

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 02:06 p.m.
) Elizabeth A. Brown
v.) 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.)
_____)

**APPENDIX TO
APPELLANT’S OPENING BRIEF
VOLUME 9 of 12**

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 9 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 12th day of August, 2020.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC

1 Q -- did he discuss having to withdraw money from his 401(k)?

2 A We talked about emotionality, depression, and anxiety
3 earlier. One of the things that worried him the most and kept him up all
4 night is that he was drawing money regularly out of his 401(k) and he
5 was so afraid that the money he worked so hard to put away to protect
6 himself and his family, would dissipate because he was withdrawing
7 money. He eventually, unfortunately, drew all of it out in order to
8 support himself.

9 Q Okay.

10 MR. KAHN: Your Honor, may we approach real quickly?

11 THE COURT: Yes.

12 [Sidebar begins at 1:29 p.m.]

13 MR. KAHN: I'm going to want to see where that's in the
14 report that --

15 MR. PRINCE: Oh, I'm not [indiscernible]. You can work on
16 that while I'm moving on. You didn't even object to the question. He's
17 already answered.

18 [Sidebar ends at 1:29 p.m.]

19 BY MR. PRINCE:

20 Q And I want to, just so we're clear, show you a couple payroll
21 records right leading up to this collision, okay?

22 A Yes.

23 Q If we can look at part Exhibit of 155, I want you to do a --
24 1364.

25 MR. PRINCE: If we can just highlight the boxes.

1 BY MR. PRINCE:

2 Q It says, there's the de -- you know, he earned -- he had a
3 draw of \$5,000. And let me ask you about that. As a manager, he had
4 kind of a safety net of a draw, right?

5 A That was my understanding.

6 Q When he had the -- when he -- after this collision, when he
7 had to become a salesman, did he lose the benefit of having the safety
8 net of a draw?

9 A My understanding is he was not getting the draw.

10 Q Right. Now, looking here, under the payroll stub, you see
11 where it says 401K, \$1,300?

12 A I do.

13 Q That's a payroll -- that's a 401K contribution, right?

14 A It appears that way, yes.

15 Q Right. And let's look at 1365. Pay period ending April 15th,
16 2013. Do you see on the bottom right on the deductions, another
17 deduction for \$1,300 to the 401K?

18 A I do.

19 Q Okay. I'm just showing you this by way of example and I'm
20 also going to show you something else.

21 MR. PRINCE: Let's go just to 1427. No hang on. That's fine.
22 Not that one. Yeah, 1427 is fine. And just show the deductions on the
23 right hand side.

24 BY MR. PRINCE:

25 Q It's pay period ending February 27th, 2015. Do you see that?

1 A I do.

2 Q Making a 401K contribution of \$1,000, but he's got a 401K. It
3 says loan and he's trying to repay back the loan of \$30.26. Do you see
4 that?

5 A I do.

6 Q Does that indicate that he is now also repaying money that
7 he's taken from the 401K through his employment?

8 A It appears to be exactly so.

9 Q Is that consistent with what he reported to you, that he had
10 to borrow money from -- he exhausted his 401K?

11 A He had to exhaust it and he was very depressed over it.

12 MR. PRINCE: That's good, Greg.

13 BY MR. PRINCE:

14 Q Now, Mr. Kahn said that Mr. Yahyavi quit his job. Did he quit
15 his job?

16 A No.

17 Q All right. Was he -- because of this injury, he was forced into
18 a different position?

19 A He moved over the to the dealership.

20 Q Had this accident never happened, would there be -- are you
21 aware of any reason that he would have had to leave or change
22 positions from being a sales manager or growing even into a high
23 position within the company?

24 A There's no reason I know of.

25 Q All right. Now, Mr. Kahn asked you questions about Mr. --

1 why Mr. Yahyavi stopped working in 2016. From your review of the
2 records, did he have a progressive worsening and difficulty with coping
3 and managing these chronic levels of unrelenting pain his neck and his
4 arm?

5 A That's my understanding of his reason for leaving at that
6 time.

7 Q Is that consistent with the medical records that you
8 reviewed?

9 A Yes.

10 Q Is that -- do you think that was a reasonable decision for him,
11 given the length of -- the duration of the symptoms, how they were
12 affecting the quality of his life and having really no other available
13 medical options, short of a surgery?

14 A He was at his wit's end.

15 Q Have you seen workers in that position before?

16 A Absolutely, to where they couldn't even participate in their
17 school plan that we were trying to rehabilitate them for.

18 Q Mr. Kahn asked you questions about the spinal cord
19 stimulator. Have you participated in counseling of people who have
20 been injured who have been recommended for a spinal cord stimulator?

21 A Many.

22 Q Under what circumstance did you see those?

23 A They're the most severe cases. They're the people that are
24 having the most unrelenting pain and the most severe cases that I see.

25 Q Okay. In this case, Mr. Yahyavi came to you in May of 2018

1 concerned about his left arm, right?

2 A Absolutely.

3 Q He had -- do you recall in reviewing the records that he had a
4 neuropraxic or an injury to his C-5 nerve?

5 A That's correct.

6 Q And did that nerve issue affect his use and function of his left
7 arm?

8 A Absolutely it affected it. It affected in his use of the arm. It
9 affected it in the pain he felt from the arm. It affected his -- the integrity
10 of the arm, the musculature and so on.

11 Q That's a form of partial paralysis, isn't it?

12 A I guess it could be referred --

13 MR. KAHN: Your Honor, I'm going to object to that as a
14 medical opinion.

15 THE COURT: Sustained.

16 MR. PRINCE: Okay.

17 BY MR. PRINCE:

18 Q If you lose function of an arm and sensation in your arm, can
19 that affect its usage?

20 A Absolutely.

21 Q Do workers in your -- was Mr. Yahyavi, was he guarding his
22 arm and like I don't want to use my left arm as much, because of the
23 pain and the numbness and the other symptoms he had into the left
24 arm?

25 A Absolutely. He was rubbing it constantly. He was shifting

1 his position. He was trying to find a position for it that was more
2 comfortable, hence less painful. It was very obvious.

3 Q Right. Did you hear Dr. Oliveri yesterday talk about not only
4 the -- you know the atrophy, the limited function, but also the significant
5 loss in grip strength? Were you here for that testimony yesterday?

6 A Yes, I was.

7 Q Now, assuming that Mr. Yahyavi went back to work in some
8 capacity and when he doesn't use his left arm, what does that do
9 occupationally to his right arm? That put his right arm and hand at risk
10 of injury?

11 A Well, it's called compensatory issues. So when somebody is
12 unable to use a lower extremity, left lower extremity and left knee, all the
13 pressure is put on the alternative side. that would be the same with an
14 upper extremity. And compensatory problems can develop to where it
15 creates wear and tear on the other limb.

16 Q And overuse-related issues, right?

17 A Correct.

18 Q Now, obviously, if you hurt his good arm, because we're now
19 overusing it vocationally in some manner, that obviously would have a
20 devastating effect on him, because now he has -- both limbs would not
21 be functioning in the way they should, right?

22 A That would be more devastating to him.

23 Q Is that one of the things you're thinking about when you're
24 putting an injured worker back is like are they at risk of a new injury or
25 reinjuring an existing condition?

1 A Quite often, they're complaining that the alternative limb is
2 beginning to bother them, so the answer is yes.

3 Q So you protect against that as well.

4 A I take that into account.

5 Q Okay. After 2016, in your opinion -- excuse me. After
6 September of 2016, did Mr. Yahyavi any longer have any earning
7 capacity based on his medical condition, as you understand it?

8 A After he left, he did not.

9 Q Right.

10 A He also had a reduction of earnings leading up to that time.

11 Q Right. So not only did he have reduced earnings leading up
12 to September 2016, he could no longer -- he lost his earning capacity
13 completely as of September 2016. Is that fair to say?

14 A Yes.

15 Q is that your opinion to a reasonable degree of vocational
16 rehabilitation probability?

17 A It is.

18 Q Now, one of the scenarios that you initially -- you and Dr.
19 Oliveri came up with was one, that maybe Mr. Yahyavi, after he heals
20 from his surgery in 2018, maybe he goes back to some type of part time
21 employment --

22 A Correct.

23 Q -- and earns some money for himself?

24 A Correct.

25 Q Did that scenario ever come to fruition? Meaning, was he

1 ever able to go do that?

2 A It did not.

3 Q Okay. So he really has been at a complete loss of earning
4 capacity since September 2016?

5 A That is correct.

6 Q Mr. Spector, is there any evidence of any vocational
7 limitation or disability before June 2013? Before this collision occurred?

8 A None.

9 Q The Defense expert in this case, their expert, your
10 counterpart, his name is Mr. Bennett.

11 A Correct.

12 Q Okay. He's supposedly coming on Monday.

13 A Yes.

14 Q In Mr. Bennett's opinion, isn't it true that he is of the belief
15 that Mr. Yahyavi can go back to being a car salesman and his normal and
16 usual and customary duties?

17 A Unfortunately, yes.

18 Q Is that even realistic, given his condition and his status?

19 A Well, given the medical evidence in this case, absolutely not.

20 Q Right. The rating physician, Dr. Oliveri, it's his opinion that
21 he's vocation disabled, right?

22 A Correct.

23 Q Dr. Schifini, the treating pain management physician, both in
24 2013 and '14 and now in 2019, he's of the same conclusion, as you
25 understand it?

1 A Correct.

2 Q You're of that same conclusion?

3 A I am.

4 Q Right. If you thought there was any meaningful way for him
5 to return back to any type of employment, would you be recommending
6 that?

7 A If there was any way, I'd love to be able to recommend it.
8 This is a gentleman who valued work. He -- it was a very important part
9 of his life and he derived a great deal of self-esteem from it.

10 MR. PRINCE: Thank you, Your Honor. I have no additional
11 questions.

12 MR. KAHN: Nothing further from the Defense, Your Honor.

13 THE COURT: Questions from the jury? Raise your hand.
14 Now questions. Thank you. You may step down.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Plaintiff, call your next witness.

17 MR. PRINCE: Your Honor, we call Dr. Terrence Clauretie.

18 [Pause]

19 THE MARSHAL: Watch your step, sir. Remain standing.
20 Face the Clerk of the Court.

21 TERRENCE CLAURETIE, PLAINTIFF'S WITNESS, SWORN

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

24 THE WITNESS: Terrence M. Clauretie. T-E-R-R-E-N-C-E C-L-
25 A-U-R-E-T-I-E.

1 THE CLERK: Thank you.

2 DIRECT EXAMINATION

3 BY MR. PRINCE:

4 Q And I know you as Dr. Clauretje, so if you'd please introduce
5 yourself to the jury and tell us about your education.

6 A I'm an economist. I got my BA in economics from Stone Hill
7 College, which is a small college in New England. I got my Master's
8 Degree and my PhD in economics, both of those degrees from
9 Washington State University. For a while in the early 1980s, I was a CPA,
10 but I didn't like doing that, so I --

11 Q Who does?

12 A Yeah. I know. I don't do that anymore. I've taught at
13 colleges and universities since 1971. I've published numerous articles
14 that professors are expected to publish.

15 Q Okay. And --

16 A And that's my background.

17 Q And I know you, because when I was 20 years-old, I met you
18 when you became a professor a professor at University of Nevada Las
19 Vegas, UNLV.

20 A You're dating both of us.

21 Q I am. I've got gray now and I was very young then. The days
22 of yesterday, so when I see you, really as an old friend. A tough
23 professor, but what did you teach at UNLV?

24 A By the time I got to UNLV, I transitioned into a subset of
25 economics, called finance. So I was interested in real estate finance and

1 I published a textbook on that, so I taught real estate finance. I also
2 taught corporate finance.

3 Q And how many years were you a professor at UNLV?

4 A From '88 to 2011.

5 Q All right.

6 A So about --

7 Q And it says --

8 A -- 20 years or so.

9 Q It says you were an emeritus professor of economics. What
10 does it mean to be an emeritus at a university?

11 A It means that you've retired from teaching. You can still --
12 you have an office at the university. You still do research and so forth.
13 You're just retired from teaching. And the title, emeritus, is awarded to
14 people that have a long history of academic research and publishing.

15 Q And the University of Nevada recognized you with that title?

16 A Yes.

17 Q That's one to the prestigious titles you could have, if you've
18 dedicated yourself to the world of academics, being deemed to be a
19 professor emeritus?

20 A You have to be voted on by your faculty peers and then
21 eventually approved by the president of the university --

22 Q Very few --

23 A -- and the board of regents, too.

24 Q Well, congratulations for you, Dr. Clauretje. As part of your
25 work in the field of economics and finance, do you make yourself

1 available to parties in litigation like this to help them calculate economic
2 losses?

3 A Correct.

4 Q And how long have you been doing that?

5 A Actually, since 1983, when I was teaching at LSU in
6 Shreveport, Louisiana.

7 Q All right. Have you testified in the field of economics in
8 calculating economic loss in Clark County Nevada before?

9 A I have.

10 Q And here we're going to be talking about cost of future
11 medical care?

12 A Yes.

13 Q And loss of earning capacity for Mr. Bahram Yahyavi?

14 A From an economic standpoint --

15 Q Right.-

16 A -- yes.

17 Q So tell us -- we just hear from Doctor -- excuse me, Mr.
18 Spector, who did the vocational rehabilitation analysis. Explain what
19 your role is when we're calculating, you know, loss of earning capacity.
20 What is it that you do and how you relate it to what his services are.

21 A Sure. When there's a vocational expert involved, their role is
22 to estimate what's called a preinjury earning capacity. A better
23 terminology, in my estimation is to say an earning capacity without the
24 injury.

25 Q Okay.

1 A And then to also opine, using government data on what the
2 work-life expectancy of that person would be, if they were not injured.
3 Work-life expectancy is like a life expectancy, except that it applies to
4 working and it comes from government data. The next thing that a
5 vocational expert will typically do is to opine on any post injury earning
6 capacity. That would be the earning capacity of somebody in the injured
7 state. And that can range anywhere from very little change in the
8 earning capacity to having no post injury earning capacity at all. But
9 that's what they do.

10 I don't have anything to do with how they come up with those
11 numbers, but once I get the information, then I apply an economic
12 analysis to it. And the economic analysis has two steps to it. The first
13 step is to estimate what the future growth rate in compensation for
14 individuals in the United States economy would reasonably have on a
15 year to year basis. We know that workers on average make more today
16 than they did 20 years ago and 30 years ago, obviously. So we have to
17 get -- I get government data that projects what those increases would be.

18 So if we have an earning capacity without a disability, preinjury
19 earning capacity of an individual, I estimate how those -- that earning
20 capacity would grow through time up through the end of the person's
21 work-life expectancy. So I have to grow. That's step number one. And I
22 look at government data. The government actually has forecasts on
23 growth rates. It makes it easy.

24 The second thing is we have to recognize that future losses from
25 an economic standpoint of view, if we're going to calculate a loss of

1 earning capacity or any other loss, we have to recognize those losses
2 occur in the future. We have to recognize that people have the
3 opportunity to invest money today. So it turns out that if you recognize
4 how much interest people can get on their money, it turns out that the
5 amount needed today to compensate for future losses is actually less
6 than the future losses, because you can take the money and put it in a
7 pot, earns interest and replace those future losses.

8 So that's what economists typically do. We grow and discount.
9 And the data that we use for -- that I use for estimating the future growth
10 rate and earnings and earning capacity comes from government
11 forecasts. The discount rate that I use or the interest rate that you could
12 make to discount future loss as to present value, that also comes from
13 the federal government. Every day, I can get on the internet from the
14 United States Treasury and say what's the interest rate on the United
15 States Treasury obligations and I can do that, like I say, on a daily basis.
16 And those num -- I don't make those numbers up. They are what they
17 are.

18 Q Right.

19 A And I just apply those to the future costs, reduce it to what
20 we call present value. Recognizing the fact that there are future losses
21 that can be replaced by a smaller amount today, because people can
22 invest their money. And we choose safe investments. We don't want to
23 put a person that needs to replace their future earnings or pay for their
24 medical expenses, we don't want to place them in securities that would
25 be -- would place them at risk of not having the funds available.

1 Q So your analysis is really to determine what the present
2 value is of like someone -- someone's lost a million dollars going into the
3 future, what is the present value of that, realizing you have to grow it
4 forward and then discount it back?

5 A Correct.

6 Q All right. Actually, you taught me -- interestingly enough,
7 you taught me that at UNLV in one of your classes, ironically enough at
8 this stage of our life. But I'm going to -- talk about that for a minute.
9 Let's stay with the earning capacity claim, okay?

10 A Okay.

11 Q Before we move on to the medical costs. Now, talking about
12 Mr. Yahyavi specifically, we're going to be talking about a loss, that you
13 grow it forward and then you discount it backward to what we call now,
14 present value. Is that fair to say?

15 A Yes.

16 Q And what was your understanding of the date of injury in this
17 case?

18 A My understanding of the date of injury was June the 19th of
19 2013.

20 Q Okay. For your calculations, Dr. Clauretje, what is the last
21 day of the preinjury earning capacity that you used?

22 A September the 15th, 2016.

23 Q Is your understanding -- and you were in court just a few
24 moments ago when Mr. Spector was here. Do you recall that?

25 A Yes.

1 Q And that Mr. Yahyavi, he stopped working in September of
2 2016?

3 A That's my understanding.

4 Q And --

5 A That's the information that I got from Mr. Spector.

6 Q Okay. And so from your calculations, did you calculate the
7 loss of earning capacity from September of 2016 to now and then have
8 you projected that into the future?

9 A Yes. Two parts. The past loss, last day the person was able
10 to work through today, so to speak and then from today through the end
11 of the person's work-life expectancy.

12 Q Okay. And Mr. Spector initially identified there was two
13 possible scenarios to you initially, didn't he?

14 A Correct.

15 Q One, that he could go back -- Mr. Yahyavi could go back to
16 work on a part time basis after September of 2016.

17 A Correct.

18 Q And another one was that he'd be fully disabled after that,
19 right?

20 A Correct. And to be clear, he initially estimated that the first
21 day of that part time earning capacity -- see, he did his report in 2018, I
22 believe.

23 Q Yeah. Originally, he did.

24 A Right. So he estimated while January 1st, 2019 would be a
25 reasonable date, if it were all possible for him to back to working part

1 time.

2 Q Okay.

3 A So I took that into consideration when I did my report.

4 Q Initially, did you calculate some post -- I mean that he could
5 go back and earn -- a scenario where he could go back and earn some
6 money, at least part time?

7 A Correct.

8 Q Right.

9 A And I used the part time number. I used the same growth
10 rates, same work-life expectancy, some economic assumptions.

11 Q Right.

12 A As applied to the preinjury earning capacity.

13 Q And as you understand now from Mr. Spector and hearing
14 his testimony, was Mr. Yahyavi ever able to go back to any part time
15 earnings?

16 A Well, I can't say that personally as an economist --

17 Q No, you defer --

18 A -- but my understanding is that Mr. Spector has looked at all
19 of the information he needs to opine on that, that he has no postinjury
20 earning capacity.

21 Q Okay. Meaning that he never went back to work to earn any
22 money part time and never will. That's your understanding?

23 A That's correct.

24 Q Okay. That's your understanding?

25 A That's correct.

1 Q Okay. So what I want to do now is, using September 2016 as
2 our guide, what did you understand -- let's talk -- let's talk through your
3 calculations, okay? And --

4 A On that initial report?

5 Q No, we can -- now I don't want you to include any offset for
6 postinjury or anything else.

7 A Oh, okay.

8 Q Because you didn't have any, right? It's your understanding
9 from Mr. Spector, that there is no postinjury earning capacity after
10 September 2016?

11 A Correct. Okay.

12 Q Okay.

13 A Fine.

14 Q And what work life expectancy did you use? What age?

15 A Well, I updated this as of -- assuming a September 10th, 2019
16 date. We're off of that by about a week, but that's okay. The same work
17 life expectancy as Mr. Spector did in his original report.

18 Q Okay.

19 A Up through age 67.32 years of age.

20 Q Did you -- is the 67 years of age, is that what you got for Mr.
21 Spector?

22 A It is.

23 Q Okay. So that's the duration of years, so he'd work up to 67
24 years old according to Mr. Spector?

25 A Yes, approximately ten years after -- he -- right now he is

1 57.72 years of age, so another ten years.

2 Q Got it. And what earnings did you use to make this
3 calculation?

4 A Well, Mr. Spector indicated to me that his earnings, without
5 any fringe benefits, preinjury earning capacity, the last date that he
6 worked without any fringe benefits was 100- and -- let me see, I want to
7 get the right number, \$163,650.

8 Q Okay.

9 A On an annual basis.

10 Q Now, when you're doing this economic calculation, is there
11 any additional benefit that Mr. Yahyavi would be entitled to for
12 calculation of what his economic loss is?

13 A Fringe benefits, yes.

14 Q And what are fringe benefits?

15 A I'm sorry?

16 Q What are fringe benefits?

17 A Oh, fringe benefits are nonmonitored -- well, they are
18 monitored, but they're not -- they're nontaxable additional items that
19 people get from their employment such as the employer paying for their
20 health insurance premiums, the employer contributing to the social -- the
21 employer's contributions of social security retirement benefits, and any
22 amount that would be added to retirement plans --

23 Q Okay.

24 A -- that the employer would add.

25 Q So what number did you use for fringe benefits to add to the

1 \$163,000?

2 A This is really interesting because if you look at the
3 Department of Labor -- the United States Department of Labor as
4 percentages so to speak, and they'll say if you get the three main things,
5 which the legally mandated; that's the employer contribution of social
6 security. If you get that and if you get a retirement plan and if you get
7 health insurance, the average is about 23 percent of your income, but as
8 an economist, I know that they're looking at the averages for the average
9 worker who might be making 50-, 60-, \$70,000 a year. I can't take 23
10 percent of the \$163,000 figure. That would be overestimating it. So on
11 occasion like this, I've got to go back and look at each item.

12 So when I looked at the amount that he reasonably would
13 have gotten in health insurance from the family, about \$12,000 a year
14 according to statistics, the legally mandated was the employer
15 contribution to social security, which is about \$8,000. And I indicated
16 there too that -- see, this is why I have to do this, because right now, a
17 worker who has the employer pay part of social security, it's cut off at
18 about \$106,000. So I only -- I had to take about seven, seven-and-a-half
19 percent of the cap; do you see what I'm saying?

20 Q Right.

21 A Okay. So that makes it less too.

22 Q So what you're saying is up -- someone who earns up to
23 \$106,000, the employer's legally obligated to providing a matching
24 contribution for social security?

25 A Up to about 106-, 113,000, something like that.

1 Q And then after that, there's no more matching required,
2 correct?

3 A That's correct.

4 Q Right. So then you adjusted for that?

5 A To make a long story short, for this fella, the fringe benefits
6 were nowhere near 23 percent; it was 12 and a half percent.

7 Q Do you think that's a conservative estimate based upon your
8 experience as an economist testifying as an expert here in Clark County,
9 Nevada?

10 A I think it's -- yeah, I think it's as accurate as I can get. I mean,
11 it's below the 23 percent, which would be average for lower income
12 workers. It's -- that's reasonable.

13 Q Okay. Now, based upon adding the fringe benefit, did you
14 come up with calculations to determine, you know, what his past earning
15 capacity loss was and explain any growth rates and discounting you did?

16 A Yes. Adding in the fringe benefits to the \$163,000 figure, his
17 annual compensation on the last day that he worked would be \$184,178.
18 And to make a long story short, if we look at the past lost earning
19 capacity, and that would be from the date that he didn't work through
20 today, which is 35.81 months, 36 -- about three years. His loss would be
21 \$571,227. That's from the past.

22 Q Okay.

23 A That's not discounted because it's not in the future, so now
24 we look to the future and after applying a reasonable growth rate and a
25 discount rate back, that present value of future loss would be \$1,885,152,

1 and the total of those two figures would be \$2,456,379.

2 Q Okay. Let's talk about the past loss. That would be from
3 September of 2016 through September 2019?

4 A Correct.

5 Q And that would be, using his earning capacity number of
6 approximately \$160,000, adding the fringe benefit that you think is
7 statistically reliable from the governmental data, right?

8 A Yes.

9 Q So up to today, just from September 2016, the loss is
10 \$571,227?

11 A Correct.

12 Q Now, does that -- is that actually underestimate his actual
13 past loss in the sense that you didn't calculate how much income he lost
14 between 2013 and 2016 when he was seeking the medical treatment for
15 his injuries and the reduction of his income, right?

16 A I have calculated no loss from June 19, 2013 through
17 September 15, 2016.

18 Q So for that three-year period, we didn't even include a loss
19 figure, right?

20 A I didn't calculate any.

21 Q Right. But if he lost -- if his income was going down, you
22 didn't calculate that, right?

23 A I was given no information on that

24 Q Right.

25 A That's correct. There may be a loss, but I didn't -- I didn't

1 calculate it.

2 Q So if there is loss from during that three years, I mean, loss
3 of income from earning money as a salesman, this number would
4 actually be conservative, meaning underestimated?

5 A It would.

6 Q All right. What -- you estimated that the future loss of
7 earning capacity would be \$1,885,152, right?

8 A I'm sorry?

9 Q You estimated the future loss of earning capacity to be
10 \$1,885,152?

11 A Correct.

12 Q Okay. That's from today through the end of his work life
13 expectancy, 67 years old?

14 A 67.32, correct.

15 Q For a total of \$2,456,379?

16 A Correct.

17 Q Now, after you came up with that calculation -- I'm going to
18 call it \$2.4 million, did you use a growth rate to grow it into the future
19 and then discount it back to present value?

20 A Well, the present value of \$1,885,152 for the future involves
21 growing his earnings at about 3.5 percent per year according to
22 government data. And then I applied a discount rate of 3.7 percent; it's
23 slightly higher than the 3.5. And the 3.7 percent is about the highest
24 amount that you could get on a safe investment on government bonds.
25 In fact, at the time I did this calculation, it's higher than any amount you

1 could get, but I thought I would be really more conservative and estimate
2 a discount rate, a higher amount in case that changed over time.

3 Q Okay. So the \$2,456,379, is that the present value of both the
4 past and loss of future earning capacity?

5 A Yes.

6 Q Okay. That's the net, right?

7 A Yes.

8 Q That's the current present value?

9 A Yes.

10 Q After all the calculations are done?

11 A Yes.

12 Q Very good. Now, I want to talk about the future medical care
13 costs, okay?

14 A Okay.

15 Q I want to change gears now. Did you -- and did you perform
16 a present value calculation of Mr. Yahyavi's future medical care costs as
17 outlined by Dr. Oliveri in his lifecare plan?

18 A March 25th of this year I did that, sir.

19 Q Okay. And what is, based on your calculation, the present
20 value of the future medical care cost for Mr. Yahyavi based upon Dr.
21 Oliveri's lifecare plan?

22 A \$529,260.

23 Q Okay. How did you come up with \$529,260?

24 A Well, I took the items in the lifecare plan that were given to
25 me in terms of \$2,019 -- about 2,019, for pain management, physical

1 therapy, medicines, the stimulator and the generator replacement, took
2 all those costs for his life expectancy, which was through age 81. So
3 from age 58 at the end of this year through age 81, I took all those
4 numbers and before I did anything, I added them up, and I got a number
5 that was \$497,299. I added them up, and that's the number in Oliveri's
6 report. So now I know I'm not overestimating or underestimating. I got
7 it right. I got all the numbers he got. He's got a total of 497,299, I got a
8 total of 497,299.

9 Then what I do is I apply a growth rate in medical costs. I have a
10 growth rate in medical costs is about the same thing as labor costs. It's
11 actually the higher value is the same as labor -- medical costs -- excuse
12 me, I use the same as labor cost. I get these growth rates from another
13 government forecast on growth rates and medical cost.

14 Q Are there published growth rates for medical care costs in
15 the United States?

16 A Medical care. And they're all the same, about 3.5 percent a
17 year for each item, except prescription medicine's a little bit steeper,
18 according to the government forecast. In any event, I do that, and then I
19 discount back those future costs by government bonds that which
20 federal government bonds that mature each year, and that present value
21 turns out to be \$529,260.

22 Q Okay. Is the \$529,260 the -- meaning how much in today's
23 dollars is needed in order to purchase the medical care that's been
24 outlined by Dr. Oliveri in the form of doctor visits, physical therapy,
25 prescriptions, spinal cord stimulator placement, and maintenance?

1 A Yes, that's the amount of money if invested to meet those
2 costs.

3 Q Right. And in order to do this calculation, did you have to
4 rely upon Dr. Oliveri's lifecare planning?

5 A Of course.

6 Q Okay. Very good. So in summary, the past loss of earning
7 capacity and loss of future earning capacity is \$2,456,379?

8 A Yes.

9 Q And that regarding the present value of the future medical
10 care costs, based upon your calculations, is \$529,260?

11 A Yes, at -- at the time I did the report.

12 Q Right. Would that be different today?

13 A It would. It would be a little bit higher.

14 Q Right.

15 A Because interest rates have come down.

16 Q So once interest rates come down, it actually makes the costs
17 go up, right?

18 A Yeah, because you have less money to -- you have less
19 interest on your money, so to meet those future costs, you need a little
20 bit more money. But I didn't recalculate that as of today.

21 Q Right. I mean, you did do a recalculation of the earning
22 capacity since he never went back to work starting in January of 2019?

23 A That was a big change, yes.

24 Q Right. In terms of a change, I mean, all it did was you just
25 took that out of it and put it all in the form of a future loss of earning

1 capacity number, right?

2 A Right.

3 Q It didn't really change your methodology or the information
4 or anything like that?

5 A Didn't change my economic methodology at all.

6 Q The idea of him going back to work in January of 2019 when
7 you did your report, that was an assumption that you made based on
8 information given to you by Mr. Spector?

9 A Correct.

10 Q That did not materialize or happen?

11 A Correct.

12 Q Therefore, is that why you needed to update your report?

13 A Yes.

14 Q Otherwise, is your calculations and your numbers identical
15 for those issues?

16 A I'm not following.

17 Q No, I mean, your calculations -- I mean, you use the same --

18 A The methodology.

19 Q -- the same methodology, growth rates, et cetera that you
20 would update your --

21 A Same growth rate, same discount rate, same work life
22 expectancy.

23 Q You just removed the one assumption that he'd return back
24 to work?

25 A One time, yes.

1 Q Okay. Very good. All right. Have all your opinions that you
2 stated here been to reasonable degree of economic probability, have you
3 used an accepted and generally relied upon methodology in forming
4 these opinions?

5 A Yes.

6 MR. PRINCE: Thank you, Dr. Clauretje. I have no further
7 questions.

8 THE COURT: Cross-exam.

9 MR. KAHN: Yes, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. KAHN:

12 Q Good afternoon, Dr. Clauretje.

13 A Good afternoon.

14 Q Just to be clear, you're not a medical doctor, you're a PhD
15 doctor, correct?

16 A Yes, sir.

17 Q And other than the deposition in this case, you haven't
18 worked for me; you and I aren't really acquainted aside from that and
19 just saying hello today, correct?

20 A Correct.

21 Q Your job, essentially, is to put some numbers on the
22 Plaintiff's claim for damages, right?

23 A From an economic standpoint, yes.

24 Q From -- limited to an economic standpoint, correct?

25 A Yes.

1 Q So you take the information that Ira Spector, the vocational
2 expert, gives to you and reduce that to a number that you think is proper
3 and appropriate for a legal trial or case or claim like this, correct?

4 A Given that information.

5 Q And --

6 A And the same with Dr. Oliveri as well, exactly.

7 Q Sorry, I didn't mean to interrupt. And the --

8 A That's okay.

9 Q And the same as to -- I mean, medical information, you're
10 talking about Dr. Oliveri's lifecare plan, you're taking information that Dr.
11 Oliveri may provide, dollars and cents of future medical care that the
12 Plaintiff is requesting and proposed and you're putting that down to an
13 amount that essentially is appropriate and proper for a legal case like
14 this, right?

15 A Yes.

16 Q And in short terms, what your role is is to take, once a
17 requested amount, for years, and years, and years of the Plaintiff's
18 balance of his life, or balance of his work life, and say if that were
19 hypothetically \$100, that if you were to give somebody X dollars today,
20 whatever that number would be, and you invested it like you said, it
21 should become the equivalent of \$100 over the balance of the person's
22 life and work life? Did I -- am I saying that appropriate?

23 A Yeah, like it became \$90 today.

24 Q Okay.

25 A They can invest it and get \$100.

1 Q And generally it's a lower number, right? Generally if -- let's
2 say if somebody is saying they need a million dollars in future medical
3 care, the number that you're going to put for present value is lower
4 because they would invest that and get interest and that's essentially
5 what you're helping us with?

6 A Except that it's not generally, it is always low, assuming the
7 interest rates are greater than zero.

8 Q Right. So you're not making determinations about medical
9 care in any fashion, correct?

10 A Correct.

11 Q You're not making determinations about vocational care,
12 treatment, or any opinions about vocational in any fashion, other than
13 the economic aspect, correct?

14 A Correct.

15 Q And you're not rendering opinions about the Plaintiffs, the
16 validity of the Plaintiff's claim, whether he should win the case on the
17 liability or whether the damages are accurate, you're taking the damages
18 presented to you by the Plaintiff and the Plaintiff's experts and doing an
19 economic computation assumption?

20 A Yes.

21 Q You said that -- and I think the words you used were that was
22 a big change. You made what you called a big change as far as taking
23 out the possibility that the Plaintiff could ever work again; is that correct?

24 A Yes.

25 Q And the trial in this case was, I believe, set to commence on

1 September 10th of this year, 2019, at the time you did that, correct?

2 A Correct.

3 Q And what your change was, was to essentially increase the
4 damages number of the Plaintiff by roughly \$270,000- plus; is that
5 correct?

6 A Oh, I mean, I can look at the numbers, but that -- that sounds
7 about right. There's two reasons it's bigger. One, is we eliminate the
8 ability for him to work part time. The second reason is marginally
9 bigger, not much, but marginally bigger because as of to date versus
10 when I did the report, there's more past losses, which we don't discount
11 the present value. And so -- and so that's another one.

12 Q So --

13 A But major reason was the elimination of the ability to work
14 part time.

15 Q So let's break that up. I understand you're saying you did a
16 report quite a while ago and with some numbers based on future, and at
17 that point in time, now you're changing to say -- you're updating that to
18 shortly before trial, giving a later point in time. I'm not asking you about
19 that half of it. I'm asking you about the other half. Are you able to -- do
20 you have your reports in front of you?

21 A Yes.

22 Q Are you able to look at that most recent report and tell the
23 jury how much the claim damages were increased by you in that report?

24 A Yes.

25 Q Can you please do that?

1 A Okay. As of the September 10th of this year, start of the trial,
2 as I testified, the present value is -- of his loss, the past, plus the present
3 value of the future, was \$2,456,379.

4 Q What --

5 A Okay. Did you write that down?

6 Q Yeah, but what I'm asking you is --

7 A Okay. No, wait a minute, I'm going to go back and I'm going
8 to give you how much it went up.

9 Q Okay.

10 A Isn't that what you asked?

11 Q I'm asking the increase in the most recent report, but, yes, go
12 ahead.

13 A I got to go back now.

14 Q And subtract it, yeah.

15 A Okay. You write that down, and then what you can do is you
16 can subtract off what my present value calculation was when I did this
17 report in May of 2018, which was \$2,114,781.

18 Q And if you give me a second, I'm going to have a magic
19 calculation. My magic calculation is that the difference between those
20 two numbers is \$271,678; does that sound correct?

21 A No. I'd go back and do it again if I were you. \$2,456,379 --

22 Q Like I said, I --

23 MR. PRINCE: Hang on, he's not done answering the
24 question.

25 MR. KAHN: But I wasn't asking him about the entire --

1 MR. PRINCE: Hang on. He won't let the witness finish.

2 MR. KAHN: What I'm asking --

3 MR. PRINCE: That's my objection.

4 THE COURT: Counsel, address to the Court.

5 All right. Go ahead and finish your answer. Were you
6 finished?

7 THE WITNESS: No.

8 THE COURT: Go ahead.

9 THE WITNESS: Today's number is \$2,456,379. My previous
10 report a year ago was \$2,114,781. My rough math says over \$300,000 --
11 about \$300,000 -- a little over \$300,000 difference. That was due to
12 eliminating the possibility working part time, plus we've now had a year
13 of past losses, which are not discounted.

14 BY MR. KAHN:

15 Q Putting aside the year of the past losses, which I'm not taking
16 issue with --

17 A Okay.

18 Q -- what did you say was the first half, eliminating the
19 possibility of returning to work, right?

20 A Correct. And I can give you that number.

21 Q And what is that -- yeah, what is that number in isolation?

22 A \$271,678.

23 Q Which is the number I threw at you 30 seconds ago, right?

24 A Right.

25 Q Okay. So --

1 A But then --

2 Q That number constant to --

3 MR. PRINCE: Hang on, objection, Your Honor. He's not
4 letting the witness finish his answer.

5 THE WITNESS: That's exactly right. We added that in, plus
6 now maybe 40-, \$50,000.

7 BY MR. KAHN:

8 Q And I'm not asking you about the year that's passed and the
9 change.

10 A Okay.

11 Q I'm asking you simply about the number.

12 A Yes.

13 Q So I want to the jury to understand what that is. What that is
14 you building into the numbers being requested in this case as damages,
15 an amount that says this is the amount that is the difference between the
16 Plaintiff working even a little bit and the Plaintiff never working again,
17 correct?

18 A Yes.

19 Q Okay. And when did Dr. Oliveri make that determination that
20 the Plaintiff could never work again?

21 A I don't know.

22 Q Well, where did you get the information from?

23 A From Mr. Spector.

24 Q When did he make that determination?

25 A I don't know when he made it.

1 Q Do you have his report?

2 A I can only tell you that I was requested several weeks ago, I
3 guess, at this time, to prepare an updated report based on the
4 assumption that he could not work part time according to Mr. Spector,
5 and I called Mr. Spector and I said is this your opinion and he said, yes.

6 Q And so you don't know whether Dr. Oliveri made this
7 determination, the Plaintiff could never work again, the same day that
8 you spoke with Mr. Spector or a year and a half ago, correct?

9 A It -- I only get it from Mr. Spector. I can't tell you what he
10 relied upon. He may have relied upon Dr. Oliveri. I don't know.

11 Q Well, your report -- supplementary report that added in the
12 270- plus thousand dollars, can you tell the jury the timing of that report?
13 What is your report date?

14 A Of the second report?

15 Q The one that added in the \$271,678?

16 A September 5th.

17 Q Okay. So that's less than a week before this trial was
18 starting, right?

19 A About -- yeah, about that, yeah.

20 Q Can you go through with your records and your file and tell
21 the jury what each year of the Plaintiff's income was that we know of,
22 year by year?

23 A Before the injury?

24 Q Every year you know of before, during, after, whatever years
25 you have and from Mr. Spector's information or your information --

1 A Right.

2 Q -- and go through year by year in 2000 and X, he made this
3 much money.

4 A Okay. I do not have that in my file at all.

5 Q You have no annual income information?

6 A I have none. Mr. Spector would have all that to use for his
7 calculations, the preinjury and the capacity.

8 Q And what do you think is inappropriate methodology as an
9 economist to determine the Plaintiff's average annual income in this
10 case?

11 A It's different case-by-case. Absolutely different case-by-case.

12 Q Well, you're using a number that Mr. Spector gave you,
13 right?

14 A Correct.

15 Q So what is that number that you're using?

16 A \$163,000 and change.

17 Q And how is that number calculated?

18 A I don't know how he calculated that number.

19 Q As far as you know, Mr. Spector is not an economist, correct?

20 A That's -- as far as I know, correct.

21 Q Are you able to back out -- well, let's start it this way, for the
22 past medical special damages, what is that number reduced to for
23 present value?

24 A Past?

25 Q Past. Well, I guess you don't have to reduce it to present,

1 right? What are the past medical specials in this case?

2 A I don't know.

3 Q You don't have that in your calculation?

4 A No, I just have the future medicals as estimated by Dr.

5 Oliveri. In other words, when I did my report, all of the values I used in
6 my present value of the future medicals was given to me as of that date.

7 I had no information on medical cost, which he actually incurred up to
8 that date. It's a separate entity or calculation.

9 Q Your future meds, when discounted, are \$529,260; is that
10 correct? When discounted and a growth rate is applied?

11 A That's correct.

12 Q And of that number, can you give me even a ballpark of how
13 much of that is the spinal cord stimulator?

14 A I can, but I'd have to do it based on the undiscounted
15 numbers, if that's okay.

16 Q And I'm not asking you for an exact calculation if you don't
17 have a calculator, but if you could at least give me a ballpark? Is it half?
18 Is it a quarter? Is it two-thirds? How much of the half million dollars plus
19 that the Plaintiff is asking for is due to the spinal cord stimulator that
20 hasn't been implanted yet? That's the question.

21 A Okay. The total in Dr. Oliveri's report before I discount was
22 \$497,299.

23 Q Okay.

24 A It's around that, but \$500,000 if you want a ballpark estimate.

25 The generator replacement was \$250,000, so that's a half.

1 Q Right.

2 A And the stimulator put in was \$171,000. I might be able to do
3 it a different way. I'll do all the ones that weren't in those categories.
4 That would be 55-, 56-, 66-, about \$75,000 out of -- \$78,000 or so out of
5 the 497- was not for the stimulator.

6 Q So without a spinal cord stimulator, if we were to back that
7 out, and again, you haven't -- this isn't part of your opinion in your
8 written report, so you haven't applied a growth rate and a discount rate
9 and those things, but of the roughly half a million dollars that's -- that
10 you've been asked to opine about as an economist, only about \$78,000
11 or so of that number, 78- or \$79,000 of that number is for the medical --
12 expected medical expenses for the Plaintiff without a spinal cord
13 stimulator, right?

14 A Off the top of my head, I'm estimating about 13.3 percent.

15 Q Okay. But I just want to get the dollar for the jury. So I want
16 to make it clear to the jury that you have a number, \$529,260, and of that,
17 about, you said, 13.3 percent is for medical items other than the spinal
18 cord stimulator, correct?

19 A I've been -- I did that off the top of my head.

20 Q And I appreciate that, and I'm not -- again, I'm not asking for
21 an exact number, but what I'm trying to ask you to explain to us is if
22 hypothetically the Plaintiff were never to get a spinal cord stimulator,
23 okay, and that weren't part of Dr. Oliveri's lifecare plan, then the number
24 that we would be considering for future medical damages is roughly
25 \$78,000 with a growth rate applied and a discount rate applied, correct?

1 A No, it would probably be a little bit more, about, maybe
2 85,000, 90,000.

3 Q Okay. 85,000, and again, like I said, I don't know with -- I
4 didn't know what the answer was when I asked you, which probably a
5 bad practice on my part, but I'm trying to figure out if there's no spinal
6 cord stimulator at issue, the damages for future medical expenses will
7 clearly be under \$100,000, right?

8 A Yes.

9 Q And I'm just talking expenses. I'm not talking pain and
10 suffering, any other aspect, costs or expenses that aren't within Dr.
11 Oliveri's lifecare plan. Just those things, remove the spinal cord
12 stimulator, future medical expenses would be less than \$100,000,
13 correct?

14 A Yes.

15 Q And your opinions, again, just so the jury has an
16 understanding, your opinions don't consider whether or not there was
17 preexisting problems, any of that? You simply take what the doctor and
18 the vocational experts on the Plaintiff's side tell you is the -- are the
19 numbers and then you work with those, right?

20 A Yes.

21 MR. KAHN: Your Honor, I think I have another, probably five
22 minutes, so if you give me a minute to leaf through my many papers
23 here.

24 THE COURT: Sure.

25 BY MR. KAHN:

1 Q Just to be clear, you're saying Mr. -- you're using Mr.
2 Spector's number of roughly 67.3 years; that's when Mr. Yahyavi would
3 be expected to work to, correct?

4 A Correct. In his report he says that's based on work life
5 expectancy tables that have been published based on government data
6 by other economists. I think he refers to those economists that
7 calculated the work life expectancy.

8 Q So from today, it would be roughly ten years, maybe a little
9 bit less, right?

10 A Yes.

11 Q Do you know anything about the Social Security
12 Administration, Mr. Yahyavi getting social security disability; does that
13 factor in any way into your opinion? I'm guessing no, but --

14 A Well, for a very good reason, that's correct.

15 MR. PRINCE: Your Honor, can we approach for a second?

16 THE COURT: Yes.

17 [Sidebar begins at 2:27 p.m.]

18 MR. PRINCE: Okay. It's very clear, social security payments
19 is a form of collateral source. He does not get any of -- that's a per say
20 ban under Proctor, and so don't ask any questions about --

21 MR. KAHN: I'm not asking the number.

22 MR. PRINCE: Yes, you did. Yes, you did.

23 MR. KAHN: I'm asking --

24 MR. PRINCE: You can't even ask that, and you know -- it's a
25 direct violation of your order on collateral source. You did it

1 intentionally.

2 MR. KAHN: I thought Mr. Spector testified about it for -- at
3 length?

4 MR. PRINCE: Yeah, but he's been accepted as disability,
5 being disabled. You can't talk about benefits, how much he gets
6 benefits, and you asked about factoring into --

7 MR. KAHN: That's fine. I'm fine with that.

8 MR. PRINCE: -- factoring in the calculations.

9 MR. KAHN: Why don't you strike it and admonish the jury.
10 I'm fine. I don't care.

11 MR. PRINCE: Yeah, strike it.

12 MR. KAHN: I'll ask about social security not considering.

13 THE COURT: Okay.

14 [Sidebar ends at 2:27 p.m.]

15 THE COURT: All right. I'm striking the last question and
16 answer. The jury is instructed to disregard that.

17 BY MR. KAHN:

18 Q What is the OASDI?

19 A That is Social Security. OASDI stands for old age, survivors,
20 and disability insurance. It's an insurance program.

21 Q And that was the 2017 report of the OASDI, that's an exhibit
22 to one of your reports? That's something you based your opinions on,
23 correct?

24 A Yes.

25 Q And the -- you have a form, personal injury earning capacity

1 information, that's a form you filled out personally, right?

2 A That's -- that's --

3 Q It's your handwritten notes?

4 A No. But that form is blank that I created, and I provided that
5 to vocational experts so that they can distill a long report into the factual
6 information that I need to do my calculations. It absolves me from the
7 need to read a lot of materials, which I'm not an expert on, and then give
8 me that in a one-page summary, the factual data that I need to make my
9 calculations.

10 Q So these --

11 A I don't fill it in. It gets filled in in my report. It's filled in by
12 Mr. Spector in this case.

13 Q This is Mr. Spector's handwriting on this?

14 A That is absolutely correct.

15 Q And do you have that in front of you? I think it's page 9.

16 A I do.

17 Q Can you look at it? There's one thing I can't read; I was going
18 to ask you to read it for me.

19 A Okay. If I can.

20 Q Under number two, fringe benefit rate on free injury earning
21 capacity, are you able to read what is written below it?

22 A Yes.

23 Q Please do.

24 A It says that he had medical disability, vision, retirement. So
25 that would be the medical and retirement, and then to that there's also --

1 he didn't have to put it in, but there's a legally mandated that everybody
2 has, which would be the employer's contribution, social security.

3 Q And I think what you were saying is that at some point that's
4 capped at \$106,000; is that what you were saying?

5 A It's capped at about seven percent of \$106,000.

6 Q Right. Once you earn more than \$106,000, then they stop
7 taking it out, right?

8 A Well, your employer stops contributing.

9 Q Employer stops contributing.

10 A It's the employer portion that's the fringe benefit, not the
11 amount they take out of your paycheck.

12 MR. KAHN: No further questions. Thank you, Dr. Clauretje.

13 THE COURT: Redirect.

14 REDIRECT EXAMINATION

15 BY MR. PRINCE:

16 Q Mr. Clauretje, it's always so much when you have a hard
17 time -- these are complex things to understand, but I want us to be
18 simple, okay? Can you hear me if I stand next to the microphone here?
19 I'm just going to stand right here. I'm not going to move.

20 First off, with regards to Mr. Spector, have you worked as an
21 economist on cases involving Mr. Spector in the past?

22 A Dozens.

23 Q Have you worked with other vocational rehabilitation experts
24 over the years?

25 A Dozens.

1 Q Do you consider Mr. Spector knowledgeable and reliable
2 towards the information he supplies to you?

3 A Well, I mean, I can't go to his -- I can't address his expertise,
4 but I found that the information he provides to me is reasonable from
5 what I could understand.

6 Q Fair enough. I'm only -- from your standpoint as an
7 economist, you do mathematical calculations; is that fair to say?

8 A I crunch the numbers.

9 Q You crunch the numbers, right?

10 A Yes.

11 Q I know you're not a CPA anymore, but you're crunching
12 numbers, right?

13 A Somebody's got to do it.

14 Q Somebody's got to do it.

15 A That's what I do.

16 Q And the information from your standpoint as an economist,
17 when you get it from Mr. Spector, you consider that reliable?

18 A Yeah.

19 Q For the purposes of your calculations?

20 A Oh, I do. I do.

21 Q Okay. And, Dr. Clauretje, how many present value
22 calculations of loss of earning capacity would you estimate you've done
23 over the years? In the thousands?

24 A No, no. So several hundred. Over 1,000 -- I've done over
25 1,000 cases, but, you know, probably, you know, 1,000 maybe.

1 Q Right. And --

2 A A lot.

3 Q -- the method you used here, is that something you would
4 use and something similar to every case? I understand the interest rates
5 may change with time and things like that; that's something you would
6 typically do?

7 A The methodology doesn't change.

8 Q The method remains the same?

9 A Correct.

10 Q Interest rates may fluctuate with time and that could affect
11 how much it grows or how much you're discounted back, right?

12 A Correct.

13 Q So it may have -- that just affects the calculation, not the way
14 you do the calculation?

15 A Exactly.

16 Q Now, Mr. Kahn asked you a question and I just want to make
17 sure that we're clear; I think it caught you off guard for a second, what is
18 the present value of the past medical expenses? You don't do a present
19 value of something that's already incurred, right?

20 A Don't have to.

21 Q We just have to add it up?

22 A You just add it up. It is what it is.

23 Q Right. So it's \$491,000, it's \$491,000, right?

24 A It is what it is.

25 Q Right. You don't need to do any -- you don't need to do any

1 calculations?

2 A I do not.

3 Q Fair enough. Now, in every case where there's a loss of
4 earning capacity claim being made, do you typically have to adjust in
5 case -- if the trial date was last year, but now it's in 2019, we -- it'll have
6 to make an adjustment because the past loss will increase, right?

7 A Depending upon the time. If there's a long time difference,
8 you'd want to do that.

9 Q Was it fair and appropriate to make an adjustment in this
10 case for the -- since your report was in May of 2018, and now the trial is
11 in September 2019, to make an adjustment for the past loss of earning
12 capacity?

13 A Well, once I was doing the update anyway for the inability to
14 work part time, then it's a simple matter of putting a new date in my
15 calculations.

16 Q Right. And --

17 A For the date of the trial.

18 Q In your report, your first one from May of 2018, you talk
19 about the -- Mr. Spector is unsure -- was unsure as to when the future
20 loss of earning capacity is going to start, remember?

21 A He said -- he gave me the month --

22 Q Right.

23 A -- and the year, so I chose the mid -- middle part of the
24 month, that --

25 Q Right.

1 A -- would make very little difference what part I chose.

2 Q It says Mr. Spector -- citing Dr. Oliveri, indicates that part
3 time work, if any, would be appropriate given his disabilities. Part time
4 income is one-half of the largest amount post-injury, and you calculated
5 that to be \$271,678 back in May of 2018?

6 A Correct.

7 Q And that's assuming he would have went to work part time,
8 right?

9 A Correct.

10 Q So now fast-forward to September of 2019, Mr. Yahyavi has
11 not gone to -- back to work, that assumption would no longer be valid;
12 you'd have to update in order to be accurate here for this jury, right?

13 A Yes.

14 Q All right. Did you make an appropriate update, given the fact
15 that Mr. Yahyavi never did go back to work?

16 A I did.

17 Q Okay. And therefore, in addition, you had to make an
18 adjustment for the additional past loss of earning capacity, meaning
19 since the trial date changed, or from the date of your report to
20 September of 2019, you needed to make an adjustment for the past loss
21 as well since more than a year plus went by?

22 A Yes.

23 Q Okay. Very good. Dr. Clauretje, thank you. No additional
24 questions.

25 MR. PRINCE: Thank you, Your Honor.

1 THE COURT: Any questions from the jury? I don't see any
2 hands.

3 Thank you, Dr. Claurette. You may step down.

4 Ladies and gentlemen, we're taking our break now, correct,
5 counsel?

6 MR. PRINCE: Yes. We're right on time.

7 THE COURT: Okay.

8 MR. PRINCE: We're right on pace.

9 THE COURT: We're actually early. I have to go sign a
10 warrant, so that makes sense.

11 During this recess, you're admonished do not talk or
12 converse amongst yourselves or with anyone else on any subject
13 connected with this trial, or read, watch, or listen to any report of or
14 commentary on the trial or any person connected with this trial by any
15 medium of information, including, without limitation, newspapers,
16 television, radio or internet. Do not form or express any opinion on any
17 subject connected with the trial until the case is finally submitted to you.

18 So before you go, I'll let you -- do you want Krispy Kreme's
19 or regular donuts?

20 MR. PRINCE: Pink box. Pink box.

21 THE COURT: I don't think he goes by there, but I -- the
22 second best place is -- what's it called on Charleston? Anyway, it's the
23 old -- it's all kinds of variety donuts. That's a question to you guys.

24 IN UNISON: Variety.

25 THE COURT: Variety. You -- all right. Then he is going to

1 get them. Okay. Thank you. We're in recess.

2 [Jury out at 2:37 p.m.]

3 [Proceedings concluded at 2:37 p.m.]

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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.

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

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None

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None

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Las Vegas, Nevada, Friday, September 20, 2019

[Case called at 9:14 a.m.]

[Outside the presence of the jury]

THE MARSHAL: -- in session.

MR. KHAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. PRINCE: Hi, Judge.

THE COURT: So, we got a call that you're running late --

MR. PRINCE: Oh, yeah.

THE COURT: -- about a minute ago.

MR. PRINCE: Yeah, sorry. The traffic was hitting us.

THE COURT: She -- it was a little behind, whatever.

MR. PRINCE: All right.

THE COURT: I guess your secretary or somebody.

MR. PRINCE: Yes.

THE COURT: What's up?

MR. PRINCE: Yesterday we had two collateral source rule problems. Both were willful and purposeful. The first was -- and they both occurred during the course of Mr. -- Dr. Clauretje's testimony. The first was the statements by Mr. Khan that my client is receiving social security disability payments and he wanted to know the amount of those.

So, we had an objection, a contemporaneous objection. You sustained it. In fact, Mr. Khan went as far as to say, go ahead and strike

1 it from the record and admonish me in front of the jury. So -- which you
2 did -- therefore did strike. You didn't admonish, but you did strike.

3 THE COURT: I instructed them to disregard it.

4 MR. PRINCE: Guard [sic] the question, correct. That's not an
5 admonishment under the *Gunderson* case, but okay. But then he went
6 on to ask purposefully, and I didn't know this because it wasn't a part of
7 admitted exhibit, talking generally, because they were talking about
8 Fringe benefits and how you'd calculate it like the percentage of fringe
9 benefit in addition to the income. He said, oh, I can't read what Mr.
10 Spector wrote about what benefits, and he specifically had Mr. -- Dr.
11 Clauretie refer to health insurance, dental insurance, and disability
12 insurance. Specifically, disability insurance, because he had him read it
13 in the record. That was a calculated effort on his part to introduce a
14 collateral source not a specific like general concept about what his fringe
15 benefits entail. He went specific to Mr. Yahyavi.

16 Well, Mr. Yahyavi has never had any disability payments or
17 any disability insurer ever in this case. That's exactly *Proctor*. *Proctor*
18 says you can't introduce any evidence of insurance per say beyond a
19 collateral source, and that case was about disability insurance. So, not
20 only did he cover social security disability, it covers that. So, the only
21 way to rectify this now -- we're asking and proposing a curative
22 instruction on this exact topic.

23 So, the jury is -- although you informed them at the
24 beginning of the case about not to consider insurance. I want another
25 specific curative instruction given right now to avoid any potential

1 prejudice since we were talking yesterday specifically about my client's
2 economic losses in the form of past medical expenses, future medical
3 expenses, and loss of income. The very specific forms of collateral
4 source Mr. Khan elicited willfully and purposefully.

5 He knows the rule. He knows the Court's ruling on collateral
6 source. You said it's out. He tried to circumvent your order and so the
7 only way to deal with this is now in the form of a curative instruction.
8 We've -- on page 5, we've proposed the curative, which I think would be
9 reasonable and appropriate in this case. And so, it's clear to this jury
10 they're not to consider any form of insurance or any collateral source of
11 payment. So, for those reasons I'm asking you to give --

12 THE COURT: Do you --

13 MR. KHAN: Your Honor, can I say something.

14 THE COURT: Yeah, do you have the transcript --

15 MR. PRINCE: I don't.

16 THE COURT: -- from yesterday.

17 MR. PRINCE: No, I don't.

18 MR. KHAN: Your Honor, what time was that filed?

19 MR. PRINCE: At 6:21 p.m.

20 MR. KHAN: Okay. So, I've had the court equivalent of 18
21 minutes, Your Honor. We'll be filing a brief in the next five to fifteen
22 minutes. I'd request that we got the opportunity to respond in writing
23 before the Court rules and hears further. We can get through with the
24 Plaintiff's direct before this is an issue because I'm not going to be
25 questioning him and I'm sure Mr. Prince won't break his own rule, so I'd

1 ask that we address this in an hour when we take our break after we file
2 the brief.

3 MR. PRINCE: I don't want that.

4 MR. KHAN: I'm not done. It should be over here in the next
5 10 to 20 minutes. It's being filed as we speak. And I think I at least have
6 the -- should have the opportunity to file a written response to
7 something they filed at 6:30 last night.

8 MR. PRINCE: Yeah, but I want it before my client testifies.

9 MR. KHAN: Well, I don't see the reason, Your Honor, to have
10 to address this before I cross him.

11 THE COURT: Well, first of all, I don't really -- I think that a
12 motion, whatever, an objection, whether the brief is filed, whether I even
13 get a chance to read the whole thing, if in fact -- well, do you have the
14 transcript?

15 MR. PRINCE: Yes. We're going to quote from a transcript in
16 our brief -- from yesterday? No. But we are quoting from another
17 transcript in our brief where it sets forth very clearly the types of
18 questions that Plaintiffs have asked some of their witnesses and why
19 these issues have been put into -- in front of the jury as far as social
20 security disability. So, before the Court rules, I would ask that the Court
21 at least look at that because we are citing from one of the transcripts.

22 MR. PRINCE: I'm citing from yesterday afternoon with Dr.
23 Clauretje. And Mr. Khan asked him a question to read from a
24 handwritten sheet, which was not an admitted exhibit, so I didn't have it
25 with me. I had his reports. But I didn't have some handwritten sheet

1 apparently that Mr. Clauretje provides to Mr. Spector and all voc experts
2 to write out information for him to use as part of his calculations. Mr.
3 Khan had him read the fringe benefit, which included health insurance,
4 dental insurance --

5 THE COURT: Mr. Prince, address me, not --

6 MR. PRINCE: And so, I'm saying that because he knows --
7 ask him if it's true, if he did that?

8 THE COURT: Well, I'm going to listen to -- can you pull up
9 that --

10 MR. PRINCE: Right at the end. It was part of a recross.

11 THE COURT: It was right at the end?

12 MR. PRINCE: It was a re-cross of Dr. Clauretje.

13 MR. KHAN: I asked him to read something that was
14 handwritten in his records that based his opinion on it. I couldn't
15 decipher because it was illegible. So, I asked if he knew what was in
16 there. I didn't know what he was going to say.

17 THE COURT: Well, I understand that. But again, I mean, I'm
18 assuming yes, that it was unintentional. He did -- and what's that? Can
19 you get it?

20 THE CLERK: I can get it easier at my desk.

21 THE COURT: Okay. Then we'll take a break. All right. Get
22 the tape. I'd like to see it.

23 MR. KHAN: Before we go off, Your Honor, I'd like to tell the
24 Court for housekeeping purposes, Dr. Baker, who is our final mechanical
25 accident reconstruction expert is here. Dr. Tung has landed from San

1 Diego. He will be here shortly. He is not available next week, at least to
2 be in person, testify in person and Edward Bennett, the vocational expert
3 will probably also be sitting here. So, I'm just identifying them for
4 purposes of the Court will see people in the courtroom.

5 THE COURT: Okay. We're going to take a break. Go get it.

6 [Recess taken from 9:21 a.m. to 9:43 a.m.]

7 [Outside the presence of the jury]

8 MR. KHAN: Did the Court see a copy of the Defendant's
9 opposition?

10 THE COURT: No, but I didn't even -- other than reading a
11 sentence of it.

12 MR. KHAN: It does not have a file stamp on it, but it has
13 been filed and your clerk has a copy of it, of the opposition as well.

14 MR. PRINCE: Did we find that portion of the record?

15 THE COURT: Yeah. The part that I heard -- so, the part that I
16 found yesterday that was the objection to Mr. Yahyavi and to Mr.
17 Clauretje. Does it factor in his social security disability? And there was
18 testimony that the Plaintiff solicited that he was considered disabled by
19 the Social Security Administration. So, other than what I did, what is
20 it -- well, you want another instruction now.

21 MR. PRINCE: I do, because --

22 THE COURT: Based on what? You brought up disability.

23 MR. PRINCE: No, no. That he was accepted for a social
24 security disability. They determined him to be disabled. I had not
25 brought up anything about payments. Mr. Khan asked Dr. Clauretje

1 about receiving payments and then we had an objection and then he
2 said, go ahead and strike it from the record and admonish the jury,
3 which you in turn then did. Then he started asking Dr. Clauretje about
4 specific benefits Mr. Yahyavi had, which included all the various forms of
5 insurance. And I specifically recall, I feel I recall him saying disability
6 insurance, and so that's why I wanted to hear what was on the -- you
7 went to get the record to determine what additional statements he
8 elicited, because he was asking specific collateral benefits to Mr.
9 Yahyavi. And I feel I want this jury instructed now and cautioned not to
10 consider those for any reason, because we have this ban -- a per say ban
11 under *Proctor*.

12 So, therefore, I just want to hear what that had to say and I'm
13 asking for a curative instruction as I've outlined in my memorandum.

14 THE COURT: Go ahead. We didn't go that far. We went to
15 the question where the objection was.

16 MR. PRINCE: It's right at -- then the question was right after
17 that, immediately after.

18 THE COURT: All right. Then we'll have to go back and look
19 at that. It's very difficult apparently to record what we're doing in here
20 and then bring up the prior testimony and then play that on top of
21 recording. It's possible. It's difficult and that's the problem, so.

22 MR. PRINCE: Well, why can't we go off the record and listen
23 to it and then go back on the record and discuss what we have?

24 THE COURT: Well, we can you do that?

25 THE CLERK: I just don't have sound.

1 MR. PRINCE: Can you play it through your speakers like on
2 your laptop? I mean, on your desktop?

3 THE COURT: Get the JAVS people or whoever, IT up here.

4 [Court and Clerk confer]

5 MR. KHAN: It was right after the objection, Judge.

6 THE COURT: I listened to it. And the question that I think
7 you're asking, he asked what is the -- he couldn't read it. He refers to the
8 medical retirement disability that he receives as fringe benefits. And that
9 was it. There was no mention of amounts and those are his fringe
10 benefits. I already admonished him. There was no contemporaneous
11 objections, so I am not giving this instruction again.

12 MR. PRINCE: Well, I don't think you necessarily -- there was
13 nothing for me to give a contemporaneous objection with, Your Honor.
14 So, we ended the day. Then I am -- so, I think my objection remains
15 timely. They heard that information. I believe it was improper to elicit
16 his specific benefits. It doesn't have to be the amounts. Because he did
17 talk about disability insurance and I have a problem with that because
18 now they have left the impression that he may be getting disability
19 payments and how to treat that. So, I feel a curative at this point
20 because of that is appropriate.

21 THE COURT: Thank you. All right. Bring them in. I'm not
22 giving it in case I didn't -- I think we're -- I did instruct them, and we'll
23 instruct them again and I'm sure you'll highlight that.

24 MR. PRINCE: I will.

25 THE MARSHAL: Please rise for the jury.

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[Jury in at 9:55 a.m.]

[Within the presence of the jury]

THE COURT: Please be seated. Good morning, ladies and gentlemen. Steve pick out good donuts? Okay, Monday we will be starting at 1:00. I have criminal, of course. Well, not -- anyway, Monday and Wednesday every week. So, that's what we'll be doing. I can't think of anything else we need to talk about. Parties acknowledge the presence of the jury?

MR. KHAN: We do, Judge.

MR. PRINCE: Yes, Your Honor.

THE COURT: Proceed.

MR. PRINCE: Your Honor, we call our next witness, Plaintiff, Bahram.

THE CLERK: Please remain standing.

BAHRAM YAHYAVI, PLAINTIFF, SWORN

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: Bahram Yahyavi. B-A-H-R-A-M Y-A-H-Y-A-V-I.

THE CLERK: Thank you.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. PRINCE:

Q Bahram, good morning.

A Morning.

1 Q It's a different view sitting over there looking this way, isn't
2 it?

3 A Yes, sir.

4 Q How are you feeling this morning?

5 A Good.

6 Q Nervous?

7 A A little.

8 Q How old are you?

9 A 57 now.

10 Q When's your birthday?

11 A December 21, 1961.

12 Q Where were you born?

13 A Iran, Tehran.

14 Q Tehran, all right. And when did you move from Iran to the
15 United States?

16 A Mid 70s, '77.

17 Q How old were you when you moved?

18 A 14-and-a-half, I think.

19 Q Were you already in high school?

20 A Yes.

21 Q Okay. Tell me about your family in Iran, your mom and your
22 dad, I mean, have any brothers and sisters?

23 A Yes. One brother, three sisters.

24 Q Okay. What kind of work did your dad do in Iran?

25 A He was a foreign services officer at the American Embassy in

1 Tehran.

2 Q Who did he work with, the United States Government?

3 A State Department, yes.

4 Q And how long did your dad work for the State Department of
5 the United States?

6 A 33 years.

7 Q When you moved from Iran, where did you move to?

8 A San Diego.

9 Q Okay. Did you go to high school in San Diego?

10 A I did.

11 Q And did you -- were you athletic as a kid?

12 A Yes.

13 Q What types of sports did you play?

14 A Football, soccer.

15 Q You call it football. It's really soccer, right?

16 A It is.

17 Q Right. And did you ever -- about your mom. Did she work
18 outside of the home or was she just a Persian mom?

19 A Typical Persian mom.

20 Q Did your dad instill in you a strong work ethic?

21 A Yes, very strong.

22 Q And would you say that's still instilled in you to this day and
23 how you would wish to teach your own children?

24 A It is.

25 Q And where did you go to high school in San Diego?

1 A Mira Mesa High.

2 Q And after you graduated from high school, did you go on to
3 college?

4 A I did.

5 Q Where did you go to school?

6 A National University.

7 Q And where is that?

8 A San Diego.

9 Q Did you play sports while you were in college?

10 A Yes.

11 Q What sport did you play?

12 A Soccer or football.

13 Q And what type of degree did you receive?

14 A Bachelor of Business Administration first and then MBA after
15 that.

16 Q So, you received a bachelor's degree also?

17 A I did.

18 Q And tell us about your work life. I mean, what business did
19 you do? Again, I know you're not working now. We're going to talk
20 about that, but what industry have you been in in your whole career?

21 A Car business.

22 Q Tell us how you got started in the car business and some of
23 your work that you did in San Diego?

24 A Well, it was always my passion, cars were. And I started
25 by -- in a very small car lot that I opened up. And a --

1 Q Was it your own business?

2 A It was, buying and selling cars.

3 Q And how long did you have that business?

4 A For a few years. I would say about eight, nine years.

5 Q Okay. What other parts of the automobile business were you
6 in while living in San Diego?

7 A We also tried wholesale, buying cars for other dealerships.

8 Q Okay. How long did you do that?

9 A I would say another eight, nine years of that.

10 Q What other aspects of the car business have you been in
11 before you moved to Las Vegas?

12 A That was about it. Just mostly buying and selling cars.

13 Q And did you enjoy your work?

14 A I did. I love car business.

15 Q And in regard to your -- I want to talk about your family. Do
16 you have children?

17 A I do. Four wonderful children.

18 Q And the jury met Darian. Is he your oldest?

19 A Yes, he is.

20 Q Tell us about the other three kids.

21 A Casey is right after Darian and then Callie, and Dominique.

22 Q Where does Casey live?

23 A Here, Las Vegas.

24 Q Okay. Are you close with Casey?

25 A I am.

1 Q How often do you see Casey?

2 A He works, so a few days a week he comes by, Sundays
3 especially.

4 Q And is he -- does he go to college?

5 A He did.

6 Q Okay. And where did he go?

7 A UNLV and CSN.

8 Q And your daughter, your older daughter is Kali?

9 A Kali, yes.

10 Q And where does Kali live?

11 A LA, Los Angeles.

12 Q And did Kali go to college?

13 A She did.

14 Q Where did she go to college?

15 A LAU.

16 Q Is that Loyola Marymount University?

17 A Yes.

18 Q What a beautiful school. And what did she receive her
19 degree in?

20 A Journalism.

21 Q What does she do now?

22 A She manages a health facility, spa.

23 Q Like a fitness facility?

24 A Fitness facility.

25 Q Okay. And your youngest daughter, Dominique, how old is

1 Dominique?

2 A She's 21 now, just turned.

3 Q Where does she go to college?

4 A San Francisco University of San Francisco.

5 Q And what is she majoring in?

6 A Also journalism.

7 Q What does she hope to do?

8 A Broadcasting I think is what they thought.

9 Q And what year did you move to Las Vegas, Bahram?

10 A 2007, I think.

11 Q Okay. Why did you move here? What brought you here?

12 A Well, we moved here. Darian was going to UNLV. They
13 were looking at him playing for them.

14 Q Okay. But did Darian start his high school athletic career in
15 San Diego?

16 A He did.

17 Q Was he thinking about going to UNLV and playing football
18 here?

19 A He was.

20 Q Okay. And when you moved here, who moved here with
21 you? Did Darian come with you?

22 A Yes.

23 Q And what about Casey, did Casey move out here with you as
24 well also?

25 A Yes, he did.

1 Q Now, when you went to -- what high school did Darian go to?

2 A Sierra Vista.

3 Q Okay. And was he a good football player?

4 A He was.

5 Q How fun was that to watch him to play football and want to
6 play college football?

7 A Wonderful.

8 Q And how about Casey, was he also a football player?

9 A He was.

10 Q And I know you had the boys here with you and you were
11 raising the boys. Let's talk about working when you initialed moved to
12 Las Vegas. Did you go to work when you came to Las Vegas?

13 A After a probably a few months, yes, I did.

14 Q What kind of jobs did you have before you started working at
15 Chapman Dodge?

16 A Same thing. I worked for Desert Chrysler and Jeep and
17 Integrity Chrysler and Jeep.

18 Q Okay. When did you go to work for Chapman Dodge?

19 A I believe it was around 2010.

20 Q Okay. And did you like working for Chapman Dodge?

21 A I loved it.

22 Q And when you started there, what was your position?

23 A I started as a salesperson and then within two days I was a
24 manager there.

25 Q Okay. What does it mean to be a manager at Chapman

1 Dodge?

2 A You have a team of salespeople that you have to manage
3 plus inventory and all that.

4 Q What were your responsibilities as a floor sales manager?

5 A Basically I was a closer, so I went on every table and made
6 sure the salespeople were doing their job properly, showing the vehicles
7 properly and just basically managing the floor.

8 Q Okay. Did you help the dealership with inventory?

9 A I did. Well, not the dealership, but the salespeople.

10 Q Salespeople?

11 A Yes.

12 Q Were you also responsible for understanding what new
13 inventory was coming in so that you could tell your salespeople what,
14 you know, what you had coming in, what's available, what stock you
15 had?

16 A Exactly. Yes, that's what it is.

17 Q And how long were you a floor sales manager at Chapman?

18 A 2013.

19 Q Why did you stop being a floor sales manager at Chapman?

20 A Well, the accident happened, and I couldn't do that job
21 anymore.

22 Q Okay. Let's talk about how you did in that job. How did you
23 do in that job? How was your performance?

24 A It was very good. I was thriving there, and I was moving up
25 the ladder.

1 Q Did you feel there was growth opportunities with you at the
2 Chapman dealership?

3 A Definitely, yes.

4 Q And how were your sales numbers?

5 A Very good. I did really well.

6 Q Okay. But more importantly, did you enjoy your work?

7 A I did. I loved my work.

8 Q Did you enjoy the people you worked with?

9 A I did.

10 Q What do you enjoy the most about the car business and
11 specifically being a floor sales manager at Chapman?

12 A Well, socializing with people, making deals and, you know,
13 basically putting deals together, you know. It's a wonderful time. I
14 enjoyed it.

15 Q Did you feel like you found a home in terms of like a long
16 term like working for Chapman?

17 A Sure.

18 Q Was Chapman a family owned dealership?

19 A It is.

20 Q A series of dealerships?

21 A It is. People have been there a long time. Don Hammock
22 [phonetic] was our general manager. He's been there forever and a few
23 other managers that have been there for a long time.

24 Q Was that a good fit for you?

25 A Yes, it was. It was a great fit.

1 Q And we were -- let's talk about the work and how many days
2 were you working prior to this collision happening Bahram?

3 A Five, six days.

4 Q Okay. How many hours a day?

5 A I was putting 10 to 12 hours a day.

6 Q So, long hours?

7 A Long hours.

8 Q And when you were working, I mean, did you have any
9 limitations or any physical difficulties in any way doing your job before
10 this collision?

11 A No.

12 Q Did you ever have to take time off, go on leave for any
13 reason, any medical leaves before this collision occurred for any reason?

14 A No.

15 Q How would you -- when you were reviewed by Chapman,
16 how would they characterize your performance as a floor sales manager
17 before this happened?

18 A Great. I would say it was great. My numbers were good,
19 and I was performing.

20 Q And according to your payroll stubs at the end of 2012, Greg,
21 that's Exhibit 114, bate number 1354, this is the end of 2012, actually it's
22 the middle of 2000, December of 2012, it says your income was \$159,714
23 through December 15th. Looks like you're making about \$160,000 a
24 year, maybe a little more?

25 A Correct.

1 Q Does that sound about right?

2 A Yes.

3 Q Do you have any reason to believe you wouldn't have -- had
4 this injury not happened you would have not continued to earn that
5 amount of money, do well at Chapman?

6 A No.

7 Q Now, it says here, it says you have draw of \$5,000 in
8 commission sales. Tell us how the draw system worked there, Bahram.

9 A On the 5th of the month you get a draw and on the 20th you
10 get a wash check.

11 Q What's a wash check?

12 A It clears out your previous months, all of your previous
13 month's income.

14 Q Like all your commissions that would be owed on all your
15 deals?

16 A Exactly.

17 Q And as a sales manager, I mean, were salespeople just a -- a
18 sales associate in selling cars, did they receive a draw or was it because
19 you were a floor sales manager you received a draw?

20 A Only the managers would get the draw.

21 Q Okay. And were you responsible for supervising people
22 while working at Chapman?

23 A All salespeople, yes.

24 Q How many people was that?

25 A Well, we had 35 to 40 people, but we had different managers

1 also.

2 Q How many floor sales managers were there?

3 A At that time I think there were three.

4 Q Okay. And how many -- were you responsible for at least
5 participating in supervising all those salespeople?

6 A Directly 12 to 15 per manager.

7 Q Was there room for advancement for you there?

8 A Yes.

9 Q What sort of room for advancement were you talking about
10 with Chapman while you were working or before this collision
11 happened?

12 A General sales manager.

13 Q That's what you were hoping to achieve?

14 A Yes.

15 Q And let's talk about life outside of work. I know this work
16 was your passion, obviously took up a lot of your time. But, tell me
17 about you before this. I mean, did you have any physical problems that
18 prevented you from doing anything?

19 A No.

20 Q How would you characterize your health before this?

21 A Very good.

22 Q Were you active?

23 A I was.

24 Q Did you live an active lifestyle?

25 A I did.

1 Q I know your boys are athletes. I know your oldest one Darian
2 is a or I apologize, he's in the fitness business. Did you exercise to keep
3 yourself healthy and strong?

4 A I did. I went skiing.

5 Q Okay. What sort of hobbies did you have, like physical
6 hobbies? You said you went skiing?

7 A Yes. We had a boat. Skiing around the lake a lot and
8 exercises.

9 Q Okay. How often would you go snow skiing in the winter?

10 A Every chance we'd get, so.

11 Q Where did you go?

12 A Brian Head, Mt. Charleston, further Utah, Deer Valley.

13 Q Would you sky every year?

14 A Yes, just about.

15 Q Who did you go with?

16 A The kids mostly. Sometimes friends would come along and
17 their kids.

18 Q Yeah. And how frequent would go on the lake? I know all the
19 car dealerships in Las Vegas are closed on Sundays --

20 A Right.

21 Q -- for sure. How often would you go on your boat?

22 A We try to go every weekend in the summer, the summer
23 months when the weather permits.

24 Q I realize that no life is perfect, but how were things going for
25 you just before this happened?

1 A It was great.

2 Q Okay. Now, there was some -- how are you doing now? I
3 mean, you're sitting here. It's obvious that you're in discomfort, you're
4 uncomfortable. Is it hard to sit for long periods of time?

5 A It is.

6 Q And I know you've been in court; you've sat in the back.
7 When you haven't been in court, the days you've been here for a few
8 hours, what's it like for the next few days after this?

9 A Pretty tough. It's pretty tough at home.

10 Q Tough in what way?

11 A Well, it's painful. I pay for it at home. I have to lay down for
12 a while. So, the next couple days I'm paying for it. Sitting in the court I
13 try to be as quiet as possible, but it takes a lot of effort.

14 Q Are you in pain right now?

15 A I am in pain.

16 Q Where?

17 A All the way back here.

18 Q Your neck down to your arm?

19 A Yes. I didn't take my medication today.

20 Q You did or didn't?

21 A Did not.

22 Q If you don't take your medication, what happens to you?

23 A I'm like this. It's painful.

24 Q What happens when you take medication?

25 A Well, it kind of, you know, relaxes me a little.

1 Q Does it make you kind of sleepy and groggy?

2 A Yeah, it does.

3 Q Do you like that feeling?

4 A No.

5 Q So, you kind of -- either way, you're uncomfortable?

6 A I am.

7 Q Okay. I want to talk about this collision that occurred on

8 June of 2013, okay?

9 A Yes.

10 Q I first want to kind of set the scene up again. If we can have
11 the scene layout. Let me get you the demonstrative. I'm going to start
12 with 10, demonstrative 10. And Bahram, is it hard for you turn your neck
13 after your surgery?

14 A It is.

15 Q Which way can you turn? Can you turn it without having to
16 turn your whole body?

17 A No. I have to turn my whole body.

18 Q Were you like this before that happened?

19 A Absolutely not.

20 Q Now, what we're showing here, the jury, is there any way -- I
21 guess you can't. You have to look there. So, this collision occurred at
22 Sahara and Glenn Avenue; is that right?

23 A Correct.

24 Q And on the left side, looking at the monitor on the left, I have
25 a Chapman logo and then I have a Chapman on the right. Do you see

1 that?

2 A I do.

3 Q Where was the dealership that you were working at? The
4 one on the left, the west?

5 A Left side of me, yes.

6 Q Okay. The original Chapman is the one corner of Glenn and
7 Boulder Highway?

8 A That's correct.

9 Q Chapman Dodge?

10 A Chapman Dodge, that's correct.

11 Q Okay. And Chapman on the left on the westside, is that the
12 dealership where you were working at?

13 A Yes, sir.

14 Q And how frequently would you go from -- well, what was the
15 dealership known as on Glenn and Boulder Highway in June of 2013?

16 A Can you repeat that?

17 Q Sure, what did they call the dealership on Glenn and Boulder
18 Highway in June of 2013? It wasn't Chap -- was it Chapman Dodge or
19 Chapman something else?

20 A It was Chapman Chrysler Jeep and Dodge.

21 Q Okay.

22 A Value Center. Value Center, that's what it was called.

23 Q Yeah, it was a little different, right?

24 A Yes.

25 Q Okay. But did -- why were you -- how frequently before June

1 of 2013 would you go down to the other dealership, the one on Boulder
2 Highway and Glenn?

3 A Almost every day I would take that ride.

4 Q How far is it from the new car dealership where you were
5 working at down to the Value Center?

6 A I would say about less than half a mile or just about half.

7 Q Was that a route that you were familiar with?

8 A Yes.

9 Q Was that a route you were familiar with?

10 A Yes.

11 Q Now, is there any -- and when you get to Glen, if you could
12 just maybe tell us, when you get to Glen Avenue, is it a -- is it more of a
13 veering off or is it a hard turn you have to make?

14 A No, it just veers off to the side.

15 Q Now, have you driven -- you'd said you'd driven that route
16 how many times would you estimate before this? Hundreds?

17 A Hundreds, maybe more.

18 Q And when you -- your normal practice when you turn
19 from -- onto Sahara, what lane would you get in?

20 A The right lane.

21 Q Okay. And then the aerial shows there's actually a dedicated
22 turn lane that would normally be there. Do you remember a dedicated
23 turn lane that would normally be there?

24 A Yes.

25 Q Okay.

1 A Right lane.

2 Q Okay. And let's look at Exhibit Number 6, bate number 12.

3 And do you see -- Bahram, I know your -- it's on your monitor, but
4 there's a right-hand turn and you can see the arrows from up above. Do
5 you see that there?

6 A I do.

7 Q There's one, two, three through lanes on Sahara. Do you see
8 that?

9 A I do.

10 Q And then there's a dedicated right-turn lane that you could
11 pull into and then turn onto Glen right there. Do you see that?

12 A Yes, sir.

13 Q Is there any sort of a stop sign or anything at Glen when you
14 make your turn there?

15 A No, sir.

16 Q Or can you just continue on?

17 A Yes, you can just drive on.

18 Q Okay. And then how many lanes would there be on Glen
19 going towards Boulder Highway?

20 A One.

21 Q Okay. And so that day, the day we're talking about, was the
22 right-turn lane on June 19, 2013, was it opened or closed due to
23 construction?

24 A It was closed due to construction.

25 Q Okay. If we can look at Exhibit Number 2, bate number 8.

1 And this is the picture from June of 2013. And it shows the, like,
2 construction equipment and cones and everything in the -- what would
3 be the right-hand turn lane. Do you see that?

4 A I do.

5 Q All right. So what -- tell us -- walk us through, you know,
6 getting in the car and turning onto Sahara and what happens from your
7 standpoint.

8 A Sure. I get in the car and make a right-hand turn on Sahara
9 and then veer off to Glen --

10 Q Okay. And --

11 A -- in the designated lane, of course.

12 Q Okay. And when you turn onto Sahara, you're in the right-
13 hand turn lane. So are you in -- are you driving in the right lane?

14 A Yes.

15 Q Approximately how fast are you going?

16 A About 25 to 30 miles an hour. Normal speed.

17 Q Were you in any hurry?

18 A No.

19 Q Okay. Were you traveling in the dedicated travel lane?

20 A Yes.

21 Q And when you get to Glen, do you notice any equipment?

22 A I did.

23 Q What do you see?

24 A There were trucks and backhoes and there were a cement
25 truck and then a big trailer truck.

1 Q Like a big trailer. Okay. And did you see anybody driving the
2 -- a forklift back there?

3 A I did not.

4 Q Did the truck block your view as well?

5 A Yes, it did.

6 Q Of what was behind it?

7 A Yes.

8 Q Okay. Did you have any -- in your wildest dream, did you
9 ever imagine a forklift would be coming out onto the roadway?

10 A No.

11 Q Okay. And so when you -- well, I'm trying to just show you
12 another picture. If you can show bate number 134. And in that picture,
13 we see a cement truck and then the green tractor truck. Do you see that?

14 A I do.

15 Q Okay. Were those -- do you recall those trucks being there
16 that day when you made your turn onto Glen?

17 A Yes.

18 Q Okay. And as you made your turn onto Glen, did you turn
19 your blinker on?

20 A I did.

21 Q Okay. Was it your normal custom and practice to use your
22 blinker when you made that turn?

23 A Yes.

24 Q Did you have to break for any reason to your recollection?

25 A No, you don't have to break.

1 Q And do you -- so when you make the turn, do you take your
2 foot off the gas a little?

3 A Yes.

4 Q Just to kind of slow down as you make the turn?

5 A Just to make the veer and turn.

6 Q Was there any significant -- was there any traffic in front --
7 any cars in front of you?

8 A No.

9 Q And -- you can jump down -- and as you make that turn, what
10 do you remember next after making that turn onto Glen?

11 A A bomb went off.

12 Q When you say, "a bomb went off," what do you mean by
13 that?

14 A Just came to a halt.

15 Q Okay. Did you ever see the forklift driving towards your car?

16 A Never.

17 Q What's the -- do you remember the -- other than hearing the
18 impact and feeling like a bomb went off, did your -- did at that time did
19 you know what had happened?

20 A I did not. I had no idea.

21 Q What's your first recollection after hearing the bomb go off?

22 A What hit me? What was it? What happened?

23 Q Tell us about how you're doing mentally and physically in
24 the car right after the car stops. What's going through your mind? Do
25 you have much of a recollection of that?

1 A Not much. I don't remember much, but I knew I was scared,
2 and I didn't know what happened.

3 Q Did you --

4 A I kept saying to myself what hit me. God, what hit me? What
5 was it?

6 Q Were you scared at the time?

7 A I was.

8 Q How were you -- what's the first thing you remember after
9 hearing that -- that bomb, that noise?

10 A Someone opening up the door, the driver door, and my head
11 was on his hand. Later on I found out it was the driver of the forklift.

12 Q Okay. And what do you remember about the exchange you
13 had with the driver of the forklift?

14 A I threw up on his hand and wiped it off for him. I told him
15 that I was sorry, and he said he was -- I didn't see you. I'm sorry. He
16 was very sorry.

17 Q And how were you doing while he -- at that point?

18 A It was terrible.

19 Q Do you remember anything really at the scene?

20 A Not after that part. That was the only part I remember.

21 Q Do you remember the ambulance coming?

22 A I do not.

23 Q Do you remember the ambulance ride to the hospital?

24 A I do not.

25 Q I mean I know there's been records saying that you

1 weren't -- your conscience level, you couldn't provide your address,
2 other information, Darian couldn't, you know, get you to answer
3 questions at the hospital. I mean do you even remember being much at
4 the hospital?

5 A Not much.

6 Q Okay. At some point, what do you learn what happened to
7 you? Well, before I -- let me go back. Do you remember anybody from
8 Chapman, the dealership, coming to the scene?

9 A Kevin.

10 Q Do you remember seeing anybody?

11 A Kevin Mackey was there within minutes. While my head was
12 laying on this guy's arm, Kevin Mackey I saw within a minute, a couple
13 minutes. I reached out for him. I said Kevin, I don't know what hit me.
14 He was just, lay there, you're going to be fine.

15 Q Okay. So he was a familiar face, obviously?

16 A The only one around there, yes.

17 Q Does he do anything for you, or does he just tell you to stay
18 still?

19 A He just told me to stay still.

20 Q And how did you eventually learn about what had happened
21 to you?

22 A A police officer told me that a forklift drove into my vehicle.

23 Q What was your reaction to that?

24 A Shocked.

25 Q And how are you doing when you leave the hospital? Do

1 you remember leaving the hospital?

2 A Not really. I was dazed that whole day.

3 Q Okay.

4 A Went home.

5 Q And how do you start putting the pieces of what happened
6 together over the next few days?

7 A Just by gathering information, talking to Kevin and the other
8 people that were there apparently, the other employees.

9 Q Okay. And did Kevin -- were you shown pictures?

10 A Kevin did. Yes, he showed me pictures.

11 Q And were you -- let's look at demonstrative 16.

12 THE CLERK: 16?

13 MR. PRINCE: Demonstrative 16. It's a demonstrative.

14 THE CLERK: Okay.

15 MR. PRINCE: It's just a -- it's an exhibit that's in evidence.

16 I'm just calling it a demonstrative because --

17 THE CLERK: This is proposed?

18 MR. PRINCE: No, it's not a proposed. It's a -- these are
19 pictures that are already in evidence. I'm just using it demonstratively
20 side by side.

21 BY MR. PRINCE:

22 Q And on the left, I have the forklift; and on the right, I have the
23 car you were driving. Do you see that, Bahram?

24 A I do.

25 Q What was your reaction when you saw the forklift, the car,

1 the damage to the car?

2 A Shocked. Amazed.

3 Q Did it frighten you?

4 A It did.

5 Q In what way?

6 A I was lucky to be alive, I guess.

7 Q Is that you how you feel?

8 A I do.

9 Q Do you feel that same way now? You're lucky to be alive?

10 A I do.

11 Q And when you see these pictures now, how do they make
12 you feel?

13 A Not very good.

14 Q In what way?

15 A It's just not a good feeling. It reminds me of the situation I
16 had in the car when I was hit.

17 Q Okay. And does it affect you in the sense of had that not
18 happened, you wouldn't be in the medical position you're in, the
19 financial position you're in and not able to work?

20 A All of that. All of the above.

21 Q Does it serve as a constant reminder to you?

22 A It does, nightmares about this.

23 Q What sort of nightmares do you have?

24 A Thinking about, you know, what if something worse would
25 have happened or, you know, you think a lot about things like this. It's

1 just etched in the memory.

2 MR. PRINCE: Yeah. And I want to look at demonstrative 14.

3 BY MR. PRINCE:

4 Q In addition to the front, I mean was there also -- you're
5 looking -- was there damage to the roof of the car?

6 A Yes, it buckled.

7 Q And was the door, passenger door, damaged?

8 A Yes.

9 Q Okay. Was this car repairable after this?

10 A I don't think so. No.

11 Q Okay. And when you looked at some of the interior pictures
12 of the car from your vantage point -- let's look at 2035 -- the window is
13 caved in there and if you look at 2036 or 83A and looking at that with
14 which would be your vantage point within the car, was there anything
15 minor about this to you, Bahram?

16 A No.

17 Q Was this a substantial collision from your standpoint as a
18 human being in that car?

19 A It was.

20 Q And when you look at these pictures, does it frighten you?

21 A It does.

22 Q How?

23 A I can't even look at them. You know, being in that position in
24 that car, is just --

25 Q Did your life change forever as a result of that day?

1 A It did.

2 Q Now, I want to talk about your medical care --

3 A Okay.

4 Q -- a little bit. How were you doing in the days and weeks that
5 followed the collision?

6 A I had a lot of pain. I had a lot of pain.

7 Q Pain where?

8 A The whole left side of me was -- also right and my back.

9 Q Okay. So you had some pain in your neck and your upper
10 back and shoulder and into your arm?

11 A Yes. Yeah.

12 Q And did you also have some lower back and middle back
13 pain?

14 A I did.

15 Q And did you take any time off of work initially?

16 A A few days.

17 Q Okay. And how were you feeling a few days later?

18 A Worse.

19 Q Okay. Were you in a lot of pain?

20 A I was in a lot of pain.

21 Q And the records, the medical records show that about four
22 days later you went and saw the assistance of a chiropractor, Downtown
23 Neck and Back Clinic.

24 A Yes.

25 Q And why would you wait a few days to go?

1 A Worker's comp had to make that appointment.

2 Q Okay. And when you did that and you go back to work, how
3 are you doing physically?

4 A Not good. I couldn't perform my work.

5 Q Okay. Did you try to continue to do your job?

6 A Yes, I did try to push through. I figured it would be, you
7 know, something that it would go away. You know, I was hoping that.

8 Q So initially, you thought this would just be a, you know,
9 some kind of a strain and in a few days, you'd be better?

10 A Yes.

11 Q Is it your nature to try to push through?

12 A Of course.

13 Q And at that point in time, I mean was Casey still living at
14 home, your son?

15 A Yes.

16 Q What about Darian?

17 A He was too.

18 Q Were they financially dependent upon you?

19 A Yes.

20 Q And also your girls, were they also financially dependent
21 upon you?

22 A Yes, they were all in school.

23 Q And so, I mean, taking off work, obviously, would mean
24 missing out on your income?

25 A Correct.

1 Q And as you continue to try to push through in your job,
2 what's -- what parts of the job couldn't you do any longer, Bahram?

3 A Sitting down negotiating deals with customers.

4 Q Why?

5 A It would take a lot, you know, it would take a lot to sit down.
6 I was in a lot of pain. I couldn't concentrate. I had to take breaks.

7 Q Okay. Is that -- as a sales manager, being off the floor taking
8 breaks, does that affect your performance?

9 A Yes.

10 Q How?

11 A Well, you wouldn't be able to get a deal and a commission
12 off of that deal. And so I was unable to sit there and close a deal, finish
13 up the deal.

14 Q Okay. And when you say breaks, what kind of breaks would
15 you take?

16 A I would go upstairs and use ice packs and all that. The
17 doctor told me to use the chiropractor --

18 Q During the day?

19 A During the day, yes. Lay back and with a towel rolled up
20 behind me and --

21 Q And after -- at some point, were you not able to do that job in
22 June of 2013?

23 A It was a couple of weeks later I couldn't do it.

24 Q And at that point, you know, given -- how many days a week
25 did you need to be there and how many hours a day did you need to be

1 there as a floor sales manager?

2 A Five, six days a week and 10, 12 hours a day I had to work.

3 Q Did it affect your concentration level, your pain?

4 A It did.

5 Q Did it affect your stamina to do your job?

6 A It did.

7 Q Did it affect your ability to communicate in the way you'd

8 want to --

9 A Yes.

10 Q -- and the way you normally were accustomed to?

11 A Yes.

12 Q Were you as effective?

13 A I was not.

14 Q And what -- Mr. Kahn yesterday said that you quit your job at
15 the end of June 2013 -- end of June 2013. And did you quit your job?

16 A I did not. I just couldn't do that job anymore.

17 Q Okay. And I'm going to show you a document. I'm going to
18 show you Exhibit 114, bate number 1371. It says there's an employee
19 separation termination. It says June 20, 2013. Do you see that?

20 A I do.

21 Q Why did you decide -- why was there a decision made that
22 you're going to step away from that floor sales manager position?

23 A Because I just couldn't do the job anymore. I asked to be --

24 Q Did they have part-time sales available for you at that
25 dealership?

1 A I asked to go into part-time sales. They did not have.

2 Q Okay.

3 A And a friend of mine called from the other store and they had
4 that opportunity there, a Chapman store. Same company. I just moved
5 from one to another.

6 Q Which store are you talking about now?

7 A Jeep store in outer part, Henderson.

8 Q Okay.

9 A Excuse me.

10 Q So after you leave at floor sales manager Chapman Dodge,
11 you then -- how long after that do you start at the Chapman Jeep store?

12 A A couple weeks I would say.

13 Q And --

14 A Maybe a week-and-a-half.

15 Q And how are you feeling physically when you start at -- you
16 can take that down -- at Chapman Jeep a couple weeks later?

17 A Same way. I was, you know, but they gave me my own
18 hours, so I didn't have to punch in and out so --

19 Q When you say -- did you have more flexibility?

20 A I did. I did.

21 Q And at that time, were you, I mean, you know, the doctors
22 have described that you went through hundreds of doctor visits and
23 therapy appointments and injections. I mean, were you active with your
24 -- trying to not only work but also manage your medical care at the same
25 time?

1 A I was.

2 Q Was that hard?

3 A Very difficult.

4 Q How?

5 A Well, it would take a long time to go to the appointments,
6 that pain, you know, come back to work. Sometimes I had to leave work
7 to go to my appointments. Some of these doctors didn't have the
8 appointments that would coincide with my work.

9 Q Was it -- how long would -- let's just give the jury an
10 example. Like let's just take physical therapy. Was it -- is it just a -- it's
11 not just a visit there? It's actually getting ready, driving there, being
12 there and then driving back either home or work. How long would that
13 normally take? Just a one -- it sounds like a simple visit, but it's really
14 more than that.

15 A Well, you have to spend an hour there. It takes about an
16 hour-and-a-half to two hours to do the whole going back and forth. So a
17 total of two-and-a-half, three hours.

18 Q Would you sometimes do that during the middle of your
19 workday?

20 A I did.

21 Q So you would go to work, do your appointment and then go
22 back?

23 A Yes, sir.

24 Q How difficult was that?

25 A Very difficult because you're -- it's more painful when you

1 come back from physical therapy.

2 Q And how many hours a day and how many days a week were
3 you working when you went to Chapman Dodge --

4 A Five --

5 Q -- Chapman Jeep?

6 A Five to six.

7 Q How many hours a day, though?

8 A Ten, twelve hours.

9 Q So you're still trying to make it 10, 12 hours?

10 A I am.

11 Q Would you take breaks?

12 A I would. Frequently.

13 Q Tell us about those breaks.

14 A Well, I would go upstairs to the conference room, lay down
15 with an ice pack. It had a refrigerator up there. And just until I felt a little
16 better. Then I would come back down.

17 Q And how long would you typically go off the floor for?

18 A Probably about an hour.

19 Q Did that affect your performance since you're off the floor?

20 A Sure.

21 Q What would happen if you're in severe pain and you're trying
22 to negotiate a deal and finish a car deal?

23 A I would have to get up and leave.

24 Q Who would do the -- who would finish it for you?

25 A Another manager, another one of the floor managers or desk

1 managers they would come and finish it. Very difficult. It wasn't fair to
2 them either because they didn't know how far I'd gone in the deal and it
3 was difficult.

4 Q Okay. Was walking and, you know, standing and walking
5 and getting in and out of cars with people and showing cars was that
6 physically demanding on you?

7 A Yes, it was.

8 Q And how about just even just sitting at a desk once you're
9 now you kind of picked a car and you want sit down with a customer and
10 negotiate or discuss, you know, the terms of the deal. Was that hard?

11 A It was.

12 Q Now, during this time, after a few months, the pain did it
13 go -- did it improve? Did it stay the same? Did it get worse?

14 A Stayed the same.

15 Q Okay. Do you remember being referred to an orthopedic
16 spine surgeon, Dr. Perry, Dr. Archie Perry?

17 A I do.

18 Q Okay. And did Dr. Perry recommend that you undergo
19 injections, spinal injections with Dr. Schifini?

20 A He did.

21 Q Did those help much?

22 A For a short period they did. But long term, no.

23 Q Do you recall Dr. Perry recommending you undergo neck
24 surgery to you in July of 2014 --

25 A He did.

1 Q -- about a year later. And you're -- are you still working at
2 this point in July of 2014?

3 A I am.

4 Q And when he recommended neck surgery to you after you've
5 gone through multiple rounds of these injections that gave you
6 temporary relief, what was your reaction to that?

7 A Well, I asked about the surgery, what it is. I didn't know what
8 it was. He explained it to me and explained the procedure and the risks.
9 And I wanted to exhaust the rest of the, you know, I asked him for an
10 alternative. I didn't want to jump into a surgery.

11 Q Were you scared of the surgery?

12 A I was.

13 Q What -- did he -- after he explained the risks to you, what
14 scared you the most about the surgery?

15 A This. What I have right now.

16 Q Did he tell that you, you know, you could die, be paralyzed?

17 A Nerve damage, you could die, you could have infections. So
18 there was a lot of risks involved. I wanted to try injections and physical
19 therapy and whatever I could to avoid the surgery.

20 Q Right. So I want to stop here for a second. So in July
21 of -- I'm going to put that note up and then we're going to go backwards
22 in time.

23 A Yes, sir.

24 Q Okay? It's Exhibit Number 91, bate number 294, it's your
25 visit with Dr. Perry, July 7th, 2014. And I want to highlight the second to

1 last paragraph. That says, "Dr. Perry and I do believe the patient would
2 benefit from a surgical intervention directly at the level C3-4 and C6-7 as
3 previously discussed given these have been identified positively as his
4 pain generators. The patient is very apprehensive which is
5 understandable about surgical interventions." Do you see that?

6 A I do.

7 Q And then it says here that given this, the patient may benefit
8 from acupuncture. Did you go to acupuncture?

9 A I tried it once.

10 Q Did it help?

11 A It did not.

12 Q Okay. Now, there's been some discussions, Bahram, and I
13 want to -- how are you -- do you need a break or are you doing okay?

14 A No, I'm okay.

15 Q Okay. I want to talk about medically speaking how are you
16 doing in the couple of years before this, okay?

17 A Okay.

18 Q I mean, you've now been recommended for a surgery. Had
19 you ever, number one, had any in the 10, 15, 20 years before this, any
20 treatment directed to your neck or your spine at all?

21 A No.

22 Q Had you ever been to physical therapy for any neck problems
23 before this collision?

24 A No.

25 Q Had you ever been recommended for any kind of physical

1 therapy, chiropractor for your neck in any way?

2 A No.

3 Q Had you ever -- had you ever had -- been referred to a pain
4 manager who does these specialized injections into your spine before
5 June of 2013?

6 A No, sir.

7 Q Had you ever been to a spinal surgeon --

8 A No, sir.

9 Q -- for -- to recommend any type of surgery or procedure to
10 your neck?

11 A No.

12 Q Okay. And did you have any problems with your neck, do
13 you recall, ever before this?

14 A No.

15 Q Now, I want to ask you about a couple of questions about a
16 record from Southwest Medical Associates.

17 A Okay.

18 Q Do you remember going to Southwest Medical Associates in
19 2011?

20 A I really don't, but I'm going to look at.

21 Q Okay. Do you -- I mean do you remember going there just to
22 like establish a primary care relationship and that sort of thing?

23 A Yes, I do.

24 Q Okay. And your first we're going to -- is October 7th, 2011.
25 And it says -- if we can go to bate number 2113. And if we could go to

1 the reason for the visit. It says "patient checkup" in that subject. And
2 then it says, "Patient new to SMA," which is Southwest Medical
3 Associates, "has patches of itchy dermatitis, using over-the-counter
4 medication, has HTM," which is what, high blood pressure? Do you have
5 high blood pressure?

6 A I do, yes.

7 Q Do you control it with medications?

8 A I do.

9 Q Okay. And there's no comments about any neck complaints
10 on that visit and -- and the gentleman with the phone back there, that's
11 Dr. Tung. Do you remember Dr. Tung, the Defense expert?

12 A I do.

13 Q Okay.

14 A Vaguely.

15 Q Okay. And did they take some blood draw and do some
16 laboratory testing from you on that visit? Do you remember that?

17 A I don't remember that.

18 Q Okay. This is the next visit I really want to talk about.

19 October 25th, 2011, bate number 2110. And then under the subject. It
20 says, "Patient returned for lab results." Is that the reason why you were
21 there that day to follow up on your lab results according to this note?

22 A According to this note.

23 Q Then it says, "also complains of neck pain for several years.
24 Denies any history of neck surgery, no neck trauma." Bahram, you're
25 under the penalties of perjury here in this courtroom and I want you to

1 understand that you understand the importance of your testimony here
2 today. Do you recall ever reporting several years' worth of neck pain to
3 this doctor that day?

4 A I honestly don't.

5 Q Okay. Have you ever had neck stiffness, back stiffness of any
6 kind before?

7 A Sure.

8 Q But in connection with what?

9 A With work. You know, I put in -- after a week-long work, you
10 know, 50, 60 hours of working, I get stiff in the back. Normal stuff.

11 Q Okay. Anything that required any sort of medical care?

12 A No, sir. Absolutely not. Never been on medication or
13 anything like that for it prior to this accident.

14 Q Yeah. There was an x-ray taken that day which showed
15 degeneration which you've heard the doctors talk about. Do you recall
16 that x-ray being taken?

17 A I really don't. It seems nine years ago I can't remember it --

18 Q Okay.

19 A -- honestly.

20 Q And then I want to fast forward to March of 2012 and it's the
21 visit from March 12th, 2012. You're talking about some right knee
22 symptoms you're having. It's 2108. Okay. And then it says you were
23 there because injured right knee while skiing on Mt. Charleston about
24 three months ago. Occasionally gives out on him. The swelling has
25 decreased but he had torn his left ACL in the past. States it feels the

1 same way. Do you see that?

2 A I do.

3 Q And were you -- during, you know, the winter of 2011 and
4 early 2012, were you skiing?

5 A I was.

6 Q Any limitations, any problems with your -- for your neck?
7 Sounds like you twisted your knee. Any problems with your neck?

8 A No.

9 Q Okay. Any limitations at all during that period of time?

10 A No.

11 Q All right. The next visit is November 1st, 2012. This will be
12 your third visit there. Bate number 2106. And I'm going to ask you two
13 questions about your -- this visit plus about your neck and your arm.
14 Then it says -- if we can go to the reason for the visit and subject there.
15 Maybe even pull in the current meds. All right. It says, "Fifty-year-old
16 male presents to discuss lab results. States he is feeling well without
17 any physical complaints. Blood pressure has been running 130 over 90
18 after medications." It says -- where it states, "he's feeling well without
19 any complaints," is that consistent with your memory of how you were
20 doing before this?

21 A Yes.

22 Q Okay. And then it says your current meds was a protopic.
23 What was that for? Was that for your dermatitis --

24 A Oh, yeah.

25 Q -- this appointment?

1 A Yeah. I don't remember the name, but yes.

2 Q Okay. And then it says there's a Lisinopril. What is that for?

3 A Blood pressure.

4 Q Okay. Any pain medications or -- well, there it says none?

5 A No. None.

6 Q Okay. And then if you go down to the review of systems

7 exam, the musculoskeletal and the neurological. First off,

8 musculoskeletal which means your body. It says, "No joint, redness,

9 swelling." It says, "No persistent muscular pain." Do you see that?

10 A I do.

11 Q Is that your -- consistent with your own recollection that you
12 had no ongoing physical pain either neck or really anywhere else for that
13 matter?

14 A No.

15 Q Is that consistent with what you remember?

16 A Yes, it is.

17 Q All right. Then it says, "Neurologic. No headaches, extremity
18 numbness, paresthesia, weakness or clumsiness." Do you see that?

19 A I do.

20 Q Have you ever had any symptoms in your left arm, pain,
21 numbness, tingling, weakness before this collision?

22 A No.

23 Q How about now?

24 A I do.

25 Q When did the left arm problems start?

1 A It's always there after the accident.

2 Q It's always been there?

3 A Always.

4 Q Okay. Now, from Dr. -- Dr. Oliveri explained to the -- you can
5 take that down -- explained to the jury you tried multiple rounds of
6 physical therapy, you tried chiropractic care, Dr. Schifini did some
7 injections. But then you went to some other pain managers to do more
8 injections. Why did you do that, Bahram?

9 A I was looking for relief. I was trying to find relief. I did
10 everything I could to try to avoid surgery.

11 Q And we looked yesterday -- how was your sales
12 performance? I mean we can show the graph, if you could. Did
13 you -- number one, did you stay at Chapman Jeep until you finally
14 stopped working?

15 A The whole time.

16 Q When did you stop working at Chapman Jeep?

17 A 2016. I think it was towards the end.

18 Q Yeah. We have September 2016. Does that sound right to
19 you?

20 A That sounds about right, yes.

21 Q Okay. And so from, you know, July of 2013 until September
22 of 2016, did you work at Chapman Jeep?

23 A I did.

24 MR. PRINCE: Do you have the income graph up?

25 BY MR. PRINCE:

1 Q And were you trying to work as much as you could?

2 A Was trying to push through, yes.

3 Q How was pushing through working for you?

4 A You know, painful. It was no fun. I mean it was rough times.

5 Q Was your income the same?

6 A No.

7 Q How did it go down? Tell me in a way that it went down.

8 A Well, it went down because I wasn't at the tables. You know,
9 I was taking a lot of breaks. I was trying to put ice on my back and, you
10 know, get comfortable. The income started going down because other
11 people had to pick up the slack. Like I said, it wasn't fair to them either
12 because they had their own so --

13 Q Okay. Did you like working at Chapman Jeep?

14 A I loved it. I found my niche. The place was very nice. Family
15 owned. It was a great dealership.

16 Q Yeah.

17 A Treated people right.

18 Q And as you're kind of -- we're now moving into 2016, how
19 are you feeling?

20 THE COURT: Is this probably a -- okay. Go ahead and
21 answer the question.

22 THE WITNESS: Yes, sir.

23 BY MR. PRINCE:

24 Q How are you doing physically by say early, mid-2016?

25 A It was pretty bad now at this time. I was at my wit's end.

1 Q Okay.

2 THE COURT: We're going to take a 10-minute recess.

3 THE WITNESS: Thank you.

4 THE COURT: During this recess, you're admonished do not
5 talk or converse amongst yourselves or with anyone else on any subject
6 connected with this trial or read, watch or listen to any report of or
7 commentary on the trial or any person connected with this trial by any
8 medium of information including without limitation newspapers,
9 television, radio or internet. Do not form or express any opinion on any
10 subject connected with the trial until the case is finally submitted to you.

11 We've been going since 9. I didn't want you to think that we
12 -- we've been going. Okay.

13 THE MARSHAL: Ten minutes, folks. Please rise for the jury.

14 [Jury out at 10:52 a.m.]

15 [Recess taken from 10:52 a.m. to 11:07 a.m.]

16 [Audio begins at 11:07:25 with witness answering question]

17 THE WITNESS: Correct.

18 BY MR. PRINCE:

19 Q Where you work -- did you ever start working less hours?

20 A I did.

21 Q When did you start working less hours?

22 A Right after the accident, a few days.

23 Q Yeah. And with time, you know, 2015/2016 timeframe, are
24 you moving ahead a little bit? Just kind of -- you know, you've kind of
25 been through the injections. Dr. Perry recommended surgery. You

1 didn't want that. You've tried a couple different pain doctors to see if
2 that would help control the pain. Now you're into 2016.

3 So the beginning of 2016, the last year that you worked, are you --
4 how are were you doing then? I mean are you working less hours than
5 you even were before? Or how are you modifying your schedule in a
6 way to try to make it work for yourself?

7 A It's a lot less. I couldn't work as much at all. The pain was
8 increasingly more and unbearable, unrelenting.

9 Q And remember -- Dr. Oliveri, he did an impairment rating on
10 you in April 2015.

11 A Yes.

12 Q Do you remember seeing Dr. Oliveri through worker's comp
13 for that?

14 A I do.

15 Q Okay. Before that, there was a functional capacity evaluation
16 that's been described as invalid. Do you remember going to that
17 functional capacity evaluation with a physical therapist in 2014?

18 A Yes.

19 Q Okay. Tell us about that.

20 A Nice gentleman. He wanted me to pick up some weight and
21 reach above my head all the way up. And some of the things I told him
22 that were painful, and I just can't do it. So we just kept on going to the
23 next one, next one. There were things that he asked me to do that I
24 couldn't do. And I told him that. I said it's very painful and I don't want
25 to do it.

1 Q Okay. And why -- what about it was painful to you?

2 A Well, the amount of weight that he wanted me to pick up or
3 pull or push. Reaching above my head, there's -- you know, especially
4 on the left side. There's some pins that he wanted me to put into the --
5 you know, operator area. I could do it with the right. I couldn't do it
6 much with the left. So it was very painful on the arm. So just couldn't
7 do it.

8 Q Okay. And Dr. Oliveri, he eventually rated you with an eight
9 percent whole person impairment. And at that -- after that, what
10 happened to the worker's compensation -- the work comp claim? Did it
11 close after that?

12 A It did.

13 Q And then how were you handling health -- your health care
14 after that? Were you handling that privately?

15 A Privately, yes, I was.

16 Q Okay. So now we're in 2016. How many hours a day are you
17 working, say, starting in the beginning of 2016?

18 A I don't remember how many hours, but I remember a lot of
19 frequent breaks.

20 Q The breaks continued?

21 A It did.

22 Q And as we kind of get through the -- to the summer of 2016,
23 how are you doing?

24 A Not very good. Hot, bothered, being bothered by the pain a
25 lot.

1 Q What was the quality of your life by the summer 2016?

2 A I couldn't take it anymore.

3 Q Were you active like you once were?

4 A No. I wasn't doing anything at all. Just coming to work,
5 working as much as I could, trying to push through, going back home
6 and paying for it.

7 Q Did you have a 401(k) before then?

8 A I did.

9 Q Did you have to borrow money from the 401(k) to help you
10 live?

11 A I did. Hardship money I borrowed, yes.

12 Q Did you use -- did you have any money left in your 401(k) or
13 did you use it all?

14 A At the end, I used it all.

15 Q Was financial pressure getting to you also?

16 A Very much so.

17 MR. PRINCE: And if you could show the income slide, the --
18 just --

19 BY MR. PRINCE:

20 Q Okay. It's like, you know, the year before the collision, you
21 earned 156,000, according to the documents, and then the year of the
22 accident, 105,000. The next year, 124,000. So 2014 you got it back up
23 there. 97,000 in 2015, and only 55,000 in 2016.

24 Did you ever get back to where you were before?

25 A Never.

1 MR. KAHN: Your Honor, I would just ask that this exhibit --
2 this demonstrative Exhibit 61 be marked by the clerk and I be able to
3 utilize it for my witnesses as well.

4 MR. PRINCE: It's in the PowerPoint that's already been
5 lodged with the Court. It was done in opening. And so, the Court has it.
6 You have a copy too.

7 BY MR. PRINCE:

8 Q So, Bahram, how did it -- you know, being the provider for
9 yourself and your family with your incoming coming down like that, how
10 did that make you feel?

11 A Terrible. Terrible. I couldn't take care of my children, my
12 needs. I couldn't do anything.

13 Q And when you -- at some point, you come to the decision
14 that you need to stop working?

15 A In September of 2016, yes, sir.

16 Q And tell us what went into that. Tell me -- tell us what's
17 going on with you physically, mentally, and emotionally that led to that
18 decision.

19 A It was terrible. I couldn't take it anymore. I was depressed. I
20 was sad. No social life. Withdrawn. Just went home. Couldn't do
21 anything.

22 Q Were you tired?

23 A I was tired, tired of the pain.

24 Q Could you sleep well?

25 A Not very well today.

1 Q Tell the jury how you sleep at night. Tell us your pattern.

2 A Wake up a few times and then --

3 Q What wakes you up?

4 A Pain mostly, numbness, tingling, more recent.

5 Q So what do you eventually tell the dealership?

6 A I'm sorry. I can't do it.

7 Q Okay. I mean someone who -- you know, someone with a
8 strong work ethic from your -- still from your father, I mean is that a --
9 were you embarrassed by that decision?

10 A I was embarrassed. I was humiliated by it. I was a strong
11 person on the floor, top earning. And then I couldn't even sit on the
12 table. People looking at me.

13 Q Did you come -- I know Darion [phonetic] is in the courtroom.
14 Did you become financial dependent upon him?

15 A I did. I sure did.

16 Q Does he live with you now?

17 A He does.

18 Q Does he provide -- does he help you around the house, help
19 with your needs?

20 A A lot.

21 Q Do you feel like you're a burden?

22 A Sometimes I do, yes.

23 Q How does that make you feel that you feel like you're a
24 burden on your family?

25 A It's not supposed to be this way. I'm supposed to take care

1 of him and my other children until they find their way.

2 Q And when you eventually took off work at the end of 2016,
3 and in 2017, you make the decision of whether, yeah, I need to go seek
4 another surgical consultation, I need to figure out what my options are?

5 A Yes.

6 Q And who did you go see?

7 A Well, I did some research. Dr. Kaplan was -- we finally, we
8 decided on Dr. Kaplan. Went and saw him . He took a look at all my
9 records, examined them thoroughly. We did some x-rays and CT scans
10 and things like that and decided that the surgery would be the way to go.

11 Q And so, he'd recommended the surgery that you've now
12 had?

13 A He certainly did.

14 Q And why did you eventually -- why did you decide to
15 undergo it in January 2018?

16 A I just have had it. I've had it with this pain. I want to -- you
17 know, I figured that this would help me. There's -- the quality of life is
18 not there anymore.

19 Q And how did Dr. Kaplan describe the surgery?

20 A Same thing as Dr. Perry. He said there are risks involved,
21 you know. And, you know, you could get nerve damage and all that.
22 You could have infections, paralysis. He did tell me all of that.

23 Q Did you think you'd exhausted everything before you
24 decided to undergo the surgery?

25 A I definitely did. I tried everything I could.

1 Q And when you have the surgery in January 2018, what did
2 you do after?

3 A Afterwards, it's painful in the hospital bed. I was begging for
4 medication or something.

5 Q Did anything get worse?

6 A I left home.

7 Q How did it get worse?

8 A I couldn't even lift it. It was 100 pounds I was carrying, it felt
9 like, at all times.

10 Q Could you move it well?

11 A I could not. I couldn't even raise it.

12 Q And how did that make you feel?

13 A Terrible.

14 Q What did Dr. -- what were you told about your condition?

15 A Dr. Kaplan said that it would happen to very few patients, the
16 nerve issue. So I think that's what I had developed afterwards.

17 Q Okay. And do you remember being called -- it being called a
18 C5 neuropraxic injury, a nerve injury?

19 A Yes. Another doctor also confirmed that as well.

20 Q Who was that? What doctor is that? Dr. Shannon; does that
21 sound right?

22 A Dr. Mary Ann Shannon. That's correct.

23 Q Okay. And with regard to a neuropraxic injury, had you ever
24 heard of it being called a palsy?

25 A I did.

1 Q Okay. And did you think neuropraxia was some type of a --
2 at least partial paralysis?

3 A Yes.

4 Q Did it feel that way to you?

5 A It did, certainly, on my left side.

6 Q Did it ever improve?

7 A It did, you know, somewhat.

8 Q Did it ever -- what's happened now to your left -- your
9 shoulder, your back, your arm? What's happened physically to that
10 now?

11 A Very weak. I've lost a lot of muscles on this side.

12 Q Do you have atrophy?

13 A I do have atrophy.

14 Q How about your grip strength?

15 A Very much has been affected.

16 Q And now you've got -- did it take away the neck pain?

17 A Not really.

18 Q How would you characterize after -- you know, a few months
19 after the surgery, how would you characterize how you're doing after
20 that -- your surgery? I mean say a year later.

21 A A year later.

22 Q 2018.

23 A This left side is a lot worse.

24 Q Do you think you're better off or worse off after the surgery?

25 A Probably worse off.

1 Q Do you -- in terms of -- was one of your fears like a
2 complication that you've now experienced from the surgery even though
3 it's a known risk and a complication? Did you actually experience that
4 yourself?

5 A Yes. That's what I was afraid of.

6 Q And that happened?

7 A It did happen.

8 Q What are your limitations now?

9 A Sitting, walking for a long period, driving, sleeping.

10 Q Are you getting much sleep?

11 A I wake up about two, three times a night.

12 Q What do you do?

13 A Just massage myself.

14 Q Do you take medication? Do you take pain medication?

15 A Massage this out.

16 Q What pain medication -- or what medications do you take?

17 A Gabapentin.

18 Q What's that for, for the nerve pain?

19 A I think it is.

20 Q What else?

21 A Oxycodone as I need it. I know they're very dependent.

22 Q What else?

23 A A few other ones. I don't remember the name, but I have a
24 whole bunch at home.

25 Q And when you -- what's a typical day look like for you?

1 A Wake up when I can in the morning. Try to make breakfast,
2 try to get breakfast for the son. And you know, sit in the chair and -- with
3 my pillow propped up. Watch a little bit of news, try to get outside to
4 water plants.

5 Q Do you --

6 A And --

7 Q I'm sorry.

8 A -- come back inside and lay down.

9 Q Do you try to exercise?

10 A I do.

11 Q Do you stretch?

12 A I do.

13 Q What are things that you do?

14 A Well, there are a few things that I push up against the wall a
15 little bit and stretch it. Darion has been very helpful, been showing me --
16 and physical therapy also. You know, a few stretches and all that that I
17 do.

18 Q And do you feel lonely?

19 A I do. I have nothing to do, boring at home.

20 Q Do you think it's realistic for you to go back to work safely
21 and be effective in any way?

22 A I don't think so.

23 Q I mean there's been reference here that this -- you know, you
24 have access to your iPhone. You can just do business from your iPhone.
25 Can you do the -- run a car business from your iPhone?

1 A No. You have to touch and feel the vehicles, so you can't.

2 Q Is that the only industry you've really ever known?

3 A Yes.

4 Q And with regard to your day-to-day life, do you feel anxious
5 about your future?

6 A I am. Very [indiscernible].

7 Q What are you anxious about?

8 A The children are getting older. Sooner or later, they're going
9 to have kids. I wanted to be there for them, you know, try to teach them
10 sports and all that, grandchildren. I'm even afraid to pick -- you know,
11 thinking about hey, how about if I have a granddaughter or grandson. I
12 can't even lift them.

13 Q Would you think --

14 A I can't even pick them up.

15 Q Would it be -- would you feel it'd be unsafe to pick up a
16 baby?

17 A But if I have a spasm of some sort and drop the baby. How
18 would I live after that?

19 Q These are things that you think about?

20 A All the time.

21 Q How about your social life now?

22 A There is none. It's nonexistent.

23 Q What do you do to try to keep yourself going, moving
24 forward?

25 A Well, I'm hoping maybe modern or something that can help

1 me. New inventions.

2 Q Now with -- there's been a lot of discussion in front of the
3 jury about your spinal cord stimulator?

4 A I have to have that, yes.

5 Q Did you go back and reopen your worker's compensation
6 claim?

7 A I did.

8 Q Okay. Did you know that your -- you could even reopen
9 when you had your surgery? Did you ever know that was an option?

10 A I did not know that.

11 Q Okay. So you went back, and you reopened your work comp
12 claim. Have they approved the spinal cord stimulator for you?

13 A I believe so.

14 Q Okay. And did they send you to another doctor for an
15 opinion, Dr. Thalgott?

16 A Yes, he did.

17 Q And did he recommend the spinal cord stimulator?

18 A He did, yes.

19 Q How about Dr. Kaplan? Did you recommend the spinal cord
20 stimulator?

21 A Yes.

22 Q And you had Dr. -- also Dr. -- and you also went back to Dr.
23 Schifini, who's been involved in your care early and then he's been
24 involved now again.

25 A I did.

1 Q Did Dr. Schifini try some additional injections?

2 A He said after post-operation let's try a couple more injections
3 to see if they helped, and they did.

4 Q Did they help?

5 A They did not.

6 Q And with regard to -- did Dr. -- what did they tell you your
7 remaining medical option is other than just living with it? The
8 stimulator?

9 A The stimulator.

10 Q Are you going to have the stimulator implanted?

11 A Yes.

12 Q Now we heard -- we saw some records from a Dr. Staci Ross,
13 who is a psychologist.

14 A Psychologist, yes.

15 Q So you went there for psychological clearance before the --
16 for the stimulator. Do you remember meeting with her?

17 A Yes. Worker's comp asked me to go.

18 Q Okay. And did she clear you for that?

19 A She did.

20 Q Okay. When do you plan on hopefully having the spinal cord
21 stimulator implanted?

22 A I'll have to have a CT scan first, which I have an appointment
23 on the 26th of this month with Desert Radiology. And then whenever
24 they schedule me for the surgery.

25 Q Now did you go back and do another FCE in 2019 in this

1 year?

2 A I did.

3 Q Okay. Did you get through that one?

4 A I did.

5 Q Was it painful?

6 A It was.

7 Q Okay. Even though you went through the FCE and they, you
8 know, laid out some limitations, did Dr. -- did you have a discussion with
9 Dr. Oliveri whether it was safe and appropriate for you to return back to
10 work?

11 A I did.

12 Q What did you learn from Dr. Oliveri?

13 A He said it's not safe for me to go back to work.

14 Q Now have you had any, so we're clear, Bahram, did you
15 reinjure yourself in any way after June 2013? Like any other car
16 accident, fell, anything like that?

17 A No, sir.

18 Q How would you describe the quality of your life now
19 compared to how it used to be?

20 A One-eighty.

21 Q Night and day?

22 A Night and day. I was active, social life, work, the children,
23 going out with friends. Not anymore.

24 Q And are you hopeful for the future?

25 A I am hoping the modern medicine can help me.

1 Q You know, I mean do you have some good days, that are --
2 some days that are better than others?

3 A Yeah.

4 Q What do you do when you have a good day?

5 A Basically the same. Not much, because I'm afraid of --

6 Q What if you -- are there days that you feel like you overdo?
7 Like I was out. I probably did too much. I was probably too active one
8 day. I mean what happens in the days after that?

9 A I pay for it. I pay for it dearly. I have to lay on the bed or
10 couch for a long period to recuperate.

11 Q Okay. Mr. -- or excuse me. Dr. Tung. I don't see him in here.
12 He was in here a moment ago, the gentleman with the phone. Do you
13 remember the Defense asked you to see a Dr. Tung?

14 A Yes.

15 Q And he's the neurosurgeon from San Diego they hired to see
16 you?

17 A Yes.

18 Q How long did he meet with you face to face?

19 A Probably less than five minutes.

20 Q So brief?

21 A Very brief.

22 Q Okay. What do you remember about his examination of
23 you?

24 A He asked me to make a face. First, he asked me to walk five
25 steps in the small office, walk back and forth. And then he pulled on my

1 arms, and that was it.

2 Q When you saw him, had you had the surgery yet?

3 A No.

4 Q Okay. He's a neurosurgeon. Did you ask him about the
5 surgery?

6 A I did.

7 Q And what did you ask him?

8 A I asked him what he thought of surgery. That was my
9 concern. So I asked him.

10 Q And what was his response to you?

11 A He said I refer you to your physicians, to your treating
12 physicians. Those are the guys who can best decide for you, because I
13 haven't been your physician. So I don't know.

14 Q So when you asked him specifically, did he ever tell you I'm
15 against surgery for you, you're not a surgical candidate? Did he ever tell
16 you that?

17 A No, sir.

18 Q And so, when you made the decision to have surgery, did
19 you rely upon the education, training, and expertise of Dr. Kaplan?

20 A I did.

21 Q Now other than just medications and a stimulator, are there
22 -- are you aware of any other medical options that have been provided to
23 you?

24 A No.

25 MR. PRINCE: Your Honor, let me check my notes. Let me

1 just check one thing. I made a few notes on my phone.

2 BY MR. PRINCE:

3 Q I know Darion lives with you now and provides you a lot of
4 help. And I'm sure -- certain -- are you grateful for that?

5 A I am.

6 Q And he's obviously a very dutiful son. Are you -- do you
7 worry about like how you'll care and manage for your needs once he
8 moves out? I mean I guess at some point he's got to just move on with
9 his life too.

10 A Sure.

11 Q I mean he'll get married or buy his own house and just live
12 his life.

13 A Sure.

14 Q What sort of fears do you have?

15 A Not being able to take care of myself.

16 Q Okay. What's it like living with chronic pain and this arm
17 symptom?

18 A Terrible.

19 Q Is there any facet of your life that's not affected by it?

20 A Absolutely not. Everything has been affected.

21 Q Do you find that you're more cautious with doing things, you
22 know, just because like you don't want to injury any other part of your
23 body or aggravate your condition?

24 A I am. I think about that all the time. How about if I hurt my
25 left side -- right side? How about if I hurt my lower back? Then I'll really

1 be disabled. I won't have anything to -- helpless.

2 Q Right. I guess the right word would be helpless at that point.

3 A Yes.

4 Q Do you -- have you looked for things that you think you can
5 do but workwise that you can be consistent with and effectively do?

6 A I cannot do anything consistent.

7 Q When you take medications, can you concentrate well?

8 A I cannot. I fall asleep or, you know, loopy.

9 Q Yeah. So then what about right now? I mean we've been
10 going here. You've been testifying for an hour-and-a-half. I mean
11 you've been in court for a couple of hours and you haven't had your
12 medication. And --

13 A I have it.

14 Q -- you have it in your pocket.

15 A I do have it in my pocket. Right after this, I'm going to have
16 to take it.

17 Q When you don't get restful sleep, do you feel fatigued?

18 A All day.

19 Q What does it do to the pain when you feel more fatigued?

20 A Exacerbated.

21 Q What are your concerns about the spinal cord stimulator?

22 A Well, the way they described it to me was that there's not
23 enough room there to go for a trial, I guess. So they're going to have to
24 implant this permanently.

25 Q Okay. Do you have concerns about whether it's going to

1 work or not?

2 A Yes.

3 Q Are you hopeful that it will work?

4 A Well, that's what they tell me, all the doctors tell me. Yes, I
5 am hopeful.

6 Q Have you ever returned back to doing the activities that you
7 used to do, like skiing, you know, going up to the lake to being
8 [indiscernible] or whatever, with your children?

9 A Sure.

10 Q You have done that, or you haven't done that?

11 A I have not, not after the accident. I haven't done any of that.

12 Q Okay. Did you try -- did you ever go to a ski lodge or -- with
13 the boys after this?

14 A I took him -- we all went to skiing in Mount Charleston after
15 the accident.

16 Q Did you ski?

17 A I could not. I waited at the base for the kids to enjoy.

18 Q Just to watch them?

19 A Yes.

20 Q Did you feel left out?

21 A Well, yes, sitting there by myself, not exercising, enjoying
22 themselves. So --

23 Q A lot of the other issues that came up the other day was your
24 pinkies, your -- on the x-rays. Does that ever -- do they ever cause you
25 any trouble in your life, your pinkies?

1 A No. I was born this way.

2 Q Then there was a discussion about a scar on your left elbow.

3 A Right.

4 Q Yeah, on your left elbow.

5 A Yes.

6 Q Tell us what happened there?

7 A Fifty some years ago, I fell down, broke a bone here, and
8 scraped my elbow on the ground.

9 Q So is there a scar? If we lift up your shirt, would there be a
10 scar there?

11 A Yes. Would you like to see it?

12 Q Yeah.

13 A Okay.

14 Q Maybe turn this way so the jury can -- is there like keloiding
15 on this, like up here in the upper elbow, kind of up in this area here?

16 A Yeah. I scraped it here and broke it here.

17 Q Okay. Did you make a -- I mean that sounds like a childhood
18 injury. Did you make a complete recovery from that?

19 A Yes.

20 Q Okay. Did it ever give you any ongoing problems of any
21 kind?

22 A No.

23 Q There's a gentleman over there in a blue t-shirt. His name is
24 Mr. Bennett.

25 A Okay.

1 Q That's the Defendant's, Capriati Construction Corporation's --
2 that's their vocational expert, that gentleman sitting over there now.

3 A Yes.

4 Q He says you can go back -- in his opinion, you can go back to
5 work full duty. You can go back to work in doing car sales in the way
6 you did before.

7 A Okay.

8 Q That's his position. Is that realistic, Bahram?

9 A Not in my opinion. I don't think so. I'm not --

10 Q Okay. If -- could -- if you could do it, would you do it?

11 A Yes. I would love to. I would love to go back to work and
12 start earning a living and honest living and -- I love my job.

13 Q Right. And is there anything about your life that you could
14 go back to doing the way you did it before? Is there any aspect of it,
15 including work?

16 A No.

17 Q Bahram, thank you for your time. I know it's difficult but
18 thank you.

19 A Yes, sir.

20 MR. PRINCE: I have no additional questions.

21 THE COURT: Counsel, approach.

22 [Sidebar begins at 11:35 a.m.]

23 THE COURT: Do you want to start with him now or you want
24 to --

25 MR. KAHN: I think we --

1 THE COURT: -- go to early lunch?

2 MR. KAHN: I think we should just start with him now.

3 THE COURT: Okay.

4 MR. PRINCE: Yeah. Yeah, let's do it.

5 THE COURT: All right. You're talking Tung, right?

6 MR. KAHN: Yeah. He's in the back. We've got some
7 pictures also.

8 THE COURT: Okay. I'll tell him.

9 MR. PRINCE: Are you going to cross-examine right now,
10 start -- let's start cross-examining right now.

11 MR. KAHN: I'll cross after. I'll cross after the doctor is done.
12 I want to get him in and out.

13 MR. PRINCE: Well, I know. My client has got to take a pain
14 medication. He's got some things going on.

15 THE COURT: Well, it'll -- he can -- it'll be Monday. Your
16 Tung is going to take the rest of the day probably.

17 MR. KAHN: He's going to take at least a couple hours.

18 THE COURT: Yeah. And with cross I'm sure. So it'll be, you
19 know -- he can go home. And it'll be --

20 MR. PRINCE: Okay.

21 THE COURT: -- Monday or Tuesday. Whatever.

22 MR. PRINCE: Okay.

23 THE COURT: All right.

24 [Sidebar ends at 11:36 a.m.]

25 THE COURT: All right. Ladies and gentlemen, we're going to

1 take a witness out of order.

2 Mr. Yahyavi, you may take a seat.

3 THE WITNESS: Okay, sir.

4 MR. PRINCE: We're going to --

5 THE COURT: Sometimes expert's availability -- so we're
6 taking Dr. Tung out of order, and we'll have cross-examination probably
7 Monday or Tuesday. Whatever.

8 THE MARSHAL: Watch your step. Remain standing and face
9 the Clerk of the court.

10 THE CLERK: Please raise your right hand.

11 HOWARD TUNG, DEFENDANT'S WITNESS, SWORN

12 THE CLERK: You may be seated.

13 MR. KAHN: Could you please state your full name for the
14 record?

15 THE WITNESS: Howard Tung, T-U-N-G.

16 THE CLERK: And spell the last name.

17 THE WITNESS: T --

18 THE COURT: Spell your last name.

19 THE WITNESS: T-U-N-G.

20 THE CLERK: Oh, sorry. Thank you.

21 DIRECT EXAMINATION

22 BY MR. KAHN:

23 Q Dr. Tung, you're a medical doctor, correct?

24 A Yes.

25 Q And you flew in for these proceedings today, correct?

1 A Yes.

2 Q Can you tell the jury where you preside?

3 A I live in San Diego.

4 Q And what's your current employment?

5 A I'm a neurological surgeon.

6 Q Do you have any teaching activities that you do?

7 A I'm a professor of neurosurgery at UCSD.

8 Q Okay. So you teach --

9 A Clinical professor.

10 Q You teach neurosurgeons, right?

11 A Correct.

12 Q And neurosurgery can also be called brain surgery; is that
13 correct?

14 A Yes.

15 Q And you --

16 A Brain and spine.

17 Q Brain and spine. And a portion of your actual surgical
18 activities are related to brain surgery, correct?

19 A Absolutely.

20 Q About what percentage split do you do between spinal
21 surgery and brain surgery?

22 A So the last couple of -- the last four or five years, I'd consider
23 -- I would split it up, about 80 percent spine, 20 percent cranial. I do
24 trauma surgery and brain surgery and vascular surgery. All sorts of
25 things.

1 Q You have testified as an expert in other cases, correct?

2 A Yes.

3 Q And just to be clear to the jury, in this case, you are not a
4 treating physician of Mr. Yahyavi, correct?

5 A That's correct.

6 Q You are serving only in the role of an expert witness capacity
7 and a forensic capacity for litigation, correct?

8 A Correct.

9 Q And there was just some testimony -- I know you stepped
10 out, but there was just some testimony about your IME, and a question
11 that was asked of you about whether he should get surgery, something
12 like that. Would it be appropriate for you, as a forensic expert doing an
13 independent medical examination of a Plaintiff, to recommend or tell
14 them what to do regarding surgery?

15 A I don't usually tell, in that situation, what a patient should or
16 shouldn't do.

17 Q And I think his testimony was -- to the effect of you told him
18 he should check with his treating physicians; does that sound correct?

19 A I don't have an independent recollection, but it sounds like
20 something I would say.

21 Q When were you retained in this case? Or at least
22 approximately when?

23 A It was approximately when -- well -- it was sometime in early
24 2016 probably.

25 Q 2016. So nearly three and a half years ago, roughly?

1 A Correct.

2 Q And what were you asked to do?

3 A So I was asked to provide a medical examination, which we
4 just talked about, but also, I was provided some records in and around
5 that time, and then to give -- asked for my opinions with regards to the
6 medical treatment, the possible future medical treatment,
7 reasonableness of treatment, and causation thereof.

8 Q And you're being paid for your time on this case? The
9 Defense is paying you for your time, both for all the work you've done up
10 to date, and to be here at this trial, right?

11 A Yes.

12 Q And do you have a ballpark of how much you've charged the
13 Defense for all of your services up to today?

14 A It's about \$15,000 to \$20,000.

15 Q Okay. Can you tell the jury where you went to undergrad
16 and where you went to medical school?

17 A Sure. So my educational background is went to Dartmouth
18 College. I think someone else also did. I'm a few years older. It's by
19 Beta Kappa Magna, and I did -- and then I stayed on and did my medical
20 school at Dartmouth. Actually, I graduated college and medical school in
21 seven years. It often takes eight years or most -- 99 percent of people
22 take eight years. I did it in seven years. And then I went on and did my
23 residency at USC, University of Southern California, where I spent --
24 that's a seven year residency, and then one of the years was spent at Cal
25 Tech. I did some molecular biology research at Cal Tech for a year. I

1 worked with Dr. Lee Hood [phonetic], who when we were doing -- you
2 know, he was actually nominated for the Nobel Prize. So I was really
3 lucky to be in that sort of a lab. And then after residency, I began my
4 practice in San Diego.

5 Q And you have several certifications as you sit here, correct?

6 A Yes, I do.

7 Q Can you tell me what your medical certifications are and then
8 we'll go to state certifications for other things?

9 A Well, I'm board certified in neurological surgery, and I mean,
10 that's my main certification. Once you finish your residency, you belong
11 to a number of national societies which all -- most all neurosurgeons
12 belong to. American Association of Neurological Surgeons, the
13 Congress of Neurological Surgeons, Western Neurosurgical Society, the
14 California Association of Neurological Surgeons, San Diego Academy.
15 I've been -- I'm executive board for the Congress of Neurological
16 Surgeons. I also belong to the North American Spine Society. I'm on a
17 committee there, the Professional Ethics and Conduct Committee.

18 Q Let me stop you there. The Spine Society and Ethics
19 Committee, can you explain to the jury what that committee does?

20 A Sure. Sometimes, there are disputes among surgeons, and
21 so we look at those disputes. Sometimes, it has to do with forensic
22 matters. Sometimes, it has to do with what would be considered
23 testimony outside the bounds of what the -- as the society feel would be
24 reasonable. And so there are certain kind of ethical guidelines that we --
25 and conduct that we're supposed to follow. American Association of

1 Neurological Surgeons has something similar, as well, and if you fall
2 outside those bounds, you can get reprimanded.

3 Q What about -- do you have any qualifications from the State
4 of California for any kind of medical examination or review?

5 A Sure. So I'm a -- in California, the workers' compensation
6 has a system where you have to obtain -- so I'm a qualified medical
7 examiner, if you will, and an agreed [phonetic] medical examiner, so you
8 have to take a test. You have to do a number of CMEs and hours, and
9 then you can do evaluations for injured workers. The systems are very
10 different sometimes in different states, but in California, what that means
11 is you're on a panel and people will pick you off that panel. So that's
12 called a qualified medical examiner, and so that is the way the system
13 has been working there.

14 Q Are you currently -- do you currently work as a physician, as
15 a neurosurgeon, for any professional or college level sports teams?

16 A Not currently. I have in the past. I was the team
17 neurosurgeon at USC for a year, year and a half.

18 Q For which team?

19 A The football team.

20 Q The football team.

21 A Yeah.

22 Q And what hospitals do you currently either work out of or
23 have credentials at?

24 A So I'm credentialed at a number of the hospitals in San
25 Diego. A brief list would be the UCSD Hospital. It's their two main

1 campuses. The Hillcrest one, which is the downtown one, and the La
2 Jolla campus, which is the Jacobs Medical Center. I also have Scripps
3 Memorial La Jolla. I've been chair of neurosurgery there. I think it's -- I
4 can't remember exactly. I think it's 14 of the last 18 years or 12 of the
5 last 16 years. Tri-City Medical Center, which I'm now chair of
6 neurosurgery there. Palomar Medical Center. I was at Sharp. I think this
7 January I did not renew, because I just can't go to every hospital. I think
8 that was -- oh, children's hospital. I used to do pediatric neurosurgery. I
9 don't -- haven't really been active in pediatric. I'm on the backup panel,
10 so I haven't really done that in the last six or eight years.

11 Q Have you contributed to peer review journal publications in
12 your area of expertise or in the medical profession?

13 A Well, yeah. I've published in the, you know, peer review
14 journals in the past. Certainly, I have.

15 Q And --

16 A It's part of being in academic medicine. I haven't -- nothing
17 really recently, just because the younger guys do that now and I don't
18 really need to as much. I'm really mostly involved in doing
19 neurosurgery and teaching neurosurgery. That's what I really love to do.

20 Q And I was going to ask you, too. Can you explain to the jury
21 -- and the other physicians for the Plaintiff had some role in training
22 medical students that might come down from Reno or be assigned here
23 -- can you explain to the jury what a teaching doctor does at a teaching
24 hospital and as far as, you know -- in addition to what any doctor would
25 do at any hospital or any neurosurgeon would do surgically. Just the

1 additional types of activities you would do as a teaching doctor.

2 A Well, so I've been at UCSD, you know, for over a decade, if
3 not two decades almost now, but what we have there at UCSD, we have
4 a medical school. So I don't do didactic teaching in the sense I get to a
5 classroom for medical students. These are people -- the ones that I'm
6 mostly involved with -- although we have some medical students that
7 rotate on the service -- are the residents, who these are ones that have
8 finished medical school and are now accepted into a neurosurgery
9 training program, so that involves -- for me, it's mainly teaching in the
10 OR.

11 So they come to the operating room and we will -- and we have
12 pre-op conference, etcetera, but we'll talk about what someone is
13 presenting with, what the films show, intricacies of how -- approaches,
14 different approaches, why one way might be better than another way,
15 why you might only do two levels versus three levels, or why you would
16 approach a brain tumor from the center of the head versus the back of
17 the head. And then we do teaching rounds, just like you see on TV, like
18 Grey's Anatomy or something like that. So we do morning rounds.

19 And then I was in charge of the journal club for -- I don't know --
20 seven or eight years. I'm not in charge now, but I have been in the past,
21 so what that means is generally, it's the chief resident will choose a
22 topic, he will pull four or five articles from a topic, we review the articles,
23 and we get together, and we sit and we kind of go through why one
24 article might be good, and another article might not be so good, and you
25 know, the pros and cons because the literature is filled with many things,

1 and we have to try to manage that and go through that.

2 Q And just to be clear, we're pushing a lot of information in
3 front of the jury in a short time.

4 A I understand.

5 Q We have been for weeks, but is one of your activities, just to
6 be clear, you are teaching other neurosurgeons how to be
7 neurosurgeons?

8 A Yes, absolutely.

9 Q And about how many of those are under your tutelage each
10 year?

11 A So UCSD is a two a year program. So it's a seven year
12 program. We have 14 in our cache, if you will, of residents, but -- so it's
13 always 14. Two graduate and two come in. Two graduate, two come in.
14 Most of the residencies are one or two. I think there's only like three or
15 four in the whole country that have three. Those are the bigger places.

16 Q Now in your work for this case, one of the things you did was
17 you were provided with documents and information such as medical
18 records, and you reviewed those, correct?

19 A Yes, I did.

20 Q Without going through every one, because there are a lot,
21 can you give the jury a general description of the types of records you
22 reviewed before rendering any opinions in this case? And I'll take it after
23 the day of the independent medical evaluation, because I don't know
24 what -- well, we had some records. So why don't we just give the jury an
25 idea of the types of records you reviewed, generally? Forget about the

1 opinion part and the timing.

2 A Sure.

3 Q Just if you could give them a general description.

4 A Well, to be clear, I've received medical records throughout
5 this three-year period, and they have not -- they weren't just -- they didn't
6 just all show up, if you will, and I think that's just the process of this type
7 of situation where records are discovered, and they get sent to me and
8 then I do a report, and then I get more records. So I just want to be clear
9 about that. But if you're -- are you asking, at the time right around --

10 Q No.

11 A -- or just in general now?

12 Q I'm just asking very generally, as you sit --

13 A Okay.

14 Q -- here today, the types of records you looked at --

15 A Okay.

16 Q -- and then we can talk about specific records or different
17 things as we go forward.

18 A Okay. So I have records of Mr. Yahyavi --

19 Q I think it's Yahyavi.

20 A Yeah, Yahyavi. So Southwest Medical Associates. I have
21 records -- chiropractic records. Records of Dr. Schifini. Dr. Oliveri saw
22 this patient for an evaluation. I have multiple radiologic reports, MRI
23 studies from two-thousand -- and I'm going to say the cervical spine
24 because those are the main ones -- 2013, 2016, 2017. I actually have the
25 discs and the images. Records from Desert Orthopedic. I think that

1 includes Dr. Perry and Dr. Mayo. Physical therapy records I think I
2 mentioned. Dr. Dixit, EMG induction studies, obviously Dr. Kaplan had
3 some reports. He did a surgery, I think that you're well aware of.
4 Nevada Pain Center records, x-ray -- I have a number of x-rays, and then
5 more recently, records of Dr. Thalgott, more records of Dr. Dixit, and
6 then I think I mentioned Dr. Oliveri already. I don't want to get repetitive.
7 I think that kind of covers it.

8 Q And can you explain to the jury, we've seen a bunch of
9 reports of x-rays or CT scans or MRIs that have gone up, and the
10 Plaintiff's medical physicians or experts have discussed them a little bit.
11 The jury has seen some of these, like an x-ray report, but can you explain
12 to the jury, you said you have discs and images from some of the MRIs
13 and/or other imaging studies.

14 Can you explain to the jury the difference between your reading a
15 report, a written report that tells you what the x-ray said, or the MRI said,
16 as opposed to your looking at the actual imaging studies themselves?

17 A Sure.

18 MR. PRINCE: Your Honor, can we approach for a second?

19 THE COURT: Yes.

20 [Sidebar begins at 11:53 a.m.]

21 MR. PRINCE: He never commented on any direct review of
22 any film anywhere in his report. I looked exhaustively in every report,
23 and he never talks about it in any one of them, a direct review of the film
24 and like a radiological review. So for him to like start showing things
25 now like this, he doesn't -- so I looked at every report, so I want him to

1 show me any report where's he's directly reviewed and commented on
2 his interpretation, which would be an opinion on --

3 MR. KAHN: Are you saying he looked at them and didn't
4 note them in the reports? Are you saying he didn't comment on them?

5 MR. PRINCE: He did not say he did a direct review. He only
6 commented -- he only summarized the radiology reports, and you're
7 drawing a distinction that he's not just read that, but he's actually
8 interpreted, you know, the films, and he doesn't ever say that. And you
9 don't ever -- he didn't say anything in his notes, for example, and all of a
10 sudden he has the direct imaging. Like, oh, yeah, I got a CD of all these
11 things, and I'm going to like -- on this film, this is what my interpretation
12 of this is. On this film, this is my interpretation.

13 MR. KAHN: Let me get there. Let me explain. It's like --

14 THE COURT: We might as well let them go.

15 MR. KAHN: Okay.

16 [Sidebar ends at 1:54 p.m.]

17 THE COURT: All right. Ladies and gentlemen, we're going to
18 let you take your lunch recess. During this recess, you're admonished,
19 do not talk or converse amongst yourselves or with anyone else on any
20 subject connected with this trial or read, watch, or listen to any report of
21 or commentary on the trial, or any personal connected with this trial by
22 any medium of information, including without limitation, newspapers,
23 television, radio, or internet. Do not form or express any opinion on any
24 subject connected with the trial until the case is finally submitted to you.
25 We'll see you at 10 after 1.

1 THE MARSHAL: Please rise for the jury. Use this time to get
2 your parking validated.

3 [Jury out at 11:55 a.m.]

4 [Outside the presence of the jury]

5 THE MARSHAL: Please be seated.

6 MR. PRINCE: Your Honor, if we could also excuse the doctor
7 from this discussion, as well.

8 THE COURT: Yeah. You can go and wait in the anteroom.

9 MR. KAHN: We're done until after lunch, so why don't you
10 take him back to the office.

11 UNIDENTIFIED FEMALE: Okay.

12 THE COURT: Well, we may have to ask him outside the
13 presence what --

14 MR. KAHN: Shall I keep him? Hold on, Doctor.

15 THE COURT: Just go in the anteroom, please.

16 THE WITNESS: Sure.

17 MR. KAHN: And I need a minute to go through this
18 because --

19 THE COURT: All right. I guess we could do it after lunch.

20 MR. KAHN: Okay.

21 MR. PRINCE: Yeah, and here's my specific objection.

22 THE COURT: I understand.

23 MR. PRINCE: You got it? Okay.

24 THE COURT: Between the reports and the actual I reviewed, I
25 had this in a trial not terribly long ago and --

1 MR. PRINCE: Like separate --

2 THE COURT: -- there is a big distinction.

3 MR. KAHN: So I'm looking at -- just so the Court's aware
4 before we break, I'm starting to go through this and I'm looking at five
5 records in a row in June of 2013, and they don't say x-ray report. They
6 say CT brain, CT cervical, CT abdomen, chest x-ray, x-ray left humerus.
7 So in other words, they're not identifying reports. They're identifying the
8 imaging studies themselves.

9 So I'll need to take the lunch break and go through because
10 this gentleman -- the Plaintiff had a lot of imaging studies, and I honestly
11 don't know the answer.

12 MR. PRINCE: Well, I --

13 MR. KAHN: Sorry, but if the Court wants to put the doctor --

14 THE COURT: Let him finish.

15 MR. KAHN: -- on and ask him, that's fine, too. I don't --

16 MR. PRINCE: Yeah, because here's the distinction. He does
17 a -- what they call a medical records review where he does chronology,
18 so the dates would be, and the impression, would be from the radiology
19 report because he identifies the radiologist, and he never says I
20 independently reviewed the films and this film. This is my impression
21 from this film, whether it be x-ray, MRI, or CT imaging.

22 So his summary is part of a medical chronology, and he's
23 just simply identifying the radiologist and what the impression was of,
24 so he doesn't talk about a direct review at all.

25 MR. KAHN: He doesn't have to review every single study

1 and comment on it. He's saying in his report, I reviewed all these CTs
2 and x-rays.

3 THE COURT: Well, here's what came up, and that is -- in this
4 other trial -- okay, here's the reports. Well, last week, I actually looked at
5 the films and I disagree with the interpretation, and that's not -- that's big
6 time.

7 MR. KAHN: Okay.

8 MR. PRINCE: Right.

9 MR. KAHN: Well, Your Honor, two things. One is --

10 THE COURT: So --

11 MR. KAHN: -- he hasn't --

12 THE COURT: -- you need to ask him.

13 MR. KAHN: He hasn't said any of that. The other one --

14 THE COURT: I understand that. That's what I'm saying. You
15 need to find --

16 MR. KAHN: But in his actual written report -- I'm looking at
17 the most recent one from August 15th that has the comprehensive
18 medical chronology, he seems to distinguish between reports because
19 he's putting the word report on some from 2015 to '17, and the imaging
20 studies themselves, which do not have that word "report".

21 So for the ones he did not say report, it appears to be the
22 case that he's saying in his report that, you know, these are imaging
23 studies and not reports. Now also, the Court should know the Plaintiff
24 did not depose this doctor, so that is part of the mix, too, but what I'm
25 saying is he --

1 MR. PRINCE: That's not part of the mix.

2 MR. KAHN: -- he seems to be distinguishing in his report this
3 is an x-ray report, an MRI report, or this is an x-ray or an MRI, and so it's
4 very clear what he's reviewed, assuming I'm tracking it properly.

5 THE COURT: Okay. And there may not be any problem here,
6 except unless if he says, well I disagree with the x-ray report, and that's
7 not in his opinion.

8 MR. KAHN: I'd like the lunch --

9 THE COURT: That was --

10 MR. KAHN: I'd like the lunch hour to ask him.

11 THE COURT: That's fine. That wasn't --

12 MR. PRINCE: Here's the -- he's commenting on another
13 doctor's impression as part of a medical chronology. He doesn't identify
14 separately and say, I've read -- said a 2013 MRI and this is my
15 impression, my interpretation of those results, or any other image, for
16 that matter. So we can identify, specifically, his own opinion and his
17 own interpretation so that we could --

18 THE COURT: We don't even know that he's making that.
19 They'll find out. It will --

20 MR. PRINCE: So my issues are a Rule 16.1 issue and I guess
21 a timeliness issue.

22 THE COURT: I understand that, and if it occurs --

23 MR. PRINCE: Okay.

24 THE COURT: -- there's -- like I said, there was, I examined
25 two weeks ago the actual films, and that was never -- I think that was

1 never disclosed. It was a while ago, but anyway, that issue came up. I'm
2 just saying --

3 MR. KAHN: 1:10, Your Honor. Thank you.

4 THE COURT: Okay, thank you.

5 [Recess taken from 12:01 p.m. to 1:08 p.m.]

6 [Outside the presence of the jury]

7 THE COURT: Did you resolve this?

8 MR. KAHN: Yes. He's not going to contradict any of the
9 opinions of any of the doctors and any of the imaging study reports.

10 MR. PRINCE: But he didn't do a direct imaging review as
11 documented in his expert witness evaluation. What Mr. Kahn was
12 referring to earlier -- I went back and checked this -- he would quote the
13 impression section of each of the radiologists. He never -- like he says
14 he has CDs and all the elicited materials. None of those include CDs with
15 imaging on there. So for him now to be able to get up and use those
16 to --

17 THE COURT: Well --

18 MR. PRINCE: -- as a basis of his opinions, so I don't feel that
19 that's appropriate, because I would've maybe done something different
20 had he commented on any of the films, and so therefore, because it
21 wasn't part of the elicited materials or the actual images, and he wasn't a
22 treating physician, we're asking that you just restrict his use to the
23 radiology reports, which is documented as part of his reports, as what he
24 relied upon in forming his opinion, and the basis for his opinion.

25 MR. KAHN: He says he's looked at imaging studies. He says

1 he's looked at imaging, and he references all these studies in his report.
2 They didn't take his deposition. If you have a question, put him on the
3 stand and the Court can ask him, you know, to confirm he's not going to
4 contradict them, and he can explain which ones are which, but the reality
5 is, I don't think we're going to be using imaging studies in front of the
6 jury. I just want the jury to understand he went the extra mile and
7 looked at these things.

8 MR. PRINCE: Well, he doesn't say that in his report that he
9 looked at them, and that's a Rule 16.1 issue.

10 THE COURT: I'm very concerned about that. As I said, we
11 had that issue where, you know, the week before, oh yeah, I looked at
12 the imaging now. And so when did he look at the imaging?

13 MR. KAHN: He got them a while ago, before his last report.

14 MR. BROWN: He's been looking at those. He sent them as
15 they're sent in discovery. As we obtained them over the years, he was
16 submitted with them, just as we provided them in the expert disclosures
17 over the years.

18 THE COURT: Did he disclose that he actually had the
19 images? That's pretty unusual.

20 MR. KAHN: It doesn't say --

21 MR. BROWN: It refers to --

22 MR. KAHN: -- I have a CD. It says, I looked at the MRI.

23 THE COURT: All right. Bring him in. Bring him in. Let's ask
24 him.

25 MR. PRINCE: It doesn't say he got a CD, Judge. That's what

1 I'm trying to tell you. Every one of his reports, he never talks about a CD
2 with imaging and commenting on the direct imaging.

3 THE COURT: Go ahead and take the stand. Doctor, you're
4 still under oath. Have a seat.

5 THE WITNESS: Thank you.

6 THE COURT: So my first question is, you mentioned that you
7 actually reviewed the imaging, and so first of all, what imaging did you
8 actually look at? I'm not talking about reports. I'm talking about the
9 actual films or however you viewed it.

10 THE WITNESS: So the MRIs -- I have some MRIs from
11 9/8/16 --

12 THE COURT: Okay.

13 THE WITNESS: -- that they came. And then another -- some
14 MRIs that came 10/18.

15 THE COURT: 10 of 18? Is that what you're saying?

16 THE WITNESS: October 2018.

17 THE COURT: Okay.

18 THE WITNESS: And then some of these were duplicates, but
19 more MRI -- more films, again, some were duplicates, but also, May of
20 2019.

21 THE COURT: All right. And when did you review those?

22 THE WITNESS: When I get them, usually. Like the ones from
23 -- the ones from September 2016 were reviewed in and around the time I
24 did my IME. They probably came -- they came after the IME, obviously,
25 but I didn't issue the report probably for a month after this IME.

1 THE COURT: Okay. And do your opinions regarding
2 reviewing the actual films differ at all from the radiologist's reports?

3 THE WITNESS: No, they're pretty much similar.

4 THE COURT: Well, pretty much similar?

5 THE WITNESS: Oh, they're similar.

6 THE COURT: Are you sure they're --

7 THE WITNESS: I'm not going to say I disagree or something
8 to that effect, oh I disagree with C5/C6. I think the importance of the --
9 well, I won't tell you -- or do you want me to tell you why the reports are
10 important? They support my opinion. That's all.

11 THE COURT: Right. Okay. So what question -- did you have
12 a question that --

13 MR. PRINCE: I do. Is it okay if I just ask the doctor directly?

14 THE COURT: Go ahead.

15 MR. PRINCE: Good. Doctor, do you have your reports in
16 front of you?

17 THE WITNESS: I have them.

18 MR. PRINCE: All right. One of the things you did do was you
19 documented a medical records review, which would be the chronology
20 of the actual physical records you were supplied, correct?

21 THE WITNESS: I did.

22 MR. PRINCE: Right. And with regard to the medical records
23 review, when you commented on, for example, just using as an example,
24 the imaging taken at the hospital, the CT imaging, you just quoted
25 directly from the impression, correct? That was how your record -- I

1 compared your records review with the actual impression from the --

2 THE WITNESS: That's what a record review is. I don't make
3 editorial comments on a record review.

4 MR. PRINCE: Okay. That's all I'm asking.

5 THE WITNESS: Sure.

6 MR. PRINCE: And then separately, using your initial report,
7 which was the IME report, August 26th, 2016, there's no section in that
8 report where you directly comment on the imaging, correct? Of your
9 own independent review of the imaging?

10 THE WITNESS: I beg to differ.

11 MR. PRINCE: Show me.

12 THE WITNESS: It says -- it says right here, "Mr. Yahyavi has
13 undergone radiologic imaging with CT scan and MRI study of the
14 cervical spine. Cervical spondylosis/degenerative changes are noted
15 throughout the cervical spine, and Mr. Yahyavi is noted to have
16 degenerative interbody fusion at C6/C7."

17 MR. PRINCE: Right.

18 THE WITNESS: "These degenerative findings, more likely
19 than not, were present and pre-exist the subject motor vehicle accident
20 of June 19th, 2013."

21 MR. PRINCE: But there's nowhere in there -- that's part of
22 your discussion section --

23 THE WITNESS: Right.

24 MR. PRINCE: -- where you do a -- you've identified the
25 imaging and specifically document your own impression or findings on

1 that imaging. You don't have a section like that, correct?

2 THE WITNESS: I am not sure that's a requirement, but --

3 MR. PRINCE: I'm not --

4 THE WITNESS: -- the answer to your question is I did not do
5 what you are asking.

6 MR. PRINCE: And you didn't identify which specific films you
7 reviewed as of August 26th, 2016? Directly reviewed. Not the report.

8 THE WITNESS: Well, I reviewed the film, and I think it's
9 implied and it's obvious, because there's only one MRI at that point in
10 time of the cervical spine, and there's only one CT of the cervical spine.

11 MR. PRINCE: I'm --

12 THE WITNESS: What else could it be, sir? And I have the
13 films.

14 MR. PRINCE: You did not -- listen to my question very
15 carefully.

16 THE WITNESS: I'm listening very carefully.

17 MR. PRINCE: No, please don't interrupt. You don't
18 document what films you reviewed and your own direct observations
19 from your independent review in the chart in its -- correct?

20 THE WITNESS: Wrong. I believe it's documented because
21 what I said was he's undergone radiologic images, and I go on and say
22 what both radiologic images showed.

23 MR. PRINCE: Right, but you also were --

24 THE WITNESS: Personally, I -- that's -- I mean, that's what
25 doctors do. I don't say, oh, I did that, and looked at this level. I mean,

1 that's not how a neurosurgeon would dictate anything, if I'm dictating
2 any report.

3 MR. PRINCE: Well, you're an --

4 THE WITNESS: And I don't --

5 MR. PRINCE: -- expert here --

6 THE WITNESS: I don't --

7 MR. PRINCE: -- so we're dealing with --

8 THE WITNESS: Yeah.

9 MR. PRINCE: -- what the reports say.

10 THE WITNESS: And I don't know that --

11 THE COURT: All right. Don't interrupt him either.

12 THE WITNESS: -- any of the treating doctors did that, as
13 well. I don't see any treating doctors, oh, I looked at this MRI and it
14 showed exactly this. That's not what we do as docs.

15 MR. PRINCE: Well, I'm not asking that. Well, the rules are
16 different. You're a retained expert, so the rules to you are different. And
17 my specific question is, we don't -- there's no section in your report
18 where you specifically identify your findings on direct review, correct?

19 THE WITNESS: All I can tell you is what I did, sir. And what I
20 did is I looked at the films and I put it in the report. I believe it's in the
21 report.

22 MR. PRINCE: You believe it's implied?

23 THE WITNESS: I don't believe it's implied. I know that's
24 what I did. It's --

25 MR. PRINCE: But you know that --

1 THE WITNESS: You're saying it's implied or that it's not
2 there. I'm telling you what I did.

3 MR. PRINCE: You're said it's implied.

4 THE COURT: All right. All right, enough. Do you have
5 anything you want to --

6 MR. KAHN: No. It's just the doctor has indicated where he
7 believes it's in his report and I think it's fairly done and --

8 THE COURT: I have to disagree in that regard. If -- and
9 Doctor, you weren't here, but we had this case where a doctor reviewed
10 the films after -- and it's not the same as this -- but after reviewing the
11 report, and then he disagreed with what was in the report. Now, I
12 understand you're not doing that, but certainly, it would've avoided all
13 this if you would've said, I reviewed the actual films. That, at least here,
14 is the rarity, as opposed to, I did -- and I've done dozens of these trials
15 with neurosurgeons, and it's the rarity that it's always, oh, well I'm not a
16 radiologist, but having said that, is this going to even come up other
17 than what he just testified that he looked at the films in your --

18 MR. KAHN: Like I said --

19 THE COURT: -- direct?

20 MR. KAHN: Like I said, I wasn't intending to show any of the
21 imaging studies themselves unless Plaintiff uses them to the jury. I just
22 wanted the jury to understand what this gentleman did to prepare for his
23 testimony and opinions because I'm expecting on cross-examination,
24 he's going to be portrayed as somebody who has very limited role in Mr.
25 Yahyavi's -- in review of Mr. Yahyavi's medical condition, and that's not

1 accurate if he's reviewed a number of imaging studies. So I would just
2 like to at least have him identify which ones --

3 THE COURT: Well --

4 MR. KAHN: -- he reviewed.

5 THE COURT: -- he --

6 MR. PRINCE: Okay. The --

7 THE COURT: -- said he reviewed the films, so that's already
8 in. I don't --

9 MR. PRINCE: Then I guess we don't need -- then if that's --
10 then I object to anything beyond that because he doesn't enumerate
11 what direct films he looked at, what the findings were with respect to
12 each respective film, because he's not saying I'm going to -- I'm not
13 going to absolutely disagree, but he's not adopting the same radiologist
14 findings. He could explain it in an alternative way --

15 THE COURT: Well, I assume --

16 MR. PRINCE: -- and that's a problem because it's all
17 interpretation.

18 THE COURT: Well, wait a second. Are you adopting the
19 radiologist's interpretation? That's what --

20 THE WITNESS: I agree with the radiologist's interpretation.

21 THE COURT: Okay.

22 MR. PRINCE: All right, then we don't need to show the films
23 because he didn't document, and he's required as a retained expert --

24 THE COURT: Then fine.

25 MR. PRINCE: -- to document those --

1 THE COURT: I think this is all about nothing, so all right.

2 MR. PRINCE: What are you shaking your head for?

3 THE WITNESS: I'm agreeing with the Judge. Am I not
4 allowed to agree with the Judge? If you had taken my deposition --

5 THE COURT: Go on.

6 THE WITNESS: -- you would know where I had --

7 MR. PRINCE: Well, that's another thing I want you to instruct
8 on. He's not allowed to ask me, you didn't take my deposition. We're
9 not required to take his deposition, and strategically, we didn't.

10 THE COURT: You're not required.

11 THE WITNESS: Okay.

12 THE COURT: So --

13 THE WITNESS: I'm not going to say --

14 MR. PRINCE: And so for him to say --

15 THE COURT: Don't bring up the depo.

16 THE WITNESS: I won't say it.

17 THE COURT: You didn't have your depo. It's not an issue.
18 They are not required. You're required there. The Defendant relies on
19 your report. Enough of this. Okay. Bring them in.

20 So I'm thinking that the doctor is going to be the only
21 witness now today.

22 MR. KAHN: Well, I sent Mr. Bennett [phonetic] back to get
23 into a suit in case there's time, so --

24 MR. PRINCE: Well --

25 THE COURT: One --

1 MR. PRINCE: -- he said he's coming Monday, so I wanted
2 to --

3 MR. KAHN: He's definitely coming Monday, but if --

4 THE COURT: 1:30.

5 MR. PRINCE: We're not going to get done today.

6 THE COURT: 2:30 minimum.

7 MR. PRINCE: We're not getting done.

8 THE COURT: 3:30, and then --

9 MR. KAHN: You want to break after him? I'll tell Bennett not
10 to come back. That's fine.

11 MR. PRINCE: Yeah, we're going to go all the way to the end
12 of the day with the doctor. I'm sure of that.

13 THE COURT: Okay. Tell him he can go home.

14 MR. KAHN: Amanda, can you get ahold of Bennett and tell
15 him he doesn't --

16 MR. PRINCE: Or if we have time, with a stroke of luck of
17 time, I have a depo read we can do.

18 THE COURT: I recall that there's a depo, so yes.

19 THE MARSHAL: Please rise for the jury.

20 [Jury in at 1:23 p.m.]

21 [Within the presence of the jury]

22 THE COURT: All right. Please be seated. Good afternoon,
23 ladies and gentlemen.

24 IN UNISON: Good afternoon.

25 THE COURT: In case I forget, we'll see you at 1:00 on

1 Monday.

2 Parties acknowledge presence of the jury?

3 MR. PRINCE: Yes, Your Honor.

4 MR. KAHN: Yes, Your Honor.

5 THE COURT: Proceed. You're still under oath, Doctor.

6 THE WITNESS: Thank you.

7 BY MR. KAHN:

8 Q Good afternoon, Dr. Tung.

9 A Good afternoon.

10 Q You've identified that you reviewed a number of materials
11 and then you prepared some written opinions for the case to provide
12 notice to all parties and/or the Court of what your opinions would be int
13 his case, correct?

14 A Yes, sir.

15 Q And you began doing that after you did an IME of the
16 Plaintiff?

17 A Yes, sir.

18 Q Can you explain what an IME is or an independent medical
19 examination?

20 A I view it as a medical exam, brief history, the physical exam,
21 and then I move on, just like if you were at a doctor's office.

22 Q And because you were conducting it, was it a neurological
23 exam?

24 A Well, I'm a neurosurgeon, so yes, it was mainly a
25 neurological and spine exam. I would --

1 MR. KAHN: Your Honor, at this time, I'd ask that the witness
2 be able to come down in front of the jury and that Mr. Severino be
3 involved in a brief demonstration of what that is.

4 THE COURT: What what is?

5 MR. KAHN: A neurological examination.

6 THE COURT: Oh.

7 MR. KAHN: It's under five minutes.

8 THE COURT: Okay, fine.

9 MR. KAHN: You will have to hold this microphone.

10 THE WITNESS: So you've probably been through this with --
11 sit on down, please. So you've probably been through this just at a
12 normal doctor's office, but it's a neurological exam. So generally, we
13 would do reflexes like this, with a hammer, and then I would do the ankle
14 reflexes. I'd come down and do the biceps, wrists, biceps, wrists, triceps.
15 And then -- I'm going to put this down so I can --

16 MR. KAHN: I'll hold it.

17 THE WITNESS: -- do it with two hands.

18 MR. KAHN: That's okay.

19 THE WITNESS: So then we go through the motor exam, so
20 that part, so squeeze, fingers apart, wrist up, wrist up, push out, pull up,
21 push out, pull up, elbows out, start -- okay, so I can see. Elbow up.
22 Good. Then I might do the neck. Look up, down, side to side, and then
23 side tilt, and then I would say, does any of that hurt. Then we would do
24 a sensor exam, so I have a sharp thing that would touch, and I would
25 touch here. Do you feel me? Do you feel any numbness?

1 So we do that with light touch and a pinwheel or a pin prick.
2 Then there's a Babinski, so shoes would be off in order to do Babinski.
3 Then we'd do lower extremities, straighten out a leg. That's straight leg
4 raise. Keep it straight, and go up, press on the gas pedal, pull one
5 toward the table, that's hamstrings. Straight leg raise again. Does that
6 hurt? Keep it straight, then go up, step on the gas pedal, hold onto the
7 table, knees together, knees together, knees apart, thigh up, thigh up. So
8 that's all that.

9 Then we'd have that -- oh, then follow my finger, so cranial
10 nerves, up, down, using the touching on both sides of the face here.
11 Give me a smile, stick out your tongue, say ahh. So that's that. And
12 then we would have him stand up, then I would have him do Tinetti and
13 gait. So it's one foot in front of the other. Good. Perfect. And then can
14 you go on your toes? Can you go on your heels? And hold for balance
15 sometimes.

16 And then last thing I always do is range of motion. Lumbar
17 is fine because you're standing. And then bend forward, and back,
18 rotate, side bending. That's pretty much it. That's a neurological exam.
19 I'm sure you've had it at a doctor's office and it's pretty quick.

20 BY MR. KAHN:

21 Q So is that the examination that you performed on Mr.
22 Yahyavi when you did the independent medical examination?

23 A Pretty much so; yes.

24 Q And is that different from the examination you perform on
25 your own patients, with the one you did on Mr. Yahyavi, when you're

1 doing the neurological examination on patients?

2 A No, it's pretty -- very similar. That's what we do.

3 Q All right. So when Mr. Yahyavi said it took about five
4 minutes, that's relatively accurate, right?

5 A Yeah.

6 Q But it's --

7 A It's usually less than 10 minutes.

8 Q But it's typical for all your patients?

9 A Oh, absolutely.

10 Q Did you do anything different that you recall with Mr.
11 Yahyavi than you generally do with your patients that are your own
12 patients?

13 A Nothing in particular; no.

14 Q Okay. So you reviewed some materials, you did that, had the
15 meeting with Mr. Yahyavi, did the neurological testing, and then you
16 identified some opinions, correct?

17 A Correct.

18 Q And I'm looking at your August 26th, 2016 documented
19 independent medical examination and opinions. So what opinions did
20 you render at that point?

21 A So at that point in time, my opinion was that I felt that Mr.
22 Yahyavi had sustained straining injuries to spinal access, meaning neck
23 and back, and that he had undergone some treatment for that, and I
24 thought it was reasonable. I thought that he had reached a level of
25 maximum medical improvement and returning to his baseline state in

1 and around the end -- or the mid or end of summer of 2014. I then went
2 on and talked about the radiologic imaging, which shows some
3 degenerative spine disease, interbody fusion. I think this patient clearly
4 had pre-existing degenerative findings that pre-existing the subject
5 motor vehicle accident of June 19th, 2013.

6 I also identified in the records the functional capacity exam that
7 was deemed unreliable or invalid. There are several reasons why that
8 could be, but overall, he provided insincere effort or less than maximal
9 effort resulting in an unreliable or invalid functional capacity exam. And
10 then I went on to talk about some of the injections that Dr. Schifini had
11 done, and despite his valiant tries, he didn't really get any benefit for any
12 of the injections, and that really Mr. Yahyavi had symptoms primarily of
13 axial neck pain. And he really didn't have any radiculopathy that I could
14 see. I think the records support that very well.

15 He did have a nerve conduction study in January and February of
16 2014, which also indicated there was no cervical radiculopathy, and I
17 pointed that out. And overall, I thought that he was not a good
18 candidate for surgery. I would not have recommended surgery. I said
19 that his symptoms at that point in time would be best treated with
20 medical supportive care, and medical supportive care doesn't mean you
21 just sit at home. It means you do exercise program designed for
22 strengthening, anti-inflammatory agents, and judicious activity.
23 Obviously, we would try to avoid narcotics, particularly with the opioid
24 problem we have now. And again, I mentioned cervical surgery is not
25 recommended.

1 At this point, he hadn't had surgery, and I stated that if he were to
2 have surgery, contemplated or completed in the future, that I believed
3 and within a reasonable degree of medical probability that is, this would
4 be unrelated to the subject motor vehicle accident and most substantially
5 related to Mr. Yahyavi's pre-existing degenerative cervical spine
6 disease/spondylosis. And my final opinion was that Mr. Yahyavi was not
7 disabled from work. He was actually working at that time, I think.
8 Maybe not. I don't know. Anyway --

9 Q Okay. Before we get into other -- your later efforts in this
10 case, you issued a total of six different opinions and reports as things
11 came to you, correct?

12 A Correct.

13 Q But let's start with this one. First of all, do you still hold
14 those same opinions as you sit here today?

15 A I do. None of the further information has detracted from this
16 opinion. In fact, I believe that the information that has come in
17 subsequent to this only further supports my initial thoughts here within a
18 reasonable degree of medical probability.

19 Q And that was my next question. Since these are still your
20 opinions, are you expressing all of these opinions here in court to a
21 reasonable degree of medical probability?

22 A I am, sir.

23 Q And one of the things you said -- so I'm going to go through
24 this one a little bit before I move on. So you were saying at that point,
25 and this is August of 2016, correct? So about three years ago?

1 A Correct.

2 Q And it predates the surgery about a year and a half, right?

3 A Correct.

4 Q You were saying at that point, based on the records you had
5 reviewed at that point, and your physical examination of Mr. Yahyavi,
6 the neurological examination you just demonstrated, a similar one, that
7 you were saying that his problems were mainly caused by his history of
8 degenerative disc disease which pre-existed the accident; that's one of
9 your opinions, right?

10 A Correct.

11 Q And you were also saying, if he ever gets surgery for this in
12 his neck, it's not related to this accident, correct?

13 A Correct.

14 Q Now, could you explain -- you were talking about
15 spondylosis in addition to the degenerative disc disease. Can you
16 explain to the jury briefly, what is spondylosis?

17 A So spondylosis is a medical term. And it's a medical term
18 that kind of encompasses a lot of degenerative changes. It would
19 encompass degenerative disc disease, bony osteophytes, arthritis, if
20 you will, of the cervical spine, and it encompasses all of that. We all get
21 some spondylosis, if you will, with age and time. When you're a baby,
22 you don't have any, and as you go through -- unfortunately, as we go
23 through life, we develop cervical degenerative spine
24 disease/spondylosis. I use the slash because in -- even when you talk to
25 doctors, some people just use degenerative cervical spine disease or

1 degenerative disc disease, and as a neurosurgeon, we want -- I'm more
2 exact, but if I'm talking to a medical doctor, they may just use that as a
3 catch all, but spondylosis is kind of more the general term.

4 Q Okay. Let me go over some of the things that the other
5 doctors have discussed in the last week and just make sure you're on the
6 same page as them before we move forward.

7 A Okay.

8 Q So I went over with some of the other doctors, and counsel
9 did, too, some of the conditions the Plaintiff had before this accident, and
10 it seems like the doctors, on both sides, are in relative agreement, and
11 the dispute seems to be about the effect of the accident compared to his
12 current situation. So I'm going to go down a list, and you tell me if you
13 think he had these things before this accident. Did the Plaintiff have
14 degenerative disc disease, aka degenerative spine disease, before this
15 accident?

16 A Absolutely.

17 Q Do you think that the Plaintiff had a C6/C7 spontaneous
18 fusion or auto fusion or boney fusion? It's called by different names, but
19 his vertebrae at the C6/7 level were fused before this accident?

20 A Yes. It's --

21 Q Do you think --

22 A It's --

23 Q Sorry. Do you --

24 A It's a sign of degenerative spine disease.

25 Q Do you think that the Plaintiff had foraminal narrowing of his

1 cervical spine before this accident?

2 A He does.

3 Q Do you think that the Plaintiff had -- was documented to
4 have reversal of his cervical or [indiscernible] curvature before this
5 accident?

6 A He does, and it's documented.

7 Q And I think there was one other one, but I'll get it later. So
8 bringing all of those things to the accident, at this point in time, August
9 26th, 2016, you were unaware of the Southwest Medical Associate's
10 records from before the accident, correct?

11 A Correct. It only further supports my opinion.

12 Q And then you received additional materials and you issued a
13 report, it was about two years later on August 2nd, 2018, correct?

14 A Correct.

15 Q And in that report, can you identify, just generally, some of
16 the providers who now you had reviewed these new records that were
17 more recent in time as of a year ago?

18 A Yeah, I received further records from Dr. Oliveri and Dr.
19 Kaplan, the operating neurosurgeon.

20 Q And included in that was the -- was it new -- well, it was new
21 to you because it's now years later and it's the first time you've seen it.
22 Dr. Oliveri did his comprehensive medical evaluation on April 24th, 2018,
23 right?

24 A Correct.

25 Q So your report is a little over three months after that occurs?

1 A About; yes.

2 Q And then did any of those documents or records alter your
3 opinions?

4 A No. I -- in fact, what the opinion really was, it appeared from
5 these records that Mr. Yahyavi had developed some radicular symptoms
6 which only began years following the subject motor vehicle accident,
7 and that -- those symptoms are unrelated, causally, to the subject motor
8 vehicle accident, and most substantially related to the ongoing
9 degenerative -- progressive degenerative cervical spine
10 disease/spondylosis, which Mr. Yahyavi had experienced for years. The
11 surgical treatment that Mr. Yahyavi had undergone in my opinion, within
12 a reasonable degree of medical probability, was unrelated to the subject
13 motor vehicle accident that we're here talking about.

14 Q And were those opinions, at the time, to a reasonable degree
15 of medical probability?

16 A They were; yes, sir.

17 Q And I think, at that point in time, you found out about the
18 surgery from Dr. Oliveri's reference to it; is that fair?

19 A correct.

20 Q So by the -- your second report, August 2nd, 2018, you're
21 now aware the Plaintiff has had the five level cervical fusion surgery in
22 his neck, right?

23 A Yes, the posterior --

24 Q And you're saying specifically, that's unrelated to this car
25 accident, right?

1 A Yes, sir.

2 Q And then you issued another report in December of 2018,
3 correct?

4 A Yes.

5 Q And that is when you began receiving some documentation
6 from before this accident for the first time; is that fair?

7 A Yes.

8 Q And those were -- those included the records from
9 Southwest Medical Associates from 2011 and 2012?

10 A Yes.

11 Q And you -- at that time, you identified this sentence in the
12 record that we've been talking about here in your absence for days,
13 about Mr. Yahyavi complaining of neck pain for years, correct?

14 A Correct.

15 Q And did that -- did these new records that you reviewed, the
16 Southwest Medical and any others that are included in this, change your
17 opinions that you had originally formed several years earlier after the
18 IME?

19 A No, it further solidified my opinion.

20 Q And then you reviewed more records into the first half of this
21 year, and provided additional opinions and referenced the materials you
22 reviewed on June 12th, 2019, your fourth written summary, correct?

23 A Correct.

24 Q And you identified additional records you reviewed. Can you
25 tell the jury what records -- what generally -- not each day by day -- but

1 generally what records were added to your list of things reviewed as of
2 three months or so?

3 A So this is June 2019. I had received additional records with
4 Dr. Dixit, Dr. Kaplan, Dr. Karno , cervical spine reports, therapy
5 evaluations, treatment from ATI Physical Therapy, supplemental reports.
6 These are now beginning to be like expert certified. Vocational services,
7 functional capacity evaluation, Dr. Oliveri's fifth supplemental report,
8 present value and future medical costs by Dr. Clauretje, vocation of
9 rehab loss of earning capacity by Dr. -- or I guess Mr. Spector.

10 Q Mr. Spector. Okay, and you issued opinions at that time, as
11 well, correct?

12 A I did.

13 Q Your overall opinions were not altered; is that fair?

14 A That's very fair.

15 Q And again, for all these reports up to and including June
16 12th, 2019, your opinions were rendered to a reasonable degree of
17 medical probability?

18 A Yes, and this is the report where they were talking about the
19 cervical stimulator, and my opinion is that if a cervical stimulator were to
20 be completed or contemplated, thought about, or completed, that I think
21 it would be excessive. I don't think it's going to help him, but more
22 importantly, it would be causally unrelated to the subject motor vehicle
23 accident.

24 Q Okay. So just to be clear, three months ago, you were of the
25 opinion that Mr. Yahyavi, if he had a spinal cord stimulator, number one,

1 it wouldn't be related to this accident, correct?

2 A Correct.

3 Q And number two, you don't think it's a benefit to him?

4 A I don't think it's going to help him.

5 Q And is that still your opinion, those two opinions?

6 A Yes.

7 Q And they are to a reasonable degree of medical probability;
8 is that correct?

9 A Yes.

10 Q You also said -- you noted in June that it started out, but not
11 unexpectedly. Can you read that sentence in your report and then either
12 paraphrase it or explain to the jury what your opinion was in June?

13 A Sure. I just reiterated that, you know, my opinion from three
14 years ago is that Mr. Yahyavi was not a good surgical candidate. I didn't
15 feel he was a good surgical candidate, and even if he had surgery, it
16 would be causally unrelated to the motor vehicle accident we're here
17 talking about. And I said non-expectedly, because I didn't think he was a
18 good candidate. "Mr. Yahyavi had continued with chronic pain following
19 a cervical surgery." Because I didn't think he was a good surgical
20 candidate, so I didn't think he was going to have a good surgical result,
21 and I think it's worn out.

22 Q And then you reviewed additional materials and issued
23 another report about a month and a half ago, August 9th, 2019, correct?

24 A I did.

25 Q As the case approached trial, there were additional materials,

1 additional treatment, at the last minute, things like that, that were being
2 performed. Let me back up. Mr. Yahyavi continues to treat, correct?

3 A He does.

4 Q You don't have an issue with whether or not he should go to
5 a doctor and do whatever they recommend, correct?

6 A I think if he -- he's having chronic pain, I think he should
7 continue to treat.

8 Q And as new materials come in from this treatment, you are
9 provided with those prior to your testimony here today, whenever
10 they're available and you review them, and determine if they have any
11 effect on your opinions, right?

12 A That's correct.

13 Q Up to today, you haven't seen any records that have altered
14 your opinions from three years ago, or so, correct?

15 A That's correct. They haven't changed.

16 Q Okay, so let's talk about the records you reviewed up to the
17 August 9th, 2019; what additional records were you provided with?

18 A So I received more records from the Center of Disease of
19 Surgery and Spine, Steinberg Diagnostic, Las Vegas Neurological
20 Institute, ATI Physical Therapy records, Surgery Center records --
21 procedure records, nursing records from the Surgery Center. And
22 basically updated records from Dr. Kaplan, his surgeon. And some
23 correspondence of Dr. Schifini.

24 Q And none of your opinions were changed from your original
25 opinions, correct?

1 A They did not change.

2 Q And then the last report you issued was about a week later,
3 and now we're up to about a month ago, August 15, 2019, correct?

4 A Correct.

5 Q And you were provided with some additional records and
6 materials, right?

7 A Right.

8 Q And did any of those new materials, up to a month or so ago,
9 cause you to alter any of your opinions?

10 A My opinions have not changed.

11 Q And as you sit here today, again, all the opinions you've
12 expressed are to a reasonable degree of medical probability; is that
13 correct?

14 A They -- that is correct.

15 Q And so what I'd like to do is start going through and
16 unpacking some of the opinions that you provided now and explain kind
17 of the basis for it and working through the history a little bit. When you
18 say a straining injury, that's -- that's your opinion that the accident
19 caused a straining injury; is that right?

20 A Correct.

21 Q And that's similar to what other doctors or physical
22 therapists, or chiropractors refer to as a sprain/strain or a sprain or
23 strain; is that correct?

24 A That's correct.

25 Q And that is more of a -- what's called a soft-tissue type of

1 injury, correct?

2 A That's correct.

3 Q Okay. So can you explain for the jury what you mean by --
4 by straining injury, just so they understand before we move forward?

5 A Well, I think that when someone has a strain, not
6 uncommonly they will have some neck pain, they will have shoulder
7 pain, et cetera. And those types of injuries usually improve, not likely
8 than not, if you will, over a period of several weeks, if not a few months'
9 times. They can last longer, but the majority improve over a few
10 months' times.

11 Q One of the things --one of the other things you talked about
12 was early on in this case, from the records you reviewed, there was no --
13 there was an EMG study or a nerve conduction study, correct?

14 A Correct.

15 Q And we've had Dr. Oliveri describe that as a two-part test,
16 where they put electrodes -- send some electricity through your body,
17 and then they use a pinprick, kind of like you said with a pin wheel or
18 something similar. And that provides some objective information about
19 a patient. Right?

20 A Yes, it does.

21 Q And is one of the things that they were looking for in the
22 earlier EMG study of Mr. Yahyavi, and this is now a year or so post-
23 accident, right?

24 A Correct. This -- end of --

25 Q Maybe less.

1 A -- January '14 and February '14. They did it in two parts.
2 This one.

3 Q Okay, so we're about eight months post-accident, right?

4 A Correct.

5 Q And we're whatever five and a half years ago, right?

6 A Correct.

7 Q So why was that important to you to review the EMG study?
8 Let's start with that. What information does it provide you as a
9 neurologist?

10 A Okay. Or neurosurgeon.

11 Q Neurosurgeon.

12 A So with this EMG, so this is done after -- the accident was in
13 June and this EMG is done about eight months, as we said. And so the
14 EMG is negative for any radiculopathy. It does show some carpal tunnel
15 syndrome and also right-sided ulna neuropathy. Which are peripheral
16 nerve type issues. But the key is that there is no cervical radiculopathy
17 at this point in time.

18 Q And why is that important to you in a case where eventually
19 they're talking about surgery. They performed surgery. They're talking
20 about chronic pain. What is the importance to you of radiculopathy?
21 And just, I know the jury's hearing a lot of medical terms, so take your
22 time and explain to them what that means to you and what information
23 it applies.

24 A Sure. So as a surgeon, you know one of the -- one of the --
25 initially Mr. Yahyavi had not had surgery, so one of the questions was

1 the reasonableness of treatment and possible future medical care and
2 causation thereof. So at that point in time, what were the surgical
3 indications? Why do people have neck surgery, if you will? Cervical
4 spine surgery.

5 And so as we teach residence, and as the literature would support,
6 is surgery for axial neck pain. I mean if you just have neck pain alone, or
7 even axial back pain, same similar, but we'll talk neck pain, doesn't work
8 very well. Regardless of -- unless there's some obvious instability,
9 regardless of how much degenerative change may or may not be on the
10 film, or studies.

11 Surgery for axial neck pain doesn't work. And therefore it's
12 not recommended. These are -- this is from evidence-based medicine.
13 We have gears. There's a study called the Decade of Bone and Joint,
14 with Publishing Spine. From 2000 to 2010. It was sponsored by the
15 World Health Organization. Eight or nine countries were involved.
16 Several institutions from the United States was involved. But the bottom
17 line that came out of that was surgery for axial neck pain, we don't do. It
18 doesn't -- it doesn't work. It doesn't mean it doesn't get done. But in
19 general, it's a -- what I call a low thank you rate type surgery, right. I
20 mean surgeons, we like to hit for batting average, right? You got a lot of
21 singles and doubles, right. Striking out is no good. That's -- that's no
22 good for a surgeon.

23 Q Okay.

24 A So for axial pain, no it's not really a good surgical indication.
25 And what are the good surgical indications? Well, if you have

1 radiculopathy, we help those people. Those are -- those are things that
2 we can help and the -- you might, you know, I mean the success rate is
3 much more.

4 Q So --

5 A So that's why.

6 Q So other doctors have used that term, axial, as well, but I
7 don't think it's been explained to the jury --

8 A Oh.

9 Q -- so if -- can you explain axial neck pain as opposed to any
10 other kind of neck pain?

11 A Yeah, yeah. Actually another way would be just -- just along
12 your axis, so neck pain. Sometimes go out to the shoulder, but just neck
13 pain. It's not non-radicular would be another way of thinking about it.

14 Q And you understand that Dr. Oliveri is referring to it at times
15 as motion segment injury; is that correct?

16 A Yes.

17 Q And that --

18 A I've heard that -- I've heard him say that.

19 Q And that just -- and I confirm that with him, that essentially
20 refers to some problem in the processes between the two -- any two
21 vertebrae, or any number of vertebrae, right?

22 A Yeah, it would be axial at that point in time.

23 Q Okay, so that's -- they're similar terms?

24 A I think we're using pretty similar.

25 Q So just so it's clear for the jury, what you're saying is as a --

1 as a professor of medicine, and as a practicing neurosurgeon, you
2 believe that the state of art, that the literature is clear that if someone
3 just has cervical neck pain, without radicular symptoms and without
4 some kind of other problem, that performing the surgery is done on
5 occasion, but it's probably not a good idea?`

6 A That's exactly right. It's not -- it's not a good indication for
7 surgery.

8 Q And when you looked at the initial materials for Mr. Yahyavi
9 several years ago, did you have available to you at least some -- some
10 information about his -- his neck condition? Some objective
11 information?

12 A Yes.

13 Q Okay, so people have talked about degenerative disc disease,
14 a/k/a degenerative spine disease here for the better part of a week. But
15 again, this is one of those phrases and terms that the doctors have been
16 using and, you know, they may think it's clear, I may understand it
17 because I've seen it in cases, but can you explain to the jury what you
18 mean generally by degenerative disc disease or degenerative spine
19 disease and how that effects people generally. Without referencing Mr.
20 Yahyavi right now. How does that affect the population?

21 A So in general, if you're getting degenerative spine disease, as
22 I said spondylosis, which we all get, what happens over time is the disc
23 will become dehydrated. And when discs become dehydrated, they
24 become narrow. They can bulge. They can protrude. You might have --
25 and then when bulges and discs protrude, the body tries to stabilize that,

1 and they may calcify some of those edges, and you may get gone spurs,
2 or osteophytes.

3 In addition you might get something called facet
4 hypertrophy, because the joints have to work harder, they get arthritic. If
5 you've ever seen someone with rheumatoid arthritis, their knuckles get
6 quite big or their joints get big because that's what happens from the
7 inflammatory response to the arthritis. And so those are the
8 degenerative occurrences. And because of that, what happens because
9 of -- from degenerative spine disease is that the pathways that the spinal
10 cord goes down the cervical spine, or the nerve roots go out the sides of
11 the cervical spine, through the foramina, which are the tunnels, if you
12 will, that nerves go out, they become narrowed.

13 And if they become narrow to a point, they may actually elicit
14 nerve compression and therefore nerve pain. Or spinal cord
15 compression. And therefore problems with something called
16 myelopathy. So those are the things that occur in a progressive
17 degenerative spine condition.

18 Q So I'd like to clear up one or two things. So as far as
19 somebody having degenerative disc disease, that doesn't mean that the
20 person necessarily experiences pain, correct?

21 A Correct.

22 Q On the other hand, a person with degenerative disc disease
23 could experience pain, right?

24 A Correct.

25 Q Similarly, if someone experiences a trauma, that doesn't

1 necessarily lead to pain every time, correct?

2 A That's correct, as well.

3 Q But traumas can easily lead to pain, depending on the nature
4 of the trauma, right?

5 A That can occur as well.

6 Q And you understand here, you've read the reports of Dr.
7 Oliveri, and you're familiar with what the opinions are of Dr. Oliveri, Dr.
8 Schifini, Dr. Kaplan in this case, right?

9 A I am.

10 Q You understand all three of them stand to rate against you to
11 say that this accident is the only thing that caused Plaintiff's problems
12 that he's here suing my client about, right?

13 A I believe that they're wrong. And I believe that the medical
14 records or substantial medical evidence supports my opinion better.
15 And I think that -- I don't know that they had all the records at the right
16 time.

17 Q Okay. So you -- just to be clear, you disagreed with the
18 opinions of all three of the Plaintiff's physicians, to the effect that this
19 accident, the motor vehicle collision on June 19th, 2013, between the
20 forklift and the Dodge Charger is the only thing that's responsible for Mr.
21 Yahyavi's problems that he's alleging in this case?

22 A Yes, I disagree with them. I think they have misattributed the
23 symptoms to the car accident that we're talking about.

24 Q And similarly, you stand by your opinion that it's his
25 degenerative disc disease that is primarily responsible for his pain and

1 his problems that he's alleging here in Court, right?

2 A Correct. My opinion is supported by the medical records.

3 Q Now you've already said this, but I want to make it again,
4 extremely clear for the jury. You are allowing for some treatment and
5 some medical visits after the accident, correct?

6 A Correct.

7 Q You think it was totally appropriate for him to get in an
8 ambulance after the accident, right?

9 A Yes.

10 Q You think it was totally appropriate for him to be seen at
11 UMC after the accident?

12 A Yes.

13 Q You believe that his initial chiropractic care with Downtown
14 Neck and Back out of Calloway, however long that was, that was a
15 proper thing to do?

16 A Yes.

17 Q He then saw, I think Kelly Hawkins, physical therapist for a
18 while. You think all of that is okay?

19 A I do.

20 Q And you also think it was appropriate for Dr. Schifini to give
21 him some injections of roughly, you know, 8 to 12 months later or 8 to 14
22 months later, to try to alleviate any pain symptoms he was expressing?

23 A I think Dr. Schifini was trying to help someone who had
24 chronic neck pain. I don't know that he knew that it was pre-existing, but
25 I think he was trying to help Dr. -- I think he was trying to help the

1 patient, yeah. So I allowed it -- I allowed it.

2 Q And you're drawing the line on, what date is it, September
3 3rd, 2014; something like that?

4 A Yeah, around there. The end of August it's called.

5 Q End of August, early September?

6 A Sure.

7 Q And you're saying after that, everything that Mr. Yahyavi has
8 been experiencing, all these things he's claiming in this case, he's saying
9 he has chronic pain. He can never work again. He had to get the fusion
10 surgery. Now he's talking about a spinal cord stimulator, which we'll talk
11 about, you're saying all those things are not the result of this accident,
12 correct?

13 A Correct.

14 Q And you're saying they're -- they were caused by what?

15 A I think he's having progression of his pre-existing
16 symptomatic degenerative circle spine disease. I think the records
17 clearly support he had years of this. It's an ongoing chronic problem. I
18 think that it's difficult after any sort of accident to go to the emergency
19 room, especially if as a provider, you don't know, but he gets treated for
20 symptoms of neck pain. And he gets continued treatment. But I think at
21 that point in time, after seeing some of the results of the injections and
22 his response to some of these therapies, which were minimum at best, I
23 think, that really he's just getting treated for his chronic cervical spine
24 disease that he's had all along.

25 And the -- and the images show, and the EMG nerve

1 conduction shows that this is a progressive problem. So ultimately,
2 he's going to end up getting surgery. I would not have done the surgery,
3 because I -- the records I reviewed, but that's -- but he got surgery --

4 Q So --

5 A -- and that's what occurred.

6 Q -- let's take out the EMG things and isolation.

7 A Okay.

8 Q So you've already said end of January, early February 2014,
9 he has the EMG study. And the EMG study, the written EMG study that's
10 in evidence in this case does not show radiculopathy, correct?

11 A Absolutely, it does not show radiculopathy end of January,
12 early February 2014.

13 Q You would agree that later studies did end up showing
14 radiculopathy when he went back and did later nerve conduction studies
15 between 2014, and now we're five and a half years later, correct?

16 A That's a great point. Further supports my opinion. And
17 that -- but that information is before the surgery, by the way.

18 Q And what do you attribute that to? The fact that the 2014
19 doesn't show nerve -- doesn't show radiculopathy and later EMG studies
20 do show radiculopathy?

21 A The overwhelming medical probability it's related to
22 degenerative spine disease. I know of no -- I mean unless there's an
23 accident that we don't know about. I'm not going to make that
24 assumption. There may be an exacerbation. But there's -- it's -- what
25 else could it be? I mean he doesn't have it in '14. That's after the

1 accident. Two and a half years later, we get two afterward. Now he's
2 got radiculopathy. I just told you that's the best indication for surgery,
3 and he gets a surgery afterward. What else could it be?

4 Q Well --

5 A But more importantly, it's related to progressive
6 degenerative circle spine disease, which we know pre-exists the subject
7 motor vehicle accident. And the MRIs show progression.

8 Q Now again this is a lot to -- to unpack. And we're talking
9 about things ranging from the very simple, like somebody says they're in
10 pain, to the very complicated like putting in a spinal cord stimulator
11 witness a trial. And how you thread that up the spinal column. So what
12 I'd like to ask you is the simple question before I move on to any other
13 medical issues, and that is: Does degenerative spine disease, or
14 degenerative disc disease, like Mr. Yahyavi had before this accident,
15 does it generally improve, or stay exactly the same over time, as a
16 person ages?

17 A It generally gets worse with time.

18 Q That's not always the case.

19 A Not always -- it can -- it could stay the same, but in general it
20 gets worse with time.

21 Q Okay, I'm going to ask a couple more questions. So you --
22 you've read about this accident. You're familiar with the dynamics of the
23 accident, and how it was explained to have occurred, at least in so far as
24 the medical records, correct?

25 A Yes.

1 Q And you read Mr. Yahyavi's deposition, where he described
2 the accident, correct?

3 A Yes.

4 Q You've read the records from Dr. Kaplan, correct?

5 A I have.

6 Q And you've taken issue with his opinions that he's expressed
7 in this case, that the -- that all of the Plaintiff's problems, or the vast
8 majority were caused by this accident. Do you have any comments on
9 Dr. Kaplan's opinions other than that?

10 A I respectfully disagree with Dr. Kaplan's opinions. I think
11 that -- I mean in reading some of the testimonies, et cetera, I think that he
12 didn't have all of the information, and he came to the opinions not with
13 all the information.

14 Q And what about Dr. Oliveri, did he also express certain
15 opinions initially without, in your opinion, having full information?

16 A I don't think that Dr. Oliveri had all the information, either.

17 Q And Dr. Schifini's role is more limited, right? He's a treating
18 physician?

19 A He is a treating physician, my understanding.

20 Q He's not -- he's not a retained expert in this case, issuing
21 reports and opinions, correct?

22 A That's correct.

23 Q And his role was to essentially look at the patient's pain
24 profile, or his pain, and try to help him have less pain. That's one thing,
25 correct?

1 A Correct.

2 Q And then he would ordinarily work with the other medical
3 professionals to determine -- to have a say, maybe, in Mr. Yahyavi's
4 treatment going forward, right? That's a standard thing?

5 A Yes, sir.

6 Q And when they talk about putting in the spinal cord
7 stimulator, if that were ever to happen, he's certainly qualified to be the
8 anesthesiologist at that procedure, right?

9 A Well, yeah, sure.

10 Q And to be clear to the jury, your qualifications are essentially
11 the equivalent of Dr. Kaplan's, right?

12 A My understanding is Dr. Kaplan's board certified in
13 neurological surgery. He's a few years younger than me. But, yeah, I
14 think he's a qualified --

15 Q He's essentially --

16 A And I have nothing ill, you know, negative to say about Dr.
17 Kaplan.

18 Q No, he's essentially your counterpart on the Plaintiff's side,
19 right?

20 A Yeah.

21 Q One of the things the Plaintiffs have implied is that because
22 we only have you, Dr. Tung, the neurosurgeon that teaches at UCSD,
23 that somehow our position is not as good as theirs, because they have
24 three doctors.

25 MR. PRINCE: Objection, leading. Argumentative.

1 THE COURT: I'm going to sustain it. Rephrase.

2 BY MR. KAHN:

3 Q Does the fact that Plaintiff has three physicians rendering an
4 opinion that are contrary to yours cause you any difficulties?

5 A No, I think the medical records speak for themselves. I think
6 that the objective evidence that medical records and the medical logic,
7 and clinical correlation really speaks to the opinion within reasonable
8 medical probability that Mr. Yahyavi's situation is substan -- most
9 substantially related to. His degenerative -- ongoing degenerative circle
10 spine disease.

11 Q Let's talk about medical records for a second. As a
12 neurological surgeon, neurosurgeon, you're not most people's primary
13 care physicians, probably unless they're in your immediate family; is that
14 fair?

15 A Yeah, we tend to be the -- more the tertiary kind of care
16 providers.

17 Q So when you get patients referred to you, they're generally
18 referred by other doctors, or through the hospital; is that fair?

19 A A lot of times, yes.

20 Q And when patients come to you, what do you usually
21 receive? What do you usually see or get from the other doctor or the
22 hospital, for you to determine what your -- what you think about a
23 patient's care? Again, I'm talking about Mr. Yahyavi. I'm talking about,
24 let's say in your private setting, your private practice setting, or hospital
25 setting what -- can you explain to the jury kind of how it works to rope in

1 a neurosurgeon, and what you look at before you make a decision?

2 A Sure. So generally, we'll get a referral. You usually have to
3 have a referral. You get a referral. You'll get the medical records from
4 the referring doc. They usually will be kind enough to send that over.
5 Most of the time when I see someone now, they have an MRI already.
6 So they're -- they're going to have that, and we'll take a history. They fill
7 out, you know, a history form, et cetera. We take a history.

8 And we'll -- we'll have to go through that. And we'll go
9 through the physical exam. And then we'll make some
10 recommendations about care. Whether I think they're a candidate or not
11 for surgery. And if they're not -- I mean there are so many people that
12 have neck pain and back pain. Only a very, very tiny portion ever get
13 surgery, or thought about any surgery. Most of the times we treat those
14 types of symptoms with medical support care.

15 Q So give me a ballpark. You see I excess of how many
16 patients a year, roughly?

17 A Well, I see, well, easily over 1,000 patients. I know I see at
18 least 80 to 100 patients a month. So you know, only a small portion of
19 those get surgery.

20 Q And for the vast majority of those people, do you -- when
21 you see them face to face, do you do the type of neurological exam you
22 performed on Mr. Severino from my office?

23 A I do a neurological exam on everybody.

24 Q And for most of your patients that you see, do you do much
25 more than that, physically?

1 A No, that's the neurological exam that we went through with
2 you guys. But then it's -- then a lot of it has to do with the imaging. And
3 kind of trying to correlate everything with the imagine.

4 Q And what other information --

5 A And the history.

6 Q Sorry, go ahead.

7 A And the history if someone has ongoing problem, or
8 problem for years. I mean people in chronic pain don't do as well with
9 surgery. Smokers don't do as well with surgeries. There are other --
10 sometimes other issues involved in people's lives, that don't do as well
11 with surgery. So those things, as a surgeon are important to me, at
12 least. And I think to most surgeons. Because again, if we're trying to get
13 a high thank you rate from surgery, then you want to choose patients
14 that are going to benefit. Why put -- why put someone at risk, if they're
15 not going to benefit?

16 Q You also receive information from doctors, from referring
17 physicians, correct? They may tell you something in a letter, or provide
18 you with a report, provide you with imaging, or call you and provide you
19 with information, right?

20 A They do, yes.

21 Q And what about from the patients themselves? You said you
22 get a history, but you don't -- your job and the job of no doctor is to do
23 whatever the patient says. So if a patient comes and says give me
24 medicine, you don't just give them medicine. That's -- that's not how it
25 works, right?

1 A No, that's not how it works. No, we have to take a history
2 because the patient is going to let us know what they're -- they're feeling.
3 What they've been feeling. What -- what's -- and that's the -- I guess
4 that's the best way to get the information. But regardless of what a
5 patient wants or doesn't want, we have to give them the best advice,
6 because that's what our training, experience and knowledge tells us. We
7 have to -- we have to try to give them the best advice. So any -- an
8 example I use might be if someone gets their finger pricked, and some
9 people would look at it. Some people would say I've got to go to the
10 emergency room, it hurts so bad.

11 And there might even be a person who says I've got to go to the
12 emergency room, and the emergency room doctor says cut off my
13 finger, cut off my finger. It hurts so bad. It's ten out of ten. You don't
14 cut if off. I mean, we know better, right. But the patient may feel that
15 that's what they want because it hurts so bad.

16 And we have to then -- we have to be the doctor and tell them what
17 we think. And tell them that's not the way to go.

18 Q I'm going to go over a couple of items, just to be clear that
19 your opinion is very clear on the record. And then we'll -- we'll focus on
20 the records. Okay.

21 A Okay.

22 Q The fusion surgery that Dr. Kaplan performed in January of
23 2018, what's your opinion as to that's relationship to -- that surgery's
24 relationship to this accident?

25 A I do not believe it is causally related to the subject motor

1 vehicle accident. And most substantially related to ongoing
2 progressive, degenerative cervical spine disease/spondylosis.

3 Q And that's to a reasonable degree of medical probability?

4 A Within a reasonable degree of medical probability, yes.

5 Q What about -- what about the spinal cord stimulator, if it gets
6 implanted?

7 A I do not believe that Mr. Yahyavi is a good candidate for
8 spinal cord stimulation. It's very difficult already in someone who has a
9 post-laminectomy. Because generally you put it underneath the lamina
10 to keep the leads from migrating. There's -- I mean it's been written in
11 people who are post-laminectomy, but it's very difficult. I've done them
12 and you actually have to go retrograde. The risk is much, much higher,
13 because you have to go retrograde and you might paralyze a person.

14 And so that is something. And someone with chronic pain in this
15 type of instance, I don't think it's going to help them personally. And I
16 would never put one in without a trial.

17 Q And is that opinion to a reasonable degree of medical
18 probability?

19 A Yes.

20 Q Approximately how many spinal cord surgeon -- sorry, spinal
21 cord stimulator implantation surgeries -- that's a mouthful, have you
22 performed in your career?

23 A I've done -- over my career, I've been practicing 30 years, so
24 at least 100 or so. I mean --

25 Q In --

1 A -- it's not the main thing I do. I mean I've done thousands of
2 spine surgeries.

3 Q Of all of the 100 plus spinal cord stimulator implants that
4 you've personally installed in people's spines and bodies, how many of
5 those have been implanted without the use of a trial?

6 A Oh, I, me, personally?

7 Q Have you ever --

8 A I've never --

9 Q -- implanted an --

10 A I've never.

11 Q -- SCS without a trial?

12 A No, I've never put one in without a trial.

13 Q And you were at a teaching hospital where they have a
14 neurosurgical department, correct?

15 A Yes.

16 Q And is that something you've seen done in the 30 years?

17 A We -- I --

18 Q At your hospital? Is it --

19 A Yeah, my hospital, I would say 99.9 percent are trialed. I
20 mean I -- I can't think of one offhand. I mean, I don't want to say never,
21 because maybe we'd find a case or two. But I don't think it's usually
22 done that way.

23 Q You can't think of any instance where you've either
24 participated or been told that there have been at your teaching hospital?

25 A Correct.

1 Q And what you say about you don't think it will help the --
2 help the Plaintiff, is that to a reasonable degree of medical probability?

3 A That's my opinion, yes.

4 Q And what about the injections, and blocks, and all the things
5 that Dr. Schifini and the other doctors did after September 3rd, 2014, or
6 whatever the magic date is, end of August, middle of September,
7 whatever the date is, what about the injections and blocks, and all the
8 things that were done for diagnostic and/or therapeutic purposes,
9 whether it's sticking needles in Mr. Yahyavi's cervical spine, to either
10 identify levels of pain generators, to give him some relief with steroidal
11 liquid, that happens to be in the needle, what's your opinion about the
12 relationship of those activities and costs, to this -- to this case, and Mr.
13 Yahyavi's claims?

14 A Sure. So I think that the initial round of injection, I think that
15 that Dr. Schifini was trying to help the patient, and I think that I -- I
16 allowed for that. I gave Mr. -- Mr. Yahyavi the benefit of doubt from that
17 type of perspective. I think that it -- I don't think -- and I think the
18 medical records support, he didn't really have any benefit from these.
19 And I don't think they were diagnostic at all. And I think at a certain
20 point, meaning the end of the summer of 2014, really they're just
21 superfluous, they're not beneficial. They're not helping him and we're
22 not really gaining any information. In fact, if we look at the records really
23 carefully, they did more medial branch blocks. And I think the initial
24 round of medial branch blocks didn't work.

25 Q And is that opinion to a reasonable degree of medical

1 probability?

2 A Yes.

3 Q You haven't worked for me before in any case, right?

4 A I have not.

5 Q You've never worked for Capriati Construction before in any
6 case that you can recall, right?

7 A That's correct.

8 Q When you met with Mr. Yahyavi, did you take a medical
9 history from him about his neck? Did you personally ask him about his
10 neck history?

11 A I did.

12 Q And what did he tell you, face to face, in or about August of
13 2016 about his history of neck pain, if any?

14 A He told me he denies a history of prior trauma or previous
15 cervical neck pain prior to the subject motor vehicle accident.

16 Q And you then placed that into your written report, and
17 incorporated that within your opinions and your IME, correct?

18 A I did.

19 Q And when you asked him that, did you limit your question to
20 immediately before the accident, or a couple of days before, or a couple
21 of weeks before? Did you limit it in time?

22 A No, that I can recall.

23 Q So you were asking him, did you ever have neck pain before
24 this accident, or neck problems, and he said no?

25 A Correct.

1 Q Not those exact words, necessarily, but that's the import of it.
2 You said, did you ever have neck problems --

3 MR. PRINCE: Objection. Leading.

4 MR. KAHN: All right. I'll withdraw.

5 THE COURT: Sustained.

6 BY MR. KAHN:

7 Q Now you talked about Mr. Yahyavi reaching MMI, and can -- I
8 think in the summer of 2014, the end of the summer or the same time,
9 where in your opinion, he should be cut off for this case from future
10 treatment related to this accident. Can you tell the jury what does MMI
11 mean?

12 A It's a term that we use in -- when you're doing evaluations
13 and things, but medical -- maximum medical improvement, MMI.

14 Q And what does that mean?

15 A It means that really more treatment, such as injections, or at
16 this point, I don't think any surgery is necessary, so really, it's really --
17 the patient really has to manage their symptoms to -- with medical
18 management. And that this may be the way he's going to be.

19 Q I am going to ask you to help me with some words, because
20 there have been some words used by other doctors, and I'd like to hear
21 your opinions of those words' meaning in the medical context, or
22 definitional context. So one of the words is ongoing. In the context of
23 ongoing pain. So what to you -- what does ongoing pain mean to you as
24 a neurosurgeon?

25 A Well, I kind of -- I would -- to me, I would use chronic an

1 ongoing together. If someone has chronic pain, it's generally ongoing.

2 And if it's ongoing, it's generally chronic.

3 Q Okay.

4 A But ongoing could be it's ongoing for two weeks. So the
5 American College of Rehabilitation Medicine has termed chronic
6 generally six months.

7 Q Okay.

8 A That's the definition that's written about. So I don't think
9 there's any argument about that. But if someone says ongoing, and we
10 know it's been for years, or if we know it's been for years, it's generally
11 ongoing. Can I think of a scenario where ongoing might not be chronic?
12 Yes. I mean it might be have had ongoing pain two weeks straight.
13 Started after, you know, playing basketball with my buddies or
14 something, and they identify that.

15 But generally chronic and ongoing go together.

16 Q And does a medical record have to have the word -- the
17 physical word ongoing in it, in order to identify ongoing pain?

18 A In my --

19 Q You said -- you said chronic pain to you, by the definition of
20 the American College of Rehabilitative Medicine, sorry if I got that a little
21 bit wrong, is six months or more of pain.

22 A That's --

23 Q Right?

24 A Yeah, that's generally the accepted definition.

25 Q And when you read medical records, you said you see, you

1 know, a lot of patients every year all the time. When you read medical
2 records and people have chronic pain issues, do they always include the
3 medical recordkeepers and notators and physicians, and physician
4 assistants, and office -- do they always put the word ongoing when
5 there's a description of chronic pain?

6 A No, it's -- that's not the -- it's not the standard.

7 MR. PRINCE: Your Honor, can we approach for a second?

8 THE COURT: Yes.

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

10 MR. PRINCE: Okay, I want to -- I think I see where that is
11 heading. That Dr. Tung has never given an opinion that Mr. Yahyavi
12 suffered chronic cervical spine pain or symptoms before this motor
13 vehicle collision. Even though this -- he had the Southwest record dating
14 back -- starting as early as December 2018, he did three more reports
15 after that, and he's never offered the opinion he had ongoing chronic
16 symptomatic neck pain before. So that would be a new opinion, clearly
17 germane to this issue, not documented in any record.

18 MR. KAHN: Your Honor, from my position, this is now the
19 sixth, or seventh, or eighth time this has been raised. This was raised by
20 the earlier trial brief. The Court made a ruling that he incorporated the
21 Southwest Medical records into his opinions and said they don't change.
22 The doctors look at -- he got rid of that -- he got rid of the, you know, the
23 MRI stance, fine. But he can't get rid of the MRI -- or the Southwest
24 Medical records, and the fact that this guy has reviewed them and has
25 rendered opinions.

1 MR. PRINCE: No.

2 THE COURT: Okay. That is -- I don't think that's what he's
3 saying, but is that where you're going? Are you going to ask him, is it
4 his opinion that these are --

5 MR. KAHN: I'm going to ask him are the Southwest records
6 consistent with the opinions he's been expressing for a year and a half,
7 well, or three years or whatever it is.

8 THE COURT: That it's not due to the accident.

9 MR. PRINCE: Well, that his current symptoms --

10 THE COURT: That's different --

11 MR. PRINCE: -- yeah, they're different than he had chronic
12 pain before.

13 THE COURT: That's -- those are different. So if you're going
14 to ask the latter, the one that I was saying, that's fine. But if you're
15 asking if he rendered an opinion that the 2011 was chronic, and he hasn't
16 put that in his medical records, again, he should have. I understand he's
17 not from here, but just like the -- the reviewing the records versus
18 actually reviewing the -- there is a difference.

19 So anyway --

20 MR. KAHN: Okay.

21 THE COURT: And I've given you some guidance. But if
22 you're asking him, is his opinion that it was chronic, and unless that's in
23 the records, it's different.

24 MR. KAHN: But his symptoms were chronic before.

25 THE COURT: You said --

1 MR. KAHN: That the --

2 THE COURT: His opinion is nothing has changed. That's
3 fine, and that's what I said before.

4 MR. KAHN: Okay.

5 [Sidebar ends at 2:21 p.m.]

6 MR. KAHN: Can we pull up Exhibit 156, Bates 2110.

7 THE COURT: And I should have asked, this is probably a
8 good time to take a short recess. So during this recess, you're
9 admonished do not talk or converse amongst yourselves or with anyone
10 else on any subject connected with this trial, or read, watch, or listen to
11 any report of, or commentary on the trial, or any person connected with
12 this trial, by any medium of information, including, without limitation,
13 newspapers, television, radio, or internet. Do no form or express any
14 opinion on any subject connected with the trial, until the case is finally
15 submitted to you.

16 We'll take ten minutes.

17 THE MARSHAL: Please rise for the jury.

18 [Jury out at 2:22 p.m.]

19 [Outside the presence of the jury]

20 MR. KAHN: By the way, I'm supposed to relay to you, your
21 offer's been rejected.

22 MR. PRINCE: Cool.

23 [Recess from 2:23 p.m. to 2:31 p.m.]

24 [Outside the presence of the jury]

25 MR. KAHN: Your Honor, before the jury comes in, I'd like to

1 make at least a bit of a record.

2 THE COURT: Go ahead.

3 MR. PRINCE: Well, if it's concerning Dr. Tung, then I request
4 that he be excused from the courtroom.

5 MR. KAHN: Okay, yeah. Why don't you wait in the -- just
6 wait in the back hall.

7 THE WITNESS: No problem.

8 MR. KAHN: My record is this, Your Honor. The Plaintiffs had
9 three medical experts. One of them got the Southwest medical records
10 the day before his testimony. One of them got the Southwest medical
11 records two weeks before his testimony. None of them in there had that
12 those did not designate -- did not connote chronic pain, even though that
13 was their testimony on the stand. And to deprive my single medical
14 expert, who's flown in, from rendering testimony to respond to those --
15 the testimony of three doctors, either directly related to the records, that
16 they didn't disclose, and got at the last minute, or by hypothetical
17 question in reference to Dr. Schifini, who I was very careful not to ask
18 him about the records, but he talked about them anyway, for
19 hypotheticals, is unfair to my client and prejudicial.

20 And I'm requesting the Court reconsider the ruling before the
21 break, because it's not fair for the Plaintiff's three experts to talk about
22 the Southwest medical records saying neck pain for years, when they
23 didn't designate it in their reports, and my expert did, and when one of
24 them got it the day before his testimony, and another one got it two
25 weeks before, that was their testimony. To let them talk about it, and

1 now my expert can't respond, that is unfair and prejudicial. And I'll
2 submit it with that.

3 MR. PRINCE: Well, you've already made the rulings on those
4 issues. So secondarily, Mr. -- or excuse me, Dr. Tung reviewed these
5 records. And he first documented the review of them in December 13,
6 2018. He never gives the opinion that Mr. Yahyavi -- this is the -- this is
7 what my objection was at the Bench. Suffered from chronic pain up
8 until the time of the motor vehicle collision. That he was symptomatic
9 up until the time of the motor vehicle collision. And so he never
10 expressed that opinion in his December 13, 2018 report, June 12th, 2019
11 report, August 9th, 2019 report, or the August 15, 2009 [sic] report.

12 So he authored four reports where he put that in his medical
13 chronology, 2011 medical records. I'm just saying he call out what they
14 say, but he can't say that it's my opinion that he was chronic-- had
15 chronic neck pain immediately before this motor vehicle. He's never
16 expressed that opinion. He's talked about degenerative disc disease.
17 He's never expressed the opinion that the disc degeneration was
18 symptomatic in the days, weeks, or months, or years leading up to this
19 motor vehicle collision.

20 He never offers that. For example, and more specifically, he
21 never expresses the opinion that Mr. Yahyavi was symptomatic at the
22 time of the motor vehicle collision. So for all of those reasons, since he
23 didn't express it as a retained expert, I'm recommending, or I'm not -- I'm
24 asking the Court to preclude offering that opinion, because it's not
25 documented anywhere.

1 Mr. Kahn said previously this is his entire case. Fine. But he
2 didn't have that -- this doctor, or this expert, express that opinion. And
3 he's never expressed that opinion. The mere fact that he says, oh,
4 yeah, degenerative -- degeneration from 2011. We agree, he did. But
5 that doesn't mean he was symptomatic and chronically symptomatic in
6 the days, weeks, and months, or even years leading up to this motor
7 vehicle collision. That would be a new opinion.

8 MR. KAHN: And most simply, Your Honor, their experts
9 talked about it, and said it doesn't mean it's -- it's chronic because it
10 doesn't have the word ongoing. There was all this testimony about it.
11 Their experts never even listed the report and -- that -- that record in any
12 of their reports. My expert listed it a year and a half ago in his report.
13 And he also rendered this opinion on August 2nd, 2018. That Yahyavi
14 has had progression or pre-existing cervical spondylosis/degenerative
15 spine disease, over several years. In other words, he says it's
16 progressive. And he put that in opinion a year ago.

17 MR. PRINCE: Well, that meant before the surgery. Meaning
18 from the time he saw him in 2016, he's saying the he had progressive
19 pre-existing cervical spondylosis, degenerative spine disease over
20 several years. He's talking about from the duration from the time of the
21 accident until the time he had the accident. That's --

22 THE COURT: Let me see the --

23 MR. PRINCE: -- that's a --

24 THE COURT: I'll let him say anything he said in the report.

25 MR. KAHN: Let's see.

1 THE COURT: But --

2 MR. KAHN: The part at the bottom.

3 THE COURT: Again, I'll let him say anything he said in the
4 report. That's not an issue. But you're telling me, and you haven't
5 provided, where he says he had chronic -- has -- if you want to say it's a
6 progression of pre-existing -- which he has said, pre-existing cervical
7 spondylosis, degenerative spine disease, over several years, that's in his
8 report.

9 MR. PRINCE: What -- what --

10 THE COURT: I think what you want him to go on to say is
11 that it was chronic back in 2011.

12 MR. KAHN: Correct.

13 THE COURT: Correct?

14 MR. KAHN: In response to the three Plaintiff experts who
15 didn't have these records even in their report saying it was not chronic in
16 2011. Which is what happened this whole last week.

17 MR. PRINCE: Yeah, but he's not expressing the opinion,
18 Your Honor, that he was chronically --

19 THE COURT: But first of them --

20 MR. PRINCE: -- symptomatic before. He's never said that
21 before.

22 THE COURT: First of all, at least the one is a treating
23 physician and didn't have to provide a report.

24 MR. KAHN: Schifini, correct.

25 THE COURT: But --

1 MR. KAHN: But the other two did discuss it at length. How
2 they said it wasn't chronic -- you'll remember Oliveri said it wasn't
3 chronic, because it wasn't ongoing.

4 THE COURT: Okay.

5 MR. KAHN: And I think I'm at least --

6 THE COURT: Well, I think all that their testimony has been it
7 isn't chronic, because it's one medical record and not supported.

8 MR. KAHN: Right.

9 THE COURT: But in any event --

10 MR. KAHN: And my expert should be able to respond to that
11 opinion because he listed it in his reports, and that's the testimony he's
12 responded --

13 THE COURT: So far you haven't asked him, and I can
14 understand why, about the follow-ups. And so that's -- you know, that's
15 fine, you haven't. And I don't think I would. But I think what you want
16 to ask him is it is opinion that in 2011, you know, he had a chronic and --

17 MR. KAHN: Asked --

18 THE COURT: -- and isn't -- but it says -- but if he says, Mr.
19 Yahyavi has had progression preexisting the blah, blah, blah, since, you
20 know, that's fine.

21 MR. KAHN: Okay, thank you.

22 THE COURT: The above reports do not alter my opinion as
23 expressed in August 6th -- apparently undergone surgery. Spine disease
24 for several years.

25 MR. KAHN: Right. He's saying the same thing Plaintiff's own

1 doctors are saying. That he had the --

2 THE COURT: And he's also -- he certainly has testified over
3 six months is chronic.

4 MR. KAHN: Right.

5 THE COURT: So --

6 MR. PRINCE: But he can't say he was chronically
7 symptomatic at the time of this collision. That's not an opinion that he's
8 ever offered before. Or that he -- there was -- chronic in 2011. He's
9 never even said that.

10 MR. KAHN: Oliveri and Kaplan never offered the opinion that
11 it wasn't chronic, which they both stood up here and said.

12 MR. PRINCE: Well, we're talking about now, this doctor and
13 these reports. And I'm focused on --

14 THE COURT: Well, I think --

15 MR. PRINCE: -- Tung's.

16 THE COURT: -- I think there's certainly a difference because
17 they were saying, I believe, and the jury's going to whatever, that it
18 wasn't chronic because --

19 MR. KAHN: It was isolated.

20 THE COURT: -- on the follow-up visit.

21 MR. KAHN: Yeah.

22 THE COURT: Which as long as he sticks to his report, he's in
23 good shape.

24 MR. KAHN: Okay.

25 THE COURT: I guess you want him to say in 2011, he already

1 had a chronic problem based on the one record.

2 MR. KAHN: If that's his opinion, yes.

3 MR. PRINCE: Well, I guess no, there's two things.

4 MR. KAHN: Because the Plaintiff's expert said the opposite.

5 THE COURT: Well, all right.

6 MR. PRINCE: No, there's two things happening here, Your
7 Honor.

8 THE COURT: All right, I -- you know.

9 MR. PRINCE: What if he's chronically symptomatic?

10 THE COURT: Wait, we're done. If he -- if you had made that
11 objection and I somehow missed, which I don't think we even had the
12 objection. In any event, we're here on this, and I'm just saying stick to
13 the report.

14 MR. KAHN: Okay.

15 THE COURT: If they didn't, and you objected, and I did it,
16 then that's what appeals are for.

17 MR. PRINCE: Understood, Your Honor.

18 THE COURT: How much -- I'm assuming you have a half
19 hour.

20 MR. KAHN: Twenty minutes, maybe half an hour, yes.

21 THE COURT: And he's got 3 hours. So, I mean I'm sure of it.

22 MR. KAHN: I will go as quickly as I can.

23 THE COURT: All right.

24 THE MARSHAL: Please rise for the jury.

25 [Jury in at 2:43 p.m.]

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[Within the presence of the jury]

THE COURT: Please be seated. Parties acknowledge the presence of the jury?

MR. PRINCE: Yes, thank you, Judge.

THE COURT: Continue.

DIRECT EXAMINATION CONTINUED

BY MR. KAHN:

Q What exhibit is this? I'm going to ask to pull up Exhibit 91, please. While I'm doing that, your written opinions in this case involve the word -- the phrase "progression of preexisting," right?

A Yes.

Q And so what does the word preexisting mean?

A Well, in this case, preexisting before this incident.

Q And what about progression? What does that mean in the context of your medical opinion, sir?

A It's getting worse.

Q So putting those together, your written opinions in this case, especially the one on August 2nd, 2018 was saying he had problems before this accident, and the problems got worse after the --

MR. PRINCE: Objection. Foundation. Leading.

THE COURT: Overruled.

BY MR. KAHN:

Q Did you hear that question of mine?

A I didn't. I -- I heard the --

Q The progressive, pre-existing condition, he had the problem

1 before, but it got worse after?

2 A Correct.

3 Q And so I've pulled up Bates R303, which is a medical imaging
4 report from Desert Radiologists. It's not the best copy, so let me look for
5 the date. Service date October 1st, 2013. Do you see that?

6 A Yes.

7 Q So this is a few months after the accident, right?

8 A Yes.

9 Q And this is one of the records that you reviewed in support of
10 your opinions?

11 A Yes.

12 Q And what did this record tell you?

13 A I chose the degenerative spine disease we talked about.

14 You're going to see a lot of words in the report, but it talks about disc
15 space narrowing, osteophytes at multiple levels, reverse of the cervical
16 lordosis, facet arthrosis, which is facet arthritis, or hypertrophy, and just
17 degenerative changes. And it also talks about the size, if you will, of the
18 canal. Remember I told you with the direct changes, the canal can get
19 narrowed.

20 Q Yeah.

21 A So -- and so this one really just shows someone who's got a
22 lot of degenerative circle spine disease.

23 Q And you've seen MRI reports up to the last year or two. Is
24 that fair?

25 A Yes.

1 Q And you've looked at a number of MRI reports. This
2 gentleman, has, it's pretty obvious, had a number of them done over the
3 last six or seven years; is that fair?

4 A He has.

5 Q Okay. So these are the findings. Should be on the monitor
6 in front of you.

7 A Oh, perfect.

8 Q It will be easier for you to see it there. And let's go over
9 them. This is initially. You've seen the records from Southwest Medical
10 Associates from before the accident of the x-ray from October of 2011?

11 A Yes.

12 Q And this first thing says straightening and minimal reversal
13 of the normal cervical lordosis. Is that something that was found in the
14 imaging study before the accident from 2011?

15 A It's -- yes, it's in there.

16 Q And then it's talking about the next line, multi-level disc
17 desiccation, most notably C6-7. As to that level, C6-7, that's the area that
18 turned out to be the most problematic area years later when they decide
19 to do the surgery, right?

20 A Correct.

21 Q And that was noted in the Southwest Medical records, 21
22 months or so before the accident, as well. That level was focused on, as
23 being a problem, right?

24 A Yes.

25 Q And then essentially in your complete loss of disc space C6-

1 C7, with suggestion of developing ankylosis C6 and C7 vertebral bodies.

2 What is ankylosis?

3 A That's the auto fusion they're talking about. Ankylosis is
4 fusing of the 6 and 7 that you've heard people --

5 Q And again you were saying, and I think the Plaintiff's doctors
6 are in agreement, that's something that the Plaintiff brought to this
7 accident. It wasn't something that only this accident caused?

8 A Correct. I think we're in agreement about that.

9 Q Then the next one talks about multi-level ventral endplate
10 osteophyte spurring. Most notably C5-6 and C6-7 and C7-T1. The
11 osteophytes, those are the bone spurs that are growing out of Mr.
12 Yahyavi's cervical spine?

13 A Yes, sir.

14 Q And those were there before the accident, correct?

15 A Yes.

16 Q And they're documented in the x-ray report from Southwest
17 Medical from October 2011, right?

18 A They are.

19 Q And then it's talking about signal changes. I don't think we
20 need to go into that. So you can take that one down. And we're going
21 to put up the medical record about the neck pain from Southwest
22 Medical.

23 UNIDENTIFIED SPEAKER: Is that the same exhibit number?

24 MR. KAHN: I'll get there in one second. That would be 156.

25 That would be Exhibit 156, Bates P2110. If you could enlarge the date

1 and that sentence.

2 BY MR. KAHN:

3 Q So when you rendered the opinion that Mr. Yahyavi had a
4 preexisting and progressive cervical spine disease, and that any future
5 surgery wouldn't be related and that he had a straining injury from this
6 accident, you had in hand the 2013 imaging study, right? The MRI?

7 A Yeah.

8 Q But you did not have this 2011 record yet, right?

9 A I did not.

10 Q So once this came back in -- and can you highlight the
11 sentence. Once this came to light, my question to you is was this record,
12 which purports to say that Mr. Yahyavi had neck pain for several years,
13 consistent with your earlier opinions that he had progressive and
14 preexisting degenerative disease?

15 A It's that --

16 MR. PRINCE: Objection. foundation. Outside the scope of
17 his reporting and opinions.

18 THE COURT: Overruled.

19 BY MR. KAHN:

20 Q You can answer.

21 A Oh, it's absolutely consistent, and I think it supports my
22 opinion.

23 Q And I think we can take that one down and move on to the x-
24 ray that's behind it. The next exhibit would be, Exhibit 156, P2119, this is
25 the x-ray from the same time period, October 2011. And you understand

1 after that medical record where Mr. Yahyavi is said to complain of neck
2 pain for years. There was a cervical series of x-rays ordered, or cervical
3 x-ray ordered?

4 A There were, yes.

5 Q And when you receive information in a medical record about
6 a patient's history, as a neurosurgeon, what do you do with that?

7 A Well, we chart it. If I'm seeing it, I'll chart it, or it will be part
8 of the records. I mean in -- where I'm at, we have like a -- something
9 called media, where we store the medical records. And so it's there. If
10 someone is looking at the chart, they'll be able to see the report. I may
11 not say -- I may just say the x-ray shows degenerative spine disease or
12 loss of lordosis. But I won't reiterate the report. That's just a waste of
13 time because it's right there.

14 Q I'm going to ask you the same question I asked the Plaintiff's
15 medical doctors and expert, which is, is there some way you can go and
16 check a patient's history? If you want to be a private eye and go figure
17 out are these things correct? Is that something anybody does, or is that
18 something you essentially take the patient's word?

19 A We take the patient's word most of the time. Unless you
20 have the film, then you're going to look at the film. Or if you have the
21 report, you'll look at the report.

22 Q Okay, so let's expand this. This is the 2011 x-ray report. The
23 jury has seen it before. October 2011. And just so -- you can just do the
24 first paragraph, it's probably easier. And this has some of the same
25 things we saw in the post-accident one as well, right. It's talking about

1 C6-C7. That's the same spinal level that was focused in on the 2013 MRI,
2 correct?

3 A Yes.

4 Q So that's documented to be an issue before this accident,
5 right?

6 A It is.

7 Q And then it goes from C3, all the way to T1 the levels, right?

8 A Right.

9 Q As far as reversal of the lordotic curvature, that's also
10 something that was identified after the accident, correct?

11 A Yes.

12 Q And then interior osteophytes. So osteophytes are another
13 thing that was documented after the accident, correct?

14 A Correct.

15 Q Okay. Now I'm going to try to find a later in time MRI,
16 depending on what's in evidence. And I think it's in Dr. Schifini's
17 records. While they're looking, I will keep going. Can you please pull up
18 Exhibit 156, P2120? P2120 is a record from Southwest Medical
19 Associates, dated March 12th, 2012. That's a record reflected in your
20 documents that you reviewed, correct?

21 A Yes.

22 Q And can you enlarge just the phrase where it says
23 "backache"? As a physician, what does -- what does it denote to you
24 when something is said to be active?

25 A It's ongoing.

1 Q Say it again.

2 A It's ongoing.

3 Q Okay. And does this appear to be a reference to the same
4 complaint of neck pain that was documented in the prior Southwest
5 Medical records a few months earlier, that led to the cervical spine x-ray,
6 or does it appear to be some different problem from what you can see?

7 MR. PRINCE: Objection. Foundation. Speculation. Because
8 that's not the -- that's not the treatment --

9 THE COURT: Counsel approach. Approach.

10 [Sidebar begins at 2:55 p.m.]

11 THE COURT: I have a question -- it says backache, how --
12 you're asking him does it really say backache, or are you asking him -- it
13 sounds like speculation.

14 MR. PRINCE: Yeah.`

15 THE COURT: That's why I'm hesitating.

16 MR. KAHN: Okay, I'll back up and -- I'll back up and lay a
17 foundation.

18 THE COURT: What is he going to say?

19 MR. PRINCE: No, no, hang on, he's not going to show him --
20 that's not the actual clinic note. That's not the clinic note from that date.
21 And that's just what he's doing.

22 THE COURT: I don't even know what this --

23 MR. PRINCE: It's just like some summary of --

24 MR. KAHN: March 2012. I'm going to back up and--

25 MR. PRINCE: It's not the clinic note thought.

1 MR. KAHN: -- lay a foundation. I'll withdraw the question
2 and lay a foundation.

3 THE COURT: All right. Lay a foundation.

4 [Sidebar ends at 2:56 p.m.]

5 THE COURT: I am sustaining the objection.

6 [Pause]

7 MR. KAHN: Can you please pull up Exhibit 156, P211?

8 BY MR. KAHN:

9 Q And this is the second page of the October 25th, 2011 record,
10 the one that talked about the complaints of neck pain. I'm going to ask
11 you to look at a certain portion of it.

12 MR. KAHN: That's not it. It's 2111. It's Exhibit 156, P2111.

13 And can you, under assessment, can you enlarge the whole
14 assessment, please?

15 BY MR. KAHN:

16 Q So what are those numbers after those two bullet points?

17 A Those are the --

18 Q Say again.

19 A Those are the codes that they're using, the --

20 Q Medical codes identifying certain problems, right?

21 A Correct.

22 Q And this is the same date that the Plaintiff's saying that he
23 has neck pain for years, right?

24 A It is.

25 Q And it's coded only as two things, a central -- whatever that

1 word is, huh; can you tell us what that is?

2 A Tri -- his triglycerides are high.

3 Q Okay.

4 A Hyper --

5 Q And then backache, right?

6 A And backache.

7 Q It doesn't say neckache or neck pain or cervical problem,
8 correct?

9 A It doesn't.

10 Q It has that code, 724.5, which is a precise medical code that
11 doctors are permitted to use in records, right?

12 A Correct.

13 Q And I'm now going to show you the March record --

14 MR. PRINCE: I guess I'm going to object to that, Your Honor,
15 because what he's not the actual treatment record, and so he's not
16 showing the record, so I'm objecting to it on a foundation basis.

17 MR. KAHN: It's an admitted record; it goes to weight, Your
18 Honor.

19 THE COURT: I'll allow it. Overruled.

20 MR. KAHN: P2120, Exhibit 156.

21 MR. PRINCE: He said -- so I'm objecting the use of a
22 treatment record, as he said it, because it's not the actual treatment
23 record.

24 MR. KAHN: Fine. The medical document.

25 BY MR. KAHN:

1 Q I'm going to show you the medical document, Doctor.

2 A Okay.

3 Q And I'm going to ask you to compare this code from March
4 12th, 2012 and the -- all the active problems under that to what we saw
5 roughly five months before in October of 2011 and tell me if you see any
6 of those items besides Hypertriglyceridemia that are the same?

7 A Yeah, the backache is active and it's the same.

8 Q Okay.

9 A That's the neck problem.

10 Q So what is this telling you five months later?

11 A It's active. It's ongoing.

12 Q You read the records from University Medical Center; is that
13 correct?

14 A Yes.

15 Q And what did those show after the -- that a Plaintiff went
16 there? Just generally.

17 A He was having neck pain.

18 Q And did they make any comments as to trauma?

19 A At the UMC? Yeah, they talked about the motor vehicle
20 accident.

21 MR. KAHN: Can you please pull up Exhibit 86, and I'd be
22 looking at P179, which is page 2 of the CT spine from UMC. Exhibit 86,
23 P179.

24 And just blow up the whole top, please.

25 BY MR. KAHN:

1 Q These are within the records that you reviewed, Doctor; is
2 that correct?

3 A Yes.

4 Q And what was the determination in the report of the CT
5 cervical spine on the day of the accident at UFC, the Level 1 Trauma
6 Center?

7 A There's no traumatic injury to the cervical spine seen, but
8 degenerative changes were noted, as we knew he had before this
9 accident.

10 Q Is that consistent with your opinions that you've rendered in
11 this case?

12 A It is, yes.

13 MR. KAHN: Can you please bring up Exhibit 91, P291. This
14 will be a November 11, 2013, from Desert Orthopedic Center, Dr. Perry.
15 And if you can blow up that first paragraph, History of Present Illness.
16 And highlight the part that says high blood pressure, please.

17 BY MR. KAHN:

18 Q Was this one of the record you reviewed, Doctor?

19 A Yes.

20 Q And what importance is it to you that someone's been taken
21 off work due to high blood pressure in this case?

22 A Well, could be a lot of things, but stress.

23 Q The patient appears to be telling Dr. Perry that high blood
24 pressure is being caused by his pain.

25 A Well he said it's implied, yes. I mean, in that sentence.

1 Q That means the patient's telling him, right?

2 A Yes.

3 Q And in your experience is that a typical thing, that pain
4 causes high blood pressure, or is it atypical?

5 A The best answer is it can occur.

6 Q Have you read any records here where a medical doctor has
7 said what the Plaintiff's implying there, that this pain caused him to have
8 high blood pressure to the point where he had to be removed from work
9 for a period?

10 A No.

11 MR. KAHN: Can you pull up, please, Exhibit 91, P299. I know
12 I'm moving fast, but I'm doing that on purpose because of the time.
13 And if you could blow up the middle paragraph where it says plan. And
14 highlight the part where it says, "In my opinion," to the end of -- where it
15 says "patient".

16 BY MR. KAHN:

17 Q So this is Dr. Perry, his treating orthopedic surgeon, in
18 November of 2014, so approximately 16 months after the accident,
19 essentially recommending against surgery, right?

20 MR. PRINCE: Objection. To the question, as leading, and
21 assuming facts not in evidence, lacking foundation.

22 MR. KAHN: It's foundational.

23 THE COURT: Overruled. You can answer.

24 THE WITNESS: Yes, that it is -- he's not confident at all that
25 this patient would benefit from any surgery.

1 BY MR. KAHN:

2 Q And earlier Dr. Perry had been talking about consideration of
3 surgery, right?

4 A Before this, he had.

5 Q Based on the records you reviewed, what changed between
6 Dr. Perry thinking maybe surgery was a good idea and now this in
7 November of 2014 saying surgery is a bad idea?

8 MR. PRINCE: Well, objection. That is not what the doctor --
9 misstates the record.

10 MR. KAHN: I'll withdraw and --

11 MR. PRINCE: Argumentative and leading.

12 MR. KAHN: -- ask it a different way. I'll withdraw it and ask it
13 a different way.

14 THE COURT: Sustained.

15 BY MR. KAHN:

16 Q What changed between Dr. Perry's earlier comments about
17 surgery and this medical document?

18 A It looks like he reviewed the diagnostics as well as overall the
19 patient's whole clinical situation at this point and he felt that -- I mean,
20 the record speaks for itself. He doesn't feel confidence surgical
21 intervention will help and so, to me as a doc, this just means he's not
22 recommending surgery.

23 Q Were there any EMG conduction studies performed between
24 Dr. Perry considering surgery and now Dr. Perry in November of 2014
25 saying he's against surgery?

1 A He had that -- EMGs done in February, January and February,
2 yes, of '14.

3 Q So --

4 A Did not show radiculopathy.

5 Q Right. So he had an EMG study about ten months before
6 this, that doesn't show radiculopathy, and now he's essentially changed
7 his position as to surgery, right?

8 A Yes.

9 Q Okay.

10 MR. KAHN: Next one is going to be Exhibit 96, P542. This is
11 going to be a record -- have it -- Exhibit 96, P542. I believe it's Dr. Fisher.
12 Yeah, it's Dr. Fisher.

13 All right, if you could blow up the date on the top, please.
14 And then the paragraph that's below, Number 1, the plan, that says, "At
15 this point," just the -- two down. That's it. Blow that up and highlight the
16 whole thing, please.

17 BY MR. KAHN:

18 Q So this is Dr. Fisher in March of 2015, and what is he -- how
19 do you read this? What does this tell you as a neurosurgeon?

20 A This just says that he does not feel that there's anything
21 more to offer from a standpoint of injections. Or therapeutic
22 interventions. He's using the word, MMI, so he thinks he's at Maximum
23 Medical Improvement. And he wants to send him for a FC, stands for
24 Functional Capacity examination.

25 Q And this is approximately five years before Dr. Schifini

1 resumes injections a couple of months ago, this year, right?

2 A That's correct.

3 Q So am I correct that a medical doctor, who is similar to Dr.
4 Schifini, a pain management doctor, said four and a half years ago, that
5 Mr. Yahyavi wouldn't benefit from further injections, but in the last
6 couple of months he's begun having additional injections?

7 A That's correct. He's at a different stage now, but yes.

8 MR. KAHN: Can you please pull up Exhibit 92, P384 and 385,
9 if you can put them together.

10 BY MR. KAHN:

11 Q This will be a Steinberg Diagnostic Medical Imaging MRI,
12 cervical spine, June 28, 2016. So almost about three years after the
13 accident?

14 A Yes.

15 Q And this is a -- that's a record that you reviewed, your
16 records reflect you reviewed it?

17 A I reviewed this, yes. Document.

18 Q And what I'm going to ask you to do is look through the
19 findings -- I'm not going to go through each level again. But I'm asking
20 you to look through the findings and the impression as they're sitting up
21 here and tell me if this provides you with information as a neurosurgeon
22 in comparison with the shortly after the accident in 2013 and the cervical
23 spine x-rays from Southwest Medical in 2011.

24 A So -- I mean, if you look at it just from a general standpoint, if
25 you read the impression, the first line, "Advance multi degeneration," it's

1 on page 2, "Advanced multi degenerative disc disease as described
2 above." So what they're saying is there's still a lot of degenerative spine
3 disease you wouldn't expect it to go away.

4 But if you even just look at some of the individual levels, like for
5 instance here, if you look at the C3/4 level, on the first page. If you look
6 at C3/4 level. Keep on going down. Down one more. C3/4. There you
7 go.

8 And it says, "The spinal canal is narrowed to," I'm just reading it.
9 I'm just reading the report. "But the bony spinal canal is narrowed to
10 eight millimeters and there's bilateral neuroforaminal narrowing,
11 posterior osteophytes. So it's degenerative spine disease.

12 If we were to go and look at the 2013 MRI, which you saw earlier,
13 but at C3/4 the diameter of the canal was one centimeter, so one
14 centimeter is ten millimeters. So clearly and objectively there has been
15 more narrowing between 2013 and this MRI in 2016.

16 Why did that patient get more narrowing? There's only one
17 explanation. Progressive degenerative cervical spine disease.

18 MR. KAHN: Can you please pull up Exhibit 103, Page P699;
19 103, Page P699. And if you could highlight just little part over here, the
20 tiny words, highlight them, blow them up, whatever you can do, it's hard
21 to read it.

22 BY MR. KAHN:

23 Q Do you see that, Doctor?

24 A I do.

25 Q And this is talking about an exacerbation -- you testimony

1 yesterday an exacerbation is a temporary increase or worsening of a
2 condition; is that accurate?

3 A Generally flare up, in work comp law, used for exacerbation
4 does not have to be temporary. But -- so the word flare up, but
5 exacerbation depends what language you want to use, but exacerbations
6 are not necessarily temporary, in fact, people get more disability related
7 to exacerbations in work comp law.

8 Q This is --

9 A In California, at least.

10 MR. PRINCE: Objection. Move to strike regarding work
11 comp law, what they do in California.

12 THE COURT: Sustained.

13 BY MR. KAHN:

14 Q This is a record from January 18th, 2017, and it references an
15 exacerbation six or seven months earlier; so doing the math, when you
16 put that exacerbation, Doctor?

17 A June of 2016.

18 Q And that's how many months before the Plaintiff stops
19 working?

20 A A few months, just a few -- three months.

21 Q You heard a little bit of the Plaintiff's testimony this morning?

22 A Was it September, I think it was done.

23 Q Correct.

24 A So three months.

25 Q Right. And did hear a little bit of the Plaintiff's testimony

1 here this morning?

2 A I did. I had to take a phone call, I apologize.

3 Q And have you seen any explanation in the medical records
4 for an exacerbation in June of 2016?

5 A I do not have an explanation.

6 Q And as a natural atraumatic exacerbation something that
7 gets worse without any accident or fall or cause; is that consistent with
8 your opinion?

9 A It's entirely consistent with degenerative progressive
10 degenerative cervical spine disease.

11 Q Now, we're up to this year, and I'm trying to find another MRI
12 report that's more recent. Do you -- can you tell from your records
13 what's the most recent report that you've referenced?

14 A There's another MRI from 5/11/17.

15 Q I may not have that in my stack, because I don't know if
16 we've used it. Is that through Dr. Schifini's office; do you know?

17 A I think it's in Dr. Schifini's records, yes.

18 Q We'll see if we can find that; hold on one second.

19 [Pause]

20 MR. KAHN: Next will be Exhibit 102, P676.

21 BY MR. KAHN:

22 Q It's a later in time MRI. I'm not certain it's the one you
23 referenced, but it's -- we'll pull out the date for you before we do
24 anything with it.

25 Date of service 2/14/18 --

1 MR. KAHN: -- and I'm going ask the helper to pull up all the
2 findings. And I'm going to ask you to look at that and compare it with
3 whatever other ones we've discussed that you think are important to
4 note and --

5 THE WITNESS: Well, this one -- this is not -- this is post-op.

6 BY MR. KAHN:

7 Q Right. Post-operative.

8 A Yeah.

9 Q Okay. So you want to see the last one before?

10 [Pause]

11 MR. KAHN: I'm going to ask you to pull up Exhibit 6 --
12 Exhibit 12612 -- Exhibit 102, sorry.

13 BY MR. KAHN:

14 Q This should be an MRI from 2017, Doctor, before the surgery.
15 We'll take a look first.

16 A Yes.

17 Q Okay. This is May 1st -- I'm sorry, May 11, 2017, correct?

18 A Yes.

19 Q And it's an MRI report; this is months before the surgery, but
20 approximately four years after the accident, right?

21 A Right.

22 Q And what do you see from the findings as a neurosurgeon
23 when you compare those findings to the findings from 2016, 2013, the x-
24 ray from 2011?

25 A So you guys can write this down if you want, but if you go

1 level by level and look at the 2013 MRI and then go level by level, and
2 you go and look at 2017 MRI, this MRI was obviously done before the
3 surgery; that there is progressive narrowing, not just at one level, but at
4 several levels. So for instance, at the C5-C6 level in 2013, and I'm just
5 reading from the report, the canal, meaning the circle is 1 centimeter, 10
6 millimeters, and in 2017 it's 9.1 millimeter, so it's 10 percent less.

7 If you look at C7-T1, is another one. It's 9.4 millimeters in 2013 and
8 it's 8.1 millimeters in 2017.

9 The bottom line is the spinal -- cervical spine is showing more
10 degenerative changes and this is manifested in more narrowing of the
11 spinal canal and the neural foramina, and in fact, even at C5-C6, and the
12 reason this is important, in 2017 if you want to highlight it, it says;
13 "There's some impingement on the left C6 nerve root, suspect some
14 impingement," over here at the bottom of the C5-C6, you guys can
15 highlight --

16 MR. KAHN: Bottom of C5-C6 there.

17 THE WITNESS: There you go. "Suspect some impingement
18 on the left C6 nerve root. Advise clinical correlation." Well it happens to
19 correlate with the fact that he had an EMG nerve conduction study that
20 shows C5-C6 radiculopathy, which he didn't have in 2014.

21 So what we're seeing now is we're seeing not only are we
22 seeing an objective electrol diagnostic evidence of a radiculopathy,
23 progressive, we have anatomical evidence of a radiculopathy, based on
24 the report, and I agree with the reports.

25 BY MR. KAHN:

1 Q The Plaintiff has not said at any point that he had any other
2 trauma after this accident; in fact, the opposite; he's telling the doctors
3 he hasn't had another injury since the accident, right?

4 A Right. I know of nothing. He had an exacerbation, we know
5 that; we just saw that, that record. There is an exacerbation in the
6 summer of 2016. So this -- in my mind, within a reasonable degree of
7 medical probability, tells me that the reason he had the surgery is the
8 ongoing and progressive degenerative spine disease, as evidenced by
9 electro diagnostically, anatomically by MRI studies -- this -- I don't know
10 anyone can come to a different conclusion.

11 But I mean, they're obviously welcome to come to a different
12 conclusion.

13 Q The MRIs we looked at; those are consistent with your
14 opinions that you've expressed for years in this case, right?

15 A Yes.

16 Q And a narrowing spinal area that you just described at these
17 different levels, can that cause pain?

18 A Yes, absolutely.

19 Q And how, what is the mechanism for a narrowing of the
20 spine at these cervical levels to cause pain?

21 A Well it can cause neurological compression, as I said, one of
22 the reasons they don't operate just for neck pain, but if you have
23 radiculopathy then those sorts of compressions are more amenable to a
24 surgery.

25 Unfortunately in this instance the patient continued to have pain

1 despite surgery. Had a complication actually.

2 Q Have all the opinions you've rendered today at this trial been
3 to a reasonable degree of medical probability?

4 A Yes.

5 Q And is there anything about your testimony that you'd like to
6 correct or change before I hand the questioning over to counsel?

7 A No.

8 Q Thank you, sir.

9 THE COURT: Counsel approach.

10 [Sidebar begins at 3:20 p.m.]

11 THE COURT: Okay. So there's no way we're going to be
12 done by 4:00 or even 4:30. I need to go. I told you that.

13 MR. PRINCE: I want to -- I would love -- I would really
14 appreciate, Your Honor, if we -- I could get started.

15 MR. KAHN: Yeah, we'll take as much as we can. You take
16 the --

17 THE COURT: Well, that's fine. That's fine. When -- you -- I
18 thought you had said he can't even come back next week.

19 MR. KAHN: He has a convention in Chicago on Wednesday;
20 he's on a committee that he described here.

21 THE COURT: Right.

22 MR. KAHN: So he'll be available --

23 MR. PRINCE: I guess he'll back Monday.

24 MR. KAHN: Tuesday.

25 THE COURT: Okay. So we'll deal with that --

1 MR. KAHN: We'll deal with that --

2 MR. PRINCE: How can we do that? I object to him being
3 available by Skype for me on a cross.

4 MR. KAHN: All right. I didn't agree that Dr. Oliveri could be
5 split in half. I was just told it was happening, so --

6 MR. PRINCE: Well, he didn't finish --

7 THE COURT: All right.

8 MR. PRINCE: -- and he came back.

9 THE COURT: He's talking about --

10 MR. PRINCE: He physically came back to court.

11 THE COURT: And I will deal with that later.

12 MR. PRINCE: Okay.

13 THE COURT: Go ahead and start.

14 [Sidebar ends at 3:21 p.m.]

15 THE COURT: Cross.

16 CROSS-EXAMINATION

17 BY MR. PRINCE:

18 Q Doctor, I thank you for your patience. Good afternoon, sir. I
19 have some questions for you, obviously.

20 I just want to start off with this idea, you're not here as an
21 independent expert; you were selected by the lawyers for this Defendant
22 as an expert witness in this case, correct?

23 A Yes.

24 Q You weren't appointed by the Court, correct?

25 A Yes.

1 Q Am I correct in that?

2 A I agree with you.

3 Q And the Defense is paying you for your services that you've
4 performed in this case, correct?

5 A Yes.

6 Q So really there's -- you're not truly independent in this case,
7 are you? You just did it -- you were requested to do a job, review
8 records, examine my client, and that's what you are paid for, right?

9 A That's the nomenclature, independent medical exam. We
10 can argue whether the nomenclature is correct, but yes --

11 Q You're not truly independent, right?

12 A I believe I'm independent, but I was -- as you said, I was
13 selected by --

14 Q Right.

15 A -- the Defense firm.

16 Q The Court has never determined you to be someone
17 independent and appointed by the Court in this process, correct?

18 A As I said, that's the nomenclature, I'm not arguing with you.

19 Q Right. Now, I have your resume here, sir, and I've had a
20 number -- many of your resumes I've seen over the years. Now I just
21 want to make sure that you and I are clear. You do -- you've never had a
22 neurosurgical practice in Las Vegas, Nevada, correct?

23 MR. KAHN: Objection. Relevance.

24 MR. PRINCE: Relevance. He doesn't practice in the State of
25 Nevada.

1 BY MR. PRINCE:

2 Q You don't practice neurosurgery in the State of Nevada.

3 THE COURT: All right. Overruled.

4 MR. PRINCE: Correct?

5 THE COURT: You don't -- answer --

6 THE WITNESS: The answer, that's not true. I've seen
7 patients, non-forensic patients in Nevada. I have a Nevada license. In
8 fact, I've had a couple of patients travel to San Diego to have surgery
9 with me.

10 BY MR. PRINCE:

11 Q Sir, you have never operated an office and own -- for
12 neurosurgery in Las Vegas, Nevada, correct?

13 A As I said, I don't -- I don't -- well, you have to define practice
14 then. I've seen patients in Nevada who are non-forensic patients, and in
15 fact, I know of -- I can think of one already that traveled -- who I saw here
16 first, who traveled to San Diego to have surgery. If you consider that not
17 a practice, then I'm just telling you the circumstances.

18 Q You don't maintain an office in Las Vegas, Nevada, where
19 you see patients on a regular basis, correct?

20 A I --

21 MR. KAHN: Objection. Argumentative. Asked and
22 answered.

23 THE WITNESS: I have an office --

24 THE COURT: Sustained.

25 MR. PRINCE: Okay.

1 BY MR. PRINCE:

2 Q Where's your office located?

3 A It was at 2410 Fire Mesa. We just moved to a place on
4 Buffalo, and I don't know the exact --

5 Q Right. You don't have any hospital privileges here, correct?

6 A That is correct.

7 Q You've never done surgery here in Las Vegas, correct?

8 A That is correct.

9 Q You don't have a referral relationship with primary care
10 physicians, pain management specialists, to see patients here in the Las
11 Vegas office, correct?

12 A You'd have to define relationship. I was referred a patient --

13 Q A patient, right?

14 A -- or a couple of patients.

15 Well, a couple of patients.

16 Q Okay, two. Well, let's say --

17 A So but they didn't find --

18 Q -- it's five.

19 A -- me by themselves; they were actually referred, but -- so I
20 don't know if you consider that a referral pattern or not. But I'm not
21 disagreeing with you. I certainly -- my main practice is in San Diego.

22 Q Your --

23 A That is without question.

24 Q Your full time practice is in San Diego, California, correct?

25 A That's true.

1 Q All right. You do not even have a part-time practice here in
2 Nevada, correct?

3 A Well I just said, I've seen a couple of patients, so it might
4 be --

5 Q Over how many years?

6 A -- point -- it might be .11 or 011 percent, or something like
7 that, but it's not a big part, for certain.

8 Q .011 percent --

9 A Something like that. I mean, I don't know how many
10 patients. I'm just -- what I'm trying to say is, when you say "part-time" --

11 Q That's not even part-time, right? .001, that wouldn't even be
12 part-time.

13 A Well, full time or no time, and something in between would
14 be part time. You're playing semantics, sir.

15 Q Okay. How many patients have you seen in the last five
16 years in a non-forensic setting when not related to a lawsuit?

17 A I just said, it's only been a couple.

18 Q Okay. And you see 80 to 100 patients a month in San Diego,
19 so you say that's more than a 1000 a year, and so you've seen a couple
20 in Las Vegas in 5 years, so it's fair to say you really don't truly practice
21 here, right?

22 A I'm not trying to start a practice here.

23 Q Right. That's clear.

24 Now, one thing you do, do, is you do come to Nevada in
25 connection with lawsuits, right?

1 A Forensic --

2 Q Yeah, forensically. People hire you, in fact, you have a whole
3 schedule for your fees that you charge for your expert witnessing work
4 here in Las Vegas, Nevada, correct?

5 A I do.

6 Q Right. And you even have a fee schedule for Nevada. It
7 says, "Nevada -- Howard Tung, Neurosurgery." That's you, right?

8 A That's me.

9 Q And so one of the things you do is, even though you're a full
10 time practitioner in San Diego, see if I understand what you do. You see
11 80 to a 100 patients a month, correct?

12 A In San Diego.

13 Q In San Diego -- oh yeah, obviously San Diego.
14 So full time in San Diego seeing patients, right?

15 A Correct.

16 Q Doing neurosurgery, both cranial and spine?

17 A Correct.

18 Q You're a clinical professor, so you're part of -- you help with
19 some of the residents at -- from UC-San Diego, correct?

20 A Correct.

21 Q Do you take call at any of the hospitals?

22 A I do.

23 Q How many hospitals do you take call at down there?

24 A I take call at two or three of the hospitals.

25 Q How often?

1 A Well call varies.

2 Q Well how often do you take call?

3 A I --

4 Q Do you have a regular call schedule, where --

5 A No, it varies. It's like -- sometimes it's for a week at a time
6 and then I'll have five weeks I don't. But I do it a couple different
7 hospitals, so it might average --

8 Q Couple weeks a month?

9 A No, not quite that often, getting -- you know, you get
10 seniority, you get to do a little less call, that's good.

11 Q Right.

12 A But yeah, 30 years of it. But I take call; I'm not arguing.

13 Q Oh. Right. So obviously -- but then you set aside time to fly
14 out to Las Vegas to do these examinations, right? In connection with
15 lawsuits.

16 A Correct.

17 Q Generally 80 percent of the time you're testifying as an
18 expert witness is on behalf of the Defense, correct?

19 A Correct.

20 Q And in Nevada that percentage is even higher, isn't it?
21 Because in Nevada almost 100 percent of the time you're hired by the
22 Defense to fly out here and examine somebody like my client, Bahram
23 Yahyavi, correct?

24 A I don't disagree with that.

25 Q Right.

1 A That's correct.

2 Q So in Nevada it's 100 percent Defense?

3 A That's incorrect.

4 Q Right. 95 percent?

5 A Yeah, and it's more than -- yeah -- it's not 100 percent, but
6 it's --

7 Q It's pretty close.

8 A -- it's more than 90 percent for certain.

9 Q Right. And so the medical/legal, in fact, that takes up 20
10 percent of your time, right? Doing this forensic work, it takes about 20
11 percent of your time as I understand it?

12 A That's about right.

13 Q Right.

14 A Maybe a little less now, but that -- I'll go with that number.

15 Q Right. And so when you come to Nevada, you try to
16 schedule a few exams for the same day, so you don't just see one
17 person, you try to see -- schedule -- come to Las Vegas, you can see a
18 number of people on one trip?

19 A If I can, I think it's more efficient that way.

20 Q Yeah. And so you charge \$1,750 per person, just to travel
21 out here, just to -- that doesn't include the exam; that's just to travel out
22 here per person that you see, right?

23 A That's correct.

24 Q And then you charge another \$750 to do the exam part,
25 right? For the evaluation.

1 MR. KAHN: Your Honor, can we approach?

2 THE COURT: Yes.

3 MR. KAHN: May we approach?

4 THE COURT: Yes.

5 [Sidebar begins at 3:30 p.m.]

6 MR. KAHN: I don't have any problem with him asking him
7 what he charged in this case. Asking him all these other cases and how
8 much he's charging another case. That's prejudicial.

9 MR. PRINCE: No, it's not. It's part of his bias. Defense bias.
10 How much he earns in money doing this. *Worth v. Capanna, Robinson*
11 *GCG.*

12 THE COURT: You can ask him how much he earns doing
13 that; I think it's allowed.

14 Your objection is --

15 MR. KAHN: Its relevance --

16 THE COURT: -- that somehow he charges different amounts?

17 MR. KAHN: No, my objection is it's prejudicial --

18 THE COURT: -- no that goes to bias.

19 MR. KAHN: My objection is it goes to other cases that are
20 collateral. That's my objection, collateral.

21 THE COURT: All right. Overruled.

22 [Sidebar ends at 3:30 p.m.]

23 THE COURT: Overruled. Go ahead.

24 BY MR. PRINCE:

25 Q All right. So I just want to make sure we're clear on your

1 fees, okay.

2 A Oh, absolutely.

3 Q Yeah, I want to -- so just to see one person per -- each person
4 you see when you come to Las Vegas, you charge \$1,750, right?

5 A Correct.

6 Q Then you charge an additional \$750 to do the face-to-face
7 evaluation part, correct?

8 A That would occur with any patient, correct.

9 Q So that's \$2,500 per person, just to travel out here and see
10 them in the exam room, right?

11 A That's correct.

12 Q And typical -- you agree that your typical neurological
13 examination -- neurosurgical examination, that takes between five and
14 ten minutes per person?

15 A The -- the --

16 Q The evaluation part?

17 A The exam -- the exam is about ten minutes or so.

18 Q Yeah.

19 A But it's not the appointment.

20 Q Okay.

21 A The appointment is usually an hour.

22 Q So how many do you -- people do you typically try to see
23 when you come out to Las Vegas, every so often?

24 A It varies quite greatly. I mean I've seen as many as five. And
25 I've seen as few as one.

1 Q Right. And in addition to the \$2,500, you charge an
2 additional \$600 per hour, with a two hour minimum, so it's \$1,200, to
3 review and summarize medical records, correct?

4 A That's correct.

5 Q Right.

6 A It's 600 per hour for a --

7 Q Right.

8 A -- medical record review.

9 Q Okay. And you do all this forensic work, whether it be in
10 Nevada, California, or any other state, you only do it for the money,
11 right? That's why you do it? Because it's lucrative.

12 A No, that's not true.

13 Q Because for example with my client, you don't have a patient
14 physician relationship with him, do you?

15 A That is true.

16 Q Right. So you - so he's not your patient. So you're not doing
17 it to help and treat people, you're doing it to earn money, right?

18 A I do earn money, but that's not the only reason I do it.

19 Q That is the primary reason you do it is because you earn
20 money, correct? Doing it?

21 A I don't --- I don't believe it's the primary reason, but you can
22 suggest that, but it's not the primary reason I do it.

23 Q And isn't it true -- let's see, I want to -- I want to make sure I
24 get this exactly right. You don't deny earning in excess of \$750,000 a
25 year on average, for the last three years, doing this forensic medical

1 legal work, correct? You don't deny that, do you?

2 MR. KAHN: Objection. Relevance.

3 MR. PRINCE: It goes to bias, Judge.

4 THE COURT: Overruled.

5 THE WITNESS: I don't know that it's that much. But I don't
6 deny it, because I don't know the amount.

7 BY MR. PRINCE:

8 Q Well, you're in private, neurosurgical practice, correct?

9 A No, I have an academic practice and a private practice, but I
10 don't --

11 Q But you have a private practice.

12 A -- know the exact amount. In fact, people have asked me,
13 and I just don't know the exact amount. I'm not an accountant.

14 Q Yeah, but you earn the income. You, Dr. Howard Tung, earn
15 the income, right?

16 A Dr. Howard Tung does earn income, yes.

17 Q Right. Does -- you earn the income from doing these
18 forensic evaluations, correct?

19 A Correct.

20 Q And you don't deny earning in excess of \$750,000 a year, on
21 average, over the last three years, doing this forensic medical legal work,
22 correct?

23 A I'm not certain what you're reading from, but I would not den
24 in combination with my medical practice, but I don't know, because I
25 don't -- I've never really separated it out, because it's -- it's one pot.

1 Q Yeah, you -- no matter what, you definitely earn in the
2 hundreds of thousands of dollars a year doing -- it may not be 750, but
3 you don't deny you earn in the hundreds of thousands of dollars.

4 A I'm just wondering where you got the number, because I
5 don't ever recall ever testifying or saying something to that effect,
6 exactly how you phrased it.

7 Q On August 13, 2019, a deposition was taken of you in a case
8 in Nevada, and it says would you deny you're earning in excess of
9 \$750,000 per year on average, for the last three year? You say I would
10 neither confirm nor deny it.

11 A Well, I think you asked me would deny it. And I think I said I
12 would neither confirm nor deny.

13 Q But so over the years you've been --

14 A And it didn't specify. I think the question didn't specify --

15 THE COURT: Asked answered.

16 THE WITNESS: Okay. Asked and answered.

17 THE COURT: Go ahead.

18 BY MR. PRINCE:

19 Q And so you --

20 THE COURT: No, go ahead. --

21 MR. PRINCE: You can answer.

22 THE COURT: -- and answer is what I was saying.

23 BY MR. PRINCE:

24 Q You've been doing this medical legal work for ten or more
25 years, right?

1 A I would say so.

2 Q Yeah, you've earned in the millions of dollars doing this
3 exact thing. Being hired by the Defense in connection with litigated
4 matters, and you've earned in the millions of dollars doing this, right?
5 Over the years.

6 A So ten years, you're saying so I do 100,000. I don't know, I
7 guess that -- I guess that could be correct.

8 Q Okay. Okay. You do it for the money, Dr. Tung, correct?

9 MR. KAHN: Objection, asked and answered.

10 THE WITNESS: Is that a question?

11 MR. PRINCE: Yes, it is.

12 MR. KAHN: Asked and answered.

13 THE WITNESS: I think --

14 THE COURT: Overruled.

15 THE WITNESS: No, I think you asked me, and I said that's
16 not the primary reason.

17 BY MR. PRINCE:

18 Q You're not here trying to help the community in Clark
19 County, Nevada that you have no relationship to, right?

20 MR. KAHN: Objection, Your Honor. That's argumentative
21 and improper.

22 THE COURT: That's sustained.

23 BY MR. PRINCE:

24 Q Okay. And you've never testified in a trial in Nevada on
25 behalf of an injured Plaintiff, have you?

1 A That's incorrect.

2 Q How many times have you testified in Nevada in a trial on
3 behalf of an injured Plaintiff?

4 A I don't know exactly, but I can think of one.

5 Q So one time.

6 A Well, I don't know exactly.

7 Q Which one? What's the name of the case?

8 A I can think of one. I don't remember the case it was several
9 years ago, but I know it was for a Plaintiff. I don't remember the case.

10 Q Okay. Now --

11 A I think I remember the -- I think there was a Christiansen
12 [phonetic] involved, maybe. I don't remember.

13 Q Okay. If we can get the -- ready for me, Judge, my side by
14 side, 16.

15 THE COURT: Uh-huh.

16 Q Okay.

17 UNIDENTIFIED SPEAKER: Ready?

18 MR. PRINCE: Yes.

19 BY MR. PRINCE:

20 Q Dr. Tung, I'm showing you a -- two photographs that have
21 been admitted into evidence, this is a demonstrative slide.

22 A Okay.

23 Q The forklift is on the left, and my client's car is on the right.
24 Do you see that?

25 A Okay, yes, sir.

1 Q You agree that my client was injured in this collision with this
2 forklift, correct?

3 A He was injured in this accident, yes.

4 Q He suffered a traumatic injury in this motor vehicle collision
5 with this forklift, correct? That's your medical opinion, correct?

6 A He was injured in this accident, correct.

7 Q And you agree that he's reported symptoms in his neck,
8 beginning the day of this collision, June 19th, 2013, correct?

9 A Well, I'm not saying it began, because we already showed
10 that he had neck pain prior, so we don't -- you - you used the word
11 began. He had neck pain following this accident, yes.

12 Q Do you agree that my client started to experience pain in his
13 neck and symptoms associated with this traumatic event, beginning
14 June 19th, 2013, correct?

15 A I don't -- I don't see that I ever wrote started, which implies it
16 started. What I said -- that's not what I wrote. So I'm --

17 Q Oh.

18 A -- not agreeing with you because I didn't use the word
19 started. If you show me where I -- where that -- you're getting that, I
20 would be happy to try to explain it.

21 Q Your impression as the result of this motor vehicle, that my
22 client developed cervical neck pain, correct?

23 A What I said was he had sustained a straining injury to his
24 spinal axis, that's correct.

25 Q No, under your impression you wrote history of a motor