and don't believe in lawsuits or whatever it is. I don't get that sense, but who knows. And I hope there are folks on this jury who are just as willing to fight for what's right or willing to take a stand for the standard of care in this community and say that this type of behavior is not okay, that what happened does not meet the standard of care, and are willing to not give up and will fight for that in this room. Because giving up is easy, but fighting for what you believe in can be hard. Thank you.

THE COURT: On behalf of defense, Mr. McCartney.

MR. McCARTNEY: Yes, Your Honor. I need a moment to change over technology.

THE COURT: You may.

DEFENDANTS' CLOSING ARGUMENT

MR. McCARTNEY: This is a tough case. It's not often you end up in a trial where you have to admit your client did something wrong, but that is something that has been admitted here and there's been no dispute about it throughout the trial.

There's four things I want you to

consider during the course of your deliberations. I'm not going to sit here and try to rebut everything Mr. Eadie said. That would take way too long, and you've heard it. I'm not going to sit here and take the bait on some of the things he said, it's not worth it. Because these are the four things that you really need to consider during the course of your deliberations.

First, it's been acknowledged that a mistake was made. Second, this is a quote from Mr. Eadie during voir dire, Stratford is full of good people who want to do well and want to help people. I'm not accusing anyone of intentionally doing anything. The person working did not want her to fall. Consider all facts, even those that are unfavorable to both sides.

Both sides need to consider all facts whether they're favorable to that side or not. And the death of Leona Maxim, by the preponderance of the evidence, the greater weight of the evidence, the overwhelming evidence, is that she died from aspiration pneumonia related to her underlying

conditions.

So let's delve into those things. A mistake was made. Now, Mr. Eadie has taken exception about how we talked about the fact that a mistake was made. He points to the Request For Admissions that were read to you regarding whether or not Chakesha Jones violated the standard of care in only having one person to assist Leona Maxim on the morning of June 3rd. And the response was that those were denied because we don't agree that Chakesha Jones did anything wrong. We don't think it's fair to single out one single aide and say hey, you're responsible for what happened, when it wasn't her fault that the order wasn't on.

On that day there was no order. On June 3rd, 2013, there was no order for two-person assist. And without that order, Chakesha Jones had done nothing wrong.

Now, if the question had been admit that Kindred - Stratford through its employees fell below the standard of care in allowing her to be moved in bed with only one person, we would have admitted that. That's not the

question they asked. We even explained that we weren't going to admit those two requests because that assumed that Chakesha Jones did anything wrong. That's why Chakesha Jones wasn't disciplined. That's why she wasn't disciplined. She did nothing wrong.

A mistake was made. We offered in the middle of trial to say hey, we don't have to go through this, we agree there should have been two people helping her. However we got there, there should have been two people helping her. A mistake was made. Mr. Eadie and Mr. Hill didn't want to do that because if they had done that it would have shortened the trial significantly because there would have been a lot less questions to ask. But if they had done that, they wouldn't have been able to do this constant beating down of how bad Stratford was, this place where Mr. Eadie said I think it's filled with good people that are trying to help people. But that wasn't the theme he wanted to portray, they wanted to portray, during the course of this case. They want you to believe this was a terrible facility providing terrible care on a daily

basis, and this place should be shut down. That's essentially what they want you to believe.

And if they agreed to the stipulation and we had just gone to the issues of what were Leona Maxim's damages as a result of the fall on June 3rd and was the death related, they wouldn't have been able to bring all these people in to keep talking about it and all these extraneous issues because they would have no longer been relevant. They wanted to paint Stratford in a bad light despite what Mr. Eadie just said so it would arouse your passion so you would have that feeling of anger at Stratford, this sense that you wanted to punish them. That was a trial strategy. And, as the judge will instruct you, you're not to consider those kinds of things. Those aren't relevant.

And you have to remember what was said about Stratford and how Leona Maxim felt about it and how the staff at Stratford felt about Leona Maxim. They loved her. She was one of their favorite residents. She had been there for years, longer than most of them had

worked there. They all cared for her deeply. But a mistake was made. Unfortunately, that happens.

When she was readmitted, that order for the two-person assist wasn't carried over, and it should have been. There should have been two people that day. That has been accepted and recognized. We know it's been recognized before trial despite what Mr. Eadie said because you heard from the depositions, you heard them read the deposition -- or play the deposition of Mercedes Chisholm. Nowhere in her deposition did they play that was taken months and months ago was there any kind of trying to say hey, we don't own up to this.

In the other employees' depositions when he sat there and used them, remember he used the depositions, nowhere did he ever come back and say hey, you denied that Stratford was responsible. Never happened because Kindred - Stratford was taking responsibility.

We retained an expert, I retained the expert, Jeffrey Schlaudecker, a geriatrician. Someone who does this every day. Trained in geriatrics. He doesn't come in here and say

they didn't do anything wrong. He said, you know what, looking perspectively, I'm not so sure she needed two-person assist. But since that is what the facility had done, and without some kind of discussion to the contrary, she should have had a two-person assist that day. That's never been denied. So to sit there and suggest that Stratford isn't taking responsibility is absurd. It's intellectually dishonest.

People have a right -- Even when I make a mistake, I'm only obligated -- If someone makes a mistake, you are only obligated for the damages you caused. And you could have a legitimate dispute about that. Just because you dispute it doesn't mean that you're not accepting responsibility. It means you have a disagreement, and that's why you eight are sitting in this box today to assist us in deciding who was right about whether or not the death is related. It's not because of a lack of accepting responsibility. It's because that's what our American justice system does to resolve disputes. We sit eight people in a box, eight people like you, to

make the decision.

Stratford is full of good people who want to do well and to help people. I'm not accusing anyone of intentionally doing anything. The person working did not want her to fall. That's what Mr. Eadie said repeatedly at different times. They're full of good people. Yet he comes in casting dispersions at people, casting dispersions at Jose Giner and his experience.

Jose Giner, who started as a nurse, worked as a floor nurse, worked his way up to be a supervisor, then a charge nurse, then six months after Kindred took over the facility applied and was given the job as director of nursing, and has held that position for three years. Left voluntarily because he got a better offer from another company, Saber Healthcare. And Saber Healthcare thought so much of him during his time there they've promoted him in addition up the chain to be a regional nurse.

These are good people that were there doing their best they could and meeting the standard of care other than making the simple

mistake of not making sure that two-person assist order was on.

Consider all the facts, even those not favorable. I bring this up because remember, this wasn't my statement that I came trotting out repeatedly. This was a statement by Mr. Eadie. He talked to Dr. Schlaudecker about it, he talked to Mr. Levine about it. And I find it ironic that Mr. Eadie would ask those kinds of questions you need to consider all facts even those not favorable when that's exactly the opposite of what the Plaintiff has done throughout the course of this case and even today in closing, not fully disclosing and recognizing facts that don't favor them. What do I mean by that? Let's look at the cognition.

Now, there's a dispute here about whether or not -- what Ms. Maxim's cognitive status was before the fall on June 3rd and after. Mr. Eadie tells you oh, she was perfectly fine, perfectly fine, there was no cognitive deficits whatsoever. But that doesn't comport with the facts. She had a loss of cognitive status before the fracture.

And you know who agrees with that, you know who testified as to that? Dr. Seskind, the expert retained by Mr. Eadie and Mr. Hill. He acknowledged she had cognitive deficits before.

You heard about this waxing and waning, these fluctuations. You know who agrees that she had fluctuations? Dr. Seskind. He admitted she had fluctuations in her status. And at no point in time did I or any witness take that stand and tell you that her fluctuations in cognitive status took her to such a low level that she wasn't able to in the long term care for herself and think. But there were some days that were better than others, some days when she was alert and oriented times three, and some days that she was not.

And the testimony and the evidence is not just based on that one BIMS score from February despite what Mr. Eadie wants you to believe. It is -- The chart is replete with references through it that at various times, even before the femur fracture, there were declines in Ms. Maxim's cognitive status and

times that she was not fully alert and oriented.

And this is a prime example here. This is from April -- excuse me, February 5th, 2013. This is from a barium swallow study, and in lead up to that they check about her cognitive status and note that she was alert but passive. Not alert and active. Alert but passive. Ability to follow directions, good. Oriented to person. She was not oriented on this day to place and time. I do think that's actually April 4th.

May 2nd. This is from the May 2nd, 2013, readmission assessment done by the nurse when she came back, when Mrs. Maxim came back into Hillcrest following her short hospitalization for aspiration pneumonia. The nurse noted verbal responses, confused conversation but able to answer questions. She also noted in it altered safety awareness due to cognitive status. Mr. Eadie asked lots of witnesses about this. Even before she fell on June 3rd there were times that she had altered cognitive status. Not so much that she couldn't generally carry on conversations.

Remember the question to Dr. Schlaudecker that Mr. Eadie put up was, in general she was lucid? Dr. Schlaudecker's response was, in general, yes, that was true.

Again, now you look at afterwards, July 3rd. In addition to those nursing assessments, which must be done when a resident is admitted, they redo them quarterly to check on the status. On July 3rd when they were checking on her status, verbal responses, oriented. Not the confused conversations that she had on May 2nd. Alert and oriented to person, place and time. Not just oriented to person as she was on April 5th, 2013, before her barium swallow.

You can also look at the status here. This is from July 20th, and this is the note, Page 334, and it actually bleeds over from the page before which gives the date up at the top. It talks about this nurse observed a moderate amount of purulent drainage. And then it goes down and states, family in today and stated that their mother seems a little confused as well. A little confused as well. That doesn't suggest some significant, massive

change in her cognitive status that the family now claims now that the lawsuit has been filed. Back in that period of time it was some mild confusion.

And what do we know about July 20th and why she might be having some mild confusion? We know on this day, as you see from the order, they ordered the UA, urinalysis, and a C&S, culture and sensitivity. Meaning they cultured the urine to see whether or not there was any bacteria in it. And we know that culture came back, that the wound was infected on this day, which may account for the fact that she was experiencing some confusion.

Mr. Eadie also trotted out during the trial this note from July 23rd about Mrs. Maxim's behaviors. In fact, on this date she was hitting her call light repeatedly and there was no explanation for it. But again, this was the same time period that she had the wound infection. And we know that because if we look up at the note above here, this is the day on July 24th where the antibiotics were prescribed for the wound. And this kind of

behavior never repeated itself over the next couple of weeks after the wound was treated and the infection was cleared and the wound started to heal and improve. These were temporary things that happened out of the norm of her basically in general being lucid.

Wound. Already mentioned that. Made a big deal about this wound and how terrible this wound was. Well, the infection was treated when she got to Ahuja on August 15th. At no point in time did anyone theorize, ruminate, opine, that there was anything wrong with this wound that needed to be cultured. It was never cultured while at Ahuja. It improved. I went through with you the size. Reached a maximum of 5.5. by 3.6 by .3 or .4 centimeters. By the time she got to Ahuja it was 1.5 by .5 by .5. That wound cleared up about 75 or 80% over the course of three weeks, it was improving. And what's interesting about it, when Dr. Seskind was shown those pictures and what the depth was of that wound, what Dr. Seskind did when he was confronted by evidence which didn't support his position he said, I don't believe

it, I don't believe that evidence. I believe the wound was worse than they described it and in the picture.

Functional capability. Way to downplay the impact of the April 2013 aspiration pneumonia. As you hear from the Plaintiffs that she goes to the hospital a couple days, gets some antibiotics, and she comes back and she's perfect and there's nothing wrong with her anymore, that is belied by the physical therapy and occupational therapy notes when she returned on May 2nd. Those notes show that she had basically lost all function. She wasn't able to propel herself in her wheelchair at all. She had lost all function. What minimal function she had, she had lost it completely.

We also know, as Dr. Schlaudecker pointed out to you, an x-ray done on August 9th of 2013 showed that the chest, the lungs, had not cleared completely from the April 2013 pneumonia. Pneumonia, even in a young person, takes time to clear and resolve and get a person back to baseline. And in an elderly person with a significant co-morbid

condition and her underlying massive deconditioning, it was going to take a long time for her to improve.

We also know that Leona Maxim after her fracture was able to return to her baseline in terms of how long she could sit and she could also return to her baseline chair mobility. How do we know that? We have the occupational therapy notes, this is from May 9th to May 14th, that week that included Mother's Day. Sitting tolerance, she began unable, then she got to one hour with a goal of four hours in a wheelchair. And by July 8th we see wheelchair sitting tolerance last week was five hours, by July 8th she could sit for six hours. Six hours in a wheelchair, which also happened to be her long-term goal. So she returned to her baseline in terms of her ability to sit in a wheelchair.

She also returned to her baseline in terms of her ability to self-propel herself in a wheelchair. Here's the discharge summary from the occupational therapy provided to Mrs. Maxim in 2012. If you remember, the

reason that she was given this or underwent this therapy in 2012 was because she had decreased endurance, decreased strength and weakness. And at that time she could only wheelchair herself with verbal cues from 25 to 100 feet. This is the discharge summary on July 22nd when she was discharged after the fracture. Propulsion, patient propelled self 100 feet.

And what's interesting about those May 20 -- excuse me, the 2012 occupational therapy notes is this box I have back here filled with exhibits are the Plaintiff's exhibits they've given us that they're going to introduce, the ones they've introduced. And they have a separate exhibit, Exhibits 19A and B, which include occupational therapy notes. And here's A, here's some occupational therapy notes. That's them. And then B. You know what these notes are? These notes are for the May into June occupational therapy in 2013 and the June into August therapy notes.

What's not included, what Plaintiffs did not -- Plaintiff did not offer into evidence, are these therapy notes from 2012.

Never once did they reference them during the three and a half/four days they put evidence on. You have to consider all the evidence that is not favorable. Plaintiffs did not do that themselves. They ignored these occupational therapy notes and never explained how this 100 feet is any different than her baseline status was back in May of 2012.

Consider all the facts. We also know she had plateaued before her fracture after she went into therapy from her April 2013 aspiration pneumonia. Another fact that the Plaintiffs haven't and their experts have not considered. How do we know that? Well, this is the progress notes that exist from the daily notes, the nurses and others make entries. And right here in the middle, June 3rd, here's a note about the daughter, Marilyn Mazzone, did not come this weekend to sign the cut letter for therapy services. A call was placed to the daughter and the letter will be mailed out for signature.

And from Ben Knuchel, who you heard from again on Friday, he explained what a cut letter is is when it's being sent out because

a person has plateaued in therapy and no longer is going to be continued in therapy. And Mr. Eadie said, well, that could be because the payer didn't pay for it and that's why they were cut. And then that's why I came back in Redirect and asked why would the payer stop paying for it? The payer stops paying for it because the person had plateaued, had reached their maximum improvement.

Mr. Knuchel explained to you that the goals he set were unrealistic when he went back and saw the occupational therapy notes from 2012.

So we know from her cognitive status that Mrs. Maxim returned to her baseline after the fracture, and we know from her physical functional capability she also returned to her functional status.

They trot out things such as pictures and family photos. And they look at these and said, well, let's look at this photo from July 4th and how poorly Mrs. Maxim is doing this day. This is terrible. She's just lying -- For instance, this is Plaintiff's Exhibit 5A, Page 4. This picture from

July 4th and say, oh, this is terrible. She wasn't able to do anything. She's just lying in her wheelchair. Well, what evidence did we also hear about this? Well, what we heard about this was at the end of the day as it got dark they would build a fire. What do we see? We see a fire.

We also don't see sunlight. In another picture such as this one (indicating) you can see sunlight in the background. So we know it's getting dark. Well, July 4th in Cleveland, Ohio it's not getting dark until 9:00, 9:30 or 10:00. So this is very late in the day.

And what else can you see from this photo? You look at this photo, this is Marilyn Mazzone there. She's wearing I think they're called capris. Not that I'm an expert on women's clothing, but I think they're called capris. Then she has looks to be a blue jean jacket on. It's not warm outside. And you look at Chris Guest right there. She's got a sweater on and also capris. And I don't know who this woman is right there, blue jeans and looks like a sweater. Blue jeans.

This is not a warm day. This is the end of the day. It's not surprising that she has a blanket on her. It's cold. It's at the end of the day. This is an elderly person and they have her out at 9:00, 8:30 at night and they're surprised that she's lying down and might be tired.

May readmission orders. I want to touch on this just briefly. Mr. Eadie at several times has put up May orders that were typed and said these were the orders that had the two-person assist. And I explained to you in opening that when she came back on May 2nd new orders were put in the chart, and it was these orders beginning on Page 1049 of Defendant's Exhibit A1 that did not include the two-person assist. But these orders are handwritten. These were the orders that were in effect at the time that Leona Maxim was at Stratford during May up to June 3rd, not the orders that he showed that still had it.

Let's consider all the facts, even those unfavorable. What's interesting, when Mr. Eadie called Mr. Newman by videotape, and Mr. Lipsey was by videotape because he was out

of the country, called Mr. Giner and called Mr. Knuchel, what didn't he do? He didn't ask them any questions about their experience, who they were, what have they done, how did they get to their positions. Which is why I had to bring each and every single one of them -- why Ms. Becker and I had to bring these people back because you didn't learn anything about Mr. Newman. The fact that he's been in the long-term care industry for 17 years. The fact that he himself has worked as the executive director/administrator at several facilities. The fact that for the past six and a half years now he has served as director of district operations. You learned nothing about his experience and who he was.

Mr. Lipsey, the same thing. There was no testimony elicited from the Plaintiff that they played out about the fact he's been a nursing home administrator since 2001; that he's worked not only at two Kindred facilities but also he's worked at four other facilities, four other nursing homes. That was not brought out.

Mr. Giner, you didn't hear -- I went

through his qualifications earlier. You didn't hear about how he's risen up through the ranks through Kindred, then gets his job at Saber, continues to rise and get promotions.

You didn't hear from Mr. Knuchel about his experience, his training, his background, not only undergraduate degree but he had to go get a masters degree in order to be an occupational therapist. That was true of every single one of the witnesses they called.

They didn't play the parts of Mr. Lipsey's videotaped deposition that dealt with the e-mails about staffing. That wasn't played. They asked him no questions on Cross about those e-mails, those e-mails which Mr. Lipsey explained what he meant by bare minimum wasn't that it was bare minimum that we're scraping by. That's the staffing he wanted. That was the staffing he believed if I got that I have enough. He didn't mean bare minimum is we're barely scraping by and we hope nothing goes wrong. But they didn't want you to hear that. They didn't want you to

concentrate on that.

Let's talk about Dr. Gilson. And I'm going to tell you this about Dr. Gilson: I don't fault Dr. Gilson's initial investigation and what he concluded back in 2013. They get what, 5,000 or 6,000, 7,000 cases reported to them a year. They take half of them. And I asked him the question when I showed him all the records from Stratford, I said, does your office have time to go through all these records? He said, no way. And probably 999,999 times out of 1 million that investigation no one contests and there's no issue with it. But in this case it was different and people did contest it.

And yes, I put these up. This was what he reviewed. This is the extent of records that he reviewed, and that's it. He didn't talk directly to anybody, never made an attempt to talk to anyone at Stratford. He admitted he did not know her prior level of function before June 3rd. When Mr. Eadie and Mr. Hill sent him more records, what did they send him? They didn't send him all the records. They didn't send him any records,

any records, from before June 3rd. They sent notes after June 3rd. They didn't send the 2012 occupational therapy notes.

So I don't fault Dr. Gilson in the sense that yes, it is reasonable for him to have done what he did at the time. However, when confronted with more facts, where I do fault Dr. Gilson is he needed to sit there and go, you know, at the time I believed my considerations were reasonable; however, if there's additional information available to me, I would reconsider my opinions.

And it's interesting because one of the jury instructions you're going to get from the Court talks about what you should do when you first go back to deliberate. And it states, your initial conduct upon commencing deliberations is important. It is not wise to express immediately a determination or to insist upon a certain verdict. Having so expressed yourself, your sense of pride may be aroused and you may hesitate to give up your position even if shown that it's not correct. That's what happened with Dr. Gilson when he was confronted with lots of evidence and

questions that he could not answer or did not know. Rather than simply backing off and saying hey, at the time I believe my conclusions were reasonable but I don't know what her level of functioning was before, I can't say if her level of functioning returned to normal. Then, in that case, I might change.

And the thing -- two things that Dr. Gilson said about why femur fractures have such -- and broken bones have such an impact on the elderly is not because it's automatic. It comes with two conditions. One, is it has to significantly decrease the functional capabilities of a resident. In this case, this femur fracture did not cause that. We're not talking about yes, for a short period of time she was not able to propel herself in a wheelchair. We're talking about something more permanent and more long term, especially since she reached baseline by mid July. She already functionally wasn't able to ambulate. She already was not able to assist in bearing weight in transfers.

The other thing he talked about was

reduction in muscle mass, a loss of muscle. That didn't happen in this case, either. Mrs. Maxim was deconditioned before June 3rd of 2012 from her long list of her comorbid conditions, the fact she wasn't able to exercise. And you remember when Diane Fovozzo came back on Friday and testified and was asked the question how was Mrs. Maxim doing when she was able to propel herself in a wheelchair? It was not far and it was slow. That she would go a little distance and stop partly to socialize, but partly also to catch her breath and get some rest.

Now, Dr. Seskind also does not know the prior level of function. He could have looked at the records. He got all the records. Didn't know when he -- We never hid the May 2012 OT notes if he wanted to see them. If you are going to come into this courtroom and claim someone didn't return to baseline and never got back to normal, you need to go in and look to see what that baseline was. You need to be intellectually honest and figure that out.

We also know that all the comorbid

conditions; cardiovascular obstructive pulmonary disease, congestive heart failure, stroke, seizures, scoliosis, gastroesophageal reflux disease, Parkinson's Disease, hyperlipidemia, depression, dysphagia and cognitive decline, these weren't diseases that were going to get better. These were diseases that were going to continue to get worse and Mrs. Maxim was going to continue to progressively have less and less function and ability to do things.

I put this -- I jumped ahead of myself. The really decreased muscle tone -- should be really decreased function and lose muscle tone.

And silent aspiration. Well, Mr. Eadie makes a big deal about this silent aspiration no one knows about. Well, it's sort of like your toilet at home that's leaking just a little bit and you don't know about it. Or that faucet and it's leaking a little bit. You don't really know about it until you get your water bill and you look at your water bill and go what is going on? Why is my water bill high? This is not something

-- It was silent. That's what silent means, that nobody knew that it was happening on a daily basis, just each day a little bit of aspiration slowly eroding at Mrs. Maxim's lungs.

What he didn't show you -- He talked about and showed Dr. Schlaudecker things about a barium swallow that was done in June. What he didn't show Dr. Schlaudecker and what he didn't reference during closing here was this from July 11th, 2013, another barium swallow. And what does it show? Aspiration before swallow, aspiration during swallow, aspiration after swallow. That she was aspirating. And if you go back through all the barium swallows, almost every time she was aspirating. That's why she went four years with taking nothing by mouth.

The death here was clearly caused by aspiration pneumonia and not something else.

We talked already about the wound. There was no indication anywhere that the wound was still infected or even close to being infected by the time Mrs. Maxim went back -- went to Ahuja Medical Center in

August.

We also know from Dr. Schlaudecker's testimony, which is uncontroverted here in this courtroom, is that the bacteria that caused the infection in one of Mrs. Maxim's wounds was different than the bacteria that grew out on the sputum culture from her lungs in August of 2013. So they were not related, the two infections.

We also know that the doctors did not consider urinary tract infection the cause -- or they said the most likely cause is pneumonia, is aspiration pneumonia, the second possibility is a urinary tract infection. We know this because of the discharge summary that says very clearly sepsis secondary to healthcare-acquired pneumonia.

The doctors who are actually treating her and assessing her said it was pneumonia, aspiration pneumonia.

And you heard all -- Dr. Seskind say, well, if it's aspiration pneumonia, you expect it to be in the right lower lobe. Well, Dr. Schlaudecker explained to you that's true if you're swallowing like a whole mass like a

peanut or Cheerio or something like that. But in terms of this liquid aspiration that occurred on a continuous basis, that can go anywhere in the lungs, the liquid could go anywhere in the lungs.

Well, I already mentioned this x-ray from August of 2013 that talks about the look of her lungs on August 9th. Bilateral minimal infiltrates. There is slight left pleural effusion. The findings are improved from May 12, 2013. Not resolved, just improved.

I want to talk about some other issues. You heard testimony initially about how when Kindred took over this facility in April of 2010 there was a complete changeover in management; that the executive director/administrator was gone, and then the director of nursing was out and Jose Giner was hired. Well, we know that's not true. You heard from Mr. Newman that prior to Prentice Lipsey there was a Jane I think Harst, and she was there when Kindred took over and she stayed there until Prentice Lipsey came into Stratford in November 2011.

You also heard from Jose Giner that

he didn't become the director of nursing immediately upon the change of ownership. It was six months later.

A.M. care. Well, there was a fanciful description of Jose Giner's testimony about a.m. care that Mr. Eadie gave you. What Jose said was it could take as little as 10 to 15 minutes.

What you also heard then from Diane Fovozzo on Friday was it depends how long it would take depending on how much of that care they needed. Not all residents needed a.m. care, not all of them needed all of it, and some of these things you could do together, such as if you put them on the toilet you could get their pants off and you could get ready to put the new underwear on and new pants on and get their socks on at the same time. You can check the skin as you're bathing them. You can check the skin as you're toileting them. This all isn't being done just on one shift.

It starts on the night shift where the aides on the night shift do about four residents apiece. So some of it's on the

night shift and some of it's on the day shift.

The knee immobilizer. We spent a lot of time on the knee immobilizer, which was unnecessary. I'll tell you why. The wounds that she suffered on her calf, on her right calf, were related to the knee immobilizer whether properly placed or not. Since Stratford is responsible for the femur fracture, they're responsible for complications of the femur fracture which included the wounds. And that's never been in dispute. And whether the knee immobilizer was placed correctly or not doesn't really matter because Stratford is still responsible.

But I want to make a couple observations about this. First observation is the testimony from those who actually place them, the occupational therapist, et cetera, was that these are notorious for sliding and not staying in place.

And the second thing you heard from Dr. Schlaudecker, you're in a battle with these things because, you saw the pictures, they're Velcro straps, of getting them tight enough so they don't move but not so tight

that you cause wounds.

And the last thing I want to say about this, with all the pictures you've seen, pictures of Mrs. Maxim at Hillcrest, pictures of her at Ahuja, picture of the knee immobilizer, the picture you never saw was a picture of the knee immobilizer out of place. Why is that?

Urinary tract infections. I thought this issue -- I thought this issue had gone away and was unnecessary to talk about. Apparently, I was wrong. Mr. Eadie brought it up during closing again. His duty, and one of his safety rules, No. 4, the duty to provide appropriate care to patients who are incontinent. Nobody has testified, no one has sat in that chair and testified, that the incontinent care provided by Stratford was anything but within the standard of care. No one has testified that anything they did related to incontinence care caused her urinary tract infections.

In fact, Dr. Seskind's testimony was, when I asked him on Cross, no, there's no problems with this. In incontinent patients

urinary tract infections will occur. He was not critical of it. There's no evidence to suggest they did anything wrong.

Then the pictures. I want you to take a close look at these pictures they submitted, the ones from before and the ones from after. I want you to look closely at Mrs. Maxim. I think as you look at these pictures you're going to see a slow change in her appearance over the last couple of years where early on she was always smiling, even by December of 2012 you look at the pictures she's no longer smiling, and the look on her face, a little more empty and not quite as there as it once was.

I think if you look at those photos, examine them closely, they're Plaintiff's Exhibits 4, 4B and 5A, and see if you agree with me. You might not. But look at those and see whether maybe Paul's right about this.

I want to talk about staffing here. You heard Brian Newman say staffing is more an art than a science. The evidence the Plaintiff has introduced about a lack of staffing is lacking. They called no one to

the stand that would say that the facility, Stratford, was not sufficiently staffed. What they did is they called Ernest Tosh, a lawyer who makes his money by suing nursing homes, a lawyer who devised this tool to assist lawyers who are suing nursing homes, who only testified about an antiquated way that Medicare expects a certain level of staffing based on the census and acuity. And as Mr. Levine said, that's not what Medicare uses anymore. They recognized that number wasn't right.

And you talk about Kindred putting -- Stratford putting profits over the safety. There's no evidence of that. If you looked at Mr. Levine's analysis, the correct analysis, they were staffing more than was required by Medicare. They could have staffed less and saved a lot of money, and they chose not to. They chose to have all these additional positions that were not required in order to provide the care they believed was necessary.

Then the whole issue about oh, according to the CMS five star rating, they were below average in staffing. There's more

to staffing that goes into that five star rating than just the number of staff. It reminds me of the first day of law school during orientation we're sitting there listening to the dean. I was at Ohio State. I remember the dean saying, look around you. Approximately half of you are going to finish in the bottom of the class. And you know what they call the person who finishes last in their class in medical school? They call that person doctor.

Just because you're below average doesn't mean you're not meeting the standard of care. You heard the testimony that -- from Mr. Tosh agreeing that Medicare, CMS, could revoke the provider agreement that allows a facility to accept Medicare or Medicaid payments. And there's no evidence that Medicare, that CMS, ever revoked the provider agreement for Stratford because of any staffing issue. Because it didn't happen.

The other thing you lack was anybody, a witness, a former employee, a current employee, anybody from Stratford getting up in that chair and telling you we didn't have

enough staff. In fact, the evidence in this case is clearly that based on 65 years of experience that you heard from Mr. Levine, Mr. Lipsey, Mr. Newman, about the process by which you go about staffing, no staff complained, no evidence that staffing was an issue on May 2nd when the order wasn't reinstituted or on June 3rd when the fall and fracture occurred.

The problem with staffing is on any given day you don't know what you need. On Saturday night my oldest daughter was home, so we went out to dinner. We went to a nice restaurant that is known for service. We had been there before. Normally, excellent service. Well, when we sit down, right next to us is a table of 10, and this table was particularly needy. So we end up about 10 or 15 minutes going without anybody coming up and asking us if we wanted a drink or appetizer or anything. We flagged the manager down, who was apologetic.

The problem is as they sit there and do the budget in the Fall of 2012, they don't know what they're going to need on June 3rd of

2013. They don't know what they're going to need on May 2nd of 2013. That's why the testimony of Brian Newman is staffing is more an art than a science. And you have to sit there and know based on experience that these things even out over time; and that what Jose told you, if I wanted more staff I added it; what Brian Newman told you, if someone requested more staff we got it and even sometimes when we were denied we still went ahead and got things we wanted done; that no one internally, nobody came in from the facility, no one from the outside, will tell you that staffing levels were not appropriate. This is a non-issue being made up to try to paint Stratford and Kindred in a bad light.

Kindred Healthcare Operating. It's not so simple as Mr. Eadie suggests about Kindred Healthcare Operating. You're going to get a jury instruction about Kindred Healthcare Operating, and under what circumstances you can find that Kindred Healthcare Operating is liable for allegedly having such control over the facility.

The jury instruction is going to lay

out three different criteria you must find. Control over the nursing home by Kindred Healthcare Operating, Inc. was so complete that the nursing home has no separate mind, will, or existence of its own.

Well, that's not the testimony here. The staffing, you heard Prentice Lipsey in charge of the day-to-day operations. Brian Newman told you he wasn't there day-to-day. He might be there a couple times a month at best, that the allocation to staffing and how it was set up in the facility was done in the facility by the DON; that care was being provided by facility level employees.

Even going beyond that one, let's look at number two. Control over the nursing home corporation by those to be held liable was exercised in such a manner as to commit fraud, an illegal act, or similarly unlawful act against Leona Maxim.

What evidence has been submitted of fraud? An illegal act? Or similarly unlawful act? What evidence is there that was exercised in this fashion to be used against Leona Maxim? There is none. There is none.

Zero.

So it's nice to go off and say hey, this isn't just Stratford, this is some big company that's involved here. Hate the big company, but you have to introduce evidence to support your allegations. You can't just come into this courtroom and make allegations without introducing evidence to support them.

Now, compensation. I'll tell you I was a little concerned when we came in here today that Mr. Eadie would ask for $27 million since in voir dire he said he was going to ask for $3 million, and then by the time we got to opening two days later his number had jumped to $9 million. I figured he was going to multiply it again by three-fold.

Compensation is supposed to be fair and reasonable. It's a very difficult task, in this case a little different because I do believe obviously, since we admit that Stratford was negligent in allowing the femur fracture to occur, you're going to have to make some decisions about compensation. And how you take what happens to a person and assign a monetary number from that is an

incredibly difficult thing. You're not really going to get any instruction from the Court on that because the instruction is it has to be fair and reasonable.

I suggest to you that the numbers that Mr. Eadie set forth are not fair and reasonable. I suggest those numbers are outrageously high. I think if you look at it and you look at how much would fairly compensate Leona Maxim for the little over two months that she had with the femur fracture, with having to take pain medications, with having the knee immobilizer that required her leg out, I think you could award $50,000 from that and that would be fair and reasonable compensation.

I don't think you're going to get to the decision about awarding money to the children. There's no doubt this is a great family, they loved each other, they cared for each other. I don't think you're going to get to that because I think you are going to agree with me that the death was unrelated. However, if you get that far, I think fair and reasonable compensation for them would also be

$50,000 apiece. I base it on the fact that you can look at what Leona Maxim's comorbid conditions were and how many she had, and Dr. Schlaudecker's testimony about her life expectancy is so incredibly more believable than Dr. Seskind saying oh, she could live another 10 years out of a predicted 13-year life expectancy.

She had been in a nursing home for six years. She had been wheelchair bound or bedbound for three years. She had significant respiratory issues. She had heart issues. All of these things each day were making her more deconditioned and less able to function, and this would have been a continuation of these downward episodes. As Dr. Schlaudecker told you, repeated, recurrent aspiration pneumonias were going to occur. And I think when you look at that, that a fair amount would be $50,000 per child. I think that would be a fair amount.

Now, I remember it was a long time ago now because my oldest daughter was four years old, I was in the middle of a trial and we finished up early, sort of like we did on

Friday. The lawyers and Court had to discuss some legal issues, and we thought it was going to take much longer so we sent the jury home, but, amazingly, it took us a very short amount of time in order to finish up the different legal discussions we had. But we already had sent the jury home, so I was done early afternoon.

And it was back in December that year, and my daughter wanted to go see Toy Story. And I kept telling her as soon as I get through my trial and I have some time I'll take you. Well, we finished up early that day so we went and saw Toy Story.

It's December, cold weather climate, surprise, surprise, parking lot, snow, ice. Part of the fun when you're four years old and going to a movie is not just seeing the movie itself. It's getting the popcorn, getting the soda, getting the candy. And at that time my daughter had just discovered Reese's Pieces, and she was this -- she was going crazy over getting Reese's Pieces. That little box was huge.

And at that time she was four, and

she was a tiny four. She was just a little wisp of a thing. She could not eat all the popcorn she had, she could not eat all the Reese's Pieces. So she had most of that box of Reese's Pieces left with her as we were leaving. And as we're walking across the parking lot from the movie to our car she's holding my hand, and as she's walking across she hits a patch of black ice and she goes down and her Reese's Pieces go everywhere. And she's crying about that. I've lost my Reese's Pieces, it's not fair. I was being careful, it's not fair.

Well, I had to explain to Molly at that time that sometimes you can be careful and things still go wrong. That happens. That's life. And in this case yes, Stratford did something wrong, made a mistake. But it's not what resulted in Mrs. Maxim's death. We're not trying to blame her. That's offensive. We're not trying to blame her. We're saying hey, this is our view, this is our opinion, we're entitled to this.

When you look at this, sometimes she had a bad set of facts with her health and the

reason she passed away in August of 2013 was because of her underlying conditions. It had nothing do with a femur fracture from which she had recovered two and a half months earlier. Thank you.

THE COURT: Ladies and gentlemen of the jury, Mr. Eadie has approximately 15 more minutes of argument in his rebuttal. My question to you only is, in case somebody feels you need a recess before he commences I don't want to interrupt him if I can avoid it, can everybody last another 15 minutes? If you have a problem, just raise your hand. Okay.

Mr. Eadie, you may complete your rebuttal evidence.

PLAINTIFF'S FINAL CLOSING ARGUMENT

MR. EADIE: I'm not going to take 15 minutes.

So that was taking responsibility. That's what that looks like for Kindred.

There's so much to respond to, and it occurred to me as I was writing all these pages of notes that I didn't hear anything that made it okay.