

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

-----x	
ELOYD ROBINSON, ET AL. ,)
)
PLAINTIFFS,)
)
vs.)
)
THE METROPOLITAN WASHINGTON)
ORTHOPAEDIC ASSOCIATION,)
CHARTERED, ET AL. ,)
)
DEFENDANTS.)
)
-----x	

2015 CAM 8980

Washington, D. C.
Wednesday
June 14, 2017

The above-entitled action came on regularly for the Plaintiffs' Closing Arguments before the Honorable NEAL E. KRAVITZ, Associate Judge, in courtroom number 100, commencing at the hour of 2:00 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS REPORTED.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

On Behalf of the Plaintiffs:
Patrick Malone Associates
By: Patrick Malone, Esq.
1310 L Street, NW, Suite 800
Washington, D. C. 20005
202.742.1500
pmalone@patrickmalonelaw.com

Trombly & Singer, PLLC
By: Kenneth Trombly, Esq.
Daniel Singer, Esq.
1825 K Street, NW, Suite 1150
Washington, D. C. 20006
202.887.5000
kmt@schultztrombly.com

On Behalf of the Defendants:
Wharton Levin Ehrmantraut & Klein, P. A.
By: D. Lee Rutland, Esq.
Tiffany Randolph, Esq.
104 West Street
Annapolis, Maryland 21404
410.263.5900
dlr@wlekn.com

1 P R O C E E D I N G S

2 CLOSING ARGUMENT

3 MR. MALONE: Thank you, Your Honor. May it please
4 the Court, ladies and gentlemen: One thing that always gives
5 me goose bumps is when I hear the jury instructions with this
6 line right here: "All parties stand equal before the law and
7 are to be treated as equals in this court."

8 Where else in the world would that happen? We have
9 the greatest justice system in the world, because a man with
10 a ninth-grade education stands equal to a man with advanced
11 degrees, neither one of them can claim any undue sympathy or
12 prejudice. They are equal under the law. That is a precious
13 thing that we have, and you are a core part of that, because
14 where else in the world do we call on citizens to decide our
15 important disputes? Nowhere.

16 The famous writer de Tocqueville wrote a book 170
17 years go called *Democracy in America*. He said that the right
18 to vote in a jury and actually the duty to vote in a jury.
19 Because think of something else: What else does our country
20 and our local government require you to do? Draft, in times
21 of war and jury service. That's it, in terms of things that
22 you actually have to leave your house to do. Pay your taxes
23 inside your house on your computer or whatever. But to do
24 actual things, jury service is it.

25 And de Tocqueville said that it's just as important

1 to vote on a jury as it is to vote in a ballot box, but it's
2 a lot harder. Because in a ballot box, you've just got to
3 vote for whomever you want to. You don't have to explain
4 your vote to anybody, and you don't have to reveal your vote
5 to anybody. You have to deliberate. You have to talk to
6 each other. You have to go over the evidence together and
7 agree on a decision.

8 You know, just think of those guys a few blocks from
9 here over on Capitol Hill if they were required to do what
10 you have to do: Listen to the same evidence and sit in the
11 same room and not have alternative facts where one side says
12 one thing and the other side says the other thing, and they
13 never meet together. And then, instead of just talking back
14 past each other with their sound bites, they have to sit down
15 in a room and talk to each other. Wouldn't we be so much
16 better off?

17 What you do is called a "verdict." It's Latin for
18 "ver" means "truth," and "dict" means "to speak." You
19 literally will speak the truth with your verdict. And you
20 will speak it with one voice. That's the voice of our
21 community; a cross-section of people chosen randomly who've
22 heard this evidence.

23 So let's talk about the evidence. What is a
24 reasonable and prudent surgeon to do in a circumstance like
25 this? I told you in the opening statement that Dr. Azer

1 broke basic patient safety rules that are there to protect
2 everybody; patient safety rules that are embodied in what
3 doctors call "standards of care." And they were so basic:
4 Do your homework. Do your homework. Make sure that you know
5 the special stuff about this patient, so that you can adjust
6 your care for this patient, because we're all unique
7 individuals. And doctors treat us as individuals, and that's
8 so important.

9 And the man told me three times in his deposition
10 that he didn't know about that stent until the last day that
11 he saw him. It was right there in his records that he had no
12 idea about the Washington Hospital Center, Dr. Lustgarten, or
13 the existence of this stent until August 19, when he had a
14 man with a dead leg in his office. And at trial, "I think I
15 knew about the stent." You have to decide what the credible
16 evidence is. Did he do his homework?

17 Did he violate the rule about doing no harm? Basic
18 Hippocratic Oath: Don't do unnecessary harm to your patient
19 when you can avoid it by being careful. He didn't need to
20 put that tourniquet on there. He didn't need to squeeze off
21 the blood flow to that leg for four hours. If there is some
22 reason he did, there's plenty of stuff he could've done
23 afterwards to fix it.

24 Third basic safety rule: Pay attention. Pay
25 attention when the healing process is not doing right.

1 Normal healing from a wound two weeks post-op is a thin
2 little line. Our cell phone photo -- and I told Kevin that
3 "You've got to get a better cell phone, man," because it is a
4 little pixelated -- but you can see it. It's not a normal
5 wound. And then in the hospital, the dead leg with the same
6 geographic pattern that you see around this wound on August
7 2nd.

8 So you know that leg was dying on August 2nd. And
9 what did Dr. Azer say in his note? "The wound is healed"?
10 "The wound is healed." And Clara Robinson told us how they
11 started to take the sutures out the nurses. And Dr. Azer
12 comes in, and it's all oozing pus and stuff. So he said,
13 "Stop it." And, actually, he documents that he did not
14 remove the sutures. That doesn't do anything else. All he
15 had to do was call the vascular guy on that day: "Will you
16 take a look at my man? Take a look at my patient." He
17 didn't do it. And fix the harm that you've done.

18 So simple. One phone call. One phone call pre-op
19 to do the vascular evaluation. One call from when he got
20 that call from the PACU that he never returned the page. One
21 call the next day in the hospital. One call at any time
22 thereafter up through August 2nd. This man could have had
23 two good legs with a nice, shiny knee replacement. And his
24 only problem would be going through airplane security and
25 having to go through the big scan.

1 But in addition to these four basic patient safety
2 rules and standards of care that we've proved to you were
3 violated here, maybe there's one more that we should talk
4 about, and that is the duty of care. A doctor must care.
5 What did Dr. Azer tell us in this deposition? And I played
6 it here during the trial.

7 (Whereupon, the tape was played.)

8 MR. MALONE: "The surgery was uneventful." So
9 many different stories that your head swims with all of them.
10 But the issue that it raises is when a doctor cares for his
11 patient, shouldn't the doctor also care about his patient?
12 They call it "medical care" for a reason. We call it our
13 "health care system." They call it Obamacare. And President
14 Obama said, You know, they tried to insult me calling it
15 "Obamacare." I like the word, "Obamacare," because Obama
16 does care. And that is a basic requirement for all doctors:
17 They must care about their patient, and that's a question for
18 you to deliberate on in this deliberation that you're about
19 to undertake.

20 You don't even need all of these experts that
21 paraded through the court. Let me remind you who a few of
22 them were. You saw Dr. Shapiro this morning on the
23 videotape; the orthopedic surgeon who did come to court last
24 week -- last Tuesday -- and told us, "Frankly, this was
25 egregious." That was his word.

1 MR. RUTLAND: Your Honor, objection. I'd renew
2 the motion that I made at the time.

3 THE COURT: Overruled.

4 MR. MALONE: Dr. Matza testified by video. The
5 very last thing that he told us in that video deposition --
6 (Whereupon, the tape was played.)

7 MR. MALONE: What Dr. Azer did with cutting off
8 both bones and then only putting in the tibial plate and
9 leaving the femoral plate undone, he's got a story about it.
10 But in 39 years, this doctor who told us that he's done
11 thousands and thousands of total knee replacements has never
12 seen or heard of any surgeon -- competent surgeon -- being
13 able to finish the job.

14 Dr. Paul Collier told you also that this was a
15 large-vessel disease; that they needed to open up the large
16 vessel. They needed to call someone like him during any of
17 that time frame along clear up through August 2nd, and the
18 guy would have a healthy leg today. Our medical detective,
19 Dr. McTigue. We had him come in. We said, "Scientifically,
20 doctor, tell us how long this leg was dying?" And he said,
21 "That leg was good and dead within two to four weeks."

22 And we asked him: "What about this thing about this
23 so-called diabetic, small-vessel disease?" And he put
24 together all of the evidence for us. He looked at the
25 slides: "I see normal, tiny little vessels," he told us.

1 and he circled that one for you to demonstrate it for you:
2 "I don't see any vessels that are clogged up by somebody
3 having a high level of sugar circulating through their
4 blood."

5 And there are labs that they do to figure out if
6 somebody has diabetic small-vessel disease. Because if it's
7 circulating through your body, it's going everywhere; right?
8 You look at the kidney function: "Are you spilling protein
9 in your urine?" "No, sir." "Are you spilling sugar in your
10 urine?" "No way." "Does he have any other evidence of guide
11 that it's small-vessel disease?" And he said, "No." Dr.
12 Ong, the family doctor and not a paid expert with no dog in
13 the fight came in to tell us that, as far as he was
14 concerned, Mr. Robinson didn't have diabetes at all. His A1C
15 levels -- the gold standard test for long-term blood sugar
16 were in the normal range. They were not even in the diabetic
17 range. So, overwhelming evidence.

18 Now, because the evidence is so overwhelming, I want
19 to get to something that is more important perhaps and more
20 difficult, and that is: What is a fair assessment? The key
21 instruction that His Honor gave you that, "If you find in
22 favor of Mr. Robinson" -- and this is on his claim and not
23 her claim -- "then you must decide what amount of money will
24 fairly and reasonably compensate him for the harm that you
25 find was caused by Dr. Azer's negligence. You may assess

1 damages for any of the following harms you find were
2 proximately caused. "

3 And by the way: The word is "assess. " Every now
4 and then an old word has leaked out in court where they talk
5 about an "award of damages. " It's not a prize. It's not
6 like a lottery. It's no gift that anyone is giving. It's a
7 payback, a compensation. Remember I said at the beginning:
8 A balancing for the harm that was done.

9 And it must be fair, and it must pay for everything
10 that happened that is on this list: Extent and duration of
11 physical injuries; effects on overall, physical and emotional
12 well-being; quality of life; physical pain and emotional
13 distress; disfigurement; deformity; humiliation or
14 embarrassment that goes with that; inconvenience.

15 Wow, what an understatement. Inconvenience of a guy
16 who didn't go to doctors for anything except routine checkups
17 with Dr. Ong. And, now, he's tied totally into the medical
18 care system; and he's a patient for the rest of his life. We
19 didn't ask for medical bills past or future. He's got other
20 resources for that, and they are the smallest, tiniest part.
21 He doesn't need money for medical bills. But what he asks
22 and Clara ask and I ask is that you consider everything that
23 happened.

24 Because life is lived forward; not backwards. The
25 way to understand what this man has been through is to go

1 back to the beginning and look at it from the start forward.
2 So it's like the grim reaper is there over his shoulder on
3 the night of July 15th, 2013; the night of the surgery.
4 "I'm afraid to tell you, Mr. Robinson, something horrible is
5 about to happen as a result of the negligence of your surgeon
6 that you're trusting; and you're going to go into surgery
7 with. You're going to experience a terrible loss."

8 MR. RUTLAND: Objection, Your Honor.

9 THE COURT: Approach the bench.

10 (Whereupon, the following sidebar conference took
11 place:)

12 MR. RUTLAND: It's totally inappropriate. The
13 grim reaper is on his shoulder the night before surgery?
14 He's suggesting that he's going to die tomorrow? That's not
15 a legitimate comment on the evidence in the case.

16 THE COURT: Where are you headed with this?

17 MR. MALONE: I'm just running the evidence from
18 the beginning forward and telling Mr. Robinson what is going
19 to happen to him.

20 THE COURT: For what --

21 MR. MALONE: That's the way I always do it.

22 THE COURT: That may be a fact. But can you just
23 explain to me: What do you mean that's the way you always do
24 it? Are you comparing --

25 MR. MALONE: I am explaining how he experiences it

1 in real time by going to the beginning and going forward.

2 THE COURT: What does that have to do with the
3 grim reaper looking over his shoulder?

4 MR. MALONE: It's a way of thinking about it. You
5 know, you can think of it as a guardian angel. I don't care.

6 THE COURT: What's the bottom line? Is that he
7 would've chosen not to have the surgery?

8 MR. MALONE: No, no, no. Just that this is
9 inevitable: "Here's what's happening to you and will happen
10 to you. But the good news is we have a system that will
11 compensate you for all of this." That's the point.

12 MR. RUTLAND: Absolutely improper argument, Your
13 Honor.

14 MR. MALONE: That is not so.

15 THE COURT: What's improper about it, as long as
16 he's not using terminology like "the grim reaper"?

17 MR. RUTLAND: That's what I mean. He can
18 certainly talk about the purpose of our compensation system.
19 But by saying the grim reaper says that, "Something terrible
20 tomorrow is going to happen to you," that's solely to incite
21 this jury.

22 MR. MALONE: I'll call it the "guardian angel."

23 MR. RUTLAND: That's improper also. What he's
24 thinking the night before the surgery is not --

25 THE COURT: I guess I'm inclined to agree with the

1 defense that what someone is telling the plaintiff or what
2 he's thinking, I mean except to the extent that what his
3 expectations were might've played into his emotional
4 distress, I think, ultimately, it just doesn't seem to me
5 directly related to what the injuries are here. I mean you
6 can go through chronologically.

7 MR. MALONE: I'll go through it chronologically.

8 (Whereupon, the sidebar conference concluded.)

9 THE COURT: All right. The objection sustained.
10 He's going to rephrase that.

11 MR. MALONE: Forget about the grim reaper. Let's
12 look at it from the beginning from Mr. Robinson's point of
13 view of what he's experiencing in real time. He gets only
14 half a knee replaced, and he has horrible pain and immobility
15 just from that. He's forced by his surgeon to come to the
16 doctor's office for first post-op exam. And every bump on
17 the road will be excruciating. His wife has testified about.

18 His leg slowly dies over the next month. It gets
19 that hideous, ugly scar where the surgical wound never heals
20 right. The amount of pain that he experiences in that first
21 month or two, "I don't know a human could feel that much
22 pain" is what's in his heart and what he said in this court.
23 And it would be pretty much constant. In the post-op visits,
24 the surgeon spends one or two minutes with him each time and
25 barely looks at him, according to three people who were in

1 the room.

2 He gets a cast put on his leg that makes it even
3 worse. By August 19th, his leg is black and dead. And
4 still, surgeon does not recognize it. Still the surgeon puts
5 nothing in his notes about the foot being black. And so,
6 nothing is documented until he goes to the hospital that
7 night. He goes to the hospital, and he is delirious in pain.
8 The nurses dutifully do a chart every day. "August 19, pain
9 rating nine. Location: Right leg." Next day: "Ten, ten,
10 nine, nine." And you'll have this sheet. "Ten, ten." Right
11 here where it's circled 8/24 is the first day where it no
12 longer says "right leg." It says "right AKA," above-knee
13 amputation.

14 His respiratory rate stays fast during this whole
15 time, even though he's getting Dilaudid. And they bring the
16 pain down temporarily, but it always goes back up. He has to
17 have intravenous narcotic pain pills. Here was an exhibit
18 that we admitted into evidence on the Admitting Nursing Note
19 that shows the foot being "dark in color and no pulses and
20 cold to the touch." And this is the first night. And then
21 early the next morning, we see, "Patient was heard screaming.
22 When nurse asked why, he said his right leg hurt. Dilaudid,
23 two milligrams. IV given."

24 A strong man. A professional athlete in his day is
25 reduced to screaming in pain. When they finally tell him the

1 leg has to be amputated, he learns that they can only save a
2 short stump. So he goes from a full knee to half a knee to
3 no leg and a short stump. He has excruciating pain during
4 the healing of the stump, because the periosteum -- the thing
5 around the bone which is very nerve rich -- has been cut.

6 All of this time, he's wearing a diaper. All of
7 these two months post-op. He goes through many months of
8 rehab. He gets high-tech prosthetic legs, but he can't feel
9 the floor under his artificial leg, because he has now this
10 thing called "proprioception." And it makes it impossible
11 for him to walk any distance to make it practical to go
12 places without the wheelchair. And that leg that's cut off,
13 it's still there. It's a ghost leg. They call it "fathom
14 sensations" of having your leg.

15 He had some falls. Once in the street in front of
16 his house. Once out of bed, when he has to lay on the floor
17 in the middle of the night for an hour, and that makes him
18 understandably fearful of walking. He was a man who walked
19 five miles a night 10,000 steps or more each and every day.
20 We recite all of these things, and we say to Mr. Robinson:
21 "The good news, Mr. Robinson, is that we have a system in
22 court that requires an impartial group of jurors from across
23 our community to assess all of these things and more and make
24 a fair assessment of them and pay for all of them and not
25 leave anything out."

1 10,000 steps a night when he could have had a good
2 knee replacement. Think about that from the four years
3 between then and now and another five-and-a-half and six
4 years of life expectancy or more ten years. 10,000 times 365
5 times ten years, my God. It's millions of steps that he has
6 lost the ability to normally feel. Things that I do that I
7 don't even think about and that all of us do; and we take
8 them for granted. And now, he hobbles to the bathroom on one
9 foot, and that is his life.

10 Everything he does will put stress on his shoulders
11 and his opposite leg. The opposite leg will suffer from
12 overuse. You saw him try to get up on the witness stand.
13 Mr. Robinson was Mr. Fix It. Mr. Outdoorsman; the man who
14 was proud to do everything around the house: The decks, the
15 cabinets in the kitchen, the car maintenance, the garden, the
16 lawn. All of that he did and all of that he has no more.

17 So what he does now is he spends most of his time in
18 his bedroom. He hops on one leg from his bed to his
19 bathroom. He's unable to move more than a few steps on the
20 walker without being exhausted. Because of this, this proud
21 man does not want to go out in public even in the wheelchair,
22 because he does not want to be a bother to his wife; and he
23 does not like the feeling of being a strong man reduced to
24 being in a wheelchair.

25 And so when he does go in public, what does he do?

1 He only takes enough water in his mouth to swallow his
2 medicine so he won't have to go to the bathroom and navigate
3 public bathrooms. That golfing that he wanted to do so much
4 and the main reason why he had this surgery, he'll end up
5 giving away the clubs.

6 Working full time up until a few days before this
7 surgery, he's lost what he loved about that. He loved his
8 job because he's right by the ballpark. He could retell
9 baseball stories about the old days back in the Negro
10 baseball leagues, and he toured 38 states and a number of
11 Canadian provinces. And we know that he some adversity
12 during that time too. We know what it was like. But here's
13 a man to put that adversity behind him. He drinks out of the
14 same water fountain as everybody does now.

15 He can greet in that walking around --

16 MR. RUTLAND: I object, Your Honor. I'm sorry. I
17 have to object to that.

18 THE COURT: Overruled. Let's just move on.

19 MR. MALONE: Okay. He's a personable man, who
20 greets all of the dog walkers with the names of their dogs.
21 He knows them. And now, he's reduced to dependency and
22 isolation and immobility. In 1 Corinthians, St. Paul wrote
23 that, "A body is one, though it has many parts. And all of
24 the parts of the body, though many, are one body." You
25 cannot take an important aspect of a person from them -- an

1 | important limb -- without causing terrible harm to their
2 | entire body to the entire spirit to the entire person.

3 | What you're left with, Mr. Robinson, is a lot. He's
4 | still got that good-natured sense of humor. He got a hit off
5 | of Satchel Page that was a grounder down the third base line
6 | that, over the years in the retelling, turned into a line
7 | drive. He kept those five uniforms hanging on the back porch
8 | in Danville, Virginia. Each one of them was ready to go.
9 | First team that called him offering the five bucks for the
10 | game, he's out the door with that uniform on.

11 | And you still got that, and that's good. He's got
12 | the finest prostheses that money can buy, but no equipment
13 | can replace what God gave us. He has loyal friends, but he
14 | has trouble seeing his friends, because he doesn't want to be
15 | a bother and doesn't want them to see him like this. He has
16 | a loyal, strong wife. She becomes his nurse and caretaker,
17 | even though he chafes at that too, because he doesn't want to
18 | be dependent.

19 | I'll just give you this on Clara Robinson's claim
20 | and what Eloyd Robinson would say to her. This was a riff of
21 | what he said on the witness stand. Last Friday was Cole
22 | Porter's 125th birthday: *I've Got You Under My Skin* and
23 | all of that good stuff. He could say to Clara: "You are the
24 | Nile. You are the Tower of Pisa. You are the smile on the
25 | Mona Lisa. I'm a worthless check. A total wreck. A flop.

1 But if, baby, I'm the bottom. You're the top. "

2 So how do you appraise what's been taken from him
3 and what he's been left with? We have our scales of justice,
4 and it is a balancing act. We consider all of the items on
5 one side. Every single thing that I told you about from July
6 16th, 2013, when the negligence started clear through the
7 end of his life expectancy -- and you heard the judge say
8 that you're not limited to treating him like a number. You
9 can treat him on the life expectancy according to the way
10 that he takes care of himself: A guy with good diet who
11 works hard to take care of himself.

12 All of that balanced out by a jury verdict in
13 dollars. And we say it must be a fair and reasonable verdict
14 that is objective, logical, rational and justifiable. I want
15 to suggest a procedure in the jury room that riffs off
16 something that the judge told you. It's just a suggestion.
17 Everyone has a right to be heard here equally in your
18 deliberations. And I suggest to you that, if you get to the
19 issue of the numbers -- the fair balancing -- the first place
20 to start might be to have everyone pull out a sheet of paper
21 and write down their first number, fold it over, and put it
22 in the middle of the table.

23 That way, if you went around the room orally and the
24 first two or three people said the same or similar thing, you
25 know, others would feel under pressure to go long. So it's a

1 way of equalizing everybody. Put your feeling out there
2 literally on the table and then open them up and see what the
3 range is. Likely, there will be a range. Will some of your
4 numbers be in eight figures? Will some be more? Will some
5 be less?

6 MR. RUTLAND: Objection, Your Honor.

7 MR. MALONE: That's not for me to say.

8 THE COURT: Objection's overruled.

9 MR. MALONE: It's for you to decide, based on the
10 evidence that at the end of this case I suggest that you will
11 look Eloyd Robinson and Clara Robinson in the eye, and you
12 will say, "We balanced it out. We did fair justice."

13 One last thing that I want to say: Some people
14 think things happen at random. Some people think there's a
15 reason for everything that happens. Maybe you got here just
16 by random. Maybe there was some higher purpose. If you
17 decide that you're here for a reason, you will find the
18 strength to render justice in this case and to do the right
19 thing under the law and to render a verdict -- a speaking of
20 the truth -- that will answer the question: Are you here to
21 enforce justice? Are you here to enforce accountability for
22 gross violations of the rules of patient safety and a
23 standard of care?

24 And are you here to render justice that will value a
25 human life and that will say that, no matter if a person is

1 of modest means and no matter if he is in the twilight decade
2 of his life -- and by the way, why do they call it the
3 "golden years" -- you will say in your verdict and in your
4 speaking of truth that his life is precious and his
5 independence and his productivity and his mobility and his
6 dignity cannot be taken away from him without a heavy value
7 being placed on what he has lost. Thank you.

8 MR. RUTLAND: May we approach, Your Honor?

9 THE COURT: Yes.

10 (Whereupon, the following sidebar conference took
11 place:)

12 MR. RUTLAND: Your Honor, I'd move for a mistrial
13 at this time on several bases: Number one, the repetition of
14 the testimony from the expert that the care was egregious. I
15 moved for a mistrial the first time that came up, and I'd
16 move to strike it. That will be the first one.

17 The second one would be the reference to drinking
18 equally from a water fountain. That is an improper injection
19 of race into this case. The record should reflect that three
20 of our jurors are African-American. I believe that is an
21 absolute improper injection of an issue into the case that
22 need not have been raised.

23 I don't believe that the argument on damages was an
24 appropriate Colston argument. Saying, "You might write down
25 eight figures, but it's not for me to say." I don't think

1 that's what Colston had in mind is talking to a juror and
2 telling them, "You know, you might write this number down for
3 this case." That wasn't what they had in Colston, which was,
4 "I can't say it's worth this or that or whatever," but I just
5 don't believe that's what Colston had in mind.

6 MR. MALONE: I think all of those are totally
7 wrong. The care was egregious. You'd have to call a spade a
8 spade at some point. The water fountain comment has nothing
9 to do with any kind of racial appeal. It's about this man to
10 say the same thing with an all-white jury. It's about this
11 man rising up from adversity but being able to still be a
12 good, joyful person. Except now, he's had a blow that he has
13 not and will not recover from. That's that one.

14 And then the damages argument, I followed exactly
15 the thing of questioning whether some of the figures would be
16 in that range and saying that it wasn't for me to decide. So
17 everything's proper.

18 THE COURT: Can you explain to me, Mr. Rutland,
19 what's the problem with the statement that the care was
20 egregious?

21 MR. RUTLAND: It is not for expert witnesses to
22 categorize negligence. This is not a punitive damage case.
23 I don't have a case here, but I know it has come up in the
24 past where they're trying to put a label on the type of
25 negligence this is. This isn't a gross negligence case where

1 | it might've some significance to a contributory negligence
2 | defense.

3 | But it is not proper for an expert to say. It is a
4 | person opinion. That's not a medical opinion. They think
5 | it's egregious. It's not proper.

6 | MR. MALONE: It is a medical opinion, and there's
7 | a big difference between a case that's close to the line of
8 | being good care and one where the care is just ridiculously
9 | bad from start to finish. That's what we proved. That was
10 | our case.

11 | THE COURT: Well, I'm going to deny the motion for
12 | a mistrial. First of all, I mean what was said in the
13 | closing argument about the "egregious" comment was an
14 | accurate summary of what the testimony was of the expert, who
15 | characterized the conduct as "egregious" or the violations of
16 | standard of care as "egregious." And I think Mr. Malone is
17 | probably correct that an expert can state an opinion
18 | regarding the extent to which the standard of care was
19 | breached, whether it was a minor breach or an egregious
20 | breach.

21 | I hadn't thought about this in the context of
22 | punitive damages. And, coincidentally, I noticed at some
23 | point when I was reading the instructions this afternoon that
24 | there's an instruction which says -- and I can't remember
25 | exactly what it says -- in effect it says, "Punitive damages

1 are not available in a case like this. "

2 MR. MALONE: Right.

3 THE COURT: The purpose here is to compensate the
4 plaintiff and not to punish the defendant. I don't think
5 anyone asked for that instruction. Certainly, no one
6 mentioned it today. Maybe that would've been a good
7 instruction to give, and I suppose maybe I should consider
8 giving it now, if the defense would like; but that's one
9 thing for you to think about.

10 The reference to the drinking from the water
11 fountain, I'm not sure that it has great relevance to
12 anything here. But I think it's an overstatement to say that
13 it injects issues of race into the case. I just think that
14 the fact of the matter was that was testimony that the
15 plaintiff played baseball in the Negro Leagues back in the
16 late 40's and early 50's. I think anyone who's at all a
17 student of history knows what people engaged in that pursuit
18 endured.

19 And I think that, to the extent that the reference
20 to "drinking from water fountains" referred to an issue of
21 race, it didn't do so in a way that went beyond the extent
22 that issue was already in front of the jury. I should also
23 add that, you know, that the fact of the matter is that the
24 defendant isn't a Native American or an immigrant.

25 And to the extent that the emphasis on everyone

1 being treated equally in the court favors the plaintiff,
2 given that he's a racial minority, I think it also
3 potentially favors the defendant and can protect against any
4 unfair prejudice that members of the jury might've been
5 inclined to show toward him. And so I guess what I'm trying
6 to say is that both parties can benefit from a sensitivity on
7 the part of the jury for insuring that everyone be treated
8 equally and be respected and thought of in a dignified way,
9 regardless of their beginnings.

10 In terms of the Colston argument, I mean I have to
11 confess that I didn't reread Colston before the argument
12 today; and I probably should have, because I knew that this
13 was going to be an issue, given it had been an issue in one
14 of the in limine motions. I believe, based on my familiarity
15 with the Colston decision, that what Mr. Malone said was
16 consistent with what the Court of Appeals said was okay.

17 Mr. Rutland, if you think I'm wrong about that and
18 you want to file some post-trial motion on it, I'd certainly
19 consider it with an open mind. Because, as I said, I didn't
20 go back and read it --

21 MR. RUTLAND: All right.

22 THE COURT: -- more recently than a couple of
23 months ago when we were dealing with this in limine issue.
24 So I'm going to deny the motion for a mistrial. The jury
25 would probably like to take a short break before you get

1 | started.

2 | MR. RUTLAND: Sure.

3 | * * *

4 | THE COURT: Thank you, Mr. Rutland. Mr. Malone,
5 | do you wish to make a brief rebuttal closing argument?

6 | CLOSING ARGUMENT (CONT' D)

7 | MR. MALONE: I do, sir. Wow, I don't know what
8 | trial they were listening to or what evidence they were
9 | listening to. But we've heard a series of cherry-pickings,
10 | no truths, and half truths. I could go over for the next --
11 | although the judge would kill me -- I could spend the next
12 | half an hour and untangle all of these messes that were just
13 | set out. We don't have time for that. We know what happened
14 | here.

15 | Just think for a second about this causation theory
16 | that they have. The idea is that never mind the fact that
17 | the man didn't know about the stent; and that he crushed the
18 | stent underneath the tourniquet for four hours; that the foot
19 | is never recorded as "warm" in the rest of the hospital stay;
20 | and never mind the fact of what the photo looked like on
21 | August 2nd; and never mind what Dr. Nedd found when he took
22 | that stent out and found it was occluded; and never mind what
23 | Dr. Azer heard from Dr. Regan (phonetic), the pathologist
24 | that the whole arterial system was obliterated, oh, no.

25 | We have something else. Oh, diabetic small-vessel

1 disease. Well, do they have any evidence? We look for --
2 he's got the label from way back but we look for hard
3 evidence. Did he have high sugar? No. Did he have diabetic
4 disease in the actual tissue that was taken out? No.

5 Just pure coincidence that all of this bad stuff
6 happens with Dr. Azer and then, I guess, miraculously clears
7 up and then along comes this raging diabetes and wipes that
8 leg out and then retreats because, when he's admitted to the
9 hospital, he's got totally normal protein and sugar levels in
10 his urine. I mean wow, wow, wow.

11 So he tried to defend this guy who I accused of
12 being a professional witness. And, Dr. Andrews, he's the one
13 that I said, You are the guy who says, "I'm with him."
14 Because I want to suggest that maybe the most disturbing
15 thing of all that happened in this courtroom was yesterday
16 and perhaps the most startling statement of all. I went
17 through on the machine. I showed Dr. Andrews paragraph after
18 paragraph after paragraph of a leading article from his
19 journal, *The Journal of the American Academy Orthopedic*
20 *Surgeons*.

21 It was all exactly written about our case, you know,
22 ten, twelve years ahead of time. It said that you've got to
23 get the vascular consult pre-op. You've got to check the
24 patient afterwards. These injuries are totally preventable.
25 You just need to be vigilant. You have to care about the

1 patient. And what did he say about that? And even though
2 the article that we went painstakingly through, that article
3 is one of the only references in the online textbook -- this
4 Wheelis thing (phonetic) -- that Dr. Andrews lists as his
5 only publication on his résumé that they list that article as
6 authoritative.

7 And here's what he says: "Well, ladies and
8 gentlemen" -- and this is after he went through all of this
9 painstakingly -- he turned and said, "Is it my turn now? Do
10 I get to speak?" in that southern drawl. "Those articles
11 that, we put out, those are just for the baby lawyers -- baby
12 doctors. They aren't for us practitioners. We don't even
13 pay any attention to those articles." My God. Think of the
14 implications of that. Medicine has advanced so far in our
15 modern era with the peer-view process and with scientific
16 journals and with prospective, randomized studies that they
17 publish and they debate and they talk about, and he suggests
18 we pay no attention to any of it?

19 If that standard was followed and if that standard
20 was endorsed by you, what kind of throwback to the 19th
21 Century medicine would that represent? What kind of
22 throwback to a time of medicine where doctor knows best? The
23 doctor is always right. You can never show that the doctor
24 is wrong, based on how doctors teach each other in their
25 literature because, "Well, we don't follow what it says." We

1 brought the literature in to show you that this is not a
2 hired gun against a hired gun.

3 This is a mountain of objective, peer-reviewed
4 literature that stands unchallenged and unanswered and not
5 one word of it was ever answered. Oh, oh, well. That stuff
6 about no tourniquets in patients with the peripheral vascular
7 disease, that only applies if it's a vascular graft with a
8 vein. That's not what the article said. I showed you this
9 one from Dr. Butt (phonetic): "Certainly, where there are
10 signs or symptoms of peripheral arterial disease, they should
11 be avoided. If any doubt exists, consultation with a
12 vascular surgeon is recommended," *The Journal of*
13 *Arthroplasty*, the standard journal in the field, 2010.

14 I can't give you these to send back to the jury
15 because, under our Rules of Evidence, we're not allowed to
16 send articles back to the jury room. So you won't see it
17 back there. You've seen all of these quotes. You've had a
18 chance to take notes on them. It's in evidence, and you're
19 entitled to consider what the literature actually said. And
20 just one or two other points. The talk about half truths:
21 Oh, Dr. Black. He uses tourniquets over stents? left out
22 one thing, didn't you, Mr. Rutland? Dr. Black not only --
23 and he did acknowledge short time much lower pressure -- he
24 checks.

25 He checks right afterwards with the Doppler right on

1 the thigh, and you get a wave form. You see it on the
2 machine. He makes sure that he hasn't damaged the blood
3 vessel. Half truths and no truths.

4 On the injury, my goodness. We get this parade of
5 witnesses: Karns and Panagos. And the whole message seems
6 to be, "Oh, hey. Great marriage. Not such a bad injury."
7 Really? They took away everything from this guy and then
8 they want to say that it's not so bad. And then Miss Karns.
9 Do you remember? You know we said, "Look. The guy needs
10 24/7 care. It's not safe for him to get out of bed in the
11 middle of the night."

12 And we said, Look. We'll pay for it. "We want you
13 guys to know about it," because this is invasion of privacy,
14 and it's not just inconvenience. It's all kinds of stuff.
15 Imagine any of us having to have somebody there to help us
16 get to the bathroom safely in the middle of the night. And
17 maybe she doesn't know that we guys do a little more than the
18 ladies do. But, in any event, what was her answer on that?
19 "Let Mrs. take care of it."

20 Well, hang on. Mrs. has been transformed by this
21 man's negligence from a loving wife into a loving caretaker.
22 She needs some balancing from you for that to acknowledge
23 that marriages are sacred. We sign up for better or worse
24 and for sickness and for health. But if somebody, by
25 carelessness and negligence and indifference turns our whole

1 marriage upside down, they have to be held accountable for
2 it. And the final point: Did Dr. Azer care, as first thing
3 that Mr. Rutland said when he stood up, "Oh, he made all of
4 these phone calls on August 19." Well, of course, he's
5 panicking at the time.

6 But remember when I questioned Dr. Azer about the
7 very next day, August 20th, in the hospital? There's a
8 note that you'll see. Nurse called Dr. Azer to confirm that
9 he wanted the vascular consult. The leg is already dead.
10 Dr. Azer did not return the call. I asked him about it in
11 trial. "He wasn't my patient anymore. They called the wrong
12 people." But we ask you to care to show what good medical
13 care is like and to speak the truth. Thank you.

14 * * *

15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, GARY BOND, an Official Court Reporter
in and for the Superior Court of the District of Columbia,
hereby certify that at said time and place I reported in
my official capacity by means of machine shorthand all
testimony adduced and other oral proceedings had in the
matter of ELOYD ROBINSON, ET AL., vs. RIDA AZER, ET AL., ,
case number 2015 CAM 8980, in said court on the 14th day of
June, 2017.

I further certify that the foregoing pages, 1
through 31, constitute the official transcript of said
proceedings, as taken from my shorthand notes, and that
it is a correct and accurate record of said proceedings.

WITNESS my hand at Washington, D.C., this 26th day
of June, 2017.



GARY BOND, RPR, RMR
CERTIFIED SHORTHAND REPORTER