A I couldn't tell you at what point I began --
Q Right.
A -- examining claims. I've been with the risk management department in a clerical position from I believe October or November of 2000.
Q Okay. Very good. And were you working with the school district before that time?
A Yes.
Q When did you first start working for them?
A September of -- of 1998.
Q That's around the time my last child was born. Okay. That's a long time. So very good. So when you were working in the reception or that area, is that where they would receive these reports usually?
A That was some of the duties, yes.
Q Okay. So you were familiar with how they come in and the process?
A Yes.
Q Is that process still the same today?
A No.
Q Okay. Which changed?
A We -- these forms are obsolete. When students are seen in the health office, there is an electronic record of that health office visit. So anything that's on there is now electronic.

Q And who does a electronic record go to?
A It goes into the database maintained by risk management.
Q Do you still determine whether or not to investigate it -- I mean, do you see it automatically? Or do you still not see it until somebody else brings it to your attention?
A We review those records that come in, yes.
Q Okay. All right. Let's go back to my -- let's go back to my letter here that I was using to refresh your recollection of December 15, 2004. So this is after you received this letter is pretty much started your investigation and found this student injury accident report and started working on the file?
A Yes.
Q Okay. And at this time you were informed that Makani was treating with Dr. Carr and Dr. Lu of Retina -- Dr. Carr by -- you know, is of one place, and Dr. Lu of Retina Consultants?
A Yes.
Q Okay. And you were informed of the hyphema traumatic glaucoma and this traumatic cataract at that time?
A Yes.
Q And -- and even at this time, seven months after the incident, you were informed that Makani was going to -- well, it said possible necessity for removal -- removal of traumatic

cataract after the corneal blood staining is removed?

A Yes.

Q And you were provided a couple of medical records with this letter, weren't you?

A Yes.

Q Okay. And were you also informed at that time that you were going to be notified that Makani had reached maximum medical improvement to make sure you had all the medical bills and everything and discuss the claim in more detail?

A Yes.

Q Okay. And as being with the risk management department, wasn't there also a -- a request as to whether or not the school district was going to accept liability and assist Makani in going forward with his treatment? Just look at the last paragraph.

A Yes, that's in your initial letter.

Q Okay. And then it said we look forward to trying to work with you and work on this case, right?

A Yes.

Q Okay. And I know I'm going to go through some other letters, but at some point in time there was no real -- there was contact between our office for a while, correct?

A Yes.

Q Okay. And then at some point in time there was no contact between us?

A Correct.

Q Okay. You were informed even as early as December of 2004 that Makani thought he was probably going to need another surgery and that nothing would probably be resolved until he reached maximum medical improvement?

A Yes.

Q Okay. Let's -- let's look at Exhibit 1, please. Okay. Let's see, the first -- do you see the first page of that? It's got a Bates stamp CCSD several zeroes, I'll say 021.

A Yes.

Q Okay. So this is -- this is a document -- this -- it's a two-page document, correct?

A Correct.

Q Okay. 21 and 22. This was produced by the school district?

A It was produced by Woodbury Middle School.

Q Okay. Well -- and this was produced to you, correct?

A Yes.

Q Okay. And it looks like it was produced in -- like, maybe April 6th, 2005, somewhere around there --

A That's the date on the top of it, yes.

Q -- if the date was correct on whatever the fax machine was?

A Yes.

Q Well, it was probably correct. If it was my fax machine it might have said, like, the other year already and not been changed over. But okay. So it says, "To Eileen, Risk Management." So it's from the health office?

A Yes.

Q Okay. Did you discuss the -- this incident with this Mary Whited [phonetic] with the health office?

A I don't remember ever speaking to Mary Whitehead or Whited.

Q Okay. Was this document provided from a request as far as just a log of when Makani was in the -- when he saw the FASA?

A Yes.

Q Okay. So if we turn to the next page, is that why it says, "Makani Payo, May 12th, health office visit, attention Eileen"?

A Yes.

Q Okay. It actually says "att." But I'm assuming that means attention. The -- is everything else blacked out on that because they involve other students?

A Yes.

Q Okay. Would those all have been entries of other students that were in the health office on that particular day?

A Yes.
Q At Woodbury Middle School?
A Yes.
Q Okay. So at about 9:45 a.m. on May 12th, 2004, Makani was already the sixth person to see the FASA that day?
A Yes.
Q Okay. Let's see. It looks -- can you make out what it says on that line?
A I'll try.
Q I know. Me, too. I should have brought my magnifying glass and I forgot it.
A It says, "Payo, Makani, 6119" --
Q It looks like that might be his student number or something like that.
A Possibly. "Petersen." "Time in, 9:45, reason for visit, hit with hockey stick near eye area. Bruised."
Q Bruised and cut maybe?
A Possibly. "And cut. Ice plus." And then it also has "Lori Payo," and I don't know what the rest of that says. And then it says "1100," which I assume is 11:00.
Q So maybe that -- maybe -- well, it looks like it says, "picked up student." But I can't -- I couldn't tell you for sure, either, at about 11:00. Let's see, what does it say on the top. "Observation Action" is what that's under, correct?

A Well, it says, "Time Out, 11:00."

Q Right, the last one. And then before that it says, "Reason for visit." Is that like a temperature, like if they took his temperature or something?

A 9:45?

Q No. You see on the very top of the black part, the blacked-out part? If we go from the left, it looks like it says, "Student name, grade, teacher, time in, reason for visit," and does that say "temp"?

A I think it says "hit."

Q On the -- you know, right where it says "Clark County School District Health Office Log," that first line above the black?

THE COURT: The title line.

BY MR. KURTH:

Q The categories?

A Time in.

Q Right. Time in --

A Oh, and temp. I see what you're saying. I see nothing other than --

Q Okay.

A -- a continuance of the reason.

Q I see. Do you know what it says on the outcome part? What those blanks say?

A I don't.

Q I don't know, either. So "temp." Would that be a place where they would put their temperature?

A Yes, if they were taking their temperature.

Q Okay. Do they normally do that?

MR. O'BRIEN: Objection. Lack of foundation.

THE COURT: Does she know?

MR. KURTH: I don't know.

BY MR. KURTH:

Q Are you familiar with these -- being in the risk management department, even at that time, are you familiar with receiving these medical logs?

A With receiving the logs? Yes.

Q Okay. And are you receiving with the information that's -- I'm sorry.

Are you familiar with the information that's on the logs that's presented to you?

A Yes.

Q Okay. And the various categories?

A Yes.

Q Okay. So -- so you could state that that means temperature, a place where you've seen in the past where if they took their temperature, they would mark that?

A I don't remember if I've ever --

Q Okay.

A -- seen it there.

Q Sure. Okay. It's fair. It's all I'm asking for. All right. So -- so you completed investigation in this matter, didn't you?

A I conducted an investigation, yes.

Q Okay. And in that investigation, did you request more information about the -- this field hockey/floor hockey game?

A Yes.

Q Okay. And who did you request that information from?

A My request was to the principal who was at Woodbury at the time of the notice of claim.

Q What was his name?

A Can I cheat? I can't remember right this minute.

Q Okay. Could you -- if you turn to Exhibit 8, which the jurors don't have that exhibit, because it's -- it hasn't agreed to be admitted into evidence yet.

A Greg Snelling.

Q Greg Snelling? That refreshes your recollection?

A Yes.

Q Okay. And that was the -- who you thought was the -- that was who was the principal at the time that the incident occurred?

A No. He was the principal at the time that I was aware that you wish to make a claim.

Q Okay.
A He's currently still the principal there.
Q At Woodbury?
A Yes.
Q Okay. So you found out who the principal was at Woodbury and you sent a request to them?
A Yes.
Q Did you speak to them about the case?
A I believe so.
Q And then -- and what did you request?
A I can't remember exactly what was requested. If it was made in writing, it would be nice to review the request.
Q Would you have made a written request in your normal practice as a claims specialist at that time in 2004 for the information you needed while conducting an investigation?
A Often, yes.
Q Okay. But not every time?
A Not every time.
Q Have you seen any documentation that shows that you made a request to Greg Snelling for information concerning this floor hockey game that happened at Woodbury High School?
A I think I remember reviewing in preparation of coming here that there was a written request made.
Q Do you know why that writing was provided to the plaintiff?

A Oh, if -- if there was a written request, it would have been provided. I'm just speaking from my memory.

Q Okay. Okay. What did you request to be provided from Mr. Snelling at Woodbury?

A Again, I'm relying on my memory, I -- I don't remember exactly what was requested. It's almost 11 years ago.

Q If you look at Exhibit 8, Proposed Exhibit 8, will that refresh -- please take a look at that and see if that refreshes your recollection.

A Okay.

Q Okay. Does that refresh your recollection?

A Well, it refreshes my recollection of receiving the game play information. But I don't -- still couldn't tell you exactly what was requested when speaking to Mr. Snelling.

Q Do you -- you recall requesting any rules that may have been provided to the students who participated in that floor hockey game on May 12th, 2004?

A That would be -- I -- I don't remember requesting it, but that would be a normal request --

Q That would be a normal request --

A -- for this event.

Q -- and you --

A In this event.

Q Okay. Conducting your investigation?

A Yes.

Q After you've been notified?

A Yes.

Q Okay. And were you provided some type of rules for floor hockey for Woodbury?

A Yes.

Q Okay. And are the -- the rules that were provided to you contained in Proposed Exhibit 8?

A Yes.

MR. KURTH: And I'd ask for the admission of Exhibit 8.

MR. O'BRIEN: Your Honor, I object. This is a document that's created after the fact by someone else. There's no foundation. There's no reason to believe that, you know, this was -- these were the rules that were in effect in Mr. Petersen's class at the time.

THE COURT: Counsel?

MR. KURTH: Judge, I think I've laid a foundation. Ms. Wheelan testified that she's the PMK for the school district --

THE COURT: Hold on. Miss --

UNIDENTIFIED SPEAKER: I'm trying to get the marshal.

THE MARSHAL: Yeah, I saw the notes. I was waiting --

UNIDENTIFIED SPEAKER: Okay. Thank you.

THE MARSHAL: -- and watching.

MR. KURTH: Holy cow.

THE COURT: Apologies. Sorry for the interruption, Mr. Kurth.

MR. KURTH: No problem, Judge. I --

THE COURT: Document's admitted. Foundation's been laid.

MR. KURTH: Thank you, Judge.

(Plaintiff's Exhibit 8 admitted.)

THE COURT: So Exhibit 8 is admitted into evidence.

MR. KURTH: Court's indulgence for a minute. I think I have -- I think I got the copies of that made. Let me make sure. I apologize.

(Pause in proceedings.)

THE COURT: Would you like to take an early lunch?

MR. KURTH: Judge, I think I could just -- whatever you want to do. I -- I'm going to probably have to call my office, I guess. I must have left them there. I'll see. I can just use the --

THE COURT: Either way is fine by the Court. It's up to you.

MR. KURTH: Okay.

THE CLERK: What are you missing?

MR. KURTH: That exhibit.

THE CLERK: Exhibit 8?

MR. KURTH: 8, yes.

THE CLERK: I've got the originals and [indiscernible].

MR. KURTH: Okay.

THE CLERK: Would you like to use the witness books? [Indiscernible.]

MR. KURTH: Do we have enough copies? Not really.

THE COURT: He's looking for -- are you looking for copies to give in the juror notebooks?

MR. KURTH: Yes, that's what I was looking for.

THE CLERK: Oh, that's what you need. Oh, I'm sorry.

MR. KURTH: That's what I was looking for, to give to them so they had it so they could look at it. I'll probably have to have them brought to me.

THE CLERK: That's [indiscernible].

MR. KURTH: Having a Barney Fife moment, I guess. I don't know. Can I have them copied here?

THE CLERK: We've got a copy we can give you in our witness book. Are you [indiscernible]?

MR. KURTH: Oh, no. That's okay. That's okay. Just, could I have permission to publish, Judge?

THE COURT: On the ELMO?

MR. KURTH: Yes.

THE COURT: Yes, certainly.

BY MR. KURTH:

Q You have those rules in front of you, don't you?

A Yes.

Q Okay.

MR. KURTH: I apologize to the jury.

THE COURT: Do you have a microphone?

MR. KURTH: No.

THE COURT: Can you provide --

MR. KURTH: I just made everything more difficult. Okay. Thank you.

BY MR. KURTH:

Q So Ms. Wheelan, is -- is -- are these the rules that were provided to you in Exhibit 8 that's been admitted in evidence?

A Yes.

Q I mean, this is the first page, at least, the cover sheet?

A Yes.

Q Okay. And this looks like it was provided on or about February 11th, 2005, from Woodbury Middle School and Greg Snelling to you at risk management?

A Yes.

Q Okay. And that's if the fax is correct, of course?

A Yes.

Q Was there any -- I didn't see any stamp on it as far as received by risk management anywhere?

A Because it came in through fax and it's date and time-stamped at the top, it would not routinely be stamped in as mail.

Q Okay. So let's look at the first page of these rules, Bates stamp CCSD, you know, 031. Okay. So they say "Woodbury's Hockey Unit," correct?

A Yes.

Q Okay. And isn't it -- so it says floor hockey is a game that's been adapted from ice hockey?

A Yes.

Q Okay. And it's talking about how the rules have been adapted from ice hockey and further modified to fit the class size, ability, and space, correct?

A Yes.

Q Okay. And the first page, at least, talks about on the bottom that the game is played on tennis courts with a net on each end?

A Yes.

Q And then it gives some terminology such as high stick when playing the puck, the stick is brought higher than the waist?

A Yes.

Q And it talks about hooking and slashing, which, I

don't know, are you really familiar with hockey, floor hockey?

A No.

Q More familiar now probably?

A Yes.

Q Okay. Thank you. Now, this is -- this refers to a puck, doesn't it?

A It does.

Q Okay. And is it your understanding that this high stick, hooking, slashing, those are things that you're not supposed to do? Or do you know?

A Well, further on it does say --

Q Okay. Okay. We'll go to that page. Now, do -- do you know why these rules -- well, that first page was typewritten; do you know why the other pages are handwritten?

A I don't know.

Q Do you know when the handwritten pages were completed?

A I don't know.

Q So during your investigation when you received these rules, did you ask Mr. Snelling or the PE person in charge when these rules were written?

A I don't remember.

Q Okay. And do you -- do you know why it's written on, like, a prescription form?

A I don't know why it was written on that.

Q Angiomax or injection, I don't know what that is.
A I don't think it's a prescription form. I think it's probably a tablet provided by --
Q Okay. That makes sense.
A Sorry.
Q Sure, I agree with that. Okay. So this page here, I guess the first page had a No. 1 under the rules, so this one does start with the number 2.
THE COURT: Is that a question?
MR. KURTH: Oh, sorry, Judge.
BY MR. KURTH:
Q Does this -- does this page appear to be in order, then, with the type -- the typewritten page, even though it's handwritten?
A Yes. And from the fax information at the top, it did come in as the third page of the -- the fax.
Q Okay. Thank you. Now, from a review of these rules in your investigation, how many players consist of a team?
A According to this, six players, one center, two wings, two defense men, and one goalie.
Q And then it talks about teams rotating in and three-minute time periods?
A Yes.
Q And then it also describes what we were talking about on the other page, about what penalties are, correct?

A Yes.
Q Okay. And according to these -- these Woodbury Hockey Unit rules, you can be penalized for high stick?
A Yes.
Q Hooking?
A Yes.
Q And -- well, let me say -- elbowing?
MR. O'BRIEN: Your Honor, at this point, I'm going to object to having counsel simply read the document into the record. It's already in the record.
MR. KURTH: Well --
MR. O'BRIEN: Don't try to double proof something.
THE COURT: Go ahead and ask her if those -- that list --
MR. KURTH: Okay. Okay, Judge.
BY MR. KURTH:
Q Is this list here on this page of these Woodbury Hockey Unit rules, does that appear to show a list of -- of penalties for students who, if they commit any of those offenses during the game?
A Yes.
Q Okay. And on that list, it includes high stick?
A Yes.
Q That's only one of 10 different type of penalties, correct?

A Yes.

Q Okay. Does it say anywhere in these rules that a team would consist of 12 players?

A It does not.

Q Okay. So is this, marked CCSD 033, appear to be the next page in succession of these rules --

A Yes.

Q -- that were provided to you?

A Yes.

Q Okay. Okay. And do you know why under "safety," that first line is all crossed out?

A I don't know.

Q Can you read it? Tell what it says?

A I can try.

Q Okay.

A Looks like "instructed over and over again before" something "engage in the game." "We ever engage in the game."

Q Okay. But it was crossed out? That was before it was given to you?

A Yes.

Q Okay. And these safety rules include that all players are to control their sticks and avoid high sticks?

MR. O'BRIEN: Objection, Your Honor. Again, this is a document, it's admitted into evidence. There's no purpose for having this witness read what's in this document to the

jury. This witness can testify where she got the document, what she believes it -- what role it played in her investigation.

THE COURT: Okay. Let's keep the objections --

MR. KURTH: I'm trying to shorten it, Judge.

THE COURT: -- shorter.

MR. KURTH: I -- I can ask her general question, what do the safety rules apply. But I think it's important -- I mean, the jury can see it now because it's up here, but, I mean, they need to have an opportunity to know what's in these rules. And I think that's fair. I mean that's what this case is about.

THE COURT: Okay. Okay. Okay. Okay.

MR. KURTH: Sorry.

THE COURT: That's okay. She can answer that one question, then move on.

MR. KURTH: Okay.

THE COURT: Might have to ask her again.

THE WITNESS: Please.

BY MR. KURTH:

Q Do the safety rules for this floor hockey game that were provided to you at your request provide for the players to avoid high sticks and use a soft rubber ball for the puck?

A Yes.

Q What's your understanding of what ball was used on

the day that Makani was injured playing this game?

A At this time?

Q Yes.

A I know that a tennis ball was used.

Q So you can say that --

A Now.

Q -- a tennis ball was used during that game?

A Yes.

Q Okay. So is this document, CCSD 034, the next document in line on these rules?

A Yes.

Q Okay. And does that talk about there's extra sticks that need to be supervised?

A Yes.

Q And according to these rules, where's -- where's the best place to referee the game while it's going?

MR. O'BRIEN: Your Honor, the document speaks for itself.

THE COURT: Overruled.

MR. KURTH: Thank you.

THE WITNESS: It states, "The game is best refereed at the center line next to a wall."

BY MR. KURTH:

Q There's no walls in the tennis court, were there?

A I don't --

MR. O'BRIEN: Objection, Your Honor. Lack of foundation.

MR. KURTH: Or I can ask her the question.

THE COURT: She can -- certainly, she can answer if she knows. So the question's fine.

BY MR. KURTH:

Q I mean, during your investigation, did you go look at the tennis courts at Woodbury Middle School?

A No.

Q Why not?

A I didn't -- I don't know.

Q You didn't think that would be an important part of your investigation to see if they were, you know, solid, no cracks in them or anything else going on?

A I don't remember my reason why I didn't go over there.

Q Do you know if there's walls on those tennis courts?

A I don't know.

Q Okay. So this is the -- the next page in line of these rules, correct?

A Correct.

Q Okay. And then there's two more pages to those rules that were provided, correct?

A Yes.

Q And those are just talking about, like, shooting or

goal tending or defense play and offensive play, correct?

A Yes.

Q Okay.

THE COURT: Is now a good time to break?

MR. KURTH: Sure, Judge.

THE COURT: Let's take our lunch break, ladies and gentlemen. We'll return at 1:00.

While we are taking our lunch break, during this recess you're admonished not to talk or converse amongst yourselves or with anyone else on any subject matter connected with this trial, or read, watch, or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information including, without limitation, newspapers, television, radio, or the Internet, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

We'll see you back at 1:00 p.m. Thank you.

(Court recessed at 11:55 a.m., until 1:06 p.m.)

(In the presence of the jury.)

THE COURT: Welcome back ladies and gentlemen. You'll have a new document or documents for your exhibit binders. And then --

THE CLERK: Exhibit 8, I believe.

MR. KURTH: Exhibit 8, yes.

THE COURT: Exhibit 8.

MR. KURTH: And -- okay.

THE COURT: And, Mr. Kurth, you're welcome to continue cross. Or actually --

MR. O'BRIEN: Your Honor, stipulate to the presence of the jury.

THE COURT: Thank you.

MR. KURTH: So stipulated.

THE COURT: Thank you both.

MR. KURTH: Judge, can I approach the clerk?

THE COURT: Sure.

MR. KURTH: Judge, we have a document to be marked as the next exhibit in line.

THE CLERK: Court 29.

MR. KURTH: 29. And, Judge, this is -- actually, I've just set it over there for the jurors, too. But we had talked, myself and Mr. O'Brien, and this exhibit, we're asking for it to be admitted into evidence. It's a letter dated December 15th, 2004, from myself and my office to Ms. Wheelan, who she's -- was refreshing her recollection with it earlier.

MR. O'BRIEN: No objection, Your Honor.

THE COURT: Exhibit 29 is admitted into evidence.

(Plaintiff's Exhibit 29 admitted.)

THE COURT: That's the December 15, 2004, letter, correct?

MR. KURTH: Correct.

THE COURT: Thank you.

BY MR. KURTH:

Q Ms. Wheelan, do you recall when a formal complaint was filed with the court in this matter with the Clark County School District?

A I believe it was sometime in 2013.

Q Okay. If I provided you with a file-stamped copy of that complaint, would -- could that refresh your recollection as to the date that it was filed?

A Yes.

Q Okay.

MR. KURTH: May I approach?

THE COURT: Yes.

BY MR. KURTH:

Q From a review of that document, does that refresh your recollection as to when a formal complaint was filed in the Eighth Judicial District Court --

A Yes.

Q -- against the Clark County School District by the plaintiff?

A Yes. It's electronically filed September 21st, 2012.

Q Okay. Thank you. And is it your understanding that since that process, the case has been in the litigation phase?

A Yes.

Q Okay. And did you do any investigative work on this file after this complaint was filed?
A No.
Q Okay. During your investigation of the 2004 incident, did you determine what time the middle school started at Woodbury on that day, May 12th, 2004?
A I don't remember. But I do know that each school year we have available to us the start times for each school.
Q You don't recall ever making a notation in your file as to when school started that day?
A I don't remember that.
Q Do you recall during your investigation whether or not this was plaintiff Makani's first class that day?
A I don't remember noting that.
Q Okay. Before, we were -- we were talking about Exhibit 1, this health log; do you recall that?
A Yes.
Q See if you could take a look at that again. From a review of Exhibit 1, does it show who actually treated Makani that day?
A I don't see on there that it indicates it. It may be part of the cut-off portion. So I don't see that.
Q Okay. Can you -- we -- we were trying to figure out what some of these categories meant before. So we can take another look at it, see if -- if you remember. You see the

top categories that are just above the blacked-out portion?

A Yes.

Q Okay. And then do you see the last one, does it appear to say "time"?

A Yes.

Q Or "time out" is it?

A "Time out."

Q Okay. What does "time out" mean?

A Time that they left the health office.

Q Okay. And then before that it looks like it says "outcome"?

A Uh-huh.

Q Is that correct?

A Yes. Sorry.

Q And underneath, at least in Makani's column, it looks like there's three different things in there. Could you make out any of those or?

A The lower one looks to be "other."

Q Okay.

A And I honestly cannot read the other two.

Q Okay. Does it -- does it -- do you know if that looks to say "home," the one that was circled?

A That's possible.

Q Okay. Do you know if the other one would be if Makani went back to class, they would circle that one?

A That's possible.

Q Okay. The -- do your -- during your investigation, did you determine if a school nurse ever spoke with Makani's mother about this incident?

A I don't believe I saw that in the claim file. I do know that I spoke with Wally, as she was the person who was in the health office that day and treated Makani.

Q And do you know what the requirements are to be a first aid safety assistant?

A No, I don't know the specific requirements.

Q Do they fall under a different area in the school district than risk management?

A Yes.

Q Did they fall under a different area in 2004?

A Yes.

Q Okay. What area did they fall under?

A Under health services.

Q Okay. The -- during your investigation of this incident, did you determine whether an actual nurse ever saw Makani for his injuries?

A On the day of the injury?

Q Yes.

A I understood that a nurse did not see him that day at school.

Q And -- and no time thereafter concerning these

injuries for which we're here today for, correct?

A Correct.

Q Okay. Do you know if a school nurse was supposed to be on campus that day?

A I don't know. I do know that nurses have more than one school location, and they rotate which site they're at on a daily basis.

Q So in your -- in your position in this risk management department, do you know how many schools the nurse had to cover back in 2004?

A I do not.

Q Do you know how many they'd have to cover today?

A I do not.

Q When you received those hockey rules, Exhibit 8 from Woodbury, was it your understanding that those were the rules that were being used at Woodbury at the time when Makani was injured?

A That was my understanding.

Q And have you since come to any different understanding?

A No.

Q After you received -- well, let's see. Okay. So after you received my letter of representation that's been admitted as Exhibit 29, at that time you conducted an investigation, correct?

A Correct.

Q And that's the time when you were aware of the student injury report, you went and got that, too?

A Correct.

Q And did you do some research on your own to determine what floor hockey rules might have been used or present or available for the Woodbury Middle School?

A I am not a big sports person, so I wasn't sure what floor hockey or field hockey was. So I did Google it, yes.

Q And -- and when you did that, did you find some floor hockey rules?

A I did.

Q Okay. And were those rules that you had put into your investigation file?

A Yes.

Q Okay. Besides those rules, did you find any other rules?

A Not that I recall.

Q And those floor hockey rules you found, were those rules that you provided to your counsel at the school district?

A Yes, I provided everything that was within the claim file.

Q Okay.

A And that was --

Q And that was part of it, that was in the claim file?
A Yes.
Q And when you did that -- that research, do you remember where you located those rules?
A I remember, because I've seen them since. And I -- I believe it was Rice University was the -- the Web site, or the author of the documents.
Q Okay. So besides the -- the Woodbury rules that were provided to you by Greg Snelling, the principal there, the other rules you found were on the Internet that you made the search for?
A Yes. And I believe I obtained the Internet rules prior to receiving the rules from -- from Woodbury.
MR. KURTH: Wanting clarification, did we admit No. 8, didn't we?
THE CLERK: Yes.
MR. KURTH: Okay. Thank you.
BY MR. KURTH:
Q Let me -- why don't you take a look in your binder what you have that's Proposed Exhibit 18. Do you see those -- those documents in there that are Bates stamped CCSD 025 through 029?
A Yes.
Q Are -- does that appear to be a true and correct copy of the rules that you had found on the Internet doing

your search during your investigation process?

A Yes, it does.

Q Okay. And these are the rules that were put into your investigative file?

A Yes.

Q And these rules concern floor hockey?

A Yes.

Q But it was floor hockey at Rice University?

A Yes.

Q Okay?

MR. KURTH: I'd ask for the admission of Proposed Exhibit 18.

MR. O'BRIEN: Objection, Your Honor. Hearsay grounds, relevance grounds, and just on their face, they weren't even adopted till after this accident. They apply to college kids, not to middle school kids. There's no evidence that these rules have been adopted anywhere other than at Rice or that they were available to anybody at the school district.

THE COURT: Overruled. Exhibit 18 is admitted into evidence.

MR. KURTH: Thank you, Judge.

(Plaintiff's Exhibit 18 admitted.)

MR. KURTH: Judge, may I -- I have a -- I do have copies of these, they were brought to me by my office that I had left there before I left this morning that I could

provide.

THE COURT: Make sure counsel's seen them or --

MR. O'BRIEN: I have a copy, Your Honor.

THE COURT: Okay. Thank you.

MR. KURTH: Counsel has a copy in his binder, Judge. Thank you. And -- and they're in your binders. Okay. Thank you.

BY MR. KURTH:

Q Do you have those rules in front of you, Ms. Wheelan?

A Yes.

Q Okay. And do you -- do you recall reviewing those rules when you obtained them?

A I remember looking for them and I do remember reviewing them. But I do realize that I misspoke when I said I thought I got them before the others.

Q Well, it's --

A Realize that now.

Q It's pretty close to the same time. I mean, it's a long time ago. So does it look -- can you tell when you would have printed them off the Internet?

A Yes.

Q And what date was that on?

A February 11th, 2005.

Q Okay. When you got these rules, did you do a

further search to see if there were any other rules that were similar?

A Not that I recall.

Q Okay. You were just waiting on those rules to be provided by Woodbury to see if they had any?

A Probably.

Q Did you search the school district's curriculum to see if they had any rules for floor hockey in their curriculum?

A I don't believe so. I don't remember.

Q You don't believe they have any or you don't believe you've searched?

A No, I don't -- I don't remember searching the District's curriculum for the rules.

Q Well, if -- if you were investigating the -- the claim and -- and the rules are important, aren't they?

A True. What I felt was important was to know what rules were in place at the location where the incident occurred.

Q Did you check to see if there were any other rules in place at any other middle schools?

A I don't remember. It's a long time.

Q Well, if there -- if you would have looked and found some rules, you probably would recall that?

A If I -- if I had obtained any other rules, they

would have been part of the file, as well.

Q Okay. Very good. Now, in -- in these -- these rules here are apparently -- I mean, they're applicable to intramural sports activities at Rice University, correct?

A Correct.

Q From a review of the document. So not like they're -- and they say they're conducted under the NIRSA laws of the game, with different additions, exceptions, and clarifications?

A Yes.

Q Do you know what NIRSA is?

A It's a national interscholastic sport -- I don't know the exact definition of the acronym, but I know it's a national sports group.

Q Okay. Sure. And at least -- at least Rice at the time for their intramural activities, according to these rules, they required their participants to complete a waiver of liability form prior to participating, correct?

MR. O'BRIEN: Objection, Your Honor. He's leading the witness.

THE COURT: She's hostile. So, overruled.

MR. KURTH: Thank you, Judge.

BY MR. KURTH:

Q Do you see on the very first line of the rules, the top?

MR. O'BRIEN: Your Honor, I also object on relevance. What Rice University required has not been shown to have any relevance whatsoever to middle school floor hockey.

THE COURT: Mr. Kurth?

MR. KURTH: Judge, I -- I think it's completely relevant, because we have the -- the risk manager who's higher up in the department now. At the time she was a claims specialist. She's investigating, she's looking for rules, she gets them from Woodbury, she gets these rules. I think it's relevant to compare them. And also that we're talking about rules for -- I mean, our argument is that these rules for these college-age --

THE COURT: Okay. Don't --

MR. KURTH: Okay.

THE COURT: Don't testify for the jury right now.

MR. KURTH: Okay, Judge.

THE COURT: That objection is sustained.

MR. O'BRIEN: Thank you, Your Honor.

MR. KURTH: What -- what was the objection?

THE COURT: Relevancy, I believe.

MR. O'BRIEN: Yeah, these -- these rules have not been shown to have any relevance to floor hockey as played at Woodbury and in middle school.

MR. KURTH: I think it should go to the -- the

weight, Judge. I mean, that's for the weight, for the jury to determine --

THE COURT: Okay. The --

MR. KURTH: -- the applicability of the --

THE COURT: -- ruling's already been made. Thank you.

BY MR. KURTH:

Q Do you know if Makani or his parents were required to sign any waiver of liability form at the school district prior to him participating in his floor hockey physical education activity in 2004?

MR. O'BRIEN: Objection, Your Honor. Relevance.

THE COURT: Overruled.

MR. O'BRIEN: May I be heard, Your Honor?

THE COURT: Sidebar?

MR. O'BRIEN: That's fine, Your Honor.

(Off-record bench conference.)

THE COURT: So the record's clear, the objection's overruled. Mr. Kurth, you may need to re-ask the question.

MR. KURTH: Mr. Recorder, if -- do you have that question? Can you see that specifically?

THE COURT RECORDER: No.

MR. KURTH: Okay.

BY MR. KURTH:

Q I know -- I know what it is, basically. The -- to

your knowledge, okay, at the -- in 2004, were the parents of a child, such as Makani's parents, required to sign any type of waiver of liability form for their child to participate in physical education in those activities in middle school?

A Not to my knowledge.

Q To your knowledge today, are -- is the parent of a student required to sign any such type of waiver of liability for their child to participate in physical education class in those activities associated therewith?

A Not to my knowledge.

Q And we can see that these rules, apparently, show that they were revised, it appears, like, in -- if we take the document for what it is, August 24th, 2004, correct?

A Yes.

Q Okay. That would have been after Makani's injury?

A Correct.

Q Okay. Did you go back and do a search to see what the changes were in the rules prior to that time, if any?

A No. The basic purpose of me searching it was so that I would understand the game, what was being played.

Q So then from your research and obtaining these -- these rules, was it your understanding that the game is played on a small-sided game? And do you know what I mean by that?

A No.

Q Okay. Like, a few players against a few players,

like, you know, five v. five, six v. six, something like that?

A Basically, yes.

Q I think the Woodbury rule said six against six?

A I think so.

Q Okay. And then when you compare these rules that you obtained, they said how many?

A It says five, including the goalie.

Q Okay. And there was -- on your review of these rules, there was recommended equipment for the players, wasn't there?

A Yes.

MR. O'BRIEN: Your Honor, again, I -- I thought my relevance objection was sustained.

THE COURT: It was.

MR. KURTH: That was sustained as far as the -- my understanding is my question at that time --

THE COURT: Repeat your question. Don't answer until --

THE WITNESS: Okay.

THE COURT: Thank you.

MR. KURTH: Okay. I was just asking her to state what the recommended equipment was for the players from her research, according to these -- these rules she found here for these intramural activities at Rice.

MR. O'BRIEN: And, Your Honor, again, it is not

relevant. The rules are played at the collegiate level by somebody else have no -- have not been shown to have any relevance to how it's played --

THE COURT: Understood. The objection is sustained.

MR. KURTH: Judge, can I -- can I comment on that, please? I'll comment for the record, at least, if you're -- is that all right?

THE COURT: Yes.

MR. KURTH: Thank you. Judge, this is -- I mean, I think it's part central to the case, because we have the Woodbury rules and we have these intramural rules to even compare to each other. We're talking about --

THE COURT: The rules are admitted.

MR. KURTH: Right. Okay.

THE COURT: So.

MR. KURTH: Okay.

BY MR. KURTH:

Q Did you, you know, after you received these -- these rules off the Internet during your research, and you looked at the Woodbury rules, did you do any other, you know, research to determine what kind of equipment the kids in sixth grade at Woodbury were supposed to be using to participate in this floor hockey game?

A I honestly don't remember. And since it's not -- there's nothing in the claim file, I don't have anything to

reference. So I don't remember.

Q Weren't you concerned with the, you know, whether or not what type of equipment was supposed to be used or recommended or required for that game?

A Concerned? I would be concerned.

Q I mean, as -- in -- in risk management, in -- and you're investigating in the claim to see if, you know, were these kids using the proper, you know, equipment, right?

A Right.

Q Okay?

A In reviewing the paperwork I received from Woodbury, there was no mention of equipment. And I don't remember if I asked about that when I spoke to the principal at the time. I don't recall, and I didn't document it.

Q Is there a reason why you wouldn't have documented that?

A At the time in 2004, we did not have the electronic system that we have now. So claims are documented in much more detail now than they were at the time. And I'm much more experienced now than I was at the time, as well.

Q Sure.

A And I write down pretty much every person and time and everything that I discuss.

Q So is it fair to say that, you know, if you were investigating the same claim today that came to your desk,

that you would investigate it differently than you did back in 2004, then?

MR. O'BRIEN: Objection, Your Honor. Relevance to how she would investigate a claim today.

THE COURT: Sustained.

MR. O'BRIEN: Thank you.

BY MR. KURTH:

Q You were put on notice by the letter dated December 15, 2004, Exhibit 29, that this part of Mr. -- can you hear me?

A Yeah. But what was the date?

Q Oh, did I say -- December 15, 2004.

A December 15th?

Q That letter, do you have that still --

A Yes.

Q -- December 15, 2004?

A Yeah. I thought you said September 15.

Q Okay. December 15th.

A Okay.

Q It's been now admitted as Exhibit 29, my letters.

A Yes.

Q Do you still have a copy of that?

A Yes.

Q Okay. You were put on notice at that time, weren't you, that Makani was making a claim based on his allegations

that proper equipment wasn't provided to him to participate and play that floor hockey game that day that he was injured?

A Yes.

Q Okay. And that was before you received the Woodbury hockey rules and these Rice rules?

A Yes.

Q Okay. So -- so since you were on notice that was -- there was a claim about the equipment, did you do other research concerning what equipment should be required or is required throughout the school district at that time?

A Again, I'm relying on my memory from nearly 11 years ago. I don't remember specifically. I would imagine that I did ask about it and would have not investigated further if I was told I couldn't tell you who or when or specifically what was asked. That would be a good question.

Q And you haven't looked into it since then? Since that time?

A Since that time or as of 2004?

Q Since -- since that time?

A Whether equipment -- safety equipment isn't required now?

Q Whether any equipment is required now for this particular activity.

A It's my understanding that it's not.

Q Do you have any documentation that shows that?

A No. You're asking me if I -- I know that.
Q Okay. Do you know that from reviewing anything?
A No.
Q Okay.
MR. KURTH: So I'd object and strike that based on hearsay.
MR. O'BRIEN: Objection, Your Honor. I'm -- he asked her what she knows, he -- she told her. She --
MR. KURTH: It's based on hearsay.
THE COURT: Overruled. It's overruled.
MR. KURTH: Nothing she's seen. Okay.
BY MR. KURTH:
Q So you haven't seen anything that says that?
A No.
Q Okay. Did you review the curriculum for the floor hockey?
A No.
Q Okay. You were designated the person most knowledgeable concerning this matter, this claim, by the school district, weren't you?
A Yes.
Q So when interrogatories -- you're familiar with what interrogatories are, aren't you?
A Yes.
Q Okay. And those are, I mean, questions that were

presented that need to be answered and responded to?

A Yes.

Q And when you were -- you've reviewed the interrogatory questions that were provided to the school district by the plaintiff and provided responses to them, didn't you?

A Yes.

Q Okay. All right. Now, in those interrogatories, there was a couple of people that answered questions, right?

A Yes.

Q Okay. And that was, what, Todd Petersen and Waleska Ruiz, formerly known as Wally Morton?

A Yes.

Q Okay. Did you discuss the -- the questions with them before providing your answers?

A No.

Q Okay. And these -- you signed the answers to interrogatories, didn't you?

A Yes.

Q Okay. And -- and I'll just suggest to you that they look like they were signed on or about February 13th, 2015. I mean --

A It sounds right.

Q Okay. I mean, if you need to check that, you can. They're in Exhibit 9, if you need to. It's like the

next-to-the-last page is where your verification page is.

A February 13, 2015.

Q Okay. And interrogatory No. 1, you were asked to describe in detail your account of the incident on May 12th, 2004, and your response looks like it says the only information you had as to how the accident occurred was on the student injury accident report.

A Yes.

Q Okay. But at that -- at this time you had had a lot of information as to how the accident occurred, didn't you? I mean, didn't you have the claim form from the plaintiff?

A At what time?

Q Well, these were done in February of 2015.

A Right.

Q So that was this year, correct?

A Well, yes.

Q Okay. And when you responded to these, you had had the, you know, letters from myself, about what the claims were as to how the accident occurred and what happened?

A Correct. But the letters from yourself were not part of my investigation. That's a statement provided by you. The allegations of what caused the injury.

Q You don't -- you don't consider statements that are proffered by the person involved, their attorney, to be reviewed as part of the investigation when you're

investigating a claim?

MR. O'BRIEN: Objection, Your Honor. That misstates her testimony.

MR. KURTH: I don't think it misstates anything.

THE COURT: Overruled.

THE WITNESS: There -- I didn't see anything in the statement or the information provided by you that was different than what we knew to have been the result or the cause of the accident. So, yeah, I guess this is a misstatement that I -- if I didn't include your letters of representation. So.

BY MR. KURTH:

Q On Interrogatory No. 2, it was -- it was asked about -- asking to identify any and all persons who were involved or observed, the incident where Makani was injured, and their involvement or their observation. It looks like your answer was that Brandon Higgins was listed as a possible witness on that -- what's a CCF620?

A It's the injury report, accident injury report.

Q Okay. And then you say although it's unclear whether he witnessed the incident or whether he was the student who escorted Makani to the nurse's office?

A Yes.

Q So even at this time in 2015, you weren't sure of what Mr. Higgins' involvement was?

A Correct. Because I hadn't handled or looked at this case in many years.

Q Did you poll -- during your investigation, did you poll the -- the class that Makani was in at the time of the injury and -- and see all the students who were enrolled in that class at the time?

A No.

Q So did you not think it was important to find out who all witnessed this incident?

A I didn't believe -- I didn't think there was any dispute as to how it happened.

Q Okay.

A So I didn't feel that was necessary.

Q In some of these -- these answers to the interrogatories, they have specific initials. So the EW would be your initial, correct?

A Yes.

Q Okay. Now, there's a -- a response to No. 5, Interrogatory No. 5. It doesn't have -- have any initials. If -- on these -- these responses where there's no initials, am I assume that you being the person most knowledgeable at the school district was providing these answers, working with your counsel to provide these answers?

A No.

MR. O'BRIEN: Objection, Your Honor. Objection,

Your Honor. Person most -- first of all, it invades the attorney-client privilege and -- and attorney work product. And secondly, it's not relevant to any matter at issue.

THE COURT: Ask her who, if she's aware, who provided the answers that do not have the initials next to them.

BY MR. KURTH:

Q Are you aware of who provided the answers to the -- the interrogatory questions where there's no initial stated?

A No.

Q And by review of this -- this document, does it show that there's three different -- I mean, it appears that there would be three different persons who provided these answers according to the verifications.

THE COURT: It appears to the Court that Question 5 is answered by Mr. Petersen. Page 13.

MR. KURTH: All right. Thank you, Judge. I see that's set forth in their verifications.

THE COURT: It's a little difficult to find.

(Pause in proceedings.)

MR. O'BRIEN: Your Honor, is there a question --

MR. KURTH: I'm just looking --

MR. O'BRIEN: -- forthcoming?

MR. KURTH: -- to compare the -- I apologize. Just looking to double check these, which ones were answered and --

and not answered, since we have that. Because there were some that were apparently --

THE COURT: We'll give him a minute.

MR. O'BRIEN: Thank you, Your Honor.

(Pause in proceedings.)

BY MR. KURTH:

Q Now, your deposition was taken in this matter, too, wasn't it?

A Yes.

Q Okay. And there was a question posed to you in your deposition where you were asked, you know, why was there no other safety equipment provided to Makani to participate in this floor hockey game, correct?

A I don't remember the question. But possibly.

Q Okay. Do you recall that question, something similar to that? No? You want me to find the exact question?

A Please.

(Pause in proceedings.)

MR. O'BRIEN: Your Honor, while he's looking, has the original been provided to the Court?

MR. KURTH: We can provide the original to the Court. Permission to approach.

THE COURT: Approach. Thank you. Thank you, Mr. Kurth.

MR. KURTH: Thank you.

(Pause in proceedings.)

THE COURT: The deposition of Eileen Wheelan has been published.

(Pause in proceedings.)

BY MR. KURTH:

Q What is your understanding as to why no other safety equipment was provided to Makani prior to participating in that activity?

A My understanding is that it was not required.

Q It was not required by whom?

A By the curriculum of CCSD.

Q Did you ever review any curriculum from CCSD concerning floor hockey that was applicable at May of 2004?

A No, as I stated earlier.

Q So you haven't seen anything that says it -- it wasn't required?

A No.

Q Do you recall testifying about funding and having effective funding on the equipment, providing it?

A I don't remember that. It was a long day.

Q You don't remember testifying that it wouldn't have been in the school district's budget to provide that equipment?

A I don't remember saying that.

Q Okay. When you were -- when you received these

medical records on Makani when you were doing your investigation, did you also look into, you know, the -- the injuries that were caused to him, like, what it was?

A I -- I know that I pulled up one of the diagnoses, because I had never heard of it before.

Q Do you recall what diagnosis that was?

A Vitreous hemorrhage, I believe.

Q Okay. Did you pull that document off the Internet?

A Yes.

Q Do you recall what a vitreous hemorrhage, you know, what you found out from your investigation?

A If I remember correctly, it had to do with the fluid, the vitreous fluid in the eye and it leaking. Layman's terms.

Q Right. Of course. Neither of us are doctors as far as I know. You don't have any medical training, do you?

A No.

Q Okay. And do you know when you looked that up?

A I don't remember the date. It must have been sometime after I received documentations with that diagnosis provided on it.

Q Okay. We'll refer you to Proposed Exhibit 19. Go ahead and take a look at that. Does that refresh your recollection as far as to when you obtained that information or looked for it?

A Yes. January 3rd, 2006.

Q And would this have been after you had actually received the requested claim form?

A I believe so.

Q Do you recall doing any other research concerning Makani's medical condition?

A No.

Q Okay. And does this two pages appear to be a true and correct copy of what you had found on your research concerning vitreous hemorrhage?

A Yes.

Q And are -- were these documents in your investigation file?

A Yes.

Q And were these documents provided, then, to your counsel to produce?

A Yes.

Q Okay.

MR. KURTH: Ask for the admission of Proposed Exhibit 19.

MR. O'BRIEN: Objection, Your Honor. Hearsay. Lack of authentication other than she pulled it off the Internet.

THE COURT: Overruled.

MR. KURTH: Thank you.

THE COURT: Exhibit 19 is admitted into evidence.

(Plaintiff's Exhibit 19 admitted.)

MR. KURTH: May I approach and give a copy to the jury, Judge?

THE COURT: You may. Thank you.

BY MR. KURTH:

Q After you found out this information about vitreous hemorrhage, did you do further investigation on the file?

A I'd have to look at my file notes.

Q Do you have those notes with you?

A Yes.

Q You can go ahead and review those to refresh your recollection. We're not -- I'm surprised you brought them with you.

THE COURT: Oh -- I -- can you --

THE WITNESS: They were part of the deposition.

THE COURT: Can you tell us what you're looking at?

THE WITNESS: It's -- it's a printout of the electronic file that was created a couple of computer systems ago, converted into the prior computer system we were in for data and into the one we're in now. So it's limited electronic documentation.

THE COURT: So are the -- the papers in front of you given to you as part of your deposition transcript?

THE WITNESS: Correct.

THE COURT: Okay. So counsel knows, that's what

she's looking at and referring to.

BY MR. KURTH:

Q So that was an -- an exhibit that was provided to you that you were questioned about in your deposition?

A Yes.

Q Okay. But it's -- it's not attached to the -- well, the deposition hasn't been -- isn't being provided to anyone.

A It's difficult for me to determine from this file how much was conducted -- how much investigation was conducted after this date, because again, it was converted from one operating system to another operating system to another --

Q Right.

A -- so the dates that are along the left side of the notes are from the date that the original claim was created.

Q Okay. And does it -- does it show -- from your review of those notes, when was the original claim created?

A December 21st, 2004. No, I'm sorry. I misspoke. December 20th, 2004.

Q Okay. And does that show other correspondence you had back and forth between yourself and myself or my office?

A It shows notations of some of the actions taken, but it does not contain the correspondence.

Q Okay. Shows you notations about when you received things or when they were sent out?

A Yes. Or when I was checking for information from

you.

Q Okay. Sure. And -- and you had provided a letter to my office sometime around December 20, 2004, in response to our initial letter dated December 15th, 2004, requesting a claim form, correct?

A I believe so. That is the general practice. I don't see the letter here.

Q Okay. And then do you have a -- a notation about receiving a letter dated October 17th, 2005, from my office?

A I don't see that note, or notation, no.

Q I think before that you might have sent, like, another claim form to our office to --

MR. O'BRIEN: Objection, Your Honor. Is counsel testifying or asking a question?

THE COURT: Sustained.

MR. KURTH: Okay. I'll ask a question.

BY MR. KURTH:

Q Do you recall sending a letter to my office around August 5th of 2005 requesting status?

A I don't remember dates or times that I sent letters. But I can check my note.

Q Right, from reviewing your notes, you were reviewing your log there, I thought that would refresh your recollection as to this.

A Let's see. So I have a July 31st, sent a status

letter. And then it goes on to several notations later, still waiting.

Q Okay.

A Nothing new. No new contact. And then I have another one in -- that's dated August 5th. But again, I don't know the exact year, because I didn't add the year to the notation. Sent status letter to attorney, Robert O. Kurth, Jr.

Q Do you recall if you were requesting that -- that official claim form, that you needed that in your office?

A I don't remember the contents of the letter. I'd have to see the letter.

Q Did you consider the letter of representation and other information provided as enough to start a claim?

A Yes, to initiate a claim. But the claim form is required. Gives us a good baseline of what the claimant is looking for and what they allege.

Q And if the claim form's not required -- I mean, not provided, what do you do?

A We try to communicate with the attorney and look for communication from him or her.

Q And if not provided, do you close the claim at some point if that form's not provided?

A If eventually we have no communication from the attorney, we don't keep it in open and active file, because it

can be reopened at a later date.

MR. KURTH: I'd like to approach the witness with a letter to refresh her recollection. I asked her the question, I could ask her again, but he'll say asked and answered. It's about whether or not she had -- in her file she remembered us sending her a letter on or about October 17, 2005.

MR. O'BRIEN: No objection, Your Honor.

THE COURT: Thank you. You may approach.

MR. KURTH: Thank you, Judge.

THE COURT: If you can, Mr. Kurth, let us know so we all have it on the record what -- what you just handed her.

MR. KURTH: It's not an exhibit.

THE COURT: No.

MR. KURTH: I just handed her a letter dated --

BY MR. KURTH:

Q What's the date of that letter, Ms. Wheelan? Is it October 17th?

A It's dated October 17th, 2005.

Q Okay.

MR. KURTH: It's a letter from the Kurth Law Office to Ms. Wheelan dated October 17th, 2005, in response to the correspondence between CCSD, her of the risk management department, and myself concerning this claim.

BY MR. KURTH:

Q Correct?

A Correct.
Q Okay. And does that refresh your recollection?
A Not really.
Q Okay. Does it -- I mean, from a review of that letter, does it appear that you were being informed that Makani's mother was supposed to come in and sign the claim form that you were requesting and gives you an update on -- little update on the treatment status?
A It does.
Q Okay. Okay. And does it also inform you that it was -- it was Makani's understanding, mother's understanding that he's going to need another surgery once he's 18 years old?
A Yes, it does state that on the letter.
Q Okay. And then you were actually provided a claim form, weren't you?
A Yes.
Q And that's in Exhibit 17, I think. Would you take a look at that?
A Yes, I have it in front of me.
Q And this -- this letter here, there's a letter attached to it that was received in your risk management department, and it has the claim form attached to it, doesn't it?
A Yes.

Q Okay. And it appears that, I mean, there's already testimony about this that -- that you heard earlier on, correct?

A Yes.

Q Okay. So and it appears from this exhibit that it was signed and notarized on or about October 27th, 2005, which would have been shortly after the other letter that you were provided with an update on what was going on in the case?

A Yes.

Q Okay. Although the claim form wasn't actually provided till -- or received in your office it looks like around January 3rd, 2006?

A Correct.

Q Okay. But this claim form that CCSD used and that was completed was consistent with the information that was previously provided to you concerning the claim?

A Yes.

Q Okay. All right. Okay. Very good. Did you ever -- oh, no. Did you already say that you never interviewed Todd Petersen?

A No, I did not.

Q Okay. Have you ever spoken to him at all about this incident?

A No.

Q Okay. Did you ever talk to the school nurse who was

assigned to Woodbury Middle School on the day the incident occurred?

A Not that I recollect.

Q Okay.

A Look in my notes.

Q From your investigation of the incident, do you know where the school nurse was on that day that Makani was injured at Woodbury Middle School?

A No, I don't know exactly where she was.

Q I mean, the one that was assigned to cover that school along with however many other schools?

A Right. I don't know.

Q Okay. Did you attempt to find out when you were doing the investigation?

A I don't remember.

Q Okay.

MR. KURTH: All right. I'll pass the witness.

CROSS-EXAMINATION

BY MR. O'BRIEN:

Q Ms. Wheelan, you were asked -- you were shown an exhibit, Exhibit No. 8, Woodbury Middle School rules I believe those were?

A Yes.

Q Do you know who made -- created those rules?

A It was my understanding that --

Q Do you know who created those rules?
A No, I don't. I don't.
Q Where -- how did you get them?
A I received them via fax from the principal at the time that they were sent to me.
Q Okay. And that -- that was after the incident; isn't that correct?
A Yes.
Q Back -- almost a year later?
A Almost a year later.
Q And you don't know who created them? Do you know whether those rules were in effect at the time of Makani's accident?
A I don't know that for a fact.
Q Okay. Do you know anything about those rules other than they were given to you by the principal as part of your investigation?
A No, I don't.
Q Thank you. With respect to the Rice University rules, why did you -- why did you pull off -- that off the Internet?
A Just for my own curiosity, to -- again, I'm not a sports enthusiast, I've never played field hockey or hockey, and was hoping that some other written documentation could kind of explain to me how the game was played.

Q Was your understanding that those rules had any applicability at all to Woodbury Middle School?

A No, not --

Q In fact, those are Rice University rules, weren't they?

A Correct.

Q They were -- they were created for play at the collegiate level; isn't that correct?

A Correct.

Q Did you -- did -- has anybody ever told you that those rules are adopted anywhere other than Rice University?

A No.

Q Specifically, has anybody ever said that Clark County School District follows those rules?

A No.

Q You in 2004, you were a claims examiner, sir?

A Correct.

Q And so you examined claims?

A Correct.

Q What's -- what is reported on a student accident injury report? Is that just claims?

A No. It's any injury at the time when the form existed, an injury that occurred to a student.

Q So that could be any kind of injury; isn't that correct?

A Correct.
Q Stubbed toe, scraped elbow, anything?
A Yes. Yes.
Q Okay. And do you investigate every single one of those that comes across versus -- in 2004, did you investigate those -- every one of those that came across your desk in 2004?
A No.
Q In 2004, do you have any idea how many schools there were in the Clark County School District?
A Probably just under 300.
Q And approximately how many of those student accident injury reports would you get in a typical month?
A Oh, in a month? This is going to be a rough estimate, but I'm going to say close to 1,000, maybe more, given summer months would be slower and...
Q Is -- about 12,000 a year?
A Roughly 12,000, sometimes more.
Q Okay. And do you investigate -- you don't investigate all those, do you?
A No.
Q And those come from all schools, elementary, middle school, and high school, don't they?
A Yes.
Q Uh-huh. And out of those in a typical -- in 2004,

for instance, out of the 12,000 or so that you got, how many of those resulted in claims?

A Less than 1 percent.

Q Okay. So maybe a --

A Probably far less than 1 percent.

Q Okay. Can you give us a number?

A Well --

Q 1 percent of 10,000 would be 1,000, do you think there were 1,000 claims?

A Oh --

Q I mean, 1,000 -- yeah, do you -- do you think there were 1,000 claims?

A Do the math.

MR. KURTH: I think one percent of 10,000 is -- sorry.

MR. O'BRIEN: Don't have a calculator.

MR. KURTH: Just help you, I think it's 100.

THE WITNESS: Yeah, I know, and you're testing my math.

BY MR. O'BRIEN:

Q How many of those -- those student accident injury reports resulted in a claim in a typical year?

A I'm going to guess that there may have been about 100 claims from students injured at school per year.

Q Okay. When you say --

A That's a rough estimate.

Q -- guess, is that based upon --

A It's an estimate.

Q -- your experiment -- experience?

A Yes.

Q And, again, do you know what the difference between an estimate and a guess?

A Well, it's a guess.

Q Okay. You understand that an estimate is you have some basis --

A I have data.

Q -- just for [indiscernible] --

A Yes, no.

Q Hey, let me finish, please --

A Sorry.

Q -- my question before you start answering. That's going to be real hard to understand this transcript later.

You understand that an estimate is based on some knowledge or experience that you have or some -- some evidence that you have; a guess is just based -- just a guess has no basis in anything?

A Yes.

Q So is this properly characterized as a guess or an estimate?

A An estimate.

Q Okay. Because you do this --
A Yes.
Q -- you were doing that at the time?
A Yeah.
Q And you had some -- a general idea how many you were getting a year?
A Yes.
Q And it could have been more, could have been less, but your best estimate is that maybe 100 resulted in claims each year; is that correct?
A Yes.
Q Okay. And those claims that you would get, you investigated; is that correct?
A Yes.
Q And if you didn't have a claim, you had no reason particularly to investigate the other 11,900; is that correct?
A Yes.
Q So until plaintiff filed his -- her -- his claim, you had no reason to investigate this accident, did you?
A No.
Q Specifically, was there anything on the student accident injury report regarding Makani Payo that caused you to believe for an instant that anybody was going to sue us for that injury?
A No.

Q Thank you.

MR. O'BRIEN: That's all I have, Your Honor.

MR. KURTH: Judge, my -- my line of questioning right now would just be to cover some of these Rice hockey rules. I know they've been admitted into evidence, but since Mr. O'Brien asked some specific questions about their applicability to Woodbury Middle School, I think --

THE COURT: You can proceed subject to any objections that Mr. O'Brien may make.

MR. KURTH: Okay. Thank you, Judge.

MR. O'BRIEN: Well, before he starts and so as not to delay it, since she testified that she had no reason -- any -- no knowledge that these were applicable to the school, I don't understand how any question with her is going to result in any answer other than I don't know.

THE COURT: Let's not testify for the witness. But he -- go ahead and ask the question. You can make your objection.

Ms. Wheelan, if you could pause, perhaps, after the question's asked and give Mr. O'Brien a chance to make an objection if -- if he sees fit.

THE WITNESS: I apologize.

THE COURT: No, that's okay. It's tough. Thank you.

REDIRECT EXAMINATION

BY MR. KURTH:

Q Ms. Wheelan, do you have Exhibit 18 in front of you?

A Yes.

Q Okay. And you previously testified that you -- you reviewed these rules from the Rice College intramural sports activities, correct?

A Yes.

Q Okay. And you compared those rules to the Woodbury Middle School rules that you received?

A Yes.

Q And -- and did you pay attention to the -- the Rice rules as far as what equipment was recommended for the participants in the activity?

A Yes.

Q Okay. And in reviewing those rules and the recommended equipment, did you determine that a helmet and a mouthpiece were recommended equipment to participate in that activity?

MR. O'BRIEN: Objection, Your Honor. The document speaks for itself.

THE COURT: He's asking what she determined from her review, so it's overruled.

THE WITNESS: I determined that the Rice rules included what equipment was recommended, yes.

BY MR. KURTH:

Q And -- and that equipment included shin protectors, helmet, mouthpiece?

A Yes.

Q Okay. Did that equipment also recommend using a lightweight puck or ball?

A Yes.

Q And -- and did those rules also recommend that a team would consist of five players on the floor at one time?

A Yes.

Q Okay. Now, you also just answered some questions about claims that were received, and you were talking about 1,000 a month, approximately?

A No.

Q Well, I thought Mr. O'Brien asked you if there was about 12,000 of these student injury reports, you know, student accident injury reports?

A That's -- yeah. There's a --

Q Okay. Difference between that.

A -- difference between a claim and that.

Q Okay. I apologize. Clarify. So you were receiving about 1,000 of those approximately a month, you think?

A He asked for an average, and since we were averaging about 12,000 a year, divided it by 12 months.

Q But as a risk claims specialist at the time of this incident in May of 2004, those 1,000 weren't coming across

your desk, were they?

A No.

Q So you were only getting the 1 percent or part of the 1 percent as part of a team working?

A I would get -- yes, if they were -- if there was a claim or if there was any red flags or we were notified by a parent or a school that a claim was possible or to be expected.

Q Okay. And how many people were reviewing those claims at that time, if you recall?

A I don't remember exactly --

Q Sure?

A -- but there was more than one person reviewing those incident reports.

Q Okay. That were --

THE COURT: Wait, I'm -- I'm confused now.

MR. KURTH: Okay.

THE COURT: He asked you, I thought, about the claim reports.

THE WITNESS: Accident report.

BY MR. KURTH:

Q Well, we have the student injury accident reports, those are submitted, you said approximately 1,000 -- 1,000 a month, approximately?

A Correct.

Q Okay. And then about 1 percent of those would go to a claim form that was submitted?

A Okay.

Q Is that correct?

A Yes.

Q Okay. And then that 1 percent of these claims, then, now official claims, were being reviewed amongst yourself and others in your department at least one more person?

A Oh, for claims handling?

Q Yes.

A I believe in 2004 there were -- I believe there were three others handling claims at the time.

Q Okay. So that would be about four people handling, say, approximately 100 claims a month that was disbursed among them?

A No.

THE COURT: No.

THE WITNESS: No. That would be 100 claims a year --

BY MR. KURTH:

Q -- oh.

A -- of the GL, of the --

Q Okay.

A -- student injuries.

Q Okay.

THE COURT: That's what I understood, too.

MR. KURTH: Thank you for clarifying that.

THE WITNESS: That would be, whoo.

BY MR. KURTH:

Q Right. So maybe each one of you had about 25 new claims annually?

A Well --

Q That you were handling?

A No. Because there were other types of claims that we would handle, as well.

Q Okay. Besides these type of claims?

A Correct.

Q Okay. Were those, like, property damage claims or something?

A Property damage claims, both from claimants and for damage to district property, as well.

Q Okay. But on -- you had your -- your -- your notes before that you were -- your file notes, right, that you were reviewing that you saw in your deposition, I think it was probably Exhibit 3 in your deposition?

A Yes.

Q Okay. And you still have those before you?

A Yes.

Q Okay. So in -- in December 20th, 2004, you weren't

yet provided with the official CCSD claim form by myself on behalf of the plaintiff, were you?

A No.

Q Okay. But you did open a new liability claim file on or about that day?

A Yes. Based on your letter indicating your client wished to pursue a claim.

Q Okay. And it looks like right away from -- I mean, this shows who made the notes in the file, doesn't it?

A I believe so. But again, it's been converted from one operating system to another, and to the current operating system, which these were printed from. So --

Q Do you know when --

A -- I wouldn't -- I wouldn't testify --

Q Okay.

A -- to that.

Q Do you know why another name, like, shows up in here sometimes of Kimberly Crumland [phonetic]?

A Yes. She was my supervisor at the time. So when an initial claim was entered and it would go to a supervisor to review and assign it to an examiner.

Q Okay. Now, it looks like from review of this, well, from reviewing that, can you tell me when -- looks like you had spoke to the FASA?

A It -- it looks like February 8th. No, I'm sorry.

Let me see.

Q That -- that's what it appears to look like to me.

A Yes.

Q Okay. And at that time it -- it appeared at least that Wally was telling you that she had a good recollection of the events?

A Yes.

Q And are your notes consistent with that -- is it your understanding of your conversation with Wally that, according to your notes, that she wouldn't tell a parent that a student didn't need medical attention?

A Yes, that's what my note says.

Q Okay. And did you also request -- did you talk to the Woodbury principal at that time about the PE teacher, Makani's PE teacher?

A Yes. It looks as though from my note that I spoke with the office manager and asked that she pass my request for documentation from the PE teacher to the principal, the current principal.

Q And your request was to have the -- the other PE teacher that was at Woodbury at the same time in 2004 as Mr. Petersen, to provide what?

A I believe, if I can look here, well, my initial request was to -- to the prior principal. And I asked for documentation from his other boy's PE teacher who was at

Woodbury last year addressing rules of play, what equipment is standard for field hockey, general instructions given prior to play beginning and what, if anything, he may have witnessed regarding this incident.

Q And in response to that request are the rules that we've provided and have been admitted here today, correct?

A Correct.

Q Not the Rice rules, but the other Woodbury rules?

A Correct.

Q Okay. And Mr. O'Brien asked you if you ever thought a lawsuit was going to be filed concerning this matter, seeing the claim?

A I don't believe --

MR. O'BRIEN: Objection, Your Honor, that misstates my question.

THE COURT: Sustained.

MR. KURTH: Okay. I guess I could read back whatever his question about --

BY MR. KURTH:

Q It was from the claim form that was provided to you --

A I believe --

Q So what was it, then?

A I believe his question was regarding the injury accident report.

Q So your -- so when you said that you never thought a lawsuit could result in this matter, it was because of the initial student accident report that was --

A Correct.

Q -- completed and signed by the principal, Wally and Todd Petersen?

A Correct. That's the question that I understood.

Q Okay. Once you received the letter from my office and the official claim form, did you think the matter was going to result in litigation?

A No. I hoped I would continue to have communication with you and handle the claim to conclusion.

Q Okay. So at that time you thought there was a possibility of resolving it outside litigation?

A That's always the hope.

Q Okay. But you knew that at that time Makani was injured and needed more treatment when he was -- it was alleged, at least, after he turned 18 and --

A Yes.

Q And at that time, you knew that Makani was making a claim for damages, correct?

A Correct.

Q Okay. Thank you.

MR. KURTH: No further questions.

THE COURT: Thank you. Mr. O'Brien, do you reserve

the right to recall her in your case in chief?

MR. O'BRIEN: Yes, Your Honor, I do. Thank you.

THE COURT: Now would probably be a good time to take our break.

Ms. Wheelan, you're excused at least for --

THE WITNESS: All of this?

THE COURT: -- for now as a -- as a witness. But let's wait and dismiss the jury first.

We'll go ahead and take a 15-minute break now. Ladies and gentlemen, we're going to take a 15-minute recess. During this recess, you're admonished not to talk or converse amongst yourselves or with anyone else on any subject connected with this trial, or read, watch, or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information including, without limitation, newspapers, television, radio, or the Internet, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

We'll see you back in 15 minutes. Thank you.

(Jury recessed at 2:42 p.m.)

THE CLERK: Is there anything outside the presence? Outside the presence? No?

MR. KURTH: I don't -- I don't think so.

THE COURT: We're not getting it done today, right?

MR. KURTH: Sorry, Judge, I thought we were going to get done today. I really did. And I took a little longer than I thought. Maybe we could do -- work on jury instructions on the very end, probably.

THE COURT: Yeah, let's --

THE MARSHAL: I have three witnesses that I have who's out there right now.

MR. KURTH: Well, you got Mr. Petersen, you got another gentleman, and another --

THE COURT: I'll leave it to you guys to discuss that.

MR. KURTH: Okay.

THE COURT: But, yeah, we're not going to finish.

(Court recessed at 2:43 p.m., until 3:01 p.m.)

(Outside the presence of the jury.)

MR. KURTH: Judge, I designated Dr. Tyree Carr. I subpoenaed him, I provided him appropriate check to show up in court. The subpoena was actually dated for I believe the 28th, just in case. So I did talk to his office on the 27th, I believe. And even though I'd requested that money, they had requested additional funds for him to come and testify and were supposed to get back with me.

I haven't talked to him personally, but I informed them that he was under subpoena and I expected him to be here, and he's not here today. So --

THE COURT: Here's what I would be inclined to do, subject to input from -- from Mr. O'Brien. Not having the subpoena or anything in front of me right now, I can't -- don't feel comfortable making any ruling on that. But if -- if the school district's amenable, what I would suggest is you reserve the right to call him when and if he becomes available prior to submission to the jury.

MR. KURTH: That's what I would request, Judge, that at this time at least I reserve the right to be able to call him and I'll try to get a hold of him to make sure he's not sick or ill or -- or something else --

THE COURT: Sure.

MR. KURTH: -- reserve that right and -- I'd like to reserve the right to call Makani on rebuttal, the plaintiff, if necessary.

THE COURT: Mr. O'Brien, any --

MR. KURTH: And other than that, I'll be resting my case.

THE COURT: Okay.

MR. O'BRIEN: I would object to having Makani recalled unless there's something that comes out.

MR. KURTH: And I think it would only be for that purpose, if something came out that we hadn't already dealt with.

THE COURT: Yeah, the -- generally, you're -- you're

done, you've rested. But if something does come out, so to speak, you're welcome to raise it, you know, with the Court.

MR. KURTH: Sure.

THE COURT: Mr. O'Brien, as far as Dr. Carr, what's your position there?

MR. O'BRIEN: He wants him to -- he wants him to testify. I don't have any problem with that, and if they -- if they can get him in here. But I don't want to delay the trial for him, either, so.

THE COURT: Agree.

MR. KURTH: And -- and I agree, Judge. If he can't be here, like, Monday morning, then, you know, he's not going to -- he's not going to be here, but I'm going to reserve my right to request an order to show cause.

THE COURT: Certainly.

MR. KURTH: Thank you.

THE COURT: Yeah, and -- and like you said, in the meantime, try and get him or his staff on the phone and make those arrangements. So yeah, thank you both. So that's what we'll go ahead and do.

Do you have a witness ready?

MR. O'BRIEN: I have three witnesses ready, Your Honor.

THE COURT: Okay. Because --

MR. KURTH: Judge, before we get that, I'd like to

make a motion.

THE COURT: Sure. Is it brief? Because they're waiting.

MR. KURTH: Well, it's brief. But, I mean, since we've finished our case, except for if we can get a hold of Dr. Carr, or, you know, with the testimony that's been presented, I know we determined previously that there was a question for the jury to determine. But we're just moving for a directed verdict at this time. We believe with the testimony that's been presented concern the recommended size of the playing with the rules that have been provided, with the testimony that's going to be undisputed how many kids were actually playing, which was far in excess of five or six per team at the time when Makani was injured, with the recommended equipment, and with Ms. Wheelan, the person most knowledgeable from the Clark County School District defendant testimony that she thought she would be able to resolve the claim is an admission of liability and responsibility that the claim wouldn't go to --

MR. O'BRIEN: No.

THE COURT: Don't even -- don't even go there, counsel.

MR. KURTH: This is my argument, Judge. That would go to --

THE COURT: Okay. Make your record, but make it

brief, because we do have the jury waiting.

MR. KURTH: Sure. That's -- well, that would go toward the issue of liability.

THE COURT: Denied. But thank you.

MR. KURTH: Okay.

THE COURT: We good to bring in the jury?

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Okay.

(Jury reconvened at 3:09 p.m.)

MR. O'BRIEN: Your Honor, the defendants stipulate to the presence of the jury.

THE COURT: Does plaintiff stipulate to the presence, as well?

MR. KURTH: So stipulated, Judge.

THE COURT: Thank you both.

Ladies and gentlemen of the jury, at this time, subject to perhaps another witness coming in on Monday, the plaintiff is resting its -- his case. Now is the time for the defense to -- to present its side.

So Mr. O'Brien, go ahead.

MR. O'BRIEN: Call Todd Petersen, please.

THE COURT: Thank you.

TODD PETERSEN, DEFENDANT'S WITNESS, SWORN

THE CLERK: Please be seated, state your full name for the record, and spell your last name for the record.

THE WITNESS: Todd H. Petersen, P-E-T-E-R-S-E-N.

MR. O'BRIEN: Your Honor, may I use the podium?

THE COURT: You -- you certainly may, counsel.

DIRECT EXAMINATION

BY MR. O'BRIEN:

Q Mr. Petersen, do you -- are you currently employed?

A No.

Q When -- have you ever worked for the Clark County School District?

A I did.

Q Can you tell the jury when that was?

A From 1996 to the fall of 2004.

Q And what did you do for the Clark County School District during that time period?

A I was a middle school health and PE teacher.

Q What did -- what -- what sort of things do you have -- what sort of education do you have to have in order to become a middle school teacher?

A I spent -- I finished a curriculum at Northern Illinois University at Dekalb in physical education and health education. It was a four-year degree program where I got a Bachelor of Science in Education.

Q And after that did you have to get any additional education to become a teacher?

A No.

Q Are you licensed -- were you licensed at that time in Nevada?

A I was.

Q When did you get your license?

A In 1996.

Q Okay. What did you have to do to get your license?

A I had to submit all my coursework from Northern Illinois University to the State of Nevada for their, you know, transcripts, etcetera, for them to review and provide me the license.

Q Did you have a license in any other state?

A I had a license in Illinois and also a license in Iowa.

Q And you came to UN -- or, UNLV -- the Clark County School District in 1996; what was your first job with the District?

A It was health and physical education with Woodbury Middle School.

Q Did you ever teach at any other school while you were with the Clark County School District?

A No, I did not.

Q And did you teach health and PE the entire time that you were with the school district?

A I did.

Q Did you -- did the Clark County School District

provide you with any sort of training while -- while -- once you became a teacher?

A Well, there were new teacher trainings and there were -- I wouldn't say they were, like, a scheduled, you know, I think they were -- I -- I would say they were sporadic, you know, a training, whether it's -- the only thing we had to do on a timely basis was to -- I think it was every two years we had to update and retrain on CPR and first aid and such.

Q But you -- you had -- when you were at Woodbury, did you have -- who did you work under?

A Supervising administrator?

Q Yes.

A Joe Murphy and Gary Williams, depending on the year.

Q Okay. Was Gary Williams, like, an athletic director or something?

A He was the assistant principal.

Q Okay. And he was in charge with PE or athletics?

A I think it depended on their workload, so sometimes Joe Murphy was my supervising administrator and sometimes Gary Williams was. It wasn't, you know, they -- it changed on an annual basis based on their workloads.

Q When you started in 1996, was floor hockey a -- a unit of physical education course you taught?

A It was a course at the time where one of the teachers at Woodbury who was the department chairperson was

working with some other district level people to implement into the middle school curriculum.

Q Did it get implemented into the Woodbury school curriculum?

A Yes.

Q When was that?

A The next year, so it would have been the fall of '97, I believe.

Q And so have -- from 1997 up until you left the District, was that part of your regular PE curriculum?

A Yes.

Q As -- when you're teaching that course -- first of all, would you explain to the jury what floor hockey is?

A Floor hockey is a game that you use a plastic hockey stick that's, I don't know, approximately, oh, I bet it's three feet long or so, with a bladed stick, and then there's a small, round, soft rubber ball that's used to essentially play hockey on a hard surface. We used the -- the tennis courts outside at Woodbury to play the -- to use -- to use this unit. And we kind of ran on a length-wise basis, and it utilized the space that we didn't have a lot of funding for tennis rackets and things, so it gave us a space that we weren't really using, gave us a unit to teach there.

Q Could you explain to the jury by it -- it ran length-wise?

A So the, you know, on a tennis court, you have a, you know, this side and this side, and the net in the middle instead of running the game, you know, we couldn't run through the net, so we use the nets as a barrier to divide the two separate games.

Q Did you utilize more than one tennis court for the -- for the game?

A We -- I believe it was three, length-wise.

Q So it would have been longer and narrower --

A Yeah, it would have been --

Q -- it probably would have been --

A -- a lot longer and narrower, and then we used the midline of the middle tennis court to divide the game further so that we didn't have, you know, 20 students on one side. It was a way to kind of keep them, you know, so you didn't have 20 kids surrounding the ball, which can be a, you know, probably a not -- not a great situation. So it was divided into an offensive and defensive half.

Q And how were the -- were the -- how was it played? I mean, did the players just go wherever they wanted and chase the ball?

A Well, again, offensive and defensive sides were divided. So the offensive players on one side couldn't cross over to -- to play defense for their own team, and vice versa on the other team. So the offensive team, obviously, tried to

get the round, plastic ball in the net at the end of the court, and when it crossed over to the other side, the defensive team tried to get it back to them so they could do that.

Q And so it was kind of like soccer [indiscernible] --

A Yeah, kind of back and forth.

Q -- so far?

A Yep. Back and forth goal-oriented game.

Q How many students would typically play a game of --

A You --

Q -- floor hockey?

A -- you know, depending on the class and depending on the size of the class, I would say the teams were probably from -- anywhere from 8 to 12 students per team. We didn't have that many sticks, so there would have been substitution players for each team -- each of the four teams. And they would kind of stand in the far corners and we would rotate them into the game, you know.

Q How many would be playing a typical game at the same time --

A About eight --

Q -- on each side?

A About eight players per team is --

Q Okay.

A -- is my recollection.

Q How did you decide how many people to play in a game -- game at a time?

A That -- it -- it was purely driven by the class size. So if I had 40 kids in a class, I had four teams of 10. If I had, you know, 36, that's four teams -- you know, four teams of nine.

Q Were there any hockey rules in effect while you were teaching floor hockey at Woodbury Middle School?

A Well, again, the -- the teacher that implemented the program in 1997 kind of developed the unit. And we, you know, like all the units we taught, whether it be softball or basketball or what have you, we'd go over a list of rules prior to playing those games every -- every different time we rotated it.

And again, based on numbers and -- and the way the school calender worked and the number of PE teachers we had, we repeated units at least twice a year and sometimes as many as three -- three times a year. So students would play these games, you know, floor hockey and basketball and softball. And we did a unit on physical fitness, and we did all types of other units that we basically rotated through depending on what access point we had in the school, whether we were inside in the gym, whether we had a defined space on an outdoor field, whether we had the basketball courts, or whether we had a volleyball area, badminton area, what have you.

Q With respect to the number of students playing on each side in the game, was there -- were there any sort of rules that said you have to have no more than five on each side or no more than eight or something like that?

A Well, again, it was all -- really, we were utilizing the divisibility of the teams so that it was evenly balanced, so that we could manage the substitution. And that a lot of times was done not only because we only had so many hockey sticks, but also because, you know, depending on the time of year, it can be 90-plus degrees out. So you don't want kids out there at, you know, a max output for 45 minutes when it's 95-plus.

Q What would you do while the students were playing?

A You know, it was my training from Northern Illinois University and the way I conducted my classes to constantly move and monitor and teach and reteach skills. And make sure that, you know, kids were behaving, following the rules, and -- and kind of doing what they were supposed to do.

Q When you went over the rules with the -- with the students, what sort of rules did you go over?

A Well, with floor hockey in particular, we went over the fact that, you know, the -- the stick is to be utilized with holding one hand lower on the stick, one hand higher on the stick, and that the blade of the stick, which is about the, I don't know, it's probably eight inches long, maybe 10

-- I don't think it was 10, but -- that that particular piece of the stick needed to stay below the knee so that we didn't have any -- you know, you didn't want to swing it like a bat, because that was dangerous. So we constantly taught, you know, among all the teachers, and that was the, you know, focal point, that -- that the blade of the stick needed to remain below the knee at all times.

Q Did students occasionally raise the blade of the stick above the knee level?

A Yes.

Q What was your practice if you observed that?

A If we observed that or if other students complained of -- of a student doing that, we would, you know, pull that student aside, you know, take them out of the game, pull them -- you know, pull them aside and, you know, kind of explain it again. And, you know, if we had recurring problems, which I, you know, don't really recall having a lot of, because kids wanted to participate, that we would remove them a game, you know, for five minutes or 10 minutes or what -- whatever it was.

Q Did you have written rules as to how the game was to be played in --

A We had --

Q -- focusing more on 2004 now?

A Okay. More on 2004. Yeah, again, the guy that

developed that particular lesson, we would go over the rules at the beginning of that unit and talk about the rules, you know, the -- you know, and you would hopefully get as much interaction as possible from the kids to -- to make sure they understood. And we would, you know, use a couple kids to demonstrate, you know, hey, this is what we mean by using the stick properly and keeping it below the leg.

And in doing so and the way we asked them to hold the stick, the only way you could make the stick really work is to bend a lot at the waist and to move yourself, and that's what kept the stick down and kept it -- kept it safe.

Q In terms of rules, though, did you have written rules that you handed out to the students?

A Yeah. We didn't -- we didn't hand them out. We -- we -- we had handouts and we would go over them at the beginning of the unit and -- and make sure everybody understood what we were doing. And then they were always available, you know, in the gym if -- if a student were absent and hadn't participated in this, you know, we always had them available.

Q Do you remember Makani Payo?

A I -- you know, do I remember him from 11 years ago?

Q Yes.

A No.

Q Do you recognize this gentleman here?

A No.

Q Do you remember an incident that occurred on May 12th, 2004, while the floor hockey unit was being played?

A No.

Q You don't remember an incident where a student claimed to be injured?

A What I recall of the incident was, you know, again, this is 10-11 years later, when you called me last spring and kind of made me aware of what was going on. The first thing I think I asked you to do was, you know, if there was an incident, there would be an incident report. And I read that and kind of refamiliarized myself with it. So from those documents, I, you know, kind of recalled some of the stuff.

Q So what do you recall as you sit here today about the incident?

A What I recall is generally when a student, you know, was hurt, I -- I recall a student coming up with his hand over his face and another student saying he got hit in the face with a hockey stick. You know, we kind of assessed the situation. My protocol at that point, if the student was able to, we would send up a responsible student with that student that was injured to the nurse's office so that they could seek the treatment of those so trained.

Q Did you have any sort of safety protocol that you followed when a student was injured?

A Well, again, the first protocol was for me to do the assessment. And if that student were injured and needed, you know, it was more than, you know, just a little, you know, a sting or a bounce or a scrape or whatever, if they needed something further that I didn't have access to, you know, bandages or antiseptics or anything, that I send them to the first aid office.

Q What if it was a serious injury?

A If it were a more serious injury and the student couldn't move, then the protocol would be for me to either send a student or use a radio to call the first aid office, and they would either send somebody down, you know, if it -- if the student was incapacitated, couldn't move, they would generally bring a wheelchair down and they would take it from there, because that was, you know, obviously their training to kind of take over at that point.

And in an instance where, you know, the -- a student were really injured and, you know, we were directed to use that radio or to contact the first aid office and have them, you know, call 911 or get an emergency -- emergency services there.

Q And if you don't remember, you need to make sure that you say that. Actually, I'm not trying to suggest anything. But when -- did you follow your normal procedures with respect to Mr. Payo on March 12th, 2004 -- or May 12th,

2004?

A Yes.

Q What sort of assessment did you do?

A Well, from what I recall, again, from reading the incident report, was that, you know, the student came up, had his hand covering his, you know, the upper part of his face and his eye. Another student saying he got hit with a hockey stick, you know, and me saying, Okay, he's not bleeding, he's not -- he can still move, he moved toward me, I moved toward him. And so I sent him to the nurse's office with another student.

Q Did anyone tell you that Mr. Payo was claiming that he had been knocked unconscious?

A No.

Q Did Mr. Payo, when you observed him, appear to be disoriented or unsteady on his feet in any way?

A No.

Q Did he appear to be -- you said there was no bleeding that you observed?

A None that I observed. But again, he had his hand over his face.

Q And did he tell -- did anybody -- nobody told you he'd been knocked unconscious for, like, 10 minutes?

A No.

Q Or 10 seconds?

A If he would have been knocked unconscious for 10 minutes, I would have certainly seen it myself, you know, that a student was down, and I would assume that a commotion, you know, that other students would have, you know, reacted to that. It would have been a -- he wouldn't have been able to be down for 10 minutes, because we had 40 kids playing a game. So if -- if that were the situation, it would have -- it would have been a big deal. And at that point, you know, we would use the radios or another student to go to the first aid office and get an ambulance there.

Q Now, when you were supervising the game, were you in a position to see what was going on on the -- on the whole playing area?

A Yeah. Again, with the tennis courts, you know, they were kind of bordered by a concrete block brick wall and it was my, you know, way of doing things to just kind of rotate around the perimeter and, you know, be as -- as -- be as observant as possible to what was going on or, you know, who might be following the rules, breaking the rules, needing a little reteaching or -- or what have you.

Q You don't remember seeing Mr. Payo get hit, though, do you?

A No.

Q And when -- when he came up to you, I mean, was there anything about him that you observed that caused you to

think that he might be seriously injured?
A Not that I recall.
Q Nothing sufficient to call the nurse, have them -- nurse's office -- have them come?
A No.
Q And certainly not enough to warrant calling 911?
A No.
Q And what was your practice then? You decide that he's hurt, what do you do?
A Again, you'd find the responsible student, you know, somebody in the class, and send the injured student up with that student. If, you know, I guess if the thought were that he were a little more injured, you potentially could send two more. But in general, if I thought that, I would have probably had the nurse come to us, you know, just from a liability standpoint.
Q All right. And what's -- were you -- if someone was injured, why wouldn't you take them to the nurse's office?
A That would leave nobody to supervise my class.
Q Did you have any sort of assistant helping you on -- on the day of this incident?
A No.
Q There was no co-teaching or anything going on?
A No.
Q Did you have a problem with any of the kids on that

day that you remember causing difficulties?

A None that I recall.

Q Breaking the rules or anything like that?

A It was a long time ago.

Q In all the years that you taught floor hockey, had you ever seen a student get seriously injured by being hit in the face or the head with a hockey stick?

A Never.

Q Had you ever heard of that occurring at any of the schools in the Clark County School District?

MR. KURTH: Objection. Speculation.

MR. O'BRIEN: I asked him if he heard about it.

MR. KURTH: Oh, okay.

THE WITNESS: No.

THE COURT: Overruled.

MR. KURTH: Okay.

THE COURT: The objection.

MR. O'BRIEN: Sorry, Your Honor.

THE COURT: That's okay.

BY MR. O'BRIEN:

Q When did you leave the Clark County School District?

A In October of 2004.

Q So wasn't too long after this incident?

A No. I finished that school year, started the next school year, and had an opportunity outside of teaching and

outside of the state of Nevada. So I resigned and moved on.

Q And I just want to make it clear, you didn't resign because you were being disciplined for any reason, were you?

A No.

Q Did you ever receive any sort of discipline for the manner in which you were supervising your students?

A No.

Q Had you ever been, I mean, even written up or what they call an oral conference about whether or not, you know, claiming that you weren't present when you were supposed to be present?

A Never.

Q Did you ever have a parent complain about the safety of their students when they -- when they were in your class?

A No.

Q And specifically with respect to floor hockey?

A Not to my knowledge.

Q What would have been your protocol if Makani or the person that came up with him had told you he -- he was -- he was knocked out?

A Then it would have obviously escalated even beyond, Hey, let's -- we would have tried to get the nurse down there as quickly as possible to -- we would also said it's -- it's a big emergency and we need to call 911 and get an ambulance here.

Q And if -- if you -- is there -- is there any reason why you wouldn't do that if -- if you were told a student was knocked out?

A No.

Q Would you get in trouble if you called 911 too often or something?

A No.

Q Did you follow all the protocols that -- that you've outlined in -- with respect to Mr. Payo?

A Yes.

MR. O'BRIEN: I'll pass the witness, Your Honor. Thank you.

THE COURT: Thank you. Mr. Kurth?

MR. KURTH: Thank you, Judge.

CROSS-EXAMINATION

BY MR. KURTH:

Q Mr. Petersen, I'm Robert Kurth. I represent the plaintiff, Makani Payo, who's present here today. Remember I spoke with you on the phone for just a little while one time when I was trying to see if we could schedule a deposition?

A Yep.

Q Okay. And that -- and that didn't -- it didn't come to fruition. So I apologize for any -- if that caused any issues with you for that, that we never actually had the deposition.

A I never heard back from you, so I assumed it was something that wasn't going to happen.

Q Okay. So I recall -- let's see -- did you teach -- I mean, about how many kids did you teach an hour, you know, in your PE class?

A I would say the average was probably 40, and sometimes you had 45 and sometimes you had 35. It was -- it varied, you know, from class to class, from year to year.

Q Do you remember telling me that this incident happened, like, at the tail-end of your teaching career?

A Well, again --

Q Right.

A -- based on when -- when they called me last I believe it was early April, obviously, I looked at the timing of it all and knew that I finished off that school year and I resigned my teaching position in October of the following year. So yeah, I knew it was toward the -- the end of my teaching career.

Q And do you recall never saying anything to me that you were teaching 45-50 kids an hour for about seven hours each day for nine years?

A I probably didn't say nine years. I said I taught an overload --

Q Okay.

A -- just so that I had seven classes and I didn't --

I didn't have -- they bought out my planning period so that they could manage the schedule is I believe what I was trying to communicate to you.

Q Okay. So you were just -- so you didn't have, like, a --

A Yeah. Most teachers --

Q -- what do they call that -- that --

A A planning period.

Q Okay.

A Yeah, I did not have one of those, so I would do the planning at my home in the evenings.

Q Sure. Sure. Okay. Now, you never saw Makani back in school after this incident happened, did you?

A I -- I don't recall. Again, it was 11 years ago.

Q So if you made any statement that said you thought he had been back in school --

A Again, that was derived --

Q -- sometimes after that --

A -- from reading the incident report that I -- that I wrote and that the -- the first aid specialist wrote.

Q Okay. So you --

A That was what really kind of jogged my memory as to really what happened and kind of took me back 11 years. Do I remember everything vividly? No. I remember what I -- what I try and remember as best I can.

Q Sure. Sure. And -- and I know it's -- and I know it was a long time ago. And that's for various reasons that we're going through in this trial.

Could -- you have a big binder in front of you there?

A I do.

Q Okay. Could you turn to Exhibit 2 in that binder. Okay. Do you have that, sir?

A I do.

Q Okay. Great. And are you familiar with this type of form when you were working for the school district?

A Yes.

Q Had you filled out -- I mean, about how many of those forms do you think you filled out during your time there?

A I -- I don't know.

Q No? Hundreds?

A No, I would doubt it was in the hundreds.

Q So this is a student injury accident report. Is that your signature on this form, looks like about in the middle?

A Yes.

Q Okay. And is -- is your handwriting anywhere on this form?

A Yes.

Q And could you tell me where it's at on the form?
A Under where it says, "Description of the accident."
Q What about where it says -- where it has the witness, it says, "Witnesses, Brandon Higgins." Is that your handwriting?
A Yeah, it appears to be.
Q It just kind of looks the same to me, but I'm not sure. So.
A Yeah, it -- it kind of does. But again, somebody -- I can tell where it says "employee in charge," that's not my name.
Q Okay.
A But -- or -- it's not my handwriting, I'm sorry.
Q Sure. Sure.
A But yeah, that Brandon Higgins could, and that could have been the student that made me aware that he was injured.
Q Okay. Do you know if that was the student that you sent Makani with to take him to the FASA?
A I don't know that.
Q Okay. And then under -- under your description, it says, "Student was playing floor hockey on tennis courts and got hit in the face by another player with hockey stick." Is that accurate?
A Yeah. It's -- I mean, again, I didn't --
Q You didn't see it --

A -- I didn't physically --

Q -- how it --

A -- see it happen.

Q Okay.

A So that's what, you know, somebody made me aware of and then I followed -- you know, went forward with the, you know, injury protocol.

Q Sure. You previously said that if -- if Makani would have been out for, like, 10 -- 10 minutes, you would, of course, seen that and --

A Oh, absolutely. I mean --

Q Right.

A -- if somebody passed out on the floor in here for 10 minutes, I think we'd all notice.

Q Sure. What about if he had passed out on there for 10 seconds?

A I probably, again, still would have noticed. Because it would have been somewhat commotional with, you know --

Q Right.

A -- 40-plus students. It wouldn't -- if a kid went down like that, it wouldn't -- it wouldn't go without notice on their part or my part.

Q Oh, you said probably. So -- so then somebody could maybe pass out for 10 seconds or less and then a student

brings them to you and you send them to the nurse, because -- is that --

A No. If a student passed out and was on the ground, again, it would automatically elevate itself. Because I think if a student passed out and was unconscious, that, to me, would be something extremely serious, where we would use, you know, the tools we had to get an ambulance there. I mean, even if it's for 10 seconds, that's still pretty serious to me.

Q Sure. But you might not have seen -- seen it if he passed out for 10 seconds there, correct?

A I think I probably would have, you know. Again, based on how others would react, I would have known.

Q Probably would have known?

A Yeah.

Q Okay. That's fair. Who was the teacher at Woodbury that developed these rules, the floor hockey rules?

A There was a teacher in 1997, Mr. Sontag [phonetic], who was the department chairperson at the time. And so he brought the unit there. Now, whether he developed the rules or he worked in conjunction with other teachers on a, you know, on a district PE, you know, planning, I don't know that. All I know is he was the one that would have brought it to the rest of the teachers and said, Here's a new unit we have to teach. We talked about it, we talked about how to present it,

we talked about how to teach it, and we talked about how to implement it, you know, among the six or seven or eight PE teachers that we had at the school then.

Q So if you had six to eight PE teachers, you're talking about the -- the department chair would have been one of those six to eight --

A Correct.

Q -- was the department chair?

A Correct.

Q Okay. So not somebody outside of Woodbury Middle School?

A Well, the department chair is on a -- I can't remember what they call them then, usually a zone, and I was on this committee --

Q Okay.

A -- later in my career, so I know a little bit about how it works. And, you know, he would have been presented this information at, you know, from other department chairs and said, Hey, we developed this great unit on floor hockey, and, you know, others are implementing it or, you know, what have you. And that's where it came from, to my knowledge.

Q Okay, sure.

A So I don't know if Mr. Sontag actually wrote the rules himself or if somebody else did. I know that he presented us the unit.

Q Okay. Who was the principal at the school at the time you were there?

A Joe Murphy.

Q Okay. Did you know Greg Snelling?

A He was a dean the first year, I believe, I was at Woodbury. And then he moved to another school after that.

Q Okay. And -- and these rules that -- you guys had rules for the department, then, to use to review --

A Correct. Yeah.

Q Okay. And these rules were in the gym, if anybody wanted to see them, they could ask to see them?

A We had copies of the rules that were, you know, we shared, you know, the male PE teachers had their set that they used for their classes and the female teachers had a set that I assume they use for their classes.

Q Sure. And these rules weren't sent home with the students, were they?

A No.

Q Okay. And these rules weren't shown to the students' parents prior to participating in the activity, were they?

A No, no.

Q Okay. When -- when you were supervising the game normally, you know, of floor hockey, where would you stand in the tennis courts?

A I would generally move around the perimeter so that I could constantly be, you know, have different vantage points and obviously be around the maximum amount of students I could. If you pick one vantage point, then you only have one vantage point, you know. So if you move, you constantly are listening, hearing, and seeing, and knowing what's going on in your class.

Q Sure. Do you -- were you ever on the playing surface, where they were playing, like --

A The entire time.

Q So were you in part of the game?

A Well, I mean, they're tennis courts that are surrounded by fences. So there was really nowhere else for me to -- I just, you know, kind of walked around the perimeter of the field, tried to stay out of the way. So again, that's being aware of what's going on.

Q So were any -- were any of these tennis courts where this play was going on surrounded by any walls?

A There was a concrete block wall on the -- that divided the tennis courts from the basketball courts.

Q So there was one wall maybe at the end of the tennis court section?

A It ran the whole length of the, you know, three tennis courts.

Q Okay. And then the players played on one side --

A The nets ran down the middle. There were two games going on on the sides of the nets, length-wise. A goal here, a goal here, a goal here. So two games. And I would move around the perimeter of the area.

Q And the tennis nets kind of separated --

A They divided the game --

Q Okay.

A -- the sections.

Q So they were still in place during this game?

A Yeah.

Q Okay. Just wanted to make sure if you took the tennis nets down or anything like that.

A Yeah, no.

Q I didn't think so.

A They remained up.

Q Okay.

A They were old. If we would have taken them down, they would have never gone back up.

Q Right. Right. If -- so did you ever referee these games or observe them by being in -- in the center, moving around, you know, like a referee would in a -- a game?

A Well, yeah. I mean, that was part of my role was teaching and -- and making sure people were playing by the rules. And -- and doing any reteaching or any, you know, if somebody wasn't playing by the rules, talking to them about

why they weren't or, you know, taking them out of the game for a period of time to make sure they understood how they were supposed to play.

Q Would you yell, No high sticking, or things like that during these games occasionally?

A Oh, we -- yeah. I mean, that was something that certainly was a big part of the concern. So we went over that repeatedly so that everybody knew.

Q Is that what happened sometimes during the games?

A Yeah.

Q And when it happened and you saw it, would you yell, No high sticking?

A Well, if it -- if it was one instance a kid, you know, kind of took one of his hands off it and the stick got high, yeah. If it was repeated by the same student, then again, we would pull him aside and kind of make sure that student understood what they were doing wrong, how to do it correctly, and, you know, what the potential danger they were creating was.

Q Sure. Now, you said that you would use a small, round, soft rubber ball?

A Uh-huh. Yeah. It was a little bit bigger than a racquet ball. It came with the hockey equipment when we purchased it.

Q Now, on this date, when Makani was injured, it's my

understanding that you were using tennis balls.

A No. We used a small orange-in-color ball that came with all the hockey equipment. Never used tennis balls. Didn't have tennis balls, because we didn't really teach tennis there.

Q You had tennis courts, but you guys didn't teach tennis?

A Correct. They were, yeah, it wasn't really part of the middle school curriculum. I believe it was part of the high school curriculum.

Q Do you remember receiving some -- or helping to answer some interrogatory questions that were presented?

A When?

Q Oh, it would have been earlier this year.

A Earlier this year?

Q Yes.

A I answered some questions that Dan sent me, yes.

Q Okay.

A I don't recall the exact date. It could have been this year, it could have been late last year, too.

Q Do you see -- you still have Exhibit 2 open in front of you, don't you?

A I do.

Q Do you see that description of the -- the injury to Makani?

A Which piece of the document?
Q It looks like it's right under your signature.
A Under where it says, "Please indicate areas of injuries"?
Q Yes.
A Yes. I do see that.
Q And that -- that looks like it might be the Wally Morton's handwriting, but I don't know. Do you know whose handwriting that is?
A I would assume by looking at the document and looking at the signature of the person that signed it, that it's Wally Morton's. But I know it's not mine.
Q What was your understanding of Wally Morton's position at the school?
A She was the nurse's assistant or the first aid assistant, I think was her title.
Q And from working a the school district for the period of time you did at Woodbury Middle School, do you know what her training and experience was at the time as a first aid safety assistant?
A I don't know what type of training she went through to -- to get hired for her position.
Q Okay. So this -- this document suggests that Makani was hit on the left eye, side of face, had swelling, bruised, cut, and bleeding. Do you recall seeing that?

A No. Again, when I was approached by the, you know, injured student and another student, he had his hand over his face.

Q Well, if -- if one of your students is hurt in PE class and they had a hand over your face, wouldn't you, like, say, Let me take a look at that, and see if it was just a sting or something? Stinger?

A I would -- no, I wouldn't do that. Because I don't have the, you know, a higher level of safety training. If somebody were injured and they were covering it and I could tell that they were injured, I would get the person that, you know, handles injuries to deal with it. And that's not my training is to handle injuries.

Q Well, if they were covering their face like -- like you suggest, with their hand or -- or looking down, could you think that they might have, you know, they could have a headache or something?

MR. O'BRIEN: Objection, Your Honor. Answer calls for speculation.

THE COURT: Go ahead and rephrase.

BY MR. KURTH:

Q You've previously stated that if you thought the -- there was blood or the injury was serious enough that you could even call 911 sometimes, correct?

A Correct.

Q And you say that was your practice and procedure to assess the injury to determine whether or not the student needed to be sent to the -- the FASA or the nurse or to call 911 before the student left your class?

A Correct. And that's exactly what I did.

Q Okay. So if a student, Makani, had his hand over his eye or on his head, you wouldn't remove that and assess the injury before just sending him off?

A No, again that's not my --

MR. O'BRIEN: Objection, Your Honor. Objection, Your Honor. Asked and answered.

THE COURT: Sustained.

MR. KURTH: I don't remember asking that question before. What was the answer before? Could we read that back?

THE COURT: The objection's been sustained. It was asked and it was answered.

BY MR. KURTH:

Q So why don't you turn to Exhibit 9 in your book there, sir. If you turn to the back of that --

A The back of 9?

Q Yes, the --

A So, close to 10?

Q Yes. About four pages from there.

A Is there a page number?

Q 13. Does that look like your signature on that

verification page?

A It does.

Q Okay. And that was notarized in Nebraska?

A Correct.

Q Okay. And that was where you were at at the time you signed this on or about February 19, 2015?

A Yeah.

Q And this verification -- if I can say it -- appears to say that you assisted in the answers to interrogatories numbered 1, 2, 3, 5, 13, 14, and 15; is that correct?

A That's correct.

Q Okay. Let's look at Interrogatory No. 1, which is on page 2. So there's the question on the top of that page, about, "Describe in detail your account of the incident on May 12th, 2004." Okay?

A Uh-huh.

Q Then you see the Response No. 1, and there's some initials that say "TP"?

A Yep.

Q Okay. I mean, you didn't -- you didn't type the document?

A No, I did not.

Q Okay. But I imagine the "TP" probably stands for Todd Petersen?

A I assume that.

Q Okay. So when asked to describe in detail your account, at least at this -- at that time, was your -- your answer was basically that you didn't recall much about it?

A Yeah. Again, it was 10-11 years after the fact. So now after the documents that Dan sent me, you know, I familiarized myself and -- and I thought more about it. You know, yeah, that's what I remember.

Q Okay. So this is your -- your -- your best answers at the time from reviewing some other documents that had refreshed your recollection --

A Correct.

Q -- before -- before you actually gave these answers and signed verification?

A Yes.

Q Okay. And on -- the answer to this interrogatory, it says, "We had teams of 10 to 12 players on each side."

A Again, I was working --

Q "With substitutions."

A -- off a general number of 40 kids per class. You know, 40-ish. So if we had 12, that would have been a -- 48, you know, 48 kids in that particular class. Do I recall how many were in this particular class? I do not.

Q Okay. So from this, then, we assume that you could have had 10 to 12 players playing each other at one time?

A Well, again, there was kids that we -- the amount of

kids that physically played the game at one time was dictated by how many hockey sticks we had. And I believe that was anywhere from 8 to 10. I don't recall the exact number.

Q 8 to 10 per side?

A Correct. And again, divided into offense and defense, you would have four players on offense, four on defense. Divided. And two teams playing, you know, a team playing against each other.

Q So there's probably 10 on each -- enough for at least 10 hockey sticks on each team to play each other?

A Again, it could have been 8, it could have been 10. I know it was an even number.

Q Okay. Okay. And then if we go to Interrogatory No. 2, which is on page 4, it looks like your response on that one was consistent that you honestly do not recall if you actually saw Mr. Payo get hit or just saw that he was hurt after the fact?

A Yeah, that's what it says.

Q Now, there's an answer in response to No. 5. That's on page 5. It suggests that your verification says that you contributed to answering this question, providing the information?

A So your question's about Interrogatory No. 5, which says, "Did CW Woodbury Middle School require students to wear protective gear," etcetera?

Q Yes.
A Okay. So what's your question?
Q Did they require them to wear any protective gear?
A No.
Q Shin guards?
A No.
Q Helmets?
A No.
Q Goggles if they wore glasses?
A No.
Q And -- and in the answer where it says "curriculum developers," your -- is that speaking to the chair of the department at Woodbury, whoever came up with these rules?
A Again, he's the one that presented us this information. I would -- he could have played a role in the development of the curriculum, I don't know that. He's the one that presented the information to me and the other people I taught with.
Q And then it says, "There was no money in the budget for any safety equipment." Do you know why it says that?
A I don't know why it says that. I do know that we, you know, for materials, we, you know, didn't have a ton of money. I mean, when we integrated the hockey thing, I mean, it was a big deal, it was something that this -- Mr. Sontag was working on for several years to get the money in the PE

budget to buy enough equipment for both the boys' and the girls' classes.

Q And -- and there was enough money for, like, some hockey sticks, but not for any other protective equipment?

A Again, I wasn't in charge of the budget, so I don't know. I know the budgets weren't that big, that's what I know.

Q And let's turn to page 10, please. On this one it says that you assisted with the response to No. 15, that question.

A "Please take each and every fact which CCSD believes the risk of Payo's injury from the May 12th, 2004, incident are inherent to the sport of field hockey." Yeah, I don't see a response that's got my initials next to it, on this document, at least.

Q No, it's -- yeah, your initials aren't next to it, but when you look at your verification page, it has No. 15 on there.

A Okay. Oh, on page 13?

Q So on page 13. Yes.

A Yeah, I see that.

Q Okay.

A So is there a question or?

Q Sure. The -- the answer here, it says -- well, first of all, do you think that risks are inherent in the

sport of field hockey, floor hockey? Risk of injury?

A I think there's risks of injury in every -- every unit I taught, whether it's basketball or softball or physical fitness or badminton or whatever. I mean...

Q Okay. So pretty much risks of injury in any sport, you think?

A There's risks to walking down the street.

Q Okay. So -- and then it says -- the -- the response is, "The game is played with hockey sticks. The risk of coming into contact with a hockey stick cannot be eliminated with alterating [sic] the fundamental nature of the sport." I guess that makes sense, you have to have hockey sticks, right?

A Yeah.

Q Okay. Have you seen, like, hockey sticks with a softer -- you know, not the hard plastic on the bottom, but the softer ones that are available?

A No.

Q You haven't seen them?

A No.

Q And you don't know of the availability of those?

A No.

Q Okay. Are some of the -- the hockey sticks, when they're playing on floors that they're worried about getting scuffed, covered with, you know, the hard plastic with some other softer material?

A I don't know.

Q Is -- is it fair to say that -- well, is your only experience, really, with the floor hockey on the tennis courts at Woodbury?

A Yes.

Q Okay. Then it says, "And therefore, the entire object of the game, which is to use the sticks to control the movement of the tennis ball and hit the tennis ball (puck) puck into the goal."

A Yeah, again, I didn't write this.

Q Okay. But do you -- do you know why it says "tennis ball"?

A I don't.

Q Okay.

A It was about the size of a tennis ball. If that makes it -- I don't know.

Q Was it yellow or green or anything like that?

A No. It's orange.

Q And it says, "The term high sticking has been coined to reflect the known possibility of getting hit by a hockey stick." Is -- do you agree with that statement?

A Yeah.

Q "And is a term with which plaintiff was fully aware of before we started to play." Which would mean that you would have told the class --

A Again, what --

Q -- what high sticking was, right?

A Yeah. When I'm instructing the class on how to hold the stick, the whole point of doing that and being rather obsessive about doing that is so that they hold it so that, you know, it's in a manner where a hand is high and a hand is -- or a hand is high on the stick and a hand is low on the stick, that it's almost physically impossible, if you don't hold that stick like that, to -- to get it above your knee. It's very -- it's not easy to do. So, I mean, you're -- that's part of this, you know, the -- the teaching of that unit was to make sure they understood how to use a hockey stick so that it was safe.

Q Did you teach this floor hockey to sixth, seventh, and eighth graders?

A Yes.

Q And do you recall if you had more high sticking at any particular age group?

A No, I don't recall one being more than the other.

Q There's -- see that in Exhibit 10, there's what we call some requests for admissions. Now, these -- I would suggest that these are not, you know, something that you -- well, I don't know. I don't know if you had any response or help to answer those, but there's no verification page or anything signed by you. It's normally --

A I've never --
Q -- something that attorney just signs.
A Okay. I've never seen this before.
Q Okay. Was -- isn't it correct that Makani was required to participate in his PE class when you were the teacher?
A Yeah, participation was part of their grade and an expectation of everybody in the class.
Q And if they didn't participate in the class, the physical activity, they would get marked down?
A Correct.
Q Okay. And -- okay. Well, and -- and you've -- you've said that there were some formal rules of -- of hockey there, huh? Let me turn you to -- let's see where it's at. Exhibit 8, please. Okay. Could you go ahead and take a look at those, some pages in there, those pages Bates stamped 30 through 37.
A What -- oh, through 37?
Q Yes. It's, like, that entire Exhibit 8. First page is the -- it's a fax from Woodbury Middle School, and then there's a typewritten page about Woodbury's hockey unit.
A Uh-huh.
Q Do you recognize the handwriting on -- in that document, other than the first page?
A No, I do not.

Q And -- well, if you look at the first page, it says this was sent from Greg Snelling. You said you knew how Greg Snelling was, correct?

A He was the dean of students when I was first at Woodbury in 1996.

Q And then did he become the principal there or?

A I don't know. He was not the principal there when I resigned.

Q Okay. Do you recall what his position was when you resigned?

A I have no idea what his position was when I resigned.

Q So these are the hockey rules that were provided to us that were said to be used at Woodbury Middle School?

A Oh, the -- yeah. I mean, this is not my -- I mean, my unit, I mean, or a unit that, I mean, that's certainly not my handwriting. But yeah, they're very similar to the -- the rules that we utilized. Another teacher, I guess, could have written this up. I don't know when the document's from, though. I mean, when did he provide it?

Q The fax on it is February 11, 2005. So just, you know, not too much longer after you resigned from there. I guess you said in October, right, of 2004?

A Yes.

Q Okay. So these rules look similar to the same rules

that you would have been using at the same time?

A Yeah, there's -- there's similarities to them.

Q Do you notice anything that's, you know, clearly not the same rules that -- that you had?

A I guess I'd have to read it more in depth. But, yeah, I mean, from just -- you know, I've been looking at it for the last couple of minutes. It, you know, it looks similar. Again, what it looks like to me is this is a teacher's lesson plan for their particular lesson. So I don't know if they took the unit page and then added this particular teacher, you know, copies of their lesson plans or something like that. That's what it appears to be to me.

Q Does this first page, this -- it's Bates stamped on the bottom, there's a CCSD, several zeroes, and a 31. Does that first page look like the same page that you would have had?

A This is not -- I mean, not familiar to me. But, you know, in 1997 they would have probably provided us something, you know, a good high level general, Here's, you know, kind of the -- the basic tenets of hockey, you know, the hockey unit. And -- and then we would have each developed our own lesson plans utilizing that document, which probably would have looked more like the later few pages, because each teacher would develop their own, you know, lesson plan. That was our job.

Q Where would the specific -- the specific rules that were used on the exact day that Mr. -- that Makani was playing floor hockey located? Where would they have been located in February --

A In a --

Q -- of 2005?

A -- PE teacher's office, probably, when they weren't, you know, being utilized in a class.

Q Okay. You didn't, like, take them all with you when you left or something?

A No, I didn't.

Q Okay.

A Wasn't my property to take.

Q I see. Now, this one says that a team consists of six players. Would that be accurate?

A Again --

Q Says it on --

A -- it's not mine. This could be another teacher's and maybe that's the way they taught the unit.

Q Okay.

A Where -- what page does it say that on, I guess?

Q CCSD, zeroes, and then there's a 32 on the bottom.

A Yeah. Again, that's I assume a teacher at Woodbury's lesson plan. So maybe they had smaller classes after I left. I don't know.

Q Did you guys basically follow the same lesson plans according to the -- at least for, you know, the rules of the game --

A Yeah. Yeah, I mean --

Q -- court -- okay.

A -- they -- because, you know, students track from sixth to seventh to eighth grade, they didn't always have the same teachers. But, you know, the -- the rules remained, you know, constant from the unit. But, you know, different teachers made -- may have made some adaptations to their class.

Q Okay. And have you looked up any other rules about, you know, floor hockey?

A Looked them up where?

Q Well, let me tell you, why don't you turn to Exhibit 18. These are some rules that were found and apparently implemented through an intramural sports program at Rice University. And on the first page it says, "A team shall consist of five players on the floor." Are you -- are you aware of how many players should be on the floor at one time on the team?

MR. O'BRIEN: Objection, Your Honor -- Your Honor. It assumes that there's some universal requirement --

THE COURT: Sustained.

BY MR. KURTH:

Q Are you aware of how many players should be playing floor hockey on a team at one time?

MR. O'BRIEN: Objection, Your Honor. It's the same objections. It's actually the same question.

MR. KURTH: It's not related to those specific rules.

THE COURT: As long as we're not referring to Exhibit 18, I think the question's okay.

BY MR. KURTH:

Q Just referring to your actual knowledge, Mr. Petersen, from being the physical education teacher and teaching this class at Woodbury Middle School.

A Again, the number of students that participate, you know, actively in the game play was dictated by the amount of hockey sticks we had, which, again, I believe to be approximately 8 to 10. And again, and we utilized whatever our class size was and had substitutions in so that we had even teams. So I don't think there was a mandated number of players, you know.

Q Okay. Did you ever request that other safety equipment be provided for the kids to use for field hockey?

A No.

Q Okay. Thank you.

MR. KURTH: Pass the witness.

MR. O'BRIEN: I have no further questions, Your

Honor.

THE COURT: Do we have any --

MR. O'BRIEN: One more.

THE COURT: Okay. Mr. Petersen, thank you very much. You are excused as a witness.

Since he's excused, he can sit in the courtroom if he has that desire.

MR. KURTH: He's in Las Vegas. I don't know when he's leaving, but he's probably got better things to do than that. No, I don't know.

MR. O'BRIEN: I would call Joe Murphy.

JOSEPH MURPHY, DEFENDANT'S WITNESS, SWORN

THE CLERK: Please be seated.

THE WITNESS: Thank you.

THE CLERK: State your full name for the record and spell it.

THE WITNESS: Sure. Joseph Murphy, M-U-R-P-H-Y.

DIRECT EXAMINATION

BY MR. O'BRIEN:

Q Good afternoon.

A Good afternoon.

Q Mr. Murphy, are you currently employed by the Clark County School District?

A Yes, I am.

Q In what capacity?

A The title is assistant chief student achievement officer.

Q And that's an upper-level administrative position?

A Yes. I supervise 21 schools.

Q How long have you been with the Clark County School District?

A This is my 34th year.

Q Can you just generally tell the jury what sort of positions you have held during that time period?

A Sure. Spent 11 years as a classroom teacher, spent three years as a dean of student, one year as an assistant principal, 13 years as a middle school principal, and the past six in my current position.

Q During the course of your years as a high school principal, did you ever teach at Woodbury Middle School?

A I was principal at Woodbury for eight and a half years.

Q And what years did that time period encompass?

A Official date of appointment be December 1997 through January 2005.

Q Do you know -- or, in fact, you may have passed him on the way in -- did you know Todd Petersen?

A Yes.

Q Did you hire Todd Petersen?

A I did not hire Todd Petersen. That was my

predecessor, Jan Sexton Boyer [phonetic]. But I did supervise Mr. Petersen off and on during the years that I was at Woodbury.

Q And when you say you supervised him, you directly supervised him?

A Some years I directly supervised him, some years my assistant principal supervised him.

Q How does -- how did Woodbury -- and what did you do to supervise a teacher? And I'm -- I'm speaking specifically about Mr. Petersen, but in general, too.

A Sure. The -- first of all, the general protocol for supervising teachers is to meet with teachers in the early fall, September's what we shoot for, to go through really a pre-observation meeting, where we're lining -- outlining expectations for the teachers in terms of lesson planning, their particular teaching assignment, etcetera.

Subsequent to that, we would do three full-period observations. If there were no issues with the teacher, after each one of those observations we'd meet with the teacher for what we call the post-observation conference. And again, assuming no issues with the teacher, we would then take that data and use that to write the evaluation and hold the evaluation conference.

Q So are you talking about formal observations?

A Correct.

Q And what -- what do you do -- I mean, what go -- what's entailed in making a formal observation?

A Sure. A formal observation during the years that Mr. Petersen was at Woodbury involved scripting what we were observing the teachers and the students doing. And again, we were really looking for a full-period observation. Typically, about 52-55 minutes would be the class period. You would be observing for things like how did they get classes started, what is the level of supervision within the class, how well is the class structured, how well do the students with the -- under the teacher's guidance transition from activity to activity, what's the amount of off-task behavior.

Q And approximately how many occasions did you -- did you have the opportunity to directly observe Mr. Petersen?

A You know, I'm a little hesitant to give an exact number, because I would have to go back, if I could find the records, and look at which years I supervised Mr. Petersen. I do know that I supervised him, I feel very comfortable saying that I supervised him at least three of the years, so that would be nine observations.

Q And that's nine formal observations?

A Correct.

Q Do you -- excuse me.

A Excuse me. Nine formal observations, it was standard practice during my time as a building principal to do

a lot of what is referred to as management by walking around. Okay. We're not taking formal data, but we're visiting classrooms, going in, so that both the students and the teachers are comfortable with the administration coming into the classroom. And they expect it with some frequency.

Q During the times that you had the opportunity to observe formally or informally Mr. Petersen conducting a class, did you ever have any problems with him with respect to whether or not he was paying attention to what was going on?

A No.

Q Ever have any concerns about safety of the classes that he was teaching?

A No.

Q Was there -- in fact, did you ever have to discipline Mr. Petersen with respect to any attendance issues or safety issues?

A No.

Q Did you form an opinion during the time that you supervised Mr. Petersen as to his ability as a -- a teacher?

A Mr. Petersen was a solid PE teacher. I knew that the activities were going to be well-structured, that the kids were going to be well supervised in that there were going to be safety measures put into place both in the locker room for locker room supervision and during the games.

Q Had you ever heard a complaint from a parent the

entire time you were supervising Mr. Petersen about safety issues in his class?

A No, not to the best of my recollection.

Q Had you ever heard a complaint from anyone about safety issues with -- staff, teachers, children, anyone -- about Mr. Petersen with respect to safety in his classes?

A Again, I cannot recall a complaint.

Q Did you form an opinion -- oh, I already asked you that one, excuse me.

Your -- on May -- was it May 12th, 2004 --

A Okay.

Q -- were you still a principal at Woodbury High [sic] School?

A Yes.

Q Were you aware of the incident involving Mr. Payo being hit by a hockey stick?

A You know, in terms of our procedures, that would have been reported to the health office. If it had been a significant incident where there was, you know, we would get radio calls of student down, need to call paramedics, at that point I would have been aware of that.

Following the procedure -- it would have been handled through the health office -- an accident report would have been completed, I would have been made aware of it when I signed off on that accident report.

Q Do you remember signing off on an accident report involving Mr. Payo?

A I know that I did sign off on the accident report. To say that I would have had instant recollection without reviewing, no.

Q Okay. That's my next question, would it help you to review that -- that document?

A Absolutely.

Q That's Exhibit no. 8, I think.

MR. KURTH: I think it's 2. I think it's 2.

MR. O'BRIEN: Yeah. Yeah, 2. Excuse me.

BY MR. O'BRIEN:

Q Do you have Exhibit 2 in front of you? There's an exhibit book there.

A All right.

Q If you would please take a look at that, take a minute to familiarize yourself with that, and then I'll ask you a question on it. Let me know when you're ready, please.

(Pause in proceedings.)

A Okay.

Q Do you -- do you -- now, having seen that document, do you recall that, signing that document?

A It's clearly my signature. Do I have photographic memory of this specific incident? No, I can't tell you that I have that.

Q Okay. In light of the date of the accident, at the bottom it says it was submitted to you on May 13th, 2004, what would been -- have been your custom or practice, would you sign it that same day?

A Once it's submitted to me, that's actually my handwriting on the date, so that is the date that it was processed through my office. Typically, the accident report is completed by the FASA, submitted to the office manager, and then it's part of my, you know, part of my regular routine as I go through and review documents that I need to eventually sign off on and approve.

Q Okay. So you signed off on this on the next -- the day after the incident?

A Correct.

Q Did anybody provide you with any information about -- other than what's in this form, about the accident?

A No.

Q Were you ever contacted by the parent or the student about this accident?

A You know, I'm -- I'm going to have to tell you that I don't recall that happening. But this is quite a -- quite a while ago.

Q Thank you. Was there anything about -- that you read on this report or that you read on this report that would have caused you to think that Mr. Petersen might have done

something wrong?

A No. I mean, as -- as I read it, it is, you know, we're never happy when we have a student experiencing discomfort, but there wasn't something that jumped out at me that there was an egregious injury, egregious error. It looks like something that I would expect to come through our health office.

Q During the entire time that you were -- well, during your entire career with the Clark County School District, have you ever been made aware of any serious injury resulting to a -- a middle-school player playing floor hockey?

MR. KURTH: Objection, foundation. And...

THE COURT: Overruled.

THE WITNESS: Okay. No, I'm not aware of any. Field hockey to me, as I observed it at Woodbury, was a -- was a recreational activity. Trying to develop kids' motor skills. But I -- I really saw it as just another PE activity. It's something that I continue to observe occurring on middle school campuses as I supervise the schools that I do -- I do now.

BY MR. O'BRIEN:

Q Are you aware of any middle school in the Clark County School District that provides safety equipment, such as helmets or goggles, to students playing this -- or participating in this activity?

A No.

Q Are you aware of any -- any middle school anywhere that provides that sort of safety equipment to middle school students playing floor hockey?

A You know, I'm able to speak directly to Clark County School District, and I'm not aware of a school in Clark County that provides that equipment.

Q Thank you.

MR. O'BRIEN: That's all I have, Your Honor.

CROSS-EXAMINATION

BY MR. KURTH:

Q Mr. Murphy, are you -- are you familiar with the rules of floor hockey that were developed to be used at Woodbury Middle School?

A I'm sure that I reviewed them 11 years ago. You know, that's something that we would expect in the activity, that there would be a set of rules, guidelines for kids. We would also expect that there is going to be a little bit of skill instruction.

Q And was it your practice as the principal of Woodbury during that time to -- that the PE department would provide these rules of the games of the activities they were going to be going over to the kids to take home to review with their parents?

A Not for every single activity, no. They would send

home what are called course expectations. But beyond that, you know, the rules for every individual activity, that was not an expectation or a protocol.

Q Would it be the protocol for the rules of this activity to just be in the gym for somebody to look at if they wanted to?

A Yeah, I'm not sure that I understand your question.

Q Well, my understanding is that these rules were available if somebody wanted to review them in the gym, or maybe the PE office, if there was a PE office at Woodbury.

MR. O'BRIEN: Your Honor --

MR. KURTH: He said the gym. So.

MR. O'BRIEN: Your Honor, if I may object. It's somewhat vague, these rules. Is he talking about specific rules or just rules in general?

THE COURT: When he says these, I'm assuming he's talking about the floor hockey rule. But you can certainly clarify.

MR. KURTH: Sure, Judge.

BY MR. KURTH:

Q There's -- let's see. Mr. Murphy, that notebook in front of you there --

A Sure.

Q Respectfully, could you turn to Exhibit 8, please, for me.

A Okay.

Q Okay. Thank you. Are you familiar with who Greg Snelling is?

A Yes, I am. He's the gentleman that followed me when I left to open the new school.

Q Okay. And are you familiar with Eileen Wheelan?

A Excuse me?

Q Eileen Wheelan?

A No.

Q Okay.

A I may -- I may be and the name's not clicking with me right now. But...

Q Well, she's sitting right here. Are you familiar with the gal sitting at the school district table?

A Okay. No.

Q Okay. Okay. So Greg Snelling took over as you -- principal at Woodbury, then?

A Correct.

Q Okay. And these look like they were faxed. We've determined they appear that they were faxed to the risk management department of CCSD on or about February 11th, 2005. When did you stop being the principal there?

A May -- or, I'm sorry, trying to remember the effective date, but I'll --

Q Just somewhere general --

A -- I'll call it --
Q -- that's okay.
A -- yeah. Mid --
Q I'm not holding you to that.
A Mid -- mid-January 2005.
Q Okay. So somewhere soon to this date, then?
A Correct.
Q Okay. And if -- if when you were the principal at Woodbury and a request came over to you from the risk management department to provide the -- the rules for floor hockey at Woodbury, how would you go about to get those rules?
A I would ask for the teacher to give to me the materials that they're using for that particular unit. Okay, that would be something I would expect to see attached to teacher lesson plans.
Q Okay. Sure. Sure. Because the teacher lesson plans have to be approved at some time by the principal?
A They're reviewed periodically.
Q Sure. Okay. And that's part of your supervision, right, that you talked to before about nine formal times, maybe, would be like reviewing lesson plans, too?
A No. Those -- well, the observations are actual in-the-classroom observations.
Q Okay.
A Lesson plan reviews are supplemental to that. I can

request lesson plans at any point in time.

Q Okay. So what's your position now at the school district, sir?

A It's assistant chief student achievement officer.

Q And what do you do in that position?

A Supervise 21 principals and evaluate the operations of their schools.

Q Okay. So if a -- a principal in the school, like Greg Snelling, when he took over from you, if he received this request for these rules and he provided them, would you think that he was providing the rules that they were using in that particular, you know, for floor hockey at that time?

A I think he's providing the rules that the teacher made available to him. He has, you know, at that point he's going on this is what the teacher says we're using, great, this is what we're using.

Q Okay. That's fair. Do you know if, in floor hockey at Woodbury, if they were supposed to play five against five or six against six or anything like that?

A I couldn't answer with that level of specificity at this point.

Q Do you recall supervising -- or do you recall where these floor hockey games were taking place at Woodbury Middle School?

A You know, what I can answer is typically they will

take place on the tennis courts, outdoors. And I say typically. I did observe them in that setting at Woodbury at times. I've seen them at the middle schools I supervise now, at times. There is a possibility that the activity could be brought into the interior gym. Okay. Can I say with any specificity, you know, what was occurring on that particular date? I don't have that recollection.

Q Okay. During that time, when you were at Woodbury Middle School around 2004, do you recall observing any floor hockey games?

A Certainly observed it in the course of being on the campus. Whether that was the subject of a formal classroom observation or not, that I -- I can't recall that.

Q Do you recall if you observed more than eight players playing against more than eight players at one time?

A Again, I can't recall that at this point.

Q Are you familiar with what equipment is recommended for students to use in participating in the game of floor hockey?

A The equipment that we see at the middle schools, two goals constructed of PVC and nets and plastic hockey sticks and the tennis ball.

Q Tennis ball?

A I believe it's a tennis ball.

Q Okay. And are you familiar with -- I -- I

appreciate that response, Mr. Murphy. Are you familiar with any recommended safety equipment for this activity of floor hockey?

A No, I am not.

Q Okay. Are you familiar with the training that a first aid safety assistant is -- or was required to have in 2004, such as Wally Morton, at the time this incident occurred?

MR. O'BRIEN: I'm going object, Your Honor. This exceeds the scope of direct.

MR. KURTH: I think he --

MR. O'BRIEN: A whole new area. He didn't name his -- Mr. Murphy as his witness.

MR. KURTH: He -- Mr. O'Brien asked Mr. Murphy about how it's handled when an injury occurs. And he said mostly it goes to the FASA.

THE COURT: The objection is overruled.

MR. KURTH: Thank you, Judge.

THE WITNESS: So the training would be a standard district protocol. There's certain certifications the FASAs or people being considered for the FASA position need to have to get into the qualified selection pool. Things like first aid training, CPR training, those kinds of things. Additionally, they would probably receive -- I'm saying probably, because I'm going on recollection -- training, and

they have to pass a quiz to be able to -- quiz, test -- to be able to dispense medication.

BY MR. KURTH:

Q And -- and this is the training you're talking about that would have been at the time when you were the principal at Woodbury?

A That would be the standard -- the standard certifications they'd look to even consider for -- a person for eligibility to be hired as a FASA. The District always provides additional trainings after the point of hire.

Q Do you know if a FASA has to be an EMT-1 or EMTI or anything like that?

A I can't -- I can't answer that concrete -- or absolutely.

Q Do you know if the certification process has changed for a FASA since 2004?

A I can't answer that directly.

Q Okay. Now, at that time when you're the principal at Woodbury in 2004, did you have a school nurse that was assigned to Woodbury?

A Probably two days a week.

Q Okay.

A Okay, yeah, I mean --

Q That be a good week?

A It's a position that's divided among multiple

schools.

Q At that time, do you know how many schools you were sharing a school nurse with?

A I can't answer that. Long time ago.

Q Are they -- is the school district still, you know, sharing nurses among various schools?

A Absolutely. And we have a shortage. So we divide them up even more than we did then.

Q Do you know what the ratio is now?

A No, I don't.

Q Do you know back then in 2004, was the ratio, like, one to three schools, or four or five, or do you have any idea?

A I can't give you a concrete ratio.

Q Okay. Thank you very much for your time. Appreciate it.

A Okay.

MR. O'BRIEN: No further questions, Your Honor.

THE COURT: Any questions from the jury? Okay. Mr. Murphy, thank you very much for your time.

You're excused as a witness.

THE WITNESS: All right. Have a good day, have a good weekend.

THE COURT: Thank you.

MR. O'BRIEN: I'm going to address the judge first,

if I may.

THE COURT: You certainly may.

MR. O'BRIEN: Given the hour and the fact that I expect this witness may take a little longer --

THE COURT: That is fine.

MR. KURTH: Okay.

THE COURT: Go ahead.

MR. KURTH: No, I agree, Judge.

THE COURT: Okay. We're approaching 5:00 and the Court and the attorneys actually have a few items to discuss, as well. So we're going to -- to break for the weekend. I do have a -- a full hearing calender Monday morning. So we will meet back here at 10:30, like we did the -- the other day. So don't show up at 9:00, unless you want to watch real fun hearings. But be back Monday morning at -- at 10:30.

I know you're probably tired of hearing these, but, okay.

Ladies and gentlemen, we're going take a weekend recess. During this recess, you're admonished not to talk or converse amongst yourselves or with anyone else on any subject connected with this trial, or read, watch, or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information including, without limitation, newspapers, television, radio, or the Internet, or form or express any opinion on any subject

connected with the trial until the case is finally submitted to you.

Have a good weekend. We'll see you back Monday morning at 10:30. Thank you.

(Jury recessed at 4:40 p.m.)

THE COURT: Some --

THE CLERK: Settling jury instructions, it seems like that [indiscernible].

THE COURT: So settling when I discuss them with them is off the record?

THE CLERK: Yeah. I mean, you can do it on the record or off the record. Most of the time it's really not reported or recorded. It's when they're finalized and they come back and put everything you want once it's finalized. But generally the negotiations [indiscernible].

MR. KURTH: Are we on the record now?

THE COURT: Yes.

MR. KURTH: As far as jury instructions you're talking about?

THE CLERK: Uh-huh.

MR. KURTH: Well, I know that if there's specific --

THE COURT: Disputes.

MR. KURTH: On the disputed ones, I would say then we would come back on the record and then --

THE CLERK: [Indiscernible.]

MR. KURTH: -- put that --

MR. O'BRIEN: Yeah.

MR. KURTH: -- on the record.

MR. O'BRIEN: The -- the discussions where we try to figure out which ones we can agree on are off the record. Then we come back and make a record about the ones we don't agree on. Isn't that -- that's what I --

THE COURT: That's --

THE CLERK: [Indiscernible.]

MR. KURTH: Sure.

THE COURT: The Court does, as well. So I think we're all on the same page.

THE CLERK: [Indiscernible.]

THE COURT: No, no, no. Hold on. Hold on. Mr. O'Brien, who are you going to be calling Monday?

MR. O'BRIEN: Waleska Morton.

THE COURT: Okay. Aka Wally?

MR. O'BRIEN: Wally, yes.

THE COURT: Okay. I have gone through the agreed upon -- those are, you know, if you agree on them, the Court doesn't have any problems or issues. If you both have the proposed but objected ones, what I was kind of thinking might be helpful for you in your spare time over the weekend is to have kind of my initial thoughts on them.

MR. KURTH: Sure.

THE COURT: And, you know, then -- then we can maybe go through them in more detail on Monday. If you have a few minutes right now?

MR. KURTH: Sure. Is there a set that says proposed by defendant, objected by defendant? Or is this them?

MR. O'BRIEN: That's them.

MR. KURTH: Okay.

MR. O'BRIEN: And I have somehow misplaced the ones that --

THE COURT: The proposed by plaintiff?

MR. O'BRIEN: Proposed.

MR. KURTH: Well, these ones here, I have them right here. So we can -- isn't that them?

MR. O'BRIEN: No, these are -- I ended up with two of the agreed upon.

MR. KURTH: Okay. There's, like, three of these, though. I've got, like, three.

MR. O'BRIEN: Okay. I know I made enough for everybody.

MR. KURTH: It looks like -- yeah, I'm glad there's not so many, then. I was, like, holy cow.

THE COURT: So I have an agreed upon that I don't think we need to go over. And then I have a proposed by plaintiff, objected by defendant, and a proposed by defendant, objected by plaintiff.

MR. O'BRIEN: Yes, Your Honor.

MR. KURTH: Yes.

MR. O'BRIEN: That's what I've got.

THE COURT: Okay. Since -- let's go through the short one first, which is proposed by plaintiff, objected by defendant.

The P8 is the insurance instruction. We will definitely need, I think, anyway, an insurance instruction, given the -- the questions, you know that we've received written from the jury.

MR. O'BRIEN: Defendant agrees, Your Honor. We withdraw our objection.

THE COURT: Okay.

MR. O'BRIEN: Because of what has transpired since we objected.

THE COURT: The Court appreciates that. So we'll move right now we can move P8 over to the agreed upons.

Next one I have is P16, that talks about expert opinions.

MR. KURTH: I don't think we've really had any expert -- we haven't had any expert witnesses. So probably -- those next two instructions probably shouldn't be in.

THE COURT: Yeah. Thank you.

MR. KURTH: Maybe not the hypo -- I don't know about the hypothetical -- not the hypothetical question, either,

then. Because that was really related to expert witnesses.

THE COURT: Yeah. Yeah, exactly. So those three, I guess the only caveat might be if Dr. Carr maybe --

MR. KURTH: I don't think that's going to happen.

THE COURT: Okay. So for now we'll -- we'll keep those out. Then the next I have is P25. I will need to see the order referred to there dated 5/11/2015. Don't need to see it right now. But if you could bring a copy on Monday, I don't know if that's what the order says.

MR. KURTH: What --

THE MARSHAL: I'm sorry, Your Honor. I need to interrupt for a minute.

Can I cut your witness loose and tell her to be back on 10:30 or do you need to talk to her?

MR. O'BRIEN: I'll need to talk to her for a minute.

THE MARSHAL: Okay.

MR. O'BRIEN: Thank you.

THE MARSHAL: I just didn't want her sitting out there [indiscernible].

THE COURT: Oh, yeah. Yeah. Do you want to go tell her to wait around a few minutes real quick?

MR. O'BRIEN: If it's all right with the Court, sure.

THE COURT: That's fine.

MR. O'BRIEN: Thank you.

(Pause in proceedings.)

MR. O'BRIEN: Thank you, Your Honor.

THE COURT: No problem at all. Apart from the order, the instruction seems more of an -- an argument type of closing argument rather than a jury instruction.

MR. KURTH: Well, there is an -- well, right. There is an instruction, Judge. I think our -- the dispute that we were having is on this whole inherent risk part. Because there's definitely a -- I mean, a ruling that there's a duty. And that the school district admitted that -- and has -- that the student could be injured while playing this, that they knew that.

THE COURT: Well, and -- and again, I --

MR. KURTH: Even in the interrogatory responses.

THE COURT: You're certainly welcome to -- to bring the order --

MR. KURTH: Okay.

THE COURT: -- that you're referring to there. I don't recall making that order. But again, it seems to me subject to -- like I said, I -- I just want to try and go through these quick so you have my thoughts for the weekend. Seems to me to be more argument and not a proper instruction. But welcome additional input on Monday.

MR. KURTH: Okay. Okay, Judge.

THE COURT: P26, I don't see a problem with. That

would be kind of -- seems like the stock negligence instruction.

P28, welcome input from defense on Monday. It looks, you know, okay to me, but I welcome input.

MR. O'BRIEN: The only input, and just very brief --

THE COURT: Sure.

MR. O'BRIEN: -- is the last two words. It says "district is liable [indiscernible]."

THE COURT: Yeah. I have --

MR. O'BRIEN: [Indiscernible.]

THE COURT: Oh, okay. That's your hand -- I was going to say --

MR. KURTH: Yeah.

THE COURT: -- my copy has plaintiff's injuries crossed out and written his conduct in there.

MR. O'BRIEN: Yes. It's still proximate cause. I mean, this skips a step in the negligence chain.

THE COURT: And so there's -- I'm fine with his conduct. But Mr. Kurth, if you want to discuss keeping it as it is, that's fine, too. We can discuss that on Monday.

MR. KURTH: Okay.

THE COURT: P29 I don't see a problem with. But welcome input from -- from the school district, and same with P32.

MR. O'BRIEN: There's no issue there, though, Your

Honor. We haven't challenged the medical records.

THE COURT: I'm sorry, I couldn't hear you.

MR. O'BRIEN: I'm sorry. There's no issue there. Plaintiff has the right to rely -- where's -- where's the issue on it? We haven't objected to the -- any of the treatment or reasonableness or necessity of the treatment.

MR. KURTH: Yeah, normally I would -- I would agree with that. Because it's usually the low impact cases. But there is an issue in this case, which I think is reflected throughout the testimony, of that the length of time in waiting for him to see Dr. Carr.

THE COURT: Yeah. I tend to agree with Mr. Kurth on that point, but welcome more input on Monday.

Going to proposed by defendant, I'm okay with the first one regarding governmental entity.

MR. KURTH: I don't -- I just don't like the word -- I don't like the term governmental entity. I know we talked about that if --

THE COURT: Well, think of over the weekend if you have a term you want to insert there --

MR. KURTH: Okay.

THE COURT: -- that you both could agree on.

MR. KURTH: Right.

THE COURT: The wilfully suppressed instruction.

MR. O'BRIEN: There's actually two of them, Your

Honor. And they're slightly different.

THE COURT: Oh, yeah, yeah.

MR. KURTH: The governmental entity ones?

THE COURT: No, there's -- yeah.

MR. O'BRIEN: Presumption.

THE COURT: There's one that says presume that it's adverse, and then one that says you can infer, but you're not bound by the inference. I welcome argument regarding whether evidence has been shown that it was wilfully suppressed on Monday. That one will take some time. So let's go to the next one.

Next one I have is a request for admission, is the truth being conclusive. I don't have a problem with that one.

MR. KURTH: I have, like, a million. I must just have extra copies of these.

MR. O'BRIEN: We've got withs and without.

MR. KURTH: Oh, okay.

MR. O'BRIEN: That's why.

MR. KURTH: Both parties served each -- yeah, because we didn't -- I don't think we had one of those formally in the other one. So we just have to change the served PM. It must be served on, right?

THE COURT: Well, yeah. Let's talk -- the next one, proximate cause I think would be covered by the ones that -- that plaintiff provided. The next one's on substantial

negligence. Welcome discussion on that.

And, sorry, we're getting to the very end of the day, so I'm going to kind of rush here.

MR. KURTH: Okay.

THE COURT: Yeah. Substantial evidence, I have questions about that, whether that's proper.

Conform to custom, not sure about that. Instruction alone seems fine. But not sure.

MR. O'BRIEN: Did you skip one, Your Honor? I'm --

THE COURT: No, no. I'm hurrying.

MR. KURTH: No, he --

THE COURT: I apologize. We can -- we can go through more on Monday. These are to hopefully give you some idea.

Next is sports activity failure to provide safety equipment does not increase risk. That seems kind of like the argument on the other side.

The assumption of risk, I'm not sure that's proper or not. But welcome input.

MR. KURTH: Yeah, I don't --

THE COURT: Next is comparative negligence. Like to know how is modified from the stock instruction.

MR. O'BRIEN: Just that it has his name in it instead of...

THE COURT: And mitigating damages, there is an

issue of that that's been presented. So the minor, that's, you know, I'll have to do my research on that one, I think.

Those are my thoughts, so thank you very much and we'll see you Monday morning.

MR. O'BRIEN: Thank you, Your Honor.

MR. KURTH: Thank you, Your Honor.

(Court recessed for the evening at 4:57 p.m.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MAKANI KAI PAYO,

Plaintiff,

vs.

CLARK COUNTY SCHOOL DISTRICT; DOE CLARK COUNTY SCHOOL DISTRICT EMPLOYEES I-V; DOES I-V and ROE COMPANIES I-V, inclusive,

Defendants.

Case No. A-12-668833-C
Dept. XV

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PLAINTIFF'S TRIAL BRIEF RE: THE STATUTORY CAP ON DAMAGES PER NRS 41.035

COMES NOW the Plaintiff, MAKANI KAI PAYO ("MAKANI"), by and through his counsel, Robert O. Kurth, Jr, of the KURTH LAW OFFICE, and hereby submits his Trial Brief Re: the Statutory Cap on Damages per NRS 41.035.

I. STATEMENT OF FACTS

On or about May 12, 2004, the Plaintiff MAKANI KAI PAYO ("MAKANI") was an 11 year old minor child and 6th grade student attending C.W. Woodbury Middle School in Clark County, Nevada. The Defendant, CLARK COUNTY SCHOOL DISTRICT ("CCSD"), is a political subdivision of the State of Nevada or other governmental entity, whose purpose is to

administer the state system of public education. C.W. Woodbury Middle School is a school located within the CCSD. MAKANI was injured on May 12, 2004, while attending his physical education class, where he was required to participate and play field / floor hockey (hereinafter referred to as either "field" or "floor" hockey). MAKANI commenced treatment for his injuries and needs additional treatment as of today per his visit with Dr. Tyree Carr, M.D. on or about January 21, 2015. Prior to that visit, MAKANI had a traumatic cataract removed and a crystalens put in his left eye in or around July and August of 2007, as a result of the injuries sustained on May 12, 2004.

Defendant CCSD disputes liability and claims if they are liable, the statutory cap on damages to be applied per NRS 41.035 should be as of the initial date of the incident of May 12, 2004, when the cap was $50,000.00. Further, the Defendant CCSD claims that if MAKANI prevails, he can only be awarded one cap amount for one claim against the Defendant CCSD. MAKANI disputes such and does not believe that is the current status of Nevada law, or that the matter has been specifically decided by the Nevada Supreme Court.

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II. ARGUMENT & ANALYSIS

1. Is Plaintiff's MAKANI's recovery limited to a maximum of $50,000.00 pursuant to NRS 41.035, including special and general damages?

NRS 41.035 Limitation on award for damages in tort actions provides:

1. An award for damages in an action sounding in tort **brought** under NRS 41.031 or against a present or former officer or employee of the State or any political subdivision, immune contractor or State Legislator arising out of an act or omission within the scope of the person's public duties or employment may not exceed the sum of $100,000, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages.

2. The limitations of subsection 1 upon the amount and nature of damages which may be awarded apply also to any action sounding in tort and arising from any recreational activity or recreational use of land or water which is brought against:

(a) Any public or quasi-municipal corporation organized under the laws of this State.

(b) Any person with respect to any land or water leased or otherwise made available by that person to any public agency.

(c) Any Indian tribe, band or community whether or not a fee is charged for such activity or use. The provisions of this paragraph do not impair or modify any immunity from liability or action existing on February 26, 1968, or arising after February 26, 1968, in favor of any Indian tribe, band or community.

The Legislature declares that the purpose of this subsection is to effectuate the public policy of the State of Nevada by encouraging the recreational use of land, lakes, reservoirs and other water owned or controlled by any public or quasi-municipal agency or corporation of this State, wherever such land or water may be situated.
(Added to NRS by 1965, 1414; A 1968, 44; 1973, 1532; 1977, 985, 1539; 1979, 1736; 1987, 543; 1995, 1073; 2007, 3024, 3025)

When reviewing the legislative history, Chapter 512 of Assembly Bill No. 483 per **2007 Statutes of Nevada, Page 3025 (Chapter 512, AB 483)** provides:

Section 3.3 of this bill increases the limitation on the amount of damages that may be awarded in a tort action brought against a governmental entity or its officers or employees from $50,000 to $75,000. (NRS 41.035) **Section 6** provides that **this increase becomes effective on October 1, 2007, and expires by limitation on October 1, 2011**. **Section 3.5** of this bill increases that limitation on the amount of damages to $100,000 effective on October 1, 2011.

Sec. 3.3. NRS 41.035 is hereby amended to read as follows:
41.035 1. An award for damages in an action sounding in tort brought under NRS 41.031 or against a present or former officer or employee of the State or any political subdivision, immune contractor or State Legislator arising out of an act or omission within the scope of his public duties or employment may not exceed the sum of ~~[$50,000,]~~ **$75,000,** exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages.

2. The limitations of subsection 1 upon the amount and nature of damages which may be awarded apply also to any action sounding in tort and arising from any recreational activity or recreational use of land or water which is brought against:
(a) Any public or quasi-municipal corporation organized under the laws of this State.
(b) Any person with respect to any land or water leased or otherwise made available by that person to any public agency.
(c) Any Indian tribe, band or community whether or not a fee is charged for such activity or use. The provisions of this paragraph do not impair or modify any immunity from liability or action existing on February 26, 1968, or arising after February 26, 1968, in favor of any Indian tribe, band or community.
The Legislature declares that the purpose of this subsection is to effectuate the public policy of the State of Nevada by encouraging the recreational use of land, lakes, reservoirs and other water owned or controlled by any public or quasi-municipal agency or corporation of this State, wherever such land or water may be situated.

Sec. 3.5. NRS 41.035 is hereby amended to read as follows:
41.035 1. An award for damages in an action sounding in tort brought under NRS 41.031 or against a present or former officer or employee of the State or any political subdivision, immune contractor or State Legislator arising out of an act or omission within the scope of his public duties or employment may not exceed the sum of ~~[$75,000,]~~ **$100,000,** exclusive of interest computed from the date of judgment, to

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or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages.

2. The limitations of subsection 1 upon the amount and nature of damages which may be awarded apply also to any action sounding in tort and arising from any recreational activity or recreational use of land or water which is brought against:

(a) Any public or quasi-municipal corporation organized under the laws of this State.

(b) Any person with respect to any land or water leased or otherwise made available by that person to any public agency.

(c) Any Indian tribe, band or community whether or not a fee is charged for such activity or use. The provisions of this paragraph do not impair or modify any immunity from liability or action existing on February 26, 1968, or arising after February 26, 1968, in favor of any Indian tribe, band or community.

The Legislature declares that the purpose of this subsection is to effectuate the public policy of the State of Nevada by encouraging the recreational use of land, lakes, reservoirs and other water owned or controlled by any public or quasi-municipal agency or corporation of this State, wherever such land or water may be situated.

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There is no specific case on point of authority in Nevada concerning this matter. The Defendant CCSD cites *Las Vegas Metropolitan Police Department ("LVMPD") v.* Yeghiasarian, 312 P.3d 503, 129 Nev. Adv. Op. No. 81. This case concerns an Estate of a deceased person, who filed a wrongful death action against the LVMPD. One issue concerned whether the damages should be assessed and then reduced for any comparative negligence prior to getting to the cap or from the cap. The Court determined that they are assessed prior to getting to the cap. The case did uphold a statutory cap of $50,000.00, which was awarded per claimant, but did not state when the death occurred, and did not state that anyone ever argued or claimed that the cap should have been increased to $75,000.00.

The Defendant CCSD also cites CCSD v. Richardson Constr. Co., Inc., 123 Nev. 382, 168 P.3d 87 (2007) for the proposition that MAKANI can only be awarded the statutory cap once. The Court stated that claim means cause of action and not each instance of the wrong. The Court goes on to state that they did not hold but discussed in County of Clark v. Upchurch a "per incident or occurrence" standard for damages under NRS 41.035. Richardson Construction was trying to get $50,000.00 per claim of tortious interference and there was only one claim, which was tortious interference. This is inapposite to the case at hand.

The Complaint in this matter was filed September 21, 2012. MAKANI is claiming

two separate causes of action: 1. Negligence and 2. Negligent Supervision. Therefore, MAKANI should be entitled to the cap on damages for each claim / cause of action if proven. Further, the statutory cap should apply from the date of filing in the interest of fairness and statutory interpretation. As shown herein, the current version of NRS 41.035 states "An award for damages in an action sounding in tort **brought"; not tort occurred, which would imply the date the action was filed, or "brought"**. The Nevada Legislature could have easily said date of incident or injury, but chose not to state such. Consequently, the statutory cap on damages should be $100,000.00 per claim. Moreover, there is a plethora of law and the Court can take judicial notice that the wording of the statute should be given the most effect in determining its intent and the intent of the Legislature.

DATED this 29th day of May, 2015.

Respectfully Submitted by,
KURTH LAW OFFICE

/s/Robert O. Kurth, Jr.
ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Plaintiff MAKANI

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of May, 2015, I electronically served via Electronic Service in accordance with EDCR 8.05, the foregoing Plaintiff's Trial Brief to:

CLARK COUNTY SCHOOL DISTRICT
Office of the General Counsel
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Las Vegas, NV 89146
Attorneys for Defendant

/s/ Robert O. Kurth, Jr.
An employee of **KURTH LAW OFFICE**.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT, Appellant, v. MAKANI KAI PAYO, Respondent.	No.: 68443 District Court Case No.: A-12-668833-C District Court Dept. No.: XV (Hon. Joe Hardy)

APPELLANT'S APPENDIX

VOLUME VII

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Docket 68443 Document 2015-40175

ALPHABETICAL INDEX

Volume / Page

Bugay v. Clark County School District, 2014 Nev. Unpub. LEXIS 1921 (2014) ..... I / 0154-0160

12-10-2013 Clark County School District's Answer to Makani Kai Payo's First Amended Complaint ..... I / 0099-0106

03-10-2015 Clark County School District's Answer to Makani Kai Payo's Second Amended Complaint ..... II / 0343-0351

07-15-2015 Clark County School District's Case Appeal Statement ..... IX / 1632-1635

07-15-2015 Clark County School District's Notice of Appeal ..... IX / 1636-1638

07-20-2015 Clark County School District's Notice of Appeal Filed in Supreme Court ..... IX / 1639-1726

04-08-2015 Clark County School District's Notice of Motion and Motion for Summary Judgment ..... III / 0355-0483

06-10-2013 Clark County School District's Notice of Motion and Motion to Dismiss ..... I / 0014-0044

01-28-2015 Clark County School District's Notice of Motion and Motion to Strike Makani Kai Payo's Damages Calculation or, in the alternative, Motion in Limine ..... II / 0285-0298

05-13-2015 Clark County School District's Offer of Judgment to Makani Kai Payo ..... IV / 0701-0702

01-22-2014 Clark County School District's Opposition to Makani Kai Payo's Request for Exemption from Arbitration ..... I / 0110-0117

05-08-2015 Clark County School District's Pre-Trial Memorandum ..... IV / 0660-0672

02-23-2015 Clark County School District's Reply to Makani Kai Payo's Opposition to Clark County School District's Motion to Stike Makani Kai Payo's Damages Calculation and Motion in Limine ..... II / 0314-0331

05-05-2015 Clark County School District's Reply to Opposition to Motion for Summary Judgment and Opposition to Countermotion for Summary Judgment ..... IV / 0644-0659

07-10-2013 Clark County School District's Reply to Opposition to Motion to Dismiss ..... I / 0055-0068

09-16-2015 Clark County School District's Request for Transcripts of Proceedings ..... IX / 1728-1730

02-13-2015 Clark County School District's Response to Makani Kai Payo's First Set of Interrogatories ..... IX / 1733-1748

04-08-2015 Clark County School District's Responses to Makani Kai Payo's Subpoena Duces Tecum ..... II / 0352-0354

05-26-2015 Clark County School District's Trial Brief.....IV / 0738-0757

05-28-2015 Clark County School District's Trial Brief on the Issue of the Amount of the Statutory Cap on Damages Applicable to Makani Kai Payo's Case under NRS 41.035.....V / 0967-0969

02-07-2014 Commissioner's Decision on Request for Exemption - Granted.....I / 0118-0119

09-21-2012 Complaint for Negligence.....I / 0001-0009

04-16-2015 Deposition of Eileen Wheelan.....III / 0492-0578

01-22-2015 Deposition of Makani Kai Payo.....II / 0180-0284

05-13-2015 Errata to Clark County School District's Pre-Trial Memorandum.....IV / 0703-0718

04-17-2014 First Amended notice of 16.1 Case Conference.....I / 0123-0125

07-21-2014 Joint Case Conference Report.....I / 0126-0143

05-22-2015 Joint Pre-Trial Memorandum.....IV / 0726-0737

06-16-2015 Judgment Upon Jury Verdict.....VIII / 1608-1609

06-02-2015 Approved and Given Jury Instructions.....VIII / 1546-1588

06-02-2015 Jury Instructions (Objected to and Not Given)
- Inherent Risk.....VIII / 1589
- Assumption of Risk.....VIII / 1590
- Minor cannot collect past medical damages.....VIII / 1591
- Offered but objected.....VIII / 1592

01-15-2015 Makani Kai Payo's, Answers to Clark County School District's Interrogatories.....I / 0161-0178

08-25-2014 Makani Kai Payo's Demand for Jury Trial.....I / 0147-0148

10-14-2013 Makani Kai Payo's First Amended Complaint.....I / 0092-0098

02-13-2015 Makani Kai Payo's Opposition to Clark County School District's Motion to Strike Makani Kai Payo's Damages Calculation and Motion in Limine.....II / 0299-0313

04-27-2015 Makani Kai Payo's Opposition to Motion for Summary Judgment, and Counter-Motion for Summary Judgment.....IV / 0580-0643

07-01-2013 Makani Kai Payo's Opposition to Motion to Dismiss.....I / 0045-0054

01-14-2014 Makani Kai Payo's Request for Exemption from Arbitration.....I / 0107-0109

03-05-2015 Makani Kai Payo's Second Amended Complaint.....II / 0336-0342

05-26-2015 Makani Kai Payo's Trial Brief.....IV / 0758-0769

05-29-2015 Makani Kai Payo's Trial Brief Re: The Statutory Cap on Damages Per NRS 41.035.....VII / 1380-1384

05-13-2015 Minutes from Court (Hon. Joe Hardy) re: Calendar Call.....IV / 0719

05-11-2015 Minutes from Court re: Clark County School District's Motion for Summary Judgment.....IV / 0674-0675

07-15-2013 Minutes from Court re: Clark County School District's Motion to Dismiss.....I / 0069

03-03-2015 Minutes from Court re: Clark County School District's Notice of Motion and Motion to Strike Makani Kai Payo's Damages Calculation or, in the alternative, Motion in Limine.....II / 0334-0335

09-03-2014 Minutes from Court re: Re-opening the Case.....I / 0149

05-08-2015 Minutes from Court (Hon. Bonnie Bulla) re: Status Check: Compliance.....IV / 0673

04-17-2015 Minutes from Court (Hon. Bonnie Bulla) re: Status Check: Status of Case/Trial Date.....III / 0579

03-07-2014 Notice of 16.1 Case Conference.....I / 0120-0122

06-17-2015 Notice of Entry of Judgement (Judgement Upon Jury Verdict).....IX / 1628-1631

05-20-2014 Notice of Entry of Order (Order Denying Motion).....

05-20-2015 Notice of Entry of Order (Order Denying Motions For Summary Judgment) .....IV / 0722-0725

08-22-2013 Notice of Entry of Order (Order Granting in Part and Denying in Part Clark County School District's Motion to Dismiss).....I / 0086-0091

04-14-2015 Notice of Entry of Order (Order Granting in Part and Denying in Part Clark County School District's Motion to Strike Makani Kai Payo's Damages Calculation or, in the Alternative, Motion in Limine.....III / 0487-0491

06-17-2015 Notice of Entry of Order (Order Regarding Damages Post-Jury Verdict).....VIII / 1618-1627

04-09-2015 Notice of Hearing (Clark County School District's Notice of Motion and Motion for Summary Judgment).....III / 0484

05-13-2014 Order Denying Motion.....IX / 1731-1732

05-19-2015 Order Denying Motions For Summary Judgment.....IV / 0720-0721

08-21-2013 Order Granting in Part and Denying in Part Clark County School District's Motion to Dismiss.....I / 0083-0085

04-10-2015 Order Granting in Part and Denying in Part Clark County School District's Motion to Strike Makani Kai Payo's Damages Calculation or, in the Alternative, Motion in Limine.....III / 0485-0486

06-16-2015 Order Regarding Damages Post-Jury Verdict.....VIII / 1610-1617

09-18-2014 Order Setting Civil Jury Trial, Pre-Trial Conference and Calendar Call.....I / 0150-0153

01-21-2015 Plaintiff's Bates Numbered document 000291.....I / 0179

06-02-2015 Proposed Verdict Form Returned Unsigned.....VIII / 1605-1606

07-15-2013 Recorder's Transcript Re: Notice of Motion and Motion to Dismiss.....I / 0070-0082

08-06-2014 Scheduling Order.....I / 0144-0146

08-31-2015 Settlement Program Status Report.....IX / 1727

03-02-2015 Stipulation and Order to Amend Makani Kai Payo's First Amended Complaint.....II / 0332-0333

03-11-2013 Summons.....I / 0010-0013

05-27-2015 Transcript of Proceedings - Jury Trial - Day 1.....V / 0770-0966

05-28-2015 Transcript of Proceedings - Jury Trial - Day 2.....VI / 0970-1158

05-29-2015 Transcript of Proceedings - Jury Trial - Day 3.....VII / 1159-1379

06-01-2015 Transcript of Proceedings - Jury Trial - Day 4.....VIII / 1385-1545

06-02-2015 Transcript of Proceedings - Jury Trial - Day 5.....VIII / 1593-1604

05-11-2015 Transcript of Proceedings: Motions.....IV / 0676-0700

06-02-2015 Verdict.....VIII / 1607

CERTIFICATE OF SERVICE

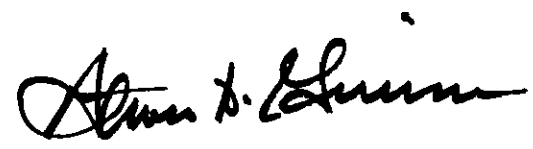
I HEREBY CERTIFY that the **APPELLANT'S APPENDIX** was filed electronically with the Nevada Supreme Court on the 31 day of December, 2015. I further certify that I served a copy of this document by depositing a true and correct copy hereof in the United States mail at Las Vegas, Nevada, postage fully prepaid, addressed as follows:

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MAKANI PAYO,	)	
	)	CASE NO. A-12-668833
Plaintiff,	)	DEPT NO. XV
vs.	)	
	)	
CLARK COUNTY SCHOOL DISTRICT,	)	
	)	
Defendant.	)	**TRANSCRIPT OF PROCEEDINGS**
	)	

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 3

FRIDAY, MAY 29, 2015

APPEARANCES:

For the Plaintiff: ROBERT O. KURTH, ESQ.

For the Defendant: DANIEL LOUIS O'BRIEN, ESQ.

RECORDED BY MATTHEW YARBROUGH, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

I N D E X

WITNESSES FOR THE PLAINTIFF:

MAKANI KAI PAYO

Cross-Examination By Mr. O'Brien - (Continued) 9

Redirect Examination By Mr. Kurth 24

EILEEN WHEELAN

Direct Examination By Mr. Kurth 37

Cross-Examination By Mr. O'Brien 121

Redirect Examination By Mr. Kurth 129

WITNESSES FOR THE DEFENDANT:

TODD PETERSEN

Direct Examination By Mr. O'Brien 144

Cross-Examination By Mr. Kurth 161

JOSEPH MURPHY

Direct Examination By Mr. O'Brien 191

Cross-Examination By Mr. Kurth 200

E X H I B I T S

PLAINTIFF'S EXHIBITS ADMITTED:		PAGE
8	Letter	72
29	Letter	84
18	Rice University Floor Hockey Rules	92
19	Printout of Web Page	114

LAS VEGAS, NEVADA, FRIDAY, MAY 29, 2015, 8:57 A.M.

* * * * *

(Outside the presence of the jury.)

THE COURT: Good morning. Understanding plaintiff's counsel's not here right now. It is -- in 10 seconds, according to my clock, it's 8:58 a.m.

Counsel, did you have a chance to bring in the proposed jury instructions?

MR. O'BRIEN: Yes, Your Honor. I have them right here.

THE COURT: I'll take a -- a copy, if you could...

(Pause in proceedings.)

MR. O'BRIEN: [Indiscernible]?

THE COURT: Yes.

MR. O'BRIEN: There's three sets agreed upon [indiscernible].

THE COURT: Thank you.

(Pause in proceedings.)

MR. O'BRIEN: Your Honor, did I just give you one set of each or did I give you three sets of each?

THE COURT: No, I kept one. And then on the -- the objected ones, looks like you gave me one copy of the -- the opposed ones. So you gave me three copies, I think, of the agreed-upons. And you can have those two back. I think on the -- the opposed ones, I think you only gave me one copy,

which is fine by me.

MR. O'BRIEN: Thank you.

(Pause in proceedings.)

MR. O'BRIEN: Your Honor, just for the record, I placed a copy of each set on plaintiff's counsel's table.

THE COURT: Thank you.

(Pause in proceedings.)

THE MARSHAL: I have the whole jury now, Your Honor.

THE COURT: Okay.

THE MARSHAL: My last one just got here. Mr. Kurth was just on the phone with his client, stuck in traffic. So. But that's okay. They're -- they're eating donuts, so they're -- they're all happy.

THE COURT: Thank you.

THE CLERK: We appreciate that. We like happy jurors.

THE COURT: Yes.

THE MARSHAL: All about keeping them happy. So long as they're happy, our process goes smoothly.

(Pause in proceedings.)

THE COURT: Is plaintiff himself here?

THE MARSHAL: My understanding he's been here since 8:30.

THE COURT: What's that?

THE MARSHAL: My understanding he's been here since

8:30.

(Pause in proceedings.)

THE COURT: Mr. O'Brien, when Mr. Kurth arrives, and for the record, it's approximately 9:20, court was supposed to begin at 9:00 a.m. this morning. In any event, you can be thinking about what type of sanctions may be appropriate. The Court will ask him his thoughts, as well. But in the meantime.

MR. O'BRIEN: Thank you, Your Honor. Your Honor, I did -- I don't know if you want them now, I did prepare responses to the juror questions that we had last night. Do you want me just to submit them? I wrote my comments on each one.

THE COURT: If you have a copy that you can give to Mr. Kurth, I'd be happy to take a copy myself, or -- or you could give, you know, we could make a copy for you, I guess.

MR. O'BRIEN: May I? I don't know what I was thinking. I didn't make a copy.

THE COURT: No, let's --

THE CLERK: I'll be happy to do that.

(Pause in proceedings.)

THE MARSHAL: Mr. Kurth is on his way through the scanner right now, sir.

THE COURT: Thank you.

(Pause in proceedings.)

THE COURT: Okay. Let's let the record reflect it's approximately 9:22 a.m. We were supposed to begin at 9:00 a.m. Mr. Kurth apparently was 22 minutes late.

Mr. Kurth, everyone else has been here on time, including your own client, the Court, the court staff, and the jurors. First day you were 20 minutes late, the Court let that slide. I want to hear from you what type of sanctions you think the Court should issue.

MR. KURTH: Sanctions? I don't have any comment on that. I mean, how am I -- how can I comment on that, Judge? I mean, if you want to issue sanctions, you're going to issue sanctions. I don't think it's appropriate. But, you know, I can apologize to the Court. And I was running a little bit late. I did hit an accident on the freeway. But that does happen a lot during that time in the morning, coming from the northwest.

I was trying to file a quick trial brief that you had requested, finish that. Trying to fit that in somehow. And, I mean, that's what happened. That's all I can say. I mean, I'm not one to make a lot of excuses. I -- you know, the Court already said we could be subject to -- or be subject to overtime. I mean, I think we'll probably get done with everything today on time, which will save two days. But, I mean, what is -- what is there to say?

I mean, whatever sanction is -- is coming for

anything is going to be coming out of my pocket. So either way. I mean, I can't be like a Br'er Rabbit and say throw me in the briar patch where I live. So I don't...

THE COURT: Mr. O'Brien?

MR. O'BRIEN: Your Honor, I believe that an appropriate sanction would be for Mr. Kurth to apologize, not only to the Court, but to his clients for his rather blatant show of disrespect for the Court.

MR. KURTH: I -- I do not have a blatant disrespect for the Court. And I don't have a blatant disrespect for anybody here. And I -- I've never had that. And I -- you know, I was late.

THE COURT: Twice. The first time you were late without even notifying us until after you were late.

MR. KURTH: I actually called the Court on the way and left a message. That's correct. Judge, I've been doing, you know, everything I can by myself in this case. We've prepared all these notebooks, we've hauled them all up here, we've done -- we've done just a lot of things, a lot of work. So. I mean, I didn't get up late, was at my office, had to take care of another client, something for them, which I've been ignoring for the week. And I had to try to get this trial brief filed quick, which I left when my legal assistant showed up. And I got stuck in traffic. I know I have to -- then for having to park and wherever and get all my gear here

and --

THE COURT: Okay. Let's -- okay. You're extremely lucky that Mr. O'Brien didn't suggest something else. The Court will accept your apology to the Court, the client, and opposing counsel, if you are willing to make that apology right now.

MR. KURTH: Judge, I do apologize sincerely for holding anything up. I apologize to my clients. I mean, they've worked hard, they've been through a lot. I'm working hard on their behalf. And I apologize to Ms. Wheelan and Mr. O'Brien and the court staff, the marshal, clerk, recorder, yourself, JEA, law clerk. And anyone else associated with the case.

THE COURT: Thank you. Marshal Hawks, let's go ahead and bring the jury in.

THE MARSHAL: Yes, sir.

(Pause in proceedings.)

(Jury reconvened at 9:28 a.m.)

THE COURT: Welcome back, ladies and gentlemen of the jury. The Court and the parties certainly appreciate you being here this morning earlier than previously scheduled, so we -- we certainly appreciate that.

Mr. O'Brien, I believe you were cross-examining Mr. Payo; is that correct?

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Do you want to continue that cross-examination?

MR. O'BRIEN: Yes, Your Honor. We'll stipulate to the presence of the jury.

THE COURT: Thank you.

MR. KURTH: So stipulated, Judge.

THE COURT: Thank you. Mr. Payo.

MAKANI KAI PAYO, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please be seated. Please state your name.

THE WITNESS: Makani Kai Patrick Payo.

CROSS-EXAMINATION - (Continued)

BY MR. O'BRIEN:

Q Good morning, Mr. Payo.

A Good morning.

Q Remember we were talking yesterday about the fact that you were knocked unconscious at the time of the incident?

A Yes.

Q Do you recall stating that you were knocked unconscious for 10 minutes?

A Yes.

Q Have you given any thought to that statement as to whether or not you believe that's accurate?

A I'm not really sure. I mean, 10 minutes sounds like a lot. It could have been more like 10-15 seconds, maybe.

But long seconds. I don't know how to...

Q That's why I'm asking. Because you said 10 minutes yesterday and everybody in the room, I think, appeared surprised. So, I mean, do you even know how long you were unconscious?

A It's hard for me to remember. I was blacked out. So.

Q Do you remember me asking you in your deposition four months ago how long you were knocked out?

A Yes.

Q And do you remember your response?

A I do not.

Q Okay. If -- do you have your deposition transcript in front of you?

THE COURT: It should be Tab 14 in the binder there.

THE WITNESS: It's -- it's missing in here.

THE COURT: Madam Clerk, I think we have the original.

THE CLERK: There's one right behind you, too.

THE WITNESS: Thank you. What page was that?

BY MR. O'BRIEN:

Q Page 57. You look at lines 14 -- or, excuse me -- never mind, I wrote down the -- oh, that's the wrong page. Yeah, 57, line 13 through 17.

The question was asked, "Do you also state that you

were knocked unconscious for a time; is that correct?"

Did I just read that question correctly?

A Yes.

Q And your answer?

A Was "Yes."

Q Then I asked you, "Do you know how long you were unconscious?"

Would you read your response?

A "I don't."

Q So you didn't -- in -- in January of this year, you didn't know how long you were knocked unconscious?

A No, I don't remember.

Q And I'm -- I'm asking that, because you seemed pretty certain yesterday that it was 10 minutes. Because we asked you questions about that. And you said you were lying face down on the -- on the tennis court for that long. Do you recall that?

A Yes.

Q Something happened between then and now that caused you to change your testimony?

A No. Something hard to remember from 10 years ago.

Q Do you recall telling me later in the deposition that you only blacked out for a second?

A Not that I remember.

Q If you would look at page 65.

A Okay.

Q Can't find it. Line 11 I think is what I marked. Oh, there we go. Excuse, me, it's page 67.

On line 7, I asked you, "At the time before, again, you were knocked out, what do you remember feeling?"

And you responded. And if you look at that page 11 -- or line 11, would you read the -- the -- the words that follow those two dashes?

A "I blacked out for a second and then after I blacked out, I came back and my vision was very blurry from the impact."

Q Okay. So was it a second? Was it 10 seconds? Was it 10 minutes? I mean --

A Probably 10 to 15 seconds, like I said.

Q Okay. Probably? You -- you think it was probably 10 to 15 seconds now?

A Yes.

Q Okay. And why do you say 10 to 15 seconds now, when you said a second there and 10 minutes yesterday?

A I thought about 10 minutes sounds pretty long.

Q And seconds --

A Now -- now --

Q -- sounds too short?

A Now that I think about it, 10 to 15 seconds sounds like a better --

Q Better guess?
A Yeah.
Q Because you don't know, right?
A Not -- yeah.
Q You remember that before you gave your deposition you swore to tell the truth, the whole truth, and nothing but the truth?
A Yes.
Q And did you tell the truth in your deposition?
A Yes.
Q When you testified in your deposition, did you tell us things intending for us to rely upon what you said?
A Can you repeat that again?
Q Essentially, you wanted us to believe what you were saying when you were testifying in your deposition, didn't you?
A Yeah.
Q You made the same oath today -- before you started testifying today, didn't you?
A Can you repeat that?
Q Isn't it true that just a few moments ago the Court Clerk swore you in to tell the truth, the whole truth, and nothing but the truth?
A Yes.
Q After your deposition was taken, you were given the

opportunity to review what you said, weren't you?

A Yeah.

Q Did you take that opportunity?

A No, I didn't.

Q You didn't read your deposition transcript?

A No.

Q So you made no corrections to it?

A No.

Q You never mentioned in your deposition anything about being knocked to the ground, did you?

A I'm not sure. I -- I don't remember a lot of this stuff.

Q You don't remember what you testified to in January of this year?

A Not -- not by heart, I can't remember some of this.

Q Well, assuming that the deposition speaks for itself, and there's nothing in there about you falling to the ground, can you explain why you wouldn't -- why you would leave out that detail?

A I have no idea.

Q When you fell to the ground, you said yesterday you fell to the ground and you were face down on the tennis courts; what was the weather like that day?

A I don't remember.

Q Gets pretty hot in May, doesn't it?

A Yeah, probably.

Q Okay. Did you suffer any burns to your face from lying on the pavement for 10 to 15 seconds, or 10 minutes or whatever it was?

A No.

Q Do you remember answering interrogatories or written questions that we sent to your attorney by my office?

A Yes.

Q And if you'd look at Exhibit 11?

A Okay.

Q Would you look at page 17? There's a document that says "verification" at the top. See that document?

A Yes.

Q Do you recognize that document?

A I do not.

Q Did you sign a verification with respect to your answers to interrogatories?

A Not that I remember.

MR. O'BRIEN: Will counsel stipulate that he's provided us with a signed verification?

MR. KURTH: I believe we did provide a signed verification.

BY MR. O'BRIEN:

Q In that verification, it says, "Makani Payo, being first duly sworn, deposed and says under oath, that he" -- "in

the above" -- let's see. "Under oath that he is the plaintiff in the above entitled action and he has read the foregoing. The plaintiffs, Makani Payo, answers to defendant Clark County School District's first set of interrogatories and knows the contents thereof, that the same is true of his own knowledge, except for those matters stated that thereon stated on information and belief and as to those matters he believes in to be true." Did I just read that correctly?

A Yes.

Q You don't remember ever seeing that document?

A No.

Q If we -- if we have a document with your signature on it, would you have any reason to doubt that you actually saw something like that?

A No.

Q Switching gears for just a little bit, do you remember being asked -- you remember your discussion about the school nurse and what happened in the nurse's office --

A Yes.

Q -- what you testified to yesterday?

A Yes.

Q And you said something to the effect that the nurse provided you with an ice pack and called your mom. And you remembered that phone call in particular, didn't you?

A Yes.

Q And you said that you heard -- your -- the -- the FASA, the -- the lady that was on the phone with -- with your mom, say that you weren't -- you weren't hurt and some -- nobody needed to come and get you; isn't that what you recall saying, something to that effect?

A Yes.

Q I want to make sure, you didn't -- yesterday you didn't say that the FASA told your mom that you were hurt and that someone should come get you yesterday? You didn't say that, did you?

A Was that -- what was that? Can you repeat that?

Q Probably not. Yesterday you said that the nurse never told your mom that someone should come get you; do you remember saying that?

A Yes.

Q Okay. And in fact you said that you heard the FASA say you were fine; do you recall saying that?

A Yes.

A Yes.

Q Would you look at the answers to interrogatories, which I think is Exhibit 11. And if you would turn to page 4. Are you there?

A Yes.

Q Question No. 25, the first question at the top says, "Please describe in detail everything that occurred in the school nurse's office." Did I read that correctly?

A Yes.

Q Now if you would turn to page 7, would you read your answer to that question?

A "At this time I recall when I was at the nurse's office, the person assisting me did not do anything but call my mother and let her know I was hurt and to have someone pick me up. Also I recall looking into the mirror and seeing" --

Q Just 25 is -- that's -- that's all the part I'm -- I'm talking about. The mirror you -- you mentioned and that your left eye was blurry. But the part that you just read, you stated under oath in your answer to interrogatory, that you recall at the nurse's office the person assisting you didn't do anything except call your mom; is that correct? Is that what you said?

A Yes.

Q That's not what you said in court yesterday, correct?

A Yes.

Q So there's -- do you agree there's a pretty significant difference between doing nothing and putting on an ice pack and cleaning the wound?

A I remember answering these interrogatories, and I was working on the ship, and I had a hard time submitting these, because --

Q Will you please answer my question? The answer that

you gave to Question 25 is -- is completely different than the answer you gave in court yesterday; isn't that correct?

A Yes.

Q And the second part, too. It says you called your mother to let her know you were hurt and to have -- and you heard the -- you heard the FASA call your mother to let her know you were hurt and to have someone pick you up. That's what you said, isn't it, in these answers?

MR. KURTH: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: Where -- where is this at? On page 7 still?

BY MR. O'BRIEN:

Q Page 7, same question, 25, part of the first sentence, second half.

A Yes.

Q And that's not true, is it?

A This first sentence is not true, is that what you're talking about?

Q That's what I'm asking you.

A There's -- there's some truth to it. I mean, I don't know why...

Q Is this statement true?

A Aside from the ice pack and -- I don't know what you're trying to...

Q You state in this question that the FASA called your mother to let her know you were hurt and to have someone pick you up. Is that what it says?

A Yes.

Q But yesterday you said the FASA told your mother you were fine, that you didn't need to go to the hospital?

A Yeah, that's two different things.

Q Okay. Did you hear the FASA tell your mom she needed to come and pick you up?

A Yeah, I heard over the phone.

Q Okay. So that part's true?

A Yes.

Q Okay. Did you hear your mother tell -- or the FASA tell your mother that you were hurt?

A Yes.

Q And yesterday you said the opposite, you said that the FASA told your mother you were fine. How do you explain that difference?

A I don't remember saying that. She said I was fine, that I didn't have to go to the -- the hospital, that's why I got sent home.

Q You were here when your mother testified, right?

A Yes.

Q And what she said, if you recall, and correct me if you think I'm -- I've got it wrong, but your mom said that she

asked if you needed medical assistance, and that the FASA didn't respond. Said she'd call back. Do you remember that?

A Yes.

Q So your mom sees it differently than you do, too; isn't that correct?

A Yes.

Q If you would look at Exhibit 12. You have that?

A Yes.

Q Would you look at Request No. 1? And that asks for each and every document of any kind or nature whatsoever, regardless of how created, stored, maintained, or accessed, which describes or references the incident referenced in your amended complaint or/and you alleged that on May 12th, 2004, you were injured while playing field hockey at -- I think it was Fertitta Middle School, but we decided that that was an error, so -- that's not the point. Just other than the Fertitta Middle School; did I read that correctly?

A Yes.

Q But we talked early on about a document that you created very early, while you were still in the hospital; do you remember talking about that?

A Yes.

Q And when you responded to our request, you didn't produce that, did you?

A I have no idea. I thought I gave it to my attorney.

Q You wrote down on that -- you said you wrote down on that document, on the back of a menu, what happened?

A Yes. It was a statement of what happened that day.

Q Again, switching topics a little bit, I'm just letting you know ahead of time so you don't think I'm talking about the same thing. You have not sought any medical treatment for any of the injuries suffered by you in the May 12th, 2004, accident since 2007, have you?

A Yes.

Q When was that?

A I don't know the exact -- the exact -- are you talking about the last appointment in January?

Q No, you can mention that, if you want. But no, I'm talking about that entire time between your deposition -- the day before your deposition, which occurred on January 22nd of this year?

A And now?

Q Between the time -- 2007 until then, you -- you sought no treatment at all for any of the injuries you suffered in this accident; isn't that correct?

A Yes.

Q In fact, you haven't sought out any treatment for any of the injuries that you suffered since you turned 18, have you?

A Yes.

Q Yes, you have?
A Like, no, I -- no, I haven't.
Q Have you -- again, changing directions a little bit -- have ou ever been turned down for a job because of the -- any of the problems you have with your injury?
A No.
Q You never been denied a promotion because of any disability resulting from your injury?
A No.
Q No one has ever come to you and said that because of your eye injury, your performance was -- was inadequate?
A No.
Q You started working on a food truck in 2010, didn't you?
A Yes.
Q In 2010, did your eye injury interfere with your ability to work?
A No.
Q And you've had several cooking jobs since then?
A Yes.
Q So is it fair to say that your eye -- your eye injury has not -- has in no way interfered with your career to date?
A Yes.
Q Thank you.

MR. O'BRIEN: That's all I have, Your Honor.

THE COURT: Redirect, if any.

REDIRECT EXAMINATION

BY MR. KURTH:

Q Mr. Payo, how old were you when this incident occurred?

A 11.

Q Okay. And -- and you treated for that incident with Dr. Carr from 2004 through 2007, correct?

A Yes.

Q Okay. And then you went to California?

A Yes.

Q And why did you go to California and finish high school there?

MR. O'BRIEN: Objection, Your Honor. This -- this exceeds the scope of -- of direct.

THE COURT: I think it falls within the scope of cross, though. So I'm going to allow it.

MR. KURTH: Thank you, Judge.

THE WITNESS: To start on a new foot, start a new life.

BY MR. KURTH:

Q Make sure you speak up, okay? Sorry, this air is on. Okay.

And what do you mean -- what do you mean, start on a

new foot? Why?

A Just to get away and -- from everything, get away from all my friends that were playing sports.

Q Okay. Well, did you -- did you check in to be able to play sports by using any other type of equipment or anything?

A I never wanted to really play after my injury, because I didn't want to have it happen -- my eye get injured again in some way.

Q And then you didn't see Dr. Carr again until January of this year, correct?

A Yes.

Q Okay. Did you know during that, you know, the time that you had had -- after you had the crystal lens put in and the traumatic cataract removed, that you were going to have to go back and see Dr. Carr or some other specialist again?

A Can you repeat that again? Sorry.

Q Was it your understanding that there was going to be a time that you needed to go back to Dr. Carr or another specialist to have your left eye examined to see how it was doing?

A Oh, yes. Yes.

Q Okay. And then was it your -- was it your understanding that you were going to need to do that sometime after your turned 18?

A Yes.

Q Okay. And -- and then why did you wait so long, then, even after you turned 18, to go see Dr. Carr?

A I was -- I was afraid to go under his knife again and do another surgery. And I didn't really want anybody to touch my eye and it was still healing. Still healing now.

Q So -- so describe -- describe your -- what you're seeing right now. Describe what you're seeing out of our left eye right now.

A I mean, I can see -- it's as if there's, like, a fog over my -- like, a -- a glass with fog on it on my left eye, probably because of the -- the membrane or the -- whatever that's growing on it that needs to be removed.

Q And when you went and saw Dr. Carr in January of 2015, you were informed that you had a membrane that you had to have -- that needs to be removed?

A Yes.

MR. O'BRIEN: Objection, Your Honor. This is --

THE COURT: Sustained.

MR. KURTH: Okay. Is the objection leading or?

MR. O'BRIEN: At least.

THE COURT: Make the objection.

MR. O'BRIEN: Your Honor, it's leading.

MR. KURTH: Okay.

MR. O'BRIEN: Testifying for the witness.

THE COURT: Sustained.

MR. KURTH: Okay. Thank you.

BY MR. KURTH:

Q Did you see Dr. Carr in January of 2015?

A Yes.

Q Okay. And you were present during that entire visit, correct?

A Yes.

Q And what is your understanding that -- of the work that needs to be done to your eye from -- that you learned in that visit with Dr. Carr?

THE COURT: Counsel, that's already been asked and answered. Let's move on, please.

MR. KURTH: Okay.

BY MR. KURTH:

Q I guess we covered that in the very beginning, I guess, didn't we?

Okay. You -- you were asked some questions about a -- you were asked some questions about writing some notes on the back of a menu; do you remember that, by Mr. O'Brien?

A Yes.

Q Okay. And -- and you believed you had provided that -- that menu to your attorney, correct?

A Yes.

Q Okay. And why did you write the notes on the menu?

A To take note of what I knew happened and what I could remember on that day. Probably the closest thing that -- to the date that I wrote down, of anything that I wrote down.

Q Were you requested to write down that information?

A I don't remember. Maybe by you. I don't -- not sure.

Q And is --

MR. KURTH: Judge, may I approach and show him the document?

MR. O'BRIEN: Your Honor, I would object.

THE COURT: Let's have a sidebar.

MR. KURTH: Okay.

(Off-record bench conference.)

THE COURT: Thank you, ladies and gentlemen, for your patience.

BY MR. KURTH:

Q Makani, were you -- I mean, required to participate in the physical education activities in your PE class in sixth grade?

MR. O'BRIEN: Asked and answered.

THE COURT: Sustained.

MR. KURTH: Does he ask -- he asked him the question about it after I asked him -- I mean, I asked him and he said he's required to participate, and then Mr. O'Brien asked him,

and he pretty much said the same thing. But then he talked to him about being forced. And then he said -- and tried to do something between force or have to participate to --

THE COURT: So let's --

MR. KURTH: -- to -- to --

THE COURT: -- let's --

MR. KURTH: -- to mix it up a little bit. He confused the issue.

THE COURT: Let's move on. Thank you.

MR. KURTH: Okay.

MR. O'BRIEN: Your Honor, I move to strike the argument that counsel just made.

THE COURT: Stricken.

BY MR. KURTH:

Q Makani, you remember that your deposition was taken, correct?

A Yes.

Q Okay. And you had to take time off from your current employment to go do that, didn't you?

A Yes.

Q Okay. And how much -- how much are you getting paid in that employment? How does that work?

MR. O'BRIEN: Objection, Your Honor. I don't see any relevance to this at all. Adds or detracts not at all from the case.

THE COURT: Would tend to agree.

MR. KURTH: Whether he missed any time or he's missed any --

THE COURT: There's no claim for that that the Court's aware of.

MR. KURTH: No -- no continuing lost wages claim?

MR. O'BRIEN: There's no lost wages claim at all, counsel. Plaintiff said that himself.

THE COURT: That's fine. Let's keep going.

BY MR. KURTH:

Q Makani, in your deposition on page 35 -- do you have that in front of you?

A Yes.

Q Okay. Do you see line 15?

A Yes.

MR. O'BRIEN: Your Honor, is there a question pending that the witness needs his recollection refreshed? So the basis for having him just read his deposition.

THE COURT: Ask your question before showing him the deposition transcript.

MR. KURTH: Okay, Judge.

BY MR. KURTH:

Q Makani, do -- do you remember you were asked some questions by Mr. O'Brien as far as who was playing hockey in your PE class that day?

A Yes.
Q Okay. And do you -- who do you believe was playing hockey in it, everyone or not everyone or who?
A It was half and half the class.
Q Were playing what, against each other?
A Yes.
Q Okay. Do you recall anyone that was sitting out that day?
A I said I -- I think there was a few on -- on the side.
Q Do you know why they might have been on the sideline?
A I have no idea.
Q So you don't know if they were waiting to substitute in or?
A They could be substitutes --
MR. O'BRIEN: Objection, Your Honor. Asked and answered.
MR. KURTH: Just trying to clarify.
THE COURT: Overruled.
MR. KURTH: Thank you.
THE WITNESS: They could have been substitutes, yeah.
BY MR. KURTH:
Q Do you remember anyone ever -- do you remember your

PE teacher giving you -- you know, verbally saying to you anything about, Hey, if you don't want to play this game today, you don't have to play?

A No.

MR. O'BRIEN: Objection, Your Honor.

MR. KURTH: Mr. O'Brien asked these --

MR. O'BRIEN: He's testifying --

THE COURT: Hold on.

MR. O'BRIEN: -- for the witness.

THE COURT: Hold on. Go ahead.

MR. O'BRIEN: It's a leading question, he's telling him what to say.

THE COURT: It was very leading. So rephrase.

BY MR. KURTH:

Q What do you recall Mr. Petersen saying before this game commenced that day that you were injured?

A I don't remember.

Q Okay. Do you remember anything that was being said while the game was being played?

A I just remembered no high sticking.

Q Okay. Do you recall ever being given any rules of the game to go over before you participated in the activity?

A I wasn't given any rules, no.

Q I can't -- I can't hear you.

A I wasn't given any rules.

Q Okay.

THE COURT: Make sure you hold that microphone closer.

BY MR. KURTH:

Q When you were -- do you remember how you were getting to your doctors' appointments, you know, in 2004, '05, '06, '07?

A Yeah.

Q How were you getting there?

A My mom would borrow my aunt's car, drop her off at work, take me to my appointments --

Q Okay.

A -- and then --

Q Does your mom have her own car?

A No, she doesn't.

Q Okay. Were you ever instructed by anyone not to participate in physical activities because of your injury?

A Dr. Carr advised me not to.

Q Okay. Were you ever given any advice after the date you were advised to not participate in that -- those physical activities, that it was okay for you to do so?

A No. I -- I never...

Q Okay. Do you know how much it's going to cost for you to have this membrane removed and a new crystal lens put in?

A I do not.

Q Do you feel comfortable having that done by anyone else other than Dr. Carr?

A No.

Q Why not?

A Just for the fact that he knows the history of my eyes, he's -- he knows what I've been through. So I trust him the most. I can't trust any other doctor.

Q Okay.

MR. KURTH: No further questions.

THE COURT: We have some --

MR. O'BRIEN: Your Honor, if I may?

THE COURT: Sure.

MR. O'BRIEN: One brief follow-up question, if I may.

THE COURT: Let's go through the submitted questions.

MR. O'BRIEN: Thank you, Your Honor.

THE COURT: If counsel could approach with the proposed written questions, we'll do -- we received some written questions from some of the jurors that may or may not apply to be asked right now. We'll go through these very quickly and be right back.

(Off-record bench conference.)

THE COURT: As always, thank you for your patience,

ladies and gentlemen. We did receive several written questions. It appeared to -- to all of us that most of them were eventually covered by the questions. A few of them we can't ask regardless. But there are a few, before we excuse Mr. Payo.

Mr. Payo, did your grandmother administrate any medication when she picked you up from school, if you recall?

THE WITNESS: Tylenol, I think.

THE COURT: How many times did you black out?

THE WITNESS: Once.

THE COURT: When the assistance nurse, or it's been also referred to as the FASA, called your mother, were you allowed to speak with your mother?

THE WITNESS: I didn't speak with her at that time when she was talking to her.

THE COURT: Say that again.

THE WITNESS: I wasn't -- I didn't -- I wasn't able to speak with her at that time.

THE COURT: Okay. Thank you very much for your time. You're excused.

Counsel, if you could approach?

MR. KURTH: I'm good with you making the decision on that, Judge, if you want.

THE COURT: Just real quick.

MR. KURTH: Okay.

(Off-record bench conference.)

THE COURT: Some questions we cannot ask, so, Mr. Payo, you're excused.

MR. KURTH: Judge, I'm -- the next witness that we're going to call is going to be Eileen Wheelan. I don't know if -- I'm sure that --

THE COURT: Now would be a good break, is that --

MR. KURTH: I think it might be good for, you know, to allow the jury to take a -- you know, we could take a short break. Because we'll probably take her to lunch and hopefully be done with her at lunch, by lunch.

THE COURT: Certainly. Appreciate the suggestion. Let me get to the admonishment.

Let's take a -- a 10-minute break. Ladies and gentlemen, we are going to take a 10-minute recess. During this recess, you're admonished not to talk or converse amongst yourselves or with anyone else on any subject connected with this trial, or read, watch, or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information including, without limitation, newspapers, television, radio, or the Internet, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Let's be back here at 10:40. Thank you.

(Court recessed at 10:29 a.m. until 10:43 a.m.)

(In the presence of the jury.)

THE COURT: Mr. Kurth, you can go ahead and call your next witness.

MR. KURTH: I'd like to call Eileen Wheelan to the stand.

EILEEN WHEELAN, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please be seated. State your full name for the record, please.

THE WITNESS: Eileen Wheelan.

DIRECT EXAMINATION

BY MR. KURTH:

Q Ms. Wheelan, as you know, I'm the attorney representing the plaintiff, Makani Payo.

A Yes.

Q And we've met before, correct?

A We have.

Q Okay.

MR. KURTH: Can you -- can you hear her?

THE COURT: Yes.

MR. KURTH: Okay. Okay.

BY MR. KURTH:

Q And that was during your deposition, was it?

A Yes, it was.

Q Okay. And prior to that date, then, we had never met each other, had we?

A No.
Q Okay. Do you recall your deposition being taken in this matter on or about April 16th, 2015?
A I do remember.
Q And after it was taken, did you have the opportunity to review and make any corrections to it?
A Yes.
Q And do you recall making any corrections to that deposition?
A No. No corrections were made.
Q Okay. Now, what is your position with the Clark County School District?
A My current position is coordinator of property and liability claims.
Q Okay. Coordinator of property and liability claims?
A Correct.
Q And where do you sit in the chain of command in -- well, what department is that in? Let me ask you that.
A It's in the risk and environmental services department.
Q Okay. And I apologize if I repeat something just to make sure, because while the air's on, it's a little more difficult for me. Did you say risk and environmental services?
A Correct. Formerly known as risk management.

Q Okay. So they combined another department with you?
Yes.
A Yes.
Q Okay.
A I'm sorry.
Q And did you say where are you at in that hierarchy?
A I -- I guess I would say I'm third -- third down.
Q Okay. So No. 3 in charge or whatever?
A [Indiscernible.]
Q Okay. Now, back in May 12th, 2004, where were you employed?
A I was employed at the risk management department with the Clark County School District.
Q Okay. And at that time was it just called the risk management department?
A Yes.
Q Do you recall if they had any other departments at that time, like a safety department or?
A Within the Clark County School District?
Q Yes.
A Yes. There were other departments.
Q I mean, things have changed over the years, haven't they, as far as how they're doing their departments and assigning duties?
A Correct.

Q And were you the -- what was your title back then?
A My title was claims management specialist.
Q Okay. And what were your duties?
A I was a claims examiner for property and liability claims that were presented against the District.
Q Okay. So -- so in being a claims examiner, what were -- what would you do?
A I would review claims that were made against the Clark County School District and determine if there was liability on the part of the District, and if so, determine damages and attempt to settle.
Q Okay. Did you become aware that there was an incident involving the plaintiff Makani on or about May 12th, 2004?
A Did I personally become aware of that incident? No.
Q Well, when did you first become aware of it?
A When I received a letter from your office indicating that Makani -- his mother on behalf of Makani was to initiate a claim.
Q Okay. And was that on or about December 15th, 2004, if you recall?
A I believe that's the date of the letter, but it was sometime after that when it was received in our office.
Q Okay.
A I'd have to look at it.

Q So was that about, what, seven -- how many months was that after the May 12th, 2004, incident?

A Seven months.

Q About seven months? Okay. So about seven months after this incident occurred, you had become aware of it?

A Correct.

Q Okay. And do you recall the contents of the letter?

A I -- I couldn't tell you word for word without reviewing the letter. Basically that you wished to present or that your -- your client wished to present a claim against the District.

Q Okay. If I gave you a copy of that letter to review, would it refresh your recollection?

A Yes.

MR. KURTH: Judge, could I approach?

THE COURT: Sure.

MR. O'BRIEN: Is that an exhibit?

MR. KURTH: It's not offered as an exhibit. I don't think we -- I don't think we're offering any -- I don't think we offered any correspondence, except for -- as an exhibit. It is on your Bates stamp; do you want me to give you the number?

MR. O'BRIEN: No. Your Honor, I'd object to having her review a document without a question pending.

THE COURT: Say that again? Now I can't hear you.

MR. O'BRIEN: I would object to having her review a document that isn't marked an exhibit or potential exhibit without a question at least pending. He said, Do you remember all -- everything in there. She said not everything. There's no purpose for the -- for the documents.

MR. KURTH: I'd be happy to have it marked as an exhibit. I mean, we'd have to make copies of it. But I merely want to ask her questions I've already asked her, if she remembers receiving the letter and she says yes, that's when she was notified of the claim, and I asked her if she remembered the contents of it and she said no.

MR. O'BRIEN: Can I see it briefly?

MR. KURTH: Sure.

(Pause in proceedings.)

MR. O'BRIEN: No objection, Your Honor.

THE COURT: Okay. Thank you both very much.

MR. KURTH: Thank you, Judge. And I'll just say this was what -- this was produced and --

THE COURT: He already said he has no objection. So.

(Pause in proceedings.)

BY MR. KURTH:

Q I know there's a lot of information in there, so just kind of take your time and...

(Pause in proceedings.)

BY MR. KURTH:

Q Okay. Probably just -- my questions are going to be, you know, more detailed to what you were informed of by the letter, okay?

A Okay.

Q Okay. So -- so when you first found out about the claim by Makani and his mother, it was about seven months, correct?

A Correct.

MR. KURTH: Judge, I'd ask for -- I don't know that I -- I need to do it and Mr. O'Brien hasn't objected, but, I mean, this is the school district's witness. Although she's a very friendly person. And if -- you know, if I need to take her like a adverse witness, I'd like to do that.

THE COURT: Any objection, Mr. O'Brien?

MR. O'BRIEN: If she acts as an adverse witness, he certainly should.

MR. KURTH: Okay.

THE COURT: Yeah.

MR. KURTH: Okay. Thank you, Judge.

BY MR. KURTH:

Q So at this time at least, you know, somewhere close to December 15, 2004, when you received the letter, you were informed that Makani was struck by a -- do -- do you want me to ask you the questions or do you want -- do you want me to

just state what they are, what's better? I'll just ask you.

You were informed that Makani was struck by a hockey stick from another student in his PE class, correct?

A Yes.

Q Okay. And in that, it was Makani's position that he was required to play that game that day -- just look about five lines down.

A I don't see where it says he had to play in the game. I'm looking for that.

Q See where it says --

A Oh, were required to?

Q Yes.

A It does say that --

Q I'm not saying that --

A -- in your letter.

Q -- you know, you're -- you're admitting that or anything. I'm just saying that --

A No, I see that.

Q -- the position that was proposed --

A Yes.

Q -- to you as handling the claim was that Makani's position was that he was required to participate at that time?

A Yes.

Q Okay. And his -- and then you were informed that he wasn't provided any face protection, correct?

A Yes.

Q Okay. And at this time, at least, it says that the allegation was that Makani had passed out for about 10 -- approximately 10 seconds?

A Yes.

Q Okay. And he was taken to the nurse's office, which -- which we know?

A Yes.

THE COURT: You need to speak up when you respond, please.

BY MR. KURTH:

Q Okay. So -- and -- and these -- these allegations that were made to you were within fairly close proximity to when the incident occurred?

A Seven months later, yes.

Q Right. I mean, a lot better than now, I guess?

A True.

Q Okay. Okay. So in the allegations back then was that the nurse had said that he didn't need stitches and she would call the mother back --

A That's --

Q -- if she thought he needed that?

A That's what it says, yes.

Q Okay. And -- and that's all I'm saying, is, you know, these are allegations not for you, you know, saying it's

an admission or anything. And then you were informed that for at least about two days, Makani had alleged that he suffered from serious headaches and trouble sleeping and had pressure and had to go to the, you know, had a blood clot in his eye and had to have tests and go to the emergency room and be treated?

A Yes.

Q Okay. And -- and there was even specific dates given about when Makani had some of this surgery and treatment done, wasn't there?

A Yes.

Q Yes?

A Yes.

Q Okay. And back then, the allegation was that Makani had felt and his mother felt that it could have been prevented if the school had provided head protection and if the nurse had advised them to seek immediate medical attention?

A Yes.

Q Okay. And -- and by nurse, we've later found out that there wasn't a school nurse there at the school that day --

A Yes.

Q -- at Woodbury, correct?

A Correct.

Q So, I mean, during your -- during your

investigation, who did you determine was the person who treated Makani --

A The first --

Q -- after the incident?

A The first aid safety assistant.

Q Okay. And did the name of the first aid safety assistant was?

A Wally.

Q Okay. Was it Wally Morton or Waleska?

A That sounds correct.

Q Maybe known as I think Ruiz -- or Ruiz now?

A [No audible response.]

Q Okay. And did you ever speak with Wally Morton about this incident?

A I did shortly after receiving your letter.

Q Okay. And how many times did you speak with Ms. Morton about this incident?

A I don't remember.

Q Do you think it was more than once?

A Don't remember.

Q Okay.

A It's been a long time.

Q Okay. And then did Ms. Ruiz provide you -- or, excuse me, Ms. Morton provide you something in response to your request?

A I believe she did.

Q Okay. Okay. And I apologize, I'm going to be -- flip back and forth a little bit. Could you look at what's been -- been admitted as Exhibit 3. Are you familiar with this document? Oh, I'm sorry, I see you're --

A Sorry. Allergies.

Q I was looking down when I asked, so. Could have waited.

A Allergies.

Q I hear you.

A I recognize it, yes.

Q Okay. Is that -- is there a stamp on the bottom that says, "Received February 22nd, 2005, Risk Management"?

A Yes.

Q And who would have placed that stamp on the document?

A Whoever in our department that was taking care of the incoming mail.

Q Okay. And then what would happen in that document?

A It would be distributed to the appropriate party within our office.

Q Okay. So now we're about nine months after the incident?

A Correct.

Q Okay. About two months after you got the letter?

A Correct.
Q And during this time, you were investigating the claim?
A Yes.
Q Okay.
A If I might say, there was also winter break --
Q Oh.
A -- shortly after I received your letter.
Q Of course. Right. So everybody was off for a couple of weeks during that time?
A We are not, but the schools are unavailable.
Q And that would make it more difficult to get a hold of somebody and get a response from them?
A Correct.
Q It's understandable. Do you recall if the conversation you had with Wally Morton was consistent with what's contained in this document you received from her?
A I honestly don't remember the conversation I had with her. So really all I have to go by is the -- the statement that she provided and if I made any notes within the claim file.
Q Okay. Now, you've been present during the treatment that's preceded during this entire trial so far, haven't you?
A Yes.
Q Okay. And you're here as the representative for the

Clark County School District?

A Yes.

Q Okay. Is it your understanding that -- or did you hear testimony earlier that questions were asked, you know, didn't the FASA, first aid safety assistant, like, shine a light in Makani's eyes?

A I heard the testimony, yes.

Q Okay. And is there any reason for you to believe that that occurred from your investigation of the incident?

A I have not questioned that, so I don't know if it did or did not occur.

Q Well, you requested the FASA to give you a statement concerning what happened, right?

A Yes.

Q Okay. And when you review that statement, Exhibit 3, does that say anything about shining a flashlight in his eye?

A It doesn't.

Q It doesn't. So does it say that, basically, she applied an ice pack and cleaned it up?

A Yes.

Q Okay. Do you remember the FASA ever telling you that she saw Makani at school again after this incident happened?

A I don't remember her telling me that. Again --

Q Right.
A -- I really can only rely on --
Q I know, it's a long time ago.
A -- documentation.
Q Well, on -- so the documentation that she provided says that she saw him at school a few days later, doesn't it?
A It does.
Q I mean, did you check Makani's records to see if he was ever at school?
A I don't remember if I did or not.
Q Do you know if the school district -- I mean, did you -- did the school district provide any records to show that Makani was in school, like, he went back to Woodbury after this incident?
A I don't know that those records were pulled and I don't know if they're available at this point so many years later.
Q Okay. All right. Let's go to Exhibit 2. Easy to pull to that one. Do you recall this document?
A I recognize it, yes.
Q Okay. Now, this student -- it's a student injury accident report. Is this a -- a document that's normally prepared after there's some kind of injury at school?
A In 2004 it was, yes.
Q Okay. So it was a regular common practice and

procedure when an accident occurred on school grounds for that to be prepared?

A Yes.

Q Okay. Was there any policy or procedure back then that said it couldn't be released to the parent?

A No.

Q No. So do you know why this document was -- wasn't provided to Makani's mother when she requested it?

A I -- I --

MR. O'BRIEN: Objection, Your Honor. It assumes matters not in evidence.

THE COURT: Overruled.

MR. KURTH: Thank you.

THE WITNESS: I don't know. I do know the process for a parent obtaining a copy of it.

BY MR. KURTH:

Q Oh. Back then do you recall what the process was?

A Yes.

Q What was the process?

A The same as it is now. The risk management department would receive a request either verbally, or now we have actually a form so we can confirm and have a signed request. The parent would request the form or at -- in this case, a representative, and we would send out a copy of the letter along -- or the form along with a cover letter. And

that cover letter would remain with the accident report.

Q Would the principal of the -- the school, Woodbury, at that time been aware of that policy and procedure?

A I don't know what they were aware of.

Q Well, you were in the risk management department back then. Did the principals have to receive any training in what to do when there was an injury on campus?

A In 2004, I was a claims examiner. So I wasn't involved in any training to the administrators within the district.

Q During your investigation of this matter, did you ever inquire into whether the, you know, principal had had that form prepared and provided?

A Not that I remember.

Q When's the first time that you saw this student injury accident report in the risk management department?

A The first time that I remember or would generally see it would be after receiving your letter, we would then go through the files that contain the student accident reports filed by site and so forth, and by date, and we'd pull it to review it and include it in our file. So after December 15th. So.

Q So this form here appears to be signed by -- well, the person completing the description says Todd Petersen, Todd H. Petersen. And person who treated the student, Wally

Morton, the FASA. And the principal. Is -- is that what the requirements were?

A Yes.

Q Okay. And the it says, "White to risk management department, yellow to school file"?

A Yes.

Q Okay. So the school would have had a copy of this on file even after they gave it to the risk management department?

A Yes.

Q Okay. But if a parent --

THE COURT: Can you say that again so we can hear?

THE WITNESS: Yes.

THE COURT: Thank you.

BY MR. KURTH:

Q And would the -- so if the parent went to the school to get a copy of it, the school would have had a copy there, correct?

A Yes, they would have a copy. But I don't believe they were supposed to be releasing copies.

Q Even though it was about the parents' own student?

A Correct.

Q Okay. Have they changed that policy and procedure?

A No.

Q So would the parent have to find out where the risk

management department is and -- and go there? Or what would they have to do?

A As I spoke earlier, they could call us and request a copy of it, they could send letter, they could come into your office. Various different ways.

Q Well, if they -- if they showed up at the school to get this form, did the school have some kind of document, you know, provided by the risk management department or the school district that said, Here's where you need to go, here's the address, phone number, to go get a copy of this, because we can't give it to you?

A I don't know if they had a document of any kind.

Q Okay. And -- and do you know if -- from your investigation of the incident, do you know if Makani's mother went to the school and asked for this to be provided?

A I have no knowledge of that.

Q Okay. So once -- so even though this incident happened on -- on school May 12th, 2004, and this student injury accident report was apparently provided on May 13th, 2004, the next day to the risk management department, no one there looks -- well, I don't know if it was provided to the risk management that day, but it said it was submitted to principal supervisor on that day. So what was the normal process and procedure when it would be provided to the risk management department?

A Well, once it was completed, forms were then sent through district mail, district courier to our department. And this is date stamped in our department on May 18th, 2004.

Q Oh. Where's that at? I missed that.

A It's over the back side of the little body.

Q Oh, okay. There, it's hiding from me. Thank you for pointing that out. Okay. So the risk management department would have got this form on or about May 18th, 2004?

A Yes.

Q Okay. And then the form just -- nobody does any investigation or anything, it just lies dormant until somebody decides to do something else about it?

A Somebody reviewed every single accident that came into our office for, you know, different criteria. Depending on the information that's on the form or if we had had any contact by anyone, the school or parent or anyone else, that would trigger an investigation. In this case, I believe we had no other reason to conduct investigation at that time.

Q Was there any process or procedure by the school district for somebody from risk management that reviewed this form to follow up with the student's parents?

A For every single accident report?

Q Well, I'm sure some are very minor.

A Well --

Q For any reports?
A -- we -- we didn't follow up with students.
Q Okay.
A If information on the accident report raised questions, we would contact the school to see if there was additional information that we needed to gather.
Q So this -- this student injury accident report says that the student was playing floor hockey on tennis courts and got hit in the face by another player with hockey stick --
A Yes.
Q -- would a -- did you do any investigation and see if that -- the other player that hit him was suspended, RBC'd, expelled?
A At the time that we received this?
Q At any time.
A I don't remember. I didn't see anything to that effect in the file. So I -- I don't remember.
Q I'm asking that, but I think it's been pretty much stipulated between both sides that it wasn't -- it wasn't an intentional act by the student to purposefully injure --
A True.
Q -- Makani. Okay. But being a -- did you ever interview Brandon Higgins?
A No.
Q Did you ever interview Todd Petersen concerning this

incident?

A No, I did not.

Q Why not?

A By the time we were contacted by your office, it was another school year, and Mr. Petersen was not working for the Clark County School District, nor in Nevada, nor, if I remember right, did we have any contact information for him.

Q Did you search for any contact information for him?

A No.

Q Can you read the principal/supervisor's name that signed that? Or do you know who it was?

A I know who it is, so that's --

Q Okay.

A -- Joseph Murphy.

Q Joseph Murphy? Okay. Did you, you know, I guess after you received the student injury accident report or after you received my letter in December of 2004, did you talk to Mr. Murphy and during your investigation of this claim?

A No.

Q Why not?

A He was no longer the principal at Woodbury -- Woodbury Middle School that year.

Q Oh. Was he still working for the school district?

A Yes.

Q Do you know where he was working at the time?

A I do not.
Q Did you do any search to see where he was working at the time?
A I don't remember if I did or not.
Q Okay. Okay. Did you ever call the mother, Lori Payo, and talk to her?
A No.
Q Was that -- was that because she was represented by counsel when you found out about the incident?
A Yes.
Q Okay. But you did talk to Wally Morton?
A Yes.
Q At least once?
A At least once.
Q From reviewing this student injury accident report, and in your position as a, you know, claims specialist at that time in 2003 in the risk management department, do you think it should have been flagged to follow up on?
A No, I don't see anything that stands out from this that would indicate further investigation.
Q So even though it -- it says that another student hit Makani, who was a student, with a hockey stick in the eye?
A Yes.
Q How -- how long you had been a risk manager claims specialist in 2004?

A Yes, he was.

Q Do you recall being informed by anyone from the Clark County School District, prior to Makani playing this floor hockey in PE, that he was going to be participating in that activity?

A No.

Q Were you provided any information from the -- I'm going to say CCSD, if that's okay, meaning the Clark County School District, CCSD, I might say school district -- but that he was going to be participating in that activity?

A No.

Q Were you asked -- ever asked to sign any type of waiver or liability form for Makani that you recall to participate in PE activities?

MR. O'BRIEN: Your Honor, I object. There's no relevance to whether she was asked to sign a waiver of any kind. She's already said she wasn't told about it. So it's -- it's irrelevant.

MR. KURTH: It's going to be -- I think it is relevant on -- on its face, because she wasn't provided it. Plus, we plan on introducing, which I think -- we don't -- it hasn't been admitted yet --

THE COURT: Objection's overruled.

BY MR. KURTH:

Q So did you even know that he was going to

participate in that activity before he did?

A No.

MR. O'BRIEN: Objection, Your Honor. Asked and answered.

THE COURT: That -- that objection is sustained.

MR. KURTH: Asked and answered? Okay. Sorry. All right. Yeah.

BY MR. KURTH:

Q What kind of a student was Makani at that time? You know, before the accident, before this incident happened?

A He was a straight-A student, participate in class and other -- with his friends, very active. He was a -- he was very -- he was -- he was -- he had a lot of friends, and so he did things with their friends, with the neighborhood kids that came over to the house or he went over hang out with them, I knew the parents. And they always had plans of doing things together. So he was always active, always had something to do with his best friends and a group of boys who I've known the parents for a while. And they would hang out.

And it was okay if -- they lived in the area, same area. So I would let him go to their house, which is around the block and is just -- all the parents communicated with each other about the boys hanging out together. So he was very active with his friends.

Q And was he athletic? Was he -- was he an athletic

kid?

A He -- yes, he was. He played basketball with his friends, he would skateboard, you know, he would go and play football with his friends, but they would -- they always did something together, they were always physical, whether it was at the park or up at the school, at the basketball courts. They were doing -- they were constantly doing something on the weekends.

Q Did there -- well, let's go back to this -- his treatment here a little bit. So Makani went and saw Dr. Carr, then --

A Yes.

Q -- after UMC?

A Yes.

Q Okay. And he saw him the next day that he was released from UMC; is that correct?

A Yes.

Q Okay. Let's go to Exhibit 7. Well, I think it's going to be a different one. So that's a recent one. Sorry. I think it's 4. Yeah, let's go to 4.

You there?

A Yes.

Q Okay. So this first page here, Bates stamp 00018 in Exhibit 4, looks to show that he saw -- it says, "Provider" on the left, Dr. -- or "Tyree Carr, MD." It says, "Makani B.

Payo" on the top. Date of birth, 9/22/92; is that Makani's date of birth?

A Yes.

Q Okay. It says exam date was May 15th, 2004. Actually, it says 5/15/2004; is that correct?

A Yes.

Q Okay. So that would have been -- 12th was a Wednesday, so that's when it happened. 14th, Quick Care, ambulance, UMC, and then the next day he saw Dr. Carr; is that right?

A Yes.

Q Okay. So on the Saturday. And on these records here, there's not much -- you have to go, like, three, four pages back, and then it -- show you, like the diagnosis and what Dr. Carr determined.

Did you go to these exams with Makani to see Dr. Carr?

A Yes.

Q Okay. And did you go with Makani when he went to UMC on the times that he did?

A Yes.

Q Okay. So if we look at Bates stamp pages 021 and 022, it's showing the diagnosis trauma, blunt to OS orbit and globe, and then it says "hockey." Hyphema; traumatic; Total 8-Ball; OS; Glaucoma associated with ocular trauma; OS;

eyelid, laceration, full nick -- full thickness, no lacrimal. And then on the treatment, it talks about there were some CT scans. Do you remember -- did Makani have some CT scans that were done?

A Yes.

Q And he recommended these eyedrops and other things be done. Did you give Makani the eyedrops?

A Yes.

Q And did you do that on a -- did you follow all the doctor's instructions during -- while Makani was going to the doctor and the treatment?

A Yes.

Q Okay. So after that, you took Makani home?

A Yes.

Q Okay. So that's a Saturday. Then we go down a little further and we get to Bates stamp 023. So that's going to show you on the top-right corner, it looks like he was back there to see Dr. Carr again on May 17th. So Monday, somewhere around the -- the following Monday. And -- and it also shows on the left, it'll show you the last exam date. So it'll say the last one was 5/15, this one's 5/17.

Now, on Bates stamp 026, it says something about, "eye shield to affected eye." Was Makani required to wear some type of eye shield?

A Yes.

Q Can you describe that?

A It's -- it was a piece of metal and it had -- it was, like, a mesh-like. It was about, like an egg-size, to cover over his -- his left eye. It was metal, but Dr. Carr had suggested to me to put tape around the edges just to pad it, because his eye was sensitive.

Q So it was -- so was it -- was it black or --

A It was silver. And I used -- we used medical tape.

Q And did he have to keep it on --

A Yes.

Q -- regularly? For what periods of time?

A He had to wear it all day. Even when he slept, in the shower, he had to -- we had -- he had to actually take a bath, because Dr. Carr didn't want anything to get in his eye.

Q And it didn't look cool like Captain Jack Sparrow's eye patch or anything like that?

A No.

Q Okay. Did -- so then if we turn further, so that's on a Monday, and then we have exam date of May 19th, Bates stamp 028, so then he was back again on a Wednesday again, correct?

A Yes.

Q So he saw Dr. Carr on Saturday, Monday, and now Wednesday?

A Yes.

Q Okay. Had Makani been back to school during that time period?
A No.
Q Did Makani go back to school after this injury occurred --
A No.
Q -- at Woodbury Middle School?
A No.
Q No? You're sure?
A Yes.
Q Okay. You know, I skipped you forward, but I wanted to point out that on the -- on Bates stamp 027, on that May 17th exam date, it says, "Recommend in-house restrictions and no physical activities until further notice." Is that -- is that what Dr. Carr said, that Makani couldn't participate in any physical activities?
A Yes.
Q At least at that time until further notice?
A Correct.
Q Well, how did you -- how did you deal with -- if Makani didn't go back to school? Didn't he have exams, didn't he have to graduate?
A He -- he stayed home. I -- I called -- I called about -- about him missing classes. And I don't know particularly exactly, I talked to somebody in the office

saying that what -- what was going on with my son. And at that -- and at that time, I also got a letter in the mail saying that my son's missed the last couple of weeks of school and that they were going to expel him, because he hasn't appeared in class for the rest of the school year.

Q But they didn't expel him, right? You -- you got that all taken care of?

A Yes.

Q So you were able to work with somebody there and -- at the school or the school district and get it resolved?

A They -- because he -- he was such a good student and extra credit that he was doing, he was doing extra classes, that he was able to pass his sixth grade.

Q So he didn't have to retake sixth grade?

A No.

Q And when he went onto seventh grade, did he still attend Woodbury or did he go to a different school?

A He actually -- he was still at Woodbury.

Q Did he go to another middle school when he was still here living with you?

A No.

Q Okay. The -- let's see here. On May 19th, 2004, it's Bates stamp 032, it looks like you took Makani back to Dr. Carr on that day, that Wednesday. Did he say that he needed to be admitted to UMC pediatric unit?

A Yes.

Q Says for "Glaucoma and traumatic hyphema, dehydration." Do you know what -- what that was about, what happened?

A He was -- he was feeling nauseated and he kept complaining about the eye pressure he had in his eye, and headaches.

Q So then we go back to 6, Exhibit 6, skip back to there, because we'll go back to the UMC record, since he was admitted to UMC then. Sorry. Seeing the record, it looks like it's a little out of order there.

So if we go to 0147. 0147. This is the record from University Medical Center that says Makani was admitted on May 19th, 2004, discharged on May 23rd, 2004. Is that what you recall?

A Yes.

MR. O'BRIEN: Your Honor, if I may, what exhibit is that? My 4 only goes up to 92.

MR. KURTH: Exhibit 6.

THE COURT: Exhibit 6.

MR. O'BRIEN: Exhibit 6? I'm sorry.

MR. KURTH: Exhibit 6, 0147.

BY MR. KURTH:

Q So down here on -- on Admission Diagnosis, it says that he was having increased left ocular pressure and

traumatic glaucoma. And it looks like on his discharge they had resolved the increased inner-ocular pressure. And it says, "Status post evacuation of hyphema."

Then you go down to the history of present willness -- illness, it talks about he was seeing Dr. Carr, an ophthalmologist for the week for ongoing therapy of severe left hyphema, he was having persistent vomiting and nausea, was complaining of left-eye pain. Is that why he was admitted again to UMC?

A Yes.

Q This time it was for a longer period of time?

A Yes.

Q It says on procedure performed, do you -- do you remember did Dr. Carr perform an evacuation of his left-eye hyphema?

A Yes, I believe so.

Q Or was that to, you know, to remove, like, the blood and -- that was causing pressure or?

A Yes.

Q Okay. And it says also sent back commute -- computed tomography of the brain for trauma. So did he have some other, like, brain scans or head scans or --

A Yes.

Q Okay. And then under followup, on the next page, 0148, it says he was supposed to again follow-up -- keep

following up with Dr. Carr, which would have been the next day on the -- May 23rd -- or 24th.

A I'm sorry, what document was that?

Q The next page, 0148, or -- yeah, the 0148, under "followup." I'm kind of flipping around a little bit.

A Okay.

Q So apparently he's -- was supposed to keep following up with Dr. Carr, correct?

A Yes.

Q And he did that?

A Yes.

Q Now, let's look at Bates stamp couple more pages down, 0151. Still showing, you know, documents from being -- when he was admitted on May 19th, 2004. Do you see that?

A Yes.

Q Okay. And in the middle of the page it shows -- looks like it says, "Playing hockey 5/12/04, hit with stick, 5/14/04, vomiting," then it says "knocked out." Looks like it says "knocked out." Do you see that?

A Yes.

Q Is it your understanding that when Makani got hit, you know, in PE class with the stick, that he was unconscious for any part of the time?

A Yes.

Q And you came to that understanding from talking to

Makani about what happened?

A Yes.

Q Okay. Do you recall anybody else ever telling you that Makani was unconscious after that incident?

A Just my son.

Q Okay. Okay. So he was discharged from UMC on May 23rd, 2004, and then go back and during the time he was there, Dr. Carr had done a procedure, relieve the pressure on his eye, he was to follow up with Dr. Carr on May 24th, and he did, according to the records in Exhibit 4, Bates stamp 033, correct? So you'd have to go back to 4 and then look at the 033.

Right?

A Yes.

Q Okay. And then he -- and then if you keep turning down, and go to 041 and 042 in that exhibit, went back to Dr. Carr again two days later on the 26th?

A Yes.

Q Okay. And at that time Dr. Carr recommended that he see a retinal specialist?

A Correct.

Q Were they -- the next page, 042, it says he recommended a retinal specialist at Retinal Consultants in Summerlin since pressures are down. So is it your understanding that he saw a retinal specialist because he had

less pressure then in his eye so they could --

A Yes.

Q -- see him at that time? Yes?

A Yes.

Q Okay. In between those two dates, flipping you -- you back to Exhibit 6, which I have a little out of order here, it shows that on Bates stamp 0135, that Makani was back at UMC again on May 25th, 2004. So on 0135, Exhibit 6; do you see that?

A Yes.

Q Okay. Let's see. On the next page, 0136, that's showing that he was there at UMC on May 25th, in between those Dr. Carr visits. Under the "History of Present Illness," it says, "The child had eye surgery where a blood clot was removed from the inner aspect from his eye." Is that your understanding of what happened?

A Yes.

Q And it says that "They came in today because he has had increasing headache. He complains primarily of left-sided eye and facial pain. These symptoms are identical to the symptoms he has had since the onset of his injury." So he was still complaining about that on May 25th?

A Yes.

Q Okay. Had he been having these headaches since May 12th?

A Yes.

Q And even though he's going back and forth to Dr. Carr pretty much every day, he had the blood clot removed, he -- he was still having such issues where you thought he needed to go back to UMC?

A Yes.

Q Was that the last time he was at -- at University Medical Center for this injury?

A I believe so.

Q Okay. So then he went to Retina Consultants, he was referred there, so that's Exhibit 5.

Apologize, these are in a little different order. Okay. So if we turn to Bates stamp in that exhibit, 0112, looks like a letter that Dr. Premium [phonetic] had sent from a -- who works with Dr. Lu [phonetic] at Retina Consultants in Nevada; does that sound familiar to you?

A Yes.

Q Okay. At that time he was -- he was examined by Retina Consultants, and it was determined that he had a 20/20-1 in the right-eye vision and a 20/50 in the left eye, correct?

A Yes.

THE COURT: Counsel, I don't mean to interrupt. But is this a 2007 letter?

MR. KURTH: Oh, that is a 2007 letter. I went to

2007. Okay. Thanks, Judge. Let's go back. Appreciate you pointing that out there.

BY MR. KURTH:

Q Looks like they're a little out of order, because when you look at the -- that's a 2007 letter, but when you look at the next page, 0113, it's got the ultrasound report dated May 27th, 2004. So I'm not sure on the -- it's a typo or -- or what. I'm not really sure on that one.

But, so there was an -- oh, so he went to Retina Consultants and they did an ultrasound report to look and see if he had a retinal detachment, correct?

A Yes.

Q That's what they -- they were really concerned about, if his retina was detached, right?

A Yes.

Q And you were concerned? Okay. And it determined -- they determined that there was blunt trauma to his left eye, but there was no retinal detachment, correct?

A Yes.

Q Okay. And then, yeah, that letter on 0110 looks like it's dated correctly, May 27th, 2004, which makes sense. Letter to Dr. Carr from Dr. Lu basically saying that Makani had had corneal bloodstaining, he'd undergone subsequent anterior chamber washout. This one showed that he had visual acuity pinholes to 20/30 in the right eye and his pressure in

his eye was 10. It's talking about there being a -- a fibronized [phonetic] blood clot there and having a traumatic cataract.

So Makani had a traumatic cataract, didn't he?

A Yes.

Q This -- this cataract that he had was induced by the trauma that was sustained from the incident getting hit with a hockey stick?

MR. O'BRIEN: Objection, Your Honor. Lack of foundation as to her knowledge as to what caused what.

MR. KURTH: According to the medical records that we've reviewed -- I can go on that, Judge. Pass that, get to that -- it's in the record.

THE COURT: Thank you.

MR. KURTH: Okay.

BY MR. KURTH:

Q So down a little further on that one, 0110, it says, "I do agree with your assessment that Mr. Payo presents with a history of blunt trauma to the left eye with resulting traumatic cataract, photo hyphema, which has resulted in corneal blood staining and has necessitated anterior chamber washout," correct?

A Correct.

Q And it talks about Dr. Lu discussing those findings with Mr. Payo and his parents and counsel and concerning

u-turning the long-term recovery and probable necessity for removal of traumatic cataract; is that right?

A Yes.

Q It says something about "removal of traumatic cataract after resolution of the corneal blood staining, which may take many months." Is that your understanding?

A Yes.

Q So -- so tell me about the cataract. After meeting with the doctors and everything, what was your understanding about what was going on with this cataract situation with Makani?

A He explained to me that the cataract around his eye, that it was due to the trauma that he suffered. And I -- what I -- to my knowledge, what a cataract is is what elder people have, you know, as -- as their eye deteriorates. And that's what I asked -- asked them, is that's what happening to my son?

And he says, it's -- he's got a cataract due to the trauma he suffered from the -- all that pressure in his eye. I was afraid he was going to lose his sight.

Q Thank goodness he didn't lose his sight, did he?

A No.

Q And did you continue in also taking Makani to see Retinal Consultants -- excuse me, Retina Consultants of Nevada?

A After the -- was sent to the letter, Dr. Carr consulted with me about what they want to do with his eye. And we went back to Dr. Carr.

Q Okay. So if we look at these -- these records from Retina Consultants, if you'll look at page 0106 -- actually, it looks like even go a couple pages further than that, 0108. It looks like that he saw Dr. Lu or Retina Consultants on or about June 10th, 2004. See the top left where it gives the date?

A Yes.

Q It says he was referred -- referring doctor was Tyree Carr?

A Yes.

Q Okay. So June 10th, and then we go a couple more pages to 0106, backwards. And he's providing a -- looks like he saw him on June 29th and was -- had provided a B-scan ultrasound, secondary to -- and looking about the cornea blood scarring from the trauma; is that right?

A Yes.

Q Okay. So you're not only taking Makani to Dr. Carr, had been at UMC, and now you're going back and forth with Retina Consultants also, during this time period?

A Yes.

Q I'm going to go back a couple more pages to 0102. Looks like they did another ultrasound August 19th, 2004,

right?

A Yes.

Q Okay. Go back a couple more pages to 0098, Dr. Lu saw him again on September 17th, '04, and -- correct?

A Yes.

Q And if you keep going back a couple more pages, since it's in this other order, it's -- apologize. It's -- looks like October 14th, '04, 096, that he saw Dr. Lu again?

A Yes.

Q Okay. And then go back a couple more pages to 094 and he -- Makani had seen Dr. Lu again on December 30th of 2004?

A Yes.

Q Then we get to the first document in that Exhibit 5, Bates stamp 00093. That's a letter dated February 21st, 2005, to Dr. Carr from Retina Consultants, correct?

A Yes.

Q And -- and this is confirming that Makani had a history of blunt trauma in the left eye, hyphema, and corneal blood staining. Says he also suffered a vitreous hemorrhage, which was observed with spontaneous clearing. Is that your understanding that he had -- that Makani had a vitreous hemorrhage --

MR. O'BRIEN: Your Honor, I object --

BY MR. KURTH:

Q -- according to his records?

MR. O'BRIEN: -- lack of foundation.

THE COURT: Could ask her what her understanding was as to her son's condition in February 2005.

MR. KURTH: Thank you, Judge.

BY MR. KURTH:

Q From a review of the medical records and from your taking Makani to his doctor appointments and meeting with them, what's your understanding of what Makani had suffered from concerning his eye?

A Yes, I did understand.

Q Pardon me?

A Yes.

Q What are the -- what are the things that he was suffering from? You said before, you know, hyphema, 8-ball, blunt trauma, vitreous hemorrhage, I mean, is -- did you talk to the doctors about a vitreous hemorrhage?

A He explained to me, basically, the injury to his eye. He used -- I didn't understand the terms, but he broke it down for me so I could understand. And the one I -- the -- how he explained it to me, like I said before, that he explained it to me like an 8-ball hyphema. And I -- when he explained it to me, I knew exactly what he was talking about.

Q And was his vision 20/50 at that time in his left eye?

A As far as his vision, I didn't know exactly what his vision was, but I know he had a hard time, his vision was not normal.

Q Okay. So this was all the way in February of 2005 now, correct?

A Yes.

Q Okay. Then you continued taking him to Dr. Carr after that time?

A Yes.

Q Okay. Go to Exhibit 4. I know this is a little long, but it's -- it's important to go through this, so if you need to take a drink of water or something, you can do that.

So let's go to Bates stamp 058.

A Okay.

Q Okay. So this is showing that Dr. Carr examined Makani on May 8th, 2005, about a year after the incident occurred, correct?

A Yes.

Q The last time that Dr. Carr had examined him looks like it was about October 27th, 2004, according to this record. Correct?

A Yes.

Q Okay. So in between that time, he had been going to Retina Consultants?

A Yes.

Q Then here on treatment and instructions, it says, "YAG laser on a Saturday," on page 061. What's -- did Makani have a YAG laser? Do you know what that is?

A No.

Q You're not sure exactly what that procedure is?

A I understood it as, like, being almost like Lasik's.

Q Like what?

A Like Lasik's, when they laser your eye.

Q I'm sorry, just apologize, because the air is, like, right above my head here.

THE COURT: She said she understood it to be like Lasik.

MR. KURTH: Okay. Thank you, Judge.

THE COURT: It -- it's hard for me to hear sometimes up here, as well. So, yeah.

MR. KURTH: Thank you.

BY MR. KURTH:

Q So Makani had, like a Lasik -- like a surgery on his eye, then, right?

A Yes.

Q Performed by Dr. Carr?

A Yes.

Q Okay. And then on -- if we go to Bates stamp 067, June 22nd, 2005, exam date, it says, "Per Dr. Carr, he'll wait on his cataract." Is there a -- what's your understanding of

the reason why you're waiting to get Makani's cataract removed?

A It was, basically, I understood it as his eye healing, to see how it heals after -- his eye has been through so much surgeries, and Dr. Carr was -- explained to me that it can create, like, scarring tissue. So he wanted to wait on his eye to see him -- how he healed, so that he can do that procedure. Because he didn't want to traumatize the eye as it has already been after all the -- the other -- all the other procedures he had done already from the emergency room to -- to the eye drops, everything.

Q So then he, Makani, still continued to see Dr. Carr, then, right?

A Yes.

Q Okay. And so this Record 068 shows that he saw Dr. Carr on August 26th, 2005?

A Yes.

Q And on Bates stamp 072, it's talking about still going to make a decision later concerning how to handle the cataract situation?

A Yes.

Q And that went on for quite some time, didn't it?

A Yes, it did.

Q But during that time, as these records show, he kept seeing Dr. Carr?

A Yes.

Q Because then on Bates stamp 073, shows that he saw Dr. Carr again on October 26th, 2005?

A Yes.

Q Makani was also diagnosed with having a glaucoma -- glaucoma issue, correct?

A Yes.

Q So after that October 26 of 2005 date, we go all the way to April of 2007. Will you turn to -- that other record looks like it was right -- to 081, Exam Date April 25th, 2007. Dr. Carr referred Makani again to go see Retinal Consultants.

A Yes.

Q Okay. And -- and he went and saw Retinal Consultants, as we've seen, in 2007, correct?

A Yes.

Q Okay. And then at that time Dr. Carr also discussed with you -- says, "Discussed with patient regarding that he will need his cataract removed in his left eye, and he will need the multi-focal lens."

A Yes.

Q Did the time passing have anything to do with Makani's age, you know, to get the cataract removed?

A Yes. Dr. Carr suggested to me that in -- after having all those procedures done to his eye, he was still experiencing headaches. So he wanted to take a break from

doing all, you know, the Lasik's and everything on his eye. He was -- he was complaining about a lot of headaches, his equilibrium was off and everything. So Dr. Carr wanted to take a break, you know. And he was saying to me that, you know, we have to wait and see how his eye heals.

Q How was it going to all these numerous appointments with Makani over this --

A It was hard. As a single mom, it's -- it was hard financially, but I had to make it work, because it was, like, my son's vision.

Q Right. And how was Makani doing with this during this -- this entire time?

A It was hard on him as a kid. He -- his -- it changed his life. It's just -- he didn't want to go out anymore, he didn't want to be with his friends. He didn't -- he didn't want -- he didn't want to -- he couldn't be out much in the sun. And it's just -- he was very hermit. He wouldn't communicate with me or his friends. We tried to get him to be active. He didn't want to do anything, he just wanted to sit in the house.

And then he -- he wanted -- with -- with everything he couldn't participate here, he just didn't want to live here anymore. So he asked me to move to California with the dad and the grandmother. He couldn't participate in anything. He -- he pretty much alienated himself from his friends, because

they all went off to go play sports. And they had activities, they played team sports all together. And my son couldn't. He was advised not to.

So it changed him. He -- he -- it killed me to see my son like that. I cried -- I -- I asked for advice through his dad what to do. And I felt as a mom if he felt that he wanted to be with his grandparents in LA and this is what's going to make him happy, I -- I -- I allowed that. I had a discussion with his dad in LA. And he says, If this is what he wants, this is -- this is what I want -- this is what I want for him, I want him to be happy. I've seen him suffer through all that. It was hard on me.

Q So -- so after Makani's ninth-grade year here, then he went to finish his schooling in California and live there?

A Yes.

Q Look at this -- I apologize. You okay?

A Yeah.

Q Look at -- keep in these records, just to finish this. 086, looks like he saw Dr. Carr on July 11th, 2007. It shows on 087 that he was back again wearing a protective eye shield at -- at least at bedtime for three to six weeks. And it's showing that he had superficial healing, satisfactory. He was supposed to take some eyedrops. So they had -- they had done this other surgery, then, right? One of them?

A Yes.

Q Then if we go to August 9th, 2007, which is Bates stamp 092, it looks like this is about the last time that Dr. Carr saw him before Makani moved to California?

A Yes.

Q That says, "Postoperative state of eye, left eye, removal of loose suture with topical anesthesia, no problems. Will return for contact lens fitting for right eye only." So he must have got a contact lens. So they had taken care of his cataract and put a crystal lens in by that time; is that correct?

A Yes.

Q All right. So then after that, Makani went to live in California and finish out his high school there, correct?

A Yes.

Q Okay. Do you remember what high school Makani went to here in town?

A Sierra Vista.

Q Sierra Vista? So you were looking closer to Sierra Vista at that time, after you had moved from when he had went to Woodbury?

A Yes.

Q Did Makani ever attend Fertitta Middle School?

A He did. It was for, I think, a half a -- or half a quarter or a semester.

Q Before you said that, you thought he had just

attended Woodbury. Did he attend Woodbury, or did he attend Fertitta, or do you remember?

A I -- honestly, it's -- at that time, when we -- we moved, there was a lot going on. And, I mean, think about it now, he did go to Fertitta. I couldn't tell you that -- if -- how long he went.

Q Now, there come a time when you contacted an attorney to make a claim against the school district?

A Yes.

Q And was I the first attorney you contacted?

A Yes.

Q Did you make a claim with the school district? An official claim?

A That's when I contacted you, and after telling you what happened with my son, I left it in your hands.

Q Okay. Let me have you -- do you recall signing a -- a form that the school district provided to make a claim?

A Yes.

Q Do you know what date you signed that form? It was a long time ago, I don't expect you to remember the exact date, but do you know it?

A I know I signed one. Exact date, no, I don't.

Q Okay. You see in that book, it's not been -- this hasn't been admitted into evidence, so it's not in any books over here. Let's look at -- it should be in your book.

Proposed Exhibit 17. So turn to 17 in there.

MR. O'BRIEN: Your Honor, I would object to the introduction of Exhibit 17. I'd request that the argument be heard outside the presence of the jury.

THE COURT: Now's probably a good time to -- to take an afternoon break, as well. So let's -- let's go ahead and take a -- a 10-minute break.

Okay. Ladies and gentlemen, we're going to take a 10-minute break. During this recess you are again admonished not to talk or converse amongst yourselves or with anyone on the subject connected with this trial, or read, watch, or listen to any report of or commentary, including Google or the Internet, regarding this case.

And we will meet you back here, let's go until 2:30.

(Jury recessed at 2:15 p.m.)

THE COURT: Before we go, let's talk about this exhibit real quick.

Mr. O'Brien, since it's your objection.

MR. O'BRIEN: The only objection, Your Honor, I have is that the exhibit includes a letter from Mr. Kurth's office that I believe since it's part of settlement process with our risk management department, that it constitutes a part of the settlement discussion and shouldn't come in. The document itself I don't have a problem with --

THE COURT: The claim form itself?

MR. O'BRIEN: -- the claim form. Right.

MR. KURTH: Well, I have it in both ways, Judge. I mean, if -- my position for having this letter, though, is Mr. O'Brien made a big deal, even on his opening statement, you know, and, I mean, there's still a long delay regardless, but, like, us contacting the school district. And -- and we're going to show later that I sent Ms. Wheelan, when -- in her testimony, a letter in December of '04. And then we had to get this regular claim form that they requested and they required. And by the time we got it notarized and signed, I sent it to them.

It doesn't say anything about settlement in here, it just says -- they're trying to say that we weren't cooperating and participating, and that's what they've already argued. And so I think it's -- it's relevant.

THE COURT: So --

MR. KURTH: That's why I'd like it.

THE COURT: The -- the claim form by itself is Proposed Exhibit 16 --

MR. KURTH: Correct, Judge.

THE COURT: -- is that correct?

MR. KURTH: Yes.

THE COURT: The claim form itself is dated --

MR. KURTH: October 27th, 2005.

THE COURT: October 27. Not sure why the --

MR. O'BRIEN: Your Honor, I withdraw -- withdraw my objection.

THE COURT: Okay. Are we okay with admitting Exhibit 17 right now, or do you want to --

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Okay. Mr. Kurth, you good?

MR. KURTH: Now he's going to make a big deal, because he's going to say I sent it two months later. Whatever. That's fine. I don't care. I'll deal with it.

THE COURT: Exhibit 17 is admitted.

MR. KURTH: I still sent it.

THE CLERK: [Indiscernible.]

THE COURT: No, there's -- there's no objection now. So 17's admitted without objection.

(Plaintiff's Exhibit 17 admitted.)

THE COURT: And let's take our break.

MR. KURTH: I do have to knock off -- black out -- there's a Social on that form, I see. So get a black marker.

THE COURT: You may have noticed the Court received a few notes. Let's deal with those. I've -- I've got to take a break myself.

THE CLERK: [Indiscernible.]

THE COURT: Yeah, let me take a break, because I need one.

(Court recessed at 2:20 p.m., until 2:27 p.m.)

(Outside the presence of the jury.)

THE COURT: Counsel, we've received a few, actually, questions from some of the jurors. So what I'd like to do now is give them to both of you to take a look at. There are quite a -- quite a few of them. But if you could both take a look and then we can discuss them once you've had an opportunity to -- to look at them real quick.

(Pause in proceedings.)

THE COURT: Your response?

MR. KURTH: I mean, I think it affected the family, and it had an effect on Makani, her son. So I -- but it's not -- anyway.

THE COURT: Yeah, I -- I think -- there's no --

MR. KURTH: We're not making a claim for that.

THE COURT: Yeah.

MR. KURTH: [Indiscernible.]

THE COURT: Yeah. I agree. So we'll -- we'll keep out --

MR. KURTH: And I don't think it's prejudicial or anything if they ask, was asked [indiscernible].

THE COURT: The question from Juror No. 9, "Did the mother lose out on any work hours while taking him back and forth to the doctors." Counsel for CCSD has objected to the question on the basis primarily of relevance, but also as the Court understands it, unfairly prejudicial and nonprobative.

Court's inclined to -- to keep this question out. So we won't be asking the question from Juror No. 9.

I mean, the one I thought she already answered, on the speaking one.

MR. KURTH: Yeah, I don't know that. She told him before he went to the UMC. I mean, I don't know if she said that she's -- did it on, you know, Thursday morning or Thursday -- or Wednesday [indiscernible].

THE COURT: I mean, I'm fine if you want to ask that specific question to maybe assuage the juror who is asking.

MR. KURTH: [Indiscernible.]

MR. O'BRIEN: I'm going to ask most of these [indiscernible].

MR. KURTH: [Indiscernible.]

MR. O'BRIEN: Who is Jack [indiscernible.]

MR. KURTH: I don't know. That's -- where that was in the record.

MR. O'BRIEN: I don't --

MR. KURTH: Where that was the record? I don't see that name in there.

MR. O'BRIEN: I don't, either. Yeah, I don't know that -- anything about that. So.

THE COURT: On that one, I would just say let's keep it out, because it -- nobody knows what it...

MR. KURTH: Right. I think some -- sometimes I

think in the records it says [indiscernible] with her at the time, and she wasn't -- if they're really worried about was she really single or not, I guess maybe that's --

THE COURT: You -- well, I -- I noticed that, as well. Obviously, the juror did, too. Somebody may want to follow up on that.

MR. O'BRIEN: I have no objection [indiscernible].

MR. KURTH: [Indiscernible] asked about it [indiscernible].

MR. O'BRIEN: [Indiscernible] shouldn't be asked till after he's done and I'm done [indiscernible].

THE COURT: I agree. So let's -- let's hold until you both are done. And then I can say okay, we've received some questions, some of them have already been answered. Others have already, you know, legally speaking, I'm not permitted to ask. And then if there are -- does that work for you guys?

MR. O'BRIEN: Works for me.

MR. KURTH: Are you saying you want me to ask her about the parents, then, or --

MR. O'BRIEN: [Indiscernible.]

THE COURT: No, yeah --

MR. O'BRIEN: I just wouldn't [indiscernible].

THE COURT: Right now. Yeah.

MR. O'BRIEN: Read now and have to address that now

[indiscernible].

THE COURT: In your normal course of...

MR. KURTH: Okay. Thank you.

THE COURT: Is everyone ready?

MR. O'BRIEN: Your Honor, do we know who the individuals in the back of the courtroom?

MR. KURTH: Some -- they're just some people that I know. They're not witnesses or anything.

MR. O'BRIEN: Okay. That's all that I was...

MR. KURTH: Yeah.

MR. O'BRIEN: Thank you.

THE COURT: Welcome.

(Pause in proceedings.)

(Jury reconvened at 2:35 p.m.)

THE COURT: Will counsel stipulate to the presence of the jury?

MR. O'BRIEN: So stipulated, Your Honor.

MR. KURTH: So stipulated, Judge.

THE COURT: Thank you. Mr. Kurth, you may continue. So the jury knows while you were away, we did admit into evidence Exhibit 17, which is not in your binders.

MR. KURTH: And I need to give that -- I do have a copy of -- for that, Judge. But I noticed there's a -- a Social on there that I need to black out. And I do not know what I did with those markers I brought with me. Do you have

one that I could use? Thank you. I'll do that.

(Pause in proceedings.)

MR. KURTH: This is Exhibit 17.

(Pause in proceedings.)

BY MR. KURTH:

Q Okay. Ms. Payo, you understand you're still under oath, correct?

A Yes.

Q Okay. And we're just resuming your -- your prior testimony right now.

Are you currently married?

A No.

Q Okay. Did you ever get divorced from Makani's father?

A Yes.

Q Do you know when you got divorced?

A '98.

Q Okay. When you went to these appointments with Dr. Lu or Dr. Carr, did you go there with Makani?

A Yes.

Q Did Makani's father ever attend any of those appointments with you?

A No.

Q Okay. Was he living in Nevada during that time?

A No, he was living in California.

Q Okay. Do you know if your -- your -- did your mom or your sister or anybody else go to any of those appointments; do you remember?

A My sister, for a couple appointments.

Q What was her name?

A Leann Escobedo [phonetic].

Q Okay. That's what you recall right now?

A Yes.

Q I mean, so if there was any documents that say your -- your parents or whatever, that they talked to the parents, do you know why they would say that, like, plural? Not just you?

A I don't know.

Q Okay. Let's look at -- talking before about you making a -- a claim with the school district, correct?

A Yes.

Q Okay. And do you remember when -- well, you said you signed the claim form, correct?

A Yes.

Q Okay. So let's look at Exhibit 17 now that's in your book. It's been admitted into evidence. Do you see that?

A Yes.

Q Okay. So the first page of that exhibit, Bates stamp 0295?

A Yes.

Q Okay. So -- so that's a letter from -- from me, right? My law office to --

A Yes.

Q -- and that's to the Clark County School District Risk Management Department?

A Yes.

Q Okay. Attention Eileen Wheelan, right?

A Yes.

Q Okay. So it appears that -- that that letter was sent out somewhere around December 29th of 2005?

A Yes.

Q Okay. And then the next page is -- two pages are Bates stamp 0296 and 0297. Do you see those?

A Yes.

Q Okay. Now, is that -- that document's entitled "Claim Against Clark County School District"?

A Yes.

Q Okay. And on the second page of that 0297, do you see there's a couple of signatures on that. Looks like three signatures -- well, couple of signatures on that page; do you see those?

A Yes.

Q Okay. Is that your signature there?

A Yes, it is.

Q Okay. And that's where it says, what, Lori B. Payo?
A Yes.
Q And do you believe you signed that on or about October 27th, 2005?
A Yes.
Q Okay. It looks like that signature was notarized, too?
A Yes.
Q Okay. You see a notary stamp there? You see that notary stamp right there?
A Yes.
Q Okay. And so it looks like you've -- you signed a claim form that was notarized on about October of -- 27 of 2005, and then a letter from my office wasn't sent out with that until about December 29th, 2005; would that be your understanding?
A Yes.
Q Okay. Do you know any reason why it was -- there was a little bit of a time lapse in there from signing that claim form till my office sent it out?
A I remember signing it and I left -- I left it with you.
Q Okay. So this -- this form here, you -- you reviewed it before you signed it, correct?
A Yes.

Q Okay. And here it asks for your -- the name of the claimant. It says Makani Payo through his mother Lori Payo, correct?

A Yes.

Q And shows your address as being 9642 Cedar Park Avenue?

A Yes.

Q Okay. So was -- that was the new location you had moved to after the incident happened?

A Yes.

Q Okay. And do you still reside there?

A Yes.

Q Okay. And the -- your -- what was -- was your prior address something on East Harmon Avenue?

A Yes.

Q Okay. What -- do you remember what it was? The numbers or not?

A No.

Q No? Okay. But it was -- but it was on East Harmon?

A Yes, it was.

Q Okay. And that -- if you look at -- if you look at -- I'm going to flip you back here, but just real quick, to Exhibit 6, Bates stamp 0115, is that -- that first document we looked at about when Makani was brought by ambulance to the UMC on May 14th, 2004. So Exhibit 6, 0115, first page there.

It looks like it says your address is something-90 East Harmon Avenue?

A Yes.

Q Okay. So -- so that's where you were residing, you know, when you were right in the process of moving --

A Yes.

Q -- and brought him to the hospital, correct?

A Yes.

Q And at least later on, if you flip to Bates stamp 0135 in that document, that's at least showing an admit date of 5/25/2004? Are you there yet, 0135?

A Yes.

Q Okay. See on the top left it looks like your address then is something-Cedar Park?

A Yes.

Q Okay. So you're at Harmon and sometimes during that period of time you -- you had -- you'd moved to Cedar Park, correct?

A Yes.

Q Okay. So now on Exhibit 17, this -- this claim form that you signed and you reviewed --

A Yes.

Q Okay. So it -- it -- on No. 4, Section No. 4 on there, it's asking -- "Describe how damage or injury occurred, get full details, include all pertinent information and

documentation." It says, "On May 12, 2004, at approximately 9:45 a.m., the school nurse called me while I was getting ready for work and advised that my son was playing field hockey during PE, he was struck on his face and left eye. I asked if he needed medical attention and she said she would call me. The nurse never called me back. See 09/01/04 letter."

Do you know what that's -- what that's about, the letter? Do you remember sending any letter to the school district around that time, September 1st of 2004?

A Not that I can remember.

Q Okay.

A It's been a while.

Q So you don't know if that was some kind of letter from you or could have been the letter from your attorney or -- just, either way, it looks like it refers to some letter dated September 1st, 2004, correct?

A Yes.

Q Okay. And under -- what did the school district or its employees do to cause your damages or injury? Was -- you're alleging at least at that time, still alleging the same today, but negligent supervision, fail to provide adequate equipment, negligence, and it says etcetera, right?

A Yes.

Q Okay. And on No. 8, turn to the next page, 0297,

according to this claim form, it says, "Further, he will need cataract surgery at some time in the near future," and then you gave an estimate of the medical expenses at that time, correct?

A Yes.

Q Okay. So it's your understanding that whenever this letter was sent by your lawyer a couple months later in December of 2005, that the school district would have had this claim form with that information about what had happened to Makani and what you thought he needed for treatment, correct?

A Correct.

Q And at that time you had never -- still had never seen that student injury accident report that's Exhibit 2, did you?

A No.

Q Okay.

MR. KURTH: Pass the witness.

MR. O'BRIEN: Let me try this, see if it works.

MR. KURTH: You'll be right in front of me, but it's up to you what you want to do. Okay. Thank you.

CROSS-EXAMINATION

BY MR. O'BRIEN:

Q Hey, I think you know who I am. I'm Dan O'Brien, I represent the Clark County School District. I'm going to ask you a few questions. I don't believe I'll take as long as

your attorney did.

You -- first of all, you don't remember all the details that your attorney read to you out of the records, do you?

A No.

Q Just confirming that that's what the records say and --

A Right.

Q -- you don't remember anything different; is that -- that fair to say?

A Yes.

Q Okay. And we -- the records are in evidence, so we're not contesting what the records say. That's not even an issue. But I wanted to understand that whether you had an absolute photographic memory or if you were just confirming that you don't remember anything different.

A No.

Q Is that fair? All right. I want to talk just a little bit about the medical records. First of all, you weren't present when Makani was hit?

A No.

Q And, in fact, you didn't see him till the next day after midnight; isn't that correct?

A Yes.

Q So you don't know what he looked like right after he

was hit?

A No.

Q You don't know what the teacher saw, for instance, when the teacher examined Makani before he sent him to the nurse?

A No.

Q And you don't know what the -- the first aid safety assistant saw when she examined Makani in the nurse's office, do you?

A No.

Q And some of the symptoms that -- that have been described in this -- this case, the vitreous hemorrhage, the -- the eye being all pink and things like that, that all occurred after he went home; isn't that correct?

A Yes.

Q That's when it was first observed?

A Yes.

Q Okay. So the decision -- it's fair to say the decisions that the teacher or the FASA were making were based upon what they saw at the time; that correct?

A Yes.

Q All right. And there is no contest, there's no -- no allegation in here that he wasn't seriously hurt. I mean, I want that -- that-- that should be clear. And we're not suggesting that he wasn't seriously hurt, that he didn't

require the treatment he under -- underwent.

Do you recall when you first retained an attorney in this case?

A Actually, Robert Kurth was actually recommended to us by a friend.

Q But he was hired within a few days of the accident, wasn't he?

A Yes.

Q Okay. I mean, it wasn't, like, months later that he -- you consulted with him? I got that impression from one of the questions. I just wanted to clarify.

A Yes.

Q Yes, he was hired months later?

A Yes, he was hired.

Q But he was hired within a few days of the accident?

A Yes.

Q All right. When you came home the night after he was injured, you saw him sitting up in bed asleep; is that right?

A Yes.

Q Did you examine him at that time?

A No.

Q When was the first time you got a chance to examine him?

A It was the morning after, which was Thursday.

Q Okay. And what did you see?

A I saw that he had cuts and bruising on the side of his eye from -- from his -- the breaking of his glasses. I saw a lot of bruising and his eye was puffy and red, pretty much bloodshot around the area.

Q Okay. And I'm certainly not trying to argue. Are you -- are you talking about the eye or around the side of his face?

A It's -- he had cuts -- he had cuts and bruising on his eye -- or on his -- left side of his face. And then he had also cuts on -- above his lid and below his cheek -- below his cheekbone, right -- right above his cheekbone below his eye.

Q Okay. And did you look directly in his eye when -- when you first saw him that morning?

A Yes.

Q And did you see anything wrong with the eyeball itself?

A It was a -- it was a tinge of red.

Q Was a tinge of red --

A Yes.

Q -- already? Okay. But you don't know when that tinge of red appeared; is that correct?

A Yes.

Q Did Makani -- when you first spoke with Makani about

his injury, did he tell you that he had been vomiting?

A No.

Q When did you first find -- or learn that he was vomiting?

A My -- the night -- the night before I came home, my -- before my son went to bed, my mom told me that he was not feeling well. He was -- he was very agitated and he was nauseated and he was throwing up. He couldn't keep dinner down.

Q Okay. Now at that point you knew he'd been hit in the head, and you knew he was vomiting and he was nauseous, couldn't keep anything down; why didn't you send him to the doctor right then?

A As a single mom, I didn't -- I had no transportation at the time. Because of the accident, my work gave me the day off because of the injury my son suffered. And I had no way of transportation. My sister was at work; normally she would be -- she would help me transport -- with transportation. If I don't have transportation, I'm -- I take the -- the bus.

Q Why didn't you call an ambulance?

A I was not thinking.

Q You could call the paramedics. I don't believe that costs anything, does it?

A To call them? No. But they will bill -- you do get billed for it. As a single mom, I can't -- I couldn't afford

that.

Q Okay. But if you'd done that, you would have known right then and there that his condition was serious, wouldn't you?

A Yes.

Q When -- when did you finally decide that he needed to go to a doctor in spite of the fact that it's expensive and you're a single mom?

A The Thursday after I was home with him and I sat -- he sat up -- he sat up in bed, and I thought he -- I thought, as a mom, I wanted to see if he was getting better. And I -- you know, we -- we gave him water and everything. He sat up, he was -- and then he started complaining of headaches. And as -- it wasn't as bad until later on in the evening, as it was -- it was later on in the evening. It got late.

Q Okay. So late on Thursday that -- what -- what got worse, the headaches?

A Yes.

Q How about the nausea?

A He -- he was nauseated. He was dizzy. His head hurt.

Q When did he first tell you he was dizzy?

A That -- that evening.

Q Thursday evening?

A Yes.

Q He didn't tell you before? You were with him all that Thursday, right?

A Yes.

Q He never mentioned dizzy until late Thursday?

A At that same time we were also in the process of packing up the house and moving, we were moving to the east side.

Q Okay. My question, though, he didn't tell you till late that evening --

A No.

Q -- that he was dizzy? When did he first tell you he had blacked out?

A He -- actually, Thursday. It was when I asked him again about his headaches, and then he -- he -- he mentioned -- when he -- he got hurt, he was dazed and he -- he doesn't remember anything.

Q Okay. Now, you said he was dazed or did he tell you he actually was unconscious?

A He told me he was actually blacked out.

Q What did he tell you about that?

A When he came -- when he came to -- he was -- he said he felt groggy. He saw the -- he saw his -- his other students that were -- that was around him, and that the -- the teacher -- the teacher came over to -- to look at him.

Q Did he tell you he was laying on the ground blacked

out?

A He told me he was on the ground.

Q Okay. In what way? Was he -- I mean, stereotypical picture, you know, he's out. Did he tell -- explain to you, I'm flat on the ground, I'm kneeling? What did -- what did he tell you?

A That he was lying on the ground.

Q He didn't tell you anymore than that?

A No.

Q So now you know that he's unconscious, he was knocked unconscious, and he's got severe headaches, and he's nauseous and he's vomiting, and he's got scratches on his face and on his eyelid, and you still didn't call -- take him to a doctor; is that correct?

A Yes.

Q You didn't call a paramedic; is that correct?

A Yes.

Q And you didn't -- obviously didn't call an ambulance; is that correct?

A No.

Q No, it's not correct?

A No, I didn't call an ambulance.

Q Thank you. Bad question. My apologies. What changed between Thursday night and Friday morning that caused you to finally think that he -- he better go see a doctor?

A He was lose -- Friday he lost vision in his left eye. He barely could stand up. He said the -- the room was spinning and he had -- he was complaining of pressure in his eye.

Q And these are all new symptoms that appeared on Friday; is that correct?

A Yes.

Q Did you ever call anyone at the school district to tell them that he was having these severe symptoms and that you needed to take him to the doctor?

A No.

Q Just this is a very little thing, but on the claim form that you filled out, Exhibit 17 -- do you have that in front of you still?

A Yes.

Q Page -- or -- yeah, page 0296. Do you see on there where you said that the nurse called you?

A Yes.

Q Do you know who the school nurse was at that time?

A No.

Q And the other question I have is on this Exhibit 17, the -- the 296-297, did you actually fill this out? Did you type this document?

A No.

Q You told somebody what you remembered and they typed

it out; is that correct?

A Yes.

Q And so when the word "nurse," is that your word, or did somebody change your word?

A That was my word.

Q Was that a mistake?

A Yes, it was.

Q You figured that out later, of course?

A Yes.

Q Okay. Do you remember when the last time was that Makani saw Dr. Carr?

A It was before he moved to California.

Q Do you remember what year that was?

A 2007.

Q Did Makani wear -- Makani -- you said, I think, the -- the glasses -- he was wearing glasses at the time of his injury?

A Yes.

Q What was his vision before the accident? 20/20? 20/50, 20/70, what -- what was his vision in his eye?

A I'm not sure at the time what his vision was.

Q Do you remember when the last time was that he went to an eye doctor prior to this incident?

A It was -- he got the glasses that year.

Q Okay. So it was relatively recent to the -- the

time of the incident?

A Yes.

Q Is it fair to say his vision wasn't perfect on May 12, 2004?

A Yes.

Q Do you know what his vision is now?

A No.

Q Do you know -- are you able to tell whether his vision now is any worse than it was on May 12th, 2004, before this accident?

A Yes.

Q Okay. So which was worse, 2004 or now?

A It's 2004, closer to 2004.

Q Okay. So that -- his -- his vision's better now than it was then; is that what you're saying?

A It's improved.

Q Okay. Thank you. You never spoke with the first aid safety assistant who treated Makani, did you, about the accident?

A From -- the -- at the school?

Q Yes.

A No.

Q And you never spoke with Todd Petersen, the teacher, about the accident, did you?

A No.

Q Is it fair to say you have no idea what they saw when they looked at Makani on May 12, 2004?
A No.
Q Thank you.
MR. O'BRIEN: That's all I have.

REDIRECT EXAMINATION

BY MR. KURTH:
Q The -- you said that the word "nurse" was a mistake on this -- this form, this claim form?
A Yes.
Q Okay. Is that because you later found out the school nurse didn't actually see Makani?
A Yes.
Q And there wasn't a school nurse even at the -- at Woodbury Middle School when he got hurt, was there?
A No. She was an assistant.
Q An assistant?
A Yes.
Q Okay. But Mr. O'Brien just asked you if you talked to the first aid safety assistant, like a F-A-S-A, FASA?
A I was assuming that he said after the accident.
Q Oh.
A Like right after.
Q So did anybody call you from Woodbury Middle School after Makani was injured on that day?

A Yes.
Q Okay. Because before I thought you testified that you -- you didn't know the name. I asked you if it was Wally Morton and you said you didn't -- you didn't know?
A I don't know her name.
Q Okay. But who called you? What was your understanding what they did at the school?
A She said -- she identified herself as the assistant, that the actual nurse wasn't there.
Q Okay. And were you told that, from whatever this assistant observed, that you should take Makani to the ER?
A No.
Q Did anybody ask you for permission for the school to have Makani transported to the ER?
A No. I asked her on the phone.
Q But -- but you already said you didn't see what exactly that assistant had seen when --
A No.
Q -- she was treating Makani?
A Right.
Q You -- you said you think that Makani's vision might be better now than after the incident happened?
A It's --
Q -- in 2004?
A It's improved with -- with all the treatments and

the crystal lens that was put in his eye.

Q What do you mean, crystal lens?

A Dr. Carr had put a crystal lens, basically what it is, it's a -- like a -- like an eyeglass into his eye.

Q Okay.

A I don't know how else to explain it to you.

Q In his left eye?

A In his left eye.

Q And let's -- so Dr. Carr did that when he took out the traumatic cataract?

A Yes. He had to remove that before he had to insert that crystal lens in his eye.

Q And that was -- and we looked at those records before, that was done sometime in -- looked like July of '07 --

A Yes.

Q -- before Makani left to --

A Yes.

Q -- okay -- to go live in California, right?

A Yes.

Q Okay. And since that time, do you recall going to another visit with Makani to go and see Dr. Carr?

A Yes.

Q Do you remember when that was?

A The earlier part of this year.

MR. KURTH: Court's indulgence.

THE COURT: Sure.

BY MR. KURTH:

Q All right. Let's look at Exhibit 7, please. Are you there?

A Yes.

Q Okay. So Exhibit 7 is Bates stamp 0291, 0292, and 0293. So does this refresh your recollection of when you went with Makani to see Dr. Carr in 2015?

A Yes, it does.

Q When was that?

A It was January 21st of this year.

Q Okay. And it says in the comment that he was last seen August 9, 2007, by their office, correct?

A Yes.

Q Okay. And it says that Makani was there for an eye exam recommended by his lawyer after having an eye injury in 2004. So he was there to see if there was any other procedures that he might need in the future, correct?

MR. O'BRIEN: We'd object to the question --

THE WITNESS: Yes.

MR. O'BRIEN: -- as leading.

MR. KURTH: Guess that's -- we kind of agreed to that earlier on, I guess, for the record.

MR. O'BRIEN: With respect to going through the

medical records, we agreed not to his opinion as to why she did something or why anybody else did something.

MR. KURTH: Just reading off the record. But I'll be happy to restate it. I don't --

THE COURT: Go ahead and restate. Thank you.

MR. KURTH: Okay.

BY MR. KURTH:

Q Was Makani living in Nevada in 2014?

A No.

Q Okay. Was he living in Nevada in 2015?

A No.

Q And -- and is -- is it your understanding that Makani had to come back here to Nevada?

A Yes.

Q Why was that?

A Dr. Carr was the only one who understood his injury and was treating him the whole time. So I -- we -- I felt and his dad felt that it's -- was better for him to be seen by the doctor that took care of him from the beginning, from the time he got injured till -- up until this point.

Q Okay. So then on Bates stamp 0293, Dr. Carr came up with another diagnosis at this time, didn't he?

A Yes.

Q Okay. So it says, "After cataract obscuring vision, left eye, lens replacement left eye." Correct?

A Yes.

MR. O'BRIEN: What -- what page is that?

MR. KURTH: Oh, 09 -- 0293. The last page of that exhibit.

MR. O'BRIEN: Thank you.

MR. KURTH: It's in the description, diagnosis part.

BY MR. KURTH:

Q So Dr. Carr had explained to both you and Makani at this visit about this after-cataract membrane formation?

A Yes.

Q And do you -- do you recall anything about it specifically?

A That it -- he -- it would have to be removed.

Q And -- and then it says something about explain that his left eye best-corrected vision is 20/40 as opposed to prior best correction --

A Yes.

Q -- 20/20; is that right?

A Yes.

Q Okay. So is it your understanding that Makani needs to have another YAG laser treatment?

A Yes.

Q And replacement of the crystalline lens?

A Yes.

Q Okay.

MR. KURTH: No further questions at this time.

MR. O'BRIEN: Your Honor, may I have a brief redirect? Couple of questions that he raised that weren't raised before.

THE COURT: No.

MR. O'BRIEN: Your Honor, I'd like to make a record, then.

THE COURT: Sure.

MR. O'BRIEN: Outside of the presence of the jury, so I don't prejudice them.

(Off-record bench conference.)

THE COURT: Okay. Mr. O'Brien, go ahead.

RECROSS-EXAMINATION

BY MR. O'BRIEN:

Q First of all, how do you pronounce your last name? I think I'm butchering it every time I mention it.

A It's Payo.

Q Payo.

A Uh-huh.

Q Ms. Payo, when you were being questioned on redirect by your attorney, you stated that you -- that Makani came back to Nevada to see Dr. Carr. And the impression I -- I'm afraid that that gave was that that's the only reason you came back. Would you -- is it your understanding the only reason he came back to Nevada in January of this year was to see a doctor?

A Yes.

MR. O'BRIEN: Your Honor, may I follow up?

THE COURT: You have other witnesses you can follow up with.

MR. O'BRIEN: Thank you, Your Honor.

THE COURT: Thank you.

MR. O'BRIEN: Thank you, Ma'am.

THE COURT: We did receive a few written questions from the jurors. From the time they were written and provided to the Court, the vast majority of the questions seem to have been answered now with the -- the complete testimony. Bear with me one second.

Counsel, if you would take a look at this -- this last one.

One or two of the questions we can't ask under the law.

But Ms. Payo, the question -- one of the questions that may not have been addressed, did you actually speak with Makani the night of the incident while you were on a break at work?

THE WITNESS: Yes.

THE COURT: And what do you recall about that?

THE WITNESS: It was just brief. I just asked him if he was okay. And he went back to -- he went back to lying down. And then I spoke with my mother.

THE COURT: You stated to the effect that you took some period of time off of work. The question following up on that is when did you go back to work initially?

THE WITNESS: At the time of the accident, I was working at Spago's. But I was there temporary, because my -- originally, I worked at Wolfgang's at the MGM. And they -- they were renovating it. So they -- they dispersed the staff to the different Wolfgang Puck restaurants in Vegas. And I was at Spago's at the time. And when the incident happened, I -- because of what my son was going through and only -- I could -- I had to take him to all the doctors, I had to stop working.

And considering I was -- at the time I was a trainer for Wolfgang's helping new staff members come into the company, they gave me that time off, because they -- because I was constantly calling in and missing -- and having my shift covered. So when I explained to them what the situation was, they gave me the time off until our restaurant at the MGM was built, and I went back there.

THE COURT: Do you recall when that was?

THE WITNESS: It took -- it took four months for the restaurant to be rebuilt at MGM. So I -- so about four months.

THE COURT: Okay. Do you happen to know who Jack Lasernon [phonetic] is?

THE WITNESS: No.

THE COURT: Okay. Approach reach quick, counsel.

(Off-record bench conference.)

THE COURT: That will be all the questions for Ms. Payo. Thank you very much, you are excused. You may remain in the courtroom as before.

Mr. Kurth, call your next witness, please.

MR. KURTH: Makani Payo. Plaintiff calls Makani Payo, the plaintiff.

MAKANI KAI PAYO, PLAINTIFF, SWORN

THE CLERK: Please be seated. State your full name for the record, please.

THE WITNESS: Makani Kai Patrick Payo.

DIRECT EXAMINATION

BY MR. KURTH:

Q How are you doing, Mr. Payo?

A Good.

Q Did you answer?

A Yeah, I did.

Q Okay.

A I'm -- I'm all right.

Q Make sure --

THE COURT: You may need to speak up.

BY MR. KURTH:

Q -- you speak up or by that, or try not to put your

hand in front of your -- I know I do that sometimes, too. I talk like that, and it's kind of -- you know, I don't know, like this. This law professor I had one time, he'd always walk around talking, like, in law school, you know. Anyways.

Plus, it's hard for me to hear. Whenever this kicks on I can't -- I can't hear very good. So, getting old.

So tell me, do you remember going to Woodbury Middle School?

A Barely. After the incident, it was -- it's hard to really remember.

MR. KURTH: Can you -- can you hear his answers over there?

MR. O'BRIEN: Your Honor, I can't hear him.

THE COURT: I can't hear him, either.

MR. KURTH: Can't hear.

THE COURT: Mr. Recorder, is there a way we can move the microphone closer or something?

THE COURT RECORDER: We can give him the handheld, but no, there's no way to move the --

MR. KURTH: Or just try to speak louder.

THE COURT: That one's fixed.

THE COURT RECORDER: We can give him the handheld.

MR. KURTH: Marshal is awesome, look at that.

THE COURT: Thank you.

MR. KURTH: Thank you very much.

THE COURT: Go ahead and -- and repeat the question, if you can.

BY MR. KURTH:

Q I was asking about you remember attending Woodbury Middle School?

A I can barely remember. It was -- it's kind of hard.

Q Okay. So back then in May 12th, 2004, how old were you?

A 11.

Q And this was near the end of your sixth-grade year?

A Yes.

Q And you were in PE class?

A Yes.

Q Okay. Do you know if -- do you know was that the last class of your day or in the middle or do you know?

A It was the beginning of the -- the day. It was the beginning of school.

Q Okay. So you had PE in the morning?

A Yeah. One of my first periods.

Q Now --

MR. O'BRIEN: I'm sorry -- I still can't hear him.

MR. KURTH: It's this a/c thing.

THE MARSHAL: You got a real soft voice.

MR. KURTH: Yeah, I could hear you better.

THE COURT: Okay.

MR. KURTH: Speak up. We can -- I can hear you much better. It's just this -- this'll kick off and it'll be a lot better in a second.

THE MARSHAL: Use the handheld.

MR. O'BRIEN: May I approach, Your Honor?

THE COURT: Yes. With the marshal.

(Pause in proceedings.)

THE MARSHAL: Try that.

THE WITNESS: Hello, hello, hello.

MR. KURTH: Okay.

THE MARSHAL: There you go.

BY MR. KURTH:

Q All right. Say something.

A Test, test, test.

Q Okay. You don't have -- don't lift it up. Just talk normal and let's see if it works. Okay.

THE COURT: Yeah.

BY MR. KURTH:

Q Okay. Good. Excellent. Like American Idol now or something. Let's see.

So you're 11 years old. You're in your PE class. And what were you doing?

A We were playing field hockey.

Q Okay. And when -- when you were -- before you played that day, had you ever -- do you remember playing it

out there on the tennis courts before?

A No. It was my first time.

Q From what you remember, it was the first time playing that --

A Yes.

Q -- activity?

A Yes.

Q Okay. Now, when you were in PE back then, did you get points for, like, dressing out?

A I -- I believe so, yes.

Q Were you required to participate in -- in the PE activities of the class?

A Yes.

Q Okay. So from what you remember when you were 11, you -- you had to dress out and participate in the activities that were given to you by your physical education teacher?

A Yes.

Q Okay. Did your -- who was your physical education teacher at the time?

A Mr. Petersen.

Q Okay. And that's the Todd Petersen that's been referred to here?

A Yes.

Q Okay. So this game, did -- did Mr. Petersen teach you, teach your class about, you know, this game before you

played it?

A I can barely remember. But he might have said a few.

Q Do you remember going over some rules?

A All I remember is, like, no high sticking. That's pretty much it.

Q What was the object of the game?

A To score into the opponent's goal.

Q Okay. So did they have goals set up on the tennis courts?

A Yes. On opposite ends.

Q Okay. And did you use, like, a -- a -- well, what kind of ball did you use? Was it a hard ball or a soft ball that wouldn't --

A It was a tennis ball.

Q Tennis ball. Okay. And would the tennis ball bounce?

A Yeah, it could bounce.

Q Like, if somebody hit it with -- with a stick, did you see the tennis ball bounce, like, up a certain height level or anything; do you remember?

A Yeah. It -- it was bouncing around.

Q Okay. Is -- is that the ball that was provided to, you know, you and other students to use in that PE class?

A Yes.

Q Okay. And then were you provided a hockey stick?
A Yes.
Q Okay. What -- what type of hockey stick was it? Do you remember what it looked like?
A It was, like, three and a half, four feet. It was like a normal hockey stick. It had -- went down, came out at, like, an angle to hit the ball.
Q So it had, like, a hard, plastic piece on the bottom?
A Yes.
Q Is there anything soft on there, soft about it?
A No.
Q And, I mean, were you wearing your glasses that day?
A Yeah.
Q Do -- do you remember when you got glasses?
A The same year, in sixth grade.
Q Do you remember what your vision was when you got the glasses?
A Honestly, I don't.
Q So when you're playing hockey that day, some rules -- some rules are went over with you. Were -- were you ever -- do you remember ever being given any written-type rules to review?
A I don't.
Q Did the -- did the PE class -- do you remember

within the PE class, you usually learned about a unit and then maybe you had to take a test about the different rules or game or whatever it was, did you do that back in sixth grade, if you remember?

A I don't remember.

Q Okay. All right. There was a time in this case where your deposition was taken, wasn't there?

A Yes.

Q Okay. And -- and that -- your deposition was taken on January 22nd, 2015?

A Yes.

Q Okay. And the day before that you had went and saw Dr. Carr, right?

A Yes.

Q Okay. And where were you living and, you know, before that, January 2015?

A Well, I was working on the cruise ship, so I was in Hawaii --

Q Okay.

A -- working on the cruise ship. But I -- my address, my mailing address would be in Cypress, California.

Q At -- at your grandparents'?

A Yes.

Q Okay. And as -- I know I'm getting -- I'm kind of moving around a little bit. I'll try to come back to it. But

-- and is that where you had lived after you had left here in 2007?

A Yes.

Q Okay. And did you go to high school there?

A Yes. I went to multiple high schools. And I went -- I was in -- actually in a different address, too, before Cypress, in Carson, California.

Q So you're working on a cruise ship right now?

A Yes.

Q And what do you do there?

A I cook.

Q What kind of things do you cook?

A Everything, from burgers and fries to fine dining. Everything.

Q Okay. Did you -- how long have you been working for the cruise ship?

A I'm on my second contract.

Q How long is a contract?

A Five months.

Q Okay. Did you have to get permission to -- to leave to come have your deposition taken and go see Dr. Carr?

A Yes.

Q And did you have to get permission to be able to come here from the cruise line and -- for your trial?

A Yeah. I had to get approved by, like, seven

officers to be...

Q And are you -- are you getting paid during that time?

A No.

Q Even though you're on a contract, they're not paying you?

A No. This is considered a work break.

Q Okay. But you still have your job, you're okay with -- with --

A Yes.

Q What's the name of the cruise line?

A Norwegian Cruise Lines.

Q And where are you -- where are they cruising around right now when you're working there?

A It's within the Hawaiian islands.

Q Oh, very nice. So let's go back to your -- when you came here and you saw Dr. Carr, you know, before your deposition was taken, you heard -- you heard what your mom testified to, correct?

A Yes.

Q Okay. So, before, when you last saw Dr. Carr and he put in a crystal lens and he took care of your traumatic cataract, right?

A Yes.

Q And then you left and started attending 10th grade

on in California, correct?

A Yes.

Q Okay. And -- and after that, you didn't see any other eye specialists except for, like, you know, ophthalmologists for your glasses or something?

A I only saw, yeah, regular eye doctors. I never really wanted to see any other doctors who didn't know the history of my eye. So.

Q Okay. So -- so when you came back and you saw Dr. Carr, what's your understanding of what you need to have done further to your left eye?

A A Lasik to remove some tissue or something like that, and possible change of, like, my lens needed.

Q Okay. So to remove that membrane that it says in the records, and then a new crystal lens?

A Yes.

Q And can they put the crystal lens in before the remove the membrane?

MR. O'BRIEN: Objection, Your Honor. Lack of foundation.

MR. KURTH: I'm asking his understanding of what -- from the treatment.

THE COURT: Ask that question, then.

MR. KURTH: Okay. Thank you, Judge.

BY MR. KURTH:

Q From -- from your meeting with Dr. Carr and him reviewing the treatment with you of what's recommended, what is your understanding of what has to be done, or what he's recommending should be done?

A Get my -- the membrane removed and then taking -- possibly putting a new lens in.

Q Okay. Do they have to do anything else for your right eye?

A No. They didn't -- I don't really want them to touch my right eye.

Q Okay. Why is that?

A I just been through so much with my left eye, I don't -- I'd rather -- I mean, I'm fine right now. So I -- I'd rather not have them do so much.

Q Because it scares you to have more -- to work done on a -- another eye that --

A Yeah.

Q -- hasn't had all the work done on it?

A Of course, yeah.

Q Okay. Make sure you speak up, okay? Thank you.

So let's go back to that -- that day of when the incident happened. So you're playing -- you're playing floor hockey out there. Do you remember how many kids were playing? Or how many kids were in your -- well, do you remember how many kids were in your class? Let's go to that question

first.

A 20 or 30 people.

Q And do you remember how many kids were playing this game at the time of floor hockey on the tennis courts?

A I think the class was split up into half and half, one team was half and then the other half was another team.

Q So you remember them having a lot of hockey sticks, then?

A Yeah, I believe so.

Q Okay. And then so you're playing, tell -- tell me what happened while you were playing; I guess, tell the jury what happened while you were playing.

A I mean, we were just going back and forth trying to get into our opposing goals. And then I was looking down, seen the ball come right under me. And I was looking straight down, and this guy, Brandon Higgins, full-on swung into my eye. And then blacked out, was on the -- laying on the ground. And it was pretty much what happened.

Q So do you know how long you blacked out for?

A Probably, like, 10 minutes. Just on the ground.

MR. O'BRIEN: Your Honor, I'm sorry, I didn't hear his answer.

THE WITNESS: 10 minutes laying on the ground.

BY MR. KURTH:

Q You think -- you think you were down there that

long?

A I believe so.

Q Well, either way, you blacked out, right?

A Yeah.

Q So you blacked out and then -- how do you know you blacked out?

A I remember when I got hit, I -- my vision just went out, like, I knew my eyes were open, but I couldn't really see anything. And I was -- I was just face-down on the ground, just waiting there until I can actually know what I was doing at the moment.

Q And did -- sometime did you look up and see the kids or the teacher?

A I -- I just -- I remember seeing feet around -- well, when I started getting my vision back, I remember seeing, like, kids, like, huddling around me.

Q Okay. Did somebody help you to get up and -- do you remember?

A I believe -- it -- I believe it was the -- the guy who hit me, Brandon Higgins.

Q Okay. Just asking for what you -- what you specifically remember, not for you to guess or anything else. Okay? So helped you up and then do you remember being helped to the first aid safety assistant station?

A Yeah. I remember one of -- one of the kids walked

me to the office.

Q Okay. Well, it looks like -- let's see, did we admit that? Okay. Why don't you -- why don't you turn to Exhibit 2. And, I mean, would it help you to review something to refresh your recollection as far as what was going on, what happened, who brought you there?

A [No audible response.]

Q Makani? Would it help you to look at a document to refresh your recollection?

A Yes.

Q Okay. Did you have a chance to review that document?

A Is this --

Q Exhibit 2?

A Yeah.

Q Okay.

A The accident report?

Q Yes. So does -- does that refresh your recollection as to whether Brandon Higgins was bringing you there to the FASA, first aid safety assistant?

A Yes.

Q Then what -- what treatment did you receive when you were there?

A An ice pack. And that's pretty much it.

Q Is that what you remember, an ice pack?

A Yeah, pretty much.

Q Do you remember them cleaning up -- cleaning up anything on your face? Maybe blood or scrapes or anything?

A It says with -- with soap and water. Maybe, I --

MR. O'BRIEN: Objection, Your Honor. He's not testifying from his memory. He's reading from a document.

MR. KURTH: I'll ask him if he remembers that or not.

THE COURT: You kind of already did ask him. But go ahead and re-ask him so we can clarify.

BY MR. KURTH:

Q So I'm asking for what -- you know, after -- after reviewing a document -- the document, okay, which can help you to refresh your recollection, I'm asking what you recall. Okay. Not for you to necessarily read off of it right now. Just for you -- do you recall them cleaning your face with soap and water?

A I don't remember.

Q Okay. Do you recall having an ice pack applied?

A Yes.

Q You remember that part?

A Yeah.

Q Okay. Do you recall the first aid safety assistant calling your mother?

A Yes, I do.

Q And so did you hear that conversation?
A A little bit of it.
Q Okay. What do you recall about that?
A The nurse assistant called my mom. I guess she was on the phone with her and she said that I was -- I was fine and I didn't really need to go to the ER or anything.
Q You remember that?
A Yeah.
Q Okay. Do you remember the person's name, the first aid safety assistant's name?
A I do not.
Q Okay. Okay. So -- and who came and picked you up from school?
A My grandma.
Q And then you went home that day?
A Yes.
Q Okay. And then what happened after you went -- went home, what did you do?
A I went and laid down on the ground.
Q You mean, like, on the floor in your house or on the ground outside?
A On the floor in my house.
Q Okay. And -- and then what?
A I just -- I just laid there, because, I mean, I was so dizzy and I felt nauseated. Just wanted to be on the

ground.

Q And your grandmother was there at the time?

A Yes.

Q Okay. That -- is that when you were living on Harmon?

A Yes.

Q Did you move from Harmon?

A Yes. Around that same -- same week.

Q Okay. Was that to the Cedar Park address?

A Yes.

Q Did you go back to Woodbury Middle School that year, sixth grade?

A No, I did not.

Q Are you sure?

A Not at all.

Q I mean, are you sure that you didn't go back to school?

A Yes.

Q Okay. So you didn't go back to school a couple of days later and talk to the first aid safety assistant or Mr. Petersen?

A No.

Q Did your mom check on you when she got home from work?

A I believe so.

Q Then was there a time when you went to the Quick Care?

A Yeah. I went, like, Friday.

Q Do you remember the ambulance ride?

A Yeah, I do, actually.

Q What do you remember about that?

A I -- I was kind of scared, because that was, like, my first -- my first time in an ambulance.

Q How were you feeling at the time?

A I was sick. I felt sick.

Q Were you having a lot of pain?

A Yeah, I was. From my eye. My balance was off.

Q You were here when we went through all those medical records with your mom, right?

A Yes.

Q Okay. And you were here and you were paying attention when we went through the University Medical Center records and the records with Dr. Carr and Dr. Lu?

A Yes.

Q Do you believe that the testimony and the records that you've heard and reviewed, you know, that have been admitted into evidence adequately reflect, you know, the pain and discomfort that was going on with you during the time and your treatment and procedures?

A Yes.

Q Okay. Do you remember being admitted to UMC?
A Before or -- the Quick Care or the hospital?
Q Well, at the hospital. Were you admitted more than once?
A Yes. A couple times.
Q Okay. And how were you feeling during that time?
A It was -- it was bad. It was one of the craziest pains I've ever felt.
Q Was your mom there with you on every step of the way?
A She was.
Q Was, I mean, were you ever scared? Or, I mean, tell me -- describe to me how you were feeling.
A It -- it's nothing that you can really explain. It was so -- it was so bad. I couldn't even understand it myself. Like, I've never felt anything, like, I knew it hurt so bad, but my face was numb a lot when I was in the hospital. I was on a lot of meds, morphine. Yeah, I was -- I don't really know how to explain it.
Q How about wearing the eye patch; do you remember wearing that eye -- whatever that mechanism that went on your eye?
A Yeah, I remember that.
Q And what did you think about that? Did you like that?

A I didn't like it at all. It was a big metal eye patch with little holes in it. Have to tape it on every day, block out the sunlight, protect my eye from when I sleep, from when I shower.

Q Do you remember having any of the -- the surgeries done, like the YAG laser surgery before with Dr. Carr?

A Yeah, I remember all the surgeries.

Q Tell me about them.

A The first surgery, when I went to the UMC Hospital, I remember they did it while I was -- while I was awake and I am seeing all these doctors, I see Dr. Carr and he's over here cutting at my eye while I'm still awake. And he had to make a slit, because my eye was filled with blood. You couldn't even see the white or black part of my eye. So he put me under anesthesia or something. But I remember when they're cutting on my eye and just draining it and then putting stitches and it was pretty crazy.

Q Was it scary at all to you or?

A Of course it was scary.

Q So then you remember the other -- when your cataract was removed or your crystal lens was put in; do you remember those?

A Yeah. I remember it was the same thing. I started -- I was awake at first, and then I went into, like, a deep sleep, I guess. They gave me, like, a sleeping thing. And

then I guess they took off. They scraped the whole shiny part of my eye with, like, a razor. And then they put a new crystal lens on my left eye. And I had to wait for that to heal for a long time.

Q You still have that lens in there now?

A Yeah.

Q Okay. Now, remember going to all those doctors appointments?

A Yes.

Q I mean, it -- it looked like, from what we were reviewing, I mean, like, 30, 40, somewhere around there, doctors' appointments?

A Yes.

Q I mean, did it seem like a lot to you?

A It's a handful.

Q And -- and then so after Woodbury, where did you go to school?

A I went to Fertitta Middle School.

Q Okay. So you went to Fertitta in which grades?

A Seventh and eighth.

Q And then you went to high school where at?

A Freshman year in Sierra Vista, while I was here in Vegas.

Q Okay. Now in -- in seventh and eighth grade, were you participating in PE?

A I had the PE class, but I never wanted to put myself in a situation where I can get hit in my head or something that will -- that could affect me. Like, after the injury, I mean, I didn't want to get hit in the head again, so I was very careful doing my own thing. I was in PE.

Q And -- and because your injury, you weren't required to do any of those type of activities?

A They knew of my injury from going to the -- the doctors and stuff. But my PE teacher kind of let me do my own thing.

Q Was it -- was it hard for you to not be able to participate in those physical activities?

A Yeah, it was -- it was really hard.

Q Why? Why was it hard?

A Because, I mean, all of my friends were participating in, like, physical sports. And, I mean, I -- it sucks, like, seeing that whole, you know, everybody else doing it, but then, you know, just because I didn't want to hurt myself because of the injury, I want my eye to heal. So I never really participated.

Q Did you ask Dr. Carr about, you know, if you could participate in any of those sporting activities later?

A He suggested me I shouldn't for the possibility of, you know, my -- my retina being detached and anything else that could, you know, cause -- because they didn't know the

extent of -- they knew how bad it was, but they didn't know how far it would even -- how far it would go to, like, more, you know.

Q So did you want to play football or any other sport when you got into Sierra Vista?

A I wanted to play football for the team. But that wasn't going to happen.

Q I mean, did there come a time when you talked -- you talked to somebody about that and you were recommended to not do it?

A Dr. Carr. Dr. Carr told me, he advised me I shouldn't because something could happen.

Q So then when you -- when you moved, why did you move in 10th grade? Right before your 10th-grade year?

A I wanted to start somewhere new and be away from, like, all my friends, like, everybody that I knew that played sports and all that. I -- I couldn't participate in any of that stuff, so I kind of wanted to start in on, like, a new -- a new foot when I was in California.

Q Was it difficult for you to see your friends doing all these sports and activities that you couldn't participate in?

A Yeah, of course. Because I went to the football games and basketball games, and I would just watch them.

Q When -- when you went to California, you went to

school there for 10th, 11th, and 12th grade, did you participate in any of those sporting activities?

A I -- I really chose not to participate in everything after the -- the whole eye injury. Just for the -- anything can happen.

Q So you're still concerned about every -- all the trauma that you had went through before with your -- your left eye and you didn't want to relive that again?

A Yeah, of course.

Q So did you graduate from high school?

A Yes, I did.

Q Where at?

A At Gilbert High School.

Q Where's that at?

A Anaheim, California.

Q Okay. And what year did you graduate from high school?

A 2010.

Q Do you remember if your -- your grades suffered at all, you know, if your grades were worse after you, you know, went to Fertitta Middle School or not or?

A My grades -- it was hard to focus in school, so my grades went down after the whole eye injury.

Q Was school any more difficult for you --

A Yeah, it was hard.

Q -- with all the appointments and everything else?

A Yeah, I'd have to miss for all those appointments, and just focusing in school is just hard with, you know, my vision.

Q So when you graduated from high school, what did you do?

A As in?

Q Did you go to work?

A Yes. Right after -- or the year I graduated, I got into the kitchen and started pursuing, like, culinary.

Q Is that -- so you started studying culinary?

A Well, my -- my dad is a chef and I always, like, wanted to follow in his steps of him being, you know -- I -- my whole family's in the restaurant business. My -- my brother's a cook, too.

Q So you got into the -- the cooking industry, the culinary industry?

A Yes.

Q Okay. Did you go to any specific school for that?

A No, I didn't.

Q What did you do? Where did you work?

A I've worked at multiple restaurants. I've worked at House of Blues, Downtown Disney, this bar-b-cue place in Hollywood, Roadside Eats, I worked at this fine dining restaurant called Kiwa [phonetic]. My first job was actually

on a food truck, this Japanese ramen food truck. And then now I'm working for Norwegian on the cruise ship.

MR. O'BRIEN: I'm sorry, Your Honor, I missed that whole last comment. I can't hear him, Your Honor. It's --

MR. KURTH: It's just when this air kicks on it's really bad. It's, like, right behind us.

THE COURT: The -- you want him to go through all --

MR. KURTH: I -- I heard him.

THE COURT: -- the restaurants he just --

MR. O'BRIEN: No, just his last sentence.

THE COURT: Oh, the last -- I think he's talking about the last -- where -- where you said about Norwegian.

MR. KURTH: Yeah.

THE COURT: Is that?

THE WITNESS: Oh yeah. Now I work for Norwegian Cruise Lines.

MR. O'BRIEN: Thank you.

BY MR. KURTH:

Q Yeah, just try to talk a little bit -- I know it's hard, because you're normally talking at a certain level.

A Yeah.

Q You know. But it's -- the acoustics sometimes we need a little bit louder. Okay?

So now, I mean, has it affected you, you think, getting any of these cooking jobs, because of your eye injury?

A I try to never make it a problem.

Q How do you do that?

A I mean, I -- I never really told the restaurants that I've been in that -- about the eye injury. Just for -- that they wouldn't let me get into the restaurant.

Q So you just -- you just keep that to yourself that you have that, or this crystalline lens or anything?

A Yeah.

Q Okay. I mean, do you think it would affect you if they knew, though?

A I think it would.

MR. O'BRIEN: Objection, Your Honor. Calls for speculation.

THE COURT: The answer's stricken.

MR. KURTH: Okay.

THE COURT: And -- and the objection's sustained.

MR. KURTH: Okay. Yeah, I guess that's speculating. You don't know what they -- what they know or don't know, right?

BY MR. KURTH:

Q So is your perception -- I mean, why don't -- why don't you just tell everybody you have this eye injury?

A I don't know. I'm just kind of scared it'll affect a decision of -- with a job or, you know.

Q How somebody perceives you?

A Yeah.

Q So that's just a choice that you've made, though. You don't -- I mean, nobody's ever said, Hey, you -- you have this eye injury and I'm not going to hire you, have they?

A No.

Q But they don't know about it, either, do they?

A They don't know about it, because I don't -- I don't -- kind of scared to tell --

Q Okay.

A -- anybody.

Q Okay. So when this was going on, you relied on your mom for -- to help you through this, didn't you?

A Yeah.

Q Okay. And, I mean, did you rely on your mother and -- to take care of this claim for you?

A Yes.

Q Okay. And I guess your attorney --

A Yeah.

Q -- did you rely on your attorney, too, to handle that?

A Yes.

Q Okay. So -- so you're an adult now, right? You're the age of majority, 18 or older?

A Yes.

Q Okay. And -- and you elected to file a lawsuit

against the school district, correct?

A Yes.

Q Okay. Are you -- are you really familiar with legal terms, such as negligence or negligent supervision?

A Not really.

Q I mean, what do you think that, you know, was done wrong to you to cause your injury?

A Maybe safety equipment could have been provided where I had head protection, maybe safety goggles or something.

Q Have you seen a regular game of hockey played before?

A At the time it was only, like, on TV.

Q You're talking, like, ice hockey or?

A Yeah, ice hockey.

Q Like, professional ice hockey or what?

A Yeah.

Q This wasn't professional ice hockey, was it?

A No.

Q Did you see anyone else playing floor hockey that day, the date you were hurt, that were provided any type of goggles?

A No. I think it was just our -- our class.

Q And -- and was anyone in your class provided any type of helmet, goggles, face gear?

A No.
Q Was anybody provided any type of a -- a hockey stick that was, you know, softer on the bottom, not the hard plastic?
A No.
Q Who do you think hit you with the hockey stick?
A Brandon Higgins.
Q Okay. And what was your relationship with him?
A He was -- he was just a classmate of mine. I think really -- he wasn't really a friend outside of school.
Q And you don't think that Mr. Higgins intentionally hit you, do you?
A No, I don't.
Q Was it -- what was the situation there, was it crowded area, or did you have a big open area? What was -- what was it like?
A It was a lot of kids running around playing hockey. And, yeah.
Q Were do you remember Mr. Petersen being, if you remember?
A Off to the side somewhere. I don't really remember.
Q So he wasn't in the middle of the game, like, refereeing or anything?
A I don't think so. No.
Q Do you remember anybody in the middle of the game

refereeing or officiating this game?

A I don't.

Q Do you remember hearing the term high sticking?

A Yeah, I do.

Q And what's your recollection of what high sticking means?

A I thought it was no swinging your stick above the shoulder at the time.

Q When you were playing this game that day, do you remember anybody saying no high sticking?

A I heard -- I heard somebody yell it out.

Q Do you remember you heard it once or twice or?

A I heard it probably once.

Q Was that before you were hit?

A Before I was hit.

Q Do you know how long before? How long you'd been playing?

A Right -- right before I got hit, I think I heard no high sticking.

Q Did the game stop at that time when somebody yelled no high sticking?

A I believe it -- it might have.

Q Do you remember if anybody was taken out of the game?

A No, I don't remember anything like that.

Q Okay. So is this injury that you have right now, is it still affecting you at all?

A I mean, my vision is still not all the way there. But I try to make myself live a normal life, you know, after -- after all that happened, I didn't really want to make it a big, you know, deal.

Q Well, how has it affected your life since that time? Since 2004?

A I mean, affected me a lot. I -- there's a lot of stuff I couldn't participate in. I mean, I had to keep myself safe for the sake of myself, not wanting to get injured in my eye, you know, anything that can cause it to, you know -- I mean, maybe I can get hit in my head today and something can happen. I don't know. I just try to be safe.

Q Okay.

MR. KURTH: Pass the witness.

CROSS-EXAMINATION

BY MR. O'BRIEN:

Q How are you doing?

A Good.

Q Great. I'll be able to hear you better because I'm a lot closer to you now. So hopefully this will work out.

You were injured on May 12th, 2004; is that correct?

A Yes.

Q And you didn't tell anybody -- you didn't tell

anybody that works at the school district that you planned to make a claim against them until your attorney did sometime in December of 2004; isn't that right?

A Yes.

Q Do you agree that it would have been a lot easier to investigate a claim if you knew there was a claim that was going to be made?

MR. KURTH: Objection. Speculation. He's not an investigator, he doesn't -- he doesn't know anything about that.

THE COURT: Response.

MR. O'BRIEN: Your Honor, I'm asking him what his impression, which is I think something that anyone with any sense at all could answer whether they think it would be more beneficial --

THE COURT: If you can --

MR. O'BRIEN: -- to start a claim early rather than later.

MR. KURTH: I just object to counsel testifying, too, and ask for it to be stricken.

THE COURT: Yeah. Let's keep the -- the objections and responses shorter. But the way you phrased the question seemed to call for speculation, so it's sustained.

BY MR. O'BRIEN:

Q Are you aware that by the time your attorney made a

claim on you behalf, that Mr. Petersen had already left the district?

A No.

Q Are you aware that by the time your attorney made the claim, the principal of the school, Mr. Murphy, had moved on to another school?

A No.

Q Mr. Petersen in particular would have been a pretty good witness here, wouldn't he? I mean, for the District, if they wanted to investigate a claim?

MR. KURTH: Objection. Speculation.

THE COURT: Sustained.

BY MR. O'BRIEN:

Q Mr. Petersen was present when you were hit, right?

A Yes, I believe so.

Q And he came out onto the field after you were hit, correct?

A Yes.

Q He looked at you?

A I believe so.

Q And he sent you to the nurse?

A Yes.

Q So if you had made a claim with the District sooner, we could have asked him what he saw; is that fair?

MR. KURTH: Same objection. I mean...

THE COURT: Sustained.

MR. KURTH: Thank you.

BY MR. O'BRIEN:

Q Are you aware that after your attorney made the initial claim with the District, he subsequently stopped communicating with the District about the claim?

A I don't -- no.

Q Do you remember giving your deposition in this case?

A Yes.

Q Do you remember not being able to answer some of the questions because of the passage of time?

A Yes.

Q Do you believe that you would have been able to answer questions closer to the time of the event?

A Yes.

Q You -- you testified in your deposition you created a record concerning what had happened; do you recall saying that?

A Yes.

Q Are you aware that that record has not -- was not -- never provided to the District until this morning?

A Yes.

Q When you wrote that record back -- sometime in 2004, do you agree that the -- your knowledge of what happened would have been fresher in your memory than it is today?

A Yes.

Q Do you remember in the deposition that you gave I asked you several questions about the claims you were making against the District?

A Yes.

Q One of the claims we talked about was the failure to supervise District employees; do you recall that?

A Yes.

Q And do you recall stating that you had no knowledge of any facts supporting the claim that the District failed to properly supervise its employees; do you remember saying that?

MR. KURTH: Objection. Calls for a legal conclusion, which I believe that was -- I have to look at the deposition, but I believe I objected to that line of questioning about these legal issues back then.

MR. O'BRIEN: Your Honor, I request that the deposition of Makani Payo be open and published.

THE COURT: I think he has a -- a copy with him. So -- oh, we do have, yes, go ahead.

(Pause in proceedings.)

MR. O'BRIEN: I don't need it. I have a copy.

BY MR. O'BRIEN:

Q And do you recall your counsel objecting to that line of questioning at the deposition?

A I don't understand what you're --

Q Do you remember that when I asked you that question in your deposition, that your attorney stood up and objected? If you don't remember, that's fine.

A I don't remember.

Q Okay.

MR. O'BRIEN: And we'll stipulate at page 48, line 8-9, Mr. Kurth did object, calls for a legal conclusion.

So we're at the point where we guess we need a ruling on whether or not that question calls for a legal conclusion. I asked him if he is aware of any facts that support the claim that the plaintiff made?

THE COURT: Mr. Kurth?

MR. KURTH: Judge, there's -- there's questions in here about the, you know, Mr. O'Brien was going through the complaint in the deposition and about the -- the claims for relief, the causes of action, and asking Makani about that, the plaintiff. And I objected that that called for a legal conclusion. He's saying here, part of his question says, What facts do you base that claim on?

But to be able to determine what facts you base a claim on, you have to understand that legal claim, the claim -- you have to understand the law, you know, what is the law of negligence? What is the law of negligent supervision? What is -- which is involving the properly supervising of the employees. So I don't know how you can answer what facts

you're basing that on.

THE COURT: Ask Mr. -- ask Mr. Payo if he understands what you mean by the term failed to properly supervise its employees.

MR. O'BRIEN: May I respond to the objection first, Your Honor?

THE COURT: Sure.

MR. O'BRIEN: Mr. Kurth himself earlier asked his own client regarding what he thinks the school district did wrong. So I'm just following up on that, trying to explore what the plaintiff's understanding is as to why he is suing the school district.

THE COURT: Okay.

MR. O'BRIEN: And he had several --

THE COURT: Hold -- Mr. Kurth, hold on. Go -- are you done, Mr. O'Brien?

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Okay. I didn't --

MR. KURTH: Sorry, Judge, I didn't mean to put my hand up.

THE COURT: Yeah. It was a little distracting. If you're -- if you're done?

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Okay. I don't mean to cut you off, is the -- the -- saying what -- what he thinks the school

district did wrong is, you know, an "understandable" layman term, so the Court understands why he could answer that versus, perhaps, whether he understands the term "failed to properly supervise its employees." So if you want to ask him if he understands that term you're referring to, and then if he does, you can continue.

MR. O'BRIEN: Thank you, Your Honor.

BY MR. O'BRIEN:

Q Makani, or Mr. Payo, do you even know that your complaint has a claim against the Clark County School District alleging negligent supervision of District employees?

A Yes.

Q You're aware of that claim?

A Yes.

Q What's your understanding of what that claim is based on?

A Meaning, like, what --

Q What did the school district do wrong with respect to supervising its employees?

A Maybe not being in the game refereeing -- like, refereeing the game.

Q Okay. And I need to understand your answer. Are you saying that there should have been a supervisor there in addition to the teacher making sure that the teacher was refereeing the game?

A A -- a --

Q I mean, I don't understand that you're saying.

A A teacher or supervisor refereeing the game to see what was going on.

Q You testified in your deposition that Mr. Petersen was there the whole time; do you remember that?

A Yeah. He was -- he was -- I'm -- from what I can remember, I know he was there, obviously. Because he was my teacher. But he -- I don't exactly know where he was.

Q Okay. In fact, you testified that Mr. Petersen supervised and refereed the entire game. That he never left the tennis courts and was present when you were injured; do you remember saying that?

A Possibly. I mean, I don't see why he would -- would abandon the -- he might have been off to the side watching the game.

Q Excuse me for interrupting, I'm not trying to be rude. But the question was do you remember saying that in your deposition?

A I think so. Yes.

Q You also testified that before you were even permitted to play, Mr. Petersen went over a few rules before you played; remember that?

A I don't remember the rules. I don't -- I remember I said that. Yes, I do.

Q In fact --

MR. KURTH: I'd object to -- that's -- well, I say I'd object. That's a mischaracterization. Could we refer to the page of the deposition transcript if we're going to ask this, please? Because --

MR. O'BRIEN: I'm asking his recollection is all, Your Honor.

THE COURT: There's no question pending right now. So.

MR. KURTH: Okay.

BY MR. O'BRIEN:

Q And you remember seeing that the teacher might have also gone over the rules, you just don't remember; do you recall saying that?

A Yes.

Q And do you remember me asking you directly whether you thought that Mr. Petersen did anything to cause your injury; do you remember me asking you that question?

A Yes.

Q And what was your answer?

A No.

Q If you recall?

A No.

Q No, he didn't do anything to cause your injury; is that correct?

A Yes.

Q You mentioned on direct and in your deposition we discussed the issue of providing safety equipment. I asked you if it was your understanding that the District had a duty to provide you with safety equipment. Do you remember me asking you that?

A Yes.

Q And your response was what?

MR. KURTH: I'm objecting. Calls -- objection. Calls for legal conclusion.

THE WITNESS: I don't remember.

THE COURT: Was the objection made during the deposition?

MR. KURTH: I'm sure it was. But -- I'm sure I had a continuing objection. I just -- I'll see if I can find it in the specific --

MR. O'BRIEN: The only question pending was whether he remembers --

MR. KURTH: Okay.

MR. O'BRIEN: -- that -- that coming up.

THE WITNESS: I don't remember.

BY MR. O'BRIEN:

Q You don't remember your response?

A Yes.

Q Yes you do remember your response or don't?

A I don't remember my response.

Q I keep doing that, ask bad questions and then wonder why I don't get a good answer.

Asked you in your deposition if you knew anything about what sorts of sports equipment, helmets, goggles, or whatever, were available in 2004; do you remember me talking about that issue?

A Yes.

Q And do you remember your response?

A I do not.

Q You don't remember or you don't know anything about what was available?

A I don't remember my response.

Q Okay. And if I represent that you stated that you don't know what was available, but you talked about possibly goggles could help, does that sound right?

A Yes.

Q And possibly some sort of a helmet with a full face shield would help?

A Yes.

Q Do you remember saying something like that?

A Yes.

Q Okay. Are you aware of any school anywhere, at the middle grade school level, that -- that requires their students to wear goggles or full safety helmets like you

described?

A I'm not -- I'm not sure.

Q You ever seen that?

A No, I haven't seen anybody play hockey in school.

Q As you sit here today, do you believe the Clark County School District had a duty to provide you with helmets or goggles?

A Yes.

Q And where -- where do you come up with that? I mean, what's -- what's your basis for believing -- or your belief?

A I mean, the possibility of getting hit in your head and getting hit in the eye.

Q Okay. So you think that creates a duty of some sort on the part of the school district to provide its students with some sort of goggles and -- or helmets?

A Yes.

Q Okay. Have you ever talked to an expert witness, expert of any kind on -- on sports equipment that have informed you that there even is such equipment available for use by middle school field hockey players?

A No.

Q Now, you talked earlier with -- with your attorney about seeing ice hockey with professionals, but you've never seen, other than the class -- one class you were in, you've

never seen another middle school class playing field hockey, have you? Or -- or floor hockey?

A Yes. No, I haven't.

Q Let's talk about the size of the court where you were playing. It was a tennis court, right?

A Yes.

Q Was there one game going on?

A I believe it was only one hockey game going on, yeah.

Q Okay. And were they playing on one tennis court?

A Yeah.

Q They took the -- the net out of the middle and they were playing on one tennis court?

A I think there was two tennis courts on the side of each other, and it was, like, dividing one side. So.

Q Okay. So you -- were you playing on both sides or you were just playing on one side of the --

A On one side, yeah.

THE COURT: On one side of the two courts?

THE WITNESS: Yes.

THE COURT: Okay.

BY MR. O'BRIEN:

Q All right. And so the -- the court that you're playing on would have been smaller or larger than this room?

A Probably, I'm right here, so, like, right here.

Q Okay. To the wall?
A To the -- yeah.
Q And to that wall, approximately?
A Yeah.
Q All right. So if Mr. Petersen was on the sideline watching and supervising the kids, he should have been able to see everybody; isn't that correct?
A Yeah. Yes.
Q Did you ever see Mr. Petersen leave the -- the court?
A I don't -- I don't remember really seeing him there. But I know he's -- he had to be there. I mean...
Q Remember testifying in your deposition that he was there the entire time and he never left, as far as you knew?
A Yeah.
Q Your attorney has suggested that you were forced to play field hockey. And so I'm going to ask you some questions -- you -- about that. You went to play field hockey on this day. It's the first day that that court -- that segment was being offered in your PE class; is that correct?
A Yeah.
Q Did you ask to sit out that game?
A No.
Q Did you express any concern to Mr. Petersen about your safety?

A No.
Q Were you concerned about your safety?
A No, not really.
Q Okay. And you also testified that you seem to recall that at least a couple kids were sitting out; do you remember saying that?
A Yeah.
Q So you could have sat out if you'd wanted to --
A Yeah.
Q -- as far as you know? All right. So is it fair at all to say that you were forced to play field hockey on that day?
A Well, actually, I mean, I would have to participate, so, I mean, I'm -- I'm not forced. But for the grade, I would have to participate.
Q Okay. Have you ever sat out of a PE class and had the teacher assign you to some other alternate task so you still got the participation grade?
A After -- after this whole injury.
Q Okay. So that does happen?
A Yeah.
Q So you wouldn't necessarily have lost any participation points if you had decided that you didn't want to play for any reason?
A Not that I know of. It --

Q Might have, might not have, you don't know?
A Yeah.
Q You testified that Brandon Higgins is the student who hit you with the hockey stick; is that correct?
A Yes.
Q And before you were hit, you didn't have any problems with Mr. Higgins, did you?
A No.
Q But you'd never seen him playing in a wild or crazy manner before you were hit, did you?
A No.
Q And specifically, you'd never seen him high sticking, raising the stick up --
A No.
Q -- you know, higher than allowed? So you had no reason to believe on May 12th, 2004, that he might raise his stick high enough to hit you in the face; is that fair?
A Yes.
Q This was just an accident that happened on May 12th, 2014 [sic]; is that fair?
A Yes.
Q And let's -- let's talk about the accident itself. You testifying -- well, how did this happen? I mean, how -- how long did it take between the time you noticed that you might be getting -- going to get hit and the time you were

actually hit?

A It happened really quick.

Q In fact, you didn't have any time to react at all, did you?

A The slightest.

Q And is it fair to say that the -- the hit came out of the blue?

A Yes.

Q Is -- do you -- in your opinion, do you think it is fair to state that this accident occurred so quickly that from his position on the sideline, there's nothing Mr. Petersen could have done to stop that once it started; is that fair?

A Yes.

Q Okay, again, I'm -- I'm changing directions here, so I'm going to let you know before I ask different questions.

You stated that you were knocked out for approximately 10 minutes; is that -- is that your testimony?

A Yes.

Q Okay. And that you were face down on the ground; is that correct?

A Yes.

Q Do you have a clear recollection of that?

A Not a clear one, but from what I kind of remember.

Q Okay. And I'm going to suggest that there may be contradictory testimony, so I'm going to kind of feel you out

on what you do remember, and if you don't remember it, please don't -- don't agree with me.

But do you think that it's possible that you got hit, and you saw stars, and you didn't know what was going on for a period of time?

A Yes.

Q Is it possible that you didn't fall to the ground after you were hit?

A No.

MR. KURTH: I'm sorry, I couldn't hear that last question.

MR. O'BRIEN: I asked if it was possible that he didn't fall to the ground after the hit.

MR. KURTH: Thank you.

THE WITNESS: I remember falling to the ground.

BY MR. KURTH:

Q Okay. Do you actually remember falling to the ground; do you remember coming to on the ground?

A I remember falling on the ground.

Q Were you unconscious for any period of time?

A I mean, I don't -- my -- my vision was blacked out and was laying face down on the ground, but I don't know how you want to describe, like, unconscious.

Q Okay. I don't want to describe it. I want you to describe it. Were you aware of what was going on around you

while you were on the ground?

A After -- I mean, I blacked out, and then it took me a while to get my vision back. And then I remember just seeing feet huddle around me, just from looking up for a second. And that's what I remember.

Q Was Mr. Petersen there when you came to?

A Not sure.

Q What did Mr. Petersen do after you came to?

A I think I just remember getting walked to the office, the nurse's office, by I think Brandon. I don't really remember Mr. Petersen around me.

Q Okay. Do -- and -- and this -- this may already be covered in the answer you just gave, but specifically, do you remember Mr. Petersen looking at you, examining you at all and asking you how you were doing, anything like that?

A I don't.

Q And though you don't remember it, are you -- do you even know if that occurred?

A I -- I don't remember.

Q Okay. So if it happened, you just don't remember?

A Yeah.

Q Okay. Do you remember talking with Mr. Petersen after the incident?

A I don't.

Q Okay. So you didn't tell him that you blacked out;

is that correct?

A No.

Q I mean, you didn't tell him -- you -- you indicated while -- while you were discussing your injuries, that you felt nauseous at some point in time; when did you first start to feel nauseous?

A From the time I was walking from the tennis courts to the nurse's office.

Q Okay. So on the field, you didn't -- you didn't -- you didn't feel nauseous?

A No.

Q There was testimony earlier by your mother that you were vomiting at some point in time; do you recall when that started?

A I know I was at -- I was at home. I'm not sure, probably that -- that same -- around the same time I came home, maybe that same night.

Q And specifically what I'm getting -- you weren't vomiting at school; is that correct?

A No.

Q Okay. So the FASA wouldn't have any reason to write down that you were vomiting; is that correct?

A No.

Q No, it's not correct, or no, she would have no reason?

A No, she would have no reason.

Q Thank you. And -- and after you talked at one point about being dizzy and -- and unsteady on your feet; when did that start?

A After I got hit in my eye.

Q Right away?

A Yeah, I started pretty immediately.

Q Did you -- think I know the answer to this. You didn't tell Mr. Petersen that, did you?

A No, I don't remember. I don't remember him being there.

Q All right. And do you know who asked Brandon Higgins to walk you to the nurse's office?

A I do not. Probably Mr. Petersen, just...

Q Okay. And I'm -- I'm not asking you to guess. If -- if you don't remember, just, you don't remember, that's -- that's perfectly fine. I'm not trying to trick you. I'm -- I'm just trying to get what you remember.

Did you have any difficulty walking to the nurse's office?

A I don't remember. I know I was really dizzy and off-balance. But I think Brandon probably had his arm around me and then just guiding me to the nurse's office.

Q You remember that he had his arm around you or are you guessing that he might have?

A I think he did, because I -- I did have a hard time standing.

Q Is there any reason why you didn't tell us that in your deposition?

A No.

Q When did the headaches first start?

A I don't really remember. Just sometime after the -- I mean, it all came, like, the dizziness and the headaches came right after from when I got to the nurse's office, carried to the home.

Q You don't really recall when they started, somewhere between the time you were hit and some -- the time you got home; is that what you're saying?

A Yes.

Q Okay. So you may not have told Mr. Petersen that you were having severe headaches; is that fair?

A Yeah.

Q And you may not have told the -- the first aid safety assistant that you were having severe headaches; is that fair?

A Yes.

Q You wouldn't have told the nurse that you had been vomiting, because you hadn't been; is that correct?

A Yes.

Q Did you tell the first aid safety assistant that you

were having difficulty seeing?

A I did.

Q Do you specifically remember that?

A Yes, I do.

Q Okay. Remember the first aid safety assistant examining you?

A I remember -- yeah, I do.

Q Do you remember looking in your eye with a flashlight?

A I don't. I remember the ice pack. Yeah, I -- that's about it.

Q Okay. And just so that we're clear, are you saying that she didn't look in your eye with a flashlight, or you just don't remember?

A I don't remember.

Q Do you remember telling the nurse that you had blacked out?

A I believe so.

THE COURT: The nurse or the --

MR. O'BRIEN: Excuse me.

BY MR. O'BRIEN:

Q First aid safety assistant, the person in the nurse's office.

A I believe so.

Q By the time you got to the nurse's office, were you

having difficulty seeing out of your left eye?

A I remember it was just blurry already. My eye was already swollen and cut around my eye.

Q And the -- the main force of the blow was to the side of your face around the eye socket, correct?

A I mean, I think it hit right around and a little bit towards the inside. But around my eye.

Q Okay. In your deposition, you -- you testified that you were hit by the flat part of the bottom of the hockey stick and it hit pretty flush; is that -- is that your -- do you recall saying that?

A Yes.

Q Okay. Did you ever look in a mirror while you were in the nurse's office?

A Yeah, I did.

Q And what do you remember seeing?

A I remember -- I remember my vision was a little bit blurry and it looked -- it looked pretty bad. It was swollen and then it was a little red. I could see the -- I mean, a little blood from like, the side bleeding into the white part. But, yeah.

Q Okay. That's on the skin, correct? The eyelid? The records indicated that there was a laceration to the eyelid; is that where the blood was coming from?

A The eyelid, but I also remember seeing in -- the

inside of my eye just a little bit.

Q Did you ever tell the nurse that you were bleeding from inside the eye?

A I couldn't really -- I couldn't really pinpoint, like, what it was. But, I mean, they made it seem like an ice pack would have done the -- swell -- I never had an injury that bad, you know. So I just...

Q Okay. Is -- are you claiming that the treatment provided by the first aid safety assistant somehow caused you any sort of injury?

A No.

Q After you went home, you didn't talk to your mom until a telephone call later; is that -- is that right?

A Yeah.

Q And do you remember what you told her at that time?

A I don't. I just remember -- actually, I -- I really don't.

Q Do you remember anything about that conversation?

A Not -- not really.

Q Okay. You say not really, so I'm going to probe a little bit. If you don't remember, just say you don't remember.

Do you remember -- do you think you told her you blacked out when you were hit?

A I believe so.

Q Okay. Did you tell her that you felt nauseous?
A I believe so.
Q Did you tell her that you were unsteady on your feet?
A Probably.
Q Did you tell her that you were having extreme headaches?
A Possibly.
Q And did you tell her that you were having considerable difficulty seeing out of your left eye?
A I don't remember.
Q But she didn't -- she didn't decide at that point in time to send you to the hospital or to a doctor, correct?
A Yeah, she was -- she was --
Q That's correct?
A Yes.
Q Okay. Your -- your mother talked about coming in I believe after midnight the night of the injury. Do you remember seeing her or talking to her at that time?
A I don't.
Q I don't think she said she talked to you, I just was wondering --
A Yeah.
Q -- if you remembered it?
A No, I don't remember it.

THE COURT: Counsel, when you -- when you reach a good break in the next few minutes, let us know.

MR. O'BRIEN: I think I can wrap up in the next 5 or 10 minutes.

THE COURT: Okay.

MR. O'BRIEN: I'm not sure. If you want a break, then now would be better than later, if I'm going long.

THE COURT: Your preference.

MR. O'BRIEN: I'll try to wrap it up, Your Honor.

THE COURT: Okay.

BY MR. O'BRIEN:

Q So when was the first time your mom actually got to look at you and talk to you about what happened?

A The next I want to say Friday -- Thursday morning.

Q Thursday morning sometime?

A Yeah.

Q Okay. At that time, was your face, the skin part, swollen?

A Yeah, it was.

Q And you had lacerations or scrapes on the face?

A Yes.

Q And you were having difficulty seeing out of your eye?

A Yes.

Q You were nauseous and you were vomiting by then; is

that correct? Or was that later?

A I -- I believe so.

Q Okay. In addition, you couldn't see out of the eye? Or you were having -- lot of -- lot of difficulty seeing out of the eye?

A Yeah. It was progressively, like, getting worse.

Q Okay. When your grandma picked you up, did you explain to her what had happened?

A I don't -- I don't remember talking to my grandma.

Q Okay. But your grandma took you home; was she able to see what symptoms you were having?

A Yes.

Q Okay. So she knew at least what she could see and what you may have told her about your condition; is that correct?

A Yes.

Q But she also didn't think it was necessary to call for medical care?

A I have no idea.

Q You didn't, in fact, seek any medical care until two days later, on May 14th; isn't that correct?

A Yes.

Q I think your attorney has gone over that. By the time that you got to the hospital, had your symptoms worsened?

A Yes.

Q So when you presented at the emergency room -- or at the Quick Care and then at the emergency room, what they would have observed would have been worse than what the teacher or the FASA would have observed; is that fair?

A Yes.

THE COURT: Counsel, let's -- if you're okay, we can continue tomorrow?

MR. O'BRIEN: That's fine with me. I only have a little bit. But that's fine.

THE COURT: Yeah, let's --

MR. O'BRIEN: I know it could -- a little bit could go forever.

THE COURT: Yeah. Thank you. Before we break, jurors, typically we start the day at 10:30, because the Court has hearings in other cases that are heard prior to -- to you all and the trial beginning. Tomorrow we don't have any hearings. So if -- if you all can do it, we can start at 9:00 a.m. tomorrow morning. But, you know, if -- if -- if that works for all of you, that's -- that's the only... And if it doesn't, that's fine, too. I mean...

MR. KURTH: 9:00 or 9:30.

THE COURT: Okay. We'll do 9:00 a.m. Thank you. That will help speed up the process, hopefully.

So we're going to break for the day. This evening I admonish you again not to talk or converse amongst yourselves

or with anyone else on the -- any subject connected with this trial, or read, watch, or listen to any report of or other commentary on the trial or any person connected with -- with this trial by any medium of information, including, without limitation, newspapers, television, radio, or the Internet, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

And we will see you back at 9:00 a.m. tomorrow, so thank you very much.

(Jury recessed at 4:51 p.m.)

THE COURT: Mr. Payo, you may -- you may step down.

Before we break, did you want to put the objection -- the question that you had wanted to ask, did you want to make a record of that?

MR. O'BRIEN: I don't remember the question at this point, Your Honor.

THE COURT: Okay. If you recall it tomorrow morning, you're welcome to -- to make a record if -- if you feel necessary. That's fine.

MR. KURTH: I just want to say that I was okay with still starting at 10:30.

THE COURT: Early to bed, early to rise. I am hoping we could finish tomorrow, but, you know, I did tell them through Tuesday. So if not, that's no problem.

MR. KURTH: Well, it's -- if we start at 9:00, it's

possible that we could -- possible that we could finish tomorrow.

So then what do you want to do about the jury instructions? I mean, we have -- most of them were agreed, but the ending ones were not. I don't know when we should deal with that.

THE COURT: That's --

MR. O'BRIEN: Yeah, I've got -- I separated them into three piles.

MR. KURTH: Did you? Okay.

MR. O'BRIEN: So that the ones that --

MR. KURTH: [Indiscernible].

MR. O'BRIEN: -- are greater than -- mostly the form ones.

MR. KURTH: I had a problem, because I converted them from the -- the Word, you know. And then I was trying to make changes and it was changing the number.

THE COURT: I have a --

MR. KURTH: The ones -- the ones --

THE COURT: -- some type of copy that's titled "Jury Instructions," then, parentheses, "Approved and cited." But I'm not sure, you know, what --

MR. O'BRIEN: I don't -- I don't believe that's correct. I think that there's ones we object to, ones they object to. And I have those separated. I think I made extra

copies. But I'll have them tomorrow.

THE COURT: Great. That's what I was going to suggest, if -- if you could bring them tomorrow, that'd be fine. That -- that's a fair point, though. If, you know, with trials, it all depends on who goes how long, etcetera, etcetera.

But if you could bring those tomorrow morning, then maybe we could, depending on what happens, I'll be able to look at them at least and have a better idea of what I need to do.

MR. O'BRIEN: Thank you, Your Honor.

MR. KURTH: I mean, I know on that one that was provided, it -- it has the ones that are agreed to. Then there's a sticky note on the one that was kind of copied from there down that we didn't agree on. So -- but, either way, we'll figure it out tomorrow.

THE COURT: Okay. Thank you both very much.

MR. KURTH: Thank you, Judge. You want to look at those other jury questions that they have or not? There are a bunch more questions.

THE COURT: There are a bunch.

MR. KURTH: Really?

THE COURT: There's -- there's more than --

MR. KURTH: Holy smokes.

THE COURT: -- than before. Can we make a photocopy

of these and give them -- let's make -- we're going to make a copy --

MR. KURTH: Okay.

THE COURT: -- of the questions, because there are more than there were before. Take a look at them tonight, and if -- if we can get Mr. Kurth out of bed, you're welcome to show up before 9:00 and maybe we could go through some of those.

MR. KURTH: I've been trying to change my schedule to go to bed early, and I -- yeah, I did last night and it was hard. I just go to bed really late. Thanks.

THE COURT: Yeah, we'll -- we'll go off now, unless counsel has anything further.

MR. KURTH: Yeah, let's go off.

(Court recessed for the evening at 4:56 p.m.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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KIMBERLY LAWSON

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT, Appellant, v. MAKANI KAI PAYO, Respondent.	No.: 68443 District Court Case No.: A-12-668833-C District Court Dept. No.: XV (Hon. Joe Hardy)

APPELLANT'S APPENDIX

VOLUME VI

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ALPHABETICAL INDEX

	Volume / Page
Bugay v. Clark County School District, 2014 Nev. Unpub. LEXIS 1921 (2014)	I / 0154-0160
12-10-2013 Clark County School District's Answer to Makani Kai Payo's First Amended Complaint	I / 0099-0106
03-10-2015 Clark County School District's Answer to Makani Kai Payo's Second Amended Complaint	II / 0343-0351
07-15-2015 Clark County School District's Case Appeal Statement	IX / 1632-1635
07-15-2015 Clark County School District's Notice of Appeal	IX / 1636-1638
07-20-2015 Clark County School District's Notice of Appeal Filed in Supreme Court	IX / 1639-1726
04-08-2015 Clark County School District's Notice of Motion and Motion for Summary Judgment	III / 0355-0483
06-10-2013 Clark County School District's Notice of Motion and Motion to Dismiss	I / 0014-0044
01-28-2015 Clark County School District's Notice of Motion and Motion to Strike Makani Kai Payo's Damages Calculation or, in the alternative, Motion in Limine	II / 0285-0298
05-13-2015 Clark County School District's Offer of Judgment to Makani Kai Payo	IV / 0701-0702
01-22-2014 Clark County School District's Opposition to Makani Kai Payo's Request for Exemption from Arbitration	I / 0110-0117
05-08-2015 Clark County School District's Pre-Trial Memorandum	IV / 0660-0672
02-23-2015 Clark County School District's Reply to Makani Kai Payo's Opposition to Clark County School District's Motion to Stike Makani Kai Payo's Damages Calculation and Motion in Limine	II / 0314-0331
05-05-2015 Clark County School District's Reply to Opposition to Motion for Summary Judgment and Opposition to Countermotion for Summary Judgment	IV / 0644-0659
07-10-2013 Clark County School District's Reply to Opposition to Motion to Dismiss	I / 0055-0068
09-16-2015 Clark County School District's Request for Transcripts of Proceedings	IX / 1728-1730
02-13-2015 Clark County School District's Response to Makani Kai Payo's First Set of Interrogatories	IX / 1733-1748
04-08-2015 Clark County School District's Responses to Makani Kai Payo's Subpoena Duces Tecum	II / 0352-0354

05-26-2015 Clark County School District's Trial Brief.....IV / 0738-0757

05-28-2015 Clark County School District's Trial Brief on the Issue of the Amount of the Statutory Cap on Damages Applicable to Makani Kai Payo's Case under NRS 41.035.....V / 0967-0969

02-07-2014 Commissioner's Decision on Request for Exemption - Granted.....I / 0118-0119

09-21-2012 Complaint for Negligence.....I / 0001-0009

04-16-2015 Deposition of Eileen Wheelan.....III / 0492-0578

01-22-2015 Deposition of Makani Kai Payo.....II / 0180-0284

05-13-2015 Errata to Clark County School District's Pre-Trial Memorandum.....IV / 0703-0718

04-17-2014 First Amended notice of 16.1 Case Conference.....I / 0123-0125

07-21-2014 Joint Case Conference Report.....I / 0126-0143

05-22-2015 Joint Pre-Trial Memorandum.....IV / 0726-0737

06-16-2015 Judgment Upon Jury Verdict.....VIII / 1608-1609

06-02-2015 Approved and Given Jury Instructions.....VIII / 1546-1588

06-02-2015 Jury Instructions (Objected to and Not Given)
- Inherent Risk.....VIII / 1589
- Assumption of Risk.....VIII / 1590
- Minor cannot collect past medical damages.....VIII / 1591
- Offered but objected.....VIII / 1592

01-15-2015 Makani Kai Payo's, Answers to Clark County School District's Interrogatories.....I / 0161-0178

08-25-2014 Makani Kai Payo's Demand for Jury Trial.....I / 0147-0148

10-14-2013 Makani Kai Payo's First Amended Complaint.....I / 0092-0098

02-13-2015 Makani Kai Payo's Opposition to Clark County School District's Motion to Strike Makani Kai Payo's Damages Calculation and Motion in Limine.....II / 0299-0313

04-27-2015 Makani Kai Payo's Opposition to Motion for Summary Judgment, and Counter-Motion for Summary Judgment.....IV / 0580-0643

07-01-2013 Makani Kai Payo's Opposition to Motion to Dismiss.....I / 0045-0054

01-14-2014 Makani Kai Payo's Request for Exemption from Arbitration.....I / 0107-0109

03-05-2015 Makani Kai Payo's Second Amended Complaint.....II / 0336-0342

05-26-2015 Makani Kai Payo's Trial Brief.....IV / 0758-0769

05-29-2015 Makani Kai Payo's Trial Brief Re: The Statutory Cap on Damages Per NRS 41.035.....VII / 1380-1384

05-13-2015 Minutes from Court (Hon. Joe Hardy) re: Calendar Call.....IV / 0719

05-11-2015 Minutes from Court re: Clark County School District's Motion for Summary Judgment.....IV / 0674-0675

07-15-2013 Minutes from Court re: Clark County School District's Motion to Dismiss.....I / 0069

03-03-2015 Minutes from Court re: Clark County School District's Notice of Motion and Motion to Strike Makani Kai Payo's Damages Calculation or, in the alternative, Motion in Limine.....II / 0334-0335

09-03-2014 Minutes from Court re: Re-opening the Case.....I / 0149

05-08-2015 Minutes from Court (Hon. Bonnie Bulla) re: Status Check: Compliance.....IV / 0673

04-17-2015 Minutes from Court (Hon. Bonnie Bulla) re: Status Check: Status of Case/Trial Date.....III / 0579

03-07-2014 Notice of 16.1 Case Conference.....I / 0120-0122

06-17-2015 Notice of Entry of Judgement (Judgement Upon Jury Verdict).....IX / 1628-1631

05-20-2014 Notice of Entry of Order (Order Denying Motion).....

05-20-2015 Notice of Entry of Order (Order Denying Motions For Summary Judgment) .....IV / 0722-0725

08-22-2013 Notice of Entry of Order (Order Granting in Part and Denying in Part Clark County School District's Motion to Dismiss).....I / 0086-0091

04-14-2015 Notice of Entry of Order (Order Granting in Part and Denying in Part Clark County School District's Motion to Strike Makani Kai Payo's Damages Calculation or, in the Alternative, Motion in Limine.....III / 0487-0491

06-17-2015 Notice of Entry of Order (Order Regarding Damages Post-Jury Verdict).....VIII / 1618-1627

04-09-2015 Notice of Hearing (Clark County School District's Notice of Motion and Motion for Summary Judgment).....III / 0484

05-13-2014 Order Denying Motion.....IX / 1731-1732

05-19-2015 Order Denying Motions For Summary Judgment.....IV / 0720-0721

08-21-2013 Order Granting in Part and Denying in Part Clark County School District's Motion to Dismiss.....I / 0083-0085

04-10-2015 Order Granting in Part and Denying in Part Clark County School District's Motion to Strike Makani Kai Payo's Damages Calculation or, in the Alternative, Motion in Limine.....III / 0485-0486

06-16-2015 Order Regarding Damages Post-Jury Verdict.....VIII / 1610-1617

09-18-2014 Order Setting Civil Jury Trial, Pre-Trial Conference and Calendar Call.....I / 0150-0153

01-21-2015 Plaintiff's Bates Numbered document 000291.....I / 0179

06-02-2015 Proposed Verdict Form Returned Unsigned.....VIII / 1605-1606

07-15-2013 Recorder's Transcript Re: Notice of Motion and Motion to Dismiss.....I / 0070-0082

08-06-2014 Scheduling Order.....I / 0144-0146

08-31-2015 Settlement Program Status Report.....IX / 1727

03-02-2015 Stipulation and Order to Amend Makani Kai Payo's First Amended Complaint.....II / 0332-0333

03-11-2013 Summons.....I / 0010-0013

05-27-2015 Transcript of Proceedings - Jury Trial - Day 1.....V / 0770-0966

05-28-2015 Transcript of Proceedings - Jury Trial - Day 2.....VI / 0970-1158

05-29-2015 Transcript of Proceedings - Jury Trial - Day 3.....VII / 1159-1379

06-01-2015 Transcript of Proceedings - Jury Trial - Day 4.....VIII / 1385-1545

06-02-2015 Transcript of Proceedings - Jury Trial - Day 5.....VIII / 1593-1604

05-11-2015 Transcript of Proceedings: Motions.....IV / 0676-0700

06-02-2015 Verdict.....VIII / 1607

CERTIFICATE OF SERVICE

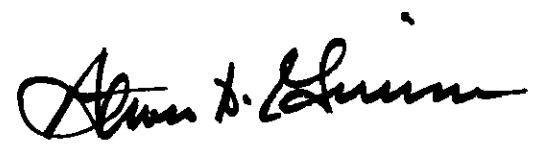
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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MAKANI PAYO,	)	
	)	CASE NO. A-12-668833
Plaintiff,	)	DEPT NO. XV
vs.	)	
	)	
CLARK COUNTY SCHOOL DISTRICT,	)	
	)	
Defendant.	)	**TRANSCRIPT OF PROCEEDINGS**
	)	

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 2

THURSDAY, MAY 28, 2015

APPEARANCES:

For the Plaintiff: ROBERT O. KURTH, ESQ.

For the Defendant: DANIEL LOUIS O'BRIEN, ESQ.

RECORDED BY MATTHEW YARBROUGH, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

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I N D E X

OPENING STATEMENTS:

By Mr. Kurth 18

By Mr. O'Brien 26

WITNESSES FOR THE PLAINTIFF:

LORI PAYO

Direct Examination By Mr. Kurth 42

Cross-Examination By Mr. O'Brien 102

Redirect Examination By Mr. Kurth 114

Recross Examination By Mr. O'Brien 120

MAKANI KAI PAYO

Direct Examination By Mr. Kurth 123

Cross-Examination By Mr. O'Brien 155

E X H I B I T S

PLAINTIFF'S EXHIBITS ADMITTED:		**PAGE**
17	Letter	90

LAS VEGAS, NEVADA, THURSDAY, MAY 28, 2015, 10:43 A.M.

*** * * * ***

(Outside the presence of the jury.)

THE COURT: Go ahead.

MR. O'BRIEN: Thank you, Your Honor. The first thing that I wanted to raise is the medical billing summary that was provided by counsel is fine in terms of the things that it listed. But after looking at it, it states, "The plaintiff, Makani Payo, incurred the following medical bills with the following medical providers with regard to this claim." And "incurred" could be misconstrued to mean that he had the right to collect them. And our whole point is that he hasn't incurred anything while he was a minor.

So I've asked that the language be changed to just state that the following medical bills were for treatment resulting from the accident on May 12th, 2004.

THE CLERK: Just for the record, we're referencing Exhibit 15.

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Mr. Kurth, any response?

MR. KURTH: Judge, I have -- well, you know, my first response is that it's been admitted. We already agreed, we looked at it, approved it, and it was admitted.

But my second response is that when we say -- and I thought about this when I did it, because I did know the

school district's argument. And it's a legal argument. And I think that whatever happens with the, you know, in the end of this case, if the plaintiff prevails and a verdict is rendered, then the -- then the Court's going to make a decision regardless of what the damages are. And there's already been a ruling by the judge sitting prior that the damages couldn't exceed 50,000 for special damages for medicals. And these are just under that amount.

So I don't -- I don't really think it matters. I mean, I don't have a problem with --

THE COURT: Now --

MR. KURTH: -- the other wording that he suggests. But I don't -- I don't think it infers -- I mean, they were incurred for his treatment. So, but I mean, he was a minor at the time, so.

MR. O'BRIEN: If it -- if it said they were incurred for his treatment, I wouldn't have a problem with it. And we did just get this yesterday morning.

MR. KURTH: Right.

MR. O'BRIEN: And I glanced at it briefly. But I don't want an inference or an argument to be made that we have somehow now admitted that Makani Payo incurred these and that he's therefore in -- by virtue of our admission, entitled to recover those damages.

MR. KURTH: I think their argument's still preserved

on the record. But if -- if the Court's going to -- wants to require us to change some wording, then, you know, we'd obviously agree to that.

THE COURT: Yeah, the -- the Court's biggest concern is that we already went through the process of -- of admitting it. So the -- the exhibit will stand, however, the school district definitely retains the right to -- to argue, you know, the -- that the bills were not incurred, that they weren't incurred to this claim, that they weren't incurred by Mr. Payo, etcetera, etcetera.

Court takes it to -- to be a -- a quick summary of medical bills. But, so the record's clear, Court understands that school district is not agreeing to -- to liability or that any of the -- the damages listed were as a result of the accident.

MR. O'BRIEN: I'm not sure what that last row -- these are all related to the accident. We're just not agreeing that Makani incurred them, Mom incurred them. If that's what you just said, then, yeah, --

THE COURT: Yes, that's --

MR. O'BRIEN: -- I understand.

THE COURT: Yeah, that's -- I mean, I may not have said that as articulately as you just did, but yes.

MR. KURTH: Yes, Judge. I think the only -- the only thing is I -- I believe mine are saying is the school

district's only objection is basically to, regarding their legal, which -- which they made throughout on whether or not, you know, they can be awarded or should be awarded because of the parents. You know, because it was a minor at the time.

THE COURT: The legal issues, right?

MR. KURTH: Yes.

THE COURT: Yeah.

MR. O'BRIEN: Yeah, that issue still is unresolved and -- at this point, as I understand it.

THE COURT: Understood. And again, I certainly appreciate, you know, both -- both counsel streamlining the process with things like -- like this. It saves -- saves everyone, including the Court and the jurors a lot of time. So thank you both.

MR. O'BRIEN: Thank you.

MR. KURTH: Thank you, Judge.

MR. O'BRIEN: I also have two motions that I would like -- or two briefs that we discussed yesterday that I would like to file in open court, if I may. They both have to do with the statutory cap, one has to do with the amount that which cap applies to this case, and one has to do with the number of caps that are applicable to Mr. Payo's claims.

THE COURT: Madam Clerk, can we take those.

THE CLERK: Sure.

THE COURT: Make sure you provide, if you haven't

already, Mr. Kurth with copies.

MR. O'BRIEN: I have done that and he has signed a receipt --

THE COURT: Thank you.

MR. O'BRIEN: -- copy on the originals. May I approach, Your Honor?

THE COURT: Yes, you may. Thank you.

THE CLERK: Do you have copies for the judge?

MR. O'BRIEN: I have unsigned copy, yes.

THE CLERK: That would be fine. He just --

MR. O'BRIEN: I've signed it, but [indiscernible].

THE COURT: I just like to scribble on my copies. So.

THE CLERK: I appreciate that. Thank you.

THE COURT: One followup related to yesterday. I'm not sure if it will come up today or not, but if it does, regarding the -- what we had been referring to as a journal, but more appropriately may be the notes on the menu, the Court's ruling stands. However the one clarification that the -- that the Court left open, at least that I recall, was whether Mr. Kurth may conduct any redirect if -- if the issue is -- is raised on cross.

Court believes that -- that fairness would dictate that if the door, so to speak, is -- is open on cross, that redirect maybe -- may be appropriate. It will depend on, I

think, the scope of cross, if any. But also the nature of the questions on redirect, which we can't really know ahead of time what those will be. So redirect may be permissible subject to whatever the scope of cross is, but also subject to any objections made at the time that the redirect question or questions are made.

So be -- be cognizant that I think both -- both attorneys, the -- be on your toes, so to speak, when the -- when and if that issue arises. I will be happy to -- to take, you know, any objection that is made prior to any answer given. And the -- the scope of the redirect is probably going to be very limited. But --

MR. KURTH: Sure.

THE COURT: -- I think I can only really deal with that when it happens. So.

MR. O'BRIEN: Thank you, Your Honor.

THE COURT: Thank you both.

MR. KURTH: And, Judge, we'll file the ROC, but whether or not -- you know, the Court's made its ruling. But just want to put on the record that I did provide a copy and showed Mr. O'Brien the original of the document in question today.

THE COURT: And so when you -- when you do file the ROC and you file a copy of the document, the Court would appreciate a courtesy copy.

MR. KURTH: Okay.

MR. O'BRIEN: Thank you, Your Honor.

MR. KURTH: Thank you, Your Honor.

MR. O'BRIEN: And we -- I stipulate that he provided me with a -- a legible photocopy of the document this morning.

THE COURT: Okay. Thank you both again.

MR. KURTH: Thank you, Judge.

THE COURT: Are we ready to go?

THE CLERK: We're ready.

MR. O'BRIEN: I'm ready -- defense is ready, Your Honor.

MR. KURTH: Am I ready? I have a question. What is the Court's limitations on opening statement? Do you have any specific limitations? I mean, I know we're not supposed to argue the case. It's a kind of open question, I guess, huh?

THE COURT: I thought that was the jury for a second.

THE CLERK: That's not --

MR. KURTH: That's okay. Okay.

THE COURT: Okay.

MR. KURTH: I -- I guess, like, as far as any personal -- well --

THE COURT: Bear -- bear with me. I mean, the -- the opening statements are not argument, which I think you already understand. Let's see, we already talked about

potentially using exhibits.

THE MARSHAL: Are you guys going to need the ELMO and stuff like that?

MR. O'BRIEN: I will for opening.

THE MARSHAL: Are you going to need to put up any documents or anything?

MR. KURTH: Yes, uh-huh. Yes. Thank you. Sorry.

THE COURT: You know, other -- the other -- other than your general rules, you know, regarding the exhibits, and then opening statements are not arguments, not sure what the question really is, I guess.

MR. KURTH: Well -- well, I suppose it probably isn't -- I'm trying to, you know, maybe I took care of some of it in voir dire yesterday. But, you know, part of me -- we're suing the school district. We do have our jury impaneled. We asked them a lot of questions yesterday. But even my daughter, for instance, is a teacher for the school district. I don't think we look like the bad person that's suing the school district. But, I mean, I'd frankly thought about just mentioning that, you know, my daughter even works as a teacher there.

THE COURT: No.

MR. KURTH: Okay, Judge. Thought I'd ask so I don't get in trouble.

THE COURT: No, it's better to ask and, yeah, better

to ask. So.

MR. KURTH: Okay.

THE COURT: Thank you.

MR. KURTH: Okay. No problem. All right.

MR. O'BRIEN: Your Honor, would it be possible to have a break for convenience purposes before the jury's brought in?

THE COURT: Yes.

MR. O'BRIEN: Thank you, Your Honor.

(Pause in proceedings.)

(Jury reconvened at 11:00 a.m.)

THE COURT: Will counsel stipulate to the presence of the jury?

MR. KURTH: So stipulated, Judge.

MR. O'BRIEN: So stipulated, Your Honor.

THE COURT: Thank you. Thank you, welcome back, ladies and gentlemen.

The Court appreciates your patience. And I realize we're starting a little later than I had anticipated. The good news is a lot of the time spent with the Court with counsel outside the presence of the jury generally will streamline and shorten the process. And so we -- we've been working to do that. So appreciate again your -- your patience.

To continue with -- with the admonishments, I may

repeat a little from what I said, but bear with me.

Since the plaintiff has the burden of proof, the plaintiff gets to argue to you twice at the end of trial. Plaintiff will argue, defense will argue, and then the plaintiff has the opportunity to rebut the defendant's argument.

After the attorneys have presented their arguments, you will retire to select a foreperson to deliberate and arrive at your verdict. Again, like I said yesterday, faithful performance by you of your duties is vital to the administration of justice.

It is your duty to determine the facts and determine them from the evidence and reasonable inferences arising from such evidence. And in doing so, you must not engage in guesswork or speculation.

The evidence which you are to consider consists of testimony of witnesses and the exhibits admitted in evidence. The term witness means anyone who testifies in person in court or by way of a deposition. A deposition is simply an examination of the witness at a prior date under oath with the attorneys present, testimony's taken down in a written format.

Again, admission of evidence in court is governed by rules of law. From time to time it may be the duty of the attorneys to make objections, and my duty as a judge to rule on those and decide whether certain question may be answered

or whether certain evidence may be admitted.

Good news in this trial, as part of our deliberations outside your presence, the parties have already stipulated or agreed to the admission of quite a bit of the evidence, which will save us a lot of time.

You must not concern yourself, however, with objections made by the attorneys or with the Court's reasonings -- reasons for its rulings.

You must not consider testimony or exhibits to which an objection has been sustained or which has been ordered stricken.

Further, you must not consider anything which you may have seen or heard when the Court is not in session, even if what you have seen or heard is said or done by one of the parties or one of the witnesses.

While you're here in the courthouse, please always wear the blue badge that the marshal gave to you, which will identify you to everyone that you are a -- a seated juror.

When you're coming in in the morning or during breaks or at recess or in the elevators, please only chitchat with people that have that blue badge on. Sometimes you won't be able to tell whether a person's a juror or not, unless they're wearing the blue badge.

When you came in, for example, there's no -- you know, the -- there's nothing to identify a person to you as a

-- as a potential witness in the trial. They could look like -- like anyone. So if you limit your conversations to people wearing the blue badge, it makes it just easier for everyone.

There are two types of evidence in every case, one is direct, one's circumstantial. Direct testimony -- direct evidence is testimony by a witness about what the person did, or saw, or heard. Circumstantial is testimony or exhibits which are proof of a particular fact from which, if that fact is proven, you can infer the existence of a second fact.

You may consider both types of evidence in deciding this case, and the law permits you to give equal weight to both types of evidence. But it's up to you to determine how much weight to give to a particular piece of evidence.

Opening statements and closing arguments are intended to help you in understanding the evidence and applying the law. But again, as -- as I mentioned yesterday, what the attorneys tell you is not evidence. They are not witnesses, they have no firsthand information, and therefore what they tell you is not evidence.

I may, during trial, take notes myself of what the witnesses are saying. Don't make any inference from that action on my part, because I'm required to be prepared for legal arguments that the attorneys make during trial, and for that reason I'll probably be taking notes, just like some of you may or may not be doing.

Again, let me remind you that until the case is submitted to you, do not talk to each other about it or anyone else who has anything to do with it until the end of the case, when you go to the jury room to decide your verdict.

Do not talk with anyone else about this case or anyone who has anything to do with it until trial has ended and you've been discharged as jurors, and this includes members of your family and your friends.

Those of you who are employed, obviously, you'll need to, you know, talk to your employer that you're called to jury duty. But other than that, don't discuss the case with anyone.

Do not let anyone else talk to you about the case. If someone should try to talk to you about the case, let us know and report to -- to the marshal.

Do not read any news stories or articles or listen to any radio or television or Internet reports about this case, if there are any. Do not do any research or make any investigation about the case on your own. Simple instruction, but sometimes people ignore it, overlook it, or -- or don't quite understand what it means.

If something happens during the trial and there's testimony or a witness that you don't understand or you think, Oh, I should look this up or something like that, the instruction is don't do that. We're limited to -- to what's

here in the trial itself.

For example, say your best friend's an expert in something that arises in this case. You can't call your friend and say, Hey, in the trial today the witness was talking about this, can you explain it to me. Don't do that.

It also means don't -- don't Google or Facebook or -- or, like I mentioned yesterday, do not make up your mind about what the verdict should be until after you've gone to the jury room to decide the case and -- and talk amongst yourself in deliberation about the case itself. It's important that you keep an open mind throughout this process. And we certainly appreciate the answers that you all gave about being able to keep an open mind.

At the end of trial, you'll have to make a decision based upon what you recall of the evidence. You will not have a written transcript to consult. Even though we have a court recorder who's recording everything that's said, it's not typed up into a readable format. It's time-consuming for our recorder to read back testimony. So please, I urge you, pay attention to the testimony that's given when it's given.

Here's a pretrial instruction regarding questions that -- that you may have that arise during the trial. After the attorneys have completed their questioning of a witness, if there's a factual question that you would like answered, which wasn't asked, or if you need clarification of an answer

given by a witness, you may submit that question to the marshal in writing before the witness is excused from the courtroom. So write it down on a clean piece of paper and raise it so that the marshal can see it, if you happen to have a question.

The marshal will give me your questions, and I will then discuss them with the attorneys and determine whether the question is legally proper or if another witness in the trial later may be answering that question already. Since the law requires that any question asked of any witness comply with the rules of evidence, it's possible that I may deem your question inappropriate, and therefore, it may not be asked.

You're not to draw any inference or conclusions one way or the other if that happens. It's just we have certain rules of law in evidence that come into play with every question, including any question that one of you may have. If your question is asked and answered, you're not to place any undue weight on the answer, just like any other question that's asked.

There are certain questions which you may wish to ask which are never proper or allowed at trial. Those questions may involve things like a criminal history, if any -- if any of a witness, or questions which ask a witness to relate a fact told him by someone else commonly known as hearsay. Please refrain from submitting those types of

questions, since I'll have to say we can't ask that question anyway.

That concludes the Court's pretrial instructions. The Court understands that the parties wish to invoke the exclusion of witness rule with the exception of the mother of the plaintiff; is that correct?

MR. KURTH: That's correct, Judge.

MR. O'BRIEN: Yes, Your Honor. And also Eileen Wheelan, who will be a witness, is the District's representative, so I request that she be allowed to remain through the trial.

MR. KURTH: No objection, Judge.

THE COURT: Thank you. We'll now turn the time over to plaintiff's counsel for his opening statement.

MR. KURTH: Your Honor, I've -- thank you. I've submitted some -- or provided some exhibit binders, which I'd like to give to -- can I hand them out to the jury?

THE COURT: You may.

MR. KURTH: Okay. Thank you.

(Pause in proceedings.)

MR. KURTH: Need a bigger podium, something that -- should buy something that sticks up here to hold everything on here.

PLAINTIFF'S OPENING STATEMENT

MR. KURTH: Good morning. Good morning, ladies and

gentlemen of the jury. You met me yesterday. My name's Robert Kurth. I'm representing the client here, Makani Payo, who's present. This is the date and time for the trial to begin.

Appreciated your time yesterday in getting through all the -- the voir dire process. I know it's a very long and tedious process. But it was very important so that we could, you know, pick. Both sides have the opportunity to try to select the best jury possible. And by doing so, we believe that, you know, you were selected to be a fair and impartial, and through a combination of the process, the judicial process, that, you know, we're lucky to have and lucky to have created by our founders years and years ago.

The -- today what we're going to start doing is we're going to present evidence. So we're going to present evidence about what happened to Makani when he was 11 years old in sixth grade attending Woodbury Middle School.

I've provided you some binders. It's not always a -- a normal thing to do that. So I apologize if they're too bulky or something. If you don't want to use it, you don't have to use it. We'd like you to, you know, watch the witness and pay attention to the witness and what they're saying. But all the exhibits that have already been stipulated and agreed to to be admitted, which are in evidence, and they're for your review and consideration in this case, along with the

witness's testimony in totality of everything that's going to be presented to you, to be able to make a decision at the end.

When we get to the end of the case, we're going to ask you to make a decision, and we're going to ask you to make a decision concerning the preponderance of the evidence standard. So you're going to be instructed specifically about the law by the judge through several jury instructions. And it'll be a long and tedious, you know, reading all the instructions and everything. Which you're required to follow, because those are statements of the law in the case.

The -- when you're thinking about it, I just wanted to give you a little bit of that information ahead of time, so while you're sitting here thinking about it, I don't know that we really discussed it enough in voir dire, is that about the preponderance of the evidence standard. Usually somebody thinks about tipping the scales.

The law says, you know, that it's such evidence when considered and compared with that opposed to it, has more convincing force, produces in your mind a belief that what is sought to be proved is more probably true than not true. So it's more probably true than not. So it's not, you know, when we talk about evidence -- and I just want to give you a little bit of that information ahead of time, you know, because, you know, you're familiar with people getting traffic tickets or pulled over the police, and reasonable suspicion, probable

cause to arrest, probable cause to search, get warrants. And we're at preponderance of the evidence standard.

Then you have a clear and convincing evidence standard, such as in cases like they terminate parental rights.

Then you have a beyond a reasonable doubt standard to convict somebody of a crime.

So we're down here at the preponderance standard. So I just want you to think about that as you're hearing the evidence as it's produced to you as the witnesses are testifying and you're -- you're thinking about everything in the totality about what's more probably true than not true.

This is a case about negligence. It's about -- case about negligence and negligent supervision. Makani, back on about May 12th, 2004, you're going to hear to this effect, was 11 years old and in the sixth grade, almost done with his sixth-grade year. He was in PE class and during the PE class he was playing this game called field hockey or floor hockey. And I'm -- I guess I'll probably call it floor hockey. But I'll probably say either one.

So they're out there with -- you're going to hear evidence -- with hockey sticks, tennis balls, on a tennis court. Lot of kids out there playing with the teacher supervising. The incident out there, when one of the kids hits Makani, who's wearing glasses at the time, in his left

eye and causes substantial injury and damages to him.

I mean, the kids are -- are -- you're going to hear evidence that they're saying -- well, the kids are taught to hold the sticks by two hands. And that they're taught to not high stick, raise the stick above the waist. And it wasn't like a -- a sport that they were playing. It was like a PE sport that they had went through. In whatever respects, we're not sure yet. We'll -- what the evidence shows about how much was taught about it or -- but that they went over some rules and they went and they put them out there and they played this game.

And then during the game another kid, not intentionally -- you'll hear no evidence that the other child intentionally or maliciously hit Makani -- but that it did happen during the play of the game. There's no dispute that he was injured. There's no dispute as to the amount of damages -- well, excuse me, well, the amount of damages is probably in dispute, going to be a dispute. As far as you first determining negligence, you are going to have to determine that, or negligent supervision, or both. And you're going to have to then determine the amount of damages if you -- if you find that way, when we get to that point. But that's what we're going to present the evidence to you and ask you to consider.

But what's not disputed are the treatment that was

provided, which is set forth in those exhibit binders, that he did have this medical treatment, that he was getting treated from 2004 through 2007. And there's going to be evidence that there was a -- a break in treatment. That he left Nevada and moved to California in 10th grade. And he was there.

You're going to hear evidence that a claim was initially made, that the Clark County School District -- the defendant was on notice of the claim. You're going to hear evidence that the claim, you know, there was process going on, but then the lawsuit wasn't filed till later, when Makani was actually a -- an adult, because the statute of limitations doesn't run when somebody's a minor, for somebody filing a case for negligence, against a minor child. So that's one reason. Usually that statute of limitations is a two-year time period, okay, for when you get in an accident, or you -- you know, you're filing something, such as a car accident.

So the -- in your binder, I think it's Exhibit 15, I believe, is going to show that --

Let's see how this looks here. So that's going to be right -- it's got an auto focus on it? Let's see if this works here. Nope. I was not in the visual technical in school, high school. Okay. Well, I think that's Exhibit 15.

So either way, this is undisputed that these are medical expenses that were, you know, the result of his treatment. Okay. The result of his treatment after this

injury through 2007. And then you're going to hear evidence that he recently went back to one of his -- to his treating doctor this year, early this year.

You're going to hear evidence of what -- of what he believes, you know, he's still suffering and what he suffered during the time and what's been done. But to consider that, you know, first we've got to -- you're -- you're going to hear the evidence concerning the negligence and the negligent supervision.

It's going to be the plaintiff's position that when you -- that you'll be able to find that, after the testimony that's going to be presented, which is going to show that there was no headgear provided for these children. There was no -- and -- and, you know, it's hard. And we don't even have a picture of him. Back in 2004, I was trying to think of when -- what was going on at that time, I have to assimilate it to when, you know, my kids were that age or what was going on, and when I first got them cell phones and they were texting like crazy and the bills were high.

But, you know, we don't have a picture, unfortunately, of that. We don't have a picture of what he looked like. I sure wish we did have a picture, because it's probably hard to see him right here, he's 22 years old now. But I'm going to ask you while the testimony's going on to think about this was an 11-year-old kid that was undergoing

this. Just finishing his sixth-grade year.

Because we're going to show you evidence that there wasn't headgear provided, there weren't goggles provided, the hockey sticks were the regular hard plastic on the bottom -- we don't -- we don't have the hockey sticks, either. That's what they were, just regular, with tennis balls, hit into a -- a net on the other side.

There's a general -- there's no question that there was a duty to use reasonable care in this case. So when you hear the evidence of why this equipment wasn't provided or what was going on, what happened at the time, how it affected Makani, then you're going to have to determine at the end if that was -- if that was the standard, reasonable care. Or if the school district did anything also to increase the risk of harm to 11-year-old Makani participating in this PE activity.

There's not -- there's really not a lot to it. You know, it's not a long and drawn-out process. We're going to try to present this evidence as -- in a efficient manner and try to limit the time that you're going to have to be here. But, you know, it's important, you're listening to everything, to consider all of the witnesses, along with your common everyday sense and your judgment.

And when I say that, you know, we don't have -- we're used to seeing on TV, and -- and I apologize for that, and all this, you know, CSI and everything else, and fancy

things. But we just don't have that in this case. This is a case that happened a long time ago where he was injured and is seeking recovery. And that's why we're here today, to present that to you. And then you're going to make that decision whether or not you think the evidence that was presented is enough to meet the more-probable-than-not standard.

And, you know, I was looking for an Abraham Lincoln quote. I couldn't find one. I like Abraham Lincoln. But Thomas Jefferson, and he said, It's the trade of lawyers to question everything -- and that's why we're here -- to yield nothing, and to talk by the hour. So that's why we're here today. But we're going to try to limit -- limit the talking as much as possible and -- and get it done.

So thank you again for being here. Thank you for your time. And look forward to presenting the case to you.

THE COURT: Does defense wish to make an opening statement at this time?

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Thank you.

DEFENDANT'S OPENING STATEMENT

MR. O'BRIEN: Ladies and gentlemen of the jury, again, thank you very much for being here. You have no idea how much we appreciate having you here. Because without you, we couldn't get an answer to the questions to the disputes that we have. So we -- we both appreciate your service very

much.

This case, however, is really not that complicated. I don't think anybody's really spelled out for you what this case is all about. So I'm going to try to do that right now. Basically, over a decade ago, in 2004, Makani Payo was playing floor hockey in his PE class. Now, they play this with plastic hockey sticks and a tennis ball. They play it on a tennis court. There's two teams with I think approximately 12 players each.

During the play, and this is coming from Makani, because we took his deposition before; and in case that hasn't been explained, deposition is a statement under oath. We're allowed to do that with the different witnesses. So what I'm telling you is what Makani has -- has said. So -- and you'll hear it again either from him or through his deposition if he changes his mind.

But, basically, he said they're playing and he's got his hockey stick, and he's going for the ball and another player's going for the ball. And his -- his hockey stick comes up and hits him in the face. It hits him on the side of the face near the eye. And that was the flat part of the hockey stick. It wasn't, like, the edge or the point or anything. This is, again, according to Makani, slapped him up here right beside the eye. And I don't remember which eye. I'm using my left, but it could be either eye.

It is undisputed that Mr. Payo's injuries turned out to be very serious. In retrospect, afterwards, he had required a lot of treatment and surgery. And we don't -- we don't question that. We aren't claiming that his medical records that he -- that had been produced that have been -- weren't a result of this injury. That's -- that's not even in question. He was hurt, he was seriously hurt.

But the issue is this happened in 2004. And we have to look at this with respect to did we do something wrong in 2004 that caused -- that was a cause of his injuries?

The -- Makani will tell you that the accident happened in the blink of an eye. It happened so fast he had no time to even react or try to get out of the way. He didn't see it coming. There's no prior animosity between him and the other student, Brandon Higgins, you'll hear his name again. There's no reason to believe that -- for the District or anyone else to believe that Brandon Higgins tried to hit him or intended to hurt him or anything else. The plaintiff himself has characterized this thing as an accident. Not -- not something intentional by -- by Mr. Higgins at all. So we're not going to be talking about Mr. Higgins and his background and trying to portray him as a bad guy.

This is an accident that happened in the middle of playing a PE -- playing floor hockey during PE. That's it. This case is that simple.

Plaintiff will tell you that Todd Petersen, the teacher, who you will get to see hopefully tomorrow, was present the entire time. That he went over the rules beforehand, including the -- the hockey -- some safety rules. He will tell you that high sticking was explained to him, and he was told nobody's supposed to high stick. Mr. Petersen will tell you that, you know, one of the reasons you keep two hands on the hockey stick is because you can't swing as wildly as you can with one hand. That they did everything that was reasonable under the circumstances to prepare the kids to play, and then supervise them.

Makani will tell you he was there the whole time. He was actively supervising him. He was engaged. He was -- he was controlling the situation the best he could from the sidelines.

But again, he will tell -- also tell you this happened so quick that even if Mr. Petersen had seen something that indicated that Mr. Higgins was about to swing wildly or excessively, there wasn't -- there wouldn't have been enough time for him to react. I mean, there wasn't enough time for the plaintiff to react. So that's -- you know, that's what the evidence is going to show.

In fact, plaintiff has testified and presumably will do so again, that he doesn't think Mr. Petersen did anything wrong. He doesn't think that there's an issue about -- he

doesn't know anything about an issue about negligent supervision. That's -- that's his testimony. That's what he said. And we'll show you if he changes his mind -- and sometimes there's reasons to change your mind, so we're not suggesting that he's going to -- to lie. If he changes his mind, we'll show him in his deposition transcript and have him explain it to you. But as -- as we sit here today, his statement was he doesn't blame Mr. Petersen. He doesn't think he did anything wrong.

The issue in this case, really, has to do with whether or not we had a duty to provide safety equipment. We're going to put on Mr. Murphy, who was the principal at the time -- remind you this was 11 years ago -- and he's going to -- he -- he will tell you there's never been a prior injury like this previously while playing floor hockey. He will tell you that, you know, there was adequate supervision. He will tell you that class -- you know, the teacher-to-student ratio was set by a state law, and that they don't really have control over it unless somebody gives them extra funding to hire an extra teacher. And that -- that this sport was generally considered to be a -- a safe sport.

Now, there's no activity in the world, ladies and gentlemen, and I couldn't -- this -- this goes without saying, that is absolutely 100 percent safe. There's always a chance that somebody can get hurt. It's what they call an inherent

risk in the sport. Plaintiff has admitted that the -- the risk of getting hit by a -- the hockey stick is a risk that's inherent in this activity. So you can take that as established fact.

The issue, then, is were we reasonable in the manner in which we taught this course, supervised this course. And if you find that we, you know, if you find that -- for some reason that we were not reasonable in the manner that we supervised it and presented it to the students, then, of course, you can find for the plaintiff.

Mr. Petersen will also tell you that in the entire time he taught this -- this course, that he -- nobody had ever sustained a similar injury.

Eileen Wheelan here at that time was a claims adjuster for the District. When someone makes a claim against the District, she would investigate it, gather evidence, find -- get information from the -- the claimant, and try to determine whether we -- we did something wrong. And then if we did, do we owe them money and how much. That's -- and so she started an investigation in this case.

But she'll tell you also in that looking at the risk management records, there had never been a prior claim or an injury to their face or head or anything resulting from playing floor hockey. The entire school district, not just at Woodbury Middle School, but in the -- the entire district.

There'll be other issues that will be addressed during the trial. But the only complication in this case, and it came up during voir dire, is the issue of timing. Why are we going to court in 2015? Well, that's easy enough to explain. The lawsuit was filed in I think 2013, 2012. It takes a while to do discovery, gather your evidence in trial [indiscernible], get it in.

But what about the gap between 2004 and 2013, when this lawsuit was filed? Why did that happen? And that's -- we're going to put on evidence, Your Honor, that plaintiff has suggested he had Mr. Kurth representing him in just a few days of the accident. So he had an attorney. Yet, they didn't -- he didn't present a claim.

And this is Eileen Wheelan, said she wasn't told that anybody even thought for a moment that we were at fault until we got a letter from Mr. Kurth. And that's -- that's an item that -- I don't remember if that's an item that's in evidence or not. But we got a letter -- she'll tell you she got a letter from Mr. Kurth informing her that he represents Mr. Payo. And then she started an investigation.

Now, the problem is that letter came some seven, eight months after the incident [indiscernible]. Todd Petersen, the teacher, the person most likely to have knowledge of this, had left the school district. He got a better job somewhere in California and he, in fact, has since

ended up in -- in Omaha, Nebraska. He has agreed to fly out for this, but he is not a school district employee, he's -- he's a witness.

He was gone. He wasn't available. With respect to the students, we can't talk to them without permission from the parents. And besides, based upon the -- the student accident injury report, which you will see, there was nothing to suggest that he had done anything wrong. There was nothing to suggest anybody was going to sue us until some seven or eight months later. So right out of the box, District was hammered in -- in [indiscernible] discovery. But Ms. Wheelan did the best she could under the circumstances.

Mr. Kurth then filed a specific form, Notice of Claim form on behalf of the plaintiff. But Ms. Wheelan got a point where she needed more information from the plaintiff. She needed more information from the plaintiff as to how this happened. That's very important. You have to know how it happened. You have to hear it from the claimant to know what are -- what are we investigating? What's going on here? What's -- what's the basis for the claim?

So she asked Mr. Kurth for additional information. And that's when all of a sudden the communication stopped from Mr. Kurth's office. Ms. Wheelan will tell you she repeatedly kept asking for an update. Repeatedly kept asking for additional information. And after a year or so passed, she

closed the file. No reason to do anything if you can't get the basic information you need from the source that is making the claim, there's nothing left to do. At that point in time, there was no longer an active claim.

Plaintiff in this case, Mr. -- Mr. Payo, treated up until approximately I think 2007 was the last time he sought any treatment for this case. No -- at no time during that time period did he contact the District and say, I want to reopen my claim, here's my medical bills, you know, take care of me. Not -- not a word.

Even after 2007, he doesn't do anything. He doesn't treat from 2007 at all with respect to this -- this incident. Nothing.

In 2015, in January of 2015, January 22nd, in fact, we took his deposition and he indicated, Oh, I just went to Dr. Carr again yesterday. But if you look at Dr. Carr's report, and Dr. Carr, I understand, is going to be testifying as a witness, we'll see that he didn't provide treatment. He went there -- our argument will be that -- for litigation purposes, did a checkup and be able to come in and say here's -- here's my status. Say I wasn't treating him.

So Makani had the ability, he had an attorney within a few days of the incident, he had the ability to bring his case at any time. The District didn't do anything to slow down his claim. The District never even made a decision as to

liability, because it was unable to conclude its -- its initial discovery into the case. We never told him, No, we reject this claim, yes, we accept it. We haven't got to that point, because Makani, as far as the District was concerned, simply disappeared. And that's what the evidence will show in this case.

This, you know, I -- I got to say again, this case is really not that complicated. There's going to be concerns expressed by everyone, including Makani. They don't remember much about this. Well, of course not. Because it happened 11 years ago. And plaintiff had the ability to give us the information we needed to complete our investigation, make a determination, and decided not to. So any suggestion that the District has tried to slow down this case, or that the District has in any way impeded plaintiff in completing his -- the claim process is absolutely unsupported by the evidence.

And then there's another issue in connection with the delay. During the course of trial -- the course of pretrial, we conduct what's called discovery. We send out a written interrogatories, written questions to ask them to tell us stuff. They send us interrogatories. We send them a request for production of documents. They didn't send us one. We sent -- they sent us a request for admissions, we didn't send them one. So these things -- we exchange documents.

And then we set depositions. In other words, we

take the statement of people under oath. We took Mr. Payo's statement under oath, because we wanted to know where he's coming from on this case.

Mr. Payo did not take Mr. Peterson's -- Todd Peterson's deposition. We not only after -- after finally tracking him down, we not only made him available, but we actually set a deposition time for him and at the last minute --

THE COURT: Counsel, let's stick with the facts of the case.

MR. O'BRIEN: This is just, Your Honor, to establish the -- the timing issue and the -- the issue that [indiscernible] delay. And I am discussing the facts.

THE COURT: Let's move along. Thank you.

MR. KURTH: Can you please stand closer to the mike.

MR. O'BRIEN: Sure.

MR. KURTH: Thank you.

MR. O'BRIEN: To the extent, though, that anybody claims that they did not have evidence and that they can't remember anything, you can look to determine why they don't have that evidence, and why they don't have that testimony.

The Court will instruct you and has instructed you that argument of counsel is not evidence. But when an attorney gets up here, either one of us, and makes a representation to you, you should hold them to that. If I get

up here and tell you, you know, the sun is blue, you should hold me to that. And if I don't prove it, you can hold that against my client, because I've made a representation to you as to what the evidence will show, and I haven't shown it.

And that applies to the arguments that I'm making, and that applies to the arguments that plaintiff's counsel has made in this case.

For that reason, during the trial, and you've already been -- it's already been suggested to you, you need to focus on the evidence. Not what I say the evidence is, not what Mr. Kurth says the evidence is, but the evidence.

When a witness testifies, you look at the witness. You assess that witness's credibility. You assess the consistency of the testimony with other evidence that you've already seen. You test whether or not that individual was in a position to know those things or see those things or hear those things. You -- you look at the evidence and make your own decision as to what that evidence is.

If you decide that the -- the -- the testimony of any witness just simply isn't credible for any reason, you take -- you know, you should make a note of that. Because we'll argue that we -- we might argue that we think that that was important evidence. But it's your decision as to what's important evidence and what isn't evidence.

And that the ultimate question in this case, does

the evidence support the allegations that the District negligently supervised Makani Payo, that as a result of that negligent supervision, he was injured, and that we therefore owe him money. That's -- that's really the only -- that's really the question that's before you. And plaintiff may argue alternative theories of why we were negligent. But those -- that's the goal of this case, plaintiff has the burden of showing that we were negligent, we did something wrong, we caused his injuries, and we owe him money for that reason.

And just briefly, although plaintiff went over the burden of proof, the way it really boils down is at the end of the trial and all the evidence has been presented and the issue comes to you, if you decide that there's equal weight on both sides, evidence for the plaintiff is just as competent and as -- and -- and as persuasive as the evidence for the defendant. But you can't discriminate between the two, plaintiff hasn't met their burden of proof.

They have to show that it's more probable than not. If it's -- you come up with it's just as likely that we were negligence -- as negligent as that we weren't, plaintiff hasn't proved their case. So look at the evidence, please. Listen to the witnesses, look at the documents, come to your own conclusions. Whatever your decision is, we'll live with it.

Thank you very much, Your Honor, ladies and gentlemen.

THE COURT: Thank you both, counsel.

We're approaching noon and we can either take our first witness and then break for lunch or break right now. I would think breaking now is probably good, but.

MR. KURTH: Yeah, we might as well just break right now, Judge, and start --

MR. O'BRIEN: Whatever the Court's inclined to do is fine with us.

THE CLERK: Is it a long witness?

MR. KURTH: That's a loaded question to ask an attorney. You never know. You know, I've said that before thinking a witness is 15 minutes, and I don't know.

THE COURT: Let -- let's go ahead and take our lunch break, our lunch recess. We will come back here at quarter to 1:00.

So ladies and gentlemen of the jury, we are going to take a 60-minute recess. During this recess, you are admonished not to talk or converse amongst yourselves or with anyone else on any subject matter connected with the trial, or read, watch, or listen to any report of or commentary on the trial or any person connected with this trial by any means, whether it be newspaper, television, Internet, etcetera. You're also admonished not to form or express any opinion on

any subject connected with the trial until the case is finally submitted to you.

We'll be back at quarter to 1:00. Thank you.

(Jury recessed at 11:47 a.m.)

THE COURT: What the Court would prefer to happen is we are all seated in here before quarter to 1:00 waiting for the jury. So.

MR. KURTH: I'm just going to eat my apple and granola bar, so.

THE COURT: Thank you.

THE MARSHAL: And just so you guys know, when you're up to the podium, you guys have to stay on top of that mike. That one just doesn't pick up as well as the ones that are at your --

MR. KURTH: Is this -- does this one pick up good, like if we don't want to -- are we okay to ask our questions from here to the witness?

THE MARSHAL: No, yeah, that -- those mikes are all right. You're -- at your tables are -- are great. But for some reason that mike that's on that stand -- I switched them out, for some reason, just where it's located, it doesn't pick up well.

MR. O'BRIEN: Are we allowed, Your Honor, to walk around while we're asking questions and -- and -- and make arguments? I mean, there are different times when --

THE MARSHAL: You can if you want to wear this.

MR. O'BRIEN: That's fine with me. I just want to make sure --

THE MARSHAL: You just have to be by a microphone, counsel, so that your questions are miked up. Because later if you want a transcript, when the court recorder goes to type it out, if you're not by a microphone or not wearing a lapel mike, it's not going to pick up your question.

THE COURT: Yeah. I -- I'm fine if -- if we have those. If they want to use them, that -- that works maybe even better, depending on your preference.

MR. O'BRIEN: Thank you Your Honor.

MR. KURTH: And -- and I'd rather just --

THE COURT: Just make sure they work.

MR. KURTH: I'm probably not going to use that podium, just because it's -- doesn't have much room to put anything on and it's, like, right in my way. So -- are you going to use this thing? Are you going to use that podium?

MR. O'BRIEN: At times.

THE COURT: We can --

MR. O'BRIEN: If it's in your way, you can move it.

MR. KURTH: Okay. I'll just slide it over when I'm asking.

THE MARSHAL: Yeah, yeah.

MR. KURTH: Just put it in the middle right here for

now. Thank you.

THE COURT RECORDER: You can move it out of the way if you need to.

(Court recessed at 11:49 a.m., until 12:52 p.m.)

(In the presence of the jury.)

THE COURT: Does counsel stipulate to the presence of the jury?

MR. O'BRIEN: Yes, Your Honor.

MR. KURTH: So stipulated, Judge.

THE COURT: Thank you. Mr. Kurth, you may go ahead and call your first witness.

MR. KURTH: Call Lori Payo to the stand, Judge.

LORI PAYO, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please be seated. State and spell your full name for the record, please.

THE WITNESS: Lori Payo, P-A-Y-O, L-O-R-I.

MR. KURTH: Is there an exhibit book up there next to you?

THE CLERK: It'll be right behind you.

DIRECT EXAMINATION

BY MR. KURTH:

Q Ms. Payo, how do you know the plaintiff in this case?

A He's my son. My son.

MR. KURTH: You picking that up okay on the voice?

THE COURT RECORDER: Yes.

MR. KURTH: Okay. Thanks.

BY MR. KURTH:

Q The -- and let's take you back to May of 2004, okay. So around May 12th of 2004. Long time ago. Do you remember what was -- what was going on in your life during that time?

A At the time I was living with my -- my mom. I was a single mom. I had Makani, Mikela, and my -- Lauren, my three youngest that was living with me at the time. I just moved from California and I stayed with my mom.

Q Okay. And where was Makani attending school at that time, May 12th, 2004?

A At Woodbury.

Q Is that a middle school?

A Yes, it is.

Q Okay. And what grade was he in?

A Fifth grade.

Q In May of 2004, was he in fifth grade or sixth grade?

A Sixth grade, I'm sorry.

Q And how close was the school to where you were living?

A It was walking distance about -- about two blocks, very close.

Q And where were you working at the time?

A At the time I was working for Wolfgang Puck, the cafe at the MGM at the time.

Q What did you do there?

A I was a -- a hostess and a trainer for Wolfgang.

Q Okay. How long had you been working there?

A At that time I was working there about two years now at that time.

Q Okay. And did you -- do you have a college education?

A No, I don't.

Q Did you graduate from high school?

A Yes, I did.

Q Where at?

A Waipahu High School in Hawaii on Oahu.

Q And so you're working at Wolfgang Puck's. Do you remember what happened on May 12th, 2004?

A I do remember when my son got hurt. I was on the way to work at the time.

Q How were you getting to work?

A I was either catching the bus -- I had no transportation, so I was catching either the bus, or my coworker whom, his four-year-old, my mom was babysitting for him. So he would pick me up, drop off his son, and bring me to -- to work. I would ride work -- to work with him.

Q Okay. So on that day, did you -- did you get a call

from somebody about Makani?

A Yes, I did. I was on -- I haven't -- didn't reach work yet. And I got the call from the assistant nurse. Wasn't the actual nurse. And she told me that my son got hurt playing at PE. And I asked, you know, I asked him if he was okay. And she said, you know, it was just they were playing -- participating in PE and he got hurt. I said, How did he get hurt? He got hit. And my next question was, Was there any blood, you know, is he coherent? You know, or -- you know, was he okay?

And I -- and then I asked her, Does he need to be going to the hospital? And she said, No, it was just a bump on the head. He was playing field hockey.

Q The head or the eye or where?

A When she told me, it was the head. And I asked her specifically where, because I know my son wears glasses. And she says, Right -- right off of the left eye.

Q Okay. So then did you come pick him up?

A No, I didn't.

Q What did you do?

A I -- I -- I asked her again, before the end of our conversation, I asked her if he needs to go the emergency room, because if that's the case, I would have turned around and come back, straight back home. She -- she reassured me that it was just a bump on the head.

So I -- me, being a single mom, and I'm -- I'm also a trainer for Wolfgang's at the time, I had to be at work. So I went -- so I went to work, and she told me that she was -- she's already talked to my mom, who's also -- also can pick up my son if there's an emergency, she's able to pick him up, that she could go pick him up. So I just went on -- on to work, and I was going to check back in with her on my break to see how my son was doing.

Q Did -- did you call your mom and ask her to go pick up Makani?

A Yes. I wanted to make sure that she was able to -- to just walk over two blocks to pick him up at the school.

Q Okay. And when did you get off -- when did you get off work that night on that -- would have been May 12th a Wednesday in 2004?

A That night I was working -- I was working a double shift. A morning shift, and then I was working till the restaurant closed, which it closes at 11:00. But where they're an hour after, and by the time -- by the time I was the last one to leave with the managers, I would catch the bus home, because all my other coworkers would have left already. So I was catching the bus home from MGM to where I -- where I was living on Harmon.

Q And you were living around where, Harmon and where?

A Harmon and Sand Hill.

Q So, and when you got home, did you, you know, take a look at Makani?

A When I got home it was -- it was after 1:00. And I checked in with my mom and I just peeked in on him and he was sleeping sitting up. So I checked on him, I didn't want to disrupt him, and I asked my mom how has he been? And she was just telling me that he's been, you know, he's been okay --

MR. O'BRIEN: Objection, Your Honor. Hearsay.

THE COURT: Sustained.

BY MR. KURTH:

Q Don't testify to what, you know, somebody else specifically said. Okay. You can testify to your -- your understanding from that conversation. Okay? So -- so you checked on Makani and then did you go to work on Thursday?

A No, I didn't.

Q And then did you take Makani to the doctor on Thursday?

A No, I didn't. I did not.

Q And then the next day would have been the May 14th, Friday morning. So what happened then, that day?

A That day he was complaining to me that his head was hurting and he -- he -- when he would stand up he was dizzy. And he was saying that, he -- like, things were blurry.

Q You're referring to Makani?

A Yes, my son.

Q So did there come a time when you took him to the doctor?

A I actually took -- took him to Quick Care on boulder -- on Boulder Highway. When he was -- he started to -- he was throwing up and wasn't feeling well. So I -- and -- I told my mom that, you know, he needs to be checked out. Just so happened one of my friends -- I didn't have a car at the time -- one of my friends was there at my house to help me. We were also in the process of moving from the -- from the east side to the west side. And he was helping me move, helping us move, because he had a trailer.

Q So you were -- your family was having to move during this same time while all this was going on?

A Yes.

Q And so you took him to Quick Care, then what happened at that time?

A When we got there, we had -- actually, the doctor came out and looked at him, was complaining of, you know, head -- his head hurt. He wasn't feeling well, dizziness. And he decided to call the ambulance and have him transported to UMC, the trauma center.

Q So then Makani was taken by ambulance on that Friday to UMC?

A Yes.

Q Now, before you -- before you went -- went to Quick

Care, did you, you know, try to do anything concerning what had happened to him, did you try to find out anymore information?

A I want -- I went -- I went to -- I wanted to know what exactly happened at school. I went -- before we went to Quick Care, I went to the school to see if I could get an incident -- a report on what happened, just to explain that it didn't happen at home and that it was at school.

Q Okay. Could you go ahead and turn to Exhibit 2 that's in that book. Do you see that title, the "Clark County School District Student Injury Accident Report"?

A Yes.

Q Has a number on the bottom right corner, says "CCSD," and then a bunch of zeroes, and then 39?

A Yes.

Q So when you went to the school that day, did they give you this?

A No.

Q Is this the form that you thought you were after that day to get a copy of?

A I wasn't sure what the form looked like, but it was something saying that he was hurt on -- at school at PE. But as far as what the form looked like, this is the first -- I hadn't see it at the time.

Q Okay. So was this form ever provided to you

personally by the school district?

A No.

Q Okay. So -- but at some point in time this form was provided and you've seen a copy of it?

A Absolutely.

Q Okay. Now, when we're looking at that, this, it says on top of it, it says school name -- let me see how we'll do this; if I'm going to ask you and say it, or if I'm going to just ask you to read it. So we'll see how it goes.

It says, "Woodbury Middle School," correct?

MR. O'BRIEN: I'm going to object, Your Honor. If he wants to ask her questions, that's fine. But if he wants to read this document into the record, it's already in there -- in the record.

THE COURT: Document's already been stipulated into evidence. You're welcome to ask her questions about the document.

BY MR. KURTH:

Q So when does it say the accident occurred?

A 5/12/04.

Q Okay. And it -- and the location?

A Tennis court at 9:40 a.m.

Q And does it list the employee in charge at the time?

A Mr. Petersen, PE teacher.

Q And there was a witness?

MR. O'BRIEN: Your Honor, again, I'm going to object. The document speaks for her -- itself. It doesn't need to be read into the record again.

MR. KURTH: Oh, and -- and I would state that we have that, even the medical records, and we're going to have to go through it, because they're -- they're in evidence, but we need to get out the parts of those specific documents that are in evidence. So if I don't --

THE COURT: Well, let's --

MR. KURTH: -- ask her, I'm going to ask the school district person, who'll -- every one of them.

THE COURT: Objection's overruled.

BY MR. KURTH:

Q Okay. And so what's the -- from your -- what's your understanding from a review of this form as to -- as far as the description of the accident as to what happened?

MR. O'BRIEN: Objection, Your Honor. Her understanding from this, she can't -- that's not a factual question. That's an opinion question that has nothing to do with this. The document speaks for itself. She can testify what she knows of her own personal knowledge. But what conclusions she's drawn from it are not evidence and -- and it would be improper to present that to the jury.

MR. KURTH: I'd be happy to have you just read it verbatim off the form, since it's admitted into evidence,

instead of asking you what your understanding of it was. I was trying to -- to help out a little bit here. But...

THE COURT: The -- because it's admitted into evidence, the jurors are -- are welcome to -- to read it when they deliberate or to the extent they have the juror notebooks right now. She can testify as to her understanding, but not to read it verbatim.

MR. KURTH: Thank you, Judge.

BY MR. KURTH:

Q If you look near the bottom of that document, it says, "Signature, person who treated student," it's Wally Morton. Do you -- do you recall that being the person who you spoke with?

A No, I don't.

Q You don't know if it was Wally Morton?

A I don't.

Q Okay. And what's our understanding of when this -- this form was submitted to the -- the principal at the school?

A I didn't get this form -- I didn't see this form --

Q Do you see that there's a date on the bottom left of it, of the document?

A Yes.

Q Okay. It says, "Date submitted to principal, supervisor."

A 5/13/04.

Q Okay. So that would have been Thursday. So you went in on Friday and tried to get a copy of it, correct?

A Yes.

Q Okay. And you weren't provided that at that time?

A No.

Q So you took -- so Makani was then taken to the -- the emergency room from Quick Care by ambulance?

A Yes.

Q Let's turn to Exhibit 6, please. Let me know when you're there. You got that?

A Yes.

Q Okay. So Exhibit 6 has been admitted into evidence and it has -- I suggest to you that it has medical records from University Medical Center, probably some other doctors mixed -- mixed in there that was received from them. So do you see that first page there Bates stamped with a 0115 on the bottom?

A Yes.

Q Okay. And it says, "Pediatric Emergency Department Record." And does it show in -- in the top right corner when Makani was admitted?

A Yes.

Q Okay. And when was he admitted?

A 5/14 of 2004, time was 1439.

Q Okay. And then a little down further, it says Mercy

Ambulance had brought him there, apparently? You see that down about four lines on the left?

A Yes.

MR. O'BRIEN: Your Honor, I'm going to object again. At this point the witness isn't testifying as to her recollection of anything. She's reading documents. That's -- I mean, there's no purpose to be served. Unless she's asked first about the documents.

THE COURT: Okay. Let's -- let's keep the objections short.

MR. O'BRIEN: Thank you, Your Honor.

THE COURT: Mr. Kurth.

MR. KURTH: What?

THE COURT: Your response to the objection?

MR. KURTH: Judge, the document's admitted in evidence. I think we're allowed to go through the documents. We can't just say, Okay, jury read all these -- these pages and look through and then we're going to be done. We need to -- to point out some things. It's also used to refresh her recollection about what was going on.

THE COURT: Do -- you haven't met the -- the fact that she needs to be refreshed. But you can certainly lay the groundwork. Overruled, that particular objection.

So continue.

MR. O'BRIEN: Your Honor, if -- if I may be heard

for purposes of perhaps expediting this. I don't mind if he asks her a question, you know, this says he got there at 2:00, does that sound right? This says this, is -- do you remember that? I don't have a problem with that. I'm -- I'm not trying to slow the process up, I'm -- but I'm trying to have it done in a way that makes sense.

MR. KURTH: I'll be happy to lead her right through it, Judge.

THE COURT: Okay.

MR. KURTH: That would be probably a lot easier.

THE COURT: Let's go.

MR. KURTH: Okay. Thank you.

BY MR. KURTH:

Q Okay. We're on Exhibit 6, Bates Stamp 0115, see where it says, "Injury Wednesday, hit in eye with hockey stick, blurry vision, lost" -- or "last night vomiting, vision, seen QC, sent here."

A Yes.

Q Okay. And that would be consistent with what you've -- you've already -- you've already said, right?

A Yes.

Q Okay. And let's turn to the next page, 0116. Talk -- it talks about history of present illness. Under that it says, "However, last night there was a change. He started vomiting, complaining of more left-eye pain and then more

blurry and decreased vision. He was presented to Quick Care today." So -- so does that conform with what happened, that his -- his symptoms and everything had changed, had progressively gotten worse?

A Yes.

Q And that's why you -- you took him to the hospital then?

A Yes.

Q Well, actually, the -- you took him to Quick Care and they said he needs to go to the hospital, correct?

A Yes.

Q Okay. Under -- go down further on that page, review of symptoms. "His eye he says he cannot see through and he has eye pain." Talks about the -- down lower under HENT, that he has bruising around his left eye, upper and lower lid, also an abrasion to the left side of his face toward the temple. "However, most dramatically, on his left-eye exam, he has a sub -- sub conjunctival hematoma in the sclera superiorially. But then what is most remarkable is that he has what appears to be dark blood obscuring not only just his pupil, but his whole iris. And it is all perfectly round over the shape of the iris."

They basically couldn't see -- do you remember that? Does that -- do you remember what was going on at that time?

A Yes. He --

Q But what did it look like? I mean, what did his eye look like? I mean --

A It had -- was a tinge of red. You couldn't see his pupil.

Q Did that worry you?

A Yes, it did.

Q So if we turn to the next page, Bates stamp 0117, see he was released from UMC that night sometime?

A Yes.

Q Okay. It looks like on the -- on the bottom left, it says there's a DD, not exactly the bottom, but kind of like three quarters of the way down the page. It says, "May 14, 2004, at 2345." Do you think he was discharged about that time period?

A Yes.

Q Okay. But then he was referred to go see Dr. Carr, wasn't he?

A Yes.

Q Who is Dr. Carr?

A Dr. Carr was recommended -- that saw him at the hospital and actually examined him and wanted him to have Dr. Carr look at him and see. Because he treated him in the hospital. He's an ophthalmologist and wanted to see the -- the kind of damage he had in his eye.

Q Okay. So let's turn to the next page, 0118. We'd

previously talked about it progressively getting -- getting worse and taking him to the Quick Care and then being taken to UMC ER. We -- this document's dated May 14, 2004. It says a Dr. Nelson, "Evaluate left-eye findings of acute painful loss of vision from the left eye following a hockey stick injury at school two days ago on May 12th."

So -- so that's -- that's your understanding of how the injury happened, right?

A Yes.

Q And it says, "Per Makani and his mother." So -- so you had spoke with somebody there at the hospital abut what had been going on with him and his injuries, correct?

A Yes.

Q Okay. It says, "After his initial injury, upon presenting home, he had mild swelling in his left periorbital area and his vision was slightly blurred. Over the past two days his vision has progressively worsened to the point where he lost total vision today, and it was associated with pain, nausea, and vomiting." Is that correct?

A Yes.

Q Okay. And because it had initially gotten so much worse, that's why you took him in?

A Yes.

Q Then down on "assessment," it says, "Blunt trauma to left periorbital area from a hockey stick. Traumatic hyphema,

total 8-ball." Do you know what that is?

A Yes, I do.

Q What -- what is that?

A Dr. Carr explained it to me that the way his -- it's a -- a 8-ball hyphema, meaning that it's how they describe it like an 8-ball, like, from a pool table, and it's -- it's the top part of, like, a circumference on the top of, like -- like, almost like a bull's eye.

Q Okay.

A And that's how he described it to me.

Q Now, the -- let's go to the next page, 0120. There's -- there's some notes here from someone, looks like the treating provider at -- at the hospital. It says on the top, let's see, "Struck left eye hockey stick at school during PE class. No head gear or eye gear worn." Is it your understanding that when Makani was playing this floor hockey in PE that he was not -- he didn't -- wasn't provided any goggles?

A No.

Q Was he provided goggles?

A No, he wasn't.

Q Okay. Was he provided some kind of a helmet or face shield or anything?

A No, he wasn't.

Q Was Makani actually wearing glasses at the time?

PROSPECTIVE JUROR NO. 096: Yeah.

MR. KURTH: All right. Do you have -- would you have any -- well, did any of your kids go to the Clark County School District?

PROSPECTIVE JUROR NO. 096: Yes. And I currently have grandkids at Clark County School District.

MR. KURTH: Like out at Moapa Valley or something?

PROSPECTIVE JUROR NO. 096: Logandale, and then our son lives in Henderson.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 096: And we have a son that's in the Army in Korea. He's a linguist, however you say that. He interprets Korean.

MR. KURTH: I think that's going to be more important here soon, maybe.

PROSPECTIVE JUROR NO. 096: Yeah.

MR. KURTH: Hopefully not, but, you know.

PROSPECTIVE JUROR NO. 096: He's --

MR. KURTH: Hopefully not. So you've never been permanently injured in an accident?

PROSPECTIVE JUROR NO. 096: I have a leg that's been rebuilt.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 096: But I never sued.

MR. KURTH: So you went through treatment yourself

and --

PROSPECTIVE JUROR NO. 096: Uh-huh. Uh-huh.

MR. KURTH: Okay. Do you have any medical training or hospital experience?

PROSPECTIVE JUROR NO. 096: No.

MR. KURTH: Do you know if any of your kids played floor hockey, field hockey in the school district?

PROSPECTIVE JUROR NO. 096: No. They were all involved in sports, very active in sports.

MR. KURTH: Okay. Were they, like, competitive sports, club sports?

PROSPECTIVE JUROR NO. 096: Yes. Lot of soccer, a lot of volleyball, softball, the boys played baseball, played football. My grandkids, I have two that are very competitive in junior rodeo. And my granddaughter plays basketball, another one plays volleyball.

MR. KURTH: Okay. Well, that's -- that's good. It keeps you very busy, that's for sure. Keeps you very busy. Would you have a problem about ruling against the school district if the -- the evidence so showed --

PROSPECTIVE JUROR NO. 096: No.

MR. KURTH: -- that they were negligent?

PROSPECTIVE JUROR NO. 096: No.

MR. KURTH: Do you have a problem -- I mean, does it concern you that the -- would it affect your ability to render

a fair and unbiased decision knowing that the incident we're going to be talking about happened in 2004?

PROSPECTIVE JUROR NO. 096: That might be a little problematic, but I -- I don't think so.

MR. KURTH: Just like you need a little bit more explanation on it or?

PROSPECTIVE JUROR NO. 096: Yeah. It -- it -- I can't remember what happened last week.

MR. KURTH: Right, okay. Yeah, I hear you. Okay. Would you have a problem awarding damages to a plaintiff for pain and suffering?

PROSPECTIVE JUROR NO. 096: No, if you prove it.

MR. KURTH: Okay. Do you believe every child attending school has a right to a safe environment?

PROSPECTIVE JUROR NO. 096: Absolutely.

MR. KURTH: All right. Thank you very much.

PROSPECTIVE JUROR NO. 095: Halina Chudoba, 095.

MR. KURTH: Thank you. Your main language is Polish, right?

PROSPECTIVE JUROR NO. 095: Yes.

MR. KURTH: Or better language?

PROSPECTIVE JUROR NO. 095: Yes. Much better.

MR. KURTH: Okay.

THE COURT: Let's -- let's go ahead, it's about 3:00 anyway and the Court was thinking it would be a good time for

a break, as well. So let's go ahead and take a -- a quick bathroom break, five minutes or however long it will take for everyone to use the restroom.

THE MARSHAL: Thank you. Court will be in recess.

THE COURT: You're welcome to leave your -- your purse in the...

(Court recessed at 2:56 p.m., until 3:15 p.m.)

(In the presence of the prospective jury.)

THE COURT: Court plans on going until 5:00. Mr. Kurth, you may continue.

MR. KURTH: Thank you, Judge. Okay. I'm good. Do you have something to say -- you want to say?

PROSPECTIVE JUROR NO. 095: Halina Chudoba.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 095: 095.

MR. KURTH: Okay. Thank you very much. Can you pass it down for me? Thank you.

I'll try to go a little bit faster.

THE COURT: Go ahead and state your name and badge --

PROSPECTIVE JUROR NO. 094: Elizabeth Paredes, Juror 94.

MR. KURTH: Okay. Paredes. Do you have other family here in town?

PROSPECTIVE JUROR NO. 094: Yes.

MR. KURTH: Okay. And are any of them in the legal profession?

PROSPECTIVE JUROR NO. 094: No.

MR. KURTH: Okay. Have you ever made a -- a claim for personal injuries?

PROSPECTIVE JUROR NO. 094: No.

MR. KURTH: Has anybody ever sued you for personal injuries?

PROSPECTIVE JUROR NO. 094: No.

MR. KURTH: Did -- how long have you lived here in Las Vegas, Clark County, Nevada?

PROSPECTIVE JUROR NO. 094: Since 2005.

MR. KURTH: Did you have any kids that went to school here?

PROSPECTIVE JUROR NO. 094: Yes.

MR. KURTH: Yes? Okay.

PROSPECTIVE JUROR NO. 094: Yes.

MR. KURTH: Did they have -- what grade did they start going through here?

PROSPECTIVE JUROR NO. 094: Sixth grade through 12.

MR. KURTH: Where did they go to sixth grade at?

PROSPECTIVE JUROR NO. 094: Summerlin the middle school at -- no, it was elementary -- the last year of elementary at Summerlin. I don't remember the name of the school.

MR. KURTH: Okay. And if the evidence so showed, would you have any problem rendering a verdict against the school district for damages?

PROSPECTIVE JUROR NO. 094: For damages? No.

MR. KURTH: But you would have a problem with something else?

PROSPECTIVE JUROR NO. 094: Yes. Pain and suffering.

MR. KURTH: Okay. You would have a problem awarding damages for pain and suffering?

PROSPECTIVE JUROR NO. 094: Yes.

MR. KURTH: Okay. Do you believe every child attending school has a right to a safe environment?

PROSPECTIVE JUROR NO. 094: Yes.

MR. KURTH: And do you know if any of your kids played field hockey or floor hockey in school?

PROSPECTIVE JUROR NO. 094: Not in Nevada. But right now I -- a month ago my daughter had a head concussion playing soccer at her college.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 094: We didn't sue. We're not suing. We will not sue.

MR. KURTH: Okay. Just kind of how you just feel about that, then?

PROSPECTIVE JUROR NO. 094: We don't sue.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 094: My husband broke his leg in a skating rink, we didn't sue. We didn't even ask for money for the ambulance or anything. We just don't.

MR. KURTH: All right. Well, that's all -- all of our rights to do that, obviously, you know. Got to find if they're -- if it was somebody else's fault or if they did something else. All right. I appreciate your time, appreciate your candidness, your candor.

I think I -- I think I already asked you questions, didn't I? No? Go ahead and pass it on, please.

Is it 093?

PROSPECTIVE JUROR NO. 093: Yes.

MR. KURTH: Okay. 093, urgent care. Okay. So you said you work for the urgent care and it would be -- are you a PA there?

PROSPECTIVE JUROR NO. 093: Correct.

MR. KURTH: Okay. How long have you been a PA?

PROSPECTIVE JUROR NO. 093: Going on four years.

MR. KURTH: So have you seen people come into there during that time with any eye injuries?

PROSPECTIVE JUROR NO. 093: Yes.

MR. KURTH: Okay. Have you ever treated anybody for an eye injury?

PROSPECTIVE JUROR NO. 093: Yes.

MR. KURTH: And was any of that treatment related to an accident or an incident for them involved in a sports activity?

PROSPECTIVE JUROR NO. 093: Lacerations happen commonly just above the eye. There's lots of different complaints.

MR. KURTH: Okay. Do you recall if any of them involved anything that was going on while they were at school?

PROSPECTIVE JUROR NO. 093: Not specifically, no.

MR. KURTH: And were you saying that it would be a hardship for you to -- to serve on the jury?

PROSPECTIVE JUROR NO. 093: Yeah. I'm in financial hardship I just got married. Got a lot of bills and credit cards that are maxed out. And I'm missing many, five, six shifts straight. And it's going to be really hard finding coverage. Our on-call person is already called in, so the clinic very well may close if I'm not there. So.

MR. KURTH: All right. Thank you for your time. I appreciate it.

And we'll just move forward. Thank you.

PROSPECTIVE JUROR NO. 125: Jasmine Miranda.

MR. KURTH: Jasmine Miranda.

PROSPECTIVE JUROR NO. 125: Yes, sir.

MR. KURTH: Let's see.

PROSPECTIVE JUROR NO. 125: I do retail.

MR. KURTH: Express Fashion; is that right?

PROSPECTIVE JUROR NO. 125: Yes.

MR. KURTH: Okay. Are you a fashion consultant?

PROSPECTIVE JUROR NO. 125: No.

MR. KURTH: Okay. Retail?

PROSPECTIVE JUROR NO. 125: Yeah.

MR. KURTH: Okay. Did you go to school in the school district here?

PROSPECTIVE JUROR NO. 125: Yes.

MR. KURTH: Okay. When did you graduate?

PROSPECTIVE JUROR NO. 125: 2010.

MR. KURTH: Okay. What high school did you graduate from?

PROSPECTIVE JUROR NO. 125: Desert Pines.

MR. KURTH: All right. East side, right?

PROSPECTIVE JUROR NO. 125: Yeah.

MR. KURTH: And do you remember playing any type of sport, field hockey, floor hockey when you were in PE class when you were in sixth, seventh, eighth grade, somewhere around there?

PROSPECTIVE JUROR NO. 125: Yes. Hated it. Yes.

MR. KURTH: Okay. And where did you go to sixth grade at?

PROSPECTIVE JUROR NO. 125: Del H. Robison.

MR. KURTH: Went to Del H. Robison, believe that?

It's been around for a long time, that means. Because I'm a month older. Wasn't as much -- there was no Desert Pines at that time, though, I can tell you that.

PROSPECTIVE JUROR NO. 125: No.

MR. KURTH: Let's see. Dell H. All right. So did you play that in PE class?

PROSPECTIVE JUROR NO. 125: Yes.

MR. KURTH: Okay. 2010, okay. So did you ever recall -- well, so this case is about the plaintiff being injured while participating in that activity when he was in sixth grade. Knowing that and knowing that you participated in that activity in PE in the school district, would you be able to render a fair and impartial opinion and consider the -- the weight of the evidence before you do that?

PROSPECTIVE JUROR NO. 125: Yes.

MR. KURTH: Okay. If the evidence was there, would you have a -- a problem awarding damages against the school district?

PROSPECTIVE JUROR NO. 125: No.

MR. KURTH: Would you have a problem awarding for any of those, loss of enjoyment of life, pain and suffering, emotional distress?

PROSPECTIVE JUROR NO. 125: No.

MR. KURTH: Okay. Sometimes those damages are kind of difficult to quantify.

PROSPECTIVE JUROR NO. 125: Yeah.

MR. KURTH: Have you ever been in -- in an accident or made a claim yourself?

PROSPECTIVE JUROR NO. 125: No.

MR. KURTH: Do you live with your parents?

PROSPECTIVE JUROR NO. 125: Yes.

MR. KURTH: What do they do for work?

PROSPECTIVE JUROR NO. 125: My mother is a maid and my father lives in Arizona.

MR. KURTH: Okay. Do you believe that a child attending school has a right to a safe environment?

PROSPECTIVE JUROR NO. 125: Yes.

MR. KURTH: Did you ever have to go to the school nurse's office when you were in, you know, middle school?

PROSPECTIVE JUROR NO. 125: Yeah. I'm a klutz.

MR. KURTH: Okay. Anything major?

PROSPECTIVE JUROR NO. 125: No.

MR. KURTH: Okay. Have you ever been permanently injured in an accident?

PROSPECTIVE JUROR NO. 125: No.

MR. KURTH: Have you ever played recreational or, you know, club sports outside, you know, playing at -- in school?

PROSPECTIVE JUROR NO. 125: Yes.

MR. KURTH: What sport?

PROSPECTIVE JUROR NO. 125: I did track in high school.

MR. KURTH: Okay. What did you do?

PROSPECTIVE JUROR NO. 125: The shot put.

MR. KURTH: Excellent. All right. Thank you for your time.

PROSPECTIVE JUROR NO. 105: Laurel Rockrohr, 105.

MR. KURTH: Ms. Rockrohr, have you been in Clark County for a long time?

PROSPECTIVE JUROR NO. 105: 16 years. And then prior to that, two years, early '90s.

MR. KURTH: I've been here since, like, 1970. Somewhere in there, '71, I don't know. Lot has changed since then, '90s, you know.

PROSPECTIVE JUROR NO. 105: Uh-huh.

MR. KURTH: Did you have any kids that attended school in the Clark County School District?

PROSPECTIVE JUROR NO. 105: I do right now. I have two nine-year-olds.

MR. KURTH: So you have twins?

PROSPECTIVE JUROR NO. 105: Yeah, twins. Yep.

MR. KURTH: Okay. Excellent. Boys or girls?

PROSPECTIVE JUROR NO. 105: One of each.

MR. KURTH: All right. That's even better.

PROSPECTIVE JUROR NO. 105: Yep.

MR. KURTH: So do you have any other kids?

PROSPECTIVE JUROR NO. 105: Nope, just those two.

MR. KURTH: Okay. And where do they go to school at?

PROSPECTIVE JUROR NO. 105: Reedom S. Elementary, or Carolyn Reedom Elementary, I don't know. Something like that.

MR. KURTH: What side of town is that on?

PROSPECTIVE JUROR NO. 105: Southwest, Mountain's Edge area, yeah.

MR. KURTH: So they must be in, like, fourth grade or something?

PROSPECTIVE JUROR NO. 105: Third grade.

MR. KURTH: Third grade?

PROSPECTIVE JUROR NO. 105: Uh-huh.

MR. KURTH: Would you have a problem allowing your kids to participate in sports in their PE class?

PROSPECTIVE JUROR NO. 105: Absolutely not. I have an avid hockey player who plays. He's a squirt for the Las Vegas Ice Center. And they're both black -- almost black belts. The red/black in taekwondo.

MR. KURTH: Oh.

PROSPECTIVE JUROR NO. 105: So no, zero problems with sports. Sorry. We're, like, do or die in our house. So we're, you know, we're into that. Yeah.

MR. KURTH: Okay. Very good. So they play hockey

at nine years old on ice or?

PROSPECTIVE JUROR NO. 105: Yeah. One. My son does. My daughter does not. She was into ice skating and then realized it was not her thing. So. But then they're both into taekwondo since they were, like, three and a half.

MR. KURTH: Okay. So -- so they play with a regular puck and all that, just like the --

PROSPECTIVE JUROR NO. 105: Yeah.

MR. KURTH: -- NHL?

PROSPECTIVE JUROR NO. 105: Yeah. He stick handles in the house.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 105: Does everything. Yeah. Just a regular little hockey player.

MR. KURTH: All right.

PROSPECTIVE JUROR NO. 105: Just went to go see the Ducks and the Hawks in Anaheim.

MR. KURTH: That would be exciting.

PROSPECTIVE JUROR NO. 105: It was exciting. The longest in franchise history. Sorry.

MR. KURTH: Yeah.

PROSPECTIVE JUROR NO. 105: For the Blackhawks. It was awesome.

MR. KURTH: Yeah, that's exciting. I think the Ducks got all the -- more fame after that Disney show, I

think.

PROSPECTIVE JUROR NO. 105: Yeah, I think so.

MR. KURTH: All right. Would you have a problem awarding damages against the school district for an accident that happened in 2005 involve -- involving playing floor hockey, field hockey?

PROSPECTIVE JUROR NO. 105: Not if it was justified. Not if all the facts were presented and it was justified and -- no.

MR. KURTH: Okay. Would you have a problem awarding damages for pain and suffering or loss of enjoyment of life or emotional distress?

PROSPECTIVE JUROR NO. 105: Yeah, because it depends on what degree of loss of, you know, life --

MR. KURTH: Well, it has to be proven, right?

PROSPECTIVE JUROR NO. 105: -- or -- absolutely.

MR. KURTH: Sure.

PROSPECTIVE JUROR NO. 105: It has to be, you know, proven that there was loss of life or, you know, distress.

MR. KURTH: Have you ever been injured in an accident?

PROSPECTIVE JUROR NO. 105: I actually have. Well, I -- I -- to a degree, yes. My eye -- I have a little bit of a eye injury myself.

MR. KURTH: Oh, okay.

PROSPECTIVE JUROR NO. 105: In an automobile accident where it just had to be -- like a laceration. It really wasn't a major eye injury. But an automobile accident, yeah.

MR. KURTH: Was the accident your fault?

PROSPECTIVE JUROR NO. 105: No. Nope.

MR. KURTH: Did you make a claim?

PROSPECTIVE JUROR NO. 105: The automobile insurance, yeah, through them we made a claim to cover the damages to the car. And the medical. So absolutely. But --

MR. KURTH: No permanent --

PROSPECTIVE JUROR NO. 105: -- I don't think there was pain and suffering. I mean, I don't think there was anything above and beyond, I mean, any of, you know, the rest of -- medical and whatever else they do. I don't know. It was such a long -- it was, like, 25, 26 years ago.

MR. KURTH: Oh, so it was a long time ago?

PROSPECTIVE JUROR NO. 105: It was a long time ago, yeah.

MR. KURTH: Okay. No other claims since then?

PROSPECTIVE JUROR NO. 105: No. No.

MR. KURTH: Anybody ever made any claims against you?

PROSPECTIVE JUROR NO. 105: No.

MR. KURTH: Okay. All right. Pass it down, please.

PROSPECTIVE JUROR NO. 106: Mark Russie, 106.

MR. KURTH: 106. Audio engineers. Okay. So your wife works for the -- how long has your wife worked at the Department of Welfare?

PROSPECTIVE JUROR NO. 106: She's going on her sixth year.

MR. KURTH: Okay. Okay. And did you say you're a union member, then?

PROSPECTIVE JUROR NO. 106: Yeah, it was stagehands union.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 106: Local 720.

MR. KURTH: All right. They seem to be getting a little bit busier.

PROSPECTIVE JUROR NO. 106: It's been a pretty good year so far.

MR. KURTH: So do you have any preconceived notions about anybody that files an action for personal injuries?

PROSPECTIVE JUROR NO. 106: No, sir.

MR. KURTH: Okay. And do you have any problem with the -- that the accident happened in 2005 and it's coming to trial now?

PROSPECTIVE JUROR NO. 106: I don't -- no.

MR. KURTH: Okay. Have you ever made a claim yourself?

PROSPECTIVE JUROR NO. 106: Yeah. I was rear-ended once in the 1990s.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 106: And I was t-boned in I think it was '98, actually.

MR. KURTH: All right. All right. No more questions for you. How's that. Thank you. 126, right? 126, is that right?

PROSPECTIVE JUROR NO. 126: 0126, Jlee Lefiles. Is it on?

MR. KURTH: Okay. Yep, it's on. And you were -- you're a retired computer engineer and your spouse, too, huh?

PROSPECTIVE JUROR NO. 126: Correct. Well, she was a -- a tech. Yeah.

MR. KURTH: Okay. Did you have kids that went to school here in the Clark County School District?

PROSPECTIVE JUROR NO. 126: No. We have no kids.

MR. KURTH: Okay. How long have you been living here in Clark County?

PROSPECTIVE JUROR NO. 126: Since 2005, Laughlin.

MR. KURTH: Oh. Been to Laughlin a few times. So have you just lived in Laughlin or have you lived up here in this area?

PROSPECTIVE JUROR NO. 126: No. Never lived in the Vegas area. It's -- we moved from California from Riverside

County to Laughlin in 2005.

MR. KURTH: And I think you said that you were a -- a juror before, weren't you?

PROSPECTIVE JUROR NO. 126: Yes. On two separate occasions.

MR. KURTH: Okay. So do you know any -- any kids that are in the school district, going to school, attending school?

PROSPECTIVE JUROR NO. 126: No.

MR. KURTH: Okay. Have you -- have you always been a computer engineer or did you do something else before that?

PROSPECTIVE JUROR NO. 126: A former Marine and Vietnam veteran.

MR. KURTH: Okay. Thank you very much. Appreciate that very much. Okay. Would you have a problem awarding damages to someone in a personal injury accident?

PROSPECTIVE JUROR NO. 126: Not if the evidence supports it.

MR. KURTH: Would you -- by evidence you mean, like, a preponderance of the evidence?

PROSPECTIVE JUROR NO. 126: Well, if it's established and proven and justified, I -- yeah.

MR. KURTH: Okay. Would you have any problem ruling against the school district?

PROSPECTIVE JUROR NO. 126: No.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 126: I have no bias one way or the other.

MR. KURTH: Okay. And have you ever played field hockey, floor hockey, anything like that?

PROSPECTIVE JUROR NO. 126: No, sir.

MR. KURTH: Okay. You ever coach youth sports?

PROSPECTIVE JUROR NO. 126: No, sir.

MR. KURTH: Okay. Do you have -- what is your favorite sport?

PROSPECTIVE JUROR NO. 126: Internet.

MR. KURTH: Okay. That can give you [indiscernible], I don't know. All right. Excellent. Okay. Do you -- does it bother you knowing that this accident happened in 2005 and it's going to trial right now?

PROSPECTIVE JUROR NO. 126: No, sir.

MR. KURTH: Okay. And you wouldn't have any problem awarding damages for pain and suffering or loss of enjoyment of life?

PROSPECTIVE JUROR NO. 126: No, sir.

MR. KURTH: Okay. Okay. Thank you very much.

PROSPECTIVE JUROR NO. 108: Eric Cromer, 108.

MR. KURTH: Eric Cromer. Mr. Cromer, so I don't know you then, right?

PROSPECTIVE JUROR NO. 108: We -- I don't think so.

MR. KURTH: Okay. I don't know. There's so many names over the last 23 years, I'm just -- want to make sure.

PROSPECTIVE JUROR NO. 108: I have a couple of friends that are lawyers. So we might have drank together, I don't know.

MR. KURTH: Well... that wouldn't be me. I wouldn't be there. I'd be in trouble, like some of my other clients --

PROSPECTIVE JUROR NO. 108: Right.

MR. KURTH: -- I'd have to represent.

PROSPECTIVE JUROR NO. 108: Right.

MR. KURTH: Been married too long. So remind -- remind me of what you do in town.

PROSPECTIVE JUROR NO. 108: I have a medical billing business.

MR. KURTH: Okay. Medical billing business. And you deal -- deal with any eye doctors or UMC or anything like that?

PROSPECTIVE JUROR NO. 108: Eye doctors sometimes will refer us patients. But it's more, like, if they have a laceration and it got an infection. Something like that. Not the actual injury itself.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 108: It's more for the infection side. We do wound care and HPO, as well.

MR. KURTH: What was the name of the place?

PROSPECTIVE JUROR NO. 108: Mine is Bravo Medical Billing. But I'm the practice manager for Infectious Disease Specialists.

MR. KURTH: Oh, Infectious Disease Specialists.

PROSPECTIVE JUROR NO. 108: Yeah.

MR. KURTH: Okay. There's only one called that in town, isn't there?

PROSPECTIVE JUROR NO. 108: Yeah, well --

MR. KURTH: Infectious Disease Specialists?

PROSPECTIVE JUROR NO. 108: -- there's a bunch that are, you know, Infectious Disease Consultants and Infectious Disease -- they have a lot of different names. There's not that many doctors that do it, though.

MR. KURTH: Yeah. That's where they have the real high-powered, like, antibiotics and stuff, right?

PROSPECTIVE JUROR NO. 108: Correct.

MR. KURTH: Yeah.

PROSPECTIVE JUROR NO. 108: Correct. When the internal medicine doctor can't handle it, they'll bring in an infectious disease doctor.

MR. KURTH: Yeah, I've -- yeah. Been there. So. Okay. Not to Bravo or anything like that, though. So. Would you have a problem that this event happened in 2004 and it's coming to trial now in 2015?

PROSPECTIVE JUROR NO. 108: It makes me suspicious,

but I guess if it was proven, then I wouldn't have a problem.

MR. KURTH: Just, like, why it took so long or?

PROSPECTIVE JUROR NO. 108: Correct.

MR. KURTH: Okay. All right. Do you have a problem awarding damages to somebody claiming personal injuries?

PROSPECTIVE JUROR NO. 108: No.

MR. KURTH: Would you be able to look at another doctor's records and, you know, give it whatever weight that doctor gave it in their records and not --

PROSPECTIVE JUROR NO. 108: Absolutely.

MR. KURTH: -- put in your own opinion or whatever?

PROSPECTIVE JUROR NO. 108: Yes.

MR. KURTH: Okay. Do you have any problem with giving damages for loss of enjoyment of life?

PROSPECTIVE JUROR NO. 108: No.

MR. KURTH: Have you ever been in a personal injury accident?

PROSPECTIVE JUROR NO. 108: A few.

MR. KURTH: A few? Was it your fault or someone else's fault?

PROSPECTIVE JUROR NO. 108: All the personal injuries were someone else's fault.

MR. KURTH: So did you make any claims?

PROSPECTIVE JUROR NO. 108: Three times.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 108: Just, like, through the insurance company. Not, like, lawsuits or anything.

MR. KURTH: All right. Well, okay. Do you believe every child attending school has a right to a safe environment?

PROSPECTIVE JUROR NO. 108: Absolutely.

MR. KURTH: Do you have any kids that have grown up in the Clark County School District?

PROSPECTIVE JUROR NO. 108: I have two currently.

MR. KURTH: What ages are they?

PROSPECTIVE JUROR NO. 108: Fifth grade and eighth grade.

MR. KURTH: And what middle school does the eighth-grader go to?

PROSPECTIVE JUROR NO. 108: Tarkanian.

MR. KURTH: And are you aware of any of your kids playing field hockey or floor hockey in school?

PROSPECTIVE JUROR NO. 108: I -- I think that she has, the eighth-grader probably has.

MR. KURTH: Do you know anything about it?

PROSPECTIVE JUROR NO. 108: About field hockey?

MR. KURTH: About her playing it or anything like that?

PROSPECTIVE JUROR NO. 108: You know, they -- I mean, they do crazy things there all the time. So I -- I'm

just guessing that she probably played that. They do archery, they do everything. So, and I know they spend a lot of time in the gym, as well.

MR. KURTH: Is Tarkanian, is that part of the Clark County School District?

PROSPECTIVE JUROR NO. 108: Yes.

MR. KURTH: Okay. And you wouldn't have a problem rendering a -- a damage award against the school district even though your kids are attending there?

PROSPECTIVE JUROR NO. 108: I prefer not to, but no, I don't have a problem with it.

MR. KURTH: What do you mean you prefer not to?

PROSPECTIVE JUROR NO. 108: Well, I'm a proponent -- I mean, I'm for the Clark County School District, but, you know, if they did something wrong, then I'd -- then I could -- then I would judge against them.

MR. KURTH: For the -- okay. You mean you're for the Clark County School District providing schooling for your kids?

PROSPECTIVE JUROR NO. 108: And sports and everything else, yeah.

MR. KURTH: Okay. My four kids and myself all attended there. But anyways. Okay. Thank you for your time.

PROSPECTIVE JUROR NO. 109: Steven Brown, 109.

MR. KURTH: Steven Brown. All right. Are you

related to any attorneys in town?

PROSPECTIVE JUROR NO. 109: No, sir.

MR. KURTH: Okay. And Realtor, huh? Like, commercial Realtor or residential Realtor?

PROSPECTIVE JUROR NO. 109: Residential.

MR. KURTH: Okay. How long you been doing that?

PROSPECTIVE JUROR NO. 109: Six months.

MR. KURTH: Okay. Did you go to school here in town?

PROSPECTIVE JUROR NO. 109: Yes, I did.

MR. KURTH: Where did you graduate from?

PROSPECTIVE JUROR NO. 109: Boulder City High School. I did K through high school all through Boulder City.

MR. KURTH: Okay. And what year did you graduate?

PROSPECTIVE JUROR NO. 109: 1997.

MR. KURTH: Okay. Did you play floor hockey or field hockey when you were in school; do you remember?

PROSPECTIVE JUROR NO. 109: Yes. I actually coached floor hockey for third graders when I was a freshman in high school.

MR. KURTH: Okay. In PE class or something like that?

PROSPECTIVE JUROR NO. 109: Are we referring to my coaching, sir?

MR. KURTH: Yes.

PROSPECTIVE JUROR NO. 109: No. That was through the rec center.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 109: But I personally played floor hockey through, you know, my youth and middle school, even high school. So.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 109: I'm familiar with the sport.

MR. KURTH: Right. Would you have a -- a problem rendering damages for personal injuries sustained while participating in that activity?

PROSPECTIVE JUROR NO. 109: No.

MR. KURTH: Not even though you've coached it and played and everything?

PROSPECTIVE JUROR NO. 109: It's a matter of the -- the -- the case being presented with evidence that there was negligence or whatever led to that injury. But I -- I -- I'm of the belief that injuries happen in sports. But it depends on the level of negligence.

MR. KURTH: Okay. All right. Thank you.

PROSPECTIVE JUROR NO. 109: Thank you.

MR. KURTH: Appreciate it.

PROSPECTIVE JUROR NO. 129: Badge 129, LaTonya Gonzalez.

MR. KURTH: How are you today?

PROSPECTIVE JUROR NO. 129: I'm good. How are you?

MR. KURTH: Good. Excellent. Thank you. I didn't put down where you worked, I apologize.

PROSPECTIVE JUROR NO. 129: I work at the Green Valley Ranch Resort and Spa.

MR. KURTH: Okay. I remember now.

PROSPECTIVE JUROR NO. 129: Yeah.

MR. KURTH: How long you been there?

PROSPECTIVE JUROR NO. 129: About three years. But I've actually worked with Station Casinos for about 13 years. So I bounced around a little bit.

MR. KURTH: Was it -- was it your spouse that does, like, grounds maintenance or something or?

PROSPECTIVE JUROR NO. 129: Airification -- well, no.

MR. KURTH: Irrigation?

PROSPECTIVE JUROR NO. 129: Irrigation.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 129: At the Mirage, yes.

MR. KURTH: Okay. And do you have any kids that go to the school district?

PROSPECTIVE JUROR NO. 129: Yeah, I have one.

MR. KURTH: How old?

PROSPECTIVE JUROR NO. 129: Six years old.

MR. KURTH: Okay. So just starting out there.

PROSPECTIVE JUROR NO. 129: Yeah.

MR. KURTH: And did you go to school here in the Clark County School District?

PROSPECTIVE JUROR NO. 129: Yes. I was born and raised here in Las Vegas.

MR. KURTH: Okay. What middle school did you go to?

PROSPECTIVE JUROR NO. 129: I went to O'Callahan and Keller Middle School.

MR. KURTH: Okay. East side.

PROSPECTIVE JUROR NO. 129: Yeah.

MR. KURTH: Couple of my kids went to Keller. So what -- did you play -- remember playing floor hockey or field hockey in middle school?

PROSPECTIVE JUROR NO. 129: I'm sure.

MR. KURTH: You participated in your PE class?

PROSPECTIVE JUROR NO. 129: Yes.

MR. KURTH: Okay. Would you have a problem if the evidence showed rendering a verdict for damages against the school district for someone that was injured participating in that activity?

PROSPECTIVE JUROR NO. 129: No, sir.

MR. KURTH: Okay. Would you have a problem awarding damages for pain and suffering or enjoyment of life or anything?

PROSPECTIVE JUROR NO. 129: No.

MR. KURTH: Okay. Okay. All right. Thank you very much.

PROSPECTIVE JUROR NO. 129: Thank you.

PROSPECTIVE JUROR NO. 112: Anthony Meadows, 112.

MR. KURTH: Mr. Meadows, Aria Resort.

PROSPECTIVE JUROR NO. 112: Yes, sir.

MR. KURTH: What do you do for them?

PROSPECTIVE JUROR NO. 112: I'm a guest care specialist.

MR. KURTH: Okay. Have you ever made any personal injury claims against anyone?

PROSPECTIVE JUROR NO. 112: I have not.

MR. KURTH: Has anyone made any claims against you?

PROSPECTIVE JUROR NO. 112: They have not.

MR. KURTH: Okay. So you've heard these other -- these other questions. Would it -- would it bother you knowing that this incident happened in 2004 and we're going to trial on it in 2015?

PROSPECTIVE JUROR NO. 112: Frankly, yes.

MR. KURTH: Okay. And did you say you were married?

PROSPECTIVE JUROR NO. 112: I'm engaged.

MR. KURTH: Okay. Did you go to school here in the school district?

PROSPECTIVE JUROR NO. 112: I did not. I went back

in Maryland. So.

MR. KURTH: So different back there. Did you play in a floor hockey, field hockey stuff?

PROSPECTIVE JUROR NO. 112: Sure. Growing up I was big into sports. So.

MR. KURTH: Okay. Okay. So engaged, huh? When are you supposed to be married?

PROSPECTIVE JUROR NO. 112: It's not a -- it's not a hard -- hard date.

MR. KURTH: Oh.

PROSPECTIVE JUROR NO. 112: It's been pretty recent.

MR. KURTH: Okay. Well, good. Remember, it takes 100 percent from both sides. About 50/50. Okay. Anyways. Okay.

Let me get that to the next person. Want me to grab it? Thank you.

THE COURT: Mr. Kurth?

MR. KURTH: Yes.

THE COURT: We're going to pass it to Mr. O'Brien now to --

MR. KURTH: Okay. Sounds good, Judge. Where do you want this to go, Mr. O'Brien?

MR. O'BRIEN: First of all, could we have a sidebar off the record?

THE COURT: Sure. So -- so you all know, the

attorneys may ask for a sidebar occasionally.

Yeah, I'm trying -- so the attorneys may ask for a sidebar occasionally. That's when we'll go back, myself and the attorneys, and discuss something off the record. Can be for any number of reasons. Generally, they're pretty short. So we'll just do that real quick right now. And thank you again for your patience.

(Off-record bench conference.)

THE COURT: Back on. Again, thank you for your patience.

Mr. O'Brien, you may begin.

MR. O'BRIEN: Thank you, Your Honor. May I use the podium?

THE COURT: Yes.

MR. O'BRIEN: And, Your Honor, may I voir dire the panel and then ask individual questions if it -- depending on their answers?

THE COURT: Yes.

MR. O'BRIEN: Thank you.

THE COURT: And let's -- let's make sure we can pick up his microphone there. Is he good at the -- the podium?

THE MARSHAL: Yes.

THE COURT: Okay. So you want --

MR. O'BRIEN: Ask questions of the whole panel. If any of them have a response, I'll -- I'll follow up with them

individually, rather than asking all the same questions to all the same people.

THE COURT: The -- the only concern would be if you ask them as a group, it won't necessarily be recorded. Now, if you don't have an issue with that, that's fine by the Court. But just so you're aware.

MR. O'BRIEN: I don't have an issue with it, Your Honor. Thank you.

First of all, I'd like to welcome you and thank you for your patience. I imagine that most of you would rather be anywhere than talking with a bunch of attorneys. I'm going to try to be brief. I've been listening to the questions that the Court asked, I've been listening to the questions the plaintiff asked.

I want to follow up on one question in particular that he asked almost every one of you, if not every one of you, and his question was would any of you have a problem with awarding a judgment against the school district? And I want to ask the same question in a different way.

Is anybody here anxious to make a -- enter an award against the school district? In other words, has anybody here heard anything about the Clark County School District that would cause you to think, boy, this is my chance to -- to make them pay? No one? Thank you.

I'm going to skip up -- I have about four pages of

questions. I'm going to skip most of them because they've been asked and I understand your answers. And I thank you.

In this case, it's a civil case, there's a thing called the burden of proof. One -- each party has the burden to prove different things. Generally speaking, first of all, the judge will give you the -- the law on this. So don't commit to memory what I'm going to say. But generally speaking, the plaintiff, or the person who is initiating the lawsuit has the burden of proving their case. And if they, at the conclusion of their case, have not produced sufficient evidence, the district, the defendant, we have no duty to put on any evidence.

With that in mind, my question is, is do you believe that simply because a person has filed a lawsuit, that they're entitled to some sort of compensation? Anybody think that? Okay.

PROSPECTIVE JUROR NO. 129: LaTonya Gonzalez, Badge No. 129. Can you repeat that question again, please?

MR. O'BRIEN: Yes. Do any of you believe that simply because someone has filed a lawsuit that they must be entitled to some sort of compensation?

PROSPECTIVE JUROR NO. 129: Only because they filed that lawsuit?

MR. O'BRIEN: Yes.

PROSPECTIVE JUROR NO. 129: Or has anything been

proven?

MR. O'BRIEN: No, that's -- that's -- the question is just that simple.

PROSPECTIVE JUROR NO. 129: Oh.

MR. O'BRIEN: Just because they filed suit, do you think, Well, they must be entitled to something?

PROSPECTIVE JUROR NO. 129: No.

MR. O'BRIEN: Let me ask the question -- the same question a different way to everyone. Do you think that just because the person who is being sued is called the defendant, that they must have done something wrong? Is anybody coming in here thinking, Well, they must have done something wrong, let's wait and see what it is, but they must have done something wrong. Anybody have that kind of notion?

I'm sorry, I didn't see that.

PROSPECTIVE JUROR NO. 117: 117, Danielle Kaylor.

MR. O'BRIEN: Yes, ma'am.

PROSPECTIVE JUROR NO. 117: Just from my experience in court proceedings, when I was in criminal cases, we generally felt like that, because we had 100 percent conviction rate. But I've never been in a civil case. So this is something a little different to me. But in my judgment, in a criminal case, the defendant, if he made it this far, in our -- in my eyes, he was guilty. Because I wouldn't work a case where I didn't know he was guilty. I had

the evidence.

But in a civil case, I don't -- I don't -- I've never been through one, so I don't know.

MR. O'BRIEN: Okay. And do you understand this is a civil case?

PROSPECTIVE JUROR NO. 117: Yes.

MR. O'BRIEN: And as a practical matter, anybody can sue anybody for anything?

PROSPECTIVE JUROR NO. 117: Sure.

MR. O'BRIEN: I mean, I'm not suggesting -- this case certainly isn't a frivolous case. Plaintiff was seriously injured. We just dispute that we -- we caused his injuries. But the question is, and it was aimed at just that, if in a -- if -- if you think that just because someone's called a defendant, somebody has already kind of marshalled the evidence and determined they're at fault, and you kind of mentally say, Well, it's their case to disprove; do you feel that in a civil case?

PROSPECTIVE JUROR NO. 117: In this particular case, I don't feel that, since it's been explained to me that they have the burden of proof right off the bat to show that -- and -- to show the evidence that something was your fault. Or was the District's fault. I understand that. Yeah. I just want to let you know that in general, with my field, we thought exactly that when we had 100 percent conviction rate. We knew

when a defendant came in, they were guilty.

But in this case, I understand what's going on and -- and I see that they really have to show the evidence for me to believe that they're -- they should be awarded something.

MR. O'BRIEN: Okay. Thank you.

PROSPECTIVE JUROR NO. 114: 114, Hunter Maynard. Sort of along the lines of your question, if they bring something up from many years ago, it makes me suspicious to think that maybe they did -- maybe the defendant did do something wrong, since it's been brought up from so many years ago.

MR. O'BRIEN: Okay. And you were asked questions about the delay in time?

PROSPECTIVE JUROR NO. 114: I was not, actually. I did not get asked that question.

MR. O'BRIEN: Other people were asked that question?

PROSPECTIVE JUROR NO. 114: Yeah.

MR. O'BRIEN: I -- I assume you heard them. So the -- if -- if you think that because of the delay, the defendant must have done something wrong?

PROSPECTIVE JUROR NO. 114: Well, I don't know. The delay just -- I don't get the delay. If it -- if it was out of the plaintiff and the defendant's control, I -- I don't get it. I don't get why it had to wait so long.

MR. O'BRIEN: Do you think you would hold it against

the defendant, for instance, if it was determined that the delay was not the defendant's fault?

PROSPECTIVE JUROR NO. 114: No.

MR. O'BRIEN: Same thing, would you hold it against the plaintiff if it wasn't the plaintiff's fault?

PROSPECTIVE JUROR NO. 114: No.

MR. O'BRIEN: Anyone -- I'm sorry, Juror No. 93?

PROSPECTIVE JUROR NO. 125: 125.

MR. O'BRIEN: Excuse me, 125. Yes, ma'am.

PROSPECTIVE JUROR NO. 125: What he said about the time limit.

MR. O'BRIEN: Yes.

PROSPECTIVE JUROR NO. 125: Like, that kind of puts me on -- on the plaintiff's side, because it's like the pain and suffering and the loss of happiness or whatever, right? Because it takes the time for you to really realize that you missed out on things or that you were afraid to do things. And so that kind of puts me, like, more towards -- on the plaintiff's side than with the -- the defendants.

MR. O'BRIEN: Okay. If -- if the District was found not to be liable, in other words, we didn't cause plaintiff's injuries, would you still feel because of the time, because of the pain and suffering, that you ought to give plaintiff something?

PROSPECTIVE JUROR NO. 125: I would think that

because it took so long for it to come here, that it took the time for him to really realize that he missed out on stuff because -- from that incident.

MR. O'BRIEN: Do you think that you could set aside that feeling if the evidence showed that it wasn't the defendant's fault that it took that long -- time -- length of time to get this case to -- to you?

PROSPECTIVE JUROR NO. 125: Yeah.

MR. O'BRIEN: Because that's all either of us want is somebody who can -- if you have some preconceived notions, you can set them aside at least for purposes of deciding this case.

Do any of you -- have any of you had any children in Woodbury Elementary -- or Middle School?

Any of you worked or done any work on Woodbury Middle School? Provided any supplies for them? Had any dealings with them?

That's all I have, Your Honor.

THE COURT: Thank you.

MR. O'BRIEN: Thank you, ladies and gentlemen.

THE COURT: We'll take a -- another quick sidebar right now.

(Off-record bench conference.)

THE COURT: Okay. Thank you all again for your patience.

At this time we will excuse for cause Juror No. 114, Mr. Maynard. You can go to the back and make sure you check in with jury services on your way out.

We will also excuse Juror No. 93, Mr. Garling; Juror No. 94, Ms. Paredes; Juror No. 108, Mr. Cromer; and Juror No. 112, Mr. Meadows.

THE CLERK: Okay. 118, Jerelyn Malan. 118.

THE COURT: So you will be coming up and -- and taking the place of...

THE CLERK: Badge 144, Rowena Cluff; Badge 145, Felix Bustamante; Badge 155, Yvonne Anderson; and Badge 172, Michelle Pester.

THE COURT: Okay. Hopefully, the process will go a little quicker. Let's start with Juror No. 118. Please state your name for us.

PROSPECTIVE JUROR NO. 118: Jerelyn Malan, No. 118.

THE COURT: Where do you work?

PROSPECTIVE JUROR NO. 118: At Centennial Hills Hospital.

THE COURT: What do you do there?

PROSPECTIVE JUROR NO. 118: I'm an RN.

THE COURT: Say that again?

PROSPECTIVE JUROR NO. 118: A registered nurse.

THE COURT: Are you married?

PROSPECTIVE JUROR NO. 118: Yes.

THE COURT: Does your spouse work?
PROSPECTIVE JUROR NO. 118: Yes.
THE COURT: And what does he do?
PROSPECTIVE JUROR NO. 118: He's an attorney.
THE COURT: What's his name?
PROSPECTIVE JUROR NO. 118: Douglas Malan.
THE COURT: Have you ever been a juror before?
PROSPECTIVE JUROR NO. 118: I have not.
THE COURT: Thank you. Go ahead and pass the mike, actually, to the juror in front of you.
PROSPECTIVE JUROR NO. 144: 144, Rowena Cluff.
THE COURT: And where do you work?
PROSPECTIVE JUROR NO. 144: Bellagio.
THE COURT: What do you do there?
PROSPECTIVE JUROR NO. 144: Switchboard.
THE COURT: And are you married?
PROSPECTIVE JUROR NO. 144: Yes.
THE COURT: What does your spouse do?
PROSPECTIVE JUROR NO. 144: The truck driver.
THE COURT: Have you ever been a juror before?
PROSPECTIVE JUROR NO. 144: No.
THE COURT: Okay. Go ahead. Thank you. Pass the mike to the -- to your left.
PROSPECTIVE JUROR NO. 145: 145, Felix Bustamante.
THE COURT: And where do you work?

PROSPECTIVE JUROR NO. 145: United Blood Service.

THE COURT: What do you do there?

PROSPECTIVE JUROR NO. 145: Warehousing driver.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 145: No.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 145: No.

THE COURT: Okay. Thank you. Go ahead.

PROSPECTIVE JUROR NO. 155: Juror 155, Yvonne Anderson.

THE COURT: And where do you work, ma'am?

PROSPECTIVE JUROR NO. 155: I work for GS Exposition Services here in Las Vegas.

THE COURT: What do you do for them?

PROSPECTIVE JUROR NO. 155: I work at the corporate office in accounting.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 155: Widowed.

THE COURT: My apologies.

PROSPECTIVE JUROR NO. 155: Thank you.

THE COURT: What did your husband do before he passed?

PROSPECTIVE JUROR NO. 155: He was a ACT [indiscernible] driver.

THE COURT: And have you ever served as a juror?

PROSPECTIVE JUROR NO. 155: Yes, I have.

THE COURT: Civil, criminal, both?

PROSPECTIVE JUROR NO. 155: Criminal, in California, San Diego.

THE COURT: When was that?

PROSPECTIVE JUROR NO. 155: I'm sorry, it was over 20 years ago. I can't remember the facts of it.

THE COURT: That's a -- that's a fair response. Did you all reach a verdict in that case?

PROSPECTIVE JUROR NO. 155: No, we did not.

THE COURT: Were you the foreperson?

PROSPECTIVE JUROR NO. 155: No, I wasn't. No.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 155: You're welcome.

PROSPECTIVE JUROR NO. 172: 172, Michelle Pester.

THE COURT: And where do you work?

PROSPECTIVE JUROR NO. 172: I'm retired military and hospice social worker.

THE COURT: What did you do for the military?

PROSPECTIVE JUROR NO. 172: Army, I was a food inspector.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 172: Yes.

THE COURT: Does your spouse work?

PROSPECTIVE JUROR NO. 172: Yes. He's an MMA

professional fighter in Jiu-Jitsu and MMA instructor.

THE COURT: What's his name?

PROSPECTIVE JUROR NO. 172: Sidney Silva.

THE COURT: Is he from Brazil?

PROSPECTIVE JUROR NO. 172: We both are.

THE COURT: [Indiscernible.] Have you ever been a juror before?

PROSPECTIVE JUROR NO. 172: Sorry?

THE COURT: Have you ever been --

PROSPECTIVE JUROR NO. 172: No.

THE COURT: -- a juror before? Thank you. Mr. Kurth?

MR. KURTH: Okay. 118 -- oh, where's it at right now?

THE COURT: All the way to the back corner.

MR. KURTH: So you're -- you said your husband was Doug Malan?

PROSPECTIVE JUROR NO. 118: Yes.

MR. KURTH: Oh, okay. All right. He's a real estate attorney, right?

PROSPECTIVE JUROR NO. 118: Yes.

MR. KURTH: So he doesn't do any injury type cases or anything like that?

PROSPECTIVE JUROR NO. 118: Not at all.

MR. KURTH: With, like, Deener Deener [phonetic] or

whatever?

PROSPECTIVE JUROR NO. 118: Uh-uh.

MR. KURTH: Okay. And how long have you been a nurse at Centennial Hills?

PROSPECTIVE JUROR NO. 118: Five years.

MR. KURTH: Have you ever been a nurse for a school district?

PROSPECTIVE JUROR NO. 118: No.

MR. KURTH: While a nurse at Centennial Hills, have you treated people with eye injuries?

PROSPECTIVE JUROR NO. 118: No, I work with newborns. Preemies.

MR. KURTH: Okay. Like in the NICU unit or something?

PROSPECTIVE JUROR NO. 118: I don't do NICU. I do healthy babies.

MR. KURTH: Okay. Would it cause -- would you have a problem rendering a verdict against the school district for pain and suffering, loss of enjoyment of life, those kind of damages, if the proof was there?

PROSPECTIVE JUROR NO. 118: If the proof was there, no.

MR. KURTH: Okay. Did you have kids that attended the school district here?

PROSPECTIVE JUROR NO. 118: Yes.

MR. KURTH: And do you remember any of them playing field hockey or floor hockey in school here?

PROSPECTIVE JUROR NO. 118: I don't.

MR. KURTH: Okay. All right. All right. And then right in front of you.

Ms. Cluff, right?

PROSPECTIVE JUROR NO. 144: Right.

MR. KURTH: Is it 144, right?

PROSPECTIVE JUROR NO. 144: Right.

MR. KURTH: And did you say before you had a -- and I apologize bringing it up, but do you think that serving on the jury is going to cause you any issue with the --

PROSPECTIVE JUROR NO. 144: Yes.

MR. KURTH: -- you said something before about --

PROSPECTIVE JUROR NO. 144: Yes.

MR. KURTH: -- murder case or whatever?

PROSPECTIVE JUROR NO. 144: Yes.

MR. KURTH: Yes. Even though it was a long, long time ago, you think it's --

PROSPECTIVE JUROR NO. 144: I still have those feelings now.

MR. KURTH: Would -- would that have any impact on you making a determination whether to render a personal injury damages award for the plaintiff against the school district?

PROSPECTIVE JUROR NO. 144: No.

MR. KURTH: Did you understand my question?

PROSPECTIVE JUROR NO. 144: To be honest, no, I did not.

MR. KURTH: Okay. Do you -- all right. Okay. Can you just pass it next to her. Thank you. Juror 145, is that right?

PROSPECTIVE JUROR NO. 145: Yeah. Yeah.

MR. KURTH: Mr. Bustamante?

PROSPECTIVE JUROR NO. 145: Yeah.

MR. KURTH: Okay. Now, I think -- maybe I wrote something wrong -- or down wrong. Were -- did you have an interview with the post office or was that somebody else?

PROSPECTIVE JUROR NO. 145: That's me.

MR. KURTH: Oh, that's you.

PROSPECTIVE JUROR NO. 145: That's me. Tomorrow at 1:30.

MR. KURTH: Okay. Okay. But right now you're working --

PROSPECTIVE JUROR NO. 145: United Blood -- United Blood Service.

MR. KURTH: Okay. And what type of job is it an interview for?

PROSPECTIVE JUROR NO. 145: Courier.

MR. KURTH: Okay. And do you know are they -- are holding mass interviews that day or did they specifically set

a time for you for that interview?

PROSPECTIVE JUROR NO. 145: Specific time for me at 1:30.

MR. KURTH: Okay. And do you know how difficult it is to reschedule that, or if you can, if it'll hurt you?

PROSPECTIVE JUROR NO. 145: It's -- it's hard to get in there, I'm sure. I've been waiting three months for an interview. So.

MR. KURTH: Okay. All right. All right. So I guess we got to come all the way back up front again, huh? Sorry. Pass it up -- there you go. Thank you very much.

PROSPECTIVE JUROR NO. 155: Juror 155, Yvonne Anderson.

MR. KURTH: Ms. Anderson, did you have kids that attended school in the school district here?

PROSPECTIVE JUROR NO. 155: Yes, I did.

MR. KURTH: Okay. Do you have any kids attending there now?

PROSPECTIVE JUROR NO. 155: No, I do not.

MR. KURTH: Did they go to Woodbury Middle School?

PROSPECTIVE JUROR NO. 155: No, they did not.

MR. KURTH: Do they go to middle school here?

PROSPECTIVE JUROR NO. 155: Yes, they did.

MR. KURTH: Do you know if they played field hockey, floor hockey in middle school here?

PROSPECTIVE JUROR NO. 155: No, they did not.

MR. KURTH: Not that you remember or?

PROSPECTIVE JUROR NO. 155: No, they did not.

MR. KURTH: Okay. Did they participate in sports in the PE class?

PROSPECTIVE JUROR NO. 155: My daughter participated in sports in probably high school.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 155: But she did not play field hockey, no.

MR. KURTH: Okay. But they -- but they went to school and went to PE and everything?

PROSPECTIVE JUROR NO. 155: Yes, they did.

MR. KURTH: Okay. And would it cause you any concern knowing that this case is from an incident that happened in 2004, would it affect you either way --

PROSPECTIVE JUROR NO. 155: No.

MR. KURTH: -- you know, against the plaintiff or the defendant?

PROSPECTIVE JUROR NO. 155: No, it would not.

MR. KURTH: All right. Would you have a problem awarding damages against the school district?

PROSPECTIVE JUROR NO. 155: No, I would not.

MR. KURTH: Okay. Thank you very much.

PROSPECTIVE JUROR NO. 155: You're welcome.

PROSPECTIVE JUROR NO. 172: 172, Michelle Pester.

MR. KURTH: All right. MMA, huh? Is that the Silva, the famous Silva?

PROSPECTIVE JUROR NO. 172: No.

MR. KURTH: Oh, well, sorry. Well, I --

PROSPECTIVE JUROR NO. 172: We know him.

MR. KURTH: Going to be soon, right? I just know the last name, I couldn't remember the first name, you know.

PROSPECTIVE JUROR NO. 172: They have a lot of Silvas in Brazil.

MR. KURTH: It's a lot of work. Do you do any of that MMA yourself?

PROSPECTIVE JUROR NO. 172: Not any more.

MR. KURTH: Okay. But you used to do it?

PROSPECTIVE JUROR NO. 172: Uh-huh.

MR. KURTH: Okay. Do you have any kids in the school district here?

PROSPECTIVE JUROR NO. 172: Yes, I do.

MR. KURTH: What ages?

PROSPECTIVE JUROR NO. 172: He's 15.

MR. KURTH: 15?

PROSPECTIVE JUROR NO. 172: Uh-huh.

MR. KURTH: Okay. And how long has he been going to school here?

PROSPECTIVE JUROR NO. 172: We moved here about six

years ago from Hawaii.

MR. KURTH: Okay. And does he participate in sports?

PROSPECTIVE JUROR NO. 172: Yes. Any sports that they have, he will be right there.

MR. KURTH: Does he play any competitive sports?

PROSPECTIVE JUROR NO. 172: Usually two, [indiscernible].

MR. KURTH: Do you know if he's ever played field hockey in school?

PROSPECTIVE JUROR NO. 172: I'm not sure.

MR. KURTH: Would you have a problem rendering a verdict in the school district knowing that your kids attended school there?

PROSPECTIVE JUROR NO. 172: Not if there's enough proof for it.

MR. KURTH: Okay. Would you think there'd have to be, like, extra proof if you were suing the school district?

PROSPECTIVE JUROR NO. 172: There has to be proof. Because like he said, the burden of proof has to --

MR. KURTH: It has to be proved that they were negligent --

PROSPECTIVE JUROR NO. 172: Uh-huh.

MR. KURTH: -- but if they were found negligent or you determined they were negligent, then you could award

damages?

PROSPECTIVE JUROR NO. 172: I don't think it's as black and white as you say. It's a situation that is just too many moving pieces. Just, you have to hear everything to know.

MR. KURTH: Sure. Of course. No doubt about that. Right. Okay. Thank you.

I'll pass, then, to Mr. O'Brien.

MR. O'BRIEN: You all heard the questions that -- you all heard the questions that I asked of the other jurors. Do any of you have any -- come to the jury with any preconceived notions about the school district, either for the school district or against the school district?

Have any of you had any bad experiences dealing with the school district?

Does anybody think that they can't treat the school district just like they would any other party in a lawsuit?

Do any of you have a notion that because someone is called a defendant, that they must be guilty? Or they're probably guilty?

PROSPECTIVE JUROR NO. 105: I'm sorry. When he said for or against [indiscernible], I -- I do a lot of volunteer work --

MR. O'BRIEN: Excuse me.

PROSPECTIVE JUROR NO. 105: I'm sorry.

MR. O'BRIEN: Wait for the microphone, please.

PROSPECTIVE JUROR NO. 105: Okay. I apologize.

MR. O'BRIEN: Wherever that is.

PROSPECTIVE JUROR NO. 105: Laurel Rockrohr, 105. When you mentioned against or for the school district, I do a lot of volunteer work for my kids at the school. I just did field day, where they did field hockey. And we did lots of things and I was one of the parent volunteers. Anytime I have an opportunity, although I have a busy work schedule, I constantly volunteer. You know, moms and muffins. So I am somewhat for Clark County School District, because my kids are big into that. You know, I was on the PTA for a little while, you know, actively involved. So I have to say yeah, I am for Clark County.

MR. O'BRIEN: And do you think --

PROSPECTIVE JUROR NO. 105: So, you know, if -- if -- just in answering that one question.

MR. O'BRIEN: Certainly.

PROSPECTIVE JUROR NO. 105: If there's, you know, a way to be for that, yeah. I've been volunteering, I am, you know, for Clark County School District.

MR. O'BRIEN: If the evidence was there, though, if the District committed negligence and as a result Mr. Payo was injured --

PROSPECTIVE JUROR NO. 105: Uh-huh.

MR. O'BRIEN: -- would you be able to set aside your affection or your -- your --

PROSPECTIVE JUROR NO. 105: Sure.

MR. O'BRIEN: -- predisposition --

PROSPECTIVE JUROR NO. 105: Yes. Absolutely.

MR. O'BRIEN: -- towards the District --

PROSPECTIVE JUROR NO. 105: Yes. Yes.

MR. O'BRIEN: -- and -- and, quite frankly, enter a fair judgment?

PROSPECTIVE JUROR NO. 105: Yes, I would be able to do that.

MR. O'BRIEN: Because it's fair to him, not necessarily --

PROSPECTIVE JUROR NO. 105: Sure.

MR. O'BRIEN: -- something we think --

PROSPECTIVE JUROR NO. 105: Sure. I just wanted to answer that honestly and say that. Yeah. Yeah.

MR. O'BRIEN: All right. I appreciate that.

PROSPECTIVE JUROR NO. 105: Uh-huh.

MR. O'BRIEN: I have no other questions, Your Honor.

THE COURT: Thank you. Let's take a --

MR. O'BRIEN: Thank you very much.

THE COURT: -- a quick break. Counsel.

(Off-record bench conference.)

THE COURT: Back on. Okay. At this time, the Court

will excuse for cause Juror No. 144, Ms. Cluff; and Juror No. 145, Mr. Bustamante.

THE CLERK: Badge 185, Mary Hobson; Badge 187, Michael Corrigan.

THE COURT: Does Ms. Hobson have the microphone now?

PROSPECTIVE JUROR NO. 185: Yes.

THE COURT: Okay. Thank you. Could you tell us your name and badge number?

PROSPECTIVE JUROR NO. 185: Mary Hobson, 185.

THE COURT: And where do you work?

PROSPECTIVE JUROR NO. 185: I'm a retired flight attendant.

THE COURT: What airline was that?

PROSPECTIVE JUROR NO. 185: Southwest.

THE COURT: Are you married?

PROSPECTIVE JUROR NO. 185: Yes.

THE COURT: Does your husband work?

PROSPECTIVE JUROR NO. 185: Yes.

THE COURT: Where does he work?

PROSPECTIVE JUROR NO. 185: He is in the casino industry.

THE COURT: What hotel or casino does he work at?

PROSPECTIVE JUROR NO. 185: The Stratosphere.

THE COURT: What does he do there?

PROSPECTIVE JUROR NO. 185: He's in management.

THE COURT: Have you ever been a juror before?

PROSPECTIVE JUROR NO. 185: Yes.

THE COURT: Civil or criminal case or cases?

PROSPECTIVE JUROR NO. 185: Civil case.

THE COURT: How long ago was that approximately?

PROSPECTIVE JUROR NO. 185: Oh, gosh. Six-plus years.

THE COURT: Was that here in Clark County?

PROSPECTIVE JUROR NO. 185: Yes.

THE COURT: Did you all reach a verdict in that civil case?

PROSPECTIVE JUROR NO. 185: No, we got -- we got seated, like we are now, and then they settled.

THE COURT: That happens sometimes.

PROSPECTIVE JUROR NO. 185: Okay.

THE COURT: So thank you. Were you the foreperson, by chance?

PROSPECTIVE JUROR NO. 185: No.

THE COURT: Okay. Go ahead and pass the mike to Mr. -- is it Corrigan?

PROSPECTIVE JUROR NO. 187: Yes, it is.

THE COURT: And you're --

PROSPECTIVE JUROR NO. 187: How am I?

THE COURT: -- Badge No. 187?

PROSPECTIVE JUROR NO. 187: Yes, sir.

THE COURT: Okay. Do you work?

PROSPECTIVE JUROR NO. 187: Yes, sir.

THE COURT: Where --

PROSPECTIVE JUROR NO. 187: At Palace Station, I'm a race and sports book manager.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 187: No.

THE COURT: Have you ever been a juror before?

PROSPECTIVE JUROR NO. 187: No.

THE COURT: Okay. Mr. Kurth?

MR. KURTH: Right. You've heard all these questions, let's just -- do you have any comments, right? Does any -- if any of the questions that have been, you know, posed to anyone, is there anything that, you know, comes out to you as being an issue?

PROSPECTIVE JUROR NO. 187: [No audible response.]

MR. KURTH: Do you think you could be fair and impartial if you were sitting on this jury and rendering an award of damages if the burdens -- of proof was met and it was -- it was proven against the school district?

PROSPECTIVE JUROR NO. 187: [No audible response.]

MR. KURTH: Okay. And did you go to the school district here? Did you grow up going to the school district here?

PROSPECTIVE JUROR NO. 187: No.

MR. KURTH: Okay. How long have you been here in town?

PROSPECTIVE JUROR NO. 187: 13 years.

MR. KURTH: Okay. And do you have any kids?

PROSPECTIVE JUROR NO. 187: No.

THE COURT: Does he need the microphone?

MR. KURTH: Oh, does he? Okay.

PROSPECTIVE JUROR NO. 187: Sorry.

MR. KURTH: I didn't know he didn't have it. So I thought it was over there, Judge. Sorry. I could hear him.

All right. Were you ever in the military?

PROSPECTIVE JUROR NO. 187: No.

MR. KURTH: Have you ever made a claim for personal injury?

PROSPECTIVE JUROR NO. 187: No.

MR. KURTH: Has anyone ever made a claim against you for personal injuries?

PROSPECTIVE JUROR NO. 187: No.

MR. KURTH: All right. And do you believe that -- trying to look at how I exactly wrote it so it's correct -- do you believe every child attending school has a right to a safe environment?

PROSPECTIVE JUROR NO. 187: Yes.

MR. KURTH: All right. Could you just pass it over?

Hey, thank you for being here. I appreciate it.

Have you ever coached any sports?

PROSPECTIVE JUROR NO. 185: Me?

MR. KURTH: Yeah.

PROSPECTIVE JUROR NO. 185: No.

MR. KURTH: Okay. Do you have any kids that grew up here and went to school in the school district?

PROSPECTIVE JUROR NO. 185: No. Well, I have a child that lives here, yes. But she does not go to the Clark County School District.

MR. KURTH: Okay. Where does she go to school at?

PROSPECTIVE JUROR NO. 185: She goes to private school.

MR. KURTH: And do you have any preconceived notions about the Clark County School District that would affect your ability to render a fair and impartial decision in this case if the burden of proof was met?

PROSPECTIVE JUROR NO. 185: I don't think so.

MR. KURTH: Okay. Do you believe that every child attending school has a right to a safe environment?

PROSPECTIVE JUROR NO. 185: Yes.

MR. KURTH: And would you have a problem awarding damages to the plaintiff for pain and suffering or loss of enjoyment of life or emotional distress?

PROSPECTIVE JUROR NO. 185: Not if the -- the case was proven to me.

MR. KURTH: Okay. And have you ever had a accident claim before yourself?

PROSPECTIVE JUROR NO. 185: No.

MR. KURTH: Has anyone ever made a claim against you?

PROSPECTIVE JUROR NO. 185: No.

MR. KURTH: Okay. What do you think about the idea that one who's injured because of someone else's negligence has a right to bring a legal action, to have a jury determine, you know, liability and damages?

PROSPECTIVE JUROR NO. 185: I think that that's their right as a citizen.

MR. KURTH: Okay. All right. Pass.

MR. O'BRIEN: Ms. Hobson, Juror 185, when you were asked about whether you had children attending the Clark County School District, you kind of paused. Do you have any preconceived notions about the Clark County School District? Is that something that has gone into your thinking as to why your children don't attend?

PROSPECTIVE JUROR NO. 185: Yes.

MR. O'BRIEN: Is that based upon personal experience with the Clark County School District?

PROSPECTIVE JUROR NO. 185: It's on things that I've read and studied and reviewed before my child was school age.

MR. O'BRIEN: Okay. So how old is your -- your

child?

PROSPECTIVE JUROR NO. 185: 14.

MR. O'BRIEN: 14 years ago you read something and you didn't like it, so your child goes to private school now; is that correct?

PROSPECTIVE JUROR NO. 185: Yes.

MR. O'BRIEN: Do you -- if -- if the evidence wasn't there, would you have any difficulty at all, would you hesitate at all to enter an award in favor of the Clark County School District?

PROSPECTIVE JUROR NO. 185: I wouldn't have a problem with that, no.

MR. O'BRIEN: That's all I have, Your Honor.

THE COURT: Thank you. Does plaintiff now pass the seated panel for cause?

MR. KURTH: Yes.

THE COURT: Does defendant now pass the seated panel for cause?

MR. O'BRIEN: Defendant passes for cause, yes.

THE COURT: Thank you both. Ladies and gentlemen who are seated in what we call the venire, which is the seats over there, who we have not called forward and spoken to, at this time -- no? Okay.

I'm going to listen to the marshal. We are going to now go over what we call the peremptory challenges. This is

the time when attorneys get together and decide whether anybody should leave or stay.

(Pause in proceedings.)

THE COURT: While they're doing that, so we're not just sitting here doing nothing, we'll go over some pretrial information with you which may aid in your role as a juror in the case. As you could probably tell already, each case starts by the plaintiff filing a document -- that document is called the complaint -- with the clerk of the court.

In the complaint, the plaintiff makes certain allegations as to why he is suing the defendant. Document is served on the defendant, and the defendant files an answer in response to the complaint.

In the answer, the defendant may admit some of the allegations and deny other allegations. So, for example, say we were here on a motor vehicle accident case. Both parties may agree as to the date and time and location of the collision. But they may disagree as to who was at fault or who was mostly at fault. They may disagree on the amount of damages claimed by the plaintiff and other things of that nature.

Purpose of the jury trial is to arrive at a resolution of the dispute in a courtroom based upon very strict laws of both -- very strict rules of both law and procedure. All parties to this lawsuit start off on a level

playing field, and they are, you know, even Steven, so to speak.

As you could probably tell already, the plaintiff has the burden of proof. That means just -- it's the plaintiff's job to show you all by the end of the trial that its side of the case is more convincing than that of the defendant. If you imagine the scales of justice rest perfect equilibrium at the start of the trial, which is the case, the plaintiff must tip those scales in his favor by the end of the trial, or the plaintiff cannot win the lawsuit.

Burden of proof is called the preponderance of evidence in a civil case like this. That's different than the standard used in criminal cases, which is beyond a reasonable doubt. Preponderance simply means you stack up all the factors for and against each party and if the scale is slightly in favor 50.1 percent, 51 percent in favor of the plaintiff, you find for the plaintiff. If -- if it remains even or less, you find for the defendant.

We ask that you not make up your mind about the ultimate verdict in this case until you have heard all the witnesses and seen all the evidence. We ask that you keep an open mind throughout the trial and not begin to make up your mind about what the facts are until you and your fellow jurors go to the jury room to deliberate.

We ask that you base your verdict solely upon the

evidence brought out at the trial and the law that applies to that evidence, and not based on sympathy or public opinion.

Are we ready with the peremptory challenges? Do you want to confer up here?

(Pause in proceedings.)

THE MARSHAL: Folks, when your name's called out, you're going to come back to me in the back of the room.

THE CLERK: Danielle Kaylor, Badge 117; Ksenia Stafeeva, Badge 086; Lucetta Scolaro, Badge 089; Mary Hobson, Badge 185; Michael Corrigan, Badge 187; Halina Chudoba, Badge 095; James Dunn, Badge 097; Laurel Rockrohr, 105; Jlee Lefiles, Badge 126; Steven Brown, Badge 109.

We have our jury, Your Honor.

THE COURT: Thank you. Before they leave, does either side need to or want to exercise a Batson or JEB vs. Alabama challenge to the exercise of the peremptory challenges?

MR. O'BRIEN: No, Your Honor.

MR. KURTH: No, Your Honor.

THE COURT: Thank you.

THE MARSHAL: Okay. Jurors, thank you very much. Return to the third floor, check out with the jury clerk.

And then you stay seated where you are. You folks are released.

THE CLERK: We also excuse the three in the back?

THE COURT: Yes. Thank you.

(Pause in proceedings.)

THE CLERK: Do you want me to swear our jury?

THE COURT: Well, let's make sure we have the proper names and badge numbers.

THE CLERK: All right. Jerelyn Malan in Seat No. 1; Jason Terry in Seat No. 2; I'm going to have trouble with this name, I apologize, Somanathan Pillai, Seat No. 3; we have Karen Ericsson in Seat No. 4; Sherice Green in Seat No. 5; Jasmine Miranda in Seat 6; Mark Russie in Seat 7; Yvonne Anderson in Seat 8; LaTonya Gonzalez in Seat 9.

JUROR NO. 9: LaTonya.

THE CLERK: LaTonya, sorry. Michelle Pester in Seat 10.

THE COURT: Okay. Go ahead and --

THE CLERK: Could I have you stand and all raise your right hand, please.

(Jury sworn.)

THE CLERK: Thank you, please be seated.

THE COURT: Real quickly, before we break, I need to read admonishments to all of you. They're basically your instructions.

So, ladies and gentlemen, you're admonished that no juror may declare to a fellow juror any fact relating to this case of his own -- his or her own knowledge, and if any juror

discovers during the trial or after the jury has retired that he or she or any other jury -- juror has personal knowledge of any fact or controversy in this case, he or she shall disclose that situation to me in the absence of the other jurors. And -- and as the marshal stated, all communications go through him.

This means that you if you learn during the course of the trial that you are acquainted with the facts of the case or the witnesses and you've not previously told us of that relationship, you must then declare that fact by communicating to the marshal.

Again, the way that you communicate with the Court, me, the judge, throughout our trial is through Marshal Hawks. He is present at all times when we're in session. During the course of the trial, the attorneys for both sides, court personnel other than the marshal are not permitted to talk to you. It's not that we or they are antisocial. It's simply that we are all bound by ethics and the law not to speak with you, because to do so might compromise your verdict. We are not even allowed to say hi to you if we pass you in the hall or in the elevator. So we're not begin antisocial. Again, that's just the rules.

If you should recognize a witness or be familiar with the facts of the case when the witness is testifying, please make a little note on your jury pad that you recognize

such-and-such a witness -- you'll get the pads tomorrow -- and how that -- how it is that you recognize that witness. At the next break in the trial, then please hand that note to the marshal and he will present it to the Court and counsel. Frequently, people do not recognize witnesses by name, but may recognize them when they come in to testify in court in person. Person might be your child's soccer coach and you only know him by his nickname, or maybe somebody who's your neighbor, but you don't quite know their name. If that happens, just make a note, like I said, and present it to the marshal at the next break.

You are admonished additionally that you are not to visit the scene of any of the acts or occurrences, i.e., Woodbury Middle School, during the trial, unless specifically directed to do so by me. The reason that we -- the reason that we do not want you going out to any particular scene or location is not because we don't want you to know everything there is to know about the location, but simply that there's no guarantee that the location looks the same today as it did back when the incident occurred. Sometimes photographs are used, and we may use those during trial.

The parties may present objections to some of the testimony or other evidence. At times I may sustain those objections or direct you to disregard certain testimony or exhibits. You must not consider any evidence to which an

objection has been sustained or which I have instructed you to disregard.

It is the duty of a lawyer to object to evidence which he believes may not be properly offered and you should not be prejudiced in any way against the lawyer who makes the objections on behalf of the party which he represents.

I may also find it necessary to admonish the lawyers. And I if do, you should not show prejudice towards the lawyer or his clients because I found it necessary to admonish him.

Throughout the trial if you cannot hear a question asked by the attorney or the answer given by a witness, please raise your hand as an indication. If I don't see your hand up, just say, Excuse me, I didn't hear that. And we'll ask that the question and answer be repeated.

If you wish, you are allowed to take notes to help you remember anything a witness says. If you do take notes, please keep those to yourself until you and your fellow jurors go to the jury room to decide the case.

Do not let note-taking distract you, however, so that you're writing down an answer and meanwhile questions and answers are being given while you're writing down a question five questions ago.

You should rely upon your own memory of what was said and not be overly influenced by the notes of other jurors

when you go back to deliberate.

The case will proceed in the following order tomorrow. First, plaintiff has the opportunity to make an opening statement outlining his case and suggesting to you what he believes the evidence will be. Defendant may then make its opening statement, or may reserve its right to make an opening statement till after plaintiff has put on all his evidence.

Opening statements are a synopsis and overview of what the attorney believes the testimony will be. Opening statements of the attorneys are not evidence. After all, the attorneys are not witnesses to any of the facts in controversy. Plaintiff will then introduce evidence and call witnesses. The conclusion of plaintiff's case, the defense may then call any additional witnesses and submit additional evidence, if it wishes to do so. After the defense rests, the plaintiff has the right to call rebuttal witnesses.

After all of the evidence is in, I will instruct you on the law as it applies to this case. You must not be concerned with the wisdom of any rule of law stated in these pretrial instructions, or in the instructions I give you at the end of the trial. Regardless of any opinion you may have as to what the law should be or ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given to you by the Court.

After the instructions of the law are read to you, each party has the opportunity to argue orally in support of its cause. This is called closing argument or summation. What the attorneys say in closing arguments, again, is not evidence. Their arguments, however, are designed to summarize and interpret the evidence for you and show you how the evidence and the law relate to one another.

Since the plaintiff has the burden of proof, plaintiff gets to argue to you twice at the end of the trial. Plaintiff will argue, defense will argue, and then the plaintiff has the opportunity, if he wishes, to rebut the defendant's argument.

After the attorneys have presented their arguments, you will retire to select a foreperson to deliberate and arrive at your verdict. Faithful performance by you of your duties is vital to the administration of justice. I can't stress that enough.

It is your duty to determine the facts and determine them by the evidence and reasonable inferences arising from such evidence. In doing so, you must not indulge in guesswork or speculation.

The evidence which you are to consider consists of the testimony of the witnesses and the exhibits admitted in evidence. The term witness means anyone who testified either in person here in the courtroom or by way of a deposition.

And it may include parties to the lawsuit.

Now, deposition is simply an examination of a witness at a prior date prior to being here in court under oath with the attorneys present, where the testimony is written down and question and answers are given and may be read to you at trial.

Admission of evidence is governed by the rules of law. From time to time it may be the duty of the attorneys to make objections, and my duty as judge to rule on those objections and decide whether a certain question may be answered or certain evidence may be admitted. You must not concern yourself with the objections made by the attorneys or with the Court's reasonings for its rulings.

Since it is 5:00, we'll continue with the instructions tomorrow. In the meantime, don't talk to anybody about the case, don't Google it, don't Facebook it, and we will come back and see you all tomorrow at 10:30 here.

Now the marshal may give you instructions, right now, as to where you should go from here, correct?

THE MARSHAL: Yes.

THE COURT: Thank you.

UNIDENTIFIED JUROR: What is your name?

THE COURT: My name is Joe Hardy, Jr. And I should have a plaque up there, but I don't yet.

UNIDENTIFIED JUROR: [Indiscernible] tomorrow?

[Indiscernible.]

THE COURT: If anyone is uncomfortable, bring a sweater.

THE MARSHAL: Yeah, they're working on the a/c units up here. They had one freeze up. So they turned the rest of them up because we were having so many of you in here earlier, they didn't want it to get overheated. So I would bring a sweater.

UNIDENTIFIED JUROR: Do we come directly here?

THE MARSHAL: I will explain all that to you in the hall.

UNIDENTIFIED JUROR: Gotcha.

THE COURT: So they are excused for the day with the admonishments that I read, and see you. Marshall Hawks will explain to you where you go from here and where you come tomorrow morning. Thank you.

(Jury recessed at 5:05 p.m.)

THE COURT: I do have hearings in the morning. Not sure how long those will take before the jury comes in. But if you have any issues that you need to raise, I'll be here. So thank you.

MR. KURTH: Thank you, Judge.

(Court recessed for the evening at 5:06 p.m.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

KARR REPORTING, INC.
Aurora, Colorado



KIMBERLY LAWSON

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

MAY 28 2015

BY, Jennifer Kimmel
JENNIFER KIMMEL, DEPUTY

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A-12-668833-C
TB
Trial Brief
4460108

DISTRICT COURT

CLARK COUNTY, NEVADA

MAKANI KAI PAYO,

Plaintiff,

v.

CLARK COUNTY SCHOOL DISTRICT,

Defendants.

Case No. A-12-668833-C
Dept. No. XV

CLARK COUNTY SCHOOL DISTRICT'S TRIAL BRIEF ON THE ISSUE OF THE AMOUNT OF THE STATUTORY CAP ON DAMAGES APPLICABLE TO PLAINTIFF'S CASE UNDER NRS 41.035

POINTS AND AUTHORITIES

Defendant CLARK COUNTY SCHOOL DISTRICT, in accordance with the Court's request, respectfully submits for the Court's consideration, a Trial Brief on the issue of the amount of statutory cap applicable to Plaintiff's case pursuant to NRS 41.035.

1. **Facts**:

Plaintiff was injured while participating in a Field Hockey unit in his Physical Education class at Woodbury Middle School on May 12, 2004. Although Plaintiff alleges that the current, $100,000.00 statutory "cap" on damages set forth in NRS 41.035 applies to this case because he waited until 2013 to file his case, Plaintiff is in error. The statutory cap on damages in

3

effect at the time of Plaintiff's injury limits Plaintiff's recovery in this case to $50,000.00.

Chapter 512, Stats. 2007, which amended this section, contains the following provision not included in NRS:

> "The amendatory provisions of:
>
> (1) Section 3.3 of this act apply to a cause of action that accrues on or after October 1, 2007, but before October 1, 2011.
>
> (2) Section 3.5 of this act apply to a cause of action that accrues on or after October 2, 2011."

See: Reviser's Notes, immediately following NRS 41.035.

Plaintiff's cause of action did not "accrue" when he filed his lawsuit. A cause of action for negligence "accrues" when an accident occurs and a person sustains an injury. Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18 (1990). Thus the cap in effect on May 12, 2004, which was $50,000.00, applies to this case. *See*: Las Vegas Metro. Pol. Dep't. v. Yeghiazarian, 129 NAO 81, 312 P.3d 503, 509 (2013) [holding that the version of NRS 41.035(1) that was in effect at the time of the accident governs any award against a governmental entity].

CONCLUSION

The statutory cap applicable at the time of Plaintiff's injury, was $50,000.00. There is no authority that holds otherwise.

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Under the circumstances, Plaintiff may not recover from the District a sum greater that $50,000.00 for losses which accrued in May of 2004, as a matter of law.

Respectfully submitted this 28th day of May, 2015.

By: 

Daniel L. O'Brien
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Office of General Counsel
Clark County School District
5100 West Sahara Avenue
Las Vegas, NV 89146
Counsel for District

RECEIPT OF COPY

Robert O. Kurth, Jr., hereby acknowledge receipt of the foregoing CLARK COUNTY SCHOOL DISTRICT'S TRIAL BRIEF ON THE ISSUE OF THE NUMBER OF STATUTORY CAPS ON DAMAGES AVAILABLE UNDER NRS 41.035, in open court, on this 28th day of May, 2015.

Robert O. Kurth, jr.
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Kurthlawoffice@gmail.com
Attorney for Plaintiff



An Employee of CCSD

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT, Appellant, v. MAKANI KAI PAYO, Respondent.	No.: 68443 District Court Case No.: A-15-718383-C District Court Dept. No.: XV (Hon. Joe Hardy)

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APPELLANT'S APPENDIX

VOLUME V

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ALPHABETICAL INDEX

Volume / Page

Bugay v. Clark County School District, 2014 Nev. Unpub. LEXIS 1921 (2014) ..... I / 0154-0160

12-10-2013 Clark County School District's Answer to Makani Kai Payo's First Amended Complaint ..... I / 0099-0106

03-10-2015 Clark County School District's Answer to Makani Kai Payo's Second Amended Complaint ..... II / 0343-0351

07-15-2015 Clark County School District's Case Appeal Statement ..... IX / 1632-1635

07-15-2015 Clark County School District's Notice of Appeal ..... IX / 1636-1638

07-20-2015 Clark County School District's Notice of Appeal Filed in Supreme Court ..... IX / 1639-1726

04-08-2015 Clark County School District's Notice of Motion and Motion for Summary Judgment ..... III / 0355-0483

06-10-2013 Clark County School District's Notice of Motion and Motion to Dismiss ..... I / 0014-0044

01-28-2015 Clark County School District's Notice of Motion and Motion to Strike Makani Kai Payo's Damages Calculation or, in the alternative, Motion in Limine ..... II / 0285-0298

05-13-2015 Clark County School District's Offer of Judgment to Makani Kai Payo ..... IV / 0701-0702

01-22-2014 Clark County School District's Opposition to Makani Kai Payo's Request for Exemption from Arbitration ..... I / 0110-0117

05-08-2015 Clark County School District's Pre-Trial Memorandum ..... IV / 0660-0672

02-23-2015 Clark County School District's Reply to Makani Kai Payo's Opposition to Clark County School District's Motion to Stike Makani Kai Payo's Damages Calculation and Motion in Limine ..... II / 0314-0331

05-05-2015 Clark County School District's Reply to Opposition to Motion for Summary Judgment and Opposition to Countermotion for Summary Judgment ..... IV / 0644-0659

07-10-2013 Clark County School District's Reply to Opposition to Motion to Dismiss ..... I / 0055-0068

09-16-2015 Clark County School District's Request for Transcripts of Proceedings ..... IX / 1728-1730

02-13-2015 Clark County School District's Response to Makani Kai Payo's First Set of Interrogatories ..... IX / 1733-1748

04-08-2015 Clark County School District's Responses to Makani Kai Payo's Subpoena Duces Tecum ..... II / 0352-0354

05-26-2015 Clark County School District's Trial Brief.....IV / 0738-0757

05-28-2015 Clark County School District's Trial Brief on the Issue of the Amount of the Statutory Cap on Damages Applicable to Makani Kai Payo's Case under NRS 41.035.....V / 0967-0969

02-07-2014 Commissioner's Decision on Request for Exemption - Granted.....I / 0118-0119

09-21-2012 Complaint for Negligence.....I / 0001-0009

04-16-2015 Deposition of Eileen Wheelan.....III / 0492-0578

01-22-2015 Deposition of Makani Kai Payo.....II / 0180-0284

05-13-2015 Errata to Clark County School District's Pre-Trial Memorandum.....IV / 0703-0718

04-17-2014 First Amended notice of 16.1 Case Conference.....I / 0123-0125

07-21-2014 Joint Case Conference Report.....I / 0126-0143

05-22-2015 Joint Pre-Trial Memorandum.....IV / 0726-0737

06-16-2015 Judgment Upon Jury Verdict.....VIII / 1608-1609

06-02-2015 Approved and Given Jury Instructions.....VIII / 1546-1588

06-02-2015 Jury Instructions (Objected to and Not Given)
- Inherent Risk.....VIII / 1589
- Assumption of Risk.....VIII / 1590
- Minor cannot collect past medical damages.....VIII / 1591
- Offered but objected.....VIII / 1592

01-15-2015 Makani Kai Payo's, Answers to Clark County School District's Interrogatories.....I / 0161-0178

08-25-2014 Makani Kai Payo's Demand for Jury Trial.....I / 0147-0148

10-14-2013 Makani Kai Payo's First Amended Complaint.....I / 0092-0098

02-13-2015 Makani Kai Payo's Opposition to Clark County School District's Motion to Strike Makani Kai Payo's Damages Calculation and Motion in Limine.....II / 0299-0313

04-27-2015 Makani Kai Payo's Opposition to Motion for Summary Judgment, and Counter-Motion for Summary Judgment.....IV / 0580-0643

07-01-2013 Makani Kai Payo's Opposition to Motion to Dismiss.....I / 0045-0054

01-14-2014 Makani Kai Payo's Request for Exemption from Arbitration.....I / 0107-0109

03-05-2015 Makani Kai Payo's Second Amended Complaint.....II / 0336-0342

05-26-2015 Makani Kai Payo's Trial Brief.....IV / 0758-0769

05-29-2015 Makani Kai Payo's Trial Brief Re: The Statutory Cap on Damages Per NRS 41.035.....VII / 1380-1384

05-13-2015 Minutes from Court (Hon. Joe Hardy) re: Calendar Call.....IV / 0719

05-11-2015 Minutes from Court re: Clark County School District's Motion for Summary Judgment.....IV / 0674-0675

07-15-2013 Minutes from Court re: Clark County School District's Motion to Dismiss.....I / 0069

03-03-2015 Minutes from Court re: Clark County School District's Notice of Motion and Motion to Strike Makani Kai Payo's Damages Calculation or, in the alternative, Motion in Limine.....II / 0334-0335

09-03-2014 Minutes from Court re: Re-opening the Case.....I / 0149

05-08-2015 Minutes from Court (Hon. Bonnie Bulla) re: Status Check: Compliance.....IV / 0673

04-17-2015 Minutes from Court (Hon. Bonnie Bulla) re: Status Check: Status of Case/Trial Date.....III / 0579

03-07-2014 Notice of 16.1 Case Conference.....I / 0120-0122

06-17-2015 Notice of Entry of Judgement (Judgement Upon Jury Verdict).....IX / 1628-1631

05-20-2014 Notice of Entry of Order (Order Denying Motion).....

05-20-2015 Notice of Entry of Order (Order Denying Motions For Summary Judgment) .....IV / 0722-0725

08-22-2013 Notice of Entry of Order (Order Granting in Part and Denying in Part Clark County School District's Motion to Dismiss).....I / 0086-0091

04-14-2015 Notice of Entry of Order (Order Granting in Part and Denying in Part Clark County School District's Motion to Strike Makani Kai Payo's Damages Calculation or, in the Alternative, Motion in Limine.....III / 0487-0491

06-17-2015 Notice of Entry of Order (Order Regarding Damages Post-Jury Verdict).....VIII / 1618-1627

04-09-2015 Notice of Hearing (Clark County School District's Notice of Motion and Motion for Summary Judgment).....III / 0484

05-13-2014 Order Denying Motion.....IX / 1731-1732

05-19-2015 Order Denying Motions For Summary Judgment.....IV / 0720-0721

08-21-2013 Order Granting in Part and Denying in Part Clark County School District's Motion to Dismiss.....I / 0083-0085

04-10-2015 Order Granting in Part and Denying in Part Clark County School District's Motion to Strike Makani Kai Payo's Damages Calculation or, in the Alternative, Motion in Limine.....III / 0485-0486

06-16-2015 Order Regarding Damages Post-Jury Verdict.....VIII / 1610-1617

09-18-2014 Order Setting Civil Jury Trial, Pre-Trial Conference and Calendar Call.....I / 0150-0153

01-21-2015 Plaintiff's Bates Numbered document 000291.....I / 0179

06-02-2015 Proposed Verdict Form Returned Unsigned.....VIII / 1605-1606

07-15-2013 Recorder's Transcript Re: Notice of Motion and Motion to Dismiss.....I / 0070-0082

08-06-2014 Scheduling Order.....I / 0144-0146

08-31-2015 Settlement Program Status Report.....IX / 1727

03-02-2015 Stipulation and Order to Amend Makani Kai Payo's First Amended Complaint.....II / 0332-0333

03-11-2013 Summons.....I / 0010-0013

05-27-2015 Transcript of Proceedings - Jury Trial - Day 1.....V / 0770-0966

05-28-2015 Transcript of Proceedings - Jury Trial - Day 2.....VI / 0970-1158

05-29-2015 Transcript of Proceedings - Jury Trial - Day 3.....VII / 1159-1379

06-01-2015 Transcript of Proceedings - Jury Trial - Day 4.....VIII / 1385-1545

06-02-2015 Transcript of Proceedings - Jury Trial - Day 5.....VIII / 1593-1604

05-11-2015 Transcript of Proceedings: Motions.....IV / 0676-0700

06-02-2015 Verdict.....VIII / 1607

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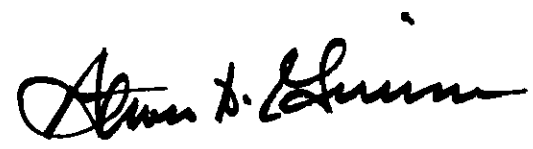
I HEREBY CERTIFY that the **APPELLANT'S APPENDIX** was filed electronically with the Nevada Supreme Court on the 31 day of December, 2015. I further certify that I served a copy of this document by depositing a true and correct copy hereof in the United States mail at Las Vegas, Nevada, postage fully prepaid, addressed as follows:

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MAKANI PAYO,	)	
	)	CASE NO. A-12-668833
Plaintiff,	)	DEPT NO. XV
vs.	)	
	)	
CLARK COUNTY SCHOOL DISTRICT,	)	
	)	
Defendant.	)	**TRANSCRIPT OF PROCEEDINGS**
	)	

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 1

WEDNESDAY, MAY 27, 2015

APPEARANCES:

For the Plaintiff: ROBERT O. KURTH, ESQ.

For the Defendant: DANIEL LOUIS O'BRIEN, ESQ.

RECORDED BY MATTHEW YARBROUGH, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

KARR REPORTING, INC.

LAS VEGAS, NEVADA, WEDNESDAY, MAY 27, 2015, 10:44 A.M.

* * * * *

(Outside the presence of the prospective jury.)

THE COURT: This is not a good foot to start a trial on.

MR. KURTH: I know, Judge. Sorry. I apologize. It won't happen again.

THE COURT: I had some questions before we bring in the -- the parties or the jury. And you're both welcome to seat or stand, whichever is more comfortable for you all. I -- I'm fine either way.

We received proposed voir dire questions from both sides. I assume these are questions that -- that you as the attorneys want to ask the prospective jurors yourselves, rather than have me ask. But I wanted to make sure that's what you want.

MR. O'BRIEN: Your Honor, my understand -- usually in trials the judge asks basic questions, and then we, you know, follow up on those; and then if we have our own special questions, that's -- we follow up with those, with the Court's permission, of course. I -- that's -- I -- the way I've always done it. I don't know if that's how you want it done.

THE COURT: No, that's -- that's what I assumed as well, but wanted to just make sure we're all on the same page before we bring the -- the jury in here.

MR. O'BRIEN: Your Honor, along that same line, I haven't seen counsel's proposed voir dire questions. I'd like to at least glance at them. I don't expect I'll have an objection, but --

THE COURT: That's a fair request.

MR. O'BRIEN: Thank you, Your Honor.

THE COURT: I think we got them this morning, maybe.

The Court went through the questions. The Court would prefer to not ask so many as both sides submitted. But I'll leave that up to you with that -- I wouldn't call that a directive, even, but Court's preference. Put it that way. This doesn't seem like a case that, you know, perhaps merits that many questions of each prospective juror. But having said that, yeah, I'll -- I -- Court will ask the basics and then turn it over to the attorneys.

We received the joint pretrial memorandum, so thank you both. Question on that. In Section 5 -- Section 5, which is on page 5, as well, it's titled "Joint Exhibits to be Offered." And then you have Section 5A, "Exhibits With Objections." On the Joint Exhibits to be Offered, are those stipulated as into evidence right now, or not stipulated, or what's the -- the status on those?

MR. O'BRIEN: Your Honor, I believe they're mostly stipulated, except for No. 8, entitled "Woodbury's Hockey Unit" -- excuse me -- "introduction and floor hockey rules."

We will and do intend to object to that.

MR. KURTH: Well, I thought you were agreeing to -- that's not the college ones. You were objecting to the college ones, right?

MR. O'BRIEN: Well, I was objecting to both, because --

MR. KURTH: Oh, okay.

MR. O'BRIEN: -- in this case -- I said I don't object with the proper foundation, but --

MR. KURTH: I see.

MR. O'BRIEN: -- they weren't prepared by Mr. Peterson, the teacher. And so unless there's a foundation for introducing them, we will object.

Deposition transcripts, of course, are not usually evidence. They're read into evidence.

And the billing summary of charges what we received was not what we expected, and that's Item No. 14. That was just a letter that was --

THE COURT: It's 14 on the joint pretrial.

THE CLERK: Okay. It should be 15.

THE COURT: But 15 on the exhibit sheet.

MR. O'BRIEN: Oh, 15 on the -- yeah, we object to that.

THE COURT: Sure.

MR. O'BRIEN: I don't know if you want our

objections now. We -- we will object to that, because it's argumentative and includes matter beyond just a simple summary.

THE COURT: No, I -- questions right -- right now were more to -- to make sure we're all on the same page. So if those --

THE CLERK: We do have an agreement, Your Honor, though, I believe. On 1 through 7, there won't be an objection. And on 9 through 12, there will not be an objection.

MR. O'BRIEN: That's correct, Your Honor.

THE CLERK: So if Mr. Kurth agrees that we -- we have them and we can admit them.

MR. KURTH: That's correct.

THE COURT: Okay.

THE CLERK: So then they're admitted?

THE COURT: Okay. Yes, so Exhibits 1 through 7 are admitted, Exhibits 9 through 12 are admitted. And -- and for now that's -- that's it.

(Plaintiff's Exhibit 1 through 7 and 9 through 12 admitted.)

MR. O'BRIEN: Your Honor, Mr. Kurth --

THE COURT: Sure.

MR. O'BRIEN: -- has just handed me a medical summary, Item No. 14. If we switch this for the one that was submitted, we have no objection.

THE COURT: Okay. Let's do that right now.

THE CLERK: Let's keep calling it 15, though.

THE COURT: Yeah.

MR. KURTH: Okay. It's -- yeah, it's --

MR. O'BRIEN: Oh, 15 on your sheet. Yeah. Excuse me.

THE COURT: No, the -- I think there's a -- a slight difference between the pretrial memorandum --

MR. KURTH: Oh.

THE COURT: -- and the exhibit list. There's two deposition -- depositions on the exhibit list. So that's where -- so we will admit the new, so to speak, Exhibit 15; is that correct, Mr. O'Brien and Mr. Kurth?

MR. KURTH: Let's see, it's --

MR. O'BRIEN: Yes, Your Honor.

MR. KURTH: Yes.

THE CLERK: May I have a copy, please?

MR. KURTH: Yeah, one coming right now. Thank you.

(Plaintiff's Exhibit 15 admitted.)

(Pause in proceedings.)

MR. O'BRIEN: Your Honor, with respect to the voir dire questions offered by defendant, the only one I would object to is the last one. It says, "Do you believe the Clark County School District has the duty to protect students from harm?" I think that -- the duty is something that the Court

instructs the jury and it shouldn't be suggesting a duty to them before the Court's instructions.

THE COURT: Mr. Kurth?

MR. KURTH: My position on that, Judge, is that if they answer no right away, then, I mean, they shouldn't -- they are not going to be, you know, unbiased. They're going to be prejudiced. And, you know, have an impact on another juror, too, I mean.

THE COURT: Court agrees with Mr. O'Brien.

MR. KURTH: Okay.

THE COURT: And it appreciates the -- the argument given. And so Mr. Kurth, you're instructed not to ask that last No. 36 question in voir dire.

That reminds the Court, one, to express my thanks to -- to both sides for working together on the exhibits. That will obviously save everyone a lot of time. So the Court really, truly appreciates that.

Mr. Kurth, if you want to take a -- a minute, if you haven't done so already, you have any issues with the school district's proposed questions, welcome to entertain those now.

While you're looking at that, the next issue is there's some discussion in the pretrial briefs regarding plaintiff's journal. And before we call the jury in, the Court would be interested to hear first from defendants, because they raise -- defendant, school district, because it

raises that issue, and then plaintiff.

But before we go to there, Mr. Kurth, did you have any issues with the school district's voir dire questions?

MR. KURTH: Well, I have a -- I don't really understand their 13, it's "Do you believe it is fair to place the burden of proof upon the injured plaintiff rather than on the defendant?"

THE COURT: Bear with the Court one second. Let me -- I thought I brought those up. Of course they were under my binder. So No. 13? Yeah, we'll strike that one.

MR. O'BRIEN: Your Honor, may I be heard?

THE COURT: Unless -- yes, I apologize.

MR. O'BRIEN: Just -- it's pretty obvious that if -- if someone comes in and believes that the injured plaintiff shouldn't have to carry the burden of showing anything that he's injured, we need to know that before we get started. We need to know what predispositions they're bringing to the court. If anybody says that I don't think it's fair that if you're hurt, you have to bear the burden of proof, we need to know that and explore it in order to make a determination of whether that person -- that individual should be stricken.

MR. KURTH: I think those questions are covered. I just think it's -- it's confusing the way it's -- it's confusing the way it's worded. And it's -- it's like suggesting that the defendant has a burden of proof. I mean,

if it was asked the way Mr. O'Brien asked it, I think it would be fine, if he wants to ask them if -- if they believe if somebody's injured, should -- should still have to prove their case.

MR. O'BRIEN: And, Your Honor, I think that's pretty much what it says.

MR. KURTH: Well, I don't -- well, the next one is 14, when you couple it with that, "Do you believe that if someone is seriously injured, a lower standard of proof should be required in order to hold the defendant liable?"

THE COURT: Yeah. The -- the Court's concern with both 13 and 14, given the context of instructing plaintiff not to ask the question on the duty to protect students, it's hard for the Court to distinguish the -- the difference, if you will, between that question and Question 13.

MR. O'BRIEN: 13 and 14, of course, Your Honor, would not both be asked. One or the other would be.

THE COURT: Yeah. Court is inclined, subject to -- to hearing from Mr. O'Brien, to strike 14. As to 13, I think the question is -- is generally fair. The concern would be is what distinguishes 13 from -- from plaintiff's 36, in terms of 36 is not going to be asked because it goes into a question of law. 13, Mr. O'Brien, what's -- what's the difference there?

MR. O'BRIEN: Your Honor, 36, plaintiff would ask the jury do you believe that the school district has a duty?

Suggesting that the school district has a specific duty to protect students from harm. As a general duty to exercise reasonable care to avoid causing injury, this suggests that there's an actual hard and fast duty to protect students under all circumstances. And that's the reason that we object to it as it's stated.

Ours just asked do you believe it's -- this process is even fair that we require somebody who's hurt to come in and prove their case?

THE COURT: Court appreciates the difference now, thank you.

Mr. Kurth, here's what the Court's inclined to do subject to your thoughts, is to allow 13, but not 14. Any response?

MR. KURTH: No objection, Judge.

THE COURT: Okay. Let's do that, then. 14 will not be asked, 13's okay.

MR. O'BRIEN: Thank you, Your Honor.

MR. KURTH: Judge, 16, I think -- well, 16 is going to be related to this issue that I guess we're going to deal with right now.

THE COURT: Yeah. So let's go ahead. I -- I want to hear more about the -- the journal, like I said, beginning with the defendant, because he raised the issue.

MR. O'BRIEN: Thank you, Your Honor. We had, of

course, conducted discovery and we'd ask -- well, under Rule 16.1, plaintiff was supposed to give us anything that was reasonably relevant to the case. But we also sent out requests for production of documents. And this journal, we weren't even told it existed.

And Mr. Payo's deposition on January 22nd of this year, he -- he stated that he kept a record. It wasn't a journal, per se. But it was something he wrote down on the back of a Wolfgang Puck menu that he had. And he said that the purpose of writing that was to record what had happened at the time of the incident. He stated that he still has that journal, that he gave it to his attorney.

Now, we've never been provided with that -- that journal, that we -- we have no idea what's on it, we have no way to know if he's going to come in and testify from the journal, or if he's going to come in and testify from his memory. We have no way to cross-examine him on it. It's -- it's just fundamentally unfair to allow the plaintiff to have a contemporaneous record that goes right to the heart of the issues in this case, central facts of this case, what happened on May 12th, 2004, and then keep it from us.

And therefore we're -- we -- we have proposed jury instructions that either state that the -- they're alternative, because one of the other's given. One that states that if you find they deliberately withheld it, then

you may infer -- or that you may assume -- presume that that record would have been adverse to plaintiffs -- plaintiff if it had been produced. The other is that you may infer that it would have been adverse.

But we believe that, you know, quite frankly, I'm astounded that plaintiff discloses this record for the first time, you know, some 11 years after the incident. It was never given to our risk management department when they were handling this. Of course, it was a gap of several years before the lawsuit was filed. But even after discovery, we -- we haven't been given this. We have no idea what's on it.

I think that it's -- it's the -- the exact type of thing that is contemplated by -- by the rules that say that you -- you have to produce evidence.

THE COURT: Mr. Kurth?

MR. KURTH: Judge, well, first, I would say that I wasn't aware of it. And when Mr. Payo said in his deposition he wrote something down, we've been searching through. And I did locate it. So I located this. I have it. It's not really a -- it's not a big deal. I mean, I can produce it. It's past the discovery time. But there's -- there's nothing there. And --

THE COURT: So the --

MR. KURTH: -- I'm happy to show it to him, and I would, you know, object to any, you know, the instructions or

anything else about it.

So we didn't know it, we didn't locate it or it got bypassed because it was something that looked very insignificant.

THE COURT: Here's the -- the question that the Court has in -- in response, Mr. Kurth, to -- to what you just stated. Both sides agree it wasn't produced in discovery. Apparently, plaintiff or -- or his counsel had it. So the -- the question -- first question, at least, I guess, is why wasn't it produced?

MR. KURTH: I have to look at the request for production, but it's not really a journal or anything like that. So whenever the documents were went through, it just wasn't -- wasn't noticed.

THE COURT: Counsel for the school district has characterized it in a certain way. Court obviously hasn't seen it. Court understands that what the school district's saying it is is a record made by plaintiff somewhat at least contemporaneously with the accident at least several years ago from -- from today.

Mr. Kurth, how would you characterize it?

MR. KURTH: Well, you know, I would almost -- I believe it actually could almost be characterized as work product, attorney work product. Because I believe what happened, from looking at it, is when I talked to them, I

probably said, You need to, you know, write down what happened and who was there and what was going on and -- and everything else. And this is what he did, is he wrote that down, from looking at it. I mean, it's a one-page document. It is written on the back of a Wolfgang Puck menu.

THE COURT: Is that in any privilege log?

MR. O'BRIEN: There is no privilege log, Your Honor.

MR. KURTH: No.

THE COURT: It sounds to the Court, at least right now, that it is a document that would be relevant. It doesn't seem like either party says it would be irrelevant. And it certainly sounds like if it is plaintiff recording, you know, "facts," it certainly would be relevant. You know, that type of thing, you know, normally could be used to refresh recollection or something like that, or -- or even possibly be admitted into evidence. So it seems to the Court that it is relevant.

Even -- even -- not even going into any document requests, which the Court can do later on, but -- but won't right now, given the time, from everything that's been stated so far, it sounds like a record that should have been voluntarily produced at the very least, under Rule 16.1. And the parties -- the initial disclosure and supplemental disclosure obligations. Fact that it wasn't is troubling to the Court.

Having said that, you know, it doesn't seem to the Court, at least right now, that there was any mal intent to -- to withhold it. However, the record, I think, needs to be clarified. What -- what I'm inclined to do is reserve a -- a ruling in terms of what instruction to give. As counsel for the school district pointed out, the instruction to give depends on, you know, basically, the -- the facts that -- that come in. And, you know, we -- we haven't gotten any testimony -- well, I guess there's a deposition testimony, which the Court doesn't have right in front of it. But so reserve ruling as to what instruction to give. But the school district I think is -- is welcome to establish the record that it deems appropriate to obtain one of the two instructions.

The Court is also inclined to state that the document, because it was not produced in discovery and -- and, you know, if it were work product, you know, it should have been listed in a privilege log. Courts can't tell if it was work product or not. But if it were, it would have been -- should have been in a privilege log, and it wasn't.

Court's inclined to rule that -- that the document cannot be used by -- by plaintiff in any manner, whether to try and admit into evidence or to try and refresh recollection, because it was not produced in discovery.

So, Mr. O'Brien, any response?

MR. O'BRIEN: Our concern is that whatever caused it

not to be produced up until January 22nd, on January 22nd, at the time of the deposition, he knew we didn't have it. His client said it exists. It's contemporaneous record made within a couple of days of the accident, within a few days of the accident, and it still wasn't produced. I mean, this is trial by ambush.

If it comes in, if he's -- we have the -- I -- I'm -- I'm going to request the right to inform the jury that plaintiff has contemporaneous record that he has kept from us. And that they can take that into account when they're viewing the plaintiff's credibility in this case. I think that's only fair.

THE COURT: Mr. Kurth?

MR. KURTH: I think it would be unfairly prejudicial and -- for the jury to be instructed on that or for a question to be asked about it in voir dire, let alone during the case.

Judge, we have the -- the record. It's past the discovery time, we located it. There's nothing to it. I mean, we can copy it, the school district can look at it. They can admit it if they want, they can ask him questions about it.

THE COURT: But here --

MR. KURTH: It's not like --

THE COURT: -- here's the --

MR. KURTH: -- something that was --

THE COURT: Here's --

MR. KURTH: -- that was --

THE COURT: Hold on counsel. Here's the issue.

MR. KURTH: Uh-huh.

THE COURT: Your -- your client made it. At the very least, said in his deposition, apparently, that he had it within the discovery period. And yet despite that, it wasn't produced. So it -- it's too late to come in and say we can copy it, we can disclose it, you know. So continue, but keep that in mind.

MR. KURTH: I'm not -- the plaintiff wasn't going to present it for any evidence. It does nothing to enhance or to damage his case, in my opinion. Person that was handling the file for me, which I had requested a continuance a couple of times, to continue this trial in the first place because my main legal assistant for, I don't know, 14 years, went on her emergency maternity leave about 10 weeks early. And she was the one that was mostly in charge of this file.

The -- we located it -- I located the document. It was after the discovery time. You know, we have it to show to the school district. They can use it if they want. It's not like some evidence that was there that was destroyed or -- or being withheld that's going to damage the plaintiff in any way.

So to instruct the jury or have them ask questions

that would assume that this document is damaging just because it wasn't produced within the discovery time period would be unfairly prejudicial.

MR. O'BRIEN: Your Honor, it --

MR. KURTH: And would taint --

THE COURT: Hold on. Hold on.

MR. KURTH: -- the entire case.

THE COURT: Are you done?

MR. KURTH: Yes, Judge.

THE COURT: Okay. Go ahead.

MR. KURTH: Sorry.

MR. O'BRIEN: Any prejudices that that might cause is caused by plaintiff's failure to produce the document. It's very self-serving to say, Oh, well, this -- I -- I don't think this is important, so I didn't -- I -- I'm not going to produce it. You know. That's -- that's not how it works. We get to look at everything, the important and the unimportant. We get to make our decisions on how we're going to present a trial based on the evidence.

And -- and he's got this and he's -- to this day we don't have it. I mean, it's not even like we got it a couple of days ago and at least had a chance to review it. The trial's about to start. The prejudice that he complains about is prejudice that he's created himself.

THE COURT: Yeah, the --

MR. KURTH: There -- there is -- the school district was going to object no matter what. It was past the discovery time period, they can stand here and act like they're riding in on some white horse, but they're not. And they haven't -- and they haven't from the beginning of this case in even how they handled the investigation.

THE COURT: Well, let's -- we're -- we're focused on -- on one particular document here. Court wants trial briefs from both sides regarding the document. The sooner you get those to the Court, the better. Definitely before we give the jury instructions. Court is concerned, obviously, if that hasn't come across, you know, again, documents relevant was not produced in discovery. The reasons given as to why it wasn't produced do not seem adequate to the Court at this time.

Court will reserve the right to offer one of the proposed instructions subject to the briefs and the evidence that comes in at trial. However, the Court will order right now that plaintiff is not to use or refer to the document, whether it's to try and get it admitted into evidence or refresh recollection. By not producing the document, plaintiff put himself in that position.

The school district, however, is welcome to use it however it deems fit and whether that's no use at all, whether it's ask plaintiff about it, whether it's to use it for

impeachment, however the school district deems fit, and that can include not refer to it at all.

The briefs, the Court, again, wants to flesh out the legal ramifications, which may include a very specific type of instruction to the effect that plaintiff created a document, did not produce it in discovery, and therefore you, the jury, are entitled to infer this or that. So it doesn't necessarily even need to be referred to during trial. It may be subject to a -- a very specific instruction.

MR. O'BRIEN: Your Honor, with respect to not referring to it in trial, we can ask him, Did you create a record, you've never given us a copy; isn't that correct?

THE COURT: Yeah. You're --

MR. O'BRIEN: We can just ask that much?

THE COURT: You are definitely -- as I said, you're --

MR. O'BRIEN: So --

THE COURT: The school district is welcome to ask about it, to use it any way you -- you deem fit. So you can certainly ask plaintiff about it, whether it exists, you know, however. But, you know, you don't even necessarily need to give it to him. It depends -- depends on how you want to handle it.

Mr. Kurth?

MR. KURTH: Judge, if they're allowed to ask about

it, then it should be able to be produced. Because them asking about it infers that they don't have access to it.

THE COURT: Well, hold on.

MR. KURTH: And they're having -- going to have access to it right now.

THE COURT: Hold on. They -- right --

MR. O'BRIEN: Well --

THE COURT: That's the problem.

MR. KURTH: And it's a --

THE COURT: No, no, no, no. Let's --

MR. KURTH: Judge, it's a one --

THE COURT: Let's -- let's not argue back and forth.

MR. KURTH: That's --

THE COURT: It wasn't produced during discovery, and there's no reason why it wasn't produced. That's the problem.

MR. KURTH: Even though it wasn't produced during the discovery time period, it's still here. They're -- they're going to argue that it's something that wasn't produced, that he's hiding something. Which isn't true. He's not hiding anything. It wasn't produced during that time period. We have it.

THE COURT: Court's made its ruling.

MR. O'BRIEN: Thank you, Your Honor.

With respect to the -- the question to the jury, though, No. 16, you want that stricken?

THE COURT: Yes. Clark County School District's proposed voir dire questions, 16 is not permitted to be asked on -- on voir dire.

Another issue that was raised is the medical expenses incurred by the parents. Unfortunately, as you both are aware, the judge sitting before you does not have the benefit of many of the briefs that have been previously filed. What -- what I'm inclined to do right now is -- is allow those into evidence. It looks like probably some are already admitted. And the Court welcomes briefs, however, on that issues, as well in understanding that I know you have briefed that at least somewhat, but the Court definitely would appreciate having the benefit of specific briefs on that issue, if you're so inclined. You definitely do not have to give those, but the Court would welcome them.

On the damages cap, it appears that the maximum allowable recovery is either 50,000 or 100,000. That appears to be under the statute, says, "An award for damages in an action sounding in tort," etcetera, etcetera. The Court takes that to mean an action encompasses the -- whatever claims are asserted in the action, the -- but the -- the total amount of damages exclusive of interest, as the statute states, is either the 50 or the $100,000, regardless of the number of claims asserted in that particular action.

The Court notes that the prior judge sitting on the

case did issue an order regarding defendant's motion to strike plaintiff's damage calculation or in the alternative motion in limine. The Court will take that order and do its best to ensure that that order's complied with, and request that the parties do so, as well.

The issue as to whether it's capped at 50,000 or 100,000 I don't think is an issue necessarily that we need to deal with right now. Because I think the way it works, and Court welcomes input from counsel, that the jury determines whatever damages, if any, they want to award. And then postverdict, the Court makes sure that the damages award complies with the statute.

Mr. O'Brien, because this is your issue again, do you have anything further to add?

MR. O'BRIEN: You're correct, I -- I agree with you, not you're correct -- with you to the extent that the jury's allowed to enter a -- an award. And then the Court is the one that cuts it down to the cap. But there -- in our -- in our mind there's no question that the cap is $50,000. The accident happened on May 12th, 2004. The revised -- the amendatory -- the reviser's notes state statutes of Nevada say that -- that part of the statute or part of the bill that wasn't written into the statute, but it's still part of the law that was passed, states that Section 3.3 of this acts applies to a cause of action that accrues on or after October

1st, 2007, but before October 1st, 2004, and that was the provision that raised it from 50,000 to 75 -- $75,000.

This occurred, of course, well before October 1st, 2004, and the cause of action accrued when the accident happened and the injuries were incurred. There -- there really is little question to that -- the cap that was in effect at the time applies.

Any other ruling would, in fact, encourage people to delay, especially minors are particularly available, is they delay when they know that the statute's about to change to -- to try to get more money. And that's not what the purpose of the statute is.

In the case that I cited, Las Vegas Metropolitan Police Department vs. Yeghiazarian, which was a 2011 advance opinion, it specifically states -- the Court specific state the -- that the version of NRS 41.035(1) that was effect at the time of the accident governs an award against a governmental entity. It's whether the accident happens, when the injuries occur.

THE COURT: Say that citation again.

MR. O'BRIEN: Las Vegas Metropolitan Police Department vs. Y-E-G-H-I-A-Z-A-R-I-A-N. That's Yeghiazarian or something like that. 129 Nev. Advanced Opinion 81, 312 P.3d, 502 at 519.

THE COURT: Hold on, the Court can't write that

fast. 129 Nev. Advanced Opinion, page --

MR. O'BRIEN: 81.

THE COURT: And then?

MR. O'BRIEN: 312 P.3d, 503 at 509. That's at page 9 of our trial brief, Your Honor.

THE COURT: Okay. Mr. Kurth?

MR. KURTH: Judge, I haven't -- I haven't reviewed that case yet. I just saw that case.

THE COURT: And -- and the Court hasn't, either. What -- what the Court's inclined to do, which you're welcome to -- to still respond, Mr. Kurth, is if either party wants to submit a specific brief, although the Court notes that -- that both sides in their trial briefs did discuss that particular issue and I believe even provided citations. The Court just has not had time to review those.

So what I'm inclined to do, again, is not rule on whether it's 50 or 100 right now, but go back and review the -- the cases cited by both sides. Because I don't think that I need to rule on that right now, because it's not an issue that's before the jury.

Having said that, Mr. Kurth, welcome any input or argument from you on the issue.

MR. KURTH: I will, Judge. And I will take a look at that case. I mean, my research has not found anything that was dispositive on the subject. And when I read the statute

and when I went through and looked at the legislative history which I cited, it's not deposit -- dispositive, and could have easily been taken care of by the legislature, who didn't do it.

Concerning the Court's other ruling about whether or not it's, you know, the cap is per claim, I don't believe that Richardson Construction says that. I mean, those -- these other cases that were cited by the school district are looking at whether or not you can sue various governmental entities that were involved and get, you know, the cap for each -- for at least one cause of action against each governmental entity that was involved. If you have three governmental entities that were negligent in the same, you know, complaint, the same -- regarding the same claim for relief for cause of action, the event or occurrence, then I think it says no, you can only get it against one.

But I believe the law is clear that, if you can prove negligence, if you can prove negligent supervision, those are two different -- two different causes of action, claims for relief, and the cap would apply to each one separately. That's our position in the case. So if the cap's 100,000, that we would be limited to 200,000 in this -- in this matter.

I wish we had a definitive decision on everything, because I thought if we did, it could have helped. I always

wondered if the school district --

THE COURT: If we did, none of us would be here.

MR. KURTH: Well, always wondered if the school district thought that this was only limited to 50,000 only, why they never filed anything to throw us into the -- and have that decision determined early on. It would have pushed us into an arbitration and a short trial situation.

THE COURT: Yeah, the Court's not concerned with that right now. We're -- we're here today --

MR. KURTH: Okay.

THE COURT: -- again, on -- on that issue, both sides are -- are welcome, do not have to, but are welcome to file a -- a trial brief directly on -- on that issue. The Court will reserve its ruling. What I'm inclined to do is probably have another discussion or argument with -- with both sides, you know, after the verdict comes back, as to that issue and then after that rule -- rule on -- on that.

But we are almost to -- well, not almost, but it's past 11:30 right now. What the Court would like to do is go off the record real quick and ask the marshal a question.

(Off the record at 11:33 a.m., until 11:35 a.m.)

(Outside the presence of the prospective jury.)

THE COURT: Mr. Recorder, are we ready?

THE COURT RECORDER: Yes.

THE COURT: Okay. Thank you.

Counsel, given the time of 11:35 right now, what the Court is going to do is we'll bring the jury back -- well, not back, actually, we'll bring them in to start up with them at 1:00 p.m. The Court still has some -- some issues to discuss with both of you. But meanwhile, we're going to alert jury services that the prospective jurors can go to lunch.

So Court appreciates both counsels presumably agreeing to that. Any issues with that?

MR. O'BRIEN: No, Your Honor.

MR. KURTH: No, Judge.

THE COURT: Thank you both. An issue the Court wanted to make both attorneys aware of, given the -- this courtroom's configuration, we do sidebar right in the back here to my left. The problem with that is it's not recorded. And so if -- if either side determines or -- or wants the sidebar on the record, which is fine and understandable by the Court, I definitely understand the need, you know, to put things on the record, but if that is -- if that occurs, what we'll have to do is either -- and -- and I'll leave it to the attorneys how you want to do it.

We will either need to re-raise and discuss the issue on the record during a break when the jury's out of the room, or if it is pressing enough that you want it handled right then and there on the record, what we can do is excuse the jury to take a break, and then put it on record.

Again, Court will leave that up to counsel, and it will probably depend on -- on the circumstances of what the issue being discussed is. But wanted to make -- make you both aware that when we go to sidebar back there, it's -- it's not being recorded. Understood?

MR. KURTH: Yes, Judge.

THE COURT: Okay.

MR. O'BRIEN: Yes, Your Honor.

THE COURT: You know, the accommodations aren't always perfect. But wanted to make you aware of that.

Oh, as to the alternates, what we'll -- we'll plan on doing is seating 20 in the box, you know, and end up with 10; with eight and the two alternates. It -- it seems, as far as peremptories go, it seems easier to give both sides just -- just the five, which would be the four, plus the one for the -- the alternates, but to do just the five as to any of the -- any of the jurors, including the alternates, rather than reserve the -- the four, then the one.

Having said that, Court welcomes counsels' thoughts on that.

MR. O'BRIEN: It works well for us, Your Honor.

MR. KURTH: We're good with that, Judge.

THE COURT: Okay. The -- the Court appreciates both counsel. So -- so that's how we'll proceed, rather than -- than the four and the one reserved for the alternates, we'll

just do the -- the five.

MR. O'BRIEN: Your Honor, if I may, how do you handle challenges for cause? Do you do that in front of the whole panel?

THE COURT: You know, this is my first trial, if you didn't know that already.

MR. KURTH: I would say.

THE COURT: And so what -- what I was thinking is we would go back to the "sidebar" and you just give me them back there. But if you prefer a different method, you know, I -- I've never been in this position for a trial, so I certainly welcome your thoughts.

MR. O'BRIEN: Challenges for cause are usually made in front of the panel, because it breaks up -- if we go back there, discuss it, then come out and they're excluded, they're going to know we excluded them, anyway. So rather -- you know, if we want to keep this thing moving, my recommendation would be just do it in front of the panel.

MR. KURTH: I disagree with that one. But -- I think that it can prejudice the panel or other members. So I think the way to do it would be to just to submit it on the paper -- well, we have to go back and argue it, if we have an argument, obviously. So -- but I don't think -- you know, and I think you -- you wait a little bit and then you, you know, excuse a couple of them. You don't just excuse one, somebody

answers a question, we run up and say, Okay, for cause, Okay, you leave, you're gone.

THE COURT: I think there might be a -- I think you're kind of talking about the same -- same thing.

MR. O'BRIEN: Ordinarily, Your Honor, when someone -- you know, if you -- you question someone and you have cause, discuss that, move to strike, strike them for cause right then. They leave, and the next ones move up. And that way you've always got a jury of people who are, subject to peremptories, you always have a -- the first eight or 10 people are the ones that are -- are going to be the ones you're choosing from.

If you're doing it the other way, you're going to be reinstructing jurors every time you kick a couple off.

MR. KURTH: I just don't like the idea of asking one person -- if one person answers something that, I mean, obviously, they should be challenged for cause, and maybe somebody else wants to get off the panel and they do the same thing.

THE CLERK: We call it parroting.

MR. KURTH: Yeah. I don't want that to happen. So.

MR. O'BRIEN: I will do it however you want, Your Honor. I -- those were just my thoughts.

MR. KURTH: The easiest way is the best way, but that's my concern.

THE COURT: Madam Clerk, how do we usually do it?

THE CLERK: I think a -- a good way to do it is to say, Your Honor, I'll make a -- I need to make a motion on this person, then we know that that means you're going to be challenging them for cause. But that doesn't include the rest of the jury again on that, what we're going to be excusing them for. But it also saves both of you time from not wasting time asking them any further questions, because they're going to challenge you. We stop asking them questions anymore.

MR. KURTH: Sure.

THE CLERK: That makes it a little easier for others, got a doctor's excuse. But parroting is usually regarding other activities that they've got planned and it usually starts happening, and then one or two people fall in line, they'll all start having things that they had planned. And then so it's done kind of more secretly to avoid that.

THE COURT: Any issues with that method?

MR. O'BRIEN: As you said, Your Honor, I'll do it any way that the Court prefers.

THE COURT: And regarding moving them up, Madam Clerk, I think we had talked about they would stay in their -- yeah.

THE CLERK: That's the other thing. We're not going to play jumping chairs. What'll be -- when we excuse someone for cause, that person that's next in line will be called to

fill that seat.

THE COURT: To that particular seat, if that makes sense.

MR. KURTH: Oh, they're not going to just move?

THE CLERK: They're not all going to shift.

THE COURT: Yeah, that -- that way we don't have to --

MR. KURTH: Oh.

THE COURT: -- you know --

MR. KURTH: Right.

THE COURT: -- change the names on the -- on the --

THE CLERK: [Indiscernible.]

THE COURT: Yeah.

THE CLERK: The next name. Otherwise you're going to be drawing lines through everybody and moving them all -- your list is going to be --

MR. KURTH: I hear you. Okay.

THE CLERK: Got it?

MR. KURTH: Sure.

THE COURT: Again, any questions or -- or issues that -- that come up, the Court welcomes counsels' input.

MR. O'BRIEN: Thank you, Your Honor.

THE COURT: No, thank -- thank you both. Let me look through my notes, see if there was anything else.

While I'm looking, you both are welcome to come up

with any other questions you might --

MR. O'BRIEN: Well, I have a motion to make, too, Your Honor, before the jury is called.

THE COURT: Sure.

MR. O'BRIEN: When -- at your convenience.

THE COURT: Okay. Yeah. Let's go through this and then deal with that when we're done, but before we break for lunch ourselves.

MR. O'BRIEN: Certainly. Thank you, Your Honor.

THE COURT: Madam Clerk, did we decide which juror's seats will be the alternates?

THE CLERK: No. And that's up to counsel. Counsels have a preference on alternates and how we select them, or do we want to just make the last two? It seems to work, especially with the configuration, they can hear. The closer they are to the witnesses, the better they hear.

THE COURT: And we'll be -- we'll be seating five in the back row and five in the front row.

THE CLERK: And not using --

THE COURT: So they could see you guys better, rather than those four at the end. For the final jury, when we seat them to go through voir dire, we'll just leave the last two empty. But we should definitely, before we begin, pick which two seats will be the alternates.

THE CLERK: Counsel have a preference?

MR. O'BRIEN: Well, once -- once they're seated, I don't care where they sit. But usually the process, you pick the whole 10, and then the Court usually -- usually draws lots to figure out which two are going to be the alternates. So that -- I mean, that kind of takes it out of our hands and the Court assigns to where they sit. I don't care.

THE COURT: Mr. Kurth?

MR. KURTH: I'm used to just the last two being the alternates. So.

THE CLERK: That's the way I'm used to it, too.

THE COURT: Uh-huh. Let's --

MR. O'BRIEN: I don't care. Whatever you think, Judge.

THE COURT: Let's go ahead and do the last two. It seems easier.

THE CLERK: Okay.

THE COURT: And that way you both know ahead of time.

THE CLERK: And they'll be seated [indiscernible].

THE COURT: Yeah. I don't know if either side plans to show anything -- any documents or evidence during your open -- opening statements. The exhibits that are stipulated into evidence, you're welcome to show if you want. Otherwise, you know, any -- anything that's not already admitted into evidence will not be shown during opening statement.

Most of these I assume you both already know, such as don't make any Golden Rule arguments in your voir dire, don't make speeches or argument, those types of things which the Court assumes both attorneys already know.

Any questions before we get to the -- the motion that the school district wants to make?

MR. KURTH: No. I have a couple other issues, but we can wait till they make their motion.

MR. O'BRIEN: Oh, I get a --

THE COURT: You're -- let's handle -- you know, what -- what the Court would want to do right now is handle any housekeeping type of stuff prior to the -- the motion.

MR. O'BRIEN: Who brings the water for the jury? That's usually one of the biggest contentions.

THE COURT: Yeah, I think --

MR. KURTH: I'll bring it if I can put my name on the...

THE COURT: I think from what my JEA told me --

MR. KURTH: Just kidding.

THE COURT: -- actually, that's a fair question. This morning, you're responsible for water today, Mr. Kurth.

MR. KURTH: Okay.

THE COURT: She said -- I thought she had said she talked to somebody. Or maybe she told me to tell you. During lunch if you could go out and grab some water or call

somebody. You're welcome to call right now if that would help.

MR. O'BRIEN: We did bring -- the district did bring some journals and pens for the jury.

THE COURT: And my apologies, Mr. Kurth, for the late notice on that.

MR. O'BRIEN: And also, I didn't even ask you, do -- you allow the jury to have -- take notes, don't you?

THE COURT: Yes.

THE CLERK: Are we going to use jury notebooks for the jury?

THE COURT: Just the -- the notepads and pens, right?

THE CLERK: Just notepads, not juror books.

MR. KURTH: I have prepared them already.

THE CLERK: You have?

MR. KURTH: They're at my office. So, I mean, I prepared them with the exhibits that would be --

THE COURT: Admitted?

MR. KURTH: -- admitted that were agreed to. And then when other ones are admitted, if they're admitted, then we can --

THE COURT: Oh, I mean, I don't have a problem with that.

Mr. O'Brien?

MR. O'BRIEN: It just can serve as a distraction, when you start the trial, they start looking through this stuff and not paying attention to the witnesses. But other than that, I have no strong feelings.

THE COURT: Yeah, that's -- Court shares that concern. It can, you know, distract. However --

MR. O'BRIEN: Your Honor, may I make a suggestion?

THE COURT: Sure.

MR. O'BRIEN: Give them a notebook, and then as the exhibits -- or with the admitted ones, then as they're admitted -- that's what you just said. As they're admitted, add them to the books.

THE COURT: Yeah, I think that's -- that's what you said, right?

MR. KURTH: Yes, Judge.

THE COURT: Yeah. Well --

MR. KURTH: It -- it's --

THE COURT: -- I have no -- no problem with that. And we can certainly do that.

MR. KURTH: I mean, it's up to the Court. I think that they, you know, at least in the, you know, when you do it in a short trial, they seem to like it. So they seem to like to have it.

THE COURT: Yeah.

MR. KURTH: There's no real major demonstrative, you

know, this is kind of not your, for lack of better --

THE COURT: Three weeks is a long trial.

MR. KURTH: -- word, maybe, well, I think we should say -- you know, it's just not a flamboyant type trial, we don't have a lot of video or pictures.

THE COURT: No.

MR. KURTH: Nothing, you know. It's pretty -- fairly simple.

THE COURT: Yeah. So let's go ahead and if you have the notebooks, Mr. Kurth, you're welcome to -- to use them. Just make sure, you know, that the -- let Mr. O'Brien verify, so to speak. Court definitely is interested to see, you know, what the jury does with it during the trial. That may be beneficial to me, actually, to see how that goes. So they are welcome to be used as we've discussed. Don't have to use them, but welcome to use them if you'd like.

What next?

MR. KURTH: Well, I have two -- you know, the question is whether it's -- it's the time to present it or it's going to be the time to present it when the questions are asked.

THE COURT: Could certainly ask right now and --

MR. KURTH: And you can let me know. Well, Judge, you know, we're talking about this, you know, your ruling, I'm still a little confused on this -- this menu ruling. But if

questions are asked about it by Mr. O'Brien, I would suppose that I can ask about it, you know, in response to whatever questions were asked. Not present it, but ask a question about it.

THE COURT: In redirect?

MR. KURTH: Yes.

MR. O'BRIEN: Your Honor, that would be inappropriate, because that would invoke the best evidence rule, and it can't be introduced, so it would all be hearsay about another document that the jury is never going to see. That would -- that would -- that would completely eviscerate your prior ruling.

MR. KURTH: And I would ask the Court, and I'd like to put on the record, that I have it. You know, it's being provided after the discovery cutoff, I understand. And I understand we're supposed to brief that. But I'm willing to produce it. I'm not asking to admit it in evidence. But it's here for the school district to admit in evidence or ask questions about or look at or whatever they want to do with it. So they're going to have complete access to it. And so if they're able to ask questions about it, I sure should be able to at least redirect about it.

It's just -- the inference that it's going to give, I think, is -- it's unfairly prejudicial. I mean, it's going to cause -- it could -- it could be detrimental to the case,

because they're going to infer something, like if we had some kind of a, you know, bad air conditioning unit and we went and, you know, hid it in some storage yard and blew it up or something or, you know, so they could never inspect it. That -- that's not the case.

You know, we located the document, we have the document. So they should be entitled to review it. They could be entitled to say, Well, it wasn't produced in time or do you know it wasn't -- or whatever they want to do about that. But --

THE COURT: Well, let's stick with --

MR. KURTH: Well, anyways, Judge.

THE COURT: -- the Court appreciates the question --

MR. KURTH: I'm going back.

THE COURT: -- about redirect. Not going to change the ruling in -- in terms of direct and admitting evidence by the plaintiff. The question about asking on -- on redirect on one hand is, you know, general rule is yeah, if it's brought up and asked about on cross, then it's fair game for redirect. However, this isn't your -- your general type of rule issue.

Let's do this. If it is raised on cross-examination and Mr. Kurth, you believe you'd like to ask questions on redirect regarding it, let's do a sidebar first. And that may be one that you would want to put on the record. But if you do, let me know.

Next?

MR. KURTH: Judge, in -- in looking at that and the decision by the Court, you know, they've put in their -- I just got their trial brief. And I was -- I'm trying to look at it. And I see that they're planning on, let's see, asking questions of the principal or of the PE teacher. And -- and they're -- they're claiming that, well, you know, we could have deposed them if we'd wanted or we could have asked them this or that.

But we sent them discovery requests. And we asked for information about curriculum. We asked for information about whatever they had. You know, this -- this is about the student being injured and what the rules were in place at the time and what was going on. And now it looks like they're going to proffer testimony about going up to the state of Nevada or getting curriculum approved or -- we've never heard anything about that. There's been no document produced about it, so any -- anything they're going to try to testify to would really be a hearsay evidence.

I mean, the only thing that we did hear is when we took their PMK, we noticed the PMK. And -- and we're planning on calling her as a witness, Eileen Wheelan. And she said -- and -- and they said in their answers to interrogatories that, Well, okay, curriculum didn't provide it, or we didn't have the funding for it, and there's -- there's nothing that said

we needed to have, you know, safety equipment.

So -- but now they're intending on presenting evidence or testimony about some kind of process. And, you know, to get the game approved and everything else, when they haven't provided us any information about that prior.

And, you know, I would object to admission of any evidence or testimony concerning that from them.

THE COURT: This sounds kind of like a motion.

MR. KURTH: Well, so --

THE COURT: Rather than a -- than a housekeeping type of issue. Because Mr. O'Brien asked for his motion to be heard and I -- I continued that.

MR. KURTH: Right.

THE COURT: Let's -- Mr. Kurth, you're -- once we go through Mr. O'Brien's motion, let's discuss that issue.

Any -- any housekeeping type of matters?

MR. KURTH: I don't think so. We're not really dealing with -- no, I don't think so.

THE COURT: Okay.

MR. O'BRIEN: Your Honor, I have one more --

THE COURT: Sure.

MR. O'BRIEN: -- that I thought of while we were standing here.

THE COURT: Yeah.

MR. O'BRIEN: When I went through the medical and

billing records that were provided by plaintiffs, there's references to insurance all over the place. I didn't actually look for Social Security Numbers, but it -- I know back in 2004 it was fairly common to have those, too.

I think that the records before the -- any of the medical records or the billing records, if they're even given to the jury, but before those are ever produced -- provided, that they need to be scanned and -- and have somebody redact that information.

THE COURT: Fair point. We've already admitted into evidence several of the exhibits. To the extent any of those have a Social Security Number on them, the parties are invited to figure that out and -- and raise that specific document and notify the Court and address the Court with how they would like to handle that. And that would include probably, you know, the issue of giving binders with exhibits to the jurors. Whether you want to go through it and redact anything like that first, we're probably talking about plaintiff's own Social Security Number, telephone number, that type of thing. So the Court will largely leave that to -- to plaintiff to decide how plaintiff wants to handle that. Fair point.

MR. KURTH: We'll go through the records and if we -- look again, and if we see a Social Security Number, we'll have to black it out.

MR. O'BRIEN: And insurance information.

MR. KURTH: I don't know --

THE COURT: Say that again.

MR. O'BRIEN: Is -- and we also discussed insurance information [indiscernible] because that'll certainly raise the issue of whether or not these bills have already been paid by -- by a third -- another -- a collateral source, which can't be produce -- provided to the jury.

THE COURT: As to what's already been admitted, plaintiff is -- is welcome to figure that out. If it's an issue at all with plaintiff, and as well as anything going forward, if it is an issue, Court would invite the parties to address it before it gets admitted.

MR. O'BRIEN: Thank you.

THE COURT: Anymore housekeeping or can we move to the motions?

MR. O'BRIEN: Can't think of any other housekeeping.

THE COURT: Mr. Kurth, anything else?

MR. KURTH: I guess we would invoke the exclusionary rule, Judge, except for I have the plaintiff and the plaintiff's mother. And while he was a minor at the time, this was his mother, who he was living with, and I don't think the school district objects to her being present.

MR. O'BRIEN: No, I have no objection to the mother being present. The other witnesses, though, shouldn't be permitted to go to school on what the other witnesses say.

THE COURT: Court agrees and will enforce the exclusionary rule with the exception of plaintiff's mother. Again, Court appreciates counsel working together on that issue.

Okay, Mr. O'Brien, let's hit your motion.

MR. O'BRIEN: Your Honor, we previously briefed the issue of the inherent risk doctrine. We now, though, have an admission by the plaintiff set forth in the joint pretrial memo and in the plaintiff's pretrial brief that the type of injury in this case was caused by encountering a risk inherent in the sport of field hockey.

Plaintiff's response is yes, but then he goes on to argue that we knew about the risks, and the County didn't appreciate the risks. Who knew about the risk is irrelevant to the inherent risk doctrine. Everybody knows that these injuries can occur. Inherent risk doctrine says that if it's a risk inherent in the activity, then there's no duty to -- to take safeguards to prevent against that injury. That the duty is, in fact, not to act so as to increase the injury.

We cited in our brief several cases that -- that discuss this, Knight vs. Jewett [phonetic], Turner vs. Mandalay Sports Entertainment is a good example. Everybody knew that a foul ball could fly just about anywhere and get hit. And yet they -- they discuss the inherent risk doctrine in that case. And it wasn't an issue of, Gee, they didn't

know that this ball could end up in their -- their area. The -- the issue was did they act reasonably under the circumstances in general? But they couldn't be held liable for that foul ball, because foul balls are something that are inherent in this sport.

In fact, they talked about -- in Turner, they talked about them putting up the protective nets and other things, because, you know, the -- the risk at that point was so great that it would be negligence not to act. But with respect to more remote areas and more remote things, they said no.

And the -- the cases that we've cited, from California, mostly, because they have a very large body of law discussing this issue, they talk about even the -- like throwing a beanball and baseball as an example they use, it's barred by the rules. You're not supposed to do it. Everybody knows that you can seriously hurt somebody if you do it. But when it's done, the Court does not hold the -- the property owners of the -- the people running the -- the activity liable. Because even though it's against the rules, it happens. It's something that is inherent in the activity, and it really can't effectively be eliminated without altering the complete nature of the activity.

In this case, plaintiff now admits that getting hit in the head with a hockey stick is a risk that's inherent in the activity. Under those circumstances, the duty that we

owe, we owe no duty to the plaintiff to provide safety equipment. In -- in the cases that we cited in our -- our trial brief in particular, we talk -- they talk -- the cases talk about that. You have a duty not to increase the risk. You don't have to have a duty to decrease the risks even if there are feasible means to do so.

And -- and that -- that's -- that's the nature of this doctrine, is that -- to encourage people to get out and participate and not to chill the sport or basically have everybody sit in a circle by themselves far enough apart where they can't hurt each other and -- and do nothing so that they can't even risk injury to themselves.

The -- in light of plaintiff's admission that this was an inherent risk, we -- we're going to ask that the Court grant -- readdress our motion for summary judgment and -- and grant judgment in favor of the District at least with respect to the issue of whether we had a duty to provide safety equipment. Because we believe that under the inherent risk doctrine, we clearly did not.

THE COURT: Thank you. Mr. Kurth?

MR. KURTH: Judge, we're talking about, I think, you know, a term of -- a term of art, I guess. What is -- what is inherent risk? Because the school district says, Okay, we did this because it was a -- a low risk. And then they say, No, there's, you know, everybody knows that you can be -- get hurt

doing this, and how else could you not get -- get hurt? I mean, if we don't have -- use hockey sticks to play with in this game, then you're not going to be able to get hurt, that's the only way. Which -- which isn't true.

I think what we have here is a difficulty in determining when we're saying inherent risk, because they're -- they're asking for this now in their motion and they're asking for it in a -- even regardless of that jury instructions, and then you have assumption of risk. And it's -- what do you mean, is it -- the risk inherent? Is somebody going to get hurt? Can somebody get hurt in a sport? Does every sport have an inherent risk of getting hurt in it? If we -- if we use it as, you know, Webster's or a dictionary, I would say yes, you know, there probably isn't a risk in every -- in sport of getting injured somehow.

But if they're saying inherent risk, to me, they were claiming that, yeah, there -- there's no way that this could have been avoided, you know. You're going to get hurt, you could get hurt, you get -- could get hit in the eye with a hockey stick and -- and it doesn't matter, because we don't have any duty, because everybody knows that.

And -- and I think the question for the jury is, an 11-year-old at that time, did he know? Did he appreciate the risk that was involved at that time that he's going to play under the supervision of his class, of his teacher, in a

school where he has to attend, that he's going to get hurt by -- that severely by participating in that game? I mean, it's --

THE COURT: The Court will advise Mr. Kurth that the Court is inclined to rule in his client's favor right now. If you wish to keep going, you're welcome. But school district's welcome to give its rebuttal, if Mr. Kurth is inclined to pass it.

MR. KURTH: I'm inclined to pass, Judge.

MR. O'BRIEN: Thank you, Your Honor. In light of this admission, we intend to argue to the jury that plaintiff has admitted that this is a risk inherent in the activity, and that therefore we owe no duty, because that is the state of the law, that if it's an inherent risk, which plaintiff admits that it is, there's no question of fact to be submitted to the jury.

It doesn't -- the foreseeability is not -- not a factor. Plaintiff, when his deposition was taken, was 21 or 22 years old. He said, under oath, he knew when he was 11 that if you got hit in the face with a hockey stick, he could get seriously hurt. There is no question on -- for -- on plaintiff's foreseeability or -- on foreseeability at all in this case. The question is, is this an inherent risk? Plaintiff admits it is. There's nothing to submit to a jury. There's nothing they can decide on this -- on the issue of

whether we had a duty to provide safety equipment to the students. There -- there's simply nothing left for them to resolve. It's an issue of law, purely.

THE COURT: Court appreciates counsel's arguments. But it's going to deny the motion without prejudice at this time based primarily on the reasons already given in the order denying summary judgment previously.

MR. O'BRIEN: Your Honor, may I ask then, will you be telling the jury that they have -- that the district has a duty to provide safety equipment? Because it -- I mean, it's purely an issue of law. We didn't give them any safety equipment.

THE COURT: Well, I think it's to the jury to -- to determine whether the school district exercised reasonable care and whether -- whether reasonable care includes provided safety or -- equipment or not is really question for the jury.

MR. O'BRIEN: And, Your Honor, I don't mean to belabor this --

THE COURT: No, that's --

MR. O'BRIEN: -- I know nobody likes somebody who won't give up. But this is an issue of law. There -- there's nothing for the jury to decide. They can decide we didn't supervise properly, that's fine if -- if they decide that. They can decide we didn't train our people, whatever the other theories are. But there's nothing left to be decided except

for the Court to state we either did or did not have a duty to provide safety equipment. That's different from the general negligence supervision. This is strictly with respect to the issue of whether we had a duty to provide safety equipment for the students.

THE COURT: Court's still going to deny the motion. But appreciates counsel's argument.

MR. O'BRIEN: Okay. And may I ask for guidance, then. What can we argue to the jury with respect to duty?

THE COURT: Sure. Whether the -- the -- the duty under Nevada law, as the Court understands it is, is whether reasonable care was exercised by Clark County School District in providing or not providing safety equipment. The duty is reasonable care. I think the Supreme Court's clarified its -- I don't want to say intent, but it's clarified that -- that the law, whether it's, you know, slip and fall, an open and obvious, you know, whatever -- whatever the negligence claim is based on or the affirmative defenses, boils down to -- to whether reasonable care was exercised.

And Court's inclined to -- to give a reasonable care instruction and the jury can determine whether, you know, reasonable care was exercised and whether, you know, safety equipment needed to be -- needed to be provided to meet that standard of care.

MR. O'BRIEN: I understand, Your Honor. Thank you.

THE COURT: Okay. Did you have another motion?

MR. O'BRIEN: No, that was it, Your Honor.

THE COURT: Thank you. Mr. Kurth?

MR. KURTH: Judge, my -- my motion deals with limiting the testimony of the plaintiff's -- of the defendant's, excuse me, witnesses concerning hearsay testimony about going to the State and whatever testifying or whatever they're going to say they did, and about this curriculum that they helped get, and rules, other than the rules that the school district provided to the plaintiff in the discovery.

I mean, it's -- it's true, and I don't know if it's splitting hairs right here, it probably is a little bit, because in Ms. Wheelan's deposition, and in interrogatory responses by the school district, they basically state there was no funding to provide safety equipment, and the curriculum didn't require it. But there's no providing of any of this curriculum that they talk about. Even though it's been requested.

But now, from looking at the trial brief, they appear to be wanting to bring in the principal of the school at the time and the PE teacher to testify about how they got this curriculum going and why and what, and that it -- something about approval with the State, which -- which information was never provided prior.

Yes, we didn't take their depositions. But we did

propound written discovery and requested, you know, any information about these rules. And even our request for production of documents, their response is, Well, we've already given you everything we have. We've given you everything we have in this -- in this file. We don't have anything else.

But now it looks like they want to come in and testify to some other things that they're saying existed that we don't have and have never been given or provided.

Now, I do, and, you know, where I'm saying splitting hairs, is I do plan on asking Ms. Wheelan, you know, and verifying her responses before that, you know, there was no funding and she didn't see any equipment for it. But she never produced any documents supporting that.

I'm not saying they're going to produce testimony saying that -- I mean, they're not going to produce anything, I don't think -- they -- they haven't, that's going to say it was required. But they want to come in and testify that it wasn't to some extraneous evidence or some extraneous documents or whatever process they think they went through, when they haven't provided anything about it for us to be able to review. And we're not aware of any process, we were never told of any -- any process.

THE COURT: So -- so the Court understands, are what you saying is that you propounded an interrogatory or multiple

interrogatories or document request or multiple document requests that would have addressed this issue, and in response the school district did not disclose what they are disclosing now in their trial brief?

MR. KURTH: Correct. And it's not a document. It's just that they're apparently going to have testimony concerning --

THE COURT: Here's what the Court will need from you --

MR. KURTH: Okay.

THE COURT: -- when you give your rebuttal argument. Specific interrogatory or document requests and the response that you believe is deficient.

Mr. O'Brien?

MR. O'BRIEN: Thank you, Your Honor. I just went through the interrogatories and our answers. There's no interrogatory that in any way asks questions about the process by which field hockey was adopted as a sport at this school. There's nothing that remotely suggests that that's an -- an issue in this case. And I -- I have to take umbrance at the argument that plaintiff, who deliberately neglects to take -- to conduct discovery, is -- is entitled to come in and express concern that we may not have told him everything.

He did -- he -- we set the deposition -- he set the deposition of Todd Peterson, the teacher, and didn't take it.

He set the deposition of Wally Morton on more than one occasion. I actually took her to his office for the purpose of her deposition. The deposition didn't go forward.

We offered to allow depositions to be taken outside of the course of discovery. He asked for and obtained a continuance to take the depositions of Wally Morton and Todd Peterson, and he --

THE COURT: So are we talking about --

MR. O'BRIEN: We're talking about the teacher --

THE COURT: -- three different individuals?

MR. O'BRIEN: No, the teacher and the first-aid safety assistant. He elected not to take the depositions. He elected not to ask them any questions. And now he's complaining, I don't have any answers.

THE COURT: What's the -- the principal never noticed, I guess, or --

MR. O'BRIEN: Never noticed him.

THE COURT: Okay.

MR. O'BRIEN: Never asked to -- to talk about it. And he's just going to talk about the procedures by which -- a couple of things. They've raised the issue of negligent supervision. Joe Murphy is the principal who -- he was the principal at the time. And he's going to talk about his experience in supervising Mr. Peterson and whether or not there were ever any complaints against him or any allegations

that he wasn't doing his job. That's -- that's pretty normal.

He's also going to talk in general about the process by which a class is added to the curriculum. Because that process existed at the time and he was familiar with it.

Todd Peterson, the teacher, was actually on the curriculum development committee that -- when they adopted field hockey. And he's going to testify about how you -- what you have to go through to get a class, a course added to their curriculum. It's not something the school just does. They have to go to the State. There's several layers of authority and -- and revisions and reviews that they have to go through to get -- get a course approved.

And with respect -- Mr. Murphy will also talk about funding and that he -- plaintiff has raised the issue of class size. Maybe one teacher for 24 kids or whatever it was on a tennis court is not enough supervision. Well, class sizes are governed by the State. We reference that in our brief. Funding is dependent on the number of students you have in your classes. There's no funding. When -- when Mr. Peterson said there was no money and when Mr. Murphy will say there was no money, they're talking strictly about decisions that are made of how much money there is available to spend on things and whether there's any money available, even, to spend on -- on these activities.

Now that, of course, brings up the issue of

discretionary immunity. The decision to -- that is made as to how you can -- how much money you get to spend and what you get to spend it on isn't something that, quite frankly, plaintiff gets to second guess. That's a legislative function, and -- and it's an executive function for which the District is immune. They can't complain that we had a single teacher, when we didn't have enough money to afford a second teacher.

That directly involves the weighing of competing interests. You know, we put one more here in PE, where are we taking it away from? You know, special ed? Science class? ELL? I mean, these are not the sort of decisions that the Court ordinarily allows a party to challenge.

This is -- this is strictly background information. He has information about how the course was adopted. And that's what he's going to say. He'll say, Here's how it was adopted. And he's going to say it was considered low-risk sport, and he's going to say that -- that the decision was made that safety equipment wasn't required based on the way it was played in middle school, with a tennis ball, in a relative confined area on the tennis court.

THE COURT: Because the -- the teacher and the FASA -- is that how you refer to it?

MR. O'BRIEN: Yeah, first-aid safety assistant, FASA.

THE COURT: -- were noticed, presumably they were disclosed as potential witnesses in discovery. The principal, Mr. Murphy, was he disclosed?

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Okay. Anything further before --

MR. O'BRIEN: No, I just -- plaintiff can't refuse to do discovery and then complain he doesn't know what the witness is going to say.

THE COURT: Mr. Kurth?

MR. KURTH: Judge, just looking through -- looking through our interrogatories, on -- see, on No. 2, I mean, we -- I mean, we asked to identify any and all persons who were involved or observed the May 12th, 2004, incident. And later on we said, And we'd like in the description of their involvement or their observation of said incident. So a description of their involvement.

And they list Todd Peterson, and his answer is, "I was there, but honestly do not recall if I actually saw Mr. Payo get hit or only saw that he was hurt after the fact."

Now, I mean, even there, their involvement? Well, they're -- I mean, we know he was the teacher, the PE teacher supervising it. But if he was involved in trying to get this curriculum approved, that was never disclosed to us. Nor the process.

I'm, you know, there's -- in their Interrogatory No.

5, and -- and most of our questions to everything were aimed toward asking, you know, give us something that shows, you know, if Woodbury required students to wear any sort of protective gear or safety equipment, you know, while playing this game. List it.

So we didn't say, I guess, specifically, Give us any document that says -- well, I think we did -- we did ask if -- if it wasn't required, I mean, what do they have?

Their response to No. 5 was, "The curriculum developers did not mandate the use of safety equipment, and there was no money in the budget for such."

THE COURT: That sounds to me like what Mr. O'Brien has said they're going to testify to.

MR. KURTH: Right. But they're going to testify to the process -- they're saying this curriculum, I mean, what was the process? How did they get this curriculum? They've provided -- they've provided no curriculum.

THE COURT: Well, that --

MR. KURTH: They're saying there's some kind of curriculum, but they've never provided this curriculum that must exist, they've never provided it, that they're going to testify to, that we don't have. I mean -- I mean, when we're asking to identify in No. 7 -- Interrog No. 7, "Identify each and every individual who has investigated or prepared any oral or written reports." Well, you know, I think it falls -- I

think it falls under there. And our request for production, of course, we have --

MR. O'BRIEN: There were no requests for production served in this case, Your Honor.

MR. KURTH: Yes, there were.

MR. O'BRIEN: No, there weren't.

THE COURT: Okay.

MR. KURTH: Well --

THE COURT: Here's what the Court's going to do because of, if for no other reason, time constraints. It's 12:30. If a document that is a "curriculum" was never provided, it's never going to come into evidence at trial. Whether a curriculum is an actual document is unclear to the Court at this time. Court welcomes, you know, further -- hesitates to say this at this point, but welcomes further discussion of that issue as we get into the trial, but right now we need to take a break and be back here at 1:00, when the jury's here.

MR. O'BRIEN: May I make one brief response, though?

THE COURT: Very brief.

MR. O'BRIEN: Counsel's talking about interrogatories. And Interrogatory No. 5 he referenced. And the answer to that question was -- the question was whether students were required to wear safety equipment. The response is, "The curriculum developers did not mandate the use of

safety equipment and" --

THE COURT: The Court --

MR. O'BRIEN: There are curriculum developers. The subject --

THE COURT: The Court heard that and --

MR. O'BRIEN: -- was before counsel.

THE COURT: Court heard that and understood. And that's why the Court asked the question that it did when the response was read.

MR. O'BRIEN: Also, just so the record's clear, we were never served with request for production of items.

THE COURT: Okay. Well, we're going to break now.

MR. O'BRIEN: Thank you.

THE COURT: And be back here at 1:00. Thank you.

MR. O'BRIEN: Thank you, Your Honor.

MR. KURTH: Thank you, Your Honor.

(Court recessed at 12:32 p.m., until 1:15 p.m.)

(Outside the presence of the prospective jury.)

THE COURT: Mr. Kurth, is plaintiff so willing?

MR. KURTH: I would not like to have any overtime costs. I would like not to have any overtime, so I would ask that we stop at different intervals so that we don't have that.

THE COURT: Here's the problem. We already have some overtime, given the -- the delay in the start and the

Court trying to accommodate counsel. So we will have some today. Hopefully not any further. Hopefully, we will be starting on time going forward. So with that said, can you agree to today?

MR. KURTH: I'll have to agree to it either way. So...

THE COURT: Thank you. Mr. O'Brien?

MR. O'BRIEN: Defendant agrees, Your Honor.

THE COURT: Thank you. Thank you both.

(Pause in proceedings.)

(Prospective jury panel convened at 1:24 p.m.)

THE CLERK: Your Honor, we're going to call Case A668833, the matter of Kai Payo vs. Clark County School District. We have Robert Kurth here on behalf of the plaintiff, and we have Daniel O'Brien here on behalf of the Clark County School District.

THE COURT: Thank you, Madam Clerk, and thank you Marshal Hawks.

Good afternoon, ladies and gentlemen. Welcome to Department 15 of the Eighth Judicial District Court. My name is Judge Joe Hardy, Jr. You have all been summoned here today to serve as prospective jurors and we appreciate you coming.

The case, as the clerk stated, is titled Makani Kai Payo vs. Clark County School District. Ultimately, 10 of you will be chosen as jurors and alternate jurors to decide this

case.

Some of you might be saying to yourself, 10 jurors? I thought juries were composed of 10 -- 12 persons. You'd be correct if that were a criminal trial. Here in the state of Nevada, a civil case like this is decided by an eight-person jury. And we always choose a couple alternate jurors. In case something should happen to one of you during the trial, we would not have to -- we would not want to start this whole process over unless we reserve two alternate jurors.

The questioning of the jury that we're about to begin is known by the French term called voir dire or voir dire. Depending on where you're from, you pronounce it differently, which, loosely translated, means to speak the truth. It's done under oath.

But before the clerk issues the oath to all of you, I need to know if any -- if any of you sitting here today are either not citizens of the United States or if any of you are convicted felons whose civil rights have not been restored. To be a juror you need to be a citizen and must not be a convicted felon whose rights have not been restored.

Please raise your hand right now if you're either not a citizen or if you are a convicted felon whose rights have not been restored. I see no hands. Thank you.

Madam Clerk, you can administer the oath.

(Prospective jury sworn.)

THE CLERK: Please be seated.

THE COURT: Thank you all. Ladies and gentlemen, the attorneys for the parties in this case have informed us that they expect the trial to last today through perhaps next Tuesday. When our computer system randomly selected you all for jury service today, it has no way of knowing which if you is scheduled for a -- a triple bypass surgery tomorrow or the next day or if you have nonrefundable tickets to Tahiti for this weekend or anything like that, which may preclude you from serving the rest of this week and into early next week.

We need to know. Therefore, if any of you have a reason why you cannot serve your community as a juror in this trial perhaps as late as next Tuesday, if any of you cannot, please -- let's start -- actually, let's start over here. Is there anyone in the back row? If so, raise your hand. Let's -- let's go row by row, though. Back row first.

THE MARSHAL: All right, folks, you just have to speak into that microphone. Remember, your name, last three of your badge number, and then your response, please.

PROSPECTIVE JUROR NO. 083: Ray. I do work for Nellis Air Force Base and Clark County School District [indiscernible].

083, Ray. I do work for Clark County School Districts and Nellis Air Force Base.

THE MARSHAL: Hang on. We're not done with you in

case they have a question for you. So.

THE COURT: Right now we're -- we're trying first to -- to get a time conflict, if you will. But the Court -- we certainly appreciate you saying that -- that you work for the school district. Court is inclined to excuse Mr. Hunsberger.

PROSPECTIVE JUROR NO. 083: Yes, sir.

THE COURT: Thank you very much.

THE CLERK: Could I get Badge 113. Judge, you want a replacement?

MR. KURTH: I'd wait till we go through everybody for this question and then --

THE CLERK: Okay.

THE COURT: Yeah. Let's...

PROSPECTIVE JUROR NO. 086: 086, Stafeeva. I'm a surgeon and I do have a full load of surgeries on Tuesdays.

THE COURT: So let -- let me see if I heard you correctly. You're a surgeon, you have surgery -- or surgeries scheduled for next Tuesday?

PROSPECTIVE JUROR NO. 086: Yes.

THE COURT: Counsel, do we think this trial will go through Tuesday?

MR. O'BRIEN: If today's any measure, it may.

MR. KURTH: I -- Judge, I don't think it will. I think we'll be done Monday. But I --

THE COURT: Okay.

MR. KURTH: -- I don't, you know, it depends on the school district's, you know, questions.

THE COURT: We'll have you stay there for now. Thank you.

THE MARSHAL: Can you pass the mike down to Juror No. 1, please? And if I can get you to speak a little more into the mike?

THE COURT: Yeah. Everything is being recorded. That's why I kind of lean over to the mike. One, I'm soft-spoken, and -- and two, everything's being recorded. So try and speak into the mike if -- if you can, we appreciate that.

PROSPECTIVE JUROR NO. 079: Carolyn Balfour, and I also work for the Clark County School District. And I am on probation [indiscernible] of -- till next month.

THE COURT: So you currently work for Clark County School District?

PROSPECTIVE JUROR NO. 079: Yes, Your Honor.

THE COURT: Okay. You'll be excused. But go ahead back down to the -- the end of the -- other way, on the back row.

PROSPECTIVE JUROR NO. 090: 090. I have a family trip this Friday.

THE COURT: And you are Mr. --

PROSPECTIVE JUROR NO. 090: Pedro Palafox. I'm

sorry.

THE COURT: No, that's okay. Family trip to where?

PROSPECTIVE JUROR NO. 090: Canada.

THE MARSHAL: Speak into the microphone, sir.

PROSPECTIVE JUROR NO. 090: Canada.

THE COURT: And you're set to leave Friday?

PROSPECTIVE JUROR NO. 090: Yes.

THE COURT: Okay. How long's the trip been planned?

PROSPECTIVE JUROR NO. 090: Two weeks.

THE COURT: We will excuse you. Thank you. Hold on. Sorry.

THE MARSHAL: You got new batteries for it?

THE COURT: Technical difficulties.

THE MARSHAL: Yeah, I think the battery's dead.

PROSPECTIVE JUROR NO. 093: Adam Garling, 093. I'm a physician assistant at an urgent care and I'm scheduled to work a string of shifts. I'm the sole provider at -- or at a clinic throughout the weekend and into next week. And I've been informed it's -- there's no coverage for me if I'm not there. So the clinic would shut down.

THE COURT: So you're -- you are the sole worker at the clinic?

PROSPECTIVE JUROR NO. 093: Well, there's just one provider at the clinic per shift. And there's difficulty finding coverage. I could try to find coverage, but as of

this point there's not. So the clinic would close for the day if a provider's not there.

THE COURT: What's the name of the clinic?

PROSPECTIVE JUROR NO. 093: Urgent Care Extra. It's not a guarantee, but it's kind of a tight time.

THE COURT: Okay.

PROSPECTIVE JUROR NO. 093: Coverage is all.

THE COURT: For now we'll -- we'll keep you. But we'll continue on. Thank you.

PROSPECTIVE JUROR NO. 095: My name is Halina Chudoba, 0095. And I have couple reasons. My -- I understand simple English, but I have a problem with technical stuff. And also I just sold the house. I am packing. My moving company is coming next week and it's still a lot of packing. My daughter just had a baby, so -- another baby -- so I need to go and help her.

THE COURT: What's your native language?

PROSPECTIVE JUROR NO. 095: Polish.

THE COURT: Polish. Court imagines retaining a translator would be somewhat difficult. How long have you lived in the United States?

PROSPECTIVE JUROR NO. 095: Over 30 years. 32, exactly.

THE COURT: Court assumes that -- that you have a general understanding of English?

PROSPECTIVE JUROR NO. 095: Yes, but I am not good with making decisions. I like everybody, so --

THE COURT: Okay.

PROSPECTIVE JUROR NO. 095: -- it would be very hard for me to decide.

THE COURT: Understand that -- that English is not your native language, but the fact that you've lived here for 30 years, I assume you can understand English fairly well. This -- for better or worse, this is not a super complex case. So we'll keep you for now.

If you could pass the microphone on.

PROSPECTIVE JUROR NO. 098: 098, Joseph Nicola. I'm a chiropractor in private practice. I didn't anticipate having to take five days out of my clinic, and I do not have any coverage going through till Tuesday.

THE COURT: Are you a solo?

PROSPECTIVE JUROR NO. 098: I -- I have another doctor in my office. He's at a seminar currently.

THE COURT: When's he scheduled to return?

PROSPECTIVE JUROR NO. 098: Monday.

THE COURT: Do you have appointments set for tomorrow?

PROSPECTIVE JUROR NO. 098: I do.

THE COURT: We'll excuse you. Going to the -- the front row.

PROSPECTIVE JUROR NO. 103: 103, Emelia Martinez. And I'm facing financial hardship. And one income that's coming in the household. And I don't get paid if I miss work. It's contract.

THE COURT: What do you do?

PROSPECTIVE JUROR NO. 103: I work with children that have behavior problems. I go to homes.

THE COURT: Do you have any children at home?

PROSPECTIVE JUROR NO. 103: Yes, I have two. I'm a single mother.

THE COURT: We'll excuse you.

PROSPECTIVE JUROR NO. 103: Thank you.

PROSPECTIVE JUROR NO. 107: My name is Melinda Thomas, No. 103. And I have -- oh, I'm sorry. 107.

THE COURT: Okay. I'm glad you said that, because all -- all our stuff has 107, so that's good.

PROSPECTIVE JUROR NO. 107: Okay. I have children that I need to pick up from school and take to their after-school activities. I have someone to do it today, but not the rest of the week.

THE COURT: Person who's picking up to and from today, could they do --

PROSPECTIVE JUROR NO. 107: Well, they're off today, off of work today.

THE COURT: But back to work tomorrow?

PROSPECTIVE JUROR NO. 107: Yes.

THE COURT: Are you a single parent?

PROSPECTIVE JUROR NO. 107: Yes, I am.

THE COURT: We'll excuse you. Thank you.

PROSPECTIVE JUROR NO. 105: 105, Laurel Rockrohr. I have a similar issue, but just what time would this last until? Because I do have a husband, similar issues with picking up children and taking them and caring for them, because we work separate shifts. So I just, you know --

THE COURT: Sure. Fair question. We -- we will break at 5:00.

PROSPECTIVE JUROR NO. 105: That would be something I could do.

THE COURT: Okay. Thank you.

PROSPECTIVE JUROR NO. 111: Lawrence Nau, No. 111. Not sure if this is pertinent, but I'm self-employed, I own a golf cart repair company. And I do contract work for the school district.

THE COURT: How long have you been doing that contract work?

PROSPECTIVE JUROR NO. 111: I been doing golf cart repairs for about 15 years. Probably about the last five or six.

THE COURT: Contracting with the school district?

PROSPECTIVE JUROR NO. 011: Uh-huh. At some of the

schools, yes.

THE COURT: We'll excuse you. Thank you.

PROSPECTIVE JUROR NO. 113: Arnaldo Versola, 113. I currently work at CCSD, Clark County School District.

THE COURT: Thank you, you're excused.

PROSPECTIVE JUROR NO. 113: Thank you, sir.

PROSPECTIVE JUROR NO. 122: Jim Marshall.

THE COURT: That's a test, by the way.

PROSPECTIVE JUROR NO. 122: I failed American Idol. Jim Marshall, 125. I was supposed to --

THE COURT: Is it -- is it 122?

PROSPECTIVE JUROR NO. 122: Oh, I'm sorry. 122. I was supposed to start a new job today. I didn't fill out the paperwork yet, so I'm -- I'm not really hired. And I have concerns about that.

THE COURT: So you told your -- your hopefully employer that you wouldn't be there today?

PROSPECTIVE JUROR NO. 122: Correct. And they wanted to see the summons. And I said that I would bring the summons in. I just don't know how they'll react if I'm off until Tuesday.

THE COURT: We'll excuse you, sir. Thank you.

PROSPECTIVE JUROR NO. 123: Paul Solomon -- Paul Solomon, 123. I'm -- I work for EPA, I'm scheduled to go on a trip to Lawrence Berkeley National Lab the rest of this week

and Saturday for research.

THE COURT: So -- so you work -- it was a little hard to hear you. You work --

PROSPECTIVE JUROR NO. 123: I work for the --

THE COURT: -- for the EPA?

PROSPECTIVE JUROR NO. 123: Yeah. Yeah, and I'm meeting people at Lawrence Berkeley National Lab from Chicago to do research Thursday, Friday, and Saturday.

THE COURT: How long has that been scheduled?

PROSPECTIVE JUROR NO. 123: Well, it was actually supposed to be next week, and then recently got rescheduled to this week.

THE COURT: You're excused. Thank you.

PROSPECTIVE JUROR NO. 123: Thank you.

PROSPECTIVE JUROR NO. 114: My name is Hunter Maynard, Badge No. 114. My mom works for CCSD. But I'm starting a new job, as well. A building manager position at a gym. And the training can -- the training lasts from tomorrow till Saturday, I believe.

THE COURT: So you're scheduled to start your new job tomorrow?

PROSPECTIVE JUROR NO. 114: The training.

THE COURT: Are you currently working there and will be train --

PROSPECTIVE JUROR NO. 114: Yes, I am. But the

training is mandatory, I believe.

THE COURT: Where do you work?

PROSPECTIVE JUROR NO. 114: The UNLV gym.

THE COURT: When did you start working there?

PROSPECTIVE JUROR NO. 114: I've been working there for two semesters now, but I just got a promotion.

THE COURT: We'll keep you for now. Thank you.

PROSPECTIVE JUROR NO. 128: My badge number is 0128, my name is Amelia -- Amelia Olivares. Can I have one excuse because I don't speak too much English, I barely understand all you already. Please.

THE COURT: How long have you lived in the United States?

PROSPECTIVE JUROR NO. 128: 18 or -- I think it's 19 years.

THE COURT: What language do you speak at home?

PROSPECTIVE JUROR NO. 128: Spanish.

THE COURT: Other than the English issue, do you have any scheduling issues?

PROSPECTIVE JUROR NO. 128: I don't understand what you say. I'm work part-time.

THE COURT: Say that again?

PROSPECTIVE JUROR NO. 128: I am part-time on my work.

UNIDENTIFIED SPEAKER: She has a part-time job.

THE COURT: We'll excuse you. Thank you.

PROSPECTIVE JUROR NO. 128: Thank you so much.

PROSPECTIVE JUROR NO. 133: Joseph Mirenda, Badge No. 133. I have a -- a job interview scheduled for Friday morning at 9:00. The company I'm interviewing with is flying out their district manager. They're doing interviews this week. My interview happens to be at 9:00 on Friday morning.

THE COURT: Do you know where they're flying from?

PROSPECTIVE JUROR NO. 133: South Carolina. Yeah, the company's called Bath Fitters. They're just -- they're establishing a new branch out here in Las Vegas.

THE COURT: We'll excuse you.

PROSPECTIVE JUROR NO. 133: Thank you, Your Honor.

PROSPECTIVE JUROR NO. 145: How you doing? Felix Bustamante, 145. I actually have an interview tomorrow, too, at 1:30 for the post office.

THE COURT: Is that here in town?

PROSPECTIVE JUROR NO. 145: Yeah, it's here -- it's here in town.

THE COURT: What's the position?

PROSPECTIVE JUROR NO. 145: Courier.

THE COURT: My understanding is the post office is generally flexible and understanding with jury service. So we'll keep you for now. But thank you.

PROSPECTIVE JUROR NO. 145: All right.

PROSPECTIVE JUROR NO. 144: 144. I testified before about murder and after that, I always have this emotion and that person is, like, hunting me, his face is, like, kind of -- sometimes I wake up, I see his face. So I kind of still emotional until now about this here -- that I am here.

THE COURT: Being in a courtroom?

PROSPECTIVE JUROR NO. 144: Yes.

THE COURT: How long ago did you testify?

PROSPECTIVE JUROR NO. 144: It happened 1997, and then I think -- I can't remember if they call me back after, like, four years.

THE COURT: We're dealing -- understand the emotion behind that. This case, luckily for everyone involved, is not a criminal case. It's purely a civil case. And we'll keep you for now. Thank you.

PROSPECTIVE JUROR NO. 138: I'm No. 138, my name's Mary Carson. I have not begun yet, but the beginning of the next school year, I will be working for Clark County School District.

THE COURT: So in other words, you're already hired?

PROSPECTIVE JUROR NO. 138: Yes.

THE COURT: Just haven't started work?

PROSPECTIVE JUROR NO. 138: Right.

THE COURT: Okay. You're excused. Thank you.

PROSPECTIVE JUROR NO. 138: Thank you.

PROSPECTIVE JUROR NO. 189: My name is Steven McLucas, Badge No. 189. I'm currently a single parent, and I have a 50/50 joint custody with my daughter. And I'm supposed to drop her off Friday in California.

THE COURT: Where in California?

PROSPECTIVE JUROR NO. 189: Oxnard, California.

THE COURT: We will break Friday at 5:00 p.m. And the Court believes you can either take her then or Saturday morning. And if there's an issue with your ex-significant other, Court will be happy to address that. So we'll keep you for now. But thank you.

PROSPECTIVE JUROR NO. 191: Rhonda Kalas, No. 191. I work for the Metro Police Department. We will be testing on Monday for new police officers. Also, my husband works for Clark County School District since 1990.

THE COURT: We'll excuse you due to your husband's relationship.

PROSPECTIVE JUROR NO. 191: Thank you, sir.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 192: Rubie Gomez, Badge No. 192. I work at an animal hospital and there's a full work schedule. I work Thursday, Friday, Saturday, and Monday. And I had to find someone to cover my shift today, and I have to cover the shift on Saturday, and they don't have anybody else to cover it.

THE COURT: How many people work at the animal hospital?

PROSPECTIVE JUROR NO. 192: It's a pretty big hospital, but there's only seven technicians. I'm one of them and one of the other ones is covering my shift today.

THE COURT: We'll keep you for now. Thank you.

THE CLERK: Badge 114, Hunter Maynard. Badge 117, Danielle Kaylor.

THE MARSHAL: Ma'am, you'll be in Seat No. 3.

THE CLERK: Badge 121, Somanathan Pillai.

THE MARSHAL: Seat No. 6.

THE CLERK: Badge 124, Sherice Green. And Badge 125, Jasmine Miranda.

THE MARSHAL: Ma'am, you'll be over here in Seat No. 13.

THE CLERK: Badge 126, Jlee Lefiles.

THE MARSHAL: Sir, you're going to be in Seat No. 16.

THE CLERK: And Badge 129, LaTonya Gonzalez.

THE MARSHAL: Right here, sir. And ma'am, you'll be in Seat No. 19, right here.

THE COURT: Thank you. And thank you, everyone.

(Pause in proceedings.)

THE COURT: Okay. Thank you again, ladies and gentlemen, for your patience. At this time, I would like to

have the attorneys for each side introduce themselves, their clients, and tell you the names of the other attorneys in their offices. After they have done that, I would like them to tell you the names of the witnesses that they will be calling at this trial.

Basically, the Court and the parties need to know if any of you know the attorneys here in trial or if anyone in their offices has represented you or someone adverse to you, if you know the parties or if you know the witnesses.

Counsel for plaintiff, will you please start.

MR. KURTH: Thank you, Judge.

Good afternoon, I appreciate you all being here today. My name's Robert Kurth. I'm the attorney for the plaintiff; the plaintiff's here. It's Makani Payo.

No other attorneys in my office right now. I'm a sole practitioner, so we don't have to worry about any other names there. Or sometimes I'm know as Robert O. Kurth, Jr., I'll give you my full name in case you've seen that somewhere.

Judge, do you want me to name some of the witnesses that we'll be calling right now or not?

THE COURT: Yes.

MR. KURTH: Okay. And other witnesses that we will be calling will be Lori Payo; Eileen Wheelan, who's an employee of the Clark County School District; and Dr. Tyree Carr, a doctor in town; and I believe that's it.

THE COURT: Thank you, Mr. Kurth.

MR. KURTH: Thank you.

THE COURT: Does anyone know Mr. Kurth or Mr. Payo or any of the other individuals discussed?

Hold on, wait -- wait for the microphone. Thank you.

THE MARSHAL: We've got to get you the microphone.

THE COURT: It is -- it is a process and hopefully most people have not already gone through it. So.

THE MARSHAL: Name and badge number, please.

PROSPECTIVE JUROR NO. 086: 086, Stafeeva. Is Dr. Tyree Carr's the ophthalmologist?

MR. KURTH: Yes.

PROSPECTIVE JUROR NO. 086: So I'm -- I know him.

THE COURT: How do you know him?

PROSPECTIVE JUROR NO. 086: He's a colleague of mine. Different practice, but.

THE COURT: What type of -- what surgery do you do?

PROSPECTIVE JUROR NO. 086: I'm an ophthalmology corneal specialist, corneal transplants.

THE COURT: Would knowing that doctor have any effect on your ability to hear the facts and issue a verdict in accordance with the facts and the law regardless of your knowing that other doctor?

PROSPECTIVE JUROR NO. 086: I'm not sure. Perhaps.

THE COURT: Thank you for your disclosure.

Does anyone else know any of the individuals mentioned?

PROSPECTIVE JUROR NO. 130: David Hales, No. 130. Your Honor, I grew up with Mr. Kurth and used to baby-sit his kids, and he would take me on camping trips.

THE COURT: Thank you, you're excused. Okay. Mr. O'Brien, go ahead. Thank you.

MR. O'BRIEN: Good afternoon. I'm Daniel O'Brien. I represent the Clark County School District in this case.

There are 10 attorneys in our office. See if I can remember half of them. General counsel is -- in case you know anybody, name's Carlos McDade; and then his second in command is Donna Mendoza Mitchell; John Okazaki is in our office; Sammy Randolph is in our office; Patrick Murch is in our office; Jon-Marie Oshert Hanna is in our office; oh, Scott, Greenburg [phonetic] is in our office; and then I -- I just can't remember the name of the -- the other lady that is in the office next to me.

That's all the attorneys I can remember, anyway, Your Honor.

THE COURT: Does anyone know any of those attorneys?

Go ahead with the witnesses.

MR. O'BRIEN: Phoebe Redmond [phonetic] is the name of the other attorney.

THE COURT: Can go ahead with the witnesses.

MR. O'BRIEN: The witnesses that -- that the District intends to call include Joe Murphy, who is the principal of the school where this incident occurred; Todd Peterson, who was the teacher at the time of the incident in question. I wrote them all down so I wouldn't forget them. The first-aid safety assistant that we're going to call is -- I'm sorry, I -- I'm terrible with names.

MR. KURTH: Waleska Morton.

MR. O'BRIEN: Waleska Morton, she's also known as -- well, she was Wally Morton, now she's Waleska Ruiz. She was a first-aid safety assistant. Of course, we're going to speak with Makani today. And I think that's all we listed. Unless I've forgotten somebody, I believe that's it.

THE COURT: Thank you. Does anyone know any of the witnesses that Mr. O'Brien just mentioned? Thank you.

Ladies and gentlemen, I'm going to give you the Court's very brief summary about this case right now, so you get a little bit of -- of the background of the case, very brief. The attorneys will later give opening statements that will go into more detail.

But in this case, the plaintiff, Mr. Payo, was a middle school student, or those of us who are a little older might know it more as junior high school student, who was playing field hockey during PE class and was hit in the eye

area accidentally by another student with the hockey stick.

Mr. Payo has filed suit against Clark County School District for damages or injuries as a result of that incident and is claiming that Clark County School District is responsible or liable for those damages and injuries. Clark County School District denies any liability or responsibility and states that the rules given to the students and the supervision was proper, the supervision by the PE teacher.

As I told you earlier, we will be picking 10 of you to serve as jurors and alternates in this case. In order to do that, we must qualify 20 of you to serve. The reason for this is because under our statutory scheme, each side to the lawsuit has the right to peremptorially -- that's a mouthful -- challenge five jurors from the list of qualified jurors. Therefore, if we start with 20 qualified, the plaintiff side and the defense side excuse five, then we'll be left with a total of 10, which is how many we need for the trial.

We already have 20 of you seated there. And so we'll go and -- and I will begin asking some -- some basic simple questions. There are no right or wrong answers, only honest answers. Questions I ask will be easy. But after I ask you, the attorneys will get to ask you some follow-up questions, those might be more involved.

At the end of the -- as we go along, the questioning -- the attorneys may exercise their right to challenge a

juror. They can also do that at the end.

So let's begin with Juror No. 1. Could you state your full name for us, please.

PROSPECTIVE JUROR NO. 114: My name is Hunter Maynard, Badge No. 114.

THE COURT: Thank you. And you work at the UNLV Gym, correct?

PROSPECTIVE JUROR NO. 114: Yes, sir.

THE COURT: Okay. And if you're married, what does your -- where does your spouse work and what does he or she do?

PROSPECTIVE JUROR NO. 114: I'm not married.

THE COURT: Okay. Thank you. Have you ever been a juror before?

PROSPECTIVE JUROR NO. 114: No, sir.

THE COURT: Those are all my questions. So go ahead and -- and pass the mike. Thank you very much.

PROSPECTIVE JUROR NO. 081: Jason Terry, Badge 81.

THE COURT: Thank you. As we go through this process, you'll -- you'll already be anticipating my questions, so thank you.

And where do you work, Mr. Terry?

PROSPECTIVE JUROR NO. 081: Project engineer for AMI Mechanical.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 081: No, I'm not.

THE COURT: Okay. Have you ever been a juror before?

PROSPECTIVE JUROR NO. 081: Once.

THE COURT: And was that a civil or a criminal case?

PROSPECTIVE JUROR NO. 081: It was civil.

THE COURT: And how long ago was it?

PROSPECTIVE JUROR NO. 081: That was about five or six years ago.

THE COURT: Did the case go to a verdict?

PROSPECTIVE JUROR NO. 081: It did. But I was excused before the verdict.

THE COURT: Okay. Were you -- were you an alternate juror?

PROSPECTIVE JUROR NO. 081: You know, I can't -- I think I was. I can't remember exactly, but I believe I was.

THE COURT: Okay. Thank you.

PROSPECTIVE JUROR NO. 117: Danielle Kaylor, Badge No. 117.

THE COURT: And where do you work, Ms. Kaylor?

PROSPECTIVE JUROR NO. 117: I'm retired.

THE COURT: Prior to being retired, what did you do?

PROSPECTIVE JUROR NO. 117: I was a postal inspector.

THE COURT: And was that here in Las Vegas?

PROSPECTIVE JUROR NO. 117: No, that was in El Paso, Texas, Los Angeles, and Charlotte, North Carolina.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 117: Yes.

THE COURT: Is your spouse retired?

PROSPECTIVE JUROR NO. 117: Yes.

THE COURT: What -- what did your spouse used to do?

PROSPECTIVE JUROR NO. 117: Postal inspector.

THE COURT: Have you ever been a juror before?

PROSPECTIVE JUROR NO. 117: No.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 086: Ksenia Stafeeva, Badge No. 086.

THE COURT: And what's the -- the name of your practice?

PROSPECTIVE JUROR NO. 086: New Eyes, Las Vegas.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 086: No.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 086: No.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 089: Lucetta Scolaro, 089.

THE COURT: And where do you work?

PROSPECTIVE JUROR NO. 089: Pierson Productions.

THE COURT: Is that Pierson --

PROSPECTIVE JUROR NO. 089: Pierson Productions.

THE COURT: -- Productions? What type of work is that?

PROSPECTIVE JUROR NO. 089: We're a contract screen printer. I'm their account manager.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 089: Yes, I am.

THE COURT: Where does your spouse work?

PROSPECTIVE JUROR NO. 089: My spouse works at the M Resort.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 089: No, sir.

THE COURT: Thank you. Go ahead.

PROSPECTIVE JUROR NO. 121: 121, Somanathan Pillai.

THE COURT: And do you work?

PROSPECTIVE JUROR NO. 121: No. I am unemployed.

THE COURT: I'm sorry?

PROSPECTIVE JUROR NO. 121: No, I am unemployed.

THE COURT: Okay. Prior to becoming unemployed, what did you do?

PROSPECTIVE JUROR NO. 121: I was a tax associate with H&R Block.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 121: Yes, please.

THE COURT: Does your spouse work?

PROSPECTIVE JUROR NO. 121: Yes, please.

THE COURT: What does she do?

PROSPECTIVE JUROR NO. 121: She's a nurse.

THE COURT: I'm sorry?

PROSPECTIVE JUROR NO. 121: Was a charge nurse, RN.

THE COURT: Okay. Thank you. Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 121: No. Once -- once they call in when the -- my case was -- was [indiscernible] something, that's why they send us back.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 121: Uh-huh.

PROSPECTIVE JUROR NO. 093: Adam Garling, Badge No. 093.

THE COURT: Remind us where you work again?

PROSPECTIVE JUROR NO. 093: Urgent Care Extra.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 093: Yes.

THE COURT: And does your spouse work?

PROSPECTIVE JUROR NO. 093: No.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 093: No.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 094: Elizabeth Paredes, 094.

THE COURT: Do you work, ma'am?

PROSPECTIVE JUROR NO. 094: Yes.
THE COURT: Where's that?
PROSPECTIVE JUROR NO. 094: United States Postal Service.
THE COURT: What do you do for the postal service?
PROSPECTIVE JUROR NO. 094: Letter carrier.
THE COURT: And are you married?
PROSPECTIVE JUROR NO. 094: Yes.
THE COURT: And does your spouse work?
PROSPECTIVE JUROR NO. 094: Yes.
THE COURT: What does he do?
PROSPECTIVE JUROR NO. 094: American Airlines, ticket agent.
THE COURT: Have you ever served as a juror before?
PROSPECTIVE JUROR NO. 094: I never got to the courtroom.
THE COURT: Welcome. Thank you.
PROSPECTIVE JUROR NO. 095: Halina Chudoba, 0095.
THE COURT: And do you work?
PROSPECTIVE JUROR NO. 095: Yes, I do.
THE COURT: What do you do?
PROSPECTIVE JUROR NO. 095: I work at the Palazzo as a casino dealer.
THE COURT: And are you married?
PROSPECTIVE JUROR NO. 095: Yes.

THE COURT: What does your spouse do?

PROSPECTIVE JUROR NO. 095: Nothing. He's unemployed.

THE COURT: Don't forget this is all on the record. So. Thank you.

Prior to becoming unemployed, did -- did he work?

PROSPECTIVE JUROR NO. 095: He was truck driver.

THE COURT: He was what?

PROSPECTIVE JUROR NO. 095: Truck driver.

THE COURT: Okay. Thank you.

PROSPECTIVE JUROR NO. 095: Cross country.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 095: No. I was called once, but I never serve.

THE COURT: Thank you. You could pass the microphone.

PROSPECTIVE JUROR NO. 096: Karen Ericsson, 096.

THE COURT: And do you work?

PROSPECTIVE JUROR NO. 096: Retired from the California Department of Corrections.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 096: Yes.

THE COURT: Does your spouse work?

PROSPECTIVE JUROR NO. 096: Yes.

THE COURT: Kind of?

PROSPECTIVE JUROR NO. 096: He's a wrangler/horse trainer in the motion picture business. It's as needed. He travels a lot.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 096: Yes. In a civil matter.

THE COURT: Okay. Go ahead.

PROSPECTIVE JUROR NO. 096: We did get a verdict.

THE COURT: You did reach a verdict?

PROSPECTIVE JUROR NO. 096: Yes, sir.

THE COURT: Did you serve as the foreperson?

PROSPECTIVE JUROR NO. 096: I may have. Thanks.

THE COURT: How -- how long ago was it?

PROSPECTIVE JUROR NO. 096: It's been, like, nine years ago in California.

THE COURT: Okay. In California, you said?

PROSPECTIVE JUROR NO. 096: Yes, sir.

THE COURT: Okay.

PROSPECTIVE JUROR NO. 096: Los Angeles County.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 097: James Dunn, Badge No. 097.

THE COURT: And do you work, sir?

PROSPECTIVE JUROR NO. 097: Yes. I work for a company called NOS Communications.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 097: Yes.
THE COURT: Does your spouse work?
PROSPECTIVE JUROR NO. 097: Yes. She's a legal secretary.
THE COURT: Do you know what firm or business she works?
PROSPECTIVE JUROR NO. 097: Howard and Howard.
THE COURT: Have you ever served as a juror before?
PROSPECTIVE JUROR NO. 097: No.
THE COURT: Thank you.
PROSPECTIVE JUROR NO. 124: Sherice Green, 124.
THE COURT: And do you work?
PROSPECTIVE JUROR NO. 124: Yes.
THE COURT: Where do you work?
PROSPECTIVE JUROR NO. 124: Dermatology place for animals.
THE COURT: And are you married?
PROSPECTIVE JUROR NO. 124: No.
THE COURT: Have you ever served as a juror before?
PROSPECTIVE JUROR NO. 124: No.
THE COURT: Thank you.
PROSPECTIVE JUROR NO. 125: Jasmine Miranda, 125.
THE COURT: And do you work?
PROSPECTIVE JUROR NO. 125: Yes.
THE COURT: Where do you work?

PROSPECTIVE JUROR NO. 125: Express Fashion.
THE COURT: I'm sorry, what?
PROSPECTIVE JUROR NO. 125: Express Fashion.
THE COURT: And are you married?
PROSPECTIVE JUROR NO. 125: No.
THE COURT: Have you ever served as a juror before?
PROSPECTIVE JUROR NO. 125: No.
THE COURT: Thank you.
PROSPECTIVE JUROR NO. 105: Laurel Rockrohr, 105.
THE COURT: And do you work?
PROSPECTIVE JUROR NO. 105: Yes, I do.
THE COURT: Where do you work?
PROSPECTIVE JUROR NO. 105: Design Source Interiors.
THE COURT: And are you married?
PROSPECTIVE JUROR NO. 105: Yes, I am.
THE COURT: Does your spouse work?
PROSPECTIVE JUROR NO. 105: Yes, he does.
THE COURT: Where's that?
PROSPECTIVE JUROR NO. 105: The Cosmopolitan.
THE COURT: Have you ever served as a juror before?
PROSPECTIVE JUROR NO. 105: I was called and was held and then was let go graciously.
THE COURT: Thank you.
PROSPECTIVE JUROR NO. 106: Mark Russie, 106.
THE COURT: Do you work?

PROSPECTIVE JUROR NO. 106: I'm a union audio engineer.

THE COURT: Union audio engineer?

PROSPECTIVE JUROR NO. 106: Yeah.

THE COURT: Okay. And are you married?

PROSPECTIVE JUROR NO. 106: I am. My wife works for the Department of Welfare.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 106: No, sir.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 126: Jlee Lefiles, 0126.

THE COURT: Do you work, sir?

PROSPECTIVE JUROR NO. 126: I'm retired.

THE COURT: Where did you work before you were retired?

PROSPECTIVE JUROR NO. 126: I was an engineering manager in the personal computer industry.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 126: Yes.

THE COURT: Does your spouse work or did she work?

PROSPECTIVE JUROR NO. 126: She's retired also, but she also, when she was working, she was also in the PC industry.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 126: Yes, sir. Twice.

THE COURT: In civil, criminal, both?

PROSPECTIVE JUROR NO. 126: The -- I think it was both, in -- in the early '90s it was a civil case, and we did reach a verdict. In I think it was 2010, it was a criminal federal case, and also reached a verdict.

THE COURT: In either case did you serve as the foreperson?

PROSPECTIVE JUROR NO. 126: No, sir.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 108: Eric Cromer, 108.

THE COURT: Do you work?

PROSPECTIVE JUROR NO. 108: I do. I own Bravo Medical Billing, and then I'm the practice manager for Infectious Disease Specialists.

THE COURT: Are you married?

PROSPECTIVE JUROR NO. 108: I am married.

THE COURT: Does your spouse work?

PROSPECTIVE JUROR NO. 108: She works as -- in the executive offices at MGM.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 108: No, Your Honor.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 109: 109, Steven Brown.

THE COURT: And do you work?

PROSPECTIVE JUROR NO. 109: Yes, sir.

THE COURT: Where's that?

PROSPECTIVE JUROR NO. 109: I'm a Realtor.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 109: Yes.

THE COURT: Where does your spouse work?

PROSPECTIVE JUROR NO. 109: She is a visual manager at Anthropologie.

THE COURT: That's the store, I assume?

PROSPECTIVE JUROR NO. 109: Yes. In the district in Green Valley Ranch.

THE COURT: Okay. Have you ever served --

PROSPECTIVE JUROR NO. 109: No, sir.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 129: LaTonya Gonzalez, Badge No. 129. I do work.

THE COURT: And where's that?

PROSPECTIVE JUROR NO. 129: Green Valley Ranch Resort and Spa.

THE COURT: What do you do there?

PROSPECTIVE JUROR NO. 129: I'm the group reservations coordinator.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 129: Yes.

THE COURT: And does your spouse work?

PROSPECTIVE JUROR NO. 129: Yes, he does. He --

THE COURT: Where's that?

PROSPECTIVE JUROR NO. 129: He works out at the Mirage. And he's the irrigation manager.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 129: No, I have not.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 129: Thank you.

PROSPECTIVE JUROR NO. 112: Anthony Meadows, Badge 112.

THE COURT: And do you work?

PROSPECTIVE JUROR NO. 112: I do.

THE COURT: Where is that?

PROSPECTIVE JUROR NO. 112: At Aria Resort and Casino.

THE COURT: What do you do there?

PROSPECTIVE JUROR NO. 112: I am a guest care specialist.

THE COURT: And are you married?

PROSPECTIVE JUROR NO. 112: Engage, so not -- not yet.

THE COURT: Congratulations.

PROSPECTIVE JUROR NO. 112: Thank you.

THE COURT: What does your fiancee do?

PROSPECTIVE JUROR NO. 112: Seeking employment now after her degree for special needs education.

THE COURT: Have you ever served as a juror before?

PROSPECTIVE JUROR NO. 112: I have not.

THE COURT: Thank you.

PROSPECTIVE JUROR NO. 112: You're welcome.

THE COURT: Okay. Like I said, my questions are -- are simple. We will turn the questioning over now to plaintiff's counsel, Mr. Kurth.

MR. KURTH: Thank you, Judge.

THE MARSHAL: You need to give me a heads up where you're going to so we can get them the microphone.

MR. KURTH: Oh, okay.

THE MARSHAL: If you're going to ask individual questions.

MR. KURTH: Sure. All right. How are you doing today? Well, bear with me for a minute here and ask you a couple of questions.

Let's go to -- just No. 1 there.

THE MARSHAL: Juror No. 1?

MR. KURTH: Or -- excuse me -- yes. 114. Have you ever been a victim of an accident?

PROSPECTIVE JUROR NO. 114: Yes.

MR. KURTH: Okay. And did you make a claim for that accident?

PROSPECTIVE JUROR NO. 114: No, sir. It was my parents driving at the time. I was very young.

MR. KURTH: Okay. So you haven't never been a victim where you've made a claim?

PROSPECTIVE JUROR NO. 114: No, sir.

MR. KURTH: Okay. Do you have any medical training?

PROSPECTIVE JUROR NO. 114: No, sir. Besides CPR certified in AD.

MR. KURTH: Did you say that your mother was going to work for the school district?

PROSPECTIVE JUROR NO. 114: My mother is a bus driver currently --

MR. KURTH: Okay. And how long --

PROSPECTIVE JUROR NO. 114: -- for the school district.

MR. KURTH: And how long has she been a bus driver there?

PROSPECTIVE JUROR NO. 114: I believe a couple months now.

MR. KURTH: Okay. And do you live with your mother?

PROSPECTIVE JUROR NO. 114: Yes, I do.

MR. KURTH: Okay. And did you say you're currently working?

PROSPECTIVE JUROR NO. 114: Yes, I am.

MR. KURTH: And what are you doing?

PROSPECTIVE JUROR NO. 114: I work at the UNLV SRWC, aka the gym. I'm a building manager and a fitness attendant

there.

MR. KURTH: Okay. Are you going to school there, too?

PROSPECTIVE JUROR NO. 114: Yes, sir.

MR. KURTH: Okay. Very good. Just go to No. 81. Just pass it down, that's fine. Is that Jason Terry; is that right?

PROSPECTIVE JUROR NO. 081: Correct.

MR. KURTH: Okay. Are you related to any Terrys that did ironwork -- ironworkers?

PROSPECTIVE JUROR NO. 081: Not that I'm aware of.

MR. KURTH: Okay. Okay. And what did you do for work?

PROSPECTIVE JUROR NO. 081: I'm a project engineer for commercial plumbing/HVAC company. I have two jobs. That's my -- that's one of them.

MR. KURTH: Okay. And I didn't get down, are you married?

PROSPECTIVE JUROR NO. 081: No. I'm engaged.

MR. KURTH: Okay. Okay. Have you ever been a victim of an accident?

PROSPECTIVE JUROR NO. 081: I have not.

MR. KURTH: Okay. What do you think about the idea that someone who's injured because of someone else's negligence has a right to bring a legal action to have a jury

determine whether damages should be awarded to them?

PROSPECTIVE JUROR NO. 081: Sounds reasonable to me.

MR. KURTH: Okay. Do you have any preconceived notions about this case, hearing that it's about the school district or an accident in PE class?

PROSPECTIVE JUROR NO. 081: I don't have any preconceived notions, no.

MR. KURTH: Have you ever coached youth sports?

PROSPECTIVE JUROR NO. 081: Yes.

MR. KURTH: What sport?

PROSPECTIVE JUROR NO. 081: Basketball and soccer.

MR. KURTH: And what level have you coached?

PROSPECTIVE JUROR NO. 081: Elementary.

MR. KURTH: Like rec ball or competitive?

PROSPECTIVE JUROR NO. 081: Rec basketball and then competitive soccer. Help my son, my son's on the soccer team.

MR. KURTH: How old is he?

PROSPECTIVE JUROR NO. 081: He's eight.

MR. KURTH: Okay. And playing competitive already?

PROSPECTIVE JUROR NO. 081: Well, I mean, competitive in -- it's in --

MR. KURTH: Club ball?

PROSPECTIVE JUROR NO. 081: No, I mean, it's not the bottom level. It's club soccer.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 081: So.

MR. KURTH: Okay. Very good. Thank you. Just pass it over, please. 117. How are you doing?

PROSPECTIVE JUROR NO. 117: Fine.

MR. KURTH: Let me find you on here. It's like you have to look at a bunch of different papers here. It's kind of like trying to read the IRS tax codes sometimes, I think. It's a little bit difficult.

So -- what do you do in town?

PROSPECTIVE JUROR NO. 117: What do I do in town?

MR. KURTH: Uh-huh.

PROSPECTIVE JUROR NO. 117: I play golf.

MR. KURTH: Okay. Are you a good golfer?

PROSPECTIVE JUROR NO. 117: Yeah, I think so.

MR. KURTH: Okay. So you were a postal inspector before, right?

PROSPECTIVE JUROR NO. 117: Yes.

MR. KURTH: Okay. And you're -- your husband, is he currently a postal inspector?

PROSPECTIVE JUROR NO. 117: No, he's retired also from that.

MR. KURTH: Okay. And when -- as a postal inspector, did you investigate accident claims?

PROSPECTIVE JUROR NO. 117: No. Ours was mainly criminal actions that we investigated. All criminal

investigations.

MR. KURTH: Okay. Mail fraud or something like that?

PROSPECTIVE JUROR NO. 117: Any crime you can think of related to a post office, an employee, or the billings.

MR. KURTH: Okay. And how long were you doing that for? How long did you investigate for the post office?

PROSPECTIVE JUROR NO. 117: 20 years.

MR. KURTH: Would it affect your ability to fairly decide this case if you knew the incident happened in 2004 that we're talking about when the plaintiff was 11 years old, and now we're going to trial now in 2015?

PROSPECTIVE JUROR NO. 117: I don't believe so.

MR. KURTH: Okay. Would you have any difficulty to award a judgment against the Clark County School District if the evidence was such that it should be awarded?

PROSPECTIVE JUROR NO. 117: I would have no problem doing that.

MR. KURTH: Okay. Did you ever serve in the military?

PROSPECTIVE JUROR NO. 117: No.

MR. KURTH: Okay. Thank you very much. So 086, right?

PROSPECTIVE JUROR NO. 086: Yes, 086.

MR. KURTH: Oh, okay.

PROSPECTIVE JUROR NO. 086: Ksenia Stafeeva.

MR. KURTH: That's right. You're the surgeon. And -- and you say you have a booked -- booked a load on what, Tuesday?

PROSPECTIVE JUROR NO. 086: Yeah, I have actually patients scheduled Friday, Monday, and surgery on Tuesdays. Full clinic.

MR. KURTH: Okay. Would it -- have you ever been the victim of an accident?

PROSPECTIVE JUROR NO. 086: My car was hit in a parking lot, but I was not in the car.

MR. KURTH: Well, that's good.

PROSPECTIVE JUROR NO. 086: Yes.

MR. KURTH: And have you ever been a -- anybody ever made a claim against you for anything?

PROSPECTIVE JUROR NO. 086: No.

MR. KURTH: Okay. If you knew that anyone involved in the case was unemployed, would that affect you in any way in rendering a decision, considering their credibility?

PROSPECTIVE JUROR NO. 086: No.

MR. KURTH: Would you have a problem awarding damages to a plaintiff for pain and suffering?

PROSPECTIVE JUROR NO. 086: No.

MR. KURTH: Would you have a problem awarding damages to a plaintiff for emotional distress?

PROSPECTIVE JUROR NO. 086: No.

MR. KURTH: Okay. And I'll give you another same questions. Would it affect your ability to fairly decide this case if you knew the incident happened in 2004 and we're going to trial now in 2015?

PROSPECTIVE JUROR NO. 086: No.

MR. KURTH: All right. Have you ever -- well, okay. Please pass it to the next one. Thank you.

THE COURT: You could go ahead and state your name and badge number while --

PROSPECTIVE JUROR NO. 089: Lucetta Scolaro, 089.

MR. KURTH: It says you're a screen printer; is that right?

PROSPECTIVE JUROR NO. 089: No, I work for a contract screen printing.

MR. KURTH: Okay. And is that a 40-hour-a-week job or?

PROSPECTIVE JUROR NO. 089: Plus.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 089: I do their accounting, though.

MR. KURTH: Okay. So are you able to do any of that from home or do you have to go to the office and do it?

PROSPECTIVE JUROR NO. 089: I go to the office -- I have to be at the office, but I make my own hours.

MR. KURTH: Okay. Have you had any children that have been enrolled in the Clark County School District?

PROSPECTIVE JUROR NO. 089: Many years ago when we lived here the first time in Vegas.

MR. KURTH: Okay. So you lived here and then you moved somewhere else?

PROSPECTIVE JUROR NO. 089: We were here for three years back in the '90s.

MR. KURTH: And then where did you go?

PROSPECTIVE JUROR NO. 089: We moved back to Pennsylvania.

MR. KURTH: And came back to Vegas for work or?

PROSPECTIVE JUROR NO. 089: My -- all my children have moved out and gone off, graduated colleges, became a grandma and moved out here.

MR. KURTH: Okay. Well, that's nice. I haven't had that happen yet, but hoping they all get married first. So. And then --

PROSPECTIVE JUROR NO. 089: One can hope.

MR. KURTH: -- I'll be happy to do that. Have you ever served in the military?

PROSPECTIVE JUROR NO. 089: I have not.

MR. KURTH: Okay. Have you ever been in an accident?

PROSPECTIVE JUROR NO. 089: Yes.

MR. KURTH: Okay. And was the accident your fault or someone else's fault?

PROSPECTIVE JUROR NO. 089: Someone else's fault.

MR. KURTH: And did you make a claim?

PROSPECTIVE JUROR NO. 089: I was unable to do so.

MR. KURTH: Why was that?

PROSPECTIVE JUROR NO. 089: No insurance, no job. Was on private property. So it was very difficult.

MR. KURTH: Okay. Would you have negative feelings towards someone who's a single mother, would that affect your decision in any way?

PROSPECTIVE JUROR NO. 089: No.

MR. KURTH: Would you have any difficulty to award a judgment against the Clark County School District if the evidence was such?

PROSPECTIVE JUROR NO. 089: No.

MR. KURTH: Would you have a problem awarding damages for loss of enjoyment of life or pain and suffering?

PROSPECTIVE JUROR NO. 089: No, I would not.

MR. KURTH: Okay. Or emotional distress?

PROSPECTIVE JUROR NO. 089: No.

MR. KURTH: All right. So the next juror is 121, I think, correct?

PROSPECTIVE JUROR NO. 121: Somanathan Pillai, 121.

MR. KURTH: How do you say your last name?

PROSPECTIVE JUROR NO. 121: Pillai.
MR. KURTH: Okay.
PROSPECTIVE JUROR NO. 121: P-I-L-L-A-I.
MR. KURTH: Okay. Pallai, okay. Is -- and you said your spouse is a nurse?
PROSPECTIVE JUROR NO. 121: Yes.
MR. KURTH: And where does she work?
PROSPECTIVE JUROR NO. 121: VA, Veteran's Hospital.
MR. KURTH: Pardon me?
PROSPECTIVE JUROR NO. 121: VA Hospital.
MR. KURTH: Okay. Okay. And what did -- are you working right now?
PROSPECTIVE JUROR NO. 121: No.
MR. KURTH: Okay. What were you doing? An accountant, was it?
PROSPECTIVE JUROR NO. 121: Yes. I'm a tax associate.
MR. KURTH: Okay. So do you just kind of work during the tax season?
PROSPECTIVE JUROR NO. 121: Yes, unfortunately. I couldn't find a full-time job.
MR. KURTH: Okay. Well, I hope that works out for you. Do you have any kids in the school district?
PROSPECTIVE JUROR NO. 121: Yes. My daughter.
MR. KURTH: Okay. What grade is she in?

PROSPECTIVE JUROR NO. 121: She's in eighth grade. In fact, her graduation ceremony is at 5:00 today.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 121: Yeah, I hope to attend that.

MR. KURTH: The -- just one daughter, then?

PROSPECTIVE JUROR NO. 121: Yeah. One daughter and one son. Son is in college.

MR. KURTH: Okay. Very good. Have you ever coached youth sports?

PROSPECTIVE JUROR NO. 121: No.

MR. KURTH: No? Have you ever played field hockey or floor hockey?

PROSPECTIVE JUROR NO. 121: No. I'm not a sports person.

MR. KURTH: Not familiar with that?

PROSPECTIVE JUROR NO. 121: No.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 121: My kids play. I just watch.

MR. KURTH: Okay. Did you say your kids have played it?

PROSPECTIVE JUROR NO. 121: Yeah, kids -- yeah. My son is -- son and daughter, they play volleyball.

MR. KURTH: Volleyball?

PROSPECTIVE JUROR NO. 121: Yes.

MR. KURTH: Okay. Okay. Do you know if they ever played field hockey?

PROSPECTIVE JUROR NO. 121: No.

MR. KURTH: Okay. We're -- we're calling -- let me just explain that. We're calling it, like, field hockey or floor hockey. I don't know, it's kind of -- it's kind of mixed up in here. Going to hear both terms, but really mean the same thing. One is, like, on tennis courts or -- one is on really the grass or something, right. But basically the same type of...

Do you have any bias or prejudice or preconceived notions against someone who sues for damages?

PROSPECTIVE JUROR NO. 121: No.

MR. KURTH: And have you ever made a claim for personal injuries?

PROSPECTIVE JUROR NO. 121: No.

MR. KURTH: Has your wife ever worked as a nurse in a school?

PROSPECTIVE JUROR NO. 121: No.

MR. KURTH: Is she a registered nurse?

PROSPECTIVE JUROR NO. 121: Yes.

MR. KURTH: How long has she been a nurse?

PROSPECTIVE JUROR NO. 121: She's -- for the last 10 years. She -- [indiscernible] experience. But in the US

[indiscernible] for the last 10 years.

MR. KURTH: Okay. Would you have a problem with awarding damages against the school district even though one of your children attends the school district?

PROSPECTIVE JUROR NO. 121: No.

MR. KURTH: All right. We'll pass it to the young lady in front of you there. Thank you very much, sir.

PROSPECTIVE JUROR NO. 124: 124, Sherice Green.

MR. KURTH: 124, Sherice -- Sherice Green. I can't ask how old you are. But I don't -- so you don't know me at all? Do you know me at all, Robert Kurth?

PROSPECTIVE JUROR NO. 124: No.

MR. KURTH: Your name just sounds so familiar to me.

PROSPECTIVE JUROR NO. 124: Yeah, I don't --

MR. KURTH: And my law practice --

PROSPECTIVE JUROR NO. 124: I don't know you.

MR. KURTH: No? Okay. Okay, good. Okay. Just want to make sure, you know, that you aren't, like, on the other side or something, you know. What do you do for work?

PROSPECTIVE JUROR NO. 124: I work at a dermatology --

MR. KURTH: Okay. For the --

PROSPECTIVE JUROR NO. 124: -- place for animals.

MR. KURTH: -- animals, right?

PROSPECTIVE JUROR NO. 124: Yes.

MR. KURTH: Okay. That's right. For the animals. What do you do?

PROSPECTIVE JUROR NO. 124: Receptionist.

MR. KURTH: Okay. And did you go to school here in the Clark County School District?

PROSPECTIVE JUROR NO. 124: Yes.

MR. KURTH: Okay. Did you go all -- through all your school there?

PROSPECTIVE JUROR NO. 124: No. I was -- I've been here since the sixth grade and graduated. So.

MR. KURTH: Okay. Did you participate in this field hockey when you were in sixth, seventh, eighth grade in the school district, do you recall?

PROSPECTIVE JUROR NO. 124: I don't recall.

MR. KURTH: Okay. But you were in PE class and stuff?

PROSPECTIVE JUROR NO. 124: Yes. Yes.

MR. KURTH: Okay. All right. Do you have any children?

PROSPECTIVE JUROR NO. 124: No.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 124: I do have nieces and nephews. Well, I have two nieces.

MR. KURTH: Okay. Do you help take care of them or something?

PROSPECTIVE JUROR NO. 124: No, no.

MR. KURTH: Okay. Have you been -- ever been in a personal injury lawsuit?

PROSPECTIVE JUROR NO. 124: No.

MR. KURTH: Do you have a problem with anybody that makes a claim for personal injuries that were --

PROSPECTIVE JUROR NO. 124: No.

MR. KURTH: -- sustained?

PROSPECTIVE JUROR NO. 124: No.

MR. KURTH: Okay. Would you have difficulty to award a judgment against the school district?

PROSPECTIVE JUROR NO. 124: No.

MR. KURTH: Guess I should probably ask everybody this -- the -- the question about it, the incident happening in 2004 and us going to trial right now in 2015. Does -- would that affect your decision at all in making a decision, in hearing the case, being fair and impartial?

PROSPECTIVE JUROR NO. 124: No.

MR. KURTH: Okay. Do you believe every child attending school has a right to a safe environment?

PROSPECTIVE JUROR NO. 124: Yes.

MR. KURTH: Okay. All right. Thank you very much.

PROSPECTIVE JUROR NO. 097: James Dunn, Badge No. 097.

MR. KURTH: Mr. Dunn, okay. Are you related to the

neurologist in town? I think his name's James Dunn.

PROSPECTIVE JUROR NO. 097: No.

MR. KURTH: Or maybe it's Gerald Dunn, I think, actually.

PROSPECTIVE JUROR NO. 097: No, I don't have any relatives in the medical field.

MR. KURTH: Okay. Oh, you said your spouse is a legal secretary for Howard and Howard?

PROSPECTIVE JUROR NO. 097: Yes.

MR. KURTH: Do they share office space with someone?

PROSPECTIVE JUROR NO. 097: Not that I know of.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 097: There's several attorneys there, but I don't know.

MR. KURTH: Who does she work for, which attorney?

PROSPECTIVE JUROR NO. 097: She has three different attorneys and I only know them by their first name. I've met them at their Christmas parties and things like that. That's it.

MR. KURTH: Is that Jimmy Howard or Jack Howard or?

PROSPECTIVE JUROR NO. 097: The main office is in Michigan and anybody associated with that name is probably there.

MR. KURTH: Oh, okay. So this is -- so what kind of work do they do?

PROSPECTIVE JUROR NO. 097: I know they do patents and they also do civil litigation.

MR. KURTH: So do you know if they do any type of insurance -- or defense work or --

PROSPECTIVE JUROR NO. 097: I really don't know.

MR. KURTH: -- personal injury work? No? It's not something you guys really discuss?

PROSPECTIVE JUROR NO. 097: No. Not really.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 097: I don't find it that interesting, so we don't talk about it.

MR. KURTH: Well, okay. I don't blame you. NOS Communications, what do you do for them?

PROSPECTIVE JUROR NO. 097: I'm the director of IT operations and support. I make sure the computers keep running, basically.

MR. KURTH: Okay. Did you grow up here in town?

PROSPECTIVE JUROR NO. 097: No, I didn't.

MR. KURTH: When did you move here?

PROSPECTIVE JUROR NO. 097: 23 years ago.

MR. KURTH: Long time ago, lot of changes since then.

PROSPECTIVE JUROR NO. 097: Yes.

MR. KURTH: Did you have any kids that went to school here in the school district?

PROSPECTIVE JUROR NO. 097: I've had two of my own children and four exchange students. I have -- currently have an exchange student going to Shadow Ridge High School.

MR. KURTH: Oh, Shadow Ridge? What grade are they -- is she -- are they in?

PROSPECTIVE JUROR NO. 097: She's in 12th.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 097: But she's an exchange student. She's only here for one year.

MR. KURTH: Okay. Right, right.

PROSPECTIVE JUROR NO. 097: My son -- my daughter also graduated from there last year.

MR. KURTH: From Shadow Ridge?

PROSPECTIVE JUROR NO. 097: Uh-huh.

MR. KURTH: She play any sports there?

PROSPECTIVE JUROR NO. 097: Yes.

MR. KURTH: Which ones?

PROSPECTIVE JUROR NO. 097: Tennis.

MR. KURTH: Tennis, okay. I know my daughter goes to Shadow Ridge, so -- my youngest, at least. Yeah.

PROSPECTIVE JUROR NO. 097: Huh.

MR. KURTH: But she's not a senior, so I don't know that they know each other. That name doesn't sound familiar or anything. I guess I could say her name. Does she talk about her friends or anything?

PROSPECTIVE JUROR NO. 097: On occasion. But I -- I --

MR. KURTH: Kenzie, Kenzie Kurth or whatever?

PROSPECTIVE JUROR NO. 097: Not that I know of.

MR. KURTH: Okay. So would you have a problem rendering a judgment against the school district if the evidence was such to show that they were negligent?

PROSPECTIVE JUROR NO. 097: No, I wouldn't have a problem with it.

MR. KURTH: Would you have a problem awarding damages to a plaintiff for pain and suffering?

PROSPECTIVE JUROR NO. 097: No.

MR. KURTH: What about for loss of enjoyment of life?

PROSPECTIVE JUROR NO. 097: Not if it was warranted.

MR. KURTH: Or emotional distress?

PROSPECTIVE JUROR NO. 097: Again, no.

MR. KURTH: Do you remember any of your kids ever playing field hockey, floor hockey in the schools?

PROSPECTIVE JUROR NO. 097: Not that I know of. They all participated in PE and they played soccer. But that's...

MR. KURTH: Okay. Let's see, I apologize. Let's see. Do you have -- have you ever been the victim of an accident?

PROSPECTIVE JUROR NO. 097: No.

MR. KURTH: Have you ever been sued?

PROSPECTIVE JUROR NO. 097: No, I haven't.

MR. KURTH: Do you feel that the legal system in the state of Nevada or anywhere else is being abused by individuals who file lawsuits?

PROSPECTIVE JUROR NO. 097: Sometimes, yeah.

MR. KURTH: Okay. Have you ever been required to take medications for pain for a prolonged period of time?

PROSPECTIVE JUROR NO. 097: Yes.

MR. KURTH: That wasn't due to some accident or anything? Just...

PROSPECTIVE JUROR NO. 097: I had neck surgery years ago.

MR. KURTH: So do you have any bias, prejudice, or preconceived notions for or against someone who comes to court and sues for money damages?

PROSPECTIVE JUROR NO. 097: No.

MR. KURTH: All right. Did you ever serve in the military?

PROSPECTIVE JUROR NO. 097: Yes, I did.

MR. KURTH: What branch?

PROSPECTIVE JUROR NO. 097: The Army.

MR. KURTH: For how long?

PROSPECTIVE JUROR NO. 097: 13 years.

MR. KURTH: Thank you very much for your service. What was your -- your rank?

PROSPECTIVE JUROR NO. 097: E-6.

MR. KURTH: Would it affect your ability to fairly decide this case if you knew the incident happened in 2004 and it's going to trial in 2015?

PROSPECTIVE JUROR NO. 097: No.

MR. KURTH: Okay. All right. Thank you very much.

PROSPECTIVE JUROR NO. 096: Karen Ericsson, 096.

MR. KURTH: Karen Ericsson. When I hear that I think of, like, Vikings, you know, like Leif Erikson or something.

PROSPECTIVE JUROR NO. 096: I have a son that's a lawyer here in town.

MR. KURTH: Oh. What's his name?

PROSPECTIVE JUROR NO. 096: Tom.

MR. KURTH: Tom Ericsson?

PROSPECTIVE JUROR NO. 096: Uh-huh.

MR. KURTH: Oh, okay. So he's like a -- he's, like, a judge, isn't he? Like a DUI judge?

PROSPECTIVE JUROR NO. 096: No.

MR. KURTH: No?

PROSPECTIVE JUROR NO. 096: No. He's an attorney. And then I have another son that's a Las Vegas Metro sergeant that was on the SWAT team for, like, 15 years.

MR. KURTH: That's good. My son's a -- still going through field training, so.

PROSPECTIVE JUROR NO. 096: Very good.

MR. KURTH: Yeah. Tough stuff, boy.

PROSPECTIVE JUROR NO. 096: It is.

MR. KURTH: Yeah.

PROSPECTIVE JUROR NO. 096: Yes.

MR. KURTH: Probably tough to be, you know --

PROSPECTIVE JUROR NO. 096: We worry about him a lot.

MR. KURTH: Yeah.

PROSPECTIVE JUROR NO. 096: He's good at what he does, though.

MR. KURTH: That's important. So this Tom Ericsson, I'm trying to think. I was thinking of an Ericsson that I thought heard, like, DUI/DMV cases. That's not him, though?

PROSPECTIVE JUROR NO. 096: No.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 096: He has a lot of cases.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 096: He's in these courts a lot.

MR. KURTH: Okay. Who does he work for?

PROSPECTIVE JUROR NO. 096: He is -- he's in his own practice with O-R-O-N-O-Z, however you say it, Oronzo?

MR. KURTH: James Oronoz?

PROSPECTIVE JUROR NO. 096: Yes. He's in with -- he's partnered with him.

MR. KURTH: Okay. Okay. Sure. Let's see. Oh, your spouse is a horse trainer.

PROSPECTIVE JUROR NO. 096: Correct.

MR. KURTH: Very nice.

PROSPECTIVE JUROR NO. 096: In the movie industry, yeah.

MR. KURTH: Cool. I like horses. So you're retired from California Corrections? What did you do there?

PROSPECTIVE JUROR NO. 096: I was in labor relations for, like, nine years, employee relations, did adverse actions against staff. I dealt with 16 unions representing management.

MR. KURTH: Go on, I'm getting tired.

PROSPECTIVE JUROR NO. 096: Yeah, it was very -- and then I did -- and made appeals. And I was in charge of staff complaints and Americans with Disabilities Act.

MR. KURTH: So you handled claims?

PROSPECTIVE JUROR NO. 096: Correct.

MR. KURTH: So --

PROSPECTIVE JUROR NO. 096: Well, it was inmate appeals.

MR. KURTH: -- you maybe --

PROSPECTIVE JUROR NO. 096: It was their Americans with Disability rights, ensuring that they --

MR. KURTH: Sure. I'm familiar with the ADA.

PROSPECTIVE JUROR NO. 096: Uh-huh.

MR. KURTH: So -- but the -- but did you handle personal injury claims, then? People that got hurt, too?

PROSPECTIVE JUROR NO. 096: I did adverse actions against some workman's comp fraud type cases, yes, I did.

MR. KURTH: And did you investigate those? Were you --

PROSPECTIVE JUROR NO. 096: Not necessarily investigated them, but I wrote the adverse actions.

MR. KURTH: So you'd research it and would you testify?

PROSPECTIVE JUROR NO. 096: Yeah, we would get the -- we would get the investigation, I'd listen to the interviews, the tapes, read all the statements, and then put together the adverse.

MR. KURTH: How long have you been here in Nevada?

PROSPECTIVE JUROR NO. 096: Actually, I was raised in Las Vegas.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 096: But was in California for a long time. We've been back in Nevada for three years.

MR. KURTH: And that case you were on, that was a

California case, was it? Civil verdict, California case? Is that right?

PROSPECTIVE JUROR NO. 096: Yes. Yes.

MR. KURTH: Yeah, Logandale's nice up there.

PROSPECTIVE JUROR NO. 096: Uh-huh.

MR. KURTH: So have you ever made a claim yourself for personal injuries?

PROSPECTIVE JUROR NO. 096: Kind of in a roundabout way. But we didn't -- we didn't really sue. We worked for a ranch and I got kicked by one of his horses and it shattered my right leg. And he had no insurance. It cost us around 100,000. And we started to do something about it, but we didn't.

MR. KURTH: So you were taking -- taking care of somebody else's horses and they were paying you, like, boarding fees?

PROSPECTIVE JUROR NO. 096: Yeah, we worked -- we worked on a ranch.

MR. KURTH: Okay.

PROSPECTIVE JUROR NO. 096: Yeah.

MR. KURTH: Yeah, I know, yeah, a little bit around some of that ranch stuff.

PROSPECTIVE JUROR NO. 096: It's a good life.

MR. KURTH: Yeah. Yep. If you could just make a living doing that, that would be okay.