

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CAPRIATI CONSTRUCTION CORP.,	)	Supreme Court No: 80107
INC., a Nevada Corporation	)	District Court Case No: A718689
Appellant,	)	Electronically Filed
	)	Aug 12 2020 01:44 p.m.
v.	)	Elizabeth A. Brown
	)	Clerk of Supreme Court
	)	
BAHRAM YAHYAVI, an individual,	)	
Respondent.	)	
	)	
-----	)	
CAPRIATI CONSTRUCTION CORP.,	)	Supreme Court No: 80821
INC., a Nevada Corporation	)	
Appellant,	)	
	)	
v.	)	
	)	
BAHRAM YAHYAVI, an individual,	)	
Respondent.	)	
-----	)	

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**APPENDIX TO  
APPELLANT'S OPENING BRIEF  
VOLUME 10 of 12**

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Appeal from the Eighth Judicial District Court  
Case No. A718689

HUTCHISON & STEFFEN, PLLC

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPENDIX TO APPELLANT’S OPENING BRIEF VOLUME 10 of 12** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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DATED this 12<sup>th</sup> day of August, 2020.

*/s/ Kaylee Conradi*

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An employee of Hutchison & Steffen, PLLC

1 vehicle accident June 19th, 2013. Correct?

2 A Yes.

3 Q You also put number two, cervical neck pain, correct?

4 A Correct.

5 Q Right. So you agree that my client suffered cervical neck  
6 pain as a result of the traumatic event of June 19th, 2013, correct?

7 A That's incorrect.

8 Q That's incorrect?

9 A At the -- there's no relationship of causation. He has an  
10 accident, my impression. Number two, he's got cervical neck pain.  
11 Number three, he's got cervical spondylosis. You're making a  
12 connection that isn't written.

13 Q You --

14 A You're implying a connection, if you will.

15 Q Okay. Now, you noted that Mr. Yahyavi sustained an injury  
16 to his spinal axis, that includes the cervical spine, correct?

17 A That's correct.

18 Q Are you saying that he became more symptomatic?

19 A I think he had a cervical straining injury, because he  
20 complained of neck pain to the emergency room.

21 Q He complained of neck pain in the ambulance ride to the  
22 hospital, correct?

23 A That as well.

24 Q Yeah. So immediately following, he complained of neck  
25 pain, right?

1 A He did.

2 Q He complained of neck pain when he got to the emergency  
3 room, correct?

4 A Correct.

5 Q And he's complained at every other doctor visit after that, for  
6 over six years, of neck pain, right?

7 A He's had neck pain, yes.

8 Q Persistent and ongoing neck pain reported at every medical  
9 visit you've seen, since June 19, 2013, correct?

10 A And prior, yes.

11 Q All right. We're going to get to that. Isn't it true -- there's  
12 nowhere in your August 26, 2016 report, do you say that Mr. Yahyavi  
13 was experiencing symptoms in the weeks, days, or months, or even a  
14 year leading up to this motor vehicle collision, do you? You don't ever  
15 say that, do you?

16 A I don't say that. I didn't have any records to -- to say that.  
17 And he told me at my medical exam --

18 Q You say he don't say that.

19 MR. KAHN: I would ask that he be allowed to finish.

20 THE COURT: Yes, you can --

21 MR. PRINCE: Go ahead.

22 THE COURT: -- finish the answer.

23 THE WITNESS: Yes, I don't -- you are correct, I do not say  
24 that, because I do -- don't have at this point in time medical records that  
25 would have allowed me to say that, nor, did he tell me he had -- in fact

1 he told me he didn't have pain beforehand.

2 BY MR. PRINCE:

3 Q Okay.

4 A So how -- why would I make a statement that can't be  
5 supported, if you will.

6 Q Okay. Now you wrote another report August 2nd, 2018,  
7 correct?

8 A Yes.

9 Q Okay. And that was after he had his surgery, correct?

10 A Yes.

11 Q Okay. And in your August 2nd, 2018 report, you don't state  
12 that Mr. Yahyavi had symptomatic neck pain, which required any kind of  
13 medical treatment in the days, weeks, or month, or even a year before  
14 this motor vehicle collision?

15 A Same answer as before, yes.

16 Q That's a no, correct?

17 A The answer --

18 Q To my question is no.

19 A The answer to your question is no, I don't have any records  
20 that would have allowed me to say something like that.

21 Q Okay. By December 13th, 2018, that's your next report, you  
22 do have those Southwest Medical records, correct?

23 A Correct.

24 Q Yeah. And I want to read your -- but you do -- when you  
25 prepare one of these reports is you summarize the medical records and

1 create like a -- create a medical chronology, correct?

2 A I do.

3 Q And so you have assistants, or people who do this for you,  
4 correct?

5 A I have help, yes.

6 Q Okay. And what you then -- what you do have, you kind of  
7 review the chronology, you just take exactly from the actual medical  
8 records themselves, the portions that you think are clinically relevant,  
9 right?

10 A Yes.

11 Q Right. And then at the end, what you do is you come up with  
12 a -- a summary of medical opinion. That's where your opinion is set  
13 forth, right?

14 A Yes.

15 Q Okay. So -- and you understand that as a retained expert  
16 witness, you have to document all of your medical opinions, and the  
17 reasons for your opinions, right?

18 A Yes.

19 Q Okay. And the only opinion you state on December 13, 2018,  
20 after your review of these records from Southwest Medical is, the above  
21 records do not change my opinions as originally expressed in my prior  
22 reports. Mr. Yahyavi's undergone posterior cervical decompression and  
23 fusion on January 30th, 2018. The surgery -- the cervical surgery is  
24 causally unrelated to the subject motor vehicle accident of June 19,  
25 20103, over four and a half years prior. Did I read that correctly?

1 A Yep.

2 Q There is no opinion stated by you, after you have these  
3 Southwest Medical records, that Mr. Yahyavi suffered from ongoing  
4 chronic neck pain in the days, weeks, or months, leading up to this motor  
5 vehicle collision, correct?

6 A Well --

7 Q You don't say that in this report.

8 A Well, I do, in a way.

9 Q No, I'm asking do you specifically say it.

10 MR. PRINCE: I'd ask that he be allowed to answer it.

11 MR. PRINCE: I'm asking yes or no questions.

12 THE COURT: Well, I'm going to -- it is a yes or no question, if  
13 you want to explain on redirect, then that's fine.

14 THE WITNESS: Well, the answer then is no.

15 BY MR. PRINCE:

16 Q What?

17 A Because it's -- the answer, well, no --

18 Q No, just answer --

19 A -- because --

20 Q Correct.

21 A -- it's expressed in a prior report, where I say, Mr. Yahyavi  
22 has had progression of pre-existing cervical spondylosis, degenerative  
23 spine disease over several years.

24 Q Now progression of --

25 A So if you want to play semantics, it's okay.

1 Q Well, progression of degenerative disc disease, that's a  
2 radiological finding. You're discussing a radiological finding, right?  
3 What you see on an x-ray. That's what you're talking about in terms of  
4 quote/unquote progression, right? When you -- that's how you use that  
5 word.

6 A That would be one way, yes.

7 Q Right. You don't say in this December 13th, 2018 report that  
8 based on new records you received that Mr. Yahyavi had ongoing  
9 chronic neck pain even before this motor vehicle collision occurred,  
10 right?

11 A I think the record speaks for itself.

12 Q No, I'm asking you, that you don't say that as an opinion, do  
13 you?

14 A I did say it. I said progression of pre-existing cervical  
15 spondylosis/degenerative spine disease.

16 Q Right.

17 A Over several years. I said it in the prior report, actually.

18 Q That's in the ray -- that's based upon looking at x-rays that he  
19 has quote -- progressive degeneration and spondylosis.

20 A It's getting worse. I don't think any -- there's any doubt --

21 Q No.

22 A -- that it's getting worse.

23 Q On one thing, there's -- if you look at an x-ray, and you see  
24 disc degeneration and spondylosis, whatever you want to call it.

25 A Sure.

1 Q That doesn't mean someone having pain or symptoms,  
2 correct?

3 A Not necessarily.

4 Q There's a difference between degeneration on the one hand,  
5 and being symptomatic on the other hand; isn't there?

6 A There is.

7 Q Right. You can have degeneration and no symptoms,  
8 correct?

9 A You can.

10 Q Right. And you never state that Mr. Yahyavi, in any report,  
11 even as of December 13, 2018, that Mr. Yahyavi's disc degeneration, or  
12 spondylosis was symptomatic before this collision, do you? You never  
13 say those words.

14 A I don't say those words, exactly. That's correct.

15 Q In fact, you don't say those words in any of your reports, do  
16 you?

17 A Well, I don't say those words exactly.

18 Q Right. Now, do you agree there was -- well, it was  
19 reasonable for Mr. Yahyavi to undergo treatment for his neck symptoms  
20 following this motor vehicle collision, correct?

21 A Yes.

22 Q You agree that it was reasonable for him to under  
23 chiropractic care following this motor vehicle collision for his pain and  
24 related symptoms in his neck, correct?

25 A Yes.



1 Q You agree that in your opinion, he suffered, as you describe,  
2 a strain of sorts, right?

3 A Yeah.

4 Q Right. And generally speaking a sprain or strain of a muscle  
5 ligament usually resolves in days, weeks, or even within a few months,  
6 correct?

7 A Generally.

8 Q Right. And sometimes without any intervention at all, based  
9 upon your opinion you've given in other cases, correct?

10 A Sometimes.

11 Q Right. Here you agree that all of the medical treatment up  
12 through, and including the summer of 2014 was directly attributable to  
13 this June 19th, 2013 motor vehicle collision, correct?

14 A I did.

15 Q Right. And so the end point where you cut him off is, let's  
16 just call August 30, 2014, correct?

17 A Yes.

18 Q Right. And in no report of any of the six you've generated,  
19 do you give an opinion that Mr. Yahyavi was significantly symptomatic  
20 requiring any medical care before this motor vehicle collision of June 19,  
21 2013, correct?

22 A Yes.

23 Q You agree that the referral to Dr. Perry, the spine surgeon,  
24 that was reasonable and related to this motor vehicle collision, since it  
25 was within the 14 months?

1 A Yes.

2 Q You agree that Dr. Perry ordered additional testing, including  
3 an MRI, correct?

4 A Yes.

5 Q You agree that Dr. Perry ordered site-specific injections to the  
6 spine, performed by Dr. Schifini, correct?

7 A Yes.

8 Q And one of the things he's doing with those injections, is  
9 trying to determine what the source of the pain is; where his pain is  
10 coming from, correct?

11 A I think that's one of the reasons he was doing it.

12 Q That's one of the reasons why you do a transforaminal  
13 epidural steroid injection, is to assist in the diagnosis of what's causing  
14 the pain and determine whether it provides any relief.

15 A Well, I think that -- that could be one reason. The other  
16 reason is trying to help the pain, so.

17 Q So it's two reasons. One --

18 A Could --

19 Q One trying to find out the source of the pain, or the pain  
20 generator. And two, maybe help the patient relieve the pain, correct?

21 A Yes. They're not necessary diagnostic. A lot of people  
22 actually don't think they're that diagnostic. But that's more academic  
23 discussion. But I'm not going to argue with you. That's --

24 Q Orthopedic spine surgeons like Dr. Perry, they utilize site-  
25 specific pain management injections to assist them in diagnosing a pain

1 generator in a patient's spine.

2 A I understand that they may use it and that may be what they  
3 have told you. What I'm telling you is that there is -- at least the  
4 literature would tell us, they're not that site specific as you have used.  
5 And that there are a lot of false positives.

6 Q False positives.

7 A So from an academic standpoint, they're not the best. That's  
8 not to say they don't get used. That's why I said I think it's reasonable to  
9 try.

10 Q The spine service at your -- at your university, UC San  
11 Diego --

12 A Uh-huh.

13 Q They do transforaminal epidural steroid injections on  
14 patients, don't they?

15 A We do some. The cervical transforaminals have a higher  
16 risk. In fact there's some literature that would suggest cervical  
17 transforaminal are not suggested because of the risk to the spinal cord.  
18 That generally they really think you should do more caudal C7-T1 area.  
19 You can read about it if you'd like. But so it's not done with great  
20 frequency.

21 Q I looked at the website.

22 A Uh-huh.

23 Q The spine service at UCSD.

24 A Uh-huh.

25 Q One of the things they offered is a non-operative treatment

1 for it.

2 A Uh-huh.

3 Q Are these epidural steroid injections. They do them down  
4 there right?

5 A Oh, we definitely do epidural.

6 Q Okay.

7 A I'm not arguing with you there.

8 Q Okay, that's fine.

9 A Absolutely.

10 Q Now, you agree that you don't perform epidural steroid  
11 injections for a simple strain, right? They're not indicted for a straining  
12 type injury, don't you agree?

13 A Generally, we wouldn't suggest that, yes.

14 Q Right. So in addition to that, you wouldn't be trying to  
15 order, use an EMG or nerve conduction study if you thought he had a  
16 simple soft tissue nerve injury, correct? Soft tissue injury, sorry.

17 A Well, it -- generally it would be negative, if you had a -- just  
18 soft tissue.

19 Q Yes.

20 A You'd be -- if one is wanting to work up the situation, that  
21 might be a test that was ordered.

22 Q Well, the question is --

23 A Like you said, the site-specific.

24 Q If someone believes -- if you believe a patient has a soft  
25 tissue injury only, a muscle ligament strain --

1 A Uh-huh.

2 Q -- you're not ordering a nerve conduction study, correct?

3 A Me, personally?

4 Q Yeah. It --

5 A I --

6 Q -- it wouldn't be indicated at all medically.

7 A I wouldn't order it, but I mean the word cervical strain shows  
8 up not just me, but multiple medical providers in the records.

9 Q Oh, well, he definitely had -- he definitely had muscular strain  
10 to his cervical, thoracic, and lumbar region, right?

11 A I think so. But I'm just saying -- and so I don't quite  
12 understand the question then.

13 Q Well, no, muscles, ligaments, strains to the cervical, thoracic  
14 and lumbar, those -- those resolved for Mr. Yahyavi after this collision,  
15 right? The straining part resolved.

16 A I believe so.

17 Q Right. The other part is more of a structural problem within  
18 the spine, or the spine that's causing him ongoing symptoms, right? So  
19 there' another component for what we're talking about in this case,  
20 right?

21 A Well, I'm not -- I'm not sure when you say structural  
22 component. What are you -- what are you identifying as a structural  
23 component?

24 Q If they're trying to determine -- if Dr. Perry was trying to  
25 determine if the pain was coming from one or more levels of the disc in

1 his spine, correct?

2 A That's what he -- well, that's what the injections were done --

3 Q Right.

4 A -- you'd have to ask Dr. Perry why he did it. I --

5 Q What I'm asking you is you -- if someone has a simple soft  
6 tissue strain, self-limiting injury, you're not doing epidural steroid  
7 injections to determine if the pain is coming from a motion segment or a  
8 disc of the spine, correct? You're not doing that?

9 A If it's a -- if it's a --

10 Q Soft tissue injury?

11 A Generally not.

12 Q Okay. So Dr. Perry obviously thought it was something  
13 more than a soft-tissue injury, correct?

14 A He may have suspected something.

15 Q Correct. And looking at these records, from before, the first  
16 visit in Southwest Medical on October 7th, 2011, that's Exhibit 156, 2113,  
17 that's his first visit there. And he's there establishing primary care, isn't  
18 he? That day.

19 A Yeah.

20 Q Okay. And you have no medical records before October 7,  
21 2011, correct?

22 A I do not.

23 Q Right. And so one of the things they -- they would have took  
24 from him then was trying to find out what his current medications were,  
25 right?

1 A I believe they did that.

2 Q And there was no pain medications, right?

3 A I did not see that, I agree.

4 Q You would have been looking for that, right?

5 A I don't know that I was looking for anything, I'm just reading  
6 it. But I agree with you, I didn't -- I didn't see anything.

7 Q If someone was taking pain medication for some reason,  
8 that's something you would have wanted to know, because what's  
9 causing the pain, and why is the patient taking a pain reliever?

10 A I think it would be good information to have.

11 Q Right. You also looked at the review of SIB (phonetic)  
12 symptoms of this note, and there was no complaint of any -- or finding of  
13 any cervical-related symptom, correct? Of October 7, 2011?

14 A Yes.

15 Q Okay. There was no prescription of any kind. And on that  
16 day, let's just -- let's look at 2114. That's the examination. The physician  
17 did an HEENT exam, which is a head, eyes, ears, nose and throat. Do  
18 you see that?

19 A Yes.

20 Q He said there was an examination of the neck that day, right?

21 A Yes.

22 Q He said he had full range of motion, correct?

23 A Yes.

24 Q Someone who had ongoing symptomatic disc degeneration,  
25 you would expect them to have some limitation range of motion,

1 correct?

2 A Not necessarily.

3 Q You would generally -- most patients who have symptomatic  
4 disc degeneration have some loss of range of motion, correct?

5 A Not necessarily. I have met many patients who have  
6 degenerative spine disease and have normal range of motion. And they  
7 have neck pain. People have neck pain and have normal motion. People  
8 have back pain and have normal range of motion.

9 Q Okay. And there was no -- someone who had -- generally  
10 speaking if you have -- if you have severely symptomatic disc  
11 degeneration you don't normally have range of motion. Well, they --  
12 some patients may have normal range of motion, most don't, correct?

13 A I don't know I can't answer most. Some. I don't know what  
14 those -- those words mean in a context.

15 Q Well, those are -- you use those words.

16 A Well, no, you just asked me a question utilizing that. But  
17 what I say is I don't disagree. Some people would have -- could have  
18 pain with range of motion. Some people might not.

19 Q Okay. Now, one of the exams that you do when you evaluate  
20 people is you do range of motion evaluations, correct?

21 A Yes.

22 Q Because you're trying to determine is pain limiting their  
23 motion, correct?

24 A Pain, yes.

25 Q Okay. And also, like you do flexion. Sometimes you forward



1 flex, right? Then that may reflect that might be a sign of a component of  
2 a disc component, right?

3 A It could possibly be there.

4 Q Limitation with extension. When you kind of load the facet.  
5 That could be a finding that may be consistent with pain coming from a  
6 facet joint, right?

7 A It could be consistent with that.

8 Q Right. And you agree that Mr. Yahyavi came back on  
9 October 25th, 2011. And that's when he says also complains of neck  
10 pain for several years. Do you see that?

11 A Yep.

12 Q All right.

13 A Yes.

14 Q That's the one and only reported, documented, neck  
15 complaint ever before June of 2013, correct? That one time. That one  
16 visit.

17 A Other than the other record we looking at, that talked about  
18 back ache, and I think we laid the foundation that back ache that -- that --  
19 and they list back ache here with the neck ache, and then it was an active  
20 problem four or five months later. But other than those two, that's all I  
21 saw.

22 Q Okay. So this is the only place where you saw a complaint of  
23 neck pain, ever in the record, correct?

24 MR. KAHN: Objection, asked and answered.

25 MR. PRINCE: I mean subjectively reported.

1 MR. KAHN: Asked and answered.

2 THE COURT: Overruled.

3 THE WITNESS: Yes, it says --

4 BY MR. PRINCE:

5 Q Okay.

6 A -- that for several years.

7 Q Correct.

8 A That's what it says in this record.

9 Q All right. Now, I want to go down to the neck examination  
10 from October 25, 2011, 2110. And on that day he had supple with full  
11 range of motion; do you see that?

12 A I see that.

13 Q That means he had pain free range of motion, correct?

14 A It doesn't say pain free. It says he has full range of motion.

15 Q Well, you would interrupt that if there was pain noted to be  
16 -- to be painful, you would expect it to be documented, wouldn't you?

17 A I would hope it to be documented, but it doesn't say that.

18 You asked me a question, I just answered your question, sir.

19 Q Right. And it -- there was no spasms present that day,  
20 correct?

21 A Correct.

22 Q All right. Now, he was diagnosed with a "back ache". You  
23 agree that's a symptom. That's not really a true -- like a definitive  
24 diagnosis of anything, is it?

25 A I don't know. It's a ICD9 code. So to --

1 Q But a backache --

2 A -- diagnose. Well --

3 Q But a backache is a symptom, right? It really is a symptom,  
4 don't you agree?

5 A I think it can be a symptom.

6 Q Right.

7 A It can be a -- I mean, I don't know. ICD9 codes are funny, but  
8 there is neck ache, there's cervicalgia, I mean there's a lot of different  
9 ways of explaining it, and you choose one.

10 Q That's a very generalized way, isn't it?

11 A But it's generalized.

12 Q Right. It's non-specific, correct?

13 A That in and of itself is non-specific. I think the x-ray that was  
14 done on that day is very specific.

15 Q Yeah. And we're going to talk about that, so. And it says  
16 backache, will try Naproxen. On page 6, it says not taken anything for  
17 pain relief in the past. That -- that's significant to you, right? That if you  
18 quote/unquote has neck pain for years, that it wasn't ever to the point  
19 where he needed any sort of medications, correct? That was important  
20 to you?

21 A That's information, yes.

22 Q Yeah, it's information that it probably wasn't significant.  
23 That he never had any medications for it ever in the past, assuming it's  
24 true, right?

25 A I'm not sure I would apply the word significant, but I would

1 say that it's great that he didn't have to take pain -- that he didn't have to  
2 take medication. I mean it's significant enough at this point, they're  
3 getting x-rays. I mean if I thought it were insignificant, you wouldn't get  
4 x-rays. If you thought it was muscular you wouldn't get x-rays.  
5 Obviously someone suspected something.

6 Q Okay. So -- so plain film gets taken, right?

7 A That's correct.

8 Q A plain x-ray gets taken.

9 A Yes.

10 Q And there's never even a follow-up visit where the patient  
11 is -- they sit down and discuss the results with him, is there?

12 A Well, there's not -- there was an offer for a follow-up visit.  
13 You probably saw the letter, where they --

14 Q No, I'm saying there was never a face to face meeting where  
15 that x-ray was discussed, right?

16 A As I said, the patient elected not to come back, because the  
17 letter that says, hey, if you want to come in, you have arthritic changes  
18 on your x-ray, and if you want to come back, please call for an  
19 appointment. He did not.

20 Q Right. That suggest to you that it wasn't very significant,  
21 assuming he was having any neck pain at all, that it wasn't significant,  
22 right? He didn't even come back, or call, to schedule an appointment to  
23 review it?

24 MR. KAHN: Objection. Hypothetical without foundation.  
25 Improper hypothetical.

1 MR. PRINCE: No, that's not true.

2 THE COURT: I'll sustain the objection. Rephrase.

3 BY MR. PRINCE:

4 Q Right. The fact that the patient never came back to discuss it,  
5 doesn't it suggest to you that his problem really wasn't very significant,  
6 if at all?

7 A I don't know what it suggests. It suggests he didn't want to  
8 come back.

9 Q Okay. And with regard to the x-ray itself, you agree that it  
10 shows degeneration at multiple levels?

11 A The x-ray shows that.

12 Q Yeah. And you can't just look at an x-ray to say oh, yes, this  
13 person had degeneration, they must be symptomatic, can you?

14 A I wouldn't do that just from an x-ray.

15 Q No. That's -- you need to put the whole clinical picture  
16 together, right? You have to look at the x-rays, what's someone's  
17 complaints, exam findings, response to treatment, and other testing  
18 results. Wouldn't that be a fair statement?

19 A Yes. And in this case, as--

20 Q No, I'm not asking about that.

21 A Oh, you don't want to know about this case, okay.

22 Q I was asking about -- you'd want to put the whole picture  
23 together, right? I'm asking about it in general.

24 A In general, yes, I would want to try to do that.

25 Q Right.

1 A And --

2 Q Like you couldn't just look at this, without knowing one thing  
3 about this case, you couldn't look at this x-ray of Mr. Yahyavi and say,  
4 oh, yes, he must be having some kind of cervical pain.

5 A No, I think that -- I think that you have it backwards. He had  
6 cervical pain. The x-ray was taken, and the logical,, and the medical  
7 diagnosis, or assumption would be that he had neck pain related to the  
8 degenerative cervical spine disease the x-ray showed.

9 Q Hold on. You can't really -- you can't relate the neck pain  
10 with no examination findings to the degeneration. It could be muscular  
11 in nature, right?

12 A I don't think -- I think that -- I think that when you read -- if  
13 you look at what the Doctor wrote back, said that the x-rays showed  
14 arthritic changes and that he had neck pain and that the -- that letter kind  
15 of tells us that they thought the neck pain was related to the arthritic  
16 changes and degenerative --

17 Q Well, then the letter doesn't --

18 A --and degenerative changes --

19 Q -- the letter doesn't say that, does it?

20 A Well, you could read the letter then --

21 Q But it doesn't say it, does it? That the arthritis in the neck  
22 was causing the symptoms. It doesn't say that does it?

23 A It doesn't -- no, it does in a way. That's -- that's what we  
24 write back. I mean you've got an -- you have neck pain, we get an x-ray.  
25 It shows a lot of arthritic changes. What is the -- and then you get a letter

1 saying oh, these x-rays shows a lot of arthritis changes. What is the  
2 patient going to think?

3 Q Okay.

4 A Oh, great, I've got arthritic changes. My neck pain's not  
5 related.

6 Q Okay.

7 A It doesn't say that, either.

8 Q Oh, good point. Was there any recommendation for  
9 treatment following the neck x-ray? Physical therapy? Yes or no?

10 A No, he didn't come back in.

11 Q Was there any recommendation for referral to a pain  
12 management physician for evaluation, following an x-ray?

13 A No.

14 Q Was there any referral to a surgeon of any kind following an  
15 x-ray?

16 A No.

17 Q Any referral to a chiropractor physician following an x-ray?

18 A Nope.

19 Q Very good. Let's go now to the March 12th, 2012 visit,  
20 because you -- you weren't shown the actual office note on March 12th,  
21 2012, 2108. And this note is when he comes in complaining of knee  
22 complaints, correct?

23 A Yeah, I think -- is this the ski accident?

24 Q Yes.

25 A Yeah.

1 Q Right. And obviously he's being active, because he was  
2 skiing and said he had some problems with his knee, right?

3 A Yes.

4 Q And you read this note in its entirety, correct?

5 A I've seen this note, yes.

6 Q There's no complaint of neck pain at all on this visit, correct?

7 A Correct.

8 Q There is no examination findings on this visit related to the  
9 neck, correct?

10 A Correct.

11 Q All right. He had been on Naproxen, correct?

12 A I think it says that, yes.

13 Q Naproxen, that was from the October 2011 visit, right?

14 A Yes.

15 Q Now, let's go to the diagnosis of this day, and what the  
16 orders were for this day. 2109.

17 MR. KAHN: Your Honor, could we approach very briefly?

18 THE COURT: Yes.

19 [Sidebar begins at 4:03 p.m.]

20 MR. KAHN: So we can talk about whatever, but if the Court's  
21 going to pull the plug, I'd like to ask him to opine and --

22 MR. PRINCE: Fine, I want -- I want -- I want, if I can have  
23 another 30 minutes, I want to --

24 MR. KAHN: 30 minutes, Judge --

25 THE COURT: It's not going to be 30 minutes.



1 MR. PRINCE: Or whatever you -- let me finish the Southwest  
2 Medical records.

3 THE COURT: How long?

4 MR. PRINCE: Like 10 -- take 10 or 15 minutes.

5 THE COURT: All right. But then that's --

6 MR. KAHN: After that you have to go, right?

7 THE COURT: Yes.

8 MR. KAHN: Okay.

9 THE COURT: And I told you guys --

10 [Sidebar ends at 4:04 p.m.]

11 BY MR. PRINCE:

12 Q So, let's go to the orders.

13 MR. PRINCE: Go pull the whole note down, Greg.

14 BY MR. PRINCE:

15 Q So talked about a plan related to the right knee, correct?

16 A It looks like -- yes.

17 Q No plan related to the neck, correct?

18 A I do not see one.

19 Q And in addition, it says he's taken -- told to discontinue  
20 Naproxen, correct?

21 A It says that.

22 Q So the pain medication he was reportedly given in October of  
23 2011, they're taking him off of it in March of 2012, correct?

24 A Yes.

25 Q No neck findings that day, right?

1 A None seen.

2 Q Right. So no indication that he has any ongoing neck  
3 complaints as of March 2012, which required any sort of medical  
4 intervention, correct?

5 A Yes.

6 Q As of that day? And that date, the -- the diagnosis wasn't  
7 back ache. It was knee joint pain, correct?

8 A I think you are correct.

9 Q So earlier when Mr. Kahn was talking to you, and showing  
10 you that medical -- that summary page, that wasn't an active problem,  
11 according to the actual clinic note from that day, correct?

12 A I guess that's incorrect, because that's part of the clinic note.

13 Q This --

14 A The problem list was part of the clinic note, if you will.

15 Q Well, the -- well the office -- this particular office note, that's  
16 not -- backache was not an active problem according to this actual note  
17 by the physician, that particular day, right?

18 A That's true, because he came specifically for his right knee  
19 pain, status post a ski injury. I mean hydrochloric -- I mean the elevated  
20 triglycerides, which are still an active problem gets listed, but it doesn't  
21 say, hey, you have high triglycerides. It's part of an active problem. But  
22 they're talking about the knee, because he came in for his knee.

23 Q You're not assuming that he had an ongoing cervical pain on  
24 March 12th, 2012, right? Because there's no documentation of it.

25 A There is documentation of it. It says he's got a backache and

1 it's active.

2 Q Okay. I'm looking at the actual note from the physician this  
3 day. And they don't document any complaint of neck pain, findings on  
4 an exam, or even list it there, do they?

5 A I just gave you my interpretation that it doesn't say  
6 triglycerides either, and he still has hyper-triglyceride anemia.

7 Q Okay. Okay. Let's go to November 1st, 2012, one year after  
8 the -- big number 2106. And bring me the subjective and current meds.  
9 So he comes as of November 1st, 2012, states he is feeling well without  
10 any physical complaints. Do you see that?

11 A Yes, sir.

12 Q Therefore, he's got no ongoing neckache, backache, or  
13 anything, as of November 1st, 2012, correct?

14 A It doesn't say that.

15 Q No, but --

16 A It doesn't say he has ongoing neck pain.

17 Q Right, so it's not an -- it's not an active problem as of  
18 November 1st, 2012, is it?

19 A I don't know that I could say that.

20 Q Well, he's there feeling -- well, but you can. And you agree,  
21 in fairness, you can't be selective in your review of these records. You  
22 have to be --

23 A I agree with you. It doesn't say he has physical complaints.

24 Q Right. So therefore, there would be no neck complaints that  
25 day, right? That's how you would interpret this note?

1 A That's fair.

2 Q Okay. And so certainly not any ongoing chronic neck pain,  
3 right? Documented by this physician?

4 A Not documented.

5 Q Right. Well, he also does a musculoskeletal exam that day.  
6 You know, let's look at the -- well, let me stay with this for a second,  
7 since this up. The current medications were Protopic, which is  
8 an ointment for dermatitis, right?

9 A I believe so, yes. External ointment it says.

10 Q And then it's a -- and then high blood pressure medication?

11 A Correct.

12 Q No pain medication of Naproxen, no anti-inflammatory, no  
13 muscle relaxer, no opioid of any kind, right?

14 A Correct.

15 Q So wouldn't you expect -- if someone had symptomatic disc  
16 generation, been symptomatic for years, wouldn't you normally expect  
17 those -- a patient to have some kind of pain medication, anti-  
18 inflammatory, something?

19 A No, you can't have it both ways. Because when he presented  
20 with years of neck pain, you even just said and pointed to the record that  
21 he wasn't taking pain medications.

22 Q Okay.

23 A So there are people that have pain they don't -- they don't  
24 want to take medication. So I don't -- I mean I can't explain why he  
25 didn't take medication.

1 Q Okay. Right. And then on this particular day, let's go down  
2 to the examination, the musculoskeletal. Where it says neurologic, or  
3 excuse me, muscle -- no joint redness, swelling or pain. No persistent  
4 muscular pain. Do you see that?

5 A I see that.

6 Q So obviously this physician did a comprehensive  
7 musculoskeletal evaluation, right?

8 A Yes.

9 Q That's what it says.

10 A Well, review of systems, and it says no persistent muscular  
11 pain.

12 Q Right. And that's not consistent with someone who has neck  
13 pain ongoing for years, is it? It looks like it's resolved by now?

14 A I don't know that I would say it's resolved, but he does not  
15 have persistent muscular pain based on the -- and I read this, yeah.

16 Q Well, a year later after the one that you rely on, I mean  
17 certain -- when you talk about the x-ray from October 25th, 2011, there's  
18 no symptoms consistent with disc degeneration on November 1st, 2012,  
19 correct?

20 A Correct.

21 Q And you agree that chronic pain is pain that is persistent and  
22 ongoing for six months or longer?

23 A By definition he had chronic pain. But I mean if we used the  
24 definitions, as apply, and we apply the definitions, he had chronic pain.

25 Q Yeah, you just don't know the source of the pain, what that

1 was. Right? Could have been muscular, could have been stiffness, could  
2 have been stress. You can't assume it was discogenic pain, right?

3 A The only thing I can say it was neck pain for years and that  
4 he had an x-ray that showed --

5 Q Okay.

6 A -- severe degenerative spine disease. I think that -- in all  
7 fairness, as you asked me, that would be the conclusion that one would  
8 come to.

9 Q Right. But as of one year later, he's on no pain medication of  
10 any kind. He's got no persistent muscular pain. That's significant to  
11 demonstrate that he's not -- his disc degeneration is not causing pain,  
12 correct? On that visit.

13 A On that visit, on that visit, he's not complaining of muscular  
14 pain.

15 Q Yeah. Right. Also on the -- let's go to the neurologic exam.  
16 It says no headaches, extremity numbness, paresthesia, weakness, or  
17 clumsiness. Do you see that?

18 A Yes, sir.

19 Q You agree that after this motor vehicle collision, Mr. Yahyavi  
20 reported consistent headaches?

21 A He had headaches afterwards.

22 Q Yeah, he also reported extremity pain, numbness and  
23 weakness in the left arm, following this motor vehicle collision?

24 A Well, how -- when you say following, now you have to --  
25 that's a little vague to time, because he did have some, and then they

1 read it as occasional. And then some people said he didn't have it. So --

2 Q He reported --

3 A -- intermittently --

4 Q -- the first --

5 A -- occasionally?

6 Q The first visit after the UMC visit and to the chiropractor, he  
7 was reporting symptoms into his left arm, correct?

8 A I think he reports that to the chiropractor, yes.

9 Q He reported that to Dr. Perry on his initial examination, that  
10 he's having symptoms, including numbness, into his left arm, correct?

11 A I don't know if it's the first visit, but there are visits where he  
12 complains of left arm pain. And there are other visits where Dr. Perry  
13 says it's only going to the shoulder. It doesn't mention left arm pain.  
14 And in fact, if you look at the pain diagrams, we can go through a  
15 number of them. That the only -- they don't -- he doesn't write down that  
16 it's going down his left arm. And really, it's only in the neck area.

17 But -- but there are others that maybe do show that. So what  
18 I'm saying is that -- but I don't disagree, he had some left arm. I won't  
19 disagree, that --

20 Q Yeah, like --

21 A There are some -- there are some records that say he had  
22 some left arm pain.

23 Q Right. And the chiropractor on the first visit --

24 A Or it might be paresthesia -- or pain and paresthesia --

25 Q But, right?

1 A Might be both.

2 Q It's actually both.

3 A Okay, good.

4 Q And before this, he had no paresthesia, numbness or pain  
5 documented in his left arm ever before June 19, 2013, correct?

6 A That's correct.

7 Q Right. So those are new and different findings after June 19,  
8 2013, correct?

9 A They are --

10 Q Right.

11 A -- new and different.

12 Q Right. And the -- that day he wasn't talking any -- I mean  
13 this date of November 1st, 2012, there was no recommendation for any  
14 sort of care related to his spine, correct?

15 A Yes.

16 Q And based upon your review of this record, he wasn't  
17 indicated for any sort of care or therapy directed to a cervical spine as of  
18 November 1st, 2012, correct?

19 A Correct.

20 Q It wasn't indicated for physical therapy, chiropractic care,  
21 MRI imaging or referral to a medical subspecialist like pain management  
22 for surgery?

23 A Yes.

24 Q And there's no indication to you in any -- that he was having  
25 any limitations or difficulties at work, or any of his other daily activities,



1 correct? As of November 1st, 2012?

2 A No, it's -- yeah, but --

3 Q In fact he had been skiing the year before, right? Because he  
4 got -- remember he twisted his knee?

5 A He had a ski accident.

6 Q Right. So obviously he's active, right?

7 A Yeah.

8 Q Right. Now, let's look at the last note immediately before  
9 this collision. It's May 2013. Immediately before. It's Bates number  
10 2104. And he was there on that day because of the subjective -- he was  
11 there after he had been to the -- it looks like he had been to the hospital  
12 because he had some other -- some gastrointestinal problems.

13 A Yeah, he was anemic because he was bleeding out a little bit.

14 Q And so that's unrelated to anything we're talking about in  
15 this case, right? The fact that he might have been anemic. It's an  
16 unrelated medical condition?

17 A I believe it's unrelated.

18 Q Right. No documented, as of May 23rd, 2013, one month  
19 before this collision, no documented neck pain, right?

20 A Yes.

21 Q Correct? No documented arm symptoms of any kind,  
22 correct?

23 A Yes.

24 Q No recommendations for treatment of any kind directed  
25 towards the neck or the spine at all, correct?

1 A Yes.

2 Q No recommendation for any type of pain medications, anti-  
3 inflammatory, anything directed towards the neck, correct?

4 A Well, it would be contra-indicated, because of the -- the  
5 duodenitis and the gastric ulcer, right? Because that would upset his  
6 stomach and make the bleeding worse.

7 Q Right. Well, the point is, he's not -- they're not directing any  
8 pain reliever, anti-inflammatory directed towards the neck, correct?

9 A That's correct.

10 Q Okay. No rec- -- and as of May 23rd, 2013, looking at the  
11 clinical evidence in this case, there's no indication that Mr. Yahyavi has  
12 ongoing symptoms in his neck, as of one month before this collision,  
13 correct?

14 A Yes.

15 Q Okay, there's no indication Mr. Yahyavi needs any treatment  
16 directed towards his neck one month before this collision, correct?

17 A Yes.

18 Q Certainly, Mr. Yahyavi didn't need any interventional pain  
19 management or surgery one month before this collision, correct?

20 A Correct.

21 Q And you -- now -- and so you're not offering the opinion that  
22 my client, Mr. Yahyavi, required any sort of surgical care to his spine  
23 before this motor vehicle collision, obviously, correct?

24 A That's correct.

25 Q And you agree that after this motor vehicle collision, Mr.

1 Yahyavi reported continuous and persistent neck pain at every medical  
2 visit?

3 A He's had neck pain, yes.

4 Q At every visit?

5 A I don't -- well, I don't know if it's every visit, but certainly it's  
6 replete throughout the medical records.

7 Q Right. It's very clear to you that if -- I don't know what other  
8 treatment he received other than to the -- I mean for the spine, where he  
9 didn't document neck complaints, but you saw it persistently every time,  
10 correct?

11 A That's correct.

12 Q And you agree that Dr. Perry -- strike that.

13 THE COURT: I think this is a good time --

14 MR. PRINCE: That's fine.

15 THE COURT: -- I have to --

16 MR. PRINCE: That's fine.

17 THE COURT: During this -- we're going home. During this  
18 recess -- I have something I have to go to.

19 You're admonished, do not talk or converse amongst  
20 yourselves or with anyone else on any subject connected with this trial,  
21 or read, watch or listen to any report of, or commentary on the trial, or  
22 any person connected to this trial, by any medium of information,  
23 including without limitation, newspapers, television, radio or internet.

24 Do not form or express any opinion on any subject  
25 connected with the trial until the case is finally submitted to you. 1:00

1 Monday.

2 THE MARSHAL: Please rise for the jury. Folks, please leave  
3 your notebooks and pens. Make sure you grab all your personal items.  
4 Hopefully, you got your parking validated. 1:00 p.m. on Monday.

5 [Jury out at 4:17 p.m.]

6 [Outside the presence of the jury]

7 THE COURT: You may step down. Anything quickly, briefly?

8 MR. KAHN: While Dr. Tung's here, I'd like to address  
9 whatever his schedule is. Because we have Mr. Bennett spending the  
10 weekend to be here Monday morning. Having come today, as well. I  
11 think Dr. Tung has a convention starting Wednesday in Chicago. He may  
12 be available by Skype on Tuesday afternoon. But he has surgical, I think  
13 rounds or appointments Monday and Tuesday.

14 THE WITNESS: I'm just checking.

15 MR. KAHN: But he's going to check his calendar, as soon as  
16 he boots up his phone.

17 THE WITNESS: But I'm going to check on my phone.

18 MR. PRINCE: Your Honor, I don't want to Skype, because I  
19 want to show the jury documents and records. We won't have that  
20 ability.

21 MR. KAHN: We might. Give his phone a minute. We might  
22 through Magna or Veritext. There may be a way to do it.

23 MR. PRINCE: Well, I guess I'm objecting to him not  
24 personally coming back.

25 MR. KAHN: Well, let's see if he can do it first.

1 THE WITNESS: What time does it start?  
2 MR. KAHN: Well, it's not until 1:00 on Monday.  
3 THE WITNESS: You start on Tuesday? Yeah, I got Tuesday.  
4 MR. KAHN: What time are we starting on Tuesday? Do we  
5 know?  
6 THE COURT: Tuesday probably --  
7 THE CLERK: 10:30 or --  
8 THE COURT: -- 10:00 or 10:30.  
9 THE CLERK: I had 10:00.  
10 THE COURT: I mean if it's -- if it's only whatever then --  
11 MR. KAHN: Can you be here by 1:00 or not available?  
12 MR. PRINCE: On Tuesday?  
13 MR. KAHN: No, on Monday.  
14 THE WITNESS: Monday or Tuesday? I don't know I got to  
15 call my office right now and see if I can.  
16 MR. KAHN: Okay, just let me know.  
17 THE WITNESS: I mean, you know, let me just tell you, we're  
18 cancelling 30 patients, okay.  
19 MR. PRINCE: Well, I know, but --  
20 THE WITNESS: And I want to make the -- I want to --  
21 MR. PRINCE: Well, everybody's done that.  
22 THE WITNESS: I want to please the Court, so to speak.  
23 MR. PRINCE: Well, everybody's doing that.  
24 THE COURT: Stop.  
25 THE WITNESS: But, you know, Tuesday I got the same

1 difference. But I'm going to do it because it seems like I have to. So, I  
2 mean I'm sorry. But I'm just letting you know it's not -- it's not you -- I'm  
3 not the one being inconvenienced. My patients are being  
4 inconvenienced. I -- it's -- hey, I wish we didn't have trial. I -- I'm not  
5 complaining, just letting you know.

6 THE COURT: What can I tell you.

7 MR. KAHN: We have everybody doing this. It's okay.

8 THE COURT: Well, so, you guys work out Monday or  
9 Tuesday.

10 MR. KAHN: Can you come back Monday at 1:00?

11 THE COURT: Tuesday we can start earlier.

12 MR. KAHN: He'll be back Monday at 1:00, Your Honor.

13 THE COURT: Okay.

14 MR. KAHN: What about Mr. Bennett:? You want to --

15 THE COURT: Do you want to make it -- just so we -- you  
16 want to make it Monday at noon?

17 MR. KAHN: Well, we told --

18 THE COURT: Oh, wait, we just --

19 MR. KAHN: -- we told the jury 1:00.

20 THE COURT: -- told them 1:00. Yeah.

21 MR. KAHN: But what about Mr. Bennett? Because I had him  
22 fly in, spend the weekend, appear on Monday, so he's going to be  
23 Tuesday I think? No.

24 THE COURT: Sounds like it.

25 MR. KAHN: Do you think if we start at 1:00 --

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MR. PRINCE: Oh, yeah.

MR. KAHN: -- you'll finish him before 5:00?

MR. PRINCE: Oh, yeah. Oh, yeah. Yeah.

MR. KAHN: Because I'll have Mr. Bennett back Monday  
afternoon.

MR. PRINCE: That's fine. Yeah, that's good.

THE COURT: All right.

[Proceedings concluded at 4:21 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



Maukele Transcribers, LLC  
Jessica B. Cahill, Transcriber, CER/CET-708

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RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

BAHRAM YAHYAVI,  
Plaintiff,

vs.

CAPRIATI CONSTRUCTION CORP  
INC.  
Defendant.

CASE#: A-15-718689-C  
DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL  
DISTRICT COURT JUDGE  
MONDAY, SEPTEMBER 23, 2019

**RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11**

APPEARANCES:

For the Plaintiff:

DENNIS M. PRINCE, ESQ.  
KEVIN T. STRONG, ESQ.

For the Defendant:

MARK JAMES BROWN, ESQ.  
DAVID S. KAHN, ESQ.  
MARK SEVERINO, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER



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MARKED

RECEIVED

None

FOR THE DEFENDANT

MARKED

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None

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Las Vegas, Nevada, September 23, 2019

[Case called at 1:12 p.m.]

THE CLERK: Case Number A-718689, Yahyavi v. Capriati Construction.

THE COURT: Good afternoon.

MR. KAHN: Good afternoon, Your Honor.

THE COURT: So I received Defendant's trial brief number five. I didn't get a chance to fully read it, but I got through most of it, and regarding improper impeachment. Is that what you wanted to discuss or --

MR. KAHN: I just wanted to inform the Court, we just filed it, or are in the process of filing it. Mr. Prince has just seen it, so he hasn't had a chance to respond. I'm also request -- there's nothing I can do to cure that now, but I'm requesting that the deposition that was read from in front of the witness be marked as an exhibit, and a copy provided to us, so that it's in the record. That's essentially it, but -- but Mr. Prince, I think, to be fair, should have time to respond.

MR. PRINCE: Well, don't need any time to respond. The Court ruled, overruled the objection. I simply asked the witness, didn't he recently testify in a case. More testing his recollection about earning \$750,000 or more doing expert witnessing work. That he could not confirm it or deny it. And so I didn't publish it in front of the jury. I told him it's his testimony and kind of using it more to refresh and impeach. And I don't think I necessarily need to disclose the deposition transcript.

1 MR. KAHN: In that case, I'd like to respond briefly.

2 THE COURT: Go ahead.

3 MR. KAHN: And that is the question was, "Didn't you earn  
4 more than \$750,000 in forensic income?" I objected because I  
5 understood that it was going towards his ultimate income. At least that's  
6 the way I perceived it. And the response was, maybe I earned that much  
7 for all of my work. But my forensic income's only about \$100,000.

8 MR. PRINCE: Oh, no, he didn't say that --

9 MR. KAHN: I --

10 MR. PRINCE: -- oh, no, he definitely did not say that.

11 THE COURT: I -- yeah, I had to disagree, but -- and here's the  
12 big thing. I mean I think there's no way that I can avoid the fact that he's  
13 a neurosurgeon and you're saying he -- in California, doing surgeries,  
14 and this. And you're saying his total income is 750,000?

15 MR. KAHN: I'm saying he said that, I think.

16 MR. PRINCE: Oh, no, he did not say that.

17 THE COURT: I would --

18 MR. PRINCE: That was only related to medical-legal.

19 THE COURT: All right. And he -- how many -- how many  
20 cases does he do a year?

21 MR. KAHN: Forensic cases, I don't know. I think he said 100  
22 or maybe 200,000. He doesn't break it out.

23 MR. PRINCE: Uh-huh.

24 MR. KAHN: And so the question wasn't -- the question -- I  
25 objected because I knew what -- I thought I knew what he was going to

1 say, and in fact he did. So the question wasn't necessarily improper.  
2 The question was, don't you say you earn this much from forensics. And  
3 he responded, I don't know, what are you reading from. And then Mr.  
4 Prince read from the deposition that has not been marked. And then I  
5 think his response was I maybe earn that totally for all my income from  
6 the year.

7 MR. PRINCE: Uh-huh.

8 MR. KAHN: But my forensic amount is much less. And so --  
9 and so A --

10 THE COURT: All right.

11 MR. KAHN: -- I think the deposition should be fairly marked  
12 and part of the record, so that we all have it. Because it's now an issue.  
13 It was responded to over objection. And B, you know, I don't -- I don't  
14 think there's anything that can be done to cure it at this point. But it was  
15 over objections.

16 THE COURT: Well, first of all, I'm -- I think it's your character  
17 -- I don't recall him saying that was his total income, and candidly, I  
18 would be surprised if a neurosurgeon in San Diego only made a total,  
19 including his forensic work of 750,000. That's a lot for 99.9 percent of  
20 America, but for a neurosurgeon, it seems -- I mean we're talking  
21 \$50,000 generally for a surgery. And I can't remember how many he  
22 said he does a year, but --

23 MR. KAHN: He said --

24 THE COURT: -- in any event --

25 MR. KAHN: He said it was --

1 THE COURT: -- I would be skeptical. And so the question  
2 that I understood it to be was that was how much he made from forensic  
3 work. Now if you want to clear that up on -- you know, that's fine. But to  
4 impeach as to -- let's say hypothetically he makes, whatever, 500,000,  
5 200,000 --

6 MR. KAHN: Right.

7 THE COURT: -- in forensic work. It certainly is legitimate to  
8 ask, he's already testified, I believe it was him, yeah. Who he does 90  
9 plus percent for Defense work. And to impeach him, or to show bias that  
10 he makes 200,000 a year just working for Defense firms, I a legitimate,  
11 you know, impeachment, if you will. So as far asking him questions in  
12 that regard, I certainly am not excluding that. If you're saying that  
13 somehow he mischaracterized the amount, I think Dr. Tung expressed  
14 his opinion, if you will, or you know --

15 MR. PRINCE: He's tried to say he didn't know.

16 THE COURT: -- in that regard. Yeah. Now, could he have,  
17 no, I don't make that. Yeah, that would have been certainly helpful. I  
18 believe he said I'm -- something to the effect I don't know how much I  
19 make doing that. And again, it is an answer. So as far as that, you know,  
20 and my recollection certainly, you know, did you testify on a prior  
21 occasion that you made whatever, is legitimate. I don't see any reason  
22 not to attach whatever depo or make it as a Court's exhibit.

23 MR. PRINCE: Okay.

24 THE COURT: So that's what we'll do.

25 MR. KAHN: Thanks, Your Honor.

1 THE COURT: Anything else?

2 MR. KAHN: Nope.

3 THE COURT: Where are we at?

4 MR. PRINCE: Well --

5 THE COURT: Because obviously, you're not done with -- the  
6 Plaintiff is not done with his case.

7 MR. PRINCE: No, we're not.

8 THE COURT: On Friday.

9 MR. PRINCE: So we're going to have Mr. -- their expert out  
10 of order today, because he's here from out of state. Then we're going to  
11 do the depo reading. But Mr. Yahyavi, honestly he can't -- he's  
12 physically not in a good position to testify late in the day like this. So --  
13 so we'll do -- finish Mr. Bennett today, the vocational rehabilitation  
14 expert for the Defense. Then we'll do our deposition read of Kevin  
15 Mackey, who was the -- my client's supervisor at the time.

16 And then we still have a hearing on whether or not you're  
17 going to allow Mr. Baker to testify at all. Given the fact that now Dr.  
18 Tung has testified that Mr. Yahyavi was in fact injured. The he required  
19 medical treatment, and he gave him 14 months of medical care. We  
20 obviously don't believe that Mr. Baker is going to assist this jury --

21 THE COURT: Who's Baker?

22 MR. PRINCE: He's a biomechanical engineer trying to say  
23 there could be a hyperflexion extension type of movement in this  
24 collision. Even though the Plaintiff's own medical expert has given  
25 medical causation of causing an injury which required and necessitated

1 medical care. So we have a separate briefing on that. You need to be  
2 prepared for that this afternoon or tomorrow. But --

3 THE COURT: All right. I don't let biomechanicals testify  
4 about medical anyway. If he wants to testify as to the Delta V, his -- the  
5 -- unless he's a medical doctor, and I've done dozens of times, so it's  
6 nothing knew, but unless he is, as I said, a medical doctor, he can't  
7 testify that a Delta V correlates to no injury or whatever it might be.  
8 He's -- and again, I've done dozens. So unless he says something  
9 unusual, he's testifying based on testing that was done of healthy  
10 individuals with no preexisting condition, and everybody has testified  
11 that is not the Plaintiff.

12 So his opinion would not be of any assistance. I'll hear  
13 your -- I'll let you bring him in if you want, but I have done -- I have had  
14 many of these, I'm telling you just from experience, maybe there's  
15 something different. If you've heard something different than what I just  
16 said, so be it. I'm not precluding you, but as I said, he's testifying from  
17 the NHTSA or from the -- the guy sitting -- the insurance company tests  
18 regarding individuals who have no problems and they test them and find  
19 out whether they have this or that, et cetera, but that's not the Plaintiff.  
20 And so I've precluded those, and I think that covers a lot of it. But again,  
21 you can bring him in, and he can -- if he has something different to say.

22 MR. KAHN: Well, that's the biomechanical half. He also --  
23 this is the case where we did the crash test and --

24 THE COURT: Right.

25 MR. KAHN: -- to determine speed, so.

1 THE COURT: All right. The part I just said regarding Delta V  
2 can come in. That's what I said. So yes, the crash testing, the speed that  
3 he calculated, that's totally different. And I have allowed that. That's not  
4 what we're -- not what I thought we were talking about.

5 Okay, anything else? Crickets, okay. Then bring them in.

6 MR. PRINCE: I think we're ready -- I think we'll be looking at  
7 a Thursday closing, Judge. You have our --

8 THE COURT: Tomorrow, I probably will be done by 11:00.  
9 But that's not even a guarantee. I have -- I don't have a lot of things, but  
10 I have a petition for judicial review on a workers' comp. That's going to  
11 take probably 20 or 30 minutes along.

12 MR. KAHN: So starting at 11:00 tomorrow?

13 THE CLERK: You have an order to show cause at 9:00, too.

14 THE COURT: What?

15 THE CLERK: You have an order to show cause on --

16 THE COURT: That's not a biggie.

17 THE CLERK: No, but it's separated from --

18 THE COURT: 11:00, we'll try for 11:00.

19 MR. KAHN: And then our doctor is coming back Tuesday  
20 morning.

21 THE MARSHAL: Please rise for the jury.

22 [Jury in at 1:24 p.m.]

23 [Within the presence of the jury]

24 THE COURT: Good afternoon, ladies and gentlemen. Parties  
25 acknowledge the presence of the jury?



1 MR. PRINCE: Yes.

2 MR. KAHN: Yes, Your Honor.

3 THE COURT: I'm thinking we're going to start at 11:00  
4 tomorrow. I'm only halfway through reviewing the stuff. I know it's not  
5 going to be 10:00. It's whether or not it's 11:00 or 1:00 really. So I will  
6 tell you hopefully when it is, the next few breaks. Are we -- we're taking  
7 somebody out of order?

8 MR. PRINCE: We are, Your Honor. The Plaintiff -- we have  
9 not rested our case yet. We have a couple more witnesses, including the  
10 completion of Mr. Yahyavi, but the Defense has asked to use their  
11 witness -- one of the witnesses from out of state, out of order.

12 THE COURT: That's fine.

13 MR. KAHN: It's Mr. Bennett, our vocational expert. He was  
14 here Friday --

15 THE COURT: Right.

16 MR. KAHN: -- and stayed for --

17 THE COURT: Okay. Defense call Mr. Bennett.

18 MR. KAHN: Defense calls Mr. Bennett.

19 EDWARD BENNETT, DEFENDANT'S WITNESS, SWORN

20 THE CLERK: Please be seated. Please state your name and  
21 spell it for the record.

22 THE WITNESS: Edward, E-D-W-A-R-D, Lee, L-E-E, Bennett,  
23 B-E-N-N-E-T-T.

24 THE CLERK: Thank you.

25 DIRECT EXAMINATION

1 BY MR. KAHN:

2 Q Mr. Bennett, can you please tell the jury what your  
3 profession is?

4 A I'm a private practice vocational rehabilitation counselor and  
5 lifecare planner.

6 Q And where are you based?

7 A Santa Barbara, California.

8 Q How long have you been doing what you do?

9 A 43 years.

10 Q And can you explain to the jury what your profession is.  
11 What you do?

12 A Sure. A rehabilitation counselor evaluates disabled  
13 individuals. The first order of business is -- is to determine what  
14 functional limitations. By obtaining their functional limitations, we're  
15 able to tell which jobs they're able to fit in. Generally, as a rehabilitation  
16 counsel, you evaluate the individual, to determine their educational  
17 capacities. We test the individual to determine their ability to educate  
18 out of their problems, so to speak.

19 You would then consider training, if necessary, or what are called  
20 transferability of skills to return to alternative work, and/or reasonable  
21 accommodations that could assist an individual in the occasion the  
22 occupation that they engaged in at the time of injury, or alternative  
23 occupations.

24 And then generally, what would happen as a relocation counselor,  
25 you would then try to place the individual either in a new occupation, or

1 their existing occupation with reasonable accommodations or assist  
2 devices, and then follow-up. As a forensic expert, basically I do similar  
3 type evaluation looking at all those types of options. I don't always have  
4 access. If I -- if I'm doing a Defense forensic case to the individual, and  
5 then I rely upon the other rehabilitation counselor, their evaluation,  
6 testing evaluations, et cetera.

7       And as -- as that type of counselor, I've worked probably about  
8 6,000 ongoing cases in my career. And I've done about 2,000 forensic  
9 cases. I'm also a lifecare planner. And as a lifecare planner, what I do is  
10 I will evaluate the medical records, determine the impairment, determine  
11 if within the records, there's indication of future medical needs, that  
12 within a reasonable degree of medical probability. Then take those  
13 medical needs and turn those into dollars. In other words, research the  
14 cost factors for those future medical needs, based upon an individual's  
15 life expectancy, and the future treatment needs that that individual may  
16 have.

17       So those are the two basic things that I do.

18       Q     You also, in this case, have rendered certain opinions about  
19 Social Security; is that correct?

20       A     Yes. Yes, and I've been --

21       Q     And can you explain to the jury what your background is in  
22 working with Social Security?

23       A     Sure. I've been an expert with the Social Security  
24 Administration since 1978. Above and beyond the 2,000 cases that I've  
25 evaluated, I've also participated in 2,000 hearing with Social Security. In

1 that regard, as a vocational expert, I sit in the hearing, listen to the  
2 individual, determine their job titles, their skill basis. And then I'm asked  
3 by the Administrative Law Judge, based upon a hypothetical set of  
4 restrictions whether or not in my opinion, the individual can return back  
5 to work in light of the restrictions that were imposed by the  
6 Administrative Law Judge.

7           If the individual's unable to return to work based upon those  
8 types of restrictions, then a second set of questions are asked of me,  
9 depending upon the individual's age, whether or not the person has  
10 transferability of skills, and can those skills be utilized to perform lesser  
11 physical or lesser psychological applications to employment.

12           There is a third area that could be determined if there are  
13 alternative jobs that an individual could engage in that are what they call  
14 entry level occupations. And if a person can return back to work. And  
15 the Administrative Law Judge would make a determine based upon  
16 whatever criteria that they're utilizing both the medical criteria and the  
17 vocational criteria, to determine if the individual meets the definition of  
18 disability under the Social Security criteria.

19           Q     Do you also, or have you also, served as a non-attorney  
20 advocate in the Social Security system? And if so, can you explain that  
21 process to the jury?

22           A     Yes. As a non-attorney advocate occasionally, time to time,  
23 I'll be asked by claimants to represent them before the Social Security  
24 Administration. And in that regard, I'm a non-attorney representative  
25 and there's a sequential arrangement is what it's called. And my job in

1 that regard is to look up what are called medical impairment of listings.  
2 And if a person meets the medical impairment of listings, then I present  
3 it to the Administrative Law Judge and indicate this person either meets  
4 or equals those medical impairment of listings. So essentially, it's like a  
5 cookbook. It says if you have a physical disability you have to have such  
6 and such a criteria. And if it meets that criteria, then you meet the  
7 listings.

8           The second part of the sequential arrangement is that I  
9 evaluate what are called the vocational grid systems. And a person can  
10 what they call grid it out. So in other words, the vocational grid system  
11 is a system where, again, similar to what I said earlier, that if an  
12 individual has a skill base, and those transferability of skills can be used  
13 in a lesser physical demanding job, then they would grid out or indicate  
14 that they could go back to work.

15           Or they might not grid out, they can't go back to work.  
16 That's -- basically that's what I do in that regard. And I would -- would sit  
17 in at the hearing with the claimant and question the claimant about the  
18 various problems that they have, and present that to the Judge. And the  
19 Judge would then have a vocational expert come in, similar to me, and  
20 render their opinions, and the Judge would come up with an opinion or  
21 a conclusion about their ability to work.

22           Q     And have you worked with many different kinds of jobs?

23           A     Yes. Field laborers to business executives. Different -- all  
24 sorts of different types of cases. Physically disabled, psychologically  
25 disabled, head traumas, quadriplegics, paraplegics, all sorts of different

1 types of cases throughout my career.

2 Q And let's limit it just to the people you have worked with  
3 outside the forensic context. So when you were serving as a vocational  
4 counselor to individuals who aren't in the court system, is that the cases  
5 that you work with paralegics and quadriplegics on occasion?

6 A Yes.

7 Q And what was your -- what would you do for the paralegics  
8 and quadriplegics? What was the goal?

9 A Well, the goal was to restore them back to the workforce and  
10 try to either train them or fit them into a job that would allow them to  
11 perform duties. As an example, I can remember where I placed a  
12 quadriplegic who had been injured, and matter of fact, they became an  
13 intake person at a law office. In other words, they just answer the  
14 phones and send people to different departments. That type of thing.

15 Q Now, can -- can you identify when, or approximately when  
16 you were retained in this case?

17 MR. PRINCE: Your Honor, I have a short objection. I'd like to  
18 approach, please.

19 THE COURT: Approach.

20 [Sidebar begins at 1:34 p.m.]

21 MR. PRINCE: I object to this witness disclosing or discussing  
22 an opinion that Mr. Yahyavi is capable of doing any other work.  
23 Meaning that he could go do other types of jobs. His opinion has been,  
24 the only opinion he's ever offered is that he could go back to working,  
25 doing his normal job as a salesman or sales manager. He's never

1 offered or disclosed any opinions concerning employability in a field  
2 outside of automobile sales. You know, doing work on a computer at  
3 home, or any other type of vocation. That is never in any of his reports  
4 or analysis.

5 So I just want to make sure we're not going there.

6 THE COURT: In his reports?

7 MR. KAHN: I'm going through his reports. If the Court wants  
8 to see them, I'm happy to provide them.

9 THE COURT: What's that?

10 MR. KAHN: I'm going through his report. If the Court wants  
11 to see them, I'm happy to provide them.

12 MR. PRINCE: Yeah, but --

13 MR. KAHN: If you want to look through them.

14 MR. PRINCE: No, the opinion I'm offering is he's never  
15 offered an opinion that he can do anything other than going back -- he's  
16 capable of going back to his old job. And if you're offering that he's  
17 qualified to do other things, and then he's never offered any alternatives  
18 to -- than simply going back to working as a car salesman. So I just want  
19 to make sure that we're not going to be violating any of these --

20 MR. KAHN: I'm not sure that's correct after looking at the  
21 report --

22 MR. PRINCE: What do you -- what do you mean?

23 THE COURT: If you have them -- is it more than one?

24 MR. PRINCE: No, two. They're basically the same.

25 MR. KAHN: The second one is more extensive.

1 MR. PRINCE: Yeah --

2 MR. KAHN: So basically he doesn't offer any alternatives.  
3 The first report is July 3rd, 2018. He says he's not disabled and can  
4 continue working his normal job with or without accommodations. And  
5 then that opinion would remain the same in his July 27th -- usually and  
6 customary obligations -- usual and customary obligations on page 22.

7 MR. PRINCE: Yeah.

8 MR. KAHN: But I think there's more, so give me a second.

9 MR. PRINCE: No.

10 MR. KAHN: I offered -- I reviewed comprehensively all of his  
11 reports, and on page 20 of the second report.

12 THE COURT: What let me look at it. The 7/3/18 report says --

13 MR. KAHN: That's the short one -- that's the short one.

14 THE COURT: Right. It says nothing precluded Plaintiff from  
15 returning to usual and customary occupation.

16 MR. KAHN: The other one does as well.

17 THE COURT: All right.

18 MR. KAHN: I'm just looking to see if there's more.

19 THE COURT: Okay.

20 MR. KAHN: I guess I'm just --

21 MR. PRINCE: My objection is going beyond that, saying he's  
22 qualified and physically capable of doing other sedentary type work and  
23 earning an income and having an earning capacity doing any other field,  
24 or anything like that. He doesn't offer any of those opinions.

25 MR. KAHN: Your Honor.



1 THE COURT: Yes.

2 MR. KAHN: If you look at page nine, there is some research  
3 about --

4 MR. PRINCE: That's on income.

5 MR. KAHN: It's on income on different sales manager  
6 positions.

7 MR. PRINCE: Right. And he's talking about income. That's --  
8 you can talk about that. But I'm just talking about he's qualified to give  
9 other opinions.

10 MR. KAHN: Right. But Mr. Spector talked about he could be  
11 a sales manager, and not be limited to cars. So I want that to be clear.

12 MR. PRINCE: Okay, but I'm saying there's -- because your --  
13 your question was that a quadriplegic can go back to work. You place  
14 somebody in the law firm. He has no alternatives to offer Mr. Yahyavi  
15 outside of car sales. His opinion is he can go back doing it.

16 THE COURT: Mr. Spector has opened that.

17 MR. KAHN: Sales manager. Sales manager.

18 MR. PRINCE: Well, no, the issue is Mr. Spector said he can't  
19 go back -- well, excuse me only one of us is going to talk at once. And  
20 so, I mean, Mr. Kahn is your advocate here.. The -- he said he can't go  
21 back to any vocation -- vocation, disabled. He only came up with other  
22 sales jobs more just for a classification for an income purposes to  
23 establish what the capacity is.

24 MR. KAHN: Well, like I told the Court, other than what Mr.  
25 Spector said, I'm going through the report. That's what --

1 MR. PRINCE: Well, I don't want there to be alternatives --  
2 alternatives offered, and that's what I'm objecting to in advance because  
3 I can sense that you're going to say he's capable or qualified, physically  
4 capable of doing other jobs.

5 MR. KAHN: Well, he's going to talk about a combination of  
6 what can be made for him, and then as a car salesman, or as a salesman.  
7 More in white collar or that category.

8 THE COURT: The accommodation is made as a car salesman  
9 are legitimate, but I don't notice, I'm only up to page 7, anything that he  
10 could be, as you just asked, work in a law office, or in a sedentary  
11 position.

12 MR. KAHN: Yes, let's look at page 3 in the -- in the thick  
13 report, Your Honor.

14 THE COURT: Of the second report?

15 MR. KAHN: Yeah, July.

16 MR. PRINCE: July 11th?

17 MR. KAHN: No, the first one, July 3rd. The short one. Sorry,  
18 my bad. It says the positions that the Plaintiff has performed in the past,  
19 manager or salesman.

20 MR. PRINCE: Uh-huh.

21 MR. KAHN: It's considered sedentary work. The position of  
22 automobile sales worker is considered light work. His educational  
23 achievement prepares him for sedentary work. And yes, it says that he  
24 can perform the same or similar duties. It doesn't just say car sales.

25 MR. PRINCE: Yeah, but he hasn't offered anything specific

1 about sedentary jobs that he's qualified for, capable of performing.  
2 Anything. He didn't do an assessment of him.

3 MR. KAHN: He has a written opinion, same or similar duties  
4 with reasonable accommodations. It's in his first report over a year ago.  
5 That's what he said, that's what he should be -- I'll limit him, I'll lead him  
6 to the report.

7 MR. PRINCE: That's talking about the same job as an auto  
8 salesman. That's like offering, oh, he could go to work like a law firm or  
9 office setting, doing certain tasks. He never offers any alternative  
10 employment options in either report.

11 MR. KAHN: Same or similar duties, that's a comprehensive  
12 thing. And it's --

13 MR. PRINCE: No.

14 MR. KAHN: -- not limited to automobile.

15 MR. PRINCE: Well, then that's a non-specific opinion. You  
16 don't get to hide in the vaguery [sic] of these reports and start coming up  
17 with anything you want. Because I can tell by Mr. Kahn's responses that  
18 it's clearly going to move in this direction.

19 THE COURT: I don't --

20 MR. PRINCE: I want to make sure we're not --

21 MR. KAHN: I'll direct him that he [indiscernible] disclosed  
22 over a year ago. Yes, that's correct.

23 THE COURT: So where are you -- I'm looking at --

24 MR. KAHN: Counselor's comment.

25 THE COURT: -- page 3, counselor's comment.

1 MR. KAHN: Yeah, that whole paragraph.

2 THE COURT: Manager, sales is considered sedentary.

3 MR. KAHN: The next sentence.

4 THE COURT: Minor history. Okay, I mean it allows some  
5 latitude, but if I think what you're saying is he could go and work for a --  
6 as a quadriplegic, a law office, whatever, et cetera --

7 MR. PRINCE: He doesn't say that.

8 THE COURT: -- and answering phones. I know, that's what  
9 I --

10 MR. KAHN: Well, he's saying sedentary work and light work.  
11 He's saying he can do those types of things. Same and similar duties.  
12 He doesn't say just those things. He says similar duties. It's pretty clear.

13 MR. PRINCE: It's not clear. And you didn't allow us any  
14 ability to develop that with our experts to address that during our direct  
15 exam, for him to start saying that there's other options in the sedentary  
16 category, which all of our experts, I can tell you are capable of that.  
17 Then that would be new opinions that are undisclosed. Because he'd  
18 have to articulate the basis for that opinion, so --

19 MR. KAHN: I don't think -- I don't think he was deposed on  
20 that.

21 MR. PRINCE: It doesn't matter. All that clearly doesn't  
22 matter.

23 THE COURT: What's that?

24 MR. KAHN: He wasn't deposed.

25 THE COURT: It makes no difference.

1 MR. KAHN: I would like to question him on the same and  
2 similar sedentary work and light work. I'm certainly not going to --

3 THE COURT: On same and similar, but you're treading a fine  
4 line. He's right. If he had an alternate theory that he could do X, Y, or Z,  
5 he clearly could have put that in his report. It's not that difficult. And he  
6 wants to say, and he will make X number of dollars doing that. And --  
7 and he hasn't said it, I don't think. I didn't get to the second report. But I  
8 assume he's going to come up with a dollar --

9 MR. PRINCE: No, he doesn't --

10 MR. KAHN: No, he pretty much just says he can too back to  
11 work.

12 MR. PRINCE: He says --

13 MR. KAHN: He says he can go back to work sedentary --

14 THE COURT: Well, that's then that's fine.

15 MR. PRINCE: Well, that's fine, but, no, no. He's talking about  
16 the same or similar. When we think of same or similar means that he  
17 can work as an auto salesman or an auto sales manager. That's same or  
18 similar. So not like he can do other sedentary functions like he can work  
19 at a law firm, he can work at the stadium, he could part time with deaf  
20 people. I don't know.

21 MR. KAHN: Well, he wasn't talking about this claimant. He  
22 was talking about what he did with --

23 MR. PRINCE: Oh, he was talking about this Plaintiff. This  
24 specific Plaintiff. That's what he was talking about.

25 THE COURT: All right. I think --

1 MR. KAHN: He was talking about --

2 THE COURT: -- I've made myself clear. That some new  
3 theory that he could be -- I mean I'll stretch it out.

4 MR. KAHN: I --

5 THE COURT: He could be a neurosurgeon and sit to do it is  
6 totally a new and separate and totally distinct. So tell me what --

7 MR. KAHN: From the vocational perspective, he said he can  
8 do sedentary work and light work. And those are the types of things he  
9 can do, and similar duties. So office work and --

10 MR. PRINCE: No.

11 MR. KAHN: Something similar to a car salesman.

12 MR. PRINCE: He says -- he says the Plaintiff could continue  
13 to perform same or similar duties with or without reasonable  
14 accommodations. We're talking about working in the auto field.  
15 Because that's his whole career. So when you say same or similar, he's  
16 only -- he's only worked in one career.

17 MR. KAHN: Well, I think he said internet auto sales is in here  
18 somewhere, too.

19 MR. PRINCE: No.

20 MR. KAHN: Yes, I think he said it. Because he's -- he's  
21 looked at the -- the large report. Internet automobile sales. Here you go.  
22 Page 11 of the larger report. Transitional sales. Based on educational  
23 achievements, broker, banker, credit manager, labor relations manager,  
24 market research analyst, sales manager, based upon vocational history.  
25 Owner/operator automobile broker, automobile sales, salesman, internet

1 automobile sales.

2 MR. PRINCE: He's talking about -- but, yeah, but he's talking  
3 about what his skills are. If you go to --

4 MR. KAHN: He lists those -- he lists those on page 11.

5 MR. PRINCE: No, he talks about --

6 THE COURT: All right.

7 MR. PRINCE: Judge I want you to look at page 22 of the big  
8 report, because that's where the opinion is going to come down. That's  
9 where the exact opinion comes down. He's talking about skill sets there,  
10 which is just where he's at.

11 MR. KAHN: If you look at page 20 --

12 MR. PRINCE: Excuse me, if you look at page 22, in this  
13 counselor's view, nothing precludes this Plaintiff right to his usual and  
14 customary occupation of automobile sales representative manager.  
15 Then he goes on to conclude that he has no injury. He's not disabled  
16 from his usual and customary positions. He offers no alternative  
17 position, how much you could earn in that position or otherwise. So it's  
18 on page 22 and 23 of the July 27, 2018 report. That's his -- he talks  
19 about vocational potential.

20 THE COURT: Well what --

21 MR. PRINCE: Section 8A.

22 MR. KAHN: Hold on --

23 MR. PRINCE: Just because he talks about -- excuse me.

24 When he talks about transferability of skills, he doesn't apply those to  
25 Mr. Yahyavi and then articulate what other alternative would be

1 available for him. What his recommendations would be, or anything to  
2 the like.

3 MR. KAHN: When we first got here, Mr. Prince said he didn't  
4 provide an alternative profession. On page 11 he's got 11 things. So  
5 there's no question that he provided them in writing. Here are all the  
6 things he can do. Transferability of skills.

7 MR. PRINCE: But he didn't he's capable. He has skills. That  
8 doesn't mean he vocationally do them at this point given the physical  
9 limitations.

10 THE COURT: Yeah, these are --

11 MR. KAHN: Those are --

12 THE COURT: All right. I'll allow these.

13 MR. KAHN: Yeah.

14 THE COURT: These are all --

15 MR. KAHN: That's all I'm going to ask him.

16 THE COURT: -- about the old skills. Are all related to his  
17 auto employment.

18 MR. PRINCE: Well, then he can't say --

19 THE COURT: Not sitting at a -- you know, desk doing --  
20 answering phones for a law firm. He doesn't provide that, he doesn't  
21 suggest that --

22 MR. KAHN: Okay.

23 THE COURT: -- anywhere.

24 MR. KAHN: I'm limiting myself to the report. That's what I  
25 was going to do.



1 THE COURT: All right.

2 MR. PRINCE: No, but you're trying to take liberties with the  
3 report that don't exist.

4 THE COURT: All right.

5 MR. PRINCE: That's what --

6 MR. KAHN: Absolutely.

7 THE COURT: Have another question --

8 MR. KAHN: Okay.

9 THE COURT: -- and make your objection on that.

10 [Sidebar ends at 1:47 p.m.]

11 THE COURT: Go ahead.

12 BY MR. KAHN:

13 Q Mr. Bennett, did you -- after you reviewed materials in this  
14 case, can you tell the jury who you rely upon for medical issues?

15 A Dr. Tung.

16 Q And who's your counterpart on the Plaintiff's side to do that?

17 A Mr. Spector.

18 Q And you reviewed his information and his opinions?

19 A I have.

20 Q You understand that on the Plaintiff's side, they're saying  
21 essentially the Plaintiff can never work again?

22 A I understand that.

23 Q And what is Dr. Tung saying?

24 A That he believes the Plaintiff could return back to work.

25 Q And you don't render medical opinions, correct?

1           A     I do not.

2           Q     So you rely upon what Dr. Tung is telling you I order to  
3 provide your vocational assessment?

4           A     Yes.

5           Q     And you authored a few reports in the discovery period in  
6 this case. Can you go to page 11 of your second report, transferability of  
7 skills?

8           A     Okay.

9           Q     And can you identify for the jury, the types of jobs that you  
10 believe this Plaintiff is capable of doing?

11                   MR. PRINCE: Objection. Form, beyond the scope and  
12 exceeds. This was our discussion at the Bench, Your Honor, and my  
13 objection. Capable. Those are skills, not jobs.

14                   THE COURT: I'll allow it -- I'll allow it, if you're talking about  
15 Part B.

16 BY MR. KAHN:

17           Q     Okay. Based on his vocational history, what kinds of jobs do  
18 you think he can do?

19           A     Owner/operator automobile used car dealership, as  
20 performed in the past; automobile broker, as performed in the past;  
21 automobile salesperson, as performed in the past; sales manager, as  
22 performed in the past; and internet automobile sales.

23                   MR. KAHN: Your Honor, can we approach briefly?

24                   THE COURT: Yes.

25                                   [Sidebar begins at 1:49 p.m.]

1 MR. KAHN: I was going to ask him about both. Part A, the  
2 educational -- the Plaintiff's educational issues. It's in the report --

3 MR. PRINCE: But that's not -- that's not -- that's not -- he  
4 never says he can go back and do those jobs today. He just says -- well,  
5 he does say he can go on and continue work in the auto sales. He does  
6 say that. I agree with that. He does --

7 MR. KAHN: I was going to ask him what his skills were --

8 THE COURT: Based upon educational achievement.

9 MR. KAHN: What skills would transfer based on his  
10 educational skills. MBA.

11 MR. PRINCE: He doesn't say he's vocationally other than  
12 automobile. He only does automobile.

13 MR. KAHN: I'm not going to go inside of this. I'm going to  
14 go down the list.

15 MR. PRINCE: No objection. He says right here on page 20 of  
16 his report, page 22. 22. That he -- nothing precluded from returning to  
17 the occupation automobile sales manager. That's the only pen he has.  
18 Not a banker, not a credit manager, not anything else.

19 MR. KAHN: That's not true. It says --

20 MR. PRINCE: No, he --

21 MR. KAHN: This is where it --

22 MR. PRINCE: This is -- this is his --

23 THE COURT: Wait. Wait.

24 MR. PRINCE: -- whole opinion right here.

25 THE COURT: [Indiscernible].

1 MR. PRINCE: If you look on page 23, the first paragraph of  
2 page 23.

3 MR. KAHN: You tell me when --

4 MR. PRINCE: And the it says he's not -- based on -- the  
5 Plaintiff left his employment in August or September. He had suffered  
6 no loss of earnings, so he's not disabled from his usual and customary  
7 as a result of the instant case. And offered nothing else. So he's only  
8 speaking of auto business.

9 THE COURT: Page 22, 5, 6, 7, 8A, his vocational potential  
10 again is automobile sales representative manager.

11 MR. PRINCE: And --

12 THE COURT: Occupational rec-- resistivity. Is that a  
13 misspelling. I've never heard of that.

14 MR. KAHN: No, I think that's probably a technical word.

15 THE COURT: Earning capacity.

16 MR. KAHN: And then he attaches his first report that says --

17 THE COURT: Is that a Y at the end? Capacity.

18 MR. KAHN: Capacity, yeah.

19 THE COURT: Okay. It looks like a B. I'm wondering what.  
20 Okay, so what is your --

21 MR. KAHN: My position is he has transferability of skills on  
22 page 11, based on his educational [indiscernible]. He's listing a half  
23 dozen jobs. And then at the end of this second one --

24 MR. PRINCE: Obviously, he's capable of that --

25 MR. KAHN: At this point, it's my turn to talk, Your Honor.

1 THE COURT: Let -- yes. Go ahead.

2 MR. KAHN: At the end of the second one, he attaches  
3 portions of the first one that has that same quota about the same and  
4 similar duties, it's in the app. But he's saying he can transfer these skills,  
5 based on his work experience, based on his education. We know he  
6 has an MBA, it's in here. And here are the kinds of jobs he can do. He  
7 lists 11 jobs. There's no reason he shouldn't be able to at least speak  
8 these words that are in his report. That's all I'm asking for.

9 THE COURT: Okay, so let's say he -- he says he could do  
10 other things.

11 MR. KAHN: These six things.

12 THE COURT: He has listed nothing to address a economics,  
13 which I assume is the reason he's here, how that would somehow be  
14 different. He's listed nothing about the money involved with that.

15 MR. KAHN: Right. And I'm not going to ask him that. I'm  
16 going to ask him about these six jobs.

17 THE COURT: Uh-huh.

18 MR. KAHN: Is he going to be able to do these six jobs, based  
19 on the transfer of skills --

20 MR. PRINCE: Judge, without the money component, then  
21 it's irrelevant. Completely irrelevant. He doesn't say he's qualified to  
22 work as banker. He never addresses what physical limitations --

23 MR. KAHN: I get the emotion to finish a sentence at some  
24 point.

25 THE COURT: Yes, I -- don't interrupt him. I'm going to allow

1 him to state that, but you're out of luck when it comes to anything to do  
2 with money.

3 MR. KAHN: That -- that's fine.

4 THE COURT: So I'm not sure how you're going to at all tie it  
5 in.

6 MR. KAHN: That's fine.

7 THE COURT: If he says, oh, he could do these other things,  
8 but he doesn't say how that produces, or with -- not adduce, will make  
9 up for his income. And there's nothing in here regarding that, so --

10 MR. KAHN: That's fine.

11 THE COURT: -- I'll let you make the list.

12 MR. KAHN: Thank you.

13 [Sidebar ends at 4:53 p.m.]

14 BY MR. KAHN:

15 Q Mr. Bennett, on that same page, you identified some  
16 transferability of skills issue. Can you explain to the jury what you mean  
17 by the phrase transferability of skills?

18 A The -- based upon the Plaintiff's experiential background, in a  
19 demonstrated capacity to perform those type of jobs, he has those skills  
20 that transfer back to the same and similar type of occupations.

21 Q And what is his highest level of education, if you know?

22 A His highest level of education is a master's degree, an MBA.

23 Q Master's in Business Administration?

24 A Yes.

25 Q And what are the -- based upon his educational achievement,

1 what are the job titles that you said he could use -- he could do with  
2 transferring his educational skills?

3 MR. PRINCE: Objection, foundation, move to strike, Your  
4 Honor. It's not in his report what jobs -- additional jobs he can do.

5 MR. KAHN: Okay, I'll withdraw it.

6 BY MR. KAHN:

7 Q And on page -- on page 11 of your second report, can you  
8 identify what areas of employment you identified, based on the Plaintiff's  
9 educational achievements?

10 A Yes.

11 MR. PRINCE: Well, I'm going to object again, Your Honor. It  
12 misstates the report, one. Two, he's offering new opinions that he's  
13 never given before. That's the basis of the question, we've been having  
14 the discussion at the Bench, so --

15 THE COURT: Overruled. You can answer.

16 THE WITNESS: Based on the Master's in Business  
17 Administration, it's my opinion he could be a broker. He could be a  
18 banker, a credit manager, labor relations manager, marketing research  
19 analyst, sales manager

20 BY MR. KAHN:

21 Q Okay, what I'd like to do, Mr. Bennett, is kind of go through --  
22 go through your initial report on -- we're not going to put it into  
23 evidence, of July 3rd, 2018, and use that as a guide to kind of go through  
24 what you have opined in this case, prior to coming here today.

25 A Okay.

1 Q And what did you have as his work period after the accident?

2 A Post-accident return to work for Chapman Chrysler Jeep, in a  
3 position automobile sale manager and automobile sales representative.  
4 Worked for about -- well, and had additional appeared 1.5 months after  
5 this, due to a non-related medical problem.

6 Q When you say a period after this, what do you mean?

7 A That there was indication he was 1.5 months due to a  
8 surgery that he had --

9 Q Okay.

10 A -- for a non-related medical problem.

11 Q Okay.

12 A And then in approximately 2014, he returned to Chapman  
13 again in the position of sales representative on a part-time basis until  
14 either 8/16 or 9 of '16. And then discontinued work thereafter. That's  
15 what I have. So it looks like he worked for a period of three -- 3.3 years.

16 Q If you could go to page two of that report, you've identified a  
17 number of physicians and medical professionals who allowed the  
18 Plaintiff could return to work early on after this accident, correct?

19 A Yes.

20 Q Can you go down the list and identify which doctors or  
21 medical providers said he could return to work, and whether it was full  
22 duty, light duty restrictions.

23 A Sure. As of July 2nd, 2013, Dr. Shaw [phonetic] based upon  
24 an evaluation of June 25, 2013. Due to his condition will be unable to  
25 return to work until July 15, 2013. July 8, 2013 to July 18, 2013, Dr.



1 Klausner may return to modified duty as of July 18, 2013 [sic] to July 18,  
2 2013. Should wear a collar at work. As of July 18, 2013, Goldstein, who  
3 is a PAC, released him to modified duty as of July 8, 2013. Work  
4 restriction, needed to wear a collar.

5 As of July 15, 2013. Dr. Shaw, patient currently employed as  
6 a sales manager. As of July 18, 2013, Dr. Klausner, may return to full  
7 duty as of July 18, 2013.

8 Q Let's -- let's pause there for just a second. That's about a  
9 month after the accident, right?

10 A Yes.

11 Q And that's the first time a doctor is releasing back to full  
12 duty?

13 A Yes.

14 Q Okay, keep going. Let's for -- I think the next one is a Dr.  
15 Perry?

16 A Yes. November 11, 2013, Dr. Perry, I will keep him on limited  
17 duty restrictions. Has been off of work due to high blood pressure.

18 Q And have you ever seen anything in the records you've  
19 reviewed, or the records of the other professionals, where any doctor  
20 has said the high blood pressure is related specifically, and only, to this  
21 accident?

22 A No, I mean I think I recall he was on Lisinopril during the --  
23 right up before the accident.

24 Q Okay, let's go to -- now we jump to the next year, June 24th,  
25 right?

1 A Yes, June 24th, can return to work without restrictions.

2 Q And then a couple months later, Dr. Perry?

3 A Dr. Perry, August 11, 2014. Weightlifting only up to 25  
4 pounds, pushing and pulling limited to 25 pounds.

5 Q And then Dr. Perry in September?

6 A September 25, 2014, Dr. Perry, will continue full duty and  
7 restrictions of lifting up to 30 pounds, pushing and pulling limited to 60  
8 pounds.

9 Q Okay. So I'm doing time out again. So Dr. Klausner, in the  
10 middle of July says Plaintiff can go back to full duty. And in the middle  
11 of September Dr. Perry says he can go back to full duty with the lay  
12 restrictions, correct?

13 A Yes.

14 Q And then why don't we go to when Dr. Fisher -- Dr. Fisher's --

15 A Okay.

16 Q -- statements at the end of -- the end of 2014?

17 A December 3, 2014, Dr. Fisher, status light duty work.

18 Continue on?

19 Q Yes, please.

20 A February 11, 2015, Dr. Fisher, status, light duty work. The  
21 same thing Dr. Fisher, April 1, 2015, light duty and --

22 Q And then he sees -- he sees Dr. Fisher again, correct?

23 A Yes, on April 8th, 2015.

24 Q And what does Dr. Fisher say at that time?

25 A Work status full duty.

1 Q Okay, so to recap, Dr. Klaussner, Dr. Perry, and Dr. Fisher  
2 have all put him on -- back on full duty in less than two years from the  
3 accident, correct?

4 A Yes.

5 Q And then shortly after that, a few months later, Dr. Tung does  
6 his IME of the Plaintiff.

7 A Yes.

8 Q And you reviewed that, and are basing your opinions on Dr.  
9 Tung's opinions, as we discussed, right?

10 A Yes.

11 Q And one of the things that you seem to be saying is that you  
12 believe Plaintiff could still work as a salesman at a car dealership, in  
13 addition to the other vocations you've identified, right?

14 A Yes.

15 MR. PRINCE: Yes, Your Honor, move to strike. Can we  
16 approach, please?

17 THE COURT: Yes.

18 [Sidebar begins at 2:01 p.m.]

19 MR. PRINCE: Your Honor, I need you to admonish Mr. Kahn,  
20 number one, we -- a minute ago we talked about transferability of skills.  
21 He's now said that Mr. Yahyavi could continue working as a salesman  
22 and in those other jobs that he's just described. Meaning continued on,  
23 being a broker, labor relations, banking, all those things. That's exactly  
24 what you talked about that he could not do, because that was never in  
25 his report, that he could go to work in any of those other fields. He's

1 talking about a skill set that -- but he's not talking about he can go back  
2 to work in any of those other jobs. He didn't say that in any report. And  
3 Mr. Kahn just specifically asked him that question, and you previously  
4 gave him limitations that he had to stay within auto sales.

5 MR. KAHN: He's a vocational expert and he testified to what  
6 jobs the guy could do with his skill set and his educational set.

7 MR. PRINCE: No.

8 MR. KAHN: He has listed in his report, not one --

9 MR. PRINCE: He only said he --

10 MR. KAHN: -- not one job further.

11 MR. PRINCE: He -- he never says he can go to work in those  
12 fields. He never -- he says all he can do is go back to work as an auto  
13 salesperson and manager. That's it. Page 20. If you look at the second  
14 page of that report, he can return to his current position of the first  
15 report. Second report --

16 THE COURT: I missed the last question, but I thought, at  
17 least thought I --

18 MR. PRINCE: He snuck in there.

19 THE COURT: -- I think I heard the last question I thought had  
20 to do with whether or not he could do those jobs. I thought your  
21 objection was it's beyond his scope.

22 MR. PRINCE: No. Beyond the scope of his report. He said in  
23 addition -- isn't it your opinion he can go back to work as doing auto  
24 sales, auto sales manager, in addition to all those other jobs you  
25 described, which is -- he's never said he could go to work as banker,

1 labor relations manager, broker, any of those things. He's never offered  
2 that report. That's the objection and Mr. Kahn knows that.

3 THE COURT: Mr. Kahn?

4 MR. KAHN: It goes to the part that he could transfer skills to  
5 those in a certain job title. That means he could do those jobs. He's a  
6 vocational expert.

7 MR. PRINCE: That's not -- because he doesn't say that.

8 MR. KAHN: Look at page 22 of his report.

9 THE COURT: Well, and a doctor doesn't say that, either.

10 MR. PRINCE: He doesn't.

11 MR. KAHN: No, but a doctor is not a vocational expert. He  
12 says he can go back to work.

13 MR. PRINCE: No, he doesn't -- he doesn't even say that. He  
14 just says --

15 MR. KAHN: That's not -- this expert says using those same  
16 skill sets.

17 THE COURT: I want to play the last question, because unless  
18 I -- I --

19 MR. KAHN: Yeah, let's hear. Let's excuse the jury.

20 THE COURT: I know it will take a while.

21 MR. KAHN: Take a break.

22 [Sidebar ends at 2:04 p.m.]

23 THE COURT: All right. We're going to take ten minutes.

24 We're going to take ten minutes. During the recess you are admonished,  
25 do not talk or converse amongst yourselves or with anyone else on any

1 subject connected with this trial, or read, watch or listen to any report of,  
2 or commentary on the trial, or any person connected to this trial, by any  
3 medium of information, including without limitation, newspapers,  
4 television, radio or internet.

5 Do not form or express any opinion on any subject  
6 connected with the trial until the case is finally submitted to you.

7 We'll take ten minutes.

8 THE MARSHAL: Please rise for the jury.

9 [Jury out at 2:04 p.m.]

10 [Outside the presence of the jury]

11 MR. KAHN: If we could excuse the witness, Your Honor?

12 THE COURT: In a second. All right. Now, we're on the  
13 record outside the presence. Yes, please go to the ante room. Judy, can  
14 you pull up that last question?

15 [Pause]

16 [Whereupon previous testimony was played back.]

17 THE COURT: It calls for medical opinion, but we're past that.

18 [Whereupon previous testimony continued to play back.]

19 MR. PRINCE: That's the objection, right there. And that's  
20 where he said that he can go back -- and other jobs. And that is exactly  
21 what's not in his report. It says he can go back to those other jobs. Mr.  
22 Kahn exactly knows that. We had a lengthy discussion at the Bench  
23 regarding this. Because his only opinion on vocation is he can go back  
24 working as an auto sales manager only. Not any of those other  
25 categories.

1 MR. KAHN: Your Honor --

2 THE COURT: Mr. Kahn?

3 MR. KAHN: He's a vocational expert. He's listing jobs, not  
4 for the fun of it. He's listing jobs in a written report a year ago, because  
5 these are jobs he's opined in writing that this Plaintiff can go back to, and  
6 do, given his educational and vocational skill sets.

7 MR. PRINCE: No.

8 THE COURT: Well, had he put that in, as you just stated it, it  
9 would absolutely be admissible. Mr. Kahn, unfortunately, this listing on  
10 page -- and let's make sure we get it right, where he says these are  
11 similar skills -- based upon educational achievement. That doesn't  
12 qualify as an expert opinion to say he could do these other things. That  
13 is wholly inadequate. If that's his opinion, he should have said it. His  
14 opinion at the end, the only opinion that even looks like an opinion, and  
15 generally, I've seen hundreds of these. It's stated, these are my  
16 opinions. But he doesn't do that. Okay, fine. He says -- he says, under,  
17 as I said, 8(a), it is counselor's view that could be opinion, nothing  
18 precludes Plaintiff from returning to his usual and customary occupation  
19 of automobile sales representative manager. Occupational reciprocity,  
20 as demonstrated --

21 MR. KAHN: Receptivity.

22 THE COURT: What's that?

23 MR. KAHN: Receptivity.

24 THE COURT: Is that a word?

25 MR. KAHN: I'm assuming it's a term word for them.

1 THE COURT: Wow. I -- all right. I've got to look that up,  
2 because I've never heard of it. And then earning capacity as  
3 demonstrated. I don't see anywhere where he's offering an opinion that  
4 he can go back to these alternate jobs and make the same or similar  
5 money. And just to list what he could do with an MBA, assuming that's  
6 what -- which it doesn't say, isn't adequate. It's vague and it doesn't give  
7 the Plaintiff enough to say, or to inquire, well, as a broker, would he --  
8 he'd be making ten times that.

9 MR. PRINCE: Or less.

10 THE COURT: But as a credit manager for who or what? A  
11 banker -- there's no way they're going to take him a 60 year-old, or 50  
12 whatever. Again, all these things, he doesn't give that opinion.

13 MR. KAHN: Okay.

14 THE COURT: He doesn't say anything other than this one  
15 vague reference.

16 MR. KAHN: Respectfully, Your Honor, I think he does on  
17 page two. At the top of page two. It says, "With respect to the  
18 vocational evaluation", and then if you go down to the second bullet  
19 point, Plaintiff's pre-incident educational achievement, which are the  
20 exact topics we're talking about now, prepared him for sedentary work."  
21 He doesn't limit it to car sales. He says sedentary work. And then if you  
22 read that hand in glove with the listing on page 11 of the different  
23 vocations. What he's saying is here are some jobs that you could  
24 transfer skills to. So he starts -- he starts his opinions at the beginning  
25 instead of at the end.



1                   But he's saying, specifically Plaintiff brings an educational  
2 achievement preferred for sedentary work. Not just car sales, which is  
3 what Mr. Prince wants to limit him to. Also, it says, based on  
4 restrictions, he's able to perform the same or similar duties, again, not  
5 limiting it to just car sales. So these are just summary opinions at the  
6 top of the bullet points. And in there is specifically, his education  
7 prepares him for sedentary work.

8                   MR. PRINCE: That's a summary, Your Honor. You have to  
9 look at --

10                  THE COURT: Yeah, I don't think that's --

11                  MR. PRINCE: -- page 2 and page 11, and page 22 in context.

12                  THE COURT: All right. All right. Mr. Kahn, I don't think  
13 that's adequate for a report from an expert. It should have conclusions.  
14 And if you're really, in my mind, stretching it to add that paragraph, or  
15 that sentence to the other sentence, to say somehow, oh, he could go  
16 back and do that. And quite frankly, again, you didn't -- or he didn't  
17 address anything to do with how this would be the same or similar and  
18 generally speaking more money.

19                  He didn't address that whatsoever. And that would be the  
20 logical conclusion that somebody writing this type of report should have  
21 put. So --

22                  MR. KAHN: I understand.

23                  THE COURT: -- I'm sustaining the objection and --

24                  MR. KAHN: I would just ask that the Court attach the two  
25 reports as a -- as Court's exhibits.

1 THE COURT: Absolutely.

2 MR. PRINCE: Of course, fine. Then I also, Your Honor, want  
3 you to strike that -- that they are not to consider that him returning to any  
4 employment outside of automobile sales, or sales manager, and not to  
5 consider any other aspect of employment, because he didn't offer that.  
6 And that's exactly what Mr. Kahn did. We had a lengthy discussion at  
7 the Bench, because I could sense that --

8 THE COURT: Yes, yes, yes. Mr. Kahn, do you have anything  
9 that -- where he says it's my opinion he could go back to work as a  
10 broker, as a whatever. Because --

11 MR. KAHN: The fact that it's written in writing in the report --

12 THE COURT: All right, I don't think that's --

13 MR. KAHN: -- that's an indication --

14 THE COURT: -- at all adequate. We've gone over this to ad  
15 nauseum. That's not adequate under 16.1. So I'm going to sustain the  
16 objection and instruct them to only consider --

17 MR. PRINCE: Returning to automobile sales or sales  
18 manager only.

19 THE COURT: Yes.

20 MR. KAHN: Okay, as long as the reports end up in the  
21 transcript and can be referenced.

22 THE COURT: They're going to be attached as Court's  
23 exhibits.

24 MR. KAHN: Perfect. Thank you, Your Honor.

25 COURT RECORDER: I also need the depo from the other that

1 we're going to make --

2 MR. KAHN: I'll bring it tomorrow.

3 COURT RECORDER: Okay.

4 MR. KAHN: I didn't bring it today. I'll bring a copy  
5 tomorrow.

6 COURT RECORDER: Okay.

7 MR. KAHN: Five more minutes, or ten more minutes?

8 MR. KAHN: Thank you.

9

10 THE COURT: I need to read from that. I need that back,  
11 Cathy.

12 THE CLERK: Oh, okay, sorry.

13 THE COURT: Well, just that one sentence.

14 [Recess taken from 2:16 p.m. to 2:34 p.m.]

15 [Outside the presence of the jury]

16 THE COURT: So, as an intro, so the jury is instructed that the  
17 counselor's view is limited to --

18 MR. PRINCE: Right.

19 THE COURT: -- usual and customary occupation of  
20 automobile sales representative slash manager. I don't know that I need  
21 to give them an instruction. I'm going to sustain the objection and strike  
22 his question and answer.

23 MR. PRINCE: Yeah but, Your Honor, the question was, we  
24 have out there that he can return to those other jobs and with break and  
25 everything, they won't know. And so --

1 THE COURT: I didn't even hear that. You saw --

2 MR. PRINCE: I know. But we listened to it, Judge --

3 THE COURT: Yeah.

4 MR. PRINCE: -- on the record.

5 THE COURT: But they -- I don't know that they did and I'm  
6 striking the answer.

7 MR. PRINCE: Well, I don't want the risk of them hearing that.  
8 One or more hearing that is a substantial risk. Because they're saying he  
9 can go do those other jobs. And that's not a fair inference, given your  
10 ruling in this case.

11 MR. KAHN: He didn't answer.

12 THE COURT: I don't think I need to give a limiting  
13 instruction. I'd have to give a limiting instruction on every objection that  
14 I sustain. So, I'll instruct them to disregard and we will move on. All  
15 right. Bring them in.

16 THE MARSHAL: Yes, Judge.

17 THE COURT: And you've instructed your --

18 MR. KAHN: He understands.

19 THE COURT: Okay. Thank you.

20 [Jury in at 2:37 p.m.]

21 [Within the presence of the jury]

22 THE COURT: Please be seated. Do parties acknowledge the  
23 presence of the jury?

24 MR. PRINCE: Yes.

25 MR. KAHN: Yes.

1 THE COURT: I'm sustaining the last objection, ladies and  
2 gentlemen, and instruct you to disregard the question and the answer.  
3 Go ahead. You're still under oath.

4 DIRECT EXAMINATION CONTINUED

5 BY MR. KAHN:

6 Q Mr. Bennett, you rendered certain opinions in your first  
7 report that you rendered in this case, correct?

8 A Yes.

9 Q And what was your initial opinion?

10 A That nothing precluded the Plaintiff from returning to his  
11 usual and customary occupation.

12 Q Okay. I was hoping maybe you could read about the  
13 positions he performed in the past at some point.

14 A That goes on to the next report.

15 Q Well, I'm looking at page 3 of your initial report under  
16 counselor's comments.

17 A Oh, I'm sorry. I didn't see that. Okay. The positions -- this is  
18 what I wrote in my report.

19 "The positions that the Plaintiff has performed in the past,  
20 manager, sales, is considered sedentary work. The position  
21 of automobile sales worker is considered light work. And his  
22 educational achievement prepares him for sedentary work. It  
23 is this counselor's view that in light of the restrictions as  
24 imposed, based upon treaters and Defense forensic medical  
25 expert, the Plaintiff could continue to perform the same or

1 similar duties, with or without reasonable accommodations."

2 Q And you also rendered an opinion as to the Plaintiff's life  
3 care plan prepared by Dr. Oliveri, correct?

4 A Yes.

5 Q And what was that opinion?

6 A That no additional treatment is necessary relative to this  
7 case.

8 Q And that's based on what other expert on the Defense side?

9 A Dr. Tung.

10 Q And again, you're not rendering a medical opinion, you're  
11 taking Dr. Tung's opinion and applying that to Dr. Oliveri's life care plan,  
12 correct?

13 A Yes.

14 Q And tell the jury what your qualifications are for life caring  
15 planning?

16 A I have done about, I'd say 900 life care plans. I'm a certified  
17 life care planner. I have a post graduate certificate in advanced life care  
18 planning. Numerous continuing education hours in the field of life care  
19 planning.

20 Q And then a few weeks later, you reviewed Mr. Spector's  
21 report and you issued a report following that, correct?

22 A I did.

23 Q And if you could go through on the top of page 2 there are  
24 some summaries of your opinions. Do you recall making those opinions  
25 at that time?

1 A Yes. I'm summarizing the previous report.

2 Q And let's start with the first one.

3 A The vocational evaluation?

4 Q Correct.

5 A Okay.

6 "With respect to the vocational evaluation, with regards to  
7 the work classification of position the Plaintiff had performed  
8 in the past, sales manager, is considered sedentary work,  
9 and automobile salesperson is considered light work.

10 Plaintiff's pre-incident educational achievement prepared  
11 him for sedentary work. Based on restrictions imposed by  
12 treaters and Defense forensic medical expert, Plaintiff is  
13 unable -- or Plaintiff is able to continue to perform same or  
14 similar duties, with or without reasonable accommodations."

15 Q And then after that, you begin a discussion of some of the  
16 things referenced by Mr. Spector in his opinions, right?

17 A Yes.

18 Q If you could go to page 5.

19 A Okay.

20 Q We've already heard the Plaintiff's educational background  
21 from the Plaintiff and Mr. Spector, so I'm not going to go over all of it.

22 A Okay.

23 Q But have you seen any records identifying what the Plaintiff  
24 did between approximately 2005 and 2007?

25 A No. And I commented about that in my report, that I didn't

1 see that Mr. Spector listed that history.

2 Q And then if you go to page 6, you reference a company that  
3 you identified that was on the Plaintiff's social media?

4 A Yes.

5 Q And what's the name of that company?

6 A AAll Holding LLC in Las Vegas, Nevada.

7 Q And what were the dates listed on the social media for that?

8 A From May 18 to present.

9 Q Okay. And present was last year, right?

10 A Yes. When I looked that up.

11 Q Was that company referenced in any way by Mr. Spector in  
12 his reports and opinions?

13 A No. And I commented about that as an ambiguity and  
14 inconsistency in Mr. Spector's records.

15 Q Okay. Then we go to page 7. And you identified Mr.  
16 Yahyavi's earning history, correct?

17 A Yes. According to Mr. Spector.

18 Q And let's go through year by year, what you identified in  
19 your report; for 2008, how much money did Mr. Yahyavi make?

20 A \$30,786.

21 Q In 2009, how much money did Mr. Yahyavi make?

22 A \$76,733.

23 Q In 2010, how much money did Mr. Yahyavi make?

24 A \$60,225.

25 Q In 2011, how much money did Mr. Yahyavi make?



1 A \$101,703.

2 Q And in 2012, how much money did Mr. Yahyavi make?

3 A \$156,355.

4 Q So, in those five years, you then went on to average those,  
5 correct?

6 A Yes.

7 Q And what was the average annual income that you identified,  
8 based on those five years?

9 A \$85,160.

10 Q Now, Mr. Spector rendered an opinion based on what Mr.  
11 Yahyavi told him that Mr. Yahyavi would eventually go on to become the  
12 sales manager or the general manager of a car dealership, something  
13 like that?

14 A Yes.

15 Q I'm looking on the bottom of page 7.

16 A Yeah. He indicated he would be promoted to general sales  
17 manager.

18 Q And you've never seen any information that that ever  
19 actually happened, right?

20 A No. Not since he has been involved in the automobile  
21 industry.

22 Q And do you feel that that's an appropriate vocational opinion  
23 that somebody is going to become the boss of the whole company, or  
24 the head salesperson of the whole company?

25 A I thought it was kind of speculative to make that conclusion.

1 Q Then he's using -- Mr. Spector is using the 90th percentile for  
2 general sales manager as his standard under some of these vocational  
3 classifications, right?

4 A Yes.

5 Q And are you critical of that?

6 A Yes. I mean even if he were to become a general sales  
7 manager, he wouldn't start at the 90th percentile. He'd most likely start  
8 at the 50th percentile as an entry level general sales manager.

9 Q And so, are you saying that Mr. -- that the dollar amount is  
10 affected by the fact that Mr. Spector is putting it in at 90 percent?

11 A Yes. I think it's speculative to put him at the occupation  
12 itself, and then I think it's an overreach, in my opinion, to place him at  
13 the 90th percentile.

14 Q Now, Mr. Yahyavi told Mr. Spector that the Chapman  
15 dealerships he was working at were one of the highest volume  
16 dealerships in the entire United States, correct?

17 A Yes.

18 Q And did you do research as to that statement?

19 A I did.

20 Q And what did you find?

21 A It wasn't one of the highest volumes.

22 Q And can you tell the jury what you looked at as far as high  
23 volume dealerships and which dealerships in Las Vegas fit within that?

24 A Yes. I looked at what is called automotive news largest auto  
25 retailer groups in the U. S., ranked by United States, and it indicated that

1 the top 150 dealerships in the U. S., there were two dealerships in Las  
2 Vegas listed in the top 150. Findlay Automotive Group ranked at 22, and  
3 Fletcher Jones Automotive ranked at 25.

4 Q And neither of the Chapman dealerships that Mr. Yahyavi  
5 worked for was within those top 150 dealerships in the country?

6 A They were not.

7 Q And did your review of Mr. Spector's written opinions  
8 provide you with any information that he backstopped that, that he  
9 double checked it like you did?

10 A I didn't see anything in his record in that regard.

11 Q And then at the bottom of page 8 of your second report, you  
12 identified that Mr. Spector did some testing of Mr. Yahyavi, correct?

13 A Yes.

14 Q And you take issue with the fact that Mr. Spector is saying  
15 Mr. Yahyavi could have been the general sales manager of the whole  
16 dealership, in part because of the test results, is that fair?

17 A Correct.

18 Q And what did you -- what does your vocational training tell  
19 you about the test results that Mr. Spector elicited from Mr. Yahyavi?

20 A That his testing indicated that Mr. Yahyavi had a low score  
21 for verbal reasoning, low score for language usage, and a very low score  
22 on word knowledge. And I did not believe that those tests would  
23 support the contention that he would be above average aptitude for  
24 sales management. Meaning one who ran the whole operation, so to  
25 speak.

1 Q And then there was a -- Mr. Spector utilized a sales manager  
2 title from the Bureau of Labor Statistics, and you identified that you have  
3 a problem with that; you don't think that's correct, right?

4 A Could you show --

5 Q If you look at pages 9 and 10 on your second report.

6 A Okay.

7 Q You were talking about whether or not something had been  
8 published.

9 A Yes. I mean I looked at what sales managers would earn in  
10 Los Angeles -- excuse me, Las Vegas, Henderson, Paradise, Nevada for  
11 sales manager, and I couldn't find a listing for earnings there, in what is  
12 called the Bureau of Labor Statistics. Then I went to Carson City and  
13 found that they make 145,000. And then I went to Reno and found that  
14 they made 117,000. And then I went to South Nevada where they make  
15 95,000. So, it didn't support what I found to show that, you know, would  
16 be 2 or \$300,000.

17 Q And was one of the items he used a problem as far as you  
18 being able to locate it?

19 A I'm not clear on your question.

20 Q If you go to the top of page 10, under ambiguities slash  
21 inconsistencies, I think you identified you had trouble locating one of the  
22 numbers --

23 A Yes.

24 Q -- from the statistics referenced by him?

25 A Yeah. I just couldn't find it.

1 Q And do you think you looked at -- you looked in the right  
2 place?

3 A Yeah. The BLS. That's where we look. And it did not have  
4 information for Las Vegas for sales managers. They don't always have  
5 everything and that's why I went to other locations.

6 Q BLS is Bureau of Labor Statistics in the federal government?

7 A Yes.

8 Q So, what you're saying is Mr. Spector rendered an opinion,  
9 based on what he said was in the BLS, but when you looked for that one  
10 item, it wasn't there?

11 A I could not find it.

12 Q Okay. We're going to go down to post incident earnings.  
13 And you have to be a little careful here. There's an accounting issue.  
14 So, in 2013, Mr. Yahyavi continued working for the six months or so after  
15 this accident, right?

16 A Yes.

17 Q And what did he make totally for that year?

18 A \$105,863.

19 Q Okay. For 2014, we'll have to wait for the economist expert  
20 because there's an accounting issue. But would it be fair to say Mr.  
21 Yahyavi, you believe, made more than \$120,000 that year?

22 A Yes.

23 Q And that would be the year after his accident, right?

24 A Yes.

25 Q And then 2015, what do you show for his income?

1 A \$97,509.

2 Q And then his income decreases the next year and decreases  
3 almost to nothing in 2017, right?

4 A Yes.

5 Q Even at the \$120,000 -- well, let me go back. Let's go to your  
6 opinions about Social Security in page 11. One of the things Dr. Oliveri  
7 testified about was that the Plaintiff qualified for Social Security, correct?

8 A Yes.

9 Q And without getting into the details of Social Security, can  
10 you explain what you did to review Plaintiff's Social Security information  
11 for the opinions you expressed in your report?

12 A Well, I reviewed the Plaintiff's application to Social Security  
13 Administration for claim of disability.

14 Q And what did that tell you about the relationship of his neck  
15 injury to his Social Security status?

16 A That he was claiming many other issues, other than neck  
17 injury.

18 Q And what -- can you identify ones that you think can't in any  
19 way be related to the neck?

20 A That what I saw was that he was claiming other body part.

21 Q One that's not at issue in this case?

22 A Right. He was claiming elevated blood pressure.

23 Q Let me ask you this. Was he claiming -- was crippling neck  
24 pain one of the items?

25 A It was.

1 Q And then was there a separate item called crippling back  
2 pain?

3 A There was.

4 Q So, where the Social Security is looking at crippling back  
5 pain that, by definition, is not crippling neck pain because crippling neck  
6 pain is a separate item, right?

7 A Separate level of the spine.

8 Q And then you looked at -- if you go to page 12, you looked at  
9 the crippling neck pain and you've discussed some of the medical issues,  
10 those are the same types of things that Dr. Tung referenced and you  
11 would expect that the Plaintiff's medical expert referenced about the  
12 Plaintiff's neck, right?

13 A Yes.

14 Q And then again, I have to skip some of this. I'm going to  
15 page 16. I'm going to jump to page 16 under functional limitations. Can  
16 you -- you've used the phrase, but can you explain to the jury what a  
17 functional limitation is in your profession?

18 A Sure. A functional limitation is rendered by a physician. And  
19 the rehab counselors take that limitation and compare it to physical  
20 requirements of jobs. There can be physical functional limitations,  
21 psychological functional limitations, neuro cognitive functional  
22 limitations, environmental limitations. Whatever the injury that an  
23 individual has sustained. And then we take that functional limitation and  
24 look at it and try to pair it to the physical requirements of a job to  
25 determine if an individual can perform that type of work.

1 Q And just to be clear to the jury, you're rendering the opinion  
2 that you think Mr. Yahyavi, based on what you've heard from Dr. Tung in  
3 his opinion, can return back to work as a car salesman, correct?

4 A Yes. And the preponderance of other medical opinions.

5 Q And are you also saying that he can do that without  
6 limitation -- without functional -- some accommodation for him, or are  
7 you saying that he might need some accommodation?

8 A Well, I mean based upon the restrictions, no. But sometimes  
9 subjectively accommodations assist individuals. And that's what rehab  
10 counselors do. If an individual says that they have certain issues that  
11 they're concerned about, then we might provide accommodations.

12 Q Can you explain to the jury what kinds of things an  
13 occupational therapist does?

14 A Occupational therapist evaluates jobs, as well as I do. In  
15 cases like this, we would have an occupational therapist visit a jobsite,  
16 look at the job duties, and come up with assistive devices or  
17 modifications that would assist the individual in regards to their  
18 complaints.

19 Q Also, physical movements, things like that, correct?

20 A Yes. Analyze those movements to try to eliminate whatever  
21 kind of issue that might be presented from a subjective standpoint.

22 Q I'm not going to dwell on this too long because other  
23 witnesses have testified about it. But you also commented on the  
24 functional capacity exam, the first one that Mr. Yahyavi did.

25 A Yes.



1 Q And everyone agrees, including his experts, that it was  
2 what's called an invalid test?

3 A Yes. I understand that.

4 Q And what does that mean to you as a vocational expert, just  
5 generally, very briefly?

6 A Well, I mean I just don't think it provides any useful  
7 information in the long run. In my experience, functional capacity  
8 evaluations are subjectively oriented. All a person has to do is say I can't  
9 do this, or I can't do that, and it's cited.

10 Q And I'm trying to rush this a little bit just to make sure we get  
11 through everything quickly. If you could go to page 21. And I'm looking  
12 at item five.

13 A Okay.

14 Q And you're commenting, essentially, on Mr. Spector's  
15 opinion, but can you read what your opinion is?

16 A "Although Mr. Spector feels that Plaintiff does not have the  
17 ability to withstand fulltime, gainful employment, it is this counselor's  
18 view, based upon a review of records, that Plaintiff's condition has, in  
19 fact, medically improved to the point where he can perform part-time  
20 work, which is in line with Dr. Oliveri's scenario number two."

21 Q And then can you go down to number 8 and can you -- I  
22 don't want you to read that because it's a little complicated, but can you  
23 explain to the jury what your opinion was about what Mr. Spector was  
24 saying about the Social Security Administration deeming Plaintiff to be  
25 disabled? At least the first half of it?

1           A     Sure. Mr. Spector indicated that Social Security deemed the  
2 Plaintiff totally disabled. But he apparently wasn't aware of the multiple  
3 other medical conditions that were considered by Social Security. In a  
4 nutshell, that's what I was saying.

5           Q     So, we've talked about some of those things. So, the body  
6 part that's not at issue in this case, that's one of the things you think Mr.  
7 Spector -- well, let me back up. The crippling back pain separate from  
8 the crippling neck pain, let's just isolate that. You think that's something  
9 that he did consider or did not consider?

10          A     He did not.

11          Q     And then, again, you reiterated kind of on page 22 under 8A  
12 what your ultimate opinion was on the vocational potential. I'd like you  
13 to read that, please.

14          A     "It is this counselor's view nothing precludes Plaintiff from  
15 engaging -- from returning to his usual and customary occupation,  
16 automobile sales representative manager."

17          Q     And then if you go down under life care plan, can you  
18 identify what your opinion was at the time for life care plan?

19          A     "Based upon contacts, Defense forensic medical expert, this  
20 counselor is still of the opinion that there are no future medical needs  
21 based upon this instant case."

22          Q     And then if you go down to loss of earnings, you rendered  
23 opinions about loss of earnings, correct?

24          A     Yes.

25          Q     And we're going to exclude any body parts that are not part

1 of this case. And with that, I think you identified there was an unrelated  
2 body part issue that took him off work for a month and a half, something  
3 like that?

4 A Yes.

5 Q So, let's exclude that.

6 A Okay.

7 Q And what are you saying about whether Mr. Yahyavi can  
8 work part-time, fulltime?

9 A I indicated, "Additionally it is this counselor's view, based  
10 upon the preponderance of functional limitations as imposed, that after  
11 Plaintiff left his employment on either 8/16 or 9/16, he would suffer no  
12 loss of earnings because he is not disabled from his usual and  
13 customary position as a result of this case."

14 Q And just to be clear to the jury, when you say not as a result  
15 of this case, are you saying you're making the ultimate determination he  
16 can go back to work, regardless of what his physical problems may be,  
17 or are you saying that your opinions are essentially limited to his claims  
18 in this case, based on the car accident and his neck?

19 A This case. Based on the car accident.

20 Q Have all your opinions that you've stated here today, been to  
21 a reasonable degree of vocational probability?

22 A Yes.

23 Q Have the life care opinions been to a reasonable degree of  
24 life care planning probability?

25 A Yes.

1 MR. KAHN: Give me a second to see if there's any cleanup  
2 questions, please.

3 [Pause]

4 BY MR. KAHN:

5 Q You rendered some opinions in your report about the nerve  
6 conduction study, correct?

7 A Yes.

8 Q Studies plural. And those had some findings about carpal  
9 tunnel syndrome?

10 A Yes.

11 Q And what were your opinions in your reports about the  
12 carpal tunnel syndrome, based on the EMG nerve conduction studies?

13 A Well, just that there was indication that there was the  
14 possibility of having bilateral carpal tunnel syndrome. I think that was  
15 the second EMG.

16 Q Okay. I'll just ask you one more time. Have all your opinions  
17 been to a reasonable degree of vocational probability?

18 A Yes.

19 MR. KAHN: No further questions. Thank you.

20 THE COURT: Cross.

21 MR. PRINCE: Yes.

22 CROSS-EXAMINATION

23 BY MR. PRINCE:

24 Q Mr. Bennett, good afternoon.

25 A Good afternoon.

1 Q Never met you before today.

2 A Just our little handshake earlier.

3 Q We did.

4 You don't have a vocational office in Las Vegas, Nevada, do  
5 you?

6 A No.

7 Q In fact, you're based in Santa Barbara, California, correct?

8 A Yes.

9 Q You've never been a vocational counselor rehabilitating  
10 injured workers in the State of Nevada, correct? You only come here to  
11 do forensics in lawsuits like this, right?

12 A Yes.

13 Q So, you get hired to come out here to do lawsuits, yes?

14 A Yes.

15 Q All right. And in Nevada, that percentage is probably 80, 90  
16 or greater percent for the defense in Nevada?

17 A In Nevada, I'd say yes.

18 Q Right. Almost always, right. In Nevada, it's virtually -- not a  
19 hundred percent, but pretty close to a hundred percent in Nevada, you  
20 come out to do this for the defense?

21 A I think that's a safe assumption.

22 Q Very good. Now, I want to make sure we understand  
23 something real clear right now. Setting aside why or how Mr. Yahyavi  
24 has his injuries and what caused them, I mean you agree he is  
25 vocationally disabled, based on the totality of all the available medical

1 evidence, as we sit here today, regardless of what caused it?

2 A I don't know if I can say that. I mean we have medical  
3 doctors indicating functional limitations, eight different doctors, plus the  
4 Defense forensic doctor, all indicating that he could go back to work.  
5 The only doctor that I have is Dr. Oliveri and then I have the subsequent  
6 Social Security rendering of total disability.

7 Q Right. So, Dr. Oliveri has given the opinion in this case and  
8 he's testified in this case, that Mr. Yahyavi is vocationally disabled from  
9 working. He said that in this case. That's your understanding, correct?

10 A Well --

11 Q That's a yes or no. Did Mr. Kahn tell you that Dr. Oliveri has  
12 testified in this case that Mr. Yahyavi is vocationally disabled? Forget  
13 the cause as why he got there, you learned that, didn't you?

14 A His opinion that it was less than sedentary work, that's my  
15 understanding.

16 Q And you've also read Dr. Oliveri's opinions, his reports,  
17 right?

18 A I have.

19 Q And they say that he's, in his opinion, vocationally disabled  
20 from working, correct?

21 A Not all reports. Initial reports indicated he thought he could  
22 do sedentary work.

23 Q I'm asking right now, as of today -- as of today, September  
24 23rd, 2019, Dr. Oliveri's position is that Mr. Yahyavi is vocationally  
25 disabled, correct?

1 A That's my understanding.

2 Q Right. And you've seen his 2018, 2019 reports where he says  
3 that right; you've seen that?

4 A I have.

5 Q Right. Dr. Schifini. Are you aware that Dr. Schifini, the pain  
6 management physician, selected by the worker's compensation  
7 organization, that he's also testified that Mr. Yahyavi is vocationally  
8 disabled, are you aware of that testimony?

9 A No, I'm not. Because I thought he said he deferred to Dr. --

10 Q No. Dr. Kaplan said that.

11 A My misunderstanding then.

12 Q I'm talking about Dr. Schifini, the pain manager, who's most  
13 recently been involved in the care leading up to the spinal cord  
14 stimulator. Are you -- have you read his trial testimony that he's given  
15 the opinion to this jury that Mr. Yahyavi is vocationally disabled?

16 A I have not read his testimony.

17 Q Okay. Now, you agree that you've never met Mr. Yahyavi,  
18 correct?

19 A I have not.

20 Q You've never examined Mr. Yahyavi, correct?

21 A I have not.

22 Q You've never taken a vocational history, even by telephone,  
23 of Mr. Yahyavi, correct?

24 A I have not.

25 Q You've never performed any testing on Mr. Yahyavi, correct?

1 A I have not.

2 Q You've never spoken to any of Mr. Yahyavi's employers,  
3 including Chapman Dodge or Chapman Chrysler Jeep, you've never  
4 spoken to anybody there, have you?

5 A I have not.

6 Q You've never interviewed any of his managers who  
7 supervised him at Chapman Dodge or Chapman Chrysler Jeep, have  
8 you?

9 A I have not.

10 Q You've never discussed his job performance with his people  
11 who supervised him, monitored him and knew him at his work, correct?

12 A I have not.

13 Q You've never read the deposition of Mr. Kevin Mackey who is  
14 the sales manager who supervised Mr. Yahyavi?

15 A I have not.

16 Q Okay. That would be important information for you to know  
17 to want to know how his direct supervisor came to the scene of this  
18 collision, you would have liked to have known, hey, tell us how Bahram  
19 Yahyavi did at his job, right? You'd have liked to have known that?

20 A Well, sure.

21 Q Of course, right?

22 A Sure.

23 Q And, in fact, you never even reviewed his employment  
24 records?

25 A No, I have not.



1 Q Right. So, you're here as a vocational expert, I'm showing  
2 you -- I'm holding up Exhibit 114, it's several hundred pages, from 2010  
3 to 2016, and you're saying you've never read these?

4 A I have not.

5 Q Okay. Because the Defense lawyer didn't provide them to  
6 you, correct?

7 A They did not.

8 Q Right. Now, let's be clear on a few things. You are not a  
9 medical doctor, correct?

10 A I'm not.

11 Q You do not make medical assessments, do you?

12 A I do not.

13 Q You do not, from a medical perspective, document or  
14 recommend people to be on disabilities or put them on work restrictions,  
15 correct?

16 A That's correct.

17 Q You rely on the physicians to do that, correct?

18 A Correct.

19 Q You agree, as an expert witness, you need to be fair and  
20 objective?

21 A Yes.

22 Q You should not place too much emphasis on some  
23 information that would only support the defense and reject things that  
24 may be supportive of the plaintiff's position, so you have a reasonable  
25 conclusion, correct?

1 A Fair.

2 Q You're not here to be an advocate, correct?

3 A I'm not.

4 Q And so, you should not be selective or biased in your  
5 opinions, correct?

6 A Correct.

7 Q Very good. Now, I know when you were hired, and I want to  
8 talk about that. You ready?

9 A Sure.

10 Q Okay. You spoke to Mr. Brown, Attorney Mark Brown, on the  
11 phone on May 11, 2018, correct?

12 A Yes.

13 Q And you said, yeah, I'll do some work for you, right?

14 A Yes.

15 Q You knew at that time there was an expert witness  
16 disclosure, meaning we had to disclose your reports by July the 6th,  
17 2018, you're aware of that, right?

18 A I don't know if I was aware of it at that time.

19 Q I'm going to show you the proposed discovery dates, see if  
20 that refreshes your recollection of the last date for initial expert  
21 disclosures is July 6, 2018, do you see that right there?

22 A Yes.

23 Q Okay. So, you were called on May 11, 2018. Now you  
24 understand that there's an expert witness disclosure due July 6, 2018.  
25 Isn't it true, sir, you don't receive any material until July the 2nd, just a

1 few days before that expert witness disclosure?

2 A That's a fair statement.

3 Q Right. Because you, in your records reviewed, you indicated  
4 the materials you received on July 2nd, 2018, just a few days before this  
5 disclosure report is due, right?

6 A Sure.

7 Q And it's important, from your standpoint, because you need  
8 to be thorough in your analysis, correct?

9 A Yes. As thorough as I can be.

10 Q You need to be complete in your analysis, correct?

11 A As complete as I can be.

12 Q Well, that's what you need to be, right?

13 MR. KAHN: Objection. Asked and answered.

14 THE COURT: Sustained.

15 BY MR. PRINCE:

16 Q It's important because you understand that someone's  
17 livelihood or their life or a decision in this case, your testimony can  
18 impact somebody, right?

19 A It could.

20 Q So, your opinions need to be thorough, fair and accurate,  
21 correct?

22 A To the best of my ability.

23 Q Okay. Now, let's talk about what you received on July 2nd,  
24 2018, okay?

25 A Okay.

1 Q First slide. I'm going to put on -- see if I'm right on this.

2 MR. KAHN: Your Honor, I'm going to object to this. It's not a  
3 marked exhibit.

4 MR. PRINCE: It's demonstrative and we're going to work  
5 through it.

6 THE COURT: Overruled.

7 BY MR. PRINCE:

8 Q Okay. See if I have this correct. You have one thing -- let's  
9 talk about what you had as of July 2nd, 2018, okay?

10 A Okay.

11 Q You had the deposition of my client, Bahram Yahyavi?

12 A I did.

13 Q You had a July 17, 2018 designation of expert witness  
14 disclosure, right?

15 A Yes. I believe that was Plaintiff's.

16 Q Yeah.

17 A Okay.

18 Q You had a July 7, 2018 Plaintiff's expert witness disclosure,  
19 right?

20 A Yes.

21 Q Okay. You had some response to request for production of  
22 documents by the Plaintiff, correct?

23 A Yes.

24 Q And you had some additional response to request for  
25 production of documents, right? In litigation, sometimes one party will

1 ask the other side for documents and responses, those are things that  
2 sometimes you'll look at or receive as an expert witness, right?

3 A Correct.

4 Q Okay. And so, you knew you were kind of under a time  
5 constraint because that report needed to be done, right?

6 A Certainly.

7 Q And so, you did not have complete information, as of July  
8 the 2nd, 2018, isn't that true?

9 A I'm not sure what complete information means.

10 Q Well, you didn't have a full set of my client's medical records,  
11 as of that date, did you? Because that's not a complete listing of all the  
12 medical records that you reviewed in this case?

13 A I believe I had medical records that listed restrictions at that  
14 point.

15 Q No, sir, that's not what I'm asking you. I'm showing this -- all  
16 I did was type out -- attached to your first report dated July 3, you list the  
17 material that you reviewed, right?

18 A Yes.

19 Q And I've typed it correctly here, those five items, right?

20 A Yes.

21 Q So, isn't it fair to say you did not have complete medical  
22 records and information, as of July 2nd, 2018, isn't that true?

23 A Well, I'm not sure what complete medical information is, but  
24 that's what I had, it is what it is.

25 Q Well, you didn't have all the medical records from the

1 hospital, the chiropractor, the orthopedic surgeon, Dr. Perry, Dr. Schifini,  
2 the pain management, that all came later, right? Because you look at  
3 your second report, you start documenting other medical records that  
4 you received, right? So, you had another report dated July 27th and you  
5 document far more things.

6 A Well, let me respond to your first question.

7 Q Or is that all you ever got?

8 A No. I have my notes here. And I reviewed his deposition, of  
9 course.

10 Q Yeah.

11 A And then I noted that there were other exhibits. There were  
12 medical records incorporated within the disclosure.

13 Q Okay.

14 A They had doctors -- I reviewed doctors review of medical  
15 records.

16 Q Okay.

17 A I had --

18 Q Your analysis wasn't complete as of July 2nd --

19 MR. KAHN: Your Honor, I don't think he finished his  
20 response.

21 THE COURT: Let him finish.

22 THE WITNESS: I had the traffic collision report. I have the  
23 University Medical Center records.

24 BY MR. PRINCE:

25 Q What report are you reading from?

1           A     I'm reading from my file review of the records of number --  
2 attached to the Plaintiff's deposition was a bunch of records that  
3 apparently supported or was asked during that period of time, and I  
4 reviewed all those. And there was file reviews in there.

5           Q     Okay.

6           A     There were Chiropractor Callaway in there. There was the  
7 history of the accident. There was a Dr. Shaw, a Dr. Callaway, a UMC  
8 Trauma Center.

9           Q     Okay.

10          A     So, I had a lot of information and background.

11          Q     In your --

12          A     Let me finish, please.

13          Q     Okay.

14          A     I had the records reviewed from the traffic collision report,  
15 transfer to the hospital, Las Vegas Fire and Rescue. I had emergency  
16 room records. I had CT of the brain. I had CT of the cervical spine.

17          Q     What date did you have all this?

18          A     This is number one. That is number one right up there, the  
19 deposition of the Plaintiff. Attached to that were all these records --

20          Q     Okay.

21          A     -- in the file reviews and I reviewed every single one of them.  
22 Do you want me to go through them? I can go through each one. It's  
23 probably 30 pages.

24          Q     Okay. Well, then I don't have that. Where is that?

25          A     I can't help you with that.

1 Q What are you reading from? Because we don't have those  
2 reports. That's not part of the files we have. So, I guess you didn't turn  
3 that over because we don't have that.

4 A The designation --

5 Q I'm looking at your -- I'm looking at your initial report, July  
6 3rd, you don't talk about any of that, nothing. You don't do any medical  
7 chronology of any form in that July 3rd report, do you?

8 A Well, I listed the functional limitations of the various doctors  
9 and made a comment the preponderance of medical evidence of the  
10 eight doctors that were provided, indicated that Plaintiff could return  
11 back to his job.

12 Q Okay. That's fine. We're going to talk about that.

13 So, your report, less than 24 hours later, you say nothing  
14 precludes Plaintiff from returning to usual and customary occupation,  
15 which would mean salesman, sales manager, right?

16 A Yes.

17 Q Okay. In your review of the records, you have the disclosure  
18 of expert witnesses, you don't even comment or discuss Dr. Oliveri's  
19 evaluation report of April 24th, 2018, do you, in your July 3rd report, do  
20 you? You don't even mention it.

21 MR. KAHN: Your Honor, while the witness is looking, I would  
22 ask that this demonstrative be marked for the record.

23 THE COURT: It's part of the record, yes.

24 THE WITNESS: I'm looking to see if I had Dr. Oliveri's report  
25 at that time.



1 BY MR. PRINCE:

2 Q Oh, here let me help you. I'm going to hand you the  
3 Plaintiff's expert witness disclosure, dated June 6th -- excuse me, June  
4 7th, 2018, okay, because remember you said you had that? See number  
5 three right there. Third item. I'm going to hand that to you right now.

6 A Okay.

7 MR. KAHN: I would ask that that be marked for the record.

8 MR. PRINCE: Oh, that's fine. We'll mark it. Yeah, let's mark  
9 it as the next Plaintiff's in order.

10 THE WITNESS: Is this number three, I'm sorry?

11 MR. PRINCE: Yes.

12 BY MR. PRINCE:

13 Q Do you see it? Here, let's just look at it.

14 THE COURT: Counsel, approach.

15 [Sidebar begins at 3:17 p.m.]

16 THE COURT: Just for the record, when you're saying  
17 marked, these are not admissible exhibits. Reports don't come in. If you  
18 want as part of the court record.

19 MR. PRINCE: Yeah, that's fine.

20 THE COURT: Anytime this is up, she takes a screen shot of it.

21 MR. KAHN: Okay. I didn't know that.

22 THE COURT: And it's part of the record.

23 MR. KAHN: Thank you, Your Honor.

24 THE CLERK: [Indiscernible].

25 THE COURT: What? Well, I don't know what you're pointing

1 to; what he has?

2 THE CLERK: What you wanted marked?

3 THE COURT: Yes, yes, yes.

4 BY MR. PRINCE:

5 Q Mr. Bennett?

6 A Yes.

7 Q Sir, if you'd -- I'm ready for my next question.

8 A Okay.

9 Q Number 3 it says June 7th, 2018, Plaintiff's expert disclosure  
10 and supplemental pretrial disclosure. Do you see that?

11 A Yes.

12 Q I've handed that to you now.

13 A Yes.

14 Q Okay. And I want you to -- in there is the first report is  
15 actually is Dr. Oliveri's report dated April 24th, 2018. I want you to look  
16 at the document.

17 A I have it. I have notes of it right here. I looked at number 3. I  
18 have his report.

19 Q I'm looking at your report.

20 A I wouldn't know where to find it. What page or anything.

21 Q I got it right here. Let me show you.

22 A Let me see.

23 Q Do you want me to help you?

24 A Sure.

25 Q Sure.

1 A First --

2 Q Here, let me have it.

3 A Okay. Thank you.

4 Q Here.

5 A Okay.

6 Q Okay?

7 A Thank you.

8 Q You're welcome. Because all that you gave us is just  
9 your -- you have a three-page report, okay?

10 A Yes.

11 Q And that's where you set forth your opinions, right? In your  
12 three-page report.

13 A Yes.

14 Q Okay. Because you're confined to that.

15 A Understood.

16 Q Are we clear?

17 A Yes.

18 Q Okay. And in your three-page report, I want you to look at  
19 your three-page report dated July 3rd, 2018, less than 24 hours after you  
20 received this information. Tell me when you have your three-page  
21 report and you've read it.

22 A I have it.

23 Q You don't even mention Dr. Oliveri's analysis in your report;  
24 do you?

25 A It's -- it does not appear that I mentioned it, yes.

1 Q Right. So when Dr. Oliveri says that Mr. Yahyavi has two  
2 options. One is complete vocational disability or two, depending on how  
3 he recovers from surgery, he might be able to go back to work part time,  
4 that's not even mentioned by you; is it?

5 A Could you enlighten me and show me that where he says  
6 that?

7 Q Sure. You can look on that report that's in front of you, page  
8 28.

9 A Okay.

10 Q It's the full second and third -- the first and second paragraph  
11 of that page. I want you to turn to that, read it and let me know when  
12 you're done.

13 [Witness reviews document]

14 THE WITNESS: Okay.

15 BY MR. PRINCE:

16 Q Have you read it?

17 A Yes.

18 Q Okay. In that report, Dr. Oliveri discusses based upon the  
19 cervical injury alone, he talks about Mr. Yahyavi having two scenarios.  
20 One, that he will remain totally disabled on a going forward permanent  
21 basis, right?

22 A Yes.

23 Q And two, that he may, depending upon how he -- if he  
24 improves or not, may be able to go to work on a part-time basis. That's --  
25 he gives two scenarios, right?

1 A Yes.

2 Q Right. You don't acknowledge either one in your July 3rd,  
3 2018 report; do you?

4 A I did not.

5 Q Right. Moreover, you also had Mr. Spector's report as of that  
6 date because Mr. Spector's report is right behind Dr. Oliveri's as part of  
7 Exhibit 4. You had Mr. Spector's report dated May 21st, 2018.

8 A Understood and I have notes on that.

9 Q You have that, right?

10 A And I had notes on that as well, yes.

11 Q Oh, no, no. I'm not talking about notes. I'm talking about  
12 your report.

13 A No, I understand.

14 Q Oh. So you're saying that you read Mr. Spector's report  
15 before the July 3rd, 2018 report? Are you telling the Court that? And  
16 this jury that?

17 A We're talking about number 3, yes? Let me see.

18 Q Yeah. Of course. We're still on the -- we're still on --

19 A Okay.

20 Q -- that you have Mr. Spector's report as of July the 2nd.

21 A I think that Mr. Spector's --

22 Q It's in -- it's in the --

23 A Yes, yes, it is in there.

24 Q Oh, okay. So you have it in your notes?

25 A I have it in my notes, yes.

1 Q Okay. I'm not talking about your notes. I'm talking about the  
2 Court required expert witness report by you that day. You don't even  
3 mention Mr. Spector's analysis in your report; do you?

4 A Not in that report.

5 Q No. So not -- and so you -- so we know that your analysis for  
6 sure as of July 3rd, 2018, you agree it's incomplete as of that day?

7 MR. KAHN: I'm going to object, Your Honor. May we  
8 approach?

9 THE COURT: Yes.

10 [Sidebar begins at 3:22 p.m.]

11 MR. KAHN: I'm worried that the jury isn't going to follow the  
12 discovery and the disclosure rules because he talks about it two weeks  
13 later or three weeks later in the rebuttal report --

14 MR. PRINCE: Well --

15 MR. KAHN: -- which I think is appropriate since it's a -- he's  
16 rebutting that opinion. He talks about it in his supplemental reports.

17 MR. PRINCE: Oh, well, but I may have a separate motion to  
18 strike so --

19 THE COURT: I'll let you -- you can bring it up.

20 MR. PRINCE: Yeah -- so yeah. So this that timing and  
21 events --

22 THE COURT: To ask didn't you discuss all this.

23 MR. KAHN: And now we -- do we mark the paper that he  
24 did? I mean do we put a physical court exhibit marker on it?

25 MR. PRINCE: We will.

1 MR. KAHN: Because that's my request.

2 MR. PRINCE: We said -- we said that's all fair.

3 [Sidebar ends at 3:23 p.m.]

4 BY MR. PRINCE:

5 Q So in the report that we have that's disclosed to the parties,  
6 you don't even make any reference in your July 3rd, 2018 report of -- to  
7 Mr. Spector; do you?

8 A That's --

9 Q Not a word?

10 A That's what I said earlier, yes.

11 Q So you don't remember it's Dr. Oliveri and Mr. Spector who  
12 both are concluding that he is likely vocationally disabled? You don't  
13 even -- you have no reference to their words at all, right? Nothing?

14 A I don't have reference to their reports.

15 Q But you do say that Dr. Tung -- all Dr. Tung stated was he is  
16 not disabled from work as of August 26, 2016, right? You do say that?

17 A I do say that among eight other doctors.

18 Q No. Well, Mr. Yahyavi was still in August of 2016; wasn't he?

19 A That's a fair statement.

20 Q Right. All right. So now we know that your opinions and  
21 analysis they're certainly not complete as of July 3rd, 2018, correct?

22 A That's why I call it a preliminary.

23 Q No, no, no. You offered the opinion that day without a  
24 complete analysis, nothing -- go ahead, what's the next slide? Right  
25 there. Oh, excuse me. I already have that. "Nothing precludes my client

1 from returning to usual and customary occupation." And you haven't  
2 even done a complete analysis, right?

3 A I --

4 Q As of that date.

5 A I had done --

6 Q Is that true?

7 A In my opinion, I had done a complete analysis. I read all that  
8 information. I didn't incorporate in -- within the report.

9 Q So you just rejected what Mr. Spector and what Dr. Oliveri  
10 had to say as of July 3rd, 2018?

11 A My charge was to rely upon Dr. Tung just as Mr. Spector was  
12 to rely upon Dr. Oliveri.

13 Q Oh, no. Oh, no. That wasn't Mr. Spector's charge.

14 MR. PRINCE: I'm going to move to -- Your Honor, move to  
15 strike what Mr. Spector's charge was by this witness. That would be  
16 speculation and that's not what he testified to.

17 MR. KAHN: I believe that is what he testified to.

18 MR. PRINCE: No. That wasn't his charge.

19 THE COURT: I'm going to sustain it. It's speculation --

20 MR. PRINCE: Right.

21 THE COURT: -- as what he was -- I don't know --

22 BY MR. PRINCE:

23 Q You're saying your charge, the instruction you received from  
24 these lawyers were you're to rely on Dr. Tung's report?

25 A Yes.



1 Q Okay. And so your opinions are solely based on Dr. Tung's  
2 report?

3 A Among other doctors as I previously testified.

4 Q Yeah. And what weight did you give Dr. Oliveri's analysis?  
5 None?

6 A I looked at that. The doctor talked about he performed  
7 sedentary work and that was the demand of category. I would expect  
8 him from a medical perspective to have difficulty performing full-time  
9 work. He returned to work, took some time off. He had to stop working  
10 because of another medical condition. He talked about that. And he also  
11 indicated there would be some improvement as his condition went down  
12 the road. I read --

13 Q It never improved, though?

14 A -- all that.

15 Q It never improved, though, did it, when you read the medical  
16 records yourself, correct?

17 A I think that's beyond my expertise.

18 Q Right.

19 A I would leave that up to physicians.

20 Q Well, so if Dr. Oliveri testified that his condition didn't  
21 improve and in fact deteriorated after the surgery, you're not going to be  
22 here debating that?

23 A I'm --

24 Q That's not --

25 A I'm --

1 Q That's not your role?

2 A I'm not going to be debating --

3 Q Okay.

4 A -- the medical doctors.

5 Q That's fair enough. And just so we're clear, Mr. Yahyavi had  
6 his surgery on January 30th of 2018, okay?

7 A Yes.

8 Q Dr. Tung he did his evaluation of Mr. Yahyavi August of 2016,  
9 about a year-and-a-half before the surgery?

10 A Okay.

11 Q True?

12 A Yes.

13 Q Mr. -- Dr. Tung has never seen Mr. Yahyavi after surgery,  
14 correct?

15 A I don't -- I would assume he did not.

16 Q Right. You have no information that he did, correct?

17 A No.

18 Q And we're really talking about his post-operative status,  
19 how's he doing now after that 5-level fusion surgery, right? That's really  
20 what we're talking about now, his current ability?

21 A Well, I mean again, I'm -- if I'm relying upon Dr. Tung, he did  
22 not indicate that the surgery was required relative to this case. He didn't  
23 believe that that was necessary. And that's what I'm relying upon.

24 Q Well, that's not fair; is it? Because we're talking about Mr.  
25 Yahyavi's ability right now as a worker. Forget what caused it. If the

1 accident caused all of it, half of it, three-quarters of it. It doesn't matter  
2 at this point. I want to talk about his ability to return to work safely and  
3 appropriately. Right now, there is no one from the Defense side that has  
4 done an assessment of Mr. Yahyavi post-operatively, correct?

5 A Not post -- from the Defense, no. I don't think so.

6 Q Right. And we're talking about how is he right now and, in  
7 front of this jury, can he go -- can he work the rest of his work life which  
8 you agree is 60s, up to 67 years, right, about ten years from now?

9 A I would agree with that.

10 Q All right. So we're trying to find out and ask this jury is it  
11 appropriate to give Mr. Yahyavi the damages for not being able to work  
12 for the next ten years. And you're saying you don't have an opinion on  
13 that because Dr. Tung has never done a post-operative assessment of  
14 him, correct?

15 A If we're limiting ourselves to that report, I think I have  
16 functional limitations post-surgical intervention as well.

17 Q Well, Dr. -- you agree that after the surgery, Mr. Yahyavi  
18 never went back to work, right?

19 A Correct.

20 Q So Mr. Yahyavi -- are you aware that he's had a nerve injury,  
21 a C-5 neurapraxia injury to his left arm.

22 A I'm aware of that.

23 Q Right. Are you aware that it caused significant limitations?

24 A I mean, I've not seen a doctor that said it's limited. But I  
25 mean, certainly I -- certainly he has difficulties.

1 Q Okay. And in addition, you saw in Dr. Oliveri's report that he  
2 says there's visible atrophy in the deltoid, in the biceps, in the triceps on  
3 the left side? You saw that; didn't you?

4 A I don't recall that. But again, I would not --

5 Q Page 19 of his report.

6 A I would not disagree.

7 Q Okay. You agree that Mr. -- Dr. Oliveri documented a  
8 significant loss of grip strength on the left?

9 A Well, I saw that the grip strength measurements. I didn't  
10 look them up, but I saw the measurements that he made.

11 Q And he's got ongoing significant radicular symptoms in his  
12 left arm after the surgery that never went away, right?

13 A Understood.

14 Q Right. And so, someone in chronic pain, someone who's got  
15 a nerve injury that doesn't resolve, that can lead to vocational disability;  
16 can't it?

17 A It could.

18 Q And Dr. Oliveri, let's talk about him for a minute. You  
19 understand that Dr. Oliveri he was the rating physician by the State of  
20 Nevada for the permanent impairment evaluation, correct?

21 A Understood.

22 Q You understand that he is a physical medicine or  
23 rehabilitation specialist; don't you?

24 A Understood.

25 Q And in your line of work, vocational rehabilitation, don't you

1 agree that a physical medicine or rehabilitation expert like Dr. Oliveri  
2 with that -- with those qualifications they're uniquely qualified to  
3 understand a person's injury, their rehabilitation status, appropriate work  
4 restrictions, permanent work restrictions and make determinations of  
5 total disability?

6 A It's not any different than a neurologist or orthopedist. I  
7 would -- and they're all -- I'd look at all physicians like that. A physical  
8 medicine and rehabilitation doctor of course is qualified to render those  
9 opinions.

10 Q I understand. But they're -- in your experience, they're  
11 uniquely qualified; aren't they?

12 MR. KAHN: Objection. Asked and answered.

13 MR. PRINCE: No, because --

14 THE COURT: I'm going to sustain the objection.

15 BY MR. PRINCE:

16 Q Do you work with physical medicine and rehabilitation  
17 doctors in your practice?

18 A I do.

19 Q Right. It's common for injured workers to have a physical  
20 medicine rehabilitation doctor involved in their care to outline  
21 permanent restrictions, limitations on activities, vocational aspects,  
22 right? It's common -- you see those commonly; don't you?

23 A From PMRs, certainly.

24 Q Right. And Dr. Oliveri as the rating physician he certainly is  
25 qualified to discuss limitations including total disability, right?

1           A     Yeah. I saw him rate him for this case and I saw him rate for  
2 another body part.

3           Q     Yeah. And so I'm -- now, and Dr. Oliveri in this case is --  
4 you're not disagreeing with Dr. Oliveri's assessment, medical  
5 assessment, that Mr. Yahyavi is vocational disabled; are you?

6           A     No. I think that we have a difference of opinion. We have  
7 Dr. Tung who's of a different opinion and Dr. Oliveri. If I relied upon Dr.  
8 Oliveri, I would conclude the same thing that Mr. Spector would.

9           Q     Okay. Well, Dr. Schifini, let's take that out of the equation.  
10 Dr. Schifini has concluded that Mr. Yahyavi as a treating physician is  
11 completely vocationally disabled.

12          A     Okay.

13          Q     And so what weight do you place on that?

14          A     Well, if I would rely upon him, I would take the same  
15 position.

16          Q     Oh, okay. So if we believe Dr. Schifini, then he'd be  
17 vocationally disabled and -- right? And have a --

18          A     If --

19          Q     -- complete loss of earning capacity?

20          A     If he's indicating that he cannot return to any form of work --

21          Q     Right.

22          A     -- then if I were relying upon him, yes.

23          Q     Well, I want you to rely on him right now.

24          A     Okay. If I were to rely upon him, then he's disabled.

25          Q     Okay. And Dr. Schifini he's got no -- he's just a treating

1 physician involved in kind of part of the work comp process? He's got no  
2 stake in this outcome. He's not hired by me, he's not hired by the  
3 Defense. He's just somebody who was involved in the care in 2013 and  
4 '14 and then again in 2019?

5 A I can't speak to his state of mind at all. I mean, he's a doctor.  
6 He rendered an opinion that it is what it is.

7 Q Okay. And so, if Dr. Schifini has told this jury and this jury  
8 believes that, then you'd agree with him that he's vocationally disabled  
9 assuming the jury believed that?

10 A Yes. It's what the jury --

11 Q Okay.

12 A -- believes is --

13 Q Okay.

14 A -- the ultimate issue here.

15 Q Right. Well, didn't -- now, when you do these vocational  
16 assessments, when you fly out to Nevada for these lawsuits for the  
17 defendants, you would meet with people, right? You meet with these  
18 injured workers or injured people, right?

19 A When I come to Nevada?

20 Q Yeah.

21 A I -- like I said, I don't think that I evaluated a case in Nevada  
22 such as that.

23 Q Oh.

24 A In other words --

25 Q I'm talking about in connection with a lawsuit.

1 A Yes.

2 Q Have you ever -- have you ever like been involved as a  
3 vocational expert in a lawsuit such as this where you've actually come  
4 out here and met with the injured person and did an assessment and  
5 evaluation?

6 A Not in Nevada.

7 Q Okay. Well, okay. In California, have you ever been hired by  
8 the defense in a case of a personal injury lawsuit like this and done an  
9 actual in-person assessment of an injured person?

10 A When I'm hired by the defense, there's high unlikelihood that  
11 I would be allowed to evaluate the plaintiff.

12 Q Oh, no, we're talking -- you know there's a process to where  
13 the court would -- could make available the injured plaintiff to you so  
14 that you can conduct your interview, take a history, perform an  
15 assessment and test? You know there's a mechanism for that, right?

16 A Well, not in California, okay.

17 Q Well, you know that in Nevada that exists?

18 A I'm not aware of that. I'm not aware of that.

19 Q Did you ask to examine Mr. Yahyavi and meet with him face  
20 to face and take a history from him?

21 A I wasn't aware of it nor did I ask.

22 Q Okay. So you don't know what he has to truly say and what  
23 Mr. Spector says, right?

24 A I can only look at it through Mr. Spector's eyes.

25 Q Yeah.



1           A     And assuming he did a comprehensive job and I relied upon  
2 what he said.

3           Q     You don't even in your report -- let's go to your initial report.  
4 You don't even discuss the surgery in that report; do you?

5           A     No, that's my preliminary report, yes.

6           Q     Yeah. Well, no, it was your -- it's your same opinion that  
7 nothing precludes my client from going back to his usual and customary  
8 occupation, right?

9           A     Yes.

10          Q     That was your opinion on -- within 24 hours of receiving  
11 these materials and it was the same a few weeks later after you did a  
12 more detailed report, right?

13          A     Functional limitations --

14          Q     The same way?

15          A     -- drive rehabilitation consults --

16          Q     Right.

17          A     -- and that's what I'm relying upon.

18          Q     Yeah. And -- but all those functional limitations you're  
19 talking about, let's be clear, every one of those from July 2013 through  
20 November 2014, every one of those was before his surgery, right?

21          A     Understood.

22          Q     You have no documentation post-operatively about any work  
23 restrictions, right, other than just complete disability? True?

24          A     Functional limitations post-surgical intervention --

25          Q     Yeah.

1 A -- that's your question? Okay.

2 Q Yes.

3 A Let me just refresh my recollection here per -- looking at my  
4 reports here.

5 [Witness reviews document]

6 THE WITNESS: Well, I have -- well, no, excuse me, that's  
7 wrong. This is post 1/18, correct?

8 BY MR. PRINCE:

9 Q Yeah. I'm looking at your three-page report, July 3rd, 2018,  
10 where you say nothing precludes my client from returning to his usual  
11 and customary occupation within 24 hours of receiving documents by  
12 the Defense team. You don't even mention his surgery; do you?

13 A No, I don't mention the surgery.

14 Q Right. You don't mention that the Defense doesn't have  
15 anybody who's done an evaluation of him post-operatively to  
16 understand his limitations, his complaints and physical abilities, right?

17 A Other than the functional capacities --

18 Q Well, you --

19 A -- well, that was before. Excuse me.

20 Q Well, you didn't even comment on that.

21 A Well, I think it's in the report, my second --

22 Q Oh, okay. Let's do that. You look at your first report where  
23 you conclude that my client can go back to work, normal and customary,  
24 where you even mention --

25 A I did not mention --

1 Q -- the functional capacity evaluation.

2 A Not in the first report. I'm talking about the second report,  
3 excuse me.

4 Q Well, no, no. But isn't -- I mean you had your opinions down  
5 within 24 hours. I mean, let's talk about that. That's what I'm talking  
6 about. So stay with me.

7 A Okay.

8 Q Stay focused with me.

9 A Sure.

10 Q You had your opinions ready to go, locked and loaded,  
11 within 24 hours, right, because that's what you said?

12 A I'm not sure about locked and loaded, but I looked at the  
13 functional limitations of the various medical --

14 Q Okay.

15 A -- providers and I relied upon those.

16 Q Okay. But what -- well, the one -- one of the providers in the  
17 case was Dr. David Oliveri who was the rating physician. Why did you --  
18 why didn't you acknowledge his disabilities? Because that wasn't part of  
19 your charge; is that why?

20 A I'm not sure if he rated him at that point. I'm not --

21 Q Oh, okay.

22 A -- I don't recall.

23 Q Fair enough. Yeah. Let's -- He did rate him. Let's -- so we're  
24 all clear on that, let's look at the April 23rd, 2015 report of Dr. David  
25 Oliveri, Exhibit Number 98, bate number 578.

1 A Is that in here?

2 Q I'm going to put it on the monitor.

3 A Okay.

4 Q But if you want to see the hard copy, I can get that for you.

5 A Oh, no, no. That's okay.

6 Q Would you like a hard copy, sir?

7 A No, that's fine.

8 Q Very good. Let's look at the date of kind of the body parts.

9 Remember when you said that oh, Mr. Yahyavi he also complained of a  
10 backache, severe backache, when he applied for social security  
11 disability?

12 A Yes.

13 Q That's what he's being rated for his cervical spine and  
14 thoracic spine, right? That's back pain. Thoracic spine is back pain; isn't  
15 it?

16 A When I see cases where they say they have back pain, they're  
17 going to say cervical back pain, thoracic back pain. But most people  
18 when they comment about back pain are talking about lower back pain.  
19 That's been my experience doing this for 43 years.

20 Q Well, that --

21 A So when he tells social security that he has crippling back  
22 pain, in my opinion, that's lower back.

23 Q Well, you agree he had a lumbar strain in this case that  
24 resolved?

25 A According to Dr. Oliveri, it resolved. And according to when

1 the Plaintiff applied for social security benefits, it did not resolve. He had  
2 crippling back pain.

3 Q Well, he has thoracic pain. That's back pain, right? Thoracic  
4 spine is part of the back; isn't it? Yes or no.

5 A I certainly agree with you that --

6 Q Okay.

7 A -- thoracic spine is --

8 Q Fair enough.

9 A -- part of the back.

10 Q And let's talk about -- let's look at how Mr. Yahyavi presented  
11 to Dr. Oliveri as of April 23rd, 2015. And so you -- I'm showing you the  
12 PPD rating, that's 579, Greg. So you agree that you don't even comment  
13 on Dr. Oliveri's PPD in your July 3rd, 2018 report; do you?

14 A No. And I --

15 Q Right.

16 A -- recognize it was 8 percent.

17 Q Okay.

18 A That's in my recollection.

19 Q And then let's look at the -- number 1, would you like the  
20 present time. Do you see that? It says, "neck and upper back pain." Do  
21 you see that?

22 A I do.

23 Q It says, "He reports constant neck pain that will shoot from  
24 the neck into the upper back." Do you see that?

25 A Yes.

1 Q Reports "intermittent shooting pain into the left arm and  
2 forearm with some numbness in the small finger on the left side." Do  
3 you see that?

4 A Yes.

5 Q Then he goes down and talks about the examinee reports  
6 difficulties with daily activity, difficulty with working, function, pain,  
7 climbing stairs, sitting, all those types of things, right?

8 A I see that.

9 Q He talks about having difficulty at work, going on test drives,  
10 working as a sales manager at the dealership, right?

11 A Sure.

12 Q Okay. Now, in comparison, Dr. Tung doesn't take any history  
13 that remote -- that talks about pain levels, activities levels, how it affects  
14 his function? He doesn't even comment on any of those things, does he,  
15 in his August 2016 report?

16 A I thought -- I think he talked about ADLs and stuff like that but  
17 not to the degree that Dr. Oliveri did.

18 Q What I'd like to do is I'm going to -- do you have a copy of Dr.  
19 Tung's August --

20 A No.

21 Q -- 2016 report?

22 A No.

23 Q I'm going to hand you a copy?

24 A Okay.

25 Q And have you look at it.

1 A Thank you.

2 Q And I want you to let me know once you've kind of  
3 took -- looked through the history part of it.

4 A Trying to do this as quickly as possible.

5 Q Take your time.

6 [Witness reviews document]

7 THE WITNESS: I don't see anything in there.

8 BY MR. PRINCE:

9 Q Right. Okay. So looking at Dr. Tung's report, Dr. Tung  
10 doesn't document any difficulty with activities of daily living, correct?

11 A That's a fair statement. I don't see that.

12 Q He doesn't document at all anything related to work,  
13 difficulties at work, pain levels at work, functional issues at work, he  
14 doesn't even -- doesn't say a word about it; does he?

15 A He just says his occupation is sales manager for a car  
16 business.

17 Q But he doesn't talk about difficulties or limitations in  
18 performing his job, job duties concentration level or things that would  
19 normally be associated with understanding somebody's activities of  
20 daily living including employment?

21 A A fair statement. He didn't -- it doesn't look like he made  
22 comments about that.

23 Q Right. He makes one statement, one short sentence; doesn't  
24 he? He said, "He is not disabled." That's all he says, right?

25 A Yes.

1 Q Right. He doesn't do a vocational analysis; does he?

2 A No, I think he's a neurologist.

3 Q But he does -- also, he has like one that says, "My Yahyavi is  
4 not disabled from work." That's the one statement you relied on, right?

5 A Yes.

6 Q But there's no information in this report about his job  
7 performance, reduced hours, what he does at work to like -- if he's  
8 having pain, taking frequent breaks? He doesn't mention one word of  
9 that; does he?

10 A Not in that report. Again, I don't know what he had in his  
11 state of mind when he did it. I just don't know.

12 Q No, I'm -- well, you relied on the report?

13 A I relied on the report. Yes, I did.

14 Q And it doesn't give you any information about how  
15 this -- these injuries were affecting him at work; does it?

16 A No. He just gives an --

17 Q Okay.

18 A -- opinion that he feels he can work. And --

19 Q And so --

20 A -- I relied upon that.

21 A And then you accepted -- your charge by the Defense lawyers  
22 was to accept that opinion and give an opinion based on what Dr. Tung  
23 has to say?

24 A I was to rely upon Dr. Tung, yes.

25 Q Okay. Now, you understood from reviewing the records that



1 while Mr. Yahyavi continued to work, he was working reduced hours,  
2 right?

3 A Yes.

4 Q Even so -- even at -- during the period in time where the  
5 doctors were telling him to go back to work, he was working; wasn't he?

6 A I'm sorry, even when they were telling him --

7 Q Well, you're talking about in your report that doctors told him  
8 to go back, he can go back to work, he can go back to light duty, full  
9 duty, he's working; isn't he?

10 A Yes.

11 Q He's working his normal job, right?

12 A Yes.

13 Q And he's -- you said his average income was like 85,000.

14 Even in an injured state, he's making more than that after the accident  
15 until he stops working, right?

16 A Yeah. He made more -- sometimes he made --

17 Q Yeah, more.

18 A -- more post than he did pre.

19 Q No, he never did that.

20 A I mean that -- if I looked at the --

21 Q Oh, the -- well, you didn't review the payroll record, right?

22 Well, we're going to right now.

23 A I was relying on Mr. Spector who listed the earnings. I  
24 assuming --

25 Q Okay. Well, we're going to --

1 A -- that he did that accurately. And I --

2 Q All right. Let's look at --

3 A -- relied on him.

4 Q Let's look at bate -- Exhibit 114, page number -- bate number  
5 1353. That's the year to date, December -- well, not year to date. That's  
6 period ending February 15th, 2012. Do you see that?

7 A Yes.

8 Q Okay. And you see the year-to-date earnings are \$159,714  
9 through mid-December?

10 A Okay.

11 Q So Mr. Yahyavi was earning around \$160,000 in the year  
12 before this collision occurred, right?

13 A Yes. I mean I have 156 according to Mr. Spector so we're  
14 close.

15 Q Well, that number right there, that's only through mid-  
16 December, \$159,714. Do you see that?

17 A Period ending 12/15 --

18 Q Yeah.

19 A -- 12.

20 Q Right. So he's doing well before then, yes?

21 A I would agree.

22 Q Okay. And then now, at the date this collision occurred, by  
23 even July, the end of July, he'd already made \$70,000, bate number  
24 1372. Do you see that?

25 A Yes.

1 Q And he'd been off work for almost a couple of weeks. He  
2 already made 70,000 for the year.

3 A He made good money.

4 Q He was doing well; wasn't he?

5 A Yes.

6 Q So \$160,000 earning capacity that's in line with what he was  
7 actually earning, right?

8 A Up to that point, yeah.

9 Q Yeah. Right. Well, the date of this collision that's how much  
10 he was earning is about 160,000 a year, right?

11 A Okay. Sure.

12 Q Doing well, right?

13 A Yes.

14 Q Not 85,000?

15 A I looked at the last five years. That's what I looked at. That's  
16 how I generally do my evaluations.

17 Q Oh.

18 A I go by historical earnings of five years and I agree that he  
19 made more. But he made \$30,000 in 2008. I don't know why. He made  
20 76,000 in 2009. He made 60,000 in 2010. He made 101,000 in 2011. I  
21 mean he was --

22 Q So -- so --

23 A -- he made all sorts of different earnings.

24 Q So let's be clear. You averaged down. You didn't -- he made  
25 more money than 85,000 even the time period that he was injured going

1 for hundreds of medical appointments?

2 A I would agree. I just said I just averaged the five years and  
3 that's what I did.

4 Q That's not --

5 A And he made more in 2011 and 2012 than he made in 2010.

6 Q He's showing you his capacity in 2012 was 160,000. He was  
7 actually making 160,000, correct? According to those records I just  
8 showed you.

9 A Yeah, I'd say so.

10 Q Okay. And he's on pace if he's earning that 70,000 by mid-  
11 June, he's on pace to earn about 160,000 again in 2013, right?

12 A I would leave that up to the economists. I mean they can  
13 calculate that. Certainly, I would agree he was making pretty good  
14 money just before the incident.

15 Q Now, you reviewed the records of Dr. Stewart Kaplan, the  
16 neurosurgeon who did the 5-level fusion.

17 THE COURT: Before we go on, I think this is a good time --

18 MR. PRINCE: Okay. Take a quick break? Yeah. I'm almost  
19 done.

20 THE COURT: Steve said -- during this recess, you're  
21 admonished to not talk or converse amongst yourselves or with anyone  
22 else on any subject connected with this trial or read, watch or listen to  
23 any report of or commentary on the trial or any person connected with  
24 this trial by any medium of information including without limitation  
25 newspapers, television, radio or internet. Do not form or express any

1 opinion on any subject connected with the trial until the case is finally  
2 submitted to you.

3 We'll take ten minutes.

4 [Jury out at 3:49 p.m.]

5 [Recess taken from 3:49 p.m. to 4:05 p.m.]

6 THE COURT: Okay. Are you ready to go?

7 UNIDENTIFIED SPEAKER: We're ready.

8 THE COURT: Bring them in, Steve.

9 THE MARSHAL: Yes, Judge.

10 THE COURT: Thank you.

11 THE MARSHAL: All rise for the jury.

12 [Jury in at 4:06 p.m.]

13 [Within the presence of the jury]

14 THE COURT: Please be seated. Do the parties acknowledge  
15 the presence of the jury?

16 MR. PRINCE: Yes.

17 MR. KAHN: Yes.

18 THE COURT: All right. We'll be starting at 11 tomorrow as a  
19 reminder, at 11. Okay. Go.

20 MR. PRINCE: Thank you.

21 BY MR. PRINCE:

22 Q Now, you've discussed after with Mr. Kahn the fact that my  
23 client -- well, strike that.

24 He discussed that certain physicians in 2013 and 2014, set forth  
25 some limitations on returning to work, working full duty, et cetera,

1 correct?

2 A Yes.

3 MR. PRINCE: And let's look at Exhibit 114, Greg, bate  
4 number 1420 for the end of 2014.

5 BY MR. PRINCE:

6 Q You see \$128,045.98?

7 A I do.

8 Q I mean you agree that in 2013, 2014, my client is undergoing  
9 a significant amount of medical treatment, including doctor visits,  
10 physical therapy, pain management, chiropractic visits, right?

11 A Yes.

12 Q So when you talk about the functional limitations, he's  
13 actually complying with his doctor's recommendations. He's still going  
14 to work and earning a pretty good income, notwithstanding all the  
15 treatment and everything he's undergoing, right?

16 A Agreed.

17 Q And so you're not trying to suggest to this jury that he's  
18 giving less than a full effort, right?

19 A No.

20 Q Now, we looked at -- so you agree that compared to 2012,  
21 this is about a \$30,000 difference?

22 A I do.

23 Q Right. And in 2013 here in this collision he only earned about  
24 105,000, it'd be almost a fifty plus thousand dollar difference, right?

25 A Yes.

1 Q Right. And then in 2015, the end of 2015, that's bate number  
2 1447, that's period ending December 22nd, 2015, he earned \$119,448.03;  
3 do you see that?

4 A I do.

5 Q About a \$38,000 difference from his 2012 income, correct?

6 A Yes.

7 Q Okay. So he's continuing to work through and work with the  
8 pain, right?

9 MR. KAHN: Objection. It lacks foundation.

10 THE COURT: Sustained.

11 BY MR. PRINCE:

12 Q In your review of the medical records, he consistently  
13 reported significant neck pain and arm pain up through and including  
14 2015, correct?

15 A Yes. He complained of pain.

16 Q Right. And he was going for medical care treatment for the  
17 pain, right?

18 A That's my understanding, yes.

19 Q Right. So my point is, this shows that he was working  
20 through it, yes?

21 A Yes, he was working.

22 Q And are you aware that he would have to take frequent  
23 breaks?

24 A I mean I don't recall it, but again I wouldn't doubt that he'd  
25 have to take breaks.

1 Q Right. I mean if someone's in significant pain undergoing  
2 medical treatment and care, I mean they're going to need breaks, right?

3 A Sure.

4 Q You agree that chronic pain affects also concentration, not  
5 just physical ability, right?

6 A Well, it could. Again, it's a little bit beyond my expertise to  
7 make that determination.

8 Q Okay. Well, you do treat injured workers that have chronic  
9 pain, right?

10 A Certainly.

11 Q Right. And you understand that by September 2016 he's  
12 obviously -- he's earning nowhere near what he did before, right?

13 A Yeah. I mean I have 55,000 according to Mr. Spector.

14 Q Right. For the year, right?

15 A For the year.

16 Q That would be almost \$100,000 difference for 2016 compared  
17 to what he was in 2012, just six months before this accident?

18 A Sure.

19 Q Okay. And so -- well, we haven't even actually calculated  
20 that for the jury. We're only talking about loss of earning capacity from  
21 September 2016 forward, but you recognize he had substantial losses  
22 2013, '14, '15, and '16, right?

23 A Yes. I mean he had losses.

24 Q And you never calculated those; did you?

25 A I'm not an economist. I'm not doing those calculations.



1 Q Well, you understand wages and income and that's part of  
2 your role as a vocational counselor, right?

3 A Yeah, but he had other issues where he missed time to his  
4 wallet --

5 Q Right.

6 A -- because of the fact that his ability to earn that was not  
7 related to this case.

8 Q Yeah. But he -- you agree that Doctor Oliveri wrote that the  
9 medical disabilities associated with the chronic neck pain alone, you  
10 knew that as of July 2nd, 2018, right, in that report? It's in the document.  
11 Remember we showed you? I can show you again.

12 A No, you don't need to.

13 Q Yeah, I'm going to read it for you. It says his time away from  
14 work since 2016 has been reasonable and medically explained on the  
15 base of a cervical spine injury. Do you recall reading that?

16 A I don't -- but again I don't disagree that that's what he said.

17 Q Oh, okay. As long as you're good. And you understand from  
18 an injured worker's perspective that at some point the pain becomes too  
19 much and unbearable, and they venture you to stop working, right?  
20 You've seen that in your experience as a rehabilitation counselor?

21 MR. KAHN: Objection. Incomplete hypothetical.

22 MR. PRINCE: I'm talking about his own experience in  
23 working with injured people.

24 THE COURT: Overruled.

25 THE WITNESS: Yes. I mean I've seen people that have pain

1 and they're unable to bear it anymore, certainly.

2 BY MR. PRINCE:

3 Q Right. And if Mr. Yahyavi said I was in so much pain I just  
4 couldn't take it anymore, you have no reason to disbelieve him, right?

5 A Again, I have no ability to evaluate his state of mind. I mean  
6 he can state whatever he states and I'm not disagreeing with him or  
7 saying that -- you know that --

8 Q Okay. You have no reason to disbelieve that he's in the level  
9 of pain that he's describing, right?

10 A I have no reason to disbelieve that.

11 Q Okay.

12 A Again, I'm not in his mind, so I don't know exactly.

13 Q Very good. Now, you talked about earlier that there are  
14 some EMG (phonetic throughout) nerve production studies that might  
15 show some kind of carpal tunnel; do you remember that?

16 A Yes.

17 Q But no doctor ever diagnosed carpal tunnel; did they? You  
18 agree to that, right?

19 A I think that maybe Tony (phonetic) said something about  
20 carpal tunnel on one side only, but that's the only --

21 Q But that's not a diagnosis, that's on an EMG study and that's  
22 not conclusive even in your own experience?

23 A Well, that's a fair statement, I mean it was a study. And,  
24 again, I can't diagnose it.

25 Q Right. But there's no medical doctor that came up with a

1 clinical diagnosis of carpal tunnel syndrome; don't you agree with that  
2 based on your review and summary of these records?

3 A I'd have to look through all those records. And I just -- I don't  
4 recall anybody coming up with that diagnosis.

5 Q Right. So even though there might be this EMG out there  
6 kind of suggesting or talking about it, there was never an actual medical  
7 diagnosis by a medical care provider that you're aware of?

8 A That's a fair statement.

9 Q Okay. And certainly carpal tunnel syndrome is not what's  
10 affecting his ability to go back to work; don't you agree?

11 A Again, if someone has carpal tunnel and it affects their ability  
12 to do manipulation, you know, it could affect their ability to work.

13 Q But you've seen --

14 A Again, I don't have restriction on it.

15 Q Well, you can do simple surgery on carpal tunnel syndrome  
16 and people oftentimes have the surgery and they return back to work  
17 without difficulty, right?

18 A Yeah.

19 Q You see that in your experience?

20 A Sure. And then I have people that have carpal tunnel, they  
21 still have problems, so, you know, it is what it is.

22 Q There's never been any recommended treatment for alleged  
23 carpal tunnel, correct?

24 A Not that I saw.

25 Q Okay. That's kind of not really part of this evaluation; is that

1 a fair statement?

2 A It's just a compounding factor that I saw in the records that  
3 could affect employment, that's all.

4 Q Now, occupational therapy. The Defense has no  
5 occupational therapist, correct?

6 A No.

7 Q Am I correct in that?

8 A That's correct.

9 Q And you think it was reasonable and appropriate for  
10 Chapman Dodge to -- or, excuse me. You understand that my client had  
11 to leave being a floor sales manager and take a sales job so he could  
12 maintain flexibility to go to his appointments and accommodate for his  
13 injuries and needing to take breaks; were you aware of that?

14 A Well, that's kind of interesting because he goes from a job  
15 that is sedentary to a job that's light, which is more physical, arduous. I  
16 just found that compounding, too. But, again, it is what it is, but -- and I  
17 don't understand it because there are accommodations. He also  
18 indicated that another manager could assist him in the past and they  
19 would share duties. So that's my understanding.

20 Q Well, Mr. Yahyavi testified, weren't you -- didn't you read the  
21 transcript where he said that they told him that because of the amount of  
22 timing he takes off the floor going to his doctors' appointments, they  
23 couldn't accommodate him being a manager being away from the sales  
24 floor; are you aware he testified to that?

25 A Well, he testified, but one would have to ask for an

1 accommodation under the Americans with Disabilities Act and it might  
2 be hard pressed for an employer not to provide him an accommodation  
3 because it's a reasonable accommodation.

4 Q Right. Well, he went to work at another dealership, and he  
5 was -- one of the other family dealerships and was doing well, the best  
6 he could after this collision, and they allowed him to take breaks, go off  
7 the sales floor, ice his neck. That was reasonable for them to do, right?

8 A Yeah. I think that is an accommodation. I don't know why he  
9 couldn't do it for the other job, too.

10 Q So we were talking about likewise being a manager. He was  
11 already a sales manager when this occurred, right?

12 A Yes.

13 Q All right. And he was already earning 160,000,  
14 approximately, as a sales manager when this occurred, right?

15 A I believe the year before, yes.

16 Q Right. So there's no -- we don't need to have any guesswork  
17 about being in management and earning \$160,000 a year, he was doing  
18 it?

19 A At that level, yes.

20 Q Okay. Now, you don't even give Mr. Yahyavi partial  
21 disability; do you?

22 A I don't write disability restrictions. I rely upon physicians to  
23 do that.

24 Q Oh, I see. Oh, because Doctor Tung doesn't do that,  
25 therefore you don't have an opinion on that, either? You need a medical

1 doctor to say that for you?

2 A That a person has a partial disability?

3 Q Yeah, yeah, partial.

4 A Yeah, I would.

5 Q Okay. So we know Doctor Oliveri, Doctor Schifini, they're  
6 over here saying full disability, you're just saying if I accept that, then  
7 he's fully disabled. On the other hand, you're saying your charge or the  
8 direction he received from the Defendant's lawyers was accept what  
9 Doctor Tung has to say?

10 A Their opinion.

11 Q Okay. And Doctor Tung has never -- doesn't even give Mr.  
12 Yahyavi even a partial disability, does he, at this point?

13 A Yes. He said he had no limitations.

14 Q Right. Based on the 2016 evaluation, right?

15 A Yes.

16 Q Not a current up-to-date evaluation, fair?

17 A Well, I guess that is fair, yes.

18 Q Right. Because significantly he's got a surgery and a  
19 significant nerve injury associated with that surgery since that evaluation  
20 by Mr. -- Dr. Tung, right?

21 A Yes.

22 Q All right. And Dr. Kaplan is the treating surgeon. You've  
23 never seen Dr. Kaplan give any instruction saying he can go back to  
24 work, back to work full duty, partial duty, limited duty. He's never given  
25 any return to work instruction, has he, that you're aware of, you

1 personally?

2 A I don't think so. I think he deferred to Dr. Oliveri as I recall.

3 Q Right. Because he trusts and respects Dr. Oliveri, you have  
4 no problem with him deferring to physical medicine rehabilitation  
5 specialty?

6 A It's not my charge to make that determination.

7 Q Okay. And with regard to the life care plan, you really didn't  
8 do any life care planning in this case, right?

9 A No. There was none to do based upon Dr. Tung indicating  
10 that there's no future medical needs.

11 Q Right. So, again, your direction was from these lawyers as to  
12 rely on Dr. Tung for life care plan. Dr. Tung says nothing's related to this  
13 collision, therefore there's nothing for me to do, right?

14 A End of story, yes.

15 Q Right. So when Dr. Oliveri did his life care plan, you didn't  
16 prepare a response to his recommendations or the cost of those  
17 recommendations, right?

18 A I did not.

19 Q Okay. And Dr. Oliveri's not only a medical doctor, he's also a  
20 certified life care planner. He's obviously well followed for life care  
21 planning?

22 A So he is.

23 MR. PRINCE: One second, Judge.

24 [Counsel confer]

25 MR. PRINCE: Thank you. I don't have additional questions.

1 MR. KAHN: No further questions, Judge.

2 THE COURT: Questions from the jury, raise your hand. No  
3 questions? No questions. Thank you, you may step down.

4 THE WITNESS: Thank you, Your Honor.

5 MR. PRINCE: If I could do a read, I think we can get that done  
6 by 5. The witness is not available, if I can read a deposition to do a  
7 question and answer session.

8 THE COURT: And I'll explain to -- I probably -- yeah, I know I  
9 did in the pretrial instructions, but you'll hear a deposition which was  
10 done outside of court questioned by both sides. I'll read you the  
11 instruction yet again during the final instructions.

12 UNIDENTIFIED SPEAKER: I think there was a part of this that  
13 was going to be submitted into evidence.

14 THE COURT: Yes. Just leave it there.

15 [Parties confer]

16 THE CLERK: Do you have a copy of the deposition to be  
17 published?

18 MR. PRINCE: Oh, yes. Yes.

19 THE CLERK: Thank you.

20 MR. PRINCE: Your Honor, I'm going to have Mr. Strong, my  
21 colleague, do the reading.

22 THE COURT: That's fine. Whenever you're ready.

23 KEVIN STRONG, SWORN

24 THE WITNESS: Yes, I do.

25 THE CLERK: Please be seated.



1 THE WITNESS: Thank you.

2 THE CLERK: Please state your name as reading the deponent  
3 and then state the deposition you're reading.

4 THE WITNESS: My name? My name is Kevin T. Strong, last  
5 name spelled S-T-R-O-N-G. I am reading the deposition of the deponent,  
6 Kevin Mackey, that's M-A-C-K-E-Y.

7 THE CLERK: Thank you.

8 [The deposition of Kevin Mackey was read into the record as  
9 follows:]

10 Q Can you please tell us your full name with the last name  
11 spelled out?

12 A Kevin Mackey, M-A-C-K-E-Y.

13 Q What is your address at this time? This is just for the Court  
14 Reporter.

15 A 2564 East Amberwood Drive, Phoenix, Arizona 85048.

16 Q Sir, what is your profession at this time?

17 A Automobile sales.

18 Q And how long have you been in this profession?

19 A Twenty-five years.

20 Q How long have you been at [indiscernible]?

21 A Four months.

22 Q Prior to that?

23 A Las Vegas.

24 Q And how long did you stay in Las Vegas?

25 A Thirty years.

1 Q Will you be in the same profession in Las Vegas, automobile  
2 sales?

3 A Yes.

4 Q Can you briefly tell us what year you were in Las Vegas?

5 A From 1987 until February 2016.

6 Q Sir, who was your employer at that time?

7 A Chapmans Las Vegas Dodge. At the time of the accident?

8 Q Yes, sir, if you could answer that.

9 A Yes.

10 Q Can you briefly tell us your job description while you were in  
11 Las Vegas?

12 A At the time of the accident I was a General Sales Manager  
13 there at the Las Vegas Dodge.

14 MR. PRINCE: I want to add the last line, too.

15 Q Briefly, what was your job description at that time?

16 A I was in charge of the salesmen, the closer's team leaders  
17 which Bahram was one of those in charge of the finance department,  
18 also.

19 Q How many locations did you have in Las Vegas?

20 A Chapman has two locations.

21 Q And how far apart are they from each other?

22 A It's an interesting deal where you have two different  
23 locations or two different stores, but four different locations.

24 Q Okay.

25 A Where our store was located, we had a second store located

1 maybe a mile away from us where we would go back and forth between  
2 both stores picking up cars and taking cars to both locations.

3 Q Can you identify a person named Bahram Yahyavi?

4 A Yes.

5 Q Was he an employee at that time?

6 A Yes.

7 Q And can you briefly tell us what his job description?

8 A He was a closer team leader where he had a group of  
9 salesmen that worked under him.

10 Q Okay.

11 A His job was to go in and close their car deals when the  
12 salesmen were unable to.

13 Q Okay.

14 A He was also, you know, like all of us there, we would all go  
15 back and forth between the two stores picking up and dropping off  
16 vehicles as needed to sell to the people that were at the main location on  
17 East Sahara.

18 Q So on a given day how often you have to go from Location A  
19 to Location B?

20 A Depending upon the number of customers, it could be ten  
21 times, it could be 20 times. A lot of it depended on how many customers  
22 we had.

23 Q Okay. Do you recall the accident which happened on June  
24 19, 2013?

25 A Yes.

1 Q Do you recall what time it happened?

2 A Somewhere 11:00, 11:15, somewhere around that time.

3 Q Where were you at the time?

4 A At the 3175 East Sahara and at the sales tower.

5 Q Okay. And you received a phone call?

6 A Yes.

7 Q And who called you?

8 A Good question. I don't remember who called.

9 Q Do you recall the content of that phone call?

10 A Yes. They said Bahram had been involved in an accident on

11 Glen, which was the street that you turn onto to get to the second lot is

12 Glen -- was Glen.

13 Q Okay.

14 A So at that time we had a little scooter on our lot that we  
15 would drive back and forth between the two lots, and I jumped on the  
16 scooter and got to the accident.

17 Q And how long did it take you to get there?

18 A Two minutes or a minute.

19 Q Okay. When you went there, can you tell us -- I'm showing

20 Exhibit 1 at the site. It's a picture of the damaged car.

21 A Yes, that is the car and --

22 Q At the time. Go ahead.

23 A At the time I got there, the forks were still in the vehicle, so.

24 Q And can you describe us the scene at that time?

25 A The forklift was obviously right next to the vehicle with the

1 forks through the front passenger door and hitting the driver's side pillar  
2 right here.

3 Q I'm going to show you all three at the site, two, three, and  
4 four, and you pick whatever exhibit you'd like to see and tell us, please.

5 A Okay. You know, at the time I got there, Bahram was still in  
6 the driver's seat, I am going to say dazed and confused, to say the least.

7 Q I'm sorry, who was dazed?

8 A Bahram was dazed.

9 Q Dazed?

10 A Dazed and confused by what had just happened. I don't  
11 think he understood what happened.

12 Q Was he crying with pain?

13 A No, no. He was sort of in an almost state of unconsciousness  
14 almost.

15 Q Was he driving?

16 A Yes.

17 Q Himself?

18 A Yes.

19 Q Was there only one occupant in the car?

20 A Yes.

21 Q Do you recall what kind of auto he was driving at that time?

22 A A Dodge Charger.

23 Q And who owned this auto, is that a company owned vehicle?

24 A Yes. Chapman Dodge.

25 Q And he was going from one location to another location?

1 A Correct.

2 Q And do you know which location he was going to?

3 A Yes. The location on Boulder Highway, 3470 Boulder  
4 Highway.

5 Q Which you say is about a minute away from?

6 A Yes, a couple minutes away at the most.

7 Q How far apart are these locations from each other?

8 A A mile, a mile and a half at the most.

9 Q And I know you answered it, but how soon after the phone  
10 call you went to the site of the accident?

11 A I was there within a minute and a half, two minutes, so.

12 Q And do you recall the weather, the road condition, at the  
13 time?

14 A It was sunny out and there were no -- no problems with the  
15 roads. No, the roads were fine.

16 Q If I asked you to draw, if I asked you to paint a picture for us  
17 of the scene of the accident, can you do it, please, in words?

18 A Yes, because what happens is, when you are on Sahara  
19 turning onto Glen, there is a slight right-hand curve. There was a large  
20 semi-truck right where that curve was parked, and Bahram had made  
21 that turn. And obviously the forklift came from in front of the truck  
22 where you couldn't see it if you had made that turn just because the  
23 truck would be blocking that view.

24 Q Okay.

25 A And the forklift then went through the passenger side of the

1 window and all the way to the driver's side.

2 Q Do you recall the position of the forklift, was it elevated  
3 higher?

4 A It was, yes. The forks were up at head level for someone  
5 driving a motor vehicle.

6 Q And were they still inserted inside the windshield?

7 A Correct.

8 Q Okay.

9 A Correct.

10 Q Did you see any emergency vehicle lights, police or fire at  
11 that time?

12 A When I got there, no, they weren't there yet.

13 Q Okay.

14 A They arrived when I was there because I had gotten there  
15 before.

16 Q Can you describe when they came at the scene what  
17 happened?

18 A Basically when they got there, then that is when I backed  
19 away and let them do their job. But then they began working on Bahram  
20 to get him out of the vehicle. And, you know, obviously at that point  
21 then they transported him to the hospital.

22 Q Did you have a chance to talk to Bahram at the time?

23 A As best that he could, which he really couldn't. He couldn't --  
24 he did not know what happened.

25 Q He?

1 A He did not know. He was, like I said, in a state of confusion.

2 Q If I asked you to tell us how much damage was done to the  
3 vehicle, can you please tell us?

4 A It was totaled.

5 Q When you went there, was the forklift still inside the vehicle?

6 A Correct.

7 Q Did you see the driver of the forklift pull it off when you were  
8 there?

9 A I didn't see that happen, so they must have done that after  
10 the fact.

11 Q Okay. Do you recall any construction sites, notices on the  
12 road, or any coning of road, things like that that day?

13 A Yes. Like in the picture here, there were cones on the road  
14 which just basically covered where the truck was, you know, on that  
15 curve. But it wouldn't -- it wouldn't prevent you from turning onto the  
16 road which he did.

17 Q So there was still traffic going on?

18 A Yes.

19 Q Despite any coning off?

20 A Correct.

21 Q Was there any person directing the traffic at that time?

22 A No, nobody was there because I had driven that -- I mean I  
23 drove that road to go home usually every night, so. But the truck I  
24 believe that day was something new, so the truck was not there the  
25 previous night, I know that.



1 Q What kind of truck are you talking, sir?

2 A The semi-truck that had the semi-bed on the back of it.

3 Q Did that have to do with the construction of the road?

4 A I don't know. Why they were there, I have no idea. And to  
5 be honest, I don't know why the forklift was there, either, but, you know,  
6 it was -- it was I mean a bad scene.

7 Q Do you recall when Bahram came back to work?

8 A I believe it was a while, but I don't remember exactly, no.

9 Q Could it be five days, seven days, ten days, a month?

10 A I would think it was probably ten days to two weeks.

11 Q Are you familiar with what kind of wages, income, Bahram  
12 made, give or take?

13 A Yes.

14 Q On a monthly basis?

15 A Yes.

16 Q And at that time -- okay, go ahead.

17 A At that time he was probably anywhere from 15,000 to 20,000  
18 a month.

19 Q Sir, can you give a brief description of Bahram's job  
20 description?

21 A His job description would consist of training his salespeople  
22 -- his sale people that he had on his team, getting them to make phone  
23 calls, being on the lot with them, helping them with customers, helping  
24 them put the customers in the right vehicles.

25 Q Okay.

1           A     And then closing the sale for the salesmen and those  
2 customers.

3           Q     Does this job involve a lot of physical activities, like walking,  
4 sitting, standing continuously?

5           A     Yes, continuously. He would have to go bounce from table  
6 to table, sitting down with the different customers, getting up, come to  
7 the sales tower to get those numbers, and then go back to the tables  
8 with the customers.

9           Q     I know you left that place, but would you consider him a  
10 valuable employee of the company?

11          A     Yes, very valuable.

12                   MR. PRINCE: This is questions by the Defense.

13          Q     If I understand your testimony correctly, you weren't present  
14 at the time of the accident; is that correct?

15          A     No. I arrived after it happened.

16          Q     And any opinions you have expressed today concerning how  
17 the accident occurred, those are not based on your personal knowledge,  
18 they're just based on your observation after you arrived at the scene?

19          A     Yes.

20          Q     And I take it you've never qualified as an accident  
21 reconstructionist, correct?

22          A     No, never.

23          Q     You're also not a medical doctor?

24          A     No, sir.

25          Q     So any opinions you have may have indicated concerning

1 the Plaintiff's condition, you didn't intend to offer a medical opinion,  
2 correct?

3 A No.

4 Q Sir, I know you answered this, but how long it took you to get  
5 there soon after you received the phone call?

6 A Like a minute, a minute -- between a minute and two  
7 minutes.

8 Q And things were in the same position when you went there,  
9 like the lifts were still inserted in the car?

10 A Correct.

11 Q He had not taken it out?

12 A Correct.

13 Q And Mr. Bahram Yahyavi was still sitting in his seat?

14 A In the driver's seat, yes.

15 Q He was not transported?

16 A No.

17 [End of reading of deposition of Kevin Mackey]

18 MR. PRINCE: That's all the questions, Your Honor. And that  
19 included what they wanted, as well.

20 THE COURT: Okay. Counsel approach.

21 MR. PRINCE: Okay.

22 [Sidebar begins at 4:34 p.m.]

23 THE COURT: So we're done for today?

24 MR. PRINCE: That's all I have for today.

25 THE COURT: Okay.

1 UNIDENTIFIED SPEAKER: And let's double check for  
2 tomorrow because Dr. Tung will be here in the morning, okay. Then I'm  
3 going to put Bahram on.

4 THE COURT: Okay. 11. I don't want to say I'll be done at  
5 10:30, but because -- yeah, let's make it 11. It's --

6 MR. KAHN: And then we'll cross the Plaintiff. And then I'm  
7 assuming Plaintiff will rest at that point.

8 MR. PRINCE: Yeah. And then we still have to discuss what  
9 we're going to do with Mr. Baker.

10 UNIDENTIFIED SPEAKER: Right.

11 MR. PRINCE: If he has further objections. I had him  
12 [indiscernible] bring him in Wednesday.

13 UNIDENTIFIED SPEAKER: Right. That's the biomechanical --

14 MR. PRINCE: The biomechanical [indiscernible] human  
15 factors.

16 THE COURT: Well --

17 MR. KAHN: I can have him here tomorrow afternoon, but  
18 he's [indiscernible]. So I don't mind getting him started.

19 UNIDENTIFIED SPEAKER: No, let's just wait until Wednesday  
20 because I want to -- we may have some hearings on that, so let's plan for  
21 him Wednesday. But I don't think -- I think I'm going to be [indiscernible]  
22 with Tung, so.

23 THE COURT: Let's do whatever's safe, so [indiscernible].  
24 Your witnesses have had to wait, so I don't see any reason.

25 UNIDENTIFIED SPEAKER: Well, if we go Wednesday

1 morning, do we know what time Wednesday?

2 THE COURT: I'm thinking 1.

3 UNIDENTIFIED SPEAKER: Wednesday afternoon?

4 THE COURT: It's criminal. What do we have on Wednesday?

5 UNIDENTIFIED SPEAKER: Are you calling Kirkendall

6 [phonetic]?

7 [Judge and Clerk confer]

8 THE COURT: Yes, 1:00. We went to 11:30 today. Not that  
9 you care, but we went to 11:30 today because -- and this will apply to  
10 Wednesday and whatever other days. Anyway, there's a transport issue  
11 for prisoners. I know you guys don't care, but if they're high risk they  
12 bring him separately. It delays everything. It just delays everything.

13 UNIDENTIFIED SPEAKER: I used to do criminal cases.

14 UNIDENTIFIED SPEAKER: Tomorrow is [indiscernible].

15 THE COURT: Correct.

16 UNIDENTIFIED SPEAKER: What about Thursday?

17 THE COURT: Thursday we have all day. Thursday we have  
18 all day. And if you -- you're saying you think we'll be done on Thursday  
19 or be going into closings.

20 UNIDENTIFIED SPEAKER: Right.

21 THE COURT: And that means Wednesday we have to go  
22 over jury instructions.

23 MR. KAHN: Yeah. I have Baker on Wednesday. Thursday I  
24 have Kirkendall, and he's probably pretty quick, and I may bring back --  
25 either Wednesday or Thursday I may bring back Goodrich, probably

1 Wednesday, since that's when he said his schedule was, so I can start  
2 with him and that will be brief.

3 THE COURT: How many jury instructions do each of you  
4 object to for the other side so far?

5 UNIDENTIFIED SPEAKER: We objected to about 20, 25.

6 THE COURT: We may have to do that on Thursday. I mean  
7 that's more than an hour, I can easily imagine, just your 20 and then  
8 another 20.

9 UNIDENTIFIED SPEAKER: We have time tomorrow. Let's  
10 plan to do it tomorrow if we get done early.

11 THE COURT: How do we have time tomorrow?

12 MR. PRINCE: Well, if we do. I'm just saying once we get to  
13 the Plaintiff's cross, why don't we just plan for doing some jury  
14 instructions tomorrow afternoon if we have time. And then you can,  
15 assuming Baker comes and what he can testify to, deal with that. That  
16 will be Wednesday. And then you can have Goodrich. And then you  
17 said you're not doing Kirkendall until Thursday, anyway.

18 MR. KAHN: Probably, unless things are moving fast.

19 THE COURT: I'm just wondering, this is a regular PI case,  
20 why there's 20 that both sides are objecting to, but.

21 UNIDENTIFIED SPEAKER: We didn't say we had that many  
22 objections to theirs. We have just a few.

23 UNIDENTIFIED SPEAKER: We don't really have a lot. We're  
24 just going with the book, so.

25 THE COURT: Okay, good.

1 UNIDENTIFIED SPEAKER: So they have about ten specials or  
2 15 special ones that are [indiscernible] and things.

3 THE COURT: All right. We'll discuss it, but.

4 UNIDENTIFIED SPEAKER: We don't have that many specials,  
5 but.

6 UNIDENTIFIED SPEAKER: Okay.

7 THE COURT: I can't imagine that with a regular PI case.

8 MR. PRINCE: We'll let the jury know that we're on pace,  
9 we're kind of caught up, we're doing fine on time.

10 MR. KAHN: I would say closing Friday.

11 THE COURT: I kind of think, but let's --

12 MR. PRINCE: Okay.

13 [Sidebar ends at 4:38 p.m.]

14 THE COURT: Okay, ladies and gentlemen, we're going to  
15 conclude for tonight. Tomorrow is 11. And just so you know, we're still  
16 on schedule. We are progressing.

17 During this recess you're admonished do not talk or converse  
18 amongst yourselves or with anyone else on any subject connected with  
19 this trial or read, watch, or listen to any report of or commentary on the  
20 trial or any person connected with this trial by any medium of  
21 information, including, without limitation, newspapers, television, radio,  
22 or internet. Do not form or express any opinion on any subject  
23 connected with the trial until the case is finally submitted to you.

24 Have a good evening.

25 THE MARSHAL: Please leave your notebooks and pens.

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Please rise for the jury. Rise for the jury.

Don't forget to get your parking validated.

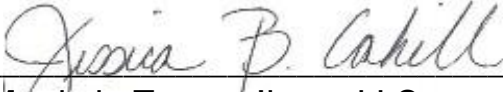
[Jury out at 4:39 p.m.]

THE COURT: All right, anything else? See you tomorrow.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

[Proceedings concluded at 4:40 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



Maukele Transcribers, LLC  
Jessica B. Cahill, Transcriber, CER/CET-708



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RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

BAHRAM YAHYAVI,  
Plaintiff,

vs.

CAPRIATI CONSTRUCTION CORP  
INC.  
Defendant.

CASE#: A-15-718689-C  
DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL  
DISTRICT COURT JUDGE  
TUESDAY, SEPTEMBER 24, 2019

**RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 12**

APPEARANCES:

For the Plaintiff:

DENNIS M. PRINCE, ESQ.  
KEVIN T. STRONG, ESQ.

For the Defendant:

MARK JAMES BROWN, ESQ.  
DAVID S. KAHN, ESQ.  
MARK SEVERINO, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

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FOR THE PLAINTIFF

MARKED

RECEIVED

None

FOR THE DEFENDANT

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None

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Las Vega, Nevada, Tuesday, September 24, 2019

[Case called at 11:02 a.m.]

THE CLERK: Case 718689, Yahyavi v. Capriati Construction.

MR. KAHN: Good morning, Your Honor.

THE COURT: Good morning. What's up?

MR. KAHN: I have a simple and brief request, similar to what happened yesterday with the vocational expert, because the six reports of Dr. Tung that were provided form part of the basis of the Court's ruling, I would just ask that at some point today, it may be marked as a Court exhibit, similar to the other expert. That was it.

THE COURT: That's fine.

MR. KAHN: Or I can get six more copies -- the six new ones that we needed.

THE COURT: Although I thought we were done with that, so I can find out if I still have a copy. Anything else?

MR. KAHN: No, we can get a copy for the Court.

THE COURT: Okay.

MR. KAHN: Okay.

THE CLERK: Okay.

THE COURT: We'll make it a Court's exhibit.

THE CLERK: So we're doing Dr. Tung's depos and Dr. Tung's reports?

MR. KAHN: Not the -- just the six reports.

THE COURT: Just his report.

1 MR. PRINCE: We're just identifying it. We're just lodging it  
2 as a Court exhibit.

3 THE COURT: Court's exhibit.

4 THE CLERK: Right. That's what I mean.

5 MR. PRINCE: Yeah.

6 THE COURT: Yeah.

7 MR. KAHN: Yeah, not admission --

8 THE COURT: His report, not his depo.

9 MR. KAHN: -- just part of the record.

10 THE CLERK: Well, the depo from the last --

11 MR. KAHN: Right. We're going to supply that --

12 THE CLERK: The one that was used.

13 MR. PRINCE: -- for the Court.

14 THE CLERK: Yeah.

15 THE COURT: Yeah. All right. Anything else? Okay. Are you  
16 ready? Are we still missing somebody? No? Okay. Bring them in.

17 MR. KAHN: And Dr. Tung is here in the back.

18 THE COURT: Okay.

19 [Pause]

20 THE COURT: Where were we at? Were you still doing --

21 MR. PRINCE: I'm on cross of the Doctor.

22 THE MARSHAL: Please rise for the jury.

23 [Jury in at 11:05 a.m.]

24 [Within the presence of the jury]

25 THE COURT: Please be seated. The parties acknowledge the

1 presence of the jury?

2 MR. PRINCE: We do, Judge.

3 MR. KAHN: Yes, Your Honor.

4 THE COURT: All right.

5 MR. PRINCE: We were in the direct -- excuse me, the cross-  
6 examination of Dr. Tung.

7 THE COURT: Dr. Tung.

8 THE CLERK: Please remain standing and raise your right  
9 hand.

10 HOWARD TUNG, DEFENDANT'S WITNESS, SWORN

11 THE CLERK: Please be seated. Please state your name again  
12 for the record.

13 THE WITNESS: Howard Tung, T-U-N-G.

14 THE CLERK: Thank you.

15 [Cross-examination of Dr. Tung by Mr. Prince previously  
16 transcribed]

17 REDIRECT EXAMINATION

18 BY MR. KAHN:

19 Q Good afternoon, Dr. Tung.

20 A Good afternoon.

21 Q Do you recall we started your testimony on Friday, several  
22 days ago last week, correct?

23 A Correct.

24 Q And you and I didn't talk much about the Southwest Medical  
25 Association's records, but you reviewed the records from before this

1 accident, correct?

2 A Yes.

3 Q From Southwest Medical Associates?

4 A Yes.

5 Q And you incorporated the notation that you had reviewed  
6 those records into one or more of your reports, correct?

7 A Yes.

8 Q Now, when you did your first report three or so years ago  
9 and opined that Mr. Yahyavi had these issues that were mostly unrelated  
10 to this accident, you did not have the Southwest Medical Associates'  
11 records, correct?

12 A That's correct.

13 Q And at some point, you rendered a written opinion in this  
14 case that you thought future surgery would not help him, correct?

15 A Correct.

16 Q And then he got the fusion surgery a year and a half ago,  
17 right?

18 A Correct.

19 Q And do you think that has helped him with his pain levels?

20 A No. In fact, Dr. Schifini says in one of the reports he has not  
21 had any benefit from it. In fact, Mr. Prince indicates that he had a  
22 neuropraxia, and we could say he's worse.

23 Q And now the Plaintiffs are asking to, for my client, to  
24 essentially pay for a spinal cord stimulator, correct?

25 A That's my understanding.

1 Q And we're more than six years after the accident, right?

2 A Correct.

3 Q And as far as you sit here today, you haven't seen an actual  
4 schedule for the surgery date or anything like that, right?

5 A Correct.

6 Q You understand that Mr. Yahyavi and Mr. Prince did properly  
7 represent that Mr. Yahyavi said he's planning to do it.

8 A That's what I just got told.

9 Q And your opinion is you don't think the spinal cord  
10 stimulator will help him either?

11 A I think the likelihood of benefit with a spinal cord stimulator  
12 is going to be limited or small. It's not zero, but it's limited or small.

13 Q Can you tell the jury what you made of the Southwest  
14 Medical Associates' records, the one that said where Mr. Yahyavi is  
15 saying that he had neck pain for years in late 2011, roughly 21 months  
16 before this accident?

17 A Well, I think that, as you know, I got those records afterward.  
18 I think it further supported my opinion that he had an ongoing  
19 degenerative cervical spine condition, that the MRI show were getting  
20 worse over time. And that the notation of having neck pain for years is  
21 exactly what it says, neck pain for years.

22 And that meant he had some issues with his neck, with pain, and  
23 the x-rays verified because you can have degenerative spine disease.  
24 We've talked about this without any pain, but we know he had pain. And  
25 in fact, that's why we go the x-rays.

1           And so if one were to put that together or clinically correlate that,  
2 you would say he had neck pain for years related to degenerative  
3 cervical spine disease.

4           Q     And the x-ray you're talking about is the one that was taken  
5 roughly contemporaneously with that report of pain for years, 21 months  
6 before this accident?

7           A     Yeah. October 2011.

8           Q     Now, one of the things Mr. Prince asked you about is the  
9 chiropractic treatment. Remember, he said the word, numerous. He  
10 said, Plaintiff had numerous chiropractic treatments in that 14-month  
11 period you're allotting?

12          A     Yeah. Numerous or many, I think, was the word he utilized.

13          Q     I'm going to ask you to reach behind you and get Exhibit 87  
14 which is the Downtown Neck and Back Chiropractic.

15          A     All right. Got it.

16          Q     And we're going to pull up Exhibit 201 first. And while he's  
17 doing that, can you tell me how many total pages are in Exhibit 87 or  
18 roughly?

19          A     194 to 212. So 18.

20          Q     Okay. Can you go through and tell the jury kind of when the  
21 chiropractic treatment started with Downtown Neck and Back right after  
22 the accident and when it stopped? This is the first outside provider that  
23 the Plaintiff sees after the hospital, right?

24          A     Correct. It looks like it starts on the 1st of July.

25          Q     Okay. I think there was another earlier date. This date that's



1 up on here is 6/2413. So about five days post-accident.

2 A Okay. 6/24/13.

3 Q So maybe find the last day.

4 A And the last day is -- oh, it's out of order. 7/30.

5 Q Okay. So he treats for about nine days, ten days, right?

6 A Okay.

7 Q And how many visits does it look like from those records that  
8 he attended that chiropractor for the nine or ten days immediately after  
9 the accident?

10 A I got five.

11 Q Would you consider that numerous visits to a chiropractor?

12 A I wouldn't use the word numerous.

13 Q And on this pain diagram that's within the file, what does this  
14 tell you? This is a pain diagram dated June 24th, '13, so five days after  
15 the accident. What does this tell you about either the patient's reported  
16 complaints of pain or how the chiropractor is interpreting those  
17 complaints of pain?

18 A Well, he's got pain across the back, shoulders and mid back,  
19 low back, but this is not a diagram of radiculopathy or radiculitis, if you  
20 will.

21 Q What would you expect to see in such a diagram?

22 A I would expect to see more pain or pain complaints, or at  
23 least a drawing that would show pain down the arms.

24 Q Markings on one or both arms?

25 A Yes.

1 Q And let's go back to Southwest Medical a second, because  
2 it's refreshing our minds. You've reviewed a boatload of medical  
3 records. That's not a legal term, boatload, but you've reviewed a  
4 boatload of medical records related to Mr. Yahyavi, correct?

5 A I have a lot of medical records.

6 Q And that includes as many records as you could review after  
7 the accident, right?

8 A Yes.

9 Q And then the Southwest medical records from before the  
10 accident, correct?

11 A Correct.

12 Q And in any of the records that you've reviewed, all the  
13 different doctors, chiropractors, physical therapist, pain management  
14 doctors, imaging providers, x-rays, MRI's, Dr. Oliveri's rating document,  
15 Dr. Kaplan, his documents before he's determining that Mr. Yahyavi's a  
16 candidate for surgery.

17 Did you ever in any of the documents you've reviewed in this case,  
18 see any mention by any of Mr. Yahyavi's doctors of this Southwest  
19 Medical pain complaint of pain in the neck for years, 21 months before  
20 the accident?

21 A No.

22 Q You went back and forth with Mr. Prince on cross-  
23 examination about radiculopathy. There were a number of questions  
24 and what I'd like you to do is kind of boil it down to its essence. And if  
25 you could explain to the jury why this initial finding of no radiculopathy

1 in early 2014, is significant to you as a neurosurgeon?

2 A The EMG, you mean, and their connection?

3 Q The EMG by Dr. Germin in end of January, early November  
4 2014.

5 A Right. When a surgeon, if someone who has a symptom of  
6 radiculitis or however you want to point to and symptoms that you can't  
7 really verify, pain down the arm. This patient has a lot of degenerative  
8 spine disease. There were multiple levels that they were looking at with  
9 the injections.

10 When we don't really have the idea of radiculopathy, surgery is not  
11 a good option for patients. And why is that, and I tried to explain this  
12 earlier, is that those patients that get operated for axial neck pain or  
13 primarily axial neck pain don't do well. It's at best a flip of the coin and  
14 often worse.

15 And then you have to take the risk of having surgery, being worse  
16 after surgery, which, you know, at no fault of the surgeon, and I'll repeat  
17 that, at no fault to the surgeon can occur.

18 So in this particular instance, there wasn't really a solid indication  
19 of moving forward with surgery. And I think that Dr. Perry, despite being  
20 shown something that says, hey, he's considering surgery, his ultimate  
21 idea after going through the injections and everything was that surgery  
22 was not going to be beneficial, which is what I've been saying.

23 That being said, then there's a gap of treatment and treatment and  
24 later, he does have surgery.

25 Q And it's not just you. At one point, his own doctor, Archie

1 Perry, his orthopedic surgeon recommended against surgery as well,  
2 correct?

3 A Correct.

4 Q And that was after the EMG nerve conduction study that  
5 doesn't show radiculopathy?

6 A Correct. Later, there is radiculopathy, and I think that is one  
7 of the driving forces for offering the patient surgery in January of '18.

8 Q A year or two or three years later after the first thing?

9 A Yeah. Three years later.

10 Q Now Mr. Prince asked you about, you didn't go and take a  
11 second bite at the apple. You didn't have another IME with the Plaintiff.  
12 How common is it in your experience to do a second IME in the litigation  
13 context?

14 A I've never -- it has never occurred in my experience.

15 MR. PRICE: Your Honor, objection. We discussed at the  
16 bench. You know that's a legal option available to the Defendant. So  
17 that's for Mr. Kahn to say --

18 THE COURT: Counsel approach.

19 [Sidebar begins at 2:49 p.m.]

20 MR. PRICE: The fact is you didn't ask for it, so it's never been  
21 denied. You are entitled to reevaluate --

22 THE COURT: Yes.

23 MR. PRICE: -- after the surgery. I'm sure they would have  
24 cooperated with --

25 THE COURT: Wait a second. How is he --

1 MR. PRICE: File your motion.

2 THE COURT: If you asked him there maybe is a right way to  
3 do that, has he ever done it, but is it an option? It is an option.

4 MR. KAHN: Well, Mr. Prince has objected to what he said  
5 about California, and that's where he [indiscernible] --

6 MR. PRICE: No. You said --

7 THE COURT: Oh.

8 MR. PRINCE: -- [indiscernible]. No.

9 MR. KAHN: -- [indiscernible] ask him that because the rules  
10 are different.

11 MR. PRICE: No. I want you now to admonish the jury now  
12 that it is an available legal option that the Defendant did not exercise in  
13 this case.

14 MR. KAHN: It's not a legal option.

15 MR. PRICE: Yes, it is.

16 THE COURT: I'm not going --

17 MR. KAHN: It's only a legal option if the Court orders it and  
18 the Plaintiff doesn't object, then it's not a given.

19 THE COURT: Well, somebody has to ask for it --

20 MR. PRICE: No, you have to file a motion. It's a Rule --

21 THE COURT: -- it was never -- apparently never asked for.

22 MR. PRICE: Correct.

23 THE COURT: But certainly I don't think he is somebody who  
24 can testify. If you ask him if he's ever done a second one, fine.

25 MR. KAHN: That's what I think I was asking.

1 MR. PRICE: I don't even think that's a relative question  
2 because --

3 MR. KAHN: I'll ask him that question.

4 MR. PRICE: -- this rule enables you to ask for another one.  
5 You specifically discussed that. So I don't want him to --

6 THE COURT: I'm going to allow him to ask if he's ever done  
7 it. You're going to get recross.

8 MR. KAHN: Thank, Your Honor.

9 THE COURT: Let's go.

10 [Sidebar ends at 2:51 p.m.]

11 BY MR. KAHN:

12 Q Dr. Tung, I'm going to ask you a different question. And that  
13 question is, in the in your experience as a forensic physician working on  
14 these litigation cases, have you ever performed a second independent  
15 medical examination on the patient?

16 A Not that I could ever recall.

17 Q Now, one of the things that you said during cross is that  
18 radial pains cannot be assumed to be radicular. Do you recall saying  
19 something like that?

20 A Radicular, yeah. It can't be assumed. That's true.

21 Q And can you explain to the jury what you meant by that  
22 because there were bunch of questions and answers, I want to make  
23 sure they understand what you're saying?

24 A So people can have pain down the arms which can mimic  
25 radiculopathy, so they call it radiculitis. Radiculopathy in its use in the

1 medical terminology implies a spine origin. And that's basically  
2 simplistically what we mean by that.

3 I mean, there are many people that have back pain and leg  
4 pain and it's not related to their lumbar spine. Some are, but not  
5 everyone is. And nor do we have a reason a lot of people have back pain  
6 and leg pains and sometimes will say, we don't really have a good  
7 reason why you have that. And we then just treat the symptoms. That's  
8 the best way to go.

9 Q Mr. Prince asked you questions about all of the different --  
10 well, let me back up. Here, Dr. Oliveri performed or a workers  
11 compensation rating analysis at first, right?

12 A Correct.

13 Q And then he became a retained expert for the Plaintiff in the  
14 litigation after, that's correct?

15 A That's my understanding, yes. Afterwards.

16 Q And you do ratings in California in your practice, correct?  
17 Worker's compensation ratings?

18 A Correct. We use the same rating scale. The AMA  
19 impairment is published by guides by the AMA Medical Association and  
20 many states use that.

21 Q What I'd like you to explain to the jury, if you could, is the  
22 difference between what you do as a worker's compensation rating  
23 physician and what you do as a retained litigation expert like you are in  
24 this case, so they understand the distinction between what Dr. Oliveri  
25 was up to and what you are up to now.

1           A     So that's what I was trying to -- I talked a little bit about that.  
2 The impairment is, and especially using DRE categories are based upon  
3 symptomatology and then some objective evidence.

4           So, for instance, if you've had cervical surgery, you're going to get  
5 a certain level. You'll be DRE Category 4. If you have some symptoms  
6 that are consistent with arm pains, for instance, but you can't really  
7 verify that, i.e., with something objective. EMG, herniated disc with  
8 obvious nerve compression, then you're going to be placed into a  
9 category. So we're not discounting the patient has symptoms, that's  
10 called DRE cervical category 2. And that impairment rating is between 5  
11 and 8 percent. So Mr. Yahyavi got the upper end of that.

12           In addition, then, you could, if you have kind of verifiable radicular  
13 pains, that would be DRE Cervical Category 3 and that's 15 to 18 percent.

14           So almost by definition because Mr. Yahyavi was placed in DRE  
15 Cervical Category 2, he didn't have verifiable radiculopathy. He didn't  
16 have it. And Dr. Oliveri didn't think so, because otherwise he would have  
17 given him Cervical Category 3. So, you know, I don't know what he said,  
18 but just what he chose as the impairment, tells me that he didn't have  
19 any radiculopathy that was verifiable.

20           Now if someone says, I can't stand to and sit too long, I can't live  
21 15 pounds, et cetera, that isn't considered in the rating. So that's more  
22 like if you are going to think about doing work restrictions, et cetera,  
23 things like that, then you might have to take the subjective nature of  
24 symptoms and place that.

25           You have to as a physician, you're going to have to marry that with



1 or engage that with, well, what's the pathology? So if someone has a  
2 normal MRI of the back or the neck, hypothetically, and they say, jeez, I  
3 can't live five pounds, you might say, well, you know, you should be able  
4 to lift five pounds. I can't, it hurts too much. And it just doesn't make  
5 any sense.

6 So, you know, that's where when one says we're going to try to  
7 quantify that and the way you want to quantify symptoms, then with  
8 kind of the ability to work or what you can do at work would be through  
9 a functional capacity exam. So that tries to see what someone can do.  
10 And if they're having certain complaints and everything to kind of utilize  
11 that subjectively and see what objective tasks one can perform.

12 But that exam in and of itself requires a sincerity of effort and it  
13 requires people who may have symptoms maybe, and they are stopping  
14 a test and it doesn't make sense, it's exaggerated or there's  
15 inconsistency because there are certain tasks you can do when they do  
16 these exams that should fall within a 10 percent range. And if they fall  
17 out of that 10 percent range, it means they're not really trying.

18 And if you're not trying, then how do we know how much you can  
19 do? I mean, you can't.

20 Q So to back up and focus on one tiny part of that.

21 A Okay.

22 Q You're saying, Dr. Oliveri rated the Plaintiff, Mr. Yahyavi, at a  
23 level 2, at the maximum level 2, 80 percent, but he made a determination  
24 that he did not have radiculopathy because if he had radiculopathy at  
25 that point during the rating, he would have been a level 3 and his

1 percentage would have been hire?

2 A Absolutely correct.

3 Q Okay. I'm going to ask to pull up Exhibit 93, Bates P428, and  
4 I'm going to ask you to make note of this and then I'm going to show you  
5 another document, doctor.

6 And these are some branch blocks that were performed October  
7 23rd, 2014. I think this is Dr. Schifini.

8 A Okay.

9 Q Is that consistent with the records you reviewed the Dr.  
10 Schifini performed some blocks in October or so of 2014?

11 A Correct.

12 Q And I'd ask you to look at the levels and note these levels  
13 that Dr. Schifini is performing the procedure on or the injection on. And  
14 then I'm going to show you a different document and I'm going to ask  
15 you to compare the two or else I'll put them up side by side if I'm able.

16 A Okay.

17 Q And now I'm going to ask that Exhibit 96, P548 be brought  
18 up. And while I'm getting help doing that, that should be documents  
19 from Dr. Fisher from injections on January 26, 2015. Your records reflect  
20 that Mr. Yahyavi also got injections from a different doctor, Dr. Fisher?

21 A Correct.

22 Q And this is approximately three months after Dr. Schifini's  
23 injections that we just showed you, right?

24 A Correct.

25 Q And can you look at these and compare the levels on Dr.

1 Fishers' injections to the ones that you just saw from three months  
2 earlier that Dr. Schifini performed.

3 A They're similar, but not exactly the same.

4 MR. KAHN: Okay. And I'd ask, can we pull up Exhibit 96 and  
5 then P549?

6 BY MR. KAHN:

7 Q And these are injections from Dr. Fisher in March of 2015. So  
8 about six weeks after the ones I just showed you. And I'd ask you to take  
9 note of the cervical levels at issue there.

10 A Correct.

11 Q And my question to you is, is Dr. Fisher performing injections  
12 on some of the same cervical levels a few months after Dr. Schifini has  
13 performed his initial set of injections on some of those same levels?

14 A Absolutely.

15 Q And what is the medical purpose of doing that, injecting the  
16 same level, having a different doctor inject the same level three months  
17 later?

18 A No. There is no purpose. The first set didn't work and  
19 they're just repeating the same test and it's not going to work again.  
20 And in fact I think Dr. Fisher later says that these didn't work, but we  
21 would've predicted it. And either he didn't know Dr. Schifini did the  
22 exact same levels. He didn't have the medical records.

23 Moreover, medial branch blocks is not a treatment for radiculitis or  
24 radicular pain. This tells me that they're also -- they're thinking it's facet  
25 related pain, which is totally different than the things we've been talking

1 about, radicular pain, which is kind of a nerve issue type situation.

2 But that being said, there's no reason to keep on repeating a  
3 injection that is not being beneficial.

4 Q And you --

5 MR. PRICE: Can we approach for a second?

6 THE COURT: Yes.

7 [Sidebar begins at 3:02 p.m.]

8 MR. PRICE: There is nowhere in his report that talks about  
9 that these injections are not medically necessary. They're unreasonable  
10 for which they were performed. He says they're not causally related, but  
11 he doesn't talk about the medical necessity, the duplicative nature,  
12 anything to suggest that they weren't reasonable and appropriate. He  
13 never says that in any report, ever.

14 MR. KAHN: And my response is, counsel asked him about  
15 every treatment he had and hundreds of medical treatments and opened  
16 up everything that he's done ever since the accident and that's what I'm  
17 responding to.

18 MR. PRICE: No, I didn't raise one time medial branch blocks  
19 or facet generated pain. I did not one single time. Not a single time.

20 MR. KAHN: I think that's a bit demonstrative, but I'd like you  
21 to look at the -- it's in the pain management, a number of pain  
22 management. So that you think he's wrong.

23 MR. PRICE: No. You can't give an opinion that there's  
24 medically unnecessary, they're duplicative, there's no medical purpose  
25 of them. He never says that in any report?

1 THE COURT: Does he say it? I haven't -- do you want to see  
2 his reports?

3 MR. PRICE: No.

4 MR. KAHN: He doesn't say it in his reports.

5 MR. PRICE: He does --

6 MR. KAHN: It was a demonstrative --

7 MR. PRICE: No.

8 MR. KAHN: -- when counsel asked him about, he had a block  
9 for pain management and asked that we look at.

10 THE COURT: Well, the demonstrative did say all the things  
11 he did, but --

12 MR. PRICE: Correct.

13 THE COURT: -- it didn't --

14 MR. KAHN: And then he asked him to render opinions about  
15 it.

16 MR. PRICE: No, I didn't.

17 MR. KAHN: And now I get to respond to that.

18 THE COURT: I don't think he asked him to render any  
19 opinions. He said, did he go to all these treatments and it's way beyond  
20 the scope of his direct. I don't remember --

21 MR. PRICE: And the cross.

22 THE COURT: -- him asking anything about this.

23 MR. PRICE: Correct.

24 MR. KAHN: Okay.

25 THE COURT: Cross. Sorry.

1 MR. KAHN: I'll establish it with the Plaintiff himself. That's  
2 fine.

3 THE COURT: Sorry. Cross. Beyond the scope of his cross, I  
4 don't remember him saying anything about the fees. I know this is the  
5 first time we've heard anything about this doctor.

6 MR. KAHN: I'll establish it with the Plaintiff directly. That's  
7 fine, Your Honor.

8 MR. PRICE: I want you to obey by the rules in trying to elicit  
9 opinions that aren't in his reports like unnecessary medical treatment,  
10 you know, no medical purpose to the injections, they didn't work the first  
11 time. He never says that in his reports.

12 MR. KAHN: He was asked for hours about every single  
13 treatment --

14 MR. PRICE: No.

15 MR. KAHN: -- hundreds of treatments --

16 MR. PRICE: No.

17 MR. KAHN: -- and aren't they all reasonable. He was asked  
18 about every treatment in totality.

19 MR. STRONG: That's not true.

20 THE COURT: He wasn't asked about these.

21 MR. PRICE: That's correct.

22 MR. KAHN: He was asked about all the treatments including  
23 these.

24 MR. PRICE: No, he was not.

25 MR. KAHN: They were listed on at least two demonstrative

1 slides. Well, he was under pain management and there was a box with  
2 several things.

3 MR. PRICE: And he said he underwent them.

4 MR. KAHN: [Indiscernible] reason [indiscernible].

5 MR. PRICE: I didn't say nothing else. That's all I said.

6 THE COURT: I don't recall him saying are those ordinarily  
7 and necessary and reasonable.

8 MR. PRICE: Correct. Correct.

9 MR. STRONG: That's right.

10 THE COURT: He said, he showed the demonstrative and he  
11 said, did he undergo all this. And I assume, so we know, that these that  
12 they're talking about are part of that demonstrative.

13 MR. PRICE: Correct.

14 THE COURT: But he never asked anything on cross about  
15 these, whatever they are, medial branch blocks.

16 MR. KAHN: I'll move on.

17 THE COURT: And for the record, that it's not in his report, so  
18 I think we are going far afield. All right. Move on.

19 MR. KAHN: I'll move on.

20 [Sidebar ends at 3:05 p.m.]

21 THE COURT: I'm going to sustain the objection. Let's move  
22 on.

23 BY MR. KAHN:

24 Q Did anything that Mr. Prince asked you on the cross-  
25 examination change your opinions in this case?

1 A No.

2 Q And as you sit here today, do you still think Mr. Yahyavi is  
3 able to work?

4 A Yes.

5 Q And do you think his problems since early September 2014,  
6 roughly four months after the accident, are related to this motor vehicle  
7 accident as opposed to being related to pre-existing progressive,  
8 degenerative spine disease and all the other things that were discussed?

9 A Yes. It was actually 14 months after, but yes.

10 Q Do you think any of his claims after September of 2014 are  
11 related to the accident?

12 A No.

13 Q Are you aware whether the Plaintiff's own medical experts  
14 have talked about Mr. Yahyavi has degenerative disc disease before this  
15 accident?

16 A I would assume that they would agree, because it seems very  
17 obvious from a medical standpoint he had it beforehand.

18 Q And what about osteophyte's?

19 A I would assume they agree because it's shown on the x-rays.  
20 I would assume they agree.

21 Q And what about narrowing of the spine?

22 A He has it and if there's progression through the MRI's after  
23 the accident, which is one of my main supporting evidence objectively  
24 that this is a progressive degenerative cervical spine problem.

25 Q And what about reversal of a lordotic curvature?



1 A It was there before the accident.

2 Q And what about the spinal fusion, auto fusion of the C-6, 7  
3 level?

4 A Again, it was there or pretty much there before the accident  
5 in 2011.

6 Q And can you explain to the jury before I conclude, what  
7 happens when there's an auto fusion at the C-6, 7 level, so they  
8 understand the medicine?

9 A Well, what's happening is the disc has become so  
10 degenerative and collapse, it's basically wasted away, and it becomes  
11 bone on bone. And as the bone on bone touches, the bone will fuse to  
12 the other bone, but it's really because the degenerative disc disease is so  
13 pronounced and severe that the disc just has wasted away and then the  
14 bone fuses to the bone.

15 MR. KAHN: No further questions. Thank you.

16 [Recross examination of Dr. Tung by Mr. Prince previously  
17 transcribed]

18 [Juror question of Dr. Tung previously transcribed]

19 [Sidebar begins at 3:31 p.m.]

20 THE COURT: What do we have next?

21 COUNSEL: Clients --

22 THE COURT: And this is your cross?

23 MR. KHAN: My cross of him and then I think Plaintiff's going  
24 to rest. I need a break if I can get one.

25 THE COURT: And I don't doubt -- see you being done today

1 with that -- are you going to be done and -- well then he has redirect.

2 MR. KHAN: I doubt it.

3 THE COURT: So today is Tuesday. Wednesday -- I'm going  
4 back to check how much I have for tomorrow. Well it is what it is. Yes,  
5 we'll take a break.

6 MR. PRINCE: Hang on. Did we answer the juror's question  
7 on when his exam was?

8 MR. KHAN: Yes.

9 MR. PRINCE: Oh, okay.

10 THE COURT: He started with that.

11 MR. PRINCE: Okay.

12 THE COURT: Yes. All right.

13 [Sidebar ends at 3:32 p.m.]

14 THE COURT: Ladies and gentlemen, we're going to take a 10  
15 minute recess. During this recess you're admonished; do not talk or  
16 converse amongst yourselves or with anyone else on any subject  
17 connected with this trial or read, watch, or listen to any report of or  
18 commentary on the trial or any person connected with this trial by any  
19 medium of information including, without limitation, newspapers,  
20 television, radio or internet. Do not form or express any opinion on any  
21 subject connected with the trial until the case is finally submitted to you.  
22 We'll take 10 minutes.

23 [Recess taken from 3:32 p.m. to 3:47 p.m.]

24 [Outside the presence of the jury]

25 THE MARSHAL: Remain seated; come to order.

1 Department 28 is again in session.

2 THE COURT: We ready to go?

3 MR. KHAN: Yes, Your Honor.

4 THE COURT: Okay. Bring them in.

5 MR. KHAN: Ready as we'll ever be.

6 THE CLERK: What does the calendar look like?

7 THE COURT: Oh, yeah. We're going to start at 1:00 mostly  
8 because of this new thing where if they're high risk they -- and you guys  
9 don't know --

10 [Pause]

11 All right. Be seated. Is it recording?

12 [Court and Court Recorder confer]

13 [Off/On the Record]

14 MR. PRINCE: Your Honor, when we last concluded before  
15 Dr. Tung came on Friday, I had completed my direct exam of  
16 Mr. Yahyavi.

17 THE COURT: Are we -- hang on. Are we recording?

18 [Court and Court Recorder confer]

19 THE COURT: -- because we're recording -- yeah, I know, but  
20 they keep going on and off. We can't miss anything, obviously. And if it  
21 goes on and off -- we'll get them up here. We have -- it has to be --

22 [Off/On the Record]

23 THE COURT: -- by any medium of information including,  
24 without limitation, newspapers, television, radio or internet. Do not form  
25 or express any opinion on any subject connected with the trial until the

1 case is finally submitted to you.

2 All right. We'll take 15 minutes. We got a new microphone  
3 last time when we had that problem. Maybe we'll get a whole new  
4 system.

5 [Recess taken from 3:51 p.m. to 4:01 p.m.]

6 THE COURT: Huh? Yeah, bring them in.

7 [Pause]

8 THE MARSHAL: Please rise for the jurors.

9 [Within the presence of the jury]

10 THE COURT: Please be seated. Parties acknowledge the  
11 presence of the jury?

12 MR. PRICE: Yes, Judge.

13 THE COURT: I think they just turned it off and on, but -- it's  
14 computers. Anyway, it is presently working. Go ahead.

15 Mr. Yahyavi, your cross-examination.

16 THE MARSHAL: Remain standing. Face the clerk of the  
17 court.

18 THE CLERK: Please raise your right hand.

19 BAHRAM YAHYAVI, PLAINTIFF, SWORN

20 THE CLERK: Please be seated. Please state your name and  
21 spell it for the record.

22 THE WITNESS: Bahram, B-A-H-R-A-M Y-A-H-Y-A-V-I.

23 THE CLERK: Thank you.

24 MR. KAHN: Good afternoon, Mr. --

25 THE COURT: One minute. Before -- so we're going to start at

1 one. I doubt, I don't want to make you wait, and I doubt we'll done by  
2 11, and then you're going back and forth, so we'll start at one just to,  
3 hopefully, well, we'll eliminate you waiting around, and I'll remind you  
4 again. Go ahead.

5 CROSS-EXAMINATION

6 BY MR. KAHN:

7 Q Good afternoon, Mr. Yahyavi.

8 A Good afternoon.

9 Q You and I haven't really spoken, correct?

10 A Correct.

11 Q I wasn't the one who took your deposition when that  
12 occurred, right?

13 A Correct.

14 Q And other than seeing each other in court, we really aren't  
15 acquainted.

16 A Correct.

17 Q That's fair, right? I'm going to jump around for some  
18 different areas, but I'm going to ask you a couple of questions to start  
19 out about the document that was up on the screen several times, you're  
20 aware that in this trial there's been a use of medical records from  
21 Southwest Medical Associates about 21 months before the accident, and  
22 the records say that you said you had neck pain for years?

23 A I've seen that, yes.

24 Q And am I correct that it's your -- was your testimony during  
25 your direct examination with Mr. Prince that you don't remember saying

1 that?

2 A I don't recall that, no.

3 Q And are you saying that you didn't say it or are you just  
4 saying you don't remember it?

5 A I just don't remember it.

6 Q So I'm going to put up a demonstrative. Now you  
7 understand that you saw Mr. Prince's opening statement to the jury,  
8 correct?

9 A Yes.

10 Q And you understand that you are asking for some amount in  
11 excess of 13 million dollars from my client?

12 A Okay.

13 Q And no one from Capriati has ever told you anything -- has  
14 ever been rude to you or done anything to you aside from this accident,  
15 correct?

16 A I have not heard from Capriati since the accident, no, the  
17 answer is no.

18 Q Now as far as not remembering the report of pain at  
19 Southwest Medical, and we'll probably have to wait for that until  
20 tomorrow because it involves some documents and I don't want to start  
21 pulling up a lot of documents this afternoon, but you realize that the  
22 same day that the Southwest Medical records say you told them you had  
23 neck pain for years, there's also an x-ray report, correct?

24 A Yes. I understand there was.

25 Q And that's part of what you went over with Mr. Prince, what

1 you were doing in your direct examination, right?

2 A Yes.

3 Q And you realize that those, the x-ray report has a lot of  
4 information about your cervical spine, specific to your cervical spine?

5 A I haven't seen the report actually, but I've seen it does.

6 Q You had gone to Southwest Medical Associates essentially to  
7 be your primary care physician. It's a clinic and you had gone there a  
8 few weeks before this report of pain for other reasons, right? General, to  
9 see a doctor?

10 A Yes.

11 Q And as far as the report of pain and the x-ray, do you  
12 remember them in any way communicating with you about the results of  
13 the cervical x-ray in October of 2011?

14 A I don't remember.

15 Q Give me one second to pull up something, please.

16 What's the -- what exhibit number is Southwest? 156?

17 MR. BROWN: 156.

18 MR. KAHN: You have it? Okay. You could pull it up. This  
19 would be Exhibit 156.

20 MR. BROWN: It's not pulling.

21 MR. KAHN: It's not working?

22 MR. BROWN: It's not.

23 MR. KAHN: Not working? Okay. That's not -- okay. I'll pull  
24 the hard copy.

25 Your Honor, may I grab the hard copy from behind the

1 witness?

2 THE COURT: Yeah.

3 MR. BROWN: He has it.

4 MR. KAHN: He has it up?

5 MR. BROWN: Yup.

6 MR. KAHN: What exhibit, Mr. Brown?

7 MR. BROWN: 156 to 116.

8 MR. KAHN: Okay. 156.

9 MR. BROWN: 2116.

10 MR. KAHN: P number 2116.

11 MR. BROWN: Right.

12 MR. KAHN: It's an admitted exhibit. I'm going to open it up,  
13 Mr. Yahyavi, so you can -- and place it in front of you so you can see it,  
14 but it's also going to be on your screen. You don't need to move.

15 THE WITNESS: Okay.

16 MR. KAHN: You're fine. And if you could just blow up the  
17 top half? Okay.

18 BY MR. KAHN:

19 Q Now this is a letter dated October 28, 2011, that was a few  
20 days after that x-ray that you discussed with Mr. Prince, correct?

21 A Correct.

22 Q And this is now still about 21 months before the accident,  
23 right?

24 A Correct.

25 Q And this is a letter to you. You don't live at that address



1 anymore, correct?

2 A I do not.

3 Q And that was your address at the time; is that right?

4 A Yes.

5 Q And this is -- if we could highlight the second and third  
6 paragraph, please? So this is the doctor at Southwest Medical, Sharon  
7 King, and she's sending you this letter and saying -- I'll paraphrase  
8 because the jury can read this. Actually, can you make the -- just the two  
9 paragraphs as big as possible so they can read it? It's still a little small  
10 for me. There you go.

11 So Dr. King from Southwest Medical -- you can highlight the whole  
12 thing if you want. This is telling you that the x-ray results are -- she's  
13 reviewed them, correct? That's one thing, she's saying she reviewed the  
14 x-ray results?

15 A Yes.

16 Q And then she's telling you that you have mild to moderate  
17 degenerative arthritic changes; do you see that?

18 A I do.

19 Q And then she's saying that there's no fractures or  
20 dislocations; do you see that part, as well?

21 A I do.

22 Q And then the next paragraph is essentially telling you you  
23 can go online and look at these results or find information at their  
24 website, right?

25 A Yes.

1 Q And are you -- do you recall receiving this letter?

2 A I really don't. I honestly don't remember.

3 Q And just to be clear, you're not telling the jury that you did  
4 not receive it, you don't -- just don't recall receiving it, right?

5 A I just don't remember it, yes, sir, correct.

6 Q Okay. You can get rid of that one. Thanks. What I'd like to  
7 do is to start going through the accident a little bit. That's probably  
8 about as far as we will get today.

9 A Yes, sir.

10 Q And I'm going to ask you a series of yes and no questions,  
11 but if you can't answer it yes and no, just tell me, I'm old. The lawyers  
12 and the judge will decide how to handle it, okay?

13 A Yes, sir.

14 Q And if at any point you don't understand my question or you  
15 need me to repeat it or rephrase it, just let me know, okay?

16 A Okay.

17 Q On the day of the accident, at the time of the accident, you  
18 were driving east on Sahara to make the turn onto Glen, correct?

19 A Correct.

20 Q And that is a route that you took frequently between the two  
21 Chapman Dodge lots and locations, right?

22 A Yes.

23 Q And would you do that drive multiple times a day on some  
24 days?

25 A Sometimes, yes.

1 Q And you'd been working there for -- at that location or I  
2 guess both locations for a while, many months, right?

3 A Yes.

4 Q And so this was a route that you took frequently, correct?

5 A Yes.

6 Q You were familiar with the route from beginning to end  
7 between the two lots and in that direction?

8 A Yes.

9 Q And you were also aware because it was a regular route of  
10 yours that there was construction going on along Sahara, in that general  
11 area, for a number of months before the accident, right?

12 A Right.

13 Q You saw, and I'm not talking just about the day of the  
14 accident, I'm talking about in the months leading up to it, you saw cones  
15 and signs and construction workers and equipment, machinery, things  
16 like that for a period of months before this accident, right?

17 A Yes.

18 Q Now as you approach the construction area, before the  
19 collision, do you recall seeing signs that told you, and without going into  
20 word-for-word, that told you essentially you're coming into a  
21 construction zone?

22 A I don't recall the signs, but I did know there was construction  
23 there.

24 Q And if I understood your testimony with Mr. Prince, you're  
25 saying at no point between leaving the lot that morning and the time of

1 the collision were you ever in any lane other than the right lane, correct?

2 A Correct.

3 Q You were never in one lane over, right?

4 A No.

5 Q And you were never in the fast road of the lanes, right?

6 A No.

7 Q And before the accident, can you say how far or how many

8 feet or yards before the accident you started signaling before Glen?

9 Your best estimate. I'm not asking for an exact number of fees.

10 A I really don't remember.

11 Q Do you think it was more than 350 feet? The length of a

12 football field with the end zones?

13 A Probably not.

14 Q And this accident happened as you were turning right onto

15 Glen from Sahara generally, right?

16 A Yes.

17 Q And do you think you were beginning the turn, in the middle

18 of the turn, or all the way through the turn when the accident happened?

19 A I thought it was right there, made my turn there, things went

20 off.

21 Q Okay. So you think it was after the turn, right?

22 A I think so.

23 Q Now you told the jury you thought you were going 25 to 30

24 miles an hour; is that correct?

25 A That is correct.

1 Q And at your deposition if you said 30 miles an hour would  
2 you recall saying that or not?

3 A Sure, and I'm incorrect.

4 Q We showed the jury at one point a document from one of  
5 your doctors and you wrote a - hand-wrote a diagram that said I was in  
6 an accident, and showed the forks, the forklift, and showed the diagram,  
7 and said you were going 30 miles an hour. Do you remember telling one  
8 or more of your doctors that you were going 30 miles an hour when the  
9 accident happened?

10 A I don't remember it, but I -- that's a statement I may have  
11 made, could have made.

12 Q And that again, I'm going to ask you to confirm this because  
13 I'm not under oath and you are, but as I heard your testimony with Mr.  
14 Prince, you said you lifted your foot up off of the gas at the time of the  
15 accident; is that correct?

16 A When I was making the turn, yes, that is correct.

17 Q And at the time of the accident, was your foot on the gas or  
18 was it off the gas?

19 A I don't remember that.

20 Q Okay. At this time I'm going to ask to get the witness's  
21 deposition, the original

22 And is counsel okay if I display it on the screen? I can give this to  
23 the witness if that's okay.

24 MR. PRICE: Well, you're required to give that to the witness.

25 MR. KAHN: May I approach, Your Honor?

1 THE COURT: Yes.

2 BY MR. KAHN:

3 Q This is your original deposition, Mr. Yahyavi. You recall  
4 giving testimony a little over three years ago in this case?

5 A I do.

6 Q May of 2019, right?

7 A Sounds about right.

8 Q And whichever one the helper can bring up first would be --  
9 good, I have about four different citations I need to go through on this  
10 point, so let's see. Do it in order. One is 39, lines 13 to 21. So if you  
11 could blow up that part?

12 And this is, Mr. Yahyavi, this is your -- one of your descriptions of  
13 the accident during your deposition, and it's saying: The car came to a  
14 halt without me pushing on the brake or anything, just stopped. And  
15 then you saw the forks. So that's one thing, is it's correct that you did  
16 not brake, right?

17 A That is correct.

18 Q And then if you could pull up page 40, lines 19 to 25? And  
19 this is another that's saying -- this was a question that was asked of you,  
20 and so you had one foot on the gas and one foot -- where was your --  
21 your right foot was on the gas pedal. Answer, yes. Question, you never  
22 had a chance to put on the brake. Answer, never did brake. You see  
23 that, Mr. Yahyavi?

24 A I do.

25 Q So how do you explain the fact that three years ago you said

1 your foot was on the gas pedal, but at this trial, you're saying your foot  
2 was off the gas pedal?

3 A Well, it wasn't accelerating. It could -- it was resting on there.  
4 That's what I understood it to be so.

5 Q Okay. And then if we could bring up 43, lines 8 through 10?  
6 This is a series of questions that was being asked to you about the time  
7 of the accident.

8 A Okay.

9 Q So 43, 8 through 10, if you can do that, or pull up the whole  
10 page, just pull it up. Question, okay, your right foot was on the gas pedal  
11 at that point. Answer, yes. Do you remember that testimony?

12 A Sure.

13 Q And your testimony now is your foot was on the gas pedal,  
14 but it was just resting on the gas pedal?

15 A I wasn't accelerating if that's what you mean, going --

16 Q Well --

17 A -- through there.

18 Q -- I heard -- go ahead. Sorry.

19 A Yeah.

20 Q I heard you say to Mr. Prince your foot was off the gas, that  
21 you took your foot off the gas. Now you're saying it was on the pedal  
22 but not repressed?

23 A Correct. I wasn't accelerating.

24 Q Okay. You were wearing a seatbelt when the accident  
25 happened, correct?

1 A As far as I remember, yes.

2 Q You can get rid of that one, please. And the airbags in this  
3 car did not deploy, correct?

4 A Correct.

5 Q And essentially what you said at your deposition, and I think  
6 what you're going to tell me know is you were going about 30 miles an  
7 hour, when your car hit the forks of the forklift, the car stopped suddenly,  
8 and that was it, barely moved; is that fair?

9 A Repeat that again? Barely move?

10 Q Yeah, I'll ask it a different way. When the car hit the forks of  
11 the forklift --

12 A It was --

13 Q -- the car essentially came to a halt?

14 A Yes, dead halt. Yes.

15 Q And what you're saying is you went from 30 miles an hour to  
16 zero in a very short period of time, right?

17 A Yes. Correct.

18 Q And the airbags did not deploy, correct?

19 A No.

20 Q But that's a correct?

21 A Yes, it is correct, yes.

22 Q Okay. Sorry. Sometimes with the questioning that happens,  
23 and I apologize.

24 A All right.

25 Q Now you said that you -- you said at some point that you



1 were describing your mental condition afterwards, you were kind of out  
2 of it, fuzzy, things like that, right?

3 A Correct.

4 Q And do you remember saying at your deposition that you  
5 blacked out?

6 A I don't remember.

7 Q Okay. So you were out of it at the time of the -- after the  
8 accident, when the ambulance came, and the ambulance said you  
9 couldn't give them your address and your insurance information. Do  
10 you think that's correct information from the ambulance company?

11 A It must have been. I don't remember.

12 Q But --

13 A Remember that comment.

14 Q But you're certain that you were in the right lane, correct?

15 A Prior to the accident.

16 Q Yup.

17 A Yes.

18 Q Prior to this.

19 A Yes.

20 Q And you're certain that you had put your blinker on for some  
21 long period of time before the turn, correct?

22 A I believe so. I think I had my blinker on.

23 Q And you're also certain that there were two trucks on Sahara;  
24 the green trench plate truck that was a semi, and then the blue cement  
25 mix, that was what you told the jury, right?

1 A Yeah, I think it was white, but yes.

2 Q White on top, blue on bottom, it's -- let's call it the semi and  
3 the cement mixer.

4 A Yes.

5 Q And you --

6 A They were both --

7 Q -- recall that the cement mixer was there before the accident,  
8 right?

9 A Yes, as I made my turn, I saw them.

10 Q You saw both trucks?

11 A Both trucks, yes, sir.

12 Q Can you please pull up deposition page 41, line 20 to 42, line  
13 2, if you can do that? This might take a second. Okay. This is the  
14 question and answer. Before you, as you are veering out to Glen from  
15 Sahara, did you notice any construction going on there? Answer, yeah.  
16 There was a semi-truck parked on the right on the side, and it was coned  
17 off. I don't know if it was a dump truck or a semi-truck, but it was a big  
18 truck. Do you see that testimony?

19 A I do.

20 Q Is there any reason at your deposition why you didn't identify  
21 that there were two trucks there and mentioned only a single truck?

22 A I wasn't asked.

23 Q At trial right now, you are saying there were two trucks  
24 present when the --

25 A As far as I remember.

1 Q -- accident happened, right?

2 A I'm sorry. Yes, sir.

3 Q And then when the accident occurred, you didn't really  
4 discuss this with Mr. Prince, but your understanding, your recollection is  
5 that you slid under the dashboard somehow, right?

6 A Yes.

7 Q And you had your seat --

8 A I do recall.

9 Q -- you had your seat belt on, correct?

10 A I did.

11 Q So you had your seat belt on, and you went from 30 to zero,  
12 the air bags did not deploy, and you somehow slid under the dashboard,  
13 correct?

14 A Correct.

15 Q Then the ambulance came, right?

16 A Okay.

17 Q And you ended up at UMC, you recall that?

18 A Vaguely, I do.

19 Q UMC released you the same day, right?

20 A I was there for a few hours, correct, the same day.

21 Q They did some tests, they took some imaging, and you were  
22 released, right?

23 A Yes, sir.

24 Q And then several days later you went to Downtown Neck and  
25 Back, right?

1 A Yes.

2 Q Now you only went to Downtown Neck and Back for under --  
3 about a week and a-half or two weeks, right?

4 A Correct.

5 Q And were you experiencing the same kind of pain that first  
6 couple of weeks that you're describing here to the jury that you still feel?

7 A Yes.

8 Q So why did you stop going to the chiropractor after ten days?

9 A He was workers' comp. order, I followed their instructions.

10 Q And then after the chiropractor, you began seeing other  
11 doctors and medical professionals, right?

12 A Correct.

13 Q But in the interim, about nine days after this accident you  
14 quit your job, correct?

15 A I didn't quit my job, I just couldn't do the job that I had, so.

16 Q So there's a document from Chapmans that indicates you  
17 quit. Did you have to formally quit Chapman Dodge to go work at  
18 Chapman Jeep or did you go back to Chapman Dodge?

19 A I went to Chapman Jeep, but you do have to fill out a form,  
20 you sign a form and your debt is released to the other.

21 Q So after -- nine days later, after the document saying you quit  
22 Chapman Dodge, you're saying your payroll records should reflect that  
23 you transferred to Chapman Jeep at that point?

24 A I don't know how the human resources handled the  
25 paperwork, but it was -- I had a phone call from Chapman Jeep and they

1 offered me a -- part-time work, so I went working there.

2 Q You ended up going to Dr. Perry for a while, he's an  
3 orthopedic surgeon, correct?

4 A Yes, sir.

5 Q And at first he discussed surgery with you; is that right?

6 A He did.

7 Q And then -- sorry, I may have been short, say that again, sir?

8 A We did discuss some options, yes, sir.

9 Q And then eventually with Dr. Perry, he told you he was  
10 against surgery, he was not recommending surgery, that was his  
11 ultimate statement to you at the end of your treatment with him, right?

12 A No, he never told me that he was against surgery, but he did  
13 say that -- he said that surgery is an option, and I asked if there is any  
14 other options that I could -- I didn't want to jump into a surgery.

15 Q At the end, Dr. Perry didn't perform any surgery on you,  
16 correct?

17 A No, he did not.

18 Q And he was an orthopedic surgeon, he was capable of doing  
19 surgeries if you had elected to do that, right?

20 A I don't know of his capabilities, and you know, but there  
21 again, workers' comp. sent me there, so.

22 Q And eventually you went to Dr. Schifini who performed some  
23 injections on your cervical spine, correct?

24 A I believe Dr. Perry referred me there. Those were the options  
25 besides the surgery that he --

1 Q And this was -- sorry. This was round one of Dr. Schifini.  
2 You saw him several months after the accident, he gave you some  
3 injections, right?

4 A Yes.

5 Q And those really didn't do anything to help you feel less pain  
6 over the long haul, right?

7 A Over the long haul, correct. A short time.

8 Q And then there was a --

9 MR. PRICE: He wasn't done with his answer.

10 MR. KAHN: Sorry, what was that?

11 THE COURT: Again?

12 MR. PRICE: He wasn't done with his answer.

13 MR. KAHN: Okay. I apologize.

14 THE WITNESS: No problem. Short-term it was a better  
15 relief, but the long-term, you are right, it was no.

16 BY MR. KAHN:

17 Q You're talking several days, right?

18 A Correct.

19 Q So you get the injection, you might feel a little bit of benefit  
20 for a couple of days, and then the pain would come back with the same  
21 level?

22 A A few hours I would say, and then --

23 Q And then -- sorry.

24 A Then --

25 Q I'll try not to cut you off.

1 A No problem.

2 Q And then several months later you ended up seeing Dr.  
3 Fisher who's also a pain management doctor, correct?

4 A I did see Dr. Fisher, but I don't know the time of, I don't  
5 remember the time.

6 Q Okay. Well, you were here when Mr. -- when Dr. Tung was  
7 examined, right?

8 A Yes.

9 Q And you saw that we put up some records that showed that  
10 you were seeing Dr. Fisher roughly three months or so after you saw Dr.  
11 Schifini the first time, right?

12 MR. PRICE: No, objection. Lacks foundation.

13 MR. KAHN: Okay. I'll put them up.

14 MR. PRICE: Inaccurate.

15 MR. KAHN: Why don't you put up Exhibit 96, hopefully?

16 Thank you. Will you highlight the date, please? And this is March 11,  
17 2015.

18 THE WITNESS: Yes.

19 MR. KAHN: And it might not be the right one. Can you take  
20 that off, please?

21 BY MR. KAHN:

22 Q Let me ask the general question rather than doing the temp  
23 thing.

24 A Yes, sir.

25 Q You saw Dr. Schifini, he gave you some injections, right?

1 A Correct.

2 Q At some point after that, you saw Dr. Fisher, he also gave  
3 you injections, right?

4 A Yes, sir.

5 Q And did you tell Dr. Fisher that you had gotten injections  
6 previously from Dr. Schifini?

7 A I don't remember that, but he had all my records.

8 Q Do you know what Dr. Fisher was attempting to do with his  
9 injections? Was he trying to do the same thing Dr. Schifini was doing or  
10 was he doing something different?

11 A I think it was different, if I recall correctly. I think he had  
12 some -- he suggested some branch blocks what he called it, and if I  
13 remember correctly, and there again, I don't remember exactly, but.

14 Q And then at some point after Dr. Schifini gave you some  
15 injections, he basically decided he wouldn't do more injections for you,  
16 he didn't think they were of any benefit, right?

17 A I don't remember that.

18 Q Well, you stopped getting injections from Dr. Fisher four  
19 years ago, right?

20 A You just said Dr. Schifini; which one are we talking about?

21 A I'll clarify. So Dr. Schifini, you saw him shortly after the  
22 accident, and then he gave you some injections, then you didn't see him  
23 for four or five years or whatever it is until this past summer, right? A  
24 few months ago?

25 MR. PRICE: Objection to foundation as to time, Your Honor.



1 Salvaging the time period for Dr. Schifini.

2 MR. KAHN: All right. So I'm asking him a question.

3 THE COURT: Overruled. Go ahead.

4 THE WITNESS: Yes, at some point I stopped going to Dr.  
5 Schifini.

6 BY MR. KAHN:

7 Q And then you started seeing him again a few months ago  
8 this summer, right?

9 A Per worker's comp, they asked me to go back.

10 Q Okay. But there was a gap in seeing Dr. Schifini for roughly  
11 five years, right?

12 A No, that's not correct.

13 Q You think it was more than that?

14 A I haven't been -- no, it was a lot less than that.

15 Q Okay. When do you think -- what do you think the gap was?

16 A Probably four years.

17 Q Okay. Fair enough. Look, no one's expecting you to  
18 remember what every day was.

19 A Thank you.

20 Q And at some point Dr. Fisher decided not to do more  
21 injections for you, correct?

22 A It didn't work.

23 Q And then after that, that was in roughly 2015? We just put up  
24 this record that was March of 2015 and you were seeing Dr. Fisher, so  
25 was it roughly early to mid-2015 when you stopped getting injections

1 from Dr. Fisher?

2 A Yes.

3 Q And then do you recall getting other injections up to today,  
4 like when did the injections start again? Did they start this last summer  
5 in June or did you get injections for -- of any kind before that?

6 A There was Dr. Su, also, but a pain management doctor that I  
7 go to. He also recommended some branch blocks.

8 Q Okay.

9 A He's trying to avoid surgery, that's -- I was looking for any  
10 avenue to avoid surgery.

11 Q And was Dr. Su a workers' comp. referral also or no?

12 A I believe so. I don't remember. Now, like I said, I'm jumping  
13 around a little bit to get as much done today as we can.

14 A Yes.

15 Q But I think this is going to continue in the morning. Let's talk  
16 about the spinal cord stimulator for a few minutes because I think we  
17 could talk about that in the time remaining today.

18 A Sure.

19 Q Your doctors discussed with you getting a spinal cord  
20 stimulator something like a year and a-half ago, spring of 2018, right?

21 A I don't remember as to time, but I think it was later than that.

22 Q Okay. You think it was more than a year ago?

23 A I don't think so with that.

24 Q You think the spinal cord stimulator issue has come up more  
25 recently than then?

1 A More recently, yes.

2 Q And your doctors are telling you that they think it's okay for  
3 you to get a spinal cord stimulator, correct?

4 A Few doctors were.

5 Q Just generally, I'm not singling them out right now.

6 A Yeah.

7 Q None of your doctors are saying don't do it, right?

8 A Correct. Everyone's saying do it.

9 Q And they're all telling you that they think it can be  
10 accomplished without the use of a trial implantation, right?

11 A Correct.

12 Q Okay. What --

13 A Not doable.

14 Q What does that mean to you that they're not going to do a  
15 trial for the spinal cord stimulator?

16 A Well, they said because there is so little areas available for  
17 them to do a trial, it's going to have to be a permanent one.

18 Q And what did they tell you though about how common it is  
19 to implant the spinal cord stimulator with no trial, if anything?

20 A It's not very common.

21 Q And what did they tell you are the problems that could  
22 occur?

23 A If I got a trial?

24 Q No, if you got it placed without any kind of trial.

25 A They can -- they can take it out.

1 Q But it's more difficult than taking out a trial implantation,  
2 correct?

3 A Correct.

4 Q It's a more major surgery because they'd be putting a battery  
5 pack in where they wouldn't do that with a trial, right?

6 A I think the way I was explained is a battery pack will go on --  
7 on somewhere on my side so it has nothing to do with the leads that go  
8 into the -- the cord area, spinal cord area.

9 Q Now you had before this accident, you had high blood  
10 pressure, correct?

11 A I was on the border, yes.

12 Q And you had some type of diabetes; is that correct?

13 A On the border, as well.

14 Q And the diabetes at some point, I think you said in your  
15 deposition, you were treating it with food; is that correct?

16 A Well, exercise and --

17 Q Diet?

18 A -- diet, correct.

19 Q Okay. But at some point you were prescribed medication for  
20 your diabetes; is that right?

21 A I don't remember that.

22 Q Okay. As far as your high blood pressure, you were off work  
23 for a period because of high blood pressure, right?

24 A No, I was never off work.

25 Q You were never taken off work because of high blood

1 pressure?

2 A No, I don't remember that.

3 Q And there's a part of your body that was injured that we're  
4 not really talking about in this case.

5 MR. PRICE: Objection, relevance.

6 MR. KAHN: Sorry?

7 MR. PRICE: Relevance. Well, Judge, can we approach?

8 THE COURT: Yeah.

9 [Sidebar begins at 4:47 p.m.]

10 MR. PRICE: Are you kidding? Why did -- why would you do  
11 that? Why all the sudden we're talking about another part of your body  
12 that you -- that we really haven't talked about in this case? So why are  
13 you going there?

14 MR. KAHN: Because he missed at least six weeks of work  
15 when he --

16 THE COURT: Blood pressure.

17 MR. PRICE: But we're not making any lost wage claim before  
18 September 2016. There is none we're making. It's only from September  
19 2016 to the trial date, that's the past, and the other, we are not asking  
20 this jury to -- and include lost wages for any time period missed.

21 MR. KAHN: Okay.

22 MR. PRICE: So --

23 MR. KAHN: And given that representation I'll skip it.

24 MR. PRICE: No, no, you know what? Your Honor, you've got  
25 to admonish him. What is he doing? He withdrew that. He accepted

1 that stipulation. We -- now he's trying to purposely infuse it.

2 THE COURT: What he --

3 MR. KAHN: I'm not - number one --

4 THE COURT: -- can ask him for --

5 MR. KAHN: Number one, his social security, there's already  
6 been testimony that Social Security rendered him disabled for that body  
7 part and another body part that wasn't related to this.

8 MR. PRICE: No, the back is.

9 MR. KAHN: For the back.

10 MR. PRICE: The back is related, it's the upper back, it's --  
11 never was the lower back and you know that.

12 THE COURT: Okay. Well, is that where you were going?

13 MR. KAHN: No.

14 THE COURT: I thought you asked about --

15 MR. KAHN: I'm talking about --

16 THE COURT: -- his blood pressure, I'm not -- where is it  
17 you're going?

18 MR. KAHN: Well, I --

19 MR. PRICE: He was going to go to the knee and doesn't want  
20 to try [indiscernible].

21 MR. KAHN: I want to establish that he had another injury  
22 that was involved in the social security ring.

23 MR. PRICE: No.

24 MR. KAHN: For a disability.

25 MR. PRICE: No.

1 MR. KAHN: But there's been testimony.

2 MR. PRICE: We need to have a hearing outside of the jury to  
3 time. His disability's based on his neck and his upper back and arm.

4 MR. KAHN: That's not what Bennett's --

5 MR. PRICE: But you don't have any --

6 THE COURT: So what's --

7 MR. PRICE: -- you don't have social security records. You  
8 don't even have those admitted into evidence. Those aren't -- you don't  
9 even have those as exhibits.

10 THE COURT: All right. We're going to talk -- we're almost at  
11 five so we're going to do this outside their presence.

12 MR. KAHN: Okay.

13 [Sidebar ends at 4:49 p.m.]

14 THE COURT: All right. Ladies and gentlemen, we're going to  
15 take our evening recess. During this recess you're once again  
16 admonished. Do not talk or converse amongst yourselves or with  
17 anyone else on any subject connected with this trial, or read, watch, or  
18 listen any report of or commentary on the trial, or any person connected  
19 with this trial by any meeting of information, including without limitation  
20 newspapers, television, radio, or internet. Do not form or express any  
21 opinion on any subject connected with the trial until the case is finally  
22 submitted to you. Tomorrow, 1 p.m. 1 p.m. Thank you.

23 THE MARSHAL: Please leave your notebooks and pens. Rise  
24 for the jury. Make sure you've got all of your personal items.

25 [Jury out at 4:50 p.m.]

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[Outside the presence of the jury]

THE COURT: All right. We're on the record now outside of the presence. You can step down.

THE WITNESS: Yes, sir.

THE COURT: We're done for the day.

MR. PRICE: So the objection was Mr. Kahn tried to elicit, for the record, a question, well, you actually injured another body part in this case that really is not part of the case, but I wanted to ask you about. We withdrew any aspect of the knee claim. The knee claim was accepted by work comp. and he was permanently rated for it, so even though with -- notwithstanding that, we withdrew that claim. They've accepted that.

We removed all the treatment records and billing associated with all -- anything directed at the knee, we've cautioned our witnesses, they tried to, like, back door it in through the vocational expert, but now Mr. -- so now we've not made any past loss of earnings or wages claimed for June 13th through September 2016.

Our past loss wage claim starts September 2016. So now trying to elicit and infuse now or allege his -- another body part inured we're not talking about in this case, that was a clear and purposeful attempt by Mr. Kahn to bring up an irrelevant topic.

He doesn't even have identified as an exhibit social security disability records. They're not even part of the case. And so -- what's that? Right. We looked at all of their pretrial disclosures, they've never even identified Social Security Administration records in the case so far, we're looking at everything right now, and with respect to that.



1 THE COURT: All right. Mr. Kahn?

2 MR. PRICE: So, anyway, there's no point to bring it up, the  
3 social security , and to try to say his unrelated back issue, he had no  
4 lower back issue, he had a cervical and upper thoracic issue. That's what  
5 he was rated for with Dr. Oliveri in 2015, so therefore, the knee's really a  
6 nonissue for the purpose of this case.

7 THE COURT: What is it you're trying to solicit and why?

8 MR. KAHN: They had doctors, including Dr. Oliveri, give the  
9 impression that this gentleman's disabled just because of his neck and  
10 that's not the case.

11 THE COURT: Well, I think the testimony was as far as social  
12 security, there was various reasons but I'm not even sure why and I  
13 believe that was the Plaintiff that solicited that he was given a total  
14 disability, but you agree that the knee is out, correct?

15 MR. KAHN: Yes. I agree the knee is out. There's no claims  
16 being made.

17 THE COURT: So what is it you're trying to -- what  
18 information are you asking and why is it relevant?

19 MR. KAHN: Well, I want to make it clear, first of all, that we  
20 cautioned our witnesses, as well, and Mr. Bennett, after hours and hours  
21 of cross, did not say the word "knee".

22 THE COURT: Yeah, and I appreciate that.

23 MR. KAHN: He had talked about an unrelated body part so --

24 THE COURT: Okay.

25 MR. KAHN: -- we did the same, but I think it's fair for the jury

1 to know that this gentleman had another issue that took him out of work  
2 for six weeks and that did not result in -- or that was submitted to social  
3 security in addition to the neck problems, and that's the testimony --

4 THE COURT: When was it? What point in time?

5 MR. KAHN: The six weeks was 2014, I think?

6 MR. PRICE: Yeah. He'd stopped working in 2016. The  
7 reason is for the neck. They don't even have the Social Security  
8 Administration records. That's -- and they've never even identified those  
9 under Rule 16.1.

10 THE COURT: So you're -- I guess, you're talking -- don't  
11 forget, I don't know all the facts.

12 MR. KAHN: Right.

13 THE COURT: I'm like the jury. So sometime before or after  
14 the accident he took six weeks off?

15 MR. KAHN: After, for surgery for the knee.

16 THE COURT: Okay. And why are you trying to solicit that?

17 MR. KAHN: I would -- I'd like to --

18 THE COURT: They're not making a claim, and he's put on the  
19 record he's not making a claim for a wage loss until after that.

20 MR. PRICE: September 16, correct.

21 THE COURT: So tell me why.

22 MR. KAHN: There are two things that took him off of work  
23 after the accident that aren't related to the neck. One is following the  
24 knee surgery and I wasn't saying the word "knee", and the other one was  
25 for high blood pressure, which I'll have to go and dig up the record, but

1 those two things took him off of work separate from the neck and I think  
2 the jury's entitled to know, even if he wanted to work that he stopped  
3 working twice because of other body areas that aren't related to this  
4 claim.

5 MR. PRICE: Well, with regard to the knee, he did take some  
6 time off of work because he did have a knee surgery, we've made no  
7 claim for loss of income from that, but secondarily, with regard to the  
8 high blood pressure, there was a -- he didn't take anything off, he  
9 decided to -- never took any time off. He'd been on high blood pressure  
10 medication even before. That was a nonissue. They can't point to the  
11 date, specific dates or times that he was gone because of alleged high  
12 blood pressure.

13 MR. KAHN: I will have it tomorrow, but I can point to a date  
14 and time, I just didn't --

15 MR. PRICE: Well, we're talking about it right now.

16 THE COURT: All right. Well, I'll consider that, but this -- it's  
17 an unrelated -- to the accident, and they're not making a claim for it, so  
18 what -- I have to ask, what is the relevance?

19 MR. KAHN: The relevance is he said that he kept working  
20 continually, and the jury hasn't heard that he had to take time off work.  
21 Their impression is he never took time off.

22 THE COURT: Okay. He had a cold and he took two days off,  
23 how is that relevant? I'm using that as an example. So he broke his  
24 femur and took two weeks off, I don't -- tell me what the relevance is.

25 MR. KAHN: I have to look at --

1 THE COURT: And here, I'll give you a minute so you can  
2 read whatever he's writing.

3 MR. KAHN: Well, I can read it now, I mean, he's telling --

4 THE COURT: Okay.

5 MR. KAHN: He's telling you that he had to take a wage  
6 reduction, okay, and take a different job, and he's also telling you that he  
7 quit nine days later, which I'm not sure is accurate, so we have to go  
8 back and look at that tonight, but that he had to switch jobs and switch  
9 lots and reduce what he did in the work life because -- just because of  
10 the neck, and I don't think that's accurate and I think I'm allowed to at  
11 least talk about it as another body part without --

12 THE COURT: Well, if you're --

13 MR. PRICE: If you think about that, it's like the white  
14 elephant in the room.

15 THE COURT: Enough. When -- if you're saying that  
16 somehow you're using it to impeach him, that he didn't take that time off  
17 for -- because he couldn't work because of the accident, that's one thing,  
18 if that's when the days are, but if you don't even know it, I -- certainly,  
19 you shouldn't be going into it until you know that that's-- if it's for  
20 impeachment as to that, that's allowed. If it's totally a different time  
21 period, it's not relevant.

22 MR. KAHN: What I'd like to do is come in tomorrow, make  
23 an offer of proof, otherwise I won't go back into it.

24 THE COURT: Okay.

25 MR. KAHN: I just have to pull together some of the stuff

1 because I didn't expect some of the responses, so.

2 THE COURT: All right. I will see you tomorrow.

3 MR. KAHN: 1:00.

4 THE COURT: Yeah.

5 MR. KAHN: Thank you, Your Honor.

6 [Proceedings adjourned at 4:58 p.m.]

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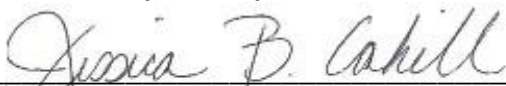
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
22 audio-visual recording of the proceeding in the above entitled case to the  
best of my ability.

23



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25