

SUMMATIONS

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1 about the future, she is not getting better, this is her
2 only day in court and the 44.7 years adopted by the Court a
3 sum of \$800,000 would not be excessive to compensate
4 Ms. Iovino for the rest of her life to deal with these
5 injuries, to compensate her, to put her back to whole from
6 before this accident.

7 I thank you, ladies and gentlemen, for listening,
8 listening to the evidence. I know you will make a decision
9 based upon that evidence. Thank you.

10 Thank you, Your Honor.

11 THE COURT: All right, everyone be seated.

12 All right, members of the jury, we have now come
13 to that portion of the trial where you are instructed on
14 the law that applies to this case and then afterwards you
15 will retire for your deliberation. You have now heard all
16 of the arguments of the attorneys. You have learned the
17 conclusions which each party believes you should draw from
18 the evidence presented to you.

19 Now, at the beginning of the trial I stated
20 certain principles for you so you could have them in mind
21 while the trial progressed and I want to touch upon them
22 again. First, you are bound to accept the law that I give
23 you. You must accept it, you must apply it and that's
24 whether you agree with it or not. You are not to ask
25 anybody else about the law. So if any members of the jury

1 have legal training, disregard that training. Just take
2 the law directly from the Court. Be sure not to conclude
3 from any of the rulings or anything I have said during the
4 trial that I favor any party to the lawsuit. You shouldn't
5 draw any inferences from any question that was left
6 unanswered because a question without an answer is nothing
7 or from anything I have directed you to disregard. So if I
8 struck testimony and said disregard it, don't consider it
9 in making your decision.

10 And, finally, in deciding how much weight you
11 choose to give to the testimony of any particular witness,
12 there is no magic formula which you can use. The tests
13 that you use in your every day affairs to decide the
14 reliability or unreliability of statements made to you by
15 other people are the same tests that you should use in your
16 deliberations. The items that can be taken into
17 consideration in determining the weight you want to give to
18 the testimony of any witness should include things such as
19 the interest or the lack of interest of the witness in the
20 outcome of the case, the bias or the prejudice of the
21 witness, if there is any, the appearance, the manner that
22 the witness testified, you know, their demeanor on the
23 stand and the opportunity that the witness had to observe
24 the facts about which they testified about, the probability
25 or improbability of the witness' testimony when considered

1 in the light of all the other evidence in the case. These
2 are the factors that you should be consideration.

3 Now, if you were to find that any witness has
4 willfully testified falsely as to any material fact -- and
5 by material fact, I mean as to an important fact and you
6 decide what's important -- the law permits you to disregard
7 completely the entire testimony of that witness upon the
8 principle that one who testifies falsely about a material
9 fact is likely to testify falsely about everything. Now,
10 you are not required, however, to consider such a witness
11 as totally unbelievable. You may accept so much of that
12 witness' testimony as you deem true and disregard what you
13 feel is false. And by that process which I have described
14 to you as the sole judges of the facts should be able to
15 decide which witnesses you believe, what part of their
16 testimony you want to accept and what weight you want to
17 give to it.

18 Now, this charge I gave you about falsus in uno
19 is about lying about a material fact. It's no hidden
20 message to you. This charge I give in every single case.
21 It's so that you know if you were to find that that
22 occurred what you can do about it.

23 Now, who has to prove this case? The burden to
24 prove this case rests on the plaintiff, the one who brought
25 the case. That means it must be established by a fair

1 preponderance of the credible evidence that the claim the
2 plaintiff is making is true. The credible evidence means
3 the testimony or exhibits you find to be worthy of belief.
4 A preponderance of the evidence means the greater part of
5 such evidence. Now, that doesn't mean the greater number
6 of witnesses or the greater length of time taken by either
7 side. That phrase refers to the quality of the evidence,
8 it's convincing quality, the weight and effect that it has
9 on your mind. The law requires that in order for the
10 plaintiff to prevail on a claim the evidence that supports
11 her claim must appeal to you as more merely representing
12 what took place than the evidence opposed to her claim. If
13 it doesn't or if it weighs so evenly that you can't say
14 there is a preponderance on either side, then you must
15 decide the question in favor of the defendant. It is only
16 if the evidence favoring the plaintiff's claim outweighs
17 the evidence opposed to it that you can find in plaintiff's
18 favor.

19 Now, while you are deliberating you may have some
20 question about what a witness said. You may have
21 forgotten. You might disagree amongst yourselves about
22 what it is and you may want that clarified or you may have
23 some question about my instructions to you on the law given
24 to you in my charge right now. I just want you to know
25 that you have the right to return to the courtroom to have

1 the testimony of any witness read back to you or to have
2 the Court's instructions to you on the law repeated or
3 explained further. You can ask for that at any time.

4 Now, what I want you to know is if you are going
5 to ask for the read back of testimony, you should be aware
6 that you have the right to have the entire testimony of any
7 witness. In fact, you can have the testimony of every
8 witness read back to you. You would be here for quite a
9 while, but it's your right. Normally, jurors don't want
10 all the testimony of everyone. Normally, jurors are
11 interested in a specific area. So what I suggest is that
12 if you are interested in a specific area, use your common
13 sense to describe what you want, who you want it from and
14 we will go to work to figure out what fits that
15 description. And then when we find it, we will read it to
16 you. This way you are more likely to get exactly what you
17 want and not a lot of what you don't want. Keeping in mind
18 also that you have a right to it all, so whether you want
19 to describe limitations because you want limited testimony.

20 The other thing that I want you to keep in mind
21 is that if you ask for a read back of testimony, there is
22 going to be a lag of time between your request and
23 responding to it because the attorneys and the Court have
24 to go to the business with the court reporter of looking
25 for that testimony and that takes a little bit of time. So

1 don't assume because there is time passing after you have
2 asked for it that we ignored you. We are working on it.
3 The other thing I want to tell you is, if you ask for a
4 read back, do you have to wait for it? You do not have to
5 wait for it. You are free to go forward and continue
6 deliberating and not wait for that testimony that you have
7 asked for. It's no skin off of our nose. We are not
8 offended by it. It is absolutely your right as jurors to
9 ask for it and not wait for it if you don't want to.

10 So in deciding the case you may consider only the
11 exhibits that have been admitted in evidence. Remember I
12 told you when things are marked it doesn't mean it's
13 admitted. So the fact that papers may have gone back and
14 forth are not admitted. It has to be actually admitted in
15 evidence. And I have marked everything that's admitted.
16 So you may only consider the items that were admitted, the
17 testimony as you heard live from the witness box and the
18 Examinations Before Trial that were read to you. I remind
19 you that under our rules of practice an Examination Before
20 Trial, although it's taken outside of the courtroom and
21 before the trial, it is taken under oath and it is entitled
22 to an equal consideration by you notwithstanding the fact
23 that it wasn't prepared right in front of you. It was
24 prepared before the trial outside the courtroom.

25 Now, the arguments of counsel, their opening

1 statements, their summations, it's not evidence. All of
2 the things that I tell you in my charge are not evidence.
3 Evidence is what you heard from the witness stand and
4 answers to questions. It's exhibits that were admitted,
5 examinations that were read to you and that's it. That's
6 what you are going to review and decide what's been proven
7 to you.

8 While it is important that the views of all of
9 the jurors be considered, you should understand that a
10 verdict of five of six of your members is sufficient under
11 our law. When five of you are in agreement, you may report
12 that verdict to the Court. What I have done is, I have
13 prepared a verdict sheet for you and the verdict sheet
14 contains questions for you to answer. Each question either
15 calls for a yes or a no response or may call for you to
16 give a number. I put under each question whether it calls
17 for a yes or no response, a box for yes, a box for no so
18 you can check it off. I also put six lines for signatures
19 so that if all six of you agree you each have a place to
20 sign. But I also put a line below that says "I don't agree
21 with the above" or "I don't concur with the above." This
22 way if five out of six of you agree, the five will sign in
23 any one of the six lines above, it can be any number, but
24 those numbers don't correspond to your numbers as jurors.
25 If you are one of the five out of six, any one of the six

1 boxes is okay, the lines, and the one who disagrees will
2 sign below.

3 Then there is instruction below as to what to do
4 next. You should follow those instructions. You will have
5 to answer more than one question. When you get to the next
6 question that requires an answer, if five of six of you
7 agree, you may answer it. And I mention this only to tell
8 you that it doesn't have to be the same five out of six.
9 The five out of six can keep changing for every question
10 that requires an answer. Of course, when you are done, the
11 verdict sheet will help you. It will say report your
12 verdict to the court to let us know that you have a
13 verdict.

14 Now, in reaching your verdict don't be affected
15 by sympathy for the parties. Do not concern yourself about
16 what the reaction is going to be, whether it's going to be
17 popular or unpopular, whether it pleases or displeases
18 anyone. In fact, don't be concerned about any
19 considerations outside of the case as it's been presented
20 to you in the courtroom. So consider only the evidence,
21 both the testimony and the exhibits, and find the facts
22 from what you consider to be the believable evidence and
23 then apply the law that I now give to you. And your
24 verdict will be determined by the conclusion you reach no
25 matter whom the verdict helps or hurts. Just call it like

1 you see it.

2 Let's talk about the law that's applicable here.
3 Now, I did want to tell you that we have had a couple of
4 highly trained people come in and talk to us. We have
5 heard from Dr. Berkowitz who is an orthopedic surgeon. We
6 have heard from Dr. Sapan-Cohn and she was the radiologist.
7 And we heard from Dr. Toriello who is also an orthopedic
8 surgeon. These folks, all of them, came in and they gave
9 testimony concerning issues that were in controversy in
10 this case and they told you about their qualifications as
11 experts in their respective field and they gave opinions on
12 issues in this case. Now, when a case involves a matter of
13 science, or art, or medicine, or requires some special
14 knowledge or skill not ordinarily processed by the average
15 person, us, an expert is permitted to state his or her
16 opinion for the information of the Court and the jury.

17 Now, the opinions stated by each of these experts
18 who testified before you was based on particular facts as
19 the experts obtain knowledge of them and testified to them
20 before you or as attorneys who questioned the expert and
21 asked the expert to assume. So some experts were
22 testifying about review of records, some were testifying
23 about review of films, some were testifying to facts that
24 they were asked to assume, some were testifying about
25 things that they saw or films that they seen. Everyone

1 gave you their qualifications and the source of the
2 information that formed the basis of their opinion.

3 Now, you may reject an expert's opinion if you
4 find the facts to be different from those which form the
5 basis of that expert's opinion. You may also reject the
6 opinion if after careful consideration of all the evidence
7 in the case, expert and other evidence, you disagree with
8 the opinion. You decide whether the opinion convinces you.
9 In other words, you are not required to accept an expert's
10 opinion to the exclusion of facts and circumstances
11 disclosed by other evidence. Expert opinion is subject to
12 the same rules regarding reliability as the testimony of
13 any other witness. It's given to assist you in reaching a
14 proper conclusion. It's entitled to such weight as you
15 find the expert's qualifications in the field warrant and
16 it must be considered by you, but it's not controlling upon
17 your judgment. Ultimately you must make your own decision.

18 Now, the plaintiff testified in this case and as
19 a party to the action she is interested in the outcome.
20 She is an interested witness. So how should you deal with
21 that? An interested witness is not necessarily less
22 believable than a disinterested witness. The fact that she
23 is interested in the outcome of the case it doesn't mean
24 that she hasn't told you the truth. It's for you to decide
25 from the demeanor on the stand and such other tests as your

1 experience dictates whether or not the testimony has been
2 influenced, intentionally or unintentionally, by her
3 interest. And you may if you consider it proper under all
4 of the circumstances not believe the testimony of such a
5 witness. However, you are not required to reject the
6 testimony of such a witness and you may accept all or such
7 part of the testimony as you find reliable and reject that
8 part you find unworthy of acceptance.

9 Now, remember I told you that I am going to give
10 you a sheet that presents questions for you to answer yes,
11 no or maybe give a number. I don't want you to assume or
12 speculate as to why it's presented in that way to you. I
13 don't want you to assume from its form, its content, its
14 layout, the way its presented, that it calls or its
15 suggesting a specific response from you. Now, I put this
16 thing together. It's not perfect. I have my own reasons
17 and I don't want you to wonder about why. And I want you
18 to answer every question on that verdict sheet that
19 requires an answer based on the application of your common
20 sense, good judgment, your conscience and what the evidence
21 has convinced you. So just call it like you see it. Do
22 not assume from the form or content that it's calling for
23 any specific response.

24 So here's what you've got to answer. I am
25 putting it in the order that I want you to consider. You

1 are going to have to answer the following question:

2 "Did the plaintiff sustain a permanent
3 consequential limitation of use of a body, organ or member
4 as a result of this accident of October 3, 2011?"

5 Now, a limitation of use of a body, organ or
6 member means that the body, organ or member does not
7 operate at all or operates only in some limited way. It's
8 not necessary for you to find that there has been a total
9 loss of the use of the body, organ or member. A limitation
10 of use must be consequential which means that it is
11 significant, important or a consequence. A minor, mild or
12 slight limitation of use is not significant, it is not
13 important or of consequence.

14 If you find that plaintiff sustained a permanent
15 limitation of use as a result of the accident of October 3,
16 2011, and that limitation is consequential as I defined it,
17 you must answer that question "yes". If you find that
18 there is no permanent limitation as a result of this
19 accident on October 3, 2011 or that the limitation is not
20 consequential, you must answer that question "no".

21 The next question that you are going to be
22 considering is what we call significant limitation of use.
23 So here's the question:

24 "Did the plaintiff sustain a significant
25 limitation of use of a body function or system as a result.

1 of that accident on October 3, 2011?"

2 Now, a limitation of use of a body function or
3 system means that the function or system doesn't operate at
4 all or operates only in some limited way. It's not
5 necessary for you to find that there has been a total loss
6 of a body function or system or that the limitation of use
7 is permanent. That's not required. However, the
8 limitation of use must be significant, meaning that the
9 loss is important or meaningful. A minor, mild or slight
10 limitation of use is not significant.

11 If you find the plaintiff sustained a limitation
12 of use as a result of the accident of October 3, 2011, and
13 that limitation is significant, you must answer that
14 question "yes". If you find that the plaintiff did not
15 sustain a limitation of use as a result of the accident or
16 that the limitation is not significant, you must answer the
17 question "no".

18 The next one is the most difficult for me to say
19 because it is very long. No so long that I will put you to
20 sleep, but I wanted to let you know in advance. For this
21 particular inquiry you are looking at the date of the
22 accident, the first 90 days out of a six-month period or
23 any 90-day stretch within a six-month period after the
24 accident. I give you that as a preface so you would
25 understand why it is so long-winded. So here's the

1 question you have to answer:

2 "Did the plaintiff sustain a medically determined
3 injury or impairment of a non-permanent nature as a result
4 of the accident on October 3, 2011, and that that medically
5 determined impairment is preventing her from performing
6 substantially all of the material acts that constituted her
7 usual and customary daily activities for not less than 90
8 days during the 180 days immediately following the
9 accident?"

10 Now, a medically determined injury is one that is
11 supported by the testimony of a medical expert such as a
12 doctor. If you find that as a result of the accident there
13 is a medically determined injury or impairment of a
14 non-permanent nature that prevented plaintiff from
15 performing substantially all of the material acts that
16 constitute her usual and her customary daily activities for
17 not less than 90 days during the 180 day period immediately
18 following the accident, you have to answer the question
19 "yes". If you find that as a result of the accident she
20 did not sustain a medically determined injury or impairment
21 of a non-permanent nature that prevented her from
22 performing substantially all of the material acts that
23 constituted her usual and customary daily activities for
24 not less than 90 days during the 180 days immediately
25 following the accident, you must answer the question "no".

1 I told you it was a mouthful. That's the third category
2 and the final category you will be considering.

3 Now, my charge to you on the law of damages
4 mustn't be taken to you as a suggestion that you have to
5 find for the plaintiff. It is for you to decide on the
6 evidence presented and the rules of law that I give you
7 whether the plaintiff is entitled to recovery a sum of
8 money from the defendant. It's only if you decide that she
9 is entitled to recover that you consider damages.

10 Now, if you find that the plaintiff is entitled
11 to recover from the defendant, you must render a verdict in
12 a sum of money that will justly and fairly compensate the
13 plaintiff for all losses resulting from the injuries she
14 sustained as a result of that accident. If you decide that
15 the defendant is liable and plaintiff is entitled to
16 recover, then plaintiff is entitled to recover a sum of
17 money that will justly and fairly compensate her for any
18 injury and for conscious pain and suffering to date caused
19 by the defendant.

20 In determining the amount to be awarded to the
21 plaintiff for pain and suffering, you may take into
22 consideration the effect that plaintiff's injuries have had
23 on her ability to enjoy life. Loss of enjoyment of life
24 involves the loss of ability to perform daily tasks, to
25 participate in the activities which were apart of the

1 person's life before the injury and to experience the
2 pleasures of life. If you find that plaintiff as a result
3 of her injuries suffered some loss of the ability to enjoy
4 life, you may take that loss into consideration in
5 determining the amount to be awarded to the plaintiff for
6 pain and suffering to date. And to date means the date of
7 your verdict.

8 With respect to any of the plaintiff's injuries
9 or disabilities, the plaintiff is entitled to recover for
10 future pain and suffering disability and the loss of
11 ability to enjoy life. In this regard you should take into
12 consideration the period of time that the injuries or
13 disabilities are expected to continue. If you find that
14 the injuries or disabilities are permanent, you should take
15 into consideration the period of time that plaintiff can be
16 expected to live.

17 Now, in accordance with statistical life
18 expectancy tables, the plaintiff has a life expectancy of
19 44.7 years. Now, such a table provides nothing more than a
20 statistical average. It neither guarantees that plaintiff
21 will live an additional 44.7 years or mean that she will
22 not live for a longer period. The life expectancy figure I
23 have given you is not binding upon you, but it may be
24 considered by you together with your own experience and the
25 evidence that you have heard concerning the condition of

1 the plaintiff's health, habits, her employment, her
2 activities in deciding what her life expectancy is. You
3 may consider all of those things in taking that into
4 account. If your verdict is in favor of the plaintiff,
5 plaintiff will not be required to pay income taxes on the
6 award and you must not add to or subtract from the award
7 any amount on account of income taxes.

8 Oh, another thing, a plaintiff is not required to
9 prove their case in any particular way. They can put any
10 evidence that's admissible they can present to you. So you
11 are not required to call any particular witness. However,
12 the failure to call a certain person as a witness may be
13 the basis for an inference against the party not calling
14 the witness. For example, in this case the plaintiff
15 didn't call Dr. Capiola who was described as her treating
16 orthopedic surgeon before this accident occurred and who
17 continued to treat her some time after the accident
18 occurred. Now, the plaintiff has offered no explanation
19 for not calling Dr. Capiola. You heard no such explanation
20 in the trial. You may, although you are not required to,
21 you may, because they didn't call this witness, you might
22 conclude that the testimony of Dr. Capiola wouldn't support
23 the plaintiff's position on the question of what her
24 physical condition or injury was after the accident. And
25 you may also, although you are not required to, conclude

1 that the testimony of Dr. Capiola wouldn't support her
2 position and would not contradict the evidence offered by
3 the defendant on this question. And you may, although you
4 are not required to, draw the strongest inference against
5 the plaintiff on the question that the opposing evidence
6 permits. And the question that I am describing to you is
7 the question of what was her condition immediately after
8 the accident that we are here about.

9 Now, I have outlined for you the rules of law
10 that apply to this case and the processes by which you will
11 weigh the evidence, decide the facts. In a few minutes you
12 will retire to the jury room for deliberations.
13 Traditionally, juror number one acts as the foreperson.
14 Your first order of business when you are in the jury room
15 will be the election of a foreperson. In order that your
16 deliberations proceed in an orderly fashion, you must have
17 a foreperson. But, of course, his or her vote is entitled
18 to no greater weight than that of any other juror. Your
19 function to reach a fair decision from the law and the
20 evidence is an important one. When you are in the jury
21 room, listen to each other. Discuss the evidence and the
22 issues in this case amongst yourselves. It is the duty of
23 each of you as jurors to consult with one another and to
24 deliberate with a view of reaching an agreement on a
25 verdict if you can do so without violating your individual

1 judgment and your conscience.

2 While you should not surrender your conscientious
3 convictions of what the truth is and of the weight and
4 effect of the evidence has upon you and while each of you
5 must decide the case for yourselves and not merely consent
6 to the decisions of your fellow jurors, you should
7 nevertheless examine the issues in evidence before you with
8 candor and frankness and with proper respect and regard for
9 the opinion of each other. So when you go to the jury
10 room, you listen and you talk. You are open. You discuss
11 what you feel. You listen to what your fellow jurors feel
12 and you do so with a view towards trying to reach a verdict
13 in this case.

14 Now, remember in your deliberations that the
15 dispute between the parties is for them a very important
16 matter. So they and the Court rely upon you to give full
17 and conscientious deliberation and consideration to the
18 issue and evidence before you. And by so doing you carry
19 out to the fullest your oath as jurors to truly try the
20 issues of this case and render a true verdict.

21 Now, just for this once I don't want to send you
22 back in and out, but I want to ask the attorneys if in my
23 charge did I miss anything. So I am going to consult with
24 them for a minute. So I am going to ask you to stay here
25 this time and I will bring them out. I will be less than a

1 couple of minutes. So please wait and don't discuss the
2 case because I haven't given it to you yet.

3 Counsels, will you please join me with our court
4 reporter and join me outside. Thank you.

5 (The following occurred at sidebar out of the
6 presence of the jury:)

7 THE COURT: Counsels, the exceptions to the
8 Court's charge that were fleshed out during the charge
9 conference are all reserved without the need to restate
10 them now. With that in mind, Mr. Herbert, are there any
11 objections to the Court's charge?

12 MR. HERBERT: No, Your Honor. The only thing I
13 am bringing up to the Court's attention, but I believe it
14 is okay, I want to bring it to Your Honor's attention and
15 see what you think. You said in your charge that the same
16 five out of six don't have to agree. It just didn't say it
17 on the sheet that I saw that the same five out of six don't
18 have to agree per question. You said it in your charge.
19 Sometimes it will say the same five out of six don't have
20 to agree.

21 THE COURT: It actually says it on the verdict
22 sheet.

23 MR. HERBERT: I am okay because you said it.

24 THE COURT: Do you want me to change it?

25 MR. HERBERT: No.