

1 SUPERIOR COURT OF NEW JERSEY
2 CIVIL PART
3 BERGEN COUNTY
DOCKET NO.: L-8823-13
A.D. #A-001067-15-T4

4 MARK CAVA, JUNIOR,)
)
5 Plaintiff,) TRANSCRIPT
) OF
6 vs.) MOTION
)
7 ELIZABETH SAIMSON,)
)
8 Defendant.)

9 Place: Bergen County Courthouse
10 10 Main Street
Hackensack, NJ 07601

11 Date: September 18, 2015

12 BEFORE:

13 HONORABLE JOHN J. LANGAN, JR., J.S.C. AND JURY

14 TRANSCRIPT ORDERED BY:

15 EDWARD J. DE PASCALE, ESQ., (McElroy, Deutsch,
16 Mulvaney & Carpenter, LLP)

17 APPEARANCES:

18 CHRISTIAN LOPIANO, ESQ., (LoPiano, Kenny &
19 Stinson)
Attorney for Plaintiff

20 EMILY BARNETT, ESQ.
21 NGHIA NGUYEN, ESQ., (Viscomi & Lyons)
Attorney for Defendant

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24 Audio Recorded
25 Recording Opr:

I N D E X

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<u>In re:</u>	<u>Page</u>
<u>Colloquy</u>	3

The Court
Decision

To be given at a later
date

1 THE COURT: Good afternoon ladies and
2 gentlemen. This is the matter of Cava C-A-V-A v.
3 Saimson S-A-M-S-O-N, Elizabeth. Counsels could I have
4 all your appearances please?

5 MR. LOPIANO: Good afternoon Your Honor.
6 Christian Lopiano. Lopiano, Kenny and Stinson on
7 behalf of Plaintiff, Mark Cava, Junior.

8 MS. BARNETT: Good afternoon Your Honor.
9 Emily Barnett from the Law Offices of Viscomi and Lyons
10 on behalf of the Defendant, Elizabeth Saimson.

11 THE COURT: Welcome counsel.

12 MR. NGUYEN: Good afternoon Judge. Nghia
13 Nguyen from Viscomi and Lyons on behalf of the
14 defendant.

15 THE COURT: Okay. Thank you very much. All
16 right. As counsel commented give or take four weeks
17 ago the jury here at this courtroom came in at a
18 verdict at \$500,000.00 for the plaintiff against the
19 defendant. There's been an application made to this
20 court one, for a new trial and/or remitter and I have
21 the papers. In looking over -- let me get my notes
22 straight. I have more notes because I don't want to
23 confuse you with that last case or the case before
24 that. And I don't want to be all over the lot like I
25 was on that one. Of course they gave me a couple

1 hundred pages of briefs. I'm looking -- if I could
2 read my handwriting it would help.

3 I think everybody's referred to He v. Miller
4 207 NJ 230 on remitter. My understanding of that case
5 is there are three things or three points that the
6 Court has to do. And the first is to create a
7 meaningful opportunity for the litigants to talk to
8 express themselves. That's what's happened here. We
9 get the briefs. We get the argument. Now I got to
10 tell you why I make my decision on a particular basis.
11 In my own informed conscience is a court must do more
12 -- ask for -- I'm reading from He. A trial court to
13 state those cases, appearance or views of mind and then
14 the infamous -- strike the word infamous. The fill of
15 the case criteria. Which I don't think is given as
16 much weight as it used to be when I started practicing
17 forty three years ago give or take a year.

18 All right. So I think the plaintiff is --
19 strike that. The defendant has put forth the areas
20 where one, this Court either over stepped or made poor
21 rulings. The first being the jury -- well I'm going to
22 -- this is my notes. The jury instructions were
23 defense counsel asked this Court to give a curative
24 instruction about the out of pocket expenses. The
25 argument being is that they -- they shouldn't even been

1 allowed to say that because they never established the
2 pip. There was ample money left in the pip so
3 therefore the -- the jury was given the impression --
4 whatever -- that's their -- not my statements. That
5 somehow that that gave the poor boy impression to the
6 -- and therefore generates some sympathy. The
7 powerpoint which I had to look at again. I appreciate
8 they gave me the color. When I say -- I don't think
9 it's a powerpoint. They called it something else.

10 MR. LOPIANO: That's -- that's a time line.
11 I did --

12 THE COURT: That's a time line.

13 MR. LOPIANO: Just so we're clear, I used the
14 powerpoint in my closing. The -- the --

15 THE COURT: But -- I --

16 MR. LOPIANO: What they're talking about is
17 the time line.

18 THE COURT: You -- you've already -- I've
19 already expressed my ignorance as to modern technology
20 and I learned more than I -- I learned a lot on
21 particularly that Friday. That there were things that
22 I didn't know you could do that were done. Because my
23 -- I -- my first ruling on the good doctor, Doctor D --
24 Duhare. I said -- I won't say because the record is
25 clear as to what I said cause I said no originally and

1 then I said yes to the way it was done. Was I -- I --
2 wow I didn't know they could do that.

3 MR. LOPIANO: Oh you mean the audio?

4 THE COURT: Yea.

5 MR. LOPIANO: Yea. Playing back. Yea.

6 THE COURT: Well no from -- from one
7 afternoon to the next morning.

8 MR. LOPIANO: Yea.

9 THE COURT: The -- the technology that was
10 used in this case was beyond my glean or what I
11 understood. Keeping in mind that's not a whole --

12 MR. LOPIANO: It's a low threshold.

13 THE COURT: It's not -- that's not a whole
14 lot.

15 MR. LOPIANO: No disrespect but I understand
16 what you're saying.

17 THE COURT: No and -- none taken. When
18 you're ignorant you're ignorant. I don't -- I mean I
19 told you the only person I email is my daughter in
20 Africa because that's the only way I can get a hold of
21 her and even then I have to write her follow up memo
22 did you get what I sent? Because I'm not so sure it
23 went. If I don't put a stamp on it -- I still pay by
24 checks. I got my checks. I sit down Saturday morning
25 with my measly salary and I write checks. I -- just

1 me. That doesn't mean the rest of the world is wrong
2 it's just I'm in -- I've said enough about that.

3 But that was a big point that in the time
4 line that was presented there were opinions expressed
5 as minute as they may have been on that scale, more
6 particularly Doctor -- Doctor Ragukonis -- Ragukonis.
7 I always feel like I have a -- Doctor Ragukonis or
8 something. That -- cause -- comments were more than
9 just what Doctor Duhare said. Cause it -- the way I
10 looked at it originally in my ruling was that hey this
11 is all what the doctor is going to testify to, that he
12 reviewed all his reports and he relied upon them. So
13 it wasn't something extemporaneous that was out of the
14 glean. So I allowed that. They're saying that what
15 happens now, the argument on the new trial is that by
16 the way now the jury is seeing other doctors who didn't
17 testify opinion. So what -- I'm just outlining what it
18 is --

19 MR. LOPIANO: Oh okay.

20 THE COURT: I mean --

21 MR. LOPIANO: I just don't know when I get to
22 respond. That's all. I didn't --

23 THE COURT: No I -- well what I --

24 MS. BARNETT: Well I didn't even get to talk
25 yet.

1 THE COURT: In referencing He I was -- I went
2 through the cases that I have to hear your argument and
3 -- and to tell you that I'm going to shoot from the hip
4 would be a mis-representation because I thought I -- I
5 can't say I was going to shoot from the hip. I read
6 your papers. But after I read He again I think it's my
7 responsibility to listen to the arguments. You know
8 it's a little bit more than just reading the papers. I
9 have the five -- certifications from -- on the cases
10 that say five hundred oh -- it's not that big a deal.
11 I got the other cases out of hear say out of whatever
12 the objection is to those. I got to read them. And
13 very frankly, the feel of the case. Okay? That's
14 something I have to do. I went through my notes. I've
15 already expressed my opinion with regards to the
16 technology used in this case. The seventeen, sixteen,
17 fifteen ad limine motions. The case was well -- to say
18 it mildly well prepared. So it was on the defense
19 side. But there's a lot more -- and cause like I said
20 with some of the ad limine motions I did, I do remember
21 and it's not to my credit, much to my chagrin sometimes
22 I say things in my chambers which I don't say out here
23 and that's not fair to the litigants cause I may
24 remember it, you may remember it but it's not -- the
25 little blue guy hasn't taken into consideration. But I

1 do remember saying by the way if you want to have any
2 more time to respond to these -- cause I read them --
3 cause I -- I made a point I like to have them Friday.
4 And I said whoa I didn't know it was going to be that
5 many. And I said bring them over. They said today? I
6 said yea. Why not. Well I didn't expect to have a
7 hernia bringing them home. But it is what it is.
8 Okay? They were well thought out. I think defense had
9 an opportunity to refer to them. But that's one of the
10 arguments that maybe I didn't spend as much time with
11 those ad limine motions as I should have. I think I
12 did. Okay?

13 You know let me say one thing about the
14 failure to object. For example, the opening statements
15 I treat that as courtesy. All right? I don't find
16 that on either side. I don't like it. I didn't like
17 them when I practiced. I don't like it in my courtroom
18 when people get up and object in the opening
19 statements. Everybody gets a fair opportunity unless
20 they totally exaggerate something. So if in fact the
21 defense didn't get up and say hey Judge -- he didn't.
22 I don't take that to be wrong. I take that as a matter
23 of being courteous. You know let him say it. Unless
24 there's something -- when are you going to stop beating
25 your wife? You know. One of those things. It wasn't.

1 So I -- I don't find anything wrong in not objecting
2 all the time. As a matter of fact some court's
3 appreciate it like me you don't jump up and down all
4 the time. So some of these maybe have to be plain
5 error because that's me. Okay? Did I -- did I go
6 through some stop signs I shouldn't have gone through?
7 I don't think I did. I thought I'd try to be fair to
8 both sides. If I do anything in the time I spend on
9 the bench I -- I just like to think I'm fair. I may
10 not be the sharpest pencil in the box sometimes, but I
11 want to be fair and I think I was. I think both -- let
12 me say this about both sides -- the case I think both
13 -- all the attorney's involved in the matter were --
14 very -- they were very professional with each other.
15 You know I can't say that every time. Sometimes you
16 think they're out there -- they're on the Rutgers
17 football team or something. You know they're --
18 they're beating up everybody. You know. It -- it --
19 it's when you're professional you act professional and
20 I think everybody in this case did. There were no
21 cheap shots. There was no back stabbing. There was no
22 -- no that.

23 They want the feel of the case, I -- I
24 thought the mother of -- of the -- of Cava's son was
25 dynamite. You know they want the feel of the case, I

1 thought he was an excellent witness. Credible,
2 believable, he did not exaggerate, did not embellish,
3 he was calm, he was polite, he was a gentlemen. I
4 thought Doctor Duhare it was one of the best
5 testimony's I've seen. And I've -- I've, granted I've
6 been doing this for ten years as a Judge, eight --
7 eight in the civil. I thought he was clear, concise,
8 believable. I -- I think the -- the driver, the
9 plaintiff -- defendant probably shouldn't have been
10 called as a witness.

11 MR. LOPIANO: Should or should not?

12 THE COURT: Should not.

13 MR. LOPIANO: Oh should not.

14 THE COURT: She didn't help. She was a nice
15 lady. She was young when it happened.

16 MR. LOPIANO: Yea.

17 THE COURT: But she -- she admitted she was
18 responsible for the accident. She didn't apologize.
19 It was close. You know? And then I even objected up
20 to -- to the question asked by the plaintiff, by the
21 way I'm not letting her ask that question.

22 MR. LOPIANO: Hundred percent question.

23 THE COURT: Explain what you meant by that.
24 You know it -- it -- so she did. That -- that's one of
25 the errors that they claim I made. And I won't say

1 what comments I made about that. I mean I -- I still
2 go over it now and I say oh that was -- but I did. I
3 made the ruling. It was following too closely. But
4 keep in mind following too closely should mean you're
5 moving. Not stationary. He wasn't in the middle of
6 the road. It was a well lit -- you know she should
7 have seen him. She was too close. Whatever. She was
8 a nice young lady. She still is a nice young lady.

9 As to the doctor --

10 MR. LOPIANO: Lakin.

11 MS. BARNETT: Lakin.

12 THE COURT: -- if I can't say something nice
13 about people I try not to say anything at all. But I'm
14 compelled to say something. What I -- if I could avoid
15 making this statement I would. Atrocious. You've --
16 you slaughtered him on cross examination. It was like
17 Custer.

18 MR. LOPIANO: Thank you.

19 THE COURT: I'm not thanking you. It's just
20 the way -- you want the feel of the case. Cause he's
21 -- he was a gentlemen too. But he -- he was wrong on
22 several areas. He -- he -- I gave an EMG which I --
23 I've already made a record, I -- I think those are --
24 you know, it's no big deal. But I gave that one as
25 much as he knew about it I could put in a thimble. He

1 didn't. He -- he was -- he's a professional. I found
2 him to be a professional. But he -- he -- he hurt the
3 case, not helped the case. It wasn't even like
4 breaking even. Its like okay you got your expert you
5 negate mine. I found it -- my -- I have these sports
6 analogies because that's all I ever -- you know. I got
7 like a Cooperstown testimony verses some high school
8 guy. That's how bad I thought the -- I won't say bad.
9 I'll strike the word. That's not very fair. He -- he
10 wasn't helpful. He didn't prove anything. Matter of
11 fact to the contraire. I think the jury didn't buy any
12 of it either.

13 They want the feel of the case. I found the
14 mother of his child to be -- she was -- she knocked the
15 ball out of the park. He knocked the ball out of the
16 park. There's no question in my mind, I'm not a doctor
17 but I've seen how many of these cases you know, let the
18 record reflect my -- my practice when I was at DeCotiis
19 (phonetic) wasn't doing personal injury work and what I
20 did was defense and I represented three insurance
21 funds. But we had Title 59 so I didn't get to see a
22 whole lot of cases. We just threw them out on
23 liability. But I've had how many cases here? One a
24 month. One a week. Two a week. Two a month. Three a
25 month for twenty years. There's no question there was

1 a herniation. There was a rear end hit. I don't see
2 how the carrier -- strike that. And whatever
3 negotiations were between them and my encouragement so
4 be it. It didn't happen. All right?

5 But there are some questions about what I
6 did. And I -- I owe it back. Do I think I like
7 reading this? Absolutely no. Cause in hindsight would
8 I have changed my mind on something? No, not right now
9 and I won't change it. Some might say well look what's
10 going to happen -- on appeal. But then so be it. But
11 I don't mean to be disrespectful to the doctor. I
12 really don't. But he didn't help. I mean I thought he
13 hurt the case. He -- he -- and I don't think anybody
14 went after him. You know sometimes -- I'm not -- I
15 don't think you put the pictures in of the -- I think I
16 asked you or I told you I wouldn't let the pictures in
17 about the various places where he works.

18 MR. LOPIANO: I didn't use them.

19 THE COURT: I know you didn't.

20 MR. LOPIANO: Yea.

21 THE COURT: Because I wouldn't let you --

22 MR. LOPIANO: I -- I didn't -- I felt as
23 though --

24 THE COURT: I -- I said --

25 MR. LOPIANO: It was a judgement call at the

1 time. I felt I didn't need them.

2 THE COURT: Well but I wouldn't have let him
3 use them anyway. I said look just because he may do
4 ExamWorks -- works for them and does one day a week in
5 Red Bank and one day a week in Camden and one week in
6 -- so be it. He's a doctor. He's entitled to make a
7 living. Okay? However, I think his -- he -- his --
8 I'm not going to harp on it because they asked -- the
9 case says I have to get the feel of the case and that's
10 -- I don't want to say because I found the defense to
11 be -- he epitomizes what I think a lawyer should be, a
12 gentlemen. That he in fact always, every time he's
13 been in this court he's been a gentlemen. He's what
14 people should be. He treats the law with respect. He
15 treats his adversaries with respect. He's welcome in
16 my courtroom any time. And sometimes they don't get to
17 call the shots. All right? They don't listen to the
18 Judge. Not the lawyer. Some people don't listen to
19 the Judge. All right? Not that they have to. You
20 know that's -- you roll the dice. They rolled the
21 dice.

22 So that's my feel of the case. I -- I was
23 going to -- exaggerate. Expand upon it. I got to be
24 careful of my language too. Cause we have the out of
25 pocket expenses that -- that -- that he had PIP

1 coverage. The power -- the time lines, the
2 powerpoint's that very frankly I don't know the
3 difference. Except the powerpoint comes up on the
4 schedule. Let me tell you what I was impressed by and
5 I think the jury was impressed by was the time unit.
6 In my ten years as sitting -- eight years. Let's leave
7 it at the eight years I've done personal injury. I've
8 never seen that presented as well as it was in this
9 case. Usually I poo poo it. I say you really want to
10 do that? Come on. It's a waste of time. Come on.
11 Give me a break. Move it along. Hey by the way treat
12 it the same way you treat life expectancy. You give it
13 whatever weight you want. But the way it was presented
14 in this case by the zillionth or millionth of hours or
15 minutes, whatever it was that's what drove the train.
16 That's what drove in my opinion, based upon my
17 experience of being a lawyer for forty some odd -- I
18 shouldn't say odd years. Forty three years, whatever
19 its been. That was the case. That the jury -- and I'm
20 not saying how they did it cause I'm -- I think under
21 the case law whether I think it's -- I don't get to --
22 being a high number whether the mathematical equations,
23 I don't have to figure that out. I just have to know
24 it was \$500,000.00.

25 But the -- you want the feel of the case? He

1 was twenty one years old when this accident happened.
2 He was going to live fifty more years. He's going to
3 have live fifty years with the pain and suffering.
4 Nobody also asked me for any mitigation charge.
5 Because we don't have any opinions on mitigation other
6 than his own statements, I don't want epidurals. Which
7 I said everybody gets an epidural. And then even after
8 Doctor Duhare testified -- and Doctor Duhare says you
9 know what risk of that is? Ah forget it. Ain't going
10 to happen. If it's in your neck, maybe I -- I'd tell
11 you worry about paralysis and stuff. But I don't talk
12 about the back. So I think it was -- the question was
13 asked of the plaintiff now that you heard Doctor Duhare
14 would you think about it? But I wasn't -- to the best
15 of my recollection I wasn't asked for mitigation
16 because usually and I say usually based upon my forty
17 years experience, I usually get a report from the
18 doctor that he refused the surgery and if he had the
19 surgery I can tell you within a reasonable degree of
20 medical certainty that in fact that would help him or
21 her. There's no testimony to that effect. I look for
22 it because and I'll be very -- I'm always candid
23 because I found that the lawyers involved in this
24 matter were -- treated this Court with the utmost
25 respect. That they were cooperative. Anything I asked

1 they -- they provided it the best they could to me and
2 that's always appreciated. I didn't have to go
3 looking. Granted I didn't want to read seventeen ad
4 limine motions but so be it. I -- I think I even used
5 the term, who's paranoid here? Look at all these --
6 look at all these motions. Oh my goodness.

7 The air bag deployment. Let me -- that's an
8 easy one for me. You need a -- unless we have Doctor
9 Goldstone (phonetic) testifying who thinks he's a bio-
10 mechanical expert that he would testify that could have
11 never happened because the impact wasn't hard enough.
12 I don't know and I can't tell you as a lay person that
13 a rear end should deploy the air bags as opposed to a
14 front end hit. I don't know. What's -- what's the --
15 the pressure? So I said no to the air bags. That
16 wasn't a hard one. Hard one may have been the
17 liability. But I made my rule. I put my facts on
18 there. I -- I'm not going to change my mind. Okay?
19 And I did deliberate because my first impression of
20 that, I went after the plaintiff. Why do you want
21 that? Come on. Give me a break. Bah, bah, bah. And
22 then you say Judge how about she's just too close? You
23 know forget the blinkers. Forget the lights for a
24 minute though we say they were on. That she came
25 through the intersection, she was how far away, she's

1 on the other side of the intersection, he stops, she
2 hits him in the rear and -- and I -- I think I put it
3 on the record, I'm pretty sure I did, I didn't look at
4 the pictures in making my decision. All right? Cause
5 of the damage to the cars. Again I thought Ms. Saimson
6 was a nice young lady. She was -- I didn't think she
7 embellished. I think she was -- she was here. Her mom
8 was with her. She -- she had her boyfriend in the car.
9 A little late on a Saturday, whatever night it was.

10 So but the -- and I apologize. I went out
11 and did this an hour or two ago. I said the same thing
12 to the -- I said oh I'm going to listen to it then I
13 start shooting my mouth off without giving everybody a
14 chance. Cause it's the application of the defendant.
15 So Emily or -- who's going to make the argument?

16 MS. BARNETT: I am Judge.

17 THE COURT: Shoot. Go ahead.

18 MS. BARNETT: Well Judge I'm a little
19 hesitant --

20 THE COURT: Forget what I just said by the
21 way.

22 MS. BARNETT: It seems -- respectfully it
23 seems like you've already made up your decision without
24 listening to the argument --

25 THE COURT: No.

1 MS. BARNETT: So if you could bear with me?

2 THE COURT: I just said forget what I said
3 because I --

4 MS. BARNETT: Okay.

5 THE COURT: Haven't made up my mind because I
6 haven't even touched upon the cases.

7 MS. BARNETT: Okay.

8 THE COURT: The excessiveness of it.

9 MS. BARNETT: Well Judge the -- the -- the
10 gist of it was there were several incorrect rulings
11 that cumulatively presented plain error --

12 THE COURT: Bad --

13 MS. BARNETT: Bad judgement and plain error
14 Judge that requires a new trial. So as far as the out
15 of pockets go, nobody here disputes that there was
16 \$250,000.00 in PIP. And nobody -- it's indisputable
17 Judge that the plaintiff had, I believe it was twenty
18 two physical therapy and chiropractic visits plus a
19 smattering of doctors visits. I believe there were --

20 THE COURT: There weren't a lot.

21 MS. BARNETT: Four or five.

22 THE COURT: Yea. Okay.

23 MS. BARNETT: So it's incomprehensible Judge
24 that let's call it -- I'll round it up Judge to twenty
25 two physical therapy and chiro visits and the five

1 doctor visits, I'll even give him a little bit more.
2 Let's call it thirty visits all together. It's
3 incomprehensible that that would have used up
4 \$250,000.00 in PIP. So PIP was still available. The
5 plaintiffs understanding or belief that he would have
6 had to pay out of pocket is irrelevant. There was no
7 proof that he was cut off or that an application had
8 been made to PIP arbitration or something else to re-
9 open it or get any other doctors visits to be paid for.
10 So the fact that he was permitted to testify that it
11 was either his belief or a doctor told him --

12 THE COURT: He was told.

13 MS. BARNETT: He would have to pay out of
14 pocket should never have come before the jury. And I
15 understand that part of the defense was to call into
16 question that break in treatment. That the plaintiff
17 had seven visits between February 7 and March 5 of 2012
18 and then did not treat again until January of 2014.
19 That was entirely permissible Judge to say you didn't
20 treat. Now for him to say well I would have to pay out
21 of -- out of pocket Judge that is a -- a mis-
22 representation. It's a mis-representation. Whether
23 the plaintiff believed it or the doctor said it should
24 never have come to a jury. And a curative instruction
25 was --

1 THE COURT: What -- what -- you mean the --
2 the testimony would have been out of pocket?

3 MS. BARNETT: Well the testimony was I
4 couldn't go for more treatment because I would have to
5 pay out of pocket.

6 THE COURT: That's what he said.

7 MS. BARNETT: That's a mis-representation
8 Judge. Maybe it was his belief. But the fact is
9 that's a mis-representation because he never would have
10 had to pay out of pocket. Assuming thirty visits Judge
11 that would had to have been an awful lot -- a very
12 expensive doctors visit to reach to the level of in
13 excess of \$250,000.00. So that's a mis-representation.
14 Whether it's a mis-understanding or a mis-
15 representation should not have gone to the jury.

16 THE COURT: Well it was subject to cross
17 examination.

18 MS. BARNETT: However Judge a curative
19 instruction was requested and I was here for that Judge
20 and my --

21 THE COURT: I know. I saw you sitting in the
22 back with the two young ladies and I say young --

23 MS. BARNETT: We all appreciate that Judge.
24 I hope I'm included in that.

25 THE COURT: Oh no -- we're all getting older.

1 MS. BARNETT: But a curative instruction was
2 requested to the effect of they should disregard it
3 because it's not an issue. And --

4 THE COURT: There were no medical --.

5 MS. BARNETT: Medicals -- right. However
6 plaintiffs counsel then stood up and said well Judge I
7 want to make sure that counsels not going to get up and
8 say something to the effect of you can't -- don't
9 consider the medical bills because she had PIP. And
10 everybody agreed yes he's not going to say that.

11 THE COURT: I don't think that --

12 MS. BARNETT: He's absolutely not going to
13 say that. So then in his closing --

14 THE COURT: Yea.

15 MS. BARNETT: Plaintiffs counsel turned
16 around and said you heard from the plaintiff and you
17 heard from Doctor Duhare plaintiff couldn't go for more
18 medical treatment because he would have to had pay out
19 of his own pocket. Judge should never have been
20 permitted. That's plain error. And respectfully Judge
21 --

22 THE COURT: Okay.

23 MS. BARNETT: That never should have been
24 permitted. That goes to the jury. We don't know if
25 part of their verdict was --

1 THE COURT: Well when what goes to the jury?

2 MS. BARNETT: That they've heard that he
3 couldn't go for more treatment --

4 THE COURT: I mean her -- I mean -- I said
5 what -- okay.

6 MS. BARNETT: That he couldn't go for more
7 treatment because he would have had to pay out of his
8 pocket and here is a hard working young man who is
9 supporting a family and that's wonderful. But oh we
10 feel bad because he was working, he's trying to support
11 a family. He couldn't take money out of his pocket
12 because that's going to his family. We don't know what
13 part of his verdict -- their verdict --

14 THE COURT: That's -- that's what you're
15 implying. Okay.

16 MS. BARNETT: That's what I'm implying Judge.
17 So that never should have happened. And I just lost my
18 whole train of thought. But however Judge should never
19 have been permitted. So that's one thing Judge.

20 THE COURT: Well let me -- why don't we take
21 point by point?

22 MS. BARNETT: Oh okay.

23 MR. LOPIANO: Yea. Thank you for doing that
24 because I would have forgotten --

25 THE COURT: Well no I tried to do it the last

1 time --

2

3 MR. LOPIANO: You know I would have forgot
4 you know what I was going to say --

5 MS. BARNETT: I always --

6 MR. LOPIANO: In response.

7 THE COURT: No. I -- we'll go point by
8 point.

9 MS. BARNETT: Okay.

10 MR. LOPIANO: Okay.

11 THE COURT: But keep in mind their argument
12 is totality of it. Not just one single argument --

13 MR. LOPIANO: Yea that's --

14 MS. BARNETT: Correct Judge.

15 THE COURT: That if you look at the greater
16 picture the jury was fed a line and you know.

17 MR. LOPIANO: Well let's -- let's be clear
18 about -- first of all let's be absolutely clear about
19 what the testimony was. Just to make a generalized
20 statement well he didn't go for more treatment because
21 he had to pay out of his pocket. No. That's an --

22 THE COURT: Well wasn't he asked though why
23 didn't you go to more treatment?

24 MR. LOPIANO: That's an --

25 THE COURT: Didn't he say I would have to pay

1 out of my own pocket? That's my recollection.

2 MR. LOPIANO: He -- let's be specific. What
3 he was asked is why -- remember there was the initial
4 phase of treatment? Where he saw his primary, he gets
5 the MRI, he says Matarese, Matarese sends him to
6 therapy. After two months of therapy basically says
7 you're not going to get any better, you need to see --
8 okay? You need to see a pain management doctor and
9 that's when the whole point about the epidurals come in
10 and he said I'm not doing that. And --

11 THE COURT: Yea.

12 MR. LOPIANO: Then said well why didn't you
13 go -- then the question was -- and this was in
14 chambers, counsel said well I'm going to make a big
15 deal and a large part of our defense is going to be
16 well why didn't you go for more physical therapy at
17 that point? Why didn't you go for more treatment?
18 Well the answer is, number one the treatment that was
19 recommended was the epidurals and that's what stopped
20 him going for anymore further treatment in terms of
21 epidurals. Well then the issue is well you didn't go
22 for more physical therapy? And then the testimony was
23 yea because I was told I had to pay out of pocket.
24 That's the time. That's the only testimony that came
25 in where he said I had to pay out of pocket.

1 THE COURT: The physical therapy?

2 MR. LOPIANO: The physical therapy on the
3 first round. When it came to Doctor Webber -- remember
4 how he got to Doctor Webber --

5 THE COURT: He's the -- is that the
6 chiropractor?

7 MR. LOPIANO: The chiropractor. Twenty two
8 months later he got to Doctor Webber because he's now
9 working for Mr. Denunziata (phonetic) or --

10 THE COURT: And he says -- sends him over
11 because he's --

12 MR. LOPIANO: And he said let me take you to
13 my friend and he can you know help you out. He goes to
14 Webber. Webber says you know what? Just give me two,
15 three months and I'll get you back where you can start
16 being functioning you know? Again. And you won't be
17 so bad. So and then the question was well why didn't
18 you continue with Doctor Webber? And his response was
19 and Your Honor actually said it on the record, I
20 listened to the audio tapes and in my papers -- and I
21 don't know whether it's -- you know that's proper or
22 not in terms of you know I didn't have a formal
23 transcript. But what I did do and what's clear in my
24 papers, my lengthy papers and I apologize for the
25 length. But we spent many hours going through all of

1 the testimony because I wanted to be sure when I made
2 an argument in my appears it was accurate. So we
3 reviewed the audio tape; okay? And if this case goes
4 on to the Appellate Division the record will show that
5 his testimony and Your Honor even said in response to
6 defense counsels statement, well that's not what he
7 testified for the chiropractor. He didn't go back --
8 he didn't continue with the chiropractor because he was
9 losing time from work. Because he -- he -- you know he
10 couldn't -- he couldn't you know leave work early and
11 --

12 THE COURT: In the closing --

13 MR. LOPIANO: Then go for treatment.

14 THE COURT: Didn't somebody say in their
15 closing that by the way you know he -- he didn't go
16 back because it's out of -- I have some recollection --

17 MS. BARNETT: Counsel said that.

18 MR. LOPIANO: I -- I did say --

19 THE COURT: Okay.

20 MR. LOPIANO: In my closing -- did I break it
21 down as specifically as I am now? No. But again was
22 there any objection? Did it go too far? Was it -- did
23 I make an argument --

24 THE COURT: I think -- already made my
25 comments about people interrupting at closing. So --

1 MR. LOPIANO: I -- I understand that. I
2 understand that Your Honor --

3 THE COURT: I don't want anybody to reflect
4 critically -- okay. Go ahead.

5 MR. LOPIANO: I get that. But there was no
6 -- at no point in my closing did I say to the jury or
7 represent Mark as a plaintiff who you know what? He
8 didn't get proper treatment and he's in this condition
9 because he didn't go and he had to pay out of pocket.
10 That was never a theme. That was never inferred and
11 could never --

12 THE COURT: Well I -- I know --

13 MR. LOPIANO: Be inferred from anything that
14 I said.

15 THE COURT: What the defense posture is that
16 by the way, how badly could he be hurt? He didn't get
17 this much treatment and they did -- in their closing
18 talk about the gaps. And say how bad can a guy get
19 hurt? In fact he has twenty months --

20 MR. LOPIANO: And that's --

21 THE COURT: Two years in between treatments.
22 How bad is he hurt?

23 MR. LOPIANO: That -- and that was the whole
24 -- that basically has been the defense of this case
25 from the beginning.

1 THE COURT: Well it made good sense to me
2 too.

3 MR. LOPIANO: Yea and -- and that's fine.
4 But if you're going to -- if you're going to do that
5 and then the explanation is well you know what? No
6 further treatment and Doctor Duhare said this too.
7 Doctor Duhare if you recall and I didnt put this in my
8 papers but Doctor Duhare said you know what? Yea you
9 get physical therapy. If it doesn't work after a
10 months it ain't working. Same thing with the
11 chiropractor. If you get the chiropractor it doesn't
12 work after a while yea it's not -- and that's pretty
13 much what he said yea you know what? It's not working.

14 THE COURT: Wasn't somebody going to call --
15 I forget somebody wasn't called --

16 MR. LOPIANO: Mastri.

17 THE COURT: Who was it?

18 MR. LOPIANO: No. No. It was Doctor Webber.

19 MS. BARNETT: No, Mastri --

20 MR. LOPIANO: I was going to call Doctor
21 Webber to testify --

22 THE COURT: Yea. But then I thought maybe
23 the defense was going to call him.

24 MR. LOPIANO: No. I was going to call Doctor
25 Webber but because of the scheduling --

1 THE COURT: I can't read my own handwriting.

2 MR. LOPIANO: Because of the scheduling it
3 was difficult because we didn't have the --

4 THE COURT: Well no I said if they're going
5 to do it, do it. And then they said well they -- they
6 -- they -- I didn't have to make a ruling because he
7 wasn't available or wouldn't come, or all of the above.

8 MR. LOPIANO: Well Doctor -- Doctor Mastri
9 was the doctor that they tried to serve a subpoena on
10 mid-trial. They wanted to get Mastri in because Mastri
11 was the EMG. That was the issue that -- where they
12 tried to get him in.

13 THE COURT: But I let -- I let the doctor
14 testify to EMG.

15 MR. LOPIANO: And you let the doctor testify
16 to the EMG anyway --

17 THE COURT: That it was normal.

18 MR. LOPIANO: Over my strong objection.

19 THE COURT: I know.

20 MR. LOPIANO: And -- and that came in. And
21 then Your Honor you know actually --

22 THE COURT: After one hour and plus 104
23 Hearing.

24 MR. LOPIANO: Correct. But then Your Honor
25 -- and -- and -- but we came up I thought with a very

1 reasonable, not placating the Court, but I thought it
2 was a very reasonable decision on how to deal with that
3 because I needed to know whether the EMG was coming in
4 and you said well I'll deal with --

5 MS. BARNETT: We're getting off -- Judge --

6 MR. LOPIANO: I know we're getting off --
7 here --

8 THE COURT: We -- you're right on that.

9 MR. LOPIANO: But just -- just -- I --

10 THE COURT: No, no, no. I --

11 MR. LOPIANO: Clean that up.

12 THE COURT: You know okay. So we've
13 addressed what you think or your recollection as to the
14 bills and that's sort of my recollection too.

15 MR. LOPIANO: And the point is when -- when
16 Your Honor told the jury at the end this has absolutely
17 nothing to do about medical bills; okay? I mean that
18 was such a small part of his testimony. For the --

19 THE COURT: That's boilerplate.

20 MR. LOPIANO: Defense to -- for the defense
21 to say though -- I know but for the defense to come in
22 here and say I portrayed him as some poor, you know
23 young kid who couldn't get treatment and he's suffering
24 because he had to pay out of his pocket. That's not
25 what the case was about.

1 THE COURT: All right. Okay.

2 MR. LOPIANO: And I'll -- and I'll rely upon
3 Your Honor's recollection --

4 THE COURT: All right. Okay. And --

5 MR. LOPIANO: Of the feel of the case on that
6 issue.

7 THE COURT: Emily? Ms. Barnett?

8 MS. BARNETT: Judge -- well I want to just
9 respond to that Judge. I didn't get up here and say
10 that that was the major case. My point is --

11 THE COURT: I know --

12 MS. BARNETT: The plaintiff said it and
13 counsel said it in his closing. And yes it's only
14 argument but that's the last thing the jury hears.

15 THE COURT: It -- well --

16 MS. BARNETT: That you heard from the
17 plaintiff and you heard from Doctor Duhare he couldn't
18 go for treatment, he didn't go for treatment because he
19 would have had to pay out of pocket. And it's
20 disingenuous for counsel to get up here and say that at
21 his closing Judge --

22 THE COURT: I --

23 MS. BARNETT: When he made the point of
24 making sure that defense didn't get up and say well he
25 can't get up and say the reason he didn't go --

1 THE COURT: Well he -- he made a point about
2 the gap in treatment; wasn't that sufficient? I mean
3 he said look he didn't get treatment for twenty -- I
4 remember cause we waited about a half hour so he could
5 -- no disrespect -- to prepare his closing argument. I
6 thought we were going to start. He came in and
7 lambasted the treatment schedule. He said by the way
8 he -- how bad can this guy be hurt? Come on --

9 MS. BARNETT: Judge --

10 THE COURT: -- twenty two months he did
11 zippo, nothing. And I don't remember it because he
12 didn't have medical bills. He didn't want the
13 epidurals which I said some few times everybody gets
14 them.

15 MS. BARNETT: Judge --

16 THE COURT: I mean Doctor -- would love to
17 have them. It's only \$11,000.00 a pop. That part --
18 exaggeration.

19 MS. BARNETT: That's not the point Judge --

20 THE COURT: Yea.

21 MS. BARNETT: The point is there should have
22 been a curative instruction and -- plaintiff should
23 never -- defendant --

24 THE COURT: Curative to say what?

25 MS. BARNETT: Defendant shouldn't have been

1 --

2 THE COURT: I'm sorry. Okay.

3 MS. BARNETT: Plaintiff shouldn't have been
4 allowed to say it and counsel shouldn't have especially
5 after he asked for clarification of defense counsel
6 that defense counsel wasn't going to get up during his
7 closing and say you heard the plaintiff say he couldn't
8 get treatment. It's not about the medicals because he
9 had PIP. So for counsel to ask for that clarification
10 and then to go and reiterate --

11 THE COURT: Well he -- he was going to -- he
12 was going to say that he PIP coverage?

13 MS. BARNETT: Counsel asked --

14 THE COURT: No, no. I'm saying cause counsel
15 -- you're -- you're cohort was he going to get up and
16 --

17 MS. BARNETT: No.

18 THE COURT: And say that by the way he had
19 PIP coverage and -- cause that was never --

20 MS. BARNETT: No. Not at all. My point is
21 when plaintiffs counsel stood up at the -- before
22 closings and said Judge. Judge. I understand what
23 you're ruling is but I want to make sure that defense
24 counsel doesn't stand up and say you heard about the
25 fact that plaintiff couldn't get more treatment because

1 he had to pay out of pocket. Medical bills aren't an
2 issue because he had PIP. Both you and --

3 THE COURT: Okay.

4 MS. BARNETT: My colleague both said I'm not
5 going to say that. Of course I wouldn't say that --

6 THE COURT: So what's the curative
7 instruction going to be?

8 MS. BARNETT: You heard testimony --
9 something to the effect of --

10 THE COURT: No --

11 MS. BARNETT: Judge you heard testimony from
12 both Doctor Duhare and the plaintiff that he couldn't
13 go for medical treatment because he couldn't have -- he
14 would have had to pay out of pocket. You are to -- you
15 should not --

16 THE COURT: Okay.

17 MS. BARNETT: You -- you shouldn't concern
18 yourself with that. Medical bills were paid. The fact
19 that plaintiff believed he would have had to pay out of
20 pocket is of no import. Something to that effect
21 Judge.

22 THE COURT: -- what was the point?

23 MS. BARNETT: Because the -- we don't know if
24 the jury awarded some of their money, some of the award
25 because they feel bad and maybe now with this money

1 plaintiff can get more treatment. Not understanding
2 that was never an issue because PIP would have covered
3 it.

4 THE COURT: Not -- no disrespect Emily that
5 -- that's a stretch. Who.

6 MS. BARNETT: Judge we don't know. We don't
7 know because that's --

8 THE COURT: I know how much the jury came up
9 with. Yea.

10 MS. BARNETT: So do I. And Judge --

11 THE COURT: Okay.

12 MS. BARNETT: Getting it straight for a
13 moment I myself had a trial in this courthouse on a
14 zero threshold with seven -- seven physical therapy
15 visits and the jury returned a no cause. So to say
16 twenty two visits over forty four months five hundred
17 thousand --

18 THE COURT: Now you're getting to the
19 excessive -- that part --

20 MS. BARNETT: Exactly. So my point is we
21 don't know why they awarded what they awarded --

22 THE COURT: We don't know. I --

23 MS. BARNETT: But one -- that's one error --

24 THE COURT: I got a pretty good idea.

25 MS. BARNETT: That's one error Judge. So

1 moving on --

2 THE COURT: The second one.

3 MS. BARNETT: The second one.

4 MR. LOPIANO: Can I just say one last thing?

5 THE COURT: Okay. You're beating this one to
6 death --

7 MR. LOPIANO: No. I just -- just -- just one
8 thing --

9 THE COURT: Go ahead. Go ahead.

10 MR. LOPIANO: One thing. Five seconds. Ms.
11 Barnett keeps saying Doctor Duhare testified he didn't
12 get additional treatment cause he had to pay out of his
13 pocket. Absolutely not.

14 THE COURT: Doctor Duhare --

15 MR. LOPIANO: He never said that. Doctor
16 Duhare never commented on that. The only words came
17 from Mark's mouth. That's it. It never was Doctor
18 Duhare. So when counsel says Doctor Duhare says --

19 THE COURT: Right.

20 MR. LOPIANO: He didn't get treatment because
21 -- that's not -- he never said that at all.

22 THE COURT: I don't think it was ever the --

23 MR. LOPIANO: That -- that's untrue. No.

24 THE COURT: Money. I think he said he's not
25 going to get epidurals and everybody said that's the

1 only --

2 MR. LOPIANO: Correct. He didn't get --

3 THE COURT: Only thing that's going to help

4 --

5 MR. LOPIANO: Treatment because of the
6 epidurals. Not because of the money.

7 MS. BARNETT: Your Honor --

8 THE COURT: Okay.

9 MS. BARNETT: I was basing that and I
10 apologize if I am incorrect both to --

11 THE COURT: No.

12 MS. BARNETT: Counsel and to the Court. I
13 was here for closings and my recollection of counsels
14 closing is you heard from Doctor Duhare --

15 THE COURT: Okay.

16 MS. BARNETT: And the plaintiff that medical
17 bill -- the medicals would to had to have been paid --

18 THE COURT: Well I don't have a transcript --

19 MS. BARNETT: So I apologize if I mis-heard.

20 THE COURT: That's -- no Emily. I know you
21 were sitting there.

22 MS. BARNETT: So --

23 THE COURT: I mean Ms. Barnett. I'm sorry --

24 MS. BARNETT: Okay. That's fine Judge.

25 THE COURT: No cause I remember you sitting

1 back there and you know.

2 MS. BARNETT: Moving on Judge. The
3 liability. And I know Your Honor spoke to that a few
4 minutes ago.

5 THE COURT: Well.

6 MS. BARNETT: However, I understand Your
7 Honor's reasoning except the defendant, her testimony
8 was something to the effect of she did not see any
9 brake lights on the plaintiffs vehicle. I understand
10 the argument about following --

11 THE COURT: Or a blinker.

12 MS. BARNETT: Too closely. She didn't see
13 any brake lights on the plaintiffs vehicle. From that
14 the jury -- it's up to the jury to decide the
15 credibility. Is that believable or not? That may have
16 factored into their decision on liability. Maybe
17 they'd still find her a hundred percent. They might
18 have found her --

19 THE COURT: Ninety.

20 MS. BARNETT: Eighty percent. They might
21 have found her nothing. But Your Honor took that
22 ability away from them when you decided a directed
23 verdict on liability.

24 THE COURT: I did.

25 MS. BARNETT: That is one more error that

1 contributes to the cumulative.

2 THE COURT: Got you. All right. Counsel you
3 want to be heard on that one?

4 MR. LOPIANO: I don't have a lot to say on
5 that issue. I think Your Honor made the correct call.
6 I think the testimony was what it was. It was really
7 an issue of even if she did see -- even if the brake
8 lights -- this is the argument I made -- the proximate
9 cause argument. Even if -- even if you know she saw
10 the brake lights on, ten feet when she's doing thirty
11 miles --

12 THE COURT: Not on. They weren't on.

13 MR. LOPIANO: I'm sorry. Even if she saw --
14 if the brake lights were on and she saw the vehicle,
15 ten feet when she's doing thirty miles an hour on a
16 straight roadway where the testimony was there was --
17 it was a clear night. It was well lit. It was a
18 straight run. There was absolutely nothing obstructing
19 her vision and when I asked her why she didn't see she
20 couldn't give any explanation.

21 THE COURT: Well in my recollection also was
22 that it's a controlled intersection. The plaintiff
23 made a left through whatever the intersection -- I
24 should know because I think I was the only one here
25 that knew it was Saddle Brook verses Garfield. Having

1 represented both the towns I'm familiar with the area a
2 little bit. That -- so therefore he had to have the
3 green light when he made the left. She on the other
4 hand must have had a red light. She never -- never
5 testified she stopped at the red light. So she went
6 through the intersection after he had already been
7 through the intersection. He had to be standing there,
8 sitting there and I just reversed myself because I
9 started out initially saying well that's a question of
10 fact as Ms. Barnett says for the jury. But after I
11 heard the argument about following -- see again
12 following too closely is always a misnomer because he
13 -- he wasn't moving. He was stopped. So if the lights
14 were off but it's a straight run at an -- at a
15 controlled intersection with lights she wasn't paying
16 -- the Court found she just -- unfortunately for her
17 wasn't paying attention. She admitted she hit him in
18 the rear. We don't get do overs sometimes.

19 MS. BARNETT: True Judge --

20 THE COURT: Well that's what this motions
21 for.

22 MS. BARNETT: But if the jury believed that
23 she didn't see the brake lights because they weren't on
24 or were not functioning that goes to a portioning of
25 liability.

1 THE COURT: Okay. I mean I went through --
2 if I remember it correctly -- but don't I have to find
3 a hundred percent? You could find eighty or ninety. I
4 went through that. But then when I said it was her
5 fault for not seeing him even if he didn't have the
6 lights on. You're only ten feet away at this
7 intersection. She was on the other side of the
8 intersection. He was stopped for a -- some time
9 waiting for a car to a light. She was late, even
10 though everybody got the time wrong. That it wasn't
11 midnight. She wasn't trying to get home with her
12 boyfriend.

13 MR. LOPIANO: But her testimony was --

14 THE COURT: Which when I say her boyfriend
15 she had somebody in the car and she -- and this idea of
16 you know the present -- you didn't say it was a present
17 -- that she gave him a present for his birthday. That
18 -- that's not what's said. She -- he said look what he
19 got -- she got a car for her birthday --

20 MS. BARNETT: He got spinal injuries.

21 THE COURT: He -- he got -- he got a
22 herniated disc for his birthday.

23 MR. LOPIANO: Belatedly.

24 THE COURT: Was it inflammatory? No.
25 Hyperbole? Yea I wish it wasn't said. But in the

1 total I think -- I keep saying first -- I apologize.
2 You know totality because that's something else about
3 hey by the way you inflamed the jury by saying -- you
4 know I found her to be a pleasant young lady.

5 MR. LOPIANO: She was.

6 THE COURT: I -- I just don't think she was
7 paying attention. I don't think I -- I found she
8 wasn't paying attention. She hit him in the rear. I
9 did comment I don't usually -- whatever I did in other
10 cases are irrelevant.

11 MR. LOPIANO: You said -- you said you rarely
12 if ever grant those motions and you actually started
13 out yelling at me. But I actually -- made the motion.

14 THE COURT: My voice was -- my voice was --
15 my voice was loud. Yes I -- I will confess because I
16 find those motions --

17 MR. LOPIANO: It's okay.

18 THE COURT: I usually say -- so. But it is a
19 point --. If in fact we get into the -- the PIP, he --
20 he had \$200,000.00 left. He wasn't going to pay out of
21 pocket. You -- maybe the jury thought he was poor and
22 therefore he had sympathy factor that maybe I should
23 have let that go to the jury. Jury could have said a
24 hundred percent. They said hey come on -- no way or
25 they could have said ninety ten. So now we're dealing

1 with four hundred and fifty thousand, not five hundred
2 thousand. All right? Cause I -- I mean I started out
3 with the argument that maybe it's eighty, ninety and
4 I'm not saying it was. I was just making argument.
5 And then I thought about it and I think I came back out
6 or we took a break and I came back and did what I did.
7 So all right so we got two strikes.

8 MS. BARNETT: Okay. I hope that's a figure
9 of speech Judge not a --

10 THE COURT: Oh no no. You don't know who's
11 up to the plate. You know that could be the other way
12 too. I mean -- say that --

13 MS. BARNETT: Okay.

14 THE COURT: You know we just turn around and
15 bat lefty then or something.

16 MS. BARNETT: Judge the next thing I want to
17 talk about is the time line. I call -- time line,
18 powerpoint, I'm referring to the time line Judge.

19 THE COURT: Agreed.

20 MS. BARNETT: The concern that I have with
21 the time line is specifically the dates of February 24,
22 2014 and March 10, 2014. I'd offer you my copy Judge
23 but it's so small --

24 THE COURT: No, no. I got it. I got it. I
25 got it.

1 MS. BARNETT: I can't read it.

2 THE COURT: I even put a little sticky on it
3 here.

4 MS. BARNETT: Okay. Judge this was I
5 understand it was used during Doctor Duhare's testimony
6 and correct me if I'm wrong it was also shown to the
7 jury during closing; correct?

8 MR. LOPIANO: Negative. No --

9 MS. BARNETT: No?

10 MR. LOPIANO: It was not.

11 MS. BARNETT: I thought I saw it when I was
12 hear but I must --

13 MR. LOPIANO: No. I had a --

14 MS. BARNETT: Have seen something else.

15 MR. LOPIANO: I had a powerpoint --

16 MS. BARNETT: Okay.

17 MR. LOPIANO: Not the time line during the
18 closing.

19 MS. BARNETT: Okay.

20 THE COURT: The powerpoint was the -- the
21 time unit; wasn't it?

22 MR. LOPIANO: Correct. And the -- the
23 powerpoint was actually -- it was a recap of the
24 testimony and I went through the issue of liability. I
25 said Your Honor had ruled on liability and then I

1 talked about Mark's testimony, Destiny's testimony, I
2 had little bullet points --

3 THE COURT: And then you had what did Doctor
4 Duhare say? And that court --

5 MR. LOPIANO: Yea. Exactly. And then we
6 heard Doctor Duhare --

7 MS. BARNETT: Right.

8 MR. LOPIANO: Come in through the courtroom
9 like God -- not that that was the intent but --

10 THE COURT: No, no I hear you. Okay.

11 MR. LOPIANO: You get what I'm saying. And
12 then --

13 MS. BARNETT: Yes.

14 MR. LOPIANO: And then I had the powerpoint
15 --

16 THE COURT: But I understood what -- what Ms.
17 Barnett's talking about.

18 MR. LOPIANO: As to the time unit --

19 MS. BARNETT: Okay. Okay. Judge I'm looking
20 --

21 THE COURT: January 14th, 2012.

22 MS. BARNETT: At February 24 and March 10 of
23 2014. My concern -- this was shown to the jury during
24 Doctor Duhare's testimony. It's the blue Judge --

25 THE COURT: Yea. Yea. No --

1 MS. BARNETT: The big blue. You see where
2 I'm -- the big blue? Well it's --

3 THE COURT: No, no. It's okay. I'm --

4 MS. BARNETT: It's on I guess -- I don't know
5 what page it's on for the blow up Judge. I apologize.

6 THE COURT: No. Okay. Go ahead. It's the
7 second page.

8 MS. BARNETT: However, February 24, 2014 note
9 from Doctor Webber complaints: low back pain, pain
10 level five, VAS scale zero to ten, opinion symptoms may
11 remain dormant for some time and resume suddenly on
12 insidious event. Doctor Webber did not testify.
13 Doctor Duhare did. That is an opinion of Doctor Webber
14 that is being -- disclosed to the jury through Doctor
15 Duhare's testimony. Similarly March 10, 2000 --

16 THE COURT: But if -- if Doctor Duhare used
17 that in his -- in rendering his opinion we know doctors
18 can use other doctors opinions. Just like your doctor
19 didn't do a whole lot.

20 MS. BARNETT: No remember Judge under James
21 v. Ruiz you can't use another doctors opinion -- you
22 can't boot strap it in Judge. So if it's being used --

23 THE COURT: That's -- if -- that's if you --
24 if you're boot strapping it.

25 MS. BARNETT: Well --

1 THE COURT: He made his own opinion which is
2 only corroborated by it. Its like he -- he -- okay go
3 ahead. I may be -- okay.

4 MS. BARNETT: So and similarly on March 10,
5 2014 under Doctor Webber complaints: low back pain,
6 pain level eight out of a scale of zero to ten. Notes,
7 patients condition exacerbated by insidious onset.
8 That's also Doctor Webber's opinion. So now the jury
9 is not only hearing Doctor Duhare's pinion but they're
10 seeing Doctor Webbers opinion Judge. It's the same as
11 if Doctor Duhare testified, well Doctor Webber found
12 that the plaintiffs condition was exacerbated by an
13 insidious event and it may -- symptoms may remain
14 dormant and my resume on an insidious onset. So that's
15 as if Doctor Webber's opinion was -- was gotten through
16 by Doctor Duhare because the jury saw this. I'm not
17 saying he shouldn't -- he couldn't use the time line
18 but that last comment, the opinion and it says it right
19 there Judge opinion. It's Doctor Webber's opinion --

20 THE COURT: Which date you looking at --

21 MS. BARNETT: February 24, 2014.

22 THE COURT: Got you. I circled it. Okay.

23 MS. BARNETT: So Doctor Webber's opinion --
24 Doctor Webber's opinion Judge is right there for the
25 jury to see. It says it right there in -- well in blue

1 and white. And March 10, 2014 Doctor Webber's notes,
2 patients condition exacerbated by insidious onset.
3 Doctor Webber's opinion is being shown to the jury.
4 Doctor Webber wasn't there for the defense to cross
5 examine. So instead Doctor Duhare is talking about yes
6 I reviewed all of Doctor Webber's notes and I examined
7 the patient and I -- I reviewed all his records and I
8 find -- this is Doctor Duhare testifying and obviously
9 I'm -- I'm summarizing it. But --

10 THE COURT: Well --

11 MS. BARNETT: Doctor Duhare said I reviewed
12 everything --

13 THE COURT: That's what he did.

14 MS. BARNETT: I examined him and I find that
15 his condition could have been exacerbated by an
16 insidious onset. Okay that's fine. That's Doctor
17 Duhare's testimony --

18 THE COURT: I don't know what that means,
19 insidious onset.

20 MS. BARNETT: Something horrible apparently.
21 But my point is Judge this time line is being shown to
22 the jury and they're seeing another doctors opinion.
23 They're not seeing a doctors notes. They're not seeing
24 recommendations. They're not seeing -- they're seeing
25 Doctor Webber's opinion and Doctor Webber wasn't here

1 to testify to cross examine. So what plaintiff got the
2 benefit of is two doctors opinions, only one doctor had
3 to testify and we couldn't cross examine this other
4 doctor whose opinion is up there for everybody to see.

5 THE COURT: Okay.

6 MS. BARNETT: That should not have been
7 permitted.

8 THE COURT: Good point. All right. Got you.
9 Counsel what -- what do you say about that?

10 MR. LOPIANO: Okay. First of all the James
11 argument on this is a stretch; okay? It's basically
12 trying to steal home plate; okay? Is what -- what it
13 is and I'll tell you why --

14 MS. BARNETT: Can I just say I don't like
15 sports analogies because I don't understand sports.
16 But okay. Go ahead.

17 MR. LOPIANO: What do you want me to use?
18 Cooking -- cooking analogies or am I being --

19 THE COURT: Well he's talking to me.

20 MS. BARNETT: Oh oh and they just had a
21 gender case right before. Oh. Oh.

22 THE COURT: Nobody -- nobody's asking you to
23 cut the chicken.

24 MS. BARNETT: I -- I -- I mean that in all
25 jest.

1 THE COURT: Okay. I know.

2 MS. BARNETT: Go ahead counsel. I apologize.

3 THE COURT: Trust me Emily you hold your own.
4 I'm not -- I'm not too worried about any taking --
5 stepping -- okay go ahead.

6 MS. BARNETT: Thank you Judge.

7 MR. LOPIANO: Getting back let's -- let's
8 first of all look at it and see what it is. This is a
9 time line which is a demonstrative tool. It's not a
10 medical record from a doctor. I didn't have a doctor
11 testify that this is what another doctors opinion was.
12 The -- what happened here and admittedly this is --
13 this is where my mistake was; okay? And I'm -- cause
14 it was a mistake. Doctor Webber was going to testify.
15 Doctor Webber had every intention of Doctor Webber
16 testifying so when I had the time line and the only
17 word in there that's a problem honestly is the word
18 opinion because --

19 THE COURT: Yea.

20 MR. LOPIANO: Actually the language that's
21 there it says -- it says exacerbated by insidious
22 onset. That's not really an opinion. Just because I
23 did I made a mistake by having the word opinion. If I
24 didn't have the word opinion; guess what? I'm sure
25 there'd be no objection because you know what?

1 Insidious onset it's what Mark testified to. It's what
2 Doctor Duhare testified to. And basically what it
3 means is that you know what? Once you have this
4 herniated disc sometimes they just flare up and you're
5 in a lot of pain. That's what insidious onset means.
6 It means it can just come on. Once you have it it can
7 just come on and flare up so --

8 THE COURT: None of this was given to the
9 jury but they saw it.

10 MR. LOPIANO: But it was never given to the
11 jury and --

12 THE COURT: Oh I know -- I -- I made enough
13 -- maybe I --

14 MR. LOPIANO: I did -- but I did --

15 THE COURT: Made a couple of errors here.
16 That would have been one of them.

17 MR. LOPIANO: But more importantly Your Honor
18 if they're -- and this is where the -- this is where
19 stealing home plate comes in under the James argument
20 okay? It's not the doctors medical record, number one.
21 Number two, I didn't have Doctor Duhare comment and
22 read this box and say anything about Doctor Webber's
23 opinion about insidious onset. He never said anything
24 other than yes he treated with Doctor Webber. I
25 reviewed his records and what I did do and the whole

1 purpose of the time line if you remember Your Honor was
2 -- was we discussed this well before the trial. There
3 was no objection at all. And I understand what Your
4 Honor's saying about objections during opening and
5 closings --

6 THE COURT: It could be plain -- plain error.
7 I mean there --

8 MR. LOPIANO: But there was no --

9 THE COURT: -- get an opinion in the back
10 door.

11 MR. LOPIANO: But if -- if there was going to
12 be any objection all I would have done was taken out
13 the word opinion; okay? But it's not really an opinion
14 that we're talking about under James. Number one, I
15 didn't boot strap in another doctors opinion about a
16 herniated disc. So it's not as if -- if I had in there
17 Doctor you know Webber says a herniated disc he read
18 the MRI well you know what? Yea. But you know that
19 would be different. But that's not what I have here.
20 What I have here is it says -- exacerbated by insidious
21 onset. All that says. And it was never -- it was
22 shown to the jury with Doctor Duhare. I think it was
23 shown to the jury briefly with Doctor Lakin. Okay.
24 Maybe. And I think it was up there for maybe less than
25 five minutes --

1 THE COURT: I -- I -- I --

2 MR. LOPIANO: With -- with -- with Cava --

3 THE COURT: I got to be honest with you --

4 MR. LOPIANO: But it --

5 THE COURT: I don't think it was up there
6 that long. But --

7 MR. LOPIANO: It wasn't up there that long at
8 all --

9 THE COURT: That's irrelevant -- irrelevant.
10 You know whether it was five minutes. I -- I can't ask
11 the jurors hey do you remember this one?

12 MR. LOPIANO: I -- I think -- so the point is
13 under James yea I understand what the argument is. But
14 it's really not a James argument because I didn't -- I
15 didn't have a record that Doctor Duhare testified to
16 and say look this is what the doctors opinion is and it
17 agrees with me. And again we're not talking about well
18 was it a herniation? Whatever. All it says is that
19 exacerbated by insidious onset meaning it's like a
20 pain. You know it's like the pain level that's there.
21 It comes and goes.

22 THE COURT: Yea -- yea but isn't the pain
23 level important? Like I remember granted that one
24 enures to the benefit of the defense. It says a five.

25 MR. LOPIANO: Correct.

1 THE COURT: Because we went through and then
2 you made a point well it could be a five at 10:05 and
3 then the next day --

4 MR. LOPIANO: Correct.

5 THE COURT: It could be a seven.

6 MR. LOPIANO: And that's what I did with
7 Doctor Lakin. Because when the defense brought these
8 Doctor Lakin's attention during direct examination what
9 they -- they wanted specific dates. And I even think
10 they may have even used my time line to the extent that
11 they used the dates --

12 THE COURT: Well --

13 MR. LOPIANO: In my time line to say well
14 wait a minute. At one point he had a five; right? And
15 they went to a date. And then at one point they had a
16 three; right? And they -- and they went to the date.
17 So in my time line I have you know those pain scales
18 which was relied upon by Doctor Lakin as well. So the
19 whole James argument about the word opinion, yea the
20 word opinion shouldn't have been in there. But let me
21 just say this you know and Your Honor is well aware, in
22 every trial; okay? In every trial there are going to
23 be some issues that you know what? Maybe aren't
24 perfect; okay? And maybe the jury hears a little bit
25 more than they -- they should. Maybe they hear a

1 question and then there's an objection. But you know
2 at the end of the day you have to look at this and say
3 well was this really -- you know? Did this sway the
4 jury? Was this a real factor in that? And you know
5 the -- to say that well my time line that wasn't
6 introduced into evidence that was up there for a few
7 minutes with a couple of witnesses that I just used to
8 orient the witness and whether they actually saw it and
9 took it for anything --

10 THE COURT: I have to assume they did.

11 MR. LOPIANO: Okay --

12 THE COURT: For the record don't I have to do
13 that? I mean I -- I can't --

14 MR. LOPIANO: Yea but -- but again --

15 THE COURT: Really now sit back and say well
16 I -- cause keep in mind I got up sometimes and I stand
17 by the jury because everybody's being shown to the jury
18 and unless I see the back of your head I -- I have to
19 get up and --

20 MR. LOPIANO: Okay.

21 THE COURT: And see what it is. And that was
22 one of the things where I remember I don't -- I can't
23 -- I don't have a transcript, and I -- say I'm getting
24 up off my --

25 MR. LOPIANO: Yea.

1 THE COURT: And moving over to the jury cause
2 we have such big surroundings here that it's --

3 MR. LOPIANO: Correct.

4 THE COURT: Difficult to walk in and out
5 without tripping over the wires.

6 MR. LOPIANO: But when I have a motion in
7 limine about me using demonstrative evidence and I show
8 it to counsel before --

9 THE COURT: You did. You did.

10 MR. LOPIANO: And we discuss it and there's
11 absolutely no objection at all and it could have been
12 cured. I mean you know what? Had I realized it --

13 THE COURT: You would have taken out the term
14 --

15 MR. LOPIANO: I would have taken out the --

16 THE COURT: Opinion.

17 MR. LOPIANO: Word opinion.

18 THE COURT: But isn't it more than that
19 though that they they're comments made by another
20 doctor and --

21 MR. LOPIANO: But he didn't comment on it.
22 Doctor Duhare didn't comment on. He said he reviewed
23 the records --

24 THE COURT: But that doesn't make it more
25 egregious that he didn't comment on it? That if he

1 used it -- say look I went through I got --

2 MR. LOPIANO: No.

3 THE COURT: Doctor Barnett, I got Doctor
4 Langan, I got --

5 MR. LOPIANO: Actually it doesn't.

6 THE COURT: Okay.

7 MR. LOPIANO: Because under James the whole
8 point is boot strapping and I did use this to boot
9 strap anything. And I didn't do that through Doctor
10 Duhare's testimony.

11 THE COURT: All right.

12 MR. LOPIANO: That's -- that's really the
13 issue. That's why it's a stretch for James.

14 THE COURT: All right. Em -- Ms. Barnett?

15 MS. BARNETT: Judge if -- if I understood
16 counsel correctly he just said Doctor Duhare didn't
17 even testify about Doctor Webber's records.

18 MR. LOPIANO: No that's not what I said.

19 THE COURT: All right. We'll get you --
20 okay.

21 MS. BARNETT: I -- I thought that's what he
22 said. But that makes --

23 THE COURT: No. He did testify about Doctor
24 Webber. How much -- I don't have a transcript. You
25 know I can only say my recollection is Doctor Duhare

1 because I found him to be clear, concise, believable,
2 credible. He didn't embellish. But --

3 MS. BARNETT: And that --

4 THE COURT: To be very frank did I remember
5 what records he said? I -- I just you know I looked at
6 the -- the spine. I looked at the -- you know it's --

7 MS. BARNETT: Well Judge I just --

8 THE COURT: And he went to --

9 MS. BARNETT: Wrote it down because I was a
10 little surprised. That's why I -- I --

11 THE COURT: No I --

12 MS. BARNETT: Wanted clarification. But the
13 point is if Doctor -- if Doctor Duhare did not testify
14 that he reviewed the records of Doctor Webber and he
15 didn't comment on them then that's even more egregious
16 because then Doctor Webbers comments and records are up
17 there for the jury to see --

18 THE COURT: Without any back up.

19 MS. BARNETT: Without any back up.

20 THE COURT: Yea.

21 MS. BARNETT: So whether it's counsels honest

22 --

23 THE COURT: Okay.

24 MS. BARNETT: Unintentional error on his part
25 that he put the word opinion in that's -- that's really

1 not the point Judge.

2 THE COURT: Okay.

3 MS. BARNETT: The point is Doctor Webber's
4 opinion or whatever we want to call it is up there for
5 the jury to see and it should never --

6 THE COURT: Okay.

7 MS. BARNETT: Have been there.

8 THE COURT: Fair enough.

9 MS. BARNETT: So my point Judge is -- and I'm
10 going to rely on my brief -- on the brief for the other
11 commentary. I don't think we need to belabor some
12 other issues --

13 THE COURT: No -- cause right now the --

14 MS. BARNETT: But --

15 THE COURT: What I -- I made some comments
16 before. It doesn't -- see the way I do it is Socratic
17 I mean cause you can comment on what I said and tell me
18 I'm wrong cause it's not my finding. It's not my
19 opinion. I won't do that until I render the whole
20 thing because the reason I started out talking about
21 the remitter is that the excessiveness of the -- is
22 something that I -- it tells me that I'm -- and
23 rightfully so I got to listen to the argument. If --
24 if I was just going to come out here and say forget
25 about it. So -- so each opinion according to I think

1 one or two is -- remitter opinion I'm supposed to --
2 I'll give you my experience and it may not be a lot. I
3 mean I think I've been around a little bit, forty
4 years. Do I do extensive P.I. work? No. DeCotiis we
5 did nothing on a contingency. You know? But I saw
6 enough because I had three insurance funds and one of
7 them for over twenty -- nineteen years that I had to
8 look at a lot of medicals because I was just the claims
9 -- I was an attorney but I was -- I was the claims
10 committee of one sometimes. And I had authority. So
11 I've seen enough reports. But on the other hand the
12 points made. I -- is it boot strapped? I have to make
13 -- I have to think about that.

14 MS. BARNETT: I think that time line Judge
15 referencing Doctor Webber is exactly what James v. Ruiz
16 --

17 THE COURT: But -- would that be sufficient
18 to call for a new trial? This -- this five minute over
19 a three day trial -- this five minute that you -- that
20 you have to have a microscope to read it?

21 MS. BARNETT: Judge this issue --

22 THE COURT: I mean it -- it's not much
23 bigger. It's -- it's a little box and I have to put my
24 glasses on and then put it real close to my face to see
25 I read it. If nobody pointed it out I would have never

1 read it.

2 MS. BARNETT: The point is it was there
3 Judge. And the point is --

4 THE COURT: Okay. No. Emily I'm not
5 disagreeing with you.

6 MS. BARNETT: These -- these issues -- the
7 out of pocket issue, the liability issue, the time line
8 plus the other things that are referenced in the brief
9 all of these together are --

10 THE COURT: That's about it. You got the
11 three of them. I think that's --

12 MS. BARNETT: Well --

13 THE COURT: That's the three biggies.

14 MS. BARNETT: The three biggies. Exactly
15 Judge. And that's why I'm saying I'm not going to
16 touch on everything that was in my brief and I'll rely
17 --

18 THE COURT: I read the briefs.

19 MS. BARNETT: On the papers. But the point
20 is Judge these three biggies as we're calling them --

21 THE COURT: -- another good legal term --

22 MS. BARNETT: The out of pocket --

23 THE COURT: -- I'm sure that's how Justice
24 Brennan (phonetic) started out.

25 MS. BARNETT: We went to law school for all

1 that --

2 THE COURT: You know --.

3 MS. BARNETT: But the out of pocket issue,
4 the liability issue and the time line issue those three
5 alone together create a cumulative error, plain error
6 that requires under the standard for a motion -- that
7 the motion for a new trial should be granted.

8 THE COURT: Fair enough. What about now
9 dealing with the excessiveness? That it's -- it also
10 ties in with the new trial; doesn't it? Don't -- it's
11 the same standard -- the high standard that I have to
12 find and I'm not going to give you my opinion now is
13 that -- I started writing an opinion. Of course I
14 didn't get around to doing it like most things. You
15 know you look at Romano v. Galaxy Toyota -- there
16 should be set aside -- only with great reluctance and
17 only in cases of clear mis-justice. Brozowsky
18 (phonetic) I can't get this -- 380. I can't read my
19 handwriting. But it -- it also ties in with the
20 remitter. I mean if in fact I -- the use of remitter
21 is not appropriate when the damage award is so grossly
22 excessive that it suggests the entire verdict was
23 tainted by the mistake. So you can back door the new
24 trial by saying it was you know -- the jury was swayed
25 by these three errors.

1 MS. BARNETT: Correct. The three biggies.

2 THE COURT: And therefore that resulted in
3 being excessive. So that's the first --. The second
4 is in and of itself the -- the \$500,000.00 is
5 excessive. Okay.

6 MS. BARNETT: Correct Judge.

7 THE COURT: Then in response to the cases
8 that the defense sites, correct me if I'm wrong counsel
9 and I'm sure you will. That you're saying Judge
10 they're only blatant hear say. You know and -- and how
11 do I know -- all these facts are? I think that's --
12 that was your objection to the cases that they -- that
13 they -- I hate to be so blunt --

14 MR. LOPIANO: Yes. That's one of the
15 objections. Yes.

16 THE COURT: Well give me the rest of them.

17 MR. LOPIANO: Okay --

18 THE COURT: Cause they -- they gave me the
19 comments about --

20 MR. LOPIANO: As -- as to the cases -- as --

21 THE COURT: The five cases you gave them.

22 MR. LOPIANO: Oh as to the cases. Well let's
23 -- let's first -- analyze this in accordance with what
24 the law requires. The law requires first of all to
25 determine whether the jury -- there's basis for the

1 jury's verdict in the evidence. And as Your Honor
2 commented in the beginning, not that that's your ruling
3 but we have a twenty one year old gentlemen that has a
4 large herniated disc, that has serious problems, the
5 testimony was very consistent, very credible and he has
6 54.3 years left. And the time unit argument that I did
7 and that I gave to the jury whether they used it or not
8 I have a feeling they probably did because if you --

9 THE COURT: One -- one will never know.

10 MR. LOPIANO: Look at -- one will never know.
11 We'll never know for sure. Just as we'll never know
12 whether they actually saw any of the boxes on the time
13 line or considered them. But that being said if you
14 look at the totality of the testimony and you say well
15 wait a minute is there support in the testimony? Is it
16 evidentiary for the verdict? And I think the Court has
17 to say, absolutely it -- it was because you have the
18 time line argument. You have a fifty four -- year life
19 expectancy. You have credible testimony. So if you
20 take the totality of the evidence that was submitted
21 including Doctor Duhare saying listen this -- condition
22 is permanent. It's not going to get any better. It'll
23 never get better. It's a permanent damage to his spine
24 and fifty four years. So that's the threshold issue.
25 If you find that there -- there's reasonable basis you

1 know for the jury's verdict well then we don't get into
2 a comparative analysis of the cases. Its only we get
3 into a comparative analysis of the cases if you find
4 that there's no support with the evidence for the
5 jury's verdict. That's what the cases say.

6 THE COURT: Wouldn't it be better that I
7 address both of them? That if in fact as we anticipate
8 this will be an appeal unless I order a new trial then
9 you'll appeal.

10 MR. LOPIANO: I -- I understand that. But I
11 want to just set forth the standard --

12 THE COURT: No, no. I understand that --

13 MR. LOPIANO: With respect to the review. So
14 once we get passed that if Your Honor finds that there
15 is no reasonable basis for this jury verdict based upon
16 the evidence that was submitted to them for their
17 consideration then we go to the second level. Now we
18 go to the analysis of the verdicts.

19 THE COURT: For a complete record.

20 MR. LOPIANO: Well exactly. Okay. But let's
21 -- let's -- now I'll do that. But I just wanted to
22 preface that --

23 THE COURT: Well no, I -- I understood by
24 making or addressing this argument you're not waiving
25 your first position --

1 MR. LOPIANO: Correct. Because --

2 THE COURT: That you don't need to get there
3 Judge. You're already you know blah, blah, blah.

4 MR. LOPIANO: If Your Honor -- if the Court
5 grants a directed verdict motion as I said or something
6 to that effect during the trial. So if Your Honor
7 finds that there is no basis and we now need to look at
8 the cases I've submitted a bunch of cases which says
9 well --

10 THE COURT: Well I -- I'm saying -- I'm
11 referring to their cases cause they've commented on
12 your cases, the papers I got Tuesday.

13 MR. LOPIANO: Okay. Well as -- as -- as I
14 point out some of the cases that they -- that they have
15 you know, if they're just taking them from a jury
16 verdict review then you know what? They are suspect.
17 There is a hear say argument and I dont want to repeat
18 everything that's in my brief because I think I really
19 got into it.

20 THE COURT: But don't I under -- He, don't I
21 have to analyze them?

22 MR. LOPIANO: Well you have to analyze it to
23 the extent that you have to look at each -- you know if
24 you look at each particular plaintiff you know? In
25 that case and -- and match it up with -- with our case.

1 And I submitted cases where just the opposite. I've
2 submitted --

3 THE COURT: I know --

4 MR. LOPIANO: Several cases where there's
5 seven figures.

6 THE COURT: I mean the standard is the Judge,
7 unless he finds something egregious should not
8 substitute his opinion for somebody else. And is it a
9 stand off that you've -- they've shown cases which
10 don't justify an award. You've shown me two or three
11 of your own cases that you've got \$500,000.00 for
12 similar -- you know one epidural, two epidural -- I
13 feel like I'm --

14 MR. LOPIANO: And -- and the -- and what --
15 says and what even he says, he says is like you know
16 what? You can't just take these cases and cherry pick.
17 This is not workers comp where you say you know what?
18 There's a --

19 THE COURT: Watch that.

20 MR. LOPIANO: Herniated disc and all of a
21 sudden you know okay it's thirty five percent of
22 partial total which is going to be \$27,000.00 depending
23 upon which -- which chart year we're looking at.
24 That's not what's done here. And that's why you got to
25 look at each individual plaintiff --

1 THE COURT: But that's --

2 MR. LOPIANO: By themselves.

3 THE COURT: One of the three criteria's under

4 He is that I have to go -- but the recent case law I

5 think has deflated the Judge's feel of the case. I

6 think that's not one -- it's one of the three elements.

7 But I have to hear your arguments. I didn't come out

8 here with the intention to make an opinion. I wanted

9 to hear the -- the arguments. You know I have some --

10 some thoughts and the reason I put them out initially

11 because I wanted to -- the -- the parties to address

12 those. You know? Not that I've made my findings on it

13 because I have three areas I found are -- I have to

14 review. You got the time lines with regards to the

15 term opinion in it. Is it James? Not James? Was the

16 liability issue should have been left to the jury? I

17 took it away from them. And some of the comments about

18 you know -- my recollection was is -- there really

19 wasn't much said about I can't afford it. But and I

20 may have made some comment and I don't know where I did

21 this because I've had some other trials where there's a

22 case within a case where they -- they -- they cut them

23 off at PIP. They're not -- hey why aren't you getting

24 it? My insurance company cut me -- whoa we mentioned

25 the magic dirty word, insurance company. Oh mis-trial.

1 Oh.

2 MR. LOPIANO: When -- when Your Honor came up
3 with the ruling --

4 THE COURT: I don't --

5 MR. LOPIANO: It was in response -- we had a
6 lengthy discussion in chambers --

7 THE COURT: Yea I --

8 MR. LOPIANO: And we were back out on the
9 record.

10 THE COURT: Cause I had a trial, I recollect
11 where that threw everything out of kilter. Because now
12 we got a case within a case and it wasn't the plaintiff
13 that did it. It was one of his doctors who said well I
14 -- got paid. So he files an appeal. The -- the
15 arbitrator makes a ruling and you're stuck with the
16 ruling. Even though you didn't participate, your
17 doctor did and an arbitrator made a decision that
18 you're not entitled to any more treatment. So that
19 really wasn't an issue here because he never went for
20 any more treatment and -- and I -- I have to look at my
21 notes. I don't remember such -- defense put a lot --
22 that the poor boy. You gave them the impression did
23 you inflame -- twenty one year old guy, he's got a one
24 year old baby, he's got the wife that you know works
25 for whoever she works for. I forgot this. And -- bill

1 -- whatever. She -- she works for a doctor or
2 something.

3 MR. LOPIANO: Yea. A medical firm.

4 THE COURT: And I won't say enough about
5 that. They were a nice couple. They live with the
6 mom. A nice couple. They got a little baby. They --
7 did I find that possibly the idea that he's emotionally
8 distraught because he can't play with his son? Okay.
9 Nobody complained about that. But that wasn't
10 exaggerated either. As Ms. Barnett says Judge you got
11 to look at the total picture. You can't pick out 3:02
12 this comment was made. We were here for three days.
13 There was a lot said. There was a lot of technology
14 done here that I learned a lot. Read a couple cases I
15 never heard about. So Emily let me say this -- Ms.
16 Barnett, I keep saying that. I apologize.

17 MS. BARNETT: That's fine Judge. I know who
18 you're talking to.

19 THE COURT: That -- that in your -- that in
20 the papers from your offices you comment about those
21 cases that plaintiff points out and I have
22 certifications from all the attorney's involved in
23 those as to what was involved. So they're saying look
24 yours are hear say, ours aren't. These are the --
25 these are the combatants. We -- we went in the

1 trenches and this is what happened. Granted -- and I
2 won't comment, Bergen and Hudson County, I'm not going
3 to say where the jury's are a little bit more -- it's
4 irrelevant. I only make that being an old Jersey City
5 boy. You know my fathers -- at the five corners and I
6 clerked in Jersey City. I'm very proud of it. I you
7 know I still go back to Prep. I didn't go to Prep. I
8 just go to the games. I couldn't get into Prep.

9 So Emily -- Ms. Barnett anything more you
10 want to say? I think you addressed the cases. Do you
11 want to say anything more about them? Be my -- please
12 do.

13 MS. BARNETT: No Judge. I'll rely on the
14 papers that were submitted --

15 THE COURT: Okay.

16 MS. BARNETT: But again -- and it wasn't
17 included and it's -- it's --

18 THE COURT: What's that?

19 MS. BARNETT: No. What -- what other case
20 wasn't included Judge I can speak from personal
21 experience. I could have put in an affidavit. I tried
22 a case here --

23 THE COURT: You've tried a lot of cases.

24 MS. BARNETT: I have. And I've won some and
25 I've lost some.

1 THE COURT: I won't talk about the one you
2 had --

3 MS. BARNETT: I -- let's block that out
4 Judge. But I -- I tried a case last year zero
5 threshold --

6 THE COURT: Did that case -- that -- that
7 case --

8 MR. LOPIANO: I'm going to -- I'm going to
9 object.

10 THE COURT: Wouldn't help you with this one.

11 MS. BARNETT: No. Judge --

12 THE COURT: I -- I'll put that one aside
13 because I thought that was -- that was --

14 MS. BARNETT: Thank you Judge.

15 THE COURT: And -- and you put a cap on him
16 and rightfully so. Though even I thought the cap was
17 high.

18 MS. BARNETT: My -- my decision --

19 THE COURT: You never know what they're going
20 to do.

21 MS. BARNETT: The point is Judge I'm relying
22 on my papers.

23 THE COURT: Fair enough.

24 MS. BARNETT: Okay. So.

25 THE COURT: Counsel you -- you stood up?

1 MR. LOPIANO: No. I just stood up --

2 THE COURT: You being polite or --

3 MR. LOPIANO: Because I didn't know if
4 counsel was going to start talking about her multiple
5 victories on verbal threshold cases that are not part
6 of --

7 THE COURT: Ms. Barnett wasn't brining that
8 up --

9 MR. LOPIANO: That's all. That was my only
10 thing.

11 MS. BARNETT: No.

12 THE COURT: She and I shared a mutual
13 experience about a year and a half ago when she --

14 MS. BARNETT: Yea. Just about a year and a
15 half ago --

16 THE COURT: When she was sitting in that
17 chair and --

18 MR. LOPIANO: That's fine.

19 THE COURT: I -- we both went what?

20 MS. BARNETT: No I don't believe that's what
21 you said Judge.

22 THE COURT: Yea -- I may have -- I may have
23 been a little stronger.

24 MS. BARNETT: But Judge I'll rely on the
25 papers for that. But --

1 THE COURT: Okay.

2 MS. BARNETT: There's also before we leave
3 and I don't know if you want -- Your Honor wants to be
4 heard --

5 THE COURT: Yes. I signed it.

6 MS. BARNETT: The motion for the stay of the
7 execution of the --

8 THE COURT: I signed it.

9 MS. BARNETT: Oh you did? Oh.

10 THE COURT: Well no you haven't given it to
11 me yet --

12 MR. LOPIANO: You're going to deposit --
13 you're going to post the bond.

14 MS. BARNETT: Oh okay. Oh.

15 THE COURT: Oh no they said they would.

16 MR. LOPIANO: Yea. That's why I didn't
17 oppose it. I mean that's standard --

18 THE COURT: Because --

19 MS. BARNETT: Oh okay. I'm sorry. Okay.

20 MR. LOPIANO: Practice; right?

21 THE COURT: The next question is -- I got to
22 make a decision. I don't want it to be my usual --
23 this is a new year I'm going to try to get my decisions
24 out within a reasonable period of time. When's the --
25 the appeal -- I mean I don't want to put you in a box?

1 When's forty five days from --

2 MS. BARNETT: Forty five days -- it was from
3 August so it's coming up Judge.

4 THE COURT: All right.

5 MR. LOPIANO: August 7th I think the -- the
6 verdict was. 8/7.

7 THE COURT: All right. I'll -- I'll -- I --
8 I -- just as you heard the other cases I'll try to do
9 it by Friday. If not sooner; okay?

10 MR. LOPIANO: So we'll come in and we'll
11 listen to Your Honor?

12 THE COURT: You know you may not have to.
13 Like I said I -- I -- I want to follow the He case. I
14 just want to go through it again to make sure that I do
15 it properly. I -- very frankly in the ten years I've
16 been here I think I've had one remitter. I've never
17 had a case that was worth talking about.

18 MS. BARNETT: Okay.

19 THE COURT: Cause we know in Bergen County
20 the usual and this was not the usual. But again for
21 the record my feel of the case, rear end hit, clear
22 herniation on a twenty one year old. I don't have a
23 whole lot of recollection of any cases in my eight
24 years of sitting here in civil -- anything similar
25 except we had a case that I -- I won't use, won't

1 bother, wasn't brought up where I was like what?
2 Usually it's like sorry. Good try. Go home. Sorry.
3 You know? And -- the thing I have to keep out of my
4 mind and I -- for the record I'll tell you I am as to
5 what negotiations went on. That's irrelevant. You
6 know?

7 MS. BARNETT: I agree.

8 THE COURT: For example telling me that the
9 arbitration was seventeen five is irrelevant.

10 MR. LOPIANO: Case law says it's irrelevant.

11 THE COURT: Once -- and then you got an offer
12 of \$75,000.00 that you know I can't go through cause as
13 a Judge, a sitting Judge in a trial you want to try to
14 work a settlement. But you also don't want to say by
15 the way I don't want to be prohibited from hearing the
16 case because I have an opinion. I'm not making the
17 opinion. I have to review what they did. But when
18 they put one of the criteria's in the Court's feel for
19 the case. I mean I gave you some of my comments about
20 the witnesses. I didn't mean to be tough on the
21 defense doctor. He came here. He -- I've never seen
22 him testify before. I never saw Doctor Duhare testify.
23 You know. I've seen a lot of doctors testify here.
24 Not that the defense doctor wasn't a -- an expert -- I
25 even gave him EMG and you're a -- you're a hand

1 specialist. What do you know about an EMG? You know.
2 Well when you're down in -- that's irrelevant. I just
3 felt help he didn't help the defense case. When you
4 put -- compare him to Duhare's testimony it was night
5 and day; okay? And you didn't talk about what office
6 you work in. You had the pictures, remember I said
7 what the -- are these? They have you know the Roseland
8 office. They had you know -- and then they had -- hold
9 on a second.

10 Again I want to say this for the record for
11 the tenth time. The manner in which the case was tried
12 everybody treated the Court with the utmost respect.
13 They handled themselves in a professional manner.
14 There was no back stabbing. There was no you said this
15 and yelling at each other. The attorney's that were in
16 this matter I would always have them back in my court
17 because they way they handled this file was the way I
18 think they should be handled.

19 MS. BARNETT: Thank you Judge.

20 THE COURT: Okay?

21 MR. LOPIANO: Thank you Your Honor.

22 THE COURT: Your welcome. All right. All
23 right. We'll give you a call Monday.

24 (HEARING CONCLUDED)

25 ****

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