's new trial motion should be affirmed under either or both of two grounds: One, Lyon's evidence on "causation," upon which he bore the burden of proof, was reasonably assessed, by the trial court, as evidence that was not so compelling that the jury was bound to accept it. Two, the trial court reasonably held that Lyon's misplaced emphasis upon Dr. Bryan's "phony" clinical notes could have induced the jury to find that negligence had been committed, but that such negligence did not cause harm. The trial court's decision is consistent with the conflicting evidence on negligence, and with the Special Verdict Form that did not limit the jury's "negligence" deliberations to the "failure to diagnose" allegation.

## **II**

This Court should not review the jury verdict independently, as though no motion for a new trial were made. Such review would improperly bypass the deference and respect, due to the trial court, following its careful consideration of Lyon's new trial motion under the governing standards.

Also, Lyon is procedurally barred from independent review of his "no competent evidence" argument, because he made no motion for directed verdict. Such motion is necessary to preserve a "no competent evidence" argument for appeal. Having made no motion for directed verdict, Lyon consented to have the jury decide the weight and

persuasiveness of his “causation” evidence, subject only to post-verdict review under the standards governing a motion for new trial.

If this Court were to independently review the jury verdict, it should affirm. The *Ortiz* case, relied upon by appellant Lyon, is procedurally different from this case, in that no motion for a new trial was made. It is also substantively different, in that the evidence supporting the appellant, in *Ortiz*, was far stronger than the evidence supporting Lyon’s “causation” argument in this case.

## **ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT’S MOTION FOR A NEW TRIAL**

This Court should affirm the trial court’s denial of appellant Lyon’s motion for a new trial, under the settled, highly deferential standard of appellate review. In this point, appellee Dr. Bryan first explains the review standard in more detail, and then applies it to the circumstances of this case.

#### **A. Standard of Review.**

A trial court’s denial of a new trial motion, when the motion is based upon alleged insufficiency of evidence, is reversed only for “abuse of discretion, i.e., no reasonable basis for the decision.” *Crookston II*, 860 P.2d at 938.<sup>2</sup> This highly deferential

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<sup>2</sup>Denial of a new trial motion is reviewed less deferentially if the trial court’s decision is based upon a mistake of law. *Crookston II*, 860 P.2d at 938. In this case, appellant Lyon does not argue that the trial court made any mistake of law.

“reasonableness” standard is based upon the trial court’s advantaged position to assess trial evidence as it is presented – not merely upon the sterile, written record: “The reason that any determination as to whether the jury exceeded its proper bounds is best made in the first instance by the trial court is that the trial judge is present during all aspects of the trial and listens to and views all witnesses.” *Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 804 (Utah 1991) (*Crookston I*). See also *Nelson v. Trujillo*, 657 P.2d 730, 732 (Utah 1982) (trial court “has heard the testimony and other evidence presented to the jury and is best suited to evaluate the claim that it is insufficient to justify the verdict”); *Holmes v. Nelson*, 7 Utah 2d 435, 441, 326 P.2d 722, 726 (1958) (Crockett, J., concurring) (appellate courts respect the trial courts’ “advantaged position” to assess the evidence on new trial motions).

Implicit in the foregoing case law is the trial court’s prerogative, on a motion for new trial, to assess not merely the existence, but the persuasiveness, of trial evidence. The trial court should consider “all aspects of the trial,” *Crookston I*, 817 P.2d at 804 – including the likely influence of counsel’s arguments about that evidence. The overarching “reasonable basis” standard, for appellate review of a new trial motion, clearly contemplates the trial court’s prerogative to review the entirety of the trial, as well as the trial court’s advantaged ability to assess why a jury has decided a given case in a given manner. The trial court is not restricted to dry analysis of a sterile, written record.

Well-settled law also requires a trial court, upon motion for a new trial, to be deferential toward the *jury*. (Ruling, R. 537-538, in Br. of Appellant Addendum C.) A

trial court *may* order a new trial if it finds that the verdict was insufficiently supported by the evidence. *E.g., Nelson v. Trujillo*, 657 P.2d at 732; *King v. Union Pac. R. Co.*, 117 Utah 40, 50, 212 P.2d 692, 697 (1949). However, “the trial court *cannot* grant a new trial on the basis of insufficient evidence *unless* the record contains ‘*substantial* competent evidence which would support a verdict for the [moving party].’” *Nelson v. Trujillo*, 657 P.2d at 732 (quoting *King*) (brackets in original, emphasis added).

A new trial cannot be granted merely because the trial judge disagrees with the jury’s verdict. *Crookston I*, 817 P.2d at 799 n.9. Instead, the verdict must be “manifestly” or “clearly” contrary to the evidence. *Price-Orem Inv. Co. v. Rollins, Brown and Gunnell, Inc.*, 713 P.2d 55, 57-58 (Utah 1986). A new trial should not be granted unless “the jury’s verdict is so contrary to the manifest weight that the trial judge cannot in good conscience permit it to stand.” *Goddard v. Hickman*, 685 P.2d 530, 532 (Utah 1984) (quoting authority, internal quotations omitted). It must “clearly appear” that the jury has refused to accept credible, uncontradicted evidence, with no rational basis for rejecting it. *Efco Distributing, Inc. v. Perrin*, 17 Utah 2d 375, 379-380, 412 P.2d 615, 617 (1966). A new trial motion, on grounds of insufficient evidence, should be granted “with reluctance.” *Lund v. Phillips Petroleum Co.*, 10 Utah 2d 276, 282, 351 P.2d 952, 955 (1960). When a jury has “conscientiously and without any showing of prejudice or other extraneous influences decided the matter, there must be some basic and compelling reason” to justify a new trial. *Uptown Appliance & Radio Co. v. Flint*, 122 Utah 298, 305, 249 P.2d 826, 829 (1952).

To this Court, appellant Lyon cites two different Utah cases that, he says, purport to either *command*, or *prohibit*, a trial court from re-weighing the evidence when presented with a new trial motion that argues “insufficient evidence.” *Compare Brown v. Johnson*, 24 Utah 2d 288, 391, 472 P.2d 942, 944 (Utah 1970) (trial court has “personal duty” to “weigh and consider the evidence”) (Br. of Appellant p. 26-27) *with Chatelain v. Thackeray*, 98 Utah 525, 100 P.2d 191 (1940) (cited by Lyon for proposition that “[t]he trial court should not step into the jury’s shoes and attempt to reweigh the evidence”) (Br. of Appellant p. 30).<sup>3</sup> Such cases actually show that a trial court, upon such motion, may properly *indirectly* re-weigh the evidence. That is, the trial court determines, from its advantaged perspective, whether the *jury* has weighed the evidence in a manner that is justified, or understandable, under all the circumstances. This approach is consistent with contemporary Utah case law, cited earlier, commanding trial court deference to jury decisions. It is also consistent with *each* party’s constitutional right to a jury trial.

However articulated, the review standard is highly deferential. Taking a cue from the trial court’s standards, even if this Court disagrees with the trial court’s decision, such disagreement forms no ground for reversal. The trial court’s decision should be affirmed so long as it is reasonable.<sup>4</sup>

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<sup>3</sup>Actually, in *Chatelain* and *Brown*, the Utah Supreme Court *affirmed* trial court decisions to *grant* new trial motions, under the “abuse of discretion” review standard. *Chatelain*, 100 P.2d at 198; *Brown*, 24 Utah 2d at 391, 472 P.2d at 944 (“large discretion” granted to trial court). In this case, had the trial court granted Lyon’s new trial motion, Dr. Bryan would be facing an “abuse of discretion” review.

<sup>4</sup>Case law governing appellate review of new trial motions is massive and at times

## **B. Reasonable Basis to Find “Causation” Evidence Unpersuasive.**

In this case, the trial court’s decision was reasonable, first, because it legitimately determined that the jury could have found appellant Lyon’s evidence of “causation” to be unpersuasive. (R. 539, in Br. of Appellant Addendum tab C.) Again, that evidence consisted of the testimony of Lyon’s orthopedist expert, Dr. Serfustini, repeated as follows, who could not plainly answer the simple, “yes or no” question posed to him about this crucial element of Lyon’s claim:

[Lyon’s Counsel]: Do you have an opinion as to whether or not Mr. Lyon’s subsequent pulmonary embolism was more likely than not caused by the lack of him getting attention on November 28?

...

[Dr. Serfustini]: Counsel that’s really, not only is that the answer is a medical one, the answer is a common sense one. If you define the problem that is a blood clot you take timely action then you stand an excellent chance of preventing this blood clot from breaking loose and going to his lungs.

(Trial transcript, R. 625 p. 39, in Br. of Appellant Addendum B.) Counsel’s effort to clarify and strengthen that response really did not improve things:

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contradictory, as the Utah Supreme Court noted in *Crookston I*, 817 P.2d at 799-806. But appellant Lyon’s reliance upon *Berven v. Gardner*, 414 F.2d 857 (8<sup>th</sup> Cir. 1969) (Br. of Appellant p. 34) is way off-target. *Berven* was a summary judgment case (although it purported to involve “findings” of fact), in the administrative law context of deciding eligibility for federal disability benefits, without a jury. As such, the decision under review, in *Berven*, would have been subject to less deferential review even under Utah law. *E.g.*, *State v. Walker*, 743 P.2d 191, 192-193 (Utah 1987) (less deference to bench verdict than to jury verdict); *Salt Lake County v. Utah Labor Comm’n*, 2009 UT App 112 ¶ 9, 208 P.3d 1087, 1089 (degree of appellate deference varies depending upon amount of discretion vested in administrative agency). *Berven* and similar cases provide no support for the *de novo* review that Lyon implicitly seeks in this case.

[Counsel]: Alright and just to make sure we're clear on this so would you, taking in account all your years of experience and training think that Mr. Lyon's blood clot, blood clot to his lungs, pulmonary embolism, was more likely than not a result of him not being treated on 11/28?

[Serfustini]: Correct.

(Id.) Dr. Serfustini further undercut his credibility by disparaging his own "bone doctor's" understanding of pulmonary emboli:

[Lyon's counsel]: How can you – could you tell us just how that happens? What actually happens, how something in the arms ends up in the lung.

[Serfustini]: I can tell you what I learned as a medical student and as an intern – I'm an orthopedic surgeon now, that it interferes with your ability to transfer oxygen and if you can't transfer oxygen and your oxygen saturation goes down, you can get some problems with your brain. That's the orthopedic explanation. I'm sure Dr. Schmitz's explanation and the pulmonologist's explanation is much more sophisticated than a bone doctor's explanation.<sup>5</sup>

(R. 625 p. 40.) In denying appellant Lyon's motion for a new trial, the trial court assessed the foregoing "causation" testimony as follows:

While at first glance the jury's verdict may seem unusual, it is by no means unreasonable. *Despite the burden of proof resting with Plaintiff*, the evidence Plaintiff presented on causation was very brief. The entirety of Plaintiff's evidence spanned approximately one minute of one witness's lengthy testimony as part of a four-day trial. Considering the minimal evidence presented on causation, the jury may have concluded that Plaintiff failed to carry his burden on this point.

Moreover, the evidence on causation was *not presented in an emphatic, or even a very clear, manner*. Dr. Serfustini, while agreeing that failure to diagnose the blood clot led to the pulmonary embolism, gave his opinion in a way that could have been seen by jurors as equivocal. Instead of answering "yes" to Plaintiff's counsel's first question of whether he had

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<sup>5</sup>Dr. Schmitz was the physician who diagnosed the pulmonary embolism on December 2, 2005. (R. 624 p. 6-15.)

an opinion and then answering directly, clearly, and unequivocally on the follow-up question, he does neither. Only when Plaintiff's counsel rephrased the question, "to make sure we're clear," does he really answer the question clearly. Dr. Serfustini's answers to Plaintiff's counsel's questions on the issue of causation leave much to be desired, especially for such a critical element of Plaintiff's case. It is entirely possible, and reasonable, that the jury may have simply found Dr. Serfustini's testimony not credible or at least unpersuasive.

(Ruling, R. 539, in Br. of Appellant Addendum C, emphasis added.)

*Uncontroverted Evidence Can be Disbelieved*

On appeal, Lyon really does not challenge the reasonableness of the trial court's assessment. Instead, he emphasizes the trial court's finding that Dr. Serfustini's testimony was uncontroverted. (Br. of Appellant p. 27.) However, a fact finder may properly reject uncontroverted testimony. In *Homer v. Smith*, 866 P.2d 622 (Utah Ct. App. 1993), *cert. denied*, 878 P.2d 1154 (Utah 1994), this Court rejected an argument that was virtually identical to that of appellant Lyon: "Sandy Hills claims that the trial court should not have disregarded the Smiths' uncontroverted testimony. Clearly, the fact-finder is in the best position to judge the credibility of witnesses and is free to disbelieve their testimony." 866 P.2d at 627.

The trial court, in *Homer*, rejected uncontroverted testimony that it found to be "self-serving and not credible," *id.* at 627 n.8, and this Court affirmed. *See also Glauser Storage, L.L.C. v. Smedley*, 2001 UT App 141 ¶ 24, 27 P.3d 565, 570-571 (affirming trial court's rejection of uncontroverted testimony). In this case, the trial court observed that Dr. Serfustini's "causation" testimony was minimal, non-emphatic, and unclear; it left

“much to be desired.” (R. 539, quoted above.) The testimony itself (also quoted above) supports that observation. Additionally, the trial court and the jury were in the advantaged position to actually observe Serfustini while giving that testimony. Taking these factors into account, the trial court properly exercised its discretion, and reasonably denied appellant Lyon’s new trial motion.

*Appellant had Burden of Proof*

Additionally, as the trial court observed, appellant Lyon bore the burden of proof for each element of his case, including causation. (R. 539, quoted above; Jury Instructions 12, 25, at R. 359, 365, copied in Appendix 3 of this brief.) That was an *affirmative* burden. Dr. Bryan bore no burden to prove the *negative* – i.e., that any alleged negligence did *not* cause harm.

The allocation of the proof burden is significant. Appellate courts in Missouri will not review claims of evidentiary insufficiency *at all* where the aggrieved party had the burden of proof, and was unsuccessful in a motion for new trial:

The verdict in this case rests upon a finding by the jury against the party having a burden of proof. Consequently, the [appellants’] contention that the verdict was unsupported by substantial evidence or by any evidence presents nothing for appellate review. Where a motion for new trial argues that the jury’s verdict was *against the weight of the evidence and the party seeking a new trial had the burden of proof*, the circuit court’s denial of the motion for new trial is a conclusive determination that cannot be overturned on appeal.

*Black and Veatch Corp. v. Wellington Syndicate*, 302 S.W.3d 114, 129 (Mo. Ct. App. W.D. 2009) (emphasis added; internal citations and quotations omitted).

This Court need not adopt Missouri’s “no appellate review” approach to decide this case. But it is important to acknowledge that given the proof burden, the verdict in this case is properly understood as a finding of “not proven” on the “causation” element of Lyon’s claim. It did not matter whether appellee Dr. Bryan introduced any evidence on that element (Br. of Appellant p. 26), because he had no obligation to do so. The trial court understood this, which also supports the reasonableness of its decision to uphold the jury’s verdict against Lyon’s claim of “insufficient evidence.”

*Jury Instructions Were Followed*

Such understanding is consistent with the jury instructions, as also observed by the trial court. Instruction No. 15, explaining expert opinion, stated in part: “You are not bound by such an opinion. Give it the weight you think it deserves.” (R. 355, in Appendix 3.) Instruction No. 3 stated, in part: “You are to determine what witnesses to believe and what parts of their testimony you believe.” This instruction concluded, “the value of a witness’ testimony is for you to determine.” (R. 342, in Appendix 3.) Also, Instruction No. 18 stated, in part:

The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the *convincing character* of the testimony, weighed impartially, fairly and honestly by you. If the evidence is evenly balanced as to its convincing force, you must find that such allegation has not been proved.

(R. 358, in Appendix 3, emphasis added; the word “quality” may have been substituted for “character.”)

On appeal, appellant Lyon places a novel construction upon the last sentence of jury Instruction No. 15, explaining expert opinion:

If you should decide that the opinions of an expert are not based on sufficient education and experience, or if you should conclude that the reasons given in support of the opinions are not sound, or that such opinions are outweighed by other evidence, you may disregard the opinion entirely.

(R. 355, in Appendix 3.) Lyon argues that this sentence restricts the jury's prerogative to reject expert opinion, permitting it to do so only when the expert's qualifications are inadequate, the expert's reasoning is unsound, or the expert's opinion is outweighed by other evidence. (Br. of Appellant p. 33.)

Neither precedent nor logic supports such restriction in the expert opinion instruction. To hold that such restriction exists would eliminate the jury's prerogative to reject *any* testimony that it finds to be unpersuasive. That prerogative was conveyed to the jury in Instructions 3 and 18, quoted earlier, as well as in Instruction 12 (R. 352, in Appendix 3, listing factors to assess credibility and weight of evidence). Additionally, the jury was instructed to "not single out one instruction alone as stating the law, but [to] consider the instructions as a whole." (Instruction 7, R. 347, in Appendix 3.) It would be improper to do as appellant Lyon now urges, and elevate the "expert opinion" instruction above all the others.

Therefore, the trial court correctly characterized the expert testimony factors, in Instruction No. 15, as "non-exclusive." (R. 540, in Br. of Appellant Addendum C.) The jury's "no causation" verdict was in accord with all of its instructions – to which neither

party objected. Recognizing as much, the trial court reasonably denied appellant Lyon's motion for a new trial.

*"Speculation"*

Appellant Lyon also assails the trial court for "a backwards justification of the jury verdict," or for "speculating" about the reasons for the jury's "no causation" verdict. (Br. of Appellant pp. 28, 30.) But settled legal standards, set forth earlier, conferred a strong presumption of validity upon the verdict, which could be rebutted only for "compelling reasons." *Lund v. Phillips Petroleum*, 10 Utah 2d at 282, 351 P.2d at 955. The trial court honored that presumption; it is hard to discern how it could do so any way *other than* "backwards," or after-the-fact.<sup>6</sup>

As for "speculation," as previously explained, the trial court had an advantage, unavailable to this Court, of actually observing the testimony and evidence as it was presented, as well as the parties' arguments. Without post-verdict interrogation of all jurors, which would violate the sanctity of their deliberations, some degree of "speculation" is inherent in a trial court's decision on a motion for new trial. The trial court's "speculation," in this case, was based upon its assessment that appellant Lyon's "causation" evidence was not so compelling as to justify overturning the jury's verdict. The "reasonableness" standard of review contemplates, rather clearly, that such

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<sup>6</sup>As will be explained in Point II-B, appellant Lyon could have obtained a "before the fact" ruling, on the "causation" element of his claim, had he moved for a directed verdict.

assessment is within the trial court's prerogative – indeed, is *expected* – when deciding a motion for a new trial.

In this case, the record on appeal contains nothing to suggest that the trial court's denial of the new trial motion, based upon its advantaged perspective, based upon the burden of proof, and based upon proper deference toward the jury's verdict, was an abuse of discretion. The trial court's decision was reasonable. For this reason, alone, this Court should affirm the trial court's denial of appellant Lyon's motion for a new trial.

**C. Mis-direction by Appellant Caused Off-Target “Negligence” Verdict.**

As an additional *or* alternative ground to affirm, this Court should uphold the trial court's judgment that appellant Lyon's focus upon Dr. Bryan's inaccurate “informed consent” notes may have caused the jury to find him negligent in his note-making, but not in failing to diagnose the DVT. (R. 540, in Br. of Appellant Addendum C.) The trial court then “hedged” on this question, stating that it found “nothing that suggests that the jury abandoned the principal issue of the case, namely, Defendant's failure to diagnose the blood clots in Plaintiff's arm.” (R. 541.) Despite the trial court's apparent ambivalence, this Court should affirm.

*Conflicting Evidence on Negligence*

This argument requires a look at the hotly contested evidence as to whether, during the November 28, 2005 follow-up examination, appellant Lyon was showing such clear signs and symptoms of DVT that failure to diagnose it was negligent. As set forth in the fact recitation of this brief, on this question appellant Lyon and Dr. Bryan gave opposing

testimony. The jury could have found either party more credible.

The testimony of other witnesses provided no clear basis to resolve that credibility question. Lyon's wife testified similarly to her husband, but admitted that her trial testimony contained significant detail, about the degree of pain and swelling reported by Lyon on November 28, that had been absent from her pretrial deposition testimony. (R. 624 p. 211-219). Dr. Bryan's certified nursing assistant testified that she recalled no report of unusual pain or swelling, by Lyon, on November 28. (R. 625 pp 193, 201-207.)

Physician witnesses also disagreed on this question. Lyon's orthopedist expert, Dr. Serfustini, interpreting a December 2 clinical description of "brawny edema," opined that unusual pain and swelling, indicative of DVT, must have been present on November 28. (R. 625 p. 28-30.) Dr. Bryan disagreed, testifying that the "brawny edema" description was misleading or inaccurate, and that a DVT clot "can develop and go to the lung in a matter of hours." (R. 625 p. 143-146.) There was testimony that on December 2, when the embolism was diagnosed, Lyon reported that he had been experiencing unusual pain and swelling to his arm for only three days prior – i.e., possibly not beginning until *after* the November 28 examination. (R. 624 pp. 53-55, 61-62).

Dr. Bryan's orthopedist expert, Dr. Vanderhooft, opined that because the swelling that was observed on December 2 did not appear to extend into Lyon's hand, any increased swelling at that time was recent, and not necessarily suggestive of DVT. (R. 626 pp. 48-50, 76-77, 81-82.) Vanderhooft also opined that because of the extreme rarity of upper extremity DVT, and because no signs of DVT were noted in Dr. Bryan's care

records, it would not violate care standards to overlook it. (R. 626 p. 63.) While Lyon's expert, Serfustini, disagreed as to whether rarity would excuse a failure to diagnose, he did acknowledge that DVT is extremely rare in an arm, and that DVT can be difficult to diagnose. (R. 625 pp. 54-58, 90-94.)<sup>7</sup> There was, in short, substantial evidence upon which the jury could have found for *either* party on whether the DVT had been negligently overlooked, by Dr. Bryan, on November 28.

#### *Non-Specific Instructions on Negligence*

Appellant Lyon asserts that the jury found in his favor on this dispute. (Br. of Appellant pp. 21, 34.) That assertion is unsupported, because of the above-described conflicting evidence, *and* because the Special Verdict Form *failed to specify* that the negligence in question was failure to diagnose the DVT. It merely asked a non-specific question: "was the defendant, Donald Bryan, M.D., negligent?" (R. 334-335, in Br. of Appellant Addendum A.) The trial court noted the non-specificity of that question, in its ruling denying Lyon's new trial motion. (R. 541, in Br. of Appellant Addendum C.)

True, the jury was told that the alleged negligence was failure to diagnose the DVT. However, that information was conveyed only once, in the trial court's un-numbered *introduction* to the case, given *before* presentation of evidence. (All jury instructions, including the un-numbered introduction, R. 336, are copied in Appendix 3 of

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<sup>7</sup>The defense expert, Vanderhooft, also opined that "lumps" on the arm, reportedly described by Lyon, would *not* likely be signs of DVT. (R. 626 pp. 43, 83.)

this brief.)<sup>8</sup> In subsequent instructions, the jury received a “generic” definition of “negligence,” without specification as to the nature of the negligence that Lyon actually alleged. (Instructions 20, 21, R. 360-361, in Appendix 3.) Appellant Lyon agreed to those non-specific instructions. (R. 626 p. 86-87.) The trial jury was thereby invited to find whether Dr. Bryan had committed *any type* of negligence, without reference to the “missed diagnosis” allegation.

That non-specificity creates a problem for Lyon, because the jury’s divided verdict on *unspecified* negligence was *not inconsistent* with its unanimous “no causation” finding. In *Schmidt v. Intermountain Health Care*, 635 P.2d 99 (Utah 1981), a jury found that a urinary catheterization had been negligently performed, but then found that such negligence did not cause the harm (urinary difficulty) that was alleged by the plaintiff. The plaintiff moved for a new trial, arguing that the evidence did not support the “no causation” verdict. The trial court denied the motion, and the supreme court affirmed, in light of defense testimony supporting the “no causation” verdict. 635 P.2d at 101. However, the supreme court *also* observed as follows regarding the *negligence* finding: “Here, not only could the jury have found that the urinary difficulties were not caused by the catheterization, but *it is not clear that the catheterization, rather than some other act or omission, formed the basis for the finding of negligence.*” *Id.* (emphasis added).

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<sup>8</sup>The post-evidence instructions appear to begin with numbered instruction 7 (R. 347, in Appendix 3).

Lyon's problem, in this case, is that it is similarly unclear whether the jury found that Dr. Byran negligently failed to diagnose the DVT on November 28, *or* found that he was negligent in his creation of inaccurate "informed consent" notes. On the former question, as just explained, the evidence supported a verdict either way. The jury was not sufficiently instructed to confine its "negligence" deliberations to the former question.

*Misplaced Emphasis on "Phony" Clinical Notes*

Appellant Lyon compounded that problem, by stressing Dr. Bryan's creation of the "phony" clinical notes. (R. 626 pp. 94-95, 138-139.) Dr. Bryan acknowledged that those "informed consent" notes were inaccurate. (R. 626 p. 136-137.) Appellant Lyon's counsel enlarged those "phony notes" to poster-sized exhibits, and he displayed and emphasized them during closing argument. (R. 540, in Br. of Appellant Addendum C.) Such emphasis misdirected the jury, by inviting it to consider the "phony notes," by themselves, to constitute negligence.

Trying to undo his own misdirected closing argument, appellant Lyon now argues, in effect, that the trial jury should have ignored it. (Br. of Appellant p. 35, emphasizing instruction that "statements of the lawyers were not evidence.") Such argument ignores reality. Closing argument is intended to persuade. Because of this, a significant body of case law has developed about improper closing arguments. A chief concern is that misleading or improper closing argument can, and at times does, induce juries to disregard or overlook the law, as embodied in their instructions. *See, e.g., State v. Bakalov*, 1999 UT 45 ¶ 55-61, 979 P.2d 799, 818-819 (reviewing multiple allegations of

improper argument for impropriety and likelihood of prejudice). “When the evidence in the record is circumstantial or sufficiently conflicting, jurors are more likely influenced by improper argument.” *State v. Todd*, 2007 UT App 349 ¶ 35, 173 P.3d 170, 178-179. In this case, with conflicting evidence on negligence, Lyon’s *own* argument likely influenced the jury’s divided finding that negligence had been committed.

Lyon also tries to rehabilitate, or re-focus, his emphasis upon Dr. Lyon’s “phony notes.” The thrust of such emphasis, he asserts, was “that Dr. Bryan’s notes demonstrated the doctor’s lack of credibility.” (Br. of Appellant p. 35.) That assertion is not supported by the record. The argument portions *cited by Lyon* were as follows:

We have now heard from Dr. Bryan that [the “informed consent” notes are] identical because they’re phony. He just tells his assistant to push a key on every patient’s file and put this identical record in every patient’s file. Yet they want us to rely upon the notes of Dr. Bryan because they don’t say anything about a swollen arm on 11/28.

(R. 626 p. 94-95, in Appendix 2 of this brief.)

. . . John Lyon some six months later, May of 2006 went in to get a copy of all of Dr. Bryan’s notes. This is six months later and walks in and the assistant there . . . says, Oh, you’re in luck, we just finished getting those into the computer. This is months from the time that Mr. Lyon had seen Dr. Bryan and it is, I think it’s months even from the time he very last saw Dr. Bryan. You heard Dr. Bryan say I don’t take hand notes. I just go and dictate them. If he’s preparing these notes after, he’s preparing them in May or even April, this is after he knows that John Lyon has been in the hospital with a pulmonary embolism.

(R. 626 p. 104-105, in Appendix 2.) Neither the above-quoted portions, nor any other portion of Lyon’s closing argument (fully copied in Appendix 2), clearly conveys the idea that the inaccuracy of Dr. Bryan’s “informed consent” notes impeaches the credibility of

his other clinical notes -- or of his trial testimony. Such argument simply was not articulated, to the trial jury, in any understandable fashion.

*Reasonable Trial Court Assessment, and Invited Error*

Given the conflicting evidence on negligence, the insufficiently specific instructions and verdict form on negligence, and Lyon's emphasis upon Dr. Bryan's "phony" clinical notes, it is not at all surprising that the jury made a divided, 6-2 finding on negligence. The majority jurors, insufficiently instructed, could have found the "phony" notes to be negligent, while the minority jurors could have found the "phony" notes to be irrelevant. All jurors could have agreed that the DVT was *not* negligently overlooked, and all jurors could have agreed that the "phony notes" did not cause the pulmonary embolism. This would explain, as the trial court observed, the unanimous "no causation" decision. (R. 540-541, in Br. of Appellant Addendum C.)<sup>9</sup>

Given the foregoing problems, the trial court reasonably held that "as a result of the emphasis placed on [Dr. Bryan]'s inaccurate notes, the jury may have found [Dr. Bryan] negligent in his note-taking, and not for his failure to diagnose the blood clots in [Lyon]'s arm." (R. 540, in Br. of Appellant Addendum C.) Significantly, those problems

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<sup>9</sup>Besides inducing likely confusion as to the nature of the negligence in issue, appellant Lyon's focus upon the "informed consent" notes probably obscured the question of causation. The trial transcript contains 45 pages of closing argument by Lyon's counsel (R. 626 pp. 87-111, 138-147, in Appendix 2.) Of those 45 pages, only about 21 *lines* address causation, in relatively offhand fashion. (R. 626 p. 91 lines 6-11, p. 106 lines 5-8, 14-16, p. 109 lines 12-16, in Appendix 2.) Some 30 lines of argument, *plus* the poster-sized enlargements, were devoted to the "phony" notes on "informed consent." (R. 626 p. 94 lines 7-25, p. 95 lines 1-8, p. 138 line 25 to 139 lines 1-2, in Appendix 2.)

were created by appellant Lyon, who approved the nonspecific jury instructions and verdict form on negligence (R. 626 p. 86-87), and who fervently assailed the “phony notes.” In effect, Lyon thereby invited the jury to commit the error that he now alleges. “[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.” *State v. Geukgeuzian*, 2004 UT 16 ¶ 9, 86 P.3d 742, 744. The reasonableness of the trial court’s decision is further supported by this “invited error” principle.

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In sum, under the deferential, “reasonableness” standard for review of new trial motions, this Court should affirm the trial court’s judgment. Affirmance may be based upon the trial court’s assessment that Lyon’s “causation” evidence was legitimately found non-persuasive, *or* upon the trial court’s assessment of Lyon’s “phony notes” emphasis, *or* upon both of these grounds. Both were properly within the trial court’s purview, during its careful consideration of Lyon’s new trial motion.

## **POINT II**

### **BECAUSE THE TRIAL COURT HAS ADJUDICATED APPELLANT’S CLAIM OF EVIDENTIARY INSUFFICIENCY VIA THE MOTION FOR NEW TRIAL, THIS COURT SHOULD NOT INDEPENDENTLY REVIEW THAT CLAIM**

In his first point on appeal, appellant Lyon implicitly asks this Court to review his argument of “evidentiary insufficiency” independently – as if he had never requested, and

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the trial court had never denied, a new trial. As follows, this Court should review only the denial of Lyon’s new trial motion, and affirm, for the reasons stated in Point I of this brief. But if it does review the evidence independently, this Court should affirm.

#### **A. Deference and Respect for Trial Court.**

Appellate review of a jury verdict, when *no* motion for new trial has been interposed, is deferential. The evidence is reviewed “in the light most favorable to that verdict.” *E.g., Water & Energy Systems Technology, Inc. v. Keil*, 2002 UT 32 ¶ 2, 48 P.3d 888, 890 (quoting authority). For the reasons explained in Point I-A, when a new trial motion *has* been made, and has been decided by the trial court, appellate courts grant *extra* deference. In fact, there appears to be no Utah case wherein the appellate court, reviewing the sufficiency of evidence, did so *both* independently *and* in the context of a new trial ruling. In this case, that is what Lyon asks this Court to do. He wants to avoid the extra deference that is owed to the trial court’s denial of his new trial motion.

It would be improper to independently review the sufficiency of the evidence, as though no motion for a new trial had ever been interposed. Besides bypassing the trial court’s discretion, such review would be disrespectful of the trial court’s conscientious effort, in this case, to carefully consider all of the evidence, as well as the parties’ arguments, related to the new trial motion. *Cf. Crookston v. Fire Ins. Exchange* 860 P.2d 937, 940 (Utah 1993) (*Crookston II*) (approving the trial court’s “very detailed” decision on new trial motion). The trial court did not rubber-stamp the jury’s decision; rather, it carefully and thoughtfully considered the parties’ arguments on the new trial motion.

Therefore, this Court should deny Lyon's request for independent review of the evidence; it should only review the trial court's decision on the new trial motion.

### **B. Procedural Bar.**

Additionally, this Court should deny independent review of appellant Lyon's "evidentiary insufficiency" claim, because he has not preserved an entitlement to such review. Lyon argues that there was "no substantial competent evidence" upon which a "reasonable, fair jury" could answer "no" to the question of causation. (Br. of Appellant p. 18.) He failed to present such argument, to the trial court, *before* the case was submitted to the jury.

Such argument could have been presented, in the form of a directed verdict motion under Utah R. Civ. P. 50 (copied in Appendix 1). Under Rule 50(a), such motion is available to a plaintiff, just as it is available to a defendant. *See, e.g., Judd v. Drezga*, 2004 UT 91 ¶ 8, 103 P.3d 135, 138 (trial court took questions of negligence and causation away from the jury, and decided for plaintiff; jury then decided damages.) If a party's motion for directed verdict is denied, and an adverse jury verdict is returned, that party has, by making the *directed verdict* motion, preserved his or her right to move for *judgment notwithstanding the verdict* (j.n.o.v.) "in accordance with his motion for a directed verdict." Utah R. Civ. P. 50(b).

A motion for j.n.o.v. must be granted if there is "no competent evidence" to support a verdict in favor of the non-moving party. *Gustaveson v. Gregg*, 655 P.2d 693, 695 (Utah 1982). That language is essentially the same as the "uncontroverted evidence"

or “no substantial evidence” mantra that Lyon repeatedly invokes in his brief to this Court. It is also the same standard that applies to a motion for summary judgment. *See Anderson v. Liberty Lobby*, 477 U.S.242, 250-251 (1986) (under federal law, summary judgment and directed verdict standards are equivalent). In this case, appellant Lyon cannot invoke that standard on appeal, because he did not make his “no substantial evidence” argument in a directed verdict motion. Hence, the trial court was given no opportunity to resolve such argument before the jury deliberated.

Such resolution could have taken two forms. Under one scenario, appellant Lyon could have obtained the directed verdict, on causation, that he now demands on appeal. The case would then have been submitted to the jury solely on the “negligence” element of his claim. The parties’ closing arguments would have been focused accordingly, and in all likelihood, the ambiguity in the jury’s verdict would have been avoided.

Under a second scenario, appellee Dr. Bryan could have been permitted to reopen the evidence on causation, to impeach Dr. Serfustini’s testimony. This is significant, because Dr. Serfustini, during his pretrial deposition (R. 622), was even more vague, about causation, than he was during trial. For one thing, he acknowledged that even if the DVT had been diagnosed during the November 28 examination, the pulmonary embolism “could have occurred anyway.” (R. 622 p. 61, copied in Appendix 4.) For another, Serfustini’s deposition testimony was that timely detection of the DVT would have created a “*better* chance” of preventing the embolism, rather than the “*excellent* chance” that he asserted at trial. (R. 622 p. 59, in Appendix 4; compare trial

testimony, supra pp. 6-7, 16-17 of this brief, and in Br. of Appellant Addendum B.) It would have been proper for the trial court, if faced with a timely motion for directed verdict, to permit the defense to re-open the evidence, and to permit such impeachment, via Serfustini's prior inconsistent statements on causation.<sup>10</sup>

There is, in short, a prescribed rule by which an appellant can preserve a "no competent evidence" argument for independent appellate review. In this case, Lyon has not invoked that rule. He thereby consented to let the jury decide whether his evidence, on the "causation" element of his claim, on which he bore the burden of proof, was sufficiently *persuasive*. The jury decided that it was not, and the trial court has upheld the jury's decision. Therefore, Lyon cannot make a "no competent evidence" argument on appeal. Nor can he otherwise demand appellate review as though his motion for a new trial had never been made and decided. Instead, appellate review is limited to the trial court's denial of his new trial motion, under the "reasonableness" standard. Under such review, as explained in Point I, the trial court's judgment should be affirmed.

### **C. *Ortiz* Decision Does Not Control**

Finally, *if* this Court were to review Lyon's "insufficient evidence" claim independently, it should affirm. Lyon relies upon *Ortiz v. Geneva Rock Products, Inc.*,

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<sup>10</sup>Appellant Lyon's able counsel doubtlessly recognized, going into trial, that Serfustini's deposition testimony on causation was weak. He could not elicit significantly stronger trial testimony from Serfustini without highlighting the inconsistency with his deposition testimony. Hence, at trial, Serfustini described an "excellent" chance of preventing the embolism, had treatment begun on November 28 -- only marginally stronger than the "better" chance that he had identified during his deposition.

939 P.2d 1213 (Utah Ct. App. 1997), wherein this Court reversed a jury’s finding of “no negligence.” (Br. of Appellant p. 15-19.) Lyon’s reliance upon *Ortiz* is understandable, because in that case, this Court reversed a verdict that had been adverse to the party with the burden of proof. Lyon seeks a similar outcome, in this case, regarding the “no causation” verdict.

Procedurally, Lyon’s reliance upon *Ortiz* is misplaced, because there is no indication that the trial court, in *Ortiz*, was ever presented with a post-verdict motion for a new trial; rather, judgment was entered on the verdict, and the appeal followed. 939 P.2d at 1216. Therefore, there was no occasion for this Court, in *Ortiz*, to pay the extra deference accorded to a trial court’s decision on a new trial motion. It also appears that in *Ortiz*, no directed verdict was sought by either party. Nor does the opinion address the allocation of the proof burden, at trial. Had such issues been raised in *Ortiz*, perhaps that appeal would have had a different outcome.

More important, *Ortiz* is significantly different, substantively, from this case. While described as a case involving “insufficient evidence,” this Court asserted its prerogative to reverse a jury verdict “upon a showing that the evidence so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.” 939 P.2d at 1216 (citing and quoting authority). The Court first recited evidence supporting the *appellant’s* position that negligence had been proven: Three witnesses, the Court held, supported appellant’s position. The Court reviewed those witnesses’ testimony in detail. *Id.* at 1217. Then, the contrary testimony of a single

opposing witness was marshaled, and deemed legally inadequate to support the “no negligence” verdict. *Id.* at 1217-1218.

In this case, appellant Lyon can scarcely lay claim to evidence, supporting the “causation” element of his claim, of nearly the same “clearly preponderating” strength. He offered *one* witness on causation, Dr. Serfustini. The text of Serfustini’s testimony (supra pp. 6-7, 16-17 of this brief) reveals it to be neither cogent nor compelling. The trial court found that it was “not presented in an emphatic, or even a very clear, manner.” (R. 539, in Br. of Appellant Addendum C.) Therefore, even if this Court independently reviews the jury verdict, without regard to Lyon’s new trial motion, it should affirm.

### **CONCLUSION**

For the reasons set forth in Point I, this Court should affirm the trial court’s denial of Lyon’s new trial motion. For the reasons explained in Point II, this Court should decline to independently review the sufficiency of the evidence. For all the reasons stated herein, the judgment of the trial court should be AFFIRMED.

RESPECTFULLY SUBMITTED this 7 day of February, 2011.

EPPERSON & OWENS, P.C.

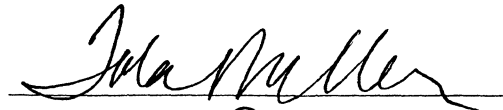
A handwritten signature in black ink, appearing to read 'D. H. Epperson', written over the printed name.

DAVID H. EPPERSON  
J. KEVIN MURPHY (of counsel)  
*Attorneys for Defendant-Appellee*

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on the 7<sup>th</sup> day of February, 2011, a true and correct copy of the foregoing **BRIEF OF APPELLEE**, plus a searchable CD-PDF diskette of same, was hand- delivered to the following:

E. Scott Savage  
Kyle C. Thompson  
SAVAGE, YEATES & WALDRON, P.C.  
170 South Main Street, Suite 500  
Salt Lake City, Utah 84101  
*Attorneys for Plaintiff-Appellant*

  
J. K. King 2/8/2011

Tab 1

## **APPENDIX 1**

**C**West's Utah Code Annotated Currentness

State Court Rules

§ Utah Rules of Civil Procedure (Refs & Annos)§ Part VII. Judgment**→ RULE 59. NEW TRIALS; AMENDMENTS OF JUDGMENT**

**(a) Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

**(b) Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

**(c) Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

**(d) On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

**(e) Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10

days after entry of the judgment.

Current with amendments effective November 1, 2010.

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**C**West's Utah Code Annotated Currentness

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)Part VI Trials**→ RULE 50. MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT**

**(a) Motion for directed verdict; when made; effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

**(b) Motion for judgment notwithstanding the verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict, or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

**(c) Same: conditional rulings on grant of motion.**

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

**(d) Same: denial of motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a

new trial, or from directing the trial court to determine whether a new trial shall be granted.

Current with amendments effective November 1, 2010.

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Tab 2

## **APPENDIX 2**

SECOND JUDICIAL DISTRICT COURT, OGDEN

WEBER COUNTY, STATE OF UTAH

---

JOHN A. LYON,	:	Case No. 070903637
	:	
Plaintiff,	:	Appellate Case No. 20100006
	:	
v	:	Volume IV of IV
	:	
DONALD W. BRYAN,	:	
	:	
Defendant.	:	With Keyword Index

---

JURY TRIAL AUGUST 3, 4, 5 & 7, 2009

PARTIAL TRANSCRIPT OF AUGUST 7, 2009

BEFORE

JUDGE MICHAEL D. LYON

---

2010 SEP 20 P 3:41  
SECOND DISTRICT COURT

---

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

**ORIGINAL**

1 law. These have been reviewed by them, been passed without  
2 exception by them and at this point they are prepared and  
3 ready to go and I'm proposing that I instruct you in the law  
4 on this case. I'm estimating that this may take me about 20  
5 minutes, maybe less, maybe a little more. That'll take us  
6 pretty close to the noon hour and then I propose that we take  
7 a lunch break. I'd like to know whether you would like an  
8 hour or a little more. I know sometimes people who work,  
9 feel a need to take care of some things that are needful and  
10 you've been in trial all week or maybe there are things that  
11 you need in the home. On the other hand, maybe you'd just as  
12 soon get on with this case. So I'm going to just defer to  
13 what you would like to do and if you'd like to take just a  
14 moment and just visit among yourselves and then let me know  
15 how you feel, we'll then begin with instructions.

16 (Closing instructions not requested for transcription).

17 (Whereupon a noon recess was taken)

18 THE COURT: The record will show the jury has  
19 returned and we're ready for closing arguments.

20 Mr. Savage, you may begin.

21 MR. SAVAGE: Thank you. If it please the Court,  
22 Dr. Bryan, Mr. Epperson, ladies and gentlemen of the jury.  
23 Well, we've reached that point where we're about done. This  
24 is where a couple of old sleep deprived lawyers get to stand  
25 up in front of you and tell you what they think the evidence

1 has shown. And as I believe I stated to you in my opening  
2 statement, for you to return a verdict against Mr. Lyon in  
3 this case, you have to decide that he and his wife are liars.  
4 This case is about what they told Dr. Bryan on November 28<sup>th</sup>  
5 and what Dr. Bryan thinks he remembers about that and what  
6 appeared in notes.

7 The sub-issue of this case, of course, is notes  
8 versus sworn testimony. This witness chair is a hot seat. A  
9 witness sitting there has a white light on them and in my  
10 many years of experience, I've come to have high regard for  
11 the effect of examination and cross examination, what  
12 witnesses say on the stand. Notes can be good, notes can be  
13 helpful, they can be determinative. But in this case, notes  
14 are very interesting because Mr. Epperson's case is entirely  
15 based upon a review of notes and ignoring everything that Mr.  
16 Lyon and Mrs. Lyon says occurred on November 28.

17 There is no claim in this case that Dr. Bryan did  
18 anything wrong with the surgery, the surgery was fine. It's  
19 not an issue in this case whether or not he's a fine surgeon.  
20 I think the evidence is he is a fine surgeon. Doesn't have  
21 anything to do with whether he's a fine man. No, what this  
22 case turns upon is whether or not John Lyon presented with a  
23 swollen arm, a very swollen arm on 11/28 and Dr. Bryan failed  
24 to pay attention to what his patient said, failed to take  
25 action with respect to that arm and the damage that that

1 delay in the treatment for the blood clots that we now know  
2 formed, cost.

3 So what is the evidence? What I say isn't  
4 evidence, what Mr. Epperson says isn't evidence but we're  
5 both going to try to do our best, I think, to remind you and  
6 touch upon what we think the evidence has shown. If your  
7 collective recollection is different from mine or Mr.  
8 Epperson's, please rely on your own and not anything either  
9 one of us says.

10 That being said, what is this case about? I've got  
11 a couple of things it's not about. It's not about medical  
12 expenses. Mr. Lyon is not making any claim for the medical  
13 expenses. I think we've had the testimony that his medical  
14 expenses were covered by insurance and insurance company  
15 hasn't made any claim to have those reimbursed. There is no  
16 claim of lost wages. Mr. Lyon was retired. There is no  
17 claim of lost future earning capacity. Mr. Lyon is retired.  
18 We're here for the general damages that Mr. Lyon incurred, if  
19 you find, and I think you will, that Dr. Bryan was negligent,  
20 that one time, that one date and it could have cost that  
21 patient his life, causing pain in his chest for five months,  
22 he couldn't lay down, couldn't sleep. You heard his wife  
23 testify in 40 years of marriage, she's never seen that tough  
24 guy in so much pain.

25 It's about whether or not the blood clots - we know

1 from all of the testimony, the doctors agree, blood clot  
2 formed in his arm, probably from the surgery, doesn't matter.  
3 We're not making any claim there's anything wrong with the  
4 surgery that caused the clot. It doesn't matter if Mr. Lyon  
5 had the clot from genetics or anything else. It just matters  
6 as to whether or not he had that clot on November 28 when he  
7 saw Dr. Bryan and whether or not Dr. Bryan missed that  
8 diagnosis and caused everything that happened since.

9           You've heard all the doctors, they all agree that  
10 the therapy for blood clots, the administration of Heparin.  
11 I think we might have used the trade name of the low  
12 molecular weight Heparin, Lomonox or Lomonex, I can't  
13 remember which and the Coumadin that comes into the system a  
14 little slower and so you do the Heparin first with shots. In  
15 Mr. Lyon's case I think there's some testimony also could be  
16 IVs, that immediately stops the body from forming more clots.

17           In this case, that therapy didn't start until  
18 December 2. Mr. Lyon had, as counsel would like to say, four  
19 days or not having that treatment and during that period of  
20 time his blood clots increased, his arm developed more clots,  
21 developed so many clots that one of them kicked loose and  
22 went to his lung. That all happened, if Mr. Lyon is telling  
23 the truth, it all happened after he saw Dr. Bryan and Dr.  
24 Bryan could have diagnosed it, putting on the Heparin - well,  
25 sent him to radiology to confirm. We know now that sending

1 him to radiology on the 2<sup>nd</sup> did confirm he had the clots in  
2 his arm, get him on the Heparin to stop anything further from  
3 happening. That didn't happen on the 28<sup>th</sup>, didn't happen in  
4 the 29<sup>th</sup>, didn't happen on the 30<sup>th</sup>, didn't happen on the 1<sup>st</sup>,  
5 didn't happen until December 2<sup>nd</sup>. Mr. Lyon now has, now  
6 because of that had the clot got to his lung. Dr. Serfustini  
7 testified that it's more likely than not that that wouldn't  
8 have happened had Mr. Lyon been put on the Heparin, Coumadin  
9 therapy on the 28<sup>th</sup>. But it did happen because he was not  
10 diagnosed. It did go to his lung and it caused him terrible  
11 lung pain, shortness of breath.

12 We've heard testimony from reading the notes of  
13 doctors that Dr. Sophey said his pain wasn't significant when  
14 he got to the hospital. Dr. Schmitz said his pain was  
15 significant when he saw him and you heard Mr. Lyon testify  
16 that he was in so much pain - this guy that never takes pills  
17 - had to stop on the way to the emergency room to take two  
18 pain pills, been taking pain pills all night, sitting up all  
19 night just waiting to see whether or not four hours had gone  
20 by so he could take another one. This guy doesn't take pain  
21 pills.

22 By the time he got to the hospital, Dr. Sophey saw  
23 him, the pain pills were working. You've heard Mr. Lyon  
24 testify, I mean, if he's a liar, why would he testify as he  
25 did that the pain pills gave him a great deal of relief, the

1 shots of pain medication in the hospital gave him a great  
2 deal of relief, that it stopped the pain while he was taking  
3 the shots. One of the pain pills or pain medications they  
4 gave him, one of the shots made his face feel like it was  
5 elongated and yet they would say, Well, you didn't really  
6 have any pain because Dr. Sophey just recorded pain was not  
7 significant after he was under the pain administration.

8 And the same thing with respect to the records  
9 while he was in the hospital. He didn't say he was in  
10 excruciating pain the whole time he was in the hospital. He  
11 said that the pain medication that they were administering in  
12 the hospital, gave him a great deal of relief, even got rid  
13 of the pain. When he went home he continued to that pain for  
14 five months, couldn't lay down for five minutes.

15 Now if Mr. Lyon is lying, why would he be lying? I  
16 submit the only reason I can think of that he would lie would  
17 be to get more money in this case. If he wanted to lie, why  
18 would he tell you under oath that he was thrilled after five  
19 months had gone by and he didn't have the pain any more? He  
20 could lay down. He hurried into his wife's room to tell her.  
21 Would we have anyway of knowing if he said otherwise? If he  
22 said, No, I still can't sleep, I still have to sit up to  
23 sleep, I still have pain in my chest, there's no way to  
24 measure that if he were lying, he'd be over exaggerating his  
25 pain.

1           Likewise is arm pain. The doctors have testified  
2   that his blood clots in his arm became chronic. That vein in  
3   his arm and it's lower arm, not in the elbow, not in the  
4   shoulder, it's in the lower arm and that's significant  
5   because as we all learned in high school, the way the  
6   circulatory system works is the arteries take the blood down  
7   all the way to the tips of our fingers and then it come back  
8   through the veins. His clot is here, his clot is here in the  
9   brachial artery in the lower arm. The swelling is going to  
10   be in the arm. It's not in the shoulder and (inaudible) as  
11   to what Dr. Bryan did on November 28.

12           It became permanent. It appears to be permanent.  
13   You may decide otherwise but Mr. Lyon has told you it's got a  
14   lot better. He said his arm hurt for two years. He's not  
15   coming in here now and telling you it still hurts, I can't  
16   raise it, I can't do anything any more that I used to could  
17   do. If he were a liar and wanted to increase his damages,  
18   he'd be saying it still hurts and we'd have no way of  
19   knowing. You know, he says, he says he's gotten better,  
20   still bothers him from time to time. I think he said he was  
21   just the other day coiling up an extension cord holding the  
22   reel in his left and pulling the cord and his arm started to  
23   bother him and he had to put it down. That's the kind of  
24   discomfort and pain he's telling you about now. I've seen  
25   people over exaggerating. He's not.

1           So let's look at what the evidence is. I won't  
2 bore you with what happened on what was discussed on the  
3 18<sup>th</sup>. This case is not about whether or not John Lyon gave  
4 informed consent. John Lyon went in for elective surgery and  
5 elected to have it done. He didn't decide not to have it  
6 done, or didn't decide to have it done because he was not  
7 told about blood clots. But it is important that John Lyon  
8 says no time, neither October 31<sup>st</sup> nor November 11<sup>th</sup>, before  
9 the second surgery did Dr. Bryan say anything to him about  
10 blood clots, in any way, shape or form, never said anything  
11 about blood clots. He never said anything about the  
12 possibility of pulmonary embolism which are blood clots in  
13 the lung, never told him anything about that and that's  
14 important because if we're going to look at notes versus  
15 sworn testimony, we've got to look at some things about  
16 notes. One of the things we've learned - I was shocked to  
17 learn this, is that Dr. Bryan puts in phony notes in his  
18 patient's charts. These documents, the notes of November 11  
19 and October 31 are not important because John Lyon was or was  
20 not told about the risk of blood clots. These are important  
21 because they're identical. I was surprised when I saw that  
22 they were identical and I talked to you about that in opening  
23 statement. We now heard from Dr. Bryan that they're  
24 identical because they're phony. He just tells his assistant  
25 to push a key on every patient's file and put this identical

1 record in every patient's file. Yet they want us to rely  
2 upon the notes of Dr. Bryan because they don't say anything  
3 about a swollen arm on 11/28.

4 In fact, I looked through, I think we only have  
5 about eight clinical notes of Dr. Bryan. Four them he's  
6 admitted are phony and what's his answer to that? Well, he  
7 says, I know lots of doctors put in these phony notes and  
8 some of their phony notes are longer than my phony notes.  
9 The point about this case is that you've got to look at notes  
10 for what they are. Notes of doctors are no better than my  
11 notes or your notes. Notes can leave things out, notes can  
12 put things in that weren't there. I don't know about you and  
13 I don't know about Dr. Sophey or anyone else, but I sort of  
14 summarize in the notes as to what somebody told me or what I  
15 observed and my summary may actually, when it comes down to  
16 close scrutiny, be slightly different from what was actually  
17 said or what was actually observed.

18 So now we have memory. Is the memory what you  
19 actually remember or is the memory what the notes refresh  
20 your recollection? You now have recollection separate from  
21 the note that you didn't have before or are you just looking  
22 at the note and relying upon what you normally do? And if  
23 you normally would say something about swelling and it isn't  
24 in that note, then I must not have had anybody tell me about  
25 swelling. Dr. Bryan stands up before you and said, right up

1 to the jury box and said, I just don't know in hindsight what  
2 I could have done differently. I'll tell him what he could  
3 have done differently, to pay attention to what his patient  
4 says. Mr. and Mrs. Lyon said that John went in told the  
5 nurse first and they bring in the nurse whose kind of a non-  
6 event. She works for Dr. Bryan, has worked for him for four  
7 and a half years and the best she's going to offer for him is  
8 she doesn't remember. She did say that it's something she  
9 would have remembered if the man had said my arm is really  
10 swollen and hurts but she didn't remember, doesn't mean  
11 anything other than she doesn't remember.

12 Mr. and Mrs. Lyon both say that John told the nurse  
13 and the nurse said tell the doctor and he told the doctor, he  
14 said, Doctor, my arm is really swollen. I'm in pain. I feel  
15 like it's going to pop. I feel like somebody has put an air  
16 hose in my arm and both of them say Dr. Bryan didn't even  
17 look at his arm. He said he had lumps in his arm. None of  
18 the experts that have come in have said the lumps had any  
19 consequence but it's still, there's nothing in the notes on  
20 the 28<sup>th</sup> about lumps in the arm, nothing about pain in the  
21 arm, nothing about the arm being swollen.

22 Mrs. Lyon says she was there. We've got a  
23 corroborating witness. She heard her husband say, my arm is  
24 swollen doctor, it hurts, feels like it's going to pop, feels  
25 like there's an air hose in it, I've got lumps in my elbow

1 and they both say Dr. Bryan didn't even look at it.  
2 Mr. Lyon says under oath that to him his arm looked the same  
3 on the 28<sup>th</sup> and felt the same on the 28<sup>th</sup> as it did on the 2<sup>nd</sup>  
4 when he saw Dr. Schmitz.

5 I think all of the experts have agreed that Dr.  
6 Schmitz did a great job, he probably saved John's life and he  
7 saw the same thing, saw painful, swollen arm, twice as big as  
8 the other arm, three plus on a scale of four for edema and he  
9 immediately sent him to radiology to find out whether or not  
10 he had a blood clot, and he did.

11 Now the defense seems to be that, well, there's  
12 somewhere else in Dr. Schmitz' notes where he says no  
13 deformity in the elbow and the elbow wasn't swollen and hot.  
14 So this means what? When Dr. Schmitz when he testifies on  
15 the stand under oath, that this man's arm was twice as big as  
16 his other arm, that this man had a terribly swollen arm, that  
17 Dr. Schmitz is lying? That some note about the elbow  
18 counteracts that? I don't think so. Dr. Schmitz testified,  
19 he swore under oath.

20 He said another very important thing in deciding  
21 whether or not John is lying and it's not in his notes. He  
22 said, I distinctly remember that John Lyon told me on the 2<sup>nd</sup>  
23 that he had shown that very swollen arm to Dr. Bryan before  
24 he came to see me. I don't think Dr. Schmitz knew it was the  
25 28<sup>th</sup>, three days before, four days before, five days before

1 but he had a distinct recollection and it's not in his notes.  
2 Does that mean is recollection is not to be trusted? I don't  
3 think so. He said John Lyon told me that he had shown this  
4 swollen arm to Dr. Bryan, long before any lawsuit, long  
5 before John Lyon even knew what was wrong with him. He's  
6 corroborating with Dr. Schmitz' sworn testimony that he had  
7 that swollen arm.

8 Now I think and I think that this is the most  
9 important piece of evidence in all of this, as to whether or  
10 not John and Mary Lyon are liars and that is Mary Lyon  
11 testified under oath that days, two or three days before the  
12 appointment of November 28, before the appointment with Dr.  
13 Bryan, John's arm was swollen, John was in pain. He was in  
14 so much pain, his arm was so swollen she was rubbing it and  
15 putting heat on it. I don't know if you remember but she got  
16 a catch in her voice, started to break up because she then  
17 said, I later found out that was the worst thing to do. And  
18 yet the defense suggests she's a liar.

19 I think John is a tough guy and then Mary said two  
20 or three days before the 28<sup>th</sup>, let's go see the doctor, your  
21 arm is so swollen and sore, I'm rubbing it, putting heat on  
22 it, let's go see a doctor. John says, no, I've got an  
23 appointment on the 28<sup>th</sup>, let's just shown him the arm then.  
24 That's a liar? Mrs. Lyon is a liar? I'm sorry that - I'm  
25 sorry I feel so strongly about this but I have a great

1     respect for what people say under oath and the challenge you  
2     can put to that with cross examination.

3             The evidence in this case is overwhelming, John  
4     Lyon has a swollen, painful arm on the 28<sup>th</sup> and before that.  
5     He told Dr. Bryan, he told the nurse and they did nothing.  
6     Didn't even look at his arm, came into the room, John says my  
7     arm is really swollen - he says, How you doing? He says my  
8     arm is really swollen, hurts, feels like it's going to pop,  
9     glanced maybe at his arm and then took the bandage off, took  
10    the sling off, looked at the shoulder where the surgery had  
11    been done. Apparently checks sensation in his hand if the  
12    note is to be believed, looking at the sites of the surgery.

13            Let's give Dr. Bryan some benefit of the doubt. I  
14    don't think he really remembers that visit. I don't really  
15    know from his testimony when I was cross examining him,  
16    exactly how that all finally came out. He had 30 to 50  
17    patients that day. I asked him, Well, can you remember any  
18    one, even one of the other patients, what they said? He  
19    said, I would have to look at my notes. I don't think Dr.  
20    Bryan heard John when he said, my arm is painful, it's  
21    swollen. I don't know why that didn't register with him.  
22    Dr. Bryan is moving from one patient to another, seeing 30 to  
23    50, has seen hundreds, even thousands by the time he knew  
24    there was any issue over what he saw on that day. He comes  
25    in and he's got a man who has undergone surgery and he wants

1 to look at the surgical wounds and I don't think he was  
2 paying attention to John Lyon, and that's negligence.

3 Their own expert, Dr. Vanderhooft, he said this  
4 morning right on the stand, if he had the same swollen arm -  
5 in fact I think he said if he had an significantly swollen  
6 arm on the 28<sup>th</sup> it would be a breach of the standard of care  
7 of doctors in this community not to send him, not to send  
8 John to radiology to find out if he had a blood clot or if  
9 there was infection developing from surgery.

10 Dr. Vanderhooft, very, very carefully limited his  
11 direct testimony and his opinion to his reading of the chart,  
12 the record, the notes and specifically he relied upon three  
13 doctor notes more than anything. He relied on Dr. Bryan's  
14 notes and said, Well, he doesn't say anything about swelling,  
15 so there must not have been any. Then (inaudible)  
16 significant swelling. Well, it doesn't say there's minor  
17 swelling, it doesn't say there's normal swelling. There's  
18 nothing about swelling at all.

19 And then they go into this 3-day duration defense  
20 and on December 2, Dr. Schmitz says in his notes, the swollen  
21 arm was of three days duration. Then we got into some, how  
22 do you count the days, 28<sup>th</sup> to 29<sup>th</sup>, one day, 29<sup>th</sup> to 30<sup>th</sup> is  
23 two days, 30<sup>th</sup> to the 1<sup>st</sup> is three days and it's now the  
24 fourth day, it was three days duration and that takes it back  
25 to when Mr. Lyon say Dr. Bryan. But it doesn't matter. I

1 don't know if you remember, but what counsel, while Mr.  
2 Epperson and I were fencing back and forth over this 3-day  
3 duration note, Dr. Schmitz was shaking his head and I finally  
4 asked him, why are you shaking your head and he said 'cause  
5 this is not the point. The point is I said days, I didn't  
6 say weeks, I didn't say months, I said the duration of this  
7 swollen arm was days. It doesn't mean anything that I put  
8 three. It could have been four, could have been five, could  
9 have been six. You're just making too big a deal out of  
10 this. You can't just take one thing out of all these notes  
11 and make such a big deal.

12 Dr. Sophey, by the way, he said about three days.  
13 About three days could be four days, could be two days. I  
14 don't know what that means.

15 This is just a interesting little note. If these  
16 notes are so important, this is Dr. Alder on December 2, he's  
17 the radiologist who Dr. Schmitz sent John to and he's the one  
18 who determined that there was a pulmonary blood clot, a lung  
19 blood clot and then it says down here in comment, "findings  
20 were discussed with Dr. Schmitz immediately following the  
21 examination by (inaudible). A preliminary report was also  
22 faxed to his office. The patient has been obstructed to  
23 report immediately to the emergency room." Of course he  
24 means he was instructed. But had John Lyon died on the way  
25 to the emergency room some clever lawyer could be taking that

1 note and saying, Well, he was obstructed from getting to the  
2 emergency room, it was Ogden Clinic that caused the problem,  
3 not Dr. Bryan. You can't over read into one note out of the  
4 entire picture and you can't read one note without regard to  
5 the sworn testimony.

6 Dr. Schmitz testified what he saw. John Lyon  
7 testified his arm was the same that day as it was on the  
8 28<sup>th</sup>. Dr. Schmitz, everybody agrees did the right thing,  
9 seeing an arm like that and Dr. Vanderhooft said, you know,  
10 this thing on numb hands, that's not relevant. We've gone -  
11 I don't know how many times we've gone into John Lyon writing  
12 a note that said his hand wasn't numb and saying under oath  
13 that he thought his hand was numb. It doesn't matter if his  
14 hand was numb. It doesn't matter if he had lumps in his arm  
15 other than it's something you would expect a doctor to look  
16 at if he said I had lumps in my arm and John and Mary Lyon  
17 said Dr. Bryan didn't even look at his arm.

18 Now, the only thing that's important is here's a  
19 man with a swollen, painful arm. That immediately raises the  
20 prospect of a blood clot. Now we all agree it's rare, but  
21 it's 100 percent when it happens to a patient and none of  
22 these doctors, even Dr. Vanderhooft didn't say because it's  
23 rare I wouldn't be concerned if I saw the swollen arm. Dr.  
24 Vanderhooft this morning testifying on behalf of the  
25 defendant, Dr. Bryan, Dr. Vanderhooft said, if Mr. Lyon's arm

1 was swollen on the 28<sup>th</sup> it would be a violation of the  
2 standard of care not to send Mr. Lyon for further followup to  
3 find out if he had a blood clot. It's that simple. It's  
4 that simple. If he had a swollen arm, forget about  
5 everything else, forget about rarity, it's a red herring as  
6 to whether this is rare or not, it's something these doctors  
7 are taught in medical school. Why do they all know how rare  
8 it is? It's because they are taught it in medical school and  
9 they all have agreed that it's something you've got to watch  
10 out for and had Mr. Lyon, as he testified under oath he did,  
11 had this swollen, painful arm, it should have been treated on  
12 the 28<sup>th</sup> and it's negligence not to do that.

13           So that's the case, the significant point in a  
14 nutshell. What was John Lyon's arm like on the 28<sup>th</sup>? Is he  
15 now coming in here and lying that he didn't have a swollen  
16 arm on the 28<sup>th</sup> or is he telling the truth, he had a swollen  
17 arm, told Dr. Bryan about it and Dr. Bryan didn't even look  
18 at it, checked the wound out. John Lyon then said, what did  
19 you do and he said I don't know, I'll have to go check my  
20 notes, comes back 15 minutes later and says, everything looks  
21 okay and Dr. Bryan is off to the next of the 30, 50 patients  
22 he's seeing that day. Doesn't mean he's a bad doctor, but  
23 when he stands up here and says I don't know in hindsight  
24 what I could do differently, that's an easy answer for you,  
25 for me. He can listen to his patient. He can look at the

1 arm when the guy says my arm is swollen.

2 I think Dr. Bryan is a very proud man and I think  
3 he may have some denial when he goes back and looks at his  
4 notes and says I didn't say swollen, so it must not have been  
5 swollen and I don't know what I can do if it wasn't swollen  
6 and nobody is saying he should have done anything if it  
7 wasn't swollen. We're not asking him to send everybody to  
8 the radiology for a sonagram if they come in after surgery  
9 and have some surgical swelling. We're asking him to listen  
10 to his patients and if the patient says I've got a sore,  
11 swollen arm following surgery, look at it, feel it, measure  
12 it, make a note about it or if it's not, make a note that  
13 it's not, patient complaints of swollen arm, checked it and  
14 it looks okay.

15 There's a very interesting little piece of evidence  
16 on Dr. Bryan's notes and that is John Lyon some six months  
17 later, May of 2006 went in to get a copy of all of Dr.  
18 Bryan's notes. This is six months later and walks in and the  
19 assistant there, probably Ms. Brockbrader, he asks her for  
20 the notes and she says, Oh, you're in luck, we just finished  
21 getting those into the computer. This is months from the  
22 time that Mr. Lyon had seen Dr. Bryan and it is, I think it's  
23 months even from the time he very last saw Dr. Bryan. You  
24 heard Dr. Bryan say I don't take hand notes. I just go and  
25 dictate them. If he's preparing these notes after, he's

1 preparing them in May or even April, this is after he knows  
2 that John Lyon has been in the hospital with a pulmonary  
3 embolism. All the doctors agree that a pulmonary embolism is  
4 life threatening, potentially life threatening. John luckily  
5 didn't die. I'd be standing here a lot more unhappy. It's  
6 rare but it's life threatening.

7 Counsel like to talk about hoofbeats and if you  
8 hear hoofbeats you're going to assume it's a horse instead of  
9 a zebra and Dr. Serfustini if it's Christmas time, it's a  
10 reindeer. The point is, these hoofbeats weren't checked out.  
11 Dr. Bryan made no effort to find out if it was a reindeer or  
12 a zebra and these hoofbeats were a thundering herd heading  
13 straight for John Lyon.

14 John, if there's one thing that ought to be clear  
15 is that John is a tough guy. I think we heard that he had  
16 his leg broken in an accident where a friend fell off a  
17 snowmobile and the snowmobile crashed into his snowmobile,  
18 pinned his leg against the snowmobile, turns out he broke it.  
19 He walked around on for six6 months with a broken leg before  
20 he saw a doctor. He saw Dr. Schmitz, Dr. Schmitz said,  
21 you've got a broken leg, it's healing on its own. He had  
22 surgery on his elbow, went to work the next day. My gosh, he  
23 had discs removed in his neck and plates put in and his neck  
24 fused and he drove his grandkids to Disneyland the next day.  
25 But please don't confuse John Lyon being able to put up with

1 the pain, more pain than I could. Don't confuse that with  
2 the pain and suffering that was occasioned in this case.

3 Now, you've heard the instruction that John must  
4 prove negligence and that that negligence caused his problem.  
5 I don't think there's any dispute in the testimony that it  
6 was more likely than not that the inattention to the blood  
7 clot on November 28 that was in his arm, resulted in the clot  
8 hitting his lung, all of the pain that that caused. That  
9 pain alone, that pain alone for 5 months, what's that worth?  
10 There was some suggestion in opening and I suppose Mr.  
11 Epperson may hit it again that, Gee, the clot would have been  
12 in his arm anyway, he still had these problems with his arm,  
13 doesn't matter whether it was diagnosed on the 28<sup>th</sup> or the  
14 2<sup>nd</sup>. It does. You heard the testimony. The testimony is  
15 the medication for clots stops the formation of further  
16 clots. He did not have that medication for four days.  
17 During that four days the clotting continued to the point it  
18 threw one into his lung. That affected his arm, that affects  
19 his arm today. What's that worth? John says he had two  
20 years of constant pain and throbbing in his arm. He has  
21 started to get some relief. He didn't like taking drugs but  
22 I submit because he's a tough guy and will tough out pain,  
23 doesn't mean that there wasn't pain and suffering caused by  
24 Dr. Bryan's negligence, if you find Dr. Bryan was negligent.

25 John doesn't come in as I said earlier and tell you

1 now that he still can't use his arm, he can't do the things  
2 he used to do, that he's virtually useless because of his  
3 arm. He has to pay somebody to mow his lawn and - no, he  
4 says it's gotten a lot better. Some days it doesn't bother him  
5 at all, most days it's just a couple of times during the day.  
6 But it's gone on for a lot of years now and it's up for you  
7 to - up to you to decide whether or not it's likely to  
8 continue for the rest of his life.

9           You heard the testimony from Dr. Schmitz and Dr.  
10 Serfustini that given the sonagram that was done five months  
11 later, six months later, May of 2006 that showed that this  
12 brachial artery was clotted and another brachial vein, excuse  
13 me, was clotted still and another vein was clotted still,  
14 that that would cause continuing pain. There was some  
15 suggestionm yeah, but there's other veins that drain the arm  
16 but that doesn't mean this vein isn't there for a reason.  
17 John says the pain that he has now is in this forearm, top of  
18 his forearm and his bicep. It's a muscle pain. It's not  
19 like the pain that was in his neck from before and after the  
20 neck surgery. It's not like a tennis elbow pain. From the  
21 doctors, both Dr. Schmitz and Dr. Serfustini said, that's  
22 consistent with not having complete blood flow through the  
23 veins. Dr. Schmitz said that over time, collaterals may  
24 form. Some people don't form them, others do and the  
25 collateral just means your body just makes other veins,

1 branch out to go around the part that isn't working. And  
2 that may still happen with John. But you have to take into  
3 consideration the possibility that this could be a much  
4 longer term discomfort to him.

5 John went back to see Dr. Bryan a month later,  
6 December 28. Dr. Bryan came in and he said, Did you hear  
7 what happened to me? Dr. Bryan said, I think somebody called  
8 and John said, I told you when I was in here my arm was  
9 swollen and I ended up in the hospital with blood clots and  
10 what's the evidence of what Dr. Bryan said back? Did he say  
11 I'm sorry it happened to you, forget about whether or not he  
12 thought he was at fault, did he say I'm sorry that happened  
13 to you? No, the testimony is he raised his voice, glared at  
14 John and I said if I send everybody that has swelling to  
15 x-ray, x-ray would be clogged up and nobody could use it. I  
16 think that's consistent with what Dr. Bryan was saying on the  
17 stand. He said something like, I think he said on the stand,  
18 I don't think he was even asked about the meeting with John  
19 Lyon on the 28<sup>th</sup> of December but he was asked, he was asked  
20 something and he said right to you, I can't send everybody to  
21 x-ray. Sound familiar? I can't send everybody to x-ray,  
22 they'll be clogged up, and then said something like I've got  
23 to worry about our insurance rates, the health insurance  
24 crisis and everything. Well, that may be if a person is in  
25 with a little swelling around the wound where he had the

1 surgery. But that's not the case when it's life threatening  
2 or potentially life threatening no matter how rare that may  
3 be, John Lyon was not just another person to send to x-ray  
4 post surgery. John Lyon had a sore, swollen arm and we know  
5 that a few days later when he saw Dr. Schmitz, Dr. Schmitz  
6 sent him to radiology and they confirmed. All the doctors  
7 testified and said Dr. Schmitz did the right thing. I think  
8 even Dr. Vanderhooft said that had the same presentation on  
9 the arm along, forget about the blood clot in the lung, on  
10 the arm alone, had Dr. Bryan seen the same thing that Dr.  
11 Schmitz saw, he should have sent him to radiology and that  
12 would have done it. That's all it would have taken, diagnose  
13 the blood clot, get him on Heparin, stop any further clots  
14 from forming, reduce greatly the risk that a clot would break  
15 loose and go to his lung and cause a potential life  
16 threatening event.

17 This, of course, means a lot to both parties, this  
18 case means a lot to John Lyon but I would submit to you also  
19 in trying to decide is he somebody just in here trying to  
20 make a buck, he hasn't sued anybody before, ever, hasn't made  
21 a claim ever. The guy that smashed his snowmobile, he hasn't  
22 even told him. John Lyon is, according to the defense of  
23 this case, must be lying because Dr. Bryan didn't put  
24 anything in his notes that day about a swollen, painful arm?

25 John Lyon was rear-ended, had a rear-end collision,

1 sitting with his wife driving and a vehicle ran into them,  
2 rear-end, went to the hospital with whiplash symptoms. John  
3 didn't make any claim, he didn't make any claim to anybody.  
4 This guy, if he's - I just submit to you that you cannot,  
5 from the evidence and from what you're seen of John, what you  
6 know of his history, you can't decide that John Lyon is lying  
7 and Mary Lyon is lying, Mary Lyon wasn't rubbing his arm two  
8 or three days before he saw Dr. Bryan.

9 Well, what's all that worth, you know? It's -  
10 can't put evidence on, can't bring in charts. I guess we  
11 could bring in old lawyers for days in the courtroom to tell  
12 you what their experience has been on what cases are worth  
13 but it's really just up to you and you're not to do this out  
14 of any sympathy for join or anger against Dr. Bryan. I'm not  
15 asking that, John's not asking that. John just wants  
16 justice. We just want you to use your fair, compassionate,  
17 calm, consideration and if you find that Dr. Bryan was  
18 negligent, return damages to John that will fairly compensate  
19 for what he went through.

20 When I was a young lawyer I was always quite shy  
21 about telling the jury the number I had in my mind and after  
22 years I had lots of jurors say why didn't you tell us, we  
23 wanted to know but it's just a suggestion. This is just me,  
24 just Scott Savage just making a suggestion and I suggest this  
25 case is worth \$450,000 for this pain and suffering damage.

1 You may think it should be higher, you may think it should be  
2 lower and I'll tell you, I'll accept whatever number you in  
3 your collective judgment think is appropriate. It's a  
4 beautiful system we have. It's an ingenious system. Your  
5 collective recall is better than mine, better than Mr.  
6 Epperson. Your collective judgement is better than mine and  
7 I also (inaudible) from years of experience, I think  
8 (inaudible) jurors can be better than judges.

9 I get a chance to talk to you briefly after Mr.  
10 Epperson and I will look forward to that. I'll keep it much  
11 briefer than this one. I think you've heard all the  
12 evidence, you've heard enough from me but I thank you again  
13 for your time and attention and I hope as you walk out of  
14 here, after you've reached a verdict, you think this was a  
15 good experience, that it showed you something about our  
16 system that's a little different from watching the OJ trial  
17 or Judge Judy and I hope you gain just one small measure of  
18 the respect I have for the system. Thank you very much. I  
19 look forward to talking to you briefly again.

20 THE COURT: Thank you.

21 Mr. Epperson?

22 MR. EPPERSON: Thank you. Could you remove your  
23 boards, Mr. Savage? Would you mind?

24 MR. SAVAGE: Oh sure.

25 MR. EPPERSON: I would appreciate it very much.

1           MR. SAVAGE: You would appreciate (inaudible).

2           MR. EPPERSON: At the beginning of this case,  
3 ladies and gentlemen of the jury and everyone here, I  
4 indicated that this was an important case for my client, Dr.  
5 Bryan, who spent over 32 years here serving in this community  
6 providing orthopedic care to many, many patients. It's  
7 difficult for a physician to be accused of malpractice. And  
8 Dr. Bryan has been here to try to respond to the allegations  
9 that have been brought.

10           From the suggestion that you just heard that this  
11 case would be reasonable for \$450,000 I think you can better  
12 appreciate why we're here today. Not only do we dispute  
13 negligence on the part of Dr. Bryan, but those sorts of  
14 figures are totally, I would suggest unsupported by the facts  
15 in evidence. But I think it will give you an understanding  
16 as to why Dr. Bryan is here today not only challenging  
17 liability but damages.

18           I've always had a good feel working in my law  
19 office, in the building and in the very office where my  
20 great-grandfather started practice in June of 1895. We have  
21 many historic things from that early era. But one thing I  
22 cherished as a young man is before he and his brother passed  
23 away who started the firm, he always spoke with great  
24 reverence to the statue that was put up shortly after he  
25 began practice on the southern spire of the City and County

1 Building in downtown Salt Lake City and on that spire is a  
2 beautiful statue of what's called Lady Justice. Lady Justice  
3 is depicted standing with a blindfold on, not that she is  
4 blind but it's symbolic that she not be distracted by things  
5 that should not distract her in dispensing justice or the law  
6 and one of the jury instructions - and I'm going to highlight  
7 instructions as I weave in the facts, because the Court has  
8 instructed you that he instructs you as to law which you must  
9 apply but you are the exclusive finders of fact. There are  
10 some real factual disputes in this case. I've never called  
11 anyone a liar but there are factual disputes, a lot of them  
12 and that's why you are here. You are the finders of fact and  
13 all we can do is present the evidence and let you decide who  
14 is most credible and where justice should be. But the jury  
15 Instruction No. 9, "This case must not be decided for or  
16 against anyone because you feel sorry or angry at anyone.  
17 It's your duty to decide this case based on the facts and the  
18 law without regard to sympathy, passion, prejudice or public  
19 (inaudible)." Once again, that is the symbolism of Lady  
20 Justice with regard to the blindfold. And so that's why in  
21 jury voir dire, you were questioned about your willingness to  
22 serve and to apply the law. One question that I appreciated  
23 so much you're responding positively to was your commitment  
24 that you would not let the natural sympathy that we all feel  
25 for misfortune, complications or bad things happening to good

1 people affect your judgment because that's the symbolism of  
2 the blindfold, not being distracted by things that you  
3 shouldn't be. You are now judges, you're not advocates.

4 Another jury instruction that I think has always  
5 been so significant to me is the burden of proof because in  
6 the American system of justice they allow anyone essentially  
7 to file a complaint in the courts and to make an allegation  
8 and if the defendant, such as Dr. Bryan does not file an  
9 answer within 30 days or 20 days, then a default judgment is  
10 taken against them. So, a defendant must step forward, get  
11 counsel, appear and defend himself against allegations in a  
12 civil system and because of that, the law says it's only fair  
13 to put what's called the burden of proof upon that plaintiff,  
14 upon that party who is invoking the legal system and causing  
15 the defendant to appear and so the burden of proof is so  
16 beautifully depicted, also by Lady Justice, because she is  
17 holding and I'm sure you're seen those statues or pictures, a  
18 balance scale in her hands, symbolic of weighing the evidence  
19 and the instruction that the Court has given you on burden of  
20 proof are in Instruction No. 19. A lot of these instructions  
21 kind of clump together and so I put together 19, 20 and 18  
22 essentially, they're all burden of proof instructions and it  
23 comments that in 19, "A party seeking to prove a fact bears  
24 the burden of proof. In doing so, the party must prove the  
25 truth of the allegation by a preponderance of the evidence.

1 Unless the evidence so preponderates in support of that  
2 allegation of fact, you shall find that the allegation is not  
3 true."

4 What does it mean by preponderates? I think the  
5 Special Verdict Form describes it as good as anything.  
6 Eventually you're asked to answer a question or two  
7 questions. It's called the verdict form and the verdict form  
8 will say, if you find the evidence is so equally balance that  
9 you cannot determine a preponderance of the evidence, then, -  
10 or if you find that the evidence preponderates against the  
11 issue presented, answer no. Question, was the defendant,  
12 Donald Bryan M.D. negligent? In other words, if even the  
13 evidence is evenly balanced, plaintiffs loose and why is  
14 that? Because our system of justice requires that someone  
15 implementing the cost, the expense, the hardship, the  
16 heartache of a system in defense, they need to prevail on  
17 their proof. If not, you've been instructed by the Court  
18 essentially to answer no to Dr. Bryan's negligence, even if  
19 it's equal.

20 As far as your role as witnesses, I mean dealing  
21 with witnesses, there's an Instruction No. 12 that says  
22 you're the exclusive judges of the credibility of the  
23 witnesses and the weight to give the evidence. That's your  
24 unique role and why we need you and what a wonderful system  
25 the jury system is. As I see you from so many backgrounds,

1 walks of life, education, it's an amazing system. A Judge  
2 can be wonderful but he may have his own events. To get eight  
3 people and an alternate, altogether who can collectively have  
4 their wisdom, their background and to find justice is a  
5 unique part of our government and constitution. And so you  
6 collectively are to consider the evidence. The witness's  
7 conduct while testifying, their frankness, their capacity to  
8 remember. You've been instructed, for example, "You may  
9 believe that a witness on some former occasion made  
10 statements inconsistent with that witness's testimony given  
11 here in this case. The effect of such evidence upon the  
12 credibility of the witness is for you to determine. If you  
13 believe any witness has willfully testified falsely as to any  
14 material matter, you may disregard the entire testimony of  
15 that witness except as that witness may have been  
16 corroborated by other credible evidence."

17 Now, I've been doing this a lot of years and I  
18 don't have too many what I call Perry Mason moments in trial.  
19 Now some of the younger jurors are going to have to ask what  
20 I mean by Perry Mason moments. That's an old movie - show  
21 about Perry Mason, the lawyer, and he would have some amazing  
22 concessions from witnesses at trial and it would make a great  
23 TV drama. At least it was per the era. I think TV has  
24 improved but I actually had one in this case. I had one in  
25 this courtroom and you folks saw it. And what do I mean by

1     that? We emphasized the testimony in the deposition, that is  
2     that on November 28 the crux of this presentation, where what  
3     was said and done became so important, we had Mr. Lyon asked  
4     on direct examination, now you work for the railroad, you're  
5     a notetaker. Why do you take notes? Oh, to refresh your  
6     memory and that's what you've done in your business. Can you  
7     believe those, are the accurate, are they (inaudible)? Yes,  
8     essentially (inaudible). When did you take notes after this?  
9     Well, some started about a month after when it's fresh and  
10    it's credible and so then we go to a deposition in 2008, not  
11    December now, late December of '05 but in '08 or so and take  
12    a deposition under oath. Four times I get testimony, I  
13    absolutely told that nurse I have swelling and this hand is  
14    "totally numb" and by the way, there's pressure and it's like  
15    a pressure hose and it feels like it's going to burst. These  
16    are specific important allegations. So as this case as  
17    plaintiff said, have been suggesting, all bears upon what  
18    this patient told the doctor on the 28<sup>th</sup> and one of those key  
19    things that they were so sure of was the numbness of the  
20    hand, I thought that was important information. Well, after  
21    the deposition is taken, we get this statement and I'm able  
22    to compare the statement that was done a month later and then  
23    I suggest at that time, wow, that's not consistent with the  
24    deposition testimony and so in court here as we start to read  
25    this, which I think it's a reasonable inquiry, I asked to be

1 read, Okay, the statement that was made in December just  
2 weeks after this, you're describing the events of the 15<sup>th</sup>  
3 after the surgery, after he performed surgery on my rotator  
4 cuff, left hand, etc., he talks about November 18 he returned  
5 to his office, removed the bandages, we'll ask him what he  
6 actually did to my shoulder and they were saying he didn't  
7 really tell me what he did to my shoulder much, I had to keep  
8 asking and asking. Remember that in discovery? And yet  
9 right in the statement from three or four weeks later, it  
10 talks about how he explained what he had done. It says, we  
11 asked him what he actually did to my shoulder and he said, I  
12 pulled it together and also repaired a lateral tear. Then he  
13 said, "I had done three rotator cuffs that day and I will  
14 need to check my surgical notes to see, to be sure what was  
15 done. He left the room, he got busy. We later left not  
16 knowing for sure what was done. That's what they said, made  
17 this comment. But then, we returned on November 28, remember  
18 that Mr. Lyon said, why am I keeping these notes? He said, I  
19 thought I was going to die and I needed to preserve this  
20 testimony or there was a chance. It would seem to me that  
21 someone who within weeks is so concerned about preserving  
22 testimony, would do it as accurately as they can. It would  
23 be fresher on their mind. So as I read then, or have him  
24 read through this, "We returned on November 28 to remove the  
25 stitches from my left hand and index finger. The nurse

1 arrived in the room, Karen? Kathy? Not sure of her name, she  
2 asked how I was doing. I told her with Mary present, my hand  
3 hasn't been going numb" and you recall as he read that he  
4 said, oh, that should have said, has been going numb and but  
5 then it says although, which is not going to match with  
6 hasn't - "although my left arm was very swollen and there  
7 were lumps in it. She then started to remove the stitches.  
8 She said, I'll have to have the man remove three because I  
9 can't get them. I told her she could and she said, I'm a  
10 digger, I like digging. She eventually got them out." Well,  
11 and then after clarification we turn it over. The doctor  
12 then arrived, he asked how I was and I told him the same as I  
13 said to his nurse, my hand wasn't going numb although my arm  
14 was very swollen with lumps.

15 I would suggest that the very best evidence of  
16 those records that were in existence, for example, before a  
17 lawsuit was filed or contemplated, the treatment records of  
18 the three physicians that Dr. Vanderhooft relied upon, these  
19 notes were very early when memory would have been fresh. So  
20 I think what's credible is not only the issue of the hand on  
21 these notes because this is the documented notes in case I  
22 die or what happened on the 28<sup>th</sup>. We read through it and I  
23 think it's important to read through some of the rest of  
24 this. "Okay, he checked my hands and asked about movement.  
25 He then took off the sling from my left arm and slowly lifted

1 it upward. It was only able to reach even with my head. My  
2 only previous instructions from 18<sup>th</sup> of November was to  
3 rotate my arm like a pendulum and use my right hand to lift  
4 my left arm up four times daily, use the left fingers to walk  
5 like a spider up the wall while lifting with the right hand.  
6 He says that I should continue at least four times daily.  
7 The only other instructions we had was keep the sling on for  
8 six weeks until December 28 and no lifting. I again asked  
9 the doctor what was actually done. He - can't read that -  
10 and got the surgical notes and said he repaired a large  
11 lateral tear, nothing was ever said about the swelling or the  
12 lumps in the arm. So Mary and I figured it was part of  
13 recuperation." Well, I think it's significant that as  
14 they're recording three or four weeks later Mr. Lyon what was  
15 discussed, is there any complaint on the face of this whole  
16 narrative referencing pain? None. It just says I'm swollen,  
17 yeah, I'm swollen. Is there any suggestion on this entire  
18 note about pressure? About popping? About pressure hose?  
19 There's none. And so one begins to wonder if through time  
20 and through other things your memory does change or in an  
21 effort to achieve a \$450,000 recovery, that there's  
22 additional emphasis placed.

23 But this is why you are the exclusive fact finders.  
24 That's your exclusive role. All I can do as a defense  
25 lawyer, I never considered myself that clever. All I can do

1 is try to get the records, put them in front of you and let  
2 you decide. But how would you defend on a claim against Dr.  
3 Bryan that what you did on the 28<sup>th</sup> is the basis of this  
4 lawsuit, then show the notes and what would support him? His  
5 testimony and his note of the 28<sup>th</sup>, what does it say?  
6 Sensation in his hand is intact. Well, I think now this note  
7 supports Dr. Bryan. This was an accurate note and that's why  
8 this morning with Dr. Vanderhooft, I felt it so important to  
9 emphasize that you know, this whole case of the plaintiff's  
10 is built upon this chair with four legs and one of those legs  
11 was I told him that I was totally numb, therefore, the index  
12 of suspicion should be higher. Well, I think we've ruled  
13 that out. And so what's the next thing? I told them about  
14 how painful this was. There is no mention on the entire  
15 narrative of pain. Switching from Ibuprofen to Voltaren, you  
16 know from these products, they're as much for swelling as  
17 they are for pain, yet they have dual purposes and in any  
18 event, there's nothing about pain here. I'm sure he had some  
19 pain. I'm sure he had swelling, but the question is one of  
20 degree and I think it's so important that Dr. Vanderhooft  
21 said, I see them at eight days because an action of swelling  
22 is more like three to seven or whatever. Well, Dr. Bryan is  
23 a little compulsive. He saw him at three and then ten days  
24 after that. I would suggest that may be above the standard  
25 of care. So the pain issue was not supported on that and

1 again, the bursting and all of those descriptions weren't  
2 supported on that as well or in the other records.

3 And then Dr. Bryan said something interesting. He  
4 said, my physical examination and what I did would be  
5 inconsistent with a description of, that he gives, of an arm  
6 twice as big and swollen the entire length. He talks about  
7 what it he did. And so I think that is the significant  
8 testimony because I think Dr. Vanderhooft shared that.

9 I've got to tell you, I liked Dr. Serfustini and I  
10 told you at the beginning of this case that he was perhaps  
11 one of my very best witnesses in many respects. He agreed,  
12 it's so rare that I have the luxury of getting, taking a  
13 deposition and doing work with a plaintiff's expert and to be  
14 able to get him to say everything my client did surgically  
15 was great, it was indicated, it was well done, he had a great  
16 result, I'd be happy if I got these results. Well, wow, I'm  
17 thinking okay, I'm two-thirds of the way home and then I  
18 said, well where are your criticisms then Dr. Serfustini? He  
19 said, Well, a DVT wasn't diagnosed in an upper extremity. And  
20 I say okay, have you ever had a DVT in an upper extremity  
21 after your incredible career - and he has one, I'll give him  
22 that. I like this guy and he said no, I've never had one.  
23 Well, Dr. Serfustini in all of your years then have you ever  
24 sent someone for an ultrasound after these kind of surgeries  
25 and he says no. And I'm thinking to myself, I'm not the fact

1 finder, you are, but I think to myself if the expert brought  
2 in has never seen this, has never sent someone for an  
3 ultrasound how can they come in here and suggest that my  
4 client, Dr. Bryan, should have some prophetic insight to be  
5 able to suspect a clot, diagnose it, prevent a pulmonary  
6 embolus. You have to weigh that.

7           So you recall what I did with Dr. Serfustini. I  
8 said now Dr. Serfustini, I really only ask experts three  
9 questions, do you have an opinion? Upon what is it based?  
10 And what is it. The key is upon what is it based. That  
11 includes education, training, work experience. Oh, he's got  
12 that. But then I said, Okay, what are your legs and what do  
13 you based them on in this case? And he said well on the face  
14 of this document and if it presents as Dr. Bryan says, he's  
15 well within the standard of care. Well, what are you  
16 assuming then that might be different? Well, if we believe  
17 Mr. Lyon or we accept everything that was said, then there's  
18 an index of suspicion. What does Dr. Serfustini include?  
19 The numbness, the pain, and I do think he fudged a little on  
20 that. I said, now come on, Ibuprofen, Voltaren, that's not  
21 narcotics, Dr. Serfustini. That's not pulling out the big  
22 gun. I was surprised we get this comment on a big gun. I  
23 thought Dr. Vanderhooft was much more credible, but again,  
24 that's your decision. To say that no, these are both the  
25 same, it's the Dr. Pepper versus the Coke and this isn't a

1 narcotic, this isn't pulling out a big gun. So pain isn't a  
2 red flag that's documented in the record. It wasn't on his  
3 notes. And so the pain was one of his feet that was taken  
4 out from underneath him.

5           The numb hand was taken out from underneath him.  
6 And he's saying, Well, I'm assuming then that they said about  
7 the bursting, the popping and the pressure hose and that  
8 would be, you know, something that a doc ought to kind of  
9 listen to if it's all said and I think that may be true. And  
10 so although Dr. Vanderhooft said I have people say that and  
11 it's not diagnostic but, you know, you might look a little  
12 more is kind of what he was saying. You remember better than  
13 I do. So I thought, okay, I'm defending Dr. Bryan, they're  
14 suggesting now that the nurse was involved. First of all,  
15 how do I prove that's the right nurse and find her and I  
16 thought it might be the medical assistant but wasn't sure and  
17 I thought, would she have an independent memory of this  
18 event? So I get hold of Sarah and it wasn't that long ago,  
19 and I say Sarah you're on maternity leave and you've been out  
20 for four or five weeks, have you ever talked to Dr. Bryan  
21 about this?

22           No, I haven't.

23           And I send records, do you remember this person?  
24 No independent memory but these records I've looked through  
25 and I thought she was very credible on this issue. I said

1 Sarah, first of all, does this sound like you and that's what  
2 I thought was kind of cute, she said, I'm a picker, that's  
3 me, I say the man and I'm the assistant. I think she tied  
4 in, yeah, that's me. They even look kind of familiar. Then  
5 what else can I say? There's no charting, I admit there's no  
6 charting but I say, Sarah, not only for Dr. Bryan but for Dr.  
7 Madsen, you've worked for seven years as McKay Dee and other  
8 places. Now you've worked there for four years plus, you've  
9 seen a lot shoulders, you know how they come in swollen. Do  
10 you think you would have an independent memory though if  
11 someone were to say, and then I repeated everything that was  
12 claimed to have been said, a swollen arm that now Dr. Schmitz  
13 is saying is twice as big and she said, I sure think I'd  
14 remember that.

15 Have you ever had that?

16 No.

17 Do you think you'd recall that sort of an event?

18 I do.

19 Well, I think that's credible because I think it  
20 gives support.

21 And wives are wonderful, they're supportive. Mary  
22 is wonderful. She's supportive of her husband, but in  
23 fairness that's why I take depositions under oath. So I say,  
24 what do you remember, Mary, about the 28<sup>th</sup>, what are you  
25 memories independent, you know, from your husband's? And I

1 read that as part of what was involved and the comment there  
2 was, basically November 28 she says, Well, I know that John  
3 told them about the swelling and the raised, the swelling of  
4 the arm and the raised, and that he was in pain and I  
5 remember Dr. Bryan essentially saying that the arm was  
6 healing well and that's all I remember. So that's what I get  
7 at the time - and we read that to you as I was impeaching her  
8 or commenting that at the time of the trial, of her testimony  
9 on the stand. And so again, wives are wonderful but I think  
10 that that's what the testimony was under oath.

11 And let me just move onto another instruction if I  
12 could. What is the standard of care of a physician? This is  
13 an important Instruction No. 21. The law does not require -  
14 it says basically, the law does not require a physician  
15 exercise the highest degree of care but ordinary care under  
16 the same circumstances. And so, again, why is it important?  
17 Common things happen commonly. Rare things happen rarely.  
18 If I'm going to be held responsible for not diagnosing  
19 something, I sure hope it's something that the guy  
20 criticizing me has at least seen in their practice and sent  
21 someone to test for. But Dr. Serfustini had never seen it,  
22 never sent anyone to test. Dr. Vanderhooft has seen one.  
23 You've heard all the testimony except for, of course, Dr.  
24 Schmitz who says, oh, this happens two to ten percent of the  
25 time which I don't think is at all credible. And you've

1 heard from even Dr. Serfustini on that issue.

2 With regard to Instruction No. 24, I think is  
3 really an important one. It says, "A physician who  
4 undertakes to treat a patient does not guarantee that no  
5 complication will occur or that no adverse results will be  
6 experienced because of the treatment. The fact that a  
7 complication or adverse result occurs does not by itself  
8 imply or prove that the physician was negligent."

9 Remember Dr. Schmitz, I said right on the stand, I  
10 said, the fact that Mr. Lyon got a clot, you're not saying  
11 that's the fault of the physician?

12 Absolutely not.

13 Dr. Serfustini said, Oh no, this happens, this is  
14 not as a result of fault or neglect. Again, you need to  
15 decide, is this a complication a bad thing that can happen to  
16 a good person like Mr. Lyon or is this one by negligence or  
17 malpractice? I think you've heard enough evidence to come to  
18 those conclusions.

19 Instruction No. 22 says the only way you can know  
20 the standard of care is by an expert witness properly trained  
21 and what they're basically saying is you compare apples with  
22 apples. An orthopedic shouldn't be compared with an eye  
23 doctor. And are basically saying so who was here? Dr. Bryan,  
24 Dr. Vanderhooft and Dr. Serfustini are the orthopedists  
25 talking about standard of care. (Inaudible) I'm a fact

1 witness, I'm a treater, I'm not a standard of care person.

2 Instruction No. 23 is the specialist is not to be  
3 compared with the generalist and that's the same thing.

4 Instruction No. 25, the plaintiff has the burden of  
5 proving that the negligence of the defendant was a proximate  
6 cause of his injury. As a juror, on the verdict form you're  
7 asked, was there negligence and was it the cause of harm?  
8 There's two questions. If you - even if it's negligence,  
9 negligence is found on the part of Dr. Bryan, if you  
10 determine that that wasn't the cause of the injury, you could  
11 say yes negligent and no causation and Dr. Bryan still wins  
12 because the law requires negligence and causation. I can be  
13 parked at a red light and be intoxicated but if someone comes  
14 behind me and slams into my car as I'm legally parked at the  
15 red light, I shouldn't be intoxicated but it's not the cause  
16 of being rear-ended. That's kind of a poor analogy but in  
17 other words, causation.

18 With regard to another instruction on expert  
19 witnesses, "If you should conclude that the reasons given in  
20 support of the opinions are not sound, or that such opinions  
21 are outweighed by other evidence, you may disregard the  
22 opinion entirely."

23 Instruction 16, you can compare relative  
24 qualifications and credibility of experts, the facts and the  
25 matters on which the opinions are based. And again, that

1 goes back to the foundation.

2 I was a little bit worried about bringing Dr.  
3 Vanderhooft in because after I heard about him and he was so  
4 recommended, I met him. He had hair down to here. I have  
5 never called anyone to court that's got a beard or long hair.  
6 I'm pretty conservative. I've never dared grow a beard in my  
7 whole practice because I think jurors are kind of  
8 conservative in Utah and I'm conservative. So I was a little  
9 bit terrified, how would you folks react to this gentleman?  
10 I saw him as he appeared this morning and he wasn't dressed  
11 in a suit like Mr. Savage and I and I thought, wow, and yet,  
12 I was struck from the time I met this gentleman as a man of  
13 absolute brilliance and integrity and he was a trench-line  
14 practitioner. He's in the trenches, he sees this and I think  
15 his opinions are credible. I did something I've never done  
16 though, I brought in someone that looked a little unusual.  
17 But I think you can look at the quality of his testimony, his  
18 education and his heart.

19 This is a zebra. But I thought that one thing Dr.  
20 Vanderhooft found as we noted at trial that I hadn't even  
21 seen, is he said Dave, there's things that don't fit in the  
22 claim. He said he'd reviewed Dr. Schmitz' deposition and his  
23 report. He never testified this arm was twice as big as the  
24 other and that's that I think is important to talk about a  
25 little bit. Dr. Schmitz at the time said - I promise -

1    aren't you glad - by the way, the big boards can't go back  
2    with you, so I felt free to mark them all up 'cause they're  
3    going to go in the garbage after anyway. You'll have little  
4    small one but not the big ones. You can find them all,  
5    buried in the record but that's why it's my last chance to  
6    remind you from the big ones and court clerks never want to  
7    save all this big stuff. You don't get these. But this is  
8    now Schmitz' office visit of December 2 and you've seen this  
9    before but again, he's talking about the shortness of breath  
10   is what's the chief complaint and brings him in. That's what  
11   he's really treating. Now, he's got a huge thing to help him  
12   diagnose the problem now, the shortness of breath, not just a  
13   swollen arm. So he does - that's moderately severe. Well,  
14   we get to the back and his first comment about muscular  
15   skeletal is the left arm pain, is swelling, severity is  
16   moderate, duration three days. We've talked about this but  
17   it's moderate. And then he talks about three plus and edema.

18  
19            Now Dr. Serfustini, although this is now a family  
20   practice and this three plus is someone who doesn't see  
21   normal post operative swelling, is saying, well (inaudible)  
22   three plus and since it's now brawny in the estimation of a  
23   family practice doctor, I'm interpreting that that it's been  
24   there since the 28<sup>th</sup>.

25            Well, Dr. Vanderhooft said, no, this can occur

1 almost overnight, within a few days, but he said what is even  
2 more significant is he said that the swelling is in the  
3 shoulder region, it's not in the whole arm. And he said,  
4 that's clearly documented here but he said that's also  
5 consistent with the fact that all of the downstream hospital  
6 records at McKay Dee on December 2, there's no nurses notes,  
7 there's no complaints or problems with regard to this arm  
8 being twice the size of the other one. In fact, it's very  
9 important I think that Dr. Vanderhooft says, Well, this is  
10 the most important note to me, Dave, this is Sophey's note,  
11 you make the notes as you're talking to the patient and then  
12 you dictate them and you've seen the dictated note but this  
13 is Sophey's handwritten note, this is a 57-year old - see how  
14 this goes? Sophey's note. This is a pleasant 57-year old  
15 white male. What happens is they jot some notes as they fall  
16 from the lips usually of the person and they do their  
17 physical examination on what they call initial orders and  
18 progress notes, December 2 of '05. And then they have time  
19 later to transcribe it. So what does he say there, Dr.  
20 Sophey? 57-year old and he talks about him. But then he  
21 gets to his physical examination. Abdomen is soft. Okay.  
22 He's examining the abdomen. That's important to look at.  
23 Extremities, mild left arm swelling. I would suggest this is  
24 a hospitalist, not a family practice doctor who doesn't see  
25 critically ill people. This man is trying to document the

1 symptoms, what is the conditoin and he says the left, mild  
2 left arm swelling.

3 I would suggest that the whole case that's being  
4 presented is since we've knocked the other three legs out  
5 from underneath them, is whether the swelling along should  
6 have clued in Dr. Bryan. Well, there's huge factual disputes  
7 on the swelling. And this is - that's why Dr. Vanderhooft  
8 says, this is probably the most important note in the chart.  
9 Why haven't you got that, Epperson? And I'm going okay, we'll  
10 throw it in and so that's it and I added it and blew it up  
11 overnight. But I think that's huge because that's consistent  
12 with what Dr. Vanderhooft said and that is, the fact that if  
13 you're going to get blockage and it's been long-term you're  
14 often going to see a fever. You're going to see occluded and  
15 you're going to see the whole arm swollen. He said, Schmitz  
16 notes don't suggest and, in fact, just the opposite, that  
17 it's not. Dr. Bryan is able to do all of his tests that we  
18 talked about. And now we have Dr. Sophey saying, mild  
19 swelling. Yeah, there's some swelling up in the shoulder but  
20 what did all that mean? I think Dr. Vanderhooft put it in  
21 context. He said, this is a more acute onset. So all of a  
22 sudden I'm thinking, okay, the best picture to me is that  
23 this gentleman presented to Dr. Bryan, he said I do have  
24 swelling and I've got a couple of lumps. But the rest as far  
25 as, is not documented.

1           And then I think there was likely a progression  
2 within the three days fits, he looks worse because he  
3 certainly didn't have an arm twice as big as the other arm  
4 when Sarah saw him or Dr. Bryan and he certainly didn't have  
5 an arm that day when Dr. Sophey saw him.

6           There's so much more I could cover but I'm not  
7 going to - you need to deliberate. But again, as a defense  
8 lawyer defending Dr. Bryan, on the issue of damages, I need  
9 to talk about damages quickly. Again, it's rare that I don't  
10 have a special damages that are provable. He's retired.  
11 There's no claim that the medical expenses were out-of-pocket  
12 and so the only thing is the "pain and suffering" or if Dr.  
13 Bryan caused through negligence his residual problems. So  
14 again, as a defense lawyer, what do I try to do? I try to  
15 okay, what records preexist? Are some of these conditions  
16 preexisting and I see some things that just jump out at me  
17 and I'm not trying to make a huge deal of them but I think as  
18 a finder of fact you need to consider them if you ever get to  
19 damages which you don't if you don't find fault or causation.  
20 But assuming you get there, to damages, then you've got to  
21 try to weigh out, what's preexisting? And then, my role as a  
22 defense lawyer is to show you what's there. So that's why I  
23 probably spent more time than I needed to but when you see we  
24 get a \$450,000 (inaudible) allegation, I've got to bring this  
25 to your attention.

1                   Okay, what's your history? Neck disc removal, etc.  
2   and Dr. Bryan, we have in the records that we can go back to,  
3   we have notes from exhibit - oh, we have the following  
4   exhibits I'll just reference. We have Exhibit 9 is 1965  
5   where he gets crashed in a motorcycle accident. I'm  
6   sympathetic to that because I had the misfortune of the same  
7   thing. Not quite as bad luckily. Then, and what resulted.  
8   In 1987 University of Utah. This is the one that Dr. Bryan  
9   referenced where the University of Utah, they worked him up  
10   for all of his complains and problems of hands and numbness  
11   and finally the doctors there say, it's difficult to be  
12   certain what's going on with this gentleman, but most of the  
13   symptoms point to a possible cervical neck spontalitic  
14   reticulopathy. Then I've got some records in here for  
15   Exhibit 12, Owen Higgs for right tennis elbow. He's got a  
16   lot of problems other side but then No. 12 is December 18 of  
17   2000, Tibbetts removed a disc from the neck and they're  
18   talking about thoracic outlet syndrome, at least looking for  
19   it. That's the radiation from neck or other places into the  
20   arm. I showed you the nerve conduction studies, three of  
21   them that talks about ulnar nerve and hand and all that  
22   preexists. So Dr. Bryan who does a lot of spine surgery in  
23   addition to everything else, in fact it's incredible to me  
24   the older trained orthopedists, Dr. Bryan is still doing all  
25   of these procedures and well. I could rarely get us someone

1 here on the stand to say, tell me about spine surgery and how  
2 that relates to potential symptomology in the arm and  
3 shoulder in addition to a clot. But this is the sort of  
4 things you need to take into account, is that there's some  
5 potential relationships. I'm not going to waste more time on  
6 that but, I think there was a deliberate effort in trial to  
7 downplay the pain he had in his shoulder, left shoulder on  
8 presentation to Dr. Bryan and that's why the very best  
9 evidence are those records that a patient generates before a  
10 lawsuit; left shoulder, the pain, this is chief complaint,  
11 talks about shoulder, 98; talks about level of pain, 6;  
12 frequency of pain, 10; etc. And yet it's like, Oh, it hurt  
13 me a little when I lifted and he had to almost talk me into  
14 the surgery. I think you can evaluate that.

15           What about damage? There's a suggestion, Well gee,  
16 does this affect his lungs? We say no, he's had sleep apnea.  
17 He's been 10 years on a C-pap machine. He's got a 10-year  
18 pack history of smoking. He's been a railroad working around  
19 diesel fumes. Is that trying to be blamed on Dr. Bryan? And  
20 so I look at the records and we finally get a sporomathy in  
21 April of 2009 and the sporomathy says no, he's at 115 percent  
22 of expected and there's a claim, and I appreciated the  
23 conception that there is no permanent lung damage claim in  
24 this case. But there's the pain and inconvenience and the  
25 potential in between.

1           On that issue I just want to point out that we have  
2 the records of Dr. Schmitz and he has six various visits or  
3 so after the patient was recovering from this on December 2  
4 and they're all in there and if you look through those notes  
5 you will see he talks about a bump on his foot, he talks  
6 about respiratory illnesses. You go through those six and  
7 see if there's complaint of arm pain. The only reference to  
8 pain and I think that's why counsel has it in his exhibit,  
9 deal with the 6-month later, let's do another study to see  
10 again what the veins looks like in the arm and the request  
11 says - for pain, look at it. There's nothing else in all of  
12 those visits that reference pain to the arm and he admitted,  
13 Well, I don't even tell Mary about the pain, I didn't tell  
14 Mary about the pain in the arm. But that's now the element,  
15 big element of their claim because there's no permanent lung  
16 damage. And again, does that translate to damage? Ahhh, of  
17 the type described? I would suggest not.

18           Anyway, I'm going to cut it off now and just  
19 basically conclude by thanking you so much for your service.  
20 Trials are exhausting for jurors but especially for lawyers.  
21 I'm tired. I know Dr. Bryan is tired. I don't know he sat  
22 there with a 2-week old, 3-week old broken ribs but he's done  
23 it, again, not for sympathy but he's looked a little  
24 discountenanced. There's a reason for it, in part, and I  
25 appreciate his integrity. I think he showed ultimate

1 integrity, even though he had those notes to say Mr. Lyon is  
2 100 percent correct, I did not tell him about pulmonary  
3 embolus. He didn't have to do that. I could no more tell  
4 Dr. Bryan not to admit something like that where he has a  
5 note in his chart that could help support he did. I would  
6 suggest that's integrity and I suspect he'll no longer keep a  
7 generic chart as he did because this is the one in - I don't  
8 know, one in hundred patients that it didn't apply to. It  
9 applies to everybody else. I think that is a little  
10 embarrassing. But was it deceitful? Was it dishonest? Was it  
11 fraudulent? Are these late records he's prepared?  
12 Absolutely not I'd suggest and you can weigh that  
13 credibility.

14 Thank you so much for your service. We appreciate  
15 it and may I just finish with again referring back to Lady  
16 Justice? Lady Justice is also depicted with a sword on her  
17 side. It's often suggested that that's for the execution of  
18 criminal penalties. But I've also like to believe that sword  
19 is on her side is also to protect those who have been  
20 wrongfully accused. Thank you.

21 THE COURT: Thank you, Mr. Epperson.

22 Ladies and gentlemen, we've been at this an hour  
23 and a half, anyone be interest in a 5-minute bathroom break?

24 MR. SAVAGE: That's about how long I'm going to  
25 take.

1 THE COURT: Okay, very well. Go ahead please.

2 MR. SAVAGE: I think defense is getting pretty  
3 desperate when they start having to go preexisting conditions  
4 are now the cause of John's terrible lung pain. They're  
5 talking a motorcycle accident, 1965; cervical operation in  
6 1987. John said he had no problems after that. That he had  
7 ulnar nerve and hand sometime, I don't even know when; that  
8 he has sleep apnea. That maybe could explain why he had  
9 terrible pain in his chest and couldn't sleep without sitting  
10 up for five months. There is nothing to tie any of these  
11 together other than the desperation of not having a good,  
12 solid case to establish what he really is saying, and that is  
13 that John and Mary Lyon are lying. He takes bits and pieces  
14 out of notes. He weaves them as a very capable lawyer could  
15 do. When all is said and done, it gets back to whether or  
16 not John had a swollen arm on November 28.

17 Plaintiff does has the burden of proving by a  
18 preponderance of the evidence and what does he have the  
19 burden of proving? That Dr. Bryan was negligent. Both of  
20 the experts, both Dr. Vanderhooft and Dr. Serfustini agree  
21 that Dr. Bryan was negligent if John Lyon had a very swollen  
22 arm on November 28. So it gets back to is John a liar  
23 because Dr. Bryan didn't write it down in his notes.

24 I've gone through the reasons why I think the  
25 testimony is consistent. I'm still stunned at the fact that

1    there are notes that Dr. Bryan has that are just phony, just  
2    paper in his file. I'm sure that counsel has not used the  
3    word liars, not called them liars, but this is what this is  
4    all about. John either had a swollen arm as he says he did  
5    or he didn't.

6               Counsel seems to hold great reliance on John Lyon's  
7    notes that he took. Keep in mind again, these are notes. I  
8    don't know how you take notes, but I don't write everything  
9    down when I write a note. We have court reporters, used to  
10   have court reporters, now we electronically record, court  
11   reporters type if we need it, that's an effort to have  
12   complete notes. The rest of us take down notes and what is  
13   important here? Counsel seems to think it's really important  
14   that John said in his deposition or maybe on the stand here  
15   that his recollection is his hand was numb on the 28<sup>th</sup> of  
16   November and in here he said in Mary's presence I said it  
17   wasn't. Well, that kind of strikes me as odd anyway as to  
18   why he would write down if he meant wasn't, why he would put,  
19   this was right in my wife's presence, I said I didn't have  
20   this; in my wife's presence I didn't have other thing I  
21   guess.

22              But what is important here? We return on November  
23   20 to remove the stitches, the nurse arrives. I told her  
24   with Mary present, my hand hasn't been going numb. That's  
25   what counsel thinks is somehow proving John Lyon is a liar

1 because there's inconsistent - he calls it his Perry Mason  
2 moment. My goodness. If that the best he can do for a Perry  
3 Mason moment he's had a very mild career. The simple fact is  
4 every case we have there's inconsistencies and so what? Dr.  
5 Vanderhooft said, it doesn't matter, it's irrelevant.

6 Counsel says it's a leg of a stool or something. It isn't.

7           What is in the stool? On this leg of this stool, I  
8 told her with Mary present, my hand hadn't been going numb  
9 although my left arm was very swollen, there were lumps in  
10 it. Counsel left out the part with the lumps, that  
11 corroborates what John said on the stand. The doctors say  
12 that's also irrelevant for diagnostic reasons. But he said  
13 in this note he took that it was very swollen and had lumps  
14 in it. She removed the stitches, Dr. Bryan came in, the  
15 doctor arrived, he asked how I was, I told him the same as I  
16 said to his nurse, my hand wasn't going numb although my arm  
17 was very swollen with lumps. There's nothing in Dr. Bryan's  
18 notes about his patient saying his arm was very swollen with  
19 lumps in it. That's consistent with what John said and it's  
20 consistent with Mary's deposition.

21           Now, we read her testimony while she was on the  
22 stand, I asked her in redirect were you nervous then, was  
23 your mind going blank? And she said, yes, and that's what  
24 this deposition says. He's somehow trying to indicate I  
25 guess that Mary Lyon has changed her story since the

1 deposition. She hasn't. This is her answer, this is the  
2 same day, talking about the 28<sup>th</sup>, "This" the 28<sup>th</sup> "is the day  
3 that John complained to him about the swollenness and counsel  
4 interrupt and she "and the...

5 My question first is, were you present?

6 Yes, I was.

7 What do you remember about that day?

8 I am so blank. That's not a blank in the  
9 transcript. It's spell out, B-L-A-N-K. I am so blank. She  
10 meant she was having trouble remembering under the stress of  
11 that deposition. She goes on to say, "I know that John told  
12 them about the swelling and the raised..." I submit that  
13 that could have been lumps, could have been describing the  
14 swelling. "The swelling of the arm and the raised...and that  
15 he was in pain." Consistent, she said he was in pain. John  
16 said he was in pain. John doesn't talk about pain much.  
17 Maybe he didn't put that in his note but there is  
18 corroboration that he was in pain. This is not something  
19 that is a Perry Mason moment and I submit it's a desperation  
20 to try to suggest that it is.

21 I believe both of the two experts have said lumps  
22 in the arm doesn't matter but John is consistent in reporting  
23 it. Counsel says that there's some inconsistencies, John  
24 doesn't say in his note he's in pain. Did Mary testify again  
25 under oath he was in pain, she was rubbing his arm and

1 putting heat on it and she's afraid that that caused it to  
2 get worse and she broke up. John is a tough guy, but he's in  
3 pain.

4 The Voltaren versus the Ibuprofen, I don't know  
5 where all these have gone - maybe put these over here.

6 Counsel has created another red herring by one choice of  
7 words that this was a bigger gun. It's not the point,  
8 whether a bigger gun, same gun or even a smaller gun. The  
9 point is, on the 28<sup>th</sup> of November when everything that was  
10 said was so important, Dr. Bryan did not say anything about  
11 pain as well as not saying anything about swelling and this  
12 is the part about Voltaren that's important, "I'm going to  
13 put him on some Voltaren to see if this will help more than  
14 Ibuprofen." I would submit that if he wanted to see if  
15 Voltaren would help more, that's because John was in pain and  
16 the Ibuprofen wasn't working well enough. Counsel would have  
17 you believe that no, he wasn't in pain, he's now lying when  
18 he says he was in pain because Voltaren is not a bigger gun  
19 that Ibuprofen. The notes says he wanted to see if it would  
20 help more and it's a pain medication, more than the Ibuprofen  
21 was helping.

22 He said, Boy, he was really happy with Dr.  
23 Serfustini and of course I was. He said that Dr. Serfustini  
24 had never seen this happen before and he thought boy, that  
25 was just great, a man with his stellar career. I think we

1 have beat that red herring out of the water. It is a rare  
2 condition but every doctor has said, you learn about it in  
3 medical school. You look for it in every patient and frankly,  
4 it doesn't matter whether or not he had surgery. If a guy  
5 comes in with a possible blood clot even in a rare location,  
6 all of the doctors have said you should check it out.

7 I asked Dr. Vanderhooft, I also liked Dr.  
8 Vanderhooft and he said it would be negligent, it would be a  
9 breach of the standard of care in this medical community to  
10 not check that arm out more if it was the same as it was on  
11 December 2. He didn't say, no, it was rare, it was in the  
12 arm, forget about it. A rarity is a red herring. It gets  
13 back again, was John's arm swollen? I asked him, I think I  
14 asked him and Dr. Serfustini did the numbness matter? No,  
15 that's irrelevant. Do the lumps matter? No, that's  
16 irrelevant. What's relevant? Was his arm swollen? John in  
17 his note said it was very swollen. Mary says it was swollen,  
18 she was rubbing it for days before he saw the doctor. He had  
19 a very swollen arm and for whatever reason, Dr. Bryan missed  
20 it, didn't listen to his patient. I don't know if he was  
21 thinking about the last patient or the 30 or 50 he was seeing  
22 that day. I don't know if he was thinking about the next  
23 patient. I don't know if he's thinking about health care  
24 reform. But he did not listen to his patient, did not check  
25 that arm out and it was very swollen at that time, it had to

1 be, it was swollen before and Dr. Schmitz testified that Mr.  
2 Lyon told him it was swollen when he went and saw Dr.  
3 Serfustini (sic).

4 Now, again, counsel picks and chooses and just  
5 finds a little bit and piece in the notes and he says, Oh  
6 look, Dr. Schmitz didn't say his arm was twice as big in his  
7 notes. How about when you stand up and swear under oath with  
8 penalty of perjury? He sat there on that stand and said that  
9 man's arm was twice as big as his right arm. He didn't say -  
10 I don't think he was even asked about these other things,  
11 about elbow and shoulder and he didn't say the wound around  
12 the shoulder from the surgery was swollen. You saw Dr.  
13 Schmitz. He said that his arm was swollen and it was twice  
14 as big.

15 Now counsel said, Well gee, on the same day Dr.  
16 Sophey wrote a note saying it wasn't very swollen, mild I  
17 think. Where is Dr. Sophey? If that was so darned important  
18 to them, why not call Dr. Sophey and ask him under oath what  
19 he meant by that note? He didn't come in here. We just have  
20 a note and Mr. Epperson has carefully filtered what went to  
21 Dr. Vanderhooft. Dr. Vanderhooft, I don't think the standard  
22 of care was breached based upon the medical records I looked  
23 at. So I asked him did you know about this? No. Did you  
24 know about that? No. Did you know this is testimony under  
25 oath about this? No. Well if all that was true, what would

1 your opinion be? Well, breach of standard of care for not  
2 sending him for treatment.

3 Dr. Schmitz explained his notes. Explaining the  
4 notes is much more important than just taking one part of a  
5 note out of context that some doctor took down. Dr. Sophey  
6 has seen lots of people too in a hospital. Dr. Schmitz has  
7 seen lots of people, sworn testimony. Best they can come up  
8 with is pick and choose on a couple of statements and some  
9 notes, pick and choose on what was said in deposition, lady,  
10 sweet lady, couldn't get her mind together at the time; and a  
11 note John Lyon wrote where he didn't say he was in pain in  
12 his note. If there's anything you ought to know, you ought  
13 to have decided by now for sure, John Lyon is a tough guy and  
14 he puts up with a lot of pain. And he didn't put it in that  
15 note. Mary said he had pain. He says now under oath he had  
16 pain and that pain was caused by the blood clot. Counsel  
17 very carefully said that, Boy, they said that the blood clot,  
18 the first clot, the start of the clot that came from the  
19 surgery, is a complication and that's true. We're not  
20 claiming that the fact it started a clot in his arm is caused  
21 by the surgery or caused by anything Dr. Bryan did wrong.  
22 It's rare, but still, it's not caused by anything Dr. Bryan  
23 did wrong. We're here because regardless of why that clot  
24 formed, it was there for three days or so before Mr. Lyon  
25 went to see Dr. Bryan, his wife was trying to get him to go

1 to the doctor. She was rubbing it, putting heat on it. We  
2 now know that that swelling was definitely caused by the  
3 clot. There's no question, there's no other offer of any  
4 explanation for why his arm was swollen. He had it.

5 We're not here because the clot first started  
6 because of the surgery. It doesn't matter to me why it  
7 started. What matters to me is that a doctor had a chance to  
8 stop this from progressing, had a chance to stop this from  
9 getting worse, had a chance to stop this from slipping part  
10 of the clot out and going to Mr. Lyon's lung, that it was  
11 swollen, he didn't look at it, John told him. If you believe  
12 John Lyon, Dr. Bryan was negligent. Dr. Serfustini believed  
13 John Lyon, said the notes are important but if he said these  
14 things and that was the presentation, Dr. Bryan was  
15 negligent. Dr. Vanderhooft said that presented, forget about  
16 the numbness, forget about it, just the swollen arm, it's  
17 negligent not to treat it.

18 One last little thing. I feel strongly about this  
19 and I don't want that to develop any negative feelings to  
20 you. I apologize if some of my emotion came through and I  
21 hope you don't hold that against John. This is important.  
22 It's important to John. It's important to Dr. Bryan. Money  
23 isn't that important to Dr. Bryan. I think it's his pride  
24 more than anything. He's a very proud man, I don't think he  
25 even today can accept the possibility that he was so

1 negligent on that day, running from patient to patient. I  
2 think you're in a position, you've seen all the evidence I  
3 think you're in a position to decide that issue. I submit he  
4 was negligent. It's caused John damage and grief and I hope  
5 that you will find a just and fair reward for John. Counsel  
6 and I agree, we're not here for sympathy or anger. We are  
7 here for justice and I'm very happy to submit this into your  
8 hands at this time. And I've appreciated your time and  
9 attention to this lengthy argument of counsel. God speed.

10 THE COURT: Thank you, Mr. Savage.

11 Mr. Domico, you have served during this trial as an  
12 alternate juror. We asked that you serve just in case one of  
13 the other jurors became ill or otherwise unable to serve.  
14 We've now at a point in the trial where the jury must  
15 deliberate and I must at this time suspend your service.  
16 Would you kindly leave your telephone number with the clerk  
17 just in case there was a situation where we had to bring you  
18 back? Otherwise, I'll have the clerk give you a call and let  
19 you know after we do have a verdict, that your services are  
20 now excused. Okay? But thank you so very much for your  
21 willingness to serve.

22 MR. SAVAGE: I think also it's appropriate that  
23 even though he's suspended, that he not talk to anybody about  
24 the case.

25 THE COURT: I agree with that. For the same reason

1     that I have repeated throughout the trial, that's to just  
2     preserve your objectivity in this case. It's remote that  
3     you'll need to come back but I think that's a point well  
4     taken. So would you just continue to remove yourself from  
5     everybody until the clerk gives you a call and tells you that  
6     you're excused? Thank you so much for your service. I know  
7     this might be a little bit deflating having invested so much  
8     time and effort in this case and now to be pointed toward the  
9     door, but it's just the way the system works. Thank you so  
10    very much for your service. You may leave now.

11             All right. Would you swear the bailiff please?

12             (Whereupon the bailiff was sworn)

13             THE COURT: Ladies and gentlemen, I'm now going to  
14     submit this case to you for your decision.

15             (Whereupon the jury left the courtroom).

16             THE COURT: Let me just express to Mr. and Mrs.  
17     Lyon and Dr. Bryan, it's been a pleasure to have you in my  
18     courtroom this week. Let me just indicate to you that I  
19     don't know what this jury is going to do but I would like  
20     both sides to know that your lawyers in this case have been  
21     exemplary. I think the legal representation provided by your  
22     attorneys have exemplified what I think is the very best of  
23     our legal profession. They had been well prepared and  
24     professional and have, I thought, done a magnificent job of  
25     presenting well, both sides.

1           With that, I'm going to just indicate that you're  
2 welcome to leave the courtroom. What I do ask is if you want  
3 to go get something to eat or leave, that you leave a phone  
4 number, a cell phone so that we can immediately reach you in  
5 case I need to ask you questions. It's not uncommon to have  
6 jurors ask questions and it is my practice and I think a  
7 proper practice that before I communicate with that jury at  
8 all, that I speak with the lawyers about what the question is  
9 and they have an opportunity to review what my response will  
10 be to the jury. And of course at such time as they have  
11 reached a verdict, I don't want to detain them unnecessarily  
12 in the jury room, but I'd like to be able as soon as  
13 possible, bring them in and receive their verdict.

14           MR. SAVAGE: (inaudible).

15           THE COURT: Great.

16           MR. EPPERSON: May I just thank you on behalf of  
17 Dr. Bryan the Court and your very attentive staff and bailiff  
18 have been wonderfully helpful and very capable and thank you  
19 for your courtesy.

20           MR. SAVAGE: I join in that.

21           THE COURT: Thank you very much. All right, we'll  
22 recess then until the jury returns.

23           (Whereupon a recess was taken)

24           THE COURT: (Inaudible) show them a menu and take  
25 orders and in that event, I'll communicate with you so you

1 can at least try to have a feel for what's happening.

2 MR. SAVAGE: In my experience it means they'll take  
3 at least an hour longer so I would hold off (inaudible).

4 (Whereupon a recess was taken)

5 THE COURT: The record may show that the jury has  
6 returned to the courtroom. The bailiff has informed me that  
7 you have reached a verdict, is this true?

8 JURY FOREPERSON: It is.

9 THE COURT: And are you the foreperson?

10 JURY FOREPERSON: Yes.

11 THE COURT: May I have your verdict please? Thank  
12 you. It appears that there is a verdict and I will read the  
13 verdict for the record.

14 The first question given to the jury is considering  
15 all the evidence in this case, was the defendant, Donald  
16 Bryan M.D., negligent? The answer is yes.

17 The next question is, if your answer to question  
18 number 1 is yes, was the negligence the proximate cause of  
19 injury or damages to the plaintiff? And the answer is no.

20 Would either side like to have the jury polled?

21 MR. EPPERSON: Yes, Your Honor, to both questions.

22 THE COURT: All right. As I read your name would  
23 you respond by just saying yes or no and this will be to  
24 question number 1. And again question number 1 is whether  
25 there was negligence in this case.

1                   Vickie Hathaway?

2                   JUROR HATHAWAY: Yes.

3                   THE COURT: Kathryn Crane?

4                   JUROR CRANE: Yes.

5                   THE COURT: Joshua Turnbow?

6                   JUROR TURNBOW: Yes.

7                   THE COURT: Emma Koller?

8                   JUROR KOLLER: Yes.

9                   THE COURT: Ethel Hansen?

10                  JUROR HANSEN: No.

11                  THE COURT: Janet Engelke? Excuse me if I

12 mispronounce.

13                  JUROR ENGELKE: Yes.

14                  THE COURT: Clara Puffer?

15                  JUROR PUFFER: Yes.

16                  THE COURT: Noreen Francis?

17                  JUROR FRANCIS: No.

18                  THE COURT: Okay, we have a [inaudible] on question

19 number 1.

20                  All right, with respect to question number 2 and

21 that question again is if your answer to question 1 is yes,

22 was such negligence the proximate cause of any injury or

23 damages to the plaintiff?

24                  Vickie Hathaway, is this your verdict?

25                  JUROR HATHAWAY: No.

1 THE COURT: Kathryn Crane, is this your verdict?  
2 JUROR CRANE: No.  
3 THE COURT: Joshua Turnbow, is this your verdict?  
4 JUROR TURNBOW: No.  
5 THE COURT: Emma Koller?  
6 JUROR KOLLER: No.  
7 THE COURT: Ethel Hansen?  
8 JUROR HANSEN: No.  
9 THE COURT: Janet Engelke?  
10 JUROR ENGELKE: Engelke.  
11 THE COURT: Engelke.  
12 JUROR ENGELKE: No.  
13 THE COURT: Clara Puffer?  
14 JUROR PUFFER: No.  
15 THE COURT: Noreen Francis?  
16 JUROR FRANCIS: No.  
17 THE COURT: I'm wondering, did I ask the question  
18 right or did -  
19 MR. SAVAGE: I don't know. The way I heard it, the  
20 answer -  
21 THE COURT: They were all consistent.  
22 MR. SAVAGE: Yeah. But I thought you asked if it  
23 was their verdict and the verdict I thought was no.  
24 THE COURT: Did you misunderstand my question? Let  
25 me rephrase the question and that may have been my fault and

1 not yours. Again, the question is, if your answer to  
2 question 1 is yes, was the negligence the proximate cause of  
3 any injury or damages to the plaintiff and the verdict form  
4 says no. My question is, is this your verdict and if it is  
5 you say yes. If it's not your verdict or you don't agree  
6 with the answer, then say no.

7 Vickie Hathaway, is this your verdict?

8 JUROR HATHAWAY: Yes.

9 THE COURT: Kathryn Crane, is this your verdict?

10 JUROR CRANE: Yes.

11 THE COURT: Joshua Turnbow, is this your verdict?

12 JUROR TURNBOW: Yes.

13 THE COURT: Emma Koller, is this your verdict?

14 JUROR KOLLER: Yes.

15 THE COURT: Ethel Hansen?

16 JUROR HANSEN: Yes.

17 THE COURT: Janet, excuse me.

18 JUROR ENGELKE: That's okay.

19 THE COURT: Engelke? Excuse me.

20 JUROR ENGELKE: My answer is yes.

21 THE COURT: Clara Puffer, is this your verdict?

22 JUROR PUFFER: Yes.

23 THE COURT: Noreen Francis, is this your verdict?

24 JUROR FRANCIS: Yes.

25 THE COURT: All right, the polling indicates that

1 their answers to the questions are consistent with the  
2 verdict.

3 Ladies and gentlemen, this has been a long week for  
4 you and I want to take this moment to express to you on  
5 behalf of all of us in this room your sincere - our sincere  
6 appreciation for your hard work and attention during this  
7 case. The admonition that I gave you earlier in the case,  
8 not to discuss this case with anyone, no longer applies.  
9 You're welcome to go home and talk to anyone about the case.  
10 I'm sure that it's been a fascinating experience for you. It  
11 was for me.

12 If you like - and there's certainly no duty or  
13 obligation on your part, you may hang around and talk to the  
14 lawyers. Sometimes they have questions. Maybe they won't  
15 have any questions, maybe they will but if you're tired or  
16 you'd just as soon not answer questions, you can just follow  
17 the bailiff out to the parking lot and he'll escort you to  
18 your car. It's still light but I'd feel more secure in  
19 having you escort the women to their cars.

20 All right, again, thank you very much and you're  
21 not discharged. Thank you.

22 MR. EPPERSON: Thank you for your service  
23 (Whereupon the trial was concluded)

24

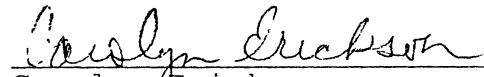
25

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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearings were held before Judge Michael Lyon was transcribed by me from a audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

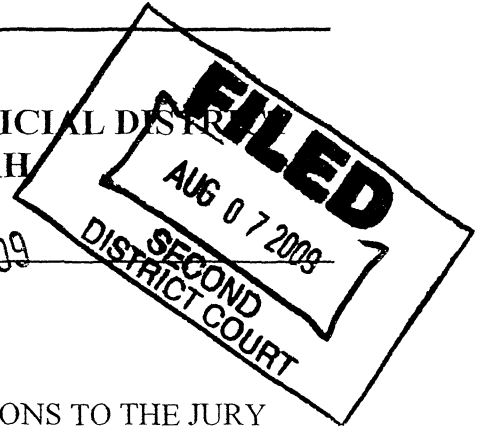
Signed this September 17<sup>th</sup>, 2010 in Sandy, Utah.

  
\_\_\_\_\_  
Carolyn Erickson  
Certified Shorthand Reporter  
Certified Court Transcriber

Tab 3

## **APPENDIX 3**

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
WEBER COUNTY, STATE OF UTAH



JOHN A. LYON,

Plaintiff,

vs.

DONALD BRYAN, M.D.,

Defendant.

INSTRUCTIONS TO THE JURY

Case No. 070903637

Judge Michael D. Lyon

INSTRUCTIONS TO THE JURY (PRELIM AND FINAL)



VD29452922

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070903637 BRYAN, DONALD W

Members of the jury, we are about to begin the trial of this case. You have heard some details about this case during the process of jury selection. Before the trial begins, however, there are certain instructions you should have to better understand what will be presented to you and how you should conduct yourself during the trial.

The party who brings a lawsuit is called the plaintiff. In this action the plaintiff is John A. Lyon (patient). The party against whom the suit is brought is called the defendant. In this action the defendant is Donald Bryan, M.D. (Orthopedic surgeon).

The Plaintiff claims that on November 15, 2005, Dr. Bryan performed surgery on Mr. Lyon's left shoulder (rotator cuff) at McKay-Dee Hospital and that on November 28, 2005, Dr. Bryan negligently failed to diagnose and treat blood clots in his arm, causing injury and damage. The Defendant Dr. Bryan has denied that he was negligent in the medical care rendered to Mr. Lyon and that his care was the cause of his alleged injury and damage.

By your verdict, you will decide disputed issues of fact. I will decide all questions of law

that arise during the trial. Before you retire to deliberate at the close of the case, I will instruct you on the law that you must follow and apply in deciding your verdict.

Since you will be called upon to decide the facts of this case, you should give careful attention to the testimony and evidence presented for your consideration, bearing in mind that I will instruct you at the end of the trial concerning the manner in which you should determine the credibility or “believability” of each witness and the weight to be given the testimony. During the trial, however, you should keep an open mind and should not form or express any opinion about the case one way or the other until you have heard all of the testimony and evidence, the closing arguments of the lawyers, and my instructions to you on the law.

While the trial is in progress, you must not discuss the case in any manner among yourselves or with anyone else, nor should you permit anyone to discuss it in your presence.

From time to time during the trial, I may be called upon to make rulings of law on objections or motions made by the lawyers. It is the duty of the lawyer on each side of a case to object when the other side offers testimony or other evidence that the lawyer believes is not properly admissible. You should not be angry at a lawyer or the client because the lawyer has made objections. You should not infer or conclude from any ruling or other comment I may make that I have any opinion on the merits of the case favoring one side or the other. And if I sustain an objection to a question that goes unanswered by the witness, you should not draw any inference or conclusion from the question itself.

During the trial it may be necessary for me to confer with the lawyers out of your hearing with regard to questions of law or procedure that require consideration by me. On some occasions you may be excused from the courtroom for the same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are

here to determine, and should be patient even though the case may seem to go slowly.

INSTRUCTION NO. 1

The case will proceed in the following order:

1. The plaintiff's lawyer may make an opening statement outlining the case. The defendant's lawyer may also make an opening statement outlining the case immediately after the plaintiff's statement, or may defer making an opening statement until the conclusion of the plaintiff's case. Neither party is required to make an opening statement. What is said in the opening statement is not evidence, but is simply designed to provide you with an introduction to the evidence the party making the statement intends to produce.

2. The plaintiff will introduce evidence through testimony of witnesses and exhibits. At the conclusion of the plaintiff's case, the defendant may introduce evidence. The defendant, however, is not obliged to introduce any evidence or to call any witnesses. If the defendant introduces evidence, the plaintiff may then introduce rebuttal evidence.

3. I will instruct you on the law which you are to apply in reaching your verdict.

4. The parties may present closing arguments to you as to what they believe the evidence has shown and the inferences which they contend you should draw from the evidence. What is said in a closing argument, just as what is said in an opening statement, is not evidence. The arguments are designed to present to you the contentions of the parties based on the evidence introduced. The plaintiff has the right to open and to close the argument.

INSTRUCTION NO. 2

The evidence in the case will consist of the sworn testimony of the witnesses, regardless of who may have called them; all exhibits received in evidence, regardless of who may have introduced them; and all facts which may have been judicially noticed, and which I instruct you to take as true for the purposes of this case.

Depositions may also be received in evidence. Depositions contain sworn testimony, with the lawyer for each party being entitled to ask questions. Testimony provided in a deposition may be read to you in open court or may be seen on a video monitor. Deposition testimony is to be considered by you, subject to the same instructions which apply to witnesses testifying in open court.

Statements and arguments of lawyers are not evidence in the case, unless made as an admission or stipulation of fact. When the lawyers on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

I may take judicial notice of certain facts. When I declare that I will take judicial notice of some fact, you must accept that fact as true.

Any evidence as to which I sustain an objection, and any evidence I order to be stricken, must be disregarded entirely.

Anything you may have seen or heard outside the courtroom is not evidence, and must be disregarded entirely.

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited

purpose and for no other.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from the facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experience.

INSTRUCTION NO. 3

You are to determine what witnesses to believe and what parts of their testimony you believe. You also must determine what weight or value you place upon the testimony of the various witnesses. In making these determinations, you might like to consider some or all of the following:

- 1) the demeanor and deportment of the witness in the courtroom;
- 2) the witness' interest in the result of the trial;
- 3) any tendency to favor or disfavor one side or the other;
- 4) the probability or improbability of events having occurred the way the witness describes the events;
- 5) the ability of the witness to actually see or hear or otherwise perceive the things described;
- 6) the ability of the witness to now accurately recall the things the witness observed;
- 7) whether the witness is able to describe what he observed accurately and in a form that you can understand;
- 8) whether the witness made earlier statements or expressions that are consistent or inconsistent with what is now being said;
- 9) whether the witness speaks the truth or not.

But whatever tests you use, the value of a witness' testimony is for you to determine.

INSTRUCTION NO. 4

Serious problems have been caused around the country by jurors using computer and electronic communication technology. It's natural that we want to investigate a case, or to share with others our thoughts about the trial, and it's easy to do so with the Internet and instant communication devices or services, such as Blackberries, iPhones, Facebook, Twitter, and so on.

However, please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends entirely on you, the jurors, reaching your decisions based on evidence presented to you in court, and not on other sources of information. You violate your oath as jurors if you conduct your own investigations or communicate about this trial with others.

Jurors have caused serious consequences for themselves and the courts by "Googling" the parties, issues, or counsel; "Twittering" with friends about the trial; using Blackberries or iPhones to gather or send information on cases; posting trial updates on Facebook pages; using Wikipedia or other internet information sources, and so on. Even using something as seemingly innocent as "Google Maps" can result in a mistrial.

Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention, and the entire case may have to be retried, at substantial cost.

Violations may also result in substantial penalties for the juror.

So I must warn you again - do not use your cell phone or computer to investigate or discuss anything connected with this trial until it is completely finished. Do not use Internet research of any kind, and advise me if you learn of any juror who has done so.

INSTRUCTION NO. 5

After the evidence has been heard and arguments and instructions are concluded, you will retire to consider the evidence and arrive at your verdict. You will determine the facts from all the testimony you hear and the other evidence that is received. You are the sole judges of the facts. Neither I nor anyone else may invade your responsibility to act as judges of the facts.

On the other hand, and with equal emphasis, I instruct you that you are bound to accept the rules of law that I give you whether you agree with them or not.

INSTRUCTION NO. 6

During this trial I will permit you to take notes. Many courts do not permit note-taking by jurors, and a word of caution is in order. There is always a tendency to attach undue importance to matters which one has written down. Some testimony that is considered unimportant at the time presented, and thus not written down, takes on greater importance later in the trial in light of all the evidence presented. Therefore, your notes are only a tool to aid your own individual memory and you should not compare your notes with other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence, and are by no means a complete outline of the proceedings or a list of the highlights of the trial. Above all, your memory should be your greatest asset when it comes time to deliberate and render a decision in this case.

INSTRUCTION NO. 7

You will not be required to remain together while we are in recess. It is important that you obey the following instructions with reference to the recesses of the court:

1. Do not discuss the case either among yourselves or with anyone else during the trial.

In fairness to the parties to this lawsuit, you should keep an open mind throughout the trial, reaching your conclusion only during your final deliberations. Only after all the evidence is in and you have heard the lawyers' summations and my instructions to you on the law, and only after an interchange of views with each other may you reach your conclusion.

2. Do not permit any person to discuss the case in your presence. If anyone does so, despite your telling him or her not to, report that fact to me as soon as you are able. You should not, however, discuss with your fellow jurors either that fact, or any other fact that you feel necessary to bring to my attention.

3. Though it is a normal human tendency to converse with other people, please do not converse with any of the parties or their lawyers or any witness. By this, I mean not only do not converse about the case, but do not converse at all, even to pass the time of day. In no other way can all the parties be assured of the absolute impartiality they are entitled to expect from you as jurors.

4. Do not do any research or make any investigation about the case on your own.

5. Finally, I instruct you again – do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Now, we will begin by giving the lawyers for each side an opportunity to make their

INSTRUCTION NO. 7 *A*

Members of the jury, I would like to thank you for your attention during this trial. I will now explain to you the rules of law that you must follow and apply in deciding this case. When I have finished, you will go to the jury room and begin your discussions, what we call your deliberations. Please pay attention to the legal instructions I am about to give you. This is an extremely important part of this trial.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. The order in which the instructions are given has no significance as to their relative importance. If a direction or an idea is stated more than once, or in varying ways, no emphasis is intended and none must be inferred by you.

You will take these instructions with you into the jury room for further reference.

INSTRUCTION NO. 8

It is my duty to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as I state it to you, regardless of what you personally believe the law is or ought to be. Even if you do not like the laws that must be applied, you must use them. On the other hand, it is your exclusive duty to determine the facts in this case, and to consider and weigh the evidence for that purpose. Your responsibility must be exercised with sincere judgment, sound discretion, and honest deliberation.

INSTRUCTION NO. 9

This case must not be decided for or against anyone because you feel sorry for anyone or angry at anyone. It is your sworn duty to decide this case based on the facts and the law, without regard to sympathy, passion, prejudice, or public opinion.

INSTRUCTION NO. 10

This case must be decided only upon the evidence which you have heard from the witnesses, and have seen in the form of documents, photographs or other tangible things admitted into evidence.

Anything you may have seen or heard from any other source may not be considered by you in arriving at your verdict.

You should not consider as evidence any statement of the lawyers made during trial.

INSTRUCTION NO. 11

It has never been my intention to give any hint that you should return one verdict or another in this case. Please understand that I do not wish in any way to influence your verdict. It would be improper for me to do so. Deciding a proper verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything that I may have said or done if it made you think that I preferred one verdict over another, that I believed one witness over another, or that I considered any piece of evidence more important than another.

You are the exclusive judges of the facts and the evidence. It is your duty to render a just verdict based upon the facts and the evidence.

## INSTRUCTION NO. 12

You are the exclusive judges of the credibility of the witnesses and the weight of the evidence. In judging the weight of the testimony and credibility of the witnesses, you have a right to take into consideration any biases, any interest in the result, and any motive or lack of motive to testify fairly. You may consider the witnesses' conduct while testifying before you, the reasonableness of their statements, their apparent frankness or candor, or the want of it, their opportunity to know, their ability to understand, and their capacity to remember. You should consider these matters you believe have a bearing on the truthfulness or accuracy of the witnesses' statements.

INSTRUCTION NO. 13

You may believe that a witness, on some former occasion, made statements inconsistent with that witness' testimony given here in this case.

That does not necessarily mean that you are required to entirely disregard the present testimony. The effect of such evidence upon the credibility of the witness is for you to determine.

INSTRUCTION NO. 14

If you believe any witness has willfully testified falsely as to any material matter, you may disregard the entire testimony of that witness, except as that witness may have been corroborated by other credible evidence.

## INSTRUCTION NO. 15

The rules of evidence ordinarily do not permit the opinions of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. Witnesses who, by education, study and experience, have become expert in some art, science, profession or calling, may state opinions as to any such matter in which that witness is qualified as an expert, so long as it is material and relevant to the case. You should consider such expert opinion and the reasons, if any, given for it. You are not bound by such an opinion. Give it the weight you think it deserves. If you should decide that the opinions of an expert witness are not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinions are not sound, or that such opinions are outweighed by other evidence, you may disregard the opinion entirely.

## INSTRUCTION NO. 16

In resolving any conflict that may exist in the testimony of medical experts, you may compare and weigh the opinion of one expert against that of another. In doing this, you may consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters on which such opinions are based.

The fact that an expert witness resides or pursues the profession in another state or community should not affect the weight you give the witness' testimony. A party may rely upon qualified experts from other states and countries in presenting evidence to the jury.

## INSTRUCTION NO. 17

A fact may be proved by circumstantial evidence. Circumstantial evidence consists of facts or circumstances that give rise to a reasonable inference of the truth of the facts sought to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. On the other hand, if the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.

# INSTRUCTION NO. 18

The term “preponderance of the evidence” means that evidence which, in your minds, seems to be of the greater weight, the most convincing and satisfactory. The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the convincing <sup>QUALITY</sup> character of the testimony, weighed impartially, fairly, and honestly by you. If the evidence is evenly balanced as to its convincing force on any allegation, you must find that such allegation has not been proved.

INSTRUCTION NO. 19

A party seeking to prove a fact bears the burden of proof. In doing so, the party must prove the truth of the allegation by a preponderance of the evidence. Unless the evidence so preponderates in support of that allegation of fact, you shall find that the allegation is not true.

INSTRUCTION NO. 20

In this case the plaintiff claims the defendant was negligent.

To return a verdict for the plaintiff, you must find by a preponderance of the evidence that:

1. The defendant was negligent; and
2. The defendant's negligence proximately caused injury to the plaintiff.

If you find in favor of the plaintiff on those two questions, you must then decide the amount of the damages suffered by the plaintiff.

# INSTRUCTION NO. 21

In this case you must decide whether or not the defendant was negligent in the context of what the law requires of physicians.

A physician is required to exercise the same degree of learning, care, skill and treatment ordinarily possessed and used by other qualified physicians in good standing practicing in the same medical field. The law does not require that a physician exercise the highest degree of care. It requires the physician to exercise the degree of care that other qualified physicians would ordinarily exercise under the same circumstances.

It is negligent for a physician not to exercise this degree of care.

INSTRUCTION NO. 22

The only way you may properly learn the applicable standard of care is through evidence presented during this trial by individuals testifying as expert witnesses and through other evidence admitted for the purpose of defining the standard of care.

In deciding whether a physician properly fulfilled the physician's duties, you are not permitted to use a standard derived from your own experience with physicians or any other standard of your own.

## INSTRUCTION NO. 23

The specialist is required to exercise the same degree of skill and care ordinarily used by similar specialists under similar conditions. The conduct of a specialist is not compared with that of the general practitioner.

## INSTRUCTION NO. 24

A physician who undertakes to treat a patient does not guarantee that no complications will occur or that no adverse results will be experienced because of the treatment. The fact that a complication or adverse result occurs does not, by itself, imply or prove that the physician was negligent.

INSTRUCTION NO. 25

The plaintiff has the burden of proving that the alleged negligence of the defendant was a proximate cause of his injury.

A proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury.

INSTRUCTION NO. 26

I will now instruct you about damages. The fact that I am instructing you concerning damages is not to be taken as an indication that I either believe or do not believe that the plaintiff is entitled to recover such damages. The instructions in reference to damages are given as a guide in case you find from a preponderance of the evidence that the plaintiff is entitled to recover. However, if you decide that plaintiff is not entitled to recover damages, then you must disregard the instructions given you upon the matter of damages.

INSTRUCTION NO. 27

If you find the issues in favor of the plaintiff and against the defendant, then it is your duty to award the plaintiff such damages, if any, that you find, from a preponderance of the evidence, will fairly and adequately compensate the plaintiff for the injury and damage sustained.

INSTRUCTION NO. 28

To be entitled to damages, the plaintiff must prove that damages occurred. There must be a reasonable probability, not just speculation, that the plaintiff suffered damages as a result of the negligence of the defendant.

#### INSTRUCTION NO. 29

You may already know that in cases of this kind the law recognizes two kinds of damages: “special” and “general.” Special damages include such things as medical expenses, lost wages or lost future wages (impairment of earning capacity). In this case the plaintiff does not claim any special damages. The plaintiff, however, does claim general damages.

In awarding general damages, you may consider any pain, discomfort, and suffering, both mental and physical, its probable duration and severity, and the extent to which the plaintiff has been prevented from pursuing the ordinary affairs of life as previously enjoyed. You may also consider whether any of the above will, with reasonable certainty, continue in the future. If so, you may award such damages as will fairly and justly compensate the plaintiff for them.

No definite standard or method of calculation is prescribed by law to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

## INSTRUCTION NO. 30

The law forbids you to decide any issue in this case by resorting to chance. If you decide that a party is entitled to recover, you may then determine the amount of damages to be awarded. It would be unlawful for you to agree in advance to take the independent estimate of each juror, then total the estimates, draw an average from the total, and to make the average the amount of your award. Each of you may express your own independent judgment as to what the amount should be. It is your duty to thoughtfully consider the amounts suggested, test them in the light of the law and the evidence and, after due consideration, determine which, if any, of such individual estimates is proper.

INSTRUCTION NO. 31

It is the duty of a person who has been injured to use reasonable diligence in caring for the injuries and reasonable means to prevent their aggravation and to accomplish healing.

When an injured person does not use reasonable diligence to care for the injuries, and they are aggravated as a result of such failure, the liability, if any, of another whose act or omission was a proximate cause of the original injury must be limited to the amount of damage that would have been suffered if the injured person had exercised the required diligence.

INSTRUCTION NO. 32

Upon retiring to the jury room you will select one of you to act as foreperson, who will preside over your deliberations and sign the verdict to which you agree. The foreperson should not dominate the jury, but the foreperson's opinion should be given the same weight as the opinions of the other members of the jury.

## INSTRUCTION NO. 33

Your attitude and conduct at the outset of your deliberations is very important. It will not be productive for any of you, upon entering the jury room, to make an emphatic expression of your opinion on the case, or to announce a determination to stand for a certain verdict. When that happens, your sense of pride may be aroused and you may hesitate to recede from an announced position, even if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but judges. Your deliberations in the jury room are for the ascertainment and declaration of the truth and the administration of justice.

## INSTRUCTION NO. 34

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if your individual judgment allows such agreement. You each must decide the case for yourself, but only after consideration of the case with your fellow jurors. You should not hesitate to change an opinion when convinced that it is wrong. However, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

# INSTRUCTION NO. 35

It is your duty to make findings of fact as to the questions I will submit to you. In making your findings of fact, you should bear in mind that the burden of proving any disputed fact rests upon the party claiming the fact to be true, and that fact must be proved by a preponderance of the evidence.

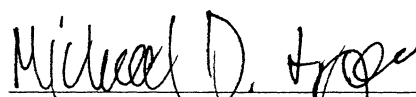
This is a civil action and six members of the jury may find and return a verdict. At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question, have the verdict signed and dated by your foreperson and then return it to this room.

You may knock on the door to let the bailiff know you have reached a verdict.

INSTRUCTION NO. 36

I have dated and signed these instructions, and you may take them with you to the jury room for further consideration; but I request that you return them into court with your verdict so they may be filed in this case as required by law.

Dated this 7 day of August, 2009.

  
\_\_\_\_\_  
Judge Michael D. Lyon  
District Court Judge

Tab 4

## **APPENDIX 4**



ORIGINAL

AUG 10 2009

**Case:** Lyon v. Bryan, M.D.

Transcript Testimony of **Anthony Serfustini,**  
**M.D.**

**Date:** September 19, 2008

**Volume:** 1

**Job #:** 562276

TRANSCRIPT TESTIMONY OF ANTHONY SERFUSTINI,



VD29452810

pages. 86

070903637 BRYAN,DONALD W

FILED  
UTAH APPELLATE COURTS

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20100006-CA

IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR WEBER COUNTY, STATE OF UTAH

JOHN A. LYON,

Plaintiff,

vs.

DONALD BRYAN, M.D.,

Defendant.

)  
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) CASE NO. 070903637MP  
) Judge R. S. Dutson  
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DEPOSITION OF DR. ANTHONY B. SERFUSTINI  
Taken at the Offices of Sousa Court Reporters  
1013 Garces Avenue  
Las Vegas, Nevada 89101  
On September 19, 2008  
At 12:59 p.m.

Reported by: JoAnn Orduna, CCR No. 370

1           A.     Correct.  Or as a resident at University  
2 of Utah.

3           Q.     Let me just ask you about whether or not  
4 this pulmonary embolism that developed could well  
5 have come from some other location than the arm.

6                     Are you able to rule that out?

7           A.     Good question.

8                     MR. SAVAGE:  It's the first one.

9                     MR. EPPERSON:  I'm entitled to get one or  
10 two good ones.  Go ahead.

11                    THE WITNESS:  The reason that's a good  
12 question, counsel, is because you know the history  
13 as well as I do.  He was in a snowmobile accident,  
14 developed some phlebitis in his lower extremity.

15                    Having said that, there was no  
16 indications from the preoperative workup, from the  
17 preoperative complaints that he had any lower  
18 extremity or pelvic complaints.

19                    So to get to your own statement, if  
20 you've got hoof beats, i.e., swelling and pain in  
21 the upper extremity, you know it's, it's a phlebitis  
22 until proven otherwise.  If you have no symptoms in  
23 lower extremity, more likely than not it didn't come  
24 from the lower extremities or the pelvis because he  
25 did have a hip surgery and that's always a potential

1 source of clots.

2 BY MR. EPPERSON:

3 Q. So you can't rule it out, but it's less  
4 likely?

5 A. Yes, correct. Yes, counsel.

6 Q. In fact, you comment, well, if he had  
7 perhaps done an ultrasound on the 28th and  
8 anticoagulation commenced, you used the comment, and  
9 I'm referring to the bottom of page eight as you  
10 follow along, it would be a quote, better chance,  
11 end quote, to avoid a pulmonary embolus  
12 complication.

13 Are you able to quantify this better  
14 chance or would that be speculative?

15 A. No, I don't think speculation had  
16 anything to do with it at all, counsel. I think  
17 that a better chance is something that you owe your  
18 patient.

19 Q. Can you quantify how much greater that  
20 chance would have been in this instance?

21 A. No. That would be pure speculation on my  
22 part.

23 Q. And despite subsequent hospitalization  
24 assuming had occurred and anticoagulation, could you  
25 have ruled, could you rule out the fact that this

1 would not have developed anyway? That is, a  
2 pulmonary embolus for this patient.

3 MR. SAVAGE: I --

4 MR. EPPERSON: I realize that's  
5 hypothetical, but even assuming --

6 MR. SAVAGE: Developed --

7 MR. EPPERSON: Let me restate the  
8 question.

9 MR. SAVAGE: The 28th or any --

10 MR. EPPERSON: Let me restate the  
11 question.

12 THE WITNESS: I think I know where you're  
13 going, counsel, but maybe --

14 BY MR. EPPERSON:

15 Q. Okay. Let me try to reask it.

16 A. Okay.

17 Q. We were talking about the better chance  
18 to avoid a pulmonary embolus. But even being  
19 hospitalized and then a coagulation -- and  
20 coagulated assuming had occurred still wouldn't  
21 guarantee or rule out that this patient would have  
22 had the very same course, would it?

23 A. Counsel, once again, with all due respect  
24 and I certainly do respect you, the clotted artery  
25 occurred. And the reason for the hospitalization

1 was to treat the clot. So I, I just don't know  
2 where you're going there.

3 Q. Well, your role here in part is trying  
4 to, you know, with -- you have the benefit of being  
5 more or less a Monday morning quarterback looking at  
6 what occurred. And you used the term well, there  
7 may have been a better chance to avoid a pulmonary  
8 embolus complication with subsequent hospitalization  
9 and anticoagulation. That was your report language.

10 A. Yes.

11 Q. I'll trying to build upon that and ask  
12 you to clarify that. Even if the diagnosis had been  
13 made on the 28th by Dr. Bryan through additional  
14 studies, in your mind does that rule out the, what  
15 eventually occurred to this patient or could that  
16 well have occurred anyway?

17 A. I thought I answered that question, but  
18 I'll try to answer it again. You're right, it could  
19 have occurred anyway, but once again, I think that  
20 as a physician, you deserve to give your patient  
21 that chance of avoiding it.

22 Q. You comment on page nine that it would  
23 appear that the surgical procedures on both the  
24 right and left upper extremities were done within  
25 the standard of care.